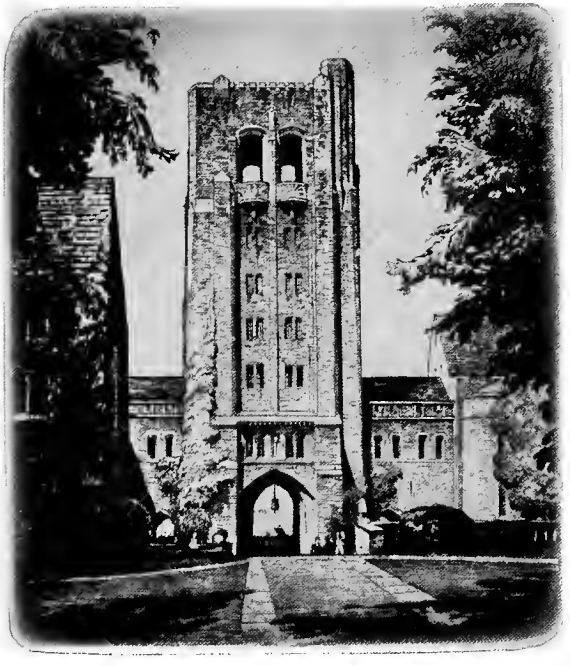

A

TREATISE

ON

AMERICAN RAILROAD LAW.

BY

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PREFACE.

THE present volume is designed to reduce to a compact and accessible form, the Law of Railroads, as it has been judicially declared in this country. The decisions upon the subject, which have been reported mainly within the last ten years, have accumulated rapidly during that period. Hitherto they have not been digested into a treatise, and when required to determine questions as they arise, are brought together with no inconsiderable labor and difficulty. Although the treatise is occupied chiefly with the discussion of the law, as declared in these cases, which it is believed, will be found to be collected with fidelity, the interpretation of such statutes as are of general interest, and are essentially the same in the several States, has been considered, while local laws have been excluded from its scope.

The English decisions, so far as they are applicable to this country, have been cited; but it must

be confessed that they furnish less aid in this than in other topics of the law. The decisions themselves, as well as the treatises on railroad law which have appeared in England, have been occupied to a very great extent with the discussion of the statutes for the organization and government of railroad companies, which have been extended by Parliament to great length and particularity of provision.

To the courts of our own country, we must chiefly look for the law of this subject. With nearly twenty-five thousand miles of railroads already constructed, in length four times those of England, and equal to all the railroads in Europe, involving a corresponding investment of capital, and application of industry in their construction and operation, our own judicial tribunals may be expected to lead the way in applying the principles of the law to this new sphere of enterprise.

The law of corporations in most of its divisions, has been open to the consideration of the author; but the points which are not peculiar to the class here considered, or are seldom presented by them for decision, have been pressed into a narrow space, so as to leave opportunity for a more full discussion of such as are of constant occurrence in the creation and management of railroad companies. For this reason, five chapters have been devoted to the subject of

Torts, which is less considered in textbooks than almost any other.

The author has amplified the statements of elementary principles in some chapters, more than a professional reader might desire, in order to render the volume of more service to persons outside of the profession, whose occupations or interests are concerned in the affairs of railroad companies, and who may be disposed for that reason to consult a treatise on the subject. The same consideration has induced the liberal extracts from judicial opinions, which have been inserted in the notes.

On some matters which it has been found necessary to discuss, such, for instance, as the fraudulent issue of stock and railroad mortgages, less authoritative declarations of the law were found than could be desired; and upon these unsettled questions, such views have been taken, with a prudent reserve, as seemed in harmony with the principles of the law which have been applied to subjects most nearly analogous.

It would be vanity in the author of any treatise, with whatever devotion he may have given himself to its preparation, to suppose that nothing could be taken from or added to it with advantage; least of all, if it occupies an untrodden field. But he may well be conscious of having done something of the duty which every lawyer owes to his profes-

sion who, by the faithful collation of the authorities and the suggestion of sound doctrines, has contributed his hours of study to illustrate the law appropriate to a department of enterprise which combines the grandest material energies of the age, and unfolds views of national greatness which patriotism delights to contemplate.

Boston, 10th August, 1857.

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AMERICAN RAILROAD LAW.

CHAPTER I.

THE FORMATION OF A RAILROAD COMPANY.

DEFINITIONS.—A corporation is an artificial being, created by law, and composed of individuals subsisting as a body politic under a special denomination, with capacity to succeed each other in perpetual succession, and to act in many respects as a natural person. The privilege of being a corporation is conferred on individuals by grant from the sovereign power, and is a franchise. A private corporation is one founded by private individuals, the stock of which is owned, at least, in part, by private persons; and is distinguished from a public corporation, which is created by the government for political purposes, or whose stock is owned exclusively by the government.[1] The charter of a private corporation is a contract, protected by the clause of the U. S. Constitution which forbids any State to pass a law impairing the

[1] Dartmouth College *v.* Woodward, 4 Wheaton, 543, 555, 562; 2 Kent, Com. 268, 275; 3 id. 458.

obligation of contracts.[1] Railroad companies are private corporations, usually created by special acts of legislation, called charters or acts of incorporation, although in some States they may be organized under general laws.

They are created for the making and maintaining of railroads, to be used for the purposes of transportation, and besides being invested with the usual privileges and incidents of corporations, are clothed with certain peculiar and extraordinary powers necessary for carrying out the objects for which they were established.[2] The law of railroads

[1] 2 Kent, Com. 272, 275.

[2] An English writer has thus described a railroad company: "A railway company may be defined to be, a collection of many individuals, united into a body corporate for the making and maintaining a railway with all necessary works, &c.; and, for the better prosecution of this design, endowed by the policy of the law, not merely with a modified capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations, of suing and being sued, of enjoying privileges and immunities, according to the scope of its institution, or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence (see Kyd Int. 13), but likewise with extraordinary powers more peculiarly characteristic of such an undertaking, viz.; powers of taking and dealing with land, houses, &c.; of internal self-government, and of raising, by the mutual subscription of its individual members, a certain amount of capital, divided into a given number of transferable shares. As a corporate body, a railway company enjoys all the ordinary incidents of such a body (subject, of course, to such express provisions on the subject as are contained in their act of incorporation, and to the limitations thereby engrafted on the general law of corporations), viz.—1st, to have perpetual succession; 2d, to sue or be sued, grant or receive, &c., by its corporate name; 3d, to purchase lands, and hold them for the benefit of itself and its successors; 4th, to have a common seal, for a corporation being an invisible body, cannot manifest its intentions by any personal action or discourse, it therefore acts and speaks only by its common seal; 5th, to make by-laws or private statutes for the better government of the corporation, which are binding on itself—unless contrary to the laws of the land, and then they are void."—Walford on Railways, pp. 68, 69.

as operated by *corporations*, is the subject of this volume. A private individual might indeed construct one without legislative interposition, provided he could succeed in obtaining a right of way by purchase ; and there would be no objection to his using the same for the purposes of a common carrier, unless there be an objection on the ground, that the right to take tolls is a franchise to be derived from some public grant; which, however, is mainly technical. Such railroads, which may be called railroads at common law, exist in England, either constructed on the owner's land or on the land of another by purchase of a right of way, or by the reservation of a way-leave over lands sold or demised.[1] In this country, railroads which are used for the purpose of transporting for the public generally, are uniformly constructed and operated by the state itself, or, as is usually the case, by companies under the authority of statutes. In some recent instances, although built by such companies, they have been leased or sold to private persons; but such transfers have not yet been the subjects of judicial decisions in the tribunals of last resort.

General frame of the Charter.—The ordinary mode of forming a corporation for the construction of a railroad, is by the application of interested parties to the legislature for the privi-

[1] Dand *v.* Kingscote, 6 M. & W. 174; 2 Eng. Rail. Cas. 27; Harrow *v.* Vansittart, 1 Eng. Rail. Cas. 602; Barnard *v.* Wallis, 2 id. 162. Walford on Railways, pp. 2–10.

lege. The legislature, in granting the same by a charter, confers on individuals the power to form the corporation; and the exercise of this power in pursuance of the grant, brings the corporation into existence. The charter, except so far as altered by constitutional legislation, is the law of the corporation, defining its powers and obligations, the mode of its internal organization and its relations to the public. It may vary, in many particulars, from others granted for a similar purpose, according to special exigencies, while its essential features are the same. Its leading provisions, some of which are frequently omitted, may here be noted.

The charter establishes a corporation, or authorizes its formation, and declares the name under which it is to be recognized in law. It designates the corporators by name or as a class. In some cases, it constitutes as corporators certain enumerated individuals with their associates and successors, and in others, those who shall hereafter become subscribers or stockholders. It invests the corporation with capacity, under its corporate name to sue and be sued in courts of justice, to use a common seal, and the same to alter and renew at pleasure, to purchase and hold real estate, to enter into contracts, and with such other powers and privileges as are necessary to carry into effect the purposes of its creation. It authorizes the construction of a railroad for the transportation thereon of persons and property by the usual means of conveyance on railroads, designates its termini and prom-

inent intermediate points, limits the time for its completion, and grants to the company the power to fix and take tolls for the use of the same. It determines the amount of the capital stock, and the mode of obtaining it, the number of shares and the nominal value of each. It authorizes the corporators named to associate others with them, and with such associates to organize the corporation. In some cases, it requires the corporators thus named, or certain commissioners named, to open books for subscription to the capital stock, at certain places upon a prescribed notice being given; and, when a fixed amount has been subscribed and, as is sometimes provided, a certain percentage on each share taken paid in, to give notice of a meeting of the subscribers for the organization of the corporation by the choice of directors; and also to conduct the election of such officers. Upon their acceptance of the trust, one of whom is, according to the charter, usually to be chosen the president by themselves, the affairs of the company pass into their management, and its organization is complete.[1]

The charter provides for the holding of the corporate meetings, the mode of conducting them, of electing the officers and filling vacancies, the number necessary for a quorum in the meetings of

[1] An election of officers may be set aside for the improper rejection of votes which would have defeated the successful ticket, but not for mere irregularities of proceeding. As to proceedings in the election of officers, see In the Matter of Long Island R. R Co., 19 Wend. 37; In the Matter of Mohawk & Hudson River R. R. Co., 19 id. 135.

stockholders and of official boards, and the terms of office.

It prescribes the proceedings for acquiring land by condemnation, in case of the inability of the company to purchase the same; authorizes preliminary surveys, the taking of a certain width for the line of the road, of materials for its construction and maintenance, and of land for its stations and necessary appendages; and defines the estate of the company in the land thus acquired. It declares the mode and rules of assessing damages to the injured party, whether made by special appraisers or a jury, the notice to be given of the condemnation and assessment, the time and place of payment, with provisions for the protection of parties under disability.

It prescribes the mode of collecting the amounts subscribed to the capital stock, the notice, if any, to be given of the calls; and may give to the company the right to declare a forfeiture of the stock for non-payment of the calls; and points out its duties and powers, in case the stock upon such forfeiture sells for more or less than its par value. It usually declares the shares to be personal property.

It authorizes the directors to make the necessary by-laws and regulations, and to appoint the necessary officers and agents for whose appointment no other special mode is provided by the charter.

Other specific powers are sometimes added, as—to change its location, borrow money, mortgage the corporate property and franchise, run trains

over the railroads of other companies, and to unite or consolidate its interests with theirs. Special duties may be imposed for the convenience and protection of the public, as—to restore water-courses, roads, and highways, crossed by it, to their former usefulness, give signals at crossings of public ways, erect cattle-guards and fences on the line of the railroad, file its location within a specified time with certain public officers. A prohibition is sometimes inserted against laying the track in cities without the consent of the proper authorities. The mode and rate of taxation of the corporate property, and exemption from other modes and rates, may be prescribed. A clause reserving the power to the legislature to alter or repeal the charter, is not unfrequently inserted. Special penalties may also be provided for the protection of the company, as double or treble damages against persons unlawfully placing obstructions on the track.

Many of the provisions here specified, may be included in a general law applicable to all railroad companies, and need not, therefore, be repeated in each charter. Such a general law, if well considered, would reduce acts of incorporation, otherwise unnecessarily burdened with provisions, to a very brief space, so as to require little besides the names of the corporators or commissioners, the termini and points of the road, the amount of the capital stock, and the time allowed for its construction. A general law has been passed in some states, under which a railroad company may be

organized without applying to the legislature for a special act, but it has been little availed of in the construction of railroads.[1]

[1] Laws of Illinois (1849, 2d session), p. 15. 2 Stat. of Illinois (Purple's ed.) p. 1060. Swan's Stat. of Ohio (1854), p. 197. Rev. Stat. of New York 4th ed.) p. 1220.

CHAPTER II.

THE CONSTRUCTION AND EXTENT OF POWERS.

General Rule of Construction.—A corporation is the creature of law, and this circumstance determines the principle which governs the construction of its powers. Deriving its existence and capacities from the express grant of the law-maker, it can assert no other than those conferred; and such as were not given, it must be presumed he intended to withhold. The strict construction of legislative grants to a corporation, has, therefore, become a settled doctrine of American law, which is applied with more stringency where private rights are to be interfered with, or important functions of government are to be abridged by them. It must, however, be understood in a reasonable sense, as not requiring the power invariably to be conferred in express words, but admitting its existence when necessarily implied from any express grant. Corporations have, therefore, such powers as are specifically granted, and such as are necessary for the purpose of carrying into effect the powers expressly granted; and no other.[1]

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[1] 2 Kent, Com. 298; Perrine *v.* Chesapeake & Delaware Canal Co. 9 How. 172; Commonwealth *v.* Erie and North East R. R. Co., 27 Penn. State, 339; Bradley *v.* N. Y. & N. H. R. R. Co., 21 Conn. 294; State *v.* Baltimore & Ohio R. R. Co., 6 Gill, 363.

The same rule of construction is enforced in England, where a railway act is regarded as a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and any ambiguity in the terms of the contract must operate against the adventurers and in favor of the public; and the company can claim nothing which is not clearly given to it by the act.[1]

The restrictions on the powers expressed in the charter are to be enforced against the company, although the effect is to render the powers worthless; and if the powers cannot be executed without disregarding the restrictions coupled with them, they cannot be executed at all.[2] The rule of strict construction applies only in cases of ambiguity, or where a power is claimed by implication. There is no room for its operation where the power claimed is expressly given.[3]

Specific Application of the Rule.—The grant to a railroad company is to be construed strictly where it interferes with a previous grant to another company,[4] or some earlier appropriation to another public use, as for a highway or canal.[5] But this

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[1] Stourbridge Canal Co. *v.* Wheeley, 2 B. & Ad. 792; Priestly *v.* Foulds, 2 M. & G. 175; 2 Eng. Rail Cas. 441.

[2] Commonwealth *v.* Erie & North East R. R. Co., 27 Penn. State, 339.

[3] Newhall *v.* Galena & Chicago Union R. R. Co., 14 Ill. 273; Cleveland, Painesville, & Ashtabula R. R. Co. *v.* City of Erie, 27 Penn. State, 380.

[4] Packer *v.* Sunbury & Erie R. R. Co., 19 Penn. State, 211.

[5] West River Bridge Co. *v.* Dix, 6 How. 543; Chesapeake & Ohio Canal

principle is not to be applied so as to defeat the subsequent grant, where both uses can stand together.[1] And the power to interfere, and even to destroy the value of the previous grant, may result from express words, or necessary implication either from the language of the charter or from its being shown, by the application of the same to the subject matter, that the railroad cannot by reasonable intendment be laid in any other manner and on any other line.[2] The grant of a right of way fifty feet wide for a railroad through a small strip of land in a densely populated city will convey only so much ground as is necessary for the line of the road, and will not carry by implication the right to erect within such line depots, car-houses, or other structures for the convenience and business of the road.[3] The free navigation of navigable waters is another public right important to be preserved; and the power to obstruct it must be clearly given.[4] The company cannot be the owner of a ferry, unless a power for that purpose is expressly or impliedly given.[5] It cannot, without express grant for that purpose, pass

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Co. *v.* Baltimore & Ohio R. R. Co., 4 Gill & Johns. 1; State *v.* Vt. Central R. R. Co., 1 Williams (Vt.), 103; Commonwealth *v.* Nashua & Lowell R. R. Corp., 2 Gray, 54; Clarence R. Co. *v.* Great North of England, &c. R. Co., 4 Q. B. 46.

[1] Boston Water Power Co. *v.* Boston & Worcester R. R. Co., 23 Pick. 360.

[2] Springfield *v.* Connecticut River R. R. Co., 4 Cush. 63; White River Turnpike Co. *v.* Vt. Central R. R. Co., 21 Vt. 590; Enfield Toll-bridge Co. *v.* H. & N. H. R. R. Co., 17 Conn. 40, 454; Rex *v.* Pease, 4 B. & Ad. 30.

[3] Mayor, &c., Allegheny *v.* Ohio & Penn. R. R. Co., 26 Penn. State, 355.

[4] Atty Gen. *v.* Hudson River R. R. Co., 1 Stockton Ch. 526; Newark Plank Road Co. *v.* Elmer, 1 id. 754.

[5] State *v.* Wilmington & Manchester R. R. Co., Busbee (N. C.), 234.

a by-law subjecting to forfeiture the shares of stockholders for non-payment of installments due thereon.[1] It must pursue strictly the authority conferred by statute for taking private property for public uses.[2] The power to change its location, when given, is to be strictly construed.[3] The power to take tolls must be expressly given, and when so given, any limitations upon it are to be construed favorably for the public.[4] A grant the effect of which is to abridge important functions of government, is to be construed strictly. Thus, the power of taxation is essential to the existence of government; and a grant to the company of exemption therefrom is not to be presumed, and when given to a certain extent, is not to be extended by construction.[5] The same principle applies where the company asserts the grant of exclusive privileges conflicting with public interest, as of the sole power to operate a railroad within certain limits.[6] The extent and limitation of a power

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[1] In Matter of Long Island R. R. Co., 19 Wend. 37.

[2] Bonaparte *v.* Camden & Amboy R. R. Co., 1 Baldwin, 229, 230; Browning *v.* Camden & Woodbury R. R. Co., 3 Green Ch. 55; Scales *v.* Pickering, 4 Bing. 44; Webb *v.* Manchester & Leeds R. Co., 4 My. & Cr. 120; S. C., 1 Eng. Rail Cas. 599; Lee *v.* Milner, 2 Y. & Coll. 618.

[3] Moorehead *v.* Little Miami R. R. Co., 17 Ohio, 340; Little Miami R. R. Co. *v.* Naylor, 2 Ohio State, 235.

[4] Perrine *v.* Chesapeake & Delaware Canal Co., 9 How. 172; Camden and Amboy R. R. Co. *v.* Briggs, 2 Zabris. 623; Gildart *v.* Gladstone, 11 East, 675; Barrett *v.* Stockton and Darlington R. Co., 2 M. & Gr. 134; 3 id. 956; 2 Eng. Rail. Cas. 465; Parker *v.* Great Western R. Co. 9 Scott N. R. 870.

[5] Providence Bank *v.* Billings, 4 Peters, 514, 561; Phil. & Wil. R. R. Co. *v.* Maryland, 10 How. 376; Ohio Life Insurance and Trust Co. *v.* Debolt, 16 id. 435.

[6] Charles River Bridge *v.* Warren Bridge, 11 Peters, 420; West River Bridge *v.* Dix, 6 How. 532; Richmond R. R. Co. *v.* Louisa. R. R. Co., 13 id. 71.

granted are determined by the purpose for which it was conferred. Thus, the power to hold real estate is confined to the proper and necessary uses of the company, such as for the line of its road, the procurement of materials for its construction and maintenance, convenient station-grounds, and other like purposes.[1]

The implied powers are such as are necessary to carry into effect the express powers. The power to condemn land, although to be strictly construed, is not to be construed with such strictness as to defeat the purpose of the grant.[2] The grant of the power to construct a railroad includes the power to make such embankments and excavations as are necessary for its construction.[3] The right to enter on land, and appropriate as much thereof as is necessary for a railroad, includes the right to remove a dwelling-house for that purpose.[4] A charter, authorizing the construction of a railroad "to the place of shipping lumber" on a tide-water river, does not limit the right of location to the upland or to the shore, but authorizes the extension of the road across the flats and over tide water to a convenient place for reaching vessels.[5] The power to establish

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[1] Overmyer *v.* Williams, 15 Ohio, 26; State *v.* Mansfield, 3 Zabris. 510; State *v.* Newark, 1 Dutcher, 315; Mayor of Norwich *v.* Norfolk R. Co., 30 Eng. L. & Eq. 120; Eastern Counties R. Co. *v.* Hawkes, 35 id. 8.

[2] Doughty *v.* Somerville and Easton R. R. Co., 1 Zabris. 442. In the case of Chicago, Burlington and Quincy R. R. Co. *v.* Wilson, 17 Ill. 123, the power was carried quite far enough. See West River Bridge Co. *v.* Dix, 6 How. 544, 545, 546.

[3] Babcock *v.* Western R. R. Corp., 9 Met. 553; Jones *v.* Vt. Central R. R. Co., 1 Williams, 399.

[4] Brocket *v.* Ohio and Penn. R. R. Co., 14 Penn. State, 241.

[5] Peavey *v.* Calais R. R. Co., 30 Maine, 498.

a railroad on a public street, may include that of making a turnout thereon to communicate with a depot on the street.[1]

The company is clothed with a discretion, not indeed arbitrary, but to be exercised bona fide, of doing the works necessary to accomplish the main purpose authorized by the act, in such a manner as reasonable, careful, and skillful men would judge expedient and fit. Thus, in England it has been held authorized to build a temporary bridge over a stream or canal, or to arch a public street, where such works are reasonably convenient and necessary to accomplish the enterprise contemplated in the act, and are not in conflict with any of its restrictions.[2] The company is authorized to do all acts within the limits of its road which are necessary and proper for its construction and operation, although the fee of the land may still remain in the owner. Thus, it may erect such buildings within those limits as are reasonably incident to its purposes.[3] So also, it may cut trees growing thereon, whether used for shade, ornament, or fruit, and whether they are cut at the time of laying out the track or afterwards; and there is no burden of proof on the company to show in its justification that the trees so growing within its limits were cut for the purposes of the

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[1] N. O. and Carrollton R. R. Co. *v.* New Orleans, 1 La. An. 128; Knight *v.* Carrollton R. R. Co. 9 id. 284.

[2] Priestly *v.* Manchester and Leeds R. Co., 4 Y. & Coll. 63; 2 Eng. Rail. Cas. 134; London and Birmingham R. Co. *v.* Grand Junct. Canal Co., 1 Eng. Rail. Cas. 238; Atty. Gen. *v.* Eastern Counties, &c. R. Co., 10 M. & W. 263; S. C., 2 Eng. Rail. Cas. 823; Clarence R. Co. *v.* Great North of England, &c. R. Co., 13 M. & W. 706.

[3] Worcester *v.* Western R. R. Corp., 4 Met. 564.

road; and the corporation itself is the judge of the exigency requiring the cutting.[1] The power of the company to make contracts, to dispose of its

[1] Brainard *v.* Clapp, 10 Cush., 6,—Shaw, C. J.: "It appears by the bill of exceptions that the action was brought for cutting down walnut and cherry trees growing on the close of the plaintiff, for use, ornament, shade, or fruit. The cutting complained of was within the limits of the five rods laid out over the plaintiff's land by the railroad company, and for which his damages had been assessed and paid. The defendant (who justified the trespass as the president, agent, and servant of the Connecticut River Valley Railroad Company) claimed that the trees obstructed the view of the track, near the depot, at the village of Greenfield, and it was necessary to the safety of the road, and those using it and working on it, that this obstruction should be removed. The Court ruled that the defendant could justify only on the ground that the acts complained of were necessary to carry out the objects and purposes intended by their charter, and that the burden of proof was on the defendant to prove such necessity. Without following the bill of exceptions minutely, it may be sufficient to say that the Court ruled that if the trees standing within the limits of the land taken for the road were an obstruction, or made the track unsafe or inconvenient to the company or their agents, the defendant, as agent of the company, had a right to cause them to be cut down; that in judging of the safety and convenience of the road, the acts of the company were entitled to a favorable construction; that the company had the exclusive right to the use of the plaintiff's land taken, so far as it was necessary to carry into operation all the objects embraced within the scope of their act of incorporation; but the officers of the company were not the sole and exclusive judges of what was to be removed from the land taken, but the necessity of the removal might be judged of by the jury; and if there were clearly no necessity for such removal, then the defendant would be responsible for cutting the trees in question. To these directions the defendant excepted, and the case has now been brought before this court for revision.

"In a general view of the law, the Court are of opinion that, *prima facie*, the railroad company are authorized to do all acts within the five rods which by law constitute their limits, in taking away or leaving gravel, trees, stones, and other objects, which in their judgment may be necessary and proper to the grading and leveling the road, in adjusting and adapting it to other roads, bridges, buildings and the like, so as to render it most conducive to the public uses which the railroad is designed to accomplish. Whatever acts, therefore, are requisite to the safety of passengers on the railroad, to the agents, servants, and persons employed by the company, and to the safe passage of travelers on and across highways and roads con-

franchise and road-track, as well as other powers, will be considered in subsequent chapters.

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nected with it, and which can be done within the limits of five rods, the company have a right, under their act of incorporation, to do. This is embraced in the idea of 'taking' land for public use. It is an appropriation of the land to all the uses of the land for the road, necessary and incidental. This appropriation the company are authorized to obtain by purchase, if it can be done; but if the owner refuses, then the company, by their officers and engineers, have the right and power to lay out the land, paying a compensation to the owner therefor, to be adjusted and settled, first by commissioners, and ultimately by a jury; and practically the damages are commonly equal to the value of the land. To this extent the power of the public, under the right of eminent domain, to provide for carrying into effect a proposed public enterprise for the common good, is transferred to the company; and their decision, therefore, must be definitive, except when under special provisions of law, they are bound to conform to the directions of the company's commissioners or other officers appointed for the purpose."

After citing cases to the point that where land is taken for the public use and paid for, the public, or the corporation acting as agent and trustee for the public, has a right to make all the use of the land which the necessity and convenience of the public may require, and the landowner receives in damages a compensation which in theory of law is an indemnity for all such uses, the learned judge continues:—

"It appears to us that the cases cited on the other side do not impugn these principles. They certainly do establish the point that, by the common law, the fee of the soil over which a public way of any kind is laid, remains in the owner; that he is entitled to the herbage and trees growing on it, and minerals under it; but they hold in like manner that the use is in the public or those who represent and act for the public, that this includes all the uses incident to the accomplishment of the public objects for which their charters had been granted; and if these, in their nature, require the cutting down and removal of trees, such rights vest in the public. Barclay *v.* Howell, 6 Pet. 498.

"This rule is general, and applies to all cases where land is taken for highways, townways, turnpikes, canals, and railroads; the principle is, that such right extends to all uses directly or indirectly conducive to the enjoyment of the franchise, and the advancement of the public benefit, contemplated by the establishment of such public work. But it is quite obvious that, though the principle is general, the extent of such use must vary, not only according to the exigencies of each particular kind, but to the varying circumstances of each species of public work. A canal, for instance, must have a towing-path as necessarily incident; roads must have drains and culverts; and a railroad, turn-outs, platforms, depots, and the like. And it

is obvious that railroads, with their engines and trains, from their complicated character and peculiar mode of operation, may require more and larger uses of the land for running and managing trains safely, than other public ways; but what they do require is within the limits of the grant, and where they are not especially prescribed or limited, must be determined by the nature of such exigency. And if trees are found to be dangerous in running cars, by obstructing the view of engineers and conductors up and down the track, in approaching depots, crossing highways on the same grade, or otherwise, the company have the same right to cut them down, standing within their limits, as if they tended to obstruct the passage of trains, and thus endanger their safety.

"And the Court are also of opinion that the right and power of the company to use the land within their limits, may not only be exercised originally, when their road is first laid out, but continues to exist afterwards; and if, after they have commenced operations it is found necessary, in the judgment of the company, to make further uses of the land assigned to them, for purposes incident to the safe and beneficial occupation of the road, by raising or lowering grades, cutting down hills, and removing trees, they have a right to do so to the same extent as when the railroad was originally laid out and constructed. All the reasons of necessity, propriety, and fitness which apply to the one case, are equally applicable to the other. And we think the authorities equally apply. Callender *v.* Marsh, 1 Pick., 431, was the case of a street and ancient highway. Tucker *v.* Tower, 9 Pick., 110, was the case of a turnpike, where a new use was made of the land, by erecting a toll-house, and cutting trees for that purpose, long after the road was established.

"The case of railroads may be regarded as standing on somewhat stronger grounds in this respect, for several reasons,—because railroads are extremely costly, and proprietors cannot in the outset make and complete all the works which they contemplate and intend to make; because these works are comparatively new, and improvements are constantly making in the structure and management of the works, and thus companies may profit by their own experience and that of others; and because an increase in the business of carrying passengers and freight, may call for new works after the roads have gone into operation, and these are new exigencies calling for a new use of the land assigned to them.

"In applying these views of the law to the present case, the Court are of opinion that the directions of the learned judge were incorrect in several respects. We think they were thus incorrect in directing, in the outset, that the defendant could justify only on the ground that the acts complained of were necessary to carry out the objects and purposes intended by their charter, and that the burden of proof was on the defendant to prove the necessity.

"Further, although the learned judge did instruct the jury that the company had the exclusive right to the use of the plaintiff's land so taken, as

far as necessary, yet it was connected with another direction, in which he instructed the jury that the officers of the company were not the sole and exclusive judges of what was to be removed from the land taken, but the necessity of the removal might be judged of by the jury; and if there were clearly no necessity for such removal, then the defendant would be responsible for cutting the trees; whereas, we think the jury ought to have been instructed that the company had a right, under the powers given them by their act of incorporation, to cut down the trees in question, as one of the acts to be done on the land within the five rods, to fit and prepare the track for the safe and convenient use of it, for the transportation of persons and freight by cars and locomotive engines; that they were the judges of what this exigency required, and that if the defendant, being their agent for this purpose, cut down the trees by their authority, he was justified in doing so. And also, that such authority might be given by the company to their president, agents, and officers, either by by-laws providing for the appointment of such officers and defining their powers, or by a general or particular vote, or by any other mode by which an aggregate corporation can express its will and exercise its powers."

CHAPTER III.

POWER OF THE LEGISLATURE OVER THE COMPANY.

THE CHARTER PROTECTED BY THE CONSTITUTION OF THE UNITED STATES.—It is provided in the tenth section of the first article of the U. S. Constitution, that "No State shall * * * pass any * * * law impairing the obligation of contracts." Charters granted to private corporations by the State are, by a construction now settled, *contracts* within the meaning of this clause. They confer rights and privileges on the grantees, on the faith of which the charter is accepted, and involve corresponding duties and obligations on their part. They imply a contract on the part of the State for the quiet enjoyment and unimpaired security of the privileges so granted. The franchises and immunities are incorporeal hereditaments, and like any other kind of property, may be the subject of grant and contract, and are protected against invasion or revocation by this constitutional interdiction.[1] A railroad company is a private corporation, whose charter is a contract between it and the state, not subject to alteration by the

[1] Dartmouth College *v.* Woodward, 4 Wheat. 518; Washington Bridge *v.* State, 18 Conn. 53; Chesapeake and Ohio Canal Co. *v.* Baltimore and Ohio R. R. Co., 4 Gill & Johns. 1; Erie and North East. R. R. Co. *v.* Casey, 26 Penn. State, 287; 2 Parsons on Contracts, 515; 2 Kent, Com. 272, 275; Thorpe *v.* Rutland and Burlington R. R. Co., 1 Williams, 144.

latter, so as to deprive the company of the rights secured by the charter.[1] It cannot, as a general rule, be subjected by subsequent legislation, to obligations not imposed in the charter. Thus, where a railroad company was by its charter authorized to build a bridge over a navigable stream, without being by the charter or previous laws liable for consequential damages to owners of lands lying on the river, a subsequent act, not accepted by the company, imposing on it liability for such damages was held to violate the obligation of the contract implied in the charter.[2] Nor can the State impair the obligation of the contract subsisting between the corporation and the individual members.[3]

What Impairs the Obligation of the Contract implied in the Charter. Exclusive Privileges not implied.—It has become a settled doctrine of American jurisprudence that the grant of a franchise in matters affecting the public interests, is to be construed strictly, and nothing passes to the grantee beyond what is required by its terms.[4] In accordance with this principle, there is no implication in the charter of a railroad company that the legislature will not authorize other rival companies, even operating parallel lines however near, by whose competition the value of the franchise, first granted,

[1] Id.

[2] Bailey *v.* Phil. Wil. and Baltimore R. R. Co., 4 Harring. 389.

[3] New Orleans, Jackson, and Great Northern R. R. Co. *v.* Harris, 27 Mississippi, 517.

[4] *Ante*, ch. ii. pp. 9, 12.

may be greatly impaired or entirely destroyed. The action of the legislature in incorporating such competing companies, may in many instances be grossly unjust; but the company which has not secured itself against the injury by a provision in its charter against other similar enterprises, cannot invoke the protection of the Federal Constitution. This principle has been expounded in celebrated causes by the highest judicial learning and ability, and is deeply laid in constitutional law. On the same principle a railroad company may be chartered, which materially injures the value of the franchise of turnpike and bridge companies already existing, where the latter have not protected themselves against such enterprises by a provision in their charter.

These principles of constitutional law were elaborately discussed in the case of the Charles River Bridge *v.* Warren Bridge. The legislature of Massachusetts in 1785, granted a charter to a company for the building a bridge over Charles River, from Boston to Charlestown, under the name of the Charles River Bridge, and authorized it to take tolls of persons passing over the bridge for the term of forty years, extended by a subsequent act to seventy years. In 1828, before the expiration of the charter, an act was passed authorizing the erection of the Warren Bridge a few rods from the former, which was to become free in six years; and the result was the reduction of the tolls of the Charles River Bridge to a very small amount. The Supreme Court of the United States decided that the grant of franchises by the public in matters where the public interests

are concerned, as exemption from taxation and the right of the state to authorize new roads and bridges, is to be construed strictly; that nothing passes by implication, and no rights are taken from the public or given to the corporation beyond those which the words of the charter, by their natural and proper construction convey; and that as the charter in its terms, granted no exclusive rights above and below the bridge, and contained no stipulation on the part of the state not to authorize another bridge above or below it, no such exclusive right could be implied.[1] The construction of a railroad from the District of Columbia to the city of Baltimore under the authority of the legislature, is not an infringement of the charter of a turnpike company previously incorporated, which had already built a turnpike between those two points, although the railroad diverted travel from the turnpike.[2] The legislature of Virginia, having granted a charter to a canal along the valley of the Tuckahoe Creek, was not thereby inhibited from subsequently granting a charter to another company to construct a railroad in the same valley, by which the profits of the canal company might be annihilated.[3] The

[1] Charles River Bridge *v.* Warren Bridge, 11 Peters, 419; S. C. 6 Pick. 377; 7 id. 345; West River Bridge *v.* Dix, 6 How. 532; S. C. 16 Vt. 466; Oswego Falls Bridge *v.* Fish, 1 Barb. Ch. 547; M'Leod *v.* Burroughs, 9 Geo. 213; Harrison *v.* Young, 9 id. 359; Shorter *v.* Smith, 9 id. 517; White River Turnpike Co. *v.* Vt. Central R. R. Co., 21 Vt. 590; Matter of Hamilton Avenue, 14 Barb. 405.

[2] Washington and Baltimore Turnpike Road *v.* Baltimore and Ohio R. R. Co., 10 Gill & Johns. 392.

[3] Tuckahoe Canal Co. *v.* Tuckahoe R. R. Co., 11 Leigh, 42,—Tucker, P., "The question then resolves itself into this: Has the legislature contracted with the *Canal Company* that it shall have the exclusive transportation of

same doctrine has been ably enforced in Illinois, where the charter of the Chicago and Rock Island Railroad Company was held not to violate the con-

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the Tuckahoe valley, and that no rival company shall be incorporated which may impair its profits or take away its custom? That it has expressly done this, cannot be pretended. The act of incorporation contains no such provision. Is such a contract on the part of the government to be *implied* from the grant of the charter for the construction of the canal? I think not. It can never be conceded that the incorporation of one company for internal improvement, is an implied negative of all future power in the legislature to incorporate other companies for other improvements. Such has never been the interpretation of legislative grants in Virginia; but wherever exclusive grants are intended, express provisions are introduced for the purpose of tying up the hands of the legislature, and restricting the future exercise of legislative power. It never was dreamed that the establishment of one bank was in itself a negative on the power to establish others. It never has been admitted, that making one railroad was a negative to all future power to construct another which might rival it; but where that was the design of the charter, it has ever been so expressed, as, in the act of 1833, ch. 3, § 38, the rights of the *Richmond and Fredericksburg Railroad Company* were expressly protected for a limited time against all rival charters. Were it otherwise, what difficulties would present themselves! Without express and definite provisions and limitations, how could we ascertain the extent of the exclusive right? Experience has proved, that monopoly is very ingenious in extending its rights and enlarging its pretensions. Give it the *carte blanche* of an implied contract, and we should soon find it without other limit than the limits of professional ingenuity; and the great mischief would at once present itself of the improvement of the country being arrested by the perpetual objection of interference with chartered rights. Chartered companies are ever sensitive at the approach of a rival, and if the discovery of a possible clashing of interests shall be held sufficient to nullify a subsequent charter, it is impossible to foresee to what extent the legislative power may be applied in this important branch of its duties. * * *

"After the very able and comprehensive investigation of this subject in the case of The Charles River Bridge *v.* The Warren Bridge, it would be superfluous as well as vain for me to attempt to enforce by any arguments of mine the principles established by the majority of the court, and sustained with such conspicuous ability by the counsel for *The Warren Bridge*. It will suffice for me to refer to that case, and to express my assent to the proposition it establishes, that the incorporation of a company for the construction of a bridge or other improvement, where the public interest is concerned, is not to be construed as conferring exclusive privileges, where none such are expressly given by the charter; and by consequence, that by charters of

tract between the State and the trustees of the Illinois and Michigan Canal, and that a provision in the charter of the latter, that the legislature should not reduce its tolls, did not deprive it of the power to authorize other improvements which would essentially diminish them.[1] A clause in the charter of a railroad company, that "No person, body politic or corporate, shall in any way interfere with, molest, disturb, or injure any of the rights or privileges" thereby "granted, or that would be calculated to detract from or affect the profits of said corporation," has been held not to take from the State the right to incorporate another company which would compete with the former company, but only to protect

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this description the legislature is not deprived of the power of granting other charters to other companies, even side by side with the former and in the same line of travel, provided there is no express restriction upon their power in the first act of incorporation. Every principle of sound policy, indeed, forbids that this should be lightly done, or that it should be done without securing some indemnity to those who suffer under such legislation. But it is not matter of right in the company; it is matter of discretion in the legislature; and hence, it is very clearly no matter for judicial decision. The injury done is not more direct tha n that which is in various instances occasioned by laws of unquestioned validity. The inns and villages upon every public road fall into dilapidation and ruin, upon the change of the course of travel by the construction of a railroad, and flourishing towns which have risen to wealth and importance on the faith of public law by being made a port of entry, sink into insignificance upon the removal of their custom-houses to more favored spots. Yet who doubts the *power*, though many may doubt the wisdom, of the legislature in making ill-advised changes, which bring ruin upon the enterprising, and misery upon thousands? This sport with human prosperity and happiness, indeed, cannot be too much reprobated; but its correction is to be found elsewhere, and not here, unless the legislature transcend its power; and we have already seen, that unless exclusive rights are contracted for, the legislative power is without a trammel."

[1] Illinois and Michigan Canal *v.* Chicago and Rock Island R. R. Co., 14 Ill. 314.

such former company from unauthorized illegal injuries.[1] The grant to a railroad company of the right to build a bridge over a river, does not violate a previous grant to a toll-bridge company, where no exclusive right has been conferred on the latter.[2] And even the exclusive right of the latter company to maintain a toll-bridge within certain limits, may not be infringed by the grant of power to a company to maintain a railroad bridge within those limits, for the purpose of carrying over the same the passengers on the railroad.[3] The legislature of Virginia provided in the charter of the Richmond, Fredericksburg, and Potomac Railroad Company, that it would not "for the period of thirty years from the completion of the said railroad, allow any other railroad to be constructed between the city of Richmond and the city of Washington, or for any portion of the said distance, the probable effect of which would be to diminish the number of passengers traveling *between* the one city and the other upon the railroad authorized by this act, or to compel the company, in order to retain such passengers, to reduce the passage money." The obligation of the contract with the company was held by the Supreme Court of the United States not to be impaired by a subsequent act incorporating the Louisa Railroad Company, whose road came from the west and struck its track at right angles at some distance from Richmond, and which was authorized

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[1] Newcastle and Richmond R. R. Co. *v.* Peru and Indianapolis R. R. Co., 3 Indiana, 464.

[2] Thompson *v.* N. Y. and Harlem R. R. Co., 3 Sandford Ch. 625.

[3] Mohawk Bridge Co. *v.* Utica and Schenectady R. R. Co., 6 Paige, 554.

to cross its track and continue the road thus authorized to Richmond; the provision in the charter of the first-named company not excluding other railroads, except for carrying passengers traveling between those two points.[1]

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[1] Richmond, &c. R. R. Co. *v.* Louisa R. R. Co., 13 How. 71. M'Lean, Wayne, and Curtis dissenting. Grier, J., delivering the opinion of the court, said, "It is a settled rule of construction adopted by this court, 'that public grants are to be construed strictly.' This act contains the grant of certain privileges by the public to a private corporation, and in a matter where the public interest is concerned; and the rule of construction in all such cases is now fully established to be this: 'that any ambiguity in the terms of the contract must operate against the corporation, and in favor of the public; and the corporation can claim nothing but what is clearly given by the act.' See Charles River Bridge *v.* Warren Bridge, 11 Peters, 544. Construing this act with these principles in view, where do we find that the legislature have contracted to part with the power of constructing other railroads, even between Richmond and Fredericksburg, for carrying coal or other freight? Much less can they be said to have contracted that no railroad connected with the western part of the State, shall be suffered to cross the complainant's road, or run parallel to it, in any portion of its route. Such a contract cannot be elicited from the letter or spirit of this section of the act. On the contrary, the preamble connected with this section shows that the complainant's road was expected to 'form a part of the main northern and southern route between the city of Richmond and the city of Washington;' and the inducement held out to those who should subscribe to its stock was a 'monopoly of transporting passengers' on this route; and this is all that is pledged or guaranteed to them, or intended so to be, by the act. It contains no pledge that the State of Virginia will not allow any other railroad to be constructed between those points, or any portion of the distance, for any purpose; but only a road 'the probable effect of which would be, to diminish the number of passengers, traveling between the one city and the other, upon the railroad authorized by the act,' or to compel the company to reduce the passage-money. That the respondents will not be allowed to carry the passengers, traveling between the city of Richmond and the city of Washington, is admitted; and they deny any intention of so exercising their franchise as to interfere with the rights secured to the complainants. That the parties will differ widely as to the construction of the grant, owing to the ambiguity created by the use of the word 'between,' as it may affect the transportation of passengers traveling to or from the West, is more than probable. But on this application for an injunction against the construction of the respondent's road, the chancellor was not bound to decide the question by

Exclusive Privileges Expressly Conferred in the Charter.—It is competent for the legislature, unless restricted by the state constitution, to provide in the charter of a railroad company that no other railroad shall be authorized within certain limits, or in terms to grant an exclusive right within those limits. The provision in either form, operates as an exclusive grant to the company, and in the former, is not subject to the objection that it is a mere executory contract, and not the grant of a franchise. The power of the legislature to confer an exclusive privilege within certain limits cannot be questioned on any well defined principles of public law. Prominent among its duties, which concern the public interests, is that of regulating highways, ferries, and other means of internal communication, and determining their extent and the distance between them, so as to advance the general convenience and prosperity. The granting of franchises is an ordinary function of legislative power; and whether they shall be of greater or less extent, more or less exclusive, is, in the absence of constitutional restrictions, within the scope of legislative discretion. The inviolability of the grant, in the form and to the extent conferred, is required for the protection of private rights. The charter is accepted by the corporators, relying on the security of the provision against rival enter-

anticipation. And, although, he may have thrown out some intimation as to his present opinion on that question, he has very properly left it open for future decision, to be settled by a suit at law or in equity 'upon the facts of the case as they may then appear.' But however probable this dispute or contest may be, it is not for this court to anticipate it, and volunteer an opinion in advance."

prises, which is one of the inducements to its acceptance. The exclusive grant is thus a contract, which the state cannot impair; and no such improvement as is provided against can be made without compensation to the company. The contract thus made, by which one legislature binds itself, its successors, and its constituents, does not operate to deprive the state of the essential attributes of sovereignty. It may, afterwards, in the exercise of the right of eminent domain, authorize the very improvement or enterprise expressly provided against in its previous grant, upon the condition upon which that right may be constitutionally exercised—that of making just compensation to the company enjoying the exclusive grant. These principles of constitutional law may be invoked by canal, bridge, or ferry companies against railroad companies, or by one railroad company against another.[1] A bridge company, in

[1] Richmond, &c., Railroad Co. *v.* Louisa Railroad Co., 13 How., 71. The court in this case, assumed the power of the State to make such a contract, it not being necessary to decide the point. Curtis, J., in delivering a dissenting opinion, said,—

"It has been suggested by one of the defendants' counsel, that though the power of the legislature to enter into a compact for some exclusive privileges is not denied, yet that the legislature had not the power to grant such privileges as are here claimed by the complainants, and therefore the State is not bound thereby. This is rested not upon any express restriction on the powers of the legislature, contained in the constitution of Virginia, but upon limitations resulting by necessary implication from the nature of the delegated power confided by the people of that State to their government. But if, as must be and is admitted, it is one of the powers incident to a sovereign State to make grants of rights, corporeal and incorporeal, for the promotion of the public good, it necessarily follows that the legislature must judge how extensive the public good requires those rights to be. Whether the State shall grant one acre of land or one thousand acres; whether it shall stipulate for the enjoyment of an incorporeal right, in fee, for life or years;

whose charter it was provided, that "no person should have liberty to build another bridge," across a river between certain limits, is entitled to compensation, upon the construction of a railroad bridge across the river within those limits; although at the time when the bridge company was incorporated, railroads were unknown, and in the charter of the railroad company it was provided that any bridge over the said river which might be necessary for its purposes should be used exclusively for railroad travel.[1] A provision in the charter of the Boston and Lowell Railroad Corporation, "that no other railroad than the one hereby granted, shall within thirty years from and after the passing of this act, be authorized to be made leading from Boston, Charlestown, or Cambridge to any place within five miles of the northern termination of the railroad hereby authorized to be made," is a contract between the State and the company, which the legislature of Massachusetts had the power to make, that no other railroad from Boston, Charlestown, or Cambridge to Lowell shall be lawfully made for thirty years; and it was not competent for the legis-

whether that incorporeal right shall extend to one or more subjects; and what shall be deemed a fit consideration for the grant in either case, is intrusted to the discretion of the legislative power, when that discretion is not restrained by the constitution under which it acts. This has been the interpretation by all courts, and the practice under all constitutions in the country, so far as I know; and it seems to me to be correct. See Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. Rep., 35, and cases there cited; Enfield Bridge *v.* Hartford and New Haven R. R. Co., 17 Conn. R., 40; Washington Bridge *v.* State, 18 Conn. R., 53."

[1] Enfield Toll Bridge Co. *v.* Hartford and New Haven R. R. Co., 17 Conn. R., 40, 454.

lature to authorize other companies, by the use and combination of several sections of their respective roads, to establish a continuous and uninterrupted line of transportation by railroad of persons and property between Boston and Lowell. There being no intention of the legislature to appropriate the franchise of the Boston and Lowell Railroad Corporation to public uses in a constitutional manner, apparent in the acts authorizing one company to enter upon and use the railroad of another, under color of which the combination was effected, the Salem and Lowell Railroad Company, the Boston and Maine Railroad Corporation, and the Lowell and Lawrence Railroad Company were enjoined from forming such a continuous line.[1] The same provision was held

[1] Boston and Lowell R. R. Corp. *v.* Salem and Lowell R. R. Co. *et al.*, 2 Gray, 1,—Shaw, C. J.: "We are then brought to a consideration of § 12, upon which the stress of the argument in the present case has seemed mainly to turn. It provides that no other railroad than the one hereby granted shall within thirty years be authorized to be made leading from Boston, Charlestown, or Cambridge to any place within five miles of the northern termination of the railroad hereby authorized, that is the termination at Lowell. The question is, does this provision confer any exclusive right, interest, franchise or benefit on this corporation? It is found in the same act; the whole is presented at once to the consideration of the corporators, to be accepted or rejected as a whole; and this would of course constitute a consideration in their minds, in determining whether to accept or reject the charter. If it adds any thing to the value and benefit of the franchise, such enhanced value is part of the price which the public propose to pay, and which the undertakers expect to receive as their compensation for furnishing such public improvement.

"This is a stipulation of some sort, a contract, by one of the contracting parties to and with the other; in order to put a just construction upon it, we must consider the character and relations of the contracting parties, the subject-matter of the stipulation, and its legal effect upon their respective rights.

"It was made by the government in its sovereign capacity with subjects, who were encouraged by it to advance their property for the benefit of the public. It was certainly a stipulation on the part of the government, regulat-

not to be infringed by an act authorizing the con-

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ing its own conduct, and putting a restraint upon its own power to authorize any other railroad to be built with a right to levy a toll; but without an authority from the government, no other company or person could be authorized so to make a railroad and levy toll, and of course no other such road could lawfully be made. It was, therefore, equivalent to a covenant for quiet enjoyment against its own acts and those of persons claiming under it. This is, in fact, all that the government could stipulate. It could not covenant with the corporation for quiet enjoyment against strangers and intruders, against the unauthorized and illegal disturbance of their rights by third parties: against these, they would have their remedy in the general laws of the land. But it has been argued that this stipulation, as it appears in the charter, is a mere executory covenant or undertaking, and is not an executed contract. But we think it may be both: so far as it confers a present right, it is executed; so far as it amounts to a stipulation that the covenantor will not disturb the enjoyment of the right granted, it may be deemed executory. So, a deed conveying land transfers on its delivery all the title and interest which the grantor can confer, and is also a stipulation that the benefit granted shall not be revoked or impaired. And this is held to apply to the grants of governments as well as to those of individuals. Fletcher *v.* Peck, 6 Cranch, 87. He who has the power of conferring a right or a franchise lying solely in grant, and who stipulates, for a valuable consideration, that another shall have and enjoy it undisturbed and unmolested by any act or permission of his, in effect grants such right or franchise. But, more especially, when such right is conferred by the community in the form of a statute, having all the forms of law, and sanctioned by the government acting in behalf of all the people, and having power to bind them by law, such right would seem to be clothed with as much solemnity, and to have the same force and effect, as if it were the grant of an exclusive right in terms. We are therefore of opinion, that under this form of words, that no other railroad should be authorized to be made for thirty years, the government, as far as it was in their power, intended to engage with the corporation that no other direct railroad between Boston and Lowell should be legally made; leaving them to guard themselves from unauthorized and illegal disturbance by the general laws in the course of the ordinary administration of justice. This is strengthened by the consideration, that as their whole remuneration would depend upon tolls, uncertain in amount, it was intended that they should be to some extent secure against any authorized road taking the same travel, and of course the same tolls. There is a provision in the close of this § 12, which in our judgment adds some weight to this conclusion. There is a right reserved to the Commonwealth, after a certain term of years to purchase the railroad, and all the rights of the corporation, on reimbursing them the whole cost with ten per cent. profit, and

struction of a railroad from Boston to a point not

then follows this provision: 'And after such purchase, the limitation provided in this section [that no other railroad shall be authorized to be made] shall cease, and be of no effect.' From this provision it is manifest that the restriction, as it is termed, was imposed upon the government, and of course upon all the subjects, for the benefit of this corporation; and after the government should have succeeded to their rights by purchase, then there would be no longer any occasion to impose any restriction on the government; it might do what it would with its own, and it would then be at liberty to make any other grant or not at its pleasure. This carries a strong implication that until such purchase, and so long as the income from tolls would enure to the benefit of the proprietors, the exclusive right, so far as these restrictions upon other railroads to take the same travel and the same tolls made it exclusive, should stand part of the charter.

"But it is strongly urged, that if the legislature intended to grant such exclusive right, and the terms of the whole act, taken together, will bear and require that construction, and they did grant such exclusive right, and did restrain such succeeding legislatures from making any grant or contract inconsistent with it, the provision itself was beyond the power of the legislature, and was void.

"We readily concede that, for general purposes of legislation, the legislature, rightly constituted, has full power to make laws, to repeal former laws; and of course the last legislative act is binding, and necessarily repeals all prior acts which are repugnant.

"But in addition to the lawmaking power, the legislature is the representative of the whole people, with authority to control and regulate public property and public rights, to grant lands and franchises, to stipulate for, purchase, and obtain all such property, privileges, easements, and improvements, as may be necessary or useful to the public, to bind the community by their contracts therefor, and generally to regulate all public rights and interests.

"It is under this authority that lands are granted, either in fee or upon any other tenure; that the uses of navigable streams and waters are regulated, the right to build over navigable waters, to erect bridges, turnpikes, and railroads, and other similar rights and privileges, are granted and justified.

"Of the necessity and convenience of all roads and other public works and improvements, of their fitness, and the best mode of providing them, the established government of the State, acting by the legislature for the time being, must necessarily judge and determine. They must decide whether it is best, to provide for them by funds from the public treasury; or to procure individuals to advance their own funds for the purpose, to be reimbursed by tolls, and to make just and adequate provisions incident to

within five miles of Lowell, although within the space included by two straight lines drawn from

each. Supposing ferries or bridges are obviously necessary over a long and broad river, it is equally obvious that no public convenience would require them to be built parallel and close to each other; on the contrary, such erections would be an unnecessary waste of property. Would it not be for the legislature to decide within what stated and fixed distances from each other public convenience would require them? If they were erected by funds drawn directly from the State, the legislature would plainly have the power to determine such distances, and provide that no one should be built within the distances thus fixed. May they not, with a due regard to the public exigencies and public interests, do the same thing, when such public works are erected by individuals, at the instance and procurement of government, for public use? Were it otherwise, and were all such grants and stipulations repealable by a subsequent legislature because they are in the form of laws, then the unlimited power of the legislature to alter and change the laws, sometimes called, rather extravagantly, the omnipotence of parliament, would be a source of weakness, and not of strength. In making such grants and stipulations, no doubt great caution and foresight are requisite on the part of the legislature,—a just estimate of the public benefit to be procured, and the cost at which it is to be obtained; and as great changes in the state of things may take place in the progress of time,—a great increase of travel, for instance, on a given line,—which changes cannot be specifically foreseen, it is the part of wisdom to provide for this, either by limitation of time, reservation of a power to reduce tolls, should they so increase at the rates first fixed as to become excessive, or of a right to repurchase the franchise, upon equitable terms, so that the contract shall not only be just and equal in the outset, but within reasonable limits continue to be so. In the charter of the Boston and Lowell Railroad Corporation the government reserved the right, both to regulate the tolls, and purchase the franchise upon terms fixed and making part of the contract. When such a contract has been made by the legislature, upon considerations of an equivalent public benefit, and where the grantees have advanced their money to the public upon the faith of it, the State is bound, by the plain principles of justice, faithfully to respect all grants and rights thus created and vested by contract. Such a power of regulating public rights is everywhere recognized as one distinguishable from that of legislation; a power incident and necessary to all well-regulated governments, and when rightly exercised is within the constitutional power of the legislature, and binding upon the government and people.

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"As the result of the whole case, the Court are of opinion that the Boston and Lowell Railroad Corporation acquired by their charter and act of incorporation a right, at their own charge and expense, but for the public

the first terminus to points five miles on each side of the other.[1] The grant of an exclusive right to build a railroad between a city and another point,

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accommodation and use, to locate and construct a railroad from the city of Boston to Lowell, for the transportation and conveyance of persons and property between those places by railroad cars, and to levy and receive, for their own benefit and reimbursement, certain tolls for the carriage of persons and property; and that, as a part of their franchise, privilege, and right, and the better to secure to them a just and reasonable compensation and reimbursement by the tolls so granted, the Commonwealth did, by the said act of incorporation, grant to and stipulate with the said Corporation, that no other railroad, within the time therein limited, and not yet elapsed, should be authorized to be made, leading from Boston, Charlestown, or Cambridge (Charlestown then embracing the territory now comprising the town of Somerville), to any place within five miles of the northern termination of said railroad at Lowell. Without such authority of the legislature, we think, that no such railroad, within the limits prescribed, could be lawfully made by other persons or corporations; and, therefore, this grant and stipulation, to a certain extent exclusive, was a part, and a valuable part, of the plaintiffs' franchise; and that this grant and stipulation it was competent for the legislature on behalf of the public to make; and that the same was a valid grant and contract.

"We are also of opinion that the legislature have not, since the granting of said charter, by right of eminent domain, taken, or manifested any intention to take, any part of the right and franchise of the plaintiffs for public use; and that no act or charter has been granted to the three defendant corporations, either or all of them, to take or use any part of the right and franchise of the plaintiffs; and if, in any manner, the acts of the defendants, under color of their acts of incorporation, do infringe upon the rights of the plaintiffs, such infringement is not warranted by either or all of the same acts: it is unlawful, and constitutes a disturbance and nuisance to the plaintiffs, for which they are entitled to a remedy.

"We are also of opinion that the several defendant corporations, having been incorporated and chartered to establish railroads between certain termini, according to their respective acts of incorporation, have no right, by the use and combination of several sections of their respective railroads, to establish a continuous and uninterrupted line of transportation by railroad, of persons and property, between Lowell and Boston; and that the actual establishment of such a continuous line of transportation by railroad is substantially making a railroad other than that authorized to be made by the plaintiffs, to their injury, and contrary to the rights conferred on them by their charter."

[1] Boston and Lowell R. R. Corp. *v.* Boston and Maine R. R. 5 Cush. 375.

is to be construed with reference to the limits of the city at the time the grant was made, so as not to exclude a railroad to a part of the city not then included within its limits.[1]

GRANT OF EXEMPTION FROM TAXATION.—The power of the legislature of a State, when not prohibited by its constitution, to bind it by a grant of exemption from taxation, has been contested, as an unauthorized parting with essential attributes of sovereignty.[2] It has, however, been sustained in the Supreme Court of the United States, but not without a conflict of opinion among the judges.[3] It has also been sustained in several of the state courts.[4] The charter may prescribe a temporary rule of taxation, which may be raised without impairing the obligation of the contract.[5] The abandonment of the taxing power is not to be presumed, in a case in

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[1] Pontchartrain R. R. Co. *v.* Lafayette and Pont. R. R. Co. 10 La. Ann. 741.

[2] Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 69; Brewster *v.* Hough, 10 id. 138; Backus *v.* Lebanon, 11 id. 24; Debolt *v.* Ohio and Life Ins. and Trust Co., 1 Ohio State, 563; Mechanics and Traders' Bank *v.* Debolt, id. 591; Toledo Bank *v.* Bond, id. 622; Plank Road Co. *v.* Halsted, 3 id. 578; Thorpe *v.* Rutland and Burlington R. R. Co., 1 Williams, 146.

[3] State Bank of Ohio *v.* Knoop, 16 How. 369; Ohio Life Ins. and Trust Co. *v.* Debolt, id. 416; Dodge *v.* Woolsey, 18 id. 231. See New Jersey *v.* Wilson, 7 Cranch. 164; Gordon *v.* Appeal Tax Court, 3 How. 133.

[4] O'Donnell *v.* Bailey, 24 Missis. 386; Armington *v.* Barnet, 15 Vt. 751; Herrick *v.* Randolph, 13 id. 525; Atwater *v.* Woodbridge, 6 Conn. 223; Osborne *v.* Humphrey, 7 id. 335; Parker *v.* Redfield, 10 id. 495; Landon *v.* Littlefield, 11 id. 251; State *v.* Berry, 2 Harrison, 80; Camden and Amboy R. R. Co. *v.* Hillegas, 3 id. 11; Same *v.* Commissioners, 3 id. 71; Gardner *v.* State, 1 Zabris. 557; Mayor, &c. of Baltimore *v.* Baltimore and Ohio R. R. Co. 6 Gill, 288; Ill. Central R. R. Co. *v.* County of M'Lean, 17 Ill. 291.

[5] Easton Bank *v.* Commonwealth, 10 Barr, 442; Ohio Life Ins. and Trust Co. *v.* Debolt, 16 How. 416.

which the deliberate purpose of the state to abandon it does not appear. It is essential to the existence of government, and it is of vital importance that it should remain unimpaired.[1] In the absence of any special exemption, the stocks and real and personal property of a railroad company may be taxed by the state;[2] and any special exemption thereof in the charter, is not to be extended by construction. Thus, where two companies were consolidated, one of which to a certain extent was exempted by its original charter from taxation, and the other not, and the act of consolidation provided that the new company should be entitled to all the powers, privileges, and advantages at that time belonging to the two companies, the exemption did not after the consolidation apply to that part of the road owned originally by the company which was not by its charter exempted from taxation, but only to so much of the road as was owned by the company which, by its charter, was entitled to the exemption.[3]

Statutory exemptions from taxation which do not amount to grants of franchises, and the rules for assessing the property of railroad companies, will be discussed in the next chapter.

Reservation of Power by the Legislature to impose additional Duties and Liabilities on the Company.—The power to amend, alter, or repeal the

[1] Providence Bank *v.* Billings, 4 Peters, 561.

[2] Mayor and City Council of Baltimore *v.* Baltimore and Ohio R. R. Co. 6 Gill. 288; Ill. Central R. R. Co. *v.* County of M'Lean, 17 Ill. 296.

[3] Philadelphia and Wilmington R. R. Co. *v.* Maryland, 10 How. 376.

charter, may be reserved by the legislature by a provision to that effect inserted therein, or in a general law declared applicable to all acts of incorporation, afterwards passed; and the right of the legislature to alter or repeal the charter is thus made a part of the contract.[1] The charter of the company is, by such a reservation subject to any reasonable amendment or alteration which the legislature may make, and any reasonable additional obligations may be imposed on the company. Thus, it may be required by virtue of such reservation to abandon the use of steam power in propelling its cars through cities, or to raise or lower highways where its track crosses them, when directed by the municipal authorities.[2] The legislature, under this power may increase the liability of the stockholders who will not thereby be exonerated from liability on their subscriptions for stock.[3] The subscriber has been held not to be released, where the legislature in pursuance of such a reservation granted to the company the power to change its route.[4] There being a general statute of Missouri, reserving the power to alter or amend acts of incorporation, an act of its legislature making companies previously incorporated liable to laborers, employed by contractors, for the work done by them on their roads, has been held constitutional.[5]

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[1] 2 Kent, Com. 306.

[2] Buffalo and Niagara Falls R. R. Co. *v.* City of Buffalo, 5 Hill, 209; City of Roxbury *v.* Boston and Providenee R. R. Corp., 6 Cush. 424.

[3] South Meadow Dam Co. *v.* Gray, 30 Maine, 547.

[4] Pacific R. R. Co. *v.* Renshaw, 18 Missouri, 210.

[5] Peters *v.* St. Louis and Iron Mountain R. R. Co., 23 Missouri, 111.

The general reservation of the power to amend, alter, or repeal the charter must receive a reasonable construction. While it authorizes alterations of the charter, and the imposition of duties required by the general convenience, it cannot sanction a reckless invasion of the rights of property, or a revolution in the character and objects of the corporation.[1] The property of the company is still protected against being taken for public uses, without just compensation being made therefor. The government may exercise its reserved power, but it cannot take what it did not give, to wit, the private property of the corporation, except in the exercise of its right of eminent domain. Thus, it has been held that the reservation does not authorize the legislature to pass a subsequent act requiring the company, at its own expense, to cause a proposed new street or highway, laid out by the commissioners of highways, to be taken across its track, and to cause all embankments, excavations, and other works, necessary for that purpose, to be done on its road.[2]

The power to *repeal* the charter may be reserved absolutely to the legislature, and when so reserved, may be exercised at its pleasure. It may be reserved to be exercised on a certain event taking place, as of some default or abuse of corporate powers; and then the legislature is to determine the occurrence of the event, and may, on finding the same, repeal the charter without having the default or abuse first

[1] White *v.* Syracuse and Utica R. R. Co., 14 Barb. 560; Pacific R. R. Co. *v.* Renshaw, 18 Missouri, 216.

[2] Miller *v.* N. Y. and Erie R. R. Co., 21 Barb. 513.

judicially ascertained. Where the conditional right is reserved, it is not yet settled whether the decision of the legislature, that the event on which the power of appeal was to be exercised has occurred, is conclusive on the courts; but it is, at least, to be presumed by them to be right. The reserved power of the legislature to repeal the charter, is a part of the contract created thereby. Its exercise does not impair, but enforces, the obligation of the contract. Nor is it taken away by the institution on the part of the state of a judicial proceeding for enforcing a forfeiture.[1]

What Rights Protected by the Constitutional Prohibition.—A law operating on the relations between the company and other parties before a contract between them has been concluded, or which merely divests vested rights where there is no contract, is not prohibited by the U. S. Constitution, although if it interferes with vested rights, it may be interdicted by some of the state constitutions. Thus, where the charter provided a mode of appraisement of the estate taken, and prescribed that upon payment or tender of the valuation, the company should be entitled to the estate as fully as if conveyed by the owner, a law enacted before any such payment or tender and after the inquisition had been made and returned to the proper court, setting it aside and directing an inquisition *de novo* to be taken,

[1] M'Laren *v.* Pennington, 1 Paige, 102; De Camp *v.* Eveland, 19 Barb. 81; Crease *v.* Babcock, 23 Pick. 334; Miners' Bank *v.* United States, 1 Greene (Iowa), 561; Erie and North East. R. R. Co. *v.* Casey, 26 Penn. State, 287.

—the conditions for the vesting of the estate not having been performed when the law was enacted, —was held not to divest vested rights or impair the obligation of a contract between the company and the State.[1]

THE COMPANY SUBJECT TO POLICE LAWS.—A railroad company, although no power is reserved to amend or repeal its charter, is nevertheless subject, like individuals, to such police laws as the legislature may from time to time enact for the protection and safety of citizens and the general convenience and good order. These laws, although imposing duties and liabilities on the company other than those contained in its charter or existing when it was granted, do not impair the obligation of the contract implied therein. Its property and essential franchises are, indeed, protected by the U. S. Constitution; but the company itself is not thereby placed above the laws. It seems not to have been the design of that instrument to disarm the States of the power to pass laws to protect the lives, limbs, health, and morals of citizens, and to regulate their conduct towards each other, and the mode of using property so as not to injure each other. Such laws may incidentally impair the value of franchises, or of rights held under contracts, but they are passed *diverso intuitu*, and are not within the constitutional inhibition.[2]

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[1] Baltimore and Susquehanna R. R. Co. *v.* Nesbit, 10 How. 395.

[2] Vanderbilt *v.* Adams, 7 Cowen, 349; Coates *v.* Mayor, &c. New York, id. 585; Baker *v.* Boston, 12 Pick. 194; Benson *v.* Mayor, &c. New York, 10 Barb. 245; 2 Parsons on Cont. 538; 24 Am. Jurist. 279, 280.

The company may, therefore, be required to blow a whistle, ring a bell, put up sign-boards, station men with signals, stop its trains when approaching or crossing highways, turnpikes, or other railroads, to erect fences and cattle-guards along its track, or to use any other reasonable precaution either in the construction of its road or machinery, or in their operation, for the safety of passengers or of the public generally.[1]

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[1] Galena and Chicago Union R. R. Co. *v.* Loomis, 13 Ill. 548; Suydam *v.* Moore, 8 Barb. 358, 365; Waldron *v.* Rensselaer and Saratoga R. R. Co., id. 390, 394; Norris *v.* Androscoggin R. R. Co., 39 Maine, 273; Madison and Indianapolis R. R. Co. *v.* Whitcneck (Supreme Court of Indiana), Am. Law Register, Feb. 1854, and to be reported in 8 Indiana; Nelson *v.* Vt. and Canada R. R. Co., 26 Vt. 717; Thorpe *v.* Rutland and Burlington R. R. Co., 1 Williams (Vt.), 140. Redfield, C. J.: "The police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State, according to the maxim, *Sic utere tuo ut alienam non lædas;* which being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. So far as railroads are concerned, this police power, which resides primarily and ultimately in the legislature, is two-fold: 1. The police of the roads, which in the absence of legislative control, the corporations themselves exercise over their operatives, and to some extent over all who do business with them, or come upon their grounds, through their general statutes and by their officers. We apprehend there can be no manner of doubt that the legislature may, if they deem the public good requires it,—of which they are to judge, and in all doubtful cases their judgment is final,—require the several railroads in the State to establish and maintain the same kind of police which is now observed upon some of the more important roads in the country for their own security, or even such a police as is found upon the English railways and those upon the continent of Europe. No one over questioned the right of the Connecticut legislature to require trains upon all their railroads to come to a stand before passing draws on bridges; or of the Massachusetts legislature to require the same thing before passing another railroad. And by parity of reason may all railways be required so to conduct themselves, as to other persons natural or corporate, as not unreasonably to injure them or their property. And if the business of railways is specially dangerous, they may be required to bear the expense of

The legislature may also, by a subsequent act inflict severe penalties on the company for exceeding the rate of toll prescribed in its charter.[1] It may give a remedy to a party wrongfully injured by the company, although previous to the statute he was without remedy. Thus, at common law no person is civilly liable to the personal representatives of a party who was killed by his negligence. A railroad company, although not answerable in damages to the personal representatives of a passenger killed by the carelessness of its servants, may, by an act passed subsequently to the granting of the charter, be made liable for such injuries by a penalty to be recovered of it by indictment; and it is no objection to the constitutionality of the act that it applies only to railroad companies, and does not extend the

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erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances.

"There would be no end of illustrations upon this subject, which in the detail are more familiar to others than to us. It may be extended to the supervision of the tracks, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety-beams in case of the breaking of axle-trees, the number of brakemen upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be. Hegeman *v.* Western R. R. Co., 16 Barbour, 353.

"2. There is also the general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right in the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm, that the right to do the same with regard to railways should be made a serious question."

[1] Camden and Amboy R. R. Co. *v.* Briggs, 2 Zabriskie, 623.

increased liability to other classes of common carriers. The act superadds a legal to what was before a moral obligation, and enforces by a penalty an acknowledged duty to use proper diligence and skill to preserve the lives of persons whom it undertakes to transport.[1]

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[1] B. C. and M. R. R. Co. *v.* The State, 32 New Hamp. 215.—Bell, J.: "The first question raised upon the plea in this case, which is in its nature merely a demurrer, is as to the constitutionality of the statute upon which this indictment is founded. Assuming that by its true construction, it subjects the plaintiff in error to indictment, as the State contends, it is said that it subjects the defendants to additional and onerous liabilities, and is, therefore an infringement of their vested rights.

"It is asserted that the legislature have no power to infringe either the express or implied privileges of a corporation; and this principle in the abstract we are inclined to admit. If this case falls within it, it is governed by it. But we think this principle cannot be construed to limit the general powers of legislation, where such legislation merely regulates the existing rights and duties of corporations, or provides new modes of enforcing acknowledged obligations. Camden and A. R. R. Co. *v.* Briggs, 2 N. J. 623; Galena and C. U. R. R. Co. *v.* Loomis, 13 Ill. 548. This statute provides a new mode of enforcing the admitted duty of these bodies to conduct their business with such care and prudence as not to endanger the lives and limbs of those whom they undertake to transport, and their obligations to compensate those who suffer by their failure to perform their duty, for the damages sustained. It was never a right of these corporations to conduct their business so carelessly as to destroy the lives of their customers, either by any express or implied grant. Their general liability to answer civilly in such cases, is beyond question; and the principle of law which prevented any redress for personal wrongs in case of the death of either party, was an absurd provision of a barbarous age, which had ceased to exist here in all cases where an action was commenced in the lives of the parties. It would be but a reasonable extension of the same principle acted upon in the statute, granting the right of prosecuting actions for personal wrongs to the personal representatives (Comp. Stat. 481, sec. 14), to have allowed the same representatives to prosecute actions which might have been commenced by the deceased, if sufficient time had elapsed between the injury and his decease. It can make no difference in the principle, that the legislature, in giving this right, have endeavored to protect these corporations from popular prejudice and excitement, and have required the prosecution to be in the form of an indictment, thus forbidding any action unless deemed well founded by a grand jury, and by

It has been decided in Massachusetts that the legislature may impose on a railroad company, already existing, the liability for injuries by fire communicated from its locomotive engines, with or without negligence, although the company without a special statute was not liable for such injuries, in the absence of negligence. It was considered that the right to use the parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations and impose such liabilities, for injury suffered from the mode of using the road, as the occasion and circumstances may reasonably justify.[1]

The legislature cannot by virtue of its police power impose additional burdens on the company,

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limiting the amount of the fine to be assessed by the court, and thus preventing the assessment of excessive damages.

"Again, it is said that the law is partial, not applicable to common carriers generally, nor even to carriers by steam, but is confined to the case of railroads. The force of this objection is admitted in cases where a law is made applicable to a class out of a large number, all standing substantially in the same position; but this law applies to a class well defined, of common carriers, distinguished by the circumstance that they use, in their business, steam locomotives, driven at a rate of speed known in no other mode of traveling, and attended with risks peculiar to themselves, and far exceeding those of any other carriers. The same reason for this provision does not apply to any other class of persons, and we think the law is free from just exception on this account."

[1] Lyman *v.* Boston and Worcester R. R. Corp., 4 Cush., 288. As in this case the company was not liable at common law or at the time of its incorporation, and was not guilty of any default, either by the negligence or misconduct of its servants, and was not chargeable with the non-performance of any positive duty imposed, the decision may be thought to go quite far enough. There was, however, an earlier statute of Massachusetts, passed March 11, 1831, before the company's charter was granted, reserving the right to amend, alter, or repeal all future acts of incorporation; which may have been in the mind of the Court. Roxbury *v.* Boston and Worcester R. R. Corp., 6 Cush., 424.

of mere private interest and concern and not required by the general security and convenience.[1] Thus, it has been considered in New York that it could not impose the duty, in a law enacted subsequently to the charter being granted, to build farm-crossings for the convenience of the owner of the land through which the road passes, the cost of building them having in legal presumption been awarded to him in the damages assessed.[2] The competency of the legislature, in the exercise of its power to regulate the use of property and especially the duties of adjoining owners, to impose on the company the duty to erect farm-crossings, has, however, been affirmed in Vermont, and stands on sound reasons of public policy.[3]

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[1] Nelson *v.* Vermont and Canada R. R. Co., 26 Vt., 717; Thorpe *v.* Rutland and Burlington R. R. Co., 1 Williams, 152, 153.

[2] Milliman *v.* Oswego and Syracuse R. R. Co., 10 Barb., 87. See Marsh *v.* New York and Erie R. R. Co. 14 id., 370; Tombs *v.* Rochester and Syracuse R. R. Co., 18 id., 585; Underhill *v.* New York and Harlem R. R. Co., 21 id. 499.

[3] Thorpe *v.* Rutland and Burlington R. R. Co.. 1 Williams, 140, 152. Redfield, C. J.: "But the argument that these cattle-guards at farm-crossings are of so private a character as not to come within the general range of legislative cognizance, seems to me to rest altogether upon a misapprehension. It makes no difference how few or how many persons a statute will be likely to affect. If it professes to regulate a matter of public concern, and is in its terms general, applying equally to all persons or property coming within its provisions, it makes no difference in regard to its character or validity, whether it will be likely to reach one case or ten thousand. A statute requiring powder-mills to be built remote from the villages or highways, or to be separated from the adjoining lands by any such muniment as may be requisite to afford security to others' property or business, would probably be a valid law if there were but one powder-mill in the State, or none at all, and notwithstanding the whole expense of the protection should be imposed upon the proprietor of the dangerous business. And even where the state legislature have created a corporation for manu-

It would not be competent for the legislature to make the company liable for any injury which had already occurred and for which when it occurred the company was not liable. An act imposing a general liability for injuries not previously actionable, would be construed to be prospective in its operation.[1]

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facturing powder at a given point, at the time remote from inhabitants, if in process of time dwellings approach the locality, so as to render the further pursuit of the business at that point destructive to the interests of others, it may be required to be suspended, or removed, or secured from doing harm, at the sole expense of such corporation. This very point is in effect, decided in regard to Trinity churchyard, which is a royal grant for interment securing fees to the proprietors; in the case of Coates *v.* The City of New York, 7 Cowen, 604; and in regard to The Presbyterian Churchyard, in their case *v.* The City of New York, 5 Cowen, 538.

"So, too, a statute requiring division fences, between adjoining proprietors, to be built of a given height or quality, although differing from the former law, would bind natural persons, and equally corporations. But a statute requiring land owners to build *all their fences* of a given quality or height, would no doubt be invalid, as an unwarrantable interference with matters of exclusive private concern. But the farm-crossings upon a railway are by no means of this character. They are division fences between adjoining occupants, to all intents. In addition to this, they are the safeguards which one person, in the exercise of a dangerous business is required to maintain, in order to prevent the liability to injure his neighbor. This is a control by legislative action, coming within the obligation of the maxim, *Sic utere tuo*, and which has always been exercised in this manner in all free States, in regard to those whose business is dangerous and destructive to other persons' property or business. Slaughter-houses, powder-mills or houses for keeping powder, unhealthy manufacture, the keeping of wild animals, and even domestic animals dangerous to persons or property, have always been regarded as under the control of the legislature. It seems incredible how any doubt should have arisen upon the point now before the Court. And it would seem it could not, except from some undefined apprehension, which seems to have prevailed to a considerable extent, that a corporation did possess some more exclusive powers and privileges upon the subject of its business, than a natural person in the same business, with equal power to pursue and accomplish it; which, I trust, has been sufficiently denied."

[1] Girtman *v.* Central R. R., 1 Geo., 173.

CHAPTER IV.

TAXATION OF RAILROAD COMPANIES.

The property of a railroad company, like that of individuals or other corporations, may be subjected to taxation for the support of government. The imposition of taxes on the company or its exemption therefrom and the regulation of the mode and rules of assessing them is, except as restricted by the state constitution, a proper legislative function. The subject of the present chapter naturally follows the last, as involving the power of the legislature over railroad companies.

Permanent Exemption from Taxation, by Grant.—It is competent for the legislature, as already stated, in the absence of constitutional restrictions, to grant to a company, in its charter, exemption from future taxation, so as to disable the legislature thereafter from taxing its property and franchises. It has also been seen, that this abandonment of the power to tax the company is only to be effected by clear and distinct terms.[1]

The mere payment of a bonus, prescribed by the charter, may not exempt the company from future

[1] *Ante*, ch. ii. p. 12; ch. iii. p. 35.

taxation.[1] The exemption of the corporation in its charter from taxation, is held to exempt also the stockholder from taxation on his individual stock.[2] It will, however, be construed as confined to such works only as are necessary for the purposes of the company.

In New Jersey, where a specific tax is by the charter imposed upon the capital stock and the company exempted from further taxation, the exemption covers only such real estate and property as are reasonably necessary for its purposes, and not such as are merely convenient and not necessary. Thus, depots, car-houses, water-tanks, shops for repairing engines, houses for switch and bridge-tenders, coal and wood yards for fuel for the locomotives, are exempted; but lands for dwellings for employés, for car or locomotive factories, coal mines and other property held for profit, are liable to taxation.[3]

In Vermont it has been held that the exemption from taxation of the stock, property and effects of the Vermont Central Railroad Company by the charter, extends to all the land in the occupancy of the company which it was enabled to take under the compulsory powers conferred in its charter, and all the erections thereon which were reasonably

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[1] Baltimore *v.* Baltimore and Ohio R. R. Co., 6 Gill, 288; N. Y. and Erie R. R. Co. *v.* Sabin, 26 Penn. State, 242. But see Gordon *v.* Appeal Tax Court, 3 How. 133. *Aliter*, if the exemption is distinctly declared; State *v.* Berry, 2 Harrison, 80; Camden and Amboy R. R. Co. *v.* Hillegas, 3 id. 11; Same *v.* Commissioners, 3 id. 71.

[2] State *v.* Branin, 3 Zabriskie, 484.

[3] Gardner *v.* State, 1 Zabris. 557; State *v.* Mansfield, 3 id. 510; State *v.* Newark, 1 Dutcher, 315.

necessary for its purposes; that this included the roadway and all erections thereon, connected with the company's business, which were reasonably necessary for such purposes; and also such erections as station-houses, although not within the limits of the roadway, and probably some others; station-houses being the only erections whose exemption was in question.[1]

Temporary Exemption by Statute.—The legislature, where there is no grant of exemption from taxation in the charter, unless restricted by the state constitution may exempt the company for the time being. If this be done expressly, the company is clearly relieved from the burden. The exemption may, however, be made by implication, and is then a question for judicial construction.

Constructive Exemption from Taxation.—An exemption may be implied, where the company would otherwise be subjected to double taxation, which was manifestly against the intention of the legislature. Thus, where it has exercised its taxing power by taxing all the property of the company in a particular manner and by a special provision in one of its acts, and has intimated no design to subject it to further burdens, the property of the company will be exempt from taxes imposed by general

[1] Vt. Central R. R. Co. *v.* Burlington (Supreme Court of Vt., Sept. T., 1856). Law Reporter, Jan. 1857, p. 526.

laws. Where an act of Pennsylvania granting privileges to the New York and Erie Railroad Company imposed a tax of ten thousand dollars per annum on the company, together with such further rate of taxation on its stock to an amount equal to the cost of construction of that part of the road situated in the State, as similar property therein was subject to, it was held that the machine-shops, foundries, freight and passenger houses of the company which were used to carry on the business of the road, and the expenses of whose erection was charged to the cost of construction, were not subject to taxation for state and county purposes under general laws.[1]

The character of railroad companies as public works has been held in some States to effect a constructive exemption of such property from taxation as is immediately necessary for their purposes. In Massachusetts they are not liable to be taxed for land included in their location, nor for buildings and structures thereon erected by them which are reasonably incident to the support of the road, or to its proper and convenient use for the carriage of passengers and the transportation of commodities, such as passengers, car-houses, depots for the accommodation of passengers, and warehouses for the convenient reception, preservation, and delivery of merchandise carried on the road; but if any part of the land within the location is used for and appropriated to purposes not incident to the proper construction, maintenance, and management of the railroad, or to

[1] New York and Erie R. R. Co. *v.* Sabin, 26 Penn. State, 242.

the use of it by the corporation, as a carrier of passengers and goods, or if it acquires by purchase other land outside of its location not authorized to be condemned,—in either case such real estate will be subject to taxation.[1]

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[1] Worcester *v.* Western R. R. Corp., 4 Met. 564, Shaw, C. J.: "From this view of the various provisions of the law, by which the rights and duties of the Western Railroad Corporation are regulated, it is manifest that the establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes therefore, like a canal, turnpike, or highway, a public easement. The only principle on which the legislature could have authorized the taking of private property for its construction, without the owner's consent, is that it was for the public use. Such has been held to be the character of a turnpike corporation, although the capital is there advanced by the shareholders, and the income goes to their benefit. Commonwealth *v.* Wilkinson, 16 Pick. 175. It is true that the real and personal property necessary to the establishment and management of the railroad, is vested in the corporation, but it is in trust for the public. The company have not the general power of disposal, incident to the absolute right of property: they are obliged to use it in a particular manner, and for the accomplishment of a well-defined public object; they are required to render frequent accounts of their management of this property to the agents of the public; and they are bound ultimately to surrender it to the public at a price and upon terms established.

"Treating the railroad, then, as a public easement, the works created by the corporation as public works intended for public use, we consider it well established that to some extent at least, the works necessarily incident to such public easement are public works, and as such exempted from taxation. Such we believe has been the uniform practice in regard to bridges, turnpikes, and highways, and their incidents; and also in regard to other public buildings and structures of a like kind,—as state-houses, forts and arsenals, court-houses, jails, churches, town-houses, school-houses, and generally to houses appropriated specially to public uses. Proprietors of Meeting House in Lowell *v.* City of Lowell, 1 Met. 538.

"The general principle is not denied in the present case; but the question is, as to the extent and the limits of this exemption from taxation. This limit, we think, is to be ascertained by considering the extent of the public easement intended to be acquired, secured, and maintained, and the franchise granted to the proprietors, to enable them to accomplish the proposed end.

"By the act the Western Railroad Corporation are not only to construct and maintain a road on which carriages may run, but also to provide for the

The same constructive exemption, with the same limitation, is adopted in Pennsylvania; where such property and such only as is appurtenant and indis-

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transportation of persons, goods, and merchandise on such railroad. Such transportation of persons and goods is the object to be accomplished; and for this purpose they may hold land, materials, engines, cars, and other things. Articles so held are appropriated to public use, as incident and necessary to the object to be accomplished. But in regard to the quantity of land to be thus taken and held, the power is not unlimited, because its extent is regulated by the act of incorporation, by which the franchise is granted. The provision in the first section is this: 'And for this purpose, the said corporation are authorized to lay out their road not exceeding five rods wide, through the whole length; and for the purpose of cuttings, embankments, and procuring stone and gravel, may take as much more land as may be necessary for the proper construction and security of said road.' To the extent of the five rods, it appears to us the legislature intended that the franchise of this corporation should extend, for any and all purposes incident to the object of its creation. It was contended in argument, that their franchise for public purposes extended only to the use of this strip of land as a way, and that if they had occasion for buildings and store-houses, as incident to their operations as carriers of persons and merchandise, they were to be regarded in their latter capacity, as carrying on a distinct business for their own profit, and therefore that such buildings were not to come under the same franchise. But no such limitation is contained in the act of incorporation, and none such results from the nature of its provisions. The establishment of the rail track, and the maintenance of engines and cars for the transportation of persons and goods, are all combined together, as one public object to be attained, and the privileges incident to the one are incident to the other. No doubt, in practice the main use of the strip of land of five rods in width in the greater part of its extent, will be for sustaining the track for the trains to run over. But such restriction of its use is not found in the act; and therefore when the corporation have occasion to use any part of such strip of five rods for any of the purposes incident to their creation, it is within their franchise, and, being used to promote the purposes contemplated by the act, it is exempted from taxation as property appropriated to public use. This is the extent to which they are authorized to take land without the consent of the owner, and this therefore we think is the extent to which the law regards the land as appropriated to public use.

"But in addition to the power of taking lands for the construction and use of a railroad, the corporation are vested with the power of purchasing lands. The main object of granting this authority, we think, was to enable the corporation to enter into agreements with private proprietors for such

pensable to the construction and preparation of the railroad for use, is exempted, while such as is designed merely for its convenience and only necessary for the increase of its business and the making of profits, is not exempted. Therefore, water-stations and depots, and among the latter, offices, oil-houses and places to hold cars, and such buildings and places as may fairly be deemed indispensable to the construction of the road, are not liable to taxation; while warehouses, coal-lots, coal-shutes, machine-shops, wood-yards, are thus liable.[1]

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lands as they might want to construct their road upon, so as not to be compelled to take it against the will of the owner, under the provisions of the act. But though this was the leading purpose, the authority was not limited to that. It was general in its terms, and authorized the corporation, by purchase to acquire a title to land beyond the limit of their location, which might be convenient though not necessary to the accomplishment of their enterprise. But if the corporation have occasion thus to acquire lands by purchase and erect buildings beyond their limits of five rods (if not necessary, under another provision of the act, for obtaining materials for deep cuts or embankments requiring greater width), such buildings or other real estate will not be considered as necessarily incident to the railroad and its objects, and therefore will not be exempted from taxation.

"So if any part of the lands lying within the prescribed limits of five rods in width, should be used and appropriated to purposes not incident to the proper construction, maintenance, and management of the railroad, or to the use of it by the corporation, as carriers of passengers and goods, we are of opinion that the estate thus used and appropriated, would be liable to taxation, like other real estate not exempted.

"The court are, therefore, of opinion that this railroad corporation are not liable to taxation for the land of the width of five rods, located for the road, nor for any buildings or structures erected thereon, so that they be reasonably incident to the support of the railroad, or to its proper and convenient use for the carriage of passengers and the transportation of commodities; and that this includes engine and car houses, depots for the accommodation of passengers, and warehouses for the convenient reception, preservation, and delivery of merchandise, and all goods and articles carried on the road."

[1] Railroad *v.* Berks County, 6 Barr, 70. See Permanent Bridge *v.* Frailey,

In Maine, where the capital stock of a company was declared personal estate by the charter, it was held that the real estate owned and used by the company, either as a track or as a depot, was not subject to taxation otherwise than by taxing the interest of the shareholder in the town where he resides, unless the legislature should otherwise specifically prescribe.[1]

In other jurisdictions, the property of the company has been held liable to taxation, unless specially exempted.[2]

In Rhode Island, where the general law declares that "no property whatsoever, of any description, not ceded or belonging to the United States, shall, on any pretense whatever, be deemed to be exempted from taxes," no constructive exemption of railroad companies is admitted, and the easement of the company as well as its rails, sleepers, and bridges, are subject to taxation.[3]

Rule of Assessing Taxes on Railroad Companies.—In New York, the property of railroad companies is subject to taxation when not specially

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13 S & R., 422; Lehigh Coal and Navigation Co. *v.* Northampton County, 8 W. & S., 334; Schuylkill Nav. Co. *v.* Berks County, 11 Penn. State, 202; Wayne County v. Delaware and Hudson Canal Co., 15 id. 351.

[1] Bangor and Piscataquis R. R. Co. *v.* Harris, 21 Maine, 533. See Mohawk and Hudson R. R. R. Co. *v.* Clute, 4 Paige, 384, where it is held that the clause declaring the stock of the company to be personal estate, does not change the character of the property held by the company in its corporate capacity.

[2] Phil. Wil. and Baltimore R. R. Co. *v.* Bayless, 2 Gill, 355; Louisville and Portland Canal Co. *v.* Commonwealth, 7 B. Monroe, 160; Ill. Central R. R. Co. *v.* County of M'Lean, 17 Ill. 296. See Regina *v.* Trustees of Birkenhead Docks, 14 Eng. L. and Eq., 128.

[3] Providence and Worcester R. R. Co. *v.* Wright, 2 R. Island, 459.

exempted. The land and fixtures, necessary for the road, are taxable in the towns or wards where they are situated, at the actual value at the time of assessment. So much of the capital stock as remains after deducting all the real estate at cost, including the railroad, is taxable as personal estate in the town or ward where the company has its principal office or place of business.[1] The real estate is to be assessed at the actual value of that part only which lies within the town where it is assessed, detached from the remainder of the road, and without reference to the income of the whole, or whether the stock is above or below par, or the business of the road productive or not, and should be appraised in the same manner as the adjacent lands belonging to individuals, and without reference to other parts of the road.[2]

In Illinois, that portion of the railroad track which lies within a county, is taxable therein as real estate, and the valuation must be of that specific part situated in the county, without reference to the value of the whole; and the personal property of the company is taxable where it has its principal office or place of business.[3]

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[1] Mohawk and Hudson R. R. Co. *v.* Clute, 4 Paige, 384; People *v.* Supervisors of Niagara, 4 Hill, 20.

[2] Albany and Schenectady R. R. Co. *v.* Osborn, 12 Barb. 223; Albany and W. Stockbridge R. R. Co. *v.* Canaan, 16 id. 244. In Paine *v.* Wright and Indianapolis and Bellefontaine R. R. Co., 6 M'Lean, 395, it is said by M'Lean, J., that a tax on railroad companies can be just and equal only by taxing their profits. As to the method and rules of taxing railway companies in England, see Regina *v.* London and S. W. R. Co., 1 Ad. & El., N. S., 558; Regina *v.* Grand Junction R. Co., 4 id. 18; Regina *v.* London, &c., R. Co., 3 Eng. L. and Eq. 329; 1 Am. Rail. Cas. pp. 354, 355, notes.

[3] Sangamon and Morgan R. R. Co. *v.* County of Morgan, 14 Ill. 163.

CHAPTER V.

CREATION OF CAPITAL STOCK BY SUBSCRIPTIONS.

The capital stock of a railroad company is derived from the contributions of individuals who agree to take a certain proportion thereof, the proportion itself being designated by shares. The individuals subscribing for the stock, in the mode admitted by the charter, become the stockholders of the company. The amount of the entire stock, is, in some cases, fixed by the charter, and in others left, with some limitations, to be fixed by the stockholders themselves. The first question, then, is, What constitutes an agreement to take stock in a railroad company?

What Makes a Subscriber.—The assent of an individual to take shares in the stock of the company—and this assent is essential to his becoming a stockholder—is ordinarily manifested by his entering his name on its books, under an appropriate formula, with the number of shares which he agrees to take placed opposite to his name. But his assent may be manifested in other modes, provided no special one is required by the charter, and it is so made as to entitle him to the privileges of a stockholder on making the proper payments. Thus, where a party signed a proxy with others, in which they were described "as being stockholders, and holding the

several shares opposite our names," and ten shares were placed by him opposite to his name, the proxy authorizing the person holding it to represent the stock at meetings of the company, this was held sufficient evidence that he was a stockholder, although he had not signed the original books of subscription belonging to the company.[1] So, where a party had received from a director a book to procure subscriptions to the stock of the company, which contained an appropriate caption for that purpose, and subscribed his own name therein, besides procuring the names of others for the purpose, afterwards stating to an agent of the company that he had taken the shares, and the clerk having entered his name as a stockholder on the books of the company without his express assent, this was held to be competent evidence to prove that he was a stockholder, although he retained in his possession the book in which he subscribed his name, and never delivered it to the company, and had not accepted from it a certificate of his shares.[2] A subscription to the articles of association of a plank-road company, is held in New

[1] Greenville and Columbia R. R. Co. *v.* Smith, 6 Rich. (S. C.) 91.

[2] N. H. Central R. R. *v.* Johnson, 10 Foster, 390, 401, Eastman J.: "It is said that the defendant was not a shareholder, and on that account was not liable to be assessed. But he subscribed the book, agreeing to take the shares. He stated that the amount upon the book that could be relied upon was $5,600, and his name was of the number that went to make up this sum. His name was entered on the records of the corporation, and he subsequently stated that he had taken five shares. The treasurer also offered him his certificate for the shares. This evidence was competent to show him a stockholder so far as to make him liable for assessments. Upon this ground, and were there no other objections to the assessments, we think the defendant could not relieve himself from liability. Chester Glass Company *v.* Dewey, 16 Mass. Rep. 94–100."

York, under the act for the incorporation of plank-road companies, not indispensable to membership; but it may be contained in a separate paper used for obtaining subscriptions to the stock and signed by only a part of the stockholders, the rest signing other similar papers. It was considered that a subscription to any legal and valid instrument, by which a party engages to become a member of the company when organized, and to pay a given sum which is to be a part of the capital stock, followed by the acceptance of a certificate for the stock, will make such subscriber a member of the company.[1] But, although the assent to become a shareholder may in general be manifested in different ways, yet if the incorporating act, either expressly or by fair construction, prescribes an exclusive mode for becoming one, as by entering his name in the books of the company or signing articles of association, a person does not subject himself to the liabilities or entitle himself to the privileges of a shareholder until he has complied with the prescribed forms.[2] Such is the construction placed by the Supreme Court of New York on the general railroad act of that State, enacted in 1848.[3] The delivery of a certificate or the formal allotment of shares to a party, is not, in general, necessary to hold him as a subscriber.[4]

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[1] Hamilton and Deansville Plank-Road Co. *v.* Rice, 7 Barb. 157.

[2] Charlotte and S. Carolina R. R. Co. *v.* Blakely, 3 Strob. 245. But see Greenville and Columbia R. R. Co. *v.* Smith, 6 Rich. 91.

[3] Troy and Boston R. R. Co. *v.* Tibbetts, 18 Barb. 297; Troy & Boston R. Co. *v.* Warren, id. 310.

[4] Danbury and Norwalk R. R. Co. *v.* Wilson, 22 Conn. 453; N. H. Central R. R. *v.* Johnson, 10 Foster, 390.

A subscriber cannot set up that the paper signed by him is an *escrow*, where he delivers it to a person who is acting for the company in procuring shareholders. The paper will not be considered an escrow, to become effectual on the performance of a certain condition, where instead of being delivered to a third person as such, it is delivered to one of the commissioners appointed to receive subscriptions for the company.[1]

The subscription being a promise, it is a familiar requirement of the common law that there must be a party *in esse*, competent to receive it, or it will not bind the maker. It has, therefore, been held that no action can be sustained by a company against a party who, before it was incorporated, signed with others a paper agreeing to take a certain amount of stock in it, and after its incorporation refused to do so, there being no act of his subsequent to the incorporation in affirmance of his former promise.[2] These decisions are, however, opposed by others, which affirm the liability of the subscriber under such circumstances.[3]

A promise to take shares, according to the best considered authorities, when made after the act of

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[1] Wright *v.* Shelby R. R. Co., 16 B. Monroe, 4. See N. H. Central R. R. *v.* Johnson, 10 N. H., 390, where although the subscriber retained the book in which his name was entered, the book could hardly be considered as an escrow, as he was acting as agent of the company to procure subscribers.

[2] Strasburg R. R. Co. *v.* Echternach, 21 Penn. State, 220; Gleaves *v.* Brick Church Turnpike Co., 1 Sneed, 491.

[3] Kidwelly Canal Co. *v.* Raby, 2 Price Exch., 93; Midland Great Western R. Co. *v.* Gordon, 16 M. & W., 804; Chester Glass Co. *v.* Dewey, 16 Mass. 94; Cross *v.* Pinckneyville Mill Co., 17 Ill. 54; Selma and Tenn. R. R. Co. *v.* Tipton, 5 Ala., 787; See Thompson *v.* Page, 1 Met. 565; Ives *v.* Sterling, 6 id. 310.

incorporation has passed and been accepted, and with reference to the future organization of the company, which is not organized at the time it is made, is binding on the subscriber.[1] Even the acceptance of the charter by the corporators who applied for the same, may be presumed, it being passed for their benefit, so as upon its being granted to bring the corporation into existence and enable it to receive promises made for its benefit.[2] Although the corporation were not to be considered *in esse* until it had been organized, a party who had subscribed for shares before its organization might render himself liable as a shareholder by acts ratifying his subscription, after the organization was effected; as, if he paid to the company certain assessments upon them, and promised to pay the remaining sums to become due on the shares which he had promised to take.[3] So also, if he acted as a stockholder in the meetings of the company, and was acknowledged as such by it.[4]

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[1] Gleaves *v.* Brick Church Turnpike Co., 1 Sneed, 491; Hartford and New Haven R. R. Co. *v.* Kennedy, 12 Conn. 499; Danbury and Norwalk R. R. Co. *v.* Wilson, 22 id. 453; Covington Plank-Road Co. *v.* Moore, 3 Ind. 510; Hamilton and Dansville Plank-Road Co. *v.* Rice, 7 Barb. 157. But see Charlotte and South Carolina R. R. Co. *v.* Blakely, 3 Strob. 245.

[2] Rathbone *v.* Tioga Nav. Co., 2 W. & S. 74.

[3] Kennebec and Portland R. R. Co. *v.* Palmer, 34 Maine, 366.

[4] Lexington and W. Cambridge R. R. Co. *v.* Chandler, 13 Met. 371; Chaffin *v.* Cummings, 37 Maine, 76. Shepley, C. J.: "A person, who before its organization subscribes for stock and afterwards claims to be a stockholder, and acts as one in meetings of the corporation, and whose claims are admitted by it by allowing him to act as such, and by receiving payment for his stock, must be regarded as the owner of the stock thus subscribed for and acted upon. Chester Glass Co. *v.* Dewey, 16 Mass. 94; Spear *v.* Crawford, 14 Wend. 20; Kidwelly Canal Co. *v.* Raby, 2 Price Ex. R., 93; Kennebec and Portland R. R. Co. *v.* Palmer, 34 Maine, 366. To make him an owner, it is not necessary that he shall have paid for his stock. A corporation may give credit for its stock, as well as for any other property sold by it. Nor is it

The special provisions of the act of incorporation or of a general law applicable to the corporation, may make a party liable as a shareholder on his performance of certain acts, who could not be so liable at common law, and on the other hand they may be such that, although under certain circumstances he would be liable as such at common law, he cannot be held under the statute. The provisions of the act of incorporation must, therefore, be examined in each case, to determine the requisites for liability as a subscriber to the stock of the company, and the question whether he is liable or not for a subscription made before the company was organized.

Where a party subscribed for shares, and gave his note for the first installment to commissioners named, in the act of incorporation, for receiving subscriptions, who when a thousand shares had been subscribed were to call a meeting of the subscribers for the choice of directors to whom they were to hand over the books of the company, it was held that the provision in the charter that each subscriber should be a member of the company, and the further fact that others had subscribed for stock previous to the subscription in question, were sufficient to show that the corporation was *in*

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neeessary that certificates should have been issued. These only constitute proof of property, which may exist without them. When the corporation has agreed that a person shall be entitled to a certain number of shares in its capital, to be paid for in a manner agreed upon, and that person has agreed to take and pay for them accordingly, he becomes their owner by a valid contraet, made upon a valuable eonsideration."

esse at the time the note was made, and so capable of taking the promise through the commissioners, notwithstanding the right to organize was made to depend on certain conditions, not fully complied with till after the note was executed.[1]

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[1] Vermont Central R. R. Co. *v.* Clayes, 21 Vt. 30, Bennet, J.: "The more important question would seem to be, Can the present plaintiffs maintain an action on this note? It is said, the corporation was not *in esse* at the time of making the promise. If this be so, it would be difficult to get over the objection. But the first section of the plaintiffs' act of incorporation declares in express terms, that such persons as shall thereafter become stockholders of said company, *are* constituted a body corporate, &c. Though it is necessary that every corporation should have corporators, yet we find by the fourth section of the act, that every subscriber for stock becomes *per se* a corporator; and by the subscription paper, which is made a part of the case, it appears that there were several subscribers for stock prior to the defendant's becoming one. Each subscriber for stock *per se* becomes a member of the corporation, and all as fast as they subscribe become *corporators* under the provisions of the act. To justify an organization of the corporation, certain things are made necessary; but in the eye of the law this corporation should be regarded *in esse* before they have the right to organize. It is the statute which creates the subscribers for stock a corporation, and not their organizing under it. It is usual, in acts of incorporation to designate the names of certain individuals as corporators; but that was not done in this instance. As the act incorporates all that shall thereafter become stockholders, it may be taken, for the purpose of giving *vitality* to the charter of incorporation, that the defendant as well as other subscribers for stock became such on the day the act of incorporation passed, although in point of fact they did not subscribe until some time subsequent. See Chester Glass Co. *v.* Dewey, 16 Mass., 94. If this be not so, the charter must, at all events have *vitality* from the time individuals became stockholders in point of fact by an actual subscription; and this is sufficient for present purposes." In Lexington and West Cambridge R. R. Co. *v.* Chandler, 13 Met. 311, it was said by Shaw, C. J., delivering the opinion of the court,—"Evidence was offered tending to show that the defendant signed a subscription paper for five shares before the organization of the company; that he was present at the meeting of the stockholders for the organization of the corporation, wrote and distributed votes, and voted for directors. The defendant objected to the subscription paper as evidence, on the ground that no valid or binding promise could be made to the corporation before its organization; and that parol evidence

It has been decided by the Supreme Court of New York, that under the general railroad act of 1848, the mere signing by a party of a preliminary paper, previous to the organization of the company, by which he agrees to take the amount of capital stock placed against his name, does not make him liable on the subscription; it not being one of the modes prescribed by the act for becoming a corporator.[1]

Defences of Subscribers to the Capital Stock.—The defences of a subscriber to proceedings of the company for enforcing the promise contained in his subscription, rest, in general, upon its non-performance of the conditions precedent, upon which

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was not sufficient to show that the defendant had made himself a subscriber to the corporation for any shares, or that he became a member of the corporation by the transactions stated. This objection was overruled, and the subscription paper and acts of the defendant were admitted as evidence of a satisfaction of his prior subscription.

"We think this decision was correct. The action is not founded on a supposed common-law obligation, arising from a promise to take and pay for a number of shares named; but it is founded on a statute liability created by the act of incorporation, binding upon all its members. The question is not, whether this subscription was a good promise at common law made to a proper party, and on a good consideration; but whether he was a member of the corporation and a holder of five shares. And for this purpose the evidence was competent. He may be proved to be a member of the corporation, by being a petitioner for the act, or being within the description of persons incorporated, by acting under it and assisting to carry it into execution. Ellis *v.* Marshall, 2 Mass. 269. The subscription paper, though made before the organization of the corporation, was made after the act of incorporation was passed, and was *prima facie* proof, competent and proper to go to the jury, both to prove the fact of his being a member of the corporation, and of the number of shares held by him, and, in the absence of any countervailing proof, decisive."

[1] Troy and Boston R. R. Co. *v.* Tibbits, 18 Barb. 297; Same v. Warren, id. 310.

his liability for assessments was to arise, or upon its breach of its contract with him, express or implied, in the misappropriation of the funds to which he was to contribute.

Non-Payment of the First Installment.—A frequent provision in acts of incorporation is, that the subscriber to the stock shall pay a certain per cent., ordinarily five or ten, on the same at the time the subscription is made. The failure of the subscriber to comply with this requirement, has been held in some cases to exonerate him from liability for subsequent calls. The payment of the installment required to be made in cash, was regarded as a condition precedent to the organization of the corporation, or even to its existence. The company had no power to take the subscription without the cash payment, and having taken it, was not bound to allow the subscriber the shares for which he subscribed; and there was no mutuality of obligation which would bind him.[1] This defence is manifestly unconscionable, enabling a party to take advantage of his own wrong. It is, therefore, discountenanced by the courts, and only admitted where it is the clear intention of the act of incorporation that the payment of the cash installment shall be a condition precedent to the liability of the

[1] Jenkins *v.* Union Turnpike Co. 1 Caines' Cas. in Error, 80, overruling the Supreme Court in 1 Caines, 381; Hibernia Turnpike *v.* Henderson, 8 S. & R. 219, in which the court were divided; Croeker *v.* Crane, 21 Wend. 211; Napier *v.* Poe, 12 Geo., 184.

subscriber.[1] Thus, in Kentucky it was decided, that although the commissioners might have refused to receive the subscription when made, without payment at the time, yet as they did not reject it, the contract, after the stock had been received by them without the payment, was binding on both sides. It was considered to be the duty of the subscriber to pay the installment when he subscribed, and he was not allowed to take advantage of his own wrong.[2] In other States, this defence has been interposed in vain, frequently where there were special circumstances showing it to be clearly without merits. Thus, where the subscriber has afterwards acted as a stockholder, by attending the meetings of the company and voting in the election of its officers, or on questions of business, he has been held estopped from denying the validity of his subscription.[3] He has been estopped from making this defence where he gave a note for the first installment at the time he subscribed, and afterwards paid it.[4] The subscriber has also been held bound by his subscription, where, instead of making the payment required in

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[1] Judah *v.* American Life Ins. Co., 4 Indiana, 333; Henry *v.* Vermillion and Ashland R. R. Co., 17 Ohio, 187; Mitchell *v.* Rome R. R. Co., 17 Geo. 588; Troy and Rutland R. R. Co. *v.* Kerr, 17 Barb. 601; Ogdensburg, Rome and Clayton R. R. Co. *v* Frost, 21 id. 541; West Chester R. R. Co. *v.* Hickman (Supreme Court of Penn.) not yet reported.

[2] Wight *v.* Shelby R. R. Co., 16 B. Monroe, 5.

[3] Clark *v.* Monongahela Nav. Co., 10 Watts, 364; Erie and Waterford Plank Road Co. *v.* Brown, 25 Penn. State, 156; Greenville and Columbia R. R. Co. *v.* Woodsides, 5 Rich. 145.

[4] Selma and Tennessee R. R. Co. *v.* Tipton, 5 Ala, 807; Klein *v.* Alton and Sangamon R. R. Co., 13 Ill. 514.

cash, he has given a note for the same, which he has not paid. Thus, where it was provided in the charter that "every person, at the time of subscribing, shall pay to the commissioners five dollars on each share for which he may subscribe, and each subscriber shall be a member of said company," it was decided to be no defence to a suit on a promissory note, that it was given by a subscriber in lieu of a cash payment; as the installment was not required to be paid in specie, and the note having been accepted as money the company could not deny to him the privileges of a corporator.[1] Where the act of incorporation provided that on non-payment of the first installment the subscription should be void, the subscriber was held liable on a promissory note for the amount; although without the giving of the note, the company could not have recovered upon the subscription, and the subscriber could not have asserted the privileges of a stockholder.[2] Nor will this defence avail where the subscriber was a commissioner to procure the stock to be taken and to receive installments; as in law he received the money when he subscribed for the stock, and it being his official duty to require a cash payment from subscribers, he is not allowed to set up his violation of duty as a bar to a suit for the amount.[3]

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[1] Vermont Central R. R. Co. *v.* Clayes, 21 Vt., 30; Greenville and Columbia R. R. Co. *v.* Woodsides, 5 Rich. 145.

[2] M'Rae *v.* Russell, 12 Iredell, 224.

[3] Ryder *v.* Alton and Sangamon R. R. Co., 13 Ill. 516; Cross *v.* Pinckneyville Mill Co., 17 id. 57; Grayble *v.* York and Gettysburg Turnpike Co., 10 S. & R. 269; Highland Turnpike Co. *v.* M'Kean, 11 Johns. 198.

FULL NUMBER OF SHARES NOT TAKEN.—It is clear that whatever conditions precedent to the personal liability of the subscriber are imposed in the charter, must be performed before he can be sued for calls upon his shares. If the act of incorporation fixes the number of shares and amount of capital stock, or requires them to be fixed by the company or its officers, and it is to be inferred from its terms that the subscription for that number and amount, so fixed, is a condition precedent to the right of the corporation to enforce the subscription, the subscriber is not liable for calls to meet its general purposes until the condition has been fulfilled by the taking up of all the shares. His agreement is to pay legal assessments, upon all the shares, which, where such condition is imposed, cannot be made until it is performed. By reducing the amount of the capital stock, the proportion which he is to contribute and the risk of the enterprise may be increased. The mere fixing of the number of shares and the amount of the capital stock by the act of incorporation, or by the action of the company or of its officers, in pursuance of the act, has been held to impose the filling up of the entire stock so fixed as a condition precedent to the liability of the subscriber for assessments. This rule is specially enforced in Maine, New Hampshire and Massachusetts.[1]

[1] Salem Mill Dam Corp. *v.* Ropes, 6 Pick. 23; S. C., 9 id. 187; Worcester and Nashua R. R. Co. *v.* Hinds, 8 Cush. 110; Stoneham Branch R. R. Co. *v.* Gould, 2 Gray, 277. Shaw, C. J.: "It is a rule of law too well settled to be now questioned, that when the capital stock and the number of shares are fixed by the act of incorporation, or by any vote or by-law passed conformably to the act of incorporation, no assessment can be lawfully made on the share of

And if under such a charter any of the subscriptions are on conditions, they cannot be counted in making up the number until the conditions have been performed or waived.[1] The amount of the capital stock may be fixed in the agreement of the subscribers, and the taking up of the entire amount may then be a condition precedent to their liability, in the same manner as if the amount of the capital stock was fixed by the act of incorporation.[2] But if the taking up of the entire capital stock is not made by the agreement or the act of

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any subscriber until the whole number of shares has been taken. Salem Mill Dam *v.* Ropes, 6 Pick. 23, and 9 Pick. 187; Cabot and West Springfield Bridge *v.* Chapin, 6 Cush. 50; Worcester and Nashua Railroad *v.* Hinds, 8 Cush. 110. This is no arbitrary rule; it is founded on a plain dictate of justice, and the strict principles regulating the obligation of contracts. When a man subscribes a share to a stock to consist of one thousand shares, in order to carry on some designated enterprise, he binds himself to pay a thousandth part of the cost of such enterprise. If only five hundred are subscribed, and he can have no assurance which he is bound to accept that the remainder will be taken, he would be held, if liable to assessment, to pay a five-hundreth part of the cost of the enterprise, besides incurring the risk of an entire failure of the enterprise itself, and the loss of the amount advanced towards it." Oldtown and Lincoln R. R. Co. *v.* Veazie, 39 Maine, 571; Penobscot and Kennebec R. R. Co. *v.* Dunn, id. 587; Littleton Manufacturing Co. *v.* Parker, 14 N. H., 543; N. H. Central R. R. *v.* Johnson, 10 Foster, 390; Contoocook R. R. Co. *v.* Barker, 32 N. H., 363. Eastman, J.: "Where the number of shares into which the capital stock of a corporation is divided is fixed by the charter, and that provides that the directors may make equal assessments upon all the shares, no valid assessment can be made against a subscriber for shares until all the shares are taken, unless he in some way waive the provisions of the charter."

[1] Central Turnpike Co. *v.* Valentine, 10 Pick. 142.

[2] Cabot and West Springfield Bridge *v.* Chapin, 6 Cush. 50; Littleton Manufacturing Co. *v.* Parker, 14 N. H., 543; Penobscot and Kennebec R. R. Co. *v.* Dunn, 39 Maine, 587. Rice, J.: "A subscription to the capital stock of an incorporated company, is a contract between the subscriber and the company. The subscriber may simply agree to take a given amount of stock, and in that event the remedy of the corporation, in case of neglect to pay

incorporation a condition precedent to the right of the corporation to recover the calls, either expressly or by implication, the subscriber will be liable for the same, although the full amount has not been taken.[1]

A subscriber may be estopped from setting up this defence by co-operating in acts of the company which cannot be properly done except on the assumption that the subscribers intend to proceed

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assessments, is upon the stock; or he may agree to take and pay for the stock absolutely, or upon such conditions as he may choose to incorporate into his subscription. Such conditions are ordinarily incorporated into subscriptions for the protection of the subscriber, and to ensure the completion of the enterprise. Where a subscription is made upon condition that the company shall not be organized, or shall not enter upon the principal object of its organization, until a given amount of its stock shall be subscribed, such condition is a condition precedent, and the company will not be authorized to enforce the collection of such subscription until they have complied with such conditions on its part. A person might be willing to become a stockholder in a railroad corporation, which should have four hundred thousand dollars of its stock subscribed before its organization, and seven hundred thousand before entering into a contract for building and completing its road, who would be unwilling to subscribe to its stock without restriction. Such a condition would provide for a capital amply sufficient to secure a full preliminary exploration and survey of the route for a road, and ensure the prompt construction of the road. The right of the corporation to assess the stock of the defendant, depended upon the conditions in his subscription. If the company have complied with these conditions, then its right to assess under its charter and by-laws, and in conformity therewith, immediately accrued, and such assessments if legally made, may be collected. If the conditions in the subscription had not been performed on the part of the company, then the assessments cannot be collected, and it matters not what may have been the form of the assessments."

[1] Hamilton and Deansville Plank Road Co. *v.* Rice, 7 Barb. 157; Schenectady and Saratoga Plank Road Co. *v.* Thatcher, 1 Kernan, 102; Kennebec and Portland R. R. Co. *v.* Jarvis, 34 Maine, 360; Lexington and West Cambridge R. R. Co. *v.* Chandler, 13 Met. 311; Waterford, &c., R. Co. *v.* Dalbiac, 4 Eng. L. & Eq., 455. See Company, &c., *v.* Theobald, 1 M. & Mal. 151.

with the stock partially taken up.[1] But, it has been held in Maine that this requirement in a charter cannot be waived by a subscriber, so as to preclude him from taking advantage of the neglect of the company to comply with it.[2] The legislature having no constitutional power to alter the contract between the company and the subscribers, it has been decided that an amendment of the charter, accepted by the company, requiring a less amount of capital stock than that prescribed in the charter, will not have the effect to make a previous subscriber liable, when that less amount only has been taken.[3]

The records of the company are competent and *prima facie* evidence to prove that the required number of shares has been taken. The books of the directors, if authorized to act in the premises, are competent evidence for that purpose.[4]

Subscriptions Conditional upon the Location.—An agreement is not unfrequently signed by persons interested in a particular locality, by which they promise to take stock in a railroad company provided a particular route is adopted by it. Except in New York, these conditional subscriptions, in the absence of a special prohibition, have been sustained, as authorized, and not in conflict with public policy. They have been enforced in Kentucky,—the agree-

[1] Cabot and West Springfield Bridge *v.* Chapin, 6 Cush. 53; N. H. Central R. R. *v.* Johnson, 10 Foster, 407.

[2] Oldtown and Lincoln R. R. Co. *v.* Veazie, 39 Maine, 571.

[3] Id.

[4] Penobscot and Kennebec R. R. Co. *v.* Dunn, 39 Maine, 587; Ryder *v.* Alton and Sangamon R. R. Co. 13 Ill. 516.

ment and not the stock itself being regarded as conditional. The parties subscribing to them are not considered stockholders until the company has performed the condition upon which the undertaking depends; and when that is done, they become stockholders by force of the agreement of the parties, and the subscription becomes absolute.[1] In Indiana and Pennsylvania, promises to pay the company a certain sum on condition that it will adopt a certain route, have been held valid, and enforced after the condition has been performed.[2] They have also been recognized as valid in Massachusetts and Ohio.[3]

In New York, a subscription on condition that the company adopt a certain route, has been held not binding on the subscriber, unless the company agrees at the time to adopt that route, notwithstanding it is afterwards adopted by the company, on the ground that the promise is without mutuality and consideration.[4] Such subscriptions have also been

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[1] M'Millan *v.* Maysville and Lexington R. R. Co. 15 B. Monroe, 218; Henderson and Nashville R. R. Co. *v.* Leavell, 16 id. 358.

[2] Carlisle *v.* Terre Haute and Richmond R. R. Co., 6 Indiana 316; Fisher *v.* Evansville and Crawfordsville R. R. Co. 7 id. 407; Cumberland R. R. Co. *v.* Baab, 9 Watts, 458; Rhey *v.* Ebensburg and Susquehanna Plank Road Co. 27 Penn. State, 261.

[3] Central Turnpike Corp. *v.* Valentine, 10 Pick. 142; Troy and Greenfield R. R. Co. *v.* Newton, 1 Gray, 544; Chapman *v.* Mad River and Lake Erie R. R. Co. 5 Ohio State. See N. H. Central R. R. *v.* Johnson, 10 Foster, 401.

[4] Utica and Schenectady R. R. Co. *v.* Brinckerhoff, 21 Wend. 139; Macedon and Bristol Plank Road Co. *v.* Snediker, 18 Barb. 317. The authority of these decisions may be questioned, as Cooke *v.* Oxley, 3 T. R. 653, mainly relied on, is now generally discredited. Boston and Maine R. R. *v.* Bartlett, 3 Cush. 224. And see L'Amoreux *v.* Gould, 3 Selden, 349, where it is laid down that the want of mutuality is a defence only where it leaves one party without an available consideration for his promise, and that there are many

held void in that State on the ground that they are not authorized by law, and are against public policy, as tending to work a fraud on those who subscribe absolutely, and to induce such a location of the road as will subserve private interests to the public detriment.[1] But a subscription on condition that a certain number of shares shall be subscribed within a limited time, has been recognized as valid.[2]

A provision as to the location, so as to be binding on the company and render the subscription conditional, must be inserted in the agreement. In the absence of fraud, or mistake of fact, parol evidence is not admissible to make a subscription conditional which on its face is absolute. A subscriber cannot defend a suit for the calls by parol proof that he should not have become a party to the agreement unless he had supposed a particular route would be adopted, where the charter does not prescribe it. He is presumed to know the provisions of the charter under which the subscription was taken; and the representations of a class of officers with whom the power of location is not lodged, will not bind the company. Even the representations of those who have this power are mere matters of opinion, on which he has no right to rely. All such considerations are merged in the written contract by which the parties

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valid contracts not mutually binding when made. See also Conn. and Pass. Rivers R. R. Co. v. Bailey, 24 Vt. 478.

[1] Butternutts *v.* North, 1 Hill, 518; Macedon and Bristol Plank Road Co. *v.* Snediker, 18 Barb. 317. *Contra,* Fort Miller and Fort Edward Plank Road Co. *v.* Payne, 17 id. 579.

[2] Morris Canal and Banking Co. *v.* Nathan, 2 Hall, 239; Fort Miller and Fort Edward Plank Road Co. *v.* Payne, 17 Barb. 579.

are to be governed.[1] The condition, in order to be a part of the subscription, must be inserted at the time of the subscription, and not subsequently, except with the consent of both parties.[2]

Notwithstanding conditional subscriptions may be admitted, yet private arrangements, not expressed in the subscription, between the agents of the company and a subscriber, by which he is to have peculiar privileges not extended to other subscribers, or by which his subscription is not to be collected, being made to induce others to subscribe, are regarded as fraudulent on the other subscribers, and not a de-

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[1] Wight *v.* Shelby R. R. Co. 16 B. Monroe, 4; Banet *v.* Alton and Sangamon R. R. Co. 13 Ill. 509; Railsback *v.* Liberty and Abington Turnpike Co. 2 Indiana, 656; Jones *v.* Milton and Rushville Turnpike Co., 7 id. 547; Greenville and Columbia R. R. Co. *v.* Smith, 6 Rich. 91; Kennebec and Portland R. R. Co. *v.* Waters, 34 Maine, 369; Conn. and Pass. Rivers R. R. Co. *v.* Bailey, 24 Vt. 465. In Crossman *v.* Penrose Ferry Bridge Co. 26 Penn. 69, 71, it is said "that, where one is induced to make a subscription to the capital stock of the company by fraudulent representations or false statements of an agent of the company or commissioners appointed to obtain subscriptions, the contract may be avoided by the subscriber; but a mere promise by the agent to procure stock for the subscriber in another company will not have the effect, nor will a mistaken estimate of the probable cost of the improvement." But *quære*, as to the position that a false statement, not fraudulent, will avoid the subscription. It was further held in this case, which was the point on which it was decided, that a preliminary injunction by a court of competent jurisdiction, suspending the prosecution of the improvement to erect which the subscription was made, until the further order of the court, will not defeat an action for the recovery of the subscription by the company. The interlocutory order does not establish that the improvement would be unlawful, or that the contract of subscription was illegal. But even upon the supposition that the cause will be ultimately decided against the company, the subscriptions to the capital stock, for aught that appears on the record, should be paid, so that the expenses of the controversy, as well as the charges necessarily attendant upon the organization of the company, may be borne equally by the stockholders, and the residue of the capital stock divided among them.

[2] N. H. Central R. R. *v.* Johnson, 10 Foster, 390.

fence to a suit for the whole amount subscribed. It follows, also, that as such private arrangements are of no effect, they will be no defence to suits against other subscribers not interested in them. The subscriptions are enforced as valid, and, therefore, other subscribers cannot complain that false inducements were held out to them.[1] This principle applies where a stockholder, subsequent to his subscription, has obtained from the officers of the company some special privilege, as to the mode of payment, or otherwise; and an arrangement of that kind will not be respected by the courts, and the company will be allowed to recover the full amount, as provided in the charter.[2] Nor, where a subscriber has taken a number of shares, and paid a part of the installments thereon, is an agreement valid as against creditors and other stockholders, by which the amount paid is acknowledged by the officers of the company as a full receipt for a less number of shares, whose par value is equal to the amount already paid on the whole number, and he is also released by them from all liability for the remaining shares. This has been affirmed in cases where the corporation, being insolvent, has been put into the management of a receiver, who by a bill in chancery, sought to collect the debts due to the company, and he has been decreed the entire amount due on all the shares.[3]

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[1] Conn. and Pass. Rivers R. R. Co. v. Bailey, 24 Vt. 465. See White Mts. R. R. Co. *v.* Eastman (Supreme Ct. of N. H., July T. 1856), 19 Law Rep. (Oct. 1856), 342.

[2] Henry *v.* Vermillion and Ashland R. R. Co. 17 Ohio, 187.

[3] Mann *v.* Pentz, 2 Sandford Ch. 257; Mann *v.* Currie, 2 Barb. 294; Mann *v.* Cooke, 20 Conn. 178; Penobscot and Kennebec R. R. Co. *v.* Dunn,

The construction of written conditions should be such as to facilitate the object of the enterprise. It appearing to be the object and intent of the subscription that the fund created thereby should be used in the construction of the road, it was held, where the subscriber agreed, together with others, to pay to the company a certain sum on each share subscribed by him, "at such times and places as may be required by the board of directors," on condition that the road should be so located and constructed as to make a certain place a point in its route, that he was bound to pay the amount upon its location making that place a point, and that its construction was not a condition precedent to the payment.[1]

The subscription may be so drawn as to make the promise of the subscriber and the condition obligatory on the company independent stipulations, as where the day fixed for payment may happen before the road is built. In such a case the subscriber will be bound to pay his subscription, and will then be left to his remedies to enforce a proper application of the amount subscribed by him.[2]

Fraud and Breach of Public Duty.—Fraud practiced by the company or its authorized agent upon a subscriber is a good defence to a suit by it

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39 Maine, 601; White Mts. R. R. Co. *v.* Eastman (Supreme Ct. of N. H., July T. 1856), 19 Law Rep. (Oct. 1856), 342.

[1] M'Millan *v.* Maysville & Lexington R. R. Co. 15 B. Monr. 218.

[2] Fort Miller and Fort Edward Plank Road Co. *v.* Payne, 17 Barb. 579, 580; Henderson and Nashville R. R. Co. v. Leavell, 16 B. Monroe, 358; New Albany and Salem R. R. Co. *v.* Pickens, 5 Indiana, 247.

for calls.[1] But he cannot defeat a suit on his subscription by proof of fraud to which he was in law or in fact a party.[2] An agreement by one stockholder to allow another a part of his dividends, and to give his proxy to that other, although its effect would be to throw the affairs of the company into the power of the party to whom the proxy is to be given, is not a defence to a suit against other subscribers.[3] The commission by the company of some act which would be a good cause for declaring a forfeiture of its charter, or irregularities in its organization, are not a defence to a suit against the subscriber for the installments due, where they do not amount to an essential change of his contract. They are matters which cannot be inquired into collaterally, but only in a direct proceeding on the part of the State.[4] *A fortiori*, he cannot defend on this ground, where he has himself consented to or waived such irregularities.[5] The action of the board of directors or commissioners in the distribution of stock, or in any matter intrusted to their discretion,

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[1] Kishacoquillas and Centre Turnpike Road Co. *v.* M'Conaby, 16 S. & R. 140; Crossman *v.* Penrose Ferry Bridge Co., 27 Penn. State, 69; Greenville and Columbia R. R. Co. *v.* Smith, 6 Rich. 91.

[2] Southern Plank Road Co. *v.* Hixon, 5 Indiana, 165; Crocker *v.* Crane, 21 Wend. 211; Kishacoquillas and Centre Turnpike Road Co. *v.* M'Conaby, 16 S. & R. 140.

[3] Ryder *v.* Alton and Sangamon R. R. Co., 13 Ill. 516.

[4] Conn. and Pass. Rivers R R. Co. *v.* Bailey, 24 Vt. 465; Wight *v.* Shelby R. R. Co., 16 B. Monroe, 4; Kishacoquillas and Centre Turnpike Road Co. *v.* M'Conaby, 16 S. & R. 140; Troy and Rutland R. R. Co. *v.* Kerr, 17 Barb. 581; Schenectady and Saratoga Plank Road Co. *v.* Thatcher, 1 Kernan, 102; Covington, &c. Plank Road Co. *v.* Moore, 3 Ind. 510; Central Plank Road Co. *v.* Clemens, 16 Missouri, 359; 2 Kent, Com. 312, *note*.

[5] Danbury and Norwalk R. R. Co. *v.* Wilson, 22 Conn. 435.

and on which they act judicially, if they exercise their discretion in good faith and according to law will not bar a recovery on the subscription.[1]

ASSIGNMENT OF SHARES.—A mere assignment of his share by a subscriber does not relieve him from liability until the assignee is substituted in his place.[2] But when no formalities are required by the charter or by-laws for an assignment, a subscriber may be relieved from liability, it seems, by a mere assignment, and the assignee will be substituted in his place.[3] A shareholder who derives his shares from the original subscriber, and receives a new certificate from the company, or is otherwise duly substituted for the original subscriber, is liable to pay the installments called for after the assignment.[4]

DEMAND AND NOTICE.—Demand of payment of the subscription need not precede a suit for the assessments, unless prescribed by the charter.[5] A demand or notice of the unpaid installments required, either personally or by publication is in many cases prescribed by the charter.[6]

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[1] Conn. and Pass. Rivers R. R. Co. *v.* Bailey, 24 Vt. 465; Crocker *v.* Crane, 21 Wend. 211; Walker *v.* Devereux, 4 Paige, 229.

[2] Ryder *v.* Alton and Sangamon R. R. Co., 13 Ill. 516; Schenectady and Saratoga Plank Road Co. *v.* Thatcher, 1 Kernan, 102; Allen *v.* Montgomery R. R. Co. 11 Ala. 451.

[3] Angell & Ames on Corporations, § 534; Huddersfield Canal Co. *v.* Buckley, 7 Term R. 36.

[4] Hartford and New Haven R. R. Co. *v.* Boorman, 12 Conn. 530; Sagory *v.* Dubois, 3 Sandf. Ch. 498; Hall *v.* U. S. Ins. Co. 5 Gill, 484.

[5] Ross *v.* Lafayette and Indianapolis R. R. Co., 6 Indiana, 297; New Albany and Salem R. R. Co. *v.* Pickens, 5 id. 247.

[6] Unthank *v.* Henry County Turnpike Co., 6 Ind. 125; Hall *v.* U. S. Ins. Co., 5 Gill, 484.

AMENDMENTS OF THE CHARTER.—The relation between the shareholder and the company is one of contract, defined in the subscription and in the charter and existing laws applicable thereto. Like the member of a partnership or joint-stock company, he contributes his funds to the common stock for a special purpose; and a diversion of the same to an enterprise entirely different from the one originally contemplated is a breach of trust, to prevent which he is entitled to equitable remedies.[1] It is not, indeed, every change, however formal or immaterial, which is to be regarded as altering his contract with the company, and to have the effect of discharging him from liability upon his subscription. The power of the State to impose police regulations without having that effect, cannot be questioned. Nor will unimportant changes by the company in the location of its road, or alterations of its charter upon its application to the legislature, when auxiliary to its original purpose and plainly beneficial to the company and the interest of the subscriber, release him from liability on his subscription.[2] But where,

[1] Livingston *v.* Lynch, 4 Johns. Ch. 573; Stevens *v.* Rutland and Burlington R. R. Co., before Bennett, Chancellor; 1 Am. Law Reg. (Jan. 1853) 154; Kean *v.* Johnson and Central R. R. Co., 1 Stockton, Ch. 401.

[2] London and Brighton R. Co. *v.* Wilson, 6 Bing. N. C., 135; Midland R. Co. *v.* Gordon, 16 M. & W., 804; Clark *v.* Monongahela Nav. Co., 10 Watts, 364; Gray *v.* Monongahela Nav. Co., 2 W. & S., 156; Conn. and Pass. Rivers R. R. Co. *v.* Bailey, 24 Vt. 479; Danbury and Norwalk R. R. Co. *v.* Wilson, 22 Conn. 435; Colvin *v.* Liberty and Abington Turnpike Co., 2 Carter (Ind.) 511; Railsback *v.* Same, 2 id. 656; Winter *v.* Muscogee R. R. Co., 11 Geo. 438, 452; Penn. and Ohio Canal Co. *v.* Webb, 9 Ohio, 139; Hartford and New Haven R. R. Co. *v.* Croswell, 5 Hill, 387; N. O. J. and Great Northern R. R. Co. *v.* Harris, 27 Missis. 536; Schenectady and Saratoga Plank Road Co. *v.* Thatcher, 1 Kernan, 109. Parker, J.: "It is not certainly every extension

without the assent of the shareholder, the company procures from the legislature an alteration of its charter, which works a fundamental change in the purpose and business contemplated therein, and superadds to the original undertaking, or substitutes for it a new and very different undertaking, he may well say, *Non hæc in fœdera veni.* He subscribed to a certain enterprise,—that enterprise has been changed without his assent; and, upon familiar principles of the law of contracts, he is discharged from the obligation of the contract by a breach of the same on the part of the company. The legislative sanction to the alteration cannot divest him of his rights under the contract, as the obligation of the same cannot be impaired by the State.[1] This would clearly be the effect, if a railroad company, under an amendment to its charter obtained from the legislature without the subscribers' assent, should convert itself into a manu-

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of the main line, or construction of a branch, or change of route subsequent to subscription for stock, that will discharge a stockholder from his express agreement to pay for his stock. The change made may be unimportant, or may be, and in most cases, doubtless is, beneficial to the stockholders. And where it is not claimed to be beneficial, and the character of the contract is not altered, there can certainly be no reason for allowing a dissatisfied stockholder to take advantage of it. None of the cases recognize the right of a stockholder to complain where he has not been injured."

[1] Hartford and N. H. R. R. Co. *v* Croswell, 5 Hill, 383; Troy and Rutland R. R. Co. *v.* Kerr, 17 Barb. 604; Macedon and Bristol Plank Road Co. *v.* Lapham, 18 id. 315; Kean *v.* Johnson and Central R. R. Co., 1 Stockton Ch. 401; N. O. J. and Great Northern R. R. Co. *v.* Harris, 27 Mississ., 536; Winter *v.* Muscogee R. R. Co., 11 Geo., 438, 453; Pacific R. R. *v.* Renshaw, 18 Missouri, 210; Banet *v.* Alton and Sangamon R. R. Co., 13 Ill., 504; Carlisle *v.* Terre Haute and Richmond R. R. Co., 6 Ind., 316; Sparrow *v.* Evansville and Crawfordsville R. R. Co., 7 id. 369; Chapman *v.* Mad River and Lake Erie R. R. Co., 5 Ohio State.

facturing corporation. Nor would there be any question about his discharge, if the charter provided for the construction of a railroad from New York to Boston, and it was so changed as to authorize the company instead thereof, to build one from New York to Washington, or from New York to Albany. On the other hand, if the amendment merely provided for different days for holding corporate meetings from those originally designated, or allowed the company to make a deviation at an intermediate point on its line, so as to shorten the distance and cheapen the expense of construction, the general termini and route and the original purpose of the enterprise remaining unchanged, and the same general line of travel and transportation being accommodated, there would be no good reason for exempting the subscriber, although by the change he might lose some incidental benefit. The general convenience also requires that there should be allowed more latitude of change in the charter of railroad companies, when accepted by them, which are empowered by the State to condemn private property for public uses, and in whose operations the community has a much greater interest than in the charter of private business corporations, which are clothed with no such high prerogatives, and in which the community have no such interest. Precisely what changes may be made in a railroad company without releasing the subscriber to its stock, cannot be determined by any general statement, as the decided cases will show.

In some early cases in Massachusetts, the sub-

scriber to the stock of a turnpike corporation was discharged from his obligation to pay his subscription where the directors had procured from the legislature an alteration of the charter changing the course of the turnpike.[1] So, in New Hampshire, where an individual had contracted to take a share in a corporation created for the purpose of making a river navigable, and empowered to hold real estate not exceeding six acres, and to collect a toll for forty years, not exceeding twelve per cent. per annum on the amount of money expended; and afterwards the legislature, upon the petition of the corporation but without the assent of the individual, authorized it to hold real estate to the amount of one hundred acres, and to collect a toll unlimited as to its amount and duration,—it was held that he was discharged from his contract, and not liable for any subsequent assessment on the share.[2] The

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[1] Locke *v.* Middlesex Turnpike Corp., 8 Mass. 268. By the court: "The plaintiffs rely on an express contract, and they are bound to prove it as they allege it. Here the proof is of an engagement to pay assessments for making a turnpike in a certain specified direction; and of the making a turnpike in a different direction. The defendant may truly say, *Non hæc in fœdera veni.* He was not bound by the application of the directors to the legislature for the alteration of the course of the road, nor by the consent of the corporation thereto. Much fraud might be put in practice under a contrary decision." Middlesex Turnpike Corp. *v.* Swan, 10 Mass. 384. But it was considered in these cases that the subscriber might still be subject to the corporate remedy of a sale of his shares, notwithstanding such an alteration. In the last case, it was decided that the subscriber was not bound by his promise, although after the amendment he had filled several offices in the corporation, and had as a director petitioned the legislature for such alteration; such acts amounting, at most, to concurrence as a corporator, and not as a subscriber.

[2] Union Locks and Canals *v* Towne, 1 N. H., 44.

principle of these cases has been adopted in Pennsylvania.[1] It has been applied in New York to railroad companies. Thus, a subscriber to the stock of the Hartford and New Haven Railroad Company, with those cities fixed by its charter for its termini, was exonerated from personal liability for calls, where the company procured from the legislature an amendment of its charter, authorizing it to purchase and hold such a number of steamboats, to be used in connection with its road, as it might deem expedient to an amount not exceeding $200,000, and for that purpose to increase its capital stock to that amount, and the amendment had been accepted by the stockholders without the assent of the subscriber in question. It was considered that no radical change or alteration in the charter could be made or allowed, by which new and additional objects were to be accomplished or responsibilities incurred by the company, so as to bind the individuals composing it, without their assent; and that in the case in hand, a new and very different enterprise had been superadded to the original undertaking, with then ecessary powers to carry it into effect, so as to preclude a recovery upon the subscription.[2] So also, the extension of the line of a turnpike, and the increase of its capital for that purpose to more than three times the original amount, was held to be such a radical and essential change

[1] Indiana and Ebensburgh Turnpike Co. *v.* Phillips, 2 Pen. & Watts, 184. But see Irvin *v.* Turnpike Co., 2 Pen. & Watts, 466; Gray *v.* Monongahela Nav. Co., 2 W. & S., 156.

[2] Hartford and New Haven R. R. Co. *v.* Croswell, 5 Hill, 383.

as to release the subscriber from his promise.[1] In Georgia, it was held where the original charter was amended so as to change the eastern terminus of the railroad, run it in a different direction, and connect it with another road, thereby shortening its length and making its rates of freight dependent on the action of another company, that the subscriber was released.[2] In Mississippi, where one railroad company, to the stock of which the subscription was made, by the votes of stockholders representing a majority of its shares accepted an amendatory act, authorizing it to assign all its rights, powers, privileges, immunities, and exemptions, as well as its stock subscribed, to another company, it was held that the charter was a contract between the State and the company, as well as between the company and the individual stockholders, of which the State could not impair the obligation; that the legislature had no power to confer on stockholders owning more than one half of the stock, authority to accept amendments of the charter making a radical change in the structure of the company; that such amendatory act and the transfer and assignment in pursuance thereof, were void; and that by virtue of such proceedings, the subscriber to the stock of the first company did not become a stockholder in the sec-

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[1] Macedon & Bristol Plank Road Co. *v.* Lapham, 18 Barb. 312.

[2] Winter *v.* Muscogee R. R. Co. 11 Geo. 438. But a stockholder in a company, whose stock has been forfeited, is not relieved from the payment of a note given by him for it, although after the forfeiture was declared, a material alteration was made in the charter without his assent. Mitchell *v.* Rome R. R. Co. 17 Geo. 574.

ond, and was not liable to the second for the amount subscribed; and as the transfer was void, he was not liable to it, although he had assented to the transfer, but still remained a stockholder in the first company.[1]

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[1] N. O. J. and Great Northern R. R. Co. 27 Missis. 517. The court regarded the amendment and alteration in pursuance thereof as void, and the subscriber as still liable to the original company. Smith, C. J.: "There can be no doubt, under the uniform decisions of the courts in this confederacy, that the acceptance of the amendatory act, in the manner it was averred to have been made, could not bind the stockholders who did not assent to it. But the question is not one of assent, as applied to the individual corporators, but one of power in the stockholders possessing a majority of the stock, to accept a legislative amendment which could produce a fundamental change in the stipulations of the charter. The amendatory act imposed no obligation on the company. It vested in the corporation no right which it did not possess under its charter. It amounted simply to a legislative permission to accept the amendment, if it should choose to do so, and could consistently with its charter-rights and obligations. No case has been brought to our attention, in which it was directly decided that the acceptance of an amendment of this character, by a majority of the corporators, was absolutely void as to the corporation itself. In all the cases we have examined, the decision turned upon the question of the individual consent of the party charged or affected by the alteration. Generally, an act performed without any authority whatever, is absolutely void. The principle applied to corporations is, that they possess only the powers which are specifically granted by the act of incorporation, and such as are necessary to carry into effect the powers expressly granted. 2 Kent, Com. 298. In this case it is not pretended that the stockholders representing a majority of the stock were expressly under the charter, vested with the power to accept of amendments thereto of the character of that under consideration; and it is impossible to conceive that it existed on the part of even a majority of the whole of the stockholders, as an implied right. Such a doctrine is repugnant to the principles of sound sense and common justice. When a person becomes a member of an incorporated company, by his subscription to the stock, he agrees to become bound by the terms of his contract, as defined in the charter of incorporation; he agrees to be bound by the acts of the corporation and its officers, performed within the scope of their charter powers; but upon no principle can it be held that he impliedly consents to any alteration which would work a radical change in the structure of the association, which might be voted or accepted by even a majority of the whole of the

What alterations in the charter and business of the company are a violation of the rights of a stockholder has been determined in cases where he has applied to a court of equity to enjoin the company and its officers from applying the corporate funds to the enterprise which the amendment assumed to authorize. Thus, where the plaintiff had subscribed and paid for shares in the capital stock of the Rutland and Burlington Railroad Company, which under its existing charter was authorized to build a railroad from Burlington, through the counties of Addison, Rutland, and Windsor, or Windham, to some point on the west bank of the Connecticut river, and a subsequent act of the legislature provided that the company might extend its road from its terminus in Burlington to Swanton in the county of Franklin, a distance of about thirty miles,—the change in the charter was held fundamental and in violation

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corporators, and thereby be subjected to burdens and obligations wholly foreign to the purposes and objects of the original charter. It is our opinion, therefore, that the act of acceptance was absolutely void for want of power on the part of the stockholders representing a majority of the stock to vote an acceptance of the amendatory act. It follows hence that the transfer and assignment were also void and ineffectual.

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"Upon the principle laid down in regard to the assignment, it is clear that the rights of neither party to it were in any wise affected. The act of transfer was void; the assignors parted with no right or immunity; the assignees acquired nothing. The defendant remained a stockholder in the company for whose stock he had subscribed, and as such was liable to the same extent after the attempted transfer as before the attempt was made. It is impossible to conceive that the assent of the defendant could bind him, unless his assent to the transfer rendered it effectual for the purposes intended, or unless, upon some consideration passing from the assignees to him outside of the transfer, he should be estopped from denying its validity."

of the rights of the plaintiff, and an injunction against the company and its directors was granted on his application, restraining them from applying the existing funds of the company or the income from the existing road, either directly or indirectly to the purpose of building said extension, or paying land damages and other expenses contingent upon building it; and also from using or pledging, directly or indirectly, the credit of the company in effecting the object of the extension; but leaving it at liberty to build the same with any new funds which it might see fit to obtain for that specific object.[1]

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[1] Stevens *v.* Rutland and Burlington R. R. Co., 1 Am. Law Reg. 154. Bennett, Chancellor,—"It was well conceded in the argument on the defence, that if the corporation had been about to proceed to a construction of the contemplated extension without the act of 1850, it would have been a proper case for an injunction. The only question which can be open to debate is, as to what shall be the effect of the act of 1850, and a subsequent adoption of the act by the corporation, upon the individual rights of a shareholder who does not assent to its adoption? If bound by it, there is no equity in this bill. It is, and must be admitted, that the legislature have no constitutional power, unless it be reserved in the grant, to change or alter an act of incorporation without consent, and thereby cast upon the company new and additional obligations, or take from them rights guaranteed under the original charter. And, indeed, this the legislature have not attempted to do. It is also equally true, that it is a part of the law of corporations, that they act according to the voice of the majority. But it is to be remembered, that this is not a suit in which the plaintiff seeks to protect himself in any *corporate* right, but in his own *individual* right, growing out of the fact of his having become a corporator, by his subscription and its payment, to the capital stock of the company. One of an aggregate corporation may contract with the company, as well as a third person; and the rights of the individual so contracting are no more distinct and independent in the one case, than in the other. The plaintiff by his subscription assumed to pay to the corporation, and only for the purpose specified in the charter, its amount according to the assessments; and there was at the same time a TRUST created, and an implied assumption on the part of the corporation to

The sale of the Elizabethtown and Somerville Railroad Company to the Somerville and Easton

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apply it to that object, and none other. The corporation also assumed upon themselves to account to this corporator for his share of the dividends, when this road should be completed and put in operation; and for his share of capital stock, though not *in numero*. The charter in this case, gives to the State the right to purchase out the road of the corporation after a given number of years, upon certain terms therein specified. The relation between each original shareholder and the corporation is the same. The obligation of the contract between the legislature and the corporation, after an acceptance of the charter, is no more sacred than that which is created between the corporation and the individual corporator. Does any one suppose the legislature could, without the consent of parties, absolve a corporator from liability on his subscription to the corporation, or modify it? and can they do the reverse of it? It is conceded that there is a class of alterations in a charter, which the corporation may obtain and adopt, that would not so essentially change the contract as to absolve the corporator from his subscription, or give him a right to complain in a court of justice in case he had previously paid it.

"Where the object of the modification or alteration of the charter is *auxiliary* to the original object of it, and designed to enable the corporation to carry into execution the very purpose of the original grant, with more facility and more beneficially than they otherwise could, the individual corporator can not complain; and I should apprehend it would make no difference with the rights of a corporation in such a case, though he could show that the charter as amended was less beneficial to the corporators than the original one would have been. The ground upon which such amendments bind the corporator, I deem to be his own consent. When he becomes a corporator by his signing for a portion of the capital stock, he in effect agrees to the by-laws, rules, and votes of the company, and there is an *implied* assent on his part with the corporation that they may apply for and adopt such amendments as are within the scope and designed to promote the execution of the original purpose; and he signs, and the corporation receive his subscription, subject to such implied contingency; and if we regard it in the nature of a *license* only, it would not alter the principle. Both parties having acted upon it, it would not be countermandable.

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"The consent or assent may, however, be *implied* in a class of cases, as has already been stated, where the amendment is not regarded as *fundamental*, and can be brought within the scope of the original purpose of the association; and this is going to the very verge of the powers of the corporation.

Railroad Company, and their union under the name of The Central Railroad Company of New Jersey,

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It is difficult, and would be unwise, to attempt to lay down any general rules to determine in what precise cases the assent of the corporator should be implied, and in what not. It is sufficient for the present purpose, to say that his assent can not be implied in a case like the present from a majority vote. Courts may differ, and doubtless will, in regard to what alterations shall be sufficient to constitute a fundamental change. Bnt in the present case, I think, on this point there can be but one opinion. The termini of the road, as fixed by the charter, are Burlington and some point on the west bank of Connecticut river, in the county of Windsor or Windham. The capital stock is one million of dollars, with a right in the corporation to increase it to an amount sufficient to complete said road, and furnish the necessary apparatus for conveyance. The supplementary act of 1850 purports to authorize the corporation within three years to construct and extend their railroad from the terminus in Burlington, to some point in Swanton, in the county of Franklin, a distance of about thirty miles; and the act provides that in the construction of the road, they shall have all the rights and privileges, and be subject to all the liabilities, contained in their original charter and the acts in addition to it.

"The franchise granted to this company was territorial; and an extension of the termini necessarily is an extension of the franchise. It cannot remain the same thing in substance, until it can be established that a part is equal to the whole. Besides, the company may increase the capital stock to such additional sum as shall be necessary to construct the extension.

"The statute of 1850 is little less in effect, if any thing, than an attempt to create in a summary manner, and by way of reference, a new corporation, and transfer all the old corporators to it. If all the corporators had assented to this transfer it was well enough. The change in the purpose was not more fundamental in the case from the 5th of Hill than in this. It is not necessary that the business should he changed in kind, to change the original purpose. If this is not a change in purpose, it would not be to extend the road in one direction to Canada line, and in the other to Massachusetts line, and there would be no limits to the control which the corporation might acquire over the individual corporators, and this, too, without their consent, except what arises from the confines of legislative authority.

"The change, then, in the charter being *fundamental*, and the corporation not being able to bind the plaintiff by a majority vote, what must be the result? If he had been sued for an assessment upon his stock, he might have claimed that he was absolved from all liability upon the acceptance of the amendment. And is not this reasonable? Shall it be said that the legislature and the corporation have power to embark this corporator in a

was held to infringe the rights of a stockholder in the former company and to entitle him to equitable relief.[1]

In England, injunctions have been granted, at the suit of a stockholder, against the company to restrain it from embarking in projects not authorized by its charter, and therefore unlawful; but when such projects have been sanctioned by Parliament, the shareholder is considered without remedy.[2] The absence of any supreme law in that country securing the inviolability of contracts, even from acts done under legislative authority, leaves a shareholder without remedy to prevent the company from diverting the corporate funds to purposes not originally contemplated. The English decisions on the point will be further discussed, in the chapter on Contracts.

There are other decisions, in which the amendments of the charter have been held not to be of that radical and fundamental character which will

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speculation to which he has never consented? If it can be done in one case, it can in another. But having paid his funds into the corporation, he has a right in chancery to compel a faithful performance of the *trust* by the corporation in conformity to the original charter, and to keep them within its purview. No one can suppose that upon the payment of his subscription the personal identity of the plaintiff was merged in the corporation, or that he ceased to have distinct and independent rights."

[1] Kean *v.* Johnson and Central R. R. Co., 1 Stockton Ch. 401; see the learned and full opinion of the master in chancery. See Chapman *v.* Mad River and Lake Erie R. R. Co., 5 Ohio State.

[2] Winch *v.* Birkenhead, &c. Junction R. Co., 13 Eng. L. and Eq. 506; Bagshaw *v.* Eastern Union R. Co., 7 Hare Ch. 114; Ware *v.* Grand Junction Water Works Co., 2 Rus. & My. 470; 13 Cond. Ch. 126; Coleman *v.* Eastern Counties R. Co., 10 Beavan, 1; Munt *v.* Shrewsbury and Chester R. Co., 3 Eng. L. and Eq. 144; Solomons *v.* Laing, 12 Beavan, 339.

relieve the subscriber.[1] Thus, the construction, by the Greenville and Columbia Railroad Company, of a branch road eleven miles long, was decided not to be such a material departure from the original enterprise, in comparison with its magnitude, as to discharge the subscriber.[2] Where the charter of the Alton and Sangamon Railroad Company, a corporation of the State of Illinois, authorized the construction of a railroad from Alton on the Mississippi River, by the way of Carlinville in Maconpin County, New Berlin in Sangamon County, to the city of Springfield in the County of Sangamon, and an amendatory act was procured by the company, authorizing it to change the location of its road so as to run the same directly from Carlinville to Springfield, whereby the line of the road was shortened about twelve miles, and the cost of construction considerably lessened, a subscriber who was largely interested in real estate near New Berlin, the value of which would have been much enhanced by the construction of the road according to the route originally provided in the charter, was still held liable for the payment of his subscription, although the road by the new route did not come within twelve miles of that place. It was considered that the alteration was beneficial to the company and to the community; and that notwithstanding a devia-

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[1] Penn. and Ohio Canal Co. *v.* Webb, 9 Ohio, 136; Clark *v.* Monongahela Nav. Co., 10 Watts, 364; Gray *v.* Monongahela Nav. Co., 2 W. & S., 156; Midland Great Western R. Co. *v.* Gordon, 16 M. & W., 804; London and Brighton R. Co. *v.* Wilson, 6 Bing. N. C., 135.

[2] Greenville and Columbia R. R. Co. *v.* Coleman, 5 Rieb. 118.

tion at an intermediate point, the general features of the enterprise remained unchanged, and the same line of travel and transportation would be accommodated.[1]

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[1] Banet *v.* Alton and Sangamon R. R. Co., 13 Ill., 504. After reviewing the authorities, Treat, C. J., said, "It follows from these authorities, that an alteration in a charter may be so extensive as to work a dissolution of the contract of subscription. An amendment which essentially changes the nature or objects of a corporation, will not be binding on the stockholders. A corporation formed for the purpose of constructing a railroad cannot be converted into a company to construct an improvement of a different character, without the consent of the corporators. A road intended to secure the advantages of a particular line of travel and transportation, cannot be so changed as to defeat that general object. The corporation must remain substantially the same, and be designed to accomplish the same general purposes and subserve the same general interests. But such amendments of the charter as may be considered useful to the public, and beneficial to the corporation, and which will not divert its property to new and different purposes, may be made without absolving the subscribers from their engagements. The straightening of the line of the road, the location of a building at a different place on a stream, or a deviation in the route from an intermediate point, will not have the effect to destroy or impair the contract between the corporation and the subscribers. We regard these conclusions as reasonable and just, and as well calculated to facilitate the construction of improvements, and promote the best interests of the public and of stockholders. The incidental benefits which a few subscribers may realize from a particular location, ought not to interfere with the general interests of the public and of the great mass of the corporators. These interests of the public and of the corporation may with propriety be consulted and encouraged, especially where the alteration will not operate to depreciate the value of the stock. A shareholder has no cause to complain of the loss of a mere incidental benefit, which formed no part of the consideration of his contract of subscription. The difficulties attending the construction of a public improvement may not be fully known when the charter is granted and the stock subscribed. The legislature possesses the power to provide a remedy, by authorizing the company to adopt a more feasible route, without obtaining the consent of the corporators. A few obstinate stockholders should not be permitted to deprive the public and the company of the advantages that will result from a superior and less expensive route. The subscribers are sufficiently protected against any invasion of their legitimate rights. The original location must be pursued, unless a change is sanctioned by the legislature. The alteration must be accepted by

In some of the States, as in Missouri, there is a strong tendency to disallow this defence in a suit on the subscription, on account of the public character of such corporations, which distinguishes them from joint-stock companies and ordinary business corporations, and to turn the subscriber over to a court of equity for his remedy, by injunction to restrain a misapplication of the corporate funds.[1]

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the managers of the company, before it becomes obligatory on the stockholders. And the latter will not even then be bound, if their interests are materially affected by the alteration; and in such case, they may not only avoid the payment of their subscriptions, but recover back such sums as they have advanced thereon.

The alteration in the present case is not of such a radical character as to exonerate the stockholders from the payment of their subscriptions. The general features and objects of the corporation remain unchanged. The termini of the road remain the same; the only change consisting in a deviation from an intermediate point. The work is still designed to accommodate the same line of travel and transportation, and promote the same general interests. The length of the road is reduced, and the cost of construction diminished. The change will be useful to the public, as the legislature has determined, and beneficial to the company, as the board of directors has decided; and the facts of the case clearly sustain both of these conclusions. The only injury that can accrue to any of the subscribers, will be the loss of some incidental benefit to their property; and that, as we have already seen, cannot be taken into consideration. If the charter had been so amended as to authorize the construction of a road from Alton to Vandalia or Shelbyville, or from Springfield to Beardstown or Peoria, instead of the one originally designated, the company would be committed to a new and difficult [different] enterprise; and the stockholders, might with much force and justice say, this is not the undertaking in which we engaged, and not the stock in which we agreed to invest our funds." Peoria and Oquawka R. R. Co. *v.* Elting, 17 Ill., 429.

[1] Pacific R. R. Co. *v.* Hughes, 22 Missouri, 291. Two judges concurred in the opinion; and Scott, J., dissented on the ground that there was a contract between the company and the subscriber, which had been violated by the changes. Leonard, J., delivering the opinion of the majority, said, "When an unincorporated joint-stock company is formed, the rights of the partners, not only as between themselves individually, but also between each member

Where the charter, or some prior statute applicable thereto, reserves to the legislature the power to

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and the whole body of the subscribers, are usually settled by the articles of association, or a deed of settlement. These articles, constituting the association, and regulating not only the powers of the majority, but also the rights of each stockholder, are the constitution of the society, and of course cannot be changed without the consent of every member; and therefore, if the company attempt to appropriate the funds to a purpose not authorized by the articles, or assume powers not conferred by the constitution of the company, the law will protect the minority by an injunction or a decree for a dissolution of the company, and an account and distribution of its effects, as the character of the act complained of may require. And it may be that the same law ought to prevail when a mere private company, charged with no public duties, and acting alone with a view to the interests of its members, acts under a charter of incorporation, upon the principle that the charter then stands as the constitution of the society in lieu of articles of association, and regulates the rights and duties both of the company and the stockholders, pursuant to their mutual agreement. Accordingly, there are cases in the books of proceedings against incorporated joint-stock companies, by individual members, to restrain the company from misapplying the corporate funds; and this relief may be extended even to a dissolution of the society, and an account and distributien of its effects, if the case requires it, upon the same principles that similar relief is administered in ordinary partnerships. But it must be observed that there is an admitted distinction between a company acting under mere articles of association and one acting under a charter of incorporation, in reference to the control of the majority over the constitution of the company. In the one case the articles are inviolable in every particular, no matter how minute, unless a power to alter is expressly given to the company; in the other, as the law authorizes the government to change the charter, with the assent of the majority, it may be said that there is an implied assent on the part of each stockholder to all such changes. It is insisted, however, that this implied assent does not extend to such fundamental changes as make the amended charter an entirely different enterprise; changing, for instance, a charter for a canal into one for a railroad; or a charter for a road to accommodate one line of travel into one for a road for the accommodation of an entirely different line; nor to changes that materially alter the constitution of the society, or greatly enlarge its powers.

"In England, however, where private property is, perhaps, as well protected as in our own country, no such limitation appears to be recognized in reference to this implied assent of all the stockholders to future changes in the constitution of the company, made by the government, with the consent of a majority of its members. Accordingly, Lord Brougham, in Ware *v.* Grand

alter or amend the charter, the company may, under the authority of the legislature, build branch roads,

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Junct. Wat. Co. (2 Russ. & Mylne, 470), refused to restrain a railroad company from applying to Parliament for an enlargement of its powers and for fundamental changes in its constitution, upon the ground that it was the right of the company to procure the changes, if they desired them; and that all who became stockholders did so with their eyes open to this power of the majority over the constitution of the society. We remark here, too, that a distinction seems to exist in the English courts between mere private corporations, acting exclusively for the benefit of their members, as banking and other similar companies, and railroad companies, that must be considered as acting partly with a view to the public interest, in consideration of which they obtain from the government the right of taking compulsorily the land of private individuals for the use of the road. (Ffooks *v.* The Lond. and S. W. Railroad Co. 19 Eng. Law and Eq. Rep. 11.)

"But however all this may be, and recognizing for the purposes of the present case the right of each stockholder to resist fundamental changes in the charter to his injury and against his consent, it seems to us that the American cases that have allowed this matter to be set up at law, as a defence to a suit for calls upon stock taken, have not been very well considered, are without any precedent in the English courts, are not warranted upon just legal principles, and cannot be carried out in practice without infinite mischief, not only to the public interests involved in all great works of this character, but also to the private rights of the other members of the company. If the dissenting member is released at law by the mere effect of these fundamental changes, it is because they have of themselves broken up, without any judicial sentence to that effect, the original association, on account of the inability or unfitness of the corporation, as now constituted, to execute the original purposes of the association. It is very evident, however, that whenever this question is to be discussed and settled, there are other parties interested in it besides the complaining stockholders and the corporate body. The members of this company have agreed with one another to construct a railroad out of a joint fund, to which each has contributed in proportion to the share he is to have in the work when completed; and it is not, and ought not to be in the power of any one or more of the partners, at pleasure, to break up this undertaking by withdrawing the fund already advanced, or, which is the same thing, by withholding what he has agreed to contribute; nor ought the courts of justice, by their judgments, to produce this result, unless in a case proper for such relief, and in which all the interests to be affected are represented before the court. Whether, however, the alleged changes in the constitution of this company, procured, or at least assented to, by a majority of the company, are of such a character as to warrant the in-

extend its line, increase its capital stock, or do such other things as the legislature may authorize in pursuance of such reserved power. The charter is accepted on that condition, and the assent of the stockholder in advance to such alterations and amendments as the legislature shall make in pursuance thereof, is an element of his contract. He can not, therefore, defend a suit on his subscription, on the ground that changes which were authorized by the legislature by virtue of the reservation, have been made in the charter and business of the company. Thus, where the Northern Railroad Company were empowered "to borrow money for the construction of their road, to an amount not exceeding one half the sum actually paid by its stockholders, and also to pay interest to stockholders for stock payments made by them beyond general calls, and payments by the whole stockholders

terference of the courts at the instance of a dissenting stockholder, by injunction against a probable misapplication of the funds, or by a decree for a dissolution of the original association, on account of the unfitness or inability of the corporation, as now constituted under the amended charter, to execute the original purpose of the partners, need not now be determined. In the view we take of the case, it is enough, yielding to this stockholder all the rights that he would have in a private joint-stock company, acting under voluntary articles of association,—without any power in the company to change the objects of association, or alter in the least the constitution of the society,—that his remedy for a wrong of the character of the present one is a suit in equity, in which all the parties in the matter to be litigated may be heard, and complete justice done to all upon the final determination of the case. And to this view of the subject we incline, notwithstanding some of the American cases to which we have referred hold quite a different doctrine, and allow fundamental changes in a charter to be used by a stockholder as a defence at law against subsequent calls upon stock previously subscribed, but with considerable difference of opinion as to the character and extent of the changes necessary to produce this result."

of the company, upon condition that the said company shall construct their road with the heavy iron rail, weighing at least fifty-six pounds to the lineal yard; and to construct one or more branch lines of railroad, to connect the line authorized by their charter, with one or more lines of railroad to be constructed in Canada East,"—it was held, that the charter being subject to amendment or repeal by a general law existing when it was given, and also itself containing such a clause, a subscriber was not absolved by such alteration, although obtained without his special assent at the time.[1] A subscriber to the stock of the Syracuse and Utica Railroad Company was held not absolved from his agreement where, there being a similar provision in the charter, as also in the general law applicable thereto, that company by a special act passed after the subscription was made, was authorized to subscribe to the capital stock of the Great Western Railroad, Canada West, the alteration being also deemed beneficial to the company.[2] So also, where the general law applicable to the charter, reserved the power to alter, repeal, or amend, a subscriber to a plank road company was held not released from his subscription where the company by virtue of a legislative act, without his consent, increased its capital stock

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[1] Northern R. R. Co. *v.* Miller, 10 Barb. 260. A contractor who has agreed to take stock in payment of his debt, cannot recover its par value when such an alteration has been made, which was authorized by the right of amendment. Moore *v.* Hudson River R. R. Co. 12 Barb. 156. See Noyes *v.* Spaulding, 27 Vt. (1 Williams), 420.

[2] White *v.* Utica and Syracuse R. R. Co. 14 Barb. 559

and applied its funds to the construction of a branch road not authorized by the original subscription.[1] Nor can a stockholder object to the building of a lateral road, where the building of such road is authorized by the charter, unless the one proposed was clearly not contemplated in the charter.[2] Where by the general law of Missouri, the charter of the Pacific Railroad Company, incorporated to construct a railroad from St. Louis to Jefferson City, and thence to some point in the western line of Van Buren county, was "subject to alteration, suspension, and repeal, in the discretion of the legislature," it was held that the passage of acts authorizing the Company to accept bonds which the State may issue for $2,000,000, and to dispose of the bonds and employ the money in the construction of the road to be mortgaged for the principal and interest of the bonds, and also granting to the Company authority to construct the road from St. Louis to any point in the western line of the State of Missouri, on any route the Company may select; and the acceptance of these amendments by a majority in interest and number of the stockholders,—did not absolve the subscriber from his obligation to pay for the shares taken by him.[3] Nor was he released where by virtue of such a reservation in a general law, the legislature increased the liabilities of stockholders by an act subsequent to the subscription.[4] So also, where

[1] Schenectady and Saratoga Plank Road Co. *v.* Thatcher, 1 Kernan, 102.

[2] Newhall *v.* Galena and Chicago Union R. R. Co. 14 Ill. 273.

[3] Pacific R. R. *v.* Renshaw, 18 Missouri, 208; Central Plank Road Co. *v.* Clemens, 16 id. 359; Pacific R. R. Co. *v.* Hughes, 22 id. 291.

[4] Meadow Dam Co. *v.* Gray, 30 Maine, 549.

after a public act had taken effect, authorizing the consolidation of two railroad companies, a party who subscribed to the stock of one of them after the passage of the act, was held liable for the subscription to the new company, whether the consolidation was with his personal knowledge or not.[1] A party may, by the terms of his subscription, consent to a future consolidation, which will not by reason of such consent release him from liability.[2] But, where a party not a stockholder promised to pay a railroad company a certain sum, notwithstanding such a reservation he is discharged from his promise by a material alteration.[3]

The doctrine that where the power of amendment has been reserved, a subscriber will not be released by alterations made in the charter, is subject to some limitation. It is implied in the decisions given under this head, that notwithstanding the reservation, such a radical change in the company as diverts it from its original purpose, or works a revolution of its character and objects, as by converting it into a manufacturing, mining, or banking corporation, would not bind a dissenting shareholder.[4] Perhaps the doctrine may be stated thus: that the reservation authorizes such alterations only as may be fairly judged to facilitate the original purpose of the charter of a road with the general route and termini appointed thereby; as, for instance, a consolidation

[1] Sparrow *v.* Evansville and Crawfordsville R. R. Co. 7 Ind. 369.

[2] Fisher *v.* Evansville and Crawfordsville R. R. Co. 7 Ind. 407; C. and Y. R. Co. *v.* Paterson, 18 C. B. 414, 86 E. C. L.

[3] Carlisle *v.* Terre Haute and Richmond R. R. Co. 6 Ind. 316.

[4] See cases cited on pp. 96, 97.

with other roads connecting with it, or the building of branch roads tributary thereto, or some convenient divergence from the line originally designated. It was held,—where the capital stock of a railroad company was reduced from $1,500,000 to $325,000, and its line shortened one half of the distance fixed in the original articles, and a transfer of a part of the remainder and a lease of the rest to another company during the continuance of the charter, were effected,—that these acts, when authorized by the legislature under its reservation of power, were not such essential changes as to exonerate the subscriber; although the judge delivering the opinion thought otherwise.[1]

Nor will the reservation have any effect where the conditions imposed by the legislature on the company, as precedent to the changes authorized in the amendment, are not fulfilled by it. If the power to make alterations is conferred on the company on condition that it shall obtain the consent in writing of persons owning two thirds of the stock, and the like consent of a majority of the inspectors, the exercise of the new power without a previous performance of those conditions, will exonerate the subscriber where the changes are essential and radical. Nor will the fact that he participated in the proceedings of the company to extend the road and increase its capital, and retained his stock after the extension had been made, and then sold the same for a valuable consideration, estop him from denying his liability to pay the sub-

[1] Troy and Rutland R. R. Co. *v* Kerr, 17 Barb. 581.

scription ; as it is to be presumed that he was in favor of legally effecting the alterations.[1]

Remedies of the Company for collecting Assessments upon the Shares.—The remedy of the company against a delinquent shareholder may be one or both of two different kinds,—by a sale of his share as forfeited on his default, or by a suit at common law upon the subscription. It is usually provided in the charter or by some general law, that in case of his default to pay his subscription, his share may be declared forfeited by the company and sold. This special remedy is not exclusive, but only cumulative ; and with great uniformity it is decided, that the shareholder is still liable on an express promise in his subscription.[2] The ex-

[1] Macedon and Bristol Plank Road Co. *v.* Lapham, 18 Barb. 312.

[2] Worcester Turnpike *v.* Willard, 5 Mass. 80 ; New Bedford and Bridgewater Turnpike Corp. *v.* Adams, 8 id. 138 ; Middlesex Turnpike Corp. *v.* Locke, 8 id. 268 ; Taunton and South Boston Turnpike Corp. *v.* Whiting, 10 id. 327 ; Middlesex Turnpike Corp. *v.* Swan, 10 id. 384 ; N. H. Central R. R. *v.* Johnson, 10 Foster, 390 ; Contoocook Valley R. R. Co. *v.* Barker, 32 N. H. 363 ; Connecticut and Passumpsic Rivers R. R. Co. *v.* Bailey, 24 Vt. 465 ; Meadow Dam Co. *v.* Gray, 30 Maine, 547, 552 ; Kennebec and Portland R. R. Co. *v.* Kendall, 31 id. 470 ; Hartford and N. H. R. R. Co. *v.* Kennedy, 12 Conn. 499 ; Goshen Turnpike Co. *v.* Hurtin, 9 Johns. 217 ; Herkimer Manuf. and Hydraulic Co. *v.* Small, 21 Wend. 273 ; Troy Turnpike and R. R. Co. *v.* M'Chesney, 21 id. 296 ; Northern R. R. Co. *v.* Miller, 10 Barb. 260 ; Troy and Rutland R. R. Co. *v.* Kerr, 17 Barb. 581 ; Fort Edward and Fort Miller Plank Road Co. *v.* Payne, 17 Barb. 567 ; Troy and Boston R. R. Co. *v.* Tibbitts, 18 id. 300 ; Ogdensburgh, Rome and Clayton R. R. Co. *v.* Frost, 21 id. 541 ; Klein *v.* Alton and Sangamon R. R. Co., 13 Ill. 514 ; Peoria and Oquawka R. R. Co. *v.* Elting, 17 Ill. 429 ; Stokes *v.* Lebanon and Sparta Turnpike Co., 6 Humph. 241 ; Greenville and Columbia R. R. Co. *v.* Cathcart, 4 Rich. 89 ; Beene *v.* Cahawba and Marion R. R. Co., 3 Ala. 660 ; Selma and Tennesee R. R. Co. *v.* Tipton, 5 id. 787 ; Allen *v.* Montgomery R. R. Co., 11 Ala. 450 ; Freeman *v.* Winchester, 9 S. & Marsh. 577 ; Instone *v.* Frankfort Bridge Co., 2

press promise is founded on a valid consideration, viz.: the interest which the subscriber is thereby to receive in the stock of the company and in its profits.[1] The common-law remedy of a suit on an express promise in the subscription, also exists where the charter declares that upon the failure to pay the calls, "the stock shall be forfeited to the company with the installments which may have been paid;"[2] and the same rule applies where the clause of forfeiture is inserted in the subscription, by the terms of which the non-payment is "on pain of forfeiting previous installments."[3]

It is a question involving much conflict of judicial opinion, whether where the statute remedy of forfeiture is given, and the subscriber has made no express promise to pay assessments in his subscription, and no personal liability to pay them is expressly imposed on him in the charter, they may be recovered of him in a suit upon an implied agreement to pay them. It was early decided in Massachusetts that in the absence of an express promise an action could not be maintained on a mere agreement to take shares. It was considered that a cor-

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Bibb, 577; River Nav. Co. *v.* Neal, 3 Hawks, 520; Canal Co. *v.* Sansom, 1 Binney, 70.

[1] Worcester Turnpike Co. *v.* Willard, 5 Mass. 86; Union Turnpike Co. *v.* Jenkins, 1 Caines, 381; Fort Edward and Fort Miller Plank Road Co. *v.* Payne, 17 Barb. 567; Hamilton and Deansville Plank Road Co. *v.* Rice, 7 Barb. 164; Kennebec and Portland R. R. Co. *v.* Palmer, 34 Maine, 366; Same *v.* Jarvis, 34 id. 360; Vt. Central R. R. Co. *v.* Clayes, 21 Vt. 30; Danbury and Norwalk R. R. Co. *v.* Wilson, 22 Conn. 435; Selma and Tennessee R. R. Co. *v.* Tipton, 5 Ala. 787; Leviston *v.* Junction R. R. Co., 7 Ind. 599.

[2] Selma and Tennessee R. R. Co. *v.* Tipton, 5 Ala. 787.

[3] Troy Turnpike and R. R. Co. *v.* M'Chesney, 21 Wend. 296.

poration has no power at common law to make assessments on the corporators for its use; that where this power is given by statute, the general rule applies that when a statute gives a new power, and at the same time provides the means of executing it, those who claim the power can execute it in no other way; and therefore where one simply engages to become the proprietor of a certain number of shares without promising to pay assessments, the only remedy of the corporation against him, when delinquent, is by a sale of his shares as provided by the statute.[1]

The decisions in Massachusetts have been followed in Maine; where it is decided that when the language of the charter or general statute which authorizes a collection of the assessments by a sale of the shares, does not in terms authorize the corporation to make a call personally upon the subscriber, or impose upon him a personal obligation to pay, there can be no recovery on the subscription unless it contains an express promise; although it might be different where no remedy by the sale of shares is provided. It was there held that a provision in the charter, authorizing the company "to make and collect such assessments on the shares" as "may be deemed expedient, in such manner as should be prescribed

[1] Worcester Turnpike Co. *v.* Willard, 5 Mass. 80; Andover and Medford Turnpike Corp. *v.* Gould, 6 id. 40; Same *v.* Hay, 7 id. 102; New Bedford and Bridgewater Turnpike Corp. *v.* Adams, 8 id. 138; Middlesex Turnpike Corp. *v.* Swan, 10 Mass. 384; Taunton and South Boston Turnpike Corp. *v.* Whitney, 10 id. 327; Franklin Glass Co. *v.* White, 14 id. 286; Salem Mill Dam Corp. *v.* Ropes, 6 Pick. 23; Newburyport Bridge *v.* Story, 6 id. 45; Cutler *v.* Middlesex Factory Co., 14 id. 483; Sedgwick on Statutory and Constitutional Law, ch. viii. p. 403.

in their by-laws," does not confer on the company the power, by a by-law, to create a personal liability of the stockholder to pay for his shares.[1] The same view is adopted in Vermont, where in the absence of an express promise the corporation is confined to the remedy prescribed in the charter or general statute. It is there decided that the subscription, in order to be sued upon, should contain something more than a promise to become a stockholder, or proprietor of a given number of shares; but if it contains in its language an acknowledgment of a personal liability thereon, and gives the right to enforce the obligation by the usual means of enforcing contracts at law, it is equivalent to an express promise, and gives a cumulative remedy to the corporation besides that of forfeiture prescribed by the charter. The subscriber was held liable, the subscription containing a clause "that the subscribers are held to pay to the amount which shall be assessed, and the company may enforce their claim thereto with expenses of collection by sale of the shares, or by suit, or by either of those means."[2] The doctrine which is established in Massachusetts also prevails in New Hampshire.[3]

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[1] Kennebec and Portland R. R. Co. *v.* Kendall, 31 Maine, 470; Jay Bridge Corp. *v.* Woodman, 31 id. 573. An agreement to take and *fill* a certain number of shares, is held equivalent to a promise to take and pay for them. Buckfield Branch R. R. Co. *v.* Irish, 39 Maine, 44; Penobscot and Kennebec R. R. Co. *v.* Dunn, 39 Maine, 587.

[2] Conn. and Pass. Rivers R. R. Co. *v.* Bailey, 24 Vt. 465.

[3] Franklin Glass Co. *v.* Alexander, 2 N. H. 380; N. H. Central R. R. *v* Johnson, 10 Foster, 390, 403. Eastman, J.: "Upon an examination of the authorities, and upon principle, we think the true rule to be this: that where a party makes an express promise to pay the assessments, he is

The doctrine of the decisions in Massachusetts is rejected in Connecticut, where it is decided, that the taking of stock in a corporation creates a contract, express or implied, to pay for it as provided in the charter, which may be enforced like an express promise; and that this construction is demanded by the objects of the corporation, which can be successfully carried into effect only by the payment of the amount subscribed. The transaction between it and the subscriber, is regarded in effect as an offer on its part to sell him shares at a given price, and an acceptance of the same by him, which by legal implication amounts to a promise, and creates an obligation on his part to pay the price agreed when lawfully required. The position that where a new power is given by a statute which also prescribes the mode of its execution, those who claim the power can exercise it in no other way, was regarded as inapplicable to beneficial statutes in civil cases. Regarding the power to sue as arising from the contract of

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answerable to the corporation upon such promise for all legal assessments, and may be compelled to its performance by action at law before resorting to a sale of the shares. It is a personal undertaking beyond the terms of the charter. Where, on the other hand, he only agrees to take a specified number of shares, without promising expressly to pay assessments, then resort must first be had to a sale of the shares to pay the assessments before an action at law can be maintained. His agreement simply to take the shares, is an agreement upon the faith of the charter; and by it alone is he to be governed, so far as his shares are to be affected. He takes them upon the conditions and law of the charter. They exist only by virtue of the charter, and are to be governed by the provisions therein contained. Where the subscription for shares contains a promise to pay the assessments, and the conditions of the subscription have been performed, there is no doubt that an action of assumpsit can be maintained in the first instance for all legal assessments."

subscription, this is not taken away by an affirmative statute giving an additional remedy.[1] The same view is adopted in New York, where the subscription is construed, even when a right of forfeiture is given to the company, to be a contract express or implied to pay for the stock, which may be enforced by suit as well as by the forfeiture.[2] Thus, it was held that a subscription to the capital stock of a railroad company, by which the subscriber agrees "to take the number of shares in said company" affixed to his name, is equivalent to an express promise to pay for the stock whenever the calls shall be made, or if not it raises an implied promise which is equally efficacious with an expressed one.[3] In Alabama, the company may recover upon the subscription, unless this remedy is expressly or impliedly inhibited by the charter.[4] In Illinois, the remedy by forfeiture, even without an express promise, seems not to be considered exclusive.[5]

This conflict of authorities arises from the circumstance that in one class of decisions the mere act of taking shares in the capital stock is regarded as a simple assent to become a member of the corpora-

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[1] Hartford and New Haven R. R. Co. *v.* Kennedy, 12 Conn. 499; Mann *v.* Cooke, 20 id. 178; Danbury and Norwalk R. R. Co. *v.* Wilson, 22 id. 435.

[2] Mann *v.* Currie, 2 Barb. 294; Sagory *v.* Dubois, 3 Sandf. Ch. 294; Northern R. R. Co. *v.* Miller, 10 Barb. 260; Troy and Boston R. R. Co. *v.* Tibbitts, 18 id. 300.

[3] Ogdensburgh, Rome, and Clayton R. R. Co. *v.* Frost, 21 Barb. 541. This doctrine was dissented from in Fort Miller and Fort Edward Plank Road Co. *v.* Payne, 17 Barb. 567, 577, by Hand, J.

[4] Beene *v.* Cahawba and Marion R. R. Co., 3 Ala. 660; Selma and Tennesee R. R. Co., 5 id. 787.

[5] Peoria and Oquawka R. R. Co. *v.* Elting, 17 Ill. 432.

tion, on such conditions as are expressly named in the charter and subscription, and therefore involving no personal liability, unless expressly stipulated; while in the other, it is construed to be a contract, involving from its nature personal liability to pay for the shares the value fixed upon them in the charter and subscription, as called for according to the provisions thereof. The former class regard the power of making assessments as a new and independent power of the corporation, existing only by virtue of express statute provision, and to be enforced only in the mode provided therein, when no express promise is superadded; while in the view of the latter, it is merely a means of fixing the period and amount of the payments to which the shareholder assented in his subscription. In some decisions of the latter class, it is remarked that personal liability might exist where the legislature had not provided any remedy by forfeiture and sale or otherwise.[1] The former view favors the shareholder, who, if he finds the corporation bids fair to be a losing concern, has the option to withdraw, forfeiting only what he has already paid, or nothing, if he has not paid the first installment; while the latter affords the greater protection to the public, as it secures a capital for the corporation, whereas if all the subscribers refused to pay for their shares, and allowed them to be sold, the stock would be fictitious, and the value of the shares nominal—and thus the public,

[1] See Andover and Medford Turnpike *v.* Gould, 6 Mass. 45; Kennebec and Portland R. R. Co. *v.* Kendall, 31 Maine, 470.

which dealt with the corporation on the faith of its capital stock, might be injuriously affected.

Even in those States in which an express promise is necessary to give a right of action, where the statute remedy of forfeiture is given, as already seen, the subscriber will be personally liable if the charter gives the alternative remedies of a suit and of a forfeiture.[1]

The right of the company to enforce a forforfeiture is not considered as a pledge or mortgage; and its exercise operates as a satisfaction of the contract, and excludes the company from suing upon the subscriptions when the shares sell below their par value, and the subscriber from recovering the surplus if they sell above their par value.[2] But a mere unsuccessful attempt to sell the shares will not deprive the company of the remedy by action.[3]

In some of the States, the right is given by statute recover, after the sale, the amount which the share sells for less than its par value.[4] Where the statute prescribes the terms on which shares may be sold for the payment of assessments, and the shareholder then held liable for the deficit in case they sell for less than the amount of the assessments, compliance with these terms is a condition precedent of the right

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[1] Kennebec and Portland R. R. Co. *v.* Kendall, 31 Maine, 470; Conn. and Pass. Rivers R. R. Co. 24 Vt. 465.

[2] Small *v.* Herkimer Manufac. and Hydraulic Co., 2 Comst., 330 (overruling 21 Wend. 273, and 2 Hill, 127); Northern R. R. Co. *v.* Miller, 10 Barb. 271, 277; Ogdensburg, Rome and Clayton R. R. Co. *v.* Frost, 21 id. 543, 544; Allen *v.* Montgomery R. R. Co., 11 Ala. 437.

[3] Instone *v.* Frankfort Bridge Co., 2 Bibb, 576.

[4] Danbury and Norwalk R. R. Co. *v.* Wilson, 22 Conn. 456; N. H. Central R. R. Co. *v.* Johnson, 10 Foster, 390.

of the company to recover the balance; and unless the terms are complied with, the sale is illegal and void. So it was held, where the notice of the sale of the shares did not purport to be given by the proper officer of the company, and the shares were sold at private sale, instead of at public auction as prescribed.[1]

Where the charter prescribes the manner of collecting the sums subscribed to the capital stock, no action can be maintained for the same, until the prerequisites have been complied with.[2]

Subscriptions by Municipal Corporations.—The validity of subscriptions by municipal corporations, as cities, towns, counties, to the stock of railroad companies, has been passed upon by the courts of several States. Their competency, by virtue of their ordinary powers and without special legislative authority, to contribute to such enterprises cannot be sustained.[3] No attempt on their part, without special legislative authority, to exercise such extraordinary powers, has as yet been the subject of judicial examination. The question has arisen upon the power of the legislature to enact a law authorizing municipal corporations to subscribe to the stock of railroad companies, and to raise money for that pur-

[1] Portland, Saco and Portsmouth R. R. Co. *v.* Graham, 11 Met., 1. In Massachusetts, the declaration under the statute need not aver that the defendant was a stockholder. Amherst and Belchertown R. R. Co. *v.* Watson, 4 Gray, 61; Troy and Greenfield R. R. Co. *v.* Newton, 1 id. 544.

[2] Banet *v.* Alton and Sangamon R. R. Co. 13 Ill. 504; Ross *v.* Lafayette and Indianapolis R. R. Co., 6 Indiana, 297; Danbury and Norwalk R. R. Co. *v.* Wilson, 22 Conn. 454.

[3] But in Talbot *v.* Dent, 9 B. Monroe, 537, it is said that a city might contribute its surplus funds for that purpose.

pose by the issue of bonds, or directly by taxation. The validity of their acts in such cases has depended on the power of the legislature under the state constitution to authorize them. Notwithstanding the policy of such subscriptions has been condemned by the courts, the power of the legislature, in the absence of special restrictions, to authorize them, has been generally sustained, not however, without dissenting opinions in several instances.[1] It is based on well-defined and familiar principles of constitutional law.

The legislature of a State, under the general grant of legislative power, may exercise all powers which are properly legislative, and not prohibited either expressly or by necessary implication, by the Constitution of the State or of the United States. Its authority has thus a double limitation. It cannot, in the first place, violate the fundamental law of the State or of the United States, either by usurping powers which the people have reserved to themselves, or which they have already granted to the federal government. In the second place, it cannot invade the co-ordinate departments of the state government, and, under color of making laws, usurp judicial functions. As a limitation of the latter class, its power to take the property of one citizen and give it to another, has been denied, as being a judicial function.[2] It is, however, entitled to a

[1] See opinions on the policy of such enterprises, Sharpless *v.* Mayor of Philadelphia, 21 Penn. State, 158, 159.

[2] Sharpless *v.* Mayor of Philadelphia, 21 Penn. State, 160, 161, 169; C. W. and Z. R. R. Co., 1 Ohio State, 86; Slack *v.* Maysville and Lexington R. R. Co., 13 B. Monroe, 22.

liberal construction of its powers, and its acts are not to be declared void by the judiciary, unless they are clearly in conflict with the prohibitions of the state or federal constitutions, either express or necessarily implied. The constitutionality of an act may be questionable; but it is contrary to all just principles of government for one department on doubtful implications to annul what another must be presumed to have established on settled conviction. The act may seem unwise and hostile to the general plan and spirit of the government; but it is not within the province of the judiciary to pass upon the policy of statutes, or their consistency with any political theory. These considerations, except so far as they may serve to indicate the intention of the legislature, and aid in the interpretation of its acts, are to be addressed to that department alone.[1]

The levying of taxes for the objects of the government is within the unquestionable scope of legislative power. The determination of what those objects shall be, and who shall bear the burden of the taxation, where there are no special constitutional limitations, belongs exclusively to the legislature. It may levy taxes for public improvements, as highways, bridges, turnpikes, aqueducts. It may levy taxes for local improvements; and it is within its discretion to say how large the community, interested therein, to be subjected to the tax, shall be,

[1] Satterlee *v.* Matthewson, 2 Peters, 380; Calder *v.* Bull, 3 Dall. 386; Bennett *v.* Bogg, 1 Baldwin, 74; Wellington *v.* Petitioners, 16 Pick. 95; Commonwealth *v.* M'Williams, 11 Penn. State, 61; Police Jury *v.* Succession of M'Donough, 8 La. An. 361; Sharpless *v.* Mayor of Philadelphia, 21 Penn. State, 147, 164.

whether the whole State, or a county, or a city, or only one of its wards, or merely a class of individuals immediately benefited thereby. As a municipal corporation is a part of the government, its powers, in the absence of constitutional restrictions, may be abridged or enlarged by the legislature, and it may be authorized by that body to levy taxes for such purposes upon the property and persons within its limits.[1] And it is no objection to the validity of the tax, that private individuals have already become personally liable for the improvements.[2] The power of taxation may be abused, both in the objects for which, and the persons on whom it is exercised in a given case; but the only remedy is with the people, who can change the legislature. It is, from its nature, unlimited in its extent, as the exigencies of the government cannot be prescribed in advance.[3] As was well said by the Court of Appeals of New York, "It must be conceded that the power of taxation and of apportioning taxation, or of assigning to each individual his share of the burthen, is vested exclusively in the legislature, unless this power is limited or restrained by some constitutional provision. The power of taxing, and the power of apportioning taxation, are identical and inseparable. Taxes cannot

[1] Norwich *v.* County Commissioners of Hampshire, 13 Pick. 60; Shitz *v.* Berks, 6 Barb. 80; Cheaney *v.* Hooser, 9 B. Monroe, 330; People *v.* Mayor, &c., of Brooklyn, 4 Comst. 419; Nichols *v.* City of Bridgeport, 23 Conn. 189; Moale *v.* Mayor, &c., of Baltimore, 5 Maryland, 314; Commonwealth *v.* M'Williams, 11 Penn. State, 61; Williams *v.* Cammack, 27 Mississ. 209; Williams *v.* Detroit, 2 Mich. (Gibbs) 560.

[2] Thomas *v.* Leland, 24 Wend. 65; Shaw *v.* Dennis, 5 Gilman, 405.

[3] M'Culloch *v.* Maryland, 4 Wheat. 428, 430; Providence Bank *v.* Billings, 4 Peters, 514, 561–563.

be laid without apportionment; and the power of apportionment is therefore unlimited, unless it be restrained as a part of the power of taxation."[1]

The provision of the U. S. Constitution, adopted in most of the States, "Nor shall private property be taken for public use without just compensation," is not in conflict with the taxing power. This power has been considered as one entirely independent, and not contemplated in the constitutional prohibition of this clause.[2] But if taxing property is to be considered as *taking* it in the sense of this clause, the tax-payer receives his compensation as a participator of the general benefit derived therefrom. In respect to the mode of compensation, the right of eminent domain differs from that of taxation. The payment of a tax is one's contribution of his share of the public burthen; and it would be absurd to refund it to him in money after it has been collected. But when his property is taken in the exercise of the right of eminent domain, he contributes beyond his share of the public burthen, and is entitled to special compensation.[3]

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[1] People *v.* Mayor, &c., of Brooklyn, 4 Comst. 426, 427.

[2] City of Bridgeport *v.* Housatonic R. R. Co. 15 Conn. 475; Sharpless *v.* Mayor of Philadelphia, 21 Penn. State, 166, 167; Williams *v.* Cammack, 27 Missis. 209; Williams *v.* Detroit, 2 Mich. (Gibbs) 560.

[3] People *v.* Mayor, &c., of Brooklyn, 4 Comst. 419, 422. In this case the constitutionality of an act, authorizing a municipal corporation to assess the expense of grading and improving streets upon the owners and occupants of lands benefited by the improvement in proportion to the amount of such benefit, was in question. Ruggles, J.: "Private property may be constitutionally taken for public use in two modes; that is to say, by *taxation* and by right of *eminent domain*. These are rights which the people collectively retain over the property of individuals, to resume such portions of it as may be necessary for public use. The right of taxation and the right of eminent

Cases may be supposed where this clause of the constitution might be successfully invoked to arrest a gross abuse of the taxing power, as where the community taxed could have no possible interest in the expenditures, and derive no possible benefit from them. If, also, the legislature imposed a tax on one town to defray the municipal expenses of another, this might well be said not to be within the general grant of legislative power. To justify the interposition of the judiciary, however, in declaring a law enacted as a tax-law void, it must be for a purpose in which the community taxed has palpably no interest,—in a case where it is apparent that a

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domain rest substantially on the same foundation. Compensation is made when private property is taken in either way. Money is property. Taxation takes it for public use; and the tax-payer receives, or is supposed to receive his just compensation in the protection which government affords to his life, liberty, and property, and in the increase of the value of his possessions by the use to which the government applies the money raised by the tax. When private property is taken by right of eminent domain, special compensation is made, for the reason hereafter stated.

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"Taxation exacts money or services from individuals, as and for their respective shares of contribution to any public burthen. Private property taken for public use by right of eminent domain, is taken, not as the owner's share of contribution to a public burthen, but as so much beyond his share. Special compensation is, therefore, to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty, and creates no obligation to repay, otherwise than in the proper application of the tax. Taxation operates upon a community, or upon a class of persons in a community, and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals. Keeping these distinctions in mind, it will never be difficult to determine which of the two powers is exerted in any given case." See C. W. & Z. R. R. Co. *v.* Com'rs of Clinton County, 1 Ohio State, 101.

burden is imposed for the benefit of others, and where it would be so pronounced at first blush.[1] But this principle does not require that the public improvement for which a community may be rightfully taxed, shall lie entirely within its local limits. If it may fairly be supposed to be tributary in a special manner to the interests of the community, by facilitating its commerce or otherwise, it is a lawful subject of local taxation.[2]

Railroads are modern inventions; but they come legitimately within the designation of public improvements, designed to promote the general convenience and prosperity by furnishing means of internal communication. As such, the State may construct them itself, and having the choice of means may authorize and employ a private company to construct them, or uniting with it in the work contribute to its capital stock, and raise money for that purpose by taxation on the local communities specially interested therein. The legislature, having the control of subordinate municipal organizations, and the power to enlarge or abridge their powers, may make them its instruments in carrying out this object, and may require or authorize them to make

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[1] Cheaney *v.* Hooser, 9 B. Monroe, 341—346; Talbot *v.* Dent, 9 id. 526; Slack *v.* Maysville and Lexington R. R. Co., 13 id. 31—33; Sharpless *v.* Mayor of Philadelphia, 21 Penn. State, 168.

[2] Talbot *v.* Dent. 9 B. Monroe, 535, 538; Police Jury *v.* Succession of M'Donough, 8 La An. 341; Sharpless *v.* Mayor of Philadelphia, 21 Penn. State, 171; Goddin *v.* Crump, 8 Leigh, 155; C. W. and L. R. R. Co. *v.* Com. of Clinton County, 1 Ohio State, 98; Nichol *v.* Mayor, &c. Nashville, 9 Humph. 252.

the subscription and to levy taxes, and issue bonds to meet the assessments thereon.[1]

Upon these considerations municipal corporations, as towns, cities, and counties, have been held authorized under the State constitution, when acting by legislative authority, to subscribe to the stock of railroad companies, and for the purpose of raising money to meet the subscription, to levy taxes on the persons and property within their limits in the States of Connecticut,[2] Virginia,[3] Pennsylvania,[4] Ohio,[5] Kentucky,[6] Tennessee,[7] Mississippi,[8] Missouri,[9] Louisiana,[10] Florida;[11] and recognized in Illinois.[12]

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[1] C. W. and Z. R. R. Co. *v.* Com. of Clinton County, 1 Ohio State, 95–97; Slack *v.* Maysville and Lexington R. R. Co., 13 B. Monroe, 22; Louisville and Nashville R. R. Co. *v.* County Court of Davidson, 1 Sneed, 662–667; Sharpless *v.* Mayor of Philadelphia, 21 Penn. State, 169.

[2] City of Bridgeport *v.* Housatonic R. R. Co., 15 Conn. 475.

[3] Goddin *v.* Crump, 8 Leigh, 120, one judge dissenting.

[4] Sharpless *v.* Mayor of Philadelphia, 21 Penn. State, 147, two judges dissenting; Moers *v.* City of Reading, id. 188, two judges dissenting.

[5] C. W. and Z. R. R. Co. *v.* Commissioners of Clinton County, 1 Ohio State, 77; Steubenville and Indiana R. R. Co. *v.* Trustees of North Township, id. 105; Griffith *v.* Commissioners of Crawford County, 20 Ohio, 622.

[6] Talbot *v.* Dent, 9 B. Monroe, 526; Slack *v.* Maysville and Lexington R. R. Co., 13 id. 1, Hise, C. J., dissenting; See Cheaney *v.* Hooser, 9 id. 230; Justices of Clarke County Court *v.* Paris, Winchester, and Kentucky River Turnpike Co., 11 id. 143.

[7] Nichol *v.* Mayor, &c. Nashville, 9 Humph. 252; Louisville and Nashville R. R. Co. *v.* County of Davidson, 1 Sneed, 637.

[8] Strickland *v.* Mississippi R. R. Co., cited 27 Missis. 209, 224.

[9] City of St. Louis and County of St. Louis *v.* Alexander, 23 Missouri, 483.

[10] Police Jury *v.* Succession of M'Donough, 8 La An. 341.

[11] Cotton *v.* County Commissioners of Leon Co., 6 Florida, 610, one judge dissenting.

[12] Ryder *v.* Alton and Sangamon R. R. Co., 13 Ill. 516. There is a newspaper report of the case of the Ohio and Mississippi R. R. Co. *v.* City of Aurora, decided in Indiana by Perkins, J., affirming the constitutionality of

The statutes providing for municipal subscriptions, have in some instances authorized the corporate

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an act authorizing a municipal corporation to subscribe to the stock of a railroad company.

There is also a newspaper report of a recent decision of M'Lean, J., in the Circuit Court of the United States, in Wallace *v.* Commissioners of Knox County, holding that prior to the present Constitution of Indiana, adopted in 1851, an act of the legislature of that State authorizing a municipal subscription to the stock of the Ohio and Mississippi R. R. Co. was constitutional, and that the new Constitution, adopted since the subscription was made, prohibiting municipal subscriptions, does not affect bonds with coupons issued by the company after it took effect, to pay for the stock subscribed for before its taking effect.

In Sharpless *v.* Mayor of Philadelphia, 21 Penn. State, 147, various provisions of the constitution of Pennsylvania for the protection of private rights were appealed to by a tax-payer of Philadelphia, seeking to enjoin the authorities of the city from making subscriptions to the stock of railroad companies in pursuance of a statute of Pennsylvania. The points held by the court were thus recapitulated by Black, C. J., at the close of his opinion:—

1. In determining whether an act of the legislature is constitutional or not, we must look to the body of the constitution itself for reasons. The general principles of justice, liberty, and right, not contained or expressed in that instrument, are not proper elements of a judicial decision upon it. 2. If such act be within the general grant of legislative power, that is, if it be in its character and essence a law, and if it be not forbidden expressly or impliedly, either by the state or federal constitution, it is valid. 3. To make it void, it must be clearly not an exercise of legislative authority, or else be forbidden so plainly as to leave the case free from all doubt. 4. An act of Assembly, authorizing a subscription by a city to the stock of a railroad corporation is not forbidden by art. 1, § xiii. of the state constitution; that section not being a restriction upon the legislative authority of the two Houses, but a bestowal of privileges upon the separate branches. 5. Such an act does not impair the obligation of any existing contract; nor does it attempt the impossibility of creating a contract, but merely authorizes two corporations to make one if they shall see proper. 6. This is not such an injury to the plaintiffs' lands, goods, or persons that they are entitled to a judicial remedy for it, agreeably to sect. xi. of art. 9. It is no injury at all, except on the gratuitous assumption that it is forbidden in some other part of the constitution. 7. It does not violate the right of acquiring, possessing, and protecting property, secured by sect. 1 of art. 9. The right of property is not so absolute but that it may be taxed for the public benefit. 8. This is

authorities to make them in their own discretion; and in others have required them to submit the

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not a taking of private property for public use without compensation, contrary to sect. 10 of art. 9. When property is not seized, and directly appropriated to public use, though it be subjected in the hands of the owner to greater burdens than it was before, it is not *taken*. 9. It cannot be said that the plaintiffs will be deprived of their property in violation of sect. ix. of art. 9. The settled meaning of the word *deprive*, as there used, is the same as that of the word *take* in sect. x. 10. An act of Assembly to authorize the taking of private property for private use would be unconstitutional, because it would not be legislation, but a mere decree between private parties. But this is no taking in any sense, for any purposes, or for any uses. 11. The plaintiffs have no ground of complaint against the acts of Assembly now in question, except because they authorize the creation of a public debt, of which they may be required hereafter to pay a part in the shape of taxes. By taxation alone can any harm ever come to them. 12. If it be within the scope of legislative power, with the consent of the local authorities, to permit the assessment of a local tax for the purposes of assisting the corporation to build a railroad bearing to the tax-payers the relation which these railroads do, then the laws complained of are unobjectionable. 13. Taxation is a legislative right and duty, which must be exercised by the General Assembly, or under the authority of laws passed by them. 14. The power of the Assembly with reference to taxation, is limited only by their discretion. For the abuse of it, members are accountable to nobody but their constituents. 15. By taxation is meant a certain mode of raising revenue, for a public purpose in which the community that pays it has an interest. The right of the State to lay taxes has no greater extent than this. 16. An act of the legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest, would not be a law; but a sentence commanding the periodical payment of a certain sum by one portion or class of people to another. The power to make such order is not legislative, but judicial, and was not given to the Assembly by the general grant of legislative authority. 17. But to make a tax-law unconstitutional on this ground, it must be apparent at first blush that the community can have no possible interest in the purpose to which their money is to be applied. And this is more especially true if it be a local tax, and if the local authorities have themselves laid the tax in pursuance of an act of the Assembly. 18. If, therefore, the making of a railroad be a mere private affair, or if the people of Philadelphia have manifestly no interest in the railroads which run to and towards the city from Easton and from Wheeling, then these laws are unconstitutional. 19. But railroads are not private affairs.

question to a vote of the citizens, and if a majority of votes should be given for the proposed subscription, to make it. Subscriptions made in this last manner, have been contested on the ground that they involve an unconstitutional delegation of legislative power by the department with which the power to decide the question is placed. The legis-

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They are public improvements, and it is the right and duty of the State to advance the commerce and promote the welfare of the people, by making or causing them to be made at the public expense. 20. If the State declines to make a desirable public improvement, she may permit it to be done by a company; and the fact that it is done by a private corporation, does not take away its character as a public work. 21. The right of the company by which it is made, to be compensated for the expense of constructing it, by taking tolls for its use, though it gives the corporation an interest in it, does not extinguish the interest of the public, nor make the work a private one; because, to say nothing of other advantages, the public can pay the tolls and still carry and travel on it very much cheaper than without it. 22. The State may therefore rightfully aid in the execution of such public works, by delegating to the corporation the right of eminent domain as she always does, or by an exertion of the taxing-power as she has done very often. 23. The right of the legislature, with the consent of the local authorities to tax a particular city for a local improvement, is as clear as the right to lay a general tax for any purpose whatsoever. 24. The State having the constitutional power to create a State debt by a subscription, on behalf of the whole people, to the stock of a private corporation engaged in making a public work, it follows from what has been before said that she may authorize a city or district to do the same thing, provided such city or district has a special interest in the work to be so aided. 25. This is not a case in which we can determine, as a matter of law, that the city has no interest in the proposed railroad. That this is true as a matter of fact, has not even been asserted in the argument. 26. The legislature and the councils have decided that the city has an interest large enough to justify the subscription; we cannot gainsay this without declaring all interest to be flatly impossible, and to do that would be absurd. 27. Finally, the authorities of the city, in accordance with the charter, and with certain laws supplementary thereto, are about to create a public debt for a public purpose in which the city has an interest. It will be as valid and binding as if it had been legally contracted to accomplish any other public purpose for the benefit of the city."

lature, it is admitted, cannot delegate legislative power to any other body, not even to the people themselves, from whom it emanated. But it may grant authority, as well as give commands; and acts done under its authority are as valid as if done in obedience to its commands. The enactment of a statute whose complete execution and application to the subject-matter is, by its provisions, made to depend on the assent of some other body, is not a delegation of legislative power. The power to make the law is not conferred, but only a discretion as to its execution, to be exercised under the law. So far as the statute confers authority and discretion, it is as obligatory from the first as the legislature can make it. Although its practical efficiency depends on the act of some other body or individual, still, it is not derived from that discretion, but only from the will of the people.[1] Legislation of this class occurs wherever a charter is given or powers are conferred on persons or bodies, which may be exercised or not in their discretion. If the legislature may thus consult the judgment and wishes of individuals, or of private corporations, there is no valid reason why it may not consult the will of the citizens of a district, who are to be specially affected by the proposed act. On these grounds, acts of the legislature requiring the question of a municipal subscription, to the stock of a railroad corporation, to be submitted to the citizens of the county, city, or town, as the case may be, and authorizing and

[1] See Slack *v.* Maysville and Lexington R. R. Co. 13 B. Monroe, 22–26.

requiring the corporate authorities, if the same be approved by a majority of votes, to make the subscription, and to levy taxes or issue bonds to meet the same, have been generally sustained.[1]

In New York, municipal subscriptions to railroad companies have been held unconstitutional in the Monroe Circuit of the Supreme Court. The common council of the city of Rochester was authorized by an act of the legislature to borrow, on the faith and credit of the city, three hundred thousand dollars, to execute bonds therefor under their corporate seal, and invest the money thus raised in the stock of the Genesee Valley Railroad Company, by a subscription to or a purchase of such stock, and to collect by tax upon the real and personal estate of the city, any sums necessary to defray the interest upon the bonds after the application of the dividends to that purpose. It was also declared in the act that the sections conferring the powers aforesaid, and prescribing the mode of their execution, should not take effect until they should have been submitted to the electors of the city, at an election to be held as in the act prescribed. The act was held uncon-

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[1] Talbot *v.* Dent, 9 B. Monroe, 526; Slack *v.* Maysville and Lexington, R. R. Co. 13 id. 22–29; Moers *v.* City of Reading, 21 Penn. State, 188; C. W. and Z. R. R. Co. *v.* Com'rs of Clinton Co. 21 Ohio, 77; Police Jury *v.* Succession of M'Donough, 8 La. Ann. 341; Cotton *v.* County Com'rs of Leon Co. 6 Florida, 610; Louisville and Nashville R. R. Co. *v.* County Court of Davidson, 1 Sneed (Tenn.) 637; City of St. Louis and County of St. Louis *v.* Alexander, 23 Missouri, 483. These cases were distinguished from Rice *v.* Foster, 4 Harring. 479; Parthe *v.* Commonwealth, 6 Barr, 507. See Commonwealth *v.* Quarter Sessions, 8 Barr, 391; Commonwealth *v.* Painter, 10 id. 214.

stitutional on these grounds: 1. The power of taxation, in the absence of any express authority or limitation in the constitution, was considered to be limited to the public necessities, and when exercised exclusively over the people of a city or other municipal organization, either directly by the legislature, or indirectly by the municipal authorities, is confined to such local purposes as are directly incident to its government and the exercise of its political powers. Within this class of legitimate purposes of local taxation, railroads were held not to be included. 2. The constitution of the State (Art. 8, § 9), enjoins on the legislature to provide for the restriction of the power of cities and villages to levy taxes, borrow money, contract debts, and loan their credit. This provision was held, by implication, to prevent the legislature from enlarging the ordinary powers of such municipal corporations; and subscriptions for such projects as railroads were not within those ordinary powers. 3. The act was further held unconstitutional, as a delegation of the sovereign power of legislation for the reason that the fact of its becoming a law was made to depend on the result of a popular vote.[1]

[1] Clarke *v.* City of Rochester, Am. Law Register, March, 1857, p. 287; 13 How. Pr. Rep. 204. On the last point, the court said, "The vote of the city, as provided for by the act, was not to advise or control the Common Council, or the exercise of their discretion in the matter of subscribing for the stock and issuing the city bonds after the law had taken effect, but to decide whether the act vesting the discretion in the council, should become a law or not, which is the very case decided in Barto *v.* Himrod, 4 Selden, 488. It would have been different had the act of the legislature vested the power in the city government, but restricted the common council in its exercise, and made its exercise to depend upon the contingency of a favorable

The opinion of the judge is unsatisfactory, especially on the first two points, and is open to the charge of declaring a law unconstitutional on doubtful implications. It is the opinion of a single judge, and as yet wants the confirmation of the Supreme Court sitting at general term, and of the Court of Appeals. The judgment usurps a legislative function, in deciding what, according to the views of the judge, are proper matters for local taxation; and assumes, in violation of the settled principles which are to govern the judiciary in pronouncing on the validity of the acts of a co-ordinate department of the government, that because the constitution has enjoined on the legislature to restrict the power of municipal corporations to levy taxes, borrow money, and contract debts, it has therefore prohibited that body from conferring on them powers which in the view of the court are not ordinary powers.[1]

The construction of a railroad by a company, which may advance the interests and prosperity of a municipal corporation in a special manner, is a "county and corporation purpose," within the meaning of a clause in the constitution of Tennessee and of Florida, which gives to the legislature power to authorize the several counties and incorporated

expression by the electors of the city; but the question submitted was, whether the power should be conferred upon the city council to act in the premises, which rendered the law unconstitutional and void." The plaintiff, who had agreed to purchase the stock subscribed by the city, and was to receive its bonds, was allowed to recover back from the city the amount he had paid it under the contract, which was declared absolutely void.

[1] Since the text was prepared, this judgment has been reversed by the General Term of the Supreme Court, the law being declared constitutional, and the bonds valid.

towns to impose taxes for "county and corporation purposes," so that it may authorize them to impose taxes for such a project.[1]

A law authorizing the subscription by a municipal corporation to the stock of a railroad company, is not unconstitutional, because it provides that a tax-payer shall be entitled to his *pro rata* share of the stock, and to have a certificate therefor when he shall pay a certain amount of tax towards it. The provision is not open to the objection that it makes him a stockholder without his consent. The privilege it extends is not a burden, but a benefit, of which he has no reason to complain.[2]

The provisions of the act authorizing a municipal corporation to subscribe for shares in the stock of a railroad company, and to issue its bonds in payment thereof, must be complied with; and if not followed, the bonds will be void in the hands of the company. Thus, where the amount of the subscription was required by the act to be first designated, advised, and recommended by the grand jury of the county to its commissioners, who were themselves to make the subscription, and the grand jury merely recommended "an amount not exceeding $150,000," without fixing it precisely, the amount of the subscription was held not to be sufficiently designated by the grand jury, in compliance with the pro-

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[1] Nichol *v.* Nashville, 9 Humph. 252; Cotton *v.* County Com'rs of Leon Co. 6 Florida, 610.

[2] Talbot *v.* Dent, 9 B. Monroe, 526; Slack *v.* Maysville and Lexington R. R. Co. 13 id. 1; Police Jury *v.* Succession of M'Donough, 8 La. An. 341, 360; Cotton *v.* County Com'rs of Leon Co. 6 Florida, 611.

visions of the act, and an injunction was granted against the railroad company, restraining it from issuing and paying out any of the bonds of the county in its possession, issued under the act, and directing that the same be given up and canceled.[1]

Where a county court having the power to make the subscription, exercises the power, it is held in Kentucky that it is not competent for a subsequent county court to set it aside.[2]

The railroad company may enforce its rights against municipal officers, who refuse to comply with the requirements of the statute authorizing the subscription, by the writ of mandamus.[3]

Where the municipal corporation has made a subscription without legislative authority, to the stock of a railroad company, it may be rendered valid by an act of the legislature confirming it.[4]

The oppressive burdens occasioned by municipal

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[1] Mercer County *v.* Pittsburgh and Erie R. R. Co. 27 Penn. State, 390. The question as to the validity of the bonds in the hands of *bona fide* holders, was not passed upon. It was further held in this case that where the act authorizing the subscription provided that the acceptance of its provisions by the company should also be deemed an acceptance of another act imposing certain restrictions upon it, and the latter act was repealed after the recommendation of the grand jury, and before the acceptance of the subscription by the company, the right to subscribe under the recommendation ceased, and no subsequent acceptance by the company, or subscription by the commissioners, was binding on the county.

[2] Justices of Clarke *v.* P. W. and K. River Turnpike Co. 11 B. Monroe, 147.

[3] C. W. and L. R. R. Co. *v.* Com'rs of Clinton Co. 1 Ohio State, 77; Justices of Clarke *v.* P. W. & K. River Turnpike Co. 11 B. Monroe, 154; Louisville and Nashville R. R. Co. *v.* County Court of Davidson, 1 Sneed (Tenn.) 637.

[4] City of Bridgeport *v.* Housatonic R. R. Co. 15 Conn. 475.

subscriptions to the stock of railroad companies have induced constitutional restrictions upon their imposition in some of the States. Thus, by the new constitution of Ohio, sec. 6th, art. 8th, it is provided that "The General Assembly shall never authorize any county, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint-stock company, corporation, or association whatever; or to raise money for, or loan its credit to, or in aid of, any such company, corporation, or association." This provision has been held to apply to future legislation only, and not to impair the authority of a county to subscribe for the capital stock of a railroad company which had been granted by a law existing when the new constitution went into operation; the power of the legislature to grant the authority under the old constitution being unquestioned. It was also provided in sec. 6th, art. 12th, that "The State shall never contract any debt for the purpose of internal improvement;" and other restrictions were made on the power of the State to contract debts. These restrictions were held to operate on the State, but not upon counties and municipal organizations acting under authority of the State.[1]

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[1] Thompson *v.* Kelly, 2 Ohio State, 647; Cass *v.* Dillon, 2 id. 607. Two judges dissenting,—1. Because laws which could not be enacted under the new constitution, although existing when it was made, and valid under the old constitution, are void under the new. 2. Because restrictions on contracting debts apply not only to the State, as an ideal abstraction unconnected with its citizens and soil, but the State also as composed of its people and territorial organizations of towns, cities, and counties of which it is made.

The same view has governed the Court of Appeals of Kentucky, which considered the restrictive provisions in the new constitution of that State as a restriction merely on the future exercise of the power, and distinguished between the debts of the State as a distinct corporate body, and those of the municipal organizations under it.[1]

Distribution of Shares.—Discretionary power is sometimes vested in commissioners, in case more than the fixed amount is subscribed for, to distribute the stock among subscribers. When exercised in good faith, it is not subject to judicial control. The commissioners may allot it to some subscribers to the entire exclusion of others, or they may apportion it in large amounts to themselves. It is not a fraud for one person to subscribe for stock in the name of another; but it is a fraud upon the law and the commissioners to do it secretly for the purpose of misleading the commissioners in their distribution of the stock. The legal title in such a case, as between the parties, is vested in the nominal subscriber, and the remedy of *bona fide* subscribers is in equity to reach such stock by a bill against the nominal holder.[2]

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[1] Slack *v.* Maysville and Lexington R. R. Co. 13 B. Monroe, 1. Hise, C. J., delivered a long dissenting opinion,—pp. 39–149.

[2] Walker *v.* Devereux, 4 Paige, 229; Crocker *v.* Crane, 21 Wend. 211. 218; Conn. and Pass. Rivers R. R. Co. *v.* Bailey, 24 Vt. 475.

CHAPTER VI.

ISSUE AND TRANSFER OF SHARES OF THE CAPITAL STOCK.

SHARES PERSONAL PROPERTY.—Shares in the stock of a railroad company are, as a general rule, regarded as personal property. They are not considered to be an interest in the real estate of the company; but a right to a proportion of the net produce of its real and personal property and of the use of the same. Therefore they are not dowable, or within the provisions of the statute of frauds respecting the sale of real estate or of any interest therein.[1] They are now usually declared personal property by statute.

SALE OF SHARES NOT BELONGING TO THE VENDOR. —A contract upon the sale of a certain number of shares of railroad stock for the transfer of the same number by the purchaser to the seller on a future day at a specified price, does not require the former without a special provision for that purpose to keep

[1] 1 Greenl. Cruise, tit. 1, sec. 3; 2 Parsons on Cont. 315, 330–332; Bradley *v.* Holdsworth, 3 M. & W. 422; Tempest *v.* Kilner, 3 C. B. 249; Duncuft *v.* Albrecht, 12 Sim. & Stu. 189; Johns *v.* Johns, 1 Ohio State, 350; *contra*, Price *v.* Price, 6 Dana, 107.

and retransfer the same identical stock. A contract for the sale of shares is not void at common law, as a wagering contract where the seller not having the same on hand intends to go into the market and purchase them, and a real transfer is contemplated by the parties.[1]

MEASURE OF DAMAGES.—In suits between a vendor and a vendee of shares for breach of contract to purchase or deliver them, the measure of damages is the difference between the contract-price and the market-value at the time of the breach.[2]

MODE AND EFFECT OF ASSIGNMENT.—The shares in the stock of the company may be assigned in the manner prescribed in its charter or the by-laws made in pursuance thereof.[3] The title to them as between the holder and the purchaser, by a proper assignment thereof passes from one to the other, without a conformity to the by-laws, subject to such equities as exist between the holder and the company at the time of the transfer, and the company will be liable in damages for refusing to permit a transfer on its books on the purchaser's being entitled to the same and producing proper evidence

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[1] Noyes *v.* Spaulding, 1 Williams (Vt.), 420; Hibblewhite *v.* M'Morine, 5 M. & W. 462.

[2] Shaw *v.* Holland, 15 M. & W. 136; 4 Eng. Rail Cas. 150; Pott *v.* Flather, 5 Eng. Rail Cas. 85; Tempest *v.* Kilner, 3 C. B. 253.

[3] Angell and Ames on Corporations, ch. xvi. When standing on the books of the company in the name of a party with "Cashier" affixed thereto, they are not *per se* transferred by the appointment of his successor as cashier. In matter of Mohawk and Hudson R. R. Co., 19 Wend. 135.

of the assignment.[1] In Connecticut the transfer on the books of the company is considered the originating act in the change of title.[2] The certificates of stock, although assignable so as to pass an equitable title, are not negotiable instruments in the sense of the commercial law, to the effect of shutting out equitable defences existing at the time of the transfer between the company and the holder. They are not negotiable in terms, and are not designed for the peculiar purposes of those instruments. Unless surrendered to the company, and new ones issued in their place, or assigned on its books or otherwise, as the charter and by-laws made in pursuance thereof require, the assignee takes them subject to the equitable defences between the company and the assignor.[3] They are not, like the bonds of the company, payable to bearer with interest coupons attached, which are taken by the purchaser free from any equities between the company and the seller.[4] The effect of an assignment of the share on the liability of the subscriber for calls, has already been noticed.[5]

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[1] Grant *v.* Franklin Ins. Co., 8 Pick. 90; Stebbins *v.* Phœnix Fire Ins. Co., 3 Paige, 350; Kortright *v.* Commercial Bank, 20 Wend. 91; Noyes *v.* Spaulding, 27 Vt. 420; Mechanics' Bank *v.* N. Y. and N. H. R. R. Co., 3 Kernan, 624; Angell & Ames on Corporations, ch. x. §§ 353, 354; ch. xvi. §§ 565, 567, 575; see Daly *v.* Thompson, 10 M. & W. 309.

[2] Oxford Turnpike Co. *v.* Bunnell, 6 Conn. 552; Marlborough Manufacturing Co. *v.* Smith, 2 id. 579; Northrop *v.* Newton and Bridgeport Turnpike Co., 3 id. 544.

[3] Mechanics' Bank *v.* N. Y. and N. H. R. R. Co., 3 Kernan, 623–631.

[4] Morris Canal and Banking Co. *v.* Fisher, 1 Stockton Ch. 667; 3 Am. Law Reg. 423; Carr *v.* Le Fevre, 27 Penn. State, 413.

[5] *Ante*, ch. v., p. 77.

Fraudulent Issue of Stock.—The fraudulent issue of the stock of railroad companies by their agents, has given rise to questions equally important and difficult, involving the law of agency and of corporations. If the power to issue the certificates of stock exists in the company, and has been conferred on the agent, their validity will depend on the good faith of the holder. If he dealt honestly with the agent, and paid value for the stock, he is entitled to the privileges of a stockholder, although the agent contemplated a secret breach of trust, by converting the funds received for the stock to his own private use; but, if he dealt with the agent dishonestly, not paying value for the same, he is not thus entitled.[1] If the corporation, although possessing the power, has not conferred the same on the agent, either in fact or by holding him out as possessing it, it is not bound by his act. As a general rule, third parties are affected with notice of his want of authority, either actual or implied.[2] There may be other circumstances which will render it more difficult to determine the existence, extent, and form of the company's liability. It may have the power, under its charter, to issue only a limited number of shares and of certificates therefor, and, having it, confer the power on the agent to issue certificates generally. The agent may then, after the issue of the full number, issue other certificates to parties receiving them in good faith, and

[1] Mechanics' Bank *v.* N. Y. and N. H. R. R. Co., 3 Kernan, 611, 634, 636.

[2] North River Bank *v.* Aymar, 3 Hill 266; Parsons' Mercantile Law, 140; Angell & Ames on Corporations, ch. ix., §§ 297, 298.

ignorant of the over-issue. The holders of the spurious shares, if capable of being identified, it would seem, could not be admitted as stockholders without a violation of the charter; but still, the liability of the company for the fraud of its agent, and his abuse of a power which the company did possess and had delegated to him, might nevertheless be maintained, on grounds of public policy and the analogies of the law. If not capable of being identified, they would, as a matter of fact, be stockholders, although the corporation would render itself liable, by exceeding its powers, to being proceeded against by the state.

The leading points just stated have been elaborately discussed in the decision of the Court of Appeals of New York, already cited. Its importance, both from the circumstances, which attracted unusual attention at the time, and the law it affirms, as well as from the diversity of judicial and professional opinions on the liability of the railroad company, or if liable, upon what grounds and in what form of action, requires a more complete presentation of its facts and the questions raised and decided.

The act, creating the New York and New Haven Railroad Company, fixed its capital stock at three millions of dollars, to be divided into shares of $100 each, which were transferable in such manner as the by-laws of the Company should direct. The entire stock, thus limited, had been taken, and the certificates therefor issued to the holders. The Company, by its by-laws, established a transfer-agency in the city of New York, and provided the form and man-

ner of transfers of stock, which were to be made in the transfer-books of the Company, and required the certificate of stock proposed to be transferred to be surrendered prior to the transfer being made. Robert Schuyler was duly appointed its president and transfer-agent in New York, holding those offices from its organization till 3d July, 1854, and was charged by the company with the duty of keeping the transfer-books, and, on a transfer of stock on the books from a former owner, and the surrender of the certificate therefor, of making and delivering to the transferee a certificate of the stock, so transferred, which in the usual form stated that he was entitled to so many shares transferable on the books of the Company, by him or his attorney, on the surrender of the certificate then given. The said transfer-agent, after the entire stock had been taken, on 20th April, 1854, fraudulently gave to one Kyle, who paid nothing for it, a certificate, regular on its face, and of the same form as the genuine certificates, for eighty-five shares of stock, without any surrender of a certificate of stock, and when there was none which he was authorized to transfer. The president, directors, and company of the Mechanics' Bank of New Haven, made a loan of $12,000, in good faith, to Kyle, on his promissory note, relying on, as collateral security, the certificate aforesaid, having no reason to doubt its genuineness, receiving from him an assignment of the stock and of the certificate, with a power of attorney to their cashier to transfer the same; but the stock was not transferred on the books of the Company or the

certificate surrendered, nor a new one issued, as the by-laws prescribed. Kyle, having paid but a small part of his note, became insolvent. The Bank applied to the Company to have the stock transferred, and afterwards for payment of the market value of the shares; and, on the application being refused, brought an action for damages in the Superior Court of New York city, for such refusal, demanding judgment for the amount of the par value of the eighty-five shares, with interest from the date of the loan to Kyle. Judgment was given in favor of the Bank, for the market value of the shares on the day that payment of the same was demanded; which was reversed by the Court of Appeals, with the assent of all the judges, except one who took no part in the decision.

The certificate was held void in the hands of the Bank, and the Company not liable on account thereof, on the following grounds:

1. It was fraudulently issued to Kyle, who paid no value for it, and not being a negotiable instrument, it was affected in the possession of the Bank with all the equities subsisting between the Company and Kyle, and not having been transferred on the books, according to the by-laws, the Company was not estopped from denying its original validity.

2. Whether negotiable or not, its issue was beyond the authority conferred on Schuyler, either actually or presumptively, and therefore could not bind the Company, even to a *bona-fide* holder; he being a transfer-agent merely, and having no power to issue a certificate, except upon the condi-

tions precedent of a transfer on the books of shares already held by a previous owner, and the surrender of that owner's certificate; and these conditions, which created the power to issue certificates, had not been fulfilled in this case, where no such certificate of a previous holder had been delivered up and a new one issued. It was considered that the Company was not responsible, because the agent had issued a certificate in the usual form of those which were genuine, and thus made the act appear to be authorized, when it was not authorized in fact, or constructively by his being held out by the Company as possessing it; although, if the issue had been authorized, the Company would be bound by his secret breach of trust, in converting the funds received for it to his own use.

3. The capital stock being limited to three millions of dollars, to be divided into shares of one hundred dollars each, the number of shares was thereby fixed at thirty thousand, which it was not competent for the Company to increase. The limitation was construed to be not on the amount merely of capital stock, so as to admit a larger number of shares and a reduction in the value of the genuine shares, which would not have the effect of increasing the amount of capital stock. This increase in the number of shares was considered a violation of the organic law of the corporation, and a direct invasion of the contract between it and each holder of the original genuine stock, who was entitled to a fixed and unalterable proportion of the capital stock. This third point, it was deemed unnecessary

to determine, as the action failed on the other grounds.

4. If the Company was not bound to recognize the spurious stock because its issue was unauthorized, or beyond its corporate power, it was not liable in damages for the false representation of genuineness which the certificate carried with it, as the agent was no more authorized to make the false representation than to make the issue, and the Company is not responsible for the fraud of agents in dealings beyond the scope of their authority. It was suggested that, if the corporation had received the benefit of its agent's misrepresentation or fraud in a transaction which was even unauthorized by its charter, it might be responsible, but that there was no such circumstance in the case at hand.[1]

The first point, which is based on strong grounds, that the certificates were not negotiable paper in the sense of the commercial law, and were received by the Bank subject to the defences of the Company against the original fraudulent holder, was sufficient to decide the case. The second ruled by the court, that an agent authorized only to *transfer* stock, cannot bind the company by the *issue* thereof, rests upon clear and well-settled principles of the law of agency. The third is expressly left by the court as not determined; and notwithstanding its consummate opinion, in the highest respect creditable to the learning and ability of the jurist who deliv-

[1] Mechanics' Bank *v.* N. Y. and N. H. R. R. Co., 3 Kernan, 599.

ered it, is still liable to be severely contested, if not overruled, in other jurisdictions. Whenever a case shall arise where the company was authorized by its charter to issue a limited amount of capital stock, and the agent, to whom it delegated the power to issue the certificates therefor, shall issue an excess of certificates to a *bona-fide* holder, there are tendencies of judicial and professional opinion indicating that the company might be held liable for the fraud of the agent. The *bona-fide* holder of a certificate, although informed in law or fact of the limits imposed by the charter, not having the means of ascertaining whether at the moment his certificate was issued, the full number allowed by the charter had been issued, and receiving the same from an agent who had been clothed with the general power to issue certificates of stock, presents a case against the company which can scarcely be denied, except upon the ground that it is under no circumstances liable where it transcends the strict limits of its charter. This doctrine might be invoked to exempt the company from all torts committed by its agents; for the legislature, it may be said, never authorized it to commit torts. If the fraud was committed by the agent in a matter where there was clearly no power given by the charter, different considerations apply. But where a power is given, and that power is used by the agents of the company in the course of their business to defraud third parties, it seems but just that a being, natural or artificial, which has clothed the wrong-

doer with the means of inflicting the injury should suffer the consequences.[1]

It is worthy of note that in the opinion in question, it is intimated that if the Bank on application at the office of the Company had *bona-fide* received new certificates instead of those which were spurious, the transfer having been effected in accordance with the by-laws, it would have been estopped from denying their validity; and it is not clear that the court regarded it necessary for the transfer on the books—in order to have the effect of clothing the Bank with rights superior to those of the original fraudulent holder—to precede the purchase, or be a part of the same transaction.[2]

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[1] As illustrative of the difficulty of the question whether in any case, and if in any case under what circumstances, a corporation is liable for the acts of its agents which are beyond the powers conferred in the charter, compare the cases of Hood *v.* N. Y. and N. H. R. R. Co., 22 Conn. 508; per Ellsworth, J. and Goodspeed *v.* Haddam Bank, id. 537, per Church, C. J., decided at the same term; in which conflicting views seem to be maintained. In Jones *v.* W. Vt. Central R. R. Co., 27 Vt. 399, a corporation is held liable for torts committed by its agents within the apparent scope of their authority or in pursuit of the general purpose of the charter, or in other words when the departure from the charter powers is not such as to be notice to all that the agent is departing from the proper work of the corporation. See Noyes *v.* Rutland and Burlington R. R. Co., id. 110; Bank of Ky. *v.* Schuylkill Bank, 1 Parsons' Select. Eq. Cas. 180; 1 Parsons on Contracts, p. 120.

[2] 3 Kernan, 619, 622.

CHAPTER VII.

ACQUISITION BY THE COMPANY OF A RIGHT OF WAY AND REAL ESTATE BY PURCHASE.

In this and the succeeding chapter, the mode of acquiring real estate, or an interest therein, for a right of way, and for the other purposes of a railroad company, will be considered. The acquisition of such rights by a voluntary sale from the owner, is the subject of the present chapter. The power to purchase real estate for its purposes is usually conferred expressly by the charter, but if not so conferred by an express grant, it may be inferred as incidental to other powers granted, limited in each case to the necessary uses of the company.[1] And, having acquired the same, the company may use it for all purposes necessary and proper for the construction and operation of its road.[2]

Construction of a Deed to the Company.—A grant to the company for its purposes carries with it, so far as the grantor can confer it, an authority to do all that is necessary to accomplish the principal object. Thus, a grant of full license and authority to locate, construct, repair, and forever maintain and use a railroad over the grantor's land, and to

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[1] *Ante*, ch. ii. p. 13.

[2] *Ante*, ch. ii. pp. 14—18.

take his land therefor to the extent authorized by the charter, empowers the company to lay ditches in connection with culverts, which extend into his land, and to deepen the bed of a mountain torrent therein; such excavations, although beyond the limits of its location, being necessary to the construction and maintenance of the road.[1] A deed of land to the company will carry with it the privileges then appurtenant to it, and parol evidence is inadmissible to show that they were excluded in the agreement.[2]

Conveyance upon Condition.—Land may be conveyed to a railroad company for its purposes, on a condition precedent or subsequent; and to which class the condition is to be referred, does not depend on technical words, but will be determined from the nature of the transaction and the intention of the parties, as it appears in the conveyance. If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and may as well be done after as before the vesting of the estate; or if, from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession,—then the condition is subsequent.[3] The breach of the condition, where the grant is in fee, may be taken advan-

[1] Babcock *v.* Western R. R. Corp., 9 Met. 553.

[2] Vt. Central Railroad Co. *v.* Hills, 23 Vt., 681.

[3] Parmelee *v.* Oswego and Syracuse R. R. Co., 2 Selden, 74; S. C., 7 Barb. 599; Underhill *v.* Saratoga and Washington R. R. Co., 20 Barb. 455.

tage of by the grantor and his heirs, but not, it has been decided, by a third person to whom he has assigned his interest before or after the breach.[1] Conditions subsequent are not favored in law, and will receive a strict construction. The omission to perform the condition in a deed which vests the fee simple, does not *ipso facto* determine the estate, but only renders it liable to be defeated at the election of the grantor and his heirs, to be signified by some act equivalent to a re-entry at common law. The forfeiture for a breach may be waived, and when once waived, the court will not assist it. Thus, the New York and Harlem Railroad Company took a deed in fee from a party, by which it covenanted to make and maintain ferries between the land conveyed and the adjoining land of the party, with a condition that the conveyance was to cease and be void, unless the railroad was completed through the said land before a certain day therein named. It was not completed within that period, but the grantee made no effort to assert his right to the estate, or to do any act equivalent to an entry at common law, until two years after the forfeiture had occurred, and some time after the completion of the road over the premises. During this time he saw the Company making large expenditures upon the land in question, and extending its road. He traveled over it himself, and even gave the Company notice to build the fences, which they did, a year before the suit was commenced,

[1] Underhill *v.* Saratoga and Washington R. R. Co., 20 Barb. 455.

thus recognizing that, in respect to the premises, himself and the Company were owners of adjoining lands. It was held that, under these circumstances, he had waived the forfeiture, and could not recover the premises in an action of ejectment.[1]

LETTERS PATENT TO THE COMPANY.—The validity of letters patent from the state to the company, granting lands to it, can only be avoided by a direct proceeding.[2]

DAMAGES FOR BREACH OF CONTRACT TO CONVEY LAND TO THE COMPANY.—Where a party who has agreed to convey land, for a certain sum, to the company for its road, refuses to perform the agreement, and in a special proceeding obtains an assessment of his damages caused by the laying out of the road over his land, the measure of damages for which he is liable on the breach of his agreement has been held to be the excess of the sum assessed in the proceeding over the price fixed in the agreement.[3]

STATUTE OF FRAUDS.—No action at law will lie against the company for the price of land sold to it, where no written contract conforming to the requirements of the statute of frauds has been entered into between the parties, subscribed by the vendor, and assented to or accepted by the purchaser. Thus, where oral negotiations for the sale of land to the

[1] Ludlow *v.* N. Y. and Harlem R. R. Co., 12 Barb. 440.
[2] Parmelee *v.* Oswego and Syracuse R. R. Co., 7 Barb, 599.
[3] Western R. R. Corp. *v.* Babcock, 6 Met. 346.

company were held, but the parties came to no agreement as to price, the owner fixing his terms, and the agent of the company saying that it would be obliged to pay the sum required if the owner insisted on it, and he paid to the owner a certain sum on account of the land, the company thereupon going upon the land, and constructing its road thereon, it was held that under the statute of frauds of New York no action at law could be maintained on the contract for the price.[1]

Rights of the Company in real Estate enforced in Equity.—The company may enforce in equity its equitable title to land held by its agents in their own names as its trustees.[2]

A valid agreement for the conveyance of land to the company for the purposes of a road, will be enforced in equity by a decree of specific performance. The same defences to a suit for specific performance by the company may be made by the owner, as in suits by other parties. A decree for that purpose will not be granted where the terms of the contract are doubtful, or it does not appear that the land in reference to which the specific performance is sought is within the contract, and that the corporation has done what is necessary under the contract to entitle it to a conveyance.[3] Nor will it be granted where the defendant shows that the agreement is void by proof of fraud or duress which

[1] Reynolds *v.* Dunkirk and State Line R. R. Co., 17 Barb. 613.

[2] Church *v.* Sterling, 16 Conn. 388.

[3] Boston and Maine R. R. *v.* Babcock, 3 Cush. 228.

would avoid it at law; or that without any gross laches of his own, he was led into a mistake by any uncertainty or obscurity in the descriptive part of the agreement by which he in fact mistook one line or one monument for another, though not misled by any misrepresentation of the company, so that the agreement applied to a different subject from what he understood at the time; or that the bargain was hard, unequal, or oppressive, and would operate in a manner different from that which was in the contemplation of the parties when it was executed; but the burden of proof is on the vendor to show these facts. It is, however, no defence to a bill praying for specific performance that the consideration was inadequate, unless the inadequacy is so gross, and the proof of it so great, as to lead to a reasonable conclusion of fraud or mistake. And where a party has stipulated, for a certain consideration, to permit a company to construct a railroad over his land, by any one of two or more routes, and when the road is definitely located to convey the land to the company for certain sums varying according to the route chosen by it,—he cannot defend against a bill for specific performance of his agreement, by showing that he was induced to believe, either by his own notions or the representations of third persons as to the preference of one route over another, that the company would select a route different from that finally adopted; nor by showing that it or its agents had made representations as to the probability that one route would be adopted in preference to another, or as to the rela-

tive advantages of each route. All such matters must be considered as merged in the agreement; and if he intended to claim larger compensation in case one route should be adopted rather than another, he should have stipulated for the alternative in the agreement. Nor can he allege a mistake which arose from his not reading or hearing the agreement read, when he had the means offered him of doing so. It is also no defence after the road has been constructed, that the company was not bound by the agreement to take the land, where the party agreed under seal to permit it to construct the road over his own land, and after the road should be definitely located to convey the same to it for a certain sum with a condition in the deed that it should be void when the road should cease or be discontinued.[1]

Where two railroad companies agreed together to build a road between certain points, and to meet each other at a given place, and to have the charges of transportation, the meeting of the cars and of the through freight trains, arranged by both companies in order to make a through business connection, an injunction was granted at the suit of one to restrain the other from changing the guage of its road so as to break up the connection contemplated.[2] There are decisions in England on the agreements

[1] Western R. R. Corp. *v.* Babcock, 6 Met. 346.

[2] Columbus, Piqua, and Indiana R. R. Co. *v.* Indianapolis and Bellefontaine R. R. Co., 5 M'Lean, 450. As to an agreement of a railroad company to construct a turn-out for the convenience of an adjacent proprietor, and when it will be enforced in equity, see Windham Manuf. Co. *v.* H. P. and F. R. R. Co., 23 Conn. 373.

of railroad companies, relative to real estate and interests therein, which may here be noted. A company is bound by an absolute agreement for the purchase of land, although it fails to obtain from Parliament power to build the road for which the land is purchased, or to secure the other means for making the purchase desirable.[1] But otherwise, if the agreement is conditional on obtaining such power or means.[2] An agreement executed on behalf of the company by an agent not authorized under seal or otherwise, binds it if it enters upon and takes possession of the land, receives the benefit of the agreement, and affirms its validity.[3] Where the company agrees to stop all its trains at a given point in consideration of an agreement to convey land to it and other stipulations, although the agreement was made on behalf of the company by an agent not authorized under seal, yet having been acted upon by it, equity will interfere to restrain it from running trains by that point without stopping.[4] A written agreement allowing one company to run its trains over the line of another for a certain time, may convey an easement which is not revocable without consent of both parties, the right to use which will be enforced by injunction. It may be a permanent grant, although not by deed, and made

[1] Stuart *v.* London and N. W. R. Co., 10 Eng. L. & Eq. 57; Webb *v.* Direct London, &c. R. Co., 5 id. 151; 9 id. 249; Hawkes *v.* Eastern Counties R. Co., 4 id. 91; 15 id. 358; 35 id. 8; but see Gage *v.* Newmarket R. Co. 14 id. 57.

[2] Preston *v.* Liverpool, &c. R. Co., 35 id. 92.

[3] Stuart *v.* London and N. W. R. Co., 10 Eng. L. & Eq. 57.

[4] Lindsay *v.* Great N. R. Co., 19 Eng. L. & Eq. 87.

to the company only, and not to the company and its successors.[1] Equity may interfere between two railway companies entitled to the joint use of a station, by prescribing regulations for its management; but will only exercise such interference on grave occasions. So also, it may direct a partition of the station and appoint a receiver, if necessary. But where provisions exist for the settlement of disputes on such matters by arbitration, it will decline to interpose until after the remedy thus provided has been resorted to.[2]

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[1] Great N. R. Co. *v.* Manchester, &c. R. Co., 10 Eng. L. & Eq. 11.

[2] Shrewsbury, &c. R. Co. *v.* Stour Valley R. Co., 21 Eng. L. & Eq. 628.

CHAPTER VIII.

ACQUISITION BY THE COMPANY OF A RIGHT OF WAY AND REAL ESTATE BY CONDEMNATION.

Derivation of the Power to Condemn Private Property for the Purposes of a Railroad Company.—A railroad company acquires the right of way less frequently by a purchase from the owner of the land than by compulsory proceedings against him, provided by statute. The latter mode, where the owners are numerous, is alone practicable. The condemnation of private property by the State for the purposes of a railroad, is made by virtue of its right of eminent domain. This right, which is designated as the sovereign right of the State to take private property for public uses, has been referred by some jurists to the feudal theory of tenure, according to which all private property is held from the sovereign on condition that it may be resumed by him, when required by his necessities.[1] By others it is referred to implied compact, public necessity, or more properly, is designated as an inherent sovereign power.[2] But from whatever source it is

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[1] Enfield Toll Bridge Co. *v.* Hartford and New Haven R. R. Co. 17 Conn. 61; Beekman *v.* Saratoga and Schenectady R. R. Co. 3 Paige, 72, 73; West River Bridge Co. *v.* Dix, 6 How. 532, 533; 2 Parsons on Cont. 52.

[2] West River Bridge Co. *v.* Dix, 6 How. 539,—per Woodbury, J.; Heyward *v.* Mayor of New York, 3 Selden, 324; 2 Kent, Com. 339.

derived, the right of the State to take private property for public uses, making just compensation to the owner, is unquestioned.[1] The object must be a public one, to justify its exercise. If merely private, the condemnation would, in effect, be taking the property of one person and giving it to another, which is not a legislative function.[2]

The right of eminent domain may be resorted to for a public use, that is, for an object which concerns the public interest, convenience, or safety. Its exercise, when reasonably required by the public exigencies or accommodation, is within the discretion of the legislature. It has been used for the purposes of public roads, turnpikes, canals, ferries, bridges, mill-sites, for the draining of marshes, and bringing water into cities and villages. Railroads have uniformly been regarded by the courts to be such public improvements, for the purposes of which the State is justified in calling into exercise the sovereign right of eminent domain. They promote the general convenience, and are important auxiliaries to the business and social progress of the territory through which they pass, and, by the development of its resources enable the State to increase its revenues. They are not less public improvements because operated by private corporations, which exclusively

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[1] See Article on The Right of Eminent Domain, by Mr. J. B. Thayer, in 19 Law Rep. (Sept. and Oct. 1856), pp. 241, 301, in which the whole subject is well digested.

[2] Beekman *v.* Saratoga and Schenectady R. R. Co. 3 Paige, 45; Varick *v.* Smith, 5 id. 137; West River Bridge Co. *v.* Dix, 6 How. 537; Giesy *v.* C. W. and Z. R. R. Co. 4 Ohio State, 326.

collect and enjoy the tolls for persons and merchandise passing over them.[1]

The State may employ private individuals or corporations for the accomplishment of its ends. The uses for which the power is invoked, rather than the instruments employed in its exercise, are the test of its existence. The purposes and advantages of the road remain the same when operated by a private corporation, receiving tolls from persons and property carried over the same. The corporation is under a legal obligation to the public to transport them for a reasonable and uniform toll, and cannot refuse one and accommodate another at its pleasure. In view of its objects and obligations, the power of eminent domain may be exercised by the State to provide it with a right of way.[2]

The right of eminent domain is only to be exercised when required by the public necessity. This necessity need not be controlling. It relates rather to the nature of the property, and the uses to which it is applied, than to the exigencies of the particular case. Thus, if contiguous lands are required for the necessary purposes of the road, they may be condemned, although others could be obtained by pur-

[1] Beekman *v.* Saratoga and Schenectady R. R. Co. 3 Paige, 45; Varick *v.* Smith, 5 id. 137; West River Bridge Co. *v.* Dix, 6 How. 537; Giesy *v.* C. W. and Z. R. R. Co. 4 Ohio State, 326.

[2] Beekman *v.* Saratoga & Schenectady R. R. Co. 3 Paige, 45; Bloodgood *v.* Mohawk and Hudson R. R. Co. 14 Wend. 51; S. C. 18 id. 9; Parmelee *v.* Oswego and Syracuse R. R. Co. 7 Barb. 625; Raleigh and Gaston R. R. Co. *v.* Davis, 2 Dev. & Bat. 451; Enfield Toll Bridge Co. *v.* Hartford and New Haven R. R. Co. 17 Conn. 40; Bonaparte *v.* Camden and Amboy R. R. Co. 1 Baldwin C. C. 205; Swan *v.* Williams, 2 Mich. (Gibbs) 427; Giesy *v.* C. W. and Z. R. R. Co. 4 Ohio State, 308.

chase.[1] The power may be used not only for the appropriation of land necessary for the bed of the road, but for the means of approach to its depots, and also for such depots, store-houses, and work-shops as are necessarily required to be contiguous to the road.[2] It has been decided in Illinois, that a grant to a railroad company of power "to maintain and continue a railroad with a single or double track, and with such appendages as may be deemed necessary for the convenient use of the same," authorizes the company to acquire land by condemnation for the repair of cars and locomotives for the road; and that this power is not exhausted by the completion of the road, if the increase of its business shall demand other appendages.[3] The company which is authorized to condemn land necessary for its purposes, is not the final and conclusive judge of what is necessary.[4]

It is not necessary, in the exercise of the right of eminent domain, for the state to declare specifically the property to be appropriated for the railroad. It may delegate in general terms the power to the corporation to take the land necessary for its purposes, having, as is usually the case, ap-

[1] Giesy *v.* C. W. and Z. R. R. Co. 4 Ohio State, 326, 327.

[2] Nashville and Chattanoga R. R. Co. *v.* Cowardin, 11 Humph. 348.

[3] Chicago, Burlington, and Quincy R. R. Co. *v.* Wilson, 17 Ill. 123. *Quære.*—It may well be doubted whether where no necessity exists for the location of any buildings on any particular locality, a proper ease is presented for the exercise of the right of eminent domain. West River Bridge Co. *v.* Dix, 6 How. 545, 546,—per Woodbury, J.

[4] South Carolina R. R. Co. *v.* Blake, 9 Rich. 228. But see Ex parte South Carolina R. R. Co. 2 id. 434; Chicago, Burlington, and Quiney R. R. Co. *v.* Wilson, 17 Ill. 130.

pointed the termini and principal points, without designating the precise land to be taken between them.[1]

The land lawfully appropriated by the company under this power, may be used by it for all purposes necessary for the proper construction and operation of the road.[2]

WHAT IS SUBJECT TO BE TAKEN BY VIRTUE OF THE RIGHT OF EMINENT DOMAIN.—As a general rule, all private property is subject to this right. It will therefore only be necessary to consider those peculiar cases which might seem exempted from its operation.

The public lands of the United States, not already appropriated to specific national purposes, are subject to be condemned by the State in which they lie, for the purpose of a railroad.[3] The franchise of a corporation, as well as its other property, is subject to be condemned for the purposes of a railroad company. It is an incorporeal hereditament, and, as well as easements, or any kind of real or personal estate, is subject to this sovereign power. The state, in its exercise, may impair its value, or even extinguish it, compensation being made. It may authorize the company to cross a turnpike, canal, or other improvement owned by a private corporation, or to take away its property, or even, when

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[1] Boston Water Power Co. *v.* Boston and Worcester R. R. Corp. 23 Pick. 326; White River Turnpike Co. *v.* Vt. Central R. R. Co. 21 Vt. 590.

[2] Brainard *v.* Clapp, 10 Cush. 4; *ante*, ch. ii. pp. 14–18.

[3] U. S. *v.* R. R. Bridge Co., 6 M'Lean, 517.

necessary, to destroy the franchise itself, upon making compensation. Such an authority does not conflict with the clause of the U. S. Constitution, which forbids any State to pass a law "impairing the obligations of contracts." It does not affect the obligation of the contract implied in the granting of the franchise, but is the exercise of an independent power, acting not on the contract, but on the property acquired thereby.[1]

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[1] Richmond &c. R. R. Co. *v.* Louisa R. R. Co., 13 How. 71; Lexington and Ohio R. R. Co. *v.* Applegate, 8 Dana, 289; Backus *v.* Lebanon, 11 N. H. 19; Northern R. R. *v.* Concord and Claremont R. R., 7 Foster, 183; West River Bridge Co. *v.* Dix, 6 How. 507, 534,—Daniel J. "A distinction has been attempted, in argument, between the power of a government to appropriate, for public uses, property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right, in private persons, in the use or enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property and nothing more; it is incorporeal property, and is so defined by Justice Blackstone, when treating, in his second volume, chap. iii. page 20, of the Rights of Things. It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions and disturbances of its enjoyment. *Vide* Bl. Comm., vol. iii. chap. xvi. p. 236, as to injuries to this description of private property, and the remedies given for redressing them. A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them, granted by the authority of the state, we regard as occupying the same position, with respect to the paramount power and duty of the state to promote and protect the public good, as does the right of the citizen to the possession and enjoyment of his land under his patent or contract with the state; and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the constitution, and no violation of a contract." Boston and Lowell R. R. Corp. *v.* Salem and Lowell R. R. Co., 2 Gray, 1; 35,—Shaw, C. J. "It is fully conceded that the right of eminent domain—

Thus, where a corporation created for the purpose of raising a quantity of water power, had been empowered to build dams over an arm of the sea,

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the right of the sovereign, exercised in due form of law, to take private property for public use, when necessity requires it, of which the government must judge—is a right incident to every government, and is often essential to its safety. And property is *nomen generalissimum*, and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments. Even the term 'taking,' which has sometimes been relied upon as implying something tangible or corporeal, is not used in the Massachusetts Declaration of Rights; but the provision is this: 'Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.' Declaration of Rights, art. 10. Here, again, the term 'appropriate' is of the largest import, and embraces every mode by which property may be applied to the use of the public. Whatever exists, which public necessity demands, may be thus appropriated. It was held, in the Supreme Court of the United States, that a franchise to build and maintain a toll bridge might be so appropriated; and that the right of an incorporated Company, to maintain such a bridge, under a charter from a State, might, under the right of eminent domain, be taken for a highway. West River Bridge *v.* Dix, 6 How. 507. The same point was afterwards decided in the same court, in the case of a railroad, Richmond, Fredericksburg, and Potomac Railroad *v.* Louisa Railroad, 13 How. 83. Such appropriation is not regarded as impairing the right of property, or the obligation of any contract; on the contrary, it freely admits such right; and in all just governments provision is made for an adequate compensation, which recognizes the owner's right.

"Nor does it appear to us to make any difference, whether the land, or any other right or interest thus appropriated, be derived directly from the government, or acquired otherwise; for the reason already stated, that it does not revoke the grant, or annul or impair the contract, but recognizes and admits the validity of both. If, for instance, government, through its authorized agent, had contracted to convey land to an individual, and afterwards, and before the title passed, it should be necessary to appropriate such land to public uses, such taking would not impair the obligation of the contract; the individual would have the same right to compensation, for the loss of his equitable title to the land, as he would have had for the land itself, if the title to it had passed. If, therefore, in the great advancement of public improvements, in the great changes which take place in the number of inhabitants, in the number of passengers and quantity of property to be transported, or in great and manifest improvements in the mode

so as to make a full and a receiving basin, and to have the use of the land in the basins, derived partly from the State, and partly from private individuals by purchase, or by condemnation at an appraisement, and to have the perpetual use thereof for mill purposes, and to make a highway on its dams and take toll thereon, the legislature, it was held, had the constitutional power to authorize another corporation to build a railroad across the basins, making compensation for the injury thereby caused to the water power, and that, as the franchise was not taken, but only a portion of the land over which it extended, compensation need only be made for damages occasioned by the taking of the land.[1] So, the legislature may authorize a railroad corporation to cross the road of a turnpike company, or to construct its road within the chartered limits of the turnpike company, making compensation, which may be assessed under the provisions prescribing the mode of appraisal for injuries to land entered upon for the purposes of the railroad.[2]

The grant to a railroad company is, however, to be construed strictly where it interferes with a prior grant to another company or some earlier appropria-

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of travel and locomotion, it becomes necessary to appropriate, in whole or in part, a franchise previously granted, the existence of which is recognized and admitted, we cannot doubt that it would be competent for the legislature, in clear and express terms, to authorize the appropriation of such franchise, making adequate compensation for the same."

[1] Boston Water Power Co. *v.* Boston and Worcester R. R. Corp., 23 Pick. 360.

[2] White River Turnpike Co. *v.* Vt. Central R. R. Co., 21 Vt. 590.

tion to another public use, as for a highway or canal.[1] But this principle is not to be applied so as to defeat the subsequent grant, where both uses can stand together.[2] And the power to interfere with and even to destroy the value of the previous grant, may result from express words, or necessary implication either from the language of the charter or from its being shown by the application of the same to the subject-matter that the railroad cannot by reasonable intendment be laid in any other manner and on any other line.[3]

The franchise of a corporation can be taken for a public use only, which is real and not merely pretended. As this right may be exercised both for and against a railroad company, it would seem that its franchise could not be condemned for another company, incorporated for precisely the same public use,—as where both companies had the same line and termini, were operated in the same manner, and answered the same public purposes. This would be substantially taking the property of one company and transferring it to another for a mere private purpose, in derogation of the first grant, not justified by the right of eminent domain,

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[1] *Ante*, ch. ii., p. 10, 11; Packer *v.* Sunbury and Erie R. R. Co., 19 Penn. State, 211; Chesapeake and Ohio Canal Co. *v.* Baltimore and Ohio R. R. Co., 4 G. & Johns. 1; West River Bridge Co. *v.* Dix, 6 How. 543.

[2] Boston Water Power Co. *v.* Boston and Worcester R. R. Co., 23 Pick. 360.

[3] Springfield *v.* Connecticut River R. R. Co., 4 Cush. 63; White River Turnpike Co. *v.* Vt. Central R. R. Co., 21 Vt. 590; Enfield Toll Bridge Co. *v.* H. and N. H. R. R. Co., 17 Conn. 40, 454; Rex *v.* Pease, 4 B. & Ad. 30.

and beyond the proper scope of legislative power.[1] This limitation does not inhibit the State from authorizing one company to use the track of another.[2] Nor does it exempt the track of one railroad company from being taken by another railroad company, compensation being made, where the objects and character of the second company are so different from those of the first as that the public benefit requires the condemnation.[3]

The power of a legislature to grant away the right of eminent domain, and thus divest a future legislature of the power to take private property for public uses on making compensation, has been questioned. Such a power has been considered to be an essential attribute of sovereignty, and of which it is beyond the competency of a legislature to divest its successors; its continued exercise being necessary to the existence and well-being of the State.[4] But a provision in the charter that no other railroad shall be authorized within a certain distance from the line of the one authorized thereby, is to be distinguished from a granting away of the power of eminent domain. It is, like the grant of an exclusive

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[1] Boston Water Power Co. *v.* Boston and Worcester R. R. Corp., 23 Pick. 393; Beekman *v.* Saratoga and Schenectady R. R. Co., 3 Paige, 45; West River Bridge Co. *v.* Dix, 6 How., 537,—per M'Lean, J.

[2] Newcastle and Richmond R. R. Co. *v.* Peru and Indianapolis R. R. Co., 3 Ind. 464.

[3] Northern R. R. *v.* Concord and Claremont R. R., 7 Foster, 183.

[4] Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 69; Brewster *v.* Hough, 10 N. H. 138; Backus *v.* Lebanon, 11 id. 24; Northern R. R. Co. *v.* Concord and Claremont R. R. Co., 7 Foster, 194, 195; Newcastle and Richmond R. R. Co. *v.* Peru and Indianapolis R. R. Co., 3 Indiana, 464, 469; 2 Parsons on Cont., 523.

right, an element of the franchise, and with the franchise is subject to the right of eminent domain, and may be appropriated by the State for public uses when the exigencies of the public require the appropriation, upon making compensation. It does not prevent the construction of such a railroad as is provided against, if compensation is made. Thus construed, such a provision is within the scope of legislative power, unless specially restrained by the constitution under which it acts. It is within its unquestioned competency to regulate public rights, and to make grants of franchises for the public benefit, and in making the grants it is within its discretion to determine how extensive they shall be, so as best to promote the general good. If for the sake of the public convenience, and to inspire confidence in a proposed public improvement as well as to draw capital towards it, the legislature deems it proper to guarantee that no other improvement of a like kind shall be made within certain limits so as to diminish its revenues, the provision against such a competing project is valid, subject, however, to yield to the public exigencies as they may occur thereafter, on compensation being made for the invasion or taking of the exclusive right.[1]

The exclusive right is, however, not to be implied; and the company enjoying a franchise without being protected by an express exclusive grant is without

[1] Richmond, &c. R. R. Co. *v.* Louisa R. R. Co., 13 How. 71; Boston and Lowell R. R. Corp. *v.* Salem and Lowell R. R. Co., 2 Gray, 1; Enfield Toll Bridge Co. *v.* Hartford and New Haven R. R. Co. 40, 454; *ante*, ch. iii., pp. 27–35.

remedy if a railroad company is authorized to construct a road so near to it as essentially to diminish its revenues. This is in accordance with the well-settled principle, already enforced, that the grant of franchises by the public in matters which concern the public interests is to be construed strictly, that nothing passes by implication, and no rights are taken from the public or given to the corporation beyond those conveyed by the words of the grant naturally and properly construed.[1]

A franchise under which an exclusive right is held within certain limits, may be condemned, as already stated, for the purposes of a railroad company, upon just compensation to the company enjoying it. The exclusive right is a part of the franchise, and may be taken, like any other property, for public uses.[2] In like manner if a provision is inserted in the charter, that no railroad or improvement of like kind shall be authorized within certain limits, it is competent for the legislature to authorize another railroad, although thus expressly excluded by the charter, upon making just compensation to the company enjoying the exclusive grant.[3] Thus, in the charter of a company, granted in 1798, by the legislature of Connecticut for the building of a bridge over the Connecticut river between Enfield and Suffield, it was provided that no person or persons should have liberty to build another bridge

[1] See *ante*, ch. iii., pp. 20–27, and cases cited.

[2] Piscataqua Bridge *v.* New Hamp. Bridge, 7 N. H. 35.

[3] Boston and Lowell R. R. Corp. *v.* Salem and Lowell R. R. Co., 2 Gray, 1; see, *ante*, this case cited and opinion of the court, ch. iii., pp. 29–34.

over that river between the north line of Enfield and the south line of Windsor during the term of the charter. Subsequently, in 1835, the legislature of Connecticut during the term, granted a charter to another company, authorizing it to build a railroad from Hartford to the northern line of the State by the most direct and feasible route and thence to Springfield (Mass.) with power, if it should become necessary, to erect a bridge across the river, to be used exclusively for railroad travel and no other passing to be permitted thereon, and with a provision added that nothing contained in the charter should be construed to prejudice or impair any of the rights then vested in the Bridge Company. The railroad was laid out in the most direct and feasible route between its appointed termini, and the railroad company was proceeding to erect a bridge for railroad purposes only, within the exclusive limits of the toll-bridge company, claiming the right to do so under its charter without making compensation, when a bill in equity was brought by the latter company against the railroad company, praying for an injunction and other relief. It was held, that the railroad bridge was such a bridge as was provided against in the charter of the toll-bridge company, and its erection without compensation to the toll-bridge company would be an invasion of constitutional rights; that the special covenant not to authorize another bridge between certain limits was a part of the contract creating the corporation, and a part of the franchise itself, which might be taken for public uses upon

making compensation, and not without; and that the reservation in the charter of the railroad company, that nothing therein contained shall be construed to prejudice or impair any of the rights then vested in the bridge company, did not protect it from the exercise of the power of eminent domain, but only secured to it equal rights with other citizens of the State,—the right to have compensation awarded if the franchise should be impaired by the construction of the road.[1]

The quantity of estate in land taken, which is vested in the company, is not uniform. Thus, in Illinois, some of the charters vest the fee simple of such land in the company;[2] while others provide that the company is merely authorized to take and appropriate, or, as in the charter of the Illinois Central Railroad Company, to "enter upon, and take possession of, and use the land."[3]

In North Carolina the fee simple is vested in the company.[4]

In Vermont, the Vermont Central Railroad Company was declared to be "seized and possessed of the land." These terms were considered to vest only a right of way; and, as that was sufficient for its purposes, it was doubted whether the legislature could deprive the owner of any greater estate and vest it in the company.[5] In New Hampshire, the

[1] Enfield Toll Bridge Co. *v.* Hartford and New Haven R. R. Co., 17 Conn. 40, 454.

[2] Private Laws (1853), pp. 5, 55, 60 (1855), p. 246.

[3] Laws 1851, p. 61; 2 Stat. of Illinois (Purple's ed.), 1354.

[4] State *v.* Rives, 5 Iredell, 307.

[5] Quimby *v.* Vt. Central R. R. Co., 23 Vt., 387.

fee remains in the owner, subject to the easement of the company.[1] In Iowa, the power to "appropriate land," gives a right of way only, not merely the ordinary right of way, but such an easement as is peculiar to a railroad, and contemplates all that is necessary and proper for the construction and maintenance of the railroad, including the right to locate and construct, operate and repair the same, take gravel, stone, and materials, and make cuts and embankments for such purposes.[2]

The right of the legislature, in the absence of a constitutional restriction to that effect, to condemn the fee for the purposes of a railroad company, can not well be questioned. It is not less a legislative function to determine what estate in point of duration the public exigency requires to be condemned, than to determine the existence of the public exigency which requires the condemnation of any estate.[3]

COMPENSATION, WHEN TO BE MADE.—The constitution of the United States provides, in the fifth article of the amendments, "Nor shall private property be taken for public uses without just compensation." This clause restricts the power of Congress, but not that of the States.[4] A similar provision designed to protect private rights, is generally found in the

[1] Blake *v.* Rich, Supreme Court of New Hampshire (July T. 1856); 19 Law Rep. (Oct. 1856), p. 344.

[2] Henry *v.* Dubuque and Pacific R. R. Co., 2 Clarke, 288.

[3] Raleigh and Gaston R. R. Co. *v.* Davis, 2 Dev. and Bat. 467; Heyward *v.* Mayor of New York, 3 Selden, 314; Moore *v.* City of New York, 4 Sandford, 456.

[4] Barron *v.* City Council of Baltimore, 7 Peters, 243.

constitutions of the several States. The period at which, in the course of its operations, compensation for the private property taken by a railroad company for its purposes, is required to be made to the owner, under this constitutional prohibition, is an important consideration. According to the current of authorities, in the absence of a distinct provision in the constitution requiring the payment of compensation to precede the taking of the property, the assessment and payment of the compensation need not precede the entry upon the land by the company for the construction of its road, provided there is an adequate remedy afforded before such entry is made for obtaining compensation, which may be provided in the charter or in existing laws. The payment or tender of the compensation, or an appropriate provision therefor, is generally required to precede an appropriation of the owner's property for the road.[1]

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[1] Bloodgood *v.* Mohawk and Hudson R. R. Co., 14 Wend., 51; S. C., 18 id., 9; Smith *v.* Helmer, 7 Barb. 416; Gould *v.* Glass, 19 id., 190; Rexford *v.* Knight, 1 Kernan, 308; Thacher *v.* Dartmouth Bridge, 18 Pick., 501; Raleigh and Gaston R. R. Co. *v.* Davis, 2 Dev. & Batt., 451; Tuckahoe Canal Co. *v.* Tuckahoe R. R. Co., 11 Leigh, 77; Pittsburgh *v.* Scott, 1 Penn., 309; Symonds *v.* Cincinnati, 14 Ohio, 174; Hatch *v.* Vt. Central R. R. Co., 25 Vt. 66; Smith *v.* M'Adam, 3 Mich. 506; People ex rel. Green *v.* Mich. Southern R. R. Co., 3 Mich. 496; Rubottom *v.* M'Clure, 4 Blackf. 505; Hankins *v.* Lawrence, 8 id. 266; New Albany and Salem R. R. Co. *v.* Conelly, 7 Indiana, 32; Hamilton *v.* Annapolis and Elk Ridge R. R. Co., 1 Md. Ch. Dec. 107. In Bonaparte *v.* Camden and Amboy R. R. Co., 1 Baldwin C. C. 205, it was held that this provision for compensation may be in a subsequent law; and that an act taking private property for public use is not void because it does not provide compensation or a mode of ascertaining it; but that its execution will be enjoined until such provision is made, and the compensation paid; and the compensation should be made simultaneously with the appropriation; see Sedgwick on Stat. and Const. Law, pp. 525–528.

Preliminary surveys and explorations for the purpose of laying out the road, may be authorized by the legislature without previous compensation to the owner of the land over which they are made, or any provision therefor. They do not amount to a *taking* of private property, and are not within the purview of the constitutional prohibition. The estate is not thereby taken, or the owner deprived of its use and enjoyment. The entry must, however, to be authorized on this principle, be for a temporary and reasonably necessary purpose, and accompanied with no unnecessary damage.[1]

The constitutional provision, it has been decided, does not require the payment of the compensation to precede an exclusive occupation of private property temporarily, as an incipient proceeding to the acquisition of a title or easement, but only the acquisition itself of the title or easement, or a permanent appropriation. But if compensation is not made or tendered within a reasonable time after the exclusive occupancy has commenced, the right to continue it will cease, and the parties continuing it will be liable as trespassers.[2]

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[1] Bloodgood *v.* Mohawk and Hudson R. R. Co.. 14 Wend. 51; S. C., 18 id. 9; Polly *v.* Washington and Saratoga R. R. Co., 9 Barb. 449; Winslow *v.* Gifford, 6 Cush. 327; Bonaparte *v.* Camden and Amboy R. R. Co., 1 Baldwin C. C. 205.

[2] In Bloodgood *v.* Mohawk and Hudson R. R. Co., 14 Wend. 51, it was considered that after an unreasonable delay in making compensation the owner would be entitled to an ample remedy; but whether the parties acting under color of legislative authority were trespassers or not, was not decided. In Cushman *v.* Smith, 34 Maine, 247, the following conclusions were arrived at by the court: "1. The clause in constitutions which prohibits the taking of private property for public use, was not designed to operate, and it does not operate, to prohibit the legislative department from authorizing an exclusive occupation of private property temporarily, as an

Where the property is taken by the State and the law appropriating it for public use provides an adequate remedy, the State may afterwards convey the land to a railroad company without the claim for damages being a lien on the land.[1] The law itself must provide a remedy, the constitution in this respect not executing itself.[2]

In some of the States, as in Mississippi, Ohio, Maryland, and Arkansas, the constitution prohibits the taking of private property for public use, "without compensation first made." Under such a provision the compensation, or a tender thereof, must precede the entry for the purpose of constructing the road.[3] But this provision does not require the compensation to precede an entry for the purpose of surveying and laying out the road.[4] And where

incipient proceeding to the acquisition of a title to it or an easement in it. (2.) It was designed to operate, and it does operate, to prevent the acquisition of any title to land or to an easement in it, or to a permanent appropriation of it from an owner for public use, without the actual payment or tender of a just compensation for it. (3.) That the right to such temporary occupation as an incipient proceeding, will become extinct by an unreasonable delay to perfect proceedings, including the actual payment or tender of compensation to acquire a title to the land or of an easement in it. (4.) That an action of trespass *quare clausum* may be unauthorized to recover damages for the continuance of such occupation, unless compensation or a tender of it be made within a reasonable time after the commencement of it. (5.) That under such circumstances, an action of trespass, or an action on the case may be maintained to recover damages for all the injuries occasioned by the prior occupation." See Levering *v.* Phil., Germantown, &c., R. R. Co., 8 W. & S. 459; Raleigh and Gaston R. R. Co. *v.* Davis, 2 Dev. & Bat. 464.

[1] People ex rel. Green *v.* Michigan Southern R. R. Co., 3 Mich. 496.

[2] Lamb *v.* Lane, 24 Ohio, 167.

[3] Doughty *v.* Somerville and Easton R. R. Co. *v.* Lewis, 3 Halst. Ch. 51; Thompson *v.* Grand Gulf R. R. and Banking Co. 3 How. (Miss.) 240; Stewart *v.* R. R. Co. 7 S. & M. 568; Ex parte Martin, 13 Ark. 198; Roberts *v.* Williams, 15 id. 198; Sedgwick on Stat. and Const. Law, pp. 494–498.

[4] Doughty *v.* Somerville and Easton R. R. Co. 3 Halst. Ch. 51.

the company constructed its road on a party's land with his consent, it was under its charter allowed to acquire title subsequently by instituting the proper proceedings, and making compensation.[1]

A general statute, or the charter in some cases, provides that the company shall not take possession of the land for the construction of its road until it has paid or tendered compensation.[2]

The title to the land becomes vested in the company when it has complied with the provisions of the statute, and paid or deposited the compensation as the law provides.[3] An act of the legislature, passed before such payment or tender, ordering a new appraisement has been held constitutional, the performance of the conditions being necessary to the vesting of the title to the land, and the act therefore not interfering with any vested rights.[4] The right of the owner to the damages, becomes vested when the right of the company to the land has vested. The right of the company to the land does not, under the statutes, become vested until the compensation has been paid or deposited in the manner provided. And where the

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[1] Coster *v.* N. J. R. R. and Transportation Co. 3 Zabris. 227; 4 id. 730.

[2] Milwaukie and Miss. R. R. Co. *v.* Eble, 4 Chandler (Wis.) 72; Ellicottville, &c., Plank Road Co. *v.* Buffalo and Erie R. R. Co. 20 Barb. 644; Swan's Stat. of Ohio (1854), p. 201.

[3] Bloodgood *v.* Mohawk and Hudson R. R. Co. 18 Wend. 10, 19; Beekman *v.* Saratoga and Schenectady R. R. Co. 3 Paige, 45, 76; Wheeler *v.* Rochester and Syracuse R. R. Co. 12 Barb. 227; Crowner *v.* Watertown and Rome R. R. Co. 9 How. Pr. 457; Montgomery and W. P. R. R. Co. *v.* Walton, 14 Ala. 207; Schuyler *v.* Northern R. R. Co. 3 Whart. 555.

[4] Baltimore and Susquehanna R. R. Co. *v.* Nesbit, 10 How. 395. See Hudson River R. R. Co. *v.* Outwater, 3 Sandf. 689.

company, before fulfilling these conditions precedent, abandons its route under authority of statute, without entering on the land to construct the road, the owner cannot enforce a claim to the damages assessed in the award which has been confirmed.[1]

Mode of Determining the Compensation.—A special remedy is uniformly provided by statute for the appraisement of the damages to parties injured by the construction of a railroad. County commissioners, special railroad commissioners, viewers, or some other board of appraisers, are designated for this purpose. The general provision in the federal and state constitutions, securing the right of trial by jury, does not prohibit a special tribunal for the assessment of damages to parties, where property is taken by the state under the power of eminent domain. It relates to the trial of issues of fact in civil and criminal cases, and not to mere collateral questions of damages, in which no suit is pending.[2] Where the constitution, as that of Ohio, specially provides that the damages shall be assessed by a jury, a jury consisting of twelve persons is presumed to be intended.[3] The clause in the constitution of

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[1] Stacey *v.* Vt. Central R. R. Co. 1 Williams, 39; Crowner *v.* Watertown and Rome R. R. Co. 9 How. Pr. 457. See English cases cited in 1 Am. Rail. Cases, 47.

[2] Beekman *v.* Saratoga and Schenectady R. R. Co. 3 Paige, 75; Bonaparte *v.* Camden and Amboy R. R. Co. 1 Baldwin C. C. 205; Hickox *v.* Cleveland, 8 Ohio, 543; Raleigh and Gaston R. R. Co. *v.* Davis, 2 Dev. & Batt. 451. 464. When land is taken by the State for its purposes, a board of commissioners appointed by the governor, was held constitutional. People ex rel. Green *v.* Michigan Southern R. R. Co. 3 Mich. 496; Smith *v.* M'Adam, 3 id. 506.

[3] Lamb *v.* Lane, 4 Ohio State, 167.

New York, providing for a jury to assess the damages, is construed not to import a tribunal consisting of twelve men acting on a unanimous determination, but to be used to describe a body of jurors of different numbers, and deciding by majorities or otherwise, as the legislature in each instance shall direct.[1]

The franchise of a bridge or turnpike corporation may, under the provisions of the statute, be within this remedy, and the appraisers authorized to assess damages for the same when taken or impaired by the railroad company.[2] It may also be availed of by the State for obtaining damages to property held by it, as a body corporate, where, under the same circumstances, a citizen would have a claim for compensation which he might enforce under it.[3] The State may, however, grant to the company the right to take its own property without requiring compensation.[4]

In a proceeding to assess the damages, the special tribunal appointed for that purpose, as the commissioners or a jury, it has been held, may pass upon the title of the claimant. In Massachusetts, he is entitled to have the judgment of the county commissioners on this point revised by a jury.[5]

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[1] Cruger *v.* Hudson River R. R. Co. 2 Kernan, 190.

[2] White River Turnpike Co. *v.* Vt. Central R. R. Co. 21 Vt. 590; Enfield Toll Bridge Co. *v.* Hartford and N. H. R. R. Co. 17 Conn. 454.

[3] Commonwealth *v.* Boston and Maine R. R. 3 Cush. 25.

[4] Indiana Central R. R. Co. *v.* State, 3 Ind. 421.

[5] Directors of Poor of York County *v.* Wrightsville and York R. R. Co. 7 W. & S. 236; Carpenter *v.* County Commissioners of Bristol, 21 Pick. 258. But in England, the arbitrators or sheriff's jury have no jurisdiction to in-

The special remedy thus provided by statute is exclusive, and an action at common law cannot be resorted to for injuries which are included within it. The assessment of damages by such a tribunal is a bar to an action for all injuries which could have been properly included by them in their award. They afford the proper remedy for the appraisement of the damages for all acts which the company may rightfully do by virtue of legislative authority, and for which it is made liable, whether it admits or denies its liability, and whether the injury is actionable at common law or only remediable by virtue of the statute. The question is not afterwards open for consideration, in a suit against the company for an injury, whether they took into consideration a particular injury; as it was their duty to do so, and the performance of their duty, except in a direct proceeding to set aside their award, or on appeal, is to be conclusively presumed. The award is a judicial act, and unless appealed from becomes like a judgment at law, *res judicata*, and cannot be collaterally impeached.[1]

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quire into his title. Regina *v.* London and N. W. R. Co. 25 Eng. L. and Eq. 37.

[1] Mason *v.* Kennebec and Portland R. R. Co. 31 Maine, 215; Vt. Central R. R. Co. *v.* Baxter, 22 Vt. 365; Sabin *v.* Vt. Central R. R. Co. 25 id. 363; Aldrich *v.* Cheshire R. R. Co. 1 Foster, 206; Clark *v.* Boston, Concord, and Montreal R. R. Co. 4 id. 114; Dearborn *v.* Same, 4 id. 179; Dodge *v.* County Commissioners of Essex, 3 Met. 380; Furniss *v.* Hudson River R. R. Co. 5 Sandf. 551; Yeiser *v.* Phil. and Reading R. R. Co. 8 Barr. 366; Winchester and Potomac R. R. Co. *v.* Washington, 1 Rob. (Va.) 67; M'Laughlin *v.* Charlotte and S. C. R. R. Co. 5 Rich. 583; Hueston *v.* Hamilton and Eaton R. R. Co. 4 Ohio State, 685; Null v. White Water Canal Co. 4 Ind. 431; Lafayette and Indianapolis R. R. Co. *v.* Smith, 6 id. 249; New Albany and

The appraisers are to presume that the company will execute its work properly, and not transgress its powers, and they cannot award damages on the supposition that it will be guilty of a breach of duty. They are only authorized to assess the damages for those acts which are authorized by statute. Therefore the special proceeding will not bar the remedy at common law where the company transcends its authority or negligently and improperly performs its work, so as to occasion unnecessary damage.[1]

Where a party claims damages against the company under the statute remedy, it has been held to be estopped from setting up that it had no authority to do the work involving the damage, on the ground that it had not taken the required preliminary steps; and where the work was done at the same time that the road was constructed, and as a part of it, it is estopped from denying that the work itself was authorized by the charter.[2]

Before the company can proceed to condemn pri-

Salem R. R. Co. *v.* Conelly, 7 id. 35; Leviston *v.* Junction R. R. Co. 7 id. 597. This remedy is held in Georgia to be cumulative. Carr *v.* Georgia R. R. Co. 1 Kelly, 524. This subject will be again considered in chapter x.

[1] Mason *v.* Kennebec and Portland R. R. Co. 31 Maine, 215; Rogers *v.* Same, 35 id. 319; Vt. Central R. R. Co. *v.* Baxter, 22 Vt. 365; Hatch *v.* Vt. Central R. R. Co. 25 id. 63; Sahin *v.* Same, 25 id. 363; Whitcomb *v.* Same, 25 id. 69; Dearborn *v.* Boston, Concord, and Montreal R. R. Co. 4 Foster, 187; Dodge *v.* County Commissioners of Essex, 3 Met. 383; Proprietors of Locks and Canals *v.* Nashua and Lowell R. R. Co. 10 Cush. 388; Hazen *v.* Boston and Maine R. R. Corp. 2 Gray, 574; Winchester and Potomac R. R. Co. *v.* Washington, 1 Rob. (Va.) 67; Crawfordsville R. R. Co. *v.* Wright, 5 Ind. 252; Ex parte Eyre, 3 Nev. & Man. 622; 1 Am. Rail. Cas. 554, 555, notes.

[2] Parker *v.* Boston and Maine R. R. 3 Cush. 107.

vate property, it must perform the conditions which the statute requires to precede the condemnation. Thus, if required to obtain from the legislature a law approving its route and termini, this law must first be obtained.[1]

In the absence of fraud, an action cannot subsequently be maintained for damages, on the ground that, at the time of the assessment, the company represented that the road was to be constructed in a certain manner, whereas it has been constructed in a manner more injurious to the owner. It was so decided in a case where it was alleged that the damages were assessed by the commissioners, upon a representation by the company, through its agents, that the railroad was to be constructed so as to cross the plaintiff's premises, with a certain fill or embankment, and that the highway was to be so raised as to pass over the railroad on a level, and that after the time had passed for an appeal from their award, the railroad was built with a certain fill or embankment greater than the one represented, and that the highway was not raised to a level with the railroad, by reason of which he sustained greater damages than what had been awarded him.[2] Any omission to assess damages, which the commissioners were bound to assess, if relied upon in a proceeding to set aside the award, must appear affirmatively.[3]

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[1] Gillenwater *v.* Mississippi and Atlantic R. R. Co. 13 Ill. 1.

[2] Butman *v.* Vt. Central R. R. Co., 27 Vt. (1 Williams), 500. Whether the plaintiff had a remedy in equity, or by an action on the special undertaking, was not decided.

[3] Coster *v.* N. J. R. R. and Transportation Co., 4 Zabris. 730.

If the act appropriating private property for the purposes of a railroad does not comply with the clause of the constitution, on account of the absence of a provision for compensation or otherwise, it is, according to the better authorities, void; no right of taking exists against the owner, who may avail himself of the common-law remedies against persons assuming to act under it.[1] And where the acts of the company, under color of their charter, will result in irreparable injury to a party whose property is unlawfully taken by it, he will be entitled to have an injunction issued against it.[2] An injunction will be granted at the suit of a company enjoying a franchise, exclusive within certain limits, against a company proceeding to disturb the same under color of a legislative act, which does not assume to provide compensation for the injury to the franchise, or otherwise to conform to the conditions imposed by the constitution of the State on the exercise of the right of eminent domain.[3]

The liability of the company for torts, in actions at common law, will be more fully considered in a succeeding chapter.

Injuries to be Compensated in the Assessment of Damages.—The statute provision for assessing

[1] Thacher *v.* Dartmouth Bridge Co., 18 Pick. 501; Boston and Lowell R. R. Corp. *v.* Salem and Lowell R. R. Co., 2 Gray, 36, 37; Cushman *v.* Smith, 34 Maine, 247; Seneca Road Co. *v.* Auburn and Rochester R. R. Co., 5 Hill, 170; Hankins *v.* Lawrence, 8 Blackf. 266. See M'Lauchlin *v.* Charlotte and S. C. R. R. Co., 5 Rich. 583.

[2] Bonaparte *v.* Camden and Amboy R. R. Co., 1 Baldwin, C. C. 205.

[3] Boston and Lowell R. R. Corp. *v.* Salem and Lowell R. R. Co., 2 Gray, 1, 27.

damages against a railroad company may be more or less comprehensive, or it may simply require compensation, where it is imposed by the State constitution as a condition to the exercise of the right of eminent domain. Before reviewing the decisions under the statutes of the several States, providing compensation, it is proper to consider what injuries come within the constitutional prohibition against taking private property for public uses without just compensation; or, in other words, what acts under authority of the State, affecting private property, are equivalent to *taking* it within the meaning of the clause.

Property actually taken.—The owner is, without question, entitled to compensation for land and materials appropriated for the permanent uses of the company, estimated at their fair market value.[1]

Injuries to Franchises.—It has already been stated, as settled law, that a grant of franchises affecting public interests is to be construed strictly, and that nothing passes to the grantee beyond what is required by its terms. There is no implication in a grant to a turnpike, canal, or railroad company, that no other like improvement shall be authorized which may diminish or destroy its profits.

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[1] Boston R. R. Co. *v.* Lee, 13 Barb. 169; Canandaigua and Niagara Falls R. R. Co. *v* Payne, 16 id. 273; Giesy *v.* C. W. and Z. R. R. Co., 4 Ohio State, 331; Phil. and Reading R. R. Co. *v.* Gilson, 8 Watts, 243; Sater *v.* Burlington and Mt. Pleasant Plank Road Co., 1 Clarke (Iowa), 386; Henry *v.* Dubuque and Pacific R. R. Co., 2 id. 288.

A company owning a canal, turnpike, or railroad, which has not protected itself by an exclusive grant within certain limits, will not be entitled to compensation, on the building of a railroad by whose competition the value of its franchise is essentially depreciated or destroyed.[1] But where it is provided in the charter of a company that no other improvement of a certain kind shall be authorized within certain limits, the exclusive grant is a part of its franchise, and the company will be entitled, under the constitution, to compensation upon the construction of such an improvement within those limits.[2]

Consequential Injuries.—Consequential injuries not actionable at common law, do not amount to a taking of private property, so as to require compensation under the constitutional restriction. A party suffering incidental injury from the reasonable use by another of his property—which, in technical phrase, is *damnum absque injuria*—is without remedy at common law. The restriction is interpreted as designed not to give new rights, but to protect those already existing.[3] As a general rule,

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[1] *Ante*, ch. iii. pp. 20—26; ch. viii. p. 157, 158.

[2] Enfield Toll Bridge Co. *v.* Hartford and N. H. R. R. Co., 17 Conn. 40, 454; Boston and Lowell R. R. Corp. *v.* Salem and Lowell R. R. Co., 2 Gray, 1; *ante*, ch. iii. pp. 27—35, ch. viii. p. 158, 159.

[3] Radcliffe *v.* Mayor, &c., Brooklyn, 4 Comst. 195; Hatch *v.* Vt. Central R. R. Co., 25 Vt. 49, 61; Richardson *v.* Same, 25 id. 465; Gould *v.* Hudson River R. R. Co., 10 Barb. 616; Monongahela Nav. Co. *v.* Coons, 6 W. and S. 114; Case of Phil. and Trenton R. R. Co., 6 Whart. 25; Henry *v.* Pittsburg and Allegheny Bridge Co., 8 id. 85; Mifflin *v.* Penn. R. R. Co., 16 Penn. State, 193; Reitenbaugh *v.* Chester Valley R. R. Co., 21 id. 100; Sunbury and

a party is not liable at common law for damages which result to another from the reasonable use of his own property. Where there are no prescriptive rights, and the acts complained of do not amount to a nuisance, he may make erections and excavations on his own premises, and conduct any kind of business thereon, which may consequentially injure his neighbor, as, by stopping his lights, or weakening the foundations of his buildings, or otherwise depreciating their value by the nature of the erections or business, without subjecting himself to liability, in the absence of negligence or want of skill.[1] This principle has been applied to injuries done by railroad companies. Thus, they have been held not responsible for fires occasioned by the issuing of sparks from their engines, in the absence of proof of negligence or want of care and skill.[2] So, excavations and embankments made by the company in building its road in a street in front of a party's store, whereby access to it by customers and teams is obstructed, and rain water is admitted to the basement, are not injuries for which

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Erie R. R. Co. *v.* Hummell, 27 id. 99; Cushman *v.* Smith, 34 Maine, 257, 258; Rogers *v.* Kennebec and Portland R. R. Co., 35 id. 323; Whittier *v.* Same, 38 id. 26; Hickox *v.* Cleveland, 8 Ohio, 543; Bradley *v.* N. Y. and N. H. R. R. Co., 21 Conn. 294, 304; Clark *v.* Saybrook, 21 id. 313. But see Fletcher *v.* Auburn and Syracuse R. R. Co., 25 Wend. 462; Mahon *v.* Utica and Schenectady R. R. Co., Lalor's Sup. to Hill and Denio, 156.

[1] Radcliffe *v.* Mayor, &c., of Brooklyn, 4 Comst. 195; Burroughs *v.* Housatonic R. R. Co, 15 Conn. 124; Phila. and Reading R. R. Co. *v.* Yeiser, 8 Barr, 366; Hatch *v.* Vt. Central R. R. Co., 25 Vt. 49; Sabin *v.* Same, 25 id. 363.

[2] Burroughs *v.* Housatonic R. R. Co., 15 Conn. 124; Phila. and Reading R. R. Co. *v* Yeiser, 8 Barr, 366.

compensation is required by the clause of the constitution already cited.[1]

RIGHTS OF OWNERS OF LANDS UPON NAVIGABLE WATERS.—The owner of lands adjoining a navigable river in which the tide ebbs and flows, has no private property in the shore between high and low water mark, but it belongs to the State in its sovereign capacity. Whatever rights he has in it are public rights, which may be restricted by the legislature without giving him compensation.[2] Thus, the owner of a farm lying on the Hudson river where the tide ebbs and flows, cannot recover damages of a railroad company, which constructs, in pursuance of a grant from the legislature, a railroad along the shore between high and low water mark with an embankment so high as to cut off all communication between such land and the river otherwise than across the railroad, and preventing the lading of boats with produce directly from the farm.[3] It is held in Maine that it is competent for

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[1] Hatch *v.* Vt. Central R. R. Co., 25 Vt. 49; Richardson *v.* Vt. Central R. R. Co., 25 id. 465. But, see Miller *v.* Auburn and Syracuse R. R. Co., 6 Hill, 61.

[2] Bailey *v.* Phil. Wil. and Baltimore R. R. Co., 4 Harring. 389.

[3] Gould *v.* Hudson River R. R. Co., 12 Barb. 616; S. C. 2 Selden, 522, Edmonds, J., dissenting; see Morgan *v.* King, 18 Barb. 277; Rundle *v.* Delaware and Raritan Canal Co., 14 How. 80; Pennsylvania *v.* Belmont Bridge Co., 18 id. 432; Commonwealth *v.* Fisher, 1 Penn. 462; Shrunk *v.* Schuylkill Nav. Co., 14 S & R. 71; *contra*, Bell *v.* Gough, 3 Zabris. 624. The charter of the Hudson River Rail Road Company required the erection of draw-bridges over navigable streams, inlets, and bays, and the extension of docks and wharfs which were cut off by the railroad. The statute is held to mean only bays capable of a general navigation, and not to require the company to extend the docks on the streams and bays. Tillotson *v.*

the legislature to authorize erections across tide waters or any navigable waters without compensation, although the navigation is impaired; but the company under a statute will be liable to an action for an injury to an owner by not complying with its requirements.[1] So, in Massachusetts where an act of the legislature authorized the company to make certain erections for its road between the channels of two navigable rivers, and such erections having been made in the manner specified in the act, whereby the course of the currents of the rivers was changed and directed upon certain wharves and flats, rendering additional sea-wall and filling necessary to secure the same, it was held that the damage thereby occasioned to the proprietor was *damnum absque injuria*, for which he was not entitled to compensation from the company; it being competent for the legislature to regulate a navigable stream so as to promote the public convenience without entitling riparian proprietors to compensation for damage thereby done to them.[2] Also, the owner of a tide mill, who is besides the riparian proprietor of flats from which the tide wholly ebbs between his mill and navigable water, has no right either as against coterminous proprietors or the public, to have his flats kept open and unobstructed for the free flow and reflow of the tide water for the use of his mills or for navigation.

Hudson River R. R. Co., 15 Barb. 406; Getty *v.* Same, 21 id. 617; see Furniss *v.* Hudson River R. R. Co., 5 Sandf. 551.

[1] Rogers *v.* Kennebec and Portland R. R. Co., 35 Maine, 319.

[2] Fitchbury R. R. Co. *v.* Boston and Maine R. R. Co., 3 Cush. 58.

The adjoining proprietors may build solid structures to the extent of one hundred rods, and thereby obstruct the flow and reflow of the tide, provided they do not wholly cut off the access of other proprietors to their houses and land; and if the mill owner or other proprietors suffer damage therefrom, it is *damnum absque injuria.* The public have a right to regulate the use of navigable waters; and the erection of a bridge, with or without a draw by the authority of the legislature, is the regulation of a public right, and not the deprivation of a private right which can be a ground for damages, or the taking of private property for public use which will entitle the owner to compensation.[1] Under the colonial ordinances of Massachusetts the flats, on an arm of the sea where the tide ebbs and flows, to the extent of one hundred rods are appurtenant to the upland.[2] The owner of the wharf or upland to which the flats are appurtenant, is by virtue of this ordinance entitled to compensation for injuries to his property by the construction of a railroad across them.[3]

A State may authorize a railroad company to build a bridge over navigable waters, which does not conflict with the legislation of Congress by virtue of its power to regulate commerce between the States. But if it conflicts with such legislation, a party suffering special damage therefrom may insti-

[1] Davidson *v.* Boston and Maine R. R., 3 Cush. 91.

[2] Commonwealth *v.* Alger, 7 Cush, 53.

[3] Ashby *v.* Eastern R. R. Co., 5 Met. 368; Commonwealth *v.* Boston and Maine R. R., 3 Cush. 25.

tute proceedings against it as a nuisance.[1] A general power to construct a railroad and bridges between a given termini, the natural and convenient route of which would cross several navigable streams, authorizes the company to construct bridges over such navigable streams in a manner that will not destroy the navigation of them.[2] The power to obstruct navigation must, however, be clearly given; and when not given, or transcended, the obstruction will be a nuisance.[3]

RIGHTS OF OWNERS OF LANDS UPON HIGHWAYS AND STREETS.—Railroads must necessarily cross highways, and in some cases run along upon them for a greater or less distance, and they have been constructed in the streets of cities and villages, operated by horse or steam power. Under what circumstances, when so constructed, compensation must be awarded to the adjoining owner, is a question not without difficulty and some conflict of judicial opinion. In its determination, it is not material whether the land for the street was originally dedicated gratuitously or appropriated by the State by compulsory proceedings.[4] A distinction

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[1] Pennsylvania *v.* Wheeling Bridge Co., 13 How. 518; S. C., 18 id. 421; Works *v.* Junction R. R., 5 M'Lean, 425; U. S. *v.* R. R. Bridge, 6 id. 517; Columbia Ins. Co. *v.* Peoria Bridge Co., 6 id. 70; Columbus Ins. Co. *v.* Curtenius, 5 id. 209; People *v.* Saratoga and Rensselaer R. R. Co. 15 Wend. 113; U. S. *v.* New Bedford Bridge, 1 Wood. and Min. 401; 2 Am. Rail. Cas., 452, notes.

[2] Attorney General *v.* Stevens, Saxton, 369.

[3] Attorney General *v.* Hudson River R. R. Co., 1 Stockton Ch. 527; Newark Plank Road Co. *v.* Elmer, 1 id. 754.

[4] Williams *v.* N. Y. Central R. R. Co., 18 Barb. 222.

has been suggested between ordinary highways and streets within the limits of cities or populous villages, according to which the latter may be used for more various uses than the former, as for laying gas and water pipes, or for any other like purposes, conducive to the comfort and health of the inhabitants.[1] But as both the highway and the street are appropriated for the same general purpose, and a highway in a district sparsely inhabited at one time may by the growth and centering of population become a street in a city, it is apprehended that this distinction does not rest on a sound basis.

The ordinary presumption is that the owner of land taken or dedicated for a highway, still retains the fee, subject to the right of way in the public and the powers and privileges incident thereto. The construction of a railroad on the highway, owned and operated by a private company taking tolls, has in a few cases been considered as subjecting the highway to an additional easement which, even without any special damage, is a taking of private property requiring compensation.[2] This doctrine cannot be regarded as law. Where private property has been taken for public use, and full

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[1] Chapman *v.* Albany and Schenectady R. R. Co., 10 Barb. 362; Plant *v.* Long Island R. R. Co., 10 id. 28; Milhau *v.* Sharp, 15 id. 193; Williams *v.* N. Y. Central R. R. Co., 18 id. 246; Wetmore *v.* Story, 22 Barb. 414; S. C., 3 Abbott, Pr. R. 262.

[2] Fletcher *v.* Auburn and Syracuse R. R. Co., 25 Wend. 462; Mahon *v.* Utica and Schenectady R. R. Co., Lalor's Sup. to Hill and Denio, 156; Presbyterian Society of Waterloo *v.* Auburn and Rochester R. R. Co., 3 Hill, 567; Miller *v.* Auburn and Syracuse R. R. Co., 6 id. 61; Benedict *v.* Coit, 3 Barb. 459; Nicholson *v.* N. Y. and Erie R. R. Co., 22 Conn. 74.

compensation made for a perpetual easement, its subsequent appropriation to another public use of a like kind does not require additional compensation.[1] The purpose of opening a highway or street is, to provide the public with a right of passage for persons on foot or with carriages or other kinds of vehicles. The use, for which this public right is obtained is not confined to the same species of vehicles, drawn by the same kind of power that prevailed at the time of the dedication or appropriation, but admits of the passage and repassage of such other vehicles, operated in such a mode and by such forces, as an advanced civilization may require for the general convenience. The improved method of conveyance may incidentally increase or depreciate the value of property on the highway; but, provided the right of ingress and egress, of passage and repassage, is left reasonably free to the adjoining owner, the injury is one which the law does not recognize. It may now be stated as the settled rule of American law, that a railroad laid out over or upon a highway or street, under proper legal authority, is not such an invasion of private right as to entitle the owner to compensation by virtue of the constitutional prohibition, provided it is so laid and constructed as not to be incompatible with the use of the same in the other usual modes of passage and conveyance. It is not necessarily a nuisance or purpresture, even in a large

[1] Chase *v.* Sutton Manuf. Co., 4 Cush. 152; Pierce *v.* Somersworth, 10 N. H. 369; Heyward *v.* New York, 3 Selden, 214; Rexford *v.* Knight, 1 Kernan, 308.

city, although it may to a certain extent interrupt the free passage of other kinds of vehicles; and unless unreasonable or permanently exclusive in its use, when authorized by competent authority it is not a nuisance to be restrained by an injunction. The authority to construct the road legalizes the obstruction, and prevents actions for special damages. The exclusive right to take tolls from persons passing over it in its cars, vested in a private corporation or individuals, does not make the use of the highway a diversion from its original purpose.[1] The right to compensation in such a case may, however, be given by the charter of the company.[2] But notwithstanding the laying of the track of the railroad on a highway so as not to be incompatible with the owner's right of passage and repassage, if made under com-

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[1] Drake *v.* Hudson River R. R. Co, 7 Barb. 508; Plant *v.* Long Island R. R. Co., 10 id. 26; Chapman *v.* Albany and Schenectady R. R. Co., 10 id. 360; Hentz *v.* Long Island R. R. Co., 13 id. 646; Adams *v.* Saratoga and Washington R. R. Co., 11 id. 414; Milhau *v.* Sharp, 15 id. 193; Stuyvesant *v.* Pearsall, id. 244; Milhau *v.* Sharp, 17 id. 435; Williams *v.* N. Y. Central R. R. Co., 18 id. 222; Wetmore *v.* Story, 22 id. 414; S. C. 3 Abbott Pr. R. 262; Anderson *v.* Rochester, Lockport, and Niagara Falls R. R. Co., 9 How. Pr. 553; Radcliffe *v.* Mayor of Brooklyn, 4 Comst. 195; Hamilton *v.* N. Y. and Harlem R. R. Co., 9 Paige, 171; Hodgkinson *v.* Long Island R. R. Co. 4 Edw. Ch. 411; Davis *v.* Mayor, &c. New York, to be reported in Kernan's Reports of the N. Y. Court of Appeals; Applegate *v.* Lexington and Ohio R. R. Co., 8 Dana, 289; Wolfe *v.* Covington and Lexington R. R. Co., 15 B. Monroe, 404; Whittier *v.* Portland R. R. Co., 38 Maine, 26; In Re Phil. and Trenton R. R. Co., 6 Whart. 25; Monongahela Nav. Co. *v.* Coons., 6 W. & S. 101; M'Laughlin *v.* R. R. Co., 5 Rich. 583; Sargent *v.* Ohio and Mississippi R. R. Co., 1 Handy (Superior Court of Cincinnati), 52; Tate *v.* Ohio and Mississippi R. R. Co., 7 Indiana, 479; 2 Am. Rail. Cas., 292; Donnaher *v.* State of Mississippi, 8 S. & M. 649; Richardson *v.* Vt. Central R. R. Co., 25 Vt. 465; Hatch *v.* Same, 25 id. 62.

[2] Mifflin *v.* R. R. Co., 16 Penn. State, 182.]

petent authority cannot be complained of by him, yet if his right to use the adjoining highway is essentially obstructed or destroyed, it would be manifestly unjust, and according to some authorities unconstitutional, to deny him compensation.[1]

A municipal corporation, by virtue of its ordinary power to regulate the use of streets may, it has been considered, by a revocable license permit private individuals or a corporation to lay railroad tracks thereon, and run cars on the same, receiving tolls for their own use from passengers, provided other modes of carriage are not essentially impaired, and a nuisance is not created. The municipal legislative body cannot, it would seem, in the absence of special powers conferred by the State, grant an irrevocable franchise to private individuals or corporations so to use the streets, as this would be an unauthorized surrender of its legislative capacities.[2]

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[1] Tate *v.* Ohio and Mississippi R. R. Co., 7 Ind. 479; Fletcher *v.* Auburn and Syracuse R. R. Co., 25 Wend. 462; Chapman *v.* Albany and Schenectady R. R. Co., 10 Barb. 366; Plant *v.* Long Island R. R. Co., 10 Barb. 26; Cooper *v.* Alden, Harring Ch. (Mich.), 72.

[2] Davis *v.* Mayor, &c., of New York, Sharp, *et al.* to appear in Kernan's Reports of the Court of Appeals of New York, overruling 3 Duer, 119; 2 id. 663; Milhau *v.* Sharp, 15 Barb. 193; 17 id. 435; Stuyvesant *v.* Pearsall, 15 id. 244. In the same case of Davis *v.* Mayor, &c., of New York, Sharp *et al.* involving the right of parties under authority of a resolution of the Common Council to maintain a railroad operated by horse power in Broadway, New York, and to take tolls from persons passing on the same, the judges of the Court of Appeals concurred, on questions of remedy and practice, in reversing the judgment of the Superior Court against the defendants, and ordering a new trial; but their opinions differ as to the power of the municipal authorities of a city, without special legislative authority to permit the use of the streets for that purpose, even by a revocable license, and as to the question whether the ordinance authorizing the railroad was a

The railroad, if built in a street or highway without competent public authority, is a public nuisance, and the parties constructing it may be indicted. The owners of the lots on the street suffering special damage in the obstruction of access therefrom to their lots by the railroad, have the right to complain thereof; and an injunction against laying its track will be granted on their application. It was so held where the construction of a railroad in the streets of New York city, under a resolution of the Board of Assistants, passed in one year, and concurred in by the Board of Aldermen in another year, had been commenced; it being necessary, to give validity to such a resolution, that it should be adopted by both bodies in the same year.[1]

The legislature of Mississippi, it has been held, cannot subject the streets in the corporation of Jackson, in which the right to them is vested, to the use of a railroad corporation without the assent of the city, or the payment of compensation.[2] But the better doctrine is, that the streets of a municipal cor-

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license or an irrevocable grant. See Drake *v.* Hudson River R. R. Co. 7 Barb. 508; Hamilton *v.* N. Y. and Harlem R. R. Co. 9 Paige, 171; Lexington and Ohio R. R. Co. *v.* Applegate, 8 Dana, 289. In Sargent *v.* Ohio and Mississippi R. R. Co. 1 Handy (Sup. Court of Cincinnati), 52, the power of the city authorities to permit a railroad company to lay its track in the streets, and run cars thereon, provided other modes of conveyance were not seriously and permanently obstructed, was sustained, and its exercise was held not to create a nuisance, or be an invasion of private rights. And for the purpose of preparing the street for the railroad track, the temporary occupation thereof by the company, although exclusive, would not be restrained by injunction.

[1] Wetmore *v.* Story, 22 Barb. 414; S. C. 3 Abbott, Pr. R. 262.

[2] Donnaher *v.* State, 8 S. & Mars. 649.

poration are subject to the paramount authority of the State to regulate their use for general purposes of the public good.[1]

Liability of the Company to Landowners for Damages, as defined by Statute.—The liability of the company to answer in damages is often enlarged by its charter, or a general law, beyond what it would be at common law, or is required by the constitutional restriction. The additional liability is wisely adapted to protect private interests, and the intention to impose it is inferred from quite general terms. The company, accepting a charter on this condition, is bound to comply with it. The statute may add more or less to the common law and constitutional liability. It may give to a party whose land is taken, compensation for consequential damages to that which is not taken. This effect is given to statutes which provide for the award to the owner of land taken, of "the damages sustained by him;" but such consequential damages, for which compensation is provided, are restricted to such as are immediate and appreciable, and affecting the same piece or tract, a part of which is taken, to the exclusion of such damages as are remote and speculative. The statutes of Maine, and of most other States, allow no compensation where no land or materials are taken.[2] The statute

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[1] In Re Phil. and Trenton R. R. Co. 6 Whart. 25.

[2] Rogers *v.* Kennebec and Portland R. R. Co., 35 Maine, 319; Whittier *v.* Same, 38 id. 26; Hatch *v.* Vt. Central R. R. Co., 25 Vt. 49.

may be so drawn as to have a wider operation, as in Massachusetts and Connecticut, so as to give a remedy to a party from whom no land or materials are taken.[1] In Massachusetts, it is provided that "every railroad corporation shall be liable to pay all damages that shall be occasioned by laying out and making and maintaining their road, or by taking any land or materials."[2] Under this clause, injuries to buildings on a lot near but not within the limits of the road, resulting in the construction of the same, from blasting, in a proper manner, a ledge of rocks through which it passes, are to be included in the assessment.[3] The owner of a wharf on an arm of the sea, the value of which is impaired by the construction of a railroad across the flats below it, is entitled to compensation.[4] The obstruction of a private way, by the building of the railroad, is, under the statute, a proper subject to be included in the award of damages. The owner of a well on land adjoining but not crossed by the railroad, the water of which is drawn off by the excavations in building the road, and the well thereby rendered useless, is entitled to compensation.[5] The owner of a right of flowage, which is injuriously affected by the construction of a railroad over the

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[1] Dodge *v.* County Commissioners of Essex, 3 Met. 380; Bradley *v.* N. Y. and N. H. R. R. Co., 21 Conn. 294.

[2] R. S., 1836, c. 39, § 56.

[3] Dodge *v.* County Commissioners of Essex, 3 Met. 380.

[4] Ashby *v.* Eastern R. R. Co., 5 Met. 368.

[5] Parker *v.* Boston and Maine R. R. Co., 3 Cush. 107. See Aldrich *v.* Cheshire R. R. Co., 1 Foster, 359.

land flowed, is entitled to damages.[1] The owners of a milldam, authorized to be raised in a navigable river, although they did not comply with the requirements of the law authorizing its erection, are entitled to have damages assessed to them for the injury caused by the construction of a railroad through and across the millpond.[2]

But the depreciation in the value of real estate not crossed or touched by the railroad, and caused not by any embankments or excavations so near as to produce direct physical damage to it, but merely by laying its track across a street leading thereto, is not to be considered in the assessment.[3]

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[1] Davidson *v.* Boston and Maine R. R. Co., 3 Cush. 91.

[2] White *v.* South Shore R. R. Co., 6 Cush. 412.

[3] Proprietors of Locks and Canals *v.* Nashua and Lowell R. R. Corp., 10 Cush. 385,—Shaw, C. J.: "Supposing, then, that a special damage, differing not only in degree but in kind, such as a direct physical damage on or to the land, necessarily caused by the respondents in the execution of their public work, and so authorized by their charter, were a proper ground on which to assess damages, still, the question recurs, whether diminution in the market value of the land not otherwise touched or affected by it, is such special damage.

"Why is the market value of an estate thus situated, diminished? Is it not because whenever a purchaser is seeking a house, or a lot to build one on, he perceives at a glance that, in passing from his house to the places he will have most occasion to frequent, he must encounter the inconveniences of an intervening railroad, such as passing over an embankment, danger of detention by trains, exposure of children to accident, and the like, considerations which render the house less eligible or attractive? Such a view applies itself to the tastes, motives, and inducements of purchasers. Now, the inconveniences of crossing a railroad track, elevated or depressed, or at a grade, the possible detention by trains, the noise and smoke, and frightening of horses, the danger to persons, especially to children, are those which the whole community suffer alike, in a greater or less degree; but it cannot be contended that every member of such community, or even those so situated as to feel them in a greater degree than others, can maintain a claim against the company for damages on this account. Is, then, the

In Maine, the statute provision is held to extend to the injury occasioned by the interruption of the proprietor's passage from one part of his land to another, as well as to any other injury which may be caused by the construction and use of the road; and when such damages as may be anticipated from

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apprehension of these inconveniences, which might tend to alarm purchasers, and deter or discourage them from buying, a more tenable ground to support a claim for damages? We think not. They are common to the whole community, to be borne by the public in consideration of the greater public good to be acquired. They are, however, to be well considered by the legislature before granting such a charter; and we presume that no wise government would grant a charter tending to such public inconveniences, without a great preponderance of public good to counterbalance them.

"It is, perhaps, impracticable to state precisely how the law should be laid down for regulating the recovery of damages. We propose, in case there should be another trial, that it be stated somewhat in this form: That all direct damage to real estate, by passing over it, or which affects the estate directly though it does not pass over it, as, by a deep cut or high embankment so near lands or buildings as to prevent or diminish the use of them, by endangering the fall of buildings, the caving in of earth, the draining of wells, the diversion of water courses, so far as these are the necessary results of suitable and proper works to accomplish the enterprise and secure the public easement which is the object of the charter; also, as being of like character, the necessary blasting of a ledge of rocks, so near to houses or buildings as to cause damage; running a track so near them as to cause imminent and appreciable danger from fire; by obliterating or obstructing private ways leading to houses or buildings,—these, and perhaps many others of like kind, which particular circumstances may present, we think are proper subjects for the assessment of damages.

"But that no damage can be assessed for losses arising directly or indirectly from the diversion of travel; the loss of custom to turnpikes, canals, bridges, taverns, coach companies, and the like; nor for the inconveniences which the community may suffer in common, from a somewhat less convenient and beneficial use of public and private ways, from the rapid and dangerous crossings of the public highways, arising from the usual and ordinary action of railroad and railroad trains, and their natural incidents." See Rex *v.* London Dock Co., 5 Ad. & El. 163; Caledonian R. Co. *v.* Ogilby, 29 Eng. L. and Eq. 22.

its future construction, if it has not been built, are assessed, they are made up on the whole injury done or expected to be done, including not only the loss of the use of the land, produced by the road, but the probable expense of fences, and the diminution of the value of the land by a separation from each other of its different parts. If the ground has been excavated or elevated at the place where the communication between the two parts must be, the expense of a way under or over the road is to be considered, and if from the situation, one portion, cut off from the other, will be greatly diminished in value and rendered worthless, such facts may properly make an element in the computation.[1] But in that State, as already seen, a party from whom no land or materials are taken is not entitled to compensation for indirect injuries, resulting from lawful acts.[2]

In New Hampshire, where the railroad commissioners, in conjunction with the road commissioners for the county in which the lands taken lie, are required to assess "the damages sustained by the owners of the land," it is considered that the damages sustained are to be such as may fairly result to the land-owner by the building of the road in a suitable and proper manner, not only on account of the land actually taken, but on account of the injuries to his other land and property, and the inconveniences to which he is subjected. They are to take into con-

[1] Mason *v.* Kennebec and Portland R. R. Co. 31 Maine, 215.

[2] Rogers *v.* Same, 35 Maine, 319; Whittier *v.* Same, 38 id. 26.

sideration and assess all damages, direct and consequential, present and prospective, certain and contingent, which they may judge fairly to result to the landowner by the loss of his property and rights, and the injuries thereto. Thus, where the company by its excavations in building its road, cut off the spring which permanently supplied with water the house and barn of the landowner and irrigated his land, it was held that he should have been allowed for the injury in the award.[1] Likewise, a cut made in the construction of the road through an individual's land, which divides a way he has made for his own private use, leading from one part of his farm to another, and which also divides his pasture, is to be considered in the award.[2] Where a part of the owner's land was made liable by the operations of the company to be washed, and to cave off at a bank, and the sand drifted from the railroad to the injury of his adjoining land, such injuries, resulting unavoidably from building the road in a suitable and proper manner, are to be compensated in the award.[3]

In Vermont, the commissioners are to appraise the damages which are likely to result to the owner of land taken, from the stones which are thrown on his remaining land by blasting in a proper manner rocks within the line of the road.[4] But where no land of

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[1] Aldrich *v.* Cheshire R. R. Co. 1 Foster, 359.

[2] Clark *v.* Boston, Concord, and Montreal R. R. 4 Foster, 114.

[3] Dearborn *v.* Boston, Concord, and Montreal R. R. 4 Foster, 179. As to damages for farm-crossings and building bridges and culverts, so as to preserve the natural flow of streams, see Marsh *v.* Portsmouth and Concord R. R. 19 N. H. 372.

[4] Sabin *v.* Vt. Central R. R. Co. 25 Vt. 363.

his is taken, they are not to assess for consequential damages to his property, as where it is injured by the operations of the company in a street or highway.[1] Where the company has the power to take materials outside of its limits for the construction of its road, the commissioners are the proper tribunal to assess the damages.[2]

In Connecticut, where the charter provided that the company "shall be liable to pay all damages that may arise to any person or persons," a party was held entitled under this provision to consequential damages of a definite and appreciable character, although not amounting to a taking of private property, within the meaning of the statute, for which compensation must be made; and damages resulting from excavations by the company for the bed of its road in land adjoining the plaintiff's, whereby the foundation of his shop on his land was weakened, and from an embankment in the street opposite his building whereby access to it was obstructed, and it was rendered by the darkening of the lights and the obstruction of the air, resulting from the company's works, unfit for occupation,—were considered to be within the clause of the charter providing compensation.[3]

In New York, where, under the fifteenth section of the railroad act, the commissioners are required to

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[1] Hatch *v.* Vt. Central R. R. Co. 25 Vt. 49; Richardson *v.* Same, 25 id. 465.

[2] Vt. Central R. R. Co. *v.* Baxter, 22 Vt. 365.

[3] Bradley *v.* N. Y. and N. H. R. R. Co. 21 Conn. 294. See Nicholson *v.* N. Y. and N. H. R. R. Co. 22 id. 74; Clark *v.* Saybrook, 21 Conn. 313.

ascertain and appraise the compensation to be made to the owner or persons interested in the real estate proposed to be taken for the purposes of the company," they are to assess damages, not only for the actual value of the land taken, but also for the injury to the owner's remaining land not taken, by leaving it in an inconvenient and unmarketable shape. But they cannot take into consideration the use to which it is to be appropriated, and give greater compensation because it is to be used for a railroad, than for any other lawful purpose, or assess damages occasioned by the construction and operation of the railroad over his premises, beyond the rule above stated. Thus, probable loss of custom to a saw-mill situated on a portion of the land not taken, difficulty of getting lumber to and from it, and increased risk of fire, from the construction and operation of the railroad, are not to be considered by them.[1] In assessing damages against a railroad company for taking a right of a way across a turnpike, the turnpike company are not to be allowed for decrease of their business in consequence of the construction of the railroad along the same general line of travel.[2] It was held that evidence of the following circumstances was rightly rejected: that the land not taken is greatly depreciated in its market value by reason of the part taken being used for railroad purposes; that the buildings on the residue of the

[1] Canandaigua and Niagara Falls R. R. Co. *v.* Payne, 16 Barb. 273; Rochester and Syracuse R. R. Co. *v.* Budlong, 6 How. Pr. 467.

[2] Troy and Boston R. R. Co. *v.* Northern Turnpike Co., 16 Barb. 100; Same *v.* Lee, 13 id. 169.

lot are less desirable as a place of residence or business by reason of their proximity to the railroad thus running through the lot, and their exposure to the noise, smoke, and other annoyances attending the passage of engines and trains; that the buildings are exposed to be set on fire by sparks from the engines; that cattle and horses on land adjacent to the track of the road are liable to be frightened and injured by the passage of engines and trains; that it is difficult and unsafe to work teams on lands adjoining a railroad; that cattle are in danger when crossing the track of running along upon it and being killed; and that the general value of a farm lot is in consequence of these inconveniences diminished; and that a railroad through a farm is a great injury to it, and to the general business and operations of a farm, and its value is greatly diminished thereby.[1]

It was once held in New York, that in estimating the damages which the owner of lands taken will sustain from the railroad, he should be allowed for the expense of maintaining his half of the partition fences along the line of his land; and the company, under the law requiring adjoining owners to contribute to the expense of maintaining a partition fence, would be bound to maintain the other half.[2] The better opinion now is, that the entire expense of fencing is to be considered in the assessment where the construction of the railroad leaves an

[1] Albany and Northern R. R. Co. *v.* Lansing, 16 Barb. 68.

[2] In Matter of Rensselaer and Saratoga R. R. Co., 4 Paige, 553; but see In Matter of Long Island R. R. Co., 3 Edw. Ch. 486.

inclosed field open, in order to arrive at the depreciated value; but it is not a subject for damages in the case of uninclosed lands.[1]

In Pennsylvania, where the provisions of the charter were construed to afford further protection to the property of landowners, injuriously affected by the construction of the railroad, than that secured by the constitution of the State, the company, having constructed its road upon the bed of a turnpike, was held bound to indemnify for consequential damages persons who had received compensation for the building of the turnpike upon their land. The owners were allowed compensation for damages resulting from excavations made for the railroad, by which their property was divided, and houses left standing in inconvenient and isolated positions.[2] In the same State, where the charter provided that the viewers "shall estimate and determine whether any, and if any, what amount of damages have been sustained, or may be sustained," by owners of lands taken or occupied in the construction of the railroad, it was held that this provision was designed to secure compensation for injuries both direct and consequential, but not for such as were speculative and imaginary. Among the latter class which were not to be considered in the assessment, the risk of accidental fires, which might be com-

[1] Henry *v.* Pacific R. R. Co., 2 Clarke (Iowa), 288; Milwaukie and Mississippi R. R. Co. *v.* Eble, 4 Chandler (Wis.), 72; North Eastern R. R. Co. *v.* Sineath, 8 Rich. 185; Indiana Central R. R. Co. *v.* Hunter, 8 Indiana. See *post*, 205, note.

[2] Mifflin *v.* R. R. Co., 16 Penn. State, 182.

municated from the locomotives on the track, to buildings standing or to be erected on land over which it passed, was included.[1]

In New Jersey, where by the charter the landowner was entitled to the value of the land and damages sustained, it was held proper for the jury to take into consideration the deterioration in value of the adjacent parts of the same tract by the proximity of the railroad, for agricultural or building purposes, the obstruction of the free use of his buildings, the increased risk of fire and of danger to his family and stock in crossing the road, and the inconvenience caused by embankments and excavations made by the company.[2]

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[1] Sunbury and Erie R. R. Co. *v.* Hummell, 27 Penn. State, 99. But see Yeiser *v.* Phil. and Reading R. R. Co., 8 Barr, 366.

[2] Somerville and Easton R. R. Co. *v.* Doughty, 2 Zabris. 495, Ogden, J., dissenting as to certain parts of the decison, said,—"While the amount should be sufficiently broad to cover all damages which may result from the natural and physical effects produced by the location, construction, and use of the railroad through the plaintiff's property, in deteriorating the value thereof, a jury should not attempt to reach, and to compensate for those imaginative damages which capricious and timid fancies may suggest, which cannot be measured by any certain criterion, and which need not necessarily, and probably never would be, sustained.

"It would be unsafe for the court to venture an enumeration of every species of injuries for which a landowner might be entitled to an assessment of damages, consequent upon the location, construction and use of a railroad across his property; nevertheless there are some elements of damages which are undisputed, as, for instance, the obstruction of the free use of the party's other lands, by the formation of an embankment or an excavation which would require on his part an increase of motive power, or an unprofitable diminution in loading in his necessary cartage over the same; the changing the character of his improvements; the impairment or destruction of some actual item of value; the expenses of erecting and maintaining two lines of fences along the length of the road across his lands for

In South Carolina, where the charter directed the commissioners "to take into consideration the loss or damage which may occur to the owner or owners in consequence of the land or right of way being taken," the expense of fencing uninclosed lands used for grazing was not to be allowed to the owner in the appraisement.[1]

So under a charter with a similar provision, the incidental depreciation of the value of the tract by reason of the railroad passing through it, was a proper matter for consideration.[2] In another case, it was held proper to direct the jury, in estimating "the loss or damage," to take into consideration not matters of sentiment or fancy, but such losses and

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the purpose of perfectly protecting his premises, as well as his stock, from injury or destruction, and divers other items of damage, which must 'depend upon the peculiar circumstances and situation of the land taken, and its relative position to other lands, property, or rights of the owner.'

"There are considerations, also, which should not enter the jury box; to wit,—the interruption of a prospect; the noises occasioned by the passage of cars; the hazard of fire from the motive power usually employed; the risk of alarm to horses, and of destruction of vehicles, and of personal injury which might result therefrom; the danger that cattle, or other live stock, may be overtaken by the trains running upon the track, and be lamed or killed; the possibility that the landowner, his wife, his children, and his domestics, or some one or more of them, may be maimed or crushed to death in their necessary passage across the railroad. These, and many other ideal, speculative, and unsubstantial elements of damages, are too contingent and casual in their natures to be susceptible of admeasurement or of specific compensation or of receiving just remunerative pecuniary equivalents for the injuries contemplated."

[1] North Eastern R. R. Co. *v.* Sineath, 8 Rich. 185, in which the *dictum* in Greenville and Columbia R. R. Co. *v.* Partlow, 5 id. 428, that "the expense of fencing along the road when it passes through fields, is properly an item of damages," is questioned. It was also decided that, on an appeal by the company, from the assessment by commissioners, the jury are not limited to the amount fixed by them, but may give higher damages.

[2] Greenville and Columbia R. R. Co. *v.* Partlow, 5 Rich. 428.

inconveniences as could be estimated in money; among which were the value of the land actually occupied; the deterioration of the parcels isolated; the alterations of arrangement required about the homestead; the loss of time and expenditures, caused by any increase of care or distance, which had been occasioned, and the injury, if any had been done, to the value which the place had as a stand for a public house.[1]

In Illinois, it is considered that the injuries which the proprietor suffers by having his farm divided, so as to make it inconvenient to pass to and from its different parts, and to compel him to erect additional fences; and all other injuries of a like character occasioned by the construction of a public work through it, are as proper subjects of inquiry in estimating the damages sustained thereby as is the value of the land actually appropriated to public use.[2]

In Iowa, where the statute provides that the commissioners shall "assess the damages which the owner will sustain by the appropriation of his land for the use of the railroad corporation," the term "damages" is held to be precisely synonymous with those of "just compensation" used in the constitution of the State, and should be commensurate with the injury sustained by the taking of the property. All the circumstances which immediately depreciate the value of the premises by taking the right of

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[1] White *v.* Charlotte and S. C. R. R. Co., 6 Rich. 47. See Greenville and Columbia R. R. Co. *v.* Nunnamaker, 4 Rich. 107.

[2] Alton and Sangamon R. R. Co. *v.* Carpenter, 14 Ill. 192.

way are proper to be considered, and none others. It was held, that the expense of fencing the land divided by the railroad was not necessarily an element to be considered in assessing the damages; but if the land was fenced before, and by taking a right of way for a railroad it is thrown open and left unfenced, this fact may be considered in arriving at the depreciated value of the remaining premises.[1]

In the construction of the English Railway Act, sect. 68, 8 and 9 Victoria, c. 18, giving compensation where "any lands or any interest therein has been taken or injuriously affected" by the company, it is considered that acts of the company which might have been lawfully done without authority of the legislature, can support no claim for compensation; but where without such authority the thing done would have afforded a cause of action, the lands and premises deteriorated thereby are "injuriously affected" within the meaning of the act. Thus, where a railway constructed under the powers of a special act, crossed on a level and in an oblique direction a private road which was the only means of approach to the plaintiff's house, and over which he had a right of way as appurtenant to his farm, so that at a point where it intersected his road, a train running at ordinary speed could not be seen for more than seventeen seconds before it reached that point; and gates were put up on each side of

[1] Henry *v.* Dubuque and Pacific R. R. Co., 2 Clarke (Iowa), 288; Sater *v.* Burlington and Mount Pleasant Plank Road Co., 1 id. 386.

the railway across his road, which were kept locked under the provisions of the act, a key being kept by a servant of the company, whose business it was to unlock the gates when any person had occasion to pass through them, and another being kept by the plaintiff, by reason of which obstruction the plaintiff's property was depreciated in value, he was held entitled to compensation, although the railway did not pass through his farm.[1] And it has since been held in the House of Lords, that a party is not entitled to compensation for the consequential injury to his premises from the crossing by the railway of an important public road leading thereto. It was also considered in this last case, that the owner of land is not entitled to compensation under the clause for any act which, if done without authority of the legislature, would not give him a right of action; and that there are injuries, such as the temporary obstruction of the highway by the closing of the gates on the side of the railway, which without legislative authority are actionable, but which do not come within the compensation clause.[2]

Admissibility of Evidence.—Commissioners, whose duty it is, to assess the damages against a railroad company should be governed in their appraisal by the established rules of evidence. They are not to admit testimony which a court of law would reject, or reject testimony which a court of

[1] Glover *v.* North Staffordshire R. Co., 5 Eng. L. & Eq. 335.

[2] Caledonian R. Co. *v.* Ogilby, 29 Eng. L. & Eq. 22; see cases reviewed, id. p. 27.

law would admit.[1] But where the acceptance or rejection of their report is discretionary with the higher court, the review will not be conducted on the strict principles which govern the review of the proceedings of judicial tribunals. The award will not be set aside for any technical error in the admission or exclusion of evidence; but only when the error is of such a character as to show that the commissioners misapprehended the principles upon which they were to make their appraisal, and that the party appealing may have been injuriously affected by such misapprehension.[2] Opinions of

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[1] Troy and Boston R. R. Co. *v.* Northern Turnpike Co., 16 Barb. 100; Rochester and Syracuse R. R. Co. *v.* Budlong, 6 How. Pr. 467.

[2] In Matter of William and Anthony Streets, 19 Wend. 678; Troy and Boston R. R. Co. *v.* Northern Turnpike Co., 16 Barb. 100; Troy and Boston R. R. Co. *v.* Lee, 13 id. 169. Harris, J.: "The verdict of a jury is determined by the testimony submitted to their consideration. It is therefore the subject of review. It may be presented to the consideration of the court upon paper. But it is not so in relation to the proceedings of these commissioners of appraisal. The very first thing they are required to do is to view the premises. Thus, their own senses are made to testify. The information thus acquired it is impossible to bring before a court of review. The commissioners, too, are selected with reference to their general knowledge, qualifying them to judge discreetly upon the matters submitted to them. Unlike a jury, they are restricted to no peculiar species of evidence, or any peculiar sources of information. They may collect information in all the ways which a prudent man usually takes to satisfy his own mind concerning matters of the like kind, where his own interests are involved in the inquiry. They may seek light from other minds, that they may be the better able to arrive at just conclusions; but, at the last they must be governed by their own judgment. That judgment is not to be controlled or outweighed by the opinions of any number of witnesses. The commissioners have no right to take such opinions, nor indeed any other evidence, as the basis of their appraisal, without exercising their own judgment. They are to hear all the proofs and allegations of the parties, as well as to view the premises, as a means of enlightening their judgment; and having done all, they are then to determine, in the free and uncontrolled exercise of that judgment, thus enlightened and thus informed, what award will best dispense equal justice

witnesses conversant with the value of the land taken are admissible to prove the value. They may also, it seems, be admitted not only to prove the value of the entire premises, where only a part of the same lot or tract is taken, but also the value of what remains after such part is taken.[1]

But opinions of witnesses as to the amount of damage done to the party by the construction and operation of the railroad, are not competent evidence. They may state the particular injuries, and the jury are to form their own conclusion of the amount from the facts proved.[2] Thus, where a turnpike company

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to all the parties. When the original jurisdiction is to be exercised in this manner, it is impossible from the very nature of the case, that there should be anything like a regular judicial review."

[1] Wyman *v.* Lexington and West Cambridge R. R. Co., 13 Met. 326; Troy and Boston R. R. Co. *v.* Lee, 13 Barb. 170; Troy and Boston R. R. Co. *v.* Northern Turnpike Co., 16 id. 104; Concord R. R. Co. *v.* Greely, 3 Foster, 242; In Matter of Pearl Street, 19 Wend. 651.

In Iowa, the rule is thus stated:—the witnesses called by the respective parties, on their examination in chief, may "speak as to their opinion of the value of the premises before and after the taking of the right of way, leaving the opposite party to the right of cross-examination to learn the ability of the witness to judge in the premises, and what he takes into consideration in making up his judgment." Henry *v.* Dubuque and Pacific R. R. Co. 2 Clarke, 288; Sater *v.* Burlington and Mt. Pleasant Plank Road Co. 1 id. 386. In Rochester and Syracuse R. R. Co. *v.* Budlong, 6 How. Pr. 467, it is held that the opinions of witnesses competent to form a judgment in the premises, are admissible to prove the value of the property for the purposes of selling, renting, or hiring, and how that value will be affected by the injury complained of, but not as to how the party will be injured in other respects independent of this diminution of value. See Somerville and Easton R. R. Co. *v.* Doughty, 2 Zabris. 495.

[2] Albany and Utica R. R. Co. *v.* Lansing, 16 Barb. 68; Troy and Boston R. R. Co. *v.* Northern Turnpike Co. 16 id. 100; Canandaigua and Niagara Falls R. R. Co. *v.* Payne, 16 id. 273; Rochester and Syracuse R. R. Co. *v.* Budlong, 6 Howard Pr. 467; Montgomery and West Point R. R. *v.* Varner, 19 Ala. 185. See Milwaukie and Miss. R. R. Co. *v.* Eble, 4 Chandler (Wis.), 72.

claims compensation of the railroad company, opinions of witnesses as to the effect the use of the railroad will produce in frightening horses traveling upon the turnpike at a particular place, or as to the necessity of diverting the line of the turnpike at another place and the cost of such diversion, or that a bridge ought to be built by the company at a crossing, or as to the amount of damages the turnpike company will sustain by reason of the crossing of its road, are inadmissible.[1] But the opinions of experts on matters which come properly within the rule admitting their opinions as evidence, are admissible. Thus, the agent of an insurance company, who was in the habit of examining buildings with reference to the insurance thereof, has been admitted to testify that the passage of locomotive engines within one hundred feet of a building would increase the rate of insurance thereof against fire.[2]

Evidence of what the railroad company has paid an adjoining owner for land voluntarily sold by him, is admissible to prove the value of the land in question. But where the price of such adjoining land was fixed by a jury or by arbitrators agreed upon by the parties, or was in any way compulsorily paid by the company, the evidence is not competent.[3] Evidence of what an undivided part of the land taken sold for at an administrator's sale, is admissible to

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[1] Troy and Boston R. R. Co. *v.* Northern Turnpike Co. 16 Barb. 100.

[2] Webber *v.* Eastern R. R. Co. 2 Met. 147.

[3] Wyman *v.* Lexington and West Cambridge R. R. Co. 13 Met. 316; White *v.* Fitchburg R. R. Corp. 4 Cush. 440; Concord R. R. *v.* Greely, 3 Foster, 242; White *v.* Concord R. R. 10 Foster, 188.

show the entire value.[1] Proof of an offer made by the company to the party claiming damages, is not admissible.[2] Nor is the testimony of the owner of the adjoining land admissible to prove what in his judgment is the value of his own land, although he is a farmer, who has occasionally bought and sold land.[3] The testimony of a person who has agreed with the owner of land taken by the company, for the purchase of the adjacent land at a certain price, is inadmissible to show the value of the land taken.[4] Nor will a witness be allowed to testify as to inconveniences which he has suffered on his own farm by the ordinary running of railroad cars, for the purpose of showing the inconveniences suffered by one owning a farm in the vicinity of a railroad, as such evidence would raise an issue collateral to that on trial.[5] An estimate, not on oath, of damages that would be sustained by a party over whose land a railroad was afterwards laid out, made by a committee of the town, while a petition of the town for a change of its route was before the legislature, and merely stating those damages as the least the party would take, although made at the request of an agent of

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[1] March *v.* Portsmouth and Concord R. R. 19 N. H. 372. It was held in this case that the evidence of the principal engineer of the road is admissible, to show the plan upon which the road is to be built, in order to determine the damages to a landowner.

[2] Upton *v.* South Reading R. R. Co. 8 Cush. 600; Concord R. R. *v.* Greely, 3 Foster, 242.

[3] Wyman *v.* Lexington and West Cambridge R. R. Co. 13 Met. 316.

[4] Chapin *v.* Boston and Providence R. R. Corp. 6 Cush. 422.

[5] Concord Railroad Co. *v.* Greely, 3 Foster, 237.

the company, is not competent evidence against the company to prove the damages.[1]

Measure of Damages.—The fair market value of the property taken, at the time of the taking,—not what estimate derived from fancy, local attachment, or otherwise, the owner places upon it, or what it would bring at a forced sale,—is the measure of damages to be followed in the assessment. As the whole of a lot or tract is not usually taken, the injury to the remaining portion of the same lot or tract is according to the ordinary interpretation of the statutes providing compensation to be added to the market value of the part taken. Where only a part is thus taken, the difference between the market value of the whole lot or tract before the taking and the market value of what remains to the owner after the taking, has been laid down as the rule of damages, which, in effect, reduces the damages in consequence of the taking to the extent of the benefits, unless the jury are specially instructed, in estimating the value of the premises after the taking, to disregard any rise in market value resulting from the improvement. The rule which measures the damages by the market value of the part taken, and the injury to the remaining portion of the same lot or tract, applies irrespective of the question whether benefits to the owner from the improvement are to be deducted or not, in the appraisement, as they

[1] Webber *v.* Eastern R. R. Co. 2 Met. 147.

may be deducted after the damages are thus ascertained.[1]

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[1] In the Matter of Furman Street, 17 Wend. 649. In Matter of William and Anthony Streets, 19 id. 690; Troy and Boston R. R. Co. *v.* Lee, 13 Barb. 169; Canandaigua and Niagara Falls R. R. Co., 16 id. 273; Rochester and Syracuse R. R. Co. *v.* Budlong, 6 How. Pr. 467; Tide Water Canal Co. *v.* Archer, 9 Gill and Johns. 479; Parks *v.* Boston, 15 Pick. 198; Meacham *v.* Fitchburg R. R. Co., 4 Cush. 299; Greenville and Columbia R. R. Co. *v.* Partlow, 5 Rich. 428; White *v.* Charlotte and S. C. R. R. Co., 6 id. 47; Somerville and Easton R. R. Co. *v.* Doughty, 2 Zabris. 495; Harrison *v.* Young, 9 Geo. 364; Giesy *v.* C. W. and Z. R. R. Co., 4 Ohio State, 331; Milwaukie and Mississippi R. R. Co. *v.* Eble, 4 Chandler (Wis.), 172; Sater *v.* Burlington and Mt. Pleasant Plank Road Co., 1 Clarke (Iowa), 386; Henry *v.* Dubuque and Pacific R. R. Co., 2 id. 309,—Isbell J.: "While the owner of the land is compelled to stand passive, the sovereign power asserts its prerogative, and says to the company, you may pass over this man's land, and enjoy certain defined rights therein, for public use, and no more, provided you first make him compensation. Money is the common measure of value, for this land and the rights you are to acquire. The measure must be applied, in the first instance, by the judgment of six commissioners on oath. The proper mode of applying this measure is, to determine the fair marketable value of the premises before the right is set apart, and then again after, and the difference will be the true measure of damage, and when paid, will be, in a legal sense, just compensation. The money paid will make the party whole. This is no chaffering contract. Prudential motives may induce the parties to accommodate themselves to one another, as to the time of taking possession and the like, but in the absence of any agreement, the whole matter is reduced in *time* to a point. The company may be presumed to be at hand with its money, to tender for the right of way, and its operative force to enter upon construction. The commissioners are on the ground; they ask themselves, What are these premises fairly worth to-day in the market? Again, What will they be worth to-day, after the owner shall have parted with the right which the company are about to acquire? The present values, taking into consideration the extent of the rights conferred, are those which are to be arrived at. The immediate and necessary consequences of parting with the right conferred, must of necessity enter into the consideration of the commissioners. The premises, as left in the condition they will then be, together with the money paid, should be equal to the value of the premises immediately before the taking. An enumeration of the various circumstances that may enter into any given case, tending to immediately depreciate the value of the premises, by taking the right of way over them, is impracticable. The most that

SETTING ASIDE OF THE AWARD.—The award of the appraisers may be set aside where the amount

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we are able to affirm, is, that all the circumstances which immediately depreciate the value of the premises by taking the right of way are proper to be considered, and none others. Thus, in case the land was before fenced, and by taking the right of way it is thrown open, and left in a manner unfenced, this fact will enter into the consideration, in arriving at the depreciated value of the remaining premises. But it will not do to say, The proprietor will have to fence his land; therefore, he should be allowed some definite price for some particular kind of fence, as a distinct consideration from the depreciation in value of the premises. Much less will it do to say, The consequence of building extra fence will be to have to keep it in repair, and therefore, a further distinct consideration should be allowed for this. But the sole ultimate consideration is, How is the taking of the right of way to affect these premises to-day in the market? How the road may affect the value of the land, if completed, or any other consideration of future benefit, has nothing to do with the assessment. Neither has any abuse of the privilege, or probability of abuse; for the company only bargained for the legitimate use, and if it goes beyond this, it will render itself liable, when the act is done, and not until then. Neither is any unwillingness on the part of the owner to allow the road to go over his land, in any manner to affect the assessment. There is a tacit condition attached to the title by which every individual holds his land,—that in case it shall be required for public use, it may be taken for its simple value in the market. Or, if a part only is required, for so much as the taking of this part, will affect the value of the premises in the market. These considerations will, at once, dispose of all questions of speculative and merely fancy damages."

Where gravel was taken from the owner's land for the building of the road, the market value of the same by the cubic yard was held to be the proper measure of damages. Phil. & Reading R. R. Co. *v.* Gilson, 8 Watts. 243. On appeal, the jury, it has been held, are to assess damages as of the day when the commissioners made their appraisal. Boston, Concord, and Montreal R. R. *v.* Greely, 3 Foster, 237. As to allowance of interest, see Shattuck *v.* Wilton R. R. Co., 3 Foster, 269; March *v.* Portsmouth and Concord R. R. Co., 19 N. H. 372; Parks *v.* Boston, 15 Pick. 206; Commonwealth *v.* Boston and Maine R. R. Co., 3 Cush. 25; Phil., Wil., and Bal. R. R. Co. *v.* Gesner, 20 Penn. State, 240; or of costs, Vt. Central R. R. Co. *v.* Baxter, 22 Vt. 365; Atlantic and St. Lawrence R. R. Co. *v.* Cumberland County Com'rs, 28 Maine, 112; Herbein *v.* Phil. and Reading R. R. Co., 9 Watts. 272; Phil., Ger., and Nor. R. R. Co., 2 Whart. 275; Phil., Wil., and Bal. R. R. Co. *v.* Gesner, 20 Penn. State, 240; Greenville and Columbia R. R. Co. *v.* Partlow, 6 Rich. 286; Harvard Branch R. R. Corp. *v.* Rand, 8 Cush. 218.

of damages assessed is excessive, or it has been made on improper evidence, or based on erroneous principles, or the appraisers have been influenced by corruption or partiality, but not for any merely technical departure from established rules by which the party complaining has not been prejudiced, or because the court differ from them in relation to the amount of damages which should be assessed.[1] The objection that they acted upon improper evidence, or were governed by erroneous principles, if not apparent on the record, must be supported by proof.[2]

Deduction of Benefits. — The constitutional clause requiring compensation for private property taken for public use, except where a special provision is introduced excluding the deduction of benefits to the owner from the damages to be assessed upon the appropriation of his property to public use, does not require that he shall receive special compensation where the benefits to his remaining property exceed or equal the value of the property taken, and does not prohibit such benefits from being deducted from the damages.[3]

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[1] Penn. R. R. Co. *v.* Heister, 8 Barr, 451; Phil., Wil. and Bal. R. R. Co. *v.* Gesner, 20 Penn. State, 240; Willing *v.* Baltimore R. R. Co., 5 Whart. 460; Troy and Boston R. R. Co. *v.* Lee, 13 Barb. 169; Bennet *v.* Camden and Amboy R. R. Co., 2 Green. 145; Vanwickle *v.* Same, 2 id. 162; N. J. R. R. Co. *v.* Suydam, 2 Harrison, 25.

[2] Coster *v.* N. J. R. R. Co., 3 Zabris. 227; 4 id. 730.

[3] Symonds *v.* Cincinnati, 14 Ohio, 174; M'Intyre *v.* State, 5 Blackf. 384; Alton and Sangamon R. R. Co. *v.* Carpenter, 14 Ill. 192; Hatch *v.* Vt. Central R. R. Co., 25 Vt. 66; Nicholson *v.* N. Y. and N. H. R. R. Co., 22 Conn. 74, 88; Nichols *v.* City of Bridgeport, 23 id. 189; Opelousas R. R. Co. *v.* Lagarde, 10 La. An. 150; Rexford *v.* Knight, 15 Barb. 627; Livermore *v.* Jamaica, 23 Vt. 36.

The statutes of the several States providing for compensation to the owners of lands injured or taken by a railroad company are not uniform in relation to a deduction of benefits which he receives from the construction of the road. Those of some States are so construed as not to confine the benefits to be deducted in the assessment of damages to such as are peculiar to him, but to comprehend those also which he shares with other members of the community in the increased salable value of his land.[3] The deduction for benefits is generally confined to such as are peculiar to the party whose property is taken.

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[3] Penn. R. R. Co. *v.* Heister, 8 Barr, 450; Greenville and Columbia R. R. Co. *v.* Partlow, 5 Rich. 428; Indiana Central R. R. Co. *v.* Hunter, 8 Indiana; Alton and Sangamon R. R. Co. *v.* Carpenter, 14 Ill. 190, Trumbull, J.: "The act concerning the right of way, R. S. ch. 92, sects. 1 and 4, declares that the householders summoned to estimate the damages which the owner of land will sustain by reason of the passage of any road or public work over the same, 'shall assess the damages which they shall believe such owner or owners will sustain over and above the additional value which such land will derive from the construction of such road, canal, or other public work,' and 'if the householders shall report it to be their opinion that no damages would be sustained by the owner of the land for the passage of any such road, canal, or other public work, over and above the advantages which such land would derive from its construction, nothing more shall be paid than the costs of the view.'

"It is obvious, from these various provisions of the statute, that the legislature never contemplated the payment of damages to the owner of a tract of land for the privilege of constructing the railroad through it, when the additional value to be given to the land by its construction was fully equal to the injury which it would occasion. If additional value is given to the land by the construction of the public work, it matters not whether it be by draining the land which was before wet, by affording additional facilities for taking its produce to market, or by the general enhancement in the value of the land occasioned by its contiguity to the public work. The language of the statute is general, and there is no propriety in restricting the benefits to be derived from the construction of the railroad, if of a real

In Connecticut, where the statute provides for the assessment of "just damages" to the owner, local and peculiar benefits resulting to him from the construction of the road may be deducted.[1]

In Massachusetts, it is held under the statute which provides for an allowance by way of set-off of the benefit to the property of the owner by reason of the road, that any direct and peculiar benefit or increase of value, accruing from the construction of the railroad to land of the same owner immediately adjoining or connected with the land

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and substantial character, to such only as arise from a particular source, or for confining them to one class of benefits more than another. It is immaterial how the owner of the land is benefited, or that others whose lands are not entered upon are benefited to an equal and even greater extent. It is enough that the value of his land is enhanced by the construction of the railroad through it, and he has no right to complain that the enhancement is not peculiar to him alone. It might as well be insisted that the increased value given to a marsh not before tillable, by cutting a canal through, so as to drain it, should not be taken into consideration in estimating the advantages which the owner of such marsh would derive from the construction of the canal, as that the construction of a railroad and the additional value given to land along its immediate line should be excluded in estimating the advantages of such road to the proprietor. One is as much a real benefit as the other. So, too, the injuries which the proprietor suffers by having his farm divided so as to make it inconvenient to pass to and from its different parts, and to compel him to erect additional fences; and all other injuries of a like character, occasioned by the construction of a public work through it, are as proper subjects of inquiry in estimating the damages sustained thereby, as is the value of the land actually appropriated to public use. We do not appreciate the distinction drawn by the Kentucky courts between the money value of the land appropriated to public use, and what they call incidental disadvantages, such for instance, as the owner of a tract of land would sustain by having part of the land flooded in consequence of the construction of a public work over it. The true rule in estimating the advantages and disadvantages, is to take into consideration all which are appreciable, for the law makes no reservation or restriction."

[1] Nicholson *v.* N. Y. and N. H. R. R. Co., 22 Conn. 88; Nichols *v.* City of Bridgeport, 23 id. 189.

taken, and forming part of the same parcel or tract, is to be allowed by way of set off; but not any general benefit or increase of value, received by such land in common with other lands in the neighborhood, as by the promotion of the general convenience, and the advance of its population, business, and prosperity; nor any benefit to other land of the same owner, not connected with that which was taken.[1]

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[1] Meacham *v.* Fitchburg R. R. Co., 4 Cush. 291. Dewey, J.: "That there must be some limitation of the proposition, that the respondents may show in reduction of damages any collateral benefit which the petitioner has received in his other property, seems quite obvious. The party whose land has been taken for a railroad, has a right, in common with his other fellow-citizens, to the benefit arising from the general rise of property in the vicinity, occasioned by the establishment of the railroad and the facilities connected therewith.

"It would operate with great inequality to hold that where there are various individuals, each owning large trading or manufacturing establishments in the immediate vicinity of a railroad, but without being adjoining to or connected with the located limits of such railroad, one of whom is the owner of a parcel of land, situate in another part of the town over which the railroad is actually located, that as to the latter he is, by way of reduction of damages for his land thus taken, to be charged for all the incidental benefits which he receives from the location of the railroad in the vicinity of his other land and establishment, while his neighbor who is equally benefited is exempt from any contribution to this object.

"It is difficult to draw the line with precision, and at the same time to establish a rule which will do equal justice to all concerned. The rule which was taken at the hearing before the jury, we think, approximates as nearly to the standard as any that can be adopted. It embraces the land as to which damages are claimed and any land of the petitioner adjoining or connected therewith, as one parcel or tract of land, and if in any portion of such land the location of the railroad has occasioned a rise in value, and the petitioner has received any peculiar benefit from the location of such road, it is the duty of the jury to make a deduction by way of set-off, and a reduction of damages on account of such advancement in value of the remaining portion of the lot or parcel of land. Thus limited to the land adjacent to that taken for the railroad, or connected as one tract or parcel of land therewith, the rule will be found reasonable and of easy applica-

In other States, the benefits to be set off against the injuries in assessing the damages, have been limited to such as are peculiar to the owner, to the

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tion. The great and leading principle, to authorize such reduction of damages, is the direct benefit, or increase of value to the remaining part of the tract or parcel of land by reason of the railroad's passing through the lot or tract, as to which the damages are claimed. We approximate very nearly, in this way, to the rule of direct benefit, or actual increase of value in the adjacent land, and exclude the more uncertain and fanciful estimation of anticipated advantages to other parcels, more or less remote, and which share only in the common benefit of the lands of citizens generally.

"The further instructions to the jury upon this point seem to have been entirely correct, and in accordance with the principle of the other ruling. The respondents are not to have the benefit of any increase in value of the petitioner's adjacent land, so far as he has been benefited by the railroad, merely in common with all the citizens of the neighborhood or village, by the anticipated general rise of property, by reason of the railroad's passing through the town and in the vicinity of their lands. It is only the increased value of the land of the petitioner, arising from the location of the road over some part of it, which is to be taken into consideration. If such location over the land of the petitioner has raised the value of his adjacent lands, then a reduction or offset is to be allowed the respondents on that account." In Upton *v.* South Reading Branch R. R. Co., 8 Cush. 600, it was held, that the sheriff's jury in assessing the damages should be instructed as follows: "that if they were satisfied that the laying out and construction of the railroad had occasioned any benefit or advantage to the lands of the petitioner through which the road passed, or lands immediately adjoining, or connected therewith, rendering the part not taken for the railroad more convenient or useful to the petitioner, or giving it some peculiar increase in value, compared with other lands generally in the vicinity, it would be the duty of the jury to allow for such benefit or increase of value, by way of set-off in favor of the railroad company; but on the other hand, if the construction of the railroad by increasing the convenience of the people of the town generally, as a place for residence, and by its anticipated and probable effect in increasing the population, business, and general prosperity of the place, had been the occasion of an increase in the salable value of real estate generally near the station, including the petitioner's land, and thereby occasioning a benefit or advantage to him in common with other owners of real estate in the vicinity, this benefit was too contingent, indirect, and remote to be brought into consideration in settling the question of damages to the petitioner for taking his particular parcel of land."

exclusion also of benefits to land disconnected from the tract a part of which is taken.[1]

The allowance for benefits as a set-off to the damages, has been regarded in some States as unjust to the landowner, so as to induce statutory or constitutional prohibitions against it or a strict construction of the laws providing for it.[2] The general railroad act of New York provides that the commissioners in determining the amount of the compensation, "shall not make an allowance or deduction on account of any real or supposed benefit which the parties in interest may derive from the construction of the proposed railroad."[3] Appraisers under this section are not authorized to make an appraisement of the owner's land on condition of a reservation of easements and privileges to him.[4] The constitution of Ohio prohibits any deduction for benefits in determining the compensation.[5]

A distinction has been taken, that in fixing a just compensation benefits cannot be set off against the

[1] Phil. and Reading R. R. Co. *v.* Gilson, 8 Watts, 243; Milwaukie and Mississippi R. R. Co. *v.* Eble, 4 Chandler (Wis.) 72; see Little Miami R. R. Co. *v.* Collett, 6 Ohio State, 182.

[2] M'Mahon *v.* Cincinnati and Chicago Short Line R. R. Co. 5 Ind. 413; Newcastle and Richmond R. R. Co. *v.* Brumback, id. 543; Eward *v.* Lawrenceburgh and Upper Mississippi R. R. Co. 7 id. 711.

[3] Sec. 16, 1 Rev. Stat. (4th ed.) 1227. See Albany and Northern R. R. Co. *v.* Lansing, 16 Barb. 69; 2 Am. Rail. Cas. p. 185, note.

[4] Hill *v.* Mohawk and Hudson River R. R. Co. 5 Denio, 206; 3 Selden, 152.

[5] Art. 1, sec. 19; Art. 13, sec. 5. The provisions of Art. 1, sec. 19, and art. 13, sec. 5—the one requiring compensation to be made without *deduction* for benefits, when property is appropriated to a public use, and the other providing for compensation *irrespective* of benefits when it is taken by a corporation for a right of way,—are in legal effect identical. Giesy *v.* C. W. and Z. R. R. Co. 4 Ohio State, 308.

value of the land taken, but may be set off against other incidental damages arising to the owner.[1]

In Iowa, the rule adopted in determining the "just compensation" required by the constitution, is to ascertain first the fair marketable value of the premises over which the improvement is to pass, irrespective of such improvement; and also a like value of the premises in the condition in which they will be after the land has been taken, irrespective of the benefit which will result from the improvement; and the difference in value is to constitute the measure of compensation.[2]

JOINDER OF PARTIES.—Parties having joint or several legal or equitable interests in the same estate, are generally allowed by statute to join in a proceeding for damages to the estate.[3] Where the interests are several, the statute may not require them to join, and a tenant for life may have the damages assessed to the life-estate without joining the remainderman.[4] There can be no reason for joining a party interested in the estate, who has no interest for an injury to which damages will be given.[5] One tenant in common cannot recover in his own name the damages to his co-tenant's inter-

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[1] Jacob *v.* Louisville, 9 Dana, 114; Opelousas R. R. Co. *v.* Lagarde, 10 La. An. 150.

[2] Sater *v.* Burlington and Mt. Pleasant Plank Road Co. 1 Clarke (Iowa), 386; Henry *v.* Dubuque and Pacific R. R. Co. 2 id. 288; *ante*, p. 204, note.

[3] Ashby *v.* Eastern R. R. Co. 5 Met. 368; Proprietors of Locks and Canals, &c., *v.* Nashua and Lowell R. R. Corp. 10 Cush. 385.

[4] Reading R. R. Co. *v.* Boyer, 13 Penn. State, 497.

[5] Davidson *v.* Boston and Maine R. R. 3 Cush. 91.

est, as well as to his own, although he is authorized by his co-tenant to commence proceedings to recover damages for him.[1] In Massachusetts, the parties having interests at the time of the filing of the location, are those who are entitled to recover the damages. Thus, where the land of an intestate is taken for a railroad, the heir, and not the administrator, is entitled to the damages for such taking, and to prosecute for the recovery thereof, although the estate is insolvent.[2] A tenant for years, under the Pennsylvania act regulating turnpike and plank road companies, is an owner within its meaning, and entitled to compensation for his interest.[3]

Notice of Proceedings to Condemn Property.— The statute authorizing the appropriation of private property for the purpose of a railroad, usually requires notice to be given to the owner, of the proceedings, as of the application for the appointment of appraisers, or of the time and place of their meeting. Such notice when prescribed must be given, to make the proceedings valid; and when none is prescribed, upon the general principles of justice independent of any statutory requirement, due notice ought to be given. And when the form is not prescribed, it should be such as to apprise the owner of

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[1] H. P. M. and L. R. R. Co. *v.* Bucher, 7 Watts, 33.

[2] Boynton *v.* Peterborough and Shirley R. R. Co. 4 Cush. 467. As to proceedings in New York by railroad companies, where land is under mortgage, see In Re N. Y. Central R. R. Co., 20 Barb. 419.

[3] Turnpike Road *v.* Brosi, 22 Penn. State, 29; Brown *v.* Powell, 25 id. 229.

the proceedings to be instituted, and the property to be taken.[1] The want of the required notice may be waived by a party's entering his appearance, and contesting the proceedings on the merits, but not by a mere appearance and objection to their regularity.[2]

The mere fact that the statute appropriating the property does not provide for a notice to the owner, does not make it unconstitutional; as the court which has cognizance of the proceedings can require due notice to be given.[3]

General Law of New York.—The proceedings for taking land, prescribed in the charters of companies incorporated before the general law of New York, enacted in 1850 and prescribing a different mode, are not affected by such general law where the provisions of the law and of the charters are incompatible. The title vests if the provisions of the charter are complied with, although those of the general law are not followed.[4]

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[1] Vanwickle *v.* R. R. Co. 2 Green, 166; Doughty *v.* Somerville and Easton R. R. Co. 1 Zabris. 447; Vail *v.* Morris and Essex R. R. Co. 1 id. 189; Coster *v.* N. J. R. R. Co. 3 id. 232, 233; 4 id. 733; Reitenbaugh *v.* Chester Valley R. R. Co. 21 Penn. State, 100; Williams *v.* Hartford and N. H. R. R. Co. 13 Conn. 397.

[2] Mohawk R. R. Co. *v.* Artcher, 6 Paige, 83; Dyckman *v.* Mayor, &c., of New York, 1 Selden, 434; Cruger *v.* Hudson River R. R. Co., 2 Kernan, 190.

[3] Swan *v.* Williams, 2 Mich. (Gibbs) 427.

[4] Hudson River R. R. Co. *v.* Outwater, 3 Sandf. 689; Visscher *v.* Hudson River R. R. Co. 15 Barb. 37; Clarkson *v.* Same, 2 Kernan, 304.

CHAPTER IX.

LOCATION OF THE ROAD.

ROUTE AND TERMINI.—The authorized limits and route of the railroad are determined by the charter. The grant of power in the charter of a company to construct a railroad, "commencing at or near the city of Schenectady, and running thence on the north side of the Mohawk river," authorized it to commence the road at some point on the north side of the river, near the city, or at some suitable point on the south side, at or within the city, and then to cross the river to the north side thereof, at its election; the river forming the northern boundary of the city.[1] A charter, authorizing the construction of a railroad "to the place of shipping lumber" on a tide-water river, does not limit the right of location to the upland or to the shore, but authorizes the extension of the road across the flats and over tide water, to a convenient place for reaching vessels.[2] The charter of a railroad company, having authorized it to construct its road *from* a city, it was held that it had no authority to enter the city, but that the boundary of the city was the *terminus a quo*.[3]

An act of the legislature which authorizes the

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[1] Mohawk Bridge Co. *v.* Utica and Schenectady R. R. Co., 6 Paige. 554.

[2] Peavey *v.* Calais R. R. Co. 30 Maine, 498.

[3] North-Eastern R. R. Co. *v.* Payne, 8 Rich. 177.

construction of a railroad between certain termini, without prescribing its precise course and direction, does not *prima facie* confer the power to take the road-bed of the highway for its track; but it is competent for the legislature to grant such power, either by express words or necessary implication; and such implication may result from the terms of the act, or from its being shown, by an application of the act to the subject-matter, that any other location is impracticable.[1] Where, in Vermont, the railroad was located so as to be in many places within the limits of a turnpike, and to cross it at several places, it not being shown that there was any other practicable route, or that the one adopted was an unsuitable or improper one, the location was held to be authorized.[2] There is no presumption against a location which includes land already taken by another corporation for public use, under legislative authority, by virtue of the right of eminent domain, where the uses of both can stand together.[3]

Where the routes selected by two companies, incorporated to construct independent lines, interfered—the termini only of each being prescribed, and there being no necessary conflict on the face of the charter, or in their objects—the prior right to particular land was held to attach to the company

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[1] Springfield *v.* Conn. Riv. R. R. Co., 4 Cush. 63 *ante*, ch. ii. pp. 10, 11.

[2] White River Turnpike Co. *v.* Vt. Central R. R. Co., 21 Vt. 590.

[3] Boston Water Power Co. *v.* Boston and Worcester R. R. Corp., 23 Pick. 360.

which first actually surveyed and adopted a route, and filed its survey according to law.[1]

Where the intermediate points and the terminus are not definitely fixed in the charter, a reasonable discretion will be allowed to the company in selecting them.[2] A charter, providing for the location of the road through certain towns, without specially directing that it shall pass through them in the order named, is complied with by the construction of the road through all of them, though not in the order named.[3] A party, it has been held in New York, has no right to object to the location on the ground of damage to his property, whose title and possession do not extend back to the time when the land was taken by the company.[4]

In New Hampshire, the report of the commissioners charged with the duty of laying out the railroad, should contain a description of such fixed, substantial, and visible monuments, from point to point, that a jury on going upon the ground can readily discover the location.[5]

Filing of the Location.—The filing of the location with the county commissioners, as required by

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[1] Morris and Essex R. R. Co. *v.* Blair, 1 Stockton, Ch., 635.

[2] Hentz *v.* Long Island R. R. Co., 13 Barb. 646; Newcastle and Richmond R. R. Co. *v.* Penn. and Indianapolis R. R. Co., 3 Ind. 464.

[3] Commonwealth *v.* Fitchburg R. R. Co., 8 Cush. 24. Petitions and plans presented to the legislature are not admissible to affect the construction of the charter. Id.; Boston and Providence R. R. Corp. *v.* Midland R. R. Co., 1 Gray, 366.

[4] Hentz *v.* Long Island R. R. Co., 13 Barb. 646.

[5] Northern R. R. Co. *v.* Concord and Claremont R. R. Co., 7 Foster, 183. See Vail *v.* Morris and Essex R. R. Co., 1 Zabris. 189.

statute, is, in Massachusetts, the taking of the land; and the location as filed is conclusive evidence of the land taken, in an action against the company by the owner of the land on which it has constructed the road.[1]

CHANGE OF LOCATION.—The power of the company to determine its location, when once exercised, is exhausted. It may have a discretion as to the selection of its intermediate points, or its route between certain fixed points, but having exercised the discretion, the location cannot be changed without legislative authority. This is in accordance with the ancient rule of the common law, that, "if a man once determines his election, it shall be determined forever."[2]

The power to change the location, to a certain extent, is sometimes given by statute.[3] And where an authority to change the location is given, it is strictly construed. Thus, an authority to vary the

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[1] Charlestown Branch R. R. Co. *v.* County Commissioners, 7 Met. 78; Boynton *v.* Peterborough and Shirley R. R. Co., 4 Cush. 467; Boston and Providence R. R. Corp. *v.* Midland R. R. Co., 1 Gray, 361; Hazen *v.* Boston and Maine R. R. Corp., 2 id. 574. See Morris and Essex R. R. Co. *v.* Blair, 1 Stockton, Ch., 635.

[2] Com. Dig. Tit. "Election," C. 2. State *v.* Norwalk and Danbury Turnpike Co., 10 Conn. 157; Turnpike Co. *v.* Hosmer, 12 id. 364; Hudson and Delaware Canal Co. *v.* N. Y. and Erie R. R. Co., 9 Paige, 323; Doughty *v.* Somerville and Easton R. R. Co., 1 Zabris. 459; Louisville and Nashville Branch Turnpike Co. *v.* Nashville and Ky. Turnpike Co., 2 Swan. (Tenn.) 282; Ex parte S. C. R. R. Co., 2 Rich. 434; Blakemore *v.* Glamorganshire Canal Co., 1 My. & Keene, 154; 1 Cl. & Fin. 262; 3 You. & Jerv. 60; 1 Am. Rail. Cas. 151, notes. See Works *v.* Junction R. R. Co., 5 M'Lean, 425.

[3] Boston and Providence R. R. Corp. *v.* Midland R. R. Co., 1 Gray, 340; Hudson River R. R. Co. *v.* Outwater, 3 Sand. 689.

route and change the location after a selection, is construed not to be an authority to change the location after the road is constructed.[1]

A party over whose land a railroad had been constructed, was held entitled to damages upon the original location being abandoned.[2]

EXPIRATION OF POWER.—The power of the company to take lands may be determined by the expiration of the time within which, by the charter, it is required to be exercised.[3] But the language of the statute may be comprehensive enough to authorize the condemnation of land after the completion of the road, when required for its maintenance and operation. Thus, where a railroad company was authorized to "maintain and continue a railroad, with a single and double track, and with such appendages as may be deemed necessary for the convenient use of the same," it was held that the power to acquire land by condemnation for workshops, and whatever is included in the term "appendages," is not exhausted by an apparent completion of the road, where the increase of its business requires land for those purposes.[4]

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[1] Moorehead *v.* Little Miami R. R. Co., 17 Ohio, 340; Little Miami R. R. Co. *v.* Naylor, 22 id. 235.

[2] Baltimore and Susquehanna R. R. Co. *v.* Compton, 2 Gill, 20. See Knors *v.* Germantown, &c., R. R. Co., 5 Wharton, 256; Butman *v.* Vt. Central R. R. Co., 27 Vt. (1 Williams), 304.

[3] Peavey *v.* Calais R. R. Co., 30 Maine, 498; Regina *v.* London and N. W. R. Co., 6 Eng. L. and Eq. 220; 1 Am. Rail Cases, 151, notes. See Ill. Central R. R. Co. *v.* Rucker, 14 Ill. 353.

[4] Chicago, Burlington, and Quincy R. R. Co. *v.* Wilson, 17 Ill. 123.

CHAPTER X.

LIABILITY OF THE COMPANY FOR TORTS IN GENERAL.

Liability at Common Law.—The liability of a railroad company for torts or actionable injuries, except as enlarged by statute, is substantially the same as that of individuals. The principle, *sic utere tuo ut alienum non lædas*, and its conditions as applied to the relations of individuals, will in general fix the limits of the company's responsibility in some form or other. That responsibility may be, and often is, extended by provisions in the charter, or in some general law existing when the charter was given and applicable thereto. It may be enlarged by police regulations, or by statutes enacted in pursuance of a power reserved in the charter, or by a general law to alter or amend the charter.[1] The remedy of the injured party may be changed so that he will be confined to a special remedy provided by statute in cases to which it is applicable, and thus precluded from a resort to the ordinary common-law remedies. But, in the absence of special legislative impositions, the prinicples which determine the liabilities of private persons for injuries to each other, will determine the liabilities of railroad companies to parties suffer-

[1] *Ante*, ch. iii. pp. 36–46.

ing injury from them.[1] The same common-law liability may be enforced against a railroad company doing business in a State although incorporated in a foreign State.[2]

The obligation of the company to indemnify a party for his property actually taken for its purposes, arises from the first principles of common justice. The appropriation thereof on any other condition is prohibited by constitutional provisions.

The company is not only liable for land actually taken by it, but for such injuries to the property of others as an individual would be responsible for, unless otherwise compensated. Thus, it is liable for diverting a stream from its natural course, to the injury of a neighboring proprietor, under such circumstances as would render an individual liable.[3] It is bound to indemnify him for the caving in of his soil, on which there is no artificial weight, in consequence of excavations on its land.[4] Where the company had constructed its road through a party's land, and afterwards abandoned the original route, the owner was held entitled to damages for the change of location.[5] A railroad company constructing its road over a turnpike belonging to an incorporated

[1] See First Baptist Church of Schenectady *v.* Schenectady and Troy R. R. Co. 5 Barb. 79; Phil. and Reading R. R. Co. *v.* Yeiser, 8 Barr, 366; Burroughs *v.* Housatonic R. R. Co. 15 Conn. 124; Hooker *v.* N. H. and Northampton Co., id. 321.

[2] Austin *v.* N. Y. and Erie R. R. Co. 1 Dutcher, 381.

[3] Whitcomb *v.* Vt. Central R. R. Co. 25 Vt. 68; Proprietors of Locks and Canals *v.* Nashua and Lowell R. R. Corp. 10 Cush. 388.

[4] Richardson *v.* Vt. Central R. R. Co. 25 Vt. 465.

[5] B. and S. R. R. Co. *v.* Compton, 2 Gill, 20. See Butman *v.* Vt. Central R. R. Co., 27 Vt. (1 Williams), 504.

company, has been held liable to the latter for the damages.[1]

According to the common law, the proprietor of land is not responsible for consequential injuries to another, resulting from the lawful use of his own land. In the absence of prescriptive rights, he may build on his own land whereby he darkens his neighbor's windows, or excavate his own soil whereby the foundations of his neighbor's buildings are weakened, or perform any other lawful acts thereon, using due care, and will not be responsible for any indirect injuries thereby resulting to his neighbor.[2]

This rule has been applied to railroad companies, which, unless specially obliged by statute, are not liable for consequential damages accruing in the prudent construction and operation of their roads to premises not taken by them.[3] Thus, excavations and embankments made by the company in building its road in a street in front of the plaintiff's store, whereby access to it by customers and teams was obstructed, and rain-water came into the basement, were not actionable injuries.[4]

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[1] Seneca Road Co. *v.* Auburn and Rochester R. R. Co. 5 Hill, 170.

[2] Callender *v.* Marsh, 1 Pick. 418; Spring *v.* Russel, 7 Greenl. 273; Lansing *v.* Smith, 8 Cowen, 146; S. C. 4 Wend. 9; Radcliffe *v.* Mayor, &c., of Brooklyn, 4 Comst. 195.

[3] Burroughs *v.* Housatonic R. R. Co. 15 Conn. 125; Phil. and Reading R. R. Co. *v.* Yeiser, 8 Barr, 366; Monongahela Nav. Co. *v.* Coons, 6 W. & S. 114; Henry *v.* Pittsburg and Allegheny Bridge Co. 8 id. 85; Mifflin *v.* R. R. Co. 16 Penn. State, 193; Reitenbaugh *v.* Chester Valley R. R. Co. 21 id. 100; Hatch *v.* Vt. Central R. R. Co. 25 Vt. 49; Rogers *v.* Kennebec and Portland R. R. Co. 35 Maine, 323; Whittier *v.* Same, 38 id. 26; Bailey *v.* Phil. Wil. and Balt. R. R. Co. 4 Harring. 389.

[4] Hatch *v.* Vt. Central R. R. Co. 25 Vt. 49; Richardson *v.* Same, 25 id. 465. But see Miller *v.* Auburn and Syracuse R. R. Co. 6 Hill, 61.

LIABILITY AT COMMON LAW ENLARGED BY STATUTE.—A company accepting a charter imposing a greater liability than that imposed on an individual at common law, or required by the constitutional restriction on the exercise of the right of eminent domain, becomes, as already stated, subject to such enlarged liability. The intention of the legislature to impose it, where the company is authorized to interfere with private property, is inferred in some States from quite general terms, as from a provision requiring it to pay the damages sustained or occasioned by the laying out, making, and maintaining of the road.[1] The construction of the statutes imposing this liability, and the injuries to be included in the assessment of damages have already been discussed in the chapter on the acquisition by the company of a right of way and real estate by condemnation.[2]

INJURIES EXCLUSIVELY WITHIN THE STATUTE REMEDY.—The competency of the legislature to substitute a statute remedy for obtaining compensation in place of the ordinary common-law actions, where by virtue of the right of eminent domain, it authorizes the company to take private property for its purposes, is unquestioned. In most of the States, county com-

[1] Dodge *v.* County Commissioners of Essex, 3 Met. 380; Ashby *v.* Eastern R. R. Co. 5 id. 368; Parker *v.* Boston and Maine R. R. Co. 3 Cush. 107; Dearborn *v.* Boston, Concord, and Montreal R. R. Co. 4 Foster, 179; Hatch *v.* Vt. Central R. R. Co. 25 Vt. 60. Sabin *v.* Vt. Central R. R. Co. 25 id. 363; Bradley *v.* N. Y. and N. H. R. R. Co. 21 Conn. 294. See Nicholson *v.* N. Y. and N. H. R. R. Co. 22 id. 74; Clark *v.* Saybrook, 21 id. 313. See *ante*, ch. viii. p. 184.

[2] *Ante*, ch. viii. pp. 184–198.

missioners, road commissioners, special railroad commissioners, or some other board of appraisers are appointed to appraise the damages to such injured parties. A trial by jury in such a case, although sometimes provided for on appeal, we have seen, is not necessary to answer the general constitutional provision requiring a trial by jury.[1] The assessment of damages by this special tribunal is a bar to an action for such injuries as could have been properly included by it in the award. Whether the tribunal did in fact take into consideration a particular injury, cannot afterwards be inquired into collaterally. Except in a direct proceeding to set the award aside, or on appeal, the due performance of its entire duty and the estimate of all damages which could have been rightfully included in the award, are to be conclusively presumed. The special remedy is also exclusive of the common-law remedies. The general principle has received repeated confirmation, that where the legislature in the constitutional exercise of the right of eminent domain, authorizes an act the necessary consequence of which is to injure the property of another, and at the same time prescribes the particular mode in which the damages shall be ascertained and compensated, giving to the injured party the right to put the same in motion, the person or corporation acting under such authority, and within the scope thereof, is not a wrongdoer, nor liable to an action for a tort, but must be proceeded against under the statute remedy. This

[1] See *ante*, ch. viii. p. 166; also Whiteman *v.* R. R. Co. 2 Harring. 514.

rule applies both where the injuries are actionable at common law, or only by reason of additional liability imposed by statute.[1]

Thus, in Massachusetts where the company was by statute "liable to pay all damages that shall be occasioned by laying out and making, and maintaining their road, or by taking any land or materials," it was held, that blasting in a proper manner a ledge of rocks through which the railroad passes, in a place where due precaution can be taken to prevent injury to persons, is a reasonable and appropriate mode of executing such a work; and injuries resulting therefrom to buildings near but outside of the line of the railroad, must be assessed by the county commissioners, the tribunal appointed by the statute, and cannot be made the subject of an action at common law.[2] In New Hampshire, where the railroad commissioners in conjunction with the road commissioners for the county where the lands

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[1] Stowell *v.* Flagg, 11 Mass. 364; Stevens *v.* Middlesex Canal 12 id. 466; Calking *v.* Baldwin, 4 Wend. 667; Lebanon *v.* Olcott, 1 N. H. 339; Woods *v.* Nashua Manufac. Co. 4 id. 527; Null *v.* White Water Canal Co. 4 Ind. 431; Furniss *v.* Hudson River R. R. Co. 5 Sandf. 551; Hueston *v.* Eaton and Hamilton R. R. Co. 4 Ohio State, 685; Yeiser *v.* Phil. and Reading R. R. Co. 8 Barr, 366; Stevens *v.* Jeacocke, 11 Q. B. 731; *ante*, ch. viii. p. 168. The statute remedy is not exclusive in Georgia. Carr *v.* Georgia R. R. Banking Co. 1 Kelly, 524. Where a public duty of building farm-crossings is imposed on the company, and a special remedy provided, by which the owner can build them himself, and recover the cost of the company, the remedy has been held cumulative, and not to exclude a common-law action for damages. Green *v.* Morris and Essex R. R. Co. 4 Zabris. 486.

[2] Dodge *v.* County Commissioners of Essex, 3 Met. 380. A case very similar to this arose in Vermont, and was decided in the same way. Sabin *v.* Vt. Central R. R. Co.. 25 Vt. 363.

taken lie, are required to assess "the damages sustained" by the owners of the lands, it is considered that the damages sustained are to be such as may fairly result to the landowner by the building of the road in a suitable and proper manner, not only on account of the land actually taken, but on account of the injuries to his other land and property, and the inconveniences to which he is subjected. They are to take into consideration, and assess all damages, direct and consequential, present and prospective, certain and contingent which may be judged by them fairly to result to the landowner by the loss of his property and rights, and the injuries thereto. All such damages which result from building the road in a suitable and proper manner, are conclusively presumed to have been included in the award of the commissioners, or the verdict of the jury on appeal, so as to preclude any subsequent action at law therefor. Thus, where the spring of a landowner which permanently supplied his house with water and irrigated his land, had been cut off by the company in constructing the railroad, it was held that this injury must have been considered by the commissioners, that the remedy by award is final except on appeal, and that an action for the injury complained of could not be sustained.[1] So, where the company in constructing the railroad caused a cut to be made through an individual's land, dividing a way which

[1] Aldrich *v.* Cheshire R. R. Co., 1 Foster, 359.

he had made on his own land for his private use, leading from one part of his farm to another, and also dividing his pasture, and the plaintiff's land-damages had been assessed, these were decided to be injuries which it was the duty of the commissioners to consider in their award, and they must be conclusively presumed to have done so, and therefore no action could be sustained on account of them.[1]

Where a part of the owner's land was liable to be washed, and to cave off at a bank, and the sand drifted from the railroad to the injury of his adjoining land,—such injuries, resulting unavoidably from building the railroad in a suitable and proper manner, were to be compensated in the award, and could not be made the basis of an action at law.[2] In Maine, it has been decided that the provision in the charter of the Kennebec and Portland Railroad Company for the assessment of damages by the county commissioners, includes injuries which may be done to the owner by the erection of an embankment upon the site of the railroad, whereby communication is destroyed between the parts of the land which lie

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[1] Clark *v.* Boston, Concord, and Montreal R. R., 4 Foster, 114. The N. H. act of 3d July, 1847, giving a right of action for injuries or inconveniences by altering or obstructing a highway, turnpike, bridge, or *private* way, does not include a private way which one has on his own land; for altering or obstructing which the commissioners must be presumed to have allowed damages in their award.

[2] Dearborn *v.* Boston, Concord, and Montreal R. R., 4 Foster, 179. It was decided in this case that where, on appeal to a jury, the railroad is built before trial, the jury may decide whether it is properly built, and what damages are proper, but they are to assess them as of the time when the commissioners passed upon the subject.

upon the opposite sides of the railroad, for which, therefore, an action at law cannot be sustained.[1]

The company is authorized to do all acts within the limits of its location, which are necessary and proper for the construction of its road; and for the performance of such acts it is not liable to an action at law. The owner, although still retaining the fee of the land included in the location, is conclusively presumed to have received compensation in the mode prescribed by law for all injuries necessarily resulting from the execution of the authority vested in the company. Thus, it is not liable for cutting trees growing within its limits whether used for shade, ornament, or fruit, and whether cut at the time of laying out the track or afterwards.[2]

The statute remedy does not exclude actions at common law for the torts of the company, for which the special tribunal had no right to assess damages. In the assessment, they are to presume that the company will execute its authority in a lawful and proper manner. Therefore, if it transcends or abuses its powers to the special injury of a party, he will have his remedy at common law.[3] Thus, it is liable at common law where having exhausted its power of location, and without a power given by statute to change the same, it relocates its road to

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[1] Mason *v.* Kennebec and Portland R. R. Co., 31 Maine, 215.

[2] Brainard *v.* Clapp, 10 Cush. 6; see *ante*, ch. ii., pp. 14–18.

[3] Mason *v.* Kennebec and Portland R. R. Co., 31 Maine, 215; Rogers *v.* Same, 35 id. 319; Vt. Central R. R. Co. *v.* Baxter, 22 Vt. 365; Hooker *v.* N. H. and Northampton Co., 15 Conn. 312; Crawfordsville and Wabash R. R. Co. *v.* Wright, 5 Ind. 252; Turner *v.* Sheffield, &c. R. Co., 10 Mees. & Wels. 425; *ante*, ch. viii., pp. 169, 170.

the special injury of a landowner,[1] or constructs its road outside of the limits of its authorized location.[2] It may be proceeded against at common law for the unlawful obstruction of an easement, as of a right of drainage, where such obstruction is unauthorized.[3] So, also, if it constructs its road in an improper and unlawful manner, or executes its work negligently or improperly, whereby unnecessary damage is done, it is liable to an action at common law by the injured party.[4] Thus, in constructing the railroad, necessary damages by blasting rocks within its line, which are thereby thrown on the adjoining land, are to be included in the assessment; but it is the duty of the company to remove the stones thus thrown on the adjoining land within a reasonable time, and for the breach of the same it will be liable to an action on the case.[5] Where by making in an imperfect manner sluices or other passages for streams which the railroad crosses, the land of the adjoining proprietors is injured, the company is liable whether any portion of the land was taken or not, and whether damages for land taken had been appraised

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[1] Little Miami R. R. Co. *v.* Naylor, 2 Ohio State, 255.

[2] Hazen *v.* Boston and Maine R. R. Corp., 2 Gray, 574. It was held in this case, that in an action of trespass by the owner of land against the company for entering upon his land, and there constructing its road, the burden of proof rests on the company to show in its justification that the *locus in quo* is covered by the authorized location.

[3] Proprietors of Locks and Canals *v.* Nashua and Lowell R. R. Corp., 10 Cush. 385.

[4] Dodge *v.* County Commissioners of Essex, 3 Met. 383; Hatch *v.* Vt. Central R. R. Co., 25 Vt. 63; Dearborn *v.* Boston, Conc., and Montreal R. R. Co., 4 Foster, 187; Davis *v.* London and Blackwall R. Co., 1 Man. & Gr. 799.

[5] Sabin *v.* Vt. Central R. R. Co., 25 Vt. 363.

or not.[1] It has been held, that the company will be liable in an action for such injuries as could not, from the special circumstances, have rightfully been included in the appraisement of damages. Thus, the use of the adjoining land for a cartway was considered to be of this description, because it could not have been known beforehand with any degree of practical certainty how much material it would be necessary to bring from a distance, or at what point it would be necessary to use the adjoining land as a cartway, or whether any necessity to use it at all would occur.[2]

The rule that the party injured is confined to the remedy against the company prescribed by the legislature, applies only where the remedy has been availed of by the company, or if not, it is in the power of the plaintiff to resort to it. If both parties have the power to carry the statute remedy into effect, and there is no prior obligation on the company to resort to it, the injured party cannot avail himself of an action at common law, and is confined to that remedy. But if the company alone can put it into operation or is under a special obligation to carry it into effect, and has not done so, the injured party is not deprived of his remedy by action.[3] The statute of limitations will bar the

[1] Whitcomb *v.* Vt. Central R. R. Co., 25 Vt. 69; Proprietors of Locks and Canals *v.* Nashua and Lowell R. R. Corp., 10 Cush. 388.

[2] Sabin *v.* Vt. Central R. R. Co., 25 Vt. 363; see Lancashire and Yorkshire Railway Co. *v.* Evans, 19 Eng. L. & Eq. 295.

[3] Calking *v.* Baldwin, 4 Wend. 667; Bradley *v.* N. Y. and N. H. R. R. Co., 21 Conn. 294; Nicholson *v.* N. Y. and N. H. R. R. Co., 22 id. 74; Hooker *v.* N. H. and Northampton Co., 15 id. 324.

special remedy where an action for the injuries complained of, if done without authority of statute, would be barred.[1]

The company when acting under color of legislative authority in attempting to appropriate private property for its purposes, may be liable to an action at common law where the act which assumes to authorize the appropriation conflicts with the constitutional prohibition against taking private property for public use without just compensation.[2]

PENAL ACTION.—Where a penal action is provided against the company, a party availing himself of it must bring his case strictly within the statute giving the remedy. Thus, where the commissioners in assessing damages may order the company to build certain structures for the benefit of the owner, and are required in their order to prescribe the time and manner of building them, an action brought to recover a penalty for the neglect of the company to fulfill it, cannot be sustained if the commissioners omitted in their order to prescribe the time within which the structures should be completed.[3] The legislature may remit a penalty imposed on the company without violating the rights of a municipal corporation for whose use the same was to be forfeited.[4]

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[1] Forster *v.* Cumberland R. R. Co., 23 Penn. State, 371.

[2] Perry *v.* Wilson, 7 Mass. 393; Stevens *v.* Middlesex Canal, 12 id. 466; Cushman *v.* Smith, 34 Maine, 247; Hueston *v.* Hamilton and Eaton R. R. Co., 4 Ohio State, 689; People *v.* Hillsdale and Chatham Turnpike Co., 2 Johns. 190; see *ante*, ch. viii., p. 171.

[3] Keith *v.* Cheshire R. R. Corp., 1 Gray, 614.

[4] Maryland *v.* Baltimore and Ohio R. R. Co. 3 How. 534; S. C. 12 Gill, 399.

INDICTMENT OF THE COMPANY.—The company is indictable for a nuisance in unlawfully obstructing the highway by building stations within its limits, or, where it is authorized to cross it, by keeping its cars on the highway an unnecessary length of time. The rule is now well settled that a corporation is indictable for a misfeasance which is a nuisance, as well as for a non-feasance.[1] If the company, either in the mode of construction or by laying its track on the highway without authority, unlawfully interferes with a street or highway to the special damage of an adjoining owner, he is entitled to a remedy by action.[2]

The company may be made liable by statute to an indictment for breach of public duty, where it would not be liable at common law, as for fatal injuries to passengers by the negligence or misconduct of its servants.[3]

LIABILITY FOR TORTS OF SERVANTS.—A railroad company is liable to an action for the tortious acts

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[1] State *v.* Morris and Essex R. R. Co., 3 Zabris. 360; S. C., 1 Dutcher, 437; State *v.* Vt. Central R. R. Co., 27 Vt. (1 Williams) 103; Commonwealth *v.* Nashua and Lowell R. R. Co., 2 Gray, 54; Commonwealth *v.* New Bedford Bridge, id. 339; Commonwealth *v.* Vt. and Mass. R. R. Corp., 4 id. 22; Proprietors of Locks and Canals *v.* Nashua and Lowell R. R. Corp. 10 Cush. 388; Queen *v.* Great Northern R. Co., 9 Q. B. 315; 58 E. C. L.; Queen *v.* Wilson, 18 Q. B. 348; 83 E. C. L.; Angell and Ames on Corp., ch. xi. § 9. *Contra*, State *v.* Great Works Milling Manufacturing Co., 20 Maine, 41.

[2] Little Miami R. R. Co. *v.* Naylor, 2 Ohio State, 235; Parrot *v.* C. H. and D. R. R. Co., 3 id. 330; Hughes *v.* Providence and Worcester R. R. Co., 2 R. I. 493; Proprietors of Locks and Canals *v.* Nashua and Lowell R. R. Corp. 10 Cush. 388.

[3] Carey *v.* Berkshire R. R. Co., 1 Cush. 475; Boston, Concord and Montreal R. R. Co. *v.* State, 32 N. H. 215; see *ante*, ch. iii., pp. 42, 43.

of its servants while acting in the course of their employment and within the powers conferred by the charter.[1] It is the duty of the company to keep servants at its stations, with authority to act for it in matters proper to be transacted there; and persons having this authority will make the company liable for a conversion made by them on its behalf.[2] The company is liable for the acts of its servants while acting in the course of their employment, although directly contrary to its instructions.[3] But it is not responsible for an unauthorized willful trespass of its servants.[4] Thus, where a watchman in the employ of the company, while the plaintiff's steamboat, which was fastened to its wharf, was on fire in the night season, and while the fire could have been extinguished, and before it had endangered the company's property, cut the cable of the boat, which then drifted away and was burned, the act of the watchman was considered to be beyond his implied authority, and not being expressly authorized, did not make the company liable.[5] It has even been held that the corporation is not

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[1] Eastern Counties R. Co. *v.* Broom, 2 Eng. L. and Eq. 406; Lowell *v.* Boston and Lowell R. R. Corp. 23 Pick. 31; Burton *v.* Phil. and Reading R. R. Co., 4 Harring. 252; Crawfordsville and Wabash R. R. Co. *v.* Wright, 5 Ind. 252; State *v.* Morris, 3 Zabris. 367. See Goodspeed *v.* East Haddam Bank, 22 Conn. 530; Watson *v.* Bennett, 12 Barb. 196.

[2] Giles *v.* Taff R. Co. 2 El. and Bl. 822; S. C. 75 E. C. L. See Glover *v.* London and N. W. R. Co., 5 Exch. 66.

[3] Phil. and Reading R. R. Co. *v.* Derby, 14 How. 468. See Southwick *v.* Estes, 7 Cush. 385.

[4] Id.; Lowell *v.* Boston and Lowell R. R. Corp., 23 Pick. 31.

[5] Thames Steamboat Co. *v.* Housatonic R. R. Co., 24 Conn. 40. See Crocker *v.* New London, Willimantic and Palmer R. R. Co., id. 249.

liable for a willful trespass, even when authorized by its president and general agent.[1] Nor is the company responsible for the fraudulent representations of its agents in matters beyond the scope of the authority it has actually or presumptively conferred upon them.[2]

The liability of the company for the torts of its servants in transactions which are in violation of the charter, and yet are authorized by the company, is not settled.[3] Thus, in constructing the railroad, if the agents turn aside to build a dam or reservoir for the mere benefit of an adjacent owner, this being outside of the authority conferred by law, the company is not responsible for torts committed in its construction or for its improper construction. But where it constructs such a dam or reservoir as incidental to its main work and for the purpose of diminishing the cost of the road, and there is no such essential departure from the charter powers as to notify the public thereof and justify resistance on their part, the company has been held liable for the torts of its agents in its erection; as, where injury is occasioned to other parties by the washing away of the dam through the unskillfulness of the work.[4]

Form of Action against the Company for the Torts of its Agents.—An action of trespass lies

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[1] Vanderbilt *v.* Richmond Turnpike, 2 Comst. 479. But see Eastern Counties R. Co. *v.* Broom, 2 Eng. L. and Eq. 406; S. C., 6 Exch. 317; Roe *v.* R. Co., 7 Exch. 36, 40.

[2] Mechanics' Bank *v.* N. Y. and N. H. R. R. Co., 3 Kernan, 599.

[3] See, *ante*, ch. vi. pp. 130–137.

[4] Jones *v.* W. Vt. Central R. R. Co., 27 Vt. (1 Williams), 399.

against a corporation where the trespass is authorized or subsequently ratified by it.[1] An action on the case is the proper remedy where the injury was not done by the express command or assent of the company, but by the negligence of its agent while acting in the course of his employment.[2]

RESPONSIBILITY FOR THE TORTS OF CONTRACTORS AND OF THEIR SERVANTS.—The company is, in general, responsible for the torts of only such persons as sustain towards it the relation of agents or servants. It is important to ascertain what circumstances create this relation, so as to determine its liability.

The relation of principal and agent, of master and servant, does not subsist where the employee exercises an independent employment, and is not under the immediate direction of the employer. Thus, if A lets out a piece of work to B, and B or his servant, while engaged in performing it, injures C, A is not responsible; for B and the persons employed by him are not the servants of A. This doctrine is now

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[1] Bloodgood *v.* Mohawk and Hudson R. R. Co., 18 Wend. 9; Dater *v.* Troy Turnpike and R. R. Co., 2 Hill, 629; Mayor, &c. New York *v.* Bailey, 2 Denio, 439; Whiteman *v.* W. and S. R. R. Co., 2 Harring. 514; Crawfordsville and Wabash R. R. Co. *v.* Wright, 5 Ind. 252; Eastern Counties R. Co. *v.* Broom, 5 Exch. 314; S. C. 2 Eng. L. and Eq. 406.

[2] Phil., Ger., and Norristown R. R. Co. *v.* Wilts, 4 Whart. 143; Ill. Central R. R. Co. *v.* Reedy, 17 Ill. 580; Sharrod *v.* London and N. W. R. Co., 4 Eng. L. and Eq. 401; Thames Steamboat Co. *v.* Housatonic R. R. Co., 24 Conn. 40; Crocker *v.* New London, Willimantic, and Palmer R. R. Co., id. 249. But see Sabin *v.* Vt. Central R. R. Co., 25 Vt. 371.

well established in England.[1] It is also the prevailing rule in this country.[2] The rule as laid down in England, has there been applied to railroad companies. Thus, where the company had let out a portion of its line for construction to a contractor, and workmen employed by him, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath along the highway by allowing a stone to fall upon him, the company was held not liable, notwithstanding in the contract it reserved the power of insisting on the removal of careless and incompetent workmen.[3] So, where the workmen employed by a contractor who had entered into an agreement with the company to do the work, while excavating a road for the purpose of making an embankment for the railway, cut into a drain or culvert whereby the water was let out over the plaintiff's land, and his crops were damaged, the company was held not responsible, although

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[1] 1 Parsons on Cont., 88–93; Story, Agency, § 454 (a); Knight *v.* Fox, 1 Eng. L. & Eq., 477; Peachey *v.* Rowland, 16 id. 442, and notes.

[2] Blake *v.* Ferris, 1 Selden, 48; Pack *v.* Mayor, &c., New York, 4 id. 222; Stevens *v.* Armstrong, 2 id. 435; Gourdier *v.* Cormack, 2 E. D. Smith, 254; Hilliard *v.* Richardson, 3 Gray, 349; Carman *v.* Steubenville and Indiana R. R. Co., 4 Ohio State, 399; Vermont Central R. R. Co. *v.* Baxter, 22 Vt. 372; Blattenberger *v.* Schuylkill Nav. Co., 2 Miles, 309; Phil. and Havre de Grace Steam Tow Boat Co. *v.* P. W. and B. R. R. Co. (U. S. Dist. Court for Maryland Dist.) 5 Am. Law Reg. (March, 1857), p. 280; Camp *v.* Wardens of Church of St. Louis, 7 La. An. 321; Barry *v.* City of St. Louis, 17 Missouri, 121; Morgan *v.* Bowman, 22 id. 538; De Forrest *v.* Wright, 2 Mich. 368. But see Wiswall *v.* Brinson, 10 Iredell, 554; Stone *v.* Codman, 15 Pick. 297; Mayor, &c., New York *v.* Bailey, 2 Denio, 433; Semple *v.* London, &c., R. Co., 1 Eng. Rail. Cas. 480; Stone *v.* Cheshire R. R. Corp. 19 N. H. 427.

[3] Reedie *v.* London and N. W. R. Co., 4 Exch. 244; Hobbit *v.* Same, id. 254.

it employed its own surveyor to superintend the work.[1]

These cases proceed on the ground, that the persons by whom the injuries are committed were not selected by the company, and are not under its control, but are employed and controlled by the contractor. They are, therefore, the servants of the contractor, who is responsible for them.

The decisions in Massachusetts seemed at one time to be in contravention of these principles. Thus, a railroad company which had let the construction of a portion of its road to a contractor, for a stipulated sum, who was to employ all the workmen for the purpose, was held liable for injuries to persons who fell into a deep cut which had been left open, and the barriers not replaced, by the workmen. It was considered that the work was done for the benefit of the company, under its authority, and by its direction. It was therefore to be regarded as the principal, and it was immaterial whether the work was done under contract for a stipulated sum, or by workmen employed directly by the company at day wages.[2] This case has been the subject of recent comment and limitation in that State, in a decision which enforces, upon a thorough review of the authorities, the non-liability of an employer for the negligent acts of a servant of the contractor to

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[1] Steel *v.* South Eastern R. Co., 32 Eng. L. & Eq. 366.

[2] Lowell *v.* Boston and Lowell R. R. Corp. 23 Pick. 24. See Stone *v.* Codman, 15 Pick. 297. This case is followed in New Hampshire. Stone *v.* Cheshire R. R. Corp. 19 N. H. 427.

whom he has let the contract, and over whose servants he has no control.[1]

To the general rule there are some exceptions which require to be noted. It does not protect an employer who has co-operated in the injurious act, and become a joint participator in the wrong. In such a case the relation of master and servant need not exist, to render the company liable for the acts of persons whom it has employed to do the tortious act. Therefore it is liable when it authorizes the act which produces the injury, or employs a person to do an unlawful act, or one amounting to a nuisance, although he exercises an independent employment.[2] Thus, it has been held liable for damages to an adjacent building by the blasting of solid rock, by contractors in the construction of their railroad, without any carelessness on their part, where in its contract with them it provided for the removal of solid rock by blasting.[3] The company will be re-

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[1] Hilliard *v.* Richardson, 3 Gray, 349, 352. In this case, it will be seen that in remarking on Lowell *v.* Boston and Lowell R. R. Corp., Thomas, J., delivering the opinion, lays stress on the point that in that case, "the barriers, the omission to replace which was the occasion of the accident, were put up and maintained by a servant of the corporation, and by their express orders, and that servant had the care and supervision of them;" and therefore the injury resulted from the negligence of the immediate servants of the company. But this circumstance does not seem to have been relied on in the decision referred to.

[2] Ellis *v.* Sheffield Gas Consumers' Co., 22 Eng. L. & Eq. 198; Peachey *v.* Rowland, 16 id. 442; S. C., 13 C. B., 182; Reedie *v.* London and N. W. R. Co., 4 Exch. 244, 254; Broome, Com. on Common Law, 705; Gourdier *v.* Cormack, 2 E. D. Smith, N. Y., 254.

[3] Carman *v.* Steubenville and Indiana R. R. Co., 4 Ohio State, 399. It was considered in this case that the owner of real estate was liable where he permitted a contractor to erect a nuisance on his premises. So in Mayor,

sponsible for injuries occasioned by unlawful obstructions created by a contractor under the direction of the immediate servants or officers of the company, and for its use and convenience;[1] or, where the work is done under its immediate superintendence, although, as between the parties, the relation may be that of employer and contractor.[2] But a clause in the contract by which the contractor agrees to conform the work to further directions of the employer, which merely reserves to the employer the power to direct the results of the work, and not the manner of its performance, does not create the relation of master and servant between the parties.[3]

The general rule, as applied to individuals and corporations in their ordinary affairs, may well admit of another exception, so as not to exempt a corporation from responsibility for the injuries done by parties in its employ, and acting under the protection of its authority, while performing acts which the State has authorized the corporation to perform in the exercise of its right of eminent domain. It has been invested with the power to appropriate private property, and

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&c., New York *v.* Bailey, 2 Denio, 445. But see 1 Parsons on Cont., 89, note (b); Hilliard *v.* Richardson, 3 Gray, 362; Gourdier *v.* Cormack, 2 E. D. Smith, N. Y., 254.

[1] Phil. and Havre de Grace Steam Tow Boat Co. *v.* P. W and B. R. R. Co. (U. S. Dist. Court for Maryland Dist.), 5 Am. Law Reg. (March, 1857), p. 280.

[2] Carman *v.* Steubenville and Indiana R. R. Co., 4 Ohio State, 414, 415; 1 Parsons Cont. 89, note (b); Camp *v* Wardens of Church of St. Louis, 7 La. An. 321.

[3] Pack *v.* Mayor, &c., New York, 4 Selden, 222; Gourdier *v.* Cormack, 2 E. D. Smith, N. Y., 254.

interfere with private interests in proceedings which would be actionable, and might be restrained by injunction, if done without the sanction of public authority. While exercising this power, so capable of dangerous abuse, it should be held to its just and faithful execution, and not permitted to divest itself of responsibility by delegating it to employees who may be irresponsible. It will thus be induced to exercise more watchful care in the choice of superintendents, contractors, and engineers, by whose carelessness and unskillfulness great damage may be done to parties on the line of the road.[1] The liabil-

[1] See Hilliard *v.* Richardson, 3 Gray, 362, 364, 365, 366; Clark *v.* Common Council of the City of Washington, 12 Wheaton, 40. On this ground the following cases may be sustained, the decision of which would otherwise be questionable: Bailey *v.* Mayor, &c., New York, 2 Denio, 433; Semple *v.* London, &c., R. Co., 1 Eng. Rail. Cas. 480; Lowell *v.* Boston and Lowell R. R. Corp., 23 Pick. 24; Stone *v.* Cheshire R. R. Corp., 19 N. H., 427; Sabin *v.* Vt. Central R. R. Co., 25 id. 371; Vt. Central R. R. Co. *v.* Baxter, 22 id. 372. Redfield, J.: "The power conferred upon railroad corporations to take the land and other materials adjoining the line of the road for the purpose of constructing the road, is one in derogation of the ordinary rights of landowners, and one which could only be conferred by the legislature by virtue of the right of eminent domain, and because it is necessary to the reasonable exercise of sovereignty. And we think it is one which is as necessary to exist in and be exercised by all the contractors on the road, as by the corporation. Indeed, it is only for that purpose that it is important. And whether the corporation construct their road themselves, or by contract with others, is unimportant. This is a power which must go with the contract, which is indispensable to the building of the road, which must be understood to go with the contract, which is in fact never exercised by the board of directors of the company, but always by the builders, under the supervision of the engineers, and which must of course be exercised only within reasonable limits, and in a proper manner. The very words of the statute show by whom it was expected this power would be exercised,—'by engineers, agents, or workmen.'

"This, then, being a power which was conferred by charter upon the company, and which of necessity pertains to the contractors, as a necessarily delegated office from the company to the contractor, and which they must

lity of the company under such circumstances, is sustained by authority. Where a company incorporated for the improvement of river navigation was authorized by its charter to enter on certain premises and take therefrom material for the construction of its public works by making compensation, certain parties who had contracted with it to do the work and furnish all the materials, having entered on the land and taken timber for the construction of the works in question, under authority of the charter, the company was held liable for the materials so taken, although the contractors had agreed to furnish them. The work was considered to be done by the company under the protection of the charter, and also under the liabilities which it imposed.[1] This liability of the company for the injury done by parties acting under contract with it, and exercising an independent employment, may be limited to cases where the acts complained of were within the authority conferred by its charter, and not extended to tortious acts in violation thereof.[2] Nor should it embrace the usual operations of the company, where it is not, as in the construction of its road, interfering with pri-

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expect him to exercise, it is the same as if in express terms it were stipulated, that he may exercise it. For this purpose, then, the contractor is the agent of the company. And as the proprietors of the land cannot resist the contractor, because he is clothed with the authority of the company, it would be hard, if they could be compelled to look to any and every contractor to whom the company might see fit to turn them over. Any stipulation between the contractor and the company is of no importance to the landowners. It is merely a private arrangement between the company and contractor as to the mode of coming at the price of the work."

[1] Lesher *v.* Wabash Nav. Co., 14 Ill., 85.

[2] Id.

vate interests. For instance, there is no more reason for subjecting the company to liability for the torts of a person who has contracted to build an engine for it in his own foundry and shops, than for subjecting a private individual to liability under like circumstances.

WHAT MAKES THE WRONG-DOER A SERVANT OF THE COMPANY. — The question whether one railroad company or some other company or individual, is responsible for the torts of a person, may be presented where the wrong-doer is not exercising an independent employment under a special contract with the company, or employed by a party holding such special contract, but is clearly the servant of the company or of some other company or individual, and the only question is, whose servant he is. As a general rule, the person committing the injury will be considered the servant of the company which employs and pays him, exercises the right to discharge him, and whose orders he is bound to obey.[1] Thus, where the plaintiff was thrown out of his wagon, in a collision with a railroad car belonging to the New York and New Haven Railroad Company, but drawn by horses owned by the New York and Harlem Railroad Company, and driven by a driver in its employ, the latter company was responsible for the injury occasioned by the driver's negligence.[2]

[1] Parsons' Cont., pp. 90–92; Story on Agency, § 453, *a*, *b*, *c*; Broome, Com. on Common Law, pp. 696–705.

[2] Weyant *v.* N. Y. and Harlem R. R. Co., 3 Duer, 360.

The company may, however, make itself liable by contract for the tortious acts of the servants of another company. Thus, where the owners of passenger cars agreed to carry a passenger, although the motive-power was furnished by the State, between which and the company there was a contract for the running of the cars, and was under the control of the State's agents, through whose negligence the passenger was injured, the owners of the passenger cars were held responsible. The servants of the State were, as between the passenger and the owners of the cars, *pro hac vice* the servants of such owners.[1]

Two companies, or a company and some individual, may render themselves both liable for the torts of a servant, where, although he may be employed by one, both are partners in the profits of the business in which the injury is inflicted, or are otherwise joint participators in the wrong, so that the wrong-doer is, in law, the servant of both.[2] Thus, a company organized under a charter from the State of Pennsylvania, is responsible for the infraction of a patent right respecting cars which were run on its track, although the entire capital stock of the company was held by a connecting railroad company incorporated in Maryland, which operated the road by its agents,—it appearing that the Pennsylvania company owned the motive power, and contributed to the expense of operating the rail-

[1] Peters *v.* Rylands, 20 Penn. State, 467; M'Elroy *v.* Nashua and Lowell R. R. Corp., 4 Cush. 400.

[2] Peters *v.* Ryland, 20 Penn. State, 497.

road, of fitting and repairing the cars, and paying the officers and agents.[1]

The company cannot divest itself of responsibility for the torts of persons operating its road, by transferring its corporate powers to other parties, or by leasing its road to them, in the absence of special statute authority and exemption. It cannot absolve itself from its obligations without the consent of the legislature.[2] The lessees may, however, also be responsible for the injury.[3]

Breach of Public Duty.—The company is responsible to a party for the breach of a general public duty, whereby special damage accrues to him, and a privity of contract between him and the company is not necessary to entitle him to an action for the injury.[4] On this ground a party is entitled to damages in consequence of a breach of a general public duty to fence its road, as will be seen elsewhere.

The obligation of the company to keep its road in a safe and proper condition for use, is not im-

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[1] York and Maryland R. R. Co. *v.* Winans, 17 How. 30.

[2] Nelson *v.* Vt. and Canada R. R. Co., 26 Vt. 717; York and Maryland R. R. Co. *v.* Winans, 17 How. 30. The company was held not liable for the torts of its lessees in Thompson *v.* N. O. and Carrollton R. R. Co., 10 La. An. 403; Hart *v.* Same, 4 id. 261.

[3] Clement *v.* Canfield (Supreme Ct. of Vt. Nov. T., 1855), 19 Law Rep. (Dec. 1856), p. 460.

[4] Marshall *v.* York, Newcastle, and Berwick R. Co., 11 C. B. 655; 73 E. C. L.; Gerhard *v.* Bates, 2 El. & Bl. 476, 20 Eng. L. and Eq. 129; Collett *v.* London and N. Western R. R. Co., 6 Eng. L. & Eq. 305; Broome, Com. on Common Law, 661, 679; Davis *v.* Lamoille County Plank Road Co., 27 Vt. (1 Williams), 602.

posed for the sole benefit of its servants and passengers paying fare. It is imposed as a public duty, independent of contract, and is co-extensive with the lawful use of the road.[1] Thus, where one company, by agreement or otherwise, has a right to run its trains over the road of another company, its servants on its trains are entitled to damages from the company owning the road for an injury occasioned by the improper and negligent management of the switch, which it was the duty of the latter to keep in the proper place.[2] It has, however, been held in New Hampshire, that the permission given by one railroad company to another to use its track does not involve a duty to keep it safe for use; or if there was a contract between the companies to that effect, a passenger on the trains of the company using the privilege would have no right of action against the company owning the road for injuries resulting from its being in an improper condition, there being no privity of contract between him and such company.[3]

If the party is unlawfully on the trains, he has no claim against the company, except for its willful injuries.[4]

LIABILITY FOR NUISANCES.—Under what circum-

[1] Great Northern Rail. Co. *v.* Harrison, 26 Eng. L. and Eq. 443; Phila. and Reading R. R. Co. *v.* Derby, 14 How. 485.

[2] Sawyer *v.* Rutland and Burlington R. R. Co., 27 Vt. (1 Williams) 370; Cumberland Valley R. R. Co. *v.* Hughes, 11 Penn. State, 141; Nolton *v.* Western R. R. Corp., 10 How. Pr. 97. See M'Elroy *v.* Nashua and Lowell R. R. Co., 4 Cush. 400.

[3] Murch *v.* Concord R. R. Corp., 9 Foster, 9. See Schopman *v.* Boston and Worcester R. R. Co., 9 Cush. 24.

[4] Robertson *v.* N. Y. and Erie R. R. Co., 22 Barb. 91.

stances a railroad company is liable to an action for a nuisance, at the suit of a private individual, is a matter of some difficulty. On grounds of public policy and general convenience, it is allowed to do certain acts under legislative authority, which, if done by a private individual, without such authority, would be actionable. Thus, where it crosses a highway, the shutting of gates may be a temporary obstruction to an individual, which would not entitle him to an action.[1] The general rule is, that whenever a public duty is imposed on the company, by statute or otherwise, a party suffering special damage from a breach of the same, is entitled to an action against it for such special damage.[2]

Under this rule the company is liable, as elsewhere shown, for injuries resulting from its neglect to fence its track, when required by statute. But special damage to the individual must be combined with the breach of public duty, so as to entitle him to an action. If the wrong suffered by him is only the same as that suffered by the public at large, he has no personal right of action; and this rule applies, although from the circumstances in which he happens to be placed he may suffer more frequently and more severely than others. It is only when he suffers some special damage, differing in kind from that which is common to others, that a personal

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[1] Hatch *v.* Vt. Central R. R. Co., 25 Vt. 61; Caledonian R. Co. *v.* Ogilby, 29 Eng. L. and Eq. 22.

[2] See Catchpole *v.* R. Co., 1 Ellis & Bl. 110; 72 E. C L. The recent English cases on *nuisances* are well collated and commented upon in Broome's Com. on Common Law, pp. 96–101, 661–676.

remedy accrues to him. This rule applies equally where equitable relief or legal remedies are sought by a party.[1]

A railroad is not *per se* a nuisance when constructed over or on a highway or street, where other ordinary modes of conveyance are not excluded by it. Nor is it a nuisance where it is constructed, under authority of the State, on navigable waters below high-water mark.[2] Equity will interfere to restrain a company which is about to construct one in such a place and manner as clearly to create a nuisance, whereby great and irreparable damage will be suffered. But it will not interfere to prevent an injury which will be only temporary, and is capable of compensation in damages, or where the right is doubtful.[3]

An action on the case has been sustained against a company by an incorporated religious society for a nuisance in running its cars and engines, ringing bells, blowing off steam, and making other noises, in the neighborhood of a church on the Sabbath day during public worship, which so annoyed and molested the congregation as greatly to depreciate the value of the building, and render it unfit for a

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[1] Brainard *v.* Connecticut River R. R. Co., 7 Cush. 506; Smith *v.* Boston, 7 id. 254; Proprietors of Locks and Canals, &c., *v.* Nashua and Lowell R. R. Corp., 10 id. 390; Hancock *v.* York, Newcastle, and Berwick R. Co., 10 C. B. 348; 70 E. C. L.

[2] *Ante*, ch. viii., pp. 175–178.

[3] Mohawk Bridge Co. *v.* Utica and Schenectady R. R. Co., 6 Paige, 554; Hamilton *v.* N. Y. and Harlem R. R. Co., 9 id. 322; Hodgkinson *v.* Long Island R. R. Co., 4 Edw. Ch. 411; Hentz *v.* Long Island R. R. Co., 13 Barb. 646; Bell *v.* Ohio and Penn. R. R. Co., 25 Penn. State, 161.

place of public worship. The company was considered liable, on the ground that the acts suffered were contrary to the statute for the observance of the Sabbath, and the plaintiff had suffered special damage from its violation.[1] In a similar case, however, not referred to in the one just given, decided by other judges of the same court a few months earlier, the injuries complained of were regarded as too remote to be the subject of an action. It was noted that it did not appear in the declaration, but that the acts were within the exceptions of the statute and therefore legal; and on the question whether if prohibited by it an action lay, an opinion was not necessary.[2]

Infraction of Patent Right.—A railroad company is liable for the infraction of a patent right.[3]

Injuries resulting from the enforcement of the Regulations of the Company for the conduct of Passengers and Persons coming upon its Premises. —The company has the power to make reasonable and proper regulations for the conduct of all persons who come upon its premises, as passengers or otherwise, or who travel in its cars. It may authorize its agents and servants to remove from its stations,

[1] First Baptist Church of Schenectady *v.* Schenectady and Troy R. R. Co., 5 Barb. 80.

[2] First Baptist Church of Schenectady *v.* Utica and Schenectady R. R. Co., 6 Barb. 313; see Hatch *v.* Vt. Central R. R. Co., 25 Vt. 62; Burton *v.* Phil., Wil., and Balt. R. R. Co., 4 Harring. 252; State *v.* Tupper, Dudley (S. C.), 135.

[3] York and Maryland R. R. Co. *v.* Winans, 17 How. 30.

cars, or other premises, persons who violate such regulations, using no unnecessary violence; and its servants for enforcing them in a proper manner will not render themselves or the company liable for a tort. Thus, it may remove an innkeeper from station who, in violation of its rules, persists in entering it to solicit patronage for his house, to the annoyance of passengers, and the interruption of its business; and where, having repeated the violation frequently, he enters the station again apparently for the same purpose, and not declaring a contrary intention, the proper officer of the company, having reasonable ground to suppose that he has entered it again for the same object, may on his refusal to leave remove him, and use the necessary force for the purpose, although in the particular instance he has in fact entered with the *bona-fide* intention of taking the cars as a passenger, and has without the knowledge of the agents of the corporation obtained a passenger's ticket, which he does not exhibit.[1]

[1] Commonwealth *v.* Power, 7 Met. 596. This was a criminal prosecution instituted against Power and several of his assistants acting under his orders, charging an assault and battery upon the complainant, Hall. The complainant was an innkeeper, who had annoyed passengers by his solicitations, and refused to comply with an order of Power, the master of the station, to discontinue the practice and not to go upon the platform, and who had after his violation of the rule been forbidden by Power to enter the station at all. Nevertheless he afterwards entered it, with the *bona-fide* intention of taking the cars, and with a ticket which he had procured without the knowledge of any agent of the corporation, and on being forbidden to go upon the platform and ordered to leave the station, still pressed forward to the platform without showing his ticket or declaring that he was going to take the cars as a passenger. He was then forcibly put out of the station by the defendants, with no more violence than was necessary to accomplish the object. Shaw, C. J.: "The court are of opinion, that the railroad corporation, both as the owners and proprietors of the houses and buildings

But to justify his forcible removal, he must in fact,

connected with the railroad, and as carriers of passengers, have authority to make reasonable and suitable regulations in regard to passengers intending to pass and repass on the road in the passenger cars, and in regard to all other persons making use of such houses and buildings. This authority is incident to such ownership of the real estate, and to their employment as passenger carriers; and all such regulations will be deemed reasonable, which are suitable to enable them to perform the duties they undertake, and to secure their own just rights in such employment; and also such as are necessary and proper to insure the safety and promote the comfort of passengers. The reasonableness of such regulations must in some measure be judged of with reference to the particular depot at which they are adopted. Regulations may be proper and necessary at one of the termini of the road, where there is usually a great throng of passengers and other persons connected with the business of the road, which would not be required at a way station, where few persons enter or leave the cars, and where they stop but a few moments.

"And we are also of opinion, that the regulations thus to be made and enforced are not necessary to be made in the form of by-laws, to be carried into effect by penalties and prosecutions. Such by-laws are rather the regulations which a corporation have power to make in respect to the government of their own members, and of their corporate officers, or of municipal corporations, that exercise, to a limited extent, the powers of government. But the regulations in question are such as an individual, who should happen to be the sole owner of the depots and buildings, and of the railroad cars, would have power to make in virtue of his ownership of the estate, and of his employment as a carrier of passengers.

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We are also of opinion, that the power which the company thus have to regulate their several depots, they may delegate to suitable officers. Indeed, it is the only mode in which a corporation can exercise their powers. And where they have appointed a superintendent with authority by himself and his assistants, to have charge of the depot, and manage its concerns, it is incident to his authority to exclude or direct the exclusion of persons who persist in violating the reasonable regulations prescribed, and thereby interrupt the officers and servants of the company in the discharge of their respective duties, or annoy passengers. If it be insisted, that by opening the doors of their depots, the company give an implied license to any and all persons to enter, it may be answered that by thus opening their doors, they do, *prima facie*, give an implied license to all persons to enter, and no person is a trespasser by merely entering therein; but all such licenses are in their nature revocable; and if actually revoked, and due notice given to an individual or class of individuals, and they still persist in entering, it is without a license, and the owner has a right to exclude them by

and not merely in the judgment of the proper

force, if necessary, using no more force than is necessary for that purpose. Weaver *v.* Bush, 8 T. R. 78. Without such a power, the business could not be carried on, because the crowd of persons entering without intending to take passage, might be so great as to exclude passengers.

In regard to the fact that Hall had a ticket at the time, and intended *bona fide* to go in the cars to Richmond, it appears to us that a fact within his own private knowledge, not communicated to the superintendent, when it was in his power to communicate it, cannot place the superintendent in the wrong in a case where he would be otherwise justified. If Hall had repeatedly violated a reasonable regulation in going upon the platform when expressly prohibited; and if the superintendent had reasonable ground to believe that he was repeating such violation, and he gave no notice that he then came there for another purpose, when it was in his power to do so, the superintendent and his assistants acting on reasonable grounds of belief, must stand on the same grounds of justification in this respect as if Hall had no such purpose.

We are, therefore, of opinion, that upon the evidence detailed in the judge's report, the jury should be instructed in a manner somewhat as follows: That if Power had been placed in charge of the depot by the corporation as superintendent, he had all the authority of the corporation, both as owners and occupiers of real estate, and also as carriers of passengers, incident to the duty of control and management: That this power and authority of the corporation extended to the reasonable regulation of the conduct of all persons using the railroad, or having occasion to resort to the depots for any purpose: That this power was properly to be executed by a superintendent, adapting his rules and regulations to the circumstances of the particular depot under his charge, and that it was not necessary that such regulations should be prescribed by by-laws of the corporation: That the opening of depots and platforms for the sale of tickets, for the assembling of persons going to take passage, or landing from the cars, amounts in law to a license to all persons, *prima facie*, to enter the depot, and that such entry is not a trespass; but that it is a license conditional, subject to reasonable and useful regulations; and on non-compliance with such regulations, the license is revocable, and may be revoked either as to an individual, or as to a class of individuals, by actual or constructive notice to that effect: That if the platform, as a part of the depot, is appropriated to and connected with the entrance of passengers into the cars, and the exit of passengers from the cars, and for the accommodation of their baggage, and if the soliciting of passengers to take lodgings in particular public houses, by the keepers of them, or their servants, is a purpose not directly connected with the carriage of passengers by the railroad, on their entrance into, or exit from cars; that if, when urged with earnestness and importunity, it is an annoyance of

officer of the company, have violated its rules.[1] The company may also without incurring liability for a

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passengers, and interruption to their proper business of taking or leaving their seats in the cars, and procuring or directing the disposition of their baggage; or if the presence of such persons, for such a purpose, is a hindrance or interruption to the officers and servants of the corporation in the performance of their respective and proper duties to the corporation, as passenger carriers; then the prohibition of such persons from entering upon the platform, is a reasonable and proper regulation, and a person who, after actual or constructive notice of such regulation, violates, or attempts to violate it, thereby loses his license to enter the depot; that such license as to him may be revoked; and if, upon notice to quit the depot, he refuses so to do, he may be removed therefrom by the superintendent, and the persons employed by him; and if they use no more force than is necessary for that purpose, such use of force is not an assault and battery, but is justifiable: That as to the circumstances of the present case, if the superintendent had issued a circular, giving notice to all innkeepers and landlords, that he had prohibited them from entering the depot to solicit persons to go to their respective houses as guests, and if this notice came to Hall, and he afterwards, and after special notice to him personally, had attempted to violate this prohibition, and solicit passengers; and if upon the particular occasion he gave no notice of coming for any other purpose; and if the defendant, Power, met him on his way to the platform, told him he must not go there, laid his hands on him, and ordered him to leave the depot, without any inquiry as to the purposes of Hall, and Hall made no reply, but pressed forward and attempted to reach the platform, in spite of the efforts of Power; this was strong *prima facie* evidence that he was going there with intent to solicit passengers, in violation of the notice and revocation of license; and that if he gave no notice of his intention to enter the car as a passenger, and of his right to do so, and if Power believed that his intention was to violate a subsisting reasonable regulation,—then he and his assistants were justified in forcibly removing him from the depot: That if Hall gave no notice of his having a ticket, of his intention and purpose to enter the cars as a passenger, and of his right to do so, and that Power had no notice of it, then Hall could not justify his conduct, and make Power a wrong-doer, by proving the possession of such a ticket, or of his intent to go in the cars to Richmond as a passenger; and that he was to be considered as standing on the same footing as if he had not possessed such ticket." In Barker *v.* Midland R. Co. 18 C. B. 46; 36 Eng. L. & Eq., 253, the company was held not liable for refusing to admit a carrier of passengers and goods within the precincts of its station, although it is in the habit of admitting the public generally.

[1] Hall *v.* Power, 12 Met. 482.

tort, remove from its cars and premises a passenger who persists in violating its reasonable regulations, using no more force than is necessary.[1] A rule requiring passengers to give up their tickets in the cars before completing their journey, and to receive the checks of the conductor in return, is a reasonable regulation, and a passenger refusing to comply with it may be required to pay his fare in cash, and refusing to do either may be expelled from the cars.[2] It is competent for the company to make a rule requiring passengers who do not purchase their tickets before entering the cars, to pay a higher fare than those who purchased their tickets at the office; and a passenger who does not purchase his ticket before entering the cars, may be required to pay the higher rate of fare, and on his refusal may be expelled from the cars by force.[3]

It is competent for the company to make a regulation requiring a passenger to show his ticket at proper times, and to remove him from the cars for refusing to show the same.[4] It may refuse to allow the purchaser of a through ticket, who leaves the train he starts in at a way station, to take another subsequent train, and complete his journey

[1] Merrihew *v.* Milwaukie and Mississippi R. R. Co. (Circuit Ct. of Wisconsin, May Term, 1854), 5 Am. Law Reg. (April, 1857), p. 364.

[2] Northern R. R. Co. *v.* Page, 22 Barb. 130.

[3] Hilliard *v.* Goold, 33 New Hamp. (Supreme Ct., July T., 1856), 19 Law Rep. (Oct. 1856), p. 343; Crocker *v.* New London, Willimantic, and Palmer R. R. Co. 24 Conn. 249. The plaintiff was held bound to pay the additional fare notwithstanding the ticket-office was closed at the time, and within a reasonable time before the train started.

[4] State *v.* Overton, 4 Zabris. 441; Willetts *v.* Buffalo and Rochester R. R. Co., 14 Barb. 585.

by virtue of the through ticket, or a conductor's check given to him in lieu thereof; and if on resuming his journey he refuses to pay the fare over again from the way station where he takes the train to his destination, he may be expelled from the cars by the servants of the company having charge of the same.[1] The company will not be responsible for the unauthorized willful injury inflicted by its servant in expelling a passenger from the cars.[2] The liability of the company for injuries to passengers will be more fully considered in a subsequent chapter.

DAMAGES.—Such damages are to be assessed for the torts of a railroad company as will compensate the injury. The same general principles are to determine the assessment of them as in actions for like injuries against other corporations or private individuals. These will be found discussed in treatises on the subject.[3]

The plaintiff's business, and the necessity of his personal attention to it, have been held proper matters to be considered in the computation in case of a personal injury.[4] Bodily pain and suffering, as well as loss of time and money, are proper matters for the consideration of the jury in assessing damages

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[1] Cheney *v.* Boston and Maine R. R. Co., 11 Met. 121; State *v.* Overton, 4 Zabris. 435.

[2] Crocker *v.* New London, Willimantic, and Palmer R. R. Co., 24 Conn. 249.

[3] 2 Greenl. Ev., tit. Damages; 2 Parsons on Cont. 441–462; Sedgwick on Damages, ch. iii., xviii., xxii.

[4] Lincoln *v.* Saratoga and Schenectady R. R. Co., 23 Wend. 425.

for a physical injury to a party.[1] The husband in an action for injuries to his wife, cannot recover for pain of body or mental suffering endured by her.[2]

Although loss of mere profits is in general too uncertain and contingent to be allowed as damages, a carrier who was injured in a collision with the cars through the negligence of the company, has been held entitled to compensation for the loss of the trip in which he was engaged, and for the use of the wagon until with reasonable diligence it could be repaired.[3]

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[1] Morse *v.* Auburn and Syracuse R. R. Co., 10 Barb. 621; as to mental suffering, see Blake *v.* Midland R. R. Co., 10 Eng. L. & Eq. 444; Bassett *v.* N. and W. R. R. Co. (Superior Court of Conn.), 19 Law Rep. (Feb. 1857), p. 554.

[2] Worley *v.* C. H. and D. R. R. Co., 1 Handy (Superior Court of Cincinnati), 481.

[3] Shelbyville Lateral Branch R. R. Co. *v.* Lewark, 4 Indiana, 471.

CHAPTER XI.

PERSONAL INJURIES RESULTING IN DEATH.

NOT ACTIONABLE AT COMMON LAW.—It is an ancient principle of the common law, that "in a civil court the death of a human being cannot be complained of as an injury," whether it results from the felonious assault or the carelessness of the party causing it. Therefore, in the absence of a special statute provision, no action can be sustained against a railroad company for the loss of the comfort, assistance, and support of a husband, father, or other relative, in consequence of his death being caused by the default of its agents or servants.[1] The same rule prevails under the Code of Louisiana, although it provides that (article 2294) "every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it." The Court of Cassation, in France, has, however, interpreted the same provision (article 1382) in the Code Napoleon so as to allow a recovery of damages in such cases.[2]

[1] Baker *v.* Bolton, 1 Camp. 493; Higgins *v.* Butcher, Yelv. 89; Carey *v.* Berkshire R. R. Co., 1 Cush. 475; Lucas *v.* N. Y. Central R. R. Co., 21 Barb. 245; Worley *v.* Cincinnati, Hamilton and Dayton R. R. Co., 1 Handy (Superior Court of Cincinnati), 481; Campbell *v.* Rogers, 2 id. 110; 4 Am. Law Reg. 474; 19 Law Rep. (Oct. 1856), 329; Eden *v.* Lexington and Frankfort R. R. Co., 14 B. Monroe, 204; but recovery is admitted for medical attendance and funeral expenses,—id.; Park *v.* Mayor, &c., New York, 3 Comst. 489.

[2] Hubgh *v.* N. O. and C. R. R. Co., 6 La. An. 495, 498.

It is a dictate of justice that parties immediately interested in the life of a person wrongfully killed by another, should be compensated by him for the fatal injury he has inflicted. Statutes have therefore been enacted in England, and in some American States, designed to compensate the persons having the greatest pecuniary interest in the life of the deceased party, as the widow, children, heirs, or next of kin, for their pecuniary loss, which they have thus suffered from the wrongful act of another; the damages being usually limited to a certain amount. Such statutes, as we have already seen, when applied to companies previously incorporated, are constitutional, and do not impair the obligation of the contract implied in the charter.[1] The remedy given may be an action against the wrong-doer for damages by the administrator or executor of the deceased, for

[1] *Ante*, ch. iii. p. 42–44. The following is the provision of the English "Act for compensating the families of persons killed by accidents." (26th August, 1846, 9 & 10 Victoria, c. 93.) "That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"That every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the before-mentioned parties, in such shares as the jury by their verdict shall find and direct."

the benefit of the interested relatives. This is the remedy provided in England, and by the statutes of New York, Pennsylvania, Ohio, and Indiana.[1] The provision of the statute of Ohio enacted 25th March, 1851, is the same as that of New York, with merely verbal variations; except that in the first section the words "murder in the first or second degree, or manslaughter," are substituted for "felony," and the provision for a criminal process is omitted.[2] The injury, in order to be actionable under the statute of Ohio, must have been inflicted within the State.[3] A *husband* cannot under it recover for the killing of

[1] See Penn. and Indianapolis R. R. Co. *v.* Bradshaw, 6 Ind. 146; Madison and Indianapolis R. R. Co. *v.* Bacon, id. 205. The statute of New York, enacted 13th December, 1847, as amended 7th April, 1849, provides, besides a criminal process against the person immediately causing the death,—

"§ 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person and although the death shall have been caused under such circumstances as amount in law to felony.

"§ 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, provided that every such action shall be commenced within two years after the death of such person." Laws of New York (1847, 2d session) ch. 450, (1849) ch. 256.

[2] Swan's Stat. of Ohio (1854), pp. 707, 708.

[3] Campbell *v.* Rogers, 2 Handy (Superior Court of Cincinnati), 110; 4 Am. Law Reg. 747; 19 Law Rep. (Oct. 1856), p. 329.

his *wife*, or for the loss of her comfort, services, and society; but may recover for the expenditures actually made in consequence of the fatal injury.[1] The act of New York limits its remedies to the wife and next of kin, and the husband has no right of action under it for the killing of his wife.[2]

In Massachusetts and New Hampshire the remedy given to the parties pecuniarily interested in the life of a person unlawfully killed, is by a fine recoverable by indictment prosecuted by the State against the wrong-doer for the benefit of the parties designated by the statute; and this remedy only being provided, an action for damages cannot be sustained. The act of Massachusetts confines its remedy to fatal injuries, suffered by a passenger, from the defaults of certain classes of common carriers; and that of New Hampshire, to those arising from the defaults of the proprietors of

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[1] Worley *v.* C. H. and D. R. R. Co., 1 Handy, 481. The statute of New York, so far as it provides a civil remedy, is copied verbatim by that of Illinois, approved 12th Feb. 1853. 2 Stat. of Illinois (Purple's ed.), 1245.

[2] Lucas *v.* N. Y. Central R. R. Co., 21 Barb. 245. Whether an action will lie at the instance of any relative of the wife, was not decided. See Worley *v.* C. H. and D. R. R. Co., 1 Handy (Superior Court of Cincinnati), 481. In Pennsylvania it is provided by the eighteenth and nineteenth sections of the act of 15th April, 1851 (Acts, p. 674), "That no action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff, but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction.

"That whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow the personal representatives, may maintain an action for and recover damages for the death thus occasioned." Penn. R. R. Co. *v.* M'Closkey, 23 Penn. State, 526.

railroads. In New Hampshire, it is held that the indictment must be against the corporation, and not against the individual stockholders, and must show that there are persons living entitled to the fine.[1]

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[1] State *v.* Gilmore, 4 Foster, 461; B. C. and M. R. R. Co. *v.* The State, 32 N. H. 215; Carey *v.* Berkshire R. R. Co., 1 Cush. 475; Skinner *v.* Housatonic R. R. Corp., id. In these cases, where a widow brought an action against the company for the loss of her husband's life, who was employed as a laborer upon the road, and a father for the loss of his child's, Metcalf, J., comparing the English statute with that of Massachusetts, said, "These statutes are framed on different principles, and for different ends. The English statute gives damages, as such, and proportioned to the injury, to the husband or wife, parents, and children, of any person whose death is caused by the wrongful act, neglect, or default of another person; adopting, to this extent, the principle on which it has been attempted to support the present actions. Our statute is confined to the death of passengers caused by certain enumerated modes of conveyance. A limited penalty is imposed, as a punishment of carelessness in common carriers. And as this penalty is to be recovered by indictment, it is doubtless to be greater or smaller, within the prescribed maximum and minimum, according to the degree of blame which attaches to the defendants, and not according to the loss sustained by the widow and heirs of the deceased. The penalty, when thus recovered, is conferred on the widow and heirs, not as damages for their loss, but as a gratuity from the commonwealth. We believe that by the civil law, and by the law of France and of Scotland, these actions might be maintained. If such a law would be expedient for us, it is for the legislature to make it."

The statute of Massachusetts, enacted 23d March, 1840, ch. 80, provides that, "If the life of any person, being a passenger, shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, steamboat, stage-coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, in this Commonwealth, such proprietor or proprietors, and common carriers, shall be liable to a fine not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment, to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs; one moiety thereof to go to the widow, and the other to the children of the deceased; but if there shall be no children, the whole to the widow, and if no widow, to heirs according to the law regulating the distribution of intestate personal estate among heirs."

The statute of New Hampshire is as follows: "If the life of any person

The measure of damages in such cases is not subject to a definite rule; but as in the case of injuries to health or reputation, is very much in the discretion of the jury, within the limits fixed by the statute, if any are fixed. Where the remedy given is by an action for damages, the money value of the life destroyed, and not the necessities of the plaintiff, it has been held, is to govern in the assessment of damages. The instruction, that the jury might compute the damages by the probable accumulations of a man of the age, habits, health, and pursuits of the deceased, during what would probably have been his life-time, with the added suggestion that if they could find a better rule they were at liberty to adopt it, was not considered erroneous. It was considered that the damages should not be limited to such probable accumulations; for many men make none in a life-time, and many have arrived at an age when they no longer attempt to make any, and yet every one is entitled to his life.[1]

In England, it has been decided, that the jury

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not in the employment of the corporation, shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, or by the unfitness or gross negligence, or by the carelessness, of their servants or agents in this State, such proprietor or proprietors shall be liable to a fine not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment, to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs, one moiety thereof to go to the widow and the other to the children of the deceased; but if there shall be no children, the whole shall go to the widow, and if no widow, to his heirs, according to the law regulating the distribution of intestate personal estate among heirs." Laws of 1850, chap. 953, sec. 7; N. H. Comp. Stat., 1853, p. 354, ch. 150, § 66.

[1] Penn. R. R. Co. *v.* M'Closkey, 23 Penn. State, 526.

is confined, in giving damages apportioned to the injury resulting from the death of the deceased, to a calculation of the pecuniary loss sustained, and to injuries of which a pecuniary estimate may be made, but cannot add to the compensation for these injuries, damages for the mental suffering occasioned by the bereavement.[1] But where, as in Massachusetts, a penalty is recoverable by indictment, it may be greater or smaller, within the maximum and minimum, according to the degree of blame which attaches to the defendant, and not according to the loss sustained by the parties who are entitled to the fine.[2]

These statutes provide a remedy for certain relatives of the deceased only in cases where, if the injury had not proved fatal, he would have had a right of action against the company. Therefore, if the deceased, by the want of ordinary care, contributed to the injury, the relatives who come within the class provided for by the statute will be without remedy under it.[3] This rule has been applied in New York, where the person killed was a lunatic, by whose negligence, or that of his father who had charge of him, the injury occurred.[4] So, also, where the fatal injury was occasioned to a servant of the company through the negligence of

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[1] Blake *v.* Midland R. R. Co., 10 Eng. L. and Eq. 437; Am. Rail. Cas. 446, 447. See Worley *v.* C. H. and D. R. R. Co., 1 Handy (Superior Ct. of Cincinnati), 481.

[2] Carey *v.* Berkshire R. R. Co., 1 Cushing, 475.

[3] Haring *v.* N. Y. and Erie R. R. Co., 13 Barb. 9.

[4] Willetts *v.* Buffalo and Rochester R. R. Co., 14 Barb. 585.

a fellow-servant, the statute affords no remedy against the company.[1] And the company will not be liable where the deceased was killed through the negligence of a person who, although employed upon its works, was not its servant.[2]

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[1] Hutchinson *v.* R. Co., 5 Exch. 343; Wigmore *v.* Jay, id. 354; Paterson *v.* Wallace, 28 Eng. L. and Eq. 48; Marshall *v.* Stewart, 33 id. 1; Sherman *v.* Rochester and Syracuse R. R. Co., 15 Barb. 574; M'Millan *v.* Saratoga and Washington R. R. Co., 20 id. 449; Madison and Indianopolis R. R. Co. *v.* Bacon, 6 Ind. 205. See Hubgh *v.* N. O. and C. R. R. Co., 6 La. An. 494.

[2] Reedy *v.* R. Co., 4 Exch. 244, 254.

CHAPTER XII.

INJURIES TO PERSONS NOT IN PRIVITY OF CONTRACT WITH THE COMPANY.

The peculiar liability of a railroad company, as a common carrier, for the safety of passengers, to be discussed in a subsequent chapter, rests on principles of public policy and the law of contracts, which have no application to injuries to parties to whom the company has assumed no such special obligation. Nor do the rules for determining its responsibility for injuries suffered by its servants, who are presumed to take upon themselves the risks incident to their employment, apply to injuries to third parties who have not accepted a relation of service involving such risks. It is proposed in the present chapter to consider the liability of the company for personal injuries to parties who are neither its passengers nor its servants; and particularly the principle which creates that liability.

Injuries to Persons exercising a Right, occasioned by the Negligence of the Company.—Collisions between a locomotive and persons crossing

the track in carriages or on foot, where it intersects a street or highway, present a case where both the person and the company are each exercising an equal legal right, independent of any contract or favor extended by the one to the other. The individual has a right to cross the track, and the company has a right to cross the highway. This is not, on the one hand, the case of a passenger, in the carriage of whom the company's liability is governed by a contract express or implied, founded on an adequate consideration, which is broken by a neglect to use the highest degree of skill and diligence; nor is it the case of a wrong-doer unlawfully on the track, and having no claim but for wanton injury. It is the common occurrence of two parties holding equal, independent rights, the exercise of which by one may result in consequential injury to the other. The duty of each under such conditions, in conformity with the principles of natural justice and municipal law, is to use ordinary care in the exercise of his own right to avoid injury to the other. If, notwithstanding such care by both parties, an injury happens, it is a misfortune which must be borne by the sufferer alone.

An attempt has been made, without success, to exact a higher degree of skill and diligence of a railroad company. Its peculiar motive power and implements require a kind of skill, a degree of vigilance, and a class of precautions, adapted to them; but the measure of its responsibility is the same as that which defines the responsibility of

the owners of carriages on the highway. It is bound to use ordinary care to avoid injury to persons on the highway crossing its track; and, acting through servants, as engineers, conductors, and brakemen, it is responsible for injuries to such persons, arising from a want of ordinary care and skill on the part of its servants,—that is, such care and skill as the mass of persons in their business are accustomed to exercise. Thus, in an action against the company, for an injury sustained by the plaintiff in consequence of being struck down and run over while walking along the track in one of the streets of a city, the instructions to a jury, "that a railroad company or its agents, in crossing or passing over a public street in a populous city with their locomotive, are bound to use the utmost care and diligence to exonerate them from liability to foot passengers, who have a right, and may be momentarily expected, to pass along upon its sidewalks, and that ordinary care was not enough to exonerate them from that liability," was held erroneous. It was considered that the highest diligence is not to be exacted of any person, except when a compensation is paid for the service; or when the party injured is in the power and under the control of the defendant, as in case of stage passengers; or the party officiously obtrudes his services upon another, or is the sole party deriving a benefit from the act; or the party occasioning the injury was in the wrong place, or engaged in an unlawful calling;—and that in this case, where both parties

stand on an equality as to the means of avoiding the accident, and both are engaged in a lawful employment, only ordinary diligence can be required of the company.[1]

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[1] Brand *v.* Schenectady and Troy R. R. 8 Barb. 368, 379. Willard, J.: "Diligence is a relative term, and must be proportioned to the danger against which it is required to guard. More active vigilance is required to conduct a locomotive through the streets of a populous town, than is necessary to guide a sled, drawn by oxen, in an unfrequented place. The degree of ordinary care implies a higher state of mental activity in the one case than in the other. It demands more skill and science to guide a ship on the ocean than a mudscow in a harbor. And yet in the performance of either duty, we may witness the several degrees of care or neglect which we have been considering. Where the law exacts ordinary care, in the performance of any business, it has reference to the care which men of common prudence generally exercise in the same business or that which is the most analogous to it. It does not expect from the farrier, the delicate and skillful movements of the oculist. It judges each by the standard of his own profession. In saying that a farrier has been guilty of negligence in shoeing a horse, we do not judge him by the skill and dexterity which the most eminent surgeon would exert in some delicate operation upon the human frame, but we refer to that standard which all farriers would recognize as the criterion of ordinary skill and care in that profession. The same principles apply to engineers engaged in the management of locomotives on our railroads. They must bring to the employment a skill and care adequate to the duty, having reference to speed and safety. These qualities must be tested by a comparison with those of others engaged in the like occupation. The care and skill which the mass of engineers of common attainments exercise in their calling constitute the ordinary skill and diligence by which the different degrees of diligence are to be measured, and by which the conduct of the engineer is to be governed.

"These considerations will enable us to examine the question whether the learned judge was right in instructing the jury, that the defendants were bound to use the utmost care and diligence, and that ordinary care was not enough to exonerate them from such liability. If we view the case upon principle, the rule promulgated to the jury seems to be too rigorous. In general, the highest diligence is not exacted from any person, except when a compensation is paid for the service, or when the party injured was in the power and under the control of the defendant, as in the case of stage passengers; or the party officiously obtrudes his services upon another; or is the sole party deriving a benefit from the act; or the party occasioning

But while the same rule of care and skill measures the liability of a railroad company as that of individuals, it may be well to remark, that the consideration should be ever present to its agents and servants, that they are dealing with dangerous elements and forces, eminently destructive to human life and limb. Although bound to exercise reasonable

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the injury was in the wrong place, or engaged in an unlawful calling. If both parties stand on an equality as to the means of avoiding the accident, and both are engaged in a lawful employment, it is hard to conceive how more than ordinary diligence can be demanded. In the present case the defendant had as good a right to pass over the track at the period in question, as the plaintiff to walk the streets, or to go over the cross-walk." Beers *v.* Housatonic R. R. Co. 19 Conn. 566, 576. Storrs, J.:—"We do not accede to the suggestion, that there is any distinction between railroads and ordinary highways in regard to the degree of care which the law requires on the part of those who have the direction or management of vehicles upon them. The rule is the same on this subject whether they are driven or propelled on one or the other of these roads, and where there is an interference, whether one of them crosses a road of the same, or of the other kind. The proprietors of railroads have no immunity which excuses them for a less, or authorizes them to require a greater degree of care when about to cross an ordinary road, than if theirs was one of the latter description. Reasonable care is that which is required, on the part of those who have the management of vehicles on either of them, in all cases. By this, we do not mean to be understood, that the same particular precautions, the same specific preventive measures, are required or tolerated indiscriminately in all these cases; or, in other words, that they would invariably constitute reasonable care. It is, from the very nature of the case, impossible for the law to prescribe the determinate acts, which, in any case, much less those which in all cases, would constitute this kind of care. What should be deemed reasonable care, in any case, must depend on the peculiar circumstances of that particular case. Those precautions which would be reasonable in some circumstances, might not be so in others. For instance, one might safely and properly drive on a broad, straight highway in the country, which is little frequented by travelers, with a speed which would be imminently dangerous in a narrow and crooked street of a city, which is usually thronged with people. So, what would be reasonable care in one driving a carriage on an ordinary road, and about to meet another carriage coming upon another road of the same description, which intersects it, might, if that other

care and skill only, except in the carriage of passengers, what will answer that requirement where there is little peril, will not where the peril is great. The care and skill, therefore, to be reasonable, must be proportioned to the danger and multiplied chances of injury; and similar precautions, it may be added, may be expected of a party who has occasion to be in the vicinity of its engines.[1]

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were a railroad on which cars were advancing, be considered gross negligence, in consequence of the velocity with which carriages on the latter kind of road are propelled, and the comparative difficulty of controlling them. So, for obvious reasons, it is usually less safe to drive rapidly in turning the corners or passing the cross-walks of streets, than where the course is straight, or there are no such walks. Reasonable care requires that, in all cases, the precautions should be proportioned to the probable danger of injury; and the question as to the exercise of such care is to be determined like other questions of fact." Aurora Branch R. R. Co. 13 Ill. 585; Central Military Tract *v.* Rockafellow, 17 id. 541; Moore *v.* R. R. Co. 4 Zabris. 268, 824; Parker *v.* Adams, 12 Met. 415; Kelsey *v.* Barney, 2 Kernan, 425; Altreuter *v.* Hudson River R. R. Co. 2 E. D. Smith, 151; Macon and W. R. R. Co. *v.* Davis, 18 Geo. 679; Park *v.* O'Brien, 23 Conn. 339; Neal *v.* Gillett, id. 437.

[1] Beers *v.* Housatonic R. R. Co. 19 Conn. 566; Moshier *v.* Utica and Schenectady R. R. Co. 8 Barb. 427; Huyett *v.* Phil. and Reading R. R. Co. 23 Penn. State, 374; Morrison *v.* Davis, 20 id. 177; Runyon *v.* Central R. R. Co. 1 Dutcher, 558. Potts, J.:—"It must be considered now the settled law, that in cases of this kind, if by the exercise of ordinary skill and care, the plaintiff could have avoided the injury, or if his conduct contributed to produce it, he is not entitled to recover, even though the defendants were also guilty of negligence. The subject was fully discussed and settled in the case of Moore *v.* The Central Railroad, in this court, 4 Zab. 268, and subsequently in the Court of Errors, in the same case; and those decisions are in accordance with the current of authority in this country and in England before and since. The necessities of railroad travel demand a speed at which it is impossible to stop in time to prevent a collision, if persons traveling on the highway rush carelessly or recklessly upon a crossing ahead of an approaching train; and every collision of the kind places not only the party driving on the track, but the passengers in a train of cars, in imminent peril; many times occasions great loss of life. Every precaution should be used, by

Whenever a party is lawfully on the track, whether in crossing it where it intersects the highway, or in occupying it at its station or other points, the company is bound to use reasonable care to avoid injury to him. Thus, where the plaintiff drove his wagon on to the track at a station by permission of the agents of the company to receive freight, it was incumbent on the company by some agent or officer to notify the plaintiff of the approach of the cars, verbally, or by some known signal, in time to enable him to remove his wagon by using reasonable diligence and alacrity.[1]

An injury may be done to a party or his property on the highway in the operation of a railroad, without any actual collision. Thus, a horse may take fright from the noise or movement of a steam engine, and run in consequence thereof, so as to receive great or fatal injury. The authority to operate a railroad includes an authority to make a noise, which is necessarily incident to its operation, and is usually a beneficent admonition of danger. Accordingly, the blowing of the whistle, or the ringing of a bell, or both, are sometimes enjoined by statute. The noise, then, which may awaken fear, being a lawful and necessary act in operating a railroad, unless accompa-

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both the drivers of the team and persons traveling in their own conveyances, to guard against coming in contact. The proper signals should always be given from a locomotive on approaching a crossing, and the omission of this caution should be punished. But, besides this, persons approaching a crossing in vehicles of their own, must use their eyes and ears, and exercise common care and prudence to avoid a collision, commensurate with the danger, or they are no less reprehensible."

[1] Shelbyville Lateral Branch R. R. Co. *v.* Lewark, 4 Ind. 471.

nied by some wrongful act, as running at a too rapid rate, or creating unnecessary noise, does not make the company liable for damages resulting therefrom.[1] The same considerations apply to injuries resulting from fright at the movement and working of the engine and train. But where the injury from fright would not have been occasioned but for some breach of duty on the part of the company, it will be responsible. If the fear which is the proximate cause of the injury was excited by an unlawful act, or by an act in itself innocent but performed in an unlawful place, without the precautions which prudence requires, it is but just to hold it accountable. This principle has been applied where the company was chargeable with a breach of duty in constructing the road. Thus, where the charter required it to purchase a turnpike road running parallel to the proposed railroad, and to assume the liabilities of the corporation owning the turnpike before it should be permitted to run its cars upon its own road, and authorized it to construct its track along and across the bed of the turnpike, but required it "to restore the road to its former state, or in a sufficient manner not to impair its usefulness," it was held, that if the taking of a part of the bed of the turnpike for the track of the railroad, or the bringing it into close proximity to the turnpike, rendered it dangerous to persons traveling with teams on the latter, and thus impaired its usefulness to the public, the company was bound either to remove the two roads further from each other, or

[1] Burton *v.* Phil. Wil. and Balt. R. R. Co., 4 Harring. 225.

to separate them by protecting guards, and was liable for injuries from fright, resulting from a neglect of these precautions.[1]

Precautions Required by Statute.—The obligation of the company to use reasonable care and diligence in running their engines over crossings, to prevent injury to travelers on the road crossed, is not discharged by a mere compliance with the specific requirements of a statute, imposing on it the duty to put up notices, ring a bell, or blow a whistle. These requirements are merely cumulative, and it is bound to use such other necessary precautions as the circumstances require.[2]

Negligence of the Injured Party.—The obligation to use ordinary care, is incumbent on a party who has suffered from a collision with the company's train, as well as upon it and its servants. The performance of this duty on his part, and the breach of the corresponding duty on the part of the company, must concur, to entitle him to damages received in a collision. If both the company and the individual are in the wrong by the breach of this duty, neither can recover of the other. The law will not apportion the damages suffered by wrong-doers. The general rule, resulting from the authorities, is that a party suffering injury on a highway, in a collision with a

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[1] Moshier *v.* Utica and Schenectady R. R. Co., 8 Barb. 427.

[2] Bradley *v.* Boston and Maine R. R. 2 Cush. 539; Linfield *v.* Old Colony R. R. Corp. 10 id. 562; Macon and W. R. R. Co. *v.* Davis, 18 Geo. 679.

company's train, is entitled to damages on proof both of a want of ordinary care on its part, and the exercise of the same degree of care on his own. And if he was himself chargeable with a want of ordinary care, and thereby contributed to the injury, he is without remedy.[1] Thus, where it appeared that the plaintiff in approaching the track had an uninterrupted view of it for a mile in the direction from which the train was coming, so that he might have seen it if he had turned his eyes in that direction, it was considered that if the plaintiff saw the train, it was an act of madness for him voluntarily to place himself in its way, and if he did not see it, the reason was that he allowed his attention unnecessarily to be drawn another way; that upon such facts it was impossible to maintain that he was free from negligence; and in order to recover he must establish the proposition that he was himself without negligence, and without fault.[2] So, where it appeared that the colliding train was one of the fastest run by the company, and was running in the day time, within a minute or two of its regular time, and could have been seen half a mile from the place of collision, and the plaintiff, who knew where the track was, and had been walking his horse for some distance when approaching it, was struck by the train at the crossing,

[1] Murch *v.* Concord R. R. Corp. 9 Foster, 43; Moore *v.* Central R. R. Co., 4 Zabris. 268, 824; Runyon *v.* Central R. R. Co., 1 Dutcher, 556. The negligence of a slave which has contributed to the injury to him, exonerates the company from liability therefor in an action brought by the master. Herring *v.* Wil. and Ral. R. R. Co., 10 Iredell, 402; Richardson *v.* W. and M. R. R. Co., 8 Rich. 120; Macon and Western R. R. Co. *v.* Davis, 18 Geo. 679.

[2] Spencer *v.* Utica and Schenectady R. R. Co., 5 Barb. 337.

it was considered that his conduct showed inexcusable negligence, being like that of one courting destruction; that the most ordinary care, would have prompted him to cast his eyes back and forward upon the railroad, to see if a train was approaching; and if he had done so, he could not have failed to escape the injury. It was declared to be a well-settled and incontrovertible principle, that an action for negligence cannot be sustained, if the wrongful act or negligence of the plaintiff or his agent co-operated with the misconduct of the defendant or his agent, to produce the damage sustained; and that in order to recover in such a case, the plaintiff must be without fault.[1]

If the evidence of the plaintiff which is clear, explicit, and indisputable, shows that he contributed to the injury, he may be nonsuited without submitting the cause to the jury.[2]

There are cases in which the rule has been said to be, that the plaintiff can not recover if at all negligent, or guilty of the least degree of negligence; seeming to imply that the same result would follow whether the negligence amounted or not to want of ordinary care, or whether or not it contributed to the injury. Cases may be conceived in which the plaintiff may have been chargeable with some degree of negligence, and yet has conducted with ordinary care, that is, such care as men of common prudence use under like conditions.

[1] Sheffield *v.* Rochester and Syracuse R. R. Co., 21 Barb. 339.

[2] Haring *v.* N. Y. and Erie R. R. Co., 13 Barb. 9; Sheffield *v.* Rochester and Syracuse R. R. Co., 21 Barb. 339.

Others may be conceived where the plaintiff has neglected to use common precautions, and yet if he had used them the injury would nevertheless have resulted from the default of the company. In each of these supposed cases, the injured party was not the author of the wrong; and the company may well be held liable for the consequences of its want of ordinary care, which has produced the injury. The more considered statement of the rule is, that the company is liable for injuries to persons, lawfully on its track, through want of ordinary care on the part of its servants; and the limitation is that the plaintiff must bear his own loss, if through want of ordinary care he has contributed to the injury. The limitation is to be construed so as to make the company liable for the consequences of its negligence where the plaintiff, although he did not use ordinary care, has not by the neglect of it contributed to the injury, or could not have avoided it by the exercise of such care.[1] Thus, it has been held that where an injury has resulted from the defendant's negligence, it is not sufficient for him to show that there was a want of care on the part of the plaintiff, unless

[1] Davies *v.* Mann, 10 Meeson & Wels. 546; Bridge *v.* Grand Junction R. Co., 3 id. 244; Kennard *v.* Burton, 28 Maine, 39; Robinson *v.* Cone, 22 Vt. 213; Center *v.* Finney, 17 Barb. 94; Moore *v.* Central R. R. Co., 4 Zabris. 268, 824; Runyon *v.* Central R. R. Co., 1 Dutcher, 556; Aurora Branch R. R. Co. *v.* Grimes, 13 Ill. 585. The rule has been stated in various ways, with more or less accuracy. It has been laid down, that notwithstanding the negligence of the plaintiff, he can recover if the defendant by the exercise of ordinary care could have avoided the injury. Macon and W. R. R. Co. *v.* Davis, 18 Geo. 679; Trow *v.* Vt. Central R. R. Co. 24 Vt. 495. This must be considered erroneous; as it would in certain cases enable a plaintiff to recover where he had been guilty of a want of ordinary care, and thereby brought the injury upon himself.

it was a want of that degree of care—that is, ordinary care—which it is incumbent on him to exercise; and the charge that "if there was negligence on the part of both the plaintiff and the defendant, and the plaintiff by the exercise of ordinary care could have avoided the injury, and did not exercise such care, and thereby contributed in any degree to the injury, he could not recover; but that if the plaintiff could not by the exercise of ordinary care, have avoided the injury, the want of such care on his part, would not preclude him from recovery,"—was held proper.[1] And although the defendant has been guilty of gross negligence, in the absence of an intention to commit the injury the plaintiff cannot recover where, by the want of ordinary care, he has materially contributed to the injury which he might have avoided by the exercise of such care.[2]

The distinction has been taken between *proximate* negligence, that is, negligence occurring at the time of the injury—and *remote* negligence, that is, negligence occurring at some time before the injury. Where there has been mutual negligence, and the negligence of each was the proximate cause of the injury, no action can be sustained. Nor can an action be sustained where the negligence of the plaintiff is proximate, and that of the defendant remote, or consisting in some other matter than what occurred at the time of the injury; under which rule falls that class of cases where the injury arose from the want of ordinary care on the

[1] Beers *v.* Housatonic R. R. Co., 19 Conn. 566.

[2] Neal *v.* Gillett, 23 Conn. 437.

part of the plaintiff at the time of its occurrence. But on the other hand, the negligence of the defendant being proximate, and that of the plaintiff remote, the action will be sustained, although the plaintiff is not entirely without fault.[1]

The general rule that the plaintiff cannot recover if his own negligence has contributed to the injury, applies also where there is a legislative act, which is construed to be declaratory of the common law, making railroad companies liable for certain injuries done by them.[2] It will also exclude the plaintiff from recovering damages under statutes providing a remedy to certain relatives of a deceased who has been killed through negligence, where the intestate's own carelessness has contributed to the fatal injury.[3]

In several of the States, acts have been passed requiring railroad companies on approaching road and street crossings, to ring bells, sound whistles, or use other like precautions. Such acts, although applied to companies already chartered, are held constitutional, being designed for the general security, and not interfering with the powers conferred by the charter.[4] But the obligation of the company to use these specific precautions to prevent collisions, does not exempt the plaintiff from his obligation to use

[1] Trow *v.* Vt. Central R. R. Co., 24 Vt. 494; Kerwhacker *v.* C. C. & C. R. R. Co., 3 Ohio State, 172; C. C. & C. R. R. Co. *v.* Eliott, 4 id. 474; R. R. Co. *v.* Norton, 23 Penn. State, 469. See Rigby *v.* Hewitt, 5 Exch. 240; Greenland *v.* Chaplin, 5 id. 243.

[2] Macon and W. R. R. Co. *v.* Davis, 13 Geo. 68.

[3] Haring *v.* N. Y. and Erie R. R. Co., 13 Barb. 9; Willetts *v.* Buffalo and Rochester R. R. Co., 14 id. 585; *ante*, ch. xi. p. 262.

[4] *Ante*, ch. iii. pp. 40, 41.

ordinary care to avoid injury; and though the company neglects to fulfill these statute requirements, if the plaintiff by his want of ordinary care contributes to the injury, he cannot recover of the company.[1] Nor is the burden of the proof upon the company to show that the injury did not arise from its omission, until some proof is given tending to show that the injury resulted from the neglect to give the required signal.[2]

Negligence of Children and Disabled Persons. —It is a question, not without some conflict of statement, whether the same conduct which in a person of full age and capacity would be negligence so as to exclude him from redress for the consequences of the negligence of others, would, in a child of tender years, still under the dominion of childish instincts, or in a blind, or deaf, or crippled person, or in a *non compos*, as in an insane or intoxicated person, have the same effect; or whether a less degree of care, proportioned to their capacity, is all that is required of such disabled persons. On the one hand, it has been considered that the ordinary care required of the plaintiff is only such as his capacity admits of, or may reasonably be expected of him; and if he

[1] Parker *v.* Adams, 12 Met. 415; Haring *v.* N. Y. and Erie R. R. Co., 13 Barb. 9; Sheffield *v.* Rochester and Syracuse R. R. Co., 21 id. 339. See General Steam Navigation Co. *v.* Morrison, 20 Eng. L. & Eq. 267; Morrison *v.* General Steam Navigation Co., 20 id. 455.

[2] Galena and Chicago Union R. R. Co. *v.* Loomis, 13 Ill. 548. The New York statute only requires the whistle to be sounded while approaching a crossing, and not after it is passed. Wilson *v.* Rochester and Syracuse R. R. Co., 16 Barb. 167.

exercises that, although under the same circumstances another person of full age and capacity would be without redress, he is entitled to recover for the consequences of the defendant's negligence. The doctrine has been stated in this form in England.[1] It has been accepted in Vermont[2] and Connecticut.[3]

On the other hand, it has been held in New York, that the negligence of the guardians and protectors of such persons, in allowing them to place themselves in a dangerous position, must in law be regarded as their negligence, so as to make it a defence to an action for injury to them arising from the defendant's negligence, in the same manner as if the action was for an injury to a person of full age and capacity.[4]

Without adopting either statement as an absolute rule, a distinction may be taken which is justified in principle as well as in the facts of the cases cited and the opinions given, and will go far to reconcile them. It is a familiar doctrine, that what satisfies the requirement of ordinary care in one case, may

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[1] Lynch *v.* Nurdin, 1 Q. B. 29; 41 E. C. L. The authority of this case is now doubtful. See Lygo *v.* Newbold, 9 Exch. 302.

[2] Robinson *v.* Cone, 22 Vt. 213.

[3] Birge *v.* Gardiner, 19 Conn. 507. But children of the age of thirteen years were held to be so emancipated from the dominion of mere childish instincts as to be under the same obligation to use ordinary care as adults. Neal *v.* Gillett, 23 Conn. 437. Whether the youth of the defendant excuses his negligence to the same extent as the youth of the plaintiff excuses his, was not decided. Id.

[4] Hartfield *v.* Roper, 21 Wend. 615; Brown *v.* Maxwell, 6 Hill, 592; Munger *v.* Tonawanda R. R. Co., 4 Comst. 359; Willetts *v.* Buffalo and Rochester R. R. Co., 14 Barb. 585; Kreig *v.* Wells, 1 E. D. Smith, 74.

not under the circumstances of another; the vigilance and precautions rising according to the danger to be apprehended. In graduating that vigilance and arranging those precautions, the agents of the company must necessarily take into consideration what vigilance and precautions may reasonably be expected of the persons, injury to whom is to be avoided. What would be ordinary care, in regard to a person whom they supposed to be competent to avoid the injury, would not fulfill the requirement in the case of a child, or of one known to them to be incapable of escaping danger. Thus, if in running an engine they observe in advance of it a person they have a right to suppose to be of full age and capacity, and to be forewarned of danger, they may ordinarily act on the supposition that he will move from such dangerous position in time to avoid injury; but if they observe a very young child on the track, or a person who is blind, deaf, insane, intoxicated, asleep, or otherwise off his guard, and is known by them to be in that condition,—driving the engine forward as though such person was of full age and capacity and on his guard, might well be regarded as wanton recklessness of human life, for which the company would be liable although the plaintiff was negligent. On the other hand, if they did not suppose, and had no reason to apprehend, that such disabled persons were in peril, they would not be required to exercise greater vigilance than is required to prevent injury to persons of full age and capacity. The *knowledge*, then, of the company, that such disabled

persons are in danger, is to be taken into consideration in determining whether it has fulfilled the requirement of ordinary care; and in the absence of such knowledge, the same acts of negligence which would preclude a person of full age and capacity from redress, must also preclude them. This view, while it recognizes the suggestions of humanity, enforces the general rule of mutual responsibility, and is sustained by the authorities.[1] Thus, where a lunatic was traveling on the cars, in company with his father, who had paid the fare for both, and who, after leaving the train temporarily at a station, on returning to it did not find his son,—the latter having changed his seat in the mean time, the conductor, without notice or knowledge of his insanity or that he had paid his fare, applied to him for a ticket, and on his refusal to deliver one caused the train to be stopped and the lunatic to be put off; in consequence of which, some hours after, and at a place five miles distant, he was run over by another train and killed,—it was held, in an action by the father to recover damages for the fatal injury, that on the assumption that the party killed was sane, there could be no recovery, as he was guilty of great negligence and imprudence; that the conductor, having no notice or suspicion of his insanity, he must be regarded as sane so far as the company was concerned; and the negligence of his father in leaving him without a protector was his negligence

[1] Robinson *v.* Cone, 22 Vt. 224, 225; Herring *v.* Wilmington and Raleigh R. R. Co., 10 Iredell, 402. See Lynch *v.* Nurdin, 1 Q. B. 38.

so as to prevent a recovery, as in other cases where the injured party has substantially contributed to the injury; but it was suggested, that if the conductor had had notice of the lunacy, the company would on that account have been held to a stricter responsibility.[1]

Negligence a Question of Fact.—Where the gist of the action is negligence, the question whether the defendant has been negligent so as to subject him to liability, and whether the plaintiff has been negligent so as to exempt the defendant from liability, is one of fact for the jury under the instructions of the court as to the principles of law applicable thereto.[2] In Connecticut, negligence is held to be exclusively a conclusion of fact; and the court will not declare it as a conclusion of law from facts admitted or proved, but will leave it as a fact to be found by the

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[1] Willetts *v.* Buffalo and Rochester R. R. Co., 14 Barb. 585.

[2] Munroe *v.* Leach, 7 Met. 274; Bradley *v.* Boston and Maine R. R. 2 Cush. 543; Kennard *v.* Burton, 25 Maine, 39; Robinson *v.* Cone, 22 Vt. 225; Mureh *v.* Concord R. R. Corp. 9 Foster, 9, 44; Burton *v.* Phil., Wil. and Balt R. R. Co. 4 Harring. 252; Macon and W. R. R. Co. *v.* Davis, 18 Geo. 679, 687; Huyett *v.* Phil. and Reading R. R. Co. 23 Penn. State, 373; M'Cahill *v.* Kipp, 2 E. D. Smith, 413; Aldridge *v.* Great Western R. Co. 3 Eng. Rail. Cas. 852; 3 M. & Gr. 515; Marriott *v.* Stanley, 1 M. & Gr. 568; Clayards *v.* Dethick, 12 Q. B. 439; 1 Parsons on Cont. 702. But in Herring *v.* Wil. and Raleigh R. R. Co. 10 Iredell, 402, it is said that "what amounts to negligence is a question of law." Moore *v.* Central R. R. Co. 4 Zabris. 268, 277. Ogden, J., "What constitutes negligence and reasonable care, I take to be a question for the court. Whether the facts relied upon to establish the one, or prove the exercise of the other, are true, is to be left for the jury." But see the opinions delivered in the Court of Errors and Appeals, 4 id. 824.

jury from the circumstances.[1] But in Vermont it is decided that negligence is a mixed question of law and fact, upon which it is the duty of the court to instruct the jury specifically; and where facts in the case are admitted, or where there is testimony tending to prove facts, it is the duty of the court to instruct the jury whether these alleged facts, if they find them

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[1] Beers *v.* Housatonic R. R. Co. 19 Conn. 566, 569. Storrs, J.,—"When it is considered that negligence or a want of due care, was here the main fact to be ascertained, and that the facts, or more correctly speaking, the circumstances, thus given in evidence, were only evidential of such main fact, and conducing to prove it, it is obvious that the court could not have pronounced that those circumstances proved the existence of negligence, or a want of due care on the part of the plaintiff, without encroaching on the rights of the jury, whose exclusive province it was to weigh the evidence, and determine whether it was sufficient for that purpose. If it were competent for the defendants to have availed themselves of a want of ordinary and reasonable care, on the part of the plaintiff, by a special plea, and that special plea should allege merely the facts or circumstances on which the defendants claim that the court should have declared to the jury that such want of care was proved; or if they had been found in a special verdict, by the jury, it is quite clear that such plea or verdict would be unavailable to the defendants on this question, for the reason that the one would allege, and the other would find, only the evidence of the fact in issue, and not the fact itself; it not being the duty of the court to draw inferences from evidence, but only to pronounce legal conclusions from facts admitted or properly found. Whether there was negligence or a want of care, of whatever degree, was, from its very nature, a question of fact, and therefore to be decided by the jury." Park *v.* O'Brien, 23 id. 347. Storrs, J.,—"The question as to the existence of negligence, or a want of ordinary care, is one of a complex character. The inquiry, not only as to its existence, but whether it contributed with negligence on the part of another, to produce a particular effect, is much more complicated. As to both, they present, from their very nature, a question, not of law, but of fact, depending on the peculiar circumstances of each case, which circumstances are only evidential of the principal fact, that of negligence or its effects, and are to be compared and weighed by the jury, whose province it is to find facts, not by any artificial rules, but by the ordinary principles of reasoning; and such principal fact must be found by them, before the court can take cognizance of it, and pronounce upon its legal effect."

to be true, constitute that negligence which will defeat the action.[1]

Although negligence is a question of fact for the jury, the court has the power to set aside a verdict which finds that fact against evidence, on the same grounds on which verdicts on other questions are set aside. So also, if the plaintiff's own testimony clearly shows that he was guilty of such negligence as to defeat his action, the court will order a nonsuit without submitting the cause to the jury.[2] And where there is no proof of the defendant's negligence, it is error to submit to the jury its existence as a debatable matter.[3]

Injuries to Trespassers.—If a person places himself unlawfully on the track, he can only recover for wanton injury.[4] And where two companies have a right to use the track, although authorized by one company, he will be considered unlawfully upon it, when he uses the track for an improper purpose. Thus, where the plaintiff, in the employ of a contractor with the railroad company owning the road, fastened on the rail a machine for sawing wood, and while using it was injured by the train of another company having a right to use the track, it was held that though he was upon the track by author-

[1] Trow *v.* Vt. Central R. R. Co. 24 Vt. 497. The rule as stated in this case cannot be regarded as law. See Morse *v.* Rut. & Bur. R. R. Co. 27 Vt. 49.

[2] Haring *v.* N. Y. and Erie R. R. Co. 13 Barb. 9; Willetts *v.* Buffalo and Rochester R. R Co. 14 Barb. 593; Rochester and Syracuse R. R. Co. 21 id. 339; Moore *v.* Central R. R. Co. 4 Zabris. 268.

[3] R. R. Co. *v.* Skinner, 19 Penn. State, 298.

[4] Robertson *v.* N. Y. and Erie R. R. Co. 22 Barb. 91.

ity of the superintendent of the company owning the road, he could not recover against the other company for the injury, even though the conductor of the train previously knew of the machine being on the track, and was guilty of negligence on the occasion. The imprudence of the plaintiff was the immediate cause of the injury, and where the parties are mutually in fault, there can be no apportionment of damages.[1]

But the agents of a company have no right to inflict wanton injury on persons unlawfully on the track; and where human life and limb are concerned, that injury may well be considered as wanton, subjecting the company to damages, when, although able to do so, they neglect to arrest the engine which they have good reason to believe will, without an effort to stop it, result in injury to the wrong-doer. A wrong-doer is not necessarily an outlaw as to his property; still less as to his person.[2]

If an engineer sees a person on the track at some distance before the engine, he may well proceed on the supposition that the person will leave it in time to save himself from harm. But if he sees persons on the track whom he knows to be intoxicated, asleep, or otherwise off of their guard, he will not be justified in neglecting to use his best efforts to arrest the locomotive.[3]

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[1] Railroad Co. *v.* Norton, 24 Penn. State, 465.

[2] See Railroad Co. *v.* Norton, 24 Penn. State, 465.

[3] Herring *v.* Wilmington and Raleigh R. R. Co. 10 Iredell, 402. *Ante*, pp. 279, 280.

CHAPTER XIII.

INJURIES TO SERVANTS.

Injuries from the negligence of Fellow-Servants.—The liability of a railroad company to its servants differs in important respects from its liability to its passengers or to third parties. Its duty to passengers who, under a contract for safe carriage, intrust themselves to its servants and vehicles, about whose competency and sufficiency their means of information must ordinarily be limited, is measured by a severe rule. Its obligations to third parties, between whom and itself there is no contract or relation of privity, must be determined by the pervading principle of social duty as well as of the common law,—that every party, whether an individual person or organized body must so use his own property and manage his own affairs as not to injure the equal rights of another. Acting through agents, the company is responsible for their acts in the course of their employment, whenever they fail to fulfill its obligations to passengers in the one case, or infringe on the rights of third parties in the other.

Unlike passengers, a servant may become acquainted with his fellow-servants, and with the implements of his occupation, and has the means of adopting precautions not ordinarily open to passen-

gers. Unlike third parties, a servant stands in a relation of privity with the company. A contract subsists between them, whose terms, express or implied, declare their mutual obligations. The maxim, *respondeat superior*, that the master is answerable for the injuries of his servants to third parties, while acting in his service, is the test of the master's liability to persons between whom and himself there is no privity of contract. These distinctions are important in determining the liability of the company to its servants receiving injury when employed in its service. The duty of the master to his servant, to use reasonable care in providing him with careful and competent fellow-servants, and his liability for injuries to him through a neglect to use such care in the employment of fellow-servants, in the absence of any proof that the injured servant was cognizant of the carelessness of his associates, so as to induce the presumption that he took upon himself the risk of such carelessness, necessarily result from the first principles of the common law. But the liability of a railroad company to its passengers and to third parties, extends further than this. It is answerable to them for a want of the continued application of such care and skill. It cannot defend an action for an injury to a passenger or to a stranger, on the ground that the servant was a careful and competent person for the post. However careful and skillful he may generally be, it is responsible for his negligence in the particular case. Like any other master, it warrants to the public the fidelity and good conduct of its agents in all mat-

ters within the scope of their agency.[1] But this rule does not necessarily measure its responsibility to its servants.

As already suggested, its relation to its passengers rests on peculiar considerations of public policy which are not appropriate to its relation to its servants. Third parties, who stand in no relation of privity with it, and cannot be presumed to assume any of the risks of its business, come necessarily within the protection of the rule that the master is answerable to a stranger for injuries committed by his servants, while acting in the course of their employment. Its duties to its own servants, when not expressly stipulated, must be derived from its *implied contract* with them. The duty of the company to indemnify the servant for injuries which arise from the careless, negligent, or unskillful act of other persons employed by it in the same business or service, in the selection of whom it exercised proper care, cannot reasonably be implied from the contract of hiring. The servant when he accepts the relation assumes with it all the natural and ordinary risks and perils incident thereto, for which he must be presumed to stipulate a proportionate compensation; and among these are such as arise from the carelessness of his fellow-servants in the same employment. Considerations of public policy, which are the foundation of implied promises, are against the implication of a duty on the part of the employer to answer to one servant for

[1] Story on Agency, § 452.

the negligence of another in the same employment. They are engaged in a common enterprise, in which the safety of each depends much on the care and skill with which every other performs his appropriate duty. They may observe the conduct of each other, give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer neglects to take such precautions as the safety of the whole may require. The doctrine that the master is not liable to one servant for injuries received from another in the same business or service, tends to make all employed in it anxious, watchful, and interested for the fidelity of each other. And it is now generally accepted.[1]

Applying these principles to a railroad company, where persons are employed by a company to perform the same or separate duties, all tending to the accomplishment of one and the same purpose—that of the rapid and safe transmission of the trains,—one person so employed has no remedy against the company for any injury received by him through the careless, negligent, or unskillful act of another engaged in the same service.[2] And the fact that the injured servant is a

[1] Priestley *v.* Fowler, 3 M. & W. 1; Wigmore *v.* Jay, 5 Exch. 354; Seymour *v.* Maddox, 5 Eng. L. and Eq. 265; Brown *v.* Maxwell, 6 Hill, 594; Williams *v.* Taylor, 4 Porter, 234; Walker *v.* Bolling, 22 Ala. 294; Cook *v.* Parham, 24 id. 21; M'Daniel *v.* Emanuel, 2 Rich. 455; Camp *v.* Wardens of Church of St. Louis, 7 La. An. 321. The master is in Scotland held liable for such negligence. Dixon *v.* Ranken, 1 Am. Rail. Cas. 569. The rule stated in the text has in this country been discountenanced by some judges, although overruled by no court. C. C. and C. R. R. Co. *v.* Keary, 3 Ohio State, 219.

[2] Murray *v.* S. C. R. R. Co. 1 M'Mullen, 385; Farwell *v.* Boston and Worcester R. R. Co. 4 Met. 49; Madison and Indianapolis R. R. Co. *v.* Ba-

minor does not vary his legal rights.[1] Thus where the engineer on a train was injured while running it, in consequence of the mismanagement of the switch by the switch-tender, who was a careful and trustworthy servant in his general character; there being no charge that the company had not used due diligence in the selection of competent and trusty servants, or furnished them with suitable means to perform the service, the company was not responsible to the engineer.[2]

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con, 6 Ind. 205; Honner *v.* Ill. Central R. R. Co. 15 Ill. 530; Hutchinson *v.* York, Newcastle, &c., Railway Cos. 5 Exch. 343; Skip *v.* Eastern Cos. Railway Co. 24 Eng. L. and Eq. 396; Hubgh *v.* N. O. R. R. Co. 6 La. An. 495; Mitchell *v.* Penn. R. R. Co., Am. Law Reg. (Oct. 1853) p. 717; Shields *v.* Yonge, 15 Geo. 349.

[1] King *v.* Boston and Worcester R. R. Corp. 9 Cush. 112.

[2] Farwell *v.* Boston and Worcester R. R. Corp. 4 Met. 49, 57. Shaw, C. J.: "The general rule, resulting from considerations as well of justice as of policy is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the danger is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible, in a particular case, for their negligence is not decided by the single fact that they are, for some purposes, his agents. It seems to be now well settled, whatever might have been thought formerly, that underwriters cannot excuse themselves from payment of a loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskillfulness of the officers or crew of the vessel, in the performance of their various duties as navigators, although employed and paid by the owners, and in the navigation of the vessel, their agents. Copeland *v.* New England Marine Ins.

It is not responsible to a brakeman in its service for an injury received by him in consequence of the

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Co., 2 Met. 440–443, and cases there cited. I am aware that the maritime law has its own rules and analogies, and that we cannot always safely rely upon them in applying them to other branches of law. But the rule in question seems to be a good authority for the point, that persons are not to be reponsible, in all cases, for the negligence of those employed by them.

"If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will in their practical application best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned under given circumstances.

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"We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in a case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer.

"In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default; of which we give no opinion."

default of another brakeman in the same service, although the latter be at the time of the injury the acting conductor of another train.[1] A common laborer, employed by the company on its road, who while riding on a gravel train to his place of labor with its consent, and not paying fare, suffered an injury in a collision with a hand-car, caused by the negligence of other servants of the company, has no remedy against it.[2] A brakeman has no right of action against the company where he receives injury from being thrown, while the cars are running at a dangerous speed, on a wood-pile placed by other servants near the track.[3] The servants on one train have no legal claim on the company for injuries occasioned by a collision with another of its trains through the carelessness of the managers of the other train.[4] Where the company had a turn-table, with an iron bar attached for the purpose of turning locomotives and cars, which was operated by the plaintiff and other servants of the company, he was denied the right to recover damages for an injury suffered from the careless and improper management of the same by the other servants.[5] The plaintiff, a trackman, employed as such to follow in a hand-car passenger trains over a certain section of the track, to make repairs and report defects in the same, being injured while so engaged, through the negligence,

[1] Hayes *v.* Western R. R. Corp. 3 Cush. 270.
[2] Gillshannon *v.* Stony Brook R. R. Corp. 10 Cush. 228.
[3] Sherman *v.* Rochester and Syracuse R. R. Co., 15 Barb. 574.
[4] Hutchinson *v.* Railway Co., 5 Exch. 343.
[5] Horner *v.* Illinois Central R. R. Co., 15 Ill. 550.

as he claimed, of other servants of the company in charge of a stake train which passed on the road in the evening without lights, and at an unusual hour, could not sustain an action against the company for the injury.[1] Nor was it answerable to a laborer injured on a gravel train through the carelessness of the conductor or engineer by the "dumping" of one of the cars while on his usual passage between his boarding-place and his work.[2]

This general doctrine has been applied to the construction of the statutes which have been enacted in England and the United States, giving to the personal representatives of a deceased party who was killed by the carelessness or willfulness of another, a right to recover damages of the wrongdoer whenever the death of the person shall be caused by a wrongful act, neglect, or default, which is such that if death had not ensued, the injured party would have been entitled to recover damages for the injury. Under such statutes the personal representatives are without remedy against the company, where the fatal injury was occasioned by the negligent or unskillful act of a fellow-servant in the same employment.[3]

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[1] Coon *v.* Syracuse and Utica R. R. Co., 6 Barb. 231; S. C., 1 Selden, 492.

[2] Ryan *v.* Cumberland R. R. Co., 23 Penn. State, 384, two judges dissenting. It was considered in this last case that a warranty that one servant shall not be injured by the carelessness of another, implied a relation of protection and dependence which does not subsist between the parties to a contract of hiring.

[3] Hutchinson *v.* R. Co., 5 Exch. 343; Wigmore *v.* Jay, 5 id. 354; Paterson *v.* Wallace, 28 Eng. L. & Eq. 48; Marshall *v.* Stewart, 33 id. 1; Sherman *v.* Rochester and Syracuse R. R. Co., 15 Barb. 574; M'Millan *v.* Saratoga and Washington R. R. Co., 20 id. 449; Madison and Ind. R. R. Co. *v.* Bacon, 6 Ind. 205; *ante*, ch. xi. p. 262.

INJURIES FROM DEFECTS OF THE ROAD AND ITS APPOINTMENTS.—The same principle determines the liability of the company for injuries to a servant from a defect in its machinery, engines, cars, tracks, and other appointments of the road. It does not warrant their absolute sufficiency, and is not responsible for injuries arising from latent defects, or such patent defects as the servant was himself cognizant of, and had not reported to its officers. While he remains in its service informed of such defects, he is presumed to take upon himself the risks incident thereto.[1] Thus, the company is not responsible for an injury to a person acting as fireman to a locomotive, caused by the breaking of the joint of a switch rod, where the company had used ordinary care and diligence to make its road sufficient for its purpose.[2]

An engineer, to be entitled to recover of the company for an injury happening through defects in the machinery or other appointments of the road, must aver and prove actual notice to it of such defects. They are matters which he is more likely to be informed of than the company, and should have reported to its officers. Thus, where the injury occurred through a defect in the cow-catcher, and in fences and cattle-guards along the track, whereby the locomotive came in collision with cattle, and was overthrown, the company was held not liable, to an

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[1] Hubgh *v.* N. O. and C. R. R. Co. 6 La. An. 494; Mad River and Lake Erie R. R. Co. *v.* Barber, 6 Ohio State; Keegan *v.* Western R. R. Co. 4 Selden, 175.

[2] King *v.* Boston and Worcester R. R. Corp. 9 Cush. 112.

engineer who was injured by the collision, without an averment and proof of notice to the company.[1]

Limitations of the General Doctrine.—While the general doctrine here stated has uniformly received the sanction of the courts by which it has been passed upon, there are some limitations which have either been suggested or received judicial affirmation.

Negligence of the Company in employing incompetent Servants and providing improper Machinery.—In the first place, it is generally admitted that a master is responsible to a servant for an injury he receives from the carelessness or unskillfulness of a fellow-servant, when he neglects to use reasonable care to protect him from such danger by associating with him fellow-servants who have the ordinary care and skill required for the post. The master, it is well said, has no right to expose his servants to unreasonable risks.[2] But the

[1] M'Millan *v.* Saratoga and Washington R. R. Co. 20 Barb. 449; Mad River and Lake Erie R. R. Co. *v.* Barber, 6 Ohio State. See Langlois *v.* Buffalo and Rochester R. R. Co. 19 Barb. 364.

[2] Hutchinson *v.* R. Co. 5 Exch. 353; Skip *v.* Eastern Counties R. Co. 24 Eng. L. and Eq. 396; Albro *v.* Agawam Canal Co. 6 Cush. 75; Coon *v.* Utica and Syracuse R. R. Co. 6 Barb. 243; Walker *v.* Bolling, 22 Ala. 294; Cook *v.* Parham, 24 id. 21; Bassett *v.* Norwich and Worcester R. R. Co. (Superior Court of Conn.) 19 Law Rep. (Feb. 1857), p. 55. Butler J.:—"It is doubtless true, as a legal presumption, and in fact, that engineers take the risk attending their business into consideration when they are engaged in the employment, and that higher wages are demanded and paid on that account; and that, therefore, a different rule should govern as between them and the company, in relation to the negligence of other employees, from that which governs as between the company and third persons; and it may be true that when the engineer is employed in immediate connection with another incompetent or negligent servant, whose capacity or conduct he may observe or control, he is bound to report to his employers or leave the service; and

master does not warrant to each servant the competency of his fellow-servants; and in case of injury to one by the other, the question, in determining the master's liability, is not only whether the wrong-doer was in fact incompetent for the service, but also whether the master failed to exercise ordinary care in employing him; and both the default of the servant and the want of ordinary care in the master, must concur to render him liable for the injury.[1]

The duty of the master to use reasonable care in providing proper machinery, has also been applied to railroad companies; who are held responsible for injuries to a servant from defects in it which were known to the company. Thus, where a fireman was injured by the explosion of the boiler of a locomotive

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that if he does neither, he may properly be held to have acquiesced in the continued employment of the negligent servant, or to have voluntarily assumed the additional risk attending such employment; but, in my judgment, neither a contemplation of the risk by the servant, nor an opportunity to observe the capacity and conduct of his fellow-servant should absolve the company from all duty or liability to their employees. Engineers and other servants should be holden to have contemplated and assumed the risks, and only the risks, incident to running a road managed with ordinary care and prudence, and run by other competent, steady employees; and should be further holden to have assumed the additional risk attending the employment and service of incompetent or intemperate persons, only in cases where they have had a fair and reasonable opportunity to observe or know that they were running such additional risk, and to remove it by remonstrance, or avoid it by abandonment of the service. And the company should be holden to the exercise of ordinary and reasonable care and prudence in the selection of their engineers and other agents, and in watching over them in the arrangement of their trains, and putting the necessary force upon them, so that in business so dangerous as this, no unnecessary risk be incurred by the employees by reason of unsafe arrangements or want of watchfulness over those in their employ, or the employment of incompetent persons."

[1] Tarrant *v.* Webb, 18 C. B. 797; 86 E. C. L.; 37 Eng. L. and Eq. 281; Mad River and Lake Erie R. R. Co. *v.* Barber, 6 Ohio State.

engine, the defective and dangerous condition of which had been made known to the company by the reports of the engineer on several occasions, which were entered in its books kept for that purpose, and there was no proof that the fireman knew the condition of the boiler and therefore took the risk upon himself, it was held that the company was responsible for the injury which resulted from its actual negligence or misfeasance, and that the principle that the master is not responsible for injuries inflicted on one servant by another in the same business, is applicable only where the injury complained of happens without any actual fault or misconduct of the master, either in the act which caused the injury, or in the selection or employment of the agent by whose fault it happens.[1] But where the company has defective machinery or a careless and unskillful servant in its employ, whereby another servant is injured, if the injured servant knew or had a reasonable opportunity to inform himself of such defect in the machinery, or of the carelessness and unskillfulness of his fellow-servants, or of any other deficiency in the appointments of the road, he is to be presumed, by remaining in its employ, to accept the risks arising therefrom, and will be without remedy against the company.[2]

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[1] Keegan *v.* Western R. R. Co. 4 Selden, 175; Mad River and Lake Erie R. R. Co. *v.* Barber, 6 Ohio State; Perry *v.* Marsh, 25 Ala. 659; Paterson *v.* Wallace, 28 Eng. L. and Eq. 48; Marshall *v.* Stewart, 33 id. 1; Noyes *v.* Smith (Supreme Court of Vermont, Sept. Term, 1856), 19 Law Rep. (Dec. 1856), p. 469.

[2] Mad River and Lake Erie R. R. Co. 6 Ohio State; Bassett *v.* Norwich and Worcester R. R. Co. (Superior Ct. of Conn.); 19 Law Rep. (Feb. 1857),

NEGLIGENCE OF THE INJURED SERVANT.—If the servant has, by his own carelessness, substantially contributed to the injury, or might by the exercise of ordinary care have avoided it, he cannot recover of the company, although but for such negligence he might, on account of its default in not exercising reasonable care to provide proper machinery and servants, have had a remedy against it.[1] Thus, where a brakeman on a gravel train leaves it of his own accord, and on his own business, while it is proceeding to its destination, and then in attempting to get upon the same train on its return, while it is running at a rate which renders such an attempt dangerous, seizes upon the rim of a gravel-box, which breaks through a defect of material, whereby he falls upon the track, and is run over by the train, he cannot recover of the company for the injury received in this manner.[2]

INJURY TO A SERVANT NOT AT THE TIME IN THE MASTER'S SERVICE.—Another limitation has been suggested, that the master is responsible for an injury to a servant occasioned to him by the act of another servant, when the servant injured was not at the time of the injury acting in the service of his master. In such a case, the servant injured is

551; Williams *v.* Taylor, 4 Porter, 234; Perry *v.* Marsh, 25 Ala. 659; Keegan *v.* Western R. R. Co. 4 Selden, 175; Coon *v.* Utica and Syracuse R. R. Co. 6 Barb. 241; Priestley *v.* Fowler, 3 M. & W. 5; Skip *v.* Eastern Counties R. Co. 24 Eng. L. and Eq. 396.

[1] Brown *v.* Maxwell, 6 Hill, 592; Hutchinson *v.* R. Co., 5 Exch., 350; Paterson *v.* Wallace, 28 Eng. L. and Eq. 48.

[2] Timmons *v.* Central Ohio R. R. Co., 6 Ohio State, 105.

substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant.[1]

INJURIES TO SLAVES.—The general doctrine is, in Georgia, held not applicable to slaves, the owner of whom can recover of an employer to whom he has hired them, when they are injured by the carelessness of other persons in the same business. This restriction was regarded as indispensable to the welfare of the slave, who, from his condition, can have no control or influence over his fellow-laborers, cannot refuse to perform a dangerous service, is subject to the will of his employer, and cannot leave him when he chooses.[2]

WHEN THE RELATION OF FELLOW-SERVANT SUBSISTS.—Another limitation, which is at once reasonable and sustained by respectable authority, is that the injured party, to be excluded from a right to recover damages of the master for the injury inflicted by another servant, must stand in the relation of co-servant to the negligent or incompetent servant from whom he received it. If he does not stand in that relation, he is, so far as that servant is concerned, a stranger to the master, and entitled to the protection of the maxim—*respondeat superior*. He assumed the risks of the service in which he is

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[1] Hutchinson *v.* R. Co., 5 Exch. 352.

[2] Scudder *v.* Woodbridge, 1 Geo. 195. No such exception, however, is made in Alabama. Walker *v.* Bolling, 22 Ala. 294; Cook *v.* Parham, 24 id. 21.

employed when he entered upon it, and among them those arising from the default of others employed in the same service; but he is not to be presumed to have assumed the risks of another distinct business or employment. Persons may be employed by a company who exercise a distinct employment, and cannot be considered as its servants. Such are its legal advisers, its financial agents, or its contractors, who are in no sense the co-servants of the conductor, the engineer, and the brakeman. There are other classes of persons in its employ, and under the immediate supervision of its superior officers, who cannot be said to be the co-servants of the employees who operate the trains. Such are the clerks in its offices, its ticket-agents, or civil engineers who are surveying its routes. If these classes of persons, while passing in the trains, are injured through the negligence of the employees in charge of them, the principles of the law and of public policy would not exclude them from recovering damages of the company. Their employment is so distinct and remote in the nature of its duties from that of operating the trains, that they could not be presumed to have assumed the risks arising from the negligence of those in charge of them. Their means of informing themselves of the character of such servants are little better than those of the public, while their control over them is no greater.[1]

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[1] See Story on Agency, § 453 (*f*); 1 Parsons on Cont., ch. v., pp. 86–93. In Farwell *v.* Boston and Worcester R. R. Corp., 4 Met. 60, there is some

The application of this distinction has created some conflict in determining what are distinct employments. Thus, where a bridge-builder, employed by the company to build a bridge over the railroad at a creek, was directed by the company to proceed in its cars to a certain place, and there assist in loading timber for the bridge, and was injured by the careless management of the train by the servants of the company having charge of its running; it was considered in Indiana, that the bridge-builder and the servants by whose negligence the injury was caused, had no common duty to perform in respect to which the injury happened; that the injured party was not at the time in a position in which it could be implied that he contributed to the injury; that he was not a co-servant of the operatives in charge of the train, and was entitled to the rights of a passenger against the company. It was noted that the injury did not occur in loading or unloading the timber; in which service the bridge-builder and those in charge of the train would have been co-servants, and as such, each would have no remedy against the company for injuries received from the default of another.[1]

So, in the same State, where a laborer was employed by the company upon one part of the road,

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language which seems not to be in harmony with this distinction, but the rule propounded by the court rather sustains than conflicts with it.

[1] Gillenwater *v.* Madison and Indianapolis R. R. Co., 5 Ind. 339.

to load and unload gravel and distribute it upon the road, at some distance from his boarding-place, and by agreement he was to be regularly carried between his place of labor and his boarding-house, the company was held liable for an injury to him received in a collision with a passenger train, caused by the negligence of the engineer of the locomotive drawing the car in which he was carried.[1]

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[1] Fitzpatrick *v.* New Albany and Salem R. R. Co., 7 Ind. 436; Davison, J., after noticing Gillenwater *v.* Madison and Indianapolis R. R. Co., 5 Ind., 339, said, "That case and the one at bar are, in point of fact, to some extent dissimilar; but each is plainly subject to the same rule of decision. Here, the plaintiff, though a servant of the company, was in no respect connected with the department of service in which the engineer was engaged, not more so than was Gillenwater. His employment—that of loading and unloading the cars—at once shows that he had no connection or control in the movement of the train. The plaintiff could not, therefore, have contributed to produce the injury. He was not, it is true, a mere passenger; his travel on the cars was an incident to the business in which he was employed; but under an agreement with the defendants, he was to be regularly conveyed to and from his work. This, it seems to us, involves an implied engagement that they would convey him as safely and securely as if he really had been a passenger in the ordinary sense of the term. Indeed, it is averred in the complaint, and admitted in the demurrer, that he was received on board the cars as a passenger.

"As a general rule, a person in the management of his business, whether he does it himself or acts through agents, must so conduct that business as not to produce injury to others. We perceive no valid reason why this rule should not apply to the present case. The engineer was the defendants' agent, and it is an admitted fact that the injury was alone produced by the gross negligence and unskillful conduct of that agent. True, there is authority for the position that 'when a party contracts to perform services, he takes into account the dangers and perils incident to the employment;' but this can only be intended to mean such 'dangers and perils' as necessarily attend the business when conducted with ordinary care and prudence. He cannot be presumed to have contracted in reference to injuries inflicted on him by negligence. The nature of the employment required the plaintiff to ride on the cars, and it seems to follow that the defendants were in duty bound to furnish a careful and skillful engineer to manage the train. In

There are decisions in other States conflicting with those in Indiana in the application of this distinction. Thus, in Massachusetts, where a common laborer employed in repairing the company's road-bed at a place several miles from his residence, was accustomed, with the permission of the company and for mutual convenience, to ride to his place of labor on a gravel train of the company without paying compensation, and having no right under any contract with it to be so conveyed, he was held to be without remedy for an injury received, while so riding on the gravel-train, through the negligence of its servants having charge of it.[1]

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this it is conceded they have failed, and the result is a serious injury to the plaintiff, who has been guilty of no wrong. He is evidently entitled to recover, unless it be assumed that the defendants were not bound to make provision for his safe and secure conveyance; and such an assumption, in view of the facts of this case, would, in our opinion, conflict with the plainest principles of justice."

[1] Gillshannon *v.* Stony Brook R. R. Corp. 10 Cush, 228. Dewey, J.: "If the relation existing between these parties was that of master and servant, no action will lie against the defendants for an injury received by the plaintiff in the course of that service, occasioned by the negligence of a fellow servant. Farwell *v.* Boston and Worcester Railroad, 4 Met. 49; Hayes *v.* Western Railroad, 3 Cush. 270.

"It was attempted on the argument for the plaintiff to take the case out of the rule stated in those cases, upon the ground that the nature of the employment of these servants was different, the plaintiff being employed as a laborer in constructing the railroad bed, and not engaged in any duty connected with running the trains, and so not engaged in any common enterprise. The case of Albro *v.* Agawam Canal Co., 6 Cush. 75, seems to be adverse to these views, and goes strongly to sustain the defence.

"It was also urged that the plaintiff was not in the employment of the defendants at the time the injury was received, or that he might properly be considered as a passenger, and the defendants, as respects him, were carriers for hire. But as it seems to us, in no view of the case can this action be maintained. If the plaintiff was by the contract of service to be carried by the defendants to the place for his labor, then the injury was received

So in Pennsylvania, where one of the laborers on the railroad was injured by the "dumping" of the car through the carelessness of the conductor or engineer of a gravel-train, while on their usual passage between their lodgings and their place of work—the company was held not to be liable for the injury.[1]

But it is not necessary that the employees of the company should perform precisely the same services in order to be co-servants, and as such to be without remedy against it for the default of each other. Thus, the company is not responsible to the engineer for injuries which he receives from the negligence of the switch-tender, notwithstanding their duties are dissimilar, and they are only occasionally in proximity to each other. Their different duties and services are designed for the same purpose, and tend to its accomplishment, to wit, the quick and safe transmission of the trains in a given direction. The connection between the different services is close and

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while engaged in the service for which he was employed, and so falls within the ordinary cases of servants sustaining an injury from the negligence of other servants. If it be not properly inferable from the evidence that the contract between the parties actually embraced this transportation to the place of labor, it leaves the case to stand as a permissive privilege granted to the plaintiff, of which he availed himself, to facilitate his labors and service, and is equally connected with it, and the relation of master and servant, and therefore furnishes no ground for maintaining this action. How does this case differ from that suggested at the argument by the counsel for the defendants, who supposed a case where the business for which the party is employed, is that of cutting timber, or standing wood, and the servant receives an injury in his person on the way to the timber-lot, by the overturning of the vehicle in which he is carried, by the negligence or careless driving of another servant? There is no liability on the part of the master in such a case."

[1] Ryan *v.* Cumberland Valley R. R. Co., 23 Penn. State, 384.

immediate, and the risk of injuries which the one may inflict on the other, may be fairly presumed to be taken into consideration by the employee in entering the service of the company. It may not be easy to state the principle which will distinguish in advance one department of service from another, so that the employees in one are not to be considered the co-servants of persons employed in another; but the distinction itself cannot well be denied.[1]

INJURIES ARISING FROM THE NEGLIGENCE OF A SUPERIOR SERVANT.—Another limitation has been admitted in Ohio, where the general doctrine is received. According to the decisions in that State, where an employer places one person in his employ under the direction of another, also in his employ, such employer is liable for injury to the person placed in the subordinate position, by the negligence of his superior. The company, having placed the engineer in its employ under the control of the conductor who directed the movements of the trains, was held liable to the engineer for an injury to him occasioned by the negligence of the conductor while they were both engaged in their respective employ-

[1] See Farwell *v.* Boston and Worcester R. R. Corp. 4 Met, 60; Gillenwater *v.* Madison and Indianapolis R. R. Co., 5 Ind. 339; Coon *v.* Syracuse and Utica R. R. Co., 1 Selden, 495, per Gardner, J.; S. C. 6 Barb. 242.

It has been considered that if one company owns the road and is obligated to keep it in running order, taking toll, and another company runs engines and cars over it, paying toll, and receiving compensation from the passengers, an engineer of the last company would have an action against the first for an injury to him through the carelessness of a switch-tender employed by the first. Farwell *v.* Boston and Worcester R. R. Co., 4 Met. 61.

ments. And the same rule was applied where the brakeman was injured through the fault of the conductor or superintendent. The prominent considerations which induced this limitation were, that there is an obligation on the company implied in the contract of hiring, to superintend and control with care and skill the dangerous force it puts in operation, in the discharge of which the conductor is its immediate representative, standing in its place, whose default must be considered as its default; and that between the conductor exercising authority over all persons connected with the train, and a brakeman or engineer subject to that authority, there is no common participation of duties, admitting that mutual supervision which the general doctrine is designed to encourage. By this view, the implied undertaking of the company is not merely to use ordinary care and skill in the employment of its superior agents, but to warrant their competency and fidelity, and the continued exercise of those qualities at all times.[1]

This limitation is not adopted in Massachusetts. The proprietors of a manufacturing establishment were held not responsible to an operative in their employ for an injury to her, by the filling with gas of the room where she worked, brought about by the gross negligence and want of skill of the superintendent who hired and discharged overseers of

[1] Little Miami R. R. Co. *v.* Stevens, 20 Ohio, 415, Spalding, J., dissenting. See 7 West. Law Journ. 369; 13 Law Rep. 74; C. C. and C. R. R. Co. *v.* Keary, 3 Ohio State, 201. In this last case Warden, J., denied the general doctrine which exempts the master from liability to a servant for injuries received by him through the negligence of a fellow-servant.

rooms, by whom the operatives were hired and discharged. The operative and the superintendent were considered fellow-servants, inasmuch as they were both servants of the same master, had the same employer, were engaged in the accomplishment of the same general object, were acting in one common service, and derived their compensation from the same source.[1] This limitation is also rejected in New York,[2] and in Pennsylvania.[3]

NEGLIGENCE OF THE COMPANY AS DISTINCT FROM THE NEGLIGENCE OF ITS SERVANTS.—The liability of the master for an injury to his servant through his own negligence, follows from the first principles of the law. The view has been taken, that if the master employs a general managing agent or superintendent with authority to employ or discharge servants, such managing agent is to be treated as standing in his place: his omissions are to be regarded as the master's omissions, and his knowledge as the master's knowledge. As the master is bound, to use reasonable care to associate with his servant careful and competent fellow-servants, it has been considered that he cannot relieve himself of this duty by the appointment of a general manager or superintendent; and if he devolves it on another, he is responsible for its faithful discharge.

[1] Albro *v.* Agawam Canal Co. 6 Cush. 75. See Hayes *v.* Western R. R. Corp. 3 Cush. 270; Gillshannon *v.* Stony Brook R. R. Corp. 10 id. 228; see Honner *v.* Ill. Cent. R. R. Co. 15 Ill. 552.

[2] Coon *v.* Utica and Syracuse R. R. Co. 6 Barb. 238. See Sherman *v.* Rochester and Syracuse R. R. Co. 15 id. 574.

[3] Ryan *v.* Cumberland R. R. Co. 23 Penn. State, 386.

It was therefore held in Alabama, that the owner of a boat is responsible for injuries to one servant through the habitual negligence of the engineer, which was known to the captain, who having the power, neglected to discharge him.[1]

As a master is responsible to his servant for injuries from his own negligence, the question occurs whether there are any defaults of a corporation which are to be regarded as its own defaults, for which it is responsible to a servant in distinction from the defaults of its servants, for which it would not be responsible to a fellow-servant. As the corporation does its business through agents, it is difficult to charge it directly with negligence in distinction from the negligence of its agents; and if this can be done, it must be by a default committed in its corporate capacity. The adoption and publication of rules and regulations for a railroad, when not in conflict with the charter, have been considered in New York as corporate acts.* But if injuries have resulted to a servant through such regulations which he must be presumed to have known when he entered its service, he cannot recover. It would be otherwise, it seems, if an order of the directors in the particular case, unknown to the servant, had

[1] Walker *v.* Bolling, 22 Ala. 294. But see Cook *v.* Parham, 24 id. 21; 1 Parsons on Cont. 529. This doctrine is narrower than the one in Ohio, which embraces all injuries happening through the default of a superior agent, whether he can discharge and employ the servants or not. But it is in conflict with decisions in Massachusetts, and New York, which do not make the employer liable in such cases. Albro *v.* Agawam Canal Co. 6 Cush. 75; King *v.* Boston and Worcester R. R. Corp. 9 id. 112; Coon *v.* Utica and Syracuse R. R. Co. 6 Barb. 238.

occasioned the injury.[1] In a subsequent case in New York, it was considered that the company, as a corporate body, cannot be guilty of running its trains at a dangerous speed, except by a formal resolution of its board of directors duly convened, directing the act to be done. For an omission to do what its duty to the community and persons in its employ required, it might be guilty without such a formal act, as then the gist of the complaint would be the culpable omission of the board to take the requisite action. But where an affirmative act is complained of, as in the case of running the trains at a dangerous speed, the only way in which it can be made liable in an action on the case, it was considered, is either by its corporate action through the board of directors, or for the acts of its agents on the principle of *respondeat superior*.[2] The company was held liable to a servant for an injury arising from a defect in the boiler of a locomotive, which the referee found had been reported to the company on several occasions, and entered on its books kept for that purpose.[3]

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[1] Coon *v.* Utica and Syracuse R. R. Co. 6 Barb. 240; 1 Am. Rail. Cas. 568, notes.

[2] Sherman *v.* Rochester and Syracuse R. R. Co. 15 Barb. 594.

[3] Keegan *v.* Western R. R. Co. 4 Selden, 175. But see King *v.* Boston and Worcester R. R. Corp. 9 Cush. 112. Fletcher, J.:—"But the plaintiff further claims to maintain his action on the ground that the injury to the plaintiff was caused by a defect in the original construction of the road, and that the defendants are liable for the consequences of such a defect. It is maintained for the plaintiff that the defendants are bound to furnish a safe road, and that they are liable for injuries happening in consequence of a defective road. It is not necessary, at this time, to consider particularly this position. As a corporation can act only through the agency of some individual person or persons, a question has sometimes been made, as to

what particular officers or persons should be considered as the corporation itself, as distinct from the servants of the corporation, for the purpose of settling what should be considered as the neglect of the corporation itself, and not of its servants. I am not aware that there has been any direct adjudication upon this point. But, assuming that it is correct, as a general principle, that the responsibility as to the sufficiency of the road rests on the defendants themselves, still, their obligation, so far as respects those in their employment, would not extend beyond the use of ordinary care and diligence, and they would be held responsible only for the want of ordinary care and diligence. If a corporation itself should be held responsible to its servants, that the road, when first used, was safe and sufficient, yet keeping the road in proper repair afterwards, would seem to be the work of servants or laborers, as much as any other part of the business of the corporation." See Honner *v.* Ill. Cent. R. R. Co. 15 Ill. 532.

CHAPTER XIV.

INJURIES TO PROPERTY BY FIRE.

The buildings, fences, or other combustible material lying near the track, are sometimes destroyed by fire, communicated by sparks from the engines while running on the track. The liability of the company for such injuries, irrespective of statute, will now be considered.

Liability at Common Law for Injuries arising from Negligence.—An action does not lie at common law for the reasonable use of one's right, though it may be to the injury of another. Besides many other cases, this rule has been applied where the fire which one has kindled on his own premises for a lawful purpose, has communicated to the land of another; and the person starting the fire on his own premises is not liable for the injury thereby caused without proof of negligence in its management. But a party is responsible for the injury to another which results from the negligent, unskillful, and improper exercise of his right.[1]

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[1] Clark *v.* Foot, 8 Johns. 329; Stuart *v.* Hawley, 22 Barb. 619; Bachelder *v.* Heagan, 18 Maine, 32; see Panton *v.* Holland, 17 Johns. 92; Livingston *v.* Adams, 8 Cowen, 175; Thurston *v.* Hancock, 12 Mass. 220.

A railroad company, being authorized to run its engines on its track in the ordinary and proper manner, is bound in the exercise of that right to use reasonable care to prevent injuries to others, and is responsible for injuries to their property caused by its negligence, or a want of due care and skill, whether it has appropriated under statute authority any of their property or not. Its liability at common law for such injuries to landowners is not excluded by the special remedy for the assessment of damages; because the tribunal appointed to assess them, being bound to presume that the company would execute its powers in a lawful and proper manner, could not take into consideration injuries arising from negligence, and award damages for them.[1] But the company is not liable for injuries to the property of others, by fire communicated from its engines while they are being operated in a proper manner, and with reasonable care and skill. It is authorized by its charter to propel locomotives by steam on the land lawfully appropriated for its purposes; and, like any other proprietor of the soil, is not responsible for injuries incidentally resulting to others in the reasonable exercise of its right. If, in conducting its lawful operations as a common carrier, it uses proper precautions to prevent injuries by the issuing of sparks from its engines, which are thrown off in the reasonable use of its right to propel vehi-

[1] *Ante*, ch. viii. p. 169; ch. x. p. 223. Huyett *v.* Phil. and Reading R. R. Co., 23 Penn. State, 373; Sunbury and Erie R. R. Co. *v.* Hummell, 27 id. 99.

cles by steam, it is not responsible for injuries which result therefrom, to property along its track. The suggestion, which has been occasionally pressed, that a greater liability for consequential injuries should be exacted of railroad companies than of other adjoining owners, for the reason that their rights originate in legislative grant, and they conduct a business of peculiar danger, the injuries arising from which may be more difficult to prove than in ordinary cases,—has not met with judicial approval.[1] Thus, while the locomotive was drawing a train of cars on the track, some sparks from the smoke-pipe passed directly therefrom to the roof of the plaintiff's building, standing eighteen inches from the side, and twenty-six feet from the middle of the road, whereby the building, without any negligence, but in the exercise of due care and skill on the part of the company, was set on fire and consumed it: was held not liable for the injury.[2]

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[1] Phil. and Reading R. R. Co. *v.* Yeiser, 8 Barr, 366; Chapman *v.* Atlantic and St. Lawrence R. R. Co., 37 Maine, 92; Rood *v.* N. Y. and Erie R. R. Co., 18 Barb. 80. Whether the assessment of damages to parties injured by the construction of the railroad should include the risk of fire—which may be communicated to their property from the engines without fault of the company—as a distinct item for damages, is not settled. It was held not proper to be included in the assessment in Sunbury and Erie R. R. Co. *v.* Hummell, 27 Penn. State, 99; Somerville and Eaton R. R. Co., 2 Zabris. 513, per Ogden, J. But see Chapman *v.* Atlantic and St. Lawrence R. R. Co., 37 Maine, 92; Webber *v.* Eastern R. R. Co. 2 Met. 147; Phil. and Reading R. R. Co. *v.* Yeiser, 8 Barr, 366; Rood *v.* N. Y. and Erie R. R. Co., 18 Barb. 84; Somerville and Easton R. R. Co. *v.* Doughty, 2 Zabris. 502, per Nevius, J. The risk of accidental fires, it would seem, could only be considered in its effect on the market value of the property.

[2] Burroughs *v.* Housatonic R. R. Co., 15 Conn. 124.

The construction of the railroad before any buildings are erected on the adjoining land, does not exempt the company from the duty to use ordinary care to prevent injury by fire to those subsequently erected. One in the lawful use of his property may expose it to accidental injury from the lawful acts of others, and still not lose his remedy against them for injuries caused by their culpable negligence. The owner of land adjoining the track of a railroad may lawfully build thereon, though the situation be one of exposure and hazard, and nevertheless be entitled to protection against the negligent acts of the company by which his buildings are destroyed.[1]

Burden of Proof.—As negligence is the gist of the action against the company for injuries received from it while exercising its lawful right to conduct its trains, the burden of proof is on the plaintiff to prove it. The fact of injury suffered by the plaintiff in consequence of the exercise of a right by the defendant, does not raise the presumption of negligence, except in some peculiar cases, as in actions against innkeepers and common carriers, which are made exceptions to the general rule on grounds of public policy.[2] Hence, negligence is not to be presumed as a conclusion of law from the burning of a party's house or other property by sparks communicated by the company's engines while being pro-

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[1] Cook *v.* Champlain Transportation Co., 1 Denio, 91; see Burroughs *v.* Housatonic R. R. Co., 15 Conn. 133.

[2] Bachelder *v.* Heagan, 18 Maine, 32; Stuart *v.* Hawley, 22 Barb. 619.

pelled on its track.[1] But, in connection with other circumstances, it may be inferred from the injury, by the jury, as a matter of fact. Thus, where the cars had been running a long time without doing damage, it was held that when the plaintiff shows damage resulting from the defendant's act which, with the exercise of proper care, does not ordinarily produce damage, he makes a *prima facie* case of negligence, which cannot be repelled but by proof of care, or of some extraordinary accident which renders care useless.[2] So, where a house was set on fire by sparks from a locomotive engine, and there was evidence that the weather was very dry and windy at the time, and that sparks were thrown from the engines to a great distance, and also set fire to several fields and fences near the same time and place, although the company gave evidence showing that all its engines were in good order, and provided with good spark arresters,—it was held, to be the province of the jury to decide whether this was sufficient evidence of carelessness, and erroneous to direct a verdict for

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[1] Phil. and Reading R. R. Co. *v.* Yeiser, 8 Barr, 366; Rood *v.* N. Y. and Erie R. R. Co., 18 Barb. 85; Herring *v.* Wilmington and Raleigh R. R. Co., 10 Iredell, 402; Aldridge *v.* Great Western R. R. Co., 3 M. & G. 515; 42 E. C. L. 272.

[2] Ellis *v.* Portsmouth and Roanoke R. R. Co., 2 Iredell, 138. But see Herring *v.* Wilmington and Raleigh R. R. Co., 10 id. 402. When the fact of injury by fire communicated from the engine, and the manner in which it is communicated, are proved, it is for the jury to determine whether the company is chargeable with negligence; and it is immaterial whether the evidence comes from the plaintiff or the defendant. M'Cready *v.* S. C. R. R. Co., 2 Strob. 356.

the defendants.[1] Where the declaration alleged that the plaintiff's stack, standing near the track, was destroyed by fire through the careless, negligent, and improper management of the engine by the servants of the company, and a case stated for the opinion of the court, found that the engine from which the sparks that set fire to the stack issued, was such as was usually employed on railways, and was used at the time in the ordinary manner, and for the purposes authorized by the incorporating act,—the court refused, on the one hand, to infer negligence from the facts as a conclusion of law, so as to direct a verdict for the defendant, or, on the other, to presume its absence, so as to direct a nonsuit, but regarded it as a proper question for the jury.[2]

The duty of the company to use reasonable care to prevent injury to others in the exercise of its own rights, renders it incumbent upon it to avail itself of the precautions at its command to prevent such injury; and its omission to use them is a fact which may be taken into consideration by the jury in determining the question of negligence. For this purpose, testimony is admissible to show that other well-conducted companies are accustomed to use precautions which the defendants neglected.[3] Where it was proved that the property was destroyed by fire communicated from the engine of

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[1] Huyett *v.* Phil. and Reading R. R. Co., 23 Penn. State, 373.

[2] Aldridge *v.* Great Western R. R. Co., 3 M. & G. 515; 42 E. C. L. 272.

[3] Cook *v.* Champlain Transportation Co., 1 Denio, 91.

the company, and the plaintiff had given evidence to prove that the damage by fire thus communicated could have been prevented by the use of certain appliances, or by employing engines of such power that they need not be worked to their utmost capacity,—upon a motion to set aside the verdict for the plaintiff, as against the weight of evidence, there being no proof that the company had adopted such precautions as might reasonably be expected to prevent injury, the court refused to grant the motion.[1] But where the most approved means which science and skill have invented are applied to prevent the emission of sparks likely to cause injury, by using proper spark arresters and otherwise, the presumption of negligence does not arise from the fact that the fire was communicated to the plaintiff's property from the sparks, and that none of the defendant's servants were on hand to extinguish it.[2]

Statute Provisions imposing Liability for Injuries by Fire.—In Maine and Massachusetts, statutes, the exact transcripts of each other, have been enacted, making railroad companies liable for injuries caused by their engines in the emission of

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[1] Piggott *v.* Eastern Counties R. R. Co., 3 C. B. 229; 54 E. C. L. 229. In this case, it was important to determine whether the sparks produced the injury; and in order to show that they could have that effect, evidence was held admissible that other engines of the same kind had thrown sparks to a greater distance.

[2] Rood *v.* N. Y. and Erie R. R. Co., 18 Barb. 80. Whether the company is bound to keep a watch on the road for the purpose of extinguishing fires, was a point raised in this case, but not decided.

sparks, even when not chargeable with negligence.[1] This provision has been held applicable as well to railroads established before as since its passage, and to estates a part of which has been conveyed to the corporation by the owner for the purpose of a railroad, as well as to those a part of which has been taken for the same purpose under authority of the law.[2] The clause extending the company's liability and the clause giving the power to insure, are held to be co-extensive, and to interpret each other. The clause giving the power to insure along its route, was considered as giving the power to insure buildings near and adjacent to the route which were exposed to the danger of fire from the engines, without limitation or defining any distance; and it was held that, under the statute, the company was liable for damages by fire to buildings near and adjacent to its route, although the fire which destroyed them was communicated from another building, which caught fire from sparks issuing from the engine. The statute is not confined to cases where the very particles of fire which fall upon and kindle the flame in the building burned, emanate from the engine

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[1] Mass. Stat. 1840, c. 85; Maine Stat. 1842, ch. 9, sec. 5. The provision is as follows: "When any injury is done to a building or other property of any person or corporation by fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be held responsible in damages to the person or corporation so injured; and any railroad corporation shall have an insurable interest in the property for which it may be so held responsible, in damages along its route, and may procure insurance thereon in its own behalf."

[2] Lyman *v.* Boston and Worcester R. R. Corp., 4 Cush. 288. See *ante*, ch. iii. p. 44.

itself, without the intervention of any other object.[1] On the other hand, the liability of the company for such injuries under the statute extends no further than insurance is practicable. It includes only property permanently existing along its route, and capable of being insured; and as to movable property having no permanent location, it is to be determined by the principles of the common law. The company was therefore held not liable for the destruction of some posts, deposited five or eight rods from the track, by fire communicated from the locomotive, while rightfully running on the track, to some combustible matter near the posts, which afterwards reached and consumed them, without proof that the company or its agents were guilty of negligence, unskillfulness, or imprudence, in running or conducting the locomotive at the time.[2]

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[1] Hart *v.* Western R. R. Corp., 13 Met. 99.

[2] Chapman *v.* Atlantic and St. Lawrence R. R. Co., 37 Maine, 92.

CHAPTER XV.

INJURIES TO CATTLE.[1]

Liability of the Company at Common Law.—A railroad company is entitled to the exclusive use of its track, except where by agreement or the requirements of public law, private or public crossings are allowed. Whether it be considered the owner of the fee, or of a mere right of way, acquired by purchase or condemnation, its enjoyment of its track must necessarily be exclusive, so as to enable it to carry out the purposes of its charter. The adjoining owner can claim no greater rights therein while it is operated by the company as a common carrier, than he can in the soil of his neighbor. He has not even the rights in the soil under the track, which he has in the soil under an adjoining highway, while it is used for the purposes of a railroad.[2]

The obligations of adjoining owners of land, to which recurrence is here necessary, are determined

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[1] The term *cattle* as employed in this chapter includes, besides beasts of the bovine genus, horses, sheep, and swine, and is not confined to the more limited signification which prevails in the United States.

[2] Hurd *v.* Rutland and Burlington R. R. Co., 25 Vt. 116; Jackson *v.* Same, 25 id. 150; Munger *v.* Tonawanda R. R. Co. 4 Comst. 349; S. C. 5 Denio, 255; Kerwhacker *v.* C. C. and C. R. R. Co. 3 Ohio State, 172; N. Y. and Erie R. R. Co. *v.* Skinner, 19 Penn. State, 298; Williams *v.* Michigan Central R. R. Co. 2 Gibbs (Mich.), 259.

by ancient principles of the common law. By these, every man must keep his cattle on his own close, and prevent their escape therefrom. If they go upon the land of another without his permission, the owner is liable in trespass. The fact that there is no fence between the two closes is not a defence to the trespass, except where the owner of the lands trespassed upon is, by prescription, agreement, or otherwise, legally bound to support the fence by a defect in which the cattle escaped into his land. If he is so bound, he cannot maintain an action for their entry, as they escaped through his own default.[1]

A railroad company, sustaining substantially the same relation to the adjacent owner as adjacent owners do in other cases to each other, is not according to these principles bound, in the absence of special statute requirements, to fence its track against the intrusion of cattle from the adjacent lands. In consequence of its not being under this obligation, it is not responsible for injuries to cattle coming upon its track through the want of such a fence, without proof of some other default. It may maintain an action for the damage done by such cattle unlawfully coming upon its track; and on the other hand, it is not liable to the owner for injuries inflicted on his cattle, thus trespassing, while it is in the lawful exercise of its right to the exclusive use of its track.[2]

[1] Rust *v.* Low, 6 Mass. 90; Thayer *v.* Arnold, 4 Met. 589; Little *v.* Lathrop, 5 Greenl. 356; Avery *v.* Maxwell, 4 N. H. 36; Tewksbury *v.* Bucklin, 7 id. 518; Wells *v.* Howell, 19 Johns. 385; Ricketts *v.* E. and W. India Docks and Junction R. Co. 12 Eng. L. and Eq. 520.

[2] Perkins *v.* Eastern R. R. Co. 29 Maine. 307; Woolson *v.* Northern R. R.

In the absence of a legal obligation to fence its track, the exemption of the company from liability for injuries to cattle straying upon it, except where the injury has been wantonly perpetrated, has been maintained on well-defined principles of law. It is by law invested with the right to the exclusive occupation of the land within the limits of its location, except in certain cases where it crosses public or private ways. It is clothed with the power to operate a railroad as a common carrier within those limits, according to the usages of railroads. Speed is the distinguishing characteristic of this method of transportation, which it is desirable and lawful to maintain in the highest degree consistent with the public safety. Upon what principle can it be required to abate that speed in favor of a party who wrongfully causes or allows his cattle to pass upon the track? If a trespasser places his cotton or other combustible property within the limits of the railroad line, he cannot demand that the company shall cease the emission of sparks from the engine, or stop the train to extinguish the fire which has been com-

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Co. 19 N. H. 267; Cornwall *v.* Sullivan R. R., 8 Foster, 170; Hurd *v.* Rutland and Burlington R. R. Co. 25 Vt. 123; Jackson *v.* Same, id. 150; Morse *v.* Same, 27 id. 49; Morss *v.* Boston and Maine R. R. 2 Cush. 536; Tower *v.* Prov. and Worcester R. R. Co. 2 Rhode Is. 404; Terry *v.* N. Y. Central R. R. Co. 22 Barb. 574; Corwin *v.* N. Y. and Erie R. R. Co. 3 Kernan, 46; Vandegrift *v.* Rediker, 2 Zabris. 185; N. Y. and Erie R. R. Co. *v.* Skinner, 19 Penn. State, 298; North Eastern R. R. Co. *v.* Sineath, 8 Rich. 194; Cranston *v.* C. H. and D. R. R. Co. 1 Hardy (Superior Ct. of Cincinnati), 198; Williams *v.* New Albany and Salem R. R. Co. 5 Ind. 111; Alton and Sangamon R. R. Co. *v.* Baugh, 14 Ill. 211; Williams *v.* Michigan Central R. R. Co. 2 Gibbs, 259; Henry *v.* Dubuque and Pacific R. R. Co. 2 Clarke (Iowa), 303.

municated to the cotton from the sparks. What greater right can a trespasser assert for the protection of his cattle than for that of any other property? He has brought the injury upon himself, not only by his negligence, but by a positive wrongful act of trespass; and, according to general principles of the common law, he is without remedy under such circumstances. The obligation which the common law imposes on a party to exercise ordinary care in the use of his property to prevent injury to that of another, defines the relations of parties both of whom are exercising a right, and has no just application to cases where one is a trespasser on the property of the other. The company has, however, no right to inflict wanton injury on cattle straying upon its track. A wrongdoer is not an outlaw, and although he may be without remedy for the consequences of his negligence which he has brought upon himself by his own act, he is protected against malicious mischief. The principle that a party becomes himself a wrongdoer when he inflicts wanton injury on a trespasser upon his property, is well settled.[1]

If it be admitted that the company on which no

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[1] Vere *v.* Lord Cawdor, 11 East, 567; Deane *v.* Clayton, 7 Taunt. 489; Mayor of Colchester *v.* Brooke, 7 Q. B. 376; Davies *v.* Mann, 10 M. & W. 546; Brownell *v.* Flagler, 5 Hill, 282; Vandegrift *v.* Rediker, 2 Zabris. 185; Trow *v.* Vt. Central R. R. Co. 24 Vt. 487; N. Y. and Erie R. R. Co. *v.* Skinner, 19 Penn. State, 298; Wright *v.* Brown, 4 Ind. 95; Williams *v.* New Albany and Salem R. R. Co. 5 id. 111; Lafayette and Indianapolis R. R. Co. *v.* Shriner, 6 id. 141; Tower *v.* Prov. and Worcester R. R. Co. 2 Rhode Is. 410; Chicago and Mississippi R. R. Co. *v.* Patchin, 16 Ill. 198; Great Western R. R. Co. *v.* Thompson, 17 id. 131. Central Military Tract R. R. Co. *v.* Rockafellow, 17 id. 541; Ill. Central R. R. Co. *v.* Reedy, 17 id. 580.

obligation to fence its track rests, is responsible for damage to cattle coming thereon from the adjoining land, provided it exercises ordinary care to avoid injury, it deserves consideration whether the running of its trains on its own track at the usual speed, without halting before obstructions, other than human beings, unlawfully placed upon it, does not fulfill the requirement of ordinary care as against such wrongdoer.

In New York, it is decided that the owner of domestic animals straying upon the track of a railroad company, and injured in a collision with its engines while operated in the ordinary manner, has no remedy for the loss against the company, although it might have been avoided by the exercise of ordinary care on its part; and not even gross negligence, in the absence of an intentional injury, will subject it to liability.[1]

[1] Clark *v.* Syracuse and Utica R. R. Co. 11 Barb. 112; Talmadge *v.* Rensselaer and Saratoga R. R. Co. 13 id. 493; Marsh *v.* N. Y. and Erie R. R. Co. 14 id. 365; Terry *v.* N. Y. Central R. R. Co. 22 id. 574; Tonawanda R. R. Co. *v.* Munger, 5 Denio, 255, 266. Beardsley, C. J.:—"Negligence is a violation of the obligation which enjoins care and caution in what we do. But this duty is relative, and where it has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term. A man is under no obligation to be cautious and circumspect towards a wrongdoer. A horse straying in a field, falls into a pit left open and unguarded; the owner of the animal cannot complain, for as to all trespassers the owner of the field had a right to leave the pit as he pleased, and they cannot impute negligence to him. But injuries inflicted by design are not thus to be excused. A wrongdoer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief. Negligence, however, even when gross, is but an omission of duty. It is not designed and intentional mischief, although it may be cogent evidence of such an act. (Story on Bail. §§ 19, 22; Gardner *v.* Heartt, 3 Denio, 236.) Of the latter, a trespasser may complain, although he cannot be allowed to do so of the former.

"In the present case, the charge of the court was in several material respects erroneous.

So, in New Jersey, nothing but willfulness, or

"As to passengers on this railroad, the defendants were certainly bound by the highest obligations of morality and law to run their engines and trains with the most scrupulous care and vigilance. It was also their duty to use every precaution to guard against communicating fire to buildings or other property adjacent to the line of their road, or otherwise doing injury thereto. But they owed no such duty to this plaintiff in regard to his oxen, when trespassing on their land. The suggestions of the court below in this part of the case would be very appropriate to a case between a passenger who had been injured through the negligence of an engineer, or the conductor of a train, but had no proper bearing on the case then to be decided by the jury. The court seemed to have held, that if the plaintiff's oxen escaped from his inclosure 'after the exercise of ordinary care and prudence in taking care of' them, he was not responsible for their trespass on the defendants' land. This view of the law, we think, cannot be sustained. The plaintiff was bound at his peril to keep his cattle at home, or at all events to keep them out of the defendants' close, and no degree of 'care and prudence,' if the cattle found their way on to the defendants' land, would excuse the trespass. It would be a new feature of the law of trespass, if the owner of cattle could escape responsibility for their trespasses by showing he had used 'ordinary' or even extraordinary 'care and prudence' to keep them from doing mischief." The judgment of the Supreme Court in this case was affirmed by the Court of Appeals, 4 Comst. 349, 357. Hurlbut, J.: "The main question in this case is presented by the plaintiff's offer to prove that the defendants were guilty of negligence, and that by the exercise of ordinary care on their part, the accident might have been avoided. Taking this as proved, the case stands thus: The defendants in the rightful use of their railway, while propelling an engine with cars attached and running at a low rate of speed, struck and killed the plaintiff's oxen, which had strayed on the track of the railway and were trespassing at the time. This result might have been avoided by the exercise of ordinary care on the part of the defendants, whose negligence contributed to produce the injury complained of; and the question is, whether under such circumstances the plaintiff can maintain his action. It is obvious that the plaintiff would have received no injury if the oxen had not been on the track of the railway; and having been there without right, the law imputes a fault to the plaintiff. On the other hand, although the plaintiff was in fault the injury would not have happened but for negligence and the want of ordinary care on the part of the defendants; and assuming this to have been a fault on their part, the injury then would appear to have resulted from the common fault of both parties. But if we were permitted to inquire as to the degree of blame which attached to each, we should be obliged to pronounce that the principal fault must be attributed to the plaintiff, and without the previous existence

such negligence as amounts to willfulness, will make the company liable for injury to cattle while wrong-

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of which, the defendants could not have been required, in the proper use of their railway, to abate their speed, or take any precaution whatever for the protection of the plaintiff's property. The case is stronger for the defendants than if it had arisen on a highway between persons in the enjoyment of the common right of travel, and where the injury resulted from the negligence of both parties. The plaintiff in such a case would start by showing himself in the exercise of a lawful right; and yet if it appeared that his own negligence or unskillfulness in any way conduced to bring about the injury complained of, he could not recover, whatever might have been the negligence of the defendant. The law will not in such a case attempt nicely to adjust the degree of blame to be assigned to the respective parties; and will not recognize any act as an injury to either, which they mutually contributed to produce. And so far has this doctrine been carried, that a person injured by an obstruction placed unlawfully in a highway has been denied a right of action for damages where it appeared that he had failed to use ordinary care, by which the injury might have been avoided. The plaintiff, before he can stand in court as an accuser, must himself be free from fault. He cannot support his action by basing it partly on his own wrong, and partly on the wrong of his adversary. He is answered when it appears that he has been wanting in duty, or has contributed to his own injury. He has then volunteered to suffer, and the law sees no wrong in the case. So that, whenever it appears that the plaintiff's negligence or wrongful act had a material effect in producing the injury, or substantially contributed toward it, he is not entitle to recover. To this rule there seems to be no exception, which can be made applicable to the case under consideration.

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"It is not deemed necessary after the very able and satisfactory review of the authorities bearing on this subject, which was made in this case by Ch. J. Beardsley, as reported in 5 Denio, 255, to dwell at length upon the cases to which we have been referred upon the present argument. Suffice it to say, that applying the principle of these cases to the facts before us, we are led to the conclusion that as the defendants were in the lawful exercise and enjoyment of their rights, and would have done no injury to the plaintiff, if his oxen had not strayed on the track of the railway; and as they were there without right, in respect to them the law did not enjoin it as a duty on the defendants to take care not to injure them. The want therefore of such care was not in judgment of law a fault to be attributed to the defendants; but if it could be so considered, the plaintiff having also been in fault, by which he contributed to produce the injury, is not entitled to recover."

fully upon its track.[1] Thus, also, in Rhode Island, where the company was bound, under its charter, to fence its track only when required by the adjoining owners, and had been released from that obligation by them, the company was held not liable for any but willful injuries to cattle straying upon the railroad track; because, owing no duty to the owner, it was not chargeable with negligence, and the injury had arisen from the wrongful act of the owner. The instruction to the jury that "if the cattle were killed by the neglect of the defendants to use ordinary care and skill in the common and ordinary use of the lands for railroad purposes, such care and skill as a man of common prudence would use, then the defendants would be liable for the damages sustained by the owners of the cattle so killed," was therefore held to be erroneous.[2] But in Vermont and some other States, the doctrine prevails that the company is liable for injuries to cattle upon its track, if they could have been avoided by its servants in the exercise of ordinary care. It was considered that the remote negligence of the plaintiff, in allowing his cattle to run at large, did not release the company from its duty to use ordinary care to prevent injury at the time it occurred.[3]

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[1] Vandegrift *v.* Rediker, 2 Zabris. 185. The same view seems to be taken in New Hampshire and Michigan. White *v.* Concord R. R. 10 Foster, 203; Williams *v.* Michigan Central R. R. Co. 2 Gibbs, 265, 266.

[2] Tower *v.* Providence and Worcester R. R. Co. 2 Rhode Is. 404.

[3] Trow *v.* Vt. Central R. R. Co. 24 Vt. 488; Jackson *v.* Rut. and Bur. R. R. Co. 25 id. 150; Morse *v.* Same, 27 id. 49; Norris *v.* Androscoggin R. R. Co. 39 Maine, 276. See Danner *v.* S. C. R. R. Co. 4 Rich. 329; North Eastern

The rule of the common law, as heretofore stated, that the owner of domestic animals is bound to keep them on his own land, and is liable in trespass when they pass upon his neighbor's land, is in several of the States rejected, so far as uninclosed lands are concerned, as inapplicable to their circumstances. The owner of such animals in these States is not regarded as a trespasser when his cattle pass upon the uninclosed lands of another; it being the prevailing custom to allow them to range at large on such lands.[1] This modification of the common-law rule is consistent with subjecting the company to liability for injuries to cattle straying upon its track only when those injuries are willful. The custom to allow cattle to graze at large on uninclosed lands, where no substantial damage is likely to be done, without making the owner liable for trespass, does not necessarily require for him the same privilege where their straying, as in the vicinity of railroads, is likely to occasion great injury to others; and even if his exemption from liability as a trespasser

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R. R. Co. *v.* Sineath, 8 id. 194; Louisville and Frankfort R. R. Co. *v.* Milton, 14 B. Monroe, 75; Perkins *v.* Eastern R. R. Co. 29 Maine, 307; Garris *v.* Ports. and Roanoke R. R. Co. 2 Iredell, 324; Ricketts *v.* E. and W. India Docks, &c., R. Co. 12 Eng. L. and Eq. 520. In Indiana, the company, it is said, would be liable in such a case for injury resulting "from gross negligence, or willful misconduct." Lafayette and Indianapolis R. R. Co. *v.* Shriner, 6 Ind. 145. See Williams *v.* New Albany and Salem R. R. Co. 5 id. 113.

[1] Studwell *v.* Ritch, 14 Coun. 292; Seeley *v.* Peters, 5 Gilman, 130; North Eastern R. R. Co. *v.* Sineath, 8 Rich. 194; Kerwhacker *v.* C. C. and C. R. R. Co. 3 Ohio State, 172; C. H. and D. R. R. Co. *v.* Waterson, 4 id. 424; C. C. and C. R. R. Co. *v.* Elliott, id. 474; Cranston *v.* C. H. and D. R. R. Co. 1 Handy (Supreme Court of Cincinnati), 196; N. Y. and Erie R. R. Co. *v.* Skinner, 19 Penn. State, 298.

is admitted under such circumstances, it does not involve any incidental rights of protection, except against wanton injury, or require the company as the proprietor of the land, to treat him as a person exercising a right, and use ordinary care to prevent injury to him.[1]

It has, therefore, been decided in Pennsylvania, where the owner is in general not liable for the entry of his cattle on wood-land or waste fields, that the common-law rule applies to uninclosed lands in the vicinity of railroads; and if the owner allows his cattle to run at large in the vicinity of them, he does so at the risk of losing them, and paying for their transgressions.[2] In Illinois, where the owner of cattle grazing upon uninclosed lands of other persons is not a trespasser, it was held, upon mature consideration, that he becomes such when they wander upon the track of an uninclosed railroad; and the company is not liable for their loss while on the track, unless its employees were guilty of willful or wanton injury, or of gross negligence, evincing reck-

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[1] In Cranston *v.* C. H. and D. R. R. Co. 1 Handy (Superior Ct. of Cincinnati), 197, Gholson, J., after noticing the exception to the common law which is adopted in Ohio, said,

"There is, however, a great difference between an action by the owner of land against the owner of cattle for the injury done by their breaking into or straying upon the land, and an action by the owner of cattle against the owner of land for an injury which the cattle may sustain while so upon the land. And in respect to the latter case, I see no reason to doubt that the rule of the common law prevails. That it does so prevail, and is as applicable to a railroad company as any other owner of land, appears to be settled by numerous authorities."

[2] N. Y. and Erie R. R. Co. *v.* Skinner, 19 Penn. State, 298; see Knight *v.* Ahert, 6 id. 472.

less or willful misconduct.[1] In Ohio, on the other hand, where the common-law rule, that every man must keep his cattle on his own close, is rejected as to uninclosed lands, it is held that the company is not obliged to fence its track, and the owner of domestic animals running at large on uninclosed lands is not liable in trespass. The owner is, however, chargeable with a kind of negligence in allowing his cattle to stray in the vicinity of an uninclosed railroad; and the company is chargeable with the same kind of negligence in not inclosing its track by fences and cattle-guards, where cattle are accustomed to run at large. The negligence in each case being remote, the company is bound to use reasonable care to avoid unnecessary injury to cattle straying upon its track, and is liable only for want of such reasonable care as is consistent with the safety of the persons and property on the train.[2] But the owner of

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[1] Chicago and Mississippi R. R. Co. *v.* Patchin, 16 Ill. 198; Great Western R. R. Co. *v.* Thompson, 17 id. 131; Central Military Tract R. R. Co. *v.* Rockafellow, id. 541; Ill. Central R. R. Co. *v.* Reedy, id. 580. Railroad companies are now required by statute in Illinois to maintain fences on the sides of their track, except in certain specified cases. Laws of Illinois, (1855), p. 173.

[2] Kerwhacker *v.* C. C. and C. R. R. Co. 3 Ohio State, 172; C. H. and D. R. R. Co. *v.* Waterson, 24 id. 424, 433. Ranney, J.: "Railroad companies have been incorporated with the capacity to acquire lands, and placed under no obligation to fence, as a condition to using them for the purpose of running trains. They hold them as other proprietors do, and if they see fit to leave them unfenced, they can no more treat the intrusion of domestic animals as a trespass, than other proprietors can. It has, therefore, always seemed to me that suffering cattle to run at large, and running trains upon an unfenced railroad, were each equally lawful—binding the owners of each to submit to the inconveniences and increased hazards of using their property in that manner—but subjecting neither to the imputation of unlawful

cattle coming upon the track, who had by a contract with the company assumed the obligation to fence his land against it, was held a trespasser, and could not recover of the company for an injury to them while upon it, "without proof of intentional injury, or of that gross carelessness, involving a recklessness of consequences, which it is somewhat difficult to distinguish from intentional wrong.[1]"

Where there is no obligation on the company to fence its track, it certainly is not responsible for

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conduct, so as to give or bar a right of action, when either right has been fairly and reasonably exercised. And that the legal consequence was, that each, as against the other, was entitled to require the exercise of reasonable and ordinary care to prevent injury." C. C. and C. R. R. Co. *v.* Elliott, id. 474, Thurman, C. J.: "The common-law doctrine that requires the owner of domestic animals, not unruly or dangerous, to keep them upon his own premises, and makes him a trespasser if he suffer them to run at large, and they go upon the uninclosed lands of another, is not the law of Ohio; being inconsistent with our statute law, and contrary to the common usage that has always prevailed in this State. The remote negligence of the plaintiff will not prevent his recovering for an injury to his property, *immediately* caused by the negligence of the defendant. The negligence of the plaintiff that defeats a recovery, must be a *proximate* cause of the injury. Suffering domestic animals to run at large, by means whereof they stray upon an uninclosed railway track, where they are killed by a train, is not in general a *proximate* cause of the loss; and hence, although there may have been some negligence in the owner's permitting the animals to go at large, such negligence being only a *remote* cause of the loss, it will not prevent his recovering from the railroad company the value of the animals, if the *immediate* cause of their death was negligence of the company's servants in conducting the train. The bare fact that a railway is uninclosed, there being no statute requiring it to be fenced, does not, in general, render the railroad company liable to pay for animals straying upon the track and killed by a train—such want of fencing being, in general, only a *remote* cause of the loss. The paramount duty of a conductor of a train, is to watch over the safety of the persons and property in his charge; subject to which, it is his duty to use reasonable care to avoid unnecessary injury to animals straying upon the road." See Cranston *v.* C. H. and D. R. R. Co., 1 Handy, 193; Danner *v.* S. C. R. R. Co., 4 Rich. 329; North Eastern R. R. Co. *v.* Sineath, 8 id. 194.

[1] C. H. and D. R. R. Co. *v.* Waterson, 4 Ohio State, 424.

injuries to cattle upon it, when the safety of persons and property on the train requires that it should not be arrested to preserve cattle from destruction. This may happen where it is doubtful whether the engine can be stopped with safety before reaching them, and there appears to be less danger of accident by running over them at full speed than at a less rapid rate. The company is under superior obligations to persons and property on its train. Even if it be considered responsible, in case of negligence, for injuries to cattle straying on the track, it is only bound to use such care as is consistent with this superior obligation; and in judging of the danger in a given case and the best means of avoiding it, its acts are entitled to a favorable construction.[1]

Injuries to Cattle on the Highway.—Town regulations, under authority of statute, allowing cattle to graze in the public highways, will not avail the owner of cattle straying upon the track from a highway crossing it, so as to entitle him to damages for an injury to them by a train of cars, at least without proof of negligence.[2]

Where the cattle are lawfully in the highway, the company whose track crosses it, is bound to exercise ordinary care to prevent a collision, and is responsi-

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[1] Kerwhacker *v.* C. C. and C. R. R. Co., 3 Ohio State, 199; C. C. and C. R. R. Co. *v.* Elliott, 4 id. 474; Cranston *v.* C. H. and D. R. R. Co., 1 Handy (Superior Ct. Cincinnati), 193; Chicago and Mississippi R. R. Co. *v.* Patchin, 16 Ill. 198.

[2] Williams *v.* Mich. Central R. R. Co., 2 Gibbs (Mich.) 259; Tonawanda R. R. Co. *v.* Munger, 5 Denio, 255; 4 Comst. 349.

ble for damages to them arising from the want of it. In such a case both parties are exercising a right, and each is bound to use ordinary care to prevent injury to the other. It has been maintained that if the least negligence of the plaintiff concurred with that of the company, he cannot recover. But where both parties are chargeable with negligence, the better doctrine is that the plaintiff is entitled to recover unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence. The same degree of care is required of railroad companies in managing their trains as of other parties managing vehicles on the highway, although a different class of precautions may be required.[1]

The company is also bound to use ordinary care to prevent injury to cattle which are rightfully on the track at farm-crossings. Under the statute of New Hampshire, which provides that the corporation shall make and maintain all necessary cattle-guards, cattle-passes, and farm-crossings, for the convenience and safety of the land-owners along the side of the road, it was held that where a railroad divides the pasture of a land-owner, and a crossing is made by the corporation according to the act, the land-owner may let his cattle run in the pasture without a herdsman, and that the corporation will be liable for their destruction while crossing the

[1] Beers *v.* Housatonic R. R. Co., 19 Conn. 566; Tower *v* Prov. and Worcester R. R. Co., 2 Rhode Island, 412. The principles discussed in ch. xii. *ante*, apply in determining the liability of the company for cattle rightfully on the track.

track from one pasture to the other, unless it appear that the injury was caused by accident, or by the fault of the owner.[1] If the cattle are on the highway for a lawful purpose, the company is liable for an injury to them caused by its neglect of its statute duty.[2] The liability of the company for injury to cattle unlawfully on the highway, and straying thence upon the track, where the injury was received, is determined by the same principles which define its liability where the cattle are unlawfully on the adjoining close, and stray from thence upon the track; and these have already been considered.

Liability of the Company under Statutes requiring it to maintain Fences.—The liability of the company for injuries to cattle when the duty is imposed on it to maintain fences on the sides of its track, may next be determined. The general principle may thus be stated: it is liable for injuries to cattle which being lawfully on the adjoining land pass from thence on to the track, and are injured through the failure of the company to perform the duty, whether imposed by a general law or a provision in its charter, although no particular negligence at the time of the injury can be attributed to it. The duty of building the fence was imposed on the company for the benefit of the

[1] White *v.* Concord Railroad, 10 Foster, 188; Housatonic R. R. Co., *v.* Waterbury, 23 Conn. 101.

[2] Midland R. Co. *v.* Daykin, 17 C. B. 126; 84 E. C. L.; 33 Eng. L. & Eq. 193.

adjoining owner, and it is liable for the special injury to him resulting from its breach.[1] The company is liable for the injury in consequence of its default in not maintaining the required fence, although it was imperfectly built by the owner of the cattle injured, who was employed by the company to build it.[2]

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[1] Broome's Com. on Common Law, pp. 668–675; Sharrod *v.* N. W. R. R. Co., 4 Exch. 584; Suydam *v.* Moore, 8 Barb. 358; Waldron *v.* Rensselaer and Saratoga R. R. Co., id. 390; Nashville and Chattanooga R. R. Co. *v.* Peacock, 25 Ala. 229; Williams *v.* New Albany and Salem R. R. Co., 5 Ind. 111; Norris *v.* Androscoggin R. R. Co., 39 Maine, 273, 277. Tenney, J.: "And where the charter of the company and the general statute provides for the safety of property, not in the transportation thereof upon the railroad, but being in an exposed situation in its vicinity, by certain requirements, and by the neglect of these requirements, the property is destroyed or injured by the engine upon the road, the liability cannot be denied. If the charter imposes upon the company the obligation, at certain crossings, to place men to guard the passages across the track, and to prevent persons or domestic animals from passing when the trains are approaching, and this requirement should be neglected to the injury of a party, from the engine, no doubt could be entertained, that compensation for such injury could be legally claimed. And where it is required, for a like object, that the railroad passing by improved land shall be inclosed by a good and sufficient fence, and this shall be neglected by the company, and horses or other animals in consequence of this omission stray upon the track, and are killed or injured by the engine or its appendages, the company is liable in damages. In such case, it is a neglect to construct the road in the manner prescribed, for the very purpose of giving to the owners of this kind of property the security designed, and the omission is the proximate cause of the damages sustained. Sharrod *v.* London and North Western R. R. Co., 6 Railway and Canal Cases, 245. The owner of the contiguous improved land is entitled to remuneration for his losses so occasioned, equally with the passenger in the cars, who should be injured by reason of the omission of the company to construct the road in the mode required. As such defect was the cause of the injury, the great moderation with which the engine was driven, the extreme care of the engineer and the agents in attendance, would be no answer to the claim for damages received." Horn *v.* Atlantic and St. Lawrence R. R., 33 N. H. (not yet issued); S. C. 19 Law Rep. (April, 1857), p. 694; Hurd *v.* Rut. and Bur. R. R. Co., 25 Vt. 124; Quimby *v.* Vt. Central R. R. Co., 23 id. 387.

[2] Norris *v.* Androscoggin R. R. Co., 39 Maine, 273.

Wrongful Act of Plaintiff.—But, although the company is liable for injuries to cattle resulting from its neglect of duty to fence its track, notwithstanding it put forth every effort to prevent the injury at the time, still it does not follow that, having neglected this duty, it is liable for injuries of which the owner was the immediate and active cause. Applying the principles of the common law to the construction of the statute, it would not be responsible if the owner's act at the time of the injury substantially contributed to it.[1] Where the plaintiff's cow was injured in consequence of the bars on his reserved road being left down, whereby she came upon the track, it not appearing by whom they were left down, it could not be attributed to the negligence of the company. It was therefore held, that the exercise of ordinary care on the part of the plaintiff and the omission of some duty or the commission of some wrongful act on the part of the defendant, must concur to entitle the plaintiff to recover.[2] It has been considered, that, although the company has neglected to perform its statute duty, yet if the injury did not arise from that cause, some other omission or neglect on its part, which

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[1] Brooks *v.* N. Y. and Erie R. R. Co., 13 Barb. 594; Marsh *v.* N. Y. and Erie R. R. Co., 14 id. 364; Underhill *v.* N. Y. and Harlem R. R. Co., 21 id. 489; Terry *v.* N. Y. Central R. R. Co., 22 id. 574; Halloran *v.* N. Y. and Harlem R. R. Co., 2 E. D. Smith, 257; Corwin *v.* N. Y. and Erie R. R. Co., 3 Kernan, 48–51; Macon and W. R. R. Co. *v.* Davis, 13 Geo. 68; but see Lafayette and Indianapolis R. R. Co. *v.* Shriner, 6 Ind. 141.

[2] Waldron *v.* Portland, Saco, and Portsmouth R. R. Co., 35 Maine, 422.

was the cause of the injury, must be shown to make it liable.[1]

Liability for Injuries to Cattle wrongfully on the adjoining Land.—The principle of the common law, which requires each proprietor of land to keep his cattle within his own close, has already been stated. Notwithstanding there was no division fence between him and his neighbor, he was liable in trespass for an entry of his cattle upon the adjoining owner's land without permission, unless they escaped from his own close through the want of a fence which it was the duty of the owner of the land thus entered upon by agreement, prescription, or otherwise, to maintain. And when a proprietor of land was obliged to fence his close, his duty was to fence only against cattle rightfully on the adjoining close. The owner of the cattle was, however, allowed to avail himself of the insufficiency of the fence of the close entered, when he had an interest in the adjoining close authorizing him to put his cattle there, as a right of way, an highway, a license, a lease, or right of common. Accordingly, where A and B owned adjoining closes between which A was bound to build the fence, if C's cattle first entered upon B's land wrongfully and thence strayed upon A's land through the want of the fence which A in neglect of duty had not supported, C is liable to A for the trespass.[2] The same rule was applied

[1] Waldron *v.* Rensselaer and Saratoga R. R. Co., 8 Barb. 394; Talmadge *v.* Same, 13 id. 496.

[2] Rust *v.* Low, 6 Mass. 90; Little *v.* Lathrop, 5 Greenl, 356; Lord *v.* Wormwood, 29 Maine, 282.

to cattle straying upon the highway, the right of soil under which being in another, and the cattle being wrongfully there except when they are being driven along.[1]

The application of this rule of the common law, to the interpretation of a statute imposing on the company the duty to make and maintain fences on the sides of its track, depends on the question, whether its purpose and intent as gathered from its terms appear to be the same as those of the statute which defines the obligations of adjoining owners in that respect. If it is designed merely for an adjustment of the duties and rights of the company and of adjoining owners, in respect to the division fences between them, simply imposing, on grounds of private justice between the parties, the entire burden on one which under other laws of a like purpose is shared equally by both, then the company under the application of the rule of the common law already stated is not liable, at least in the absence of negligence, for injuries to cattle unlawfully on the adjoining close, notwithstanding it has not complied with the statute requirement; the default being one of which the adjoining owner only, or some person enjoying his license has a right to complain. This is the construction placed in England on the sixty-eighth section of the Railways' Clauses Consolidation Act, 8 and 9 Victoria, c. 20, which provides that the company shall make and maintain, for the accom-

[1] Dovaston *v.* Payne, 2 H. Bl. 527; Staekpole *v.* Healy, 16 Mass. 33; Lord *v.* Wormwood, 29 Maine, 282; Avery *v.* Maxwell, 4 N. H. 36.

modation of the owners and occupiers of lands adjoining the railway, sufficient fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners and occupiers thereof from straying thereout by reason of the railway. It was held, that the obligation imposed by this section was the same as if the company had been bound by prescription at common law to repair the fences, and was for the protection only of the owners and occupiers of the adjoining close.[1] The statutes of several States in this country have been construed in the same manner.[2]

So in Vermont, where the charter required the company "to build and maintain sufficient fence upon each side of their railroad through the whole route thereof," and the plaintiff's horses which were kept in his pasture at some distance from the railroad, escaped therefrom and came upon the track by crossing the highway or lands of other persons remaining unfenced, and were run over by the train,

[1] Ricketts *v.* East and West India Docks, &c., Junction R. Co., 12 Eng. L. & Eq. 520; S. C., 12 C. B. 160; Manchester, &c. R. Co. *v.* Wallis, 14 C. B. 213; 78 E. C. L.; 25 Eng. L. & Eq. 373.

[2] Perkins *v.* Eastern R. R. Co., 29 Maine, 307; Towns *v.* Cheshire R. R. 1 Foster, 363; Woolson *v.* Northern R. R., 19 N. H. 267; Lafayette and Indianapolis R. R. Co. *v.* Shriner, 6 Ind. 145; Brooks *v.* N. Y. and Erie R. R. Co., 13 Barb. 594; Marsh *v.* N. Y. and Erie R. R. Co., 14 id. 364; Vandegrift *v.* Rediker, 2 Zabris. 185. The question has been raised, but not decided, whether, as against the company, the cattle which have strayed upon the adjoining land through a defect of fences which the adjoining owner was bound to maintain, were rightfully in the adjoining land; and the judge delivering the opinion, regarded the owner of the cattle as not in default. Underhill *v.* N. Y. and Harlem R. R. Co., 21 Barb. 489; but see Rust *v.* Low, 6 Mass. 90.

the obligation of the company to fence was regarded as a duty to the adjoining owners only, who might consent to the omission of its performance, or assume it themselves. After such a waiver the adjoining owner, and by a stronger reason a third party, could not recover for damages in consequence of the omission.[1] So in New Hampshire, where railroad companies are required to fence their tracks by a general statute, except where they have settled with and paid the owner of the adjoining land for building and maintaining the fence, it appeared that the company owned a strip of land lying between its road and the plaintiff's land, between which pieces there was no fence, and no proceedings had been taken by either party to have one erected; and the plaintiff's sheep, which he had turned on his own land, escaped on to the company's strip, and thence on to its track, where they were killed by the engine;—it was held that the statute was designed, as other statutes requiring owners to fence, solely for the benefit of persons whose cattle were rightfully on the adjoining land; and that as the corporation could by a contract with the adjoining owner relieve itself of the obligation to fence, it can when the land-owner itself, take such course as it pleases, and is not liable for damage to cattle trespassing on its lands.[2] Adopting this construction of the statute, the company is not liable for injuries to cattle upon its

[1] Jackson *v.* Rutland and Burlington R. R. Co. 25 Vt. 150; Morse *v.* Rutland and Burlington R. R. Co. 27 id. 49.

[2] Cornwall *v.* Sullivan R. R. Co. 8 Foster, 181.

track, at least in the absence of negligence, which have strayed upon the highway, and come upon the track through the want of the fence or cattle-guards which the company is by law bound to maintain. The cattle were unlawfully on the highway, unless they were being driven along, or while being driven along, escaped from the persons having charge of them, who made fresh pursuit. The plaintiff cannot recover for an injury brought about by his negligent and unlawful act.[1]

Although the company, when bound to fence, may not be bound to fence against cattle unlawfully on the adjoining land, it is liable for wanton injury to them, and in some States is liable for injury to them which might have been avoided by it in the exercise of ordinary care at the time of the injury.[2]

A construction of the statute may be adopted which excludes the operation of the rule of the common law requiring a party, on whom the obligation of fencing rests, to fence only against cattle rightfully on the adjoining close. If the statute is intended as a police law for the safety of

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[1] Woolson *v.* Northern R. R. 19 N. H. 267; Towns *v.* Cheshire R. R. Co. 1 Foster, 363; Trow *v.* Vt. Central R. R. Co. 24 Vt. 494; Jackson *v.* Rutland and Burlington R. R. Co. 25 id. 150; Tonawanda R. R. Co. *v.* Munger, 5 Denio, 255; 4 Comst. 349; Waldron *v.* Rensselaer and Saratoga R. R. Co. 8 Barb. 390; Clark *v.* Syracuse and Utica R. R. Co. 11 Barb. 112; Marsh *v.* N. Y. and Erie R. R. Co. 14 Barb. 364; Halloran *v.* N. Y. and Harlem R. R. Co. 2 E. D. Smith, 257; Williams *v.* Mich. Central R. R. Co. 2 Gibbs (Mich.), 259; Manchester, Sheffield, and Lincolnshire R. Co. *v.* Wallis, 14 C. B. 213; 78 E. C. L.; 25 Eng. L. and Eq. 373.

[2] Jackson *v.* Rutland and Burlington R. R. Co. 25 Vt. 150; Trow *v.* Vt. Central R. R. Co. 24 id. 487; Williams *v.* New Albany and Salem R. R. Co. 5 Ind. 114; Lafayette and Indianapolis R. R. Co. *v.* Shriner, 6 Ind. 145.

the public and the protection of property in domestic animals generally, and designed to impose a general and not merely a limited obligation, the company will be liable for damage to cattle trespassing on the adjoining land where it has neglected its public duty to fence. The great and peculiar danger attending the operation of railroads, and the loss of life and limb likely to result from a collision of the locomotive or cars in their rapid movement, with cattle on the track, invite this liberal construction of the statute. Thus, the company being required in general terms, where a railroad crossed a turnpike or other road, to keep gates constantly closed except during the time when horses, cattle, carts, or carriages passing along such turnpike or other road, shall have to cross the railway, the duty of keeping the gates closed was held to be imposed under all circumstances except those specially excepted; and and as against the railroad company, horses straying on the adjoining land were not unlawfully there, and the company neglecting the statute duty was liable for damage to them in consequence thereof.[1] The same construction has been put upon the statute of New York in a recent decision of the Court of Appeals, overruling previous decisions in the Supreme Court.[2] It was held to have imposed the

[1] Fawcett *v.* York and North Midland R. R. Co. 2 Eng. L. and Eq. 289.

[2] The statute is as follows: "Every corporation formed under this act, shall erect and maintain fences on the sides of their road, of the height and strength of a division fence required by law, with openings or gates or bars therein, and farm-crossings of the road for the use of the proprietors of lands adjoining such railroad; and also construct and maintain cattle-guards at all road-crossings, suitable and sufficient to prevent cattle and animals from

general duty of erecting and maintaining fences on the sides of the road for the public benefit and security, as also for the benefit of the owners of cattle generally, without any limitation to cattle lawfully on the adjoining premises. Having failed to perform the duty imposed by the legislature, it cannot, it was held, raise the question whether the cattle were lawfully or not on the adjoining close, but it is liable in either case for the damages done to them by the agents or engines, as the statute declares. A party whose cattle had strayed on the adjoining land, and come thence upon the track through want of the fence, was allowed to recover, although the owner of such land had covenanted to erect and maintain the fences—the covenant affecting the company's liability to the covenantor only, and not to third parties; but if the owner of the cattle had willfully driven his cattle on the track, or into its neighborhood, or had been guilty of any other positive act increasing the danger, it was considered that he would be without remedy, on the maxim *volenti non fit injuria*.[1] The same construction has been put upon a statute in Alabama, imposing on railroad companies liability for cattle killed by them; but upon the special ground that the common law, so far as it

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getting on to the railroad. Until such fences and cattle-guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines, to cattle, horses, or other animals thereon; and after such fences and guards shall be duly made and maintained, the corporation shall not be liable for any such damages unless negligently or willfully done." Laws of 1850, ch. 140, § 44.

[1] Corwin *v.* N Y and Erie R. R. Co. 3 Kernan, 42.

makes the owner of cattle who permits them to stray upon the uninclosed lands of other persons, a trespasser, is not adopted in that State.[1]

Waiver of the Benefit of the Statute requiring Fences.—The provision of a statute requiring the company to maintain fences on the sides of its track, which is to be interpreted as designed for the protection of the adjoining owner, may be waived by him, or the duty assumed by himself. The effect of such waiver is to exonerate the company from liability for injuries to his cattle in consequence of the fence not being constructed according to the requirement of the statute.[2]

In New York under the act of 1850,[3] requiring companies to erect and maintain at farm crossings, bars or gates to prevent cattle from getting upon the railroad, it was decided that where the owner had taken upon himself the obligation of performing the statute duty, and been paid by the company for the same, he had no right of action

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[1] Nashville and Chattanooga R. R. Co. *v.* Peacock, 25 Ala. 229.

[2] Jackson *v.* Rut. and Burl. R. R. Co. 25 Vt. 150; Cornwall *v.* Sullivan R. R. 8 Foster, 161. Under the N. H. act requiring the railroad company to make and maintain farm-crossings, &c., with the proviso that it shall not apply where the corporation shall settle with the landowner in relation thereto, a land-owner's deed to the company containing the clause, "said corporation to fence the land, and prepare a crossing with cattle-guards, at the present traveled path, on a level with the track," was held not to be such a settlement, and not to change the legal position of the parties. White *v.* Concord R. R. 10 Foster, 188.

[3] Laws of 1850, ch. 140, § 44.

against the company for injuries to cattle through a defect in its performance.[1]

The power of the land-owner to waive the benefit of the provision, has also been affirmed in Vermont; where it is held that the waiver is not affected by the failure of the company to fulfill an agreement to furnish some other protection, differing from but equivalent to that imposed by the statute. The land-owner's only remedy for such breach of contract is, a suit for damages thereon.[2]

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[1] Tombs *v.* Rochester and Syracuse R. R. Co. 18 Barb. 583. It may be doubted whether this decision would be approved by the Court of Appeals, at least as to injuries to the cattle of any but the party who had waived the provision of the statute, under the principles laid down in Corwin *v.* N. Y. and Erie R. R. Co. 3 Kernan, 42.

A parol agreement by the adjoining owner to erect and keep up the division fence, is not within the clause of the statute of frauds which renders void an agreement not to be performed within a year. Talmadge *v.* Rensselaer and Saratoga R. R. Co. 13 Barb. 493.

[2] Hurd *v.* Rut. and Bur. R. R. Co. 25 Vt. 116. The company was required by its charter "to build and maintain a sufficient fence upon each side of their road, through the whole route thereof." The plaintiff gave evidence to prove an agreement by the company to provide *gates*, instead of bars, as usually furnished at a farm-crossing, by neglecting to provide which, the plaintiff's cattle entered on the railroad track and were injured. The company gave evidence to prove that before the injury, while its agents were putting in the bars, he forbade them, insisting before the first injury that he was to have a free and open pass; and at another time, before the second injury, claiming that he was entitled to gates. The company had erected a fence along the road except at this point. There being no evidence of any negligence or willfulness on the part of persons running engines at either time, it was decided that, upon the principles of the common law, the plaintiff could not recover, being by them required to keep his cattle on his own land; that the provision of the charter cited created a duty personal to the plaintiff and other adjoining land-owners, each of whom, so far as he was concerned, might waive it or discharge the company of its performance, and, after such waiver, would be estopped from setting up the want of sufficient fence as a substantive ground of complaint. The erection of bars would be a compliance with the statute, whose benefit was

EXCEPTIONS TO THE RULE RELIEVING THE COMPANY FROM THE OBLIGATION TO FENCE, WHEN NOT REQUIRED BY EXPRESS STATUTE PROVISION.—To the general rule already stated, that in the absence of a special statute requiring the company to make and maintain fences along its line, such a duty does not rest upon it, exceptions have been admitted in some States.[1]

In Vermont, it was held that the general laws in

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waived by a refusal to have them erected; and if the company, who offered to erect them, neglected to erect gates according to a special agreement, the plaintiff's only remedy would be an action on the contract, for damages. This case does not decide but that, in an action on the contract, the plaintiff might recover as damages, the value of his cattle injured in consequence of its breach.

[1] In New York, it was once considered that the company should make and maintain such fences "to insure the safety of the persons and property of those who may pass upon the road." The company was regarded as liable to contribution to adjoining owners, under the laws regulating partition fences. Its liability to contribution, was based on its interest in having such fences maintained, and this interest upon its duty to protect the persons and property transported by it, from injuries likely to be received in collisions with cattle straying on the track. No intimation is made that the company is in any default towards the adjoining owners, until called upon by them to build its half of the fence, or to contribute to the expense. In the Matter of Rensselaer and Saratoga R. R. Co., 4 Paige, 553. This decision has not been followed in New York. In Matter of Long Island R. R. Co. and M'Conochie, 3 Edw. Ch. 486. It is also controverted in Henry *v.* Dubuque and Pacific R. R. Co., 2 Clarke (Iowa), 305. See Munger *v.* Tonawanda R. R. Co., 4 Comst. 349; 5 Denio, 255. Clarke *v.* Syracuse and Utica R. R. Co., 11 Barb. 112. Nor does the duty to erect fences, it seems, arise from the assumption of the appraisers of damages, that the company will build them. Williams *v.* N. Y. Central R. R. Co., 18 Barb. 222.

Under the statute of New York, making "the corporation and its agents liable for all damages which shall be done by their agents or engines, to cattle, horses, or other animals," in case of its omission to fulfill the requirement to build fences, the duty was held to be one in respect to the owners of such animals only; and its omission was not to be considered *per se* negligence in case of injury to a servant upon its trains, in consequence of a collision with cattle coming upon the track. Langlois *v.* Buffalo and Rochester R. R. Co., 19 Barb. 364.

relation to the division fence between adjoining owners do not apply to a railroad company which, by its charter, is seized only of a right of way; and that the entire expense of fencing its track, rests primarily on the company when the charter is silent as to the duty. Such a rule was considered to be the dictate of reason and justice. It was, therefore, decided, that until the company had built the fence, or paid the land-owner for doing it a sufficient length of time to enable him to do it, the mere fact that his cattle have come upon the track from his adjoining land, through the absence of such a fence, is no ground for imputing negligence to him, so as to prevent his recovering damages for an injury to them by its trains, which resulted from its neglect to use ordinary care.[1]

This doctrine—that it is the duty of the company to erect and maintain such fences on its road as will prevent domestic animals from passing thereon, and

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[1] Quimby *v.* Vt. Central R. R. Co., 23 Vt. 387. The expense of fencing having been included in this case in the assessment of damages to the owner, it is not easy to see how the company could be in default in not building the fence. There does not seem to be a uniformity of opinion in this State, on the duty of a company, in the absence of a special requirement by statute, to make and maintain fences. Thus, in Trow *v.* Vt. Central R. R. Co., 24 Vt. 492, Isham, J., says, "That a duty of that character rests upon this corporation, must be considered as settled in this State, by a decision of this court in the case of Quimby *v.* Vt. Cent. R. R. Co., 23 Vt. 393. The court there held, 'that the expense of fencing rests primarily upon the company,' and consequently, can be taken into consideration by the commissioners in the assessment of damages; and when this duty exists, an action will lie for any injury arising solely from any neglect therein." But in Hurd *v.* Rut. and Bur. R. R. Co., 25 Vt. 123, the same judge says, "Where no statutes exist, and no obligation is imposed by covenant or prescription, a railroad company is not bound to fence their land."

that it is responsible for injuries arising from such neglect, has been confirmed by the same tribunal in a subsequent decision. The duty was, however, considered more or less imperative, and its performance requiring greater or less sufficiency and care, as the locality is more or less thickly settled. While, according to the view of the court, the defendants were guilty of negligence in not erecting and maintaining suitable fences and cattle-guards upon the line of their road, it also appeared that the plaintiff was chargeable with the same degree of negligence in permitting his horse to run at large near the railroad, knowing his exposure and liability to injury therefrom. There being no evidence of any negligence of the company in conducting its train at the time the horse was killed, it was held that both parties being equally chargeable with remote negligence, not occurring at the time of the injury, which equally contributed to the result, the plaintiff could not recover.[1]

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[1] Trow *v.* Vt. Central R. R. Co., 24 Vt. 487, 494. Isham, J.: "This leads our investigation to the question, whether an action can be sustained, when the negligence of the plaintiff and the defendant has mutually co-operated in producing the injury for which their action is brought. On this question, the following rules will be found established by the authorities. When there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained. In the use of the words 'proximate cause,' is meant negligence occurring at the time the injury happened. In such case, no action can be sustained by either, for the reason 'that as there can be no apportionment of damages, there can be no recovery.' So, where the negligence of the plaintiff is proximate, and that of the defendant remote, or consisting in some other matter than what occurred at the time of the injury, in such case no action can be sustained, for the reason that the immediate cause was the act of the plaintiff himself. Under this rule falls that class of cases, where the injury

In Ohio, it has been held that a railroad company is not bound by law to fence, there being no statute

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arose from the want of ordinary or proper care on the part of the plaintiff, at the time of its commission. These principles are sustained by Hill *v.* Warren, 2 Stark R. 377; 7 Met. 274; 12 Met. 415; 5 Hill, 282; 6 Hill, 592; Williams *v.* Holland, 6 C. & P. 23. On the other hand, when the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems to be now settled in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet, if at the time when the injury was committed, it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury. So in this case, if the plaintiff were guilty of negligence, or even of positive wrong, in placing his horse in the road, the defendants were bound to the exercise of reasonable care and diligence in the use of their road and management of the engine and train, and if for want of that care the injury arose, they are liable.

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"These principles have an important application to the case under consideration. The negligence, which caused the injury in this case, cannot strictly be said to be proximate in either of the parties, but is remote, in both cases. It was remote on the part of the corporation; for it is found in the case, that there was no negligence on their part in the management of the train or engine, when the injury arose, but the neglect existed in not having previously made their fences and cattle-guards. It was also remote on the part of the plaintiff, in permitting his horse to remain in the highway, exposed to such injury, after it first came to his knowledge. The injury arose from the combined result of both causes If either of the parties had done their duty, and conformed to the requirements of the law, the injury would not have been sustained. In such case, no action can be sustained by either of the parties, no more than in the case where their mutual negligence is the proximate cause of the injury; for the same reason exists in the one case that exists in the other. From the nature of the case, there can be no apportionment of damages, and no rule can be laid hold of that settles what one shall pay more than the other. The rule is generally given in the authorities, that in cases of mutual neglect, where it is of the same character and degree, no action can be sustained. This principle has uniformly been sustained in this State, for injuries arising from negligence on the highways."

It may be remarked, that although the Supreme Court of Vermont holds that the company, in the absence of a special statute requirement, is bound to fence its road, yet it does not give the same effect to a neglect to fulfill that obligation, as is given in other States to a neglect to fulfill the statute obligation in which the company is made liable for damages re-

imposing the duty; as also, that the owner of cattle is not liable in trespass when they enter upon its uninclosed track. The company is, however, chargeable with remote negligence in not fencing its track against the intrusion of cattle in a district where the custom is to allow them to run at large; and the owner is chargeable with the same kind of negligence in allowing them to run at large in the vicinity of an uninclosed railroad. Both parties, being thus chargeable with remote negligence, not occurring at the time of the injury, and equally in fault, there can be no recovery for an injury to the cattle, if nothing further appears. But the remote negligence of the plaintiff was held not to excuse the company from exercising at the time of the injury, reasonable and ordinary care consistent with the safety of the persons and property on its train, to avoid injury to the cattle.[1]

The duty of a railroad company to fence its track, has been implied from a statute when not imposed in positive terms. The statute of New Hampshire, enacted by the Revised Statutes superseded a prior one which in direct terms imposed the duty of fencing on the company. But it was held that the term "neglect," in the beginning of the section, followed by a penalty

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sulting from the neglect, although it used the highest care to prevent the injury when it occurred. See *ante*, p. 334. The result is, that no greater responsibility is imposed on the company in Vermont, where it is held bound to fence its road, than in some other States, as in Ohio, where in the absence of a statute requirement it is held not bound to fence it.

[1] Kerwhacker *v.* C. C. and C. R. R. Co., 3 Ohio State, 172; C. C. and C. R. R. Co. *v.* Elliott, 4 id. 474; C. H. and D. R. R. Co. *v.* Waterson, 4 id. 424; Cranston *v.* C. H. and D. R. R. Co., 1 Handy, 193.

imposed upon the neglect after notice, and the provision excluding from the operation of the section cases where the corporation had settled with and paid the owner for building and maintaining such a fence, made it evident that the legislature contemplated the duty of erecting and maintaining such fences as resting exclusively on the corporation, in all cases except where the land-owner has been paid for assuming it. A party who had suffered injury through the neglect of the company to support the fence, was not confined to the remedy prescribed by the statute; as it was limited in its nature, and not co-extensive with the injuries which might arise from the neglect to fence.[1]

Duty to Fence imposed by a Special Tribunal.—The duty to erect fences is sometimes left by statute to the discretion of a tribunal authorized to assess damages; as in Massachusetts, by a statute

[1] Dean *v.* Sullivan R. R. Co., 2 Foster, 316; Cornwall *v.* Sullivan R. R. Co., 8 id. 161. The statute provision is as follows: "If any railroad corporation shall neglect to keep a sufficient and lawful fence on each side of their road, any person against whose land such fence is insufficient, may notify the agent of such corporation thereof, and if such fence shall not be made sufficient within twenty days after such notice, the owner of such land may make or repair such fence, and may thereupon recover of said corporation in an action of assumpsit, double the amount necessarily expended in making or repairing the same as aforesaid; provided, however, that the foregoing provisions of this section shall not apply to any case where such corporation shall have settled with and paid the owner of such land for building and maintaining such fence." R. S. ch. 146, § 6; Comp. Stat. ch. 150, § 46. It was said in Dean *v.* Sullivan R. R. Co., 2 Foster, 316, that railroad companies where they own their track, are subject to the same liabilities in this respect as other owners, but not when they own only an easement or right of way.

which authorizes the county commissioners to direct that fences be maintained by the proprietors of the railroad, and provides that such direction shall not be altered by the verdict of the jury on appeal. But where the cattle were injured by reason of there being no fence along the line of the railroad which was laid out before the statute, the county commissioners having awarded the adjacent owner a sum in damages, and provided in the award that the company should make and maintain the fences, and the jury on appeal having assessed damages without in their verdict making an order on the subject of fences, it was held that the whole question of damages was open for the consideration of the jury, and by necessary inference, the whole damage was assessed in money. No duty was, therefore, imposed on the corporation to build the fence, and it was not liable for injury in consequence of there being none erected.[1]

Duty to Fence Imposed by Contract.—There may be a special agreement to build the fence, as a part of the damages for taking the land, which may be enforced by a suit thereon. Thus, where a railroad corporation, in consideration of an amicable settlement of the damages with the owner of the land taken for its road, agreed with him to fence the land taken, and failing to do so within a reasonable time was sued by him for the breach of contract, the subsequent erection of the fences by it without the owner's consent or approbation, was not allowed to

[1] Morss *v.* Boston and Maine R. R., 2 Cush. 536.

affect his right to recover; and the measure of his damages was fixed at the sum which it would cost to erect the fence according to the agreement.[1] An agreement to build and maintain a fence cannot be inferred from the fact that the company built one, as it may have built it for the better security of its trains, and for the safety of its conductors and passengers.[2] Where a special agreement differing from and superseding the obligation to fence imposed by a statute, is made, a suit for damages in consequence of the failure to fence, it has been held, must be upon the agreement and not in trespass for a violation of the duty imposed by statute.[3] If the owner sustains special injury from the neglect of the company to perform its covenant to maintain fences, he is entitled to damages for the same. And where his growing crop is destroyed by cattle in consequence of the breach, he has been held entitled to recover the value of the same at the time of the injury.[4]

Kind of Fence required by Statute. — The company, when obliged by statute to maintain a fence, unless some special kind is required, may build any kind which is usual and fitted for the purpose. The erection of bars, although the ad-

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Lawton *v.* Fitchburg R. R. Co., 8 Cush. 230.

Morss *v.* Boston and Maine R. R., 2 Cush. 536; Waldron *v.* Portland, Saco and Portsmouth R. R. Co., 35 Maine, 422. In Morss *v.* Boston and Maine R. R. Co., it was held that a parol promise of the company to build a fence can be enforced, if at all, only in an action by the person to whom it was made, but not by a subsequent purchaser from him, as that would give it the effect of a covenant running with the land.

[3] Hurd *v.* Rutland and Burlington R. R. Co., 25 Vt. 116.

[4] Chicago and Rock Island R. R. Co. *v.* Ward, 16 Ill. 522.

joining owner demanded a gate, at a farm crossing, was held to be a compliance with the statute requirement of a continuous fence.[1] It has been decided in New York, that a Virginia fence, every alternate corner of which projects from three to three and a half feet over its line upon the land of the adjoining proprietor, while the intermediate corners recede a like distance within the line upon the land of the owner, fulfills the requirement of the statute, and neither the company nor its agents are liable in trespass for the erection of such fences.[2]

Construction of the Statutes imposing the Obligation to maintain Fences.—The statutes imposing on the company the obligation to fence its track, have been the subject of judicial construction, determining under what circumstances the obligation exists. In New York, under the general act of 1850,[3] providing that the company shall erect and maintain fences, &c., and farm-crossings "for the use of the proprietors of lands adjoining the road," the duty of the company to make crossings exists as well when it obtains the land by an agreement with the owner, as when it obtains it by the compulsory proceeding provided by the act, and as well when the adjoining proprietors have any particular quantity of land to be benefited by the crossing, as when they have farms.[4]

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[1] Hurd *v.* Rutland and Burlington R. R. Co. 25 Vt. 116.

[2] Ferris *v.* Van Buskirk, 18 Barb. 397.

[3] Laws of 1850, c. 240, § 44.

[4] Clark *v.* Rochester, Lockport, and N. Falls R. R. Co. 18 Barb. 350. The

EXCEPTIONS TO THE STATUTES.—There may be exceptions to the general requirement to fence and build cattle guards, either express or implied. Thus, by the general statute of Maine, the company is not obliged to fence except where its road passes through inclosed or improved lands, and the omission to build a fence where the adjoining land is uninclosed and unimproved, is not imputed to the company as negligence.[1] In New Hampshire, by the general law, the company was not bound to make "cattle-guards" where the railroad intersects a highway; but this is now required by the act of 13th July, 1850.[2] The liability imposed by the general act of New York, is designed for the benefit of the owners of domestic animals only, and not for that of a servant of the company, who is injured in consequence of its omission to fence.[3] The section of the same act requiring the company to "construct and maintain cattle guards at all road-crossings," is construed to require cattle-guards only at road-crossings, and not at farm-crossings.[4] It has also been construed not to require cattle-guards in the streets of a village or

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court in this case refused to adjudge specific performance of the obligation to build the crossing, as it appeared that justice would not thereby be done, the expense of building it much exceeding its value to the plaintiff, and left him to his remedy of a suit for damages. The agent of the company is also liable under the statute of New York. Suydam *v.* Moore, 8 Barb. 358.

[1] Perkins *v.* Eastern R. R. Co. 29 Maine, 307.

[2] Towns *v.* Cheshire R. R. Co. 1 Foster 363.

[3] Langlois *v.* Buffalo and Rochester R. R. Co. 19 Barb. 364.

[4] Brooks *v.* N. Y. and Erie R. R. Co. 13 Barb. 594.

city, where they would be nuisances.[1] Likewise it has been held in Indiana where the obligation to fence its track is enforced in general terms by statute, that the act does not authorize the company to fence its track where it passes through the streets of a town, and the omission to build the fence is not to be considered negligence.[2] In Illinois, it has been held, that after the condemnation of the land and the payment of damages, the proprietor of the land has no right to obstruct the road, and therefore cannot make a cattle guard across or under it, whether the company owns the fee simple or the right of way only.[3]

It has been held in New York that the obligation to fence is one which rests on the company owning the road, and not on another company which runs its trains over it. Thus, where a railroad company, by an arrangement with another company, run its cars over the road of the latter, and a cow was killed by the locomotive, without any negligence in the running of the cars, but in consequence of the omission to erect cattle-guards or fences, the company owning the locomotive was held not liable to the owner.[4] It was also decided in Vermont that the company owning the road is liable for injuries to cattle in conse-

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[1] Vandekar *v.* Rensselaer and Saratoga R. R. Co. 13 Barb. 390; Parker *v.* Same, 16 id. 315; Halloran *v.* N. Y. and Harlem R. R. Co. 2 E. D. Smith, 257.

[2] Lafayette and Indianapolis R. R. Co. *v.* Shriner, 6 Indiana, 141; Hurd *v.* Rutland and Burlington R. R. Co. 25 Vt. 124.

[3] Alton and Sangamon R. R. Co. *v.* Baugh, 14 Ill. 211.

[4] Parker *v.* Rensselaer and Saratoga R. R. Co. 16 Barb. 315.

quence of a neglect to build fences and cattle-guards as required by statute, although the road was operated by another company as its lessee.[1]

NEGLIGENCE OF THE COMPANY A QUESTION FOR THE JURY.—Where negligence is the gist of the action against the company for injuries to cattle, its existence is a question for the jury to determine.[2]

BURDEN OF PROOF.—The burden of proof is on the plaintiff to prove negligence on the part of the company, where its negligence is necessary to sustain an action against it for injuries to his cattle; and the injury itself is not *prima facie* evidence of negligence.[3] But in New Hampshire it has been held that where the cattle are rightfully on the track, and are injured by a train of cars, the injury is *prima facie* evidence of the negligence of the company, on which the burden of proof is to show that the injury was not done by its fault, but by some accident or fault of the owner.[4]

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[1] Nelson *v.* Vermont and Canada R. R. Co. 26 Vt. 717. But the lessee may be liable also: Clement *v.* Canfield, Supreme Ct. of Vt., Dec. T. 1855; 19 Law Rep. (Dec. 1856), 460; see *ante*, ch. x. p. 244.

[2] Morse *v.* Rut. and Bur. R. R. Co. 27 Vt. 49; *ante*, ch. xii. p. 282.

[3] Waldron *v.* Portland, S. & P. R. R. Co. 35 Maine, 422; Lyndsay *v.* Conn. and Passumpsic Rivers R. R. Co. 27 Vt. 643; Terry *v.* N. Y. Central R. R. Co. 22 Barb. 574; Galena and Chicago Union R. R. *v.* Loomis, 13 Ill. 548; Ill. Central R. R. Co. *v.* Reedy, 17 id. 580; Herring *v.* Wilmington and Raleigh R. R. Co. 10 Iredell, 402; Phil. and Reading R. R. Co. *v.* Yeiser, 8 Barr, 366; Rood *v.* N. Y. and Erie R. R. Co. 18 Barb. 85; Aldridge *v.* Great Western R. Co. 3 Man. & Gr. 515; *ante*, ch. xiv. p. 314; *contra*, S. C. R. R. Co. *v.* Danner, 4 Rich. 329. See North Eastern R. R. Co. *v.* Sineath, 8 id. 194.

[4] White *v.* Concord R. R. Co. 10 Foster, 188. The two authorities cited by the court in no way sustain its position. In Suydam *v.* Moore, 8 Barb.

FORM OF ACTION AGAINST THE COMPANY FOR INJURY TO CATTLE.—*Trespass* and not *case* is the proper remedy against the company for injuries to cattle, resulting from the negligence of its servants.[1]

POWER OF THE LEGISLATURE TO REQUIRE A COMPANY TO MAINTAIN FENCES.—The power of the State legislature to impose on the company the duty of maintaining fences and cattle-guards along its line, by a statute enacted subsequently to the acceptance of the charter, has been discussed in a previous chapter.[2]

358, the company was bound by statute to fence, and not having performed the duty, was liable for damage to cattle in consequence of its neglect, whether negligent or not. In Ellis *v.* R. R. Co. 2 Iredell, 138, the presumption was raised under special circumstances, and did not arise from the injury alone. See Herring *v.* Wilmington and Raleigh R. R. Co. 10 id. 402.

[1] Illinois Central R. R. Co. *v.* Reedy, 17 id. 580; Sharrod *v.* London and North Western R. Co. 4 Eng. L. and Eq., 401. See *ante*, ch. x. pp. 234, 235.

[2] *Ante*, ch. iii. pp. 41, 45.

CHAPTER XVI.

CONTRACTS OF RAILROAD COMPANIES.

THE contracts of a railroad company, like those of an individual, to be valid, require the essentials of a legal contract,—to wit, the existence, assent, and capacity of the parties, a lawful and valid consideration, and a lawful subject-matter.

WHEN THE COMPANY IS CAPABLE OF TAKING A DEED.—It is not necessary in order to give validity to a deed to a railroad company, even upon conditions, that when it is delivered the company be completely organized, or that its officers be chosen. Where this had not been done, a deed delivered to the company after the issuing of letters patent by the governor in compliance with the requisition of an act of Assembly creating a corporation, was held to be valid and to vest the estate in it. It was suggested by the court that a deed to a company operating a railroad, which was considered a public highway, is valid without any specific grantee *in esse* at the time of its delivery to whom the fee could be conveyed.[1]

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[1] Rathbone *v.* Tioga Navigation Co., 2 W. & S. 74; see *ante*, ch. v., pp. 59, 60.

ASSENT OF THE PARTIES.—The assent of the company to the terms of an agreement is necessary to bind it. This may be express, as where by the proper agent it makes a proposition which is accepted by the other party while it is outstanding, or where it accepts a proposition made to it while yet open. The acceptance of a deed by an authorized agent, is an acceptance of it by the corporation and an assent to the terms thereof on its part.[1] Its assent may be implied from usage; as where it is its custom to receive property for transportation deposited at a dock or station, without any special notice of the deposit, its acceptance of the goods thus deposited in the usual manner is implied, and the agreement to carry them is complete.[2] So, where goods have arrived, and their arrival has been brought to the knowledge of the owner, who has been requested to take them away, a contract to store them may be implied from the practice of the company, and the conduct of its agents at the time.[3] But either an actual acceptance or one fairly implied must be made out, to hold the company to a proposition made to it. Thus, where a proposal was made, by a contractor, to the company in consequence of an advertisement published by it, the reference by the directors of that and others of the same kind to the executive committee and the superintendent to report upon them, was held not to

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[1] Western R. R. Corp. *v.* Babcock, 6 Met. 346.

[2] Merriam *v.* Hartford & New Haven R. R. Co., 20 Conn. 354.

[3] Smith *v.* Nashua and Lowell R. R., 7 Foster, 86.

be an acceptance; and the declarations of individual directors, made immediately after the close of the meeting at which the proposals were submitted, to the effect that the proposal in question had been accepted, were held not to be competent evidence of that fact.[1] The company cannot enforce as a contract, a proposition made by the other party, unless assented to while it was outstanding. The acceptance by the company of a proposition, in order to bind the party making it must be made within the time that, under the circumstances of the case, it is presumed to be open.[2] Thus, where a landowner offered a way-leave on certain terms to the proprietors of a railway, provided it should pass through his land, which offer was made in March, 1843, but the company did not stake out the way-leave till the close of that year or the beginning of the next, and did not make the road till the close of the year 1844, and it was not open for traffic till the year 1845, these acts of the company were held to be too much delayed to constitute an acceptance of the offer.[3]

Mutuality of Obligation.—As a general rule, there must be a mutuality of obligation to bind either party.[4] Thus, where a party agreed with a railroad company to carry for it between certain

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[1] Soper *v.* Buffalo and Rochester R. R. Co., 19 Barb. 310.

[2] 1 Parsons on Cont. 399–408; Beckwith *v.* Cheever, 1 Foster, 41.

[3] Meynell *v.* Surtees, 31 Eng L. & Eq. 475.

[4] 1 Parsons on Cont. 374–376, 399–403; Gov. and Co. Copper Miners *v.* Fox, 3 Eng L. & Eq. 420, 426, notes.

places all the goods which should be presented to him for that purpose, and the agreement was to continue for twelve months, he had no right of action against the company for discontinuing business during the time, and ceasing to offer him goods for carriage.[1] Where the company, when not bound by the agreement, has yet acted upon the proposition of the other party and made the expenditures contemplated in it, this has been held not to amount in itself to an acceptance, so as to entitle the company to enforce the contract. Thus, where it was alleged in a declaration that an agreement was entered into between a company and an individual, by which the latter stipulated, that if the former would locate its road and terminate it at a certain place, and should require certain lands in the vicinity of such terminus for the purposes of the road, he would pay the damages which should be appraised to the owners of the lands; and the plaintiffs then proceeded to aver that the agreement being so made, afterwards, to wit, on, &c., at &c., in consideration thereof, and that the plaintiffs had promised to perform on their part, the defendant promised to perform on his part, and further, that the plaintiffs having afterwards located their road at the place designated, required the lands described in the agreement, and the damages had been appraised,—it was held that the promise of the individual was not binding, inasmuch as by the agreement no obligation was incurred by the company to locate the road as a consideration

[1] Burton *v.* Great N. R. Co., 9 Exch. 507.

for the defendant's promise, and that the fact that the company afterwards located the road agreeably to the terms of the proposition, was of itself nothing.[1] But a proposition may be made to the company in such terms and under such circumstances, that the party making it authorizes the acts of the company, on account of which he offers to contribute money or to do certain things, so that he will be bound, if the company within a reasonable time, or such time as is contemplated by the parties, acts upon his proposition. This may occur where a party offers to pay an incorporated company a certain sum to induce the location of its road at a particular place, which is afterwards adopted by it within the time contemplated.[2] So, also, it has been held that where a party agrees by a writing under seal to permit a railroad company to construct a road over his land, and also agrees to convey his land to it for a certain sum, after the road shall be definitely located, with a condition in the deed of conveyance that the deed shall be void when the road shall cease or be discontinued, specific performance of such agreement may be decreed, after the road is constructed over the land, although the corporation did not expressly bind itself to take or to pay for the land.[3] Where a

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[1] Utica and Schenectady R. R. Co. *v.* Brinckerhoff, 21 Wend. 139; *quære*, see comments on this case, *ante*, ch. v. p. 71, *note* (4); see also N. Y. and N. H. R. R. Co. *v.* Pixley, 19 Barb. 428; Charlotte and S. C. R. R. Co., *v.* Blakeley, 3 Strob. 245, 253.

[2] Cumberland Valley R. R. Co. *v.* Baab, 9 Watts, 458: see cases of Subscriptions to Charitable Institutions, 1 Parsons on Cont. 377.

[3] Western R. R. Corp. *v.* Babcock, 6 Met. 346.

party, in letters signed by him, and addressed to the agent of the company, stated the conditions upon which he would consent to the building of its road across his land, and upon a compliance with which he agreed to convey the title thereto, and the company manifested its assent to the conditions by commencing operations on the road with his knowledge, it was held that the company had thereby accepted his proposition, and incurred a legal obligation to perform the requirements on its part, which was a valid and sufficient consideration for its agreement.[1] Where one company in pursuance of statute authority reserved in the charter, enters on the track of another, paying compensation for the use, and the company owning the track makes expensive and permanent arrangements for its accommodation, the entry and connection do not create a perpetual contract on the part of the company so accommodated to use the road; and it may withdraw from the use of the same without subjecting itself to liability for damages in consequence of such withdrawal.[2]

Offers on Time.—A mere proposition may be withdrawn at any time before acceptance, unless there is an agreement, founded on a consideration, to keep it standing for a certain time. But whether made by the company or the other party, if accepted (not having been already withdrawn) within a reasonable time, that is, such time as under the circum-

[1] N. Y. and N. H. R. R. Co. *v.* Pixley, 19 Barb. 428.

[2] Boston and Lowell R. R. Corp. *v.* Boston and Maine R. R. 5 Cush. 375.

stances of the case, it is presumed to be left standing open, it constitutes, with the acceptance, a contract binding on both parties.[1] What is such time within which it is to remain open, may be fixed by the parties. Thus, a party may offer to the company, or the company may offer to the party, certain terms, coupling them with the offer that they may remain open a certain specified time. If they are then accepted within that period, not having been previously withdrawn, a contract is complete. The party, however, making the offer, may, unless it is under seal or founded on a consideration, withdraw the same at any time within the prescribed period, provided no acceptance has already been made. There being no consideration for the offer, and no contract having been concluded, it may be revoked. Thus, where some land-owners signed a writing by which they agreed to convey to a railroad company a lot of land "if the said corporation would take the same within thirty days from that date," which, within the thirty days was extended to thirty more, and the offer within such extended time, not having been previously withdrawn, was accepted by the company, such offer and acceptance constituted a valid contract, specific performance of which was enforced in equity.[2]

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[1] 1 Parsons on Cont. 399—408; Cope *v.* Albinson, 16 Eng. L. and Eq. 470 and notes.

[2] Boston and Maine R. R. *v.* Bartlett, 3 Cush. 224. Fletcher, J.: "In the present case, though the writing signed by the defendants was but an offer, and an offer which might be revoked; yet while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance;

ASSENT BY LETTER.—There is no reason why a railroad company, like an individual, may not express its assent by letters sent by mail by its

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and, during the whole of that time, it was an offer every instant; but as soon as it was accepted, it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendants is most surely in the right, in saying that the writing when made was without consideration, and did not therefore form a contract. It was then but an offer to contract; and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance.

"But when the offer was accepted, the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting in order to perfect a valid contract on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted, and the bargain completed at once.

"A different doctrine, however, prevails in France, and Scotland, and Holland. It is there held, that whenever an offer is made, granting to a party a certain time within which he is to be entitled to decide, whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time. There are certainly very strong reasons in support of this doctrine. Highly respectable authors regard it as inconsistent with the plain principles of equity, that a person, who has been induced to rely on such an engagement, should have no remedy in case of disappointment. But, whether wisely and equitably or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached.

"The authorities, both English and American, in support of this view of the subject, are very numerous and decisive; but it is not deemed to be needful or expedient to refer particularly to them, as they are collected and commented on in several reports, as well as in the text books. The case of Cooke *v.* Oxley, 3 T. R. 653, in which a different doctrine was held, has occasioned considerable discussion, and, in one or two instances, has probably influenced the decision. That case has been supposed to be inaccurately reported; and that in fact there was in that case no acceptance. But, however that may be, if the case has not been directly overruled, it has certainly in later cases been entirely disregarded, and cannot now be considered as of any authority."

authorized agents.[1] A contract is closed by letter when the party to whom is addressed a letter containing a proposition, in due time deposits a letter in the mail accepting it. Until it has been so accepted, the offerer may revoke it by a notice which reaches the party to whom it is made, before the acceptance is thus made. But if the notice of revocation does not reach the party to whom it is made until after it has been accepted, such notice will not amount to a revocation.[2] But no contract will be created, if the acceptance is not deposited in the mail in due time, either reasonable time or within the time prescribed in the letter making the offer, or if the acceptance varies from the terms of the offer.[3] Where the company's offer by letter is once rejected, although orally, the party making it cannot be bound by a subsequent acceptance unless the offer is renewed.[4]

CONSIDERATION OF THE CONTRACT.—A consideration is another essential element of a promise made

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[1] N. Y. and N. H. R. R. Co. *v.* Pixley, 19 Barb. 428.

[2] Adams *v.* Lindsall, 1 B. & Ald. 681; Dunlop *v.* Higgins, 1 House of Lords Cases, 381; Potter *v.* Sanders, 6 Hare, 1; Mactier *v.* Frith, 6 Wend. 103; Brisban *v.* Boyd, 4 Paige, 17; Vassar *v.* Camp, 14 Barb. 341; 1 Kernan, 441; Levy *v.* Cohen, 4 Geo. 1; Palo Alto, Daveis, 344; Hamilton *v.* Lycoming Mut. Ins. Co., 5 Barr, 339; Tayloe *v.* Merchants' Fire Ins. Co., 9 Howard, 390.

[3] 1 Duer Ins. 67; Routledge *v.* Grant, 3 Car. & P. 267; S. C. 4 Bing. 653; Hall *v.* Hall, 12 Beavan, 414; Eliason *v.* Henshaw, 4 Wheat. 225; Averill *v.* Hedge, 12 Conn. 424; Martin *v.* Black, 21 Ala. 721.

[4] Sheffield Canal Co. *v.* Sheffield and Rotherham R. Co, 3 Eng. Rail. Cases, 121.

by or to a railroad company, in order to make it enforceable.[1] There must be to sustain an agreement some benefit to the party making it or some injury to the party to whom it is made, moved by an express or implied request from the promisor. The law does not undertake to enforce gratuitous promises against an individual, still less against a civil corporation whose power to make them may well be questioned. The classes of considerations are various, consisting of labor, goods, money, forbearance or compromise of a debt, or any matter of value. The consideration may be express or implied. It must be lawful and possible, but need not be adequate. Specific performance of a contract will not be denied on ground that the consideration is inadequate unless the inadequacy is so gross, and the proof of it so clear, as to lead to a reasonable conclusion of fraud or mistake.[2] The defence of want of consideration cannot be set up against the *bona-fide* holder of negotiable paper indorsed before maturity. It is not admitted to invalidate agreements under seal, in the case of which the necessity of a consideration is usually dispensed with. Whether a corporation is bound by gratuitous promises under seal may well be questioned, on the ground that the contracting of such obligations is beyond the scope of its authority.[3] The location of

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[1] See articles on the Consideration of a Contract, in the American Law Register for March, May, and July, 1854, by the Author.

[2] Western R. R. Corp. *v.* Babcock, 6 Met. 346.

[3] Colcock *v.* L. C. and C. R. R. Co., 1 Strob. 329.

a railroad on a certain route is a valid consideration for a promise to pay the company a certain sum of money.[1] A promise to pay money to a corporation in consideration of its incurring expenditures, is binding when they have been incurred on faith of it and before its revocation.[2] Where the stock of a railroad company is subscribed for, the subscriber, on payment of the amount subscribed, is entitled to shares therein, and the right and interest which he thereby acquires in the property of the company are a valid consideration for his promise to pay the amount subscribed.[3] Even before the organization of the company, the agreement of subscribers to associate together under an act of the legislature to accomplish the purpose designed, is regarded as a sufficient consideration for the promise of each to pay the amount subscribed.[4]

Form of Contract.—As to the mode in which corporations may contract, there is a conflict between the English and American authorities. In England, it is a general rule that a corporation cannot con-

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[1] Cumberland R. R. Co. *v.* Baab, 9 Watts, 458; Western R. R. Corp. *v.* Babcock, 6 Met. 346; see Utica and Schenectady R. R. Co. *v.* Brinckerhoff, 21 Wend. 139; Charlotte and S. C. R. R. Co. *v.* Blakely, 3 Strobh. 245.

[2] Barnes *v.* Perine, 9 Barb. 202; S. C., 15 id. 249; 2 Kernan, 18; Hamilton College *v.* Stewart, 2 Denio, 403; S. C., 1 Comst. 581; Wilson *v.* Baptist Education Society, 10 Barb. 309.

[3] Kennebec and Portland R. R. Co. *v.* Jarvis, 34 Maine, 360; see Thompson *v.* Page, 1 Met. 565; Ives *v.* Sterling, 6 id. 310; see *ante*, ch. v., p. 101.

[4] Kennebec and Portland R. R. Co. *v.* Palmer, 34 Maine, 366; *ante*, ch. v., p. 60.

tract except under its corporate seal; but this rule, even there, has to a great extent been nullified by the exceptions admitted to it which dispense with the corporate seal in matters of frequent occurrence, and trivial importance or where the affixing of the seal would be impracticable, or perhaps where the corporation has received the benefit of the contract.[1] This general rule is discarded in this country, where the contracts of a corporation are assimilated to those of individuals. It is not required to use a seal where an individual is not. Its acts, evidenced by the vote of its managing directors, are as complete authority to its agents as the most solemn act done under the corporate seal. So also, it is bound not only by express promises, but also by implied promises, arising from the duties imposed on it or from the benefits received by it, in the same manner as individuals.[2] Its implied promises will be presumed to be made with the party in interest. Thus, as the husband has no legal interest in his wife's personal security, a contract of the company for that

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[1] See Cox *v.* Midland Counties R. Co., 3 Exch. 268; Cope *v.* Thames Haven Dock and R. Co., 3 id. 844; Diggle *v.* London and Blackwall R. Co., 5 id. 450; Finlay *v.* Bristol and Exeter R. Co., 7 id. 409; Pauling *v.* London and N. W. R. Co., 8 id. 867; Lowe *v.* London and N. W. R. Co., 21 Law Jour. 361; Stuart *v.* London and N. W. R. Co., 10 Eng. L. & Eq. 57; Lindsay *v.* Great North R. Co., 19 id. 87. In England, by statute the contracts of a railroad company are now valid when made in the same form in which if between private persons, they would be valid. 8 Victoria, c. 16, § 97; Lowe *v.* London and N. W. R. Co., 14 Eng. L. & Eq. 18; Pauling *v.* London and N. W. R. Co., 22 id. 560.

[2] 2 Kent Com. 290, 291; Angell and Ames on Corp., ch. viii., §§ 228, 238; Smith *v.* Nashua and Lowell R. R. Co., 7 Foster, 96–98.

purpose will be presumed to be made with her.[1] Promises to it as well as by it may be implied. Thus, where a party signs a paper subscribing for stock in the company, a promise to pay for the same may be implied from the act of taking stock.[2]

STATUTE OF FRAUDS.—The contracts of a corporation, like those of a natural person, when within the statute of frauds, must be in writing in order to be valid.[3]

WHAT SEAL MAKES A SPECIALTY.—An impression of the seal of the company upon the paper of instruments issued by it as bonds, and purporting to be under seal, is a sufficient seal to make the instruments specialties on which an action of debt may be maintained.[4]

NEGOTIABLE BONDS.—The bonds of the company payable to bearer, although not negotiable paper like promissory notes and bills of exchange under the law merchant, are still, to facilitate the purposes of their issue, and, in accordance with common usage, allowed the privileges of negotiable paper. They may be transferred by delivery so as to confer a complete title on a *bona-fide* purchaser, free from any equities subsisting between the seller and the

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[1] Fuller *v.* Naugatuck R. R. Co., 21 Conn. 557.

[2] Hartford and N. H. R. R. Co. *v.* Kennedy, 12 Conn. 499.

[3] Reynolds *v.* Dunkirk and State Line R. R. Co., 17 Barb. 613.

[4] Allen *v.* Sullivan R. R. Co. 32 N. H. 446.

company, and to enable him to sue upon them in his own name; and the possession of them is *prima facie* evidence of ownership.[1]

Promissory Notes and Bills of Exchange.—A corporation may bind itself by a negotiable promissory note or bill of exchange, as well as by any other form of contract, for debts which it is authorized to contract in the course of its legitimate business. It is not necessary to the existence of this power that it be specifically conferred in the charter, but it is incident to the power to contract debts.[2] There can be

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[1] Morris Canal and Banking Co. *v.* Fisher, 1 Stockton Ch. 667; 3 Am. Law Reg. 423; Carr *v.* Le Fevre, 27 Penn. State, 413; Mechanics' Bank *v.* N. Y. and N. H. R. R. Co. 3 Kernan, 625; 4 Duer, 582; 1 Parsons on Cont. 240. There is a newspaper report of the cases of Craig and Elliott *v.* City of Vicksburg, recently decided by the High Court of Errors and Appeals of Mississippi, in which the following points were decided:

1. That a bond payable to bearer passes by delivery from hand to hand, like a bank note, or a promissory note payable to bearer, and that the holder of such a bond claims title thereto, simply from the mere fact of his being the holder or bearer, by virtue of the contract of the maker to pay the bearer, and that such a holder may maintain an action on such a bond in his own name, without tracing his title thereto through the party to whom it was originally issued by the maker.

2. That in an action on such a bond, the plaintiff need allege nothing but the act of the execution of the bond by the maker, and that he is the bearer thereof. The fact of his being the holder, establishes a *prima facie* right in him to recover; and if the maker wishes to set up in defence of the suit on the bond any want of consideration, failure of consideration, payment, or other defence to the bond, as between himself and the party to whom it was originally issued, he must allege in his pleadings, and prove on the trial, that the plaintiff, the holder of the bond, had notice of such defence when he acquired the bond.

But see Dixon *v.* Bovill, 2 Jurist, N. S. 933, 934, 935,—per Lord Cranworth, Chancellor.

[2] Came *v.* Brigham, 39 Maine, 35; Moss v. Oakley, 2 Hill, 265; Kelly *v.* Mayor of Brooklyn, 4 id. 263; Clarke *v.* School District, 3 R. I. 199; Angell & Ames on Corp. ch. viii. § 257.

no question as to the power of a railroad company, even without a special power in its charter, to bind itself by such negotiable paper for debts which it is authorized expressly or by implication to contract, and its liability on such paper, when signed by its duly authorized agents on its behalf.[1]

CONTRACTS MADE BY AGENTS.—A corporation is bound by the contracts of its authorized agents acting within the scope of their authority, both express and implied; and neither the authority of the agents nor the contracts made by them need be under the corporate seal. And its liability for their acts arises equally where the contracts made by them were previously authorized or subsequently ratified—expressly, or impliedly by accepting benefits under them or otherwise acting upon them.[2] But it is not liable for the contracts of its agents beyond the scope of their authority, which it has not ratified.[3] Thus, a station master has no implied authority to bind the company by a contract for surgical attendance on an injured passenger.[4] The company will be bound by the contracts of its agents which are contrary to its instructions and regulations, where it

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[1] In Mitchell *v.* Rome R. R. Co. 17 Geo. 574, the company having the power "to make contracts," it was held that it might take a promissory note, and having taken one, the note was to be presumed to have been taken within the scope of its business.

[2] 2 Kent, Com. 289–291; Angell & Ames on Corp. ch. viii. §§ 238–240; ch. ix. §§ 282, 283, 297, 304; 1 Parsons on Cont. 118.

[3] Mechanics' Bk. *v.* N. Y. and N. H. R. R. Co. 3 Kernan, 631–635; S. C. 4 Duer, 480; 2 Kent, Com. 291; Angell & Ames' Corp. ch. ix. § 297.

[4] Cox *v.* Midland Counties R. Co. 3 Exch. 268.

adopts or allows a course of business inconsistent with those instructions and regulations, and indicating that it has conferred on them a more extensive authority.[1]

The agents of a corporation, as already stated, need not be appointed under seal; but when appointed by the vote of the directors or other managing board, or otherwise duly authorized or recognized as such by the permission and acceptance of their services, or the recognition or confirmation of their acts, or in general by holding them out as authorized, the company is bound by their acts within the scope of their authority. And their authority need not be under seal where they are appointed to convey the real estate of the corporation, or to do any other act.[2] Where the charter prescribes a mode in which its officers and agents must act or contract, that mode must be pursued in order to bind the corporation.[3] In Connecticut, it is held that although a particular manner is prescribed, it may by practice render itself liable on contracts made in a different way.[4] So, like natural persons, a corporation cannot take or convey real estate but by deed, and the seal must then be affixed by a person duly authorized, or it will not be the seal of the corporation. The affixing of the common seal is presumed

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[1] Smith *v.* Nashua and Lowell R. R. 7 Foster, 86, 98.

[2] Angell & Ames, Corp. ch. vii. § 224; ch. ix. § 283; Troy Turnpike and R. R. Co. *v.* Chesney, 21 Wend. 296.

[3] Angell & Ames on Corp. ch. ix. § 291; ch. viii. § 253; 2 Kent, Com. 290.

[4] Bulkley *v.* Derby Fishing Co. 2 Conn. 252; Witte *v.* Derby Fishing Co. 2 id. 260.

to have been done with authority.[1] The deed of a corporation, to be effectual as such, must be executed by the proper agent in its name, and not in his own.[2] This strictness of formality is dispensed with in the case of contracts not under seal, where the corporation will be bound by the authorized contracts of its agents if from the whole transaction it appears to have been the intention of the parties that the corporation, and not its agents, should be bound.[3] The declarations or acts of a director will not bind the company unless they are within the scope of his ordinary powers, or of some special agency relative to the subject-matter.[4] Nor will it be bound by the unauthorized contracts, or unsanctioned conduct and declarations of its individual stockholders.[5] The admissions of its agents bind it only when they are made in the course and as a part of the transaction which is within their authority, but not when made subsequently.[6]

Subject-Matter of Contracts.—There are several kinds of contracts made by railroad companies which

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[1] Angell & Ames on Corp. ch. vii. §§ 219, 223.

[2] Sherman *v.* N. Y. Central R. R. Co. 22 Barb. 239; Brinley *v.* Mann, 2 Cush. 337; 1 Parsons' Cont. 118–120. See Angell & Ames on Corp. ch. vii. § 225; ch. viii. § 254.

[3] Angell & Ames on Corp. ch. ix. §§ 293, 294.

[4] Soper *v.* Buffalo and Rochester R. R. Co. 19 Barb. 310; Norwich and Worcester R. R. Co. *v.* Cahill, 18 Conn. 484; Angell & Ames on Corp. ch. ix. § 309.

[5] Angell & Ames on Corp. ch. viii. § 239; ch. ix. § 309; Mitchell *v.* Rome R. R. Co. 17 Geo. 574.

[6] Stiles *v.* Western R. R. Corp. 8 Met. 44.

have been the subject of litigation, and will now be considered.

PURCHASE OF REAL ESTATE.—The contracts of the company by which it acquires a right of way and real estate for its purposes, have already been discussed.[1]

AGREEMENTS WITH CONTRACTORS.—There are several points in relation to the agreements between a railroad company and its contractors, employed to build sections of its road, which have been brought under judicial examination.

FAILURE OF THE CONTRACTOR TO COMPLETE THE WORK WITHIN THE TIME FIXED.—It may happen that the contractor fails to complete his work within the time specified in the contract. If he still proceeds with the assent of the company, and nothing is said about the rate of compensation, no matter which party is the innocent cause of the delay, he has been held confined to that fixed in the contract, for the work done beyond the limited time. But if the company deliberately and willfully obstructs him in his work, he is entitled to recover for the value of his labor under a *quantum meruit* count, without being confined to the rate fixed in the special contract.[2] Where the contract was under seal, and to

[1] *Ante*, ch. vii.

[2] Merrill *v.* Ithaca and Owego R. R. Co., 16 Wend. 586; Barker *v.* Troy and Rutland R. R. Co., 27 Vt. 766; see Dubois *v.* Delaware and Hudson Canal Co., 4 Wend. 285; 12 id. 334; 15 id. 87.

be performed within a fixed time, subsequently enlarged by parol, assumpsit and not covenant is the proper remedy for a breach.[1] Where the contractor has not fully performed his part of the contract, he may under certain circumstances be entitled to recover for the part performance, subject to a deduction for damages on account of his default.[2] The work may, after it has been commenced, be suspended by mutual consent, without the contract being rescinded, so that the contractor will be entitled to complete it on its being resumed; and if the company employs another contractor, it will be responsible in damages to the one first employed.[3]

Provision for Forfeiture of unpaid installments, and vesting discretion with the Engineer.—In agreements between a railroad company and its contractors, there is usually a provision that the company, but more commonly the engineer, or some one of its agents, shall be authorized to decide finally, or during the progress of the work, upon the amount, value, and character of the work done, the sum due to the contractor on account thereof, the manner in which it shall be performed, and other matters in relation thereto, and to annul the contract if in the opinion of such person the contractor has not complied with the terms of the agreement.

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[1] Sherman *v.* Rut. and Bur. R. R. Co., 24 Vt. 347; Barker *v.* Troy and Rutland R. R. Co. 27 id. 774.

[2] Barker *v.* Troy and Rutland R. R. Co., 27 Vt. 766; Danville Bridge Co. *v.* Pomroy, 15 Penn. State, 151.

[3] Fowler *v.* Kennebec and Portland R. R. Co., 31 Maine, 197.

A provision is usually inserted, giving the company a right to reserve a part of the price of the work already performed, at the time of the periodical payments, which unpaid portion shall be forfeited to the company on the contract being thus annulled. Such provisions have been considered reasonable, and, in the absence of fraud or imposition, have been enforced by the courts. They are efficient to ensure diligence and fidelity on the part of the contractor, whose neglect is likely to be productive of great damage to the company throughout its whole line, and also to enable it to prosecute its enterprise to a speedy conclusion without having it arrested by disagreements with numerous contractors. They are important to enable it to understand the state of its accounts, and to close them beyond revision in the progress of the work. The fact, that the discretion to annul the contract, and to decide on its proper performance, is vested in an interested party, if exercised in good faith, does not operate to make the provision void; and the forfeiture of an unpaid installment in case of a breach of the agreement by a contractor, when distinctly stipulated, has been regarded as liquidated damages, and not as a penalty.[1] Such stipulations have been sustained in an elaborate decision in England, by the House of Lords, where the sum to be forfeited by the contractor, on the breach of his agreement with a railway company was decided to be liquidated damages, and

[1] Easton *v.* Penn. and Ohio Canal Co., 13 Ohio, 79; Hennessey *v.* Farrell, 4 Cush. 67.

not a penalty; and the certificates of the engineer, although interested as a shareholder in the company, during the progress of the work—there being no proof of fraud—were, according to the terms of the agreement, held to be conclusive.[1]

The same provisions are introduced into agreements between a contractor and a sub-contractor. Thus, in an agreement between the original contractors of the York and Cumberland Railroad Company and a sub-contractor, it was provided that the work should be subject to the supervision and control of the engineer of the railroad company; that he should make monthly estimates of the character, quantity, and value of the work done—four fifths of the value of which to be paid to the sub-contractor,—and when the work should be completed, a final estimate; that the monthly and final estimates as to the quantity, character, and value of the work done should be conclusive between the parties; and that if the sub-contractor should not truly comply with his part of the agreement, or in case it should appear to the engineer that the work was not progressing with sufficient speed, the contractor should have the power to annul the agreement, and the unpaid portion of the

[1] Ranger *v.* Great Western R. Co., 27 Eng. L. & Eq. 35; S. C., 1 Eng. Rail. Cas. 1; 3 id. 298. In this case, by the agreement, the decision of the engineer as to all matters pertaining to the work was to be final only during its progress; and after its completion any dispute in relation to any matter of charge or account between the parties, was to be settled by arbitration. See Macintosh *v.* Midland Cos. R. Co., 3 Eng. Rail. Cas. 780; Rouch *v.* Great Western R. Co., 2 id. 505; Hawthorne *v.* Newcastle, &c., R. Co., 2 id. 288.

price should be forfeited by the sub-contractor and become the property of the contractor. The decision of the engineer, declaring the contract forfeited, was held conclusive on the sub-contractor, and the twenty per cent. retained to be a measure of reparation for the failure of the contractor to perform his agreement, and not intended as a mere penalty; but it was considered that if the company had withheld the funds due to the subcontractor, it would have been unfair to take advantage of a forfeiture declared for want of a due prosecution of the work.[1] But the law leans strongly against forfeitures, and will not declare them except where it clearly appears to have been the intention of the parties that one should take place on an event which has happened. The agreement may be so drawn that, although the company is at the time of the periodical payments authorized to retain a portion of the price of the work done, this right of retention may be considered as a means of indemnity, and not of enforcing a forfeiture on a breach of the con-

[1] Faunce *v.* Burke, 16 Penn. State, 469. In the same case, it was held that the term *value* in the agreement was to be distinguished from the term *price* as applied to the quantity of any of the different classes of work specified, for which different prices according to the cubic yard were to be paid; that the engineer in making the monthly estimates was authorized to deduct from the contract price to be paid for the quantity of work already done, what he considered would equalize the work done as to quality and value with the whole work, and was not bound to allow the sub-contractor at the monthly payment for the work done, the price specified in the agreement for that kind of work; for if he was paid in cash the price according to the cubic yard where the work was easy, he might be paid more than in fact would compensate him for the labor already performed, and would thereby be interested to desert the job.

tract, and the company will then be bound to pay over the retained amount unless it has sustained an equivalent amount of damage by the default, negligence, or misconduct of the contractor. The covenant to finish the work by a certain day, on the one part, and a covenant to pay monthly, on the other, may also be distinct and independent covenants, so that the company, which has a right to annul the contract at any time, will not have the right to assert a forfeiture of the earnings of the other party for work done before the contract was annulled.[1] The mere vesting of a discretion in one of the company's agents to determine in what quantities and at what times work is to be delivered, does not give him the power to annul the contract; and where it is to be delivered as required by the company, the contractor is entitled to notice when it is wanted.[2] Where the agreement was to place waste earth as ordered by the engineer, it was his duty to provide a convenient place for it; and if he failed to fulfill it the contractor is entitled to damages.[3]

The decision of the engineer, who is by the contract made the umpire between the parties, as to the quality, quantity, and value of the work, and whether any part is to be allowed for as extra

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[1] Philadelphia, Wil., and Balt. R. R. Co. *v.* Howard, 13 Howard, 307. Whether an express stipulation for a forfeiture would be enforced, was a question suggested in this case, but not passed upon. See Danville Bridge Co. *v.* Pomroy, 15 Penn. State, 151.

[2] Harrison *v.* Great Northern R. Co. 8 Eng. L. and Eq. 469.

[3] Philadelphia, Wil., and Bal. R. R. Co. *v.* Howard, 13 How. 307.

work, has generally the effect of an award. It is subject to be set aside on the same grounds as an award,—for the corruption of the engineer; the fraud of the party attempting to set it up; the exercise of an improper influence upon him by the company to procure under-estimates; or a mistake of fact, by which he was deluded and led to misapprehend the case, so as not to exercise his real judgment; but not for a mere error of judgment in weighing evidence or construing the contract. The relations subsisting between the company and the engineer will invite scrutiny into his decision, greater than where the award is made by an impartial arbitrator. The conflicting claims between the company and the contractor being thus submitted in advance to a referee of its own appointment, it is its duty, under the agreement, to employ a competent and upright person to that office, and to see that a decision is made by him upon the work; and if this duty is not neglected, its obligation to pay will not arise till the estimates are made by the engineer. But if it fails to employ an engineer, or the work of the contractor is not duly acted upon by him, it will be liable to the contractor without any such decision.[1] The decision of the engineer is

[1] Vanderwerker *v.* Vt. Central R. R. Co. 27 Vt. (1 Williams) 130; Herrick *v.* Belknap and Vt. Central R. R. Co. id. 673; Barker *v.* Troy and Rutland R. R. Co. id. 766; Mansfield and Sandusky R. R. Co. *v.* Veeder, 17 Ohio, 385; Faunce *v.* Burke, 16 Penn. State, 469; Easton *v.* Penn. and Ohio Canal Co. 13 id. 79; Kidwell *v.* Baltimore and Ohio R. R. Co. 11 Grattan, 676; Dubois *v.* Delaware and Hudson Canal Co. 4 Wend. 285; 12 id. 338; 15 id. 87; McIntosh *v.* Great W. R. Co. 14 Jur. 819; 2 Macn. & Gor. 74. See U. S. *v.* Robeson, 9 Peters, 327. As to the award of arbi-

not conclusive as to work not contemplated in the contract either as a part of the original plan or as extra work, in the same manner that the award of an arbitrator does not conclude matters not submitted to him.[1]

The provision in a contract for the estimates to be made by the engineer, does not necessarily require the estimates from time to time to be made by the chief engineer, but they may be made by the assistant engineer who has charge of that part of the line where the work is done.[2] A provision for the construction of the road to the satisfaction and acceptance of the engineer, has reference to its final acceptance by the chief engineer.[3]

A stipulation in the agreement for monthly estimates of the contractor's work, according to which he is to be paid, is construed to import accurate and final, and not merely approximate and conjectural estimates.[4]

CLAIM FOR EXTRA WORK.—A contract of the company cannot be implied to pay additional compensation to the contractor for work included its contract with him, and a promise of its president to pay for the same as extra work is without considera-

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trators, and on what principles it is set aside, see Boston Water Power Co. *v.* Gray, 6 Met. 131.

[1] Dubois *v.* Delaware and Hudson Canal Co. 12 Wend. 334.

[2] Herrick *v.* Vt. Central R. R. Co. 27 Vt. (1 Williams) 673.

[3] Barker *v.* Troy and Rutland R. R. Co. 27 Vt. 766.

[4] Barker *v.* Belknap and Vt. Central R. R. Co. 27 Vt. 700; Herrick *v.* Same, id. 673.

tion, and will not make the company liable upon a *quantum meruit*.[1] But as to work outside of the contract, which is done at the request of the company, he may recover the value thereof upon a *quantum meruit* where no special mode of determining its value is fixed in the contract.[2] Where the agreement provided that the line of the road or gradients might if the engineer should consider such change necessary or expedient, be altered without the contractor being entitled to any extra allowance, and alterations having been made, and a dispute between the parties as to the compensation therefor having been referred to arbitrators from whose decision it was agreed there should be no appeal, their report allowing compensation for such alterations was held to be conclusive as to the construction of the contract, and not re-examinable.[3] There are usually provisions introduced into the agreement, to exclude claims for extra work; viz. that no additional compensation shall be allowed for alterations in the location deemed necessary by the engineer, when made before the work on the altered portion has commenced, and such only as he shall deem fair and equitable where the alteration is made afterwards; and also that no claims shall be allowed for extra work unless done in pursuance of a written contract or order signed by the engineer and presented within a given time. These

[1] Nesbitt *v.* L. C. C. and R. R. Co., 2 Speers, 697.

[2] Dubois *v.* Delaware and Hudson Canal Co., 4 Wend. 285; S. C., 12 id. 334; 15 id. 87.

[3] Porter *v.* Buckfield Branch R. R. Co., 32 Maine, 539.

stipulations limit the power of the engineer and the responsibility of the company. The decision of the engineer, as to the amount due for alterations after the work has commenced on the altered portion, has been held to have the effect of an arbitrator's award, and to be impeachable only on the same grounds.[1] The engineer, to bind the company, must execute his authority in the prescribed mode. The company is not bound by his oral order and promise of additional compensation for extra work under a contract which excludes allowance of claims for extra work unless performed in pursuance of his written order.[2] The acquiescence of the contractor in the monthly estimates of the compensation due for the work done, made by the engineer, who is appointed by the contract to make such estimates, without setting up any claim for additional work, is a practical construction of the agreement against his right to further allowance.[3]

The liability of the company to a party claiming compensation for extra work, to whom the contractor has underlet the job, is deserving of consideration. If he makes a claim for extra work against the company, the agreement between it and

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[1] Vanderwerker *v.* Vt. Central R. R. Co., 27 Vt. 130; Herrick *v.* Belknap and Vt. Central R. R. Co., id. 673.

[2] Thayer *v.* Vt. Central R. R. Co., 24 Vt. 440; Vanderwerker *v.* Same, 27 id. 125, 130; Herrick *v.* Belknap and Vt. Central R. R. Co., id. 673, 686; Barker *v.* Troy and Rutland R. R. Co., id. 766; Barker *v.* Belknap and Vt. Cent. R. R. Co., id. 700; Nesbitt *v.* R. R. Co., 2 Speers, 697.

[3] Barker *v.* Troy and Rutland R. R. Co., 27 Vt. 766; Barker *v.* Belknap and Vt. Central R. R. Co., id. 700; Kidwell *v.* Baltimore and Ohio R. R. Co., 11 Grattan, 676.

the principal contractor does not determine his rights, as he was not a party to it. But while he is working on the job, it is but fair for the company to presume that he is working on the credit of his employer, the principal contractor. Where he has apparently taken upon himself all the obligations of the contractor, there is no presumption of an agreement of the company to pay him for work which comes legitimately within its agreement with the principal contractor. Whatever under such circumstances he does in execution of that agreement, it has a right to take for granted was done on the credit of the principal contractor and not on its own, although in doing the work he obeys its directions where the contractor would be bound to obey them. The engineer has no implied authority to bind the company by a promise of extra compensation for work which the original contractor was bound to perform without any title to such extra compensation. Nor will an agreement to that effect be implied from the fact that the company has before paid similar claims, in the absence of proof that the sub-contractor was thereby induced to rely on the authority of the engineer to make it.[1] The custom of railroad companies to allow their contractors while employed by them the use of their own roads, free of charge, does not imply a contract to pay their fare on a road belonging to another distinct company.[2]

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[1] Thayer *v.* Vt. Central R. R. Co., 24 Vt. 440; Vanderwerker *v.* Vt. Central R. R. Co., 27 id. 125; Herrick *v.* Belknap and Vt. Central R. R. Co., id. 686, 687; Barker *v.* Troy and Rutland R. R. Co., id. 777; Nesbitt *v.* L. C. and C. R. R. Co. 2 Speers, 697; Colcock *v.* Same, 1 Strob. 335.

[2] Colcock *v.* L. C. and C. R R. Co., 1 Strob. 329.

LIABILITY OF THE COMPANY TO A SUB-CONTRACTOR.—There is no privity of contract between the company and the sub-contractor. The latter has no equitable lien for the amount due him from the contractor, on the funds in the hands of the company which are due to the contractor for the work done, even in case of the insolvency of the contractor. Nor has he any remedy against the company for mistakes in the estimates of the engineer, who is made the umpire between the parties both in the agreement between the company and the contractor, and also in that between him and the sub-contractor, there being no privity between the company and the sub-contractor as to the engineer any more than as to other matters in the agreement. But if the company or its agents connive to influence improperly the engineer to make underestimates, the company will be responsible to the sub-contractor for the damages to him occasioned by its fraud.[1] In the agreements between the contractor and sub-contractor, the same provisions are usually introduced as are in the original contract, by which the sub-contractor is bound by the estimates of the engineer, and the contractor may declare the contract between him and the sub-contractor forfeited if the work is not done by the latter to the satisfaction of the engineer; and such stipulations are sustained.[2]

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[1] Herrick *v.* Belknap and Vt. Central R. R. Co., 27 Vt. 673; Barker *v.* Same, id. 700; McIntosh *v.* Great Western R. Co. 14 Jur. 819; 2 Macn. & Gor. 74.

[2] Hennessey *v.* Farrell, 4 Cush. 267; Herrick *v.* Belknap and Vt. Central R. R. Co., 27 Vt. 673; Barker *v.* Same, id. 700; Faunce *v.* Burke, 16 Penn. State, 469.

DAMAGES FOR BREACH OF THE AGREEMENT WITH THE CONTRACTOR.—The contractor is entitled to indemnity for a breach of the agreement by the company in suspending the work, where it has not reserved the right to suspend it. The measure of damages is the difference between the sum he was to be paid, and what it would cost to complete the work. The profits allowed to the contractor by this mode of computing the damages are the direct and immediate fruits of the contract, and are not of such a speculative and contingent character as to be disregarded in law.[1] In assessing the damages, the

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[1] Masterton *v.* Mayor, &c. Brooklyn, 7 Hill, 61; Phil., Wil., and Balt. R. R. Co. *v.* Howard, 13 How. 307, 344. This was an action brought by a contractor against the company for the breach of its agreement in stopping the work. Curtis, J.: "It is insisted that only actual damages, and not profits, were in that event to be inquired into and allowed by the jury. It must be admitted that actual damages were all that could lawfully be given in an action of covenant, even if the company had been guilty of fraud. But it by no means follows that profits are not to be allowed, understanding, as we must, the term profits in this instruction as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam.*

"And in case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it, when the other party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Wherever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains, or speculations, or states of the market, are referred to, and not the difference between the agreed price of something contracted for, and its ascertainable value, or cost. See Masterton *v.* Mayor of Brooklyn, 7 Hill's R. 61, and cases there referred to. We hold it to be a clear rule, that the gain or profit, of which the contractor was

market price or value of the work and materials at the time of the breach are to govern; and they are to be ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance. Therefore, the difference between the price to be paid to the contractor, and that which he had agreed to pay sub-contractors for doing the work is not the true measure of damages.[1] Such collateral undertakings are not necessarily connected with the principal contract, and cannot reasonably be presumed to have been taken into consideration when it was entered into.[2]

Agreement by the Contractor to receive Stock or Bonds in Payment of his Work.— Where the contractor agreed to receive the stock of the company at its par value, in payment of a portion of his compensation, to be made at a certain time, the company is not bound to seek him on the day of payment and tender the stock; and if it omits to do this, it is not liable for the par value of the stock, the market value of which is below par. Nor can the contractor, to sustain a claim for the par value, avail himself of acts of the directors changing the mode of payment of interest on the stock, or of amendments of the charter which were authorized by a clause therein reserving to the legis-

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deprived, by the refusal of the company to allow him to proceed with, and complete the work, was a proper subject of damages." See Ranger *v.* Great Western R. Co., 27 Eng. L. & Eq. 54.

[1] N. Y. and Harlem R. R. Co. *v.* Story, 6 Barb. 419.

[2] Fox *v.* Harding, 7 Cush. 516.

lature the power to make amendments, such changes not being provided against in the contract.[1] Where the company on a settlement with a contractor, agreed to pay him a certain sum in its shares or bonds at his election, the amount, however, to be retained by it as an indemnity against certain liabilities to which it was subject, and it made out and delivered to him a certificate of so many shares, with an agreement endorsed to exchange it for bonds, at his election, and the certificate was then returned to the company as such indemnity, it was held that the company was bound to deliver the bonds according to its agreement, notwithstanding its treasurer had entered the shares on its records as the property of the contractor, and they had in consequence been sold on execution as his property.[2]

Unlawful Contracts.—The company is not bound by an agreement founded on an unlawful consideration, or stipulating for the performance of an unlawful act.[3] It has been held in Pennsylvania, that a contract made by it, by which it agrees to give an express company the exclusive right to use the passenger trains of the railroad for express purposes for three years, is illegal and void.[4]

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[1] Moore *v.* Hudson River R. R. Co., 12 Barb. 156; Boody *v.* Rutland and Burlington R. R. Co., 24 Vt. 660; Barker *v.* Troy and Rutland R. R. Co., 27 Vt. 766.

[2] Jones *v.* Portsmouth and Concord R. R., 32 N. H., 544.

[3] See Mayor, &c., Norwich *v.* Norfolk R. Co, 30 Eng. L. & Eq. 120; Winch *v.* Birkenhead, &c., R. Co. 13 id. 506; Shrewsbury, &c., R. Co., 9 id. 394; Lindsay *v.* Great Northern R. Co., 19 id. 871.

[4] Sanford *v.* Catawissa, &c., R. R. Co., 24 Penn. State, 378.

An agreement between the company and other parties, the ultimate and probable tendency of which is to corrupt legislators, is void as against public policy. There is every reason to believe that a great many of this class of agreements have been entered into by railroad companies, when soliciting privileges from a legislative body. Agents have been employed to urge improper motives, and to exert corrupting influences on the members. This business, in the technical vocabulary of politicians, is termed "log-rolling," which is a misdemeanor at common law, punishable by indictment. A class of contracts has recently been denounced by the Supreme Court of the United States, in which secret agents are employed to carry a measure by personal appeals to members, from whom they agree to conceal their employment as agents, or do in fact voluntarily, without a provision to that effect, conceal it. A stipulation for high contingent compensation was considered contrary to public policy, as necessarily leading to the use of improper means, and the exercise of undue influence. The corporation has an undoubted right to urge its claims, and the reasons therefor, in any matter affecting its interests, by agents and attorneys, before legislative bodies and committees, as well as in courts of justice. But it is due to the legislators that these agents should appear in their true character, and that while deeply interested themselves in the success of the project, their advice or information should not be presented as that of unbiased parties, and thereby receive far greater confidence than it deserves. And it is also due to the public that they should not be

compensated in a manner, as by high contingent fees, which leads almost necessarily to their own demoralization, and to induce them to present unworthy considerations to legislators.[1]

[1] Marshall *v.* Baltimore and Ohio R. R. Co., 16 Howard, 314, 334–336. In this case, the plaintiff sued the defendant company to recover the sum of fifty thousand dollars, which he alleged, it owed him under a special contract, for his services in obtaining a law from the legislature of Virginia, granting the company a right of way through Virginia to the Ohio River; and the contract was held void. Grier, J.: "It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. Hence all contracts to evade the revenue laws are void. Persons entering into the marriage relation should be free from extraneous or deceptive influences; hence the law avoids all contracts to pay money for procuring a marriage. It is the interest of the State that all places of public trust should be filled by men of capacity and integrity, and that the appointing power should be shielded from influences which may prevent the best selection; hence the law annuls every contract for procuring the appointment or election of any person to an office. The pardoning power, committed to the executive, should be exercised as free from any improper bias or influence as the trial of the convict before the court; consequently, the law will not enforce a contract to pay money for soliciting petitions, or using influence to obtain a pardon. Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided.

"All persons whose interests may in any way be affected by any public or private act of the legislature, have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true characters, so that their arguments and representations, openly and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practicing deceit on the legislature. Advice or information flowing from the unbiased judgment of disinterested persons, will naturally be received with more confidence and less scrupulously examined than where the recommendations

The authorities in this country are uniform in denouncing such agreements as contrary to public policy; and while a contract for the services of an attorney or agent of a railroad company, to appear publicly in its behalf before a legislative body or committee and urge reasons for some act

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are known to be the result of pecuniary interest, or the arguments prompted and pressed by hope of a large contingent reward, and the agent 'stimulated to active partisanship by the strong lure of high profit.' Any attempts to deceive persons entrusted with the high functions of legislation, by secret combinations, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public.

"Legislators should act with a single eye to the true interest of the whole people, and courts of justice can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors.

"Influences secretly urged under false and covert pretences must necessarily operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts. Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself, are 'proper means;' and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or 'careless' members in favor of his bill. The use of such means and such agents will have the effect to subject the State governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector. Speculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capital of the Union, and of every State, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome,—'*omne Romæ venale.*'

"That the consequences we deprecate are not merely visionary, the Act of Congress of 1853, c. 81, 'to prevent frauds upon the treasury of the United States,' may be cited as legitimate evidence. This act annuls all champertous contracts with agents of private claims. 2d. It forbids all officers of the United States to be engaged as agents or attorneys for prosecuting claims, or from receiving any gratuity or interest in them in consideration of having aided or assisted in the prosecution of them, under penalty of fine and imprisonment in the penitentiary. 3d. It forbids members of Congress,

for its benefit, may be sustained, an agreement to compensate a party, especially with a contingent fee, for what are called *lobby services*, who is employed to use his personal influence with members for a measure, is illegal, and cannot be enforced against the company.[1] A secret agreement between parties, by which one of them who is a stockholder in a railroad company, is to receive a contingent compensation for his efforts in procuring it to make a certain location of its station, beneficial to the other party, tends injuriously to affect the public interests,

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under a like penalty, from acting as agents for any claim in consideration of pay or compensation, or from accepting any gratuity for the same. 4th. It subjects any person who shall attempt to bribe a member of Congress to punishment in the penitentiary, and the party accepting the bribe to the forfeiture of his office. If severity of legislation be any evidence of the practice of the offenses prohibited, it must be the duty of courts to take a firm stand, and discountenance, as against the policy of the law, any and every contract which may tend to introduce the offenses prohibited.

"Nor are these principles now advanced for the first time. Whenever similar cases have been brought to the notice of courts, they have received the same decision. Without examining them particularly, we would refer to the cases of Fuller *v.* Dame, 18 Pick. 470; Hatzfield *v.* Gulden, 7 Watts, 152; Clippinger *v.* Hephaugh, 5 W. & Serg. 315; Wood *v.* M'Cann, 6 Dana, 366; and Hunt *v.* Test, 8 Alabama, 719. The Commonwealth *v.* M'Callaghan, 2 Virginia Cases, 460. The sum of these cases is—1st. That all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, is void by the policy of the law. 2d. Secrecy, as to the character under which the agent or solicitor acts, tends to deception, and is immoral and fraudulent; and where the agent contracts to use secret influences, or voluntarily, without contract with his principal, uses such means, he cannot have the assistance of a court to recover compensation. 3d. That what, in the technical vocabulary of politicians, is termed 'log-rolling,' is a misdemeanor at common law, punishable by indictment."

[1] Wood *v.* M'Cann, 6 Dana, 366; Hunt *v.* Test, 8 Ala. 713; Clippinger *v.* Hephaugh, 5 W. & S. 315; Harris *v.* Roof, 10 Barb. 489; Gray *v.* Hook, 4 Comst. 456; Rose *v.* Truax, 21 Barb. 361.

and those of the corporation, which are concerned in having the best location adopted,—and is void, as contrary to public policy.[1]

Capacity of the Company to make Contracts. —The capacity of a railroad company, like that of other corporations, to bind itself by contracts, is determined by different principles from those which define the capacity of private persons. The power of an individual of full age and capacity, to make lawful contracts, is not limited except in a few peculiar cases. A corporation, on the other hand, being the creature of positive law, can only make such contracts as are expressly authorized by its charter, or are directly or indirectly necessary to carry the purposes of the charter into effect. A railroad company has, then, the power to make only those which it is specially authorized to make, and such as are usual and necessary in carrying on the business which it is empowered to conduct.[2] Nor is a corporation estopped from setting up its want of authority to enter into a contract which its agents have made in its behalf; for otherwise its powers might be indefinitely enlarged.[3] Nor is it responsi-

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[1] Fuller *v.* Dame, 18 Pick. 472.

[2] 2 Kent, Com. 298; Angell & Ames on Corp. ch. viii. §§ 256–275; Gov. & Co. of Copper Mines *v.* Fox, 3 Eng. L. and Eq. 420; Bank of Augusta *v.* Earle, 13 Peters, 587; Hart *v.* Missouri State Mut. F. & M. Ins. Co. 21 Missouri, 91; 1 Parsons on Cont. 120.

[3] Welland Canal Co. *v.* Hathaway, 8 Wend. 484; Penn. &c. Steam Nav. Co. *v.* Dandridge, 8 Gill & J. 319; Abbott *v.* Steam Packet Co. 1 Maryl. Ch. Dec. 542; Hood *v.* N. Y. and N. H. R. R. Co. 22 Conn. 508, 509. But see Weed *v.* S. and S. R. R. Co. 19 Wend. 537.

ble for the contracts of its agents not within its corporate powers, although ratified by its directors.[1]

But it may make any contracts naturally connected with, and incident to its business. It has authority to keep a warehouse, and make contracts for warehousing, as incidental to its business, without a special power.[2] As a general rule, a railroad company has all the powers which belong to corporations of the same class, unless there is something in its nature or the terms of its charter, or some general law, inconsistent with the exercise of such powers.[3] The power of a railroad company to contract for the transportation of persons and merchandise beyond its termini, when not authorized by statute, has been questioned in Connecticut.[4] It has, however, been affirmed in Vermont.[5]

A railroad company, under its common-law power to contract, may make a valid agreement to compensate an agent for obtaining subscriptions of stock. If the service is entirely outside of his employment by it for the month or year, an agreement for special compensation may, under certain circumstances be implied.[6] But a director or other officer cannot recover extra compensation merely on the ground

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[1] M'Cullough *v.* Moss, 5 Denio, 567; Hodges *v.* Buffalo, 2 id. 110; Boom *v.* Utica, 2 Barb. 104.

[2] Moses *v.* Boston and Maine R. R. 4 Foster, 82.

[3] Smith *v.* Nashua and Lowell R. R. 7 Foster, 94, 95.

[4] Hood *v.* N. Y. and N. H. R. R. Co. 22 Conn. 508, 509; Naugatuck R. R. Co. *v.* Waterbury Button Co. 24 id. 482.

[5] Noyes *v.* Rut. and Bur. R. R. Co. 27 Vt. 110.

[6] C. J. and C. R. R. Co. *v.* Clarkson, 7 Ind. 595.

that his acts, if done as such officer, were specially beneficial to the company.[1] A director is, however, not incapacitated from performing other services than those of a director, and receiving the usual compensation therefor. Where, by a vote of the directors, their compensation was fixed at a certain rate, it was held that the limitation was upon their compensation for such services only as could not have been performed by persons who were not directors, and not upon those which were not rendered by them in their official capacity.[2]

Decisions in England on the Capacity of the Company.—In England, the extent and limitations of the capacity of a railroad company to enter into contracts, especially as they concern its power to transfer its peculiar privileges, have been much discussed. According to the decisions, the agreements of the company, whether under seal or not, to engage in trading operations, however advantageous they may promise to be, to build branch railroads, to construct works outside of its authorized limits, to lease its road to another company, to delegate its privileges to other parties, or to form a partnership with another company for the share of profits made by both companies,—are *ultra vires* or beyond its power, and are void. The powers of a railroad company, it is considered, were conferred for, and are

[1] York and N. Midland R. Co. 19 Eng. L. and Eq. 370; Hodges *v.* Rut. and Bur. R. R. Co. (Supreme Ct. of Vt. Jan. 1857), 19 Law Rep. (March, 1857), p. 630.

[2] Henry *v.* Rut. and Bur. R. R. Co. 27 Vt. 435.

limited to the purposes for which it was established; and its funds must be used for those purposes only.[1] Such agreements are, in the first place, against public policy. The legislature, in the exercise of its discretion, clothes such bodies as it chooses to select, with such powers, involving duties to the public, as seem proper to it. But such agreements are an attempt to exercise powers which the legislature did not see fit to grant, or to part with statutory powers which the company has no power to part with, and to confer them on parties who have not been authorized by it to accept them. On grounds of public policy, they are therefore considered void, even if assented to by all the stockholders. It has also been suggested, that they are a violation of the rights of the shareholder, who may demand that the funds contributed by him shall be expended for the purposes designated by the act of incorporation, and who may have the company restrained from applying them to unauthorized purposes. But such a diversion of its funds, when authorized by an act of Parliament, can no longer be considered against public policy, or be resisted by a shareholder.[2] Thus,

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[1] Solomons *v.* Laing, 12 Beavan, 352; Mayor, &c., Norwich *v.* Norfolk Railway Co. 30 Eng. L. & Eq. 143.

[2] Beman *v.* Rufford, 6 Eng. L. and Eq. 106; 1 Simons, N. S. 550; East Anglian R. Co. *v.* Eastern Cos. R. Co. 7 Eng. L. and Eq. 505; Great Northern R. Co. *v.* Eastern Cos. R. Co. 12 id. 224; Winch *v.* Birkenhead R. Co. 13 id. 506; Gage *v.* Newmarket R. Co. 14 id. 57; 18 Q. B. 457; 83 E. C. L.; MacGregor *v.* Official Manager, &c., R. Co. 16 id. 180; Mayor, &c., Norwich *v.* Norfolk R. Co. 30 id. 120; 4 El. & Bl. 397; 82 E. C. L; Eastern R. Co. *v.* Hawkes, 35 Eng. L. and Eq. 8; 15 id. 367; South Yorkshire R. &c. Co. *v.* Great N. R. Co. 22 id. 534; Colman *v.* Eastern Cos. R. Co. 10 Beavan, 1.

where the defendant company covenanted with the plaintiff company to take a lease of the latter's railway, and to pay the costs of soliciting bills then pending in Parliament by which the plaintiffs were to be authorized to make extensions and branches of their railway, the defendants being sued for a breach of the covenant, it was held that the the defendants were not competent to make the agreement in question; that they were a corporation only for the purpose of making and maintaining the railway sanctioned by their act of incorporation, of which, being a public act, the plaintiffs must be presumed to have had notice; and that their funds could only be applied for the purposes provided therein, of which the subject of the contract in question was not one; and the defendants were held not liable for the costs of soliciting the bills, even with the assent of all the shareholders.[1]

The contract of the officers of one company to indemnify another for its application to Parliament for powers to work a railway, the last company agreeing to hand over the scheme to the first company in case of success, is void; as the first company had no power to apply its funds for that purpose, and the second company could not recover on account thereof.[2] So, the covenant of a company to construct a bridge outside of its prescribed limits, not being authorized by Parliament, was considered

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[1] East Anglian R. Co. *v.* Eastern Counties R. Co. 7 Eng. L. and Eq. 505.

[2] Mac Gregor *v.* Official Manager of Deal and Dover R. Co., 16 Eng. L. and Eq. 180.

void.[1] One company has no power to lease its privileges to another.[2] Nor can it make an agreement which amounts to such a lease. It cannot enter into an agreement delegating to another company all the powers conferred on it, or handing over the management of its line to another. Such an agreement is an unlawful attempt to effect that which Parliament alone can authorize, and equity will not interfere to promote its object, or to extend and facilitate its operation.[3] But an injunction may be obtained at the suit of a shareholder in one company, filing a bill on behalf of himself and all other shareholders therein to prevent its performance.[4] An agreement between companies to divide their profits as partners in certain proportions, is unlawful; being beyond the authority conferred by the incorporating act, and diverting the funds of the company from the channels appointed therein. It will not be enforced in equity at the suit of one company, although the company against which it is sought to be enforced has received the consideration for entering into it;[5] and equity will interfere at the instance

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[1] Mayor, &c. Norwich *v.* Norfolk R. Co., 30 Eng. L. and Eq. 120. The court was equally divided.

[2] East Anglian R. Co. *v.* Eastern Counties R. Co., 7 Eng. L. and Eq. 505; Winch *v.* Birkenhead, &c. R. Co., 13 id. 517.

[3] Great Northern R. Co. *v.* Eastern Counties R. Co., 12 Eng. L. and Eq. 224; Johnson *v.* Shrewsbury and Birmingham R. Co., 19 id. 584.

[4] Winch *v.* Birkenhead, Lancashire, and Cheshire Junc. R. Co., 13 Eng. L. and Eq. 506; Beman *v.* Rufford, 6 id. 106; Colman *v.* Eastern Cos. R. Co., 10 Beavan. 1; Salomons *v.* Laing, 12 id. 339.

[5] Shrewsbury and Birmingham R. Co. *v.* London and N. W. R. Co. 21 Eng. L. & Eq. 319.

of shareholders to prevent its performance.[1] Nor, it seems, can a railway company legally or equitably mortgage its undertaking, without authority of Parliament.[2] The affixing of a seal or of the common seal of the company to such agreements, will not give validity to them.[3] But they are legal when authorized by Parliament.[4]

There are contracts of a railroad company which it is a breach of trust for its officers and agents to enter into, but which may nevertheless bind it to innocent contracting parties. Thus, it has the right to buy fuel to furnish steam for its engines and for other purposes, but it has no right to traffic in fuel. If, then, it buys fuel of a party, he is not obliged to see to its legitimate application to the purposes of the charter, and he is entitled to the purchase-money, provided he was innocent of the intended misappropriation. It is sufficient, so far as he is concerned, if the fuel might be used by the company for an authorized purpose. So, where the company is authorized to buy land for extraordinary purposes, a party who agrees to sell land to it in good faith, and without knowledge of an intended breach of trust, is not bound to see that the land is strictly

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[1] Simpson *v.* Denison, 13 id. 359; but see Shrewsbury, &c. R. Co. *v.* London, &c. R. Co., 9 id. 394; 2 Mac. & Gord. 324.

[2] South Yorkshire R. and River Dun Co. *v.* Great Northern R. Co, 19 Eng. L. and Eq. 513; see Myatt *v.* St. Helens, &c. R. Co., 2 Eng. Rail Cas. 756.

[3] Shrewsbury, &c., R. Co. *v.* London, &c., R. Co., 21 Eng. L. and Eq. 319; South Yorkshire R., &c. Co. *v.* Great Northern R. Co., 22 id. 543.

[4] London and S. W. R. Co. *v.* S. E. R. Co., 20 Eng. L. and Eq. 417; Shrewsbury, &c. R. Co. *v.* Stone Valley R. Co., 21 id. 628.

necessary for those purposes, and may enforce the contract, although it is not so necessary.[1] But where the excess of authority appears by a public statute, or is known to the party, or is of a kind where he cannot be presumed to be innocent, as where the subject is and from its nature must be entirely foreign to the purposes of the charter, he cannot vindicate any rights growing out of it. Nor would it seem to be required that the contract should be directly necessary to carry out its purposes. If it furnishes the proper means, this may be sufficient. There could be no objection to a company manufacturing its own engines, and such an operation might much facilitate the purposes of its charter. A contract for the raw materials, and for the manufacture of these into engines, would then be within the scope of its authority. These are suggestions of principles; but it must be confessed the law on this point is not yet definitely decided.[2]

The English decisions, affirming the invalidity of the contracts of the company by which it attempts to transfer its corporate privileges and responsibilities, have been incidentally approved in this country.[3] Thus, the company owning a road has been held liable, under statutes imposing the duty to fence, for injuries to cattle in consequence of an omission to perform the duty, although they were inflicted by another company to which it

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[1] Eastern Cos. R. Co. *v.* Hawkes, 35 Eng. L. and Eq. 8.

[2] See Mayor, &c., Norwich *v.* Norfolk R. Co., 30 Eng. L. and Eq. 143, per Lord Campbell, C. J. But see opinion of Erle, J., id. p. 128.

[3] Troy and Rutland R. R. Co. *v.* Kerr, 17 Barb. 601; *ante*, ch. x. p. 244.

had leased the road.[1] So, also, a company organized under a charter from the legislature of Pennsylvania, is responsible for the infraction of a patent right respecting cars, although the entire stock was held by a connecting railroad company in Maryland which worked the road by the instrumentality of its own agents, motive-power, and cars.[2]

An arrangement between two companies to make a connecting line for goods and passengers, each one receiving freight and fare over both lines, and accounting to the other, the amount received being

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[1] Nelson *v.* Vt. and Canada R. R. Co. 26 Vt. 717.

[2] York and Maryland R. R. Co. *v.* Winans, 17 How. 30, 39. Campbell, J.: "The court charged the jury, that the road on which the infraction was committed was held under a Pennsylvania charter to the defendant in that court; that the transportation on the road was carried on by the Maryland corporation; and that the profits accruing from the use of the cars upon the road, that is, the profits of the infraction, are nominally divided between the two companies. That upon these facts, the plaintiff is entitled to recover against the present defendants, whether they are to be regarded as partners, or as principal, or agent of the Maryland corporation.

"The plaintiff complains here of this charge, for that the cars employed were not built by, and did not belong to, the company; that they were the exclusive property of the Maryland corporation; and that the agreement to divide the profits did not constitute a partnership, nor evince a relation of principal or agent to impose a liability. This conclusion implies, that the duties imposed upon the plaintiff by the charter, are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation, to enable it to provide the facilities to communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature. Beman *v.* Rafford, 1 Simons, N. S. 550; Winch *v.* B. and L. Railway Company, 13 L and E. 506."

divided according to the distance on the road of each company over which the goods or passengers were carried, was held not to amount to a transfer of corporate powers.[1]

The power of the company to embark in enterprises not contemplated in its charter when authorized by the legislature, and the rights of shareholders who refuse their consent to a change of its original purpose, have already been considered.[2]

Merger of the Contract.—The agreement of the company to pay damages to a land-owner is merged in a judgment against it for the same matter. Thus, where the company agreed to pay him four shillings per rod for building a fence on each side of its road through his land, and subsequently he obtained a judgment, which was satisfied, for the full amount assessed by the commissioners, who included in their award, besides a certain sum for land damages, an additional sum of one dollar per rod for the expense of building and keeping in repair the fences on the line of the road along his land,—this judgment was regarded as a merger of the contract; and the land-owner, having constructed the fence subsequently to the judgment, was held not entitled to recover the contract price or the difference between that and the value of the fence to him for farming purposes, although but for the

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[1] Columbus, Piqua, and Indiana R. R. Co. *v.* Ind. and Bellefontaine R. R. Co. 5 M'Lean, 450.

[2] *Ante*, ch. v. pp. 78–100.

contract he would have built for himself a more expensive fence.[1]

Evidence of the Performance of the Contract.—The original entries of days' work done in the construction of the road, made by a clerk or agent of the contractor, which it is the duty of such agent to make in the course of his ordinary business, is admissible if he is dead, or with his verification under oath if living, to prove the amount of work performed by the contractor for the company.[2] A railroad company in making a disclosure by its agent under a trustee process, is not concluded by entries on its books which are open to correction on proof of fraud or error.[3] In an action by the owner of goods against the company as a common carrier, a cartman employed by him to deliver the goods to the company is a competent witness for the owner, to prove the delivery, without a release; though the company offers to prove to the court that the goods were lost by the misconduct of the witness.[4] Where goods are entrusted to the company for transportation, its servants are competent witnesses to prove a delivery by it to the owner or his agents.[5]

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[1] Curtis *v.* Vt. Central R. R. Co. 23 Vt. 613.

[2] Merrill *v.* Ithaca and Owego R. R. Co., 16 Wend. 586.

[3] Bigelow *v.* York and Cumberland R. R. Co., 37 Maine, 320.

[4] Moses *v.* Boston and Maine R. R., 4 Foster, 71; see 1 Greenl. Ev., §§ 394–396, 416, 417.

[5] Draper *v.* Worcester and Norwich R. R. Corp., 11 Met. 505.

CHAPTER XVII.

LIABILITY OF THE COMPANY AS A COMMON CARRIER OF GOODS.

Railroad companies are invested with the powers and subject to the liabilities of common carriers of goods. This class of bailees is defined to be those who undertake for hire to transport from place to place, the goods of such as choose to employ them.[1] This rule designates with reasonable certainty a class of persons exercising a public employment, and held by the common law to a stringent liability which is not exacted of ordinary bailees. The law which fixes their rights and obligations, is of ancient origin. The owner, having placed his property in the exclusive possession and control of the carrier, and away from his own personal supervision, where he may easily be defrauded by the carrier's collusion with thieves and robbers, was regarded as a person worthy of special protection. The common carrier has the means of providing against losses resulting from ordinary dangers. The negligence or misconduct of himself or his servants, which may have produced the loss, are so exclusively within their

[1] Dwight *v.* Brewster, 1 Pick. 50; Elkins *v.* Boston and Maine R. R. Co., 3 Foster, 284.

own knowledge, and so difficult to be proved by the owner, that for wise reasons of public policy they are conclusively presumed. Accordingly, while in cases of loss other bailees are liable only for want of ordinary care and reasonable diligence, proportioned to the character of the bailment, common carriers are to a certain extent the insurers of goods intrusted to them, which they are bound to deliver agreeably to their engagements except when prevented by the act of God or the public enemies; and they may graduate their compensation according to this extraordinary responsibility.[1] The modern application of steam to the carriage of merchandise on land, has brought common carriers by railroad into existence, whose rights and obligations as well as the rights and obligations of the owners and consignees of goods intrusted to them, are to be determined by these well-established principles, subject to such modifications as the peculiar circumstances of the new mode of conveyance may render necessary and beneficial. In applying these principles to this new class of carriers, we are to consult the convenience and safety of the public, usage, and judicial precedent. That railroad companies are common carriers, and as such subject to their liabilities and entitled to their rights, is at once evident. They are authorized by law to make roads as highways, lay down tracks, place cars on them, and carry goods for hire. They are clothed with some extraordinary powers by the

[1] Thomas *v.* Boston and Prov. R. R. Co., 10 Met. 472.

government, and are designed to furnish to the public special facilities of transportation. They hold themselves out to the community, as being thus authorized. They advertise for freight, make known the terms of carriage, provide suitable vehicles, and select convenient places for receiving and delivering goods. Operated by steam and with fixed tracks and termini, they differ from other carriers by land; and this difference induces some modifications of the general law regulating the duties of common carriers, as will hereafter appear.[1] A railroad company is not a common carrier of goods by its passenger trains, not ordinarily used for that purpose, unless it so holds itself out to the public. In order to render it liable as such, its practice to act as a common carrier by such trains must be proved; and it is not sufficient, to show a single instance of its carrying goods by them and receiving compensation therefor.[2] But where its

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[1] Thomas *v.* Boston and Prov. R. R. Corp., 10 Met. 472; Norway Plains Co. *v.* Boston and Maine R. R., 1 Gray, 263. In an action against the company for non-delivery of goods received by it for transportation, the declaration should aver that it is a common carrier, and—to hold it as a bailee for hire—that it received or was to receive a compensation. Bristol *v.* Rensselaer and Saratoga R. R. Co., 9 Barb. 158.

[2] Elkins *v.* Boston and Maine R. R. Co., 3 Foster, 275, 286. Gilchrist, C. J.: "But in order to impose this extensive responsibility upon the defendants, it must appear that they have held themselves out to the world as common carriers by the passenger trains of cars upon their railway. Their object, however, was not the conveyance of goods by these trains, but the transportation of passengers. The cars upon the passenger trains are not provided with conveniences for the deposit of such articles as those now in question, during their transit. They may, however, be used for the carriage of goods, as well as of passengers if the proprietors see fit to do so, and in that case they become common carriers. Their position would then be

practice is to carry goods by its passenger trains, it is liable for them as a common carrier when they are received by an authorized agent, although by its private instructions to him, not known to the owner or the public, he is forbidden to take goods by passenger trains except on his own account.[1]

MEASURE OF LIABILITY.—Common carriers of goods, as already remarked, are excused only for such losses of goods entrusted to them as arise from the act of God or the public enemies; to which may be added losses arising from the default of the owner himself.

The *act of God* designates those causes which pro-

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similar to that of proprietors of stage coaches, who may, in addition to the transportation of passengers, become liable as common carriers, by usually carrying goods for hire.

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"In this case, the evidence shows that twice within two years, goods have been conveyed by the passenger trains, under the charge of some of the persons employed by the defendants. As the bill, however, did not state that they were carried by the passenger train, and as it does not appear, that it was understood they were to be thus transported, it is perhaps fair to suppose that they were carried on this train, for the temporary convenience of the company, and that they did not intend by so doing to hold themselves out to the world as common carriers by the passenger cars. The fact that the conductor had carried goods and eggs to market for an individual, as it does not appear that any compensation was paid therefor to the company, or that it was done by any authority, derived from them, cannot be considered as evidence of any thing beyond a private contract with the conductor, made for the accommodation and convenience of the owner of the property. There is one instance, of the transportation of goods by the passenger train, in the year 1846, for which freight was paid to the baggage master. But this, of itself, does not tend to prove that the defendants have been in the habit of thus transporting goods, or that it was practiced by their servants, in such a way that the company and the public must have understood that a custom existed to that effect."

[1] Mayall *v.* Boston and Maine R. R., 19 N. H. 122; Collins *v.* Boston and Maine R. R. 10 Cush. 508.

duce loss without the intervention of human agency. They are excepted, because they are beyond the control, and cannot be prevented by the foresight of the carrier, being such as earthquakes, lightning, and tempests. They are also not liable to be mistaken for his negligence or misconduct. But thefts, robberies, collisions, fire not occasioned by lightning, are not included in the exception, as in these cases the act of man intervenes. Inevitable accident does not excuse the carrier wherever human agency and co-operation mingle with the cause of the loss, although he may be able to show that no negligence of himself or his servants contributed to the loss, and that he could not have prevented it by any possible precaution.[1] The railroad company is liable for losses which are occasioned by defects in the machinery, or by the bursting of the boiler, or by collisions, although no negligence or misconduct can be attributed to its agents. It is bound to provide sufficient vehicles and machinery at its peril.[2]

Losses arising from the public enemies, are such as are caused by an invading army, against which the public authorities are bound to furnish protection. But this exception does not relieve the carrier from losses accruing from thefts, robberies, riots, or rebellions.[3]

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[1] Forward *v.* Pittard, 1 T. R. 27; M'Arthur *v.* Sears, 21 Wend. 190; Hall *v.* N. J. Steam Navigation Co., 15 Conn. 545.

[2] Camden and Amboy R. R. and Transportation Co. *v.* Burke, 13 Wend. 611; Sager *v.* Portsmouth L. P. and E. R. R. Co. 31 Maine, 228; Plaisted *v.* B. and K. Steam Navigation Co. 27 Maine, 132.

[3] Thomas *v.* Boston and Prov. R. R. Co. 10 Met. 472.

The principle on which the extraordinary responsibility of common carriers is founded, does not require that this responsibility shall be extended to the *time* occupied in the transportation. They are therefore not liable for delay when they have exercised due diligence, and have been interrupted by causes beyond their control. But they are bound to exercise ordinary forecast in avoiding obstructions, to use the proper means for removing them, and after they cease to operate, to exercise due diligence in completing the transportation, and in the mean time to take proper care of the goods while detained. The obligation of the company, as respects the period of delivery, is usually stated as being to deliver within a reasonable time.[1] This principle has been applied to the interpretation of a statute requiring railroad companies "to furnish sufficient accommodation for the transportation of all such passengers and property as shall within a reasonable time previous thereto be offered for transportation at the place of starting, and the junctions of other railroads." The company, which is properly provided with the means of transportation, is not liable under such a statute for a delay caused by an accumulation of freight offered to it, exceeding its ability to carry, where it makes no undue preference among owners, and carries the freight offered as soon as it can, consistently with its accommodations and

[1] Parsons *v.* Hardy, 14 Wend. 215; Bowman *v.* Teall, 23 id. 307; Broadwell *v.* Butler, 6 M'Lean, 296; Scoville *v.* Griffith, 2 Kernan, 509; Nettles *v.* S. C. R. R. Co. 7 Rich. 190; Lipford *v.* Charlotte and S. C. R. R. Co. id. 409; Hughes *v.* Great Western R. Co. 25 Eng. L. and Eq. 347.

its duty to forward freight previously offered.[1] But if the company enters into an express contract to deliver within a specified time, it is liable in damages for not delivering within that time, although the delay was occasioned by an inevitable necessity.[2]

The carrier is not responsible for losses arising from the natural decay of perishable articles, or from the fermentation or evaporation of liquors, where he has exercised reasonable care in adopting precautionary measures to prevent loss.[3] Nor is he responsible where the owner's negligence has occasioned the loss, as where the goods were not properly marked or packed.[4] If the carrier accepts goods marked, he is presumed thereby to agree to carry them in the manner and position designated. Where a box was marked "Glass, with care, this side up," and the direction was not followed, whereby a bottle within containing oil was broken, the carrier was held liable.[5] So, where the owner of a horse requested the agent of a railroad company to have him carried in a close car, but he was carried in an open car on a cold day, whereby he suffered serious injury from exposure to the cold, the company was held liable.[6]

If the owner is guilty of any fraud or imposition

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[1] Wibert *v.* N. Y. and Erie R. R. Co. 2 Kernan, 245; 19 Barb. 36. See Laws of New York, 1850, ch. 140, § 36.

[2] Harmony *v.* Bingham, 2 Kernan, 99; 1 Duer, 209.

[3] Farrar *v.* Adams, Bull. N. P. 69; Clark *v.* Barnwell, 12 Howard, 272.

[4] Elkins *v.* Boston and Maine R. R. Co. 3 Foster, 275; The Huntress, Davies, 92; Hastings *v.* Pepper, 11 Pick. 44; Cole *v.* Goodwin, 19 Wend. 263.

[5] Hastings *v.* Pepper, 11 Pick. 41.

[6] Sager *v.* Portsmouth R. R. Co. 31 Maine, 228.

upon the company, as by attempting to conceal the value or nature of the goods, or to delude it by his assumed carelessness in treating the box in which they are inclosed as of little value, or misrepresents the box as containing household goods when it contains articles of much greater value, he cannot recover of the company for the loss of the goods in relation to which the fraud was practiced or the misrepresentation made. But unless inquired of by the company as to the value, however great it may be, he is not bound to declare it.[1]

PUBLIC DUTY TO CARRY FOR ALL PERSONS.—A common carrier holds himself out to the public as ready to carry the goods of all persons indifferently, for a reasonable compensation. The law imposes on him a public duty to do what he has assumed to be ready to perform; and if he refuses, without good reason, to carry goods offered to him in the course of his employment, having the means of carrying them and the compensation being tendered to him, he is liable to an action for the breach of this duty.[2] But the common carrier may lawfully refuse to receive goods offered for transportation when his means of

[1] Relf *v.* Rapp, 3 W. & S. 25; Camden and Amboy R. R. Co. *v.* Baldauf, 16 Penn. State, 78; Coxe *v.* Heisley, 19 id. 243; Jones *v.* Voorhees, 10 Ohio, 151; Phillips *v.* Earle, 8 Pick. 182; Allen *v.* Sewall, 6 Wend. 349; 2 id. 340; Doyle *v.* Kiser, 6 Ind. 242.

[2] N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. 382; The Huntress, Davies, 86; Dorr *v.* N. J. Steam Nav. Co. 1 Kernan, 492; Johnson *v.* Midland R. Co. 4 Exch. 372, 373; Crouch *v* London and N. W. R. Co., 14 C. B. 255; 78 E. C. L.; 25 Eng. L. and Eq. 287, where the rule was held to apply, although one terminus of the route is beyond the realm.

carrying them are exhausted.[1] So, also, he may refuse to accept goods, which the person offering has no right to intrust to him for that purpose.[2]

A railroad company was required in its act of incorporation to transport, in the order in which it shall be requested, "all goods, wares, minerals, and merchandise, or other articles, which shall have been deposited at the company's depots or convenient to the said road, so that equal and impartial justice shall be done to all owners of property by the said company, who shall pay or tender to the officers of the company the toll and freight due under the act on the goods, wares, minerals, and merchandise, or other articles, which they may wish transported." The company entered into a contract with one express company for three years, by which it was "to have the exclusive right of said railroad for all express purposes, at the various stations on said road, in so far as the said railroad company control the matter, and shall continue so to control the same; provided, nevertheless, that nothing in this contract shall be construed to restrain the said railroad company from carrying any freight, baggage or passengers at their advertised rates, for any individual or individuals, company or companies whatever." It was decided that the company, as a common carrier, had public duties to perform, and was liable for refusing without

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[1] Morse *v.* Slue, 1 Vent. 190, 238; Lane *v.* Cotton, 1 Ld. Ray. 646, 652; Story on Bailments, § 508; Wibert *v.* N. Y. and Erie R. R. Co. 2 Kernan, 245.

[2] Robinson *v.* Baker, 5 Cush. 137; Fitch *v.* Newberry, 1 Doug. (Mich.) 1.

sufficient cause to carry all goods offered for transportation; that being authorized to take private property for public uses, it was designed for the public accommodation, and could not confer exclusive privileges on one man or set of men; that an express company engaged in the business of transporting small packages, has an equal right with the individual owners of packages, to the benefit of the railroad; and that the aforesaid contract securing to one express company an exclusive right of transportation in the passenger trains, was illegal and void.[1]

Limitation of Liability by Special Contract or Notice.—Railroad companies, like other common carriers, have attempted to limit their liability as *quasi* insurers, by notices and express contracts. Their power to do this has been severely contested; but to a certain extent, it has been admitted in most of the states where it has come before the courts. Under what circumstances this limitation will take effect, will now be the subject of examination. Common carriers, unlike other bailees except inn-keepers, are said to exercise a public employment, and to be under certain peculiar duties independent of their contract. Generally, they may limit their business to a particular kind of goods. An express-man, who

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[1] Sandford *v.* R. R. Co. 24 Penn. State, 378. As to the rights of express companies in England, under statutes in relation to the rates of carriage by railroad companies, see Pickford *v.* Grand Junct. R. Co. 10 M. & W. 399; Parker *v.* Great Western R. Co. 11 C. B. 545; S. C. 8 Eng. L. and Eq. 426; Edwards *v.* Same, 11 C. B. 588; S. C. 8 Eng. L. and Eq. 447; Crouch *v.* Great N. R. Co. 34 id. 573.

is accustomed to carry only small packages, is not obliged to carry bales of cotton or bars of iron. They have also the right to leave the business when they choose. Railroad companies, which owe special duties to the public in consideration of the special privileges they have received, may not have the same liberty in this respect as individual common carriers. But all common carriers, individual or corporate, having fixed the course of their employment are, as long as it remains so, bound to carry goods offered them within the same, except for some special reasons of inability or great inconvenience. Having assumed this relation to the public, they are not at liberty to decline its duties and responsibilities as fixed and defined by law. They are therefore bound, not only to accept the goods so offered to them, but to accept them under the liability imposed on them by the law,—which is, to deliver them safely at all events, unless prevented by the act of God or the public enemies. For this extraordinary liability as *quasi* insurers, they are accustomed and are authorized to exact an increased compensation, greater than would be sufficient to remunerate an ordinary bailee responsible only for want of reasonable diligence. This being so, a common carrier has no right to refuse goods, offered for carriage at the proper time and place on tender of the usual reasonable compensation, unless the owner will consent to his receiving them under a reduced liability; and the owner can insist on his receiving the goods under all the risks and responsibilities which the law annexes to his employment. If a public notice—viz.

"All goods carried by A. B. will be at the risk of the owner"—posted up by the carrier and brought home to the owner, is competent to relieve him of this extraordinary liability, it can only be on the ground that the owner has, without any positive act of his own and without any consideration, relinquished a valuable right. The presumption, on the other hand, is quite as strong that the owner intended to insist on his rights as that he assented to their qualification.[1] It is accordingly held by the Supreme Court of the United States, and by the courts of New Hampshire, New York, Ohio, and Georgia, that such a general notice, brought home to the owner, does not limit the carrier's liability.[2]

[1] "The burden of proof," said Nelson, J., in delivering the opinion of the Supreme Court of the United States, "lies on the carrier; and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties." N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. 383.

[2] New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 382, 383; Moses *v.* Boston and Maine Railroad, 4 Foster, 71; Moses *v.* Boston and Maine Railroad, 32 N. H. 535; Kimball *v.* Rut. and Bur. R. R. Co., 26 Vt. 256, 257; Camden and Amboy Railroad and Transportation Co. *v.* Burke, 13 Wend. 611; Hollister *v.* Nowlen, 19 id. 234; Cole *v.* Goodwin, id. 251; Clark *v.* Faxton, 21 id. 153; Camden and Amboy Railroad and Transportation Co. *v.* Belknap, id. 354; Slocum *v.* Fairchild, 7 Hill, 292; Dorr *v.* N. J. Steam Nav. Co., 4 Sandf. 136; 1 Kernan, 485; Jones *v.* Voorhies, 10 Ohio, 145; Davidson *v.* Graham, 2 Ohio State, 131; Graham *v.* Davis, 4 id. 376; Fish *v.* Chapman, 2 Kelly (Geo.) 349; Logan *v.* Pontchar. R. R. Co., 11 Rob. (La.) 24; Baldwin *v.* Collins, 9 id. 468; Michigan Central R. R. Co. *v.* Ward, 2 Gibbs (Mich.) 545. In Vermont it is said, "A mere general notice, when brought to the knowledge of the owner, ought not, perhaps, to have that effect, unless there is very clear proof that the owner expressly assented to that as forming the basis of the contract." Farmers and Mechanics' Bank *v.* Champlain Transportation Co., 23 Vt. 206.

On the other hand, such notices are in Pennsylvania allowed to limit the common carrier's liability; but it is there held that they must be explicit and unambiguous, and brought to the knowledge of the owner; and where the passenger could not read the English language, a notice in that language printed on his ticket was held not sufficient proof of knowledge.[1] There are decisions in Maine which imply that such general notices may have effect; but the opinion was unnecessary in both cases: in the first, the notice being a qualified one, and also of no effect because not made known to the owner; and in the second, there being a special contract. In that State, therefore, the question may still be regarded as unsettled.[2]

It does not, however, follow, because such general notices, from which no contract can be reasonably implied, are of no avail to restrict the common carrier's liability, that this liability cannot be restricted by an express contract between the carrier and the owner. The stringent liability of the common carrier is designed for the protection of the owner. The preservation of his property, the safe custody, carriage, and delivery of the goods, are its object; and these concern him alone, and not the public. When he enters into an express contract, there is no reason why he should not be bound by it. It is an

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[1] Camden and Amboy Railroad Co. *v.* Baldauf, 16 Penn. State, 67; Bingham *v.* Rogers, 6 W. & S. 495; Laing *v.* Colder, 8 Barr, 378.

[2] Bean *v.* Green, 3 Fairfield, 422; Sager *v.* Portsmouth S. and P. and E. R. R. Co., 31 Maine, 228; see Barney *v.* Prentiss, 4 Har. & J. 317; Thomas *v.* Boston and Providence R. R. Corp., 10 Met. 472.

established maxim of the common law, that any man may renounce a benefit or waive a privilege which the law has conferred upon him; subject only to the qualification, that he cannot renounce that which has been introduced for the benefit of a third party. Thus, a debtor may waive the pleas of bankruptcy, infancy, or the statute of limitations; and an indorser of a promissory note may waive demand and notice, but not so as to prejudice antecedent parties.[1] This principle applies here, where the extraordinary liability of the common carrier is the privilege of the owner, and may be waived by him. The delivery of goods to the carrier with knowledge of a general notice is not such a waiver, but an express contract may have that effect. There is nothing in the relations of the parties which renders them incompetent to make such a contract; but on the other hand their capacity seems to be justified by these relations. The common carrier may graduate his compensation according to his liability—charging more when liable as *quasi* insurer, and less when liable only for actual negligence. The owner may desire to effect his insurance elsewhere, and to contract with the carrier for a less compensation in consideration of a reduced liability. There is no incapacity of the parties to contract. The subject-matter consists of rights of property which concern no third party. The owner is under no duress—having the right to

[1] Quilibet potest renunciare juri pro se introducto.—Broome's Legal Maxims, 547.

insist on the carriage of his goods by the carrier under the liabilities imposed by the law.

There is no public policy which prohibits the common carrier being relieved from his extraordinary liability as *quasi* insurer, by express contract. Public policy would not justify a contract of impunity for his fraud or crime; and, perhaps, not for any negligence. But at common law, he is liable for losses by accident, mistake, and many inevitable occurrences, against which no human vigilance or foresight can provide, and not falling within the excepted perils of the act of God or the public enemies,—such as losses by robbers and mobs, accidental fires, mistaking of lights, and the agency of propelling power in steam engines, without any actual fault on the part of the carrier. A stipulation for exemption from loss not occasioned by his negligence or default, would not be providing impunity for misconduct, or induce habits of carelessness and indifference prejudicial to other members of the community who have not waived their common-law rights.

That a common carrier may limit his liability by an express contract with the owner, has been decided in Maine, New Hampshire, Vermont, New York, Pennsylvania, Ohio, Kentucky, South Carolina, and by the Supreme Court of the United States. The contrary doctrine was held in Georgia, on the authority of decisions in New York which are now overruled.[1]

[1] Sager *v.* Portsmouth S. and P. and E. R. R. Co., 31 Maine 228; Moses *v.* Boston and Maine R. R., 4 Foster, 90; Farmers and Mechanics' Bank *v.* Champlain Transportation Co., 23 Vt. 205; Kimball *v.* Rut. and Bur. R. R. Co.,

The express contract may be written or oral. It ordinarily consists of a bill of lading or receipt, containing the limitation, which is delivered to the owner, and being accepted by him, becomes a contract between the parties.[1]

A general notice on a passenger's ticket that his luggage is at his own risk, might not have the same effect. His passage-money covers both the carriage of his person and of his luggage. Its prepayment, of which the ticket is the evidence, is sometimes necessary to secure a seat, in many cases reduces the price, and is in most cases convenient. These circumstances and others render it impracticable for a passenger to decline a ticket which contains a clause of limitation, and should prevent its acceptance being construed as a contract for such limitation. In the cases in which such contracts have been allowed, except in Maine and Pennsylvania where effect is given to general notices, the contract was uniformly contained in a bill of lading, and this question did not arise.

A special contract to the effect that the goods

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26 id. 247; Parsons *v.* Monteath, 13 Barb. 353; Moore *v.* Evans, 14 id. 524; Dorr *v.* N. J. Steam Nav. Co., 1 Kernan, 485; S. C., 4 Sandf. 136; Mercantile Mnt. Ins. Co. *v.* Chase, 1 E. D. Smith, 115; Beckman *v.* Shouse, 5 Rawle, 189; Atwood *v.* Reliance Trans. Co., 9 Watts, 87; Bingham *v.* Shouse, 6 Watts & S. 495; Laing *v.* Colder, 8 Barr, 479; Davidson *v.* Graham, 2 Ohio State, 131; Graham *v.* Davis, 4 id. 362; Reno *v.* Hogan, 12 B. Monroe, 63; Swindler *v.* Hilliard, 2 Rich. 286; N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 Howard, 381–385; *contra*, Fish *v.* Chapman, 2 Geo. 349. It is held in Michigan that a railroad company is bound to continue a common carrier under the liabilities incident to the employment, and cannot modify them by any stipulations. Michigan Central R. R. Co. *v.* Ward, 2 Gibbs, 538.

[1] See Walker *v.* York and Midland R. Co., 22 Eng. L. and Eq. 315; York, Newcastle and Berwick R. Co. *v.* Crisp, 24 id. 396.

are at the owner's risk, or excluding certain enumerated risks, does not relieve the comm n carrier from the consequences of the negligence, fraud, or crime of himself or of his servants, and according to the current of the authorities he is, notwithstanding such a contract, still bound to exercise at least the ordinary care incumbent on other bailees, and is liable for a loss occasioned by his negligence.[1] In Ohio, notwithstanding such a special contract, he is still liable for losses arising from a neglect of that high degree of diligence enjoined on him by his public employment, which still remains greater than that required of an ordinary bailee for hire.[2] On the whole, the power of the common carrier by a special contract to relieve himself from liability for any losses, but those which are the result of inevitable accident, and with which his own default did not combine, cannot well be sustained on grounds of public policy.

Qualified notices published in the newspapers, or posted up in the common carrier's office, as well as printed on the passenger's ticket, may be allowed to impose conditions on the owner of the goods or luggage, when brought to his knowledge. The carrier has a right to inform himself of the value of the goods so as to graduate the care he should apply, and the compensation he is entitled to receive.

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[1] Atwood *v.* Reliance Trans. Co., 9 Watts, 87; Reno *v.* Hogan, 12 B. Monroe, 63; Parsons *v.* Monteath, 13 Barb. 360; N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. 383; Sager *v.* Portsmouth, S. and P. and E. R. R. Co., 31 Maine, 228; Slocum *v.* Fairchild, 7 Hill, 292; Swindler *v.* Hilliard, 2 Rich. 286; Camden and Amboy R. R. Co. *v.* Baldauf, 16 Penn. State, 671.

[2] Davidson *v.* Graham, 2 Ohio State, 131; Graham *v.* Davis, 4 id. 362.

The owner, when inquired of in these respects, is bound to return a true answer, or his fraudulent conduct will bar his recovery for a loss.[1] So, if the carrier publishes a notice that he will not be responsible for goods beyond a certain amount or of a certain kind or value without notice thereof, and payment of additional freight, such a notice is a reasonable method of obtaining information, which he is entitled to; and if brought home to the owners is, by the current of American authorities, sufficient to excuse the carrier for losses of the kind and amount excluded, in the absence of his own negligence.[2] But such notices must be brought to the knowledge of the passenger before commencing his journey, in order to affect his rights.[3] Thus, if a notice is printed in a language with which he is unacquainted, the fact that it is printed upon a ticket which he receives does prove his knowledge of it.[4] So also, if the notice is printed on the back of a passenger's ticket, and detached from the part which ordinarily contains all that it is material for him to know, there is no legal presumption that at the time of receiving the ticket, and before the train left the station, he had knowl-

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[1] Allen *v.* Sewall, 2 Wend. 340; 6 id. 349; Phillips *v.* Earle, 8 Pick. 182; Coxe *v.* Heisley, 19 Penn. State, 243; Camden and Amboy R. R. Co. *v.* Baldauf, 16 id. 78; Doyle *v.* Keiser, 6 Ind. 242; Jones *v.* Voorhees, 10 Ohio, 151; Story on Bail. §§ 565–570.

[2] Orange Co. Bank *v.* Brown, 9 Wend. 85; Moses *v.* Boston and Maine R. R., 4 Foster, 71; Farmers and Mechanies' Bank *v.* Champlain Transportation Co., 23 Vt. 206; Baldwin *v.* Collins, 9 Rob. (La.) 468; Brown *v.* Eastern R. R. Co., 11 Cush. 97.

[3] Sanford *v.* Housatonic R. R. Co., 11 Cush. 155.

[4] Camden and Amboy R. R. Co. *v.* Baldauf, 16 Penn. State, 67.

edge of the conditions and limitations imposed in the notice on the transportation of luggage; and whether he was informed of the contents before starting on his journey, is a question of fact for the jury.[1]

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[1] Brown *v.* Eastern R. R Co., 11 Cush. 97. In an action against the company for luggage lost while in its possession, it appeared that the plaintiff received from it a ticket on the face of which were printed the following words: "Not transferable. This ticket entitles to a passage in the first morning train of this day only, via the Eastern, the Portland, Saco, and Portsmouth, the Atlantic and St. Lawrence, the Kennebec and Portland Railroads to Brunswick or Bath. At Bath, steamboats connect with Richmond, Gardiner, Hallowell and Augusta. Fare paid to Bath. One dollar will be refunded to the holder of this ticket by the conductor on the Kennebec and Portland Railroad." On the back of the ticket were the following words: "Notice. Passengers are not allowed to take, nor will these companies be responsible for baggage if it exceed fifty dollars in value, unless freight on any addition thereto be paid in advance; and this notice forms part of all contracts for transportation of passengers and their effects." The jury were instructed at the trial that the plaintiff's taking the ticket raised no legal presumption that she read the printed matter; that it was a question of fact whether she knew the contents before she started on her journey, and that if she did not read it until she was on her way, her rights were not affected by it. Dewey, J., delivering the opinion of the court, said, "The limitation and notice thereof were in the present instance attempted to be established under these circumstances. The traveler, a female, had delivered her trunks to the baggage-master of the defendants, to be carried to Freeport. They were received by him without any notice of any limitation of liability, and marked for their proper destination. Subsequently, the owner applied for her passage-ticket to Freeport, and was informed that they did not sell tickets to Freeport; but that she could buy one for Brunswick, a place more remote, with the privilege of stopping at Freeport, and having one dollar refunded; and that thereupon she paid three dollars, and received a ticket for Brunswick. This ticket had on its face the route, and various railroads to be passed over, and the notice that one dollar would be refunded to those stopping at Freeport. There was no notice on the face of the ticket of any conditions or limitations as to transporting the baggage of passengers. The only notice as to that, was on the back side of the ticket. No direct notice was given by the ticket-vendor, nor was any request made to her to read the limitations and conditions stated on the back of the ticket. It was admitted that there was no actual

DELIVERY TO THE COMPANY.—The liability of a railroad company commences when the goods have been delivered to its authorized agents for transportation. This delivery is ordinarily made at its stations to a freight-agent or station-master. But if it is its custom to receive goods at some other place, as at an office or wharf not immediately adjoining its track, its liability commences when delivery has been made to it according to its custom.[1]

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or constructive notice of the limitation of the carrier's liability, unless the same was derived from the ticket received by the plaintiff. This being so, the case was in our opinion properly put to the jury, and their verdict for the plaintiff may well be sustained. A mere passenger-ticket in the form in general use would not naturally induce to the minute reading of its contents. The party receiving it might well suppose that it was a mere check, signifying that the party had paid his passage to the place indicated on his ticket. But if it be correct to hold that if this limitation had been stated on the face of the ticket, and in connection with the name of the place to which the party was to be carried, and so might be presumed to have been read, and therefore binding upon the person receiving the ticket; yet, nevertheless, a statement or notice to this effect, placed on the back of the ticket, and detached from what ordinarily contains all that is material to the passenger, would not raise a legal presumption that the party at the time of receiving the ticket and before the train had left the station, had knowledge of the limitation or conditions which the carrier had attached to the transportation of the baggage of passengers. The manner adopted by the defendants to give notice of such limitation and conditions, fails to furnish that certain information or knowledge which must be brought home to the passenger to exonerate the carrier from the full common-law liability as to such baggage, and therefore leaves the passenger the right to recur to the carrier for the damages he may sustain in the loss of his baggage, irrespective of the limitation."

[1] Burrell *v.* North, 2 Car. & Kir. 680; Phillips *v.* Earle, 8 Pick. 182; Merriam *v.* H. and N. H. R. R. Co. 20 Conn. 354; Camden and Amboy R. R. Co. *v.* Belknap, 21 Wend. 354; Logan *v.* Pontchartrain R. R. Co. 11 Rob. (La.) 24; Pickford *v.* Grand Junction R. Co. 12 M. & W. 766.

The proprietors of a railroad who receive passengers and commence their carriage at the station of another road, are bound to have a servant there to take charge of luggage, until it is placed in their cars; and if it is

As a general rule, a delivery does not take effect, so as to render the company responsible for a loss, by a deposit of the goods where the company are accustomed to receive them, until such deposit is made known to the authorized agents of the company.[1] This rule may be varied by the agreement or usage of the company. If it agrees that goods may be deposited for transportation at a particular place, without express notice to its agents, such deposit is constructive notice to the company, and constitutes an acceptance by it. So, where its usage is to receive for transportation goods left at a particular place without any express notice of the deposit, its agreement may be implied to waive the notice and consent to such a deposit as delivery. Thus, where the Hartford and New Haven Railroad Company was accustomed to receive goods at its private dock in New York, which was in its own exclusive use for the purpose of receiving goods to be transported, without its agents being notified of the deposit, the company was held liable as a common carrier for the loss of the goods after such a deposit without any special notice thereof to its agents.[2]

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the custom of the baggage-master of the station, in the absence of such servant, to receive and take charge of luggage in his stead, the proprietors will be responsible for luggage so delivered to him. Jordan *v.* Fall River R. R. Co. 5 Cush. 69.

[1] Selway *v.* Hollaway, 1 Ld. Ray. 46; Buckman *v.* Levi, 3 Camp. 414; Packard *v.* Getman, 6 Cowen, 75; Trowbridge *v.* Chapin, 23 Conn. 595; Wright *v.* Caldwell, 3 Mich. 51; Slim *v.* Great Northern R. Co. 14 C. B. 647; 78 E. C. L.

[2] Merriam *v.* H. and N. H. R. R. Co. 20 Conn. 354. It was held also that the fact that the owner was influenced by the usage need not be

The company may, according to some authorities, make itself liable for goods before reaching its terminus and while in the charge of another company,

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proved, but was to be presumed. On the question of what constitutes acceptance by the company, Storrs, J., said,—"A contract with a common carrier for the transportation of property, being one of bailment, it is necessary, in order to charge him for its loss, that it be delivered to and accepted by him for that purpose. But such acceptance may be either actual or constructive. The general rule is, that it must be delivered into the hands of the carrier himself, or of his servant, or some person authorized by him to receive it; and if it is merely deposited in the yard of an inn, or upon a wharf to which the carrier resorts, or is placed in the carrier's cart, vessel, or carriage, without the knowledge and acceptance of the carrier, his servants or agents, there would be no bailment or delivery of the property, and he, consequently, could not be made responsible for its loss. Addison on Cont. 809. But this rule is subject to any conventional arrangement between the parties in regard to the mode of delivery, and prevails only where there is no such arrangement. It is competent for them to make such stipulations on the subject as they see fit; and when made, they, and not the general law, are to govern. If therefore, they agree that the property may be deposited for transportation at any particular place, and without any express notice to the carrier, such deposit merely would be a sufficient delivery. So if, in this case the defendants had not agreed to dispense with express notice of the delivery of the property on their dock, actual notice thereof to them would have been necessary; but if there was such an agreement, the deposit of it there, merely, would amount to constructive notice to the defendants, and constitute an acceptance of it by them. And we have no doubt, that the proof by the plaintiff of a constant and habitual practice and usage of the defendants to receive property at their dock for transportation, in the manner in which it was deposited by the plaintiff, and without any special notice of such deposit, was competent, and in this case sufficient, to show a public offer by the defendants, to receive property for that purpose, in that mode; and that the delivery of it there, accordingly, by the plaintiff, in pursuance of such offer should be deemed a compliance with it on his part; and so to constitute an agreement between the parties, by the terms of which the property, if so deposited, should be considered as delivered to the defendants, without any further notice. Such practice and usage were tantamount to an open declaration, a public advertisement by the defendants, that such delivery should, of itself, be deemed an acceptance of it by them, for the purpose of transportation; and to permit them to set up against those who had been thereby induced to omit it, the formality of an express notice, which had thus been waived,

where the two companies conduct business as partners, or have made a joint contract for the transportation of the goods.[1]

In order to charge the company as a common carrier, the goods must be accepted in that capacity for carriage. When received for storage merely, while so held, it would not be liable otherwise than as warehouseman. If the consignor desired the goods to remain in its warehouse for some days, or until further instructions, or a passenger desired the same privilege for his luggage, the company is liable as a warehouseman, and not as a common carrier, for a loss, while the goods are so deposited for the convenience and at the order of the owner. But it is responsible as a common carrier for injuries to those which have been delivered to it for transportation, while they are deposited in its warehouse for its own convenience, and awaiting its earliest practicable means of conveyance. In such a case, the storage is merely accessory to the carriage, and the company is liable as a common carrier for them.[2] Thus, where

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would be sanctioning the greatest injustice, and the most palpable fraud. The present case is precisely analogous to that of the deposit of a letter for transportation in the letter-box of a post-office, or foreign packet-vessel, and to that of a deposit of articles for carriage in the public box provided for that purpose, in one of our express offices; where it would surely not be claimed, that such a delivery would not be complete without actual notice thereof to the head of these establishments or their agents."

[1] Bradford *v.* S. C. R. R. Co. 7 Rich. 201; Hart *v.* Rensselaer and Saratoga R. R. Co. 4 Selden, 37; Noyes *v.* Rut. and Bur. R. R. Co. 27 Vt. 110. See *post* p. 451–458.

[2] Platt *v.* Hibbard, 7 Cowen, 497; Spade *v.* Hudson River R. R. Co. 16 Barb. 383; Blossom *v.* Griffin, 3 Kernan, 569; Clarke *v.* Needles, 25 Penn. State, 338; Moses *v.* Boston and Maine R. R. Co. 4 Foster, 71. In this last case, the cartman who delivered the goods to the company, without being

a person arrived in the city of New York about noon, and intended to take passage in the next train of a railroad company, which did not leave till the next day, having delivered his luggage at its office to its agents, where they were accustomed to receive that of persons intending to take the next conveyance, it was held to be liable as a common carrier for the luggage as soon as it was so received.[1]

The goods must be delivered to the custody and possession of the company, in order to fasten on it the liability of a common carrier. While the owner retains them in his own, he alone must sustain the damage to which his negligence may have contributed.[2] Thus, where a passenger kept his overcoat on his seat in the car, and forgetting to take it when he left the car, it was afterwards stolen, the company was not liable for the loss. Being an article of wearing apparel in present use, and in the care and keeping of the traveler for that purpose, it is to be regarded in the same light as if it had been on his person.[3] The same rule would, doubtless, be applied to the carpet-bags or valises which passengers are accustomed to keep with them in the cars for their

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authorized to give such instructions, told its agent that the owner did not wish the goods to be sent till further orders. Before that, the goods of the owner had uniformly been sent to the company without instructions. It was held that the instructions did not bind the owner, and while the company kept back the goods it was liable as a common carrier.

[1] Camden and Amboy R. R. Co. *v.* Belknap, 21 Wend. 354.

[2] East India Co. *v.* Pullen, 1 Strange, 690; Brind *v.* Dale, 8 Car. & P. 207; S. C., 2 M. & W. 775.

[3] Tower *v.* Utica and Schenectady R. R. Co. 7 Hill, 47; Cohen *v.* Frost. 2 Duer, 335; Steamer Crystal Palace *v.* Vanderpool, 16 B. Monroe, 302. But see Great Northern R. Co. *v.* Shepherd, 8 Exch. 30.

own convenience, unless they were lost while in the possession of the company's servants. But if they were put into the passenger cars for its convenience, or were at any time in the possession of its servants, it is responsible for their safety, unless exclusive possession has been assumed by the passenger.[1] If the owner or his servant, for greater caution, accompanies the goods in their transit, although exercising some oversight of them, but still leaving them in the exclusive custody of the company, it will be still responsible as a common carrier for their safety.[2]

Prepayment of fare, or an express stipulation for freight, or an entry on the freight or way-bill, or a written memorandum, is not necessary to delivery so as to render the company responsible as a common carrier. It is sufficient for the goods to be delivered in such a manner that the owner impliedly agrees to pay freight, and the company is entitled to charge it.[3]

The acceptance, so as to bind the company, must be made by an agent authorized to make it.[4] If the servant of another company is accustomed to receive luggage for it with its consent, he will bind it.[5]

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[1] Richards *v.* London, Brighton, &c. R. Co. 7 C. B. 839; Butcher *v.* London and S. W. R. Co. 29 Eng. L. and Eq. 347.

[2] Robinson *v.* Dunmore, 2 B. & P. 419; Hollister *v.* Nowlen, 19 Wend. 236, 237.

[3] Sewall *v.* Allen, 6 Wend. 350; Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story, 35; Wood *v.* Devin, 13 Ill. 746; Choteau *v.* Steamboat St. Anthony, 16 Missouri, 222. A by-law of the company, requiring the goods to be booked before its responsibility commences, does not make the booking necessary to such responsibility where no means for booking had been provided by it. Great West. R. Co. *v.* Goodman, 12 C. B. 313; 74 E. C. L.

[4] Blanchard *v.* Isaacs, 3 Barb. 388; Elkins *v.* Boston and Maine R. R. 3 Foster, 275.

[5] Jordan *v.* Fall River R. R. Co. 5 Cush. 69.

The delivery must be made to an agent authorized to receive the goods, in order to charge the company.[1] So, also, they must be received by the agent on account of the company, and not on his own private account. A conductor, by the usage of railroads, has no personal charge of merchandise. If persons instrust to him parcels to carry on his own account, and pay him a compensation which does not go to the company, and they have no good reason to suppose is so applied, the company would not be liable in case of loss.[2] But where parcels are delivered to a general agent accustomed to receive them for the company, the presumption is that they are received on its account; and private instructions by the company to its servants, not known to the owner or the public, not to take such parcels except on their own account, will not relieve it from liability.[3]

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[1] Blanchard *v.* Isaacs, 3 Barb. 388; Elkins *v.* Boston and Maine R. R., 3 Foster, 275.

[2] Elkins *v.* Boston and Maine R. R., 3 Foster, 275.

[3] Mayall *v.* Boston and Maine R. R., 19 N. H., 122. In this case the plaintiff had delivered a package of bonnets to the baggage-master of the defendants at their station, whose duty it was to take charge of all merchandise to be transported by them, and who put the package on board of the cars. The defendants claimed that they were not liable for a loss of the bonnets, on the ground that all such packages were carried by the servants on their own account, who received the compensation as their perquisite. Gilchrist, C. J.: "The instruction of the court is, in substance, that if the plaintiff employed her own individual agent to carry the package on his own account, the defendants would not be responsible; but if it were delivered to the general agent of the defendants, to be transported by them for hire, they would be liable, notwithstanding they might have given private instructions to their general agent that packages should not be sent by

The liability of a railroad company for bank bills, drafts, and other evidences of value intrusted to its servants, has not yet received judicial discussion. Its duty to receive this species of property for carriage may be doubted. It is incorporated specially for

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passenger trains on their account, but should be on the individual account of the person undertaking to transport them, unless such instructions were known to the plaintiff or to the public generally.

"This instruction is undoubtedly correct. Any arrangement made between a carrier and his servant, by which the servant is to be paid for the carriage of particular parcels, will not exempt the carrier from responsibility for the loss of them, unless such an arrangement is known to the owner thereof, so that he contracts exclusively with the servant. Allen *v.* Scwall, 2 Wend. 327. So the mere fact that the driver of a stage-coach is accustomed to carry articles for hire, for his own particular advantage, will not render the proprietors of the coach liable. Bean *v.* Sturtevant, 8 N. H. Rep. 325. Whenever it appears that there is no intention to trust the carrier with the custody of the goods, he will not be held liable. Brind *v.* Dale, 8 Car. & P. 207. This doctrine is the dictate alike of common sense and of justice. It is the party only with whom the contract is made, who incurs any liability to the owner of the goods. The mere fact that the bailee is in the employ of a railroad corporation is not sufficient to make the corporation liable.

"Where, however, the corporation have a general agent, who is employed by them for the express purpose of receiving and transporting merchandise for hire, and is held out to the world as invested with authority for this purpose, if goods are delivered to him to be transported in the way of his duty, the corporation will be liable for the manner in which that duty is performed, and the contract of bailment may be regarded as made with them. In the present case there was such a general agent. It was his duty to take charge of all the baggage of passengers, and of all merchandise to be transported by the defendants and a delivery to him was a delivery to the corporation.

"The defendants contend that all packages not belonging to passengers going by the passenger train, were carried by the brakemen, firemen and others, on their own individual account, and that the corporation received no compensation when goods were thus transported. No private instructions or agreements between the corporation and their servants, not published to the world at large, nor communicated to the plaintiff, could affect her right to recover. A contrary doctrine would seem to infringe upon the principle that a person cannot be bound by a contract to which he is not a party." See Farmers and Mechanics' Bank *v.* Champlain Trans. Co., 23 Vt. 204.

the transportation of passengers, with their luggage, and of merchandise. The postal arrangements by which bills and drafts may be transmitted, the system of commercial exchange, and the propriety of the owner or some one in his employ accompanying the transmission of articles of such great value, are considerations appropriate to the question of its duty to carry them. If it is allowed by its charter to transport such articles, and is accustomed to do so, it is unquestionably liable as a common carrier, when its authorized agents receive them on its behalf, notwithstanding by a private arrangement with them, not known to the owner, they are to have the compensation as their perquisite. But if it is not required to undertake their carriage, and does not profess by its course of business to carry them, according to the principles which have been applied to the proprietors of stage-coaches and steamboats, it is not responsible for such articles when intrusted to persons in its employ, who receive the compensation for themselves and not on account of the company.[1] And although the company is accustomed to transport merchandise generally, the burden of proof seems to be on the owner to prove that it has authorized even its general freight-agent to contract for the carriage of bank bills and drafts; their transmission not being within the ordinary business

[1] Allen *v.* Sewall, 6 Wend. 335; 2 id. 327; Bean *v.* Sturtevant, 8 N. H. 146; Hosea *v.* M'Crory, 12 Ala. 349; Farmers and Mechanics' Bank *v.* Champlain Trans. Co., 23 Vt. 186; Choteau *v.* Steamboat St. Anthony, 16 Missouri, 216; 12 id. 389; 11 id. 226; Mechanics and Traders' Bank *v.* Gordon, 5 La. An. 604.

of such carriers, and the transportation of passengers and merchandise not necessarily implying that it holds itself out as a common carrier of these articles.[1]

DELIVERY BY THE COMPANY.—The *prima facie* duty of a common carrier of goods is ordinarily to make a personal delivery to the party entitled to receive them at their destination.[2] But this general rule is not of universal application. If there is a place of delivery agreed on between the parties, it controls the legal implication. A contract to deliver at some other place than to the owner or consignee personally, may also be implied from usage. If there is a well-known and established usage, in respect to which the parties must be presumed to have contracted for the carrier to leave the goods at his usual stopping-place, his responsibility ends when he has deposited them there.[3] So, where the custom is for a carrier by water to deliver goods to the custody of the wharfinger, his duty is discharged on such delivery.[4] Such a usage, it is evident, would be readily implied in the case of a carrier by water or otherwise, who would be obliged to resort to other means of conveyance in order to make a personal delivery.

[1] Allen *v.* Sewall, 6 Wend. 335; 2 id. 327; Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story, 16; Choteau *v.* Steamboat St. Anthony, 16 Missouri, 216. But see Farmers and Mechanics' Bank *v.* Champlain Trans. Co., 23 Vt. 186.

[2] Delivery to the person to whose care the goods are marked, in the absence of other directions, discharges the company. Bristol *v.* Rensselaer and Saratoga R. R. Co., 9 Barb. 158.

[3] Gibson *v.* Culver, 17 Wend. 305; Story on Bail. § 544.

[4] Farmers and Mechanics' Bank *v.* Champlain Trans. Co., 16 Vt. 52; 18 id. 181; 23 id 186.

If no contract to make a personal delivery can be implied where the usage is to deliver only at certain stations along the carrier's route, such a contract cannot be implied where there is no custom to make a personal delivery, and delivery elsewhere than at such stations would be impracticable. This last consideration applies to railroad companies. Unlike wagoners and expressmen, whose routes are easily varied to accommodate the public, their line of movement and points of termination are locally fixed. Their cars are confined to certain tracks; and without resorting to another and distinct species of transportation, personal delivery is impossible in most cases. Railroad companies are therefore required only to deliver at their stations, in the absence of any agreement which extends their obligation.[1]

When the Liability of the Company as a Common Carrier is changed into that of Warehouseman.—A common carrier may be under different degrees of responsibility in relation to goods intrusted to him for carriage, before he has entirely abandoned the possession of them. First, during the transportation, he is under his peculiar liability of common carrier, as an insurer against all losses, except those occasioned by the act of God or the public enemies. Secondly, after the transportation is ended, he may be the warehouseman or forwarder of the goods, receiving compensation for his services as such, either separate or included in the original charge for

[1] Thomas *v.* Boston and Providence R. R. Co., 10 Met. 472.

freight; in which relation he is responsible only for losses occasioned by his want of such care as is required of ordinary bailees for hire. His liability as warehouseman supersedes that of common carrier, when the goods have arrived and the consignee has had a reasonable opportunity to take them away.[1] And thirdly, when he ceases to hold the goods as a bailee for hire, he is only answerable for such negligence as affects a gratuitous bailee with liability.[2] The peculiar usages and circumstances of railroad transportation are important, in determining when a higher degree of responsibility for the goods is superseded by a lower.

The large quantities of merchandise which these companies are obliged to transport, require that the vehicles in which it is carried should be unladen as soon, after its destination is reached, as can be safely and conveniently done, so as not to pre-occupy their tracks and cars to the interruption of other business. The trains arriving, at different hours by night as well as by day, it is alike convenient and necessary both for the proprietors of the road and the owners of the goods, that they should be unladen and deposited in a safe place, protected from the weather and from exposure to thieves and other casualties. To facilitate the clearing of the tracks and cars, and

[1] Powell *v.* Myers, 26 Wend. 591; Goold *v.* Chapin, 10 Barb. 612; Clendaniel *v.* Tuckerman, 17 id. 184; Young *v.* Small, 3 Dana, 91.

[2] Gratuitous bailees are said to be liable for gross negligence, and bailees for hire for ordinary negligence; and although the responsibility of these two classes of bailees is different, the terms "ordinary" and "gross," used to distinguish the negligence which subjects each class to liability, are now discredited. Steamboat New World *v.* King, 16 How. 469.

to protect the merchandise, the company is usually provided at its stations with platforms, lying along side or within its station-houses on which the goods are deposited from the cars, and with adjacent warehouses where if not immediately taken away, they may be stored,—the goods of each consignment by themselves separated from the rest and ready for delivery,—to remain a reasonable and convenient time without additional charge, until called for by the consignee. The station-house, or warehouse, is suitably inclosed and secured against the weather, and properly guarded like other warehouses against theft, or ordinary dangers. The company makes no special charge for this temporary storage, but receives its compensation in the general charge for freight, and is therefore a bailee for hire.[1] Upon this view of transportation by railroad, it has been decided in Massachusetts that the implied contract of the company is to carry the goods safely to the place of destination, and there discharge them on the platform, ready for delivery to the consignee; and upon their being thus unladen and disposed of, its extraordinary liability as a common carrier is ended. But if on account of their arrival at the station at an unseasonable hour, when by usage or the course of

[1] That a common carrier under the same contract, and compensated in one entire charge, may be under distinct duties, for a breach of which he will be liable to different degrees of responsibility, is well sustained by authority. Garside *v.* Trent and Mersey Nav. Co., 4 Term. R. 581; Hyde *v.* Same, 5 id. 389; In Re Webb, 8 Taunt. 443; Van Santvoord *v.* St. John, 6 Hill, 157; M'Henry *v.* Phil., Wil., and Bal. R. R. Co., 4 Harring. 448, where it is held to be the duty of the company to store the goods on their arrival, if the owner is not present to receive them.

business delivery is not practicable, or if the consignee is not there ready to receive them, it is the duty of the company to store them safely, under the charge of competent servants, ready to be delivered, and afterwards to deliver them when duly called for by parties authorized to receive them; and for the performance of these duties, the company is liable only as a warehouseman or bailee for hire, after the goods have been unladen from the cars and placed on the platform, although the owner has not had an opportunity to take them away. Thus, where it was proved, that four rolls of leather, the plaintiff's property, were delivered to the Boston and Providence Railroad Corporation at Providence, to be transported to Boston, where they arrived safe and were deposited at its station-house; that a teamster employed by the plaintiff shortly after called at the station with a bill of freight receipted by the company, and inquired for the leather; that it was pointed out to him by the master of the station; that he then took away two of the rolls, and on returning soon after for the other two, could find only one of them,—it was held, in view of the usages of railroads, that where suitable warehouses are provided by the company, and the goods which are not called for on their arrival at the place of destination, are unladen and separated from the goods of other persons and stored safely in such warehouses without further compensation, the responsibility of the company as a common carrier terminates, and after that, it is responsible only as a depositary, without further charge, and consequently, unless guilty of

negligence in the custody of the goods, it is not liable to the owner for the loss.[1]

This decision has been more recently affirmed in the same State, where the following facts appeared: Two consignments of goods belonging to the plaintiffs were burned in the station-house of the Boston and

[1] Thomas *v.* Boston and Prov. R. R. Corp., 10 Met. 472. Hubbard, J.: "The transportation of goods and the storage of goods are contracts of a different character; and though one person or company may render both services, yet the two contracts are not to be confounded or blended; because the legal liabilities attending the two are different. The proprietors of a railroad transport merchandise over their road, receiving it at one depot or place of deposit and delivering it at another, agreeably to the direction of the owner or consignor. But from the very nature and peculiar construction of the road, the proprietors cannot deliver merchandise at the warehouse of the owner, when situated off the line of the road, as a common wagoner can do. To make such a delivery, a distinct species of transportation would be required, and would be the subject of a distinct contract. They can deliver it only at the terminus of the road, or at the given depot where goods can be safely unladed and put into a place of safety. After such delivery at a depot, the carriage is completed. But, owing to the great amount of goods transported and belonging to so many different persons, and in consequence of the different hours of arrival, by night as well as by day, it becomes equally convenient and necessary, both for the proprietors of the road and the owners of the goods, that they should be unladed and deposited in a safe place, protected from the weather and from exposure to thieves and pilferers. And where such suitable warehouses are provided, and the goods which are not called for on their arrival at the places of destination, are unladed and separated from the goods of other persons, and stored safely in such warehouses or depots, the duty of the proprietors as common carriers is, in our judgment terminated. They have done all they agreed to do; they have received the goods, have transported them safely to the place of delivery, and, the consignee not being present to receive them, have unladed them, and have put them in a safe and proper place for the consignee to take them away; and he can take them at any reasonable time. The liability of common carriers being ended, the proprietors are, by force of law, depositaries of the goods, and are bound to reasonable diligence in the custody of them, and consequently are only liable to the owners in case of a want of ordinary care."

Maine Railroad Company at Boston, which was destroyed by fire on the night of Monday, the 4th November, 1850, one of which arrived on the afternoon of the Saturday previous, and the other on the afternoon of Monday. The first consignment was ready for delivery on Monday morning, having been discharged from the cars as early as some time during the previous Saturday, and the plaintiff's truckman, who was his agent for that purpose, knew that it was so ready. The second consignment was ready for delivery, having been placed on the platform, on Monday evening before five o'clock. The plaintiff's truckman, after having waited for it from two to half-past three o'clock of the same evening, not being informed when the last consignment would be ready for delivery, left the station; it being inconvenient for him to take the goods at a later hour to the plaintiff's store, as the days were then short, the stores closed about the time of sunset, and it being necessary for him to receive them as early as half-past three or four o'clock, in order to carry them that evening where he was to deliver them. The plaintiff had no notice of the arrival of the goods except in the knowledge of the truckman. The fire was not caused by lightning; nor was it attributable to any default or negligence of the company. It was held in both cases, that the goods having been unladen from the cars and placed in the warehouse before the fire, the company ceased to hold them as a common carrier, and was liable only as a warehouseman, for want of ordinary care,

although the consignee might not have had an opportunity to take them away before the fire.[1]

[1] Norway Plains Co. *v.* Boston and Maine R. R. Co. 1 Gray, 263. Shaw, C. J.: "The question then is, when and by what act the transit of the goods terminated. It was contended, in the present case, that, in the absence of express proof of contract or usage to the contrary, the carrier of goods by land is bound to deliver them to the consignee, and that his obligation as carrier does not cease till such delivery.

"This rule applies, and may very properly apply, to the case of goods transported by wagons and other vehicles, traversing the common highways and streets, and which therefore can deliver the goods at the houses of the respective consignees. But it cannot apply to railroads, whose line of movement and point of termination are locally fixed. The nature of the transportation, though on land, is much more like that by sea, in this respect, that from the very nature of the case, the merchandise can only be transported along one line, and delivered at its termination, or at some fixed place by its side, at some intermediate point. The rule in regard to ships is very exactly stated in the opinion of Buller, J., in Hyde *v.* Trent and Mersey Navigation, 5 T. R. 397. 'A ship trading from one port to another has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier.'

"Another peculiarity of transportation by railroad is, that the car cannot leave the track or line of rails on which it moves; a freight train moves with rapidity, and makes very frequent journeys, and a loaded car whilst it stands on the track, necessarily prevents other trains from passing or coming to the same place; of course, it is essential to the accommodation and convenience of all persons interested, that a loaded car, on its arrival at its destination should be unloaded, and that all the goods carried on it to whomsoever they may belong, or whatever may be their destination, should be discharged as soon and as rapidly as it can be done with safety. The car may then pass on to give place to others, to be discharged in like manner. From the necessary condition of the business, and from the practice of these transportation companies to have platforms on which to place goods from the cars, in the first instance, and warehouse accommodation by which they may be securely stored, the goods of each consignment by themselves in accessible places ready to be delivered, the court are of opinion that the duty assumed by the railroad corporation is—and this, being known to owners of goods forwarded, must in the absence of proof to the contrary, be presumed to be assented to by them, so as to constitute the implied contract between them—that they will carry the goods safely to the place of destination, and there discharge them on the platform, and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take

The company was held liable for other goods consumed in the same fire, by reason of the negligence of its servants, who, without using proper care to inform themselves, represented to the consignee calling for them, during the day before the night of the

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them forthwith; or, if the consignee is not there ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for. This, it appears to us, is the spirit and legal effect of the public duty of the carriers, and of the contract between the parties, when not altered or modified by special agreement, the effect and operation of which need not here be considered.

"This we consider to be one entire contract for hire; and, although there is no separate charge for storage, yet the freight to be paid, fixed by the company, as a compensation for the whole service, is paid as well for the temporary storage, as for the carriage. This renders both the services, as well the absolute undertaking for the carriage, as the contingent undertaking for the storage, to be services undertaken to be done for hire and reward. From this view of the duty and implied contract of the carriers by railroad, we think there result two distinct liabilities; first, that of common carriers, and afterwards, that of keepers for hire, or warehouse keepers; the obligations of which are regulated by law.

"We may then say, in the case of goods transported by railroad, either that it is not the duty of the company as common carriers, to deliver the goods to the consignee, which is more strictly conformable to the truth of the facts; or, in analogy to the old rule, that delivery is necessary, it may be said that delivery by themselves as common carriers, to themselves as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers. If they are chargeable after the goods have been landed and stored, the liability is one of a very different character, one which binds them only to stand to losses occasioned by their fault or negligence.

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"In applying these rules to the present case, it is manifest that the defendants are not liable for the loss of the goods. Those which were forwarded on Saturday arrived in the course of that day, lay there on Sunday and Monday, and were destroyed in the night between Monday and Tuesday. But the length of time makes no difference. The goods forwarded on Monday were unladen from the cars, and placed in the depot, before the fire. Several circumstances are stated in the case, as to the agent's calling for them, waiting, and at last leaving the depot before they were ready. But we consider them all immaterial. The argument strongly urged was that the

fire, that they had been delivered; whereas they were then in the station-house.[1]

In New Hampshire, contrary to the doctrine laid down in Massachusetts, where the liability of the company for other goods lost in the same fire, which had arrived at the freight-house on the afternoon of the day of the fire, was in issue, it was held that its liability continues after their arrival, and until the consignee has had a reasonable opportunity to take them away, and is not superseded by that of a warehouse-man upon their being unladen and deposited in the warehouse; but this reasonable opportunity is not to be measured by any circumstances peculiar to the plaintiff, so as to extend it beyond that which

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responsibility of common carriers remained until the agent of the consignee had an opportunity to take them and remove them. But we think the rule is otherwise. It is stated, as a circumstance, that the train arrived that day at a later hour than usual. This we think immaterial; the corporation do not stipulate that the goods shall arrive at any particular time. Further, from the very necessity of the case, and the exigencies of the railroad, the corporation must often avail themselves of the night, when the road is less occupied for passenger cars, so that goods may arrive and be unladen at an unsuitable hour in the night, to have the depot open for the delivery of the goods. We think, therefore, that it would be alike contrary to the contract of the parties, and the nature of the carriers' duty, to hold that they shall be responsible as common carriers, until the owner has practically an opportunity to come with his wagon and take the goods; and it would greatly mar the simplicity and efficacy of the rule, that delivery from the cars into the depot terminates the transit. If, therefore, for any cause the consignee is not at the place to receive his goods from the car as unladen, and in consequence of this they are placed in the depot, the transit ceases. In point of fact, the agent might have received the second parcel of goods in the course of the afternoon on Monday, but not early enough to be carried to the warehouses, at which he was to deliver them; that is, not early enough to suit his convenience. But, for the reasons stated, we have thought this circumstance immaterial, and do not place our decision for the defendants, in regard to this second parcel, on that ground."

[1] Stevens *v.* Boston and Maine R. R., 1 Gray, 277.

would be sufficient in the case of persons residing in the vicinity of the warehouse, prepared with the means of taking the goods away, and informed of the usages of the company.[1]

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[1] Moses *v.* Boston and Maine R. R., 32 N. H. 523, 540. Sawyer, J.: "For all purposes which have reference to the difficulties and embarrassments in the way of the owner in attempting to prove loss or damage by the fault or neglect of the company, to his inability to give to them any oversight or protection, and to his security against fraud and collusion until he can have reasonable opportunity to see, by his own observation, or that of others than the servants of the company, that they have arrived, and to send for and take them away, he stands in the same relation to them as when they were actually in the course of transportation. The same broad principles of public policy and convenience upon which the common-law liability of the carrier is made to rest, have equal application after the goods are removed into the warehouse as before, until the owner or consignee can have that opportunity; and the same necessity exists for encouraging the fidelity and stimulating the care and diligence of those who thus continue to retain them in charge, by holding that they shall continue subject to the risk.

"It is no satisfactory answer to this view to say that the company, having provided a warehouse in which to store the goods for the accommodation of the owner, after the transit has terminated, may be regarded, by their act of depositing them in the warehouse, as having delivered them from themselves as carriers, to themselves as warehousemen. The question still is, when, having a proper regard to the principles which lie at the basis of their carrier liability, and to the protection and security of the owner, can this transmutation of the character in which they hold the goods be said to take place, and this constructive delivery to be made. If this is held to be at any point of time before there can be opportunity to take them from the hands of the company, then may the owner be compelled to leave them in their possession under the limited liability of depositaries, or bailees for hire, contrary to his intention, and without any act or neglect on his part which may be considered as indicative of his consent thereto. It may have been his intention to take them from their possession at the earliest practicable moment, for the reason that he may not be disposed to entrust them to their fidelity and care without the stimulus to the utmost diligence and good faith afforded by the strict liability of carriers. If he neglects to take them away upon the first opportunity that he has to do it, he may be said thereby to have consented that they shall remain under the more limited responsibility. But upon no just ground can this consent be presumed when his only alternative is to be at the station where they are to be de-

In Michigan it has been decided that the company, in lieu of personal delivery, is bound at common law to give notice to the consignee of the

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livered at the arrival of the train, at whatever hour that may happen to be, whether in the night or the day, in or out of business hours, and regardless of all the contingencies upon which the regularity of its arrival may depend. It is to be supposed that the consignee has been advised by the consignor of the fact that the goods have been forwarded, and that he has taken or is prepared to take proper measures to look for them upon their arrival, and to remove them as soon as he can have reasonable opportunity to do so. It must be supposed, too, that he is informed of the usual course of business on the part of the company, and of their agents, in the hours established for the arrival of the trains, and in unlading the cars and delivering out goods of that description, and that he will exercise reasonable diligence in reference to all these particulars, to be at the place of delivery as soon as may be practicable after their arrival, and take them into his possession. The extent of the reasonable opportunity to be afforded him for that purpose is not, however, to be measured by any peculiar circumstances in his own condition and situation, rendering it necessary for his own convenience and accommodation that he should have longer time or better opportunity than if he resided in the vicinity of the warehouse, and was prepared with the means and facilities for taking the goods away. If his particular circumstances require a more extended opportunity, the goods must be considered after such reasonable time as but for those peculiar circumstances would be deemed sufficient to be kept by the company for his convenience, and under the responsibility of depositaries or bailees for hire only.

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"We are aware that this view of the liability of railroad companies as carriers conflicts with the opinion of the Supreme Court of Massachusetts, as pronounced by the learned chief justice of that court in the recent case of Norway Plains Co. *v.* these defendants, 1 Gray, 263. In that case it was held that the liability as carriers ceases when the goods are removed from the cars and placed upon the platform of the depot, ready for delivery, whether it be done in the day-time or in the night—in or out of the usual business hours—and consequently irrespective of the question whether the consignee has or not an opportunity to remove them. The ground upon which the decision is based would seem to be the propriety of establishing a rule of duty for this class of carriers of a plain, precise, and practical character, and of easy application, rather than of adhering to the rigorous principles of the common law. That the rule adopted in that case is of such character is not to be doubted; but with all our respect for the eminent judge by

arrival of the goods; and until such notice has been given, and the consignee has had a reasonable time to remove them, it is liable as a common carrier, although the goods have been unladen and deposited in its warehouse.[1]

It has been held in Illinois that the liability of the company is not changed into that of warehouseman, until some open act of delivery, proving the change of relation, which must be shown by the company. And if in the course of the transportation, the company stores the goods at the station in the same car in which they have been transported, its liability as common carrier will not terminate until the car has been separated from the train and placed in a proper, or its usual, place of storage, and put in the charge of the proper person.[2]

Liability of the Company in the unlading of the Goods.—The company's liability continues while the goods are being unladen from the cars, unless the owner has already taken possession of them.[3] It invariably terminates when they have passed into the possession of the consignee; but merely

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whom the opinion was delivered, and for the learned court whose judgment he pronounced, we cannot but think that by it the salutary and approved principles of the common law are sacrificed to considerations of convenience and expediency, in the simplicity and precise and practical character of the rule which it establishes."

[1] Michigan Central R. R. Co. *v.* Ward, 2 Mich. (Gibbs) 538. See Rome R. R. Co. *v.* Sullivan, 14 Geo. 277.

[2] Chicago and Rock Island R. R. Co. *v.* Warren, 16 Ill. 502.

[3] De Mott *v.* Laraway, 14 Wend. 225.

giving directions as to his goods when they are in danger of loss, does not necessarily constitute acceptance.[1] If, after the arrival of the goods at their destination, he should, at his own request, receive them in the cars, or otherwise assume the control of them before they were unladen at the station-house, the company would be discharged.[2]

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[1] Bowman *v.* Teall, 23 Wend. 306; Story on Bail. § 541.

[2] Lewis *v.* Western R. R. Corp. 11 Met. 509. The Western Railroad Corporation was sued for damage to a block of marble, which it had carried from Pittsfield to Worcester. It appeared, that on its arrival at Worcester one Lamb, a truckman employed by the plaintiff, went to the depot of another company, the Boston and Worcester Railroad Company, with his truck, to receive and transport the block to the plaintiff; and that one M'Coy, who was employed by the defendants, and whose business it was to deliver and receive freight, assisted by said Lamb and his truck-horse, drew the car on which the block had been transported by the defendants, from their depot to the junction of the two railroads, and shifted the switch, and drew the block to the depot of the Boston and Worcester Railroad Corporation, and proceeded to remove the block from the car to the truck, by the aid of the derrick and machinery of that corporation, the use of which for that purpose he had obtained; and, while attempting to do this, the hook which fastened the chain of the derrick around the block gave way, and the block fell and was broken. The court were of opinion that the jury should have been instructed as follows:—

"1st. That if Lamb was authorized and employed by the plaintiff to take and receive the delivery of the block, which, being of unusual size and weight required peculiar care and attention to deliver; and if he was the authorized agent of the plaintiff to do all acts incident to the delivery and transportation of the block; and if Lamb, instead of receiving the block at the depot of the defendants, requested their agent for delivery to permit the car containing the block to be hauled to the Boston and Worcester Railroad derrick, and if Lamb requested the use of that derrick, for the purpose of removing the block from the car to his truck; then these acts, being incident to the delivery of the block, were acts within the authority conferred on Lamb by the plaintiff, and bind him in the same manner as if done by himself. 2d. That if Lamb requested M'Coy to deliver the block, or consent to the delivery thereof, in this mode, instead of delivering the same at the defendants' depot, and with the means there provided, then, from the time the car left the defendants' depot and premises, and went to the derrick of the Boston

The company is responsible for the luggage of passengers until it is delivered in the ordinary manner, unless some other mode is accepted by them as sufficient delivery. Thus, it is held in England, that where a railway company employs porters at its stations to convey the luggage of passengers from the cars to their carriages or hired vehicles, its liability continues until the porters have discharged their duty, even for luggage which, while the train was moving, was in the car with the passenger.[1]

Termination of the Liability of the Company as Warehouseman or Depositary.—The liability of the company, as already shown, does not terminate with the arrival of the goods. If the consignee is not present to receive them, it is bound to have them stored.[2] But after the consignee has had a reasonable opportunity to take them away, there being no agreement express or implied between the parties that the company is to be paid for storage,

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and Worcester Railroad, the defendants ceased to be liable either for the care and skill of the persons employed, or for the strength and sufficiency of the machinery employed for the purpose; and that the persons employed must be regarded as the agents of the plaintiff. 3d. That the general duty of the defendants as common carriers, was to make a true delivery of goods at the usual place, which, in this case was at their own depot at Worcester; but that it was competent for the plaintiff to assent to a delivery elsewhere; that if the plaintiff desired such a special delivery, to which the agents of the defendants assented, then, from and after the time that the block had gone from the regular place of delivery, with respect to such special delivery the block might be regarded as constructively delivered, so that the defendants were exempted from the duty of making any other or different delivery."

[1] Richards *v.* London, &c., R. Co., 7 C. B., 839; 62 E. C. L.; Butcher *v.* London and S. W. R. Co., 16 C. B. 13; 81 E. C. L.; 29 Eng. L. and Eq. 347.

[2] M'Henry *v.* Phil., Wil., and Balt. R. R. Co., 4 Harring. 448.

it becomes liable only as a gratuitous bailee. After its original undertaking has been performed, it may relieve itself of all liability for the goods by tendering them to the consignee, at the same time refusing to retain further charge of them, and removing them from its premises to a suitable place with no unnecessary damage. But notwithstanding its tender and refusal to retain further charge of the goods, if it still retains them in its custody, it is competent for the jury to infer its waiver of the refusal, and consent to continue the depositary of the goods.[1]

If the consignee is absent, deceased, or refuses to receive the goods, or cannot be found, the common carrier may discharge himself from further liability by depositing them with some responsible warehouseman, who thenceforward becomes the bailee of the owner, and for whose subsequent insolvency, resulting in the loss of the goods, the carrier is not responsible.[2]

Notice to the Consignee.—Whether it is the duty of the company to give notice of the arrival of the goods to the consignee, is an unsettled question. Generally, this duty is required of carriers who are exempted from the obligation of personal delivery; but it may be dispensed with by a well-known and established usage, although, it seems, the knowledge of the usage is not brought home to the consignee.[3]

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[1] Smith *v.* Nashua and Lowell R. R., 7 Foster, 86; *ante*, p. 436.

[2] Fisk *v.* Newton, 1 Denio, 45.

[3] Gibson *v.* Culver, 17 Wend. 305; Farmers and Mechanics' Bank *v.* Champlain Transportation Co. 16 Verm. 52; 18 id. 131; 23 id. 186.

Nor would it seem to be required, where, by the receipt given by the company, the goods are deliverable to the order of the consignor who already has knowledge of the sending of the goods, or where the name of no consignee is included, the goods being identified by a comparison of the marks and numbers with the way-bill.[1] In other cases, it remains to be seen whether notice left at the residence or place of business of the consignee, or deposited in the mail directed to him, will be considered as required by public policy. The usage of the company which carries the goods, or of companies generally in the same locality, may be taken into view in determining whether the duty of giving notice to the consignee is implied in the contract of transportation. The course of business of railroad companies is such,—the arrivals of goods being so frequent and various, the time occupied in transportation being more determinate than in the case of carriers by water, the custom prevailing of the consignor to forward to the consignee a receipt in the nature of a bill of lading, notifying him of the consignment, and enabling him to calculate with reasonable certainty on the time of the arrival, and the company being provided with suitable warehouses,—that it may be considered by the courts that its duty to give notice to the consignee does not arise as a conclusion of law from the contract to carry.[2]

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[1] Norway Plains Co. *v.* Boston and Maine R. R. 1 Gray, 275.

[2] Such a notice is required by statute in Ohio. Laws of Ohio (1856), p. 98.

In Vermont and Massachusetts, it does not seem to be the duty of the company to give such a notice, although the point is not directly decided.[1] In Michigan it is required; and the liability of the company, as a common carrier, continues until it is given.[2] Actual notice is required in Georgia, unless dispensed with by usage.[3]

LIABILITY OF THE COMPANY FOR GOODS CONSIGNED TO PLACES BEYOND ITS TERMINUS.—The liability of a railroad company for goods which have passed over its line, and been delivered according to usage to another carrier on their way to the place of destination, and lost while in the possession of such carrier, has recently been the subject of much judicial discussion in England and the United States. An individual carrier unquestionably has the power to contract for such a liability; and if his contract to that effect is proved, he is bound by it. He may incur liability beyond his route by an express contract,[4] or by entering into such an agreement with the other carrier beyond his route as to create in law a partnership between them, so far as third parties are concerned.[5] But carriers may form a continu-

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[1] Farmers and Mechanics' Bank *v.* Champlain Trans. Co. 23 Vt. 186, 211; 18 id. 131; 16 id. 52. Norway Plains Co. *v.* Boston and Maine R. R. 1 Gray, 274; see Moses *v.* Boston and Maine R. R. 32 N. H. 539, 541; Parsons on Merc. Law, p. 210.

[2] Michigan R. R. Co. *v.* Ward, 2 Mich. (Gibbs.) 538.

[3] Rome R. R. Co. *v.* Sullivan, 14 Geo. 277.

[4] Wilcox *v.* Parmelee, 3 Sand. 610.

[5] Waland *v.* Elkins, 1 Starkie, 272; Fairchild *v.* Slocum, 19 Wend. 329; S. C. 7 Hill, 292.

ous line for the transportation of freight and passengers without a partnership being created between them.[1]

A railroad company is subject to other considerations. Like all corporations, it is the creature of positive law, and is authorized to exercise only such powers as are specifically conferred upon it, and such as are incidental or ancillary to its existence.[2] It cannot properly enter into contracts not necessary, directly or indirectly, to answer the purposes of its incorporation.[3] The charter of a railroad company usually empowers it to construct a railroad between certain termini, and to execute the powers granted, for the transportation over the same of persons and merchandise. It could hardly be maintained that a company authorized to construct and operate a railroad, as a common carrier between Chicago and Detroit, is thereby authorized to contract for the transportation of persons and merchandise from Chicago to Cleveland, and thence to New York, San Franscisco, or remoter destinations; and if its authority to undertake the transportation beyond its terminus is admitted to any extent, it is not easy to define its limits. If it is not authorized to make such contracts, its liability upon them cannot well be maintained, except on the ground that it is estopped from setting up its inability to enter into contracts

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[1] Bright *v.* Vanderbilt, 19 Barb. 222; Straiton *v.* N. Y. and N. H. R. R. Co. 2 E. D. Smith, 184.

[2] *Ante*, ch. ii.

[3] *Ante*, ch. xvi. p. 395.

which it has made; and the doctrine of estoppel has been held not to apply to such a defence.[1]

The Supreme Court of Connecticut seems inclined upon such considerations to hold the company incompetent to contract for the transportation of goods beyond the terminus of its route.[2] But in Vermont a railroad company is held to have the power to make valid contracts both to receive freight at and to convey it beyond the limits of its road, on the ground that, if the corporators acquiesce in the extension of the business of the company, even beyond the strict limits of the charter upon the most literal interpretation, and strangers are thereby induced to contract upon the faith of the authority of its agents, it is not at liberty to repudiate their authority when their transactions prove disastrous.[3] In other jurisdictions, the power of the company to make such contracts does not seem to have been directly contested.[4]

Where the existence of the power in a company to undertake the transportation of goods beyond its line is admitted, it is an important question from what circumstances the contract may be implied. Goods are often received by railroad companies,

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[1] *Ante*, ch. xvi. p. 395.

[2] Hood *v.* N. Y. and N. H. R. R. Co., 22 Conn. 1, 502; Elmore *v.* Naugatuck R. R. Co., 23 id. 457; Naugatuck R. R. Co. *v.* Waterbury Button Co., 24 id. 468.

[3] Noyes *v.* Rut. and Bur. R. R. Co., 27 Vt. 110.

[4] In Illinois, the power to make contracts for the transportation of merchandise and passengers on each others' roads, is conferred by statute on companies incorporated by the laws of that State.—Laws of Illinois (1853), p. 222.

marked or consigned to some place beyond their line, and a receipt given for them, described as having such a destination. The acceptance of them, marked, consigned, and receipted for, in this manner, may be construed to be a contract to carry them safely to the terminus of the company's road, and there to deliver them, in the course of business, to some other carrier to be transported to their destination. Such a contract is recognized by the common law, and subjects the company to the liability of a common carrier until the goods have reached the point where they leave its road, and then to that of forwarder for storage and delivery to the next carrier.[1]

According to the decisions in the United States, the acceptance of goods by a common carrier, marked or consigned to a point beyond the terminus of his route, and the giving of a receipt for the same as so marked and consigned, does not imply a contract on his part to act as common carrier beyond his line, where his usage is to transport over his own line and then deliver to another carrier, whether such usage is known to the owner or not. Thus, where the proprietors of a line of tow-boats between New York and Albany received a box at New York marked for a place on the Erie Canal beyond Albany, giving a receipt for a box so marked, and, not having any special directions from the owner as to the place or mode of delivery, delivered the goods safely at Albany, accord-

[1] Garside *v.* Trent and Mersey Nav. Co., 4 Term R. 581; Ackley *v.* Kellogg, 8 Cowen, 223; Maybin *v.* S. C. R. R. Co., 8 Rich. 240.

ing to their custom, on board of a canal boat belonging to responsible parties, from whom they collected the freight from New York to Albany, but with whom they had no community of interest in the profits of transportation,—it was held that the proprietors, by giving the receipt, had made no contract to deliver at the ultimate destination, and were not liable for a loss on the canal boat, whether their usage was known to the owner or not.[1]

So in Massachusetts, where the Connecticut River Railroad Company, whose southern terminus is at Springfield, received boxes at Northampton, for which it gave a receipt signed by its agent as follows, "Received of E. N., for transportation to New York, nine boxes planes, marked R. & F., 21 Platt Street, New York; four boxes planes and handles, marked G. T. H. 146 Bowery Street New York;" and it was the practice of that company, to deliver goods consigned to New York, to the New Haven, Hartford and Springfield Railroad Company at Springfield, where they were sometimes carried through without change of cars, and at other times shifted into the cars of the last-named company; and to take pay only as far as

[1] St. John *v.* Van Santvoord, 6 Hill, 157; overruling S. C., 25 Wend. 660; Wright *v.* Boughton, 22 Barb. 561; Straiton *v.* N. Y. & N. H. R. R. Co., 2 E. D. Smith, 184. See Wibert *v.* N. Y. & Erie R. R. Co., 2 Kernan, 255. There are decisions in New York not easily reconciled with these authorities. See Weed *v.* Saratoga and Schenectady R. R. Co., 19 Wend. 534; Hart *v.* Rensselaer and Saratoga R. R. Co., 4 Selden, 37. In South Carolina, where two companies contract jointly for the transportation of goods, one is liable for injury received by them on the line of the other. Bradford *v.* S. C. R. R. Co., 7 Rich. 201.

Springfield,—it was held by the Supreme Court that the Connecticut River Railroad Company was not liable for a loss which took place between Springfield and New Haven; that the receipt was not a special contract to carry goods to New York; and that the company, having no connection in business with any other company, and taking pay only to the end of its road, when receiving goods marked with the name of the consignee in New York was bound to carry them safely to the end of its road, and there deliver them to the proper carriers to be forwarded towards their ultimate destination; and then its liability ceases.[1] So in Connecticut, where the passenger paid at the station of a company for a through ticket to a town situated several miles from another station, reached therefrom by stage coach,

[1] Nutting *v.* Conn. River R. R. Co., 1 Gray, 502–504. Metcalf, J.: "On the facts of this case, we are of opinion that there must be judgment for the defendants. Springfield is the southern terminus of their road; and no connection in business is shown between them and any other railroad company. When they carry goods that are destined beyond that terminus, they take pay only for the transportation over their own road. What, then, is the obligation imposed on them by law, in the absence of any special contract by them, when they receive goods at their depot in Northampton, which are marked with the names of consignees in the city of New York? In our judgment, that obligation is nothing more than to transport the goods safely to the end of their road, and there deliver them to the proper carriers, to be forwarded towards their ultimate destination. This the defendants did, in the present case, and in so doing performed their full legal duty. If they can be held liable for a loss that happens on any railroad besides their own, we know not what is the limit of their liability. If they are liable in this case, we do not see why they would not also be liable, if the boxes had been marked for consignees in Chicago, and had been lost between that place and Detroit, on a road with which they had no more connection than they have with any railway in Europe." The same view prevails in Vermont. Farmers and Mechanics' Bank *v.* Champlain Trans. Co., 16 Vt. 52; 18 id. 131; 23 id. 209.

the ticket including both railroad and stage fare, and the company not participating in the profits of the stage-coach or exercising any control over it,—the ticket was held to be only a receipt for the entire fare, which it was convenient to collect at the starting point, and not a contract to carry safely beyond the station, where the passenger took the stage-coach, so as to make the company liable for an injury received by him while riding on it.[1] More recently, where goods were received by a company, marked for a place beyond its terminus, and a receipt given by it for the transportation of the goods so consigned, and an advertisement had been published by its order that freight would be way-billed for such place, and taken through with dispatch to such destination,—the acceptance of the goods so marked and consigned, and the receipt and advertisement, were held not to be *prima facie* evidence of a contract to carry to such place, but simply of a contract to carry them to its terminus, and then forward by the usual conveyance.[2]

The English decisions are at variance with the prevailing doctrine in this country. They sustain the doctrine that when a railway company takes into its care a parcel directed to a particular place, and does not by positive agreement limit its responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking to carry the parcel to the place to which it is directed, although that

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[1] Hood *v.* N. Y. and N. H. R. R. Co., 22 Conn. 1, 502.

[2] Elmore *v.* Naugatuck R. R. Co., 23 Conn. 457; Naugatuck R. R. Co. *v.* Waterbury Button Co., 24 id. 468; see Jeneson *v.* Camden and Amboy R. R. Co.; Am. Law Reg. (Feb. 1856), p. 234.

place be beyond the limits within which the company in general professes to carry on its business as a carrier. The companies, though separate in themselves are regarded as partners in contracts to convey over the whole distance, or the second as the agent of the first. The point does not appear to have been pressed, that this presumption is overcome by proof that the company receiving the goods had no interest in the business of the other or control over it, and according to its usage delivered the goods at its terminus to the other.[1] The English cases apply the same rule when the destination of the goods is beyond the realm.[2] But if the company stipulates specially against liability beyond its terminus, the agreement overcomes the presumption, and it is not liable beyond its line.[3] Whether the company receiving the goods is liable for losses beyond its terminus or not, the company on whose line the loss occurs would be liable.[4]

Duty to deliver to the proper person.—The company is bound to deliver to the right person, or to the one to whom it has agreed to deliver, and is liable for an innocent misdelivery, as upon a forged order of the consignee.[5] If goods are delivered to

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[1] Muschamp *v.* L. and P. Junction R. Co., 8 M. & W. 421; Watson *v.* Ambergate, &c. R. Co., 3 Eng. L. and Eq. 497; Scotthorn *v.* South Staffordshire R. Co., 18 id. 553; Collins *v.* Bristol and Exeter R. Co., 36 id. 482.

[2] Crouch *v.* N. W. R. Co., 25 id. 287.

[3] Fowles *v.* Great Western R. Co., 16 id. 531.

[4] Schopman *v.* Boston and Worcester R. R. Co., 9 Cush. 24.

[5] Powell *v.* Myers, 26 Wend. 591; Rome R. R. Co. *v.* Sullivan, 14 Geo. 283; Angell on Carriers, §§ 321, 324, 325, 326; Sanquer *v.* London and Southwestern R. Co., 32 Eng. L. and Eq. 338.

the company with no special directions, consigned to the care of a certain person, delivery to such person discharges the company, although he may be one of its agents.[1]

ACCEPTANCE OF THE GOODS BY THE OWNER BEFORE REACHING THEIR DESTINATION.— The company may be discharged from responsibility, except for damage already sustained, and entitled to compensation, by a voluntary acceptance of the goods by the owner before they reach their destination.[2] The acceptance by the owner of the goods at an intermediate point, does not deprive the company of its right to the full freight originally agreed upon, unless it is waived.[3] But if the owner receives only a part while they are *in transitu*, the company is not discharged from responsibility as to the rest.[4] The owner, it has been held, has a right to demand back his goods at an intermediate point of the transit, on payment of the freight; and the company is bound to deliver them, unless compliance with his demand would produce great inconvenience to it.[5]

LIEN OF THE COMPANY.—A railroad company is entitled as a common carrier to a lien on the goods for the freight, and the advanced charges which it has

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[1] Bristol *v.* Rensselaer and Saratoga R. R. Co., 9 Barb. 158.

[2] Parsons *v.* Hardy, 14 Wend. 215; Smyth *v.* Wright, 15 Barb. 51; Harris *v.* Rand, 4 N. H. 259, 555; Hunt *v.* Haskell, 24 Maine, 339; Rossiter *v.* Chester, 1 Douglass (Mich.) 154.

[3] Ellis *v.* Willard, 5 Selden, 529.

[4] Lowe *v.* Moss., 12 Ill. 477.

[5] Scotthorn *v.* South Staffordshire R. Co., 18 Eng. L. and Eq. 553.

paid in the ordinary course of business.[1] This is a particular lien, and covers only the goods on which the charges were incurred. In the absence of a distinct usage or agreement, the carrier has no general lien by which he can retain a consignment as security for a balance due from the consignee on account of other consignments.[2] He has a lien on a passenger's luggage for his fare, but not on his person, or clothes on his person.[3] If by an agreement the carrier is not to receive pay on delivery of the goods, he waives his lien.[4] The possession of the carrier must be rightful, in order to entitle him to a lien. No man can be divested of his property without his consent, however much the assertion of his right may injure innocent parties. A thief, or trespasser, or a bailee for a special purpose who has transcended that purpose, can confer no rights to his property. Accordingly, where without the consent of the owner, express or implied, the carrier innocently receives the goods from a person who has stolen them, or is not authorized to send them by his line, he has no lien on them for freight against the owner, and on his refusal to deliver them to him is liable, without any tender of the freight, to an action of replevin for their recovery, or trover for their value.[5] Pos-

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[1] Bowman *v.* Hilton, 11 Ohio, 303; Langworthy *v.* N. H. and Harlem R. R. Co., 2 E. D. Smith, 195.

[2] Rushforth *v.* Hadfield, 6 East, 519; Lucas *v.* Nockells, 4 Bing. 729; Hartshore *v.* Johnson, 2 Halsted, 108.

[3] Wolf *v.* Summers, 2 Camp. 631; Story on Bailments, § 604; Sunbolf *v.* Alford, 3 M. & W. 248.

[4] Crawshay *v.* Homfray, 4 B. & Ald. 50.

[5] Fitch *v.* Newberry, 1 Doug. (Mich.) 1; Robinson *v.* Baker, 5 Cush. 137.

session is necessary to constitute a lien, and when the carrier parts with it, the lien is terminated.[1] But delivery to the consignee of a part of a particular consignment of merchandise does not affect his lien on the remaining part of the same consignment for the entire freight, unless the delivery of a part was intended as a delivery of the whole. And a delivery to a warehouseman for storage, and as agent of the carrier to hold the same for the unpaid freight, is not an abandonment of his lien.[2] The carrier cannot be dispossessed of his lien by the fraud of the owner, as by a delivery procured by his false and fraudulent promise to pay the freight as soon as the goods were received; and the carrier may obtain possession of the goods again, by a writ of replevin.[3] Nor is the carrier's lien dissolved by a delivery to the owner for a special and temporary purpose.[4]

Compensation.—A railroad company, in the absence of any regulations in its charter, may fix its own rates. But having fixed its rates, it is bound to carry for all alike without respect of persons. It may demand pay in advance, and refuse to carry unless this requirement is complied with.[5] Where no prepayment is made or freight fixed beforehand, it may recover its usual compensation. If it

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[1] M'Farland *v.* Wheeler, 26 Wend. 473.

[2] Boggs *v.* Martin, 13 B. Monroe, 244; M'Farland *v.* Wheeler, 26 Wend. 473.

[3] Bigelow *v.* Heaton, 6 Hill, 43; S. C., 4 Denio, 496.

[4] Hays *v.* Riddle, 1 Sandford, 248.

[5] Pickford *v.* Grand Junction R. Co., 8 M. & W. 372; 10 id. 399.

has taken possession of the goods, and the owner wishes them back again, it is entitled to remuneration for its trouble, and is not obliged to restore them until it is paid.[1] It has a special property in the goods, and may maintain an action for disturbance of its possession and for injuries to them.[2] If it exacts a larger compensation than it is entitled to by its agreement with the owner, who pays the same under protest, he may recover it back.[3] It cannot of its own mere motion, without judicial process, sell the goods for the payment of freight.[4] When tariffs of freight and fare are established upon a railroad, and received and appropriated by the company without objection, the legal presumption is that they were established by the authority of the directors.[5]

Liability in the Transportation of Cattle.— A railroad company may be the common carrier of cattle, and liable as such for their safe delivery. The fact that it undertakes the transportation of

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[1] 1 Parsons on Cont. 648–650, 680; Story on Bail. § 585, 586.

[2] Story on Bailments, § 585.

[3] Harmony *v.* Bingham, 2 Kernan, 99; see Finnie *v.* Glasgow and South Western R. Co., 34 Eng. L. and Eq. 11.

[4] Hunt *v.* Haskell, 24 Maine, 339; Fox *v.* M'Gregor, 11 Barb. 43. Judgment will not be arrested on motion after verdict, for want of allegation, in the declaration, of readiness to pay the freight on the goods being received by the company, where the suit was against it on a special contract for carriage of the goods with no provision for payment. Waterman *v.* Vt. Central R. R. Co., 25 Vt. 707.

[5] Manchester and Lawrence R. R. *v.* Fisk (Supreme Ct. of N. H., June T. 1856), 19 Law Rep. (Nov. 1856), p. 394; 33 N. H. not yet issued. Hilliard *v.* Goold, id.

cattle for hire for such persons as choose to employ it, establishes its relation as a common carrier, and with it the duties and obligations which grow out of the relation, whether the transportation of cattle be regarded as its principal employment or only incidental and subordinate. Cattle are, however, usually received by the company under a special contract, which excludes the stringent liability of a common carrier. In a suit against it for damages to the cattle, when a contract has been made, it cannot be declared against as a common carrier in an action on the case, but must be sued on the contract or for a breach of duty arising out of it.[1]

In England, the owner by these contracts assumes all the risks of injury by the conveyance or other contingencies; the effect of which is to relieve the company of responsibility, even where the injury has been caused by the defective construction of the car, or the gross negligence of the company's servants.[2] But in this country the company would not be relieved by such a contract from the consequences of gross negligence or misconduct.[3]

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[1] Kimball *v.* Rut. and Bur. R. R. Co., 26 Vt. 247. See Wilsons *v.* Hamilton, 4 Ohio State, 738.

[2] Austin *v.* Manchester and Sheffield R. Co., 5 Eng. L. and Eq. 329; S. C. 16 Q. B. 600; 71 E. C. L.; Chippendale *v.* Lancashire and Yorkshire R. Co., 7 id. 395; Morville *v.* Northern R. Co., 10 id. 366; Austin *v.* Manchester, Sheffield, &c. R. Co., 11 id. 506; 10 C. B. 454; 70 E. C. L.; Carr *v.* Lancashire and Yorkshire R. Co., 14 id. 340; 7 Exch. 707; Walker *v.* York and N. Midland R. Co., 22 Eng. L. and Eq. 315; S. C. 2 E. & B. 750; 75 E. C. L.; York, Newcastle and Berwick R. Co. *v.* Crisp, 14 C. B. 527; 78 E. C. L.; S. C. 25 Eng. L. and Eq. 396; Slim *v.* Great Northern R. Co., 14 C. B. 147; 78 E. C. L.; Broome's Commentaries on Common Law, 831, 832.

[3] Sager *v.* Portsmouth S. and P. and E. R. R. Co., 31 Maine, 228. See 1 Am. Rail. Cases, p.181, notes.

To what Parties the Company is liable for a Breach of Duty.—The owner of goods, as well as his bailee, has a right of action against the railroad company for the breach of its agreement to carry them safely, although the agreement was made with the bailee, to whom the goods had been delivered by the owner.[1] Thus, if the company is under a contract with an expressman to take all his packages for a year at a specified gross compensation, it is liable to the owner of a package for a loss, and in an action by the owner, it may also avail itself of such exceptions as it has introduced, having a right to introduce them, into the contract. The liability of the company to the owner in such cases has been placed on the ground that the expressman or forwarder is the agent of the owner; and in some instances on what is the true and better doctrine, that the common carrier is under the obligation of a public duty, and is liable in damages to the party injured by the breach.[2] A judgment against the owner in a suit by him against the railroad company is a bar to an action for the same injury brought by his bailee.[3]

So in England, it has been held, on the ground of a duty irrespective of contract, that a servant traveling with his master on a railway may have an

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[1] Elkins *v.* Boston and Maine R. R., 19 N. H. 333.

[2] N. J. Steam Nav. Co. v. Merchants' Bank, 6 How. 380; Stoddard *v.* Long Island R. R. Co., 5 Sandf. 180; Langworthy *v.* N. Y. and Harlem R. R. Co., 2 E. D. Smith, 195; Green *v.* Clarke, 2 Kernan, 343; S. C. 13 Barb. 57; 5 Denio, 497. But see Croueh *v.* Great Northern R. Co. 34 Eng. L. and Eq. 573; Pickford *v.* Grand Junction R. Co., 10 M. & W. 399.

[3] Green *v.* Clarke, 2 Kernan, 343; S. C. 5 Denio, 497; 13 Barb. 57.

action in his own name, on the custom of the realm, against the company for the loss of his luggage, although the master took and paid for his ticket.[1]

Damages for Breach of Agreement to carry Goods.—The damages against a railroad company for breach of its contract or duty as a common carrier, are governed by the same rules as determine the damages against other common carriers, and are discussed in treatises on the law of damages.[2] If the goods are totally lost by the default of the company, the measure of damages is the market value of such goods at the place of their destination, at the time when they should have been delivered, deducting freight; and if not totally lost to the owner, he may recover damages proportioned to his injury.[3] The rule of damages for non-delivery, within the reasonable time implied by law, or a period expressly fixed in the agreement, is not altogether settled. The difference between the market value of the goods at the place of delivery at the time when they should have been delivered, and their market value at that place at the time of actual delivery, with the necessary expenses of the owner in consequence of the wrongful

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[1] Marshall *v.* York R. Co. 7 Eng. L. and Eq. 519. See Collett *v.* London and N. W. R. Co. 6 id. 305; Great Northern R. Co. *v.* Harrison, 26 id. 443; S. C. 10 Exch. 376.

[2] Sedgwick on Dam. ch. xiii.; Mayne on Dam. 153–163; 2 Parsons on Cont. 468–470; Edwards on Bailments, 570–572.

[3] Id.; Stevens *v.* Boston and Maine R. R. Co., 1 Gray, 277; M'Henry *v.* Phil., Wil., and Balt. R. R. Co., 4 Harring. 448.

delay, has been considered a proper element to be taken into account in assessing the damages.[1]

The mere omission of the company to transport the goods within a reasonable time, does not amount to a conversion so as to render it liable for their full value.[2] Nor can the owner abandon the goods and recover their entire value, where they are uninjured in quality, and there is a partial loss, but he can recover only the price, at the place of delivery, of the goods actually lost.[3] If the carrier refuses to perform a special agreement to carry goods, he will be liable to the party with whom he has contracted for the difference between the price agreed upon, and the price for which the carriage might have been procured of others at the time the goods were to be received.[4] Where there is a wrongful refusal to deliver, and a subsequent delivery is made, the company is not liable for consequential damages, arising from delay to the consignee's work caused

[1] Sangamon and Morgan R. R. Co. *v.* Henry, 14 Ill. 156; Nettles *v.* S. C. R. R. Co., 7 Rich. 160; Kent *v.* Hudson River R. R. Co., 22 Barb. 278; Wilson *v.* York and Erie R. R. Co., 18 Eng. L. and Eq. 557. But in Wibert *v.* N. Y. and Erie R. R. Co., 19 Barb. 36, the difference between the market value at the proper time of delivery, and the market value at the time of actual delivery was held to be an injury too remote to the breach to be recoverable as damages. The Court of Appeals declined to pass upon the question, it not being necessary to the decision of the case. 2 Kernan, 245. Where a model was delivered to the company to be carried to a place where it was to be offered in a competition for a prize, and did not arrive within the time agreed upon for the carriage, so as to be offered in competition, the chances for obtaining the prize were held not a proper matter to be included in the damages. Watson *v.* Ambergate, &c. R. Co., 3 Eng. L. and Eq. 497.

[2] Scovill *v.* Griffith, 2 Kernan, 509.

[3] Shaw *v.* S. C. R. R. Co., 5 Rich. 462; Nettles *v.* S. C. R. R. Co., 7 id. 190; see Chicago and Rock Island R. R. Co. *v.* Warren, 16 Ill. 502.

[4] Ogden *v.* Marshall, 4 Selden, 340.

by such refusal or for a loss of profits from the same cause; but it is liable for the expense of sending to its office a second time for the goods.[1]

Action of Trover against the Company.—An action of trover will not lie against the company for a mere nonfeasance.[2] It cannot be maintained against the company for non-delivery of goods, without proof of a previous demand, unless its acts amount to a conversion.[3]

Burden of Proof.—The law imposes on the common carrier the obligation to deliver safely according to his agreement. The bailor having proved delivery to him and a loss, the burden of proof is on the carrier to bring himself within the exceptions to his liability which the law creates.[4] The proof of non-delivery by the carrier, which is incumbent on the owner, is satisfied by slight evidence.[5] But where it was the duty of the company to whom the owner delivered the goods, to forward them to a certain place, and there deliver them to another company which was to carry them still further, it is not sufficient in a suit against the first company for its breach of duty under the contract, merely to prove that the goods never reached their destination, or to

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[1] Waite *v.* Gilbert, 10 Cush. 177.

[2] Bowlin *v.* Nye, 10 Cush. 416.

[3] Rome R. R. Co. *v.* Sullivan, 14 Geo. 283; Robinson *v.* Austin, 2 Gray, 564; Angell on Carriers, § 433.

[4] Story on Bail. § 529; Angell on Carriers, § 202; Clark *v.* Barnwell, 12 How. 272; Alden *v.* Pearson, 3 Gray, 342.

[5] Angell on Carriers, §§ 470, 476; Edwards on Bailments, 566.

give evidence of a loss which is equally consistent with a loss by the one company as by the other.[1] Whether the carrier, who has been relieved by a special contract from his liability as a *quasi* insurer is required to disprove negligence, is not settled. The better opinion is that the only effect of the special contract is, to add to the exceptions of losses by the act of God and the public enemies made by the law, those resulting from unavoidable accident, and still leave it incumbent on the carrier to bring himself within the special exception, and to show not only that the loss arose from the excepted peril, but also that it was not occasioned by his negligence.[2]

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[1] Midland R. Co. *v.* Bromley, 33 Eng. L. and Eq. 235.

[2] Whitesides *v.* Russell, 8 W. & S. 44; Camden and Amboy R. R. Co. *v.* Baldauf, 16 Penn. State, 67; Davidson *v.* Graham, 2 Ohio State, 131; Graham *v.* Davis, 4 id. 362; Swindler *v.* Hilliard, 2 Rich. 286; Baker *v.* Brinson, 9 id. 201; Parsons *v.* Monteath, 13 Barb. 360; 2 Greenl. Ev., § 219; but see 2 Greenl. Ev. § 218; Story on Bail. § 573; N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. 384; Clark *v.* Barnwell, 12 id. 280.

CHAPTER XVIII.

LIABILITY OF THE COMPANY AS A COMMON CARRIER OF PASSENGERS.

MEASURE OF LIABILITY FOR THE SAFETY OF PASSENGERS.—Common carriers of goods are, as stated in the preceding chapter, responsible for all injuries thereto, except those caused by the act of God or the public enemies, even in the absence of negligence. The facility of collusion with thieves, and of embezzlement, the ordinary exclusive possession by them of the means of evidence, the entire separation of the owner from his property during the transit, are the leading grounds of public policy which gave rise to this extraordinary responsibility. These considerations do not apply to the carriage of persons. Passengers must also have some freedom of volition, and are not subject to that absolute dominion of the carrier, which may be exercised over inanimate things. It is their duty also to take reasonable care of themselves in order to avoid accidents, and it is presumed that they take upon themselves the unavoidable risks of the mode of travel they adopt.

A distinction has, therefore, been taken between the liability of the common carrier for goods, and his liability for passengers, making him liable for

injury to the latter, only in case of his negligence. But the law, in its beneficence, will not admit any trifling with the lives and limbs of human beings, and therefore exacts the highest diligence and skill of those to whose charge as common carriers they are committed. Common carriers of passengers are responsible for the slightest negligence, resulting in injury to them, or as the rule is stated in other words, are required, in the preparation and management of their means of conveyance, to exercise the highest degree of diligence and skill which a reasonable man would use under such circumstances. This obligation is imposed on them as a public duty, and by their contract to carry safely as far as human care and foresight will reasonably admit. The rule requiring the highest degree of diligence of those who undertake the carriage of passengers, which is familiar in its application to the proprietors of stage coaches, is equally applicable to railroad companies, whose vehicles are propelled by the power of steam.[1] But an impracticable degree of skill and diligence is not to be required of the company.[2]

The company is bound to provide skillful and

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[1] Stokes *v.* Saltonstall, 13 Peters, 181; Hall *v.* Conn. River Steamboat Co., 13 Conn. 319; Fuller *v.* Naugatuck R. R. Co., 21 Conn. 557; Derwort *v.* Loomer, id. 245; Camden and Amboy R. R. Co. *v.* Burke, 13 Wend. 611; Hegeman *v.* Western R. R. Corp., 16 Barb. 353; 3 Kernan, 24; Nashville and Chattanooga R. R. Co. *v.* Messino, 1 Sneed, 220; Frink *v.* Potter, 17 Ill. 406; Galena and Chicago Union R. R. Co. *v.* Yarwood, 17 id. 509; 15 id. 468; Chicago and Mississippi R. R. Co. *v.* Patchin, 16 id. 202; Galena and Chicago Union R. R. Co. *v.* Fay, 16 id. 558; Aurora Branch R. R. Co. *v.* Grimes, 13 id. 585.

[2] Galena and Chicago Union R. R. Co. *v.* Fay, 16 Ill. 558; Frink *v.* Potter, 17 id. 406.

careful servants, of good habits and in every respect competent for the posts which they are appointed to fill, as conductors, engineers, brakemen; and is responsible not only for their possession of such care and skill, but also for the continued application of these qualities at all times.[1] It is bound to use adequate skill, and the utmost care and diligence in providing such cars, engines, boilers, and other machinery as are safe and sufficient for the purposes for which they are used; and it will be responsible for injuries to passengers, which the exercise of such skill and diligence might have prevented.[2] It is responsible for injuries arising from the breaking of its machinery, from the effect of frost, which might have been avoided by proper precautions.[3] It does not, however, absolutely warrant their sufficiency. Accordingly, it has been held that if an accident happens from a defect which might have have been discovered and remedied upon the most careful and thorough examination, such accident must be ascribed to negligence, for which the company is liable in case of injury to a passenger resulting from the accident. But where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judg-

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[1] Gillenwater *v.* Madison and Indianapolis R. R. Co., 5 Indiana, 338; Nashville and Chattanooga R. R. Co. *v.* Messino, 1 Sneed, 226; M'Kinney *v.* Neil, 1 M'Lean, 550; Peck *v.* Neil, 3 id. 22; Stokes *v.* Saltonstall, 13 Peters, 181.

[2] N. J. R. R. Co. *v.* Kennard, 21 Penn. State, 203.

[3] Frink *v.* Potter, 17 Ill. 407.

ment, and the most vigilant oversight, then the company is not liable for the injury.[1]

Applying this principle to railroad companies which has been applied to the proprietors of stage coaches in Massachusetts after a thorough examination of the authorities, the company which contracts with a skillful and competent manufacturer to construct its machinery, would not be responsible for injuries arising from latent defects which could not be discovered after the delivery thereof to the company, upon a vigilant and careful examination by a competent person, although they might have been discovered by the manufacturer, upon such an examination, in the process of construction. A rule has, however, been adopted in New York by a divided court, which in effect makes the company a warrantor of the skill and fidelity of such manufacturer, although in no sense the servant of the company or under its control. Its responsibility is held to be the same, whether the machinery was manufactured by its own immediate servants in its own workshops, or by other persons of whom it was purchased; and if the defect could have been ascertained by any test which persons engaged in the business ought to have known, either by the manufacturer during the construction, or by the servants of the company

[1] Ingalls *v.* Bills, 9 Met. 1. This was a case where the proprietors of a coach were held not answerable for an injury to a passenger, received solely by reason of the breaking of one of the iron axle-trees in which there was a very small flaw, entirely surrounded by sound iron, one fourth of an inch thick, and which could not possibly be discovered by an examination externally.

afterwards, it is responsible for the consequences thereof. It engages, it was considered, that all that well-directed skill can do has been done to furnish sufficient machinery, and undertakes not only that the manufacturer had the requisite capacity, but that it was skillfully exercised in the particular instance. Thus, where the injury occurred by the breaking of the axle, which had been purchased of a skillful manufacturer, and appeared to be of the best quality of iron, and to be well made, but after it was broken a fire-crack was discovered and the iron found defective, the company was held responsible, on the ground that the defect might have been discovered by the manufacturer in the progress of the work by the application of tests known to persons skilled in the business.[1]

The company is bound to exercise the most exact diligence, not only in the management of the trains, but also in the structure and supervision of its road, and in all the subsidiary arrangements which are

[2] Hegeman *v.* Western R. R. Corp. 16 Barb. 353; S. C. 3 Kernan, 9; two judges dissenting in the Court of Appeals. The decision seems to be in conflict with the principle of Ingalls *v.* Bills, 9 Met. 1, notwithstanding Gardiner, C. J., delivering the opinion of the Court, attempts to draw a distinction between the two cases, on the ground that different precautions and different tests are required in the case of railroads and of stage-coaches. This is certainly true; but the principle which governs both is the same. The exercise of a "sound judgment and the most vigilant oversight" are required of the proprietors of both, and the exercise of these qualities in each case may call for a different class of precautions, but neither, it would seem, are by the common law the warrantors of the absolute sufficiency of their vehicles or of the application of the skill and fidelity of all the artisans, in no way under their control, whose work has entered into the construction. The judge delivering the opinion, it will be noticed, although sustaining the instructions, uses language somewhat less decided.

necessary for the safety of passengers. It is under the same responsibility for the proper condition of its track as for the sufficiency of its machinery and the fidelity of its servants.[1] It is its duty to see that a switch by which another railroad company connects with and enters on its track, is rightly constructed, attended, and managed; and is responsible for injuries which happen to its passengers through the carelessness of the switch-men, notwithstanding the switch was made by the proprietors of the other road, by whose servants it is tended.[2] It is also required in the management of the switch to see that the rails are in a right position, and not to trust exclusively to the lever when the rails are in open view while moving it; and to keep the rails firmly secured; and it is responsible for injuries to a passenger where the cars run off the track through neglect to use these precautions.[3] It has been considered its duty to keep its track inclosed by a fence, to prevent collisions with cattle whereby passengers are likely to be injured.[4] It is bound to provide safe and sufficient means of access to its stations for the accommodation of passengers.[5] It is required to avail itself of new improvements whose utility has been tested, and which are well

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[1] Schopman *v.* Boston and Worcester R. R. Corp. 9 Cush. 24.

[2] McElroy *v.* Nashua and Lowell R. R. Corp. 4 Cush. 400; Norris *v.* Androscoggin R. R. Co. 39 Maine, 276.

[3] Curtiss *v.* Rochester and Syracuse Railroad Co. 20 Barb. 282.

[4] In Re Rensselaer and Saratoga R. R. Co. 4 Paige, 553; Cornwall *v.* Sullivan R. R. Co. 8 Foster, 168, 169.

[5] Murch *v.* Concord R. R. Corp. 9 Foster, 9; Martin *v.* Great N. R. Co. 30 Eng. L. and Eq. 473.

known as safeguards against accidents; and is responsible for injuries occasioned by its omission to make use of them. Whether the invention is a necessary precaution against danger, is a question for the jury.[1] It is required to stop its trains long enough at stations where passengers are left, to give them a reasonable opportunity to leave the cars.[2] It has been considered bound to warn passengers of particular passages unusually dangerous and requiring of them superior circumspection.[3]

If, through the default of the company or of its servants, the passenger is placed in such a perilous condition as to render it an act of reasonable precaution for the purpose of self-preservation to leap from the cars, the company is responsible for the injury he receives thereby, although if he had remained in the cars he would not have been injured.[4] But the passenger has no right to leap from the train while it is running, simply because he has been carried past a station where it was the duty of the company to leave him; and he cannot recover for an injury received in the leap.[5]

NEGLIGENCE OF THE PASSENGER.—The company is

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[1] Hegeman *v.* Western R. R. Corp. 16 Barb. 353; 3 Kernan, 9.

[2] Fuller *v.* Naugatuck R. R. Co. 21 Conn. 557.

[3] Laing *v.* Colder, 8 Barr, 479; N. J. R. R. Co. *v.* Kennard, 21 Penn. State, 203.

[4] Stokes *v.* Saltonstall, 13 Peters, 181; Ingalls *v.* Bills, 9 Met. 1; Pennsylvania R. R. Co. *v.* Aspell, 23 Penn. State, 147; Galena and Chicago Union R. R. Co. *v.* Yarwood, 15 Ill. 468, 471; 17 id. 509; Frink *v.* Potter, id. 411; Eldridge *v.* Long Island R. R. Co. 1 Sandf. 89.

[5] Penn. R. R. Co. *v.* Aspell, 23 Penn. State, 147.

not responsible for an injury to a passenger which would not have happened but for his negligence, or to which his negligence substantially contributed; notwithstanding it is itself chargeable with a breach of duty.[1] Thus, the company is not responsible for injuries to a passenger to which he has contributed, by a breach of its reasonable regulations and the proper directions of the officers of the train.[2]

A passenger who is injured by the negligence of the company, while riding in the baggage car, is entitled to recover, if he was there lawfully, although he would not have been injured if he had been in the passenger car, which was a less dangerous place.[3]

MEASURE OF LIABILITY TO PASSENGERS NOT PAYING FARE.—The terms, slight, ordinary, and gross negligence, are familiar to the treatises and decisions on the law of bailments. The distinction between them is not very appreciable. A hired bailee is said to be chargeable with ordinary negligence, and a gratuit-

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[1] Laing *v.* Colder, 8 Barr, 479; Murch *v.* Concord R. R. Corp. 9 Foster, 9; Penn. R. R. Co. *v.* Aspell, 23 Penn. State, 147; Holbrook *v.* Utica and Schenectady R. R. Co. 2 Kernan, 236. It is not yet settled in England whether the negligence of the passenger is a good defence to an action against the company, the action being for a tort founded on contract, and distinguished from an action for a tort founded on negligence only. Martin *v.* Great N. R. Co. 30 Eng. L. and Eq. 473.

[2] Galena and Chicago Union R. R. Co. *v.* Yarwood, 15 Ill. 468; S. C. 17 id. 509; Galena and Chicago Union R. R. Co. *v.* Fay, 16 id. 558; see Lawrenceburgh and Upper Miss. R. R. Co. *v.* Montgomery, 7 Ind. 474; Zemp *v.* W. and M. R. R. Co., 9 Rich. 84. It is held in Penn. R. R. Co. *v.* M'Closkey, 23 Penn. State, 526, that a railroad company carrying passengers, cannot allege that a passenger is in fault in obeying specific instructions of the conductor, instead of the general directions of which he has been informed.

[3] Carroll *v.* N. Y. and N. H. R. R. Co., 1 Duer, 571.

ous bailee with gross negligence. There are, doubtless, cases where justice dictates that a bailee who receives compensation for his service, should be held liable for a loss occasioned by his neglect to use certain precautions; whereas, in the same case, if his service were gratuitous, he should not be made chargeable.

It is, however, mainly a question of fact for the jury to determine upon a view of the nature of the employment, the skill and diligence required in it, the value of the subject of the bailment, and the relations of the parties, what, under all the circumstances, is the duty of the bailee, and whether he has failed to discharge it. The distinction between negligence and gross negligence has been discountenanced in modern authorities, as unintelligible.[1] It has been substantially discarded in its application to the transportation of passengers by common carriers, in vehicles drawn by steam power; an employment requiring the faithful and vigilant exercise of peculiar skill, the omission to exercise which is greatly dangerous to the lives and limbs of human beings. Their default is not less a violation of public duty than of their contract with the passenger. Any negligence under such circumstances may well be deemed culpable, rendering the proprietors of the railroad liable for injuries, even in case of the gratuitous carriage of a passenger. Even if they are to be considered as liable only for gross negligence, they may be held,

[1] Wylde *v.* Pickford, 8 M. & W. 443, 461, 462; Wilson *v.* Brett, 11 id. 113; Hinton *v.* Dibbin, 2 Q. B. 646; Whitney *v.* Lee, 8 Met. 91.

when negligent in any degree, to be guilty of that; according to the rule recognized by the authorities, that the neglect to use the peculiar skill in an employment which requires it, is gross negligence. The present tendency of the law is to hold the common carrier of passengers by steam to substantially the same liability for passengers traveling free, as for those paying fare, provided they are lawfully on the train.[1]

[1] Steamboat New World *v.* King, 16 Howard, 471, 474. This was a suit in admiralty against the proprietors of a steamboat, for an injury caused by the bursting of a boiler, through the negligence of their servants, to a passenger who was being carried free of charge. Curtis, J., said, "The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman Law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. In Storer *v.* Gowen, 18 Maine, 177, the Supreme Court of Maine say, 'How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define.' Mr. Justice Story (Bailments, § 11,) says, 'Indeed, what is common or ordinary diligence is more a matter of fact than of law.' If the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty, had better be abandoned.

"Recently, the judges of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them. Wilson *v.* Brett, 11 Meeson & Wels. 113; Wyld *v.* Pickford, 8 ib. 443, 461, 462; Hinton *v.* Dibbin, 2 Q. B. 646, 651. It must be confessed that the difficulty in defining gross negligence, which is apparent in perusing such cases as Tracy et al. *v.* Wood, 3 Mason, 132, and Foster *v.* the Essex Bank, 17 Mass. R.

In a suit against the Philadelphia and Reading Railroad Company for damages to a passenger, the following facts appeared. The plaintiff himself was

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479, would alone be sufficient to justify these complaints. It may be added that some of the ablest commentators on the Roman Law, and on the civil code of France, have wholly repudiated this theory of three degrees of diligence, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties. See Toullier's Droit Civil, 6th vol., p. 239, &c.; 11th vol., p. 203, &c.; Makeldey, Man. du Droit Romain, 191, &c.

"But whether this term, gross negligence, be used or not, this particular case is one of gross negligence, according to the tests which have been applied to such a case.

"In the first place, it is settled that 'the bailee must proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part.' Story on Bailments, § 15.

"It is also settled, that if the occupation or employment be one requiring skill, the failure to exert that needful skill, either because it is not possessed or from inattention, is gross negligence. Thus Heath, J., in Shields *v.* Blackburne, 1 H. Bl. 161, says, 'If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence if he undertook gratis to attend a sick person, because his situation implies skill in surgery.' And Lord Loughborough declares that an omission to use skill is gross negligence. Mr. Justice Story, although he controverts the doctrine of Pothier, that any negligence renders a gratuitous bailee responsible for the loss occasioned by his fault, and also the distinction made by Sir William Jones between an undertaking to carry and an undertaking to do work, yet admits that the responsibility exists when there is a want of due skill or an omission to exercise it. And the same may be said of Mr. Justice Porter, in Percy *v.* Millaudon, 20 Martin, 75. This qualification of the rule is also recognized in Stanton et al. *v.* Bell et al. 2 Hawks, 145.

"That the proper management of the boilers and machinery of a steamboat requires skill, must be admitted. Indeed, by the act of Congress of August 30, 1852, great and unusual precautions are taken to exclude from this employment all persons who do not possess it. That an omission to exercise this skill vigilantly and faithfully, endangers, to a frightful extent, the lives and limbs of great numbers of human beings, the awful destruction of life in our country by explosions of steam-boilers but too painfully proves. We do not hesitate, therefore, to declare that negligence in the care or management of such boilers, for which skill is neces-

the president of another railroad company, and a stockholder in the defendant company, and on his account and on behalf of others, was inquiring into its affairs. He was on the road of the defendants for the purpose of viewing it, and the works of the company, by invitation of its president, and was being carried, without any charge for fare, in a small locomotive car used for the convenience of its officers, and not in the usual passenger cars. The injury to his person was caused by this car coming in collision with a locomotive and tender in the charge of another agent or servant of the company, which were on the same track, and moving in an opposite direction. Another agent of the company, in the exercise of proper care and caution, had given orders to keep this track clear. The driver of the colliding engine acted in disobedience and disregard of these orders, and thus caused the collision. The court instructed the jury substantially as follows: first, that if the plaintiff was lawfully on the road at the time of the collision, and the col-

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sary, the probable consequence of which negligence is injury and loss of the most disastrous kind, is to be deemed culpable negligence, rendering the owners and the boat liable for damages, even in case of the gratuitous carriage of a passenger. Indeed, as to explosion of boilers and flues, or other dangerous escape of steam on board steamboats, Congress has, in clear terms, excluded all such cases from the operation of a rule requiring gross negligence to be proved, to lay the foundation of an action for damages to persons or property."

The term negligence is well defined by Alderson, B., in Blyth *v.* Birmingham Waterworks Co., 36 Eng. L. and Eq. 506, 508: "Negligence I define to be, either the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do; in either case causing mischief to a third party; not intentionally, for then it would not be negligence."

lision and consequent injury to him were caused by the gross negligence of one of the servants of the defendants, then and there employed on the road, he is entitled to recover, notwithstanding the circumstances given in evidence, and relied upon by the defendants as forming a defence to the action, to wit, that the plaintiff was a stockholder in the company, riding by invitation of the president, paying no fare, and not in the usual passenger cars; secondly, the fact that the engineer having the control of the colliding locomotive, was forbidden to run on that track at the time, and had acted in disobedience of the order, was not a defence to such action. The jury under the instructions of the court, found a verdict for the plaintiff, and judgment thereon was affirmed by the Supreme Court of the United States. The fact that the passage was gratuitous was not admitted as a defence, on the ground that the company was responsible by the general rule which make the master liable for the acts of his servant, irrespective of any contract, express or implied, or any other relation between the injured party and the master, and that when carriers undertake to convey persons by the powerful and dangerous agency of steam, whether the consideration be pecuniary or not they are held to the greatest possible care and diligence, and any negligence under such circumstances is "gross."[1] The same doctrine

[1] Philadelphia and Reading R. R. Co. *v.* Derby, 14 Howard, 468, 484. Grier, J.: "The liability of the defendants below, for the negligent and injurious act of their servant, is not necessarily founded on any contract

has since been approved by the same court, and applied to an injury received by a "steamboat man" who in accordance with the usage of masters of

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or privity between the parties, nor affected by any relation, social or otherwise, which they bore to each other. It is true, a traveler, by stage coach, or other public conveyance, who is injured by the negligence of the driver, has an action against the owner, founded on his contract to carry him safely. But, the maxim of '*respondeat superior*' which, by legal imputation, makes the master liable for the acts of his servant, is wholly irrespective of any contract, express or implied, or any other relation between the injured party and the master. If one be lawfully on the street or highway, and another's servant carelessly drives a stage or carriage against him, and injures his property or person, it is no answer to an action against the master for such injury, either, that the plaintiff was riding for pleasure, or that he was a stockholder in the road, or that he had not paid his toll, or that he was the guest of the defendant, or riding in a carriage borrowed from him, or that the defendant was the friend, benefactor, or brother of the plaintiff. These arguments, arising from the social or domestic relations of life may, in some cases, successfully appeal to the feelings of the plaintiff, but will usually have little effect where the defendant is a corporation, which is itself incapable of such relations or the reciprocation of such feelings. In this view of the case, if the plaintiff was lawfully on the road at the time of the collision, the court were right in instructing the jury that none of the antecedent circumstances, or accidents of his situation, could affect his right to recover.

"It is a fact peculiar to this case that the defendants, who are liable for the act of their servant coming down the road, are also the carriers who were conveying the plaintiff up the road, and that their servants immediately engaged in transporting the plaintiff were not guilty of any negligence, or in fault for the collision. But we would not have it inferred, from what has been said, that the circumstances alleged in the first point would affect the case, if the negligence which caused the injury had been committed by the agents of the company who were in the immediate care of the engine and car in which the plaintiff rode, and he was compelled to rely on these counts of his declaration, founded on the duty of the defendant to carry him safely. This duty does not arise alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous. 'The confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it.' See Coggs *v.* Bernard, and cases cited in 1 Smith's Leading Cases, 95. It is true, a distinction has been taken, in some cases, between simple negligence, and great or gross negligence; and it is said, that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the

steamboats, was admitted by the master on board the defendant's boat free of charge. The injury was occasioned by the bursting of the boiler, through the negligence of the master of the boat, while racing with another boat in order to reach a landing place before it. It was held that the master was authorized to give a free passage to the plaintiff by a general usage, not unreasonable in itself, and indirectly beneficial to the owners, and had power to bind them thereby; and that the management of the boilers and machinery requiring skill, the failure to exercise it, either because it is not possessed or from inattention, is culpable negligence rendering the owners liable for injury resulting therefrom, even to passengers who are carried gratuitously.[1]

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difference (if it be capable of definition), as the verdict has found this to be a case of gross negligence.

"When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless servants. Any negligence in such cases may well deserve the epithet of 'gross.' In this view of the case, also, we think there was no error in the first instruction." It was further held in this case, that the fact that the servant by whose negligence the injury was committed was acting in disobedience of orders, was not a defence to the action.

[1] Steamboat New World *v.* King, 16 Howard, 469, 474; *ante*, p. 478, note; see Gillenwater *v.* Madison and Indianapolis R. R. Co. 5 Indiana, 339; Great Northern R. Co. *v.* Harrison, 10 Exch. 376; 26 Eng L. and Eq. 443; 1 Parsons on Cont. 691–695. The company cannot contract for exemption from liability for gross negligence. Pennsylvania R. R. Co. *v.* M'Closkey, 23 Penn. State, 526.

Liability for injuries to Persons Unlawfully on the Train.—The company is not liable for any but willful injuries to persons unlawfully on its trains. Thus, where a person, in violation of the rules of the company, which were known to him, was permitted by the engineer to ride with him upon the engine, without the knowledge of the conductor and paying no fare, it was decided that he was unlawfully on the train, and could not recover of the company for injuries sustained by him while riding there.[1]

Liability for passengers on Freight Trains.—The company must be carrying a person as a common carrier of passengers, in order to be liable to him as such. Railroad companies sometimes take passengers by their freight trains, although they are not common carriers of passengers by these trains unless they make their carriage by them an habitual business. If they are accustomed to have a special car attached to such trains, fitted up and designed for passengers, into which they admit all persons applying for passage, their liability for the carriage of such persons is the same as when carried on their regular passenger trains. But a different rule may well apply where, for the special accommodation of the applicants, they admit persons on board such trains without holding themselves out as common carriers

[1] Robertson *v.* N. Y. and Erie R. R. Co., 22 Barb. 91; see *ante*, ch. xii., p. 284. It was also decided in this case, that the presumption was against the authority of the engineer to allow a person to ride on the engine, whether he paid fare or rode free.

of passengers by them. In such a case, all that could reasonably be required of them by a passenger is such accommodation and management as are usual with freight trains.[1] Before the road is fairly opened to general business, the company may render itself liable as a common carrier of passengers by taking them and receiving pay, although no passenger cars are attached to the engine, and only open cars, used for carrying iron and wood, with seats placed across them, are used.[2]

The Liability of the company to Passengers purchasing tickets of it to Places beyond its Terminus.—The liability of the company for injuries to passengers to whom it has sold tickets to points beyond its terminus, has already been noticed in the preceding chapter.[3]

Liability of Persons, other than the Proprietors of the Road, contracting to carry persons over it.—If a common carrier of passengers contracts to carry them safely over a road belonging to other parties, he cannot discharge himself from liability for an injury received by them on such road, upon the ground that the trains are under the conduct and control of the servants of others, by whose negligence the injury was caused. He undertook by his contract the safe carriage of the passengers; and

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[1] Murch *v.* Concord R. R. Corp., 9 Foster, 9; Lawrenceburgh and Upper Mississippi R. R. Co. *v.* Montgomery, 7 Ind. 477.

[2] N. and C. R. R. Co *v.* Messino, 1 Sneed (Tenn.) 220.

[3] *Ante*, ch. xviii. pp. 451–458.

in fulfilling it, has made those servants his own. Thus it was held in Pennsylvania, where the road was owned and the motive power furnished by the State, which were under the control of its servants, by whose default the injury was occasioned, that a party carrying passengers on the road and doing business thereon as a common carrier by virtue of a contract with the State, was liable for an injury to a passenger who had contracted with him for a passage.[1]

LIABILITY OF THE COMPANY TO PASSENGERS PURCHASING TICKETS OF OTHER COMPANIES, WHEN CARRIED IN TRAINS UNDER THE CONTROL OF ITS SERVANTS.—Arrangements are customary among railroad companies by which one sells through tickets over its own and other roads, and accounts to the proprietors of the other roads for a proportionate share of the fare. A company, over whose road tickets have been sold under such arrangements, is liable to a passenger who is injured by its servants while riding over its road. It may authorize the sale of rights of passage at other places than its own stations, and make other companies its agents for that purpose, as it does when it authorizes them to sell through tickets over its road. Nor is its liability affected by the circumstance that the passenger, holding such a ticket, is carried through in the cars of the other company, where they are under the control of its own servants and drawn by its own locomotive.

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[1] Peters *v.* Rylands, 20 Penn. State, 497. See Jordan *v.* Fall River R. R. Co., 5 Cush. 69.

Thus, where the plaintiff purchased, at Albany or Springfield, tickets for himself and wife, of the agents of the Western Railroad Company, through to Boston over its own line and that of the Boston and Worcester Railroad Corporation, according to an arrangement between the two companies authorizing the sale of such tickets; and the cars of the Western Railroad Corporation were, on reaching Worcester, attached to the engine of the Boston and Worcester Railroad Corporation, in the control of its servants, whose line there commenced, it was held, that the last named corporation assumed towards the plaintiff and his wife, when coming upon its road by virtue of such tickets, the relation of a common carrier of passengers, and was liable for an injury to the wife during her passage thereon.[1]

PUBLIC DUTY OF THE COMPANY TOWARDS PERSONS TRAVELING UPON ITS ROAD IN THE TRAINS OPERATED BY OTHER CARRIERS.—The doctrine is now quite well established that a railroad company owes a public duty, irrespective of contract, to all persons lawfully passing upon its road. It is under an obligation to them to keep its road in a safe and proper condition.[2] As the obligation arises from public duty, its breach renders it responsible to a party suffering special damage therefrom, although there is no privity of

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[1] Schopman *v.* Boston and Worcester R. R. Corp., 9 Cush, 24.

[2] See Farwell *v.* Boston and Worcester R. R. Corp., 4 Met. 61; M'Elroy *v.* Nashua and Lowell R. R. Corp., 4 Cush. 403; Schopman *v.* Boston and Worcester R. R. Corp., 9 id. 24.

contract between him and the company, as where the contract for his safe carriage has been made with some other party. A sufficient privity exists between a party from whom and one to whom a legal duty is owing, to sustain an action for special injury resulting from its breach.[1] So, also, where one company by contract or license, lawfully runs its trains in the charge of its servants over the road of another, a passenger in such trains may recover damages of the company owning the road for an injury received from the improper condition of the road, or the misconduct of its servants in the management of the switches.[2]

Liability for passengers carried in Ferry Boats.—As ferries are, in many instances, used by railroad companies, either at the termini or at intermediate points of their line, it may be well here to state that ferrymen are common carriers, and that the circumstance of their using a ferry cannot lessen their liability for the safe carriage of the passengers over it.[3]

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[1] Skinner *v.* London, Brighton, and South Coast R. Co., 2 Eng. L. and Eq. 360; Collett *v.* London and N. W. R. Co., 6 id. 305; Marshall *v.* York, Newcastle, and Berwick R. Co., 7 id. 519; Great N. R. Co. *v.* Harrison, 26 id. 443; Nolton *v.* Western R. R. Co., 10 Howard Pr. 97; see Phil. and Reading R. R. Co. *v.* Derby, 14 How. 485.

[2] Sawyer *v.* Rut. and Bur. R. R. Co., 27 Vt. 370; see M'Elroy *v.* Nashua and Lowell R. R. Corp., 4 Cush. 403; Schopman *v.* Boston and Worcester R. R. Corp., 9 id. 24; *contra*, Murch *v.* Concord R. R. Corp., 9 Foster, 9.

[3] Fisher *v.* Clisbee, 12 Ill. 349; Richards *v.* Fuqua, 28 Mississippi, 792; Wilsons *v.* Hamilton, 4 Ohio State, 722; White *v.* Winnesimmet Co., 7 Cush. 155; Willonghby *v.* Horridge, 16 Eng. L. and Eq. 437.

DUTY OF THE COMPANY TO RECEIVE PASSENGERS AND TO CARRY THEM ACCORDING TO ITS PROFESSIONS.—The company is under a public duty, as a common carrier of passengers, to receive all who offer themselves as such and are ready to pay the usual fare, and is liable in damages to a party whom it refuses to carry without a reasonable excuse.[1] It may decline to carry persons after its means of conveyance have been exhausted, and refuse such as persist in not complying with its reasonable regulations, or whose improper behavior—as by their drunkenness, obscene language, or vulgar conduct—renders them an annoyance to other passengers. But it cannot make unreasonable discriminations between persons soliciting its means of conveyance, as by refusing them on account of personal dislike, their occupation, condition in life, complexion, race, nativity, political or ecclesiastical relations.[2] It is not obliged to receive passengers by its freight trains, unless it makes their carriage by such trains an habitual business.[3]

The company is answerable in damages to a passenger whom it neglects to carry according to its agreement. Thus, if by the ticket which it has sold to him he is to be carried through to his destination in a train starting at a certain time, he has a right

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[1] Beekman *v.* Saratoga and Schenectady R. R. Co., 3 Paige, 75; Galena and Chicago Union R. R. Co. *v.* Yarwood, 15 Ill. 472; Commonwealth *v.* Power, 7 Met. 601; 1 Parsons on Cont. 696.

[2] See Jencks *v.* Coleman, 2 Sumner, 221; Bennett *v.* Dutton, 10 N. H. 481.

[3] Murch *v.* Concord R. R. Corp., 9 Foster, 9.

of action against it, where, after carrying him to an intermediate point on its route, it makes no arrangements for carrying him thence to his destination.[1] The company is under a public duty to act up to its professions as a common carrier of passengers, and is liable in damages to a party immediately injured by its neglect thereof. Thus, if it professes by its published advertisement to carry passengers to certain places, by trains starting at a certain time, when in fact no such trains start at or near those times, it is liable for the damages immediately sustained by a party who, relying on the false representation in the advertisement, knowingly made by the company, proceeds to take the train so advertised.[2]

Duty of passengers to conform to the Reasonable Regulations of the company.—The company has the power to make reasonable regulations for the conduct of passengers while in its trains or stations, and may forcibly remove them therefrom, using no unnecessary violence, if they persist in disobeying them, without itself or its servants being made civilly or criminally liable.[3]

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[1] Hawcroft *v.* Great N. R. Co., 8 Eng. L. and Eq. 362. It seems that, for a want of room in its vehicles to be a defence, the contract should have been on that condition.

[2] Denton *v.* Great N. R. Co., 5 Ellis & Bl. 860; 85 E. C. L.; 34 Eng. L. and Eq. 154. See Crocker *v.* New London W. and P. R. R. Co., 24 Conn. 262, 263.

[3] Commonwealth *v.* Power, 7 Met. 596. See an abstract of this case with the opinion of the court, *ante*, ch. x., pp. 249—252; Hall *v.* Power, 12 Met. 482; Merrihew *v.* Milwaukie and Mississippi R. R. Co. (Circuit Court

The sale of a ticket to a passenger is a contract to carry him according to the reasonable regulations and usages of the company; and he is presumed also to contract with reference to them. Thus, a rule requiring passengers to give up their tickets in the cars soon after starting and before completing their journey, and to receive the checks of the conductor in return, is a reasonable regulation, entering into its contract to transport them. If the passenger refuses to comply with it by delivering up his ticket, he may be required to pay his fare in cash; and if he refuses to do either, he may be expelled from the cars. If he leaves them without paying his fare in cash or delivering his ticket, the company may recover of him the amount of his fare.[1]

The company may, by its regulations refuse to allow the purchaser of a through ticket, who leaves at an intermediate station the train in which he started, to take another subsequent train, and complete his journey by virtue of the same ticket or a conductor's check given to him in lieu thereof. His leaving the train at an intermediate station was an abandonment of his contract, unless the right was reserved to go through in another train. If, there-

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of Wisconsin, May Term, 1854), 5 Am. Law Reg. (April, 1857), p. 364. The company may revoke a free pass which it has issued. Id. The reasonableness of the regulation was held a question of fact for the jury, in State *v.* Overton, 4 Zabris. 435.

[1] Northern R. R. Co. *v.* Page, 22 Barb. 130. In this case the passenger had knowledge of the custom; but his knowledge has been held in other cases immaterial. Loring *v.* Aborn, 11 Law Rep. (Feb. 1849) 432, 4 Cush. 608; Cheney *v.* Boston and Maine R. R. Co. 11 Met. 121.

fore, on resuming his journey, he refuses to pay his fare from the station where he resumes it to his destination, he may be expelled from the cars by the servants of the company having charge of them.[1]

The company may enforce a regulation requiring passengers who do not purchase their tickets before entering the cars, to pay a higher fare than those who purchase their tickets at its offices; and a passenger who does not purchase his ticket before entering the cars, may be required to pay the higher rate of fare, and on his refusal, may be expelled from them by force with no unnecessary violence.[2]

It is competent for the company to make a regulation requiring a passenger to show his ticket for proper purposes, and to remove him from the cars for refusing to comply with it.[3]

Burden of Proof.—The proof of the mere fact

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[1] Cheney *v.* Boston and Maine R. R. Co. 11 Met. 121; State *v.* Overton, 4 Zabris. 435. The company will not be responsible for an unauthorized willful injury inflicted by its servant in expelling a passenger from the cars. Crocker *v.* New London, Willimantic, and Palmer R. R. Co. 24 Conn. 249.

[2] Hilliard *v.* Goold, 33 New Hamp. (Supreme Ct., July T., 1856) 19 Law Rep. (Oct. 1856), p. 343; Crocker *v.* New London, Willimantic, and Palmer R. R. Co. 24 Conn. 249. In this last case, the passenger, not having procured his ticket before entering the cars, was held bound to pay the higher rate, notwithstanding the ticket-office was closed so that he could not purchase a ticket which he sought to obtain at the office at a reasonable time before the train started.

[3] State *v.* Overton, 4 Zabris. 441; Willetts *v.* Buffalo and Rochester R. R. Co. 14 Barb. 585; Hibbard *v.* N. Y. and Erie R. R. Co., N. Y. Court of Appeals, June Term, 1857, not yet reported.

of injury received by a passenger while riding in the cars of the company, does not impose the burden of proof on the company to show that it did not arise from its negligence; for it may have happened to him through the tortious act of some person outside of the cars, or by some accident with which the company could have no possible connection. But proof of the injury and of its nature will generally develop circumstances from which negligence is to be presumed.[1]

It is well settled that proof of an injury, resulting from a collision or overturning of the cars, or the breaking of the machinery, or any other accident pertaining to the train while under the management of the company's agents, is presumptive proof of negligence, and imposes on the company the burden of proving that it was chargeable with no default, and that the injury happened from causes against which no care or foresight could have provided.[2]

DAMAGES RECOVERABLE BY AN INJURED PASSENGER.—The passenger who has been injured by

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[1] Holbrook *v.* Utica and Schenectady R. R. Co. 2 Kernan, 236.

[2] Laing *v.* Colder, 8 Barr, 479; Galena and Chicago Union R. R. Co. *v.* Yarwood, 17 Ill. 509; Hegeman *v.* Western R. R. Corp. 17 Barb. 353, 356; Zemp *v.* W. and P. R. R. Co. 9 Rich. 84; Stokes *v.* Saltonstall, 13 Peters, 181; M'Kinney *v.* Neil, 1 M'Lean, 540; Steamboat New World *v.* King, 16 Howard, 477; Ware *v.* Gay, 11 Pick. 106; Stockton *v.* Frey, 4 Gill, 406; 2 Greenl. Ev. § 222. The law on this point seems unsettled in England. Skinner *v.* London, &c., R. Co. 5 Exch. 787, 789; Carpue *v.* London and Brighton R. Co. 5 Q. B. 747; 48 E. C. L.; Perren *v.* Monmouthshire R. Co. 11 C. B. 855; 73 E. C. L.

the negligence of the company's servants, is entitled to full compensation for his injury. The jury in estimating the damages may take into consideration the loss of time and pecuniary expense consequent thereupon, and also the bodily pain or any incurable hurt.[1] Bodily pain and suffering are such necessary damages that they need not be specially alleged in the declaration.[2] It is a general rule that damages can only be given for the direct and necessary results of an injury. Such, as are speculative and contingent, are not allowed. But this does not prevent the jury from estimating future damages in the way of loss of health and of time, disability of limbs so as to prevent a party from pursuing his usual employment, bodily pain and suffering which are proved by the evidence as reasonably certain to result from the original injury.[3] Mental suffering, as fright arising from the risk and peril, may be taken into consideration where actual injury to the person has been sustained.[4] Whether vindictive or exemplary damages are recoverable in any case has been much controverted. They are allowed by the current of authorities in case of intentional or malicious

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[1] Laing *v.* Colder, 8 Barr, 479; Peck *v.* Neil, 3 M'Lean, 25; Morse *v.* Auburn and Syracuse R. R. Co., 10 Barb. 621; Varillat *v.* Carollton R. R. Co., 10 La. An. 88.

[2] Curtiss *v.* Rochester and Syracuse R. R. Co., 20 Barb. 282.

[3] Curtiss *v.* Rochester and Syracuse R. R. Co., 20 Barb. 282; Black *v.* Carrollton R. R. Co., 10 La. An. 33. Where damages do not immediately result from the injury, as where they arise from the number of the family dependent on the plaintiff and consequent embarrassment, they must, if recoverable at all, be specially alleged. Laing *v.* Colder, 8 Barr, 479.

[4] Canning *v.* Williamstown, 1 Cush. 451.

injuries;[1] but injuries to the feelings are not to be considered when the action is brought by a person other than the injured party, or where there is no intentional injury.[2]

The verdict of the jury for the plaintiff will not be set aside by the court on the application of the company, on account of the amount of damages, unless it is so excessive as to indicate partiality, prejudice, or passion, or some improper conduct.[3]

LIABILITY OF THE COMPANY FOR THE LUGGAGE OF PASSENGERS.—Railroad companies, as common carriers of passengers and their luggage, are responsible for the luggage in case of loss, except where it occurs by the act of God or the public enemies. The price for its carriage need not be paid in a distinct sum,

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[1] 2 Parsons on Cont. 446–453.

[2] Black *v.* Carrollton R. R. Co., 10 La. An. 33; Varillat *v.* Same, 10 id. 88; Blake *v.* Midland R. Co., 10 Eng. L. and Eq. 437; Morse *v.* Auburn and Syracuse R. R. Co., 10 Barb. 625.

[3] In Curtiss *v.* Syracuse and Rochester R. R. Co., 20 Barb. 282, a verdict for $4,500 for an injury to one of the plaintiff's legs whereby he had been incapacitated from labor most of the time for nearly two years, and the disability was likely to be permanent or long continued, was sustained. In Hegeman *v.* Western R. R. Corp., 16 Barb. 353, $9,900 was awarded where the plaintiff's hip was dislocated, and he was otherwise badly and permanently injured, so as to make him a cripple for life, and deprive him of the ability to support himself and family; and the court refused to set aside the verdict. In Zemp *v.* W. and M. R. R. Co., 9 Rich. 84, the court refused to grant a new trial, on the application of the company, where the damages were assessed by the jury at $10,000 for injuries to the plaintiff's left leg which required its amputation, and for other serious injuries to his right foot and ankle; but a new trial does not appear to have been moved on account of excessive damages.

but is by usage included in the fare of the passenger.[1]

WHAT MAY BE INCLUDED IN LUGGAGE.—The company should not be held liable further than it is compensated; and, therefore, it is not responsible for articles in a passenger's trunks which are not properly included within the designation of luggage. The passenger is entitled to a reasonable amount of luggage, and to include in it such articles as are necessary and convenient for personal use, and as it is usual for persons traveling to take with them.[2] What amount and kind are reasonable must be determined by the jury, under the instructions of the court, by reference to the length and object of the journey, the habits, tastes, and condition in life of the passenger, whether he travels alone or with his family, what it is necessary for a person in his situation to have along with him in his journey, and such like circumstances.[3]

Luggage does not include merchandise or samples thereof, used by the passenger in making bargains.[4]

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[1] Orange Co. Bank *v.* Brown, 9 Wend. 85, 115; Camden and Amboy R. R. Co., 13 id. 628; Hollister *v.* Nowlen, 19 id. 236; Powell *v.* Myers, 26 id. 591; Hawkins *v.* Hoffman, 6 Hill, 589; Dibble *v.* Brown, 12 Geo. 224; Jordan *v.* Fall River R. R., 5 Cush. 72; Collins *v.* Boston and Maine R. R., 10 id. 506; Camden and Amboy R. R. Co. *v.* Belknap, 21 Wend. 354. For extra luggage, which is paid for as such, the company is liable as a common carrier. Dibble *v.* Brown, 12 Geo. 224.

[2] Jordan *v.* Fall River R. R., 5 Cush. 72.

[3] Woods *v.* Devin, 13 Ill. 750; Dibble *v.* Brown, 12 Geo. 217.

[4] Pardee *v.* Drew, 25 Wend. 495; Hawkins *v.* Hoffman, 6 Hill, 586; Collins *v.* Boston and Maine R. R. Co., 10 Cush. 506; Dibble *v.* Brown, 12 Geo. 224; Great N. R. Co. *v.* Shepherd, 9 Eng. L. and Eq. 477; 14 id. 367.

Money *bona fide* taken for traveling expenses and personal use, to such a reasonable amount as a prudent person would deem necessary and proper, may be placed in the traveler's trunk, for which the company will be responsible as a common carrier; but it will not be responsible as such for money so carried when intended for trade, investment, or transportation.[1] A watch has been held proper to be carried in a trunk as luggage.[2] So, also, reasonable tools for a mechanic who is the passenger,[3] a wife's jewelry,[4] a pocket pistol or a rifle.[5] It has been considered that articles of amusement, as a gun, fishing tackle, books, may be considered luggage.[6] But handcuffs and locks are not admitted as such.[7]

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[1] Jordan *v.* Fall River R. R., 5 Cush. 69. In this case, it was held that if the sum carried exceeded the proper amount, the company would still be liable for gross negligence, p. 74. In Weed *v.* Saratoga and Schenectady R. R. Co., 19 Wend. 534, $285 were found to have been properly placed in a trunk, where the passenger was a resident of New York city and had been making collections in the western counties of the State. Bomar *v.* Maxwell, 9 Humph. 621; Johnson *v.* Stone, 10 id. 419. In Orange Co. Bank *v.* Brown, 9 Wend. 85, the sum of $11,250 in bank bills, which was being carried by the passenger from one bank to another, was held not properly included in luggage. See Doyle *v.* Kiser, 6 Ind. 242. In Hawkins *v.* Hoffman, 6 Hill, 589, it is doubted whether money for traveling expenses may be included.

[2] Jones *v.* Voorhees, 10 Ohio, 145; *contra*, Bomar *v.* Maxwell, 9 Humph. 62.

[3] Porter *v.* Hildebrand, 14 Penn. State, 129; Davis *v.* Cayuga and Susquehanna R. R. Co., 10 How. Pr. 330.

[4] M'Gill *v.* Rowand, 3 Barr, 451; Brooke *v.* Pickwick, 4 Bing. 218.

[5] Davis *v.* Cayuga and Susquehanna R. R. Co., 10 How. Pr. 330; Woods *v.* Devin, 13 Ill. 746.

[6] Hawkins *v.* Hoffman, 6 Hill, 589; Woods *v.* Devin, 13 Ill. 750.

[7] Bomar *v.* Maxwell, 9 Humph. 621.

When the Liability of the company for Luggage Begins and Ends.—The responsibility of the company for the passenger's luggage commences when it has been received for carriage by its authorized servants, whether it has been put by them in the baggage car or deposited in the office or warehouse, awaiting the next conveyance, or otherwise received according to its custom.[1] It is not responsible for a loss of luggage which the passenger retains in his own possession.[2]

The delivery of the luggage, in order to charge the company, must be to a servant authorized to receive it;[3] and by its usage it may make the servant of another company its own for that purpose.[4] The responsibility of the company continues while the luggage remains in the custody of its servants, and until it is delivered to the passenger in the ordinary mode.[5] It is bound at all events to deliver it safely, and is liable for a wrong delivery by mistake, even upon a forged order.[6] The liability of the company

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[1] Camden and Amboy R. R. Co. *v.* Belknap, 21 Wend. 354; Doyle *v.* Kiser, 6 Ind. 242; Jordan *v.* Boston and Fall River R. R., 5 Cush. 69; Logan *v.* Ponchar. R. R. Co. 11 Rob. (La.) 24; *ante*, ch. xvii. p. 425–434.

[2] Tower *v.* Utica R. R. Co., 7 Hill, 47; Cohen *v.* Frost, 2 Duer, 335; Steamboat Crystal Palace v. Vanderpool, 16 B. Monroe, 302; *ante*, ch. xvii. p. 429.

[3] Blanchard *v.* Isaacs, 3 Barb. 388.

[4] Jordan *v.* Fall River R. R., 5 Cush. 71.

[5] Richards *v.* London, &c. R. Co. 7 C. B. 839; Butcher *v.* London and Southwestern R. Co., 29 Eng. L. and Eq. 347; Midland R. Co. *v.* Bromley, 33 id. 236; *ante*, xvii. p. 448.

[6] Powell *v.* Myers, 26 Wend. 591; Hawkins *v.* Hoffman, 6 Hill, 588; The Huntress, Davies, 82; *ante*, ch. xvii. pp. 458, 459.

as common carrier, ceases when the passenger has had a reasonable opportunity after the arrival to receive his luggage; and if it remains in its custody after that, the company will be liable only as an ordinary bailee, for hire or gratuitously according to the circumstances.[1] Whether the receipt of fare and sale of a ticket to a place beyond the line of the road makes the company liable for luggage beyond its own, has already been fully considered.[2]

Limitation of liability for luggage by Notice or Special Contract.—The company, according to the current of authorities, cannot, except in Pennsylvania and perhaps in Maine, divest itself of its common-law liability by a general notice that all luggage is at the risk of the owner; but it may impose reasonable conditions by means of a qualified notice,—that it will not be responsible for luggage of a certain kind and beyond a certain value or amount, unless made known and paid for accordingly,—and exempt itself from its stringent liability, for articles of the excepted kind and value, unless the condition is complied with. And by special contract, it may discharge itself from liability except for the negligence of its servants.

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[1] Powell *v.* Myers, 26 Wend. 591, See Goold *v.* Chapin, 10 Barb. 612; Clendaniel *v.* Tuckerman, 17 id. 184; Young *v.* Smith, 3 Dana, 91; Smith *v.* Nashua and Lowell R. R., 7 Foster, 86.

[2] *Ante*, ch. xvii. pp. 451–458; Weed *v.* Saratoga and Schenectady R. R. Co., 19 Wend. 534; Hood *v.* N. Y. and N. H. R. R. Co., 22 Conn. 1, 502; Hart *v.* Rensselaer and Saratoga R. R. Co., 4 Selden, 37.

But the notice, in order to impose conditions on the passenger, must be clear and unambiguous, and brought to his knowledge. If he cannot read the English language, he cannot be presumed to have been informed of a notice in that language printed on his ticket. And if the notice is printed on the back of his ticket, and detached from what it is material for him to know, there is no legal presumption that at the time of receiving the ticket, and before the train left the station, he had knowledge of it. The subject of notices and special contracts limiting the liability of a common carrier, has already been fully discussed.[1]

Lien on luggage for Passenger's Fare.—The company has a lien on the luggage of the passenger for his fare, but not on his person.[2] It has, however, no lien on the luggage against the rightful owner where it has been delivered to it by a wrong-doer.[3]

Burden of Proof in case of loss of luggage.—The passenger having proved the delivery of his luggage to the company and a loss, the burden of proof is on it to show that it was lost or injured by the act of God or the public enemies, or by causes specially excepted in its contract with the passenger.[4] The possession by a passenger of a check, such as is

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[1] *Ante*, ch. xvii. pp. 415–424.

[2] Wolf *v.* Somers, 2 Camp. 631; *ante*, ch. xvii. p. 459.

[3] Fitch *v.* Newberry, 1 Doug. (Mich.) 1; Robinson *v.* Baker, 5 Cush. 137.

[4] *Ante*, ch. xvii. pp. 467, 468.

usually given by a railroad company for luggage delivered to it, has been considered *prima facie* evidence of the delivery of luggage to the company.[1]

TESTIMONY OF PASSENGER.—According to the common law, no man can be a witness in his own cause. To this general rule, the relation of the common carrier to the passenger furnishes an exception. After the passenger has proved a delivery of his trunk to the company and a non-delivery by it, he is a competent witness to prove its contents and value. This evidence, in the absence of any proof of fraud or spoliation on the part of the company or its servants, is admissible on the ground of necessity, as no one but the passenger is, in most cases, likely to be acquainted with the contents.[2] It is held inadmissible in Massachusetts and South Carolina.[3] In Massachusetts, it is admissible by a statute enacted since the decision.

The wife of the passenger has also been admitted to testify in his behalf, where his testimony would be admissible, to prove the contents of his trunk.[4]

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[1] Dill *v.* S. C. R. R. Co., 7 Rich. 158; Davis *v.* Cayuga and Susquehanna R. R. Co., 10 How. Pr. 330.

[2] Clark *v.* Spence, 10 Watts, 335; Whitesell *v.* Crane, 8 W. & S. 369; Sparr *v.* Wellman, 11 Missouri, 230; Doyle *v.* Kiser, 6 Ind. 242; Herman *v.* Drinkwater, 1 Greenl. 27; 1 Greenl. Ev. § 348; Great N. R. Co. *v.* Shepherd, 9 Eng. L. and Eq. 480, note.

[3] Snow *v.* Eastern R. R. Co., 12 Met. 44; Dill *v.* S. C. R. R. Co., 7 Rich. 158. See Garvy *v.* Camden and Amboy R. R. Co. (Common Pleas Court of City and County of New York, Jan. Term, 1857), 19 Law Rep. (April, 1857) p. 687.

[4] M'Gill *v.* Rowand, 3 Barr, 451; Mad River and Lake Erie R. R. Co. *v.* Fulton, 20 Ohio, 318.

The admission of this kind of evidence is, however, confined to the necessity of the case, and not allowed to prove the delivery of articles not properly luggage.[1]

A more full discussion of the liability of the company for the luggage of passengers is unnecessary here, as the principles which determine it are developed in the preceding chapter on the liability of the company as a common carrier of goods; to which the reader is referred.

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[1] Mad River and Lake Erie R. R. Co. *v.* Fulton, 20 Ohio, 318; Doyle *v.* Kiser, 6 Ind. 242; Johnson *v.* Stone, 11 Humph. 419; Pudor *v.* Boston and Maine R. R. Co., 26 Maine, 458; see Bingham *v.* Rogers, 6 W. & S. 495.

CHAPTER XIX.

REMEDIES.

The ordinary remedies in favor of and against other classes of corporations, may be pursued by and against railroad companies.[1] The company, according to the ordinary statute provisions, may be sued in the State and county where it has its principal place of business.[2]

Consolidation of Companies.—Where companies are consolidated by act of the legislature, the act usually provides that the new company shall have all the rights and privileges of the original companies and be subject to their liabilities. According to the English authorities, the consolidated company would be bound to discharge the obligations of the original companies without such a special provision.[3] The admission of one of the companies before the consolidation is, under an act with this provision, binding on the consolidated company in matters

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[1] See Grant on Corporations, 274–295. As to an action against a foreign railroad corporation in a State where it carries on its business, see Austin *v.* N. Y. and Erie R. R. Co., 1 Dutcher, 381.

[2] Androscoggin and Kennebec R. R. Co. *v.* Stevens, 28 Maine, 434; see notes to 1 Am. Rail. Cas. 142, 143.

[3] See cases cited in 1 Am. Rail. Cas. 96, notes.

where, without the consolidation, the original company would have been liable.[1]

An act consolidating different railroad companies, and providing that the new company thus formed shall be entitled to all the powers and privileges belonging to the original companies, has the effect of conferring on the new company the privileges possessed by either of the companies, to the extent of the road they each occupied before the union.[2]

Enforcement of Subscriptions.—The remedies of the company against delinquent subscribers to its capital stock, have been fully discussed in a preceding chapter.[3]

Jurisdiction of Federal Courts.—A railroad corporation is a *citizen* within the meaning of the clause of the U. S. Constitution, which gives jurisdiction to the courts of the United States over "controversies between citizens of different States." The citizen of one State can sue in those courts a corporation which is created by and transacts its business in another State, although some of its members are not citizens of the State in which the suit is brought.[4] The circuit court for one district

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[1] Phil., Wil. and Balt. R. R. Co. *v.* Howard, 13 Howard, 307.

[2] Phil., and Wil. R. R. Co. *v.* Maryland, 10 Howard, 376.

[3] Ch. v., p. 100–108.

[4] Louisville R. R. Co. *v.* Letson, 2 Howard, 497; Marshall *v.* Baltimore and Ohio R. R. Co., 16 id. 314; Works *v.* Junction R. R. Co., 5 M'Lean, 425. In Wheedon *v.* Camden and Amboy R. R. Co. (Supreme Court of Penn., Jan. 1857), Am. Law Reg. March, 1857, p. 296, it is held that a corporation

has no jurisdiction over controversies between railroad companies, where the subject-matter is local and lies beyond the limits of the district. Nor will it take jurisdiction in equity, where another company is vitally interested in the suit and is not made a party thereto.[1]

Form of Action.—As already noticed, an action on the case is the proper remedy against the company for injuries arising from the negligent acts of its agents while acting in the course of its employment.[2]

Penalties and Prosecutions by Indictment.—The company may be subjected to penalties or to an indictment, for a violation of a public duty.[3]

Assessment of Damages to Land-owner.—A statute remedy, as elsewhere stated, is usually provided for the assessment of damages to a land-owner whose property is injured by the construction of the road; and this remedy, when so provided, is exclusive of

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is not *per se* a citizen within the meaning of the U. S. Constitution; but where it sues or is sued, its governing officers, as its president and directors, are the substantial party; and if they are citizens of the State which created the corporation, and the other party is the citizen of some other State, the federal courts have jurisdiction.

[1] Northern Indiana R. R. Co. *v.* Mich. Central R. R. Co., 15 How. 233.

[2] Phil. &c. R. R. Co. *v.* Wilts, 4 Whart. 143; Ill. Central R. R. Co. *v.* Reedy, 17 Ill. 580; Thames Steamboat Co. *v.* Housatonic R. R. Co., 24 Conn. 40; Crocker *v.* New London, Willimantic and Palmer R. R. Co., id. 249; Sharrod *v.* London and N. W. R. Co., 4 Eng. L. and Eq. 401. See Vt. Cent. R. R. Co. *v.* Sabin, 25 Vt. 371; *ante*, ch. x. p. 234; as to action of trover for loss of goods, see *ante*, ch. xvii., p. 467.

[3] Ch. x. pp. 231, 232; Grant on Corporations, 283.

common-law remedies.[1] The manner of proceeding to enforce it, is pointed out by the statute. An appeal is often given from the award of the commissioners to a sheriff's jury, the manner of applying for and summoning which is also prescribed.[2]

MANDAMUS.—The writ of mandamus lies to compel the company or its officers to perform the duties imposed on them by law, which the party prosecuting the writ has a right to require to be done, and for which he has no other suitable and adequate remedy.[3] Thus it lies to compel the company to build or complete a road, which it is by law bound to build or complete.[4] It lies to compel the company to perform its duty, in restoring highways and turnpikes crossed by it to a proper condition for traveling.[5] It lies to compel the company to erect and maintain bridges over a highway or navigable streams, where it is bound by law to erect and main-

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[1] *Ante*, ch. viii. p. 166–169, ch. x. p. 223–231.

[2] Carpenter *v.* County Commissioners of Bristol, 21 Pick. 258; Wyman *v.* Lexington and West Cambridge R. R. Co., 13 Met. 316; Taylor *v.* County Commissioners of Plymouth, 13 id. 449; Porter *v.* County Commissioners of Norfolk, 13 id. 479; Pittsfield and North Adams R. R. Corp. *v.* Foster, 1 Cush. 480; Walker *v.* Boston and Maine R. R. Co., 3 Cush. 1; Commonwealth *v.* Boston and Maine R. R. Co., 3 Cush. 25; Fitchburg R. R. Co. *v.* Boston and Maine R. R. Co., 3 id. 58; Meacham *v.* Fitchburg R. R. Co., 4 id. 291; Gold *v.* Vt. Central R. R. Co., 19 Vt. 478.

[3] Angell & Ames on Corp., ch. xx.; Grant on Corp., 270–274.

[4] Whitemarsh *v.* Phil., Ger. and Norristown R. R. Co., 8 W. & S. 365; Regina *v.* Eastern Cos. R. Co., 2 Per. & Dav. 648; York and North Midland R. Co. *v.* Regina, 18 Eng. L. and Eq. 199; 16 id. 299.

[5] Regina *v.* Birmingham and Gloucester R. Co., 2 Q. B. 47; S. C. 42 E. C. L. 565; Same *v.* Manchester and Leeds R. Co., 3 Q. B. 528; S. C. 43 E. C. L. 851.

tain them.[1] This writ may be issued at the suit of the company against the officers of municipal corporations, to compel them to perform the duties imposed on them by statute, in making subscriptions to its stock, or to take the initiatory proceedings therefor which the law has required.[2]

The writ of mandamus is the proper remedy for the company or the individual owner to compel commissioners, appointed by statute to assess damages to land-owners for the land taken by the company, to perform the duty, or to compel an inferior tribunal, whose duty it is by statute to appoint such commissioners, to make the appointment. If the duty be ministerial, the writ directs the specific act to be performed. If judicial, it directs such officers to exercise their official discretion and judgment.[3]

Scire Facias and Quo Warranto.—The proceeding against a corporation for usurpation of a franchise or for nonuser and misuser of a franchise, is by *scire facias*, or an information in the nature of a *quo warranto*, at the instance and on behalf of

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[1] Cambridge *v.* Somerville and Charlestown Branch R. R. Co., 7 Met. 70; State *v.* Graham, 37 Maine, 461; State *v.* N. E. R. R. Co., 9 Rich. 247.

[2] C. W. and L. R. R. Co. *v.* Commissioners of Clinton Co., 1 Ohio State, 77; Justices of Clarke *v.* P. W. and K. River Turnpike Co., 11 B. Monroe, 154; Somerville and Nashville R. R. Co. *v.* County Court of Davidson, 1 Sneed (Tenn.), 637.

[3] Carpenter *v.* County Commissioners of Bristol, 21 Pick. 258; Dodge *v.* County Commissioners of Essex, 3 Met. 380; Ill. Central R. R. Co. v. Rucker, 14 Ill. 353; Chicago B. and Q. R. R. Co. *v.* Wilson, 17 id. 128.

the government.[1] But before a corporation can be deemed dissolved by reason of any misuser or nonuser of its franchises, such misuser or nonuser must be judicially determined and declared, in a direct proceeding instituted for that purpose.[2] A cause of forfeiture, which has not been so declared, cannot be taken advantage of collaterally.[3] As the State can alone insist on a forfeiture, it can waive the same.[4] The power to repeal the charter may be reserved in it, either absolutely or on a certain event; and a forfeiture may then be declared by the legislature, without a resort to the judiciary.[5]

Equitable Remedies. — Equity has jurisdiction over a corporation at the suit of a stockholder, to restrain by injunction its officers from embarking in projects unauthorized by its charter, or to prevent a clear misappropriation of funds, resulting in the diminution of his dividends and the value of his shares, where the acts contemplated would amount

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[1] Angell & Ames, Corp. ch. xxi. xxii.; 2 Kent, Com. 313; Grant on Corporations, 295–305; People *v.* Rensselaer and Saratoga R. R. Co. 15 Wend. 113; Commonwealth *v.* Tenth Mass. Turnpike Corp. 25 Cush. 509; State *v.* Boston, Concord, and Montreal R. R. Corp. 25 Vt. 433.

[2] 2 Kent, Com. 312; Enfield Toll Bridge Co. *v.* Conn. R. R. Co. 7 Conn. 46.

[3] Angell & Ames, Corp. ch. xxii. § 777; 2 Kent, Com. 312; Canal Co. *v.* R. R. Co. 4 Gill. & J., 1; Hamilton *v.* Annapolis and Elk Ridge R. R. Co. 1 Maryland Ch. Dec. 107; Harrison *v.* Lexington and Ohio R. R. Co. 9 B. Monroe, 470.

[4] People *v.* Mississippi and Atlantic R. R. Co. 14 Ill. 440; Angell & Ames on Corp. ch. xxii. § 777.

[5] Erie and N. E. R. R. Co. *v.* Casey, 26 Penn. State, 287; *ante*, ch. iii. pp. 36–39.

to a breach of trust.[1] An injunction will not, however, be issued where the acts sought to be enjoined are in direct furtherance of the original purpose of the charter, or where the stockholder applying for it has been guilty of laches in the assertion of his right, and neglected to seek the appropriate remedy until great public interests were concerned.[2]

The company may be restrained by injunction from committing great and irreparable damage to private property without proper authority, as where it proceeds to the construction of its road without first making a tender or payment of damages to the land-owner, as required by law.[3]

An injunction will be granted against a nuisance,

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[1] *Ante*, ch. v. pp. 85–89; Kean *v.* Johnson and Central R. R. Co. 1 Stockton, Ch. 401; Stevens *v.* Rut. and Bur. R. R. Co. 1 Am. Law Reg. 154; Chapman *v.* Mad River and Lake Erie R. R. Co. 6 Ohio State, 119; Baltimore and Ohio R. R. Co. *v.* City of Wheeling, 13 Grattan, 40; Dodge *v.* Woolsey, 18 How. 331; Ware *v.* Grand Junc. Water R. Co. 2 Russ. & Myl. 470; Cunliffe *v.* Manchester and Bolton R. Co. id. 481; Bagshaw *v.* Eastern Cos. R. Co. 7 Hare, 114; Coleman *v.* Same, 10 Beavan, 1; Beman *v.* Rufford, 6 Eng. L. and Eq. 106; Great W. R. Co. *v.* Rushout, 10 id. 72; Winch *v.* Birkenhead, &c., R. Co. 13 id. 506; Ffooks *v.* London and S. W. R. Co. 19 id. 7; Grant on Corporations, 290. The jurisdiction of equity to restrain a company in such a case at the suit of a stockholder, has been denied in Rhode Island, although it is still an open question. Hodges *v.* New England Screw Co. 1 Rhode Is. 312; S. C. 3 id. 9.

[2] Chapman *v.* Mad River and Lake Erie R. R. Co., 6 Ohio State, 120; Baltimore and Ohio R. R. Co. *v.* City of Wheeling, 13 Grattan, 40.

[3] Ross *v.* Elizabethtown and Somerville R. R. Co., 1 Green, Ch. 422; Browning *v.* Camden and Woodbury R. R. Co., 3 id. 47; Bonaparte *v.* Camden and Amboy R. R. Co., 1 Baldwin, 205; Jorden *v.* Phil., Wil. and Balt. R. R. Co., 3 Whart. 502; Walker *v.* Mad River and Lake Erie R. R. Co., 8 Ohio, 38; Chapman *v.* Same, 6 Ohio State, 119; Hudson and Delaware Canal Co. *v.* N. Y. and Erie R. R. Co., 9 Paige, 323; Bird *v.* W. and M. R. R. Co., 8 Rich. Eq. 46.

which is clearly such, created by the company without authority, at the suit of a party suffering special damage.[1]

The company may be proceeded against in equity in matters of fraud, where equity would have jurisdiction against an individual.[2]

EQUITABLE REMEDIES OF CREDITORS.—The creditors of an insolvent railroad company may have their claims against it adjusted in equity, and the debts due to the corporation and the amount of the subscriptions not paid in subjected to their satisfaction.[3]

PERSONAL LIABILITY OF STOCKHOLDERS.—The act of incorporation in some cases makes the stockholders personally liable for the debts of the company; but this liability has been construed as confined to debts created during the period in which the stockholder was a member of the company. Such is the construction which is placed upon the act of New Hampshire.[4]

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[1] Mohawk Bridge Co. *v.* Utica and Schenectady R. R. Co., 6 Paige, 554; Newark Plank Road Co. *v.* Elmer, 1 Stockton, Ch. 754; Attorney-General *v.* Hudson River R. R. Co., 1 id. 526. See Davis *v.* Sharpe, 2 Duer, 663; 3 id. 119; since overruled by the Court of Appeals; *ante*, ch. viii. p. 182, note.

[2] Story *v.* Norwich and Worcester R. R. Co., 24 Conn. 94; Herrick *v.* Belknap and Vt. Central R. R. Co., 27 Vt. 673.

[3] Allen *v.* Montgomery R. R. Co., 11 Ala. 437; Nevitt *v.* Bank of Port Gibson, 6 Sm. & Mars. 513; Hightower *v.* Thornton, 8 Geo. 486; Macon *v.* Western R. R. Co. *v.* Parker, 9 id. 377; see Mann *v.* Pentz, 2 Sandf. Ch. 257; Mann *v.* Currie, 2 Barb. 294; Mann *v.* Cooke, 20 Conn. 178.

[4] Chesley *v.* Pierce, 32 N. H. 388. The authorities on this point are conflicting. See Curtis *v.* Harlow, 12 Met. 3; Moss *v.* Oakley, 2 Hill, 265; Allen *v.* Sewall, 2 Wend. 327; Southmayd *v.* Russ, 3 Conn. 52; Middletown Bank *v.* Magill, 5 id. 28; Deming *v.* Bull, 10 id. 409.

CHAPTER XX.

MORTGAGES OF PROPERTY AND FRANCHISES.

CAPACITY OF THE COMPANY TO MORTGAGE ITS ROAD AND PROPERTY.—The validity of the mortgages by railroad companies of their personal property, or of their real property which is disconnected from their road, results from the power of corporations to dispose of their property, and has not been contested. The mortgages of their franchises and roads, so far as they have hitherto been finally passed upon in this country, were either authorized or ratified by the legislature, and when so authorized or ratified, their validity is unquestionable.[1]

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[1] In Pierce *v.* Emery, 32 N. H. 486, the mortgage was expressly authorized. In Hall *v.* Sullivan R. R. Co. (U. S. Circuit Court for the district of New Hampshire), the mortgage was subsequently recognized by statute as valid; and in Shaw *et al.*, trustees, *v.* Norfolk County R. R. Co. (Supreme Court of Mass., Nov. Term, 1855), to be reported in 5th vol. of Gray's Reports, the mortgage had been expressly confirmed by statute. In this case, a bill in equity was brought by the trustees under a mortgage by the company of its franchise and property, praying for the conditional judgment provided by the statute of Mass. in the case of the foreclosure of mortgages, and for possession of the property mortgaged, and for general relief. A decree was made by the court for immediate possession of the mortgaged property to be given to the complainants. An act of the legislature had confirmed the mortgage, but it seems to have been the impression of the court that without such an act the mortgagees might have enforced a mortgage of the franchise. In the use of the term *franchise*, it is probable that the

In England, the assignment of the right to operate the road by mortgage, or otherwise, has uniformly been held to be beyond the power of the company, and contrary to public policy, as has been shown in a preceding chapter.[1]

In this country there are as yet no positive adjudications in the courts of last resort, on the power of a railroad company, in the absence of a special statute, to mortgage its road; and the author, in examining the question, is aided only by judicial

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court intended that of using the road, and not that of being a corporation. (See *post*, p. 531, note, where the opinion is given in full.) There is a newspaper report published in the 4th volume of the Railroad Record (Cincinnati, Sept. 25th, 1856), of the case of Grinnell *et als.* trustees of the Sandusky, Mansfield and Newark R. R. Co., before Fitch, J., of the Ohio Common Pleas Court, Erie County, in which the following points are said to have been held:

1. That a railroad company, authorized to borrow money for the construction of its road, has, as an incident to that power, and without an express grant in its charter, the power to secure such loan by a mortgage.

2. That a mortgage of the road and its income is, in effect, a mortgage also of the franchises of the company, and upon a sale of the road under the mortgage, the franchise will pass to the purchasers.

3. That where two or more railroad companies become united, and consolidated into one company, under the statutes of Ohio, and such original companies had, prior to the consolidation, given mortgages on their respective roads, the rights and liens of the respective mortgages must be respected and preserved, due regard being had to the consolidation.

4. That after such consolidation, no one of the mortgages upon the original roads can be enforced by a separate sale of its original line, but all such original mortgages must be enforced by a sale of the consolidated roads, and the respective liens on the parts be adjusted in the distribution of the proceeds of the whole upon the report of the master, so as to give each mortgage so much of the proceeds as may be estimated to arise from the part covered by its lien.

[1] See *ante*, ch. xvi. pp. 397–403, where the English cases are fully cited. They have been incidentally approved in this country in Troy and Rutland R. R. Co. *v.* Kerr, 17 Barb. 601; Nelson *v.* Vt. and Canada R. R. Co. 26 Vt. 717; York and Maryland R. R. Co. *v.* Winans, 17 How. 30, 39.

dicta and the principles of the law governing analogous cases.

Corporations have the incidental power to dispose of all their property, real and personal, unless specially restrained by statute, either expressly or by just implication. They may sell it absolutely or convey a less estate therein than a fee simple, as by a lease. They may exercise this power, unless restrained as aforesaid, to discharge or secure a debt, which they may lawfully contract by a mortgage to secure it, or an assignment in trust for the benefit of creditors.[1]

Upon this principle, the presumption is in favor of the power of the company to dispose of its property in its road for the payment of its debts, or to secure them by a mortgage of the road. It may not have a fee simple absolute in the land which has been condemned for the purpose of the road, so as to enable it to use the same for any other purpose than a public highway. Even where the charter or statute authorizing it to appropriate the land, in terms vests a fee simple in the company, it may be construed to grant nothing more than the right to use the land for such a highway, in the nature of a base or determinable fee.[2] But the right to use the

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[1] Comyn's Dig., tit. Franchise, F. 18; Angell & Ames on Corp. ch. v. §§ 187, 191; 2 Kent's Com. 281; Jackson *v.* Brown, 5 Wend. 590; Barry *v.* Merchant's Exchange Co. 1 Sandf. Ch. 280; De Ruyter *v.* St. Peter's Church, 3 Comst. 238; Gordon *v.* Preston, 1 Watts, 385; Enders *v.* Board of Public Works, 1 Gratt. 364; Allen *v.* Montgomery R. R. Co. 11 Ala. 437, 454; M. C. P. R. R. Co. *v.* Talman, 15 id. 472, 491; Parr *v.* Roe, 1 Q. B. 700.

[2] Hooker *v.* Utica and Minden Turnpike Co. 12 Wend. 371; People *v.* White, 11 Barb. 26; *ante*, ch. viii. p. 160.

land so condemned, as a common carrier of goods and persons, is valuable as a source of revenue, and has the incidents of property. It is the private property of the company, which the legislature would have no power, in the exercise of the right of eminent domain, to appropriate to other public uses without making compensation to the company.[1] This right of the company, being, then, in its nature property, would seem to be liable to be subjected to the payment of its debts, either by a voluntary disposition, or a compulsory process of the law.

If the company cannot mortgage its property in its road for the payment of its debts, the disability must arise from an express prohibition in the charter which would undoubtedly create it, or in the absence of this, from an implied prohibition in the public policy of the state, or the nature of the right itself which renders it not transferable.

In England, the transfer of the management of the road is held to be contrary to public policy, and, in the absence of a special grant, beyond the power of the company owning it.[2] In this country, the view has been urged by counsel, and received recognition in some judicial dicta, that, as franchises are privileges conferred by the sovereign power and involve the duty on the part of the grantee to exercise them for the public benefit, it cannot deprive itself of the power to perform that duty by alienating the right to operate its road as a common

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[1] *Ante*, ch. iii. pp. 27–35; ch. viii. pp. 151–160, 172, 173.

[2] *Ante*, ch. xvi. pp. 397–403.

carrier, which is a means necessary for discharging the duty.[1] This doctrine has been also held in relation to turnpike and canal companies.[2]

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[1] 28 Am. Jurist (Oct. 1844), 92; Pierce *v.* Emery, 32 N. H. 504, 507. Perley, C. J.: "Railroads, by the law of this State, are public corporations, so far as to be subject in many respects to general legislation and the control of the public authorities. They are created to answer a public object, and are bound to the State for the performance of their public duty. They can do no act which would amount to a renunciation of their duty to the public, or which would directly and necessarily disable them from performing it. They cannot convey away their franchise and corporate rights, nor perhaps the track and right of way which they take and hold for the necessary use of their road.

"But they may contract debts; may purchase on credit; and we see nothing in the nature of their business, or in their relation to the public, which should prevent them from making a valid mortgage of their personal property, not affixed to the road, though used in the operation of it. Instead of disabling the road from performing its public duty, a mortgage might assist in doing it, in the same way that other corporations or individuals are aided in carrying on their business by mortgages of their property.

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"The grant of a corporation is a contract between the State granting it and the grantees. It is peculiarly and emphatically so in the case of railroad corporations, which are created upon public considerations, and clothed with extensive and extraordinary powers, for the purpose of enabling them to accomplish the public object contemplated in the grant. The members and stockholders have private rights; but the corporations are also bound to the discharge of their public duties, and cannot, without the aid of special legislation, disable themselves from performing their duty to the public by alienating or transferring their corporate rights and franchises. They may sell or mortgage their personal property, but they cannot sell or mortgage with it the right to manage and control the road, nor any other corporate right or franchise. The King *v.* The Severn and Wye R. Co., 2 B. & Ald. 646; Reg. *v.* The Eastern Counties R., 10 Adol. & Ellis, 531; Reg. *v.* South Wales R. Co., 14 Adol. & Ellis (N. S.), 902; Clark *v.* Washington, 12 Wheaton, 46, 54; Winchester and Lexington Turnpike R. Co. *v.* Vimont, 5 B. Monroe, 1; Arthur *v.* The Commercial and R. R. Bank, 9 S. & M. 394.

"If this corporation had authority to make a mortgage that should convey the franchise and corporate rights, the power must be derived from the special act."

[2] Ammant *v.* New Alexandria and Pittsburg Turnpike, 13 S. & R. 210;

The proposition, that a corporation cannot perform acts as to its property which will disable it from discharging its public duty, if admitted at all, must be confined to a very limited operation; so limited as to make the soundness of the proposition itself doubtful. The power of the company to sell all its rolling stock, cars, engines, and other personal property, cannot be questioned; and yet its exercise, where it has not the funds to replace them, may leave it unable to operate its road. It may, by a course of conduct authorized by its charter, reduce itself to a condition of hopeless bankruptcy, in which it is unable to perform its public duty. Still, the acts, by which the result was produced in each case, were within its unquestioned capacity.

Another consideration, usually pressed against the power of a railroad company to mortgage its road, is, that its franchises are conferred by grant from the legislature on such persons as it selects in its discretion, and, in the absence of a special power for that purpose, they are not assignable to other persons to whom it has not thus confided them.

This proposition may be found true of only a certain class of franchises. The franchises of a corporation may be various, some of them being such as are peculiar to itself and derived only from the sovereign power, and others being such as are possessed by individuals without any legislative grant. In one sense, all its powers are franchises.[1] The

Susquehanna Canal Co. *v.* Bonham, 9 W. & S. 27; see Leedom *v.* Plymouth R. R. Co., 5 id. 265.

[1] State *v.* Boston, Concord, and Montreal R. R. Co. 25 Vt. 442.

franchise of being a corporation is a personal right granted to certain individuals, to subsist as a body politic, with power of succession, and of acting in many respects as a natural person, and in a manner which is beyond their capacity without such a special grant. The assignment of such a franchise to other persons is like the creation of a new corporation, which is an exclusive attribute of sovereign power. The control of its affairs may, by means of assignments of the shares of the capital stock by the members, pass into other hands; but the corporation as a whole cannot be transferred. The privilege of being and acting as a railroad corporation cannot, therefore, be assigned without a special power for that purpose being conferred by the legislature.[1]

A railroad company has still other franchises besides that of existing and acting as a corporation. It may be, and usually is, empowered to take private property necessary for its purposes, and to build, own, and use a railroad, and to take tolls from persons and goods carried over the same in its vehicles.

Of these franchises, the power to take private property upon making compensation, which is delegated from the State in the exercise of its right of eminent domain, being one of a high and peculiar character, derived only from the sovereign power upon express grant, limited in the time within

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[1] State *v.* Rives. 5 Iredell, 306; Arthur *v.* Commercial and R. R. Bank of Vicksburg, 9 Smedes & M. 431; Robins *v.* Embrey, 1 Smedes & M. Ch. 269.

which and the objects for which it may be exercised by the corporation, and subject to constitutional restrictions, may be considered in its nature not assignable. The power itself is, however, to be distinguished from the property and rights acquired by its exercise.

There are other franchises which are at common law the subjects of sale and mortgage. Franchises are enumerated in the accredited text books as the subjects of sale and mortgage.[1] Thus, the privilege of maintaining a ferry and taking tolls from persons passing over it, granted by the State to an individual, is an assignable franchise. In many respects it is quite similar to the franchise of operating a railroad as a common carrier of goods and passengers.[2]

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[1] Com. Dig., tit. Grant, C; Powell on Mort. 17, b; Coote on Mort. 101; 1 Hilliard on Mort. ch. 1, § 4.

[2] Powell on Mort. 17, b; Felton *v.* Deall, 22 Vt. 170; Phillips *v.* Bloomington, 1 Greene (Iowa), 498; Fay, Petitioner, 15 Pick. 243; Trustees of Maysville *v.* Boon, 1 J. J. Marsh. 221; M'Cauly *v.* Givens, 1 Dana, 261; Biggs *v.* Ferrell, 12 Iredell, 1, 4. Pearson, J., "It is suggested, a franchise cannot be assigned. That may be true in regard to the franchise of being a corporation, for corporations have a 'limited capacity,' and only such rights and powers as are conferred by the charter. But there is no reason why an individual who owns land with a franchise annexed, as a ferry or market, may not transfer the land in fee, or for a less estate, and then the franchise passes as an incident, like rent, which passes with the reversions incident thereto."

Bowman *v.* Wathen, 2 M'Lean, 376, 393. M'Lean, J.: "It is insisted that a license to keep a ferry is personal, and cannot be assigned. That as the right of the defendant, Wathen, rests upon transfers from the original grantees, and has no other foundation, it must be held invalid.

"In this respect, no difference is perceived between a ferry franchise, the franchise of a toll-bridge, a turnpike or railroad, or any other franchise of the same nature. Certain privileges are given by the State, and the grantee becomes bound to afford the proposed public accommodation. It is true, the grant is made in the one case to a private individual, and in the others to corporations. But as it regards any matter of public confidence,

The privilege of maintaining a turnpike and taking tolls from persons using the same, has been the subject of a lease, the validity of which does not appear to have been contested.[1] A dock company, the charter of which declared the dock to be a public highway, has been held to have the power to mortgage its dock as well as its other property, although the power was contested as conflicting with the performance of its public duties.[2]

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it would seem to apply as strongly to the individuals incorporated, as to the grantee of the ferry.

"But the grantee of the ferry has a right appurtenant to the soil, which, by the law is made an indispensable pre-requisite to a ferry license. Now, we have shown that the ownership of this right may be separated from the ownership of the soil; and if this may be conveyed by the grantee before the ferry license is obtained, may it not be conveyed afterwards? And in this conveyance may not the ferry grant be included?

"The public can have no claim on the grantee beyond the requirements of the law; and it is immaterial whether these are fulfilled by the grantee or his assignee. It is probable that the assignee gives a bond and security, as the law requires, or indemnifies the grantee. There must be some settled practice on this subject, which has been so sanctioned, as to become a rule of property. However this may be, there would seem to be no doubt that the ferry franchise, with all that belongs to it, may be taken by descent or by conveyance, the same as other interests which pertain to the realty. Where an office is conferred which implies personal confidence and a capacity to discharge public duties, no assignment can be made of it. But this has no analogy to the franchise in question." But see Lombard *v.* Cheever, 3 Gilman, 469.

[1] Jowitt *v.* Lewis, 4 Litt. 160.

[2] Enders *v.* Board of Public Works, 1 Grattan, 364. In a suit brought by a bridge company for tolls, it set up a want of power to make a binding release of them which it had executed; Central Bridge Corp. *v.* Bailey, 8 Cush. 319, 323. Fletcher, J., delivering the opinion of the court sustaining the release, said, "This subject of tolls, therefore, is clearly within the scope of the general powers of the corporation, in regard to which they have a right to act and contract. There can be no doubt, that parties making contracts for a release of the whole or a

The franchise of building, owning and managing a railroad, and taking tolls for the carriage of persons and goods over the same, not being upon analogy personal to the corporation to which it was granted, would seem to be assignable, unless the transfer is prohibited by the charter expressly or impliedly, or by public policy deduced from the general course of legislation on the same and similar subjects, or from suggestions of the general convenience.[1]

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part of the tolls, would be bound by their contracts; and the corporation itself must be equally bound.

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"The legislature, if it had thought proper, might have restricted the power of the corporation in regard to making such contracts, but not having restricted it, the contracts must be binding, whatever may be their effect upon the interests of the commonwealth or the towns. A contract with a corporation may be binding on the parties, though it be an abuse of the corporate powers, for which the corporation may be answerable to the government which created it."

[1] See State *v.* Rives, 5 Iredell, 297; Arthur *v.* Commercial and R. R. Bank of Vicksburg, 9 Smedes & M. 394, 432; Hall et al., trustees, *v.* Sullivan R. R. Co. (U. S. Circuit Court for the Dist. of New Hampshire), before Curtis, J. The author has succeeded in procuring the opinion of this able and accomplished jurist, overruling the demurrer, and discussing several important points in relation to the mortgages made by railroad companies.

Curtis, J.: "This is a bill in equity brought by certain citizens of the State of Massachusetts against the Sullivan Railroad Company, a corporation created by a law of the State of New Hampshire, and against George Olcott, a citizen of the last mentioned State. It is founded on a mortgage, a copy of which is annexed to the bill, which purports to have been executed under the corporate seal, pursuant to certain votes of the corporation which are therein recited, and this mortgage conveys unto the complainants as trustees, 'the railroad and franchise of the said company in the towns of Walpole, Charlestown, Claremont, and Cornish, in the county of Sullivan and State of New Hampshire, as the same is now legally established, constructed, or improved, or as the same may be at any time hereafter legally established, constructed, and improved, from its junction with the Cheshire Railroad Company to its junction with the Vermont Central Railroad Company, with

If the assignment is prohibited in the act of incorporation expressly, the will of the legislature thus

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all the lands, buildings, and fixtures of every kind thereto belonging, together with all the locomotive engines, passenger, freight, dirt, and hand cars, and all the other personal property of the said company, as the same now is in use by the said company or as the same may be hereafter changed or surrendered by the said company,' Habendum to the said trustees; and 'Provided nevertheless, and the foregoing deed is made upon the following trusts and conditions.' Then follow the trusts and conditions, which will be more fully adverted to hereafter; but it should be here stated that the general purpose of the mortgage was to secure the payment of the interest and principal of certain bonds issued by the corporation, the interest whereon had become due before this bill was filed, and is unpaid. The bill prays, 1st, that the trustees may be put into possession of the railroad franchise and property conveyed by the deed, and may be directed by the court in its management and in the execution of their trust, and that the company may be restrained from intermeddling therewith. 2nd. That an account may be taken of what is due to bond-holders, and the company ordered to pay the same by a fixed day, and in default thereof that the company may be forever debarred and foreclosed from all equity of redemption of the mortgaged property. 3d. That a receiver may be appointed for certain purposes, which it is not necessary here to specify. 4th. That a sale may be made of the franchise and property mortgaged. 5th. For relief generally; under which last prayer the complainant's counsel, at the hearing, asked for a foreclosure by sale, instead of a strict foreclosure as specifically prayed for, provided the court should be of opinion that a foreclosure by sale would be more equitable.

"The railroad corporation has demurred to the bill; and I will now state my opinion upon the several questions which have been argued, so far as they are necessarily raised by the demurrer.

"The first is, whether the mortgage is valid and competent to convey what it purports to convey. The objection made by the respondents is, that the grant by the State of the franchise to be a corporation, and to build, own, and work a railroad, and take tolls thereon, is attended with an obligation on the part of the company to exercise these franchises for the public benefit; that consequently the corporation cannot divest itself of its railroad and all the other necessary means of discharging its public duty; and as these franchises were confided to the particular political person, they can be exercised by that person alone, and any attempt to delegate them to others is inoperative and void, upon grounds of public policy. Many authorities have been cited in support of this position, the principal of which are, Winch *v.* The Railway Co., 13 Eng. L. and Eq. 506; S. G. R. Co.

expressed is controlling. What will constitute an implied restraint against the transfer, drawn from

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v. S. G. R. R. Co., 19 Eng. L. and Eq. 513; Beman *v.* Rufford, 6 Eng. L. and Eq. 106; The S. and B. R. Co. *v.* The L. and N. W. R. Co., 21 Eng. L. and Eq. 319; Troy and Rut. R. R. Co. *v.* Kerr, 17 Barb. S. C. R. 581; State *v.* Rives, 5 Iredell's R. 297.

"These authorities are sufficient to show, that in England the law is as the defendants assert it to be in New Hampshire. To a certain extent, it needs no authority to show that the position must be well founded in New Hampshire. Among the franchises of the company is that of being a body politic, with rights of succession of members, and of acquiring, holding, and conveying property and suing and being sued by a certain name. Such an artificial being, only the law can create; and when created, it cannot transfer its own existence into another body; nor can it enable natural persons to act in its name, save as its agents, or as members of the corporation, acting in conformity with the modes required or allowed by its charter. The franchise to be a corporation is, therefore, not a subject of sale and transfer unless the law by some positive provision has made it so, and pointed out the modes in which such sale and transfer may be effected. But the franchises to build, own, and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable. Peter *v.* Kendall, 6 B. & C. 703; Com. Dig., Grant, C.

"Whether, when they have been granted to a corporation created for the purpose of holding and using them, they may legally be mortgaged by such corporation, in order to obtain means to carry out the purpose of its existence, must depend upon the terms in which they are granted, or in the absence of anything special in the grant itself, upon the intention of the legislature, to be deduced from the general purposes it had in view, the means it intended to have employed to execute those purposes, and the course of legislation on the same or similar subjects; or as it is sometimes compendiously expressed, upon the public policy of the State. There is nothing in the particular terms of the grant of these franchises to the Sullivan Railroad Corporation which expressly restrains their exercise to that corporation alone. The question, whether they can be exercised by any other person than the corporation, depending upon the public policy of the State of New Hampshire, to be deduced from an examination not merely of this charter, but of the general course of legislation of the State on this and similar subjects, it is eminently proper that this court should, if possible, follow and not precede the Supreme Court of New Hampshire in its conclusions respecting this question. In the absence of any decision by that court,

particular provisions of the charter, its general purposes and the means it has appointed for their

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I should enter on an examination of it with great reluctance. In the manuscript opinion of the Supreme Court of New Hampshire in the case of Pierce *v.* Emery, which has been produced at the bar, Mr. Chief Justice Perley has stated some views on this question. If it were necessary for me in this case to come to any conclusion concerning it, I should probably assent to the views there expressed, though I do not understand the question whether a corporation can mortgage its railroad and its franchise to own and manage and take toll on it, came directly into decision in that case. But I do not find myself under the necessity of deciding this question, because I am of opinion that the legislature of the State of New Hampshire has so far recognized the validity of this mortgage, that it is not now to be deemed invalid as being contrary to the public policy of the State. On the 14th day of July, 1855, the legislature of New Hampshire passed an act, the title and first two sections of which are as follows."

[The two acts were here quoted in full: the first, "for the purpose of enabling the company to pay its debts, and thereby to have greater power and means to provide for the public travel and transportation over its road," authorizing it to issue new stock to a certain amount, and the holders of bonds under the said mortgage, which is described by its date, to subscribe for the said new stock and pay therefor with the said bonds under certain restrictions; and the second act, of the same date, exempting the trustees under the mortgage from personal liability, except such as they should assume by contract in case it should become necessary for them to take possession of the road, and to operate it for the benefit of the bondholders, and they should actually take possession of and operate the same.]

"By the first of these acts the legislature recognize the existence of the mortgage now in question, and confer on the corporation new powers to enable it to pay the debts secured by the mortgage, and it is expressly declared that this was done to enable the corporation to have greater power and means to provide for the public travel and transportation over its railroad. By the second of these acts, not only the existence of the mortgage and the power of the trustees to take possession of the railroad, and operate it for the benefit of the bondholders are recognized, but the responsibility to be incurred by the trustees in the exercise of these powers to take possession of and operate the road, is regulated and limited. After the legislature had thus granted to the corporation new powers to enable it the better to accomplish its duty to the public by paying off this mortgage, and have interposed to facilitate the exercise of the powers of the trustees under the mortgage by regulating and restricting the personal liabilities to be incurred by them in the exercise of these powers, it seems to be impossible to maintain that the

execution, is to be determined by the proper construction of the charter itself. So far as public

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mortgage itself is void, because contrary to the public policy of the State. The will of the legislature, while acting within the powers conferred by the people of the State, constitutes the public policy of the State, and, so far from manifesting its will to have this mortgage void and inoperative, it has interfered to help out its operation, and make it more easily available as a security. I do not think a court of justice can undertake to decide that a mortgage was contrary to the public policy of the State, after the legislature has directly interposed to aid the mortgagees to act under it. I am, therefore, of opinion that this mortgage, so far as it purports to convey to the trustees the tangible property of the company, and the rights to manage and work the road, and take toll thereon, is not void as being contrary to the public policy of the State.

"The next question I have considered is, whether the trustees are entitled, upon the case made by the bill, to a decree of foreclosure, either by a strict foreclosure, or by a sale. It is insisted by the defendants that the only mode of foreclosing this mortgage is by a sale in pursuance of the fourth article; and though it is not denied that this power of sale may be executed under the direction of a court of equity, upon a bill framed for that purpose, yet it is objected that this bill does not show that a case exists for the exercise of that power; because it does not appear that the holders of two thirds of the amount of the bonds have requested the trustees to sell. The right to foreclose is incident to all mortgages save Welsh mortgages; and there is no ground for maintaining that this is a Welsh mortgage; for the conveyance is a collateral security for the bonds of the company, the interest and principal of which are payable at fixed times, and the failure to pay such principal or interest is a breach of the second express condition in the deed. (Balfe *v.* Lord, 2 D. & W. 480.)

"Without undertaking to say that the parties may not restrict the right of foreclosure, I consider it quite clear that the insertion of a power of sale in a deed of mortgage neither deprives the mortgagee of his right to strict foreclosure where such right would otherwise exist, nor prevents a court of equity from foreclosing by a sale made under its direction, in cases where it finds a strict foreclosure is not matter of absolute right on the part of the mortgagee, and strict foreclosure would be inequitable. In Slade *v.* Rigg, 3 Hare, 35, Sir James Wigram, V. C., decreed a strict foreclosure, though the deed contained a power of sale, and it was argued that the execution of that power was the only remedy for the mortgagee. In Wayne *v.* Hanham, 4 Eng. L. and Eq. 147, the deed contained a power of sale. The mortgagee brought a bill for a strict foreclosure. The mortgagor resisted, and insisted that the mortgagee could only have a decree for a sale. Sir George Turner,

policy is made up of the general course of legislation on the same and similar subjects, it is to be governed

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V. C., reviewed the case of Slade *v.* Rigg, approved it, and decreed a strict foreclosure. These were mortgages of personalty, which increased the difficulty of ordering a strict foreclosure; but that, as well as the existence of the power of sale, was held to be insufficient to confine the mortgagee to an exercise of the power of sale contained in the deed. I think the true distinction is taken in Jenkin *v.* Row, 11 Eng. L. and Eq. 297. It is between deeds containing a mere trust for a sale to secure money advanced, and a mortgage. The former must, of course, be executed as declared, and there the remedy stops. But if the deed be a mortgage, the right to a foreclosure arises from the nature of the security, and is entirely consistent with the existence of another right, viz.: a power to sell in pais, which the mortgagor cannot compel the mortgagee to execute. It is inserted for the benefit of the mortgagee, and he may avail himself of it or not, at his own will.

"It was argued in the case at bar that it could not have been intended that a right to foreclose would exist, because after foreclosure the trustees would still hold as trustees, and so the whole matter would stand as before. It is true they would hold the absolute estate as trustees; but it would be as trustees for the bondholders, and subject to such disposition thereof as their rights and interests might require. In the case of Shaw et al. *v.* The N. C. R. R., the Supreme Court of Massachusetts had a similar mortgage before them, and held that the power of sale did not supersede the right to foreclose by bill in equity. My opinion is therefore that upon the case stated in this bill the trustees have a right to come into a court of equity to foreclose this mortgage. In what manner it is to be foreclosed, whether by a *strict foreclosure*, or by a *sale*, it would be premature now to decide. Whether the statute law of New Hampshire, defining the rights and method of foreclosure, so affects the right itself that only a strict foreclosure, substantially such as is there provided for, can be decreed by a court of equity, or whether the grant of equity jurisdiction to the Supreme Court of that State can be considered as having affected the right of foreclosure by superadding those principles of equity respecting foreclosure, which are administered in courts of equity; or how far this court is to regard either of these considerations, and what particular method of foreclosure the principles of equity require in this case, can only be properly decided at the hearing when the merits of the case shall be before the court upon the allegations and proofs of both parties. For the purpose of this demurrer, it is enough that upon the case, as stated in the bill, the complainants appear to be entitled to some decree of foreclosure; and, inasmuch as the demurrer being taken to the whole bill must be overruled, if the bill for any purpose is

by the system of laws adopted in the State where the question arises, and need not be considered here.

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sustainable, it is not necessary to decide whether the complainants are entitled to the aid of a court of equity to put them in possession either in the course of, or independent of a process of foreclosure. This question also may best he decided at the hearing. If the complainants merely sought possession of tangible property of the company, not for the purpose of foreclosing the mortgage, but to enable them to take its profits, there might be no sufficient reason for the interposition of a court of equity. On the other hand if they also need to be quieted, and protected in the enjoyment of incorporeal rights, the nature of the rights and their liability to numerous interruptions and infringements, might render the powers of a court of equity indispensable to their effectual protection. See Croton S. P. Co. *v.* Ryder, 1 John. Chan. R. 611; Newburg S. P. Co. *v.* Miller, 5 John. Chan. R. 111; Bos. W. P. Co. *v.* Bos. and W. R. R., 16 Pick. 525.

"When the whole case is before the court it can be seen what the rights of the parties are, and how far and for what purposes the complainants need the aid of the court.

"The remaining question is, whether it was necessary for the trustees to make the bondholders parties. Generally, when a mortgage is made to a trustee for the benefit of a *cestui que trust*, I apprehend that the question whether the *cestui que trust* ought to be made a party, depends on the purpose of the trust. If the trustee is the proper party to receive and continue to hold the money for the benefit of the *cestui que trust*, so that the object of the suit is merely to reduce the trust fund to possession, that the trustee may hold it in trust, the *cestui que trust* is not a necessary party. For I take the general rule to be, that to a suit by a trustee to obtain possession of a trust fund, the *cestui que trust* need not be made a party. See Calvert on Parties, 212–215, and cases there cited; Allen *v.* Knight, 5 Hare, 272. But where a trustee is interposed between a lender and borrower, merely for the purpose of enabling the lender to obtain payment through the exercise by the trustee of powers conferred on him by the mortgage, and the lender is the proper party to receive the money, he should be made a party to a bill for foreclosure. It is in truth between him and the mortgagor that the account is to be taken, and he ought to be before the court for the purpose of taking the account, as well as to receive the money if paid. See Story, Eq. Pl. sec. 201.

"But this requirement of the presence of the *cestui que trust* must give way to the absolute impossibility, or even to the excessive inconvenience of complying with it; and the case at bar undoubtedly presents an instance of such excessive inconvenience, if not absolute impossibility. The bill shows that the number of different bonds secured by this mortgage was seven hundred and five, amounting to the sum of five hundred thousand dollars.

The objection against the existence of the power, drawn from the general convenience,—that the legislature conferred the franchise of making and operating the road on parties which it deemed its fit depositaries, and that they should not be permitted to assign it to irresponsible parties,—loses its force when it is considered that the road is not expected to be managed by the original corporators personally, and even the control of its affairs may, by the transfer of the shares of the stockholders, pass into

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They were not issued until after the execution of the mortgage. Of course their original holders are not parties to the deed. It is a notorious fact, and recognized in various ways by the legislation of most States where railroad corporations have issued such bonds, and manifestly contemplated by the deed in question, that these bonds were to be sold in the market and pass from hand to hand. Consequently it must have been impossible for the trustees to know who were the holders when the bill was filed. And if then known there would be no probability that they would continue in the same hands during any considerable time. To require the trustees to make the holders parties would amount to a prohibition to sue, and it is now too well settled to require a reference to authorities to show that courts of equity do not allow a rule respecting parties adopted for purposes of convenience and safety, to operate so as to defeat entirely the purposes of justice. Nor is this a case in which it could answer any beneficial purpose to make some of the bond-holders parties in behalf of themselves and all others. The trustees are competent (Powell *v.* Wright, 7 Beav. 444), and it is their duty to represent all. The deed so treats them. In the cases of a sale, or possession taken of the road for purposes of managing it, and receiving the income, the deed looks to the trustees to ascertain who are holders of bonds and to pay to each his aliquot part, and it is in the power of the court by directing the proper inquiries before a master to have the holders of the bonds before the court at the moment when the account is to be taken, and thus afford all needful security, as well to them as to the mortgagors and the trustees. See Story's Eq. Pl. sec. 207 a; Williams *v.* Gibbs, 17 How. 239; Gooding *v.* Oliver, ib. 504. It was stated at the bar, that the Supreme Court of Massachusetts came to this same conclusion in reference to parties in Shaw *v.* Norfolk C. R. R. above referred to, but that no report of the decision on that point has been made. My opinion is that the objection for the want of parties is not tenable.

"The demurrer is overruled, and the defendants ordered to answer the bill."

the hands of parties who could not possibly be within the contemplation of the legislature when making the grant. The objection is mainly technical, and can hardly outweigh the public convenience and necessity, which require even for the sake of maintaining the credit of solvent corporations, that all their property should be subjected to the payment of their debts lawfully created, and, in many cases, that the road of an insolvent corporation whose financial difficulties disable it from performing its public duty, should pass under the control of other parties, who are competent to answer that convenience and necessity.

The question as to the power of a railroad company to mortgage its road, has been much complicated, from the circumstance that, as railroads are usually owned and operated by corporations, the franchise of being a corporation, which is from its nature not assignable, has been considered in connection with the power to use the road and enjoy its revenues, which differs essentially from the power of existing and acting as an artificial body. But there is no reason why a railroad may not be owned by a private individual, who has obtained from the legislature a grant of power to exercise its right of eminent domain for the purpose, and to receive tolls for persons and goods carried over the same, the same public duties being imposed upon him as upon a corporate body receiving the same grant. It would be difficult to maintain that the individual grantee of such a power could not, after he had appropriated his right of way, like the owner of a ferry franchise, transfer the right to use it and to enjoy its tolls; and

it is conceived that the same power in this respect exists in a corporation as in an individual. Neither could bestow the franchise of being a corporation, which would be in effect creating a new one; while both are under public duties, and upon general principles their powers and obligations would be the same.

It is objected to the power of the company to mortgage its road that it is a public highway.[1] The right of the State to condemn private property for the road, rests on the ground that it is to be used for public purposes.[2] The State, it has been held, may intervene to prevent the road from being used for other purposes than a public highway, and to compel the company to maintain it for that purpose.[3] But the proposition that the road is a public highway, if admitted, would not require the admission of its disability to transfer the right to use the same. The right of the State to have it maintained for public travel and transportation does not interfere with its management by other parties than the original corporation and their enjoyment of the tolls; and if it did, it would seem to be a right for the State to assert or waive at its pleasure, and not to be taken advantage of collaterally.[4]

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[1] See Ammant *v.* New Alexandria and Pittsburg Turnpike, 13 S. & R. 210; Leedom *v.* Plymouth R. R. Co., 5 W. & S. 265; State *v.* Rives, 5 Iredell, 301, 302; State *v.* Mexican Gulf R. Co., 3 Rob. (La.) 513. This position is controverted in 4 Am. Law Mag. 254.

[2] *Ante*, ch. viii. pp. 147–151; People *v.* White, 11 Barb. 26.

[3] Rex *v.* Severn and Wye R. Co., 2 B. & Ald. 646; Reg. *v.* Eastern Cos. R. Co., 10 Ad. & El. 531; Regina *v.* South Wales R. Co., 14 Q. B. 902; Grant on Corp. 284, 285.

[4] Angell & Ames on Corp. ch. v. § 191; Arthur *v.* Commercial and R. R. Bank of Vicksburg, 9 Smedes & M. 431; Fellows *v.* Same, 6 Rob. (La.) 246.

The assignment by a railroad company of its property, including its road, by a trust deed for the benefit of creditors, has been sustained.[1]

The liability of the road to be taken on execution against the company, has been affirmed in North Carolina, although it was decided that the franchise of being a corporation could not be sold on execution.[2] If no remedy is to be allowed at law for obtaining satisfaction of the judgment by levying execution on the road, the better opinion is that its tolls may be reached in equity for that purpose.[3]

MORTGAGE OF SUBSEQUENTLY ACQUIRED PROPERTY.—Where the power to mortgage exists, the question may arise as to what is covered by a given mortgage. It is a general principle of the common law that the subject of a mortgage must be in existence when it is made, and that nothing passes by it which does not at the time when it is made belong to the mortgagee.[4] But where the company, under

[1] Fellows *v.* Commercial and R. R. Bank of Vicksburg, 6 Rob. (La.) 246; Arthur *v.* Same, 9 Smedes & M. 394, 432; Allen *v.* Montgomery R. R. Co., 11 Ala. 437; Mobile and Cedar Point R. R. Co. *v.* Talman, 15 id. 472, 491; De Ruyter *v.* St. Peter's Church, 3 Comst. 238, 242, 243.

[2] State *v.* Rives, 5 Iredell, 297; *contra*, Ammant *v.* New Alexandria and Pittsburg Turnpike, 13 Serg. & R. 210; Leedom *v.* Plymouth R. R. Co., 5 Watts & S. 265; Susquehanna Canal Co. *v.* Bonham, 9 id. 27; Winchester and Lexington Turnpike Road Co. *v.* Vimont, 5 B. Monroe, 1. See Tippets *v.* Walker, 4 Mass. 596, 597; Macon and Western R. R. Corp. *v.* Parker, 9 Geo. 377.

[3] Ammant *v.* New Alexandria and Pittsburg Turnpike, 13 Serg. & R. 210; Allen *v.* Montgomery R. R. Co., 11 Ala. 437; Macon and Western R. R. Co. *v.* Parker, 9 Geo. 377; Bigelow *v.* Cong. Society of Middletown, 11 Vt. 283.

[4] Jones *v.* Richardson, 10 Met. 488; Moody *v.* Wright, 13 id. 17; 2 Hilliard on Mort. 196.

competent authority, conveys by mortgage its road and all its property, with all its corporate franchises and rights, as one entire thing, including, among other franchises, the right to acquire future property, and in effect conveys the corporation itself, subsequently acquired property will pass to the mortgagee as an incident and accession to the subject of the mortgage. The right to acquire the property being one of the franchises conveyed, it is included within the mortgage, and property acquired afterwards by virtue of its exercise, is acquired and held under and subject to the conditions of the mortgage.[1]

Remedies of Mortgagee.—A power of sale contained in a mortgage made by the company is a cumulative remedy, and does not exclude the mortgagee from other remedies to which he would have been entitled, if no such power had been given. It does not take from equity its jurisdiction to decree a sale under its direction, or a strict foreclosure.[2]

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[1] Pierce *v.* Emery, 32 N. H. 484; Willink *v.* Morris Canal and Banking Co. 3 Green Ch. 377; Seymour *v.* Burnett, Court of Appeals of Kentucky, June, 1856, not yet reported; see State *v.* Mexican Gulf R. Co. 3 Rob. (La.) 513.

[2] Shaw et al., Trustees, *v.* Norfolk County R. R. Co., Supreme Court of Mass., Nov. T., 1856, to be reported in 5th vol. of Gray's Reports; Hall *v.* Sullivan R. R. Co., U. S. Circuit Court for the District of New Hampshire, before Curtis, J., *ante*, p. 524, note; see Carradine *v.* O'Connor, 21 Ala. 573; Eaton *v.* Whiting, 3 Pick. 484; Byron *v.* May, 2 Chandler (Wis.), 103; 2 Story Eq. Juris. §§ 1024, 1026, 1027. In Shaw et al., Trustees, *v.* Norfolk County R. R. Co. the opinion of the Court, delivered by Merrick, J., upon this and other points, is as follows:—

"Several considerations have been urged upon our attention by the respondents, as valid objections to the maintenance of the present bill. It

PARTIES TO A BILL FOR FORECLOSURE.—Where the trustees of the bondholders under the mortgage of

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is insisted, in the first place, in their behalf, that a franchise created by the legislature and conferred by its authority on a particular party, cannot be sold or transferred by him to another. But if this general proposition, concerning which it is unnecessary at this time to express any opinion, should be admitted to be strictly correct, it would be of no advantage to the respondents in the present case, because their conveyance to the complainants has been ratified and confirmed by a subsequent statute, duly enacted. Stat. 1850, ch. 175, § 2. Besides, by the deed of indenture recited in the bill, not only the franchise of the Norfolk County Railroad Company, but also all its real and personal property, consisting besides other things of lands houses, stations, iron sleepers, cars, and engines, was conveyed to the complainants, to be held by them in trust and as security for the payment of the bonds which it was the purpose and intention of the corporation to issue and deliver to its creditors. And if any doubt could ever have been supposed to exist in relation to the transfer of the franchise, there certainly would have been none concerning the conveyance of the lands and personal property described in the deed of indenture. And there may be a suit as well for the foreclosure as for the redemption of lands subject to the incumbrance of a mortgage. Rev. Stat. ch. 81, § 8.

"But the respondents further object that the bill cannot be maintained because there was no such conveyance to the grantees as would in law give to them an estate absolutely upon a breach of the condition upon which it was made; and, consequently, that there was no equity of redemption in the grantors, and would be no necessity or occasion for any process to aid in effecting a foreclosure. This position is predicated upon the assumption either that the grantors are limited to the specific remedies provided for them in the deed of indenture, or that the legal effect of the deed is to create only, and nothing more than, a Welsh mortgage. But neither the one nor the other of these assumptions can be sustained. Welsh mortgages are frequently mentioned in the English books. They resemble, says Chancellor Kent, the *vivum vadium* of Lord Coke, under which the creditor took the estate to hold and enjoy it without any limited time of redemption, and until he repaid himself whatever was due to him out of its rents and profits. But they are now entirely out of use in that country (4 Kent, Com. 137); and they do not ever appear to have been recognized or practically known among the modes of conveyancing which have prevailed in this commonwealth. They cannot exist under our statute which provides, that when the condition of any mortgage of real estate has been broken, the mortgagor and his assigns may redeem the same at any time before a legal foreclosure has been effected. Rev. Stat. 107, sec. 13.

"Every circumstance attending the transaction has the most manifest

the railroad, bring a bill in equity to foreclose the same, the bondholders, who are generally numerous,

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tendency to show that the deed of indenture executed by the respondents, and conveying their railroad, lands, and personal property to the complainants, was intended by them to be, as it in fact is, a mortgage of the granted premises. It begins with a vote of the stockholders, authorizing the directors to mortgage the railroad, franchises, and property of the company to raise thereby such sums of money as should be found necessary to complete and equip the road, and pay off all existing liabilities. In the measures adopted by the directors, they recite and profess to be governed exclusively by the terms of that vote, and in pursuance of it, they authorize and direct the president and treasurer to execute a mortgage in the name and behalf of the company. And the instrument which was executed under that authority was afterwards ratified and confirmed by act of the legislature. Stat. 1850, ch. 175. The deed of indenture contains in itself all the provisions, and has all the characteristics of that species of conveyance. It conveys an estate in fee to the grantees, to have and to hold the same to them and their survivors and successors, but upon the express condition that if payment of the bonds, and the interest accruing upon them shall be truly made as the same respectively fall due, the indenture itself shall thereupon become void, and of no effect. The conveyance being thus defeasible when the condition annexed to it has been performed according to its legal effect, and by means of such performance, can be regarded in no other light than that of a mortgage of the estate conveyed. Erskine *v.* Townsend, 2 Mass. 493; Nugent *v.* Riley, 1 Met. 117.

"And neither the right conferred upon the grantees to take possession, upon the non-performance by the grantors of the stipulated conditions, of the whole of the mortgaged property and to manage and control it, and apply the net proceeds arising from its use to the purposes of the trust, nor the duty imposed upon and assumed by them to proceed, and take possession of the premises upon the requisitions of two thirds of the bondholders according to the special provisions relative to that subject contained in the deed, affects the nature and character or legal effect of the instrument itself. It was not less a mortgage than it would otherwise have been, because the grantees were invested by special agreement with an additional authority beyond what they would have possessed without it, and which they would have no right to exercise except under an express stipulation. And so long as they took no advantage and nothing has been done under it, the rights and interests of the respective parties to the conveyance, and their relations to each other were in no respect changed or affected by it. 'A power to sell executed to one who relies upon such power, and expects and intends to purchase an absolute estate, will, without doubt, pass an uncon-

and owing to the transfer of the bonds difficult to be ascertained, are not necessary parties to the bill;

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ditional estate to the purchaser, though this form of conveyance is rare in this country. But while the power remains unexecuted, the relation of mortgagor and mortgagee subsists, if that was the relation created by the instrument separate from the power.' Eaton *v.* Whiting, 3 Pick. 484.

"But this bill may well be maintained by the complainants upon another and different ground. By the contract expressed in the deed of indenture, a trust is created, to the due performance of which they have firmly bound themselves and their successors. In the discharge of the duties thus created and thus assumed, the possession, management, and control of the estates and interests conveyed to them may—and as it seems to have already—become indispensable. For the due enforcement and regulation of such a trust, ample power is found in the jurisdiction of this court as a court of equity; and the present bill is an appropriate course of proceeding to procure for that purpose the intervention and exercise of its authority.

"The bill prays for general relief, as well as for a specific decree in relation to the foreclosure of the equity of redemption. And upon the facts stated in it, and which upon the hearing were admitted to be true, we can see no reason why the complainants ought not to be put in immediate possession of the mortgaged property in order that the purpose for which the conveyance was made may be accomplished, and the trust created by it be properly executed. The respondents have neglected, and still neglect, to pay the income, which has accrued upon a large proportion of the bonds which were duly issued and which are held by the creditors of the corporation. These bondholders are entitled to demand the money which has become due, and it is the duty of the trustees to make use of the discretionary powers which are conferred upon them for the express purpose of insuring the payments to which the creditors should severally become entitled. To that end, possession of the mortgaged property is indispensable, and the complainants ought therefore to have a decree by force of which they can obtain it.

"We see no ground for the suggestion, that the bill cannot be maintained because the complainants have an adequate and complete remedy at law. It is obviously quite the reverse. The nature of the property with the possession of which they seek to be invested, renders it impossible for them to find a remedy in a single suit at law. There must be, if resistance is made to their claim of possession, unless recourse be had to the equitable jurisdiction of the court, actions real in different counties as well as actions personal, besides such other and further proceedings as may be suitable to obtain the control and enjoyment of the franchise of the corporation. And besides all this, the trust is to be regulated as well as the property possessed. To control all this property, to enforce these obligations, and to preserve the rights

their presence being dispensed with on account of the great inconvenience, if not absolute impossibility, of making them parties.[1]

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of all parties interested, the court can only when exercising the equitable powers conferred upon it, afford a complete and adequate remedy.

"A decree properly prepared must therefore be entered on behalf of the complainants, entitling them to have immediate possession of all the mortgaged property."

[1] Hall *v.* Sullivan R. R. Co., *ante*, p. 526 note; Willink *v.* Morris Canal and Banking Co., 3 Green Ch. 377; Story Eq. Pl. § 149, 150.

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