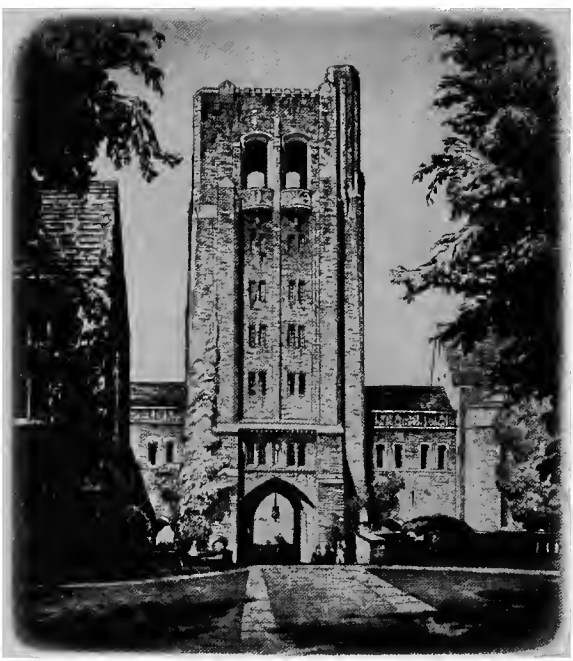

AMERICAN

RAILROAD LAW

BY

SIMEON E. BALDWIN, LL.D.

BOSTON

LITTLE, BROWN, AND COMPANY

1904

THE UNIVERSITY PRESS
CAMBRIDGE, U. S. A.

TO THE

ALUMNI OF THE YALE LAW SCHOOL,

WHO THERE STUDIED RAILROAD LAW,

IN REMEMBRANCE OF MANY A CLASS-ROOM DISCUSSION

WHICH MADE CLEARER TO THEIR INSTRUCTOR

WHAT HE WAS TRYING TO MAKE

CLEAR TO THEM,

This Book is Dedicated.

PREFACE.

THE people of the United States are gradually building up an American jurisprudence. Its resemblance to English jurisprudence is lessening rather than increasing. It is coming to be something distinctively our own. Our railroad law we could not take from England. Both her geographical and her social conditions were too dissimilar to ours. We have had to make it for ourselves, and it is still in the rough.

It has been profoundly affected by the Fourteenth Amendment to the Constitution of the United States. That changed, in a moment, and from the foundations, the whole relations of the States to the United States. Nowhere have the legal effects of this change been more manifest than in railroad law. As a "person" every railroad company has gained the security of a new guaranty against unfriendly legislation, and the position which it commonly occupies before the courts — that of a defendant — has been greatly strengthened by a new assurance that its property rights can never be impaired without due process of law. The civil war, besides producing the Fourteenth Amendment, brought in also new elements of strength to advance the weight of the authority of the United States as a nation. The power of Congress to regulate commerce between the States, which had been almost dormant since 1789, has been exerted directly upon railroads in repeated instances since 1866 (Rev. Stat., § 5258). The

theory of a general common law of the whole country as to all large questions of commercial law, which the courts of the United States had set up rather hastily and tentatively,[1] in 1840, has come to occupy an assured position,[2] although perhaps mainly by the right of the strongest, for from the Supreme Court of the United States there is no appeal.

This aggrandizement of the power of the United States has already had a marked influence in the direction of unifying American railroad law. The enormous multiplication of State reports has also tended to weaken the authority of State decisions as compared with those of the Supreme Court of the United States. There, at least, is one American court which on certain questions speaks with acknowledged authority for the whole country, and through a single series of reports. Some of those questions affect railroads. Many other decisions in these reports affect them also, although not turning on any point of federal law, and therefore not binding upon the States. But while they do not bind them of right, the tendency of the State courts, and with good reason, is strong to follow them, in like cases. The reports of the Supreme Court of the United States are the only reports in which all American lawyers feel a common interest, and which are easily accessible to them all. The opinion of that court, when State courts disagree, or have not spoken, may well be given a controlling weight.

It is the aim of this volume to state what is distinctive in American railroad law, and to put it in systematic order. To do this it has been necessary often to choose between conflicting views. If in such case those of the Supreme Court

[1] Swift *v.* Tyson, 16 Pet. 1, 19, 23.

[2] Western Union Telegraph Co. *v.* Call Publishing Co., 181 U. S. 92, 101.

of the United States have been expressed, they have generally been followed.

This book was begun in 1884. The author had then been for twenty years in the active practice of the legal profession, and continued in it for some time afterwards. In his earlier years at the bar he was more often engaged in suing than in defending railroad companies; in the later years more in counselling and defending them than in suing them. Since 1876, also, he has taught Railroad Law, at some length, to the third-year class in the Yale Law School. He has therefore studied the subject enough to have some appreciation of its difficulties. Part of these, it has seemed to him, have been due to the inclusion in treatises upon it of much that is not peculiar to railroads. His attempt has been to limit his work to what is peculiar to them, so far as this was possible without sacrifice of order or danger of obscurity.

S. E. B.

New Haven, April 4, 1904.

TABLE OF CONTENTS.

ORDER OF ARRANGEMENT.

PART I.

CONSTITUTION, FRANCHISES, AND ORGANIZATION.

PART II.

LOCATION, CONSTRUCTION, AND EQUIPMENT.

PART III.

FINANCES.

PART IV.

OPERATION.

PART V.

TRANSFERS AND LIENS.

PART VI.

ACTIONS.

APPENDIX.

ILLUSTRATIVE FORMS, DOCUMENTS, AND TABLES.

TABLE OF CASES CITED.

N. B. The references are to pages. Cases not entitled as appeals are entered twice, once under the letter with which the name of the plaintiff begins, and again under the letter with which the name of the defendant begins. The paging is only given once, that is, under the letter with which the name of the plaintiff begins. Cases entitled as "appeals" are also entered twice, once under the letter with which the name of the appellant begins, and again under A.

B.

C.

D.

F.

I.

J.

K.

L.

M.

N.

Q.

R.

S.

T.

Y.

Z.

AMERICAN RAILROAD LAW.

PART I.

CONSTITUTION, FRANCHISES, AND ORGANIZATION.

CHAPTER I.

WHAT RAILROADS ARE.

1. Genesis and Evolution.

RAILROADS (in England, and often in the United States, called railways) are an evolution from a cart-road, and when designed to serve the business of a common carrier, constitute either a special form of highway, or a special mode of using an existing highway. Those of the former kind are in this treatise generally called "through railroads," and those of the latter kind "street railroads."

The Romans taught the world to build paved roads that were straight, regularly graded, laid on a solid substructure, and well drained. In some mediæval cities, streets over which heavy carting was done were furnished with two or more parallel rows of marble slabs, set as far apart as ordinary cart wheels, and over which the latter could roll with

little friction.[1] With the same view, the owners of some English coal mines, during the seventeenth century, constructed private "waggon-ways," to take their coal to market. These, at first, consisted of two lines of trams, that is, of heavy planks, laid (the ground being first levelled) on the most convenient line across the fields.[2] Later the planks were kept in place or framed together by transverse bars, set at equal distances, the interstices being filled up with sand and gravel. Brick arches were sometimes laid, on which to build this framework, where the way crossed a hollow. Roads of this description were known as framed waggon-ways, and came into use between 1722 and 1755.[3]

The next improvement was to replace the planks by beams or trams furnished, on their outer sides, with an elevated rim or flange. Wagons were driven over these, being kept upon them by the flanges, which were set five feet apart, that being the distance between the outer edges of the cart-wheel tires then in common use. By the beginning of the eighteenth century, the effect of wear and tear on the trams was lessened by nailing down strips of iron upon them. These were known as "strap rails."[4] In the latter part of that century solid cast-iron rails were substituted, both in England and Germany, on the better class of railroads, made somewhat in the form of a T, and therefore called "T rails." At the same time, for the flange on the tram was substituted a flange on the wheel. This is the time when the term "tramway" came into general use,[5] although coal railways were also called "waggon-

[1] Biot, *Manuel du Constructeur de Chemins de Fer*, 4; 1 Redfield on the Law of Railways, 1.

[2] These plank "waggon-ways" came in during the latter half of the sixteenth century. They were certainly in use about 1679. Pit *v.* Lady Claverinth, 1 Barnard. 318.

[3] Senhouse *v.* Christian, 1 Term Reports, 560, 564, 566, 567, 569.

[4] They were used in Germany at the Harz mines before their introduction in England. Block, *Dict. Général de la Politique; Chemin de Fer.*

[5] It was so used in 1776.

ways" as long as they were operated by horses.[1] Some of these iron railways were fifteen or twenty miles in length. There was one such in Surrey, near London, between Wandsworth and Mertsham, which was completed in 1805. A single horse drew twelve loaded wagons over it (the whole train weighing thirty-six tons) for six miles without difficulty, at a fast walk.[2] Steam locomotives were used on the coal railways as early as 1804, but it was not until 1829 that they were so far perfected as to do their work efficiently and at a fair rate of speed.[3] Many railways of this kind were laid over land not belonging to the owners of the collieries, under ancient grants of a private right of way. These were called "way-leaves," and were often accompanied by "stay-leaves," or liberty to stop and unload at suitable stations. The principle that such a grant carries whatever is necessary to make it reasonably beneficial was held by the courts sufficient to authorize the grantees to construct any of the forms of way which have been described, if shown to be reasonably necessary for the transportation of coal, under the conditions of business existing at the time of their construction, although they were wholly unknown at the date of the way-leave.[4]

The longer tramways necessarily crossed public roads, and in so doing were liable to create a nuisance.[5] Acts of Parliament were passed to make such crossings lawful, and often contained a provision that any one might enter on the tram-

[1] Annual Register for 1814, p. 84.

[2] Annual Register for 1805, p. 408. The Plymouth and Dartmouth Railway Company, chartered in 1819, was a road of this nature, and still exists.

[3] The Stephenson locomotive, used on the Killingworth Railway in 1814, could only make six miles an hour, with a load of fifty tons.

[4] Dand *v.* Kingscote, 6 M. & W. 173, 197 (1840). The grant in question in this case had been made in 1630.

[5] Regina *v.* Train, 2 Best & Smith, 640 ; Canastota Knife Co. *v.* Newington Tramway Co., 69 Conn. 146, 160; 36 Atlantic, 1107.

way with suitable vehicles, and use it on payment of tolls.[1] When constructed under grants of this nature, they were declared by the courts to be public highways, and the duty to maintain them for the benefit of the public was enforced by mandamus.[2] A charter of this nature, granted in 1792, giving the owner of a coal mine a right to make any necessary railways or roads to convey his coals, was held to authorize him, on the invention of steam locomotion, to construct and operate a steam railway in connection with his colliery.[3] On the other hand, a charter for a railroad, granted after the use of steam locomotive engines had become familiar, does not necessarily imply that only this form of power shall be employed. Resort may be had to any form the use of which is consistent with the rights of others.[4]

The first English railway on which passengers were carried in trains of cars drawn by a steam locomotive was the Stockton and Darlington Railway, chartered in 1821 and opened in 1825: the first American railway was the South Carolina Railroad, chartered in 1827 and opened in 1830.

2. Definitions.

Railroads are roads laid with parallel metallic rails.[5] They can be conveniently considered as of four descriptions: through railroads, street railroads, inter-urban railroads, and elevated railroads.

[1] See statement of Law, *arguendo*, in Senhouse *v.* Christian, 1 Term Rep. 566.

[2] King *v.* Severn & Wye Railway Co., 2 B. & Ald. 646, 648, 651 (1819).

[3] Bishop *v.* North, 11 M. & W. 417, 426; 3 English Railway & Canal Cases, 459.

[4] State *v.* Tupper, Dudley (S. C.), 135 (1838). The charter passed upon in this case was that of the South Carolina Railroad Company, granted in 1827.

[5] Railroads having but one rail are a matter of experiment, and there are none yet in the United States.

3. Through Railroads.

A through, or, as it is sometimes styled, a "commercial railroad," or a "railroad of commerce,"[1] is one connecting distant points, and whose primary object is to connect them. If it is built to any extent upon highways, this is not to increase their usefulness, but with a view solely to its own primary object. It properly consists of a substructure, known as the roadbed, built, so far as practicable, upon the average level of the territory traversed, in a line made up of tangents connected by suitable curves, upon which wooden cross-ties, or "sleepers," are laid a short distance apart, to support the rails, the spaces between the ties being filled solid or "ballasted" with earth, gravel, or crushed stone. The rails used, originally of cast or rolled iron, are now almost invariably of steel, in consequence of the cheapening of that material by the invention of the Bessemer process in 1856. The T rail, when first laid in England, was made with a view of turning it over, when partly worn, so that the bottom would become the top. This required great thickness of base, and a costly iron support called a "chair," to keep it firmly in place. In the United States rails are not thus turned, and are secured to the cross-ties by spikes, without the use of chairs.

All the early English railways having been built to drive ordinary wagons on, the distance between the rails, which had been determined by the width of the cart axle, remained unaltered when the flange on the outside of the rail was replaced by one on the outside of the wagon wheel. The width of the common cart-tire was such as to require a space of four feet eight and a half inches between the rails, measured on the inside, and as new railroads were built to connect with the old ones, the same gauge of track was generally adopted, so as to allow the use of the same wagons upon all, and has come

[1] Mass. Loan & Trust Co. *v.* Hamilton, 88 Federal, 588; 32 C. C. A. 46; 59 U. S. App. 403.

to be known as the "standard gauge." For England and Scotland it was adopted (with the exception of the Great Western Railroad) by act of Parliament in 1846. The narrow-gauge railroad has a three-foot track.

There was at first no distinction made between railroads with reference to the character of the motive power. The Stockton and Darlington Railroad, and the Liverpool and Manchester Railroad, chartered in 1828, were both laid out with the intention of using horses. The same is true of the earlier American railroads, all of which were originally built with the strap-rail. The Baltimore and Ohio Railroad was operated by horses until 1832. Steam soon replaced animal power on all considerable railroads, and electricity now threatens to replace steam. Some through railroads already use it upon part of their tracks, either exclusively or by the use of a third rail, for part of the trains, the rest being run by steam.

4. Street Railroads.

In 1831 the street railroad for the conveyance of passengers in cities came into existence, the first being laid on the Bowery, in New York.[1] The cars were drawn by horses or mules on parallel metallic tracks laid down in the public highways, substantially at grade. These were at first universally known as "horse railroads."

As described in an early case, in which the question was whether their construction imposed a new servitude on the soil, "there are no cuttings, no embankments, no locomotives, no tenders nor trains, no rapid or dangerous progress, no fire, steam whistles or bells, but only a jogging horse with a species of omnibus attached, stopping every few rods to take in and let out passengers."[2] The introduction of the cable system and

[1] Johnson's Un. Cycl., art. Street Railways.

[2] Elliott *v.* Fair Haven & Westville R. R. Co., 32 Conn. 579, 587 (1860).

of electric power has worked considerable changes. It made it possible and often convenient to couple several cars together, and so make up a train. It added greatly to the rate of speed commonly maintained. It decreased the frequency of the stops. The vital difference, however, between street railroads and those of the earlier form, or through railroads, remained the same. It lay not in any difference of motive power, but in the fact that street railroads were a means of using a public highway to serve local convenience; while railroads of the older type were independent roads, which only occupied a public highway in case of necessity, for short distances, and never as a means of promoting its utility.[1]

5. Railroads considered as Highways.

The horse railroad came in as an incident of a highway. The other and older form of railroad itself constituted a highway. It possessed that character whether it was constructed at public or private expense, provided the public had a right to avail themselves of its facilities. That it was built and owned by a private corporation was immaterial. The function performed by its operation was that of the State. Though the ownership might be private, the use was public. They were public highways in their very nature, at common law.[2] The right and the duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations have been founded upon that fact.[3] Several of our State Constitutions expressly declare railroads to be public highways, and subject, as such, to public control.

In the early history of railroad enterprise it was quite generally supposed that they could be used as highways in

[1] See Chapter XVIII., Railroads on and along Highways.

[2] Olcott *v.* Supervisors, 16 Wall. 678, 695, 696.

[3] Wisconsin, Minnesota, & Pacific Railroad *v.* Jacobson, 179 U. S. 287, 296.

the fullest sense of that term. This view dictated the language of most charters granted between 1825 and 1845, and explains much of that used in later charters, or general railroad laws; these having naturally adopted forms of phraseology found prepared to hand. This original conception of a railroad was that of an immovable structure, graded for the use of vehicles moving on rails provided for the purpose, on which every one who could procure the proper carriages and apparatus would have the right to travel, on paying a proper toll for the use of the road, and conforming to any reasonable regulations which might be imposed.[1] Provisions were therefore often inserted in the charter of a railroad company, giving to any other such company, or even to private individuals, the right to connect with the railroad, or to enter upon it with the necessary cars. The word "connect," as thus used, referred to a connection of tracks.[2]

Railroads were at first regarded much as a better kind of turnpike. Companies chartered to build them were primarily construction companies. They were to build for the use of others. The great thing was to provide a new road, adapted to the new mode of locomotion. But as the company constructing a railroad would naturally desire to have the right not only to participate in its use, but to regulate the manner of such use, railroad charters and laws generally grant in terms power, first, to locate, construct, and maintain the road; second, to equip it with proper rolling-stock; and, third, to transport goods and passengers upon it. "This practice evidently springs from the conviction that a railroad company is not necessarily a transportation company, and that, to make it such, express authority must be given for that pur-

[1] Lake Superior & Mississippi R. R. Co. *v.* United States, 93 U. S. 442, 446, 450.

[2] Atchison, Topeka, & Santa Fé R. R. Co. *v.* Denver & New Orleans R. R. Co., 110 U. S. 667, 676.

pose, in compliance with the rule that no power is conferred upon a corporation which is not given expressly or by clear implication."[1]

6. Inter-urban Railroads.

Inter-urban railroads are those connecting distant communities, which are laid mainly on highways, and as to so much of them as lie within each of these communities are built upon its streets and operated so as to promote local convenience and make these streets more serviceable to the public.

It is in the development of the street railroad, and by the use of electric power to work it, that the inter-urban railroad has been produced. Such a road connecting thickly populated municipalities will ordinarily occupy in each the streets at grade, and its cars may stop at frequent intervals to take on or discharge passengers desiring to make a short local trip; but between these municipalities it may be built in whole or part off the highway, on a location made upon lands of private owners, and run in all respects substantially as a through railroad. By its connections with other like roads an inter-urban railroad may form part of a route hundreds of miles in length.

The operation of such a road will be governed, as to its use of streets, by the rules applicable to street railroads, and otherwise by those applicable to through railroads.[2] Street railroads, as to such parts of them as may lie in the open country on the outskirts of a municipality, may also often be lawfully operated much as through railroads, and those crossing their tracks must then take corresponding precautions.[3]

[1] Lake Superior & Mississippi R. R. Co. *v.* United States, 93 U. S. 442, 451.

[2] Cincinnati, Lawrenceburg, & Aurora Electric Street R. R. Co. *v.* Lohe, 68 Ohio St. 101; 67 Northeastern, 161.

[3] McNab *v.* United Railways & Electric Co., 94 Md. 719; 51 Atlantic, 421. See Chapter XVIII., Railroads on and along Highways, and Chapter XLI., Use of Highways.

7. Elevated Railroads.

Elevated railroads are those built in a city, mainly in its streets, but elevated above them on a viaduct. Their object is to promote local convenience; but while they make the streets more serviceable to the public, it is not as streets, but as sites for the support of the viaduct. In one sense, they are street railroads, but not in the ordinary sense, for the cars do not run upon the surface of the street, and there can be no travel over their tracks except by means of their own cars. It is not because they are elevated above the surface of the country that they are to be classified by themselves. Any through railroad might be so elevated throughout its entire length, should that be found the most convenient mode of construction, with reference to the character of the country traversed.[1] The elevated railroad, as that term is commonly used, is that only which, being mainly built in streets, is elevated above their surface.[2]

8. Meaning of the Term "Railroad" in Statutes.

As the through steam railroad preceded all other railroads, and early became a prolific source of legislation, a question often arises whether statutes concerning railroads, in which that term is used without restriction, cover railroads of all kinds. It may be used in that sense. It may also be used in a more limited one, to denote through railroads only, or even through steam railroads only.[3] As to this, the context, the mischief to be remedied,[4] and the date of the enactment — whether before or after the multiplication of street railways and their equipment with cars moved by electricity — will all

[1] See Fulton, &c. *v.* Short Route Railway Transfer Co., &c., 85 Ky. 640; 4 Southwestern, 332; 7 Am. State, 619.

[2] See Chapter XVIII., Railroads on and along Highways.

[3] Sears *v.* Marshalltown Street Railway Co., 65 Iowa, 742; 23 Northwestern, 150; 20 Am. & English Railroad Cases, 36 (1885).

[4] Montgomery's Appeal, 136 Pa. St. 96; 20 Atlantic, 399.

be important.[1] A statute requiring the interchange of business between intersecting railroads may apply to the intersection of electric and steam railroads, and of through and street railroads.[2] The corporate name is not decisive as to whether a railroad company is a street railroad company or not. No railroad is a street railroad unless it serves the purposes of the street on which it may be laid. If constructed on a street for the mere convenience of the railroad company, or to save expense, but used only for business that might as well be done on private land, it is not a street railroad, and imposes a new servitude on the street.[3]

Under laws authorizing municipal subscriptions in aid of railroads, a narrow-gauge railroad would be included.[4]

9. What the Term "Railroad" includes.

The term "railroad" ordinarily includes all buildings necessarily appurtenant to the roadway.[5]

Rails and any other articles going into the structure of a railroad, when once thus incorporated into it, become a part of it with reference to liens on the railroad previously existing, unless so incorporated under a contract, known to the lienor, with a third party who owned them, whereby the title was retained in him.[6]

Rolling-stock in use on a railroad is by some courts re-

[1] Massachusetts Loan & Trust Co. *v.* Hamilton, 88 Federal, 588; 32 C. C. A. 46; 59 U. S. App. 403; Funk *v.* St. Paul City Railway Co., 61 Minn. 435; 63 Northwestern, 1099; 52 Am. State, 608; Louisville & Nashville R. R. Co. *v.* Anchors, 114 Ala. 492; 22 Southern, 279; 62 Am. State, 116.

[2] Stillwater & Mechanicsville Street Railway Co. *v.* Boston & Maine R. R. Co., 171 N. Y. 589; 64 Northeastern, 511.

[3] Carli *v.* Stillwater Street Railway & Transfer Co., 28 Minn. 373; 10 Northwestern, 205; 41 Am. Rep. 290. See Chapter XVIII., Railroads on and along Highways.

[4] Meader *v.* Lowry, 45 Iowa, 684.

[5] United States *v.* Denver & Rio Grande Railway Co., 150 U. S. 1, 12.

[6] Porter *v.* Pittsburg Bessemer Steel Co., 122 U. S. 267, 283.

garded as forming part of the real estate.[1] By others, and with better reason, it is treated as personal property.[2] Some of our State Constitutions provide that it shall be considered such.[3] In view of the original conception of railroads as roads to be open for any owner of suitable vehicles to drive them on, it would seem most accordant with principle to treat the term "railroad" as, properly speaking, descriptive only of the location and the permanent structures placed upon it.[4]

[1] Williamson *v.* N. J. Southern R. R. Co., 28 N. J. Eq. 277; 14 Am. Railway Rep. 34. See Chapter XX., Rolling-stock.

[2] Neilson *v.* Iowa Eastern R. R. Co., 51 Iowa, 184; 1 Northwestern, 434; 33 Am. Rep. 124; Hoyle *v.* Plattsburgh & Montreal R. R. Co., 54 N. Y. 314; 13 Am. Rep. 595.

[3] That of Missouri does this, as part of quite a code of railroad regulations. 2 Poore's Charters and Constitutions, 1193.

[4] Lake Superior & Mississippi R. R. Co. *v.* United States, 93 U. S. 442, 451.

CHAPTER II.

MODES OF INCORPORATION.

1. General and Special Legislation.

THE earlier railroads were all built under special charters. Constitutional provisions against special legislation, and the considerations upon which these were founded, led, after twenty years, to a different policy. In 1848, New York enacted a general railroad law throwing incorporation for the purpose of constructing, maintaining, and operating a railroad open to all on equal terms; and similar laws have since been passed in many States, some covering both through and street railroads, and some confined to the former. They generally require the number of those associating for such purposes to be greater than that necessary in the case of other corporations, and the amount of the subscribed capital stock (part of which must be paid in before the articles of association can be filed) to bear some proportion to the estimated cost of construction; which cost, as well as the general route proposed, must be shown by an engineer's report accompanying the articles, and stating the general route contemplated. Such a report is regarded as of a preliminary character, and the route indicated need not be precisely pursued in constructing the road.[1] The statute often requires the approval of the scheme of incorporation by some public authority, after a public hearing.

[1] Buffalo & Pittsburgh R. R. Co. *v.* Hatch, 20 N. Y. 157. See Appendix, I.

Special charters are still occasionally granted in States where general railroad laws exist, but the Constitution does not absolutely prohibit special legislation. They furnish, of course, the only mode of incorporation in States having nothing in the nature of a general railroad law.

The general incorporation laws of some States give power to corporations formed mainly for other purposes, such as mining or manufacturing, to construct a railroad for use as auxiliary to its principal business. A company possessing such a franchise can, instead of building such a railroad, contract for the use or improvement of an existing one.[1]

A corporation can only be organized under a general railroad law of the ordinary kind, which is designed to build or maintain a railroad for public use. There must be some special provisions to authorize the construction of one the main purpose of which is to promote private ends, as by the owners of a factory for the construction of a railroad to bring materials to it.[2] Nor does a general railroad law of the ordinary kind permit the incorporation of a company to construct an elevated railroad.[3]

General railroad laws which require payment in cash of a certain part of the subscriptions to the capital stock, before the articles of association can be filed, are to be reasonably construed. Payment by an uncollected bank check is sufficient if there are funds to meet the check. It is insufficient, in the absence of such funds, although the credit of the maker was such that it would have been paid if presented.[4] Payment by a check, received by the treasurer of the company in good faith as the equivalent of money, and afterwards taken

[1] Central Trust Co. *v.* Columbus, Hocking Valley, & Toledo Railway Co., 87 Federal, 815.

[2] Weidenfeld *v.* Sugar Run R. R. Co., 48 Federal, 615, 619.

[3] *In re* People's Rapid Transit Co. *v.* Dash, 125 N. Y. 93; 26 Northeastern, 25; 10 L. R. A. 728.

[4] People *v.* Chambers, 42 Calif. 201; 4 Am. Railway Rep. 49.

up and paid by the maker while in his hands, will be sufficient, although the latter had given his check on the assurance of third parties, who were promoters of the company, that it would not be presented for payment.[1]

2. Combinations and Consolidations.

Railroad companies are often formed by the consolidation of other companies previously existing. A full consolidation extinguishes the original companies.[2]

Several railroad corporations may be authorized to unite, without thereby terminating their own existence, in forming a new corporation to succeed to their rights, franchises, and property. Corporations are frequently allowed by law to become shareholders in other corporations. They may thus be its sole shareholders. So, although they own no shares in its capital stock, they may be authorized to constitute it, with power to issue shares to others. In such case, while the new company will succeed to such of their rights and franchises as are essentially incident to the construction, maintenance, or operation of a railroad, it may not succeed to special privileges, such as immunity from taxation, which the old companies or some of them possessed. Whether those pass depends on the law governing the incorporation, and on the state of the law at the time of the incorporation.[3]

The consolidation of companies owning parallel or competing railroads is in some States prohibited by constitutional provisions, and these receive a liberal construction.[4] In the absence of such provisions it is not unlawful.[5] Such a State

[1] People *v.* Stockton & Visalia R. R. Co., 45 Calif. 306; 5 Am. Railway Rep. 1; 13 Am. Rep. 178.

[2] Yazoo Railroad *v.* Adams, 180 U. S. 1, 19. See Appendix I, 3.

[3] Railroad Co. *v.* Maine, 96 U. S. 499, 509, 510.

[4] State *v.* Atchison & Nebraska R. R. Co., 24 Neb. 143; 38 Northwestern, 43; 8 Am. State, 164; Pearsall *v.* Great Northern R. R. Co., 161 U. S. 646.

[5] Manchester & Lawrence R. R. Co. *v.* Concord R. R. Co., 66 N. H. 100; 20 Atlantic, 383; 49 Am. State, 582.

law is not invalid as respects inter-State railroads, as being an attempt to regulate commerce between States.[1]

Companies formed to unite competing railroads running from one State to another may come within the prohibition of the Sherman Act (26 U. S. Stat. at Large, 209) against combining for the purpose of monopolizing any part of the commerce between States. A new corporation, formed by arrangement between a majority in interest of the shareholders in each, to hold their shares in furtherance of a design to secure such a monopoly, would not be formed for a lawful purpose, since the arrangement would be illegal under the statute.[2] It would be virtually an arrangement between the competing companies in unreasonable restraint of trade,[3] and, as such, a misuse of their corporate powers.

Power given to a railroad corporation by the State of its charter to sell its franchises and property to a foreign railroad corporation, with a provision that the latter shall by such sale become possessed of the rights of charter so sold, makes it thereby a domestic corporation under its old name, as far as relates to the franchises and property purchased.[4] If a corporation owning a railroad in two States, in one of which it is incorporated, also incorporates in the other, the legal effect is to incorporate the individual persons who are members under its original charter,[5] and it is therefore unimportant

[1] Louisville & Nashville R. R. Co. *v.* Kentucky, 161 U. S. 677, 703.

[2] United States *v.* Northern Securities Co., 120 Federal, 721; affirmed, March, 1904, by the Supreme Court.

[3] That the phrase "agreements in restraint of trade" was adopted by the framers of the Sherman Act, supposing that it would be given the narrow construction accepted by the English courts, see George F. Hoar's Autobiography, II. 364. Mr. Justice Brewer, by whose concurrence in the judgment the decision mentioned in the preceding note was reached, in his opinion approves such a construction as will make the Act applicable only to unreasonable contracts and combinations which are in direct restraint of trade. It seems probable that this will ultimately be the prevailing view.

[4] Graham *v.* Boston, Hartford, & Erie R. R. Co., 118 U. S. 161, 167.

[5] Southern Railway Co. *v.* Allison, 190 U. S. 326, 338.

that such charter does not authorize the acceptance of any such new franchise. The same association of natural persons is thus constituted into two distinct corporate entities in the two States, acting in each according to the powers locally bestowed, as distinctly as though they had nothing in common, either as to name, capital, or membership.[1]

A new corporation may be constituted out of companies of different States, under legislation to that end in each of such States.[2] It is not invalidated by the provision in the Constitution of the United States (Art. I, sec. 10) that no State shall, without the consent of Congress, enter into any agreement or compact with another State; for that refers only to agreements or compacts of a political nature.[3]

The laws under which a consolidated corporation of this description comes into existence are to be construed in its favor, so far as may be necessary to make them, when taken together, a working scheme.[4] Thus it may not be bound by the laws of one of the States as to railroad mortgages, with respect to a mortgage of its road in another State;[5] nor by the laws of one as to the increase of its capital stock.[6] Its meetings can be held in either State, and at such a meeting business affecting the entire property can be transacted.[7]

If an illegal consolidation is followed by a transfer of the

[1] Clark *v.* Barnard, 108 U. S. 436, 453; Stone *v.* Farmers' Loan & Trust Co., 116 U. S. 307, 334.

[2] Railroad Co. *v.* Harris, 12 Wall. 65, 82; Cleveland & Pittsburg R. R. Co. *v.* Speer, 56 Pa. St. 325; 94 Am. Dec. 84.

[3] Virginia *v.* Tennessee, 148 U. S. 503, 517, 520; Chesapeake & Ohio Canal Co. *v.* Baltimore & Ohio R. R. Co., 4 Gill & Johns. 1.

[4] Ohio & Mississippi R. R. Co. *v.* People, 123 Ill. 467; 14 Northeastern, 374; Brocket *v.* Ohio & Pa. R. R. Co., 14 Pa. St. 241; 53 Am. Dec. 534.

[5] Atwood *v.* Shenandoah Valley R. R. Co., 85 Va. 966, 983; 9 Southeastern, 748.

[6] Attorney-General *v.* Boston & Maine Railroad, 109 Mass. 99.

[7] Graham *v.* Boston, Hartford, & Erie R. R. Co., 118 U. S. 161; Louisville, New Albany, & Chicago Railway Co. *v.* Louisville Trust Co., 174 U. S. 552, 563.

possession of a railroad to one company from another, the former will be liable to account to the latter for the benefits received. The contract was void, but acts have been done out of which rights arise.[1]

If several railroad companies consolidate as one when there is no law to authorize it under any circumstances, no *de facto* corporation will be created. None can be, without the existence of a law under which a *de jure* corporation might have been created. Hence if the pretended corporation, after the attempted consolidation, should give a mortgage or other conveyance, no title passes, for there is no grantor.[2]

With a few exceptions, the railroads in the United States are built under State laws. Congress has power to incorporate railroad companies to do business between States or in the Territories of the United States, but has rarely exercised it.[3]

[1] Manchester & Lawrence Railroad *v.* Concord R. R., &c., 66 N. H. 100; 20 Atlantic, 383; 9 L. R. A. 689.

[2] American Loan & Trust Co. *v.* Minnesota & Northwestern R. R. Co., 157 Ill. 641; 42 Northeastern, 153.

[3] California *v.* Pacific R. R. Co., 127 U. S. 1, 39.

CHAPTER III.

STOCK AND STOCKHOLDERS.

1. Conditional Subscriptions.

SUBSCRIPTIONS to the capital stock of a railroad company may lawfully be conditioned on the location and construction of the road through a particular point; but such a condition is satisfied as soon as the road is in good faith and finally located through such point.[1] In the natural course of things, subscriptions must be paid before the work of construction can be begun.[2] Although not so conditioned in form, if the subscription paper or the articles of incorporation specify the route, any deviation from it, which as to him is a material one, releases the subscriber.[3]

Under a subscription payable on condition that the road shall be first completed and in operation, it is enough if it be operated by the use of hired cars,[4] but not if the use

[1] Wemple *v.* St. Louis, Jerseyville, & Springfield R. R. Co., 120 Ill. 196; 11 Northeastern, 706; McMillan *v.* Maysville & Lexington R. R. Co., 15 B. Monr. 218.

[2] Swartwout *v.* Michigan Air Line R. R. Co., 24 Mich 389; 4 Am. Railway Rep. 63.

[3] Caley *v.* Philadelphia & Chester County R. R. Co., 80 Pa. St. 363; Moore *v.* Hanover Junction R. R. Co., 94 Pa. St. 324.

[4] Courtright *v.* Deeds, 37 Iowa, 503.

of the track is also hired.[1] Nor would it be enough that a single train had been run on one occasion, if its regular operation in the natural course of business had not been commenced.[2]

If subscriptions are made conditional on not less than a certain amount being subscribed, such amount cannot be made up by proof of a contract with a responsible party to construct the railroad and take stock, in part payment, to the necessary amount.[3] Such a contract, however, would be valid, and shares may be issued under it. That they are issued as full paid, but taken at much less than their par value, will not invalidate them, nor subject the contractor to an assessment by the company for the difference between what he takes them for and par, provided he takes them at their real value.[4]

2. Shares in Companies formed by a Reorganization or Consolidation.

Shares issued as full paid, under a reorganization following a foreclosure, which represent an equivalent at par for securities issued by the old company, but are worth much less than par, are not thereby invalidated by a constitutional provision that all fictitious increases of stock shall be void.[5]

A subscription to shares in a designated railroad company, payable to it or its successors or assigns, is good in favor of another company formed by a consolidation of that and others. The consolidation operates as an assignment;[6] and

[1] Lawrence *v.* Smith, 57 Iowa, 701; 11 Northwestern, 674. *Contra*, People *v.* Holden, 82 Ill. 93.

[2] Paris & Danville R. R. Co. *v.* Henderson, 89 Ill. 86.

[3] N. Y., Housatonic, & Northern R. R. Co. *v.* Hunt, 39 Conn. 75; 4 Am. Railway Rep. 56.

[4] Clark *v.* Bever, 139 U. S. 96.

[5] Memphis & Little Rock Railroad *v.* Dow, 120 U. S. 287, 299.

[6] Michigan, M. & C. R. R. Co. *v.* Bacon, 33 Mich. 466.

as the plaintiff sues in the right of another, the question is whether that other has fulfilled on its part the obligations of the subscription contract. If it has, the subscription will not be avoided because similar acts may not have been done by the plaintiff or another of its grantors, in respect to some other part of the consolidated system, not derived from the company with which the defendant was connected.[1] But a subscriber to stock in a company chartered to build a road which is subsequently cut up into three divisions, each to be built by a new and separate company, cannot be held by either or all of them.[2]

3. Discharge of Subscription by Subsequent Events.

In determining whether a subscriber is released by a subsequent change in the corporate powers of the company, the tendency of modern decisions is to hold very few changes to be so fundamental as to have that effect, particularly where, as is now generally the case, a power to alter or repeal the franchise was reserved when it was granted, in favor of the legislature.[3]

A subscription to stock is not rendered voidable because a location which had been duly made on the proper route is altered without authority of law. The alteration in such case is inoperative.[4]

[1] Munroe *v.* Fort Wayne, Jackson, & Saginaw R. R. Co., 28 Mich. 272.

[2] Marsh *v.* Fulton County, 10 Wall. 676.

[3] Connecticut & Passumpsic Rivers R. R. Co. *v.* Bailey, 24 Vt. 465, 479; Peoria & Rock Island R. R. Co. *v.* Preston, 35 Iowa, 115; Everhart *v.* West Chester & Philadelphia R. R. Co., 28 Pa. St. 339; 1 Redfield's Am. Railway Cases, 180; Champion *v.* Memphis & Charleston R. R. Co., 35 Miss. 692; Mayor *v.* Norwich & Worcester R. R. Co., 109 Mass. 103; Scotland *v.* Thomas, 94 U. S. 682; Zabriskie *v.* Hackensack & New York R. R. Co., 18 N. J. Eq. 178; 90 Am. Dec. 617.

[4] Danbury & Norwalk R. R. Co. *v.* Wilson, 22 Conn. 435, 456.

4. Other Defences.

A subscription cannot be avoided by parol evidence that it was obtained on the representation of the agent of the company that the road should be located over a certain route;[1] nor can it be by showing that the organization papers of the company were defective for such a proper description of the route and terminal points as the statute required. To hold the subscriber, it is enough that a *de facto* organization has been effected.[2]

5. Rights of Dissentient Shareholders.

Dissentient shareholders cannot be forced into continued relations with a company which by legislative amendments of its franchise has undergone a fundamental change in its constitution and purposes. Consolidation with another corporation would be such a change, if unauthorized at the time when they became shareholders.[3] But even fundamental changes may be made against their will in a railroad charter, provided the company is given the right to appropriate their shares on paying them their just value. The power of eminent domain may be thus granted in aid of a railroad enterprise, because it is for a public purpose.[4]

6. Shares are Personal Property.

Shares in a railroad company are personal property for all purposes, notwithstanding the property of the company is mainly or wholly real.[5]

[1] Ellison *v.* Mobile & Ohio R. R. Co., 36 Miss. 572.

[2] Cayuga Lake R. R. Co. *v.* Kyle, 64 N. Y. 185; Bucksport & Bangor R. R. Co. *v.* Buck, 68 Me. 81.

[3] Clearwater *v.* Meredith, 1 Wall. 25.

[4] Black *v.* Delaware & Raritan R. R. Co., 7 C. E. Green, 130; 9 C. E. Green, 455.

[5] Some early decisions took a contrary view, and gave dower in railroad stock. Copeland *v.* Copeland, 7 Bush (Ky.), 349.

7. Power of one Company to hold Stock in another.

A railroad company is not one of the kinds of corporation formed with the purpose of investing funds, from time to time, in productive securities. Hence it ordinarily has no implied power to buy shares in other corporations as an investment.[1] If, however, it establishes permanent interest-bearing funds, for lawful purposes, such as sinking funds to retire loans, or funds for the relief of disabled employees, it has implied power to invest them in such securities as any prudent capitalist might properly invest trust funds in. If stocks of other railroad companies are of such a character, it might purchase them, under such circumstances.

So, if it be authorized to consolidate with or absorb another railroad company, it may buy its stock, as a means of accomplishing that end.[2] But it cannot purchase shares in another company as a mode of acquiring control of a road owned by the latter, unless — having power to consolidate with or absorb it — this is done with a view of acquiring the whole capital stock, if it can be had at a fair price.[3] If it should, the minority stockholders in the company whose shares it has purchased will be protected in equity against any inequitable exercise of the power derived therefrom.[4]

The organization of a "holding corporation," for the mere purpose of unifying the control of competing railroads by acquiring a majority of the capital stock of the companies owning them, as the success of the scheme must depend on the action of the holders of these shares, and as they in effect

[1] Louisville & Nashville R. R. Co. *v.* Kentucky, 161 U. S. 677, 698.

[2] See Louisville Trust Co. *v.* Louisville, New Albany, & Chicago R. R. Co., 75 Federal, 433, 445; 22 C. C. A. 378; 43 U. S. App. 550.

[3] See Elkins *v.* Camden & Atlantic R. R. Co., 36 N. J. Eq. 5, 12; 9 Am. & Eng. R. R. Cases, 590; Dewey *v.* Toledo, Ann Arbor, & North Michigan Railway Co., 91 Mich. 351; 51 Northwestern, 1063.

[4] Pearson *v.* Concord R. R. Corporation, 62 N. H. 537; 13 Am. State, 590.

represent and stand for their respective corporations, may be an act in contravention of statutes designed to prevent the consolidation of such corporations or the suppression of competition between them.[1]

[1] Pennsylvania R. R. Co. *v.* Commonwealth, 7 Atlantic, 368; 29 Am. & Eng. R. R. Cases, 145; Pearsall *v.* Great Northern Railway Co., 161 U. S. 646, 671; United States *v.* Northern Securities Co., 120 Federal, 721.

CHAPTER IV.

RAILROAD FRANCHISES.

A FRANCHISE is a privilege of a public nature, held by grant from the sovereign.[1] A railroad franchise is such a privilege, whether derived from a special grant or by organization under a general law. As it is always given not merely for private gain to the corporators, but to furnish a public highway,[2] it is subject in a peculiar degree to public control.[3] Railroad franchises are generally acquired as part of an act of incorporation.

1. The Franchise to exist as an Artificial Person.

The franchise to become and exist as a railroad company in the capacity of an artificial person stands, however, on a different footing from the franchise to build or operate a railroad.

[1] Dict. of Philosophy and Psychology, *in verb.*

[2] Union Trust Co. *v.* Illinois Midland Railway Co., 117 U. S. 434, 455. See Chapter I., What Railroads are, p. 1.

[3] California *v.* Pacific R. R. Co., 127 U. S. 1, 40. See Chapter XXV., Public Right of Control.

A railroad corporation of one State may be authorized by the law of another State to extend and operate its road therein, without being thereby constituted either a corporation or a citizen of the latter State.[1] Its franchise to exist as an artificial person remains in such case a foreign one.

In the common case of the incorporation of a domestic company to build and operate a domestic railroad, the franchises granted are also distinct, and are held by different persons. The franchise to become and exist as an artificial person vests in the corporators; that to act, when incorporated, in such a way as to accomplish certain purposes, vests in the corporation.

General authority to a railroad company to transfer its franchises does not import authority to transfer the franchise of the corporators. That is personal to them and their associates and successors as members of that particular corporation. It can only be transferred by some positive provision of law making it transferable and pointing out the mode of transfer.[2]

2. The Franchise to build and work a Railroad.

Incorporation of a railroad company gives to certain persons authority to exist and act as an artificial person, for certain purposes expressly declared. These generally include the construction, maintenance, equipment, and operation of a railroad. A railroad company, however, is often incorporated for the purpose of acquiring, maintaining, and operating a railroad already constructed. A corporation incorporated simply to construct railroads is termed a construction company. It would have no implied right to operate a railroad after constructing it.

[1] Pennsylvania R. R. Co. *v.* St. Louis, Alton, & Terre Haute R. R. Co., 118 U. S. 290, 296.

[2] Memphis & Little Rock R. R. Co. *v.* Railroad Commissioners, 112 U. S. 609, 619.

A franchise to build a railroad, when the gauge is not specified, permits the adoption of any reasonable gauge, and a change of gauge if that originally adopted proves inadequate, as from a narrow gauge to the standard gauge.[1]

3. Special Franchises and Immunities.

With a franchise to construct, maintain, equip, and operate a railroad, there may also be coupled some special privileges of a kind not essential to the beneficial exercise of general powers. Such privileges are personal to the particular company to which they may be granted, and if its personality be lost, will be extinguished. Authority to mortgage its rights, privileges, and franchises, therefore, will not suffice to make a transfer of a privilege of that nature operative to prolong it in favor of the transferee beyond the life of the mortgagor. It might survive a foreclosure of such a mortgage in favor of the mortgage trustees, thus empowering them to make a new mortgage; but it would not survive a subsequent reorganization, under which the original company became extinct and its franchises passed to a new company.[2] This is true, although it be of the nature of an immunity.[3]

4. Tolls.

A railroad is often given, by law or charter, express power to charge tolls. The term "tolls" includes more than a charge for services; it authorizes the imposition of a tribute over and above what would be a fair compensation for what they cost.[4] It is a charge for passage, not for carriage.[5] No

[1] Millvale *v.* Evergreen Railway Co., 131 Pa. St. 1; 18 Atlantic, 993; 7 L. R. A. 369.

[2] Minor *v.* Erie R. R. Co., 171 N. Y. 566; 64 Northeastern, 454.

[3] Morgan *v.* Louisiana, 93 U. S. 217, 223; People *v.* Cook, 110 N. Y. 443; 18 Northeastern, 113; Schurz *v.* Cook, 148 U. S. 397, 407.

[4] Boyle *v.* Philadelphia & Reading R. R. Co., 54 Pa. St. 310.

[5] New York, Lake Erie, & Western R. R. Co. *v.* Pennsylvania, 158 U. S. 431, 435.

unreasonable charge can be exacted under such a franchise, and if the attempt be made, the State can interfere through the legislature, and prescribe a lower rate.[1]

Without a grant of such a power a railroad company is entitled to require compensation for such services as it may render. But even if it have received such a grant, it is not necessarily entitled to require a reasonable compensation for all services. The State may control its rates of charge in the interest of the public, and in so doing may forbid certain discriminations which might otherwise be reasonable and lawful.[2]

5. Railroad Franchises as a Protection respecting Acts otherwise Unlawful.

While a railroad can be, and often has been, built and operated by a private individual over the lands of others by their consent, it cannot cross or occupy public highways without authority from the State.[3] Nor without such authority can a railroad be operated at all, although with all due care, without serious risk of liability to third parties.

A franchise may render lawful what would otherwise be a nuisance. Thus the noise and jarring of the ground and the emission of smoke, sparks, and cinders, incident to the running of a steam railway train, in consequence of a reasonable exercise of the right to run it, give no ground of action to any to whom the railroad company has come under no special obligation.[4] The State having permitted it, and due compensation to landowners damaged having been made, no others can complain.

[1] Blake *v.* Winona & St. Peter R. R. Co., 19 Minn. 418; 18 Am. Rep. 345.

[2] Louisville & Nashville R. R. Co. *v.* Kentucky, 183 U. S. 503, 517.

[3] Regina *v.* Train, 2 Best & Smith, 640; Canastota Knife Co. *v.* Newington Tramway Co., 69 Conn. 146, 160; 36 Atlantic, 1107.

[4] Carroll *v.* Wisconsin Central Co., 40 Minn. 168; 41 Northwestern, 661. See Chapter IX., Acquisition of Land by Condemnation Proceedings.

6. Implied Contracts; Abandoning Franchise.

The acceptance of a franchise to construct and operate a railroad implies a contract with the State that, if the railroad be constructed, it shall, so far as may be reasonably within the power of the company, be operated.[1] It implies one by the State that such operation shall not be unreasonably obstructed by legislative requirements subsequently imposed.[2] It implies furthermore the assumption by the grantees of certain obligations not resting directly on implied contract. A railroad franchise being granted largely for the public good, its possessor is under a duty to the public to use due diligence to keep the railroad and its appurtenances in a reasonably safe and proper condition. For breach of this duty, whereby any one lawfully using the railroad is injured, he may sue in tort at common law.[3]

The acceptance of a franchise to build and operate a railroad does not create a contract between the company and the State that such a railroad shall be constructed by the former.[4] But if it be so constructed, this throws upon the railroad company the duty of commencing to operate it, and the whole of it.[5] If its operation proves unremunerative and the company becomes insolvent, it can lawfully abandon it.[6] If it proves unremunerative, or for any cause it appears to the company to be undesirable to operate a part of it, but the operation of the residue is profitable, there would be no right to abandon such part and continue to operate the residue. For the company

[1] Gates *v.* Boston & New York Air Line R. R. Co., 53 Conn. 333, 342; 5 Atlantic, 695.

[2] Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362, 393.

[3] Nugent *v.* Boston, Concord, & Montreal Railroad, 80 Me. 62; 12 Atlantic, 797; 6 Am. State, 151.

[4] People *v.* Albany & Vermont R. R. Co., 24 N. Y. 261; 82 Am. Dec. 295.

[5] Union Pacific R. R. Co. *v.* Hall, 91 U. S. 343.

[6] State *v.* Dodge City, Montezuma, & Trinidad Railway Co., 53 Kans. 329; 36 Pacific, 747, 755; 42 Am. State, 295.

to do so would be to assume a franchise not conferred, and *quo warranto* proceedings would lie for a forfeiture of the franchise; or a mandamus could be issued to compel its full execution.[1] It is not, however, always necessary to operate every part of a railroad in the same manner. If there is no real public call for regular passenger trains over a separable part of it, such as a short branch, and the expense of running them exceeds the receipts, the company may be justified in discontinuing them, and only carrying passengers by special contract.[2] But in determining its duty in any of these respects the court has the right to look at its general financial condition, and, although the grievance be confined to a short branch, may inquire if the whole revenues of the whole system would not justify an increase in the accommodation provided.[3]

7. Use of Water Connections.

Railroads terminating or touching at points on navigable water necessarily depend for much of their business on what the water brings to or takes from them: hence railroad franchises often include power to own and run boats at such points. Under such a franchise the company, instead of buying, can hire, or can contract with any shipowner to run his boats in connection with its trains, and, if it deems it proper, can guaranty that his receipts from business which the connection brings him shall be of a certain amount.[4] But unless power to own or run boats in such a manner is given expressly or by fair implication, it does not exist.[5] Such an

[1] State *v.* Hartford & New Haven R. R. Co., 29 Conn. 538, 547; State *v.* Spokane Street Railway Co., 19 Wash. 518; 53 Pacific, 719.

[2] Commonwealth *v.* Fitchburg R. R. Co., 12 Gray, 180.

[3] People *v.* St. Louis, Alton, & Terre Haute R. R. Co. (Ill.), 45 Northeastern, 824.

[4] Green Bay & Minnesota R. R. Co. *v.* Union Steamboat Co., 107 U. S. 98.

[5] Pearce *v.* Madison & Indianapolis R. R. Co., 21 How. 441; Colman *v.* Eastern Counties Railway Co., 10 Beav. 1.

implication will be made when the power would be manifestly beneficial to the company, and is reasonably incident to the nature of the enterprise;[1] and under such circumstances, in the absence of any statutory prohibition, power may fairly be implied to make any reasonable contracts for a term of years with a navigation company to secure the running of boats suitable for making the water connections properly contributory to the business of the road.[2] If no such powers be granted, but they are subsequently procured from the legislature after the construction of the railroad, this enlargement of corporate powers might under some circumstances be so radical a change as to release a subscriber to the capital stock from his obligations.[3]

8. Implied Powers.[4]

A railroad company has power to engage in many transactions which are incidental or auxiliary to its main business, or which may become useful in the care and management of the property which it is authorized to hold, and for the safety and comfort of the passengers whom it is its duty to transport. Courts are disposed, where there is no legislative prohibition shown, to put a favorable construction upon any exercise of power by it which is suitable to promote its success in its proper line of business, and to enable it to give better service to those who travel on its road.[5] A railroad corporation, while in form a private corporation,[6] as to its powers and duties stands

[1] Green Bay & Minnesota R. R. Co. *v.* Union Steamboat Co., 107 U. S. 98; Central Trust Co. *v.* Columbus, Hocking Valley, & Toledo Railway Co., 87 Federal, 815, 824.

[2] Stewart *v.* Erie & Western Transportation Co., 17 Minn. 372; 8 Am. Railway Rep. 149. See Appendix I., 4.

[3] Hartford & New Haven R. R. Co. *v.* Croswell, 5 Hill, 383; 40 Am. Dec. 354; 1 Redfield's Am. Railway Cases, 198.

[4] See Chapter III., Stock and Stockholders, p. 23.

[5] Jacksonville, Mayport, Pablo Railway and Navigation Co. *v.* Hooper, 160 U. S. 514, 523.

[6] Pierce *v.* Commonwealth, 104 Pa. St. 150, 155.

midway between a purely public and a purely private corporation. As respects its power and duty to exercise its franchise of operating such railroads as it may own, its position is more like that of a public corporation, for the public have a direct interest in their continued operation; and so far as this franchise gives authority to do what is denied to ordinary persons, it is to be construed strictly.[1] But as respects matters not directly bound up with the exercise of this franchise, and powers which, while conferred in connection with it, are simply collateral and incidental, not differing in kind from those possessed by ordinary persons, there is no reason for pushing the doctrine of *ultra vires* farther than in the case of private corporations generally. A private business corporation, in order to compete on equal terms with a natural person in the same line of business, must have equal liberty to contract in all matters pertaining to its prosecution. He can make any lawful contract. The corporation can contract only with reference to a certain class of subjects; but as to that class their powers must be equal, or he will have an undue advantage.

It may now be considered as the prevailing doctrine in American law that *ultra vires* contracts of corporations are absolutely void.[2] This must lead courts more and more to uphold contracts as within their powers which it would be open to a natural person, who was a competitor in the same business, to make, and which could fairly be regarded as reasonably incident to its profitable prosecution.[3] The earnings of a railroad depend on the amount of business it does. A railroad company may therefore make contracts legitimately tending to increase its business, although they involve pur-

[1] Thomas *v.* Railroad Co., 101 U. S. 71, 83.

[2] Central Transportation Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 59.

[3] Ellerman *v.* Chicago Junction Railways & Union Stock Yards Co., 49 N. J. Eq. 217; 23 Atlantic, 287; 35 Am. & Eng. R. R. Cases, 388.

chases or obligations not directly connected with the operation of the road. Thus it may buy land for no other purpose than to sell the gravel from it to one who has agreed to make the purchase and have it haul the gravel over its line, at a remunerative rate.[1] Such a piece of land is no part of the railroad, and, as land, serves no railroad purpose; but it opens the door to a profitable traffic.

One company may contract for a shipment over connecting lines and guaranty the safe arrival of the goods at a point far beyond the terminus of its own road.[2] Its charter will be favorably construed to support its right to buy or hire steamboats to make short trips in connection with its trains at terminal points,[3] or, if it touches the sea, to hire space on ocean steamers for goods received for export.[4] It may run stages from a station to a neighboring village, and sell through tickets accordingly.[5] Power to build a branch road implies power to buy one already built.[6] A railroad company can make its line attractive and provide for the comfort of its employees by building and running hotels and eating-houses in places on its line where such accommodations are reasonably necessary for the purposes indicated.[7]

While a company cannot build a railroad for the mere purpose of conveying or leasing it to another company, it may,

[1] Old Colony R. R. Corporation *v.* Evans, 6 Gray, 25; 66 Am. Dec. 394. The point to which this case is here cited was not, however, one necessary to uphold the decision. See, for a comment on this, Davis *v.* Old Colony R. R. Co., 131 Mass. 273; 41 Am. Rep. 221.

[2] Railway Co. *v.* McCarthy, 96 U. S. 258.

[3] Shawmut Bank *v.* Plattsburgh & Montreal R. R. Co., 31 Vt. 491; Green Bay & Minnesota R. R. Co. *v.* Union Steamboat Co., 107 U. S. 98. *Contra*, Pearce *v.* Madison & Indianapolis R. R. Co., 21 How. 441, 444.

[4] Norfolk & Western R. R. Co. *v.* Shippers' Compress Co., 83 Va. 272; 2 Southeastern, 139.

[5] Buffett *v.* Troy & Boston R. R. Co., 40 N. Y. 168, 172.

[6] Branch *v.* Jesup, 106 U. S. 468, 484–486.

[7] Jacksonville, etc. R. R. Co. *v.* Hooper, 160 U. S. 514; Abraham *v.* Oregon & California R. R. Co., 37 Oreg. 495; 60 Pacific, 899.

after having built a railroad which proves more extensive than its needs, convey trackage rights in it to other companies, even under the form of a long lease, provided it retains either a joint use or a right to resume the use, should its future business require this.[1]

A company may alter the gauge of its road at pleasure, where there is no provision of positive law to the contrary.[2] It has general power to change, in matters of detail, any of the methods of accomplishing its corporate purposes; but these purposes themselves it cannot change. If a change in method goes too far, the objection, nevertheless, may not be available in support of any private interest. If a company having a franchise to operate a street railway by a certain kind of power uses another kind, it does not thereby become a trespasser, and its right to do so can only be challenged by some direct public proceeding.[3]

The hazardous nature of its business exposes the servants of a railroad company to constant risk of bodily injury, and the company to frequent claims for compensation for such injuries. To provide a remedy for such claimants otherwise than by litigation, the company has implied power to organize a system of accident insurance (often styled a Relief Department) for the mutual benefit of itself and its employees, by means of a fund raised by their mutual contributions.[4] It may be made a condition of their employment that they shall contribute to

[1] Chicago, Rock Island, & Pacific Railway Co. *v.* Union Pacific Railway Co., 47 Federal, 15, 24; Union Pacific Railway Co. *v.* Chicago, Rock Island, & Pacific Railway Co., 51 Federal, 309. See Chapter XLVI., Leases.

[2] Millvale *v.* Evergreen Railway Co., 131 Pa. St. 1; 18 Atlantic, 993; 7 L. R. A. 369.

[3] Chicago General Railway Co. *v.* Chicago City Railway Co., 186 Ill. 219; 57 Northeastern, 822.

[4] Beck *v.* Pennsylvania R. R. Co., 63 N. J. Law, 232; 43 Atlantic, 908; 76 Am. State, 211; State *v.* Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Co., 68 Ohio St. 9; 67 Northeastern, 93. See Chapter XXVIII., Servants.

such a fund, and also that, in case of accident, if they resort to it, they cannot also look to the company.[1] It could not be made a condition that they should look only to the fund, and waive any right of action against the company.[2]

A franchise to operate a street railroad cannot be used for the maintenance of a railroad laid through streets for the sole purpose of hauling freight cars.[3]

9. Contracts between Connecting Roads.

Traffic agreements between competing roads for the establishment and maintenance of rates for business done and completed within one State are not invalid at common law, nor against public policy, if they do not contemplate or result in unfair rates. They are sometimes a proper safeguard against a competition that would bankrupt both.[4]

Contracts are frequent between connecting lines by which it is stipulated that each shall throw its business, as far as it lawfully can, over to the other, and they are not necessarily contrary to public policy.[5] But since no contract by a corporation not to perform its chartered duties can be valid, a refusal to receive goods for transportation cannot be defended on the ground of a contract with a third party that they shall not be received.[6] Should two roads unite in a traffic agree-

[1] Fuller *v.* Baltimore & Ohio Employees' Relief Association, 67 Md. 433; 10 Atlantic, 237; Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Co. *v.* Moore, 152 Ind. 345; 53 Northeastern, 290.

[2] Johnson *v.* Philadelphia & Reading Railroad, 163 Pa. St. 127; 29 Atlantic, 854.

[3] South & North Alabama R. R. Co. *v.* Highland Ave. & Belt R. R. Co., 119 Ala. 105; 24 Southern, 114.

[4] Manchester & Lawrence R. R. Co. *v.* Concord R. R. Co., 66 N. H. 100, 127; 20 Atlantic, 383; 49 Am. State, 582. See Appendix VI., 1.

[5] Stewart *v.* Erie & Western Transportation Co., 17 Minn. 372; 5 Am. Railway Rep. 333. Most of the contract in question is set out at length in the report of this case.

[6] Peoria & Rock Island Railway Co. *v.* Coal Valley Mining Co., 68 Ill. 489; 2 Am. Railway Rep. 295.

ment not to take freight from any new railroad which may be built, a new road, if built, can compel them to take its freight, by a mandatory injunction.[1]

Trackage contracts between connecting roads are common, and are ordinarily within the implied powers of the companies owning them.[2]

10. Pools.

Several railroad companies may, at common law, unite to form a "pool," throwing their earnings, or such parts of them as may be agreed on, together into one mass, and then distributing from this to each member of the pool in a proportion different from that of its contribution to it.[3] Such an arrangement, as part of which certain rates are established, while not necessarily illegal, may be such if its purpose is to stifle proper competition or establish unreasonable rates. If one of the parties to such a pool, in violation of its provisions, gets freight by promising rebates, which it afterwards refuses to pay, and is sued for them, it cannot defend on the ground that the pool was illegal without showing that there were particular provisions of the agreement which made it such.[4]

Pooling contracts by which connecting lines contract for a division of receipts for through business at an arbitrary rate, irrespective of the distance traversed on either line, are valid, unless forbidden by statute, or made with the intent to stifle fair competition, or to regulate competition so unfairly as to prejudice the public interest.[5]

[1] Denver & New Orleans R. R. Co. *v.* Atchison, Topeka, & Santa Fé R. R. Co., 15 Federal, 650.

[2] Union Pacific Railway Co. *v.* Chicago, Rock Island, & Pacific Railway Co., 163 U. S. 564.

[3] See Appendix VI., 3.

[4] Cleveland, Columbus, Cincinnati, & Indianapolis Railway Co. *v.* Closser, 126 Ind. 348; 26 Northeastern, 159; 22 Am. State, 593.

[5] Texas & Pacific Railway Co. *v.* Southern Pacific Railway Co., 41 La. Ann. 970; 6 Southern, 888; 17 Am. State, 445. See Stewart *v.* Erie

While two companies owning connecting railroads cannot enter into full partnership (for this would be, in effect, to change the depositary of a franchise), they can enter into a contract for the operation of the two roads as one, and borrow money for that purpose on their joint credit.[1] They can also enter into associations for the better dispatch of certain lines of business over their roads, which will impose a joint liability. Such associations for freighting purposes are common, and act under some name of general description, such as the "Atlantic Coast Dispatch," or "Atlantic Coast Line."[2]

11. Guaranties.

A railroad company which becomes the lawful owner of the bonds or obligations of another may guaranty their due payment or performance, as a means of enhancing their salable value to it.[3] But in regard to guaranties of obligations of others which are not owned by the company, the courts have manifested an inclination to treat them as beyond the ordinary powers of the board of directors, at least when so large a liability is involved as might result in the embarrassment of the company, and so prejudice the public interests which it was created to promote. Guaranties constitute liabilities of an uncertain and contingent character, and put the company in the position of surety for one whose conduct is not under its control. Thus, while a railroad

& Western Transportation Co., 17 Minn. 372; 5 Am. Railway Rep. 333; Sussex R. R. Co. *v.* Morris & Essex R. R. Co., 19 N. J. Eq. 13; 20 N. J. Eq. 542.

[1] Chicago, Peoria, & St. Louis Railway Co. *v.* Ayers, 140 Ill. 644; 30 Northeastern, 687.

[2] Rocky Mount Mills *v.* Wilmington & Weldon R. R. Co., 119 N. C. 693, 708; 25 Southeastern, 854; 56 Am. State, 682. This case treats the companies so associating as partners, but the decision can be supported on the ground of a joint contract. See Chapter XXVI., Rules and Regulations.

[3] Railroad Co. *v.* Howard, 7 Wall. 392. See Chapter XXII., Bonds.

company might build elevators for convenience in loading and unloading cars, it cannot encourage the formation of a corporation to build them on its line, by offering a guaranty of dividends on the stock.[1] Nor could it guaranty the bonds of a connecting road, in the mere expectation that such assistance would strengthen the road and lead to an increase of the business received from it.[2]

A subscription by a railroad company, authorized by the directors, to a guaranty fund to meet any deficiency in the receipts of a public celebration or exposition, in case one should be got up, has been held to be beyond the powers of the corporation, notwithstanding such an event might promise to bring new and profitable business to the road.[3] It is believed that this judgment was unsound. Such a promise might well be made by the owner of a stage line or a hotel, as a reasonable means of promoting his business. A similar right should be accorded to a corporation. The question in such a case is not whether the guaranty was judiciously given, but whether it falls within the class of contracts which it is possible may, under some circumstances, be judiciously made and reasonably considered as incidental to the profitable management of a railroad. If so, it is for the company, and not the courts, to decide as to whether any particular guaranty should be given. The board of directors of a railroad company, as to all questions pertaining to the ordinary administration of its property, is the company.[4] That the company itself could, without specific authority by charter to that effect, authorize a guaranty was affirmed in an early case in the Supreme Court of the United States,

[1] Memphis Grain & Elevator Co. *v.* Memphis & Charleston R. R. Co., 85 Tenn. 703; 5 Southwestern, 52; 4 Am. State, 798.

[2] Smead *v.* Indianapolis, Pittsburgh, & Cleveland R. R. Co., 11 Ind. 104.

[3] Davis *v.* Old Colony R. R. Co., 131 Mass. 258, 275; 41 Am. Rep. 221.

[4] See Chapter V., Directors and Officers.

which was carefully considered, and has been generally accepted as a well reasoned and well grounded decision.[1]

12. Alienation of Franchises.

A railroad franchise being a privilege conferred for public purposes, and peculiar to those to whom it has been granted, cannot be transferred without the consent of the State. This is true both as to that part of it which authorizes their existence as a corporation, and to that part of it which authorizes its action with reference to the construction, ownership, or operation of a railroad.[2] Nor can such a franchise be delegated or in any way made over to another by contract, to be exercised for his own benefit.[3] A railroad when built becomes from the first affected by a public trust. No part of it, therefore, which is essential to the proper exercise of the franchise can be sold or its operation abandoned without the consent of the State.[4] On the other hand, an authorized transfer of all the property of a railroad company would carry the franchise to operate the road. The bankruptcy of the company, when adjudicated on a creditor's petition, has this effect.[5]

When a transfer of a railroad franchise is made by authority of law, the new grantee takes as by an original grant of the date of the transfer, and therefore subject to the laws then existing.[6]

[1] Zabriskie *v.* Cleveland, Columbus, & Cincinnati R. R. Co., 23 How. 381, 399, 400.

[2] Commonwealth *v.* Smith, 10 Allen, 448, 455 ; 87 Am. Dec. 672. See Part V., Transfers and Liens.

[3] Stewart's Appeal, 56 Pa. St. 413, 421 ; Fanning *v.* Osborne, 102 N. Y. 441 ; 7 Northeastern, 307.

[4] State *v.* Dodge City, Montezuma, & Trinidad Railway Co., 53 Kans. 377; 36 Pacific, 747 ; 42 Am. State, 295.

[5] New Orleans, Spanish Fort, & Lake R. R. Co. *v.* Delamore, 114 U. S. 501, 507.

[6] Rockwell *v.* New York & New England R. R. Co., 51 Conn. 401.

13. Revoking or abridging Franchises.

Railroad franchises are now almost universally subject, under the laws existing when they were granted, to alteration or revocation at the will of the legislature. Such a revocation cannot disturb vested rights in the railroad property; but it may be accompanied by a legislative grant of it to another company, to be used for a similar purpose, on terms of just compensation.[1] So, where such a power has been reserved, one company may be permitted to run its cars over tracks previously laid and in use by another, on making compensation for their use, but without making compensation for the diminution thereby in the value of the franchise of the latter company or in the profits that can be realized by its exercise.[2]

While a close charter granted for a railroad constitutes a contract the obligation of which no State legislation can impair, such legislation may regulate the manner in which the railroad franchise may be exercised, provided it does not substantially interfere with the enjoyment of the main object of the grant. Thus a provision in such a charter authorizing grants of aid by municipalities, or a consolidation with other companies, may, before such grants are made or consolidations effected, be repealed, against the will of the company.[3]

The right of revocation does not extend to a franchise which has been transferred or mortgaged by legislative permission to a third party, for the title thus acquired has passed under a contract the obligation of which (U. S. Constitution, Art. I. sec. 10) cannot be impaired by the State.[4]

[1] Greenwood *v.* Freight Co., 105 U. S. 13; Thornton *v.* Marginal Freight Railway Co., 123 Mass. 32; People *v.* O'Brien, 111 N. Y. 1; 18 Northeastern, 692; 7 Am. State, 684; Bigelow *v.* Union Freight R. R. Co., 137 Mass. 478.

[2] Metropolitan Railroad Co. *v.* Highland Street Railway Co., 118 Mass. 290. *Contra*, Petition of Philadelphia, Morton, & Swarthmore Street Railway Co., 203 Pa. St. 354; 53 Atlantic, 191.

[3] Pearsall *v.* Great Northern Railway, 161 U. S. 646, 664, 674.

[4] People *v.* O'Brien, 111 N. Y. 1; 18 Northeastern, 692; 7 Am. State, 684.

14. Forfeiture of Franchise.

Neither mere non-user of a railroad franchise, nor, where a time limit for completing the construction of the road is attached to the franchise, a failure to complete it within the time set, will, in the absence of a plain provision to that effect, be treated as working a forfeiture *ipso facto*. It is for the courts to decree it.[1] The breach of duty is towards the State, and only the State can take advantage of it,[2] unless by law or contract the forfeiture enures to the benefit of some other party.[3]

An abandonment by a railroad company of any substantial part of the road which it is its corporate duty to maintain and operate is cause for a forfeiture of its charter. Its franchise is an entirety. If the location covers both profitable and unprofitable territory, it cannot keep the benefit of one without supporting the burden of the other.[4] The State may also waive a forfeiture and compel the operation of the entire road by mandamus, if any part is operated, and the abandonment of the rest affects the public injuriously. It is a clear public duty, undertaken as part of the contract of incorporation, in the performance of which the entire public have an interest.[5] The contrary is true when the operation of the part abandoned would be of no substantial value to the public. In that case the State will not be justified in seeking to compel the company to do what will be of no real public service.[6]

[1] New York & New England R. R. Co. *v.* New York, New Haven, & Hartford R. R. Co., 52 Conn. 274, 284.

[2] Wright *v.* Milwaukee Electric Railway & Light Co., 95 Wis. 29; 69 Northwestern, 791; 60 Am. State, 74, 81; State *v.* East Fifth St. Railway Co., 140 Mo. 539; 41 Southwestern, 955; 62 Am. State, 742. *Contra*, Oakland R. R. Co. *v.* Oakland, Brooklyn, & Fruit Vale R. R. Co., 45 Calif. 365; 5 Am. Railway Rep. 148; 13 Am. Rep. 181.

[3] Tower *v.* Tower & Soudan Street Railway Co., 68 Minn. 500; 71 Northwestern, 691; 64 Am. State, 493.

[4] People *v.* Albany & Vermont R. R. Co., 24 N. Y. 261; 82 Am. Dec. 295.

[5] State *v.* Hartford & New Haven R. R. Co., 29 Conn. 538.

[6] People *v.* Rome, Watertown, & Ogdensburgh R. R. Co., 103 N. Y. 95; 8 Northeastern, 369.

15. Expiration of Franchise.

Statutes for the winding up and dissolution of private corporations by decree of court on the petition of shareholders apply to railroad companies, and to those acting under charters from several States and whose road lies partly in each. Each State deals with the franchise which it has granted, and with that alone.[1]

Title acquired by a railroad company having a corporate existence limited to a certain term of years may be transferred by it during its life to another railroad company existing for a longer term, and there will be no reverter to the original owner when the existence of the first company terminates.[2]

A railroad company may be extinguished by merger in or amalgamation with another.[3] The franchise to exist and act as a corporation is not extinguished by the loss of the franchise to construct, maintain, and operate the railroad. Although, therefore, these be mortgaged and the mortgage foreclosed, the corporate life of the mortgagor will continue.

16. Enlargement of Franchise.

An enlargement of the franchise by grant of authority to build a branch road is valid as against dissenting stockholders, provided it can reasonably be viewed as in furtherance of the object of the original incorporation. While such authority could not be granted for a branch almost as long as the original railroad, it might be for a short spur.[4]

[1] Hart *v.* Boston, Hartford, & Erie R. R. Co., 40 Conn. 524. See Clark *v.* Barnard, 108 U. S. 436, 452.

[2] Morrill *v.* Wabash, St. Louis & Pacific Railway, 96 Mo. 174; 9 Southwestern, 657. See Terry *v.* New York Central & Hudson River R. R. Co., 67 How. Pract. 439, 444.

[3] Adams *v.* Yazoo & Mississippi Valley R. R. Co., 77 Miss. 194, 315; 24 Southern, 200, 217; 28 Southern, 956; affirmed, 180 U. S. 1.

[4] Stevens *v.* Rutland & Burlington R. R. Co., 29 Vt. 545. Here an amendment to a charter was held to go too far, which allowed a thirty-mile branch to be built, when the railroad was only a hundred miles long.

A railroad franchise may be enlarged to any extent by the State, against the will of some of the stockholders, if provision is made whereby the company can acquire their shares by paying their fair value, under proceedings of eminent domain. The purpose of a railroad franchise being in part a public one, this is simply taking property which stands in the way of a public use, for such use.[1] Whether power to build branches was meant to include power to build branches longer than the original railroad is a question of legislative intention, and a broad interpretation is justified if the grant be accompanied by the provision that the stock of shareholders who object to the construction of so long a branch may be bought in, upon condemnation proceedings.[2]

17. Foreign Companies.

The right of taking land by eminent domain may be conferred upon a foreign railroad company.[3] A railroad company incorporated in one State may also take title to land in another by a voluntary conveyance, without any statute of the latter State to authorize it; and this is so although the object of the purchase be to use the land in connection with its railroad system, and there is, at the time, no authority under the laws of the latter State to make such a use of it.[4]

[1] Black *v.* Delaware & Raritan Canal Co., 7 C. E. Green, 130; 9 C. E. Green, 455.

[2] Petition of Laconia Street Railway, 71 N. H. 355; 52 Atlantic, 458. *Cf.* Volmer's Appeal, 115 Pa. St. 166; 8 Atlantic, 223.

[3] See Chapter IX., Acquisition of Land by Condemnation Proceedings.

[4] State *v.* Boston, Concord, & Montreal R. R. Co., 25 Vt. 433; Thompson *v.* Waters, 25 Mich. 214.

CHAPTER V.

MUNICIPAL GRANTS AND LICENSES.[1]

A FRANCHISE, strictly speaking, can come only from a direct act of the State. The State, however, often confides to municipal corporations authority to grant to railroad corporations certain rights and privileges affecting the use and location of their railroads. Such a grant is in the nature either of a license or a contract.[2]

1. Executed Licenses.

When it is but a license if it is executed by acts of a substantial character, such as the construction of the railroad, it ceases to be revocable at pleasure.[3] The title of the municipality, or its power to pass title, was vested in it as a public agency for the public good. Its right to act was derived from the State. It was a mere conduit through which was conveyed that which made the franchise serviceable. It therefore does not occupy the position of a private landowner who may deal as he will with his own. The acceptance of its grant, when followed by the construction of the railroad, gave birth

[1] See Chapter XXV., Taxation.

[2] City of Belleville *v.* Citizens' Horse Railway Co., 152 Ill. 171; 38 Northeastern, 584; Detroit *v.* Detroit Citizens' Street Railway Co., 184 U. S. 368, 396.

[3] People *v.* Blocki, Ill. ; 67 Northeastern, 809.

to a vested right of property which the State itself could not take away.[1]

2. Rights to build in Streets.

So far as a through railroad is concerned, power to construct it in streets or highways cannot be conferred by the municipalities having charge and control of them, unless authority to that effect has been given by the legislature. None is implied from a mere grant of authority to lay out, maintain, and regulate streets and highways within their limits.[2] Such an implication would not be a necessary one, and in case of municipal corporations necessity, not convenience, is the test.[3] As to street railways, the right to regulate a street may fairly be held to include the right to permit their construction and use in it by any corporation holding a franchise to accept and execute such a grant.[4]

3. Impairing Obligation of Contract.

A municipal grant of any such privilege, pursuant to law, when accepted and acted on, constitutes a contract, the obligation of which in favor of the company the Constitution of the United States (Art. I. sec. 10) forbids the State subsequently to impair.[5] Its obligation in favor of the city may be so impaired. The city is a mere agent of the State, and so subject to its power as to its public relations to public service companies.[6]

[1] Hovelman *v.* Kansas City Horse R. R. Co., 79 Mo. 632; 20 Am. & Eng. R. R. Cases, 17.

[2] Dillon on Municipal Corp. § 705. *Contra*, Newcastle *v.* Lake Erie & Western R. R. Co., 155 Ind. 18; 57 Northeastern, 516.

[3] Merrill *v.* Monticello, 138 U. S. 673, 681; Crofut *v.* Danbury, 65 Conn. 294, 300; 32 Atlantic, 365.

[4] Atchison Street Railway Co. *v.* Missouri Pacific Railway Co., 31 Kans. 660; 3 Pacific, 284. *Contra*, Davis *v.* Mayor, 14 N. Y. 506; 67 Am. Dec. 186; Milhau *v.* Sharp, 27 N. Y. 611, 618.

[5] City Railway Co. *v.* Citizens' Street R. R. Co., 166 U. S. 557.

[6] Springfield *v.* Springfield Street Railway Co., 182 Mass. 41; 64 Northeastern, 577.

If a municipality authorized to contract with a railroad company to establish its rates of fare makes such a contract, it is one the obligation of which is protected against impairment, and no exercise of the police power can affect it.[1]

4. Judicial Intervention.

When a municipality has power to grant permission of this character, it is a privilege so far in the nature of a franchise[2] that its action is of a quasi-legislative character. In taking it, it is therefore not subject to the control of the courts of equity; and allegations that it is about to give away franchises of great value from fraudulent or corrupt motives will not justify an injunction. If there is any judicial remedy, it would be by a writ of prohibition.[3]

5. Exclusive Grants.

No exclusive privilege of this nature can be granted without clear authority from the State.[4] When granted and acted on by the construction of the railway it becomes so far an indissoluble part of the railway property, that if that be conveyed by authority of law with the privileges granted as to its maintenance and operation, these privileges vest in the grantee, so as to survive the subsequent dissolution of the grantor.[5]

[1] Detroit *v.* Detroit Citizens' Street Railway Co., 184 U. S. 368, 384.

[2] State *v.* East Fifth Street R. R. Co., 140 Mo. 539; 41 Southwestern, 955. It has been held in Wisconsin to be a franchise, and therefore that, having once been acted on and the road built, it is incapable of surrender without the consent of the State. Wright *v.* Milwaukee Electric Railway & Light Co., 95 Wis. 29; 69 Northwestern, 791; 60 Am. State, 74; 36 L. R. A. 47.

[3] State *v.* Superior Court, 105 Wis. 651; 81 Northwestern, 1046; 48 L. R. A. 819.

[4] Detroit Citizens' Street Railway *v.* Detroit Railway, 171 U. S. 48.

[5] People *v.* O'Brien, 111 N. Y. 1; 18 Northeastern, 692; 7 Am. State, 684.

6. Conditional Grants.

Municipalities are often given power to consent to the location of a railroad on highways, upon equitable terms and conditions, or subject to such modification of the plans of location proposed as may be deemed proper. No modifications, terms, or conditions can, in such case, ordinarily be imposed, which are not of a kind germane to the nature of the grant.[1] So if power to consent be given by a statute in which nothing is said as to terms or conditions, it is implied that reasonable and appropriate ones may be imposed. If a railway company incorporated to transport passengers and freight is given consent to occupy the streets for the transportation of passengers only, it is bound to this limited use of its tracks, when laid.[2] So a municipal corporation having general police powers over its streets, if invested with power to approve the location of a railroad upon them, has by implication power to approve it with a reservation of such governmental control over the road when so built as may seem to be necessary for public protection, and hence violates no contract by subsequently prohibiting the use of steam locomotives on such streets.[3]

Conditions subsequent, providing for what is not germane to the grant nor within the power of the municipality to demand, are void, and the grant stands good, as if it were unconditioned.[4]

Breach of a valid condition does not always entail a forfeiture of the grant. Equity can interfere to prevent the

[1] Central Railway & Electric Company's Appeal, 67 Conn. 197; 35 Atlantic, 32; Fair Haven & Westville R. R. Co. *v.* New Haven, 74 Conn. 102; 49 Atlantic, 863.

[2] St. Louis & Meramec River R. R. Co. *v.* Kirkwood, 159 Mo. 239; 60 Southwestern, 110; 53 L. R. A. 300.

[3] Railroad Co. *v.* Richmond, 96 U. S. 521, 527.

[4] Galveston & Western Railway Co. *v.* Galveston, 90 Tex. 398; 91 Tex. 17; 39 Southwestern, 96, 920.

municipality from insisting upon it, if there is an equitable excuse for the breach.[1]

7. Grants by Prescription.

In the case of a municipality having power to authorize or permit the occupation of a highway by a railroad, a grant may be presumed from a long and unchallenged occupation, and so a prescriptive title set up.[2]

8. Unreasonable Grants.

When a municipality has power to grant the right to construct a railroad in a highway, such grant must be so far subordinate to the former uses of the highway as not to constitute an unreasonable obstruction of them.[3]

9. Grants running beyond the Life of the Grantee.

A railroad company incorporated for a limited term can make a contract with a municipality, respecting the use of streets for tracks, to extend beyond that term. Such a contract in conferring a valuable privilege on the company would be a property right, which would survive its corporate existence for the benefit of creditors and shareholders.[4]

[1] North Jersey Street Railway Co. *v.* South Orange, 58 N. J. Eq. 83; 43 Atlantic, 53.

[2] Newcastle *v.* Lake Erie & Western R. R. Co., 155 Ind. 18; 57 Northeastern, 516.

[3] Sherlock *v.* Kansas City Belt Railway Co., 142 Mo. 172; 43 Southwestern, 629; 64 Am. State, 551.

[4] Detroit *v.* Detroit Citizens' Street Railway Co., 184 U. S. 368, 394.

CHAPTER VI.

DIRECTORS AND OFFICERS.

1. Directors.

THE directors of a railroad company are the company to an extent greater than that recognized in the case of ordinary private corporations.[1] This is because it lies with them to locate the road and to exercise the right of eminent domain for procuring the right of way. The stockholders, after making proper by-laws (where this power is left in their hands), have practically nothing to do but to elect directors and then to watch them, except with respect to legislation affecting the corporate powers, or to such great operations as an extension of the railroad, a sale, lease, or mortgage of it, or a purchase or lease of another road. As to such matters it is generally necessary, and always prudent, to bring them before the company at a stockholders' meeting.[2] There are authorities for the position that the board of directors can, by its own action, alone make a valid mortgage of the road and franchise;[3] but unless this be by virtue of some express statute to that effect, or has been long acquiesced in, or other-

[1] The older charters often contained provisions to this effect. See Eastern R. R. Co. *v.* Boston & Maine Railroad, 111 Mass. 125; 15 Am. Rep. 13.

[2] Railway Co. *v.* Allerton, 18 Wall. 233; Nashua & Lowell R. R. Corporation *v.* Boston & Lowell R. R. Corporation, 136 U. S. 356, 384.

[3] McCurdy's Appeal, 65 Pa. St. 290. See Galveston Railroad *v.* Cowdrey, 11 Wall. 459, and Chapter XLVII., Mortgages.

wise confirmed by the shareholders (as has, it is believed, always been the fact in such cases), it would at least cast a shade on the mortgage security. A mortgage, in case of foreclosure, may work an absolute alienation of title. Directors of a corporation are agents of the law rather than of the company, which cannot choose but have them; and, so far as they are agents of the company, are certainly such mainly for the transaction of its ordinary business. An owner of a franchise who intrusts the exercise of it to an agent does not thereby authorize its sale.

In matters as to which it is necessary or proper for the stockholders to act, they can direct the directors. Should they vote to lease the railroad for twenty years, it would not be proper for the directors to lease it for forty years. But while their disposition of the control of the franchise could not be altered, the directors could, after so disposing of it, should it seem necessary to protect the interests of the company in meeting new circumstances as they arose, vary the terms of transfer with respect to the compensation to be paid, or other matters of a collateral nature.[1]

Directors cannot vote themselves free passes or other compensation without authority from the stockholders.[2]

If a director buys land within the railroad location, he cannot make a profit from it out of the company, but is held to the position of a trustee.[3] If he buys bonds issued by the company below par in the open market, he can have the benefit of his purchase; but should he buy them of the company, it could avoid the sale on refunding the price paid.[4]

[1] Flagg *v.* Manhattan Railway Co., 10 Federal, 413; 20 Blatchf. 142; Shaw *v.* Norfolk County R. R. Co., 16 Gray, 407, 414.

[2] New York, New Haven, & Hartford R. R. Co. *v.* Ketchum, 27 Conn. 170.

[3] Blake *v.* Buffalo Creek R. R. Co., 56 N. Y. 485.

[4] Duncomb *v.* New York, Housatonic, & Northern R. R. Co., 84 N. Y. 190; 88 N. Y. 1.

Tolls and rates of freight charges need not be fixed by the directors: they can delegate the power.[1]

2. Executive Committee.

The by-laws of railroad companies commonly provide for the appointment of an executive committee to exercise many or all of the powers of the board of directors when the board is not in session. The doings of such a committee are, or should be, reported to the board for its approval. But if instead of this they should be reported to the stockholders and confirmed by them, and they relate to a matter as to which the stockholders could properly act, the company will be bound by the action so taken.[2] An executive committee cannot make a valid location of the railroad. That is the prime step in the exercise of the power of eminent domain, and such a power of sovereignty when intrusted to an agent or representative of the State for this purpose (which the board of directors is) cannot be delegated.[3]

The committee may act informally, and a majority acting separately can contract in its behalf, if the minority do not dissent.[4]

3. President.

The president of a railroad company is ordinarily given by its by-laws general authority over the conduct of its affairs, in matters not settled by the board of directors. Even in the absence of such an express grant of authority it may fairly be presumed that, so far as he apparently and customarily acts for the company in railroad business, he acts by its

[1] Jeffersonville R. R. Co. *v.* Rogers, 28 Ind. 1; 92 Am. Dec. 276.

[2] Union Pacific Railway Co. *v.* Chicago, Rock Island, & Pacific Railway Co., 163 U. S. 564, 597, affirming s. c. 51 Federal, 309; 2 C. C. A. 174; 10 U. S. App. 98.

[3] Weidenfield *v.* Sugar Run Railway Co., 48 Federal, 615.

[4] John A. Roebling's Sons Co. *v.* Barre & Montpelier Traction Co., Vt. ; 56 Atlantic, 530.

consent.[1] This, however, depends upon its implied acquiescence, and he has no inherent power, simply as president, to deal or contract, as its agent, with third parties.[2]

4. Treasurer.

The treasurer of a railroad company cannot, without other authority than that implied from his office, bind it upon negotiable promissory notes which he signs in its behalf. Borrowing money is not in its ordinary line of current business.[3] The directors have the power to borrow, and can confer it upon him as upon any one else.[4]

5. General Manager.

An officer styled a general manager is often appointed. He is a general agent of the company in all matters pertaining to the ordinary management and operation of the railroad.[5]

6. Superintendent.

A superintendent, and, in case of an extensive railroad system, division superintendents are commonly appointed. Such powers as they customarily and openly exercise, in respect to the operation of the road, the company impliedly authorizes.[6] No such implication arises as to acts outside of

[1] Solomon R. R. Co. *v.* Jones, 30 Kans. 601; 2 Pacific, 657; 15 Am. & Eng. R. R. Cases, 201; Olcott *v.* Tioga R. R. Co., 27 N. Y. 546, 558; 84 Am. Dec. 298; Hilliard *v.* Goold, 34 N. H. 230; 66 Am. Dec. 765.

[2] Walworth County Bank *v.* Farmers' Loan & Trust Co., 14 Wis. 325.

[3] Craft *v.* South Boston R. R. Co., 150 Mass. 207; 22 Northeastern, 917, 920.

[4] Page *v.* Fall River, Warren, & Providence R. R. Co., 31 Federal, 257.

[5] Louisville, Evansville, & St. Louis Railway Co. *v.* McVay, 98 Ind. 391; 49 Am. Rep. 770; St. Louis, Fort Scott, & Wichita R. R. Co. *v.* Grove, 39 Kans. 731, 735; 18 Pacific, 958. See City Railway Co. *v.* Citizens' Street R. R. Co., 166 U. S. 557, 568; Missouri, Kansas, & Texas Railway Co. *v.* Brown, 14 Kans. 557.

[6] New Albany & Salem R. R. Co. *v.* Haskell, 11 Ind. 301.

their natural line of duty.[1] A superintendent has no direct power to represent the company in the institution or conduct of judicial proceedings.[2] In arranging a settlement of an accident claim, his authority to represent the company, and speak for it, is presumed, in the absence of evidence to the contrary.[3]

When employees are injured by accident in the course of their employment, and the superintendent of the road provides medical attendance, it is a proper question for the jury whether he had implied authority to bind the company to pay for the services rendered; for such an act tends to promote the loyalty and good feeling towards the company of all in its employ. Should he do this in case of passengers injured by the fault of the company, the same rule would apply; but not in case of passengers injured by no fault of the company.[4] As to them it would be necessary to show authority from or ratification by the board of directors, or the general manager, if there were one, or the president, if he were charged with similar duties.[5] A division superintendent has no implied authority to promise one injured while a servant of the railroad company employment for life, in consideration of a release of all claims against it for the injury.[6]

Admissions by a superintendent are not evidence against the company without other proof that he had authority to

[1] Dilas' Adm'r *v.* Chesapeake & Ohio Railway Co., 24 Ky. Law, 1347; 71 Southwestern, 492.

[2] Mahone *v.* Manchester & Lawrence R. R. Corporation, 111 Mass. 72, 76; 15 Am. Rep. 9.

[3] Sax *v.* Detroit, Grand Haven, & Milwaukee Railway Co., 125 Mich. 252; 84 Northwestern, 314; 84 Am. State, 572.

[4] Union Pacific Railway Co. *v.* Beatty, 35 Kans. 265; 10 Pacific, 845; 57 Am. Rep. 160.

[5] Louisville, Evansville, & St. Louis Railway Co. *v.* McVay, 98 Ind. 391; 49 Am. Rep. 770.

[6] Maxson *v.* Michigan Central R. R. Co., 117 Mich. 218; 75 Northwestern, 459.

make them than that furnished by his official station.[1] In relation to the servants subject to their orders, superintendents or division superintendents represent, and are, the company.

The same is true of the heads of any of the great departments of service, such as the repair department or the manufacturing department, among which the business of large railroads is distributed.[2]

[1] Huebner *v.* Erie R. R. Co., N. J. Law, ; 55 Atlantic, 273.

[2] See Northern Pacific R. R. Co. *v.* Peterson, 162 U. S. 346, 355; Chapter XXVIII., Servants.

PART II.

LOCATION, CONSTRUCTION, AND EQUIPMENT.

CHAPTER VII.

THE MAKING OF A LOCATION.

THE location of a railroad, properly speaking, is the definite and final selection and demarcation of its route.

1. The Centre Line.

This is done in case of a through railroad by reference to an imaginary mathematical line, known as the centre line, drawn from the initial to the ultimate point of the route. The line is divided, for convenience of description, into successive sections, each one hundred feet in length. The initial point of each section is termed a "station," and these stations are numbered consecutively, station 0, station 1, station 2, etc. The width of the railroad is designated by references to this centre line, and on a rough average, taking the whole road into account, will be about the same on each side of it. Between any particular stations, however, it may

vary greatly, according to the particular circumstances of the case, such as the conformation of the country or the value of the land. To constitute a complete location for all purposes, both the centre line and the widths of the territory to be occupied on each side of it must in some way be definitely indicated; but a sufficient location for some purposes may be accomplished by the mere description of the centre line.[1] As the terminal points to be connected by a railroad can seldom, if ever, be so connected by a straight line, the centre line must consist of a number of straight lines, connected by suitable curves, each line being tangential to the curve from which it proceeds. The point where a new curve begins on the centre line is marked "P. C.," or point of curve: that where a new tangent begins is marked "P. T.," or point of tangent. If it is desired to refer to some particular point between two stations, it is described by the number of that one of those stations having the lower number, and the number of feet by which it is distant from that. Thus a point one mile from the point of beginning would be described in railroad parlance as station 52 + 80, and a point sixty feet further on as station 53 + 40.

2. The Directors must make the Location.

A location, unless definitely made at the time of the incorporation of the company in the charter or articles of association, is to be made by the directors.[2] They act, of course, on the report of a civil engineer, and this is sometimes loosely described as a location.[3] The choice of the route, involving as it must the exercise of discretion upon a comparison, at every point in the line, of the advantages of one method of proceeding with another, can only be wisely made by a small

[1] Williams *v.* Hartford & New Haven R. R. Co., 13 Conn. 110, 397.

[2] Williamsport & North Branch R. R. Co. *v.* Phila. & Erie R. R. Co., 141 Pa. St. 407; 21 Atlantic, 645. See Appendix II.

[3] County of Wilson *v.* National Bank, 103 U. S. 770, 772, 778.

body of competent men. The stockholders, therefore, have nothing to do with it. Nor can it be delegated by the directors to an executive committee of the board.[1]

3. Width of Location.

A maximum limit of the width of the location is generally set by statute or charter, to be exceeded only under exceptional conditions, at particular points.

In some States, if no width is specified in the vote of the directors, the company is presumed, on eminent domain proceedings, to have made its location of the full width permitted by law. But whether the width is specified or implied, a location is always made subject to the right of the company, within a reasonable time, to disclaim and release to the owner of the fee any part which is found to be unnecessary for its uses. It is for the public interest that it should not be burdened with the obligation of paying for what it does not need.[2]

4. Contracts to make a Particular Location.

The directors are acting for the State, and their duty is to make such a location as will best subserve the public use. Any contract, therefore, by which the company agrees, for a pecuniary consideration, to locate its road on a particular line, when another would be better for the public interests, is against public policy and void.[3] If the bargain be made with the directors or controlling officers or stockholders for their personal benefit, it is void, without reference to the question of its working a public injury. The company may, however, accept subscriptions to its capital stock, convey-

[1] Weidenfeld *v.* Sugar Run R. R. Co., 48 Federal, 615, 617.

[2] Jones *v.* Erie & Wyoming Valley R. R. Co., 144 Pa. St. 629; 23 Atlantic, 251; 169 Pa. St. 333; 32 Atlantic, 535; 47 Am. State, 916.

[3] Woodstock Iron Co. *v.* Richmond & Danville Extension Co., 129 U. S. 643, 662; Fuller *v.* Dame, 18 Pick. 472, 483.

ances, or other benefits or promises, conditioned on the adoption of a certain location; and if such location is one not incompatible with the public interest, the conditions will be upheld.[1] A municipality which has given aid to a company undertaking such arrangement can, in a plain case, obtain relief by injunction.[2]

Where there is no fence law, it is not against public policy for a railroad company, in locating its road, to agree with a landowner to maintain an open farm crossing, with side cattle-guards and wing fences for his accommodation.[3]

5. Location Maps.

The location is always made with reference to an accompanying map, and cannot be otherwise understood. The law generally requires it to be recorded in a public office, and that there be filed with it a tracing or copy of this map. It is sufficiently certain, if, when read upon the ground which it is designed to cover, with the aid of the map, a competent surveyor would be able to stake out the line and exterior bounds.[4]

6. Uncertainty.

If a location is so uncertain at any point that the amount of land to be taken from some particular person cannot be definitely ascertained, it may be helped out if followed up by long possession, with his acquiescence, of a particular parcel.[5] A fatal defect of description in a location, such as the omission to state the width in those States in which such a state-

[1] First National Bank *v.* Hendrie, 49 Iowa, 402; 31 Am. Rep. 153.

[2] Platteville *v.* Galina & Southern Wisconsin R. R. Co., 43 Wis. 493.

[3] Gulf, Colorado, & Santa Fé Railway Co. *v.* Schawe, 22 Tex. Civ. App. 599; 55 Southwestern, 357. See Chapter XVI., Farm Crossings and Ways of Necessity.

[4] Bristol *v.* New England R. R. Co., 70 Conn. 305, 318; 39 Atlantic, 235.

[5] Drury *v.* Midland R. R. Co., 127 Mass. 571, 581.

ment is indispensable, will not invalidate the taking of land under it by condemnation, if the owner of the land was informed of the width which it was supposed was taken and was fully heard as to the amount of damages to be assessed for taking it, making no objection to the defect, and this width was properly described in the award of damages. He is estopped, although he may afterwards refuse to accept the damages when tendered.[1]

7. Cuts.

Where an excavation or "railroad cut" is contemplated, land enough is generally taken to allow the formation of a natural slope from the original level of the surface to that of the roadbed when constructed. Thus, for every foot in depth of a cut through gravel it is commonly estimated by civil engineers that a foot and a half of horizontal space must be secured; while a clay soil ultimately requires a much greater appropriation of land.[2] But although the location was supposed to be wide enough to prevent a falling in of the soil of the adjoining proprietor, if it does, in fact, fall in, by its own weight, he is entitled to recover, however long the slope may be. He was entitled to the natural support of the soil removed, and it was the duty of the railroad company, if necessary, to build a retaining wall. It took the risk of having made too narrow a location.[3]

8. Street Railroads.

The location of a street railroad,[4] being mainly on highways, the course and bounds of which are well known, is less

[1] New York & New England R. R. Co. *v.* New York, New Haven, & Hartford R. R. Co., 52 Conn. 274, 282.

[2] Vose, Manual for Railroad Engineers, 84.

[3] Nading *v.* Denison & Pacific Suburban Railway Co., 26 Tex. Civ. App. ; 62 Southwestern, 97.

[4] As to the right to locate such railways on highways, without making compensation to the owner of the fee, see Chapter XVIII., Railroads on and along Highways.

full and precise than that of other railroads. The law often requires nothing more, as to the space to be occupied in streets, than the selection of the streets embraced in the route, and a statement of the number of tracks to be laid; details being left to be worked out thereafter in concert with the municipal authorities. A location over streets where the law did not authorize a location would be no justification for laying tracks.[1]

9. Liberal Construction.

The precise initial and terminal points are rarely fixed by the charter or articles of association. Ordinarily they are described in such instruments as a "convenient" or "suitable" point in a certain municipality; or the route is given as beginning "at" or "at or near," and running from thence "to" such a municipality. Such words as "from," "at," or "to" may, as thus employed, be taken inclusively, and so as to warrant a location within the municipality. So, if the point is stated as on the boundary, this may mean either the legal boundary, or that popularly treated as the boundary.[2] A franchise to construct a railroad to a designated municipality, while authorizing its construction to any convenient point in the then existing bounds of that municipality, is not enlarged by their subsequent extension.[3]

While the location must be made within the limits fixed by the charter or articles of association, these limits will be liberally construed to uphold the action of the directors.[4] It can be made upon any territory which it is reasonably necessary to cross in order to pursue the authorized route between the point of departure and the point of destination.

[1] Canastota Knife Co. *v.* Newington Tramway Co., 69 Conn. 146; 36 Atlantic, 1107.

[2] Union Pacific R. R. Co. *v.* Hall, 91 U. S. 343, 348.

[3] Commonwealth *v.* Erie & Northeast R. R. Co., 27 Pa. St. 339.

[4] Fall River Iron Works Co. *v.* Old Colony & Fall River R. R. Co., 5 Allen, 221, 226.

10. Location on Public Property.

The State, in the absence of legislation by Congress to the contrary, can authorize a location upon land under waters which for some purposes are navigable, and which contemplates filling up the land and excluding navigation. This is true of the sloughs and bayous of the Mississippi River, notwithstanding the Ordinance of 1787 and the many treaties and statutes providing for its free navigation.[1] It is merely the substitution of one commercial highway for another.

A public park, for like reasons, may be so laid out as to include part of a railroad location, and without making any compensation to the railroad company.[2] To the owner of the fee, if the railroad company owned only a right of way, compensation would be due, if injury were done to him by taking his estate for a new use. So a railroad may be laid out over a park owned in fee by a municipality, without making any compensation to it. It is in either case merely an addition of a new public use to property already held for the public.[3]

11. Location on Lands held for another Public Use.

Power to locate the road on lands already appropriated to another public use must be granted in direct terms or by necessary implication.[4] Authority to take any real estate required for the purposes of the incorporation would presumptively not warrant a location upon a public park.[5] Authority for a location on land upon which another rail-

[1] Ingraham *v.* Chicago, Dubuque, & M. R. R. Co., 34 Iowa, 249; 5 Am. Railway Rep. 99.

[2] *In re* Commissioners of Central Park, 63 Barb. 282.

[3] People *v.* Kerr, 27 N. Y. 188; Savannah & Thunderbolt R. R. Co. *v.* Savannah, 45 Ga. 602; 3 Am. Railway Rep. 36.

[4] Springfield *v.* Connecticut River R. R. Co., 4 Cush. 63.

[5] Matter of the Boston & Albany R. R. Co., 53 N. Y. 574; 5 Am. Railway Rep. 92.

road has already been located may be implied from a state of facts showing that taking the land thus already appropriated to public use is necessary in order to enjoy and exercise efficiently the corporate powers of the company claiming such authority; but then it must be limited to the extent of the necessity, and that necessity must arise from circumstances over which the company has no control, and not be one created by it for its own convenience.[1] A location can never, without special legislative authority, be so made as to constitute an unreasonable interference with a location previously made by another company under a similar power, or with a right of location previously granted to such a company, and still in force. A narrow valley often offers the only practicable site for a railroad through a mountain range. If a franchise to use the valley for such a purpose or for a kindred one belongs to different companies, priority of grant gives priority of right, though one subject to be defeated by unreasonable delay in taking advantage of it.[2]

A location of a through railroad longitudinally upon a highway can only be sanctioned by a controlling necessity.[3]

12. Revision of Location by Public Authority.

Both the public and the owners of the land which it may include have a vital interest in the selection of a proper location. The public interest is generally secured by some provision of law, under which the action of the directors may or must be submitted to some public authority for approval.

[1] Rutland-Canadian R. R. Co. *v.* Central Vermont Railway Co., 72 Vt. 128; 47 Atlantic, 399; Indianapolis & Vincennes R. R. Co. *v.* Indianapolis & Martinsville Rapid Transit Co., 31 Ind. App. ; 67 Northeastern, 1013.

[2] Chesapeake & Ohio Canal Co. *v.* Baltimore & Ohio R. R. Co., 4 Gill & Johns. 1. This case, decided in 1832, is the first railroad case of any importance in our reports. Railway Co. *v.* Alling, 99 U. S. 463.

[3] Springfield *v.* Connecticut River R. R. Co., 4 Cush. 63, 73; State *v.* Montclair Railway Co., 35 N. J. Law, 328.

For the protection of private interests, provision is often made for a hearing before such authority, at which all concerned can be fully represented. Great weight, however, is always accorded to the opinion of the directors as evidenced by the location made, and it is seldom that their action is disapproved in any important particular. A location may be approved, by the authority representing the State, in part and rejected in part, or approved with modifications.[1] It is often, in case of a long road, made and submitted for approval in sections.

The right to locate the tracks within the limits of a municipality is frequently made by law dependent on the consent of the municipal authorities to the location selected. This implies the necessity of such consent to the location of station houses and other railroad structures. If the limits of the municipality are afterwards extended, the law applies to all territory within the new limits.[2]

13. Location of Railroad Buildings.

A location can be made on lands adjacent to the main roadbed to secure sites for necessary railroad buildings.[3]

Street railroad companies may place their car barns in the residential part of a municipality, notwithstanding the disagreeable noises made in rounding the curves and passing the switches as cars are run in and out. The main purpose of the cars is to serve the residents of the city, and it is proper to store them near the scene of their principal activity, so that they can be readily brought out when needed.[4]

[1] People *v.* Tubbs, 49 N. Y. 356; 4 Am. Railway Rep. 127.

[2] Illinois Central R. R. Co. *v.* Chicago, 176 U. S. 646, 665. See Chapter V., Municipal Grants and Licenses.

[3] See Chapter IX., Acquisition of Land by Condemnation Proceedings.

[4] Romer *v.* St. Paul City Railway Co., 75 Minn. 211; 77 Northwestern, 825; 74 Am. State, 455.

14. Spur Tracks.

The legislature has the right to authorize the location of a spur track to connect the main railroad with the premises of a large customer, such as a factory or foundry. Such a spur once located and constructed becomes a part of the railroad system, and must be operated, if demanded by the customer, until legally discontinued.[1]

15. Change of Location.

The power to make a location is governed by the rule that a power of election once exercised is exhausted.[2] Unless, therefore, there is some legal provision to the contrary, after the directors have made and published a location they cannot alter it by substituting another. To meet this, a power of alteration is often given by statute or charter.[3]

Courts cannot alter a railroad location in any collateral proceedings. They cannot inquire into its merits under a claim that the company was in fault for not making a better one and so came under a liability to some person injured in consequence; nor can they enjoin the construction of the road upon it, so long as it is within the limits authorized by law, unless, perhaps, when fraud or bad faith on the part of the company is made out.[4]

When a power of alteration is given by law, and one is made which prevents the company from carrying out a lawful contract previously existing, the party injured can recover his damages, and, if the company is acting in bad

[1] New York, New Haven, & Hartford R. R. Company's Appeal, 75 Conn. 264; 53 Atlantic, 314. See Chapter IV., Railroad Franchises, and Appendix II., 3, and III., 5.

[2] Hartford & Connecticut Western R. R. Co. *v.* Wagner, 73 Conn. 506, 509; 48 Atlantic, 218.

[3] See Appendix II.

[4] New York & Erie R. R. Co. *v.* Young, 33 Pa. St. 175; Fall River Iron Works Co. *v.* Old Colony & Fall River R. R. Co., 5 Allen, 221, 226.

faith, may be entitled to an injunction to prevent an actual change of the route.[1]

16. Extending Location.

A railroad company can add to its location from time to time (if, as is customary, such a power is given), as it may deem necessary to make the road more serviceable to the public. A new station house, for instance, may be needed to replace one that has been outgrown, and with larger station grounds. For this purpose it may be necessary to acquire more land. If it is to be acquired by condemnation proceedings, the company must, and if by purchase it should, make a formal location upon it for railroad purposes. This annexes it to and incorporates it in the main location, and brings it under the full protection of the railroad franchise.

17. Inter-State Railroads.

If a single location is made by an inter-State railroad company, incorporated in each State, of its road in both States, the location in each State is, in law, a distinct and separate act. A defect or excess of power shown in the location in one State will not, therefore, affect the validity of the location in the other.[2]

18. Statutory Forfeiture.

A location on a certain route, or within a certain territory, is sometimes made by law a requirement which is bound up with the franchise, and a pecuniary forfeiture imposed for a failure to comply with it. Such a forfeiture can be enforced. It is a proper mode of liquidating damages to the public which it might be hard to establish by proof.[3] But

[1] Chapman *v.* Mad River & Lake Erie R. R. Co., 6 Ohio St. 119.

[2] Hartford & Connecticut Western R. R. Co. *v.* Wagner, 73 Conn. 506, 512; 48 Atlantic, 218.

[3] Clark *v.* Barnard, 108 U. S. 436, 460.

as it is imposed in the public interest, so it can be remitted in the public interest by the legislature, after a breach, even though it was made payable to a municipality, as a municipality is a mere agency of the State.[1]

[1] State *v.* Baltimore & Ohio R. R. Co., 3 How. 534.

CHAPTER VIII.

BRIDGES AND FERRIES.

1. Authority to bridge Watercourses.

THE franchise to construct a railroad on a route intersected by non-navigable watercourses necessarily implies power, so far as such power can be conferred, to construct it across those watercourses, if this be reasonably practicable. The right to bridge all non-navigable watercourses can be thus conferred by the State in which they are.

To bridge navigable watercourses naturally affects, to some extent, commerce between the States or with foreign countries, and requires the permission of the United States.[1] This may be granted by act of Congress,[2] and authority to give it has also been intrusted by Congress to the Secretary of War.[3] This statute has been attacked as an unconstitutional delegation of legislative power, but can probably be upheld as the creation of an agency to carry out in certain contingencies a previous declaration of the legislative will.[4] It does not pre-

[1] Miller *v.* Mayor, 109 U. S. 385, 395.

[2] Luxton *v.* North River Bridge Co., 153 U. S. 525, 530.

[3] U. S. Stat. at Large, vols. xxii. 309, xxv. 424, xxvi. 453, xxvii. 110, xxviii. 362, xxx. 1151.

[4] Miller *v.* Mayor, 109 U. S. 385, 394; Field *v.* Clark, 143 U. S. 649, 693; Lake Shore & Michigan Southern Railway Co. *v.* Ohio, 165 U. S. 365. See United States *v.* Rider, 50 Federal, 406; United States *v.* Moline, 82 Federal, 592; Montgomery *v.* Portland, 190 U. S. 89, 106.

clude the repair of a bridge constructed prior to its enactment, by authority of a State.[1] Ordinarily, permission to construct a railroad bridge over navigable water should be sought both from the State or States having jurisdiction over the banks, and from the United States; but Congress can grant the necessary franchise, in case of an inter-State railroad, under its power to regulate commerce between the States. The paramount power of Congress in all these respects extends to navigable waters wholly within a State, and has been exercised in respect to them.[2]

It is the practice for the Secretary of War to send some army officer connected with the engineers to inspect any locality where it is proposed to build a railroad bridge over waters which are claimed to be navigable, to examine any plans for the bridge that may be submitted, and to report to him. Permission to construct such a bridge is usually given on terms defining particularly the manner of its construction and use.

Whether a watercourse is to be regarded as navigable, as respects matters of railroad, as of highway, construction, depends not merely on its navigability in fact, but more on whether it is or is likely to be of substantial use for purposes of navigation and commercial intercourse.[3]

2. Drawbridges.

The owner of land on a small bay not navigable for any substantial purposes of commerce, which is crossed by a railroad causeway and bridge, has no equitable right to compel the construction of the bridge with a draw, although the want of one may cut him off from access to the water.[4]

[1] Kansas City, Memphis, & Birmingham R. R. Co. *v.* Wiygul, 82 Miss. ; 33 Southern, 965.

[2] 30 U. S. Stat. 1121, 1151; Montgomery *v.* Portland, 190 U. S. 89, 105; Frost *v.* Washington County R. R. Co., 96 Me. 76; 51 Atlantic, 806; 59 L. R. A. 68.

[3] Wethersfield *v.* Humphrey, 20 Conn. 227.

[4] Kerr *v.* West Shore R. R. Co., 127 N. Y. 269; 27 Northeastern, 833.

A railroad drawbridge must be opened by the company for the passage of vessels, and while, if a train and a vessel are approaching the draw at the same time, a reasonable preference may be given to the train, an unreasonable one cannot be.[1]

3. Interference with Prior Bridge Franchises.

The construction of a railroad bridge adapted only for the use of railway trains over a watercourse is no infringement upon the rights of the holder of an exclusive franchise to bridge such watercourse, granted in the eighteenth century, before the introduction of railroads into common use.[2]

4. Ferries.

Where the watercourse to be crossed is too wide to be conveniently bridged, the railroad company has an implied right to transfer its trains or the contents of them across on boats. If the right to establish a ferry there is expressly made part of the railroad franchise, it can only be established and maintained for railroad uses, unless there be something in the terms of the grant to show that a general ferry was intended.[3] By the charter of the company a general ferry may be made an adjunct of its railroad, and so a part of it which it is bound to maintain and operate for the accommodation of general public travel.[4] Ordinarily, however, the boats used for a railroad ferry are constructed with rails upon the deck, upon

[1] Pennsylvania R. R. Co. *v.* Central R. R. Co., 59 Federal, 190; 58 Am. & Eng. R. R. Cases, 619; 20 U. S. App. 136; 8 C. C. A. 86.

[2] Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116, 148; Tucker *v.* Cheshire R. R. Co., 1 Foster (N. H.), 29; 1 Am. Railway Cases, 196. *Contra*, Enfield Toll Bridge Co. *v.* Hartford & New Haven R. R. Co., 17 Conn. 40, 453; 42 Am. Dec. 716; 44 id. 556.

[3] Fitch *v.* New Haven, New London, & Stonington R. R. Co., 30 Conn. 38, 41; Aikin *v.* Western R. R. Corporation, 20 N. Y. 370, 378.

[4] Brownell *v.* Old Colony R. R. Co., 164 Mass. 29; 41 Northeastern, 107; 49 Am. State, 442; 29 L. R. A. 169.

which the cars are run without being unloaded. Such a ferry is a mere incident of the railroad, and if the watercourse be one over which another has an exclusive franchise for a general ferry, his rights are not infringed upon.[1]

5. Public Use.

Although a railroad bridge be so constructed as to be passable on foot or by teams, the public (in the absence of any statute granting such a privilege) have no right to use it in that way. The public use of a railroad is limited to its use as a railroad.[2]

6. Bridge Construction and Inspection.

Reasonable care must be taken in the construction of railroad bridges to build them so as not to set back water on the lands of upper riparian proprietors.[3] If the approaches obstruct access to lands adjoining the railroad location, and the company is by law liable not only to pay for land occupied, but for land damaged, the owners of the lands have an action.[4]

As respects passengers, a railroad company is bound to inspect and test for itself the materials for its bridges before they are put in place, and to examine each bridge after its completion, from time to time, with great care, to ascertain that they continue in good condition.[5] A street railway company which builds its track over a highway bridge is bound to make a careful inspection of the bridge to ascertain if it can safely support the strain thus imposed, but it is not held to as high a degree of responsibility for its safety as if it were owned,

[1] Mayor *v.* New England Transfer Co., 14 Blatchf. 159, 168.

[2] Oliff *v.* Shreveport, 52 La. Ann. 1203; 27 Southern, 688.

[3] Mellen *v.* Western Railroad Corporation, 4 Gray, 301.

[4] Burritt *v.* New Haven, 42 Conn. 174.

[5] Louisville, New Albany, & Chicago Railway Co. *v.* Pedigo, 108 Ind. 481; 8 Northeastern, 627; Louisville, New Albany, & Chicago Railway Co. *v.* Snyder, 117 Ind. 435; 20 Northeastern, 284; 10 Am. State, 60.

built, and controlled by itself.[1] If it uses electric power, it must construct its lines over the bridge with a very high degree of care for the safety of all who may use it for its ordinary purposes.[2]

7. Bridges over Highways.

Bridges built to carry highways over railroads need not always be made so high that a brakeman can safely stand upon the top of a freight car which is passing under them.[3] The general level of the country, the convenience of those using the highway, and the expense to the company are all to be considered. If these justify a low bridge, the company fulfils its duty to a brakeman when it notifies him of their height, and that there is danger of coming in contact with them to those performing a brakeman's duties. This notice is, in practice, generally given by taking new brakemen over the road in charge of some one familiar with its construction, on a tour of observation, before they go to work. Standing notice is also sometimes given by "tell-tales." These are ropes hanging loose from a beam put up over the railroad a short distance from a low bridge, and on each side of it, which come in contact with a man on top of a freight car passing under the beam. Should such tell-tales be provided, it would be a neglect of duty on the part of the company to its trainmen should it not take proper means to keep them in good order and repair.[4]

[1] Birmingham *v.* Rochester City & Brighton R. R. Co., 137 N. Y. 13; 32 Northeastern, 995; 18 L. R. A. 764.

[2] Nelson *v.* Branford Lighting & Water Co., 75 Conn. 548; 54 Atlantic, 303.

[3] Louisville & Nashville R. R. Co. *v.* Hall, 91 Ala. 112; 8 Southern, 371; 24 Am. State, 863. *Contra*, Louisville, New Albany, & Chicago Railway Co. *v.* Wright, 115 Ind. 378; 17 Northeastern, 584; 7 Am. State, 432; 33 Am. & Eng. R. R. Cases, 370. See Chapter XXVIII., Servants.

[4] McGarrity *v.* New York, New Haven, & Hartford R. R. Co., R. I. ; 55 Atlantic, 718; Hollingsworth *v.* Chicago, Indianapolis, & Louisville R. R. Co., 160 Ind. ; 65 Northeastern, 750.

8. Railroad Bookkeeping; Construction Account.

The extra expense of replacing an old wooden bridge by a stone or iron one is properly chargeable to construction account on the books of a railroad company.[1]

[1] Hartford & New Haven R. R. Co. *v.* Grant, 9 Blatchf. 542, 545.

CHAPTER IX.

ACQUISITION OF LANDS BY CONDEMNATION PROCEEDINGS.

1. Limits of the Right.

RAILROAD companies may be, and commonly are, authorized by the State to secure their right of way by the exercise of the right of eminent domain. It is a right of way in favor of the public; that is, for a public use.[1] This privilege is granted as respects lands only, and what may be incidental to the ownership or use of land. It extends to no lands that are not reasonably necessary for use as part of the railroad, and included within its location.[2] Land outside of the necessary location for the roadway, from which to take gravel for embankments, or on which to deposit rocks or rubbish, cannot be thus taken without special authority of law. As to lands wanted for such uses it is seldom necessary to grant

[1] Olcott *v.* Supervisors, 16 Wall. 678, 694.

[2] See Chapter VII., The Making of a Location.

any special rights, and when it is, and a grant is made, a formal location must be made upon them. If not to be bought at a reasonable price near one point in the line, they can generally be bought at some other point. But land within the main location or necessary for the construction of contiguous appurtenances to it cannot be duplicated or replaced. The company must have it; and without the power to condemn, it would often be held at an unreasonable if not prohibitory price.

If a location is made on land for the purpose of using it as a site for a car factory, it will not support condemnation proceedings. Land can be bought for such a purpose, but not seized upon without the owner's consent.[1] But for workshops to be used in keeping the road and its equipment in good order, land may be taken.[2] It may be taken also for stations, sidings, power houses for electric or cable railroads, freight yards, warehouses, wharves, stock yards,[3] or as a site for telegraph or telephone poles.[4] So it may be for branch tracks to take cars to and from buildings owned by a particular individual, in order to facilitate the business done with him, provided such buildings be so near the railroad that the branch can fairly be regarded as appurtenant to the main line.[5] A branch half a mile long has been held not entitled to be so regarded.[6]

[1] Eldridge *v.* Smith, 34 Vt. 484; New York & Harlem R. R. Co. *v.* Kip, 46 N. Y. 546; 7 Am. Rep. 385.

[2] Cooley on Const. Lim., ch. xv. p. 666; Chicago, Burlington, & Quincy R. R. Co. *v.* Wilson, 17 Ill. 123.

[3] *In re* New York Central & Hudson River R. R. Co., 63 N. Y. 326; 77 N. Y. 248.

[4] Prather *v.* Jeffersonville, Madison, & Indianapolis R. R. Co., 52 Ind. 16.

[5] Toledo, Saginaw, & Mackinaw R. R. Co. *v.* East Saginaw & St. Clair R. R. Co., 72 Mich. 206; 40 Northwestern, 436; 36 Am. & Eng. R. R. Cases, 553. *Contra*, Railroad Co. *v.* Benwood Iron Works, 31 W. Va. 710; 8 Southeastern, 453.

[6] Chicago & Eastern Illinois R. R. Co. *v.* Wiltse, 116 Ill. 449; 6 Northeastern, 49.

Water rights may be taken for supplying water to locomotive engines. So may an easement of laying pipes in which the water may be brought down to tanks near the track.[1] Land cannot be taken for houses for train hands.[2]

Land can be taken for future wants which can be reasonably anticipated.[3] If, therefore, less land be taken than proves necessary, more cannot be taken after a time limited for the completion of the road has expired, except (in case the grant of power be a continuing one) it be for needs subsequently arising.[4] Such needs may come from an increase of business expected under traffic contracts with other companies, and land may be taken to obtain more track room for the purpose of fulfilling such a contract.[5]

The right of eminent domain may be granted by the legislature to a mining corporation, solely to enable it to get its products to market by the construction of a railroad. While the immediate profits and advantages from the use of the road will go to a private corporation as private gain, the railroad will directly serve a public purpose in developing the industries and resources of the State to an extent that could not otherwise be accomplished.[6]

2. Taking Lands already held for a Public Use.

Lands included in the location of another railroad, but not essential to its beneficial operation, may be taken, if it be necessary for the purposes of the second road.[7] The doctrine

[1] Strohecker *v.* Alabama & Chattanooga R. R. Co., 42 Ga. 509.

[2] Eldridge *v.* Smith, 34 Vt. 484.

[3] Rensselaer & Saratoga Railroad *v.* Davis, 43 N. Y. 137.

[4] Plymouth R. R. Co. *v.* Colwell, 39 Pa. St. 337; 80 Am. Dec. 526.

[5] *In re* Staten Island Rapid Transit Co., 103 N. Y. 251; 8 Northeastern, 548 and note.

[6] Hayes *v.* Risher, 32 Pa. St. 169; New Central Coal Co. *v.* George's Creek Coal & Iron Co., 37 Md. 537. See Chapter IV., Railroad Franchises.

[7] Butte, Anaconda, & Pacific Railway Co. *v.* Montana Union Railway Co., 16 Mont. 504; 41 Pacific, 232; 50 Am. State, 508; 31 L. R. A. 298.

is sometimes stated as requiring, in the absence of express authority, an absolute necessity;[1] but the real question must always be whether it is reasonably necessary in order to secure the beneficial enjoyment and efficient exercise of the franchises of the second company;[2] always providing it does not prevent the beneficial enjoyment and efficient exercise of the franchises of the first. If it be so necessary, the taking can be justified under the ordinary provisions as to taking property necessary for the construction of a railroad found in our general railroad laws.[3] An interest in land is often thus taken to secure a crossing of an old railroad by a new one. That it will seriously hinder and prejudice the business of the old road is not enough to defeat the proceeding. Those who built the first road were bound to contemplate as not improbable the subsequent construction of others which would to some extent interfere with its operations.[4] A trackage right, or the privilege of running cars over part of the tracks of a railroad already constructed and in use, may be taken by condemnation, provided express authority to that effect is given by the legislature, and the exercise of such a right or privilege would not be necessarily inconsistent with the beneficial exercise of its franchise by the company owning such railroad.[5] If authority is so given, under a power reserved to the legislature to alter or repeal a railroad charter at pleasure, it may be given without requiring compensation for

[1] Barre R. R. Co. *v.* Montpelier & Wells River Railroad, 61 Vt. 1; 15 Am. State, 877; 17 Atlantic, 923; 4 L. R. A. 785; Sharon Railway Co.'s Appeal, 122 Pa. St. 533, 545; 9 Am. State, 133; 17 Atlantic, 234.

[2] Rutland-Canadian R. R. Co. *v.* Central Vermont Railway Co., 72 Vt. 128; 47 Atlantic, 399. See Chapter IV., Railroad Franchises.

[3] Seattle & Montana R. R. Co. *v.* Bellingham Bay & Eastern R. R. Co., 29 Wash. 491; 69 Pacific, 1107; 92 Am. State, 907.

[4] East St. Louis Connecting Railway Co. *v.* East St. Louis Union Railway Co., 108 Ill. 265; 17 Am. & Eng. R. R. Cases, 163.

[5] Metropolitan R. R. Co. *v.* Quincy R. R. Co., 12 Allen, 262; Sixth Avenue R. R. Co. *v.* Kerr, 72 N. Y. 330. See Chapter IV., Railroad Franchises.

lessening the value of the franchise or the profits of the company whose track is subjected to this new use, but requiring it only for the use of the railroad.[1]

3. The Estate taken.

The legislature may confer the power to appropriate the fee in the soil, and occasionally does; but this can rarely be necessary. The ordinary purposes of the railroad are sufficiently served by obtaining a perpetual easement. This the company takes, although it be incorporated only for a limited time, for the benefit of its successors, or of itself, if its time of existence be prolonged by the legislature.[2]

It is doubtful whether in the United States an express grant of authority to appropriate more land than that required for the location, with a view of selling off what is not needed, could be supported.[3] In England, where there are no constitutional provisions in the way, it is commonly given in railway charters. Certainly no such authority can be implied.

4. The Selection of the Lands.

The land which may be taken, being defined by the location, is selected by the board of directors in making the location, except so far as the State may itself have determined it, or may refer the location to some public authority for approval.[4] It belongs exclusively to the political departments of government to say what property it may be necessary to appropriate for a public use. The question of the necessity of taking any particular property may be deter-

[1] Metropolitan R. R. Co. *v.* Highland Street Railway Co., 118 Mass. 290.

[2] Miner *v.* New York Central & Hudson River R. R. Co., 123 N. Y. 242; 25 Northeastern, 339.

[3] Matter of Albany Street, 11 Wend. 149; 25 Am. Dec. 618.

[4] See Chapter VII., The Making of a Location.

mined by the legislature, or left to the decision of some executive, judicial, or administrative authority, or confided absolutely to the railroad company.[1] The owner of the property to be taken is not entitled to a hearing on such an inquiry.[2] He may be given it by statute, and the question made a judicial one; but whether he shall be so favored is a matter of legislative discretion.[3]

5. The Jurisdiction of the Courts.

Whatever authority to take land by condemnation is conferred on a railroad company is to be strictly construed.[4] Every proceeding for condemning lands is based on the assumption that there is a public use to be subserved. Whether if a public use may be subserved, these particular lands shall be appropriated to it, is not, properly speaking, a judicial question; but whether the use to be subserved is a public one is, in the strictest sense, a judicial question. As to that no determination of any legislative or administrative authority can be final. Judicial decisions have settled that to use land for a railroad may be a public use. But a railroad may be of such a character as not to serve a public use. This may be shown in defending against condemnation proceedings, although on the face of the charter or articles of association the use appears to be public. Thus a grant of the power of eminent domain to any railroad company organized to transport persons and property does not operate in favor of one professedly so organized, but which is really to transport persons alone, and between points not accessible from any highway.[5]

[1] Eastern R. R. Co. *v.* Boston & Maine Railroad, 111 Mass. 125, 131.
[2] Cooley, Const. Lim., ch. xv. p. 663.
[3] Rensselaer & Saratoga R. R. Co. *v.* Davis, 43 N. Y. 137.
[4] Currier *v.* Marietta & Cincinnati R. R. Co., 11 Ohio St. 228, 231.
[5] Matter of Niagara Falls & Whirlpool Railway Co., 108 N. Y. 375; 15 Northeastern, 429.

6. De Facto Corporations.

If the right of eminent domain is conferred by law on all railroad companies, a company so irregularly organized as to be only a *de facto* corporation can exercise it.[1] A *de facto* corporation is, in plain English, a corporation in fact.[2] So long as the State allows it to go forward and claim all the rights of a *de jure* corporation, it has them as to third parties. This is true even in case of a company organized under a statute requiring certain papers to be filed by every such company within a prescribed time after its incorporation, and providing that in default of this its articles of association shall be void. Void here means voidable; and although such a default has occurred, if the State has not claimed a forfeiture, there has been none, and it can proceed in its work.[3] If two railroad companies attempt to form a new one by consolidation, when there is no law authorizing the consolidation of such companies, the new organization, not being a corporation *de facto*, cannot exercise the power of eminent domain.[4]

7. Who may exercise the Right of Eminent Domain.

A foreign railroad corporation may be given this power.[5]

A receiver of a railroad company does not, by virtue of his office, acquire its right of exercising it.[6] That remains in

[1] Peoria & Pekin Union Railway Co. *v.* Peoria & Farmington Railway Co., 105 Ill. 110; Nichols *v.* Ann Arbor & Ypsilanti Street R. R. Co., 87 Mich. 361; 49 Northwestern, 538. *Contra*, New York Cable Co. *v.* New York, 104 N. Y. 1; 10 Northeastern, 332.

[2] Lamkin *v.* Baldwin & Lamkin Manufacturing Co., 72 Conn. 57, 65; 43 Atlantic, 593; 44 L. R. A. 786.

[3] Brown *v.* Wyandotte & Southeastern Railway Co., 68 Ark. 134; 56 Southwestern, 862. *Contra*, Matter of Brooklyn, Winfield, & Newtown Railway Co., 72 N. Y. 245.

[4] American Loan & Trust Co. *v.* Minnesota & Northwestern R. R. Co., 157 Ill. 641; 42 Northeastern, 153.

[5] Abbott *v.* New York & New England R. R. Co., 145 Mass. 450; 15 Northeastern, 91.

[6] See Chapter LV., Receiverships.

the hands of the company, to be exercised only at its discretion, unless the court, as it may do by a special order,[1] clothes him with this power to be exercised for its benefit, in which case the proceedings should properly be brought in its name.[2]

Nor does it pass by a lease of a railroad, given after the line has been constructed, although the lessee may desire to exercise it in making improvements. It is a right appurtenant to ownership, and clings to the reversion.[3] An authorized lease of the franchise of a company having the power of eminent domain, whose road was unconstructed or in process of construction, would carry the right to construct or complete it, and therefore to employ the power of condemnation of land; but the proceeding would properly be brought in the lessor's name.[4]

8. Entries for Preliminary Surveys.

A railroad cannot well be definitely located without such a survey as can only be made by engineers who have been upon the ground. Railroad companies are generally empowered by law to make an entry for that purpose, without the consent or against the will of the landowner, and without making any preliminary compensation. This is not a taking of the land: it is simply a temporary interference with the owner's rights caused by an overruling public necessity, and can be supported on the same ground as the right to travel over adjoining lands when a highway is temporarily impassable.[5]

[1] Morrison *v.* Forman, 177 Ill. 427; 53 Northeastern, 73.

[2] Bigelow *v.* Draper, 6 N. Dak. 152; 69 Northwestern, 570.

[3] Mayor *v.* Norwich & Worcester R. R. Co., 109 Mass. 103.

[4] Huntting *v.* Hartford Street Railway Co., 73 Conn. 179, 181; 46 Atlantic, 824. See Chapter XLVI., Leases.

[5] Cushman *v.* Smith, 34 Me. 247; 1 Redfield's Am. Railway Cases, 216; Nichols *v.* Somerset & Kennebec R. R. Co., 43 Me. 356.

9. Practice in Condemnation Proceedings.[1]

No special vote of the board of directors is necessary to authorize the commencement of condemnation proceedings. The adoption of the location and a general authority to the executive officers of the road to proceed with the construction of the railroad is sufficient to warrant their institution by them. The papers in such a proceeding should show on their face that the applicant has the right to take lands for railroad purposes, and that it has made a location on, or appropriation of, the land in question for such purposes. Ordinarily it is also necessary to allege that an unsuccessful attempt has been made to agree with the owner on a price. It is usually alleged, and in some States must be, that it is necessary to take the lands for the purposes named. Notice must be given to all parties having title to the land, and a fair opportunity to be heard accorded to them.[2] Title is only acquired from those thus notified, or who voluntarily appear without notice. The notice must therefore be given, at the peril of the company, to each party owning an interest in the land, whether in possession, remainder, or reversion, in fee, for life, or for years. If damages are awarded to one made a party as an owner, who was in fact not such, the company gains no title by paying him the award.[3] It is prudent to make one to whom the property has been bargained and sold under a written contract a party, though no legal title has passed, if the transaction appears on the land records or is known to the company. Mere lienors are not owners. Notice to mortgagees, judgment creditors,[4] and other incumbrancers,

[1] See Appendix II.

[2] New York, New Haven, & Hartford R. R. Co. *v.* Long, 69 Conn. 424, 437; 37 Atlantic, 1070.

[3] Missouri River, Fort Scott, & Gulf R. R. Co. *v.* Owen, 8 Kans. 409; 5 Am. Railway Rep. 119.

[4] Watson *v.* New York Central R. R. Co., 47 N. Y. 157; 1 Am. Railway Rep. 22.

therefore (unless required by statute), need not be given; though it commonly is, in practice, in order to give the man opportunity to assert their rights to receive the compensation that may be awarded to the owner. If they have reason to suppose that the owner will take it without accounting to them, they can have relief in equity. In many States, liens on land can be taken by condemnation proceedings, under certain circumstances; as when the security is less in value than the claim. In such case the lienors must, of course, be made parties.

Neither the location nor the application for the condemnation of land for railroad uses can be used as a means for taking land for what is not a legitimate railroad use. The real facts will be ascertained and justice done, either in the course of the proceedings,[1] if the statute provides an opportunity there, or, if it does not, by resort to a court of equitable jurisdiction. Whenever the power of eminent domain is being plainly abused by a railroad company, and there is no other adequate remedy, equity may interfere by injunction, either at the suit of the State[2] or of some private person especially injured.[3]

Where the hearing as to the amount of compensation is referred to a jury, or a committee of appraisers, they have ordinarily nothing to do with any question except what that amount should be.[4] Before it is so referred, and for the purpose of securing such a reference, the proceeding is, in some States, brought before some judicial authority. In such case that authority can inquire into the truth of all the material

[1] Ligare *v.* Chicago, 139 Ill. 46; 28 Northeastern, 934; 32 Am. State, 179.

[2] People *v.* Pittsburgh R. R. Co., 53 Cal. 694.

[3] Edgewood R. R. Co.'s Appeal, 79 Pa. St. 257.

[4] Bigelow *v.* Draper, 6 N. Dak. 152, 157; 69 Northwestern, 570; O'Hare *v.* Chicago, Madison, & Northern R. R. Co., 139 Ill. 151; 28 Northeastern, 923.

averments in the application.[1] No written pleadings are ordinarily required on the part of the landowner, but he may always file such motions or other papers as may be proper to state clearly the points he desires to make.[2] They must, however, be such as relate directly to the cause. By reason of this exclusion of collateral matters a company having no power to build or take lands for a connection which it desires, but authorized to take a lease of connecting lines, may indirectly secure its end through the organization of a new company. If some of its principal shareholders should organize such a company to build the connection, with a view to an ultimate lease, it would be no defence to condemnation proceedings begun by the latter that it only wanted the lands in order to lease them. Such issues cannot be raised in such a proceeding.[3] Evidence that the company was not proceeding in good faith and had no means or intention to construct the projected railroad would be relevant and material in defence.[4]

10. Conditional or Partial Appropriation.

By the rule that the greater includes the less, the power to impose a public use upon land includes power to impose it under limitations, or on assuming contract liabilities, in favor of the owner, not inconsistent with such use. Such limitations or contracts may tend to the advantage of both parties by reducing the damage that would otherwise be done, and so the amount of compensation to be paid. The limitations may be expressed on the face of the papers in the condemnation

[1] New York, New Haven, & Hartford R. R. Co. *v.* Long, 69 Conn. 424, 434; 37 Atlantic, 1070; Matter of Rochester, Hornellsville, & Lackawanna R. R. Co., 110 N. Y. 119; 17 Northeastern, 678.

[2] Carolina Central Railway Co. *v.* Love, 81 N. C. 434.

[3] Lower *v.* Chicago, Burlington, & Quincy R. R. Co., 59 Iowa, 563; 13 Northwestern, 718; Aurora & Cincinnati R. R. Co. *v.* Miller, 56 Ind. 88.

[4] *In re* Metropolitan Transit Co., 111 N. Y. 588; 19 Northeastern, 645.

proceedings. Thus, if these should describe the land as to be taken for the purpose of erecting an open viaduct upon it, to be so constructed that a farm crossing would exist beneath, it would be a violation of the landowner's rights of property were a solid embankment to be built instead, for which he could obtain additional damages. So, if under an application to take a parcel of land, without limitations, for railroad uses, the parties agree in writing, as part of the proceeding, that the company shall build and forever maintain a retaining wall of a certain description for the benefit of the landowner, and the damages are estimated in view of this, equity will compel the specific performance of its undertaking. Should the company become insolvent, that will be no defence, so long as it continues to operate the road. Mandamus would not lie, as the right is a private one, resting on contract alone.[1] So, if at the hearing in damages the company orally states before the assessors that it intends to construct the railroad in a certain way, and the damages are assessed on that assumption, but there is afterwards a change of plan, by which it is constructed in a different way, causing greater damage to the owner, in respect to other property not taken, equity may enjoin against the use of the road until the additional damage is paid.[2] Similar rights may arise in favor of the landowner, if the road, though built in the manner stated, is afterwards changed to his detriment.[3] If the land is taken subject to the owner's right to a farm crossing, the damages are to be assessed on the theory that such a crossing will be duly provided and maintained.[4] Rights thus excepted or reserved

[1] State *v.* Paterson, Newark, & New York R. R. Co., 43 N. J. Law, 505; 9 Am. & Eng. R. R. Cases, 134.

[2] Carpenter *v.* Easton & Amboy R. R. Co., 24 N. J. Eq. 249.

[3] Wabash, St. Louis, & Pacific Railway Co. *v.* McDougall, 118 Ill. 229; 8 Northeastern, 678.

[4] St. Louis, Keokuk, & Northwestern Railway Co. *v.* Clark, 121 Mo. 169, 195, 200; 25 Southwestern, 906; 26 L. R. A. 751; Mason *v.* Kennebec & Portland R. R. Co., 31 Me. 215; 1 Am. Railway Cases, 162.

in favor of the owner cannot (unless by express authority of law) be afterwards extinguished by new condemnation proceedings. The company must stand by its election to take subject to them.

Land already in the occupation of the company under lease for a term of years can be taken. This is not a taking of the rent, but of the land as it stands, subject to the lease.[1] Land in its occupation, whether by license or adversely, can be taken. If the possession be rightful, improvements which it may have put upon the land cannot be considered in assessing the compensation to be made:[2] if wrongful, they should be.[3]

11. The Measure of Damages.

As a railroad location covers only a narrow strip of territory, land taken for it is generally part of a larger parcel. The amount of compensation to be made for land taken is therefore to be determined in view not only of the value of that land, but of the consequent effect of constructing and operating a railroad upon it on the value of the residue of the parcel which is not taken. It is best ascertained by deducting from the fair marketable value of the whole parcel, at the time of the taking, the fair marketable value of what is left of it after the taking, in the condition in which it will be after the road has been built and is in operation.[4] The difference measures the loss or damage suffered by the owner. That the land may have a special value to the owners because

[1] *In re* New York & Harlem R. R. Co., 46 N. Y. 546, 555.

[2] North Hudson County R. R. Co. *v.* Booraem, 28 N. J. Eq. 450; 14 Am. Railway Rep. 202.

[3] Graham *v.* Connersville & Newcastle Junction R. R. Co., 36 Ind. 463; 3 Am. Railway Rep. 28. *Contra*, Jones *v.* New Orleans & Selma R. R. Co., 70 Ala. 227; 14 Am. & Eng. R. R. Cases, 217.

[4] South Buffalo Railway Co. *v.* Kirkover, 176 N. Y. 301; 68 Northeastern, 366.

of their ownership of other lands, not contiguous, in connection with which they are or may be used, is not to be considered.[1] The value is not materially affected by the uses to which the land is at the time applied: it is measured by the most advantageous uses to which it may be applied.[2]

With respect to injuries to land not taken,[3] belonging to the proprietor of the land which is taken, and contiguous to it, the more common causes of damage are impeding access from one part of the owner's land to another by the intervention of the railroad; removing the natural support of the soil; draining springs or wells;[4] diverting watercourses; turning water on the land not taken; dangers, as from blasting, necessarily incident to the work of excavation. Damages are not to be considered, if so remote that, were a third party, owning the land to be covered by the railroad, to do acts causing the same results, no action at common law would lie against him by the adjoining proprietor. They should be considered, if the effect of a physical injury to the land not taken or buildings upon it, or if, although consequential as distinguished from direct, they are due to what tends immediately to depreciate its market value. Taking the land enables the company to exercise its franchise in nearer proximity to the residue of the parcel than it otherwise could have done. If the operation of the railroad under this franchise will naturally and lawfully tend to blacken a house on the land not taken, by means of smoke, soot, and cinders, or diminish its value by jarring the ground and occasioning disagreeable noises which must annoy

[1] Fleming *v.* Chicago, Dubuque, & Mississippi R. R. Co., 34 Iowa, 353; 5 Am. Railway Rep. 133.

[2] Chicago, Evanston, & Lake Superior R. R. Co. *v.* Catholic Bishop, 119 Ill. 525; 10 Northeastern, 372; Boom Company *v.* Patterson, 98 U. S. 403, 409.

[3] See Chapter XI., Property damaged but not permanently taken.

[4] Aldrich *v.* Cheshire R. R. Co., 21 N. H. 359; 1 Am. Railway Cases, 206; 53 Am. Dec. 212.

its inmates, these are legitimate causes of damage to be taken into account.[1]

No liability for additional damages to the owner of land, part of which is taken for the location, can be afterwards incurred by building the railroad in a proper manner. If this proper manner necessarily involves raising an embankment which prevents the natural flow of water from the part not taken and ponds it up there, still it is *damnum absque injuria*, for it must be presumed that this result was contemplated when the land within the location was taken.[2] The injury that might come from a future diversion of a watercourse crossed by the railroad location is not to be considered in assessing damages, unless such diversion would be a natural and probable incident of the construction of the railroad. If the water could be conveniently crossed by the construction of a bridge, and the company has indicated no intention to divert it, either in its location papers or the condemnation proceedings, it will not be presumed that its diversion was contemplated in assessing the damages, unless they are so large as to show that it must have been taken into account.[3]

If a railroad is built on filled land along the shore of navigable water, whereby the natural access of the riparian proprietor to the water is cut off or substantially impeded, his land is damaged, and his easement of access either taken or, as the case may be, impaired in value. For this he is entitled

[1] Walker *v.* Old Colony & Newport Railway Co., 103 Mass. 10, 11; Chicago, Peoria, & St. Louis Railway Co. *v.* Nix, 137 Ill. 141; 27 Northeastern, 81; Elizabethtown, Lexington, & Big Sandy R. R. Co. *v.* Combs, 10 Bush (Ky.), 382; 19 Am. Rep. 67, 73. *Cf.* Columbus, Hocking Valley, & Toledo R. R. Co. *v.* Gardner, 45 Ohio St. 309; 13 Northeastern, 69. See Chapters XVIII., Railroads on and along Highways, and XLI., Use of Highways.

[2] Johnson *v.* Atlantic & St. Lawrence R. R. Co., 35 N. H. 569; 69 Am. Dec. 560.

[3] Stodghill *v.* Chicago, Burlington, & Quincy R. R. Co., 43 Iowa, 26; 14 Am. Railway Rep. 398; 22 Am. Rep. 211.

to compensation, whether his absolute ownership extended beneath where the navigable waters formerly flowed or not.[1]

12. Fresh Damages subsequently accruing.

Compensation is assessed on the theory that the railroad will be maintained on the land forever,[2] and both built and operated with proper care and skill. If such care or skill be not exercised, and further damage is thereby occasioned, an action lies at common law in favor of the party owning the land at the time of the injury.[3]

13. Benefits.

In most States no allowance is to be made for any benefits to the residue of the parcel by reason of the construction and operation of the railroad. In some, special benefits accruing to it, other than those shared by the property holders generally in the community, are to be deducted from the damages that would be otherwise assessed.[4] If the property taken be not land but an easement in land, benefits specially accruing to the owner of the easement from the new use of the land are to be deducted from what would otherwise be his due.[5]

14. The Date as of which the Damages are to be assessed.

The date as of which the damages are to be ascertained varies according to the particular statute under which the land is taken. It is not, on principle, taken in this sense by the mere making of the location. It is so taken by a location

[1] Rumsey *v.* New York & New England R. R. Co., 133 N. Y. 79; 30 Northeastern, 654; 15 L. R. A. 618. See Delaplaine *v.* Chicago & Northwestern Railway Co., 42 Wis. 214; 24 Am. Rep. 386.

[2] Smith *v.* Hall, 103 Iowa, 95; 72 Northwestern, 427.

[3] Ohio & Mississippi Railway Co. *v.* Wachter, 123 Ill. 440; 15 Northeastern, 279; 5 Am. State, 532.

[4] Meacham *v.* Fitchburg R. R. Co., 4 Cush. 291, 298.

[5] Bohm *v.* Metropolitan Elevated Railway Co., 129 N. Y. 576; 29 Northeastern, 802; 14 L. R. A. 344.

followed up by an entry. It may fairly be regarded as so taken when a location is followed up by the institution of condemnation proceedings. A condemnation proceeding is in the nature of an action at law, and the rights of the parties for many purposes vest at its commencement. Under some statutes, however, the time of the taking is deemed not to be reached until the award of damages is actually made: under others, when, after a location, notice is given to the landowner that the company will enter at a certain date, the land is held to be taken at that date.[1]

15. Removal of Condemnation Suit to United States Circuit Court.

A proceeding of this character, if pending before a judicial tribunal, is regarded as so far a suit at law as to be within the act of Congress as to the removal of cases before trial from the State courts to the Circuit Court of the United States.[2]

16. Remedies in Error.

For substantial errors in condemnation proceedings a judicial remedy is generally afforded at some stage by an appeal or writ of error, or on a writ of *certiorari*.[3]

17. The Passing of the Title.

The title of the company is perfected whenever payment of the compensation found due is duly made. It is generally provided by statute that a deposit for the use of the landowner in some public treasury shall be equivalent to payment. No conveyance from him is usual or required.

[1] Lafferty *v.* Schuylkill River R. R. Co., 124 Pa. St. 297; 16 Atlantic, 869; 10 Am. State, 587; 3 L. R. A. 124.

[2] New York, New Haven, & Hartford R. R. Co. *v.* Cockcroft, 46 Federal, 881; 49 Federal, 3.

[3] New York, New Haven, & Hartford R. R. Co. *v.* Long, 69 Conn. 424; 37 Atlantic, 1070.

18. Abandonment of the Right of Condemnation.

In many States, by statute, the company can abandon its effort to obtain the title at any time before the final payment is made; and in such case, on due notice to the landowner of the revocation of the location, his absolute rights in the land revive and those of the company are extinguished.[1] Such a privilege belongs generally to all public corporations who undertake to exercise the power of eminent domain. Its object is to protect the public interests by saving a waste of public money. The railroad company is a quasi-public corporation. The cost of its road, if excessive, and the line of its road, if incorrect, will work injury to the public by tending to increase charges and decrease efficiency. Hence it is often put in this respect on the footing of a full public corporation. A correlative right is sometimes given by statute to the owner of land condemned, when, after an appraisal of the damages to be paid, there has been an unreasonable delay in paying them; and, unless the appraisal operated by law as a judgment between the parties, there is no constitutional objection to allowing him to apply to have it set aside[2] and a new one made.

[1] Schreiber *v.* Chicago & Evanston R. R. Co., 115 Ill. 340; 3 Northeastern, 427. See Chapter VII., The Making of a Location.

[2] Baltimore & Susquehanna R. R. Co. *v.* Nesbit, 10 How. 395, 399.

CHAPTER X.

ACQUISITION OF LANDS OTHERWISE THAN BY CONDEMNATION PROCEEDINGS.

Most railroad property is acquired by voluntary purchase. Condemnation proceedings are expensive and lengthy. They also secure only an easement, and at the price of the fee. Railroad companies naturally prefer to get all that they pay for. The law does not allow them to condemn until they have first endeavored to buy, and this endeavor is generally an honest one.

1. Construction of Conveyances.

Railroad companies commonly have their own counsel prepare any conveyances to be executed to them of land within their location. Hence if, when so prepared, they are ambiguous, they should be construed against the company. This accords with the reason of the rule, *Verba contra proferentem fortius accipiuntur;* for the words are really chosen, not by the grantor, but by the grantee.[1]

[1] Lockwood *v.* Ohio River R. R. Co., 103 Federal, 243; 43 C. C. A. 202.

2. Bonds for Deeds.

It is customary for railroad companies on laying out their road to endeavor to procure agreements or bonds for deeds from the owners along the line. Such contracts often precede the location, and stipulate for a conveyance at a certain rate per acre, or sometimes at a nominal price, of so much land in a certain locality as the company may require for its road. A bond thus drawn leaves the amount required to be determined by the directors of the company; and if they act in good faith, no court will reduce the amount they decide to be necessary.[1] The operation of a bond for a deed of so much land as may be covered by the location will be restricted to a location made under corporate powers possessed at the date of the bond.[2]

3. Estate acquired.

A conveyance to a railroad company and its successors and assigns for all the purposes of its charter invests it with a fee-simple estate.[3] A deed to it expressed to be "for right of way" conveys only an easement.[4] It is, however, not a personal easement, and can be transferred by permission of the State to another railroad company. The use being of a public nature, and incidental to the exercise of a franchise, the change in ownership is in the nature of a change in trustees. The public will be served in the same way by the new grantee. The term "waylands" is used to include all lands occupied for the roadbed, or covered by its location, whether the estate of the company be a fee or a mere right of way.

[1] Hill *v.* Western Vermont R. R. Co., 32 Vt. 68.

[2] Hall *v.* Pickering, 40 Me. 548.

[3] United States Pipe Line Co. *v.* Delaware, Lackawanna, & Western R. R. Co., 62 N. J. Law, 254; 41 Atlantic, 759; 42 L. R. A. 572.

[4] Blakely *v.* Chicago, Kansas, & Nebraska Railway Co., 46 Neb. 272; 64 Northwestern, 972.

4. Purchase of Abandoned Canals.

Railroads have frequently been the successors of canals. The canal company, finding its business unprofitable, has sold out, by permission of the State, to a railroad company. In such case, property held by the canal company for a public use has been transferred to be held for another and kindred public use. If any property so taken had been acquired in fee simple, whether by purchase or under the right of eminent domain, the railroad company which buys it would not be liable to pay the original owner additional damages, unless when, in the latter case, he would in fact suffer additional damages by the change of use. But if only an easement for canal purposes was acquired, it ceased when the canal was abandoned.[1]

5. What are Railroad Uses.

Under a deed for all railroad purposes, the company may lay as many tracks upon the land as it thinks proper, from time to time. Nor can it be restricted to laying a single track, on parol evidence that the deed was given upon the faith of the representations of the company that it would never lay more than one.[2]

A deed of land expressed to be for the construction of a railroad thereon bars any future claim for damages to land of the grantor adjoining, from its construction or its operation.[3] It implies a right to drain surface water from the road upon

[1] Pittsburgh & Lake Erie R. R. Co. *v.* Bruce, 102 Pa. St. 23; 10 Am. & Eng. R. R. Cases, 1; Hatch *v.* Cincinnati & Indiana R. R. Co., 18 Ohio St. 92.

[2] Donisthorpe *v.* Fremont, E. & M. V. R. R. Co., 30 Neb. 142; 46 Northwestern, 240; 27 Am. State, 387. This case holds also that in such a case the grantor can recover damages, on such evidence, for breach of contract; *sed quære?*

[3] Watts *v.* Norfolk & Western Railway Co., 39 W. Va. 196; 19 Southeastern, 521; 45 Am. State, 894.

such adjoining lands, if that be the natural direction the water takes after the railroad is constructed.

6. Buying more Land than is necessary.

A railroad company has implied power to buy (though not to take by condemnation) a large tract of land, of which it desires to use only a narrow strip, with the view of selling the rest, if this be the cheapest way of obtaining what it needs.[1] Such a purchase is reasonably necessary for its corporate purposes. Like other private corporations, a railroad company can manage its affairs with as much latitude as would be open to a natural person engaged in a similar business. Railroad corporations of one State, having power to acquire such lands as may be necessary for their purposes, may acquire such lands in any other State, if its laws do not forbid.[2]

7. Conditions Subsequent.

Conditions subsequent in deeds to railroad companies of lands within their location, or appropriated and used for railroad purposes, are seldom enforced, as such, by the courts. Too great interests would be inconvenienced or prejudiced if they were. The public are interested in having the road kept open for traffic, without a break in its continuity. If therefore there is a breach of condition and a forfeiture is claimed, a suit will commonly be stayed until the company has had an opportunity to acquire a full title to the right of way by condemnation proceedings.

Under a deed conditioned on the lands being used for railroad purposes, there is no breach if tracks are maintained on it over which gravel trains are occasionally run.[3] The

[1] Boston & New York Air Line R. R. Co. *v.* Coffin, 50 Conn. 150, 155.

[2] State *v.* Boston, Concord, & Montreal R. R. Co., 25 Vt. 433; Thompson *v.* Waters, 25 Mich. 214; 4 Am. Railway Rep. 331.

[3] Behlow *v.* Southern Pacific R. R. Co., 130 Cal. 16; 62 Pacific, 295.

character of the use, and not its continuity or amount, is the material thing, so long as it is not merely illusory or in bad faith. A highway remains such, although seldom used, or used only for particular purposes. A condition in a deed of a right of way that the railroad shall be completed by a time named is waived if the grantor stands by and says nothing when the railroad is being constructed long after that time. An agreement expressed in a deed on the part of the railroad company to build and maintain a fence between the land purchased and adjoining lands of the grantor, if it be in the shape of a covenant forming part of the consideration, will be held in equity, although not made a condition, to bind any other railroad company which may succeed in title to the original grantee. The benefit of the conveyance cannot equitably be enjoyed without the attending burden.[1]

If conditions in deeds to railroad companies for the building of cattle guards, the construction of farm crossings, the laying of a spur track, or the like, are violated, equity will seldom relieve by decreeing a specific performance. It may fairly be presumed, *prima facie*, that the directors have been governed by the public interest.[2]

8. Defects in Title.

Land is often given for railroad purposes in consideration of the benefits anticipated from its construction, when by inadvertence no deed is executed. If the road is built over such lands, equity can compel a conveyance. A title as against the original owner may also be acquired under such circumstances by adverse possession.[3]

[1] Midland Railway Co. *v.* Fisher, 125 Ind. 19; 24 Northeastern, 756; 8 L. R. A. 604; 21 Am. State, 189.

[2] Columbus & Shelby R. R. Co. *v.* Watson, 26 Ind. 50; Windham Cotton Mfg. Co. *v.* Hartford, Providence, & Fishkill R. R. Co., 23 Conn. 373.

[3] Miner *v.* New York Central & Hudson River R. R. Co., 123 N. Y. 242; 25 Northeastern, 339.

9. Want of Title Papers.

Railroads are sometimes built on land under a mere parol license, no conveyance being promised or contemplated. Such a license, though thus executed, is revocable by the party giving it, or his grantees.[1] Until revoked, it is a justification for the occupation of the land. If revoked, the company can remove the rails, and if sued in ejectment, the action would be stayed, on its application, to give it an opportunity to bring condemnation proceedings. If the owner had so conducted as to raise an estoppel *in pais* in favor of the company, such an action would be enjoined in equity, on terms of making just compensation for the land taken.

10. Building without Title.

Land is sometimes appropriated for the construction of a railroad without even a license. The owner may be unknown, or the company may take the chances of making a future settlement, relying on its power of proceeding, if necessary, to condemn it thereafter.[2] In such case the railroad structure becomes a part of the land,[3] and prior to the opening of the road for business the owner, if not equitably barred by acquiescence or laches, can recover possession and mesne profits in an ordinary action. After the road is opened, the public interest in keeping it open would lead a court of equity, if necessary, to enjoin against proceeding with such an action until there had been an opportunity to condemn it.[4]

[1] Foot *v.* New Haven & Northampton Co., 23 Conn. 214. *Contra*, Campbell *v.* Indianapolis & Vincennes R. R. Co., 110 Ind. 490; 11 Northeastern, 482.

[2] Secombe *v.* Railroad Co., 23 Wall. 108, 118.

[3] Meriam *v.* Brown, 128 Mass. 391. See Chapter I., What Railroads are.

[4] See Harrington *v.* St. Paul & Sioux City R. R. Co., 17 Minn. 215; 8 Am. Railway Rep. 247.

A railroad may be built on land purchased in good faith from one supposed to own it, but which really belonged to another. In such case it is regarded as standing in the position of a trade fixture constructed by a lessee, if condemnation proceedings are afterwards instituted against the real owner. He cannot claim the railroad superstructure as a part of the soil, and will only be entitled to the value of the land, as if it were unimproved.[1] So, should he bring ejectment, the company would be entitled to remove its improvements, for as they are a part of a great public work, and derive their real value from that fact, the case cannot be ruled by the principles governing an ordinary trespass by the erection of a house.[2]

If the owner of land so occupied without right by a railroad which is being operated for public use sells it, his grantee does not necessarily stand in the position of the ordinary purchaser of land held adversely by a third party. The railroad company is not holding the land adversely, but is setting up an adverse easement in it. It had the right, also, to acquire this easement by condemnation proceedings, and in most cases has it still. It has by its location appropriated the land for public use, which it had a right to do. It has taken possession, but it did not first make just compensation, and therefore its possession was wrongful, and its title by appropriation defective. The wrong was done to the owner; but his transfer of the land does not transfer his right of action for that wrong. In ordinary cases between man and man such a wrong would be a trespass, and if the easement were used after a conveyance of the title, it would be a new trespass against the rights of the grantee. But a railroad is a vast structure and an entirety. It is permanent in its

[1] St. Louis, Kansas, & Southwestern Railroad *v.* Nyce, 61 Kans. 394; 59 Pacific, 1040; 48 L. R. A. 240.

[2] Illinois Central R. R. Co. *v.* Hoskins, 80 Miss. 730; 32 Southern, 150; 92 Am. State, 612.

nature. It is built under a franchise, and at the place in question was, by virtue of the location and the right of condemnation, built with a certain color of title. Hence it is regarded as working from the outset a permanent appropriation of the soil for railroad purposes. The wrong done was not the appropriation, but the appropriation without payment. The vendee of the land, therefore, takes it subject to the right of way of the company, but the right to compensation remains in the original owner.[1] This right survives any changes in the railroad title, and remains an equitable charge on the road in his favor.[2]

A landowner who, knowing that a railroad is being constructed on his land without right, interposes no objection until after it is completed and in operation, is estopped from afterwards disputing either its title or possession, and can only sue for damages.[3] He may resort to a court of equity for that purpose, and ask to have the damages computed and adjudged to be a lien upon the land and upon the railroad easement in it.[4]

11. Adverse Possession.

Save in exceptional cases, such as an entry under an oral gift, no title to any part of its location by adverse possession or user can be set up by a railroad company which has the right of eminent domain.[5] A title by a lost grant will not be presumed when one might have been gained by condemnation proceedings. Nor will an acquisition of title by such proceedings be implied. For this there are two reasons: first,

[1] Roberts *v.* Northern Pacific R. R. Co., 158 U. S. 1, 10; Davis *v.* Titusville & Oil City Railway Co., 114 Pa. St. 308; 6 Atlantic, 736.

[2] Drury *v.* Midland R. R. Co., 127 Mass. 571.

[3] Roberts *v.* Northern Pacific R. R. Co., 158 U. S. 1, 11.

[4] Florida Southern R. R. Co. *v.* Hill, 40 Fla. 1; 23 Southern, 566; 74 Am. State, 124.

[5] See Chapter XVI., Farm Crossings and Ways of Necessity.

because they are matters of record; and, second, because the company may well have taken possession, intending in good faith to institute the proper proceedings subsequently, and it is not to be presumed in its favor that it entered as a wilful trespasser.[1] But it may tack an adverse possession of its own to a prior adverse possession of one who conveys to it by deed, so as to make out the necessary period. Here whatever right he could sell to an a natural person, he can equally sell to the railroad company, and the presumption of a lost deed to him may be fairly made.[2]

12. Unrecorded Deed.

The failure of a railroad company to record a conveyance to it of land within its location, over which its railroad is in operation, will not avail a subsequent *bona fide* purchaser from the original owner, although he takes without actual notice of the prior deed. The location and the possession taken under it made it a mere sale of a right of entry.[3]

13. Dedication.

A conveyance of lands to a railroad company containing a reference to a map or plat on which a space is indicated as set apart for railroad uses might pass a right to occupy it for such uses, as appurtenant to the land conveyed. But a mere parol dedication of land to railroad uses would not avail to pass title, unless the railroad were owned by the public.[4] It

[1] Narron *v.* Wilmington & Weldon R. R. Co., 122 N. C. 856; 29 Southeastern, 356; 40 L. R. A. 415; Fitch *v.* New York, Providence, & Boston R. R. Co., 59 Conn. 414, 419; 20 Atlantic, 345.

[2] Covert *v.* Pittsburg & Western Railway Co., 204 Pa. St. 391; 54 Atlantic, 170.

[3] Paul *v.* Connersville & Newcastle Junction R. R. Co., 51 Ind. 527.

[4] Lake Erie & Western R. R. Co. *v.* Whitham, 155 Ill. 514; 40 Northeastern, 1014; 28 L. R. A. 612. *Contra*, Texas & New Orleans Railway Co. *v.* Sutor, 56 Tex. 496; 11 Am. & Eng. R. R. Cases, 506.

would, however, if followed by an acceptance and the construction of the railroad upon it, give the railroad company an equity to get an injunction against any disturbance of its enjoyment, or even to compel a conveyance.[1]

[1] Morgan *v.* Railroad Company, 96 U. S. 716.

CHAPTER XI.

PROPERTY DAMAGED BUT NOT PERMANENTLY TAKEN.

THE construction or operation of a railroad is often a serious damage to property which it does not occupy, and which is not part of any tract of which part has been taken for its occupation. The common-law rule, *ubi jus, ibi remedium*, in its application to such a case, is affected by the fact that the railroad is protected by a franchise which justifies much that would otherwise be held to constitute a nuisance.[1] How far this protection shall extend, it is generally for the legislature to say. Most of our State Constitutions, and also the Fourteenth Amendment to the Constitution of the United States, operate in this respect to prohibit only the taking of property without just compensation or without due process of law.

1. What constitutes a Taking.

No property is taken unless the owner is for the time being, at least, virtually excluded from its advantageous use.[2] If such an exclusion would result to any adjoining land from the construction and operation of a railroad, and would be tantamount to a substantial destruction of its

[1] See Chapter IV., Railroad Franchises.

[2] Pumpelly *v.* Green Bay Company, 13 Wall. 166.

value, this may be ground for relief in equity by an injunction against such construction until the owner has been paid his damages.[1] But in most cases where such injuries are anticipated his remedy will be to sue for damages, if they in fact happen. The same public interest which justified the construction of the railroad calls for its early completion. This ought not to be delayed by requiring the company to stop to litigate every disputed demand which may be made upon it. The remedy at law is sufficiently adequate.[2]

2. A Temporary Taking.

Property may be taken temporarily for railroad uses under statutory authority, but only on terms of just compensation.[3] An action may be supported at common law for such a taking when no compensation has been made. If the owner is at times excluded from its advantageous use, he can recover for the temporary wrong; and if its use is directly and necessarily lessened in value, in many States the common law is also held to give a remedy.

3. Interference with Watercourses.

If a railroad cut constitutes a channel through which a stream in time of freshet naturally overflows upon land of private individuals, they can recover against the company for the injury. It is treated by some courts as virtually a taking of their property,[4] and in others as a consequential but actionable damage. But if such an overflow could not reason-

[1] Spencer *v.* Point Pleasant & Ohio R. R. Co., 23 W. Va. 406; 20 Am. & Eng. R. R. Cases, 125.

[2] Stetson *v.* Chicago & Evanston R. R. Co., 75 Ill. 74; Osborne *v.* Missouri Pacific Railway Co., 147 U. S. 248.

[3] McKeon *v.* New York, New Haven, & Hartford R. R. Co., 75 Conn. 343, 347; 53 Atlantic, 656; 189 U. S. 508.

[4] Eaton *v.* Boston, Concord, & Montreal R. R. Co., 51 N. H. 504; 1 Am. Railway Rep. 44; 12 Am. Rep. 147.

ably be anticipated when the road was constructed, the flood being of an unprecedented character, the company might not be liable.[1] If parties are thus injured from whom the company acquired the land on which its road is constructed, they can recover no further damages, unless the road was constructed improperly.[2]

If water artificially collected on railroad land, as by opening up a spring in excavating for the roadbed, be discharged on adjoining land belonging to one from whom no property has been acquired, he is entitled to compensation.

4. Blasting.

The same rule would apply if rocks blasted out in constructing the road were thrown by the violence of the explosion upon his land.[3]

5. Obstructing Highway.

Where the railroad company is required by law to pay all damages that may arise to any persons by its injuring their property, their common-law rights may be enlarged. In such case, if in constructing a railroad the grade of a cross street is altered so as to impede access to lands abutting on it, there will be a remedy in damages.[4] This is true although the obstruction be only temporary, and terminates when the work of construction (or, if it be one of alteration, of reconstruction) is completed.[5] Nor is the remedy confined to those abutting on the particular part of the street obstructed. If those abutting on other parts of the street

[1] Bellinger *v.* New York Central Railroad, 23 N. Y. 42.

[2] Cleveland, Cincinnati, Chicago, & St. Louis Railway Co. *v.* Wisehart, Ind. ; 67 Northeastern, 993.

[3] Curtis *v.* Eastern Railroad Co., 14 Allen, 55, 58; 98 Mass. 428.

[4] Bradley *v.* New York & New Haven R. R. Co., 21 Conn. 294, 309.

[5] McKeon *v.* New York, New Haven, & Hartford R. R. Co., 75 Conn. 343, 347; 53 Atlantic, 656; 189 U. S. 508.

are cut off from reasonable access to their premises, their injury is actionable.[1]

The owner of land abutting on a highway has an interest in the highway of a special and peculiar nature, which may well be considered as a part of his property. If it is his only means of communication with the rest of the world, its maintenance, and maintenance in such a condition that he can use it with reasonable convenience, is essential to the enjoyment of his land. If it is simply one of several means of communication, to discontinue or obstruct it, while it would not destroy, must necessarily depreciate his estate.[2] Changes of grade which have the effect of obstructing his use of it, if made to render the highway more serviceable to the public, are not actionable at common law. But if while made by the municipality, as in its exercise of its power to repair and maintain highways, it is made under any arrangement with a railroad company, as part of a scheme to improve a railroad which crosses the highway, the courts may look through the form to the substance of the transaction, and hold the company liable.[3]

A highway may be obstructed by an elevated railroad in such a manner as to give abutting proprietors a right of action, although the municipality owns the fee of the soil and has given its consent to the construction of the road.[4]

6. Changing Highway Grade.

If, however, a railroad company is compelled by law, in order to promote public safety and convenience, after the

[1] Putnam *v.* Boston & Providence R. R. Corporation, 182 Mass. 351; 65 Northeastern, 790.

[2] Cullen *v.* New York, New Haven, & Hartford R. R. Co., 66 Conn. 211, 226; 33 Atlantic, 910. See Chapters XVIII., Railroads on and along Highways, and XLI., Use of Highways.

[3] Burritt *v.* New Haven, 42 Conn. 174, 200. *Cf.* p. 110.

[4] Aldis *v.* Union Elevated R. R. Co., 203 Ill. 567; 68 Northeastern, 95.

construction of its road, to change the grade at a highway crossing, and in so doing to change the route of the highway, it is not liable for consequential damages to abutting proprietors, unless made so by statute, since it is acting not for its own benefit, but for that of the general public.[1] So if a railroad has been originally constructed through a subway, under a street, and to render this street more convenient for travel the State compels the elevation of the road above it by a viaduct, no further damages are due to the abutting landowners.[2] It is a change made by the State, for purposes of State, by an agent of the State.

7. Consequential Injuries.

If the construction of a railroad across navigable waters changes the course or force of currents so as to wash away banks or fill up low grounds to the prejudice of their owners, it is a case of *damnum absque injuria.* The State (or the State and the United States[3]) can regulate its navigable waters so as best to promote public convenience; and the construction of the road is a mode of such regulation.[4] The same thing is true if the railroad structure prevents a riparian proprietor altogether from participating in navigation. One public use has been substituted for another. His privilege was not a private one. As he shared it with the public, he must submit to its modification or withdrawal in the public interest.[5] A statutory liability to owners of land damaged will not support any action by one from whom no land has

[1] Newton *v.* New York, New Haven, & Hartford R. R. Co., 72 Conn. 420, 429; 44 Atlantic, 813.

[2] Muhlker *v.* New York & Harlem R. R. Co., 173 N. Y. 549; 66 Northeastern, 558.

[3] Montgomery *v.* Portland, 190 U. S. 89.

[4] Fitchburg R. R. Co. *v.* Boston & Maine Railroad, 3 Cush. 58, 88.

[5] Frost *v.* Washington County R. R. Co., 96 Me. 76; 51 Atlantic, 806; 59 L. R. A. 68.

been taken, for damages (though of a physical nature, such as the blackening of a house by soot) which are remote and consequential on the lawful exercise of the railroad franchise.[1] If the railroad be built on land taken from the person so damaged, any damages, although consequential, which would naturally follow from its construction would be considered in assessing his just compensation in the condemnation proceedings.[2]

8. Unlawful Exercise of Franchise.

But a franchise to construct and work a railroad is not lawfully exercised, unless whatever is done is done with reasonable regard to the rights of others. If, therefore, a railroad company chooses to put an engine house or repair shop in a place unnecessarily near to houses which the noises, smoke, smells, and gases incident to its use will render uncomfortable or untenantable, the owner of such a house will have a remedy in damages, and in a case of irreparable injury may have one by injunction.[3]

A telephone company has no right to claim compensation from an electric railroad company, the power used by which (if used and applied with reasonable skill and care) inter-

[1] Walker *v.* Old Colony & Newport Railway Co., 103 Mass. 10, 14; 4 Am. Rep. 509; Parrot *v.* Cincinnati, Hamilton, & Dayton R. R. Co., 10 Ohio St. 624; Struthers *v.* Dunkirk, Warren, & Pittsburgh Railway Co., 87 Pa. St. 282. *Contra*, Chicago, Milwaukee, & St. Paul Railway Co. *v.* Darke, 148 Ill. 226; 35 Northeastern, 750. But see this case explained in Aldrich *v.* Metropolitan West Side Elevated R. R. Co., 195 Ill. 456; 63 Northeastern, 155. *Cf.* Chapter IX., Acquisition of Land by Condemnation Proceedings.

[2] Ham *v.* Wisconsin, Iowa, & Nebraska Railway Co., 61 Iowa, 716; 17 Northwestern, 157; Bangor & Piscataquis R. R. Co. *v.* McComb, 60 Me. 290; Weyer *v.* Chicago, Wisconsin, & Northern R. R. Co., 68 Wis. 180; 31 Northwestern, 710.

[3] Baltimore & Potomac R. R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 331; Cogswell *v.* New York, New Haven, & Hartford R. R. Co., 103 N. Y. 10; 8 Northeastern, 537. See Chapter VII., The Making of a Location.

feres with the operation of the telephone wires. Whoever is granted a right to make a special use of a highway, takes it subject to the chance of subsequent grants to others of other rights, and to any consequential injuries so occasioned by the exercise of such rights without negligence.[1]

[1] Cumberland Telephone & Telegraph Co. *v.* United Electric Railway Co., 42 Federal, 273.

CHAPTER XII.

RIGHTS UNDER A RAILROAD LOCATION.

1. Fundamental Rights.

A LOCATION creates in the company a certain title to the land which it includes, as against all except the owners, and as to them a right to a title on tendering due compensation. It fastens a servitude upon the land and operates as an appropriation of it to railroad uses, conditioned only on the making of such payment.[1]

A railroad company has practically the same rights as respects the use for any railroad purpose of so much of its location as is not upon a highway, as if it owned all the lands within it in fee simple. This is required by the nature of its business. It is immaterial that it holds it or part of it under a mere conveyance or appropriation of the right of way.

2. The "Right of Way."

The primary meaning of the term "right of way," as used with reference to the estate of a railroad company, is the right

[1] Williamsport & North Branch Railway Co. *v.* Philadelphia & Erie R. R. Co., 141 Pa. St. 407; 21 Atlantic, 645; 12 L. R. A. 220.

to construct, maintain, and operate its railroad on a certain location. A secondary meaning is the land on which such location is made.[1]

Lands used for through railroads are largely owned in fee by the railroad company. Street railways, so far as they occupy streets, rarely have any title to the fee of the soil, — that remaining in the abutting proprietors or the public authorities, as the case may be. The interest of a railroad company in the location of a through railroad, when it acquires only a right of way and not a fee, cannot strictly be termed an "easement." There is no estate which can rank as the dominant tenement. It is an interest in the land.[2] This interest embraces every right reasonably necessary to accomplish the proper construction, maintenance, and operation of the railroad, considered as an entirety.

3. Timber and Gravel.

The company must keep the lines of sight clear on each side of its tracks, so that any obstruction to the passage of trains may be readily perceived by the engineer. Hence, and also to prevent danger of kindling fires by sparks from the locomotives, it must be at liberty to cut down whatever grows there.[3] Surplus stone and gravel on any part of the location may be used for construction or repairs on any other part of it, but cannot be disposed of to third parties.[4] Timber is governed by different rules. It does not, like stone and gravel, enter into the natural conditions which govern or affect the grade at which the road is to be constructed. When, therefore, the railroad company acquires only a right

[1] New Mexico *v.* United States Trust Co., 172 U. S. 171, 182.

[2] Boyce *v.* Missouri Pacific R. R. Co., 168 Mo. 583 ; 68 Southwestern, 920.

[3] Brainard *v.* Clapp, 10 Cush. 6, 12; 57 Am. Dec. 74.

[4] Aldrich *v.* Drury, 8 R. I. 554; 5 Am. Rep. 624.

of way, the owner of the fee remains the owner of any timber growing on the location.[1] He cannot enter to cut or remove it, if this would interfere with the proper operation or maintenance of the railroad. The railroad company can cut it down, whenever, in its judgment, this is necessary for the protection of its train service. But if the company cuts and removes it, it may be a conversion as to him, for which it must respond in damages.

Authority to construct and maintain a street railroad upon a highway includes authority to trim or remove trees standing on the highway, so far as may be necessary to secure the proper construction and maintenance of the railroad; and although such trees may be owned by private individuals, no compensation is due them. The acts of the company are all in furtherance of the purposes of the highway.[2]

4. Changing the Grade.

A railroad company may raise or lower its grades at its discretion from time to time, except so far as public restrictions may exist with regard to changing the level of highways. Such an elevation of grade may be made as to turn a railroad originally laid out as a surface railroad into an elevated one.[3]

That raising the natural grade of the land by the construction of a solid embankment hinders the flow of surface water from adjoining lands, gives their owner no action. The company was not bound to put in a culvert for his convenience. It would be otherwise if the location were on a ravine where, although it was usually dry, in certain seasons of the year

[1] Blake *v.* Rich, 34 N. H. 282.

[2] Miller *v.* Detroit, Ypsilanti, & Ann Arbor Railway, 125 Mich. 171; 84 Northwestern, 49; 84 Am. State, 569. See Chapter XVIII., Railroads on and along Highways.

[3] Kotz *v.* Illinois Central R. R. Co., 188 Ill. 578; 59 Northeastern, 240. *Cf.* p. 104.

there was generally a considerable though temporary rush of water.[1]

If a railroad is built on land adjoining a highway, on one side of it, owners of land on the opposite side are not "damaged," in the legal sense of that term, by the operation of the railroad, although it be built on a viaduct and run as an elevated railroad.[2]

5. Watercourses.

A railroad company may so straighten a watercourse which meanders through its location as to cut off one of the curves which extends into adjoining land. If this change was indicated in the location map, used on a hearing to assess compensation for taking the land, and the land was taken from him into whose other land such curve extended, he will be entitled to no further compensation; but it may be required in equity, if the diversion of the stream was not in some such way brought to the attention of those making the assessment, and was not a thing to be reasonably anticipated.[3]

The company may dig wells within its location for the supply of its engines, and if a neighboring well is thereby unintentionally drained, its owner is without remedy.[4] If his land was taken for the railroad without his consent, he has received full compensation for its enjoyment for all proper railroad uses, and a railroad needs a daily supply of water as much as a natural person. If he sold it by a voluntary bargain, the right to dig wells without accountability passed as an incident of a fee-simple estate. Interference with subter-

[1] Walker *v.* New Mexico & Southern Pacific R. R. Co., 165 U. S. 593, 605.

[2] Pennsylvania R. R. Co. *v.* Lippincott, 116 Pa. St. 472; 9 Atlantic, 871; 2 Am. State, 618; Aldrich *v.* Metropolitan West Side Elevated R. R. Co., 195 Ill. 456; 63 Northeastern, 155.

[3] Baltimore & Potomac R. R. Co. *v.* Magruder, 34 Md. 79; 6 Am. Rep. 310.

[4] Hougan *v.* Milwaukee & St. Paul Railway Co., 35 Iowa, 558; 2 Am. Railway Rep. 43; 14 Am. Rep. 502.

ranean springs is not actionable. If none of his land was taken, it is a case of *damnum absque injuria*.[1]

A through railroad company so far occupies the position of a riparian proprietor that it may feed its engines from a stream that is crossed by the railroad, and, if no appreciable damages result to lower riparian proprietors, without asking their consent or making them compensation.

6. Buildings on Location.

Any use of a railroad location permitted by the railroad company is proper, as against the owners of the fee in the soil, which reasonably serves, facilitates, or promotes the conveyance of persons or property over the road. It is a proper use to allow third parties to put up factory outbuildings upon it, outside the tracks, for use in receiving goods from and delivering goods to the railroad company,[2] or to license a private individual to build a railroad elevator on the location.[3] The business of elevating grain from and discharging it into railroad cars is, in the common course of business,[4] an incident of its transportation. The State can even authorize land within a railroad location to be taken, on making just compensation, for the construction of an elevator,[5] designed and adapted to serve public convenience; but it could not authorize it in favor of private persons for their private advantage.[6]

[1] A distinction has been suggested, but without much reason, between railroad companies and other landowners in this respect, on the ground that the former have only an easement or usufruct. Parker *v.* Boston & Maine Railroad, 3 Cush. 107; 50 Am. Dec. 709. But water is necessary to make the usufruct serviceable.

[2] Grand Trunk R. R. Co. *v.* Richardson, 91 U. S. 454, 469.

[3] Gurney *v.* Minneapolis Union Elevator Co., 63 Minn. 70; 65 Northwestern, 136; 30 L. R. A. 534.

[4] Budd *v.* New York, 143 U. S. 517, 545.

[5] Stewart *v.* Great Northern Railway, 65 Minn. 515; 68 Northwestern, 208.

[6] Missouri Pacific Railway Co. *v.* Nebraska, 164 U. S. 403, 417.

7. Grants of Trackage Rights.

It is a proper use to permit another railroad company to use the tracks, station houses, or other improvements on the location.[1] Such permission may entail serious responsibilities. The company granting it, if the safety of its own trains should be imperilled by the carelessness of the other company, may, under some circumstances, be liable to any person injured, as fully as if such carelessness had been its own.[2]

8. Exclusive Right of Occupation.

The company can exclude every one from its location who does not enter it as a highway traveller, or for some purpose connected with the business of the railroad. To that extent it can exercise all the rights of any absolute proprietor of land, unless the State otherwise provides.[3]

It must have the space between its tracks kept, so far as possible, exclusively for its own use, so as to avoid danger of collisions. Hence, if the fee of the soil is owned by another, who also owns the land on both sides of the location, he cannot be permitted to pass across it, unless this right has been specially reserved or conceded, or by virtue of a way of necessity.[4] A right to cross is regarded as conceded to him if the road has been built on a trestle so as to admit of crossing, and the company does not fence him out.[5] This,

[1] Miller *v.* Green Bay, Winona, & St. Paul R. R. Co., 59 Minn. 169; 60 Northwestern, 1006; 26 L. R. A. 443; Union Pacific Railway Co. *v.* Chicago, Rock Island, & Pacific Railway Co., 163 U. S. 564, 585.

[2] Murray *v.* Lehigh Valley R. R. Co., 66 Conn. 512, 519, 527; 34 Atlantic, 506; 32 L. R. A. 539.

[3] New York & New England R. R. Co. *v.* Comstock, 60 Conn. 200, 210; 22 Atlantic, 511; New York, New Haven, & Hartford R. R. Co. *v.* Scovill, 71 Conn. 136, 145; 41 Atlantic, 246; 71 Am. State, 159; 42 L. R. A. 157. *Cf.* p. 108.

[4] See Chapter XVI., Farm Crossings and Ways of Necessity.

[5] Kansas Central Railway Co. *v.* Allen, 22 Kans. 285; 31 Am. Rep. 190.

however, it may do, if it deems it necessary for the proper protection of its road, even if the crossing has been used under a claim of right for twenty years.[1] The remedy of the party so using it, if any, would be for damages.

No easement for a way, as against a railroad company, can be acquired by third parties or the public by user over land taken for the railroad by condemnation proceedings. As the company, having taken the land for railroad purposes, could not grant a right of way for any other purpose, none can be claimed by prescription; for where a grant was impossible, no lost grant can be inferred. A grant of such a way, however, by the railroad company and the owner of the fee would be valid. He would then create a new right, and the company would assent to this abridgment of its title.

9. Adverse Possession.

Statutes are common which provide that no title by adverse possession can be acquired to lands within a railroad location. Such laws are not assailable as grants of special privileges to a favored class: they are strictly in support of a public purpose, in keeping a highway free from encroachments.[2] In the absence of such a statute, the same result logically follows from the principles of the common law. A through railroad being a highway, it is no more subject to diminution by the adverse possession of a wrongdoer than a highway of the ordinary sort; and this is true in respect to the entire location, provided tracks have been laid upon any part of it, and are in use.[3]

[1] But see Turner *v.* Fitchburg R. R. Co., 145 Mass. 433; 14 Northeastern, 627; Housatonic R. R. Co. *v.* Waterbury, 23 Conn. 101, 109.

[2] Drouin *v.* Boston & Maine Railroad, 74 Vt. 343; 52 Atlantic, 957.

[3] Southern Pacific Co. *v.* Hyatt, 132 Calif. 240, 244; 64 Pacific, 272; 54 L. R. A. 522. *Contra*, Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Co. *v.* Stickley, 155 Ind. 312; 58 Northeastern, 192; Northern Pacific Railway Co. *v.* Ely, 25 Wash. 384; 65 Pacific, 555; 54 L. R. A. 526; 87 Am. State, 766.

10. Entry from Necessity.

In certain cases of emergency, an entry on a railroad location and its temporary occupancy by those having no relations with the railroad company may be lawful. Such a case would be presented should a building on neighboring land be on fire, and it were reasonably necessary to cross the location in order to assist in putting out the conflagration. If in such case a hose be laid across the tracks, trains must be run with reasonable regard to avoiding injury to it.[1]

11. Sales and Leases.

The right of the company, though substantially equivalent to proprietorship as to the use of the location, is limited to such a use. If it finds after its road is built that it has taken under the power of eminent domain more land than it needs, it cannot sell the surplus, even to another railroad company, unless as a part of a general conveyance of its franchises and property.[2] If it does, while the original owner, if he has stood by and seen the purchasing company construct a railroad on it without a protest, may be estopped from reclaiming it, he will be entitled to recover the value of the land so sold.[3] So if the location, besides its use for railroad purposes, be used also by the railroad company, or with its consent, for other purposes, the owner of the fee can sue for the mesne profits thus realized.[4]

12. Telegraph Lines.

A telegraph line may be constructed on a railroad location without making any additional compensation to the owner of

[1] Metallic Compression Casting Co. *v.* Fitchburg R. R. Co., 109 Mass. 277, 280; 12 Am. Rep. 689.

[2] Platt *v.* Pennsylvania Co., 43 Ohio St. 228; 1 Northeastern, 420.

[3] Pennsylvania Co. *v.* Platt, 47 Ohio St. 366; 25 Northeastern, 1028.

[4] Proprietors *v.* Nashua & Lowell R. R. Co., 104 Mass. 1; 6 Am. Rep. 181.

the fee. If it subserves the uses of the railroad, it becomes an incident to it. If it does not subserve such uses, it is still a method of public use for facilitating public intercourse; and while the railroad company may claim compensation for any damage it may suffer, none that is legally appreciable can be inflicted on the owner of the soil.[1] The State may, on terms of proper compensation, subject a railroad location, without the assent of the railroad company, to independent burdens, in favor of any party, which serve a public interest. Telegraph companies having no connection with railroad business may thus be authorized to construct their lines along a railroad, on paying such a sum as will equal the resulting decrease in the value of the railroad location for railroad purposes.[2] They may also acquire such authority by contract with the railroad company, but, unless by virtue of special legislative authority, not an exclusive right.[3]

13. Appropriation for Municipal Purposes.

Land subject to a railroad location may be taken by authority of the State, under the right of eminent domain, for any municipal purpose not inconsistent with its beneficial use for railroad purposes; as by a municipality for a highway crossing,[4] or for a drain laid parallel to the tracks, but not interfering with them.[5] It cannot be so taken for exclusive

[1] Phillips *v.* Postal Telegraph-Cable Co., 131 N. C. 225; 42 Southeastern, 587.

[2] Cleveland, Cincinnati, Chicago, & St. Louis Railway Co. *v.* Ohio Postal Telegraph-Cable Co., 68 Ohio St. 306; 67 Northeastern, 890; Ft. Worth & Rio Grande Railway Co. *v.* Southwestern Telegraph & Telephone Co., 96 Tex. ; 71 Southwestern, 270; 60 L. R. A. 145.

[3] Pacific Postal Telegraph Cable Co. *v.* Western Union Telegraph Co., 50 Federal, 493 ; 50 Am. & Eng. R. R. Cases, 665.

[4] Gold *v.* Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Co., 153 Ind. 232; 53 Northeastern, 285.

[5] Baltimore & Ohio Southwestern Railway Co. *v.* Board of Commissioners, 156 Ind. 260; 58 Northeastern, 837.

occupancy for street purposes, unless by a clear grant of authority: general power to lay out streets and appropriate land therefor will not suffice.[1]

14. More Land taken than is Needed.

In appropriating or purchasing land for depot sites or other railway purposes, railroad companies have a large discretion as to the amount required and the uses to which it is necessary to put it. Although they may take the title to more than might seem to a jury necessary for their purposes, this does not prevent their holding the whole, nor does it expose any part of it to levy on execution by their creditors. Should, however, this discretion be abused so far as to evince bad faith or utter recklessness or incompetency, equity would interfere for the protection of the landowner or the stockholders.[2]

15. Abandonment.

Long-continued non-user of part of a railroad is not, as matter of law, an abandonment of the right to maintain and operate it, but it is evidence from which an abandonment might be inferred.[3] On an abandonment of all or part of a railroad location, if the title of the railroad company was simply an easement, the land becomes again the absolute property of the owner of the fee. The company, however, can remove any railroad structures which it has placed upon it. Even if they be stone piers on deep foundations, they have not become incorporated into the freehold, for they

[1] City of Valparaiso *v.* Chicago & Grand Trunk Railway Co., 123 Ind. 467; 24 Northeastern, 249.

[2] Hill *v.* Western Vermont R. R. Co., 32 Vt. 68; 1 Redfield's Am. Railway Cases, 253.

[3] Townsend *v.* Michigan Central R. R. Co., 101 Federal, 757; 42 C. C. A. 570, 574.

were erected purely for railroad purposes. The company's right to abandon its road involved the right to remove these structures which were built as a part of it.[1]

[1] Wagner *v.* Cleveland & Toledo R. R. Co., 22 Ohio St. 563; 10 Am. Rep. 770.

CHAPTER XIII.

RAILROAD CONSTRUCTION.

1. Want of Due Care.

DUE care in the mode and methods of construction is required both as respects those who are to use the railroad and those owners of adjoining or neighboring real estate whose interests may be injuriously affected.

Reasonable care must be exercised to make the railroad a safe one for the servants who are to work upon it, and extraordinary care to make it safe for passengers riding over it.[1]

Railroad companies, however, do not insure the safety even of passengers. Thus a company would not be chargeable with negligence in laying double tracks so near to each other that it would be possible for a passenger swinging himself out as far as he could from the steps or running board of a car upon one to come in collision with a car moving on the other.[2] Nor is it bound to build its depot platforms so near the tracks that it would be impossible for a passenger, by a misstep, to

[1] See Chapters XXVII., Negligence in Operation; XXVIII., Servants; XXXII., Carriage of Passengers.

[2] Craighead *v.* Brooklyn City R. R. Co., 123 N. Y. 391; 25 Northeastern, 387.

fall between them and the car.[1] It is not bound to all conceivable care in construction, nor such as will render transportation over its tracks free from any possible peril. To ask that would drive it out of business.[2]

That the mode of construction has been approved by the proper public authorities to whom the law confided that duty will not excuse the railroad company to passengers injured by faults of construction which it could have avoided by the exercise of proper care. Such approval may relieve it from liability to public prosecution, but cannot justify its operation of a road which it has not taken the requisite amount of care to render safe for travel.[3]

When land within its location is acquired by a railroad company, whether by condemnation proceedings or voluntary conveyance, the fact that it is within its location warrants the construction of a railroad upon it, without liability to the former owner for any damages to adjoining or neighboring land incident to its constructing it on the land acquired in a reasonably careful and skilful manner.[4]

If a cut be made close to the edge of the land, the company does not use reasonable care and skill, unless it shores up the side of the excavation so as to prevent the soil of the adjoining proprietor from falling in by its own weight. This simply puts upon it the burden attaching to all proprietors of land who dig a cellar in it; and its rights are, if anything, less than theirs, for it holds its location for a special use. Railroad companies, like other landowners, must use their rights so as not to injure others.[5] If the weight of the railroad structure

[1] Lafflin *v.* Buffalo & Southwestern R. R. Co., 106 N. Y. 136; 12 Northeastern, 599; 60 Am. Rep. 433.

[2] Indianapolis & St. Louis R. R. Co. *v.* Horst, 93 U. S. 291.

[3] Baltimore & Yorktown Turnpike Road *v.* Leonhardt, 66 Md. 70; 5 Atlantic, 346.

[4] Spencer *v.* Hartford, Providence, & Fishkill R. R. Co., 10 R. I. 14.

[5] Bradley *v.* New York & New Haven R. R. Co., 21 Conn. 294, 312; Richardson *v.* Vermont Central R. R. Co., 25 Vt. 465; 60 Am. Dec.

forces the soil beneath it into and under the adjacent land, so as to upheave it, or do other damage, the company is also liable, because now it is not confining its works to its location, but actually occupying land outside of it. It is immaterial that the land so occupied is under the surface, and that its occupation is a natural consequence of what would otherwise be a lawful act. It is not lawful, unless it be done with due regard to the rights of others. These could be protected by a retaining wall. If it chooses to omit that precaution, it must suffer the consequences, rather than they.[1]

2. Sic utere tuo, ut alienum non lædas.

Nor can the various structures properly appurtenant to a railroad be placed, as of course, indifferently at any points on the line, without regard to the inconvenience that may thus result to adjoining proprietors. It is a lawful act for the company to erect a repair shop at a proper place within its location. It would be an unlawful act, so far as concerns a liability for resulting damages, to erect it at a place where it would naturally work special annoyance and injury to the occupants of adjacent territory.[2] If a street railroad company, without the power of eminent domain, buys land for a power house, it must, at its peril, select a site where it will not cause such annoyance and injury to adjoining proprietors.[3]

283; McCullough *v.* St. Paul, Minneapolis, & Manitoba Railway Co., 52 Minn. 12, 17; 53 Northwestern, 802; Mosier *v.* Oregon Navigation Co., 39 Or. 256; 64 Pacific, 453; 87 Am. State, 652; 21 Am. & Eng. R. R. Cases, 508. *Contra*, Hortsman *v.* Covington & Lexington R. R. Co., 18 B. Monr. 218; Boothby *v.* Androscoggin & Kennebec R. R. Co., 51 Me. 318. See Chapter XII., Rights under a Railroad Location.

[1] Roushlange *v.* Chicago & Atlantic Railway Co., 115 Ind. 106; 17 Northeastern, 198; Costigan *v.* Pennsylvania R. R. Co., 54 N. J. Law, 233; 23 Atlantic, 810.

[2] Baltimore & Potomac R. R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 329. See Chapter VII., The Making of a Location.

[3] Rogers *v.* Philadelphia Traction Co., 182 Pa. St. 473; 38 Atlantic, 399; 61 Am. State, 716. See Chapter IX., Acquisition of Land by Condemnation Proceedings.

3. Surface Water.

A railroad company is under no liability for constructing the railroad at such a grade as to intercept the natural descent of surface water, and pond it on the adjoining land. If it owns the fee, it stands in this respect like any other proprietor.[1] If it owns only a right of way, and so keeps the water on land of the party from whom the right of way was acquired, it has the same right, if such a mode of construction was a reasonable and proper one; for he should have foreseen it when the location was made.[2] If the water is so kept on the land of a third party, he cannot recover damages; for as to him the company occupies the place and has the rights of the owner of the fee.

4. Construction Contracts.[3]

Railroads are commonly constructed by parties contracting with the company for that purpose, and who work under plans and specifications prepared by the chief engineer of the company and having its approval. The contract generally provides that it must be performed in all respects to the satisfaction of the engineer. Such a provision is effectual as to both parties, and if he be dissatisfied, the contract price cannot be recovered, unless such dissatisfaction be merly capricious or colorable.[4] Terms and conditions of a contract for constructing a railroad which might be deemed too oppressive and unjust to be enforced, if found in an ordinary building contract, may be upheld because of the nature of the work

[1] O'Connor *v.* Fond du Lac, Amboy, & Peoria Railway Co., 52 Wis. 526; 9 Northwestern, 287; 38 Am. Rep. 753.

[2] *Contra*, Drake *v.* Chicago, Rock Island, & Pacific Railway Co., 63 Iowa, 302; 19 Northwestern, 215; 50 Am. Rep. 746.

[3] See Appendix III.

[4] Williams *v.* Chicago, Santa Fé, & California Railway Co., 153 Mo. 487; 54 Southwestern, 689; Martinsburg & Potomac R. R. Co. *v.* March, 114 U. S. 549, 553; Chicago, Santa Fé, & California R. R. Co. *v.* Price, 138 U. S. 185, 195.

and the public interests involved. It is necessary that railroads should be built safely and yet with expedition. Provisions for annulling a contract, if the company's engineer is dissatisfied with the manner in which it is performed, are therefore not improper. The parties make him in a sense an arbitrator between them, notwithstanding his known and obvious interest in favor of his employer.[1] It has been held that he occupies so far a judicial position that, before making a decision on such matters as estimates and measurements, the contractor should have notice and an opportunity to be heard.[2] This seems to push the analogy of arbitration too far, in view of the peculiar nature of construction contracts for such great works, and the special reasons for their speedy execution.

It is a common provision in such contracts that a certain percentage of the contract price, such as ten or fifteen per cent, shall be kept back by the railroad company until the completion of the job, and that if that is not completed satisfactorily in all respects, this percentage shall be permanently retained by the company as liquidated damages. Such a provision is effectual as against the contractor.[3]

Construction contracts generally fix the prices to be paid for the various kinds of work to be done, and are based on specifications and estimates of the company's engineer as to how much, approximately, there will be of each kind. The profit of the contractor will be largely dependent on the accuracy of these estimates. He may obtain the contract, as the lowest bidder, by making a low price for a kind of work of which the estimates indicated that little will be required, in the expectation of profit from a relatively higher price which he may name for that of another kind. The con-

[1] Faunce *v.* Burke, 16 Pa. St. 469; 55 Am. Dec. 519.

[2] McMahon *v.* New York & Erie R. R. Co., 20 N. Y. 463, 467.

[3] Geiger *v.* Western Maryland R. R. Co., 41 Md. 4; 7 Am. Railway Rep. 434.

tract, however, always requires him to do whatever work of any of the kinds specified may in fact prove necessary, and makes the decision of the engineer as to this necessity, given from time to time as the work progresses, final and conclusive. Here again the engineer's decision will have the effect thus stipulated, if he acts in good faith, and no fraud or concealment was used. The contractor could have examined the ground for himself and made his own estimates, before signing the contract. If he chose to accept those made by the engineer, and also to agree that they might be varied thereafter by the same authority, he is bound by his bargain.[1] The same rule applies where it is left by the contract to the engineer to decide what material encountered in the progress of construction is to be classed as gravel, or what as hard pan.[2]

Construction contracts are to be construed with regard to the object to be accomplished. A contract to construct the roadbed between two towns means the roadbed between the terminal points within those towns respectively.[3] A contract for a lump sum to build and furnish a completed single-track railroad, ready for the operation of trains, implies the construction of such side tracks, turntables, and Y's[4] as are reasonably necessary for the operation of trains in a safe and convenient manner.[5]

Construction contracts frequently stipulate for payment, in whole or part, in the stock or bonds of the company at par. This, if fairly done, is lawful, and the stock can be issued to the contractor as full paid, although paid only by

[1] Cannon *v.* Wildman, 28 Conn. 472; Baltimore & Ohio R. R. Co. *v.* Polly, Woods, & Co., 14 Gratt. 447; Chicago, Santa Fé, & California R. R. Co. *v.* Price, 138 U. S. 185.

[2] Williams *v.* Chicago, Santa Fé, & California Railway Co., 153 Mo. 487, 533; 54 Southwestern, 689.

[3] Western Union R. R. Co. *v.* Smith, 75 Ill. 496, 502.

[4] See *post*, p. 144, and Chapter XV., Railroads crossing other Railroads.

[5] Central Trust Co. *v.* Condon, 67 Federal, 84; 14 C. C. A. 314; 31 U. S. App. 387.

such construction work the contract price for which was, to the knowledge of the company, made higher than it would have been had it been payable in cash.[1] If under such a contract the company fails to tender the securities when due and demanded, it loses its right to pay in that manner, but is only liable to the extent of the market value of the shares or bonds.[2]

5. **Independent Contractors; Duties incapable of Delegation.**

The governing law may impose certain duties upon the railroad company, with reference to the construction of its road which it cannot delegate, or for the due performance of which it must remain absolutely responsible to any person injured.[3] But except in respect to such matters it can let out construction work to others, on the ordinary footing of an independent contractor, and then for actionable injuries to third parties not under a contract relation with it, occurring during the construction, the contractor and not the company is liable, unless they were the natural result of performing the contract with due care.[4] In that case, both the company and the contractor are liable. But in any other, as the injury must have come from the wrongful act or negligence of the contractor, he is properly held for it, and the company is not chargeable, because it was due to the independent act or omission of another.[5] That the company owns the land on

[1] Fogg *v.* Blair, 139 U. S. 118, 125; Clark *v.* Bever, 139 U. S. 96; 31 Federal, 670.

[2] Cleveland & Pittsburgh R. R. Co. *v.* Kelley, 5 Ohio St. 180; Central Trust Co. *v.* Richmond, Nicholasville, Irvine, & Beattyville R. R. Co., 31 U. S. App. 675; 68 Federal, 90; 15 C. C. A. 273; 41 L. R. A. 458.

[3] Woodman *v.* Metropolitan R. R. Co., 149 Mass. 335; 21 Northeastern, 482; 4 L. R. A. 213; 14 Am. State, 427.

[4] Sanford *v.* Pawtucket Street Railway Co., 19 R. I. 537; 35 Atlantic, 67; 33 L. R. A. 564; Cuff *v.* Newark & New York R. R. Co., 35 N. J. Law, 17; 10 Am. Rep. 205.

[5] McCafferty *v.* Spuyten Duyvil & Port Morris R. R. Co., 61 N. Y. 178; 19 Am. Rep. 267; Eaton *v.* European & North American Railway Co., 59

which the wrong was done, and that the wrong occurred in the course of making an improvement on the land for the company's benefit, is immaterial. It did not do the wrong, nor do anything of which the wrong was a natural consequence or the injury a natural incident.[1]

But if in changing a highway for the benefit of a railroad company, a contractor should carelessly leave obstructions or excavations in the highway so unguarded as to make them the cause of injury to a highway traveller, the company may be liable to the latter, not on the ground of *respondeat superior*, but on that of an absolute duty to use due care in keeping the highway safe for travel, so far as it may have been left open for travel. Such a duty is implied in the grant to it of power to alter the highway. The State had previously committed to some public agency the duty of using due care to keep the highway safe for use. In temporarily displacing this public agency, it simply transferred the duty, for the time being, to the railroad company. The company could close the highway so long as might be necessary to enable it to make the changes desired, but if it allowed it to be kept open at a point which the work prosecuted for its benefit made dangerous, it was bound that due care should be used to prevent accidents arising from the danger.[2]

As regards passengers, the contract relation with them having thrown upon the company a common-law duty to use extraordinary care for their safety, it is liable for injuries to them while on a train or car which it runs near a place

Me. 520; 8 Am. Rep. 430. *Contra*, Stone *v.* Cheshire R. R. Corporation, 19 N. H. 427; 51 Am. Dec. 192; Lowell *v.* Boston & Lowell Railroad Corporation, 23 Pick. 24; 1 Am. Railway Cases, 284; 34 Am. Dec. 33.

[1] King *v.* New York Central & Hudson River R. R. Co., 66 N. Y. 181; 23 Am. Rep. 37.

[2] Deming *v.* Terminal Railway of Buffalo, 169 N. Y. 1; 61 Northeastern, 983; 88 Am. State, 521.

where dangerous work is being done for its benefit, from the doing of which, though by the negligence of an independent contractor, such injuries result.[1] The breach of duty on the part of the company here consists not alone in putting the passenger in a place of danger, but in leaving his safety, while doing so, in the hands of a third party, when it might itself have done the work of construction, and taken proper precautions to have it safely done. If it could not have done it itself, because the law forbade that, and if nevertheless it was work which the law required to be done, supplying its own agencies for the purpose, the company would not be liable, provided the passenger had notice of the risk he ran in taking the train or car.[2]

6. Injuries to the Former Owner of the Soil; Direct Damages.

Damages to the owner of the soil covered by the location, which are the necessary result of the construction of the railroad and are received in the course of its construction, are considered to have been paid for in advance, by the compensation made for the title obtained from him. Where the company was liable to pay and has paid damages for constructing its road to landowners from whom it acquired no title, the same principle applies. The immunity of a railroad company in such cases from suit for direct damages necessarily inflicted during the work of construction has also, but less satisfactorily, been considered as flowing from the principle that the exercise, with due care, of a franchise granted by the State can found no action for an injury thereby done.[3] Such a franchise

[1] Carrico *v.* West Virginia Central & Pittsburgh Railway Co., 39 W. Va. 86; 19 Southeastern, 571; 24 L. R. A. 50.

[2] New York, New Haven, & Hartford R. R. Co. *v.* Baker, 98 Federal, 694; 39 C. C. A. 237; 50 L. R. A. 201.

[3] Hortsman *v.* Covington & Lexington R. R. Co., 18 B. Monr. 218; Boothby *v.* Androscoggin & Kennebec R. R. Co., 51 Me. 318.

is a protection against the State, but cannot be as against third parties, if the act complained of is a direct infringement of their property rights, such as amounts to a taking of property.

7. Consequential Damages.

For merely consequential damages arising from the construction of a railroad in a proper manner neither the company nor the contractor, if there be one, is liable to the party injured. The franchise to construct the road, in giving the authority of the law for the work done, carried also here the protection of the law. The work of construction being lawful, if properly done, no legal right of any one could be violated by consequential injuries unless it were improperly done.[1] The only protection of the owner of property not taken or appropriated by the company, which may be subjected to hazard of consequential injury, is in the care and skill required of those engaged in the execution of the work.[2]

8. Nuisances.

Notwithstanding the possession of the franchise, for damages flowing directly and necessarily from what is done by the company or its contractor, compensation must be made to any who have not received it already.[3] No owner of lands can maintain a nuisance upon it, or permit its use by another for such a purpose, without incurring responsibilities to a party annoyed. Thus blasting, though carefully done, which naturally results in throwing stones outside of the railroad location, gives an action to such a party injured. Throwing these

[1] Bellinger *v.* New York Central Railroad, 23 N. Y. 42; Atwater *v.* Trustees, 124 N. Y. 602; 27 Northeastern, 385.

[2] Booth *v.* Rome, Watertown, & Ogdensburg Terminal R. R. Co., 140 N. Y. 267; 35 Northeastern, 592; 24 L. R. A. 105; 37 Am. State, 552.

[3] Watts *v.* Norfolk & Western R. R. Co., 39 W. Va. 196; 19 Southeastern, 521; 45 Am. State, 894; 23 L. R. A. 674.

stones is a direct act of trespass upon the rights of the adjoining proprietor.[1]

Wherever blasting is necessary, it must be done with due regard to the safety of persons and property. The blasts should be covered, or else ample notice given to those who may be endangered by the explosion. If they can be covered at a reasonable expense, and are not, the contractor would be liable for time lost by those living in the vicinity whom he warns to withdraw, and who comply with the warning.[2] All material thrown upon adjoining land by a blast must also be removed within a reasonable time at the cost of the party setting the blast.[3]

9. Trespasses.

If the company begins to construct its road on land which it has not acquired, nor obtained leave to occupy, the owner can have a remedy either in trespass or by injunction. But an injunction will not be granted if he be guilty of laches in applying for it, and the company offer to pay the value of the land. In such a case he will either be left to his remedy at law, or an injunction will be granted, unless within a reasonable time the company acquires title by condemnation proceedings.[4]

An action of ejectment may also be barred by such acquiescence in building its road as, in effect, has made the entry and occupation lawful.[5] Mere forbearance to sue is not ac-

[1] St. Peter *v.* Denison, 58 N. Y. 416; 17 Am. Rep. 258; Hay *v.* Cohoes Co., 2 N. Y. 159; 51 Am. Dec., 279; approved in Booth *v.* Rome, Watertown, & Ogdensburg Terminal R. R. Co., 140 N. Y. 267; 35 Northeastern, 592; 37 Am. State, 552; 24 L. R. A. 105.

[2] Blackwell *v.* Lynchburg & Durham R. R. Co., 111 N. C. 151; 16 Southeastern, 12; 32 Am. State, 786; Hunter *v.* Farren, 127 Mass. 481; 34 Am. Rep. 423.

[3] Watts *v.* Norfolk & Western R. R. Co., 39 W. Va. 196; 19 Southeastern, 521; 45 Am. St. 894; 23 L. R. A. 674.

[4] Harrington *v.* St. Paul & Sioux City R. R. Co., 17 Minn. 215; 4 Am. Railway Rep. 216.

[5] McAuley *v.* Western Vermont R. R. Co., 33 Vt. 311; 78 Am. Dec. 627.

quiescence in an unlawful construction of the road, and if accompanied by objection and protest may, however long continued, be no answer to a petition for an injunction.[1]

10. Duty to Servants.

In determining whether a railroad has been so constructed and equipped as to fulfil the duty every employer owes to his servants to use reasonable care to provide them with reasonably safe places and appliances for their work, the usual manner of constructing and equipping railroads of a similar kind is a fair test; and this, as to many of its features, is a proper subject of judicial notice.[2]

11. Bookkeeping; Construction Account.

The construction account on a railroad company's books is never closed. No road is so well built that it cannot be improved, and moneys laid out for permanent improvements and enlargements may properly be charged to the expense of construction.[3] The amount expended in construction is often made by statute a matter of importance, as affording a basis for the issue of bonds, or of taxation. What this amount is will often depend much on the view with which the company's accounts are made up, especially after the road has gone into operation. No exact line can be drawn between expenditures for the maintenance of a railroad, and those for its construction. Should a wooden bridge be replaced by one of stone or iron, it would be a plain betterment. In the case of a road in strong financial condition, the additional cost of such a new

[1] Young *v.* Chicago & Northwestern Railway Co., 28 Wis. 171; 5 Am. Railway Rep. 159.

[2] Pahlan *v.* Detroit, Grand Haven, & Milwaukee Railway Co., 122 Mich. 232; 81 Northwestern, 103. See Chapter XXVIII., Servants.

[3] Union Pacific R. R. Co. *v.* United States, 99 U. S. 402, 420.

stone or iron bridge over a new wooden one like the old would probably be charged to operating expenses: by a company desirous to swell its construction account, it would be put into that. Either course would be legitimate.[1]

[1] Hartford & New Haven R. R. Co. *v.* Grant, 9 Blatch. 542, 545.

CHAPTER XIV.

CONSTRUCTION OF HIGHWAY CROSSINGS.

1. Fixing the Grade.

When a railroad location intersects highways the railroad may be constructed across them at grade, unless this is forbidden by law or, if there be a statutory mode of review, disapproved by the proper public authority.[1] While grade crossings, in case of through railroads or of any railroads on which cars are run at a high rate of speed, are always sources of public danger, it has been found a practical necessity to allow them in sparsely settled communities, and often in those that are thickly populated, in view of the expense that would otherwise be necessary. Courts, however, when given a power of decision, rarely approve them in communities of the latter description.[2] The manner of crossing, whether at, over, or under grade should be explicitly indicated in the location papers.[3]

[1] Johnston *v.* Providence & Springfield Railroad, 10 R. I. 365.

[2] Pennsylvania R. R. Co. *v.* Braddock Electric Railway Co., 152 Pa. St. 116; 25 Atlantic, 780. See New York & New England Railroad Company's Appeal, 62 Conn. 527, 540; 26 Atlantic, 122; affirmed, 151 U. S. 556.

[3] See Appendix II., and Chapter VII., The Making of a Location.

2. Compensation.

Where the fee of the highway is in the public, no compensation is due from the railroad company for occupying it for a crossing. Where it is owned by private parties, compensation is due, except from street railroads. These are a proper mode of using the land for highway purposes.[1]

3. Reconstruction.

The approval of a location embracing such a crossing, and the construction of the railroad accordingly, do not necessarily involve its permanent maintenance as so constructed. Under the police power of the State the company may be required to reconstruct it on a different plan. The mode of crossing may be thus changed from one above the grade of the highway by means of a railway bridge, to one below the grade of the highway by means of a new highway bridge, or *vice versa*.[2] Similar changes may be made by a railroad company of its own motion, if they constitute a proper method of keeping the highway safe and convenient for the public, and this is its general statutory duty.[3] Such alterations may be required of the company by the State, or if it has committed such a power to the municipality, by that; and in either of these cases may even extend to requiring a grade crossing instead of an over or under crossing.[4]

4. Change of Grade of Highway.

If the grade of a highway is altered at a railroad crossing for the sole benefit of the railroad, and access to the lots of adjoining proprietors thereby barred or obstructed, they are entitled to compensation. If such a change of grade is part

[1] See Chapter I., What Railroads are.
[2] New York & New England R. R. Co. *v.* Bristol, 151 U. S. 556, 567.
[3] Central R. R. Co. of New Jersey *v.* State, 32 N. J. Law, 220.
[4] Wabash R. R. Co. *v.* Defiance, 167 U. S. 88.

of the original work of constructing the railroad, their property is then damaged and their right then accrues. If, on the other hand, it was not made then, and could not then have reasonably been anticipated, their right of action accrues whenever it is made. The common-law right of a municipality charged with the maintenance of highways to make changes in grade from time to time to promote public convenience, at discretion, does not protect the railroad company if it makes them to promote public convenience at its discretion. Nor does the common-law right of the railroad company to alter the grade of its railroad at discretion protect it in altering the grade of a highway crossed by the railroad. The dominant use of the highway is for ordinary travel, and the railroad use must be kept in subordination to that.[1]

5. Approval of Plan of Construction.

The law often leaves it to some public authority, like a Board of Railroad Commissioners, to decide in behalf of the State, once for all, whether a highway crossing is properly constructed. In such case a decision so made is final, and if an accident occurs by reason of what is claimed to have been a defect in the railroad structure at the crossing, and the decision was that the structure was a proper one, when there has been no change of circumstances since it was rendered, the party injured cannot recover.[2]

[1] Burritt *v.* New Haven, 42 Conn. 174; Willamette Iron Works *v.* Oregon Railway & Navigation Co., 26 Or. 224; 37 Pacific, 1016; 46 Am. State, 620; 29 L. R. A. 88. *Contra*, Conklin *v.* New York, Ontario, & Western Railway Co., 102 N. Y. 107; 6 Northeastern, 663. Some courts are disposed to deny a remedy unless the railroad company is liable by law to make compensation for all property damaged, as well as for all property taken. Parker *v.* Boston & Maine Railroad, 3 Cush. 107; 1 Am. Railway Cases, 547; 50 Am. Dec. 709.

[2] Waterbury *v.* Hartford, Providence, & Fishkill R. R. Co., 27 Conn. 146, 154.

6. Municipal Liability.

If the railroad is so constructed at the crossing, whether at, above, or below the grade of the highway, as to render the highway unsafe, and a traveller is thereby injured, the municipality bound to maintain the highway, if liable for injuries from defects in it, will be liable to him, provided it had the right to alter or remove the railroad structure; otherwise not.[1]

7. Maintenance of Highway.

The legislature may, if it thinks proper, impose the entire expense of maintaining so much of a highway as is within the location of a railroad on the railroad company.[2] It may increase the burden of the company in any such respect, from time to time, beyond that originally imposed by law, so far as may be reasonably necessary to promote public safety and convenience.[3]

8. Additional Tracks.

Although when the crossing was originally made but a single track was laid, if no permanent restriction against laying more was then imposed, more may be laid from time to time, as the necessities of the railroad may require.[4]

9. New Highways across Railroads.

A new highway may always be laid out across the tracks of an existing railroad.[5] For the effect of this upon the value of its franchise or the prosecution of its business the railroad

[1] Davis *v.* Leominster, 1 Allen, 182.

[2] Boston & Maine R. R. Co. *v.* County Commissioners, 79 Me. 386; 10 Atlantic, 113; 32 Am. & Eng. R. R. Cases, 271.

[3] Clarendon *v.* Rutland R. R. Co., 75 Vt. ; 52 Atlantic, 1057.

[4] Commonwealth *v.* Hartford & New Haven R. R. Co., 14 Gray, 379.

[5] Gold *v.* Pittsburg, Cincinnati, Chicago, & St. Louis Railway Co., 153 Ind. 232; 53 Northeastern, 285.

company can claim no damages.[1] While it must of necessity increase the difficulties of its train service, this is *damnum absque injuria.* The land at the crossing was previously subject to a public use for a certain kind of highway. It is now also subjected to a public use for another kind of highway, not inconsistent with the former use.[2] If, however, the crossing makes structural changes in the railroad necessary, compensation must be made for the cost of these.[3] So if it is made over land acquired or improved as a site for stations, turntables, water tanks, engine houses, power houses, or similar constructions, compensation is due.[4]

Compensation must include the amount of any expenses necessarily required to secure public safety and convenience at all railroad crossings, under existing laws, such as the construction and maintenance of warning boards, planking at the crossing, or cattle guards.[5] But it does not cover possible future expenses to which the company may be put by future laws or orders made by public authority in respect to the particular crossing, for the further security of the public, such as for the erection and maintenance of gates, flagmen, or electric signals.[6]

[1] Chicago, Burlington, & Quincy R. R. Co. *v.* Chicago, 166 U. S. 226.

[2] Albany Northern R. R. Co. *v.* Brownell, 24 N. Y. 345. Some courts take a different view, and require compensation for the decrease in the value of the use of the land at the crossing for railroad purposes.

[3] Mayor *v.* Cowen, 88 Md. 447; 41 Atlantic, 900; 71 Am. State, 433; Chicago, Milwaukee, & St. Paul Railway Co. *v.* Milwaukee, 97 Wis. 418; 72 Northwestern, 1118; Cincinnati, Hamilton, & Dayton Railway Co. *v.* Troy, Ohio St. ; 67 Northeastern, 1051.

[4] Portland & Rochester R. R. Co. *v.* Deering, 78 Me. 61; 2 Atlantic, 670; 57 Am. Rep. 784; 23 Am. & Eng. R. R. Cases, 51; Chicago, Burlington, & Quincy R. R. Co. *v.* Chicago, 166 U. S. 226; Chicago, Milwaukee, & St. Paul Railway Co. *v.* Milwaukee, 97 Wis. 418; 72 Northwestern, 1118.

[5] Old Colony & Fall River R. R. Co. *v.* County of Plymouth, 14 Gray, 155, 162.

[6] Morris & Essex R. R. Co. *v.* Orange, 63 N. J. Law, 252; 43 Atlantic, 730.

It is, however, in the power of the State to regulate these matters differently, by express statutory provision. The railroad company has great privileges from the State. Its franchises are almost always granted subject to future variation or revocation at the will of the legislature. Under such reserved powers a railroad company may be compelled to construct new highway crossings at its own expense.[1] It may even be denied any right to compensation for the interference with its location, unless the new highway occupies space already appropriated to some peculiar railroad use, such as a station building or a stock yard.[2]

The layout of the new street should be such as to indicate whether the proposed crossing is to be made at, under, or above grade. If it does not, it will be assumed that it authorizes a crossing in either of these ways; and when the railroad company owns the fee of the land, it will be entitled to damages for the crossing, calculated on that basis.[3] If a new highway is laid out obliquely across the tracks, at such an angle as to appropriate and withdraw from railroad uses a substantial part of the location on each side of the crossing, compensation would be due.[4]

10. Restoration of Highway.

Those who construct a railroad across a highway are bound to restore the highway, as far as may be practicable, to its former condition of usefulness.[5] Authority to change the course of the highway is often given. The duty is a continuing one, binding those owning the railroad at any time,

[1] Portland & Rochester R. R. Co. *v.* Deering, 78 Me. 61; 2 Atlantic, 670; 57 Am. Rep. 784; 23 Am. & Eng. R. R. Cases, 51.

[2] Albany Northern R. R. Co. *v.* Brownell, 24 N. Y. 345, 349.

[3] Paterson & Newark R. R. Co. *v.* Newark, 61 N. J. Law, 80; 38 Atlantic, 689.

[4] Crossley *v.* O'Brien, 24 Ind. 325; 87 Am. Dec. 329.

[5] See Chapter XVIII., Railroads on and along Highways.

and involves the maintenance of the railroad crossing in such a condition as not to render the highway unnecessarily unsafe or inconvenient for travel.[1] It is usual to plank the crossing, or otherwise fill up the space between the rails to the grade of the highway. Such planking or filling must be maintained forever in good condition, and if any dangerous defect in it occurs, which a proper inspection of the railroad would have disclosed, the company is negligent if it does not repair it forthwith.[2] On unfrequented country highways less pains need be taken to make crossing the tracks easy for travellers, as the whole highway is generally a rough one.

11. Sewers in Highways.

If a municipality, after laying out a highway over a railroad, constructs a sewer in the highway, it must do so with due regard to the protection of the railroad, and pay the cost of any necessary changes in its grade or foundations.[3]

[1] Baltimore & Ohio Southwestern R. R. Co. *v.* State, 159 Ind. 510; 65 Northeastern, 508.

[2] Wabash R. R. Co. *v.* DeHart, , Ind. ; 65 Northeastern, 192.

[3] Mayor *v.* Cowen, 88 Md. 447, 454; 41 Atlantic, 900; 71 Am. State, 433.

CHAPTER XV.

RAILROADS CROSSING OTHER RAILROADS.

1. Implied Authority for Crossing.

If a line connecting the terminal points of a projected railroad necessarily intersects the line of a railroad already in operation, the second railroad company has implied authority to construct its road across the other. If there be no law to forbid it, such crossing may be at grade. If a grade crossing be forbidden, the second road may be carried over or under the other; and to facilitate this the grade of the latter may be altered, if necessary.

2. Compensation when Crossing made on a Highway.

If the crossing be made on a highway, as by a street railway crossing a through railroad at grade, or one street railway crossing another, no compensation is due to the company owning the railroad crossed. A railroad franchise is held subject to the police power of the State, under which the use of highways for all purposes of public travel is fully within the control of the legislature. The same authority which can make it lawful for street railways to cross at grade any and every ordinary highway intersecting the street upon which their tracks are laid, can make it lawful for them to cross at grade any and every railroad upon or

intersecting that street. Two street railways can rarely cross, except at grade. To raise or depress the street, or the structure bearing street railway tracks, so as to carry it above or beneath a through railroad, might, in a particular case, cause more inconvenience or even danger to the travelling public than it would avoid. The failure of a brake upon an electric car to act would naturally cause more peril to the passengers, and to those travelling on the street, if the car were, at the time, on an up or down grade. The difficulty of hauling heavy loads increases with every considerable ascent or descent in the highway. To divert street railway tracks from the street, in order to effect a crossing of a through railroad elsewhere, necessarily leaves part of such street unsupplied with the facilities for quick communication which it might otherwise enjoy. To stop street cars on each side of a through railroad, for the transfer of their passengers on foot from one car to another, involves them in personal inconvenience and delay, and without absolutely freeing them from the danger of being struck by a passing train. The company owning the railroad to be crossed has no greater power to control the use of the highway by others, than any individual traveller possesses. It could not use the highway without legislative authority; but its rights of passage are not superior in kind to those of the individual, who needs no such authority, nor to those of any other corporation which the State may authorize to use it for purposes of travel. The risk of collision between cars on the two railroads does not differ in kind from the risk of collision between the cars on one of them and an ordinary traveller driving along the highway. He is not obliged to pay damages for temporarily obstructing the railroad track as he passes over it, nor is the railroad company bound to pay him damages for putting an object of danger in his path. A grade crossing of a highway does not create a danger so much as

increase a danger. It is the danger of collision; but that is one always incident to the lawful use of a highway. The impairment, therefore, of the value of the franchise of the through railroad company, the interference with the accustomed and necessary operation of its road, and the danger to the lives of those whom it transports, present simply a case of *damnum absque injuria*.[1]

3. Compensation when Crossing not made on a Highway.

If the crossing be made on land belonging to the original railroad, compensation is due for subjecting it to this new use, and for such structural changes in its roadbed as may be necessarily involved.[2] No indirect and consequential damages are to be considered. The first company accepted the franchise knowing that others might be granted franchises which would involve an intersection of railroads. It had no implied grant of any exclusive privilege of running its trains without interruption, should interruption become necessary for public convenience. The probable necessity of stopping its trains at the crossing, therefore, is not a proper element of damage, whether it arise from positive statute, or from the requirements of ordinary care in the operation of the road.[3]

[1] New York, New Haven, & Hartford R. R. Co. *v.* Bridgeport Traction Co., 65 Conn. 410, 432–434; 32 Atlantic, 953; 29 L. R. A. 367; Consolidated Traction Co. *v.* South Orange & Maplewood Traction Co., 56 N. J. Eq. 569; 40 Atlantic, 15; Chicago, Burlington, & Quincy R. R. Co. *v.* West Chicago Street R. R. Co., 156 Ill. 255; 40 Northeastern, 1008; 29 L. R. A. 485; Chicago & Calumet Terminal Railway Co. *v.* Whiting, Hammond, & East Chicago Street Railway Co., 139 Ind. 297; 38 Northeastern, 604; 26 L. R. A. 337; 47 Am. State, 264. *Contra*, Central Passenger Railway Co. *v.* Philadelphia, Wilmington, & Baltimore R. R. Co., 95 Md. 428; 52 Atlantic, 752.

[2] Massachusetts Central R. R. Co. *v.* Boston, Clinton, & Fitchburg R. R. Co., 121 Mass. 124; Flint & Pere Marquette R. R. Co. *v.* Detroit & Bay City R. R. Co., 64 Mich. 350; 31 Northwestern, 281.

[3] Chicago & Alton R. R. Co. *v.* Joliet, Lockport, & Aurora Railway Co., 105 Ill. 388; 44 Am. Rep. 799; 14 Am. & Eng. R. R. Cases, 62.

Such a crossing is generally constructed under an express contract between the two companies, which regulates the mode of construction as well as the matter of compensation.[1]

4. Form of Location.

The location of the second road should be so drawn as to specify the manner of crossing the first. If it is not so drawn, the company owning the first will be entitled, if land owned by it in fee or not part of an ordinary highway be taken, to compensation on the assumption that the crossing will be effected in the manner most injurious to its road. If it is so drawn as to specify the manner of crossing, damages will be restricted to those incident to a crossing of the kind specified. Among other things, the location should specify whether the new intersecting tracks are to be laid with "frogs"[2] to be maintained by the second company. Damages will then be assessed, if the two companies fail to agree, in view of the terms so proposed.[3] Should any disputes arise after the construction of the crossing as to the use by each road of its tracks at the crossing, a court of equity can regulate it.[4] If the location papers impose no obligation on the second company to maintain, at its own expense, the crossing when constructed, such an obligation may be imposed by the courts, unless the first company prefers to assume it, and to have the cost of so doing included in the damages to be awarded in its favor.

In determining the compensation to be paid, the injury to

[1] See Appendix II., 9, 10.

[2] "Frogs" are a special form of junction rail, used where one track crosses or diverges from another. They are so grooved as to provide a place for the flanges of the cars running on each track.

[3] Chicago & Alton R. R. Co. *v.* Joliet, Lockport, & Aurora Railway Co., 105 Ill. 388; 14 Am. & Eng. R. R. Cases, 62; 44 Am. Rep. 799.

[4] National Docks & New Jersey Junction Connecting Railway Co. *v.* United Companies, 53 N. J. Law, 217; 21 Atlantic, 570; 26 Am. State, 421.

be done to the business capacity of the railroad crossed is to be estimated.[1]

Nothing is to be paid for the estimated cost of safety gates or other apparatus not at present required, but which, it is conjectured, may at some future time be required for securing public safety.[2] The State has a right to require them thereafter, in view of such conditions as may then exist, and it may be then entirely just to throw the expense on the road crossed, rather than on the road which crosses it.[3]

A right to construct one railroad across another includes the right of constructing all switch tracks necessary for the use of the second road, and not inconsistent with the reasonable use of the former.[4]

5. Track Connections.

Statutes generally exist requiring companies owning railroads crossed by other railroads to submit to such union of tracks as may serve to facilitate the prompt and easy exchange of cars. Such statutes are effectual as to railroads already built as well as to those to be built. If in their terms applicable to railroads generally, they may be construed to include street or electric railroads, although enacted before these were generally in use; but in such case neither road can require the other to accept and haul cars of a build not adapted to safe transportation over its road.[5]

[1] Chicago & Western Ind. R. R. Co. *v.* Englewood Connecting Railway Co., 115 Ill. 375; 4 Northeastern, 246; 56 Am. Rep. 173.

[2] Massachusetts Central R. R. Co. *v.* Boston, Clinton, & Fitchburg R. R. Co., 121 Mass. 124.

[3] Detroit, Fort Wayne, & Belle Isle Railway *v.* Osborn, 189 U. S. 383, 390.

[4] Toledo, Ann Arbor, & North Michigan Railway Co. *v.* Detroit, Lansing, & Northern R. R. Co., 62 Mich. 564; 29 Northwestern, 500; 28 Am. & Eng. R. R. Cases, 272; 4 Am. State, 875.

[5] Stillwater & Mechanicville Street Railway Co. *v.* Boston & Maine

Track connections of this nature are generally made by what is called a "Y." From the main line of the intersecting railroad, as it approaches the point of intersection, two branches or switch tracks diverge to right and left, on curves suited to connect the two main tracks of each road, to serve for the conveyance of cars from either to the other. Such connections having been established, whether pursuant to law or by mutual agreement, each road may be required by law to receive from the other such cars, suitable in kind, as may be tendered to it, for transportation over its route with their contents.[1]

R. R. Co., 171 N. Y. 589; 64 Northeastern, 511; Chicago *v.* Evans, 24 Ill. 52.

[1] See Chapter XXXVII., Transportation of Goods over Connecting Railroads.

CHAPTER XVI.

FARM CROSSINGS AND WAYS OF NECESSITY.

1. Statutory Duty.

A DUTY to allow and construct farm crossings is often imposed on railroad companies by statute. But after a railroad has been completed, the company owning it cannot be subjected by a new statute to a new duty to construct them. It would be to impose an unanticipated burden for the benefit of private individuals.[1] If, however, the land within the location was acquired under such circumstances as to subject it to a way of necessity, the legislature can subsequently impose upon the company the duty of constructing the way, for this would better secure the safety of those using the railroad, than to leave it to the owner of the dominant tenement to construct it.[2]

2. Contract Duty.

Crossings are often reserved in conveyances for railroad purposes, or in the papers forming the basis of condemnation

[1] People *v.* Detroit, Grand Haven, & Milwaukee Railway Co., 79 Mich. 471; 44 Northwestern, 934; 7 L. R. A. 717; 42 Am. & Eng. R. R. Cases, 257.

[2] New York & New England R. R. Co. *v.* Railroad Commissioners, 162 Mass. 81; 38 Northeastern, 27.

proceedings. In such case the railroad company is generally charged with the duty of constructing them.

In determining whether a reservation to a grantor, without words of limitation in favor of his heirs or assigns, would enure to the benefit of his successors in title, it would be a circumstance material to be considered if the tract reached by the crossing would not be otherwise accessible to him.[1] A contract by a railroad company for a farm crossing will seldom be specifically enforced, and never where it appears that to provide one would be a substantial cause of danger to those travelling upon the road. The remedy at law is sufficiently adequate.[2]

3. Prescription.

As a railroad company may grant a right of way across its location, one may be gained over it by prescription in favor of an adjoining proprietor.[3]

4. Location, Construction, and Maintenance.

Where there is a duty on the part of the railroad company, whether statutory or contractual, to construct and maintain a private crossing, it is entitled as the owner of the servient tenement to select the place and determine the mode of construction, subject always to a right of the owner of the dominant tenement to resort to the courts for redress, if the crossing so provided is not reasonably convenient to him, and could have been made so without interfering with the beneficial exercise of the railroad franchise.[4] If the duty imposed

[1] Knowlton *v.* New York, New Haven, & Hartford R. R. Co., 72 Conn. 188, 192; 44 Atlantic, 8.

[2] Illinois Central R. R. Co. *v.* Willenborg, 117 Ill. 203; 7 Northeastern, 698; 57 Am. Rep. 862; 26 Am. & Eng. R. R. Cases, 358.

[3] Gay *v.* Boston & Albany R. R. Co., 141 Mass. 407; 6 Northeastern, 236.

[4] Wademan *v.* Albany & Susquehanna R. R. Co., 51 N. Y. 568.

or assumed is, in terms, simply to construct the crossing, an obligation is implied to maintain it in proper repair.[1]

5. Gates.

If there is a farm crossing at any point where the railroad company is required to fence, it is bound to construct such gate or bar-way as will make the crossing available.[2]

6. Changes in Grade of Railroad.

If it has agreed to furnish and maintain a convenient farm crossing at grade, and does so, in constructing its road, it may subsequently so raise its grade as to render the crossing useless, unless the landowner in whose favor it exists should go to the expense of constructing elevated approaches to it on his own land. If, however,[3] the crossing can be maintained at its old level, under the railroad tracks at their new elevation, by leaving a proper opening for the purpose, the landowner has a right to insist on such a mode of constructing the embankment.[4]

7. Ways of Necessity.

If the acquisition of title by the railroad company shuts off any land then owned by the party from whom the title is obtained, so that it can only be reached from a highway by crossing the railroad, a way of necessity is implied.[5] It

[1] Stewart *v.* Cincinnati, Wabash, & Michigan Railway Co., 80 Mich. 166; 44 Northwestern, 1116.

[2] Poler *v.* New York Central R. R. Co., 16 N. Y. 476. See *post*, p. 151.

[3] Williams *v.* Clark, 140 Mass. 238; 5 Northeastern, 802; 24 Am. & Eng. R. R. Cases, 460.

[4] Speer *v.* Erie R. R. Co., 64 N. J. Eq. ; 54 Atlantic, 539.

[5] Housatonic R. R. Co. *v.* Waterbury, 23 Conn. 101, 110; New York & New England R. R. Co. *v.* Railroad Commissioners, 162 Mass. 81; 38 Northeastern, 27.

would not, however, be one which could be used at all times and under all circumstances. The party entitled to it would be restricted to such a use and to a use at such times as would not substantially interfere with the safe and convenient operation of the railroad.

CHAPTER XVII.

FENCES, GATES, AND CATTLE GUARDS.[1]

1. Fences.

As, by the common law, an owner of cattle is bound to keep them in an enclosure or in custody, at his peril, and every entry by them on another's land is a trespass, railroad companies are not bound to fence as against adjoining proprietors, even if the railroad be built through a deep cut, unless required by charter or statute.[2] Our earlier railroads were often left largely unfenced,[3] and it is so now with those running through unsettled or sparsely settled territory.[4]

As respects the passengers whom they carry on their trains, they are bound to fence, if that mode of preventing danger of collision is one which prudent and skilful persons engaged in the railroad business would naturally adopt. If, therefore, the owner of land in a territory so thickly settled that due care for its passengers requires the company to fence, turns his cattle out loose, and for want of any fence

[1] See also Chapters XVI., Farm Crossings and Ways of Necessity, and XLIII., Injuries to Animals.

[2] Jones *v.* Western North Carolina R. R. Co., 95 N. C. 328.

[3] Railroad Co. *v.* Skinner, 19 Pa. St. 298; 57 Am. Dec. 651; 1 Redfield's Am. Railway Cases, 347.

[4] See Railway Co. *v.* Ferguson, 57 Ark. 16; 20 Southwestern, 545; 38 Am. State, 216.

(none being required by statute) they stray upon the track and the consequence is the derailment of a train, he is not liable to it for its loss. It cannot found a right upon its own wrong. While as against him it was not bound to fence, it took the risk of any resulting injury to itself. If by such an accident one of its train hands were injured, he would be so far identified with his employer, that, if it could not recover for its loss, he could not for his.[1]

Whether a statutory duty to fence is one imposed for the benefit of the general public, that is, of all whom a fence might serve to protect, or only as a regulation of the relations of adjoining proprietors of real estate, must depend upon a fair construction of the words of the statute.[2]

If it is for the public protection generally, a train hand injured by a collision due to the want of a fence so required can hold the company,[3] and so might a small child straying upon the track, if struck by a passing train.[4]

A statute that all railroad companies must fence, applies to a foreign company which has been allowed to extend into the State.[5]

If no special kind of fence is prescribed by statute, any kind that is reasonably sufficient for public protection will answer.[6] As to this the usage of the locality may be con-

[1] Sherman *v.* Anderson, 27 Kans. 333; 41 Am. Rep. 414.

[2] See Eames *v.* Salem & Lowell R. R. Co., 98 Mass. 560; 96 Am. Dec. 676; Hayes *v.* Michigan Central R. R. Co., 111 U. S. 228; Johnson *v.* Oregon Short Line Railroad, 7 Idaho, 355; 63 Pacific, 112; 53 L. R. A. 714.

[3] See Atchison, Topeka, & Santa Fé R. R. Co. *v.* Reesman, 60 Federal, 370; 9 C. C. A. 20; 19 U. S. App. 596; Dickson *v.* Omaha & St. Louis R. R. Co., 124 Mo. 140; 27 Southwestern, 476; 46 Am. State, 429; 25 L. R. A. 320; Terre Haute & Indianapolis Railway Co. *v.* Williams, 172 Ill. 379; 50 Northeastern, 116; 64 Am. State, 44.

[4] Schmidt *v.* Milwaukee & St. Paul Railway Co., 23 Wis. 186; 99 Am. Dec. 158; Isabel *v.* Hannibal & St. Joseph R. R. Co., 60 Mo. 475; 9 Am. Railway Rep. 261. *Cf.* Lake Shore & Michigan Southern Railway Co. *v.* Lübke, Ohio St. ; 69 Northeastern, 653.

[5] Purdy *v.* New York & New Haven R. R. Co., 61 N. Y. 353.

[6] Eames *v.* Salem & Lowell R. R. Co., 98 Mass. 560; 96 Am. Dec. 676.

sidered. A barbed wire fence may be sufficient under this rule; and if so, when properly constructed and maintained, the company will not be liable if cattle, frightened by the trains, run against it and are cut.[1]

2. Consequential Damages.

A State may constitutionally impose upon a company which fails to fence a liability for all consequential damages to adjoining property, such as impairing its value for pasturage by requiring the use of herdsmen or watchmen. It may also give the owner of any cattle killed double damages.[2]

3. Special Agreements.

If the company has specially covenanted with an adjoining proprietor to maintain a sufficient fence, and by reason of a failure to do so an animal is killed, he can recover in an action of contract for special damages for breach of covenant.[3] Such a covenant in a conveyance of land, apparently intended to charge either the land conveyed for the benefit of other land not conveyed, or the land not conveyed for the benefit of that conveyed, runs with the land benefited, and against the land charged, as respects subsequent grantees.[4]

4. Gates.

Where there is a gate in a railroad fence, made and maintained[5] for the use and convenience of an adjoining

[1] Gould *v.* Bangor & Piscataquis R. R. Co., 82 Me. 122; 19 Atlantic, 84.

[2] Minneapolis & St. Louis Railway Co. *v.* Emmons, 149 U. S. 364.

[3] Louisville, New Albany, & Chicago Railway Co. *v.* Sumner, 106 Ind. 55; 5 Northeastern, 404.

[4] Easter *v.* Little Miami R. R. Co., 14 Ohio St. 48; Bronson *v.* Coffin, 108 Mass. 175; 11 Am. Rep. 335.

[5] Spinner *v.* New York Central & Hudson River R. R. Co., 67 N. Y. 153. See *ante*, p. 147.

proprietor, the duty of keeping it closed rests on him,[1] and may be enforced, if need be, by an injunction.[2] If his cattle stray through and are killed, it is for him to show how it was left open, and if it appears that some stranger opened it, he cannot recover without showing that the company knew, or ought to have known, that it was open, and had time and opportunity to have it closed.[3]

When a spur track runs into adjoining land through a gate, a railroad servant upon a car run in upon such track cannot expect the adjoining proprietor to be responsible for opening or closing the gate. That is the duty of the railroad company and its servants.[4]

5. Cattle Guards.

Whether cattle guards at road crossings adjacent to a railway station should be constructed, under a statute requiring them at all road crossings, is to be determined as a question of fact, under all the circumstances of each case, balancing the inconvenience that might result to the public in the use of the depot by the interposition of cattle guards, against the possible danger to cattle from the want of them.[5] The company is not bound to fence at points where a fence would necessarily incommode the public and obstruct the convenient use of the railroad, either in the immediate vicinity of stations or of engine houses, car houses, machine shops, coal yards, or wood yards.[6] But a general statutory duty

[1] Swanson *v.* Chicago, Milwaukee, & St. Paul Railway Co., 79 Minn. 398; 82 Northwestern, 670; 49 L. R. A. 625 and note; Mooers *v.* Northern Pacific Railway Co., 80 Minn. 24; 82 Northwestern, 1085.

[2] Truesdale *v.* Jensen, 91 Iowa, 312; 59 Northwestern, 47.

[3] Illinois Central R. R. Co. *v.* Dickerson, 27 Ill. 55; 79 Am. Dec. 394.

[4] Read *v.* Warwick Mills, R. I. ; 56 Atlantic, 679.

[5] See Chicago & Eastern Illinois R. R. Co. *v.* Guertin, 115 Ill. 466; 1 Northeastern, 507. *Contra*, Bradley *v.* Buffalo, New York, & Erie R. R. Co., 34 N. Y. 427.

[6] Jeffersonville, Madison, & Indianapolis R. R. Co. *v.* Beatty, 36 Ind. 15; 5 Am. Railway Rep. 543, 548.

imports a duty to connect the fences with the railroad at highway crossings by cattle guards, unless the public would be thus essentially discommoded. If the statute creates a liability for all injuries to cattle for want of a fence, it applies in favor of a cattle owner to a railroad built on a location between locations of other railroads, which is so narrow that a fence would make the passage of trains on either unsafe. While the company would have no right to build a fence there, that is because of its own act in making such a location; and one injured by want of a fence should not, in order to enable it to save money by economy in land purchases, if he is to be deprived of the protection which the law gives him, be deprived also of indemnity for the lack of it.[1]

6. Fence Laws; Time for building Fences.

Statutes requiring fences sometimes specify the time by which they shall be built. In the absence of such a provision they must be built as soon as may be necessary for the security of any of those whom the statute was designed to protect.

7. Unconstitutional Statutes.

A statute requiring railroad companies to fence and build cattle guards on the line between their location and the land of any adjoining proprietor, whenever he thinks it necessary, to keep cattle from the tracks, is invalid. The rights of one person cannot thus be made subject to the will of another.[2]

[1] Kelver *v.* New York, Chicago, & St. Louis R. R. Co., 126 N. Y. 365; 27 Northeastern, 553.

[2] Owensboro & Nashville R. R. Co. *v.* Todd, 91 Ky. 175; 15 Southwestern, 56; 45 Am. & Eng. R. R. Cases, 461; 11 L. R. A. 285. See *contra*, Birmingham Mineral R. R. Co. *v.* Parsons, 100 Ala. 662; 13 Southern, 602; 46 Am. State, 92; 27 L. R. A. 263.

CHAPTER XVIII.

RAILROADS ON AND ALONG HIGHWAYS.

1. Through Railroads.

THROUGH railroads may ordinarily be located in part on and along highways, whenever this is necessary for their construction on the best and shortest route,[1] but with the obligation of restoring the highway, by reasonably safe and convenient means, to its former condition of usefulness. This may involve changes in its site or course. The duty of restoration is a continuing one which binds all successors in title to the railroad. It is a common-law duty, and ordinarily a statutory one also,[2] which can be enforced by a mandatory injunction.[3]

[1] The best route does not mean the cheapest. Greenwich *v.* Easton & Amboy R. R. Co., 24 N. J. Eq. 217. See Chapter VII., The Making of a Location.

[2] State *v.* Minnesota Transfer Railway Co., 80 Minn. 108; 83 Northwestern, 32; 50 L. R. A. 656.

[3] Town of Jamestown *v.* Chicago, Burlington, & Northern R. R. Co., 69 Wis. 648; 34 Northwestern, 728.

2. Statutory Authority.

Express or implied permission from the State to use the highway for railroad purposes must be shown. It cannot be so used without placing extensive structures upon it, of a permanent character, and that can only be done by authority of law.[1] If done without this it is a continuing trespass, and the removal of the tracks can be compelled by a mandatory injunction.[2] A right so granted is either a franchise, or incidental to the exercise of a franchise. The mode of its exercise, if left by statute to the discretion of the railroad company, cannot be controlled by the discretion of a court of equity, unless in case of a manifest abuse.[3]

A franchise, properly speaking, for a railroad in a State[4] can be granted only by the State, except that one for an inter-State railroad may be granted either by the States concerned or by the United States, or by all three of these governments. But the possessor of such a franchise, before laying down tracks in highways, may need also authority or permission from the municipalities in which they are situated. If so, it is because the legislature has so provided. Municipal corporations have no inherent power to grant such authority or permission.

3. Changing and restoring Highway.

Authority to construct a railroad on or across a highway implies authority to make such changes in it as are reasonably necessary to secure the proper location and convenient operation of the railroad. In laying down an electric trolley rail-

[1] Regina *v.* Train, 2 Best & Smith, 640.

[2] Grey *v.* New York & Philadelphia Traction Co., 56 N. J. Eq. 463; 40 Atlantic, 21.

[3] Illinois Central R. R. Co. *v.* Bentley, 64 Ill. 438.

[4] The term is sometimes used in a looser sense to cover municipal licenses. New Orleans, Spanish Fort, & Lake R. R. Co. *v.* Delamore, 114 U. S. 501. See Chapter V., Municipal Grants and Licenses.

road, therefore, shade trees upon the highway may be trimmed so as not to interfere with the wires.[1]

A railroad must be so constructed and maintained upon or across a highway as to leave it, as nearly as may be, in its former condition of usefulness. This makes it improper to leave rails raised above the grade of the travelled part of the road-bed of the highway,[2] and at a highway crossing generally requires planking or paving between the rails and on either side of the tracks. It is, however, enough if the highway is restored to a reasonably safe and convenient condition, though it be less safe and convenient than it was before.[3] If a guard rail is laid outside the tracks of a railroad constructed in the travelled part of a highway, the space between that and the inner rail should be so far filled as not unreasonably to impede the ordinary use of the highway.[4] If switches are made in the highway, and it would render them less an obstruction to travel if wooden blocks were put in at the frogs, it may be negligence for the company to omit doing so.[5] If the track is planked, no such space must be left between the planking and the rails as would unnecessarily expose travellers to the risk of having a foot or a wagon-wheel caught in it.[6] When one railway crosses another upon a highway, the rails at the crossing must be so arranged and shaped as to constitute no unnecessary cause of danger to travellers.[7]

[1] Dodd *v.* Consolidated Traction Co., 57 N. J. Law, 482; 31 Atlantic, 980.

[2] San Antonio Rapid Transit Street Railway Co. *v.* Limburger, 88 Tex. 79; 30 Southwestern, 533; 53 Am. State, 730.

[3] Gillett *v.* Western R. R. Corporation, 8 Allen, 560. See Commonwealth *v.* Erie & North-East R. R. Co., 27 Pa. St. 339; 67 Am. Dec. 471.

[4] See Chapter XIV., Construction of Highway Crossings; Goodrich *v.* Burlington, Cedar Rapids, & Northern Railway Co., 103 Iowa, 412, 416; 72 Northwestern, 653.

[5] Gulf, Colorado, & Santa Fé Railway Co. *v.* Walker, 70 Tex. 126; 7 Southwestern, 831; 8 Am. State, 582.

[6] Louisville, New Albany, & Chicago Railway Co. *v.* Phillips, 112 Ind. 59: 13 Northeastern, 132; 2 Am. State, 155.

[7] Cook *v.* Union Railway Co., 125 Mass. 57, 61.

The duty of a railroad company to maintain the highway in as good condition for ordinary travel as that in which it was before the railroad was constructed rests on the principle that the use of the highway for such travel remains the main purpose of its existence. The road, therefore, must be both so constructed and so maintained and used as to interfere with the use and enjoyment of the highway by the public no further than is essential to the proper operation of the railroad.[1]

A street or inter-urban railway company is bound at common law so to build and maintain its railroad that the part of the travelled portion of the highway which it occupies (which is at least all within the lines formed by the ends of its cross-ties) is properly graded and kept in repair for accommodating ordinary public travel upon or across it.[2]

If it be left to some public authority to examine the mode of restoration and approve or disapprove it, such an approval is final, and cannot be reviewed collaterally.[3] Otherwise, whether the work has been properly and reasonably planned and executed is a question of fact to be determined as such in any case in which it may arise.[4]

Under the ordinary police powers granted to municipalities, they cannot require railroad companies authorized to construct their roads in unpaved highways to pave them or any part of them.[5] Nor does an obligation of the company to keep that part of the highway which it occupies in repair, authorize the municipality to subject it to payment for a new pavement.[6]

[1] City of Zanesville *v.* Fannan, 53 Ohio St. 605; 42 Northeastern, 703.

[2] Railway Co. *v.* State, 87 Tenn. 746, 750; 11 Southwestern, 946.

[3] State *v.* New Haven & Northampton Co., 45 Conn. 331.

[4] Roberts *v.* Chicago & Northwestern Railway Co., 35 Wis. 679.

[5] Fielders *v.* North Jersey Street Railway Co., 68 N. J. Law, 343; 53 Atlantic, 404.

[6] Chicago *v.* Sheldon, 9 Wall. 50. See Chapter XXV., Public Right of Control.

4. Right of Eminent Domain.

Power to change the course of a highway in locating a railroad implies power to exercise the right of eminent domain to secure land on which to lay out the new course, when the company has been given this right for general railroad purposes.[1]

5. Street Railroads.

Street railroads for passenger service, built substantially at the grade of the highway, to promote convenient access to the cars from the highway, and connecting one part of a municipality with another, or running from one municipality to a neighboring one, with frequent stops to take on or put off passengers, are a proper use of the highway for the purposes for which it was laid out.[2] The State can authorize it, or permit a municipality to license it, without infringing on the rights of proprietors of lands fronting the highway, whether they do or do not own the fee of the soil, and so without providing for compensation to them, provided their access to the street is not thereby materially obstructed.[3] If the fee in the soil is in the municipality, the State can author-

[1] People *v.* Dutchess & Columbia R. R. Co., 58 N. Y. 152, 164.

[2] Taggart *v.* Newport Street Railway Co., 16 R. I. 668; 19 Atlantic, 326; 7 L. R. A. 205; Halsey *v.* Rapid Transit Street Railway Co., 47 N. J. Eq. 380; 20 Atlantic, 859; Canastota Knife Co. *v.* Newington Tramway Co., 69 Conn. 146, 153; 36 Atlantic, 1107; General Electric Railway Co. *v.* Chicago & Western Indiana R. R. Co., 184 Ill. 588; 56 Northeastern, 963. *Contra*, Craig *v.* Rochester City & Brighton R. R. Co., 39 N. Y. 404; Peck *v.* Schenectady Railway Co., 170 N. Y. 298; 63 Northeastern, 357. Some courts make an arbitrary distinction, with no very apparent reason, between country highways and streets in thickly settled communities, regarding street railways as imposing a new servitude on the soil as to the former, but not as to the latter. Dempster *v.* United Traction Co., 205 Pa. St. 70; 54 Atlantic. 501.

[3] Hobart *v.* Milwaukee City R. R. Co., 27 Wis. 194; 9 Am. Rep. 461.

ize such an occupation of the highway for a street railway, without providing for compensation to the municipality.[1]

It is not material that the railway, if of this description, is designed and used to carry both passengers and freight. Carting goods is a proper use of a highway, and their conveyance on a car propelled by steam or electricity over a railroad by which the person in charge can be also transported, is an improved form of cartage.[2]

In determining whether a new servitude is imposed on the soil of the highway by a railroad laid upon it, the kind of motive power employed is not controlling.[3] The tests are the purpose which the road serves, the grade adopted, and the character of its construction.[4] Steam was used to propel vehicles on highways in England as early as the beginning of the nineteenth century, and heavily loaded wagons were thus moved at a considerable rate of speed.[5] It is not the use of steam power, but its use in connection with a specially constructed track, that is foreign to highway purposes.

It follows, from the principle that a street railroad is a form of accommodating highway travel, that the State can provide, when a railroad has been laid and is being operated in a street by one company, that its use can be shared by another company, on terms of just compensation. Nor would it make any difference that each company used a different

[1] People *v.* Kerr, 27 N. Y. 188.

[2] Montgomery *v.* Santa Ana, Westminster Railway Co., 104 Calif. 186; 37 Pacific, 786; 43 Am. State, 89; 25 L. R. A. 654. *Contra*, Chicago & Northwestern Railway Co. *v.* Milwaukee, Racine, & Kenosha Electric Railway Co., 95 Wis. 561; 70 Northwestern, 678; 37 L. R. A. 856; 60 Am. State, 136.

[3] Newell *v.* Minneapolis, Lyndale, & Minnetonka Railway Co., 35 Minn. 112, 116; 59 Am. Rep. 303.

[4] Carli *v.* Stillwater Street Railway & Transfer Co., 28 Minn. 373; 41 Am. Rep. 290; Nichols *v.* Ann Arbor & Ypsilanti Street Railway Co., 87 Mich. 361; 49 Northwestern, 538; 16 L. R. A. 371; McQuaid *v.* Portland & Vancouver Railway Co., 18 Or. 237; 22 Pacific, 899.

[5] Annual Register for 1820, 1370.

motive power, provided there were no substantial danger or inconvenience in running cars by each mode of power on the same tracks.[1]

Without legislation granting or reserving such a right, no street railroad can be used for railroad purposes, or even for regular trips of stages on the same line of travel, without the consent of its owner. There would be no motive to build such works if any one could use them for transportation purposes over the same route without consent given or compensation made.[2]

6. New Servitude, when imposed.

As respects railroads not built substantially at the grade of the highway to promote convenient access from the highway, running between distant places and not making intermediate stops to take on or put off passengers, except at considerable intervals and at appointed stations far apart, it is a use of the highway not in accordance with its proper purposes. It is an occupation of it which obstructs or excludes its ordinary and appropriate uses. Consequently a law authorizing such an occupation imposes a new servitude on the land, and if it be owned by private individuals, they are entitled to compensation for the new burden thus put upon it.[3] If it materially hinders the ordinary use of the road, including the right of ingress and egress between it and the adjacent lots, it gives a right of action to the owners of adjacent lots, although they have no title to the

[1] North Baltimore Passenger Railway Co. *v.* North Avenue Railway Co., 75 Md. 233; 23 Atlantic, 466.

[2] Metropolitan R. R. Co. *v.* Quincy R. R. Co., 12 Allen, 262; Citizens' Coach Co. *v.* Camden Horse R. R. Co., 33 N. J. Eq. 267; 36 Am. Rep. 542.

[3] Imlay *v.* Union Branch R. R. Co., 26 Conn. 249; 68 Am. Dec. 392; Schaaf *v.* Cleveland, Medina, & Southern Railway Co., 66 Ohio St. 215; 64 Northeastern, 145.

land subject to the highway.[1] The right of an abutting proprietor to the full use of the highway which bounds his premises is something more than that of the general public. It is his sole means of securing that without which he could not exist, — communicating with the world. The world could get on without communicating with him. Hence his right to access to the highway is a real right of property appurtenant to his land.[2] If access to his land is in any way unreasonably and seriously obstructed by the construction of a railroad, and no compensation has been made for this injury, he may, if it be extreme, maintain a suit for an injunction.[3] In ordinary cases, however, he would be left to an action for damages. This, if there be a statute requiring compensation for land or other property taken or damaged, lies in favor of any owner of land adjoining a highway on which a railroad has been laid in such a manner as directly and substantially to diminish the value of his property.[4] Such an injury would be wrought by laying railroad tracks so close to the curbstone in front of a building that access to it by teams was rendered difficult and dangerous,[5] or by interference with the drainage from abutting property;[6] but not merely by a railroad laid so near

[1] Elizabethtown, Lexington, & Big Sandy R. R. Co. *v.* Combs, 10 Bush (Ky.), 382; 19 Am. Rep. 67; Cadle *v.* Muscatine Western R. R. Co., 44 Iowa, 11.

[2] Jones *v.* Erie & Wyoming Valley R. R. Co., 151 Pa. St. 30; 25 Atlantic, 134; 31 Am. State, 722 and note; 17 L. R. A. 758.

[3] Nichols *v.* Ann Arbor & Ypsilanti Street Railway Co., 87 Mich. 361; 49 Northwestern, 538; 16 L. R. A. 371; Fulton *v.* Short Route Railway Transfer Co., 85 Ky. 640; 4 Southwestern, 332; 7 Am. State, 619.

[4] City of Denver *v.* Bayer, 7 Colo. 113; 2 Pacific, 6; Park *v.* Chicago & Southwestern R. R. Co., 43 Iowa, 636.

[5] Pennsylvania & Schuylkill Valley R. R. Co. *v.* Walsh, 124 Pa. St. 544; 17 Atlantic, 186; 80 Am. State, 611. *Contra*, Kellinger *v.* Forty-second Street & Grand Street Ferry R. R. Co., 50 N. Y. 206.

[6] Jones *v.* Erie & Wyoming Valley R. R. Co., 151 Pa. St. 30; 25 Atlantic, 134; 31 Am. State, 722 and note; 17 L. R. A. 758.

the curb that teams could not occupy the street standing across it lengthwise while delivering goods at a warehouse.[1] That might be convenient for the warehouseman, but would not be necessary to his enjoyment of his property, for the horses' heads could be turned the other way, or automobiles employed.

An actionable injury may be wrought by a surface street railway, if so constructed and operated as, in view of the particular nature of the locality, to work peculiar inconvenience and discomfort.[2] A steam street railway, conveying both freight and passengers close to houses on an avenue in a seaside summer resort, where people go for rest and quiet, might thus be regarded as imposing a new servitude on the highway.[3]

The right of the State to permit the construction of a railroad upon land occupied for a highway does not depend on the fact that it is so occupied. The State can authorize the construction of a railroad anywhere. In the case of street railways, the previous subjection of the land within the limits of the street to highway uses is important, not as the foundation of the right to allow a location upon it, but only as the foundation of the right to do so without making compensation to its owners. In the case of other railroads such previous subjection is of no importance whatever. Their construction will subject it to a new use; but this is fully within the power of the State, on terms of just compensation, because every railroad is serving a public use.

[1] Hobart *v.* Milwaukee City R. R. Co., 27 Wis. 194; 9 Am. Rep. 461.

[2] See Detroit City Railway *v.* Mills, 85 Mich. 634; 48 Northwestern, 1007; Taylor *v.* Bay City Street Railway Co., 101 Mich. 140; 59 Northwestern, 447; 1 Am. & Eng. R. R. Cases, N. S. 165.

[3] Onset Street Railway Co. *v.* County Commissioners, 154 Mass. 395; 28 Northeastern, 286.

7. Spur Tracks.

It is not necessary, to justify the occupation of a highway by a railroad, that every part of the tracks laid, separately considered, should distinctly serve a public use. It is enough that the whole railroad in its entirety serves such a use. A spur track, therefore, laid on a highway to a private warehouse, for the sole accommodation of the warehouseman and the railroad, is a proper use of the highway, if authorized by the State,[1] and if due compensation be made to the owners of the soil.

8. The Motive Power used not material.

The motive power used is not controlling in determining whether a railroad in a highway serves the purposes of the highway.[2] The turning point is whether the use of the highway as a highway may be promoted by the new construction. It would not be so promoted by a horse railroad used simply as a freight connection between two through railroads.[3] It may be promoted by an electric or a cable road, as well as by a horse railroad. No additional burden is imposed on the fee in a highway by changing a horse railway into an electric railway. No additional burden is necessarily imposed by a street railroad, although of an inter-urban character, on which cars are propelled by a steam-engine, or which hauls goods as well as passengers.[4] A railway track laid

[1] Chicago Dock and Canal Co. *v.* Garrity, 115 Ill. 155; 3 Northeastern, 448. See Chapter IX., Acquisition of Land by Condemnation Proceedings.

[2] Newell *v.* Minneapolis, Lyndale, & Minnetonka Railway Co., 35 Minn. 112; 27 Northwestern, 839; Briggs *v.* Lewiston & Auburn Horse R. R. Co., 79 Me. 363; 10 Atlantic, 47; 1 Am. State, 316; Street Railway Co. *v.* Doyle, 88 Tenn. 747; 13 Southwestern, 936; 17 Am. State, 933; Rafferty *v.* Central Traction Co., 147 Pa. St. 579; 23 Atlantic, 884; 30 Am. State, 763.

[3] Carli *v.* Stillwater Street Railway Co., 28 Minn. 373; 41 Am. Rep. 290.

[4] Newell *v.* Minneapolis, Lyndale, & Minnetonka Railway Co., *supra;*

upon a highway does not make the space thus occupied any the less part of the highway, and any one can lawfully travel upon it when no cars are passing.[1]

9. Consequential Injuries.

The rule *Sic utere tuo ut alienum non lædas* requires that the construction of a railroad upon a highway should be so planned as to do no unnecessary damage to owners of any other structure or apparatus already lawfully existing upon or under it.[2] A threatened breach of this obligation may be prevented by injunction.[3] But those who are permitted to erect any structures in a highway are allowed this privilege only to promote public convenience. They know, when they accept it, that similar grants may be made to others for similar purposes. If, therefore, an electric railroad, properly and reasonably constructed, proves necessarily injurious to the owner of apparatus previously erected as a mode of using the street for public purposes, the latter has no remedy. The public has a right to put highways to the best uses, and whoever employs it for one must expect it to be also employed for others, which may make its occupation less convenient for him.[4] But whenever highways are used by a railroad company as a site for electrical apparatus, a very high degree of care is required from it in so constructing and maintaining it

La Crosse City Railway Co. *v.* Higbee, 107 Wis. 389; 83 Northwestern, 701; 51 L. R. A. 923. See Chapter I., What Railroads are.

[1] Louisville, New Albany, & Chicago Railway Co. *v.* Phillips, 112 Ind. 59; 13 Northeastern, 132; 2 Am. State, 155.

[2] Hudson River Telephone Co. *v.* Watervliet Turnpike & Railway Co., 135 N. Y. 393; 32 Northeastern, 148; 31 Am. State, 838; 56 Am. & Eng. R. R. Cases, 469; 17 L. R. A. 674.

[3] Birmingham Traction Co. *v.* Southern Bell Telephone & Telegraph Co., 119 Ala. 144; 24 Southern, 731.

[4] Cincinnati Inclined Plane Railway Co. *v.* City & Suburban Telegraph Association, 48 Ohio St. 390; 27 Northeastern, 890; 46 Am. & Eng. R. R. Cases, 588; 3 Am. Electrical Cases, 443; 29 Am. State, 559; 12 L. R. A. 534. See Chapter XI., Property damaged but not permanently taken.

as to keep it from being a source of any unnecessary public danger.[1] In case of street railroads operated by the trolley-wire system, the poles and wires may be erected in the streets without making compensation to abutting landowners, even if they own the fee in the soil;[2] but the poles must be set so as to leave the highway reasonably convenient for their use as well as for that of the general public.[3] Great care must also be taken to string the wires so that they will not be likely to touch or come so near to other wires lawfully strung upon the same highway as to make contact with the latter dangerous.[4]

10. Underground Railroad.

A subway railroad constructed beneath the surface of a street, with frequent stations from which the surface can be reached either directly or through public grounds, is a proper mode of improving the highway.[5]

If it be constructed by a municipality, pursuant to legislative authority for purely public purposes, it imposes no new servitude on the soil.[6]

If it be constructed by a railroad company for its own benefit, and the fee of the highway is in private individuals, their rights are invaded should direct injury result to them from the construction of such a subway or of any ordinary railroad

[1] McAdam *v.* Central Railway & Electric Co., 67 Conn. 445, 447; 35 Atlantic, 341.

[2] Taggart *v.* Newport Street Railway Co., 16 R. I. 668; 19 Atlantic, 326; 43 Am. & Eng. R. R. Cases, 208; 7 L. R. A. 205.

[3] La Crosse City Railway Co. *v.* Higbee, 107 Wis. 389; 83 Northwestern, 701; 51 L. R. A. 923.

[4] Block *v.* Milwaukee Street Railway Co., 89 Wis. 371; 61 Northwestern, 1101; 46 Am. State, 849; 5 Am. Electrical Cases, 293; 27 L. R. A. 365; Western Union Telegraph Co. *v.* State, 82 Md. 293; 33 Atlantic, 763; 31 L. R. A. 572; 51 Am. State, 464.

[5] *In re* New York District Railway Co., 107 N. Y. 42; 14 Northeastern, 187.

[6] Mahoney *v.* Boston, 171 Mass. 427; 50 Northeastern, 939; Sears *v.* Crocker, Mass. ; 69 Northeastern, 326.

tunnel. It deprives them of the power of constructing vaults in the space thus occupied under the highway, and may render the foundations of their adjoining buildings insecure. If the fee of the highway is in the municipality, abutting proprietors may likewise be damaged by such a subterranean structure. While they may not then be entitled to a right of support to their land from the adjoining soil as against the municipality, should it think it necessary to change the grade of the street, they are entitled to it as against private parties seeking to disturb the soil for their own benefit. Railroad companies come within this description, and an action would lie against them by such proprietors, for constructing a subway or tunnel if the foundations of buildings were thereby weakened, although there were no negligence in the execution of the work.[1]

11. Elevated Railroads.

An "elevated railroad," built high above the grade of the highway, although approachable from the highway by steps at frequent intervals, and designed to accommodate local travel along it, is not within the proper uses of an ordinary highway. Such a road cannot be treated as a street railway in the ordinary sense.[2] It cannot be built without special legislative authority,[3] nor without making compensation to all whose property rights are directly and injuriously affected. If compensation be not made to any landowners so injured, it is as to them an unlawful obstruction; and that, had due compensation been made, the franchise to operate it might have re-

[1] Baltimore & Potomac R. R. Co. *v.* Reaney, 42 Md. 117; 14 Am. Railway Rep. 330.

[2] Freiday *v.* Sioux City Rapid Transit Co., 92 Iowa, 191; 60 Northwestern, 656; 26 L. R. A. 246; Koch *v.* North Avenue Railway Co., 75 Md. 222; 33 Atlantic, 463; 15 L. R. A. 377. *Contra*, Doane *v.* Lake St. Elevated R. R. Co., 165 Ill. 510; 46 Northeastern, 520; 56 Am. State, 265; 36 L. R. A. 97.

[3] Potts *v.* Quaker City Elevated R. R. Co., 161 Pa. St. 396; 29 Atlantic, 108.

lieved the company from liability for consequential damages does not avail to free it from such liability.[1]

If an ordinary railroad is compelled by the State to elevate its tracks and construct a viaduct, at a particular point on its line, for the public benefit, it is treated on a different footing. The mandate of the State may now excuse it for doing consequential damage to the abutting landowners, by acts not incidental to the exercise of its original franchise, nor producing direct benefit to itself.[2]

12. Common-law Remedies.

If in making the location an attempt was made in good faith to settle with all whose property interests might be injuriously affected by the construction and operation of the road, the fact that some such had been overlooked, or a settlement with them deferred, might not be sufficient to make the structure as to them absolutely an illegal one. Otherwise it will be such, and accordingly its use will not be protected by the franchise to run trains over a lawful structure. A party injured is therefore not bound to contemplate its continued maintenance and operation as the natural result of its construction. It is not to be presumed that unlawful acts will be repeated, after it is decided that they are unlawful. Hence a suit for damages by an adjoining proprietor may be confined to the damages that have been suffered, not including any that may thereafter be suffered.[3] The company may be, there-

[1] Lahr *v.* Metropolitan Elevated Railway Co., 104 N. Y. 268; 10 Northeastern, 528. *Contra*, Garrett *v.* Lake Roland Elevated Railway Co., 79 Md. 277; 29 Atlantic, 830; 24 L. R. A. 396.

[2] Muhlker *v.* New York, New Haven, & Hartford R. R. Co., 173 N. Y. 549; Northeastern, ; Dolan *v.* New York & Harlem R. R. Co., 175 N. Y. 367; 67 Northeastern, 612.

[3] Uline *v.* New York Central & Hudson River R. R. Co., 101 N. Y. 98; 4 Northeastern, 536; 53 Am. Rep. 123; 23 Am. & Eng. R. R. Cases, 24; Tallman *v.* Metropolitan Elevated Railway Co., 121 N. Y. 119; 23 Northeastern, 1134; 8 L. R. A. 173; 43 Am. & Eng. R. R. Cases, 409.

fore, held liable in successive suits for continuing injuries to the same property. If the property be sold, the right of action for the injuries preceding the sale remains in the vendor, and the vendee has that for any subsequent injuries of the same kind.[1]

13. Equitable Remedies.

But if appeal is made to a court of equity by an adjoining proprietor, on the ground that the injury is one of a continuing character, arising from a permanent structure, relief may be granted by an assessment of full and final damages upon that basis.[2] So if, in an ordinary action for damages, the plaintiff elects to treat the injury as one of a continuing and permanent character, and claims full damages both past and future, and the company does not deny that its structure is to remain permanently, damages may be assessed as for a permanent injury once for all.[3]

14. Rule of Damages as to Elevated Railroads.

Such damages may be awarded, in case of an elevated railroad, to abutting proprietors for the annoyance due to soot, cinders, and smoke coming upon their property,[4] or for the

[1] But see Chicago & Eastern Illinois R. R. Co. *v.* Loeb, 118 Ill. 203; 8 Northeastern, 460; 59 Am. Rep. 341.

[2] Pappenheim *v.* Metropolitan Elevated Railway Co., 128 N. Y. 436; 28 Northeastern, 518; 96 Am. State, 486; 50 Am. & Eng. R. R. Cases, 263; 13 L. R. A. 401.

[3] Central Branch Union Pacific R. R. Co. *v.* Andrews, 26 Kans. 702, 711; Lahr *v.* Metropolitan Elevated Railway Co., 104 N. Y. 268; 10 Northeastern, 525.

[4] Lahr *v.* Metropolitan Elevated Railway Co., 104 N. Y. 268; 10 Northeastern, 528; Drucker *v.* Manhattan Railway Co., 106 N. Y. 157; 12 Northeastern, 568; 60 Am. Rep. 437; 30 Am. & Eng. R. R. Cases, 481. *Contra*, Pennsylvania R. R. Co. *v.* Marchant, 119 Pa. St. 541; 13 Atlantic, 690; 4 Am. State, 659; 33 Am. & Eng. R. R. Cases, 116.

noise of trains,[1] or the deprivation of light.[2] If the loss of privacy consequent on their running trains close to the windows of a building impairs its rental value, the owner can recover for that.[3]

If the railroad company brings condemnation proceedings to appropriate once for all the rights of the abutting proprietors who do not own the fee, a somewhat stricter rule of liability is applied in New York. It is now not in the position of a wrongdoer. It is taking rightful means to accomplish a rightful purpose. In this position of things the rights to be appropriated are said to extend to the easements of light, air, and access, and to nothing else; thus excluding any annoyance to be expected from noise.[4] On the assumption, however, that an elevated railroad imposes a new servitude, there is strong reason for holding those who build it liable for all the injuries necessarily caused by its operation to the improved property adjoining the street; and of these, that by noise is certainly a substantial one. The adjoining owner built on his land knowing that the ordinary travel on the street would be attended with noise, and prepared to submit to this. He did not contemplate the use of the street as a site for a railroad which would cause similar or greater noises at the level of his upper chambers. He does not stand in the position of one whose quiet is invaded by an elevated railroad not built on and along the street. Such a structure, put upon land acquired for the purpose, under a railroad franchise, would present the case of a lawful use

[1] Kane *v.* New York Elevated R. R. Co., 125 N. Y. 164, 186; 26 Northeastern, 278; 11 L. R. A. 640.

[2] Baker *v.* Boston Elevated Railway Co., 183 Mass. 178; 66 Northeastern, 711. *Cf.* Pond *v.* Metropolitan Elevated Railway Co., 112 N. Y. 186; 19 Northeastern, 487; 8 Am. State, 734.

[3] Moore *v.* New York Elevated R. R. Co., 130 N. Y. 523; 29 Northeastern, 997; 14 L. R. A. 731.

[4] American Bank Note Co. *v.* New York Elevated R. R. Co., 129 N. Y. 252; 29 Northeastern, 302.

of property by its owner, to the merely consequential injury of his neighbor.[1]

15. Consequential Injuries from Surface Railroads.

Such injuries from surface railroads laid on highways stand on quite different ground. Every railroad in a highway is necessarily sometimes an annoyance to the abutting proprietors. Its lawful operation produces noises and jars. If the motive power be steam, the escape of that, and of smoke, cinders, and soot, may be unpleasant.

As respects railroads of a character to impose no new easement on the soil, no action lies for such annoyances. They are of the same nature as the clatter of a horse's hoofs, or the dust raised by a stage-coach or a herd of cattle. As respects other railroads constructed under lawful authority on the surface of the highway, it is the general doctrine that to abutting proprietors having no special easement for light and air, and none of whose property has been taken for the construction of the railroad, it is a case of *damnum absque injuria*. The loss comes from the lawful exercise of a lawful right.[2] But one whose property is taken for the construction of the railroad (and the owner of the fee in the highway occupies this position) is entitled to compensation for these natural

[1] Beseman *v.* Pennsylvania R. R. Co., 50 N. J. Law, 235 ; 13 Atlantic, 164 ; Aldrich *v.* Metropolitan West Side Elevated R. R. Co., 195 Ill. 456; 63 Northeastern, 155.

[2] Jones *v.* Erie & Wyoming Valley R. R. Co., 151 Pa. St. 30 ; 31 Am. State, 722; 25 Atlantic, 134; 17 L. R. A. 758; Randle *v.* Pacific R. R., 65 Mo. 325; Dunsmore *v.* Central Iowa Railway Co., 72 Iowa, 182; 33 Northwestern, 456; Austin *v.* Augusta Terminal Railway Co., 108 Ga. 671; 34 Southeastern, 852; 47 L. R. A. 755. *Contra*, Adams *v.* Chicago, Burlington, & Northern R. R. Co., 39 Minn. 286; 39 Northwestern, 629; 1 L. R. A. 493 ; 12 Am. State, 644; Jeffersonville, Madison, & Indianapolis R. R. Co. *v.* Esterle, 13 Bush (Ky.), 667; Omaha & North Platte R. R. Co. *v.* Janecek, 30 Neb. 276; 46 Northwestern, 478; 27 Am. State, 399; Stone *v.* Fairbury, Pontiac, & Northwestern R. R. Co., 68 Ill. 394: 18 Am. Rep. 556.

and necessary incidents of the occupation of his land, so far as they lessen the value of the rest of his land adjoining the highway and not taken.[1]

16. Occupation of Highway without Right.

One who owns the fee of the soil subject to a highway can obtain an injunction against the laying of a railroad thereon without authority of law.[2] If the fee is owned by the municipality, it can sue for one, or the State can bring an action through the Attorney-General.[3]

That it would be a convenience to the company and to those who use its railroad for purposes of transportation, while the railroad is being constructed, reconstructed, or repaired, to transfer the tracks to an adjoining highway and run trains or cars over that instead of over the railroad location, will not justify such a temporary occupation of it, unless, by authority of law specially given, and after making just compensation to the owners of the soil, if that be the subject of private ownership. The company cannot enrich itself at their expense.[4]

17. Mere Change of Public Use.

If a railroad company purchases land theretofore used and owned as a canal or turnpike, it is a case of a mere change of the mode of public use of a highway. Unless, therefore, some new injury is necessarily done to the owners of the land which

[1] See Chapter IX., Acquisition of Lands by Condemnation Proceedings.

[2] Canastota Knife Co. *v.* Newington Tramway Co., 69 Conn. 146; 36 Atlantic, 1107.

[3] Doane *v.* Lake Street Elevated R. R. Co., 165 Ill. 510; 46 Northeastern, 520; 56 Am. State, 265; General Electric Railway Co. *v.* Chicago & Western Indiana R. R. Co., 184 Ill. 588; 56 Northeastern, 963.

[4] McKeon *v.* New York, New Haven, & Hartford R. R. Co., 75 Conn. 343; 53 Atlantic, 656; 189 U. S. 508; 61 L. R. A. 730.

was not incident to its previous appropriation for public use, no new compensation need be made.[1]

18. Laying New Tracks from Time to Time.

The location of a railroad on and along a highway (unless its terms otherwise provide), like a location across a highway, authorizes the laying of as many tracks as the business of the company may require from time to time, subject only to the limitation that the highway must always remain passable as such by the general public.[2] Hence, although it lays but one at first, if it, years afterwards, adds more, no new damage can be claimed by abutting proprietors owning the fee. This is true, even if in order to lay the additional tracks the grade of the highway is altered to their prejudice.[3] If the franchise or the terms of the location were such as to give no authority for laying the new tracks or altering the grade, such changes would be an illegal use of the land, for which the owners of the fee would be entitled to compensation. Such a proprietor could treat it as a trespass, and sue for the damages already suffered; following it up by successive actions for subsequent damages, if the use were continued. He could also, at his election, treat it is as a permanent injury to the freehold, working a new appropriation of the soil to that extent, and in such case, unless the railroad set up an intention to restore the highway to its former condition, he would recover damages accordingly, once for all.[4]

[1] Pittsburgh & Lake Erie R. R. Co. *v.* Bruce, 102 Pa. St. 23; 10 Am. & Eng. R. R. Cases, 1.

[2] Sherlock *v.* Kansas City Belt Railway Co., 142 Mo. 172; 43 Southwestern, 629; 64 Am. State, 551.

[3] Uline *v.* New York Central & Hudson River R. R. Co., 101 N. Y. 98; 4 Northeastern, 536; 53 Am. Rep. 123; 23 Am. & Eng. R. R. Cases, 24.

[4] See *ante*, p. 167.

19. Exclusive Occupation of Highway.

If under any circumstances a railroad, of whatever description, comes to occupy the entire highway, under public authority, so as practically to exclude ordinary travel, this is a new taking of the soil, for which new compensation must be made to its owners.[1] A grant of the right to locate and maintain a railroad upon a highway is not to be construed as authorizing any unnecessary interference with the public use of such highway. It may justify the erection of a station building upon it.[2] It would not ordinarily authorize digging a well or erecting a tank in it to supply water to locomotives.[3]

20. Temporary Interceptions of Travel.

The temporary obstruction or closing of a highway, when a reasonable incident of the construction or reparation of the railroad, is a proper and lawful use of the railroad franchise.[4] Unreasonable delays, whereby the use of the highway is impeded, may render the company liable to any person especially damaged.[5]

The municipality in which the railroad is situated may temporarily stop its operation whenever this may be reasonably necessary in order to make repairs on or improvements in the highway.[6]

[1] Lockwood *v.* Wabash R. R. Co., 122 Mo. 86; 26 Southwestern, 698; 43 Am. State, 547; 24 L. R. A. 516; Frankle *v.* Jackson, 30 Federal, 398.

[2] State *v.* Railroad Commissioners, 56 Conn. 308, 315; 15 Atlantic, 756.

[3] Chicago & Great Western Railway Co. *v.* First Methodist Episcopal Church, 102 Federal, 85; 42 C. C. A. 178.

[4] Hamilton *v.* Vicksburg, Shreveport, & Pacific Railroad, 119 U. S. 280.

[5] Knowles *v.* Pennsylvania R. R. Co., 175 Pa. St. 623; 34 Atlantic, 974; 52 Am. State, 860.

[6] Kirby *v.* Citizens' Railway Co., 48 Md. 168; 30 Am. Rep. 455.

CHAPTER XIX.

ESTABLISHMENT AND ABANDONMENT OF STATIONS.

1. Duty to establish Necessary Stations.

At common law, a common carrier plying between certain points on a highway is not bound to stop on one of his trips at any intermediate point to take on passengers, unless by force of an agreement, or a custom from which an agreement can be implied. Nor is he bound to provide buildings at the terminal points for the use of persons or goods awaiting transportation. The same doctrine has been applied to railroads.[1] In the reason of things, it can only apply to them with important limitations. A railroad is a public agency. It has been built by aid of the power of eminent domain. It is allowed, to a greater or less extent, to make use of the public roads, and to lay down permanent structures upon them. Its construction is a great geographical change, like the bursting out of a new river from the earth to serve as a highway of commerce in new directions.[2] With these attributes and effects, it cannot be treated, as a common carrier, precisely on the footing of a

[1] Southeastern Railway Co. *v.* Railway Commissioners, L. R. 6 Q. B. Div. 586, 592; People *v.* New York, Lake Erie, & Western R. R. Co., 104 N. Y. 58; 9 Northeastern, 856; 58 Am. Rep. 484.

[2] Knowlton *v.* New York, New Haven, & Hartford R. R. Co., 72 Conn. 188, 194; 44 Atlantic, 8.

stage line or a river packet. The company which operates a railroad of any considerable length as a carrier of goods and persons must be under an implied obligation not only to receive them for transportation at its terminal points, but to stop its cars to receive them at or near intermediate points where the population and industries are such as to render it clear that the business thus to be accommodated will be both considerable and remunerative.[1]

2. Discretion as to where to locate Stations.

It is, however, always primarily the office of the directors to determine the places where stations are to be established and maintained. They have a wide discretion in this respect. With the exercise of this the courts will interfere only in exceptional cases; but the legislature may overrule it, in the exercise of a reserved power to alter a railroad franchise, or of the police power.[2] Action by the courts is somewhat hampered by certain rules of judicial procedure. These provide no way to compel the establishment of a station at a place where the directors decline to establish one, unless it be by mandamus. Mandamus to compel the performance of a legal duty lies only when the duty is specific and the breach clear. When the statutory duty or charter requirement is simply to provide all necessary stations, if such general words can be held to impose a specific duty in respect to any particular place, it can only be when the facts show that the discretion of the directors has been manifestly abused.[3] Even in case of

[1] See State *v.* Republican Valley R. R. Co., 17 Neb. 647; 52 Am. Rep. 424; 24 Northwestern, 329.

[2] Dolan *v.* New York & Harlem R. R. Co., 175 N. Y. 367; 67 Northeastern, 612.

[3] People *v.* Chicago & Alton R. R., 130 Ill. 175, 182, 183; 22 Northeastern, 857; State *v.* Republican Valley R. R. Co., 17 Neb. 647; 24 Northwestern, 329; 52 Am. Rep. 424; 6 Thompson on Private Corporations, § 7828. In Northern Pacific R. R. Co. *v.* Dustin, 142 U. S. 492,

such an abuse some courts hold that mandamus does not lie, for want of a specific legal duty to be enforced.[1]

There is no remedy in equity to compel the establishment of a station, in the absence of a statutory or contract right.[2] Nor ordinarily will a contract right suffice. A decree for a specific performance is granted only of contracts the mode of performing which can be particularly directed by the court. A contract to establish and maintain a station at a certain point calls for action of a continuous character. To establish it would be of no benefit, unless it were maintained. To enforce its proper maintenance by judicial orders would be difficult or impracticable. Courts cannot efficiently run railroads.[3]

The establishment of a station does not imply that all trains are to be stopped there. It may be a flag station. It may be simply a station for accommodation trains. There may be no station agent kept there, and no baggage room provided. All these things the company is free to regulate at its reasonable discretion. If, however, it makes an unreasonable regulation in any such respect the courts can pronounce it void, and it may be so unreasonable upon its face as to be void as a matter of law. A regulation of a company having five stations in a large city that baggage should be checked and delivered at one of them only, has been held unreasonable upon its face.[4]

508, it is said that such general words imposed no specific duty; but the facts did not show any plain abuse of discretion.

[1] People *v.* New York, Lake Erie, & Western R. R. Co., 104 N. Y. 58; 9 Northeastern, 856; 58 Am. Rep. 484.

[2] Atchison, Topeka, & Santa Fé R. R. Co. *v.* Denver & New Orleans R. R. Co., 110 U. S. 667, 682.

[3] Blanchard *v.* Detroit, Lansing, & Lake Michigan R. R. Co., 31 Mich. 43; 18 Am. Rep. 142; Marsh *v.* Fairbury, Pontiac, & Northwestern Railway Co., 64 Ill. 414; 2 Am. Railway Rep. 82; 16 Am. Rep. 564.

[4] Pittsburgh, Cincinnati, & St. Louis Railway Co. *v.* Lyon, 123 Pa. St. 140; 16 Atlantic, 607; 10 Am. State, 517; 37 Am. & Eng. R. R. Cases, 231; 2 L. R. A. 489.

3. Statutory Duty.

The legislature of a State in which special legislation is not prohibited by the Constitution can require a railroad company to establish stations at particular points. In States where there is such a constitutional prohibition, authority to require the establishment of stations can be vested by general laws in any proper administrative tribunal. A State can require a railroad company which it has incorporated under a charter reserving a power of amendment at pleasure, not only to establish a new station at a prescribed point, but to exercise its right of eminent domain to that end.[1]

A statutory requirement to construct a station building at a particular spot will not relieve the company from a liability to respond in damages to one whose property is taken, or directly damaged by its construction there.[2]

4. Contracts for the Location of Stations.

No private right by contract can found an equity superior to a public right. The public have a right to have railroad stations established where they will best promote public convenience. A contract with a private individual or with a municipality to establish them where they will promote a particular, but defeat the general interest, will therefore not be specifically enforced. Such a contract would be contrary to public policy.[3] There is no objection on the ground of public policy to a contract to build and maintain a station at a particular point, unless it appears that such a site would be prejudicial to the public interest.[4] Such a contract is

[1] Mayor *v.* Norwich & Worcester R. R. Co., 109 Mass. 103, 114.

[2] Dolan *v.* New York & Harlem R. R. Co., 175 N. Y. 367; 67 Northeastern, 612.

[3] Marsh *v.* Fairbury, Pontiac, & Northwestern Railway Co., 64 Ill. 414; 16 Am. Rep. 564; 2 Am. Railway Rep. 82.

[4] Telford *v.* Chicago, Paducah, & Memphis R. R. Co., 172 Ill. 559; 50 Northeastern, 105.

good when it leaves the company free to maintain stations at any other points also; and damages are recoverable for its breach.[1]

A conveyance to a railroad company expressed to be given for the location and maintenance of a station on the land in consideration of the benefits to be derived by the grantor does not import a condition. If the grantee obtained the deed by fraudulently representing that it would build and maintain a station there, when it had no such intention, there would be ground for relief in equity by obtaining a cancellation of the instrument.[2] A condition in a conveyance of land for railroad uses that a station then established thereon shall be forever maintained, is not contrary to public policy.[3] A condition that no other station should ever be established within a certain distance would be; and therefore would be void.[4] If the remedy at law for breach of a valid condition of a grant of a right of way to establish or maintain a station is inadequate, equity may adjudge a forfeiture of the easement granted.[5]

A bond for a deed of land for the site of a station does not require an unqualified conveyance of the fee.[6]

5. Changing or abandoning Stations.

The power to locate stations is not exhausted by its exercise. It is in its nature a continuing one. As population and

[1] Louisville, New Albany, & Chicago Railway Co. *v.* Sumner, 106 Ind. 55; 5 Northeastern, 404.

[2] Chicago, Texas, & Mexican Central Railway Co. *v.* Titterington, 84 Tex. 218; 19 Southwestern, 472; 31 Am. State, 39.

[3] Gray *v.* Chicago, Milwaukee, & St. Paul Railway Co., 189 Ill. 400; 59 Northeastern, 950.

[4] St. Louis, Jacksonville, & Chicago R. R. Co. *v.* Mathers, 71 Ill. 592; 22 Am. Rep. 122; Williamson *v.* Chicago, Rock Island, & Pacific R. R. Co., 53 Iowa, 126; 4 Northwestern, 870; 36 Am. Rep. 206.

[5] Lyman *v.* Suburban R. R. Co., 190 Ill. 320; 60 Northeastern, 515.

[6] Hill *v.* Western Vermont R. R. Co., 32 Vt. 68; 1 Redfield's Am. Railway Cases, 237.

business shift, old stations may be abandoned or new ones established by the board of directors, as public convenience may require.[1] Statutes often limit this right by requiring the approval of some public authority before a station once established can be discontinued. Under such a statute a flag station is not necessarily to be regarded as a station. In determining whether it is embraced in that term, regard may be had to whether the company entered it as a station in its time-tables or lists of stations, sold tickets to it, or delivered goods at it.[2]

A railroad company can be compelled by statutory proceedings for a writ of mandamus to re-establish a station which it has abandoned without due cause. In determining whether there was due cause, great regard will be paid to the interests of the community which may have been gathered about it, and it will not necessarily be enough to defeat the application that the business centering there has so declined that the maintenance of the station is no longer profitable.[3]

6. Location in Streets.

A duty to elevate the tracks of a through railroad, and turn it into a viaduct in the street, if required by law for public safety may not entail a liability to respond in damages to abutting proprietors; but this protection against their claims does not necessarily extend to station houses outside of the tracks.[4]

[1] Mobile & Ohio R. R. Co. *v.* People, 132 Ill. 559; 24 Northeastern, 643; 22 Am. State, 556.

[2] State *v.* New Haven & Northampton Co., 37 Conn. 153; Same *v.* Same, 41 Conn. 134, 139.

[3] State *v.* Northern Pacific Railway Co., Minn. ; 96 Northwestern, 80.

[4] Ketcham *v.* New York & Harlem R. R. Co., N. Y. ; 69 Northeastern, 533. See State *v.* Railroad Commissioners, 56 Conn. 308; 15 Atlantic, 756.

CHAPTER XX.

ROLLING-STOCK.

1. How far Real Property.

ROLLING-STOCK in use upon a railroad and belonging to it is in some States deemed a part of it.[1] In all, if the railroad company has power to mortgage its road and franchises, it has power to mortgage its rolling-stock, both then owned and thereafter to be acquired.[2]

2. Leased Cars.

Rolling-stock is often held and used under a lease, or a contract of conditional sale.[3] Equipment companies exist for the purpose of supplying railroads with rolling-stock, by leases reserving a rent to be determined by the number of miles run, a fixed sum being charged for each mile. Rules governing the use of and responsibility for leased cars have been framed by an organization of railroad companies known as the Master Car Builders' Association, which are known as the "Master Car Builders' Rules." These govern such use, not only by the lessee, but also on all roads owned by members of the association.[4]

[1] See Chapter I., What Railroads are.
[2] See Chapter XLVIII., Mortgages.
[3] See Chapter XLVI., Leases, and Appendix V.
[4] Georgia Southern & Florida Railway Co. *v.* Southern Railway Equip-

3. Foreign Cars.

Upon all through railroads a considerable part of the business is transacted by the use of cars belonging to other roads, or other parties, such as sleeping-car companies and circus companies.[1] The duty of a railroad company, as a master, to use reasonable care to provide its servants with safe appliances and apparatus requires a proper inspection of all such cars when run upon its tracks, and the exclusion of any which an inspection may or would show to be unsafe.[2] It does not owe them the duty of testing the safety of every loaded freight car immediately upon its receipt from another railroad, nor of refusing to receive cars not equipped with as safe appliances as those in use on its own road.[3] It should inspect every "foreign car" cursorily when it receives it, and carefully on its reaching a point on the line where its own cars are customarily inspected.[4] More care is due in such inspection of passenger cars than of freight cars, even as respects one riding as a passenger on a freight train.[5]

4. Cars in Use by Contractor.

A railroad company often furnishes rolling-stock for the use of a contractor, and sends its servants with it. If it and they are sent to do his work in his service and are put under his control, they become, for the time being, his servants,

ment Co., 107 Ga. 186; 33 Southeastern, 184. See Chapter XXVI., Rules and Regulations.

[1] See Appendix VI., 6.

[2] Goodrich *v.* New York Central & Hudson River R. R. Co., 116 N. Y. 398; 22 Northeastern, 397; 15 Am. State, 410; 5 L. R. A. 750.

[3] Ballou *v.* Chicago, Milwaukee, & St. Paul Railway Co., 54 Wis. 257, 259; 11 Northwestern, 559; 41 Am. Rep. 31; Mackin *v.* Boston & Albany R. R., 135 Mass. 201, 206; Michigan Central R. R. Co. *v.* Smithson, 45 Mich. 212.

[4] Anderson *v.* Erie R. R. Co., 68 N. J. Law, 647; 54 Atlantic, 830.

[5] Western Maryland R. R. Co. *v.* State, 95 Md. 637; 53 Atlantic, 969.

and the company is not responsible to one of them for injuries received by the negligence of another of them in doing the contractor's work.[1]

5. Demurrage.

A charge is generally made by a company owning loaded cars to a company upon whose road they are forwarded to their destination, for their use while in transit on its road, and also of so much a day for any undue delay in returning them. A like charge is generally made by the company carrying a loaded freight car to its point of destination, against the shipper or consignee, of so much a day, after the lapse of a certain time from its arrival, for each day's delay, on his part, in receiving the contents. This is called demurrage.[2]

6. Transit Cars.

The phrase "transit car" is used to denote a loaded freight car already in transit.[3]

7. United States Statutes; Safety Appliances.

The statutes of the United States regulate the kind of rolling-stock to be used in railroads in the Territories of the United States and the District of Columbia and in commerce between the States.

Cars used in inter-State commerce must, by an act of Congress which took full effect on August 1, 1900, and its amendments,[4] be equipped with power or train brakes, that

[1] Scarborough *v.* Alabama Midland Railway Co., 94 Ala. 497; 10 Southern, 316. *Contra*, New Orleans, Baton Rouge, Vicksburg, & Memphis R. R. Co. *v.* Norwood, 62 Miss. 565; 52 Am. Rep. 191.

[2] See Chapter XXXVII., Transportation of Goods over Connecting Railroads.

[3] Stock *v.* Towle, 97 Me. 408; 54 Atlantic, 918.

[4] U. S. Stat. at Large, xxvii. 531; xxix. 85; xxxii. 943. See Chapters XXVIII., Servants, and XXXVIII., Inter-State Business.

is, brakes that are set otherwise than by the mere power of the hand; and also with couplers acting automatically,[1] and grab-irons or hand-holds on the ends or sides for the better safety of the train men. The driving wheels of the locomotive must be so arranged as to set the brakes on more than half of the cars in the train.

This statute is a penal one, and so to be strictly construed.[2] Thus the tender of a locomotive is not a car within the meaning of the word as used in it.[3]

On roads not engaged in inter-State commerce, in the absence of any State statute to the same effect the failure to provide automatic couplers cannot be regarded, in favor of a brakeman injured in coupling cars, as negligence *per se*. The old style of car is still in too common use.[4]

[1] Until 1903 it was not necessary that couplers be used which would couple automatically with any other kind of automatic coupler. Johnson *v.* Southern Pacific Co., 117 Federal, 462; 54 C. C. A. 508. But now see Stat. xxxii. 943.

[2] Sprague *v.* Southern Railway Co., 92 Federal, 59; 34 C. C. A. 207; 63 U. S. App. 711.

[3] Larabee *v.* New York, New Haven, & Hartford R. R. Co., 182 Mass. 348; 66 Northeastern, 1032. *Contra*, Philadelphia & Reading R. R. Co. *v.* Winkley, 4 Pennewill (Del.) ; 56 Atlantic, 112.

[4] See Northern Central Railway Co. *v.* Husson, 101 Pa. St. 1; 47 Am. Rep. 690. *Contra*, Harden *v.* North Carolina R. R. Co., 129 N. C. 354; 40 Southeastern, 184; 85 Am. State, 747.

PART III.

FINANCES.

CHAPTER XXI.

PUBLIC FINANCIAL AID.

1. Constitutional Prohibitions.

MANY American railroads have been constructed by the aid of funds derived from the State or from municipalities acting by authority from the State. Such aid has come in the shape of grants of public land, of loans, and of subscriptions to the stock. The result has been that railroads were often built over routes that could not furnish business enough to support them, thus involving heavy losses of public moneys with little corresponding benefit. Most of our State Constitutions now forbid any such grants of municipal aid: some forbid them from the State. Constitutional prohibitions of aid to railroad companies include by their spirit, if not by their letter, the construction of a railroad by municipal funds, as the property of the municipality.[1] In one case a contrary conclusion was reached, where a great city, which was in the fullest sense a municipal corporation

[1] Pleasant Township *v.* Ætna Life Insurance Co., 138 U. S. 67, 77.

proper, undertook the construction of such a railroad; but it is difficult to support the conclusion of the court.[1]

If the construction of a particular kind of railway within the limits of a certain municipality, is deemed by the State essential to its prosperity, and cannot otherwise be accomplished, the municipality, in the absence of any constitutional prohibition, may be given authority to build it. It is simply a form of highway, and this is true whether it is to run above or below the surface of the ground.[2] The State could build such a highway itself, and it can authorize its construction by any other public agency.

2. Limitations on Territorial Legislation.

Territorial legislatures cannot authorize a municipal corporation to issue railroad aid bonds as a means necessary to the administration "of its internal affairs," under U. S. Rev. Stat. § 1889, 20 Stat. at Large, 101.[3]

3. The Question of Public Use.

There is no objection to a grant of public aid to a railroad company for the construction of its road, on the ground that it is an appropriation of the property of all for the benefit of one. It is taking the property of all for the benefit of all, since a railroad is built for public use.[4] Nor is it of any consequence that the railroad is one to be built in another State.[5]

[1] Walker *v.* Cincinnati, 21 Ohio St. 14; 8 Am. Rep. 24. *Cf.* Wyscaver *v.* Atkinson, 37 Ohio St. 80.

[2] Sun Printing & Publishing Association *v.* Mayor, 152 N. Y. 257; 46 Northeastern, 499; 37 L. R. A. 788.

[3] Lewis *v.* Pima County, 155 U. S. 54, 57.

[4] Olcott *v.* Supervisors, 16 Wall. 678, 694; Whiting *v.* Sheboygan & Fond du Lac R. R. Co., 25 Wis. 167, 188; 3 Am. Rep. 30. *Contra*, People *v.* Township Board of Salem, 20 Mich. 452.

[5] Railroad Co. *v.* County of Otoe, 16 Wall. 667, 675; Sharpless *v.* Mayor of Philadelphia, 21 Pa. St. 147; 59 Am. Dec. 759.

4. Municipal Subscriptions.

If a municipality is allowed to subscribe and issue railroad aid bonds, provided a majority of the taxpayers assent, the fact that the latter subscribe the petition on condition that the road be built on a certain route is of no consequence, if such a condition would be for the advantage of the municipality.[1]

While the State may authorize one of its municipal corporations to aid a railroad company, it cannot compel it to do so. Such a company is public as to its franchises; private as to the ownership of its property and its relations to its stockholders. The power of the legislature in such matters is supreme only as to public purposes; and as a subscription to the stock of a railroad company, or the issue of bonds to aid it, effects both public and private purposes, and both are inseparably connected, the municipality cannot be forced to assume the relation of a stockholder or creditor, without its consent.[2]

Authority to a municipality to aid in the construction of a railroad "into, through, or near" it, has been held to extend to a railroad nine miles distant. It was for the municipality to say how near it must be located in order to be of the benefit expected.[3]

A railroad company which builds its road by the aid of municipal bonds, impliedly agrees with the municipality to

[1] Andes *v.* Ely, 158 U. S. 312, 320.

[2] People *v.* Batchellor, 53 N. Y. 128; 13 Am. Rep. 480; 5 Am. Railway Rep. 25. As all such aid must ultimately be derived from taxation, although borrowing may postpone the time, every statute authorizing the aid is of the nature of a tax law, and some courts hold that as far as the power of taxation extends, so far extends also the power to compel the assumption by public communities of public obligations to be discharged by taxation. State *v.* Common Council, 96 Wis. 73; 71 Northwestern, 86; Napa Valley R. R. Co. *v.* Board of Supervisors, 30 Calif. 435.

[3] Kirkbride *v.* Lafayette County, 108 U. S. 208.

maintain and operate it. A breach of this contract works a failure in whole or part of the consideration of the bonds, and damages may be recovered accordingly.[1]

5. Public Liens.

States which have aided in the construction of a railroad by lending their credit as surety, have generally done so under a law creating a lien upon the property for their protection. If the State refrains from enforcing the lien, the creditors may be subrogated to the benefit of it, in equity; and all the more because they cannot sue the State.[2]

6. Land Grants.

Grants of land out of the public domain to railroad companies for their right of way have been common since the early days of American railroad history; but what are known as "land grants" began in 1850.[3] These give not only land for the location, but additional adjoining land for sale. Some have been made to a particular railroad company; others to the State, to be by it assigned to particular railroad companies. Congressional grants to a particular company may fairly be presumed to have been passed with knowledge of State statutes previously passed, affecting the capacity of the grantee to take the land and build the road.[4] No conveyance to the company is necessary to pass the title in case of a direct legislative grant, whether from the United States or from a State.[5]

[1] Hinckley *v.* Kettle River R. R. Co., 70 Minn. 105; 72 Northwestern, 835.

[2] Young *v.* Montgomery & Eufaula R. R. Co., 2 Woods, 606.

[3] See Sanborn, Congressional Grants of Land in Aid of Railways, 93.

[4] Kansas City, Lawrence, & South Kansas R. R. Co. *v.* Attorney-General, 118 U. S. 682, 690.

[5] Courtright *v.* Cedar Rapids & Missouri River R. R. Co., 35 Iowa, 386; 5 Am. Railway Rep. 67.

Land grants commonly operate as grants *in præsenti*, notwithstanding the sections granted may not be capable of identification until the route of the road is definitely fixed. When that route is thus established, the grant takes effect upon the sections, by relation, as of the date of the act of Congress, cutting off all intermediate claims.[1] The time of such establishment is that of filing the map or plat of the line in the office of the Commissioner of the General Land Office.[2]

No priority of right in case of overlapping land grants to two different companies is secured by priority of location or of construction, but they take in undivided moieties.[3] When, however, the statute provides that other lands may be selected in lieu of such within the limits of the primary location as may have been sold or pre-empted before the location is made, and the power of selection among the same lands is given to two companies, priority of selection gives priority of right.[4]

A land grant for a railroad right of way implies that the land cannot be used for any other purposes; hence no third party can acquire title by adverse possession under State statutes of limitation.[5]

7. Construction of Land Grants.

In the construction of Land-grant Acts there is a well-established distinction between "granted lands" and "indemnity lands." The former are those falling within the limits specially designated, the title to which attaches when

[1] Van Wyck *v.* Knevals, 106 U. S. 360, 365.

[2] Kansas Pacific Railway Co. *v.* Dunmeyer, 113 U. S. 629, 634.

[3] Sioux City & St. Paul R. R. Co. *v.* Chicago, Milwaukee, & St. Paul Railway Co., 117 U. S. 406, 408.

[4] St. Paul & Sioux City R. R. Co. *v.* Winona & St. Peter R. R. Co., 112 U. S. 720, 727–732.

[5] Northern Pacific Railway Co. *v.* Townsend, 190 U. S. 267, 272.

the lands are located by an approved and accepted survey of the line of the road, filed in the Land Department, as of the date of the Act. The latter are those selected in lieu of parcels lost through some previous disposition or reservation for other purposes, the title to which accrues only from the time of their selection.[1]

Land grants are to be strictly construed,[2] and ordinarily do not include mineral lands.[3] A reservation of these includes lands containing stone suitable for building purposes.[4] So submerged lands under Lake Michigan were held to be not within the State grant to the Illinois Central Railroad Company of all lands and waters belonging to the State within its route for its railroad purposes.[5]

A congressional land grant, providing that the railroad when constructed shall be a public highway for the use of the government, free of charge, for the transportation of property or troops, means the location and the railroad structure placed upon it, but not the railroad cars. Hence the grantee is not bound to furnish such transportation in its own cars, but simply to let the United States run any suitable cars upon the railroad, which it may procure elsewhere, free.[6]

8. Location under Land Grants.

A location of lands under a congressional land grant giving a company alternate sections on each side of its railroad is, as respects the rights of settlers and preemptors, not necessarily made by the location of the railroad. It can seldom be well determined until proper plats

[1] Barney *v.* Winona & St. Peter R. R. Co., 117 U. S. 228, 232; Oregon & California R. R. Co. *v.* United States, 189 U. S. 103, 112.
[2] Northern Pacific Railway Co. *v.* Soderberg, 188 U. S. 526, 534.
[3] Barden *v.* Northern Pacific R. R. Co., 154 U. S. 288, 325.
[4] Northern Pacific Railway Co. *v.* Soderberg, 99 Federal, 506.
[5] Illinois Central R. R. Co. *v.* Chicago, 176 U. S. 646.
[6] Lake Superior & Mississippi R. R. Co. *v.* United States, 93 U. S. 442.

and surveys of such outside lands are filed and approved.[1] Settlers under the homestead laws, in actual occupation at the time when the location papers or surveys are filed, may also thus acquire equitable rights which the courts will protect, under the act of Congress of May 14, 1880 (21 U. S. Stat. at Large, 140).[2]

9. Forfeitures.

Congressional grants generally provide that the road must be completed within a set period, else all lands remaining unsold shall revert to the United States. A failure so to complete it does not *ipso facto* work a forfeiture. The lands do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to a judgment of office found at common law.[3] Legislation, to be sufficient, must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture and of a judgment therein establishing the right, it should be direct, positive, and free from all doubt or ambiguity.[4] No such forfeiture can be effected by mere executive action on the part of the Secretary of the Interior.[5]

The rights of purchasers from the railroad company are favorably construed and upheld against the United States by the courts.[6]

[1] Baker *v.* Gee, 1 Wall. 333, 336.

[2] Nelson *v.* Northern Pacific Railway Co., 188 U. S. 108, 124.

[3] St. Louis, Iron Mountain, & Southern Railway Co. *v.* McGee, 115 U. S. 469, 473.

[4] United States *v.* Loughrey, 172 U. S. 206; United States *v.* Northern Pacific R. R. Co., 177 U. S. 435.

[5] Southern Pacific R. R. Co. *v.* Groeck, 87 Federal, 970; 31 C. C. A. 334; 59 U. S. App. 366.

[6] United States *v.* Winona & St. Peter R. R. Co., 165 U. S. 463; United

Action by the proper officer of the United States, determining the right of a particular company to a land grant, is quasi-judicial, and not subject to revocation by his successor.[1] If a proper title is given by the Commissioner of the General Land Office to a railroad company for lands claimed under a congressional grant, and such claim was unfounded in law, though not fraudulent, the United States can avoid the title on a bill in equity brought in the name of the Attorney-General.[2]

10. Grants by Implication; Navigable Waters.

A grant of public lands may be made by implication. If a State owning the bed of a navigable watercourse grants the right to construct a railroad bridge across it, this imports that it may be done without making any compensation for the land under water occupied by the abutments and piers. The purpose is to establish a new highway for public use. It is the duty of the State to establish all necessary highways, and this duty it has delegated to the railroad company.[3]

If a railroad company, under a grant from the State, constructs its road along or beyond the line of the shores of navigable waters, it does not thereby become invested with the rights of a riparian proprietor as to reclaiming lands under water still further removed from the upland. It has a mere right to use the land specifically granted to it for railroad purposes. The State has no right to make an irrevocable grant of its title to lands under navigable waters

States *v.* Southern Pacific R. R. Co., 98 Federal, 45; 38 C. C. A. 637, 640.

[1] Noble *v.* Union River Logging R. R. Co., 147 U. S. 165.

[2] Kansas City, Lawrence, & South Kansas R. R. Co. *v.* The Attorney-General, 118 U. S. 682, 687.

[3] Pennsylvania R. R. Co. *v.* New York & Long Branch R. R. Co., 23 N. J. Eq. 157.

for purposes unconnected with the promotion of commerce and navigation. Its title is that of a trustee for the public, and remains, notwithstanding such a grant, affected by this trust.[1]

[1] Illinois Central R. R. Co. *v.* Illinois, 146 U. S. 387, 444, 455.

CHAPTER XXII.

BONDS.

1. Authority to issue.

MOST railroads are built largely on the proceeds of interest-bearing bonds, running for a term of years, and generally secured by mortgage. No special authority is required for the issue and sale of such bonds.[1] They are simply a form of borrowing money, and that is a power belonging to every person, natural or artificial.[2] If drawn payable to bearer or in blank, they are negotiable.[3] Irredeemable bonds cannot be issued without special authority They are not a form of loan.[4]

2. Income Bonds.

After the road has been mortgaged as heavily as it will bear, or upon reorganization after foreclosure, "income bonds" are sometimes issued. These are generally payable only so far as the future net income may suffice, but may be made payable, in the alternative, in new stock or scrip for new stock.[5] Where an income bond is on a fixed

[1] Commonwealth *v.* Smith, 10 Allen, 448, 455; 87 Am. Dec. 672.
[2] Railroad Co. *v.* Howard, 7 Wall. 392, 412.
[3] White *v.* Vermont & Massachusetts R. R. Co., 21 How. 575, 577.
[4] Taylor *v.* Philadelphia & Reading R. R. Co., 7 Federal, 386.
[5] See Chapters XLVII., Mortgages, and LVI., Foreclosure and Reorganization.

rate of interest, payable, in case of a deficiency of net earnings, in scrip, at the option of the company, such option cannot be exercised after the day when the interest is payable.[1] "Deferred income bonds" have also been issued, the principal of which is never to be payable, and which are to be substantially an irredeemable preferred stock. For the issue of such securities special authority must be given by law. A general authority to borrow would not suffice.[2]

3. Equipment Bonds.

"Equipment bonds" are sometimes issued and sold to procure funds to buy rolling-stock, the cars so bought being pledged as security through the medium of a trustee. The title is conveyed by the manufacturer to the latter, who conveys them to the railroad company, with delivery of possession, by some instrument in the nature of a conditional sale or equitable mortgage.[3] Such bonds are sometimes also secured by a general second or third mortgage of the road and franchises.

4. Debentures.

Bonds or interest-bearing certificates of indebtedness are sometimes issued without giving at the time any collateral security. These are commonly termed "debentures." By statute they are sometimes made a lien on the railroad franchises and property. To give them this effect as against subsequent grantees from the company, taking for value and without notice, the terms of the statute must be clear and explicit.[4] Bonds may be issued in which it is stipulated

[1] Texas & Pacific Railway Co. *v.* Marlor, 123 U. S. 687, 699–702.

[2] Taylor *v.* Philadelphia & Reading R. R. Co., 7 Federal, 386. *Cf. contra*, Philadelphia & Reading R. R. Co. *v.* Stichter, 21 Am. Law Reg. N. S. 713.

[3] See Chapter XXIII., Car Trusts, p. 201.

[4] Brunswick & Albany R. R. Co. *v.* Hughes, 52 Ga. 557; 7 Am. Railway Rep. 137; Woodson *v.* Murdock, 22 Wall. 351.

that they shall be receivable in part or entire payment of debts due or to become due to the company. When made thus receivable for freight to the amount of half the freight due and "then to be paid," the holder can tender them in discharge *pro tanto* of the aggregate amount of freight due on several distinct shipments.[1]

5. Limitations on Territorial Legislation.

Under Rev. Stat., sec. 1889, and the Act of 1878 (20 Stat. 101), a territorial legislature cannot authorize a county to issue its bonds in exchange for railroad bonds, to aid in the construction of a railroad, since such a transaction cannot "be necessary to the administration of its internal affairs."[2]

6. Construction of Constitutional Limitations.

The constitutional provisions and statutes which exist in some States, prohibiting the issue of railroad bonds without corresponding value received, have been quite strictly construed in favor of purchasers.[3]

7. Guarantying Bonds.

One railroad company cannot, without statutory authority, guaranty the bonds of another railroad company, in order to promote their sale by the latter for its benefit. Such a guaranty is so wholly *ultra vires* that no ratification and no estoppel can avail to support it.[4] It may guaranty them

[1] Evansville & Indianapolis R. R. Co. *v.* Frank, 3 Ind. App. 96; 29 Northeastern, 419.

[2] Lewis *v.* Pima County, 155 U. S. 54.

[3] Memphis & Little Rock Railroad *v.* Dow, 120 U. S. 287, 298; Continental Trust Co. *v.* Toledo, St. Louis, & Kansas City R. R. Co., 82 Federal, 642, 658.

[4] Louisville, New Albany, & Chicago Railway Co. *v.* Louisville Trust Co., 174 U. S. 552, 567.

as part of the consideration for a contract with the other company which it is authorized to make for its own benefit,[1] or, if it owns them, to promote their sale.[2]

A guaranty indorsed on a negotiable railroad bond in favor of the holder is negotiable with the bond.[3]

[1] Low *v.* California Pacific R. R. Co., 52 Cal. 53; 28 Am. Rep. 629; 9 Am. Railway Rep. 366.

[2] See Chapter IV., Railroad Franchises, p. 37.

[3] Louisville Trust Co. *v.* Louisville, New Albany, & Chicago Railway Co., 75 Federal, 433; 22 C. C. A. 378; 43 U. S. App. 550; s. c. on *certiorari*, 174 U. S. 552, 573.

CHAPTER XXIII.

CAR TRUSTS.[1]

1. How constituted.

A RAILROAD company in need of rolling-stock and unable to pay for it often finds relief through an organization known as a Car Trust. This is generally an unincorporated association of some of the stockholders or other capitalists friendly to the road, in the form of a joint-stock company. They agree on Articles of Association which virtually constitute them a partnership, but with the power in each to transfer his share in the concern to any one at pleasure, and the stipulation that the transferee shall thereupon become as fully a member of the association as was the transferor.[2] In order to protect themselves as far as they can from the ordinary liabilities of a partner, the articles name and appoint a committee, often made self-perpetuating, to be the sole managers of the undertaking, and provide that they shall make no contract with any one which does not contain an express waiver by him of any claim he might otherwise have against the members of the association. It is also stipulated that neither the death nor bankruptcy of any share-

[1] A careful study of this subject will be found in a paper by Francis Rawle in the Report of the American Bar Association for 1885, p. 277. Forms of car-trust papers are given in the Appendix (V.).

[2] See Tyrrell *v.* Washburn, 6 Allen, 466, 474.

holder shall dissolve the association, and that the members shall vote at any meetings of the association, not as equal partners, but in proportion to their investment in it; the majority in interest thus having the control. A trustee is named (generally an incorporated trust company) to take the title to such rolling-stock as may be purchased by the board of managers with the funds provided by the shareholders, and to let it to the railroad company at such an annual rental as in a short term of years, seldom exceeding ten, will repay the entire cost with interest, with the provision that if all such payments are duly made, the absolute title at the end of the term shall pass to the lessee. Members of such an association who transfer their shares would, as respects their fellow partners, thereupon cease to be partners, and the transferee would become a partner. As respects creditors ignorant of the transfer, they would still be liable as partners.[1] The provision requiring the Board of Managers to incorporate into all contracts a waiver of any right to look further than to the assets of the association infringes upon no public policy and is efficacious, so far as they conform to it. It is, however, practically impossible for such an organization to incur no liability except by a formal written contract. It may commit torts, and it must now and then, in small matters, make oral contracts or informal written ones.[2]

2. Leases and Conditional Sales.

The so-called lease of rolling-stock by the trustee of a car-trust association to the railroad company is really more like a conditional sale, and the courts incline to construe it as such where the annual payment greatly exceeds a fair rental.[3] It will be so treated by a court of equity, if a

[1] Tyrrell *v.* Washburn, 6 Allen, 466, 474.
[2] French Spiral Spring Co. *v.* New England Car Trust, 32 Federal, 44.
[3] Heryford *v.* Davis, 102 U. S. 235.

forfeiture is claimed after several annual payments have been made.[1]

3. Recording and Notice.

The equipment of railroads with rolling-stock owned by others, who hold the title without possession, is liable to give the railroad company false credit. Particularly is this true when the owner is a mere trustee for an association consisting, as is generally the case in car trusts, of persons interested in the road as stockholders or directors. Hence statutes exist in many of the States requiring rolling-stock held under car-trust leases to be lettered with the name of the true owner, and the leases to be recorded in some public office, generally one of those in the capitol. In the absence of such a statute, general laws as to the recording of conditional sales, contracts, or leases may be so expressed as to cover car-trust leases. Their terms may be such as to cover them as respects creditors, but not as against the company or a receiver of the company, or prior mortgagees.[2] If, in the absence of such a statute, the car-trust association allows the railroad company to letter the cars with its own name, and actively furthers its obtaining a false credit on the faith of ownership, it will be estopped from asserting title as against those thus misled.[3]

It may fairly be assumed that persons investing in the bonds of railways which are in active operation do so upon the assumption that their security consists largely in the

[1] Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 664; Sunflower Oil Co. *v.* Wilson, 142 U. S. 313, 324.

[2] Myer *v.* Car Co., 102 U. S. 1. A car-trust lease is printed in full in the report of this case (p. 3). Central Trust Co. *v.* Marietta & North Georgia Railway Co., 48 Federal, 868; 1 C. C. A. 133.

[3] Central Trust Co. *v.* Marietta & North Georgia Railway Co., 48 Federal, 850; 1 C. C. A. 116. *Cf.* Same *v.* Same, 48 Federal, 865; 1 C. C. A. 130.

rolling-stock in use upon them. Hence it is held that any arrangement by which one railroad is equipped with rolling-stock belonging to another should be distinct, unequivocal, and beyond suspicion.[1]

4. Prior Mortgages.

Mortgages of after-acquired rolling-stock attach to such rolling-stock acquired under a car trust, subject to the rights of the car trust.[2] This is true even if the law required a record of the car-trust lease, and it was not recorded. A lien on after-acquired property attaches to it subject to equitable claims as well as legal ones.[3] The rentals accruing under a car-trust lease have no priority over existing mortgages.[4]

5. Receiverships.

If a receiver, on taking possession of a railroad, finds cars upon it procured under car-trust leases and not yet paid for, his using them for a time and paying the stipulated rental neither adopts the lease nor compels the court, should any further use be made of the cars during the receivership proceedings, to pay the rental named, if it is more than a reasonable price.[5]

6. Equitable Car Mortgages.

In some cases a railroad company has itself built cars with funds lent by a car-trust association, under an agreement that the title to the cars when built shall be transferred to

[1] McGourkey *v.* Toledo & Ohio Central Railway Co., 146 U. S. 536, 563.

[2] United States *v.* New Orleans Railroad, 12 Wall. 362; Fosdick *v.* Schall, 99 U. S. 235.

[3] Newgass *v.* Atlantic & Danville Railway Co., 56 Federal, 676.

[4] Thomas *v.* Western Car Co., 149 U. S. 95, 98, 112.

[5] Platt *v.* Philadelphia & Reading R. R. Co., 84 Federal, 535; 28 C. C. A. 488.

a trustee for the association, and then the cars leased to the railroad company on the usual terms of a car-trust lease. A lease so given is like a direct conditional sale of rolling-stock by the manufacturer, and would be treated as in substance an equitable mortgage, if necessary to do justice between the parties.[1]

7. Equipment Companies.

"Equipment companies" are sometimes organized under the form of a corporation for the purpose of equipping railroads by direct contract with the railroad company, without the intervention of a trustee. The equipment company issues bonds to raise part or all of the money required to build the cars, and the contract, when executed, is transferred to a trust company or other trustee as collateral security for these bonds.

[1] Frank *v.* Denver & Rio Grande Railway Co., 23 Federal, 123; Huidekoper *v.* Locomotive Works, 99 U. S. 258; Chicago Railway Equipment Co. *v.* Merchants' Bank, 136 U. S. 268, 281.

CHAPTER XXIV.

TAXATION.

1. The Fourteenth Amendment.

RAILROADS may be taxed on a different plan from other property, without involving any denial of the equal protection of the laws, because they differ so radically from other property in character and use.[1] While a railroad company, the property of which is to be taxed according to its valuation, has a right to be heard either before the authority making the valuation or before some superior authority on an appeal, it is not entitled to a hearing by both, even if other individual property owners may be.[2]

2. Taxing the Franchise.

A statute making every railroad company taxable on its "railroad property" refers to the property of the company as a going concern, possessing a franchise for the operation of the road. Its operating franchise, therefore, can be indirectly assessed, though not mentioned in the statute.[3] It is the

[1] Kentucky Railroad Tax Cases, 115 U. S. 321, 339; Pacific Express Co. *v.* Seibert, 142 U. S. 339.

[2] Palmer *v.* McMahon, 133 U. S. 660; Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Co. *v.* Backus, 154 U. S. 421, 435.

[3] Detroit Citizens' Street Railway Co. *v.* Common Council, 125 Mich. 673, 709; 85 Northwestern, 96; 84 Am. State, 589.

source of its earning capacity, and the extent of that capacity is an important criterion of value. It is often a more decisive test than that furnished by evidence of the cost of the railroad, or of what it would cost to reproduce it. A road which cost $10,000,000, and can only earn $1,000 net a year, could not properly be valued at $10,000,000 even though it would take $10,000,000 to reproduce it. Nobody would care to reproduce it.[1]

3. Inter-State Railroads.

The Constitution of the United States imposes certain limitations upon the taxation of inter-State railroads.

Of these, a few are incorporated by the United States. They are taxable on their property by the States through which they run. While to a certain extent agencies of the United States, they are not deprived by such a tax of the power of performing efficiently the duties of their agency. If they could be taxed on their operations, it would diminish that power; but they may be taxed on what they own in the State, just as a government officer might be on his private property there.[2]

Most inter-State corporations are incorporated by the States concerned. If they are only incorporated severally in each of the States, though by the same name and with the same shareholders, capital stock, and property, each remains a domestic corporation, and fully subject to the taxing power of the State from which it derives its franchise. A State granting a franchise for such a railroad cannot impose a franchise tax proportioned to the amount of inter-State business done, in such a way as directly to burden such

[1] State *v.* Virginia & Truckee R. R. Co., 23 Nev. 283, 432; 46 Pacific, 723; 49 id. 38; 35 L. R. A. 759. See Chapter XXXVIII., Inter-State Business.

[2] Railroad Co. *v.* Peniston, 18 Wall. 5, 36.

business.[1] But it may impose one based on the amount of the capital stock. That would be in the nature of a poll-tax on the right to exist as an artificial person.[2] So a franchise tax on the corporation owning an inter-State road, but doing a business partly local, which tax is provided for in its charter and proportioned to its earnings, will not be invalidated by the fact that they may come principally from inter-State business.[3] If several such corporations are consolidated into one, under statutes of all the States concerned, which have the effect of thus extinguishing the original companies, the consolidated company is likewise fully subject to the taxing power of each of these States, as respects its property and the franchises that make it valuable within that State.[4]

A purely inter-State business may be done in a State by a railroad corporation of another State without the leave of the former State and without being incorporated therein. The solicitation there of such business cannot be impeded by taxation.[5] Its franchise to do this business not being derived from that State, cannot be taxed by it.[6] Such part of its capital, however, as the foreign company brings in to employ in this business can be taxed, for it has a *situs* where it is used.[7]

An inter-State road owning and using trucks to cart goods from freight stations, or cabs to transport passengers from passenger stations, is taxable on the value of such vehicles.[8]

[1] See Fargo *v.* Michigan, 121 U. S. 230.

[2] Lumberville Delaware Bridge Co. *v.* State Board of Assessors, 55 N. J. Law, 529; 26 Atlantic, 711; 25 L. R. A. 134.

[3] Railroad Company *v.* Maryland, 21 Wall. 456.

[4] The Delaware Railroad Tax, 18 Wall. 206.

[5] Norfolk & Western R. R. Co. *v.* Pennsylvania, 136 U. S. 114.

[6] People *v.* Wemple, 138 N. Y. 1; 33 Northeastern, 720; 19 L. R. A. 694.

[7] People *v.* Wemple, 131 N. Y. 64; 29 Northeastern, 1002; 27 Am. State, 542; Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 696.

[8] People *v.* Knight, 171 N. Y. 354; 64 Northeastern, 152.

If a corporation of one State engaged in inter-State business builds part of its railroad in another State, by its permission, the *situs* of this part subjects the corporation to taxation, and the tax may be proportioned to the entire gross earnings of the company, or to its trackage receipts in that State.[1] It has been asserted that it may be subjected to an excise tax by such State for the privilege of doing business within its limits, measured by the extent of that business, though it be largely, if it be not wholly, inter-State.[2] Being but an artificial person, if it asks such recognition as amounts to re-incorporation out of the State of its original incorporation, it must accept it on whatever terms are fairly warranted, in view of the use it is making there of this artificial personality. But its right to transact inter-State commerce there cannot be restricted by taxation, any more than by direct prohibition.[3] It could not be taxed a percentage on its earnings from inter-State business considered separately.[4] Nor can property in course of transportation between States be taxed against the owner.[5]

4. Cars used on Inter-State Roads.

Railroad cars used in inter-State commerce are taxable as property although solely employed in such commerce. The company owning them can be taxed on their value where it is incorporated. If held under a lease, the leasehold interest can be so taxed, and the assessment of its value based on the average number of cars used in the State during the year.[6]

[1] Erie Railway Co. *v.* Pennsylvania, 21 Wall. 492; New York, Lake Erie, & Western R. R. Co. *v.* Pennsylvania, 158 U. S. 431.

[2] Maine *v.* Grand Trunk Railway Co., 142 U. S. 217.

[3] Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 696.

[4] Lehigh Valley R. R. Co. *v.* Pennsylvania, 145 U. S. 192.

[5] Kelley *v.* Rhoads, 188 U. S. 1.

[6] Denver & Rio Grande Railway Co. *v.* Church, 17 Colo. 1; 28 Pacific, 468; 31 Am. State, 252; Hall *v.* American Refrigerator Transit Co., 24

The owner can also be taxed on their value in any State where they are being statedly and habitually used;[1] but cannot be so taxed by a State in which they may be transiently and occasionally used.[2]

An excise tax of so much for each car upon a sleeping-car company, which uses its cars both for traffic in a State and between States, if laid by a State without making any distinction between cars used solely in inter-State traffic and the others, is void as a direct burden on inter-State commerce.[3]

5. Municipal License Taxes.

If a city is authorized to provide for the regulation of vehicles in the nature of omnibuses, and to provide for the issue of licenses therefor, this justifies its laying a license tax of fifty dollars on every street car, and providing that it must be numbered and have its number displayed.[4]

6. Exemptions.

An exemption of all the property of a railroad company from taxation covers its franchise. Its tangible property being real estate and its value depending wholly on using it for railroad purposes, the franchise has no separable value.[5]

A general exemption extends to all property acquired by it which is reasonably necessary, though not indispensable,

Colo. 291; 51 Pacific, 421; 65 Am. State, 223; 56 L. R. A. 89; affirmed, American Refrigerator Transit Co. *v.* Hall, 174 U. S. 70.

[1] Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18; Union Refrigerator Transit Co. *v.* Lynch, 177 U. S. 149.

[2] Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 46; Tennessee *v.* Pullman Southern Car Co., 117 U. S. 51.

[3] Allen *v.* Pullman's Palace Car Co., 191 U. S. 171.

[4] Frankford & Philadelphia Passenger Railway Co. *v.* Philadelphia, 58 Pa. St. 119; 98 Am. Dec. 242. But see Mayor *v.* Second Avenue R. R. Co., 32 N. Y. 261.

[5] Wilmington Railroad *v.* Reid, 13 Wall. 264; 3 Am. Railway Rep. 195.

to the proper construction and maintenance of the railroad. Land bought outside of its location, for gravel pits, is within the exemption.[1] Where local taxes are authorized on real estate of the company not required and used for railroad business, all real estate will be deemed so required and used which is primarily and mainly so used, though there may be an incidental and occasional use by other parties for other purposes.[2]

7. Receiverships and Bankruptcy.

Taxes upon a railroad which are in arrears, when a receiver or trustee in insolvency or bankruptcy takes possession, are not a lien prior to mortgages antedating their assessment, unless so made by statute. Nor, if so made a lien in favor of the State, would their voluntary payment by the receiver or trustee subrogate him to the benefit of the lien.[3]

8. Levy of Tax Warrant.

In the absence of express statutory authority, a tax cannot be enforced by levy on any particular parcels of the location. The location is an entirety.[4]

This immunity does not attach to rolling-stock, although actually in use in the operation of the road. While it is affected by a public interest, and without such vehicles this highway would be useless for travel, similar rolling-stock may readily be procured to take its place. So fuel designed for use in locomotives can be levied on; for other fuel can readily be procured elsewhere. All these things the com-

[1] State *v.* Hancock, 35 N. J. Law, 537; 3 Am. Railway Rep. 223.

[2] Osborn *v.* Hartford & New Haven R. R. Co., 40 Conn. 498; 5 Am. Railway Rep. 226.

[3] Mersick *v.* Hartford & West Hartford Horse R. R. Co., 76 Conn. 11; 55 Atlantic, 664.

[4] See Plymouth R. R. Co. *v.* Colwell, 39 Pa. St. 337; 80 Am. Dec. 526.

pany can alienate by a voluntary conveyance. What it can sell, its creditors ought to be able to appropriate by legal process.[1]

9. Municipal Assessments.

Municipal assessments for public improvements may be laid upon railroad property outside of the location, which is especially benefited. In the absence of plain statutory warrant, they cannot be laid on any particular parcels within the location, however benefited, nor upon the railroad premises generally. They cannot be laid, because to enforce their payment would lead to a severance of a highway or a destruction of its public use.[2] Where there is statutory authority, the benefits to be considered are those only which enure to the property assessed as railroad land held for railroad purposes.[3] While such assessments are, in a certain sense, a form of taxation, a company would not be exempt from them which is exempt from "taxation of every kind." They are really a provision for an equal exchange of values. The municipality gets no more than it gives.[4]

No special benefits can be made the subject of such an assessment which are not plain and certain with reference to railroad uses. To pave a road leading to a railroad station benefits those who use it, but does not increase travel over the railroad.[5] To pave a street upon which a street

[1] Chicago & Northwestern Railway Co. *v.* Ellson, 113 Mich. 30; 71 Northwestern, 324. *Contra,* Chicago & Northwestern Railway Co. *v.* Forest County, 95 Wis. 80, 89; 70 Northwestern, 77.

[2] Chicago, Milwaukee, & St. Paul Railway Co. *v.* Milwaukee, 89 Wis. 506; 62 Northwestern, 417; 28 L. R. A. 249.

[3] Illinois Central R. R. Co. *v.* Chicago, 141 Ill. 509; 30 Northeastern, 1036; 17 L. R. A. 530.

[4] Illinois Central R. R. Co. *v.* Decatur, 126 Ill. 92; 18 Northeastern, 315; 1 L. R. A. 613; 147 U. S. 190; Same *v.* Same, 154 Ill. 173; 38 Northeastern, 626.

[5] New York & New Haven R. R. Co. *v.* New Haven, 42 Conn. 279; 19 Am. Rep. 534.

railroad is laid is, under ordinary conditions, not a proper foundation for a municipal assessment for benefits, but may be made so by statute.[1]

10. Taxation of Railroad Securities.

That a railroad is an inter-State road, or that it is fully taxed by the State in which it is located does not impair the right of other States to tax their citizens upon their holdings of stock in the railroad company, or of its bonds,[2] nor, upon their decease, to enforce a tax for the privilege of succession to them.[3] Bonds owned by a citizen of State A, issued by a railroad company of State B, and deposited by him in permanent charge of some one in State C, may be the subjects of taxation both in State A and State C.[4] Certificates of stock in a railroad company may also be subjected to succession taxes by any State in which they are found, without regard to the location of the railroad or of the company, and although the owner was a non-resident, who was fully taxed on his stock by his own State, and whose estate is charged there with another succession tax.[5] This is true although the company is of an inter-State character. Each State has power over its own corporations and the transfer of shares in them. Double taxation may be imposed, unless there is a constitutional provision to forbid; and double taxation only exists when double taxes are imposed by the same sovereignty.

[1] People *v.* Gilon, 126 N. Y. 147; 27 Northeastern, 282.

[2] Mackay *v.* San Francisco, 113 Calif. 392; 45 Pacific, 696.

[3] Matter of Merriam, 141 N. Y. 479; 36 Northeastern, 505.

[4] Buck *v.* Miller, 147 Ind. 586; 45 Northeastern, 647; 47 Northeastern, 8; 62 Am. State, 436 and note; 37 L. R. A. 384.

[5] Matter of Whiting, 150 N. Y. 27; 44 Northeastern, 715; 55 Am. State, 640; 34 L. R. A. 232; Matter of Merriam, 141 N. Y. 479; 36 Northeastern, 505; Matter of James, 144 N. Y. 6; 38 Northeastern, 961; Moody *v.* Shaw, 173 Mass. 375; 53 Northeastern, 891.

That railroad bonds are secured by a mortgage of the road may bring them locally within the taxing jurisdiction of the State in which the road lies, although they are owned by non-residents.[1] When the bonds are registered ones, it would be easy to enforce a tax against the holder. In case of coupon bonds, it would be necessary to enforce it through the power of the State over the railroad company and the mortgaged premises.

It is not uncommon to base the taxation of a railroad company on a valuation of its total capital stock and funded debt. Here it is not the bonds which are taxed, but the value of the property behind them.[2]

[1] Savings & Loan Society *v.* Multnomah County, 169 U. S. 421, 428, explaining, or overruling, Railroad Co. *v.* Jackson, 7 Wall. 262.

[2] State Railroad Cases, 92 U. S. 575.

PART IV.

OPERATION.

CHAPTER XXV.

PUBLIC RIGHT OF CONTROL.

1. Commensurate with the Public Use.

A RAILROAD franchise gives rights of "public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security."[1] As the railroad either constitutes a highway, or, if a street railway, forms part of one, it has, from the very birth of railroad law, been held that the public control must be commensurate with the public use.[2]

[1] California *v.* Central Pacific R. R. Co., 127 U. S. 1, 40.

[2] Louisville Committee *v.* Chappell, Rice (S. C.), 383, 398. This is the first American decision which was a distinct contribution to the creation of a Railroad Law.

All forms of railroad are equally subject to the power of the State. The operation of each is a source of public danger, and presents a proper subject for legislative regulation.[1]

2. Rates of Charge.

The legislature of a State has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract and vesting in it authority over those matters; subject to the limitations that the carriage is not required without reward, nor upon conditions amounting to the taking of property for public use without just compensation, and that what is done does not amount to a regulation of foreign or inter-State commerce.[2] A State cannot empower Railroad Commissioners to decide finally as to the rates chargeable for railroad fares or freights, with no opportunity for the roads to show that the rates prescribed are unreasonable; as it would violate the Fourteenth Amendment to the Constitution of the United States.[3]

3. Long and Short Haul.[4]

A State law absolutely prohibiting any unjust discrimination by making a greater charge for a short haul than for a longer one, on the same line, is valid as respects railroad traffic beginning and ending within the State, and not part of any inter-State commerce. Nor is it any defence to such a statute to show that the larger charge is a reasonable one

[1] Detroit, Fort Wayne, & Belle Isle Railway *v.* Osborn, 189 U. S. 383, 390.

[2] Georgia Railroad & Banking Co. *v.* Smith, 128 U. S. 177, 179. *Cf.* Chicago, Burlington, & Quincy R. R. Co. *v.* Iowa, 94 U. S. 155, 161.

[3] Chicago, Milwaukee, & St. Paul Railway Co. *v.* Minnesota, 134 U. S. 418, 457.

[4] See Chapter LVII., Penal Actions and Criminal Prosecutions.

for the service, and that the lower one is due to competition with another carrier, forcing the rate down below a remunerative standard. There may, however, be other excuses in some cases for such discrimination, which would show it not to be unjust; and the carrier cannot be deprived of the right of showing such matters of excuse, if they exist, in his defence.[1]

4. The Fourteenth Amendment.

It is the settled doctrine of the Supreme Court of the United States that railroad corporations are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression; that the State has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike, although not applicable to other corporations or individuals; nor is there necessarily such denial nor an infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they deprived of property without due process of law, by statutes passed for this purpose, under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious.[2] This control is not limited to what may be done in the exercise of the police power, as that term is commonly used. Its exercise may have no reference to the health, morals, or safety of the people of the State. It is enough if the legislation appear to be of a nature proper to enforce the obligations of railroad

[1] Chicago & Alton R. R. Co. *v.* People, 67 Ill. 11; 2 Am. Railway Rep. 242; 16 Am. Rep. 599.

[2] New York & New England R. R. Co. *v.* Bristol, 151 U. S. 555, 571.

companies to accommodate the public impartially and make all reasonable provisions for carrying persons and property with safety and expedition.[1] It must, however, extend to no matters which do not fairly belong to the domain of reasonable regulation.[2]

5. The Police Power.

The police power is not, properly speaking, a particular branch of the authority of government. It is the whole of it. Police power is a short term for political power. It is the power of sovereignty.[3]

6. Discrimination in Rates.

The courts have power at common law, as the common law is accepted in the United States, to interfere in case of any unjust discrimination in the charges made by a railroad company for transportation services of the same kind to different parties.[4]

The power of the State to prescribe the *maximum* rates of charge for transportation within its limits is one no grant or abridgment of which is to be presumed from any doubtful words.[5] It has been, however, limited in more than one way by the Fourteenth Amendment to the Constitution of the United States. It must be exercised by a general rule applicable to all cases and without discrimination in favor of or

[1] Lake Shore & Michigan Southern Railway Co. *v.* Ohio, 173 U. S. 285, 296, 297.

[2] Wisconsin, Minnesota, & Pacific Railroad *v.* Jacobson, 179 U. S. 287, 297. See *post*, pp. 217, 219.

[3] License Cases, 5 How. 504, 583 : Lake Shore & Michigan Southern Railway Co. *v.* Smith, 173 U. S. 684, 689 ; McKeon *v.* New York, New Haven, & Hartford R. R. Co., 75 Conn. 343; 53 Atlantic, 656; 61 L. R. A. 730; 189 U. S. 508.

[4] Scofield *v.* Lake Shore & Michigan Southern Railway Co., 43 Ohio St. 571; 3 Northeastern, 907.

[5] Stone *v.* Farmers' Loan & Trust Co., 116 U. S. 307, 325, 331.

against any individual. A discrimination, for instance, in favor of the holder of mileage tickets, giving them a longer life than is allowed in the case of ordinary tickets, would be to take the property of the company without due process of law.

Nor could a statute be supported which required all railroad companies to issue thousand-mile tickets at a reduced rate of charge which should be good for a man and his wife and children, since this would be a discrimination in favor of married men.[1]

7. Inter-State Commerce.[2]

The right of a State to prescribe rates for local business cannot extend to any contracts of transportation not wholly executed within the limits of the State, but under which the transportation within the State is done as part of an entire contract for transportation between such State and another State. Such a contract is a matter of commerce between the States, and no State law can regulate it, whether Congress does or does not legislate upon the subject.[3] A State, in prescribing rates for local railroad business, must be governed solely by what is fair in view of its local conditions and business alone, irrespective of the fact that the company may be doing a profitable inter-State business. The State cannot cut down local rates to less than what is fair because the United States may allow the charge of high inter-State rates.[4]

The Commissioner of Corporations in the Department of

[1] Lake Shore & Michigan Southern Railway Co. *v.* Smith, 173 U. S. 684, 691, 693, 695, 699.

[2] See Chapter XXXVIII., Inter-State Business.

[3] Munn *v.* Illinois, 94 U. S. 113, 135; Chicago, Burlington, & Quincy R. R. Co. *v.* Iowa, 94 U. S. 155, 163; Wabash, St. Louis, & Pacific Railway Co. *v.* Illinois, 118 U. S. 557, 575.

[4] Smyth *v.* Ames, 169 U. S. 466.

Commerce and Labor has no jurisdiction over inter-State railroad corporations.[1]

8. Judicial Power to revise Rates fixed by Public Authority.

When unreasonably low rates are imposed by a commission or board acting under power delegated by the State, there is a remedy by bill in equity or some equivalent proceeding in which the rights of the public as well as those of the company complaining may be protected. Where the legislature itself fixes rates that are in fact unreasonably low, and prescribes penalties for exacting greater payments, the question of the reasonableness of the rates fixed by statute can be raised in defence to an action for the collection of the penalty.[2] This question can always be brought ultimately before the courts for decision; but it does not belong there in the first instance. To establish rates is properly a matter of administrative procedure: to revise those thus established, for the purpose of determining whether they have been established legally, under our American Constitutions, may be a matter of judicial procedure. These two functions of government cannot be united in one tribunal.[3]

In determining whether the rates are reasonable, the test is not whether, if maintained, the fixed charges could be met, nor whether a reasonable interest could be earned on the cost of the road, but rather, so far as relates to the question of invested capital, whether a reasonable interest could be earned on what it would cost to reproduce it.[4]

[1] U. S. Stat. at Large, XXXII. 825; XXIV. 379.

[2] St. Louis & San Francisco Railway Co. *v.* Gill, 156 U. S. 649, 666.

[3] State *v.* Johnson, 61 Kans. 803; 60 Pacific, 1068; 49 L. R. A. 662.

[4] Steenerson *v.* Great Northern Railway Co., 69 Minn. 353; 72 Northwestern, 713.

9. The Equal Protection of the Law.

The peculiar and dangerous character of railroad business justifies legislation imposing many obligations on railroad companies which attach to no other corporations or individuals. It is for this reason that they are often held not to be deprived of the equal protection of the laws, within the meaning of the Fourteenth Amendment to the Constitution of the United States, by legislation which, though for them alone, and imposing on them burdens not imposed on others, treats them all alike, provided such legislation be of a kind reasonably adapted to the nature of the railroad business.[1]

Thus, laws have been supported, requiring rates of charges for transportation to be publicly posted; forbidding the use of steam on such parts of steam railroads as lie in cities; making wages of men thereafter hired by contractors to assist in the construction of a railroad a lien on the road; imposing a penalty for delay of over five days in despatching goods received for transportation;[2] making railroad companies liable for any injury to a passenger not due to his criminal negligence, nor to his violation of a rule of the company actually brought to his notice;[3] requiring one railroad company to let another railroad company use its tracks, on making just compensation; ordering the construction of stations;[4] directing a change of grade in the railroad, after its construction and approval by due public authority;[5] and making the salaries of the State Board

[1] Missouri Pacific Railway Co. *v.* Humes, 115 U. S. 512, 522; Cleveland, Cincinnati, Chicago, & St. Louis Railway Co. *v.* Hamilton, 200 Ill. 633; 66 Northeastern, 389. See *ante*, p. 213.

[2] Branch *v.* Wilmington & Weldon R. R. Co., 77 N. C. 347.

[3] Union Pacific Railway Co. *v.* Porter, 38 Nebr. 226; 56 Northwestern, 808.

[4] Mayor *v.* Norwich & Worcester R. R. Co., 109 Mass. 103, 114.

[5] New York & New England R. R. Co. *v.* Bristol, 151 U. S. 556.

of Railroad Commissioners a charge on the railroad companies of the State.[1]

10. Regulating Elevators.

A statute forbidding any elevator situated on the location of a railroad to be used without a license from the State, and making such elevators subject to inspection by the State, is not objectionable because it applies only to a particular class of elevators. Railroad elevators standing on the railroad location may well be classed by themselves, for they are in a position involving the possibility of danger to passing trains.[2]

11. Regulating Relations with Employees.

A State may single out railroad corporations and provide, as to them, that if they discharge an employee, although for cause, whatever may have been fairly earned by him as wages up to the day of his discharge shall become due and payable immediately, without discount for pre-payment; and if not paid, that his wages shall, as a penalty, continue to run at the regular rate until paid. This is because of the public trust with which these corporations are clothed, and the public advantage likely to result from the protection of their employees, and securing the employment of a good class of men by making the terms of employment more attractive.[3] For similar reasons a statute is valid forbidding street railway companies to contract with those in charge of running their cars for a longer day's work than ten hours. The public have an interest in the safe operation of the road, and it is

[1] Charlotte, Columbia, & Augusta R. R. Co. *v.* Gibbes, 142 U. S. 386.

[2] W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452, 469.

[3] St. Louis, Iron Mountain, & St. Paul Railway Co. *v.* Paul, 173 U. S. 404, 410. *Cf.* Atchison, Topeka, & Santa Fé R. R. Co. *v.* Matthews, 174 U. S. 96, 111.

possible that this may be endangered by putting it in the hands of men who are overworked and exhausted.[1]

12. Statutes that went too far.

Statutes have been declared invalid requiring railroad companies to pay the funeral expenses of any passenger dying on board their trains;[2] that if any railroad company fails to pay a claim for less than $50 within thirty days after demand, and judgment is afterwards recovered for the full amount so demanded, an allowance shall be made of $10 for costs of collection;[3] and that if an employee of a railroad running through two States sues in one for an injury suffered by a railroad accident occurring in the other, the law of the State which was the seat of the transaction cannot be invoked to defeat the action. In the case last mentioned the statute clearly tended to deny its proper force to a law of another State, and amounted to a confiscation of the property rights of the railroad company.[4]

A railroad company cannot be forced to do something for nothing, in favor of those who seek transportation over its road. A statute requiring free transportation to be furnished to men sent in charge of live stock is void under this rule. It aims at depriving the company of property, namely, the right to the beneficial exercise of its franchise to charge tolls, without due process of law.[5]

[1] *In re* Ten Hour Law for Street Railway Corporations, 24 R. I. 603; 54 Atlantic, 602.

[2] Ohio & Mississippi Railway Co. *v.* Lackey, 78 Ill. 55; 28 Am. & Eng. R. R. Cases, 259; 20 Am. Rep. 259.

[3] Gulf, Colorado, & Santa Fé Railway Co. *v.* Ellis, 165 U. S. 150.

[4] Baltimore & Ohio Southwestern Railway Co. *v.* Reed, 158 Ind. 25; 62 Northeastern, 488; 56 L. R. A. 468.

[5] Atchison, Topeka, & Santa Fé Railway Co. *v.* Campbell, 61 Kans. 439; 59 Pacific, 1051; 78 Am. State, 328; 48 L. R. A. 251.

13. Municipal Regulations.

Municipalities through the limits of which a railroad is located may be given statutory power to regulate not only the place of location and mode of construction, but the manner of operation, in such matters as guarding public safety by signals, gates, or lowering speed. An ordinance passed under such authority prohibiting the running of any train through a thickly populated portion of the municipality at a rate of speed exceeding four miles an hour, or except by the use of animal power, would not be necessarily unreasonable, although it compelled a change of the time schedule arranged for fast trains, and so far forth delayed the mails.[1] Municipalities may be lawfully empowered to compel street railway companies to keep the surface of the street in good repair and clean between their outer rails;[2] to water it;[3] or to pave it; or to contribute to the expense of paving it.[4] The companies are benefited by the privilege of laying their tracks in the street, and the State, through its authorized depositaries of power, can couple the privilege with any provisions reasonably necessary for public protection.[5] The State may require the alteration of a railroad or of a crossing of two railroads by a change of grade, or the

[1] Knobloch *v.* Chicago, Milwaukee, & St. Paul Railway Co., 31 Minn. 402; 18 Northwestern, 106; Meyers *v.* Chicago, Rock Island, & Pacific R. R. Co., 57 Iowa, 555; 10 Northwestern, 896; 42 Am. Rep. 50; Chicago & Alton R. R. Co. *v.* Carlinville, 200 Ill. 314; 65 Northeastern, 730; 60 L. R. A. 391; 93 Am. State, 190.

[2] Chicago *v.* Chicago Union Traction Co., 199 Ill. 259; 65 Northeastern, 243; 59 L. R. A. 666. See Chapter XVIII., Railroads on and along Highways.

[3] State *v.* Canal & Claiborne R. R. Co., 50 La. Ann. 1189; 24 Southern, 265; 56 L. R. A. 287.

[4] Fair Haven & Westville R. R. Co. *v.* New Haven, 75 Conn. 442, 451; 53 Atlantic, 960.

[5] But see Fielders *v.* North Jersey Street Railway Co., 67 N. J. Law, 76; 50 Atlantic, 533; 59 L. R. A. 455.

construction of a union station, and delegate to some administrative tribunal, such as a city council, power to regulate the details of the work, and assess the cost upon the company, or apportion it if more than one is concerned. If such a power of apportionment is committed to a city council, to be exercised by passing an ordinance, no notice need be given or hearing had before action is taken.[1]

[1] Chicago, Burlington, & Quincy R. R. Co. *v.* Nebraska, 170 U. S. 57.

CHAPTER XXVI.

RULES AND REGULATIONS.

1. The Authority and Duty to make them.

EVERY owner of land may, within reasonable limits, regulate its use by those who are permitted or invited to enter it. Every common carrier may adopt reasonable rules (or, as they are more often termed, regulations) to govern the details of the management of his business relations with the general public. Railway companies have found it necessary, both as landowners, carriers, and large employers of labor, to have a considerable number of such rules. The principal through railroad companies print them, or many of them, in a book or pamphlet for their own use. Such as govern the movements of trains are also often printed on the time-tables provided for the use of their servants engaged in that business. Standing rules of this kind it is their legal duty to make, and they are of force whether formally adopted by the board of directors or emanating only from the executive officers, provided they are reasonable. They may even be effectual though adopted by a train conductor for his own convenience.[1]

[1] Vedder *v.* Fellows, 20 N. Y. 126.

2. Their Reasonableness a Question of Law.

Whether rules governing the operation of a railroad are reasonable or not is a question of law; but if, in applying them, their reasonableness depends, as it may, on any state of facts, the jury are to determine what this state is.[1] To allow a jury to pass upon the ultimate question of reasonableness would be incompatible with uniformity of result, and there are the same grounds for treating it as one of law as obtain in the case of the by-laws of a corporation.[2] This is true with respect to any rule of the company, whether printed, written, or orally laid down by an executive officer; and whether it be one governing a subject as to which the company was bound to establish proper rules, or one as to which it could make rules or not at its discretion. Railroad companies are bound to establish proper rules to govern the working of their roads in such a manner as to promote the safety of their servants; but whether those which they may establish for this purpose are reasonable and proper is (after the facts bearing upon their application have been ascertained) a question of law.[3]

3. Notice of Rules.

Rules made by the company for the guidance of its servants in the management of its internal affairs passengers are not

[1] Hibbard *v.* New York & Erie R. R. Co., 15 N. Y. 455; 1 Redfield's Am. Railway Cases, 96; Pittsburgh, Cincinnati, & St. Louis Railway Co. *v.* Lyon, 123 Pa. St. 140; 16 Atlantic, 607; 10 Am. State, 517; Nolan *v.* New York, New Haven, & Hartford R. R. Co., 70 Conn. 159, 180, 181; 39 Atlantic, 115; 43 L. R. A. 305. *Cf.* Bass *v.* Chicago & Northwestern Railway Co., 36 Wis. 450; 9 Am. Railway Rep. 101; 17 Am. Rep. 495. *Contra*, State *v.* Overton, 4 Zabr. 435; 1 Redfield's Am. Railway Cases, 89; 61 Am. Dec. 671.

[2] Thompson on Private Corporations, I., §§ 937, 1022.

[3] *Contra*, Devoe *v.* New York Central & Hudson River R. R. Co., 174 N. Y. 1; 66 Northeastern, 568.

bound to know, even if they relate to the manner of handling and using tickets.[1] Nor when invoked to justify the conduct of a servant towards a passenger is it necessary to show that the latter had notice of them. It is only when a railroad company claims that a passenger has not conducted as the rules required him to conduct, that it must show that he had notice of them.[2] Posting them up in the car on which he is riding is evidence of notice, and generally sufficient evidence of it.[3]

A pamphlet hanging on the wall of the freight office, which contains the rules and rates of charge of the company for carriage of goods, is not constructive notice of its contents to shippers.[4]

Servants of a railroad company are not bound by rules of which they have received no notice, and if the company claims that they have been negligent in violating them, it has the burden of proving notice.[5] If, however, it has adopted and published rules for their government in printed form, they are presumed, *prima facie*, to have knowledge of them;[6] nor can the presumption be rebutted except by proof that they failed to learn what they were, after taking reasonable pains to learn.[7] Such knowledge implies acquiescence in them, and they cannot, in an action against the

[1] New York, Lake Erie, & Western R. R. Co. *v.* Winter, 143 U. S. 60, 70.

[2] O'Neill *v.* Lynn & Boston R. R. Co., 155 Mass. 371; 29 Northeastern, 630.

[3] Baltimore & Yorktown Turnpike Road *v.* Cason, 72 Md. 377; 20 Atlantic, 113; 3 Am. R. R. & Corp. Cases, 224.

[4] Coupland *v.* Housatonic R. R. Co., 61 Conn. 531, 541; 23 Atlantic, 870; 15 L. R. A. 534.

[5] Sprong *v.* Boston & Albany R. R. Co., 58 N. Y. 56; 9 Am. Railway Rep. 475. See Chapter XXVIII., Servants.

[6] Galveston, Harrisburg, & San Antonio Railway Co. *v.* Gormley, 91 Tex. 393; 43 Southwestern, 877; 66 Am. State, 894.

[7] Shenandoah Valley R. R. Co. *v.* Lucado's Adm'r, 86 Va. 390; 10 Southeastern, 422.

company for an injury occurring through their negligent violation, ask to have their reasonableness submitted to the jury,[1] nor raise the question that there ought to have been further rules.[2]

4. Excuses for Disobeying.

A company cannot, under ordinary circumstances, be charged with fault if one of its servants, who is under the direction of another, violates, by the latter's authority, a known rule of the company, designed to promote his personal safety. Thus, one of a gang of navvies customarily transported to and from their work in box cars, and forbidden to get on the engine, if told by his boss, on an occasion when the train is late, to hurry up and jump on anywhere, cannot recover of the company if he jumps on the pilot of the engine, and is injured while riding there.[3]

5. Special Rules for Special Cases.

The adoption of a suitable set of general rules will not relieve a company from the obligation of making special rules or orders in case of an emergency which requires such action.[4]

6. Rules for loading Cars.

A rule of a railroad company that coal unladen from vessels at its wharves into cars consigned to parties on the line of the railroad must be taken out of the hold by laborers selected

[1] Wolsey *v.* Lake Shore & Michigan Southern R. R. Co., 33 Ohio St. 227.

[2] Berrigan *v.* New York, Lake Erie, & Western R. R. Co., 131 N. Y. 582; 30 Northeastern, 57.

[3] Railroad Co. *v.* Jones, 95 U. S. 439; Keenan *v.* New York, Lake Erie, & Western R. R. Co., 145 N. Y. 190; 39 Northeastern, 711; 45 Am. State, 604.

[4] Sprague *v.* New York & New England R. R. Co., 68 Conn. 345; 36 Atlantic, 791; 37 L. R. A. 638.

by the company, though to be paid by the vessel, is unreasonable, unless shown to be not only convenient to the company but necessary.[1]

7. Rules as to Station Houses.

Reasonable regulations in regard to the use of stations will bind all persons as to such use. Such regulations are reasonable when suitable to enable the company to perform its duties and secure its rights. If adopted for a particular station, their reasonableness must be judged of with reference to its character and situation. Regulations may be proper and necessary at a terminal station, where there is usually a great throng of persons, which would not be required at a way station. Such regulations may be made by a general superintendent having charge of the road or depots.[2]

8. The Binding Force of Railroad Rules.

All railroad rules are a defensive justification for conduct in conformity with them on the part of the company or its servants towards all others who have business with it, whether known to them or not. This is not because the railroad holds a franchise of a public nature, and may be regarded as a quasi-public corporation.[3] It resembles a public corporation only in subserving a public use, being subject to a certain extent to public control, and in most cases being invested with the right of eminent domain. Its records are private records, and those dealing with it are not bound to take notice of them.[4] But all who deal with a common car-

[1] Johnson *v.* 318 Tons of Coal, 14 Blatchford, 453; 44 Conn. 548, 554.

[2] Commonwealth *v.* Power, 7 Met. (Mass.) 596; 1 Am. Railway Cases, 389; 41 Am. Dec. 465.

[3] Blair *v.* St. Louis, Hannibal, & Keokuk R. R. Co., 25 Federal, 684, 686; Lake Shore & Michigan Southern Railway Co. *v.* Smith, 173 U. S. 684, 690.

[4] Louisville, New Albany, & Chicago Railway Co. *v.* Louisville Trust Co., 174 U. S. 552, 575.

rier, whether such carrier be a natural or an artificial person, are, for most purposes, bound to take notice of his rules; although when there is an attempt by the carrier to charge any one with a liability, created by those rules, it may be requisite to show that he knew of them.[1]

Uniform rules may be made by concert between several railroad companies, which, if reasonable, will be binding on those doing business with them. Such a mutual agreement, although it result from and be part of the work of an association of railroad companies under a distinguishing name as such, is not a delegation by either of the constituent companies of its power and duty to manage its affairs. The rules exist only by its consent and voluntary adoption.[2]

9. How enforced.

Rules which the company has the right to make, it has the right to enforce.[3] One, for instance, providing that passengers must show a ticket whenever called upon or else pay fare, is reasonable, and can be enforced by removing from the car one who fails to comply with it.[4] That a passenger may have in a particular case, as against the company, a justification for not complying with its rules, does not necessarily amount to such a justification as between him and the conductor of the train on which he is. It is the conductor's duty to enforce any reasonable rule of the company. He knows the rule, and may not know that the special circum-

[1] O'Neill *v.* Lynn & Boston R. R. Co., 155 Mass. 371; 29 Northeastern, 630.

[2] Kentucky Wagon Mfg. Co. *v.* Ohio & Mississippi Railway Co., 98 Ky. 152; 32 Southwestern, 595; 36 L. R. A. 850; 56 Am. State, 326. See Coates *v.* Chicago, Milwaukee, & St. Paul Railway Co., 8 So. Dak. 173; 65 Northwestern, 1067.

[3] Peck *v.* New York Central & Hudson River R. R. Co., 70 N. Y. 587, 589.

[4] Townsend *v.* New York Central & Hudson River R. R. Co., 56 N. Y. 295; 15 Am. Rep. 419. See Chapter XXXII., Carriage of Passengers.

stances in fact exist on which the passenger may rely as his excuse for not respecting it. The passenger in such a case may be lawfully ejected, and no trespass against him would thus be committed by either the conductor or the company.[1]

A reasonable rule may be unreasonably enforced. It may also become unreasonable if enforced under certain circumstances.

Thus a rule setting apart a particular car for the exclusive use of women is a reasonable one; but if on a train having such a car all the other cars are full, it may be the duty of the train hands to admit other passengers to seats in it which are vacant.[2]

10. Rules as affecting Common-law Liabilities.

A railway company is bound to exercise extraordinary care as to its passengers in operating its road, but only ordinary care as to highway travellers. If it has a rule that motormen must exercise the greatest care as to the latter, it would not be admissible, in favor of a traveller injured at a crossing, as establishing a higher standard of duty than that prescribed by law, unless at the time of the accident he knew of its existence and relied on the motorman's obeying it.[3]

Some courts have held that rules requiring certain action on the part of the company's servants under certain circumstances were admissible in favor of any one injured by a neglect to take such action, as constituting an admission by the company that it was its duty to see that it was taken.[4]

[1] Monnier *v.* New York Central & Hudson River R. R. Co., 175 N. Y. 281; 67 Northeastern, 569; 62 L. R. A. 357.

[2] Bass *v.* Chicago & Northwestern Railway Co., 36 Wis. 450; 9 Am. Railway Rep. 101; 17 Am. Rep. 495.

[3] Isackson *v.* Duluth Street Railway, 75 Minn. 27; 77 Northwestern, 433; but see Stevens *v.* Boston Elevated Railway Co., Mass. ; 69 Northeastern, 338.

[4] Lake Shore & Michigan Southern Railway Co. *v.* Ward, 135 Ill. 511;

It is evident that they could not be considered as a conclusive admission to that effect. The rules may have been made as a measure of extreme precaution, not required by law or contract. This being so, it seems difficult to justify receiving them at all, as tending to show the degree of care which it was incumbent on the company to maintain. If they do not extend its common-law or contract duties they are immaterial. If they do, they ought not to advantage the party seeking to introduce them, unless he knew of their existence and relied on their execution at the time of the occurrence out of which his claim may arise.

11. Rules as to Passenger Fares.

A rule of a street railway company that no change need be given for a bank bill or government note of more than two dollars in amount is a reasonable one, and binds a passenger, whether known or unknown to him.[1]

A rule that no one can leave a passenger station without producing a ticket or paying fare is unreasonable, and to enforce it would be false imprisonment.[2]

A rule that no one can enter a passenger car without a ticket is reasonable, provided sufficient facilities are provided for the purchase of tickets; otherwise not. If the existence of such facilities be a matter in dispute, it would be for the jury to determine that, and then, if they found them sufficient, they would be bound to apply the rule.[3]

26 Northeastern, 520; Chicago & Alton R. R. Co. *v.* Eaton, 194 Ill. 441; 62 Northeastern, 784; 88 Am. State, 161.

[1] Barker *v.* Central Park, North & East River R. R. Co., 151 N. Y. 237; 45 Northeastern, 550; 56 Am. State, 626; 35 L. R. A. 489. See Chapter XXXII., Carriage of Passengers.

[2] Lynch *v.* Metropolitan Elevated Railway Co., 90 N. Y. 77; 43 Am. Rep. 141.

[3] Evans *v.* Memphis & Charleston R. R. Co., 56 Ala. 246; 28 Am. Rep. 771.

A rule that a passenger must pay extra fare who brings into a car a package too large to be carried on his lap without incommoding others is a reasonable one, and sufficiently definite. Whether a package so carried is in fact so large as to come within the rule may be so obvious as to be a question for the court, but otherwise would be one for the jury. The decision of the conductor would not be controlling.[1]

12. Rules that are Dead Letters.

As a company can make rules, so it can alter or abrogate them. It can abrogate them without any express action to that effect, by allowing them to become a dead letter. Those dealing with it have ground to assume that a rule which in practice is openly and habitually violated has been waived or abandoned.[2] Thus, a rule or notice forbidding passengers to cross the tracks at a particular point, if habitually disregarded by them, does not necessarily afford any protection to the company, in case of accident. It was the duty of its servants, if they knew or should have known that the passengers were in the habit of crossing these tracks, to take active measures to enforce the rule, or else so to manage the trains as to render it safe to disregard it.[3]

Any of its rules for the government of its servants may be waived also by so long and general a course of open neglect of their observance as must have come to the notice of the company, and yet has been followed by no protest or action on its part. This is a question for the jury, and is such even if the servant who sets up the claim especially agreed when employed that he would comply with the rules in question,

[1] Morris *v.* Atlantic Avenue R. R. Co., 116 N. Y. 552; 22 Northeastern, 1097.

[2] Sweetland *v.* Lynn & Boston R. R. Co., 177 Mass. 574; 59 Northeastern, 443; 51 L. R. A. 783.

[3] Chicago, Milwaukee, & St. Paul Railway Co. *v.* Lowell, 151 U. S. 209, 219.

and that their violation was under no circumstances consented to by the company.[1]

An established usage as to the mode of receiving goods at a local station will bind the company, although contrary to its printed and published regulations. It is bound to know of such usage, and its existence imports a suspension or abrogation of the regulation as to that station.[2]

[1] Northern Pacific R. R. Co. *v.* Nickels, 50 Federal, 718; 1 C. C. A. 625; 4 U. S. App. 369.

[2] Montgomery & Eufaula Railway Co. *v.* Kolb, 73 Ala. 396; 18 Am. & Eng. R. R. Cases, 512; 49 Am. Rep. 54.

CHAPTER XXVII.

NEGLIGENCE IN OPERATION.

A RAILROAD company is protected by its franchise from the State from liability to any one for injuries resulting from its prosecution of its business with proper care.

1. Different Degrees of Care required towards Different Kinds of Persons.

The difference in the degree of care that must be exercised by the company in the use and operation of its road towards parties standing in various relations may be summarized thus:

To passengers extraordinary care is due.[1]

[1] See Chapter XXXII., Carriage of Passengers.

To servants reasonable care is due for providing a safe road, safe equipment, and safe rules of operation, and for employing none but capable men.[1]

To travellers on the highway ordinary care is due.[2]

2. Care towards those having an Invitation or License to enter on the Railroad.

To those not passengers nor servants entering the railroad premises, if it be by invitation, ordinary care is due to keep the premises reasonably safe and to avoid injury to them. If they enter by mere license, no care is due as to making any changes in the premises for their safety or convenience, but ordinary care to avoid injury to them.

These duties extend to any lands occupied and used by the railroad, outside of its location, for the purpose of attracting custom, such as a park or playground. It must use ordinary care in favor of those whom it impliedly invites there, to keep them not only safe to walk over, or be in, under ordinary circumstances, but safe under any extraordinary circumstances that may exist, and of which it has notice.[3]

3. Trespassers.

To trespassers the only duty is to avoid wilful or reckless injury to them.

No railroad company is bound to enclose its grounds or post up any warnings not to trespass upon them, except so far as their condition may be such as to make it especially danger-

[1] See Chapter XXVIII., Servants.

[2] Wilson *v.* Minneapolis Street Railway Co., 74 Minn. 436; 77 Northwestern, 238. A contrary rule was announced as to street railways in an early case, the utmost care being declared to be necessary (Wilson *v.* Cunningham, 3 Cal. 241, 243; 58 Am. Dec. 407); but such a doctrine is manifestly indefensible. See Chapter XLI., Use of Highways.

[3] Indianapolis Street Railway Co. *v.* Dawson, Ind. App. ; 68 Northeastern, 909.

ous to enter them. In that exceptional case such an obligation may arise in favor of one injured without negligence on his own part.

4. Children: the Turn-table Cases.

This exception has been applied by courts of high authority to the case of a child injured while, without the knowledge of the company, playing with an unguarded and unlocked turn-table; but there seems little reason for it.[1] Such a turn-table is a necessary part of the railroad, and it is dangerous to no one who does not meddle with it. The company is not bound to presume that children will meddle with it, and unless chargeable because of such a presumption, it is difficult to see how any liability can be incurred.[2] A child who wanders upon a railroad without the permission or acquiescence of the railroad company is as much a trespasser as an adult would be, and the company owes him no special duty of protection until it has knowledge both of his presence and his danger.[3]

5. Failure to keep a Lookout.

No lookout need be maintained to guard trespassers or mere licensees from being struck by a passing car or train. Their presence is not reasonably to be anticipated. It is enough if, when a licensee is in fact seen, reasonable care is taken to avoid injury to him, and when a trespasser is seen, if there is no wilful or wanton omission of such care.[4]

[1] Railroad Co. *v.* Stout, 17 Wall. 657; Union Pacific Railway Co. *v.* McDonald, 152 U. S. 262, 272.

[2] Frost *v.* Eastern Railroad, 64 N. H. 220; 9 Atlantic, 790; 10 Am. State, 396; Daniels *v.* New York & New England R. R. Co., 154 Mass. 349; 28 Northeastern, 283; 13 L. R. A. 248; 26 Am. State, 253; Ritz *v.* Wheeling, 45 W. Va. 262; 31 Southeastern, 993; 43 L. R. A. 148; Ryan *v.* Towar, 128 Mich. 463; 87 Northwestern, 644; 55 L. R. A. 310; Paolino *v.* McKendall, 24 R. I. 432; 53 Atlantic, 268; 60 L. R. A. 133.

[3] Baltimore & Ohio R. R. Co. *v.* Schwindling, 101 Pa. St. 258; 8 Am. & Eng. R. R. Cases, 544; 47 Am. Rep. 706.

[4] Cannon *v.* Cleveland, Cincinnati, Chicago, & St. Louis Railway Co.,

6. Defective Condition of Roadbed.

Neither to a trespasser on a railroad nor to one who enters by its license does the railroad company under ordinary circumstances owe any duty to keep its road in a safe condition. At night it need not light its premises for his benefit, nor cover up pits into which he might fall in the darkness.[1] A failure to fence as required by statute, whereby cattle stray on the track and injure a man who is on the roadbed by mere license, gives him no right of action against the company. He must be content with the road as he finds it.[2] If frogs in switch tracks are unblocked and his foot is caught in one, he has no cause of action, although a statute may have required them to be blocked. The statute was not intended for his protection.[3]

7. Traps must not be set.

The company must not, on the other hand, set traps for any one. Its business requires the use of torpedoes, but it may be actionable negligence to leave them lying in or by a travelled path over the railroad location, where it is known to the company that people often pass, and where they have never been forbidden to pass.[4]

157 Ind. 682; 62 Northeastern, 8; overruling Louisville, New Albany, & Chicago Railway Co. *v.* Phillips, 112 Ind. 59, 66, 67; 13 Northeastern, 132, 136, 137; 2 Am. State, 155, 160, 162.

[1] Redigan *v.* Boston & Maine Railroad, 155 Mass. 44; 28 Northeastern, 1133; 14 L. R. A. 276; 31 Am. State, 520; Lingenfelter *v.* Baltimore & Ohio Southwestern Railway Co., 154 Ind. 49; 55 Northeastern, 1021.

[2] Schreiner *v.* Great Northern Railway Co., 86 Minn. 245; 90 Northwestern, 400; 58 L. R. A. 75.

[3] Akers *v.* Chicago, St. Paul, Minneapolis, & Omaha Railway Co., 58 Minn. 540, 545; 60 Northwestern, 669.

[4] Harriman *v.* Pittsburgh, Cincinnati, & St. Louis Railway Co., 45 Ohio St. 11; 12 Northeastern, 451; 4 Am. State, 507.

8. No Duty of Active Vigilance to a Licensee.

There is no duty of active vigilance to a licensee, unless he is subjected to some peril which he had no reason to anticipate.[1] The mode of operating the road need not be changed for his benefit.[2] If he is licensed to use a hand-car or "speeder" on the tracks, train hands are not, as to him, bound to be on the watch for his presence.[3]

9. Revocation of License.

If the license be to board moving cars, as in the case of newsboys, it may be revoked, and on revocation they can be ordered off the car, if it is moving so slowly that they could reasonably be expected to get off with safety.[4]

10. Trespassers: Stealing Rides.

To one who enters railroad premises as a trespasser, the only duty of the company is not to injure him wilfully, wantonly, or recklessly.[5] If one who is stealing a ride on a freight train is ordered by a train hand to get off while the train is in motion, and is injured while so doing, the company is not liable if it was moving so slowly that such an injury

[1] Sutton *v.* New York Central & Hudson River R. R. Co., 66 N. Y. 243, 248.

[2] Illinois Central R. R. Co. *v.* O'Connor, 189 Ill. 559; 59 Northeastern, 1098; Chenery *v.* Fitchburg R. R. Co., 160 Mass. 211; 35 Northeastern, 554; 22 L. R. A. 575; McCabe *v.* Chicago, St. Paul, Minneapolis, & Omaha Railway Co., 88 Wis. 531; 60 Northwestern, 260; Cincinnati, Hamilton, & Dayton R. R. Co. *v.* Aller, 64 Ohio St. 183, 192; 60 Northeastern, 205.

[3] Cleveland, Akron, & Columbus Railway Co. *v.* Workman, 66 Ohio St. 509; 64 Northeastern, 582; 90 Am. State, 602.

[4] Indianapolis Street Railway Co. *v.* Hockett, 159 Ind. 677; 66 Northeastern, 39.

[5] Leonard *v.* Boston & Albany R. R. Co., 170 Mass. 318; 49 Northeastern, 621.

would not reasonably be anticipated.[1] If the train hands should push him off, when the train is moving so rapidly that he is naturally injured by a fall, the company would be liable. It would be on their part a reckless and dangerous mode of doing an act of agency. But if they simply order him to get off, and he jumps and falls, he cannot recover. He could have remained where he was in safety, and was wanting in due care in so obeying the order.[2] If they put him off with unnecessary and excessive force, the company will be liable to him.[3]

If, while a trespasser is riding on a car without the knowledge of the company or its servants, a collision occurs, even through its gross negligence, by which he is injured, he has no remedy.[4] The same rule has been applied to one so riding by the sufferance of the train hands,[5] or on a fraudulent pretence.[6]

11. Usage to walk on the Roadbed.

That a railroad company, knowing for a long time that the public are in the habit of walking upon or across its tracks, has taken no measures to exclude them from it will not justify a jury in finding its consent to such a use of its roadbed, and

[1] Bolin *v.* Chicago, St. Paul, Minneapolis, & Omaha Railway Co., 108 Wis. 333; 84 Northwestern, 446; 81 Am. State, 911.

[2] Planz *v.* Boston & Albany R. R. Co., 157 Mass. 377; 32 Northeastern, 356; 17 L. R. A. 835. Some courts hold that the company owes such a trespasser such care as a person of ordinary prudence and skill would usually exercise under similar circumstances. Cook *v.* Southern Railway Co., 128 N. C. 333; 38 Southeastern, 925.

[3] Welch *v.* West Jersey & Seashore R. R. Co., 62 N. J. Law, 655; 42 Atlantic, 736.

[4] Singleton *v.* Felton, 42 C. C. A. 57; 101 Federal, 526.

[5] Dalton's Adm'r *v.* Louisville & Nashville R. R. Co., 22 Ky. Law Rep. 97; 56 Southwestern, 657.

[6] Condran's Adm'x *v.* Chicago, Milwaukee, & St. Paul Railway Co., 67 Federal, 522; 32 U. S. App. 182; 14 C. C. A. 506; 28 L. R. A. 749 and note.

it will remain a mere trespass.[1] No invitation to enter can legitimately be inferred by a jury from such a mere passive acquiescence.[2] No license to enter can, under such circumstances, be implied by law.[3]

12. Estoppel in pais.

But if the public use of a path across a railroad at a particular point has been considerable and constant, it may become a question for the jury whether persons so entering on the location had not been induced to believe that such entry was by the company's permission or license. This can only be under conditions sufficient to raise an estoppel *in pais*. The company must be chargeable with such a course of conduct as to make it inequitable for it to deny that it permitted that of which it knew. This course of conduct must have been such as might reasonably lead a person of ordinary prudence to believe the permission had been given. In such case, that reasonable care which is due to a licensee requires that the trains be run with some regard to the chance of the presence of persons on such crossing.[4]

[1] Central Railroad *v.* Brinson, 70 Ga. 207; 19 Am. & Eng. R. R. Cases, 42.

[2] Baltimore & Ohio R. R. Co. *v.* State, 62 Md. 479; 50 Am. Rep. 233; Illinois Central R. R. Co. *v.* Eicher, 202 Ill. 556; 67 Northeastern, 376; Devoe *v.* New York, Ontario, & Western Railway Co., 63 N. J. Law, 276; 43 Atlantic, 899. *Contra*, that acquiescence may imply invitation, Jones *v.* Charleston & Western Carolina Railway Co., 61 S. C. 556; 39 Southeastern, 758.

[3] Chenery *v.* Fitchburg R. R. Co., 160 Mass. 211; 35 Northeastern, 554; 22 L. R. A. 575. *Contra*, Barry *v.* New York Central & Hudson River R. R. Co., 92 N. Y. 289, 292; 44 Am. Rep. 377.

[4] See Thomas *v.* Chicago, Milwaukee, & St. Paul Railway Co., 103 Iowa, 649, 659; 72 Northwestern, 783; 39 L. R. A. 399, which extends the doctrine to the use of a railroad bridge as a footway.

13. Claim of Implied License to walk on a Railroad Bridge.

When an implied license is set up for the use of a high trestle bridge as a footway, if no foot planks or railing existed the implication would be ordinarily so strained that the court would not permit it to go to the jury.[1]

14. Implied Invitations.

Invitations cannot be implied without stronger evidence than would serve to support a license. Thus permission to a circus company to open its show for a day or two on vacant ground between a railroad yard and a highway cannot be treated as an invitation to cross the railroad to get to it.[2]

15. No Duty to slacken Speed of Trains.

One main object in building railroads is to promote rapid transportation. As respects cars running in the open country, no rate of speed can be so high as to constitute negligence *per se*. Trains need not be run at night so slowly that they can be stopped in time to avoid injury to men or animals on the track after they have become visible by the headlight on the engine or forward car.[3]

16. No Duty to aid Injured Trespasser or Licensee.

If a trespasser or licensee is injured by a passing train, the railroad company is under no legal obligation to give him any care or assistance, and if it undertakes to do this, and acts in good faith, it is not liable to him because the services

[1] Mason *v.* Missouri Pacific Railway Co., 27 Kans. 83; 41 Am. Rep. 405.

[2] Clark *v.* Northern Pacific Railway Co., 29 Wash. 139; 69 Pacific, 636; 59 L. R. A. 508.

[3] Winston *v.* Raleigh & Gaston R. R. Co., 90 N. C. 66; 19 Am. & Eng. R. R. Cases, 516.

are injudiciously rendered and proved harmful instead of helpful.[1] There can be no good reason for charging any greater duty upon a railroad company in such a case than upon the owner of a wagon which, without his fault, is driven over a drunken man. The only one that can be suggested would appear to be that the accident was the result of what it did or omitted to do in the exercise of its franchise, and that the emergency created a necessity of immediate relief, which attached to it as possessor of the franchise. But this franchise made the force which it employed lawful, and if the legislature burdened its use with no such charge, it is difficult to see how the courts can.[2]

17. Private Crossings.

Every crossing rightfully existing over a railroad is to a certain extent a source of danger to those travelling over the railroad. The use of the crossing by those entitled to it necessarily exposes them, also, to some risk. It is therefore the duty of the company's train crew to use care, commensurate with its responsibilities to each of these classes of persons, in approaching the crossing. They should keep a proper lookout for any whose presence upon it they ought to anticipate as reasonably possible, and, if reasonably necessary, some warning of the coming of the train should be given.[3]

18. Use of Location adjoining Highway.

That the railroad adjoins a highway does not require any more caution or forbearance in its use, so far as this is in

[1] Griswold *v.* Boston & Maine Railroad, 183 Mass. 434; 67 Northeastern, 354. *Contra*, Dyche *v.* Vicksburg, Shreveport, & Pacific R. R. Co., 79 Miss. 361; 30 Southern, 711.

[2] See dissenting opinion in Whitesides *v.* Southern Railway Co., 128 N. C. 229, 235; 38 Southeastern, 878.

[3] Swift *v.* Staten Island Rapid Transit R. R. Co., 123 N. Y. 645; 25 Northeastern, 378.

conformity with the railroad franchise, than is called for on the part of any other abutting proprietor. The company is entitled, as respects highway travellers, to run its trains as such trains are naturally run, and is not responsible if horses take fright at the noises thus occasioned. When it is engaged in the work of construction or reparation, it can temporarily pile materials, calculated to frighten horses of ordinary gentleness, so near the highway that such horses are frightened and damage results, without liability to the party suffering the loss, unless it would have been an unreasonable exercise of his property rights had the same thing been done by a private individual on land owned by him in a similar situation.[1]

19. Negligent Use of Highway.

The care due in respect to the construction and management of cars running on and along a highway, in order to avoid injury to others using or found on the same highway, is that care ordinarily and reasonably to be expected of those engaged in such a business.[2] It is a business the dangers of which increase in proportion to the speed, size, and weight of the cars, and are affected by the character of the motive power. What would be ordinary care in the case of a street car line might not be in the case of a through or inter-urban railroad with fast trains.[3]

The use by a street railroad of cars the running boards of which overlap the sidewalks, even so much as two feet, is not unreasonable, if they are run with proper care and due warning given of their approach to those upon the side-

[1] Witham *v.* Bangor & Aroostook R. R. Co., 96 Me. 326; 52 Atlantic, 764.

[2] See Chapter XLI., Use of Highways.

[3] Unger *v.* Forty-second Street & Grand Street Ferry R. R. Co., 51 N. Y. 497, 501.

walk. The greater the overhang the greater must be the care requisite on the part of those in charge of the car; but it still remains, in its character, that ordinary care which is to be expected of those conducting such a business, and ordinary care is equally due from those on the sidewalk, to avoid remaining in a position of danger as the car approaches.[1]

20. Clearing Tracks of Snow.

In removing snow from street railroad tracks, reasonable care must be used to avoid unnecessary injury to others; but if such care be used, the company is not liable to abutting proprietors injured by water flowing upon them on account of a snow-bank so created. The company is not necessarily bound to cart the snow away.[2] Reasonable care may require it to prevent it from filling up gutters or hardening into an obstruction to travel.[3]

21. Using Tracks of another Company.

If a railroad company runs cars, though but on a single occasion, by license, over tracks which it does not own, it is under the same liabilities to any person who may be injured by the negligence of its servants as if the injury occurred within its own location.[4]

[1] Hayden *v.* Fair Haven & Westville R. R. Co., 76 Conn. 355; 56 Atlantic, 613. See Chapter XXXII., Carriage of Passengers, 5, 33.

[2] Short *v.* Baltimore City Passenger Railway Co., 50 Md. 73; 33 Am. Rep. 298.

[3] Bowen *v.* Detroit City Railway Co., 54 Mich. 496; 20 Northwestern, 559; 52 Am. Rep. 822.

[4] Commonwealth *v.* Boston & Lowell Railroad Corporation, 126 Mass. 61, 68. See *post*, p. 257.

22. Duty to the General Public.

Due care in the operation of a train is owed to the public, and any one who for want of it is injured, without his fault, can recover satisfaction.

23. Risks taken in Effort to save Property or Life.

One who exposes himself to serious risk of injury, by getting on the track in the face of an approaching train, in order to protect property, must suffer the consequences. But if he does this in an emergency, to save his own life or that of any other person, he is not guilty of contributory negligence, unless the act amounts to rashness. If at the time he believed, and had reasonable ground for believing, that in doing what he did he could save his own life or that of another, the fact that the risk was greater than he thought will not bar his recovery for a consequent injury where the train was negligently run;[1] nor will the fact that he was one of the servants of the railroad company and a fellow-servant of those whose negligence led to the accident.[2]

24. Latent Defects in Machinery.

In an action by one not a passenger injured by defective machinery (*e. g.* the explosion of the boiler of a locomotive engine), the company cannot be held liable for the consequences of a latent defect, if it purchased the machinery from a manufacturer of recognized standing, and subjected it to a reasonable examination and the ordinary tests before putting it in use.[3]

[1] Eckert *v.* Long Island R. R. Co., 43 N. Y. 502; 3 Am. Rep. 721; Pennsylvania Co. *v.* Langendorf, 48 Ohio St. 316; 28 Northeastern, 172; 29 Am. State, 553; 13 L. R. A. 190.

[2] Pittsburg, Cincinnati, Chicago, & St. Louis Railway Co. *v.* Lynch, Ohio St. ; 68 Northeastern, 703.

[3] Richmond & Danville R. R. Co. *v.* Elliott, 149 U. S. 266, 272.

25. Acts protected by the Railroad Franchises.

That sparks and flashes of light are caused by the passage of an electric car, by which a horse is frightened, founds no action against the railroad company, unless it be shown by further evidence that they were due to faults of construction or negligence in operation.[1] So the escape to some extent of cinders from the smoke-stack of a steam locomotive is unavoidable. One not a passenger, who is injured by a cinder's entering his eye, must therefore prove not only that it came from the locomotive, but that its escape was due to the lack of proper care on the part of the railroad company.[2]

26. Negligence of Railroad Surgeons.

A railroad company may have agents for whose defaults it is not responsible. Responsibility is generally commensurate with the power of control. The master is responsible for what his servant does or fails to do, mainly because he controls him; for what his agent does or fails to do, mainly because he acts through and by him.

A railroad company often employs a surgeon regularly to attend at its expense such persons as it may direct, who may be injured in the course of operating the road. Such a surgeon is not its servant. No one rendering services for another is his servant, unless he be subject to his orders in respect to the particular mode of executing the service. A surgeon must act on his own knowledge and by his own judgment.[3] If he errs, the company is not responsible for the consequences, provided it has used due care in his selection and continued employment.

[1] Henderson *v.* Greenfield & Turner's Falls Street Railway Co., 172 Mass. 542; 52 Northeastern, 1080.

[2] Searles *v.* Manhattan Railway Co., 101 N. Y. 661; 5 Northeastern, 66.

[3] Quinn *v.* Railroad, 94 Tenn. 713; 30 Southwestern, 1036; 45 Am. State, 767; 28 L. R. A. 552.

27. Actions by Servants.

The care due to servants at common law being, in substance, confined to that to be taken towards providing them with a safe place to work in, suitable fellow-servants and safe appliances to work with, and safe rules to work by,[1] when these duties have been properly performed, there are few cases of personal injuries to servants for which they can hold the company, for these injuries will generally come either from some danger natural to the business, from the negligence of a fellow-servant, or from their own negligence.[2]

When several companies use the same terminal station or grounds owned by a distinct corporation, which looks after the switching, neither railroad company is responsible to its servants for injuries from negligence on the part of the servants of the depot corporation in managing the switches, for they are not its servants, nor are they doing anything which it is the duty of the railroad company to its servants to see is done with due care.[3]

28. Employers' Liability Acts.

Employers' Liability Acts, which are applicable to railroad companies, have been adopted in many of the States, patterned after the English act known by that name, which was passed in 1880. They generally do not go as far as that in changing the rules of common law. Their purpose is to give greater protection to servants injured in the course of their employment and to narrow the field governed by the "fellow-servant

[1] See Chapter XXVIII., Servants, and *ante*, p. 233.

[2] See as types of such cases, Aerkfetz *v.* Humphreys, 145 U. S. 418; Washington & Georgetown R. R. Co. *v.* McDade, 135 U. S. 554; Nolan *v.* New York, New Haven, & Hartford R. R. Co., 70 Conn. 159, 194, note; 39 Atlantic, 115; 43 L. R. A. 305.

[3] Brady *v.* Chicago & Great Western Railway Co., 114 Federal, 100; 52 C. C. A. 48; 57 L. R. A. 712.

doctrine." The English decisions as to the meaning of the terms of the English act are regarded as of persuasive, if not of controlling, authority in the States whose statutes employ the same terms.[1]

In some States (Virginia for one) constitutional provisions have been adopted to restrict the application of the fellow-servant doctrine.

[1] Jarvis *v.* Hitch, Ind. ; 67 Northeastern, 1057.

CHAPTER XXVIII.

SERVANTS.

1. Who are Servants.

RAILROADS are worked, as to the movement of cars upon them, by those who stand to the company in the relation of servants. The principal business of a train hand or track man is not to vary the company's contractual relations. Hence he is not properly to be classed as an agent; for an agent's main business is to vary his principal's contractual relations.[1]

[1] Huffcut on Agency, § 4.

2. The Conductor.

This is true even of the conductor. While he may at times have occasion to make or construe, or even vary, contracts of the company, that is not his chief office. He holds, however, a somewhat analogous position to that of a shipmaster. The owners of the railroad have put him in charge of the persons and property on board of its cars. In case of an emergency, when prompt action, if any, must be taken to protect the interests confided to his care, his ordinary powers may become greatly enlarged.[1] These are those both of a servant and an agent. A conductor in the usual execution of his office is more a servant than an agent: in emergencies he may become more an agent than a servant.

His ordinary powers as a servant are so large as frequently to subject the company to liability for his wrongful acts. From the necessity of the case he represents the corporation in the control of the engine and cars, the regulation of the conduct of the passengers as well as of the subordinate servants of the corporation, and the collection of fares.[2] If he uses unwarrantable violence in acts incident to the performance of these functions, the company is liable for it.[3] But it is not liable for more than compensatory damages, unless not only he has done something calling for vindictive damages, but it has authorized or ratified what he thus did.[4]

3. Fellow-servants.

All the servants of a railroad company who are co-workers for the purpose of securing the proper movement and manage-

[1] See *post*, p. 253.

[2] Rauch *v.* Lloyd & Hill, 31 Pa. St. 358; 72 Am. Dec. 747.

[3] Ramsden *v.* Boston & Albany Railroad Co., 104 Mass. 117, 121; 6 Am. Rep. 200.

[4] Lake Shore & Michigan Southern Railway Co. *v.* Prentice, 147 U. S. 101, 117.

ment of its trains upon a proper railroad are fellow-servants, and each takes upon himself such risks as are incident to the negligence of any of the others, except in regard to such duties as the company owes it to them absolutely to perform for their better security.[1]

4. The Company's Absolute Duties to its Servants.

As to these duties, those to whom the company intrusts their performance stand, in respect to such performance, in the place of the company, and their negligence is its negligence.

These duties of a railroad company are the following only: To use reasonable care to provide and maintain a safe railroad, and safe rolling-stock and other appliances reasonably necessary for use in its operation.

To use reasonable care in inspecting the condition of the railroad and all rolling-stock or other appliances used upon it.

To use reasonable care to provide a sufficient number of servants to do its work with reasonable safety to those engaged in it.

To use reasonable care in selecting and retaining only competent servants.[2]

To use reasonable care in instructing servants as to their duties and advising them as to any dangers incident to it which are not so obvious as to need no explanation.

To adopt and make known adequate and proper rules and directions to govern the operation of the railroad.

To use reasonable care to enforce its rules.[3]

On the due performance of these obligations every servant ordinarily has the right to rely.[4]

[1] Northern Pacific R. R. Co. *v.* Peterson, 162 U. S. 346, 353.

[2] Wabash Railway Co. *v.* McDaniels, 107 U. S. 454; Whittaker *v* Delaware & Hudson Canal Co., 126 N. Y. 544; 27 Northeastern, 1042.

[3] Whittaker *v.* Delaware & Hudson Canal Co., 126 N. Y. 544; 27 Northeastern, 1042.

[4] Union Pacific Railway Co. *v.* O'Brien, 161 U. S. 451; Texas &

5. Official Superiors.

Railroad service, as respects train crews and track men, is analogous to military service. The business is a dangerous one. It involves public safety. It calls for quick despatch. It requires the subordination of considerable bodies of men to the directions of a superior, who is often called upon to make a prompt decision, and whose orders are of a nature to require prompt obedience. Hence such orders may at times justify action not obviously perilous to safety, on the part of the servants to whom they are addressed, which would otherwise be negligent or improper.[1]

Whatever may be the rules ordinarily governing the relation of master and servant in determining questions of railroad management, the considerations above stated justify holding the railroad company responsible, under certain circumstances, for what its servants do or omit to do, on sudden occasions, in obeying the order or relying on the proper action of one whom it has set over them in a position of authority, although such order involves a departure from its standing rules, or such superior is chargeable with negligence in not taking such action.

A general manager, or superintendent or division superintendent, occupies such a position.[2]

So does, in general, any officer invested with the control of all those concerned in any distinct department of service; but not an officer merely set over a separate and distinct piece of work in a particular branch of service in such a department.[3] Thus a road master having entire charge of

Pacific Railway Co. *v.* Archibald, 170 U. S. 665, 672. As to evidence of railroad usage, as bearing on the question of due performance, see *ante*, p. 130.

[1] Southern Railway Co. *v.* Shields, 121 Ala. 460; 25 Southern, 811; 77 Am. State, 66.

[2] See Chapter VI., Directors and Officers.

[3] Northern Pacific R. R. Co. *v.* Peterson, 162 U. S. 346, 355.

the roadbed of the railroad, or of a considerable division of it, is in most matters, as to the servants under his charge, the railroad company, and not a fellow-servant.[1] So is a train master, who makes up all trains, or all trains of a particular class.[2] A station master is not,[3] nor one whose duty it is to start trains from a particular station in conformity with prescribed rules.[4]

The effect of the orders or negligence of a superior servant, as respects the rights of his inferiors against the common employer, is often regulated by Employers' Liability Acts.[5]

6. Train Despatchers and Telegraph Operators.

Courts take judicial notice of the manner in which railroads are run by telegraphic orders.[6] The heart of a railroad is in the train despatcher's office, whence the circulation of trains is constantly directed. The company is bound to provide suitable general rules and time-tables to govern their movements. Nine-tenths of the through railroad companies in the United States have adopted a set of rules recommended by the American Railway Association.[7] But special rules and orders must always be required, at times, for particular cases and irregular trains. The duty of issu-

[1] Harrison *v.* Detroit, Lansing, & Northern R. R. Co., 79 Mich. 409; 44 Northwestern, 1034; 19 Am. State, 180; 7 L. R. A. 623; 41 Am. & Eng. R. R. Cases, 398.

[2] See Goodman *v.* Delaware & Hudson Canal Co., 167 Pa. St. 332; 31 Atlantic, 670.

[3] Brown *v.* Minneapolis & St. Louis Railway Co., 31 Minn. 553; 18 Northwestern, 834; 15 Am. & Eng. R. R. Cases, 333.

[4] Rose *v.* Boston & Albany R. R. Co., 58 N. Y. 217.

[5] See *ante*, p. 245.

[6] Slater *v.* Jewett, 85 N. Y. 61, 68; 39 Am. Rep. 627; 5 Am. & Eng. R. R. Cases, 515.

[7] See Nolan *v.* New York, New Haven, & Hartford R. R. Co., 70 Conn. 159, 167; 39 Atlantic, 115; 43 L. R. A. 305; and Chapter XXVI., Rules and Regulations.

ing these is ordinarily confided to a train despatcher or to a superintendent. In performing this function he is the company, as to all its servants.[1] It requires the exercise of judgment and discretion such as the company cannot, by any delegation of authority, escape the responsibility for exercising.

Giving due notice of new general rules and orders is also a duty for the proper performance of which the company is responsible, to whatever agencies it may be committed. But giving notice of special orders affecting particular trains, or to govern in special emergencies, must, in the nature of things, be committed to local agents or servants. The general rules commit it to the local telegraph operators. They are not called upon to exercise any discretion or form any judgment. Their duty in communicating orders to the train men is simply that of a servant, and of a fellow-servant.[2]

7. Instances of the Relation of Fellow-servants.

All the crew of one train are fellow-servants with each other, and also with all the crew on any other train of the company running on the same road.[3] The engineer of a locomotive engine running detached from any train directs its course, and is in sole control; yet he remains a servant, and a fellow-servant with the fireman beside him in the cab. He is simply serving his master by running the engine.[4]

[1] Darrigan *v.* New York & New England R. R. Co., 52 Conn. 285, 305; 52 Am. Rep. 590; 23 Am. & Eng. R. R. Cases, 438; 24 Am. Law Reg. 452.

[2] Slater *v.* Jewett, 85 N. Y. 61, 69; 39 Am. Rep. 627; 5 Am. & Eng. R. R. Cases, 515; Oregon Short Line & Utah Northern Railway Co. *v.* Frost, 74 Federal, 965; 21 C. C. A. 186; 44 U. S. App. 606. *Contra*, Madden's Adm'r *v.* Chesapeake & Ohio Railway Co., 28 W. Va. 610; 57 Am. Rep. 695.

[3] Northern Pacific R. R. Co. *v.* Poirier, 167 U. S. 48; Miller *v.* Central R. R. Co., N. J. Law, ; 55 Atlantic, 245.

[4] Baltimore & Ohio R. R. Co. *v.* Baugh, 149 U. S. 368.

He, like every other member of a train crew, is also a fellow-servant of a section hand engaged in work on the track, or of a flagman.[1] Both are employed in the same service, — that which pertains to the running of trains. The section boss also is a fellow-servant of the section hand.[2] The conductor and engineer on the same train are fellow-servants; and so are the conductor on one train and the engineer on another.[3] The conductor is a fellow-servant of the brakemen on his train.[4]

8. Authority of Servants in Emergencies.

Occasions often arise in the operation of railroads for which no general rule can provide, and that call for immediate action. In such cases the master — that is, the railroad company — must be regarded as constructively present, and some one must be held to be invested with a discretion and a right to speak in his name. One thus speaking, although ordinarily a servant, may now have the authority of an agent. He may have a right to give orders, and although ordinarily a fellow-servant with those whom he addresses, he is now elevated by necessity to a higher position. He can command, and they must obey. Under such circumstances his negligence is properly imputed to the company, for he has become its direct representative, and the fellow-servant doctrine does not apply. He may, as an agent by necessity, subject his employer under these circumstances to contractual obligations. Thus, if an accident occurs, and a passenger or train hand be injured and in immediate need of surgical aid, it might be a proper question for the jury whether the conductor

[1] Murray *v.* St. Louis Cable & Western Railway Co., 98 Mo. 573; 12 Southwestern, 252; 5 L. R. A. 735; 14 Am. State, 661.

[2] Clifford *v.* Old Colony R. R. Co., 141 Mass. 564; 6 Northeastern, 751; Northern Pacific R. R. Co. *v.* Peterson, 162 U. S. 346.

[3] Oakes *v.* Mase, 165 U. S. 363; New England R. R. Co. *v.* Conroy, 175 U. S. 323, 340.

[4] Sherman *v.* Rochester & Syracuse R. R. Co., 17 N. Y. 153.

did not have implied authority even to employ a surgeon at the expense of the company, and without stopping first to determine whether the company was in fault.[1] The analogies of admiralty law, which charges the owners of a ship with the expense of curing a seaman injured on the voyage, support such an implication.

9. The Fellow-servant Doctrine in the United States Courts.

The defence to an action by a servant against a railroad company that the injury was due to the negligence of a fellow-servant is well established at common law. Although it may not be admitted by the courts of the State in which the suit is brought, it will (unless it has been abrogated by statute) be recognized in those of the United States sitting in that State. It pertains to a matter of general concern intimately connected with commerce between the States, and is a part of that general common law which the Supreme Court of the United States maintains has an existence in all the States which recognize and apply that system of jurisprudence.[2] In every State where the common law is so recognized this doctrine governs, if the action be brought in the courts of the United States, because they hold it to be part of the common law of that State.[3]

10. Brakemen.

It is *prima facie* within the implied authority of a brakeman, whether on a passenger or a freight train, to put off any

[1] Terre Haute & Indianapolis R. R. Co. *v.* McMurray, 98 Ind. 358; 49 Am. Rep. 752; Louisville, New Albany, & Chicago Railway Co. *v.* Smith, 121 Ind. 353; 22 Northeastern, 775; 6 L. R. A. 320. *Cf.* Union Pacific Railway Co. *v.* Beatty, 35 Kans. 265; 10 Pacific, 845; 57 Am. Rep. 160. A different view is taken in Thompson on Private Corporations, IV., p. 3644. See *ante*, p. 248.

[2] Western Union Telegraph Co. *v.* Call Publishing Co., 181 U. S. 92, 101.

[3] Baltimore & Ohio R. R. Co. *v.* Baugh, 149 U. S. 368. *Cf.* Western Union Telegraph Co. *v.* Call Publishing Co., 181 U. S. 92, 101–103.

person who is found upon it without right;[1] and if he does this at an improper place or in an improper manner, whereby such person is unnecessarily injured, the company is liable, even if the act were wanton and reckless,[2] provided it were not done to accomplish an independent, malicious purpose of his own.[3] But if the known rules of the company exclude any such authority, the implication is rebutted, as respects trespassers.[4]

It is the duty of a railroad company employing a brakeman or other train hand whom it knows to be inexperienced and unfamiliar with its railroad to give him general information and instructions respecting the dangers which he will naturally encounter. Brakemen must be informed as to the different kind of cars which they will have to handle, and the greater risk attaching to the use of some.[5]

11. Duty of Company as to Safety of Roadbed and Appliances.

There are many cases which assert the doctrine that a railroad company is under an absolute duty to its servants, which it cannot delegate, to furnish them with a reasonably safe track and roadbed, and, in general, with a reasonably safe

[1] O'Banion *v.* Missouri Pacific Railway Co., 65 Kans. 352; 69 Pacific, 353. But see Marion *v.* Chicago, Rock Island, & Pacific Railway Co., 59 Iowa, 428; 13 Northwestern, 415; 44 Am. Rep. 687.

[2] Kline *v.* Central Pacific R. R. Co. of California, 37 Cal. 400; 99 Am. Dec. 282; McKeon *v.* New York, New Haven, & Hartford R. R. Co., 183 Mass. 271; 67 Northeastern, 329.

[3] Rounds *v.* Delaware, Lackawanna, & Western R. R. Co., 64 N. Y. 129, 136; 21 Am. Rep. 597.

[4] Randall *v.* Chicago & Grand Trunk Railway Co., 113 Mich. 115; 71 Northwestern, 450; 38 L. R. A. 666.

[5] Louisville, New Albany, & Chicago Railway Co. *v.* Frawley, 110 Ind. 18; 9 Northeastern, 594; Hathaway *v.* Michigan Central R. R. Co., 51 Mich. 253; 16 Northwestern, 634; 47 Am. Rep. 569; 12 Am. & Eng. R. R. Cases, 249; Reynolds *v.* Boston & Maine R. R. Co., 64 Vt. 66; 24 Atlantic, 134; 33 Am. State, 908. See *ante*, p. 249.

place on which to do their work.[1] This is not true. The company's duty to them in this respect is no greater than that of any master to any servant, except so far as the intrinsic danger of the employment makes it necessary to use a care proportionate to the risk. It is merely the duty of using reasonable care to provide its servants with a reasonably safe place on which to do their work. The performance of this duty it must intrust to its agents or servants. But it remains responsible for their using such reasonable care. It is not enough that it used due care in selecting the agent or servant. He must use due care in doing what he is employed to do.[2]

The railroad may be so constructed as to be reasonably safe, although it might have been so constructed as to be much safer. The method of construction ordinarily employed on railroads of the same kind is commonly a fair test of what is reasonable. Thus, although guard rails which are blocked might, in the opinion of a jury, be safer than those unblocked, a brakeman whose foot is caught between two rails for want of blocking cannot hold the company liable for negligence in construction, when it appears that railroad companies are still in doubt whether on the whole, for all purposes, it is safer to put in blocks or not.[3] It is otherwise when there was a statutory duty to provide them; but even in that case, while the brakeman would not assume the risk consequent on a neglect to provide them, he would be responsible for the use of due care in view of their not being provided.

Assumption of risk is one thing, and contributory negligence quite another. A servant may not assume the risk naturally

[1] See, for instance, Chicago & Alton R. R. Co. *v.* Eaton, 194 Ill. 441; 62 Northeastern, 784; 88 Am. State, 161.

[2] Gardner *v.* Michigan Central R. R. Co., 150 U. S. 349, 359; Union Pacific Railway Co. *v.* O'Brien, 161 U. S. 451, 457; McGarrity *v.* New York, New Haven, & Hartford R. R. Co., 24 R. I. ; 55 Atlantic, 718.

[3] O'Neill *v.* Chicago, Rock Island, & Pacific Railway Co., 62 Nebr. 358; 92 Northwestern, 731; 60 L. R. A. 443.

incident to a known defect, and still not be justified in acting as if there were no such defect. Its existence has become a condition of his employment. He knows of the defect, and he is bound to act with the care which such knowledge makes it reasonable for him to exert.[1]

One who voluntarily renders aid to a train hand in the performance of his duties is no servant of the company, and is not entitled to rely on the same degree of care on its part with regard to supplying a safe road and safe appliances.[2]

12. Duty of Company to provide Brakemen enough.

The company owes its train hands due care in equipping its trains with the proper number of brakemen. If a train hand be injured in consequence of sending a train off not thus provided, it is no excuse to prove that brakemen enough were employed, but that one of them unexpectedly failed to report for duty. The company is bound to start no train that is not properly furnished with the necessary servants.[3]

13. Trains of Cars of one Company run over Road of another.

In these respects a train hand on a train run by one company over the tracks of another by its consent has no greater rights against the latter than against his own employer. If such a train is negligently run, and a passenger on a train of the company owning the road is consequently injured, that company is responsible to the person injured.[4] It is

[1] Narramore *v.* Cleveland, Cincinnati, Chicago, & St. Louis Railway Co., 96 Federal, 298; 37 C. C. A. 499, 504; 48 L. R. A. 68; Kilpatrick *v.* Grand Trunk Railway Co., 74 Vt. 288; 52 Atlantic, 531; 93 Am. State, 887.

[2] Church *v.* Chicago, Milwaukee, & St. Paul Railway Co., 50 Minn. 218; 52 Northwestern, 647; 16 L. R. A. 861.

[3] Flike *v.* Boston & Albany R. R. Co., 53 N. Y. 549; 5 Am. Railway Rep. 392; 13 Am. Rep. 545.

[4] Railroad Co. *v.* Barron, 5 Wall. 90, 104.

chargeable in his favor with the negligence of the train hands employed by the other company, who may *pro hac vice* be considered its own servants.[1] But where cars of one railroad are run by its servants upon the track of a connecting one without its consent, and by negligence in running them a servant of the latter road is injured, he has no remedy against the company which employs him, unless it were in fault for their entering on its road.[2]

The porter in a drawing-room car or sleeping-car not belonging to the company on whose train it is being hauled, although paid and controlled by the owner of the car, is a servant of the railroad company as to its passengers,[3] whether they hold drawing-room or sleeping-car tickets or not.[4]

When cars are let by one company to another, although manned by a crew employed and paid by the lessor, if their control belongs to the lessee, the men are the servants of the lessee.[5] The rule is the same in regard to bailments of cars, under similar conditions, as in the case of cars and train crews furnished to a contractor for construction work, and put under his control.[6]

[1] Murray *v.* Lehigh Valley R. R. Co., 66 Conn. 512; 34 Atlantic, 506; 32 L. R. A. 539.

[2] Sellars *v.* Richmond & Danville R. R. Co., 94 N. C. 654; 25 Am. & Eng. R. R. Cases, 451. See *ante*, p. 242.

[3] Thorpe *v.* New York Central & Hudson River R. R. Co., 76 N. Y. 402, 407; 32 Am. Rep. 325; Dwinelle *v.* New York Central & Hudson River R. R. Co., 120 N. Y. 117; 24 Northeastern, 319; 17 Am. State, 611; 8 L. R. A. 224.

[4] Williams *v.* Pullman Palace Car Co., 40 La. Ann. 417; 4 Southern, 85; 8 Am. State, 538.

[5] Byrne *v.* Kansas City, Fort Scott, & Memphis R. R. Co., 61 Federal, 605; 9 C. C. A. 666; 24 L. R. A. 693.

[6] Miller *v.* Minnesota & Northwestern Railway Co., 76 Iowa, 655; 39 Northwestern, 188; 14 Am. State, 258. *Contra*, New Orleans, Baton Rouge, Vicksburg, & Memphis R. R. Co. *v.* Norwood, 62 Miss. 565; 52 Am. Rep. 191.

14. Duty of Company as to Selection of Servants.

As a railroad company must rely mainly on servants to perform its duties, it is bound by its relation to them and each of them to use as much care in their selection and retention, as is due in securing the provision of suitable machinery and apparatus. It is not enough to use the ordinary care of an ordinary man. It must use such care and foresight as a careful and prudent manager of a railroad ought to exercise.[1]

15. These Duties incapable of Delegation.

Its duty as a master of using this degree of care in employing servants and in providing them with safe and suitable appliances for their work cannot be delegated so as to avoid responsibility for its due performance.[2] If a servant is employed to do the hiring or to make such provision, the company is responsible if he does not take the proper care, although he be of no higher rank than a section boss who hires the section hands.[3]

16. Inspection of Cars.

The company is thus bound to make a reasonable inspection both of its own equipment and of cars run upon the road from other roads and belonging to them,[4] and the duty will not be discharged simply by the employment of a suitable car inspector. He must do his work with reasonable care and skill.[5] He represents the company in that office, and he is

[1] Wabash Railway Co. *v.* McDaniels, 107 U. S. 454, 459, 460.

[2] Hough *v.* Railway Co., 100 U. S. 213, 218; Pennsylvania & New York Canal & R. R. Co. *v.* Mason, 109 Pa. St. 296; 58 Am. Rep. 722.

[3] Justice *v.* Pennsylvania Co., 130 Ind. 321; 30 Northeastern, 303.

[4] Baltimore & Potomac R. R. Co. *v.* Mackey, 157 U. S. 72, 87.

[5] Randolph *v.* New York Central & Hudson River R. R. Co., N. J. Law, ; 55 Atlantic, 240; Union Pacific Railway Co. *v.* Daniels, 152 U. S. 684.

not to be deemed a fellow-servant with a train hand injured by reason of his neglect.[1]

The train men themselves have also a duty of inspection. If any of the train apparatus becomes out of order during a trip between inspection points, and the train men ought to have noticed this and made the necessary repairs, their failure so to do would, under the fellow-servant doctrine, be fatal to an action against the company by any of them for injuries received from the failure to repair it.[2] But when a duty of inspection at all stops is cast, by a rule of the company, on the train men, they are not expected to perform it with all the skill of regularly employed inspectors. If, therefore, a defect which ought to have been noticed by the regular inspectors before the train started was not noticed by train men at a subsequent stop, and an accident results, a brakeman injured thereby would not necessarily be barred of his action by the fellow-servant rule. If the inspection by the train men was as thorough as could reasonably be expected from such servants, and the real fault was that of the expert inspector, previously committed, in letting the car proceed, the negligence was that of the company, for whom that inspector stood.[3]

17. Inspection of Foreign Cars.

A railroad company is as much bound to inspect the cars of another company, before admitting them into its trains, as to inspect its own.[4] It owes a like duty as to such cars which

[1] Ford *v.* Fitchburg R. R. Co., 110 Mass. 240; 14 Am. Rep. 598; Northern Pacific R. R. Co. *v.* Herbert, 116 U. S. 642, 652.

[2] Randolph *v.* New York Central & Hudson River R. R. Co., N. J. Law, ; 55 Atlantic, 240.

[3] Eaton *v.* New York Central & Hudson River R. R. Co., 163 N. Y. 391; 57 Northeastern, 609; 79 Am. State, 600.

[4] Goodrich *v.* New York Central & Hudson River R. R. Co., 116 N. Y. 398, 401; 22 Northeastern, 397; 5 L. R. A. 750; 15 Am. State, 410; Baltimore & Potomac R. R. *v.* Mackey, 157 U. S. 72, 91.

are only received temporarily, being switched on to be loaded and at once returned.[1] If, however, "foreign cars," as they are commonly termed by railroad men, are received at a point where the company is not accustomed to make a thorough inspection of its own cars, a cursory inspection there may suffice, and a more thorough one deferred until they reach a regular inspection point.

The company owning such a car may also be liable to one injured by a defect in it, who is a servant of the company on whose road it is run. The former has sent out a dangerous article, to be forwarded by other companies, and, if negligent in so doing, is bound to indemnify any engaged in this business of forwarding who are naturally injured by that which was a natural source of danger. If the danger is a secret one, this liability accompanies the car wherever it goes. But if it be one discoverable by reasonable inspection when the control of the car passes to another company, the duty of inspection passes to that company also; and whether performed or not, after the car passes the proper inspection point an employee of the company in possession must look to that alone, if injured by a defect which a reasonable inspection would have discovered.[2]

18. Inspection of Roadbed.

Railroad companies are responsible to their servants for maintaining a proper inspection of the roadbed as well as of the cars. It is not enough that they have used reasonable care in employing suitable inspectors. Inspection is, in this

[1] Texas & Pacific Railway Co. *v.* Archibald, 170 U. S. 665.

[2] Glynn *v.* Central R. R. Co., 175 Mass. 510; 56 Northeastern, 698: 78 Am. State, 507; Missouri, Kansas, & Texas Railway Co. *v.* Merrill, 61 Kans. 671; 60 Pacific, 819; 59 L. R. A. 711. *Contra*, Pennsylvania R. R. Co. *v.* Snyder, 55 Ohio St. 342; 45 Northeastern, 559; 60 Am. State, 700.

respect, so far a master's work that the company is responsible for negligence of whatever inspectors it may employ, and the fellow-servant doctrine does not apply.[1]

19. Servants' Knowledge of Defects.

These duties of their employer as to inspection and instruction do not take train hands out of the operation of the rule that a servant cannot recover if injured by a defect in the appliances furnished him, which he voluntarily and without complaint continued to use, although he knew or ought to have known of the defect, because it was plainly apparent.[2] But in determining whether he knew or ought to have known of it, the nature of the business in which he is engaged and all the attending circumstances must be taken into account.[3] A train hand is always under orders. There is ordinarily a superior servant at hand whose directions he is expected to obey. What he does in pursuance of such a direction, suddenly given, in the course of the movement of a train, is not to be judged in the same way as if ample time were afforded for observation and reflection. He must think quickly and act quickly. Upon an order to couple cars and do it in a hurry, it might not be unreasonable in him to do it in such a hurry as to prevent his noticing an obvious defect in the coupling apparatus.[4]

A train hand may also be warranted in taking considerable personal risk to remedy a defect of repair in the engine or cars of a moving train, and if injured in consequence can

[1] Smith *v.* Erie R. R. Co., 67 N. J. Law, 636; 52 Atlantic, 634; 59 L. R. A. 302.

[2] But see U. S. Stat. at Large, XXVII. 531; Chapter XXXVIII., Inter-State Business.

[3] Reynolds *v.* Boston & Maine R. R. Co., 64 Vt. 66; 24 Atlantic, 134; 33 Am. State, 908.

[4] Harker *v.* Burlington, Cedar Rapids, & Northern Railway Co., 88 Iowa, 409; 55 Northwestern, 316; 45 Am. State, 242.

look to the company for reparation, if what he did was in the line of his duty to those on board.[1]

A brakeman assumes the risk of using the kind of brakes with which the cars on the road on which he is employed is equipped, provided reasonable care has been exercised to procure such as were reasonably adapted for use. Such care does not demand the adoption of every new improvement as soon as its merits are ascertained.[2] But whatever appliances for the greater safety of train hands are in general use on most railroads of a similar character it may be negligence not to provide.[3] The question would be for the jury, and it could not be pronounced negligence as matter of law.[4]

A brakeman assumes the risk attendant on coupling cars such as the company he serves is in the habit of receiving, though their construction may differ from that of its own cars, and consequently the danger of coupling them may be increased.[5] So if any train hand accepts employment on a railroad which is not constructed in the best manner, knowing its condition, he does so at his own risk.[6]

Switching over frogs which are "unblocked" is a much more dangerous business than switching over blocked frogs. Unblocked frogs are, however, used on many roads. If a brakeman goes on such a road, and engages in switching, knowing that the frogs are in this condition, he takes all

[1] Olney *v.* Boston & Maine Railroad, 71 N. H. 427; 52 Atlantic, 1097.

[2] Hathaway *v.* Michigan Central R. R. Co., 51 Mich. 253; 16 Northwestern, 634; 47 Am. Rep. 569.

[3] Nashville & Chattanooga R. R. Co. *v.* Elliott, 1 Coldwell, 611; 78 Am. Dec. 506.

[4] Louisville & Nashville R. R. Co. *v.* Hall, 91 Ala. 112; 8 Southern, 371; 24 Am. State, 863. *Contra*, Troxler *v.* Southern Railway Co., 124 N. C. 189; 32 Southeastern, 550; 70 Am. State, 580; 44 L. R. A. 313.

[5] Kohn *v.* McNulta, 147 U. S. 238; Baldwin *v.* Chicago, Rock Island, & Pacific Railway Co., 50 Iowa, 680. See Chapter XXXVIII., Inter-State Business, and U. S. Stat. at Large, XXVII. 531.

[6] Carbine's Adm'r *v.* Bennington & Rutland R. R. Co., 61 Vt. 348; 17 Atlantic, 491.

risks incident to their use.[1] This is true if, although he knew the frogs were not blocked, he did not know how dangerous it was to use them, provided the danger were apparent to an ordinary man.[2] End ladders are safer for brakemen than side ladders; but one who goes on a road using side ladders does so at his own risk.[3]

Every train hand assumes, under ordinary circumstances, the risk incident to the proximity of tracks. If a car of unusual dimensions is on one track, and he is on the side of a car about to pass it on another track, he must look out for himself to avoid being struck by it, although, if it were of the ordinary size, there would be no danger.[4] So he assumes the risk incident to the proximity to the tracks of posts, fences, bridges, abutments, station roofs, or other objects of danger, the position of which he knew or ought to have known.[5] If the road passes through a tunnel, and the smoke and gases vitiate the air in it more and more as the business of the road increases and trains multiply, until finally a train hand becomes suffocated there, his death was not due to any actionable negligence of the company towards him. It was not bound to reconstruct its road for his accommodation.[6]

In determining, however, whether one of a train crew ought to have known of the dangerous proximity to the

[1] Southern Pacific Co. *v.* Seley, 152 U. S. 145.

[2] Railway Co. *v.* Davis, 54 Ark. 389; 15 Southwestern, 895; 26 Am. State, 48.

[3] Bell *v.* New York, New Haven, & Hartford R. R. Co., 168 Mass. 443; 47 Northeastern, 118.

[4] Content *v.* New York, New Haven, & Hartford R. R. Co., 165 Mass. 267; 43 Northeastern, 94.

[5] Lovejoy *v.* Boston & Lowell R. R. Corporation, 125 Mass. 79; 28 Am. Rep. 206. See Quinn *v.* New York, New Haven, & Hartford R. R. Co., 175 Mass. 150; 55 Northeastern, 891, for a hint of a possible qualification of this doctrine.

[6] Baltimore & Potomac R. R. Co. *v.* State, 75 Md. 152; 23 Atlantic, 310; 32 Am. State, 372.

tracks of a post or other cause of peril to him, by reason of which he was injured, regard must be paid to the kind of duty he was performing when injured, and the time he had to notice or recollect the source of danger. A brakeman ordered to run up a side ladder of a freight car in the dark, or a conductor set to collect fares from passengers on the running board of a street car, may not have, under all circumstances, a reasonable opportunity to think of or to observe every post or other structure to which the car is approaching dangerously near.[1]

The train rules of railroads generally forbid brakemen to couple cars by hand, without a coupling pin. Nevertheless they constantly do, and with the knowledge of their superiors. They do it, however, at their own risk, for the danger is obvious to every one. If in doing this they step in the way of a moving car, and there is a hole in the roadbed which they do not notice, by reason of which they are injured, the company is not liable, though a jury might find it negligent in leaving the hole unfilled. The brakeman was to blame for failure to observe a patent defect, or if it were too dark to observe it, for taking so great a risk.[2]

20. The Care required measured by the Business to be done.

The application to railroads of the rule that a master is bound to use reasonable care to provide his servants with a reasonably safe place in which to work and reasonably safe appliances and instrumentalities with which to work, and that this is a duty which cannot be delegated,[3] is necessarily affected by the nature of the employment. The place in

[1] Nugent *v.* Boston, Concord, & Montreal Railroad, 80 Me. 62; 12 Atlantic, 797; 6 Am. St. 151; Withee *v.* Somerset Traction Co., Me. ; 56 Atlantic, 204.

[2] Ragon *v.* Toledo, Ann Arbor, & North Michigan Railway Co., 97 Mich. 265; 56 Northwestern, 612; 37 Am. State, 336. *Cf. post*, p. 268.

[3] Snow *v.* Housatonic R. R. Co., 8 Allen, 441, 447; 85 Am. Dec. 720.

or upon which the train hand works is of great extent, and his presence at any particular spot in it is occasional and temporary. Hence, as respects brakemen, whose duty it may be to get off a train at any point and couple or uncouple a car, the company is not bound to ballast its tracks or keep its entire roadbed or freight yards in the condition of a safe foot-way.[1] On the other hand, the dangerous character of railroad business requires especial care on the part of the company in constructing, equipping, and repairing its road. It does not insure the safety of anything, but it is bound to a degree of care proportioned to the danger to which its servants will be exposed, and bound to it simply because no less degree would be reasonable.[2]

21. Statutory Changes of the Common Law.

By statute these rules may, of course, be changed. A statute has that effect which requires all railroad companies to provide certain safety appliances, under penalty of a fine. The ground for holding that in the absence of a statute a railroad servant assumes the risks of his employment on the railroad with which he is connected is that this is his implied agreement with the company. But no agreement will be implied when none such could be made in express terms. The company and its servant could not in express terms lawfully stipulate that no action should arise in his favor for a risk incurred from the violation of a statute. Hence no such agreement or exemption can be implied. He assumes only the risks that he could lawfully assume.[3]

[1] Kerrigan *v.* Pennsylvania R. R. Co., 194 Pa. St. 98; 44 Atlantic, 1069. *Contra*, Railway Co. *v.* Robbins, 57 Ark. 377; 21 Southwestern, 886.

[2] Patton *v.* Texas & Pacific Railway Co., 179 U. S. 658, 664.

[3] Narramore *v.* Cleveland, Cincinnati, Chicago, & St. Louis Railway Co., 96 Federal, 298; 37 C. C. A. 499; 48 L. R. A. 68; Kilpatrick *v.* Grand Trunk Railway Co., 72 Vt. 263; 47 Atlantic, 827; 82 Am. State, 939.

He cannot, however, conduct himself without regard to the want of what the statute requires. Its absence is one of the conditions and features of the business in which he is engaged, to be kept in view as a matter of ordinary prudence and common sense.

Congress has provided that it is not to be accounted negligence in a servant employed on an inter-State railroad to continue in the service on cars not equipped as the laws of the United States require. It would, however, be negligence on his part not to use ordinary care while on such cars, and that care would be partly determined by the character of its construction and equipment.

It is questionable whether this act of Congress prescribes a rule binding on the State courts in actions brought before them for injuries received on an inter-State railroad. It is in the nature of a rule of evidence, and it is for every sovereign to prescribe the rules of evidence to be followed in his courts.[1]

In some States, by statute, a railroad company is held liable for injuries to a servant due to the negligence of a fellow-servant. In an action for such a cause brought in another State adhering in this respect to the common law, the statute of the State where the injury occurred will govern, and no defence can be set up by reason of the fellow-servant doctrine.[2]

Employers' Liability Acts, including railroad companies, have been adopted in a number of the States. One of their leading features is to elevate a servant, placed in the position of a superior, above the rank of a fellow-servant with one who may be injured through his negligence. A yard master in control of a switch yard is a "superintendent," and his acts in

[1] Schlemmer *v.* Buffalo, Rochester, & Pittsburg Railway Co., Pa. St. ; 56 Atlantic, 417.

[2] Herrick *v.* Minneapolis & St. Louis Railway Co., 31 Minn. 11; 16 Northwestern, 413; 47 Am. Rep. 771; Northern Pacific R. R. Co. *v.* Babcock, 154 U. S. 190, 197.

directing the movement of cars are an exercise of superintendency, within the meaning of such a law.[1]

Under such a statute a brakeman may hold the company for injuries from a fall caused by too sudden a stopping of a train, even though it be a freight train, when the place he occupied was in such a condition from ice or otherwise that his fall was a natural consequence of such a stop.[2]

22. How far Servants may assume that the Company has done its Duty towards Others.

The obligations of the company to the public may have some effect in enlarging the rights of its servants. They have some ground for acting on the supposition that the company has performed all its duties, and that the road is being handled in a proper manner.

At highway crossings, the company being bound to pursue such a mode of constructing and maintaining its tracks as to render them reasonably safe and convenient for the travelling public, its train hands have some right to assume that this duty has been performed. If, therefore, a brakeman, in coupling cars upon a crossing, steps between them, and his foot is caught in a hole in the planking, which he did not observe, it will be for a jury to say whether due care was used by the company as well as by him.[3]

A brakeman on a freight train has a right to assume that the cars have been properly loaded, unless the defect in loading be patent. If, therefore, in coupling lumber cars, he is injured by projecting boards negligently allowed to project so far as to become dangerous, and the circumstances were such as not to give him time or opportunity to observe the danger,

[1] Brady *v.* New York, New Haven, & Hartford R. R. Co., 184 Mass. 225; 68 Northeastern, 227.

[2] Texas & Pacific Railway Co. *v.* Behymer, 189 U. S. 468.

[3] Snow *v.* Housatonic R. R. Co., 8 Allen, 441, 450; 85 Am. Dec. 720.

he may recover against the company.[1] He has a like right to assume that the rules of the company made for his protection will be observed, as that a train shall not be moved when a brakeman is at work between two cars.[2] But he is not excused from looking out for a wild train because those who are running it disregard a rule, which was not made for his benefit, for giving signals on approaching stations or curves.[3]

23. Responsibility of Company for Wrongful Injuries by Train Hands.

A railroad company is bound to use reasonable diligence in the management of its trains to prevent injury to persons or property on a public highway crossed or occupied by its tracks, either from the negligence of its train hands or their wrongful acts outside and beyond the scope of their employment. It does not insure against such injuries. From the mere fact that one such wrongful and injurious act was done, the omission to prevent it could not be claimed to constitute negligence. It must also be shown that it could have been reasonably anticipated.[4] An engineer who wantonly and unnecessarily makes a catapult of his engine, and, with no purpose to serve his employer, to gratify personal ill-will, or to amuse himself by the fright so occasioned, runs it into collision with another car or team, does not thereby make the railroad company liable.[5] If he acts simply with recklessness, it will be a question for the jury whether the company is responsible for the consequences of his misdoing.[6]

[1] Haugh, Adm'r, *v.* Chicago, Rock Island, & Pacific Railway Co., 73 Iowa, 66; 35 Northwestern, 116.

[2] Central Railroad *v.* Harrison, 73 Ga. 744.

[3] Morris *v.* Boston & Maine Railroad, 184 Mass. 368; 68 Northeastern, 680.

[4] Fletcher *v.* Baltimore & Potomac R. R. Co., 168 U. S. 135, 138.

[5] Stephenson *v.* Southern Pacific Co., 93 Calif. 558; 29 Pacific, 234; 27 Am. State, 223; 15 L. R. A. 475.

[6] Cohen *v.* Dry Dock, East Broadway, & Battery R. R. Co., 69 N. Y.

In dealing with cases of this nature courts have sometimes been led, by the dangerous character of the instruments placed under the control of train hands, to impose an undue burden on the railroad company.[1] It is not bound at all events, to a highway traveller, that its trains shall be run with due care. It is so far bound that if, while being run in its service, they are not run with due care, a party injured may look to it for redress. It is not so far bound that if, while not being run in its service, but being temporarily used to accomplish a malicious purpose of the train hands, they are not run with due care, but are run with wanton intent to injure another, a party thus injured can look to it for redress. If a servant puts a railroad torpedo, as a pure matter of frolic or horse play, in a position where it is a source of danger and injury to other servants or to any third parties, not passengers, the company is not responsible. Its liability is measured by what a servant does in the line of his service; not simply by what he does with its property in his possession, of however dangerous a nature that property may be.[2] But if a railroad servant does what he had a right and was under a duty to do, but at an improper time or place, the company may be responsible to a party injured, notwithstanding the act was done with no purpose to serve the employer, but only to frighten or injure him whom it in fact did injure.[3]

A railroad company is liable to an action for assault and false imprisonment if a conductor, while acting in the line of

170, 174. See Murray *v.* Lehigh Valley R. R. Co., 66 Conn. 512, 524; 34 Atlantic, 506; 32 L. R. A. 539.

[1] See Toledo, Wabash, & Western Railway Co. *v.* Harmon, 47 Ill. 298; Euting *v.* Chicago & Northwestern Railway Co., 116 Wis. 13; 92 Northwestern, 358; 60 L. R. A. 158; Brendle *v.* Spencer, 125 N. C. 474; 34 Southeastern, 634.

[2] Sullivan *v.* Louisville & Nashville R. R. Co., 24 Ky. Law, 2344; 74 Southwestern, 171.

[3] Alsever *v.* Minneapolis & St. Louis R. R. Co., 115 Iowa, 338; 88 Northwestern, 841; 56 L. R. A. 748.

his service, causes the unlawful arrest of a person on its cars or premises.[1]

24. Personal Liability of Train Hands to Party Injured.

To those not passengers to whom the railroad company is liable for injuries to person or property suffered on account of the negligence of its servants in the operation of a train, the servants thus negligent are equally liable, and suit can be brought against either.[2] If when a train hand is thus sued a judgment is rendered in his favor, it conclusively establishes that there is no cause of action against the company for the negligence which was charged in the suit against him.[3]

25. Relief Departments and Medical Assistance.

Some of the larger railroads have connected with them relief or benefit departments, or hospitals, for the aid of such of their employees as may become sick or be injured by accident. These are partly supported by the company and partly by contributions from its servants. The foundation and maintenance of such establishments is within the incidental powers of a railroad company, as they tend to promote good feeling and contentment in the railroad service, and to prevent human suffering on the part of those under its charge.

It is customary to require servants injured by accidents who receive relief from such a department to waive any right of action which they might otherwise possess against the com-

[1] Krulevitz *v.* Eastern R. R. Co., 143 Mass. 228; 9 Northeastern, 613.

[2] See Parsons *v.* Winchell, 5 Cush. 592, 594; Osborne *v.* Morgan, 130 Mass. 102, 104; 39 Am. Rep. 437; Mayer *v.* Thompson-Hutchinson Building Co., 104 Ala. 611; 16 Southern, 620; 28 L. R. A. 433 and note. *Contra*, Bryce *v.* Southern Railway Co., 125 Federal, 958. There are reasons against suing the servant and the company jointly, growing out of the right of a master to look to the servant who subjects him to loss, for indemnity, and the rule that there can be no enforcement of contribution among wrongdoers. Bailey *v.* Bussing, 37 Conn. 349, 351.

[3] Doremus *v.* Root, 23 Wash. 710; 63 Pacific, 572; 54 L. R. A. 649.

pany; and such a requirement is valid.[1] If they decline to receive it, they can sue for the injury.

26. **Congressional Legislation to promote Safety of Train Hands.** The act of Congress requiring power brakes, automatic couplers, and grab irons or hand holds on cars used in inter-State business, has practically resulted in their general adoption, since most railroad cars are at times run from one State into another. It provides[2] that every employee of an inter-State railroad who may be injured by the use of any locomotive, car, or train not provided with the safety appliances so required, "shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train has been brought to his knowledge." This section does not make the company an insurer of a train hand who, knowing that such safety appliances are wanting on a particular car, acts as if they were there. It refers rather to his remaining in the service of the company with knowledge of its general neglect to obey the law, and thus exposing himself to risk independently of his own action. He is still bound to use reasonable care in doing his own work, in view of the condition of the cars as it actually is, and of the dangers naturally incident to their use in that condition.[3]

If a railroad company furnishes medical or surgical assistance to one who is injured in its service, it is so far a matter of favor or charity that, although furnished at a railroad hospital supported in part by contributions by all its servants made by a deduction monthly from their wages, if

[1] Oyster *v.* Burlington Relief Department, Neb. ; 91 Northwestern, 699; 59 L. R. A. 291.

[2] U. S. Stat. at Large, XXVII. 532, § 8. See Chapter XXXVIII., Inter-State Business.

[3] Cleveland, Cincinnati, Chicago, & St. Louis Railway Co. *v.* Baker, 91 Federal, 224; 33 C. C. A. 468; 63 U. S. App. 553.

the treatment be improper, the company is not responsible, provided it used reasonable care to provide competent physicians and attendants.[1]

[1] Union Pacific Railway Co. *v.* Artist, 60 Federal, 365; 9 C. C. A. 14; 19 U. S. App. 612; 23 L. R. A. 581.

CHAPTER XXIX.

STRIKES.

STRIKES may affect the obligations of a railroad company.

1. Delaying Transportation.

A peaceable strike, however sudden and unexpected, resulting in the stoppage of trains, if temporary in character, so that the strikers can be regarded as still in the employ of the company, will not excuse what would be otherwise unreasonable delays in transportation of goods. If the company treats them as no longer in its employ, and promptly endeavors, with all reasonable diligence, though without success, to engage new men to replace the strikers,[1] it has discharged its duty to the shippers. If the strikers, after quitting work, prevent or obstruct the running of trains by acts of violence, this also would be an excuse, provided the same acts would be, if committed by those never in the employ of the company.[2]

2. Notice to Intending Shippers.

When a railroad is tied up by a strike, the company should not receive goods for transportation without acquainting the

[1] See Pittsburgh, Fort Wayne, & Chicago R. R. Co. *v.* Hazen, 84 Ill. 36; 25 Am. Rep. 422. *Contra*, Blackstock *v.* New York & Erie R. R. Co., 20 N. Y. 48; 75 Am. Dec. 372; Read *v.* St. Louis, Kansas City, & Northern R. R. Co., 60 Mo. 199; 9 Am. Railway Rep. 201.

[2] Geismer *v.* Lake Shore & Michigan Southern Railway Co., 102 N. Y. 563; 7 Northeastern, 828; 55 Am. Rep. 837.

shipper with the facts, unless he already knows them. If, with full notice, he still tenders it the goods, it will not be liable for consequent delays in forwarding them which it cannot by reasonable diligence avoid.

3. Knowledge of Passengers.

So if a passenger, knowing that there is a strike on a street railroad, and that it has been attended with violence, and there have been attacks on those using the cars, go on board of one, he cannot hold the company if he should be injured by rioters in the course of such an attack, provided it did its utmost under the circumstances to protect him.[1] A street railroad being part of a public highway, those charged with its operation owe a public duty to endeavor to keep it open for use, as far as lies in their power. They may therefore rightfully keep on running their cars during a strike and receiving passengers who are acquainted with the circumstances, unless they cannot reasonably anticipate that they can guard them from unlawful violence. It would seem that the same principles, though perhaps with less force, should be applied to through railroads.

4. Boycott of Connecting Railroad.

That a strike has been ordered on a railroad, and that any connecting railroad which continues dealing with it will be boycotted by the strikers and the labor organizations with which they may be connected, will not excuse such a connecting road from accepting cars coming from the former; and in case of a refusal to accept them a court of equity might issue a mandatory injunction.[2]

[1] Fewings *v.* Mendenhall, 88 Minn. 336; 93 Northwestern, 127; 60 L. R. A. 601. See Chapter XXXII., Carriage of Passengers.

[2] Chicago, Burlington, & Quincy Railway Co. *v.* Burlington, Cedar

A boycott thus declared or carried out by a labor organization against an inter-State railroad is a combination in restraint of commerce between the States, within the meaning of the Sherman Act (U. S. Stat. at Large, XXVI. 209).[1]

5. Claim of Forfeiture of Franchise.

Omitting to run trains in consequence of strikes will not be cause for a forfeiture of the corporate franchises, provided reasonable efforts are made to maintain the operation of the road. No person, natural or artificial, is punished for not doing what he cannot do. To send out trains not properly manned would be a breach of duty. A strike may for a time render it practically impossible that they should be so manned, and when this is so, none should be sent out until suitable train crews can be procured. In determining how long a suspension of operations could thus be justifiable, regard will be paid to the pendency of negotiations for ending the strike and the probability or improbability of its speedy termination. This is demanded by the public interest, since the safety of the travelling public is best promoted, other things being equal, when railroads are run by servants familiar with the localities traversed.[2]

6. Receiverships.

When a railroad is in the hands of a receiver, it may be a contempt of court for train men to strike without fair warning and reasonable cause.

Rapids, & Northern Railway Co., 34 Federal, 481. See Chapter LVII., Penal Actions and Criminal Prosecutions.

[1] Waterhouse *v.* Comer, 55 Federal, 149, 156; 19 L. R. A. 403. *Cf. In re* Debs, 158 U. S. 564, and United States *v.* Joint Traffic Association, 171 U. S. 505.

[2] Geismer *v.* Lake Shore & Michigan Southern Railway Co., 102 N. Y. 563; 7 Northeastern, 828; 55 Am. Rep. 837.

7. Congressional Legislation favoring Arbitration.

Provision has been made by act of Congress for promoting mediation or voluntary arbitration in case of any strikes or difficulties on inter-State railroads or those in the Territories of the United States.[1]

[1] U. S. Stat. at Large, XXX. 424

CHAPTER XXX.

PASSENGER STATIONS.

1. How constructed and maintained.

In respect to such passenger stations as it may maintain, a railroad company is bound, as to those standing to it in the relation of passengers, to use, not the utmost care, but such care as would reasonably be expected from persons of prudence, skill, and experience engaged in railroad business and familiar with its hazards, to make the stations safe and provide safe means of access to and egress from them.[1] The degree of care required being dependent on the consequences likely to result from the neglect of it, a company is not bound to exercise as high care in providing safe station grounds as in providing a safe roadway. Before passengers enter on the tracks and after they leave them, they are in a better position to take care of themselves. It is enough if such care be exercised as would reasonably be expected from persons of prudence, skill, and experience engaged in such a business and familiar with its hazards.[2]

[1] McDonald *v.* Chicago & Northwestern R. R. Co., 26 Iowa, 124; 96 Am. Dec. 114.

[2] Moreland *v.* Boston & Providence R. R. Co., 141 Mass. 31; 6 North-

2. Crossing Tracks to board Train

Trains must be run, when approaching a station house, with due regard to the safety of those in and about it. Passengers have some right to assume that they will be so run, and it is therefore not necessarily negligent for one about to board a train, to do which it is necessary to cross a track, to omit in doing so to be on the watch for the coming upon it of another train. Whether he should have done so is a question for the jury.[1]

3. Adjacent Pitfalls.

The safety of passengers must not be endangered by placing cattle guards or other excavations or structures so near a station house or other regular stopping place for the reception or discharge of passengers as naturally to be a source of peril to those seeking to enter or leave the cars, unless due protection be afforded by guards, warnings, lights, or signals.[2] If, however, proper means of egress and ingress be provided by a station platform, the company is not liable to one who makes a short cut across lots for his own convenience, although he may fall into a pit near the station house.[3]

4. Railing in Platform.

A station platform is ordinarily so near the ground that it is not necessary to fence it in, especially in view of the inconvenience which might result to those entering or leaving the cars. It need not be fenced because it is possible that a runaway horse might some day dash upon it. The company is

eastern, 225; Michigan Central R. R. Co. *v.* Coleman, 28 Mich. 440. See Chapter XXXII., Carriage of Passengers.

[1] Atlantic City R. R. Co. *v.* Goodin, 62 N. J. Law, 394; 42 Atlantic, 333; 45 L. R. A. 671; 72 Am. State, 652. *Contra*, Connolly *v.* New York & New England R. R. Co., 158 Mass. 8; 32 Northeastern, 937.

[2] Hurlbert *v.* New York Central R. R. Co., 40 N. Y. 145.

[3] Forsyth *v.* Boston & Albany R. R. Co., 103 Mass. 510, 513.

not reasonably bound to anticipate such an event.[1] A fence or railing may, however, under some circumstances, be required to protect passengers from walking off and suffering a fall, and it may be a question of fact for the jury whether one should have been erected. This is true with respect to a platform built on a highway for the use of those riding on a street railroad. Nor would it be important who built it, if it were commonly used by the railroad company for receiving and discharging passengers.[2]

5. Unsafe Stairways.

The same principle makes a railroad company responsible for injuries to passengers from unsafe stairways or other means of access to or egress from a station building which it did not make or maintain, but which they had a right to suppose that it did.[3]

6. Lights.

Station platforms on through railroads must be reasonably lighted at night whenever passenger trains arrive or depart.[4] The mode of lighting must be largely governed by the character of the place. A country station where passengers seldom embark or alight might be sufficiently lighted by the lantern of the brakeman or station agent. When there are proper lights it is *prima facie* negligence for a passenger to stray out of their range in search of some mode of exit, when a safe mode has been provided and they sufficiently show it.[5]

[1] Brooks *v.* Old Colony R. R. Co., 168 Mass. 164; 46 Northeastern, 566.

[2] Haselton *v.* Portsmouth, Kittery, & York Street Railway, 71 N. H. 589; 53 Atlantic, 1016.

[3] Delaware, Lackawanna, & Western R. R. Co. *v.* Trautwein, 52 N. J. Law, 169, 175, 176; 19 Atlantic, 178; 7 L. R. A. 435; 19 Am. State, 442.

[4] Patten *v.* Chicago & Northwestern Railway Co., 36 Wis. 413.

[5] Bennett *v.* New York, New Haven, & Hartford R. R. Co., 57 Conn. 422, 426; 18 Atlantic, 668.

7. Duty of Company towards those entering Station by License or Invitation.

The company is liable not only to such as are or intend to become passengers in its cars, but to any person who is lawfully using its premises at or about its stations, for injuries received from their unsafe condition. To the latter the use of ordinary care and prudence in keeping such premises in safe condition is due, and to the former a still higher degree of care.[1] A person who enters a station to meet and render any necessary assistance to a passenger on his arrival, or to give such assistance to one about to take a train, is regarded as there under an implied invitation from the railroad company. It is otherwise with respect to those drawn there by mere curiosity.[2] One who is conveying an intending passenger to a station is in the position of one entering the station grounds under an implied invitation from the company.[3]

8. Right to exclude those not licensed nor invited.

Stations and station houses, in respect to their use, stand on the same footing as any buildings owned in fee by an individual. A railroad company which is operating a railroad in its possession has the ordinary right belonging to every owner of real estate to exclude from entry upon it all who come without its consent and can show no superior legal title.[4] A right of entry exists in all who wish to avail themselves of its services as a common carrier and enter for that purpose at a proper place, so long as they conduct themselves with propriety and pay due regard to such reasonable

[1] Bennett *v.* Railroad Co., 102 U. S. 577, 585.

[2] Gillis *v.* Pennsylvania R. R. Co., 59 Pa. St. 129; 98 Am. Dec. 317.

[3] Tobin *v.* Portland, Saco, & Portsmouth R. R. Co., 59 Me. 183; 8 Am. Rep. 415.

[4] See Chapter XII., Rights under a Railroad Location, p. 113.

regulations as it may have made and published for the orderly and prudent management of its business. It is for their especial use that it is permitted to maintain its stations and station grounds; and the law establishes a right of entry in their favor, independent of any contractual relation between them and the company.

The extent of land about a passenger station which may be appropriated as station grounds is determined by the railroad company, with the approval of the proper authorities of the State, in view of the number of those who will probably have lawful occasion to use the station from time to time, and the accommodations necessary for their convenience and for the proper management of the road.

Every one who is driven to a station to take passage on a train can select his own conveyance, but he has no absolute right to insist on its admission within the station grounds. His driver has no greater right. These grounds may be, and in cities often must be, so cramped as to preclude the entrance of any vehicles so employed. Where the space is greater, the question of admitting them is to be determined wholly by the convenience of the passenger and the railroad company. That of the driver or owner of the vehicle need not be consulted, except so far as it is involved in that of those whom he is carrying to the station.

In regulating matters of this kind, a wide discretion is necessarily intrusted to the managers of the railroad. They are in a situation which should make them the best judges of what promotes the comfort of those who ride upon their road. Courts will always be slow to pronounce unreasonable any rule, purporting to be directed towards that end, which they have deliberately adopted.[1]

The company may therefore grant an exclusive privilege

[1] Commonwealth *v.* Power, 7 Met. 596; 1 Am. Railway Cases, 389; 41 Am. Dec. 465.

to a single person for maintaining a hack stand within its grounds at any station, provided the terms of such a grant are not inconsistent with the reasonable accommodation of the passengers upon its road. It may be more convenient for them to deal with a single local carrier than to be met, on alighting from their train, by importunate solicitations from a number of rival competitors for their custom. If any of them prefer the service of some other person, they can secure it by an order in advance, which would justify his entrance on the grounds, if they are so arranged that there is room for him there, and there is no rule of the company against it; or they can go outside and engage whomsoever they think fit.[1]

9. Duty of Company towards Outsiders.

The high degree of care that is demanded towards one upon a station platform awaiting a train on which he has secured passage, is care respecting the safety of the platform and station building, the management of the train with reference to those occupying the platform, and the provision of safe means of boarding it. It does not refer to the management of the train with respect to the safety of persons outside of the station house and not upon its appurtenant platforms, even if remotely and consequentially that may affect those within it.[2]

[1] New York, New Haven, & Hartford R. R. Co. *v.* Scovill, 71 Conn. 136, 145–148; 41 Atlantic, 246; 42 L. R. A. 157; 71 Am. State, 159. *Contra*, Kalamazoo Hack & Bus Co. *v.* Sootsma, 84 Mich. 194; 47 Northwestern, 667; 10 L. R. A. 819; 22 Am. State, 693; Indianapolis Union Railway Co. *v.* Dohn, 153 Ind. 10; 53 Northeastern, 937; 45 L. R. A. 427; 74 Am. State, 274.

[2] Wood *v.* Pennsylvania R. R. Co., 177 Pa. St. 306; 35 Atlantic, 699; 55 Am. State, 728; 35 L. R. A. 199.

10. Ticket Office.

It is not the duty of a railroad company, in the absence of a contract or statute to that effect, to maintain a ticket office or keep a ticket agent at every or at any station. If it does so, it is for its own convenience.[1]

11. Union Stations.

To one who enters a union station to take passage over the railroad of one of the companies using it, each of the other companies, in respect to their trains and appliances, owes such diligence as would naturally be exercised by prudent and skilful men in the operation of a railroad. If he be injured by the explosion of the boiler of a locomotive owned by one of them, and standing in the building, there is a *prima facie* presumption in his favor that it was in fault.[2]

A company using, and required by law to use, a union passenger station owned by a separate corporation is not liable for an injury, not due to its own act or neglect, to a passenger once properly discharged upon the station platform. After that, it is for the other corporation to look after him.[3]

[1] Nellis *v.* New York Central R. R. Co., 30 N. Y. 505, 515.

[2] Illinois Central R. R. Co. *v.* Phillips, 55 Ill. 194; 2 Am. Railway Rep. 374.

[3] Frazier *v.* New York, New Haven, & Hartford R. R. Co., 180 Mass. 427; 62 Northeastern, 731. See Appendix IV., B. 10.

CHAPTER XXXI.

PASSENGER TICKETS.

1. The Ticket not the Real Contract.

RAILROAD tickets seldom, if ever, express or purport to express the whole contract between the parties. This must be gathered, so far as not expressed, from the general law, and from such reasonable rules and regulations as the company may have adopted for running and conducting its trains. The purchaser is bound to inform himself of these, and no duty of notice to him rests upon the company.[1]

[1] Dietrich *v.* Pennsylvania R. R. Co., 71 Pa. St. 432; 10 Am. Rep. 711; 3 Am. Railway Rep. 435. But see Kansas City, Memphis, & Birmingham R. R. Co. *v.* Riley, 68 Miss. 765; 9 Southern, 443; 24 Am. State, 309; 13 L. R. A. 38.

2. The Terms, so far as they go, are binding, if read.

So far, however, as the ticket does express the terms of the contract, it measures the holder's rights of passage, if he read it or had time, ability, and opportunity to read it when he purchased it, and took it without manifesting any dissent, unless there is some legal objection to giving them effect.[1]

3. Stipulations as to Luggage.

As to his rights to the transportation of luggage, its terms have less effect, because it is not usual to insert in a ticket stipulations in respect to that, and the purchaser would not naturally expect them. They, therefore, bind him only if actually brought to his notice.[2]

4. Want of Opportunity to read Ticket.

When the ticket is bought, as is usually the case, at the station shortly before the departure of the train, it may properly be left to the jury to say whether the passenger had time, ability,[3] and opportunity to read it before he accepted it. It is ordinarily not handed to him until payment for it is made, and it would not be prudent for the ticket agent to do otherwise. If others are awaiting their turn to procure tickets, or the passenger has baggage to check, he has scant time for consideration, or for reclaiming his money on the ground that he is dissatisfied with the conditions imposed. Some courts go so far as to hold that, as matter of law, no conditions printed

[1] Walker *v.* Price, 62 Kans. 327; 62 Pacific, 1001; 84 Am. State, 392 and note; see Boston & Lowell R. R. Co. *v.* Proctor, 1 Allen, 267; 79 Am. Dec. 729. *Contra*, O'Rourke *v.* Street Railway Co., 103 Tenn. 124; 52 Southwestern, 872; 76 Am. State, 639; 46 L. R. A. 614.

[2] Malone *v.* Boston & Worcester R. R. Corporation, 12 Gray, 388; 74 Am. Dec. 598.

[3] See Ranchau *v.* Rutland R. R. Co., 71 Vt. 142; 43 Atlantic, 11; 76 Am. State, 761; The Majestic, 166 U. S. 375, 386.

upon a ticket bind him unless he had actual notice of them, and expressly or impliedly assented to them when he entered into his contract with the company.[1] This is rested partly on the considerations already stated, and partly on the one-sided position in which the company deals with the passenger. It prints its ticket as it pleases, and he must take that or nothing.

The latter reason is ample for rejecting as void any conditions which unreasonably limit the liabilities of the company as a common carrier, but has no force as respects reasonable conditions.[2] The other reasons seem to depend on matters of fact, varying in different cases. Many tickets are bought, at leisure, at offices of the company or of its agents at places other than the stations, and long before the day or hour when the trip is to commence. Whether in any particular case the purchaser had time, ability, and opportunity to read the ticket before commencing his trip, would seem, on principle, to be the decisive question as to the measure of his rights; and this it would be the proper province of a jury to determine. Conditions printed on the back of it, even if reference to them were made on its face, would naturally not be as likely to attract his attention as if they were fully stated on its face; but this seems inadequate ground for the rule intimated by some courts, that they are not binding on him without further evidence that he in fact read and assented to them. Reading the ticket at the time of obtaining it, without making any objection to its terms, implies assent.[3]

[1] Rawson *v.* Pennsylvania R. R. Co., 48 N. Y. 212; 3 Am. Railway Rep. 528; 8 Am. Rep. 543; Wilson *v.* Chesapeake & Ohio R. R. Co., 21 Gratt. 654.

[2] O'Rourke *v.* Street Railway Co., 103 Tenn. 124; 52 Southwestern, 872; 76 Am. State, 639; 46 L. R. A. 614.

[3] Rawson *v.* Pennsylvania R. R. Co., 48 N. Y. 212; 3 Am. Railway Rep. 528; 8 Am. Rep. 543.

5. Signed Tickets.

Reasonable conditions printed on a ticket which is signed by the holder bind him whether he read them or not.[1] If it provides that it shall be good if signed when presented by the party desiring transportation upon it, his omission to sign it because the conductor did not require it does not enlarge his rights. By riding upon the ticket he acknowledges it as an operative contract, so far as its provisions are valid.[2]

6. Stipulations against Liability for Negligence.

Any stipulation in a ticket issued to a passenger paying fare, debarring him from holding the company liable for negligence in executing the contract, is against public policy and void. If, however, he obtained it at a reduced rate, in consideration of his accepting it with such a stipulation, some courts hold that he loses, in case of an accident occurring in the course of his transportation, the benefit of the ordinary presumption in favor of a passenger that it was due to the company's negligence.[3]

7. Assignability of Ticket.

A railroad ticket is transferable unless it provides to the contrary.

A round-trip ticket unites two journeys in one contract, but each remains a separate journey, and there is intended to be a break between them, during which the passenger is no longer in charge of the company. The right to use it for the return journey is therefore assignable, unless it contains a stipula-

[1] Boylan *v.* Hot Springs R. R. Co., 132 U. S. 146, 150.

[2] Quimby *v.* Boston & Maine R. R. Co., 150 Mass. 365; 23 Northeastern, 205; 5 L. R. A. 846.

[3] Crary *v.* Lehigh Valley R. R. Co., 203 Pa. St. 525; 53 Atlantic, 363; 59 L. R. A. 815; 93 Am. State, 778.

tion to the contrary.[1] Such a ticket often does provide against such a transfer, and as a mode of preventing it requires the holder to identify himself to the satisfaction of the ticket agent at the point of return, who is then to stamp the ticket. In such case the agent cannot capriciously refuse to accept identification, but it is enough if he acts as a reasonable man would under the circumstances. If so acting he declares the identification unsatisfactory, the holder cannot recover for a breach of contract, although the proof offered would have been satisfactory to the jury before whom he tries his case.[2] If the point of destination be on the road of a connecting carrier, and when the traveller is about to return he can find no ticket agent at that place before whom he can appear for identification, this does not make his ticket good for the return trip. Stamping was a condition precedent; and while the fault was not his, neither was it that of the company from which he bought his ticket; and as to the other company, its conductor would be rightfully governed by the appearance of the ticket in refusing to accept it, although it might be liable in an action for breach of the implied contract to have an agent ready to stamp it.[3]

8. Reversing the Journey.

A ticket from one designated place to another cannot be used for passage from the latter to the former.[4]

9. Limit of Time for Journey.

A stipulation in a ticket that it is good only for a certain length of time is reasonable and effectual, even though it be a

[1] Carsten *v.* Northern Pacific R. R. Co., 44 Minn. 454; 47 Northwestern, 49; 20 Am. State, 589; 9 L. R. A. 688.

[2] Central of Georgia Railway Co. *v.* Cannon, 106 Ga. 828; 32 Southeastern, 874.

[3] Mosher *v.* St. Louis, Iron Mountain, & Southern Railway Co., 127; U. S. 390.

[4] Keeley *v.* Boston & Maine R. R. Co., 67 Me. 163; 24 Am. Rep. 19.

mileage ticket.[1] It, however, presupposes that the company will be ready, during that time, to provide proper transportation. If it fails to do this, the ticket is good for a reasonable time after the holder has knowledge or notice that the company is prepared to perform its contract.[2]

Unless otherwise provided, a ticket remains good until the lapse of the time provided in the statute of limitations for suing on simple contracts.

10. Rule to promote the Purchase of Tickets.

To induce passengers to procure tickets before boarding the train, railroad companies often have two rates of fare, one for those so procuring them, and another and somewhat higher for those who do not. Such a regulation is a reasonable one,[3] and can be enforced by a conductor, even against those to whom the company did not afford a reasonable opportunity to buy a ticket, unless he had personal knowledge that no such opportunity had been had in the case in hand.[4] This is demanded by public policy, to prevent annoying disputes in public conveyances, as well as to protect the company against imposition. A passenger, however, so compelled to pay the extra fare for want of a ticket which he had no reasonable opportunity to procure, could maintain an action against the company for the amount of the overcharge;[5] although he might

[1] Sherman *v.* Chicago & Northwestern R. R. Co., 40 Iowa, 45.

[2] See Auerbach *v.* New York Central & Hudson River R. R. Co., 89 N. Y. 281; 42 Am. Rep. 290.

[3] Swan *v.* Manchester & Lawrence Railroad, 132 Mass. 116; 42 Am. Rep. 432.

[4] Monnier *v.* New York Central & Hudson River R. R. Co., 175 N. Y. 281; 67 Northeastern, 569; 62 L. R. A. 357.

[5] See St. Louis, Alton, & Terre Haute R. R. Co. *v.* South, 43 Ill. 176; Jeffersonville R. R. Co. *v.* Rogers, 28 Ind. 1; 92 Am. Dec. 276; Nellis *v.* New York Central R. R. Co., 30 N. Y. 505, 516; Swan *v.* Manchester & Lawrence Railroad, 132 Mass. 116; 42 Am. Rep. 432. *Contra*, Crocker *v.* New London, Willimantic, & Palmer R. R. Co., 24 Conn. 249.

not be able to succeed in an action of tort, had he, on refusing to pay the extra fare, been expelled from the car by the conductor.

11. Prohibition against detaching Coupons.

If a part of a ticket is marked "forfeited if detached," the holder loses all benefit from it, if he does detach it, whether intentionally or negligently.[1]

12. Construction.

As the tickets are prepared by the company, if the language be ambiguous, that construction most favorable to the passenger is to be preferred.[2] Thus one marked as not to be good after a certain date, means only that the trip must be begun by that date.[3]

Tickets issued in pursuance of a special corporate duty imposed upon the company by law or public contract made for public protection are to be construed with reference to such law or contract, and the construction will be liberal in favor of the public. Thus, if a street railroad company receives a grant from a municipality of the right to lay tracks in the streets, on condition that it transports passengers between any points in the municipality for five cents, this duty will be held to continue, although the municipal limits are thereafter greatly enlarged. The municipality remains the same.[4]

[1] Hamilton *v.* New York Central R. R. Co., 51 N. Y. 100, 105; United Railways & Electric Co. *v.* Hardesty, 94 Md. 661; 51 Atlantic, 406; 57 L. R. A. 275.

[2] Cleveland, Cincinnati, Chicago, & St. Louis Railway Co. *v.* Kinsley, 27 Ind. App. 135; 60 Northeastern, 169; 87 Am. State, 245.

[3] Auerbach *v.* New York Central & Hudson River R. R. Co., 89 N. Y. 281; 42 Am. Rep. 290.

[4] Indiana, Illinois, & Iowa Railway Co. *v.* Trinosky, Ind. App. ; 69 Northeastern, 402.

13. Explaining by Parol Evidence.

As between the passenger and the company, statements of the ticket agent to him, as to what the contract evidenced by the ticket is, if not inconsistent with its expressed terms, may be admissible in evidence, and form part of the agreement;[1] and this may be so, even if such statements are not consistent with its expressed terms, provided they are made before it is purchased, and there is no reasonable opportunity to examine the ticket closely before boarding the train.[2]

14. The Conductor may stand on the Terms of the Ticket.

But as between the passenger and the conductor of the car in which he is, the terms of the ticket or check are conclusive, and the right to ride upon it on that train is, for the time being, to be determined accordingly.[3]

If a ticket, by a mistake of the official who issues it, does not conform to the contract which was in fact made, the conductor is not bound to accept it or to rectify the error, even if, upon its face, it is wholly invalid.[4]

15. Forms of Action.

In any of these cases where the ticket varies from the true contract, if the passenger is ejected, the conductor commits

[1] Callaway *v.* Mellett, 15 Ind. App. 366; 44 Northeastern, 198; 57 Am. State, 238; New York, Lake Erie, & Western R. R. Co. *v.* Winter's Adm'r, 143 U. S. 60, 70.

[2] Burnham *v.* Grand Trunk Railway Co., 63 Me. 298; 18 Am. Rep. 220.

[3] Frederick *v.* Marquette, Houghton, & Ontonagon R. R. Co., 37 Mich. 342; 26 Am. Rep. 531; Bradshaw *v.* South Boston R. R. Co., 135 Mass. 407; 46 Am. Rep. 481; Mosher *v.* St. Louis, Iron Mountain, & Southern Railway Co., 127 U. S. 390; Rolfs *v.* Atchison, Topeka, & Santa Fé Railway Co., 66 Kan. 272; 71 Pacific, 526. *Contra*, Indianapolis Street Railway Co. *v.* Wilson, 161 Ind. ; 66 Northeastern, 950, and cases therein cited.

[4] Garrison *v.* United Railways Co., 97 Md. ; 55 Atlantic, 371; Southern Railway Co. *v.* Watson, 110 Ga. 681; 36 Southeastern, 209.

no trespass, but the company is liable to an action for breach of contract. The damages for this breach will not be aggravated by the expulsion from the car. The plaintiff should have left it voluntarily. That he was in the wrong in remaining, when requested to leave, follows necessarily from the position that the conductor has a right to go by the terms of the ticket.[1] But should a conductor take up a ticket without giving a check in exchange, and then should he, forgetting or denying it, — or another conductor who replaces him on the trip, — demand payment of the fare over again, and expel the passenger for not making it, the company would be liable in an action of tort.[2]

16. Some Rules of the Company do not qualify the Passengers' Rights.

A different rule obtains where the ticket apparently entitles the passenger to his seat, and the objection taken to it is founded on some act done under a rule of the company, made for the guidance of its servants, as to the management of its internal affairs. Thus if a conductor, when asked to allow a stop-over by one who has a right to that privilege, instead of complying with a rule which required him to give the passenger a stop-over ticket, punches his regular ticket and assures him that this is enough, the passenger, if he does

[1] Keen *v.* Detroit Electric Railway, 123 Mich. 247; 81 Northwestern, 1084 (but see Hufford *v.* Grand Rapids & Indiana R. R. Co., 64 Mich. 631; 31 Northwestern, 544; 8 Am. State, 859); Pennsylvania R. R. Co. *v.* Connell, 112 Ill. 295, 304; 54 Am. Rep. 238; McKay *v.* Ohio River R. R. Co., 34 W. Va. 65; 11 Southeastern, 737; 9 L. R. A. 132; 26 Am. State, 913; Western Maryland R. R. Co. *v.* Schaun, Md. ; 55 Atlantic, 701; Bradshaw *v.* South Boston R. R. Co., 135 Mass. 407; 46 Am. Rep. 481. *Contra*, Lawshe *v* Tacoma Railway & Power Co., 29 Wash. 681; 70 Pacific, 118; 59 L. R. A. 350.

[2] Moore *v.* Fitchburg R. R. Corporation, 4 Gray, 465; 64 Am. Dec. 83; Appleby *v.* St. Paul City Railway Co., 54 Minn. 169; 55 Northwestern, 1117; 40 Am. State, 308.

not know of the rule, cannot, after making the stop-over, lawfully be put off the train which he then takes, by a different conductor to whom he tells his story; and if he is, the company is liable in tort.[1]

17. Production of Ticket, whenever called for.

A ticket is only paper evidence of the contract with the passenger; but it is the rule or practice of every railroad company that tickets must be produced as often as called for by the conductor, and this forms part of the contract itself. Such a rule or practice is reasonable.[2] If the finder of a lost ticket, which was apparently available to any holder, should claim the right of transportation upon it, it would be difficult to dispute his title; while, if presented by a *bona fide* purchaser, it would be necessary to honor it. And even if by its terms it should be good only in favor of the original purchaser, whoever might get possession of it would be in a position to embarrass if not defraud the company.

A claim that a ticket for a particular berth on a sleeping-car has been purchased and lost stands on similar ground. The conductor is not bound to give possession of the berth until the ticket is produced. If there has been such a loss, the finder may present it, and claim to have bought it and to be entitled to the berth. In such case it would be unreasonable to put upon the conductor the duty of passing upon the truth of his claim. It would be looked at, if put in the most favorable light for the true owner, as one of those occasions when one of two innocent parties (*i. e.*, the loser of the ticket and he who claims to be a *bona fide* purchaser of it) must suffer from the act of a third, and the loss should fall, for

[1] New York, Lake Erie, & Western R. R. Co. *v.* Winter's Adm'r, 143 U. S. 60, 70.

[2] Hibbard *v.* New York & Erie R. R. Co., 15 N. Y. 455, 458.

the time being, on that one of them whose act or neglect made it possible for the wrongful claim to be set up.[1]

If, on a passenger's refusing to show his ticket, the train is stopped to put him off, he cannot reclaim his right of passage by then offering to show it.[2] He may under such circumstances offer to pay the fare, and that would restore his *status* as a rightful passenger.[3]

Whenever the ticket is called for by the conductor, the passenger is entitled to a reasonable time, if it be mislaid or lost, in which to search for it; and if ejected from the train before the lapse of such time, the company is liable for breach of contract.[4]

18. Exchange of Ticket for Conductor's Check.

A regulation that tickets must be surrendered to the conductor in exchange for conductor's checks is reasonable, and after such an exchange the passenger is bound to keep the check safely, to show on demand of the conductor. If he cannot so produce it, whether it be lost or stolen, the conductor, if without personal knowledge of the facts, can require him to pay the regular fare on pain of being put off the car. This is true although the conductor put the check in the passenger's hat-band, or in any other place of apparent security, with his assent or without his dissent.[5] Nevertheless, if the check be lost or stolen without the fault of the passenger, or if it be worthless unless presented by some one to the conductor within a certain time, and is not so presented, the company would be bound to refund the money paid for it.

[1] See Pullman Palace Car Co. *v.* Reed, 75 Ill. 125; 20 Am. Rep. 232.

[2] Hibbard *v.* New York & Erie R. R. Co., 15 N. Y. 455.

[3] United Railways & Electric Co. *v.* Hardesty, 94 Md. 661; 51 Atlantic, 406; 57 L. R. A. 275.

[4] Maples *v.* New York & New Haven R. R. Co., 38 Conn. 557; 3 Am. Railway Rep. 445; 9 Am. Rep. 434.

[5] Jerome *v.* Smith, 48 Vt. 230; 21 Am. Rep. 125.

19. Duty of Passenger boarding the Wrong Train.

If one by mistake gets on an express train, intending to go to a place through which it passes without a stop, and having a ticket to that place, he must pay to the conductor, on demand, any additional sum necessary to make up the fare to the first station at which the train does stop, and if he refuses may be put off at any safe point between stations.[1]

20. Ejection of Passengers.

Whenever the violation by a passenger of a proper rule or condition of transportation occurs at a point distant from a station and is wilful, he may be put off at any safe and convenient place.[2] One ejected under these circumstances cannot then, on offering to comply with the rule, demand passage on the same train; but if his non-compliance had not been wilful he would have had that right.[3]

21. Entirety of Contract.

The passenger's contract is an entire one, and unless it be otherwise provided in the ticket, or by rule or custom, the trip cannot be broken off at any intermediate point and resumed at his pleasure.[4] The privilege of a "stop-over" is a matter of favor, unless it rests on contract, or custom implying a contract.

If a passenger asks and accepts a stop-over ticket, and leaves the train at an intermediate station, he is bound by any reasonable conditions printed on such ticket. If it pur-

[1] Atchison, Topeka, & Santa Fé R. R. Co. *v.* Gants, 38 Kans. 608; 17 Pacific, 54; 5 Am. State, 780.

[2] Illinois Central R. R. Co. *v.* Whittemore, 43 Ill. 420; 92 Am. Dec. 138.

[3] Texas & Pacific Railway Co. *v.* Bond, 62 Tex. 442; 50 Am. Rep. 532.

[4] Cheney *v.* Boston & Maine R. R. Co., 11 Met. 121; 1 Am. Railway Cases, 601; 45 Am. Dec. 190; State *v.* Overton, 4 Zabr. 435.

ports to be good only for a limited period, he can only use it during such period. Being an entire contract, it is to be executed as an entirety.[1]

22. Coupon Tickets.

If the ticket contains several coupons for passage over successive parts of a long route, upon as many different railroads, each coupon may be regarded as an entirety, unless it is otherwise provided.[2] In such case a stop-over can be made for a reasonable time at the terminal point upon each part of the route, and each coupon may be sold by the holder and will be good in favor of the vendee.[3]

The company selling a coupon ticket for transportation over several connecting roads is presumptively acting as the agent of the other roads, and in the absence of a special agreement to the contrary assumes no liability except for the transportation to the point of connection, and safe delivery to the next line,[4] and is neither severally nor jointly liable for a breach of duty to the passenger on the part of the company operating any of the connecting roads.[5]

23. Through Contracts.

A through ticket not indicating that the passage is to be over different roads is *prima facie* evidence of a single con-

[1] Churchill *v.* Chicago & Alton R. R. Co., 67 Ill. 390; 3 Am. Railway Rep. 430.

[2] Louisville & Nashville R. R. Co. *v.* Weaver, 9 Lea, 38; 42 Am. Rep. 654; Milnor *v.* New York & New Haven R. R. Co., 53 N. Y. 363; 5 Am. Railway Rep. 381.

[3] Nichols *v.* Southern Pacific Co., 23 Or. 123; 31 Pacific, 296; 18 L. R. A. 55; 37 Am. State, 664.

[4] Chicago & Alton R. R. Co. *v.* Mulford, 162 Ill. 522; 44 Northeastern, 861; 35 L. R. A. 599.

[5] Hartan *v.* Eastern R. R. Co., 114 Mass. 44. See Pennsylvania R. R. Co. *v.* Jones, 155 U. S. 333.

tract for through transportation by or on behalf of the company which issues it.[1]

It is within the power of a railroad company to contract for through transportation by means of ordinary vehicles running on the highway between its stations and neighboring points, or between stations of different railroads terminating in the same municipality and not otherwise connected there for passenger traffic.[2]

24. Joint Through Lines.

If two companies unite to form a through line without authority of law, and sell through tickets, they are jointly liable to a passenger injured. While they could not thus lawfully assume any joint obligation to him, they could do so in fact.[3]

25. Waiving Conditions of Ticket.

A conductor may waive a condition of a ticket, as respects its use on the trip during which he represents the company in that capacity. For such a purpose, on that trip, he is the company. If on all trains for a considerable time such a condition is waived by all conductors, as to all tickets containing it, a jury would be warranted in finding that the condition had been altogether waived by the company, until reasonable notice should be given of its intention to insist upon it again, and given so as to come to the attention of passengers before entering the car.[4] But evidence of some

[1] Louisville & Nashville R. R. Co. *v.* Weaver, 9 Lea, 38; 42 Am. Rep. 654.

[2] See Chapter IV., Railroad Franchises, p. 33, and Appendix VI. This doctrine was at one time doubted. Hood *v.* New York & New Haven R. R. Co., 22 Conn. 1, 16.

[3] Bissell *v.* The Michigan Southern & Northern Indiana Railroad Companies, 22 N. Y. 258; 1 Redfield's Railway Cases, 432.

[4] Thompson *v.* Truesdale, 61 Minn. 129; 63 Northwestern, 259; 52 Am. State, 579.

special instances of waiver in similar cases, falling short of a general custom to that effect, would not be admissible. The company is not bound to keep on waiving a stipulation in a ticket because it has previously waived similar conditions in similar tickets, unless it has so acted as to estop it from asserting what would otherwise be its rights.[1]

26. Ticket Scalpers.

Statutes have been passed in some of the States restricting or prohibiting sales of railroad tickets by any who are not authorized agents of the railroad company concerned. An unqualified prohibition of such sales would be an unconstitutional interference with liberty of contract and rights of property.[2] But a prohibition of such sales in fraud of the company's rights (as of tickets marked not transferable), or of the use of such tickets by the purchaser under a penalty, would not be an improper exercise of governmental power.[3]

[1] Keeley *v.* Boston & Maine R. R. Co., 67 Me. 163; 24 Am. Rep. 19; Hill *v.* Syracuse, Binghamton, & New York R. R. Co., 63 N. Y. 101.

[2] People *v.* Warden of the City Prison, 157 N. Y. 116; 51 Northeastern, 1006; 43 L. R. A. 264; 68 Am. State, 763. *Contra*, Jannin *v.* State, Tex. Crim. App. ; 51 Southwestern, 1126; 62 id. 419; 53 L. R. A. 349; Burdick *v.* People, 149 Ill. 600; 36 Northeastern, 948; 41 Am. State, 329; 24 L. R. A. 152.

[3] See Allardt *v.* People, 197 Ill. 501; 64 Northeastern, 533, and authorities cited.

CHAPTER XXXII.

CARRIAGE OF PASSENGERS.

1. Who are Passengers.

A PERSON occupies the position of a railroad passenger as respects the railroad company who, having approached the railroad for that object, undertakes, with its express or implied consent, to travel in the car provided by it for the purpose,

not being at the time travelling in its service. A servant is a passenger when not travelling in its service.[1] But if his travelling on the road to and from work is a duty imposed on him by the contract of employment, he is not a passenger.[2]

It is not necessary to make a person a passenger that he should pay his fare, if he be ready to pay it, when called for at the proper time. If he has done all that the company reasonably requires of such as desire to become passengers, it will be presumed that it has consented to his assumption of that relation.[3] But whenever it is shown that such a person has not done what is so required of him, no consent of the company will be presumed, and if there is a contract, he must show it affirmatively.[4]

Cases may occur in which the implied consent of the company to the assumption by a person of the relation of a passenger is based upon a mutual mistake. He enters a car expecting in good faith to pay the fare when demanded, but finds, when it is demanded, that he has not brought with him the necessary sum of money. The transportation of passengers on all railroads is conducted on a cash basis. No credit is expected or given. It follows that one who enters a car knowing that he is without the necessary funds is wrongfully there, and cannot claim that the company has impliedly accepted him as a passenger. But it does impliedly accept one who enters supposing in good faith that he had the necessary funds, and he has the rights of a passenger until he

[1] Dickinson *v.* West End Street Railway Co., 177 Mass. 365; 59 Northeastern, 60; 83 Am. State, 284; 52 L. R. A. 326; McNulty *v.* Pennsylvania R. R. Co., 182 Pa. St. 479; 38 Atlantic, 524; 38 L. R. A. 376; 61 Am. State, 721.

[2] Vick *v.* New York Central & Hudson River R. R. Co., 95 N. Y. 267; 47 Am. Rep. 36.

[3] Citizens' Street Railway Co. *v.* Jolly, Ind. ; 67 Northeastern, 935.

[4] Union Pacific Railway Co. *v.* Nichols, 8 Kans. 505; 3 Am. Railway Rep. 419; 12 Am. Rep. 475.

fails to pay on demand, or else to leave the car at the first reasonable opportunity after being requested to do so by the conductor.

The same thing is true of one who enters a car supposing in good faith that he could pay the fare when demanded, and expecting to do so, but who finds that he has with him nothing less than a bill or coin representing so large a sum that the conductor, should he take it, cannot give him, and cannot reasonably be expected to be able to give him, the proper change.[1] If the conductor, under such circumstances, refuses to take it, on terms of giving change, the person tendering it on those terms remains a passenger until he is given a reasonable opportunity to leave the car, and fails to leave it, on request.

The purchase of a ticket does not create the relation of passenger. That does not begin, whether a ticket has been purchased or not, until an entry on the premises of the railroad company or the act of boarding a car.[2] To become a passenger, one must have placed himself under the care of the company in such a way as to warrant its understanding him to be under its care in that capacity.[3] Boarding a moving train between stations, uninvited and unseen, is not enough.[4] Nor is the act of signalling those in charge of a street car to stop, and their assent manifested by slowing up.[5] But if there is a change of cars made during a trip on a street rail-

[1] See Chapter XXVI., Rules and Regulations; Barrett *v.* Market Street Railway Co., 81 Calif. 296; 22 Pacific, 859; 6 L. R. A. 336; 15 Am. State, 61.

[2] Gordon *v.* West End Street Railway Co., 175 Mass. 181; 55 Northeastern, 990; North Chicago Street R. R. Co. *v.* Williams, 140 Ill. 275; 29 Northeastern, 672.

[3] Chicago & Eastern Illinois R. R. Co. *v.* Jennings, 190 Ill. 478; 60 Northeastern, 818; 54 L. R. A. 827.

[4] Illinois Central R. R. Co. *v.* O'Keefe, 168 Ill. 115; 48 Northeastern, 294; 61 Am. State, 68; 39 L. R. A. 148.

[5] Donovan *v.* Hartford Street Railway Co., 65 Conn. 201; 32 Atlantic, 350; 29 L. R. A. 297.

way, one passing with a transfer ticket from one car to another, though they may be a block apart, remains a passenger.[1]

Entering on the premises of the company without a ticket may not be enough. The person so entering must be on them so near the station or the place of departure for trains, as to make it reasonable for the railroad company, under the circumstances, to look upon him as under its charge, and for him to place himself under its charge.[2] Among these circumstances proximity of time to the hour for the train to leave is one that may be of importance. The company is only bound to regard those as passengers under its charge who have offered, or are about to offer, themselves as passengers on a trip soon to be made.[3]

If entrance to a street car on one side is barred by a railing, this is notice that passengers will not be received on that side; and one clinging to such a railing, unknown to those in charge of the car, cannot be regarded as a passenger, although he may expect to pay the regular fare.[4]

One who in good faith enters a train or car in which he has no right to a seat, mistaking it for one in which he has such a right, is a passenger, unless, when informed of his error and possessed of an opportunity to withdraw, he unreasonably neglects to do so.[5]

One riding on a car on the invitation of the servants of the company, without paying fare or expecting to pay it, is a passenger, if he believed in good faith that such invitation was

[1] Keator *v.* Scranton Traction Co., 191 Pa. St. 102; 43 Atlantic, 86; 44 L. R. A. 546; 71 Am. State, 758.

[2] June *v.* Boston & Albany R. R. Co., 153 Mass. 79; 26 Northeastern, 238.

[3] Webster *v.* Fitchburg R. R. Co., 161 Mass. 298; 37 Northeastern, 165; 24 L. R. A. 521.

[4] Udell *v.* Citizens' Street Railroad Co., 152 Ind. 507; 52 Northeastern, 799; 71 Am. State, 336.

[5] Lake Shore & Michigan Southern Railway Co. *v.* Rosenzweig, 113 Pa. St. 519; 6 Atlantic, 545.

within their authority; otherwise not.[1] One wrongfully riding by their connivance, both he and they knowing that he intends to pay no fare, is not a passenger, and, if injured by the company's negligence, in the operation of the train, it is not responsible to him.[2]

2. Rights of those Accompanying Passengers.

A railroad company owes some duties to those whom it may allow to accompany passengers into its stations or on board the train, for the purpose of assisting their embarkation or for a friendly leave taking. They enter the car, in such case, on an implied invitation from the company, and if it has notice of their entrance for such a purpose it must use ordinary care to avoid injury to them, and to give them a reasonable opportunity to leave it before it is put in motion.[3] The exercise of such care may require the company not to start the train until they have had reasonable time to get off after the customary signal for departure has been given.[4]

3. Refusal to accept a Person as a Passenger.

A railroad company is not bound to accept every person as a passenger who offers to become such. Even if he has a ticket, one who is drunk or disorderly need not be received. No one need be who is not in a condition to take ordinary care of himself when on board the train, unless he be accom-

[1] Louisville & Nashville R. R. Co. *v.* Scott's Adm'r, 22 Ky. Law, 30; 56 Southwestern, 674; 50 L. R. A. 381.

[2] Toledo, Wabash, & Western Railway Co. *v.* Brooks, 81 Ill. 245.

[3] Railway Co. *v.* Lawton, 55 Ark. 428; 18 Southwestern, 543; 29 Am. State, 48; 15 L. R. A. 434; Johnson *v.* Southern Railway, 53 S. C. 203; 31 Southeastern, 212; 69 Am. State, 849; Houston & Texas R. R. Co. *v.* Phillio, Tex. ; 69 Southwestern, 994.

[4] Doss *v.* Missouri, Kansas, & Texas R. R. Co., 59 Mo. 27; 21 Am. Rep. 371; 8 Am. Railway Rep. 462. *Cf.* Lucas *v.* New Bedford & Taunton R. R. Co., 6 Gray, 64; 66 Am. Dec. 406.

panied by those who can take care of him. But if a small child or a dying man be received unattended, the company is bound to give him such care as he may need under the circumstances for his personal safety.[1] Professional gamblers who seek passage to ply their art on the train at the expense of the other passengers need not be received.[2] Persons whose person or dress is filthy may be excluded.[3]

A regulation adopted by a railroad company forbidding the reception of passengers bringing live animals with them into the car is a reasonable one, and a person offering to enter with such an animal can be excluded.[4]

4. Rights of Passengers at Common Law.

To every passenger equally, whether a ticket has been purchased or not, the company owes the same degree of care. His right to be carried safely does not depend on his having made a contract, but on the existence of the relation of carrier and passenger. That relation being established, the law fixes the duty. It is often better for him, in case of injury, to sue on this underlying common-law liability than on any express contract. Questions that might otherwise arise, such as of variance or illegality, are thus avoided.[5]

[1] Croom *v.* Chicago, Milwaukee, & St. Paul Railway Co., 52 Minn. 296; 53 Northwestern, 1128; 38 Am. State, 557; 18 L. R. A. 602. *Contra*, New Orleans, Jackson, & Great Northern R. R. Co. *v.* Statham, 42 Miss. 607; 97 Am. Dec. 478 and note; Weightman *v.* Louisville, New Orleans, & Texas Railway Co., 70 Miss. 563; 12 Southern, 586; 35 Am. State, 660; 19 L. R. A. 671; Parker *v.* Washington Electric Street Railway Co., Pa. St. ; 56 Atlantic, 1001.

[2] Thurston *v.* Union Pacific R. R. Co., 4 Dill. 321.

[3] Walsh *v.* Chicago, Milwaukee, & St. Paul Railway Co., 42 Wis. 23; 24 Am. Rep. 376.

[4] Daniel *v.* North Jersey Street Railway Co., 64 N. J. Law, 603; 46 Atlantic, 625.

[5] Delaware, Lackawanna, & Western R. R. Co. *v.* Trautwein, 52 N. J. Law, 169; 19 Atlantic, 178; 7 L. R. A. 435; 19 Am. State, 442.

5. Right to a Safe Place for Boarding or Leaving Cars: Station Houses.

A passenger has a right to expect that the place where he is to board or leave a train or car will be reasonably safe. If it is a regular station, a high degree of care must be bestowed in making and keeping it safe. If it is a point on a highway where a street car is to be taken or left, less care is required, for the company does not own and have exclusive occupancy of the soil, and is not, therefore, in a situation to exercise the same control over its condition. In either case the passenger must himself exercise reasonable care. If the track on which the car which he is about to enter or leave may be standing is so near another track as to render it dangerous to stand between them when another car is moving on the second track, it is his duty to be on his guard when stepping into a position of such possible danger.[1]

If a street railroad company constructs a platform by the side of the highway for the convenience of passengers, it is not chargeable with negligence merely because the running boards on its cars overlap the platform so that they may strike persons standing upon it, provided there is room for them to stand back as a car approaches.[2]

Waiting rooms in station houses must be warmed in cold weather, so far as may be reasonably necessary for the comfort and health of their occupants.[3]

[1] Davenport *v.* Brooklyn City R. R. Co., 100 N. Y. 632; 3 Northeastern, 305.

[2] State *v.* United Railways & Electric Company, Md. ; 56 Atlantic, 789.

[3] St. Louis, Iron Mountain, & Southern Railway Co. *v.* Wilson, 70 Ark. 136; 66 Southwestern, 661; 91 Am. State, 74.

6. Right to Seats.

The purchase of a ticket or payment of fare under ordinary circumstances gives a right both to transportation and a seat. A railroad company, therefore, is under no liability for refusing to receive any more passengers in a particular train or car when all the seats are full, unless there has been a special contract to transport the party claiming admission upon it.[1]

If one boards a train or car, seeing that all the seats are occupied, he cannot complain that none is furnished to him. If the car is not one running on a street railway he must in such case, under ordinary circumstances, stand inside.[2] If he has paid the ordinary fare, and there are parlor cars on the train, for riding in which an extra fare is charged, he has no right to enter one of them without making such extra payment.

A passenger on a through railroad who enters a train without knowing that it is already full, is not bound to surrender his ticket unless he is furnished with a seat; but if he insists on this right, he must get off the train at the first reasonable opportunity. This will generally be at the next station,[3] and he cannot be put off before reaching it, at any point that is either unsafe or highly inconvenient to him.[4]

7. Rules as to Seating and Separating Passengers.

Railroad companies can make reasonable rules as to the seating of passengers. They are reasonable if they promote the general comfort and convenience of the public, although they

[1] Gordon *v.* Manchester & Lawrence Railroad, 52 N. H. 596; 13 Am. Rep. 97.

[2] Willis *v.* Long Island R. R. Co., 34 N. Y. 670.

[3] Memphis & Charleston R. R. Co. *v.* Benson, 85 Tenn. 627; 4 Southwestern, 5; 4 Am. State, 776.

[4] Hardenbergh *v.* St. Paul, Minneapolis, & Manitoba Railway Co., 39 Minn. 3; 38 Northwestern, 625; 12 Am. State, 610.

may be inconvenient to particular persons or classes of persons.[1] A special car may be reserved for ladies, or for ladies and gentlemen accompanying them, from which others may be excluded. Colored women must be allowed to enter such car on the same terms as white women, unless separate cars are provided for colored people.[2] A rule that colored people must ride on separate cars or in certain seats in a car is not unreasonable, as matter of law, providing such cars or seats are as good as those furnished to others. It may tend to prevent personal collisions and preserve peace and order.[3] Some of the States have statutes to this effect, and such statutes, so far as they regulate transportation in the State, do not conflict with the Constitution of the United States,[4] and apply to companies doing also an inter-State business.[5]

A rule excluding women of bad repute from certain cars would be void. The conductor could not be thus constituted a court to decide on questions of reputation.[6]

On a train provided with separate cars for men and women, or for white persons and for colored persons, agreeably to the rules of the company, a person who can find no seat in the car provided for the class to which he belongs has a right to a seat in one of the other cars, if there are vacant seats in it.[7] He cannot, however, enforce this right by the use of violence.

[1] Day *v.* Owen, 5 Mich. 520; 72 Am. Dec. 62.

[2] Peck *v.* New York Central & Hudson River R. R. Co., 70 N. Y. 587; Chicago & Northwestern Railway Co. *v.* Williams, 55 Ill. 185; 1 Am. Railway Rep. 531; 8 Am. Rep. 641.

[3] West Chester & Philadelphia R. R. Co. *v.* Miles, 55 Pa. St. 209; 93 Am. Dec. 744; Bowie *v.* Birmingham Railway & Electric Co., 125 Ala. 397; 27 Southern, 1016; 82 Am. State, 247; 50 L. R. A. 632.

[4] Plessy *v.* Ferguson, 163 U. S. 537.

[5] Chesapeake & Ohio Railway Co. *v.* Kentucky, 179 U. S. 388.

[6] Brown *v.* Memphis & Charleston R. R. Co., 5 Federal, 499.

[7] Bass *v.* Chicago & Northwestern Railway Co., 36 Wis. 450; 17 Am. Rep. 495. Whether he can, under similar circumstances, if he entered the train not knowing that the ordinary coaches were all full, take a seat in a drawing-room car, *quære*. Thorpe *v.* New York Central & Hudson River R. R. Co., 76 N. Y. 402; 32 Am. Rep. 325. See *ante*, p. 307.

If "limited" trains are run, for transportation on which an extra fare is charged, one holding an ordinary ticket has no right to passage on one, although nothing to that effect is stated in his ticket. He is, to this extent, bound to know the rules of the company. Should he board such a train, however, in good faith, not knowing of the rule in fact, he enters it in the position of a passenger.[1] He can be put off if he does not pay the extra fare, but he must be put off at or near a station.[2]

A passenger who leaves a car where he has a right to ride, and goes into one not designed for ordinary passengers, into which he has no right and is not invited to go (*e. g.* a baggage car, mail car, or express car), cannot recover for an injury to which he would not have been exposed had he remained in his proper car.[3]

8. Riding on the Platform, Steps, or Running Board.

Riding either on the platform of a car on a through railroad not incorporated into a vestibuled train, or on the steps, when there are seats inside, if it contributes to an injury received by a passenger, is contributory negligence as matter of law.[4] Even if the board of directors should know of and by acquiescence sanction a general practice of so riding instead of taking a seat inside, it would only amount to a license to do so at the risk of the passenger.[5] Riding on the platform or steps of a street car, as it is attended with less risk, is gov-

[1] Thorpe *v.* New York Central & Hudson River R. R. Co., 76 N. Y. 402; 32 Am. Rep. 325.

[2] Lake Shore & Michigan Southern Railway Co. *v.* Rosenzweig, 113 Pa. St. 519; 6 Atlantic, 545.

[3] Florida Southern Railway Co. *v.* Hirst, 30 Fla. 1; 11 Southern, 506; 32 Am. State, 17; 16 L. R. A. 631.

[4] Kentucky Central R. R. Co. *v.* Thomas' Adm'r, 79 Ky. 160; 42 Am. Rep. 208; Hickey *v.* Boston & Lowell R. R. Co., 14 Allen, 429.

[5] Hickey *v.* Boston & Lowell R. R. Co., 14 Allen, 429, 431, 433.

erned by different rules. An inter-urban electric railroad, as to any such matters, is to be considered a street railroad with respect to the operation of its cars within any thickly settled municipality, and a through railroad with respect to their operation in the open country, whether upon a highway or not.[1]

Improvements in modern railroading have made car platforms a less dangerous place to stand on than they formerly were. If a passenger can find no seat inside, he is not, under all circumstances, necessarily negligent in taking a stand on the platform, or, in case of a street car, on the steps or running board, though he be injured while and in part because of occupying that position,[2] nor is the company necessarily negligent in permitting it.[3]

If there be no rule posted up or brought to his notice forbidding it, it is not *prima facie* negligence to ride upon the platform: to ride upon the steps or running board is.[4]

The presumption may be overcome by proof that he was invited or forced to ride there. The passenger might be regarded by the jury as there by invitation if the conductor observed his position and did not request him to go inside.[5]

If a rule is posted up or brought to the passenger's notice forbidding him to ride on the platform, he violates it at his own risk, unless there is evidence of a waiver on the part

[1] Cincinnati, Lawrenceburg, & Aurora Electric Street R. R. Co. *v.* Lohe, 68 Ohio St. 101; 67 Northeastern 161.

[2] Moody *v.* Springfield Street Railway Co., 182 Mass. 158; 65 Northeastern, 29.

[3] North Chicago Street Railroad Co. *v.* Polkey, 203 Ill. 225; 67 Northeastern, 793; Anderson *v.* City Railway Co., 42 Oreg. 505; 71 Pacific, 659.

[4] Moody *v.* Springfield Street Railway Co. 182 Mass. 158; 65 Northeastern, 29.

[5] Clark *v.* Eighth Avenue R. R. Co., 36 N. Y. 135; 93 Am. Dec. 495. See Chapter LIII., Rules of Evidence: Presumptions and Assumptions, p.

of the company.[1] That there was no room for him inside is no excuse. He was not obliged to get on if the car was already crowded.

It would, however, be a question for the jury if such a rule were not waived by the company, if it knowingly took him on board when all the seats were full.[2] A conductor represents the company as to the enforcement of its rules respecting the carriage of passengers. He therefore represents them as to their non-enforcement or waiver in any particular case. A conductor, in the exercise of a fair discretion, may waive a rule of the company as respects any particular passenger.[3]

The passenger, whether on a street car or a through steam railroad non-vestibuled train, who stands on the platform or the steps or running board, when there are seats inside, assumes the additional risks incident to such a position.[4] When there are no seats inside and the company allows him to occupy the platform, steps, or running board, he must exercise such care as ordinary prudence demands to avoid injury, in view of the extra risk which he necessarily incurs; nor can he, if in fact injured, claim that the company was negligent in so carrying him as a passenger, unless after he boarded the car and took such position something occurred which rendered his occupying the position more perilous. If, for instance, while he is on the front platform of an electric car, others crowd in upon it whose pressure pushes him off or forces him into a position

[1] Burns *v.* Boston Elevated Railway Co., 183 Mass. 96; 66 Northeastern, 418.

[2] Graham *v.* McNeill, 20 Wash. 466; 55 Pacific, 631; 72 Am. State, 121; 43 L. R. A. 300.

[3] O'Donnell *v.* Allegheny Valley R. R. Co., 59 Pa. St. 239; 98 Am. Dec. 336. See Chapter XXXI., Passenger Tickets, p. 298.

[4] Whalen *v.* Consolidated Traction Co., 61 N. J. Law, 606; 40 Atlantic, 645; 68 Am. State, 723; 41 L. R. A. 836; Sharkey *v.* Lake Roland Elevated Railway Co., 84 Md. 163; 34 Atlantic, 1130. But see Thane *v.* Scranton Traction Co., 191 Pa. St. 249; 43 Atlantic, 136; 71 Am. State, 767, which (contrary to the weight of authority) holds it to constitute contributory negligence *per se*.

of greater danger, it may be negligence on the part of the company to have permitted such overcrowding.[1] For a street railroad company to allow a car to be overcrowded is not necessarily and of itself negligence; but it imposes on it the duty of exercising a care proportioned to the risk to the safety of passengers naturally caused by such overcrowding.[2]

9. Negligence in Mode of Starting Car.

The starting of a street car, or starting it at a high rate of speed, after taking on a passenger and when he is about to take a seat, may be an act of negligence. Whether it is or not will depend partly on the speed at which it is started. To a small child, an old person, or one having some noticeable infirmity, more care in this respect would be due than to others, and if the car were about to pass a curve in the track, this would be a circumstance which might impose a greater obligation of caution.[3]

10. Walking from Car to Car.

In the early days of railroads, it was thought negligence on the part of a passenger to walk from car to car on a rapidly moving train. When the train is a vestibuled one, and the connections are properly made, there is slight, if any, risk of accident, and in the case of an ordinary train it can only be properly treated as a question of fact, whether it was reasonably safe under the circumstances of the case. An invitation

[1] Cattano *v.* Metropolitan Street Railway Co., 173 N. Y. 565; 66 Northeastern, 563.

[2] McCaw *v.* Union Traction Co., 205 Pa. St. 271; 54 Atlantic, 893; Lehr *v.* Steinway & Hunter's Point R. R. Co., 118 N. Y. 556; 23 Northeastern, 889; Jacobs *v.* West End Street Railway Co., 178 Mass. 116; 59 Northeastern, 639.

[3] Herbich *v.* North Jersey Street Railway Co., 67 N. J. Law, 574; 52 Atlantic, 357; Ayers *v.* Rochester Railway Co., 156 N. Y. 104; 50 Northeastern, 960; Citizens' Street Railway Co. *v.* Jolly, Ind. ; 67 Northeastern, 935.

from a brakeman to make the attempt would be admissible and important to show whether it was negligent to do so.[1]

11. Starting to Leave a Moving Car.

A passenger, when the train or car is apparently about to stop at the point of his destination, is not necessarily chargeable with negligence for leaving his seat and proceeding to the door, or even to the platform or steps, in order to expedite his disembarkation.[2]

12. Boarding or Leaving a Moving Car.

To board or get off a moving passenger car is not, in all cases, negligence as matter of law. The question always is whether one so doing has used ordinary and reasonable care under the circumstances of the case. The speed at which the car is moving, the nature of the place from which the attempt is made to step on or upon which the attempt is made to step off, the length of the step required, and the age, strength, and agility of the passenger, are the main things to be taken into account. Whether the car is being moved by steam or electric power, or by cable, horses, or mules, is of secondary importance. It may be reasonably safe for a man of ordinary strength and agility to step off from a train on a through railroad which is just beginning to move from a station platform, and clearly unsafe for him to jump from a horse car running at a rate of six miles an hour upon a rough and stony road. Negligence is *prima facie* imputed, as matter of law, whenever the speed of the car was so great that in the opinion of the court no reasonable man could possibly think that ordinary care was exercised in attempting to enter or leave it. The attempt in such case is at

[1] Macon & Western R. R. Co. *v.* Johnson, 38 Ga. 409 ; McIntyre *v.* New York Central R. R. Co., 37 N. Y. 287.

[2] Nichols *v.* Sixth Avenue R. R. Co., 38 N. Y. 131; 97 Am. Dec. 780.

least *prima facie* evidence of a want of due care, and unless something can be shown to justify it, there is no question for the jury, for should they find in such a case for the plaintiff, their verdict would be set aside as against the evidence.[1]

Special cause for excitement and alarm, in case of a passenger seeking to alight, or an invitation by the train hands to alight or get on, may constitute a sufficient justification.

If the train slows up at a station, and the brakeman announces its name, and that the train will not stop, but that passengers are requested to get off at once, a compliance with the request may or may not be negligence according to the circumstances and the rate of speed which is being maintained.[2]

13. Riding on Freight Cars.

If a railroad company customarily receives passengers on its freight cars, it receives them as a common carrier. But the conductor of a freight train, in the absence of such a custom, has no right to receive them, and if he does, the company does not become a common carrier of them.[3] One riding as a passenger, by permission of the company, on a freight car, always, however, takes such risks as are naturally and usually incident to that mode of travel.[4] He must expect the train to

[1] Gavett *v.* Manchester & Lawrence R. R. Co., 16 Gray, 501, 507; 77 Am. Dec. 422; Corlin *v.* West End Street Railway Co., 154 Mass. 197; 27 Northeastern, 1000; Cicero & Proviso Street Railway Co. *v.* Meixner, 160 Ill. 320; 43 Northeastern, 823; 31 L. R. A. 331; Central Passenger Railway Co. *v.* Rose, 15 Ky. Law Rep. 209; 22 Southwestern, 745; United Railways & Electric Co. *v.* Woodbridge, 97 Md. ; 55 Atlantic, 444. *Cf.* Hunterson *v.* Union Traction Co., 205 Pa. St. 568; 55 Atlantic, 543. See Chapter L., Rules of Evidence, Presumptions, and Assumptions.

[2] Filer *v.* New York Central R. R. Co., 49 N. Y. 47; 3 Am. Railway Rep. 466; 10 Am. Rep. 327.

[3] Murch *v.* Concord R. R. Corporation, 29 N. H. 9; 61 Am. Dec. 631; Lucas *v.* Milwaukee & St. Paul Railway Co., 33 Wis. 41; 14 Am. Rep. 735. *Contra*, Hanson *v.* Mansfield Railway & Transportation Co., 38 La. Ann. 111; 58 Am. Rep. 162.

[4] Ohio Valley Railway Co. *v.* Watson's Adm'r, 93 Ky. 654; 21 Southwestern, 244; 40 Am. State, 211; 19 L. R. A. 310.

be run as freight trains usually are, with the primary object of the reception, transportation, and delivery of goods.[1]

14. Failure to adhere to Time-table.

Time-tables which have been published for general information enter into the contract for transportation and become a part of it. Changes of the hours for starting trains, therefore, to the prejudice of one who has bought a ticket in reliance on such publications, give him a right of action for any resulting damage, provided the change was not seasonably published in like manner, or otherwise brought to his knowledge.[2] To avoid such liabilities it has become customary, and is sufficient, to insert in such publications a notice that the time-table is subject to change without notice.

15. Taking on Passengers, as a Private Carrier.

A railroad company is a common carrier, but it is not necessarily such as respects all its passengers. It may accept passengers, under special circumstances, as a private carrier. This is so as to all persons whom it is not at common law bound to receive as common carriers, and with whom it contracts on the footing of a private carrier.

Such contracts are common with owners of cars of a peculiar kind, who desire transportation for them and their contents. Persons on board such a car are not necessarily received as common carriers. If it is one designed especially for the prosecution of a particular business, the company, as to persons put on board of it in the ordinary course of that business, in order to accomplish its objects, may, by contract, be put in the position of a private carrier, and so may, under such a contract, come under less obligations to them than if it ac-

[1] Chicago & Alton R. R. Co. *v.* Arnol, 144 Ill. 261; 33 Northeastern, 204; 19 L. R. A. 313.

[2] Sears *v.* Eastern R. R. Co., 14 Allen, 433; 92 Am. Dec. 780.

cepted them as passengers in the capacity of a common carrier. Among persons occupying such a relation may be mentioned the porter of a Pullman car,[1] an express messenger,[2] and servants of a circus proprietor in a circus car.[3]

A superintendent or trainmaster may, under some circumstances, have implied authority to order the transportation of persons not employees of the company on a hand car. In such case the company is not, as to them, a common carrier, but owes them reasonable care.[4]

16. Free Passes.

With one to whom transportation is given, as a favor, without charge, a company may also so contract as not to be subject to the obligation of a common carrier. He is free to accept or reject the favor. If he takes it, he must take it as it is offered.[5] In the absence of any such special contract, however, one riding on a free pass is a passenger to all intents and purposes, and can hold the company as a common carrier.[6] An employee who receives a free pass as part of his compensation has the rights of any passenger, and a condition in the pass that he assumes all risk of accident would be void.[7]

[1] Russell *v.* Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Co., 157 Ind. 305; 61 Northeastern, 678; 87 Am. State, 214; 55 L. R. A. 253.

[2] Baltimore & Ohio Southwestern Railway Co. *v.* Voigt, 176 U. S. 498.

[3] Coup *v.* Wabash, St. Louis, & Pacific Railway Co., 56 Mich. 111; 22 Northwestern, 215; 56 Am. Rep. 374; Robertson *v.* Old Colony R. R. Co., 156 Mass. 525; 31 Northeastern, 650; 32 Am. State, 482. See Appendix, VI. 2, 6.

[4] International & Great Northern Railway Co. *v.* Prince, 77 Tex. 560; 14 Southwestern, 171; 19 Am. State, 795.

[5] Griswold *v.* New York & New England R. R. Co., 53 Conn. 371; 4 Atlantic, 261; 55 Am. Rep. 115; Payne *v.* Terre Haute & Indianapolis Railway Co., 157 Ind. 616; 62 Northeastern, 472; 56 L. R. A. 472. *Contra*, Mobile & Ohio R. R. Co. *v.* Hopkins, 41 Ala. N. S. 486.

[6] Philadelphia & Reading R. R. Co. *v.* Derby, 14 How. 468.

[7] Doyle *v.* Fitchburg R. R. Co., 166 Mass. 492; 44 Northeastern, 611; 55 Am. State, 417; 33 L. R. A. 844.

That a free pass was given in violation of the Inter-State Commerce Act makes no difference as to the risks assumed by the holder.[1]

17. Duty of Company as to providing Proper Roadbed and Appliances.

As the degree of care to be exercised in conducting any business depends upon the hazards and dangers which are incident to it and the consequences likely to result from any negligence, and as railroad business is always a hazardous one, the courts hold that the common law requires every railroad company to do for passengers whom it receives as a common carrier, in providing safe cars, running machinery, apparatus, tracks, and roadway, all that human care, vigilance, and forethought can reasonably do, consistently with the mode of conveyance and the practical operation of the road.[2] It is not required, for the sake of making travel absolutely free from peril, to incur a degree of expense which would render the operation of the road impracticable.[3] Every road need not be constructed with a double track. All railroads need not, and only the more important ones could with advantage, manufacture their own rolling-stock, and so have the opportunity to test its character in the course of manufacture.

It is not enough to buy rolling-stock or machinery from a reputable manufacturer. The company purchasing must inspect them itself to ascertain their safety. It does not,

[1] Duncan *v.* Maine Central R. R. Co., 113 Federal, 508.

[2] North Chicago Street Railroad Co. *v.* Polkey, 203 Ill. 225; 67 Northeastern, 793. In New York a distinction has been suggested in the case of a horse railroad; but the governing principle must be the same for all kinds of railroads. Unger *v.* Forty-second Street & Grand Street Ferry R. R. Co., 51 N. Y. 497.

[3] Arkansas Midland Railway *v.* Canman, 52 Ark. 517; 13 Southwestern, 280; Pittsburg, Cincinnati, & St. Louis Railway Co. *v.* Thompson, 56 Ill. 138; 3 Am. Railway Rep. 454.

however, warrant that its cars are roadworthy,[1] and has a right to rely on the standing and reputation of the manufacturer to some extent as a justification for not applying all possible tests.[2]

Cars must not only be equipped with whatever is reasonably necessary, but all that goes to constitute that equipment must be put in a proper place. Thus a fuse on a car propelled by electricity, to protect the electric apparatus from injury through a current of excessive force, is a proper part of the equipment; but it would be negligent to set the fuse box under a seat where, if the fuse were burned out, it would endanger the safety of passengers.[3]

It has been often said that the utmost care or the highest degree of care is required in providing a safe roadbed and safe appliances; but by this is not meant all the care and diligence that the human mind can conceive of, nor such as would drive the carrier from his business. The duty of the company, stated with precision, is to use extraordinary care, rather than the highest possible care.[4] It is not necessarily discharged by equipping its road with such cars and appliances as are in known general use. It should provide such as have been proved by experience to be the most efficacious in known use on railroads of a similar character, but is not bound to

[1] Alden *v.* New York Central R. R. Co., 26 N. Y. 102; 82 Am. Dec. 401; 2 Redfield's Am. Railway Cases, 418, as explained in McPadden *v.* New York Central R. R. Co., 44 N. Y. 478; 4 Am. Rep. 705; Palmer *v.* Delaware & Hudson Canal Co., 120 N. Y. 170; 24 Northeastern, 302; 17 Am. State, 629.

[2] Grand Rapids & Indiana R. R. Co. *v.* Huntley, 38 Mich. 537; 31 Am. Rep. 321; Readhead *v.* Midland Railway Co., L. R. 4 Q. B. 379, 392, disapproving Alden *v.* New York Central R. R. Co., 26 N. Y. 102; 82 Am. Dec. 401.

[3] Cassady *v.* Old Colony Street Railway Co., 184 Mass. 156; 68 Northeastern, 10.

[4] Indianapolis & St. Louis R. R. Co. *v.* Horst, 93 U. S. 291, 296, 297; Georgia Code, § 2067; Alabama Great Southern R. R. Co. *v.* Coggins, 88 Fed. Rep. 455; 32 C. C. A. 1; 60 U. S. App. 140.

procure and use every possible preventive against risk of accident which the highest scientific skill might suggest.[1]

18. Appliances not directly connected with the Use of Cars.

Nor is this extraordinary care exacted in respect to the provision of machinery, appliances, and apparatus not directly connected with the use of cars. The ground or platform from which passengers pass into or from the cars is so connected,[2] but the remoter means of access to and from the highway are not. As the danger decreases, the vigilance required to guard against it may be reasonably decreased.[3]

19. Vindictive Damages.

If a want of due care in any of these respects is so plain as to amount to wanton or reckless indifference to the safety of passengers, vindictive damages may be given in case of a resulting accident.[4]

20. Negligence of Independent Contractor.

As respects injuries to passengers, the company is not excused by the fact that they were due to obstructions on the track due to the carelessness of an independent contractor.[5]

[1] Palmer *v.* Warren Street Railway Co., Pa. St. ; 56 Atlantic, 49.

[2] Keefe *v.* Boston & Albany R. R. Co., 142 Mass. 251; 7 Northeastern, 874; Chicago Terminal Transfer R. R. Co. *v.* Schmelling, 197 Ill. 619; 64 Northeastern, 714. *Contra*, Lafflin *v.* Buffalo & Southwestern R. R. Co., 106 N. Y. 136; 12 Northeastern, 599; 60 Am. Rep. 433. See Chapter XXX., Passenger Stations, p. 278.

[3] Kelly *v.* Manhattan Railway Co., 112 N. Y. 443; 20 Northeastern, 383; 3 L. R. A. 74.

[4] Alabama Great Southern R. R. Co. *v.* Hill, 90 Ala. 71; 8 Southern, 90; 24 Am. State, 764; 9 L. R. A. 442.

[5] Carrico *v.* West Virginia Central & Pittsburgh Railway Co., 39 W. Va. 86; 19 Southeastern, 571; 24 L. R. A. 50.

So if it runs cars upon a side track, to be loaded or unloaded by a customer to whose care it commits them, it is liable to a passenger injured by his negligence in putting them so near the main track as to come into collision with a passing train.[1]

21. Duty of Company as to Working the Railroad.

In the operation of the road, a railroad company stands in a somewhat different position from that which it occupies with relation to its construction and equipment. As to these, the board of directors and its chief executive officers can act more directly and with more certainty. The ordinary operation of the road must be largely confided to servants. In their selection a high degree of care, as respects the rights of passengers, must be taken to employ none who are not careful, and with competent knowledge and skill for the duties of the particular employment. But this is not enough. They must in fact, so far as the rights of passengers against the company are concerned, act under all circumstances with such care and skill as would be reasonably expected, under those circumstances, from prudent persons employed in that business. The utmost possible care and skill is not demanded of the ordinary train hand, even in favor of a passenger.

22. Assaults by Train Hands.

The company is under an absolute duty to protect a passenger against unlawful assaults by train hands.[2] This does not flow from the rules ordinarily governing the relations of master and servant, but from its duty as a common carrier. A loss must be suffered by one of two innocent parties, the

[1] Georgia Pacific Railway Co. *v.* Underwood, 90 Ala. 49; 8 Southern, 116; 24 Am. State, 756.

[2] Stewart *v.* Brooklyn & Cross Town R. R. Co., 90 N. Y. 588; 43 Am. Rep. 185.

company or the passenger, and it was the act of the company in selecting the servant that made the loss possible.[1]

23. Justifiable Assaults.

While a railroad company as a common carrier of passengers undertakes absolutely to protect them against the misconduct or negligence of its servants employed in executing the contract of transportation, and acting within the general scope of their employment,[2] it is not responsible for assaults from such servants which the latter had a legal defence for committing; as where they acted in a reasonable, though mistaken, belief that such assaults were necessary in self defence. The master is never liable for his servant's acts of violence to one to whom the servant is not liable for them.[3]

24. Assaults and Robberies by Fellow-passengers.

The company is under a duty to guard its passengers from violence at the hands of a fellow-passenger; but it is not responsible for such acts if it had no reason to anticipate them.

It is not bound to expel every man from its cars whom it finds on them in a state of intoxication.[4] It is bound to expel those who are both drunk and disorderly, or to furnish its passengers reasonable protection against them.

In assessing damages for a breach of this duty, if robbery accompanies violence, the passenger cannot recover for the loss of any articles not properly taken with him into the car

[1] Haver *v.* Central R. R. Co., 62 N. J. Law, 282; 41 Atlantic, 916; 72 Am. State, 647; 43 L. R. A. 84.

[2] New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637; Craker *v.* Chicago & Northwestern Railway Co., 36 Wis. 657; Goddard *v.* Grand Trunk Railway of Canada, 57 Me. 202; 2 Am. Rep. 39.

[3] New Orleans & Northeastern R. R. Co. *v.* Jopes, 142 U. S. 18, 25, 27. See Chapter XXVIII., Servants, p. 271.

[4] Putnam *v.* Broadway & Seventh Avenue R. R. Co., 55 N. Y. 108; 6 Am. Railway Rep. 40; 14 Am. Rep. 190.

as an incident of the contract for his transportation. If robbed of money on his person not exceeding an amount reasonably necessary for travelling expenses, the company must reimburse him. If robbed of valuable securities, which he had not notified it that he was carrying with him, it would not be responsible for their loss.[1]

25. Assaults by Third Parties.

A railroad company may be liable for the consequence of an assault upon a passenger by third parties, when it took him to or through a point on its line where it knew, or had reason to apprehend, that assaults might be made upon its cars and those riding in them, and failed to warn him of the danger before accepting him as a passenger to that point, when not having reason to suppose that he was aware of it.[2]

26. The Company not an Insurer of Passengers.

As respects any claim founded on the negligence of its servants in the use of its road and equipment, a railroad company fulfils its duty to a passenger if they exercised the care and skill of a careful and prudent man who is engaged in that kind of business.[3] The railroad company is not an insurer of its passengers, unless (as it may be) made such by the laws of its incorporation.[4] It is not liable for any injury to them for

[1] Weeks *v.* New York, New Haven, & Hartford R. R. Co., 72 N. Y. 50, 63; 28 Am. Rep. 104.

[2] Bosworth *v.* Union R. R. Co., 25 R. I. ; 55 Atlantic, 490. See Chapter XXIX., Strikes.

[3] Stierle *v.* Union Railway Co. of New York City, 156 N. Y. 684; 50 Northeastern, 419. On street railways, as they are less dangerous agencies than other railroads, less care may be required; but the rule is the same. Railroad Co. *v.* Varnell, 98 U. S. 479, 480. A more stringent rule of liability has often been laid down, as in Chicago & Alton R. R. Co. *v.* Murphy, 198 Ill. 462; 64 Northeastern, 1011. See *ante*, pp. 320, 321.

[4] Chicago, Rock Island, & Pacific Railway Co. *v.* Zernecke, 183 U. S. 582.

which it is not in fault,[1] nor for any flowing in whole or part from their own fault.

They must use a care proportioned to the dangers incident to so rapid a mode of travel. Except in the case of those riding on platforms, steps, or the running board of a street car, if a passenger voluntarily thrusts any part of his person outside of the car, and it is injured, this is *prima facie* such negligence on his part as to preclude his recovery of damages from the company.[2] If, however, the protrusion of the body beyond the car is slight and momentary, it will be a question for the jury whether the passenger is chargeable with negligence.[3]

27. Use of Tracks of One Company by Another.

This duty as to providing a safe roadbed is not due by one company to passengers on cars which another company may, by its permission or under a lease, be running on its tracks. They are not its passengers.[4] On the other hand, if those who are its passengers should be injured by the negligence of the latter company, the former would be liable to them as fully as if the negligence were its own. It has let loose a dangerous force upon its premises, and it must answer for its being kept in due control.[5]

[1] Stoddard *v.* New York, New Haven, & Hartford R. R. Co., 181 Mass. 422; 63 Northeastern, 927.

[2] Spencer *v.* Milwaukee & Prairie du Chien R. R. Co., 17 Wis. 487; 84 Am. Dec. 758. See Pittsburg & Connellsville R. R. Co. *v.* McClurg, 56 Pa. St. 294; Quinn *v.* South Carolina Railway Co., 29 S. C. 381; 7 Southeastern, 614; 1 L. R. A. 682; Dahlberg *v.* Minneapolis Street Railway Co., 32 Minn. 404; 21 Northwestern, 545; 50 Am. Rep. 585; Francis *v.* New York Steam Co., 114 N. Y. 380; 21 Northeastern, 988.

[3] Clerc *v.* Morgan's Louisiana & Texas Railroad & Steamship Co., 107 La. 370; 31 Southern, 886; 90 Am. State, 319; Kird *v.* New Orleans & North Western Railway Co., 109 La. 525; 33 Southern, 587; 60 L. R. A. 727; 94 Am. State, 452.

[4] Sias *v.* Rochester Railway Co., 169 N. Y. 118; 62 Northeastern, 132; 56 L. R. A. 850.

[5] Chicago, St. Paul, & Fond du Lac R. R. Co. *v.* McCarthy, 20 Ill. 385; 71 Am. Dec. 285; Railroad Co. *v.* Barron, 5 Wall. 90, 104.

The other company under such an arrangement is liable also to its passengers for the negligence of the servants of the company owning the tracks, as fully as if they were its own servants; provided its trains were being run under the control of the company so owning the tracks, and the negligence was incidental to the exercise of such control. It would not be liable for wilful acts of violence by servants of the other company committed while they were occupying no such relation of control.[1]

28. Collisions at Railroad Intersections.

A passenger in a railroad car injured by its collision, at a crossing, with a car of another road, by the concurring negligence of those managing each car, can sue either or both of the companies concerned. The negligence of the railway company which was engaged in his transportation was not his negligence.[2]

29. Riding in Drawing-room or Sleeping Cars.

Passengers who choose to ride in palace or sleeping cars not owned by the railroad company, but run upon its tracks in charge of servants of their owner, and forming part of its train, come into relation with two parties, — that to which they pay the ordinary fare, and that to which they pay the fare necessary to secure their special accommodation. The first remains as to them a common carrier.[3] The second, the drawing-room or sleeping-car company, is not a common carrier. It furnishes a convenient means of being transported by a common carrier, or while being so transported. It is under a duty

[1] See Murray *v.* Lehigh Valley R. R. Co., 66 Conn. 512, 520, 527; 34 Atlantic, 506; 32 L. R. A. 539.

[2] Chicago & Eastern Illinois R. R. Co. *v.* Hines, 183 Ill. 482; 56 Northeastern, 177.

[3] Pennsylvania Co. *v.* Roy, 102 U. S. 451.

to use reasonable care to protect passengers placing themselves in its cars.[1] But if this duty is neglected, as if the porter fails to keep proper watch for thieves, and a passenger's money is stolen from under his pillow when he is asleep, the right of action against the sleeping-car company is only concurrent with a right of action against the railroad company. The latter has adopted the sleeping car as a means of transportation for its passengers, and it must see that it is managed with due care or abide the consequences. It cannot so delegate this duty as to escape all responsibility.[2]

A railroad company is under no common-law duty to receive and haul sleeping or palace cars which it does not own. If it does receive them by contract, it is not a common carrier of them, and can stipulate in the contract against liability for injuries through its negligence to the servants of their owner, who travel on board of them.[3]

A Pullman car porter is *pro hac vice* a servant of the railroad company in relation to its passengers on its train, not having any contract relation with the Pullman car company;[4] and if he maltreats them, their remedy is against the company with which they have contracted, not against that with which they have not contracted.[5]

30. Ejection of Passenger.

Passengers must respect the rules and regulations of the company affecting their transportation which are brought to their knowledge, and a wilful violation of them may be such a

[1] Lewis *v.* New York Sleeping Car Co., 143 Mass. 267; 9 Northeastern, 615; 58 Am. Rep. 135.

[2] Carpenter *v.* New York, New Haven, & Hartford R. R. Co., 124 N. Y. 53; 26 Northeastern, 277; 11 L. R. A. 759; 21 Am. State, 644.

[3] Russell *v.* Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Co., 157 Ind. 305; 61 Northeastern, 678; 87 Am. State, 214; 55 L. R. A. 253.

[4] Railroad *v.* Ray, 101 Tenn. 1; 46 Southwestern, 554.

[5] Williams *v.* Pullman Palace Car Co., 40 La. Ann. 87, 417; 3 Southern, 631; 4 Southern, 85; 8 Am. State, 512, 538.

breach of their implied obligations to it as to justify the conductor in removing them from the train, if at his request they will not voluntarily leave it. In such case, however, the passenger cannot ordinarily be put off the train except at or near a regular station.[1]

When a passenger has subjected himself, for any cause, to removal from the car or train, and the necessary steps for its accomplishment have been begun, he cannot then reinstate himself in the position of a passenger having a right to proceed, as such, by offering to do what he was in fault for not doing before. If the cause of his proposed ejection be a refusal to pay the fare, he cannot now, on tender of the fare, demand to become, or to be allowed to remain, a passenger.[2]

31. Sick, Infirm, or Incapable Persons.

If a small child in care of an older person enters a train without a ticket, the latter is responsible for the child's fare, if fare be due; and if he declines to pay it, both can be put off.[3] But in such a case, if he has a ticket for himself, which has been taken up, it should be returned, or else the *pro rata* fare refunded for the uncompleted part of the trip.[4]

A child need not be received unaccompanied by an older person, but should he be, he must receive such care and attention as his age demands.

If a passenger falls sick on a train upon a through railroad, the company must take reasonable care of him while on board.[5]

[1] Maples *v.* New York & New Haven R. R. Co., 38 Conn. 557; 3 Am. Railway Rep. 445; 9 Am. Rep. 434. See *ante*, pp. 296, 307, 309.

[2] Georgia Southern & Florida R. R. Co. *v.* Asmore, 88 Ga. 529; 15 Southeastern, 13; 16 L. R. A. 53.

[3] Philadelphia, Wilmington, & Baltimore R. R. Co. *v.* Hoeflich, 62 Md. 300.

[4] Lake Shore & Michigan Southern R. R. Co. *v.* Orndorff, 55 Ohio St. 589; 45 Northeastern, 447; 60 Am. State, 716; 38 L. R. A. 140.

[5] Railway Co. *v.* Salzman, 52 Ohio St. 558; 40 Northeastern, 891; 31 L. R. A. 261 and note; 49 Am. State, 745.

Should a passenger fall sick on a street car, and his condition be such as to constitute a nuisance to the other travellers, the company would have a right to remove him from the car, provided it could be done without unreasonable risk to his health. On street railroads trips are short, and the company cannot be expected to provide facilities for giving proper care to the sick, or preventing their condition from becoming an annoyance to others.[1]

32. Alighting at Intermediate Stations.

A passenger remains in charge of the company so long as he is on its premises for the reasonable purposes of the trip. This extends to his alighting at an intermediate station to take a walk for exercise up and down the platform, or to procure food or drink, or for any other reasonable purpose.[2]

33. When the Relation of Passenger terminates.

A passenger on a through railroad ceases to be such when he leaves the premises of the company at the point of destination. A passenger on a street car ceases to be such when, at the end of his trip, he steps from the car upon the street.[3]

Stopping a street car is, under ordinary circumstances, an implied invitation to passengers to alight, and an implied assurance that the place is a safe one at which to alight. If it is not, and a passenger is seen by those in charge of the car to

[1] Lemont *v.* Washington & Georgetown R. R. Co., 1 Mackey, 180; 47 Am. Rep. 238.

[2] Alabama Great Southern Railway Co. *v.* Coggins, 88 Fed. Rep. 455; 32 C. C. A. 1; 60 U. S. App. 140; Parsons *v.* New York Central & Hudson River R. R. Co., 113 N. Y. 355; 21 Northeastern, 145; 10 Am. State, 450; 3 L. R. A. 683; Jeffersonville, Madison, & Indianapolis R. R. Co. *v.* Riley, 39 Ind. 568. But see Missouri Pacific Railway Co. *v.* Foreman, 73 Tex. 311; 11 Southwestern, 326; 15 Am. State, 785; State *v.* Grand Trunk Railway Co. of Canada, 58 Me. 176; 4 Am. Rep. 258.

[3] Creamer *v.* West End Street Railway Co., 156 Mass. 320; 31 Northeastern, 391; 16 L. R. A. 490; 32 Am. State, 456.

be preparing to get off, due caution should be given him.[1] The duty of the company in this respect is less if the car is stopped at an unusual place at a passenger's request and for his sole benefit.

Such a caution generally fulfils its entire obligation. It is not bound to see that the highway at the place where passengers may enter or leave the car is in safe condition, except so far as its own acts may have made it defective.[2] If it has assumed to build platforms, whether on the highway or elsewhere, for the use of passengers or intending passengers, it is bound to use the utmost care in keeping them in safe condition.

If a railroad company with tracks running through a city street, whatever be the motive power used, which operates its road both as a through road and a local one, builds platforms in the street for the use of passengers on local trains, it must build them so that they can be safely used when through trains are passing. It must take into account the draught of air which accompanies the rush of a fast train, and see that the cars do not so overhang the platform as to expose those standing on them to a risk of being struck,[3] which they could not have reasonably anticipated. If, however, cars are regularly used which overhang the platform, and space enough is left, outside of that covered by the overhang, to allow proper standing room, no case of *prima facie* negligence is presented.[4]

34. Passengers alighting at Wrong Place or Time.

It is customary and proper for the train men on a railroad running between distant places to call out on each trip the

[1] Joslyn *v.* Milford, Holliston, & Framingham Street Railway Co., 184 Mass. 65; 67 Northeastern, 866.

[2] Conway *v.* Lewiston & Auburn Horse R. R. Co., 87 Me. 283; 32 Atlantic, 901.

[3] Dobiecki *v.* Sharp, 88 N. Y. 203.

[4] See *ante*, p. 306.

name of the next regular stopping place, shortly before it is reached. If after such a call the train or car should, on an emergency, be stopped before the place in question has been reached, and a passenger alights there, supposing that it had been, and is consequently injured, he is not necessarily chargeable with negligence, unless the servants of the company saw that he was about to alight and warned him not to do so.[1]

One who leaves the train at a stop not made at a station, the name of the station not having been called, takes upon himself the risk of getting off the railroad premises safely.[2]

One who does not leave a car on its arrival at its destination, though knowing that the trip is ended, but proceeds to get off later, when those in charge of the car do not know and have no reason to suppose that he is about to do so, cannot complain if the car is started before he has reached the ground or platform.[3]

35. Promise to wake Passenger.

A passenger who goes to sleep in his seat in an ordinary day car, on the assurance of the conductor that he will wake him up when the car reaches his point of destination, cannot hold the company for a failure to awake him. The conductor's promise was beyond his authority.[4] Such a promise by the porter of a sleeping car is in the line of his duty, and binds his employer.

[1] Philadelphia, Wilmington, & Baltimore R. R. Co. *v.* Anderson, 72 Md. 519; 20 Atlantic, 2; 20 Am. State, 483; 8 L. R. A. 673; United Railways & Electric Co. *v.* Woodbridge, Md. ; 55 Atlantic, 444. But see Oddy *v.* West End Street Railway Co., 178 Mass. 341; 59 Northeastern, 1026; 86 Am. State, 482.

[2] Frost *v.* Grand Trunk R. R. Co., 10 Allen, 387; 87 Am. Dec. 668.

[3] Spaulding *v.* Quincy & Boston Street Railway Co., 184 Mass. 470; 69 Northeastern, 217.

[4] Sevier *v.* Vicksburg & Meridian R. R. Co., 61 Miss. 8; 18 Am. & Eng. R. R. Cases, 245; 48 Am. Rep. 74.

CHAPTER XXXIII.

CARRIAGE OF PASSENGERS' LUGGAGE.

1. The Implied Contract.

THE contract of a through railroad with a passenger implies, in the absence of a stipulation to the contrary, an obligation to transport on the same train, and with no additional charge, a certain amount of personal baggage; that is, such a limited quantity of articles, including money for travelling expenses,[1] as is ordinarily taken by such travellers for their personal use and convenience, having regard in each case, among other things, to the means and station of the party[2] and the object and length of his journey, provided the weight does not exceed a specified amount. For extra weight an extra charge may be made. In the absence of any contract or rule to the

[1] Railway Co. *v.* Berry, 60 Ark. 433; 30 Southwestern, 764; 46 Am. State, 212; 28 L. R. A. 501.

[2] Railroad Co. *v.* Fraloff, 100 U. S. 24.

contrary, it receives these articles under the obligations attaching to a common carrier of goods.[1]

2. Reception of Articles Inappropriate for Baggage.

If the passenger offers for transportation other property not represented to be baggage, nor so packed as to assume that appearance, the company may refuse to receive it, except as ordinary freight for additional compensation. If the company receives it, without objection, on the passenger train, it can make such additional charge, and, whether it does or not, is bound to all the obligations in respect to it of a common carrier of goods.[2]

It assumes a like obligation as to articles which, whether with or without making an extra charge, it knowingly accepts as baggage, and which are tendered as baggage, although they may not be properly such.[3] Its knowledge may be inferred from circumstances. Thus if it knowingly transports a party of immigrants as passengers, it would naturally expect them to take with them what immigrants ordinarily carry.[4] The same rule applies to travelling salesmen, with trunks known by the company to contain goods or samples.[5]

3. Authority of Baggage Master.

The company is represented as to the reception of passengers' luggage by the baggage master at the station where it is

[1] Camden & Amboy R. R. and Transportation Co. *v.* Burke, 13 Wend. 611; 2 Am. Railway Cases, 399; 28 Am. Dec. 488; Isaacson *v.* New York Central & Hudson River R. R. Co., 94 N. Y. 278; 46 Am. Rep. 142; 16 Am. & Eng. R. R. Cases, 188.

[2] Hannibal Railroad *v.* Swift, 12 Wall. 262; 1 Am. Railway Rep. 434.

[3] Sloman *v.* Great Western Railway Co., 67 N. Y. 208; 15 Am. Railway Rep. 113; Talcott *v.* Wabash R. R. Co., 159 N. Y. 461; 54 Northeastern, 1.

[4] Parmelee *v.* Fischer, 22 Ill. 212; 74 Am. Dec. 138.

[5] Central Trust Co. of New York *v.* Wabash, St. Louis, & Pacific Railway Co., 39 Federal, 417; 40 Am. & Eng. R. R. Cases, 636.

tendered.[1] It is a proper question for a jury to pass upon whether his authority extends to receiving as baggage what is tendered as such, but is not such in the strict eye of the law. If he has such authority, his knowledge as to its character is the knowledge of the company, and his action in accepting it is that of the company, as fully as his action in rejecting it would have been.[2]

His checking baggage on a ticket which did not entitle the person holding it to transportation as a passenger would not, however, preclude the company from declining to carry the latter. A baggage master can have no implied authority to make or to vary the main contract for personal transportation.[3]

4. Meaning of Term "Ordinary Baggage."

Railroad companies are sometimes required by statute to transport with each passenger a certain weight of "ordinary baggage." The term "baggage" as thus used means articles of the kind above stated contained in a suitable bag, case, or other receptacle. A bicycle, not boxed or crated, would not come within it.[4] The term covers articles of personal use for the traveller or his immediate family, purchased while away from home, although never used, and which there is no intent to use until after his return.[5]

A railroad company which receives a trunk from a passenger ordinarily has a right to assume that it contains only such articles as are commonly carried by passengers in their

[1] Lake Shore & Michigan Southern Railway Co. *v.* Foster, 104 Ind. 293; 4 Northeastern, 20; 54 Am. Rep. 319.

[2] Chicago, Rock Island, & Pacific R. R. Co. *v.* Conklin, 32 Kans. 55; 3 Pacific, 762; 16 Am. & Eng. R. R. Cases, 116. *Contra*, Blumantle *v.* Fitchburg R. R. Co., 127 Mass. 322, 326; 34 Am. Rep. 376.

[3] Wentz *v.* Erie Railway Co., 3 Hun, 241.

[4] State *v.* Missouri Pacific Railway Co., 71 Mo. App. 385; 7 Am. & Eng. R. R. Cases, N. S. 66. This rule is often varied by statute.

[5] Dexter *v.* Syracuse, Binghamton, & New York R. R. Co., 42 N. Y. 326; 1 Am. Rep. 527.

luggage. If, therefore, it contains merchandise of a different character and higher value, and no notice of this is given, the company is not liable as a common carrier for the loss of its contents.[1] If liable at all, it would only be for gross negligence.[2]

5. A Check not a Contract.

A check given to the passenger by the railroad company for his luggage is no contract. It is only evidence of the receipt of property destined to a certain point.[3] If given by one who had no authority to give it to one who had not become, and did not intend to become, a passenger or buy a ticket, it does not impose the liability of a common carrier on the company.[4]

6. Judicial Notice of System of Checking Baggage.

Courts take judicial notice of the system of checking baggage going over railroads, and of checking it through, when several connecting roads are to be traversed.[5]

7. Through Checks.

If a through ticket for transportation over several connecting roads is accompanied by a through check stamped only with the name of the company which issues it, that company

[1] Humphreys *v.* Perry, 148 U. S. 627, 640; Blumenthal *v.* Maine Central R. R. Co., 79 Me. 550; 11 Atlantic, 605; 34 Am. & Eng. R. R. Cases, 247.

[2] Michigan Central R. R. Co. *v.* Carrow, 73 Ill. 348; 24 Am. Rep. 248.

[3] Dill *v.* South Carolina R. R. Co., 7 Rich. (S. C.) 158; 62 Am. Dec. 407.

[4] Beers *v.* Boston & Albany R. R. Co., 67 Conn. 417; 34 Atlantic, 541; 52 Am. State, 293; 32 L. R. A. 535.

[5] Isaacson *v.* New York Central & Hudson River R. R. Co., 94 N. Y. 278, 284; 46 Am. Rep. 142; 16 Am. & Eng. R. R. Cases, 188. See Chapter LIII., Rules of Evidence: Presumptions and Assumptions.

is *prima facie* responsible for the transportation of the baggage to its ultimate destination.[1] If stamped only with the name of the next connecting road, the first company *prima facie* fulfils its duty upon delivery to that.[2] Such a through check, stamped with the name of each of the connecting roads, is evidence tending to show either a through contract by the first road, or a several contract on the part of each for transportation over its own route. It would not, standing alone, be evidence tending to show a joint contract.[3] In any of these cases, each company in the line would also be liable to the owner in tort for an injury to it occurring on its road. When there is a doubt as to the company to be sued, it is generally safer to sue all in tort for a conversion.

If no through ticket or check is given, and no express through contract made, none will be implied. But if a through check is given upon a coupon ticket, although the ticket may limit the company's liability for transporting the passenger to the transportation on its own line, the check has the effect of a bill of lading stipulating for the through transportation of his baggage.[4]

8. Receipt of Baggage.

If the check of another company for a piece of baggage is accepted by a baggage master as equivalent to the delivery of such baggage to him, and a check of his own employer given in exchange for it, the latter becomes *prima facie* responsible for the baggage either as a warehouseman or a common car-

[1] Baltimore & Ohio R. R. Co. *v.* Campbell, 36 Ohio St. 647; 38 Am. Rep. 617; 3 Am. & Eng. R. R. Cases, 246.

[2] Milnor *v.* New York & New Haven Railway Co., 53 N. Y. 363, 369.

[3] Kessler *v.* New York Central & Hudson River R. R. Co., 61 N. Y. 538.

[4] Louisville & Nashville R. R. Co. *v.* Weaver, 9 Lea, 38; 42 Am. Rep. 654; Chicago & Alton R. R. Co. *v.* Mulford, 162 Ill. 522; 44 Northeastern, 861; 35 L. R. A. 599.

rier according to the circumstances,[1] and if it in fact never received the baggage, has the burden of proving it.[2]

A passenger cannot impose the liability of an insurer on a railroad company by sending his trunk to the station hours before the train starts, unless it be accepted as in the course of transportation.[3] If it has a rule not to check baggage more than thirty minutes before the train leaves, it is a reasonable one.[4]

9. Street Railroads.

If a street railway company is in the habit of taking boxes or trunks belonging to passengers upon the platforms of its passenger cars, charging for the service in addition to the regular passenger fare, it thereby assumes the position and responsibilities of a common carrier of such goods.[5]

10. Baggage sent by Train not taken by its Owner.

The law cannot be said to be thoroughly settled as to the responsibility of a railroad company for personal baggage checked and forwarded by a train on which the owner, for reasons of his own, is not a passenger.

The fundamental principle is that the contract between the company and a passenger is single and entire. The main obligation which it creates on the part of the company is to transport him. Its obligation to transport his baggage is only an incidental one. No separate charge is made for carrying it, unless it be of unusual weight or character, and if, in such

[1] Warner *v.* Burlington & Missouri River R. R., 22 Iowa, 166, 171; 92 Am. Dec. 389.

[2] Ahlbeck *v.* St. Paul, Minneapolis, & Manitoba Railway Co., 39 Minn. 424; 40 Northwestern, 364; 12 Am. State, 661; Chicago, Rock Island, & Pacific R. R. Co. *v.* Clayton, 78 Ill. 616.

[3] Hickox *v.* Naugatuck R. R. Co., 31 Conn. 281, 283; 83 Am. Dec. 143.

[4] Goldberg *v.* Ahnapee & Western Railway Co., 105 Wis. 1; 80 Northwestern, 920; 76 Am. State, 899; 47 L. R. A. 221.

[5] Levi *v.* Lynn & Boston R. R. Co., 11 Allen, 300; 87 Am. Dec. 713.

case, there be a separate charge, this does not, so long as it is tendered and accepted as personal baggage, change the nature of the carrier's liability.

It follows that one who tenders baggage for transportation impliedly represents that he intends to become a passenger on the train which carries it, or in one which departs, if not on the same day, then at least within a reasonable time. The contract being an entirety, if he thus induces the company to enter on its performance, he must proceed to its completion within a reasonable time, and if he does not, he waives his right to personal transportation. This being so, the company can lose nothing by his taking the trip at a later hour or day, or not at all.[1] He has the right to require it to be sent on by the same train which he takes, if it was delivered to the company in proper season, and there is no rule or practice to the contrary. It cannot, however, be considered as settled law that the company, conversely, can require him to take the train on which his baggage will, in natural course, be forwarded. There is authority for the position that a passenger can never take the trip without baggage and afterwards demand the transportation of baggage, although it was packed for the purposes of the trip, and accidentally left behind, unless the company was in fault in not forwarding it with him. Here, it is argued, the doctrine of the entirety of the contract forbids him to split it up into two parts for his own convenience. Having chosen to go on without his baggage, he waives any right to its transportation, for the right was a mere incident of the trip.[2]

But if a passenger should reach the station in time to catch

[1] See Green *v.* Milwaukee & St. Paul R. R. Co., 41 Iowa, 410; Warner *v.* Burlington & Missouri River R. R., 22 Iowa, 166; 92 Am. Dec. 389; Wilson *v.* Chesapeake & Ohio R. R. Co., 21 Gratt. 654. Compare Marshall *v.* Pontiac, Oxford, & Northern R. R. Co., 126 Mich. 45; 85 Northwestern, 242; 55 L. R. A. 650.

[2] Wilson *v.* Grand Trunk Railway of Canada, 56 Me. 60; 96 Am. Dec. 435; 57 Me. 138; 2 Am. Rep. 26.

an express train, after receiving his baggage check, but not in time to get his baggage on board of it, it seems carrying the doctrine of the entirety of his contract very far to hold that he would be forced to wait for it to be put upon a later train and proceed on that. This would involve inconvenience to him, and be of no substantial advantage to the company.

It has been suggested that, in emergencies, it might be of benefit to the carrier to have the passenger at hand to assist in caring for his property.[1] It is difficult to see how such assistance could be expected or given. The baggage has been bailed to the carrier for a definite purpose, namely, to be transported under its sole care to a fixed point. Should the passenger meddle with its custody, while in transit, he would be violating the contract of transportation, unless by permission or on request of the carrier. The carrier would have no right to request the passenger to assist it in doing its duty. Its duty to carry his baggage safely, unless prevented by the act of God or the public enemy, is absolute. If so prevented, it can be of no consequence to it whether he be present or not; for he can have no claim against it for any consequent loss.

Undoubtedly, if the passenger does not accompany his baggage, the carrier may be prejudiced by his delay in calling for it on the arrival of the train. It will naturally hold it in readiness for immediate delivery to him, and probably in a situation not so safe as might have been selected had it been known that it was not to be called for until the arrival of a later train.[2] But the company can lose nothing by this. Until the proper time to call for it had passed, its obligation as an insurer would remain; but no later. After that time had elapsed, it would, by reason of that fact, owe a less duty. It would seem, on principle, that this less duty was that of a warehouseman.

[1] Wood *v.* Maine Central R. R. Co., Me. ; 56 Atlantic, 457.
[2] Collins *v.* Boston & Maine Railroad, 10 Cush. 506.

There are expressions in some reported cases indicating that its duty, under such circumstances, is only that of a gratuitous bailee.[1] This would be quite a violent change of contract duty, if the baggage was received by the company as a common carrier; and can only be justified on the assumption that it did not so receive it. If it be a gratuitous bailee, how and when did it become so? A gratuitous bailment, like any other, can exist only by contract. The only contract which the railroad company, in such a case as is supposed, understood itself to have made was that of a common carrier; and that also is the contract which the owner of the baggage understood or claimed to have been made.

It would seem a more reasonable position, as well as one more in accord with the usages of modern travel by rail in this country, to construe the passenger's right to transportation of his baggage as not confined to its transportation by the train which he takes himself, if he can show a reasonable cause for forwarding it by an earlier or later one leaving on or about the same day.

If it goes on another by the fault of the company, its liability certainly remains the same. Why should this liability be reduced, if, without its fault, the baggage goes on one train and the passenger on another, provided both trains depart on or about the same day, and the same fare is charged on each?

For the passenger to send on his baggage ahead of him is often the only way in which he can have any assurance that he will find it ready for him on his arrival. This is almost always the case when his route lies across a city where the railroads by which he enters and leaves it are connected only by the use of ordinary vehicles travelling on the ordinary highways. If he is sent across in one of these, it is not usual to put his baggage, if it has been checked through, on it also.

If a passenger takes a train before that on which he knows

[1] Wood *v.* Maine Central R. R. Co., Me. ; 56 Atlantic, 457.

his baggage is to go, there is nothing in this to prevent his claiming and receiving it on its arrival. If he does not, the common carrier's liability, as such, will terminate, but if the nature of its contract has been correctly stated, it should not and will not be reduced below that of a warehouseman.

11. Special Contracts.

As transporting luggage without extra charge is (unless by statute) simply a matter of general custom and not obligatory upon the company, it can stipulate for its reception without assuming all the liabilities of a common carrier, or for its being responsible only to a certain amount; but no stipulation can exempt it from all liability for its own tort or negligence.[1] Nor is any stipulation operative unless assented to by the passenger. Such assent to a reasonable stipulation is impliedly given by his entering into the contract for transportation, with knowledge of the limitation thus imposed. Such knowledge is not implied by law from his receiving a ticket stating the limitation, although he reads it after the purchase is completed.[2]

12. Luggage kept in Passenger's own Custody.

The company is not liable as a common carrier of goods for property which the passenger retains in his own possession.[3] Its only obligation is to exercise reasonable care with respect to it, and it is only liable for losses due to the neglect or mis-

[1] Camden & Amboy R. R. and Transportation Co. *v.* Burke, 13 Wend. 611; 2 Am. Railway Cases, 399; Railroad Co. *v.* Fraloff, 100 U. S. 24; Davis *v.* Chicago, Rock Island, & Pacific Railway Co., 83 Iowa, 744; 49 Northwestern, 77.

[2] Rawson *v.* Pennsylvania R. R. Co., 48 N. Y. 212; 3 Am. Railway Rep. 528; 8 Am. Rep. 543; Baltimore & Ohio R. R. Co. *v.* Campbell, 36 Ohio St. 647; 38 Am. Rep. 617; 3 Am. & Eng. R. R. Cases, 246. See Chapter XXXII., Carriage of Passengers.

[3] Kinsley *v.* Lake Shore & Michigan Southern R. R. Co., 125 Mass. 54; First National Bank of Greenfield *v.* Marietta & Cincinnati R. R. Co., 20 Ohio St. 259.

conduct of its servants.[1] In determining what is reasonable care, regard must be paid to all the circumstances attending the loss. More care is due when passengers are known or may be supposed to be asleep than when they are awake;[2] and when a train stops at a point where it is customary for passengers to leave the cars for a meal, than at other stations.

A passenger who leaves his luggage in one car and goes into another for some purpose of his own, such as to see a friend or to smoke, remaining there for hours, during which time the train makes repeated station stops, has only himself to blame if the luggage disappears, unless he can prove neglect or misconduct on the part of the train hands.[3]

If the passenger accidentally drops an article of baggage out of the car window, the company is under no duty to stop the train to recover it.[4]

13. Charge for Articles not Baggage, in Hands of Passenger.

If property of small bulk but great value, for the transportation of which the company has regular rates of charge, be carried by a passenger in a hand-bag, with no view of using it during his trip, or afterwards for any purpose related thereto, he cannot thus deprive the company of the compensation due for its carriage; and it is subject, while in the car, to a right of lien therefor.[5] In such a case it reaps the emoluments of a common carrier without being subjected to the risks of a

[1] Tower *v.* Utica & Schenectady R. R. Co., 7 Hill, 47; 42 Am. Dec. 36; Pullman's Palace Car Co. *v.* Hall, 106 Ga. 765; 32 Southeastern, 923; 71 Am. State, 293; 44 L. R. A. 790.

[2] Woodruff Sleeping & Parlor Coach Co. *v.* Diehl, 84 Ind. 474; 43 Am. Rep. 102; 9 Am. & Eng. R. R. Cases, 299.

[3] Whicher *v.* Boston & Albany R. R. Co., 176 Mass. 275; 57 Northeastern, 601; 79 Am. State, 314.

[4] Henderson *v.* Louisville & Nashville R. R., 123 U. S. 61; 31 Am. & Eng. R. R. Cases, 95.

[5] Hutchins & Co. *v.* Western & Atlantic R. R., 25 Ga. 61; 71 Am. Dec. 156.

common carrier; but the passenger cannot complain of it, for it is the result of his own act in retaining the goods in his personal custody.

14. Sleeping cars.

If a sleeping-car berth ticket contains a stipulation that baggage placed in the car will be at the owner's risk, this will not protect either the sleeping-car company, in case of a loss by the negligence of its servants, or the railroad company.[1] A railroad company which runs sleeping cars on its trains, unless they are arranged in compartments with doors that can be locked, is bound to have some one maintaining a proper and substantially constant watch at night over the passage-way adjoining the berths, for the prevention of thefts or other losses of the property of the passenger.[2] If there are porters for the cars who make it a practice to assist passengers in or out by carrying their luggage, their employer is responsible for their neglect to take reasonable care of it, in so doing.[3]

15. Duty of Passenger to Call for his Baggage.

The transportation of a passenger's luggage being a mere incident of his own trip, he must call for it within a reasonable time after the trip ends,[4] and what is a reasonable time is a question of law. The train may arrive at midnight and there may be no conveyances for hire then at the station, but

[1] Louisville, Nashville, & Great Southern R. R. Co. *v.* Katzenberger, 16 Lea, 380; 1 Southwestern, 44; 57 Am. Rep. 232; Pullman Palace Car Co. *v.* Gavin, 93 Tenn. 53; 23 Southwestern, 70; 42 Am. State, 902; Kinsley *v.* Lake Shore & Michigan Southern R. R. Co., 125 Mass. 54; 28 Am. Rep. 200. See Chapter XXXI., Passenger Tickets.

[2] Carpenter *v.* New York, New Haven, & Hartford R. R. Co., 124 N. Y. 53; 26 Northeastern, 277; 21 Am. State, 644; 11 L. R. A. 759.

[3] Voss *v.* Wagner Palace Car Co., 16 Ind. App. 271; 43 Northeastern, 20; 44 Northeastern, 1010.

[4] Dininny *v.* New York & New Haven R. R. Co., 49 N. Y. 546; 4 Am. Railway Rep. 457.

nevertheless he must call for it promptly, or the company will become a mere warehouseman with regard to it.[1]

16. Presumption, in Case of Non-delivery or Delivery in Bad Order.

If on a passenger's demanding his baggage within a reasonable time after his arrival, it is not produced, the company is *prima facie* liable to him for its value.[2]

If it is delivered to him, but in bad order, although it was in good order when received by the company, it is *prima facie* liable, although it may be the last of several carriers whose roads connect.[3]

17. Storing Baggage for Passenger.

If, on arrival of the train, the passenger surrenders his check, but obtains the consent of the baggage master to leave the baggage temporarily in the station, the obligation of the company as a common carrier ceases. It becomes, however, a warehouseman, provided the baggage master had express or implied authority to give such consent.[4]

[1] Roth *v.* Buffalo & State Line R. R. Co., 34 N. Y. 548; 90 Am. Dec. 736; Kansas City, Fort Scott, & Memphis Railway Co. *v.* McGahey, 63 Ark. 344; 38 Southwestern, 659; 58 Am. State, 111; 7 Am. and Eng. R. R. Cases, N. S., 63; 36 L. R. A. 781.

[2] Burnell *v.* New York Central R. R. Co., 45 N. Y. 184; 6 Am. Rep. 61.

[3] Moore *v.* New York, New Haven, & Hartford R. R. Co., 173 Mass. 335; 53 Northeastern, 816; 73 Am. State, 298; 14 Am. and Eng. R. R. Cases, N. S., 210.

[4] Mattison *v.* New York Central R. R. Co., 57 N. Y. 552; 76 N. Y. 381.

CHAPTER XXXIV.

CONTRACTS OF AFFREIGHTMENT.

1. Express Contracts.

RAILROAD companies almost invariably give consignors a bill of lading, receipt, or other voucher, acknowledging the receipt of the goods, and the purpose for and terms and conditions upon which they are received. When this instrument upon its face takes the form of a complete contract, imposes no unreasonable abridgment of a common carrier's liability, and is accepted and assented to by the consignor, at the time when he entrusts the goods to the company, it constitutes the contract of affreightment.[1] His silent acceptance of it is sufficient evidence of his assent.[2] It is otherwise when it is not de-

[1] See Chapter XXXV., Carriage of Goods, and Appendix VI. Railroad Co. *v.* Androscoggin Mills, 22 Wall. 594, 603; McMillan *v.* Michigan Southern & Northern Indiana R. R. Co., 16 Mich. 79, 114; 93 Am. Dec. 208; Snow *v.* Indiana, Bloomington, & Western Railway Co., 109 Ind. 422; 9 Northeastern, 702. *Contra*, Chicago & Northwestern Railway Co. *v.* Calumet Stock Farm, 194 Ill. 9; 61 Northeastern, 1095; 88 Am. State, 68; and see long note to this case in 88 Am. State, 77–134, on the general subject of contracts limiting a common carrier's responsibility for goods received.

[2] Grace *v.* Adams, 100 Mass. 505, 507; 97 Am. Dec. 117 and note.

livered or accepted until after the goods have been delivered to the company. Then the common law or the oral stipulations of the parties will determine what the contract is.[1]

2. Contract by Agent of Shipper.

As a general rule, the agent to whom the owner entrusts the goods for delivery must be regarded as having authority to stipulate for the terms of transportation. If the carrier refuses to receive them except under a special contract limiting its liability, the agent has implied authority to enter into any proper contract of that nature in behalf of his principal.[2]

3. Abridging the Liability of a Common Carrier.

All railroad companies engaged in transporting goods for hire are common carriers, and bound to receive, as such, and transport for a reasonable price, all goods in proper condition and of a proper kind for such transportation, from all persons offering them. The common law makes them also virtually insurers of the due performance of the contract of transportation. This may justly be taken into account by them in determining rates of freight charges. It is not unfair to have one rate where this common-law obligation obtains in full force, and another and lower one where it is in some measure relaxed.[3]

Some courts hold acceptance without protest to be merely *prima facie* evidence of assent. Strohn *v.* Detroit & Milwaukee Railway Co., 21 Wis. 554; 94 Am. Dec. 564.

[1] Bostwick *v.* Baltimore & Ohio R. R. Co., 45 N. Y. 712.

[2] Nelson *v.* Hudson River R. R. Co., 48 N. Y. 498; 2 Am. Railway Rep. 305; Jennings *v.* Grand Trunk Railway of Canada, 127 N. Y. 438; 28 Northeastern, 394.

[3] Hart *v.* Pennsylvania R. R. Co., 112 U. S. 331, 340; Mears *v.* New York, New Haven & Hartford R. R. Co., 75 Conn. 171, 176; 52 Atlantic, 610; 56 L. R. A. 884.

4. Public Policy.

Public policy forbids that such common-law obligation should be so far relaxed as to exonerate the company from liability for negligence on its own part or that of its servants.[1]

5. Liberty of Contract.

Except as to this limitation, the general right of liberty of contract belonging to all[2] demands that every reasonable agreement, fairly and understandingly entered into between a railroad company and a shipper, should be binding on both.[3]

6. Stipulations not incorporated into the Contract itself.

But the company and the shipper do not stand on equal ground. He cannot ordinarily afford to delay or withhold shipments in order to gain better terms than it prescribes. If it should yield to him, it will be obliged to yield to the same extent to all standing in the same position, and it is therefore strongly against its interest to make any concession. If the shipper should resort to the courts for redress, it will probably be costly and long delayed. In view of all this, stipulations (though in themselves not unreasonable) which are not incorporated into the body of the paper evidencing the contract are held not necessarily to bind the shipper, although he ac-

[1] Railroad Co. *v.* Lockwood, 17 Wall. 357; Baltimore & Ohio Southwestern Railway Co. *v.* Voigt, 176 U. S. 498, 507; Insurance Co. of North America *v.* Lake Erie & Western R. R. Co., 152 Ind. 333; 53 Northeastern, 382. *Contra*, Mynard *v.* Syracuse, Binghamton, & New York R. R. Co., 71 N. Y. 180; 27 Am. Rep. 28. The Harter Act of 1893 (XXVII., U. S. Stat. 445) relieves carriers by water from liability to a shipper through negligence in navigation, but affirms the rule of policy as to stipulations against liability for negligence in other matters of transportation. The Kensington, 183 U. S. 263, 270.

[2] Baltimore & Ohio Southwestern Railway Co. *v.* Voigt, 176 U. S. 498, 505.

[3] Davis & Gay *v.* Central Vermont R. R. Co., 66 Vt. 290; 29 Atlantic, 313; 44 Am. State, 852; 61 Am. & Eng. R. R. Cases, 197.

cepts the paper when he ships the goods, and retains it without notifying the company of his dissent from any of its provisions until long afterwards. Conditions or stipulations printed on the back of a shipping receipt, though referred to on its face, — or printed on its face, but detached from what purports to be the shipping contract, though referred to therein, — come under this rule; and the company which claims the benefit of such limitations must, if in case of loss the shipper declines to be bound by them, offer further evidence to prove his assent.[1] Evidence that he in fact read the limitation, or was expressly informed of it, and did not then manifest any dissent, would be sufficient to make it binding, if it did not essentially or unreasonably diminish his common-law rights.[2]

7. Reasonable Limitations.

To some extent, every special contract drawn up by the railroad company may be expected to abridge the shipper's common-law rights, and with his full assent they may be so abridged, within reasonable limits, without any new consideration in his favor. This position is not universally accepted.[3] As a question of mere logical reasoning there is strong ground for asserting that as a common carrier is bound to receive such goods as it is his business to transport, without discrimination in favor of one over another, and as the common law makes him an insurer of them subject but to two exceptions, the shipper ought to receive some specific and distinct advantage

[1] Railroad Co. *v.* Manufacturing Co., 16 Wall. 318, 329.

[2] Chicago & Northwestern Railway Co. *v.* Simon, 160 Ill. 648; 43 Northeastern, 596; New York, New Haven, & Hartford R. R. Co. *v.* Sayles, 87 Fed. Rep. 444; 32 C. C. A. 485; 58 U. S. App. 18. See The Majestic, 166 U. S. 375, 384.

[3] See *ante*, p. 343. Some courts hold that a new consideration is required. Lake Erie & Western R. R. Co. *v.* Holland, Ind. ; 69 Northeastern, 138.

to support his consent to the admission of further exceptions. Long settled practice, and the authority of repeated decisions, has however established the contrary. A railroad company fixes its rates and terms of service in view of the risk assumed. If it asks all those who ship over its line or all who ship goods of a certain kind, to release it from an insurer's liability, provided it charges them no more than a certain sum, it would be a denial of their liberty of contract to refuse effect to such a release if given.[1] The shipper is not bound to give it. He can stand on his common-law rights, if he prefers, and pay accordingly.[2] The presumption is that a lower rate is charged on a special contract than would be if there were none.[3]

For reasons of public policy, however, no right of the shipper to the exercise of due care by the company, can be bargained away. Thus the carrier cannot, by stipulating that the shipper shall select the cars to be used, escape a liability for a loss through defective cars.[4]

8. Contracts construed against the Company.

Any special contract is ordinarily written on a printed blank prepared by the company to serve the purpose also of a receipt. It is construed strictly against the company. Thus, if a bill of lading for goods consigned over several connecting lines, stipulating for the discharge of the first carrier's liability on a delivery to the next in line, also provides that for any damage to the goods the carrier shall be liable in whose actual custody they are, when damaged, only an actual delivery will discharge the first carrier.[5]

[1] York Company *v.* Central Railroad, 3 Wall. 107; Graham & Co. *v.* Davis, 4 Ohio St. 362; 62 Am. Dec. 285.

[2] Nelson *v.* Hudson River R. R. Co., 48 N. Y. 498.

[3] Schaller *v.* Chicago & Northwestern Railway Co., 97 Wis. 31; 71 Northwestern, 1042.

[4] Cincinnati, New Orleans, & Texas Pacific Railway *v.* N. K. Fairbanks & Co., 90 Fed. Rep. 467; 33 C. C. A. 611; 62 U. S. App. 231.

[5] Texas & Pacific Railway Co. *v.* Clayton, 173 U. S. 348, 358.

9. Receipt for Goods never received.

The company is not bound by any receipt in its behalf, signed by a freight agent, when in fact no goods were received and the paper was fraudulently given.[1]

10. General Notices.

A shipper's assent is not implied to limitations materially abridging his common-law rights, which are stated in a general notice to the public, although it came to his attention.[2] If he in fact assented to them, they measure his rights so far as they are not unreasonable. His assent is implied to limitations by such a notice, when brought to his knowledge, if they do not materially abridge his common-law rights, but relate to matters of detail, which they seek to regulate so as to secure fair dealing on the part of shippers.[3]

11. Contractual Limitations: Knowledge of Shipper.

But any limitations, either incorporated or referred to in a bill of lading or shipping receipt, if known to the shipper at the time of shipment, and not then objected to, whether intentionally assented to by him or not, bind him, without any new consideration, so far as they are reasonable and proper regulations for the conduct of a common carrier's business.[4] Among permissible limitations of this class are requirements that the kind and value of the goods shall be disclosed; that on goods of high value a higher rate of freight

[1] Friedlander *v.* Texas & Pacific Railway Co , 130 U. S. 416.

[2] York Company *v.* Central Railroad, 3 Wall. 107, 113 ; Judson *v.* Western R. R. Corporation, 6 Allen, 486, 491 ; 83 Am. Dec. 646.

[3] Erie Railway Co. *v.* Wilcox, 84 Ill. 229 ; 25 Am. Rep. 451; 16 Am. Railway Rep. 457.

[4] Gaines *v.* Union Transportation and Insurance Co., 28 Ohio St. 418; 14 Am. Railway Rep. 158; 49 Am. & Eng. R. R. Cases, 711; Dillard Bros. *v.* Louisville & Nashville R. R. Co., 2 Lea, 288.

be paid; and that all goods must be packed in a manner suitable for transportation by rail.[1]

12. Contract not read by Shipper.

A bill of lading is seldom delivered and received as hurriedly as a passenger ticket, and the rule requiring extrinsic proof that a passenger either read or had a fair opportunity to read any special limitations of a common carrier's liability contained in the ticket does not apply to shippers of goods. If they are handed a contract embodying in itself such limitations, which do not essentially and unreasonably qualify the company's general duty as a common carrier, the shipper who accepts and retains the contract without dissent is bound by it, whether he reads it or not, or was told of its provisions or not.[2]

13. Oral Negotiations superseded.

If in any such case, an oral contract concerning the transportation was made before the paper was executed, the writing, although departing from it, controls; and oral evidence of the oral contract is excluded in an action at law.[3]

[1] Judson *v.* Western R. R. Corporation, 6 Allen, 486; 83 Am. Dec. 646; Durgin *v.* American Express Co., 66 N. H. 277; 20 Atlantic, 328; 9 L. R. A. 453.

[2] Germania Fire Insurance Co. *v.* Memphis & Charleston R. R. Co., 72 N. Y. 90; 28 Am. Rep. 113; Grace *v.* Adams, 100 Mass. 505, 507; 97 Am. Dec. 117.

[3] Long *v.* New York Central R. R. Co., 50 N. Y. 76; 3 Am. Railway Rep. 350. *Contra*, Stoner *v.* Chicago Great Western Railway Co., 109 Iowa, 551; 80 Northwestern, 569; Rudell *v.* Ogdensburg Transit Co., 117 Mich. 568; 76 Northwestern, 380; 44 L. R. A. 415.

CHAPTER XXXV.

CARRIAGE OF GOODS.

1. Discrimination in Terms of Transportation.

THE English courts have said that at common law common carriers were bound to make reasonable but not equal charges, and that one of whom a fair compensation was exacted had no cause of complaint because another obtained a similar service for less.[1] It is doubtful if this really was the common law of England: certainly it never was that of the United States.[2] It is the settled American doctrine that as common carriers exercise a public employment, they owe equal duties to all, and must make no unjust or injurious discrimination between different individuals in their rates of toll. This common-law duty is not ordinarily prescribed in the charters of railroad corporations, but, like the other duty of delivering goods in safety, unless prevented by the act of God or the public enemy, it attaches to them by virtue of their function as common carriers.[3] In English railroad charters, it has

[1] Branley *v.* Southeastern Railway Co., 12 C. B. (N. S.) 63, 75.

[2] McDuffee *v.* Portland & Rochester Railroad, 52 N. H. 430, 455; 13 Am. Rep. 72; 2 Am. Railway Rep. 261. See Chapter LVII., Penal Actions and Criminal Prosecutions.

[3] Chicago & Alton R. R. Co. *v.* People, 67 Ill. 11; 16 Am. Rep. 599;

been usual to insert clauses expressly requiring reasonable facilities to be extended to all on equal terms, and providing special remedies for unjust discrimination.[1]

It is not an unjust discrimination at common law to charge lower rates by the car-load than for small lots, or to parties making large shipments in any way, than to those making small ones,[2] although it takes the shape of rebates.[3] Discrimination in favor of a particular shipper by a rebate which would be otherwise unlawful by statute, is not justified by proof that he holds an unliquidated claim against the carrier for damages for a tort, in reduction of which the rebate is to apply.[4]

2. Elevators.

Railroad companies having elevators on their line, whether owned by themselves or others, are bound to receive grain in bulk consigned to any such elevator, and make delivery accordingly.[5] If there are several such elevators in a particular place, the company cannot, by any contract with the owners of one to deliver exclusively at that, defeat the right of any forwarder to direct a delivery at any other of the elevators.[6]

3. Delivery of Goods to Company.

Goods are not delivered to a railroad company simply because they are put into its freight cars, at a siding where they

2 Am. Railway Rep. 242; Rogers Locomotive & Machine Works *v.* Erie Railway Co., 20 N. J. Eq. 379.

[1] McDuffee *v.* Portland & Rochester Railroad, 52 N. H. 430; 2 Am. Railway Rep. 261; 13 Am. Rep. 72.

[2] Union Pacific Railway Co. *v.* Goodridge, 149 U. S. 680.

[3] Hoover *v.* Pennsylvania R. R., 156 Pa. St. 220; 27 Atlantic, 282; 22 L. R. A. 263; 36 Am. State, 43.

[4] Union Pacific Railway Co. *v.* Goodridge, 149 U. S. 680.

[5] People *v.* Chicago & Alton R. R. Co., 55 Ill. 95; 1 Am. Railway Rep. 480; 8 Am. Rep. 631.

[6] Chicago & Northwestern Railway Co. *v.* People, 56 Ill. 365; 8 Am. Rep. 690; 3 Am. Railway Rep. 296.

were run for that purpose. There must also be shown notice to the company of the loading of the cars, or an agreement or usage dispensing with notice.[1]

4. Payment of the Freight Charges.

The general custom of railroad companies is to waive prepayment of freight charges, relying mainly on their carrier's lien. If goods are received conformably to this custom, without asking prepayment, it is thereby waived. If the consignee be an agent of the shipper, the latter remains personally liable for the freight. It is the same if he was a vendor and the consignee the vendee, to whom, as between those two, the title passed on the delivery of the goods to the railroad company, unless the vendee had ordered the shipment to be made at his risk and for his account.[2]

5. Way Bills.

It is customary to send along with the goods a written note of the shipment, called a way bill. This generally states the description of goods, the freight charge, and the destination and consignee. It is made out purely for the use of the company, and is not shown to the shipper; but its terms may become material in enabling him to prove the terms of shipment or notice of them to the company,[3] or in favor of the company to show the information on which its agent acted, when it is claimed that such action was a breach of duty.[4] In

[1] Tate & Co. *v.* Yazoo & Mississippi Valley R. R. Co., 78 Miss. 842; 29 Southern, 392; 84 Am. State, 649.

[2] Union Freight Railroad Co. *v.* Winkley, 159 Mass. 133; 34 Northeastern, 91; 38 Am. State, 398.

[3] Railroad Co. *v.* Pratt, 22 Wall. 123, 132; Waite *v.* New York Central & Hudson River R. R. Co., 110 N. Y. 635; 17 Northeastern, 730; 35 Am. & Eng. R. R. Cases, 576.

[4] Coupland *v.* Housatonic R. R. Co., 61 Conn. 531; 23 Atlantic, 870; 15 L. R. A. 534.

case of a shipment over one road destined to a point on another, a way bill may be a source of protection to the company ultimately receiving the goods, as against a claim by their owner. Thus if the company owning the first road receives goods destined to a point on a certain connecting road, but the way bill erroneously states that they are destined to a different point on another connecting road, and by reason of this the freight agent at the end of the first road bills them on to the wrong point, the company receiving them thus billed is protected against the owner in dealing with them as so billed. As the owner did not accompany his goods, he necessarily made each connecting carrier in line his agent to forward them to the next one, suitably billed. If they are billed to the wrong point, it is therefore the act of his own agent in the line of his duty, and the principal cannot throw the loss on a third party thus misinformed.[1]

6. Delays in Transportation.

The company is an insurer, under the ordinary rules governing common carriers, of the safe transportation of the goods, but not of their prompt transportation. As to that, it is only bound to use reasonable despatch,[2] and it is bound to use that, although by special contract it was allowed a certain time for the transportation, which was unreasonably long.[3]

In determining whether it has used it, the character and condition of the cars employed may be important. If they are defective, and the defect causes delays, it does not excuse them if it could have been discerned by proper inspection. This is so, to whatever company the cars belong. The com-

[1] Briggs *v.* Boston & Lowell R. R. Co., 6 Allen, 246, 250; 83 Am. Dec. 626.

[2] Wibert *v.* New York & Erie R. R. Co., 2 Kernan, 245 (12 N. Y. 245).

[3] Leonard *v.* Chicago & Alton Railway Co., 54 Mo. App. 293.

pany using them to fulfil its contract must see that they are suitable for that purpose.[1]

It may lawfully offer shippers two rates, one for transportation with special despatch, and one for transportation in ordinary course, and make the lower rate conditioned on a discharge from any liability for injury to the goods by reason of delay not due to its own wrong.[2]

If the probability of any unusual delay is known to the company when goods are offered for transportation, it is its duty to give notice to the party making the offer.[3]

A special agreement by the local freight agent in receiving goods that they shall be forwarded or delivered by a specified day binds the company, although beyond his authority, if the shipper did not know that it was.[4]

As railroad companies have accepted a special franchise from the State, and undertaken to use it, they are bound to use it and use it efficiently. This involves an obligation to receive and transport with reasonable promptness goods offered by any one for that purpose. Want of a sufficient number of cars, unless due to temporary causes under exceptional circumstances, is no excuse. The company is bound to provide itself with suitable means for exercising its franchise, and therefore with sufficient rolling-stock and other equipment to enable it to handle such freight as may offer, to whatever amount it has had reasonable grounds to anticipate might be so offered.[5]

[1] Ruppel *v.* Allegheny Valley Railway, 167 Pa. St. 166; 31 Atlantic, 478; 46 Am. State, 666.

[2] Manchester, Sheffield, & Lincolnshire Railway Co. *v.* Brown, L. R., 8 App. Cases, 703. See Chapter XXXIV., Contracts of Affreightment.

[3] Bussey *v.* Memphis & Little Rock R. R. Co., 13 Fed. Rep. 330; 4 McCrary, 405.

[4] Rudell *v.* Ogdensburg Transit Co., 117 Mich. 568; 76 Northwestern, 380; 44 L. R. A. 415; Wood *v.* Chicago, Milwaukee, & St. Paul Railway Co., 59 Iowa, 196; 13 Northwestern, 99; 68 Iowa, 491; 27 Northwestern, 473; 21 Am. & Eng. R. R. Cases, 36; 24 id. 91; 56 Am. Rep. 861.

[5] Wibert *v.* New York & Erie R. R. Co., 12 N. Y. (2 Kern.) 245; Illinois Central R. R. Co. *v.* Cobb, Christy, & Co., 64 Ill. 128.

It is also bound, under like limitations, to keep in its employment men enough to run its trains with reasonable despatch. If its employees not only strike and quit work, but forcibly impede the operation of the road, this will be an excuse, provided there is no unreasonable delay in awaiting their return to work or filling their places.[1]

Delays in transportation of freight are excused, when due to an unusual press of business, if the company had a reasonable equipment for all ordinary purposes, and used reasonable expedition under the circumstances of the case.

Should a bridge be swept away by floods, and a temporary bridge constructed, strong enough to bear ordinary burdens, but not to bear the weight of some unusually heavy article, a delay in its transportation until the permanent bridge was replaced might be justifiable.[2]

7. Delivery at Destination.

A railroad company has the right to contract to cart goods from its tracks for delivery to the consignee at his place of business or residence; but seldom does. A local station agent has no authority to make such a contract for it.[3] In the absence of such a contract, delivery is to be made on its own premises.

As the owner of goods does not accompany them, and the movement of freight trains is more or less irregular, it is the business of the company to notify consignees of their arrival. Until such notice and a reasonable opportunity to call for them has been given, the company continues to be a common

[1] Geismer *v.* Lake Shore & Michigan Southern Railway Co., 102 N. Y. 563; 7 Northeastern, 828; 55 Am. Rep. 837. See Chapter XXIX., Strikes, p. 276.

[2] Vicksburg & Meridian R. R. Co. *v.* Ragsdale, 46 Miss. 458; 1 Am. Railway Rep. 407.

[3] Melbourne *v.* Louisville & Nashville R. R. Co., 88 Ala. 443, 6 Southern, 762.

carrier, although it has unloaded the goods and stored them in its station house: after that it is a warehouseman.[1]

If, at the consignee's request, the goods are left in the car for his convenience, instead of being put in a freight house, the transit is ended, and they are thenceforth at his risk.[2]

Unless there is a contrary agreement or usage, the transportation of goods by rail is not ended until they are unloaded by the railroad company from the car. If there is a freight station, they must be not only unloaded but placed in it, if of a kind that should be kept under shelter. If the consignee is to do the unloading, the transportation is not ended until the car is placed on a track convenient for that purpose.[3] If goods are shipped to a flag station, where, as the shipper knows, there is no station house or none intended for the reception of freight, the company makes a sufficient delivery by running the cars containing them on a side track at that point and giving notice to the consignee, after which it is not even as a warehouseman in regard to them.[4] It is not bound to build a freight house or keep an agent at every flag station.

8. Surrender of Bill of Lading.

It is the usage of railroad companies and therefore, in favor of an indorsee of a bill of lading, their duty, not to deliver goods shipped under it to any one who does not produce and surrender the bill.[5]

[1] Moses *v.* Boston & Maine Railroad, 32 N. H. 523; 64 Am. Dec. 381; Faulkner *v.* Hart, 82 N. Y. 413; 37 Am. Rep. 574; Wood *v.* Milwaukee & St. Paul Railway Co., 27 Wis. 541; 9 Am. Rep. 465; 2 Am. Railway Rep. 342. *Contra*, Thomas *v.* Boston & Providence R. R. Corporation, 10 Met. 472; 43 Am. Dec. 444; 1 Am. Railway Cases, 403.

[2] Gregg *v.* Illinois Central R. R. Co., 147 Ill. 550; 35 Northeastern, 343; 37 Am. State, 238 and note.

[3] Independence Mills Co. *v.* Burlington, Cedar Rapids, & Northern Railway Co., 72 Iowa, 535; 34 Northwestern, 320; 2 Am. State, 258.

[4] South and North Alabama R. R. Co. *v.* Wood, 66 Ala. 167; 41 Am. Rep. 749; 9 Am. & Eng. R. R. Cases, 419.

[5] First National Bank *v.* Northern Pacific Railway Co., 28 Wash. 439; 68 Pacific, 965.

9. Demurrage.

A rule imposing a "demurrage" charge of a reasonable sum, such as a dollar a day, for loaded cars which the consignee fails to unload within forty-eight hours after their arrival, is a reasonable one. Cars are designed for vehicles, not storehouses. Such a rule enters into the contract of shipment, and if it has been properly made public, binds all consignees, though without actual notice of it.[1]

The United States are divided up by general agreement among railroad companies into transportation districts, in each of which there is a "Car Service Association," composed of railroad companies doing business in that territory, and professedly designed to facilitate the loading and unloading of freight cars. Such associations make rules as to demurrage, which become by adoption rules of the companies constituting it. For demurrage due under such a rule, the company holding the car has a lien at common law on the goods which it contains.[2]

10. Right of Action for Loss of Goods.

If goods are lost, their owner at the time of the loss is the party to sue in tort for their conversion. *Prima facie* the consignee is the owner.[3] If the suit be one sounding in contract, the party with whom the railroad company contracted,

[1] Miller *v.* Georgia Railroad & Banking Co., 88 Ga. 563; 15 Southeastern, 316; 30 Am. State, 170; 18 L. R. A. 323; Kentucky Wagon Manufacturing Co. *v.* Ohio & Mississippi Railway Co., 98 Ky. 152; 32 Southwestern, 595; 36 L. R. A. 850; 56 Am. State, 326; Pennsylvania R.R. Co. *v.* Midvale Steel Co., 201 Pa. St. 624; 51 Atlantic, 313; 88 Am. State, 836; Norfolk & Western R. R. Co. *v.* Adams, 90 Va. 393; 18 Southeastern, 673; 44 Am. State, 916; 22 L. R. A. 530. See Chapter XXVI., Rules and Regulations.

[2] Schumacher *v.* Chicago & Northwestern Railway Co., Ill. 69 Northeastern, 825.

[3] Thompson *v.* Fargo, 49 N. Y. 188; 10 Am. Rep. 342.

namely the consignor, is the proper plaintiff, unless he in fact contracted as agent for another.[1]

11. Loss by Fire; Insurance; Subrogation.

If the owner of the goods is insured against fire, and they are burned under such circumstances as to make the carrier liable, the insurers, after paying the loss, can hold the carrier for the amount, by suit in the name of the insured. This right rests upon the doctrine of subrogation and is beyond the control of the insured.[2]

[1] Finn *v.* Western Railroad Corporation, 112 Mass. 524; 17 Am. Rep. 128.

[2] Hall & Long *v.* Railroad Companies, 13 Wall. 367; 3 Am. Railway Rep. 409.

CHAPTER XXXVI.

CARRIAGE OF ANIMALS.

1. Not necessarily the Duty of a Railroad Company.

A RAILROAD company is not bound at common law to accept live animals for transportation. It may be bound to do so if it is proved to have been in the custom of receiving them.[1]

2. Reasonable Facilities.

If it enters into this line of business, it must provide all reasonable facilities for doing it properly. Stock pens or yards near its tracks are usually necessary in all large places.[2]

3. Reasonable Despatch.

It must also effect the transportation with reasonable despatch, and a contract allowing an unreasonably long time for their transportation would be against public policy and void, so far as it prolonged the period beyond what was reasonable under the circumstances.[3]

[1] Lake Shore & Michigan Southern R. R. Co. *v.* Perkins, 25 Mich. 329; 12 Am. Rep. 275; 5 Am. Railway Rep. 249.

[2] Covington Stock-Yards Co. *v.* Keith, 139 U. S. 128, 133; 49 Am. & Eng. R. R. Cases, 149.

[3] Leonard *v.* Chicago & Alton Railway Co., 54 Mo. App. 293.

4. Not Liable as a Common Carrier of Goods.

It does not, however, when it receives live-stock, receive them as a common carrier of goods. Not being under a duty to do that kind of business, its power to refuse it implies a power to do it on such reasonable conditions as it may require. The considerations which make it an insurer of inanimate objects put in its charge for transportation do not apply to animals having some power to care for themselves and great power to injure themselves [1] while in transit, and which are generally accompanied by some one in immediate charge, representing the owner.[2]

5. Special Contracts.

It is customary in all cases of transporting live-stock to do so under a special contract, and the company can make reasonable stipulations against liability for anything short of its own negligence or that of its servants.[3] It is a reasonable stipulation that the owner or his agent load and unload the animals and take immediate charge of them during the trip.[4]

[1] Clarke *v.* Rochester & Syracuse R. R. Co., 14 N. Y. 570; 67 Am. Dec. 205.

[2] Heller *v.* Chicago & Grand Trunk Railway Co., 109 Mich. 53; 66 Northwestern, 667; 63 Am. State, 541; Penn *v.* Buffalo & Erie R. R. Co., 49 N. Y. 204, 207; 10 Am. Rep. 355. *Contra*, Kimball *v.* Rutland & Burlington R. R. Co., 26 Vt. 247; 62 Am. Dec. 567; Evans *v.* Fitchburg R. R. Co., 111 Mass. 142, 144; 15 Am. Rep. 19.

[3] Cooper *v.* Raleigh & Gaston R. R. Co., 110 Ga. 659; 36 Southeastern, 240; Ormsby *v.* Union Pacific Railway Co., 4 Federal, 170; Welch *v.* Boston & Albany R. R. Co., 41 Conn. 333; 6 Am. Railway Rep. 95; Ball *v.* Wabash, St. Louis, & Pacific Railway Co., 83 Mo. 574; 25 Am. & Eng. R. R. Cases, 384; Chicago & Northwestern Railway Co. *v.* Calumet Stock Farm, 194 Ill. 9; 61 Northeastern, 1095; 88 Am. State, 68. See Appendix VI., 11.

[4] Ormsby *v.* Union Pacific Railway Co., 4 Federal, 706, 710; Grieve *v.* Illinois Central Railway Co., 104 Iowa, 659; 74 Northwestern, 192.

6. Reasonable Diligence and Care always required.

In the absence of a special contract (or of a statutory duty) the railroad company is only bound to exercise due, that is reasonable, diligence and care to secure safe loading, transportation, and unloading, without unnecessary delays.[1] It may have two classes of cars for such uses, one safer than the other, and make its rates accordingly. If the lower rate is accepted, and is given on condition that the *maximum* liability in case of loss shall not exceed a certain sum, which sum is not necessarily unreasonable, such condition will be good, although the loss result from the carrier's negligence.[2] It cannot stipulate for entire exemption from the consequences of its negligence. It cannot thus escape the duty to furnish a car that is reasonably adapted to the purpose.[3] It cannot shield itself behind the negligence of others, which it could and reasonably should have remedied.

If a car loaded with live-stock is tendered by a connecting line, which is so ill-loaded or overloaded that the animals are in danger of injury, the tender should be refused, or else they should be put into other cars where they can be suitably accommodated.[4]

At common law a railroad company accepting live-stock for transportation, unaccompanied by any one to take charge of them, is bound to take reasonable charge of them, and if

[1] See McFadden *v.* Missouri Pacific Railway Co., 92 Mo. 343; 4 Southwestern, 689; 1 Am. State, 721; Betts *v.* Chicago, Rock Island, & Pacific Railway Co., 92 Iowa, 343; 60 Northwestern, 623; 54 Am. State, 558; 26 L. R. A. 248; Railroad *v.* Dies, 91 Tenn. 177; 18 Southwestern, 266; 30 Am. State, 871.

[2] Hart *v.* Pennsylvania Railroad Co., 112 U. S. 331; Coupland *v.* Housatonic R. R. Co., 61 Conn. 531; 23 Atlantic, 870; 15 L. R. A. 534. *Contra*, Central Railway Co. of Georgia *v.* Murphey, 113 Ga. 514; 38 Southeastern, 970; 53 L. R. A. 720.

[3] Lake Erie & Western R. R. Co. *v.* Holland, Ind. ; 69 Northeastern, 138.

[4] Paramore *v.* Western R. R. Co., 53 Ga. 383, 387.

the journey is so long that they would suffer damage if not fed and watered, to provide food and water, if the owner does not and was not expected to make such provision. Where he contracts with the company to make it, and it relies, and has a right to rely, on his performance of his undertaking, it is not liable for not making it itself.[1] But if the animals are shipped and accepted without being accompanied by any one to look after them, and the trip is of such a length, or by unusual circumstances is so prolonged, that they would necessarily suffer serious damage unless fed and watered, the carrier would be under an implied obligation to supply food and water, and would have a lien on them for the expenses thus incurred.[2]

7. Burden of Proof.

If live-stock transported in charge of their owner are delivered in bad condition, there is no presumption that the carrier was in fault. The burden of proving negligence rests upon the owner, for the animals were in his particular care. It is otherwise when no one was sent in charge. Then the ordinary presumption obtains, governing the delivery of inanimate property, that if goods shipped in good order are delivered in bad order, the carrier is in fault.[3]

8. Stipulation for Early Notice of any Claim.

Where live-stock are transported under the charge of the owner, at a reduced rate, it may be lawfully made a condi-

[1] Terre Haute & Logansport R. R. Co. *v.* Sherwood, 132 Ind. 129; 31 Northeastern, 781; 32 Am. State, 239; 17 L. R. A. 339; Lewis *v.* Pennsylvania R. R. Co., N. J. Law, ; 56 Atlantic, 128.

[2] See Chicago, Burlington, & Quincy R. R. Co. *v.* Williams, 61 Nebr. 608; 85 Northwestern, 832; 55 L. R. A. 289.

[3] Terre Haute & Logansport R. R. Co. *v.* Sherwood, 132 Ind. 129; 31 Northeastern, 781; 32 Am. State, 239; 17 L. R. A. 339; Hinkle, Craig, & Co. *v.* Southern Railway Co., 126 N. C. 932; 36 Southeastern, 348; 78 Am. State, 685.

tion of the contract that no claim for loss or damage shall be allowed unless made in writing before the unlading of the stock or within a specified time (not unreasonably short) thereafter.[1]

9. Statutory Regulation.

Transportation of live-stock between States is regulated in the interests of humanity to them by Acts of Congress.[2] It may be still regulated by a State so far as may be necessary to protect its people against the importation of cattle so diseased as to be a source of public danger.[3]

10. Dogs, with Passengers.

If a passenger desires to take a dog on the train with him, the company is not bound to permit it. If, in such case, one of its train crew, without its authority, takes the animal in charge by a special arrangement with the passenger, for a compensation paid him, and puts it in a baggage car, the company does not become a common carrier of it.[4]

[1] Goggin *v.* Kansas Pacific Railway Co., 12 Kans. 416; 8 Am. Railway Rep. 278.

[2] See Chapter XXXVIII., Inter-State Business.

[3] Railroad Co. *v.* Husen, 95 U. S. 465; Reid *v.* Colorado, 187 U. S. 137.

[4] Honeyman *v.* Oregon & California R. R. Co., 13 Oreg. 352; 10 Pacific, 628; 57 Am. Rep. 20; 25 Am. & Eng. R. R. Cases, 380.

CHAPTER XXXVII.

TRANSPORTATION OF GOODS OVER CONNECTING RAILROADS.

1. Judicial Regulation.

THE methods of interchanging traffic between connecting railroads cannot be regulated by the courts at common law.[1]

By Act of Congress freedom of interchange is secured to inter-State railroads (U. S. Rev. Stat. § 5258) as against State or local interference, and these provisions will, of course, be enforced by all courts, State and national, by appropriate remedies.[2]

2. Traffic Associations.

Railroad companies whose lines connect often enter into traffic contracts with each other for through transportation

[1] Central Stock Yards Co. *v.* Louisville & Nashville R. R. Co., 118 Federal, 113; 55 C. C. A. 63.

[2] City of Council Bluffs *v.* Kansas City, St. Joseph, & Council Bluffs R. R. Co., 45 Iowa, 338, 344, 346-348, 352; Bowman *v.* Chicago & Northwestern Railway Co., 125 U. S. 465.

on a joint through rate.[1] Such a contract may impose upon them a joint liability to third parties as to that description of business. While two railroad companies could not enter into a general partnership for all railroad purposes, they can enter into what, as to those who deal with them, entails the liability of partners, for the more convenient handling and fostering of a particular railroad purpose, such as through transportation of persons or goods. Such arrangements frequently result in the adoption of a conventional name, under which the companies conduct the business as an association.[2]

Under the Sherman Act (XXVI. U. S. Stat. 209) associations of railroad companies to restrain inter-State commerce by maintaining certain freight rates, whereby it is thus directly restrained and impeded, are illegal, even though the rates be, in themselves, reasonable.[3]

3. No Duty to set up a Through System over Intersecting Railroads.

In the absence of any contract, one railroad company stands, at common law, to another in no better position, because their roads connect, than that of any other person, natural or artificial, by whom business may be offered.[4] The right to connect two railroads does not imply a right to force upon the company owning either of them the establishment

[1] See Appendix VI. 1.

[2] Block *v.* Fitchburg R. R. Co., 139 Mass. 308; 1 Northeastern, 348; Burke *v.* Concord R. R. Co., 61 N. H. 160; 8 Am. & Eng. R. R. Cases, 552; Chicago, Peoria, & St. Louis Railway Co. *v.* Ayres, 140 Ill. 644; 30 Northeastern, 687; Pittsburgh, Cincinnati, & St. Louis Railway Co. *v.* Keokuk & Hamilton Bridge Co., 131 U. S. 371, 385. *Cf.* Insurance Co. *v.* Railroad Co., 104 U. S. 146, 158; Swift *v.* Pacific Mail Steamship Co., 106 N. Y. 206; 12 Northeastern, 583; 30 Am. & Eng. R. R. Cases, 105.

[3] United States *v.* Trans-Missouri Freight Association, 166 U. S. 290; United States *v.* South Traffic Association, 171 U. S. 505. See *ante*, p. 16, and *post*, Chapter LVII., Penal Actions and Criminal Prosecutions.

[4] Shelbyville R. R. Co. *v.* Louisville, Cincinnati, & Lexington R. R. Co., 82 Ky. 541; 21 Am. & Eng. R. R. Cases, 233.

of any special business relations with the other company. Setting up a continuous business connection, with through tickets, through bills of lading and through checking of baggage, is, in the absence of a statute to the contrary, no necessary consequence of a union of tracks.[1]

4. Mandatory Injunctions.

In respect to the remedy for a breach of the duty to receive goods tendered by a connecting railroad company, the latter, from the character of its business, has a claim to assistance from a court of equity which would not belong to an ordinary individual. His damages could be more readily and exactly proved, and they would seldom be of an irreparable nature. The wrong to the railroad company is also of a continuing kind, and would lie in a succession of refusals, each involving but a small pecuniary loss, but all amounting to a great sum. A mandatory injunction is therefore an appropriate remedy to compel one company to desist from refusing to accept goods tendered by another.[2]

5. Through Contracts by the First Carrier.

Unless prohibited by charter or statute, every railroad company has power by special contract with a shipper to undertake for the transportation of persons or property beyond its own line to points on connecting roads, and this whether it has in fact made such previous arrangements with those roads or not as to enable it to make such undertaking safely.[3]

[1] Atchison, Topeka, & Santa Fé R. R. Co. *v.* Denver & New Orleans R. R. Co., 110 U. S. 667, 683.

[2] Toledo, Ann Arbor, & North Michigan Railway Co. *v.* Pennsylvania Co., 54 Federal, 730; 53 Am. & Eng. R. R. Cases, 307; 19 L. R. A. 387.

[3] Myrick *v.* Michigan Central R. R. Co., 107 U. S. 102.

6. Stipulations in Favor of Succeeding Carriers.

Bills of lading on through shipments over connecting roads are often given by the first carrier, with a provision that "no carrier or party in possession" of the goods shipped while in transit shall be liable for losses of a certain description or beyond a certain amount. Such a provision, if of a kind valid in favor of the first carrier, enures to the benefit of each of the connecting roads as fully as if it had itself issued the bill of lading.[1]

7. Implied Through Contract.

Receiving the amount of the freight charges of all the connecting roads in advance from the shipper is evidence tending to show that the company receiving it contracts for the entire carriage. It is not, however, necessarily inconsistent with a claim that the part going to each of the other roads was collected as its agent.[2] Simply stating the through price to the consignor, or entering it on the bill of lading, on a consignment to another who was to pay it, is not, of itself, sufficient evidence of a through contract.[3]

No through contract can be made by a local freight agent without further authority than belongs to his local agency, unless such has been the custom at that place; nor by any "despatch company" or freight solicitor authorized simply to make contracts for transportation over the initial road;[4] nor

[1] Mears *v.* New York, New Haven, & Hartford R. R. Co., 75 Conn. 171; 52 Atlantic, 610; 56 L. R. A. 884. See Appendix VI. 9, 11.

[2] Railroad Co. *v.* Pratt, 22 Wall. 123, 132; Washburn & Moen Manufacturing Co. *v.* Providence & Worcester R. R. Co., 113 Mass. 490.

[3] Stewart *v.* Terre Haute & Indianapolis R. R. Co., 3 Federal, 768; 1 McCrary, 312; Camden & Amboy R. R. Co. *v.* Forsyth, 61 Pa. St. 81; McEacheran *v.* Michigan Central R. R. Co., 101 Mich. 264; 59 Northwestern, 612; Pennsylvania Co. *v.* Dickson, Ind. ; 67 Northeastern, 538.

[4] Insurance Co. *v.* Railroad Co., 104 U. S. 146, 157; 3 Am. & Eng. R. R. Cases, 260.

will it be implied from doubtful expressions or loose language used by an agent fully authorized.[1]

8. Imposing a Particular Route on the Shipper.

A special contract, if made, may limit the carriage beyond the terminus of the first carrier to a particular one of several competing routes, and transportation may be so offered on that route only, although others might suit the shipper better. He has no right to demand transportation beyond such terminus, and cannot complain, so long as he receives the same treatment in this respect as all others.[2]

9. Acts of First Carrier as a Forwarding Agent.

Where there is no through contract, the first road transports the goods as a common carrier, but delivers them as a forwarding agent for their owner.[3] Hence, as to the connecting carriers, its directions are his directions. Each carrier on the line engages to perform a separate and entire duty. Therefore, for a loss occurring on any road, that road is alone responsible, and it is responsible directly to the owner, from whose agent it received them.[4] Under such a forwarding agency the carrier's liability to the owner ordinarily continues until the connecting carrier has actually received them.[5] The first contract of carriage is not fulfilled until the per-

[1] Myrick *v.* Michigan Central R. R. Co., 107 U. S. 102; 9 Am. & Eng. R. R. Cases. *Contra*, Toledo, Peoria, & Warsaw Railway Co. *v.* Merriman, 52 Ill. 123; 4 Am. Rep. 590. The English rule also is otherwise: Muschamp *v.* Lancaster & Preston Junction Railway Co., 8 M. & W. 421.

[2] Atchison, Topeka, & Santa Fé R. R. Co. *v.* Denver & New Orleans R. R. Co., 110 U. S. 667, 680.

[3] Railroad Co. *v.* Manufacturing Co., 16 Wall. 318.

[4] Aigen *v.* Boston & Maine R. R., 132 Mass. 423; 6 Am. & Eng. R. R. Cases, 426.

[5] Fenner *v.* Buffalo & State Line R. R. Co., 44 N. Y. 505; 4 Am. Rep. 709; Nashua Lock Co. *v.* Worcester & Nashua R. R. Co., 48 N. H. 339; 2 Am. Rep. 242.

formance of the second has been entered upon, or at least until there is such a notification to the second carrier of the arrival of the goods as is equivalent to a tender of delivery.[1] If the first carrier is compelled to store the goods, owing to the neglect of the next carrier to receive them, it may, if such neglect violate the contract or usual course of business between them, hold the latter for any loss occasioned by having to retain the goods in store beyond a reasonable time. And if extraordinary accidents, such as a storm or flood, prevent a delivery to the next carrier, the first carrier, on giving reasonable notice to the owner, may turn his liability into that of a warehouseman.[2]

10. Perishable Goods.

If the first carrier has collected freight for the entire distance, but by its own mistake has not asked enough to pay the last carrier its regular charge (there being no joint rate), the latter does not thereby come under any obligation to the shipper to transport at a less rate. If the goods are perishable, and in need of speedy transportation, it may be constituted by the emergency an agent of the owner to transport them at its regular rate and with a corresponding lien.[3]

11. Selection of Route when there is no Special Contract.

When no special contract has been made, and there are several competing roads over which the goods may be forwarded to their destination, the first carrier, in the absence of instructions which have been assented to by it, or of a controlling usage, can select any reasonably direct and safe route.[4]

[1] Texas & Pacific Railway Co. *v.* Reiss, 183 U. S. 621, 626.

[2] Conkey *v.* Milwaukee & St. Paul Railway Co., 31 Wis. 619; 11 Am. Rep. 630; 2 Am. Railway Rep. 353.

[3] Crossan *v.* New York & New England R. R. Co., 149 Mass. 196; 21 Northeastern, 367; 14 Am. State, 408; 3 L. R. A. 766.

[4] Snow *v.* Indiana, Bloomington, & Western Railway Co., 109 Ind. 422; 9 Northeastern, 702.

12. Traffic Balances.

The general usage is, for a railroad company receiving goods destined for a point beyond the terminus of its own road, to deliver them at such terminus to the connecting road, collecting its own freight charges from the latter, and thereby investing it with a lien upon the goods for the money so advanced as well as for its own charges; and this operation is repeated when the second carrier delivers at the end of its route to the third, and so on; the last carrier having a lien both for his own charge and for the accumulated charges of all the preceding carriers, as successively advanced at each connecting point.[1] These charges are sometimes demanded on delivery of the goods to the connecting carrier, but more often are made the subject of a book account between the two companies, each debiting the other for through freight delivered to it and crediting the other for through freight received from it. This account is generally rendered and adjusted monthly. The balance found due from one or the other road is termed a "traffic balance." Prepayment in cash is seldom required, except from roads in embarrassed circumstances. It can be required of some, and not of others, at the discretion of the forwarding company.[2] Arrangements of this character between connecting railroads do not create any partnership or joint liability in favor of the shipper.[3]

[1] Conkey *v.* Milwaukee & St. Paul Railway Co., 31 Wis. 619; 11 Am. Rep. 630; 2 Am. Railway Rep. 353; Briggs *v.* Boston & Lowell R. R. Co., 6 Allen, 246; 83 Am. Dec. 626.

[2] Little Rock & Memphis R. R. Co. *v.* St. Louis Southwestern Railway Co., 63 Federal, 775; 11 C. C. A. 417; 27 U. S. App. 380; 26 L. R. A. 192.

[3] Darling *v.* Boston & Worcester R. R. Corporation, 11 Allen, 295, 298.

13. Delivery to Switching Company.

If on the arrival at a place of goods billed to a particular warehouse in that place, which is accessible by a switch-track connecting with the railroad forming the last link in the route of transportation to that place, the company owning that road contracts with a corporation engaged in the business of switching cars in that place to leave the car at the warehouse, the latter, while it may be its agent for that purpose, is also, as to the owner of the goods, a common carrier, and liable as such for negligence.[1]

14. Reception of Loaded Cars.

When loaded cars are received from a connecting railroad and come under the charge of the company receiving them, it is, in the absence of any special agreement, a common carrier, in most respects, of the cars for their owner and, in all respects, of the goods they contain for those who own them.[2] Inasmuch as the cars are not of its selection or equipment, and run upon their own wheels, it is not, as to their owner, in the position of an insurer of their roadworthiness or of their adaptation to the use to which he has put them.

An agreement or custom between connecting railroads, by which a car is not to be considered as delivered, or if delivered is not to be forwarded, unless accompanied by a freight bill and expense voucher, is not necessarily an unreasonable one, and if found reasonable in fact, justifies a refusal to receive a car without such papers.[3] Switching it

[1] Missouri Pacific Railway Co. *v.* Wichita Wholesale Grocery Co., 55 Kans. 525; 40 Pacific, 899; Peoria & Pekin Union Railway Co. *v.* Chicago, Rock Island, & Pacific Railway Co., 109 Ill. 135; 50 Am. Rep. 605; 18 Am. & Eng. R. R. Cases, 506.

[2] Vermont & Massachusetts R. R. Co. *v.* Fitchburg R. R. Co., 14 Allen, 462; 92 Am. Dec. 785.

[3] Reynolds *v.* Boston & Albany R. R. Co., 121 Mass. 291.

upon the tracks of the second road, under such circumstances, would not, alone, constitute a delivery.[1] But if received, the shipper can hold the road receiving it as a common carrier, although no papers came with it.[2]

The principles of the common law have thus far been applied to railroad companies with respect to their duty to receive and haul loaded cars belonging to other companies; and in the absence of a constitutional or statutory requirement, or of a usage from which a contract may be implied, it is held that no such duty exists. The question is complicated by the practical difficulty in adjusting the freight charges to be paid to a company receiving and hauling foreign cars. It has been the common practice to allow the owner of each loaded car a compensation for its use based on the number of miles over which it is run by the company accepting it. Since 1902 the compensation as respects cars owned by railroad companies has been generally not based on mileage, but twenty cents a day for each car. But if the company to which such a car is tendered has at the time cars of its own standing idle, it seems hard to compel it to use foreign cars on its own road.

As intersecting railroads are intersecting highways, it is for the public interest that vehicles passing over one may be readily and promptly turned into the other. For locomotive engines drawing trains this is practically impossible, unless under special arrangements; but there is no difficulty in running cars from one railroad upon another to be hauled by the engines of the latter. It would seem that the common law raises a duty to accept empty cars of suitable gauge, construction, and condition. It is clear that no such duty exists to receive and haul loaded passenger cars. This would involve the company forced to receive them in responsibilities

[1] Palmer *v.* Chicago, Burlington, & Quincy R. R. Co., 56 Conn. 137, 144; 13 Atlantic, 818; 35 Am. & Eng. R. R. Cases, 629.

[2] Michaels *v.* New York Central R. R. Co., 30 N. Y. 564; 86 Am. Dec. 415.

towards persons — the passengers — with whom it has not contracted, and whom it cannot keep under its absolute control, as it can inanimate objects. With respect to loaded freight cars, however, it is probable that the usage of receiving them, notwithstanding the company to which they are offered has cars enough of its own to haul their contents, will become steadily more general, and so ripen into a universal and controlling custom. At present it has not attained that character, and a company is under no duty (except by local custom or contract) to accept loaded foreign cars, unless it has none of its own ready for use into which the goods can be shifted.[1]

A company receiving loaded foreign cars commonly takes them into its own exclusive charge, and therefore properly comes, as to the owners of the lading, under all the liabilities of a common carrier of goods.[2] If goods known to require constant refrigeration to preserve them are shipped over several connecting lines, each which thus receives them is bound to the shipper to see that such refrigeration is provided while they are upon its road, and a custom between the lines, not known to him, for each to accept such goods in sealed cars from any other line, and transport them without

[1] Oregon Short Line & Utah Northern Railway Co. *v.* Northern Pacific R. R. Co., 51 Federal, 465; 61 Federal, 158, 163; 9 C. C. A. 409; 15 U. S. App. 479; Little Rock & Memphis R. R. Co. *v.* St. Louis, Iron Mountain, & Southern Railway Co., 59 Federal, 400, 408; Atchison, Topeka, & Santa Fé R. R. Co. *v.* Denver & New Orleans R. R. Co., 110 U. S. 667, 683; McAlister *v.* Chicago, Rock Island, & Pacific R. R. Co., 74 Mo. 351, 358; 7 Am. & Eng. R. R. Cases, 373. Cases which suggest the existence of a duty will be found to be supported by some provision of positive law. *Cf.* Vermont & Massachusetts R. R. Co. *v.* Fitchburg R. R. Co., 14 Allen, 462; 92 Am. Dec. 785; Peoria & Pekin Union Railway Co. *v.* Chicago, Rock Island, & Pacific Railway Co., 109 Ill. 135; 50 Am. Rep. 605; 18 Am. & Eng. R. R. Cases, 506; Chicago, Burlington, & Quincy R. R. Co. *v.* Curtis, 51 Nebr. 442; 71 Northwestern, 42; 66 Am. State, 456.

[2] Vermont & Massachusetts R. R. Co. *v.* Fitchburg R. R. Co., 14 Allen, 462; 92 Am. Dec. 785.

opening the cars, would be no defence if he sued for a resulting loss.[1]

In hauling cars which belong to and remain in partial charge of another party, and are specially adapted to a certain line of business, such as those of a circus company, a railroad company does not act as a common carrier, and so can limit or exclude responsibility even for its own negligence.[2]

Railroads engaged in inter-State commerce, and properly equipped with power or train brakes, need not accept from connecting roads any cars not so equipped.[3]

15. Presumption of Fault of Last Carrier.

Where a box of goods is shipped over several connecting lines, and the last carrier receives the box in apparent good order, but on delivery the consignee finds goods missing, it is *prima facie* a legal presumption that they were abstracted while in the custody of such carrier.[4]

If a trunk is checked by the first of two connecting railroads to go over both, and the latter fails to deliver it on due demand, there is no presumption that the first road was in fault,[5] and it is not liable for the loss, unless the contract evidenced by the ticket was a joint, or joint and several one,[6]

[1] Beard & Sons *v.* Illinois Central Railway Co., 79 Iowa, 518; 44 Northwestern, 800; 18 Am. State, 381; 42 Am. & Eng. R. R. Cases, 445; 7 L. R. A. 280.

[2] Chicago, Milwaukee, & St. Paul Railway Co. *v.* Wallace, 66 Federal, 506; 14 C. C. A. 257; 24 U. S. App. 589; 30 L. R. A. 161. *Cf.* Russell *v.* Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Co., 157 Ind. 305; 61 Northeastern, 678; 87 Am. State, 214; 55 L. R. A. 253.

[3] U. S. Stat. at Large, XXVII., 531, § 3.

[4] Laughlin *v.* Chicago & Northwestern Railway Co., 28 Wis. 204; 5 Am. Railway Rep. 323; 9 Am. Rep. 493. See Chapter LIII., Rules of Evidence: Presumptions and Assumptions.

[5] Stimson *v.* Connecticut River R. R. Co., 98 Mass. 83; 93 Am. Dec. 140.

[6] Wolff *v.* Central Railroad Company of Georgia, 68 Ga. 653; 45 Am. Rep. 501; 6 Am. & Eng. R. R. Cases, N. S. 441.

or unless it contracted on its own account for the whole trip.[1]

Where goods shipped over several connecting lines are delayed in transportation, there is no presumption that the delay occurred on the last line.[2]

[1] Milnor *v.* New York & New Haven R. R. Co., 53 N. Y. 363; 5 Am. Railway Rep. 381.

[2] Almand *v.* Georgia R. R. & Banking Co., 95 Ga. 775; 22 Southeastern, 674.

CHAPTER XXXVIII.

INTER-STATE BUSINESS.

1. By what Companies and how done by Rail.

RAILROAD traffic between States is mainly carried on by consolidated companies existing under the laws of several adjoining States. Other kinds of companies transacting this business have been described in Chapter II. It can also, of course, be done by independent companies — each incorporated by one State and that alone, and owning a railroad in one State and that alone, but having track connections and exchanging business with each other.

A railroad company of one State, having authority from that to extend its line into another and to operate it there, may do so by the consent of the latter, without obtaining

from it any new grant of corporate powers.[1] It then remains in the second State a foreign corporation,[2] but may nevertheless be given by it the power of eminent domain.[3] Whenever that power is confided by the sovereign to a private individual or corporation, its exercise is an act of agency, and the real actor is the State. Hence the ordinary principles of the law of principal and agent apply, and it is immaterial whether the act be performed by a foreigner or a citizen.

Such a company cannot plead the statute of limitations of the new State into which it has entered; for its residence continues in the State of its creation.

Steam railroads, whether wholly situated within one State or not, are clothed with important privileges by the Revised Statutes of the United States, § 5258, which reads as follows:

"Every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, Government supplies, mails, freight, and property on their way from one State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination. But this section shall not affect any stipulation between the government of the United States and any railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be

[1] Pennsylvania R. R. Co. *v.* St. Louis, Alton, & Terre Haute R. R. Co., 118 U. S. 290, 296.

[2] Goodlett *v.* Louisville & Nashville R. R., 122 U. S. 391, 410; Milnor *v.* New York & New Haven R. R. Co., 53 N. Y. 363; 5 Am. Railway, 381.

[3] See Chapter IX., Acquisition of Land by Condemnation Proceedings.

construed to authorize any railroad company to build any new road or connection with any other road without authority from the State in which such railroad or connection may be proposed. And Congress may at any time alter, amend, or repeal this section."

The right thus given to the company of one State "to connect" its road with that of a company of another State authorizes such a connection as will allow cars to be run from one road directly upon the other. No State legislation requiring a change of cars can avail to prevent this.[1]

2. Inter-State Commerce free from State Interference.

This statute, in authorizing the transportation of "freight and property" destined to another State, implies an intention on the part of Congress that such transportation shall be free. It therefore cannot be trammelled by State legislation.[2] If wrongfully obstructed by private individuals, the courts of the United States can protect it by the writ of injunction.[3]

3. State Control over Railroad Incorporation for Inter-State Business.

As a State may grant or refuse the privilege of incorporation under its laws at pleasure, it can grant it on such terms as it may choose to exact. If, therefore, a railroad franchise be granted on condition of a certain payment, whether as a bonus in advance, or annually out of income that may be received, to the State treasury, the mere fact that this condition may indirectly add to the charges which would other-

[1] City of Council Bluffs *v.* Kansas City, St. Joseph, & Council Bluffs R. R. Co., 45 Iowa, 338, 346–348, 352.

[2] Bowman *v.* Chicago & Northwestern Railway Co., 125 U. S. 465, 485.

[3] *In re* Debs, 158 U. S. 564, 580, 590, 592; Toledo, Ann Arbor, & North Michigan Railway Co. *v.* Pennsylvania Co., 54 Federal, 730; 19 L. R. A. 387.

wise be made for transportation services between States by the company so incorporated does not invalidate it.[1] Such payment may be required to be proportioned to the amount of business done, although a large part of that business may be inter-State commerce.[2] If, however, all the earnings of the carrier came from inter-State business, they could not be taxed in this way; for the tax would then be a direct burden upon such business.[3] Nor in any case can a railroad corporation of one State be taxed by another directly upon the amount of inter-State business done in the latter.[4]

A State may prohibit the consolidation of competing railroad companies, although they may be engaged in inter-State business and claim that consolidation would promote it.[5] It is a legitimate mode of safeguarding the interests of its people against monopolies.

4. Transportation of Live-stock.

The transportation of live-stock by any railroad company (whatever be the motive power used) on a road forming part of a line over which they are being taken from one State to another[6] is regulated by United States Revised Statutes, § 4386, *et seq.*, in such a way as to secure their humane treatment while in transit unless "storm or other accidental causes" should prevent their receiving proper attention. A penalty of not less than $100 is provided for each offence. This provision does not import a penalty for each animal

[1] See Chapter XXIV., Taxation, pp. 203–205.

[2] State Tax on Railway Gross Receipts, 15 Wall. 284.

[3] Philadelphia & Southern Steamship Co. *v.* Pennsylvania, 122 U. S. 326.

[4] Fargo *v.* Michigan, 121 U. S. 230; 7 Sup. Ct. 857.

[5] Louisville & Nashville R. R. Co. *v.* Kentucky, 161 U. S. 677, 702.

[6] The statute does not affect cattle not being transported between States, though in a car on a road which is an inter-State road. United States *v.* East Tennessee, Virginia, & Georgia R. R. Co., 13 Federal, 642. See Chapter XXXVI., Carriage of Animals.

not treated as the law requires, when there are several animals included in the same shipment.[1] An accident to a train due to the company's negligence is not an excuse.[2]

The shipment by rail from one State or Territory to another of live-stock affected by any contagious or infectious disease is prohibited also by United States Statutes at Large, Vol. XXIII. p. 32, § 6. This prohibition does not so far cover the whole field of transporting live-stock from or into a State as to deprive the State of the power of legislating on the subject for the protection of its inhabitants, in a way that does not conflict with what Congress has ordained.[3]

5. Congressional Regulation of the Cars used.

Cars used in inter-State commerce[4] must, by an Act of Congress passed in 1893, and its amendments (XXVII. Stat. 531; XXIX. Stat. 85; XXXII. Stat. 943), which took full effect August 1, 1900, be equipped in a certain manner, which has been stated in Chapter XX. p. 182.

Brakemen remaining in the service of a railroad, the cars on which are not properly equipped with grab-irons, are by this statute not to be deemed to waive thereby a right of recovery, if injured for want of them. The statute being a penal one, and so to be strictly construed, is held not to exclude from the jury the consideration of their remaining with knowledge of the defective equipment as evidence tending to show contributory negligence, if it appears that they did not exercise due care in view of the existence of the defects.[5]

[1] United States *v.* Boston & Albany R. R. Co., 15 Federal, 209.

[2] Newport News & Mississippi Valley Co. *v.* United States, 61 Federal, 488; 9 C. C. A. 579; 22 U. S. App. 145.

[3] Reid *v.* Colorado, 187 U. S. 137.

[4] Cars are so used, though unladen, when moving to a point where they are to be laden with goods to be carried to another State. Voelker *v.* Chicago, Milwaukee, & St. Paul Railway Co., 116 Federal, 867.

[5] Sprague *v.* Southern Railway Co., 92 Federal, 59; 34 C. C. A. 207; 63 U. S. App. 711.

It is not enough that the cars were originally equipped with proper couplers. Due care must be used to maintain them continually in good working condition.[1]

6. The Inter-State Commerce Commission.

The Inter-State Commerce Commission created by Act of Congress in 1887 has large power over inter-State railroads.[2]

Their decisions are collected in a series of reports known as Inter-State Commerce Commission Reports. Many of them have been overruled by the courts, and the practical working of the Inter-State Commerce law has not been in all respects satisfactory.

7. Summary of the Inter-State Commerce Act.

Its general features are these:

It applies only to common carriers by rail, or partly by rail and partly by water.

It applies only to transportation between one State or Territory and another or a foreign country.

It requires all charges for such transportation to be reasonable, just, and equal, without rebates or any undue preferences. A reduction of charges in favor of the public or of charitable objects is permitted.

It forbids carriers to discriminate unequally between connecting carriers.

It forbids a greater charge "under substantially similar circumstances and conditions" for a short haul than for a long one including the former,[3] except by special permission of the Commission.

[1] Philadelphia & Reading Railway Co. *v.* Winkler, Del. ; 56 Atlantic, 112.

[2] U. S. Statutes at Large, Vol. XXIV. p. 379; Vol. XXV. p. 855; Vol. XXVI. p. 743; Vol. XXVII. pp. 443, 531; Vol. XXXII. p. 847.

[3] The inability of the State to prevent this was the moving cause of this Act of Congress. Wabash, St. Louis, & Pacific Railway Co. *v.* Illinois, 118 U. S. 557.

It forbids any pooling.

It requires the publication by each carrier of its rates of charge, and strict adherence to them, as thus published.

No advance in these can be made except after ten days' notice; no reduction except after three days' notice.

Special remedies are provided in favor of parties aggrieved by violations of the Act.

Railroad officials can be compelled in any proceeding under this Act to disclose any unlawful practices to which they may have been parties; but in such case those so testifying cannot be prosecuted for the offences committed.[1]

As it is only undue preferences that are prohibited, large parties may still be transported at lower rates for each individual than are charged for a similar service to a single person.[2]

The Commission is without power to regulate railroad charges, except by way of revision. The railroad company makes them, and then they can be altered by the Commission if deemed unjust or unreasonable.[3] The Commission can also procure the institution by the United States of suits to compel conformity to the established rates.[4]

Inasmuch as the published rates of charges must be strictly maintained, any agreement with any particular person to take less would be illegal.[5]

8. Its Effect in narrowing the Powers of the States.

Before the enactment of the Inter-State Commerce Act the States, in the exercise of their police power, had a much

[1] The constitutionality of this provision (Act of Feb. 11, 1893) was upheld in Brown *v.* Walker, 161 U. S. 591; 16 Sup. Ct. 644.

[2] Interstate Commerce Commission *v.* Baltimore & Ohio R. R. Co., 145 U. S. 263; 12 Sup. Ct. 844.

[3] Cincinnati, New Orleans, & Texas Pacific Railway Co. *v.* Interstate Commerce Commission, 162 U. S. 184, 196; Interstate Commerce Commission *v.* Same, 167 U. S. 479.

[4] Missouri Pacific Railway Co. *v.* United States, 189 U. S. 274.

[5] Gulf, Colorado, & Santa Fé Railway Co. *v.* Hefley, 158 U. S. 98.

wider jurisdiction over inter-State railroads than they have since possessed. All State statutes are now necessarily inoperative when they operate upon the same subject-matter as that of the Inter-State Commerce Act and prescribe a different rule.[1] Thus a State statute requiring all railroad companies to adhere strictly to any rates of charge specified in their bills of lading is inoperative as against inter-State shipments billed at less than the published tariff rates. It would in such cases, if effectual, enforce an illegal discrimination.[2] But State laws regulating the business of common carriers, unless in conflict with some express enactment of Congress, are not invalid because they incidentally and remotely affect inter-State commerce. A State statute prohibiting any one from acting as a locomotive engineer unless licensed by a State board of examiners applies to the engineer of a train making continuous trips to and from another State.[3] So a statute has been upheld forbidding the heating by stoves of any cars run in or through the State,[4] and one prohibiting the running of freight trains in or through the State on Sunday.[5] A law requiring railroad companies so to order their tracks and intersections as to give greater and not unreasonable facilities for transacting inter-State commerce does not transcend the power of a State. It is in aid of such commerce and not a possible impediment to it.[6]

But a statute would be void which imposed a tax for maintaining an office in the State on a foreign inter-State railroad company. This would strike directly at its business and

[1] Gulf, Colorado, & Santa Fé Railway Co. *v.* Hefley, 158 U. S. 98, 105.

[2] *Ibid.*

[3] Smith *v.* Alabama, 124 U. S. 465.

[4] New York, New Haven, & Hartford R. R. Co. *v.* New York, 165 U. S. 628, 631.

[5] Hennington *v.* Georgia, 163 U. S. 299, 303, 308, 317.

[6] Wisconsin, Minnesota, & Pacific R. R. *v.* Jacobson, 179 U. S. 287.

necessarily tend to increase its charges.[1] Keeping such an office is itself an act and a means of inter-State commerce. Nor can the owners of goods in transit by rail from one State to another, or of goods or live-stock on the way to a railroad station there to be shipped from one State to another, be taxed by any State in which such property happens to be while so in course of transportation.[2]

The validity of State legislation which indirectly affects inter-State railroad business, on any point not regulated by Act of Congress, depends in each instance largely on the reasonableness of the statute in view of the particular circumstances to which it applies. Thus, a law forcing an inter-State railroad company to stop three trains daily, if it runs so many, at all stations on its line in places with over three thousand inhabitants has been held valid;[3] and statutes directing that all trains must be run to and stopped at a station at the end of a branch over three miles long, or that all trains must be stopped at all county seats, pronounced invalid.[4]

Limiting the speed of inter-State trains, including those carrying the mail, to a moderate rate, within the limits of a thickly populated municipality, is a reasonable and proper measure of local police.[5]

9. The Common Law of the State applied.

The courts of the United States, in dealing with inter-State commerce transactions having their seat within a State,

[1] Norfolk & Western R. R. Co. *v.* Pennsylvania, 136 U. S. 114, 118.

[2] Kelley *v.* Rhoads, 188 U. S. 1.

[3] Lake Shore & Michigan Southern Railway Co. *v.* Ohio, 173 U. S. 285, 303, 308.

[4] Illinois Central R. R. Co. *v.* Illinois, 163 U. S. 142, 153; Cleveland, Cincinnati, Chicago, & St. Louis Railway Co. *v.* Illinois, 177 U. S. 514.

[5] Chicago & Alton R. R. Co. *v.* Carlinville, 200 Ill. 314; 65 Northeastern, 730; 60 L. R. A. 391; 93 Am. State, 190.

apply the general principles of the common law of that State (as they understand it) so far as the point presented has not been settled by statute.[1] Nor does either the Inter-State Commerce Act or the general power of Congress over inter-State commerce prevent the State courts from enforcing against inter-State railroad companies such common-law remedies as these courts recognize for common-law wrongs committed in doing their inter-State business.[2] So as a general rule it may be said that railroad companies, wherever incorporated, and whether doing business between States or not, in respect to such business as they may do in a State are subject to its law. The common law as to carriers is subject there to such change by legislation, within constitutional limits, as the State may think fit. It is to State law that resort is naturally had to determine the rights and duties of common carriers and the manner of compelling them to perform their obligations or answer for their breach. "Persons travelling on inter-State trains are as much entitled, while within a State, to the protection of that State as those who travel on domestic trains. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable, according to the law of the State, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. It is equally within the power of the State to

[1] Western Union Telegraph Co. *v.* Call Publishing Co., 181 U. S. 92, 101, approving Murray *v.* Chicago & Northwestern Railway Co., 62 Federal, 24. The other view had been ably maintained in Swift *v.* Philadelphia & R. R. Co., 58 Federal, 858; 64 Federal, 59.

[2] Chicago, Milwaukee, & St. Paul Railway Co. *v.* Solan, 169 U. S. 133, 136.

prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the State has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of inter-State commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce."[1]

10. State Business done at One Rate, and Inter-State at Another.

While rates for carriage by an inter-State railroad on a route wholly within one State can be regulated by that State, it cannot require such a company to regulate its rates for inter-State business by those which it may establish for such State business. This would be directly to affect inter-State commerce.[2]

11. Conflict of Laws between States.

For contracts made by a railroad company in one State for transportation of goods or passengers from thence to another State, the governing law, as to any breach of duty occurring in a second State, is the law of that State, if and only if the contracting parties should be considered to have so intended.[3] In case of a contract for transportation from one point to another in the same State, the fact that the road

[1] Chicago, Milwaukee, & St. Paul Railway Co. *v.* Solan, 169 U. S. 133, 137.

[2] Louisville & Nashville R. R. Co. *v.* Eubank, 184 U. S. 27, 41.

[3] Liverpool & Great Western Steam Co. *v.* Phenix Insurance Co., 129 U. S. 397, 447-462; Curtis *v.* Delaware, Lackawanna, & Western R. R. Co., 74 N. Y. 116; 30 Am. Rep. 271.

for a small part of the distance is situated in a different State will not, in case of an injury suffered in such other State, make the right of action governed by the laws of the latter. The rule that the law of the place of performance applies is founded on the presumed intention of the parties; and their intention, in the case mentioned, to make the laws of the second State enter into the contract cannot fairly be presumed.[1]

The question as to the law applicatory to a contract made in one State, and to be performed in another, presupposes that there is a contract.[2] If the law of the State where the parties purport to contract makes their agreement void, its terms cannot control the liability of the railroad company, in whatever State it may be sued.[3]

12. What is Inter-State Business within the Scope of the Inter-State Commerce Act?

The Inter-State Commerce Act includes companies operating a railroad wholly within one State, if, and as far as, they engage in inter-State business.[4] A contract to transport goods from one point in a State to another, and deliver them there to another carrier for transportation to a point to which they are billed, out of the State, is such business.[5] But if they are billed to the first point of delivery, and no through rate has been agreed on between the two carriers, it is local

[1] Dyke *v.* Erie Railway Co., 45 N. Y. 113; 6 Am. Rep. 43.

[2] Freeman's Appeal, 68 Conn. 533; 37 Atlantic, 420; 57 Am. State, 112; 37 L. R. A. 452. See Mitchell *v.* First National Bank, 180 U. S. 471.

[3] Illinois Central R. R. Co. *v.* Beebe, 174 Ill. 13; 50 Northeastern, 1019; 43 L. R. A. 210; 66 Am. State, 253.

[4] Cincinnati, New Orleans, & Texas Pacific Railway Co. *v.* Interstate Commerce Commission, 162 U. S. 184.

[5] Houston Direct Navigation Co. *v.* Insurance Co. of North America, 89 Tex. 1; 32 Southwestern, 889; 30 L. R. A. 713; 59 Am. State, 17.

business.[1] A shipment from one point in a State to another, by a railroad which between those points runs for part of the way through another State, is inter-State business.[2]

The Act covers transportation by water when effected in connection with transportation by rail, when both modes of transportation are used "under a common control, management, or arrangement for a continuous carriage or shipment." It covers also transportation between the United States and adjacent foreign territory, and shipments to a foreign country by way of an American port, or from a foreign country to an American port and thence to any place in the United States. The terms of the Act, in these and other respects, are partly taken from the English Railway and Canal Traffic Act of 1854 and the Regulation of Railways Act of 1873; and the English decisions which have construed those Acts, reported in the series known as "Railway and Canal Traffic Cases," are often helpful in determining the construction of ours.

To make a "common control," there is required an actual executive control by executive officers. If one company buys up a majority of the shares in another, and so controls the election of its directors and officers, this is not enough.[3]

A switching company, the business of which is to switch cars from the tracks of one inter-State railroad to another, is not a common carrier, within the scope of the Inter-State Commerce Act.[4]

[1] Interstate Commerce Commission *v.* Cincinnati, New Orleans, & Texas Pacific Railway Co., 56 Federal, 925.

[2] Hanley *v.* Kansas City Southern Railway Co., 187 U. S. 617.

[3] Pullman Palace Car Co. *v.* Missouri Pacific Railway Co., 11 Federal, 634.

[4] Kentucky & Indiana Bridge Co. *v.* Louisville & Nashville R. R. Co., 37 Federal, 567; 2 L. R. A. 289.

13. The Act a Penal Statute.

The remedy which the Inter-State Commerce Act gives in favor of any persons injured by a violation by any carrier of the provisions of the Act covers only cases of actual damage. The statute in this respect is a penal one, and to be strictly construed.[1] A discrimination, by an offer of a lower rate than that regularly allowed, which is never accepted, and was a mere paper rate never intended or understood to be anything but a form, will not support such an action.[2]

14. Reasons to justify Discriminations.

The acquisition and annexation of a connecting railroad which, considered by itself, does not pay expenses does not justify the company acquiring it in so changing its freight rates as to favor transportation over the new addition to its system by giving undue preferences as compared with the rates charged on other parts of its system over which the goods might be and previously had been transported. The public interests are not to be sacrificed to allow shareholders to get dividends.[3]

No such difference of conditions as will justify a discrimination in charges exists between shipments to one who is on a competing road and to another who is not. Nor can such a discrimination be indirectly accomplished, as by carting from the railway station for the former and not for the latter.[4]

It would not (unless done as a device to discriminate

[1] Ratican *v.* Terminal Railway Association of St. Louis, 114 Federal, 666.

[2] Lehigh Valley R. R. Co. *v.* Rainey, 112 Federal, 487.

[3] Interstate Commerce Commission *v.* Louisville & Nashville R. R. Co., 118 Federal, 613.

[4] Wight *v.* United States, 167 U. S. 512.

between those on competing railroad lines) be an unlawful discrimination to furnish free cartage to all customers in certain towns and not to those in others. Here all in the same situation are treated alike.[1]

There may be a difference of conditions justifying a larger charge for a short haul than for a long one, in case of competition by other railroad companies.[2] Here there is no discrimination between shippers, but all are treated alike as to the same kind of shipment. This construction of the Act is followed even when the competition is illegal, and comes from another carrier, subject to the Act. It is the conditions in fact existing which determine the rights of the parties.[3] Competition to be a material condition must be an actual, not a conjectural, competition, and if it is such, its materiality is not affected by its being illegal.[4]

A large disparity between through and local rates may be entirely proper. Foreign competition by sea may be taken into account, and foreigners may be brought to points in the United States at lower rates than are charged to Americans going from such points abroad, if such competition fairly justifies it.[5]

When rates are fixed and published in such a way that the carrier cannot vary them, as in the case of a joint rate agreed on by connecting railroads, this may operate to restrict the company's right to make a special contract with a shipper relieving it of part of its common-law liabilities, for it cannot

[1] Interstate Commerce Commission *v.* Detroit, Grand Haven, & Milwaukee Railway Co., 167 U. S. 633.

[2] Interstate Commerce Commission *v.* Alabama Midland Railway Co., 168 U. S. 144.

[3] East Tennessee, Virginia, & Georgia Railway Co. *v.* Interstate Commerce Commission, 181 U. S. 1.

[4] Interstate Commerce Commission *v.* Louisville & Nashville R. R. Co., 190 U. S. 273, 283.

[5] Texas & Pacific Railway Co. *v.* Interstate Commerce Commission, 162 U. S. 197.

now give him an option between rates as a consideration for granting such relief.[1]

15. Judicial Review of the Doings of the Inter-State Commerce Commission.

If the Inter-State Commerce Commission applies, as it may under the Act, to the Circuit Court of the United States, to enforce any of their orders, the court will look to see if they are reasonable ones, and if in its opinion they are not, will refuse its aid. Should, for instance, the Commission order a carrier to haul all goods of a certain kind at the same price, though some are cheap and some costly, it would not be reasonable, and the court would dismiss an application to enforce it.[2]

16. Criminal Proceedings.

No criminal prosecution under the Inter-State Commerce Act could originally be maintained against a railroad corporation. The criminal penalties provided were for individual wrong doing on the part of its officers and agents.[3] As now amended, the Act authorizes the punishment by fine of the company itself, and no one who violates it can be sentenced to imprisonment.[4]

17. The Sherman Act.

Congress passed in 1890 what is known as the Sherman Act,[5] which makes every contract, or combination in the form of a trust or otherwise, in restraint of trade or com-

[1] Wehmann *v.* Minneapolis, St. Paul, & Sault Ste. Marie Railway Co., 58 Minn. 22 ; 59 Northwestern, 546.

[2] Interstate Commerce Commission *v.* Delaware, Lackawanna, & Western R. R. Co., 64 Federal, 723.

[3] *In re* Peasley, 44 Federal, 271.

[4] U. S. Stat. at Large, XXXII. 847. See Chapter LVII., Penal Actions and Criminal Prosecutions.

[5] U. S. Stat. at Large, XXVI. 209.

merce between States illegal and criminal, and gives a remedy by injunction in behalf of the United States, and for treble damages in favor of any party aggrieved. Under these provisions, competing railroad companies are prohibited from uniting even to make reasonable joint rates for inter-State business. The Act extends to contracts looking to future transportation.[1] It is broad enough to include a combination of the shareholders in one railroad company with the shareholders in another to create a third corporation to hold the shares in the other companies and so control their operations, if this be a device for putting a direct restraint on trade between the States.[2]

The statute is comprehensive in its terms and affects combinations of labor as well as combinations of capital. It covers combinations whether of employees on a railroad or strikers who have been such employees to obstruct its business.[3]

Actions to enforce its provisions by the United States are privileged in order of trial, and any appeal from a judgment rendered in one by a Circuit Court must be taken directly to the Supreme Court.[4]

18. Return of Accidents.

There is an Act of Congress requiring monthly returns to the Inter-State Commerce Commission of all accidents on inter-State railways, stating their nature and causes. These reports, however, cannot be used against the company making them, in any suit arising from the accident, and, of course, could not be evidence in its behalf.[5]

[1] United States *v.* Trans-Missouri Freight Association, 166 U. S. 290; United States *v.* Joint Traffic Association, 171 U. S. 505; Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211.

[2] See *ante*, p. 16.

[3] *In re* Debs, 158 U. S. 564.

[4] U. S. Stat. at Large, XXXII. 823.

[5] U. S. Stat. at Large, XXXI. 1446.

CHAPTER XXXIX.

THE EXPRESS BUSINESS.

1. Express Companies.

THE express business in connection with railroads first took an organized form in the United States about 1839. Its object is to provide for the quick carriage and delivery of goods, and for this purpose they are generally transported by rail on passenger trains. Instead of committing this service to their own agents, as is done in Europe, our railroad companies have generally preferred to let it be undertaken by middlemen, with whom they make a special contract; and these middlemen, originally individuals or partnerships, are now generally associated as an express company, under the form of a corporation or quasi-corporation. They are common carriers, performing their office partly by the use of their own vehicles, and partly by the use of those of railroad companies.[1]

2. Exclusive Facilities granted to one Express Company.

A railroad company is not a common carrier of other common carriers and their business.[2] Therefore it may, and

[1] Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174, 181; United States Express Co. *v.* Backman, 28 Ohio St. 144; 14 Am. Railway Rep. 82.

[2] Blank *v.* Illinois Central R. R. Co., 182 Ill. 332; 55 Northeastern, 332.

ordinarily each railroad company does, make a contract with some particular express company, under which all the express business going over the road is regulated, and by which every other express company is excluded from the business of the line.[1] The principal express companies have for many years divided up the territory of the country among themselves, and each has confined its operations by rail to a certain section, and to the railroads that traverse it.

The railroad company performs its whole duty to the public at large, and to each individual, when it affords the public all reasonable express accommodations. It owes no duty as to the particular agencies it shall select for that purpose. It may select any appropriate means of carriage, if they are such as to insure reasonable promptness and security. It may, therefore, legally limit its express facilities to a single express company, and refuse to admit others to a participation in them, provided the single company selected performs the service in such a way as properly to accommodate the public.[2]

3. Railroad Company may exclude Liability for its own Negligence.

It contracts in the capacity, as regards the express company, of a private carrier, and can therefore stipulate against liability even in case of its own negligence.[3]

4. The General Form of Contract between Railroad and Express Companies.

A common form of contract is one by which the goods expressed are to be transported on particular trains in cars

[1] See Appendix VI. 2.

[2] The Express Cases, 117 U. S. 1; Sargent *v.* Boston & Lowell R. R. Corporation, 115 Mass. 416.

[3] Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Co. *v.* Mahoney, 148 Ind. 196; 46 Northeastern, 917; 47 Northeastern, 464; 40 L. R. A. 101; 62 Am. State, 503.

specially constructed for this use, in charge of a messenger employed by the express company.

5. Rights of the Express Messenger.

Such contracts generally provide that the railroad company shall not be liable to the messenger so carried for any injuries received through its negligence or that of its servants. When the messenger knows of this contract, and agrees to be bound by it, as a condition of his employment, he is bound by it, unless there is a statute to the contrary,[1] and cannot hold the company for any such injury.[2] When he is ignorant of it, he is not bound by it.[3] In the absence of a contract respecting his rights of action, he has those of a passenger.[4]

An express car is not always as safe a vehicle of transportation as the ordinary passenger car on the same train. Any extra risk thus occasioned, the express messenger assumes.[5]

6. Custody of the Goods expressed.

Such a messenger does not become a servant of the railroad company.[6] Nor do the goods under his charge come into the possession of the railroad company as a common carrier for their owners. The express company is transporting them as a common carrier for their owners, and has employed the railroad company as its agent to haul them. If the railroad company is negligent in their transportation, the express company must answer for it, and no stipulations to the con-

[1] O'Brien *v.* Chicago & Northwesteru Railway Co., 116 Federal, 502.

[2] Baltimore & Ohio Southwestern Railway Co. *v.* Voigt, 176 U. S. 498; Louisville, New Albany, & Chicago Railway Co. *v.* Keefer, 146 Ind. 21; 44 Northeastern, 796; 38 L. R. A. 93; 58 Am. State, 348.

[3] Brewer *v.* New York, Lake Erie, & Western R. R. Co., 124 N. Y. 59; 26 Northeastern, 324; 11 L. R. A. 483; 21 Am. State, 647.

[4] Blair *v.* Erie Railway Co., 66 N. Y. 313; 23 Am. Rep. 55.

[5] Pennsylvania Company *v.* Woodworth, 26 Ohio St. 585.

[6] Louisville, New Orleans, & Texas Railway Co. *v.* Douglass, 69 Miss. 723; 11 Southern, 933; 30 Am. State, 582.

trary between the latter company and the owners can exonerate it, because the cause of damage is the negligence of its agent.[1]

As it is the express company and not the railroad company that occupies the position of a common carrier and so is responsible to the shipper for the safe transportation of the goods, it would not be reasonable to allow the custody of them to be interfered with. Therefore the railroad company cannot claim a right to open any express package which has been received on board its cars, in order to determine what it contains.[2]

[1] Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174, 181.

[2] Southern Express Co. *v.* St. Louis, Iron Mountain, & Southern Railway Co., 3 McCrary, 147; 10 Federal, 210, 869. *Cf.* The Nitro-glycerine Case, 15 Wall. 524, 535.

CHAPTER XL.

CARRIAGE OF MAILS.

1. Railroads are Post Roads.

By the Revised Statutes of the United States, § 3964, "all railroads or parts of railroads which are now or hereafter may be in operation" are established post roads. This obviously should be construed to include only such as are operated under a lawful franchise for public use.[1] It is a proper exercise by Congress of the power of Congress (Const., Art. I. Sec. 8) to establish post roads.[2] It can build new roads or adopt old ones, at its pleasure.[3] Every railroad being thus a government post road, to wilfully obstruct a train upon it is a criminal offence.[4]

2. Postal Railway Clerks.

Chapter 10, Title 16, of the United States Revised Statutes is devoted to railway mail service. By § 4000 every railroad company contracting to carry the mail shall carry it on

[1] Cleveland, Painesville, & Ashtabula R. R. Co. *v.* Franklin Canal Co., 1 Pittsb. Leg. J. No. 36; 5 Fed. Cases, No. 2890.

[2] See *In re* Debs, 158 U. S. 564, 580, 599; Kohl *v.* United States, 91 U. S. 367.

[3] See The Clinton Bridge, 10 Wall. 454, 462.

[4] U. S. Rev. Stat. § 3995, *et seq.*

all trains, if required by the Postmaster-General, "with the person in charge of the same." A postal clerk thus sent in charge of the mail is not a passenger.[1] He is, however, lawfully on the car under a statutory right, and if injured by the negligence of the company, can hold it liable,[2] even if he holds a pass expressly exempting it from such liability.[3]

If such a mail clerk is in the known habit of flinging mail bags out on the platforms of stations, the railroad company may be liable to a passenger who is hit by one.[4] It is bound to use due care to keep its passengers safe while in its charge, and such a practice tends to make their use of the platform unsafe.

A railroad company is not liable to a person in its employment who is struck by a mail bag carelessly thrown out in this way by the mail agent at a point where such a bag was not ordinarily thrown out.[5]

3. Duty of Railroad Companies which have had Government Aid.

The Pacific railroads which received aid from the United States, and other roads to which land grants were made, are under a statutory obligation, by Act of Congress, to carry the mails.[6] Other railroad companies may decline to carry the mails, and if they carry them, do so by special contract.

[1] Price *v.* Pennsylvania R. R. Co., 113 U. S. 218.

[2] Gleeson *v.* Virginia Midland R. R. Co., 140 U. S. 435. *Cf.* Stoddard *v.* New York, New Haven, & Hartford R. R. Co., 181 Mass. 422; 63 Northeastern, 927.

[3] Seybolt *v.* New York, Lake Erie, & Western R. R. Co., 95 N. Y. 562, 574; 47 Am. Rep. 75. *Cf.* Baltimore & Ohio Southwestern Railway Co. *v.* Voigt, 176 U. S. 498, 518.

[4] Carpenter *v.* Boston & Albany R. R. Co., 97 N. Y. 494; 49 Am. Rep. 540.

[5] Muster *v.* Chicago, Milwaukee, & St. Paul Railway Co., 61 Wis. 325; 21 Northwestern, 223; 50 Am. Rep. 141; 18 Am. & Eng. R. R. Cases, 113.

[6] U. S. Rev. Stat. § 4002, *et seq.*; 19 U. S. Stat. at Large, 78, 82; United States *v.* Alabama Great Southern R. R. Co., 142 U. S. 615; Wisconsin Central R. R. Co. *v.* United States, 164 U. S. 190.

4. Carriage of Private Mail prohibited.

Under the statutes of the United States it is unlawful for any railroad company to carry letters or packets for others in such a way as to come into competition with the government mail service.[1] This does not affect the right of the company to carry whatever forms part of its own correspondence, or other matter of its own.[2]

5. Negligence of the Railroad Company.

A railroad company in transporting the mail comes under no such legal relations with the owner of what it carries in the mail as can render it liable to him for losses suffered through the negligence of its servants.[3]

It owes reasonable care to those rightfully coming upon its premises, on account of its carriage of the mail, in maintaining them in safe condition. If a mail car is run which contains a travelling post office, the railroad company owe to those coming to it to mail letters or buy stamps the duty of using due care to maintain safe means of access.[4] Whoever is rightfully visiting a mail car has reason to expect this duty to be performed, and may in some measure rely upon it. A carrier of the mail between a village railroad station and the post office, who steps upon a railway track to get a mail pouch which has been thrown out upon it on the arrival of

[1] U. S. Rev. Stat. §§ 3985, 3992, 3993.

[2] United States *v.* Hall, 9 Am. Law Reg. 232; 26 Fed. Cases, No. 15,281.

[3] Boston Insurance Co. *v.* Chicago, Rock Island, & Pacific Railway Co., 118 Ia. 423; 92 Northwestern, 88; 59 L. R. A. 796. It was intimated in Central R. R. & Banking Co. *v.* Lampley, 76 Ala. 357, 367; 52 Am. Rep. 334; 23 Am. & Eng. R. R. Cases, 487, that the company might be held for any act of direct tort, as a bailee for hire. A bailment, however, imports a contractual relation with the injured party, and here the only contract is with the government.

[4] Hale *v.* Grand Trunk Railroad, 60 Vt. 605; 15 Atlantic, 300; 1 L. R. A. 187.

a train, by the mail agent in the usual way, is not necessarily negligent because he does not first look to see if another train is coming upon the track where the mail pouch lies, when it is not customary for trains to meet there. He is there on an implied invitation.[1]

6. Rules of the Post-office Department.

As against railroad companies carrying the mail, the rules of the Post-office Department applicable to the discharge of their duties by transfer clerks in the railway postal service are admissible in evidence, in favor of such a clerk suing for a personal injury received when he was in a situation required by the rules; and the jury are at liberty to infer that the company knew what these were.[2]

7. Criminal Offences.

Violently entering a mail car, or assaulting a railway postal clerk, is a criminal offence by Act of Congress (XXXII., Stat. at Large, 1176).

[1] Tubbs *v.* Michigan Central R. R. Co., 107 Mich. 108; 64 Northwestern, 1061; 61 Am. State, 320.

[2] Chicago & Alton R. R. Co. *v.* Kelly, 182 Ill. 267; 54 Northeastern, 979.

CHAPTER XLI.

USE OF HIGHWAYS.

1. The Protection given by a Railroad Franchise.

A RAILROAD company which lays tracks in a highway is responsible for any injuries that may result from want of due care and skill in the construction of the road, in its maintenance, or in its operation, in such highway. When such care and skill are exercised, the franchise is generally a protection against claims for consequential injuries; and this is particularly the case when the mode of construction followed was one prescribed by the legislature with a single eye to the public benefit.[1]

[1] Muhlker *v.* New York & Harlem R. R. Co., 173 N. Y. 549; 66 Northeastern, 558. See Chapter XVIII., Railroads on and along Highways.

2. Faults of Construction.

That a railroad has been so constructed as to make a crossing especially dangerous, through the interposition of obstructions which render it difficult to see an approaching train, cannot, standing alone, be left to a jury as tending to prove such negligence as might render the company liable, if sued for an accident sustained by a traveller. But it is a circumstance to be considered in determining whether sufficient warnings are given, or an undue rate of speed maintained.[1]

3. Want of Gate or Flagman.

If a crossing is an especially dangerous one, much travelled, and without a gate or flagman, it may be left to the jury to say whether reasonable prudence demanded of the railroad company that a gate or flagman should be maintained there.[2] And this is so, even if the law of the State has empowered some public authority to require gates or flagmen at crossings which may be deemed specially hazardous, and no such order has ever been made as to the crossing in question.[3]

As the jury are thus put in the position which such a public authority would occupy, or has occupied, evidence is admissible in defence to show the annual cost which the maintenance of a gate or flagman would involve. Due care is a relative term. Unreasonable expenses cannot be demanded by reasonable care. What is a reasonable expense in case of a crossing that is much travelled or especially

[1] Cordell *v.* New York Central & Hudson River R. R. Co., 70 N. Y. 119; 26 Am. Rep. 550.

[2] Huntress *v.* Boston & Maine Railroad, 66 N. H. 185; 34 Atlantic, 154; 49 Am. State, 600.

[3] Eaton *v.* Fitchburg R. R. Co., 129 Mass. 364; Grand Trunk Railway Co. *v.* Ives, 144 U. S. 408, 421, 422. *Contra*, Dyson *v.* New York & New England Railroad Co., 57 Conn. 9; 17 Atlantic, 137; 14 Am. State, 82.

hazardous might not be reasonable as to one little travelled or of the ordinary character.

4. Neglect in maintaining Safe Roadbed or Reparation of Highway.

A railroad company is liable to a highway traveller injured by a defect in a highway caused by the natural effect of travel on the highway in wearing away the roadbed next to one of its rails, if it was negligent in not repairing it.[1] It would also be liable for such injuries from a defect caused by snow which it negligently banked up and left in the highway in clearing off its tracks.[2]

It is ordinarily charged by statute with the duty of keeping the highway between its tracks and within a certain distance outside of them in good repair. This duty of repair does not extend to reconstruction, so long as the highway remains in a reasonably safe and convenient condition. The company cannot be compelled to repair when the existing pavement is a sufficiently good one to answer all the proper demands of public travel.[3] The State, however, may require or authorize a municipality to require repairing in whole or part whenever the public welfare reasonably demands it.[4]

The duty of a railroad company to keep a highway crossing in safe and passable condition will not necessarily relieve the municipality charged with the general repair of the highway from responsibility to highway travellers.[5]

[1] Groves *v.* Louisville Railway Co., 109 Ky. 76; 58 Southwestern, 508; 52 L. R. A. 448.

[2] Gerrard *v.* LaCrosse City Railway Co., 113 Wis. 258; 89 Northwestern, 125; 57 L. R. A. 465.

[3] Williamsport *v.* Williamsport Passenger Railway, 203 Pa. St. 1; 55 Atlantic, 836.

[4] Fair Haven & Westville R. R. Co. *v.* New Haven, 75 Conn. 442, 453; 53 Atlantic, 960.

[5] Baltimore & Ohio R. R. Co. *v.* Mayor, Md. ; 56 Atlantic, 790.

5. Neglect in equipping Cars.

It is incumbent upon a railroad company to equip all cars with sufficient brakes to stop them within a reasonable time and distance, and a failure so to do, resulting in a collision, at a highway crossing, may render it liable to the party injured.[1]

There must be such lights on all locomotive engines, and all street cars at night, that their approach can be seasonably noticed by travellers on the highway.[2]

It should not be left to a jury to say whether street car platforms should be equipped with side barriers to prevent people from falling off from them, or fenders to catch them if they fall. The State can require such appliances to be used, but whether they should be required or not depends on so many considerations that can only be appreciated by those specially familiar with the business that the judgment of an ordinary man, or of twelve ordinary men, on the question would be of uncertain value, and furnish an unsafe criterion for deciding a cause.[3]

6. Frightening Horses.

Every railroad upon a highway must be operated with reasonable care with respect to making no unnecessary noises calculated to frighten animals which are in the highway. Some noises of this character are necessary, and these the railroad franchise justifies. Some are necessary or proper

[1] Forbes *v.* Atlantic & North Carolina R. R. Co., 76 N. C. 454; 14 Am. Railway Rep. 313.

[2] Rascher *v.* East Detroit & Grosse Pointe Railway Co., 90 Mich. 413; 51 Northwestern, 463; 30 Am. State, 447; Bohan *v.* Milwaukee, Lake Shore, & Western Railway Co., 58 Wis. 30; 15 Northwestern, 801; 61 Wis. 391; 21 Northwestern, 241; 19 Am. & Eng. R. R. Cases, 276.

[3] West Philadelphia Passenger Railway Co. *v.* Gallagher, 108 Pa. St. 524.

under some conditions but not under others. Letting off steam, blowing steam whistles, and sounding a loud bell or gong, all are acts which, if they frighten horses, may, if done without reasonable cause, found a claim of actionable negligence.[1]

7. Street Railroads.

As a street railroad is only one way of using a street for highway purposes, the manner of use must be always consistent with its use by others for those purposes. It must be such as not unreasonably to impede its use by owners of land abutting on the street. If rails are laid so close to these lots that a vehicle standing by the door of a building thereon must be on or over the track, the cars must be run with reasonable regard to the convenience of the owner of the vehicle.[2] If the building be a warehouse and the door one through which goods are taken and received, carts may lawfully be backed up across the tracks to load and unload, for a reasonable time, and cars must wait meanwhile.[3]

The right to move cars on its tracks implies a right in the servants of the company to use the street on each side of its tracks so far and so long as is reasonably necessary for the assistance of those entering or leaving a car.[4]

8. Construction of Railroads at Highway Crossings.

There is commonly a statutory duty imposed of setting up and keeping up signs to warn travellers of danger, and main-

[1] Ellis *v.* Boston & Lynn R. R. Co., 160 Mass. 341; 35 Northeastern, 1127; Philadelphia & Reading R. R. Co. *v.* Killips, 88 Pa. St. 405; Chicago, Burlington, & Quincy R. R. Co. *v.* Dickson, 88 Ill. 431.

[2] Rafferty *v.* Central Traction Co., 147 Pa. St. 579; 23 Atlantic, 884; 30 Am. State, 763.

[3] San Antonio Rapid Transit Street Railway Co. *v.* Limburger, 88 Tex. 79; 30 Southwestern, 533; 53 Am. State, 730.

[4] North Chicago Street Railroad Co. *v.* Cossar, 203 Ill. 608; 68 Northeastern, 88.

taining cattle-guards, on each side of the tracks, at highway crossings at grade of through or inter-urban railroads.

9. Giving Proper Signals of the Approach of a Train or Car.

Statutes exist in all the States requiring certain warnings, by whistle or bell, to be given as through railroad trains approach highway crossings. A failure to give them, if an accident results, is negligence *per se*.[1] Whenever a train or car moving upon a highway is approaching any point upon it, whether near a crossing or not, where, from the existing condition and occupancy of the highway, it is apparent that the danger of injury to those using it would be materially lessened by sounding the whistle, bell, gong, or other audible signal of approach, it is the duty of those in charge of it to give such signal.[2]

The common-law rule that, when there are different public easements to be enjoyed by two different parties at the same time and place, each must use his privilege with due care so as not to injure the other, governs the use of the highway in these respects. Even at crossings the company does not necessarily fulfil this duty by complying with the express directions of any statutes which may exist requiring certain warnings to be given or precautions taken. If any other warnings or precautions are reasonably necessary, they are also required by the common law.[3] On the other hand, an omission on the part of the company to perform any statutory

[1] Cordell *v.* New York Central & Hudson River R. R. Co., 64 N. Y. 535, 538; Cincinnati, Hamilton, & Indianapolis R. R. Co. *v.* Butler, 103 Ind. 31; 2 Northeastern, 138.

[2] Murphy *v.* Derby Street Railway Co., 73 Conn. 249, 253; 47 Atlantic, 120.

[3] Hayes *v.* Michigan Central R. R. Co., 111 U. S. 228, 235; O'Neil *v.* Dry Dock East Broadway & Battery R. R. Co., 129 N. Y. 125; 29 Northeastern, 84; 26 Am. State, 512; Chicago City Railway Co. *v.* Fennimore, 199 Ill. 9; 64 Northeastern, 985.

duty, whether that of sounding a signal, or maintaining a warning board or flagman, even if made proof of negligence by the statute, does not relieve a traveller from the effect of contributory negligence,[1] unless the statute so provides.[2]

10. The Proper Rate of Speed.

It is not enough for those in charge of a train or car to give proper audible warnings.

On no railroad constructed on and along the travelled part of a highway can cars lawfully be run, at any point on the highway, although remote from a highway crossing, at a speed incompatible with the safety of those making a reasonable use of the highway for its ordinary purposes.[3]

The speed of a train or car at a highway crossing should never be so great as, under the attending circumstances, to render any warning required by statute unavailing; and this is especially true when intervening objects prevent those who are approaching the railroad from seeing a coming train or car in time to stop. Both parties are charged with the mutual duty of keeping a careful lookout for danger.[4] The degree of diligence to be exercised by those in charge of the train or car is such as a reasonably prudent man would exercise, under the circumstances of the case, in endeavoring fairly to perform his duty. That required of a highway traveller is the ordinary care of an ordinary man under those circumstances. Only reasonably prudent men should be put in charge of a railroad car.[5] Any man has

[1] Dodge *v.* Burlington, Cedar Rapids, & Minnesota R. R. Co., 34 Iowa, 276; 5 Am. Railway Rep. 507, 510.

[2] Massachusetts has such a statute, excusing any contributory negligence not gross or wilful.

[3] Newark Passenger Railway Co. *v.* Block, 55 N. J. Law, 605; 27 Atlantic, 1067; 22 L. R. A. 374.

[4] Continental Improvement Co. *v.* Stead, 95 U. S. 161, 164; Baltimore & Ohio R. R. Co. *v.* Griffith, 159 U. S. 603, 609.

[5] Grand Trunk Railway Co. *v.* Ives, 144 U. S. 408, 416.

a right to travel on the highway. But to both parties the care is largely measured by the danger. If a thunderstorm were raging, for instance, there might be so little chance of a traveller's hearing the bell or whistle on a steam railroad or the gong of a street car, or seeing the train or car, that it would become the duty of those in charge to slow down.[1]

A railroad company and a traveller on the highway, at a point where the railroad crosses the highway on the same level, have, in theory, under the common law,[2] equal rights as to the use of the crossing, and each must use due care to avoid injury to himself or the other. The right of the railroad company, however is to propel its train or car over the crossing in the way in which railroad cars and trains are usually and reasonably run. It is usual and reasonable to run them, under ordinary circumstances, at a greater rate of speed than that commonly used by highway travellers. As they are heavier than ordinary vehicles, they acquire a greater momentum, and are less readily brought to a stop. They are prevented by the rails on which they rest from being turned aside to avoid a collision. The speed at which they move cannot be estimated by one observing them from the highway as closely as that of an ordinary traveller. All these things are known to every person of ordinary intelligence. In case of a through railroad, or of that portion of an inter-urban railroad which is between the cities which it connects, he cannot, in the common course of things, rely on any considerable reduction of the speed of an approaching car or train when it crosses the highway. The person who is directing its movements, although he sees a pedestrian or team approaching a crossing, is not ordinarily bound to slacken speed.[3]

[1] Dyson *v.* New York & New England R. R. Co., 57 Conn. 9, 22; 17 Atlantic, 137; 14 Am. State, 82.

[2] Barker *v.* Savage, 45 N. Y. 191; 6 Am. Rep. 66.

[3] Warner *v.* New York Central R. R. Co., 44 N. Y. 465; Dyson *v.*

11. Slowing up to Prevent a Collision otherwise Probable.

If the pedestrian or the driver of the team is too near to attempt the crossing in safety, the engineer or motorman has a right to presume that he will stop short of it. If, on the other hand, there is ample time to cross in safety, the engineer or motorman has a right to presume that this will be accomplished. But should he know that the man was deaf, intoxicated, or insane, or see that he was pressing forward, apparently determined to cross, when there was not time for it, he would be bound to give an extra alarm signal, by bell or whistle, and, if that were not heeded, to check his speed or stop the train, if possible, in time to prevent a collision.[1]

The man who is directing the course of a street car on a local trip should commonly govern his conduct by these rules. If, however, he is directing it through a crowded street, ordinary care always requires a moderate rate of speed. It is comparatively easy for him to slow up or to bring his car to a sudden stop. This is known to all who are using the street. They may prudently go upon the tracks in front of a car advancing slowly, and which they know can only be advanced slowly if due regard is had to the safety of highway travel. The nature of the locality, therefore, is important in determining whether it is safe to push on across a railroad track in face of an approaching car.[2] At an unfrequented crossing in the outskirts of a city, an electric

New York & New England R. R. Co., 57 Conn. 9, 21; 17 Atlantic, 137; 14 Am. State, 82.

[1] Lake Shore & Michigan Southern R. R. Co. *v.* Miller, 25 Mich. 274; 5 Am. Railway Rep. 478, 483; Waldron *v.* Boston & Maine Railroad, 71 N. H. 362; 52 Atlantic, 443; Gahagan *v.* Boston & Maine Railroad, 70 N. H. 441, 450; 50 Atlantic, 146; 55 L. R. A. 426.

[2] New Jersey Electric Railway Co. *v.* Miller, 59 N. J. Law, 423; 36 Atlantic, 885; 39 Atlantic, 645; Tesch *v.* Milwaukee Electric Railway & Light Co., 108 Wis. 593; 84 Northwestern, 823; 53 L. R. A. 618; Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 489; 37 Atlantic, 379; 37 L. R. A. 533.

street car may, in the absence of any public regulation to the contrary, proceed at a high rate of speed, and in such case a traveller at a crossing must practically give it the precedence.[1]

Cars may be run, under ordinary conditions, over highway crossings in the open country at any rate of speed not prohibited by positive law.[2] When passing through populated communities, more care to avoid the chance of accident should be exercised on every kind of railroad, because such chances are necessarily more numerous.[3] But where all proper safeguards, such as gates and flagmen, have been provided, any rate of speed can be maintained in the open country, without the imputation of negligence.[4]

12. The Care required of the Traveller.

The care required of the traveller has been sometimes stated by courts to be that to be expected of a prudent man.[5] But the highway is for the use of all, the wise and the simple alike. To be entitled to the name of a prudent man, one must be distinguished by his prudence from ordinary men. It is enough if the traveller approaches the crossing with the prudence to be expected from an ordinary man under the attending circumstances. That degree of care, whether he is accustomed to exercise it on ordinary occasions or not, he is bound to exercise when he steps upon a railroad track, because he knows the nature of its use by cars running at high speed at irregular intervals.

[1] McNab *v.* United Railways, etc. Co., 94 Md. 719 ; 51 Atlantic, 421.

[2] Warner *v.* New York Central R. R. Co., 44 N. Y. 465 ; Dyson *v.* New York & New England R. R. Co., 57 Conn. 9, 21 ; 17 Atlantic, 137 ; 14 Am. State, 82.

[3] Fero *v.* Buffalo & State Line R. R. Co., 22 N. Y. 209, 212 ; 78 Am. Dec. 178.

[4] Custer *v.* Baltimore & Ohio R. R. Co., 206 Pa. St. 529 ; 55 Atlantic, 1130.

[5] Satler *v.* Utica & Black River R. R. Co., 88 N. Y. 42, 51 ; Continental Improvement Co. *v.* Stead, 95 U. S. 161, 165. See *ante*, p. 407.

In the case of small children this rule is relaxed. Children up to the age of three or four are too young to appreciate the danger of crossing a railroad track, at all, and cannot be charged with contributory negligence for putting themselves in the way of a train.[1] As to children of four and upwards, it will be a question for the jury whether they exercised that degree of care which may reasonably be expected of, and is ordinarily exercised by, those of their age. If they did, their not looking or listening, or other want of care, will not be contributory negligence.[2]

13. Looking and Listening

If there is a failure, as a train on a through railroad nears a grade crossing, to give the customary warning by bell or whistle, of the train's approach, this is not such an assurance of safety as to excuse one travelling upon the highway, and about to cross the railroad, from looking or listening.[3] The track is itself a warning.[4] Such an omission of the statutory duty is, of course, a circumstance to be considered in determining how far he exercised due care.

It is a rule of common sense[5] which may now be said to have become one of law that a person upon a highway in approaching a point where it is crossed at grade by a through railroad is required to make use both of his eyes and ears to ascertain whether cars are approaching in either direction.[6]

[1] Daley *v.* Norwich & Worcester R. R. Co., 26 Conn. 591, 598; 68 Am. Dec. 413. *Contra*, Wright *v.* Malden & Melrose R. R. Co., 4 Allen, 283.

[2] McDermott *v.* Boston Elevated Railway Co., 184 Mass. 126; 68 Northeastern, 34. See *post*, p. 413.

[3] Railroad Co. *v.* Houston, 95 U. S. 697, 702; Wilcox *v.* Rome, Watertown, & Ogdensburgh R. R. Co., 39 N. Y. 358; 100 Am. Dec. 440.

[4] Elliott *v.* Chicago, Milwaukee, & St. Paul Railway Co., 150 U. S. 245, 248; Lake Shore & Michigan Southern R. R. Co. *v.* Miller, 25 Mich. 274; 5 Am. Railway Rep. 478, 494.

[5] Partlow *v.* Illinois Central R. R. Co., 150 Ill. 321; 37 Northeastern, 663.

[6] Salter *v.* Utica & Black River R. R. Co., 88 N. Y. 42, 46.

It is his obvious duty, under ordinary conditions, both to look and listen, and to do so at such a time and such a place that if he sees or hears a coming car, he can avoid a collision with it.[1] In many States this is enforced as an absolute rule of law,[2] and in one, at least, the rule is, in the case of steam railroads, that he must stop also for this purpose.[3] To stop, however, in all cases, is obviously unnecessary. There are many crossings in approaching which the track is in view in each direction for so great a distance as to render it easy for a traveller, while moving, to observe a coming train in time to avoid a collision.[4]

If where either of the rules of law described above obtains, the traveller fails to observe it, and is struck by a car, it is held that his failure presumptively contributed to the occurrence of the accident, and bars a recovery.[5] This presumption, however, is not conclusive, and if he can show that no such precaution on his part would have prevented the injury, he may still be entitled to a verdict.[6]

So in most jurisdictions he may be, if the conditions attending his crossing were so extraordinary that a man of ordinary prudence might reasonably omit to look or listen.[7]

In those jurisdictions where no absolute rule of law has

[1] Railroad Co. *v.* Houston, 95 U. S. 697, 702; Northern Pacific R. R. Co. *v.* Freeman, 174 U. S. 379, 382.

[2] Burnett *v.* Eastern & Amboy R. R. Co., 61 N. J. Law, 373; 39 Atlantic, 663; Chase *v.* Maine Central R. R. Co., 78 Me. 346; 5 Atlantic, 771; Rodrian *v.* New York, New Haven, & Hartford R. R. Co., 125 N. Y. 528; 26 Northeastern, 741; Carter *v.* Central Vermont R. R. Co., 72 Vt. 190; 47 Atlantic, 797.

[3] Pennsylvania R. R. Co. *v.* Beale, 73 Pa. St. 504; 13 Am. Rep. 753.

[4] Manley *v.* Delaware & Hudson Canal Co., 69 Vt. 101; 37 Atlantic, 279.

[5] Philadelphia, Wilmington, & Baltimore R. R. Co. *v.* Hogeland, 66 Md. 149; 7 Atlantic, 105; 59 Am. Rep. 159.

[6] Engrer *v.* Ohio & Mississippi Railway Co., 142 Ind. 618, 623; 42 Northeastern, 217.

[7] Chicago & Erie R. R. Co. *v.* Thomas, 155 Ind. 634; 58 Northeastern, 1040; Chicago City Railway Co. *v.* Fennimore, 199 Ill. 9; 64 Northeastern, 985.

been recognized as imposing a duty to look and listen, the same result is reached practically by directing a verdict or granting a new trial where the injured party did not look and listen and (as is generally the case) there can be no reasonable ground for holding that the omission did not contribute to the injury.[1] The trial judge, also, if a case of this description was allowed to go to the jury, would hardly omit, if requested, to call their attention to the omission to look or listen as strong evidence of a want of due care.[2] A simple charge that the plaintiff could not recover, if he did not exercise such care as was to be expected from an ordinarily prudent man under such circumstances, would always be inadequate in a suit for an accident at a railway crossing. The attention of the jury should be definitely directed to the kind of acts by which such care would naturally be shown.[3]

A child who does not look or listen before stepping on a railroad track is guilty of contributory negligence as fully as an adult, if he was old enough and intelligent enough to understand the danger. As to this, evidence of his familiarity with the operation of railroads will be relevant. A boy of nine has been held to be old enough to be bound to look or listen.[4]

That the view of the track was obstructed, or that a storm was raging which rendered ordinary sounds inaudible, would

[1] Northern Pacific R. R. Co *v.* Freeman, 174 U. S. 379, 382; Gahagan *v.* Boston & Maine R. R., 70 N. H. 441; 50 Atlantic, 146; 55 L. R. A. 426; Fletcher *v.* Fitchburg R. R. Co., 149 Mass. 127; 21 Northeastern, 302; 3 L. R. A. 743.

[2] See Davis *v.* Concord & Montreal R. R., 68 N. H. 247; 44 Atlantic, 388; Chicago, Burlington, & Quincy R. R. Co. *v.* Yost, 61 Nebr. 530; 85 Northwestern, 561; Hook *v.* Missouri Pacific Railway Co., 162 Mo. 569, 588; 63 Southwestern, 360.

[3] Malott *v.* Hawkins, 159 Ind. 127; 63 Northeastern, 308.

[4] Anderson *v.* Central R. R. Co. of New Jersey, 68 N. J. Law, 269; 53 Atlantic, 391. See *ante*, p. 411.

not lessen the care which the law demanded of the traveller, but rather increase it. Under all circumstances, the rule holds that the greater the apparent danger, the greater should be his caution in proceeding.

14. Gates left Open; Fault of Flagman.

Where it is the custom of the company, when a train is approaching a crossing, to shut a gate, or station a flagman to warn travellers, whether a statute require it or not,[1] one acquainted with this custom who sees the gate open and no flagman near has some reason for assuming that no train is coming.[2]

If a flagman beckons the traveller on, this, in those jurisdictions where the look and listen rule has not been recognized as absolute, might justify sending the case to the jury, although the plaintiff neither looked nor listened.[3] And where that rule is accepted as absolute, in case of a double track railroad if the traveller obey it in due season before entering on the first track, he is not necessarily bound to look or listen again before proceeding upon the second one, and may not be wanting in due care if he omits to do so because the flagman has signalled him that it is safe to go on.[4]

[1] Dolph *v.* New York, New Haven, & Hartford R. R. Co., 74 Conn. 538; 51 Atlantic, 525.

[2] French *v.* Taunton Branch R. R., 116 Mass. 537; York *v.* Maine Central R. R. Co., 84 Me. 117; 24 Atlantic, 790; 18 L. R. A. 60; Woehrle *v.* Minnesota Transfer Railway Co., 82 Minn. 165; 84 Northwestern, 791; 52 L. R. A. 348; Baltimore & Ohio R. R. Co. *v.* Stumpf, 97 Md. 78; 54 Atlantic, 978. *Cf.* Baltimore & Potomac R. R. Co. *v.* Landrigan, 191 U. S. 461, 475.

[3] Clark *v.* Boston & Maine Railroad, 164 Mass. 434; 41 Northeastern, 666; Ernst *v.* Hudson River R. R. Co., 35 N. Y. 9, 35, 48; 39 N. Y. 61, 64; 90 Am. Dec. 761; 100 Am. Dec. 405.

[4] Ayers *v.* Pittsburg, Cincinnati, Chicago, & St. Louis Railway Co., 201 Pa. St. 124; 50 Atlantic, 958.

15. Country Crossings.

The same rules apply to highway crossings of inter-urban, cable, or electric railroads in the open country as to steam railroads.[1]

16. City Crossings by Street Railroads.

These rules do not fully apply to such parts of inter-urban railroads laid in highways or of ordinary street railways as are in populated communities.[2] The crossing in this case is a crossing of two highways of the same kind. The railway is here using one of these highways lengthwise, and it is also being used at the same time and in a similar way by other vehicles. The person approaching the track from the cross street has to look out not only for the electric cars, but for ordinary vehicles. He cannot, as in the case of a through railroad, concentrate his attention on the railroad track. His safety may be endangered by a vehicle coming from any part of the highway. The railroad car also is under easy control and can be readily and quickly stopped.[3] Its rate of speed in populated districts is generally moderate. There is often no substantial risk in crossing in front of one approaching and near at hand. There is not the same danger in stopping a horse at the edge of the track that attends stopping one at the edge of a track used for fast and heavy trains. Hence the absolute stop, look, and listen rule is nowhere applied to street railway crossings in cities.[4]

[1] McNab *v.* United Railways, etc. Co., 94 Md. 719; 51 Atlantic, 421.

[2] Robbins *v.* Springfield Street Railway Co., 165 Mass. 30; 42 Northeastern, 334; Connelly *v.* Trenton Passenger Railway Co., Consolidated, 56 N. J. Law, 700; 29 Atlantic, 438; 44 Am. State, 424; Fairbanks *v.* Bangor, Orono, & Oldtown Railway Co., 95 Me. 78; 49 Atlantic, 421. *Contra*, Cawley *v.* LaCrosse City Railway Co., 101 Wis. 145; 77 Northwestern, 179.

[3] Driscoll *v.* Market Street Cable Railway Co., 97 Calif. 553; 32 Pacific, 591; 33 Am. State, 203.

[4] Ehrisman *v.* East Harrisburg City Passenger Railway Co., 150 Pa.

The sense of hearing is also under such circumstances a better protector than in case of a highway crossing by a through railroad. Trains upon that are run at such a rate of speed that it is difficult to measure distance by sound. Hence, if one listens, without stopping, when approaching a street railway track, it may be all that ordinary care demands. Looking without especially listening may be enough,[1] and under some circumstances listening without looking might be. The very fact that a collision occurred, however, is persuasive evidence that the person injured entered on the tracks without making the proper observations, if it appears from the attending circumstances that, had they been made, he would not or ought not to have exposed himself to the risk.[2] Not to look, and to look both ways, when so to look would have been to see danger in time to avoid it, is negligence *per se*.[3] It is no excuse that the person injured was in a vehicle so covered that he could not look in the direction from which the car was approaching.[4]

Looking and seeing nothing when at some distance from the track will not necessarily excuse the want of looking again just before entering on the track. Conditions rapidly change in the use of a much travelled street, and it is seldom that a clear view can be obtained for any considerable space.[5]

At highway crossings a street car has no paramount right

St. 180; 24 Atlantic, 596; 17 L. R. A. 448; Callahan *v.* Philadelphia Traction Co., 184 Pa. St. 425; 39 Atlantic, 222.

[1] McCracken *v.* Consolidated Traction Co., 201 Pa. St. 378; 50 Atlantic, 830; 88 Am. State, 814.

[2] Wilcox *v.* Rome, Watertown, & Ogdensburgh, R. R. Co., 39 N. Y. 358; 100 Am. Dec. 440.

[3] McGee *v.* Consolidated Street Railway Co., 102 Mich. 107, 115; 60 Northwestern, 293; 26 L. R. A. 300; 47 Am. State, 507; Beerman *v.* Union R. R. Co., 24 R. I. 275; 52 Atlantic, 1090.

[4] Fritz *v.* Detroit Citizens' Street Railway Co., 105 Mich. 50; 62 Northwestern, 1007.

[5] McCracken *v.* Traction Co., 201 Pa. St. 384; 50 Atlantic, 832; Burke *v.* Union Traction Co., 198 Pa. St. 497; 48 Atlantic, 740.

as against any other vehicle approaching on the cross street. The right attaching to each is equal and must be exercised with due regard to that attaching to the other, and so as not to interfere with or abridge it unreasonably.[1] It is not necessarily the duty of the driver of an approaching team to wait until the street car has passed, nor is it necessarily his right to push on and cut off its advance. Each party must act reasonably under all the attending circumstances.

17. Practical Right of Precedence of Railroad Cars.

It results from all these considerations that a traveller upon a highway, who approaches a railroad track on which cars are being run, is subject to a higher duty of watchfulness and precaution than that required of him when about to pass another ordinary traveller. So is the railroad company subject to a higher duty than the owner of an ordinary vehicle. The relative care demanded of each party is the same as in other cases; but the absolute care demanded of each is greater. This absolute care on the part of the traveller must, in the nature of things, be greater in respect to a through railroad than in respect to a street railroad; and in respect to an electric or cable street railroad than in respect to a horse railroad.[2]

To a pedestrian, ordinary prudence recommends stopping when there is any peril of collision should he walk forward; for he can come to a stop in a moment with ease and certainty.[3] Those in charge of the train or car, if it is in rapid motion, have a right to assume that he will stop,

[1] O'Neil *v.* Dry Dock, East Broadway, & Battery R. R. Co., 129 N. Y. 125; 29 Northeastern, 84; 26 Am. State, 512.

[2] Lynam *v.* Union Railway Co., 114 Mass. 83; Newark Passenger Railway Co. *v.* Block, 55 N. J. Law, 605; 27 Atlantic, 1067; 22 L. R. A. 374; Indianapolis Street Railway Co. *v.* Tenner, Ind. ; 67 Northeastern, 1044; Robbins *v.* Springfield Street Railway Co., 165 Mass. 30; 24 Northeastern, 334.

[3] Consolidated Traction Co. *v.* Behr, 59 N. J. Law, 477; 37 Atlantic, 142.

whether he is upon a street crossing or upon a street between crossings.[1]

The same reasons apply to one on a bicycle, who, if he cannot stop, can turn with equal ease.

The driver of an ordinary vehicle can proceed at a highway crossing to go over a street railway in the face of an approaching car, when, and only when, he has reasonable ground for believing that he can pass in safety if both he and those in charge of the car act with reasonable regard to the rights of each other.[2] The duty to slow up or stop, if necessary to prevent a collision, rests equally on each party.[3] Under ordinary circumstances, the first to reach the crossing, if each has been moving at a reasonable speed, has the right to proceed over it before the other; but if it be apparent to the driver that the motorman does not intend to respect this right, he must stop and give way, if a collision can thus be avoided.[4]

In practical effect these doctrines give any railroad car approaching a highway crossing what amounts to a right of precedence. This follows from the rule respecting contributory negligence. No man has the right to calculate close chances as to his ability to reach the track before the car, and throw the risk of injury on the other party. As to whether the chances were close, however, and whether the railroad company were not the one really in fault, will ordinarily be a question for the jury.[5] When a traveller is struck by a car,

[1] Helber *v.* Spokane Street Railway Co., 22 Wash. 319; 61 Pacific, 40.

[2] Tesch *v.* Milwaukee Electric Railway & Light Co., 108 Wis. 593; 84 Northwestern, 823; 53 L. R. A. 618; Lawler *v.* Hartford Street Railway Co., 72 Conn. 74; 43 Atlantic, 545; McNab *v.* United Railways, etc. Co., 94 Md. 719; 51 Atlantic, 421.

[3] New Jersey Electric Railway Co. *v.* Miller, 59 N. J. Law, 423; 36 Atlantic, 885; 39 Atlantic, 645.

[4] Earle *v.* Consolidated Traction Co., 64 N. J. Law, 573; 46 Atlantic, 613.

[5] Continental Improvement Co. *v.* Stead, 95 U. S. 161, 164; Day *v.*

the collision may be due to a sudden increase of its rate of speed, which he had no reason to anticipate, or to his meeting with some unexpected and extraordinary impediment upon the crossing. All the attendant circumstances are to be taken into account.

There is less reason for reducing the speed of a street car to avoid risk of accident between, than at, highway crossings. While the relative duty of the company to those upon the highway is determined by the same rule, in applying the test of ordinary care practically, the traveller at points between highway crossings must yield more to public convenience, which demands the rapid movement of the car.[1]

18. Travelling upon the Railroad Track.

As to those travelling on the street ahead of an advancing car, the company has practically a superior right to the use of its roadway. If a car overtakes a person or vehicle travelling upon it, the latter must turn off, and those in control of the car have a *prima facie* right to assume that they will.[2]

Boston & Maine Railroad, 96 Me. 207; 52 Atlantic, 771; 90 Am. State, 335; 97 Me. 528; 55 Atlantic, 420; Cincinnati Street Railway Co. *v.* Snell, 54 Ohio St. 197; 43 Northeastern, 207; 32 L. R. A. 276; Callahan *v.* Philadelphia Traction Co., 184 Pa. St. 425; 39 Atlantic, 222; Wilds *v.* Hudson River R. R. Co., 29 N. Y. 315. *Cf.* Smith *v.* Metropolitan Street Railway Co., 7 App. Div. N. Y. 253, 256.

[1] It has even been held by some courts that a street car has, as matter of law, a right of precedence between highway crossings, and that a dominant right to the space occupied by a street railroad is in the street railroad company. McCracken *v.* Consolidated Traction Co., 201 Pa. St. 378; 50 Atlantic, 830; 88 Am. State, 814. *Cf.* Street Railroad Co. *v.* Howard, 102 Tenn. 474; 52 Southwestern, 864; O'Neil *v.* Dry Dock, East Broadway, & Battery Railroad Co., 129 N. Y. 125; 29 Northeastern, 84; 26 Am. State, 512.

[2] Wood *v.* Detroit City Street Railway Co., 52 Mich. 402; 18 Northwestern, 124; 50 Am. Rep. 259; Ehrisman *v.* East Harrisburg City Passenger Railway Co., 150 Pa. St. 180; 24 Atlantic, 596; 17 L. R. A. 448; Everett *v.* Los Angeles Consolidated Electric Railway Co., 115 Calif. 105; 43 Pacific, 207; 46 Pacific, 889; 34 L. R. A. 350; Laufer

The car, however, must be under reasonable control, so that it may be stopped, should it seem necessary to avoid a collision, with reasonable facility.[1] On the other hand, the traveller is enjoying a right — that of passing over the portion of the street occupied by the railroad — the exercise of which is liable to frequent interruptions. He must therefore be on the watch for such interruptions, and ordinary care may require him to look and listen for a car approaching from behind.[2]

One who is walking along a railroad track in a city street between the rails occupies an unusual position. Sidewalks are for pedestrians and the highway between the sidewalks is more particularly for the use of vehicles. Hence a pedestrian using the railroad as a pathway must use a degree of care proportioned to the risk thus necessarily assumed, and greater than that generally required of the driver of a team.[3]

19. Presumption of Negligence.

The highway traveller who approaches a grade crossing is one of two independent actors, and is charged with duties correlative to those of the railroad company. Accidents at such crossings are extremely few in comparison with the number of those who daily pass over in safety. It has been held therefore by some courts that when a traveller is struck by a train, it is a presumption of fact that the fault was his own.[4] This seems going too far, but it is certainly true that

v. Bridgeport Traction Co., 68 Conn. 475, 489; 37 Atlantic, 379; 37 L. R. A. 533.

[1] Consolidated Traction Co. *v.* Haight, 59 N. J. Law, 577; 37 Atlantic, 135. See *post*, pp. 421, 425.

[2] Adolph *v.* Central Park, North & East River R. R. Co., 76 N. Y. 530, 538.

[3] Gilmartin *v.* Lackawanna Valley Rapid Transit Co., 186 Pa. St. 193; 40 Atlantic, 322.

[4] Cincinnati, Hamilton, & Indianapolis R. R. Co. *v.* Butler, 103 Ind. 31; 2 Northeastern, 138.

the mere fact of his being struck is not *prima facie* evidence of fault on the part of the railroad company, and that he must show that fault or negligence of his own did not contribute to his injury. He must prove his case, and this demands proof of an injury resulting from the defendant's negligence. If his evidence shows that it was partly due to his own, he cannot recover, for should he, he would be profiting by his own wrong. If, on the other hand, his evidence does not show any contributory negligence, he has done all that is required of him, unless something new is brought out in defence.[1]

20. Driving or Walking in Face of Approaching Street Car.

Whatever may be true of through railroads, for one to start to cross a street over a street railway in front of an approaching car is not necessarily shown to have been negligent by the fact that the car struck him. It may have been going, when he started to cross, so slowly that there would have been no danger of a collision had it proceeded at the same rate. Whether he had the right to assume that the speed would not be increased so as to endanger his safety is a proper question for the jury.

So those travelling along a street on which a street railroad is in operation have as good a right to use the street where the tracks are laid as to use any other part of it, provided they act with due regard for the convenient and safe movement of the cars upon them. These must also be run with due regard for their safety. The motorman must be on the constant watch for teams or cyclists turning upon the track, and keep his car under such control as to be able to slacken speed or come to a stop should their safety seem

[1] Johnson *v.* Hudson River R. R. Co., 20 N. Y. 65, 73; 75 Am. Dec. 375.

reasonably to demand it.[1] He is not, however, bound to anticipate that any one will suddenly turn from a position of safety, and drive in front of the car in such a way as to risk a collision.[2]

21. Highway Traveller overtaken by Street Car.

While one is bound to use reasonable care as to looking and listening before going upon a street railroad, when once upon it and travelling along it he is not bound, as matter of law, to keep looking behind him for approaching cars. He is entitled to place some reliance on receiving audible warning of their approach, and if apparently he is not aware of their proximity, it is the duty of the motorman to give him special warning by sounding the gong, or otherwise.[3]

22. Increased Vigilance may be demanded in Emergencies.

What would be proper on the part of a locomotive engineer or motorman under ordinary circumstances may fall short of the exercise of due care under extraordinary circumstances.

In running a street car at a time when a fire alarm has been sounded and the fire engines are hurrying through the streets, ordinary care on the part of the motorman requires more than ordinary vigilance to prevent collisions. The driver of a fire engine, whose duties require him and are universally known to require him to drive fast, has some right to rely on the exercise of such vigilance in his favor, and if he runs risks that the driver of an ordinary team

[1] Adams *v.* Camden & Suburban Railway Co., N. J. Law ; 55 Atlantic, 254.

[2] Chicago Union Traction Co. *v.* Browdy, Ill. ; 69 Northeastern, 570.

[3] Vincent *v.* Norton & Taunton Street Railway Co., 180 Mass. 104; 61 Northeastern, 822; Zolpher *v.* Camden & Suburban Railway Co., N. J. Law, 55 Atlantic, 249. See *ante*, p. 406.

would not be expected to hazard, the question as to his negligence would be one for the jury.[1]

23. Stationary Cars.

Whatever precedence at a highway crossing practically belongs to a railroad train has its reason and justification in its promoting the convenience and safety of the greater number of the persons concerned; in the greater ease with which a man or a team can be brought to a stop; and in the fact that cars move on known and invariable tracks. But as between a highway traveller and a stationary train neither has precedence. The right of passage is equal, and each party concerned should act with due regard to the other.[2] No presumption of negligence arises from the mere attempt to cross a highway immediately in front of a stationary engine or car. The traveller has a right to expect that some signal will be given before it is set in motion.[3]

If a railroad train is stopped at and over a highway crossing so as to bar the way for an unreasonable length of time, those using the highway are not thereby justified in attempting to pass between or over the cars, but would become trespassers by so doing.[4]

24. Switching.

A railroad company has the right to switch cars across highways, but not to make a running or flying switch [5] (par-

[1] Warren *v.* Mendenhall, 77 Minn. 145; 79 Northwestern, 661.

[2] Allen *v.* Boston & Maine Railroad, 94 Me. 402; 47 Atlantic, 917.

[3] St. Louis & San Francisco Railway Co. *v.* Dawson, 64 Kans. 99; 67 Pacific, 521.

[4] Kriwinski *v.* Pennsylvania R. R. Co., 65 N. J. Law, 392; 47 Atlantic, 447; Barr *v.* Railroad, 105 Tenn. 544; 58 Southwestern, 849.

[5] A running switch is one to make which a train is broken, before reaching the switch track, by uncoupling the cars to be switched off. If a car is to be cut out of the train, it is uncoupled at both ends. The forward section of the train is then run rapidly over the switch; the de-

ticularly if it be for the purpose of cutting out a car), without giving adequate warning to travellers of the approach of the detached car or cars.[1] The circumstances may be such as to make this kind of switching negligence *per se*.[2]

25. Backing Cars at Night.

Backing a train over a crossing at night, without any light on the rear car or other signal, is *prima facie* negligence.[3]

26. Extra Trains: Hand Cars.

Every railroad company has the right to run extra trains at pleasure, and to use hand cars upon its tracks. Travellers at a highway crossing must be always on their guard against any car that may appear. If one not a servant of a railroad company is allowed by one whom it has put in charge of a hand car to use that car for his own purposes upon its tracks, and he negligently runs it against a traveller at a highway crossing, the company is liable. Either the traveller or the company must suffer by the act of negligence, and it was the company whose servant and whose track laid upon the highway made it possible.[4]

tached car, moving more slowly, as it arrives there is switched off; and the switch is replaced in time to let the rear section pass along the main track, to be joined to the first section when it reaches it, being carried along by its retained momentum.

[1] Brown *v.* New York Central Railroad, 32 N. Y. 597; 88 Am. Dec. 353.

[2] Delaware, Lackawanna, & Western R. R. Co. *v.* Converse, 139 U. S. 469.

[3] Maginnis *v.* New York Central & Hudson River R. R. Co., 52 N. Y. 215, 222.

[4] Salisbury *v.* Erie R. R. Co., 66 N. J. Law, 233; 50 Atlantic, 117; 88 Am. State, 480.

27. Duty of Company to use Care to avoid Consequences of Traveller's Negligence.

Negligence is only deemed contributory when it was a proximate cause of the injury. That only is a proximate cause of an event, juridically considered, which, in a natural sequence, unbroken by any new and intervening cause, produces that event, and without which that event would not have occurred. It must be an efficient act of causation separated from its effect by no other act of causation. If, after the act or omission constituting negligence on the part of one injured at a railroad crossing the cars might have been so controlled, by the exercise of reasonable care and prudence on the part of those in charge of them, as to avoid the injury, then a failure to exercise such care and prudence would be an intervening cause, and so the plaintiff's negligence no longer a proximate cause, and therefore not a bar to his recovery.[1] Still more, if the train should be wilfully run over him, would his negligence become immaterial.

If, then, a locomotive engineer or the motorman on a street railway sees one on the track in front of him, or apparently about to go on it, and perceives that a collision will probably result unless he reduces the speed of the cars under his control, reasonable prudence requires him to reduce it, and if he does not and a collision happens, that the party injured was originally in fault does not relieve the railroad company of responsibility.

This doctrine, however, must not be so used as to abrogate the general rule to which it is in the nature of an exception, and it is to be applied with caution to railway-crossing accidents. It does not apply when both parties were contemporaneously and actively in fault, and their mutual carelessness

[1] Grand Trunk Railway Co. *v.* Ives, 144 U. S. 408, 429; Parkinson *v.* Concord Street Railway, 71 N. H. 28; 51 Atlantic, 268.

produces the injury.[1] There is generally little time for either party to think, after the chance of accident appears. It is an affair of a few seconds. Particularly is this true as respects street railways, where much must depend on the rate of speed maintained by the party attempting to cross the tracks, and whether he directs his course at right angles to the track or obliquely. One useful test, in a suit by the owner of a team injured by a collision, is to ask whether if the motorman had been the one injured, and had sued the plaintiff, and proved that his team was negligently driven upon the tracks, it would have been a sufficient answer that the car could have been stopped in time to prevent the accident. Each party must be judged by the same rule. The driver of a team cannot take what are obviously doubtful chances of crossing in safety, and throw upon the motorman the duty of slackening speed to resolve the doubt. In such a case, where both of the persons immediately concerned are acting hurriedly at the same time, it is impracticable to separate the plaintiff's negligence from the injury which so closely follows.[2]

28. Liability of Company to indemnify Municipality charged with Care of Highway.

If a traveller recovers against a municipality for injuries received on a highway at a railroad crossing from defects in the highway caused by the default of the railroad company in constructing or maintaining the crossing, the municipality can compel the company to indemnify it, notwithstanding its own negligence in not repairing the defect; provided it gave due notice of the suit.[3]

[1] Everett *v.* Los Angeles Consolidated Electric Railway Co., 115 Calif. 105; 43 Pacific, 207; 46 Pacific, 889; 34 L. R. A. 350.

[2] Rider *v.* Syracuse Rapid Transit Railway Co., 171 N. Y. 139; 63 Northeastern, 836; 58 L. R. A. 125.

[3] Lowell *v.* Boston & Lowell R. R. Corporation, 23 Pick. 24; 34 Am. Dec. 33; Woburn *v.* Boston & Lowell R. R. Corporation, 109 Mass. 283.

CHAPTER XLII.

THE MANAGEMENT OF TRAINS AT RAILROAD INTERSECTIONS.

1. The Site held for a Common Use.

A RIGHT to build one railroad across another carries no title to the soil. The company building it acquires a mere easement, and the ground remains for the common use of both companies in such a manner that each can exercise its franchise beneficially.[1]

Precautions against accidents may be exacted of each company by the State, and that whose road is subjected to the crossing may be obliged to provide expensive safeguards at its own cost, although the crossing was of no benefit to it.[2]

2. The Care required.

Where two railroads intersect at grade, each company must run its cars with due regard to the rights of the other.[3] Each owes the other no more than ordinary care, that is, than the care to be reasonably expected of a prudent man engaged in the same business. That is, however, a high degree of care.[4]

[1] National Docks & New Jersey Junction Connecting Railway Co. *v.* State, 53 N. J. Law, 217; 21 Atlantic, 570; 26 Am. State, 421.

[2] Detroit, Fort Wayne, & Belle Isle Railway *v.* Osborn, 127 Mich. 219; 86 Northwestern, 842; 62 L. R. A. 149; affirmed, 189 U. S. 383.

[3] Patterson *v.* Wabash, St. Louis, & Pacific Railway Co., 54 Mich. 91; 19 Northwestern, 761; 18 Am. & Eng. R. R. Cases, 130.

[4] See Metropolitan R. R. Co. *v.* Hammet, 13 D. C. App. 370.

It is the duty of the man directing the movements of a train or car across another railroad not to allow it to enter on the tracks of the latter until he has used reasonable care to ascertain if there is danger of collision with any train or car upon them. He need not, in the absence of a statute requiring it, come to a total stop, but he must go so slowly as to enable him to see the danger, if there be any, in time to give him a reasonable opportunity to avoid it; and if ordinary prudence requires him to listen, he must do that also.[1]

Contracts between the two companies concerned are usually made which regulate the manner of crossing, and provide for certain safeguards.[2]

Statutes often impose special duties on one or both companies, such as stopping every train or car before reaching the crossing, or maintenance of certain signal apparatus. Ordinary care, of course, then requires compliance with this law.

3. Right of Precedence.

If two street railways intersect, one using horse power and the other electric power, the cars of the latter have no right of precedence at the crossing.[3] If a street railway crosses a through railroad, the cars of the latter have such a right, for they are generally heavier, proceed at a greater rate of speed, and form part of a train having a considerable momentum.

4. Rights of Passengers in Case of Collision.

In case of a collision between cars on intersecting railroads, resulting in injury to a passenger, he is not so identi-

[1] Kansas City, Fort Scott, & Memphis R. R. Co. *v.* McDonald, 51 Federal, 178; 4 U. S. App. 563; 2 C. C. A. 153. But see Downey *v.* Philadelphia Traction Co. & Philadelphia & Reading R. R., 161 Pa. St. 588; 29 Atlantic, 126; 58 Am. & Eng. R. R. Cases, 594, which asserts the stop rule as invariable.

[2] See Appendix II. 9, 10.

[3] See Metropolitan R. R. Co. *v.* Hammett, 13 D. C. App. 370.

fied with the company carrying him that, if it was negligent, its want of care can be imputed to him and defeat his recovery against the other, if that too was negligent. In such a case he can sue both or either.[1]

[1] Chapman *v.* New Haven R. R. Co., 19 N. Y. 341; 75 Am. Dec. 344; Little *v.* Hackett, 116 U. S. 366.

CHAPTER XLIII.

INJURIES TO ANIMALS.[1]

1. Cattle Lawfully on the Track.

As respects the rights of owners of cattle lawfully on the track, railroad trains must be run with reasonable care to avoid a collision with them.[2] A superior duty, however, is due to the human beings on board the train, and their safety is not to be imperilled to save cattle. Those in charge of a moving engine must be on the lookout for any obstructions on or near the track and, when the presence of cattle would be lawful and so might be anticipated, for cattle on or near it; but this duty is always subordinate to that of caring for human life.[3]

2. Want of a Fence which the Company was required to build.

If an animal, for want of a fence which the company was required by the law to build, strays upon a railroad from

[1] See also Chapter XVII., Fences, Gates, and Cattle Guards.

[2] Maynard *v.* Boston & Maine Railroad, 115 Mass. 458; 15 Am. Rep. 119.

[3] Howard *v.* Louisville, New Orleans, & Texas Railway Co., 67 Miss. 247; 7 Southern, 216; 19 Am. State, 302 and note.

adjoining land which it lawfully entered, and is run over by a train, the railroad is liable, although due care was used in running the train. The company is held by reason of its fault in not fencing, coupled with the fact that its train struck the beast.[1]

Whether the owner can recover if, knowing there was no fence, he turned his cattle out to pasture, regardless of the danger of their straying on the track, must depend on the fair interpretation of the statute. Under some statutes he could recover under those circumstances;[2] under others not.[3]

If the company has built a proper fence, but it has since become defective, the ordinary principles governing the relations of adjoining proprietors at common law apply. To turn cattle out into a pasture adjoining a railroad, immediately after a severe storm which has prostrated fences in many places, without first looking to see if the railroad fence was in good condition, might be inexcusable negligence.[4]

3. To Whom the Duty to Fence is owed.

Under statutes designed to protect adjoining landowners only, a third party, whose cattle trespassed first on the adjoining proprietor and then on the railroad, and were there killed by a train, could not recover on the mere ground of a neglect to fence; for it was not a neglect of a duty owed to him.

4. Injury from falling into a Pit.

If an animal straying on a railroad not duly fenced fall into a pit in the roadbed, the company is not liable; for it

[1] Rogers *v.* Newburyport R. R. Co., 1 Allen, 16.

[2] Eames *v.* Salem & Lowell R. R. Co., 98 Mass. 560; 96 Am. Dec. 676.

[3] Congdon *v.* Central Vermont R. R. Co., 56 Vt. 390; 48 Am. Rep. 793; Wilder *v.* Maine Central R. R. Co., 65 Me. 332; 9 Am. Railway Rep. 289; 20 Am. Rep. 698.

[4] Carey *v.* Chicago, Milwaukee, & St. Paul Railway Co., 61 Wis. 71; 20 Northwestern, 648; 20 Am. & Eng. R. R. Cases, 469.

would not then have actually caused the injury. It is not bound to keep its grounds safe for the benefit of trespassers; and whether the animal belonged to one as to whom the company was bound to fence, or not, its entry was a trespass.[1]

5. Cattle Unlawfully on the Track.

As respects the rights of the owner of cattle unlawfully upon the track of a railroad properly fenced, the train hands are not bound to be on the watch for them. It is enough if they use ordinary care to avoid running them down after they in fact observe them.[2] This amount of care they are bound to use in favor of the owner, although he may have been chargeable with want of care in letting them stray.[3] And if the track be unfenced, then although no fence was required by statute, the train hands, in passing through a territory much of which is used for pasturage, should be on the lookout for cattle on the track; for it would then be natural to expect them occasionally to stray in that direction.[4] Trains should not be run at night, through such a country, at so great a rate of speed as to make it impossible, by the use of ordinary means and appliances, to stop them within the distance at which animals on the track can be seen by the aid of the headlight.[5]

[1] Hughes *v.* Hannibal & St. Joseph R. R. Co., 66 Mo. 325.

[2] Illinois Central R. R. Co. *v.* Noble, 142 Ill. 578; 32 Northeastern, 684.

[3] Isbell *v.* New York & New Haven R. R. Co., 27 Conn. 393; 71 Am. Dec. 78. *Contra*, Maynard *v.* Boston & Maine Railroad, 115 Mass. 458; 15 Am. Rep. 119.

[4] Washington *v.* Baltimore & Ohio R. R. Co., 17 W. Va. 190; 10 Am. & Eng. R. R. Cases, 749.

[5] Louisville & Nashville R. R. Co. *v.* Kelton, 112 Ala. 533; 21 Southern, 819.

6. Slowing up Train.

The engineer is not bound to slow up, because he sees cattle near the track, unless he has reasonable cause to anticipate their entry upon it.[1]

7. The Proof required from the Plaintiff.

In an action for injury to cattle by collision with a train, mere proof of the injury is not *prima facie* evidence of negligence unless accompanied by proof that the company was bound to fence and had not fenced at the point where they entered the road. Proof that they were killed near that point, if it were the only point unfenced, would tend to prove that they entered there.[2]

8. Cattle on Highway or Farm Crossings.

Cattle are seldom lawfully on a railroad, except at a highway or farm crossing. In approaching such a crossing, the train must be run with ordinary care for the purpose of looking out for live-stock, and of avoiding a collision with them. Cattle have a certain amount of intelligence, and their attention is readily and naturally attracted by noises to the direction from which the noises come. A failure to give the customary statutory signals by bell and whistle, therefore, in approaching a crossing may be a ground for charging negligence, if cattle are killed by the train at the crossing so approached.[3]

[1] Louisville & Nashville R. R. Co. *v.* Bowen, 18 Ky. Law, 1099 ; 39 Southwestern, 31.

[2] Chicago & Alton R. R. Co. *v.* Utley, 38 Ill. 410.

[3] Hohl *v.* Chicago, Milwaukee, & St. Paul Railway Co., 61 Minn. 321 ; 52 Am. State, 598 ; 63 Northwestern, 742. *Contra*, Fisher *v.* Pennsylvania R. R. Co., 126 Pa. St. 293; 17 Atlantic, 607. *Cf.* Gillette *v.* Goodspeed, 69 Conn. 363, 369 ; 37 Atlantic, 973.

9. Turning Cattle loose on Highway.

Where the principles of the common law obtain, a horse set loose to pasture on the road near a railroad crossing, which strays upon it, is, even in a State where the fee of the highway is owned by the adjoining proprietors, and they therefore have the right of pasturage upon it, unlawfully upon the railroad, and his owner is guilty of contributory negligence.[1] Where cattle can be lawfully allowed to run at large, to allow this is not negligence.[2]

10. Runaway Horses.

If a runaway horse dashes on the track at a highway crossing, ordinary care is due to avoid injury to him, and, for want of it, the owner can recover, if he used reasonable diligence to recapture the horse, and was not in fault for the original escape from his control.[3]

11. Frightening Horses.

A railroad company cannot be held in damages for doing what it is authorized by law to do. It is authorized to run trains. This necessarily involves the making of certain noises. If that alarms a horse on a neighboring highway or passing under a railroad bridge, or in case of a railroad running on a street, though operated by steam, if a horse on that street is thereby frightened and runs away, it is a case of *damnum absque injuria*.[4] If, however, such noises are unnecessarily

[1] Trow *v.* Vermont Central R. R. Co., 24 Vt. 487; 58 Am. Dec. 191. *Contra*, Cressey *v.* Northern Railroad, 59 N. H. 564; 47 Am. Rep. 227.

[2] Savannah, Florida, & Western Railway Co. *v.* Geiger, 21 Fla. 669; 58 Am. Rep. 697; 29 Am. & Eng. R. R. Cases, 274.

[3] Clark *v.* Boston & Maine Railroad, 64 N. H. 323; 10 Atlantic, 676.

[4] Favor *v.* Boston & Lowell R. R. Corporation, 114 Mass. 350; 19 Am. Rep. 364; Howard *v.* Union Freight Railroad, 156 Mass. 159; 30 Northeastern, 479; Walters *v.* Chicago, Milwaukee, & St. Paul Railway Co., 104 Wis. 251; 80 Northwestern, 451. See Chapter XLI., Use of Highways.

and unexpectedly made, in such a way as to frighten horses lawfully on the railroad premises, their owner may be entitled to recover.[1]

12. Salting Tracks.

Ice about switch tracks is often salted in winter to thaw it out. If this is done in a State where there is no railroad fence law, and cattle attracted there to lick up the salt are run over by the train, the company is not chargeable with negligence in not having stationed a watch to keep cattle away from the spot.[2]

13. Condition of Cattle Guards.

Cattle guards need not, under all circumstances, be kept clear of snow and ice, although there has been ample opportunity to remove it. Reasonable care only is required to keep them in a reasonably safe condition, taking into account the season, the state of the weather, and the number of cattle likely to be then going at large.[3]

14. Statutes in Aid of Owners of Cattle.

Statutes exist in some States making railroad companies liable for all animals killed by their trains, unless due care is affirmatively proved. Such laws are a valid exercise of the power of the legislature to regulate civil procedure.

Statutes imposing an absolute liability, even though negligence were disproved, deny the company the benefit of due process of law, and therefore are unconstitutional.[4]

[1] Newson *v.* New York Central R. R. Co., 29 N. Y. 383.

[2] Kirk *v.* Norfolk & Western R. R. Co., 41 W. Va. 722; 24 Southeastern, 639; 56 Am. State, 899; 32 L. R. A. 416.

[3] Wait *v.* Bennington & Rutland R. R. Co., 61 Vt. 268; 17 Atlantic, 284. *Contra*, Dunnigan *v.* Chicago & Northwestern Railway Co., 18 Wis. 28; 86 Am. Dec. 741.

[4] Zeigler *v.* South & North Alabama R. R. Co., 58 Ala. 594.

Statutes requiring railroads to be fenced, which give an action for all cattle killed by railroad trains on unfenced roads, furnish a proper mode of enforcing a proper duty.[1] Double damages may be given by statute in actions of this kind. It is a fair way of punishing the failure to meet this requirement.[2]

[1] Missouri Pacific Railway Co. *v.* Humes, 115 U. S. 512; Atchison, Topeka, & Santa Fé R. R. Co. *v.* Matthews, 174 U. S. 96.

[2] Missouri Pacific Railway Co. *v.* Humes, 115 U. S. 512, 522.

CHAPTER XLIV.

FIRES.

A STEAM railroad company has the right to use locomotive engines of proper construction, and is not liable for fires set by sparks which may be scattered from one of them, unless there was something wrong in the mode of its construction or operation.[1]

1. Presumption of Negligence.

Such a locomotive, if properly equipped and run, does not ordinarily set fire. If, therefore, fire is set by one, it is in several States made by statute *prima facie* evidence of negligence on the part of the company. In the absence of such a statute, the principles of common law lead to the same result.[2] It is almost necessary for the attainment of practical justice

[1] Burroughs *v.* Housatonic R. R. Co., 15 Conn. 124; 2 Am. Railway Cases, 30; 38 Am. Dec. 64.

[2] Piggott *v.* Eastern Counties Railway Co., 3 C. B. 229; 54 Eng. Common Law, 228; McCullen *v.* Chicago & Northwestern Railway Co., 101 Federal, 66; 41 C. C. A. 365 and note; 49 L. R. A. 642.

that such a presumption should be made.[1] The condition of the locomotive and the mode of its operation will naturally be best known by the company, and probably known by it only. Proof that fire was set by sparks from one in passing has some relevancy to show that there was fault either in its equipment or operation, leading to their escape; for it shows an unusual state of facts. The clearest and most satisfactory way to put it before the jury is as a sufficient foundation for a *prima facie* presumption of negligence.[2] Of course, if the company, when its turn comes, can bring forward evidence to rebut the presumption, so clear and full that it ought to convince any reasonable man, it may be the duty of the court, instead of telling the jury what the *prima facie* presumption was, to direct a verdict for the defendant.[3]

2. Relevant Evidence.

Evidence would be relevant in defence that the engine was equipped with proper fire screens, and carefully operated by a competent engineer.[4] It would be relevant for the plaintiff to show the quantity, size, and character of the sparks thrown out from the locomotive, and to prove by expert testimony that such sparks would not be thrown out from a proper engine in proper repair.[5]

3. Duty of Company as to preventing or putting out Fires.

The company is bound to use the best sieves, spark arresters, or other contrivances in known and common use to

[1] See Chapter LIII., Rules of Evidence: Presumptions and Assumptions.

[2] Spaulding *v.* Chicago & Northwestern Railway Co., 30 Wis. 110, 121; 11 Am. Rep. 550.

[3] McCullen *v.* Chicago & Northwestern Railway Co., 101 Federal, 66; 41 C. C. A. 365, 370 and note; 49 L. R. A. 642.

[4] Missouri Pacific Railway Co. *v.* Texas and Pacific Railway Co., 41 Federal, 917.

[5] Peck *v.* New York Central & Hudson River R. R. Co., 165 N. Y. 347; 59 Northeastern, 206.

prevent the communication of fire from its engines.[1] While not bound to adopt every new invention for which superiority is claimed, it is chargeable with negligence if it does not procure those which have been thoroughly tested in practice and found the best. Statutes sometimes exist requiring the use of some particular safeguard, and if they appear to have been intended to prescribe the only precaution to be taken, no other need be.[2]

It is evidence of negligence that a kind of coal was used for the locomotives which throws off more sparks than some other kinds; but any kind of coal can be selected which is in common use for such purposes.[3] The locomotives, however, must be such as are adapted to the kind of fuel used.[4]

For loss from a fire set by a passing engine without negligence on the part of the company, it may nevertheless be responsible, if having notice of the fire and a reasonable opportunity to put it out, it failed to use such opportunity. While it is never absolutely bound to stop a passenger train for such a purpose, and could rarely be bound to stop a freight train, circumstances might demand that either should be. So if the fire is seen by its trackmen or repair gangs, it would be a proper question for a jury whether they ought not to have endeavored to extinguish it.

This duty arises from the fact that a railroad is a dangerous agency, and those connected with its operation have special facilities for observing such occasions of danger to adjoining property as may arise.[5]

[1] Jackson *v.* Chicago & Northwestern R. R. Co., 31 Iowa, 176; 2 Am. Railway Rep. 473; 7 Am. Rep. 120.

[2] West Jersey R. R. Co. *v.* Abbott, 60 N. J. Law, 150; 37 Atlantic, 1104.

[3] Lackawanna & Bloomsburg R. R. Co. *v.* Doak, 52 Pa. St. 379; 91 Am. Dec. 166.

[4] Chicago & Alton R. R. Co. *v.* Quaintance, 58 Ill. 389.

[5] Missouri Pacific Railway Co. *v.* Platzer, 73 Tex. 117; 11 Southwestern, 160; 38 Am. & Eng. R. R. Cases, 366; 15 Am. State, 771; 3 L. R. A. 639.

4. Circumstantial Evidence as to Origin of Fire.

Circumstantial evidence to raise an inference is often all that can be had to show the origin of a fire. Proof that one was started in inflammable goods stored by a railroad company on its wharf upon which it had been moving locomotives might justify an inference by the jury that it was set by one of these.[1]

To show that the fire was set by a particular locomotive, evidence is admissible that fires were set by that locomotive on the same trip, at other points.[2] When there has been no identification of the engine by which, as the plaintiff claims, the fire was set, he may be allowed to show that shortly before, other locomotives of the company, at or near the same place, had scattered sparks;[3] and this is so although it is not shown that they were of similar construction.[4] While to a certain extent raising collateral issues, it is one of those pieces of evidence which would naturally carry some weight to an ordinary mind,[5] and it is produced by a party who has not the means of readily ascertaining exactly what was the build and condition of the engines in question, and so must in a measure depend upon facts of general knowledge.

5. Combustible Material carelessly left on the Location.

Fires from locomotives are generally set first to dry grass, piles of old ties, or other combustible materials on the railroad, and spread thence to the adjoining land. Hence com-

[1] Marande *v.* Texas & Pacific Railway Co., 184 U. S. 173, 193.

[2] Woodson *v.* Milwaukee & St. Paul Railway Co., 21 Minn. 60.

[3] Lesser Cotton Co. *v.* St. Louis, Iron Mountain, & Southern Railway Co., 114 Federal, 133; 52 C. C. A. 95.

[4] Grand Trunk R. R. Co. *v.* Richardson, 91 U. S. 454, 470; McGinn *v.* Platt, 177 Mass. 125; 58 Northeastern, 175. *Contra*, Coale *v.* Hannibal & St. Joseph R. R. Co., 60 Mo. 227; 9 Am. Railway Rep. 210.

[5] See Plumb *v.* Curtis, 66 Conn. 154, 166; 33 Atlantic, 998.

panies may be negligent if they fail to keep their roads clear of such materials,[1] or if in burning them up themselves, they do it carelessly, and fire is thus communicated to the property of others.[2] If a fire is set for this purpose, and a child attracted by the blaze strays on the railroad and is burned, the company is not liable.[3]

To support the action in these cases for burning property, it is not necessary to show that there was negligence in letting the engine scatter sparks. It is inevitable that some sparks should escape. The actionable negligence is that, notwithstanding this, the company left material on its premises upon which such sparks would naturally fall, and which they would naturally set ablaze.[4]

6. Contributory Negligence.

Landowners along the line of a railroad are under no duty to use special pains to guard against fires that may be set by locomotives, nor, under ordinary circumstances, to refrain from what would otherwise be a proper use of their premises.[5] They are not bound to put metallic rather than shingle roofs on their buildings, nor to maintain a fire apparatus.[6] They cannot, however, intentionally produce a fire and then ask compensation for it, and if they put their premises in such

[1] Atchison, Topeka, & Santa Fé R. R. Co. *v.* Dennis, 38 Kans. 424; 17 Pacific, 153; 32 Am. & Eng. R. R. Cases, 318.

[2] Illinois Central R. R. Co. *v.* Mills, 42 Ill. 407; Troxler *v.* Richmond & Danville R. R. Co., 74 N. C. 377; McNally *v.* Colwell, 91 Mich. 527; 52 Northwestern, 70; 30 Am. State, 494.

[3] Erickson *v.* Great Northern Railway Co., 82 Minn. 60; 84 Northwestern, 462; 51 L. R. A. 645; 83 Am. State, 410.

[4] Delaware, Lackawanna, & Western R. R. Co. *v.* Salmon, 39 N. J. Law, 299; 23 Am. Rep. 214.

[5] Boston Excelsior Co. *v.* Bangor & Aroostook R. R. Co., 93 Me. 52; 44 Atlantic, 138; 47 L. R. A. 82. But see Collins *v.* New York Central & Hudson River R. R. Co., 5 Hun, 499; 71 N. Y. 609.

[6] Indiana Clay Co. *v.* Baltimore & Ohio Southwestern R. R. Co., Ind. ; 67 Northeastern, 704.

a condition as virtually to amount to this, by fraud, or negligence so gross as to be equivalent to fraud, it would bar their action.[1]

7. Fire first set on or from the Location, and Spreading beyond it.

If a fire is set by sparks from a locomotive upon the location of the railroad, and thence spreads to adjoining land, the company is not liable if there was no negligence leading to the escape of the sparks, nor any which facilitated the starting of the fire, nor any in not putting it out.[2] It is not bound to keep its tracks throughout its entire length constantly patrolled to prevent such conflagrations. It is bound to put out fires which it has set, endangering the property of others, within a reasonable time after it has notice of them.[3]

Railroad companies may be negligent in not having a watch kept at points of special danger, such as wooden trestles and bridges, as trains pass over them, to guard against danger from their being set on fire through the spread of the conflagration to inflammable buildings of others in their near vicinity. If sued for damage to others occurring in such a manner, evidence that other railroad companies in the vicinity are not accustomed to watch their bridges would be immaterial, unless possibly when such bridges were equally close to other buildings as inflammable as were those of the plaintiff.[4] If buildings thus exposed to risk of fire are put on railroad land under a lease or license, the company may lawfully stipulate against any claim for losses that may be suffered in

[1] Bowen *v.* Boston & Albany R. R. Co., 179 Mass. 524; 61 Northeastern, 141.

[2] Baltimore & Ohio R. R. Co. *v.* Shipley, 39 Md. 251. But see Bass *v.* Chicago, Burlington, & Quincy R. R. Co., 28 Ill. 9; 81 Am. Dec. 254.

[3] Simmonds *v.* New York & New England R. R. Co., 52 Conn. 264; 52 Am. Rep. 587.

[4] Grand Trunk R. R. Co. *v.* Richardson, 91 U. S. 454, 469.

case of their being burned in consequence of its failure to maintain a watch, or other want of care.[1]

If an engine sets fire to grass or other material on the location of the railroad, in a place where it is likely to spread to the adjoining land, and the train hands notice it, and the proper and safe operation of the road would permit stopping the train, and putting off some of the company's servants to extinguish the fire, an omission so to do is evidence tending to show negligence.[2]

If a fire set by a locomotive on land adjoining the railroad spread in natural course to lands beyond, those thus ultimately damaged have an action against the company. He who starts a conflagration must answer for all its natural consequences. If he starts it on a windy day, or in a windy season, when the fire is exposed to a wind blowing in a certain direction, he has some reason to anticipate that the flame or sparks may be carried that way. In such cases it is for the jury to determine whether the plaintiff's injury was the natural consequence of the defendant's act, under suitable instructions as to what may be proximate damages and what are too remote to be admissible.[3] The company may be liable for damage done many miles from the railroad.[4]

[1] Hartford Fire Insurance Co. *v.* Chicago, Milwaukee, & St. Paul Railway Co., 175 U. S. 91. See *ante*, p. 439.

[2] Rolke *v.* Chicago & Northwestern Railway Co., 26 Wis. 537; 3 Am. Railway Rep. 548.

[3] Hoag *v.* Lake Shore & Michigan Southern R. R. Co., 85 Pa. St. 293; 27 Am. Rep. 653; Milwaukee & St. Paul Railway Co. *v.* Kellogg, 94 U. S. 469; Hooksett *v.* Concord Railroad, 38 N. H. 242; Lehigh Valley R. R. Co. *v.* McKeen, 90 Pa. St. 122; 35 Am. Rep. 644; Hoffman *v.* King (and cases cited therein), 160 N. Y. 618; 55 Northeastern, 401; 46 L. R. A. 672; 73 Am. State, 715; Alabama & Vicksburg Railway Co. *v.* Barrett, 78 Miss. 432; 28 Southern, 820. But see Toledo, Wabash, & Western Railway Co. *v.* Muthersbaugh, 71 Ill. 572.

[4] Poeppers *v.* Missouri, Kansas, & Texas Railway Co., 67 Mo. 715; 29 Am. Rep. 518.

A statutory liability for "fires communicated" from a locomotive engine covers a fire kindled by sparks from a burning building, at a distance, which was set on fire by sparks from the engine.[1]

8. Fire set on the Location without Authority.

If track repairers cook a meal on the side of the tracks and a fire spreads therefrom to adjoining land, the company could not be held, unless it knew of or authorized such a use of its grounds; and the authority of the foreman of the section gang would not be sufficient.[2]

9. Fire set by Contractors.

For fires negligently set by independent contractors, in the construction or improvement of the railroad, the company is not liable, if the work was not such as, even if properly done, would have resulted in a fire.[3]

10. Fire set by Lessee, Mortgagee, or Receiver.

If fire is negligently set by an engine on a road operated under a lease, the lessor may be held by the party injured, unless exempted from such a claim by the terms of the law authorizing the lease.[4] If set on one operated by trustees under a mortgage, they are personally liable.[5] A receiver would not be, for he is simply an officer of court.[6]

[1] Hart *v.* Western Railroad Corporation, 13 Met. 99; 1 Am. Railway Cases, 414; 46 Am. Dec. 719; Simmonds *v.* New York & New England R. R. Co., 52 Conn. 264; 52 Am. Rep. 587.

[2] Morier *v.* St. Paul, Minneapolis, & Manitoba Railway Co., 31 Minn. 351; 47 Am. Rep. 793.

[3] Callahan *v.* Burlington & Missouri River R. R. Co., 23 Iowa, 562. See Chapter XIII., Railroad Construction.

[4] Balsley *v.* St. Louis, Alton, & Terre Haute R. R. Co., 119 Ill. 68; 8 Northeastern, 859; 59 Am. Rep. 784. See Chapter XLVI., Leases.

[5] See Chapter XLVII., Mortgages.

[6] See Chapter LV., Receiverships.

11. Absolute Statutory Liability.

Many States have statutes making railroad companies liable for all fires set by their engines, irrespective of any question of negligence. There is no constitutional objection to such legislation. It is remedial and to be liberally construed.[1] It simply re-establishes, as to a certain class of dangerous agencies, what was the original rule of the common law for all men.[2]

Such statutes generally give the company an insurable interest in all property of others along its line which is exposed to any danger of fire from its locomotives; and blanket policies of that nature can then be taken out. Under such statutes contributory negligence is no answer to the claim of the property holder against the railroad company. It now occupies to him the position of an insurer. It can re-insure itself from loss, and his contributory negligence would be no answer to its claim against its own insurer.[3]

12. Insurable Interest under such Statutes.

The right to insure what the company does not own is generally given in such terms as to include any property, real or personal, which may be situated in proximity to its line. Its responsibility for losses is commensurate with its power to insure itself against them. On goods temporarily and transiently found along its line, it may not be able to procure insurance, and if so, ought not to be held itself an insurer.[4]

Such a statute, making a railroad company an insurer against fires set by its engines, does not give an action to owners of goods in its own hands, as a warehouseman, which

[1] Grand Trunk R. R. Co. *v.* Richardson, 91 U. S. 454, 472.

[2] St. Louis & San Francisco Railway Co. *v.* Matthews, 165 U. S. 1.

[3] Rowell *v.* Railroad, 57 N. H. 132; 24 Am. Rep. 59.

[4] Pierce *v.* Bangor & Aroostook R. R. Co., 94 Me. 171; 47 Atlantic, 144. *Contra*, Haseltine *v.* Concord Railroad, 64 N. H. 545; 15 Atlantic, 143.

are thus burned. They are confined to their common-law remedy.[1]

It is competent for a railroad company to contract with any property owner that he shall not, in case of fire, set up any claim under such a statute.[2]

13. Insurance by Owner of Property burned.

Fire insurance, unlike life or accident insurance, is a contract of indemnity. It compensates one who has suffered a loss, to an amount not exceeding the extent of that loss. Hence, an equity arises, in favor of the insurer, on making this compensation, to the benefit of any remedy the insured may have against any third party to whose fault the loss was due. Applying this principle of subrogation to railroad fires, if one whose property has been burned by the negligence of a railroad company had a policy of insurance on it, he cannot recover both from the railroad company and from the insurer. This is true as to the owner of goods shipped over the railroad, as well as to the owner of a building. He can be paid but once for the damage he has sustained. Hence, if he receives his full damages from an insurance company, he must make over to it the benefit of his remedy against the railroad company;[3] and if he has already been paid by the railroad company, he holds it in trust for the insurance company.[4] Conversely, if the railroad company pays him, after he has collected his insurance policy, and with knowledge of that fact, it commits a wrong against the insurance company, and

[1] Bassett *v.* Connecticut River R. R. Co., 145 Mass. 129; 13 Northeastern, 370; 1 Am. State, 443; Blackmore *v.* Missouri Pacific Railway Co., 162 Mo. 455; 62 Southwestern, 993.

[2] Griswold *v.* Illinois Central Railway Co., 90 Iowa, 265; 57 Northwestern, 843; 57 Am. & Eng. R. R. Cases, 59; 24 L. R. A. 647.

[3] Hall & Long *v.* Railroad Companies, 13 Wall. 367.

[4] Hart *v.* Western Railroad Corporation, 13 Met. 99; 1 Am. Railway Cases, 414; 46 Am. Dec. 719.

remains liable to it, precisely as if it had not paid the owner.[1] He may, however, sue it for the benefit of the insurance company, and in such case payment to him is, of course, proper, and his having been himself paid the full amount of his policy is immaterial.[2] If his policy did not cover his entire loss, he can collect the balance from the railroad company. A suit by him, in such case, against the latter, should be for the entire loss. A cause of action for a single wrong cannot be divided,[3] unless by the consent of the wrongdoer.[4]

14. Risk of Fire not allowed for in Condemnation Proceedings.

In assessing damages for taking land by condemnation proceedings, risk of fire to adjoining land of the same proprietor is not an element to be considered, unless it be unusually great.[5] When a railroad is operated with due care, fires seldom happen, and damages are to be estimated on the assumption that the road will be so operated, and the basis of what is probable, not of what is simply possible.

[1] Connecticut Fire Insurance Co. *v.* Erie Railway Co., 73 N. Y. 399; 29 Am. Rep. 171. *Contra*, Cunningham *v.* Evansville & Terre Haute R. R. Co., 102 Ind. 478; 1 Northeastern, 800; 52 Am. Rep. 683.

[2] Briggs *v.* New York Central & Hudson River R. R. Co., 72 N. Y. 26.

[3] Norwich Union Fire Insurance Society *v.* Standard Oil Co., 59 Federal, 984; 8 C. C. A. 433; 19 U. S. App. 460.

[4] Omaha & Republican Valley Railway Co. *v.* Granite State Fire Insurance Co., 53 Nebr. 514; 73 Northwestern, 950; 14 Am. & Eng. R R. Cases, 140.

[5] Wilmington & Reading R. R. Co. *v.* Stauffer, 60 Pa. St. 374; 100 Am. Dec. 574.

PART V.

TRANSFERS AND LIENS.

CHAPTER XLV.

SALES.

1. Property Essential to the Enjoyment of the Franchise.

THE inability of a railroad company, without statutory authority to that effect, to sell its franchise or any part of it,[1] extends to whatever of its real property is essential to the exercise of the franchise. The franchise was vested in certain particular individuals for public purposes. The property was acquired under the franchise, and as without it the franchise cannot be fully exercised, to dispose of it would necessarily tend to defeat a public purpose.[2]

It is immaterial whether such property was acquired under the right of eminent domain. If procured by voluntary pur-

[1] New Orleans Spanish Fort & Lake R. R. Co. *v.* Delamore, 114 U. S. 501, 507; New Orleans, Jackson, & Great Northern R. R. Co. *v.* Harris, 27 Miss. 517, 540. See Chapter IV., Railroad Franchises.

[2] Boston, Concord, & Montreal Railroad *v.* Gilmore, 37 N. H. 410; 72 Am. Dec. 336.

chase, and acquired in fee-simple, it is nevertheless inalienable, because it has been devoted to a particular public use, in subservience to a particular franchise, the holder of which alone can exercise it. It has become part of a public highway by the act of the owner, which is as irrevocable as a dedication of land for ordinary highway purposes.

2. Lands acquired by Condemnation Proceedings.

Nor are lands acquired under the right of eminent domain, which prove unnecessary for the purposes of the railroad, the subject of sale by the railroad company. Its title was acquired for railroad uses. If such uses are abandoned, the title reverts to the original owner. They can be sold only in case the use is abandoned by the company in order to allow it to be continued by another party having a franchise for that purpose, and when such a transfer is authorized by law.

3. Land granted for Railroad Purposes.

So a grant of a right of way for railroad purposes to a railroad company and its assigns conveys nothing which it can assign to any party not having a franchise to use the land in the same way, and nothing which could be taken on execution by its creditors.[1]

4. Lands held in Fee-simple.

But lands granted to a railroad company in fee-simple, not within the location, and not necessary for the uses of the railroad, may be sold at the discretion of the directors.[2]

5. Personal Property.

Rolling-stock, old rails, and other materials may be sold in the same way. It cannot be said of any particular car

[1] East Alabama Railway Co. *v.* Doe, 114 U. S. 340, 350.
[2] Platt *v.* Union Pacific R. R. Co., 99 U. S. 48, 57.

that it is necessary for the operation of the road. If, however, the directors, without the sanction of the stockholders, were to attempt to sell all the rolling-stock of the road, with a view to abandoning its operation, the latter would be entitled to preventive relief in equity.[1]

6. Statutory Powers of Purchase and Sale.[2]

Power to construct a railroad over a given line, or a branch from an existing railroad, implies power to purchase one already existing upon that line, or capable of use for such a branch.[3]

Power given by the State of its incorporation to a railroad company to purchase the railroad franchise and property of any connecting railroad company carries by implication a corresponding power to sell to any company of the latter description which has been incorporated by the same State.[4]

A power "to connect or unite with" other railroads refers only to a connection of tracks, and does not authorize a sale or lease [5] to a railroad company having connecting tracks.[6]

7. Power implied from Authority to consolidate.

A power to sell out the whole road and franchise to another railroad company may be implied from powers to acquire, hold, and convey any or all kinds of property, and to incorporate the stock of the company with that of any

[1] See Chapter IV., Railroad Franchises.

[2] See Appendix IV. A. 4. As to the form and effect of a conveyance by way of sale under a mortgage or deed of trust, see Chapter XLVII., Mortgages.

[3] Branch *v.* Jesup, 106 U. S. 468, 486. *Contra*, Campbell *v.* Marietta & Cincinnati R. R. Co., 23 Ohio St. 168.

[4] New York & New England R. R. Co. *v.* New York, New Haven, & Hartford R. R. Co., 52 Conn. 274. See Matter of Prospect Park & Coney Island R. R. Co., 67 N. Y. 371, 377.

[5] See Chapter XLVI., Leases.

[6] Louisville & Nashville R. R. Co. *v.* Kentucky, 161 U. S. 677.

other railroad company. What a company could thus effect indirectly by a consolidation, it can do directly by a sale. "The greater power of alienating or extinguishing all its franchises, including its own being and existence, contains the lesser power of alienating its road and the franchises incident thereto and necessary to its operation." [1]

8. A Sale of Shares not a Transfer of the Franchise.

A sale of all the shares of the stock of a railroad company to another railroad company, although followed by a delivery of the possession of the road to the latter, works no transfer of the franchises of the former, and leaves it fully responsible to third parties for their proper exercise.[2]

9. Sale of Franchise to Exist.

A power to a railroad company to sell all its franchises, including that to be a corporation, when executed, *ipso facto* dissolves the corporation. It is, in effect, a surrender of them to the State, an acceptance of the surrender, and a re-grant of them to the purchaser.[3]

But a mere statutory power to sell its road and franchises, or any part thereof, would not import a right to sell the franchise to exist as a railroad corporation. That was granted to the corporators, and never, in strictness, resided in the corporation itself.[4]

10. Sale of all Franchises.

When all the franchises of the company are sold, they pass subject to all restrictions attaching to them by the law ex-

[1] Branch *v.* Jesup, 106 U. S. 468, 478.

[2] Chollette *v.* Omaha & Republican Valley R. R. Co., 26 Nebr. 159; 41 Northwestern, 1106; 4 L. R. A. 135.

[3] See Rogersville & Jefferson R. R. Co. *v.* Kyle, 9 Lea, 691.

[4] Smith *v.* Gower, 3 Met. (Ky.) 171; Fietsam *v.* Hay, 122 Ill. 293; 13 Northeastern, 501; 3 Am. State, 492.

isting at the date of the sale. Special immunities, which can be regarded as personal to the original grantee, do not form part of the franchises and do not pass to the purchaser.[1]

An authorized sale of an entire railroad, and all the franchises of the vendor, carries a franchise of exercising the right of eminent domain. But if the railroad be sold in parcels, to different purchasers, that will not pass, unless such a division of the franchise appears to have been within the intent of the legislature in authorizing the sale.[2]

11. Insolvency and Bankruptcy Sales.

A railroad company may be thrown into insolvency or bankruptcy, under the ordinary statutes regulating such proceedings, and its property and franchise to operate the road sold by order of court.[3]

[1] Chesapeake & Ohio Railway Co. *v.* Miller, 114 U. S. 176; State *v.* Sherman, 22 Ohio St. 411.

[2] State *v.* Morgan, 28 La. Ann. 482, 490.

[3] New Orleans, Spanish Fort, & Lake R. R. Co. *v.* Delamore, 114 U. S. 501, 506. See Appendix IV. A. 5.

CHAPTER XLVI.

LEASES.

1. Unauthorized.

THE same principles which forbid a sale of a railroad, without legislative authority to that effect, apply to leases.[1]

A lease not so authorized is therefore, as a conveyance, void.[2] But if possession has been delivered, the lessee may be held to account for the benefits in fact received. While an *ultra vires* agreement cannot support an action either at law or equity,[3] rights may arise from what has been done under it, which will support one, or which may be set up in defence to one.[4] The obligation of the lessee is of a quasi-

[1] See Chapter XLV., Sales.

[2] Thomas *v.* Railroad Company, 101 U. S. 71, 83.

[3] Pennsylvania R. R. Co. *v.* St. Louis, Alton, & Terre Haute R. R. Co., 118 U. S. 290, 314, 316; Oregon Railway & Navigation Co. *v.* Oregonian Railway Co., 130 U. S. 1, 23.

[4] Central Transportation Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 60; Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 159.

contractual nature.[1] The public also may have rights calling for protection. Thus if the lessor should threaten to resume possession by force, the lessee might obtain relief by injunction against what might thus produce public inconvenience.[2]

2. Authorized.[3]

Authority to make or take a lease of a railroad will not be implied in favor of a railroad corporation from doubtful expressions.[4]

Power "to make contracts and engagements" with any other corporation for the transportation of goods or passengers, or to make contracts with other railroad companies for the use of their roads, does not warrant a lease.[5] Nor does a power to consolidate stocks with another railroad company and connect the roads.[6]

Power to lease to any person or corporation includes a foreign corporation.[7]

3. Lease of Connecting Road.

Statutory authority to take leases of railroads often confine the right to leases of connecting roads. Any road is a connecting road, under such a power, which connects either with a railroad system as originally built, or with any part of it

[1] See Paper of E. A. Harriman on *Ultra Vires* Corporation Leases, Report of the American Bar Association for 1900, p. 310.

[2] Western Union Telegraph Co. *v.* Union Pacific Railway Co., 1 McCrary, 556.

[3] See Chapter XLIX., Railroad Conveyancing, and Appendix IV. B.

[4] Oregon Railway & Navigation Co. *v.* Oregonian Railway Co., 130 U. S. 1, 26.

[5] Thomas *v.* Railroad Co., 101 U. S. 71, 80; Pennsylvania R. R. Co. *v.* St. Louis, Alton, & Terre Haute R. R. Co., 118 U. S. 290, 312.

[6] Board of Commissioners *v.* Lafayette, Muncie, & Bloomington Railroad Co., 50 Ind. 85, 110. *Contra*, Woodruff *v.* Erie Railway Co., 93 N. Y. 609, 616.

[7] Stewart *v.* Lehigh Valley R. R. Co., 38 N. J. Law, 505. As to the form of the granting clause, see Chapter XLVII., Mortgages.

since acquired, either by purchase or lease. Every new lease, therefore, may, by making a new connection, lead up to and warrant another lease.[1]

A grant of power to receive a lease from a connecting railroad company, which was incorporated by the State granting such power, implies a grant of power to the latter company to give the lease.[2]

4. Consent of Shareholders.

A lease of a railroad for a long term of years works a fundamental change in the relation of the lessor to the road. If the lessor is an incorporated company, and the laws at the time of the incorporation did not authorize nor contemplate the authorization of such a lease, an amendment of the law whereby it is authorized would violate the charter contract,[3] unless all the shareholders should consent to this alteration of it, or unless due provision were made for buying in the shares of dissenting shareholders or appropriating them under the right of eminent domain.[4]

A lease of a railroad with its franchises, when authorized by law, must, it would seem, be made by vote of the stockholders, unless the statute otherwise provides. It is one of those large operations which are beyond the scope of the ordinary business of the road, and so beyond the powers commonly vested in the board of directors.[5]

[1] Atchison, Topeka, & Santa Fé R. R. Co. *v.* Fletcher, 35 Kans. 236; 10 Pacific, 596; Hancock *v.* Louisville & Nashville R. R. Co., 145 U. S. 409, 412.

[2] Huntting *v.* Hartford Street Railway Co., 73 Conn. 179, 181; 46 Atlantic, 824.

[3] Boston & Providence R. R. Corporation *v.* New York & New England R. R. Co., 13 R. I. 260. See Dickinson *v.* Consolidated Traction Co., 114 Federal, 232, 253.

[4] Petition of Laconia Street Railway, 71 N. H. 355; 52 Atlantic, 458.

[5] See Waldoborough *v.* Knox & Lincoln R. R. Co., 84 Me. 469; 24 Atlantic, 942; Nashua & Lowell R. R. Co. *v.* Boston & Lowell R. R.

5. Authority of Directors to consent to Modifications.

A lease is generally prepared and executed under the direction of the board of directors, acting by authority of the stockholders. If after its execution there are negotiations for its alteration, these are for the directors, and they can generally agree in behalf of the company to any changes which are collateral to the estate created. It is, however, customary and desirable for the stockholders to give express authority to this effect.

Railroad leases are sometimes made reserving as part or all of the rental a certain sum to be paid semi-annually or quarterly to the shareholders in the lessor company, each receiving directly a sum proportioned to his stock interest. This is a valid provision, the shareholders for the time being, on the day when any such payment falls due, thus made the appointees of the lessor to receive what would otherwise belong to it. Their right, however, being solely derived from the contract of lease, and no estate having been thereby conveyed to them, is subject to modifications from time to time by the parties to that instrument. Those who make any executory contract can subsequently vary its obligation by mutual agreement. Hence, if the directors of the lessor were authorized to make and did make the lease, they can — acting in good faith — modify it at any time by reducing the rent, and thus correspondingly lessening the payments to the shareholders.[1]

Co., 27 Federal, 821, 826; Rogers *v.* Nashville, Chattanooga, & St. Louis Railway Co., 91 Federal, 299, 322; 33 C. C. A. 517; 62 U. S. App. 49; Cass *v.* Manchester Iron & Steel Co., 9 Federal, 640. *Contra*, Beveridge *v.* New York Elevated Railroad Co., 112 N. Y. 1; 19 Northeastern, 489; 2. L. R. A. 648.

[1] Flagg *v.* Manhattan Railway Co., 10 Federal, 413, 431; Beveridge *v.* New York Elevated Railroad Co., 112 N. Y. 1; 19 Northeastern, 489; 2 L. R. A. 648.

6. Lease of Franchise to construct Railroad.

When a franchise to construct and operate a railroad is alienable by law, it may be transferred by lease for a term of years, and in such case, if the lease is made before the road is constructed, the lessee can construct it during the term.[1]

7. Lease to Private Individual.

A general power to lease authorizes a lease to a private individual; and such leases have been not infrequently given.[2]

8. Long Leases.

Railroad leases are often made for a term of 99 or 999 years. There is no magic in these numbers, and unless they follow some statutory limitation any others might as well be selected.

The practice of making the term 99 years is probably due to the force of traditional custom reaching back to the Roman law. It was one of the rules of that system of jurisprudence that the estate known as a usufruct, which corresponded in many respects quite nearly to our leasehold, could not be created for a longer term than the life of the usufructuary. There was a *delectus personæ*. But a corporation never died. Hence it was settled that if a usufruct were granted to a municipal corporation (and one would seldom, if ever, under Roman institutions, be likely to have come to any other kind of corporate body), the limit of a hundred years must be observed, that being assumed to be the longest term of human life.[3]

[1] Huntting *v.* Hartford Street Railway Co., 73 Conn. 179, 181; 46 Atlantic, 824.

[2] Bank of Middlebury *v.* Edgerton, 30 Vt. 182, 190. See Woodruff *v.* Erie Railway Co., 93 N. Y. 609, 616.

[3] Pandects, XXXIII. 2, *de usu et usufructu, etc.*, 8.

A lease reserving an annual rent for 999 years cannot be treated as a sale. The reversion remains in the lessor, and the rental incident to it makes it of present value.[1]

9. Lease for Term longer than Life of Parties.

Many railroad corporations are created for a fixed term of years. A lease by or to such a corporation is good, although for a period exceeding the term of its corporate existence.[2]

10. A Long Lease not a Sale nor a Perpetuity.

Not only is a lease reserving an annual rent, for however long a term of years, or even in perpetuity, not to be regarded as a sale,[3] but it does not create an unlawful perpetuity at common law. What is generally known as the common-law "rule against perpetuities" is directed against a postponement of the vesting of an estate, and not against a prolongation of its duration.[4] The unlawful character of an estate, which there has been an attempt to create by tying up property for a period unreasonably long, results from what is the recognized public policy as to the alienation of property. That policy requires that the right of free alienation shall not be unreasonably narrowed. Hence a condition in a deed that the premises conveyed shall never be alienated is repugnant to the grant and void. Hence, also, any attempt to create an estate immediately to be prolonged indefinitely

[1] Morrison *v.* St. Paul & Northern Pacific Railway Co., 63 Minn. 75; 65 Northwestern, 141; 30 L. R. A. 546.

[2] Gere *v.* New York Central & Hudson River R. R. Co., 19 Abb. N. C. 193; Union Pacific Railway Co. *v.* Chicago, Rock Island, & Pacific Railway Co., 163 U. S. 564, 592.

[3] Morrison *v.* St. Paul & Northern Pacific Railway Co., 63 Minn. 75; 65 Northwestern, 141; 30 L. R. A. 546; State *v.* Mississippi River Bridge Co., 109 Mo. 253; 19 Southwestern, 421; Chicago & Alton R. R. Co. *v.* People, 153 Ill. 409; 38 Northeastern, 1075; 29 L. R. A. 69.

[4] Sioux City Terminal Railroad & Warehouse Co. *v.* Trust Co. of North America, 82 Federal, 124, 132; 27 C. C. A. 73; 49 U. S. App. 523.

would be void. But a lease in perpetuity is not obnoxious to these rules of policy, because the lessor and lessee have each a vested interest, and together can, at any time, convey a clear title in fee-simple.[1]

11. Difference in Effect between Leases and Consolidations.

A company having power to lease the road for 999 years, or in perpetuity, is not thereby empowered, on giving such a lease, to consolidate with the lessee company. Nor does a prohibition against the consolidation of competing roads prevent a lease for a long term of years,[2] unless it be for so long a term (*e. g.*, 999 years) as to be manifestly a device to avoid such prohibition.[3] In that case the survival of the lessor corporation, denuded of all power to serve the public, can secure no object which it was the purpose of the prohibition to promote.

12. Lease of a Finished Railroad.

When a lease of a railroad which has been constructed is given by due authority of law, the franchise to maintain and operate it during the term passes to the lessee, but the franchise to construct it remains in the lessor. If, therefore, it becomes necessary to appropriate more land for the use of the railroad, any proceedings to that end under the right of eminent domain must be taken by the lessor. Railroad leases commonly provide that such proceedings will be taken by the lessor at the request and expense of the lessee, and

[1] Scatterwood *v.* Edge, 1 Salk. 229; Sir Edward Sugden, *arguendo*, Cadell *v.* Palmer, 1 Cl. & Fin. 408; Gray, Restraints on the Alienation of Property, 90; Pollock *v.* Booth, Irish Rep. 9 Eq. 229, 244; 607.

[2] State *v.* Montana Railway Co., 21 Mont. 221; 53 Pacific, 623; 45 L. R. A. 271 and note.

[3] State *v.* Atchison & Nebraska R. R. Co., 24 Nebr. 143; 38 Northwestern, 43; 8 Am. State, 164.

that lands thus acquired shall remain the property of the lessor, subject only to the lease.[1]

13. Injuries to Third Persons during Term of Lease.

Whenever the franchise to maintain and operate the road during the term of the lease has, by the lease, passed from the lessor, it cannot be held responsible to third parties for injuries to them, owing to its wrongful or negligent operation by the lessee or to the latter's not maintaining it in as good condition as that in which it was let.[2] For such injuries, occurring during the term, from defects of construction existing prior to the lease, the lessor is responsible.[3]

A bare power to lease a railroad does not necessarily include power to make an absolute transfer of the franchise of maintaining and operating the railroad during the term. It may, under some circumstances, be construed as merely constituting the lessee the agent of the lessor in exercising such franchise.

The lessor has undertaken certain public duties and obligations. It should not be held to be relieved from them, unless such appears to be the legislative intent.[4] According to some authorities, that intent, to support an absolute transfer, must be distinctly and unequivocally manifested.[5] It will be implied more readily, when the lease authorized covers the entire railroad, than if it is only of a section of

[1] Mayor *v.* Norwich & Worcester R. R. Co., 109 Mass. 103.

[2] Mahoney *v.* Atlantic & St. Lawrence Railroad Co., 63 Me. 68; Murch *v.* Concord Railroad Corporation, 29 N. H. 9, 35; 61 Am. Dec. 631. *Contra*, Pennsylvania Co. *v.* Ellett, 132 Ill. 654; 24 Northeastern, 559, which holds each company liable.

[3] Ditchett *v.* Spuyten Duyvil & Port Morris R. R. Co., 67 N. Y. 425, 427; Nugent *v.* Boston, Concord, & Montreal Railroad, 80 Me. 62; 12 Atlantic, 797; 6 Am. State, 151.

[4] Balsley *v.* St. Louis, Alton, & Terre Haute R. R. Co., 119 Ill. 68; 8 Northeastern, 859; 59 Am. Rep. 784.

[5] Driscoll *v.* Norwich & Worcester R. R. Co., 65 Conn. 230, 255; 32 Atlantic, 354.

it.[1] If the legislative authorization of the lease be coupled with an express exemption of the lessor for injuries to third parties from the acts or omissions of the lessee during the term, this, of course, is effectual. It is a public discharge from a public obligation, and implies an absolute transfer of the franchise of operating the road during the term of the lease.

14. Specific Performance.

A railroad lease ordinarily contains covenants binding the lessee to continue the operation of the road. For a breach of such a covenant, the law affords no adequate remedy, since it would be difficult to assess just damages. Hence the lessor can sue in equity to compel a specific performance of the obligation.[2]

15. Receiverships.

If a receiver should be appointed for a lessee company, he would not be bound to adopt the lease. He is not in by assignment and cannot be treated as an assignee of the term.[3] The leased road, on passing from the possession of the company, comes into that of the receiver as part of a public highway in the uninterrupted maintenance of which the public have an interest, and his continuing to operate it for a reasonable time does not preclude the court from afterwards directing him to decline to operate it further.[4]

16. Covenants against Assignment or Underletting.

A covenant not to assign or underlet, by the lessee of a railroad, is broken if the control of the road is in any way fully turned over to a third party, even although the lessee

[1] Braslin *v.* Somerville Horse R. R. Co., 145 Mass. 64; 13 Northeastern, 65.

[2] Southern Railway Co. *v.* Franklin & Pittsylvania R. R. Co., 96 Va. 693; 32 Southeastern, 485; 44 L. R. A. 297.

[3] Quincy, Missouri, & Pacific R. R. Co. *v.* Humphreys, 145 U. S. 82, 97.

[4] St. Joseph & St. Louis R. R. Co. *v.* Humphreys, 145 U. S. 105, 113.

may nominally retain possession. The lessor has a vital interest in having the road operated so as to serve the public, and the covenant should be liberally construed to secure it.[1]

17. Leases of Privileges in Station Houses.

Leases of parts of station houses, for news-stands, restaurants, or similar purposes, contributing to the convenience of passengers, are not improper; nor are temporary leases of part of the location, not needed for the immediate wants of the company, as sites for elevators or warehouses, connecting with the railroad and serving to facilitate or increase its business.

18. Leases of Outside Property.

Surplus rolling-stock may be leased, without any special statutory authority to that effect.[2]

Over lands outside the location, and not inseparably connected with it by appropriation to railroad uses, the company has full power of disposal in any way.

19. Grants of Trackage Rights.

To grant trackage rights over a railroad is not a lease, but a proper exercise of the franchise to maintain and operate a railroad.[3] Such a grant, unless it provides otherwise, is a personal privilege and not assignable.[4]

[1] Boston, Concord, & Montreal Railroad *v.* Boston & Lowell Railroad, 65 N. H. 393, 453; 23 Atlantic, 529. *Contra*, St. Joseph & St. Louis R. R. Co. *v.* St. Louis, Iron Mountain, & Southern Railway Co., 135 Mo. 173; 36 Southwestern, 602; 33 L. R. A. 607.

[2] Hartford Fire Insurance Co. *v.* Chicago, Milwaukee, & St. Paul Railway Co., 175 U. S. 91, 99.

[3] Union Pacific Railway Co. *v.* Chicago, Rock Island, & Pacific Railway Co., 51 Federal, 309; 2 C. C. A. 174; 10 U. S. App. 98; 163 U. S. 564. See Lake Superior & Mississippi R. R. Co. *v.* United States, 93 U. S. 442, 451.

[4] South Side Passenger Railway Co. *v.* Second Avenue Passenger Railway Co., 191 Pa. St. 492, 509; 43 Atlantic, 346; Chicago, Rock Island, & Pacific Railway Co. *v.* Denver & Rio Grande Railroad Co., 143 U. S. 596, 608.

CHAPTER XLVII.

MORTGAGES.[1]

1. Mortgage Trustees.

Most American railroads have been built largely from the proceeds of bonds payable to bearer, secured by one or more mortgages of the railroad franchises and property. These mortgages are made to one or more persons, natural or artificial (of late commonly to a trust company), and provide for the retention of possession by the company until the lapse of a certain period after a default. The mortgage is generally made and recorded before the bonds are issued, and is conditioned to secure them when and as issued.

2. Power to Mortgage.

No mortgage of the road and franchises can be made without authority from the legislature, for every mortgage may result in a foreclosure and so in an absolute transfer of title.[2]

[1] See Chapters XLIX., Railroad Conveyancing, LV., Receiverships, LVI., Foreclosure and Reorganization, and Appendix IV. C.

[2] Richardson *v.* Sibley, 11 Allen, 65; 87 Am. Dec. 700. *Contra*, Kelly

Ordinarily, authority to give such mortgages is expressly conferred by law; but it may be implied from a grant of power to sell. A corporation authorized to sell its franchises and property can mortgage them; for a mortgage is in effect a defeasible sale, and the greater includes the less.[1]

Power given to a railroad company to mortgage its railroad implies power to mortgage the franchise to operate it, for otherwise the property, in case of foreclosure, would fail to serve its proper purposes and the public interest might be prejudiced.[2] A mortgage of the railroad without the franchise would, however, be valid.[3] Power to a railroad company to mortgage its franchises would not be construed to imply power to mortgage the franchise to exist as a corporation.[4] It is frequently accompanied by a grant of power to the purchaser, in case of a foreclosure, to form a new corporation; and such a provision is effectual in his favor.[5]

Power to mortgage its real property outside of its location and not appropriated and regularly used for railroad purposes as part of the working road, or its personal property, not including any of its franchises, (as well as to sell or lease it), belongs to every railroad corporation as incident to its power to acquire property.

v. Trustees, 58 Ala. 489, 496. It has been held, but with little reason, that a power to a railroad company to issue bonds implies a power to mortgage for their security its road and franchise to operate it, though not its "prerogative franchises." Bardstown & Louisville R. R. Co. *v.* Metcalfe, 4 Met. (Ky.) 199, 208; 81 Am. Dec. 541.

[1] Willamette Manufacturing Co. *v.* Bank of British Columbia, 119 U. S. 191, 198. *Cf.* O'Brien *v.* Flint, 74 Conn. 502; 51 Atlantic, 547.

[2] Meyer *v.* Johnston, 53 Ala. 237; Chadwick *v.* Old Colony R. R. Co., 171 Mass. 234; 50 Northeastern, 629.

[3] Gloninger *v.* Pittsburgh & Connellsville R. R. Co., 139 Pa. St. 13; 21 Atlantic, 211.

[4] Memphis & Little Rock R. R. Co. *v.* Railroad Commissioners, 112 U. S. 609, 619.

[5] Gates *v.* Boston & New York Air Line R. R. Co., 53 Conn. 333; 5 Atlantic, 695.

3. Sectional and Successive Mortgages.

A long railroad, particularly if running through several States, is often made the subject of several distinct and successive mortgages on separate sections. Subsequent to these a "blanket" or "consolidated" mortgage on the entire line is frequently given; certain of the bonds secured by it being generally reserved for use in retiring the previous sectional mortgage bonds. A company mortgaging its road separately in sections may include in each mortgage such rolling-stock as it may have chosen to assign to the particular section in question.[1]

4. Mortgage of Rolling-Stock.

As rolling-stock is generally treated as personal property, if there be no special law regulating mortgages of it in that respect[2] they would be subject to any recording law covering all chattel mortgages,[3] unless its provisions were such as to show that it was not adapted and therefore not intended to embrace mortgages of railroad property.[4] Although cars are personal property, they have such a *situs* in the State where they are and where the company giving them is located that a mortgage of them there follows them into whatever other State they may be sent.[5]

5. The Granting Clauses.

When it is intended that a railroad mortgage should cover all the property of the company then owned or thereafter to

[1] Minnesota Co. *v.* St. Paul Co., 2 Wall. 609, 635.

[2] Southern California Motor Road Co. *v.* Union Loan & Trust Co., 64 Federal, 450; 12 C. C. A. 215; 29 U. S. App. 110.

[3] Hoyle *v.* Plattsburgh & Montreal R. R. Co., 54 N. Y. 314; 13 Am. Rep. 595.

[4] Hammock *v.* Loan & Trust Co., 105 U. S. 77, 92. See Palmer *v.* Forbes, 23 Ill. 301.

[5] Nichols *v.* Mase, 94 N. Y. 160; 17 Am. & Eng. R. R. Cases, 230.

be acquired, very general language of description will suffice.[1] It is customary to describe the principal items intended in some detail and conclude with some sweeping catch-all phrase, but a court of equity would be disposed to give full effect to the instrument if it simply conveyed "all the property of the company," [2] unless qualified by other expressions.[3] So a mortgage of a railroad, describing it as constructed between two cities, will be construed to cover all the terminal estates within such cities.[4]

6. After-acquired Property.

A railroad mortgage is generally so drawn as to include all the property of the company acquired or to be acquired for the purposes of the railroad, or section of railroad, mortgaged. Rolling-stock and, as against the company, at least, railroad supplies subsequently acquired are held by such a mortgage.[5] A railroad, like any living organism, is the subject of daily waste and in need of daily supplies to meet it. Such supplies are either a mere replacement of the property originally mortgaged, or a natural incident of growth. A mortgage of this kind may cover coal, wood for fuel, and other articles of daily use and consumption. It does, if it cover, and by law may cover, all materials and other property of the company, present or to be acquired. The mortgagor, while it could use any supplies, so mortgaged, on the railroad, could not alienate them in fraud of the mortgagee; and it has been held (though this is open to question) that the mortgagee would be entitled to protection by injunction should an execution

[1] See Chapter XLIX., Railroad Conveyancing, and Appendix IV. C. 1.

[2] Buck *v.* Seymour, 46 Conn. 156, 173; Chamberlain *v.* Connecticut Central R. R. Co., 54 Conn. 472, 486; 9 Atlantic, 244.

[3] Boston & New York Air Line R. R. Co. *v.* Coffin, 50 Conn. 150, 152, 157.

[4] Central Trust Co. *v.* Kneeland, 138 U. S. 414.

[5] Pennock *v.* Coe, 23 How. 117. See Appendix IV. C. 1.

be levied on such property by a general creditor before possession is taken under the mortgage.[1]

A mortgage of a railroad and its equipment, given before its construction is begun, attaches to it, and to every item of the property described, as soon as they come into existence.[2]

A mortgage of after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If it come subject to any liens, the mortgage does not displace them, though they may be junior to it in point of time. They are paramount, even if unrecorded and the proper subject of record; for registry laws are for the protection of subsequent, not prior, purchasers and creditors.[3] But rails and other articles which become affixed to and part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of *bona fide* creditors, as against any mere contract between the furnisher of the property and the railroad company, stipulating that the title shall not pass till the property is paid for, and reserving to the vendor a right of removal.[4] Nor can any agreement for a lien between the company and parties furnishing money to build part of the road affect the rights of mortgagees, under a prior mortgage covering all after-acquired property.[5]

A railroad mortgage may lawfully be drawn to cover both all old rails that may be taken up to be replaced, and also the new ones that may be bought to replace them. Whether such new rails be deposited within or outside of the railroad location will make no difference, if the mortgage (as it generally does) purports to embrace all property of every description

[1] Phillips *v.* Winslow, 18 B. Monroe, 431; 68 Am. Dec. 729. See Chapter LII., Attachment and Execution.

[2] Pennock *v.* Coe, 23 How. 117, 128; Galveston Railroad *v.* Cowdrey, 11 Wall. 459, 481.

[3] United States *v.* New Orleans Railroad, 12 Wall. 362, 365.

[4] Porter *v.* Pittsburg Bessemer Steel Co., 122 U. S. 267, 283.

[5] Thompson *v.* White Water Valley Railroad Co., 132 U. S. 68, 74.

"used or intended to be used in connection with or for the purposes of" the railroad.[1]

7. Mortgage of Income.

Bare authority given to a railroad company to mortgage its franchises and property does not imply power to mortgage its future income. What may be pledged in that respect is only its power to earn income.[2] Power to mortgage the future income is, however, generally expressly given, and it is so pledged in most mortgages. Whatever profit the road makes, after meeting its current expenses, ought to be devoted, so far as necessary, to satisfy preferred creditors, and a mortgage is the highest kind of voluntary preference. But although the mortgage cover all future accruing income, the company is not accountable to the mortgage trustees for income received prior to their demand for possession or an account.[3] Bringing a bill in equity for a surrender of possession is equivalent to a demand for it.[4] An actual demand, although followed up by filing a bill in equity for an account and payment of any funds on hand to apply on the mortgage, unless possession and a receiver be prayed for, will not prevail against a subsequent attachment or creditor's bill.[5]

8. Retention by Mortgagor of Possession and Power to sell.

Railroad mortgages generally provide for a retention of possession by the company, until a default, and for a certain time thereafter, and also that while in possession it may sell

[1] Farmers' Loan & Trust Co. *v.* San Diego Street Car Co., 49 Federal, 188, 196.

[2] Georgia Southern & Florida Railway Co. *v.* Barton, 101 Ga. 466; 28 Southeastern, 842.

[3] Sage *v.* Memphis & Little Rock R. R. Co., 125 U. S. 361, 378.

[4] Dow *v.* Memphis & Little Rock Railroad Co., 124 U. S. 652, 654.

[5] American Bridge Co. *v.* Heidelbach, 94 U. S. 798; Ellis *v.* Boston, Hartford, & Erie R. R. Co., 107 Mass. 1.

any personal property not necessary for railroad uses. It is often provided also that it may sell real estate not necessary for such uses, on obtaining the consent of the mortgage trustee. Such provisions are not a badge of fraud. As concerns personal property, they are required for the good of the railroad.[1]

9. Stockholders should authorize any Mortgage of the Road and Franchise.

A power granted to a railroad corporation to mortgage its road and franchises, if the statute does not otherwise provide, would seem (in the absence of special statutory provision) to be one to be exercised by virtue of some action of the shareholders, since it is a conditional alienation of their entire investment. The business of a board of directors is to direct the administration of the corporate franchise and property, not to convey them away.[2] The power has often been assumed by the board of directors without any vote of the company, but the proceeding is of such a nature and involves such notoriety that acquiescence by the shareholders, implying ratification, can hardly fail to be established should any question be raised. There are, however, cases holding that where the directors are given by law the general management and control of the company's property, they can execute any power to mortgage the road and franchise which is vested in the company.[3]

10. Statutory Provisions as to Execution and Record.

Statutes regulating both the execution and the record of railroad mortgages are common. They often expressly ex-

[1] Butler *v.* Rahm, 46 Md. 541; 18 Am. Railway Rep. 86.

[2] Thompson, Commentaries on Private Corporations, § 3983.

[3] McCurdy's Appeal, 65 Pa. St. 290; Hodder *v.* Kentucky & Great Eastern Railway Co., 7 Federal, 793. See Chapter VI., Directors and Officers, p. 49.

clude all other modes of execution or record, and in the absence of an express exclusion, one would naturally be implied.[1]

11. Rights of Trustee.

Railroad mortgages are a peculiar class of securities. The trustee represents, to a certain extent, both the mortgagor and mortgagee, and in executing his trust may exercise his own discretion, within the scope of his powers. He is not bound by the advice of a majority of the bondholders, but if, in giving it, they act in good faith and without collusion, it is entitled to great consideration. He represents the bondholders in all legal proceedings carried on by him affecting his trusts, to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them.[2]

12. Option to declare Principal payable on Default of Interest.

Where a mortgage provides that, if the interest remains in default for a certain period, the principal shall, upon the expiration of such period, become immediately due and payable, the mortgagee need not make any formal declaration, after such a default, that the principal has thereby become payable. It is enough if he brings foreclosure proceedings for both principal and interest.[3]

13. Rights of Third Parties when the Trustees are in Possession.

If trustees under a railroad mortgage take formal but not exclusive possession, and in fact the company continues to have a share in running the road, it remains responsible to

[1] Boston & New York Air Line R. R. Co. *v.* Coffin, 50 Conn. 150, 157. See Chapter LVI., Foreclosure and Reorganization.

[2] Shaw *v.* Railroad Co., 100 U. S. 605, 611, 612; Union Trust Co. *v.* Illinois Midland Railway Co., 117 U. S. 434, 463.

[3] Morgan's Louisiana & Texas Railroad & Steamship Co. *v.* Texas Central Railway Co., 137 U. S. 171, 194.

those injured by its operation.[1] Otherwise the trustees only are responsible. Their liability is personal, but with a right to indemnity from the property, unless the injuries were due to their wilful default or gross negligence.

[1] Pennsylvania R. R. Co. *v.* Jones, 155 U. S. 333, 353.

CHAPTER XLVIII.

LIENS OTHER THAN MORTGAGES.

1. Judgment Lien.

STATUTES regarding judgment liens may embrace railroads, and when they do, and grant a lien on the debtor's lands within a county, the lien can be enforced in equity, by a proceeding to obtain a sale of the entire railroad and payment to the plaintiff of his equitable share of the proceeds.[1]

2. Liens for Supplies and Labor.

Statutes exist in some States giving a lien on railroads in favor of material men and laborers. The tendency is to construe them strictly against the claimant.[2] A statutory lien, in favor of a contractor on the whole railroad, unless the law makes it cover the franchise also, does not necessarily imply a power in courts of equity to enforce it by the sale of the road.[3]

[1] Stewart *v.* Railway Co., 53 Ohio St. 151; 41 Northeastern, 247; 29 L. R. A. 438. *Cf.* Fulkerson *v.* Taylor, 100 Va. 426; 46 Southeastern, 309.

[2] Neilson *v.* Iowa Eastern Railway Co., 44 Iowa, 71; 8 Am. Railway Rep. 82.

[3] Louisville, New Albany, & Chicago Railway Co. *v.* Boney, 117 Ind. 501; 20 Northeastern, 432; 3 L. R. A. 435.

3. Mechanics' Liens.

Ordinary mechanics' lien laws do not apply in favor of those erecting structures on a railroad location. If they did, it would tend to split up the railroad, by detaching particular structures from the rest of the property, and defeat the public purposes which a railroad serves.[1] This, however, is purely a question of legislative intent, and, if the words used are general and unqualified, they may be held to include railroad structures.[2]

Thus a statute granting a mechanics' lien on "any bridge" includes railroad bridges.[3]

When a lien is given on a railroad structure, the mode of enforcing it must be determined in view of the nature of the particular structure. If it be one without the use of which the road could not be operated, then, as a railroad is an entirety, in case of foreclosure a decree for a sale must include the entire road.[4]

A statutory lien on a bridge or other structure, forming part of a railroad as originally constructed, is taken subject to prior mortgages of the railroad which purported to convey it as it was thereafter to be constructed.[5]

4. Equitable Liens created in Foreclosure Suits.

Courts of equity in foreclosure proceedings may compel the mortgagee of a railroad to do equity in order to get equity, by discharging claims against the mortgagor for sup-

[1] Buncombe County Commissioners *v.* Tommey, 115 U. S. 122.

[2] Botsford *v.* New Haven, Middletown, & Willimantic R. R. Co., 41 Conn. 454, 464.

[3] Smith Bridge Co. *v.* Bowman, 41 Ohio St. 37; 52 Am. Rep. 67.

[4] *Ibid.*

[5] Cleveland, Canton, & Southern Railway Co. *v.* Knickerbocker Trust Co., 86 Federal, 73. *Cf.* Toledo, Delphos, & Burlington R. R. Co. *v.* Hamilton, 134 U. S. 296.

plies or work which have improved the security and were necessary to keep the railroad up as a going concern. Such equitable liens could not be created for work done in the original construction of the railroad after the record of the mortgage.[1]

5. Charge on Railroad of Counsel Fees for securing Equitable Relief.

Where equitable liens are established upon railroad property by successful litigation, the solicitors of the prevailing parties may have the property charged by the court with a lien in their favor for their reasonable costs and fees, to be settled as between solicitor and client.[2]

6. Liens for Land condemned but Not Paid for.

If land is appropriated by a railroad company under a claim of exercising the right of eminent domain, and it takes possession before payment, the right to payment may be treated in equity as a charge on the land in the nature of a lien, superior to any mortgage given by the company, and enforceable against its successors in title.[3]

7. Vendor's Lien.

In States recognizing a vendor's lien on land sold and conveyed, such a lien attaches to land within a railroad location, whether the title was conveyed or not; and if the company hold under the purchase of a mere right of way, then it attaches to the easement.[4]

[1] Toledo, Delphos, & Burlington R. R. Co. *v.* Hamilton, 134 U. S. 296. See Chapter XLVII., Mortgages.

[2] Trustees *v.* Greenough, 105 U. S. 527; Central Railroad & Banking Company of Georgia *v.* Pettus, 113 U. S. 116.

[3] Drury *v.* Midland Railroad Co., 127 Mass. 571, 576.

[4] Dayton, Xenia, & Belpre R. R. Co. *v.* Lewton, 20 Ohio St. 401.

A vendor's lien on part of a railroad location, in case of a foreclosure of a mortgage of the whole road, may be enforced as a last resort by a sale of the particular land on which it rests; but ordinarily the court will order it paid out of the earnings of the road pending the foreclosure suit, or out of the proceeds of the general foreclosure sale.[1]

8. Obligations secured by Statutory Liens.

Debentures or other obligations of the company are sometimes made by statute a lien on the road and franchise, and even a lien superior to a mortgage, although no conveyance of any title or estate whatever has been made to secure them.[2] If the obligation is in negotiable form the right of lien runs with it, and no waiver by a prior holder can abridge the security of a subsequent purchaser.[3]

So grants of public aid may be made by a statute imposing a lien in the nature of a mortgage to secure the ultimate repayment of the sums granted.[4] If such lien is imposed on all the property of the railroad company, it will extend to after-acquired property.[5]

[1] Wheeling Bridge & Terminal Railway Co. *v.* Reymann Brewing Co., 90 Federal, 189; 32 C. C. A. 571.

[2] Wilson *v.* Boyce, 92 U. S. 320; Gibbes *v.* Greenville & Columbia R. R. Co., 13 S. C. 228.

[3] See Ketcham *v.* Pacific Railroad, 4 Dill. 78.

[4] United States *v.* Union Pacific R. R. Co., 91 U. S. 72; 12 U. S. Stat. at Large, 489.

[5] Whitehead *v.* Vineyard, 50 Mo. 30.

CHAPTER XLIX.

RAILROAD CONVEYANCING.[1]

CONVEYANCES of railroads, in matter of form, are necessarily somewhat lengthy. This is less because they deal with large properties than because they are of a nature to require provision for many conditions and contingencies.

1. General Words of Description.

In describing the premises conveyed, general terms are sufficient. The location of the road is always a matter of public record. It is too long a document, and one too technical in its phraseology, to make it of any great value to repeat its words of description in a deed which is to be recorded at length. If the place of record is (as is not unusual) some State office in which books are kept, devoted exclusively to railroad conveyancing, the location will probably have been recorded either there or in some other office (*e. g.*, that of the Board of Railroad Commissioners) in the same building. If, on the other hand, the place of record is in a county or town office, to repeat the full terms of the

[1] See Appendix IV.

location there would be to occupy a number of pages, to the exclusion of ordinary conveyances between man and man, with what concerns comparatively few searchers of title, and could be found by them nearly or quite as readily in the office, whether of the State at the capitol, or one connected with a court, where it was originally entered.

While, therefore, it may be against the policy of a State to uphold deeds of property which is of a kind not so capable of precise identification by reference, when they use only general terms of description,[1] it is enough in a conveyance of a railroad to name the counties, towns, or other localities in which it is situated, and refer to its location for a precise statement of the premises.[2] This is true, even when the location has not been made or completed. When made, and as soon as made, the conveyance will apply to it.

In a conveyance of a railroad and the personal property naturally appurtenant to it, and acquired or to be acquired for railroad uses, generality of description is also permissible and usual, in respect to such personal property. The equipment of a railroad is so various, and is the necessary subject of such continual replacement and renewal, that it would be highly inconvenient, if not impossible, to particularize every item or even every particular class of items that may go to constitute it.[3]

2. After-acquired Property.

After-acquired property will not pass under a conveyance of all the railroad and property of the company, until it has been not only acquired, but annexed to or put in use in connection with the operation of the railroad.[4] A conveyance

[1] De Wolf *v.* Sprague Manufacturing Co., 49 Conn. 282, 316–318.

[2] Boston & New York Air Line R. R. Co. *v.* Coffin, 50 Conn. 150.

[3] Buck *v.* Seymour, 46 Conn. 156, 171; Chamberlain *v.* Connecticut Central R. R. Co., 54 Conn. 472, 486; 9 Atlantic, 244.

[4] Brainerd *v.* Peck, 34 Vt. 496; Farmers' Loan & Trust Co. *v.* Commercial Bank, 11 Wis. 207; 15 Wis. 424; 82 Am. Dec. 689.

of a railroad and all the property that may be thereafter acquired by the railroad company will be construed to refer only to property acquired by it for railroad uses. Transfers of property to be acquired in the future are allowed rather by way of exception to the ordinary rules of law, and the exception should not be extended beyond the necessity for it.[1] It will cover property acquired under a merely equitable title.[2]

Whenever it is intended to convey all property belonging to the company, the draftsman should be careful not to describe it as all property belonging to the railroad. A railroad company may own, and generally does own, considerable property not so connected with its railroad that it can fairly be said to belong to it.[3]

3. Property "ejusdem generis."

Words importing a conveyance of all the property of the company, if used in connection with a grant of certain specified items, will be construed to include only property of the same general character as that specified, and its appurtenances. Bonds of another corporation which it might hold would therefore not be included.[4] In a mortgage of the roadbed, and telegraph line and offices along the road, and the machine shops, "and all other property in the State and in Georgia belonging to the Company, also all coal mines belonging to the company, and all mineral lands, and iron manufacturing establishments," the phrase "all other property" was held to be restricted to property of the same kind with that particularly specified, such as that appertaining to the telegraph offices, etc., and not to embrace outside lands.[5]

[1] Calhoun *v.* Memphis & Paducah R. R. Co., 2 Flippen, 442; 4 Federal Cases, No. 2309. *Cf.* Meyer *v.* Johnston, 53 Ala. 237; 15 Am. Railway Rep. 467.

[2] Central Trust Co. *v.* Kneeland, 138 U. S. 414, 419.

[3] Parish *v.* Wheeler, 22 N. Y. 494, 496, 512.

[4] Smith *v.* McCullough, 104 U. S. 25, 28.

[5] Alabama *v.* Montague, 117 U. S. 602, 610.

4. Appurtenances.

A mortgage of a railroad and its "appurtenances" does not embrace real estate situated at a distance from its location. Land is never appurtenant to land.[1]

A mortgage in terms covering a railroad and all other property now owned, or that may be acquired for the purposes of operating the road, does not pass the benefit of a subsequent public land grant,[2] nor of one already made, but on conditions not yet performed;[3] nor the title to choses in action;[4] nor to lands acquired, not for use as part of the railroad, but for sale to the employees of the mortgagor.[5]

5. The Naming of Mortgage Trustees.

Railroad mortgages and deeds of trust were formerly usually made to several individuals as joint tenants, *habendum* to them and the survivors and survivor of them, and his heirs and assigns, in trust. Of late years, since trust companies have become common, they have more generally been made to such a company, *habendum* to it and its successors and assigns, in trust.[6] A trust company of a State in which no part of the railroad is situated is often selected; and to this there is no objection, unless some statute should forbid.[7] The natural market for the bonds is not infrequently in quite another part of the country from that in which the railroad is chartered or constructed, and purchases will naturally be made more readily if the security is to be held by a corpora-

[1] Humphreys *v.* McKissock, 140 U. S. 304, 313.

[2] New Orleans Pacific Railway Co. *v.* Parker, 143 U. S. 42, 56.

[3] Campbell *v.* Texas & New Orleans R. R. Co., 2 Woods, 263.

[4] Milwaukee & Minnesota R. R. Co. *v.* Milwaukee & Western R. R. Co., 20 Wis. 174; 88 Am. Dec. 740.

[5] Pardee *v.* Aldridge, 189 U. S. 429, 433.

[6] See Appendix IV. C. 1, 3, 4.

[7] Hervey *v.* Illinois Midland Railway Co., 28 Federal, 169, 175.

tion with the management of which the buyers are familiar, and in which they have confidence.

In one or two States railroad mortgages must be made to a State officer, as trustee, and to his successors in office. This is inconvenient in practice, since most railroads are subject to more than one mortgage, and to have the same person made trustee under each makes an awkward situation in case it is desired to foreclose the junior incumbrance, since the same officer must be both plaintiff and defendant.

A deed of a railroad to trustees, to hold for a long term, whether they be natural or artificial persons, should provide for the succession to them in case of resignation, death, disability, or the dissolution of a corporation trustee. Forms of such a provision will be found in the Appendix.[1]

6. Provision for Bondholders' Meetings.

The close relations which necessarily exist between bondholders under a railroad mortgage, partaking of a contractual nature, make it often convenient for them to get together to discuss proposed action upon matters of common concern.[2] This is particularly true in case of a foreclosure. It is therefore not uncommon to insert in the mortgage a provision for calling or conducting meetings of bondholders.[3]

7. Provision for Compensation of Trustee.

In drafting a railroad mortgage or deed of trust, it is usual and proper, but not necessary, to provide expressly for the compensation of the trustees should they be called on to act. Their right to compensation is implied, as in the case of all trustees in possession, under the general rule of American

[1] IV. C. 1, 3, 4.

[2] See Gilfillan *v.* Union Canal Company of Pennsylvania, 109 U. S. 401, 403.

[3] See Appendix IV. C. 2.

practice. Nor is it confined to a mere right against the trust estate. It exists against any bondholders at whose special instance and request they may act, personally and individually.[1]

8. Reservation of Power to create Prior Liens.

In mortgages to secure long term bonds and leases for a long term, due provision should be made for any outstanding indebtedness of the company which may mature during the term. This may require, and will support the validity of, a provision authorizing the issue of new bonds to retire such indebtedness at its maturity, and reserving power to execute a mortgage to secure them, which shall have priority over the interests passing by the conveyance which contains the reservation.

Similar provisions are also often inserted for the contingency of an extension of the railroad, the construction of a branch line, or the making of any purchase on credit for the benefit of the property conveyed.[2]

9. Arbitration Clause.

It is also desirable to insert in such conveyances some provision for a speedier determination of any difference or dispute that may arise between the parties than can generally be obtained by resort to a law-suit. A form of such a provision is given in the Appendix.[3]

10. Form of Execution and Attestation.

Some States have special statutes providing as to the mode of executing and attesting railroad conveyances. If this mode be followed, the courts will be inclined to uphold the instrument, in view of the large interests involved, although other forms prescribed by the general law as to conveyances were

[1] Rensselaer & Saratoga R. R. Co. *v.* Miller, 47 Vt. 146.

[2] See Appendix IV. C. 1, 3.

[3] IV. C. 4.

not observed, the special statute being regarded as an exception to it.[1]

It is always better for the party making a formal written contract with a railroad company to have the corporate seal affixed to it, although this is not usual except in case of contracts of special importance, or of those passing interests in real estate. The seal carries with it a presumption that it was attached by authority of the corporation, and so that the execution of the contract was within the scope of the official power of the person signing in the company's behalf.[2] Most railroad contracts are made by superintendents, purchasing agents, and others not having the appearance of general authority which may belong to a president or general manager, and who hold positions liable to frequent changes. Hence it is specially desirable to get the benefit of the presumption derived from the use of the corporate seal.

11. Consolidation Agreements.

Contracts between railroad companies sometimes have by statute the effect of conveyances. Agreements of consolidation by which two existing railroad companies become merged in a single one are of this description. They should be drawn in strict conformity to the requirements of the statute, but if they conform to it substantially, and possession is delivered to the new organization, it will be enough to pass the title.[3]

Sworn certificates are often required by statute, stating the accomplishment of an agreement between railroad companies for a conveyance or merger, and of a reorganization after foreclosure.

[1] Nichols *v.* Mase, 94 N. Y. 160. But see Farmers' Loan & Trust Co. *v.* Oregon & C. Railway Co., 24 Federal, 407, 410, and *ante*, p. 465.

[2] Jourdan *v.* Long Island R. R. Co., 115 N. Y. 380, 384; 22 Northeastern, 153.

[3] See Appendix I. 3.

PART VI.

ACTIONS.

CHAPTER L.

JURISDICTION.[1]

1. When dependent on Residence.

WHERE jurisdiction depends upon the residence of the parties, and the company has a fixed location by its charter, such location is its only residence. If not so located, it will be deemed to reside wherever its principal office within the State is situated.[2] In some States it is held that it may also be treated as a resident in any county where its officers and agents are actually exercising its franchises and operating its railroad.[3] These matters are now generally regulated by statute.

2. When dependent on Citizenship.

A corporation formed by the incorporation of the same persons under the same corporate name by several States may

[1] See Chapters LIV., Actions for Injuries causing Death, and LVI., Foreclosure and Reorganization.

[2] Connecticut & Passumpsic Rivers R. R. Co. *v.* Cooper, 30 Vt. 476; 73 Am. Dec. 319; Thorn *v.* Central R. R. Co., 26 N. J. Law (2 Dutch.), 121.

[3] Slavens *v.* South Pacific R. R. Co., 51 Mo. 308; 3 Am. Railway Rep. 262.

sue and be sued in the courts of each as a juridical person belonging to it.

It cannot, when described as a citizen of each State, sue or be sued by a citizen of either State in the Circuit Court of the United States. A citizen of a State from which it has not received incorporation may sue it in that court as a citizen of either of those from which it has received incorporation.[1] In each of the latter States, so far as a right to remove a cause commenced in a State court into the Circuit Court of the United States is concerned, as well as in the Circuit Court of any District, it stands as a fellow-citizen with a citizen of the State in which it was first incorporated; the legal fiction that its shareholders are and remain all citizens of that State, and so that it is the same thing as an association of such individual citizens, being indisputable.[2]

It would seem from the more recent decisions of the Supreme Court of the United States not only that no citizen of the State in which such a company was originally incorporated can sue it in the Circuit Court held within a State from which it subsequently received incorporation, but that it could not be sued in a Circuit Court held in the latter State by a citizen of that State who alleges in his writ that it is a citizen of the State which originally incorporated it. As to him, it is a citizen of his own State.[3]

[1] St. Louis & San Francisco Railway Co. *v.* James, 161 U. S. 545, 562; St. Joseph & Grand Island Railroad Co. *v.* Steele, 167 U. S. 659; Nashua & Lowell Railroad Corporation *v.* Boston & Lowell Railroad Corporation, 136 U. S. 356.

[2] Southern Railway Co. *v.* Allison, 190 U. S. 326, 332, 336, 338; Hollingsworth *v.* Southern Railway Co., 86 Federal, 353.

[3] See the discussion of this subject in Goodwin *v.* New York, New Haven, & Hartford R. R. Co., 124 Federal, 358. It is doubtful whether the main ground on which this decision was placed was well taken. This is that a corporate organization maintaining one system of railroads in several States, and chartered by each, is one corporation and to be treated in each by the federal courts sitting there, as a citizen of that State alone, however it might be regarded by such courts when held in a State from which it had not received incorporation.

3. Transitory Actions.

A railroad corporation may be sued in any State in which it does the business, out of which the cause of action arises, if the laws of such State so provide, although incorporated in another.[1] If it is operating a railroad in several States, as lessee, it may be sued in the State where it belongs for an injury received in another.[2] Any railroad company may, if the laws of the forum so provide, be sued in transitory actions, in any State where it does any regular business, and has resident agents on whom service may be made, or property which may be attached, without regard to the seat of the transaction with which the suit is concerned. The courts of the forum have, however, a discretionary power to dismiss such a cause, when brought by a non-resident, if there would be difficulty in compelling the attendance of material witnesses, or if for any other reason justice would be thus promoted.[3] If the cause of action depends on any question of local law as to which there may be a difference of opinion, or if the defendant is still doing business and liable to suit in the State or country where the cause of action arose, these are circumstances material to be considered in determining whether to retain jurisdiction.[4]

So far as the jurisdiction of the federal courts is concerned, a distinction has been suggested between the right to sue a corporation incorporated by several States for a tort committed in one of them, when the suit is brought in that State,

[1] Railroad Co. *v.* Koontz, 104 U. S. 5, 10.

[2] Watson *v.* Richmond & Danville R. R. Co., 91 Ga. 222; 18 Southeastern, 306.

[3] Great Western Railway Co. of Canada *v.* Miller, 19 Mich. 305. *Cf.* Morris *v.* Missouri Pacific Railway Co., 78 Tex. 17; 14 Southwestern, 228; 22 Am. State, 17; 9 L. R. A. 349; Morisette *v.* Canadian Pacific Railway Co., Vt. ; 56 Atlantic, 1102.

[4] Mexican National Railway Co. *v.* Jackson, 89 Tex. 107; 33 Southwestern, 857; 31 L. R. A. 276; 59 Am. State, 28.

and when it is brought in another. The suggestion is that as to acts done in each State the corporation of that State should be regarded as the only actor, and therefore a citizen of the State where a tort is committed should not be allowed to sue the corporation for it as a corporation of any other State, in the Circuit Court of the United States.[1] This distinction seems rather unsubstantial. Federal jurisdiction depends on diverse citizenship, and the place of an act seems to have little bearing on the political citizenship of the actor.

4. Local Actions.

Actions for injuries to real estate by the operation of a railroad in one State or country, *e. g.*, done by fires set by a passing train, are local, and cannot be made the subject of an action in another.[2]

5. Conflict of Laws.

In a suit against a company, brought in one State for a personal injury suffered in another, the right to recover and the limit of the amount of the judgment are governed by the law of the latter State, if not so far opposed to good morals, or natural justice, or prejudicial to the rights of the citizens of the former, as to be deemed contrary to public policy.[3] The question is not where the defendant first became chargeable with the breach of duty which caused the injury, but where this injury in fact occurred. The place where the in-

[1] See Goodwin *v.* New York, New Haven, & Hartford R. R. Co., 124 Federal, 358.

[2] DeBreuil *v.* Pennsylvania Company, 130 Ind. 137; 29 Northeastern, 909. *Contra*, Little *v.* Chicago, St. Paul, Minneapolis, & Omaha Railway Co., 65 Minn. 48; 67 Northwestern, 846; 60 Am. State, 421; 33 L. R. A. 423.

[3] Northern Pacific R. R. Co. *v.* Babcock, 154 U. S. 190, 198; Walsh *v.* New York & New England R. R. Co., 160 Mass. 571; 36 Northeastern, 584; 39 Am. State, 514. See Chapter LIV., Action for Injuries causing Death.

jury was suffered was the seat of the transaction to be investigated, although it was the natural consequence of negligence with which the railroad company became chargeable in another State.[1]

In applying this doctrine to actions for injuries resulting in death, the place of death is immaterial unless the remedy is given for that event rather than for that which led up to it.[2] The sequence of events is, first, the wrong; second, the injury; and, third, the death.

Whether the right of action in any case depends on the customary or the positive law of the State where the injury occurred is immaterial, except in case of penal statutes.[3]

6. Equitable Jurisdiction over Management of Foreign Company.

Equitable suits to control action of a foreign railroad corporation affecting its foreign railroad will not be entertained, although it may be doing such business in the State where it is sued as to give jurisdiction to its courts with respect to controversies arising in the course of the ordinary business dealings of the company.[4]

[1] See *ante*, p. 219.

[2] Alabama Great Southern R. R. Co. *v.* Carroll, 97 Ala. 126; 11 Southern, 803; 18 L. R. A. 433; 38 Am. State, 163; Minor, Conflict of Laws, 482.

[3] Gardner *v.* New York & New England R. R. Co., 17 R. I. 790; 24 Atlantic, 831. See also as to garnishments for servants' wages, Chapter LII., Attachment and Execution, and as to matters of evidence and procedure, Chapter LIII., Rules of Evidence: Presumptions and Assumptions.

[4] Kimball *v.* St. Louis & San Francisco Railway Co., 157 Mass. 7; 31 Northeastern, 697; 34 Am. State, 250.

CHAPTER LI.

FORMS OF REMEDY.

1. Tort or Contract.

It is often more advantageous to sue a railroad company in tort than in contract, when there is an election of remedies, since in an action sounding in tort there is less risk of a variance, and a wider door opened for the recovery of damages.[1] There is an election of remedies against a carrier for a neglect of a duty, imposed by law in consequence of the relations of the parties, although such relations were created by contract.[2]

2. To enforce Duty of operating Road.

The duty assumed by the acceptance of a franchise to maintain and operate a railroad is a public one. It flows

[1] Boylan *v.* Hot Springs R. R. Co., 132 U. S. 146, 151.

[2] Holden *v.* Rutland R. R. Co., 72 Vt. 156; 47 Atlantic, 403; 82 Am. State, 926; Coupland *v.* Housatonic R. R. Co., 61 Conn. 531, 536; 23 Atlantic, 870; 15 L. R. A. 534; Southern Pacific Co. *v.* Arnett, 111 Federal, 849; 50 C. C. A. 17.

from an implied contract with the State. Hence, it is for the State to enforce its performance. While a public duty, and because it is such, no member of the unorganized public can enforce its performance. The company is not subject to be twice vexed by suits by different plaintiffs on one cause of action. Hence, although it has received municipal aid, no such suit can be brought by a citizen of the municipality,[1] nor by the municipality itself.

Contracts may also, under certain circumstances, be implied in favor of a municipal corporation, which has granted aid to the railroad, and on such contracts the municipality may, of course, bring suit.[2]

3. Abandonment of Franchise.

The corresponding right and power of the company to maintain and operate the railroad is also one to be challenged only by the State which gave it. Hence, if such a franchise, after being disused for years, is resumed, no municipality or private individual can obtain an injunction to prevent this.[3]

4. Interference by the State in Disputes between Shareholders.

The State is not a proper party to bring suits to settle controversies between stockholders as to their respective rights. If there are two boards of directors, each claiming to have been duly elected, and struggling for the possession of the road, the State cannot intervene in favor of either to oust the other. The wrong to be redressed, if any, is a private one.[4]

[1] Henry *v.* Ann Arbor Railroad Co., 116 Mich. 314; 75 Northwestern, 836.

[2] See *ante*, pp. 58, 186.

[3] Wright *v.* Milwaukee Electric Railway & Light Co., 95 Wis. 29; 69 Northwestern, 791; 60 Am. State, 74, 81; 36 L. R. A. 47.

[4] People *v.* Albany & Susquehanna R. R. Co., 57 N. Y. 161; 6 Am. Railway Rep. 73. See *post*, p. 491.

5. Equitable Protection to Franchise.

A railroad company may protect its franchise by an appeal to the courts against a wrongful invasion of it by another. Thus if one company threatens without legal right to lay tracks across a railroad owned and operated by another, an injunction can be granted either at the suit of the State or of the latter company. Any impediment to the safe and proper use of a railroad is a matter of public concern, and cannot be measured by money nor dealt with on the footing of a claim for damages.[1] So if a municipal corporation has power to lay out highways across a railroad only when their construction will not unnecessarily interfere with the reasonable use of the railroad, and no other mode of determining the question of necessity is provided, it may be determined by a court of equity on a petition for an injunction against the prosecution by the municipality of proceedings brought to obtain an assessment of the damages that would be done to any parties by the layout and construction of a highway across a railroad owned by the petitioner.[2] The same remedy may be extended to protect a street railroad company, which has constructed its road under a municipal grant, against an unreasonable interruption of its use and enjoyment by another street railroad company claiming under a later grant from the same municipality, made without any provision for compensation for the abridgment of the rights conferred by the former grant.[3]

6. Statutory Actions.

Under the Inter-State Commerce Act (as amended in 1889) any one, against whom an illegal discrimination in the matter

[1] New York, New Haven, & Hartford R. R. Co. *v.* Bridgeport Traction Co., 65 Conn. 410, 423; 32 Atlantic, 953; 29 L. R. A. 367.

[2] Pittsburg, Cincinnati, Chicago, & St. Louis Railway Co. *v.* Greenville, Ohio State, ; 69 Northeastern, 976.

[3] Hamilton, Glendale, & Cincinnati Traction Co. *v.* Hamilton & Lindenwald Electric Transit Co., Ohio State ; 69 Northeastern, 991.

either of charges or transportation facilities is made by an inter-State railroad company, can apply to the Circuit or District Court of the United States, as relator, for a writ of mandamus, to compel obedience to the law in such respects.[1]

The Inter-State Commerce Commission can apply to the Circuit Courts, under Sec. 6 of the same Act (as amended in 1889), for an injunction to prevent an inter-State railroad company from doing business as such until it has complied with the provisions of the Act as to fixing and publishing its rates of charge; or, under Sec. 15, to compel it to obey their lawful orders.

The United States can also apply for an injunction against any company violating the provisions of the Sherman Anti-Trust Act.[2]

Any person injured by a violation by a railroad company of that Act (Sec. 7) can recover treble damages by suit in the Circuit Court of the United States, without respect to the amount in controversy, and also a reasonable attorney's fee.

A statute providing that any citizen of the State may sue for an injunction against an unlawful consolidation of railroad companies is good, and no special damage to the plaintiff, in such a case, need be alleged. The public interest has been confided to his protection.[3]

7. Issue of Prerogative Writs.

Proceedings by the State to protect the public interests, by one of the extraordinary actions, such as *quo warranto*, or *mandamus*, can be set on foot by the State, of its own motion, or on the relation of any one suffering special damage from the acts complained of. Thus any resident and landowner on a part of a railroad which has been abandoned can be the

[1] See Chapter XXXVIII., Inter-State Business.

[2] U. S. Stat. at Large, XXVI. 209.

[3] Currier *v.* Concord Railroad Corporation, 48 N. H. 321. See *ante*, p. 489.

relator in *mandamus* proceedings by the State to compel the company to resume its operation.[1]

8. Mandamus.

Where the charter of the company requires it to construct its road to a certain point, or in a certain way, *mandamus* lies, at the suit of the State, to compel obedience. But wherever the charter simply authorizes an act, without requiring it, *mandamus* does not lie.[2]

The continuous operation of the whole railroad can ordinarily be enforced by mandamus, so long as any part of it is operated.[3]

If a railroad is allowed to run down, and become out of repair, for want of the necessary funds, a writ of *mandamus* to compel proper repairs will not be issued. The law never orders that to be done which cannot be done. It is simply ground for *quo warranto* proceedings to enforce a forfeiture of the charter.[4]

9. Protecting the Mail Service.

The United States have such an interest in the prompt carriage of the mails, and the free maintenance of commerce between States, that they can maintain a bill for an injunction to prevent combinations to use unlawful force in aid of a strike on an inter-State road.[5]

[1] State *v.* Spokane Street Railway Co., 19 Wash. 518; 53 Pacific, 719; 67 Am. State, 739; 41 L. R. A. 515. See Chapter IV., Railroad Franchises.

[2] Northern Pacific R. R. Co. *v.* Dustin, 142 U. S. 492, 499; People *v.* New York, Lake Erie, & Western R. R. Co., 104 N. Y. 58, 66, 67; 9 Northeastern, 856; 58 Am. Rep. 484. See *ante*, pp. 175, 179.

[3] See *ante*, pp. 30, 41.

[4] Ohio & Mississippi Railway Co. *v.* People, 120 Ill. 200; 11 Northeastern, 347.

[5] *In re* Debs, 158 U. S. 564, 582. See also p. 493.

10. Injunctions to protect Railroads.

The remedy by injunction is liberally administered in favor of railroad companies to protect them against any unlawful interference with the construction, maintenance, or operation of their railroads. The public interest in opening and keeping open this form of highway is promoted by such action.[1]

A combination in aid of a strike to stop inter-State traffic over certain railroads may be met by an injunction under the Sherman Act.[2]

If a municipal corporation insists on the removal of a railroad structure, built on the highway under its supervision, because its location is technically unauthorized, the railroad company may be protected by injunction.[3]

11. Mandatory Injunctions.

Mandatory injunctions are seldom granted against railroad companies, for they would constitute a direct interference with the administration of a franchise of a public nature for the operation of a highway.[4] If, however, a railroad company acts in plain violation of its public duty, and there is no other adequate remedy, one may issue,[5] and not only against the company, but its servants generally.[6] Such a case might be presented if it refused to accept shipments over a spur track from a particular person, on account of a contract to do business over it only with another party.[7]

[1] Asheville Street Railway Co. *v.* Asheville, 109 N. C. 688; 14 Southeastern, 316. *Cf.* Beasley *v.* Texas, etc. Pacific Railway Co., 191 U. S. 492, 497.

[2] United States *v.* Elliott, 62 Federal, 801. See also p. 492.

[3] Winnetka *v.* Chicago & Milwaukee Electric Railway Co., 204 Ill. 297; 68 Northeastern, 407.

[4] Rogers Locomotive & Machine Works *v.* Erie Railway Co., 20 N. J. Eq. 379.

[5] See *ante*, pp. 154, 366.

[6] Toledo, Ann Arbor, & North Michigan Railway Co. *v.* Pennsylvania Co., 54 Federal, 746; 19 L. R. A. 395. See also p. 494.

[7] Louisville & Nashville R. R. Co. *v.* Pittsburgh & Kanawha Coal Co., 23 Ky. Law Rep. 1318; 64 Southwestern, 969; 55 L. R. A. 601.

The remedy has been applied in favor of a municipality to compel the removal by a railroad company of bridge abutments unlawfully built on the highway.[1]

12. Injunctions against a Company and its Servants.

Any injunction issued against a railroad company and its servants binds each of the latter personally, although he was not made personally a party to the record. A locomotive engineer who, having notice of such an injunction, issued to prevent a refusal to interchange cars with a connecting road employing non-union engineers, refuses to aid in such an interchange is guilty of a contempt of court.[2]

13. Certiorari.

The writ of *certiorari* lies at common law to review irregularities in the proceedings of public officials invested with a quasi-judicial authority as to the location of a railroad, its alteration, the establishment or discontinuance of stations, and similar matters of an administrative character.[3]

14. Property condemned but not paid for.

While the ordinary rule as to eminent domain proceedings that, when the owner of land taken without making compensation can enforce an assessment of his damages by some statutory proceeding, he is restricted to that remedy applies to railroads, it does not preclude such a landowner from recovering possession by an action of ejectment.[4] Such

[1] Lake Shore & Michigan Southern R. R. Co. *v.* Elyria, Ohio State, ; 69 Northeastern, 738.

[2] *In re* Lennon, 166 U. S. 548. See also pp. 275, 493.

[3] People *v.* Board of Railroad Commissioners, 158 N. Y. 421 ; 53 Northeastern, 163.

[4] Daniels *v.* Chicago & Northwestern R. R. Co., 35 Iowa, 129; 5 Am. Railway Rep. 82; 14 Am. Rep. 490. See Chapter IX., Acquisition of Lands by Condemnation Proceedings.

an action, however, would, in practice, be stayed on motion of the company, for such reasonable time as would enable it to bring condemnation proceedings.

15. Specific Performance.

Contracts to build a railroad or a railroad structure at a particular point, or to run a railroad in a particular way, are seldom specifically enforced, and never when the public interest would be thereby prejudiced, or when the result would be to compel the court to direct as to the details of matters of operation.[1] Contracts between railroad companies granting one rights of trackage over the road of the other, and fully providing for the manner of exercising them, may be.[2]

16. Bankruptcy.

A railroad company may be thrown into insolvency or bankruptcy, in which case the trustee will take the franchise with the property to which it gives its only substantial value.[3]

[1] Blanchard *v.* Detroit, Lansing, & Lake Michigan R. R. Co., 31 Mich. 43; 18 Am. Rep. 142. See *ante*, pp. 95, 146, 176, 177.

[2] Joy *v.* St. Louis, 138 U. S. 1; Union Pacific Railway Co. *v.* Chicago, Rock Island, & Pacific Railway Co., 163 U. S. 564. See also p. 461.

[3] New Orleans, Spanish Fort, & Lake R. R. Co. *v.* Delamore, 114 U. S. 501; Graham *v.* Boston, Hartford, & Erie R. R. Co., 118 U. S. 161, 179. See Appendix IV. I. 5.

CHAPTER LII.

ATTACHMENT AND EXECUTION.

1. What may be Levied on.

CREDITORS of a railroad company cannot levy attachments or executions on particular parcels of real property or fixtures which it has appropriated and is using for railroad purposes, as part of its working road and apparatus, even though not within the formal location of the railroad. Their value depends largely on the manner in which they can be used. That manner depends on the nature of the railroad franchise, and franchise and property are to be regarded as an entirety. If they can obtain a lien upon it at all, it must be on the whole road, through some proceeding in the nature of a creditor's bill and through a receiver.[1] Real property, though within the location, owned in fee by the company, can be levied on if the company has abandoned its franchises, and the railroad is not in operation.[2]

This doctrine has been held to apply in favor of mortgagees to protect from attachment their lien on fuel stored for use in the locomotives.[3] It may be questioned whether such a

[1] East Alabama Railway Co. *v.* Doe, 114 U. S. 340, 353; New Orleans, Spanish Fort, & Lake R. R. Co. *v.* Delamore, 114 U. S. 501.

[2] Benedict *v.* Heineberg, 43 Vt. 231; Gardner *v.* Mobile & Northwestern R. R. Co., 102 Ala. 635; 15 Southern, 271; 48 Am. State, 84.

[3] Phillips *v.* Winslow, 18 B. Monroe, 431; 68 Am. Dec. 729. *Contra*,

lien has such an effect prior to a taking of possession by the mortgagee. While fuel and other supplies may be indispensable to the operation of a road, no particular lot of coal or barrel of oil is indispensable to it. If the company owning such articles is permitted by statute to mass them together with the real estate, and mortgage the whole as an entirety, it is true that neither can the mortgage be wholly displaced by an attachment of all that it includes, nor the security weakened by a levy made on certain of the articles which are indispensable to the beneficial enjoyment of the railroad, leaving the rest untouched.[1]

It certainly is not true that no levy can be made on supplies not mortgaged. Any of its personal property which has not been turned into fixtures attached to the railroad, nor lawfully subjected to any general lien upon the railroad and its appurtenances, the railroad company can sell; and what it can thus alienate its creditors can attach.[2]

In some States the rolling-stock upon a railroad is held to form part of it and assume the character of real estate. But except where this doctrine is maintained, any locomotives or cars not in use in the transportation of the mail, and not protected by prior liens, can be seized on attachment or execution.[3] This question is seldom one of any practical importance. Railroads are almost universally subject to general mortgages covering all their personal property used in their business. Such mortgages run with the rolling-stock which they include wherever it may be found. A mortgage creating a valid lien upon a car in the State in which it was when the conveyance

Coe *v.* Knox County Bank, 10 Ohio St. 412. See Chapter XLVII., Mortgages.

[1] Nichols *v.* Mase, 94 N. Y. 160; 17 Am. & Eng. R. R. Cases, 230. Boston, Concord, & Montreal Railroad *v.* Gilmore, 37 N. H. 410; 72 Am. Dec. 336. See Richardson *v.* Sibley, 11 Allen, 65; 87 Am. Dec. 700.

[2] Boston, Concord, & Montreal Railroad *v.* Gilmore, 37 N. H. 410; 72 Am. Dec. 336.

was executed, and to which the mortgagor belonged, is not displaced by sending it temporarily into another State; and it can no more be attached there than in the State from which it went.[1]

Statutes exist in some States expressly providing for attachments of rolling-stock and regulating the method.

Real estate outside of the location, and not necessary for railroad uses, may be levied on.[2] So may old rails, taken up for removal, and any new material not yet incorporated with the railroad, if they are not covered by prior liens.

2. Garnishment.

A foreign attachment can always be laid on moneys due a railroad company from its customers or from connecting roads for traffic balances. No mortgage of future earnings will avail to defeat such process, if served before the mortgagee has made demand of possession of the road or of its earnings, for condition broken.[3]

3. Attachments of Goods in Transit by Rail.

Attachments may be made of goods in the custody of a railroad company for transportation, in a suit against the owner. Even if the goods are actually loaded on the cars, and in transit, the officer can seize and remove them on paying the freight due. This discharges the liability of the company, provided it gives reasonable notice to the shipper or consignee.[4]

If a process of garnishment is served on the company, as holding property of the party owning the goods, it is ineffect-

[1] Nichols *v.* Mase, 94 N. Y. 160; 17 Am. & Eng. R. R. Cases, 230.
[2] Plymouth R. R. Co. *v.* Colwell, 39 Pa. St. 337; 80 Am. Dec. 526.
[3] Dow *v.* Memphis & Little Rock R. R. Co., 124 U. S. 652.
[4] Stiles *v.* Davis, 1 Black, 101; Edwards *v.* White Line Transit Co., 104 Mass. 159; 6 Am. Rep. 213.

ual as respects goods in transit between States,[1] but will charge the company as respects goods in transit from one point to another within the State, and not destined to go beyond its limits,[2] which it has notice that the principal defendant owns, and time and opportunity to withhold from delivery after receiving such notice.[3]

4. Garnishment for Wages of Employees.

Notwithstanding the inconveniences naturally resulting to both debtor and garnishee, a railroad company incorporated in several States, and operating its railroad in each, is liable to garnishment in either by any creditor of one of its employees for what it may owe the latter as wages, without regard to where he belongs or where the wages were earned.[4] If they were, where earned, exempt from garnishment by a local statute, such exemption, being a mere matter of local procedure, will be unavailing as a defence to the attachment in any other State.[5]

To avoid the effect of these doctrines, statutes have been enacted in several States prohibiting their citizens from instituting such proceedings of garnishment against a fellow-citizen in other States. Such a statute is a valid mode of compelling obedience to law by those who are rightly subject to it.[6]

[1] Stevenot *v.* Eastern Railway Co. of Minnesota, 61 Minn. 104; 63 Northwestern, 256; 28 L. R. A. 600.

[2] Adams *v.* Scott, 104 Mass. 164. *Contra*, Bates *v.* Chicago, Milwaukee, & St. Paul Railway Co., 60 Wis. 296; 19 Northwestern, 72; 50 Am. Rep. 369.

[3] See Cooley *v.* Minnesota Transfer Railway Co., 53 Minn. 327; 55 Northwestern, 141; 39 Am. State, 609.

[4] Chicago, Rock Island, & Pacific Railway Co. *v.* Sturm, 174 U. S. 710, 717.

[5] Mineral Point R. R. Co. *v.* Barron, 83 Ill. 365. *Contra*, Drake *v.* Lake Shore & Michigan Southern Railway Co., 69 Mich. 168, 179; 37 Northwestern, 70; 13 Am. State, 382.

[6] Zimmerman *v.* Franke, 34 Kans. 650; 9 Pacific, 747; Cole *v.* Cunningham, 133 U. S. 107, 120.

CHAPTER LIII.

RULES OF EVIDENCE: PRESUMPTIONS AND ASSUMPTIONS.

1. Negligence.

THE operation of a railroad gives rise to much litigation turning upon questions of negligence.[1] Some of these pertain to the character and sufficiency of the equipment of the road. As to that, the party claiming adversely to the railroad company, and unconnected with it by employment, is under a necessary disadvantage. A rapidly moving train gives those by whom it passes slight opportunity to observe closely. Those who are on board see little of it outside of the car in which they are. Who the train hands may be they do not know. If there is any defect of equipment or service, it is

[1] See Chapter XXVII., Negligence in Operation.

therefore hard to prove it, except by testimony from those employed by the company, and so naturally inclined in its favor.

2. Trial by Jury.

On the other hand, a railroad company being always a corporation in control of a large property, and known to be receiving daily a considerable gross income from it, when sued by one who claims to have sustained, and generally has sustained, an injury from something which has occurred in the operation of the road has, before a jury, a certain disadvantage from the fact that it is presumably better able to meet the loss than he.

It has therefore been found necessary, by courts and legislatures, to modify somewhat the common-law rules of evidence in the disposition of suits against railroad companies.

Those rules are largely the product of our practice of trial by jury. No country in the world has so artificial a system of the law of evidence as England and the United States. It rests mainly on the necessity that some one familiar with law and logic shall guide the doings of twelve men, most, if not all, of whom are commonly untrained in the processes of either. It is peculiar to Anglo-American law, because in that of no other country is there found anything approaching our canon of judicial procedure by which all disputed questions of fact can, at the will of either party, be put for final decision before men thus unlearned and having no permanent share in the administration of justice by public authority.[1]

3. No Precise Criterion of Relevancy.

Railroad law, also, has mainly grown up since 1840. Its whole tone is modern. The courts which have applied or

[1] See Thayer's Preliminary Treatise on Evidence at the Common Law, 2, 111, 527, 530.

created it have had a better opportunity for acquaintance with the historical foundations of the law of evidence than was open to their predecessors, and the advantage of a more philosophical discussion of the principles on which, at bottom, it must everywhere be grounded. In railroad cases, therefore, more than any other, it has been recognized that there is no precise and universal test of relevancy; that unless shut out by some absolute rule or principle of law, any fact may be proved which logically tends to aid the trier in the determination of the issue; and that any objection to such proof must be disposed of, as it arises in each case, according to the teachings of reason and previous experience, with a view to practical rather than theoretical considerations.[1]

Issues, however, which are so remote as to be of no substantial importance cannot be raised. Thus, in accident cases turning upon the condition of the railroad at a particular point, evidence of its condition at other and distant points is incompetent.[2]

Evidence of changes made by the company in the railroad or its apparatus, after an accident resulting from what is claimed to have been a defect in them, is inadmissible in an action to recover for injuries received from such accident. There are two reasons for this. Public policy demands its exclusion, for else every railroad company would be tempted to defer or omit what might be highly proper though not necessary improvements in furtherance of the safety of travellers. Nor would such evidence have any legitimate tendency to show negligence, or an admission of negligence. The company might well have made the changes from a desire to do more than the law required of it, and as a measure

[1] Plumb *v.* Curtis, 66 Conn. 154, 166; 33 Atlantic, 998. See Chapter XLIV., Fires.

[2] Briggs *v.* East Broad Top R. R. & Coal Co., 206 Pa. St. 564; 56 Atlantic, 36.

of extreme caution, suggested by the possibility of danger which the occurrence of the accident had first brought to its notice.[1]

4. The Nature of Presumptions.

The common experience and observation of men has wrought out certain presumptions and assumptions, which have come to assume a legal character, with reference to the every-day results of railroad operation. These presumptions, except so far as they have been taken up by legislatures and put in statutory form, are still mainly presumptions of fact. Presumptions, whether of fact or law, are conclusions which judicial experience has shown that it is safe and wise to draw under certain circumstances. The difference between a presumption of fact and one of law, as these terms are commonly used, is that while the former may be, the latter must be, regarded by the trier.[2] But there is little practical difference of effect between the two, in this respect, when stated to a jury. They are seldom inclined to reject a rule which, as the judge tells them, has been generally found, in cases such as that before them, helpful in reaching a just conclusion.

5. Presumptions as to Who are Passengers.

There is a *prima facie* presumption that every one riding in a passenger car is there lawfully as a passenger.[3] There is a like presumption that a person on a freight train is not lawfully a passenger, and it lies with him who claims to be one to take the burden of proof to show that, under the special circumstances of the case, the presumption has been

[1] Railroad *v.* Wyatt, 104 Tenn. 432; 58 Southwestern, 308; 78 Am. State, 926; Columbia & Puget Sound R. R. Co. *v.* Hawthorne, 144 U. S. 202, 207.

[2] Ward *v.* Metropolitan Life Insurance Co., 66 Conn. 227, 239; 33 Atlantic, 902; 50 Am. State, 80.

[3] Pennsylvania R. R. Co. *v.* Books, 57 Pa. St. 339; 98 Am. Dec. 229.

rebutted.[1] It may be by proof that he had paid the usual fare of a passenger, and was riding in a car adapted for carrying persons, although the conductor may have violated the rules of the company in allowing him to enter it.[2] It is a *prima facie* presumption of law that one not connected with the railroad company, nor engaged in the work of construction, who is riding on a construction train, is not lawfully thereon; and this is not rebutted by mere proof that he was invited to ride by the employees of the company who were in charge of it.[3]

In case of a man killed while riding in a passenger car, and who has received from the conductor a check evidencing his right to ride as a passenger, the presumption that he was lawfully a passenger would not be rebutted because there was found in his pocket a non-transferable pass issued to another. It would not be presumed, in the absence of other proof, that he had made any fraudulent use of it to procure the check.[4]

6. Res ipsa loquitur.

While railroad companies are like other common carriers in having entire control of the vehicle of transportation, they are unlike them in having also entire control of that upon which the vehicle is moved. Hence they are bound in favor of passengers to extraordinary care in providing a safe track. Common experience proves that when both a railway train and the track upon which it runs are in safe condition and the train

[1] Eaton *v.* Delaware, Lackawanna, & Western R. R. Co., 57 N. Y. 382, 389; 15 Am. Rep. 513.

[2] Dunn *v.* Grand Trunk Railway Co. of Canada, 58 Me. 187; 4 Am. Rep. 267; Am. Law Register, X., N. S., 615, with note by Chief Justice Redfield, disapproving the doctrine of this case.

[3] Rosenbaum *v.* St. Paul & Duluth R. R. Co., 38 Minn. 173; 36 Northwestern, 447; 8 Am. State, 653.

[4] Louisville, New Albany, & Chicago Railway Co. *v.* Thompson, 107 Ind. 442; 8 Northeastern, 18; 9 Northeastern, 357; 57 Am. Rep. 120.

is prudently operated, they will not part company. Whenever, therefore, a car or train leaves the track, or receives any violent shock, it is some evidence, in favor of a passenger injured, that either the track or machinery, or something else belonging to the railroad was not in a proper condition, or that the machinery or apparatus was not properly operated, and presumptively shows that the company, whose duty it was to use due care to keep the track, apparatus, and machinery in proper condition, and to have the operation of the road conducted with the necessary prudence and skill, had in some respect violated this duty.[1]

If a passenger on one railroad which crosses another is injured by a collision at the crossing, he has the benefit of this presumption against the company which was carrying him.[2]

It is true that a bad state of the track, apparatus, or machinery may have resulted from the wrongful act of persons for whose conduct the company was not responsible; but such cases are extraordinary, and those guilty of perpetrating such acts are highly criminal. There is, therefore, no presumption of the perpetration of such acts by others, and the company, if excusable upon this ground, must prove the facts establishing such excuse.[3]

The presumption of negligence does not arise from the mere fact of an injury to the passenger while on the train and in the exercise himself of due care, although the rule has been often stated as if it did.[4] It must be an injury of such a kind as to be naturally referable to some cause incident to the condition or operation of the railroad. Proof that a passenger was shot, while occupying a seat, by a

[1] Meier *v.* Pennsylvania R. R. Co., 64 Pa. St. 225; 3 Am. Rep. 581.

[2] Osgood *v.* Los Angeles Traction Co., 137 Calif. 280; 70 Pacific, 169; 92 Am. State, 171.

[3] Edgerton *v.* New York & Harlem R. R. Co., 39 N. Y. 227, 229.

[4] Gleeson *v.* Virginia Midland R. R. Co., 140 U. S. 435, 443; United Railways & Electric Co. *v.* Beidelman, 95 Md. 480; 52 Atlantic, 913.

bullet coming from outside the train would not found such a presumption.[1] Nor would proof of a shock received from the collision of a train with a team at a highway crossing. That might as naturally be due to the fault of those in charge of the team as of those in charge of the train.[2] But proof of a shock from a collision of two of the defendant's own cars would found the presumption, and it would be for the company then to show, if it could, that it was without fault in respect to the management of either.[3]

The presumption of negligence thus raised is always rebuttable. Thus if it appears that the injury was received from the breaking of part of the mechanism of an electric car, *res ipsa loquitur*, and negligence is presumed; but the presumption is disproved should it be shown that this part was purchased from a reputable manufacturer, and had been properly inspected and tested by the company every day.[4]

The benefit of the presumption is not lost by an unsuccessful endeavor to show that the accident occurred from a particular cause.[5]

The mere fact that one lawfully using a highway was injured by sparks or cinders falling from a locomotive engine running on or over the highway constitutes no ground of action. The railroad franchise made the use of the locomotive lawful. Sparks or cinders may (under certain conditions) be scattered, though all due care be used. The

[1] Pennsylvania R. R. Co. *v.* MacKinney, 124 Pa. St. 462; 17 Atlantic, 14; 10 Am. State, 601; 2 L. R. A. 820; Thomas *v.* Philadelphia & Reading R. R. Co., 148 Pa. St. 180; 23 Atlantic, 989; 15 L. R. A. 416.

[2] Chicago City Railway Co. *v.* Rood, 163 Ill. 477; 45 Northeastern, 238; 54 Am. State, 478.

[3] Fredericks *v.* Northern Central R. R., 157 Pa. St. 103; 27 Atlantic, 689; 22 L. R. A. 306. *Cf.* Herstine *v.* Lehigh Valley R. R. Co., 151 Pa. St. 244; 25 Atlantic, 104.

[4] Murray *v.* Pawtucket Valley Street Railway Co., 24 R. I. ; 55 Atlantic, 491.

[5] Cassady *v.* Old Colony Street Railway Co., 184 Mass. 156; 68 Northeastern, 10.

party injured has the burden of proving negligence, and it is not fulfilled by showing a condition of things leaving it just as probable that there was negligence as that there was not.[1]

There is no presumption in favor of one not a passenger, who is injured by the fall of a freight car door upon him, that the company was negligent.[2] Some trespasser may have loosened it only a moment before. Nor would such a presumption arise, under those circumstances, in favor of the holder of a ticket bought at a reduced rate, in consequence of a stipulation that he assumes all risk of accident. While this stipulation would not affect his right of recovery for an accident due to the company's negligence, it leaves him, in such case, under the burden of showing affirmatively that its negligence was the cause.[3]

But if part of the load of a moving freight car should fall upon one lawfully passing alongside of it, there would be a presumption of negligence, for goods properly loaded ordinarily do not fall off when the train is moving at a proper rate of speed.[4]

Railroad servants employed in running a train can claim the benefit of a presumption of negligence on the part of the company towards them, when the locomotive or cars are not equipped in a proper manner and there is no evidence that any care was exercised by the company to provide the proper equipment. A failure to furnish a brake for a locomotive engine, if unexplained, would raise such a presumption in favor of a fireman injured by a collision which, had there

[1] Searles *v.* Manhattan Railway Co., 101 N. Y. 661 ; 5 Northeastern, 66.

[2] Case *v.* Chicago, Rock Island, & Pacific Railway Co., 64 Iowa, 762; 21 Northwestern, 30; 19 Am. & Eng. R. R. Cases, 142.

[3] Crary *v.* Lehigh Valley R. R. Co., 203 Pa. St. 525; 53 Atlantic, 363 ; 93 Am. State, 778; 59 L. R. A. 815.

[4] Howser *v.* Cumberland & Pennsylvania R. R. Co., 80 Md. 146; 30 Atlantic, 906; 27 L. R. A. 154; 45 Am. State, 332.

been a brake on the engine, would probably not have occurred.[1] On the other hand there would be no such presumption in favor of a brakeman injured by the breaking of a freight train in two, by reason of the use of too short coupling pins. While proof that it thus broke apart would be *prima facie* proof of negligence if the plaintiff were a passenger, it is not when the plaintiff is a servant of the company; for the fault may have been either that of the company in not providing proper pins, or that of a fellow-servant in not using proper pins. As in the latter case the plaintiff could not recover, he has not fulfilled the burden of proof.[2]

7. Assumptions and Presumptions in Favor of Highway Traveller.

If a patent defect exists in the roadbed of a railroad constructed upon or along a highway, it is presumed in favor of a highway traveller who is injured thereby, that the company knew of the defect and was negligent in not having repaired it. Such a case is not governed by the rules affecting the liability of a municipality for a defect in a highway. The municipality is not expected to maintain a daily inspection of all its highways. It may therefore justly ask for some proof that it knew of the defect, or ought to have known of it. But a railroad company is working a road of a peculiar nature, which requires daily inspection and is daily traversed by servants having an opportunity to observe its condition, and whose attention is naturally directed to it.[3]

[1] Choctaw, Oklahoma, & Gulf R. R. Co. *v.* Holloway, 191 U. S. 334, 339.

[2] Thyng *v.* Fitchburg R. R. Co., 156 Mass. 13; 30 Northeastern, 169; 32 Am. State, 425.

[3] Worster *v.* Forty-Second Street & Grand Street Ferry R. R. Co., 50 N. Y. 203.

The erection upon a highway of apparatus incident to the operation of a trolley road puts over the heads of travellers a constant source of peril. The company owning it is therefore held in their favor to a high degree of care in its construction and maintenance, and if one of the overhead wires, though it be but a guy wire, falls on one of them, a *prima facie* presumption of negligence arises in his favor.[1]

Running a train at a rate of speed prohibited by law is negligence *per se*,[2] if it collides with a highway traveller. But in the absence of a governing statute, no conceivable rate of speed on a car running through the open country is — standing alone — evidence of such negligence.[3]

8. Injury to Highway Traveller causing his Death: Presumptions as to Care.

When a person is killed at a highway crossing and a statutory action is brought for damages for his death, as in order to support the action it must be proved that the death was due to the defendant's fault, and as the presence as a witness at the trial of the principal sufferer can never be had, and it is seldom that his deposition can be taken, the courts have come to the plaintiff's relief by raising a presumption, in the absence of controlling evidence either way, that there was no contributory negligence. In the common course of things, men of ordinary prudence generally look and listen for a train before undertaking to cross a railroad track. They know the danger to be apprehended from any lack of reasonable care. Hence not only will it not be presumed, without

[1] Chattanooga Electric Railway Co. *v.* Mingle, 103 Tenn. 667; 56 Southwestern, 23; 76 Am. State, 703.

[2] Barfield *v.* Southern Railway Co., 108 Ga. 744; 33 Southeastern, 988.

[3] McKonkey *v.* Chicago, Burlington, & Quincy R. R. Co., 40 Iowa, 205; 8 Am. Railway Rep. 406.

evidence, that they failed to exercise it,[1] but it will be presumed that they did exercise it.[2]

On the other hand, it will not be presumed, in the absence of any evidence except that a man was killed by collision with a train at a highway crossing, that the train was not run with due care. The plaintiff must prove affirmatively that the defendant was in fault. Common experience shows that men are often so killed at crossings without fault on the part of the railroad company, even when they themselves were in the exercise of what to one of ordinary prudence would seem due care. They miscalculate the speed of an approaching train, although it is no greater than is usual or proper. They are driving a horse which suddenly becomes frightened and unmanageable. In some such way a fatal accident may happen, and yet neither party be in fault.[3]

If there are no witnesses to be had to give an account of the circumstances under which the person killed was upon the track when struck, testimony may be received that he had often passed over this crossing and was in the invariable habit of stopping or driving slowly as he approached it and watching for trains. Such evidence comes in because it is the best attainable, under the peculiar circumstances of a case of this description.[4] It is not admissible if witnesses of the transaction are to be had.[5]

[1] Texas & Pacific Railway Co. *v.* Gentry, 163 U. S. 353, 366 ; Pennsylvania R. R. Co. *v.* Middleton, 57 N. J. Law, 154; 31 Atlantic, 616; 51 Am. State, 597.

[2] Mynning *v.* Detroit, Lansing, & Northern R. R. Co., 64 Mich. 93; 31 Northwestern, 147; 8 Am. State, 804; Pennsylvania R. R. Co. *v.* Weber, 76 Pa. St. 157; 18 Am. Rep. 407; Crawford *v.* Chicago Great Western Railway Co., 109 Iowa, 433; 80 Northwestern, 519; Weller *v.* Chicago, Milwaukee, & St. Paul R. R. Co., 164 Mo. 180; 64 Southwestern, 141; 86 Am. State, 592; Baltimore & Potomac R. R. Co. *v.* Landrigan, 191 U. S. 461, 474.

[3] Ward *v.* Southern Pacific Co., 25 Oreg. 433; 36 Pacific, 166; 23 L. R. A. 715.

[4] Davis *v.* Concord & Montreal Railroad, 68 N. H. 247; 44 Atlantic,

[5] Southern Kansas Railway Co. *v.* Robbins, 43 Kans. 145; 23 Pacific, 113.

9. Dying Declarations.

In a statutory action for injuries causing death, dying declarations of the decedent as to the circumstances attending the injury are inadmissible to support the plaintiff's case, unless they so serve to characterize some act as to become part of the *res gestæ*. For the defendant such declarations are admissible when part of the *res gestæ*, and also if amounting to admissions against interest.

10. Statutory Presumption of Negligence.

Some States provide by statute that the occurrence of an injury to person or property in consequence of the operation of a railroad is *prima facie* evidence of want of due skill or care on the part of the railroad company.[1] The constitutionality of such a law, under the XIVth Amendment to the Constitution of the United States, is defensible on the ground that the operation of railroads is always a dangerous thing. It is therefore reasonable to make special rules to govern suits against the class composed of those who are engaged in this particular kind of business.

Such a statute applies to any suit against any railroad company, although it be a foreign one and sued for an injury received in another State. It is a matter of procedure, and procedure is governed by the *lex fori*.[2] On the other hand, and for the same reason, a presumption, whether statutory or founded on the common law, obtaining in the State where a transitory cause of action arises, will not be applied

388; Louisville, Cincinnati, & Lexington R. R. Co. *v.* Goetz's Adm'x, 79 Ky. 442; 42 Am. Rep. 227; 14 Am. & Eng. R. R. Cases, 627; Smedis *v.* Brooklyn & Rockaway Beach R. R. Co., 88 N. Y. 13, 19; 8 Am. & Eng. R. R. Cases, 445.

[1] Missouri Code, § 1808.

[2] Pennsylvania Co. *v.* McCann, 54 Ohio St. 10; 42 Northeastern, 768; 56 Am. State, 695; 31 L. R. A. 651.

in any other State in which suit may be brought, if no such presumption obtain there.[1]

11. Contributory Negligence.

The question whether the plaintiff is bound to prove affirmatively the absence of contributory negligence is, in actions to recover for railroad accidents, largely an academic one. The circumstances attending such an injury are necessarily so far part of his case that they generally come to the surface before he has closed his evidence, and speak for themselves.

12. Contributory Negligence of Passenger.

In view of the mode in which railroads are constructed, the proximity to each other of parallel tracks, and the posts, bridge abutments, and other structures frequently set very near the rails, if a passenger on a through railroad puts his head or arm out of the car window and it is struck by some object passed, he is generally chargeable, as matter of law, with contributory negligence.[2] He is not thus chargeable if on a street car.[3]

A *prima facie* presumption of negligence arises against a passenger injured while riding on the platform of a car on a through railroad, not incorporated into a vestibuled train, when there was a seat inside which he could have occupied.[4] No such presumption arises from riding on the

[1] Hoadley *v.* Northern Transportation Co., 115 Mass. 304; 15 Am. Rep. 106.

[2] Todd *v.* Old Colony & Fall River R. R. Co., 3 Allen, 18, 21; 80 Am. Dec. 49; Georgia Pacific Railway Co. *v.* Underwood, 90 Ala. 49; 8 Southern, 116; 24 Am. State, 756. See Chapter XXXII., Carriage of Passengers.

[3] Sias *v.* Rochester Railway Co., 169 N. Y. 118; 62 Northeastern, 132; 56 L. R. A. 850; Summers *v.* Crescent City R. R. Co., 34 La. Ann. 139; 44 Am. Rep. 419.

[4] Hickey *v.* Boston & Lowell R. R. Company, 14 Allen, 429, 431,

platform of a street car, if there is no rule of the company forbidding it.[1] From riding on the steps of a street car a presumption would arise, but it could be rebutted by proof that it was done at the express or implied invitation of the conductor, the car being full.[2]

There is no necessary presumption of negligence from the act of getting on or off a street car which is moving very slowly.[3]

There is such a presumption from the act of getting on or off any car on any railroad which is going at a rapid rate of speed, there being no circumstances to cause special excitement or alarm.[4] Four or five miles an hour has been pronounced by some courts,[5] and denied by others,[6] to be such a rate. In determining whether such an act was negligent, an invitation to do it from those in charge of the car would

433; Worthington *v.* Central Vermont R. R. Co., 64 Vt. 107; 23 Atlantic, 590; 15 L. R. A. 326; Goodwin *v.* Boston & Maine Railroad, 84 Me. 203; 24 Atlantic, 816.

[1] Nolan *v.* Brooklyn City & Newtown R. R. Co., 87 N. Y. 63; 41 Am. Rep. 345; North Chicago Street R. R. Co. *v.* Baur, 179 Ill. 126; 53 Northeastern, 568; 45 L. R. A. 108; Watson *v.* Portland & Cape Elizabeth Railway Co., 91 Me. 584; 40 Atlantic, 699; 44 L. R. A. 157; 64 Am. State, 268. *Contra* (if the car is not full inside), Thane *v.* Scranton Traction Co., 191 Pa. St. 249; 43 Atlantic, 136; 71 Am. State, 767.

[2] Clark *v.* Eighth Avenue R. R. Co., 36 N. Y. 135; 93 Am. Dec. 495.

[3] Stager *v.* Ridge Avenue Passenger Railway Co., 119 Pa. St. 70; 12 Atlantic, 821. But see McDonald *v.* Montgomery Street Railway, 110 Ala. 161; 20 Southern, 317.

[4] Gavett *v.* Manchester & Lawrence R. R. Co., 16 Gray, 501, 507; 77 Am. Dec. 422.

[5] Jagger *v.* People's Street Railway Co., 180 Pa. St. 436; 36 Atlantic, 867; 38 L. R. A. 786; Hunter *v.* Cooperstown & Susquehanna Valley R. R. Co., 112 N. Y. 371; 19 Northeastern, 820; 8 Am. State, 752; 12 L. R. A. 429; Louisville & Nashville R. R. Co. *v.* Crunk, 119 Ind. 542; 21 Northeastern, 31; 12 Am. State, 443.

[6] Chicago, Burlington, & Quincy R. R. Co. *v.* Hyatt, 48 Nebr. 161; 67 Northwestern, 8; 4 Am. & Eng. R. R. Cases, N. S. 44; Finkeldley *v.* Omnibus Cable Co., 114 Calif. 28; 45 Pacific, 996; 5 Am. & Eng. R. R. Cases, N. S. 393.

ordinarily be admissible as tending to rebut the presumption of negligence.[1]

A passenger, in boarding or leaving a train at a station, is not, as matter of law, chargeable with contributory negligence from a failure to look or listen before stepping on a track over which he must pass. He has a right to rely to some extent on the duty the company owes him to make his ingress or egress safe.[2]

13. Contributory Negligence of Railroad Servants.

It is negligence as matter of law for a laborer on a railroad to walk upon and along the track without looking out for approaching trains.[3]

14. Contributory Negligence of Highway Travellers.

Contributory negligence is conclusively presumed, as matter of law, against one suing for an injury by collision with a train at a grade crossing, who failed either to look or listen, when looking or listening would probably have disclosed the approach of the train to an ordinary man.[4] The law treats him as if he had seen what he could have seen, and had heard what he could have heard.[5] That he was under some special disability, such as blindness or deafness, would be

[1] Hunter *v.* Cooperstown & Susquehanna Valley R. R. Co., 112 N. Y. 371; 19 Northeastern, 820; 8 Am. State, 752; 12 L. R. A. 429; Filer *v.* New York Central R. R. Co., 49 N. Y. 47; 3 Am. Railway Rep. 466; 10 Am. Rep. 327; Georgia R. R. & Banking Co. *v.* McCurdy, 45 Ga. 288; 12 Am. Rep. 577; Pittsburg, Cincinnati, Chicago, & St. Louis R. R. Co. *v.* Gray, 59 Northeastern, 1000 (Ind. App.).

[2] Chaffee *v.* Boston & Lowell R. R. Corporation, 104 Mass. 108, 115.

[3] Elliott *v.* Chicago, Milwaukee, & St. Paul Railway Co., 150 U. S. 245, 248; Carlin *v.* Chicago, Rock Island, & Pacific R. R. Co., 37 Iowa, 316; 8 Am. Railway Rep. 141.

[4] Davis *v.* New York Central & Hudson River R. R. Co., 47 N. Y. 400, 402; Salter *v.* Utica & Black River R. R. Co., 75 N. Y. 273.

[5] Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Co. *v.* Fraze, 150 Ind. 576; 50 Northeastern, 576; 65 Am. State, 377.

immaterial, unless it were known to those managing the train. That the night was dark and the wind high would be no excuse for not endeavoring to use both eye and ear.

That this presumption may be rebutted by proof of a reasonable excuse, disclosed by the attending circumstances, is the rule in many States. In one of these it has been held that if the train was moving at such an excessive rate of speed that, if he had looked and listened for it, nothing would have been seen or heard to prevent a prudent man from stepping on the track, this would be an excuse, because then looking or listening would not have prevented the accident.[1] It is undoubtedly true that a prudent man may drive upon a crossing in view of a train approaching, but at so great a distance that it could not reasonably be expected, under any circumstances, to reach the highway until he had cleared the track; and if in such a case, the train appears to him to be moving at the usual rate of speed, he may take that circumstance into account. If it was, in fact, going faster, and a collision results, it would be for the jury to say whether he exercised due care. But this is a very different thing from a collision between a train running at an excessive rate of speed and a traveller who neither looked nor listened for it. As railroad trains may be run in the open country at any rate of speed not forbidden by positive law, travellers must act on this assumption.

For a cyclist to ride between the double tracks of an interurban railroad, in which trolley poles are set, leaving a space less than the width of the handle bars of the bicycle between pole and track, is negligence *per se*.[2]

[1] Lyman *v.* Boston & Maine Railroad, 66 N. H. 200; 20 Atlantic, 976; 11 L. R. A. 364. *Cf.* Chase *v.* Maine Central R. R. Co., 78 Me. 346; 5 Atlantic, 771.

[2] Gagne *v.* Minneapolis Street Railway Co., 77 Minn. 171; 79 Northwestern, 671.

15. Contributory Negligence of Adjoining Proprietor.

If the bars in a barway left in a railroad fence for the accommodation of an adjoining owner are found left down, there is a presumption, as between him and the railroad company, that he left them down, since he is the only party who would naturally use them.[1]

16. The Operating Rules of the Company.

The operating rules of all American through railroads are much the same.[2]

Among other things, they regulate the speed of trains. If there is a rule that in passing way stations speed shall be reduced to a certain rate, it may be put in evidence by one injured by a train moving more rapidly, at a highway crossing near such a station, as tending to show that it was moving faster than was usual. If the party injured knew of the rule, he had some ground for presuming that the train was not running faster than it provided, and for acting accordingly. If he did not know of it, it has still a tendency to prove that the speed, as it was greater than that which the rule allowed, was unusual. As against the railroad company the jury may, in the absence of contrary proof, presume that its rules are obeyed; and the party injured had some ground for expecting the train to run in the usual way.[3] They would not be admissible on the ground that they constitute an admission by the company as to the proper and necessary amount of care to be taken by its employees. It may require more care than is necessarily or properly due.[4]

[1] Eames *v.* Boston & Worcester R. R. Corporation, 14 Allen, 151. See Chapter XVI., Farm Crossings and Ways of Necessity.

[2] See Chapter XXVI., Rules and Regulations.

[3] Davis *v.* Concord & Montreal R. R., 68 N. H. 247; 44 Atlantic, 388.

[4] Fonda *v.* St. Paul City Railway Co., 71 Minn. 438; 74 Northwestern, 166; 70 Am. State, 341. *Contra*, Cincinnati Street Railway Co. *v.*

In suits by passengers for injuries by a railroad accident, the company's rules are admissible against it, because they are entitled to demand of it, as a common carrier, the exercise of extraordinary care, and it is its settled duty, as such common carrier, to a passenger, first, to adopt suitable rules for securing the exercise of such care in the operation of its road, and, second, to exercise such care, in fact. If a plaintiff, injured when a passenger, shows that the company directed certain precautions against accident to be taken, he establishes the fact that such precautions, in its judgment, can be reasonably taken, and therefore that less than the utmost care consistent with the practical working of the railroad was exercised, if they were not taken at the time and place of his injury.

So in an action by a servant for an accident occurring to him, he can introduce the company's rules, if he claims to have suffered either from their inadequacy or their violation; for it was, as an owner and operator of a railroad upon which he was employed, under a duty to him to adopt suitable rules, and to use due care to secure their proper observance.

But to third parties, not passengers nor servants, who may be injured on highways at a place over which they have a right to pass, and over which the railroad company also has a right to move its trains, it owes no duty to have rules, except so far as such a duty may be implied from the general duty to exercise ordinary care. As to them, its being a common carrier or an employer of labor on a railroad is immaterial. Its general duty to exercise ordinary care is absolute, and no evidence is needed to establish it.

What useful purpose (with the exception above noted) can be served by allowing a plaintiff in such a case to introduce rules which have been in fact established, but

Altemeier, 60 Ohio State, 10; 53 Northeastern, 300; Chicago & Alton R. R. Co. *v.* Eaton, 194 Ill. 441; 62 Northeastern, 784; 88 Am. State, 161. See *ante*, p. 229.

were unknown to him, if they required more than ordinary care to be used? If they required less than ordinary care, then they might have a value as corroborative evidence to support his claim that less was used towards him, or to fortify a demand for vindictive damages. But if they require more than ordinary care, to put them before a jury not only has a direct tendency to mislead in the case on trial, but is likely to be prejudicial to the public interest, by inducing railroad companies thereafter to prescribe rules less calculated to secure public protection, because calling for no more than ordinary care.

It is always open to the plaintiff in such an action to show that railroad companies generally, in operating trains, exercise certain precautions which the defendant failed to exercise. In support of a claim of that kind, and after laying a proper foundation for it, by proof of the usage of other companies, it would be competent to show that the defendant itself recognized this usage in its own rules. This, however, would be so, simply because it would now be relevant evidence to prove that ordinary care demanded these precautions.

Rules adopted by a railroad company for the government of its train men have sometimes been introduced in evidence in actions against it by those with whom it is in no contract relation, and particularly where the subject of the action was an accident at a highway crossing, without objection and, when so introduced, treated by the court as material. The only ground suggested for admitting them when objection has been made, except that they constitute admissions by the company as to the precautions that should properly be taken,[1] is that to violate them is not simply a breach of duty by the servant to his master, but also to the party injured, whoever he may be.[2] This seems an unwarranted extension of the doctrines of

[1] See Chapter XXVI., Rules and Regulations, p. 229.

[2] Stevens *v.* Boston Elevated Railway Co., Mass. ; 69 Northeastern, 338. This decision is based partly on the assumption that it has become

agency. A servant's contract duty is owed only to his employer.[1] "To his own master he standeth or falleth." If by his act or neglect, while in a position in which he represents his master, a direct physical injury is done to another by means of property which his master has placed in his control, the master may be liable for the consequent damage, under the rule of *respondeat superior*, in an action of tort. But in such case the injured party has no legitimate concern with the contract between master and servant, except so far as may be necessary to show that this rule applies.

A rule requiring a whistle to be blown on approaching sharp curves is for the safety of trains only, and is not admissible in evidence in favor of a trespasser.[2]

Each of the servants on the railroad is presumed *prima facie* to have knowledge of such rules for the government of his department of service as the company has adopted and distributed in printed form,[3] and the presumption can only be rebutted by proof that he failed to learn what they were, after taking reasonable pains for that purpose.[4]

17. Presumption as to those in Charge of Sleeping-cars.

It is a presumption of law that the conductor and porter of a sleeping-car owned by one company, and forming part of

the general practice to receive such evidence. Of the precedents cited, however, the leading ones were cases in which passengers were the plaintiffs, as in Chicago, Milwaukee, & St. Paul Railway Co *v.* Lowell, 151 U. S. 209; Warner *v.* Baltimore & Ohio R. R. Co., 168 U. S. 339; Delaware, Lackawanna, & Western R. R. Co. *v.* Ashley, 67 Federal, 209; 14 C. C. A. 368; 28 U. S. App. 375; Cincinnati Street Railway Co. *v.* Altemeier, 60 Ohio St. 10; 53 Northeastern, 300; Lake Shore & Michigan Southern Railway Co. *v.* Ward, 135 Ill. 511; 26 Northeastern, 520.

[1] Savings Bank *v.* Ward, 100 U. S. 195, 204.

[2] Louisville & Nashville R. R. Co. *v.* Howard's Adm'r, 82 Ky. 212; 19 Am. & Eng. R. R. Cases, 98.

[3] Galveston, Harrisburg, & San Antonio Railway Co. *v.* Gormley, 91 Tex. 393; 43 Southwestern, 877; 66 Am. State, 894.

[4] See Shenandoah Valley R. R. Co. *v.* Lucado's Adm'r, 86 Va. 390; 10 Southeastern, 422.

a train run by another, exercise their functions with the assent of the latter; and therefore they may be regarded as its servants in favor of passengers.[1]

18. Presumptions in Favor of Shippers.

If goods received for transportation are not delivered at the point of destination, a legal inference arises that their non-delivery is due to the fault of the company.[2]

Possession by one who has been a passenger on a railroad of a baggage check, and proof of a failure to comply with a seasonable demand for the delivery of the baggage under it, at the point of destination, raise a presumption that the holder is the owner of baggage, and that the company was negligent in respect to it.[3]

If articles shipped in good order were received at the end of the route in bad order, the presumption is that they were injured in transit, and in a way for which the carrier is responsible.[4]

19. Connecting Lines.

If goods shipped or a passenger's luggage checked over several connecting lines, though in good condition when put into the custody of the first carrier, reach the owner at the point of destination in a damaged condition, it is a *prima facie* presumption of law that they were damaged while on the last line. A state of things once proved to exist is generally presumed to continue until the contrary is proved. The last carrier, also, has the best means of information. In

[1] Pennsylvania Co. *v.* Roy, 102 U. S. 451.

[2] Camden & Amboy R. R. Co. *v.* Baldauf, 16 Pa. St. 67; 2 Am. Railway Cases, 357; 55 Am. Dec. 481.

[3] Atchison, Topeka, & Santa Fé R. R. Co. *v.* Brewer, 20 Kans. 669; Isaacson *v.* New York Central & Hudson River R. R. Co., 94 N. Y. 278; 46 Am. Rep. 142; 16 Am. & Eng. R. R. Cases, 188.

[4] Mears *v.* New York, New Haven, & Hartford R. R. Co., 75 Conn. 171, 174; 52 Atlantic, 610; 56 L. R. A. 884.

case of an exterior appearance of injury, he knows, or should know, whether the goods came to him in that condition. In case of a damage not so apparent, he at least knows best the circumstances attending his own custody of them.[1] So, for like reasons, if a case of goods is shipped over several connecting railroads, and on delivery by the last line it is found that the contents have been stolen, though the case show no external marks of violence, there is a legal presumption that the loss occurred on the last line.[2]

20. Credibility of Train Hands.

It is common in suits for accidents at highway crossings for the plaintiff to produce witnesses who say that no whistle was blown nor bell rung, and for the train men to testify for the defence that these signals were duly given.

While positive testimony is ordinarily entitled to more weight than negative testimony, a jury may consider the bias of witnesses on either side, and their opportunities of knowledge, and a verdict for the plaintiff will seldom be set aside as against the weight of evidence, because the testimony of train hands was not credited.[3]

21. Expert Testimony.

Railroads are so far a part of the common life of the community, and all are so familiar with their customary operation, that the field of expert testimony from civil engineers

[1] Moore *v.* New York, New Haven, & Hartford R. R. Co., 173 Mass. 335; 53 Northeastern, 816; 73 Am. State, 298.

[2] Laughlin *v.* Chicago & Northern Railway Co., 28 Wis. 204; 5 Am. Railway Rep. 323; 9 Am. Rep. 493.

[3] Renwick *v.* New York Central R. R. Co., 36 N. Y. 132; Chicago & Alton R. R. Co. *v.* Gretzner, 46 Ill. 74. *Cf.* Bohan *v.* Milwaukee, Lake Shore, & Western Railway Co., 61 Wis. 391; 21 Northwestern, 241; 19 Am. & English R. R. Cases, 276.

or others connected with railroad construction or operation has become rather a narrow one. It serves no useful purpose to put the opinion of a witness before a jury of men who have substantially as good qualifications for forming one for themselves.

Opinions of experts have been received as to what rate of speed would be safe under certain circumstances;[1] as to how soon a car or train, running at a given rate of speed, and equipped in a certain manner, could be brought to a stop;[2] as to whether a certain stock car was provided with sufficient bars;[3] and as to the advantages of constructing cars with double "dead-woods."[4]

The opinion of any person of ordinary intelligence and experience, familiar with the operation of railroads from personal observation, is admissible as to the speed of a train which he saw pass.[5]

The opinions of experts have been rejected as to whether blowing the whistle in a particular manner at a particular point was dangerous to travellers on the highway;[6] as to whether a certain highway crossing or a certain station platform was a safe one;[7] as to whether a cattle guard, if built at a certain point, would be a source of danger;[8] as to whether a freight car without grab-irons was safe for brake-

[1] Cooper *v.* Central R. R. of Iowa, 44 Iowa, 134.

[2] Detroit & Milwaukee R. R. Co. *v.* Van Steinburg, 17 Mich. 99.

[3] Betts *v.* Chicago, Rock Island, & Pacific Railway Co., 92 Iowa, 343; 60 Northwestern, 623; 54 Am. State, 558; 26 L. R. A. 248.

[4] Baldwin *v.* Chicago, Rock Island, & Pacific R. R. Co., 50 Iowa, 680, 684.

[5] Grand Rapids & Indiana R. R. Co. *v.* Huntley, 38 Mich. 537; 31 Am. Rep. 321; St. Louis & San Francisco Railway Co. *v.* Brown, 62 Ark. 254; 35 Southwestern, 225; Illinois Central R. R. Co. *v.* Ashline, 171 Ill. 313; 49 Northeastern, 521.

[6] Hill *v.* Portland & Rochester R. R. Co., 55 Me. 438; 92 Am. Dec. 601.

[7] Atchison, Topeka, & Santa Fé R. R. Co. *v.* Henry, 57 Kans. 154; 45 Pacific, 576.

[8] Chicago & Eastern Illinois R. R. Co. *v.* Modesitt, 124 Ind. 212; 24 Northeastern, 986.

men;[1] as to whether a certain mode of inspecting brake-rods was sufficient;[2] and as to whether a baggage man was incompetent for his position.[3]

22. Judicial Notice.

The same reasons that operate to narrow the field of expert testimony, in respect to railroad matters, broaden that of judicial notice. It would be useless and wasteful to delay the business of courts to hear evidence as to facts which are matters of such common knowledge as to be familiar to all men and beyond any possible dispute.

The judicial notice which courts take of the general business affairs of life includes the manner in which ordinary railroad business is conducted and the every-day practical operation of them,[4] and the character of railroad companies as common carriers of persons and property.[5] This extends to the system of checking baggage, and of through checks;[6] to the custom to receive and haul through freight cars;[7] to the movement of trains by telegraph;[8] to their ordinary

[1] Dooner *v.* Delaware & Hudson Canal Co., 164 Pa. St. 17; 30 Atlantic, 269.

[2] Schneider *v.* Second Avenue R. R. Co., 133 N. Y. 583; 30 Northeastern, 752.

[3] Moore *v.* Chicago, Burlington, & Quincy Railway Co., 65 Iowa, 505; 22 Northwestern, 650; 54 Am. Rep. 26.

[4] Cleveland, Cincinnati, Chicago & St. Louis Railway Co. *v.* Jenkins, 174 Ill. 398; 51 Northwestern, 811; 66 Am. State, 296; McDonald *v.* Illinois Central R. R. Co., 187 Ill. 529, 536; 58 Northeastern, 463; Downey *v.* Hendrie, 46 Mich. 498; 9 Northwestern, 828; 41 Am. Rep. 177.

[5] Caldwell *v.* Richmond & Danville R. R. Co., 89 Ga. 550; 15 Southeastern, 678; Condran's Adm'x *v.* Chicago, Milwaukee, & St. Paul Railway Co., 67 Federal, 522; 32 U. S. App. 182; 14 C. C. A. 506; 28 L. R. A. 749.

[6] Isaacson *v.* New York Central & Hudson River R. R. Co., 94 N. Y. 278, 284; 46 Am. Rep. 142.

[7] Burlington, Cedar Rapids, & Northern Railway Co. *v.* Dey, 82 Iowa, 312; 48 Northwestern, 98; 31 Am. State, 477; 12 L. R. A. 436.

[8] State *v.* Indiana & Illinois Southern R. R. Co., 133 Ind. 69; 32 Northeastern, 817; 18 L. R. A. 502. See Chapter XXVIII., Servants.

speed;[1] to the fact that no spark arresters have as yet been invented which entirely prevent the escape of sparks from locomotives under all circumstances;[2] to the fact that a street car in passing around a curve is subjected to a somewhat violent motion, against which a passenger, if on his feet, must be on his guard;[3] and to the time commonly taken by passenger trains between well-known points.[4] Judicial notice will also be taken of the existence of a railroad situated in whole or part in the State where the court sits,[5] and of when it was opened for traffic. It is a geographical feature of the country.[6] It may even extend to recognizing the time when or about when electric cars displaced horse cars on the streets of a certain city.[7]

23. Railroad Reports.

The official reports of a railroad superintendent to the board of directors, stating the physical condition of the road, are admissible in evidence against the company, when sued for an accident claimed to be due to its bad condition.[8]

The written trip reports to the company by a conductor, of passengers transported and fares collected, as required by its rules, are admissible in corroboration of his testimony as to the facts which were the subject of the report, in a suit

[1] Pearce *v.* Langfit, 101 Pa. St. 507, 511; 47 Am. Rep. 737.

[2] Frace *v.* New York, Lake Erie, & Western R. R. Co., 143 N. Y. 182; 38 Northeastern, 102.

[3] Ayers *v.* Rochester Railway Co., 156 N. Y. 104; 50 Northeastern, 960.

[4] Pearce *v.* Langfit, 101 Pa. St. 507; 47 Am. Rep. 737. *Contra*, Wiggins *v.* Burkham, 10 Wall. 129, 132.

[5] Watson *v.* Richmond & Danville R. R. Co., 91 Ga. 222, 226; 18 Southeastern, 306.

[6] Morgan *v.* Farrel, 58 Conn. 413; 20 Atlantic, 614; 18 Am. State, 282; Knowlton *v.* New York, New Haven, & Hartford R. R. Co., 72 Conn. 188, 194; 44 Atlantic, 8.

[7] Meyer *v.* Krauter, 56 N. J. Law, 696; 29 Atlantic, 426; 24 L. R. A. 575.

[8] Vicksburg & Meridian R. R. Co. *v.* Putnam, 118 U. S. 545.

against the company by one claiming to have paid fare as a passenger on a certain trip. Such reports cannot be regarded as self-serving declarations and do not come within the reason of the rule excluding hearsay evidence. It is safer to let them speak for themselves than to use them merely to refresh the recollection of the witness.[1]

[1] Callihan *v.* Washington Water Power Co., 27 Wash. 154; 67 Pacific, 697; 56 L. R. A. 772; 91 Am. State, 829.

CHAPTER LIV.

ACTIONS FOR INJURIES CAUSING DEATH.

1. Forms of Remedy.

THE special dangers to human life incident to the operation of a railroad led Massachusetts, in 1840, to depart, in the case of railroad passengers, from the common-law principle that no civil action lies for wrongfully causing the death of another, so far as to make a negligent killing finable by indictment, and the fine payable to the executor or administrator for the benefit of the family. This was a penal statute, acting by way of punishment. Most, if not all, of the States have since enacted statutes designed to give pecuniary relief of a similar nature by means of a civil action for compensatory damages, and these are generally applicable to any persons killed in the course of the operation of a railroad by the fault of the company or its servants. The usual form of remedy prescribed is an action on the statute by the executor or administrator, but in several States those beneficially interested may sue directly, and in some the State is plaintiff. In a very few, recovery by an executor or administrator enures to the benefit of the

estate of the deceased, and so operates in favor of creditors.[1] If the executor or administrator is the plaintiff, he is in most States such simply as a statutory agent for that especial purpose. Hence he could bring a suit after a final settlement of the estate of the deceased.[2] Under most of these statutes the maximum damages are fixed at a certain sum, such as $5000 or $10,000, and within this limit the measure of damages is the amount of the pecuniary injury done to the family of the deceased:[3] in some it is that of the injury to himself resulting in the loss of life.[4]

2. Averments as to the Statutory Beneficiaries.

As the recovery is for the benefit of relatives, it is always prudent and generally necessary to allege the existence of such relatives. It is not necessary to allege the precise manner in which they have sustained damage. Some damage may fairly be presumed from their relationship.[5]

3. Alien Beneficiaries.

It is immaterial whether those for whose benefit suit is brought are citizens or aliens.[6]

[1] Louisville & Nashville R. R. Co. *v.* McElwain, 98 Ky. 700; 34 Southwestern, 236; 56 Am. State, 385; 34 L. R. A. 788.

[2] Hubbard *v.* Chicago & Northwestern Railway Co., 104 Wis. 160; 80 Northwestern, 454; 76 Am. State, 855.

[3] Cooper *v.* Shore Electric Co., 63 N. J. Law, 558; 44 Atlantic, 633; Howard *v.* Delaware & Hudson Canal Co., 40 Federal, 195; 6 L. R. A. 75.

[4] Goodsell *v.* Hartford & New Haven R. R. Co., 33 Conn. 51; Broughel *v.* Southern New England Telephone Co., 73 Conn. 614; 48 Atlantic, 751; 84 Am. State, 176.

[5] But see Chicago, Rock Island, & Pacific Railway Co. *v.* Young, 58 Nebr. 678; 79 Northwestern, 556.

[6] Mulhall *v.* Fallon, 176 Mass. 266; 57 Northeastern, 386; 54 L. R. A. 934; 79 Am. State, 389. *Contra*, Deni *v.* Pennsylvania R. R. Co., 181 Pa. St. 525; 37 Atlantic, 558; 59 Am. State, 676.

4. Special Damages.

Under certain circumstances, third parties may have a common-law action for injuries resulting in the death of one in whose continued life they have a legal interest. A slaveholder, in the days of slavery in the United States, could sue for the negligent killing of his slave, because his slave was his property and had a salable value.[1] The life of a free person has no salable value, but if there be a right to enjoy his services or society for a term of years or during his life, to destroy that right may to a certain extent be actionable. Such a right often belongs to relatives by blood or marriage. Thus a husband may recover for the loss of his wife's society, or a father for the loss of services of a minor son, between the time of a personal injury received and a consequent death,[2] or for the expenses of his last sickness and burial.[3] The action in such case is not founded on the death, but on circumstances existing before the death.

Whether claims of this kind are merged in the statutory remedy must depend in each case on the terms of the statute.[4]

5. Computation of Damages in Ordinary Cases.

The value of a man's life to himself is incapable of any exact legal measurement.[5] Its value to his widow and family can be approximately ascertained by considering what he would probably have earned annually over and above what he would probably have spent for his own personal support and benefit; multiplying this sum by the number of years he might

[1] Swigert *v.* Graham, 7 B. Monroe, 661.

[2] Louisville & Nashville R. R. Co. *v.* McElwain, 98 Ky. 700; 34 Southwestern, 236; 56 Am. State, 385; 34 L. R. A. 788.

[3] Holland *v.* Brown, 35 Federal, 43.

[4] Atchison, Topeka, & Santa Fé R. R. Co. *v.* Wilson, 48 Federal, 57.

[5] Broughel *v.* Southern New England Telephone Co., 73 Conn. 614; 48 Atlantic, 751; 84 Am. State, 176.

have been expected to live, according to the standard tables showing the expectation of life at different ages;[1] and making a reasonable discount for the anticipation of the earnings of future years.[2] The tables used should be those based on the expectancy of life for men in general; not such as may be based on the expectancy of life for any selected class, as, for instance, that of those who may be considered suitable subjects for life insurance.

In the case of an unmarried person, having no immediate family dependent upon him, the probability or improbability that he would have added from his earnings to the pecuniary means of the statutory beneficiaries is to be considered, and also the loss of his companionship.[3]

The mental suffering of the beneficiaries caused by the death cannot be taken into account when the statute provides that the damages shall be proportionate to the injury resulting to them.[4]

6. Death of Beneficiary.

The death of a sole beneficiary pending the action would not abate it, but damages would be computed only to the date of his death.[5] If the statute designate as the beneficiary the widow, or if there be none, the next of kin, the next of kin have no interest if there be a widow, although she may die before suit or before judgment.[6] The right of action became a vested one, at the death of the person for killing whom the action was given, and it was vested unalterably.

[1] Louisville & Nashville R. R. Co. *v.* Trammell, 93 Ala. 350; 9 Southern, 870.

[2] Nelson *v.* Branford Lighting & Water Co., 75 Conn. 548, 553; 54 Atlantic, 303.

[3] McKay *v.* New England Dredging Co., 93 Me., 201; 43 Atlantic, 29.

[4] Blake *v.* Midland Railway Co., 21 L. J. Rep., N. S. Q. B. 233; 10 Eng. Law and Eq. 437.

[5] Cooper *v.* Shore Electric Co., 63 N. J. Law, 558; 44 Atlantic, 633.

[6] Railroad *v.* Bean, 94 Tenn. 388; 29 Southwestern, 370.

7. Contributory Negligence.

Contributory negligence of the person killed is fatal to the action, and the fellow-servant doctrine applies, if the decedent was a servant of the company.[1]

When the injury causing death was suffered in one State, and the suit is brought in another, a defence of contributory negligence is regarded as going to the right of action, rather than to the remedy, and hence if it would be good if set up in a court of the former State, it will be equally good in the latter State, whatever may be its law as to that subject.[2]

As no one can be allowed to profit by his own wrong, contributory negligence on the part of the beneficiary will be a full defence, when the action is given for the injury to him from the death of the person killed. If such negligence be chargeable to some of several, who are entitled to recover their respective losses, it will be a full defence to their respective claims, but not to those of the others, who therefore can recover their *pro rata* shares.[3] When the action is given for the benefit of the estate of the deceased, contributory negligence on the part of his heirs or the distributees of his estate, if they are made the statutory beneficiaries, as such, would not defeat a recovery. It is then treated as virtually a survival of a right of action of the party killed.[4]

[1] State *v.* Manchester & Lawrence Railroad, 52 N. H. 528; State *v.* Maine Central R. R. Co., 60 Me. 490. See Chapter LII., Rules of Evidence: Presumptions and Assumptions.

[2] Morisette *v.* Canadian Pacific Railway Co., Vt. ; 56 Atlantic, 1102. See *ante*, p. 486.

[3] Wolf *v.* Lake Erie, & Western Railway Co., 55 Ohio St. 517; 45 Northeastern, 708; 36 L. R. A. 812.

[4] Wymore *v.* Mahaska County, 78 Iowa, 396; 43 Northwestern, 264; 6 L. R. A. 545.

8. Contracts with Servants in Bar of the Statutory Action in Case of their Death.

When the person killed was a railroad servant, it will be no defence that in consideration of taking him into the service of the company, he, or the beneficiaries for whose benefit the action is brought, agreed with the company not to set up any claim against it for injuries which he might thereafter, through negligence with which it might be chargeable, receive while in its employment. Such a contract is against public policy and void.[1] But if the company should be one having a "relief department," organized to grant benefits to such of its servants, in case of injury, as may choose to become members of it, or to their appointees, and the beneficiaries, under the rules of the department, if they receive the benefits, can claim no damages against the company by reason of such injury, a payment and acceptance of benefits would found an equitable defence, provided such beneficiaries were made parties to the statutory suit,[2] and were the same persons for whose profit the action was given. It would also, in case the beneficiaries received the fruits of a judgment recovered for their use against the company in a statutory action, bar any subsequent demand by them on the relief department.[3]

9. Common-law Rights of Action in Favor of Decedent.

A railroad passenger who is fatally injured by the negligence of the company, but lives some time, has an election between two rights of action for what he may suffer by reason of the injury prior to his death; one in tort, and the other in

[1] Tarbell *v.* Rutland R. R. Co., 73 Vt. 347; 51 Atlantic, 6; 56 L. R. A. 656; 87 Am. State, 734.

[2] See Boulden *v.* Pennsylvania R. R. Co., 205 Pa. St. 264; 54 Atlantic, 906. See Chapter XXVIII., Servants.

[3] Oyster *v.* Burlington Relief Department of Chicago, Burlington, & Quincy R. R. Co., Nebr. ; 91 Northwestern, 699 ; 59 L. R. A. 291.

contract. His action in tort dies with him, unless it survives by statute. His action of contract survives to his executor to the extent of any damage directly suffered by him, and so by his estate, between the time of the accident and of death, such as cost of medical attendance or injury to business for want of his personal attention to it. This will not be barred by the recovery of full statutory damages for the death, for the benefit of the family.[1]

In many of the States, in addition to the statutory remedy, in case of death caused by the fault of a railroad company, in favor of the family and measured by their injury, there is a general statute that all actions of tort shall survive. In such States, the executor can maintain an action of tort for the injuries to the deceased during his lifetime, without prejudice to the statutory remedy in favor of his family. The causes of action are different. One is for damages to the original sufferer, preceding a certain event, to a certain date; the other for damages of another kind, to other parties, accruing after that event.[2]

If the statutory remedy for the death does not rest on the injury to the survivors, but on that to the deceased, then, as the kind of damage is the same, and the cause for holding the company to pay it is the same, both actions could not be prosecuted to judgment; and a settlement between the deceased and the company in his lifetime would bar any remedy in favor of his family.[3]

[1] Bradshaw *v.* Lancashire & Yorkshire Railway Co., L. R., 10 C. P. Cases, 189.

[2] Needham *v.* Grand Trunk Railway Co., 38 Vt. 294; Bowes *v.* Boston, 155 Mass. 344; 29 Northeastern, 633; 15 L. R. A. 365. *Contra*, Legg *v.* Britton, 64 Vt. 652; 24 Atlantic, 1016.

[3] Read *v.* Great Eastern Railway Co., L. R., 3 Q. B. 555.

10. Statutes as to the Survival of Actions.

A statute merely making actions of tort survive would not give any remedy in favor of the estate of one killed instantaneously by the fault of a railroad company. There would be nothing to survive, for no right of action ever arose in his favor.[1] But if it extends expressly to cases of instantaneous death, there is no difficulty in considering it as a prolongation of the point of time between life and death, for the purposes of a legal remedy, and so as a real survival.[2]

11. Grant of Administration.

If the person killed left no other assets, or none within the State to which the railroad company belongs, the claim under the statute will be regarded as assets for the purpose of founding jurisdiction to issue letters of administration,[3] since otherwise the statute would fail to meet the mischief in view. If he was a non-resident and left assets elsewhere, it has been held that the statute authorizing a suit by an administrator should be construed to include foreign administrators, and so to support an action by an administrator appointed in the State of his domicil, without requiring him to take out ancillary administration.[4] The ordinary rule, that no suit lies in favor of a foreign executor or administrator, rests on the ground that the rights of creditors, and perhaps of domestic creditors, may be involved, and that the estates of the dead should be so settled that the assets in any particular jurisdiction should be held subject to the debts that may be prov-

[1] Broughel *v.* Southern New England Telephone Co., 72 Conn. 617; 45 Atlantic, 435; 49 L. R. A. 404.

[2] Higgins *v.* Central New England & Western R. R. Co., 155 Mass. 176; 29 Northeastern, 534; 31 Am. State, 544.

[3] Hartford & New Haven R. R. Co. *v.* Andrews, 36 Conn. 213.

[4] Memphis & Cincinnati Packet Co. *v.* Pikey, 142 Ind. 304; 40 Northeastern, 527; Boulden *v.* Pennsylvania R. R. Co., 205 Pa. St. 264; 54 Atlantic, 906.

able against them there.[1] This reason fails when the personal representative sues, not really as such, but as a trustee invested with the sole title to a cause of action, which was never an asset of the decedent and was not in existence during his lifetime.

12. Construction of Statutes.

Whether such statutes, giving a remedy against railroad companies, apply to all kinds of such companies, or only to through steam railroads, depends on a fair construction of the terms employed, with due reference to the circumstances existing when the law was passed.[2]

Statutes of this nature, being remedial, will be liberally construed. If they give the right of action to the administrator, not only will this term be construed as including both a domestic administrator and one appointed in the State of the domicil of the intestate, but as extending to an administrator appointed in any State where suit may be brought.[3]

13. Suit in one State for Injury in another.

The common law denied a civil action for wrongfully causing another's death, not because of the absence of wrong, but of the greatness of it. The fact also that such an act, in the rough days of early English history, was generally a crime, and that the offender's goods and chattels were forfeited to the crown, even in involuntary manslaughter,[4] so that no fund was left to satisfy any loss to the family of the man killed, made the question of civil remedy one of little importance. When one was finally granted, therefore, it was

[1] Minor, Conflict of Laws, Chapter IX.

[2] Holland *v.* Lynn & Boston R. R. Co., 144 Mass. 425; 11 Northeastern, 674.

[3] Leonard *v.* Columbia Steam Navigation Co., 84 N. Y. 48; 38 Am. Rep. 491. *Contra*, Richardson *v.* New York Central R. R. Co., 98 Mass. 85, 91.

[4] Blackst. Comm., IV. 193.

not a case of creating a new statutory wrong. It was removing a bar to demanding satisfaction for what had always been an admitted wrong. It was a virtual restoration of the ancient practice of the Teutonic peoples before our common law took shape.[1] It recognized the solidarity of the family, and ties of blood; and sought to enforce the natural obligation of a wrongdoer to make reparation to any whom he has wronged.

Considerations of this nature have served to support the jurisdiction of the courts of one State to enforce an action against a railroad company for a wrongful killing in another State, founded on a statute enacted there. Ordinarily each of the States concerned will have a statute of the same general nature. But jurisdiction, at bottom, does not rest upon that circumstance. The plaintiff is suing for an act which, where done, was an actionable wrong, and which would have been equally wrong if done in the State where suit is brought. For such acts done there, no civil remedy may be provided; but the plaintiff's cause of action was a transitory one, and was complete in the State where the wrong of which he complains was committed. It being then a tort in both jurisdictions, unless there is some law or policy of the State where the remedy is invoked which requires its denial, the suit should be entertained. That the State of the forum has as yet enacted no such law, as respects such acts done within its limits, does not of itself manifest a policy to make its courts powerless to deal with such acts done elsewhere and remediable where done.[2]

The procedure should be, as far as may be, according to the *lex fori*.[3]

[1] See, for example, Heinnecius, Corpus Juris Germanici Antiqui, 125, 342, 413, 418.

[2] Stewart *v.* Baltimore & Ohio R. R. Co., 168 U. S. 445, 448.

[3] Nicholas *v.* Burlington, Cedar Rapids, & Northern Railway Co., 78 Minn. 43; 80 Northwestern, 776. See *ante*, p. 486.

Where each of the States in question has provided a form of statutory action and they differ, so far as the ownership of the fruits of the action are concerned, it seems most reasonable to follow the statute of the State where the wrong was done,[1] but, so far as the mode of collection is concerned, that of the State where the action is brought.[2]

If, therefore, the amount that may be recovered in such cases be limited by the statute of the State where the suit is brought, and not by that of the other, this may be regarded as an expression of the public policy of the former State, and the *lex fori* prevails.[3] The plaintiff has invoked its aid and must take it subject to all its essential limitations.

A question of more difficulty arises in respect to the party in whose name the suit may be brought. The suit is a process of collection. The claim to be collected, however, rests on a statute conferring a right of action on a designated person. If this is to be regarded as a grant, under which a certain party is invested with the title to a certain chose in action, whether for his own use or that of another, the strictly logical conclusion would be that only the grantee can sue for what has been so granted. This seems the proper rule where the grantee is also beneficially entitled to the fruits of the suit.[4] But where, as is generally the case, the grantee is in effect only an agent of the law to collect and distribute the fund in behalf of others, the substantial object of the suit is to secure their beneficial rights. The grant or appointment in his favor may then not unfairly be regarded either as an

[1] McDonald *v.* McDonald's Adm'r, 96 Ky. 209; 28 Southwestern, 482; 49 Am. State, 289. *Cf.* Florida Central & Peninsular R. R. Co. *v.* Sullivan, 120 Federal, 799; 57 C. C. A. 167; 61 L. R. A. 410.

[2] Stewart *v.* Baltimore & Ohio R. R. Co., 168 U. S. 445.

[3] Wooden *v.* Western New York & Pennsylvania R. R. Co., 126 N. Y. 10; 26 Northeastern, 1050; 22 Am. State, 803; 13 L. R. A. 458. *Contra*, Northern Pacific Railroad Co. *v.* Babcock, 154 U. S. 190, 199.

[4] Wooden *v.* Western New York & Pennsylvania R. R. Co., 126 N. Y. 10; 26 Northeastern, 1050; 22 Am. State, 803; 13 L. R. A. 458.

incident of the process of collection, or as the creation of a vested interest, as may best promote the main intent of the statute and serve the purposes of justice in the particular case. Particularly is this true in those States where the system of common-law pleading has given way to one in which legal and equitable rights may be enforced in the same proceeding. Equity never suffers a trust to fail for want of a trustee. A suit may therefore, when brought by one having no beneficial interest in himself, be maintained by the plaintiff designated by the statute of either State, provided no local law of policy be thus contravened.[1] If, under the statute obtaining in the place of the delict the State be designated as the party to sue, it might be contrary to public policy to allow it to sue in another State, on account of the difficulties in the way of holding it to account to those interested in the recovery; and in such case, if the State of the forum, in a statute of a like nature, has given the right of action to an executor or administrator, he would be a proper plaintiff.[2]

Where the statute designates the party to sue, and also designates others as the beneficial owners of whatever may be collected, it would seem that if the latter should sue in their own names in any other State, in which legal and equitable remedies can be combined in the same action, it would be at most but a defect in parties, curable by adding the statutory plaintiff or citing him in as a defendant. In States maintaining the old distinction between proceedings in law and equity, and in the courts of the United States, such an action could hardly be supported.[3] The plaintiff in such an action may defeat his right of action by founding it solely, in his pleading, on the statute of the foreign State. He may then

[1] See Harrill *v.* South Carolina & Georgia Extension Railway Co., 132 N. C. 655; 44 Southeastern, 109.

[2] Stewart *v.* Baltimore & Ohio R. R. Co., 168 U. S. 445.

[3] Usher *v.* West Jersey R. R. Co., 126 Pa. St. 206; 17 Atlantic, 597; 12 Am. State, 863; 4 L. R. A. 261.

be taken at his word, and if that statute gives him no right of action, he must fail.[1]

If in creating the right of action a time for bringing it is limited, this limitation accompanies the right and will be enforced in every State.[2] But if there is no special statute affecting that class of actions in the State where the delict was committed, the action is subject to the statute of limitations, whether it be special or general, of the State where the action is brought.[3]

If the statute of the State where the wrong was done provides only a remedy of a criminal or penal nature, this cannot be regarded as removing a bar to demanding civil satisfaction for a tortious act. On the contrary, its apparent object is to punish an offence, and the fact that this is accomplished by a fine or forfeiture, which is to go to the benefit of the family of the deceased, does not change its character internationally. Hence no action out of the State can be founded on such a statute. The courts of one sovereign never enforce criminal penalties provided by another sovereign for offences against his laws.[4] If the injury done by the killing, under the law of the place of the delict, was not remediable by a civil action, it is not so remediable anywhere.

There are authorities in favor of the view that in case of essential variance between the statutes on this subject in the State of the wrong and the State of the action, such an action should be dismissed.[5] As applied to railroad accidents, this

[1] Oates *v.* Union Pacific Railway Co., 104 Mo. 514; 16 Southwestern, 487; 24 Am. State, 348; Fabel *v.* Cleveland, Cincinnati, Chicago, & St. Louis Railway Co., 30 Ind. App. 268; 65 Northeastern, 929.

[2] Weaver *v.* Baltimore & Ohio R. R. Co., 21 D. C. 499; Hamilton *v.* Hannibal & St. Joseph R. R. Co., 39 Kans. 56; 18 Pacific, 57.

[3] Munos *v.* Southern Pacific Co., 51 Federal, 188; 2 C. C. A. 163; 2 U. S. App. 222.

[4] Adams *v.* Fitchburg R. R. Co., 67 Vt. 76; 30 Atlantic, 687; 48 Am. State, 800; Matheson *v.* Kansas City, Fort Scott, & Memphis R. R. Co., 61 Kans. 667; 60 Pacific, 747.

[5] See cases cited in Minor, Conflict of Laws, 260.

doctrine seems to be more scholastic than practical. Most of the considerable railroads in the United States are operated in more than one State. They furnish transportation to a rapidly changing population in a country of vast extent. They are often owned by companies which are not corporations of the State in which an accident occurs, and the person injured may belong to still a third State. As respects commerce between States, the United States are one country, and it should be the aim of every State so to shape its procedure that recognized wrongs occurring in the course of such commerce shall not go unredressed. This originally dictated what is in any aspect a somewhat anomalous practice. It is a practice founded on convenience, if not necessity, owing to the nature of our system of internal transportation.[1] The strong tendency of modern decision is therefore towards giving a remedy in these cases by making one statute yield to the other in such a way as may be found most conducive to the ends of justice.

[1] See Dennick *v.* Railroad Co., 103 U. S. 11.

CHAPTER LV.

RECEIVERSHIPS.

1. Possession changes; not Title.

THE appointment of a receiver of a railroad company does not (unless by force of some statute) divest it of any of its franchises or property. The court making the appointment simply steps in and takes possession, by the hand of the receiver, of the railroad and of the franchise of maintaining and operating it.

2. Inter-State Railroad.

If one company owns a railroad running through several States, but has its principal seat in one of them, the appointment of the principal receiver should be sought in the courts sitting there, and ancillary suits for the appointment of ancillary receivers should be brought in each of the other States. This is so, whether the main suit be brought in the Circuit Court of the United States, or in a State court. In practice, it is generally brought in the Circuit Court,

especially if the road runs through more than one of the States included in the Circuit. Ordinarily, the principal receiver will also, as a matter of comity and reason, be appointed receiver in each of the ancillary suits.[1]

Such suits, while ancillary in effect, are not in form. Each is an independent and original action, though it is proper to allege what proceedings may have been elsewhere had in prior suits.[2]

The court in which the first suit is brought is presumptively the proper one to direct the receiver as to any matter involving the general management of the entire road, but in the ancillary suits orders may be made, in case of necessity, governing transactions within the territorial jurisdiction of the court in which the principal suit is pending.[3]

3. Protection of Owner of Land taken but not paid for.

A receiver may be appointed for the protection of one whose land has been taken and incorporated into a railroad, under color of condemnation proceedings, but not paid for. If the railroad is in operation upon the land, the public would be so incommoded by an ouster from this parcel under legal process [since it would stop the running of trains], that a court of equity may put the road into the hands of a receiver to hold until the next earnings satisfy the damages due.[4]

[1] New York, Pennsylvania, & Ohio R. R. Co. *v.* New York, Lake Erie, & Western R. R., 58 Federal, 268, 278.

[2] Mercantile Trust Co. *v.* Kanawha & Ohio Railway Co., 39 Federal, 337.

[3] Guarantee Trust & Safe Deposit Co. *v.* Philadelphia, Reading, & New England R. R. Co., 69 Conn. 709; 38 Atlantic, 792; 38 L. R. A. 804.

[4] Provolt *v.* Chicago, Rock Island, & Pacific R. R. Co., 57 Mo. 256.

4. Protection of Judgment Creditor.

Where a judgment creditor of a railroad obtains the appointment of a receiver, mortgagees can intervene and ask to have the receiver hold for them as well as for the plaintiff, or that the receiver be discharged and they put in possession for purposes of foreclosure.[1]

5. Receiver of Part of Railroad.

A receiver may be appointed for a part only of a railroad property. Thus if two companies are co-tenants of any such property and cannot agree in the mode of use, a receiver of it can be appointed, if otherwise the operation of either road would be embarrassed.[2]

6. The Choice of a Receiver.

The general rule that a court rarely appoints as receiver of a corporation one who has been in its management[3] is often relaxed in the case of a railroad, owing to the importance of having it in charge of those familiar with its peculiar conditions and necessities.[4] The president and directors even may be appointed joint receivers.[5]

If a stockholder sues for the appointment of a receiver, it is not improper for the board of directors to aid in furthering the appointment, if they deem it necessary in order to keep the road in continued operation.[6] The public have an interest in that, and it is their duty to endeavor to protect this interest.

[1] Sage *v.* Memphis & Little Rock R. R. Co., 125 U. S. 361, 378.

[2] Delaware, Lackawanna, & Western R. R. Co., *v.* Erie Railway Co., 21 N. J. Eq. 298.

[3] Finance Co. of Pennsylvania *v.* Charleston, Cincinnati, & Chicago R. R. Co., 45 Federal, 436.

[4] Farmers' Loan & Trust Co. *v.* Northern Pacific R. R. Co., 61 Federal, 546, 549.

[5] Gibbes *v.* Greenville & Columbia R. R. Co., 15 S. C. 304.

[6] Brassey *v.* New York & New England R. R. Co., 19 Federal, 663; 22 Blatchf. 72; 17 Am. & Eng. R. R. Cases, 285.

7. Powers of Receivers.

Although a receiver may have all the property and franchises of a railroad company under his general control, he is by no means invested with power to do all which it could have done. His authority to operate the railroad, however, enables him to make any contracts for transportation which the company could have made, in the ordinary course of railroad business, including the assumption of responsibility for safe transportation over connecting roads, on a through contract.[1]

Where any matter involving the exercise of judgment upon a large and doubtful question is involved, he should, if possible, seek the advice of the court before acting. It is also to be remembered that a court is unlikely to sanction any practices which are not in all respects fair, straightforward, and legal, however beneficial they may seem to the interests of the railroad.[2]

8. Condemnation Proceedings.

Whenever it is necessary to procure more land for the uses of the railroad during a receivership, condemnation proceedings may be instituted in the name of the company. The court may also, by special order, authorize the receiver to institute them in his name as receiver. This is a matter of form, for in either case he must provide the necessary funds, and the railroad will be correspondingly and permanently benefited.[3]

[1] Farmers' Loan & Trust Co. *v.* Northern Pacific R. R. Co., 120 Federal, 873; 57 C. C. A. 533.

[2] Cowdrey *v.* Galveston, Houston, & Henderson R. R. Co., 93 U. S. 352, 353.

[3] Morrison *v.* Forman, 177 Ill. 427; 53 Northeastern, 73.

9. Provisional Occupation under a Lease.

When a railroad company in the hands of a receiver has taken a lease of another railroad, he can take possession of the leased road provisionally, without binding himself to take it permanently, and hold it long enough to ascertain its value. If he finally elects to keep it, he will become liable as receiver on the covenants of the lessee, by privity of estate.[1]

10. Receiver's Certificates.

A receiver is apt to find railroad property in bad condition, and in need of immediate repairs and new equipment, which there are no funds to supply. It may also require improvements or short extensions to make it self-supporting. For such purposes, the court may authorize him to issue "Receiver's Certificates." These are interest-bearing certificates of indebtedness, payable after a few months or years, drawn much in the form of a railroad bond, but are not negotiable instruments, as no one is personally liable upon them.[2] The court may make them a first lien on the road, paramount to any existing mortgages. This is generally done only by the express or implied consent of the trustees under the mortgages. Most railroad receiverships are incidental to the foreclosure of a mortgage, and the petitioner is glad to consent to this mode of protecting his security.

This is simply the exercise of the jurisdiction of a court of equity to protect and preserve trust funds in its hands. It is a power to be exerted with great caution, and, if possible, with the consent or acquiescence of all parties interested in the fund. It may extend to provision for completing unfinished portions of the road.[3]

[1] United States Trust Co. *v.* Wabash Western Railway, 150 U. S. 287.

[2] Turner *v.* Peoria & Springfield R. R. Co., 95 Ill. 134; 35 Am. Rep. 144. See Appendix VI. 13.

[3] Wallace *v.* Loomis, 97 U. S. 146, 162; Miltenberger *v.* Logansport

Purchasers of receiver's certificates from the receiver are not bound to see to the proper application of the purchase money.

They may, by order of court, be sold below par, and, if thus sold, the purchaser will be entitled to claim their face value upon their maturity.[1]

11. Debts of the Income.

Receivers under a railroad mortgage may be authorized or directed to apply the income of the road, earned while in their possession, to pay debts in arrear contracted by the mortgagor for operating expenses, or balances due connecting roads. But this power should be exercised with caution and, when possible, with the consent of the mortgagees.[2] It exists only when there has been a diversion for the benefit of the mortgagees of income which should have gone to pay current expenses.[3] If the court allows a receiver appointed on a judgment creditor's bill to make such payments, the plaintiff has no equity to treat them as a diversion of funds belonging properly to him, and so as justifying a charge of his judgment, to that extent, on the *corpus* of the railroad.[4]

The *corpus* of the property may be first charged, in the decree of distribution, on a foreclosure, with any debts of the receiver, which the income earned by him was insufficient to pay, for operating expenses and damages to persons or property.[5]

Railway Co., 106 U. S. 286; Union Trust Co. *v.* Illinois Midland Railway Co., 117 U. S. 434, 455.

[1] Union Trust Co. *v.* Illinois Midland Railway Co., 117 U. S. 434, 461.

[2] Wallace *v.* Loomis, 97 U. S. 146. See Chapter XLVII., Mortgages; Miltenberger *v.* Logansport Railway Co., 106 U. S. 286, 308–312.

[3] Mersick *v.* Hartford & West Hartford Horse R. R. Co., 76 Conn. 11, 23; 55 Atlantic, 664.

[4] Ruhlender *v.* Chesapeake, Ohio, & Southwestern R. R. Co., 91 Federal, 5; 33 C. C. A. 299; 62 U. S. App 1.

[5] Union Trust Co. *v.* Illinois Midland Railway Co., 117 U. S. 434, 465.

Unsecured debts of the company may often be allowed priority to claims of mortgagees upon net earnings made by a receiver, although their payment would not be ordered out of proceeds of a sale of the *corpus* of the property on a foreclosure. The test, in the latter case, is, Were the debts originally left unpaid in order to apply moneys, out of which they should have been satisfied, for the benefit of the mortgagees?[1]

12. Actions against Receivers.

Actions against a receiver are in law actions against the receivership, or the funds in the hands of the receiver. His contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from funds in his hands.[2] The railroad company is not liable for them in cases where it did not ask his appointment, for he is in no sense its agent.[3]

If, however, a receiver appointed in one State takes a lease of a railroad in another, although it be with the consent of the court which appointed him, he stands as a private individual in the foreign State, and can be sued there personally for any default in operating the leased road, whereby third parties are injured.[4]

13. Accident Claims.

Claims against a domestic receiver for injuries received in the course of his operation of the road, by reason of the fault

[1] St. Louis, Alton, & Terre Haute R. R. Co. *v.* Cleveland, Columbus, Cincinnati, & Indianapolis Railway Co., 125 U. S. 658, 673. See Chapter LV., Foreclosure and Reorganization.

[2] McNulta *v.* Lochridge, 141 U. S. 327, 332; Archambeau *v.* Platt, 173 Mass. 249; 53 Northeastern, 816; Cardot *v.* Barney, 63 N. Y. 281; 20 Am. Rep. 533.

[3] Metz *v.* Buffalo, Corry, & Pittsburgh R. R. Co., 58 N. Y. 61; 7 Am. Railway, 92; 17 Am. Rep. 201.

[4] Kain *v.* Smith, 80 N. Y. 458, 471.

or negligence of his servants, are an equitable charge on the road or, if sold, upon its proceeds, as against creditors of the company for whose benefit he was put in possession.[1] They may also be an equitable charge on the road, if it be turned back to the company in an improved condition by reason of his management of it, to an extent not exceeding the betterment.[2]

Actions or intervening petitions to establish such claims or any others, brought by leave of the court appointing the receiver against him in that court, may be, at its discretion, referred to a committee or master in chancery, or sent to a jury under or in analogy to the chancery practice relating to a feigned issue.[3]

14. Congressional Legislation as to Receivers.

By Act of Congress, suits against a receiver appointed by a court of the United States may be brought in any proper court of the State or the United States, without first asking leave from the court by which he was appointed; but any suit so brought is subject to the equitable control of that court.[4] Ordinarily it will direct the payment by the receiver, if there are sufficient funds applicable for the purpose, of any judgments so recovered against him in a State court.[5] If he be a non-resident, service upon him may be made in any State in which any part of the railroad under his charge is situated, by service of process on his principal agent there.[6] Such a receiver, by the same statute, is required to

[1] Anderson *v.* Condict, 93 Federal, 349; 35 C. C. A. 335.

[2] See Texas & Pacific Railway Co. *v.* Bloom's Administrator, 164 U. S. 636.

[3] Barton *v.* Barbour, 104 U. S. 126.

[4] XXV. U. S. Stat. at Large, 436.

[5] Central Trust Co. *v.* St. Louis, Arkansas, & Texas Railway Co., 41 Federal, 551.

[6] Central Trust Co. of New York *v.* St. Louis, Arkansas, & Texas Railway Co., 40 Federal, 426.

operate the railroad as may be required by the laws of the State in which it lies.

The statute varies the rule as to how actions may be brought, but not that as to what actions may be brought. It still remains true that no suit can be brought in any other court than that of his appointment, for the purpose of divesting his possession of that which he holds as an officer of the latter.[1]

15. Tax Warrants.

A tax warrant cannot be levied on property in a receiver's hands. The only remedy is by an application to the court, whose officer he is, to order him to make payment.[2]

16. Penal Statutes.

Penal statutes primarily directed against railroad companies, and requiring on their part a certain manner of operating the road, do not necessarily apply to receivers.[3]

If a receiver commits a penal offence, in the discharge of his duties, he is liable to arrest for it, unless the act was one apparently innocent and done by order of the court which appointed him. If, for instance, the franchise or right of operation of the railroad which a receiver is ordered to operate be derived from an unconstitutional law or a municipal ordinance which is *ultra vires*, the fact that its operation is technically a public nuisance will not subject him to a criminal prosecution for doing what he has been directed to do; and it would be a contempt of court to arrest him in such a proceeding.[4]

[1] American Loan & Trust Company *v.* Central Vermont R. R. Co., 84 Federal, 917; Gableman *v.* Peoria, Decatur, & Evansville Railway Co., 179 U. S. 335, 338.

[2] *In re* Tyler, 149 U. S. 164.

[3] United States *v.* Harris, 177 U. S. 305.

[4] United States *v.* Murphy, 44 Federal, 39.

17. Relations with Railroad Servants: Disputes as to Wages.

Where a receiver is in possession of a railroad, under an appointment by a court of the United States, employees on the road have a right, by Act of Congress, to be heard before the court on any question of wages, or as to the conditions of their employment, and to be represented by officers of their labor organizations.[1]

18. Injunctions: Boycotts.

A railroad company being a public service company, and its receiver being an instrument of the court for carrying out its public functions, the court will protect him against all unlawful interference with them. For this purpose an injunction is often an appropriate remedy. Particularly is this true with respect to those whom he has employed to operate the road. They are, in a certain sense, as well as he, officers or agents of the court, and so responsible to it for their conduct.[2] An injunction may therefore be issued to prevent them from continuing to cripple the operations of the road by any unlawful act.[3] It would be such an act for the employees of a receiver to refuse to handle freight coming from a connecting railroad, against which a boycott had been declared by a labor organization to which they belonged or with which they were in affiliation,[4] and it might also be a contempt of the court in which the receivership proceedings were pending.[5]

[1] XXX. U. S. Stat. at Large, 427.

[2] *In re* Higgins, 27 Federal, 443, 444.

[3] *In re* Doolittle, 23 Federal, 544; Farmers' Loan & Trust Co. *v.* Northern Pacific R. R. Co., 60 Federal, 803; 25 L. R. A. 414. See Paper by Charles Claflin Allen, in the Reports of the American Bar Association, XVII. 299.

[4] Beers *v.* Wabash, St. Louis, & Pacific Railway Co., 34 Federal, 244.

[5] Thomas *v.* Cincinnati, New Orleans, & Texas Pacific Railway Co., 62 Federal, 803.

19. Railroad run at a Loss.

The court may refuse to appoint a receiver to take possession of and operate a railroad at the suit of the trustee under the mortgage, if it seems probable that the road is not worth running. But if one is appointed, the bondholders do not impliedly represent or agree that it is worth running. If, therefore, it finally sells on foreclosure for less than suffices to meet the amount due to the employees of the receiver for wages in running it, these employees cannot claim an equity to hold the bondholders or the mortgage trustee personally chargeable.[1]

20. Charging Railroad with Receiver's Liabilities.

It is customary, in discharging a railroad receiver, to provide in the decree for a lien upon the road, into whosesoever hands it may pass from his, for liabilities contracted by him, and for which it is equitably chargeable.[2] In the absence of such a provision, if equity could impose charges of this description, they would be subject to any liens created or conveyances made by his grantees, before the institution of the equitable suit.[3] A promise of the company to pay such a liability may also be implied when the receiver was discharged by its procurement or with its assent, and turned over the road in a greatly improved condition, notwithstanding the liability in question was for a mere act of negligence causing a personal injury.[4]

[1] Farmers' Loan Co. *v.* Oregon Pacific R. R. Co., 31 Oreg. 237; 48 Pacific, 706; 65 Am. State, 822; 38 L. R. A. 424.

[2] Farmers' Loan & Trust Co. *v.* Central Railroad of Iowa, 7 Federal, 537.

[3] See Archambeau *v.* Platt, 173 Mass. 249; 53 Northeastern, 816; Texas & Pacific Railway Co. *v.* Johnson, 151 U. S. 81.

[4] Texas & Pacific Railway Co. *v.* Bloom's Adm'r, 164 U. S. 636. See *ante*, p. 547.

CHAPTER LVI.

FORECLOSURE AND REORGANIZATION.[1]

1. Responsibilities of Mortgage Trustees.

AUTHORITY to mortgage railroad franchises necessarily implies power to foreclose them in favor of the mortgagee or purchaser at a foreclosure sale, and to make them available in his hands.[2]

The trustees under a railroad mortgage, as soon as a forfeiture occurs under the conditions of the deed, are in a position of great responsibility. They must elect between delay and action; between claiming possession and operating the road, and leaving it in the hands of the company. Most railroad mortgages contain provisions exempting them from any active duties as to possession or foreclosure unless requested

[1] See Chapters XLVII., Mortgages, and LV., Receiverships.

[2] New Orleans, Spanish Fort, & Lake R. R. Co. *v.* Delamore, 114 U. S. 501, 509.

by a certain number of the bondholders, and indemnified for their expenses.

If they take possession and proceed to foreclose, their trust is not affected by the foreclosure when obtained, and they must continue in possession, operating the road under its franchise, until relieved by a transfer to a purchaser, or to the representative of the bondholders, by due authority of law.[1]

While in possession they are personally liable for the negligence or misconduct of those operating the road. If they are not personally in fault, they will be indemnified out of the mortgaged property, so far as it is sufficient for that purpose.[2]

2. Parties to Foreclosure Suits.

Where successive mortgages are made to the same trustee, each to secure a different issue of bonds, he may, as trustee for the first mortgage, foreclose it; and the second mortgage bondholders, in the absence of collusion or fraud, will be so far represented by him as to be bound by the decree.[3] He should make himself, as trustee for the second mortgage, a party defendant, and also some of the bondholders under that mortgage, in behalf of all.

3. Foreclosure Suits by Bondholders.

The mortgage may be so drawn as to exclude any individual bondholder from seeking a foreclosure until the trustee has been requested to sue for one by holders of a certain number of the bonds, and has refused. This does not oust the jurisdiction of courts, but simply regulates the mode of invoking it.[4] Limitations on the mode of foreclosure by the

[1] Sturges *v.* Knapp, 31 Vt. 1; 1 Redfield's Am. Railway Cases, 405; Knapp *v.* Railroad Co., 20 Wall. 117.

[2] Sprague *v.* Smith, 29 Vt. 421; 70 Am. Dec. 424.

[3] Robinson *v.* Iron Railway Co., 135 U. S. 522, 531.

[4] Seibert *v.* Minneapolis & St. Louis Railway Co., 52 Minn. 148; 53 Northwestern, 1134; 20 L. R. A. 535; 38 Am. State, 530.

trustee are strictly construed. Thus if the mortgage deed gives a power of sale, to be executed in a certain way exclusively, this will not be deemed to affect the power of a court of equity to order a judicial sale, under a decree of foreclosure, to be made in a different way.[1]

When there is no such restriction, a single bondholder in cases of emergency, as when the trustee refuses to act, or is incompetent, or immediate relief cannot otherwise be had, may sue for a foreclosure in behalf of all, making the trustee a defendant. In such case, whether others intervene or not, he must see that all are equally protected by the decree.[2]

4. Prior Liens.

A second mortgage is often foreclosed, without making the prior mortgagee a party, and if his security is ample, he will pay no attention to the suit. So in foreclosing any mortgage of an entire railroad and its franchises, there is no occasion for the intervention of the holder of an underlying mortgage on a part of the road to protect his interests. The foreclosure title will be subject to his rights, and he will, therefore, not be allowed to share in the proceeds of a foreclosure sale.[3]

5. Suits adversely affecting the Mortgage.

In equitable actions affecting the mortgage title, brought against the mortgage trustee, it is not necessary to join any of the bondholders as defendants, but it is not improper to join enough of them to represent the whole, in order to insure publicity to the proceeding, and cut off any possible complaint of unfairness or collusion.[4]

[1] Guaranty Trust and Safe Deposit Co. *v.* Green Cove Springs and Melrose R. R. Co., 139 U. S. 137, 142.

[2] New Orleans Pacific Railway Co. *v.* Parker, 143 U. S. 42, 58.

[3] Woodworth *v.* Blair, 112 U. S. 8.

[4] Shaw *v.* Norfolk County R. R. Co., 5 Gray, 162, 170.

6. Power of Sale.

Railroad mortgages usually contain a power of sale, like an ordinary trust deed.[1] In such case it is not indispensable to institute judicial proceedings for a foreclosure. But the interests involved are so various and complicated that in practice a foreclosure suit is always instituted.

7. Formation of a Bondholders' Committee.

Prior to suit, it is customary for some of the bondholders to get together and appoint a committee of their number to take such steps as may be thought best to protect their interests. A circular is then issued naming the committee and requesting all bondholders to deposit their bonds with some trust company, to be used for their benefit as the committee may direct. A small cash payment is also requested on account of each bond, to provide for the expenses of foreclosure. The mode of foreclosure and of reorganization is practically directed by this committee, if, as is usually the case, they obtain control of a majority of the bonds. While the trustee under the mortgage is not bound to follow their advice, he seldom declines to do so, and the courts give it much weight, if he presents it as his justification.[2] In case of a sale on foreclosure their control of the bonds generally enables them to become or to name the purchaser.[3]

All bondholders desiring to become parties to such an agreement have so far an equity to be admitted as such that, if this be refused without adequate cause, the court having

[1] See Chadwick *v.* Old Colony R. R. Co., 171 Mass. 239; 50 Northeastern, 629.

[2] Shaw *v.* Railroad Co., 100 U. S. 605.

[3] Louisville Trust Co. *v.* Louisville, New Albany, & Chicago Railway Co., 174 U. S. 674, 683. See Industrial & General Trust *v.* Tod, 170 N. Y. 233; 63 Northeastern, 285.

jurisdiction of the foreclosure will see that their interests are properly protected in case of a sale.[1]

8. The Decree will be moulded liberally for the Protection of all Equities.

In railroad foreclosures the interests involved are so many and complicated, and that of the general public is so great, that courts are justified in moulding their decrees in furtherance of substantial right and justice with greater freedom than is customary or permissible in case of an ordinary mortgage. Thus, if a foreclosure is sought for a default in interest, under a mortgage to secure long term bonds, if no right was granted in the mortgage to the trustee or bondholders to elect to have the principal thereby become payable, and the railroad is capable of division without substantial loss, the court may order a sale of only so much as will discharge the interest in arrears, or even restrict relief to directing a lease to be made for the benefit of the bondholders for such time as will suffice to satisfy what is due them.[2]

9. Debts of the Income.

Every bondholder under a railroad mortgage, in accepting his security, impliedly agrees that current debts contracted in the ordinary course of business in operating the road shall be paid from current receipts, before he has any claim upon the income.[3] To preserve his security, the road must be kept running. If this, up to any given date, costs more than it brings in, the deficiency will for a reasonable time thereafter

[1] Reed *v.* Schmidt, Ky. ; 72 Southwestern, 367; 61 L. R. A. 270.

[2] Bardstown & Louisville R. R. Co. *v.* Metcalfe, 4 Met. (Ky.) 199; 81 Am. Dec. 541.

[3] Fosdick *v.* Schall, 99 U. S. 235, 252; Hale *v.* Frost, 99 U. S. 389, 391; Mersick *v.* Hartford & West Hartford Horse R. R. Co., 76 Conn. 11; 55 Atlantic, 664. See *ante*, p. 545.

be treated as a charge on the income subsequently accruing, and the equity to this charge is not displaced by the institution of a foreclosure suit or the appointment of a receiver.[1] Nor is it affected although the company, while retaining possession, diverted the income to purposes not enuring to the advantage of the mortgage security and foreign to the beneficial maintenance, preservation, or improvement of the property.[2]

The claims carrying such an equity are only those which can fairly be regarded as part of the operating expenses, and as contracted on a tacit understanding on the part of all concerned that they were to be discharged out of the operating receipts.[3] If they were furnished on the credit of the company, and not of its earnings, they have no preference. Arrears of car rentals and track rentals have been excluded under this rule.[4] They are not what the courts call "debts of the income," but simply debts of the company. Every allowance of this kind is an exception to general rules of priority, and the reason for an exception must be a plain one.[5] Because surplus earnings were in prosperous years applied to improving the railroad is no ground for subsequently going back and charging the amount thus used against the mortgagees when they ask a foreclosure.[6] Taking the mortgagor's note, while it is in possession, for such a claim, in the

[1] Burnham *v.* Bowen, 111 U. S. 776.

[2] Virginia & Alabama Coal Co. *v.* Central Railroad & Banking Co. of Georgia, 170 U. S. 355, 365.

[3] Southern Railway Co. *v.* Carnegie Steel Co., 176 U. S. 257, 285, 296.

[4] Quincy, Missouri, & Pacific R. R. Co. *v.* Humphreys, 145 U. S. 82, 104; Thomas *v.* Western Car Co., 149 U. S. 95, 110, 112; Louisville & Nashville R. R. Co. *v.* Central Trust Co., of New York, 87 Federal, 500; 31 C. C. A. 89, 93; 59 U. S. App. 694.

[5] Bound *v.* South Carolina Railway Co., 58 Federal, 473; 7 C. C. A. 322; 8 U. S. App. 461.

[6] St. Louis, Alton, & Terre Haute R. R. Co. *v.* Cleveland, Columbus, Cincinnati, & Indianapolis Railway Co., 125 U. S. 658.

ordinary course of business, does not prejudice the creditor's equitable rights, and such rights pass to any subsequent holders of the paper.[1]

If interest on mortgage bonds be paid, while the company retains possession, in violation of the implied agreement that current debts shall be paid out of current income, such payment will be a charge on the future earnings, and, if necessary, on the *corpus* of the property, in favor of those who should have received the amount so paid to apply on current debts. This equity rests on the assumption of law that credit for such current debts was given on the faith of the current receipts, and not on the general credit of the company.[2] It is enforced, in case of a foreclosure, on petition of intervening creditors. He who seeks must be ready to do equity.[3]

10. Wages.

The wages of the servants of a railroad company, earned during the last six months of the company's possession, are generally treated as preferred claims, in equity.[4] Services rendered by attorneys-at-law stand on the same footing.[5]

11. Accident Claims.

Claims of strangers for injuries received in the course of the operation of the road by the company are by statute in some States made a lien superior to subsequent mortgages. Without such a statute, they are entitled to no preference. They cannot be considered as claims contracted on the faith

[1] Burnham *v.* Bowen, 111 U. S. 776, 783.

[2] Southern Railway Co. *v.* Carnegie Steel Co., 176 U. S. 257, 285.

[3] Burnham *v.* Bowen, 111 U. S. 776, 780; Lackawanna Iron & Coal Co. *v.* Farmers' Loan & Trust Co., 176 U. S. 298.

[4] Union Trust Co. *v.* Illinois Midland Railway Co., 117 U. S. 434.

[5] Blair *v.* St. Louis, Hannibal, & Keokuk R. R. Co., 23 Federal, 521.

of current earnings, nor do they arise from anything serving to improve the property.[1]

Such claims against a receiver for injuries received while he is in possession are an equitable charge against his current receipts from the operation of the road. The action of the court gave him the opportunity to do the wrong, and in doing it he acted as its official representative. It ought therefore to see that no profit is made by its operation of the railroad at the expense of those whom he has injured.[2]

These considerations do not apply with equal force to the disposition of the proceeds of the railroad when it is sold on foreclosure, and against these such claims will ordinarily found no charge. The receiver took the place of the mortgagor, and has no greater power than the mortgagor to displace vested liens. The court may in the order appointing him require the discharge of any such claims before payment of the mortgage debt, and such a provision will be effectual.[3]

12. Subrogation.

Lending money to pay interest on a mortgage debt gives no preference to the lender, in subsequent foreclosure proceedings, as against the bondholders; notwithstanding the loan in fact prolonged the existence of the company as a going concern.[4]

13. Injunction Bonds.

If a railroad company gives an injunction bond with surety, to prevent attachments, and the road is afterwards foreclosed,

[1] St. Louis Trust Co. *v.* Riley, 70 Federal, 32; 36 U. S. App. 100; 16 C. C. A. 610; 30 L. R. A. 456. *Contra*, Green *v.* Coast Line R. R. Co., 97 Ga. 15; 24 Southeastern, 814; 54 Am. State, 379 and note; 33 L. R. A. 806.

[2] Dow *v.* Memphis & Little Rock R. R. Co., 20 Federal, 260, 269.

[3] Davenport *v.* Receivers, 2 Woods, 519. See *ante*, pp. 546, 550.

[4] Morgan's Louisiana & Texas R. R. & Steamship Co. *v.* Texas Central Railway Co., 137 U. S. 171, 197.

the surety may properly be indemnified out of funds earned, pending the foreclosure suit, which would otherwise go to the mortgagees.[1] He has helped to preserve their property from dismemberment, at the request of one whom they left in charge of it, and so in effect put in the position of their representative in such emergencies.

14. The Trust-fund Doctrine.

The right to direct any equitable preference in a foreclosure suit rests at bottom on the ground that the road and its proceeds constitute a trust fund, which is in the hands of a court of equity for distribution among various liens and claims, and that such distribution ought to be ordered, whoever may have brought the cause before the court, in view of the fact that it was at all times important for the public interest to keep the railroad as a going concern.[2] Preferences, however, should be conceded only so far as those claiming them contributed directly to secure that end.

15. Inter-State Railroad.

A railroad situated in two States, and subject to one mortgage, may be sold by order of a court of either of the States having jurisdiction of the parties to the mortgage,[3] or foreclosed by such a court under a strict foreclosure.[4] If the company which owns it does not belong in either State, the courts of either, by reason of their control of the land within it, can grant an effective foreclosure with respect to that land.

[1] Union Trust Co. *v.* Morrison, 125 U. S. 591, 611.

[2] Union Trust Co. *v.* Illinois Midland Railway Co., 117 U. S. 434, 455, 459. *Cf.* Hollins *v.* Brierfield Coal & Iron Co., 150 U. S. 371, 381.

[3] Muller *v.* Dows, 94 U. S. 444; Georgia Southern & Florida R. R. Co. *v.* Mercantile Trust & Deposit Co., 94 Ga. 306; 21 Southeastern, 701; 47 Am. State, 153.

[4] Mead *v.* New York, Housatonic, & Northern R. R. Co., 45 Conn. 199; 17 Am. Railway Rep. 367.

A suit for such a purpose is, however, generally brought in the Circuit Court of the United States, which has similar jurisdiction in respect to roads only part of which lies in the District where the court sits, and similar jurisdiction *in personam* against citizens of the State containing such District.

16. The Decree operates "in personam."

A decree of foreclosure is a judgment *in personam*, and its chief office is to cut off a personal equity. The legal title passed, if at all, when the mortgage was given. Hence such a decree does not ordinarily operate on the land itself, and when that is situated beyond the territorial jurisdiction of the court, the courts of that jurisdiction can still pass upon any claim of legal title. If, however, that title was conveyed by the mortgage, they will recognize the fact that no equity to redeem exists against the purchaser under the decree of foreclosure, although the proceedings leading up to the decree were wholly in a court of another State.[1]

17. Collusive Decree.

If a strict foreclosure of a railroad mortgage be granted by collusion on the part of the company, the remedy of a dissentient stockholder is to be sought in the foreclosure suit, or before the court which granted the decree, and not by any independent proceeding in another tribunal.[2]

18. Reorganization in the Interest of the Bondholders.

A decree of foreclosure by sale generally provides that bids may be accepted payable up to a certain limit, say ninety-five

[1] Lynde *v.* Columbus, Chicago, & Indiana Central Railway Co., 57 Federal, 993; Craft *v.* Indianapolis, Decatur, & Western Railway Co., 166 Ill. 580; 46 Northeastern, 1132.

[2] Graham *v.* Boston, Hartford, & Erie R. R. Co., 118 U. S. 161, 178.

per cent, in the bonds secured by the mortgage.[1] This puts the bondholders or the committee representing them in a position which enables them to bid to the best advantage. A scheme of reorganization is customarily agreed on by them, in anticipation of the sale. This has sometimes been so framed as to give some of the unsecured creditors, or the stockholders in the old company, a small interest in the common stock of the new company, in consideration of their not opposing a speedy foreclosure.[2] It is always prudent to submit a scheme of this nature to the approval of the court in which the foreclosure proceedings are pending. Arrangements by which some protection is given to the stockholders and none to the creditors are, under ordinary circumstances, discountenanced by the courts.[3]

When there has been a strict foreclosure, the State or States in which the railroad is situated can authorize a majority of the bondholders to organize a new company to take over the property for the benefit of all. If such a statute be enacted, no minority bondholder can object and call for an account and a setting off to him of his proportionate share in the road.[4]

If trustees under a railway mortgage take steps towards a reorganization in the course of foreclosure proceedings, for the benefit of all the bondholders, and with the consent of most of them, the minority will be bound by this action, if they are chargeable with notice of it, and are guilty of any laches in asserting their objections.[5] If they have not lost their rights, they should make both the trustees and some

[1] Duncan *v.* Mobile & Ohio R. R. Co., 3 Woods, 597.

[2] See Appendix VI. 12.

[3] Louisville Trust Co. *v.* Louisville, New Albany, & Chicago Railway Co., 174 U. S. 674, 682, 688; Duncan *v.* Mobile & Ohio R. R. Co., 3 Woods, 597.

[4] Gates *v.* Boston & New York Air Line R. R. Co., 53 Conn. 333; 5 Atlantic, 695.

[5] Barnes *v.* Chicago, Milwaukee, & St. Paul Railway, 122 U. S. 1, 19.

of the consenting stockholders parties to any action which they may bring to set aside the proceedings.[1]

19. Divisional Mortgages; Consolidation of Suits.

Where foreclosures are sought, in the same court, of different mortgages on different divisions of a railroad, it may be proper to consolidate the suits. If that is done, a sale may be ordered at which each division shall be offered separately, and then all of them together, and if the court deem it most advantageous to accept the bid for all at one gross sum, it may do so, and make an equitable apportionment of the proceeds, in proportion to the separate bids.[2] Ordinarily, however, the order in every case of divisional mortgages, when all the parties interested in any of them are before the court, is simply for a sale of the road as an entirety, as it is apt thus to bring a larger sum.[3]

20. Sale to Private Individual or Foreign Corporation.

Any person, natural[4] or artificial, can become the purchaser at a foreclosure sale. This is necessary in order to secure the widest competition and the highest price. A foreign railroad company can therefore bid, if it has charter power to purchase.[5]

On the confirmation of the sale and delivery of the deed, if a private individual is the purchaser, the franchise to own and operate the railroad will immediately pass to him.[6]

[1] Ribon *v.* Railroad Companies, 16 Wall. 446.

[2] Union Trust Co. *v.* Illinois Midland Railway Co., 117 U. S. 434.

[3] Low *v.* Blackford, 87 Federal, 392; 31 C. C. A. 15; 58 U. S. App. 737.

[4] Lawrence *v.* Morgan's Louisiana & Texas R. R. & Steamship Co., 39 La. Ann. 427; 2 Southern, 69; 4 Am. State, 265, 268; 30 Am. & Eng. R. R. Cases, 309.

[5] Boston, Concord, & Montreal Railroad *v.* Boston & Lowell Railroad 65 N. H. 393; 23 Atlantic, 529; Central Trust Co. of New York *v.* Western North Carolina R. R. Co., 89 Federal, 24.

[6] Chadwick *v.* Old Colony R. R. Co., 171 Mass. 239; 50 Northeastern, 629.

21. Exemptions or Obligations running with the Road.

The sale of a railroad franchise and property, under a foreclosure, does not pass any chartered exemption from taxation. That is a personal privilege.[1]

Purchasers at a foreclosure sale do not become liable to perform the contracts of the foreclosed company, as to the location or construction of the road, except such as may be so embodied in conveyances of title as to run with the land.[2] They are bound by its charter obligations to the State. They take the franchise subject to all its conditions. One is that if they assume to operate the road, then so far as its road has been built and operated by the foreclosed company, it must be operated by them. They cannot operate a part which pays, and abandon a part which does not pay.[3]

22. Statutes as to Redemption of Mortgages.

A general statute authorizing a redemption of mortgaged lands sold on foreclosure, during a certain time, does not apply to railroad mortgages. Their value depends on the railroad franchise, and land and franchise constitute an entirety which was not within the intent of the legislature in enacting the general law.[4]

[1] Morgan *v.* Louisiana, 93 U. S. 217.

[2] Hoard *v.* Chesapeake & Ohio Railway, 123 U. S. 222, 226.

[3] State *v.* Dodge City, Montezuma, & Trinidad Railway Co., 53 Kans. 377; 36 Pacific, 747; 42 Am. State, 295.

[4] Hammock *v.* Loan & Trust Co., 105 U. S. 77.

CHAPTER LVII.

PENAL ACTIONS AND CRIMINAL PROSECUTIONS.

1. Penal Actions.

MANY statutes have been enacted by the several States and a few by the United States, which give penal actions against railroad companies. Most of these are for injuries done by them to person[1] or property in the operation of their railroads; refusal to receive or to transport within a reasonable time cars or freight tendered; unjust discrimination in charges for transportation; obstructing highway crossings by unnecessarily standing trains on them; or neglect to comply with statutory regulations for the protection and convenience of the travelling public.

No constitutional provisions are violated by such statutes, although directed solely against a single class of persons, namely, railroad companies, so long as they have a reasonable relation to the mischiefs liable to occur in connection with the operation or management of the peculiar kind of business which they conduct. As its prosecution gives special opportunity for oppression and extortion, and exposes the

[1] See Chapter LIV., Actions for Injuries causing Death.

public to special dangers, special remedies may properly be given.

Penalties are provided by Act of Congress against inter-State railroad companies for certain acts of inhumanity or neglect as to animals received for transportation, and also against the owners of such animals or those in charge of them.[1]

By Act of Congress it is a penal offence for an inter-State railroad company to run cars not equipped with such power (or air) brakes, automatic couplers, draw-bars, and hand-holds as are required by the statute.[2]

2. Charging more for a Short than for a Long Haul.

State statutes making it penal to charge more for a short than for a long haul cannot affect railroad companies making such charges for transportation between States.[3]

Under the rule that penal statutes are to be construed strictly, the statutory offence under the Inter-State Commerce Act, of charging more for a short haul than for a longer one over the same line is not committed unless the line is not only the same line of track but operated in the sole interest of the same carrier. If two connecting roads were to constitute a through line and agree on through rates, that part of the new line which each constitutes is not, considered in its relation to the whole, the same line as it was before. The through rates have no necessary or natural connection with the local rates previously charged by each separate road. Neither is compelled to charge less than its full local rate, in making up the through rate. If it does, it is in view of considerations not applicable to the local rate.

[1] U. S. Rev. Stat. § 4388.

[2] See Chapter XXXVIII., Inter-State Business; U. S. Stat. at Large, XXVII. 443, 531; XXXII. 943.

[3] Wabash, St. Louis & Pacific Railway Co. *v.* Illinois, 118 U. S. 557.

Hence, if either road, in charging for local traffic between certain points, puts the rate higher than the agreed joint rate for transportation over the same part of its road and also over part of the other road, the statute is not violated.[1]

3. Receivers.

Penalties provided against railroad companies do not extend to receivers of railroad companies who are operating railroads.[2] Receivers, however, are criminally liable for acts which would be criminal offences if committed by any private individual, unless they be such as are apparently lawful, and done under the authority of the court from which they derive their appointment.[3]

4. Criminal Prosecutions.

Several Acts of Congress and numerous State statutes define and provide for the punishment of certain offences affecting the operation of railroads. Some of these are directed against those who do a wrong to the railroad, and others against railroad companies, or their officers, agents, or servants, who do a wrong to others who are using the railroad or are exposed to injury from its operation.

It is thus made a crime against the United States to commit to an inter-State railroad company for transportation obscene publications, or papers containing directions for the prevention of conception (U. S. Stat. at Large, XXIX. 512) or lottery tickets or advertisements (U. S. Stat. at Large, XXVIII. 963[4]).

[1] Chicago & Northwestern Railway Co. *v.* Osborne, 52 Federal, 912; 3 C. C. A. 347; 10 U. S. App. 430; Commonwealth *v.* Chesapeake & Ohio Railway Co., 24 Ky. Law, 1881, 3; 72 Southwestern, 361.

[2] State *v.* Wabash Railway Co., 115 Ind. 466; 17 Northeastern, 909; 1 L. R. A. 179; 35 Am. & Eng. R. R. Cases, 1.

[3] See Chapter LV., Receiverships.

[4] The Lottery Case, 188 U. S. 321; Reilley *v.* United States, 106 Federal, 896; 46 C. C. A. 25.

5. Offences against Railroad Companies.

Congress has made it a crime wilfully and maliciously to trespass or enter upon any railroad car or locomotive within any Territory of the United States or any place subject to their exclusive jurisdiction or control, with intent to murder, rob, or assault any person, or commit any offence against any person or property thereon. The penalty is imprisonment for not over twenty years, or a fine not exceeding $5,000, or both. Accessories before the fact are deemed principals.[1]

The main offences against railroad companies created by State statutes are obstructing, wrecking, or holding up trains; throwing missiles at cars carrying passengers; train robberies; wilful injuries to railroad property; wilfully moving switches or meddling with signal apparatus; loitering about railroad stations; fraud in evading payment of fare; forging railroad tickets, checks, or passes; obliterating conductors' marks on tickets, showing their partial use; leaving gates open or bars down at a private crossing; dumping rubbish or depositing filth on a railroad location; negligence or misconduct, on the part of railroad servants, causing personal injuries; and burglarious entries into cars or station houses.

6. Defences.

It is immaterial in a prosecution under such statutes that the railroad company is a mere *de facto* corporation. They are passed to protect the public quite as much as the company.[2]

The commission of acts prohibited as public wrongs cannot be justified on the plea that they were done to protect the private interests, or legal title, of the party doing them, however clear may be his interests or title. Thus, the owner of

[1] U. S. Stat. at Large, XXXII. 727.
[2] Hodge *v.* State, 82 Ga. 613; 9 Southeastern, 676.

land on which a railroad has been built and is being operated without right cannot throw obstructions across the track to derail trains.[1]

7. Crime committed on Moving Car.

If a car is entered with a felonious intent, on a moving train, and the person making the entry remains on board, with the same intent, until it passes into another county or State, it is an entry in each county or State, for which he may be prosecuted in either, as for an independent offence.[2]

8. Statutory Burglary.

A railroad freight station is a "warehouse," within the meaning of statutes extending the crime of burglary to an entry of a warehouse.[3] The waiting-room for passengers in a passenger station is not an "office" under such a statute. A ticket office, adjoining it, would be.[4]

9. Offences committed by or in Behalf of Railroad Companies.

Under the Inter-State Commerce Act[5] it is made a misdemeanor for an inter-State railroad company, or its officers or agents, to violate any of the provisions of the Act. This provision covers all persons employed by the company, who alone or with any other persons wilfully do or omit to do anything which the statute makes it the duty of the company to do or omit to do, and as to which they may be acting for the company. For railroad servants engaged in running its cars to discriminate between shippers or connecting roads, in pursu-

[1] State *v.* Hessenkamp, 17 Iowa, 25.

[2] Powell *v.* State, 52 Wis. 217; 9 Northwestern, 17; 9 Am. & Eng. R. R. Cases, 156.

[3] State *v.* Bishop, 51 Vt. 287; 31 Am. Rep. 690.

[4] Commonwealth *v.* White, 6 Cush. 181.

[5] Sec. 10, as amended in 1889.

ance of a sympathetic boycott, in aid of a strike by servants of other employers, is within the terms of the statute.[1]

It is also a misdemeanor for any person to ask or receive any rebate or other special favor in regard to rates of transportation from an inter-State railroad company.

The penalty for any of these misdemeanors is fine only, but it may be one as high as $20,000.[2]

Under the Sherman Anti-Trust Act of 1890,[3] any railroad company entering into a combination to monopolize any part of the trade between States or with foreign nations, or making any contract in restraint of trade in any Territory of the United States or in the District of Columbia, or between Territories, or Territories and States, or Territories and foreign nations, is guilty of a misdemeanor.

Transporting in the course of inter-State or foreign commerce, or in the Territories, nitro-glycerine on passenger cars, under any circumstances, or on freight cars, unless it is marked, "NITRO-GLYCERINE: DANGEROUS," is made a criminal offence by U. S. Rev. Stat. §§ 5353–5355. This statute includes dynamite, that being a compound of which nitro-glycerine is the main ingredient.[4]

A railroad company which constructs its railroad on a highway without right is indictable at common law for erecting a nuisance, and the offence would not be purged for the past by the subsequent confirmation of the location by the legislature.[5]

Railroad corporations are often, by State statutes, made criminally liable to a fine for failure to restore highways altered by their location; for unlawful combinations in restraint

[1] See Chapter XXXVIII., Inter-State Business.

[2] U. S. Stat. at Large, XXXII. 847.

[3] U. S. Stat. at Large, XXVI. 209. See, as to the construction of this Act, Chapter II., Modes of Incorporation, p. 16.

[4] United States *v.* Saul, 58 Federal, 763.

[5] Commonwealth *v.* Old Colony & Fall River R. R. Co., 14 Gray, 93, 97.

of fair competition; for extortion; for granting free passes to public officers; and in general for failure to obey any statutory requirement.

Railroad officers, agents, or servants, are often made criminally liable for extortion of more than the legal rate of fare or freight charge; for making up trains improperly, as by putting freight cars behind passenger cars; and for secretly carrying off or concealing carcasses of animals killed on a railroad track.

10. Compelling Incriminating Testimony.

A witness summoned before the Inter-State Commerce Commission, upon an investigation into charges of criminal violation of the Inter-State Commerce Act, cannot decline to testify on the ground that it would tend to criminate him. The statute provides that no person shall be prosecuted or subjected to any penalty on account of any transaction concerning which he may so testify, and this is sufficient to avoid any infraction of the Fifth Amendment to the Constitution of the United States.[1]

[1] Brown *v.* Walker, 161 U. S. 591.

APPENDIX.

ILLUSTRATIVE FORMS, DOCUMENTS, AND TABLES.

I.

INCORPORATION.

1. Articles of Incorporation under a General Railroad Law.

Articles of Association of the Hartford and Harlem Railroad Company.

Know all men by these presents that the undersigned have formed and do hereby form a company for the purpose of constructing, maintaining, and operating a railroad for public use in the conveyance of persons and property, and that the following are made and signed as the Articles of Association of said company.

1st. The name of said company is and shall be "The Hartford and Harlem Railroad Company."

2nd. The place where its principal office and place of business is located is and shall be the Town of New Haven in the State of Connecticut.

3rd. It is proposed to construct, maintain and operate said railroad from the State line at some convenient point on the west boundary of the town of Greenwich to some convenient point in the town of Hartford, and through and into the towns of Greenwich, Stamford, Darien, Norwalk, Westport, Fairfield,

Bridgeport, Stratford, Milford, Orange, New Haven, Hamden, North Haven, Wallingford, Meriden, Berlin, New Britain, Newington, West Hartford, and Hartford.

4th. The length of said railroad as nearly as may be will be eighty-five and $\frac{75}{100}$ miles, and the amount of capital stock of said company is five million ($5,000,000) dollars, divided into fifty thousand (50,000) shares of one hundred dollars each.

5th. The undersigned have chosen eleven directors of said company to manage its affairs for one year, and the names and residences of said directors are as follows:

Name.	Residence.
John Jacobs	Chicago, Ill.
Levi Norton	New York City.
Frederick W. Bruggerhoff .	Noroton, Conn.
Warren H. Day	Bridgeport, Conn.
Charles Roberts	New York City.
Henry Brown	Boston, Mass.
Henry G. Lewis	New Haven, Conn.
Samuel G. Thorne	New Haven, Conn.
Thomas Jones	Boston, Mass.
John E. Bassett	New Haven, Conn.
Henry Killam	New Haven, Conn.

6th. The undersigned severally agree with said company and with each other to take the number of shares in the capital stock of said company respectively which is written opposite their respective signatures hereto.

7th. These articles of association are made and signed under and pursuant to the general laws of the State of Connecticut relating to the organization of railroad companies, and said company is to have and exercise all powers that are or may be conferred on railroad companies by the laws of said State, and on the filing and record of these articles the undersigned together with all persons who shall become stockholders of said company shall be a corporation under the laws of said State, by the name hereinbefore specified.

8th. In the formation of this company it is contemplated by the undersigned that the same may be, so far as may be allowed by law,[1] united or be consolidated with, or make some other permanent connection with one or more corporations organized under the laws of the State of New York, or otherwise acquire rights or property in said State to the end that a continuous transportation line may be formed from some convenient point in the city and State of New York to the State line at Greenwich, and thence through the towns hereinbefore mentioned in the State of Connecticut.

Dated at New Haven this 22nd day of December, 1882.

[Twenty-five names, etc., follow.]

New Haven, December 29, 1882.

The undersigned, being three of the directors named in the annexed and foregoing articles of association, hereby certify that the amount of stock of the

[1] See Gen. Stat. of Conn. Rev. of 1902, § 3674.

Hartford and Harlem Railroad Company required by law, to wit: Five thousand dollars of stock for every mile of railroad proposed to be made, being four hundred and thirty thousand dollars (430,000) has been in good faith subscribed and that ten per cent in cash has been paid thereon to the directors named in said articles, and that it is intended in good faith to construct the road named in such articles.

LEVI NORTON
WARREN H. DAY } *Directors.*
HENRY G. LEWIS

Subscribed and sworn to at New Haven this twenty-ninth (29th) day of December, 1882, before me,

SIMEON E. BALDWIN
Commissioner of the Superior Court for New Haven County.

2. ENGINEER'S REPORT FILED WITH THE FOREGOING ARTICLES OF ASSOCIATION.

Engineer's Report on the Proposed Hartford and Harlem Railroad.

TO LEVI NORTON AND OTHERS, AND TO THE HARTFORD AND HARLEM RAILROAD COMPANY, AND TO WHOM IT MAY CONCERN:

Having made a personal examination of the route over which you propose to construct, maintain and operate a railroad I submit the following report.

The general route proposed and surveyed, maps and profiles of which are herewith submitted, is as follows:

Beginning at a point in the State line between the States of New York and Connecticut five hundred (500) feet Northerly from the centre line of the New York, New Haven and Hartford Railroad at the middle of its crossing of the Byram River. Thence N 40° 43′, 430 ft. Thence by curve to the right radius 1637 ft. for 738 ft. Thence N 66° 40′, E 325 ft. Thence by curve to the left, radius 1637 ft. for 1490 ft. Thence N 14° 30′, E 420 ft. Thence by curve to the right, radius 1637 ft. for 682 ft. . . . Thence by curve to the right, radius 1433 ft. 970 ft. to a point in the centre line of the New York and New England Railroad about 1730 ft. from Clayton Station, measured along the N. Y. and N. E. R. R. North Easterly.

The route above described is seventy-nine and $\frac{14}{100}$ miles in length and passes through the towns of Greenwich, Stamford, Darien, Norwalk, Westport, Fairfield, Bridgeport, and Stratford in Fairfield County, the towns of Milford, Orange, New Haven, Hamden, North Haven, Wallingford and Meriden in the County of New Haven, and the towns of Berlin and New Britain in the County of Hartford.

From the junction with the New York and New England railroad near Clayton, as previously designated, it is proposed, if satisfactory arrangements can be effected with that company, to use their tracks into the City of Hartford.

Should it be necessary, however, your road can be continued, crossing the New York and New England above grade near Clayton, and from thence

by a line nearly parallel therewith to Hartford, either to the Asylum Ave. depot, or to a connection with the New York and New England railroad at or near the town limit, and the accompanying map and profile represent it with sufficient accuracy for you to determine whether or not it will be expedient to adopt it.

An examination of the accompanying map and profile, which have been made under my direction, and from actual surveys, will show the route to be perfectly feasible both to construct and operate.

The profile shows the indications of rock, earth, etc., the character and structure of the proposed road bed, the manner in which it is proposed to construct the proposed railroad, and the general profile of the surface of the country through which the said road is proposed to be made.

The estimate of the probable cost of construction herewith submitted is for a first class, double track railway, with road bed thirty ft. wide through cuts and twenty-eight ft. on embankments at sub grade. It is based on the latest obtainable prices for similar work. The cost of steel rails is, however, taken at $50 per ton instead of the present exceptionally low price of $40.

All bridges, except those carrying highways over the railway it is proposed to construct of iron with masonry piers and abutments, and all intersecting railways, except the short road from Stamford to New Canaan will be crossed either above or below grade wherever it appeared practicable to do so.

It is also proposed to avoid all draw bridges, with the exception of one over the Housatonic river; the Saugatuck to be crossed by a high grade viaduct, allowing eighty-three (83) feet above high tide, which elevation I am informed will permit any vessel which can now reach Westport to pass with safety.

All of which is respectfully submitted.

A. Bryson,
Chief Engineer.

New Haven, Dec. 26th, 1882.

Estimate of Probable Cost of Construction.

17 miles of grubbing and clearing	@	$500		$8,500.00
1666247 cub. yds. earth excavation	"	.30		499,874.00
1183665 " " Rock	"	1.10		1,302,031.50
105706 " " hard pan	"	.60		63,423.60

(Other items of cost were added)

Recapitulation.

Graduation, masonry, bridges, etc.	$4,893,722.90
Track, ballast, etc.	1,637,858.36
Buildings	249,000.00
Equipment	570,000.00
Right of way	820,000.00
Grand total, estimated probable cost	$8,170,581.26

A. Bryson,
Chief Engineer.

(Affidavit subjoined.)

3. Agreement of Consolidation between Railroad Companies of Different States.

Joint Agreement and Act of Consolidation between the Hartford and Harlem Railroad Company, and the East River and Connecticut Railway Company.

Whereas the Hartford and Harlem Railway Company has been incorporated under the laws of the State of Connecticut with an authorized capital stock of five million dollars, for the purpose of building and operating a railroad within said State, from the boundary line between said State and the State of New York, at some convenient point on the West boundary of the town of Greenwich to some convenient point in the town of Hartford, or to connect with the New York and New England railroad at a point west of Main Street, in the City of New Britain, as is provided in a Special Act of the General Assembly of the State of Connecticut, approved April 25th, 1883, entitled an "Act relating to the location of the Hartford and Harlem Railroad Company;"

And *whereas* the East River and Connecticut Railway Company has been incorporated under the laws of the State of New York, with an authorized capital stock of five hundred thousand dollars, for the purpose of constructing, maintaining, and operating a railroad in New York and Westchester Counties, commencing at a point at or near Port Morris, on what was formerly the Westchester side of Long Island Sound or Harlem River and running *via* New Rochelle to a point at or near Port Chester, as may be deemed most advantageous in forming in connection with any other railroad line; with branch roads from Pelham via White Plains to Hall's Corners, and from the main line to a point at or near Fort Schuyler on Long Island Sound;

And *whereas* the line of railroad of said East River and Connecticut Railway Company is situated wholly outside of the State of Connecticut, and said line, and the line of the Hartford and Harlem Railroad Company, will together form one continuous line of railroad from a point at Hartford or New Britain in the State of Connecticut, to a point on the Harlem River at or near Port Morris in the City, County and State of New York;

And *whereas* it is proposed that said two companies shall consolidate together their capital stock, franchises and property, pursuant to the laws of said States, so as to form one consolidated corporation, and the directors of said respective companies have agreed on the terms and manner of such consolidation as is hereinafter more particularly set forth;

Now, therefore, know all men by these presents: that, by joint agreement of said respective boards of directors, said consolidation, if the stockholders of each company by a legal vote approve the same, as by the laws of said States is provided, is and shall be made and regulated as is set forth in the following eight articles.

Article I.

The name of the new, consolidated corporation, shall be The Hartford and Harlem Railroad Company.

Article II.

There shall be a board of thirteen directors thereof, not less than six of whom shall at all times be citizens of Connecticut; and the following named officers, to wit: — a President, a Vice-President, a Secretary, and a Treasurer.

Article III.

The following are the names and places of residence of the first directors and officers of said consolidated corporation.

President.

John Doe . . . . . New York City, New York.

Vice-President.

Horace Ashton . . . . . New York City, New York.

Secretary.

Peter Penniman . . . . . Bridgeport, Conn.

Treasurer.

Richard Roe . . . . . New Haven, Conn.

Article IV.

The number of shares of the capital stock of said new consolidated corporation shall be fifty-five thousand (55,000) of the par value of one hundred dollars each; making in all the amount of capital stock to be $5,500,000 par value.

Article V.

Every person who has subscribed for or become entitled to or owner of any of the capital stock in either of said original corporations, may exchange the same, share for share, for stock in the consolidated corporation. For every full paid share of stock in one of said original corporations, he shall receive one full paid share of stock in the consolidated corporation; and for every share of stock in one of said original corporations on which a partial payment has been made, he shall receive a share of stock in the consolidated corporation on which a payment of the same amount, only, shall be credited, leaving the balance subject to future calls, by the consolidated company. All certificates, or scrip, or receipts for instalments paid, issued by either of the original companies and held by any person desiring to make such exchange, must be surrendered to the consolidated company, before such exchange is consummated.

Article VI.

The annual meeting of the consolidated company shall be held at New Haven, in the State of Connecticut, on the first Tuesday of January in each year; and a board of thirteen directors shall be elected by ballot, at said meeting. Said board shall elect the other officers of the company. Until the annual meeting to occur next hereafter, the directors and officers named in Article III. shall continue in office.

Article VII.

From and upon the adoption of this agreement by stockholder's votes, as by the laws of said States provided, and the filing of the same, or a certified copy thereof, with the certificates thereon required by law, in the respective offices of the Secretary of each of said States, said consolidated corporation shall own, have and enjoy all the rights, franchises, property, choses in possession and action and privileges whatsoever, which at the time of the consolidation were severally had or enjoyed by said consolidated companies, and each of them, to the full extent provided in the laws of said States, respectively; and each of said consolidated companies hereby covenants with the other and its successors, to make any further assurance, confirmation or conveyances, which may at any time or times be necessary or proper to vest said premiums effectually and absolutely in said consolidated corporation.

Article VIII.

Said consolidated company may issue its bonds and secure the same by mortgage of its entire franchises and property, in both States, existing or to be acquired, or any part thereof; and said mortgage may provide for a foreclosure or sale of the entire road and franchises in both States, in case of default on the bonds, by judgment or decree of a court of competent jurisdiction in either State.

In witness whereof this *Agreement* and *Act of Consolidation* of said two companies has been executed, on this fifth day of January, 1883, in behalf of the Hartford and Harlem Railroad Company under its corporate seal by John Doe, its President and agent, hereunto duly authorized by vote of its board of directors passed on the fourth day of January, 1883, and in behalf of the East River and Connecticut Railway Company under its corporate seal by Peter Forbes, its President and agent, hereunto duly authorized by vote of its board of directors passed on the third day of January, 1883.

[L. S.] The Hartford and Harlem Railroad Company
by John Doe, *President and agent.*

[L. S.] The East River and Connecticut Railway Co.
by Peter Forbes, *President and agent.*

Signed, and sealed in presence of
Robert Timmins.
Theodore Todd.

State of Connecticut,
New Haven County, ss. *New Haven, January* 8th, 1883.

Personally appeared, John Doe, President and Agent of the Hartford and Harlem Railroad Company, and acknowledged the within and foregoing instrument to be the free act and deed of said company; before me

John Smith,
Justice of the peace.

State of New York,
City and County of New York, ss.

I, John Day, a notary public, duly commissioned and sworn, hereby certify that at said City of New York on the sixth day of January, 1883, there personally appeared before me Peter Forbes, president and agent of the East River and Connecticut Railway Company, to me personally known to be the individnal described, as such, in and by whom was executed the foregoing instrument and acknowledged that said company and he as its president and agent executed the same.

Witness my hand and notarial seal on said day and in said city hereunto set.

JOHN DAY,
Notary Public.

[L. S.]

4. EXTRACT FROM ARTICLES OF INCORPORATION OF A NAVIGATION COMPANY FORMED TO RUN IN CONNECTION WITH A RAILROAD.

Article III.

The purposes for which said corporation is constituted are the following:

To carry on the business of transporting railroad-cars, passengers, goods and freight, by water, between Bridgeport and New York city, or some convenient point or points in the State of New Jersey on the North River or New York bay, and between Wilson's Point, in Norwalk, and New York city or some convenient point or points in New Jersey on the North River or New York bay; and to acquire, hold, use, and convey all lands, buildings, docks, wharves, vessels, and other property, real or personal, necessary or convenient for the prosecution of said transportation business; and to enter into any contracts that may be deemed advisable, for the formation of any through transportation line or lines, partly by rail and partly by water, passing through the waters of Long Island Sound to or from Bridgeport or Wilson's Point; and to do any other business, and exercise any other powers, incidental to the purposes hereinbefore specified; and to carry on out of this State whatever lawful business may be incidental to the business within it.

II.

LOCATION AND CROSSINGS.

1. Vote making a Location of Part of Railroad.

Voted, that this company hereby lays out and locates — subject to the approval of the Railroad Commissioners and to any modifications thereof which said commissioners may prescribe — the northerly portion of its railroad in the towns of New Britain, Berlin and Newington, as follows, to wit:

The centre line of said location begins at a point in the town of Newington, in the centre of the New York & New England Railroad, 2115 feet northerly from the centre of its Clayton depot, measured along the line of the New York & New England Railroad, and thence runs southerly by curve to the left, radius 1910 feet for 1539 feet to station 15 + 39,[1] point of tangent; thence south, 0° 15′ west, 4464 feet to station 60 + 03, point of curve, crossing highway, leading west from Clayton depot, at grade (fill 1 foot to sub-grade); thence by curve to the right, radius 5729.7 feet for 2407 feet to station 84 + 10, point of tangent; thence south, 24° 19′ west, 2923 feet to station 113 + 33, point of curve, crossing a highway at station 101 + 30 at grade (fill of 3 feet); thence by curve to the left, radius 5729.7 feet for 2825 feet to station 141 + 58, point of tangent in road crossed at grade (fill 2 feet); crossing Town line between Newington and New Britain, at station 116 + 06; thence south, 3° 56′ east, 1280 feet to station 154 + 38, point of curve; thence by curve to the right, radius 3437.9 feet for 3046 feet to station 184 + 84, point of tangent; crossing Kelsey Street at station 168 + 75 at grade (cut 6 feet); thence south, 46° 50′ west, 4914 feet to station 233 + 98, point of curve, crossing Town line between New Britain and Berlin at station 185 + 97.

The width of said lay-out and location is as follows, on either side of said

[1] The numeration of stations is sometimes expressed by the full number of feet of their distances from the initial point; *e. g.*, the next course would be under such a numeration from station 1539 to station 6003.

centre line: From station 0 to station 66 + 65, it is three rods on each side of said line. From station 66 + 65 to station 71 + 41 it is three rods on the east side and four rods on the west side. From station 71 + 41 to station 225, it is three rods on each side. From station 225 to station 251 it is four rods on each side.

From said station 233 + 93 point of curve, said centre line runs by curve to the left, radius 5729.7 feet for 2277 feet to station 256 + 75, point of tangent; crossing the New Britain Branch of the New York, New Haven & Hartford Railroad, above grade, at station 240+87 (fill 18½ feet above top of tie), as shown on map; crossing highway at station 250 + 58 above grade (fill 14 feet); crossing New Britain and Meriden highway above grade at station 253 + 97 (fill 11 feet); crossing the Kensington and Berlin highway at station 256 + 25, above grade (fill 9 feet); thence south, 24° 04′ west, 2205 feet to station 278 + 80, point of curve; crossing highway at station 262 + 27 above grade (fill 22 feet), changed as indicated on map and profile, hereinafter described;

. . . . . .

The extra widths, above six rods, south of station 225 are necessary for obtaining stone, earth, and gravel, and for embankments and cuttings.

. . . . . .

Said location is further shown on a map and profile, marked "Map and profile of the location of the Northerly portion of the Hartford and Harlem Railroad in New Britain, Berlin and Newington. A. Bryson, Chief Engineer," which is the map hereinbefore referred to, in describing said location.

2. Vote Changing Location of an Unconstructed Railroad.

Voted, that whereas it is deemed by this board necessary and expedient to change the location of part of the road of this company, as hereinafter specified, and whereas the construction of said road has not yet been commenced, therefore the following lay-out and location of the railroad of this company, as respects that portion thereof in the towns of New Haven, Orange, Milford, Stratford, Bridgeport, and Fairfield, hereinafter described, is hereby adopted, in lieu of any former location heretofore made by this board, in so far as such former location differs from the location hereinafter described; and said portion of said railroad as hereinafter described, is hereby laid out and finally located — subject to the written approbation of said location, as hereby changed and established, by the Railroad Commissioners, and to any modifications thereof which said Commissioners may prescribe — as follows, namely:

The centre line of said location, as hereby changed and established, begins at a point in the town of New Haven, at station 1495+92 of the eastern division of said railroad, as heretofore located by vote of this board, in Dixwell avenue, and runs thence by curve to the right, radius 1910 feet for 1441 feet to station 1510+33, point of tangent, crossing under Bassett street at station 1500+25 (cut 22 feet); crossing city line about station 1504+16. . . .

3. Vote locating a Freight Spur.

Voted, That a freight spur is hereby located along the Easterly bank of the canal in Shelton, occupying a strip of land with a width of twelve feet next adjoining said canal, between Cornell street and a point opposite the North line of the paper mill property, with any necessary sidings running off from said strip into adjoining factory properties.

Voted, That application be made to the Railroad Commissioners for the approval of said location.

4. Vote of Directors adding to Station Grounds by Closing Streets.[1]

Whereas the terminal facilities of this company, afforded by the present location of its railroad, are inadequate to meet the increasing demands of the business of the company,

Voted, that the location of the railroad of the New Haven and Derby Railroad Company be, and the same hereby is, altered and extended in the town of New Haven, in order to improve its lines, and to add to the width and extent of its depot grounds at New Haven, and for additional tracks and turn-outs, so as — upon the approval of such changes by the Railroad Commissioners — to cover and include all the lands in said town lying Southerly of the present location of said railroad, and bounded Northerly by said location, Westerly by Liberty street, Southerly, and in part Westerly, by Minor street, from Liberty street to Lafayette street, and thence Southerly by the Northerly line of Minor street, extended to the Easterly side of Lafayette street, and thence Westerly, about 165 feet, by Lafayette street, to the Southwest corner of the lot on said street, formerly owned by Charles R. Waterhouse, and by him conveyed to Solomon Rosenbluth, March 9, 1892; and thence Southerly in part by land of Mark Ryder, in part by land formerly of Thomas Horsfall, deceased, and in part by land formerly of E. P. and E. A. Belden, in all about 209 feet, upon a bent line, and thence Southwesterly by land formerly of said Belden about 86 feet, to Water street, and thence by Water street and highway around in an Easterly direction to the present location of said railroad; said changes of location requiring the discontinuance and closing of Lafayette street and Lafayette Place, between Minor street and said present location of said railroad.

5. Vote of Directors Abandoning a Location after its Approval by due Authority.

Whereas certain real estate in New Britain, in the State of Connecticut, was heretofore laid out and located on for railroad purposes by this company, which is described as follows:

and whereas it is now, on further investigation, the opinion of this board that it is not necessary or expedient for the purposes of the railroad to take said

[1] See State *v.* Railroad Commissioners, 56 Conn. 308; 15 Atlantic, 756.

land or any part of it, and that the grade of the land is such as to make it impracticable to use it for railroad purposes without incurring an unreasonable and injudicious expense, and whereas the road has never been opened or worked over said land,

Voted, That said location and lay-out over said land, be, and the same hereby is, revoked, abandoned, and discontinued, and said proposed addition of said land to the railroad of this Company is abandoned and discontinued.

Voted, That the Secretary give immediate notice of this abandonment to the owners of said land.

Voted, That a certified copy of the foregoing vote and of this vote be forthwith filed by the Secretary, certified under the seal of the Company, in the town clerk's office in New Britain; and a like copy in the office of the clerk of the Superior Court for Hartford County, for record.

6. Stockholders' Vote Authorizing Construction of a Branch.

"Whereas, a direct connection between this company's road and either the New York and New England Railroad, or the Housatonic Railroad, would be for the interests of this company and the public.

Voted, That this company hereby authorizes and directs the board of directors to take such action as they may deem most for the interests of the company and of the public, to secure such connection, or connections, either by constructing a branch railroad to meet a proposed branch of the Housatonic Railroad, or by constructing a branch or extension railroad to connect with the New York and New England Railroad or a branch thereof, through such towns, and on such lines, as the board may deem most expedient."

7. Directors' Vote Locating a Branch.

"Whereas, the stockholders of this company, at a meeting duly warned and held on December 29th, 1887, have voted in favor of constructing either a branch road to connect with a proposed branch of the Housatonic Railroad, or one to connect with the New York and New England Railroad, as this board may think best; and whereas, this board concurs in the opinion that such a branch to connect with the Housatonic Railroad is required by public convenience and the interests of this company;

Voted, That the following lay-out and location of a branch railroad, in the towns of Derby and Huntington, is hereby adopted, and said branch railroad, as hereinafter described is hereby laid out and finally located — subject to the written approbation of said location by the Railroad Commissioners, and to any modifications thereof which said commissioners may prescribe — as follows, namely;

The centre line of said location begins at a point in the town of Derby, at a point midway between the rails of the New Haven & Derby Railroad, in the town of Derby, county of New Haven and State of Connecticut, at station zero + zero of this branch, which station is at the north face, of the north wall plate of the bridge of said railroad crossing the Naugatuck River in said town,

and runs thence northerly, on a tangent having a bearing N. 47° 04′ W., for a distance of 492 feet, to a station marked 4 + 92, point of curve; thence on a curve to the left, having a radius of $1{,}432\frac{69}{100}$ feet, for a distance of $779\frac{10}{100}$ feet, to a station marked 12 + 71.16, point of tangent.

. . . . . .

From Station to Station.	Width on the Left, or westerly side of said center line.	Width on the Right, or easterly side of said center line.
0 to 26	25 feet.	25 feet.
26 " 55	15 "	15 "
55 " 56	100 "	15* "
56 " 59+50	100 "	40* "
59+50 " 65	100 "	28* "
65 " 69	100* "	19* "
69 " 70+50	49½* "	17* "
70+50 " 152+70	49½ "	49½* "
. . . . .	. . . . .	. . . .

* The boundary of said location, between stations 55 and 70+50, is on a line the ends of which are distant so many feet as is above indicated from the said centre line at the stations above indicated by an asterisk in the foregoing table; elsewhere said boundary is a continuous straight line parallel to said centre line.

The width of the foregoing location in excess of six rods, wherever such excess occurs, is required and established, because the same is needed for slopes and embankments and cuttings and procuring stone and gravel and earth.

This location is further shown on a map and profile marked 'Map and profile of the Huntington branch of the New Haven and Derby Railroad, December, 1887: Frederick J. Boller, Engineer'; a tracing of which, similarly marked, is to be filed in the office of the Railroad Commissioners of the State of Connecticut; reference to which map is hereby had for a more particular description of this location."

8. Vote of Directors Changing a Location for a Grade Crossing, which has Been Disapproved, into a Bridge Crossing.

"Whereas the Railroad Commissioners of the State of Connecticut, by a finding and order dated and signed the 6th day of February, 1888, upon the application of this company, dated the 20th day of January, 1888, for the approval of the location of its branch railroad in the towns of Derby and Huntington, disapproved of so much of said location as related to the crossing at grade of the highway or public street, in the borough of Shelton, in the town of Huntington, described as Center street, and declined to direct the construction of said branch railroad at said crossing upon a level therewith; and whereas this board is of opinion that public convenience can be fully met

by the construction of said branch railroad, at said crossing, at grade, and carrying the travel upon said Center street over said railroad by a highway bridge;

Voted, that the following alteration of the lay-out and location of said branch railroad at the crossing of said highway or public street known as Center street, and of said street in the borough of Shelton, in the town of Huntington, is hereby adopted — subject to the written approbation of said alteration of location by the Railroad Commissioners, and to any modifications thereof which said Commissioners may prescribe — as follows, namely; Said railroad shall cross said street at grade, as heretofore located, but said highway known as Center street shall be and hereby is altered by carrying the same or the central portion thereof over said railroad on an iron bridge with stone abutments and suitable approaches, the centre line whereof shall be the same with the centre line of said street, and the easternmost of which approaches shall begin at a point 115 feet from the Shelton end of the highway bridge between Shelton and Birmingham and end at a point 181 feet westerly therefrom, and 44 feet easterly from the canal of the Ousatonic Water Company, and shall be constructed with retaining walls of masonry, and a width at its westerly abutment nearest the canal of 20 feet, and a uniform grade of $7\frac{1}{10}$ feet to the hundred; and the westernmost of which approaches shall begin at a point $65\frac{5}{10}$ feet westerly of said canal, with a stone abutment 20 feet wide, and running thence 100 feet, with a uniform grade of 6 feet to the hundred; there being also a footway provided on the southern side of said bridge, 8 feet wide, with suitable steps 5 feet wide, leading up to the bridge, from the southerly side of Center street on each side of the bridge east and west; said bridge being not more than 18 feet in the clear above the rails of said railroad, and having a span 56 feet wide over said canal, and supported by suitable uprights set on 6 piers westerly of the canal, and 4 piers easterly of the canal; and so much of Center street as lies west of the canal, and within the location of said railroad to be closed and discontinued:

Reference being had for a further description hereof to the map of the same in the office of the company, by F. J. Boller, engineer, marked, 'Proposed over-grade crossing of Center street, Shelton.'

A tracing of said map is to be filed in the office of the Railroad Commissioners of the State of Connecticut, reference to which map is hereby had for a more particular description of this alteration of location."

9. Contract Permitting Crossing of one Railroad by Another.

This Indenture made this tenth day of June A. D., 1910, by and between the Brompton Railroad Company, party of the first part, and the Chicago Railroad Company, party of the second part,

Witnesseth, that the party of the first part, in consideration of the agreements of the party of the second part herein contained, grants unto the party of the second part, upon the conditions and for the purposes hereinafter set forth, the right to lay, maintain and operate a (double) track railway of (standard) gauge, over and across the location and tracks of the party of the

first part in the town of Elton, County of Jefferson, and State of Illinois, between stations 1500 and 1500 + 30, on the centre line of said location, as shown on plan hereto annexed and marked "Plan of Elton crossing, June 10, 1910. John Smith, Chief Engineer, Brompton R. R. Co."

The foregoing grant is expressly conditioned upon the performance by the party of the second part of all and singular the covenants hereinafter set forth, to be by it performed, and a failure to perform any of said covenants shall work an absolute forfeiture of said grant.

The party of the second part covenants as follows, to wit:

First. The party of the first part, notwithstanding the aforesaid grant, shall have the right to retain the track or tracks now owned and operated by it at said crossing, and shall also have the right, at any and all times hereafter, to lay, maintain and operate, over the track or tracks of the party of the second part herein authorized to be laid, such additional tracks as it may from time to time see fit, and shall also have the right, at any and all times, to change the grade of its roadbed and tracks at such crossings as it may think proper; and the party of the second part, at its own cost and expense, upon reasonable notice of the desire of said party of the first part to lay additional tracks or to change the grade of its roadbed and tracks, will provide the material for and properly construct and put in the crossings with such additional track or tracks according to such plans and specifications as the party of the first part may prescribe, and will also make such changes in the grade of its roadbed and tracks as may be necessary to conform to any changes made in the grade of the roadbed and tracks of the party of the first part; and nothing shall be done or suffered to be done by the party of the second part that shall in any manner materially impair the usefulness or safety of the track or tracks of the party of the first part, or of such tracks as it may hereafter lay at said crossing.

Second. The party of the second part will furnish the materials for and construct and put in all crossing frogs, crossing signals, gates and targets and other fixtures necessary to make the crossings at the point aforesaid, in accordance with such plans and specifications as the party of the first part may prescribe, and will, at its sole cost and charge and to the satisfaction of the party of the first part, forever maintain and keep in good repair, and renew from time to time when necessary, all crossing frogs, signals, gates, targets and other fixtures provided for in this indenture for said crossing with existing tracks, and for crossings with any additional tracks that may be laid as above provided, and will maintain the grade, ties and roadbed at such crossings, and keep blocked and protected the frogs, guard rails and switches at said crossings, and at the junction of the connecting and transfer tracks hereinafter mentioned, with the track or tracks of the party of the first part, so as to make them as free as possible from danger to the employees of the party of the first part.

Third. Whenever the party of the first part, or the laws of the State of Illinois, or the ordinances of any municipal corporation thereof, or any other lawful authorities, shall require a flagman or flagmen to be stationed at said crossing, or shall require the same to be protected by signals or gates, or by

an interlocking and derailing plant, or any other safety appliances, in any such case said party of the second part shall employ, as hereinafter provided, and pay the wages of such flagmen, and shall employ, as hereinafter provided, and pay the wages of all persons required for the operation of any such signals, gates, interlocking and derailing plant, or other safety appliances, and shall furnish all supplies and pay all other expense of operating the same.

And said party of the second part shall also, at its own cost and expense, provide and put in place in accordance with plans and specifications prescribed by the Chief Engineer of the party of the first part, and approved by the railroad commissioners or crossing board, or other legal authority having jurisdiction over railroad crossings in said State, all such signals, gates, interlocking and derailing plant or other safety appliances, which may be so required at said crossing. Such plans and specifications shall include the preparation and changes in the tracks of both parties, incident to the application and use of any such signals, gates, interlocking and derailing plant, or other safety appliances, the connection of the tracks of both parties therewith, and all other things necessary to the proper working of such appliances and to provide for the protection and operation of the railroads of both parties in connection therewith. Said party of the second part shall, after the construction of any such signals, gates, interlocking and derailing plant or other safety appliances at said crossing, repair, maintain and renew the same from time to time at its own expense to the satisfaction of the party of the first part.

Said party of the first part may, however, if it so elect, establish such signals and gates, or provide and put in place such interlocking and derailing plant, or other safety appliances, according to plans and specifications so prescribed and approved, and said party of the second part will in any and every such case, upon presentation of bills therefor, pay to said party of the first part the entire cost thereof.

If, thereafter, any changes in such signals, gates, interlocking and derailing plant or safety appliances shall be required by the party of the first part or by any legal authority, or if the said party of the first part shall lay any additional tracks which it shall require to be connected with any interlocking and derailing plant or safety appliance established at said crossing, the party of the second part will in either event make such changes or connections at its own expense, or said party of the first part may, if it so elect, make such changes and connections at the expense of the said party of the second part.

Whenever, in the judgment of the party of the first part, any such interlocking and derailing plant or safety appliance should be renewed, the party of the second part will, at its own expense, replace the same with such device as may at the time such renewal is required be prescribed by the Chief Engineer of the party of the first part, and approved by the railroad commissioners or crossing board, or other legal authority having jurisdiction over railroad crossings in said State; or the party of the first part may, if it so elect, renew and replace such interlocking device or safety appliances, as may be so prescribed and approved, at the expense of the said party of the second part.

Fourth. In case said crossing shall at any time hereafter be protected in

the manner herein provided, the party of the second part shall employ such flagman or flagmen and all such persons required for the operation of any appliance which may be there provided, as the party of the first part may select and recommend as suitable persons to be employed at such crossing. Such employees shall be subject to direction and control by the party of the first part, but either party hereto may require the discharge of any such employee at any time for good and sufficient reasons, to be stated to the other in writing, if required.

Fifth. Between the parties hereto the persons employed for the protection of said crossing or in the operation of any such signals, gates, interlocking device or safety appliances, shall be deemed the employees of the party of the second part, and the party of the second part shall at all times bear any and all loss or damage, together with all costs, charges and expenses which either party shall suffer, or for which it shall become liable to any person or corporation, in consequence of the fault or negligence of any such employee.

If the party of the first part shall suffer or become liable for any damages to persons or property, resulting from a defective condition of said crossing, or from unblocked frogs, guard rails or switches, or as the result of any default of the party of the second part, said party of the second part will pay such damages, and all costs, charges and expenses incurred by the party of the first part by reason thereof, and save the party of the first part harmless therefrom.

Sixth. In the passage of the respective trains of the parties hereto over the aforesaid crossing, if passenger trains of each of said parties arrive at such crossing simultaneously, the passenger trains of the party of the first part shall have preference, in passing over said crossing, over the passenger trains of the party of the second part, and in like manner freight trains of the party of the first part shall have preference over freight trains of the party of the second part; but in all cases passenger trains shall have preference over freight trains.

Seventh. The party of the second part shall pay the full cost of any connecting or transfer tracks that may be at any time required at the point of crossing aforesaid, whether such tracks shall be ordered by competent authority or put in by agreement between the parties hereto.

Eighth. In case of failure on the part of the party of the second part to perform promptly and fully any obligation imposed upon it by this agreement, the party of the first part may perform such obligation; and the party of the second part will promptly repay to said party of the first part, upon presentation of proper bills therefor, the entire amount by it expended in the performance thereof.

Ninth. It is agreed that any waiver at any time by the party of the first part of a breach of any condition of this agreement shall extend only to the particular breach so waived, and shall in no manner impair or affect the existence of such condition or the right of the party of the first part, its successors or assigns, thereafter to avail itself of such condition, and any subsequent breach thereof.

Tenth. The party of the second part agrees to construct and maintain

proper cattle guards at the intersection of its track or tracks with the boundary lines of the roadway or right of way of the party of the first part, to prevent animals on the premises of the party of the second part from straying upon the premises of the party of the first part.

Eleventh. If at any time the party of the second part shall fail faithfully to fulfill all of the agreements herein contained to be fulfilled by it, all of the rights herein granted to the party of the second part shall cease and determine; and the party of the second part shall, within thirty (30) days after being notified in writing by the party of the first part to do so, take up and remove its said railway track or tracks from the roadway or right of way of the party of the first part; and if the party of the second part shall fail to remove its said track or tracks as aforesaid, the party of the first part shall have the right to take up and remove the same at the risk and expense of the party of the second part.

Twelfth. The grants, covenants and stipulations hereof shall extend to and be binding upon the respective successors and assigns of the parties hereto, whether so herein expressed or not; provided, however, that all the rights and privileges hereinabove granted shall cease and become void unless the same are exercised by the party of the second part within two (2) years from the date hereof.

In Testimony whereof, the parties hereto have caused these presents to be executed in duplicate by their duly authorized officers the day and year first above written.

[L. S.] THE BROMPTON RAILROAD CO.
Attest: By
[L. S.] THE CHICAGO RAILROAD CO.
Attest: By

20. CONTRACT FOR GUARDING AN EXISTING GRADE CROSSING BY AN INTERLOCKING PLANT.

Agreement

made December first, 1911, between the Brompton Railroad Company, hereinafter called the Brompton Company, and the Western & Northern Railway Company, hereinafter called the Western Company.

Whereas the tracks of the parties hereto intersect and cross each other at grade in or near the Town of Lincoln in the State of New Ohio; and

Whereas, in order to promote further the safe passage of trains over said crossing, it is deemed desirable by the parties hereto to erect, for their mutual protection, an interlocking tower and an interlocking plant and signal system;

Now, therefore, in consideration of the premises and of the covenants and agreements hereinafter contained, the parties hereto mutually agree as follows:

Article I.

There shall be established and placed in operation an interlocking system of signals and switches sufficient to protect said grade crossing, as shown by the blue print hereto attached and made a part hereof, marked Plan A, Dec. 1, 1911, John Doe, Ch. Engineer.

Article II.

The Brompton Company will forthwith construct upon its location, adjacent to said crossing, an interlocking tower house, and will construct and put in place upon the location or waylands of both parties hereto, in connection with said crossing an interlocking plant and signal system; said interlocking tower house, plant and signal system, to be constructed and completed in all respects in accordance with the detailed plans and specifications which shall have been approved by both the Chief Engineers of said companies; but nothing herein contained shall give to either party any interest in the location, rights, or real estate of the other party.

Article III.

The management and operation of said interlocking tower and plant shall, during the continuance of this agreement, be under the exclusive control of the Brompton Company, which shall maintain the same in proper repair, and make such changes in, or additions thereto, as may from time to time be approved by both the Chief Engineers of said companies; and also make such repairs thereto as may be asked by the Western Company.

Article IV.

The actual cost and expense of constructing, maintaining, repairing, renewing and operating the said interlocking tower and plant shall be borne equally, one-half by each party hereto, and all bills rendered from time to time therefor by the Brompton Company to the Western Company shall be paid within twenty days after receipt. Upon payment for the cost of the establishment of said system, the same shall become the joint property of both parties hereto.

Article V.

Each party hereto shall at its own expense do all the track work, furnish all the ties in place, and provide and prepare all switches and derails required in the track or tracks which it operates, ready to be connected with the interlocking mechanism; and do all the preliminary grading, and prepare the surface of the ground along its tracks where the connections are to be run; and also all the excavating that may be required for the foundations of any portion of the system and appliances in its tracks, except the signal tower; and shall also do at its own cost the work necessary for the proper drainage of that part of its road bed along which the pipe or wire connections may extend, and provide boxing for the pipe or wire lines across all streets, avenues, alleys and roadways, and under all station platforms along its tracks and crossing under its tracks. Each party shall keep in repair, maintain and renew its own derails and derailing switch timbers as a part of its own railroad, and the same shall not be considered a part of the interlocking tower and plant provided for herein. Each party shall at all times, during the continuance of this agreement, keep its own track and derails at said crossing clear from

snow, ice or other obstruction, and in case of failure or neglect so to do, the other party may remove such snow, ice or other obstruction from said tracks, and shall be reimbursed on its demand by such other party for any sum or sums expended in such removal.

Article VI.

All employees required for the operation of said interlocking plant and tower shall be employed by, and be under the exclusive control and direction of the Brompton Company; but, at any time, upon the request in writing of the General Superintendent of the Western Company made upon the Brompton Company, the latter shall promptly discharge, upon reasonable cause being furnished, any employee engaged in the operation of said plant. Such employees must be telegraph operators, and their duties shall include the doing of the telegraph work required by both parties hereto, without extra compensation or cost to either party.

Article VII.

Upon the request of either party hereto, additional switches upon the railroad operated by such party shall be connected with said interlocking plant, and all necessary additions and changes be made at the sole cost and expense of such party, and without any cost or expense whatever to the other party hereto; but before making any such connection, change or addition, plans and specifications therefor shall be approved by both the Chief Engineers of said Companies, and if required by law, by the proper State authorities.

Article VIII.

Complete accounts shall be kept by the Brompton Company, showing all expenses incurred in the construction, operation, maintenance, repair, renewal and improvement of said interlocking tower and plant, and all incidental expenses connected therewith, and said accounts shall be open at all reasonable times to the examination of the officers and agents of the Western Company.

Article IX.

The signals and other devices, indicating and permitting the free and safe movement of trains over the said crossing, shall at all times be so handled by the operator in charge of the mechanism of said interlocking tower and plant, as to cause the least possible delay in the movement of engines, cars and trains on the tracks of the parties hereto, and in conformity to any rules and regulations that may from time to time be agreed upon between the Brompton Company and the Western Company. Any such rules shall provide that preference shall be given, as far as practicable, to the passenger trains of either party over freight or other trains or engines of the other party hereto.

Article X.

Each party assumes all risk of damage to its own trains, engines, cars and other property while upon the space covered by said interlocking plant, and also assumes all liability for all deaths, personal injuries and damages to property occurring upon its trains, engines or cars, or by reason of or in connection with the operation thereof, upon the space covered by said interlocking plant (including deaths and personal injuries of employees as well as others), whether such deaths, personal injuries, or damages, be caused by any negligence or wrongful act or omission of any of its officers, agents, servants or employees, or of employees in the operation, maintenance or repair of said interlocking tower and plant, or of any other person whatsoever; it being expressly understood and agreed that for the purposes of this Article the persons employed in the operation, maintenance and repair of said interlocking plant and tower shall be deemed the servants and employees solely of the party which for the time being is using or operating its trains, engines or cars upon the space covered by said interlocking plant.

All trains, engines and cars running over the tracks of either company, shall, so far as the provisions of this contract are concerned, be deemed to be the property of the company over whose tracks the same shall run.

Each party hereto shall be liable to the other party and to all other persons or corporations, for all deaths, personal injuries and damages to property which shall be caused solely by the misconduct, negligence or omission of its own employees in disregarding or passing by any danger-signals or stop-signals given through the interlocking plant, or by any person engaged in guarding said crossing, in case the interlocking system should be out of order.

Each party covenants that it will forever indemnify and save harmless the other party hereto, and its successors and assigns from and against all claims, liabilities and judgments for, or by reason of, any damage, the risk of which is assumed herein by such party, and also from and against all claims, liabilities, or judgments on account of any death, injury or damage to persons or property the liability for which is herein assumed by such party; and such party agrees to pay, satisfy and discharge all costs, charges and expense that may be incurred, and any judgments that may be rendered, by reason thereof.

In the event that damage of any kind to any portion of said interlocking system shall be caused by the fault of either of the parties hereto, then all such damage, and cost attendant thereupon, shall be borne by the party at fault.

Article XI.

In case the Western Company makes default in any payment hereinbefore provided to be made by it at the time when such payment shall become due as aforesaid, then upon thirty days' written notice by the Brompton Company to the Western Company to that effect, and such default still continuing, the Western Company shall, at the end of said thirty days, be debarred from the further use of said interlocking plant, and of the employees engaged thereat, until such time as it shall make such payment or payments in default.

Article XII.

In case any disagreement shall arise between the parties hereto, as to any matter arising under this agreement, then, upon the written request of either party, such disagreement shall be submitted to three arbitrators, one of whom shall be appointed by the Western Company, one by the Brompton Company, and the third by the two so appointed. The decision of such arbitrators or any two of them, given after a hearing of which both parties shall have been duly notified, and at which they shall have had an opportunity to be heard, shall be final and binding upon the parties between whom such disagreement shall have arisen as to the matter or matters submitted for arbitration; and each of the parties hereto agrees that forthwith, upon the rendering of any such decision, it will perform and comply with the requirements thereof.

Article XIII.

This agreement shall continue in force and be binding upon and inure in favor of the parties hereto and their successors and assigns for twenty (20) years from the date hereof, provided that either party hereto may, at its option, discontinue and cancel said contract at the end of any period of five (5) years by giving the other party ninety (90) days' notice prior to the expiration of such period of five (5) years of its desire to discontinue and cancel the same; and in case of such discontinuance, said interlocking tower and signal system shall be removed and the material constituting the same shall be divided between the parties hereto upon the basis of their ownership therein.

Executed in duplicate at (&c., &c.).

Attest:

[L. S.]

[L. S.]

III.

CONSTRUCTION AND EQUIPMENT.

1. Contract to Construct Railroad for Cash, with Full Specifications.

Agreement

Made this 16th day of April, 1883, between James Savage of the City of Augusta, State of Maine hereinafter called the contractor, party of the first part, and the New York and New England Railroad Company, a corporation existing by law in the States of Massachusetts, Rhode Island, Connecticut, and New York, party of the second part, hereinafter called the company.

It is covenanted and agreed by and between the parties hereto as follows:

I. The contractor hereby covenants to do all of the earth and rock work necessary for widening, sloping, grading, and ditching the cuts; widening, grading, and dressing the embankments; changing the alignment, and extending and repairing the masonry of the road-bed, for a second track on sections 1 to 8 in part inclusive, located between Blackstone and North Windham and from 36½ to 81½ miles from Boston on the line of said New York and New England Railroad; also all of the grading that may be necessary for all new sidings and turnouts, all changes in highways, private crossings, station-grounds, and such other improvements as may be incidental to the construction of a second track between the above-named points.

II. Said work is to be prosecuted and finished as described in the following specifications, and in accordance with such instructions as the engineer of the company shall from time to time give to said contractor as to place of working, force to be employed, and as to the lines, grades, and all matters of detail not specified in the specifications, and is to be entirely completed on or before the 1st day of November, 1883; and time is of the essence of this contract.

III. *Specifications.* (1) All work is to be done in the most thorough, faithful, and workmanlike manner, and according to these specifications, to the full extent and meaning of the same as interpreted in their most liberal

sense; and to the entire satisfaction, approval, and acceptance (certified in writing as hereinafter provided) of the engineer of the company, under the supervision and direction of such agent or agents, if any, as he may choose to appoint; and is to be completed so as to be ready for the said party of the second part to enter upon and occupy the premises and lay the new track thereon.

(2) All material or workmanship shall, at any time before acceptance, be subject to inspection and rejection, and any material or workmanship which shall at any time before said acceptance prove, in the judgment of the engineer, defective or contrary to these specifications, shall be replaced and made good at the expense of the contractor (subject to inspection and rejection as aforesaid). All materials used throughout must be the best of their respective kinds.

(3) The engineer shall have the right to make any alterations, additions, or omissions of work or materials during the progress of the work that he may find to be necessary; and the same shall be acceded to by the contractor, and carried into effect, without otherwise in any way affecting, violating, or vitiating this contract.

If, during the progress of the work, any additions, alterations, or omissions are made as aforesaid, either in the quantity, quality, or character of the same, the value of such changes, omissions, or alterations shall be decided by the engineer, who shall make an equitable allowance for such changes, alterations, or omissions, which allowance shall be added to or deducted from the contract price as the case requires.

(4) No charge shall be made by the contractor for hindrance or delay by the railroad company or its agents in the progress of the work, or any portion of it; but it may entitle him to an extension of the time for completing the work sufficient to compensate for the delay, of which the engineer shall be the judge. No allowance of either time or money shall be made for delay or hindrance caused by any other parties than the representatives of the railroad.

(5) Whenever grade is mentioned, it shall be understood as meaning the level of the base of the rail of the proposed track. Sub-grade will be from eight inches to two feet below this, as the engineer may deem necessary. The widths of the excavations and embankments, when completed, will be from nineteen to twenty-two feet, measured at a level twenty inches below the base of rail, from the centre of the present track; unless a greater width is necessary for side tracks, change of alignment or other cause, in which case the widths shall be such as the engineer may decide.

(6) The side slopes shall be generally one and one-half to one in earth excavations and embankments, and one-fourth to one in rock excavations, unless otherwise directed by the engineer.

(7) Where there is any tendency in the slopes of cuts to slide, there shall be a berm-ditch of not less than two feet in depth and one and one-half feet wide at the bottom, and with slopes of one and one-half to one, or of greater dimensions if the engineer shall direct; and not less than ten feet between the edge of the ditch and the top of the slope of the cut, unless the engineer shall direct the omission or diminution of the same. There shall be a berm of five

feet left between the top edges of rock cuts and the foot of the slopes of the overlying earth.

The sloping and the trimming shall be done, as far as practicable, as the work progresses.

(8) No material shall be deposited in spoil-banks or removed from borrow-pits without the knowledge and consent of the engineer; and, if said spoil-banks are formed on top of any excavation, a distance of at least fifteen feet shall be left between the foot of slope of the spoil-bank and the top of the slope of the excavation.

Care shall be taken, in forming embankments, to exclude all roots, stumps, brush and other perishable material, and all frozen earth or snow and ice.

(9) *Solid rock* is to include all ledge and detached bowlders measuring over two cubic yards.

Loose rock shall include all rocks or bowlders measuring not less than one-half nor more than two cubic yards.

Earth shall include all material to be moved not classified above.

(10) This shall include excavations for the foundation of masonry. It shall be classed as "wet" when bailing of water is required; and all other will be classed as "dry." Foundation excavation will include only such excavation as is made below the natural surface of the ground, and will not include any excavation through embankments for masonry or bridges.

(11) Wherever it may be necessary to remove any part of the present masonry, it shall be carefully stepped back so as to insure a sufficient bond between the new and the old work.

Whenever by removing any part of the masonry, the safety of the present track would be endangered, a sufficient notice of at least sixty (60) hours shall be sent to the chief engineer, who will see that proper arrangements are made to permit of its removal safely; but none shall then be removed until permission is given by the engineer in charge.

Whenever it may be deemed necessary, the engineer shall have the right to require the contractor to point up the face and grout solid the backing of masonry beneath the present track; and this work shall be considered as embraced within and forming a part of this contract, and shall be paid for as hereinafter provided for under the heading of "Grouting and Pointing."

. . . . . .

The bed of both box and arch culvert openings shall be covered with a pavement, at least twelve inches thick, of stones not less than six inches thick, set edgewise, and laid dry with the large ends down and inclined slightly with the stream, so that the top of the pavement shall conform in slope and level with the natural bed of the stream.

In case the bottom is at all uncertain, this pavement shall be laid in hydraulic cement mortar, or a timber foundation may be substituted, as may seem best in the judgment of the engineer. The edges of all pavements at the ends of culvert shall be finished off with large and heavy stone, laid with close joints, and firmly bedded in the ground, so that their tops shall conform with the grade of the remainder of the pavement. Whenever it may be deemed necessary by the engineer, there shall be built across the ends of culverts a wall laid

in cement mortar, and carried three feet below the bed of the stream, two feet in thickness.

. . . . . .

(20) The contractor is to exercise extraordinary care to keep the company's tracks free from obstruction during the progress of the work, and no blasts shall be fired within less than half an hour before the time when a train may be due; and in no case shall a blast be fired until signal-men with torpedoes (and with red flags if in the daytime, and red lanterns if after sunset and before sunrise) have been stationed at a point at least *nine hundred* yards, or twenty-one standing telegraph poles, from the rock to be blasted; and, if such point be on a curve, then the signal-man shall go to the next tangent.

Every precaution is to be taken by the contractor to prevent delay or damage to trains; and he is to observe, and also see that his men properly observe, the rules of the railroad which are now in force, or which may be issued as the work progresses.

He will be held strictly responsible for any damage which may arise through the neglect of himself or his men of the observance of such rules, or want of proper care.

No derricks or other appliances shall be placed within seven feet of the outside of the nearest rail of the present track, where the track is on a level; and, where the rail is elevated on curves, the distance shall be made equivalent to this at twelve feet above the rail.

All loose material must be kept cleared back, and must be nowhere nearer than seven feet from the nearest rail, nor above the level of the top of the ties.

Good reliable men, such as are satisfactory to the engineer, shall be placed in charge as foremen.

(21) No free transportation will be allowed for either men or material.

(22) Whenever the operations connected with the work interfere with public or private roads, safe and convenient passing places must be kept open for public use; and the contractor is to be responsible for all damage to property or persons caused through the acts or neglect of himself or his employees, and is to make the company whole for any liability it may be exposed to thereby.

(23) All accessory material, such as timber for coffer-dams, sluice-ways, etc.; all rails, spikes, etc.; and all tools used or destroyed in the construction, will be at the cost and risk of the contractor, who shall be at the expense of replacing any material destroyed or lost through flood, fire, theft, or otherwise, until the entire work is finally accepted.

He shall be charged upon the company's books with the value of all material, such as iron, ties, etc., which may be loaned to him, and shall be credited, upon their return, with their estimated value.

(24) The engineer shall have a right to forbid any construction, or the use of any material, which, in his judgment, may seem to threaten serious damage to life or property; and the contractor shall have no claim for damages for any act of the engineer under the power here given him.

(25) No claims for extra work shall be made by the contractor, unless it shall have been done in obedience to the written orders of the company's engineer, or his authorized agent.

All such claims, in any month, must be made in writing before the payment of the next succeeding monthly estimate; and, failing to make such claim within the time specified, all right of the contractor to compensation for such extra work shall be forfeited.

(26) After the work is completed, the company's land shall be cleared of all rubbish and refuse material, by the contractor, without charge.

IV. The Contractor further covenants to give a bond in the form hereto annexed, with sufficient sureties, in the sum of dollars, conditioned for the payment of all labor performed under this contract, and for the faithful and prompt performance of all the covenants coutained in this indenture, on his part to be performed.

V. And the Company hereby covenants and agrees to pay to the contractor, upon certificate as hereinafter provided, for the work herein specified, as follows: —

For solid rock excavation, per cubic yard, the sum of . .	$1.40
" Loose rock excavation, per cubic yard, the sum of . .	0.60
" Earth excavation, per cubic yard, the sum of	0.28
" Material hauled more than one thousand feet, per cubic yard, per one hundred feet, the sum of	0.01
" Wet excavations for foundations, per cubic yard, the sum of	0.75
" Dry excavations for foundations, per cubic yard, the sum of	0.40
" Excavation from present embankments for removal of old masonry, per cubic yard, the sum of	0.35
" First-class masonry laid with new stone, per cubic yard, the sum of	13.00
" First-class masonry laid with old stone, per cubic yard, the sum of	3.00
" Second-class masonry laid with new stone, per cubic yard, the sum of	10.00
" Second-class masonry laid with old stone, per cubic yard, the sum of	3.00

On or about the last day of each month estimates shall be made, by the engineer, of the value of the work done up to date, and upon the presentation, not before the fifteenth day of the succeeding month, of his written certificate specifying the amount and value of the work done to his satisfaction, the company will pay ninety (90) per cent of the amount named in said certificate. And when the entire work embraced in this contract is completed agreeably to the specifications, and in accordance with the directions, and to the satisfaction and acceptance of the engineer, a final estimate shall be made by him of the amount and value of said work according to the terms of this agreement; and upon the presentation of his written certificate specifying the amount and value of the work done to his satisfaction, and that the entire work covered by this contract has been done to his satisfaction, and specify-

ing the date when the last persons performing labor or services or furnishing material, under this contract, ceased to do so, the company will pay the balance appearing to be due within sixty (60) days after said date upon the contractor's giving it a release under seal from all claims or demands whatsoever growing in any manner out of this agreement, and agreeing to indemnify it, against any and all liens that may subsequently be put on its premises by his creditors.

VI. And the contractor further covenants, that the work embraced in this contract shall be commenced within five (5) days from this date, and in a sufficient number of places, and prosecuted with such force as the engineer shall deem adequate to insure its completion within the time specified. If at any time the contractor shall refuse or neglect to prosecute the work with a force sufficient, in the opinion of said engineer, for its completion within the time specified in this agreement, then, and in that case, said engineer may, upon giving five (5) days' written notice of his intention so to do, either personally or by his authorized agent, do all acts at the expense of the contractor which he (the engineer) deems necessary to insure the completion of the work by the time specified. In case the engineer shall give such notice, he, or his agent as aforesaid, shall have authority, at the expense of the contractor, to buy materials, employ workmen, laborers, overseers, hire machinery, and do all such other acts as may in his opinion be necessary to insure completion as aforesaid, paying such prices, wages, and rent as he may deem necessary or expedient. All work done under such notice shall be put to the credit of the contractor as work done by him under this contract, and all sums paid by said engineer under such notice shall be charged to said contractor as money paid to him under this contract. Or in case of failure to prosecute the work with an adequate force, in case of non-compliance with the directions of the engineer in regard to the manner of constructing it, or of any other omission or neglect of the requirements of this agreement and these specifications on the part of the contractor, said engineer may, if he thinks it just so to do, declare this contract, or any portion or section embraced in it, forfeited; which declaration and forfeiture shall exonerate the company from any and all obligations and liabilities arising under the contract, the same as if this agreement had never been made, and the reserved percentage of ten (10) per cent upon any work done by the party of the first part may be retained forever by said New York and New England Railroad Company.

The above provisions are cumulative; and nothing herein contained shall prevent said company from recovering from the contractor all damages it may suffer for breach of this contract, or any provision thereof.

VII. And the contractor further covenants to take and provide all sufficient precautions and safeguards against the occurrence or happening of any accidents, injuries, damages, or hurt to any person or property during the progress of the work herein contracted for, and to be responsible for, to indemnify and save harmless the company and said engineer, from the payment of all sums of money, by reason of all or any such accidents, injuries, damages, or hurt that may happen or occur about the said work.

VIII. In case of any disagreement or difference of opinion between the

parties hereto upon any matter concerning the quality or character of the work performed hereunder, or the force to be employed, or upon any other matter arising under this contract, whether of like kind as the matters stated or not, the matter shall be referred to said engineer as arbitrator, and the obtaining of his award shall be a condition precedent to the right of either party to maintain any action hereunder.

IX. The word "engineer" as used above shall in all cases be construed to mean the person who is at the time the chief engineer of the company.

X. All covenants and agreements hereinbefore set forth shall be binding on the contractor and his executors and administrators.

In witness whereof, said party of the first part has hereunto set his hand and seal, and said party of the second part has hereunto affixed its corporate seal, and caused these presents to be signed by its General Manager, thereto duly authorized, this sixteenth day of April, A. D. 1883.

James Savage. [SEAL.]

The New York & New England Railroad Co.,

By S. M. Felton, Jr. Gen'l Manager. [SEAL.]

2. ANOTHER FORM OF CLAUSE AS TO INJURIES DONE BY CONTRACTOR TO THIRD PARTIES.

7. If any damage shall be done to any land or property, or to the owner or owners, occupant or occupants thereof by the Contractor or by any person or persons in the employ of the Contractor, or by any sub-contractor, or by any person or persons in the employ of any sub-contractor, or through neglect or failure of the Contractor or Contractor's employees, or any sub-contractor or sub-contractor's employees to protect properly adjacent property during the prosecution of the work, the assistant engineer in charge of the work may estimate the amount of such damage and the Railroad Company shall have the right to pay such estimated damage to the person or persons aggrieved, and the amount so paid shall be deducted from any moneys then or thereafter due the Contractor for the work.

3. FORM OF PROVISION FOR ACQUIRING NECESSARY LAND.

20. All roads and ways to and from the work and all grounds not within the limits of the land of the Railroad Company needed for the erection of temporary structures or for other purposes incident to the performance of the work shall be secured and paid for by the Contractor without cost to the Railroad Company.

21. The Railroad Company will acquire the necessary lands upon which the work under this contract is to be done, but the Railroad Company shall not be responsible to the Contractor for any delays occasioned by negotiation with land owners or by the process of condemnation. In case the Contractor shall be delayed in the performance of the work by such delays, or on account of the Railroad Company being unable to secure such necessary lands, or from any unavoidable cause, the Contractor shall, on condition that written application

to the assistant engineer in charge of the work is made at the time such default or such cause becomes known to the Contractor, or to the representative of the Contractor in charge of the work, be granted such extension of time as the Engineer shall deem equitable and just.

4. Form of General Damage — Indemnity Clause.

40. The Contractor hereby assumes all risk of loss or damage, however caused, and whether or not caused by the negligence of agents or employees of the Railroad Company, to the property of the Contractor and to the property of all sub-contractors employed in and about the work, and to the property of the agents and employees of the Contractor, and of the agents and employees of sub-contractors; also all risk of death, loss, injury or damage, however caused, and whether or not caused by the negligence of agents or employees of the Railroad Company, to the Contractor or to sub-contractors, or to the agents and employees of the Contractor, or to the agents and employees of sub-contractors, if and while said property or said persons are carried free of charge on or over any of the lines of railroad of the Railroad Company or any other lines of railroad on account of this contract, and also if and while such persons or property are connected with the prosecution of the work, although at the time of injury they may not be actually engaged in the work; and the Contractor agrees to hold the Railroad Company free and harmless from all liability, loss, damage, costs and expenses arising from, or growing out of, any accident or casualty, however caused, and whether or not caused by the negligence of agents or employees of the Railroad Company, to any persons or their property, either while such persons, or their property, are being carried free of charge under the provisions of, or on account of, this contract, or while such persons are employed or engaged in constructing the work, or while such persons or property are connected with the prosecution of the work, although at the time of injury they may not be actually engaged in work, and also free and harmless from all liability, loss, damage, costs and expenses growing out of, or arising from, damage to property, or death or injury to persons which shall be caused wholly, or in part, by the negligence of the Contractor, or by the negligence of agents or employees of the Contractor, or by the negligence of sub-contractors, or by the negligence of agents or employees of sub-contractors, or by the neglect or failure of the Contractor or of sub-contractors, or of agents or employees of the Contractor, or of agents or employees of sub-contractors, to observe or perform any of the promises, requirements or terms of this contract; and if suit shall be brought against the Railroad Company to recover for any liability, death, loss, damage or injury as aforesaid, the Contractor agrees to defend such suit without cost to the Railroad Company, and to pay any judgment that may be recovered therein, and to save the Railroad Company free and harmless from any loss, costs, attorney's fees, damage or expense thereby. The promises in this article contained shall be for the benefit of all railroad companies owning or operating any lines of railroad over which free transportation is provided for by, or is allowed on account of, this contract, and the lessors, licensees, successors and assigns of such railroad companies, and any

railroad company incurring liability, loss, damage, or injury, for or by reason or in the course of such free transportation shall be likewise and to the same extent, by the Contractor held free and harmless and defended, and shall be entitled to enforce the provisions of this article in such railroad company's own name and for its own benefit, as if a party to this contract, or in any lawful manner.

5. Spur Track Contract and Conveyance.[1]

The Sabine Railroad Company, a corporation incorporated by the State of Texas, hereinafter called the company, and John Carter of the County of Polk and State of Texas, agree as follows; each so agreeing in consideration of the agreement of the other:

Article I.

The company will, at its own expense, construct within sixty days from date a spur track and switch at a point between stations 20 and 20 + 19 on the centre line of its railroad, in Polk county, East from Trinity station, and about twenty miles East from Groveton station, connecting its railroad with a certain sawmill owned by said Carter, about seventy (70) feet distant from the main track of said company, in order to facilitate his shipping lumber and other freight from said mill over said railroad; which switch shall be called Barnum. The line and position of said spur track and switch is shown on a blue print hereto annexed, marked "A. Plan of Switch at Barnum, July 10, 1910."

Article II.

Said Carter hereby conveys to said company and its successors and assigns a perpetual right to lay, maintain and use said spur track upon his land to said mill, as shown on said plan: and further agrees for himself, his heirs, executors, administrators and assigns, and those who may succeed him in the ownership of said mill and mill site forever, to release, and does hereby release, said company from any and all damages and claims arising from the injuring or killing of any stock or cattle belonging to him, or his employees, or contractors with him, or to the owner of said mill and mill site for the time being, at any time hereafter, which stock or cattle may be injured or killed by the locomotives or cars of said company running on said spur track, or approaching or leaving the same in transit to or from said mill or mill site; and from all damages resulting from the injury or destruction of any property whatever belonging to him or his employees, or contractors with him, or his successors in ownership of said mill and mill site, that may be injured or destroyed by fire or sparks from any locomotive of said company at or about said Barnum switch; and if said company shall be forced to pay any damage done by it to

[1] See Missouri, Kansas & Texas Railway Co. *v.* Carter, 95 Tex. 461; 68 Southwestern, 159. This form of paper carries a title and should be recorded on the land records.

any stock, cattle, or property, that may be caused as aforesaid to any of his employees or contractors with him, then he will re-imburse it for any moneys or judgments for money so by it paid, including all costs of court forming part of such judgments; and said Carter hereby charges the claim for re-imbursement which said company would so have upon him, on said mill and its fixtures, and the entire lot of land on which it is situated; and all the stipulations in this Article shall operate as a covenant running with said land and mill, on the part of his assigns and each and all of its owners, lessees and tenants, from time to time, forever.

Article III.

The company may take up and remove said spur track, with all its rails, sleepers, switch, and fixtures, should it ever deem it proper, after giving sixty days previous written notice to the occupant of said mill for the time being; and upon the removal thereof, all estate, easements and interest in the land on which the same was situated, derived by said company under this contract and conveyance, shall cease and be terminated without any entry or other act on the part of the owner of said land.

Signed and sealed in duplicate, at Jefferson in said county, this first day of July, 1910.

[To be executed as a deed of land.]

6. Conditional Sale of Rolling Stock by the Manufacturer to the Railroad Company.

Agreement

Made August 4, 1910, at Cincinnati, Ohio, between the Central Car Manufacturing Company, hereinafter called the Vendor, and the Ohio Railway Company, hereinafter called the Vendee.

The Vendor hereby agrees to sell to the Vendee, and the Vendee hereby agrees to purchase from the Vendor, the following railroad equipment and rolling stock:

1,000–34 ft. 60,000 lbs. capacity Box Cars,
800–36 ft. 80,000 lbs. " Coal Cars,
200–36 ft. 60,000 lbs. " Combination Coal and Stock Cars,

to be built by said Vendor in a good, workmanlike manner, and in accordance with plans and specifications which have been agreed upon, of which copies are hereto attached and made a part hereof, and subject to inspection and approval by said Vendee or its authorized agent, at the works of said Vendor in the City of Cleveland, to wit:

1,000 Box cars shall be lettered and numbered to , inclusive;
800 Coal cars shall be lettered and numbered to , inclusive;
200 Combination Coal and Stock cars shall be lettered and numbered to , inclusive, all as required by the Vendee, and then to be inserted herein by filling above blanks.

Said Box, Coal and Combination cars are to be delivered to said Vendee

at the works of said Vendor at Cleveland on or before the first day of September, 1911, subject to delays on account of accidents, labor strikes, fires or any other cause beyond the control of the said Vendor, and for which said Vendor shall not in any manner or to any extent be liable; said sale and purchase to be in respect to each of said cars for the period of Eighty-Four (84) months from August 1, 1911, subject, however, to provisions and conditions hereinafter contained.

1. Said Vendee shall keep an inspector at said works of said Vendor during the construction of said cars, to inspect the same, who shall have access to the works of the Vendor at all reasonable times, and when said cars are completed, said inspector shall, if he accepts the same, sign a certificate that the same have been so inspected and accepted by him, and such certificate shall be final and conclusive evidence that said cars are built in accordance with this contract, and likewise, if he declines to accept any car, his certificate of rejection shall be final and conclusive.

2. The total agreed purchase price of said cars is to be paid by said Vendee as follows, to wit:

A cash payment of Sixty-Nine Thousand Six Hundred and Nineteen and $\frac{76}{100}$ Dollars in gold coin of the United States of America, of or equivalent to the present standard of weight and fineness, payable on delivery of cars, and in addition to said cash payment, and after delivery of all the cars said Vendee agrees to execute and deliver its negotiable promissory notes to said Vendor, payable to the order of said Vendor, Forty-Two (42) of said notes being each for the sum of Twenty-Nine Thousand One Hundred Fourteen and $\frac{58}{100}$ Dollars ($29,114.58), payable during the months of September, October, November, December, January and February of each year and Forty-Two of said notes being each for the sum of Seven Thousand Seven Hundred Twenty-Five and $\frac{94}{100}$ Dollars ($7,725.94), and payable during the months of March, April, May, June, July and August of each year, and payable in gold coin of the United States of America, of or equivalent to the present standard of weight and fineness. All said notes shall bear date of August 1, 1911, and be so drawn that one shall be payable upon the first day of each consecutive month thereafter, for the whole of the purchase price as herein stipulated and provided, in excess of said cash payment; the total sum of said notes being One Million Five Hundred Forty-Seven Thousand Three Hundred One and $\frac{84}{100}$ Dollars ($1,547,301.84).

Each of said notes shall be drawn in form like the following, which is the form of that first to mature:

$ CINCINNATI, August 1, 1911.

On the 1st day of September, 1911, for value received, the Ohio Railway Company promises to pay to the order of the Central Car Manufacturing Company Dollars, at the with interest from maturity at the rate of five (5) per cent per annum.

This note is one of a series of even date and like tenor, eighty-four in number, aggregating $1,547,301.84, maturing the first thereof on September 1, 1911, and one thereof on the first day of each successive month until August 1, 1918, and all equally secured by the title to 1,000 Box cars,

numbered to , inclusive, 800 Coal cars, numbered to , inclusive, 200 Combination Coal and Stock cars, numbered to , inclusive, all lettered , constructed by the Central Car Manufacturing Company, given in pursuance of the terms of a certain agreement between said Ohio Railway Company and said car manufacturing company, bearing date of August 4, 1910, by the terms of which the title to the cars remains vested in the said Car Manufacturing Company, or its assigns, holders of said notes, until full payment thereof.

OHIO RAILWAY COMPANY
By

Treasurer.

Countersigned:

General Auditor.

No. Due

A schedule of said Eighty-Four notes showing their respective numbers and amounts and dates of maturity, is hereto attached as an exhibit and made part hereof.

If all the cars are not delivered by September 1, 1911 or, if later than that, within a time which will make the average delivery thereof as of August 1, 1911, then before said notes are delivered, there shall be credited on the note or notes first maturing, an amount equal to the interest included in all of said notes at the rate of five per cent per annum from August 1, 1911, to the average date of the delivery of all said cars.

3. The possession of the rolling stock and equipment aforesaid, or any part thereof, by the Vendee or its assigns, under this agreement, shall not be construed, claimed or held to be evidence of ownership in said Vendee, its successors or assigns; but, on the contrary, it is hereby expressly stipulated and agreed that the title to and ownership of said property shall remain in the Vendor, its successors or assigns, until all of said notes shall have been fully paid, and all of the obligations herein imposed upon said Vendee have been fully discharged.

4. In case default is made in the payment, as and when due, of any one or more of said notes, or in case of default by said Vendee, its successors or assigns, in the discharge of any obligations herein upon said Vendee imposed, the right of the Vendee to the possession or control of any of said cars, and to receive or collect any mileage earnings due or to become due thereon, shall at once cease and determine, and said Vendee shall, at its own cost and expense, upon the demand of said Vendor, deliver each and every of said cars to said Vendor at such place or places as said Vendor may direct; and in such event said Vendor, its successors or assigns, shall have the right at its or their option, by its or their agents, employees or attorneys, to take immediate and exclusive possession of and remove any or all of said cars wherever same may be found, and may for that purpose enter upon the road or premises of said Vendee, its successors or assigns; said Vendee, for itself, its successors and assigns, hereby agreeing to furnish to the Vendor, its successors or assigns, all the facilities and assistance in the recovery of said cars which

said Vendor may require; and said Vendor shall have the right to sell said cars at public or private sale, with or without notice (as it may elect), in one or more lots, at such place or places and on such terms as it may deem advisable, and at any such sale such Vendor may (if it so elect) become a purchaser of said cars. And in case of such default as aforesaid, all mileage earnings of said cars, and each of them, which at the date of such default may be due, or which shall thereafter become due, shall thereupon be and become payable to the Vendor, and shall be applied to the payment of said notes then due and payable, or thereafter becoming due and payable, or to the payment of any other indebtedness due hereunder from said Vendee to said Vendor. Upon such default, said Vendee shall forthwith notify the parties from whom such mileage earnings are due or to become due, to pay the same to said Vendor, but such notice shall not be necessary in order to enable the Vendor to collect or receive such earnings in case of such default. And to facilitate the Vendor, in the event of such default, in securing possession of said cars, and the payment to it of said mileage earnings, said Vendee hereby appoints irrevocably said Vendor its agent and attorney in fact, and hereby authorizes said Vendor as such agent and attorney in fact of said Vendee, and in the name of the Vendee, to give such instructions and directions, verbal and written, as in the judgment of the Vendor may be desirable and necessary to enable the Vendor to obtain possession of said cars, and the payment of such mileage earnings.

The remedies herein created for the benefit of the Vendor shall not be deemed exclusive, but shall be deemed cumulative and in addition to any and all other remedies existing at law or in equity, upon the part of said Vendor.

5. In the event of a sale made by said Vendor, as herebefore provided, by reason of the default of said Vendee, it is hereby expressly stipulated and agreed that it shall not be necessary to have present at such place or places where such sale or sales may be made, said cars or any one of said cars; and should said Vendor become the purchaser at any sale or sales, in lieu of paying in cash the purchase price bid, the Vendor may apply the amount of such bid or bids as a credit upon said notes, or any other indebtedness due from said Vendee to said Vendor under the terms of this agreement.

6. In the event of a sale made as herein provided, the proceeds thereof shall be applied as follows:

First. — To the payment of the costs and expenses of the recovery, transportation, custody and disposition of said cars, with all charges incident thereto.

Second. — To the payment of any balance that may be then due and owing upon said notes, or any of them, or other indebtedness from the Vendee to the Vendor arising hereunder; it being expressly agreed that in the event default is made in payment of any one of said notes or of any indebtedness from the Vendee to the Vendor arising hereunder, then and in such event, each of said notes shall thereupon become due and payable, whether due and payable on its face or not.

Third. — If the proceeds of such sale or sales shall be more than sufficient fully to pay each of said notes and interest thereon, and all other indebtedness

due hereunder from said Vendee to said Vendor, and all said costs and expenses, then the surplus shall be paid to said Vendee; but if there should be a deficit, then said Vendee shall pay such deficit, upon the demand of the Vendor.

7. Said cars shall be insured against fire by said Vendee for the benefit of the Vendor to the extent of the Vendor's interest in said cars, and all insurance premiums shall be paid by said Vendee; and said Vendee shall, at its own expense, replace any and all cars destroyed by fire or otherwise, and shall receive from the Vendor the amount, if any, collected from the insurance company on such loss, provided at the time of such loss said Vendee is not in default of the discharge of any obligation herein upon it imposed; and any sum or sums payable or arising out of the destruction or injury to any of said cars shall, at the option of said Vendor, be payable to it.

8. Said Vendee shall keep each of said cars in good order and repair, subject to the inspection and approval of said Vendor; and said Vendor shall have the right to inspect said cars once in every year during the continuance of this agreement, or oftener if it desires so to do, by any person or agent to be appointed by it after notice to said Vendee; and said Vendee shall provide suitable facilities for such inspection, and shall furnish free transportation over its lines to such persons or agents making such inspection.

9. Said Vendee shall pay all taxes, licenses, and charges of any and every nature and kind whatsoever, that may at any time be levied, rated, assessed, charged, or be or become payable on said cars. And any failure so to repair said cars, or to pay said taxes, licenses, rates or charges, or said insurance premiums, or to replace cars destroyed, or repair cars injured, or perform any obligation on the Vendee herein imposed, shall be deemed and held to be a default upon the part of said Vendee, which default shall entitle the Vendor to all mileage earnings due or to become due upon each and every of said cars, and to take immediate possession of said cars, and to sell the same in the manner hereinbefore provided for.

10. Iron ownership-plates shall be securely fastened to each side of said cars by said Vendor, with the name of the Vendor thereon, followed by the word "Owner" so as to conform with the requirements of law, and for the purpose of making the ownership publicly known: said plates shall be maintained on said cars by the Vendee, at its own expense, until all the conditions of this contract have been fulfilled. Any further acts shall also be done by the Vendee, which may hereafter be required by law, to protect at its expense, the Vendor's title.

In case such plates shall be removed or destroyed the Vendee shall immediately replace the same; and said Vendee shall do such other and further acts and things as the Vendor shall deem necessary for the full and complete protection of its rights as owner of said cars: said Vendee shall not place or suffer to be placed on any of said cars, any marks, signs or words, or do or suffer to be done any act which shall declare the title to or ownership of said cars, in any person, firm or corporation other than said Vendor.

11. Said Vendee shall assist said Vendor in the proper filing and recording of this agreement wherever, in the opinion of the Vendor, it may be

necessary to record or file the same for the purpose of further securing said Vendor in the ownership of said cars, until all payments herein provided to be made have been made.

12. No change or modification of this agreement shall be made which shall in any respect, or to any extent, diminish the total sum due hereunder as purchase price of said cars, or otherwise, and no modification or change shall be made which may in any respect, or to any extent, change or affect the title to or ownership of the railroad equipment and rolling stock herein referred to, until said notes and all sums due by the Vendee hereunder as purchase price of said cars, or otherwise, and also the total sum due as purchase price, or otherwise, under any agreement changing or modifying this agreement, shall have been fully paid.

13. In the event of the transfer or assignment by the Vendor of this agreement, or of any of said notes, and default thereafter in the payment of any notes so transferred or assigned, said Vendor may, if it so elect, take up, acquire or pay said notes, or any part thereof, but in such case notes so taken up, acquired or paid shall not be considered as paid, and the holder thereof shall have, as security for the payment of said notes, the full protection and benefit of this agreement.

14. Said Vendee hereby covenants and agrees for itself, its successors and assigns, to pay promptly as and when due, each and every of said notes, and faithfully to discharge and perform each and every agreement and undertaking on behalf of said Vendee herein contained.

15. If and when said Vendee shall have faithfully performed each and every, all and singular, the stipulations, terms and conditions of this agreement upon it imposed, and paid said notes as and when they mature, in manner and form as herein provided, and without default, then and thereupon the Vendor shall, upon payment to it of the sum of One Dollar, convey said rolling stock and equipment to said Vendee by proper bill of sale (at the cost and expense of said Vendee) and file such declarations or certificates showing the satisfaction of this contract, as are or may be required by law; and upon the payment of all said notes, said plates indicating ownership in the Vendor shall be forthwith removed.

16. Said Vendor shall have full power and authority to sell, transfer, pledge or assign the whole or any portion of said notes; and these presents shall continue and remain as security of any notes so sold, transferred, pledged or assigned. And said Vendor may assign, transfer or pledge this agreement, and all rights, privileges, powers and remedies hereunder, at any time and from time to time, and on such terms and conditions as it may deem proper; but in the event of the sale or transfer, assignment or pledge of said notes, or either of them, or of this agreement, the rights, powers, privileges and remedies herein given to said Vendor, in case of default by said Vendee in the performance of any of the covenants or stipulations hereof, shall also still remain in the said Vendor, to be exercised (if deemed best by said Vendor) as the trustee of an express trust (but solely in its own name) for the use and benefit of all parties in interest.

17. In the event said Vendee shall at any time sell, transfer or pledge said

railroad equipment and rolling stock, or any part thereof, this agreement shall inure to the benefit of such purchaser, assignee or pledgee, with all the force and effect as though the same had been originally made by and between such purchaser, assignee or pledgee and said Vendor.

18. This agreement shall be binding upon the parties hereto and upon their respective successors and assigns; and wherever the terms "Vendor" and "Vendee" are in this agreement used they shall be construed to cover the respective successors and assigns of said Vendor and said Vendee.

Executed in triplicate [1] under the corporate seals of the parties, on the day and year first above mentioned.

[1] A third copy may be required for record in some States.

IV.

CONVEYANCES.

A. — Deeds.
B. — Leases.
C. — Mortgages.
D. — Licenses.

A. — DEEDS.

1. Agreement to give deed.
2. Ordinary deed to railroad company, passing a fee simple.
3. Form when only a right of way is given.
4. Deed by mortgage trustees, after a foreclosure, to reorganized company.
5. Release deed by assignees in bankruptcy under a decree of sale after a foreclosure.

1. Agreement to give deed.

Agreement for Deed.

In consideration of dollar paid by the Hartford and Harlem Railroad Company, receipt whereof is hereby acknowledged, the undersigned agree to sell and convey to said company, upon its paying to h , within months from date, the further sum of dollars, the following described land in the town of , bounded

Said conveyance is to be by deed, with the usual covenants, to be prepared by said company at its own expense, and to convey a clear title and to include a release of all damages to adjoining or neighboring real estate of the undersigned, accruing, accrued, or that may at any time accrue from the construction and operation of the railroad of said company. And in case said company should not make such further payment, and tender said deed within said period, the payment made this day, as above recited, is to be forfeited, and said company shall not be entitled to any return of the same or of any part thereof.

Dated this day of 1910. [L. s.]

2. Ordinary Deed to Railroad Company, passing a Fee Simple.

To all People to whom these Presents shall come, Greeting:

Know ye, that of the town of and State of Connecticut for the consideration of dollars, received to full satisfaction of the Housatonic Railroad Com-

pany, a corporation chartered by the State of Connecticut, do give, grant, bargain, sell and confirm unto the Housatonic Railroad Company, and its successors and assigns forever, a certain parcel of land situated in the town of in said State, and bounded and described as follows:

being the parcel known as No. on the land maps of the branch of said company's railroad; hereby releasing and discharging all claims for damages to said premises and to any adjoining and neighboring estate of the undersigned, accruing, accrued, or that may at any time accrue from the construction and operation of the railroad of said company; excepting however and not discharging any such claims which may arise from any negligence or wilful default of said company, or its successors or assigns, in constructing or operating said railroad:

To Have and to Hold the above granted and bargained premises, with the appurtenances thereof, unto the said grantee, and its successors and assigns forever, to its and their proper use and behoof.

And also, the said grantor do for sel heirs, executors and administrators, covenant with the said grantee, its successors and assigns, that at, and until the ensealing of these presents, well seized of the premises as a good indefeasible estate in fee simple: and have good right to bargain and sell the same in manner and form as is above written; and that the same is free from all encumbrances whatsoever.

And furthermore, the said grantor do by these presents bind sel and heirs forever, to warrant and defend the above granted and bargained premises to the said grantee, its successors and assigns against all claims and demands whatsoever.

In Witness Whereof, have hereunto set hand and seal this day of A. D. 19

Signed, sealed and delivered, }
in presence of }

3. Form when only a Right of Way is given.

Insert in Form No. 2 in the granting clause, just before the description of the land conveyed, "a right of way for railroad purposes over and upon," and add to the *habendum* clause, "for use only for railroad purposes."

4. Deed by Mortgage Trustees, after a Foreclosure, to Reorganized Company.

Know all men by these Presents: That whereas, a certain mortgage deed was made, bearing date the nineteenth day of March, A. D. eighteen hundred and sixty-six, by the Boston, Hartford and Erie Railroad Company, to Robert H. Berdell, Dudley S. Gregory, and John C. Bancroft Davis, Trustees, of the railways, franchises, and property of the Boston, Hartford and Erie Railroad, together with such railways, franchises and property as might be thereafter

acquired by said company as specified in said mortgage; as will more fully appear by reference to said mortgage, which is recorded among other places, in the offices of the Secretaries of State of the States of Connecticut and Rhode Island, in the Clerk's office of the County of Dutchess in the State of New York, in Book 115 of Mortgages, pages 82 to 94 inclusive, and in the Registry of Deeds for the County of Suffolk in the Commonwealth of Massachusetts, Lib. 884, Folio 273;

And whereas, on the nineteenth day of July, 1871, William T. Hart, George Talbot Olyphant, and Charles P. Clark, became, and were by due appointment, succession and confirmation, the Trustees under said mortgage, and so remained until the twenty-fourth day of April, 1873, when the said Olyphant died, and the said Hart and Clark have ever since said date remained as the sole Trustees under said mortgage, and now are the sole Trustees thereunder;

And whereas, said mortgage has been absolutely foreclosed according to the provisions contained in the same, and after said foreclosure, said Hart, Olyphant and Clark, being then the Trustees under said mortgage, did pursuant to three certain decrees hereinafter particularly specified, call a meeting of the holders of the mortgage bonds secured by said mortgage, by an advertisement published as required in said mortgage, which meeting was held in the city of Boston on the seventeenth day of April, A. D. 1873; and all the requirements of said mortgage were complied with in the holding of said meeting, and at the same, said bondholders did, in the manner provided for in said mortgage, choose from their number a Board of Directors, and organize themselves into a corporation under the corporate name of the New York and New England Railroad Company, and copies of the proceedings of said bondholders in said organization were filed in the offices of the Secretaries of State named in said mortgage, as required therein;

And whereas, said New York and New England Railroad Company has paid said Trustees for their services, disbursements and advances, and indemnified them from and against all liabilities, as required by said mortgage; and it has thereupon become the duty of said Trustees to make this conveyance;

And whereas said trustees, pursuant to the terms of said mortgage, have heretofore at sundry times, while in possession of said mortgaged railroads, property, and franchises, applied such portions of the rents, income and profits received by them therefrom as were in their judgment necessary, to such purchase of lands, property and estate for the increase and improvement of said roads, as the business thereof in their judgment required, and have taken deeds of conveyance of such land, property, and estate.

Now, therefore, we the said William T. Hart and Charles P. Clark, as we are the Trustees under said mortgage as aforesaid, in consideration of the premises and pursuant to the terms of said mortgage and our duty thereunder, and in accordance with the provisions of certain statutes enacted in the several States of Massachusetts, Rhode Island, Connecticut and New York, and with the decree of the Supreme Judicial Court of the Commonwealth of Massachusetts, in the cause pending in said court for the County of Suffolk wherein George Ellis and others are plaintiffs, and said Boston, Hartford and Erie Railroad Company is defendant, and with the decrees of the Superior

Court of the State of Connecticut, and the Supreme Court of the State of Rhode Island, in causes wherein George Ellis is plaintiff and said Boston, Hartford and Erie Railroad Company defendants, do hereby remise, release, and forever quitclaim unto the said New York and New England Railroad Company, all the said mortgaged railways, franchises, and property, and all additions thereto, including all lands, property and estate, so as aforesaid purchased by said Trustees; and all interests, legal or equitable, in and unto every and all bonds, notes, stocks, claims, liens and demands acquired by said Boston, Hartford and Erie Railroad Company for the better protection of its interest in the property in said mortgage deed described, so far as said Trustees have a right to assign and convey the same; and all interest which has come to said Trustees, and which they have a right to assign and convey, in and unto the railroad of the Norwich and Worcester Railroad Company and the franchises, property and lease thereof, but subject to the terms and conditions of said lease; — meaning and intending to convey, release and assign hereby, all lands, property, franchises and rights, legal or equitable, which have come to said Trustees by reason of the making of said mortgage deed, and of the foreclosure thereof, and of the possession taken and continued thereunder, or in any other manner acquired by them as said Trustees.

To have and to hold all and singular the same, to the said New York and New England Railroad Company, and its successors and assigns to its and their use and behoof forever; said corporation hereby as part of the consideration of this conveyance assuming as its own proper debts and liabilities the debts and liabilities incurred by said Trustees or either of them in good faith in the discharge of their said trust or in the management and operation of said railroads and trust property.

In witness whereof we the said William T. Hart and Charles P. Clark, Trustees, as aforesaid, have hereunto set our hands and seals this twenty-seventh day of July, A. D. 1875.

Signed, sealed and delivered in presence of
ROBERT R. BISHOP to both.
JAMES W. PERKINS to both.

(signed) WM. T. HART. (Seal.)
(signed) CHARLES P. CLARK. (Seal.)
} Trustees.

[Acknowledgments follow.]

5. RELEASE DEED BY ASSIGNEES IN BANKRUPTCY UNDER A DECREE OF SALE AFTER A FORECLOSURE.

Whereas, in and by a certain indenture of mortgage, bearing date the nineteenth day of March, A. D. 1866, by and between the Boston, Hartford and Erie Railroad Company, of the one part, and Robert H. Berdell, Dudley S. Gregory, and John C. Bancroft Davis, trustees, of the other part, which said indenture is recorded, among other places, in the offices of the Secretaries of State of the States of Connecticut and Rhode Island, in the Clerk's office of the county of Dutchess, in the State of New York, in Liber 115, of mortgages,

pages eighty-two to ninety-four inclusive, and in the Registry of Deeds for the county of Suffolk, in the Commonwealth of Massachusetts, in Lib. 884, folio 273, the said corporation did convey or purport to convey to said trustees, upon the trusts and to the uses and purposes therein declared, and in mortgage, to secure the payment of the bonds therein mentioned, all and singular the railways of said Boston, Hartford and Erie Railroad Company, commencing at the foot of Summer street, in Boston, in the State of Massachusetts, and running to Willimantic, in the State of Connecticut, through Thompson in said Connecticut, and commencing at Providence, in the State of Rhode Island, and running to said Willimantic, and also commencing on the northerly side of said city of Boston, and running through Woonsocket in said Rhode Island to said Willimantic, and thence through the State of Connecticut and a portion of the State of New York to the western terminus of the location of the railway of said company on the east bank of the Hudson River at Fishkill; also running from said Willimantic to the city of New Haven in Connecticut, also from a point in said railway in said Thompson to Southbridge in the State of Massachusetts, as said railways were then or should be located, constructed or improved under or by virtue of any powers then granted, or that might thereafter be granted, or obtained, to locate, construct, or use a railroad on any of said indicated lines, with all the lands that were included, or might be included in the location of said railway, or acquired for the uses of said company, within the terminal points aforesaid, but not including the lands at the termini at Boston and Fishkill which were outside of the location of said railroad; together with all their lands, tracks, lines, rails, bridges, ways, depots, stations, water-tanks, shops, buildings, piers, and wharves, erections, fences, walls, fixtures, privileges, franchises, rights, leases and charters; also all the like estate, roads, railroads, and structures and matters and things pertaining or belonging thereto, that might be thereafter acquired, or constructed, or belong to, or be controlled by said party of the first part; together with all the tolls, income, issues and profits to be had from the same, and all rights to receive and recover the same, and every thing necessary for the complete use of the road; also all the locomotives, engines, tenders, cars, carriages, tools, shops, fixtures and machinery, and all the coal, wood, and other fuel belonging or appertaining to said railroad, or that might at any time thereafter belong or appertain to the same, as it might be changed by use and new acquisitions; also all the estate, real, personal and mixed, of any of the foregoing descriptions, or of any other kind which might be thereafter acquired by said party of the first part, and used or intended to be used in the construction and operation of the said railroad;

[Recital of the facts leading up to and including the foreclosure of the mortgage, and the formation of the new bondholders' corporation to take over the property, and the deed to it from the trustees.]

And whereas said Boston, Hartford and Erie Railroad Company was duly adjudged and decreed a bankrupt, under the laws of the United States, commonly known as the Bankrupt Law, by a decree of the District Court of the United States in and for the district of Massachusetts, made on the second day of March A.D. 1871, and Charles S. Bradley, of the city of Providence,

in the State of Rhode Island, George M. Barnard of the city of Boston, in the Commonwealth of Massachusetts, and Charles R. Chapman of the city of Hartford, in the State of Connecticut, were duly chosen, appointed, became, and were, and now are, the assignees in bankruptcy of said corporation, and by force of said decree and of an assignment made by S. Lothrop Thorndike, Esq., register in bankruptcy, dated on the eighteenth day of March, 1871, all the right, title, interest, claim, and demand which the said Boston, Hartford and Erie Railroad Company had in and to said property, on the twenty-first day of October, 1870, became vested in said Bradley, Barnard and Chapman as the assignees and lawful successors of said company, subject, nevertheless, to said indenture, and the rights existing and arising thereunder;

And whereas, before the expiration of said eighteen months, said assignees brought a bill in equity against said trustees to redeem said property from said mortgage, and both before and since the expiration of said eighteen months, said assignees brought various suits against said trustees and others, for the purpose of ascertaining and liquidating the liens and claims of the parties thereto on and to the property in said indenture described or intended so to be;

And whereas, in and by said indenture of mortgage, said Boston, Hartford and Erie Railroad Company, for itself and its successors, did covenant and agree to and with said trustees, parties of the second part to said mortgage, their successors and assigns, among other things, that it would, at any time or times thereafter, upon the request of said parties of the second part, their successors or assigns, make, do and execute, and cause to be made, done and executed, all and every such further and reasonable acts, conveyances, assignments and assurances in the law for the better and more effectual vesting and confirming the premises by said mortgage granted, or intended so to be, in and to the said parties of the second part, their successors and assigns forever, as by the parties of the second part, their successors or assigns, or their counsel learned in the law, should be reasonably devised, advised, or required;

And whereas said trustees and also said New-York and New-England Railroad Company being thereto advised by their counsel learned in the law, have requested said Bradley, Barnard, and Chapman, assignees as aforesaid, to make this conveyance, and have also agreed to purchase of said assignees for the consideration hereinafter mentioned, all the right, title, and interest vested in the assignees in and to the property in said indenture described, and by it conveyed or intended so to be;

And whereas said New-York and New-England Railroad Company desires that all said suits shall be ended and settled, and that it may hold and enjoy the property in said indenture described, and thereby conveyed or intended so to be, free from all claim and demand on the part of said assignees, or any one else, claiming or to claim under them, the said assignees; and the assignees, considering the present value and condition of said property, and the amount of bonds purporting to be issued under said mortgage and intended to be secured thereby, and all other the premises; and thinking it proper and most for the interest of the creditors by them represented, to settle said controversies upon the terms herein contained, and to release to said cor-

poration all right of redemption in the premises on the terms herein contained, and to sell the property hereby granted, subject to such liens and claims, if any, as may lawfully exist thereon, upon the terms herein contained, and being herein and hereto especially directed and authorized by a decree of said District Court for the district of Massachusetts, dated July 21, 1875, and made upon a petition duly presented by said assignees, to which decree (a copy whereof is hereto appended), and to the mortgage, indenture, notice, and other documents herein mentioned, reference is hereby made:

Now, therefore, in consideration of the premises, and of the duty and obligation of said corporation and said assignees in the premises, and of the sum of one hundred thousand (100,000) dollars in lawful money, to said assignees in hand, well and truly paid by said New-York and New England Railroad Company, a corporation, the receipt whereof is hereby acknowledged, said Charles S. Bradley, George M. Barnard, and Charles R. Chapman, assignees as aforesaid, do hereby grant, convey and release unto said corporation, its successors and assigns, all the right, title, and interest, claim, and demand, which is vested in them as assignees as aforesaid, in and to any and all of the railroads, franchises, rights and property, and all other matters and things in said indenture described as aforesaid, and by it conveyed, or purporting or intended so to be; but without any warranty or covenant, express or implied, or any personal liability on their part whatever.

And whereas the property conveyed, or intended to be conveyed by said indenture, as aforesaid, was in large part acquired by said Boston, Hartford and Erie Railroad Company from the following corporations; namely, the Southern Midland Railroad Company, the Thompson and Willimantic Railroad Company, the New York and Boston Railroad Company, the Hartford, Providence and Fishkill Railroad Company, and the Boston, Hartford and Erie Extension Railroad Company, some or all of which corporations were formed out of prior existing corporations, or by the acquisition of property previously owned by other corporations, and at the date of such acquisitions by said Boston, Hartford and Erie Railroad Company the same were, severally, subject to divers claims, liens and demands; and whereas, in pursuance of its charter, and for the purpose of better protecting its property against the claims of third persons, and for the other purposes contemplated by its charter, said Boston, Hartford and Erie Railroad Company acquired the title to, or some interests legal or equitable in or to, large portions of such liens, claims, and demands, including the following; viz.:

Bonds to the amount of $772,000 and interest issued by the Boston and New York Central Railroad Company;

Bonds to the amount of $410,750 and interest issued by the Norfolk County Railroad Company;

. . . . . .

All of which notes, bonds, and coupons were originally secured or intended so to be, by mortgages on the property of said corporations subsequently acquired by said Boston, Hartford and Erie Railroad Company as aforesaid.

And whereas said trustees and their successors, said New-York and New-England Railroad Company, claim that, under the provisions of said charter

and said mortgage indenture and by the operation thereof they are entitled to the benefit of such acquisitions, and the ownership thereof, for the better protection of their interest in the property in said indenture described; but said assignees have brought certain suits against the trustees and others to recover possession of said bonds and notes and the value thereof, and to enforce their rights thereunder, if they should be decreed to be the owners thereof:

Now, therefore, said assignees, for the considerations aforesaid, do hereby grant, assign, release and convey unto said New-York and New-England Railroad Company all the right, title, and interest, claim, and power which said assignees have in, to, and over the aforedescribed claims, liens and demands, and all other like claims, liens and demands, which said Boston, Hartford and Erie Railroad Company acquired in the manner and for the purposes aforesaid, to be held and enjoyed by said New-York and New-England Railroad Company as fully and beneficially, and to the same effect as said Boston, Hartford and Erie Railroad Company was authorized to hold the same.

. . . . . .

To have and to hold all the premises and rights by this deed granted, with all the rights and appurtenances thereto belonging, to said New-York and New-England Railroad Company its successors and assigns, to their own use and behoof, in fee simple, forever; *provided*, that this release and conveyance shall not affect or impair any right, title or interest (if any such there be) of any stockholder or creditor of the Hartford, Providence and Fishkill Railroad Company, or of any other party having any claim or right superior to the rights belonging to or vested in said assignees in bankruptcy.

And whereas the following suits have been brought and are now pending, in which questions as to the matters and things hereintofore set forth are raised, —

In the Circuit Court of the United States for the district of Massachusetts:

No. 161. Bill in equity, Charles S. Bradley, *et al.*, Assignees, plaintiffs, *vs.* William T. Hart, *et al.*, Trustees, defendants.

In the District Court of the United States for the district of Massachusetts, as numbered in 1875:

No. 234. Writ of entry, same *vs.* same.

In the Circuit Court of the United States for the district of Connecticut:

Bill in equity, Charles S. Bradley, *et al.*, assignees, *vs.* William T. Hart, *et al.*, trustees, and Henry S. Lippett, *et al.*, also defendants.

In the Circuit Court of the United States for the district of Rhode Island:

Bill in equity, Charles S. Bradley, *et al.*, assignees, *vs.* William T. Hart, *et al.*, trustees, and George M. Bartholomew, *et al.*, also defendants.

In the Superior Court for Hartford County in the State of Connecticut:

Bill in equity, William T. Hart, *et al.*, *vs.* George M. Bartholomew, *et al.*

In the Supreme Court of the State of Rhode Island:

Action at law, George M. Bartholomew, trustee, *vs.* Hartford, Providence and Fishkill Railroad Company.

Now it is agreed, as part of this settlement, that such disposition shall be

made of, and such entries made in, said suits, and in any other similar suits that may have been omitted in the foregoing list, as shall be proper to carry out the true intent of these presents, but without costs to either the assignees or the trustees as between each other and without expense to the assignees.

And whereas a bill in equity is now pending in the Circuit Court of the United States for the district of Massachusetts, wherein said assignees are plaintiffs, and said Hart and Clark and the Norwich and Worcester Railroad Company are defendants, and whereas certain other suits at law, and in equity, are pending by said assignees against said Hart and Clark, in which said assignees claim that the lease of said Norwich and Worcester Railroad and certain parcels of land outside the location of said Boston, Hartford and Erie Railroad are not included in or affected by said mortgage indenture, and ask for certain relief consequent thereon and for the rents and profits of the same while in the possession of said trustees:

Now it is hereby expressly declared and agreed that nothing herein contained shall be construed in any way to impair or affect said claim nor said right to relief, which claim and right the grantees hereunder in nowise admit, but entirely deny and dispute.

And whereas suits have been brought against said assignees by parties making claims as holders of stock, bonds, or other obligations of some of the corporations which have heretofore been absorbed into said Boston, Hartford and Erie Railroad Company, as aforesaid, now it is also agreed and understood that the grantees and their successors and assigns claiming hereunder shall assume the labor, expense, and responsibility of defending said suits, and shall save the assignees and the estate remaining in their hands harmless from the said suits, claims and demands, and all others of like character that now have been or may hereafter be made or brought.

In witness whereof, we, the said Charles S. Bradley, George M. Barnard, and Charles R. Chapman, assignees as aforesaid, have hereunto set our hands and seals this twenty-eighth day of July, in the year eighteen hundred and seventy-five.

[Acknowledgments, &c. follow.]

I, Elisha Bassett, Deputy Clerk of the District Court of the United States for the district of Massachusetts, do hereby certify that the following is a true copy of the decree of said court made on the twenty-first day of July, 1875.

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, ss. IN BANKRUPTCY.

IN RE BOSTON, HARTFORD AND ERIE R. R. COMPANY, A BANKRUPT.

The petition of George M. Barnard, Charles S. Bradley and Charles R. Chapman, assignees of said bankrupt, praying for leave to sell and convey certain property, and to settle and compound certain controversies, came on to be heard on Friday the twenty-fifth day of June, A. D. 1875, and afterwards, by adjournment, on Monday the twenty-eighth day of June, A. D. 1875, and on Wednesday the seventh day of July, A. D. 1875; and it appeared that due notice thereof had been given, as ordered by the court; and O. G. Waterman, Earl P. Mason, John A. Taft, trustee and administrator, Andrews and

others appeared and objected to the granting of the prayers of said petition, and thereupon the same was argued by counsel for the respective parties, and was heard and considered by the court.

And thereupon the court doth order, adjudge and decree as follows, to wit: said assignees are hereby authorized and directed forthwith to make, execute and deliver to the New-York and New-England Railroad Company a deed according to the form annexed to said petition as amended, releasing to said grantees the property therein described, and settling and adjusting the various controversies therein described in the manner and upon the terms therein set forth; and said assignees shall collect and receive from said grantees the sum of one hundred thousand dollars as the consideration-money therefor. By the court,

Attest:

ELISHA BASSETT, *Deputy Clerk.*

JULY 21, 1875.

I further certify that the foregoing deed is a true copy of the deed referred to in said decree as amended, except that the same did not bear date nor signatures, and did not contain the date of the aforesaid decree.

ELISHA BASSETT, *Deputy Clerk.*

B. — LEASES.

1. Lease for ninety-nine years.
2. Clause excepting record books, &c.
3. Insurance clause.
4. Clause for agreed valuation of equipment demised.
5. Provision for an inventory of demised premises and appraisal.
6. Provision for a joint control over expenditures on the road.
7. Covenant for free passes.
8. Provision for a novation of a prior lease to the lessor, by a new lease direct to the lessee.
9. Agreement conveying a right of user, less than leasehold, but resembling the latter.
10. Agreement for use of union passenger station.

1. LEASE FOR NINETY-NINE YEARS.

This Indenture, made this ninth day of July, A. D. 1889, between the New Haven and Derby Railroad Company, hereinafter called the Lessor, party of the first part, and the Housatonic Railroad Company, hereinafter called the Lessee, party of the second part, both corporations, incorporated under the laws of the State of Connecticut,

Witnesseth, That the said parties hereto, in consideration of the premises and of the several covenants and agreements hereinafter contained to be kept and performed for the benefit of each respectively, hereby mutually covenant, and agree to and with each other as follows:

First. — The Lessor hereby lets and demises unto the Lessee, its successors and assigns, the railroad of the Lessor, to wit:

All and singular the main line of railroad of said New Haven and Derby Railroad Company, extending from tide water, at New Haven, in New Haven County, in the State of Connecticut, through Orange, to Ansonia, in the town

of Derby, as said main line is or may hereafter be located and constructed; and also, all and singular the branch line of railroad of the lessor extending from a point on said main line, in said town of Derby through the borough of Shelton, to a point in the town of Huntington, in Fairfield County, in said State, where it connects with the railroad of the Lessee, as said branch line is or may hereafter be located and constructed; and also all lands, tenements and hereditaments, lands under water and riparian and location rights thereto appertaining, water rights, rights of way and easements, now held or that may be hereafter acquired by said lessor for the purposes of said main and branch railroad, or either of them, and for the purposes of depots, stations or terminals in connection therewith; and also, all leaseholds, leases, terms and parts of terms, rights under leases and under contracts, covenants, declarations of trust and agreements, and all rights of trackage and terminal rights, privileges and franchises and all licenses, permits or privileges of transit granted by any governmental or municipal authority, and all other rights, general and special, now held or that may be hereafter acquired by said New Haven and Derby Railroad Company for the purposes of said main and branch railroad and terminals, or any of them; and also all railways, ways, tracks, sidings, turnouts, bridges, viaducts, culverts and fences, wharves, docks and piers, depots, station houses, freight-houses, warehouses, round-houses, car-houses, store-houses, turn-tables, water-tanks, machine shops and repair shops and other buildings, structures, erections, fixtures and improvements of every kind, and all locomotives, engines, cars and other rolling-stock and railway equipment, and all papers, documents, maps, surveys, deeds and conveyances, showing the condition of the Lessor's title to the real estate hereby demised; and all other property, real or personal, now held or that may hereafter be acquired by said Lessor for or in connection with the construction, maintenance, operation, reparation or replacement of said railroad and branch, or of said terminals, or other properties, or any of them, or as necessary or convenient for the uses or privileges thereof; and also all rights, powers, privileges, and franchises connected with or relating to said railroad, branch, terminals, leaseholds and properties or any of them, including the right of the Lessor to operate said railroad, branch and terminals, whether the same be now held or shall hereafter be acquired by the said Lessor.

To have and to hold the said demised railroad, property, premises, equipments and appliances, leaseholds, rights, privileges and franchises, unto the Lessee, its successors and assigns, for the term of ninety-nine years beginning on the tenth day of July, A. D. 1889, inclusive of said day.

Provided always, and it is hereby expressly understood and agreed that nothing herein contained shall be deemed to affect in any manner the rights of corporate existence of the Lessor, or any powers and franchises, the exercise of which may from time to time be necessary to maintain such existence, or to perform its covenants herein, or to protect the interests of its stockholders and creditors according to the true intent and meaning of these presents; and provided further, that if it so be that the right to, or to the use or enjoyment of any of the property, matters or franchises hereinbefore referred to, which the Lessor now has or enjoys would not pass to the Lessee,

but would be impaired or lost to the Lessor by reason of this lease, then the same are excepted herefrom and are not included herein; but the Lessor covenants to do and perform at the expense of the Lessee any act or thing in relation thereto which the Lessee may request, to enable it to have, use and enjoy the same, as near as may be, to the same extent as the balance of the property hereby demised.

Second. — In consideration of the premises, the Lessee hereby covenants, promises and agrees for itself, its successors and assigns, to pay unto the Lessor, or otherwise as hereinafter provided, as rental for the rights, franchises and property hereby demised, the sums following, to wit:

1st. During the first three years of said term, the sum of nine thousand four hundred dollars, to be paid in two equal semi-annual installments of four thousand seven hundred dollars on the tenth days of January and July in each year of said term, and to be paid by the Lessee directly to the stockholders of the Lessor, who are hereby made the appointees of the Lessor to receive the same in its behalf, for their use respectively *pro rata* according to their holdings of such stock at the close of business on the seventh day prior to that above appointed for any such payments at the rate of one dollar at each semi-annual payment for each share thereof. During the next three years of said term the sum of twenty-three hundred and fifty dollars shall be added to each of said semi-annual payments, and paid to said stockholders respectively as aforesaid, making each payment at the rate of one dollar and a half on each share. During the residue of said term the further sum of twenty-three hundred and fifty dollars shall be added to each of said semi-annual payments, and paid to said stockholders as aforesaid, making each payment at the rate of two dollars on each share.

2nd. And, also, all sums of money which shall become due and payable during said term for interest accruing after the date hereof, upon any and all bonds or other interest-bearing obligations issued by the Lessor, and which are or may be outstanding from time to time, namely, all bonds mentioned and secured by a mortgage from the Lessor to the City of New Haven, dated July 17th, 1869, and recorded in the land records of the town of New Haven, volume 240, page 85, said issue being limited to a par value of $225,000, all of which are now outstanding, and are dated February 1st, 1870, and payable February 1st, 1900, with interest at the rate of seven per cent, payable semi-annually on the first days of February and August in each year; and all bonds mentioned in and secured by a mortgage from the Lessor to the Treasurer of the State of Connecticut, dated May 1st, 1888, and recorded in the office of the Secretary of said State, on October 24th, 1888, in the records of Railroad Mortgages; said issue being limited to a par value of $800,000, of which amount $225,000 can be issued only on the retirement of an equal amount of said prior issue; and of which whole authorized issue of $800,000, only $575,000 are now outstanding; and on all the certificates of indebtedness heretofore issued by the Lessor, comprising one series of the par amount of $480,000 being dated August 1st, 1888, and payable February 1st, 1900, with interest at the rate of six per cent, payable semi-annually on the first days of February and August, and another series of the par amount of $225,000 being dated

August 1st, 1888, and payable February 1st, 1900, with interest at the rate of six per cent, payable semi-annually on the first days of February and August, in each year; all of which said certificates of indebtedness are now outstanding.

And said semi-annual payments on account of said bonds and certificates of indebtedness above provided for shall be paid directly to the holders of said bonds or certificates of indebtedness, who are hereby made the appointees of the Lessor to receive the same, respectively, at the time or times, and place or places covenanted therein, and in all respects as required by the tenor of said bonds or certificates of indebtedness and the coupons representing such interest.

3d. And, also, in each year of said term, after said bonds or certificates of indebtedness or any of them shall have been retired, paid or discharged by the issue of other bonds or obligations, as hereinafter provided, all sums of money which shall become due and payable during said term for interest accruing upon the bonds or obligations hereafter issued by the Lessor in accordance with the terms hereof, in lieu of or for the purpose of paying, discharging or retiring all or any of the aforesaid bonds or certificates of indebtedness of the Lessor.

And the Lessor hereby expressly covenants with the Lessee that the amount of the capital stock of the Lessor issued and outstanding does not exceed 4,700 shares of the aggregate par value of four hundred and seventy thousand dollars, and that no more shares shall hereafter be issued without the written consent of the Lessee; and that no further bonds shall be issued under its said $800,000 mortgage, dated May 1, 1888, except to replace bonds of the prior $225,000 series that may be hereafter paid or retired, unless with the written consent of said Lessee; and that no new bonds or other obligations shall be issued in lieu of or for the purpose of paying, discharging or retiring the bonds, certificates of indebtedness, or other obligations of the Lessor, in excess of the amount of the bonds, certificates of indebtedness, or other obligations paid, discharged or retired, either in respect to the principal sum thereof or in respect to the interest charge thereof.

The Lessor covenants that, upon demand of the Lessee at any time during the continuance of this lease, and written notice specifying any of the bonds, or other obligations, of the Lessor then outstanding, for the payment or retirement of which the Lessee desires to provide, which notice shall be given at least ninety days prior to the maturity of such bonds or obligations, the Lessor will forthwith make, execute and deliver to the Lessee its new bonds or other obligations for an equal amount of principal secured by mortgage upon all or part of the demised property, if and as the Lessee may desire, to be exchanged at par for any of the bonds or other obligations of the Lessor then outstanding, specified by the Lessee as aforesaid, and the bonds or obligations so issued shall bear such rate of interest, and be for such time, and they and any mortgage securing the same shall be in such form and contain such terms, provisions, covenants and conditions, as the Lessee shall determine; provided, that in case said new bonds or obligations should be so drawn as to mature at a date later than two years prior to the expiration of said term,

they shall be in such form and contain such terms, provisions, covenants and conditions as shall be acceptable to the Lessor; and any of said bonds, so far as the Lessee shall elect, shall be issued under and secured by any existing mortgage of the Lessor under which new bonds can lawfully be issued.

If the Lessee so elect, said new bonds or obligations may be sold by it to a sufficient amount to pay said bonds or obligations so specified as aforesaid, with necessary expenses, the proceeds to be applied to the payment of the principal of the bonds or obligations specified as aforesaid, and said expenses, in which event said bonds shall be sold to the highest responsible bidder or bidders, (but at a price not less than par), after such reasonable advertising for proposals as the Lessor may request, which proposals shall be open to the Lessor's inspection, before acceptance; and the Lessee covenants that the Lessor shall be at no expense in the issue or sale of said new bonds.

All bonds or obligations executed and delivered by the Lessor to the Lessee, which are not required for the exchange or sale above provided for, shall be cancelled and returned to the Lessor, and the balance of the proceeds of such sale, if any, remaining after the application of such proceeds, as above specified, shall be held by the Lessee to be applied to the retirement of bonds or obligations next thereafter specified by it for retirement, or to any expense theretofore incurred by it in retiring any of said bonds or obligations.

The Lessor covenants that if, at the time when any of its bonds or obligations shall mature, it shall have failed for any reason whatever, to keep its aforesaid agreements in regard to new bonds or obligations to be used to retire or to provide for the payment of said maturing bonds or obligations in accordance with the foregoing covenant, then it will pay the principal of said maturing bonds according to the tenor thereof.

In case the Lessee shall not exercise the rights herein given it to retire the bonds or obligations of the Lessor by means of new bonds or obligations of the Lessor, the Lessor may provide for the payment of said maturing bonds or obligations by issuing such new bonds or obligations as may seem to it desirable, the interest upon which shall be paid by the Lessee as aforesaid; provided that the amount of bonds or obligations so issued shall not exceed the amount of the bonds or obligations so maturing, either in respect to the principal sum thereof, or in respect to the interest charge thereon.

The Lessor hereby covenants and agrees to and with the Lessee that there are now issued and outstanding no greater numbers or amounts of its bonds and certificates of indebtedness than are hereinbefore particularly specified, to wit: an aggregate amount of $1,505,000; and that it will not during the continuance of this lease extend the time of payment of any of its bonds, certificates of indebtedness, or other obligations, without the written consent of the Lessee.

And the Lessor further covenants that all proceeds it may realize from time to time from any leases or sales of real estate outside of its location, and not held for railroad uses, and not included in this lease, whether its interest in such real estate be legal or equitable, in possession, remainder or reversion, absolute or contingent, shall be applied to the payment of its bonds, certificates of indebtedness, or other obligations outstanding from time to

time, or to their purchase, or for a sinking fund for their future purchase or payment.

And the Lessee further covenants with the Lessor to pay during each year of said term, all taxes, rates, charges and assessments, ordinary and extraordinary, which may come due or be lawfully imposed or assessed in any way upon the Lessor, its capital stock, indebtedness, franchises and revenues, the premises hereby let, or said rental, or any part of the same; said payments to be made to the authority or treasurer entitled by law to receive the same, whether such law be that of the United States, the State of Connecticut, or any municipal corporation of or in said State, so that said Lessor shall be saved harmless, during the said term of this lease, from any such tax, assessment or charge, under laws or proceedings made or authorized by the United States or the State of Connecticut; and if any taxes or assessments shall be imposed upon or levied against the individual holders of the stock or bonds or other obligations of the Lessor, in lieu of any taxes or assessments upon the Lessor itself, its railroad and premises, the same shall be paid as soon as due, by the Lessee, to the authority or officer entitled to receive the same, and said individual holders saved at all times harmless therefrom, and indemnified against any demand for or payment of the same.

The Lessee further covenants with the Lessor, that, upon receiving possession of the property hereby leased, and upon the assignment and transfer to it of all the cash in hand, supplies, tools, furniture, materials, choses in action and all other personal property of the Lessor, it will assume and pay all sums due for interest from the Lessor, and all the floating indebtedness of the Lessor; provided, however, and the Lessor hereby covenants that such floating indebtedness does not exceed the sum of $10,000.

And whereas, the Lessor owes J. A. Bostwick about $72,000 for sundry parcels of land in Shelton and on Thorn and Silver streets, New Haven, heretofore purchased by him with his own funds for the use of the Lessor, which lands now stand in the name of J. A. Bostwick, but said Lessor has by agreement with him the right, and is under the duty to pay for and procure from him, for the amount of his advances thereon, and legal interest; as is shown in his declaration of trust dated May 1st, 1889, reference being had to the land records of New Haven and Huntington for a further description thereof; and, whereas the equitable interest of the Lessor under said agreement and declaration of trust in said land is hereby leased; now, therefore, the Lessee hereby covenants with the Lessor to pay to said J. A. Bostwick all interest hereafter accruing on said amount of said advances, and to pay the principal amount of such advances, on demand, and on a conveyance by him to the Lessee of the lands so held by him as above mentioned: and in such latter case, on the expiration of said lease, if any of said lands remain undisposed of in the hands of the Lessee, to convey the same to the Lessor, on payment by the Lessor of any sums then necessary to reimburse the Lessee for moneys paid on account of said lands, over and above all moneys received by the Lessee therefrom.

The Lessee further covenants to keep and maintain the railroad, premises, equipments and other property hereby demised, and the appurtenances thereto belonging, in as good order, repair and condition as when received at the

beginning of said term, replacing and renewing whatever becomes defective and worn out from time to time, and so to use and care for all the property hereby leased that the right of the Lessor to the ultimate use thereof, as at present, shall not be impaired by reason of any breach of the terms or conditions upon which it is now holden; and the Lessee covenants that *all new property*, real or personal, acquired by it for the uses of the demised railroad, shall thereupon become and remain part of the demised premises, as fully as if now owned by the Lessor.

Third. — The Lessee covenants and agrees that it will during the continuance of this lease, do every act and thing that may by law be obligatory upon it, or upon the Lessor, in respect to the operation, maintenance and use of the said railroad, premises and property hereby demised, and every part thereof, including the keeping and rendition of all accounts required by law; but the said Lessee, its successors and assigns, may, at any time during the continuance of this lease, alter the location, line and gauge of the leased railroad, and in so doing may discontinue any part of the present location or tracks of said railroad, and any of the machine shops or depots not required for the use of the line, and may also change the grade or grades of said road and alter the location of any of the tracks, water stations, buildings or erections appurtenant to or connected therewith; and may exchange lands or buildings hereby demised for other lands or buildings more convenient or necessary for its use, and of equal value for the uses and purposes of said railroad. All premises received in exchange are to be conveyed to the Lessor, and held by the parties hereto as if the same were now part of the premises hereby demised.

Fourth. — The Lessee covenants with the Lessor to make the several rental and other payments hereinbefore stipulated, as the same become due and payable in each year of said Lease, provided, nevertheless, that if any of said payments shall not be made within thirty days from the time when the same becomes payable, or if default be made for thirty days in the performance of any other of the covenants and agreements of the Lessee in this indenture contained, and shall be thereafter continued for ten days after written notice of such default has been given to it by the Lessor, then this lease shall expire and terminate at the option of the Lessor, which may thereupon re-enter upon the demised premises, or that which then represents them, and the same have and possess as of its former estate; and without such re-entry may recover possession thereof by any statutory proceeding in the nature of summary process; it being understood that no demand for the rent, or any part thereof, and no re-entry for condition broken as at common law, shall be necessary to enable the Lessor to recover such possession, but that all right to any such demand or re-entry is hereby expressly waived by the Lessee; saving to the Lessor any right to damages for breach of any of the provisions of this indenture, and the further right to recover the proportional parts of the several rental charges aforesaid which had accrued at the date of its recovery of possession, if this lease be terminated by the exercise of the option above provided for.

Fifth. — The Lessee covenants that at the expiration or other determination of the term for which the railroad is hereby demised, it will surrender

said demised railroad with a perfect track and all its rolling-stock, equipments, depots, stations, shops, grounds, buildings and structures, in as convenient and good condition for the uses and purposes of the Lessor, as when it received them, together with all additions and renewals, whether of real or personal estate, made or acquired by the Lessee during said term, for the convenient exercise of the demised franchises or the convenient operation of the demised premises.

Sixth. — The Lessor covenants and agrees that the Lessee shall, upon payment in the manner herein provided, of the annual rent herein reserved, and keeping and performing the covenants and agreements herein agreed by it to be kept and performed on its part, have the uninterrupted possession, use, control and management of said railroad and the real estate, premises and property herein demised, with the right to demand and receive for its own use and benefit all tolls and charges, fares and freights, which may or can be legally demanded and received for the transportation of persons and property upon and over the same, or any part thereof, and all the income and revenue of the aforesaid estate and property of the Lessor and all other, its rights, privileges, franchises and benefits, in its quiet and peaceable possession and enjoyment, without detriment, hindrance, interruption or molestation from said Lessor or its successors and assigns, for and during the term of this lease.

And the Lessee covenants with the Lessor that it will save the Lessor harmless from all suits, costs, damages and expenses by reason of any act or omission of the Lessee in the use of said demised premises, or otherwise, under this lease, and will, at its own expense, defend all suits brought against the Lessor on account of any such act or omission of the Lessee, and that it will keep and perform all and singular the contracts which are in force and binding on the Lessor at the date of the approval hereof, except the payment of the principal of the Lessor's bonds or certificates of indebtedness, including all stipulations in deeds or leases of real estate to the Lessor, and will also at its own expense defend all suits now pending or hereafter brought against the Lessor for any claims disputed by it, which have been stated in writing to the Lessee by the Lessor before the approval of this lease, and will pay and perform the judgments therein rendered.

Seventh. — The Lessor covenants that it will during the continuance of this lease, maintain its existence and organization as a body corporate, in due form of law, and that it will, from time to time, as a body corporate, and at all times when thereto required by said Lessee, do and perform all such acts, matters and things consistent with the rights of said Lessor under this lease, as shall be necessary in the opinion and judgment of the Lessee, or its officers or counsel, to the due preservation and protection of all estates, property, rights, franchises and interests herein demised to the Lessee, and to carry into full effect the true intent and meaning of this lease, and in default thereof that the same may be done by the said Lessee, its successors and assigns, or its lawful agents, in the name and as the act of the said Lessor. And the Lessee covenants to furnish to the Lessor a correct list of the Lessor's stockholders, for use at the annual meeting of the Lessor, at least ten days prior to such annual meeting, and to pay the expenses of printing and mailing

notices of, and proxies for use at any future meeting of the Lessor, and to provide a suitable place therefor.

And the Lessor covenants with the Lessee that it will from time to time, if requested by the Lessee, proceed to appropriate and condemn by appraisal such real estate, either as an addition to the main and branch line already built, or for any branch that the Lessee may desire to have hereafter built, as the convenient exercise of the demised franchises or operation of the demised premises, or the orders of the Railroad Commissioners, or of the General Assembly or any Court, may render necessary or desirable, the Lessee, however, advancing and paying all expenses thereby incurred, including the legal expenses, for which advances, as made from time to time, and for any other advances made by the Lessee, for the purchase or acquisition of real estate for railroad uses, to become part of the demised premises, the Lessor covenants to give to the Lessee its promissory, non-negotiable notes, for the full amount thereof, payable at any time within one year after the termination of this lease, with interest from the date of such termination.

And the Lessor also agrees that the Lessee may use its name in bringing or defending any suits, so far as it may deem necessary for the use, quiet enjoyment and protection of the demised premises, or to protect itself against unlawful exactions or demands by or under any public authority, but at the sole expense of the Lessee, saving the Lessor harmless from all loss, costs or damages thereby accruing.

Eighth. — The Lessor further covenants that it will, from time to time, and at any time hereafter, at the request of the Lessee, execute and deliver all such other and further specific or general assignments and transfers, instruments and assurances in the law, for the further, better or more perfect assuring the railroad, premises, property, rights, privileges and franchises herein and hereby demised, according to the true intent and meaning of these presents, as by the Lessee or its counsel, learned in the law, shall or may be reasonably advised or required; but it is expressly covenanted and agreed that all such assignments and transfers shall be only for the term and subject to the provisions of this lease.

And the Lessee further covenants with the Lessor that it will furnish and keep all such books, forms and papers, and do all such acts and things at its own cost and expense as may be required for the proper issue, record and transfer of the stock of the Lessor, and for the registration and transfer of any of its bonds or obligations, which books shall at all proper times be open to the inspection of the officers of the Lessor; and will provide a suitable person to act as the transfer agent of the Lessor during the continuance of this lease; provided, always, that all stock certificates and bonds shall be signed by the proper officers of the Lessor; and will give free transportation over the demised railroad to the directors of the Lessor, at all times during the term of this lease.

Ninth. — The Lessee hereby covenants with the Lessor that it will, during the full term of this lease and every year thereof, run as many trains, both passenger and freight, over the railroad hereby leased, daily, in the respective seasons of the year, as the Lessor has run during the year ending on the first

day of July, 1889, provided the same are reasonably required by public convenience and necessity; and also as many more trains from time to time as public convenience and necessity may require.

Tenth. — Each and all of the preceding covenants, agreements and stipulations shall mutually bind and inure to the benefit of the parties hereto, their and each of their successors and assigns.

In witness whereof, the parties have caused these presents to be signed by their respective Presidents and their respective corporate seals to be hereunto affixed, the day and year first herein written.

Signed, sealed and delivered in the presence of
SIMEON E. BALDWIN.
EDWIN A. SMITH.

[L. S.] THE NEW HAVEN & DERBY RAILROAD CO.,
by WILLIAM H. STEVENSON,
President and Agent.
A. H. KELLAM, *Secretary.*

[L. S.] THE HOUSATONIC RAILROAD COMPANY,
by WILLIAM H. STARBUCK,
President and Agent.
M. E. STONE, *Secretary and Treasurer.*

[Acknowledgments follow.]

2. CLAUSE EXCEPTING RECORD BOOKS, ETC.

And demising all the personal property of the lessor (except cash, the corporate seal, the stockholders' and directors' record books, the transfer and stock books, the Treasurer's books, accounts and office furniture).

3. INSURANCE CLAUSE.

Said lessee agrees that it will at all times keep the buildings and other personal estate leased, and which is now insured, as fully insured as the same now is, for the benefit of said lessor; and that any building or other property insured and destroyed by fire shall be at once rebuilt, replaced, or renewed, and a like or greater amount shall be kept insured on any new building, or improvements, or renewals, or new purchases, or new constructions, or property put in place and stead of any had under this lease, and destroyed as aforesaid; and it is mutually agreed that any and all sums paid upon any policy of insurance upon any property insured as aforesaid, or on any property under any policy now held by the lessor on said property, shall be received by said lessee, and by it used in renewals or substitutions of like property to that insured under such policy or policies of insurance.

4. CLAUSE FOR AGREED VALUATION OF EQUIPMENT DEMISED.

It is agreed that the value of the rolling-stock, equipments, machinery and tools, hereby leased is five hundred and fifteen thousand dollars, and that at

the expiration of this lease the lessee will deliver to the lessor, in lieu of said rolling-stock, equipments, machinery and tools, property of similar character and value.

5. Provision for an Inventory and Appraisal of Demised Premises.

Thirteenth: There shall forthwith be made a full and complete inventory and appraisal, of all the locomotives, cars, rolling-stock, machinery and personal property of every nature and description, demised by this lease; and an accurate description and appraisal made of the road, tracks, buildings, bridges and all similar property appertaining to, and of the nature of real estate of the Lessor; and a copy of such inventory, description and appraisal shall be furnished to the Lessor and the Lessee, and the same shall be conclusive evidence in any and all cases in which the question of the value and condition of said property at that time of making this lease shall arise between them. Said inventory, description and appraisals shall be made by two disinterested persons — one selected by the Lessor and one by the Lessee, who, in case of any dispute or disagreement, may choose a third — their expenses to be shared equally by the Lessor and Lessee.

Fourteenth: On the termination of this lease, whether before or at the end of the term, a like inventory and appraisal shall be made of all property surrendered to the Lessor, and if the value so appraised of the property surrendered is greater or less than the value would have been, had the property leased been surrendered in the same repair that it was on the 1st day of September, 1892, the difference shall be paid in money.

6. Provision for a Joint Control over Expenditures on the Road.

It is mutually agreed that the general charge and determination of what expenditures shall be made to keep the railroad, bridges, buildings, and equipment, of the lessor equal to the present condition of the same, and whether any additions thereto may be required during the term by the increased business of the road, shall be confided to the decision of a managing agent, to be agreed upon by the boards of directors of the two companies; and if they do not agree, to be appointed by the arbitrators herein mentioned; and if, in the opinion of either board of directors, the opinion and determination of said managing agent is not satisfactory as to any of said matters, his decision as to the same shall be submitted to said arbitrators, whose decision thereon shall be final, and said manager shall act in accordance therewith. All expenditures authorized by said manager for such additions required by increase of business during the term, under the foregoing provision are, upon his certificate, to be paid by the treasurer of the lessor from the funds he may receive from the income of the road and property. Said manager shall be removed from office on the request of either party, and a new one appointed; and he shall make no order for expenditure exceeding five thousand (5000) dollars, without the assent of some proper officer appointed by the directors of the lessee, except after arbitration had as aforesaid.

7. Covenant for Free Passes.

And the lessee covenants that it will furnish the directors and treasurer of the lessor with free annual passes over all said demised railroads during the continuance of this lease, and will permit said directors to inspect said demised premises and property from time to time.

8. Provision for a Novation of a Prior Lease to the Lessor, by a New Lease Direct to the Lessee.

Provided nevertheless, that should at any time hereafter The New Haven and Derby Railroad Company, or The Danbury and Norwalk Railroad Company, desire, in lieu of its lease to the lessor herein assigned to the lessee, and in discharge thereof, to substitute a lease by it, direct, to the lessee herein, and such a lease is duly agreed on, made, and ratified by the two companies parties thereto (to which the lessor herein hereby assents) then and thereupon, the lease of said New Haven and Derby Railroad or said Danbury and Norwalk Railroad, as the case may be, to the lessor herein shall become and be terminated, and of no further obligation upon any parties thereto or their assigns, except as to acts by them previously done or omitted.

9. Agreement conveying a Right of User, Less than Leasehold, but resembling the Latter.

Whereas the Danbury and Norwalk railroad is held by the Housatonic Railroad Company by a lease dated July 21, 1886, for the term of 99 years; and whereas the Danbury and Norwalk Railroad Company and the Housatonic Railroad Company and the New York and New England Railroad Company entered into a certain agreement with the New England Terminal Company, dated January 11, 1889, for the establishment of a through transportation line over their respective roads to and from South Point, and by the boats of said New England Terminal Company, through Long Island Sound, to New York and neighboring points; and whereas said New England Terminal Company desires to obtain the right to use for said business certain real estate and riparian property now in possession of said Housatonic Railroad Company, at said Point: the exclusive enjoyment of which estate and property it is for the present not necessary for said Railroad Company to retain;

Now, therefore, this indenture, between the Housatonic Railroad Company and the New England Terminal Company, both corporations incorporated by the State of Connecticut, witnesseth as follows:

Article 1. — Said Housatonic Railroad Company grants to the New England Terminal Company, the right to use and improve in said business, and for all the corporate purposes of said New England Terminal Company, all the real estate and property held by said Railroad Company, under said lease, which is situated in the town of Norwalk, county of Fairfield and State of Connecticut, and bounded Southerly by tide-water: Easterly by land of

of Lunette R. Davis; Northerly by an irregular line parallel to the line of the shore and five hundred (500) feet distant Northerly therefrom; and Westerly by a line running Northerly from the seashore, at right angles thereto, from a point one thousand (1,000) feet Westerly of the point where the Westerly line of said land of Lunette R. Davis intersects the shore; together with all the wharves, docks, bridges, and improvements thereon, or extending therefrom into tide-water; with the right to extend and enlarge all such improvements and erections, at the pleasure and cost of said New England Terminal Company: *to have and to hold* said rights herein granted for the term of ten years from the day of 1889, yielding and paying therefor the sum of eight thousand (8,000) dollars a year, payable in quarterly payments of two thousand (2,000) dollars each, on the days of and in each year; reserving nevertheless to said Railroad Company the right to use, without charge or rebate, for yard-room and tracks, such portion of said premises above tide-water as said Terminal Company may at any time not use or need to use for its purposes.

Article 2. — Said New England Terminal Company agrees to pay to said Housatonic Railroad Company said quarterly payments during every year of said term, as the same fall due, as above agreed; and to keep said wharves, bridges and other improvements now on said premises, or extending therefrom into tide-water, in good repair and condition, ordinary wear and tear, or accidental fire, only excepted; replacing any piles or planking at its own expense, which may become worn out or dangerous from time to time.

Provided, however, and it is further agreed, that, if said rent shall remain unpaid thirty days after the same shall become payable as aforesaid, or if said New England Terminal Company shall assign its interest under this indenture, or underlet or otherwise dispose of the whole or any part of said premises, or use the same for any purpose but that hereinbefore authorized, or shall commit waste or suffer the same to be committed on said premises, or injure or misuse the same, or shall not perform and fulfill each and every of the covenants herein before contained, to be performed by said New England Terminal Company, then all its right under this indenture shall thereupon, by virtue of this express stipulation therein, if the Housatonic Railroad Company so elects, expire and terminate, and the Housatonic Railroad Company may, at any time thereafter, re-enter on the whole of said premises, and the same have and possess as of its former estate.

Article 3. — In case of injury by fire to any of the improvements now on said premises, during said term, the Housatonic Railroad Company will repair or replace such improvements as soon as practicable, at its own cost; and there shall be no abatement of said quarterly payments on account of such injury.

Article 4. — At any time not later than two months before the expiration of said term, said New England Terminal Company may notify in writing said Housatonic Railroad Company that it elects to renew its estate and interest under this indenture for ten years more, at the price of twelve thousand (12,000) dollars a year, payable quarterly; and thereupon this indenture shall be deemed renewed and extended from the date of the end of said original term

for said additional term, on the same conditions as for the original term, except as to said increased rent, and except that there shall be no right to a further renewal after said second term.

Article 5. — All additions to said premises made by the New England Terminal Company during said original or extended term shall belong to said Housatonic Railroad Company at the final expiration of the interest of the New England Terminal Company in said premises.

Article 6. — Should any difference arise between the parties hereto, respecting the extent of the rights reserved in Article 1 hereof, as to the use of part of said granted premises, or any other matter affecting the interests of either party hereunder, such difference, on the written request of either party, shall forthwith be submitted to the decision and arbitrament of such disinterested person as they may agree on, failing such agreement, as may be appointed for the purpose by any Judge of the Superior Court of the State of Connecticut, on the written application of one party and reasonable notice to the other; and the written decision and award of the person so appointed shall be final and conclusive.

In witness whereof, the Housatonic Railroad Company has caused its corporate seal to be hereunto affixed and its corporate name hereunto subscribed on this day of 1889, and to a duplicate of the same tenor and date, by its and agent, duly authorized and the New England Terminal Company has caused its corporate seal to be hereunto affixed and its corporate name hereunto subscribed on this day of 1889, and to a duplicate of the same tenor and date, by its and agent, duly authorized.

10. Agreement for Use of Union Passenger Station.

Agreement

made September first, 1914, between the Union Depot Association, hereinafter termed the lessor, and the Brompton Railroad Company, hereinafter termed the lessee.

Article I.

The lessor grants to the lessee and the lessee accepts the right to the joint use and enjoyment, in common with any and all railways now admitted, or at any time hereafter admitted to such joint use and enjoyment, of the Union Passenger Station in the City of Brompton, and all the terminal facilities appurtenant thereto and connected therewith, now existing, as well as such additional facilities as may hereafter from time to time be acquired, constructed or added thereto, being hereinafter referred to as Station Facilities, and being or to be situated within the territory delineated on the plat hereto annexed and made part hereof, marked "Plat of terminal territory, John Doe, Chief Engineer, Sept. 1, 1914."

Article II.

As compensation and rental for such joint use of said Station Facilities, herein granted and accepted, said lessee hereby covenants with the lessor, its successors and assigns, to pay in the manner, and at the times hereinafter specified, the proportionate part, ascertained as hereinafter provided, of the rental, and of all charges, costs, taxes, ordinary and extraordinary, assessments, benefits, outlays and expenditures of every kind, incurred, created, made, rated, levied, assessed, imposed or for which said lessor may in any manner, whatsoever, become liable in the operation, maintenance, repair, renewal, control, and management of said Station Facilities and every part thereof; it being expressly understood that interest on the bonded indebtedness of the lessor shall not constitute a charge for which the lessee shall be in any manner liable.

Article III.

For the purpose of determining the compensation and rentals to be paid hereunder by said lessee to said lessor, it is hereby agreed that the aggregate amount received by said lessor monthly from railway lines using said Station Facilities shall be at all times sufficient fully and promptly to meet, pay and discharge each and all of the following items, which items shall constitute an account hereinafter designated,

Union Station Account.

A. An annual sum of $32,500.00, payable in equal monthly instalments of $2,708.35 : said sum of $32,500.00 being five per cent on $650,000, which sum of $650,000 is hereby agreed and stipulated to be the fair value of existing Station Facilities, including the connection with and use of the storage yards now in course of construction.

B. An annual sum payable in equal monthly instalments, equivalent to five per cent upon all amounts which the lessor may at any time during the term of this contract be required to pay under or by virtue of any present or future Ordinances of the City of Brompton, under which said existing Station Facilities may have been constructed, and future additions or betterments may be acquired or constructed ; and five per cent upon the cost to the lessor of all real estate, betterments, additions and improvements to said Station Facilities, including rebuilding of buildings or structures destroyed by fire or other casualty, which said lessor may from time to time hereafter acquire, construct, or add to, and make part of its Station Facilities ; such additions and betterments to be made as hereinafter provided.

C. All rentals and other liabilities assumed by the lessor arising out of leases, contracts, and agreements, by which the lessor may hereafter secure the use of additional facilities to become appurtenant to and form part of said Station Facilities, payable also in equal monthly instalments.

D. All unsettled or unadjusted claims and demands, of whatever nature and kind, which may have arisen out of the operation of the old

Union Depot and appurtenances thereto, and which would have been a proper charge to the lines using said Union Depot. Provided, however, that any payments made on account of any such claims and demands, shall be prorated and charged against the lines using said Union Depot.

E. All taxes, rates, levies, benefits, assessments and charges of any kind, from time to time hereafter during the term of this lease, assessed, levied, rated, charged, or imposed in any manner upon said Station Facilities, or any part thereof, or connected with the operation thereof, and for the payment of which said lessor, or said Station Facilities, or any part thereof, may be or may become, in any manner whatsoever, liable.

F. All charges of effecting and carrying insurance of the lessor, of any kind, upon said Station Facilities, including also, such Accident and Employers' Liability Insurance, upon employees engaged in the operation or maintenance of said Station Facilities, as the Lessor may procure and for the payment of which it may become liable.

G. All charges and expenses of every kind incurred, created, or for which the lessor may be in any manner liable, in the operation, maintenance, repair and renewal of said Station Facilities, and such additional facilities as may be hereafter acquired and become appurtenant to and connected with existing Station Facilities.

H. All salaries of officers, wages of employees, agents and servants, and the purchase price of material and supplies connected solely with the operation, maintenance and control of said Station Facilities, and a reasonable and proper proportion of the salaries of officers, wages of employees, agents or servants engaged in the joint service of said lessor and the operation and maintenance of said Station Facilities.

I. All sums expended by the lessor in payment or settlement of losses and claims for damages arising in any manner out of the operation, maintenance, management and repair of said Station Facilities.

J. Any and all other charges and expenses, made, created or incurred, by the lessor or for which it may become in any manner whatsoever liable in connection with the operation, maintenance, management, renewal and repairs of said Station Facilities; it being hereby expressly declared that any enumeration of items herein made shall not be held to exclude any other item not enumerated and properly chargeable to said Station Account, — it being the spirit and intent of this agreement that the compensation received by said lessor from railway lines, for the use and enjoyment of said Station Facilities, shall at all times be sufficient to yield five per cent interest on the value of said Station Facilities as fixed and provided for in Paragraphs A and B of Article III, and fully reimburse the lessor for all necessary charges, expenses, taxes, rates, levies, assessments and benefits of any kind, which the lessor may incur, make, create, or which may be levied, rated, charged, assessed or imposed, or for which the lessor may be or become liable in any manner in connection with the operation, maintenance, control, management, repairs, renewals, alteration, extension and enlargment of said Station Facilities.

If said Union Passenger Station or any building or structure of said lessor forming a part of said Station Facilities should be destroyed by fire or other casualty, the lessor shall promptly rebuild the same, and all expenditures made by the lessor on account of such rebuilding, less the amount of insurance received by the lessor, shall be and become a part of the principal, interest on which, at the rate of five per cent per annum, shall be charged to said Station Account, and shall be paid monthly as in Paragraph B of this Article above provided. The lessor shall insure against loss by fire to a reasonable amount said Union Passenger Station and buildings connected with said Station Facilities.

Article IV.

The proportion of the aggregate of said items comprising said Station Account, which said lessee hereby agrees to pay as rental and compensation for the joint use of said Station Facilities herein to it granted and by it accepted, shall be ascertained, determined and paid in the following manner: said Station Account chargeable to all lines using said Station Facilities, and showing the proportion of each line and items of charges and expenses, shall be prepared monthly by said lessor, and from the aggregate of the items thereof shall be deducted the actual net monthly revenue, which said lessor may derive from ground rentals of land embraced within said Station Facilities and from tenants, lessees, licensees and occupants of offices, apartments and privileges in and about the said Union Passenger Station, and from all sources whatsoever connected with said Station Facilities, including a fair and reasonable rent for any offices, buildings or real estate, included in said Station Facilities used by said lessor for any purposes not connected directly with the management and operation of said Union Passenger Station Facilities; and the balance remaining shall constitute the amount, its proportionate part of which, determined as hereinafter provided, said lessee hereby covenants to pay on sight drafts to said lessor, its successors or assigns, on the fifteenth day of each month succeeding the month covered by such statements; errors or omissions, if any, in any such statement, to be corrected in succeeding statements.

Said proportionate part of said balance above referred to which said lessee shall pay to said lessor shall be ascertained in the following manner:

An accurate record shall be kept by the lessor of all passenger, baggage, mail, express, sleeping, dining, and special cars, passing in and out of the said Union Passenger Station during each calendar month, and said lessee shall pay said lessor such proportion of said balance, as the number of such cars of said lessee in and out of the said Station, bears to the whole number of such cars in and out of lines using said Station Facilities during the month; and in so ascertaining the number of such cars in and out, cars hauled in trains, the run of which terminates within thirty-seven miles of said Union Passenger Station, shall be counted as one-third part of a car; in all other cases as one car.

The Station Account above referred to shall be prepared by the Auditor of the lessor and shall be sent to each line using said Station Facilities; such statements shall show the rentals, credits, expenses and charges, the number

of cars in and out, during said month, and the proportion of balance due by each line.

Article V.

It is understood and agreed that the compensation to be paid by said lessee as provided in Article III., covers only such services as properly belong to Union Station service, namely: the switching of trains between Station and Storage yards; the switching of cars in and about Storage Yards, Station tracks, or Express buildings; the care of passengers in and about Train Shed and Waiting Rooms; sales of tickets; handling of baggage and mail; operation and maintenance of tracks, switches, and interlocking apparatus; the heating and lighting of Station, Train Sheds, etc.; the maintenance and care of premises included in the Station Facilities and appurtenances thereto; and the proper management of all the sources of revenues to be credited on the Rental Account as provided in Article IV.: and that all supplies for cars, such as ice, oil, gas, fuel, or of any other nature; labor and material for cleaning or repairs of cars; fuel, water, and supplies for engines; use of Round House and care and attention of engines therein; material and labor; repairing engines; together with any or all services and supplies or material not incident to Union Station work but requested by said lessee to be done, or performed for, or furnished to it, shall be at the sole charge and expense of said lessee, who shall pay the sight drafts of the lessor therefor on the 15th day of each month for the preceding month, any errors or omission in such statement to be corrected in the next subsequent statement.

Article VI.

Said lessor shall have exclusive control except as hereinafter provided, of the operation, repair, renewal, and maintenance of said Station Facilities and every part thereof, and the right to establish and shall establish all necessary rules for such operation and management; but all rules and regulations so established by the said lessor shall be uniform and shall apply equally and without discrimination to all lines; and such rules and regulations said lessee hereby agrees to observe, and cause to be observed by its employees.

If at any time any line shall desire to change any of such rules, or regulations, or add to the same, or alter the basis of apportionment of said Station Account, it may in writing suggest such change or changes to the lessor, and thereupon the lessor shall in writing notify each line of such suggested change or changes, and of the time within which, not less than thirty days, each line may in writing approve, or disapprove of such change or changes; and if, within the time in such notice specified, the lines paying a majority of the percentage of said Station Account (for the month in which said notice is given), shall communicate in writing to the lessor approval of such suggested change or changes, the same shall take effect and be in force from and after the first day of the following month, and until again in like manner changed; if, however, lines paying a majority of the percentage of said Station Account fail, within the time specified in said notice, to communicate in writing to the lessor approval of such suggested change or changes, then the lessor shall

itself determine the question of such change or changes; provided, however, the lessor may veto any change or changes, approved in the manner just stated by the lines, unless such approval be unanimous. Should, however, the lessor exercise such right of veto, it shall notify in writing each of said lines of such veto, and thereupon and within thirty days, the lines may in writing notify the lessor of their approval, or disapproval of such veto, and if the lines so paying sixty per cent of said Station Account shall fail within said thirty days to disapprove of such veto, the same shall stand and such proposed change or changes shall not take effect, but nothing in this Article contained shall affect, or in any manner release said lessee from the obligation to pay its proportion of said Station Account as hereinbefore provided, or affect in any manner or to any extent the items of said Station Account.

Article VII.

Inasmuch as the Station Facilities are to be operated and maintained for the joint and common use of all lines using the Union Passenger Station, it is hereby expressly stipulated:

First. — Said lessee will fully indemnify and save harmless said lessor from and against all charges, expenses, loss and damage to persons or property occurring within the boundaries of said Station Facilities, and resulting from the use of defective equipment, or from the fault, negligence, or misconduct of said lessee, or any of its officers, agents, employees or servants.

Second. — Said lessee also covenants fully to indemnify and save harmless all other railway companies using said Union Passenger Station, from and against all charges, expenses, loss and damage to persons or property occurring within the boundaries of said Station Facilities, and resulting from the use of defective equipment, or from the fault, negligence, or misconduct of said lessee, or any of its officers, agents, employees, or servants.

Third. — Said lessor will fully indemnify and save harmless said lessee from and against all charges, expenses, loss and damage to person or property occurring within the boundaries of said Station Facilities, and resulting from the use of defective equipment of said lessor, or from the fault, negligence, or misconduct of any of its officers, agents, employees or servants, when such equipment, officers, agents, and employees or servants are employed in the service of said lessor, not connected with the operation, management, maintenance or repair of said Union Passenger Station Facilities.

Fourth. — Any loss or damage sustained by either or both of the parties hereto, or by any other party, due to the use, operation or maintenance of said Union Passenger Station Facilities, not covered by Sections 1, 2 and 3 of this Article shall be charged as an Union Passenger Station expense and prorated in the Union Passenger Station Account, as other expenses are prorated, and when collected, shall be paid to the party sustaining such loss or damage.

Article VIII.

Said lessor shall be considered the agent of said lessee and of all other lines using said Station Facilities for the sale of railway tickets at said Union Pas-

senger Station, and shall be liable for and account to said lessee and other lines for all moneys received from the sale of tickets at said Union Passenger Station; and said lessee, whenever requested so to do by said lessor, shall send a representative to check up its ticket account with said lessor; it being further expressly understood that the liability of the lessor to the lessee and other such lines, arising out of the relation of the lessor to lines as Ticket Agent of the said lines respectively, shall be limited solely to a faithful accounting for all tickets, and moneys received from the sale of tickets, of said respective railway lines.

Article IX.

Inasmuch as the rights herein accorded the lessee are in common and joint with the rights granted other railway lines, and as the Station Facilities are intended or designed only for purposes and uses necessary to a proper and reasonable use and enjoyment of said Station Facilities, the lessee shall have no right to the storage or holding of any more passenger, baggage, mail, express or sleeping cars within the limits, or on the tracks embraced within Station Facilities, than are necessary for the proper and reasonable operation of its trains in and out of said Union Passenger Station; nor shall said lessee, or any other line, be permitted to store or hold surplus equipment within the limits of said Station Facilities; and said lessor shall have the right to make a reasonable charge for all surplus equipment so stored or held.

Article X.

Said lessee, for itself, its successors and assigns, hereby covenants and agrees to and with the lessor, its successors and assigns, that said Union Passenger Station shall, during the term of this agreement, be used for all passenger trains of said lessee, its successors and assigns, into and out of said city of Brompton.

Article XI.

In the event that said lessee shall fail to pay within thirty (30) days after the same is due and payable, its full proportion of the balance of said Station Account, ascertained and determined, and by it agreed to be paid, as hereinbefore provided, said lessor shall have the right to terminate the rights and privileges herein granted and exclude said lessee from the use and enjoyment of said Station Facilities and every part thereof, until all amounts due from said lessee, under this agreement, together with interest thereon, at the rate of six per cent per annum from the date when such amounts should have been paid, are fully paid; but such exclusion shall not release the lessee from its liability to pay any sum or sums due from it to the lessor, under the provisions of this contract, nor from its liability for any loss or damage resulting to the lessor or other lines using said Station Facilities from such failure to pay its proportion of said Station Account.

Article XII.

In the event of default, at any time by any other line, in the payment in full of its proportion of said Station Account, the lessor shall add to said Station Account the amount of such default, or defaults, but the absorption of such default or defaults in said Station Account shall not relieve the line in default from the payment to the lessor of the amount of such default or defaults, it being expressly understood and agreed that, notwithstanding the absorption of such defaults in said Station Account, said lessor shall, as Trustee of an express trust, or in its own name, collect, sue for, and recover from the lines in default, the amount of such default or defaults, and all amounts so recovered shall be credited upon said Station Account for the month following such recovery or collection.

Article XIII.

The lessor agrees that it will make no addition or betterment to said Station Facilities involving expenditures exceeding fifty thousand dollars in the aggregate in any one fiscal year, or the payment of an annual rental or charge exceeding twenty-five hundred dollars, unless requested so to do by the lines paying a majority of the percentages of said Station Account for the month in which such request may be made, or unless the lessor shall give notice in writing to each of said lines of such proposed addition or betterment, and of the time within which, not less than 30 days, said lines may communicate in writing to the lessor approval or disapproval of such proposed addition or betterment, and if within the time specified in said notice said lines paying a majority of the perceutages of said Station Account shall so in writing communicate disapproval of such proposed additions, or betterments, the same shall be abandoned; if, however, said lines paying a majority of the percentages of said Station Accouut fail within the time specified in said notice to express in the manner herein specified disapproval of such proposed leasing, addition or betterments, then said lessor shall itself determine the question of such proposed acquisition or betterment.

Any notice herein provided to be given to said lessee or any of said lines may be given in writing to the President or General Manager or the Acting Chief Officer of said lessee and of said lines, respectively, or mailed to either of such officers at his office address.

Article XIV.

It being the intent of the parties hereto that the minimum amount to be paid hereunder by said lessee to said lessor by way of rent and compensation during each and every month that this contract shall continue in force shall not be less than Oue Thousand Dollars ($1,000.00), said lessee hereby covenants and agrees that for every month that its proportion of rent and compensation, determined as hereinbefore provided, shall be less than One Thousand Dollars ($1,000.00), it will pay to said lessor the fixed sum of

One Thousand Dollars ($1,000.00) in payment for its proportion of said rent and compensation; provided, however, that in ascertaining the proportion to be paid hereunder by said lessee, the proportion to be paid by any affiliated line of said lessee shall be included, although such proportion may, by direction of said lessee, be shown separately on the monthly statement to be rendered as hereinbefore provided.

Article XV.

This contract shall continue in force for the period of ten (10) years from and after September 1st, 1914, unless the rights of said lessee are declared forfeited by the lessor as in Article XI., hereinbefore provided.

Executed in duplicate (etc., etc.).

C. — MORTGAGES.

1. Blanket mortgage to a trust company.
2. Extract from a mortgage, providing for meetings of bondholders in case of need.
3. Extracts from a second mortgage to individual trustees.
4. Mortgage to individual trustees, to secure bonds issued to retire a prior issue.
5. Sinking Fund clause.
6. General provision for reorganization after a foreclosure.
7. Clause providing for a particular mode of reorganization, in case of foreclosure.

1. Blanket Mortgage to a Trust Company.

This Indenture of mortgage made this first day of January, in the year of our Lord one thousand eight hundred and seventy-six, by and between the New York and New England Railroad Company, a corporation existing under the laws of the States of Massachusetts, Rhode Island, Connecticut and New York, party of the first part, and the Boston Safe Deposit and Trust Company, a corporation existing under the laws of the State of Massachusetts, party of the second part, *Witnesseth* that, *whereas*, said New York and New England Railroad Company is authorized by special legislation of each of the States aforesaid, and by vote of its stockholders at a meeting thereof duly notified and held, to make and execute these presents, and to issue bonds secured thereby to the amount and of the tenor hereinafter specified; and being so authorized, has determined by votes of the board of directors of said corporation, duly passed and recorded, to make and issue the bonds of said company to an amount not exceeding in the aggregate ten millions of dollars or its equivalent in the sterling currency of Great Britain, with interest coupons attached, payable semi-annually, and to secure the same by a mortgage of the premises hereinafter described and of the tenor hereof; said bonds to be numbered consecutively from number one to the highest number which may be issued, and to be each of the tenor and in the form following, when payable in Federal currency, that is to say: —

No. $1,000.

UNITED STATES OF AMERICA.

Know all Men by these Presents, That the New York and New England Railroad Company acknowledges itself indebted to the bearer hereof in the sum of one thousand dollars, in lawful money of the United States, which sum it promises to pay at its office or agency in the City of Boston, on the first day of January, in the year one thousand nine hundred and five, with interest at the rate of seven per centum, per annum, payable semi-annually, on the first days of January and July in each year, on the presentation and delivery of the proper annexed interest coupons, payment of which shall discharge the company from all further liability for such interest.

This bond is one of a series of ten thousand bonds of even date herewith, for the sum of one thousand dollars each (or two hundred pounds each when in sterling currency), issued or to be issued for the purpose of enabling said company to take up and discharge any and all liens and incumbrances existing upon its railroads and upon any portion thereof, and to perfect its title therein, to complete said railroads, to purchase and provide terminal facilities, and properly to equip and maintain said roads, all of which said bonds are equally secured by a mortgage of its property, railroads, franchises, furniture and equipment, dated the first day of January, A.D. 1876, which has been made in trust to the Boston Safe Deposit and Trust Company of Boston, in the State of Massachusetts, and duly executed, recorded and delivered, and which is to be the first and only lien on the property and franchises of the company, when the existing debt is retired, to meet which a corresponding portion of this issue of bonds has been reserved, and is to be issued only in exchange or substitution therefor.

Upon the failure to pay any one of the interest coupons attached to any of said ten thousand bonds, upon due presentation, on or after maturity and offer to surrender the same, provided said default continue for the space of six months thereafter, the principal of all said bonds shall thereupon become immediately due and payable.

And said company further agrees with the holder hereof that this bond may be registered in the name of such holder on its books, in Boston, or any other place where it may keep transfer books for that purpose, and that, after such registration of ownership certified hereon by the transfer agent of the company, no transfer, except by such owner or his attorney, or personal representatives, on the books of the company shall be valid, unless and until the last transfer upon said books shall be to bearer, which shall restore the transferability by delivery. But this agreement shall apply to the principal of the bonds only and not to the coupons.

This bond shall not become obligatory until authenticated by a certificate indorsed hereon, signed by the Trustee named in said mortgage, or its successor in said trust, and another certificate by the Controller of Public Accounts of the State of Connecticut that it has been registered in his office, as required by the laws of said State.

In witness whereof the New York and New England Railroad Company

has caused its corporate seal to be hereto affixed and this obligation to be signed by its President and countersigned by its Treasurer, and the conpons annexed attested by the name of said Treasurer, this day of , one thousand eight hundred and seventy-

Countersigned by

, *President.*

, *Treasurer.*

The Boston Safe Deposit and Trust Company hereby certifies that this bond is one of the ten thousand bonds of one thousand dollars each (or two hundred pounds each when in sterling currency), issued under and secured by the mortgage above referred to, and that said mortgage has been delivered to said Trust Company and duly recorded as required by law.

, *Trustee.*

STATE OF CONNECTICUT. CONTROLLER'S OFFICE.

This certifies that this bond has been duly registered in the office of the Controller of Public Accounts of the State of Connecticut.

Given under my hand this day of 187 .

, *Controller.*

And such of said bonds as shall be made payable in sterling currency to be for the principal sum of two hundred pounds sterling, in lieu of one thousand dollars, and the interest thereon to be at the rate of six per centum instead of seven per centum per annum, and the principal and interest thereof to be made payable in sterling at such place in London as the directors of the company shall authorize, in lieu of the office or agency of the company in the city of Boston, but otherwise to be of like form as the bond hereinbefore recited.

Now, therefore, said party of the first part, for the better securing and more sure payment of the sums of money mentioned in the said bonds, and each of them according to the tenor thereof, and in consideration of the premises and of one dollar to it paid by the party of the second part, the receipt whereof is hereby acknowledged, does by these presents, grant, bargain, sell, convey, alien, release and confirm unto the said party of the second part, as trustee, and to its successor or successors in the trust hereby created, all and singular the railways of said New York and New England Railroad Company, commencing in Boston, in the State of Massachusetts, and running to Willimantic, in the State of Connecticut, through the towns of Blackstone and Thompson, together with a branch from said Thompson to the town of Southbridge, in said Massachusetts; and commencing in Providence, in the State of Rhode Island, and running to said Willimantic; and thence through said State of Connecticut and a portion of the State of New York to the Hudson River at Fishkill; and commencing at a point in Brookline on the line of the Boston and Albany Railroad and running thence to Woonsocket in the State of Rhode Island; and all and singular the leasehold and other estate which said New York and New England Railroad Company now has or may hereafter acquire or assume in and to the Norwich and Worcester Railroad, running from a point in the city of Worcester, in Massachusetts, to Allyn's Point, so called,

some miles southerly of the city of Norwich, in the State of Connecticut; as said railways are now or shall be located, constructed or improved under or by virtue of any powers now granted or that may hereafter be granted to locate, construct or use a railroad on any of said indicated lines, however the same may be described or built; together with all its franchises and powers to maintain and operate said railways; and all the lands, tracks, lines, rights of ways, leasehold interests, flats, water rights, viaducts, roads, depots, shops, bridges, piers, wharves, fences, walls or other structures that are or may be included in the location of said railways, or that have been or may hereafter be acquired for the uses of said company within the terminal points aforesaid, whether the same be included in the location of said railway or not; and all the locomotives, engines, tenders, cars, carriages, tools, fixtures, fuel, rails, materials, equipments and machinery belonging to said New York and New England Railroad Company, or in which it has any leasehold or other interest, or which it may hereafter acquire; including in this conveyance all the present and in future to be acquired property of said corporation, real and personal, and all its present and future rights and franchises, terms and remainders of terms, whether the same are hereinbefore sufficiently described or not, and including all stocks, bonds and other evidences of indebtedness of or title to any and all corporations which have become or are claimed to be merged in, or consolidated, or connected with or operated by said New York and New England Railroad Company, and all legal or equitable liens, claims and demands against any such corporation which have been or may hereafter be acquired by said New York and New England Railroad Company.

Provided, however, that nothing in this indenture shall be construed to prevent said company from hereafter mortgaging any extension of its said railways or of any branches thereof, not included in its present location, and which may hereafter be acquired or built, so as to create a prior lien for the expense or cost thereof; or from creating a prior lien by mortgage upon any other property, that it may hereafter acquire, real or personal, to secure the purchase money thereof.

To Have and to Hold the above bargained and granted premises, together with all and singular the tolls, incomes, emoluments, advantages, tenements, hereditaments and appurtenances thereto belonging, and all books of account, deeds, certificates, papers, leases, and all other documents evidencing, or appurtenant to, the title, unto the said party of the second part, and its successor or successors in the trust hereby created, forever, but upon the trusts and for the uses and purposes and upon the conditions herein declared and none other, that is to say: —

First. In case said New York and New England Railroad Company shall fail to pay, upon actual demand therefor, made upon the party of the first part, the principal, or any part thereof, of any of the bonds secured or intended to be secured hereby, or any of the interest thereon, at any time when and where such principal or interest may become due and payable according to the terms of such bonds, and such default shall continue for six months thereafter, then and in such case all of said bonds, both principal and interest, shall thereupon become due and payable, and the party of the second part *may*,

and upon the written request of the holders of one-tenth of said bonds then unpaid and outstanding, *shall* enter into and take possession of all and singular the railroads, premises and property hereby conveyed, or intended to be conveyed, which shall be immediately surrendered by said party of the first part to said party of the second part, or its successors in said trust or its or their agent or agents duly authorized, upon demand therefor; and as the attorney in fact, or agent of said first party, said party of the second part shall and may, by its officers or agents duly constituted, have, use, operate and enjoy the same, making from time to time all needful repairs, alterations and additions, and apply the net proceeds thereof to the payment, *pro rata*, of the principal and interest of all of such bonds remaining unpaid; and said party of the second part, at any time after taking possession of said premises as aforesaid, or after demand therefor, *may*, and on the written request of the holders of one-fifth of said bonds then unpaid and outstanding, *shall*, proceed to foreclose or sell, in such manner as the Supreme Judicial Court of Massachusetts, or any other proper Court or Courts having jurisdiction of the premises may direct, the whole or so much of the mortgaged premises as shall be necessary to discharge the principal and interest of all such of said bonds as may be unpaid, together with the expenses of such proceedings and sale, and of the administration of its trust, and shall, after deducting from the proceeds of any such sale the cost and expense thereof, and of the management of said property, including its own reasonable compensation and enough to indemnify and save harmless itself and its officers or agents against all liabilities arising from this trust, apply so much of the proceeds of said property as may be necessary to the payment *pro rata*, first, of the interest and then of the principal of said bonds remaining unpaid, and shall restore the residue of such property, or of the proceeds thereof, if any, to said party of the first part, its successors and assigns, or shall make such other or further disposition of such property, or of the proceeds of the sale thereof, as such Court or Courts shall direct or as may be prescribed by law. But it is expressly understood and agreed that the rights and remedies herein and hereinafter specified shall not exclude the party of the second part, or its successors in said trust, or its or their agents, or the holders of bonds secured hereby, from any other legal or equitable remedies in the premises.

Second. That the actual possession, use, management and control of all the granted premises and of the current revenues thereof shall be and remain with the party of the first part until six months after default shall be made in the payment of the principal or interest of said bonds, or some one of them, when said corporation shall and hereby covenants and agrees that it will, on demand therefor by the party of the second part, or its successors in said trust, or its or their agents, duly authorized thereto, assign to such party of the second part or its successors, all the right, title and interest of the party of the first part in and to every lien on any of the property hereinbefore described, and will, in the same case and upon such demand, deliver to said party of the second part, or its successors in said trust, or its or their agent or agents so authorized as aforesaid, the actual and peaceable possession of said granted premises; and said party of the first part, while in the possession of said

premises, may, from time to time, sell or exchange any articles of personal property, including rails upon its track, which may have become in its opinion unnecessary or unfit for use on its road, and may, likewise, from time to time, with the consent in writing of the party of the second part, by its president for the time being, or by such other officer or agent as may be duly authorized thereto by vote of its board of directors, sell or exchange any other of the granted premises, and apply the money or property received therefor solely to the improvement or increase of the premises hereby mortgaged in such manner that the security created by this mortgage shall be in no wise impaired by such sale or exchange.

Third. That if said party of the first part shall well and truly pay or cause to be paid to the holders of said mortgage bonds or obligations intended to be secured hereby, and every of them, the principal sums of money therein mentioned, according to the true intent and meaning thereof, with interest thereon, at the times and in the manner therein provided, and according to the true intent and meaning of these presents, then and from thenceforth this instrument and the estate hereby granted shall cease, determine, and be utterly void, and the right and title to the premises and property hereby conveyed shall revert to and revest in said party of the first part, its successors and assigns, without any acknowledgment of satisfaction, reconveyance, re-entry or other acts.

And in case the trustee hereby appointed, or any future trustee, shall at any time desire to be discharged from, or decline or become incapable or for any reason unfit to act in the trusts of these presents, then and in every such case and so often as the same shall happen, the Supreme Judicial Court of Massachusetts, upon the application of any party interested, may appoint a new trustee or trustees in its or his or their place; and so often as any new trustee or trustees hereof shall be duly appointed, either in the manner above provided or in any other lawful manner, all the estate, property, rights and powers which shall for the time being be held upon the trusts hereof, shall thereupon be vested in the acting trustees hereof for the time being, to and for the same uses and upon the same trusts and with and subject to the same powers and provisions as are herein contained and declared of and concerning the same, or such of the same uses, trusts, powers and provisions as shall then be subsisting or capable of taking effect; and every new trustee so appointed and accepting shall thenceforth be competent in all things to act in the execution of the trusts hereof as fully and effectually and with all the same powers and authorities, to all purposes whatsoever, as if he or it had hereby been originally appointed a trustee, in the place of the trustee to whom he or it shall, whether immediately or otherwise, succeed. And the retiring or retired trustee shall execute to such new trustee, such deed of release, or conveyance, if any, as said Court shall order, or as said party of the first part, in case the same shall be deemed necessary, shall reasonably require.

And this indenture further witnesseth, that said party of the first part, for itself and its successors, does covenant and agree to and with the said party of the second part, and its successor or successors in this trust, —

1*st*. That it will, at its own proper charge, do all things necessary to be

done to keep intact the lien hereby created, and will faithfully perform all the covenants and agreements herein recited or contained, on its part to be performed; and will pay to the holders of the bonds hereby secured, respectively, the principal sums of money therein mentioned, together with interest thereon, as the same shall become due and payable, and as the coupons therefor shall be presented for payment.

2d. That it will at any time or times hereafter, upon the request of said party of the second part, or its successor or successors in this trust, make, do and execute, or cause to be made, done or executed, all and every such further and reasonable acts, conveyances, assignments and assurances in the law, for the better and more effectually vesting and confirming the premises hereby granted, or intended to be granted, and all after acquired property as hereinbefore specified, in and to said party of the second part, its successor or successors forever, as by said party of the second part, its successor or successors, or its counsel learned in the law, shall be reasonably devised, advised or required.

3d. That for the purpose of more effectually providing for the taking up and discharging of all existing liens and incumbrances, which now amount in the aggregate, with accrued and overdue interest added, to not over four millions of dollars, the bonds secured hereby and numbered from one (1) to four thousand (4,000) inclusive, shall be reserved in the keeping of the party of the first part, and shall not be certified by said trustee, or issued, except upon the presentation and surrender, from time to time, to said trustee of an equal amount of the bonds, notes or other evidences of indebtedness, secured by such existing lien or incumbrance, reckoned at their face value, with the lawful interest due thereon added; it being the intention of this instrument that the whole mortgage debt secured hereby, including all such existing liens and incumbrances, shall not at any time exceed ten millions of dollars, except as hereinafter provided; but in case said parties of the first and second part shall both deem it expedient to preserve such outstanding bonds, notes or other evidences of indebtedness, so acquired, or any of them, without cancellation, then the same may be so held in such manner and under such restrictions as may be satisfactory to said party of the second part. And whenever said trustee shall certify upon these presents that it has been satisfactorily shown and established that all of the indebtedness secured by such existing liens and incumbrances known to said trustee has been taken up and surrendered, or that not over one hundred thousand dollars in amount thereof is outstanding, then any balance remaining of said bonds secured hereby, numbered from one (1) to four thousand (4,000), and reserved as aforesaid, may, upon the request of the party of the first part, be certified by said trustee, and may be issued accordingly.

4th. That said party of the first part shall, at all times, keep an office or agency in the city of Boston, and also in the city of London, if any bonds secured hereby shall be made payable there, or wherever else the bonds secured by this instrument or any portion of the same shall be made payable, for the payment of the principal and interest of such bonds, and shall provide for the transfer and registration of said bonds at said agencies.

It is also expressly understood and agreed that said bonds shall stand equally secured by this mortgage, though made, issued and sold at different times, and that no bond shall be deemed to be secured by or issued under this mortgage unless the same is certified to have been so issued by the party of the second part or its successor or successors in said trust.

And this indenture further witnesseth that said party of the second part hereby accepts the trusts aforesaid and agrees to execute them upon the following conditions, which are mutually agreed upon by the parties interested herein, to wit: That the party of the second part shall be responsible only for gross negligence or wilful default; that it shall not be required to act in execution of the trusts hereby created, except at its own option, unless requested so to do as hereinbefore provided, and unless reasonable indemnity be furnished against the loss, trouble and expense it may be put to in so doing; that it shall have power to submit all controversies arising under this instrument to arbitration; and that in case it is required to take measures for the enforcement of this mortgage, the reasonable expense of such measures shall be paid out of the trust estate, in preference to all other charges.

In witness whereof said party of the first part has caused its corporate seal to be hereto affixed, and these presents to be signed by William T. Hart, its president, and George B. Phippen, its treasurer, thereto duly authorized; and said party of the second part has caused the same to be subscribed by Francis M. Johnson, its president, and its corporate seal to be hereto affixed, the day and year first above written.

New York and New England Railroad Company,
[Seal of N. Y. and N. E. R. R. Co.]

By Wm. T. Hart, *President.*

Geo. B. Phippen, *Treas.*

Boston Safe Deposit and Trust Company,
[Seal of B. S. D. and T. Co.]

By Francis M. Johnson, *President.*

Signed, sealed and delivered in the presence of
G. W. Baldwin,
Simon W. Hatheway, } to all.
[Acknowledgments follow.]

2. Extract from a Mortgage, providing for Meetings of Bondholders in Case of Need.

Article Thirteenth. Meetings of the holders of bonds issued hereunder may be held at any time, in case of any default in payment of interest on the bonds hereby secured, for the purpose of better protecting their interests hereunder, upon the call of the Trust Company or the holders of one-fifth in amount of said bonds then outstanding. Such meetings shall be held in the City of New York or the City of Bridgeport, and notice of the time and place, with a general statement of the purpose of the meeting, shall be given by publishing the same daily for at least the two successive weeks immediately preceding the meeting, in two newspapers printed and published in each of said cities, and

of good circulation in the business community thereof; and also by written or printed notice mailed in the city of New York, postage prepaid, at least two weeks before such meeting, to the registered holders of any such bonds, at their last registered address. Any such meeting may be continued or adjourned from time to time, and holders of said bonds may attend and vote thereat in person or by proxy, each of said bonds entitling the holder or registered owner thereof to one vote; provided, that a majority in interest of the then outstanding bonds, in person or by proxy, shall be required to constitute a quorum at any such meeting, except that less than a quorum may adjourn from time to time; and provided, further, that any vote of such meeting, affecting or intended to affect any person or corporation, including the parties hereto, or their successors, may, by such person or corporation to be affected, be required to be authenticated under the hands and seals of the persons so voting.

And it is hereby declared and provided, that at any meeting of bondholders held in pursuance of the provisions hereof, any bondholder present may require the ownership of bonds by the persons claiming to be such owners to be evidenced by the production of the bonds, excepting in the case of bonds standing registered in the name of such holder; and that whenever, under any of the provisions of this indenture, effect is to be given to the election, act, appointment, or assent of a majority, or any specified amount or proportion, of the bonds secured hereby, any person whose interests are to be affected by such action, may require that the ownership of such bonds at the time of such action by the person claiming to be such owner (excepting registered bonds, as aforesaid) shall be vouched for by the affidavit of such person, or his duly authorized agent or attorney having possession of the bonds, stating such ownership of the bonds at the time of such action, and giving their numbers and amounts, which affidavit shall be received as *prima facie* evidence of the fact, but subject to question of its verity in any legal proceeding or controversy.

Any requests, assents to any proceeding had or proposed, proxies, powers of attorney, or other instruments signed by bondholders, pursuant to any provision of this mortgage, may be in any number of parts, and shall be proved or acknowledged before an officer authorized to take acknowledgment of deeds at the place of execution.

3. Extracts from a Second Mortgage to Individual Trustees.

This Indenture of mortgage made this twenty-second day of June, in the year of our Lord one thousand eight hundred and eighty-two, by and between the New York and New England Railroad Company, a corporation existing under the laws of the States of Massachusetts, Rhode Island, Connecticut, and New York, party of the first part, and William T. Hart of Boston in the State of Massachusetts, Frederick J. Kingsbury of Waterbury in the State of Connecticut, and Eustace C. Fitz of Chelsea in the State of Massachusetts, Trustees, parties of the second part, *Witnesseth*, . . .

[Recitals as to bond as in Form 1.]

This bond is one of a series of five thousand bonds of even date herewith, for the sum of one thousand dollars each, issued or to be issued, for the pur-

poses specified in the several laws of said States of Massachusetts, Rhode Island, Connecticut, and New York governing the execution and issuance of this series of bonds, all of which said bonds are equally secured by a mortgage of its property, railroads, franchises, furniture, and equipment, dated the twenty-second day of June, A. D. 1882, which has been made in trust to William T. Hart, Frederick J. Kingsbury, and Eustace C. Fitz, and duly executed, recorded, and delivered, and which is to be a general lien on said property and franchises of the Company, subject only to the prior mortgage of the party of the first part to the Boston Safe Deposit and Trust Company, dated January 1, A. D. 1876, to secure the bonds of the party of the first part, amounting in the aggregate to ten million ($10,000,000) dollars.

. . . . . .

This bond shall not become obligatory until authenticated by a certificate indorsed hereon, signed by one of the Trustees under said mortgage, and another certificate by the Controller of Public Accounts of the State of Connecticut that it has been registered in his office, as required by the laws of said State, and another certificate by some person, appointed by the corporation for the purpose, that the bond is approved by him and that it is properly issued and recorded.

In witness whereof the New York and New England Railroad Company has caused its corporate seal to be hereto affixed and this obligation to be signed by its President and countersigned by its Treasurer, and the coupons annexed attested by the name of said Treasurer, this first day of August, in the year of our Lord one thousand eight hundred and eighty-two.

President.

Countersigned by

[L. S.] *Treasurer.*

I, , one of the Trustees, under the mortgage dated June 22, A. D. 1882, above referred to, hereby certify that this bond is one of the five thousand bonds of one thousand dollars each, issued under and secured by said mortgage, and that said mortgage has been delivered to said Trustees, and recorded as required by law in the offices of the Secretaries of State of Connecticut and Rhode Island and in the offices of the Registers of Deeds in the several counties of New York and Massachusetts through which the road passes and in the office of the clerk of the City of Boston.

Trustee.

STATE OF CONNECTICUT. CONTROLLER'S OFFICE.

This certifies that this bond has been duly registered in the office of the Controller of Public Accounts of the State of Connecticut.

Given under my hand this day of 188 .

Controller.

The undersigned, who has been duly appointed by the corporation for that purpose, hereby approves the within bond and certifies that it is properly issued and has been duly recorded by the Treasurer.

Agent to certify.

And whereas William T. Hart of Boston in the State of Massachusetts, Frederick J. Kingsbury of Waterbury in the State of Connecticut, and Eustace C. Fitz of Chelsea in the State of Massachusetts, have been nominated by the party of the first part as Trustees and Grantees under these presents, and have been approved as such by his Excellency the Governor of Connecticut, and have been further approved as such by the Governor and Council of the Commonwealth of Massachusetts,

Now, therefore, said party of the first part, for the better securing and more sure payment of the sums of money mentioned in said bonds and each of them, according to the tenor thereof, and in consideration of the premises and of one dollar to it paid by the parties of the second part, the receipt whereof is hereby acknowledged, does by these presents, grant, bargain, sell, convey, alien, release, and confirm unto said parties of the second part, as Trustees, as joint tenants and not as tenants in common, and their heirs, successors and assigns forever, all and singular the railways of said New York and New England Railroad Company, commencing in Boston, in the State of Massachusetts, and running to Willimantic, . . .

TO HAVE AND TO HOLD the above bargained and granted premises, together with all and singular the tolls, incomes, emoluments, advantages, tenements, hereditaments and appurtenances thereto belonging, and all books of account, deeds, certificates, papers, leases, and all other documents evidencing or appurtenant to the title, unto the said parties of the second part, as joint tenants, and not as tenants in common, and their heirs, successors, and assigns forever, subject, however, to a prior mortgage of the party of the first part to the Boston Safe Deposit and Trust Company, dated January 1, A. D. 1876, to secure the bonds of the party of the first part, amounting in the aggregate to ten million ($10,000,000) dollars; but upon the trusts and for the uses and purposes and upon the conditions herein declared and none other, that is to say: —

. . . . . .

Fourth. — And in case any of the Trustees hereby appointed, or any of the future Trustees, shall die or remove from the State of which at the time of his appointment he was a resident, or at any time desire to be discharged from, or decline or become incapable or for any reason unfit to act in the trusts of these presents, then and in every such case, and so often as the same shall happen, the Supreme Judicial Court of Massachusetts, upon the application of any party interested, may, from the residents of the State in which the retiring Trustee resided, appoint a new Trustee or Trustees in his or their place; and so often as any vacancy or vacancies shall occur in the office of Trustee or Trustees under this indenture, or any new Trustee or Trustees hereof shall be duly appointed, either in the manner above provided, or in any other lawful manner, all the estate, property, rights, and powers which shall for the time being be held upon the trusts hereof, shall thereupon be vested in the acting Trustees or Trustee hereof for the time being, to and for the same uses and upon the same trusts and with and subject to the same powers and provisions as are herein contained and declared of and concerning the same, or such of the same uses, trusts, powers, and provisions as shall then be subsisting or capable of taking effect; and every new Trustee so appointed and accepting shall thenceforth be competent in all things to act in the execution

of the trusts hereof as fully and effectually and with all the same powers and authorities, to all purposes whatsoever, as if he had hereby been originally appointed a Trustee in the place of the Trustee, to whom he shall, whether immediately or otherwise, succeed. And the surviving Trustees or Trustee, or the retiring or retired Trustees or Trustee, shall execute to such new Trustees or Trustee such deed of confirmation, release or conveyance, if any, as said court shall order, or as said party of the first part, in case the same shall be deemed necessary, shall reasonably require.

And this indenture further witnesseth, that the said party of the first part, for itself and its successors, does covenant and agree to and with the said parties of the second part:

. . . . . .

3d. That for the purpose of securing the payment of all unsecured debts now due from the party of the first part, which debts have been incurred for the completing of the road, and amount in the aggregate to the sum set forth in a statement thereof signed by the President and Treasurer and bearing date August 1, A. D. 1882, to be handed to said Trustees, bonds secured hereby, equal in amount to said sum, shall be delivered to said Trustees, to be held by them in trust as follows: said Trustees shall hold said bonds without collecting the interest on the same until six months after default is made in the payment of the principal or interest, if any, due on said unsecured debts or any of them, and written notice thereof and of the creditor's intention to demand the bonds given as security therefor is served on the party of the first part by each person making the claim hereinafter mentioned, or until the party of the first part shall notify the Trustees or a majority of them so to do, whichever shall first happen, and thereupon said Trustees or a majority of them shall issue to each of the aforesaid unsecured creditors or their assigns, making claim therefor, bonds equal in amount to the principal due as aforesaid (counting as principal all sums named in said statement whether inserted therein as principal or interest) and coupons attached thereto already payable or to become payable within the six months then next ensuing for the amount of interest, if any, then due on said principal at the rate of six per centum per annum (any difference, in favor of said Company between said amount and the amount of accrued interest then represented by such coupon, being paid to the Trustees, or a majority of them, for the benefit of the party of the first part in cash, and the other overdue coupons originally attached being cancelled and returned to the party of the first part); and thereupon and upon the acceptance of the same by said creditors respectively, the debt due the unsecured creditor so accepting the same shall be thereby discharged to the extent of the payment so made him in bonds and coupons, as fully as if such payment had been made him in cash, and all right of the party of the first part to said bonds and coupons shall be extinguished; of which facts the acceptance by said creditor and the certificate by one of the Trustees that the bonds are duly issued shall be conclusive evidence; *provided however*, that if the party of the first part shall, at any time while said bonds or any of them are in the hands of the Trustees, present to them or a majority of them vouchers certified by the Treasurer of the party of the first part, showing the payment by it of any unsecured debts, in said statement mentioned, to the amount of one thousand

dollars or upward, excluding interest accrued thereon after August 1, 1882, said Trustees or a majority of them shall deliver to the party of the first part such number of bonds as shall equal, as nearly as may be, the amount of unsecured debts aforesaid paid, which bonds shall then be discharged of all trusts affecting them, and the certificate by one of the Trustees that the bonds are duly issued shall be conclusive evidence thereof.

. . . . . .

And it is further expressly understood and agreed, that all the bonds hereby secured, which are not delivered to the Trustees for the security of the holders of the unsecured debt of this Company, pursuant to the foregoing provision, shall be issued and used by the party of the first part, and the proceeds thereof applied solely and exclusively for the purposes specified in the several laws of the States of Massachusetts, Rhode Island, Connecticut, and New York, hereinbefore referred to, governing the execution and issuance of the bonds hereby secured.

. . . . . .

The word Trustees and parties of the second part, in this indenture, shall be understood to include the survivors or survivor, successors or successor, of the Trustees, parties of the second part, hereinbefore named.

[Certificates annexed to deed.]

COMMONWEALTH OF MASSACHUSETTS.

KNOW ALL MEN BY THESE PRESENTS that the foregoing mortgage and the three trustees to whom it is made are hereby approved by the Governor and Council of the Commonwealth of Massachusetts, under chapter two hundred and forty of the Acts of said Commonwealth for the year 1882.

WITNESS my hand and the seal of said Commonwealth this 26th day of June, A. D. 1882.

HENRY J. COOLIDGE,
Deputy Secretary of the Commonwealth.

TO HIS EXCELLENCY THE GOVERNOR OF THE STATE OF CONNECTICUT: —

The New York and New England Railroad Company, having accepted the resolution of the General Assembly passed at its January session, 1882, "amending the charter of the New York and New England Railroad Company," and having also voted to issue bonds to the amount of $5,000,000, par value, and to make a mortgage to secure them, as authorized by said resolution, hereby nominates for your approval the following persons, to be trustees under said mortgage, namely: —

WILLIAM T. HART, of Boston, Mass.
EUSTACE C. FITZ, of Chelsea, Mass.
FREDERICK J. KINGSBURY, of Waterbury, Conn.

Dated this 15th day of June, 1882.

THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY.
by
JAMES H. WILSON,
President.

[Seal of the N. Y. & N. E. R. R. Co.]

JAMES W. PERKINS,
Secretary.

STATE OF CONNECTICUT, EXECUTIVE OFFICE,
NEW HAVEN, June 16, 1882.

The three trustees above nominated, William T. Hart of Boston, Eustace C. Fitz of Chelsea, both of Massachusetts, and Frederick J. Kingsbury of Waterbury, Conn., as trustees under the mortgage to be made by the New York and New England Railroad Company, under authority of the act above referred to, are hereby approved.

HOBART B. BIGELOW,
Governor.

4. MORTGAGE TO INDIVIDUAL TRUSTEES TO SECURE BONDS ISSUED TO RETIRE A PRIOR ISSUE.

BOSTON AND NEW YORK AIR LINE RAILROAD CO., TO HENRY B. HAMMOND AND FREDERIC W. RHINELANDER, TRUSTEES.

MORTGAGE DEED.

This Indenture, made the first day of August, in the year one thousand eight hundred and eighty, by and between THE BOSTON AND NEW YORK AIR LINE RAILROAD COMPANY, a corporation incorporated by the State of Connecticut, party of the first part, and Henry B. Hammond and Frederic W. Rhinelander, both of the City, County, and State of New York, trustees, as is hereinafter set forth, parties of the second part, witnesseth as follows:

Whereas said Company is the owner in fee simple of a railroad running from a point in the City of New Haven to a point in the village of Willimantic, in the State of Connecticut, and of its appurtenances and equipments, and is now operating the same, and is authorized by its charter to mortgage the same for an amount not exceeding two millions of dollars, in manner and form as is herein provided; and

Whereas said Company mortgaged the same to said parties of the second part, by an indenture made the first day of August, 1875, and recorded in the office of the Secretary of the State of Connecticut, on the twenty-fifth day of September, 1875, to secure the bonds of said Company to an amount not exceeding five hundred thousand dollars, dated August 1st, 1875, and payable August 1st, 1895, and bearing interest at the rate of seven per cent. a year, payable semi-annually, but containing a reservation to said Company of the right to call in and pay off said bonds on the first day of February or of August, in any year before August 1st, 1895, on giving six months' notice to the bondholders, in the manner specified in said bonds and mortgage; and

Whereas said Company, pursuant to a vote of its board of directors, passed on the twenty-ninth day of July, 1880, exercised said right to call in and pay off said bonds, and has given said six months' notice, in the manner specified in said bonds and mortgage, that said bonds will be paid off on February 1st, 1881, with the coupons due on said day, and a premium of five per cent. on the principal amount of each bond, in addition thereto; and

Whereas in order to provide means for retiring and paying off said bonds,

the board of directors of said Company, at meetings held on the twenty-ninth day of July, and the thirtieth day of October, 1880, voted that new bonds of said Company be issued to an amount not exceeding five hundred thousand dollars, bearing five per cent. interest *per annum*, and be secured by a mortgage of all the rights, franchises, and property, then owned, or thereafter to be acquired by said Company; said bonds to be of the form hereinafter set forth, and said mortgage to be drawn and executed in manner and form as these presents are drawn and executed; and,

Whereas said Company at a special meeting, duly warned for the purpose of taking action with reference to the issue of such bonds, and the execution of such a mortgage, and held at Middletown, on the fourth day of November, 1880, voted as follows:

"*Whereas* the board of directors of this Company have voted to issue the bonds of this Company dated August 1st, 1880, to an amount not exceeding five hundred thousand dollars, payable August 1st, 1905, bearing five per cent. interest *per annum*, payable semi-annually, and to secure the same by a mortgage of all the railroad, property, and franchises, whatsoever, now owned and hereafter to be acquired by this Company, which mortgage shall be a first lien on all the property embraced in it, for the exclusive security of said proposed issue of bonds to said amount.

Voted, That said action of the board of directors is hereby approved, ratified and confirmed, and the directors are hereby requested and authorized to proceed to issue the bonds of this Company for the amount of ($1.000) one thousand dollars each, to the aggregate amount above specified, and to cause a mortgage to be executed to Henry B. Hammond and Frederic W. Rhinelander, of New York City, to secure the same; said bonds and mortgage to be such as said board have voted, as above recited, and to be in all other particulars such, and of such form, and so executed, as has been or may be authorized by said board of directors; and that said board of directors may exchange said bonds or any of them for the outstanding seven per cent. bonds of this Company, which have been called in, or may sell said five per cent. bonds or any of them at such prices as they may deem advisable, and use the avails to aid in retiring said seven per cent. bonds of the Company, as said board may deem best;" and,

Whereas said five per cent. bonds are to be of the form and tenor following, namely:

[Recital of bond.]

And whereas on the back of each of said bonds it is further provided, as follows:

"This bond may be registered in the owner's name on the Company's books in the City of New York, or at any other place which the Company may determine, such registry being noted on the bond by the Company's Transfer Agent; after which no transfer shall be valid, unless made on the Company's books by the registered owner, and similarly noted on the bond; but the same may be discharged from registry, by being transferred to bearer, after which it shall be transferable by delivery, but may be again registered, as before.

The registry of the bond, as above, shall not restrain the negotiability of the coupons by delivery.

Payment by the Company of any interest accrued upon this bond, when made to the bearer of the coupon for such interest, shall forever discharge the Company from liability for the interest so paid."

And whereas said Company proposes immediately to commence the issue of such bonds, and to continue the same from time to time, if necessary, until said limit of five hundred thousand dollars has been reached, and each bond issued within said limit is to be secured by these presents equally with every other bond of said series, without any priority or preference between them on account of any priority of issue;

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that the Boston and New York Air Line Railroad Company, party of the first part, as well for and in consideration of the premises aforesaid, and for the better security of the parties who shall become holders of said bonds, for the payment of the same with interest according to their tenor, as also for and in consideration of one dollar paid unto said Company by Henry B. Hammond and Frederic W. Rhinelander, both of the City, County and State of New York, parties of the second part, at and before the ensealing and delivery hereof, the receipt of which is hereby acknowledged, has granted, bargained and sold, aliened, assigned, transferred, conveyed and set over, and by these presents, does grant, bargain and sell, alien, assign, transfer, convey and set over to the said Henry B. Hammond and Frederic W. Rhinelander, and to the survivor of them, and to his and their successors, heirs, and assigns, forever, all and singular the railroad of the party of the first part, from a point in the City and County of New Haven to a point in the village of Willimantic.

[General description of the railroad and its appurtenances, etc.]

Provided, however, that nothing in this indenture shall be construed to prevent said Company from hereafter mortgaging any extension of its said railways, not included in its present location, which may hereafter be acquired or built, so as to create a prior lien for the cost thereof; or from creating a prior lien by mortgage upon any other property, which it may hereafter acquire, to secure the purchase-money thereof.

TO HAVE AND TO HOLD the said above bargained and granted premises, unto them, the said Henry B. Hammond and Frederic W. Rhinelander, as joint tenants, and not as tenants in common, and to the survivor of them, and his and their successors, heirs, and assigns, in trust for the persons, parties, and corporations, who shall become holders of said five per cent. bonds hereinbefore described, in the manner and on the terms and conditions, and for the use and purposes, herein declared, to wit: —

First. — That the actual possession, use, and management of the granted premises shall be retained by the party of the first part, so long as it shall well and truly perform all and singular the stipulations, on its part to be performed, expressed in said bonds and each of them, and in this indenture.

Second. — That, while said Company remains in possession of said granted premises, it may from time to time sell or exchange any of the estate or premises hereby bargained and granted, which is not essential to the operation or security of said railroad, and may give a clear title thereto, free of any trust; using however the avails of such sale or exchange for the benefit and

improvement of said mortgaged premises, in such manner that such sale or exchange shall not lessen the value of said mortgage security; *provided always* that no such sale or exchange of any part of the location of said railroad, or of any of the franchises or real estate of said party of the first part, shall be valid without the written consent thereto of said parties of the second part, or the survivor of them, or his or their successors in said trust, first had and obtained.

Third. — That the said parties of the second part, and the survivor of them, and his and their successors in said trust, in case they at any time enter into the actual possession of the mortgaged premises, shall, while so in possession, keep a complete record and account of all their doings, receipts and expenditures, and render to the party of the first part, its successors and assigns, semi-annually, a detailed account of said receipts and expenditures, computed up to and including the first days of February and of August in each year, respectively.

Fourth. — That, in case said Company shall make default in the payment of any coupon appertaining to any of said bonds, according to its tenor, and said default shall continue for sixty days, then said parties of the second part, and the survivor of them, and his and their successors in said trust, may, and, upon the request in writing of any holder or holders of said bonds to an aggregate amount of one hundred thousand dollars, interest on which has remained in default for sixty days as aforesaid, shall enter upon, and take actual possession of all and singular the premises herein granted, and by themselves, or their agents, receive the income and profits thereof, defraying out of the same their expenses in operating the road and for needful repairs and improvements thereon, and paying the net earnings, which may remain, after deducting their reasonable compensation for and expenses in said execution of their trust, to the holders of the whole of said series of bonds, hereby secured, *pro rata*, so far as may be necessary to discharge all the interest due and payable thereon, according to their tenor, from time to time; and, if said net earnings suffice at any time for the full payment of all overdue coupons on said bonds and for the payment of the whole set of coupons next thereafter to mature on said bonds, said parties of the second part, and the survivor of them, and his and their successors in said trust, shall, on demand of said Company, surrender to it the possession, use, and management of all and singular said mortgaged property; unless the principal of said bonds has by that time become immediately payable.

Fifth. — That, whenever the whole series of bonds aforesaid shall become payable, if they, or any of them, being presented for payment, are not duly paid, said parties of the second part, and the survivor of them, and his and their successors in said trust, shall apply to the proper court or courts of the State of Connecticut for a foreclosure of the mortgage created by this indenture; and shall hold the title to the aforesaid mortgaged premises, under such decree of foreclosure as may be passed, after the equity of redemption of the party of the first part, and its successors and assigns, shall be extinguished and barred, in trust for the holders of said bonds; to be conveyed to such person, or persons, party, or corporation, as said bondholders may appoint, agreeably to the laws of the State of Connecticut.

And said party of the first part, for itself, and its successors and assigns,

hereby covenants with said parties of the second part, and the survivor of them, and his and their successors in said trust, that, until the ensealing and delivery hereof, said party of the first part is well seized and possessed of the above bargained and granted premises, and has full power to bargain and sell, grant, assign, and convey the same in manner aforesaid; and that the same are free from all incumbrances, whatsoever (excepting said prior mortgage to said parties of the second part to secure said seven per cent. bonds, to replace which said five per cent. bonds are to be issued); and that it will warrant and defend the same unto the said parties of the second part, and the survivor of them, and his and their successors in said trust, against all claims and demands whatsoever; and also that it, said party of the first part, and its successors and assigns, will from time to time, and at any time, on demand of said parties of the second part, or of the survivor of them, or of his or their successors in said trust, make, execute, and deliver all and singular such further assurances, conveyances, and instruments, as shall from time to time be necessary, and as by said parties of the second part, or the survivor of them, or his or their successors in said trust, or their counsel learned in the law, shall be reasonably advised and required, for the better effectuating of the objects and purposes of this mortgage and the trusts hereby created, and subjecting thereto any and all property, both real and personal, which may hereafter be acquired by said party of the first part, or its successors and assigns, and shall appertain to said railroad, or be used or intended to be used in its construction, reparation, operation or improvement. And said party of the first part, for itself, and its successors and assigns, hereby covenants with said parties of the second part, and the survivor of them, and with his and their successors in said trust, that it will well and truly fulfil all the stipulations and promises set forth in the form hereinbefore recited of the bonds to be secured hereby, which are on its part to be performed; and that it will not, while in possession of the above bargained and granted premises, permit the same or any part thereof to be wasted, or its value impaired through neglect or mismanagement; and that, if default shall at any time be made in the payment of any of said bonds, or of any coupon appertaining to any of said bonds, according to its tenor, and said default shall continue for sixty days, then said party of the first part, and its successors and assigns, will upon the demand of said parties of the second part, or of the survivor of them, or of his or their successors in said trust, immediately and peaceably, without process of law, surrender the actual and peaceable possession of all and singular the above bargained and granted premises unto said parties of the second part, or the survivor of them, or his or their successors in said trust.

But this conveyance is upon the express limitation that upon the payment of the principal and interest of each and every of said bonds, according to the tenor thereof, and the discharge of said party to the first part from all liability thereupon, the estate and trust herein and hereby created in said parties of the second part, and the survivor of them, and his and their successors, heirs, and assigns, shall cease and be null and void, and said premises hereby granted and conveyed, and all rights and property which shall have been subjected to this mortgage, shall be divested from said parties of the second

part, and the survivor of them, and his and their successors, heirs, and assigns, and be immediately re-vested, in law and in fact, in said party of the first part, without any entry or other act, conveyance, declaration, or proceeding, to be by it, or by said parties of the second part, or the survivor of them, or his or their successors, heirs, or assigns, made, done, or instituted.

And it is hereby provided and mutually agreed by both parties to these presents that in case the party of the first part, or its successors or assigns, shall at any time desire to sell or exchange any part of the location of said railroad, or any of the franchises or real estate herein mortgaged and conveyed, and the written consent thereto of said parties of the second part, or of the survivor of them, or of his or their successors in said trust, is refused; or if any disagreement should at any time arise between the parties to these presents, or their successors, or assigns, relating to the application of the avails of any of said mortgaged rights and property, which shall have been sold or exchanged as is hereinbefore provided, or to the comparative value of the subject of such sale or exchange and the avails thereof, then the question whether such consent ought to be given, or the decision as to the subject-matter of such disagreement, shall be submitted to the final arbitrament and award of a referee, who shall be appointed by any Judge of the Supreme Court of Errors of the State of Connecticut, on application of either of the parties to this indenture, and after at least three days' notice of the hearing on said application, first given to the adverse party; and each party to this indenture, and its, his, or their successors or assigns, shall do or forbear to do whatever said referee may award in the premises.

And it is hereby further mutually agreed and provided, that said parties of the second part, and the survivor of them, and his and their successors in said trust, when in actual possession of the mortgaged premises, shall have full power to submit all questions of law or fact, arising in the course of their execution of said trust between said parties of the second part, and the survivor of them, and his and their successors in said trust, and third persons not being parties to this indenture, to arbitration, and also to compromise and settle any such questions in such manner as said parties of the second part, or the survivor of them, or his or their successors in said trust, may deem best for the interests of all concerned in said mortgaged premises.

And it is hereby further mutually agreed and provided, that either of the parties of the second part, or of their successors in said trust, may, at any time, effectually terminate his estate and trust under these presents, by sending his written resignation thereof, over his signature, to his co-trustee, and to the Secretary of said party of the first part, which resignation shall take effect only upon the receipt of the same by both said co-trustee and said Secretary; and that in case of the permanent mental incapacity of either of the parties of the second part, or of their successors in said trust, he may be removed from said trust, and his estate under these presents terminated, by any Judge of the Supreme Court of Errors of the State of Connecticut, on application either of his co-trustee, or of the party of the first part, and after such reasonable notice to the trustee, whose removal is sought, of the hearing on said application, as such Judge may order.

And, inasmuch as it is the true intent and meaning of these presents, that, on the death, removal from office, or resignation of either of the parties of the second part, or of their successors in said trust, the whole estate and trust created and limited by these presents shall become vested in the surviving or remaining trustee, it is hereby further mutually agreed and provided, that, as early as practicable after any and every such death, removal from office, or resignation, the party of the first part, and the surviving or remaining trustee, or, if they cannot agree to unite in such application, then either of them shall apply in writing to a Judge of the Supreme Court of Errors of the State of Connecticut for the appointment of a successor, to be named in said application, to the trustee, who shall have died, or been removed, or resigned, as aforesaid, and shall publish in a daily newspaper, published in the City of New York, and in a daily newspaper, published in the City of New Haven, and in a newspaper published in the City of Middletown, notice of the time and place set for the hearing of said application, and of the nomination made to fill said vacancy, in at least two successive issues of each of said newspapers, prior to said hearing; and upon said hearing said Judge may approve or reject said nomination, and, if he reject it, may forthwith appoint, to fill the vacancy, any other suitable person agreed upon by all parties who may be present or represented at said hearing, or, if said parties fail to agree on any name, any suitable person, whom said Judge may select; and the action of said Judge in the premises, being declared in writing, over his signature, and delivered to the Secretary of the party of the first part, and a duplicate thereof delivered to said surviving or remaining trustee, shall be effectual to constitute the person, whose nomination shall have been approved by said Judge, or who shall have been so appointed by said Judge, a co-trustee under this indenture, and to vest in him the same estate, rights, and title, which would have vested in him if he had been particularly named in this indenture as one of the grantees under the same; and thereupon the other co-trustee may, and shall, if requested by such newly appointed trustee, make, execute, and deliver to him all such releases, confirmations, and assurances, as may be necessary or proper to vest or confirm the legal estate in the premises, bargained and granted in this indenture, in both said trustees, and the survivor of them, and his and their successors in said trust, in the same manner as they are by these presents vested in the parties of the second part, and the survivor of them, and his and their successors in said trust.

And it is hereby further mutually agreed and provided, that neither of the parties of the second part, nor of their successors in said trust, shall be liable to the party of the first part, or to its successors or assigns, or to any party claiming under it or them, for any loss or damage arising from any act done or omitted in the matter of the execution of the trusts hereby declared, unless the same be due to his, the said trustee's, own wilful default, or gross negligence, so that no trustee shall ever suffer or be held liable for the default or negligence of his co-trustee.

In witness whereof, The Boston and New York Air Line Railroad Company has caused its corporate seal to be hereunto affixed, and its corporate name hereunto subscribed, by H. B. Hammond, its President, being the agent

of said Company, specially authorized to do the same, and the said parties of the second part have also set their hands and seals hereunto, on this fourth day of November, 1880.

THE BOSTON & NEW YORK AIR LINE RAILROAD CO.
by H. B. HAMMOND, *President and Agent.* [CORPORATE SEAL.]
HENRY B. HAMMOND, *Trustee.* [L. S.]
FREDERIC W. RHINELANDER, *Trustee.* [L. S.]

[Acknowledgments and attestations follow.]

5. SINKING FUND CLAUSE.

And the party of the first part further covenants with said trustee, and its successors in said trust, that, for the purpose of providing a sinking fund for the redemption or purchase of bonds hereby secured, it will pay to said trustee, or its successors in said trust, fifty thousand ($50,000) dollars on the first day of January in each year preceding that when the principal of said bonds is by their terms payable, such annual payments and each of them to be used by said trustee or its successors, as soon as may be after receipt thereof, for the purchase and payment of such bonds, so far as they may be offered for that purpose at not exceeding par and interest.

And it is further mutually agreed that in case bonds enough to exhaust said moneys in the sinking fund at any time cannot be purchased at that price, said trustee shall notify, as soon as may be, the party of the first part, and thereupon the latter shall advertise for proposals for the sale of such bonds to be made by the holders thereof to said trustee, and said trustee shall purchase any bonds that are so offered at such prices as it may think reasonable, not exceeding a premium of ten per cent over par, and interest.

And if at any time more bonds are offered to said trustee, than there are funds on hand so to purchase, said trustee shall select the bonds to be purchased by drawing lots, under such regulations as it may think proper to establish.

6. GENERAL PROVISION FOR REORGANIZATION AFTER A FORECLOSURE.

Fifth. That, whenever the whole series of the bonds hereby secured shall become payable, if they, or any of them, being presented for payment, are not duly paid, said party of the second part, and his successors in said trust, shall apply to the proper court or courts of the State of Connecticut for a foreclosure of the mortgage created by this indenture; and if a strict foreclosure be decreed, shall hold the title to the aforesaid mortgaged premises, under such decree of foreclosure as may be passed, after the equity of redemption of the party of the first part, and its successors and assigns, shall be extinguished and barred, in trust for the holders of said bonds, to be conveyed to such person, or persons, party, or corporation, as a majority in interest of said bondholders may appoint, agreeably to such decree and the laws of the State of Connecticut existing at the time of such appointment: and it is further agreed that if a foreclosure be decreed by sale, any holders of bonds hereby secured may bid at such sale and pay their bid, if a sale be made to them, in

whole or in part, in said bonds and the coupons thereto belonging, under such limitations and to such extent as the decree of the court may prescribe.

7. Clause providing for a Particular Mode of Reorganization in Case of Foreclosure.

10th. In case of an absolute foreclosure under the provisions[1] of this instrument, it shall be the duty of the Trustees to call a meeting of the holders of the mortgage bonds secured by this instrument, by an advertisement of the time and place and object thereof at least three times a week, for three successive weeks, in newspapers published, one in the City of Boston, one in the City of Providence, one in the City of Hartford, one in the City of New York, and one in London, in England; and the bondholders at such meeting may, at an election to be presided over by such of the parties of the second part or their successors as shall be present, and in which each bondholder may cast one vote for every one thousand dollars principal sum of such bonded debt held by him, choose from their number a Board of Directors of like number with the then Board of Directors of the Boston, Hartford and Erie Railroad Company, the grantor herein, and may organize themselves into a corporation, with a corporate name to be selected by them, and a capital stock equal to such outstanding mortgage debt, divided into shares of one hundred dollars each, which said corporation[2] shall be invested with all the powers, privileges and franchises, and shall be subject to all the duties, liabilities and restrictions of the Boston, Hartford and Erie Railroad Company, and shall consist of the holders of the mortgage bonds secured hereby at the rate of ten shares for every bond of one thousand dollars or of two hundred pounds sterling, as said bonds shall be surrendered to said new corporation to be exchanged for certificates of stock at the rate aforesaid. And said parties of the second part shall by deed convey unto said new corporation all said mortgaged property, premises, estate and franchises, and all additions thereto, and all moneys remaining in their hands when they shall be fully paid and indemnified for their services and liabilities as hereinbefore provided; copies of which said deed shall be recorded or lodged wherever this instrument is required by law to be recorded or lodged; and upon the organization of the bondholders into a corporation they shall file in the offices of the several Secretaries of State above named copies of their proceedings in the organization under their corporate seals, attested by their President and Secretary, which shall be *prima facie* evidence in all suits for or against them that they are a corporation; and after that time no bondholder shall participate in the earnings of the mortgaged property until he surrenders his bonds to the new corporation as herein provided.

11th. The remedy herein given to said parties of the second part shall not be construed to deprive them or any other parties of their full rights and remedies in the several courts of law and equity in said States, as they exist

[1] See Graham *v.* Boston, Hartford, & Erie R. R. Co. 118 U. S. 161, 175.

[2] This, of course, requires authority from the State, given either in advance or by way of ratification and confirmation.

now or may hereafter exist, and any court of competent jurisdiction may enforce any of the provisions of this instrument.

D. — LICENSES.

1. For a structure under the track. | 2. For an electric wire crossing; poles to be set on railroad.

1. For a Structure under the Track.

This Agreement, made this day of A. D. 190 , between Railroad Company, party of the first part, hereinafter called the Railroad Company, and
party [or parties] of the second part, hereinafter called the Licensee, of County of and State of *Witnesseth:*

Whereas, the Licensee wishes to construct and lay herein-after called the Structure, across and underneath the location, waylands, and tracks of the Railroad Company at between stations 1510 and 1511.

Now, Therefore, The Railroad Company hereby grants to the Licensee license and permission to construct and lay the Structure underneath and across said location, waylands, and tracks in consideration of, and subject to, the agreements following, which are also hereby made conditions of said grant:

1. The Licensee shall place the Structure at least feet below the tracks of the Railroad Company, measured from the bottom of the ties; and the work of laying the same and restoring the surface of said waylands to proper condition shall be done under and subject to the general supervision of the Roadmaster in charge of said tracks of the Railroad Company, and to his satisfaction; and said work shall be done at such time or times and in such manner as not to interfere with the convenient operation of the railroad of the Railroad Company.

2. The Licensee shall indemnify the Railroad Company for and against any liability, expense or damage it may incur or suffer, caused by or on account of the construction, maintenance or existence of the Structure.

3. The Licensee shall take up and remove the Structure from said location and waylands at any time hereafter on the request of the Railroad Company, and on failure so to do the Railroad Company shall have the right to remove the same therefrom at the risk and expense of the Licensee.

4. This agreement shall be binding on the heirs, executors, administrators, successors and assigns of the Licensee, and shall be joint and several where there is more than one party of the second part.

In Witness Whereof the parties hereto have caused these presents to be executed in duplicate the day and year first above written.

Railroad Company.

Form Approved, *General Counsel.* By
Description Correct, *Chief Engineer.* *Vice President.*
Terms and Conditions recommended, *Superintendent of Eastern Division.*

2. For an Electric Wire Crossing; Poles to be set on Railroad.

This Agreement, made this day of A. D. 1904, by and between the Railroad Company, hereinafter called the Grantor, of in the County of and State of hereinafter called the Licensee, party [or parties] of the second part, *Witnesseth:*

That the Grantor hereby grants unto the Licensee license and permission to suspend wires over and across the lands and tracks in the township of Lincoln, Grantor's location between stations 1005 + 20 and 1006 on the centre line of its railroad, and to erect poles on said lands to support said wires, under and subject to the following conditions and stipulations:

1. The poles shall be erected only at such places as shall be satisfactory to the Roadmaster of the Grantor and at least feet distant from any and all tracks of the Grantor; and said wires shall be suspended and maintained at least feet above the tracks of the Grantor and at least feet above all wires of telegraph or other electric lines now or hereafter suspended along the railroad of the Grantor; and the work of erecting said poles and suspending said wires shall be done under the supervision of the Roadmaster of the Grantor and to his satisfaction.

2. The Licensee hereby agrees to provide, put in place and maintain such form of basket or other protection against said wires, as the Superintendent of Telegraph of the Grantor shall require.

3. The Licensee hereby agrees to indemnify the Grantor for any expense or damage it may incur or suffer caused by the erection of said poles or the suspension of said wires, or by their maintenance or existence.

4. The Licensee hereby agrees at any time hereafter on the request of the Grantor, to change the location of said poles, or the height of said wires, or the method or device for protection against the same, or to remove said poles and wires from the lands of the Grantor and if the Licensee shall fail to comply with such request, the Grantor shall have the right to change the location of said poles, or the height of said wires, or the method or device for protection against the same, or to remove said poles and wires from its lands, at the risk and expense of the Licensee.

5. This agreement shall be binding on the heirs, executors, administrators, successors and assigns of the Licensee, and shall be joint and several on the part of the Licensees where there is more than one Licensee.

In Witness Whereof the parties hereto have caused these presents to be executed in duplicate the day and year first above written.

V.

CAR TRUSTS.

1. Articles of association.
2. Lease of cars by car trust association to railroad company.

1. Articles of Association.

THE NEW-ENGLAND CAR TRUST.

Articles of Association.

This Agreement, made this first day of February, one thousand eight hundred and eighty-two, between William T. Hart of Boston, Eustace C. Fitz of Chelsea, Jonas H. French of Gloucester, Henry D. Hyde and Edward P. Nettleton of Boston, and all of Massachusetts,

Witnesseth that the aforenamed parties have agreed to form an Association for the purpose of buying, selling and leasing railroad rolling-stock, to be sold or leased to the New-York and New-England Railroad Company, that other persons may be admitted to membership in said Association, with the same rights and advantages and subject to the same liabilities as the parties in this agreement first named, on the terms hereinafter set forth, and that the said parties do severally agree to and with each other, as follows:

First, Said parties hereby associate together under the name of the New-England Car Trust, for the purpose of buying, selling and leasing railroad rolling-stock as hereinafter mentioned.

Second, The shares of stock of said Association shall be three thousand of one thousand dollars each, and the same shall be classified in alphabetical series, beginning with the letter "A"; the certificates of stock of the first series to be marked "Series A," and the certificates of the other series to be marked by other letters indicating the series to which such shares of stock shall belong.

Third, Any person, becoming the owner of one or more shares of the stock, shall become a member of the Association.

Fourth, All contracts relating to any business of the Association, involving liabilities for the payment of money, shall be in writing, and made under the direction of the Board of Managers hereinafter provided for, and shall be signed on behalf of the Association by at least three of such persons as shall, at the time of such signing, be members of such Board of Managers and by the person, persons or corporation with whom such contract shall be made; and a duplicate of every such contract shall be deposited with the Trustee herein named. Every contract shall contain a stipulation on the part of the person or persons or corporation contracting with the Association, that the person or

corporation so contracting shall look only to the property and funds of the Association for payment under such contract, or for the payment of any debts, damages, judgment or decree, or of any money which may otherwise become due or payable by reason of the failure, on the part of the Association, to perform such contract in the whole or in part; and that neither the Board of Managers, collectively or individually, present or future, nor any other member, present or future, of the said Association, shall be or become personally liable for the payment of any money that may become due in any manner whatever upon such contract.

Fifth, William T. Hart, Eustace C. Fitz, Jonas H. French, Henry D. Hyde and Edward P. Nettleton, aforesaid, shall be the Board of Managers of the Association. Any three Managers, at a meeting duly called for that purpose, after ten days' notice to the Managers, sent by mail, addressed to their respective places of business, shall have power to fill any and all vacancies in their Board, which may happen from any cause.

Sixth, Each Manager hereafter appointed shall own at least one share of stock in his own right; and if at any time any Manager hereafter appointed shall cease to be the owner of at least one share of stock in the Association, he shall thereupon cease to be a Manager, and the remaining members of the Board shall forthwith elect a shareholder as a Manager in his stead.

The shareholders shall have the power to remove any or all of the Managers, and to elect others at any meeting of the Association which may be called for that purpose by the Trustee hereinafter named, upon the written request of the holders of a majority of the shares. And said Trustee hereby agrees that on such request it will call such meeting.

At all meetings of the Association, and upon all questions that shall arise, every shareholder shall be entitled to one vote for each share of stock owned by him.

Seventh, The Trustee may from time to time issue and deliver in payment for railroad rolling-stock such number of shares of stock of the Association as the Board of Managers shall direct.

Eighth, Neither the death, the voluntary assignment, the insolvency, nor the bankruptcy of any shareholder or party to this agreement, nor the sale, transfer or surrender of any share or shares, nor the admission of any new members into the Association under this agreement, shall work a dissolution of the Association, nor discharge any present or future member or shareholder from any duty incurred under this agreement: *provided, however*, that any member who shall cease to be a shareholder by sale, transfer or cancellation of his share or shares, shall thereupon also cease to be a member of the Association, and shall in no manner be affected by any contract or obligation thereafter made or incurred by or on behalf of the Association; and any purchaser or transferee of any share or shares shall, by such purchase or transfer, be and become a member of the Association, with all the rights of a member. All questions arising among the shareholders or parties hereto, in relation to the business of the Association, shall be decided by the Board of Managers, and their decision shall be final.

Ninth, All rolling-stock contracted for or purchased for the Association

shall be paid for in full, either before or at the time of its delivery. And whenever rolling-stock is ready for delivery to the Association, the Board of Managers shall deliver to the Trustee hereinafter named an inventory descriptive thereof, with the cost-price of each engine, car, or other piece of rolling-stock, and cause the said rolling-stock to be delivered to said Trustee. And upon such delivery, said Trustee shall pay the cost-price of such rolling-stock out of any moneys or shares of stock in its hands belonging to the Association; but the Trustee shall not accept or receive any rolling-stock under this agreement until it shall be in funds, either cash or shares of the Association, sufficient to pay for the same.

Tenth, The shares of stock shall be transferred by delivery, or may be registered and transferred on the books of the Trustee to be kept for that purpose; but no share shall be issued, assigned or transferred until the same shall have been paid in full, either in cash or in railroad rolling-stock.

Eleventh, Every owner of one or more shares of the stock shall be entitled to a proportionate share of the rentals to be received by the Trustee as herein provided. And said Trustee shall issue a certificate, with interest coupons, for the number of shares paid for, substantially in the form following; to wit: —

THE NEW-ENGLAND CAR TRUST.

SERIES A. No.

SIX PER CENT. YEARS' CERTIFICATE.

(*Interest payable semi-annually on the first days of April and October.*)

This is to certify that the bearer is entitled to *One Share* of *One Thousand Dollars* in THE NEW-ENGLAND CAR TRUST, payable on the first day of April, A. D. 18 ; also to interest thereon at the rate of *six per cent.* per annum. payable semi-annually, as evidenced by the interest coupons attached hereto, at the office of *The American Loan and Trust Company* in the city of Boston, Payments to be made only from moneys received as rentals, as provided for in a lease of railroad rolling-stock made under date of 1882, by said American Loan and Trust Company, Trustee, to the *New-York and New-England Railroad Company*. Said lease is held in trust by said American Loan and Trust Company for the benefit of the holders of this and nine hundred and ninety-nine other certificates of one thousand dollars each, of Series A, of even date herewith, amounting in the aggregate to one million dollars, payable in ten equal annual instalments of one hundred thousand dollars each. This certificate may be registered at the office of The American Loan and Trust Company, at Boston, at the option of the holder.

AMERICAN LOAN AND TRUST COMPANY, *Trustee.*

by

Actuary. *President.*

SERIES A. COUPON NO. $30

The New-England Car Trust.

The holder hereof is entitled to *Thirty Dollars* on the first day of being six months' interest of Certificate No. , of *The New-England*

Car Trust, payable only out of the moneys received as rentals, as mentioned in the certificate to which this coupon is attached.

AMERICAN LOAN AND TRUST COMPANY, *Trustee.*
by
Actuary.

The moneys paid in for the shares of stock of the said Association shall be applied only to the purchase and acquisition of railroad rolling-stock, and the Trustee shall issue certificates of shares of stock only for money or in payment for railroad rolling-stock, the title to which shall be taken in the name of the Trustee under this agreement to be leased by the latter, under the direction of the Managers of this Association, to the New-York and New-England Railroad Company for the rental, and under the covenants and agreements hereinafter expressed; and as each and every lease in pursuance hereof shall be executed and delivered to the lessee, with the required schedules thereto attached, showing the number and cost of the engines or cars or other rolling-stock thereby let and demised, an amount of certificates of shares of stock shall be issued equal to, but not greater, than the purchase-cost thereof. And of all the certificates to be so issued under each and every such lease, one-tenth in amount shall mature, be paid and cancelled at the expiration of one year after the date of each of said leases, and one other tenth thereof shall mature, be paid and cancelled at the expiration of each succeeding year hereafter, until the whole thereof shall be discharged. And all of the certificates of each and every series shall be of substantially the same tenor and description, saving only in respect to date of issue, numerical mark, time of maturity and number.

Twelfth, Said Trustee shall have full power under the direction of the Board of Managers, to contract with the New-York and New-England Railroad Company for the lease to said company, from time to time, of all railroad rolling-stock (a separate lease to be made of each series) which may be delivered to said Trustee under this agreement, upon the following terms and conditions:

1. That in every lease so to be made and delivered to said New-York and New-England Railroad Company, the lessee shall covenant and agree to pay to the Trustee a rent which shall be sufficient to pay and discharge the following items: —

(*a*) Interest on all the outstanding and unmatured shares or certificates of the series which shall be issued, as aforesaid, in the purchase, by the said Association, of the railroad rolling-stock thereby let, at the rate of six per centum per annum, free and clear of all taxes and deductions, in equal semi-annual instalments of three per cent.;

(*b*) An annual sum equal to one-tenth of the cost-price of the railroad rolling-stock thereby let;

(*c*) All the necessary expenses of the Trust connected with said series, including compensation to the Trustee as hereinafter provided; and

(*d*) Any and all taxes upon the income or property of the Association, connected with said series or issue of certificates, or which the Trustee may be

required by law to pay or to retain from dividends. And every such lease shall continue in force until the rent, so to be paid under the same, shall be sufficient to meet, discharge and cancel all the shares or certificates so issued as aforesaid in respect to said demised rolling-stock and the interest and charges aforesaid; and after all such payments shall be fully made to said Trustee, said rolling-stock thereby leased shall be released by said Trustee, and shall be and become the absolute property of said lessee, its successors or assigns.

2. The lessee shall covenant to maintain and keep all of the said rolling-stock in good order and repair at its own proper cost and charges, and cause the same to be consecutively numbered and lettered on the body thereof, and kept lettered and numbered thus: "New-England Car Trust, Series A"; and to replace and re-mark at its own cost any that may be destroyed by accident while in its service or under its control or management, or while on connecting or other railroads, by other rolling-stock of equal value, and of like material, character and construction. And the lessee shall also covenant to insure, at its own expense, said rolling-stock in such companies, and to such amount as shall be satisfactory to the Trustee.

3. The lessee shall covenant to furnish through its general manager, or other proper officer or agent, to the Trustee once in every year during the continuance of this contract, an accurate statement of the number and description of said engines and cars or other rolling-stock which it may then have in actual service, the number and description of all that may have been destroyed by accident, and the number repaired during the year next preceding, and also the number then undergoing repairs, or in the shops of the lessee for repair; and it shall further covenant that all said rolling-stock may be inspected once in every year during the continuance of the lease, by an agent to be nominated by the Board of Managers of the Association, and appointed by the Trustee; and the Trustee shall not be required to make any other inspection of the same, but shall have the right at all times to inspect the same.

Thirteenth, It shall be the duty of the Trustee to collect and receive from the lessee the aforesaid rents, respectively, when and as the same shall become due and payable, and to apply and distribute the same to the respective series of shares representing the rolling-stock from which the said rents were derived, as follows: —

1. To the payment of the necessary expenses of the Trust connected with said series, including the following compensation to the Trustee; to wit, upon each million of dollars which shall be outstanding under the Trust on the first day of January in each year during its continuance, the Trustee shall receive five hundred dollars per annum, and at that rate per annum upon fractional parts of a million in excess of one or more millions outstanding; but, when reduced below one million, the annual compensation shall not be less than five hundred dollars.

2. To the payment of any taxes upon the income or property of the Association connected with said series, or which it may be required by law to pay or to retain from dividends.

3. To the payment of a dividend of three per cent. semi-annually upon the respective series of the outstanding certificates of stock of the Association upon which no instalments remain due and unpaid.

4. To the payment for cancellation of each year's certificates as they become due.

Fourteenth, Upon the cancellation of all the certificates of any one series of stock as aforesaid, all the rolling-stock belonging to that series shall be released by said Trustee, and shall thereupon become the absolute property of the lessee, its successors or assigns; and neither said Association nor the Trustee shall thereafter have any further control or interest in the same.

Fifteenth, The Trustee shall not in any way be liable or responsible for any matter or thing connected with the Trust hereby intended to be created, except for wilful and intentional breaches thereof. And in all contingencies that may arise, not herein provided for, in relation to the trust property, the Trustee shall have such authority as may be given from time to time by the Board of Managers, and shall not be liable for acting under such authority.

Sixteenth, This agreement shall take effect upon the day of its execution.

Seventeenth, The American Loan and Trust Company of Boston shall be the Trustee under this agreement.

Eighteenth, In the event of the declination or disability, from any cause, of said Trustee to act in such capacity at any time before the full execution and performance of the trust hereunder, the Board of Managers shall have the power to appoint a successor or successors in the said Trust, who shall thereupon be and become vested with all the powers and duties herein conferred and imposed upon the Trustee above named, as fully, to all intents and purposes, as if such successor or successors were herein and hereby appointed.

Nineteenth, This agreement shall be executed by the original parties in triplicate, one of which shall be left with the said Trustee; another shall be left with the Board of Managers, and the third shall be left with the president of the New-York and New-England Railroad Company.

In witness whereof the parties hereto have set their hands and seals to these presents in triplicate on the day and year first herein written.

[Signatures.]

The American Loan and Trust Company, the Trustee named in the foregoing agreement, in consideration of the premises, hereby accepts the trust in said agreement created, and upon the terms and conditions therein specified.

In witness whereof the said American Loan and Trust Company, Trustee as aforesaid, hath caused its corporate seal to be hereto affixed, and these presents to be signed by its president and actuary hereto duly authorized this first day of February, A. D. 1882.

AMERICAN LOAN AND TRUST COMPANY,
by A. P. POTTER, *President*.

N. W. JORDAN, *Actuary*.

[Seal of American Loan and Trust Company.]

Car Trust Lease.[1]

Lease

of railroad rolling-stock representing the certificates of the New England Car Trust, marked Series A, to the New York and New England Railroad Company.

Agreement, made the 24th day of April Anno Domini 1882 between The American Loan and Trust Company of Boston, Trustee as hereinafter mentioned, acting under the direction of the Board of Managers of The New England Car Trust, and hereinafter called the lessor, party of the first part, and The New York and New England Railroad Company, hereinafter called the lessee, party of the second part.

Whereas, A certain agreement has been entered into, bearing date the first day of February, Anno Domini eighteen hundred and eighty-two, between William T. Hart, Eustace C. Fitz and others, whereby an association has been formed under the name of the New England Car Trust, for the purpose of buying, leasing and selling railroad rolling-stock, as in said agreement mentioned;

And whereas, William T. Hart, Eustace C. Fitz, Jonas H. French, Henry D. Hyde and Edward P. Nettleton are designated and appointed by said agreement as the managers of said Association, and the American Loan and Trust Company of Boston as the Trustee under said agreement, and it is provided in said agreement, among other things as follows, to wit: — [Here the Thirteenth and Fourteenth articles of Form No. 1 are recited].

Now this Agreement witnesseth: —

1. That the American Loan and Trust Company of Boston, Trustee as aforesaid, party of the first part (acting under the direction of the Board of Managers of said Association), in consideration of the rents and covenants hereinafter mentioned to be paid, kept and performed by said party of the second part, has let, and by these presents, under and by virtue of the Articles of Association, lets unto the party of the second part, for the use of the party of the second part, subject to the control of the party of the second part, as to the use and employment thereof, all the railroad rolling-stock described in Schedule "A," hereto annexed and made part of this lease, representing the certificates of the said New Englaud Car Trust, Series A, for the term of ten years from and after the first day of April, A. D. 1882, unless sooner terminated as hereinafter provided, for the rent and sums of money for the rent or hire of said rolling-stock to be paid to the lessor, as fully set forth in the following covenants of the lessee.

And the lessee, in consideration of the premises, covenants with the lessor as follows: —

(1) That it, the lessee, shall and will pay to the lessor a rent which shall be sufficient to pay and discharge the following items: —

(*a*) Interest on all the outstanding and unmatured shares or certificates of

1 For form of conditional sale, under form of a lease of rolling-stock direct from manufacturer to railroad company, see one recited in Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 664.

the series which shall be issued as aforesaid in the purchase by the said Association of the railroad rolling-stock hereby let, at the rate of six per centum per annum, free and clear of all taxes and deductions, in equal semi-annual instalments of three per centum on the first days of April and October of each year, for the full term of this lease.

(*b*) An annual sum equal to one-tenth of the cost-price of the railroad rolling-stock hereby let, payable at the end of each year dating from the commencement of this lease.

(*c*) All the necessary expenses of the Trust connected with said Series "A," including compensation to the Trustee; and

(*d*) Any and all taxes upon the income or property of the Association connected with said series or issue of certificates, or which said Trustee may be required by law to pay or to retain from dividends, as provided in said Articles of Association.

(2) That it shall and will, at its own proper cost and charges, maintain and keep all of the said rolling-stock in good order and repair, and cause the same to be consecutively numbered and lettered on the body thereof, and kept numbered and lettered, thus: "New England Car Trust, Series A;" and shall and will replace and re-mark, at its own cost, any that may be destroyed by accident while in its service, or under its control or management, or while on connecting or other railroads, by other rolling-stock of equal value, and of like material, character and construction; and will insure, at its own expense, said rolling-stock in such companies, and to such amount, as shall be satisfactory to the lessor.

(3) That it shall and will, through its general manager, or other proper officer or agent, furnish to the lessor, once in every year during the continuance of this contract, an accurate statement of the number and description of said engines and cars, or other rolling-stock, which it may then have in actual service; the number and description of all that may have been destroyed by accident, and the number repaired during the preceding year, and also the number then undergoing repairs, or in the shops of the lessee for repair. And the lessor shall have the right to inspect said rolling-stock once in every year, during the continuance of this lease, by any person or agent, to be nominated by the Board of Managers of the said Association, and appointed by the lessor; and such person or agent shall be entitled to a free passage over the railroads of the lessee while making such inspection.

(4) That an inventory or schedule of all rolling-stock placed as aforesaid on the road of the party of the second part, under this lease, containing a memorandum of the original cost of each car and locomotive, and the date of its delivery upon the road of the lessee, shall be made in duplicate at the time of said delivery, and signed by the Trustee aforesaid on the part of the lessor, and the General Manager for the time being of the lessee, to be attested also by the signature of the President of the lessee; and one of said duplicates shall be retained by each of the parties hereto, and shall be evidence of the facts therein stated.

(5) That in case the lessee shall make default in the payment of any part of said rent, for more than thirty days after the same shall become due and

payable, or shall fail or refuse to comply with any of the covenants herein on its part to be kept and performed, the lessor, by and under the instructions of the Board of Managers in the said Articles of Association named, may, by its agents, enter upon the railroads and premises of the lessee, and take possession of all said rolling-stock, and withdraw the same from said railroad, and make such disposition of said rolling-stock as said Board of Managers shall direct; and said lessee shall thereupon cease to have any rights or remedies under this contract, but all such rights and remedies shall be deemed thenceforth to have been waived and surrendered by said lessee; and no payments theretofore made by the lessee for the rent or use of said rolling-stock, or any of it, shall, in case of such default on its part, and such repossession by the lessor, give to the lessee any legal or equitable interest or title in or to the said rolling-stock, or any cause or right of action, at law or in equity, against the lessor, or said New England Car Trust, or the managers or any of the shareholders thereof; and such repossession by the lessor shall not be a bar to the recovery of the rent actually due for the same at the time of such default, and so long as the said rolling-stock, or any of it, shall remain in the possession of said lessee.

2. It is hereby further agreed, that, in the event that all of said rolling-stock shall not be delivered to the lessee, in accordance with the terms of this lease, then, this lease shall be and remain in full force and effect as to all such cars and locomotives, portion of the rolling-stock hereby let, as shall or may be delivered hereunder, excepting only that, in lieu of the semi-annual payments of rent herein specified, said lessee shall pay a proportional part thereof, respectively, calculated upon the basis of the cost of the cars and locomotives in their several classes, as respectively mentioned in said schedule "A."

3. It is further agreed that the lessee becomes party to this lease upon the condition and distinct understanding and agreement, that it shall not and does not assume or incur any liability or responsibility for the application or non-application of the said rent or sums of money to be paid by it to said lessor, as in this lease provided; and that, upon the payment by the lessee of all the rents and sums of money as herein provided, that then, without further payment by the lessee, the lessor shall and will forthwith release and transfer said rolling-stock to the lessee; and that all the said rolling-stock hereby leased shall thereupon become the absolute property of the lessee, and that neither the lessor nor its *cestuis que trustent* shall have any further control over or interest in the same.

4. And the lessor hereby agrees to render to the lessee, once in every year, an account of the operations and condition of the Trust, including an account of the moneys received and disbursed, and of the expenses paid, and of the certificates purchased, paid, and cancelled, as in said agreement mentioned; and a duplicate of said yearly account shall be retained by the lessor, which shall, at all reasonable times, be open for inspection by the holders of the certificates mentioned in said agreement.

5. It is hereby further provided and understood that the lessee shall in no event have any claim hereunder against said Board of Managers, collect-

ively or individually, present or future, or against any other member, present or future, of said Association, by which they or any of them shall be or become personally liable in any manner whatever hereunder, for the payment of any money, debt, damages, judgment or decree that may become due or payable to the lessee or its successors or assigns.

In witness whereof the party of the first part, by order of and acting under the special direction and instruction of the Board of Managers of the said Association, has caused its corporate seal to be hereto affixed, and these presents to be signed by its President and Actuary, hereto duly authorized; and the party of the second part, by order of its Board of Directors, has caused its corporate seal to be hereto affixed, and these presents to be signed by its President and Secretary, the day and year first above written. Executed in duplicate.

THE AMERICAN LOAN AND TRUST COMPANY,
by ASA P. POTTER, *President.*

N. W. JORDAN, *Actuary.* [Seal of American Loan and Trust Co.]

THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY,
by JAMES H. WILSON, *President.*

JAMES W. PERKINS, *Secretary.* [Seal of New York and New England Railroad Co.]

SCHEDULE "A."

Railroad rolling-stock belonging to the New England Car Trust, in the service of the New York and New England Railroad Company under the provisions of the foregoing lease, representing the certificates of the said New England Car Trust, Series "A."

Number and Kind of Rolling-stock.		Numbers.	Cost.
300	Gondola Coal Cars.	171 to 470 inclusive.	$520.00
110	" " "	A. 771 to A. 880 inclusive.	520.00
160	" " "	A. 471 to A. 630 inclusive.	520.00
300	Box Freight Cars.	11151 to 11450 inclusive.	580.00

VI.

CONTRACTS.

1. Traffic Arrangement between Connecting Roads.

Agreement

between The New York and New Haven Railroad Company of the first part, and The New Haven, Middletown, and Willimantic Railroad Company of the second part.

1. *Whereas* the railroad of the party of the second part is in process of construction, and, when completed, will, together with that part of the Boston, Hartford, and Erie Railroad which extends from Boston to Willimantic, and the railroad of the party of the first part between New York and New Haven, form a continuous line of railroad between the cities of New York and Boston;

2. *And whereas* it is to the mutual interest of both of the parties to these presents, that proper joint arrangements between said parties for the transportation of passengers and freight, between New York and Boston and intermediate points, should be made, of a similar character to those now existing between the party of the first part and the New Haven, Hartford, and Springfield, and Boston and Albany Railroad Companies, and that like arrangements should also be made between the parties hereto, for the use by the party of the second part of the track of the party of the first part, between its passenger depot in New Haven and Mill River, and for the use of said depot by the party of the second part, and for the other accommodations hereinafter mentioned;

3. *And whereas* it is not practicable at this time to frame an agreement between said parties, which shall provide for all the details which the anticipated business of the party of the second part may render necessary, but the parties to these presents have mutually agreed to form said joint arrangements

upon the basis hereinafter set forth, and to enter into a more specific and detailed agreement hereafter;

4. *Now it is agreed* between the said parties hereto, that as soon as the party of the second part, in connection with the railroad from Willimantic to Boston, now being constructed by the Boston, Hartford, and Erie Railroad Company, shall be prepared to do a through business between New York and Boston, passengers shall be ticketed through between New York and Boston and intermediate stations, baggage checked through, and freight waybilled through, and through passenger and baggage cars run, in the same manner as is now being done on the through lines *via* Springfield and New London, and equal facilities shall be extended to the business done over the line of the party of the second part as shall be extended to that done over either of the other through lines between New York and Boston, except in so far as the volume of business of either of said lines may render a greater amount of accommodation necessary to one than to the other; and that on through passengers and freight between New York and Boston, coming over the road of the party of the second part, the rates of fare or freight charged for transportation over the road of the party of the first part shall be as low as is received by said party of the first part for like service on through passengers and freight between New York and Boston passing over said other through lines or either of them, so long as the party of the first part shall not be consolidated with any other line; and, in case of such consolidation, said rates of fare and freight shall not exceed the *pro rata* per mile proportion between New York and New Haven of that part of the through price which shall belong to the consolidated line. Provided, however, that, in case any terminal allowance for expenses in New York is made to the party of the first part on through passengers and freight between New York and Boston by the other lines, there shall be allowed to said party of the first part such additional sum as will give to the line between New York and New Haven an equal amount on passengers and freight coming over the line of the party of the second part, as though the same were transported by the other lines.

5. As soon as the party of the second part shall commence business on any part of its line, the same connections and facilities shall be afforded to it by the party of the first part as are or may be afforded by the party of the first part to any other road connecting with it; but each road is to receive on local business its local fare, except in cases where otherwise specially agreed.

6. And it is further mutually agreed that there shall be, at least, one through express train daily, each way, between New York and Boston, *via* the road of the party of the second part, at such hours as shall best accommodate the through business of the party of the second part between New York and Boston, and the party of the second part shall be afforded all reasonable facilities for running a through express between New York and Boston in connection with any other express trains which the party of the first part may run, provided such trains shall not be thereby overloaded. And in general, the party of the first part shall give to said party of the second part as good facilities in the number of express trains, as it shall give to the other lines to Boston, or either of them, in proportion to the amount of business

given to said party of the first part by said party of the second part, compared with the amount of business given to the party of the first part by the other Boston lines.

7. And it is further agreed that the party of the second part shall have the same facilities in the use of that part of the track of the party of the first part which lies between Mill River and its present or any future passenger depot in New Haven, and in the use of such depot, as either of the other roads connecting with that of the party of the first part now has, or may have, and shall also be furnished by said party of the first part with standing room for the cars and locomotives of the party of the second part in New Haven; and that a reasonable compensation shall be made by the party of the second part to the party of the first part for such use of said track and depot, and such standing room; and if the parties to these presents fail to agree upon the amount of such compensation, it shall be fixed annually by two arbitrators, one to be selected by each party, and if the two arbitrators cannot agree, then by an umpire to be selected by them.

8. The party of the first part further agrees to receive and repair at its shops the engines and cars of the party of the second part, when desired so to do by the party of the second part, so long as the same shall not interfere with the proper repair of its own equipment; being paid for such repairs the actual cost thereof, and a reasonable percentage in addition, to cover use of grounds, shops, tools, etc.; and in case of disagreement as to such percentage, the same shall be fixed by arbitration as hereinbefore provided in respect to use of track and depot, and standing room for cars.

9. This agreement is on condition that the through fare between New York and Boston by the line of the party of the second part shall not be reduced below the through fare which is or may be charged on either of the other through railroad lines between Boston and New York *via* the Shore Line or *via* Springfield.

10. This agreement shall continue in force for ten years from this date, and thereafter until one year after written notice shall be given by one party to the other of its intention to terminate the same. But a further agreement shall be executed, specifying more particularly the details of the arrangements hereby made.

11. Provided, however, that this contract shall cease and determine whenever said party of the second part shall form any business connection with any other line of railroad which shall be in competition with the road of said party of the first part, on business between New York and New Haven, and intermediate points.

In witness whereof, the said parties to these presents have caused the same to be signed by their respective presidents, and their respective corporate seals to be hereto affixed, the seventh day of June, One Thousand, Eight Hundred and Seventy.

[SEAL.] THE NEW YORK AND NEW HAVEN RAILROAD COMPANY,
By WM. D. BISHOP, *Pres.*

[SEAL.] THE NEW HAVEN, MIDDLETOWN, AND WILLIMANTIC RAILROAD COMPANY,
By DAVID LYMAN, *Pres.*

2. CONTRACT BETWEEN RAILROAD COMPANY AND EXPRESS COMPANY.

Agreement

Made September first, 1910, between the Nebraska Railway Company, hereinafter termed the Railway Company, and the Swiftsure Express Company, hereinafter termed the Express Company.

Article I.

The Railway Company agrees to transport in cars or car-compartments, properly lighted and warmed, at its expense, and attached to its passenger trains each way daily, the messengers, safes, packing-trunks and express matter of the Express Company to and from all stations upon its lines of railway and branches which it now owns or operates and any other which it may own or operate during the life of this contract.

Article II.

It is understood that the word "messengers" as used in Article I hereof shall comprise only such persons as accompany the freight and valuables of the Express Company; and the Railway Company agrees to transport such messengers and such other agents as the Express Company may necessarily send over the Railway Company's lines in the transaction of its business as an express carrier, free of other charge than the consideration embraced in this contract, provided the properly authorized officers of the Express Company make application in writing for passes for such messengers or agents.

Article III.

The Railway Company shall also provide and allow the Express Company free approach and access to all depots, station premises and trains, and reasonable time to load and unload express matter upon and from these trains.

Article IV.

The Railway Company will also, as far as it can conveniently do so, and without charge therefor, permit the Express Company to use a portion of its station houses on the lines herein mentioned, for the reception, safe-keeping and delivery of express matter carried under this agreement. The Express Company will also be permitted, when agreeable to the Railway Company, to employ as its agents any employees or agents of the Railway Company whenever such employment by the Express Company shall not conflict with their duties to the Railway Company; the Express Company to be liable for the acts of such agents done by them within the scope of their authority as employees of the Express Company, but not otherwise.

Where the same person is employed as agent by the Express Company and the Railway Company, the delivery by such person to the Express Messenger on the train of money packages belonging to or consigned to the Railway Company shall constitute the delivery to the Express Company; and the

delivery to such person of money packages addressed to the Railway Company which it would be within his authority to receive for it, were he not agent for the Express Company, shall constitute a delivery by the Express Company.

Article V.

The Railway Company further agrees to transport free, at its risk, over its lines covered by this agreement the horses, wagons, safes and material necessary to be used by the Express Company at the various points on said lines in the transaction of the business contemplated by this agreement.

Article VI.

The Railway Company further agrees that none of its employees, for himself or for the Railway Company, shall be allowed during the continuance of this agreement to transport money, valuable packages, goods or merchandise of any kind whatsoever, except regular passenger baggage, and supplies for the Railway Company's use (including the use of its eating houses), upon the passenger trains of the said Railway Company, except that the Railway Company reserves the right to transport dogs on its passenger trains, when accompanied by owners, and also to transport corpses.

Article VII.

The Railway Company will not contract with any other party or parties to do an express business over said road or any portion thereof during the existence of this agreement.

Article VIII.

If other lines of railway are constructed, leased, operated or acquired by the Railway Company during the life of this agreement, the Express Company shall have the same exclusive facilities on all such lines in so far as the Railway Company can legally grant such facilities; it being understood that if the Railway Company should become bound by trackage arrangements with other railroad companies, which it may deem best to make hereafter, or by legislation or judicial proceedings to grant to any other express or transportation company facilities for carrying on an express business on its lines, or any part of same, the revenue derived from the facilities so afforded such other express or transportation company shall be credited to the Express Company in its payment provided for under Article IX of this agreement; and it is further agreed that the compensation to be charged such other express or transportation company or companies shall not be less than the compensation provided for under the ninth article of this agreement for the same service.

Article IX.

In consideration of the execution of this agreement and the performance by the Railway Company of its several agreements set forth herein, the Express Company hereby agrees to pay the Railroad Company four thousand dollars ($4,000.00) monthly, each payment to be made on or before the tenth day of each month, to the Treasurer of the Railway Company at Omaha, beginning in October, 1910.

Article X.

The Express Company agrees to give to the Railway Company, at all times, free access to all books and records of accounts of the business embraced in this agreement.

Article XI.

The Express Company will assume all risk and damage to its property, freight and valuable packages, and also assume all risk and damage to its agents and messengers while on said road in the course of their employment, including damages arising from the negligence or carelessness of the agents or employees of the Railway Company; provided, however, that in all cases where the same person acts jointly as Baggageman for the Railway Company and Express Messenger for the Express Company, then that any sum or sums paid out in settlement or satisfaction of any claims made or judgment recovered on account of injuries sustained by such joint employee in the course of such joint employment while upon the road of the Railway Company, shall not be assumed or borne by the Express Company, exclusively, but shall be borne and paid by both the Railway Company and the Express Company in the same proportion as they may have contributed to the salary of such joint employee at the time such injuries are sustained by him, but neither party shall have the right to compromise or settle any claim or suit for such injuries without the consent in writing of the other party hereto.

Article XII.

The Express Company will transport all money and valuable packages, the property of the Railway Company, free of charge over its said roads and over all lines on which the business of the Express Company is regularly conducted, and deliver the same at all proper places of delivery on same or at the termini thereof, subject to the conditions named in the Express Company's printed form of receipt.

The Express Company will also transport all matter, property of the Railway Company, over the lines of the Railway Company free of charge.

The Express Company will also transport free of charge the railroad tickets of the Railway Company between New York city and Omaha and will transport free of charge the folders of the Railway Company between any points on all lines of the Express Company, — this in consideration of a full page advertisement of the Express Company's business in said folders; all shipments of the Railway Company's tickets and folders to be so marked.

The Express Company will also transport free of charge over any of the lines on which it does business matter of any kind, property of the Railway Company, where such shipments do not exceed twenty (20) pounds in weight between any points reached by said Express Company, and will charge on shipments exceeding twenty (20) pounds in weight, the property of the Railway Company, to or from any points reached by the Express Company, off the lines of the Railway Company, seventy-five (75) per cent. of its regular tariff on such shipments.

Article XIII.

The Express Company agrees that it will not issue any local rates per hundred pounds between points on the Railway Company's lines which shall be less than one and one half (1½) times the Railway Company's freight rate per hundred pounds on the same commodity between the same points, unless consent to the contrary has been obtained from the Traffic Manager of the Railway Company; provided, however, that no restrictions shall be placed by the Railway Company on the charge to be made by the Express Company on news matter or parcels, and provided, also, that the Express Company shall be permitted to make such rates between competitive points as will enable it to compete successfully with other express companies operating on other lines of railway; the Express Company agreeing to notify the Railway Company of any reduction in rates made on account of competition; and when such competitive rates are reduced to one and one half (1½) times the freight rates of the Railway Company on the same commodity, the Express Company agrees that no further reduction shall be made in such competitive rates without the consent of the Railway Company.

Article XIV.

This contract goes into operation on its date and shall continue for ten (10) years, until September first, 1920.

Executed in duplicate (etc., etc.).

3. Pooling Contract.[1]

Agreement

between the Boston & New York Air Line Railroad Co. and the New York, New Haven, & Hartford Railroad Co. dated March 21, 1879.

Whereas the track of the Boston and New York Air Line Railroad Company connects at New Haven with the railway of the New York, New Haven, and Hartford Railroad Company; and

Whereas the passengers and freight upon and over the railroad of the first-named company are to a large extent received from and delivered to said last-named company at said New Haven in such a way that there is of necessity a close business connection between said companies at said New Haven both in the interchange of passengers and freight and the delivery thereof by each to the other, and in the receipt by each of moneys belonging to the other; and

Whereas public convenience requires that said business connection shall be kept up;

Now, therefore, to give permanence and stability to said business connection, it is hereby agreed by and between said Boston and New York Air Line Railroad Company as party of the first part, and said New York, New Haven, and Hartford Railroad Company, as party of the second part, as follows, to wit: —

[1] Such a contract can now only be made between roads not subject to the Interstate Commerce Act.

Article 1*st.* From and after March first, 1879, each of said companies shall, on or before the 20th day of each and every month, make and deliver to the other of said companies, as full and accurate a statement as is then practicable of all its gross receipts from railroad business for and during the calendar month next preceding the month in which said statement is made, and the total amount of the gross earnings of said two companies for such calendar month shall, on or before the 25th day of the month in which said statement is made, be divided between said two companies in the proportion (until otherwise determined as hereinafter provided) of six parts thereof to said party of the first part and ninety-four parts thereof to said party of the second part, — and for the sake of greater convenience in making said division between said companies, said party of the first part shall, before delivering its said monthly statement, pay over into the hands of said party of the second part all moneys which it shall have received for or on account of railroad business done by it or by said party of the second part during said preceding calendar month (said moneys may be paid over in daily or weekly payments at the option of said party of the first part), and said party of the second part shall after the interchange of said monthly statements and on or before said 25th day of the month in which said statements are made and delivered as aforesaid, and in consummation, so far as is then practicable, of said monthly division of gross earnings in this article agreed upon, pay over to said party of the first part its share or proportion of said gross earnings retaining the remaining part of said gross earnings as its own.

Article 2*d.* Each of the parties hereto shall be alone responsible for the condition and operation of its own railway or railways, and shall operate and keep the same, together with its rolling-stock and equipments in good repair in entire good faith towards the other party and towards the public, defraying all expenses thereof out of its share of said gross earnings, and to that end as said party of the second part operates much the longest extent of railway and receives much the largest amount of gross earnings therefrom, said party of the first part shall forthwith establish and thereafter while this agreement is in force maintain without alteration (except so far as alteration may be consented to by said party of the second part) on and over all parts of its railway, such reasonable and just rates of freights and fares as shall be approved by said party of the second part, and shall, during the continuance of this agreement, run such passenger and freight trains over its railway and at such hours and upon such time as will best subserve the interest of both said companies, and of the travelling and freighting public.

Article 3*d.* For the purposes of, and within the meaning of this contract, the term "gross earnings" shall include all the earnings of all the railways now owned or operated by either of the parties hereto, but shall not include (*a*) any income from investments which either of said parties may have in property of any kind not used by it for railroad purposes — (*b*) nor the proceeds of the sale by either of said parties of any property which is not required for the use of the railway or railways owned or operated by such party — (*c*) nor any rents received by said party of the second part, unless the amount thereof received in any one year shall exceed the amount of rents

paid by said party during the same year, and in such case the excess of rent received over the amount of rent paid only shall be included in said gross earnings, — (*d*) nor shall any part of the money paid by said party of the second part, for the use by it of the tracks of the New York and Harlem Railroad be considered as "gross earnings" within the meaning of this contract, but the same shall be deducted from the gross receipts of said party of the second part for the purpose of ascertaining its said "gross earnings" within the purview of this contract.

It is further hereby agreed that if either of the parties hereto shall hereafter acquire and operate as owners, lessees or otherwise any additional railway or railways, the earnings therefrom shall not be included with, or as a part of the "gross earnings" of such party for any of the purposes of this contract, but any change in the condition of either of said parties, caused by such acquisition and operation, may be taken into account by the arbitrators hereinafter provided for, in fixing a ratio for the future division of said "gross earnings."

Article 4th. Said party of the second part shall do and perform at New Haven without charge therefor for said party of the first part, during the continuance of this contract, all such labor, haulage and other service as it is now paid for doing for said party at said New Haven, and all the privileges and facilities now had and enjoyed by said party of the first part in and about the depot and depot buildings, and upon and about the tracks, wharves and yards of said party of the second part at said New Haven, including the use of two rooms in its passenger depot building for offices, shall be continued to it, the said party of the first part, free of charge therefor so long as this contract remains in force, provided that if said party of the second part shall, at any time, require said two rooms for its own use or for the use of other tenants who will pay adequate rent therefor, the same shall be vacated by said party of the first part at thirty days' written notice so to do.

Article 5th. This contract shall continue in force for the full term of ninety-nine years and eight months from the first day of February, 1879, unless disapproved by the stockholders of one or the other of the parties hereto, at their meeting first hereafter held, to which said meeting it is hereby agreed by the parties hereto, each for itself, said contract shall be duly submitted for approval or disapproval, and if the same shall be disapproved at such meeting of either of said parties, it shall cease to be operative and become of no force or effect on and after the first day of the second month next succeeding said meeting — provided that from and after October 1st, 1880, the proportionate share of said gross earnings belonging to each of the parties hereto shall (in case said parties shall not hereafter and before said October 1st, 1880, agree in reference to the division of said earnings after that date) be determined by three disinterested arbitrators, who shall be experienced in railroad business, one of whom shall be chosen by said party of the first part, one by said party of the second part and the third by the two thus chosen — said arbitrators so to be chosen by the parties hereto as aforesaid, shall both be chosen on or before the first day of October, 1880, and the third as soon thereafter as practicable. As soon as said arbitrators are all chosen, they shall give notice to the parties hereto of the time and place when and where they

will meet said parties and hear any and all evidence, arguments and suggestions, which they, said parties, or either of them, may desire to submit touching the share or proportion of said "gross earnings" which each of said parties ought to and shall receive for and during the five years next succeeding said October 1st, 1880, and said arbitrators shall finish said hearing and publish their decision to said parties on or before the first day of November, 1880. Said decision shall be final and binding on both said parties for the full term of five years from and after said first day of October, 1880, and at the end of each and every five years thereafter during the continuance of this contract either of said parties shall be at liberty to demand and have, on giving to the other party written notice of its desire therefor, at least thirty days before the determination of any of said periods of five years, a new arbitration by a new board of arbitrators to be chosen in the manner hereinbefore prescribed, to fix and determine, upon like notice and hearing as aforesaid, the share or proportion of said "gross earnings" which each of said parties shall receive and have for and during the period of five years for and with reference to which said new arbitration is demanded and had. And the determination of each new board of arbitrators shall be final and binding for the five years next succeeding October 1st, of the year in which said arbitration is had and until a new arbitration shall be demanded and had as aforesaid; and provided further that if either of the parties hereto shall neglect or refuse to choose an arbitrator when notified as aforesaid, for a period of ten days after notice, or if the two to be chosen as aforesaid, shall neglect or refuse to choose a third as aforesaid for the period of ten days after their appointment, then and in either of said events the party hereto not in fault in the premises may apply to the Chief Justice or Presiding Judge of the Supreme Court of Errors or of the court of last resort in and for the State of Connecticut to appoint the arbitrator or arbitrators so omitted by neglect or refusal as aforesaid to be chosen; and said Judge shall give to the parties hereto such notice of the time and place when and where he will make said appointment as he shall deem reasonable and proper and shall at said time and place, after hearing the parties hereto, or either of them, if they or either of them shall desire to be heard, make said appointment; and it is hereby agreed between the parties hereto that the action of such Judge shall be binding, and that the arbitrator or arbitrators so chosen or appointed by him shall have and exercise all the powers he or they would have and exercise if chosen in either of the other modes prescribed in this Fifth Article of this contract.

Article 6th. The officers and agents of said party of the first part are to furnish to the officers and agents of said party of the second part when requested, all such daily, weekly, or monthly statements and reports of the amount of its business and receipts as said party of the second part shall deem it necessary to have, to enable it to have and keep up a full and accurate knowledge thereof. And as soon after the 30th of September in each year as is practicable, the total amount of the gross earnings for the year ending on that day, and the exact amount thereof due to each of the parties hereto shall be accurately ascertained, and if either of said parties shall then be found to have received or retained more than its just share of said gross earnings, as fixed by

this contract, the payments necessary to give to each its due proportion for the entire year shall forthwith be made.

Article 7th. Each of the parties hereto shall, during the continuance of this contract, sell and furnish to and for the use of the other, at their actual cash cost at the place of delivery, any and all such railroad materials and supplies as it may have on hand and shall not require for its own immediate use, whenever requested by such other party so to do, and, whenever either of said parties shall, during the continuance of this contract, haul for the other any such materials or supplies or any railroad materials or supplies, procured by either for its own use along or in the vicinity of the line or lines of the other, the price to be charged and paid for such haulage shall not exceed one cent per ton per mile, and in case the party furnishing materials or supplies under this Article shall have hauled the same over any part or parts of its railway or railways before such sale and furnishing, the price to be charged and allowed for all such haulage for the purpose of ascertaining said cash cost at said place of delivery shall not exceed said sum of one cent per ton per mile.

Article 8th. Said party of the second part shall not, during the continuance of this contract, require said party of the first part to do any business on and over its railway which is not strictly local, but within the meaning hereof "local business" shall include all business between all points or stations on the railway of said party of the first part; all business coming from any point or station on any of the railways of said party of the second part and destined to any point or station on the railway of said party of the first part; and all business coming from any point or place easterly of Willimantic and destined for any point or station on the railway of said party of the first part; and it is hereby agreed that for the purposes of this contract all such business shall be taken and deemed to be strictly local business. The stations of said party of the second part at the City of New Haven, and the stations of the New York and New England R. R. Company at said Willimantic shall for all the purposes of this contract be deemed to be stations on the railroad or line of said party of the first part.

[Acknowledgments follow.]

4. Contract for Coal Supplies from the Mine.

This Contract, made at Pittsburg, Pennsylvania, this day of 190 , by and between the Pittsburg Railroad Company, hereinafter called the Buyer, and of hereinafter called the Seller, for the term of one year from the first day of April, A.D. 190 .

Witnesseth: That the Buyer agrees to purchase and take from the Seller, and the Seller agrees to sell and deliver to the Buyer during the said term, from the mine . . . operated by the Seller, located at or near , a minimum of cars of coal per working day, said coal to be of the following description:

It is part of the consideration of the amount which the Buyer hereinafter agrees to pay for the coal which the Buyer agrees to purchase and take from

the Seller, that the Buyer shall have the right at its option to purchase and take from the Seller and the Seller hereby agrees to sell and deliver to the Buyer upon the same terms hereinafter set forth, as much more coal of any number or all of the kinds above specified as the Buyer shall desire for the Buyer's own use, by giving orders for the same to the Seller from time to time during the existence of this contract, provided the Buyer shall not order more than cars of coal per working day as a maximum.

The Buyer shall pay for said coal at the following rates per ton of two thousand (2,000) pounds, payments to be made monthly, and during the month succeeding that in which the coal is received and audited by the Buyer. And on all payments so made on or before the 10th of the month, the seller will allow a discount of per cent.

For Screened Lump Coal loaded in Coal Cars	per Ton.
For Screened Lump Coal loaded in Box or Stock Cars	per Ton.
For Run of Mine Coal loaded in Coal Cars	per Ton.
For Run of Mine Coal loaded in Box or Stock Cars	per Ton.

The Seller shall deliver said coal, unless otherwise hereinafter stated,[1] free on board cars at upon the railroad tracks of the Buyer, in such kinds and quantities and at such times as may be ordered by the Buyer from time to time during the existence of this contract, and in the following manner:

Said Coal shall be loaded by the Seller in coal cars or box cars or stock cars as may be specified by the Buyer in its order, provided such cars shall be available for the purpose. If no kind of cars shall be specified in the order, coal cars shall be understood.

All of said coal shall be strictly in conformity to said description, and shall be received subject to the Buyer's inspection, and any part or all of said coal may be rejected at any time, in whole or in part, if not approved by the Buyer, after such inspection, as suitable for the Buyer's use in its locomotive engines.

The weight of said coal shall be determined for the purpose of settlement upon the following basis: Temporary settlements for coal purchased under this agreement will be made on the basis of mine weights, and the coal will be re-weighed at the option of the Buyer on the track scales of the Buyer that are in good working condition, and located nearest to the mine in the direction in which the coal is being moved. If there shall be a difference in these weights, and the consequent difference in the cost of the coal to the Buyer shall not be adjusted by the Seller to the satisfaction of the Buyer, or if the coal shall not be suitable as aforesaid, or satisfactory in all respects to the Buyer, then the Buyer shall have the right to cancel this contract at any time by giving to the Seller Five (5) days' notice in writing of the Buyer's intention so to do.

Said lump coal shall be screened as follows: If a straight bar screen is used, the coal shall pass over a screen of the following minimum dimensions: feet long, feet wide, and with a clear open space between the screen

[1] If it is to be delivered through chutes, say "through chutes of the Seller free on board tenders of locomotive engines, at the Seller's mine upon the line of said railroad, whenever said engines shall arrive at said chutes and request shall be made for said coal."

bars of inches. In case a shaker screen is used the minimum dimensions of said screen shall be as follows: feet long, feet wide, with perforations inches in diameter and perforations to each square foot.

Where two or more sets of dimensions are given for the screens, the figures refer to the upper and lower parts of the screen, in the order in which they respectively appear.

No lump coal shall contain more than per cent. of slack.

Until the Buyer shall have received each day the amount of coal to which it is entitled under this contract and the orders given thereunder, the title to the coal loaded by the Seller on cars at said mine shall, as fast as loaded, and up to said amount each day, vest in the Buyer, and such loading shall be a delivery under this contract.

In case of strikes or unavoidable accidents occurring on the Buyer's railroad, or in the operation of the Seller's mine, stopping the operation of said railroad or mine, neither party hereto shall be liable to the other for failure to perform this contract caused thereby.

In witness whereof the parties hereto have executed this contract in duplicate on the day and year first above written.

THE PITTSBURG RAILROAD COMPANY,

[L. S.] By

Purchasing Agent.

[L. S.]

5. CONTRACT FOR COMPRESSING AND LOADING COTTON.

Agreement, made the day of 1904, between the Mobile Compress Company of Mobile in the State of Alabama, hereinafter styled the "Compress," and the Alabama Railroad Company, hereinafter styled the "Railroad Company."

Whereas the Railroad Company and the Compress from time to time have, or may have, transactions with each other of the following description:

1. The Railroad Company may receive from shippers or consignees cotton ordered by them to be delivered to the Compress, such cotton being hereinafter styled "consigned cotton."

2. The Railroad Company may deliver, without being so ordered, to the Compress cotton for the purpose of being held by the Compress in the capacity of warehouseman, such cotton being hereinafter styled "warehoused cotton."

3. The Railroad Company may deliver to the Compress cotton in transit, upon through bills of lading issued by the Railroad Company for the purpose of being compressed before being carried further, such cotton being hereinafter styled "cotton in transit."

4. The Railroad Company may issue bills of lading for cotton in the possession of the Compress upon the basis of certificates issued by the Compress and before the receipt of the cotton by the Railroad Company, such cotton being hereinafter styled "billed cotton."

In consideration of the covenants and agreements hereinafter contained to be performed by them respectively, the parties hereto covenant and agree with each other as follows:

THE COMPRESS AGREES AND BINDS ITSELF:

1. To receive, receipt for, unload, shelter, compress and load on cars, cotton in transit; to receive, receipt for, unload and shelter, consigned cotton and warehoused cotton; and to shelter, compress and load on cars, billed cotton.

2. To properly handle, store and protect cotton in transit, and billed cotton, until the Railroad Company shall furnish cars to hold it.

3. To compress all cotton, from whomsoever received, intended for shipment on the railroad of the Railroad Company, to the density of twenty-two and one-half pounds per cubic foot, and to load not less than 50 bales of compressed cotton in any standard car of 34 feet in length (excepting remnants), and when loading is completed to cause doors of cars to be closed, sealed and stripped in a proper manner; it being understood that doors closing tight into the side of the car properly fastened and sealed need no strips.

4. To place on all such cotton for domestic shipment at least six (6) bands, and on all such cotton for foreign shipment at least eight (8) bands, and to tag all cotton.

5. To issue to all shippers delivering to the Compress cotton intended to be shipped on the railroad of the Railroad Company certificates correctly showing the condition of the cotton when received, and each covering one mark, or lot of one mark, and to issue no duplicates of such certificates without the consent in writing of the Railroad Company.

6. To compress, load, unload, and reload all cotton in the order of its receipt, and to avoid the breaking of lots.

7. To assume and pay to the Railroad Company the amount of all expenses incurred in putting in order any cotton compressed by the Compress, and shipped on the railroad of the Railroad Company, that may be rejected by vessels as not being in proper shipping condition under the commercial rules and regulations of the port of shipment.

8. That where sufficient cars have been furnished by the Railroad Company, but by reason of the Compress failing to load the entire shipment at the same time, complete delivery at the point of destination is not made of any lots of cotton called for as an entirety by bills of lading issued by the Railroad Company, the Compress will pay to the Railroad Company the amount of all storage charges which may accrue at the point of destination on such incomplete lots until such time as the delivery of such lots shall be completed.

9. To insure fully all cotton in transit and billed cotton, contained in the warehouse, on platforms or grounds, or under sheds of the Compress, or in cars while on side tracks used for the Compress, (the insurance to be for such amounts and in such insurance companies as the Railroad Company shall approve, and any insurance moneys that may become due for losses to be payable to the Railroad Company,) and to lodge the insurance policies therefor with the Railroad Company.

10. To protect, defend and hold the Railroad Company harmless from any

liability, damages, losses or claims that may arise from the loss or injury or delay of cotton in transit, warehoused cotton or billed cotton, or any part thereof, from the time of the delivery to the Compress until the re-delivery to the Railroad Company of cotton in transit and warehoused cotton, and from the time of the issue of bills of lading by the Railroad Company until the delivery to the Railroad Company of billed cotton; and to pay all costs, lawyers' fees and expenses that the Railroad Company may become liable for, or suffer in any suit or proceeding to recover on account of such loss or injury or delay.

11. For the purposes of this agreement, when cars are placed upon side tracks used for the Compress, and notice thereof is given to the Compress, cotton in or on such cars shall be considered delivered to the Compress; and when cars have been loaded by the Compress, and sealed, and the Railroad Company notified thereof, the cotton in or on such cars shall be considered delivered by the Compress to the Railroad Company.

12. To be responsible for the number of bales in each car loaded by the Compress until the count is verified by the Railroad Company at the point where the seals are broken.

13. To weigh carefully all cotton compressed under this agreement, or at any time delivered by the Compress to the Railroad Company, and to furnish the Railroad Company with an accurate statement of the cotton loaded on each car, and the actual weight of each lot or consignment.

14. That the rate charged for compressing cotton under this agreement shall be as low as that charged by any other Compress in the State of Alabama.

15. That the rate charged for compressing cotton for the Railroad Company shall not be greater than the rate charged any other corporation or person whatever, and that if for any reason whatever a lower rate is made to any other corporation, or person whatever, than the rate herein charged the Railroad Company, the Railroad Company shall have the benefit of the least rate allowed to any corporation or person whatever, and that no rebate, commission or discount shall be allowed to any one under any circumstances.

16. To furnish to the Railroad Company, and keep the Railroad Company at all times fully informed as to, the names of the agents or servants of the Compress authorized to sign certificates, receipts, loading tickets, or similar documents issued by it, together with the correct signatures of such agents or servants, and to inform the Railroad Company promptly when any such agent or servant shall cease to have authority to sign such certificates, receipts, loading tickets, or similar documents.

17. That all certificates, receipts, loading tickets, or similar documents issued by the Compress, or by any one in its employ authorized to issue the same for cotton actually delivered to the Compress, shall be genuine, and represent cotton actually delivered, and in the possession of the Compress, and that each and every bale specified in such certificates, receipts, loading tickets, or similar documents, shall be a merchantable bale so far as weight is concerned except as noted thereon; also to save harmless the Railroad Company from all liability, loss, damage or expense which the Railroad Company may incur, or be put to, from or on account of the non-delivery to the Compress, or by the

Compress to the Railroad Company of the Cotton, or any part thereof, covered by such certificates, receipts, loading tickets, or similar documents.

18. To permit the Railroad Company at any and all times by its officers or agents to inspect the premises, records, books and papers of the Compress to the extent necessary to enable the Railroad Company to verify properly certificates, receipts, loading tickets, and similar documents purporting to be issued by, or on behalf of the Compress, and to the extent necessary to enable the Railroad Company to inform itself properly whether the Compress has fully complied with the provisions of this contract.

THE RAILROAD COMPANY AGREES AND BINDS ITSELF:

1. To pay ten cents per one hundred (100) pounds for compressing cotton for account of the Railroad Company, except as provided in articles 14 and 15 hereof.

2. To furnish within a reasonable time, cars necessary for the shipment of cotton in transit, and billed cotton, and if such cars are not furnished within ninety-six (96) hours after receipt of written notice from the Compress that the cotton is compressed and ready for loading on cars, to repay to the Compress the amount, estimated *pro rata*, of the insurance paid on all such cotton thereby delayed, but only for the time of such delay after the expiration of ninety-six (96) hours.

3. To make settlement with the Compress at the end of each week for all cotton compressed for and delivered to the Railroad Company under this agreement, on the basis of bill of lading weights.

It is mutually agreed by the parties hereto that this agreement shall continue in force until unless terminated by one party giving to the other days' notice, in writing, of the intention to terminate the same.

In witness hereof the parties hereto have caused this agreement to be subscribed by their names, such as are corporations acting by their duly authorized officers, who have also caused their corporate seals, duly attested, to be hereunto affixed, on the day and year first above written.

[L. S.] THE MOBILE COMPRESS COMPANY,
Attest: By JOHN DOE, *President.*
Secretary.

[L. S.] THE ALABAMA RAILROAD COMPANY,
Attest: By RICHARD ROE, *President.*
Assistant Secretary.

GUARANTY.

TO THE ALABAMA RAILROAD COMPANY.

In consideration of your entering into the foregoing agreement not yet executed by you, we the New Orleans Guaranty Company, a corporation under the laws of the State of Louisiana, do hereby guarantee the faithful and punctual fulfilment on the part of the party therein styled Compress of all and singular the covenants and agreements entered into by the last named party in the said agreement; provided, our liability is not to exceed Twenty Thousand Dollars, for which sum this shall be a continuing guaranty during the continu-

ance of said agreement; and we hereby waive notice of your entering into the foregoing agreement, and notice of each and every default by said party under said agreement, and waive any and all defences which could not be made by said party styled Compress in a suit upon said agreement, and agree that we shall be bound to you by this guaranty in all cases in which said party styled Compress shall be bound to you by said agreement.

[L. S.] THE NEW ORLEANS GUARANTY CO.,
By JOHN JONES, *Treasurer*.

6. CIRCUS CAR CONTRACT.

This Agreement, made at this day of , A. D. 190 , between the Western Railroad Company, hereinafter called the Railroad Company, and , a , hereinafter called the Circus Company,

Witnesseth that for and in consideration of the stipulations and agreements hereinafter set forth, the Railroad Company agrees to furnish Conductors, Engineers and necessary train men, together with suitable and sufficient motive power to haul safely and promptly, in not less than sections, or in regular freight trains of the Railroad Company, subject to the provisions hereinafter contained with reference thereto, cars, as follows: advertising cars, passenger cars, box cars, stock cars, and flat cars, all of which cars are to be furnished by said Circus Company or rented from the Railroad Company as hereinafter provided, and to be used only for the purpose of transporting the circus and menagerie owned by the Circus Company from and to the following named places, on the dates named, and with the privilege to stop at the places named for exhibition; to receive said cars furnished by the Circus Company from the Chicago Railroad Company at Elton and also to deliver said cars furnished by the Circus Company at Lincoln to the Western Railroad Company without additional charges:

LEAVE	APPROXIMATE TIME	DATE	TO BE HAULED TO
1.			
2.			
3.			
...			

The Circus Company hereby requests that on the runs numbered above the cars containing the circus and menagerie, aforesaid, be transported by regular trains of the Railroad Company subject to the provisions hereinafter contained with reference thereto.

The word "cars" as used in this contract, shall include passenger coaches, unless the context requires a different meaning.

The above described cars must conform in construction and equipment to the statutes of the United States and the rules of the Master Car Builders Association.

Said Circus Company warrants all of said cars and coaches, to be furnished by it as aforesaid, to be in good condition and running order, and hereby agrees, at its own cost and expense, to keep the same in like good condition and running order, and to this end to furnish competent and trustworthy men to inspect said cars and coaches regularly, to provide for proper oiling and to make all needful repairs thereof, and to indemnify the Railroad Company against loss or damage resulting from the Circus Company's defective cars, or from overloading cars, or from the negligence of said Circus Company or any of its employees, including those hired to it for the time by the Railroad Company, and to return all locomotives and other machinery in the condition received by the Circus Company.

Such inspectors may be chosen, if the Circus Company shall so elect, from the regular force of inspectors employed by the Railroad Company, and in this case, no additional compensation shall be paid for this service to the Railroad Company.

In case such inspectors shall determine that repairs are necessary upon such cars or coaches, the Circus Company agrees to make the same, and in the event that the Circus Company shall not have facilities for so doing, the Railroad Company, upon being requested so to do, agrees to furnish the tools, material and men for making such repairs, the same to be made under the management, direction, order and control of the Circus Company; the latter also agreeing on demand to pay the Railroad Company for the use of such men, material and tools, the cost of labor and materials and an additional sum as profit of ten per cent. thereof, as a condition of further performance of this contract by the Railroad Company.

Said Railroad Company may, however, for its own protection, if it so desire, itself inspect the cars and coaches used by the Circus Company and may elect to reject any cars or coaches, or to cancel this contract if it deem such cars or coaches unsafe for use.

It is further agreed that the Railroad Company shall not pay mileage or *per diem* charges for the use of said cars and coaches to be used in the transportation of said Circus Company's circus and menagerie, and if the circus and menagerie or any part thereof are delivered to said Railroad Company in cars for which the Railroad Company would be liable for mileage or *per diem* charges under the usual and prevailing customs, the Circus Company agrees to pay on demand, in addition to the amount shown below herein, such mileage or *per diem* charges as the Railroad Company may be liable for to the owners of said cars or coaches, as a condition of further performance of this contract by the Railroad Company.

The cars are to be loaded and unloaded by the Circus Company, but good, suitable and sufficient engines with necessary crews shall be provided by the Railroad Company to assist in switching the cars and placing them in the best places at the disposal of the Railroad Company, during the loading and unloading thereof. The Railroad Company shall furnish track room, at such suitable

places and sidings as are at its disposal on its road in each town, for said circus and menagerie to load and unload expeditiously. Said tracks are to be clear and ready for such use upon the arrival of the trains in each place named. The conductors, engineers, trainmen and crews provided by the Railroad Company, while engaged in the services in this agreement provided for, shall be the servants of the Circus Company and not of the Railroad Company, but the transportation herein provided for shall be in accordance with the rules, regulations and time cards of the Railroad Company. The circus and menagerie, their appurtenances and employees will be transported at the risk of the Circus Company which, in consideration of the peculiar nature of the service contracted for, the reduced charge, the increased risk to the trains of the Railroad Company, and the privilege of stopping as aforesaid, assumes and agrees to bear all damages for, and to release and forever discharge the Railroad Company from liability for delay, loss of life, or loss, damage or injury, which may occur to persons or property transported under this agreement, or to the proprietors, agents, billposters, advertisers or servants of the Circus Company, however caused, and to indemnify and save harmless the Railroad Company therefrom, and from all judgments, expenses and costs arising therefrom, including attorneys' fees.

The Railroad Company shall use its best endeavors to permit the delivery, at each place of exhibition, of said circus and menagerie on or before 5 o'clock A. M. of the day of exhibition, provided the transportation thereof is begun in time for such delivery without the employment of an extraordinary or unusual rate of speed, and provided also that said circus and managerie and the cars containing the same are not transported by the regular trains of the Railroad Company.

The Circus Company shall pay for said transportation the total sum of dollars, which is a reduced rate from that regularly charged for transportation in the usual way by the Railroad Company, as follows:

For the Run from	To	Dollars

Each sum to be paid before leaving each point of departure, and as a condition of further performance of this contract by the Railroad Company, the Circus Company expressly undertakes and agrees by means of the Circus Company's own servants, and at the Circus Company's own expense and charge, to load and unload all of said trains, and to have said trains loaded and ready to start from each of the above designated points at the days and hours above stipulated.

Said Circus Company further covenants and agrees with the Railroad Com-

pany that, if (with the written consent of the Railroad Company, which must be previously obtained) any cars or coaches belonging to the Railroad Company shall be used for the transportation of a part or the whole of said circus, menagerie and members and servants of the Circus Company, said cars and coaches shall be by the Circus Company unloaded, released and returned to the Railroad Company, promptly upon arrival of said cars or coaches at , and that for each and every passenger coach so used and belonging to the Railroad Company, the Circus Company shall and does hereby agree to pay to the Railroad Company from day to day and subject to the same provisions as the payments last hereinbefore provided, a rental charge of $ for each twenty-four hours or fraction thereof while such passenger coaches shall be engaged in said service. This time shall be computed from the time of delivery of said coaches to the Circus Company, to the time of return of said coaches, unloaded and released, to the Railroad Company. For the security of the Railroad Company it is agreed that the circus, menagerie and cars of the Circus Company shall not be removed from the tracks owned or operated by the Railroad Company until all the payments in this agreement promised to be made by the Circus Company shall have been made.

It is further understood and the Circus Company agrees that said cars and coaches shall be considered as rented to the Circus Company, and shall be returned to the Railroad Company in as good condition as when delivered to the said Circus Company, ordinary wear and tear alone excepted.

The Circus Company further agrees to inspect all such cars before using the same, and to assume the risk of all defects, whether latent or patent, in such cars or their equipment, and that such cars shall be subject to the same stipulations in all respects as cars furnished by the Circus Company, except that the Circus Company shall save and keep the Railroad Company harmless from loss, damage or injury to cars so rented.

If, during the continuance of this contract, for the purpose of greater economy in the transportation of the said circus and menagerie, the cars containing the same shall be at any time transported by regular trains of the Railroad Company, then, in consideration of the reduced rate provided for by this contract, and which has been made in view of the possibility last aforesaid, and of the duties assumed herein by the Railroad Company distinct from those of common carriers, it is agreed by and between the parties hereto that in case of delay, loss, damage or injury to any person or property in the course of such transportation, the rights of the Railroad Company and of the Circus Company respectively shall be the same as if said cars had been transported under this contract exclusively by the servants of the Circus Company only.

It is expressly agreed that this agreement is not made by the Railroad Company as a common carrier, but only as letting the motive power and the use of its railroad to the Circus Company for the purpose of enabling the Circus Company to move said trains between said points; and that all said trains shall be operated under the management, direction, orders, and control of the Circus Company, or its agents, as being in actual possession and con-

trol of the Circus Company by means of the employees of the Railroad Company, acting as the agents of the Circus Company and not of the Railroad Company. The Railroad Company shall have the right to attach cars and coaches to said trains for the use and benefit of the Railroad Company, without charge to the Railroad Company, provided that the Circus Company shall be at no expense on such account, and shall not be liable to the Railroad Company for any loss, damage or injury to cars so attached or to goods or passengers thereon.

But if, notwithstanding the aforesaid contractual exemption from liability, the Railroad Company shall be held liable in any court for any loss or damage suffered by the Circus Company on any account, it is hereby agreed in consideration of the special undertaking of the Railroad Company and the low rate of charges, that such damage shall be and is hereby liquidated and stipulated not to exceed the actual value of the animals or property aforesaid, which, for the purpose of this agreement, and as a basis of the said special undertaking and low rate, it is by said Circus Company stipulated, agreed and represented, in no case will exceed the sum per head for each animal or piece of property enumerated as follows, the declared valuation to govern, if given and inserted in writing herein; otherwise the printed valuation to be taken, to wit:

	Declared valuation.
Elephants, Hippopotamuses, Giraffes, Rhinoceroses	$500.00 each
Horses, Zebras, Lions and Tigers	100.00 "
All other members of the equine and feline species	25.00 "
Buffaloes and other members of the bovine species	50.00 "
Seals	10.00 "
Monkeys, Crocodiles, Alligators, Serpents and other Reptiles	5.00 "
Birds, all species, and all other animals not enumerated	5.00 "
Chariots, band wagons, tableau wagons, cages on wheels, calliopes or other vehicles	100.00 "
Canvas tents with centre poles, ropes and paraphernalia complete	100.00 "

It is further declared to be a part consideration of this contract that the Circus Company is to have sole charge of every person and of all animals and property on any trains or cars hauled pursuant to this contract, and the Railroad Company assumes, and shall be under, no responsibility for the safety of any of the cars, persons, animals or property on said trains in charge of the Circus Company, or of advance agents, from any cause whatever, and the Circus Company will indemnify and save harmless the said Railroad Company against all loss or damage on account of strangers, tramps or others riding on said trains or cars and getting hurt or killed, or on account of any persons, strangers or others, being hurt or killed in the operation of said trains or cars, or in the handling, loading or unloading of said cars, and will protect and in-

demnify said Railroad Company from liability for the damages suffered by any one from wild, tamed or domesticated animals escaping from cars or custody, and will further protect and indemnify the Railroad Company against all liability for loss, damage or costs for or on account of the spread or transmission of any disease to animals or persons from unloading offal, or caused in any manner by the Circus Company.

The Circus Company further covenants and agrees, as a further consideration of this contract, for itself and all of its employees or persons employed in or around or in connection with said circus, menagerie or the business of the Circus Company, that in the event of any death, delay, loss, damage or injury of property or persons for which a cause of action may exist against the Railroad Company, in accordance with the terms, stipulations and provisions of this contract, or in any way whatever, the Circus Company, for itself and for its employees and such others, will give written notice to some freight or station agent of the Railroad Company of said death, delay, loss, damage or injury within fifteen (15) days after the happening thereof and in such notice will state the time, place, nature, and causes of such death, delay, loss, damage or injury, and the amount of the claim arising therefrom. Failure on the part of the Circus Company to comply with the requirements of this paragraph shall absolutely defeat and bar any cause of action for any such death, delay, loss, damage or injury; and if such notice is given, any action for such death, delay, loss, damage or injury must be brought within ninety (90) days after the happening thereof, and not later, any statutes of limitations to the contrary notwithstanding, the benefit of which is hereby freely and fully waived.

Said Circus Company further agrees with the Railroad Company that, if any property of the latter is injured or destroyed while any trains or cars of the Circus Company are upon the railroad of the Railroad Company pursuant to this contract and such injury or destruction of property is done by any employee of the Circus Company or by any person connected with said circus or menagerie or the business of the Circus Company, said Circus Company will reimburse the Railroad Company for such injury or destruction of the latter's property, whether or not the acts of said Circus Company's employees or of the persons connected with said circus, menagerie or the Circus Company's business, which caused such injury or destruction, were done in the course of their employment in or about said circus, menagerie or business.

The amount of compensation hereinbefore agreed upon includes compensation for transporting by passenger, freight or mixed trains, at the convenience of the Railroad Company, the advertising cars referred to at the beginning of this agreement, with agents, bills and bill-posters, and the free transportation, on any passenger trains of the Railroad Company, of the authorized agents and advertisers of the said circus and menagerie, and their necessary baggage and advertising material, but at the risk of the Circus Company as hereinbefore provided.

In witness whereof the parties to this agreement have signed their names as follows, at

7. Contract for Transfer of Passengers and Baggage between Stations in a City.

Agreement made in duplicate this day of 190 , between Railroad Company, hereinafter called the Railroad Company, and hereinafter called the Transfer Company.

Whereas the Railroad Company is operating its line of railroad to the City of , in the State of , and sells tickets to carry passengers and baggage of passengers over its said line to said City and thence over the following railroad or railroads also running to said City, the

hereinafter called the Connecting Railroad, (all words herein referring to the Connecting Railroad to be taken as importing such number of Connecting Railroads as shall be appropriate) and it is necessary to transfer passengers and baggage of passengers from the depot of the Railroad Company to the depot, or depots, of the Connecting Railroad in said City;

(1) The Transfer Company agrees to transfer promptly all passengers and baggage of passengers from the depot of the Railroad Company to the depot or depots of the Connecting Railroad, who are transported on account of through tickets reading to points on and beyond the line of the Connecting Railroad. The Transfer Company further agrees to provide ample accommodations for the transfer of such passengers and baggage of passengers, meeting all necessary trains of the Railroad Company for that purpose.

(2) The Railroad Company agrees to pay the Transfer Company for such services the following compensation:

For the transfer of one person and his baggage, for each full coupon ticket cents; for each half coupon ticket cents.

Only transfer coupons issued by the Railroad Company, including both going and returning coupons of its round trip inter-line tickets, and transfer checks given by conductors in lieu of transfer coupons which are omitted from the inter-line ticket, are to be accepted for redemption on the above basis by the Railroad Company, except that coupons reading from the depot of the Railroad Company issued by foreign lines other than the Connecting Railroad will also be accepted by the Railroad Company on the above basis.

(3) All coupons collected shall be reported by the Transfer Company to the Agent of the Railroad Company at said City, and a record kept of the same by the Transfer Company, and at the end of each month such record, when approved by the said Agent of the Railroad Company, together with a bill from said Transfer Company and the coupons collected, shall be forwarded promptly to the Auditor of Passenger Receipts of the Railroad Company at New York, for settlement in accordance with the provisions hereof.

(4) The Transfer Company shall hold and keep harmless the Railroad Company from liability, damage or loss for or on account of death, injury, damage, or delay of passengers, and loss, injury, damage, or delay of baggage, caused in whole or in part by the agents or servants of the Transfer Company; and in the event that the Railroad Company shall be held liable therefor, the Transfer Company agrees to pay to the Railroad Company the amount recovered,

including all expenses, costs and attorney's fees arising therefrom. The Railroad Company shall have the right, in its discretion, to compromise or settle any claims arising against it on account of any such death, loss, injury, damage or delay, and such compromises or settlements shall be binding on the Transfer Company.

(5) In consideration of the faithful performance by the Transfer Company of the conditions and duties herein imposed upon it, it shall have the privilege as aforesaid to transfer passengers and baggage of passengers for coupons, from the depot of the Railroad Company at said City, and said privilege shall be exclusive, so far as the Railroad Company may lawfully so contract.

(6) This contract shall continue until terminated after written notice given by either the Railroad Company or the Transfer Company to the other, of the intention to terminate it, and shall terminate thirty days after the receipt of such notice by such other.

(7) This contract shall be binding on the successors, heirs, executors, administrators, and assigns by operation of law, of the parties hereto, and shall be joint and several where there is more than one party of the second part. But this contract, and money becoming due by reason thereof, shall not be assignable by the voluntary act of the Transfer Company, without the written consent of the Railroad Company endorsed on this contract.

8. CONTRACT FOR CARRIAGE OF GOODS AT REDUCED PRICE, IN CONSIDERATION OF AGREED DIMINUTION OF COMMON-LAW LIABILITY.

Special Freight Contract for Limited Liability ("Owner's Risk") *at the* LOWEST TARIFF RATES.

In consideration of the Housatonic Railroad Company's receiving, at the request of the undersigned, the following property:

of the agreed *Value* of not exceeding dollars, for transportation from station to station; the same being consigned to and of its charging for such service the *Lowest Tariff Rates*, based upon said valuation and the nature of the property, namely, dollars and cents, (instead of the higher rate chargeable by Tariff for such property of greater value, or received for transportation at "Carrier's Risk," so called,) the undersigned, being or representing the owner of said property above described, hereby releases said company and each other company over whose line said property may pass to the place of destination, from any and all claims that might otherwise arise for damage to said property, not shown to result from the negligence of the company in question: it being the intent of this agreement that said respective companies and each of them shall not be treated as an insurer of said property, as if taken at Carrier's Risk, but be liable only for want of ordinary care and diligence; and it is further agreed that the Housatonic Railroad Company is not to be held responsible for damage done to said property while in the custody of any other company over whose road it may be transported in order to reach said place

of destination; and the undersigned guaranties [1] payment of said freight charge of the amount above specified.

And if any of said above described property is glass, crockery, musical instruments, or eggs, it is further agreed that they are to be put on board ordinary freight cars, and that if injured in consequence of jolting, jars, or contact with other goods, such as would not inflict similar injury on ordinary freight, of a less *Fragile* nature, then such injury is not to be deemed due to the negligence of the company on whose line the accident occurred, that being one of the risks assumed by the shipper for the consideration above mentioned, in sending said property on an ordinary freight car.

Signed in duplicate at , this day of 189 .

THE HOUSATONIC RAILROAD COMPANY,

By

Station Agent.

Shipper.

Agent for Shipper.

9. CONTRACT FOR CARRIAGE OF GOODS LIABLE TO EXTRA HAZARDS.

Station 19

In consideration of the New York Railroad Company receiving and carrying, at tariff rates, and without extra charge, all freight consisting of

which may be delivered by me to said Company from the day of 19 , to the day of 19 , which property, by reason of its size or weight, or inherent qualities, or the manner in which it is packed or marked, or other peculiarity of said property, or of the circumstances under which it is received, is liable to extra hazards, it is agreed, between said company and the shipper thereof that said company, and the owners and operators of the railroads and boats with which its road connects and which receive such property, are hereby released from liability for loss occasioned by mob, riot, insurrection, or rebellion, and all damage incident to a time of war; also from liability for leakage of all kinds of liquors; shrinkage or deficiency in weight or measure of all grains, or other property shipped in bulk, arising from any cause; breakage of all kinds of glass or crockery, carboys of acid, or articles packed in glass, stoves and stove furniture, castings, machinery, carriages, furniture, musical instruments of all kinds, packages of eggs; or for loss or damage on hay, hemp, cotton, or any article the bulk of which renders it necessary to be shipped in open cars; or for damage to perishable property of all kinds occasioned by delay from any cause, or change of weather; or for damage and loss while in the company's depots; from damage or loss on the sea, lakes, or rivers; also from breakage or chafing, or loss or injury by fire or water, heat or cold, or collision; also from the wrong carriage or wrong delivery of goods that are marked with initials, numbered,

[1] Where shipper prepays freight strike out the word "guaranties" and write in "has made."

or imperfectly marked, or where the marks or directions on packages are made on paper or cards. And in consideration aforesaid, I agree to indemnify and save harmless said company from any and all claims made by any consignee of any of said property for loss or damage thereto arising from any of the causes aforesaid, while in the possession or under the control of said company.

Signed in duplicate. THE NEW YORK RAILROAD COMPANY,
By *Station Agent.*

Shipper.
Agent.

10. CONTRACT WHEN FRAGILE GOODS ARE SHIPPED, WITH GUARANTY OF FREIGHT.

BOSTON RAILROAD CO.
AUBURN, MASS. STATION, Oct. 22, 1891.

In consideration of the Boston Railroad Company's transporting the following described property, viz:

1 Bedstead sides & Slats, 1 Bureau, 1 Commode (2 pts.), 1 Bed spring, 1 Table & boards, 2 Trunks, 1 Mattress, 2 Boxes, 2 Barrels, &c., 2 Tubs, 1 Boiler, &c., 1 R. Oil Cloth, 4 Bundles Chairs, 1 R. Chair, 1 Stove, 1 Package of Stove Pipe, 1 Roll Zinc, 1 Looking-glass Frame, 2 Bundles Pails, 1 Bundle Window-shades, 1 Broom, 1 Stand, from Auburn, Mass. Station to Bridgeport, Conn. Station, the same being consigned to A. Hedin; *I hereby Release said Company*, and each and every other company, over whose line said Goods may pass to destination, from any and all *damage* that may occur to said goods; arising from leakage or decay, chafing or breakage, damage by fire while in transit or at stations, loss or damage from the effects of heat or cold, or from any other cause not the result of collisions of trains or of cars being thrown from the track while in transit. And I further guarantee to said company or companies, that any or all freight, or other necessary charges that may accrue as provided by tariffs of said road or roads, shall be paid by the consignee within twenty-four hours after arrival of said goods at destination; and in case such charges are not so paid, the company holding said goods may send them to a warehouse or sell them for charges, without further recourse to me; and if, when sold, the goods do not realize enough to pay all charges, I will pay the difference on presentation of freight bill.

A. HEDIN.

In presence of
E. L. BANCROFT, *Witness.*

11. Contract for Carriage of Live Stock at Reduced Price.

Live Stock Contract

"Owner's Risk" Release, and Agreed Valuation, according to the "Official Classification."

BROMPTON RAILROAD CO.

Station 19 .

Whereas The Brompton Railroad Company transports live stock either by the head or by the car load at certain prices, "Carrier's Risk," and at reduced prices upon certain risks, as specified below, being assumed by the shipper or owner, and upon the further condition that the property is valued as stated below;

Now, In consideration that said company will transport at said reduced prices, —

Horses	valued at not exceeding		$100	each.
Mules	"	"	100	"
Cattle or Cows	"	"	75	"
Fat Hogs	"	"	15	"
Fat Calves	"	"	15	"
Sheep, Lambs, Stock Hogs, Stock Calves	valued at not exceeding		$5	each.

Entire contents of full chartered car valued at not exceeding $1200, per car load, consigned to at

It is Agreed, that the shipper shall examine the car provided by said company for said shipment, and be satisfied that it is a suitable one, and in good condition, and, upon being so satisfied, shall load said stock in the same, and that the shipper or consignee shall unload said stock, at his own risk, the agents of the company, at the point of shipment, or of destination, affording such reasonable assistance as they can under the direction of the shipper or consignee; and that the liability of said company, or of any company which shall have carried said stock toward or to destination, shall cease upon the delivery of the car or cars to the connecting company, or at the station to which it may be consigned, in a suitable place for the unloading of said stock: *Also*, that as to all stock carried by the car load, neither this company, nor any of its connections, shall be liable for the number or weight of said stock, but only to deliver such animals as arrive at the place of destination: *Also*, that neither this company, or any of its connections, shall be liable for any injuries which the animals, or either, or any of them, may receive in consequence of any of them being wild, vicious, unruly, weak, or of escaping, maiming themselves or each other, or in consequence of heat, or suffocation, or other ill effects of being crowded, either upon cars or in yards, or on account of being injured by the burning of hay, straw or any other material

for feeding the stock: or in any other way not due to the negligence of this company: *Also*, that neither this company, nor any of its connections, shall be liable for any loss or damage sustained by reason of any delay in the loading, transportation, or delivery of said stock, or in consequence of any displacement of car doors, or any other insecurity of the cars.

It is also Agreed, in consideration aforesaid, that said stock, while in the possession of the carrier, shall be fed and watered by or at the expense of the shipper, consignee, or agent of them or either of them. *And it is also Agreed*, that in the event of the loss, death, or injury of the animals, or any of them, from causes which would make the carrier liable, such liability shall not in any case exceed an amount to be fixed according to the above valuations.

And Whereas this company and its connections allow persons, for the purpose of taking care of live stock, to ride with them and on the train carrying said live stock, without charge for the carriage of such persons,

It is Expressly Understood and agreed, that the person or persons so riding in charge of the above mentioned live stock to ride at his or their own risk of accident, and this company and its connections are hereby released by, for, and in behalf of said person or persons, and their personal representatives, in case of death, from all liability for injury to said person or persons, or any of them, under any circumstances, by the negligence of any of the servants of the company or companies operating such connecting roads, whether such injury or injuries are fatal or otherwise.

THE BROMPTON RAILROAD COMPANY,
By *Station Agent.*

Shipper.

In presence of And for owner or consignee and the person or persons riding in charge.

I, , the person who is to ride in charge of the above mentioned animals, hereby assent to and accept all the conditions and limitations of liability of the foregoing instrument, which are applicable to me.

In presence of

N. B. Station agents *must not omit* to have persons riding in charge sign the foregoing.

12. REORGANIZATION AGREEMENT BY BONDHOLDERS IN VIEW OF A FORECLOSURE.

THE LOUISVILLE, EVANSVILLE, AND ST. LOUIS RAILWAY COMPANY

BONDHOLDERS' AGREEMENT.

Whereas the interest on the first mortgage bonds issued by the Louisville, New Albany, and St. Louis Railway Company, and secured by mortgage deed, executed by said company June 1, 1881, and styled herein, "first mortgage bonds," is in default; and,

Whereas said Railway Company by consolidation has become The Louisville, Evansville, and St. Louis Railway Company; and,

Whereas said Louisville, Evansville, and St. Louis Railway Company has defaulted in the payment of interest upon its mortgage bonds secured by mortgage deed, executed by said last named company, dated March 1, 1882, and styled herein "second mortgage bonds;" and,

Whereas proceedings for the foreclosure of the said mortgages have been instituted in the United States Circuit Court for the District of Indiana and the Southern District of Illinois, and it is deemed necessary that the holders of said first and second mortgage bonds should enter into an agreement for the reorganization of said Louisville, Evansville, and St. Louis Railway Company, and for the mutual protection of their interests therein;

Now, Therefore This Agreement Witnesseth, That we, the undersigned, who are respectively holders of said first and second mortgage bonds, of the amounts as specified opposite our names respectively hereunto subscribed, in consideration of the advantages which will result to us from concert of action, and of other good causes and of valuable considerations, the receipt whereof is acknowledged, do hereby, each for himself, and not one for the other, or either of the others, agree with each other and the Trustees hereinafter mentioned, as follows: —

1. We hereby appoint and constitute Jonas H. French, Isaac T. Burr and William T. Hart, all of Massachusetts, and Alex. P. Humphrey and James M. Fetter, both of Kentucky, to be our agents and attorneys in fact, for us and each of us, and as such to constitute a Board of Trustees, to act in our behalf, for the purposes hereinafter mentioned; and they are hereby authorized and empowered to take such proceedings, and give such directions, and do such acts and things as they may consider judicious and proper for the accomplishment of such purposes; and any vacancy occurring in said Board shall be filled by the other members thereof.

2. Upon the sale of the premises mortgaged under said mortgage made by said Louisville, Evansville, and St. Louis Railway Company, dated March 1, 1882, and styled the "Second Mortgage" herein, said premises extending from New Albany, Indiana, to Mt. Vernon, Illinois, and from Evansville and Jasper, Indiana, to Gentryville and Rockport, Indiana, as therein described, said Trustees are hereby authorized and empowered to purchase the same for our account and benefit, subject, however, to a first mortgage for nine hundred thousand dollars on the Evansville division, so called, at such price (not, however, exceeding the aggregate amount of the principal and interest at the time being due or unpaid, upon all our said bonds, secured by said "Second Mortgage") as they may consider judicious, and to take a conveyance thereof to themselves, in their own names as joint tenants, but to take and hold the same as Trustees only, and to apply and deal with the same upon the trusts, and in the manner, and for the purposes, herein set forth.

3. Upon the sale of the premises mortgaged under said mortgage of said Louisville, New Albany, and St. Louis Railway Company, dated June 1, 1881, and styled herein the "First Mortgage," said premises extending from New Albany in the State of Indiana, to Mt. Vernon in the State of Illinois, as therein described, and known as the Main Line, said trustees are hereby authorized and empowered to purchase the same for our account and benefit,

at such price (not, however, exceeding the aggregate amount of the principal and interest at the time being due or unpaid, upon all our said Bonds secured by said "First Mortgage") as they may consider judicious, and to take a conveyance thereof to themselves, in their own names as joint tenants, but to take and hold the same as Trustees only, and to apply and deal with the same upon the trusts, and in the manner, and for the purposes herein set forth.

4. Said Trustees shall form, or cause to be formed, a corporation under the laws of Indiana and Illinois, or, if necessary or convenient to vest the title to all and any said property and premises so acquired by them in one inter-State corporation, they shall form, or cause to be formed, separate corporations under the laws of Indiana or Illinois, or both, and by consolidation of said corporations, a consolidated corporation under the laws of Indiana or Illinois or both, and shall convey all and any of said property and premises to, or cause the same to be vested in such one corporation, two corporations, or consolidated corporation, by immediate conveyances to said consolidated corporation, or by conveyances to the constituent companies thereof.

Said corporation, corporations, or consolidated corporation, shall issue in payment for the property and premises, so acquired by it, bonds and stock for distribution among the signers hereto, according to their respective shares and proportions of interest, and for such further distribution among other parties, as is hereinafter provided for. And for the purpose of organizing and perfecting such corporation, or corporations, and of issuing such new securities, the above-named Trustees are hereby especially invested with full power to act as our attorneys in fact, or agents, in the premises.

5. The new corporation shall issue new first mortgage bonds to the extent of four million dollars. The principal of said bonds shall be payable in thirty years from date, in gold coin, and they shall be secured by a mortgage on the entire property of the new corporation. One million dollars of said bonds shall be known as Series A. Bonds, and the Trustees may use so many of them as may be necessary to pay, in such bonds at par, three-fourths of certain notes with interest to Jan. 1, 1886, or so many of them, not exceeding three-fourths, as in the judgment of said Trustees shall seem best; the face value of said notes amounting to the sum of $308,470\frac{88}{100}$ dollars, and having been given for money borrowed by said Louisville, Evansville and St. Louis Railway Company, and herein called "special notes;" and to pay and discharge any liens on the property of said railroad to be purchased by said Trustees, and to pay for rolling stock, and to pay for such improvements and equipment of said railroad property, as in the opinion of said Trustees may be necessary for the profitable operation of said railroad. Said bonds shall bear interest absolutely at the rate of six per centum per annum, payable, semi-annually, in gold coin. Any of said bonds remaining in the hands of said Trustees at the end of six months from the time the said Trustees convey the property to the said new corporation or corporations shall be cancelled by them. The remaining three million dollars of said bonds shall be known as Series B. Bonds, and shall bear interest as follows: For the first year no interest, for the second and third years interest payable semi-annually at the rate of two per cent. per annum, for the fourth year interest at the rate of three per cent. per annum, for the fifth year

at the rate of four per cent. per annum, for the sixth year at the rate of five per cent. per annum, and thereafter at the rate of six per cent. per annum, and they shall be distributed, *pro rata*, among the holders of said first mortgage bonds.

6. The capital stock of the new corporation shall be issued in shares of one hundred dollars each, and shall be of two classes, preferred and common, and in such amounts of each as may be necessary for the purposes herein mentioned. The preferred stock shall be entitled to, and shall receive, from year to year out of the net earnings and prior to the payment of any dividend on the common stock, dividends not exceeding five per cent. per annum in any one year, which shall be non-cumulative.

7. Preferred stock shall be issued to all first mortgage bondholders, at par, for the unpaid interest on the first mortgage bonds to the first day of January, 1886, without any interest on interest; and to the holders of said special notes, to the amount of not exceeding one-fourth of the face of said special notes, and interest thereon to Jan. 1, 1886; and to the holders of the second mortgage bonds, for their face value, upon the surrender of said bonds and all the coupons belonging thereto; but said preferred stock shall receive no dividend prior to 1890.

8. Common stock shall be issued to the holders of the income bonds of said Louisville, New Albany, and St. Louis Railway Company, in the proportion of two shares of said common stock for each income bond; and to the holders of the common stock of said Louisville, Evansville, and St. Louis Railway Company, in the proportion of one share of said new common stock for twelve shares of said outstanding common stock; and to the holders of said first mortgage bonds, in the proportion of one share of said common stock for each first mortgage bond; but said common stock shall receive no dividend prior to 1890.

9. Upon receiving notice from the Trustees that the holders of a majority of the first mortgage bonds, as hereinafter provided for, have assented hereto, the subscribers hereto representing the first mortgage bonds, as specified opposite to their signatures, agree to deliver to the American Loan and Trust Company of the City of Boston, their respective amounts of first mortgage bonds and coupons, with irrevocable right and power to said Trustees to withdraw and use their said securities towards paying for said property, and in exchange for new securities as above provided, and shall receive from said Trust Company a negotiable receipt, in form to be approved by said Trustees, representing the amount of bonds and coupons so deposited.

10. Upon receiving notice from the Trustees that the holders of a majority of the second mortgage bonds, as hereinafter provided for, have assented hereto, the subscribers hereto representing the second mortgage bonds, as specified opposite to their signatures, agree to deliver to the American Loan and Trust Company of the City of Boston their respective amounts of second mortgage bonds and coupons, with irrevocable right and power to said Trustees to withdraw and use their said securities towards paying for said property, and in exchange for new securities as above provided, and shall receive from said Trust Company a negotiable receipt, in form to be approved by said Trustees, representing the amount of bonds and coupons so deposited.

11. To defray the expenses of carrying out this agreement, the holders of said first mortgage bonds shall, upon the deposit of their bonds as aforesaid, pay to said Trustees, or to such party as they may designate, in cash, five dollars per bond, and upon the receipt of the new bonds, shall pay an additional five dollars per bond; and holders of second mortgage bonds, income bonds, special notes and old common stock shall pay one dollar per share upon their receipt, as herein provided, of new, preferred or common stock, which money shall, when received, be paid out only on the order of said Trustees.

12. Said Trustees may act in all cases by a majority of their number, and they are declared to possess, and are hereby invested with, the legal and equitable powers, authorities and rights of purchasers, with respect to the purchase which may be made, or possession taken, in pursuance thereof, and shall have full power and authority to convey all the estates, rights and interests acquired by such purchasers, to any corporation or corporations, which may be formed as aforesaid, and generally do all such acts and things as in their judgment may seem necessary for the formation of said corporation or corporations and consolidation thereof, and for investing it, or them, when so formed, with the title to said property acquired as aforesaid, and for distributing the proposed new bonds and stock.

13. This agreement shall be valid and binding on the subscribers hereof only when it shall have been signed by the holders of a majority of the first mortgage bonds, and by the holders of a majority of the second mortgage bonds.

14. The signatures of the Trustees hereto shall be evidence of their assent to accept the trusts hereby created, and to fulfil the duties and obligations hereof; and said Trustees are to be liable, each for himself, and not one for the other, and are not to be under any obligation, express or implied, to any bondholder who does not become a party to this agreement by executing the same and complying with the conditions thereof.

15. All copies of this instrument which shall be signed by bondholders and by the Trustees, or by any one bondholder and the Trustees, shall be taken together as one instrument, with like legal effect as if all the signatures were on a single paper.

16. Any new securities herein provided for, other than Series A. bonds, to which parties may become entitled by signing this agreement, shall at the end of six months from the time the Trustees shall convey the property to said new corporation or corporations be turned over to said new corporation or corporations.

17. This agreement may be altered, or amended, at any time, by the written consent of two-thirds of the holders of the first and second mortgage bonds who shall sign this agreement; but notice, post-paid, of any alteration or amendment shall be mailed by said Trustees to all first and second mortgage bondholders signing this agreement who shall not have assented in writing to such alteration or amendment, to their respective addresses set opposite to their several signatures hereto, and any bondholder not assenting shall have the right for the period of ten days from the mailing of said notice, to withdraw his bonds and cash deposited, upon surrender of his negotiable receipt; but failing to withdraw his bonds for said period of ten days shall be deemed and held to have ratified and assented to such amendments and alterations.

We, the undersigned income bondholders and stockholders of the Louisville, Evansville and St. Louis Railway Company, hereby severally assent to the foregoing plan of reorganization, and agree to exchange our said income bonds and stock for said new common stock, as herein provided.

NAME.	RESIDENCE.	AMOUNT INCOME BONDS.	AMOUNT OF STOCK.

13. RECEIVER'S CERTIFICATE.

Whereas the undersigned, John Doe of New Haven in the State of Connecticut, was, on the first day of March, 1899, appointed Receiver of the Brompton Railroad Company, by decree of the Superior Court for Fairfield County in said State, passed in a certain suit therein pending, wherein A. B. is plaintiff and said Company and others are defendants, and whereas, by a decree of said Court in said cause, passed on the tenth day of October, 1899, it was ordered and adjudged that the undersigned, as such Receiver, might borrow not exceeding one hundred thousand dollars, at a rate of interest not exceeding five per cent. a year, and issue Receiver's certificates therefor, of the form of these presents as appears more fully by said decree on file, a copy whereof is printed on the back of this certificate of indebtedness; and whereas this certificate is one of a series of one hundred certificates issued and to be issued for money borrowed under and conformably to said decree, each of said certificates being for the amount of $1000.00 and all said certificates being numbered consecutively from 1 to 100:

Now therefore THIS CERTIFIES that the undersigned, as Receiver of said company, but not individually, is indebted, for money borrowed pursuant to said authority, unto or bearer in the sum of one thousand (1000) dollars, payable on or before the first day of January, 1902, with interest payable semi-annually at the rate of five per cent. a year, in equal semi-annual payments of twenty-five dollars each, payable on the first days of January and July in each year, until this certificate is paid and satisfied, on surrender of the proper coupon therefor, which is hereto annexed.

Provided, however, that neither principal nor interest shall be payable except out of funds received by me as such Receiver, or my successors in said trust, so far as the same may be sufficient and available for said purpose, agreeably to the orders of said Court, and that I, as such Receiver, or my successors in said trust may call in and pay off this certificate at any time

prior to its maturity, on giving notice not less than sixty days beforehand to the holder either personally or by advertisement inserted not less than three times in a daily newspaper published in the of

Dated at Bridgeport this first day of January, 1900.

JOHN DOE, *Receiver.*

[Coupons annexed.]

VII.

TABLES.

1. Distances in feet traversed per minute and per second by railroad cars moving at different rates of speed (without stops).
2. Distances run after putting on brakes by a 50-car through freight train, which was going on a down grade at twenty miles an hour when the brakes were applied.

1. Distances in Feet traversed per Minute and per Second by Railroad Cars moving at Different Rates of Speed (Without Stops).

RATE OF SPEED.	DISTANCES TRAVERSED BY CAR		
NUMBER OF MILES PER HOUR.	IN FEET AND INCHES.		IN MILES.
	PER SECOND.	PER MINUTE.	PER MINUTE.
5	7 feet 4 inches.	440 feet.	1-12
10	14 " 8 "	880 "	1-6
15	22 "	1320 "	1-4
20	29 " 4 "	1760 "	1-3
25	36 " 8 "	2200 "	5-12
30	44 "	2640 "	1-2
35	51 " 4 "	3080 "	7-12
40	58 " 8 "	3520 "	2-3
45	66 "	3960 "	3-4
50	73 " 4 "	4400 "	5-6
55	80 " 8 "	4840 "	11-12
60	88 "	5280 "	1

2. DISTANCES RUN AFTER PUTTING ON BRAKES BY A 50-CAR THROUGH FREIGHT TRAIN WHICH WAS GOING ON A DOWN GRADE AT TWENTY MILES AN HOUR WHEN THE BRAKES WERE APPLIED.[1]

NO. OF FEET PER MILE OF DOWN GRADE.	AUTOMATIC AIR BRAKES USED.		HAND BRAKES USED.[2]	
	NO. OF FEET RUN AFTER APPLYING BRAKES.	NO. OF SECONDS BEFORE TRAIN STOPPED.	NO. OF FEET RUN AFTER APPLYING BRAKES.	NO. OF SECONDS BEFORE TRAIN STOPPED.
32.2	93	6[3]	1000	48
35.	158	10	1342	60
47.	95	6[3]		
47.	194	11	1720	72
52.8	176	11		
52.8	109	6[3]		

[1] This table is made up from results of experiments stated by the Westinghouse Air Brake Company. The train was 1900 feet long, with a total weight of about 1000 net tons. With a lighter train moving on a level or on an up grade, the comparative results would probably be considerably more favorable to the use of hand brakes.

To get comparative results for different rates of speed, the following process may be used:

Given the rate of speed (say, as here, twenty miles), at which a train was running when the brakes were applied, and the distance which it ran before coming to a full stop. Desired to get the distance which the same train would have run before stopping, if it had been going at a certain different rate of speed before the brakes were applied. Mode of computation: — Multiply the given distance by the square of such different rate of speed and divide the product by the square of the given speed. Thus, let x = the number of feet within which such a train moving at 30 miles an hour would stop, after applying the brakes. Assume (as per above table) 158 feet as the distance within which such a train moving at 20 miles an hour could be stopped. The equation will then be $x = \frac{158 \times (30 \times 30)}{400} = 355$ feet 6 inches.

[2] The trains had 5 or more brakemen.

[3] The brake leverage was here increased so as to give the quickest time possible.

INDEX.

A.

B.

C.

D.

E.

F.

G.

H.

J.

L.

M.

N.

Q.

R.

S.

T.

U.

V.

W.

Y.