THE

LAW OF RAILWAYS

EMBRACING

THE LAW OF CORPORATIONS, EMINENT DOMAIN, CONTRACTS, COMMON CARRIERS, TELEGRAPH COMPANIES, EQUITY JURISDICTION, TAXATION, THE CONSTITUTION, RAILWAY INVESTMENTS, &c.

BY

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SIXTH EDITION,

BY

J. KENDRICK KINNEY.

VOL. I.

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PREFACE TO THE SIXTH EDITION.

It is hoped that nothing may be found too seriously amiss in this new edition of a book which now may be called an old one. Pains have been taken to make it not unworthy of a place by the side of those which have preceded it; but the effort has not been without its embarrassments. Since the publication of the last edition the reports have overflowed with an ever-increasing number of cases in this field of the law; and it has been a work of no small difficulty to find in the general mass the decisions bearing on the topics originally treated, and so to apply them as to keep the work within its former compass, and still to leave it not less complete as a present statement of the law of railways than it was left by its author.

The form of the book has been left unchanged, and the text also, except in a very few passages which had escaped the proof-reader, or which bore on a state of things that has now passed away. The old notes, however, have been freely rewritten in order to make room for new matter.

J. K. K.

Chicago, November, 1887.

AUTHOR'S PREFACE TO THE FIFTH EDITION.

We have made no change in the arrangement of the work, in this edition, except to place the title of each separate portion of the work on the leaf preceding it, and to number the Parts, and place their titles on the first page of the Table of Contents, as a Summary; thus enabling any one to see at a glance what the work contains. It will thus be seen that it really embraces the discussion of thirteen distinct topics of law, in each of which is embraced an analysis of the law, almost as comprehensive and complete as a distinct treatise. The Parts upon Corporations; Common Carriers of Goods and Passengers; Telegraphs; Mandamus; Certiorari, and some others, are complete treatises, and all the Parts embrace everything pertaining to railways, and much more.

The plan of the work is novel, but it seems the only one suited to such a work; and by striking out nearly all the opinions in the notes, and rearranging to some extent the other portions of the notes, so as to bring them into the same order as if now prepared for the first time, we have saved nearly space enough for the new matter added, and at the same time have been able to have the work come nearer its original ideal — that of giving the systematic analysis of principles in the text, and a complete digest of all the cases in the notes — than has ever been possible before.

The American opinions found in the notes to the former editions were originally inserted, because they constituted, to some extent, the basis of important doctrines connected with the law of railways, and could not be readily obtained elsewhere by the profession in many portions of the country. But now that we are able to furnish the leading American cases upon the subject in separate volumes, to those who desire to obtain them in that form, there seems no propriety in longer incumbering the pages of our principal work with any of them, however indispensable it might formerly have been. And although many law book-makers have adopted that course, and some of high authority, at an early day, we are glad to see that the fashion is going into disuse, as we have long since become convinced it was not the best mode, either in writing or editing law books, and have eliminated as fast as possible all extended opinions from all law treatises with which we have had to do of late. Where an opinion contains the basis of the law upon a particular point, as some of the English cases do, and possibly some few of the American cases, it may as well be given in that form; and when a brief extract from an opinion gives the very point we desire, it comes with more weight in that form than any other; but, beyond that, opinions should never be permanently retained in text-books.

The additions to the present edition, both in the text and notes, have been very large for the short time since the former one, covering about a hundred pages in the work itself, besides the appendix of the latest cases, reported while the work was in press. When any late case establishes any new point it is inserted in the text, and the exact point of all the new cases is given in the notes, when it varies in any particular from those before stated.

We have not the vanity to suppose the work will be found perfect, or complete in all its details. That is scarcely to be expected in any work covering so wide a space. But we believe it contains as much that will be found useful and instructive, both to students and the profession generally, as it would be reasonable to expect in the same space, without such an extreme degree of condensation as greatly to impair both its clearness and completeness.

In taking leave of our professional brothers, we beg to assure them how deeply and gratefully we appreciate their uniform kindness and respect; and our only surprise is, that, in our humble and patient way of daily toil on their behalf, we should have been able to earn so much at their hands. We will not, however, impugn their good sense and discrimination by presuming to doubt its propriety, however difficult it may be for us always to comprehend it.

I. F. R.

Boston, Jan. 1, 1873.

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THE LAW OF RAILWAYS.

THE LAW OF RAILWAYS.

*CHAPTER I.

INTRODUCTION.

1. Origin of railways in England.
2. First built on one's own land, or by special license from the owner.
3. Questions in regard to private railways.
4. Railways in America, public grants.
5. Use of steam power on railways.
6. The franchise of a railway not necessarily corporate, nor unassignable.

§ 1. 1. Although some of the Roman roads, like the Appian Way, were a somewhat near approach to the modern railway, being formed into a continuous plane surface, by means of blocks of stone fitted closely together, yet they were, in the principle of construction and operation, essentially different from railways. The idea of a distinct track, for the wheels of carriages, does not seem to have been reduced to practice until late in the seventeenth century. In 1676, some account is given of the transportation of coals near Newcastle, upon the river Tyne, upon a very imperfect railway, by means of rude carriages, whose wheels ran upon some kind of rails of timber.[1] About one hundred years afterwards, an iron railway is said to have been constructed and put in operation at the colliery near Sheffield. From this time they were put into very extensive use, for conveying coal, stone, and other like substances, short distances, in order to reach navigable waters, and sometimes near the cities, where large quantities of stone were requisite for building purposes.

* 2. These railways, built chiefly by the owners of coal-mines and stone-quarries, either upon their own land or by special license, called "way-leave," upon the land of others, had become

[1] Roger North's Life of Lord Keeper North, ii. 281; Encyclopædia Americana, art. Railway, x. 478.

numerous long before the application of steam power to railway transportation.

3. Some few questions in regard to the use of these railways, or tramways, at common law, have arisen in the English courts.[2] But as no such railways exist in this country, it would scarcely be expected that we should here more than allude to such cases.[3]

*4. All railways and other similar corporations in this country exist, or are presumed to have originally existed, by means of an express grant from the legislative power of the state or sovereignty.[4]

5. The first use of locomotive engines upon railways for purposes of general transportation does not date further back than October, 1829; and all the railways in this country, with one or two exceptions, have been built since that date.[5]

[2] Walf. Railw. 2 *et seq.*; Hemingway *v.* Fernandes, 13 Sim. 228; Keppell *v.* Bailey, 2 Myl. & K. 517.

[3] The principal points of those cases are: That such licenses are not limited to the use of the means of locomotion known at the date of the license, but may extend to such as afterwards come into use. Dand *v.* Kingscote, 2 Railw. Cas. 27; s. c. 6 M. & W. 174. To the use of steam-power, for instance. Bishop *v.* North, 3 Railw. Cas. 459; s. c. 11 M. & W. 418. That this will not justify a grantee of a right to erect a railway for a special purpose to erect one for general purposes. Dand *v.* Kingscote, *supra*; Farrow *v.* Vansittart, 1 Railw. Cas. 602; Durham & Sunderland Railway Co. *v.* Walker, 3 Railw. Cas. 36; s. c. 2 Q. B. 940. That if the railway is such as the company may lawfully make for purposes for which when made it may be lawfully used, mere intention to use for an unlawful purpose gives the reversioner no ground of complaint. Durham & Sunderland Railway Co. *v.* Walker, *supra*. That such way-leaves may exist by express contract, by presumption or prescription, from necessity, as accessory to other grants, and by acquiescence. Barnard *v.* Wallis, 2 Railw. Cas. 162; s. c. 1 Craig & P. 85; Monmouthshire Canal Co. *v.* Harford, 1 C. M. & R. 614. And that the proprietors are under certain obligations to keep road in repair, so as not to injure occupiers of adjoining lands, to pay tenant's damages, and sometimes to pay rent. Wilson *v.* Anderson, 1 Car. & K. 544; Walf. Railw. *supra*.

[4] 2 Kent Com. 276, 277; Stockbridge *v.* West Stockbridge, 12 Mass. 400; Hagerstown Turnpike Co. *v.* Creeger, 5 Har. & J. 122; Greene *v.* Dennis, 6 Conn. 292, 302, *per* Hosmer, C. J.; Franklin Bridge Co. *v.* Wood, 14 Ga. 80. But municipal authorities have assumed to grant a right to a private railway within the limits of the municipality. Wilson *v.* Cunningham, 3 Cal. 241. And see *infra*, § 250.

[5] The celebrated trial of locomotive engines on the Liverpool and Manchester Railway, to determine the relative value of stationary and locomotive power, resulting in favor of the latter, was had in October, 1829. The

*6. There is nothing in the prerogative right of maintaining and operating a railway and taking tolls thereon which is necessarily of a corporate character, or which might not, with perfect propriety, belong to, or be exercised by, natural persons, or which in its nature may not be regarded as assignable.[6]

Quincy Railway, for the transportation of granite by horse power, was constructed about two years before; but the Boston and Lowell Railway, one of the first railways in this country for purposes of general traffic, was not incorporated until June, 1830.

[6] Middlebury Bank *v.* Edgerton, 30 Vt. 182, *per* BENNETT, J.

PART I.

THE LAW OF PRELIMINARY ASSOCIATIONS.

PART I.

THE LAW OF PRELIMINARY ASSOCIATIONS.

*CHAPTER II.

PUBLIC RAILWAYS AS CORPORATIONS. — PRELIMINARY ASSOCIATIONS.

SECTION I.

Mode of instituting Railway Projects.

1. Subscribers' associations in England.
2. Subscribers bound by subsequent charter.
3. Issue and registry of scrip certificates.
4. Original subscriber liable to unregistered purchaser.
5. Holders of scrip entitled to registry.
6. Preliminary associations not common in this country.
7. Petitioners for incorporation file plans and surveys.
8. English statute of 1862.
9. Preliminary associations may be registered.
10. Not now held responsible as partners in England.

§ 2. 1. The mode of instituting railway enterprises, in England, is more formal and essentially different from that adopted in most of the American states. There the promoters usually associate under two provisional deeds, the one called a "Subscribers' Agreement," and the other a "Subscription, or Parliamentary Contract," which are expected only to serve as the basis of a temporary organization till the charter is obtained. This is specifically and often in detail to some extent provided for, in the subscribers' agreement. A board of provisional directors is provided to carry forward the enterprise, whose powers are defined in the subscribers' agreement or deed of association, and whose acts will not bind the members unless strictly within the powers conferred by the deed.

2. Under this form of association, the subscribers are bound by the act obtained, if within the powers conferred by the deed, even where it involves the purchase of canal, and other property by the

company.[1] And courts of equity often interfere to restrain the provisional directors from exceeding their powers under the deed,[2] * or misapplying the funds, or delaying payment of the debts of the association.[3]

3. The provisional directors usually issue scrip certificates, which pass from hand to hand by delivery merely, and, after the charter is obtained, the scripholders are registered as shareholders in the company, and thereby become entitled to all the rights, and subject to all the liabilities of the shareholders.[4]

4. And if the original subscriber sell the scrip to one who omits to have his name registered as a shareholder, by reason of which the original subscriber cause his name to be registered and sell the shares again, he will be held to account for the avails of the second sale, as a trustee for the first purchaser.[5]

5. But the company are not obliged to accept of the holders of scrip as shareholders, in discharge of the original subscribers, it has been said, but may insist upon registering the original subscribers to the deed of association, to whose aid it may be presumed the promoters looked in undertaking the enterprise, which by their act of incorporation they are morally, and in some cases legally, bound to carry forward.[6] But the English decisions, upon the whole, hardly seem to justify this proposition. The subscriber cannot abandon the obligation at will.[7] But if the

[1] Midland Great Western Railway Co. *v.* Gordon, 16 M. & W. 804.

[2] Gilbert *v.* Cooper, 4 Railw. Cas. 396; s. c. 15 Sim. 343. All persons concerned must be made parties to the bill, — even shareholders of whom it is alleged a rival company proposes to purchase shares, to destroy the independence of one of the companies connected with the common enterprise. Greathed *v.* Southwestern & Dorchester Railway Co., 4 Railw. Cas. 213; s. c. 10 Jur. 343.

[3] Lewis *v.* Billing, 4 Railw. Cas. 414; s. c. 10 Jur. 851. Bagshaw *v.* Eastern Union Railway Co., 6 Railw. Cas. 152; s. c. 7 Hare, 114; Bryson *v.* Warwick & Birmingham Canal Co., 23 Eng. L. & Eq. 91; s. c. 4 De G. M. & G. 711.

[4] Birmingham, Bristol & Thames Junction Railway Co. *v.* Locke, 1 Q. B. 256; London Grand Junction Railway Co. *v.* Graham, id. 271; s. c. 2 Q. B. 281; Cheltenham & Great Western Union Railway Co. *v.* Daniel, 2 Railw. Cas. 728; Sheffield, Ashton-under-Lyne, & Manchester Railway Co. *v.* Woodcock, 2 Railw. Cas. 522; s. c. 7 M. & W. 574. And see *infra*, § 47.

[5] Beckitt *v.* Bilbrough, 19 Law J. 522; s. c. 8 Hare, 188.

[6] Hodges Railw. 97.

[7] Kidwelly Canal Co. *v.* Raby, 2 Price, 93; Great North of England Rail-

scrip is transferable, by delivery, it would be strange if the holder was not entitled * to be registered, as a shareholder, the same as the assignee of a fully registered share in the stock. And for the company, after having issued scrip certificates, in a form calculated to invite purchases, and when they were aware of the use constantly made of such scrip, to refuse to register the names of the holders, as shareholders and members of the company, would amount to little less than express fraud. Hence we conclude they have no right to decline accepting such scripholder, as a shareholder.[8] But where false scrip had been issued, beyond the amount allowed in the charter, and the full number of shares allowed by the charter already registered, it was held the company could not upon that ground refuse to register the shares of such as had purchased the genuine scrip.[9] But we shall have occasion to say more upon this subject elsewhere.[10]

6. By the laws of some of the states a given number of persons associating, in a prescribed form, for particular purposes, as religious, manufacturing, and banking purposes, and often for any lawful purpose, are declared to be a corporation. In such cases no application to the legislature is required. But, generally, railways in this country have obtained special acts of incorporation. There is, in most of the states, no provision for any preliminary association, and these enterprises are, for the most part, carried forward by individuals, or partnerships, and questions arising, in regard to the binding force of the acts of the promoters, either upon or towards the corporation, must depend upon the general principles of the law of contract.[11]

7. By the general law of some of the states the petitioners are required to furnish surveys of the proposed route, properly delineated upon charts by competent engineers, with estimates, and other information requisite for the full understanding of the subject. And these profiles and plans are required, where the petition is granted, to be deposited in some public office, for inspection and preservation.[12]

way Co. *v.* Biddulph, 2 Railw. Cas. 401; s. c. 7 M. & W. 243, where the question is raised, but not determined.

[8] Midland Great Western Railway Co. *v.* Gordon, 5 Railw. Cas. 76; s. c. 16 M. & W. 804.

[9] Daly *v.* Thompson, 10 M. & W. 309.

[10] *Infra*, §§ 39, 47.

[11] Angell & Ames Corp. §§ 86-94.

[12] Mass. Laws, 1833, c. 176, 1848, c. 140; Rhode Island Laws, 1836;

8. Since the publication of the second edition of this work, the mode of procedure in obtaining parliamentary powers for railways, * in England, has been considerably changed. The former laws have been repealed, and the whole consolidated into one statute,[13] called "The Companies' Act, 1862," which applies to other companies as well as railways.

9. The usual course now is for the preliminary association to register itself as a preliminary company under the Act of 1862, for the purpose of obtaining a special Act of Parliament. This is effected by the promoters signing a memorandum of association, in which the powers of the company are specially limited to certain acts or purposes.

10. If the association be not registered under the statute so as to constitute it a corporation with limited powers, there may be danger that the individual members, who are active in promoting the enterprise, may incur the responsibility of general partners.[14] But in England, it seems now settled that the promoters of railways are not, ordinarily, to be held responsible, as partners, for the acts of each other.[15]

*SECTION II.

Contracts of the Promoters not binding at law on the Company.

1. In this country, promoters bind only themselves and associates.
2. Contracts of promoters not enforceable by company.
3. But by consenting to a decree in equity setting up the contract, the company will be held to have adopted it.

§ 3. 1. The promoters of railways, in this country, where the law makes no provision for the preliminary association becoming a corporation, can only bind themselves and their associates, at most, by their contracts. The promoters are in no sense identical * with the corporation, nor do they represent them, in any

Conn. Laws, 1849, c. 37, 1853; Me. Rev. Sts. c. 81, § 1; 2 Railroad Laws & Ch. 616, 657, 838; 1 Railroad Laws & Ch. 305. Similar provisions are made by the laws of many of the States.

[13] St. 25 & 26 Vict. c. 89. [14] Hodges Railw. (ed. 1865), 2.

[15] Hamilton *v.* Smith, 5 Jur. N. S. 32; Norris *v.* Cooper, 3 H. L. Cas. 161; *infra*, § 4, note 12. St. 27 & 28 Vict. c. 121 facilitates, in certain cases, the obtaining of powers for the construction of railways.

relation of agency, and their contracts could of course only bind the company, so far as they should be subsequently adopted by it, as their successors; much in the same mode and to the same extent, and under the same restrictions and limitations, as the contracts of one partnership bind a succeeding partnership in the same house.[1]

2. But a contract by a joint-stock association, that each member shall pay all assessments made against him, cannot be enforced by a corporation subsequently created, and to which, in pursuance of the original articles of association, the funds and all the effects of the former company have been transferred.[2] Nor is

[1] Moneypenny *v.* Hartland, 1 C. & P. 352; Kerridge *v.* Hesse, 9 C. & P. 200; Doubleday *v.* Muskett, 7 Bing. 110. And see further, *infra*, § 4, note 12. From these cases, from Bell *v.* Francis, 9 C. & P. 66, from the cases cited in the note above referred to, and from some others, it would seem that the directors and managing committee are always liable for services rendered the association on their employment and credit, and that such other members of the association are liable also as from their active agency in the business (as, e. g., by attending meetings) or from the terms of association may reasonably be looked to for compensation. Lake *v.* Duke of Argyll, 6 Q. B. 477; and see Swan *v.* North British Australasian Co., 7 H. & N. 603; Eales *v.* Cumberland Black Lead Mine Co., 6 H. & N. 481; s. c. 7 Jur. N. S. 169. Thus, in Scott *v.* Lord Ebury, Law Rep. 2 C. P. 255, it was held that the promoters were liable for the expense of obtaining the act of parliament, notwithstanding the incorporation and the assumption of those acts by the company. But see Nevins *v.* Henderson, 5 Railw. Cas. 684, which held that a surveyor, to recover of the provisional committee, must show employment by them or their agent, or a ratification. And see Williams *v.* Pigott, 5 Railw. Cas. 544; s. c. 2 Exch. 201; Spottiswoode's Case, 39 Eng. L. & Eq. 520. As to admissions made by committee-men and others who have taken part in the enterprise, the courts in England make some allowance for misapprehension on the part of those who do not understand the liability of such persons. Newton *v.* Belcher, 6 Railw. Cas. 38; s. c. 12 Q. B. 921. And where others have not acted on such admissions, it may be shown that they were made under mistake either of law or of fact; and where so made they add nothing to the liability. This rule is laid down in Heane *v.* Rogers, 9 B. & C. 577, and expressly recognized in Newton *v.* Liddiard, 6 Railw. Cas. 42. And even where they amount to an estoppel, it extends only to parties and privies to the particular transaction in which the admissions were made. Heane *v.* Rogers, *supra*. This is in accordance with the established principle of the law of evidence. Strong *v.* Ellsworth, 26 Vt. 366.

[2] Wallingford Manufacturing Co. *v.* Fox, 12 Vt. 304; Goddard *v.* Pratt, 16 Pick. 412, where it is held that the original copartners are still liable, on contracts made with third parties ignorant of the dissolution by the effect

the act of * all the corporators even, the act of the corporation, unless done in the mode prescribed by the charter and general laws of the state.[3] Nor can an incorporated company sustain an action at law, upon a bond executed to a preliminary association, by the name of the individuals and their successors, as the governors of the Society of Musicians, for the faithful accounting of A. B., their collector, to them and their successors, governors, &c., the company being subsequently incorporated.[4]

3. But the company, by consenting to a decree against them, upon a bill to enforce a contract with the promoters, by which they stipulated to withdraw opposition in parliament, upon condition that the company, when it came into operation, should take the land of the opposers of the bill at a specified price, and pay all the costs and expenses of the opposition until the time of the compromise, were held to have adopted the agreement, whether it would have been otherwise binding upon them or not.[5]

SECTION III.

Subscribers to the Preliminary Association inter sese.

1. Liability for acts of directors limited by terms of subscription.
2. Association not binding until preliminaries are complied with.
3. Contracts, how far controlled by oral representations of directors.
4. Subscribers not excused from paying calls by contract of directors.
5. Not liable for expenses, except by terms of agreement.
6. Deeds of association generally make provision for expenses.
7. One who obtains shares, without executing the deed, not bound to contribute.

n. 12. No relation of general partnership subsists between subscribers.

§ 4. 1. The project for a railway being set on foot by a provisional committee of directors or managers, the subscribers may insist upon the terms of subscription. The subscribers are not bound by any special undertaking of the directors, or any portion

of the incorporation, the company having carried on business in the name of the partnership.

[3] Wheelock *v.* Moulton, 15 Vt. 519.

[4] Dance *v.* Girdler, New Rep. 34. See Gittings *v.* Mayhew, 6 Md. 113.

[5] Williams *v.* St. George's Harbor Co., 2 De G. & J. 547; s. c. 4 Jur. N. S. 1066.

of them, beyond or aside from the powers conferred by the terms of the deed or contract of association.[1]

2. And the association is not binding, until the provisions by * which it is, by its own terms, to become complete, are complied with. If before that the scheme be abandoned, the provisional subscribers, or allottees, may recover back their deposits of the provisional committee, in an action for money had and received.[2] So, too, if one is induced to accept of shares in the provisional company, by fraudulent representations, he may recover back the whole of his deposits.[3]

3. But if one actually become a subscriber, he is bound by the terms of subscription, without reference to prior oral representations, and must bear a portion of the expense incurred, if the subscription so provide.[4] But if the directors, in such provisional company, in order to induce subscriptions, promise the subscriber, that in the event of no charter being obtained he shall be repaid his entire deposit, this contract is binding upon them, and may be enforced by action, notwithstanding the subscriber's agreement authorized the directors to expend the money in the mode they did.[5]

4. But the contract of the directors will not excuse the subscriber from paying calls, if the terms of the subscriber's agreement require it.[6] The contract of the directors in such case, and

[1] *Ex parte* Londesborough, 27 Eng. L. & Eq. 292; s. c. 4 De G. M. & G. 411; *Ex parte* Mowatt, 1 Drewry, 247.

[2] Walstab *v.* Spottiswoode, 4 Railw. Cas. 321; s. c. 15 M. & W. 501.

[3] Jarrett *v.* Kennedy, 6 C. B. 319. To bind the subscriber to take the shares, the company need not give notice of allotment. It is the subscriber's duty to take notice thereof, and to pay all dues fixed by law or by the terms of the contract. *Ex parte* Bloxam, 10 Jur. N. S. 814; s. c. 33 Beav. 529.

[4] Watts *v.* Salter, 10 C. B. 477. And it will make no difference that he has not received the shares allotted to him nor paid the deposits. *Ex parte* Bowen, 21 Eng. L. & Eq. 422. Where a subscriber has paid towards expenses all that the terms of association require, he cannot be charged further because he paid without taxation. Croskey *v.* Wales Bank, 4 Giff. 314. But he cannot charge his subscription against the company as money advanced for its benefit. Spackman *v.* Lattimore, 3 Giff. 16; s. c. 7 Jur. N. S. 179.

[5] Mowatt *v.* Londesborough, 25 Eng. L. & Eq. 25, and 3 Ellis & B. 307; s. c. in error, 28 Eng. L. & Eq. 119, and 4 Ellis & B. 1; Ward *v.* Londesborough, 22 Eng. L. & Eq. 402.

[6] *Ex parte* Mowatt, *supra*. The subscriber will not be liable on calls, however, unless he has subscribed the deed of association, nor unless the shares

the deed of association, are wholly independent of each other, and neither will control the other.[7]

5. But it has been held, that persons, by taking shares in a projected railway, do not bind themselves to pay any expense incurred, unless it is so provided in the preliminary contracts of association, or the expense is incurred with their sanction and upon their credit.[8] And even where such shareholder consents to act on the provisional committee, it will not render him liable, as a contributory, to the expense of the company.[9]

* 6. But in general, the form of the deeds of association is such, that if one takes shares without reservation he is to be regarded as a contributory to the expense, and especially where he acts as one of the provisional committee, and also accepts shares allotted to him.[10]

7. But one who had obtained shares in a projected railway company, but without executing the deed of settlement, or any deed referring to it, was held not liable to contribute to the expense incurred in attempting to put the company in operation,[11] and especially if the acceptance of the shares was conditional upon the full amount of the capital of the company being subscribed, which was never done.[12]

have been specifically numbered and appropriated by number. Irish Peat Co. *v.* Phillips, 7 Jur. N. S. 413; S. C. affirmed, 7 Jur. N. S. 1189, 1 B. & S. 598. But it is not indispensable under the English statute that the register of shareholders be made and sealed within the statute period. So far as the liability of the subscriber is concerned, the statute is to be deemed directory. Wolverhampton New Waterworks Co. *v.* Hawksford, 11 C. B. N. S. 456; 8 Jur. N. S. 844. The company when incorporated may sue in its own name on calls made by the preliminary association. Hull Co. *v.* Wellesley, 6 H. & N. 38.

[7] Dover & Deal Railway, *ex parte* Mowatt, 19 Eng. L. & Eq. 127; S. C. 1 Drewry, 247.

[8] *Ex parte* Maudslay, 1 Eng. L. & Eq. 61; S. C. 14 Jur. 1012.

[9] *Ex parte* Carmichael, 1 Eng. L. & Eq. 66; S. C. 14 Jur. 1014; *Ex parte* Clarke, id. 69.

[10] *Ex parte* Burton, 13 Eng. L. & Eq. 435; S. C. 16 Jur. 967; *Ex parte* Markwell, 13 Eng. L. & Eq. 456; S. C. 5 De G. & S. 528; Upfill's Case, 1 Eng. L. & Eq. 13; S. C. 14 Jur. 843; Watts *v.* Salter, 12 Eng. L. & Eq. 482. See also *In re* St. James's Club, 13 Eng. L. & Eq. 589; S. C. 10 C. B. 477, as to the effect of proof of the subscriber being present when a resolution is passed.

[11] To fix the liability of the subscriber, where the liability depends on the subscription, the subscription, it seems, should be in his own handwriting, and not by procuration. *Ex parte* Richardson, 4 Law T. Rep. N. S. 589.

[12] It was formerly held that all persons engaged in obtaining a bill in par-

*SECTION IV.

Contracts of the Promoters adopted by the Company.

1. Liability in general transferable with assent of creditors. But not if inequitable.

n. 3. Powers of provisional company to contract limited by statute.

§ 5. 1. The company when fully incorporated may assume the liabilities of the preliminary association, incurred in obtaining the special act, or, as is sometimes the case, where the association * make an assignment of their property.[1] But even an express provision in the charter, that the company shall be solely liable for the debts of the association, will not exonerate the association unless by the consent of the creditors.[2] But when the company assumes the debts of the association, with the assent of the cred-

liament for a railway were partners in the undertaking. Holmes *v.* Higgins, 1 B. & C. 74. See also Goddard *v.* Hodges, 1 C. & M. 33. But it is now settled in England that there is no relation of general partnership, and no power to bind one another for expenses; and that each binds himself alone, unless he acts by virtue of some authority conferred by deeds of association. Bright *v.* Hutton, 3 H. L. Cas. 341, 368, *per* PARKE, B. If, however, the promoters suffer themselves to be held out as partners, they are liable for services rendered on their credit. Wood *v.* Duke of Argyll, 6 Man. & G. 928; Steigenberger *v.* Carr, 3 Man. & G. 191. As they are, on any theory, where they have so conducted themselves as reasonably to be looked to for payment. See *supra*, § 3, note 1. With respect to contribution between promoters, it is held that one cannot in equity compel another to contribute to expenses incurred by him, unless he is willing to have all expenses brought into one account and adjusted together. Denton *v.* Macniel, Law Rep. 2 Eq. 352. But an agreement, aside from the deed of association, that one of the promoters shall indemnify another, is valid. Connop *v.* Levy, 5 Railw. Cas. 124; s. c. 11 Q. B. 769. A general indemnity, however, against costs, will extend only to costs in suits lawfully brought. Lewis *v.* Smith, 2 Shelf. (Bennett's ed.) 1030. The property in shares vests on execution of the deed and registration of the company. The certificates are but the *indicia* of property. Hunt *v.* Gunn, 3 Fost. & F. 223. And a registered shareholder in a company afterwards incorporated with a new company is to be regarded as a shareholder in the latter, if the act of incorporation so provide, though he has not exchanged his certificates. Spackman *v.* Lattimore, 3 Giff. 16; s. c. 7 Jur. N. S. 179.

[1] Haslett *v.* Wotherspoon, 1 Strob. Eq. 209; Salem Mill Dam Co. *v.* Ropes, 6 Pick. 23.

[2] Witmer *v.* Schlatter, 2 Rawle, 359.

itors, the association will be relieved.[3] But where the plaintiff contracted * with the promoters of a railway bill to bear the costs of obtaining it, and the bill passed with the usual clause that the costs of obtaining it should be borne by the company, it was nevertheless held that the contract would preclude the recovery of the costs of the corporation.[4]

SECTION V.

How contracts of the Promoters may be adopted by the Company.

Company cannot assume the benefit without the burden.

§ 6. Wherever a third party enters into a contract with the promoters of a railway, which is intended to enure to the benefit of the company, and they take the benefit of the contract, they will be bound to perform it, upon the familiar principle that one who adopts the benefit of an act, which another volunteers to perform in his name and on his behalf, is bound to take the burden with the benefit.[1]

[3] Whitwell *v.* Warner, 20 Vt. 425. But under the English statutes companies provisionally registered are not allowed to make any contract not indispensable to carrying forward the project to full registration. St. 7 & 8 Vict. c. 110. A contract, e. g., for plans, sections, and books of reference to the value of £3,000. Bull *v.* Chapman, 20 Eng. L. & Eq. 488; s. c. 8 Exch. 444. Or a contract by which the promoters agree to give a tenant for life £20,000 for his support to the scheme, the contract being adopted by the provisional committee of a substituted company and carried into an indenture by the incorporated company, and recognized by payment of interest on the sum agreed on. Such a contract held *ultra vires*, and not in respect of "costs incurred in obtaining the special act, and incident thereto," within the meaning of the Consolidation Act, § 65. Lord Shrewsbury *v.* North Staffordshire Railway Co., 12 Jur. N. S. 63, *per* KINDERSLEY, V. C. And a contract between the projector and the directors of a company provisionally registered, not in terms made conditional on the completion of the company, is not binding on the subsequently completely registered company, though ratified and confirmed by the deed of settlement. Gunn *v.* London & Lancashire Insurance Co., 12 C. B. N. S. 694.

[4] Savin *v.* Rylake Railway Co., Law Rep. 1 Exch. 9; s. c. Law Rep. 1 Eq. 593.

[1] Gooday *v.* Colchester & Stour Valley Railway Co., 15 Eng. L. & Eq. 596; s. c. 17 Beav. 132; Preston *v.* Liverpool & Manchester & Newcastle-upon-Tyne

*SECTION VI.

Contracts between the Promoters and Opposers of a Bill for the Charter of a Railway.

1. English cases numerous and important.
2–5. Lord Eldon's opinion, in case of Vauxhall Bridge Co.

§ 7. 1. The cases in the English books upon the subject of contracts between the promoters of railway projects in parliament and those who have counter interests, and who are ready to persist in opposition to such projects unless they can secure some compromise with the promoters, are considerably numerous, and involve a question of no inconsiderable importance. We shall therefore examine them somewhat in detail.

2. One of the earliest cases upon this subject[1] was decided by the Lord Chancellor, COTTENHAM, upon full argument, and great consideration, as early as 1836. But as this case professes to rest mainly upon a leading opinion of Lord Chancellor ELDON,[2] upon a somewhat analogous subject, it may not be improper here to give the substance of that decision.

3. The application to parliament for the plaintiffs' company, if granted, it was conceded, would injuriously affect the tolls upon another bridge not far distant. The proprietors of this bridge were opposing the plaintiffs' grant before the parliamentary committee, with a view to secure some indemnity against such loss, to be specially provided for by the plaintiffs' act, upon condition that the plaintiffs should open their bridge for the public travel. The promoters of the plaintiffs' grant and the proprietors of the rival bridge had come to an agreement in regard to the extent of the indemnity, and upon naming it to the committee, with a view to have it inserted in the act, one member of the committee objected to such course, as calculated to sanction improper influences upon public legislation. The promoters of the new bridge then pro-

Junction Railway Co., 7 Eng. L. & Eq. 124; s. c. 1 Sim. N. S. 586; Edwards *v.* Grand Junction Railway Co., 1 Myl. & C. 650. The cases in support of this general proposition are very numerous, and will be more fully examined in the next section.

[1] Edwards *v.* Grand Junction Railway Co. *supra.*

[2] Vauxhall Bridge Co. *v.* Earl Spencer, Jacob, 64.

posed to the proprietors of the rival one to give them security for the proposed indemnity, by way of bond with surety, which should quiet their opposition, and the bill pass. This was acceded to and the securities given, and the bill passed accordingly. The opinion * of Lord ELDON is an affirmance of the decision of the Vice-Chancellor, retaining the bill till the matter should be tried at law.[3] But the intimations of the Chancellor indicate certainly that he regarded the contract as perfectly valid, and the bill was afterwards dismissed by consent. Lord ELDON said: "In the view I take of the case, it will not be an obstacle to the plaintiffs that they do not come with clean hands, for it is settled, that if a transaction be objectionable, on grounds of public policy, the parties to it may be relieved; the relief not being given for their sake, but for the sake of the public. Thus it is in the case of marriage brocage bonds. The principle was much discussed in the case of Neville *v.* Wilkinson,[4] where Mr. Neville being about to marry, inquiry was made by the lady's father to what extent he was indebted. Wilkinson, who was applied to at the desire of Neville, concealed the demand which he had against him; after the marriage he attempted to recover it, and a bill was filed to restrain him. I remember arguing it with obstinacy, but Lord THURLOW thought that, having made a misrepresentation, a court of equity must hold him to it, and that, although the plaintiff was a *particeps criminis;* so it was held in the case of Shirley *v.* Ferrers,[5] in the Exchequer.

4. "It is argued that this was a fraud upon the legislature; but I think it would be going a great way to say so, for *non constat*, if it had been pushed to the extent of taking the opinion of the House, that it might not have passed the bill in its former shape. It cannot be said that the agreement is contrary to legislative policy, because one member of the committee makes an objection, which is not sanctioned or known by the House at large. Indeed, such things are constantly done, and with the knowledge of the House; for they are in the habit of saying, with respect to these private acts, that though they will not of themselves pass them into laws, yet they will if the parties can agree; and matters sometimes are permitted to stand over to give an opportunity of coming to a settlement.

[3] Vauxhall Bridge Co. *v.* Earl Spencer, 2 Mad. 356.

[4] 1 Br. C. C. 543.

[5] Cited 11 Ves. 536.

5. "It is then said, that the money was to be paid out of the funds of the Vauxhall Bridge Company, which by the act were devoted to other purposes. The proprietors of Battersea Bridge, however, say that they have nothing to do with the funds of the * company; that they have contracted with a number of independent persons, to whom they look for the payment of the bonds; and if the obligors agree with the company to pay the bonds with their money, what have the obligees to do with that unless by antecedent contract? They had no demand in law or equity against the company. If, then, the Vauxhall proprietors choose to sanction what the legislature has not directed, namely, the indemnifying the persons who have become obligors in the bonds, that is one thing; if they have not, then the individual officers who have paid the money over in discharge of the bonds ought not to have paid it, and may now be called on to pay it back; as between them and the company, the money must be considered as being still in their hands. If the transaction is to be considered merely as between the obligors and the obligees, the latter not refusing the money from whatever hands it came, but not entangling themselves in any contracts between the obligors and the company, then the obligees would not be affected by those contracts. But if so, still the case depends upon the validity of the bonds; for I think the Vauxhall Bridge Company may with propriety say, if the money was paid in consequence of an arrangement for the discharge of the bonds, and if the bonds were bad, that then it may be called back. When the cause was heard by the Vice-Chancellor, he did that which he was not bound to do; for he certainly had jurisdiction, and might have decided upon the validity of the bonds. But he directed that to be tried at law, where all the objections may be raised upon the pleadings in the same manner as here; and considering that in matters of this nature, both courts of law and equity have jurisdiction exercised upon the same principles, I do not see any occasion to vary the decree."

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SECTION VII.

Contracts of the Promoters enforced in Equity.

Case of Edwards *v.* Grand Junction Railway.

§ 8. 1. Edwards *v.* The Grand Junction Railway,[1] is an application to a court of equity to enforce such a contract against a railway company, whose charter was obtained by means of the quieting opposition in parliament, in conformity to the contract. * The trustees of a turnpike road were opposing in parliament the grant to the defendants, unless their rights were guaranteed in such grant. The promoters of defendants' charter, and the trustees of the turnpike road, came to an agreement in regard to the proper indemnity to be inserted in the act, but to save delay it was secured by way of contract, on the part of the promoters, providing for a renewal of the covenants, on the part of the company, in a brief time specified, after it should go into operation. The controversy in the present case was with reference to the width of a bridge, by which the railway proposed to convey the turnpike road over their track. The contract stipulated that such viaducts should be of the same width as the road at that point, which was fifty feet. The charter only required them to be of the width of fifteen feet, and the company having declined to assume the contract of the promoters, were proceeding to build the bridges thirty feet wide only. The bill prayed an injunction, which was granted by the Vice-Chancellor, and confirmed by the Chancellor, who held that an agreement to withdraw or withhold opposition to a bill in parliament is not illegal; that a court of equity will enforce a contract founded upon such a consideration; and that an incorporated company will be bound by the agreement of its individual members, acting, before incorporation, on its behalf, if the company had received the full benefit of the consideration, for which the agreement stipulated in its behalf. The opinion of the Lord Chancellor will best show the grounds of the decision. "But then the railway company contend that they, being now a corporation, are not bound by anything which may have passed, or by any contract which may have been en-

[1] 1 Myl. & C. 650.

tered into by the projectors of the company before their actual incorporation.

2. "If this proposition could be supported, it would be of extensive consequence at this time, when so much property becomes every year subjected to the power of the many incorporated companies. The objection rests upon grounds purely technical, and those applicable only to actions at law. It is said that the company cannot be sued upon this contract, and that Moss entered into a contract, in his own name, to get the company, when incorporated, to enter into the proposed contract. It cannot be denied, however, that the act of Moss was the act of the projectors of the railway; it is, therefore, the agreement of the parties who were seeking an act of incorporation, that, when incorporated, certain things should *be done by them. But the question is, not whether there be any binding contract at law, but whether this court will permit the company to use their powers under the act in direct opposition to the arrangement made with the trustees prior to the act, upon the faith of which they were permitted to obtain such powers. If the company and the projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of, all that the projectors had before; they are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and in prosecution of it had entered into arrangements, and then had sold and resigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser; but in this court it would be otherwise. So here, as the company stand in the place of the projectors, they cannot repudiate any arrangements into which such projectors had entered. They cannot exercise the powers given by parliament to such projectors, in their corporate capacity, and at the same time refuse to comply with those terms, upon the faith of which all opposition to their obtaining such powers was withheld. The case of The East London Water Works Company *v.* Bailey,[2] was cited to prove that, save in certain excepted cases, the agent of a corporation must, in order to bind the corporation, be authorized by a power of attorney; but it does not therefore follow that corporations are not to be affected by equities, whether created by contract or otherwise, affecting those to whose position

[2] 4 Bing. 283.

they succeed, and affecting rights and property over which they claim to exercise control. What right have the company to meddle with the road at all? The powers under the act give them the right; but before that right was so conferred, it had been agreed that the right should only be used in a particular manner. Can the company exercise the right without regard to such an agreement? I am clearly of opinion that they cannot; and having before expressed my opinion that the contract is sufficiently proved, it follows that the injunction granted by the Vice-Chancellor is in my opinion proper, and that this motion to dissolve it must be refused with costs."

3. "The case of The Vauxhall Bridge Company *v.* Earl Spencer,[3] was cited for the trustees; and it certainly is a strong authority in favor of their *claim; Lord ELDON having in that case expressed an opinion, that the withdrawing opposition to a bill in parliament might be a good consideration for a contract, and having recognized the right of an incorporated company to connect itself with a contract made by the projectors of the company, before the act of incorporation. On the other hand Dance *v.* Girdler,[4] was cited for the railway company; but that was an attempt to make a surety liable beyond his contract; and Sir JAMES MANSFIELD, in his judgment in that case, relied much upon the want of identity between the society with whom the contract was made and the corporation; and the question there was as to a legal liability, not as to an equitable right. It was contended for the railway company that to enforce this equity would be unjust towards the shareholders of the company, who had no notice of the arrangement. To this two obvious answers may be made: first, that the court cannot recognize any party interested in the corporation, but must look to the rights and liabilities of the corporation itself; and, secondly, that there is nothing in the effect of the injunction inconsistent with the provisions of the act; for although the act provides that bridges shall not be less than fifteen feet in width, it does not provide that they shall not be made wider. The company might under this act clearly agree that this or any other bridge should be fifty feet wide."

[3] 2 Mad. 356, Jac. 64 (4 Cond. Ch. Rep. 28). [4] 1 N. R. 343.

SECTION VIII.

Contracts of the Promoters binding on the Company at Law.

Case of Howden *v.* Simpson.

§ 9. 1. We have next in order of time the important case of Simpson *v.* Lord Howden,[1] before the Master of the Rolls, and the Lord Chancellor on appeal, where it is held, that equity will not interfere to decree the surrender of an illegal contract, where the illegality appears upon the face of the contract, the remedy at law being adequate. We have then the same case, at law, before the Queen's Bench,[2] and decided, on full argument, where it is held that a contract to pay Lord Howden £5,000, in consideration of * his withdrawing opposition to a bill for incorporating "The York & North Midland Railway Company," he being a peer in parliament, and owning estates in the vicinity of the proposed line, was illegal, being a fraud upon the legislature. This decision was subsequently reversed in the Exchequer Chamber.[3] The case being the leading case upon the subject, at law certainly, may require a more extended statement. The agreement under seal, between the plaintiff and defendant (the case now standing, Howden *v.* Simpson), recited that a company had been formed for making a railway; that defendants were proprietors; that a bill had been introduced into parliament, according to which the line would pass through plaintiff's estates and near his mansion, and

[1] 1 Railw. Cas. 326; 1 Keen, 583; 3 Myl. & C. 97.

[2] 10 A. & E. 793.

[3] The case was reversed mainly on the ground that the plea did not allege that the parties, at the time of entering into the contract, intended to keep it secret from the legislature. 10 A. & E. 793; 1 Railw. Cas. 347. But the Exchequer Chamber held that the agreement was *prima facie* valid, that the plaintiff was not bound to communicate to parliament the bargain he had made with the company, and that a member could make any terms for the sale of his land, and compensation for injury to his comforts and property, which a private individual might make. That judgment was affirmed in the House of Lords, on full argument, before the Chancellor, Lord Lyndhurst, Lord Brougham, the two chief justices, and ten of the judges. 3 Railw. Cas. 294; s. c. 9 Cl. & F. 61. But Lord Campbell adhered to his former opinion that the contract should be held illegal, if it was an element that it should be kept secret, and not communicated to parliament.

that he was a dissentient, and opposed the passing of the bill; that defendants had proposed that, if he would withdraw his opposition, and assent to the railway, they would endeavor to deviate the proposed line: and plaintiff agreed that, on condition of the stipulations in the agreement being performed, he did thereby withdraw his opposition and give his assent; and defendants covenanted that in case the then bill should be passed in the then session, they would, in six months after it received the royal assent, pay plaintiff £5,000 as compensation for the damage which his residence and estates would sustain from the railway passing according to the deviated line, exclusive of, and without prejudice to further compensation to plaintiff, in the event of the deviated line not being ultimately adopted, and without prejudice to such further compensation for any damage as in the agreement after mentioned.

2. Plaintiff declared in debt, and averred that he withdrew his opposition to the bill, which passed into a law in the then session, * that six months had since elapsed, but that defendants had not paid the £5,000.

3. Plea, that the railway, at the time of making the agreement, and according to the act, was intended to pass through the lands of divers individuals; that the agreement was made privately and secretly by the parties thereto, without the consent or knowledge of the said individuals, and was concealed from them continually until the act was passed, and was not disclosed to, or known in parliament, and was concealed from the legislature during the passing of the act; and that plaintiff at the time of passing the act and still was a peer of parliament.

SECTION IX.

What Contracts between the Promoters of Railways and Others will be enforced, either in Law or Equity, against the Contracting Parties or the Company.

1. Contract to take land of opposing party.
2. Contract prejudicial to the public.
n. 3. Other contracts which the courts will enforce.

§ 10. 1. Since the decison of Howden *v.* Simpson, in the Exchequer Chamber, and the House of Lords (1842), the English

courts seem to have acquiesced in the principles there established, until a very recent period. The validity of such a contract is recognized, in regard to the company purchasing the interest of the lessee of lands near the line of the proposed railway.[1] And where the promoters of one railway entered into an agreement with a land-owner on the proposed line to take his land at a specified price (£20,000), by which he was induced to withdraw opposition; and the promoters of a rival line, who proposed also to pass through the same land, had petitioned for a charter, and the merits of the two projects were, under the sanction of the committee of the House of Commons, referred to arbitration, and the solicitors of the two bills agreed that the adopted line should take the engagements entered into with the land-owners, by the rejected line, — it was held, that the second company prevailing, were bound, as a condition of entering upon the lands of plaintiff, to fulfil the terms of the agreement of the first company.[2]

*2. And where one railway company was prohibited from opening their line for traffic, until they had built a branch railway connecting their line with that of another company, it was held, that a court of equity was bound to enforce the prohibition, on motion of the other company, though the probable result would be to cause inconvenience to the public, and not to benefit the other company.[3]

[1] Doo *v.* London & Croydon Railway Co., 1 Railw. Cas. 257; s. c. 3 Jur. 258.

[2] Stanley *v.* Chester & Birkenhead Railway Co., 1 Railw. Cas. 58; 9 Sim. 264.

[3] Cromford & High Peak Railway Co. *v.* Stockport, Disley & Whaley Bridge Railway Co., 24 Beav. 74; s. c. 29 Law T. 245.

There are also other contracts which the courts will enforce. Thus in Low *v.* Connecticut & Passumpsic Railroad Co., 45 N. H. 370; s. c. 1 Redf. Am. Railw. Cas. 1, where the question was as to the right of those who had rendered services in promoting the subscription to the stock of the corporation to compensation, after full discussion it was held that the corporation, having elected to take the benefit of the services knowing that they were rendered with the understanding that compensation should be made, must take the benefit with the burden. This case, however, seems to have proceeded on the authority of Hall *v.* Vermont & Massachusetts Railroad Co., 28 Vt. 401; and it may be doubted if the rule there adopted, charging to the corporation services rendered in effecting its organization, is not too lax and too susceptible to abuse, and if there should not be proof that the corporation promised to pay.

So where a private company, having leased land with a clause for re-entry,

SECTION X.

Courts of Equity will enforce Contracts with the Promoters.

1. *Bona fide* contract not evasive of statute, valid.

§ 11. The English courts of equity do not hesitate to restrain railways from proceeding to take land under their compulsory powers, where the proprietor of the estates had surceased opposition to the bill, by an arrangement with the projectors, by which they stipulated that the company should pay a certain sum, which it had declined to do. This was done, notwithstanding the proprietor was a peer of parliament, and notwithstanding the tender of an undertaking on the part of the company not to enter upon the land until the further order of the court, and notwithstanding the time, within which the company by their charter were authorized to take land, would have expired before the hearing of the cause.[1] And although this case is questioned by some writers,[2] the learned Lord Chancellor St. Leonards said the cases establish the proposition, that a *bona fide* contract of this sort, not evading the act of parliament, but enabling the company to assist its views, and carry the act into effect, was valid, without reference to the reasonableness of the amount agreed to be paid.[3]

becomes incorporated by a charter expressly providing that all prior contracts shall be binding, the corporation may maintain ejectment. London Dock Co. *v.* Knebell, 2 Macl. & R. 66.

But one railway company cannot bind itself to defray the expense of an application to parliament by another company for the establishment of another line expected incidentally to benefit the first company. Such a contract is beyond the powers of a railway company, and so illegal; and such a covenant cannot be enforced at law, however beneficial to the covenantor if carried out. East Anglian Railway Co. *v.* Eastern Counties Railway Co., 11 C. B. 775; s. c. 7 Eng. L. & Eq. 505; Macgregor *v.* Dover & Deal Railway Co., 18 Q. B. 618; s. c. 16 Q. B. 180; *infra* §§ 56, 137. See *infra* § 12, note 3. See also *infra* § 13, note 2.

[1] Petre *v.* Eastern Counties Railway Co., 1 Railw. Cas. 462.

[2] Shelf. Railw. 400.

[3] Hawkes *v.* Eastern Counties Railway Co., 1 De G. M. & G. 737; s. c. 15 Eng. L. & Eq. 358; s. c. before the Vice-Chancellor, 3 De G. & S. 314; s. c. 4 Eng. L. & Eq. 91.

*SECTION XI.

Such Contracts enforced where the Railway is abandoned.

1. Where a certain sum is to be paid to quiet opposition.
2. Merely provisional contracts not always enforced.

§ 12. 1. It has sometimes been held, that an absolute agreement made, by the promoters of a railway, to pay one a certain * sum to quiet opposition, is valid, notwithstanding the contemplated work is never carried forward, and the injury to the opposer, * which the contract of quietus assumes, is never sustained.[1] But such a contract is certainly based upon a principle * of very questionable policy, and courts would more incline to give the contract, when consistent with the words used, such a * construction, that it shall be the purchase of a pecuniary interest, or indemnification for a pecuniary loss, which are legitimate * subjects of bargain and sale, than to regard it as the purchase of good-will, or the price of converting ill-will unto favor, which * are certainly not regarded ordinarily as the just basis of contracts.[2]

* 2. But in many cases these provisional contracts have been enforced, notwithstanding the projected works have been abandoned.[3] * But where the contract is a mere arrangement to pur-

[1] Bland *v.* Crowley, 6 Railw. Cas. 756; s. c. 6 Exch. 522.

[2] Gage *v.* Newmarket Railway Co., 18 Q. B. 457; s. c. 7 Railw. Cas. 168; s. c. 14 Eng. L. & Eq. 57; Porcher *v.* Gardner, 14 Jur. 43; 19 L. J. 63; 8 C. B. 461; Shelf. Railw. 402. See also Cumberland Valley Railway Co. *v.* Baab, 9 Watts, 458; Hawkes *v.* Eastern Counties Railway Co., 1 De G. M. & G. 737; s. c. 3 De G. & S. 314; 7 Railw. Cas. 219; s. c. 4 Eng. L. & Eq. 91. But see Hodges Railw. 164, where it is said to be settled that agreements for the purchase of lands and the withdrawal or withholding of opposition to a bill are not illegal. And see also Capper *v.* Lindsey, 3 H. L. Cas. 293; s. c. 14 Eng. L. & Eq. 9, where a contract in effect for the taking of land if desirable and for the quieting of opposition was assumed to be legal, and which, being thoroughly considered, ought perhaps to be taken as the final determination of the English courts.

[3] Shrewsbury & Birmingham Railway Co. *v.* London & Northwestern Railway Co., 3 Macn. & G. 70; s. c. 20 L. J. Ch. 90; s. c. 14 Jur. 921; 1 Eng. L. & Eq. 122; Hawkes *v.* Eastern Counties Railway Co., 3 De G. & S. 314; s. c. 20 L. J. 243; s. c. 4 Eng. L. & Eq. 91; Preston *v.* Liverpool, Manchester

chase land at a specified price, for the purpose of building the * railway, and the quieting of opposition does not enter into the consideration, the company are not bound to pay over the money, * unless they enter upon some portion of the land, and under such circumstances an absolute covenant to pay the money, by the company, would be *ultra vires* and void.[4]

& Newcastle-upon-Tyne Junction Railway Co., 1 Sim. N. S. 586; 7 Railw. Cas. 1; 7 Eng. L. & Eq. 124. In Hawkes *v.* Eastern Counties Railway Co., 1 De G. M. & G. 737; s. c. 15 Eng. L. & Eq. 358; s. c. 3 De G. & S. 314; s. c. 4 Eng. L. & Eq. 91, it was considered that a railway company, having agreed to purchase an estate, although moved to do so for the quieting of opposition to a bill to enable it to extend a branch subsequently abandoned, was nevertheless bound to perform its agreement. See also Shelf. Railw. 400. The case of Hawkes *v.* Eastern Counties Railway Co. came before the Lord Chancellor, St. Leonards, on appeal from the Vice-Chancellor in 1852, when the entire subject of the legality of such contracts, as well as the propriety of decreeing specific performance, was discussed, and most of the cases reviewed and compared. The conclusion reached was that even where the company is not able to carry its project into full effect, but has abandoned it, it is nevertheless bound specifically to perform; and that it is no objection to a decree, that it involves the necessity of paying the price of the land out of general funds raised for provisional purposes merely, with no view of ultimately purchasing land and building the road, nor that the land can be of no use to the company in present circumstances. One can scarcely fail to perceive that in this decision a principle, perhaps sound and just in some circumstances, is pushed quite to its limit. Damages at law might have been the more proper disposition of all interests concerned. The judgment was affirmed, however, in the House of Lords, 5 H. L. Cas. 331; s. c. 35 Eng. L. & Eq. 8, and elaborate opinions delivered, by Lord Chancellor Cranworth, Lord Campbell, and Lord St. Leonards. The decision there was obviously put somewhat on the ground of the peculiar state of facts, — that it was a contract under the seal of an existing company, and not the contract of the projectors of a contemplated company merely; and that though the contract had respect to an extension of the existing line, by means of a branch line, which, as to the existing shareholders, the company had no right to construct, and even with the consent of the legislature could not construct, with funds of the existing company, yet nothing of that seemed to have been known to the other party.

[4] Gage *v.* Newmarket Railway Co., 18 Q. B. 457; s. c. 14 Eng. L. & Eq. 57. The views of Lord Campbell in this case do not seem to be altogether reconcilable with those expressed by the Lord Chancellor, in Hawkes *v.* Eastern Counties Railway Co., but they seem more consistent with the views held in this country, upon analogous subjects, and may be expected to find more favor in the English courts when the pressure of circumstances shall be removed by lapse of time. See *infra* § 16, and notes. And see Edinburgh, Perth, & Dundee Railway Co. *v.* Philip, 2 Macq. Ap. Cas. 514; s. c. 28 Law

[*35, *36]

* In an important case[5] before the House of Lords, the doctrine of the former cases is assumed to have established the proposition, that the acts of parliament to railway companies, empowering them to build railways, are enabling and not obligatory in their nature. And it was here considered, that upon a contract whereby the company before obtaining their act executed a debenture bond in the sum of £14,500 to one of the land-owners, as the sum to be paid * him before breaking ground, taking a counter obligation to repay the sum if the bill should not pass, and, having obtained their act but never exercised its powers or built their road, it must be held, that, upon the fair construction of the whole transaction with reference to the more recent view taken by the courts of the law applicable to such contracts, the money stipulated was not due the land-owner except upon the company breaking ground for the purpose of constructing their works.

SECTION XII.

Practice of Courts of Equity in decreeing Specific Performance.

1. Mutual arrangements protected in Chancery.
2. But decisions are conflicting. In cases of doubtful right plaintiff is remitted to common-law remedies.

n. 2. Statement of cases.

§ 13. 1. The English courts of chancery have in many instances enforced specific performance of contracts between different lines of railway, fixing mutual arrangements in reference to their future operations, even where acts of parliament were necessary to carry such contracts into full effect, and sometimes, after a change of circumstances materially affecting the interest of the parties concerned. And those courts have often enforced an injunction, in cases of this kind, where interests of great magnitude were concerned, even where the right of the plaintiff was

T. 345, 39 Eng. L. & Eq. 41. If such a contract is made in advance of the charter and with reference to its being obtained, it is to be viewed as if made afterwards; and it may be enforced though part of the sum agreed to be paid was for the annoyance caused by the works, which would not accrue if the road were not built, or the land not taken. Taylor *v.* Chichester & Midhurst Railway Co., Law Rep. 4 H. L. 628.

[5] Scottish Northeastern Railway Co. *v.* Stewart, 5 Jur. N. S. 607; 3 Macq. Ap. Cas. 382.

questionable, upon the ground that things were required to be kept in a safe train, until the rights of the respective parties could be definitely determined.[1]

2. But the practice of the English courts of equity, in regard to this subject, resting chiefly in discretion, as might be expected, is very variable, and the cases not easily reconcilable. In many cases, where the right of the plaintiff is doubtful, the injunction to stay the progress of the road till the contract was performed has been denied, and the party remitted to his rights in a court of law.[2] The latter course would seem to be most consistent with * the ordinary proceedings of courts of equity, in applications for specific performance.

[1] Great Western Railway Co. *v.* Birmingham & Oxford Junction Railway Co., 2 Phillips, 597. The remarks of Lord Chancellor COTTENHAM in this case strongly defend the practice of enforcing contracts made by the projectors of railways against the company itself, after it comes into operation.

[2] Webb *v.* Direct London & Portsmouth Railway Co., 1 De G. M. & G. 521; s. c. 9 Eng. L. & Eq. 249. Vice-Chancellor TURNER, when the case was before him, seemed to regard the plaintiff as entitled to specific performance, but the Lords Justices, on appeal, entertained no doubt that the party should be remitted to his rights in a court of law. See Preston *v.* Liverpool, Manchester & Newcastle Junction Railway Co., 1 Sim. N. S. 586; s. c. 7 Eng. L. & Eq. 124. The Court of Appeal, in a similar case, Stuart *v.* London & Northwestern Railway Co., 1 De G. M. & G. 721; s. c. 7 Railw. Cas. 44; 11 Eng. L. & Eq. 112, put its refusal to decree specific performance on the ground, that the remedy, if any, was at law; and that there was no mutuality, as after the abandonment or material departures from the scheme, the railway could not hold the land to any beneficial purpose. Lord Chancellor ST. LEONARDS seemed also to be of opinion that the only ground on which the decision, in Webb *v.* London & Portsmouth Railway Co., 1 De G. M. & G. 521; s. c. 9 Eng. L. & Eq. 249, could be vindicated, was the want of mutuality. But it would seem, that all cases of this class where contracts have been made to take land, either at a given price per acre or for a gross sum, or to pay a sum of money for the damage to an estate in gross, should be regarded as conditional, unless the contrary appears in express terms, or by the clearest implication. Any other view gives these contracts very much the air of wagering policies or legislative gambling. See also on this subject, Potts *v* Thames Haven Dock & Railway Co., 15 Jur. 1004; s. c. 7 Eng. L. & Eq. 262, where a query was suggested, whether a specific performance could be decreed, there having been no valuation of the land, and great delay on the part of the company, owing to pecuniary embarrassment; but, after discussion, it was agreed to give the company further time, and the claim was ordered to stand over.

In Strasburg Railway Co. *v.* Echternacht, 21 Penn. St. 220, where several persons agreed that if the company should be incorporated with certain privi-

*SECTION XIII.

Specific Performance in Courts of Equity.

Object of courts to compel good faith when a definite contract is made.

§ 14. But the courts of equity have been mainly influenced by what they esteem the policy of enforcing these parliamentary contracts, * for the arrangement of conflicting interests, in regard to such projected railways. And they have declined to interfere by * injunction, where no such contract had been definitely made,[1] notwithstanding such representations on the part of the promoters as misled the agents of the land-owner. Thus showing, very explicitly, that the main ground upon which the English courts of equity have proceeded, in decreeing specific performance, and enforcing it by injunction, has been to compel good faith on the part of such incorporations, in carrying into effect any contracts on their part. For it is said by the English courts, having obtained advantages in consequence of the contracts and assurances of the agents employed in the projects, it would tend to destroy all confidence in any such arrangement if they were not enforced, which would be of evil example and tend to great practical inconvenience. But where the parties stand upon their legal rights, as secured in the act of incorporation, a court of equity will not interfere.[2] In a later case these * provisional contracts seem to

leges, they would subscribe the number of shares set opposite their names respectively, and the charter was obtained with the privileges in question, but one of the subscribers refused to take the stock, it was held, that the promise was without consideration, and therefore not a contract, but a mere naked expression of intention, which equity would not enforce by decree for specific performance, and that if it was a binding agreement it should be enforced at law.

In Lindsay *v.* Great Northern Railway Co., 10 Hare, 665; s. c. 19 Eng. L. & Eq. 87, the court decreed specific performance of a contract that trains should stop at a particular station, but gave the company time to make the necessary arrangements before making the decree absolute.

In Heathcote *v.* North Staffordshire Railway Co., 6 Railw. Cas. 358, it was held that a contract to make a railway is not one of which a Court of Equity will compel specific performance.

[1] Hargreaves *v.* Lancaster & Preston J. Railway Co., 1 Railw. Cas. 416.

[2] Aldred *v.* North Midland Railway Co., 1 Railw. Cas. 404; Eton College *v.* Great Western Railway Co., 1 Railw. Cas. 200. Where the plaintiff had

be regarded as conditional, depending, ordinarily, for their obligation, as against the corporation, upon their having done anything under their charter which the agreement enabled them to do, so as thereby to have received the benefits of it.[3]

SECTION XIV.

Courts of Equity may restrain a Party from Opposition or Petition in Parliament.

1. Such cases not common in practice. | 2. Such cases not readily recognized.

§ 15. 1. It is held in the English courts of equity altogether competent and within their appropriate jurisdiction, to restrain a party from opposing a bill in parliament by petition, if a proper case is made out, and by parity of reason from pursuing a petition in favor of an act of parliament.[1] But such cases are not common in practice, * and dependent upon peculiar circumstances, as where proceedings in parliament are in violation of express covenants, or for some other reason in bad faith, and where dam-

incurred expense in bringing the scheme of a proposed railway before the public, and in consideration thereof the promoters had agreed that the company should pay him a certain sum at a certain point of its success, the contract was enforced although the company never went into full operation. Touche *v.* Met. Railway Co., Law Rep. 6 Ch. 671.

[3] Gooday *v.* Colchester & Stour Valley Railway Co., 17 Beav. 132; s. c. 15 Eng. L. & Eq. 596. In this case, where it appeared that after the act was obtained nothing was done nor any step taken to construct the railway, the Master of the Rolls held that he could not say that the company had adopted the agreement, or was bound by its terms. In Williams *v.* St. George's Harbor Co., 30 Law T. 84; s. c. 2 De G. & J. 517, it was held that an agreement entered into by the promoters of a company before incorporation is not binding on the company when incorporated, unless it subsequently does some act amounting to an adoption of it. This seems now to be the settled doctrine in the English courts. See *supra*, § 3.

[1] Stockton & Hartlepool Railway Co. *v.* Leeds & Thirsk Railway Co., 2 Phillips, 666; s. c. 5 Railw. Cas. 691. In this case the injunction was granted by Vice-Chancellor SHADWELL; but the order was discharged by Lord Chancellor COTTENHAM, on the ground that no proper case for the interference of a court of equity was made out; but the jurisdiction was distinctly affirmed. And see Heathcote *v.* North Staffordshire Railway Co., 6 Railw. Cas. 358.

ages at law are no adequate compensation. These cases are therefore determined much upon the same grounds as other cases of specific performance, and come properly under consideration in this connection.

2. In one case, where the company had quieted opposition by inserting a clause in the act to enable them to buy land, which they had agreed to purchase as the price of quieting the opposition, and afterwards applied for an act enabling them to abandon this branch, and repealing this clause, it was held, that, although the court had power to restrain an application to parliament, it was difficult to conceive a case in which it would do so, and that it would not do so in this case.[2]

SECTION XV.

Contracts to withdraw opposition to Railway Projects, and to keep this secret, against Sound Policy, and would seem to be illegal.

1. Principle of foregoing decisions obscure.
2. Not adopted in this country unless terms inserted in charter.
3. Recent change of views in English courts.

3–5. Statement of late case in which principle of Edwards *v.* Grand Junction Railway is doubted.

6. Act of incorporation should not be varied by oral testimony.
7. Contracts to quiet opposition not favored in this country.

n. 1. Some English and American decisions.

8. Regarded as *ultra vires*.
9. May be enforced, if legislature not exposed to be misled.

§ 16. 1. The principle of the foregoing decisions, upon the subject of specific performance of contracts with the promoters of railway projects being enforced in courts of equity against the company, is, to say the least of it, somewhat obscure. Regarded as illegal contracts, it does not seem very apparent how they can with much show of consistency be specifically enforced in a court of equity. Ordinarily, such contracts are not the subject of an action for their enforcement, in any court. That there may be extreme cases, where one has gained an unconscionable advantage by enticing a * less-experienced person into participation in an illegal transaction, where a court of equity will compel the successful party to relinquish the fruits of the fraud, may be true.

[2] Steele *v.* North Metropolitan Railway Co., Law Rep. 2 Ch. 237.

But the general proposition laid down by Lord ELDON upon this subject, in the Vauxhall Bridge case,[1] does not seem to gain much support from the case cited by him.[2]

2. It seems to us impossible to justify such contracts beyond the mere sale of a definite pecuniary interest. And even that, it would seem, should be secured by the insertion of definite provisions in the charter. We cannot find that any attempt has been made in this country to enforce against a corporation a contract made with the promoters to quiet opposition in the legislature. That it is often charged that such and similar contracts are made by the promoters of railway projects with the friends of rival projects, and other opposers, and with the members of the legislature even, and large sums of money disbursed in fulfilment of such contracts, which are expected to be refunded by the company, and which are so refunded sometimes, is undeniable. But, we apprehend, there is in this country but one opinion in regard to the legality and decency of such contracts, and that those who expect to profit by them have far too much sagacity to trust their redress to the judicial tribunals of the country. But that turnpike and bridge companies, and existing railways, whose profits are to be seriously affected by the establishment of new railways, and land-owners, whose property is to be affected by such railways, may properly stipulate for reasonable indemnity, as the price of withdrawing opposition, there can be, we apprehend, no question. But it seems to us that the only proper mode of securing this indemnity is, by the insertion of special clauses in the charter of the new company. There can be no question in regard to the duty of courts of equity, in a proper case * for their interference, to enforce an indemnity secured by the act.[3]

[1] *Supra*, § 7; Jacob, 64.

[2] Neville *v.* Wilkinson, 1 Bro. C. C. 543. The principle of this case is familiar. It holds, that one who has represented to a creditor of his debtor, or to the father of the intended wife of his debtor, that his debt does not exceed a specified sum, shall not be allowed to enforce a debt for a larger sum, the marriage having taken place in confidence of such representation. In this case the representation was made, indeed, by connivance between the husband and his creditor, to deceive his wife's father. But so far as the creditor is concerned, the decision seems to rest on the familiar principle of an estoppel *in pais*. Shirley *v.* Ferrers, cited in St. John *v.* St. John, 11 Vesey, 536.

[3] Gray *v.* Liverpool & Bury Railway Co., 9 Beav. 391; s. c. 4 Railw. Cas. 35; *supra*, § 11.

3. We infer from the late decision of the House of Lords upon this subject, that the views of the courts, in that country, are already undergoing some change in relation to it. In the case of Caledonian and Dumbartonshire Junction Railway *v.* Helensburgh Harbor Trustees,[4] the facts were that the magistrates of Helensburgh agreed with the provisional committee of a projected railway company to allow the company certain privileges of taking land in the town, and laying rails for a side track to the harbor of H., the company to pay all the expenses of enlarging the harbor, and of obtaining an act of parliament for that purpose. The Harbor Act was obtained, and also the Railway Act. In the latter there was no provision authorizing, or referring to, the previous agreement, and the railway company refused to perform their part, and did not claim performance of the other part.

4. On a bill for specific performance, brought by the harbor trustees, held, reversing the decision of the Court of Session, that specific performance could not be decreed, because the railway company had no power to make a harbor, which would be entirely beside the object of their incorporation.

5. It is said by the Lord Chancellor, and by Lord Brougham, "It seems that Edwards *v.* Grand Junction Railway Co., 1 Railw. Cas. 173, and Lord Petre *v.* Eastern Counties Railway Co., Id. 462, and other similar cases, which have followed them, are unsupported in principle, but these cases are distinguished from the present by the nature of the contracts sought to be enforced, which were matters within the scope of the respective charters. The custom sometimes adopted by committees in parliament of omitting special clauses from acts of incorporation, on the agreement of the promoters that the objects proposed to be attained by these clauses should be carried out, appears to be illegal, and improper."

6. It seems very obvious, that, if these clauses can be foisted into the act of incorporation, by oral testimony, at the will of interested parties, it is exposing the operation of the act to all the inconveniences and inconsistencies which might be expected to *follow from subjecting written contracts to the same mode of exposition. Sound views and true policy seem to us to require a strict adherence to the act of the legislature, as in other cases.

[4] Before the House of Lords in June, 1856; s. c. 2 Macq. Ap. Cas. 391; s. c. 39 Eng. L. & Eq. 28.

7. And it is very questionable, whether, in this country, the contract to sell a definite pecuniary interest — as land which is required for the construction of the road, or turnpike and canal property, the value of which is to be seriously affected by the railway going into operation — at a price agreed, made with the promoters of the railway, but not inserted in the act, and which is not unreasonable, can be enforced against the company. It is certain, we think, that a contract going altogether beyond this, and stipulating large sums, beyond the supposed value of any pecuniary interest to be secured, and for the obvious purpose of quieting opposition or securing favor and support, could not be enforced here, even against the contracting parties, and much less against the company, or at all events that it ought not to be.[5]

[5] In the more recent cases little countenance is given to the doctrine of the earlier English cases, which held the contracts of the promoters of railways binding on the company, on the slightest grounds of adoption, and often by the most forced constructions. In Preston *v.* Liverpool, Manchester, &c. Railway Co., 5 H. L. Cas. 605; s. c. 35 Eng. L. & Eq. 92, although the case is professedly decided on the construction of the particular contract, it is not difficult to perceive, in the very sensible reasons assigned for the construction adopted, a manifest disposition to abandon the former ground assumed by the courts. See Edinburgh, Perth, & Dundee Railway Co. *v.* Philip, 2 Macq. Ap. Cas. 514; s. c. 39 Eng. L. & Eq. 41.

In Aldham *v.* Brown, 2 El. & El. 398, the extent of the responsibility of a subscriber to the preliminary association is much discussed, with a result which may be briefly stated as amounting to nothing more than that such subscriber is responsible for his ratable proportion of the provisional expenses, whether the scheme is finally abandoned or not.

In *In re* Aberystwith Railway Co., 7 Jur. N. S. 510, where a deposit of eight per cent on the estimated cost of a railway was paid into court, in compliance with the parliamentary orders, upon filing petitions for certain railways, it was held that the proportion of such deposit would be paid out of court to the party duly representing the petitioners, on any of the railway projects being abandoned. But on the question being brought to the attention of the Lords Justices (id. 564), it was doubted whether the statute allowed the money to be repaid merely on the withdrawal of the petition, and no order was made. But upon principle it would seem that there could be no difference between the case named specifically in the statute for repayment of the money, that of withdrawal of the petition, and such as denial of the petition or refusal to allow the party to proceed. See *In re* Dartmouth & Torbay Railway Co., 9 Weekly Rep. 609. It is no objection that the requisite parliamentary deposit is made from borrowed funds. Scott *v.* Oakely, 10 Jur. N. S. 431, 648. And a court of equity will enforce any agreement made with the

*8. In an English case,[6] decided in the Exchequer Chamber, reversing the decision of the Court of Exchequer, it was held, that a contract by the company to pay £2,000 to a land-owner, *who opposed the company in obtaining parliamentary powers for extending their line, for the injury he had or might sustain in respect of the preservation of the game on his estate, by reason of the proposed extension, was *ultra vires* and did not bind the company, the covenant being absolute and not depending on the building of the railway, and the funds of the company being both by the original and the new act appropriated to specific purposes which did not include the consideration of this contract.

9. There is an American case,[7] where it was held, that an indemnity secured by a railway company to an individual, to quiet

lender to compel the repayment of such deposit. *Ib.* But an agreement by an existing railway to contribute towards the deposit required to promote the grant of other lines, is held *ultra vires*. So also is an agreement by an existing railway to take shares in the projected company, or to establish traffic regulations with reference to future extensions. But such an agreement will not be *ultra vires* where its validity is expressly made dependent upon the sanction of parliament. Maunsell *v.* Midland Great Western Railway Co., 1 Hemm. & M. 130; s. c. 9 Jur. N. S. 660. See Scottish North Eastern Railway Co. *v.* Stewart, 3 Macq. Ap. Cas. 382. But where the company stipulates to do acts *ultra vires*, there is no implication of a condition that the company shall have or shall be able to obtain legislative authority to do them; and if the acts so stipulated to be done are component parts of an entire agreement embracing other matters within the powers of the company, an injunction will be granted against carrying any portion of the agreement into effect. Hattersley *v.* Shelburne, 7 Law T. N. S. 650. Where six different lines of railway, forming one general scheme, were promoted by the same persons, but subsequently four of them were abandoned, and an act obtained authorizing the construction of the other two, by which it was provided that the expenses, costs, and charges of obtaining and passing the act, and incidental and preparatory thereto, should be paid by the incorporated company, it was held that the costs and expenses connected with the abandoned lines were properly chargeable on the company. *In re* Tilleard, 32 Beav. 476; s. c. 9 Jur. N. S. 1217.

[6] Taylor *v.* Chester & Midhurst Railway Co., Law Rep. 2 Exch. 356. Willes and Blackburn, JJ., dissenting. This judgment was reversed in the House of Lords, and judgment rendered for the plaintiff. Law Rep. 4 H. L. 628. But the doctrine of the Exchequer Chamber is more in conformity with the American cases than that of the House of Lords. *Supra*, § 12, note 4.

[7] Low *v.* Connecticut & Passumpsic Railway Co., 46 N. H. 284; s. c. 45 id. 370, 1 Redf. Am. Railw. Cas. 1; *supra*, § 13, note 2.

opposition before the legislature, for the mere purpose of protecting a private interest, and the party is thereby induced to forego his opposition, — that the indemnity will be enforced, unless the case presented an instance where the legislature was thereby exposed to be misled, and to do what it otherwise would not have done.

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PART II.

THE LAW OF CORPORATIONS.

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THE LAW OF CORPORATIONS.

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*CHAPTER III.

RAILWAYS AS CORPORATIONS.

SECTION I.

Origin and Different Classes of Corporations.

1. The existence of corporations is of early date.
2. The different kinds of corporations. Sole and aggregate.
3. This work treats chiefly of aggregate joint-stock corporations.
4. Corporations are either ecclesiastical or lay.
5. So they are divided into eleemosynary and civil corporations.
6. Corporations are public or private.
7. Private corporations, where stock is private property.
8. Public corporations, where stock is owned and the management retained by the state.
9. It does not affect the private character of a corporation that the state or the United States own a portion of the stock.
10. Distinction between corporations and partnerships. The latter defined.
11. Further definition of the distinction between corporations and partnerships.

§ 17. 1. The idea of corporate action, i. e. by means of mere legal entities, or creations of the law, seems to have existed from a very early day in the history of civilization. They seem to have been allowed by the laws of Solon, and by those of the Twelve Tables; and may very probably have existed at a still earlier period.[1]

2. There have existed various kinds of corporations, distinguished sometimes by the form of the association or the nature of the organization, and sometimes by the character of the work to

[1] 1 Kent Com. 524. The Eighth Table allowed societies or private companies to make their own by-laws, if not inconsistent with the public law. See also 2 Kent Com. 268, note; Dig. Rom. Civ. Law, 47, 22, 4.

which the corporate body was devoted. Thus corporations, in the English law, are either sole or aggregate. By the former is understood corporations existing in a single individual, as the rector of a church, or the judge of a particular court, as the judge of probate, in whose name securities are taken and to be prosecuted, or any other official name, as the treasurer of a town, county, &c., in all which cases the single individual, maintaining for the time the particular official relation, constitutes the *quasi* corporation. Aggregate corporations are where the body consists of more than * one member, whether such members are shareholders, as in the case of a mere business corporation, or are composed of different subdivisions of the entire corporation; as the mayor, aldermen, and common council of a city or other municipality.[2]

3. The corporations with which we are chiefly concerned, and which will be mainly considered in the following work, are aggregate business corporations, with a joint-stock capital, such as banks, railways, manufacturing and other similar organizations.

4. But, as almost all kinds of corporations have in some sense analogous powers and functions, it will not be practicable to discuss the law applicable to one class without at the same time, to some extent, considering the law applicable to all other classes of corporations. It may be proper therefore to mention here, that aggregate corporations may be ecclesiastical or lay, i. e. their functions may have reference exclusively to religious matters, as a parish or church, whereby they are appropriately designated as ecclesiastical or religious bodies; or they may have reference only to secular matters, whereby they are more appropriately denominated lay corporations. The distinction is, however, sometimes not easily determined, since the business and functions of a corporation may approach so nearly the one or the other as not inappropriately to be classed among either. Thus the English Universities of Oxford and Cambridge are now regarded as merely lay or civil corporations, although at one time they were with propriety classed among ecclesiastical corporations.[3]

* 5. Corporations, too, are divided into eleemosynary, or such as disburse only charity and subsist for that purpose only, — such as

[2] Co. Litt. 8 *b*, 250 *a*; 2 Kent Com. 273, 274. The nature of sole corporations is not discussed here, as very few exist in this country, and those by statutes by which the rules of succession are expressly defined.

[3] Angell & Ames Corp., § 40; 1 Bl. Com. 471.

schools, colleges, and hospitals, — and those which are of a business or pecuniary character, called civil or political bodies, intrusted with certain rights or duties, and required to perform certain functions, more or less connected with the polity of the state or nation, — such as towns, counties, school districts, or railways, banks, and manufacturing, or merely business corporations.

6. Corporations are either public or private. Public corporations embrace all the municipal subdivisions of the state; such as counties, towns, and cities, and school districts, and other similar organizations. Private corporations include all aggregate joint-stock incorporated companies, whose capital stock is owned by private persons. But such joint-stock corporations as possess no shares not owned by the state or nation are also regarded as public corporations, the same as the municipalities of the state. The law in regard to railways was thus stated in the former edition of this work.

7. Railways[4] in this country, although common carriers of freight and passengers, and in some sense regarded as public works, are ordinarily private corporations.[5] By private corporations nothing more is implied, than that the stock is owned by private persons.

8. If the stock is owned exclusively by the state, the corporation is a public one. And such public corporations are under the control of the legislature, the same as municipal corporations, and ordinarily acquire no such vested rights of property as are beyond the control of legislative authority.[6] The American cases going * to confirm this proposition, and to show that railways are private corporations, are numerous.[7]

[4] The charter may be to a single person as well as to an aggregation of persons; and the same rights, duties, and liabilities result from the grant, in the one case as in the other.

[5] *Supra* § 1, pl. 6.

[6] Dartmouth College *v.* Woodward, 4 Wheat. 518, 568; 2 Kent Com. (7th ed.) 275, and notes. If the question were entirely new, it might be regarded as admitting of some doubt, perhaps, how far the American states could with propriety undertake such extensive public works, whose benefit enures almost exclusively to private emolument and advantage. But the practice is now pretty firmly established. And moreover there seems to be no proper tribunal to determine such questions between the states and the citizens.

[7] Donnaher *v.* Mississippi, 8 Sm. & M. 649, 661. By the court, in Waterloo Presbyterian Society *v.* Auburn & Rochester Railway Co., 3 Hill, 570; Dartmouth College *v.* Woodward, 1 N. H. 111, 116; Eustis *v.* Parker, 1 N. H.

* 9. It does not alter the character of a private corporation, that the state or the United States own a portion of the stock.[8] (*a*) * But a turnpike company or other corporation, managed exclusively by state officers, and at the expense and for the benefit of the state at large, is a public corporation.[9]

10. The legal distinction between a corporation and a copartnership is marked and important. A mere partnership is the result of voluntary association between two or more persons, to invest their capital and labor in the joint conduct of any business, mercantile or otherwise, either for a definite or indefinite time, according to the terms of the organic contract. This contract may be in writing or merely oral, and requires no legislative sanction to give it validity.[10] The result of such an association is to create a joint interest both in the capital and the business, unless there is some special stipulation as to the property remaining in those of the partners who furnish the capital. The several partners also become responsible for all the debts and legitimate contracts of the partnership; unless in special and limited partnerships, where, under certain conditions, the special partners are not liable for the partnership contracts beyond the amount of the capital invested by them.[11]

273; Dearborn *v.* Boston, Concord & Montreal Railway Co., 4 Fost. N. H. 179, 190; Ohio, &c. Railroad Co. *v.* Ridge, 5 Blackf. 78; Bonaparte *v.* Camden & Amboy Railroad Co., 1 Bald. 205, 222; Rundle *v.* Delaware & Raritan Canal Co., 1 Wal. Jr. 275; Raleigh & Gaston Railroad Co. *v.* Davis, 2 Dev. & Bat. 451; Thorpe *v.* Rutland & Burlington Railroad Co., 27 Vt. 140; s. c. 1 Redf. Am. Railw. Cas. 587. This last case discusses the right of legislative control over private corporations whose functions are essentially public, like those of banks and railways.

[8] United States Bank *v.* Planters' Bank, 9 Wheat. 904; Miners' Bank *v.* United States, 1 Greene, Iowa, 553; Turnpike Co. *v.* Wallace, 8 Watts, 316; Bardstown & Louisville Railroad Co. *v.* Metcalfe, 4 Met. Ky. 199.

[9] Sayre *v.* North Western Turnpike Co., 10 Leigh, 454. But see Toledo Bank *v.* Bond, 1 Ohio State, 622, 657. Opinion of Storrs, J., in Bradley *v.* New York & New Haven Railway Co., 21 Conn. 294, 304, 305.

[10] Story Part. §§ 2, 3, and cases cited.

[11] Coope *v.* Eyre, 1 H. Bl. 37, 48, where Lord Chief Justice Loughborough defines a partnership to be a sharing both in profit and loss, and says that limited partnerships are not allowed in England, although upheld on the Continent. But the law is now otherwise by special statute both in

(*a*) Marshall *v.* Western Railroad Co., 92 N. C. 322; Moore *v.* Schoppert, 22 W. Va. 282. See *infra*, § 17 *b*, note 1.

11. But the organization of a corporation is essentially different. The individual members or corporators are not responsible, except by special statute, and that is an anomaly, for any of the acts of the corporation. The corporators are, so to speak, merged in the abstract being created by the act of incorporation, and can do no act binding the corporation except in accordance with the organic law by which this artificial being is created. And the corporation receives its powers and functions solely from the act of incorporation; and this act must, in all cases, emanate, either directly or indirectly, from the legislative power of the state or nation, and cannot be created by any mere contract among the members, as in the case of copartnerships. These principles are so elementary and fundamental to the very existence of corporations as scarcely to require to be stated, much less to be fortified by authority.[12]

SECTION II.

How Corporations are created.

1. Corporations created by grant of the sovereignty. This may be proved, by implication or by presumption.
2. The sovereignty may establish corporations by general act, or delegation or procuration.
3. Different forms of defining a corporation.
4. The corporate action of corporations restricted to state creating them.
5. It may act by its directors and agents in other states.
   n. 10. But cannot properly transfer its entire business to another state.
6. A college located at one place cannot establish a branch at another.

§ 17 *a.* 1. Strictly speaking, corporations can only be created by the authority of the sovereignty, either state or national.[1] (*a*)

England and in America. But, independent of statute, all the partners are responsible for all the liabilities of the concern. Angell & Ames Corp., § 11 *et seq.*, and cases cited.

[12] Angell & Ames Corp., § 591 *et seq.* The members of a joint stock company, however numerous, are liable as partners, unless the company is incorporated. Williams *v.* Michigan Bank, 7 Wend. 539, 542.

[1] The federal sovereignty being limited by the Constitution to powers expressly conferred and powers necessary to their exercise, and no power to

(*a*) It is a power which belongs to the legislature unless taken away by the Constitution. Chenango Bank *v.* Brown, 26 N. Y. 467.

Hence, the ordinary mode of creating joint-stock business corporations is by charter, by way of legislative act of the several states. But as, in some cases, the record of such charters may not have been preserved, and, in other cases, the grant of corporate powers * may have been by way of implication rather than express legislative act, the courts have allowed corporations to prove their corporate character and capacity, by evidence that such character and capacity is reasonably, or necessarily, implied from other legislative action ;[2] or else, that its existence is fairly to be presumed from the long continuance of its unquestioned exercise.[3]

2. The legislature may create corporations by general acts of incorporation, as they are called, whereby a given number of persons, by forming an association in a prescribed form, shall become possessed of corporate powers, for certain defined objects and purposes. (*b*) This is common, in many of the states, as to ecclesiastical and charitable, or benevolent associations, and not unfrequently as to banking, railway, and other business corporations. And although at one time questioned, it seems now conceded that the sovereign authority may grant to any one the power to erect corporations to an indefinite extent, upon the maxim: *Qui facit per alium facit per se*. This power is given to the Chancellor of the University of Oxford,[4] and exists in many other forms. (*c*)

3. A corporation is defined by Lord HOLT, C. J.,[5] as an *ens civile*, a *corpus politicum*, a *persona politica*, a *vollegium*, an *univer-*

create corporations being expressly given, the Supreme Court held at an early day that Congress could charter such corporations only as might fairly be considered necessary to the exercise of its various powers and functions. McCulloch *v.* Maryland, 4 Wheat. 316; Osborn *v.* United States Bank, 9 Wheat. 733.

[2] Conservators of the Tone *v.* Ash, 10 B. & Cr. 349.

[3] Dillingham *v.* Snow, 5 Mass. 547; 2 Kent Com. 277; 1 Bl. Com. 473.

[4] 1 Bl. Com. 474.

[5] Anonymous, 3 Salk. 102.

(*b*) The constitutions of some of the states contain restrictions upon the exercise of this power, as by forbidding the granting of charters by special act. See San Francisco *v.* Spring Valley Water Works, 48 Cal. 493; St. Paul Fire Insurance Co. *v.* Allis, 24 Minn. 75. See also Calla-

[*56]

way County *v.* Foster, 93 U. S. 570; Wallace *v.* Loomis, 97 U. S. 146.

(*c*) But this must be taken with the qualification that the power to make laws cannot be delegated. See Cooley Const. Lim. 116. But see *In re* Deveaux, 54 Ga. 673.

sitas, a *jus habendi et agendi*. A corporation is well defined, as to the general sense of the term, by Chief Justice MARSHALL,[6] as "an artificial being, invisible, intangible, and existing only in contemplation of law." It is, in fact, the mere creature or creation of the law, endowed by its charter with the capacity of performing certain functions, and having no rights, and possessing no powers, except those conferred by the sovereignty by which it was created.

4. It is upon this ground, that it has been declared, upon the most unquestionable basis, both of principle and authority, that a "corporation can have no legal existence out of the boundaries of the sovereignty by which it is created."[7] "It exists only in contemplation * of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty." And the same thing, substantially, is repeated in another case[8] by Mr. Justice THOMPSON. (*d*) But a corporation may transact business in a foreign state or country, and may be there sued in relation to the same.[9]

5. There seems to be no question but the corporation may act, by its directors, agents, and servants, beyond the limits of the sovereignty by which it was created.[10] (*e*) But its first meeting, and all its subsequent meetings, in order to bind absent and dis-

[6] Dartmouth College *v.* Woodward, 4 Wheat. 518. The same learned judge, in another place, Providence Bank *v.* Billings, 4 Pet. 514, thus comments on the purposes of acts of incorporation: "The great object of an incorporation is, to bestow the character and properties of individuality on a collective and changing body of men."

[7] TANEY, C. J., in Bank of Augusta *v.* Earle, 13 Pet. 519, 588.

[8] Runyan *v.* Coster, 14 Pet. 122, 131. And to the same point see Miller *v.* Ewer, 27 Me. 509; Farnum *v.* Blackstone Canal Co., 1 Sumner, 46; Day *v.* Newark India Rubber Co., 1 Blatchf. C. C. 628.

[9] Newby *v.* Colt's Patent Fire-Arms Co., Law Rep. 7 Q. B. 293.

[10] McCall *v.* Byram Manuf. Co., 6 Conn. 428. It was held in this case, that the directors of a manufacturing corporation might legally hold a meeting, out of the state, for the purpose of making the appointment of secretary of the corporation, and that the appointment would not be rendered invalid by permanent residence of the appointee without the state.

(*d*) And to the same effect FIELD, J., in Paul *v.* Virginia, 8 Wal. 181.

(*e*) But this only by comity, and subject to legislative control in the state in which they assume to act. Christian Union *v.* Yount, 101 U. S. 356. And see United States *v.* Insurance Co., 22 Wal. 99; Leazure *v.* Union Mutual Life Insurance Co., 91 Penn. St. 491.

senting members, should, it would seem, be held within the limits and jurisdiction of the sovereignty creating the corporation.[11] But in one case in New Jersey,[12] the general rule is reaffirmed, that a corporation can hold no meeting and transact no corporate business, except within the state from which *they derive their charter. And it was here further held, that a resolution of the directors, at a meeting held out of the state where the corporation was created, for the purpose of transferring stock to some of their own number, was wholly inoperative. But the court declined to enjoin those holding under such title from voting at the election of corporate officers, until all parties could be heard upon the question of title.

6. But a college of learning, established in a particular place, has no power to establish a branch, for one of its departments or faculties, at a different place. It was accordingly held, that Geneva College, at Geneva, N. Y., could not establish a medical school in the city of New York.[13]

[11] Miller *v.* Ewer, 27 Me. 509. It is so well settled, that corporations, created by one sovereignty, cannot transfer their locality so as legally to exist and act in their organic corporate capacity in another sovereignty, that it appears very singular that so many speculative joint-stock corporations, deriving their charters from the legislature of the state, should attempt to transfer their entire local action to another sovereignty and jurisdiction. There is no principle better settled than that the locality of a business corporation is determined by that of its principal business office; and yet there are many business corporations chartered by the legislature of one state having their principal and only business offices in other states. This is done doubtless by holding the stockholders' meetings in the states where the charter was obtained, and appointing a board of directors with full powers, and then carrying forward the business of the company through the agency of the board of directors, with a by-law for filling vacancies in the board by the action of the directors themselves. But that seems scarcely less than an evasion; and though such action may be binding on the members of the company so long as they acquiesce, it might at any time be enjoined by proper proceedings in equity.

[12] Hilles *v.* Parrish, 1 McCart. N. J. 380.

[13] People *v.* Geneva College, 5 Wend. 211.

[*58]

SECTION III.

Constitutions of Corporations, and mode of Proof.

1. Definitions of the different senses of the term "constitution," as applied to corporations.
2. How corporations may be composed or constituted.
   n. 1. The question illustrated more in detail.
3. Distinction between legislative, electoral, and administrative assemblies not essential.
4. Corporation can act only by its name. Subject discussed.
5. Any deviation from the name allowed, if the substance and sense be preserved.
6. Courts of equity will not restrain corporations from applying for enlarged powers.
7. Change of constitution. Effect of change of name.
8. Courts of equity will enjoin a new corporation from assuming the name of one of established credit.
9. Promissory note payable to A. B., treasurer of a corporation, may be sued in the name of A. B. Promissory note for subscription waives condition.
10. Corporation may be estopped to deny its existence. How described.
11. How the existence and non-existence of corporations may be proved.
12. Party to written contract, payable to corporation, cannot deny corporate existence.
13. Proof of corporation in fact sufficient in all cases.

§ 17 *b*. 1. The term "constitution," as applied to corporations, is susceptible of being used in very different senses. It may imply nothing more than the charter or formal grant of corporate organization and powers by the sovereignty, or it may be applied to certain fundamental principles, declared by the corporators themselves as the unalterable basis of the organization of the body; or, if not wholly unalterable, not to be altered except by the * adoption and concurrence of certain formalities, not likely to occur, except in regard to changes of very obvious necessity; or the term may be used to signify the constituent members, or different bodies of which the corporation is composed.

2. A corporation may be composed of natural persons, acting in their separate and individual capacity; or it may be composed of different bodies of natural persons, acting in separate assemblies; or it may be composed of separate and distinct corporations.[1]

[1] In general, joint-stock business corporations are composed of natural persons, but as membership is a result of ownership of shares, it may exist in other corporations or in the state or government. United States Bank *v*. Planters' Bank, 9 Wheat. 904; South Carolina Bank *v*. Gibbs, 3 McCord,

3. Some writers have distinguished the meetings or assemblies of aggregate corporations into three kinds, — legislative, electoral, and administrative. But this is a distinction with reference to the different offices or duties of the same assembly, or meeting, and is consequently of no practical importance to be maintained or discussed.[2]

4. A corporation must be constituted by some corporate name, and can only act by such name.[3] A corporation by prescription may have several names, but by charter it can have, it is said, but one name for the same purpose and at the same time. For, * although it may have a new charter by a new name, it thereby loses the old name.[4]

5. But it sometimes becomes an important and difficult consideration, how far a departure from the strict corporate name can be allowed without the violation or disregard of established principles. It was early decided[5] that in contracts by or to corporations, it is sufficient if the name be substantially preserved. It is not requisite *ut idem nomen syllabis* be preserved, but only

377. A state, however, "as a member of a corporation," as said by MARSHALL, C. J., in the former case, "never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act."

So it may exist in different associations of natural persons, or in a defined number of persons of a particular class. 1 Kyd, 36; 7 S. & R. 517. Of corporations composed of several subordinate corporations the Dean and Canons of the English cathedrals, and the English Universities composed of different colleges and halls are examples. 2 Burn Ec. Law, tit. Monasteries, 542; Angell & Ames Corp. § 96.

[2] 1 Kyd, 399; Angell & Ames Corp. § 98.

[3] Physicians' College *v.* Salmon, 3 Salk. 102.

[4] Anonymous, 3 Salk. 102. But some writers have said that if the charter of a corporation allow it to act by different names for the same purpose, there is no good reason why it may not. 1 Kyd, 230. And in Minot *v.* Curtis, 7 Mass. 441, it is said a parish may be known by several corporate names. The point is not important, since few corporations make any claim to an *alias dictus;* and where that is claimed there will commonly be no difficulty in determining how far the claim can be justified or maintained. There is no pretence that a corporation may change its name at will. Serious inconvenience might be expected to result from a concession of any such power. Reg. *v.* Registrar, 10 Q. B. 839. But the legislature may change the name of a corporation, and this will not affect its rights, its identity being shown. Rosenthal *v.* Madison, Indianapolis Plank-Road Co., 10 Ind. 358.

[5] Lynne Regis, 10 Co. 122.

in re et sensu. The precise words of the same are not indispensable. It is sufficient if the substance and the sense be preserved. And in a case in New Hampshire, it was held not essential, in naming a corporation, that the same words should be used in the same order, provided the description was sufficient to identify the body.[6] And this rule obtains generally, in all the cases upon the subject, both English and American. If the name used to describe the corporation does not describe any other person, natural or corporate, and is sufficient to show that the particular corporation was intended, it will be sufficient.[7] (*a*)

6. The constitutions and powers of all corporations must necessarily depend upon the law of the state where the same was created. And in the English courts of equity it is not the practice to interfere to restrain the majority of the shareholders from applying to parliament for enlarged powers. And the same rule is there adopted as to foreign corporations, whose shareholders principally * reside in England, and where the principal business is transacted in that country.[8]

7. The English courts of equity hold a very strict hand over joint-stock companies incorporated by act of parliament, both in regard to the exercise of their powers and the application of their funds.[9] Where the name of a corporation is altered by act of the legislature, with a provision that it shall not have the effect to prejudice any right or remedy in favor of the company previously existing, it was held to save the remedy against a surety upon a bond for faithful service of an employé.[10]

8. An application was made in a somewhat recent case,[11] for an injunction against the defendant's adoption and use of the plain-

[6] Newport Mechanics Co. *v*. Starbird, 10 N. H. 123.

[7] Sutton First Parish *v*. Cole, 3 Pick. 232; Tucker *v*. Seamen's Aid Society, 7 Met. 188; Attorney-General *v*. Rye, 7 Taunt. 546; Foster *v*. Walter, Cro. Eliz. 106; Domestic & Foreign Missionary Society's Appeal, 30 Penn. St. 425; Button *v*. American Tract Society, 23 Vt. 336; Redf. Wills, Pt. 1, § 40, and cases cited.

[8] Bill *v*. Sierra Nevada Lake Water Co., 1 De G. F. & J. 177; s. c. 6 Jur. N. S. 184.

[9] Attorney-General *v*. Great Northern Railway Co., 1 Drewry & S. 154.

[10] Groux Improved Soap Co. *v*. Cooper, 8 C. B. N. S. 800.

[11] London Insurance *v*. London & Westminster Insurance Co., 9 Jur. N. S. 813.

(*a*) There would seem to be no reason why the misnomer of a corporation should have any legal effect other than such as the misnomer of an individual has. See Clement *v*. Lothrop, 18 Fed. Rep. 885, and cases *passim*, in which this seems to be assumed.

tiff's name, or one so similar as to lead the public to suppose they were the same institution, upon the ground that this would tend to deprive them of the just benefits of the long period of conducting their business upon terms and in a mode most acceptable to the public. The application was based upon the same grounds that have induced courts of equity to interfere to protect parties from the fraudulent use of established trade-marks, inasmuch as it tends to a double fraud, — in depriving the parties first giving character to such mark of the legitimate fruits of their industry; and also in that it induces the public to suppose they are obtaining the original article of the original proprietor, when in fact they are not.[12] The court, Vice-Chancellor STUART, intimated no doubt of the propriety of granting the relief, upon the ground claimed in the bill, but denied the injunction upon the ground that no such case was made out at the hearing. But a company cannot by user acquire an exclusive right to use, in its title of incorporation, a term descriptive merely of the locality where the business is carried on; and the court will not restrain the use of such general term by a new company, although it appear that the former company may have been prejudiced by the similarity of name.[13]

* 9. A promissory note payable to a person by name, adding treasurer, &c., naming a railway corporation, must be regarded as payable to the person named and not to the corporation.[14] But such a note, given for a conditional subscription of stock, must be regarded as a waiver of the condition, and, if executed some time after the date of the subscription, cannot be construed as part of the contract of subscription.[15]

10. A corporation, after having claimed and exercised corporate powers for a considerable time, will be estopped from denying its corporate existence.[16] (*b*) It is said in some cases, that if the cor-

[12] 2 Story Eq. Jur. § 951 *et seq.*, ed. 1866.

[13] Colonial Life Assurance Co. *v.* Home & Colonial Life Assurance Co., 33 Beav. 548; s. c. 10 Jur. N. S. 967.

[14] Chadsey *v.* McCreery, 27 Ill. 253.

[15] O'Donald *v.* Evansville, Indianapolis, & Cleveland Railroad Co., 14 Ind. 259.

[16] Callender *v.* Painesville & Hudson Railroad Co., 11 Ohio St. 516; Atlantic & Ohio Railroad Co. *v.* Sullivant, 5 Ohio St. 276. See also Ashtabula & New Libson Railroad Co. *v.* Smith, 15 Ohio St. 328.

(*b*) See Real Estate Savings Institution *v.* Fisher, 9 Mo. Ap. 593.

poration contracts by a style which is usual in creating corporations, and which discloses the names of no natural persons, that the corporate existence will be implied and need not be averred.[17] But in general such a proposition would not be regarded as maintainable in suits either in favor or against a corporation; it should be described as such in the declaration, with its location at its central place of doing business.

11. It has been held, that where defendants, sued as a corporation, rely upon the fact that the corporate existence has ceased before the institution of the suit, it must be pleaded in abatement and not in bar of the action. But in general the want of corporate existence and power may be shown at any time before judgment, upon proper notice and special plea.[18] A party who has sued a corporation and recovered judgment against them by a particular name, is afterwards estopped from denying the corporate existence.[19] But this seems not altogether in accordance with the requirement that estoppels be mutual, unless the judgment were between the same parties. Such an estoppel would therefore only operate as between the plaintiff in the former suit and the corporation. (*c*)

12. The cases are very numerous where it has been held that a * party who gives a written contract to a corporation by a particular name is estopped to deny the existence and name of such corporation.[20]

13. And in all cases of the plea of *nul tiel* corporation, proof of a corporation in fact will be sufficient.[20]

[17] Stein *v*. Indianapolis Building Association, 18 Ind. 237.
[18] Meikel *v*. German Savings Fund Society, &c., 16 Ind. 181.
[19] Pochelu *v*. Kemper, 14 La. An. 308.
[20] Hubbard *v*. Chappel, 14 Ind. 601.

(*c*) Upon this question of estoppel on one who has dealt with a *de facto* corporation, see Sayers *v*. First National Bank, 89 Ind. 230; Stanley *v*. Richmond Railroad Co., 89 N. C. 331; Real Estate Savings Institution *v*. Fisher, 9 Mo. Ap. 593; Brown *v*. Scottish American Mortgage Co., 110 Ill. 235; Ryan *v*. Martin, 91 N. C. 464; Johnston Harvester Co. *v*. Clark, 30 Minn. 308. See also Provident Savings Institution *v*. Burnham, 128 Mass. 458, where it is held that a recital in a deed that one of the parties is a corporation is *prima facie* evidence that it is so. And see German Bank *v*. Stumpf, 9 Mo. Ap. 593, to the same point. But *quære* whether the courts proceed in these cases on the doctrine of estoppel, — whether the rule is more than a rule of evidence.

*CHAPTER IV.

PROCEEDINGS UNDER THE CHARTER.

SECTION I.

Organization of the Company.

1. Conditions precedent must be performed.
   n. (b). *Semble,* however, that there is a distinction between conditions.
2. Stock, in general, must all be subscribed.
3. Charter-location of road, condition precedent.
4. Colorable subscriptions binding at law.
5. Conditions subsequent, how enforced.
6. Stock distributed according to charter.
7. Commissioners must all act.
8. Defect of organization must be specially pleaded.
9. Question cannot be raised collaterally.
   n. (c) *Semble* that there is a distinction between cases.
10. Records of company, evidence.
11. Membership, what constitutes, and how maintained.
12. Subscription and transfer of shares generally necessary.
13. Offers to take shares not enforced in equity, and may be withdrawn.

§ 18. 1. To give the corporation organic life, the mode pointed out in the charter must ordinarily be strictly pursued. Conditions precedent must be fairly complied with.[1] (*a*) Thus, where a given amount of capital stock is required to be subscribed or paid in before the corporation goes into operation, this is to be regarded as an indispensable condition precedent.[2] But if the charter is in the alternative, so that the stock shall not be less than one sum or greater than another, the company may go into operation with the less amount of stock, and subsequently increase it to the larger.[2] (*b*)

[1] Angell & Ames Corp. §§ 95–112; 2 Kent Com. 293 *et seq.*

[2] *Infra,* § 51, and cases cited. Bend *v.* Susquehanna Bridge, 6 Har. & J. 128; Gray *v.* Portland Bank, 3 Mass. 364; Minor *v.* Mechanics' Bank, 1 Pet. 46, *per* STORY, J. And where a corporation is formed, or attempted to be formed, under general statutes, the inchoate proceedings do not ripen into a corpora-

(*a*) But see Walworth *v.* Brackett, 98 Mass. 98; People *v.* Stockton Railroad Co., 45 Cal. 306; People *v.* Cheeseman, 7 Col. 376, where it is said that charters should not receive a technical construction, and that a substantial performance is sufficient.

(*b*) Unless otherwise provided, the

*2. And where business corporations are created with a definite capital, it is regarded as equivalent to an express condition that the whole stock shall be subscribed before the company can go into full operation; (*c*) and in the case of banks, it must be paid in specie, in the absence of all provision to the contrary, before they can properly go into operation.[3]

tion until all the requirements of the statute, even the filing of the articles in the office of the Secretary of State, are complied with. Until this is done, the subscription of any one to the articles is a mere proposition to take the number of shares specified, of the capital stock of the company thereafter to be formed, and not a binding promise to pay. The obligation is merely inchoate, and can never become of any force unless the corporation goes into effect in the mode pointed out in the statute. Burt *v.* Farrar, 24 Barb. 518.

[3] King *v.* Elliott, 5 Sm. & M. 428; *infra*, § 51. But a requirement in the charter of a railway company, that so much per mile shall be subscribed, and ten per cent paid thereon in good faith, does not require ten per cent to be paid by each subscriber. It suffices that such proportion on the whole subscription is paid. Ogdensburg, Rome, & Clay. Railroad Co. *v.* Frost, 21 Barb. 541. Under the late English statutes, corporations are allowed to organize, and make calls to some extent, before all the capital is subscribed. Ornamental Pyrographic Woodwork Co. *v.* Brown, 9 Jur. N. S. 578; S. C. 2 H. & C. 63. But in America, the rule that all the stock must be subscribed before the company can go into operation is strenuously adhered to. Shurtz *v.* Schoolcraft & Three Rivers Railroad Co., 9 Mich. 269. And on general principles it seems not to be held indispensable in England that all the stock be subscribed, either to enable the corporation to go into operation or even to borrow money on mortgage. McDougall *v.* Jersey Imperial Hotel Co., 2 Hemm. & M. 528; S. C. 10 Jur. N. S. 1013. But in America, the entire capital stock must be subscribed and paid in money, and it will not be sufficient to pay it in the equivalent for money, to the acceptance of the shareholders or directors, unless the charter or general laws of the state so provide. People *v.* Troy House Co., 44 Barb. 625.

incorporation takes effect on acceptance of the charter. It would seem that there is a distinction between a condition attached to the formation of the corporation, and a condition attached to the carrying on of business after such formation. See People *v.* Chambers, 42 Cal. 201; Hammond *v.* Straus, 53 Md. 1; Perkins *v.* Sanders, 56 Miss. 733. And see Boston, Barre, & Gardiner Railroad Co. *v.* Wellington, 113 Mass. 79; Boston, &c. Railroad Co. *v.* Pearson, 128 Mass. 445. Each subscription for stock, nothing being stipulated to the contrary, is impliedly conditioned upon the raising of the full amount. Skowhegan & Athens Railroad Co. *v.* Kinsman, 22 Am. & Eng. Railw. Cas. 13.

(*c*) The charter may, however, provide otherwise of course. Boston, &c., Railroad Co. *v.* Pearson, 128 Mass. 445; Boston, Barre, & Gardiner Railroad Co. *v.* Wellington, 113 Mass. 79, and cases *passim*.

3. In some cases it is a condition of the charter, or of the subscriptions to the stock, that the track of a railway shall touch certain points, or that it shall not approach within certain distances of other lines of travel. This class of conditions, so far as they can practically be denominated conditions precedent, must be strictly complied with, before the company can properly go into operation so as to make calls.

4. But it has been held, that colorable subscriptions to stock, in order to comply with the requisites of the charter, are not to be regarded as absolutely void. They are binding upon the subscribers themselves. And they are binding upon the other subscribers, unless upon their first discovery they take steps to stay the further proceedings of the corporation, which may be done in a court of equity. If there has been unreasonable delay in opposing the action of the corporators, upon the faith of such subscriptions, or if matters have progressed so far before the discovery of the true character of the subscriptions, by the parties liable to be injuriously * affected by them, as to render it difficult to restore the parties to their former rights, the corporation will still be allowed to proceed, notwithstanding the fraud upon the charter.[4] (*d*)

5. Conditions subsequent in railway charters, by which is to be understood such acts as they are required to perform after their organization, will ordinarily form the foundation of an action at

[4] Walker *v.* Devereaux, 4 Paige, 229; s. c. 1 Redf. Am. Railw. Cas. 29. The entire ground of chancery jurisdiction in regard to the conduct of commissioners or corporations in making colorable subscriptions of stock is here very fully discussed. The conclusion reached, that colorable subscriptions or fraudulent distribution of stock will not render the organization invalid unless the thing is arrested *in limine*, seems to be the only practicable one. Johnston *v.* South Western Railroad Bank, 3 Strob Eq. 263; Selma & Tennessee Railroad Co. *v.* Tipton, 5 Ala. 787; Hayne *v.* Beauchamp, 5 Sm. & M. 515. The decision of the commissioners is conclusive upon the company and shareholders, certainly at law. Crocker *v.* Crane, 21 Wend. 211; s. c. 1 Redf. Am. Railw. Cas. 42. And where the charter, or act of association, names commissioners to take up subscriptions, they alone have jurisdiction of the matter, and subscriptions taken up by volunteers are not binding upon the subscribers unless adopted by the commissioners. Shurtz *v.* Schoolcraft & Three Rivers Railroad Co., 9 Mich. 269.

(*d*) The subscriptions should be absolute and not conditional. A subscription on condition precedent is but an offer. See Monadnock Railroad Co. *v.* Felt, 52 N. H. 379; Oskaloosa Agricultural Works *v.* Parkhurst, 54 Iowa, 357.

law, in favor of the party injured; or they may be specifically enforced in courts of equity, in cases proper for their interference in that mode; or, if the charter expressly so provide, proceedings by way of *scire facias* to avoid the charter may be taken.[5]

6. Where a statute declares certain persons by name, and such other persons as shall hereafter become stockholders, a corporation, the distribution of the stock, in the mode pointed out in the statute, is a condition precedent to the existence of the corporation.[6]

7. Where the charter of a railway company appoints a certain number of commissioners to receive subscriptions and distribute the stock, in such manner as they shall deem most conducive to the interests of the company, making no provision in regard to a quorum, all must be present to consult when they distribute the stock, although a majority may decide, this being a judicial act. * Receiving subscriptions is a merely ministerial act and may be performed by a number less than a majority.[6]

If the organization of a corporation is regular upon its face, and the legislature have recognized it as such subsequently to its having gone into operation, it becomes *ipso facto* a legal corporation.[7]

8. Questions in regard to the organization or existence of the corporation can only be raised ordinarily upon an express plea, either in abatement or in bar, denying its existence.[8]

[5] 2 Kent Com. 305, and notes.

[6] Crocker *v.* Crane, 21 Wend. 211; s. c. 2 Am. Railw. Cas. 484; s. c. 1 Redf. Am. Railw. Cas. 42. Where the statute names a large number of persons, and enacts that they, or any three of them, may act as commissioners, either the whole number or any three may act at the election of the individuals. No particular form of words is required to create the grant of a corporation. The grant of power to perform corporate acts implies the grant of corporate powers. Commonwealth *v.* West Chester Railway Co., 3 Grant Cas. 200.

[7] Black River & Utica Railway Co. *v.* Barnard, 31 Barb. 258.

[8] Boston Type & Stereotype Foundry *v.* Spooner, 5 Vt. 93, and cases cited; Railsback *v.* Liberty & Abington Turnpike Co., 2 Cart. 656. But some cases seem to require such proof to establish the contract. Stoddard *v.* Onondaga Annual Conference, 12 Barb. 573; Heaston *v.* Cincinnati & Fort Wayne Railroad Co., 16 Ind. 275. One who executes his promissory note to a company by its corporate name is estopped to deny its corporate existence. East Pascagoula Hotel Co. *v.* West, 13 La. An. 541; s. p. Black River Railroad Co. *v.* Clarke, 25 N. Y. 280. But in an action by a corporation on a judgment, the defendant is estopped to plead that no such corporation exists, even if he propose to prove its dissolution after the date of the judgment. He should plead such matter specially. Perth Amboy Steamboat Co. *v.* Parker, 2 Phila. 67. But see Anderson *v.* Kerns Draining Co., 14 Ind. 199.

9. But all the cases concur in the proposition, that the existence of the corporation, the legality of its charter, and the question of its forfeiture, cannot be inquired into, in any collateral proceeding, as in a suit between the company and its debtors, or others against whom it has legal claims.[9] (*e*)

10. The records of the corporation are *prima facie*, but not indispensable, evidence of its organization and subsequent proceedings.[10] But the authenticity of the books, as the records of the

[9] Duke *v.* Cahawba Navigation Co., 16 Ala. 372; *infra*, § 242, note 6. But in an action against a stockholder for the debt of the company under the statute, the existence and organization of the company must be proved; and judgment against the company is not evidence against the stockholder. Hudson *v.* Carman, 20 Law Rep. 216; s. c. 41 Me. 84; Cleveland, Painsville, & Ashtabula Railroad Co. *v.* Erie, 27 Penn. St. 380. See also Eakright *v.* Logansport & Northern Indiana Railroad Co., 13 Ind. 404. The subscription to the stock of a corporation estops the subscriber to deny the corporate existence; nor can the subscriber plead in defence of such subscription that other subscribers, by means of secret fraudulent agreements, were promised shares on terms different from those specified in the agreement, since such fraudulent arrangements are of no validity, and cannot avail the parties on whose behalf they are made. Anderson *v.* Newcastle & Richmond Railroad Co., 12 Ind. 376.

[10] Angell & Ames Corp. § 513; Grays *v.* Lynchburg & Salem Turnpike Co., 4 Rand. 578; Buncombe Turnpike Co. *v.* McCarson, 1 Dev. & Bat. 306; 1 Greenl. Ev. § 493; Rex *v.* Martin, 2 Camp. 100; Hudson *v.* Carman, 20 Law Rep. 216; s. c. 41 Me. 84. A corporation, to establish its existence in a litigation with individuals, need only prove its charter and user under it. This constitutes it a corporation *de facto*, and that is sufficient, in ordinary suits between the corporation and its debtors. The validity of its corporate existence can be tested only by proceedings in behalf of the people. Mead *v.* Keeler, 24 Barb. 20. Between the company and strangers, the records of the company will ordinarily be held conclusive against it in regard to such matters as it is its duty to perform. Zabriskie *v.* Cleveland, Columbus, & Cincinnati Railroad Co., 10 Am. Railw. T. No. 15; s. c. affirmed, 23 How. 381;

(*e*) But here again there would seem to be a distinction where the existence is alleged to depend on the performance of certain conditions precedent, between the case of conditions which are necessary steps in the process of incorporation and conditions required of individuals seeking to become incorporated. Non-performance of the former may be taken advantage of collaterally; of the latter, by the state alone. First National Bank *v.* Davies, 43 Iowa, 424. And see Lord *v.* Essex Building Association, 37 Md. 320; People *v.* Chambers, 42 Cal. 201; Mokelumne Hill Mining Co. *v.* Woodbury, 14 Cal. 424; Hammond *v.* Straus, 53 Md. 1; Perkins *v.* Sanders, 56 Miss. 733.

*corporation, must be shown by the testimony of the proper officer entitled to their custody, or that of some other person cognizant of the fact.[11]

11. Questions sometimes arise as to what constitutes membership in a corporation. This has to be determined, in most aggregate corporations, by the just construction and fair import of the charter and by-laws of the body. The usage of the corporation and of other similar bodies will be of controlling force in determining such questions. But the power of maintaining in some mode a supply of members of the body, is incident to all corporations, as indispensable to its continued existence.[12]

Heaston *v.* Cincinnati Co., 16 Ind. 275. Upon the general question of proof and presumption of the organization of corporations see Leonardsville Bank *v.* Willard, 25 N. Y. 574; Belfast & Angelica Plank Road Co. *v.* Chamberlain, 32 N. Y. 651; Buffalo & Allegheny Railway Co. *v.* Cary, 26 N. Y. 75. Where the statute under which an incorporation is formed in another state required, that before the corporation should commence business it should cause its articles of association to be published in a prescribed form, it was held that it might be regarded as sufficiently incorporated for the bringing of an action without the publication; and that the general reputation and notoriety of the fact that the corporation was doing business in that capacity, coupled with the fact that the contract sued on was made payable to it, was sufficient evidence of the corporate existence. Holmes *v.* Gilliland, 11 Barb. 568. See Unity Insurance Co. *v.* Cram, 43 N. H. 636, where the rule of construction is somewhat more strict.

There seems to be no rule of practice better settled than the rule that where the defendant, in a suit brought by a corporation, pleads the general issue, he thereby concedes the right of the plaintiff to sue in his corporate capacity. Orono *v.* Wedgeworth, 41 Me. 49. The members of a mutual insurance company cannot dispute the corporate existence in a suit on the premium notes in favor of a receiver appointed to wind up the concerns of the company. Hyatt *v.* Whipple, 37 Barb. 595. Misnomer of corporations must be pleaded in abatement, or it will be regarded as waived. Keech *v.* Baltimore & Washington Railway Co., 17 Md. 32.

[11] Highland Turnpike Co. *v.* McKean, 10 Johns. 154. See Breedlove *v.* Martinsville & Franklin Railroad Co., 12 Ind. 114.

[12] Hicks *v.* Launceston, 1 Rol. Abr. 513, 514; s. c. 8 East, 272 note. See also 2 Kent Com. 294. It is not competent for the defendant, in an action by a corporation, to plead that the company has committed acts working a forfeiture of its corporate franchises. That can be determined only by a suit on behalf of the public, brought expressly to try that question. Commonwealth *v.* Morris, 1 Phila. 411; Coil *v.* Pittsburgh Female College, 40 Penn. St. 130; Dyer *v.* Walker, id. 157. Membership in the corporation is not affected by the certificate of shares containing a promise to pay interest till a certain time. McLaughlan *v.* Detroit & Milwaukee Railway Co., 8 Mich. 100.

*12. But in joint-stock business corporations, like banks and railways, and other similar companies, membership is originally constituted by subscription to the shares in the capital stock; and it is subsequently continued by the transfer of such shares, in conformity with the charter and by-laws of the company, and no election by or assent on the part of the corporation is requisite, unless made so by the charter or by-laws.

13. Serious questions often arise in regard to the allotment and acceptance of shares. Courts of equity have sometimes declined to interfere to carry into effect, specifically, contracts with the promoters to accept shares in the company when it should be fully organized.[13] But, we apprehend, the rule is generally otherwise, as we have stated elsewhere.[14] And one who has made the requisite deposit, and also the formal application to the company for an allotment of shares, is still at liberty to withdraw the application at any time before it is accepted or any allotment made.[15]

SECTION II.

Acceptance of Charter or of Modification thereof.

1. New or altered charter must be formally accepted.
2. Subscription for stock sometimes sufficient.
3. Inoperative unless made as required.
4. Assent to beneficial grant presumed.
5. Matter of presumption and inference.
6. Organization or acceptance of charter may be shown by parol.
7. Corporators assenting are bound.
8. Charter subject to recall until accepted.

§ 19. 1. It is requisite to the binding effect of every legislative charter (or modification of such charter) of a joint-stock company, *that it should be accepted by the corporators.[1] This question more commonly arises in regard to the modification of a charter, or the granting of a new charter, the company in either case,

[13] Oriental Inland Steam Co. v. Briggs, 2 Johns. & H. 625; s. c. 4 Law T. N. S. 578. But this case was affirmed by the Lord Chancellor, on the ground that there was no valid or complete contract. 5 Law T. N. S. 477.

[14] *Infra*, § 31, pl. 6. [15] *Ex parte* Graham, 7 Jur. N. S. 981.

[1] King v. Pasmore, 3 T. R. 200, 240; Ellis v. Marshall, 2 Mass. 269. In the latter case there was a charter to certain persons by name, for the purpose of making a street, and subjecting them to assessment for the expense, and it was held not to bind a person named in the act, unless he assented to it.

whether under the old or the new charter, going forward to all appearance much the same as before. In such case, it has usually been regarded as important to show some definite act of at least a majority of the corporation.[2]

2. The question of acceptance becomes of importance often, where a partnership, or some of its members, obtain an act of incorporation. But ordinarily, in the first instance, the assent of the stockholders or corporators is sufficiently indicated by the mere subscription to the stock.

3. Where a statute in relation to a corporation requires acceptance in a prescribed form, and that is not complied with, the corporation can derive no advantage from the act.[3]

4. It has been held, that grants beneficial to corporations may be presumed to have been accepted by them, the same as in the case of natural persons.[4] (*a*)

5. And in the majority of instances, perhaps, the acceptance is rather to be inferred from the course of conduct of the company than from any express act.[5]

6. It may always be proved by oral testimony, as may also the organization of the company, ordinarily.[6]

7. In a case in Ohio, where an amendment of the charter of a bank was passed by the legislature giving the bank certain immunities and privileges, upon the assent of all the stockholders in writing, filed with the auditor of the state, to become personally responsible for the liabilities of the company in the manner prescribed * in the act, it was held, that although all the stockholders did not subscribe the required written declaration, yet if the bank had enjoyed the benefits secured by the amendment, neither those stockholders who did subscribe it, nor the bank itself, can deny

[2] Wilmot J., in Rex *v.* Vice-Chancellor of Cambridge, 3 Bur. 1647; Rex *v.* Amery, 1 T. R. 575; Falconer *v.* Campbell, 2 McLean, 195.

[3] Green *v.* Seymour, 3 Sandf. Ch. 285.

[4] Charles River Bridge *v.* Warren Bridge, 7 Pick. 344, per Parker, C. J., and Wilde, J.

[5] United States Bank *v.* Dandridge, 12 Wheat. 64, per Story, J., and cases cited.

[6] Coffin *v.* Collins, 17 Me. 440; Manchester Bank *v.* Allen, 11 Vt. 302; Angell & Ames Corp. §§ 81–87; Dartmouth College *v.* Woodward, 4 Wheat. 688; Wilmington & Manchester Railroad Co. *v.* Saunders, 3 Jones, 126.

(*a*) And acceptance may be presumed from previous application. Atlanta *v.* Gate City Gaslight Co., 71 Ga. 106; Perkins *v.* Sanders, 56 Miss. 733.

the acceptance of the amendment, as against the claims of third persons.[7]

8. And where the constitution of the state is so altered as to prohibit the grant of special acts of incorporation, it was held, that such an act granted before the new constitution took effect, and which had not been accepted by the corporators, could not be accepted thereafter; as the grant of a charter to those who had not applied for it, until it was accepted, remained a mere offer, and might be withdrawn at the pleasure of the grantors.[8] But where any amendment of the charter of a corporation is fully accepted by the shareholders before the new constitution takes effect, it cannot be affected by any of the provisions thereof; and what shall amount to such acceptance is matter of fact, depending upon the construction of the facts proved.[9]

SECTION III.

Ordinary powers — Control of majority.

1. Ordinary franchises of railways, like those of other private corporations aggregate.
2, 3. Implied right of majority to control.
4. Cannot change organic law.
5. Except in the prescribed mode.
6. Nor accept amended charter.
7. Nor dissolve corporation.
8. May obtain enlarged powers.
9. Equity will not restrain the use of funds for that purpose.
10. But will, for conversion of canal into railway.
11. Right to interfere lost by acquiescence.
12. Acquiescence of one plaintiff, fatal.
13. Railway a public trust.
14. Suit maintained by rival interest.
15. Equity will not restrain majority from winding up except for fraud, &c.

§ 20. 1. The ordinary powers (*a*) of a railway company are the same as those pertaining to other joint-stock aggregate corpora-

[7] Owen *v.* Purdy, 12 Ohio N. s. 73. And a legislative permission to a plank-road company to mortgage its corporate property is an amendment which may be accepted by the vote of the majority. And the same is true of all amendments calculated merely to facilitate the attainment of the existing objects and purposes of the corporation. Joy *v.* Jackson & Michigan Plank Road Co., 11 Mich. 155.

[8] State *v.* Dawson, 16 Ind. 40.

[9] State *v.* Dawson, 22 Ind. 272.

(*a*) A corporation has such powers only as are expressly conferred or as are necessary to the exercise of powers so conferred. Central Railroad & Banking Co. *v.* Smith, 76 Ala. 572. One of the ordinary powers of the cor-

tions, unless restricted by the express provisions of their charter, * or by the general laws of the state. These are perpetual succession; the power to contract, to sue and be sued by the corporate name, to hold land for the purposes of the incorporation, to have a common seal, and to make its own by-laws or statutes, not inconsistent with the charter, or the laws of the state.[1] And it may be proper to say, that it is implied in the grant of all business corporations, that they possess the power to acquire and convey such property, both real and personal, as shall be found reasonably necessary and convenient for carrying into successful operation the purposes of their incorporation. And when there is no limitation upon this power in the act of incorporation, it can only be limited by writ of mandamus or injunction, out of chancery, at the suit of the attorney-general, or by some other proceeding on the part of the people. Until some such public interference, the title of the corporation will be good.

2. The right of the majority of a joint-stock company, whether a copartnership or a corporation, to control the minority, is a consideration of vital importance, and will be more extensively discussed hereafter.[2] (*b*)

3. There can be no doubt that the general principle of the right of the majority to control the minority, in all the operations of the company, within the legitimate range of its organic law, is implied in the very fact of its creation, whether expressly conferred or not.[3] (*c*)

[1] Walf. Railw. 69; 1 Bl. Com. 475, 476; 2 Kent Com. 277, where the power of amotion of members for just cause is added.

[2] *Infra*, §§ 56, 212.

[3] Louisville, Cincinnati, & Charleston Railway Co. *v.* Letson, 2 How. 497. The very definition of a corporation, that it is an artificial being composed of

poration is the power to apply in equity to have fraudulent agreements of its directors set aside; and proceedings by a single shareholder will enure to the benefit of all the shareholders, if promptly instituted. His diligence will be their diligence, and laches will not be imputable to them. Metropolitan Elevated Railway Co. *v.* Manhattan Railway Co., 15 Am. & Eng. Railw. Cas. 1.

(*b*) A member of a corporation assents to the rule of the majority only where the rule is within the powers of the corporation. Leo *v.* Union Pacific Railroad Co., 16 Am. & Eng. Railw. Cas. 452.

(*c*) See Dudley *v.* Kentucky High School, 9 Bush, 578, per Lindsay, J. And see also Durfee *v.* Old Colony Railroad Co., 5 Allen, 242, per Bigelow, C. J.

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4. And perhaps it is equally implied in the fundamental compact, that the majority have no power to change the organic law of * the association, except in conformity to some express provision therein contained.

5. This principle lies at the foundation of all the political organizations in this country, which, in theory certainly, are not liable to be changed by the will of the majority, except in the mode pointed out in the constitution of the state or sovereignty. And corporations are not subject to the ultimate right of revolution, which is claimed to exist in the state, and which may be exercised by the law of force, which is a kind of necessity to which all submit when there is no open way of escape. This could have no application to a commercial company, whose movements are as much under the control of the courts of justice as those of a natural person.

6. And in this country it has been held, that the acceptance by the majority of a corporation of an amendatory act does not bind the minority.[4] (*d*) An amendment to the charter of a corporation, to become binding, must either have been applied for in pursuance of a vote of the stockholders, or else have been accepted by such vote; or it must have been acted under for such a length

different members, and existing and acting as an abstraction, and having its habitation where its functions are performed, presupposes that it must act in conformity with its fundamental law, which is according to the combined results of its members, or the will of the majority. But this will cannot change its fundamental law without changing the identity of the artificial being to which we apply the name of the corporation. See St. Mary's Church, 7 S. & R. 517; New Orleans, Jackson, &c. Railroad Co. *v.* Harris, 27 Miss. 517. See also *Ex parte* Rogers, 7 Cow. 526, which holds that if the charter requires a certain number to be present, in order to the performance of a particular act, it is requisite that the number remain till the act is complete, and if one depart before, though wrongfully, it will defeat the proceedings.

[4] New Orleans, Jackson, &c. Railroad Co. *v.* Harris, 27 Miss. 517. But this rule has some limitations. While the alteration, if fundamental, must have the assent, express or implied, of all the corporators (*infra*, pl. 8; § 56, pl. 3, 7), if it be an amendment within the ordinary range of the original charter, giving increased facilities for the accomplishment of the same objects, it may be accepted by the majority so as to bind the whole company.

(*d*) See Utley *v.* Donaldson, 94 U. S. 47; Whiteside *v.* United States, 93 U. S. 255.

of time as to raise a reasonable presumption of knowledge in the shareholders, and subsequent acquiescence.[5]

7. And a contract of a manufacturing corporation to employ the plaintiff, a stockholder, during the time for which the corporation is established, that being indefinite, is not released by a majority of the company voting to dissolve the corporation and wind up its concerns, discharging the plaintiff from his employment, and transferring the property to trustees to pay the debts and distribute the surplus among the stockholders, and giving notice to the executive department of the state, that they claimed no further interest in their act of incorporation.[6] (*e*)

* 8. But the English cases seem to suppose, that it is incident to every business corporation to obtain such extension and enlargement of its corporate powers as the course of trade, and enterprise, and altered circumstances, shall render necessary or desirable, not altogether inconsistent with its original creation.[7]

9. Hence it was held that a court of equity will not, at the instance of a shareholder, restrain a joint-stock incorporated company, whose acts of incorporation prescribe its constitution and objects, from applying, in its corporate capacity, to parliament, and from using its corporate seal and resources, to obtain the sanction of the legislature to the remodelling of its constitution, or to a material extension and alteration of its objects and powers.[7]

[5] Illinois River Railway Co. *v.* Zimmer, 20 Ill. 654.

[6] Revere *v.* Boston Copper Co., 15 Pick. 351. This case, although put mainly on the ground of plaintiff's rights being independent of the law of the association, yet incidentally involves the right of the majority of the corporators to change its constitutional law. See also Von Schmidt *v.* Huntington, 1 Cal. 55, and Kean *v.* Johnson, 1 Stock. 401, where it is held, that where the charter is granted for a limited time, it must continue in operation till the term expires, unless, perhaps, in case of serious loss, or of consent of all the corporators, and others having any legal interest in the question. The same rule was declared in Louisiana in Lodge No. I. *v.* Lodge No. I., 16 La. An. 53, where it was considered, that a resolution passed by the majority of the members of a corporation giving the property of the company to a new corporation of which the members voting were also members, and the delivery thereof in pursuance of such resolution, was void.

[7] Ware *v.* Grand Junction Waterworks, 2 Russ. & M. 470. Lord BROUGHAM seems here to suppose, that the right of petition to parliament for enlarge-

(*e*) Nor can the majority assent to a consolidation of the corporation with another. Tuttle *v.* Michigan Air Line Railroad Co., 35 Mich. 247; Clearwater *v.* Meredith, 1 Wal. 25.

10. In one case, where the purpose of the company was to apply to parliament for leave to convert part of its canal into a railway, the Vice-Chancellor granted the injunction against applying any of its existing funds to the proposed object.[8] This is the more common view of the subject in this country, and to a great extent in England.[9] (*f*)

11. But this right of the minority of the shareholders to interfere * by way of injunction, to restrain the majority from obtaining permission to alter the constitution of the corporation, may undoubtedly be lost by acquiescence.[10] (*g*) Thus where the shareholders know of the purpose of the directors to apply the funds of the company to the construction of part only of the road, to the abandonment of the remainder, and remained passive for eighteen months, while the directors were applying large sums to the completion of this part only, the court refused to interfere by injunction.[10]

ment of powers, is an implied incident of all business corporations, by which the subscribers are bound, unless some express prohibition is inserted in the charter. But the more common implication in this country certainly is, that the original shareholders are not bound by any such alteration, unless such power exists, in terms, in the original charter, or is auxiliary to existing powers.

[8] Cunliff *v.* Manchester & Bolton Canal Co., 2 Russ. & M. 480, note. But it is here stated, that a few days afterwards, one Maudsley filed a bill against the same company and for a similar object. The cause was heard on its merits, and the suit dismissed with costs. Any act beyond the scope of the constitution of the company requires the consent of all the members. Burmester *v.* Norris, 6 Exch. 796; s. c. 8 Eng. L. & Eq. 487.

[9] *Infra*, §§ 56, 181, 212.

[10] Graham *v.* Birkenhead, &c. Railway Co., 2 Macn. & G. 146; s. c. 6 Eng. L. & Eq. 132; Beman *v.* Rufford, 1 Sim. N. s. 550. Lord Cranworth says, "This court will not allow any of the shareholders to say, that they are not

(*f*) See Railway Co. *v.* Allerton, 18 Wal. 263; *In re* London Discount Co., Law Rep. 1 Eq. 277.

(*g*) Kitchen *v.* St. Louis Railway Co., 69 Mo. 224; Thompson *v.* Lambert, 44 Iowa, 239; Kent *v.* Quicksilver Mining Co., 78 N. Y. 159. But a shareholder is not necessarily precluded by assenting to an illegal contract from applying to the courts to restrain performance. Still it is matter of discretion with the courts. Leo *v.* Union Pacific Railway Co, 19 Fed. Rep. 283. And one shareholder may maintain a bill to restrain the corporation from an act *ultra vires*, though all others assent. Dupont *v.* Northern Pacific Railroad Co., 16 Am. & Eng. Railw. Cas. 456. Nor is a shareholder who has acquiesced in an unauthorized act precluded by such acquiescence from opposing other like acts. Bloxam *v.* Metropolitan Railway Co., Law Rep. 3 Ch. 337.

12. And if one of the shareholders, who has acquiesced in the diversion of the funds, be joined in the suit with others who have not, no relief can be afforded.[11] And there can be no doubt of the soundness of this principle, although the effect of its application may be to produce a fundamental alteration of the constitution of a corporation, and thus to enable them to do what they had no power before to do. But this is only applying to the case the principle of implied consent of all the shareholders, resulting from silence, which is all that is requisite in any case to legalize the alteration of the charter of a private corporation.

13. It is said in one case by an eminent equity judge, Vice-Chancellor STUART:[12] "Although generally speaking . . . there can be no doubt of the soundness of the principle, that the directors and the majority of the company may be restrained from employing money, subscribed for one purpose, for another, however advantageous, . . . and although this is the law as to joint-stock companies, unincorporated and unconnected with public duties or interests, it has not been applied to corporate companies for a public undertaking, involving public interests and public duties under the sanction of parliament. In such cases the court of chancery has * permitted the use of the corporate seal, and the moneys of the company, to obtain the sanction of parliament to purposes materially altering the interests of the shareholders, according to the contract *inter se*. This was done in the case of Stevens *v.* South Devon Railway Company."[13] The learned judge therefore concludes, that although the principle first stated by him may apply to the case of public railway companies in general, "it must be taken to be subject to many qualifications, and requiring much caution and consideration" in its application.

14. The same learned judge further adds, upon the important subject of such proceeding being taken by one in the interest of a

interested in preventing the law of their company from being violated." Ffooks *v.* London & Southwestern Railway Co., 1 Smale & G. 142; s. c. 19 Eng. L. & Eq. 7. But one creditor of a corporation cannot, by injunction, restrain another creditor of the same grade from obtaining prior payment by virtue of an execution issued on a prior judgment. Gravenstine's Appeal, 49 Penn. St. 310.

[11] Ffooks *v.* London & Southwestern Railway Co., *supra;* opinion of Vice Chancellor STUART, and cases cited.

[12] Ffooks *v.* London & Southwestern Railway Co., *supra.*

[13] 13 Beavan, 48; s. c. 12 Eng. L. & Eq. 229; s. c. 9 Hare, 313.

rival company: "It has been suggested that this suit is constituted to serve the purposes of another set of shareholders. If it had been established that the real object of seeking this injunction had been to serve the interests of a rival company, I should have considered that a circumstance of great importance in determining the rights of the plaintiffs to any relief. No doubt it has been held in several cases, that the mere fact that the plaintiffs are shareholders in a rival company is no reason for the court in a proper case refusing its aid to prevent the violation of contracts. But when the fact is established, that, under the pretence of serving the interests of one company, the shareholders in a rival company, by purchasing shares for the purpose of litigation, can make this court the instrument of defeating or injuring the company into which they so intrude themselves, in order to raise questions and disputes on matters as to which all the other members of the company may be agreed, I cannot consider that in such a case it is the province of this court ordinarily to interfere. In questions on the law of contracts, where there is a discretionary jurisdiction in this court, circumstances affecting the condition of the contracting parties, and the origin and situation of their rights in relation to the subject-matter of the contract, deserve great consideration."

15. But in a later English case[14] it was determined by Vice-Chancellor Wood, that the court will not, upon the application of the minority of the members of a corporation, interfere with a resolution of the company voluntarily to wind up its concerns, unless the resolution was obtained by fraud, or by overbearing conduct, or by improper influences. (*h*)

[14] *In re* Imperial Mercantile Credit Association, 12 Jur. N. S. 739.

(*h*) See Merchants' Line *v.* Waganer, 71 Ala. 581.

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*SECTION IV.

Meetings of Company.

1. Meetings, special and general.
2. Special, must be notified as required.
3. Special and important matters, named in notice.
4. Notice of general meetings need not name business.
5. Adjourned meetings, still the same.
6. Company acts by meetings, by directors, by agents.
7. Courts presume meetings held at proper place.
8. Every shareholder may vote, but not by proxy.
9. General owner of shares entitled to vote and act as member.
10. Trustees act as owners.
11. Stock issued in the name of B. to secure a debt, from the corporation to A., cannot be voted on.
12. Shares held as collateral security cannot be changed.

§ 21. 1. By the English statutes meetings of railway companies are distinguished as "ordinary" and "extraordinary." That distinction, in this country, is expressed by the terms "general" and "special." Ordinary meetings are the annual and semi-annual meetings of the company, and such others as are held at stated times and for defined objects, according to the provisions of the charter and by-laws; and extraordinary meetings are such as are held by special call of the directors, or other officer whose duty it is made to call meetings of the company, in certain contingencies usually defined by the statutes.[1]

2. Notice of special meetings must be issued in conformity to the charter and statutes of the corporation, and, where no special provision exists, must be given personally to every member.[2] (*a*)

3. Notice of special meetings should ordinarily specify the general purpose and object of the call. But it is said this is not in-

[1] Statute 8 & 9 Vict. c. 16, § 66.

[2] Wiggin *v.* Freewill Baptist Society, 8 Met. 301. This view seems to be countenanced by Lord KENYON, in Rex *v.* Faversham, 8 T. R. 352. And see Rex *v.* May, 5 Bur. 2681; King *v.* Langhorn, 4 A. & E. 538. See also, cases cited in the argument of this case. But all the cases agree, that if the members attend even without notice, it is sufficient. King *v.* Theodorick, 8 East, 543. A meeting may be general for most purposes, and also special for a particular purpose. Cutbill *v.* Kingdom, 1 Exch. 491.

(*a*) All reasonable presumptions should be made that meetings are regularly held; and service of proper notice on each shareholder will be implied. Sargent *v.* Webster, 13 Met. 497.

dispensable, when it is for the transaction of ordinary business, and that giving security for the debt of a bank, by mortgage of its real estate, is of this character.[3] But where the business is unusual and important, as the election or amotion of an officer, the making of by-laws, or other matter affecting the vital interests and fundamental operations of the corporation, and on a day not * appointed for the transaction of business of this character, or of all business of the corporation, the notice must state the business, or the action upon it will be held illegal and void.[4] (*b*)

4. But as a general rule, it may be safely affirmed, perhaps, that in regard to general meetings of the company, which are for the transaction of all business, no notice of the particular business to be done is necessary.[5] And all the members of the corporation are presumed to have notice of their stated meetings and are bound by the proceedings at such meetings; but there is no presumption that they know what is done at such meetings, so as to affect them with notice of anything done there contemplating future action at any other time than the stated meetings.[6]

5. The adjournment of a general meeting is not a special meeting, but the mere continuance of the general meeting, and requires no notice of the business to be transacted.[5] But if the adjourned

[3] Savings Bank *v.* Davis, 8 Conn. 191.

[4] Rex *v.* Doncaster, 2 Bur. 738; Angell & Ames Corp. §§ 488–496. Zabriskie *v.* Cleveland, Columbus, & Cincinnati Railroad Co., 10 Am. Railw. T. No. 15. And see s. c. affirmed 23 How. 381, where this subject is discussed by Mr. Justice McLean, with the conclusion that where the question to be determined by the company is the guaranty of the bonds of a connecting railway to a large amount, under a statute requiring the consent of the shareholders at a meeting in which two-thirds of the capital stock is represented, it is indispensable that the call for the meeting state the business to be transacted, and be given long enough before the meeting to enable the remotest shareholders to attend, or communicate with their agents or proxies, and also to enable the resident agents of foreign shareholders to communicate with the owners. This seems but a just and reasonable limitation on the power of corporations, in regard to special meetings.

[5] Warner *v.* Mower, 11 Vt. 385; s. c. 1 Redf. Am. Railw. Cas. 78; Wills *v.* Murray, 4 Exch. 843.

[6] People *v.* Batchelor, 22 N. Y. 128.

(*b*) But *quære* if the notice of *any* special meeting should not state the business. *In re* Silkstone Fall Colliery Co , Law Rep. 1 Ch. 38; *In re* Bridport Old Brewery Co., Law Rep. 2 Ch. 191. And see Ehrenfeldt's Appeal, 101 Penn. St. 186.

meeting be for the transaction of any other business than the mere completion of the unfinished business of the stated or special meeting, as the case may be; and more especially where the business is of a character which could not have been legally transacted at the former meeting, it will not afford any warrant for its legality that it is done at an adjourned meeting from one legally constituted originally.[7] But the publicity and general notoriety of a transaction may be sufficient * ground for presuming knowledge of the appointment of one to a corporate office, even to the extent of subjecting such corporator to a penalty for non-acceptance.[8]

6. By the English statutes, railways may act in either of three modes: First, by the general assembly of the shareholders, which, as between them and the directors and other agents of the company, has supreme control of its affairs; second, by its directors; third, by its duly constituted agents.[9] The same general principle is applicable in this country, and at common law.

7. And where the by-laws require the meetings of the company to be held at a particular place, as the counting-house of the company, and the record or evidence does not show that the meetings were held at a different place, it will be presumed they were held at the place designated.[10] (*c*)

8. Every shareholder is, ordinarily, entitled to participate in the meetings of members of the corporation duly called and to vote upon all his shares, according to the mode prescribed in the charter and by-laws of the company, and in conformity with the general laws of the state. But it seems not well settled whether a by-law of the corporation will be sufficient to entitle the members to vote by proxy, and whether some legislative sanction is not requisite to that effect.[11] But where the charter provided that

[7] People *v.* Batchelor, 22 N. Y. 128; Scadding *v.* Lorant, 5 Eng. L. & Eq. 16. See Smith *v.* Law, 21 N. Y. 296.

[8] London *v.* Vanacre, 5 Mod. 438.

[9] Walf. Railw. 70.

[10] McDaniels *v.* Flower Brook Manufacturing Co., 22 Vt. 274.

[11] State *v.* Tudor, 5 Day, 329; where, in mere business corporations, it was considered that a by-law was sufficient to give the power to vote by proxy. But in Taylor *v.* Griswold, 2 Green, 222, the contrary opinion is maintained. See also, 2 Kent Com. 294. There seems no question that in public and eleemosynary corporations the members must attend in person.

(*c*) See *supra*, note (*a*).

"each person being present at an election shall be entitled to vote," it was held to mean actual presence, and votes by proxy were properly excluded.[12]

9. The question is sometimes made, where shares are held by creditors as collateral security for debts, which party, the debtor or the creditor, is entitled to represent the shares, so held, in the meetings of the company. Upon general principles, the party who pledges or mortgages or in any other mode hypothecates shares as security for a debt, is still to be regarded as the general owner, and entitled to all the privileges and subject to all the responsibilities of owner.[13] (*d*)

10. Trustees, whether testamentary or executors, guardians, or others holding shares in joint-stock companies for the ultimate benefit of others, are generally entitled to act as members, and are responsible as such, without reference to the extent of their interest or the amount of the trust estates.[14] (*e*) But in New York even this is denied where the *cestui que trust* is *sui juris*, and, as said, the latter is entitled to vote upon the shares and to act as member, by virtue of the interest vested in the trustee for his benefit.[15]

11. And in California,[16] where a certificate of shares was issued by a corporation in the name of B., in order to secure a debt of the corporation due to A., it was held that the same was illegally issued, and that no one could vote upon it. B. could not, because he was a mere trustee for A., and, as between them, whatever interest was created vested beneficially in A. And A. could not vote upon the stocks, because his property was not that of the general owner, but

[12] Broom *v.* Commonwealth, 2 Phillips, 156.

[13] Cumming *v.* Prescott, 2 Y. & Col. Ex. 488; *Ex parte* Willcocks, 7 Cow. 402; *Ex parte* Barker, 6 Wend. 509; McDaniels *v.* Flower Brook Manufacturing Co, 22 Vt. 274. The same is declared by statute in Massachusetts. Gen. St. c. 68, § 13.

[14] *Ex parte* Hoare, 2 Johns. & H. 229; s. c. 8 Jur. N. S. 713; Fearne & Deane's Case, Law Rep. 1 Ch. App. 231.

[15] *Ex parte* Holmes, 5 Cow. 426. See *infra*, § 40, pl. 5, and cases cited.

[16] Brewster *v.* Hartley, 37 Cal. 15.

(*d*) Vail *v.* Hamilton, 85 N. Y. 453. But when one has sold his shares, he is not entitled to vote, though there has been no transfer on the company's books. McHenry *v.* Jewitt, 26 Hun, 453.

(*e*) *In re* North Shore Ferry Co., 63 Barb. 556.

that of a pledgee. And the corporation could not vote upon its own stock. (*f*)

12. Where shares are passed as collateral security, it is incumbent upon the holder to return the identical shares received by him, whenever the purposes of the pledge are answered. And if the shares have been sold, and others purchased by the transferee at a less price, the transferor will be entitled to the difference. But if the transferor have parted with the shares before he is aware that they have been changed, he cannot maintain a bill to restore the shares originally transferred, since he will be bound to first restore those received by him.[17]

*SECTION V.

Election of Directors.

1. Should be at general meeting, or on special notice.
2. Shareholders may restrain their authority.
3. Company bound by act of directors *de facto*.
4. Act of officer *de facto*, binds third persons.

§ 22. 1. The election of directors is regarded as more important to the interests of the company than most other business, inasmuch as, when duly elected, they hold office for a considerable term, and have all the powers of the corporation in regard to the transaction of its ordinary business, unless especially restrained. They should, therefore, be elected at the regular meetings of the company, and even vacancies should not properly be filled at special meetings, unless special notice of that particular business had been given according to the laws of the company, which include its charter and statutes, and the general laws of the state applicable to the subject.

2. The shareholders may, in a proper assembly, pass statutes, general or special, which shall control the directors, as between them and the company.[1] Where the by-laws of the company

[17] Langton *v.* Waite, 17 W. R. 475.

[1] But where the charter vests the control of the concerns of the company in a select board or body, the shareholders at large have no right to interfere as to what the vote shall be. *In re* Pioneer Paper Co., 36 How. Pr. 111.

(*f*) Nor can any vote be cast on shares whose joint owners disagree

require notice of the meeting for electing directors, but do not specify the time or mode of such notice, it must be given according * to the requirements of the general statutes of the state upon the subject.[2]

3. But the company cannot object that its directors, who have acted as such, were not elected at a meeting properly notified.[3] (*a*)

with the doings of these, their charter agents. Commonwealth *v.* St. Mary's Church, 6 S. & R. 508; Dana *v.* United States Bank, 5 Watts & S. 223, 247; Conro *v.* Port Henry Iron Co., 12 Barb. 27. And courts are always reluctant to interfere with the conduct of directors of a corporation, even at the instance of a majority of the shareholders, and ordinarily will not, when such directors have acted in good faith. State *v.* Louisiana Bank, 6 La. 745.

In Scott *v.* Eagle Fire Co., 7 Paige, 198, it was held, however, that the directors of a joint-stock corporation may be compelled to divide the actual surplus profits of the company among its stockholders from time to time, if they neglect or refuse to do so, without any reasonable cause. But if they abuse their power to make dividends of surplus profits, by dividing the unearned premiums received by them, without leaving a sufficient fund, exclusive of the capital stock, to satisfy the probable losses on risks assumed by the company, it seems they will be personally liable to such creditors of the company, if in consequence of extraordinary losses the company become insolvent.

[2] *In re* Long Island Railroad Co., 19 Wend. 37; s. c. 2 Am. Railw. Cas. 453.

[3] Sampson *v* Bowdoinham Steam Mill Co., 36 Me. 78. Where persons have acted as directors of a railway company, the court will not summarily inquire into the validity of their appointment. In Thames Haven Dock & Railway Co. *v.* Hall, 5 Man. & G. 274, 286, TINDAL, C. J., said: "If the shareholders allow parties to act as directors, it may be they have no right to turn round in a court of justice and say that such parties were not properly elected." In Port of London Assurance Company's Case, 5 De G. M. & G. 465; s. c. 35 Eng. L. & Eq. 178, one registered insurance company agreed to sell its business to another registered insurance company, and a deed of assignment was accordingly executed, whereby the latter company covenanted to indemnify the former against all claims. After the business had been carried on for some time by the purchasing company, that company failed, and both companies were wound up under the Winding-up Acts. On tender by the official manager of the selling company of proof against the purchasing company, in respect of claims satisfied by the selling company, one part of the deed of assignment was produced, having affixed to it the seal of the purchasing company, but another part, alleged to have been executed by the selling

(*a*) Nor can they object to the acts of a board allowed to hold over. Thorington *v.* Gould, 59 Ala. 461. This general rule rests on the ordinary doctrine of the law of agency. See Despatch Line *v.* Bellamy Manufacturing Co., 12 N. H. 223, *per* PARKER, J.

Nor can the validity of the acts of the directors be collaterally called in question on the ground of irregularity in the notice of the meeting at which they were elected.[4] Where the charter fixes the number of directors, and vacancies occur, the act of the board is not thereby invalidated, provided a quorum still remains.[5]

4. An election of directors will not be set aside, because the inspectors of the election were not sworn as required by the statute. This statute is merely directory, and, so far as third persons are *concerned, it is sufficient that the inspectors were elected and entered upon the duties of the office, and became officers *de facto*.[6]

SECTION VI.

Meetings of Directors.

1. Every director should be notified.
2. Adjourned meeting requires no special notice.
3. Board not required to be kept full.
4. Usurpations tried by shareholders or courts.
5. Usage will often excuse irregularities.
6. Decisions of majority usually valid.
   n. 8. Records of proceedings, evidence.
7. The action must be taken at a formal meeting.

§ 23. 1. As a general rule, where corporate powers are vested in certain members, whether the whole body of the shareholders, the directors, or a committee, and the general laws of the state,

company, was not forthcoming. The court held that it was unnecessary to determine whether the selling company had executed the purchase-deed, or whether its directors had exceeded their powers in making the sale; that where a purchaser has enjoyed the subject-matter of a contract, every presumption must be made in favor of its validity; and that if all the proceedings on the part of the directors of the purchasing company, with reference to the purchase, had not been in strict accordance with its own deed of settlement, still, if the contract with the other company was the means of the latter's coming into existence, the former could not act in contravention thereof.

[4] Chamberlain *v.* Painesville & Hudson Railway Co., 15 Ohio St. 225.

[5] Walf. Railw. 71, 72; Thames Haven Railroad Co. *v.* Rose, 4 Man. & G. 552.

[6] *In re* Mohawk & Hudson River Railway Co., 19 Wend. 135; s. c. 2 Am. Railw. Cas. 460.

the charter of the company, or the corporate statutes, contain no directions in regard to assembling the body, it is requisite to give due legal notice to each member. (*a*) Accordingly, when by the rules of a friendly society the power of electing officers was vested in a committee of eleven, at a meeting of the committee, where ten of the members were present, the eleventh not having received notice, and the defendant was removed from the office of treasurer, and the plaintiff appointed in his stead by a majority of votes, it was held that the election was void, although the absent committeeman had, for a considerable period, absented himself from the meetings, and intimated an intention not to attend any more, and although the defendant himself had demanded a poll at the election, and was now objecting to its validity.[1] (*b*)

* 2. But an adjourned general meeting of directors, which is provided for by the general regulations of the board, and is for the transaction of the general business of the company, requires no

[1] Roberts *v.* Price, 4 C. B. 231. In the course of the argument in this case, Cresswell, J., referred to King *v.* Langhorn, 4 A. & E. 538, and in his opinion said he thought that case "directly applicable." In Smyth *v.* Darley, 2 H. L. Cas. 789, 803, it is said: "The election being by a definite body, on a day of which, till summons, the electors had no notice, they were all entitled to be specially summoned; and if there were any omission to summon any of them, unless they all happened to be present, or unless those not summoned were beyond summoning distance, — as, for instance, abroad, — there could not be a good electoral assembly; and even an unanimous election by those who did attend would be void." *Infra*, § 211; Great Western Railway Co. *v.* Rushout, 5 De G. & S. 290; s. c. 10 Eng. L. & Eq. 72.

(*a*) Otherwise the majority might in effect exclude the minority from participation in the management of the affairs of the company. Herrington *v.* Liston, 47 Iowa, 11; Doyle *v.* Mizner, 42 Mich. 332; Stoyestown Turnpike Co. *v.* Craver, 45 Penn. St. 386. But if a quorum be present due notice to all will be presumed. Chohan Insurance Co. *v.* Holmes, 68 Mo. 601.

(*b*) The weight of authority seems to support the proposition that the directors may hold their meetings out of the state, unless otherwise provided by the charter. See Bellows *v.* Todd, 39 Iowa. 209; Reichwald *v.* Commercial Hotel Co., 106 Ill. 439; Ormsby *v.* Vermont Copper Mining Co., 56 N. Y. 632. And see Wood Hydraulic Mining Co. *v.* King, 45 Ga. 40, where it is said that as the authorities are now uniform that an agent of the corporation may act out of the state, and as directors are but agents, there would seem to be no reason why they should not so act.

special notice of either time or place, or of the business to be transacted.[2]

3. But where the charter of a railway provides that its business shall be carried on under the management of twelve directors, to be elected in a particular mode pointed out, and that where vacancies shall occur it shall be lawful for the remaining directors to fill them, it was held that this provision did not require that the board should be always full; but was merely directory, as to the mode of filling vacancies.[3]

4. Where it is complained that the existing board of directors have usurped their places in violation of the wishes of the majority of the shareholders, the question should be referred to a meeting of such shareholders,[4] or it may be tried upon a *quo warranto*.[5]

5. But in practice, in this country, it is believed that most of the routine business of railway and other joint-stock commercial companies is transacted through the agency of sub-committees of the board of directors, and that, where the voice of the board is taken it is more commonly done without any formal assembly of the board. And long-established usage as to particular companies, in regard to the mode of conducting an election, has been held of binding force in regard to such company.[6] And the same course of reasoning might induce courts to sanction a practice, which had become universal from its great convenience, although not strictly in accordance with the principles of the decided cases upon analogous subjects, or the results of *a priori* reasoning.

6. The decision of a majority of the board of directors is usually * regarded as binding upon the company; (*c*) and the assembling

[2] *Supra*, § 21. Wills *v.* Murray, 4 Exch. 843. But see Reg. *v.* Grimshaw, 10 Q. B. 747.

[3] Thames Haven Dock & Railway Co. *v.* Rose, 4 Man. & G. 552; *supra*, § 21; Wills *v.* Murray, 4 Exch. 843.

[4] *Infra*, § 211.

[5] *Infra*, § 166.

[6] Attorney-General *v.* Davy, cited 1 Ves. Sen. 419. It would savor of bad faith, where the business of the company has been transacted in a particular mode, to allow the company to repudiate the acts of its agents because the transaction has proved disadvantageous, if it might take the benefit of them if they proved successful.

(*c*) State *v.* Smith, 48 Vt. 266; Baldwin *v.* Thunder Bay Boom Co., 42 Mich. 536; Doyle *v.* Mizner, Ib. 332; Baldwin *v.* Canfield, 26 Minn. 43.

of a majority will be treated as a legal quorum for the transaction of business, unless the charter or by-laws contain some specific provision upon the subject;[7] and notice to the absent directors will be presumed unless the contrary appears. (*d*) The general rule upon this subject is, that the act of a majority of a body of public officers is binding; but *that if they be of private appointment*, all must act, and, in general, all must concur, unless there is some provision to accept the decision of a majority. In this respect, railway directors certainly come under the former head. The proper distinction upon the general subject seems to be, that where the matter is of public concern, and of an executive or ministerial character, the act of the majority of the board will suffice, although the others are not consulted. But where the function is judicial, involving a determination of some definite question, the whole body must be assembled and act together. If the matter is of public concern, the decision of a majority will bind; but in private concerns, as arbitrations, all must concur.[8] (*e*)

[7] Cram *v.* Bangor House, 3 Fairf. 354; Sargent *v.* Webster, 13 Met. 497; 2 Kent Com. 293 and notes; King *v.* Whitaker, 9 B. & C. 648; Commonwealth *v.* Canal Commissioners, 9 Watts, 466; *Ex parte* Wilcocks, 7 Cow. 402; Field *v.* Field, 9 Wend. 394, 403, where it is held that any number of stockholders are a quorum if the others are properly summoned. But as to the directors, it is requisite that a majority attend. 2 Kent Com. 293; Cahill *v.* Kalamazoo Insurance Co., 2 Doug. Mich. 124; Holcomb *v.* New Hope Delaware Bridge Co., 1 Stock. 457.

[8] Green *v.* Miller, 6 Johns. 39; King *v.* Great Marlow, 2 East, 244; Battye *v.* Gresley, 8 East, 319; Rex *v.* Coln St. Aldwins, Bur. Set. Cas. 136; King *v.* Winwick, 8 T. R. 454. But it has never been held that the entire board of directors must assemble; it is enough if all be summoned, and a majority attend. See note 7. Edgerly *v.* Emerson, 3 Fost. N. H. 555. If the doings of directors are not recorded, they may be proved by parol. Ib. The president has a right to vote on all questions to be determined by the president and directors. McCullough *v.* Annapolis & Elk Ridge Railroad Co., 4 Gill, 58.

The records of the clerk of a railway company, of the proceedings of the directors in making calls, may be used as evidence by the company in suits for calls, against one who subscribed for shares and was one of the grantees of the charter and a director at the time of making such calls, and who had exercised the rights of a shareholder from the first. White Mountains Railroad

(*d*) See *supra*, note (*a*).

(*e*) Minutes of the action of a director at a meeting of the board are not to be controlled by parol. Metropolitan Elevated Railway Co. *v.* Manhattan Railway Co., 15 Am. & Eng. Railw. Cas. 1.

* 7. But where the authority of a quorum of directors is required for the execution of a bond, it must be given at a formal meeting, whereat the members of the quorum are all present at once.[9]

SECTION VII.

Qualification of Directors.

1. A contractor cannot be a director.
2. *Aliter* of the company's banker.
3. Mortgaging of stock does not disqualify.
4. Bankruptcy will not vacate office, nor will absence.
5. Company compelled to fill vacancies in board.

§ 24. 1. By the Companies' Clauses Consolidation Act,[1] (*a*) it is provided, that no person interested in any contract with the company shall be a director, and no director shall be capable of being interested in any contract with the company; and if any director, subsequent to his election, shall be concerned in any such contract, the office of director shall become vacant, and he shall cease to act as such. Under this statute it was held, that, if a director enters into a contract with the company, the contract is not thereby rendered void, but the office of director is vacated.[2]

Co. *v.* Eastman, 34 N. H. 124. As to the effect of the records of the doings of the corporation, kept by their own officer, being evidence but not indispensable evidence of such facts, when proved by third parties, see Hudson *v.* Carman, 41 Me. 84; Coffin *v.* Collins, 17 Me. 440; Penobscot Railway Co. *v.* White, 41 Me. 512. See also Indianapolis & Cincinnati Railroad Co. *v.* Jewett, 16 Ind. 273.

[9] D'Arcy *v.* Tamar, Kethill, & Callington Railway Co., 4 H. & C. 463; s. c. 12 Jur. N. S. 518.

[1] Stat. 8 & 9 Vict. c. 16.

[2] Foster *v.* Oxford, Worcester, & Wolverhampton Railway Co., 13 C. B. 200; s. c. 14 Eng. L. & Eq. 306. This case is discussed in a later case in the House of Lords. Aberdeen Railway Co. *v.* Blakie, 1 Macq. Ap. Cas. 461.

(*a*) Unless some special qualifications are required by the charter, any person of sound mind capable of acting as agent of another is eligible as a director; and, unless the charter provides otherwise, ownership of shares is not necessary. See *In re* St. Lawrence Steamboat Co., 44 N. J. Law, 529; Stock's Case, 33 Law J. Ch. 731. The charter usually provides, however, for such ownership.

2. But it has been held, that being a member of a banking company, who were the bankers and treasurers of the railway, and who, as such, received and gave receipts for calls, and paid checks drawn by the directors, will not disqualify one from acting as director, but that this clause only applied to such contracts as were made with the company in the prosecution of its enterprise.[3]

3. Where the qualification of a director consisted in owning a certain number of the shares, the qualification is not lost by a mortgage of the shares.[4]

4. Neither the bankruptcy nor absence of a director, and voluntarily * ceasing to act as such, will put an end to his character of director, unless it be so provided in the deed of settlement.[5]

5. If shareholders are dissatisfied with the board of directors not being full, that may be a ground of applying for a mandamus to compel the company to complete the number.[6]

[3] Sheffield, Ashton-under-Lyne & Manchester Railway Co. *v.* Woodcock, 7 M. & W. 574; s. c. 2 Railw. Cas. 522.

[4] Cumming *v.* Prescott, 2 Y. & Col. Ex. 488.

[5] Phelps *v.* Lyle, 10 A. & E. 113. But if one abscond from his creditors the office is thereby vacated. Wilson *v.* Wilson, 6 Scott, 540.

[6] Thames Haven Dock & Railway Co. *v.* Rose, 3 Railw. Cas. 177; s. c. 4 Man. & G. 552, *per* MAULE, J.; Mozley *v.* Alston, 1 Phillips, 790.

*CHAPTER V.

PREROGATIVE FRANCHISES.

1. Control of internal communication in a state a prerogative franchise.
2. Grant thereof confers powers pertaining exclusively to sovereignty, as taking tolls, and the right of eminent domain.

§ 25. 1. Railways possess also many extraordinary powers or franchises which partake more or less of the quality of sovereignty, and which it is not competent for the legislature even to delegate to ordinary corporations. These are sometimes called the prerogative franchises of the corporation. They exist in banks, which practically supply the currency of the country or its representative, and railways, which have already engrossed the chief business of internal communication in this country, and almost throughout the civilized world. And both currency and internal communication between different portions of a state are exclusively the prerogatives of sovereignty.

2. In saying that it is not competent for the legislature to confer prerogative franchises upon all corporations, nothing more is intended than that these prerogative franchises do not appertain to all the operations of business, and must therefore of necessity be limited to those persons, whether natural or artificial, which are occupied in matters of a sovereign or prerogative character, and which thus render an equivalent for the franchises conferred.[1] This subject will be discussed more in detail under the titles of Tolls and Eminent Domain.

[1] State *v.* Boston, Concord & Montreal Railroad Co., 25 Vt. 433; s. c. 1 Redf. Am. Railw. Cas. 81. The right to build and use a railway, and take tolls or fares, is a franchise of the prerogative character, which no person can legally exercise without some special grant from the legislature. But the legislature may confer this franchise on a foreign corporation, so as to enable it to take land for the purpose of constructing a public improvement in the state. Morris Canal & Banking Co. *v.* Townsend, 24 Barb. 658. And what title shall be acquired by such foreign corporation, and whether the proposed amendment will be likely to prove beneficial to the citizens of the state, is a question solely within the discretion of the legislature. Ib.

*CHAPTER VI.

BY-LAWS AND STATUTES.

SECTION I.

Power of making By-Laws or Statutes.

1. May make by-laws to control conduct of passengers.
   n. (a) Or any reasonable by-law fit to effectuate objects of incorporation.
2. They must be reasonable and not against law.
3. Power may be implied, where not express.
4. By-laws need not be in any particular form unless specially required.
5. Usual power of English companies.
6. Model code of by-laws framed by Board of Trade in England.
7. Company may demand higher fare if paid in cars.
8. Public statutes control by-laws.
9. Cannot make by-laws subjecting shares to forfeiture.
10. Cannot refuse to be responsible for baggage.
11. Statutes operate on members from promulgation ; on others from notice of the same.
12. Regulations, for accommodation of passengers, must yield to the right of others to be carried.

§ 26. 1. It is incident to every corporation to enact by-laws or statutes for the control of its officers and agents, and to regulate the conduct of its business generally. And in the case of railways this includes the regulation of the conduct of passengers and others who are in any way connected with them in business, although not their agents.

2. This power is subject to some necessary limitations. Such by-laws must not infringe the charter of the company or the laws of the state, must not be unreasonable, and must be within the range of the general powers of the corporation.[1] (*a*) And the

[1] Elwood *v.* Bullock, 6 Q. B. 383; Calder Navigation Co. *v.* Pilling, 14 M. & W. 76; Child *v.* Hudson Bay Co., 2 P. Wms. 207; Angell & Ames Corp. § 10; 2 Kent Com. 296 ; Davis *v.* Lowell Meeting-House, 8 Met. 331.

(*a*) The majority have implied authority to make any by-law which is reasonable and fit to effectuate the objects of incorporation. Harrington *v.* Workingmen's Benevolent Association, 70 Ga. 340; Security Loan Association *v.* Lake, 69 Ala. 456. All by-laws must be reasonable and consistent with the principles of the law of the land. Kent *v.* Quicksilver Mining Co., 78 N. Y. 182.

question, whether reasonable or not, is to be determined by the jury under instructions from the court, being a mixed question of law and fact.[2] But in a case in New Jersey[3] it was decided * that the question whether the regulation of a corporation affecting third persons is reasonable is a question of fact; but the validity of a by-law of a corporation, which affects only its members, is a question of law to be determined by the court. The general powers of business corporations to enact by-laws was extensively and learnedly discussed in a somewhat recent case which passed through the Queen's Bench, the Exchequer Chamber, and was finally determined in the House of Lords.[4] The case turned mainly upon the reasonableness of the by-law, which excluded any person who had become bankrupt or notoriously insolvent from becoming one of the governing body of the company. The provision of the by-law was held entirely reasonable; but that having admitted the party to the office, he could not be removed without formal proceeding upon notice and hearing. And where one part of a by-law is reasonable it may stand, although connected with another part which is not reasonable.[5]

3. By-laws in violation of common rights are void.[6] The power to make by-laws is usually given in express terms in the charter. And where such power to make by-laws is given in the charter upon certain subjects to a limited extent, this has been regarded as an implied prohibition beyond the limits expressed, upon the familiar maxim, *Expressum facit cessare tacitum.*[7]

4. By-laws, unless by the express provisions of the charter or general statutes of the state, are not, in this country, required to

In a case in Kentucky it is said the power of a corporation to make by-laws is limited by the nature of the corporation and the laws of the country. It can make no rule contrary to law, good morals, or public policy. Sayre *v.* Louisville Union Benevolent Association, 1 Duvall, 143.

[2] Day *v.* Owen, 5 Mich. 520.

[3] Ayres *v.* Morris & Essex Railway Co., 5 Dutcher, 393.

[4] Reg. *v.* Saddlers' Company, 6 Jur. N. S. 1113; s. c. 7 Jur. N. S. 128; s. c. 9 Jur. N. S. 1081; s. c. 4 Best & S. 1059; s. c. 10 H. L. Cas. 404.

[5] Reg. *v.* Lundie, 8 Jur. N. S. 640.

[6] Hayden *v.* Noyes, 5 Conn. 391; Adley *v.* Whitstable Co., 17 Ves. 315; Clark's Case, 5 Co. 64. When the penalty of a by-law is imprisonment, it is void as against Magna Charta; but power to imprison may be given by statute.

[7] Child *v.* Hudson Bay Co., 2 P. Wms. 207.

be enacted or promulgated in any particular form, but only to be enacted at some legal meeting of the corporation. But in England it is generally considered requisite that by-laws be made under the common seal of the corporation, and that in regard to railways, by-laws affecting those who are not officers or servants of the company should have the approval of the Board of Trade or Railway Commissioners.[8]

5. By many of the special railway charters in England, and by the Companies' Clauses Consolidation Act of 1845, it is provided * that railway companies may make by-laws under their common seal "for the purpose of regulating the conduct of the officers and servants of the company, and for the due management of the affairs of the company in all respects whatever." And they have power to enforce such by-laws, by penalty, and by imprisonment for the collection of such penalty. But a by-law requiring a passenger, not producing or delivering up his ticket, to pay fare from the place of the departure of the train, was held not to be a by-law imposing a penalty, and therefore not justifying the imprisonment of such passenger.[9]

6. The statute requires a copy of such by-laws to be furnished every officer and servant of the company, liable to be affected thereby. The code of by-laws framed by the Board of Trade in England for the regulation of travel by railway, and generally adopted there, is certainly very judicious, and if some similar one could be adopted and enforced here, it would accomplish very much towards security, sobriety, and comfort, in railway travelling, and tend to exempt the companies from much annoyance and very often from loss.[10]

[8] Walf. Railw. 219; Hodges Railw. 552, 553.

[9] Chilton *v.* London & Croydon Railway Co., 16 M. & W. 212; s. c. 5 Railw. Cas. 4. PARKE, B., there says: "This is not the case of a penalty, but the mere demand of a fare. Any passenger who does not, at the end of his journey, produce his ticket, may have broken his contract with the company, and be liable to pay his full fare from the most remote terminus. But this is not a penalty or forfeiture, under section 163, giving a right to arrest for non-payment of a penalty or forfeiture." See also the opinion of ROLFE, B., from which it appears that the by-law was considered valid.

[10] See Hodges Railw. 453, where the rules, relating to the purchase of tickets before taking seats in the cars, to smoking or otherwise interfering with the comfort of passengers, injuring cars, &c., are set out at large.

*7. In a case in Vermont, it was held, that railway companies have the power to make and enforce all reasonable regulations in regard to the conduct of passengers, and to discriminate between fares paid in the cars and at the stations, and to remove all persons from their cars who persist in disregarding such regulations, in a reasonable manner and proper place, although between stations.

8. But this may be controlled as to existing railways even, by general legislation of the state. And where a statute gave all railways the power to remove from their cars, *at the regular stations*, those who violated any of the by-laws or regulations of the company, this was held to carry an implied prohibition from removing such persons at other points.[11] And where one refuses to pay fare, and the train is stopped for the purpose of putting him off the train, at a dwelling-house, as by the statute of New York is *allowed, the right of the conductor is not affected by a subsequent offer to pay fare.[12] So, too, one may be ejected from the cars by the conductor for disorderly conduct, and in justification, it is competent to prove any improper conduct during the entire passage, and this cannot be controverted by general evidence of the good reputation of the person for sobriety. And one may be expelled, also, for refusing to surrender his ticket to the conductor on request, in conformity with the general regulations of the company.[13]

9. But it has been held, that a general power to make by-laws for the regulation of the use of a canal, will not justify the proprietors in closing the navigation of the canal on Sundays,[14] or in making by-laws, subjecting the shares to forfeiture for non-pay-

[11] Stilphin *v.* Smith, 29 Vt. 160; Chicago, Burlington & Quincy Railroad Co. *v.* Parks, 18 Ill. 460. See Hilliard *v.* Goold, 34 N. H. 230, in which it is held that railways may lawfully discriminate between fare paid in the cars and fare paid at the stations. See *infra*, § 28, note 17; *infra*, § 160. See also Chicago & Alton Railroad Co. *v.* Roberts, 40 Ill. 503; Illinois Central Railroad Co. *v.* Sutton, 42 Ill. 438; Chicago & Northwestern Railway Co. *v.* Peacock, 48 Ill. 253; Tarbell *v.* Central Pacific Railroad Co., 34 Cal. 616.

[12] People *v.* Jillson, 3 Parker C. C. 234.

[13] People *v.* Caryl, 3 Parker C. C. 326.

[14] Calder Nav. Co. *v.* Pilling, 14 M. & W. 76; s. c. 3 Railw. Cas. 735. But it is questionable whether this case is maintainable, in this country, on any such grounds.

ment of calls, unless that power is expressly given by the charter or by statute.[15]

10. And a by-law declaring that the company would not be responsible for a passenger's baggage, unless booked and the carriage paid, is bad, as inconsistent with the general law, allowing railway passengers to carry a certain amount and kind of baggage.[16]

11. The members of a joint-stock company are affected by all binding statutes of the corporation from the time of their enactment, without any formal notice of their existence. And all persons legally affected by such statutes, rules, or by-laws of the corporation, must conform to their requirements from the time they become aware of their existence.[17]

12. Regulations as to the accommodation of passengers must yield to the rights of others to be carried, and the accommodation of passengers during the transit is subject to such general rules *and regulations as the company see fit to make, provided they are reasonable, and whether that be so is to be determined by the jury, under suitable instruction from the Court. But these rules and regulations must have for their object the accommodation of the passengers generally, and must be of a permanent nature, and not made for a particular emergency or occasion.[18]

[15] *In re* Long Island Railroad Co., 19 Wend. 37; s. c. 2 Am. Railw. Cas. 453.

[16] Williams *v.* Great Western Railway Co., 10 Exch. 15; s. c. 28 Eng. L. & Eq. 439. But it seems questionable whether the principle of this decision can be maintained. It seems to be no reasonable abridgment of the right of a passenger to carry a certain weight and kind of baggage, to require it to be booked and the carriage to be paid.

[17] Woodfin *v.* Asheville Mutual Insurance Co., 6 Jones, L. N. C. 558.

[18] Day *v.* Owen, 5 Mich. 520. The practice in America, in almost all modes of passenger transportation, is to cram the carriages to the point of suffocation, if passengers offer. But that is never allowed in England or on the Continent. And it would seem that a passenger-carrier, supplied with sufficient accommodations for all who ordinarily offer, had better be excused from carrying any excess which might occasionally offer, than be compelled to carry them at the expense of the discomfort and suffering of all the other passengers.

SECTION II.

By-Laws regulating the use of stations and grounds.

1. May exclude persons without business.
2. May regulate the conduct of others.
3. Superintendent may expel for violation of rules.
4. Probable cause will justify.
5. In civil suit must prove violation of rules.
6. Regulation of stations and traffic by means of injunction. Equality of charges.
7. Through trains will not be required unless reasonably necessary for public accommodation.
8. Mode of enforcing search warrants in freight stations.
9. The right of railway companies to exclude persons having no business, from their stations.
10. Company bound to maintain platforms about passenger stations in safe condition.

§ 27. 1. Questions have sometimes been made, in regard to the right of railway companies to exclude persons from their grounds who had no business to transact there connected with the company, * or to establish regulations or by-laws to govern the conduct of such persons as had occasion to come there, and to exclude others. But, upon the whole, there seems little ground to question the right.[1] (*a*)

2. A railway corporation has authority to make and carry into effect reasonable regulations for the conduct of all persons using the railway, or resorting to its depots, without prescribing such regulations by formal by-laws; and the superintendent of a railway station, appointed by the corporation, has the same authority by delegation.

[1] Barker *v.* Midland Railway Co., 18 C. B. 46; s. c. 36 Eng. L. & Eq. 253; Commonwealth *v.* Power, 7 Met. 596; s. c. 1 Am. Railw. Cas. 389; Hall *v.* Power, 12 Met. 482.

(*a*) Thus it has been held that a company may exclude hotel runners who come upon the platforms of the station to solicit patronage, and eject them, using no more force than may be necessary for the purpose. Landrigan *v.* State, 31 Ark. 50. Or hackmen, expressmen, peddlers, or "loafers." Summitt *v.* State, 8 Lea, Tenn. 413. And that any one not there for the purpose of coming or going by train, while not a trespasser, may be requested to leave, and, on refusal, may be ejected. Johnson *v.* Rock Island & Pacific Railroad Co., 51 Iowa, 25.

3. Such superintendent may exclude from the stations and grounds persons who persist in violating the reasonable regulations prescribed for their conduct, and thereby annoy passengers, or interrupt the officers and servants of the company in the discharge of their duty. Thus, where the entrance of innkeepers and their servants into a railway station to solicit passengers, to go to their houses, produces such effect, they may be excluded from coming within the station; and if, after notice of a regulation to that effect, they attempt to violate it, and after notice to leave, refuse to do so, they may be forcibly expelled by the servants of the company, using no unnecessary force.

4. And where an innkeeper had been accustomed to annoy passengers in this manner, and had been informed by the superintendent of the station that he must do so no more, but still continued the practice, and afterwards obtained a ticket for a passage in the cars, with the *bona fide* intention of entering the cars as a passenger, and went into the station on his way to the cars, and the superintendent, believing he had entered for his usual purpose, ordered him to go out, and he did not exhibit his ticket, nor give notice of his real intention, but pushed forward towards the cars, and the superintendent and his assistants removed him from the station, using no unnecessary force, the removal was held justifiable, and not an indictable offence.[2]

5. But the superintendent cannot remove a person from the station and grounds of the company, merely because such person, in the judgment of the superintendent and without proof of the fact, violated the regulations of the company, or conducted himself * offensively towards the superintendent.[3] And it was said if such person is removed for an alleged violation of the regulations of * the company, and it finally is shown that he did not in fact

[2] Commonwealth *v.* Power, 7 Met. 596; Markham *v.* Brown, 8 N. H. 523.

[3] Hall *v.* Power, 12 Met. 482; s. c. 1 Am. Railw. Cas. 440. From this case and Commonwealth *v.* Power, 7 Met. 596, it would seem, as the points are stated, that as to justification of a defendant who acted in good faith and upon probable cause, the court distinguished between a civil suit for damages and a prosecution for assault and battery; but the distinction would seem to be unwarranted and the court did not intend to make it. The law as to the power of the superintendent to remove persons conducting themselves offensively or in a way to interfere with persons properly at the station, &c., is well stated by Shaw, C. J., in Commonwealth *v.* Power.

violate any of such regulations, he may recover damages of the superintendent of the station by whose order he was removed, notwithstanding such superintendent acted in good faith. And in such case, it is not competent to show that the plaintiff had been guilty of former violations of other regulations of the company.

6. Under the English statute of 17 & 18 Vict., requiring among other things that the Superior Courts of Westminster Hall shall enforce the duty of railway companies in regard to their traffic in goods and passenger transportation, it was held a proper ground for granting a rule to show cause why an injunction should not issue, that at one of the stations of the company, where an important junction with other roads occurred, no covered place was provided for the accommodation of the passengers. But the English Railway Traffic Act does not justify the courts in requiring the companies to make the same charges, or to afford the same facilities in regard to return tickets of a particular class, on one of their branches, which they do upon others. To constitute inequality of charge, it must be for passing over the same line, or the same part of the line.[4]

*7. To justify the courts in interfering to require the companies constituting a continuous line to run through trains, it must be shown that public convenience requires it, and that it can reasonably be done. And they will not interfere in such cases where there is another route where through tickets may be obtained, although somewhat longer, no additional cost or serious loss of time being thereby incurred, and there being no general complaint of public inconvenience on that account.[5]

8. A railway freight station or warehouse kept by a railway company for the storage of goods transported by them, is not exempt from the process of search warrant under the statute against the keeping and sale of spirituous liquors; nor is it necessary that such warrant should be executed during the usual business hours, or that the officer should consult the person who has charge of the station.[6]

[4] Caterham Railway Co. *v.* London & Brighton & South Coast Railway Co., 40 Eng. L. & Eq. 259; s. c. 1 C. B. N. S. 410.

[5] Barret *v.* Great Northern Railway Co., 1 C. B. N. S. 423.

[6] Androscoggin Railway Co. *v.* Richards, 41 Me. 233.

9. The Supreme Court of Vermont[7] (*a*) decided that *prima facie* railway stations were open to all persons, but the company may revoke such implied license to all, and exclude all except such as have legitimate business there growing out of the operation of the road or with the officers or employés of the company. They may direct all others to leave the station, and, on refusal, may remove them. It is the duty of such persons as desire to remain in such stations, for the purpose of taking the cars or for any other lawful purpose, to make known the same to the officers and employés of the company on request. And if such is the regulation of the company, one purposing to become a passenger may be required to purchase his ticket in order to remain in the station. This right of entering the station to take the cars can only be in conformity with the regulations of the company, and within a reasonable time only before the departure of the trains, which will depend upon the particular circumstances of each case. It is not requisite the person should enter the station with the purpose of taking passage : it is enough that he entertains the purpose at the time he refuses to leave, and conducts himself in other respects in conformity with the regulations of the company.

10. As to such persons as have lawful business with the road and just occasion to come upon the platforms about passenger stations, including passengers and those who come to see them off or to receive them, as well as the employés of the company, there is a duty resting upon the company to maintain the structure in such strength as to support all who may thus have occasion to go upon it.[8] (*b*)

[7] Harris *v.* Stevens, 31 Vt. 79; Gillis *v.* Pennsylvania Railroad Co., 59 Penn. St. 129.

[8] Gillis *v.* Pennsylvania Railroad Co., 59 Penn. St. 129.

(*a*) And see *supra*, note (*a*). (*b*) See *infra*, § 192, note (*a*).

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*SECTION III.

By-Laws or Rules as to Passengers.

1. By-laws considered as statutes.
2. Considered as rules, or regulations.
3. Requiring larger fares for shorter distances.
4. Requiring passengers to go through in same train.
n. 5. Discussion of cases in point.
5. Arrest of passenger by company's servants.
6. How far company responsible.
7. Company liable for act of servant.
8. By-law must be published.
9. Excluding merchandise from passenger-trains.
10. Discrimination between fare paid in cars and fare paid at stations.
n. (c) Regulations requiring passengers to buy and exhibit tickets, &c.
11. Liability for excess of force.
12. Officer *de facto* may enforce rules of company.
13. Company cannot enforce rule against passenger, when itself in fault.
14. Consent of company to tariff of fares, how presumed.
15. Discrimination on the ground of color.
16. Regulations and duties of street railways.

§ 28. 1. A distinction is sometimes made between by-laws and orders or regulations, the former being supposed, in strictness of language, to have reference exclusively to the government of their own members and of their corporate officers.[1] And it is true that such other ordinances as any owner of the buildings and grounds about a railway station, employed in carrying passengers, might find it convenient to establish, are certainly not what is ordinarily understood by the by-laws, or statutes, of the corporation.

2. But in the English cases they are both called by-laws.[2] Thus a by-law, that each passenger, on booking his place, should be furnished with a ticket, to be delivered up before leaving the company's premises, and that each passenger, not producing or

[1] Shaw, C. J., in Commonwealth *v.* Power, 7 Met. 596, 601.

[2] Chilton *v.* London & Croydon Railway Co., 16 M. & W. 212; s. c. 5 Railw. Cas. 4. It would seem from the opinion of Parke, B., that the by-law was regarded as valid, but as imperfect, in not subjecting the passenger to a penalty in terms. The other judges doubted whether the act was intended to give the company power to imprison the plaintiff, or any one, except for some offence against the act. But all seemed to concur in the opinion that the passenger was bound to comply with the regulation, or submit to the alternative. State *v.* Overton, 4 Zab. 435; Baltimore & Ohio Railroad Co. *v.* Blocher, 27 Md. 277.

delivering up his ticket, should be required to pay fare from the place whence the train originally started, was held not to be a by-law imposing a penalty.[2] And that therefore the non-production of the ticket, with which a passenger had been furnished, and his refusal to pay fare from the place whence the train started, * did not justify his arrest, but only rendered him liable to pay fare from the place whence the train started.

3. But in an English case,[3] where the company had made a legal by-law, that any passenger who should enter a carriage of the company, without first having paid his fare, should be subjected to a penalty not exceeding 40*s.*, a passenger, desiring to go to Diss station, where the fare was 7*s.*, procured a ticket for Norwich, a more distant station on the line, but where the fare was but 5*s.*, in consequence of competition, and entered the carriage accordingly, and at Diss offered to surrender his ticket, but refused to pay the difference in fare; he was prosecuted for the penalty, and a majority of the Court of Queen's Bench held he was not liable on the ground that he had paid his fare before entering the carriage. Lord CAMPBELL said, "I cautiously abstain from expressing any opinion, as to the power of the company to make special regulations or by-laws, so as to enforce larger fares for shorter distances." — "Had not Frere, within the meaning of the by-law, paid his fare, before he entered the carriage? I think he had. He had paid the full fare from Colchester to Norwich, — all that was required of him; and he cannot be said to be a person who had entered the company's carriage without payment of fare." [4]

4. It had been held that a regulation requiring passengers to go through, in the same train, and that if one do not, requiring fare

[3] Reg. *v.* Frere, 4 Ellis & B. 598; s. c. 29 Eng. L. & Eq. 143.

[4] But the argument of Lord CAMPBELL on this point does not seem altogether satisfactory. Whether the passenger had paid his fare depended on the validity of the by-law, and could not be fairly determined on any other basis. Frere had paid fare to Norwich, but had not paid fare to Diss, unless the by-law was void; so that the validity of the by-law did seem to be necessarily involved in the decision. And the decision of the court, although not professing to do so, did virtually disregard it. For if the by-law was valid, Frere had no more paid his fare than if he had taken a ticket to a station short of his destination. And if the by-law meant anything sensible, it meant payment of fare to the intended destination.

for the remainder of the route, is valid.[5] (*a*) * And where the ticket was marked "good only two days after date," it was held to be

[5] Cheney *v.* Boston & Maine Railway Co., 11 Met. 121; see 2 Redf. Am. Railw. Cas. 447. This case was as follows: The passenger bought a ticket not knowing of the regulation. The conductor told him and offered to refund his money, deducting a sum in proportion for the distance already travelled. The passenger refused, and demanded his ticket in exchange for the conductor's check, marked "good for this trip only." He stopped by the way, and went on the same day in the next train; and when he presented the check, it was refused, and fare collected. The court held that he could not recover the money of the company, and that it made no difference that he was not aware of the regulation at the time he purchased his ticket.

This subject is much discussed in a case in New Jersey, with a like conclusion. It is there said that the company may discriminate between way and through fare, unless prohibited by law. State *v.* Overton, 4 Zab. 434. The same rule is held to apply to excursion tickets sold and marked "good for one passage on this day only." It cannot be used on any other day, and if the holder refuse to pay his fare, he may be put off the train, and may not return on producing a regular ticket. State *v.* Campbell, 3 Vroom, 309. In Pier *v.* Finel, 24 Barb. 514, where a person was put off for refusal to pay fare, having, and offering to the conductor, a ticket, dated a few days before, and marked "good for this trip only," but uncancelled, — it was held that the ticket was *prima facie* evidence that the holder had paid the regular fare, and had a right to be transported, at some time, on some passenger train; that the presumption was, that it had never been used; and that it imposed on the company the duty to so transport the holder. It was also held that the indorsement, "good for this trip only," had reference to no particular trip, or any particular time, but only to some one continuous trip. This decision does not seem to meet the whole question; that is, whether such a regulation was valid and binding. There can be no doubt that such a ticket is generally understood to entitle the holder to a passage only on that day, if not only in the very next train.

It seems to be finally settled that a passenger who accepts a ticket, or check, marked "good for this day and train only," has no right to leave the train, at a way station, and demand a passage on another, and that if he do so, and refuse to pay the fare for the remainder of the route, the conductor may lawfully put him off the train. See McClure *v.* Philadelphia, Wilmington & Baltimore Railroad Co., 34 Md. 532. Nor has the ticket-master at a way station any

(*a*) Cody *v.* Central Pacific Railroad Co., 4 Sawyer, 114. So is such a regulation coupled with a limitation as to time for which the ticket shall be good. Livingston *v.* Grand Trunk Railway Co., 21 Lower Canada Jur. 13. And see Gale *v.* Delaware, Lackawanna & Western Railroad Co., 7 Hun, 670; Hill *v.* Syracuse, Binghamton & New York Railroad Co., 63 N. Y. 101; Powell *v.* Pittsburg, Cincinnati & St. Louis Railroad Co., 25 Ohio St. 70; Grand Trunk Railway Co. *v.* Cunningham, 11 Lower Canada Jur. 107.

evidence of a contract to that effect between * the railway and the purchaser, and to be of no force after the expiration of the term.[6] (*b*)

authority to extend a conductor's check. Ib. But the conductor may give a passenger leave to stop by the way, while riding on such a ticket, and by indorsing his check make it good for an after train. And where tickets for extended routes are issued in coupons, it is commonly understood that the passenger may stop at the end of any of the sections for which a coupon is issued, and complete the passage at any time within reasonable limits. And the same rule applies to season tickets, which the holder is in terms required to present, when demanded. If the holder fail to present the ticket when demanded, he must pay fare or consent to be put off the train. Downs *v.* New York & New Haven Railway Co., 36 Conn. 287. And it was here held to be no valid excuse for not presenting the ticket, that the holder had accidentally left it at home and therefore had it not in his power to present it. In the case of Dietrich *v.* Pennsylvania Railway Co., 29 Philad. 212, it was held that railway companies may make reasonable rules and regulations in regard to passenger transportation, binding on passengers whether known to them or not; and therefore that a drover's ticket, allowing the holder to ride between the points named in a continuous passage, without stopping at intermediate places, can only be so used.

So, also, if the passenger refuse to surrender his ticket in exchange for the conductor's check, according to the regulations of the company, and leave the cars at any point, without surrendering his ticket, he is liable to pay fare for the distance he has ridden; and if he refuse to surrender his ticket, or pay fare, the conductor may expel him from the cars. Northern Railroad Co. *v.* Page, 22 Barb. 130. But passengers are not obliged to surrender their tickets without having a check in exchange by which they may be able to show that they have paid fare. State *v.* Thompson, 20 N. H. 250. In Hibbard *v.* New York & Erie Railway Co., 15 N. Y. 455, it was held, that a regulation, made by a railway company, requiring passengers to exhibit their tickets whenever requested by the conductor, and directing that those who refused be expelled from the cars, was reasonable and valid; and that the binding force of such a

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[6] Boston & Lowell Railroad Co. *v.* Proctor, 1 Allen, 267; Shedd *v.* Troy & Boston Railroad Co., 40 Vt. 88. The same doctrine is maintained in Johnson *v.* Concord Railroad Co., 46 N. H. 213. And it was there held that ignorance of the by-laws or regulations of the company will make no difference; and that the conductors having waived them is no evidence of repeal unless known to the governing officers of the company.

(*b*) So a ticket dated and with the printed words, "good for this day only," on its face, was held not good on the day after its date. Boice *v.* Hudson River Railroad Co., 61 Barb. 611. But a ticket for a continuous passage, good if used within a certain time, is good if the passage is begun within the time. Lundy *v.* Central Pacific Railroad Co., 18 Am. & Eng. Railw. Cas. 309.

And where the regulations of the * company allow the conductors, by making a memorandum on a ticket, to permit the passenger to stay over and pass upon another train, and one stayed over without procuring such memorandum, it was held that another conductor, to whom he presented his ticket in attempting to pass at a subsequent time, was justified in demanding fare, and putting the passenger off the train upon his refusal to pay.[7]

5. In one case,[8] where the plaintiff, upon the information of the station-clerk that he might return at a given hour upon an excursion ticket, purchased such ticket and took the train named by such clerk to return, but the train did not pass through; and at the place where it stopped the station-clerk demanded 2*s.* 6*d.* more, saying he should not have taken that train; payment being refused, the superintendent took the plaintiff into custody. The plaintiff's attorney having written the secretary of the company, asking compensation, he requested to be furnished with the date of the transaction, and promised to make inquiries. He also

regulation was matter of law to be decided by the court. And it was further held that under such a regulation, a passenger was bound, on request, to exhibit his ticket a second time, the train having in the mean time passed a station, but that if the conductor knew he had paid his fare he had no right to expel him from the cars. It was also intimated, that a passenger who has thus forfeited his right, cannot regain it by exhibiting his ticket after the train is stopped for the purpose of putting him off; and also, that the *company* would not be liable for a wrong construction of the regulation by the conductor and the consequent wrongful expulsion of a passenger, nor for an excess of force. Where a person gives up his ticket to the conductor, he cannot, at an intermediate station, by virtue of the subsisting contract, leave his seat in the train, and claim a seat in another. Cleveland Railroad Co. *v.* Bartram, 11 Ohio St. 457.

[7] Beebe *v.* Ayres, 28 Barb. 275.

[8] Roe *v.* Birkenhead, Lancashire, & Cheshire Junction Railway Co., 7 Exch. 36; 7 Eng. L. & Eq. 546; s. c. 6 Railw. Cas. 795. And it has been held that a steamboat proprietor might exclude one from his boat, while employed in carrying passengers, if such person was the agent of a line of stages, the rival of that which, by contract, carried in connection with his boats, the object of such person being, at the time, to solicit passengers to go by the rival line of stages, the jury having found that the contract was *bona fide* and reasonable, and not entered into for the purpose of an oppressive monopoly, and that the regulation excluding plaintiff was necessary in order to carry the contract into effect. Jencks *v.* Coleman, 2 Sumner, 221. But a contract not to carry passengers coming by a particular line will not excuse the carrier from carrying such passenger. Bennet *v.* Dutton, 10 N. H. 481.

stated verbally that it was an awkward business, and the blame would fall upon the station-clerk who gave the plaintiff the false information, and offered to return the 2*s.* 6*d.* It was held that, as there was no evidence of the authority of the defendants to make the arrest, and none that they had expressly or impliedly authorized or ratified it, it must be regarded as the mere tortious act of the servant, for which he alone was responsible.

6. And in a somewhat similar case,[9] in the Exchequer Chamber, * where the plaintiff below had been taken into custody by a railway inspector of the defendants, charged with having no ticket, refusing to pay fare, intoxication, and assaulting the inspector; at the hearing before the magistrate, the solicitor of the company attended to conduct the proceedings; and it was held that such attendance was no ratification by the company, it not appearing that the facts were known to the company. These cases afford more latitude for corporations to escape from liability for the acts of their agents and servants, while employed in the prosecution of their business, than is commonly allowed in this country.[10]

7. There are many cases in this country where it has been held that trespass will not lie against a corporation for the act of its agents;[11] but this is not the prevailing rule here, where the servant acts within the apparent scope of his authority, and where his acts would bind the principal, being a natural person.

8. An English railway company[12] having power by statute to

[9] The Eastern Counties Railway Co. *v.* Broom, 6 Exch. 314; 2 Eng. L. & Eq. 406; s. c. 6 Railw. Cas. 743.

[10] *Infra*, § 225 and notes. See, also, *infra*, §§ 169, 182. And in Coppin *v.* Braithwaite, 8 Jur. 875, it is said to have been ruled by Rolfe, B., at Nisi Prius, that a carrier having received a pickpocket as a passenger on board his vessel, and taken his fare, cannot put him on shore at any intermediate place, so long as he is guilty of no impropriety.

[11] Philadelphia, Germantown, & Norristown Railroad Co. *v.* Wilt, 4 Whart. 143; s. c. 2 Am. Railw. Cas. 254; Orr *v.* United States Bank, 1 Ohio, 36; Foote *v.* Cincinnati, 9 Ohio, 31. Comstock and Brown, JJ., in Hibbard *v.* New York & Erie Railway Co., 15 N. Y. 455. The company is responsible for the act of its conductors in forcibly ejecting a passenger from the cars on the ground that he was drunk, when in fact he is sober. Higgins *v.* Watervliet Railroad Co., 46 N. Y. 23.

[12] Great Western Railway Co. *v.* Goodman, 11 Eng. L. & Eq. 546. In Edwards *v.* London & North Western Railway Co., Law Rep. 5 C. P. 445, it was held, that the head porter, having charge of the station in the absence of the station master, has no implied authority to give in charge to a peace officer

make by-laws, which were to be painted upon a board and hung up at the stations, and to be binding upon all parties, made, among others, a by-law that "first-class passengers shall be allowed one hundred and twelve pounds, and second-class passengers fifty-six pounds luggage each, and that the company will not be responsible for the care of the same unless booked and paid for accordingly." It did not appear that the plaintiff knew of the by-law, or that it had been posted up as required. The plaintiff became a passenger, and gave his luggage to the servants of the company, and it had been stolen. It was held that the company were liable, unless they showed the by-law hung up at the stations, as required by the statute, or else brought it home to the knowledge of the plaintiff.

9. A by-law excluding merchandise from the passenger-trains, and confining its transportation to the freight-trains, was held * reasonable. The company are not bound to carry a passenger daily upon his paying fare, when his trunk or trunks contain merchandise, money, and other valuable matter known as "express matter." [13]

10. In a case in Connecticut, it was held by a divided court, that where a railway company established and gave notice of a discrimination of five cents between fares paid in the cars and at the stations, the regulation was valid, and that where a passenger refused to pay the additional five cents in the cars, the conductor might lawfully put him out of the cars, using no unnecessary force.[14] (*c*) Upon the trial of an action for such expulsion, it was

one whom he suspects of stealing the company's property, and that if he give in charge one who is innocent the company will not be responsible. As to the authority of special constables in the employ of railway companies in making arrests, and what will amount to probable cause, see Walker *v.* South Eastern Railway Co., Law Rep. 5 C. P. 640.

[13] Merrihew *v.* Milwaukee & Mississippi Railroad Co., 5 Am. Law Reg. 361.

[14] Crocker *v.* New London, Willimantic & Palmer Railroad Co., 24 Conn. 249. The court were so nearly equally divided in this case, that it cannot be regarded as of much authority. But the proposition is supported by other cases. Hilliard *v.* Goold, 34 N. H. 230; State *v.* Goold, 53 Me. 279; Chicago, Burlington & Quincy Railroad Co. *v.* Parks, 18 Ill. 460. And the last named of these cases holds that where the passenger pays from station to sta-

(*c*) Wilsey *v.* Louisville & Nashville Railroad Co., 26 Am. & Eng. Railw. Cas. 258. So of a regulation entitling the passenger to a discount from the advertised rates where he purchases a ticket. Nor does it violate

held, that the plaintiff was not entitled to recover upon proof that he went to the ticket-office of the company a reasonable time before the train left, to procure a ticket; that the office was closed, and so remained till the train departed; and that he so informed the conductor, before his expulsion from the cars.

tion, the additional five cents may be exacted at each payment. And the passenger is bound by such regulation whether he knew of it or not. State *v.* Goold, *supra;* Chicago & Alton Railroad Co. *v.* Roberts, 40 Ill. 503; Illinois Central Railroad Co. *v.* Sutton, 42 Ill. 438; Chicago & Northwestern Railway Co. *v.* Peacock, 48 Ill. 253; *infra*, § 124, pl. 13.

The only point of doubt seems to be as to the duty of the company, in making such discrimination, to give passengers reasonable opportunity to obtain tickets at the lowest rate of fare. The generally received opinion is that the company is so bound. See *infra*, note 15.

a statute providing that the rates of fare shall be the same for all persons between the same points. Swan *v.* Manchester & Lawrence Railroad Co., 132 Mass. 116; Hoffbauer *v.* Davenport & Northwestern Railway Co., 52 Iowa, 312; Bordeaux *v.* Erie Railway Co., 8 Hun, 579.

A rule prohibiting riding on freight trains without tickets is reasonable and valid. St. Louis & Southeastern Railway Co. *v.* Myrtle, 51 Ind. 566; Falkner *v.* Ohio & Mississippi Railway Co., 55 Ind. 369; Lake Shore & Michigan Southern Railway Co. *v.* Greenwood, 79 Penn. St. 373; Indianapolis & St. Louis Railroad Co. *v.* Kennedy, 77 Ind. 507; Law *v.* Illinois Central Railroad Co., 32 Iowa, 531. But reasonable facilities must be provided for the obtaining of tickets. Evans *v.* Memphis & Charleston Railroad Co , 56 Ala. 246.

A regulation, that passengers not showing tickets should be charged fare from the station from which the train started, held unreasonable as against a traveller acting in good faith, and void. London & Brighton Railway Co. *v.* Watson, Law Rep. 3 C. P. 429.

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A regulation requiring passengers to show season tickets is a reasonable one. Cresson *v.* Philadelphia & Reading Railroad Co., 11 Phila. 597; and see Cooper *v.* London, Brighton & South Coast Railway Co., Law Rep. 4 Exch. 88.

So is the regulation requiring passenger stopping over to get a stop-over check. Yorton *v.* Milwaukee, Lake Shore & Western Railway Co., 54 Wis. 234. And see Lake Shore & Michigan Southern Railway Co. *v.* Pierce, 47 Mich. 277. So is a regulation limiting stop-over checks. Wentz *v.* Erie Railway Co., 3 Hun, 241. So is a regulation requiring excursionists to go by the excursion train. McRae *v.* Wilmington & Weldon Railroad Co., 88 N. C. 526. And so is a regulation requiring the conductor to detach the ticket. Norfolk & Western Railroad Co. *v.* Wysor, 26 Am. & Eng. Railw. Cas. 234. But rules of a company that a certain ticket shall be good only on certain trains are not irrebuttably presumed to be known to the passenger when not on the ticket. Lake Shore & Michigan Southern Railroad Co. *v.* Rosenzweig, 26 Am. & Eng. Railw. Cas. 489.

The following propositions are maintained in the opinion of the court: (1) That the defendants, as common carriers, were under no legal obligation to furnish tickets, or to carry passengers for less than the sum demanded, if the fare was paid in the cars. *(2) That the plaintiff's claim rested solely upon the assumption, that the defendants had undertaken to carry for the less sum, on certain conditions, which they had themselves defeated. (3) That the regulation did not constitute a contract, but a mere proposal, which they might suspend, or withdraw at any time. (4) That such proposal was withdrawn by closing the defendants' office, and the retirement of their agent therefrom. (5) That the proposition being withdrawn, the parties were in the same condition as before it was made; the defendants continuing common carriers were bound to carry the plaintiff for the usual fare paid in the cars, and not otherwise. (6) That the plaintiff, refusing to pay such fare, was properly removed from the cars.

It was further held by all the judges that if the plaintiff was wrongfully removed from the cars, he might lawfully re-enter them, and if in attempting to do so he received the injury complained of, he was entitled to recover, unless he was himself guilty of some want of care, which produced, or essentially contributed to produce, the injury.

But if the expulsion was lawful, or if the plaintiff was guilty of want of care as stated, he could not recover.

The majority of the court also held, that if any of the defendants' employés whom the conductor called to his aid, in putting and keeping the plaintiff off the cars, intentionally kicked the plaintiff in his face, without the knowledge or direction of the conductor, the defendants are not liable for the act, in trespass. But the more reasonable view in regard to the mode of enforcing a discrimination between fares paid in the cars and at the stations is, that such a regulation, however proper in itself, cannot legally be enforced by the company unless they have afforded every proper and reasonable facility to the passenger for procuring his ticket at the station.[15]

[15] St. Louis, Alton, & Chicago Railroad Co. *v.* Dalby, 19 Ill. 353; Chicago, Burlington, & Quincy Railroad Co. *v.* Parks, 18 Ill. 460. In St. Louis, Alton, & Terre Haute Railroad Co. *v.* South, 43 Ill. 176, it was held that the cases were not to be construed, as requiring companies to keep open their ticket offices, beyond the time fixed by their time-tables for the departure of a train,

* 11. There is no question, upon general principles, in an action or indictment against the conductor of a railway train for unlawfully expelling a passenger, where the evidence shows a right to make the expulsion, that the conductor may nevertheless become liable for the manner of doing it. This is a question to be determined by the jury, and cannot ordinarily be decided by the court, as matter of law. If there be an excess of force, or it be applied in an unreasonable and improper manner, the conductor is liable for such excess, to respond in damages to the party, and also to public prosecution for a breach of the peace.[16]

12. The authority of the conductor of a railway train, or of any other servant of the company, to enforce their regulations, does not depend upon the formal mode of his appointment, but upon the fact of his being employed at the time in the particular office.[16]

13. In an English case,[17] where the railway company had established a by-law requiring all passengers to purchase tickets before entering the cars, and to show the tickets when required so to do, and to deliver them up on request, before leaving the company's premises, and the plaintiff took tickets for himself and three boys and three horses, by a certain train, which was afterwards divided by the company's servants into two parts, one being composed of passenger carriages, and the other of horse boxes; and the plaintiff retained all the tickets and travelled by the first-

but only for a reasonable time before the time so fixed; that they must furnish a convenient and accessible place for the sale of tickets, and afford the public a reasonable opportunity to purchase them; and that parties who did not avail themselves of the opportunity, must submit to pay the extra fare required by the general regulations of the company, or on refusal might be expelled from the cars. It was also held that the rule giving companies the right to discriminate between fares paid in the cars, and at the stations, required them, very properly, to give a reasonable opportunity for procuring tickets at the lower rate. The same rule is maintained in Du Laurans *v.* Pacific Railroad Co., 15 Minn. 49. And it was there said that what is a reasonable opportunity is a question for the jury.

[16] Hilliard *v.* Goold, 34 N. H. 230; State *v.* Ross, 2 Dutcher, 224. In the latter case where it appeared that the conductor kicked a passenger who, in a state of intoxication, persisted in attempting to get on the train, the court held a conviction proper. So, too, where the conductor put one off the train while it was in motion, the act of the conductor was held to bind the company for damages. Kline *v.* Central Pacific Railroad Co., 37 Cal. 400.

[17] Jennings *v.* Great Western Railway Co., 12 Jur. N. S. 331.

mentioned portion of the train, so that the boys, who were left to go in the other portion of the train, were unable to produce their tickets when requested, and were accordingly excluded by the company's servants from entering the horse boxes, — it was held a breach of contract by the company, for which they were responsible.

*14. A tariff of fares or freight must have the sanction of the corporation to become of binding obligation. But if established by the president, and the business of the company transacted with reference to them, without objection, the consent of the company will be presumed.[18]

15. There has been considerable controversy in the country, how far railway companies have the legal right to require colored passengers to sit in a particular car, or portions of the car. That right was maintained by the Supreme Court of Pennsylvania.[18] But it has been denied in other courts. The recent amendments of the United States Constitution have been supposed by some to settle this question. There seems to be no sufficient reason why any such discrimination should now be made, and when the unfortunate animosities growing out of the former existence of slavery in the country shall have effectually subsided, it is to be hoped that any such questions will cease to be raised. Persons of the highest culture and refinement, as a general thing, feel less sensitive on this subject than others, and their example will constantly tend to lead others in the right path. (*d*)

[18] Westchester Railroad Co. *v.* Miles, 55 Penn. St. 209.

(*d*) See Central Railroad Co. *v.* Green, 86 Penn. 421, 427. For rulings under the Civil Rights acts, see Gray *v.* Cincinnati Southern Railroad Co., 11 Fed. Rep. 683, asserting the equal rights of colored persons, and Smoot *v.* Kentucky Central Railway Co., 13 Fed. Rep. 337, holding that Congress has no power to protect such a right, — the right of a colored woman to ride in the ladies' car. And see Cully *v.* Baltimore & Ohio Railroad Co., 1 Hughes, 536. It seems, however, that under its undoubted power to make reasonable rules tending to the comfort, order, and safety of passengers, a company may make a rule setting apart cars for the exclusive use of ladies and gentlemen accompanied by ladies. Chicago & Northwestern Railway Co. *v.* Williams, 55 Ill. 185. And it would seem that though in the absence of rule a company might not lawfully from caprice or prejudice exclude a colored woman from a particular car, it might reasonably make a rule requiring colored people to occupy separate seats in other cars equally safe and comfortable. Ib. Equality of accommodation does not mean identity

16. A regulation of a street-railway company requiring passengers to enter and leave the cars by the rear platform is highly just and reasonable; and a passenger who suffers injury from the needless violation of such regulation has no claim for compensation against the company, even when the driver was in fault. And the permission of the driver will not excuse the passenger in the violation of a known rule of the company.[19] Such company owes its passengers the highest degree of care, but only ordinary care to the general public.[20]

[19] Baltimore City Passenger Railroad Co. *v.* Wilkinson, 30 Md. 224.

[20] Pendleton Street Railroad Co. *v.* Shires, 18 Ohio St. 255. See Cleveland, Columbus, & Cincinnati Railroad Co. *v.* Terry, 8 Ohio St. 570.

of accommodation. Separation of different classes in different cars may be reasonable. Saywood *v.* Memphis & Charleston Railroad Co., 21 Am. & Eng. Railw. Cas. 256; Murphy *v.* Western & Atlantic Railroad Co., Ib. 258.

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*CHAPTER VII.

CAPITAL STOCK.

SECTION I.

Limitations.

1. General rights of shareholders.
2. Capital stock not the limit of property.
3. Cannot mortgage, unless on special license of the legislature.

§ 29. 1. All joint-stock companies are allowed to raise a certain amount, and sometimes an indefinite amount, of capital, by the subscription of the members; the corporation in fact generally consisting of the contributors of stock and their assignees, the stock being divided into shares, transferable according to the by-laws and charter of the corporation, entitling the owner for the time being to the rights of voting, either in person or by proxy, as a general thing, and to a participation in the profits of the enterprise.[1]

2. The capital stock of a corporation is not necessarily the limit of its property.[2] It is not uncommon for charters of stock companies to contain restrictions and limitations in regard to their right or capacity to hold real estate, and sometimes even in regard to personal estate.

3. But railway companies, being created for the purpose of carrying into effect a definite enterprise, must almost of necessity have the power to issue sufficient stock to accomplish the undertaking, or to raise the requisite funds in some other mode, as by loan and mortgage. And where the stock is limited, and often where it is not, these corporations have been compelled, either to abandon the enterprise, or to resort to loans and mortgages, which being in some sense a desperate mode of raising funds, as long as the company have power to issue stock, could only be justified, * ordinarily, by a strict and fatal necessity, and by permission of the legislature, as is generally considered.[3]

[1] Walf. Railw. 252; Penobscot Railroad Co. *v.* White, 41 Me. 512.

[2] Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280; South Bay Meadow-Dam Co. *v.* Gray, 30 Me. 547.

[3] *Infra*, §§ 148, 234, 235.

SECTION II.

Conditions precedent, which the Public Authorities may enforce.

1. Stock, if limited, must all be subscribed. | 2. Payments at time of subscription.

§ 30. 1. If, by the charter, the stock of the company is divided into a certain number of shares, that number cannot be changed by act of the company.[1] And if the charter either expressly or by legal intendment require that a certain number of shares be subscribed before any assessment is laid, no valid assessment can be laid until that number be *bona fide* subscribed, and if it is attempted the company may be dissolved.[2] (*a*)

2. And where the general law of the state, or the particular charter, requires a given proportion of subscriptions to be paid in at the time of subscription, this condition must be complied with, or the subscriptions will not fulfil the condition precedent.[3]

[1] Salem Mill-Dam Co. *v.* Ropes, 6 Pick. 23.

[2] Salem Mill-Dam Co. *v.* Ropes, 6 Pick. 23; Central Turnpike Co. *v.* Valentine, 10 Pick. 142. No valid assessment, that is, for the general purposes of the enterprise; and if any of the subscriptions be made upon conditions precedent, it must be shown that such conditions have been waived or performed. Central Turnpike Co. *v.* Valentine, *supra*. But assessments to defray the expenses of incorporation, organization, and preliminary examination have been allowed before the stock is all subscribed. Salem Mill-Dam Co. *v.* Ropes, *supra*. And in a suit upon subscriptions to stock in a corporation, where by the charter a given amount of stock is required to be subscribed before the corporation can go into operation, it is necessary to allege the latter fact, and the omission will be ground of error, although the question is not raised at the trial. Fry *v.* Lexington & Big Sandy Railroad Co., 2 Met. Ky. 314.

[3] Highland Turnpike Co. *v.* M'Kean, 11 Johns. 98; 1 Caines Cas. 85; Wood *v.* Coosa & Chattooga River Railroad Co., 32 Ga. 273. But see *infra*, § 51, where it will appear, that although the public or the other shareholders may insist upon the payment, in money, of the sums required by the charter to be paid at the time of subscription, this is a condition which cannot be taken advantage of by the subscriber, as between himself and the company, in an action

(*a*) Stoneham Branch Railroad Co. *v.* Gould, 2 Gray, 278, where the rule and the reason on which it rests are clearly stated by Chief-Justice Shaw. And see Peoria Railroad Co. *v.* Preston, 35 Iowa, 118; Bray *v.* Farwell, 81 N. Y. 600; Allman *v.* Havana Railroad Co., 88 Ill. 521; Santa Cruz Railroad Co. *v.* Schwartz, 53 Cal. 106.

Where * the charter of a railway company provided that the whole capital stock should be subscribed, before any of the powers and provisions of the charter should be put in force, and the company made a call upon the shares before the subscriptions were completed, and commenced an action after they were so, it was held the action could not be maintained, the completion of the subscription being necessary to enable the company to make the call.[4]

SECTION III.

Shares Personal Estate.

1. Railway shares personal estate at common law.
2. Not an interest growing out of land, nor goods, wares, and merchandise.
3. Early cases treated such shares as real estate.

§ 31. 1. The shares of railway companies are now almost universally regarded as personal estate. (*a*) The English statute so

for calls. And it has been held, that the stock subscriptions to a railway with banking privileges cannot be paid in bills of the company, but must all be paid in specie. King *v.* Elliott, 5 Sm. & M. Ch. 428. Subscriptions in the name of infants, unless some one is responsible for payment of calls, are not a compliance with the charter. Roman *v.* Fry, 5 J. J. Mar. 634. But if the corporation acquiesce in such subscriptions, it cannot afterwards object. Creed *v.* Lancaster Bank, 1 Ohio St. 1. See Beach *v.* Smith, 28 Barb. 254. See also East Pascagoula Hotel Co. *v.* West, 13 La. An. 545; Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491; Fiser *v.* Mississippi & Tennessee Railroad Co., 32 Miss. 359; Hayne *v.* Beauchamp, 5 Sm. & M. 515, 537; Lewis *v.* Robertson, 13 Sm. & M. 558; Barrington *v.* Mississippi Central Railroad Co., 32 Miss. 763; Mississippi & Tennessee Railroad Co. *v.* Harris, 36 Miss. 17.

But it has been held that a condition in the charter, that one dollar per share shall be paid at the time of subscription, and the company organized when one thousand shares are subscribed, does not apply to subscriptions made after the organization of the company, and that the failure of the company to build its road within the time limited in the charter will not enable the subscribers to defend against calls. Taggart *v.* West Maryland Railroad Co., 24 Md. 563.

[4] Norwich & Lowestoft Navigation Co. *v.* Theobald, 1 Moody & M. 151. It is not competent for all the shareholders to reduce the amount of the capital

(*a*) Shares are mere choses in action, while certificates are chattels; but both, of course, are personal property, as stated in the text. And this, though all the property of the corporation is realty. See Baldwin *v.* Canfield, 26 Minn. 43.

declares them. Hence the transfer of such shares is not required to be in writing, nor are they regarded as coming within the acts of * mortmain.[1] This has been repeatedly decided in regard to shares of canal and dock companies, and bonds secured by an assignment of the rates.[2] Such shares may be sold by parol where the contract is executory.[3] And it would seem that the same view would prevail in the English courts, even where there is no statutory declaration that the shares shall be deemed personal estate.[3]

2. And the sale of foreign railway shares standing in the name of another person, and a guarantee that such person shall deliver, need not be in writing, either as having respect to an interest growing out of land, or as an undertaking for another, the undertaking being original and not collateral.[4] Railway shares are neither an interest in land, nor goods, wares, and merchandise, within the statute of frauds.[5]

3. Some of the early English cases treated the shares of incorporated companies as real estate, where the interest grew out of the use or improvement of real estate,[6] and a similar view is taken

stock, by mutual consent, below that fixed in the charter. If that is attempted, it will be enjoined upon a bill brought by the company against the shareholders and projectors. Society of Practical Knowledge *v.* Abbott, 2 Beav. 559.

[1] Ashton *v.* Lord Longdale, 4 Eng. L. & Eq. 80. This case extends the same rule to the debentures of such companies. Neither is railway scrip within the Mortmain Act. But mortgages given by a railway company of the undertaking and tolls may be within the act. So also shares in a bank secured by mortgages. Myers *v.* Perigal, 16 Sim. 533; King *v.* Chipping Norton, 5 East, 239.

[2] Sparling *v.* Parker, 9 Beav. 450; Thompson *v.* Thompson, 1 Coll. C. C. 381; Hilton *v.* Giraud, 1 De G. & S. 183; Walker *v.* Milne, 11 Beav. 507. But see Tomlinson *v.* Tomlinson, 9 Beav. 459.

[3] Bradley *v.* Holdsworth, 3 M. & W. 422; Bligh *v.* Brent, 2 Y. & Col. 268, 294. This is an elaborate case establishing the proposition that the shares in a corporation, whose works are real estate, are nevertheless personal estate, and this upon general principles of the common law.

[4] Hargreaves *v.* Parsons, 13 M. & W. 561.

[5] Humble *v.* Mitchell, 2 Railw. Cas. 70; s. c. 11 A. & E. 205. See also Duncuft *v.* Albrecht, 12 Sim. 189; Tempest *v.* Kilner, 3 C. B. 249; Knight *v.* Barber, 16 M. & W. 66.

[6] Drybutter *v.* Bartholomew, 2 P. Wms. 127; Townsend *v.* Ash, 3 Atk. 336; Buckeridge *v.* Ingram, 2 Ves. Jr. 652.

in some of the American states.[7] But the settled rule upon the subject now, both in England and in this country, is that before stated.[8] This has often been decided in recent analogous cases. * The fee of land being in the corporation, vests no interests of the nature of real estate in the separate shareholders.[9]

[7] Welles *v.* Cowles, 2 Conn. 567. See also Cape Sable Company's Case, 3 Bland, 606, 670; Binney's Case, 2 Bland, 99; Price *v.* Price, 6 Dana, 107; Meason's Estate, 4 Watts, 341; Copeland *v.* Copeland, 7 Bush, 349.

[8] Walf. Railw. 254; *supra*, § 31, and cases cited in notes, 1–4; Tippets *v.* Walker, 4 Mass. 595, 596, *per* PARSONS, C. J. Howe *v.* Starkweather, 17 Mass. 240, 243, *per* PARKER, C. J.

Waltham Bank *v.* Waltham, 10 Met. 334; Hutchins *v.* State Bank, 12 Met. 421; Denton *v.* Livingston, 9 Johns. 96, 100; Planters' & Merchants' Bank *v.* Leavens, 4 Ala. 753; Union Bank *v.* State, 9 Yerger, 490; Brightwell *v.* Mallory, 10 Yerger, 196; Heart *v.* State Bank, 2 Dev. Eq. 111; State *v.* Franklin Bank, 10 Ohio, 91, 97; Slaymaker *v.* Gettysburg Bank, 10 Penn. St. 373; Gilpen *v.* Howell, 5 Penn. St. 41, 57; Johns *v.* Johns, 1 Ohio St. 350; Arnold *v.* Ruggles, 1 R. I. 165.

A distinction has sometimes been attempted between the shares of a bank or manufacturing corporation, and a turnpike or railway; but the slightest examination will show that there is no substantial ground for such a distinction. The one may be more intimately connected than the other with real estate, but both must have some connection, more or less intimate, and in neither have the shareholders any title to the land, while the shares are merely a right to the ultimate profits of the company, and are as really choses in action as promissory notes, bills of exchange, or bonds and mortgages, of natural or corporate persons. Wheelock *v.* Moulton, 15 Vt. 519; Isham *v.* Bennington Iron Co., 19 Vt. 230. See also Johns *v.* Johns, *supra*.

[9] Ackland *v.* Lewis, 1 K. & G. 334.

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*CHAPTER VIII.

TRANSFER OF SHARES.

SECTION I.

Restrictions upon Transfer.

1. Express provisions of charter to be observed.
2. If not made exclusive, held directory merely.
3. Unusual and inconvenient restrictions void as in restraint of trade.
4. The company may have a lien on stock for the indebtedness of the owner.
5. But such lien is not to be implied.
6. Where transfer is wrongfully refused, vendee may recover value of the company.

§ 32. 1. We cannot here attempt to show in detail all the incidents of the transfer of stock in railway companies. It is transferable much the same as other personal property, excepting only that any express provision of the charter upon that subject must be regarded as of paramount obligation.[1] (*a*)

[1] Strictly speaking, perhaps no shares in any joint enterprise are transferable so as to introduce the assignee into the association, as a member, unless it be shares in joint-stock companies and corporations formed in pursuance of legislative authority; and such shares are transferable only under the charter, and according to its terms. Duvergier *v.* Fellows, 5 Bing. 248, 267, *per* Best, C. J. A mere partnership cannot be so constituted as to release the assignor of a share from all liability to third persons, and introduce the assignee at once, and completely, into his place. Blundell *v.* Winsor, 8 Sim. 601, *per* Shadwell, V. C.; Jackson *v.* Cocker, 4 Beav. 59, 63. In England it has been held, that where the charter of a corporation or the deed of settlement required the assent of the directors to complete the title of the purchaser of shares, it was the duty of the seller to procure this assent, in order to comply

(*a*) Bishop *v.* Globe Co., 135 Mass. 132; Stockwell *v.* St. Louis Mercantile Co., 9 Mo. Ap. 133; State *v.* Pettineli, 10 Nev. 141. But this rule applies only to a transfer of existing shares, not to a substitution of parties to a contract for the purchase of shares from the company. See Morton's Case, Law Rep. 16 Eq. 105; Beresford's Case, 2 Macn. & G. 197.

When a married woman transfers shares without compliance with the statute, she is not estopped from setting up her title against a subsequent purchaser without notice. Merriam *v.* Boston, Clinton & Fitchburg Railroad Co., 117 Mass. 241.

* 2. In many cases, however, where the charter only provides a mode of transfer, and does not declare this mode exclusive of all

with his contract to convey. Wilkinson *v.* Lloyd, 7 Q. B. 27; Bosanquet *v.* Shortridge, 4 Exch. 699.

And all corporations may require all calls to be paid, before they will substitute the purchaser of shares for the original subscriber, as such substitution would release the subscriber, and it would be liable to defeat public enterprises of moment, after large expenditure. Hall *v.* Norfolk Estuary Co., 7 Railw. Cas. 503; s. c. 8 Eng. L. & Eq. 351. But the assignee of a share may always insist on becoming a member on paying all calls.

Questions of some difficulty often arise between shareholders and the company, as to whether an informal transfer has been confirmed by acquiescence. In Shortridge *v.* Bosanquet, 16 Beav. 81; s. c. 17 Eng. L. & Eq. 331, and in *Ex parte* Bagge, 13 Beav. 162; s. c. 4 Eng. L. & Eq. 72, it is held that if the entry of the transfer is made on the books of the company, it cannot treat the transaction as void, for any want of form in the transfer, especially where the company has dealt with the shareholder claiming under the transfer, though informal in a material matter specially required by the charter, the informality being also such as its own irregularities have rendered it impossible to observe. And where the secretary of a joint-stock company fraudulently transferred shares, and the proprietor of the shares treated the transaction as valid against the transferee, but filed a bill against the company for damages, it was held that he was not entitled to relief. Duncan *v.* Luntley, 2 Macn. & G. 30; s. c. 2 Hall & T. 78.

In *Ex parte* Straffon, 4 De G. & S. 256; s. c. 10 Eng. L. & Eq. 275, Lord Chancellor St. Leonards characterizes these transactions, which, although informal in some respects, are acquiesced in by both parties, until there comes some crisis in the affairs of the company perhaps, or the transferee becomes insolvent, as valid as between the parties, though all formalities have not been observed.

And in Bargate *v.* Shortridge, 5 Ho. Lds. 297; s. c. 31 Eng. L. & Eq. 11, upon elaborate argument and great consideration, it seems to have been definitively settled, that where the deed of a joint-stock company requires the certificate of consent of a certain number of directors to the transfer of the shares of the company, and in practice this has never been given, but, for years, transfers have been made on the verbal assent of the managing director on the spot, and a large portion of the original shares have been so transferred, the company cannot refuse to regard one as a member to whom a transfer has been so made and whose name has been entered on the books; and that it cannot treat the one who has transferred as still a member. Lord St. Leonards, who delivered the principal opinion, pointed out the distinction between acts for which the directors have no authority and which are absolutely void, and acts within their power, and said that in case of the latter neither law nor equity would allow the company to take advantage of their neglect.

This distinction seems to be sound and to have an important bearing on the rights of the *bona fide* holders of stock fraudulently overissued. See s. c.

* others, the provision has been regarded as merely directory, and not indispensable to the vesting of title in the assignee. And this has generally been so regarded, where the express provisions, in relation to the transfer of shares, exist only in the by-laws of the corporation.

3. And any unusual restriction in the by-laws of a corporation upon the transfer of stock, as that it shall be made only upon the books of the corporation, in person, or by attorney, and with the consent of the president, or other officers of the corporation, has been regarded as void, as an unreasonable restraint upon trade,[2]

4 Exch. 699. See also Taylor *v.* Hughes, 2 Jones & La T. 24; Humble *v.* Langston, 7 M. & W. 517; s. c. 2 Railw. Cas. 533; *Ex parte* Cockburn, 4 De G. & S. 177; s. c. 1 Eng. L. & Eq. 139. But where the charter, or the general law, requires all debts of the owner to the company to be paid before transfer of shares, the company is not bound to accept a transfer otherwise made. Reg. *v.* Wing, 33 Eng. L. & Eq. 80.

[2] Sargent *v.* Franklin Insurance Co., 8 Pick. 90; Quiner *v.* Marblehead Insurance Co., 10 Mass. 476; Noyes *v.* Spalding, 27 Vt. 421; Bates *v.* New York Insurance Co., 3 Johns. Cas. 238; Chouteau Spring Co. *v.* Harris, 20 Mo. 382. In this last case the charter of the company provided that the stock might be "transferred on the books of the company," and the company was authorized "to regulate the transfer of stock" by by-laws, and, in certain cases, to make *assessments* of *stockholders* beyond their shares of stock. It was held that no such assessment could be made on one who had ceased to be a member, by a transfer of his stock; that the power "to regulate the transfer" did not include the power to restrain transfers, or to prescribe to whom they might be made, but merely to prescribe the formalities to be observed in making them; that the company could not prevent one from selling his stock, even to an insolvent person; that an assignment "upon the books of the company" was sufficient to effect a change of ownership, without taking out a new certificate in the name of the assignee; and that any transfer in writing was valid against the company, if, being notified, the company refused to allow it to be made according to their by-laws.

And in Dauchy *v.* Brown, 24 Vt. 197, which was an action against stockholders, on the proper debt of the corporation, where the charter provided, that the persons and property of the corporators should be held to pay its debts, and that any execution, which should issue against the corporation, might be levied on the person or property of any individual thereof, it was held, that the stockholders were liable only in default of the corporation, and that judgment should first be recovered against the corporation, and the statute remedy strictly pursued. See, also, in regard to the remedy against stockholders, who are by statute made personally liable, Southmayd *v.* Russ, 3 Conn. 52; Middletown Bank *v.* Magill, 5 Conn. 28; Child *v.* Coffin, 17 Mass. 64; Roman *v.* Fry, 5 J. J. Marsh. 634. And in Robinson *v.* Chartered Bank, Law Rep. 1 Eq. 32, where the charter required that no one should

* unless as a provision to secure the indebtedness of shareholders. In such case it is sometimes said the assignee need only make his right known to the company, and require the transfer entered upon the books, and his title becomes perfected.[3]

4. But if the former owner was indebted to the corporation, and the charter required all such indebtedness to be liquidated, before transfer of stock, such indebtedness will remain a lien upon the stock in the hands of the assignee.[4] (*b*) And where the charter of * the company requires the payment of all sums due before registering a transfer, this will embrace all calls made and which are payable at the date of the transfer.[5]

become a transferee of shares unless with the approval of the directors, it was held that the directors must use this power reasonably and would be controlled in equity. But where the charter of a corporation required all transfers to be executed by both parties and approved by the directors, and the transferor's name had been entered on the registry on his own execution merely, and the company was being wound up, the court refused an application to remove his name from the registry. Walker's Case, Law Rep. 2 Eq. 554.

[3] Sargent *v.* Franklin Insurance Co., 8 Pick. 90; United States *v.* Vaughan, 3 Binn. 394; Ellis *v.* Essex Bridge Co., 2 Pick. 243; Chester Glass Co. *v.* Dewey, 16 Mass. 94; Agricultural Bank *v.* Burr, 11 Me. 256; Same *v.* Wilson, id. 273.

[4] Union Bank *v.* Laird, 2 Wheat. 390; Utica Bank *v.* Smalley, 2 Cow. 770; Rogers *v.* Huntingdon Bank, 12 Serg. & R. 77; Downer *v.* Zanesville Bank, Wright, 477; Farmers' Bank *v.* Iglehart, 6 Gill, 50; Hall *v.* United States Insurance Co., 5 Gill, 484. See Angell & Ames Corp., § 355 and note. In Marlborough Manufacturing Co. *v.* Smith, 2 Conn. 579, it was said the transfer of shares to constitute the assignee a stockholder must be in strict conformity to the charter and by-laws. And in the case of Pittsburg & Connellsville Railroad Co. *v.* Clarke, 29 Penn. St. 146, Lewis, C. J., goes into an elaborate review of the cases to show, that under the Pennsylvania statutes, (which provide, that no transfer of shares shall be made while the holder remains indebted to the company, except by consent of the board of directors, and no transfer shall discharge any liabilities before incurred), both the stock and the holder remain liable for all calls due before the transfer; that the original subscriber, having promised to pay so much on a share, is indebted to the company before calls made; and that even where the transfer is made with the consent of the directors, he will remain liable until all calls are paid, notwithstanding the statute subjects the transferee also to a like liability. The same principle was reaffirmed in Graff *v.* Pittsburg & Steubenville Railroad Co., 31 Penn. St. 489.

[5] *Ex parte* Orpen, 9 Jur. N. S. 615. This question is fully discussed in

(*b*) A transfer on the books of the company is a waiver of the lien. Hill *v.* Pine River Bank, 45 N. H. 300. And see *In re* Northern Assam Tea Co., Law Rep. 10 Eq. 458.

[*116, * 117]

* 5. A corporation has no implied lien upon stock for the liabilities of the stockholders to the company.[6] (*c*)

* 6. And when the company wrongfully refuse to record transfers of shares, on their books, the vendee may recover the price of such shares, the company having caused them to be sold, as the property of the vendor.[6] (*d*)

Reese *v.* Bank of Commerce, 14 Md. 271, where it was held that the lien of the bank on the stock was not waived by a certificate entitling the holder to a transfer on surrender thereof, that an assignee took subject to the rights of the bank, and that he could obtain a transfer only on payment of all debts due at time of final demand. Such a lien will be good against the money for which the shares were sold, in the hands of the official liquidator, for the shareholder. *In re* General Exchange Bank, Law Rep. 6 Ch. App. 818.

[6] Massachusetts Iron Co. *v.* Hooper, 7 Cush. 183; Heart *v.* State Bank, 2 Dev. Eq. 111; Sargent *v.* Franklin Insurance Co., 8 Pick. 90, and cases cited *supra*, note 2. But dividends due and unpaid may be said to be a fund, in the hands of the corporation, which it is not obliged to pay to the assignee of the stock, until its debts from the assignor are liquidated. Dividends are strictly due only to the assignor, and would not probably pass by a mere sale of the stock, unless there were some special ground for giving the transfer of the stock that operation.

(*c*) The corporation cannot refuse to permit a transfer in the absence of an express provision and of special agreement, merely because the assignor is indebted to the company. Merchants' Bank *v.* Shouse, 102 Penn. St. 488; Farmers' Bank *v.* Wasson, 48 Iowa, 310; Carroll *v.* Mullanphy Savings Bank, 8 Mo. Ap. 219; Case *v.* Bank, 100 U. S. 446.

(*d*) And it has been held that the assignee may maintain assumpsit for a refusal to transfer. Commercial Bank *v.* Kortright, 22 Wend. 348. And see Merchants' National Bank *v.* Richards, 6 Mo. Ap. 461; Scripture *v.* Francestown Soapstone Co., 50 N. H. 571; West Branch Canal Co.'s Appeal, 81 Penn. St. 19. So it has been held that he may maintain an action against the corporation for refusing to issue or transfer a certificate, though the assignment was not made on the books pursuant to charter. Baltimore City Passenger Railway Co. *v.* Sewell, 35 Md. 238. But upon principle, as there is no privity of contract, it would seem that the assignee should resort to proceedings against the assignor, either by action for damages or by a bill for a specific performance, or to proceedings treating the assignor as trustee. The assignee may in equity compel issue of a certificate, if he is willing to pay implied instalments. Iron Railroad Co. *v.* Fink, 41 Ohio St. 321.

SECTION II.

Contracts to transfer Stock.

1. Transfer under English statutes. Registered companies.
2. Contracts to transfer stock not yet acquired, valid if *bona fide*.
   n. 3. Effect of rule requiring assent of directors.
3. Vendor must have the stock, at the time agreed on.
4. Force of usages of stock-exchange.
5. Company will reform the registry at its peril.
6, 10. Company may compel one to accept shares on contract.
7. Stock standing in joint names belongs to survivors.
8. Mode and effect of correcting registry.
9. If the company vary the contract, specific performance will be denied.
10. Closing contracts by offer and acceptance.
11. Form of transfer. Two may join in one transfer.

§ 33. 1. Questions often arise in regard to transfers of stock in incorporated companies as to the quantity of interests conveyed, the title of the person making the conveyance, and many other incidents. The English statutes in regard to the registration of * railway companies are not intended to affect the property in the shares,[1] and a transfer is valid, although made before the registration.[2]

2. It would seem, too, that a contract to transfer stock in railway companies, at a future time, which the party neither has, nor is about to have, but expects to purchase in the market, for the purpose of fulfilling his undertaking, is nevertheless a valid contract, and not illegal, or against the policy of the law,[3] and that

[1] London & Brighton Railway Co. *v.* Fairclough, 2 Railw. Cas. 511; s. c. 2 M. & G. 674.

[2] Sheffield, Ashton-under-Lyne & Manchester Railway Co. *v.* Woodcock, 2 Railw. Cas. 522; s. c. 7 M. & W. 574.

[3] Hibblewhite *v.* M'Morine, 5 M. & W. 462. Walford intimates, Walf. Railw. 256 and note, that the law of France regards contracts of this class as illegal, and cites Hannuic *v.* Goldner, 11 M. & W. 819, in confirmation. But the case does not expressly decide the point. Where the deed of settlement required the assent of the directors to a transfer of shares, and the vendor did not obtain it, and in the mean time the price of shares fell in the market, it was held that the vendee might recover back his money. Wilkinson *v.* Lloyd, 7 Q. B. 27. But where the plaintiffs covenanted to subscribe for stock in a railway, and pay ten per cent, and then transfer to defendant, who agreed to pay the residue, but the by-laws of the company provided for transfer only after the payment of thirty per cent, unless by the consent of the directors,

the intimation of Lord TENTERDEN,[4] that such contracts were illegal, and not to be encouraged by the law or its ministers, is not to be regarded at this time as sound law, however good sense or good morality it may seem to be.

3. It is clearly not a stock-jobbing transaction within the English statute.[5] But to the performance of such a contract it seems * to be requisite, that the seller should *bona fide* procure the stock, by the time appointed for the transfer.[6]

4. The English reports, both in law and equity, and especially the more recent ones, abound in cases more or less affecting transfers of shares on the stock-exchange, and the practice and law governing transactions between brokers. These rules are allowed to have great weight in fixing the construction and effect of contracts made through the instrumentality of brokers. In the sale of shares in companies requiring the consent of the directors or of the company itself to the transfer, it is not understood, according to these rules, that the vendor or his broker undertakes to procure that consent, and if he does all that is requisite to effect a transfer of the equitable interest of the property, and there is no obstruction to the vendee in obtaining the registration of such transfer, by taking the prescribed steps the transfer will be regarded as complete.[7] There have been somewhat recently two English decisions bearing upon the sale of shares upon the stock-exchange which seem to require an

which was refused, and the plaintiffs tendered the defendant an assignment with power of attorney to transfer, which was refused as not being a compliance with the contract, it was held, in an action for damages, that the plaintiffs had complied with their covenant, and might recover, not the difference beween the value of the stock at the time of refusal and the sum due upon the subscription, but the whole sum due and interest. See also Orr *v.* Bigelow, 14 N. Y. 556.

[4] In Bryan *v.* Lewis, Ryan & Moody, N. P. 386, and in Lorymer *v.* Smith, 1 B. & C. 1.

[5] Hewitt *v.* Price, 4 M. & G. 355; Mortimer *v.* M'Callan, 6 M. & W. 58.

[6] Hibblewhite *v.* M'Morine, 2 Railw. Cas. 51–66; s. c. 6 M. & W. 200. The comments of ISHAM, J., in Noyes *v.* Spaulding, 27 Vt. 420, 429, may be regarded, perhaps, as giving the present state of the English law upon this subject.

[7] Stray *v.* Russell, 1 Ellis & E. 888, 916; s. c. 5 Jur. N. S. 1295; s. c. affirmed in Exchequer Chamber, 2 Ellis & E. 592. See also Field *v.* Lelean, 6 H. & N. 617, where a custom of the stock-exchange not to deliver shares of a particular class on contracts of sale until payment of the price, was held binding.

extended statement here. In Coles *v.* Bristowe[8] the question was heard in chancery. The custom of the stock-exchange seems to be that shares are bought and sold for the next settling day, when the jobber is either to take the liability on himself, or pass the names of transferees to whom no reasonable objection can be taken; and on such names being accepted by the vendor, and the transfers made and the price paid by the transferees, the personal liability of the jobber to the vendor ceases. It was accordingly held, that, where the plaintiff instructed his brokers to sell certain shares for him, and they disposed of them to the defendants for the next settling day, both plaintiff and defendants being familiar with the usages of the stock-exchange, and the transaction being confessedly subject thereto, and on the settling day the defendants passed the names of persons whom the plaintiff accepted, and executed transfers to them, and received the price of them, but the suspension and winding up of the company between the sale and the settling day having rendered the registration of the transfers impossible, it was held that the defendants, who, up to the acceptance of the transferees and transferring the shares to them, were liable to indemnify the vendor in respect of his liability on the shares, became thereupon exonerated from all liability; and the transferees became liable to the same extent by accepting the transfer as if they had executed it on their part, but how far that liability will extend was not determined here. But it was here held that the vendor of shares on the stock-exchange cannot excuse himself from being bound by the usages of the exchange, so long as he continues to sell there by any private instructions to his broker. The same subject is very extensively discussed by Lord Chief-Justice Cockburn in delivering the opinion in Gressell *v.* Bristowe,[9] with the same general results; so that it must now be regarded as settled in England that one who sells upon the stock-exchange through a broker, will be bound by the known usages of the place, and whether such usages are in fact known to the vendor or not will not probably be held essential, so long as they are of general notoriety and understood both by his broker and that of

[8] 17 W. R. 105, before the full Court of Chancery Appeal, Lord Chancellor Cairns, and Lords Justices Wood and Selwin.

[9] 17 W. R. 123, in the Exchequer Chamber, on error from the Common Pleas, 16 W. R. 428; s. c. Law Rep. 3 C. P. 112; *infra*, § 36, pl. 4, note 4.

the other party. The precise point of the decisions seems to be, that any usage of the stock-exchange which is uniform and reasonable will be understood to form one of the terms of sales made there, unless there is something to show that the parties understandingly waived or departed from it. And the fact that one of the parties gave special instructions to his broker, which were not communicated to the broker of the other party, will make no difference.

*5. Where the company assume to erase transfers from their books on the alleged ground that they are merely colorable, and made for the purpose of injuriously affecting the interest of the company or others, they assume the burden of showing such to be the facts; and the transferees will be entitled to a mandamus to compel the company to restore their names to the registry as the proprietors.[10]

6. It is competent for the company to maintain a bill in equity against one upon an agreement to accept shares, although no writing has been signed by the defendant according to the statute requiring the acceptance to be in writing. The contract may be enforced, as an agreement to do what the statute requires, and the decree will settle the question whether the defendant or some other one is the lawful holder of the shares in question.[11]

7. Where stock is allowed to stand in the joint names of two persons, they will be regarded as joint tenants, unless something is shown to the contrary, and the company may treat the survivor as the owner of the whole.[12]

8. A court will not interfere to compel a joint-stock company to correct their registry by removing one name and inserting another while an action at law is pending in regard to the same

[10] Ward *v.* South Eastern Railway Co., 2 Ellis & E. 812; s. c. 6 Jur. N. S. 890. The owner of shares, unless precluded by the charter of the company, may lawfully transfer them to any one who will accept the same, although it be done to escape the responsibility of membership. Weston's Case, 17 W. R. 62; *Ex parte* Rayner, id. 64.

[11] New Brunswick & Canada Railway Land Co. *v.* Muggeridge, 4 Drew. 686; Bog Lead Co. *v.* Montague, 10 C. B. N. S. 481; s. c. 8 Jur. N. S. 310.

[12] Garrick *v.* Taylor, 3 Law T. N. S. 460. And this will be so, though, by the rules of the bank, there is to be no benefit of survivorship, it appearing to have been the purpose of the deceased to have his share go to the survivor. Garrick *v.* Taylor, 29 Beav. 79; 7 Jur. N. S. 116, affirmed by Lords Justices, 10 W. R. 49.

matter.[13] Where the registry is altered under a misapprehension as to the genuineness of a transfer it will not have the effect to transfer the shares.[14] Specific performance of a contract to sell shares will be decreed in equity, notwithstanding the constitution of the company provides that no shares shall be transferred except in such mode as the board shall approve, and the board refuse to give its consent to the transfer.[15]

9. If the company in their notice of allotment annex a condition which they have no power to do, it will be regarded as such a variation * of the contract that a court of equity will not interfere to decree specific performance of the original contract. As when the company in such notice require the allottee to sign the deed of settlement on pain of forfeiture of the shares, when the constitution of the company gave no such power.[16]

10. The learned judge, Lord Chancellor Westbury, here discusses the general questions involved, and concludes, that in general the court will specifically enforce a contract to accept of shares in a joint-stock company. His lordship explains much at length his own views of the true *modus operandi* in effecting contracts by means of written offers and acceptance, and concludes, very justly, we think, that one who attempts to enforce such a contract must show that the acceptance on his part was prompt, simple, and unqualified; and that where new conditions are made in the acceptance the contract will not be regarded as closed until assent is given by the other party, either expressly or by fair implication, to such conditions.

11. The transfer of shares intended to be recorded on the books of the company should contain nothing but the transfer of the title. And where there are shares in different companies transferred between the same parties at the same time, it will be more convenient to have a separate transfer for each company.[17] But as to the mere conveyance of title between the parties, one conveyance is sufficient. And it is held even that two different owners may join in one conveyance to the same person.[18]

[13] *Ex parte* Harris, 29 Law J. 361; s. c. 5 H. & N. 809.

[14] Hare *v.* London & North Western Railway Co., 1 Johns. Ch. Eng. 722.

[15] Poole *v.* Middleton, 29 Beav. 646; s. c. 7 Jur. N. S. 1262.

[16] Oriental Inland Steam Co. *v.* Briggs, 2 Johns. & H. 625; s. c. 8 Jur. N. S. 201.

[17] Lord Campbell, C. J., in Reg. *v.* General Cemetery Co., 6 E. & B. 415, 419; Copeland *v.* North Eastern Railway Co., 6 id. 277.

[18] Wills *v.* Bridge, 4 Exch. 193.

SECTION III.

Intervening Calls, or Assessments.

1. Vendor must pay calls, if that is requisite to pass title.
   n. (a). But as between parties liability depends on agreement.
2. Generally it is matter of construction, and inference.
   n. 2. Calls paid by vendor after executing transfer.

§ 34. 1. It has been said, too, that the contractor to transfer stock must see to it that all calls are met, up to the time of the * transfer, as in general the charters of such companies, or their by-laws, prohibit the transfer of stock while calls remain unpaid.[1] (*a*) But we have seen that this is a provision for the protection of the company, and in which they alone are interested, and which will not ordinarily avoid a sale, between other parties, otherwise valid.

2. And it would seem that the question, upon which party the duty to pay future calls shall rest, is one of construction, in the absence of express stipulation; at all events, one of intention. It may perhaps be safe to say that the sale of stock, in the present tense, ordinarily implies that it is free from incumbrance of any kind, unless there is some exception or qualification in the contract. And that may be the common presumption, in regard to contracts to deliver stock in future. But in the latter case the presumption is not, by any means, of so conclusive a character as in the former, and sometimes, in such cases, it has been held not incumbent upon the seller to pay intervening calls.[2]

[1] Walf. Railw. 256, 257. And under the English statute 8 Vict. c. 16, § 16, providing that no transfer of shares shall be valid until the transferor shall pay any call due on such shares, or on any other shares held by him, does not apply to the transfer of shares on which no calls are due, notwithstanding the transferor may hold shares not fully paid up. Hubbersty *v.* Manchester, Sheffield, & Lincolnshire Railway Co., Law Rep. 2 Q. B. 59.

[2] Shaw *v.* Rowley, 16 M. & W. 810; s. c. 5 Railw. Cas. 47. In this case

(*a*) As between assignor and assignee, the liability for unpaid calls depends altogether upon agreement. But in the absence of agreement, it may fairly be implied that the purchaser assumes the payment of whatever the certificates show to be due; and where there is no delivery of certificate and no reference to the amount paid, it may be implied that the shares are paid up. See Morawetz Priv. Corp. § 161, and cases cited.

*SECTION IV.

Transfer by Deed in Blank.

1, 2. Blank transfer formerly held invalid in England.
3. Rule different in America.
4. Deed executed in blank and filled by procuration valid.

§ 35. 1. Ordinarily the transfer of stock, or a contract to transfer, is not required to be in any particular form. All that is requisite is, the same as in any other contract, the meeting of the minds of the parties. But in some cases the shares are, by the

it was held no impediment to the seller's readiness to convey the shares that he had not paid an intervening call, as he might do it at the moment of executing the transfer; and the court say the call was ultimately to be paid by the purchaser.

In Humble *v.* Langston, 7 M. & W. 517; s. c. 2 Railw. Cas. 533, it is decided that on the sale and transfer of the shares, where the purchaser's name is not substituted on the register for that of the seller, but the stock is still standing in the seller's name, so that he is subject to the payment of future calls, he cannot recover the money of the purchaser, because there is no implied contract to that effect, resulting from the transaction. This is a most remarkable decision, and unsupported by either reason or analogy. But it is affirmed in the subsequent case of Sayles *v.* Blane, 6 Railw. Cas. 79. These cases can be accounted for only on the principle of discouraging blank unregistered transfers, which have the effect to evade the stamp duties. Shelf. Railw. 108; Report on Railways, 1839, No. 517, p. 4.

In Cheltenham & Great Western Union Railway Co. *v.* Daniel, 2 Q. B. 281; s. c. 2 Railw. Cas. 728, it is held that the purchaser of shares may, by way of estoppel *in pais*, be made liable for calls before his name is actually substituted for that of the seller on the register of shares. If so, both parties are liable for the calls, and the seller, while his name remains on the register, is the mere surety of the purchaser, as to future calls. And while the purchaser suffers the seller's name to remain on the register, and liable through his neglect to the payment of calls, what more proper than that he should be held to an implied promise to indemnify the seller against all loss on that account? See Burnett *v.* Lynch, 5 B. & C. 589.

Since the above was written, the later case of Walker *v.* Bartlett, 18 C. B. 815; s. c. 36 Eng. L. & Eq. 368, has come to hand, where a blank transfer seems to be regarded as perfectly valid, and the transfer in this mode as imposing on the vendee the duty of paying calls on the shares, while they remain his property. This result is very gratifying, as the former decisions had quite effectually mystified the subject.

express requirements of the charter, made transferable only by deed executed by both parties to the transfer.

2. And in such case, it was considered that a deed executed by the seller, with a blank for the name of the transferee, was no compliance with the statute.[1] (*a*) The opinion of the court seems to rest * upon the early cases, in which it is held that the party cannot effectually execute a deed, leaving such important blanks as the name of the grantee or obligee, while it is considered that less important ones, like the date, etc., may be supplied, after the execution, by permission of the party executing the same. This seems to have been the undoubted rule of the English law, from the authorities cited in the last case.

3. But it seems to be rather technical than substantial, and to found itself either in the policy of the stamp duties, or the superior force and sacredness of contracts by deed, both of which have little importance in this country. And the prevailing current of American authority, and the practical instincts and business experience and sense of our people, are undoubtedly otherwise.

4. There is no good reason why one should not be as much bound by a deed executed in blank, and filled according to his directions, as by a blank acceptance or indorsement of a bill, or note; and accordingly we find a large number of decisions of the American courts leading in that direction.[2]

[1] Hibblewhite *v.* M'Morine, 2 Railw. Cas. 51; s. c. 6 M. & W. 200. It is considered that two or more several owners of shares may join in one deed to convey their shares. Wills *v.* Bridge, 4 Exch. 193; Enthoven *v.* Hoyle, 13 C. B. 373; s. c. 9 Eng. L. & Eq. 434. See *supra*, § 34, note 2.

[2] Stahl *v.* Berger, 10 S. & R. 170; Sigfried *v.* Levan, 6 S. & R. 308; Wiley *v.* Moor, 17 S. & R. 438; Ogle *v.* Graham, 2 Penn. 132; Woolley *v.* Constant, 4 Johns. 54, 60: *Ex parte* Kerwin, 8 Cow. 118; Boardman *v.* Gore, 15 Mass. 331. And the following certainly incline in the same direction. Smith *v.* Crooker, 5 Mass. 538, *per* Parsons, C. J.; Hunt *v.* Adams, 6 Mass. 519; Warring *v.* Williams, 8 Pick. 326; Adams *v.* Frye, 3 Met. 103; Commonwealth Bank *v.* Curry, 2 Dana, 142: Commonwealth Bank *v.* McChord, 4 Dana, 191; Johnson *v.* United States Bank, 2 B. Monr. 310; Camden Bank *v.* Halls, 2 Green, 583; Duncan *v.* Hodges, 4 M'Cord, 239.

In London & Brighton Railway Co. *v.* Fairclough, 2 Man. & G. 674; s. c. 2 Railw. Cas. 544, the deed of transfer, where one name was first inserted as transferee, and subsequently erased and another inserted, and the deed re-

(*a*) A blank indorsement of the stock-certificate is valid. Walker *v.* Detroit Transit Railway Co., 47 Mich. 338.

*SECTION V.

Sale of spurious Shares. — Rules of Stock Exchange.

1. Vendor, who acts *bona fide*, must refund money.
   n. 1. Discussion of the extent of implied warranty.
3. No implied warranty in such case which will entitle the vendee to special damage.
4. Rule of the stock-exchange, made after the sale, not binding on parties. How far such rules bind parties.

§ 36. 1. Where one employed a share-broker to sell in the market what purported to be scrip or certificates of shares in a projected railway company, which subsequently proved to have been forged, and the broker paid the price at which he sold them to the defendant, but being called upon by the purchaser to make good the loss, repaid the money, and a further sum, according to a resolution of the committee of the stock-exchange as to the value of genuine shares in the same railway company, which resolution was passed after the sale of the spurious shares; the defendant declining to pay this further sum, the broker brought an action, claiming to recover, as upon a warranty that the shares were genuine, with a count for money paid.[1]

executed by the vendor, was held void because it had not been restamped. *Infra*, §§ 239, 241.

But where one borrowed money and deposited certificates of railway shares with blank assignments upon them as security, and the blanks were not filled up till the shareholder became bankrupt, it was held that the depositary had a lien upon the shares for money advanced by him or paid on calls upon the shares. *Ex parte* Dobson, 2 Mont. D. & De G. 685. And railway bonds issued with the name of the obligee blank, are held negotiable in that form, although not in terms negotiable; and any holder for value, before the blanks are filled, may maintain an action in his own name against the company. Chapin *v.* Vermont & Massachusetts Railroad Co., 8 Gray, 575. See also White *v.* Vermont & Massachusetts Railroad Co., 21 How. 575.

An auctioneer who sells shares at public auction without disclosing the name of his principal makes himself personally responsible for the fulfilment of the contract of sale. Franklyn *v.* Lamond, 4 C. B. 637; Hodges Railw. 119.

[1] Hodges Railw. The rule has been thus defined: "If a share-broker, directed to buy shares, buys what is ordinarily bought and sold in the stock-market as shares, he has fulfilled his commission, and cannot be made responsible for the fraud or misconduct of parties who may have issued the shares

* 2. Upon the latter count the defendant paid into court the money received upon the original sale, with interest.

3. It was held, the plaintiff could not recover upon the ground of the warranty, there being no promise, express or implied, that the certificates were genuine; and that under the other count he could only recover the money paid defendant.

4. It was also held, that the resolution of the committee of the stock-exchange, made after the transaction was completed, however it might bind the members of that body, could not affect the defendant.[2] There has been considerable discussion in the English courts, as we have seen, in regard to the binding effect of a rule of the stock-exchange, by which the purchasing broker of shares is held entitled at the settling day, in case of the purchase of shares, to bring forward a responsible party to whom the shares are to be transferred, and thus exonerate himself from any further responsibility in the matter; the seller being bound to look to the party

without authority. There is no warranty or undertaking, on the part of the broker employed to buy shares or scrip, that the article which merely passes through his hands is anything more than what it purports on its face to be, and what it is generally understood to be in the market." Addison Con. 5th ed. 191. But if a broker sell stock-shares or debentures for an undisclosed principal, and sign the sold note, he is responsible for any loss sustained by the purchaser through the fraud of the undisclosed principal, although the purchaser knew that he was dealing with a broker. Carr *v.* Royal Exchange Insurance Co., 5 B. & S. 666; s. c. *nom.* Royal Exchange Insurance Co. *v.* Moore, 11 W. R. 592.

There is no good reason why the vendor of shares in a joint-stock company should not be held responsible for the genuineness of the article, the same as any other vendor. It may not follow that either of the brokers of the contracting parties could be so held, since, in general, they act merely in a representative capacity. But the ultimate vendor must be responsible on an implied warranty to that extent. And, as was held in the case last cited, if the broker withholds the name of his principal he thereby assumes that responsibility personally.

[2] Westropp *v.* Solomon, 8 C. B. 345. The cases in this country would be regarded, probably, as favoring the view that on such a sale there is an implied warranty that the article is what it purports to be, and, consequently, that the seller is liable to pay its value in the market at the time its spuriousness is discovered. But see cases collected *infra*, § 235. It would seem that in England it is an indictable offence for persons to conspire to fabricate shares, in addition to the number of which a company consists, in order to sell them as good shares, notwithstanding any imperfection in the original formation of the company. Rex *v.* Mott, 2 C. & P. 521; *infra*, § 37, note 3.

to whom the shares are thus transferred for indemnity against future calls, provided the company shall decline to register the transfer. The Court of Common Pleas,[3] BYLES dissenting, held the custom not reasonable, and of no force. But this judgment was reversed in the Exchequer Chamber,[4] (*a*) where the custom was held entirely reasonable and binding. The courts could scarcely pronounce so convenient and universal a custom to be unreasonable.

[3] Grissell *v.* Bristowe, Law Rep. 3 C. P. 112.

[4] Grissell *v.* Bristowe, Law Rep. 4 C. P. 36. It seems from this case, and that of Torrington *v.* Lowe, Law Rep. 4 C. P. 26, that the seller has no remedy against any other party after he accepts the purchaser. But he is not obliged to accept him, unless he is ready to pay the price and is a responsible party, nor if he is a non-resident foreigner; and on his refusal to accept him, the broker will remain personally responsible to his customer, not having offered the name of a purchaser against whom no reasonable objection could be made. Allen *v.* Graves, Law Rep. 5 Q. B. 478. In the case of Mollett *v.* Robinson, Law Rep. 7 C. P. 84; s. c. 20 W. R. 544, the effect of custom in regard to a particular trade in a particular city, in binding persons not resident at that place or shown to be cognizant of the custom, was fully discussed in the Exchequer Chamber, by six of the judges, who were equally divided on the point, and who therefore gave separate opinions. In Maxted *v.* Paine, Law Rep. 6 Exch. 132; s. c. Law Rep. 4 Exch. 203, (*a*) the question of the effect of the seller having accepted a purchaser not responsible for future calls is extensively considered, and all the cases carefully reviewed, and the conclusion reached that, although the seller may not be bound to accept an irresponsible person as purchaser, still, if he do accept such person, he cannot compel the broker to indemnify him against loss. See also Coles *v.* Bristowe, Law Rep. 6 Eq. 149; s. c. 4 Ch. Ap. 3; Bowring *v.* Shepherd, Law Rep. 6 Q. B. 309; *supra*, § 33, pl. 4, and note.

(*a*) Maxted *v.* Paine, cited in note 4, was approved in Merry *v.* Nickalls, Law Rep. 7 Ch. Ap. 733, where it is held that where the broker for the buyer of shares gives the name of an infant as the buyer, he is not thereby exonerated from liability to indemnify the seller from new calls or other charges on the shares.

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SECTION VI.

Readiness to perform.—Custom and Usage.

1. Vendor must be ready and offer to convey.
2. Vendee must be ready to pay price.
3. General custom and local usage.
n. 3. Oral evidence to explain memoranda of contract.
4. The party taking the initiative must prepare the writings.

§ 37. 1. The obligation resting upon the vendor of railway shares is to have, at the time specified in the contract for delivery, a good title to the requisite number of shares, and to manifest his readiness to convey, which is usually done by tendering the proper conveyance. But this is not necessary. Any other mode of showing readiness is sufficient.[1]

2. The corresponding obligations upon the vendee are readiness to receive the proper conveyance, at the specified time and * place, and to pay the price, and it would seem to prepare a proper conveyance, and tender the same for execution, upon having a good title made out.[2]

3. But the incidents of such contracts are liable to be controlled by general and local customs, and usages of trade, the same as other similar contracts.[3] Hence any general known usage of those

[1] Humble *v.* Langston, 7 M. & W. 517; s. c. 2 Railw. Cas. 533; Hannuic *v.* Goldner, 11 M. & W. 849; Hare *v.* Waring, 3 M. & W. 362; Hibblewhite *v.* M'Morine, 2 Railw. Cas. 51. In Munn *v.* Barnum, 24 Barb. 283, it is held that mere readiness to transfer is sufficient in such cases, and that an actual transfer is never requisite where the purchaser declines to pay the price.

[2] Lawrence *v.* Knowles, 5 Bing. N. C. 399; Stephens *v.* De Medina, 4 Q. B. 422; Bowlby *v.* Bell, 4 Railw. Cas. 692.

[3] Stewart *v.* Canty, 2 Railw. Cas. 616; 8 M. & W. 160. And one who employs a share-broker at a particular place to purchase shares, is bound by a usage affecting the broker at that particular place, — a usage, e. g., by which the seller may resell, the buyer not being ready to pay, and collect the difference of the broker. Pollock *v.* Stables, 5 Railw. Cas. 352; s. c. 12 Q. B. 765.

So of a usage by which the vendor having paid a call to enable him to convey, the broker must pay him, and resort to the buyer as for money paid for his use. Bayley *v.* Wilkins, 7 C. B. 886. And it would seem the party is bound by such usage, though not cognizant of it. Bayliffe *v.* Butterworth, 1 Exch. 425, *per* PARKE and ROLFE, BB.; s. c. 5 Railw. Cas. 283; Sutton *v.* Tatham, 10 A. & E. 27.

Where the broker could not obtain the certificate of shares for some

* negotiating similar business, and which may be fairly presumed to have been known to the parties, or which ought to have been, and * any local custom, or usage of trade, which was in fact known to both parties, is regarded as if incorporated into the contract, the parties being presumed to have contracted with reference to it.[3] But it may be questionable, perhaps, whether the custom in regard to sales of stock in this country, would require the purchaser to be at the sole expense of preparing the proper conveyance.

4. It is safe, perhaps, to say, that the party tendering a conveyance, or he who demands it, in practice, ordinarily causes the instrument required to be executed to be prepared in the one case and executed in the other. But less will often suffice, where the other party refuses to proceed.[4]

months, on account of the delay in having them registered by the company, and in the mean time a call was made which he paid, the buyer, having from time to time urged the forwarding of the scrip without delay, it was held, should not repudiate the contract. McEwen *v.* Woods, 11 Q. B. 13; 5 Railw. Cas. 335.

So where one gave a broker an order to purchase shares at a time when no shares were in the market, or had in fact issued, but when letters of allotment were commonly bought and sold as shares, and the plaintiff bought a letter of allotment of fifty shares, it was held that a jury might find that this was an execution of the order. Mitchell *v.* Newhall, 15 M. & W. 308; s. c. 4 Railw. Cas. 300.

And where the broker bought scrip certificates, which were sold in the market as "Kentish Coast Railway Scrip," and signed by the secretary of the company, but which were afterwards repudiated by the directors as having been issued by the secretary without authority, it was held, in an action to recover from the broker the price paid and his commissions, that the proper question for the jury was, whether what the plaintiff intended to buy was not that which went in the market as "Kentish Coast Railway Scrip," there being no other form of that scrip in the market at the time. Lamert *v.* Heath, 15 M. & W. 486; s. c. 4 Railw. Cas. 302; *supra*, § 36.

The remarks of Lord Campbell, C. J., in the case of Humfrey *v.* Dale, 7 Ellis & B. 266; 20 Law Rep. 227, in regard to the necessity of relaxing the rule of the admissibility of oral evidence to explain the import of commercial terms and memoranda in written contracts between merchants, are worthy of particular attention.

[4] Walf. Railw. 262, note, where it is said, "It would seem, that if the vendor fails to make out a title, this dispenses with a tender of conveyance." But if stock is to be delivered on demand, it is necessary to show an actual request to deliver, in order to sustain an action for non-delivery. Green *v.* Murray, 6 Jur. 728. Where the contract is to deliver stock in a reasonable time, or at

* SECTION VII.

Damages. — Specific Performance.

1. Damages, difference between contract price and price at time of delivery.
2. Equity will decree specific performance of contract for sale of shares.

n. (a) When like shares cannot be obtained elsewhere.

§ 38. 1. The damages which either party is entitled to recover, is the difference between the contract price and the market price, at the time for delivery, or, in some cases, a reasonable time after, which is allowed either party for resale or repurchase.[1]

no specified time, which the law regards as in a reasonable time, or on or before a day named, it is presumed each party is entitled to the whole time in which to perform. Stewart *v.* Cauty, 2 Railw. Cas. 616; s. c. 8 M. & W. 160. It seems that where the deed of settlement requires the consent of the directors to the validity of the transfer of shares, it is incumbent on the vendor to obtain such consent; and where the transfer is duly made, executed, and delivered, and the money paid, but the directors refuse to give their assent, the purchaser may recover the money paid, and the return of the transfer will be deemed collateral to the contract of purchase, and not a condition precedent to the plaintiff's right to recover. Wilkinson *v.* Lloyd, 7 Q. B. 27.

And where the charter of the company or the statute prohibits the transfer of the shares while calls remain due, a deed of transfer made, while calls remain unpaid, is altogether null and void, so that the company may refuse to register such a transfer, though the calls have been subsequently paid. It is said it would be necessary to re-execute the deed, after the payment of the calls, before the company could be compelled to register it. Hodges Railw., 121, 122. But it has been said, that if a deed be delivered as an escrow in such case, to take effect when the calls are paid, it may be good. Patteson, J., in Hall *v.* Norfolk Estuary Co., 7 Railw. Cas. 503; s. c. 8 Eng. L. & Eq. 351. As to the binding effect of the usages of the stock-exchange, see Maxted *v.* Paine, 17 W. R. 886; *supra*, § 36, pl. 4, and note 4.

[1] Barned *v.* Hamilton, 2 Railw. Cas. 621; Humble *v.* Mitchell, 11 A. & E. 205; s. c. 2 Railw. Cas. 70; Shaw *v.* Holland, 15 M. & W. 136. But the purchaser is not entitled to recover any advance in the market price of such shares, after a reasonable time for repurchase. Tempest *v.* Kilner, 2 C. B. 300; s. c. 3 C. B. 249. See also Pott *v.* Flather, 5 Railw. Cas. 85; Williams *v.* Archer, id. 289; s. c. 5 C. B. 318. But a broker is not entitled to commissions unless he completes the sale; he may, however, be entitled to reimbursement of actual expenses. Durkee *v.* Vermont Central Railroad Co., 29 Vt. 127. In a case in the Common Pleas, Loder *v.* Kekule, 3 C. B. N. S. 128; s. c. 30 Law T. 64, it was decided, that for breach of contract by delivery of an inferior article, if the article was one that could be immediately sold in the market, the damages

2. And a court of equity will decree a specific performance of a contract to transfer railway shares, but not for the transfer of stock in the funds, as any one may always obtain that in the market, but railway stock is not always obtainable.[2] (*a*) This subject * has been largely discussed in the English Court of Chancery Appeal,[3] and the same rule declared, which is stated above. But in that case the plaintiff failed to obtain a decree, for the reason that he had already conveyed the stock to the defendant's vendee, in ignorance that the defendant was the real purchaser; and the matter having lain by for a whole year, it now seemed impossible to say that the plaintiff had made, or could make, good title to the stock, which is always an insuperable barrier to a decree for specific performance. A later case upon the subject in the English Court of Chancery Appeal holds, that an agreement to accept a transfer of railway shares, on which nothing had been paid, was not *nudum pactum*, but a contract which may be specifically enforced in equity. Lord CHELMSFORD, Chancellor, in delivering his

were the difference between the market value of the article delivered and that contracted for. But where the article cannot be immediately resold, as where the resale is delayed by the defendant, the measure of damages is the difference between the value of the article contracted for, at the time and place of delivery, and the amount made by the resale, within a reasonable time of the delivery of the article. See also Rand *v.* White Mountain Railroad Co., 40 N. H. 79. It is here said that such a contract creates no debt, attachable by process of foreign attachment, but is merely a claim for unliquidated damages. And see Hager *v.* Reed, 11 Ohio St. 626, where the general question of the enforcement of contracts to transfer stock is considered, and the effect of judgment for the price without an actual transfer or an order of court therefor.

[2] Duncuft *v.* Albrecht, 12 Sim. 189; Shaw *v.* Fisher, 2 De G. & S. 11; s. c. 5 Railw. Cas. 461. Leach *v.* Fobes, 11 Gray, 506. On bills in the English courts for specific performance of contracts to transfer stock there has been most controversy as to the sufficiency of the proof. See Parish *v.* Parish, 32 Beav. 207; Bermingham *v.* Sheridan, 33 Beav. 660; s. c. 10 Jur. N. S. 415.

[3] Shaw *v.* Fisher, 5 De G. M. & G. 596; Sullivan *v.* Tuck, 1 Md. Ch. 59, 112; McGowin *v.* Remington, 12 Penn. St. 56. See, also, upon the subject of specific performance in courts of equity, Adams, Eq. (ed. 1859) 77–91, and cases cited; Carpenter *v.* Insurance Co., 4 Sandf. Ch. 408; Lowry *v.* Muldrow, 8 Rich. Eq. 241.

(*a*) Specific performance will be decreed at suit of the purchaser whenever shares similar cannot be procured elsewhere. Parish *v.* Parish, 32 Beav. 207; Beckitt *v.* Bilbrough, 8 Hare, 188. And see Monson *v.* Fenno, 129 Mass. 405; Baldwin *v.* Commonwealth, 11 Bush, 417. Otherwise of course where performance is impossible. Ferguson *v.* Wilson, Law Rep. 2 Ch. Ap. 87.

judgment, quotes with approbation the words of the Vice-Chancellor of England, in Duncuft *v.* Albrecht. "There is not any kind of analogy," said that learned judge, "between a quantity of three per cent, or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market,) and a certain number of railway shares of a particular description, which railway shares are limited in number, and which are not always to be had in the market." We regard this as the latest authoritative declaration of the English equity courts upon the subject.[4] So it was held, that a court of equity will decree a specific performance against a railway company of a contract to take land and pay a stipulated price.[5]

*SECTION VIII.

Specific Performance.

1. Specific performance decreed against the vendee.
2. This was denied in the early cases.
3. Owner of original shares may transfer them.
4. Specific performance not decreed where not in the power of the party.

§ 39. 1. It is considered, under the English statutes, that the purchaser of shares in a railway is bound to execute the assignment on his part, procure himself to be registered, pay all calls intervening the assignment and the registration of his name as a shareholder, and indemnify the seller against future calls, and upon a bill filed for that purpose, it was so decreed.[1]

[4] Cheale *v.* Kenward, 3 De G. & J. 27. There has been a similar decision by the Supreme Court of Massachusetts. Leach *v.* Fobes, 11 Gray, 506; s. p. Todd *v.* Taft, 7 Allen, 371.

[5] Inge *v.* Birmingham, Wolverhampton, & Stour Valley Railway Co., 3 De G. M. & G. 658; s. c. 23 Eng. L. & Eq. 601; *infra*, § 213. So also in their favor, Old Colony Railroad Co. *v.* Evans, 6 Gray, 25. And the fact that the price of shares has unexpectedly fallen in the market will not preclude a decree for specific performance. Hawkins *v.* Maltby, 17 W. R. 557; s. c. Law Rep. 4 Ch. Ap. 200; approving case between same parties, 16 id. 209; overruling same case, 15 id. 1075; Price *v.* Denb., R., & C. Railway Co., 17 id. 572.

[1] Wynne *v.* Price, 3 De G. & S. 310; s. c. 5 Railw. Cas. 465; Shaw *v.* Fisher, 2 De G. & S. 11; s. c. 5 De G. M. & G. 596. These cases were decided by

2. But in some of the earlier cases, very similar in principle, the Court of Chancery declined to interfere, and the opinion is very distinctly intimated that the law implied no undertaking, on the part of the purchaser of railway shares, to assume the position and burdens of the seller.[2]

3. In the case of Jackson *v.* Cocker a query is started by the * Master of the Rolls, upon the authority of Josephs *v.* Pebrer,[3] whether a contract by which the original subscribers of shares in a railway company stipulate to be relieved from their undertaking, and to substitute another party in their place, is to be regarded as legal? But the case referred to was decided upon the ground that the concern then in question was illegal in itself, within the English statute,[4] as having transferable shares, and affecting to act as a body corporate, without authority by charter or act of parliament.

4. The Court of Chancery will not decree specific performance against a railway company which promised to allot shares to the plaintiff, especially where it appears such shares have been given to others.[5] A court of equity will never, it seems, decree specific performance against a party, where it is not in his power to perform, although such incapacity be the result of his own

Vice-Chancellor Knight Bruce, and are obviously somewhat at variance with the principles assumed in Humble *v.* Langston, 7 M. & W. 517. The learned judge here seems to have felt a just indignation that any defence was attempted in such a case. "The defence," says he, "was without apology or excuse." And in the case of Jacques *v.* Chambers, 2 Coll. C. C. 435; 4 Railw. Cas. 499, where a testator possessed of fifty original shares and seventy purchased shares, calls upon which had not all been made, by his will gave thirty shares to trustees, for A., and thirty shares to B., and twenty-five original and five purchased shares were allotted by the executors to each of the legatees, the same judge held that the testator's estate was liable to pay the calls; and a sum to pay the unpaid calls was ordered to be placed to a separate account, and laid out, and the income meanwhile paid to those entitled to the general residue. This case was decided on the authority of Blount *v.* Hipkins, 7 Sim. 43, 51, which, it was said, could not be substantially distinguished as regarded either set of shares. See also Duncuft *v.* Albrecht, 12 Sim. 189. But, as before said, it is well settled, that the courts in England will not decree specific performance of a contract to sell public stocks, which may always be had in the market. Nulbrown *v.* Thornton, 10 Ves. 159.

[2] Jackson *v.* Cocker, 2 Railw. Cas. 368; s. c. 4 Beav. 59.

[3] 3 B. & C. 639.

[4] Statute 6 Geo. 1, c. 18.

[5] Columbine *v.* Chichester, 2 Phillips, 27.

fault. But will, in such case, leave the other party to his remedy at law, by way of damages, which is all the redress that remains.[6] (*a*)

* SECTION IX.

Trustee entitled to Indemnity against future Calls.

1. Trustee entitled to indemnity, on general principles.
2. English courts hesitated in regard to railway shares.
3, 4. Cases reviewed.
5. Mortgagees liable, as stockholders, for the debts of the company.
6. Ostensible owner must respond to all responsibilities.
7. Executors responsible personally.
8. Mortgagor is entitled to redeem on restoring the shares as stipulated in his deed.

§ 40. 1. It seems to be regarded as the general rule of chancery law, that the trustee of property is entitled to indemnity for expenses *bona fide* incurred in the management and preservation of the trust-fund, or estate, either out of the property or as a personal duty from the *cestui que trust*, in most cases.[1]

2. We apprehend there is no good reason why this principle should not receive a general application to the case of shares in a railway company, held as security for debt, by way of mortgage or pledge. And it would seem, that no serious question could ever

[6] Greenaway *v.* Adams, 12 Ves. 395, 400; Varick *v.* Edwards, 11 Paige, 289. In the case of Miller *v.* Illinois Central Railroad Co., 24 Barb. 312, where the company, by its treasurer, gave a receipt for money, to be repaid with interest on demand, or received in payment of stock, to be issued to them or their assigns when the directors should authorize the issue of more stock, it was held that the holder of such receipt had only an option to take the shares or the money, and that he could not claim to be a holder of stock, or to have any right thereto, until he had given notice of his election to take stock. And an assignee of such holder, who took the receipt as collateral security, was held in the circumstances to have no better right.

[1] Murray *v.* De Rottenham, 6 Johns. Ch. 52, 67 ; Green *v.* Winter, 1 Johns. Ch. 27; Watts *v.* Watts, 2 McCord, Ch. 82; Myers *v.* Myers, 2 McCord, Ch. 264; McMillan *v.* Scott, 1 (?) Monr. 151; Morton *v.* Barrett, 22 Me. 257; Draper *v.* Gordon, 4 Sandf. Ch. 210; Egbert *v.* Brooks, 3 Harring. Del (?) 110; Methodist Episcopal Church *v.* Jaques, 1 Johns. Ch. 450; Story Bailm., §§ 306, 306*a* 357 358.

(*a*) See *supra*, § 38, note (*a*).

have arisen upon the subject, but for the strange inconsistencies into which the English courts and judges have been led, by attempting, for so long a period, to maintain the doctrine laid down in Humble *v.* Langston,[2] but which is now effectually overruled in the tribunal of last resort.[3]

3. But we shall refer briefly to the decisions upon this point, in regard to railway shares and stock, in other similar companies. It was held, by WIGRAM, Vice-Chancellor,[4] that where there was * a contract for retransfer, claimed by the mortgagor, or found in express terms in the contract of pledge or mortgage, or inferable from circumstances, this was sufficient ground for implying a contract, by the mortgagor, to indemnify the mortgagee against liability to the creditors of the company for debts incurred, while his name remained upon the register of shares as owner, and a decree was made accordingly.

4. The same learned judge, in the same case, considered, that where the mortgage was made simply as an absolute transfer, subject to redemption, and nothing had passed binding the mortgagor to take a retransfer of the shares, the mortgagor was not bound to indemnify the mortgagee against debts incurred after the transfer made in the mortgage, and before the mortgage debt was paid off. But it is here maintained, that the mortgagee has not in such case any right, at law, against the mortgagor, as to payments which he has been compelled to make while he remained the ostensible owner of the shares, even where a contract for retransfer is shown. But an English writer upon this subject [5] seems to incline to the opinion that, in such case, an action of trespass on the case might be maintained against the purchaser of shares who fails to cause his name to be registered as owner, or to indemnify the seller against liabilities after the sale. And the same

[2] 7 M. & W. 517.

[3] Walker *v.* Bartlett, 18 C. B. 845; s. c. 36 Eng. L. & Eq. 368. See also Paine *v.* Hutchinson, Law Rep. 3 Eq. 257.

[4] Phene *v.* Gillan, 5 Hare, 1. In this case, it was held, that where the mortgagor is entitled to claim a retransfer of shares standing on the register in the name of the mortgagee, the debt being paid, he is entitled to take proceedings in the name of the mortgagee to compel such retransfer, giving the proper indemnity for costs. And either the company or the directors, who have prevented the shares from being transferred, are proper, and, it would seem, necessary parties to the bill.

[5] Hodges Railw., 122.

principle will apply to the mortgagee, after the debt is paid. But all these refinements must now, we think, be regarded as effectually abrogated, by the virtual abandonment, by the English courts, of the rule laid down in Humble *v.* Langston, and the recognition of the contrary doctrine.

5. It has been held, in this country, that, where B. being indebted transferred shares to his creditors, as security, with the power of sale, and upon condition that the shares should be returned or accounted for, whenever the debt should be paid, the debt being paid off, and an informal power of retransfer given the mortgagor, and subsequently a more formal one, the mortgagees were to be regarded as stockholders, until the actual retransfer of the shares, and as such liable to the creditors of the company, under the charter.[6] As the case of Humble *v.* Langston is not in * terms overruled, although it is in principle, we think, we here insert the substance of the opinion of the court in Walker *v.* Bartlett, as showing the present state of the English law on the subject.[7]

[6] Adderly *v.* Storm, 6 Hill, 624. Bronson, J., there argues the liability of the mortgagees to the creditors of the company, while their names remained on the books of the company as absolute shareholders, on the ground that "they might receive dividends, vote at elections, and enjoy all the rights pertaining to the ownership of the property, and with the privileges they must take the burdens of a stockholder." A query is here started whether a retransfer to the mortgagor of the shares, on the payment of the debt, might not release the mortgagee. "The assignment, as between the parties to it, would have passed the legal interest in the stock." But are the creditors of the company bound to look beyond the register of shares? Rosevelt *v.* Brown, 11 N. Y. 148; Worrall *v.* Judson, 5 Barb. 210; Stanley *v.* Stanley, 26 Me. 191. In Adderly *v.* Storm, *supra*, it is intimated, that a fraudulent transfer of stock by a solvent owner to an insolvent person, for the purpose of avoiding liability to the creditors of the company, might not avail, even at law.

[7] "The case of Wynne *v.* Price, 3 De G. & S. 310, shows that in equity the plaintiff would be entitled, under the circumstances of the present case, to indemnity; but it was contended for the defendant, that, however the case might be in equity, there was no contract for indemnity to be implied by law; and the case of Humble *v.* Langston, 7 M. & W. 517, was relied upon as a direct authority against the plaintiff upon this point; and the Court of Common Pleas, in the judgment appealed against, considered that it was bound by that decision, though it was intimated that but for that express decision their own judgment might have been different. It must be admitted that, in principle, no substantial difference can be taken between that case and the present, except this, that in Humble *v.* Langston the plaintiff claimed

* 6. It seems most unquestionable that a trustee may be made liable for assessments or calls upon the shares standing in his

to be indemnified by the defendant against all future calls, even though made after the defendant had himself transferred the shares to other persons; and the Court of Exchequer, at the end of the judgment, observes, that if there were any analogy in principle between the case of Burnett *v.* Lynch, and that before the court the defendant's implied promise would only be to indemnify against such calls as should be made while he was beneficially interested, whereas the plaintiff Humble claimed an indemnity against calls made after the defendant had parted with his interest. This, no doubt, is a very important distinction; and though the Court of Exchequer expresses an opinion that there was no contract of indemnity at all, it adverts to the difference between a claim to indemnify during the time the defendant is beneficially interested, and a claim to be indemnified after he has ceased to be interested. The circumstances of the present case are, therefore, distinguishable from those in Humble *v.* Langston, and it consequently is not so direct an authority against the plaintiff's claim in the present case, as at first sight it might appear to be.

"It seems to us, therefore, that the circumstances of this case bring it directly within the principle upon which Burnett *v.* Lynch was decided. In the present case the defendant entered into no express agreement to pay calls or indemnify, but he accepted the only transfer the plaintiff could give, and which invested him with full power to become the registered owner of the shares when he pleased. That transfer expressed that the transferee took them subject to the same rules as those under which the plaintiff held them, one of which was, that the registered owner should pay the calls. It could hardly have been the intention of the parties, that if the defendant, for his own benefit, omitted to make a perfect transfer, by registration in the company's books, the plaintiff should still continue to pay the calls; and if that was not the intention, was it not understood between them that the defendant should save the plaintiff harmless from any calls made during the time when he was virtually owner of the shares?

"In Burnett *v.* Lynch, a lease had been granted to Burnett, in which he covenanted to pay the rent and repair the premises; his executors assigned the lease to Lynch, subject to the performance of the covenant, but without any express covenant or contract by him that he would pay the rent or perform the covenant. The executors were called upon by the landlord, and obliged to pay damages for not repairing, according to the covenant, during the time Lynch was assignee; the executors brought an action on the case against Lynch, founded on a breach of duty in not repairing. In giving judgment for the plaintiffs, Abbott, C. J., says, 'It is true, the defendant entered into no express covenant or contract that he would pay the rent or perform the covenants; but he accepted the assignment subject to the performance of the covenants; and we are to consider whether any action will lie against him. If we should hold that no action will lie against him, the consequence will follow, that a man having taken an estate from another, subject to the payment of rent and performance of covenants, and having thereby induced an

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name, beyond the amount of the trust property.[8] And the transferee of shares, having taken upon himself the position and attitude of owner, cannot be allowed to excuse himself from responsibility by pleading irregularity in transfers, and it makes no difference in this respect whether he hold as trustee or beneficially.

7. Thus where reserved shares were offered to the shareholders and the executors of such as are deceased, in proportion to the original shares, it was held that executors who accept shares must * be placed upon the list of contributories in their own right, and not in their representative capacity.[9]

8. Where the owner of shares in the public stocks, or in joint-stock companies, sells the same to raise money, and loans the money upon mortgage of real property, with conditions for having the shares replaced, at a given time, which is not done, but the mortgage continued, the court will allow the redemption of the mortgage upon retransfer of the shares stipulated, at the price on the day of the decree, although the funds had fallen.[10]

undertaking in the other that he would pay the rent and perform the covenants, will be allowed to cast that burden upon the other person. Reason and common sense show that that never could be intended.' He then goes on to say, that though an action on the case would lie, there might also be an action of assumpsit.

"With the distinction of circumstances to which we have already adverted between this case and that of Humble *v.* Langston, we think that the principle upon which the case of Burnett *v.* Lynch was decided, is directly applicable to the present case, and that the plaintiff is entitled to make the rule absolute to set aside the nonsuit, and enter a verdict upon the first count of the declaration and so much of the pleas as may be applicable to that count."

[8] *Ex parte* Hoare, 2 Johns. & H. 229; s. c. 8 Jur. N. S. 713.

[9] Fearnside & Dean's Case, Law Rep. 1 Ch. Ap. 231.

[10] Blyth *v.* Carpenter, 12 Jur. N. S. 898; s. c. Law Rep. 2 Eq. 501.

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SECTION X.

Fraudulent Practices to raise the Price of Shares.

1. Courts of equity will vacate sales where price of shares is raised by fraudulent practices.
2. Necessary parties. Extent of relief.
3, 4. Declaration of dividends, none being earned, e. g., will vacate sales, and subject directors to indictment.
5. Equity will not interfere where vendor acted *bona fide*, unless the shares were valueless.
6. Managers of company liable in tort to party injured.
7. Purchase of shares in another company considered.
8. *Bona fide* purchaser of shares fraudulently issued acquires same rights as other shareholders.

§ 41. 1. All fraudulent practices, either of the shareholders or directors, resorted to for the purpose of raising the price of shares in the market, where sales have been induced in faith of the truth of such representations, will be relieved against in a court of equity.[1] (*a*) As where the directors of a joint-stock company, in

[1] Stainbank *v.* Fernley, 9 Sim. 556. And in a more recent case, Lefever *v.* Lefever, 30 N. Y. 27, the plaintiff, a director in a bank, who had been such from its organization, who usually attended the meetings, and was actually present and took part in the proceedings of the board of directors when the last dividend was declared, having purchased from the cashier twenty shares of stock, brought an action to have the contract rescinded, and to recover back the money paid, on the ground of false representations and concealments by the cashier as to the value of the stock and the condition of the bank at the time of the purchase. It was held that he was not estopped from setting up his actual ignorance of the condition of the bank at the time of the sale; that although he was a director, having the means of knowledge, he was not in the particular transaction chargeable with notice of the condition of the bank; that if he was actually ignorant of its condition, the fraudulent vendor would be responsible to him for the deceit, as to a stranger; and that it was not a case in which the plaintiff was legally bound to know the truth or falsity of the vendor's representations.

In the case of Smith *v.* Reese River Silver Mining Co., Law Rep. 2 Eq. 264; s. c. 12 Jur. N. S. 616, where a person was induced to take shares in a company on faith of a statement in the prospectus as to the nature of the property, which statement the promoters had no ground for believing to be true, and which turned out to be untrue, it was held, that he was entitled to an injunction restraining the company from enforcing calls against him, although

(*a*) Redford *v.* Bagshaw, 29 Law Jour. Exch. 59; Davidson *v.* Tulloch, 3 Macq. Ap. Cas. 783; Cross *v.* Sackett, 2 Bosw. 617.

order * to sell their shares to advantage, represented in their reports, and by their agents, that the affairs of the company were in a very prosperous state, and declared large dividends, at a time when the affairs of the company were greatly embarrassed.

2. A person who had been induced by these means to purchase shares of one of the directors, filed a bill against that director, praying to be paid his purchase-money and offering to retransfer the shares ; a demurrer for want of equity, and because all the other partners in the transaction ought to have been made parties, was overruled. But where a bill was filed against the public officer of a joint-stock bank, charging a similar fraud, through the fraudulent representations of the directors, in their reports, as to the prosperous state of the company's affairs, and that the plaintiff had thereby been induced to purchase five hundred shares in the bank, and praying that the sale might be declared void as between him and the company, and that they might be decreed to repay the purchase-money, it was held, that as the litigation was between one member of the partnership and the other members, the public * officer was improperly made a party, as representing the company, and a demurrer was allowed.[2] But in a case before the Court of Chancery Appeal, it was decided that the directors of a railway company are in the position of trustees, and if the purchaser has not by his own conduct affected his rights, the company cannot, as against him, retain money acquired from a fraudulent sale of their

the articles of association to which the prospectus referred would have informed the purchaser that the statement in the prospectus was not justified.

But one who claims to be injured by such fraudulent practices of directors and other agents of corporations must bring his action for relief at the earliest practicable opportunity after having learned the probable fact of such fraudulent practices. Clarke *v.* Dickson, 1 Ellis, B. & E. 148; s. c. 5 Jur. N. S. 1029; *In re* Hop & Malt Co., Law Rep. 1 Eq. 483. One who purchases upon the facts stated in a prospectus must be held to have notice of facts stated in other documents expressly referred to, unless there are special grounds for presuming the contrary. Ib. See also *Ex parte* Briggs, 12 Jur. N. S. 322; s. c. Law Rep. 1 Eq. 483.

[2] Seddon *v.* Connell, 10 Sim. 58. It was further held, that it is not competent for the party to file a bill against the company and some of the directors, praying, that if he is not entitled to relief against the company, he may have it against the directors; and that such a bill is demurrable, on the ground that the prayer for relief should be absolute, for relief against the directors, in order to maintain the bill against them. But it is not necessary to make all the parties to a fraud defendants in a bill for relief.

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property to him, through the false representations of their directors. But the court held that the plaintiff was not entitled to a decree against the directors, but was entitled to a decree against the company for his money and interest.[3] And it seems to be settled, by the decision of the House of Lords, that in England and in Scotland, for any fraudulent act done by the directors, without the range of the powers of the company, whereby third persons suffer damage, they are personally liable to an action: but for all such acts within the power of the body of the shareholders to sanction, although the directors might not have been justified in what they were doing, there could be no right of action.[4] And a director cannot screen himself from responsibility for any imposition which is brought upon others by means of the circulation of a prospectus through his instrumentality, upon the ground that the document is capable of a construction by which it may be regarded as true. It is for the jury to say whether that is the natural sense.[5] And it is not necessary that there should have been any direct communication between the plaintiff and defendant in order to subject the defendant to an action for false representation. If the defendant authorized the circulation of the prospectus before the public, containing false representations, by * which the plaintiff was misled, it is the same as if the defendant had made such representations to him personally.[5] And the fact that other inducements were also held out to plaintiff by other parties by which he was partially influenced, will not excuse the defendant.[5] But the representation of an officer of the company as to the effect of deeds, which it forms no part of his duty to expound, will not release the party executing the deed from his liability.[6]

3. The declaring of dividends by the directors, where none have been earned, if done by them for the purpose of fictitiously enhancing the price of shares, for their own benefit, is regarded as such a fraud as will relieve a party who has purchased shares in faith of such facts, at prices greatly beyond their value,[7] and the transfer of the shares will be set aside.

[3] Conybeare *v.* New Brunswick & Canada Railway & Land Co., 1 De G. F. & J. 578; s. c. 6 Jur. N. S. 518.

[4] Davidson *v.* Tulloch, 3 Macq. Ap. Cas. 783; s. c. 6 Jur. N. S. 543.

[5] Clarke *v.* Dickson, 6 C. B. N. S. 453; s. c. 5 Jur. N. S. 1029. See also *Ex parte* Nicol, 3 De G. F. & J., 387; s. c. 5 Jur. N. S. 205.

[6] Athenæum Life Insurance Co., 5 Jur. N. S. 216; s. c. Johns. Ch. Eng. 451.

[7] Burnes *v.* Pennell, 2 H. L. Cas. 497.

4. In this case,[7] Burnes *v.* Pennell, Lords CAMPBELL and BROUGHAM concurred in saying: "Dividends are supposed to be paid out of profits only, and where directors order a dividend to be paid, when no such profits have been made, without expressly saying so, a gross fraud is practised, and the directors are not only civilly liable to those whom they have deceived and injured, but are guilty of conspiracy, for which they are liable to be prosecuted and punished."

5. Where both parties labored under the same delusion in regard to the value of stock, relief could not be granted, of course, on the ground of fraud in the sale, and a court of equity will not ordinarily interfere to set aside a sale on the ground of mutual misapprehension as to the state and condition of the subject-matter, unless in extreme cases, as where that is sold as valuable which is wholly valueless, or does not exist.[8] To constitute a fraud in such cases, it is requisite, ordinarily, that the parties should have been upon unequal footing in regard to their means of access to the knowledge of the true state of the company's funds and property, and that the party gaining the advantage in the bargain, should, in some way, participate in giving currency to the false estimate of its condition, beyond the mere fact of repeating * the report of the directors, where both parties have equal means of judging of its correctness.

6. It seems to be regarded as settled law, that in case of such false representations to raise the price of stocks, and damage thereby sustained, the suffering party may maintain an action of tort against the party making the false representation, although it were not made directly to such injured party, there being no necessity for any privity between the parties to support an action of tort for a false representation. But where the action is *ex contractu* or *quasi ex contractu*, some privity is indispensable to the maintenance of the action.[9]

[8] 1 Story Eq. Jur. § 142; Hitchcock *v.* Giddings, 4 Price, 135, 141; 2 Kent Com. 469.

[9] Gerhard *v.* Bates, 2 Ellis & B. 476; s. c. 20 Eng. L. & Eq. 129. In this case the defendant was one of the promoters and managing directors of a joint-stock company, and in offering the shares for sale guaranteed a certain semi-annual dividend to purchasers, and the plaintiff purchased on the faith of such general guaranty. It was held that he could not maintain an action on the guaranty, but might recover in tort, as for a fraudulent representation. *Infra*, §§ 234, 240.

7. It has recently been decided that a *bona fide* sale and transfer of property of one company to another, in consideration of shares in the one company being transferred to the other, is not such a return of capital as would be in contravention of the English statute, which is in confirmation of the general rule of law, prohibiting the conversion by corporations of capital into income, and thus virtually reducing the stock of the company below the requirements of the charter; and on the other hand giving the shares of the company a false value in the market by reason of fictitious dividends.[10]

* 8. But the *bona fide* purchaser of shares fraudulently issued acquires the same right as other shareholders, unless he buys after the company is in the process of liquidation; and even in that case he may come in for his equal proportion of the assets, by proving that he bought of one who was a *bona fide* holder before the company was subjected to the process of being wound up.[11] (*a*) But it was held that a *bona fide* sale of shares in a company, entered into after the presentation of the petition, but before the first advertisement for winding up the company, both vendor and purchaser being ignorant that such a petition was pending, was held sufficient to have passed the title. But the rule was reversed.[12]

[10] Cardiff C. & C. Co. 11 W. R. 1007. See also McDougall *v.* Jersey Imperial Hotel Co., 2 Hemm. & M. 528; s. c. 10 Jur. N. S. 1043. This point as to the taking of shares by one company in another is discussed in the case of Great Western Railway Co. *v.* Metropolitan Co., 9 Jur. N. S. 562. There can be no doubt that in general this will not be allowed, unless by the express sanction of legislative permission. And it was here considered, that such an express sanction will not be construed to extend to additional shares, issued by the same company, and expressly required to be allotted to the existing shareholders. Vice Chancellor Wood, when the case was before him, cited the case of Solomons *v.* Lang, 12 Beav. 377, as establishing the right of the defendant in the suit to raise the question of the plaintiff's right to take these additional shares, beyond the amount which the special legislative permission authorized. The case of the Attorney-General *v.* Great Northern Railway Co., 1 Drewry & S. 154; s. c. 6 Jur. N. S. 1006, is also cited by the learned judge as analogous to the case then before him.

[11] Barnard *v.* Bagshaw, 1 Hemm. & M. 69.

[12] Emmerson's Case, Law Rep. 2 Eq. 231; s. c. reversed on appeal, Law Rep. 1 Ch. Ap. 433.

(*a*) And so a *bona fide* purchaser of shares, the certificates for which declare on their face that the shares have been paid up, is entitled to rely on the truth of the representation.

SECTION XI.

Liability of Company for not registering Transfers.

1. Company is liable to an action.
2. Whether mandamus will lie to compel record.
3. Company not bound to record mortgages of shares.
4. Grounds of denying mandamus.
5. Bill in equity most appropriate remedy.
6. Rule of damages.
7. Fraudulent cancellation of an unregistered transfer will not affect the title.

§ 42. 1. It seems to be settled in England, that an action will lie against a joint-stock company, who neglect or refuse, upon proper request, to register shares and deliver new certificates, after the deed of transfer has been sent to the secretary. (*a*) Damages may be recovered, it seems, by reason of such refusal of the company, whereby the party is deprived of the right to attend and vote at the meetings of the company, and especially where calls are made upon the shares, and in consequence of non-payment the shares are declared forfeited and sold.[1]

[1] Hodges Railw. 123; Catchpole *v.* Ambergate Railway Co., 1 Ellis & B. 111; 16 Eng. L. & Eq. 163. See also Wilkinson *v.* Anglo-California Gold Co., 18 Q. B. 728; s. c. 12 Eng. L. & Eq. 444. In regard to the right to sustain a writ of mandamus in England, to compel such transfer on the books of the company, see Rex *v.* Worcester Canal Co., 1 M. & R. 529; Regina *v.* Liverpool, Manchester, & Newcastle-upon-Tyne Railway Co., 11 Eng. L. & Eq. 408; Sargent *v.* Franklin Insurance Co., 8 Pick. 90. So also an action on the case will lie for not transferring stock. The rule of damages, where the stock has been sold as the property of the vendor, is the value of the shares at the time of the refusal; Sargent *v.* Franklin Insurance Co., or, as it has sometimes been held, the highest value between the time of refusal and the commencement of the action. Kartright *v.* Buffalo Commercial Bank, 20 Wend. 91; s. c. 22 Wend. 348. And some cases extend it even to the time of trial. But see *supra*, §§ 36, 38.

Where stock in a railway is purchased out of the earnings of a married woman and registered in her name, she and her husband may sue jointly

(*a*) The company is liable to the assignor in an action founded on contract. His claim is a legal claim for damages. But where the remedy at law would be inadequate, as where the assignor would remain liable to creditors or other shareholders, a bill will lie for specific performance. See Freon *v.* Carriage Co., 42 Ohio St. 30; Shepherd *v.* Gillespie, Law Rep. 5 Eq. 293; Paine *v.* Hutchinson, Law Rep. 3 Ch. 388. The assignee, it seems, may also maintain an action. See *supra*, § 22, note (*d*).

*2. There can be no question probably in this country, that where the company refuse on reasonable request to make the proper entry upon their books of the transfer of shares whereby the owner is liable to be deprived of any legal right or pecuniary advantage, the company may be compelled to do their duty in the premises, by writ of mandamus. (*b*)

3. But it has been held, that the company are not bound to register trust-deeds or mortgages, and especially such as contain other property, or the stock of other companies. The mandamus was refused in such a case, in the Queen's Bench, so late as May, 1856, and upon the ground, as stated by Lord CAMPBELL, C. J., that, "if the company were bound to register this deed, they must become custodians of it, and must incur great responsibility as to its safe custody, and that therefore convenience requires that they should only be bound to register mere transfers, passing the legal title, and showing who is the legal owner of the shares." [2]

4. But a mandamus to compel the registry of the transfer of shares in a railway company to an infant,[3] was denied. And the

for dividends, and if she sue alone, it is only ground of abatement. Dalton *v.* Midland Railway Co., 13 C. B. 474; s. c. 20 Eng. L. & Eq. 273.

Stock cannot be transferred so as to pass the title after the dissolution of the corporation, the shareholders being then entitled only to a share in the assets. James *v.* Woodruff, 2 Denio, 574.

Where a company has registered a transfer, which is alleged to be a forgery, and is threatened with a suit from both the transferor and transferee, the court will not grant an interpleader. Dalton *v.* Midland Railway Co., 12 C. B. 458; s. c. 13 C. B. 474; 22 Eng. L. & Eq. 452.

[2] Regina *v.* General Cemetery Co., 6 Ellis & B. 415; s. c. 36 Eng. L. & Eq. 126.

[3] Regina *v.* Mid. Counties & Sh. Junction Railway Co., 15 Ir. Com. Law, 514, 525; s. c. 9 Law T. Rep. N. S. 151. But the practice of compelling the registry of transfers, by mandamus, seems well established, even where they

(*b*) This seems doubtful. In general, the writ of mandamus should not issue where there is no public interest involved, nor where there is other ample remedy. Stackpole *v.* Seymour, 127 Mass. 104; Lamphere *v.* United Workmen, 47 Mich. 429. Besides, it is a legal remedy, and should not be granted to one who stands upon a mere equity. And accordingly, the weight of authority is against its employment in this case. See Stackpole *v.* Seymour, *supra;* Lamphere *v.* United Workmen, *supra;* Freon *v.* Carriage Co., 42 Ohio St. 30; Baker *v.* Marshall, 15 Minn. 177; Durham *v.* Monumental Silver Mining Co., 9 Oreg. 41; State *v.* Guerrero, 12 Nev. 105.

* court of equity declined to interfere to compel the registry of the transfer of shares when the company are denied the opportunity of inspecting the certificates by their directors.[4]

5. The more effectual, and at present the more usual, remedy against corporations for refusing to allow the transfer of stock upon their books into the name of the real owner is by bill in equity. And in one case,[5] where the party whose stock had been allowed by the bank to be transferred into the names of those who had purchased it under forged powers of attorney sought redress by an action at law, the court said, "We cannot do justice to this plaintiff unless we hold that the stocks are still his," and therefore denied the action for the value of the stocks, but allowed a recovery for the dividends which had been declared after the transfer.

6. And there is the same difficulty in compensating the purchaser of stocks, where a transfer on the books has been denied in an action at law. In some cases this has been attempted to be done by allowing the party to recover the highest market price of the stock between the refusal to transfer and the trial. But the only rule at all analogous to settled principles seems to be that the corporation shall pay the value of the stock at the date

are not of a character to induce the most favorable consideration, e. g., a transfer to a pauper to enable the transferor to get rid of liability, it being intended to be out and out, with no secret trust for the transferor. Ib. In general, one who understandingly consents to have shares transferred into his name upon the public registry of shares, must be content to assume all the responsibility towards the public and the other shareholders not conusant of the special contract, which any other shareholder would incur. But as between the company and the purchaser there may be special grounds of relief. *Ex parte* Coleman, 1 De G. J. & S. 495; *Ex parte* Grady, id. 488; *Ex parte* Barrett, 10 Jur. N. S. 711; *Ex parte* Saunders, id. 246; S. C. 4 Gif. 179.

Any transaction of this kind will not be disturbed, after considerable lapse of time. *Ex parte* Spackman, 1 De G. J. & S. 504; S. C. 10 Jur. N. S. 911; *Ex parte* Lane, id. 25; *Ex parte* Spackman, 11 Jur. N. S. 207. In Houldsworth *v.* Evans, Law Rep. 3 H. L. 263, it is distinctly declared, as the settled doctrine of the English courts, that any arrangement between the company and the shareholders, although irregularly entered into as between the directors and the shareholders, will nevertheless bind the body of the shareholders, unless they take active steps to have it set aside within some short and reasonable time after it becomes known to them *Infra*, § 135, pl. 6, and note.

[4] *In re* East Wheal Martha Mining Co., 33 Beav. 119.

[5] Davis *v.* Bank of England, 2 Bing. 303; *infra*, § 241.

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of their refusal to transfer it, as that is the time when the corporation became in default, and when by said default the stock, as between the parties, became theirs.[6] The question of the effect of forged and fraudulent transfers is very ably discussed by the Court of Chancery Appeal in Tayler *v.* Great Indian Peninsula Railway.[7]

7. In a somewhat recent case,[8] one A. authorized a stock-broker to purchase for him some shares in a company, and paid the purchase-money, and the shares were duly transferred to him, by written instrument, but his name was not registered. Afterwards the stock-broker, on a false pretence, prevailed on A. to cancel his signature to the instrument of transfer, and to sign a deed of transfer to him, the broker; A. believing, on the representation of the broker, that he was executing a fresh transfer to himself in the place of that which had been cancelled. The broker transferred them to an innocent holder as security for £5,000, money lent a short time before. Held, on a bill filed by A., that the original transfer to him must have its effect; and that the shares were thereby vested in him, and still remained, notwithstanding the cancellation and subsequent transactions.

*SECTION XII.

When Calls become Perfected.

1. Calls are made when the sum is assessed; notice may be given afterwards.
2, 3. Directors the proper authority to make calls.
4. Manner of giving notice and of proof.

§ 43. 1. The English statute of 1845, called the Companies' Clauses Consolidation Act, requires all calls to be paid before any valid transfer can be made. Under this statute, and similar provisions in special charters, it has often been made a question, when a call may be said to be made. It seems to be considered

[6] Pinkerton *v.* Manchester & Lawrence Railway Co., 1 Am. Law Reg. N. S. 96; s. c. 42 N. H. 424.

[7] 5 Jur. N. S. 1087; s. c. 4 De G. & J. 559. See *infra*, §§ 46, 241. And see Building Association *v.* Sendemeyer, 50 Penn. St. 67.

[8] Donaldson *v.* Gillot, 12 Jur. N. S. 959; s. c. Law Rep. 3 Eq. 274.

that the word "call" in this connection may refer to the resolution of the directors, by which a certain sum is required to be paid to the company, by the shareholders,[1] or secondly to the notice to the shareholders of the assessment, and the time and place at which they will be required to make payment, and the amount to be paid. But it seems finally to be settled, that the company are not obliged to regard any transfer, made after the resolution of the directors making the assessment, which need not specify the time of payment, but that may be determined by a subsequent act of the board.[2] (*a*)

[1] *Ex parte* Tooke, 6 Railw. Cas, 1; North American Colonial Association *v.* Bentley, 19 Law J. Q. B. 427; 15 Jur. 187.

A resolution of the board of directors requiring the stockholders to pay an instalment of ten per cent every thirty days, on all cash subscriptions, until the whole is paid, and that due notice thereof be given, is admissible evidence of calls for the whole subscription. It was here considered that the words "month," and "thirty days," used in different portions of the act, must be considered of the same import. Heaston *v.* Cincinnati & Fort Wayne Railroad Co., 16 Ind. 275; Sands *v.* Sanders, 26 N. Y. 239.

[2] Great North of England Railway Co. *v.* Biddulph, 2 Railw. Cas. 401; s. c. 7 M. & W. 243; Newry & Enniskillen Railway Co. *v.* Edmunds, 5 Railw. Cas. 275; s. c. 2 Exch. 118, 122; Parke, B., in Ambergate, Nottingham & Boston & Eastern Junction Railway Co. *v.* Mitchell, 6 Railw. Cas. 235; s. c. 4 Exch. 540; Regina *v.* Londonderry & Coleraine Railway Co., 13 Q. B. 998.

Unless there is something in the subscription or the charter and by-laws of the company requiring notice of calls, or making the subscription payable on calls, it is said in Lake Ontario, &c. Railroad Co. *v.* Mason, 16 N. Y. 451, that it is not indispensable that notice of calls should be given the subscribers before suit. But this seems contrary to the general course of decision on that point, and at variance with the idea of a call, or assessment; and such seems to be the general understanding of the rule in the American courts. But these questions will depend very much on the special provisions of the statutes in the different states, by which the matter is controlled, and somewhat on the special terms of the contract of subscription. Heaston *v.* Cincinnati & Fort Wayne Railroad Co., 16 Ind. 275. Thus, in the present case it was held that the general railway law of Indiana required notice and a personal demand before proceeding to forfeit the stock, but not before suit to recover instalments; and that as to calls the statute required the subscribers to take notice of the action of the directors. And it was further said, that where the articles of association or the preliminary articles of subscription, or both combined, con-

(*a*) Calls are not always necessary, e. g., when the charter provides that shares shall be payable at certain periods. Waukon Railroad Co. *v.* Dwyer, 49 Iowa, 121.

* 2. It seems the directors, and not the company, are the proper parties to make calls under the English statutes. (*b*)

3. This seems to have been decided upon the general ground of the authority of the directors.[3]

4. The question of what shall amount to a good call, and how the same may be shown in court, is considerably examined in Miles *v.* Bough.[4] (*c*) It is here decided, that no person could be sued for non-payment of a call till he had received due notice thereof, although the statute did not require notice in express terms; that an order to pay the money at a given broker's was a good call; that in the declaration it was sufficient to allege that the calls were made and the defendant duly notified, without further specification of particulars; and that the jury may infer sufficient notice from the fact of an express promise to pay, notwithstanding it appeared that a defective notice had been sent, unless it appeared that was the only notice given, when the case must be decided upon the sufficiency of the notice in fact given.

tain an undertaking to pay the amount subscribed on certain conditions, an action will lie to enforce the stipulations upon proof of the subscription and the performance of the conditions.

[3] Ambergate, Nottingham & Boston & Eastern Junction Railway Co. *v.* Mitchell, 4 Exch. 540, *per* POLLOCK, C. B., who said, "The next objection is, that the directors made these calls; but they were competent to do so, as they may do all things, except such as are to be done by the shareholders at a general meeting; and there is nothing in the act which makes it necessary that the company should make calls at a general meeting;" and Baron PARKE spoke to the same effect.

[4] 3 Q. B. 845. Defective notice by publication is not aided by personal notice of a shorter time. Sands *v.* Sanders, 26 N. Y. 239.

(*b*) In general, this depends on the provisions of the charter. Whomsoever the charter designates is agent in this behalf; if the board of directors, neither the president nor a minority of the board can make a call. Silver Hook Road *v.* Greene, 12 R. I. 161; Mutual Fire Insurance Co. *v.* Lowell, 59 Me. 504. Nor can the power be delegated. Silver Hook Road *v.* Greene, *supra*.

(*c*) Where the charter does not provide otherwise, it is in general unnecessary to give notice. See Eppes *v.* Mississippi Railroad Co., 35 Ala. 33; Eakright *v.* Logansport Railroad Co., 13 Ind. 404; Wilson *v.* Wils Valley Railroad Co., 33 Ga. 466.

*SECTION XIII.

Transfer by Death, Insolvency, or Marriage.

1. Mandamus lies to compel the registry of successor.
3. In case of death, personal representative liable for calls.
4. Notice requisite to perfect the title of mortgagee.
5. Stock in trust goes to new trustees.
6. Assignees of insolvents not liable for the debts of the company.
7. Effect of marriage of *feme sole*.

§ 44. 1. The title to shares in a railway is liable to transfer by the death, bankruptcy, or insolvency of the proprietor, or by marriage of the female owner of such shares. In such case the English statute requires a declaration of the change of ownership to be filed with the secretary of the company, and the name of the new owner is thereupon required to be entered upon the register of shareholders. A mandamus will lie to compel the clerk to make the proper entry in such case.[1]

2. These incidents are so much controlled by local laws, in different jurisdictions, that it would scarcely comport with our object to state more than the general principles affecting them. In most of the United States all property (especially personal estate as railway shares), in the first instance, upon the decease of the proprietor, vests in his personal representative, in trust, first for the payment of debts, and afterwards for legatees, or in default of them, the heirs of such proprietor.

3. And so far as regards voting upon such shares, the title of the executor or administrator will ordinarily be sufficient. Before the name of the executor or administrator is entered upon the books of the company, as a shareholder, the estate only could be held liable for calls probably, and perhaps the same rule of liability would obtain after that.[2] But in general where shares

[1] Rex *v.* Worcester Canal Co., 1 M. & R. 529.

[2] Fyler *v.* Fyler, 2 Railw. Cas. 873; s. c. 3 Beav. 550; Jacques *v.* Chambers, 2 Coll. C. C. 435; s. c. 4 Railw. Cas. 499. But the administrator or other personal representative of a deceased shareholder may, under the recent English statute, maintain an action against the company for refusal to register his name as successor to the title, and after recovery of damages he is entitled to a mandamus to compel the company to register his name. He is also entitled to the prerogative writ of mandamus in such cases at common law. Norris *v.* Irish Land Co., 8 Ellis & B. 512; s. c. 30 Law T. 132.

in a joint-stock * company are bequeathed specifically, the legatee takes them subject to all future calls.[3] But where the payment of future calls is indispensable to bring the shares into the state in which the testator regarded them in his will, such calls should be paid by the estate.[4]

4. In case of death or insolvency, the title of a mortgagee first notified to the company will commonly have priority.[5] Notice to the company is necessary to perfect the title of a mortgagee, in case of bankruptcy or insolvency.[6]

5. As to the title of the bankrupt, all shares standing upon the register of the company in his name will be regarded as under his control, order, and disposition, and will, under the English statutes, go to the assignees.[7] But stock in any incorporated company standing in the name of the bankrupt as trustee, is to be transferred by the assignee to the name of new trustees, and a court of chancery will so order.[8]

6. The assignees of an insolvent estate, a portion of whose assets consists of shares in a manufacturing corporation, are not liable under special statutes making shareholders liable for the debts of the corporation. That is a provision of positive law, and is to be construed strictly.[9]

7. The marriage of a *feme sole*, being the owner of shares, will have the effect to transfer them into the control of the husband, the same as any other personal estate, unless where it is provided otherwise by statute, or the husband chooses to leave them still under the control of the wife.[10]

[3] Blount *v.* Hipkins, 7 Sim. 43, 51; Jacques *v.* Chambers, 2 Coll. 435; Clive *v.* Clive, Kay, 600; Wright *v.* Warren, 4 De G. & S. 367; Adams *v.* Ferick, 26 Beav. 384.

[4] Armstrong *v.* Burnet, 20 Beav. 384.

[5] Cumming *v.* Prescott, 2 Y. & Col. C. C. 488.

[6] But where all parties are partners, notice will sometimes be implied. *Ex parte* Waitman, 2 Mont. & A. 364; Duncan *v.* Chamberlayne, 11 Sim. 123; Etty *v.* Bridges, 2 Y. & Col. Eq. 486.

[7] Shelf. Railw. 118–121.

[8] *Ex parte* Walker, 19 Law J. Bank. 3.

[9] Gray *v.* Coffin, 9 Cush. 192.

[10] Schouler Dom. Rel. 111 *et seq.*, and cases cited; Richardson *v.* Merrill, 32 Vt. 27, and cases cited.

SECTION XIV.

Legatees of Shares.

1. Entitled to election, interest, and new shares, but not to bonds.
2. Shares owned at date of will pass, although converted into consolidated stock.
3. Consolidated stock subsequently acquired will not pass.

§ 45. 1. Legatees of railway shares have the election out of which class of shares their legacy shall be paid, when there is more * than one class of the same description found in the will. And they are entitled to the income of the shares, after the death of the testator, and to receive any advantage, by way of new shares resulting from the ownership of the shares.[1] But a specific legatee of shares is not entitled to a bonus on such shares, declared after the decease of the testator, but arising out of moneys due the company from the testator, and which claim was compromised by his executors, but such bonus belongs to the general fund of personal estate.[2] And such legatee must bear the calls which are made after the testator's death, unless there is something in the will to show a different intent.[3]

2. A bequest of the testator's railway shares, of which he should be possessed at his decease, was held to pass such railway shares specifically named in the will as the testator had at the date of his will, although subsequently converted into consolidated stock of the same company, by a resolution of the company.

3. But that other consolidated stock of the same company owned by testator at his decease, did not pass under the will, the same having been purchased after the execution of his will.[4]

[1] Jacques *v.* Chambers, 2 Col. C. C. 435; s. c. 4 Railw. Cas. 205; Tanner *v.* Tanner, 5 Railw. Cas. 184; s. c. 11 Beav. 69. And it is held in this last case that on a bequest of railway shares and all right, title, and interest therein, money paid beyond the calls will pass to the legatee.

[2] Maclaren *v.* Stainton, 27 Beav. 460; s. c. 6 Jur. N. S. 360; Loch *v.* Venables, 27 Beav. 598; s. c. 6 Jur. N. S. 238.

[3] Day *v.* Day, 1 Drewry & S. 261; s. c. 6 Jur. N. S. 365.

[4] Oakes *v.* Oakes, 9 Hare, 666.

SECTION XV.

Shares in Trust.

1, 2. Company may safely deal with registered owner.
3. But equity will protect the rights of *cestuis que trust.*
4. Discussion of the rights of *cestuis que trust* in stock certificates.

§ 46. 1. By the English statute, railway companies are not bound to see to the execution of trusts in the disbursement of their dividends, but are at liberty to treat the person in whose * name the shares are registered as the absolute owner. It would seem that in the case of the bankruptcy of a shareholder in a joint-stock company, a court of equity will sometimes protect trust funds, although registered in the name of the bankrupt, both from the claim of the assignee and the company, who have made advances to the nominal owner, upon the faith of his being the true owner, but without any pledge of the stock.[1]

2. In general, in this country, it is believed railway companies will be protected in dealing *bona fide* with the person in whose name shares are registered on the books of the company, as the absolute owner, notwithstanding any knowledge they may have of the equitable interest of third parties. (*a*)

[1] Pinkett *v.* Wright, 2 Hare, 120. The opinion in this case is a very elaborate opinion, by Vice-Chancellor Wigram, on the subject of protecting the interest of *cestuis que trust* in the stock standing in the name of a trustee who has become bankrupt. The trustee in this case was also the proprietor of shares in his own right, all standing in his name, without anything on the books of the company to distinguish which were trust funds. It was held that the trustee must be presumed to have pledged such stock as belonged to himself, and not that of his *cestuis que trust,* and that shares which stood in the name of the trustee at the time of the bankruptcy, and thenceforward remained in his name, might fairly be presumed to be identical with those in which the trust funds were invested, the number of shares being the same. Notice to the company is indispensable to create an equitable mortgage of railway shares. *Ex parte* Boulton *v.* Skelehley, 29 Law T. 71; s. c. 1 De G. & J. 173.

(*a*) The company, however, should not pay to the holder of the legal title after notice of an equity. And the courts will protect the rights of equitable assignees. See Parrott *v.* Byers, 40 Cal. 614. Pennsylvania Railroad Co.'s Appeal, 86 Penn. St. 81.

3. But there can be no question, a court of equity will always protect the interest of a *cestui que trust*, when it can be done without the violation of prior or superior equities, which have *bona fide* attached.

4. It was recently held after careful examination of the authorities,[2] that the holder of stock, as trustee, has *prima facie* no right to pledge it as security for his private debt, and one who accepts the pledge under such circumstances, acquires no rights against the *cestui que trust*. And the word "trustee" in the certificate, in connection with the name of the holder, is notice to all persons to whom the certificate may be delivered, sufficient to put the party on inquiry as to the nature of the holder's title, and the character and extent of the trust.

*SECTION XVI.

The extent of Transfer requisite to exempt from claim of Creditors.

1. How transfer of stock perfected as to creditors.
2. Reasonable time allowed to record transfer.
3, 4. In some of the states no record required.
n. 3. Question further considered.

§ 46 *a.* 1. The question of what constitutes a valid transfer of shares in a joint-stock corporation, so as to exempt them from

[2] Shaw *v.* Spencer, 8 Am. Law Reg. N. S. 299; S. C. 100 Mass. 382. The decision here falls short, probably, of what the authorities would support if the case required it. But the usages of the Stock Exchange, whereby trustees are enabled to defraud their *cestuis que trust* for the benefit of speculators, receives a moderate but very just rebuke; the court saying that certificates of stock in blank are not to be regarded as negotiable instruments, cutting off all equities of *bona fide* parties in interest (S. P. Sewall *v.* Boston Water Power, 4 Allen, 272); and that no usage or custom of brokers, or course of business can avail to defeat or qualify the established rules of law, recognized in courts of equity. The following significant intimation of the court is worthy of notice: "The circumstance that stock certificates, issued in the name of one as trustee and by him transferred in blank, are constantly bought and sold in the market without inquiry, is likewise unavailing. *A usage to disregard one's legal duty, to be ignorant of a rule of law, and to act as if it did not exist, can have no standing in the courts.*"

attachment and levy by creditors of the transferor, is considerably discussed in a case in New Hampshire by a judge of large experience, and the result reached, that upon a pledge of stock in a railway corporation in New Hampshire, there should be such delivery as the nature of the thing is capable of, and to be good against a subsequent attaching creditor the pledgee must be clothed with all the usual muniments and *indicia* of ownership; that by the laws of New Hampshire, a record of the ownership of shares must be kept, by domestic corporations, within the state, and by officers resident there; and that on the transfer of stock the delivery will not be complete, as to creditors, until an entry is made upon such stock-record, or it be sent to the office for that purpose, and the omission thus to perfect the delivery will be *prima facie*, and if unexplained * conclusive evidence of a secret trust, and therefore, as matter of law, fraudulent and void as to creditors.[1]

2. But in the case last cited it is said that when[2] the transfer is made at a distance from the office and the old certificate surrendered and a new one given by a transfer agent residing in a neighboring state, proof that the proper evidence of such transfer was sent by the earliest mail to the keeper of the stock record to be duly entered, although not received until an attachment had intervened, would be a sufficient explanation of the want of delivery, and the transfer would be good against the creditor. Any unreasonable delay in perfecting the record title to such shares leaves them liable to the claims of creditors.

3. But where the charter of the company or the general laws of the state contain any specific restriction or requirement in regard to the transfer of shares, it must be complied with or the title will not pass.[2] (*a*)

[1] Pinkerton *v.* Manchester & Lawrence Railroad Co., 1 Am. Law Reg. N. s. 96; s. c. 42 N. H. 424.

[2] Fisher *v.* Essex Bank, 5 Gray, 373; Sabin *v.* Woodstock Bank, 21 Vt. 362; Pittsburgh & Connellsville Railroad Co. *v.* Clarke, 29 Penn. St. 146.

(*a*) Whether, where it is required that all transfers be executed on the books of the corporation, an assignment by delivery of the certificate will be good against an attaching creditor, seems not settled. The matter is vigorously discussed in Morawetz Priv. Corp § 196 *et seq*, and the rule stated in the text is impugned on principle. See Central National Bank *v.* Williston, 138 Mass. 214; Newell *v.* Williston, 138 Mass. 240; Application of

4. In a case in New Jersey,[3] it seems to be considered that nothing more is required to make an effectual transfer of stock in a bank, even as against creditors, than an assignment of the certificates and a delivery to the assignee, and that this will be regarded as effectual against an attaching creditor without notice, even where the charter of the company declares the stock personal estate, and provides that "it shall be transferable upon the books of the corporation," and also, "that books of transfer of stock shall be kept, and shall be evidence of the ownership of said stock in all elections and other matters submitted to the decision of the stockholders."

[3] Broadway Bank *v.* McElrath, 2 Beasley, 24. It is proper to say that there is considerable difference in the decisions of the different states as to the point of time from which the transfer of equitable titles is to be reckoned, as between purchasers for value and creditors. It is generally considered that the transfer takes effect from the date of notice to the trustee, who holds the legal title subject to all equities, which attach ordinarily only on notice brought home to him. Some of the states regard the equitable rights of the purchaser as dating from the period of the actual purchase, provided notice to the trustee be given within reasonable time after. The question and the cases have been somewhat discussed in Rice *v.* Courtis, 32 Vt. 460; s. c. 1 Redf. Am. Railw. Cas. 111. And see 1 Story Eq. Jur. § 400 *b*.

Murphy, 51 Wis. 519; Skowhegan Bank *v.* Cutler, 49 Me. 315; Sibley *v.* Quinsigamond National Bank, 133 Mass. 515; Scott *v.* Pequonnock National Bank, 15 Fed. Rep. 494. And see Broadway Bank *v.* McElrath, 2 Beasley, 24; Pinkerton *v.* Manchester Railroad Co., 42 N. H. 424; Cheever *v.* Meyer, 52 N. H. 66; Scripture *v.* Francestown Soapstone Co., 50 N. H. 571.

*CHAPTER IX.

ASSESSMENTS OR CALLS.

SECTION I.

Party liable for Calls.

1. Party whose name appears on the register liable for calls.
2. Bankrupts remain liable for calls.
3. *Cestuis que trust* not liable for calls in law or equity.
4. Trustee compelled to pay for shares.
5. Party whose name is registered may show that it is improperly there.

§ 47. 1. It seems to be settled law that the registered owner of railway shares is liable for all calls thereon, so long as his name remains upon the register.[1] The effect of the transfer of railway scrip is only to convey an equitable interest in the shares, with the right to have the shares formally assigned to him, and his name entered upon the register as a shareholder.[1] (*a*)

[1] Midland Great Western Railway Co. *v.* Gordon, 5 Railw. Cas. 76; s. c. 16 M. & W. 804; Mangles *v.* Grand Collier Dock Co., 10 Sim. 519; s. c. 2 Railw. Cas. 359; Sayles *v.* Blane, 14 Q. B. 205; s. c. 6 Railw. Cas. 79; West Cornwall Railway Co. *v.* Mowatt, 15 Q. B. 521. In this case it was said that even if the transaction by which the title to the stock and the registry of defendant's name were made were illegal, it could not avail him in an action for calls. See *infra*, § 236; Long Island Railroad Co., 19 Wend. 37; Mann *v.* Currie, 2 Barb. 294; Hartford & New Haven Railroad Co. *v.* Boorman, 12 Conn. 530; Mann *v.* Cooke, 20 Conn. 178; Rosevelt *v.* Brown, 11 N. Y. 148. The registry of shareholders, though irregularly kept, is *prima facie* evidence of the liability to calls, of those whose names appear upon it. Birmingham Railway Co. *v.* Locke, 1 Q. B. 256; London Grand Junction Railway Co. *v.* Freeman, 2 M. & G. 606; Same *v.* Graham, 1 Q. B. 271; Aylesbury Railroad *v.* Thomson, 2 Railw. Cas. 668. This last case holds that the purchaser of shares is only liable for calls *made* after his name is on the register. The company may, by its charter, and probably by a by-law, provide that the original subscriber shall be holden for all calls, or until a certain amount is paid in. Vicksburg, Shreveport, & Texas Railroad Co. *v.* McKeen, 14 La. An. 724.

(*a*) Miller *v.* Great Republic Insurance Co., 50 Mo. 55; Gilbert's Case, Law Rep. 5 Ch. Ap. 559; Harrison's Case, Law Rep. 6 Ch. Ap. 286; Murray *v.* Bush, Law Rep. 6 H. L. 37.

2. In case of bankruptcy, the bankrupt remains liable for all calls unless the names of the assignees are registered on the books of the company, as this is not regarded as a debt payable in future, and which may be proved under the commission.[2]

* 3. The trustee of shares, whose name appears upon the books of the company, is alone liable for calls, and the company have no remedy in equity even for calls against the *cestui que trust*.[3] But if a shareholder when the company is *in extremis* makes a colorable transfer to an irresponsible person, it has been held it will not relieve him from liability to contribute.[4] But in the absence of fraud or *mala fides*, the *cestui que trust* cannot be subjected to a call although he may be compelled to indemnify his trustee.[5] And it seems finally to be settled in the English Court of Chancery, that a shareholder may transfer his shares in an abortive company, where such shares pass by delivery, to an insolvent person, for the purpose of getting rid of liability to contribute to its responsibilities, provided the transaction be a real one, and not a false or hollow contrivance.[6] But where the transaction exhibits no motive except escape from the liability of the company, and especially where it transpires after the company is publicly declared insolvent, it was

[2] South Staffordshire Railway Co. *v.* Burnside, 2 Eng. L. & Eq. 418; s. c. 5 Exch. 129; 6 Railw. Cas. 611.

[3] Newry, &c., Railway Co. *v.* Moss, 4 Eng. L. & Eq. 34; s. c. 14 Beav. 64. But where, in winding up the affairs of a company, the name of a member who had obtained his certificate after the expenses were incurred, was placed among the contributories, he was held not liable. Chapple's Case, 17 Eng. L. & Eq. 516; s. c. 5 De G. & S. 400. Where shares were pledged at a bank as security for a loan, and the name of the bank, or of the chairman and manager of the bank, was entered on the register of shareholders simply as holders of the shares, which had been represented as fully paid up at the time of pledge, it was held that they were not liable for calls. Guest *v.* Worcester, Bromyard, & Leominster Railway Co., Law Rep. 4 C. P. 9.

[4] *Ex parte* Lund, 27 Beav. 465; *Ex parte* Hyam, 6 Jur. N. S. 181; s. c. 1 De G. F. & J. 75. See also De Pass's Case, 4 De G. & J. 544; *Ex parte* Chinnock, 1 Johns. Ch. Eng. 714; *infra*, § 242.

[5] Electric Telegraph Co. *v.* Bunn, 6 Jur. N. S. 1223.

[6] *In re* Mexican & South American Co., 2 De G. F. & J. 302; *Ex parte* Slater, 12 Jur. N. S. 242. All that seems to be required is that the transfer be absolute. Bush's Case, Law Rep. 6 Ch. Ap. 246. And even the fact that the transferor guaranteed the transferee against future calls will not defeat the effect of the transfer. Harrison's Case, id. 286. Even the most suspicious circumstances will not defeat the transfer. Master's Case, 7 id. 292.

held it will be regarded as merely colorable and not valid.[7] But where the holder of shares threatened to put the company into insolvency unless the directors would find some one to purchase his shares and give him an indemnity, which was done twelve months before the company became insolvent, it was held to be a valid transfer.[8] Trustees under a will are properly made contributories.[9]

4. The trustee into whose name the *cestui que trust* had caused shares to be transferred by deed, reciting that the price of the same had been paid to the vendor, who executed the deed, may nevertheless be compelled to make good such price to the vendor, if it * were not in fact paid, although he accepted the transfer in the belief that it had been paid.[10]

5. Notwithstanding the defendant's name appear upon the register of shares, he will be permitted, in a suit for calls, to show that it was illegally placed there, and without his authority. But a purchaser of shares, or even an original subscriber, cannot be sued for calls, under the English statute, until his name is placed on the registry.[11] But one's name appearing upon the books of the company as a shareholder is *prima facie* evidence of the fact, in an action against such person to enforce against him the personal responsibility of a stockholder for the debts of the company.[12] (*a*) And in such an action the judgment against the corporation is *prima facie* evidence of its indebtedness as against the stockholder.[12]

[7] *In re* Electric Telegraph Co., 30 Beav. 143.

[8] Phœnix Life Assurance Co., 7 Law T. N. S. 267.

[9] *Ex parte* Drummond, 2 Gif. 189; S. C. 6 Jur. N. S. 908.

[10] Wilson *v.* Keating, 27 Beav. 121.

[11] Hodges Railw. 4th ed. 101; Newry & Enniskillen Railway Co. *v.* Edmunds, 2 Exch. 118.

[12] Hoagland *v.* Bell, 36 Barb. 57.

(*a*) Turnbull *v.* Payson, 95 U. S. 421, and cases there cited. Washer *v.* Allensville Turnpike Co., 81 Ind. 78.

SECTION II.

Colorable Subscriptions.

1. Colorable subscriptions valid.
2. Directors may be compelled to register them.
3. Oral evidence to vary the written subscription inadmissible.
4. Register evidence although not made in the time prescribed.
5. Confidential subscriptions void.
6. Shares cannot be issued to secure debts of company.

§ 48. 1. Equity will not restrain a railway company from enforcing calls, by action at law, upon the ground that one of the conditions of the charter, requiring a certain amount of subscriptions of stock before the incorporation took effect, had not been complied with, but that a fraud upon the provision had been practised by means of colorable subscriptions. The Court of Chancery regards colorable subscriptions, made in the course of getting a bill through the House of Lords (to comply with one of the standing rules of that house, requiring three-fourths of the requisite outlay to be subscribed before the bill passes), to be binding upon the directors and managers who make the same, and that they are in fact valid and binding subscriptions, although such subscriptions were made with the purpose of being subsequently cancelled, and * had never been registered upon the books of the company, or any calls made upon them. (*a*)

2. It is within the proper range of the powers of a court of equity to compel the directors to register such shares, and enforce the payment of calls upon them.[1]

[1] Preston *v.* Grand Collier Dock Co., 11 Sim. 327; s. c. 2 Railw. Cas. 335; Mangles *v.* Same, 10 Sim. 519. The principle of these cases is very distinctly recognized in the case of Blodgett *v.* Morrill, 20 Vt. 509; s. c. 1 Redf. Am. Railw. Cas. 138, and it lies at the foundation of all fair dealing, that one is bound by representations on which he has induced others to act, although at the time he did not intend to be bound by them, but expected, through favor, to be relieved from their performance. See also Henry *v.* Vermillion Railroad Co., 17 Ohio, 187. But if one obtain shares in a distribution by commissioners by fraud, he may be compelled, in equity, to surrender them to

(*a*) Muller *v.* Hanover Junction Railroad Co., 87 Penn. St. 99; Melvin *v.* Lamar Insurance Co., 80 Ill. 446; Pickering *v.* Templeton, 2 Mo. Ap. 424. And see Henderson *v.* Lacon, Law Rep. 5 Eq. 249; Occidental Insurance Co. *v.* Ganzhorn, 2 Mo. Ap. 205.

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In one case[2] where this subject came under discussion in equity, where the provisional directors, in the process of carrying a bill through parliament, proposed to the contractor that he should have the contract for the company's works provided he would accept payment partly in shares, the number to be settled by the company's engineer; but contracted for him to sign for a sufficient number of shares to make up the amount required by the standing orders of parliament, which was 630 of £10 each, which he accordingly subscribed and the bill passed; * but when the contract was closed he was to take but 300 shares; the scheme being abandoned before the works were commenced, it was held that the arrangement made by the directors with the contractor was *ultra vires*, and if not a fraud upon the orders of parliament it was void as against such subscribers as were not privy to it; and that the circumstance of the contractor having subscribed the deed last but one, and the last subscriber being privy to the arrangement, did not alter the rights of those subscribers who were not privy to it; and that the contractor was liable, as a contributory, for the entire number of shares for which he signed the deed.

3. Oral evidence is inadmissible to vary the terms of a subscription to the stock of a railway unless it tend to show fraud or mistake.[3] But where the subscriber is really misled, and induced

other subscribers, to whom they would have been awarded but for such fraud. Walker *v.* Devereaux, 4 Paige, 229; s. c. 1 Redf. Am. Railw. Cas. 29.

A subscription for shares will bind the subscriber, although the company agree in writing to release the subscriber, the understanding being that the subscription is to be held out to the public as *bona fide*. The agreement to release is a fraud upon other subscribers, and void. White Mountains Railroad Co. *v.* Eastman, 34 N. H. 124; Downie *v.* White, 12 Wis. 176. See also Connecticut & Passumpsic Rivers Railroad Co. *v.* Bailey, 24 Vt. 465; Mann *v.* Pentz, 2 Sandf. Ch. 257; Penobscot & Kennebec Railroad Co. *v.* Dunn, 39 Maine, 601.

[2] North Shields Quay Co. *v.* Davidson, 4 Kay & J. 688.

[3] Wight *v.* Shelby Railroad Co., 16 B. Monr. 5; Blodgett *v.* Morrill, 20 Vt. 509; s. c. 1 Redf. Am. Railw. Cases, 138; Kennebec & Portland Railroad Co. *v.* Waters, 31 Me. 369. But mere mistake, or misapprehension of the facts, by the subscriber, is no ground of relief unless it amounts to fraud and imposition, brought about by some agent of the company. Hence where one subscribed for shares under the mistaken belief that he might forfeit his stock at will, and be no further liable, he was held liable, though this belief was the result of assurances then made by the person taking the subscription, that such were the terms of subscription secured by the charter, such assurances being founded in mistake, and not wilfully false. Northeastern Railroad Com-

to subscribe for stock, upon the representation of a state of facts in regard to the time of completing the road, or its location, made by those who take up the subscription, and in good faith and upon proper inquiry and the exercise of reasonable discretion believed by the subscriber, and which constitutes the prevailing motive and consideration for the subscription, and which proves false, it would seem that the contract of subscription should be held void, both in law and equity.[4]

4. When the statute requires the registry of shares to be made * within a limited time, such requirement is regarded as merely directory, and the registry, although not made within the prescribed time, will still be competent evidence, and to the same extent as if made within the time required.[5]

5. Subscriptions made under an agreement that they are not to be binding unless a specified sum is subscribed, are not valid to bind other subscribers, as it is essential that there should be no conditions as to the liability of any of the subscribers not applicable to all. (*b*) Confidential subscriptions in such case made for the purpose of making up the required sum are a fraud upon the other subscribers; and should not be treated as valid subscriptions. Where by deducting such confidential subscriptions the required sum is not subscribed, the contract of subscription does

pany *v.* Rodrigues, 10 Rich. S. C. 278; North Carolina Railway Co. *v.* Leach, 4 Jones, N. C. 340. It is here said that one of the commissioners, in taking subscriptions, has no right to give any *assurances* as to the line of location which will be adopted. And if the location be different from that provided in the charter of the company, the party may lose the right to object to paying his subscriptions on that ground, unless he resort to mandamus or injunction, at the earliest convenient time. *Ex parte* Booker, 18 Ark. 338; Brownlee *v.* Ohio, Indiana, & Illinois Railroad Co., 18 Ind. 68.

[4] Henderson *v.* Railway Co., 17 Tex. 560.

[5] Wolverhampton New Waterworks Co. *v.* Hawksford, 7 C. B. N. S. 795; 6 Jur. N. S. 632. Affirmed in Exchequer Chamber, 10 W. R. 153; 11 C. B. N. S. 456; 8 Jur. N. S. 844.

(*b*) A subscription upon a condition precedent is a mere offer, of no binding force until the condition has been performed and the subscription has been accepted. Central Turnpike Co. *v.* Valentine, 10 Pick. 142. And see Ticonic Water Power Co. *v.* Lang, 63 Me. 480; Ridgefield Railroad Co. *v.* Brush, 43 Conn. 86. An offer to subscribe on condition of location of the road on a certain line is revocable till accepted, and death of the offerer is a revocation. Wallace *v.* Townsend, 43 Ohio St. 537. And see Sedalia, Warsaw, & Southern Railroad Co. *v.* Wilkerson, 83 Mo. 235.

not become operative, so as to bind the subscribers. Parol evidence is admissible to show that certain of the subscriptions were confidential in character, and therefore fraudulent.[6]

6. Where the corporation was indebted for borrowed money, and issued stock to a third person in trust for the security of the debt, on condition to be retransferred to the company upon payment of the debt, it was held the shares were illegally issued.[7]

SECTION III.

Mode of enforcing Payment.

1. Subscription to indefinite stock raises no implied promise to pay the amount assessed.
2. If shares are definite, subscription implies a promise to pay assessments. Right of forfeiture a cumulative remedy.
3. Whether issuing new stock will bar a suit against subscriber, *quære*.
4. It would seem not.
5. But the requirements of the charter and general laws of the state, must be strictly pursued in declaring forfeiture of stock.
6. Notice of sale must name place.
7. Validity of calls not affected by misconduct of directors in other matters.
8. Proceedings must be regular at date.
9. Acquiescence often estops the party.
10. Forfeiture of shares.
11. Irregular calls must be declared void, before others can be made to supply the place.

§ 49. 1. The company may resort to all the modes of enforcing payment of calls which are given them by their charter, or the general laws of the state, unless these remedies are given in the alternative. But the principal conflict in the cases seems to arise upon the point of maintaining a distinct action at law for the amount assessed. Many of the early turnpike and manufacturing companies * in this country, did not create any definite, or distinct capital stock, to consist of shares of a definite amount, in currency, but only constituted the subscribers a body corporate, leaving them to raise their capital stock in any mode which their by-laws should prescribe. And in some such cases, the charter, or general laws of the state, gave the company power to assess the subscribers according to the number of shares held by each. But the amount of the shares was not limited. The assessments

[6] New York Exchange Co. *v.* De Wolf, 31 N. Y. 273. But see *supra*, note 1.

[7] Brewster *v.* Hartley, 37 Cal. 15; *supra*, § 20, pl. 11.

might be extended indefinitely, according to the necessities of the company. In such cases, where the only remedy given by the deed of subscription, the charter and by-laws, or the general laws of the state, was a forfeiture of the shares, the courts generally held, that the subscriber was not liable to an action *in personam* for the amount of calls.[1] And this seems to us altogether reasonable and just. *For if a subscription to an indefinite stock created a personal obligation to pay all assessments made by the company upon such stock, it would be equivalent to a personal

[1] Franklin Glass Co. *v.* White, 14 Mass. 286; Andover Turnpike Co. *v.* Gould, 6 Mass. 40; Same *v.* Hay, 7 Mass. 102; New Bedford Turnpike Co. *v.* Adams, 8 Mass. 138; Bangor House Proprietary *v.* Hinckley, 3 Fairf. 385, 388; Franklin Glass Co. *v.* Alexander, 2 N. H. 380. But where there was an express promise to pay assessments, or facts from which such an undertaking was inferable, it was always held, even in this class of cases, that an action will lie. Taunton & South Boston Turnpike Co. *v.* Whiting, 10 Mass. 327; Bangor Bridge Co. *v.* McMahon, 1 Fairf. 478. But a subscriber to the stock of a turnpike company, who promised to pay assessments, when afterwards the course of the road was altered by law, was held thereby exonerated. Middlesex Turnpike Co. *v.* Swan, 10 Mass. 384. These propositions have never been questioned. Worcester Turnpike *v.* Willard, 5 Mass. 80. To the same effect are Chester Glass Co. *v.* Dewey, 16 Mass. 94; Newburyport Bridge Co. *v.* Story, 6 Pick. 45; Salem Mill-Dam Co. *v.* Ropes, 6 Pick. 23; Ripley *v.* Sampson, 10 Pick. 371; Cutler *v.* Middlesex Factory Co., 14 Pick. 483. This general question of the responsibility assumed by those who consent to become shareholders in a corporation, where the shares are not fully paid up, is discussed by Allen, J., in Seymour *v.* Sturgess, 26 N. Y. 134, where, the facts being peculiar, it was held that the shareholder incurred no obligation to pay the balance due on the shares if he elected to abandon them. But there is no implication of duty to pay the amount of a subscription where the terms of subscription declare payment to be made in such instalments as shall be required by the board of directors, unless the declaration and proof show that an instalment had been required by the directors. Gebhart *v.* Junction Railroad Co., 12 Ind. 484; McClasky *v.* Grand Rapids & Indiana Railroad Co., 16 Ind. 96. Where by the charter of an eleemosynary corporation subscriptions were allowed to be taken, and the subscriber, by securing the amount and paying the interest promptly, was entitled to save the payment of the principal, it was held this was matter of indulgence to the subscriber, to which he could only entitle himself by proving his compliance with the conditions on which the indulgence was granted. Denny *v.* Northwestern Christian University, 16 Ind. 220. The undertaking of subscribers to a joint-stock will be held several and not joint, without express words. Price *v.* Grand Rapids & Indiana Railroad Co., 18 Ind. 137. The law by which a corporation exists and acts forms part of the contract of subscription. Hoagland *v.* Cincinnati & Fort Wayne Railroad Co., 18 Ind. 452.

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liability of the stockholders for the debts and liabilities of the company; as we shall see, hereafter, that the directors of a corporation may be compelled, by writ of mandamus, to make calls upon the stock, for the purpose of paying the debts of the company.[2]

2. But where the stock of the company is defined in its charter, and is divided into shares of a definite amount in money, a subscription for shares is justly regarded as equivalent to a promise to pay calls, as they shall be legally made, to the amount of the shares. This may now be regarded as settled, both in this country and in England, and that the power given the company to forfeit and sell the shares, in cases where the shareholders fail to pay calls, is not an exclusive but a cumulative remedy, unless the charter or general laws of the state provide that no other remedy shall be resorted to by the company.[3] (*a*)

[2] *Infra*, § 50.

[3] Hartford & New Haven Railroad Co. *v.* Kennedy, 12 Conn. 499. In this case it was held, that, from the relation of stockholder and company thus created, a promise was implied to pay instalments; that the clause authorizing a sale of the stock was merely cumulative; and that, whether the company resorted to it or not, the personal remedy against the stockholder remained the same. The same points are confirmed by the same court, in Mann *v.* Cooke, 20 Conn. 178. And in Danbury Railroad Co. *v.* Wilson, 22 Conn. 435, the defendant was held liable for calls on a subscription to the stock of a company whose charter had expired, and been revived by the active agency of defendant. See also Dayton *v.* Borst, 31 N. Y. 435; Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491.

Nearly all the cases hold, that where the subscription is of such a character as to give a personal remedy against the subscriber, in the absence of other specific redress, the mere fact that the company has the power to forfeit the shares for non-payment of calls, will not defeat the right to enforce the payment of calls by action. Goshen Turnpike Co. *v.* Hurtin, 9 Johns. 217; Dutchess Cotton Manufacturing Co. *v.* Davis, 14 Johns. 238; Troy Turnpike Co. *v.* McChesney, 21 Wend 296; Northern Railroad Co. *v.* Miller, 10 Barb. 260; Plank-Road Co. *v.* Payne, 17 Barb. 567. In this last case it was held to be matter of intention and construction, whether the remedies were concurrent and cumulative, or in the alternative. And in Troy & Boston Railroad Co. *v.* Tibbits, 18 Barb. 297, it is said to be well settled, that the obligation of actual payment is created by a subscription to a capital stock, unless plainly excluded by the terms of the subscription, and that the forfeiture is a cumulative remedy. Ogdensburg, Rome, & Clayton Railroad Co. *v.* Frost, 21 Barb.

(*a*) Boston, Barre, & Gardner Railroad Co. *v.* Wellington, 113 Mass. 79; Hughes *v.* Antietam Manufacturing Co., 34 Md. 317; Milton *v.* Clayton, 54 Iowa, 425.

* 3. The question in the English cases seems to be whether, after the forfeiture of the shares, and a confirmation of the same * by

511. See also Herkimer Manufacturing & Hydraulic Co. *v.* Small, 21 Wend. 273; s. c. 2 Hill, 127; Sagory *v.* Dubois, 3 Sandf. Ch. 466; Mann *v.* Currie, 2 Barb. 294; Mann *v.* Pentz, 2 Sandf. Ch. 257; Ward *v.* Griswoldville Manufacturing Co., 16 Conn. 593; Lexington & West Cambridge Railroad Co. *v.* Chandler, 13 Met. 311; Klein *v.* Alton & Sangamon Railroad Co., 13 Ill. 514; Ryder *v.* Same, 13 Ill. 516; Gayle *v.* Cahawba Railroad Co., 8 Ala. 586; Beene *v.* Cahawba & Marion Railroad Co., 3 Ala. 660; Spear *v.* Crawford, 14 Wend. 20; Palmer *v.* Lawrence, 3 Sandf. 161, where Duer, J., says the law must now be considered as settled, "that the obligation of actual payment is created in all cases, by a subscription to a capital stock, unless the terms of subscription are such as plainly to exclude it." Elysville *v.* O'Kisco, 5 Miller, 152; Greenville & Columbia Railroad *v.* Smith, 6 Rich. 91; Charlotte & South Carolina Railroad Co. *v.* Blakely, 3 Strob. 245; Banet *v.* Alton & Sangamon Railroad Co., 13 Ill. 504, 514; Hightower *v.* Thornton. 8 Ga. 486; Freeman *v.* Winchester, 10 Sm. & M. Ch. 577; Tar River Navigation Co. *v.* Neal, 3 Hawks, 520; Gratz *v.* Redd, 4 B. Monr. 178; Selma & Tennessee Railroad *v.* Tipton, 5 Ala. 787; Troy & Rutland Railroad Co. *v.* Kerr, 17 Barb. 581. Where the statute gave an election to the company either to forfeit the shares for non-payment of calls, or to sue and collect the amount of the shareholder, it was held that no notice of such election was necessary to be given before suit brought. New Albany & Salem Railroad Co. *v.* Pickens, 5 Ind. 247. The terms of the charter must be pursued where they provide specifically for the redress for non-payment of calls; as if the shareholder is made liable only for deficiency after forfeiture and sale of the stock. Grays *v.* Turnpike Co., 4 Rand. 578; Essex Bridge Co. *v.* Tuttle, 2 Vt. 393. But some of the American cases seem to hold, that a corporation has no power to enforce the payment of calls, against a subscriber for stock, unless upon an express promise, or under some express statutory power, and that a subscription for the stock is not equivalent to an express promise to pay calls thereon to the amount of the shares. Kennebec & Portland Railroad Co. *v.* Kendall, 31 Me. 470. But cases of this class are not numerous, and are, we think, unsound. See also Allen *v.* Montgomery Railroad Co., 11 Ala. 437. It has been held, that after the forfeiture is declared, the company cannot longer hold the subscriber liable. Small *v.* Herkimer Manufacturing & Hydraulic Co., 2 Comst. 330. So if the company omit to exercise its power of forfeiture, as the successive defaults occur, until all the calls are made, it thereby loses its remedy by sale. Stokes *v.* Lebanon & Sparta Turnpike Co., 6 Humph. 241. See also Harlaem Canal Co. *v.* Seixas, 2 Hall, 501; Delaware Canal Co. *v.* Sansom, 1 Binn. 70.

An option on the part of the commissioners to reject subscriptions for stock, does not make them less binding, unless they are so rejected. Connecticut & Passumpsic Railroad Co. *v.* Bailey, 24 Vt. 465. And an agreement made at the time of subscription inconsistent with its terms, and resting in parol merely, cannot be received to defeat the subscription. Ib. In a case in Kentucky this subject is very elaborately discussed by counsel, and to us,

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the company, and the issuing of new stock in lieu of the forfeited shares, the subscriber is still liable for any deficiency. The cases all regard him as liable, under the English statutes, to a personal action, until the confirmation of the forfeiture of his stock.[4]

4. But in the House of Lords,[5] it seems to have * been settled,

very justly disposed of by the court. McMillan *v.* Maysville & Lexington Railroad Co., 15 B. Monr. 218. It was there held, that subscriptions to the stock of a railway company, like other contracts, should receive such construction as will carry into effect the probable intention of the parties; that as the stock subscribed is the means by which the road is to be constructed, a subscription for stock, on condition that the road should be so "located and constructed" as to make a certain town "a point," imposes on the subscribers the duty to pay, on the location of the road in that place; and that the construction of the road is not a condition precedent to the right to recover for calls on the stock. See also New Hampshire Central Railroad Co. *v.* Johnson, 10 Fost. N. H. 390; South Bay Meadow Dam Co. *v.* Gray, 30 Me. 547; Greenville & Columbia Railroad Co. *v.* Cathcart, 4 Rich. 89; Danbury & Norwalk Railroad Co. *v.* Wilson, 22 Conn. 435. An agreement to take and fill shares in a railway company, is an agreement to pay the assessments legally made. Bangor Bridge Co. *v.* McMahon, 10 Me. 478; Buckfield Branch Railroad Co. *v.* Irish, 39 Me. 41; Penobscot & Kennebec Railroad Co. *v.* Dunn, 39 Me. 587; Penobscot Railroad *v.* Dummer, 40 Me. 172; White Mountains Railroad Co. *v.* Eastman, 34 N. H. 124. So, too, an agreement to take shares before the act of incorporation is obtained, creates an implied duty to pay calls duly made thereon. Buffalo & New York City Railroad Co. *v.* Dudley, 14 N. Y. 336. The general subject is discussed somewhat at large in this case, and the results arrived at confirm the doctrines laid down in the text. Rensselaer & Washington Plank Road Co. *v.* Barton, 16 N. Y. 457. The same rule is mentioned in Fry *v.* Lexington & Big Sandy Railroad Co., 2 Met. Ky. 314, where the question of the extent of implied obligation assumed by subscription to the capital stock of a corporation is very fully and fairly illustrated.

[4] Great Northern Railroad Co. *v.* Kennedy, 4 Exch. 417. So the allottees of shares in a projected railway company are made liable for a proportionate share of the expense. Upfill's Case, 1 Sim. N. S. 395; s. c. 1 Eng. L. & Eq. 13; *In re* Direct Shrewsbury & Leicester Railway Co., 1 Sim. N. S. 281; s. c. 7 Sim. N. S. 28; London & Brighton Railway Co. *v.* Fairclough, 2 M. & G. 674; Edinburgh, Leith, & Newhaven Railway Co. *v.* Hebblewhite, 6 M. & W. 707; s. c. 2 Railw. Cas. 237; Birmingham, Bristol, & Thames Junction Railway Co. *v.* Locke, 1 Q. B. 256; s. c. 2 Railw. Cas. 867; Railway Co. *v.* Graham, 1 Q. B. 271; Huddersfield Canal Co. *v.* Buckley, 7 T. R. 36. It has been held, that a shareholder cannot absolve himself from calls by paying the directors a sum of money for his discharge, even though the money be accepted, and the shares transferred. *Ex parte* Bennett, 18 Beav. 339; s. c. 5 De G. M. & G. 284. See also § 4, *supra*.

[5] Inglis *v.* Great Northern Railroad Co., 1 Macq. Ap. Cas. 1112; s. c. 61 Eng. L. & Eq. 55. See also Peoria & Oquawka Railroad Co. *v.* Elting, 17 Ill. 429; Cross *v.* Mill Co., 17 Ill. 54. But where the deed of settlement gives

upon great consideration, that where the charter or general statutes give the right to forfeit the shares, or to collect the amount of the shareholder, and the forfeiture, sale, and cancellation of the shares do not produce the requisite amount, the company may issue new shares for the deficiency, and at the same time maintain an action for it against the former owner.

5. It seems to be well settled, that to entitle the company to sue for calls, the provisions of their charter, and of the general laws of the state, must be strictly pursued. And if the shares have been forfeited and sold without pursuing all the requirements provided in such case, no action will lie to recover the balance of the subscription.[6] And if the shares be sold for the non-payment of several assessments, one of which is illegal, the corporation cannot recover the remainder of the subscription.[7] But where the by-laws of the company prescribe a specific mode of notice to the delinquent, through the mail, of the time and place of sale, this is not to be regarded as exclusive, but other notice which reaches the party in time will be sufficient.[8]

But in another case[9] the law in regard to proceedings in forfeiture * of shares is held very strictly. It is here considered that

the right to forfeit the shares at once, or to enforce the payment, if they should think fit, a judgment for the amount due is a bar to any subsequent forfeiture. Giles *v.* Hutt, 3 Exch. 18. And where the charter of the company provides that the shares of a delinquent shareholder "shall be liable to forfeiture, and the company may declare the same forfeited and vested in the company," the option in declaring such forfeiture is in the company, and not in the shareholders. Northeastern Railroad Co. *v.* Rodrigues, 10 Rich. S. C. 278.

[6] Portland, Saco, & Portsmouth Railroad Co. *v.* Graham, 11 Met. 1.

[7] Stoneham Branch Railroad Co. *v.* Gould, 2 Gray, 277.

[8] Lexington & West Cambridge Railroad Co. *v.* Chandler, 13 Met. 311. And where the charter requires certain notice of the instalment becoming due, the publication, and oral evidence of its being repeated the requisite number of times, are *prima facie* evidence of compliance without producing all the papers. Unthank *v.* Henry County Turnpike Co., 6 Port. 125. And in a later case, Anderson *v.* Ohio & Mississippi Railroad Co., 14 Ind. 169, where the charter limited the amount of calls to ten per cent per annum, and ten per cent had been paid, a call was held sufficient without specifying the place of payment or the percentage to be paid, only five calls remaining within the power of the directors, and the notice fixing the time and place of payment.

[9] Lewey's Island Railroad Co. *v.* Bolton, 48 Me. 451. The rules as to what is requisite to constitute a valid subscription to a stock and to justify calls, are much considered in the recent case of Maltby *v.* Northwestern Virginia Railroad Co., 16 Md. 422.

notice must be given in the precise time and in the exact form required by statute, and that the sale must in all respects correspond precisely with the requirements of the provisions of the law. The rule is carried so far here that posting notice in a public place was held no sufficient compliance with the law requiring it to be in a "conspicuous" place; and it was here considered that subscriptions to preferred stock could not be reckoned to make up the requisite amount of capital to enable the corporation to go into operation.

6. But notice that shares in a railway corporation will be sold for non-payment of assessments on a day fixed, and by an auctioneer named, who is and has long been an auctioneer in the place at which the notice bears date, is insufficient if it do not name the place of sale.[10]

7. The validity of calls cannot be called in question upon the ground that the directors making the same are acting in the interest and for the benefit of a rival company, and have in consequence unnecessarily retarded the construction of the company's works.[11] But the directors must be duly appointed.[12]

8. And the proceedings in making the calls must have been substantially in conformity with the charter and by-laws of the company and the general laws of the state at the time of making the same. Any subsequent ratification by the directors of an informal call will only give it effect from the date of the ratification.[13]

9. A subscriber who has executed the deed of settlement, purchased shares and received dividends upon the same, is not at liberty to object to their validity upon the ground that the company were by the deed of settlement authorized to issue shares for £100, and these were issued as half shares at £50; this acquiescence estops him from doing so.[14]

10. It seems that unless the constitution of the corporation or the general laws of the state contain a provision justifying a for-

[10] Lexington & West Cambridge Railroad Co. *v.* Staples, 5 Gray, 520.

[11] Orr *v.* Glasgow, Airdrie, & Monklands Junction Railway Co., 3 Macq. Ap. Cas. 799; s. c. 6 Jur. N. S. 877.

[12] Howbeach Coal Co. *v.* Teague, 5 H. & N. 151; s. c. 6 Jur. N. S. 275.

[13] Cornwall Great Consolidated Mining Co. *v.* Bennett, 5 H. & N. 423; s. c. 6 Jur. N. S. 539; Anglo California Gold Mining Co. *v.* Lewis, 6 H. & N. 174; s. c. 6 Jur. N. S. 1376.

[14] Hull Flax & Cotton Co. *v.* Wellesley, 6 H. & N. 38.

feiture * of shares, it is not competent for the majority of the shareholders by prospective resolution to establish a regulation whereby the shares shall be forfeited upon failure to comply with the requirements of such resolution.[15] (*a*)

11. It is no valid reason for making more calls than are justified by the constitution and laws affecting the question, that some of the calls were not regularly made and were therefore void, and were not paid by the defendant. It should appear that such irregular calls had been declared void, otherwise the directors may have secured most of the money demanded by them.[16]

SECTION IV.

Creditors may compel Payment of Subscriptions.

1. Mandamus to compel company to collect of subscribers.
2–4. Amount due from subscribers, a trust fund for the benefit of creditors.
5. Same, though a state own the stock.
6, 7. Diversion of the funds from creditors a violation of contract on the part of the company, and a state law authorizing it invalid.
8, 9. General doctrine above stated found in many American cases.
10. Judgment creditors may bring bill in equity.
11. Promoters of railways liable as partners, for expenses of procuring charter.
12. Railway company may assign calls before due, in security for *bona fide* debt. No notice required to perfect assignment against attachments or judgment liens.

§ 50. 1. By the present English statute, the creditors of a company may recover their judgment debts against shareholders who have not paid the full amount of their shares, to the extent of the deficiency.[1] Before this statute, it was considered that a writ of mandamus would lie, to compel the company to make and enforce calls against delinquents.[2]

[15] Barton's Case, 4 De G. & J. 46.

[16] Welland Railway Co. *v.* Berrie, 6 H. & N. 416.

[1] Statute 8 & 9 Vict. c. 16, §§ 36, 37.

[2] Walf. Railw. 277; Hodges Railw. 106, n. (*u*); Regina *v.* Victoria Park Co., 1 Q. B. 288, where the opinion of the court very clearly intimates, that the

(*a*) Perrin *v.* Granger, 30 Vt. 595; *In re* Long Island Railroad Co., 19 Wend. 37.

2. In this country this question has arisen, not unfrequently, in * the case of insolvent companies, no such provision existing in most of the states as that of the English statute just referred to.

3. This subject is very extensively examined and considered by the national tribunal of last resort, in a case of much importance and delicacy,[3] and the following results arrived at: —

4. On the dissolution of a corporation, its effects are a trust-fund for the payment of its creditors, who may follow them into the hands of any one, not a *bona fide* creditor, or purchaser without notice; and a state law, which deprives creditors of this right and appropriates the property to other uses, impairs the obligation of their contracts and is invalid.

5. The fact that a state is the sole owner of the stock in a banking corporation, does not affect the rights of the creditors.

6. The capital stock of a company is a fund set apart by its charter for the payment of its debts, which amounts to a contract, with those who shall become its creditors, that the fund shall not be withdrawn and appropriated to the use of the owner, or owners, of the capital stock.

7. A law which deprives creditors of a corporation of all legal remedy against its property, impairs the obligation of its contracts and is invalid.

8. These propositions, with the exception of the constitutional question, in regard to the impairing of an assumed or implied contract with the creditors of the corporation, are all fully sustained by numerous decisions of the highest authority in this country.

9. Thus in the case before Mr. Justice STORY, in the Circuit Court,[4] (*a*) it was held that the capital stock of a corporation is a trust-fund, for the payment of its debts, and being so, it may, upon general principles of equity law, be followed into other hands, so

writ of mandamus will lie, to compel the company to enforce the payment of calls, where it appears that judgments against the company remain unsatisfied for want of assets, although in the circumstances of the case it was thought unnecessary to issue the writ.

[3] Curran *v.* Arkansas, 15 How. 304.

[4] Wood *v.* Dummer, 3 Mason, 308.

(*a*) See Sanger *v.* Upton, 91 U. S. 60. And see Broughton *v.* Pensacola, 93 U. S. 268; Shamokin Valley & Pottsville Railroad Co. *v.* Malone, 85 Penn. St. 36; City Insurance Co. *v.* Commercial Bank, 68 Ill. 348.

long as it can be traced, unless the holder show a paramount title.[5] And in cases where the capital stock or assets of a corporation have been distributed to the stockholders without providing for the payment of its debts, a court of equity will allow the creditors to sustain a bill against the shareholders, to compel contribution to the payment of the debts of the company, to the extent of funds obtained by them, whether directly from the company, or * through some substitution of useless securities for those which were good.[6]

10. Where a corporation have abandoned all proceedings under their charter, from insolvency, and still owe debts, the subscriptions to the capital stock not being all paid, a judgment creditor may proceed, in equity, against the delinquent shareowners, there being no longer any mode by which calls upon the stock may be enforced, under the provisions of the charter, or by action at law, in favor of the company.[7]

[5] Adair *v.* Shaw, 1 Sch. & L. 243, 261. See Dayton *v.* Borst, 31 N. Y. 435.

[6] Nathan *v.* Whitlock, 9 Paige, 152; s. c. 3 Edw. Ch. 215. But it has been held, that the distribution of the capital stock among the shareholders before the debts of the company are paid, leaving no funds for that purpose, will not render the shareholders liable to an action of tort at the suit of the creditors of the company, there being no such privity as will lay the foundation of an action at law, even in states where no court of chancery exists. Vose *v.* Grant, 15 Mass. 505. In equity the suit may be in the name of the receiver. Nathan *v.* Whitlock, *supra*. Or in the name of a creditor, suing on behalf of himself and others, standing in the same relation. Mann *v.* Pentz, 3 Comst. 415, 422. And all the shareholders, who have not paid their subscriptions, should be made parties to the bill, and compelled to contribute proportionally. Ib.

The same principle is recognized in numerous other cases. Mumma *v.* Potomac Co., 8 Pet. 281; Wright *v.* Petrie, 1 Sm. & M. Ch. 282, 319; Nevitt *v.* Port Gibson Bank, 6 Sm. & M. 513; Hightower *v.* Thornton, 8 Ga. 486; Fort Edward & Fort Miller Plank Road Co. *v.* Payne, 17 Barb. 567; Gillet *v.* Moody, 3 Comst. 479. In the last named case the bank, of which the plaintiff was receiver, had transferred specie funds to defendant, in exchange for his stock in the bank. The transaction was held illegal, and the defendant was compelled to refund, for the benefit of the creditors of the bank. And in another case, where the subscriber to a bank, which became insolvent, assigned all his interest in the bank, it was held not to exonerate him from liability to assessments made to pay debts due from the bank, although contracted subsequent to the assignment. Dayton *v.* Borst, 7 Bosw. 115. See also Morgan *v.* New York & Albany Railroad Co., 10 Paige, 290.

[7] Henry *v.* Vermillion & Ashland Railroad Co., 17 Ohio, 187. See also

11. It is held under the English statutes, in regard to fully registered companies, which never go into full operation, but have to be closed under the winding-up acts, that a shareholder, who has paid up the full amount of his shares, is still liable to pay the necessary calls to defray the expenses of winding up the company, * the subscribers to such joint-stock companies, under the statute, being held liable to the same extent as partners.[8]

12. The company may assign, as security for a debt due from them, an existing unpaid call upon shares not yet due, and if the assignment contains a power of sale, that will not invalidate the assignment, since if held void, a court of equity will expunge it, or restrain its exercise, and it cannot have any effect to avoid the assignment until acted upon; and a shareholder from whom such call is due will be affected with notice of the assignment, if presiding at the meeting when it was made, although having no further knowledge in regard to it.[9] But it was doubted if any notice were required to perfect an assignment in security of a *bona fide* debt, against a subsequent judgment or attachment lien. And in a later case,[10] it was decided that no notice is required in such case, and that Watts *v.* Porter,[11] where the majority of Queen's Bench held such notice indispensable, was no longer law.

Miers *v.* Zanesville & Maysville Turnpike Co., 11 Ohio, 273; s. c. 13 Ohio, 197. And where the company retains its organization and officers, it may be compelled, by writ of mandamus, to enforce calls against the shareholders to the extent of their liability, as well as to perform other duties. Commonwealth *v.* Lancaster, 5 Watts, 152.

[8] *In re* Sea, Fire, and Life Assurance Society, 3 De G. M. & G. 459; s. c. 23 Eng. L. & Eq. 422. The form of proceeding and the extent of responsibility is extensively considered, as to delinquent subscribers to an insolvent corporation, in Adler *v.* Milwaukee Patent Brick Co., 13 Wis. 57.

[9] Pickering *v.* Ilfracombe Railway Co., Law Rep. 3 C. P. 235.

[10] Robinson *v.* Nesbitt, id. 264.

[11] 3 Ellis & B. 743.

SECTION V.

Conditions precedent to making Calls.

1. Conditions precedent must be performed before calls.
2. Collateral, or subsequent conditions otherwise.
3. Definite capital must all be subscribed before calls.
4. Same where defined by the company, as in the charter.
5. Conditional subscriptions not to be reckoned.
6. Legislature cannot repeal conditions precedent.
7. Limit of assessments cannot be exceeded for any purpose.
8. Where charter fails to limit stock, corporation may.
9. Alteration in charter reducing amount of stock.

§ 51. 1. Conditions precedent must be complied with, before any binding calls can be made. Any thing, which, by the express provisions of the charter or the general laws of the state, is made a condition to be performed on the part of the company, or its * agents, before and as the foundation of the right to make calls upon the subscriptions to the stock; or where the thing is required to be done before calls shall be made, and is an important element in the consideration of the agreement to take stock in the company, it should ordinarily be regarded as a condition precedent.

2. But where the matter to be done is rather incidental to the main design, and only affects the enterprise collaterally, it will commonly be regarded as merely directory to the company, or at most as a concurrent or subsequent condition, to be enforced by independent proceedings, and in the performance of which time is not indispensable.[1]

[1] Carlisle *v.* Cahawba & Marion Railway Co., 4 Ala. 70; *supra*, § 18; Banet *v.* Alton & Sangamon Railway Co., 13 Ill. 504; Utica & Schenectady Railway Co. *v.* Brinkerhoff, 21 Wend. 139. This last case is an action on a special undertaking to pay land damages, on condition that the company would locate its road so as to terminate at a particular place, which the company alleged they had done, and defendant was held not liable, for want of mutuality, the company not being bound by the contract. But it admits of some question whether the case of Utica & Schenectady Railway Co. *v.* Brinkerhoff, *supra*, comes fairly within the principle on which it was decided. The case of Cooke *v.* Oxley 3 T. R. 653, which was relied on and which has been sometimes questioned, is an obvious case of want of consideration on the part of defend-

* And where the company voted to issue six hundred additional shares and to allow each stockholder to take one new share for

ant, it being a mere naked refusal of goods, for a fixed time, the plaintiff in the mean time having an election to take them or not. Cases of this class are numerous and sound, resting on the mere want of consideration. Burnet *v.* Bisco, 4 Johns. 235. But where such an option is given upon consideration, or as a standing offer, and in the mean time the other party proceeds to perform on his part, the contract becomes binding. And it was so held, in the case of the Cumberland Valley Railway Co. *v.* Baab, 9 Watts, 458. In this case the inhabitants of a portion of Harrisburg made a subscription to induce the company to cross the river at a particular point, and build its depot on a particular street, which being done, the subscribers were held liable to pay their subscriptions, and on the most obvious and satisfactory grounds.

In Henderson & Nashville Railroad Co. *v.* Leavell, 16 B. Monr. 358, it was held, that a subscription conditioned that the road should pass through a certain town and the money subscribed be expended in a certain county, was a valid subscription. If a subscription for stock be conditioned, that the subscriber may withdraw his subscription, at his election, if the whole stock be not taken, at a given time, and he pay part of his subscription after that date, he is liable for the balance, unless he shows the failure of the condition, and his own election in a reasonable time thereafter to withdraw. Wilmington & Raleigh Railway Co. *v.* Robeson, 5 Ire. 391. On a subscription on condition that the road should "pass" on a certain route through a certain county, it is not a condition precedent to the right to demand payment, that the road should be actually constructed on that line; it is sufficient if the road be permanently located there. North Missouri Railroad Co. *v.* Winkler, 29 Mo. 318; Ashtabula & New Lisbon Railroad Co. *v.* Smith, 15 Ohio St. 328. See also Vicksburg, Shreveport, & Texas Railroad Co. *v.* McKean, 12 La. An. 638.

In Chamberlain *v.* Painesville & Hudson Railroad Co., 15 Ohio St. 225, where a subscription was made for a given number of shares of stock, payable at such times and in such instalments as the directors might prescribe, provided the road was "permanently located" on a given route, and a freight house and depot built at a point named, it was held that on the permanent location of the road in accordance with the terms proposed, the subscription became absolute; that the provision in relation to the erection of the buildings should be regarded as a stipulation merely, and not a condition precedent; the giving by a subscriber of his note for the balance of his subscription, and taking therefor a receipt, stipulating, that when paid, the amount of the note should be applied on his stock, was *prima facie* a waiver of conditions precedent. But this last is denied in a later case, Parker *v.* Thomas, 19 Ind. 213. Where a subscription was on the express condition that the company "should locate and construct" its road along a certain route, and the subscriber paid one instalment and part of the second, but delayed the payment of the residue until the company suspended operations, after which payment was refused on the ground that though the road had been *located*, it had not been *constructed* according to the condition in the subscription; it was held

* every two held by him, if he subscribed for the same, paid a certain sum and gave his note for the balance, before a day named;

that, the promise of subscription being precedent to that of construction, the subscriber could not insist on performance by the company, while he refused performance on his part, and that the road having been located as stipulated, and completed so far as the means of the company would allow, there was a compliance with the condition, and that the condition was not a condition precedent, and required only that the road when located and constructed should occupy the route designated. Miller *v.* Pittsburg & Connellsville Railroad Co., 40 Penn. St. 237.

Where the charter required subscriptions by responsible persons of a certain proportion of the estimated cost of the work before entering upon the construction, it was held unnecessary for the company to show compliance with this requirement in order to enforce calls. Nor does the right to make calls depend on the extent or nature of the indebtedness of the company; nor can a subscriber defend against calls by showing that some of the subscriptions necessary to make up the amount requisite to bind the defendant were made by persons of no actual or reputed pecuniary responsibility, unless he also shows that they were not made or taken in good faith. Penobscot Railroad Co. *v.* White, 41 Me. 512. And see Penobscot Railroad Co. *v.* Dummer, 40 Me. 172. And the bad faith cannot be shown by the declarations of the subscribers made long after making such subscriptions. Ib. Where the charter of a corporation requires that a certain number of shares shall be subscribed before the organization of the company, the decision of the majority of the subscribers that the condition has been complied with, and the actual organization of the company in pursuance of the decision, are binding on the minority. Ib. But this will not preclude the minority from defending on the ground that the proceedings of the majority were in bad faith. See also Taggart *v.* West Maryland Railroad Co., 24 Md. 563. And where the subscriber gives the company his note for the sum required to be paid at the time of subscription, and subsequently pays the same, his subscription is binding, and makes him a member of the company, and he cannot escape the responsibility of his position on account of any previous irregularity. Ogdensburg Railroad Co. *v.* Wolley, 38 N. Y. 118. Subscribers cannot defend against calls, on the ground that subscriptions were taken for two sections of the road without distinguishing how much was to be applied on each; nor on the ground that the construction of the road was begun before a certain per cent of each subscription was paid, according to the requirements of the charter; or that by a subsequent statute the amount of capital stock required to build the road had been reduced below the requirements of the charter; or that interest had been paid on subscriptions according to the recommendation of the terms of subscription; or that the charter of the company had been amended by extending the time for completing the road. Agricultural Branch Railroad Co. *v.* Winchester, 13 Allen, 29.

See also Andrews *v.* Ohio & Mississippi Railroad Co., 14 Ind. 169; Eakright *v.* Logansport & Northern Indiana Railroad Co., 13 Ind. 404, where the ques-

* it was held there was no implied condition that the whole six hundred shares should be issued, and the failure to do so was no * ground for allowing an action to be maintained for the money paid, or any defence to the notes given for the balance.[2]

tion of controlling written subscriptions by oral declarations of those who solicit them, as to the probable route of the road, is further discussed and placed on the true ground, that such representations can have no effect, unless upon the ground of fraud. See also Parker *v.* Thomas, 19 Ind. 213; Cunningham *v.* Edgefield & Kentucky Railroad Co., 2 Head, 23; Brownlee *v.* Ohio, Indiana, & Illinois Railroad Co., 18 Ind. 68.

There are some cases which go the length of saying that as the directors of a railway company have no power to give any binding assurance as to the route which shall be finally adopted, it being their duty to place it where, in their judgment, the public good requires, it is the folly of any subscriber to rely on such representation, and that even where it could be shown that such representations were fraudulently made, to induce subscriptions, and had the purposed effect, the subscriptions could not be avoided on that ground. Ellison *v.* Mobile & Ohio Railroad Co., 36 Miss. 572; Walker *v.* Same, 34 Miss. 245. See also Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491.

The verbal promise of the agent who takes subscriptions, that the time of payment shall be delayed beyond the time named in the charter, is not binding on the company. Thigpen *v.* Mississippi Central Railroad Co., 32 Miss. 317.

There is a case in Vermont (Connecticut & Passumpsic Rivers Railroad Co. *v.* Baxter, 32 Vt. 805), where the court seem to hold, that where the subscription defined the route of the proposed railway, the representations of the agent who carried about the paper, that the written words really defined one particular route, and not another, the subscribers themselves being equally consuant of the facts with the agent, was binding on the company, and would preclude recovery of calls, if the road were not located on the route indicated by the agent, although in fact so located as to comply with the conditions of the written subscription, and although the agent acted in good faith. The case is not one of such importance as to require much discussion, but it may be observed that the decision seems to adopt the oral representations of the agent as part of the written contract of subscription, whereas the subscriber was bound by the legal construction of the writing. A similar question arose and was more reasonably determined in McAllister *v.* Indianapolis & Cincinnati Railroad Co., 15 Ind. 11. The subscription there was unconditional, and the subscriber took his certificate, and afterwards kept it without offering to surrender it. But at the time of the subscription the company promised that a branch should be constructed to a certain place where the subscriber resided. It was held that the parol promise to construct the branch could not be proved as part of the written contract of subscription, and hence that the money paid could not be recovered on the ground of a breach of contract, and that in the circumstances recovery could not be had on the ground of fraud.

[2] Nutter *v.* Lexington & West Cambridge Railroad Co., 6 Gray, 85.

3. It is an essential condition to making calls, in those companies where the number of shares and the amount of capital is fixed, that the whole stock shall be subscribed before any calls can lawfully be made.[3] (*a*) And if calls are made before the requisite stock is subscribed, although the subscription is completed before action brought, no recovery can be had.[4] But it has been held, that the general provision in the charter of a railway act, that so soon as £1,500,000 shall have been subscribed, it shall be lawful for the company to put in force all the powers of the act authorizing the construction of the railway, and of the acts therein recited, being the general railway acts, did not require such subscription to be made before making calls, but only before exercising compulsory powers of taking land.[5]

* 4. And where the charter provides that the members might divide the capital stock into as many shares as they might think

[3] Stoneham Branch Railroad Co. *v.* Gould, 2 Gray, 277; Salem Mill-Dam Co. *v.* Ropes, 6 Pick. 23; s. c. 9 Pick. 187; s. c. 1 Redf. Am. Railw. Cas. 89; Cabot & West Springfield Bridge Co. *v.* Chapin, 6 Cush. 50; Worcester & Nashua Railroad Co. *v.* Hinds, 8 Cush. 110; Lexington & West Cambridge Railroad Co. *v.* Chandler, 13 Met. 311; New Hampshire Central Railroad Co. *v.* Johnson, 10 Fost. N. H. 390; Penobscot Railroad Co. *v.* Dummer, 40 Me. 172.

But a subscriber for shares in a railway company is liable for calls, although by a subsequent amendment of the charter of the company the capital stock is raised to a sum which has not been subscribed, there being no such condition, either in the charter of the company or the terms of subscription, at the time of subscribing. York & Cumberland Railroad Co. *v.* Pratt, 40 Me. 447.

The records of the company are evidence that subscriptions to the requisite amount have been made. Ib. Same *v.* White, 20 Law Rep. 689; s. c. 41 Me. 512; Peake *v.* Wabash Railroad Co., 18 Ill. 88.

[4] Norwich & Lowestoft Navigation Co. *v.* Theobald, 1 Moody & M. 151; Stratford & Moreton Railway Co. *v.* Stratton, 2 B. & Ad. 518. And see Atlantic Cotton Mills *v.* Abbott, 9 Cush. 423, where a condition in a subscription for stock, that the capital stock of the company should not be less than a certain sum, was held a condition precedent to making calls.

[5] Waterford, Wexford, Wicklow, & Dublin Railway Co. *v.* Dalbiac, 6 Railw. Cas. 753; s. c. 4 Eng. L. & Eq. 455. But the American cases will not justify such a construction. It would here be held a condition precedent to the right to make calls, or probably even to maintain a corporate existence.

(*a*) Bray *v.* Farwell, 81 N. Y. 600; Allman *v.* Havana Railroad Co., 88 Ill. 521. And see Peoria Railroad Co. *v.* Preston, 35 Iowa, 118, and cases there collected.

proper, and by a written agreement the subscribers fixed the capital stock at $50,000, divided into 500 shares of $100 each, and only one hundred and thirty-eight shares had been subscribed, it was held no assessment for the general purposes of the corporation could be made.[6]

5. And where the charter of a railway company requires their stock to consist of not less than a given number of shares, assessments cannot be made before the required number is taken. And in such case conditional subscriptions are not to be reckoned, even where the condition is acceded to by the company, if the subscriber still repudiates the subscription, on the ground that the condition is not fully performed by the contract drawn up in form. And the plea of the general issue, is no such admission of the existence of the company, as to preclude subscribers from contesting the amount of subscriptions, to enable the company to make calls.[7]

[6] Littleton Manufacturing Co. *v.* Parker, 14 N. H. 543; Contoocook Valley Railroad Co. *v.* Barker, 32 N. H. 363.

Where the condition of a bond given for the amount of a railway subscription was, that the same should be paid when the road was "completed" to a certain village, it was held that the condition was performed when the road was made to the suburbs of the village, in such a manner as to allow daily trains on it, carrying all the freight and passengers that offered, although some portion of the work was only temporary. O'Neal *v.* King, 3 Jones, 517; Chapman *v.* Mad River & Lake Erie Railroad Co., 6 Ohio St. 119.

[7] Oldtown & Lincoln Railroad Co. *v.* Veazie, 39 Me. 571. Any condition the subscriber sees fit to annex to his subscription must be complied with before the subscriber is liable to assessments. Penobscot & Kennebec Railroad Co. *v.* Dunn, 39 Me. 587.

A condition, that not more than five dollars on a share shall be assessed at one time, is not violated by two or more assessments being made at one time, if only five dollars is required to be paid at one time. Ib. Penobscot Railroad Co. *v.* Dummer, 40 Me. 172.

And where the charter of the company requires that the capital stock be not less than a certain number of shares, nor more than a certain greater number, and authorizes the directors to assess upon the smaller number, as soon as subscribed, and from time to time to enlarge the capital to the maximum amount named in the charter, all the shares to be equally assessed, it is not necessary for the company to define its capital, within the prescribed limits, before making calls. White Mountains Railroad Co. *v.* Eastman, 34 N. H. 124.

It is doubtful if the directors of a railway have power to release subscribers to stock, but at all events, where the release is optional with the subscriber, he must make his election to be released, and in a reasonable time. Penobscot &

*6. And where the charter originally required 11,000 shares to be the minimum, and when less than 10,000 were subscribed the company was organized, and the subscriptions accepted, and assessments made, and afterwards, by an act of the legislature, accepted by the corporation, the minimum was reduced to 8,000 shares, in an action to recover assessments made on defendant's shares, before and after such alteration of the charter, it was held: (1.) that the minimum was a condition precedent, to be fulfilled by the corporation, before the subscribers were liable to assessments; (2.) that the alteration of the charter would not affect prior subscribers; (3.) that the defendant would not be estopped from relying upon this condition, by having acted as a shareholder and officer in the corporation, and contributed towards the expenses of the company; (4.) that corporators, by any acts or declarations, cannot relieve the corporation from its obligation to possess the capital stock required by its charter.[8]

7. Where the charter of a railway company provided for assessments by the directors of the company upon the shares of the stock, as they might deem expedient and necessary in the execution and progress of the work, provided "that no assessment shall be laid upon any share in said corporation of a greater amount than one hundred dollars in the whole, . . . and if a greater amount of money shall be necessary to complete said road it shall be raised by creating new shares," it was held that the charter limited the amount of all the assessments to one hundred dollars on a share, and that assessments beyond that sum, made for the purpose of paying the debts of the company, were illegal.[8]

*8. Where the charter of a railway company fails to fix the number of shares of the capital stock, it must be presumed to have been the purpose of the legislature that the corporation should limit the number. And this must be done before any valid assessments can be made. In such case, if the number fixed exceed the number subscribed, the company may change the number; but the assessments must be made upon the whole number, and if an assessment be made before the number ultimately fixed is subscribed, it will be irregular and void. A sub-

Kennebec Railroad Co. *v.* Dunn, *supra*. See also Troy & Greenfield Railroad Co. *v.* Newton, 8 Gray, 596.

[8] Great Falls & Conway Railroad Co. *v.* Copp, 38 N. H. 124.

scriber who has paid one assessment is not thereby precluded from insisting upon this irregularity in defence to others.[9]

9. Where the charter of a railway company as originally granted limited the amount of stock at a point which the subscription never reached, but by a subsequent alteration of the charter the amount of the capital stock was reduced, and after the subscriptions reached that amount the company was duly organized, it was held that the alteration in the charter did not release prior subscribers.[10] But this seems questionable.[11]

SECTION VI.

Calls may be made payable by Instalments.

§ 52. It was at one time considered that calls made payable by instalments were invalid.[1] But it seems now to be settled that such mode of making calls, where the directors of the company have an unlimited discretion as to the time and mode of requiring payments of the subscriptions, is unobjectionable.[2] But where the subscription contains a provision, that payment shall be made at such times and places as should thereafter be directed by the directors, and shall be applied to the construction of the road, it was held, that the subscription did not become payable, until the directors, at a regular meeting, had fixed the time * and place of payment.[3] But it is further held, in this case, that it is not necessary to give notice to the subscribers of the time and place of payment.[3] This point in the decision seems not altogether in accordance with the usual practice in such cases, or the general course of decision in regard to calls, which upon general prin-

[9] Somerset & Kennebec Railroad Co. *v.* Cushing, 45 Me. 524.

[10] Bedford Railroad Co. *v.* Bowser, 48 Penn. St. 29.

[11] *Supra*, § 51, pl. 6, note 8.

[1] Ambergate, Nottingham & Boston & Eastern Junction Railway Co. *v.* Coulthard, 5 Exch. 458; Stratford & Moreton Railway Co. *v.* Stratton, 2 B. & Ad. 518.

[2] London & Northwestern Railway Co. *v.* McMichael, 6 Exch. 273; Ambergate, Nottingham, Boston, & Eastern Junction Railway *v.* Norcliffe, 6 Exch. 629; s. c. 4 Eng. L. & Eq. 461; Birkenhead, Lancashire, & Cheshire Railway Co. *v.* Webster, 6 Exch. 277; s. c. 6 Railw. Cas. 498.

[3] Ross *v.* Lafayette & Indianapolis Railroad Co., 6 Ind. 297.

ciples must be notified to subscribers before an action can be maintained. But where the subscription is made payable in instalments of ten per cent every sixty days as the work progresses, it is not important that any formal call or demand be made for the successive payments.[4]

Where the charter gives the corporation power to collect subscriptions to the capital stock by such instalments as the president and directors shall deem proper, they may make contracts with subscribers for the payment of subscriptions in any reasonable instalments, as to time and place, and if such condition were *ultra vires*, it would render the whole contract void, and not the condition merely.[5]

SECTION VII.

Party liable for Calls.

1. Subscribers liable to calls.
2, 6. What constitutes subscription to capital stock.
3. How a purchaser of stock becomes liable to the company.
4. One may so conduct as to estop himself from denying his liability.
5. Register of the company evidence of membership.
6. Subscriptions must be made in conformity to charter.
7. Transferee liable for calls. Subscriber also in some cases.
8. Original books of subscription primary evidence.
9. Secondary evidence admissible when original is lost.
10. What acts will constitute one a shareholder.
11. May take and negotiate or enforce notes for subscriptions.
12. But note fraudulently obtained not enforceable.
13. Subscriptions by one as executor distinct from those in private capacity.

§ 53. 1. All the original subscribers to the stock in a railway company are usually made liable to calls, by the charter of the company, or by general statute.

2. Some question has arisen in the English courts, as to what is necessary to constitute one a subscriber. In an early case[1] *upon this subject, it was held, that the word "subscriber," in the act of parliament constituting the company, applied only to those

[4] Breedlove *v.* Martinsville & Franklin Railroad Co., 12 Ind. 114; Smith *v.* Indiana & Illinois Railway Co., 12 Ind. 61.

[5] Roberts *v.* Ohio & Mobile Railroad Co., 32 Miss. 373.

[1] Thames Tunnel Co. *v.* Sheldon, 6 B. & C. 341.

who had stipulated that they would make payment, and not to all those who had advanced money; and that one, who was named in the recital of the act as one of the original proprietors, and who had paid a deposit on eight shares, but who had not signed any contracts, was not a subscriber within the meaning of the act, and not liable to be sued by the directors for calls on the remainder of such shares.

3. This is the generally received opinion upon that subject, in this country. In one case,[2] a plea to an action to recover calls on stock subscribed, that another person had agreed to take the stock, and that the commissioners had counted this stock to such other person, is insufficient. The signature of the first subscriber should have been erased, and that of the other substituted, or something done to hold the latter liable. A subscriber for stock cannot subrogate another person to his obligation, without a substitution of his name upon the books of the company, or some other equivalent act recognized by the charter and by-laws of the company.

4. But the principal difficulty, in regard to liability for calls, arises, where there have been transfers, and the name of the transferee not entered upon the books of the company. For whenever the name of the vendee of shares is transferred to the register of shareholders, the cases all agree that the vendor is exonerated (unless there is some express provision of law by which the liability of the original subscriber still continues), and the vendee becomes liable for future calls.[3] And the vendee having made such representation to the company as to induce them to enter his name upon the register of shares, is estopped to deny the validity of the transfer.[4] And even where the party has represented himself to the company as the owner of shares, and sent in scrip certificates, which had been purchased by him, claiming to be registered as a proprietor in respect thereof, and had received from the company receipts therefor, with a notice that they would be exchanged * for sealed certificates on demand,

[2] Ryder *v.* Alton & Sangamon Railroad Co., 13 Ill. 516.

[3] Sheffield & Ashton-under-Lyne & Manchester Railway Co. *v.* Woodcock, 2 Railw. Cas. 522; s. c. 7 M. & W. 574; London Grand Junction Railway Co. *v.* Freeman, 2 Railw. Cas. 468; s. c. 2 M. & G. 606; *infra*, § 54.

[4] Sheffield, Ashton-under-Lyne & Manchester Railway Co. *v.* Woodcock, *supra*; London Grand Junction Railway Co. *v.* Freeman, *supra*.

he was held estopped to deny his liability for calls, although his name had not been entered upon the register of shareholders, or any memorial of transfer entered, as required by the act.[5] And where one has paid calls on shares, or attended meetings of the company, as the proprietor of shares, he is estopped to deny such membership.[6]

5. The holders of scrip certificates are properly entered as proprietors of shares before the passing of the act, although they have neither signed the parliamentary contract, nor been original subscribers; and the register-book of shareholders, which is required by the statute to be kept in a prescribed form by the company, though irregularly kept, is *prima facie* evidence who are proprietors.[7]

6. The subscription for stock, to be valid, must be made in conformity with the act. So that where it was required to be made in such form as to bind the subscriber and his heirs, it was deemed requisite to be made under seal.[8] But such a provision is of no force in this country, simple contracts being of the same force as against heirs as specialties.

7. If by the act of incorporation the shares are made assignable without restriction, and no express provision exists in regard to the party liable for calls, it would seem to follow, upon the general principles of the law of contract, that the proprietor of the share, for the time being, is liable for calls. And where certain formalities are requisite in the transfer of shares, and these have been complied with on the part of the transferee, or waived by the company at his request, his liability to calls then attaches.[9] The liability of the original subscriber often continues,

[5] Cheltenham & Great Western Union Railway Co. *v.* Daniel, 2 Q. B. 281, and Same *v.* Medina, 2 Railw. Cas. 728. And this being matter of estoppel *in pais*, may be used in evidence, in answer to the defence, without being pleaded.

[6] London Grand Junction Railway Co. *v.* Graham, 2 Railw. Cas. 870; s. c. 1 Q. B. 271.

[7] Birmingham, Bristol, & Thames Junction Railway Co. *v.* Locke, 2 Railw. Cas. 867; s. c. 1 Q. B. 256.

[8] Cromford & High Peak Railway Co. *v.* Lacey, 3 Y. & J. 80. See *supra*, § 18, note 2.

[9] Huddersfield Canal Co. *v.* Buckley, 7 T. R. 36; Aylesbury Railway Co. *v.* Mount, 5 Scott, New Rep. 127; West Philadelphia Canal Co. *v.* Innes, 3 Whart. 198; Mann *v.* Currie, 2 Barb. 294; Hall *v.* United States Insurance Co., 5 Gill, 484; Bend *v.* Susquehannah Bridge Co., 6 Har. & J. 128; Angell & Ames Corp., § 534.

at the election of the * company, after that against the vendee attaches, but when the company consent to accept the name of the transferee, that of the subscriber, or former proprietor, ceases.[10]

8. It seems to be regarded as settled law, that the best evidence of an original subscription to the capital stock of a railway company is the production of the original subscription book, or the book of records of the company on which the subscriptions were made.[11]

9. But where the books are shown not to be in the proper place of deposit and custody, and no trace can be found of their present existence elsewhere, secondary evidence is admissible. And the court decide the question of loss, as a preliminary one to the admission of the secondary evidence.[11]

10. One who accepts a subscription made by another on his behalf, and pays the calls made thereon and receives a certificate of ownership, is responsible as a shareholder; and it makes no difference that his name does not appear upon the transfer books or the alphabetical list of stockholders as a transferee of stock. And one may become a shareholder without receiving a certificate of stock.[12]

11. It seems clear that railway companies may accept promissory notes in payment of subscriptions, and either negotiate or enforce them by suit.[13] The questions of pleading and evidence which may be raised in suits upon such notes are extensively discussed in the case last cited.

12. And where the subscription to railway stock is dependent upon the condition that no calls shall be made until work should be begun upon a particular section of the road, and the subscriber was induced to execute his note for the amount upon the representation of the agents of the company that work had been so commenced, when in fact it had not, the note cannot be enforced.[14]

[10] *Infra*, § 54.

[11] Graff *v.* Pittsburgh & Steubenville Railroad Co., 31 Penn. St. 489. These subscriptions are, in fact, sometimes made on different books, and then brought together on one book, for the purpose of permanent preservation. But it would seem that there should be evidence of the original subscription.

[12] Burr *v.* Wilcox, 6 Bosw. 198.

[13] Goodrich *v.* Reynolds, 31 Ill. 490. See also Straus *v.* Eagle Insurance Co., 5 Ohio St. 59.

[14] Taylor *v.* Fletcher, 15 Ind. 80.

*13. Subscriptions in the capacity of executor are to be regarded as distinct contracts from those in the personal capacity of the subscriber, so that the pendency of a suit for one will not abate or render vexatious a subsequent suit for the other.[15]

SECTION VIII.

Release from liability for Calls.

1, 2. Where the transfer of shares, without registry, will relieve the proprietor from calls.
3. Where shares are forfeited, by express condition, subscriber no longer liable for calls.
4. Dues cannot be enforced which accrue upon shares after they were agreed to be cancelled.

§ 54. 1. One may relieve himself of his liability for calls, by the transfer of his shares, and the substitution of the name of his assignee for his own upon the books of the company. But until this change upon the books of the company is made, they are at liberty to hold the original subscriber liable, if they so elect.[1] But where the act of incorporation of a joint-stock company declared the shares should be vested in subscribers, their executors and assigns, with power to the subscribers to assign their shares, and a committee, to be appointed under the act, were authorized to make calls upon the proprietors of shares, it was held, that an original subscriber, who had transferred his shares, was no longer liable to calls.[2]

2. But this case is determined upon the express provisions of the charter of the company. The general rule in England, at present, under their consolidated acts, is undoubtedly as stated above. And we see no good reason why it should not equally apply in this country. It would seem to be the only mode of securing the ultimate payment of calls. But some of the cases

[15] New York City & Erie Railroad Co. *v.* Patrick, 39 N. Y. 256.

[1] *Supra*, § 47, and cases there cited. In Everhart *v.* West Chester & Philadelphia Railroad Co., 28 Penn. St. 339, it is said that a transfer of stock, made for the purpose of exonerating a subscriber, without the consent of the company, is not a valid defence to an action against him for the purchase-money of the shares subscribed. *Supra*, § 32.

[2] Huddersfield Canal Co. *v.* Buckley, 7 T. R. 36, 42.

seem to assume, that the mere transfer of the shares in the market *does exonerate the subscriber from the payment of future calls. But this depends chiefly upon the provisions of particular charters, and the general laws of the state applicable to the subject.[3]

3. Where shares are allotted to one upon the express condition to be forfeited if a certain deposit is not paid in a certain time, and nothing more is done by the allottee, he is not liable for calls, although the company have entered his name upon the register of shares as a shareholder.[4]

4. Where the corporation resolve to release subscribers and to cancel their stock upon making certain payments, which are made and the stock cancelled, the company cannot enforce any dues on such shares which subsequently accrue,[5] since the former arrangement amounted to an accord and satisfaction of all claim on the part of the company. But if the company thereby materially lessened the remedy of creditors, they might possibly interfere.

[3] In West Philadelphia Canal Co. *v.* Innes, 3 Whart. 198, it was held, that where the proprietor of shares of the plaintiff's stock transferred them on the books of the company, after calls were made, but before they fell due, the transferee was liable for such calls, although he had never received certificates, or given notice of the acceptance of the transfer. And it was held to make no difference, that the transfer was from an original subscriber, without consideration. Mann *v.* Pentz, 2 Sandf. Ch. 258; Hartford & New Haven Railroad Co. *v.* Boorman, 12 Conn. 530; Aylesbury Railroad Co. *v.* Mount, 5 Scott, New Rep. 127.

[4] Waterford, Wexford, Wicklow, & Dublin Railway Co. *v.* Pidcock, 18 Eng. L. & Eq. 517; s. c. 17 Jur. 26; s. c. 22 Law T. Rep. n. s. 116; s. c. 8 Exch. 279. Where the company accepts a conveyance of shares to itself it will exonerate the owner from calls. But a sale to another company of all the effects of the company will not release the shareholders from calls already made. Plate Glass Insurance Co. *v.* Sunley, 8 Ellis & B. 47.

[5] Miller *v.* Second Jefferson Building Association, 50 Penn. St. 32. And where the company accepts another in the place of the original subscriber, the latter is wholly released. Haynes *v.* Palmer, 13 La. An. 240.

*SECTION IX.

Defences to actions for Calls.

1. Informality in organization of company insufficient.
   n. (a). Fraud as a defence, in general.
2. Slight acquiescence estops the party in some cases.
3, 4. Default in first payment insufficient.
5. Company and subscriber may waive that condition.
6. Contract for stock, to be paid in other stock.
7, 8. Infancy. Statute of limitations and bankruptcy.
9. One commissioner can give no valid assurance as to the route.
10. What representations matters of opinion.

§ 55. 1. It is certainly not competent for a subscriber, when sued for calls, to go, in his defence, into every minute deviation from the express requirements of the charter, in the organization and proceedings of the company. (*a*) Any member of the association, who intends to hold the company to the observance of those matters which are merely formal, should be watchful, and interpose an effectual barrier to their further progress, at the earliest

(*a*) The contract of the subscriber, like contracts in general, is voidable for fraud. Vreeland *v.* New Jersey Stone Co., 29 N. J. Eq. 190; City Bank *v.* Bartlett, 71 Ga. 797; Central Railway Co. *v.* Rich, Law Rep. 2 H. L. 99; Montgomery Southern Railroad Co. *v.* Matthews, 77 Ala. 367. And see 14 Am. Law Rev. 177, for an essay on this general subject. A false representation, to be ground of avoidance, must not be as to matters of law, which every one is supposed to know. Upton *v.* Trebilcock, 91 U. S. 45. Nor, for the same reason, as to the contents of the charter or as to the legal effect of the subscription. New Albany Railroad Co. *v.* Fields, 10 Ind. 187; Ellison *v.* Mobile & Ohio Railroad Co., 36 Miss. 572; Selma Railroad Co. *v.* Anderson, 51 Miss. 829. A false representation, however, as to the contents of the subscription paper, e. g. to a subscriber who cannot read, may be ground for avoidance. Wert *v.* Crawfordsville Turnpike Co., 19 Ind. 242. But representations must be of matters of fact, not matters of mere opinion. Union National Bank *v.* Hunt, 76 Mo. 439. Nor may they amount to promises. If promises, they should be incorporated with the contract, and cannot be received in evidence, under the settled rule, to vary the written instrument. This applies to representations that the road shall be built on a certain route, or within a specified time. Choteau Insurance Co. *v.* Floyd, 74 Mo. 286. And so, the general drift of the cases, though there are some cases the other way. Of course the representations must have misled, must have been material, and must have been within the scope of the powers of the agent who made them. This is elementary in the law of fraud.

opportunity, by mandamus, or injunction out of chancery, or other appropriate mode.[1] In cases of this kind often, where vast expense has been incurred and important interests are at stake, courts will incline to conclude a member of the association, by the briefest acquiescence in any such immaterial irregularity, and often, in regard to those, which, if urged in season, might have been regarded as of more serious moment. In one case,[1] TINDAL, C. J., says, in regard to the offer of a plea, that the money sued for, being the amount of a call, was intended for other purposes than those warranted by the act, "It seems to me it was never intended, nor ought it to be allowed, that so general a question as that should be litigated, in the question, whether a call is due from an individual subscriber." And it was held no sufficient ground of enjoining the directors from making calls, that the proceedings had been such as to amount to an abandonment of the enterprise, as it was possible that there were still legal obligations * to answer.[2] And where the directors were authorized to limit the number of shares, but could not proceed with the road until two hundred and fifty shares were subscribed, and after that number were taken they resolved to close the books, it was held that this vote was equivalent to a vote fixing the number of shares, and that the company might therefore proceed to make and enforce calls, under the statute, and to collect the deficiency remaining, after the sale of forfeited stock.[3]

2. But where the statute prescribes the terms on which shares may be sold, it must be strictly followed or the sale will be void, as where the prescribed notice is not given.[4] And it would seem,

[1] London & Brighton Railway Co. *v.* Wilson, 6 Bing. N. C. 135. This case decides, that a plea that the company has made deviations in the line, and that the money sued for is needed only for such deviations, cannot be entertained or regarded as a proper inquiry in an action for calls on shares; and so also of a plea, that fewer shares have been allotted than the act requires. Walf. Railw. 279; Wight *v.* Shelby Railroad Co., 16 B. Monr. 5. Nor can a shareholder defend against a suit to enforce his personal liability for the debts of the corporation, on the ground of defects in the organization of the company; especially where he has acted as a member, and his name so appeared, when the debt was contracted. Eaton *v.* Aspinwall, 19 N. Y. 119.

[2] Logan *v.* Courtown, 5 Eng. L. & Eq. 171.

[3] Lexington & West Cambridge Railroad Co. *v.* Chandler, 13 Met. 311.

[4] Portland, Saco, & Portsmouth Railroad Co. *v.* Graham, 11 Met. 1.

that the courts are reluctant to admit defences to actions for calls, upon the ground of informality in the proceedings of the company, or even of alleged fraud, where there has been any considerable acquiescence on the part of the shareholder.[5]

3. It seems to have been held, in some cases, that a subscriber for stock may defend against an action for calls, upon the ground that he did not pay the amount required by the charter to be paid down at the time of subscription.[6]

4. But it is questionable how far one can be allowed to plead his own non-performance of a condition in discharge of his undertaking. And a different view seems to have obtained to some extent.[7] It has been held the stockholder cannot object that he has not complied with the charter, after having voted at the election of officers, or otherwise acted as a shareholder.[8] And so also where * the subscription is made, while defendant held the books of the

[5] Walf. Railw. 278, 279; Cromford & High Peak Railway Co. *v.* Lacey, 3 Y. & J. 80; Mangles *v.* Grand Collier Dock Co., 10 Sim. 519; s. c. 2 Railw. Cas. 359; Thorpe *v.* Hughes, 3 Myl. & C. 742.

[6] Highland Turnpike Co. *v.* McKean, 11 Johns. 98; Jenkins *v.* Union Turnpike Co., 1 Caines Cas. 86; Hibernia Turnpike Co. *v.* Henderson, 8 S. & R. 219; Charlotte & South Carolina Railroad Co. *v.* Blakely, 3 Strob. Law, 245.

[7] Henry *v.* Vermillion & Ashland Railroad Co., 17 Ohio, 187. A similar rule is recognized in Louisiana, in the case of Vicksburg, Shreveport, & Texas Railroad Co. *v.* McKean, 12 La. An. 638.

[8] Clark *v.* Monongahela Navigation Co., 10 Watts, 364. Nor can a subscriber, after having transferred his stock to another, thus treating it as a valid security, object, in the trial of a suit against him on the original subscription, that the same was originally invalid, by reason of the non-payment of the sums requisite to give it validity, at the time of making the subscription. Everhart *v.* West Chester & Philadelphia Railroad Co., 28 Penn. St. 339.

Where commissioners were appointed by the legislature, and authorized to receive subscriptions for a railway, no subscription to be valid unless a certain sum was paid on each share at the time of subscribing, letters-patent to be issued by the governor on subscription of a certain number of shares certified to by the commissioners, it was held that the act imposed no restriction on the corporation after it was organized, relative to payment at the time of subscription; that the condition, that subscriptions should not be valid till a certain amount was subscribed, was one which the parties had a right to annex to the contract, and so valid; and that the subscriptions could not be enforced till the condition was performed. Philadelphia & West Chester Railroad Co. *v.* Hickman, 28 Penn. St. 318. See also Black River & Utica Railroad Co. *v.* Clarke, 25 N. Y. 208; Haywood & Pittsborough Plank Road Co. *v.* Bryan, 6 Jones, N. C. 82; Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491.

company and acted as commissioner.[9] And payment before the books are closed has been held sufficient to bind the subscriber.[10] So also if the sum have been collected by suit.[11] And a promissory note has been held good payment, where the charter required cash on the first instalment, at the time of subscription.[12] And, by parity of reason, if the subscription binds the subscriber to pay for the stock taken, in conformity to the requisitions of the charter, which is the more generally received notion upon the subject at present, we do not well comprehend why the subscription itself may not be regarded as effectual to create the subscriber a stockholder, and as much a compliance with the condition to pay as giving a promissory note. In either case, the company obtain but a right of action for the money, and if the party can be allowed to urge his own default in defence, it is perhaps no compliance with the charter. But upon the ground that, so far as the subscriber is concerned, the company may waive this condition, upon what is equivalent to payment, it ought also to be equally held, that when * the subscriber has obtained such a waiver, for his own ease, he shall be estopped to deny that it was so far a compliance with the charter as to render the contract binding.

5. And, upon the other hand, the company having consented to accept the subscriber's promise, instead of money, for the first instalment, cannot defeat his right to be regarded as a stockholder, on account of his not complying with a condition which they have expressly waived. It would seem, that under these circumstances, the immediate parties to the contract could not obtain any advantage over each other, by reason of the waiver of strict performance of such condition, by mutual consent. But the objection must come properly from some other quarter, either the public, or the other shareholders. And possibly the cases decided upon this subject do not justify any such relaxation, even between the parties to the immediate contract of subscription.

[9] Highland Turnpike Co. *v.* McKean, 11 Johns. 98; Grayble *v.* York & Gettysburg Turnpike Co., 10 S. & R. 269. So also if one act as a stockholder in the organization of the company. Greenville & Columbia Railroad Co. *v.* Woodsides, 5 Rich. 145.

[10] Klein *v.* Alton & Sangamon Railroad Co., 13 Ill. 514.

[11] Hall *v.* Selma & Tennessee Railroad Co., 6 Ala. 741.

[12] McRae *v.* Russell, 12 Ire. 224; Selma & Tennessee Railroad Co. *v.* Tipton, 5 Ala. 787; Tracy *v.* Yates, 18 Barb. 152; Greenville & Columbia Railroad Co. *v.* Woodsides, 5 Rich. 145; Mitchell *v.* Rome Railroad Co., 17 Ga. 574.

Upon general principles applicable to the subject, as educed from the law of contracts, we see no objection to the waiver of such a condition on behalf of the company. And if there be any objection upon other grounds, it is not for the benefit of the subscriber.[13]

[13] It has been held that the misstatement of the length of the road, in the articles of association, if there be no fraud; or the lease, or sale, of the franchises of the corporation to another company, which is void; or the neglect to make the whole road, even without legislative sanction, will not exonerate a subscriber from paying calls. Troy & Rutland Railroad Co. *v.* Kerr, 17 Barb. 581. But where a preliminary subscription is required, it must be absolute and not dependent upon conditions. Troy & Boston Railroad Co. *v.* Tibbits, 18 Barb. 297. But a condition that provides for interest, by way of dividends, to paying subscribers, until the full completion of the road, at the expense of subscribers who do not pay, or one that imposes a limitation on the directors in calling in stock, is void as against good policy. Ib.

In Wight *v.* Shelby Railroad Co., 16 B. Monr. 5, it was held, that a subscription to stock was not rendered invalid by the subscriber's failure to pay a small sum required by the charter to be paid on each share when he subscribed. It was said that it was the duty of subscribers to pay at the time the stock was subscribed, but that they should not be allowed to "take advantage of their own wrong, and release themselves from their whole obligation, by a failure to perform part of it." This seems sound and consistent with the general principles of the law of contract.

Where one subscribed for stock on the understanding that the first ten per cent, required by law to be paid in cash on subscribing, should be paid by services in securing subscriptions and right of way, and subsequently presented an account against the company for services, in which it appeared that at the date of subscription the company owed him more than the ten per cent for services, and the account was settled, it was held that the statute was sufficiently complied with. Beach *v.* Smith, 30 N. Y. 116. See also Vicksburg, Shreveport, & Texas Railroad *v.* McKean, 12 La. An. 638.

It was further held to be no valid defence to a subscription to the stock of a railway, that it was delivered as an escrow to one of the commissioners appointed to receive subscriptions, as it should have been delivered to a third person, to become effectual as an escrow.

It has been held, that the commissioners may not accept the check of a subscriber in payment of the amount required by the charter to be paid at the time of subscription, but that specie, or its equivalent, must be demanded. Crocker *v.* Crane, 21 Wend. 211; s. c. 2 Am. Railw. Cas. 484; s. c. 1 Redf. Am. Railw. Cas. 42. But this is at variance with the general course of decision, unless in regard to banks, where the charter expressly requires the payment to be in specie. King *v.* Elliott, 5 Sm. & M. 428.

A charter of a railway company was made to depend on the expenditure of a certain sum in two years, and completion of the road in four years from the date of the grant. The company failed in the first part of the condition, but obtained subscriptions to a large amount, and the defendant was one of

*6. An agreement to take stock and pay in the stock of a canal company, and an offer of the canal stock, will not make the party liable to pay money.[14]

*7. Infancy is a good defence, if the person be an infant at the time of suit brought, or if he repudiate the subscription within a reasonable time after coming of full age.[15] By the general provisions of the English statute, all persons may become shareholders, there being no exception, in terms, in favor of infants; and if one be registered while an infant, and suffer his name to remain on the registry after he becomes of full age, he is liable for calls, whether made while he was an infant, or afterwards.[16]

the subscribers. The company organized and chose directors, the defendant being one of them. The legislature revived and renewed the charter, and extended the time for the performance of such condition; and subsequently a meeting of the stockholders was called by the commissioners, in which the defendant took part. Additional directors were appointed, and at a meeting of the directors, the defendant being present, a call was made on the subscriber. It was held that this was a virtual acceptance of the renewal of the charter, and a recognition of the former organization of the company, amounting to a sufficient organization under the new charter; and that the defendant was estopped to deny the regularity of these proceedings. Danbury & Norwalk Railroad Co. *v.* Wilson, 22 Conn. 435.

Where the general law, under which a company is organized, requires a payment of ten per cent on each subscription before the filing of the articles of association with the secretary of state, it is sufficient, if the cash payments, by whomsoever made, amount in the aggregate to ten per cent upon $1,000 for each mile of the road proposed to be constructed. Lake Ontario, &c. Railroad Co. *v.* Mason, 16 N. Y. 451. And the subscription to stock before the incorporation of the company is obligatory on the company, although the subscriber make no cash payment whatever, the right of membership thereby acquired being a sufficient consideration for the subscription. Ib. *Supra*, § 51, note 1.

[14] Swatara Railroad Co. *v.* Brune, 6 Gill, 41.

[15] Northwestern Railway Co. *v.* McMichael, 5 Exch. 114; Birkenhead Railway Co. *v.* Pilcher, 5 Exch. 121; s. c. 6 Railw. Cas. 622. The party should also deny having derived any advantage from the shares, or offer to restore them. Northwestern Railway Co. *v.* McMichael, 5 Exch. 114; Leeds & Thirsk Railway Co. *v.* Fearnley, 4 Exch. 26; Dublin & Wicklow Railway Co. *v.* Black, 16 Eng. L. & Eq. 556; s. c. 8 Exch. 181. See also Deposit & General Life Assurance Co. *v.* Ayscough, 6 Ellis & B. 761.

[16] Cork & Bandon Railway Co. *v.* Cazenove, 10 Q. B. 935. But it would seem that infants are not comprehended, by the general terms of the English statute. Birkenhead, Lancashire, & Cheshire Junction Railway Co. *v.* Pilcher, 5 Exch. 121.

It has been said that an infant shareholder, or subscriber, in a railway com-

It seems to be * doubted by the English courts whether the statute of limitations as to simple contracts applies to an action for calls, that being a liability imposed by statute, and so to be regarded as a specialty.[17] (*b*)

pany, is in the same situation as in regard to real estate, or any other valuable property, which he may have purchased and received a conveyance of. If on coming of age, he disclaim the contract, and restore the thing, with all advantages arising from it, his liability is terminated, and he cannot be made liable for calls. PARKE, B., in Birkenhead & Cheshire Railway Co. *v.* Pilcher, 6 Railw. Cas. 625. The infant is not regarded as merely assuming an executory undertaking, which is void on the face of it, but as a purchaser of what is presumed to be valuable to him. Where, therefore, there is nothing but the simple fact of infancy pleaded to an action for calls, it is insufficient. Ib. It would seem that the plea should contain averments, showing the disadvantageous nature of the contract to the infant, his repudiation of the contract, and restitution of all benefits derived under it, on coming of age, or that he is still an infant, but will be ready to restore such benefits on coming of age. McMichael *v.* London & Northwestern Railway Co., 5 Exch. 855; s. c. 6 Railw. Cas. 618; Birkenhead, Lancashire, & Cheshire Railway Co. *v.* Pilcher, 5 Exch. 121; s. c. 6 Railw. Cas. 564, 662. The mere plea of infancy is an immaterial plea, and issue being joined thereon, and found for defendant, the plaintiff is still entitled to judgment *non obstante veredicto*. Ib. The plea must show that the infant avoids the contract of subscription, on his coming of age. Leeds & Thirsk Railway Co. *v.* Fearnley, 5 Railw. Cas. 644; s. c. 4 Exch. 26. And the appearance by attorney is not equivalent to an averment that the defendant is of full age. Ib.

But a plea which alleges, that the defendant became the holder of shares by reason of his having subscribed for them, and that at the time of his so subscribing, and also at the time of the making of the calls, he was an infant; and that while he was an infant he repudiated the subscription, and gave notice to the plaintiffs that he held the shares at their disposal; it is *prima facie* a bar; and if the defendant, after he came of full age, disaffirmed his repudiation, or if he became liable by enjoyment of the profits, those facts should be replied. Newry & Enniskillen Railway Co. *v.* Coombe, 3 Exch. 565; s. c. 5 Railw. Cas. 633.

Where shares were sold to an infant, and duly transferred to him, on the declaration of the vendor that he was of full age, and the father of such infant, by a deed reciting that he had purchased on behalf of the son, and covenanting that he, on coming of age, would execute the deed and pay all calls, and that the father would indemnify the company against all costs by reason of the son being an infant, it was held that the father was a contributory. Reaveley's Case, 1 De G. & S. 550. See also Stikeman *v.* Dawson, 4 Railw. Cas. 585; s. c. 1 De G. & S. 90.

[17] Cork & Bandon Railway Co. *v.* Goode, 13 C. B. 618; s. c. 21 Eng. L. & Eq. 245.

(*b*) The statute, at any rate, does not begin to run, where no assessment has been made by the company, until the court has made a call, or until

8. Bankruptcy is a good defence for calls made after the certificate of bankruptcy issues, but to meet liabilities incurred before.[18]

9. One of the commissioners appointed with five others at a given place to take subscriptions to a railway, has no right in doing so to give any assurance as to the line of location that would be adopted by the company.[19] (*c*)

10. And where the subscription is made upon condition of the road going in a particular route, the plaintiff may show that the defendant owned land upon that route. And any representations of the agents taking the subscriptions, as to the ultimate value of the stock, will be regarded as matters of opinion merely upon which the subscriber had no right to rely.[20] (*d*)

[18] Chapple's Case, 17 Eng. L. & Eq. 516; s. c. 5 De G. & S. 400.

[19] North Carolina Railroad Co. *v.* Leach, 4 Jones, N. C. 340.

[20] Vawter *v.* Ohio & Mississippi Railroad Co., 14 Ind. 174.

some authorized demand has been made. Scovill *v.* Thayer, 105 U. S. 143. And see generally Glenn *v.* Dorsheimer, 23 Fed. Rep. 695; Terry *v.* Cape Fear Bank, 20 Fed. Rep. 417; Glenn *v.* Soule, 22 Fed. Rep. 417.

(*c*) But where the agent soliciting subscriptions agrees with a subscriber that his subscription shall be delivered only on location of the road in a certain way, delivery otherwise will not bind the subscriber. Saginaw, Tuscola, & Huron Railroad Co. *v.* Chappell 22 Am. & Eng. Railw. Cas. 16.

(*d*) Union National Bank *v.* Hunt, 76 Mo. 439.

*SECTION X.

Fundamental alteration of Charter.

1. Such alteration releases subscribers.
2. Instance of alteration permitting purchase of steamboats.
3, 7. Majority may bind company to alterations not fundamental.
4. Directors cannot use the funds for purposes foreign to the organization.
5. 9. But legal alterations in the charter, or the location of the road, will not release subscribers.
6. If subscriptions are made on condition of a particular location, however, it must be complied with.
8. 9, Consideration of subscription being location of road, must be substantially performed.
10. Express conditions must be performed.
11. How far alterations may be made without releasing subscribers.
12. May be made where such power is reserved in the charter.
13. Personal representative liable to same extent as subscriber.
14. Money subscriptions not released by subsequent ones in land.
15. Corporation cannot make calls in another state even by legislative permission.

§ 56. 1. There can be no doubt, that subscribers to the stock of a railway company are released from their obligation to pay calls by a fundamental alteration of the charter. (*a*) This is so undeniable, and so familiar a principle, in the general law of partnership, as not to require confirmation here. We shall briefly advert to the points decided in some of the more prominent cases, in regard to incorporated companies. The general doctrine applicable to the subject is very perspicuously stated by WOODBURY, J., in an early case in New Hampshire.[1] "Every

[1] Union Locks & Canal Co. *v.* Towne, 1 N. H. 44. But where the original charter or preliminary contract provides for modifications, the sub-

(*a*) An attempt by a state legislature at such an alteration is, of course, void under that provision of the federal constitution which forbids the impairment of the obligation of contracts. Nor have a majority of the stockholders any implied authority to accept such an alteration. But if they attempt to act under the amended charter, and so indicate an intention to rescind their original contract with one another and the minority, the minority may treat it as rescinded and withdraw, instead of proceeding in equity, as clearly they may, for an injunction. To this point, the cases are numerous. Southern Pennsylvania Iron Co. *v.* Stevens, 87 Penn. St. 190; Nugent *v.* Supervisors, 19 Wal. 241; Bank *v.* Charlotte, 85 N. C. 433; International Railroad Co. *v.* Bremond, 53 Tex. 96, and cases *passim*.

owner of shares expects, and stipulates with the other owners, as a corporate body, to pay them his proportion of the expenses, which a majority may please to incur in the prosecution of the particular objects of the corporation. To make a valid change in this special contract, as in any other, the consent of both parties is indispensable."

2. In an important case[2] where it appeared that after calls fell *due, but before suit brought, the company, being incorporated for the purpose of building a railway, procured an additional special act, by which they were authorized to purchase steamboats, it was held, that a subscriber, not having assented to the alteration, was absolved from his obligation to pay calls.

3. In a very elaborate opinion of BENNETT, Chancellor,[3] upon this subject, the following propositions are established: *(1.) That a majority of a joint-stock company cannot use the joint property except within the legitimate scope of their charter, *and if they attempt to do so equity will restrain them; (2.) the shareholders are bound by such modifications of the charter as are not fundamental, but merely auxiliary to the main design; (3.) if a majority of a railway company obtain an alteration of their charter which is fundamental, as, to enable them to build an extension of their road, any shareholder who has not assented to the act may restrain the company, by injunction, from applying the funds of the original organization to the extension.

scribers are still bound by all such as come fairly within the power. Cork & Youghal Railway Co. *v.* Patterson, 18 C. B. 414; s. c. 37 Eng. L. & Eq. 398; *infra*, § 254, note 6; Nixon *v.* Brownlow, 30 Law T. 74; s. c. 3 H. & N. 686.

[2] Hartford & New Haven Railroad Co. *v.* Croswell, 5 Hill, 383. In Winter *v.* Muscogee Railroad Co., 11 Ga. 438, the charter was so altered as to allow the road to stop short of its original terminus and pass by a different route, and subscribers to the stock were held thereby released, unless they assented to the alteration. But where one gave his note for the first instalment, and his stock was forfeited for non-payment of calls, he is not relieved from payment of his note by a material alteration of the charter. Mitchell *v.* Rome Railroad Co., 17 Ga. 574. But any modification of the charter which affects merely the detail of proceedings in making and enforcing calls will not release subscribers to the stock, when such modification has been accepted by the corporation. Illinois River Railroad Co. *v.* Beers, 27 Ill. 185.

[3] Stevens *v.* Rutland & Burlington Railroad Co., 29 Vt. 545. The opinion at length is a valuable commentary upon this important subject.

4. In a case before the Master of the Rolls,[4] it was held * that directors have no right to enter into or to pledge the funds of the company in support of any project not pointed out by their act, although such project may tend to increase the traffic upon the railway, and may be assented to by the majority of the shareholders, and the object of such project may not be against public policy. And that acquiescence by shareholders in a project for ever so long time, affords no presumption of its legality. And in a case in this country it is held, that the subscriber having acted as director of the corporation, and as such having participated in the proceedings to effect the alteration, will not make him liable for calls, upon his original subscription.[5]

5. But it is no defence to an action for calls, that the directors have altered the location of the road, if by the charter they had the discretion to do so.[6] And if the charter contain a provision that the legislature may alter or amend the same, the exercise of this power will not absolve the shareholders from their liability to pay calls.[7] And all subscriptions to stocks, and all contracts for

[4] Colman *v.* Eastern Counties Railway Co., 10 Beav. 1; s. c. 4 Railw. Cas. 513. See also Munt *v.* Shrewsbury & Chester Railway Co., 13 Beav. 1; s. c. 3 Eng. L. & Eq. 144; East Anglian Railway Co. *v.* Eastern Counties Railway Co., 11 C. B. 775; s. c. 7 Eng. L. & Eq. 505; Macgregor *v.* Dover & Deal Railway Co., 18 Q. B. 618; s. c. 16 Eng. L. & Eq. 180; Danbury & Norwalk Railroad Co. *v.* Wilson, 22 Conn. 435; Mill-Dam Co. *v.* Dane, 30 Me. 347; *infra*, § 232; Winter *v.* Muscogee Railroad Co., 11 Ga. 438; Hamilton Plank Road *v.* Rice, 7 Barb. 157; Commonwealth *v.* Cullen, 1 Harris, 133; s. c. 3 Woodb. & M. 105. But the House of Lords held in Taylor *v.* Chichester & Midhurst Railway Co., Law Rep. 4 H. L. 628, where an existing railway was empowered by act of parliament to enter on a new undertaking and to add the new undertaking to the old, and to treat the capital intended to be raised for the new undertaking as capital added to the old, that the company was thereby authorized (should it be unable successfully to raise the new capital, a matter not to be assumed) to apply to the new undertaking funds previously applicable to the old. *Sed quære.*

[5] Macedon & Bristol Plank Road Co. *v.* Lapham, 18 Barb. 312. But see Greenville & Columbia Railway Co. *v.* Coleman, 5 Rich. 118.

[6] Colvin *v.* Turnpike Co., 2 Cart. 511, 656.

Nor is it a defence to an action for calls, that the name of the company, or the length and termini of the road, have been materially altered. Delaware & Atlantic Railroad Co. *v.* Irick, 3 Zab. 321.

[7] Northern Railroad Co. *v.* Miller, 10 Barb. 260; Pacific Railroad Co. *v.* Renshaw, 18 Mo. 210. And where a subscription is made to the capital stock of a railway, while an act of the legislature exists, allowing the con-

the * purchase of stock, to be delivered at a future day, must be understood to be made subject to the exercise of all the legal powers of the directors and of the legislature, and an illegal exercise of power by either will, it has sometimes been said, bind no one, and should exonerate no one from his just obligations.[8]

6. But where subscriptions are made upon the express condition that the road shall go in a particular place, the performance of such condition is commonly regarded as indispensable to the liability of the subscribers, the same as in other contracts.[9] (*b*)

solidation of such company with another, the fact that such consolidation is subsequently made affords no ground for avoiding the subscription. Bish *v.* Johnson, 21 Ind. 299. And if, from the articles of association of the company, it is obvious that consolidation with another company was one of the leading purposes of the incorporation, the fact of such consolidation, after the date of a subscription, will be no defence against its enforcement, even when the statute authorizing the consolidation is subsequent to the date of the subscription. Hanna *v.* Cincinnati & Fort Wayne Railroad Co., 20 Ind. 30. The consolidation of two corporations does not effect the dissolution of either, so as to work the abatement of pending actions. Baltimore & Susquehanna Railroad Co. *v.* Musselman, 2 Grant. Cas. 348. But see McMahan *v.* Morrison, 16 Ind. 172, *contra*. For many purposes the liabilities of the original companies remain, as before the consolidation. Central Railroad Co. *v.* Bunn, 3 Stock. 336. It is here decided, that where the original company and a new company formed by the mortgagees after sale of the road bear the same name and have the same president, a suit to enforce a claim contracted before the sale, served on the president, cannot go to judgment against the new company, and that a court of equity will not allow a general judgment, at law, to be taken. The plaintiff must elect to take judgment, in terms, against the original company. This seems to be a very judicious course, but one for which courts of equity will afford no precedent. The order should have been made, most obviously, in the court of law.

[8] Irvin *v.* Turnpike Co., 2 Penn. 466; Connecticut & Passumpsic Rivers Railroad Co. *v.* Bailey, 24 Vt. 479; Faulkner *v.* Hebard, 26 Vt. 452; *s. c.* 2 Redf. Am. Railw. Cas. 692; Fry *v.* Lexington & Big Sandy Railroad Co., 2 Met. Ky. 314.

[9] See cases under notes 2, 3, *supra*: and also Railsback *v.* Liberty & Abington Turnpike Co., 2 Ind. 656. And in Kenosha, Rockford, & Rock Island Railroad Co. *v.* Marsh, 17 Wis. 13, it was held, that where the legislature had the general power to repeal or alter acts of incorporation, and accordingly allowed an existing company, chartered to carry a railway over a given line, and whose subscriptions had been taken with that view, to change its route essentially, the subscribers were thereby released from their obligation to pay calls.

(*b*) But it would seem that such a condition, to be of avail, must be incorporated in the contract of subscription. See *supra*, § 55, note (*a*).

But an alteration in the line of the road which does not affect the interest of the subscriber, will not absolve him from his subscription.[10] And when the subscription was made upon condition that the road be located upon a given line, and providing that such location should be sufficiently evinced by an order of the board of directors accepting such subscription upon the condition named, it was held sufficient to bind the subscriber, that the road had been in fact located and built upon the line designated, and that this was known to him, although there had been no formal action of the board accepting the subscription.[11]

7. And an alteration in the charter, which consists only of an increase of the corporate powers, or of a different organization of the corporate body, leaving it with lawful power to execute what * may be regarded as substantially the original object of its creation, will not exonerate subscribers to the stock of the company.[12] So too where the general laws of the state provide that all acts of incorporation may be altered, amended, or repealed by the legislature, it is no defence to a subscription for stock, that subsequently the legislature increased the liability of the stockholders.[13]

8. And notwithstanding much apparent conflict in the cases upon this subject, it will be found to be the general result of the best considered cases, that the alteration, either in the charter of the company or the line of the road, to exonerate the subscriber

[10] Banet *v.* Alton & Sangamon Railroad Co., 13 Ill. 504; Danbury & Norwalk Railroad Co. *v.* Wilson, 22 Conn. 435.

[11] Moore *v.* New Albany & Salem Railroad Co., 15 Ind. 78; Warner *v.* Callender, 20 Ohio St. 190.

[12] Pacific Railroad Co. *v.* Hughes, 22 Mo 291; Peoria & Oquawka Railroad Co. *v.* Elting, 17 Ill. 429. In Everhart *v.* West Chester & Philadelphia Railroad Co., 28 Penn. St. 339, the subscribers for stock were held not released by such a change in the charter of the company as empowered them to issue preferred stock, to enable them to raise the means of making and equipping the road in the manner originally contemplated. It was considered that such an amendment of the charter was merely ancillary to the main design, and might be accepted by a majority of the stockholders and thus become binding on all; that it is implied in every subscription that the company may resort to the ordinary and legal means for accomplishing the object proposed by the charter. It is here said that an alteration of the charter which superadds an entirely new enterprise, will release subscriptions to the stock. See also Fry *v.* Lexington & Big Sandy Railroad Co., 2 Ky. 314.

[13] South Bay Meadow Dam Co. *v.* Gray, 30 Me. 547; Buffalo & New York City Railroad Co. *v.* Dudley, 14 N. Y. 336. But see *supra*, note 9.

for stock, must be one which removes the prevailing motive for the subscription, or else materially and fundamentally alters the responsibilities and duties of the company, and in a manner not provided for, or contemplated, either in the charter itself or the general laws of the state.[14] (*c*)

* 9. Where a town or city stipulate with a railway company, for adequate consideration, to terminate their route at a point beneficial to such town or city, this will not preclude the company from forming connections with other routes, by land or water, at the same point.[15]

10. And where the plaintiff made it a condition of his subscription to the capital stock of a railway, that it should pass through some portion of the counties of Monroe and Ontario, and the road was so located as not to touch either of those counties, it was held, that he was released from his subscription.[16]

[14] But in the Greenville & Columbia Railroad Co. *v.* Coleman, 5 Rich. 118, where the charter gave the stockholders the right to designate the route they preferred, and if any stockholder was dissatisfied with the route selected, the right to withdraw his subscription, "provided, at the time of subscribing, he designated" the route he desired; and one subscribed without designating the route he preferred, under an assurance from one who was soliciting subscriptions, that he might pay a small percentage, and be free from liability as to the residue, it was held, that he was liable as a stockholder, without the right to withdraw. But some of the American cases do not seem to recognize any alteration in the route of the road, even one which renders it practically a different enterprise, as a defence to subscriptions for stock. Central Plank Road Co. *v.* Clemens, 16 Mo. 359. But in Champion *v.* Memphis & Charleston Railroad Co., 35 Miss. 692, it was decided, that when the route on which a railroad is to be located is prescribed by its charter, a subsequent material deviation from the route therein prescribed will release the stockholders who had previously subscribed, and who did not consent to the deviation.

It is not every deviation in the location of a railroad from the route prescribed in the charter which will release non-assenting stockholders, and it is impracticable to lay down any general rule to serve as a guide in determining the question of the materiality of the deviation. Each case must be determined by its own particular circumstances; and hence, where a stockholder resists the collection of his subscription for stock, on the ground of a deviation from the route prescribed by the charter, he ought to set out in his plea such deviation clearly and distinctly, so that its materiality can be determined.

[15] Baltimore & Ohio Railroad Co. *v.* Wheeling, 13 Grat. 40.

[16] Buffalo, Corning, & New York Railroad Co. *v.* Pottle, 23 Barb. 21. Where one not a stockholder executed a promissory note to a company, promising

(*c*) See *supra*, pl. 1, note (*a*).

* 11. Where the articles of incorporation of a railway company restrict calls upon subscriptions to twenty per cent in one year, and ten per cent at one time, and also provide that said articles may at any time be changed by the unanimous consent of the board of directors, it is competent for the board to so change the mode of making calls as to require them to be made not exceeding five per cent a month, and such change in the articles

to pay, in consideration of the location of the depot on a certain block, and to pay when the company should commence the construction of the depot, and by subsequent act of the legislature the line of the road was divided at the point where the depot was to be erected, and a portion given to another company, which built its depot in another portion of the town, the former company only constructing a freight depot on the block, it was held that by the alteration of charter and the acceptance thereof, the company became substantially a different corporation, and unable to perform the condition on which the note was to become payable, and that the circumstance, that the depot located on that block was of some advantage to the party, was of no importance.

But an amalgamation of two companies, subsequent to the date of subscription to the stock of one of them, but authorized by a prior act of the legislature, will not release the subscription. And it is of no importance, that the consolidation took place without the knowledge of the subscriber. Sparrow *v.* Evansville & Crawfordsville Railroad Co., 7 Ind. 369.

A subscription to stock of an amalgamated company is a sufficient consent to the amalgamation. And such consent by the stockholders seems to be regarded as requisite to the power of the legislature to amalgamate existing companies. Fisher *v.* Evansville & Crawfordsville Railroad Co., 7 Ind. 407. Where one of the stockholders of a railway company agreed with the company to subscribe and take a given number of shares in the capital stock, if the company would adopt a particular route, there being two under consideration, and the company in consequence adopted that route, it was held that the party was bound by his contract to take and pay for the number of shares he had thus agreed to subscribe. Spartanburgh & Union Railroad Co. *v.* De Graffenreid, 12 Rich. 675. But where in such a case, by a subsequent amendment of the charter, the route in consideration of which the subscription was made was abandoned, and another adopted, the subscriptions were held to be thereby avoided. Hester *v.* Memphis & Charleston Railroad Co., 32 Miss. 378. But one who makes an absolute subscription cannot avoid it by proving a parol condition not complied with, unless he shows that fraud also existed in the contract. North Carolina Railroad Co. *v.* Leach, 4 Jones, N. C. 340. This case is referred to *supra*, § 55, pl. 9, and one important point of the decision is there given. It was also there held that if the party have a remedy by mandamus or injunction, where the directors locate the road differently from the requirements of the charter, and omit to resort to it at once, he is bound by such acquiescence.

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as to the mode of making calls will be binding upon previous subscriptions.[17]

12. And in a somewhat recent case[18] it was held, where the legislature had reserved, in the charter of a corporation, the power to modify or repeal the same, that members of the corporation hold their shares subject to such liability as may attach in consequence * of the extension or renewal of the charter, although obtained without their consent.

13. And it was also here considered, that the estate of an intestate shareholder succeeded to the personal responsibility of the deceased in the corporation, and this will render the administrator liable for the debts of the corporation contracted after the decease of the intestate, to the same extent the deceased would have been if still living; and that the stockholder or his personal representative can only relieve himself from responsibility by a *bona fide* and absolute sale of the stock.

14. A railway company do not release money-subscriptions by accepting large land subscriptions at a subsequent date.[19]

15. And a railway corporation, chartered in one state to construct and operate a road within that state, cannot emigrate into another state, even where that state had given legislative permission to act therein. And after having transferred its business office into another state, where it performed all its corporate functions, it is not competent for it to make valid calls in such other state upon subscriptions taken in the place of its creation.[20]

[17] Burlington & Missouri River Railroad Co. *v.* White, 5 Clarke, 109.

[18] Bailey *v.* Hollister, 26 N. Y. 112. But it is here suggested, that after the charter of a corporation has expired, there is no power to revive it, by any agency less than the consent of all the corporators.

[19] Hornaday *v.* Indiana & Illinois Central Railway Co., 9 Ind. 263.

[20] Aspinwall *v.* Ohio & Mississippi Railroad Co., 20 Ind. 492.

SECTION XI.

Subscriptions before date of Charter.

1. Subscriptions before date of charter good.
2. Subscriptions on condition not performed. Effect of subsequent performance.
3. Subscription by a stranger to induce company to build station.
4. Subscription on condition, an offer merely.
5. Conditional subscription takes effect on performance of the condition.
6. How far commissioners may annex conditions to subscription.
7. Such conditions void, if fraudulent as to company.

§ 57. 1. It has been held that one who subscribes before the act of incorporation is obtained, and, by parity of reason, before the organization of the company, although after the act of incorporation, is holden to the corporation to pay the amount of his subscription. And a suit is sustainable, in their name, upon any securities given in the name of the association, or of the commissioners for organizing the company, and equally upon the subscription * itself in the name of the corporation.[1] (*a*) And it is

[1] Kidwelly Canal Co. *v.* Raby, 2 Price, 93; Selma & Tennessee Railroad Co. *v.* Tipton, 5 Ala. 786; Vermont Central Railroad Co. *v.* Clayes, 21 Vt. 30; Delaware & Atlantic Railroad Co. *v.* Irick, 3 Zab. 321. In the last case, the very point ruled, is, whether the company was proper plaintiff, in an action to enforce calls against one who signed the commissioners' paper for shares before the organization, and it was held that the commissioners were to be regarded as agents of the company. See also Troy & Boston Railroad Co. *v.* Tibbits, 18 Barb. 297; Stanton *v.* Wilson, 2 Hill, 153; Troy & Boston Railroad Co. *v.* Warren, 18 Barb. 310; Hamilton Plank Road Co. *v.* Rice, 7 Barb. 157; Stewart *v.* Hamilton College, 2 Denio, 417; Danbury & Norwalk Railroad Co. *v.* Wilson, 22 Conn. 435. So also a subscription to the capital stock of a railway, made on the solicitation of one who was not a commissioner, but who felt an interest in the road, and volunteered to take up subscriptions to its stock, was held valid in one case. Northeastern Railroad Co. *v.* Rodrigues, 10 Rich. 278. An agreement to take a certain number of shares of the stock of a railway company, made by signing a paper with others, in advance of obtaining the act, is equivalent to a subscription for shares after the act is obtained. Burke *v.* Lechmere, Law Rep. 6 Q. B. 297.

(*a*) And see Marseilles Land & Water Power Co. *v.* Aldrich, 86 Ill. 504; Batty *v.* Adams County, 16 Neb. 44; Lake Ontario Shore Railroad Co. *v.* Curtiss, 80 N. Y. 218; Athol Music Hall Co. *v.* Carey, 116 Mass. 473; Ashuelot Boot & Shoe Co. *v.* Hoit, 56 N. H. 518; McClure *v.* People's Freight Railway Co., 90 Penn. St. 269. It seems upon these and other cases that there is a distinction between an agreement to subscribe for

not competent for one, who is a subscriber to such an enterprise, to withdraw his name while the act of incorporation is going through the legislature.[2]

2. But an informal subscription, which is never carried through the steps necessary to constitute the subscribers members of the company, has been held inoperative, as no compliance with the act.[3] And a subscription, upon condition that the road is built through certain specified localities, the company at the time not assuming to build the road through those places, will not, it has been held, make the subscriber liable to an action for calls, even if the condition be ultimately performed by the company.[4] (*b*) But

[2] Kidwelly Canal Co. *v.* Raby, 2 Price, 93; Brownlee *v.* Ohio, Indiana & Illinois Railroad Co., 18 Ind. 68.

[3] Troy & Boston Railroad Co. *v.* Tibbits, 18 Barb. 298.

[4] Macedon & Bristol Plank Road *v.* Lapham, 18 Barb. 313. In this case it seems to have been decided that such a subscription is not good, as a subscription for stock, not on the ground mainly that it was conditional and so against public policy, or from want of mutuality, but on the ground of an extension of the road and an increase of the capital stock. See also Utica & Schenectady Railroad Co. *v.* Brinckerhoff, 21 Wend. 139, where such a decision is made. But the current of authority, both English and American, is in a counter direction. It is impossible fairly to consider such a subscription, where the road is located in a given line, in faith, and in fulfilment of the condition, as a mere offer, unaccepted. It is a proposal accepted, and as much binding as any other possible consideration. But if it were to be regarded as a mere open offer, when accepted according to its terms, it is binding as a contract and no longer revocable; and the only case of much weight, which ever attempted to maintain the opposite view, that of Cooke *v.* Oxley, 3 T. R. 653, has been regarded as overruled on that point for many years. See L'Amoreux *v.* Gould, 3 Seld. 349; Connecticut & Passumpsic Rivers Railroad Co. *v.* Bailey, 24 Vt. 178. Mr. Benjamin, in his book on Sales, pp. 47–50, attempts to uphold the case of Cooke *v.* Oxley, on the ground that it has been misunderstood by the American courts and text-writers. That may be so. But on what sensible ground can that case be upheld to the full extent? If a continuing offer is made without consideration, no doubt it may be withdrawn at any time before it is accepted; and after the withdrawal is made known to the other party he is no longer at liberty to act upon it. But until that event, or the expiration

shares, which must be said to contemplate an additional act before parties are to become shareholders, and an unconditional agreement to become shareholders when the corporation is formed, which is an offer which when accepted by the corporation is binding.

(*b*) But see Mansfield, Coldwater, & Lake Michigan Railroad Co. *v.* Stout, 26 Ohio St. 211; Cedar Rapids & St. Paul Railway Co. *v.* Spafford, 41 Iowa, 292. And see *infra*, pl. 4.

*one might perhaps raise some question, whether, upon general principles, such a subscription ought not to be binding, as a *standing offer accepted and acted upon by the company, which is sufficient consideration for the promise.[5]

3. And even where a mere stranger subscribes to a railway company, with others, in order to induce the company to build a station-house and improve the roads to it, and to aid the company in such work, and the company perform the condition on their part, the subscription is upon sufficient consideration, and may be enforced against the subscribers.[6]

4. And a subscription to the stock of a railway company, conditioned to be void unless the company would accept the conveyance of a specific tract of land at a given price, is a mere offer to invest the land in shares, and until accepted by the company is of no validity.[7] (*c*)

5. A subscription upon the performance of a condition becomes absolute upon such performance. The subscription takes effect from that time; the first instalment required to be paid at the time of subscription then becomes due and payable, and the subscriber liable to assessment for the remainder.[8] (*d*)

6. There is another case[9] wherein propositions are declared

of the offer by lapse of time, he is at liberty to accept it; and if he do so, a valid contract is thereby created between the parties, on the basis of the offer. This view is placed on very satisfactory grounds by Mr. Justice NELSON, in Taylor *v.* Merchants' Fire Insurance Co., 9 How. 390. There is, unquestionably, this difference between a standing offer made upon consideration and one made gratuitously; that in the former case it cannot be withdrawn, and in the latter it may be. But even in the case of a gratuitous offer, the withdrawal does not become effective until notice of such withdrawal reaches the adverse party. If the latter, before such notice, do that, which by the terms of the offer amounts to unconditional acceptance, the contract is complete, and both parties irrevocably bound by it.

The subject is very justly illustrated by Mr. Justice FLETCHER, in the case of Boston & Maine Railroad Co. *v.* Bartlett, 3 Cush. 224.

[5] See this subject more fully discussed in §§ 51, 55, *supra*. See, also, Johnson *v.* Wabash & Mount Vernon Plank Road Co., 16 Ind. 389.

[6] Kennedy *v.* Colton, 28 Barb. 59.

[7] Junction Railroad Co. *v.* Reeve, 15 Ind. 236.

[8] Ashtabula & New Lisbon Railroad Co. *v.* Smith, 15 Ohio St. 328.

[9] Bedford Railroad Co. *v.* Bowser, 48 Penn. St. 29. See, also, Lowe *v.* E. & K. Railroad Co., 1 Head, 659.

(*c*) See *supra*, § 48, note (*b*). (*d*) See *supra*, § 48, note (*b*).

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which seem at variance with the general rule that subscriptions dependent upon conditions are not effectual until such conditions are complied with. It was here held, that commissioners appointed to receive subscriptions to the stock of a projected railway company are so far limited in their authority that they have no power to attach conditions to subscriptions received by them, and where they do so the act is not binding upon the company, and that after the organization of the corporation, the directors have no power to assume the subscriptions upon the conditions named, i. e. that the company assume the payment of the subscriptions and release the subscribers.

7. But we apprehend that if this decision is maintainable upon *recognized rules of law, it must be because the whole scheme of such a subscription evidences a covert fraud upon the contemplated corporation, and that the act of the directors is but one step in fulfilment of the scheme, as the case shows the action of the first board of directors was immediately repealed upon the coming in of a new board, and the court held it competent to show what took place at the time of passing the first resolutions, with a view to establish the fraudulent purpose.

SECTION XII.

Subscription upon Special Terms.

1. Subscriptions not payable in money.
2. Subscriptions at a discount, not binding.
   n. 2. Contracts to release subscriptions not binding.
3, 4. Subscriptions before and after organization. President may accept conditional subscriptions.
5. Subscription payable in labor not enforced in money until opportunity given to perform.
6. True rule, subscription enforceable only according to terms, but directors responsible to creditors for money.
7, 8, 9. Subscriptions to be paid in bonds at par value.
10. *Quære*, whether a corporation can stipulate to pay interest on stocks.
11. Such a certificate of stock is not thereby rendered inoperative for legitimate purposes.

§ 58. 1. It is well settled, that a railway, or other joint-stock company, cannot receive subscriptions to their stock, payable at less sums, or in other commodities, than that which is demanded

of other subscribers. Hence subscriptions, payable in store-pay, or otherwise than in money, will be held a fraud upon the other subscribers, and payment enforced in money.[1] (*a*)

2. So too in a case where subscriptions to stock of such a company * are, by the agents of the company, agreed to be received at a discount, below the par value of the shares, it will be regarded as a fraud upon the other shareholders, and not binding upon the company.[2] (*b*)

[1] Henry *v.* Vermillion & Ashland Railroad Co., 17 Ohio, 187. But in Philadelphia & West Chester Railroad Co. *v.* Hickman, 28 Penn. St. 318, it is said the company may compromise subscriptions for stock, which are doubtful, on receiving part payment, or may receive payment in labor or materials, or in damages which the company is liable to pay, or in any other liability of the corporation. The certificates of stock in this case were issued to the contractors, in part payment for work done by them on the road; to others, in part payment for a locomotive, for sleepers, for land-damages, and for cars. We do not understand how there can be any valid objection to receiving payment for subscriptions to the capital stock in this mode, if the shares, so disposed of, are reckoned at their fair cash value, at the time the contract is entered into. Contracts of this kind have been very generally recognized by the courts as valid.

[2] Mann *v.* Cooke, 20 Conn. 178. In this case the defendant subscribed for forty shares on condition that all future calls should be paid, as required, or the shares should become the property of the company. He thereupon received certificates of ownership of the forty shares, the special terms of his subscription not being known to the other subscribers. Some time afterwards, the company being largely indebted, and insolvent, and the greater part of the instalments on its stock being unpaid, the president made an arrangement with the defendant that he should immediately pay the instalments on twenty shares of his stock, in full, and be discharged from all liability on the other twenty shares. The defendant complied with these terms, and the money paid went for the benefit of the company. The plaintiff was appointed receiver, and brought a bill for the balance due on the other twenty shares,

(*a*) In Richfield & New York Railroad Co. *v.* Brush, 43 Conn. 86, however, it was held that a subscription with a supplemental agreement that it should be payable in work and materials was valid, it being made in good faith.

(*b*) As to subscriptions upon conditions generally, see Burke *v.* Smith, 16 Wal. 390, where conditions hindering the collection of capital or lessening its value are said to be a fraud on subscribers whose subscriptions are unconditional. But see *contra*, Hinton *v.* Morris County Co-operative Society, 21 Kan. 663, where the directors agreed with a purchaser of shares that he should have the privilege of withdrawing his money at any time on thirty days' notice and surrender of his shares, and the agreement was upheld.

*3. In a case in Pennsylvania,[3] it is said that subscriptions made to the capital stock of a corporation before its organization, must always be payable in money only. But after the organization, the company may stipulate with the subscriber for payment in any other mode, and can only enforce the contract according to its terms; and the act of the president of the company in accepting conditional subscriptions is binding upon the company.

4. It is also held in the same case,[3] that the fact the subscriber makes part payment in money before call, will not estop him from setting up the special contract in defence of an after call.

and it was held, that the subscription was in legal effect the same as an ordinary subscription without condition; that the arrangement made with the president was void, as a fraud upon stockholders and creditors; and that the company, being created for public purposes, could not receive subscriptions under a private arrangement at less than the par value of the stock, as this would deprive the company of so much of its available means, and thus operate as a fraud upon all parties interested.

But where one paid for stock, under a secret agreement with the commissioner of contracts that he might receive land of the company at a future day, and pay in the stock certificate, and the company declined to ratify the contract, it was held that the subscriber was released from his portion of the contract, and might recover the money he paid for the stock of the company. Weeden *v.* Lake Erie & Mad River Railroad Co., 14 Ohio, 563. But in the case of the Cincinnati, Indiana, & Chicago Railroad Co. *v.* Clarkson, 7 Ind. 595, it seems to be considered, that the company is bound by a contract to compensate a solicitor of subscriptions payable in land, but no question is made in regard to the validity of the subscriptions. The solicitors were ordered by the directors to accept such subscriptions, and were to have two per cent on all which were accepted by the company, and the contract was held binding on the company. An agreement by a railway company, that a subscriber for stock may pay the full amount, or any part of his subscription, and receive "interest thereon until the road goes into operation," does not oblige the company *to pay* interest before the road goes into operation. Waterman *v.* Troy & Greenfield Railroad Co., 8 Gray, 433. See, also, Buffalo & New York City Railroad Co. *v.* Dudley, 14 N. Y. 336; *supra*, § 54, pl. 4. An agreement to pay interest on stock "as soon as paid," means fully paid. Miller *v.* Pittsburg & Connellsville Railroad Co., 40 Penn. St. 237.

[3] Pittsburg & Connellsville Railroad *v.* Stewart, 41 Penn. St. 54. The question of the presumptive effect of the conduct of a subscriber after the organization of the company, in attending and taking part in the meetings of the company, on the proper construction of any special contract with the company, is here considerably discussed.

5. But in a somewhat recent case in Alabama,[4] it was held that a subscription to the capital stock of a railway company in express terms made payable in work, in grading the line, to be taken at the public or private letting and performed to the acceptance of the company's engineer, could not be enforced against the subscriber until he had had reasonable opportunity to perform the contract in the manner specified by its terms. But if after that, the defendant failed on his part to perform it, he was liable to pay the amount in money. It is here said that the subscriber must take notice of the published lettings of the work.

6. The cases may seem conflicting upon this point; but the true principle seems to be, that the corporation can only enforce the contract of subscription according to its terms, and of this the subscriber cannot complain, or resist successfully the enforcement of his subscription in that mode. But so far as the creditors of the company are interested in the matter, they may hold the directors responsible for having received the amount of the capital stock in money. And as to the duty of the directors, they cannot, in strictness and fairness, receive subscriptions payable in any thing but money: nor can they launch the company until the whole capital stock is subscribed in money. And any fraud or evasion in this particular will render the directors responsible for the debts of the company, as in equity and fair dealing it should.

*7. There is a very sensible case[5] in North Carolina bearing upon this question. The legislature had authorized the town of Newbern to take stock in a company for improving the navigation of the river Neuse, by which the business of the town was expected to be advanced. The town was, by the act, authorized

[4] Eppes *v.* Mississippi, Gainesville, & Tuskaloosa Railroad Co., 35 Ala. 33; Haywood & Pittsborough Plank Road Co. *v.* Bryan, 6 Jones, N. C. L. 82.

[5] Neuse River Navigation Co. *v.* Newbern Commissioners, 7 Jones, N. C. L. 275. But in Shoemaker *v.* Goshen Turnpike Co., 14 Ohio St. 569, from the mere permission in the statute to submit the question of subscription to the voters of a township, the court implied the power to issue bonds in payment of such subscription in the usual negotiable form, and to negotiate them to the company at par, in payment for the stock subscribed.

to pay for the stock subscribed by them with their bonds, to be issued and sold on certain terms, but the amount of bonds issued was restricted to the amount of the stock subscribed, and it was held, that as the corporation could not, except by legislative sanction, accept anything but money in payment of stock, and could not issue stock at any rate below par, the bonds could not be sold below par; and that to a mandamus to compel the town to pay for stock thus subscribed, it must be regarded as a sufficient return, that the authorities of the municipality had prepared and executed the bonds, and had offered the same for sale by public advertisement, and had diligently endeavored otherwise to effect a sale of the same on the terms prescribed by the statute, and had not been able to sell the same.

8. This case unquestionably puts these perplexing inquiries upon the true basis; that is of *fair dealing* or *no dealing at all*. But we apprehend that railway contractors and builders would regard it as placing the matter in a very impracticable light. And we are not prepared to say how far the courts will feel justified in departing from the strict letter of the law in these particulars, out of deference to the speculative tendencies of the age.

9. It is certain that corporate stocks, from the first, are now always more or less a matter of speculation in the market; and the same is true of all municipal bonds issued in aid of enterprises affecting the interests of such corporations. And, in fact, no one ever dreams of demanding strictly par values, in dealing either with the bonds or the stock, and we do not suppose it can now ever be brought back to the strictly par basis.

10. There seems to be some question whether a corporation can stipulate to pay interest upon its stock certificates from the first, without regard to the earnings of the company. It is certain such a stipulation is at variance with the ordinary duties of corporations, and will not therefore come within the range of the implied authority of the directors of the company. But in one case,[6] it seems to have been considered, that the stockholders

[6] McLaughlin v. Detroit & Milwaukee Railroad Co., 8 Mich. 100. It seems scarcely allowable to treat the vote of the majority as a ratification of an act of the directors beneficial to the minority, and at the same time not binding upon the minority except by their consent. Richardson v. Vermont & Massa-

might so ratify such a stipulation as to render it binding upon the company. But we should very seriously question if any such authority is implied from the general grant of corporate power for ordinary business purposes, like that of railways. It would seem to require a special delegation of authority by the legislature, and in that form it is nothing but a device for borrowing money, in advance of launching the corporation upon its legitimate functions. (*c*)

11. The case last cited [6] decided that such a stipulation, superadded to a certificate of stock, will not defeat its original effect of making the holder a member of the corporation; and that if certificates of stock be so issued by the directors, it will be regarded as a sufficient ratification of them by the corporation that at a stockholders' meeting a majority voted to pay such interest in the bonds of the company; but the holders are not thereby compellable to accept payment in that mode, unless they assented to the vote.

chusetts Railroad Co., 44 Vt. 613, where the question is very extensively examined and placed on the most plausible ground, — the ground, i. e. that such a condition in the subscription may be binding on the company, whenever its surplus earnings will enable it to meet the payment, which amounts to nothing more than a guaranty of a dividend to that amount.

(*c*) But it cannot be paid out of capital, but only out of profits. Chaffee *v.* Rutland Railroad Co., 55 Vt. 110; McGregor *v.* Home Insurance Co., 33 N. J. Eq. 181; Taft *v.* Hartford Railroad Co., 8 R. I. 310. A right to interest in any event may, however, be given to a part of the stockholders by the charter. See Williams *v.* Parker, 136 Mass. 204; Phillips *v.* Eastern Railroad Co., 138 Mass. 122.

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*SECTION XIII.

Equitable Relief from Subscriptions obtained by Fraud.

1. Substantial misrepresentations in obtaining subscriptions will avoid them.
2. But for misconduct of the directors, not amounting to fraud, they alone are liable.
3. Purchaser must make reasonable examination of papers referred to. No relief, where there is no fraud, or intentional misrepresentation.
4. Directors cannot make profit for themselves.

§ 59. 1. The directors of a railway company, who make representations on behalf of the company to induce persons to subscribe for the stock, so far represent the company in the transaction, that if they induce such subscription by a substantial fraud, the contract will be set aside in a court of equity.[1] The proper inquiry in such case is, "Whether the prospectus, so issued, contains such representations, or such suppression of existing facts, as, if the real truth had been stated, it is reasonable to believe the plaintiff would not have entered into the contract; that is, that he would not have taken the shares allotted to him and those which he purchased."[2] (*a*)

[1] Sir John Romilly, M. R., in Pulsford *v.* Richards, 17 Beav. 87; s. c. 19 Eng. L. & Eq. 387, 392. The prospectus issued in such cases is to be regarded as a representation. And where one is induced to take shares in a joint-stock company, through the false and fraudulent representations of the directors, he is not liable to calls for the purpose of paying the expenses of the company. Royal British Bank, Brockwall's case, 29 Law T. 375; s. c. 4 Drewry, 205. And where one of the directors of a company put the name of an extensive stockholder in the company, who resided in a foreign country, to a new subscription for forty additional shares, without consultation with such person, in the belief that he would ratify the act, and he, on being informed of such act, made no objection for the period of nearly seven years, during which time the company, having no intimation of any dissent on his part, applied his dividends in payment of the subscription, it was held that the subscription thereby became binding, and that the party could not recover such dividends of the company. Philadelphia, Wilmington, & Baltimore Railroad Co. *v.* Cowell, 28 Penn. St. 329.

[2] Pulsford *v.* Richards, 17 Beav. 87; s. c. 19 Eng. L. & Eq. 392; Jennings *v.* Broughton, 17 Beav. 234; s. c. 19 Eng. L. & Eq. 420. To entitle himself to be relieved from his subscription, one must show that he acted on the false

(*a*) See *supra*, § 55, note (*a*).

*2. But the omission to state in a prospectus the number of shares taken by the directors, or other persons in their interest, is no such fraud as will enable a subscriber to avoid his subscription.[2] The fact that the directors of the company had entered into a contract with one, as general superintendent of construction, for four per centum upon the expenditure; and that this was an exorbitant compensation, and was, in fact, intended to compensate such person for his services in obtaining the charter, and that this is not stated in the prospectus is no such suppression as will exonerate subscribers for stock. "There was not the suppression of a fact that affected the intrinsic value of the undertaking. That value depended upon the line of the projected railway, the population, the commercial wealth, the traffic of the places through which it passed, the difficulties of the construction, and the cost of the land required. Extravagance in the formation of a line of railway is a question of liability of the individual directors to the shareholders, but not a ground for annulling the contract between them."[2]

3. There can be no question one will be affected with notice of all facts discoverable by examination of papers referred to in a prospectus for the sale of shares, provided such papers are accessible to him, unless the facts stated in the prospectus are so specific as to divert interest from all further inquiry. It was accordingly held that where the contract of subscription bound the subscriber to the terms of the articles of association, an examination of which would have disclosed the facts upon which the party claimed to be relieved from his subscription, but that trusting to the statements contained in the prospectus, he did not look further, this neglect or omission was no answer to his claim for relief.[3] But the party is not entitled to relief by reason of the representation of any fact, made in good faith, and upon reason-

representations of the directors in a matter of fact material to the value of the enterprise, and not on the mere speculation of the directors, or on his own exaggerated expectations of the prospective success of the undertaking. In Reese River Silver Mining Co. *v.* Smith, 17 W. R. 1012; s. c. Law Rep. 4 H. L. 64, Lord CAIRNS is reported to have said, "If persons take upon themselves to make assertions, as to which they are ignorant whether they are true or untrue, they become, in a civil point of view, as responsible as if they had asserted that which they knew to be untrue;" provided it prove to be so, his Lordship intended to imply, of course.

[3] Central Railway Co. *v.* Kisch, Law Rep. 2 H. L. 99.

able grounds of probability, but which proves unfounded upon grounds equally unknown to both parties.[4]

4. But the learned judge in one case[2] suggests, with great propriety, that if the directors have made contracts, in the course of the performance of their duties, from which advantage is expected to * arise to themselves, or to others for their benefit, mediately or immediately, they may, in a court of equity, be made to stand in the place of trustees to the shareholders.[5]

SECTION XIV.

Forfeiture of Shares. — Relief in Equity.

1 Requirements of charter and statutes as to forfeiture must be strictly pursued.
2. Otherwise equity will set aside the forfeiture.
n. (a) At suit of any shareholder proceeding by shareholder's bill.
3. Company must credit the stock at full market value.
4. Provisions of English statutes.
5. Evidence must be express, that all requisite steps were pursued.

§ 60. 1. The company, in enforcing the payment of calls by forfeiture of the stock, must strictly pursue the mode pointed out in their charter and the general laws of the state. This is a rule of universal application to the subject of forfeitures, and one which the courts will rigidly enforce, and more especially where the forfeiture is one of the prescribed remedies given to the party, and against which equity does not relieve, when fairly exercised.[1]

2. But as the company, in such case, ordinarily stand in both relations of vendor and vendee, their conduct, in regard to fair-

[4] Kennedy *v.* Panama Mail Co., Law Rep. 2 Q. B. 580.

[5] *Infra*, § 140.

[1] Sparks *v.* Liverpool Water-Works, 13 Ves. 428; Prendergast *v.* Turton, 1 Y. & Col. 98, 110–112. This case is put mainly on the ground of delay and acquiescence, but there is little doubt it would have been maintained, on the general ground stated in the text. See Edinburgh, Leith, & Newhaven Railway Co. *v.* Hebblewhite, 6 M. & W. 707; s. c. 2 Railw. Cas. 237. But where the deed of settlement of a joint-stock company provides for a forfeiture of the shares without notice to the subscriber, the forfeiture determines the title without notice. Stewart *v.* Anglo-California Gold Mining Co., 18 Q. B. 736; s. c. 14 Eng. L. & Eq. 51.

ness, will be rigidly scrutinized, and the forfeiture set aside in courts of equity, upon evidence of slight departure from perfect fairness. (*a*)

3. Hence where the company declared the stock cancelled, and credited the value at a less sum than the actual market price at the time, but more than it would probably have sold for if that number of shares had been thrown at once into the market, the court set aside the forfeiture, on the ground that the company were bound to allow the highest market price which could be * obtained, without speculating on what might be the effect of throwing a large number of shares into the market.[2]

4. By the English statute the company are not allowed to forfeit a larger number of shares than will produce the deficiency required.[3] And upon payment to the company of the amount of arrears of calls, interest, and expenses, before such forfeited shares are sold by them, the shares revert to the former owner.[3]

5. The evidence of the company having pursued the requirements of their act, in declaring the forfeiture, must be express and not conjectural.[4]

[2] Stubbs *v.* Lister, 1 Y. & Col. 81.

[3] Statute 8 & 9 Vict c. 16, §§ 34, 35.

[4] Cockerell *v.* Van Diemen's Land Co., 18 C. B. 454; s. c. 36 Eng. L. & Eq. 405.

(*a*) An unauthorized forfeiture, while it may be annulled in equity at suit of the stockholder specially injured, may be annulled also at suit of any shareholder, proceeding by shareholder's bill for the protection of the rights of the company. Sweny *v.* Smith, Law Rep. 7 Eq. 324. The owner of the forfeited stock has also a right of action against the corporation for the value of his shares.

SECTION XV.

Right of Corporators and Others to inspect Books of Company.

1. Corporators or shareholders may inspect and take minutes from books.
2. Discussion of the extent to which such books are evidence.
3. Purposes for which such books are important as evidence.
4. Books within the rule. Books of proceedings of directors.
5. Party claiming to be shareholder may inspect register.
6. Whether inspection allowed when suit or proceedings not pending.
7. Party may have aid in the inspection.

§ 60 *a.* 1. It seems to be conceded as a well-settled rule of law, that the shareholders or corporators in a joint-stock corporation are entitled, as matter of right, to inspect and take minutes from the books of the company at all reasonable times,[1] (*a*) as they are the best evidence of the facts there registered, and equally the property of all the proprietors.[2] And the board of directors of the company have no power to exclude any member from the exercise of this right, even upon the ground that he is unfriendly to the interests of the company.[3]

2. But it seems to be now settled that strangers cannot obtain the inspection of such books, even by application to the court, their contents being regarded as private memoranda, in no sense possessing any public character,[4] notwithstanding a contrary * practice obtained[5] for a time. It may sometimes have been assumed, that the books of private corporations possessed a higher quality of evidence than is the fact. We do not apprehend that they are in any sense indispensable primary evidence of the facts there recorded. As a general thing, as to the organization of the company and the choice of officers, all that is requisite will be to

[1] Angell & Ames Corp. § 681.
[2] Owings *v.* Speed, 5 Wheat. 420, 424.
[3] People *v.* Throop, 12 Wend. 183; Cotheal *v.* Brower, 1 Seld. 562.
[4] Southampton *v.* Greaves, 8 T. R. 590.
[5] Lynn *v.* Denton, 1 T. R. 689, and cases cited.

(*a*) Commonwealth *v.* Phœnix Iron Co., 105 Penn. St. 111; State *v.* Einstein, 46 N. J. Law, 479; Union National Bank *v.* Hunt, 76 Mo. 439. The matter is to some extent regulated by statute, as in England and in New York.

prove, *de facto*, the organization of the company and the exercise of such offices by the persons named. Where it is requisite that an authority be given by the majority vote of the company, it may most conveniently be shown by the record, and perhaps in such a case the records of the corporation may fairly be considered the best proof of the facts, if in the power of the party, as if the corporation itself were called to prove such vote. But any party not entitled to the custody of the papers can only prove their contents, unless the corporation is the opposing party, in which case he may give notice to produce the books, and, in default, may prove the contents by secondary evidence. It has been decided that the clerk of the company cannot be compelled to produce the books on a *subpœna duces tecum*.[6]

3. It has been held that a bank depositor has the right, under proper circumstances and in a reasonable manner, to inspect the books of the bank.[7] In practice it is not one time in ten where the record books of a corporation are ever referred to in court, unless to fix a date or the precise form of a vote upon which a power is made to depend. But the registry of shareholders may be properly regarded as the primary evidence of membership, but by no means indispensable or conclusive.[8]

4. Where the deed of settlement under which a corporation is registered contained a provision "that the books wherein the proceedings of the company are recorded shall be kept at the principal office of the company, and shall be open to the inspection of the shareholders," it was held that the clause gave shareholders power only to inspect the books of minutes of proceedings of the general meetings, and not of the minutes of the proceedings of the directors.[9]

* 5. In a somewhat recent English case[10] it was held, that a party whose claim to be a shareholder is disputed by the company may, in an action brought against the company, inspect any entries in the register which relate to the matter in dispute.

[6] Utica Bank *v.* Hillard, 5 Cow. 419; Narragansett Bank *v.* Atlantic Silk Co., 3 Met. 282.

[7] Union Bank *v.* Knapp, 3 Pick. 96.

[8] We refer to what we have before said on the subject, *supra*, § 18, pl. 10–13; § 23, note 8.

[9] Regina *v.* Mariquita Mining Co., 1 Ellis & E. 289.

[10] Foster *v.* Bank of England, 8 Q. B. 689.

6. And in a still more recent case, where one of the members of the corporation was in controversy with the company in regard to his right to act as one of the governing body, which right depended upon an inspection of the records of the company in order to determine its usages, the court granted permission to inspect the books.[11] But it is here said this will not be done unless there is a suit or some proceedings pending.

7. And in the inspection of all documents, by order of the Court of Chancery, the party in whose favor the order is made has the right to have such aid in the inspection, either by counsel, interpreters, or experts, as will make the inspection available to him.[12]

[11] Regina *v.* Saddler's Co., 10 W. R. 87, *per* CROMPTON, J., at chambers.

[12] Swansea Vale Railway Co. *v.* Budd, Law Rep. 2 Eq. 274; s. c. 12 Jur. N. S. 561. As to the effect of the certificate of the clerk of a corporation under its seal, see New Orleans, Jackson, & Great Northern Railroad Co. *v.* Lea, 12 La. An. 388. A passenger, who has brought suit against a railway company for injury sustained on its line, has the right to inspect the record of accidents kept by the company, on the report of the conductor, in obedience to the statute. Woolley *v.* North London Railway Co., 17 W. R. 650; s. c. 17 W. R. 797; Law Rep. 4 C. P. 602.

PART III.

THE LAW OF RIGHT OF WAY, EMINENT DOMAIN, ETC.

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*CHAPTER X.

RIGHT OF WAY BY GRANT.

SECTION I.

Obtaining Lands by express Consent.

1. Right to obtain under the English statute.
2. Persons under disability.
3. *n.* 2. Money to take the place of the land.
   n. (a) Persons of whom in this country it may be obtained, — equitable owners, husbands, trespassers, &c.
4. Consent to pass line of another company.
5. Right of companies acquiring by purchase in this country.
6. License to build railway. Construction.
7. Company bound by conditions in deed.
8. Parol license good till revoked.
9. Sale of road under mortgage no abandonment.
10. Deed conveys incident; not explainable by parol.
11. Grantor cannot derogate from compulsory grant.
12. But this does not apply to accidental incidents.
13. Decision somewhat at variance with the preceding cases.
14. A municipal corporation may be bound by implied contract in the grant of land so as not to be at liberty to recede from it.
15. Mere agreement to sell, although in writing, will not justify an entry on the land, nor defeat proceedings under the statute to recover damages for taking it.

§ 61. 1. The English statute[1] enables railway companies to purchase, by contract with the owners, (*a*) "all estates or inter-

[1] Statute 8 & 9 Vict. c. 18, § 6. In this country companies have the right, on general principles, to acquire the right of way by contract with the landowners. But such concessions by natural persons to public companies will receive a reasonably strict construction, so as to secure the rights of landowners. Unangst's Appeal, 55 Penn. St. 128.

(*a*) Here right of way can be had of no one but the owner, either by deed or by estoppel. It cannot be had of an equitable owner of an undivided in-

ests (in any lands) of what kind soever," if the same, or the right of way over them, be requisite for their purposes.

2. And by another section of the same statute such companies are empowered to purchase such lands of persons legally incapacitated to convey the title, under other circumstances, as guardians of infants, committees of lunatics, trustees of charitable or other uses, tenants in tail, or for life, married women seised in their own right, or entitled to dower, executors or administrators, and all parties entitled, for the time being, to the receipt of the rents and profits.[2] (*b*)

[2] Hutton *v.* London & Southwestern Railway Co., 7 Hare, 264. Some suggestions are here made by Vice-Chancellor WIGRAM in regard to the time within which it is requisite to make compensation in the several modes of taking

terest in a reversion, nor can it exist over an undivided interest alone. Taput *v.* Detroit, Grand Haven, & Milwaukee Railway Co., 50 Mich. 267. Nor can it be had from a holder of a contingent dower interest, or from a tenant at will. Toledo, Ann Arbor, & Grand Trunk Railway Co. *v.* Dunlap, 47 Mich. 456. But a husband having absolute control and management of land, the legal title of which is held by another, for the benefit of his wife and children, may give a license good so long as he lives, if it does not injuriously affect his duties under the deed. Tutt *v.* Port Royal & Augusta Railroad Co., 16 S. C. 365. Desistance from opposition by a mere trespasser is no consideration for a promise to pay to quiet opposition. Botkin *v.* Livingston, 21 Kan. 232. A conveyance with a reservation of a spring and a right to lay pipes thereto held not to preclude the company from laying a track over the spring, the spring being properly protected. Matthews *v.* Delaware & Hudson Canal Co., 27 Hun, 427. Agreement to convey more land than covenantor owns. Hutchinson *v.* Chicago & Northwestern Railway Co., 41 Wis. 541. An agreement to convey construed. Wheeling, Pittsburg, & Baltimore Railroad Co. *v.* Gourley, 99 Pa. St. 171. Conveyances construed. Warner *v.* Sandusky, &c., Railroad Co., 11 Am. & Eng. Railw. Cas. 417; Hutchinson *v.* Chicago & Northwestern Railway Co., 37 Wis. 582.

As to when an action will lie for breach of an agreement under which the company has taken possession, see Kansas Pacific Railway Co. *v.* Hopkins, 18 Kan. 494. And against whom, see Preston *v.* Liverpool, Manchester, & Newcastle Railroad Co., 1 Sim. N. S. 586.

As to measure of damages for breach of a contract to convey, see New Haven & Northampton Co. *v.* Hayden, 117 Mass. 433; Varner *v.* St. Louis & Cedar Rapids Railway Co., 55 Iowa, 677; Davies *v.* St. Louis, Kansas City, & Northern Railway Co., 56 Iowa, 192.

(*b*) Purchase-money paid into court under the statute, for land of which an infant is seised in fee, takes the place of the land and descends to the heirs. Kelland *v.* Fulford, Law Rep. 6 Ch. D. 491.

* 3. The valuation in this latter class of cases is to be made by disinterested persons, and the price paid into the bank for the benefit of the parties interested.

4. And where a railway act provided, in terms, that nothing therein should authorize the company to do any damage or prejudice to the lands, estate, or property of any corporation or person whatsoever, without the consent in writing of the owner and occupier, it was held they could not pass the line of another railway without their consent, although the withholding of such consent should frustrate the purpose of the grant.[3]

5. In this country most of the railway charters contain a power to the company to acquire lands, by agreement with the owner. In such case it has been held the rights of the company are the same as where they take their land under their compulsory powers. And they are bound to the same care in constructing their road.[4]

6. And where the railway have the power to take five rods, through the whole course of their line, and a land-owner deeds them the full right to locate, construct, and repair, and forever maintain and use their road over his land, if, in laying the drains or ditches through the land, it becomes necessary to go beyond the limits of the five rods, in order to guard against the effect of

lands. The principal point settled is, that in regard to lands injuriously affected by railway works on other lands, it is not requisite to make compensation in advance. But where lands are purchased from persons under disability, the course of devolution of the property is not thereby changed, but the money paid in compensation is to take the place of the land, and to be treated as real estate. Midland Counties Railway Co. *v.* Oswin, 1 Coll. 74; s. c. 3 Railw. Cas. 497; *Ex parte* Flamank, 1 Sim. N. s. 260; *In re* Horner's Estate, 5 De G. & S. 483; s. c. 13 Eng. L. & Eq. 531; *In re* Stewart's Estate, 1 Sm. & G. 32; s. c. 13 Eng. L. & Eq. 533.

[3] Clarence Railway Co. *v.* Great North of England Railway Co., 1 Q. B. 45; Gray *v.* Liverpool & Bury Railway Co., 9 Beav. 391; s. c. 4 Railw. Cas. 235.

[4] Whitcomb *v.* Vermont Central Railroad Co., 25 Vt. 49, 69. This right to acquire lands, by contract with the owners, is probably limited, by implication, if not expressly, to the necessities of the company, the same as the right to take *in invitum*, and cannot be extended to any private use. But if the owner of the land consent to the use, the constitutional objection is removed, and the right to hold the land is a question between the company and the public. Dunn *v.* Charleston, Harper, 189; Harding *v.* Goodlett, 3 Yerg. 41; 11 Wend. 149; Embury *v.* Conner, 3 Comst. 516.

a stream to be passed, the company may lawfully do so under the grant.[5] (*c*)

* 7. In case of a deed to a railway company of land, on which to construct their road, the assent of the company will be presumed, and they are bound by the conditions of the grant, (*d*) as that the road shall be so constructed as not to interfere with buildings on the land.[6]

[5] Babcock *v.* Western Railroad Co., 9 Met. 553; s. c. 1 Redf. Am. Railw. Cas. 191. But a contract with the owner of land for leave to build the road through his land, and staking out the track through the land, is not such occupation as will be notice of the right of the company against a subsequent mortgagee. Merritt *v.* Northern Railroad Co., 12 Barb. 605. But the payment by the company of the price of the land, and changing its route in faith of the title, might give an equity superior to that of a subsequent mortgagee. Ib. The deed of one tenant in common is a good release of his claim for damages, although it convey no right as against his co-tenant. Draper *v.* Williams, 2 Mich. 536. But an agreement to sell land to a railway company, and a tender of the price by the company, gives no title. Whitman *v.* Boston & Maine Railroad Co., 3 Allen, 133.

[6] Rathbone *v.* Tioga Navigation Co., 2 Watts & S. 74. And the rights and duties of the company, in such case, are precisely the same as if the land had been condemned, by proceedings *in invitum*, under the statute. Norris *v.* Vermont Central Railroad Co., 28 Vt. 99. Such grant carries the incidents necessary to its enjoyment; and if it become necessary, in constructing the road, to

(*c*) Where by statute the company may receive conveyances of a right of way not exceeding a certain width, a conveyance not specifying the width will give a right of way as wide as the company may wish to occupy, not exceeding that named in the statute. Indianapolis, Peru, & Chicago Railway Co. *v.* Rayl, 69 Ind. 424. A deed for a strip of land of a certain width along a line yet to be established conveys a mere floating right. Detroit, Hillsdale, & Indiana Railroad Co. *v.* Forbes, 30 Mich. 165.

(*d*) A condition that a certain system of drainage be kept up is a condition subsequent. Hammond *v.* Port Royal & Augusta Railroad Co., 15 S. C. 10; s. c. 16 S. C. 567. Stipulation that company will locate its road over the land. See East Line & Red River Railroad Co. *v.* Garrett, 52 Tex. 133. And see Hastings & Avoca Railroad Co. *v.* Miles, 56 Iowa, 447. Failure to perform a condition subsequent is no ground for setting aside the conveyance. Stringer *v.* Mount Pleasant & Northern Railroad Co., 59 Iowa, 277. And see Galveston, Harrisburg, & San Antonio Railroad Co. *v.* Pfeuffer, 56 Tex. 66. Nor will title revert. Texas & New Orleans Railway Co. *v.* Sutor, 56 Tex. 496. After conveyance with promise that company shall construct crossings, the company cannot evade its contract by proceedings to condemn. Gray *v.* Burlington & Missouri River Railroad Co., 37 Iowa, 119.

8. An oral permission to take and use land for a railway is a bar to the recovery of damages for such use, until the permission is revoked.[7] (*e*) In one case before the House of Lords,[8] a very important, and as it seems to us reasonable and just qualification is annexed to the familiar doctrine of implied assent to the appropriation of land to a permanent use, by the owner standing by and not objecting. It is here ruled, "If a stranger builds upon the land of A., supposing it to be his own, and A. remains wilfully passive, equity will not allow him to profit by the mistake; but if the stranger knows that the land upon which he is building belongs to A., then A. may assert his legal rights and take the *benefit of the expenditure. And a tenant building upon his

make a deep cut, it may be made, and the company is not bound to protect the banks of the excavation by a wall. Hortsman *v.* Lexington & Covington Railroad Co., 18 B. Monr. 218. See also Louisville & Nashville Railroad Co. *v.* Thompson, 18 B. Monr. 735.

[7] Miller *v.* Auburn & Syracuse Railroad Co., 6 Hill, 61. It seems to have been made a question whether the company, after the revocation of such license, could be allowed to remove the fixtures of the road from the land, such as rails, spikes, &c., and it was held it might remove them as trade fixtures. Northern Central Railroad Co. *v.* Canton County, 30 Md. 347. And such license, when executed by the construction of the work, is not allowed to be revoked. The only relief the party is entitled to is compensation for his land. Trenton Water-Power Co. *v.* Chambers, 1 Stock. 471. And it was held in Corby *v.* Hill, 4 C. B. N. S. 556; s. c. 31 Law T. 181, that where the owner of land had given oral permission to one for a private way, he could not obstruct, nor give permission to others to obstruct, the way; and that where a third person, by permission of the landowner, placed building materials in the way, whereby an injury accrued to the person having the way, he might sue for such injury.

[8] Ramsden *v.* Dyson, Law Rep. 1 H. L. 123; s. c. 12 Jur. N. S. 506.

(*e*) Buchanan *v.* Logansport, &c. Railway Co., 71 Ind. 265. See Bidder *v.* North Staffordshire Railway Co., Law Rep. 4 Q. B. 412. And a gift of a right of way to one company is a bar to proceedings by the giver for an injunction to restrain use thereof by the licensee of the donee. Holbert *v.* St. Louis, Kansas City, & Northern Railway Co., 38 Iowa, 315. Though the right of way may not be acquired by mere license, where the road is built, the licensor may be restrained from legal proceedings pending condemnation proceedings. Baltimore & Hanover Railroad Co. *v.* Algire, 63 Md. 319. But a company laying a track by permission across the track of another acquires title only to what it occupies, although it is a part of a larger parcel reserved by the company, whose track is crossed from a previous grant. Illinois Central Railroad Co. *v.* Indiana & Illinois Railway Co., 85 Ill. 211.

landlord's land, in the absence of such special circumstances, acquires no right against him at the expiration of the tenancy. But a mere license to build works connected with a railway, the damages to be settled with a person named, or "on equitable terms hereafter," does not amount to any definite agreement.[9] (*f*)

9. Where land is conveyed, for the use of a railway, upon condition that it shall revert to the owner upon the abandonment of the road, and the road was sold, under a mortgage, to the state, and by the state and by new companies chartered for that purpose completed, it was held, that the grantor was not entitled to hold the land.[10]

[9] Fitchburg Railroad Co. *v.* Boston & Maine Railroad Co., 3 Cush. 58. But a writing whereby the owner of land along the line of a contemplated gravel road gave the road-company the right to enter on his land anywhere within a mile of the contemplated road and dig and remove gravel, as much as it might require, was held not a mere license, but a grant irrevocable. Bracken *v.* Rushville Gravel Road Co., 27 Ind. 346.

[10] Harrison *v.* Lexington & Ohio Railroad Co., 9 B. Monr. 470. So, too, if land is conveyed on condition that a water-tight embankment over a brook crossing the land shall be erected by the grantors, and that the embankment, or dam, with the floodgates or sluices therein, may be used for hydraulic purposes by the grantors, the grantees not to be liable to the grantors for any damage they may sustain by a break in such dam, unless the same shall happen through the gross neglect or wilful misfeasance of the grantees, but that the grantees shall repair the dam forthwith, it is a condition subsequent, the failure to perform which will give the grantors a right of re-entry at their election. But conveyance of the estate by the grantees will defeat the condition, and the assignee will have no remedy on it. Underhill *v.* Saratoga & Washington Railroad Co., 20 Barb. 455. And such conditions may be waived by the party in whose favor they are made, as e. g. a condition in a grant of land for a railway track, that the road shall be completed by a day named or the deed be void, may be deemed waived when the grantor continues to treat the company as having the right to use the land for the purposes of the grant. Ludlow *v.* New York & Harlem Railroad Co., 12 Barb. 440. The mere permission by a railway company, that some of their warehouses or engine-houses shall be used by private dealers for warehousing purposes on payment of rent, will not operate as a forfeiture of the rights of the company in favor of the owner of the fee, but will entitle him to maintain a writ of entry

(*f*) When the landowner in writing agrees to sell and convey, and the company takes possession and proceeds to construct its road, the owner cannot have an injunction against possession and use, the company not being in default. He has waived his right previous to assessment of damages. Baltimore, Pittsburg, & Chicago Railroad Co. *v.* Highland, 48 Ind. 381.

10. Where land was conveyed to a railway company, for the purpose of constructing their road, on which was a tenement, and to this water was conveyed by an aqueduct from another portion of the land of the defendant, and the price of the land was fixed by the commissioners, the defendant at the time claiming the right to withdraw the water, and this not being objected to by the president and engineer of the company, who were present at the * time, it was held, that the deed containing no exception in regard to the water, the company acquired the right to its use in the manner it had been before used, and the defendant was liable to an action for diverting it,[11] and the intention of the parties could not be determined by extraneous evidence.

11. So, also, the principle that a grantor, knowing the purpose for which his deed is accepted, cannot derogate from his own grant, applies to the case of a compulsory conveyance, under legislative authority, and the act is sufficient notice to the grantor of the purposes of the conveyance. But this rule will not apply to any accidental state of facts existing at the time of the grant, as the support resulting from an excavation being filled with water at the time, so as to entitle the grantee to insist upon its continuance. (*g*)

12. And accordingly, where a railway took the land above a mine for the support of the abutments of a bridge, the mine having been abandoned for forty years and full of water, it was held they could not insist upon having the water remain in the pit, as a support to the earth, but that they were entitled to be protected from damage likely to result from working the mine.[12]

13. If a railway have power to take land by consent of the owner, an oral consent is sufficient.[13] And if the company take

against the company for the establishment of his right therein, and to recover mesne profits during such misappropriation of the land. Locks & Canals Proprietors *v.* Nashua & Lowell Railroad Co., 101 Mass. 1.

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

[12] North Eastern Railway Co. *v.* Elliott, 1 Johns. & H. 145; s. c. 6 Jur. N. S. 817.

[13] Central Railroad Co. *v.* Hitfield, 5 Dutcher, 206; s. c. in error, 5 Dutcher, 571.

(*g*) Although a company purchasing acquires the fee, it acquires it merely for the purpose of the road, and cannot by the erection of a boarding prevent the acquirement of a prescriptive right to windows looking across the line of the road. Norton *v.* London & Northwestern Railway Co., Law Rep. 9 Ch. 623.

land and put it to their use without the consent of the owner, or any other proceeding under their powers, it is a trespass, but can only be sued for by the person then owning the land, and not by his grantee.[13] But this case was reversed upon error, and it was decided, somewhat at variance with the present English rule, that such a license, coupled with an interest, was still revocable at the option of the licensor. But the final conclusion of the court of error, that "consent," in such an act, meant the effectual consent of the law expressed with due formality, seems altogether the more reasonable ground upon which to place the case.

14. The New York Court of Appeals[14] held that municipal corporations, as to their rights and powers over lands owned by the corporation, were to be viewed the same as any other owner * of land, and that their acts and resolutions in regard to the use of such land by others were not to be regarded as either of a legislative or governmental character; and that although such corporations have no power as a party to make contracts which shall control or embarrass their legislative powers and duties, yet, as these legislative duties, or powers, only extend to regulations of police and internal government, and not to the mere imposition of a sum of money for revenue purposes, an ordinance imposing a license duty upon city cars, for revenue purposes only, is not an ordinance for police and internal government, and the imposition of an annual tax upon a city passenger railway, in derogation of its rights as defined by a specific agreement between the city and the railway company, for purposes of revenue merely, is unlawful and void.[15]

[14] New York *v.* Second Avenue Railroad Co., 32 N. Y. 261; s. c. 34 Barb. 41, where the case was similarly ruled.

[15] The terms of this contract appear more fully where the case is reported in Barbour. It prescribed the regulations to which the company should be liable, requiring no further license, and reserving no power to require one thereafter. This was held to preclude the city authority from making the imposition demanded. It would seem, that the case might have been decided, in conformity with the dissenting opinion of Ingraham, J., in the court below, without any great violence to principle. See also Branson *v.* Philadelphia, 47 Penn. St. 329; Veazie *v.* Mayo, 45 Me. 560; People *v.* New York & Harlem Railroad Co., 45 Barb. 73; Vilas *v.* Milwaukee & Mississippi Railroad Co., 15 Wis. 233. A grant of land to the use of a highway seems to be regarded as giving the municipal authorities the same rights to its use that they have where the land is condemned for that purpose. Murphy *v.* Chicago, 29 Ill.

15. Proof of a written agreement to sell land to a railway company at a given price, within a limited time, and a tender of the same within the time, and a refusal to accept, will not justify the company in locating their road upon the land, or defeat proceedings under the statute to recover damges for such location.[16] (*h*)

279. The grant to a railway company of a right to build a tunnel will not preclude the owner of the land from digging minerals under the tunnel, in conformity with the general railway acts. London & Northwestern Railway Co. *v.* Aekroyd, 8 Jur. N. S. 911.

[16] Whitman *v.* Boston & Maine Railroad Co., 3 Allen, 133. This written contract might be evidence of the value of the land, or an admission by the owner, and as such might probably be used in the proceedings under the statute for estimating damages.

(*h*) An agreement to release and convey a right of way over any of the lands of the promisor as soon as the road is located, is a bar to a claim for damages. Conwell *v.* Springfield & Northwestern Railroad Co., 81 Ill. 232. But otherwise, of an agreement to give a right of way on performance of a certain condition, the agreement being delivered in escrow but returned on failure of the company to comply. Hibbs *v.* Chicago & Southwestern Railway Co., 39 Iowa, 340.

As to estoppels upon the land-owner, the company having entered and made improvements, see New Jersey Midland Railway Co. *v.* Van Syckle, 37 N. J. Law, 496; Rockford, Rock Island, & St. Louis Railroad Co. *v.* Shunick, 65 Ill. 223. The measure of damages is the value of the land as it was before improvements were made. Emerson *v.* Western Union Railroad Co., 75 Ill. 176; North Hudson County Railroad Co. *v.* Booraem, 28 N. J. Eq. 450.

As to the removal of buildings as a consideration for an agreement to convey, see Detroit Hillsdale, & Indiana Railroad Co. *v.* Forbes, 30 Mich. 165.

*SECTION II.

Specific Performance in Equity.

1. Contracts before and after date of charter.
2. Contracts, all the terms of which are not defined.
3. Contracts by which an umpire is to fix price.
4. Right to mandamus as affecting the remedy.
5. Contracts not signed by company.
6. Contracts of which terms are uncertain.
7. Contracts giving the company an option.
8 Contracts not understood by both parties.
9. Order in regard to construction of highways may be enforced at the suit of the municipality.
10. Courts sometimes decline to decree specific performance on the ground of public convenience.
11. Specific performance not decreed when contract vague and uncertain, and for other reasons.
12. Courts of equity will not in the final decree make the price a charge on the land, unless so declared at first.

§ 62. 1. There can be no doubt courts of equity will decree specific performance of contracts for land, made by consent of the owners, as well after the act of parliament as before.[1] (*a*)

2. If the agreement contains provisions for farm-crossings, fences, and cattle-guards, either express or implied, the master will be directed to make the proper inquiry, and any decree for specific performance should provide minutely for all such incidents.[2] But, upon general principles, if the agreement provide that the price of land is to be fixed by an arbitrator or umpire, it has generally been held that a suit for specific performance is not maintainable.[3] (*b*)

[1] *Supra*, § 13, *et seq.;* Walker *v.* Eastern Counties Railway Co., 5 Railw. Cas. 469; s. c. 6 Hare, 594.

[2] Sanderson *v.* Cockermouth & Workington Railway Co., 19 Law J. Ch. 503; 11 Beav. 497.

[3] Milnes *v.* Gery, 14 Ves. 400. But in this case the umpire was not agreed on, and the court held that it could not appoint one. But the Master of the Rolls held that an agreement to sell, at a fair valuation, might be executed. See Tillett *v.* Charing Cross Bridge Co., 26 Beav. 419; s. c. 5 Jur. N. S. 994.

(*a*) Chicago & Southwestern Railroad Co. *v.* Swinney, 38 Iowa, 182. But see Gooday *v.* Colchester & Stour Valley Railway Co., 15 Eng. L. & Eq. 596. It is no defence to a bill for specific performance that the time for a compulsory taking has elapsed. Webb *v.* Direct London & Portsmouth Railway Co., 5 Eng. L. & Eq. 151.

(*b*) Where an estimate of certain expenses was to be submitted to the land-owner's agent for his approval,

3. But if the arbitrator have acted and fixed the price,[4] and by parity of reason, if the umpire is named and ready to act, there being no power of revocation, a court of equity may decree specific performance. Hence in the case above, the Vice-Chancellor held, that, as the contract was to take the land on the terms prescribed in the act of parliament, the court had the means of * applying those terms, so as to get at the price, and might therefore require the party to put them in motion, and then, in its discretion, decree specific performance.

4. And the consideration, that possibly the party might proceed by mandamus, will not deprive him of this remedy in equity, unless the act specially provides the remedy by mandamus.[5]

5. But if the company take a bond of a land-owner, to convey so much land as they shall require, and subsequently appropriate the land, but decline accepting a deed and paying the price, equity will not decree specific performance of the contract, the bond not being signed by the company.[6] But in such a case specific performance will be decreed against the party signing the bond upon refusal.[7] (*c*)

6. A contract to sell a railway company "the land they take" from a specified lot of land, at twenty cents a foot, "for each and every foot so taken by said company," imports a taking by the company, under their compulsory powers, and will not be specifically enforced until so taken by the company. And if the terms of a contract are doubtful, a court of equity will not decree specific performance.[8]

[4] Brown *v.* Bellows, 4 Pick. 179.

[5] Hodges Railw., 189.

[6] Jacobs *v.* Peterborough & Shirley Railway Co., 8 Cush. 223.

[7] Parker *v.* Perkins, 8 Cush. 318.

[8] Boston & Maine Railroad Co. *v.* Babcock, 3 Cush. 228; s. c. 1 Am. Railw. Cas. 561. But under a contract with a railway company, giving it all the land it desires not exceeding four poles in width, on which to construct its road, "provided said road shall not run farther north of my southwest corner than ten feet, and not farther south of my northeast corner than 140 feet," it was

and he died before the submission was made, it was held that the submission was of the essence of the agreement, and specific performance was refused. Firth *v.* Midland Railway Co., Law Rep. 20 Eq. 100.

(*c*) To a bill to enforce a contract for more land than the company was empowered to purchase, the purchase having been made by another at the procurement of the company, the nominal purchaser is a necessary party. Pennsylvania & New England Railroad Co. *v.* Ryerson, 36 N. J. Eq. 112.

7. Where one contracts with a railway company, under seal, to permit them to construct their road over his land, in either one of two routes, and to convey the land after the road shall be definitively located, with a condition that the deed shall be void, when the road shall cease or be discontinued, if the company take the land and build their road upon it, specific performance will be decreed, although the company did not expressly bind themselves to take the land, or pay for it. And where the company had been in the use of the land for their road three or four years, it was held no such unreasonable delay as to bar the relief * sought. The party cannot excuse himself by showing, that, from his own notions, or the representations of the company, or of third persons, he was induced to believe that a different route would have been adopted by the company, or that there was an inadequacy in the price stipulated, unless it be so gross as to amount to presumptive evidence of fraud or mistake.[9]

8. But it is a good defence, in such case, that the party was led into a mistake, without any gross laches on his part, by an uncertainty or obscurity in the descriptive part of the agreement, so that it applied to a different subject-matter from that which 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 in such case the burden of proof is upon the defendant, to show mistake or misrepresentation.[9] In an English case[10] before the Court of Chancery Appeal, after elaborate argument, the Lord Justice KNIGHT BRUCE, an equity judge of the most

held the company had a right to 66 feet through the whole land, and was only restricted in relation to the distance the road went from the corners named. Lexington & Ohio Railroad Co. *v.* Ormsby, 7 Dana, 276.

[9] Western Railroad Co. *v.* Babcock, 6 Met. 346; s. c. 1 Am. Railw. Cas. 365. The delivery of a deed to the agent of a corporation, in such case, is sufficient. And where the party, in disregard of his contract, obtains an assessment of damages, under the statute, his liability on the contract is, to the difference between the appraisal and the stipulated price in the contract. Unreasonable delay is ordinarily a bar to specific performance in a court of equity. Guest *v.* Homfray, 5 Ves. 818; Hertford *v.* Boore, Aston *v.* Same, 5 Ves. 719; Watson *v.* Reid, 1 Russ. & M. 236; 2 Story Eq. Jur. §§ 771, 777, and cases cited.

[10] Wycombe Railway Co. *v.* Donnington Hospital, Law Rep. 1 Ch. Ap. 268; s. c. 12 Jur. N. S. 347.

extended learning and experience, thus states the rule upon this point: This court will not enforce specific performance of a contract, where the defendant proves that he understood it in a sense different from the plaintiff, even although the plaintiff's construction may be the plain meaning of the contract.

9. Where the county commissioners made order in regard to the mode of construction of a railway, in crossing a highway, it was held, that the mayor and aldermen of a city, or the selectmen of a town, are the only proper parties to a bill for specific performance, and that the owners of the land, over which the railway passes, are not to be joined in the bill.[11] But where the * order

[11] Brainard *v.* Connecticut River Railroad Co., 7 Cush. 506. In Roxbury *v.* Boston & Providence Railroad Co., 6 Cush. 424, it was also held that the commissioners must make such order specific, and not in the alternative, and that laches, in regard to such order, will not defeat the claim for a decree for specific performance, where public security is essentially concerned.

And courts of equity have held a parol license to erect public works irrevocable, the works being erected in faith of it, and the company entitled to hold the land on making compensation, and have virtually decreed specific performance. Trenton Water-Power Co. *v.* Chambers, 1 Stock. Ch. 471. See also Hall *v.* Chaffee, 13 Vt. 150; Boston & Maine Railroad Co. *v.* Bartlett, 3 Cush. 224. But it is held that an action for the price of land will not lie on a parol contract of sale, where there has been no conveyance of the land, although the company has taken possession and paid part of the price. Reynolds *v.* Dunkirk & State Line Railroad Co., 17 Barb. 612. This is undoubtedly according to the generally recognized rule on the subject, in those states where the Statute of Frauds is in force.

In Laird *v.* Birkenhead Railway Co., 6 Jur. N. S. 140; S. C. 1 Johns. Ch. Eng. 500, the question of an estoppel in fact becoming so fixed on a railway company by acquiescence as to be enforced by a court of equity, is discussed by Vice-Chancellor Wood, and placed on higher and sounder grounds than in most of the earlier cases. The plaintiff, by parol agreement with the company, built a tunnel through the company's land in order to facilitate access to his business, laid rails, and used the same for two years, paying tolls as agreed. The company then claimed that the plaintiff was merely a tenant at will, and subject to dictation as to the right to use and the terms on which he might use the works, and gave notice in writing of the immediate and absolute termination of the contract, and in pursuance of such notice removed the rails and permanently erected a board across the passage. The learned judge said, it must be inferred, from the nature of the transaction, and after all that expense, that it was not to be determined by three months' notice; that the necessary inference was that there was to be a right of user as long as the plaintiff was the owner of the yard. It was further considered that, aside from the actual use, a court of equity would have decreed specific performance on reasonable terms; and that after use for a considerable term on the basis of

required the highway to be so raised as to pass over the railway, at a place named, but without defining the height to which it should be raised, the grade, the nature of the structure, or the time within which it should be made, it was held too indefinite to justify a decree for specific performance.[12]

*10. The Master of the Rolls, Lord Romilly, in Raphael *v.* Thames Valley Railway,[13] held, that in deciding whether specific performance should be enforced against a railway company, the court must have regard to the interests of the public, and therefore, where a bridge had not been constructed in conformity with an agreement with a land-owner, but the injury to the land-owner was small, and the railway had since been opened for traffic, and the relief, if granted, would have necessitated an interference with the traffic, the court refused to compel specific performance.

11. And it has been more recently declared by the English courts of equity, that where a contract is vague and so uncertain that no compensation could be awarded, a decree for specific performance could not be made.[14] So also the court will not interfere after considerable lapse of time and when the company are not possessed of funds for completing the purchase.[15] So refusal to decree specific performance may be based upon the public safety and convenience.[16]

12. And a Court of Equity will not make the amount to be paid for land a charge upon the land, under leave to apply for further directions, where it was not made so by the original decree.[17]

an unsigned memorandum, the court would regard that as evidence of the ultimate agreement of the parties. s. p. Mold *v.* Wheatcroft, 27 Beav. 510. But the railway companies of a sovereignty so far represent or partake of the prerogative character, that any acquiescence on their part in a use of their lands, inconsistent with the permanent rights of the public, will be construed as merely temporary, and will create no permanent rights in the party exercising such use. Heyl *v.* Philadelphia, Wilmington, & Baltimore Railroad Co., 51 Penn. St. 469.

[12] Roxbury *v.* Boston & Providence Railroad Co., 2 Gray, 460.

[13] Law Rep. 2 Eq. 37; s. c. 12 Jur. N. S. 656.

[14] Tillett *v.* Charing Cross Bridge Co., 26 Beav. 419; s. c. 5 Jur. N. S. 994.

[15] Pryse *v.* Cambrian Railway Co., Law Rep. 2 Ch. Ap. 444.

[16] Raphael *v.* Thames Valley Railway Co., Law Rep. 2 Eq. 444.

[17] Attorney-General *v.* Sittingbourne & Sheerness Railway Co., Law Rep. 1 Eq. 636.

*CHAPTER XI.

EMINENT DOMAIN.

SECTION I.

General Principles.

1. Definition of the right.
2. Distinguished from the ordinary proprietary right of the sovereign.
3. Necessary attribute of sovereignty.
4. Antiquity of its recognition.
5. Limitations upon its exercise.
6. Resides principally in the states.
7. Duty of making compensation.
8. Right to regulate use of navigable waters.
9, 10, 11. Its exercise in rivers, above tide-water.

§ 63. 1. This title is very little found in the English books, and scarcely in the English dictionaries. But with us, it has been adopted from the writers on national and civil law, upon the continent of Europe,[1] and is perhaps better understood than almost any other form of expression, for the same idea. It is defined to be that *dominium eminens*, or superior right, which of necessity resides in the sovereign power, in all governments, to apply private property to public use, in those great public emergencies which can reasonably be met in no other way.

2. It is a distinct right from that of public domain, which is the[1] land belonging to the sovereign. This is a superior right which the sovereign possesses in all property of the citizen or subject, whether real or personal, and whether the title were originally derived from the sovereign or not. One of the chief occasions for the exercise of this right is, in creating the necessary facilities for intercommunication, which in this country is now very generally known by the name of Internal Improvement. This extends to the construction of highways (of which turnpikes and railways are, in some respects, but different modes of construction and maintenance), canals, ferries, wharves, basins, and some others.[2]

[1] Vatt. B. 1, c. 20, § 244; Code Nap. B. 2, tit. 2, 545; 1 Bl. Com. 139; Gardner *v.* Newburgh, 2 Johns. Ch. 162; 2 Dallas, 310.

[2] 3 Kent Com. 339 *et seq.* and notes; Beekman *v.* Saratoga & Schenectady Railroad Co., 3 Paige, 45, 73; 12 Pick. 467; 23 Pick. 327; 3 Seld. 314. This

* 3. This is a right in the sovereignty, which seems indispensable to the maintenance of civil government, and which seems to

right, as some of the above cases show, extends to numerous matters not named in the text, but it would be out of place here to enter into the discussion of the general subject. The indispensable prerequisites to the exercise of the right will appear, as far as they apply to the subject of this work, in the following sections.

That railways are but improved highways, and are of such public use as to justify the exercise of the right of eminent domain, by the sovereign, in their construction, is now almost universally conceded. Williams *v.* New York Central Railroad Co., 18 Barb. 222, 246; State *v.* Rives, 5 Ire. 297; Northern Railroad Co. *v.* Concord & Claremont Railroad Co., 7 Fost. N. H. 183; Bloodgood *v.* Mohawk & Hudson Railroad Co., 18 Wend. 9; s. c. 14 Wend. 51; s. c. 1 Redf. Am. Railw. Cas. 209; 1 Bald. 205. See also 3 Paige, 73; 3 Seld. 314; Donnaher *v.* State, 8 Sm. & M. 649. A freight company has been regarded as not of such public interest as to justify taking land by the right of eminent domain. This was for loading and unloading freight. Memphis Freight Co. *v.* Memphis, 4 Cold. 419. But this case is perhaps questionable. A railway for the purpose of transporting freight is as much for a public use as one also for the transportation of passengers. And a freight company of more limited extent might be said to be in aid of the company carrying greater distances. The marginal railways in cities for the purpose of connecting the different lines of traffic, are as much public companies entitled to exercise the sovereign right of eminent domain, as any other railway. But no railway company can take land for other than public uses, as for the deposit of dirt, &c., not connected with the efficient use of its right of way. Lance's Appeal, 55 Penn. St. 16.

It seems to be well settled, that the legislature has no power to take the property of the citizens for any but a public use but that a railway is such use. Bradley *v.* New York & New Haven Railroad Co , 21 Conn. 294; Symonds *v.* Cincinnati, 14 Ohio, 147; Embury *v.* Conner, 3 Comst. 511.

But this is a power essentially different from that of taxation, in regard to which there is no constitutional restriction, and no guaranty for its just exercise, except in the discretion of the legislature. People *v.* Brooklyn, 4 Comst. 419; Cincinnati, Wilmington & Zainesville Railroad Co. *v.* Clinton County Commissoners, 1 Ohio St. 77.

The legislature must decide, in the first instance, when the right of eminent domain may be exercised, but this is subject to the revision of the courts, so far as the uses to which the property is applied are concerned. 2 Kent Com. 340.

But as to the particular instance, the decision of the legislature, and of the commissioners appointed to exercise the power, is ordinarily final and not revisable in the courts. Varrick *v.* Smith, 5 Paige, 137; Armington *v.* Barnet, 15 Vt. 745.

And the legislature may restrain the owners of property, in regard to its use, when in their opinion the public good requires it, unless with compensation to those injured, as this is not the exercise of the right of eminent domain. Commonwealth *v.* Tewksbury, 11 Met. 55; Coates *v.* New York, 7 Cow. 585. But see Clark *v.* Syracuse, 13 Barb. 32.

* be rather a necessary attribute of the sovereign power in a state, than any reserved right in the grant of property to the subject or citizen.

4. It seems to have been accurately defined, and distinctly recognized, in the Roman empire, in the days of Augustus and his immediate successors, although, from considerations of policy and personal influence and esteem, they did not always choose to exercise the right to demolish the dwellings of the inhabitants, either in the construction of public roads or aqueducts, or ornamental columns, but to purchase the right of way.

5. But in the states of Europe and in the written Constitution of the United States, and in those of most of the American states, an express limitation of the exercise of the right makes it dependent upon compensation to the owner.[3] But this provision in the United States Constitution is intended only as a limitation upon the exercise of that power, by the government of the United States.[3]

6. And it would seem that notwithstanding this right of sovereignty may reside in the United States, as the paramount sovereign, so far as the territories are concerned, in reference to internal communication, by highways and railways, and notwithstanding the ownership of the soil of a portion of the lands, by the United States, in many of the states, as well as territories, still, when any of the territories are admitted into the Union, as independent states, the general rights of eminent domain are vested exclusively in the state sovereignty.[4]

7. The duty to make compensation for property, taken for public use, is regarded, by the most enlightened jurists, as founded in the fundamental principles of natural right and justice, and as

[3] Barron *v.* Baltimore, 7 Pet. 243; Fox *v.* Ohio, 5 How. 410, 431, 435.

[4] Pollard *v.* Hagan, 3 How. 212; Goodtitle *v.* Kibbe, 9 How. 471; Doe *v.* Beebe, 13 How. 25; United States *v.* Railroad Bridge Co., 6 McLean, 517. In Illinois Central Railway *v.* United States, 20 Law Rep. 630, the court of claims held, that the abandonment of a military reserve, which had become useless for military purposes, causes it to fall back into the general mass of public lands, and that a state, by virtue of its right of eminent domain, may authorize the construction of railways through land owned but not occupied by the United States. And the United States being in possession of land owned by the plaintiff, necessary to carry out the objects of its charter, it was held, that a payment made by the plaintiff, to obtain possession thereof, was made under duress, and might be recovered back.

* lying at the basis of all wise and just government, independent of all written constitutions or positive law.[5]

8. But the public have a right, by the legislature, through the proper functionaries, 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 made the ground of an action, even where private loss is thereby produced, nor is it the taking of private property for public use which will entitle the owner to compensation.[6]

9. And where a ford-way was destroyed by the erection of a dam across a river, in the construction of a canal or other public work, under legislative grant, the river being a public highway, although not strictly navigable, in the common-law sense (which only included such rivers as were affected by tide-water), it was held the owner of the ford-way could recover no compensation from the state, or their grantees, the act being but a reasonable exercise of the right to improve the navigation of the stream as a public highway.[7]

10. Neither can the owner of a fishery, which sustains damage or destruction by the building of a dam to improve the navigation of a river above tide-water, under grant from the state, sustain an action against the grantees.[8] So also in regard to the loss of the use of a spring, by deepening the channel of such a stream, by legislative grant.[9]

11. Nor is the owner of a dam, erected by legislative grant upon a navigable river, and which was afterwards cut off by a canal, granted by the same authority, entitled to recover damages.[10]

[5] Spencer, C. J., in Bradshaw *v.* Rodgers, 20 Johns. 103; 2 Kent Com. 339, and note, and cases cited from the leading continental jurists.

[6] Davidson *v.* Boston & Maine Railroad Co., 3 Cush. 91; Gould *v.* Hudson River Railroad Co., 12 Barb. 616; s. c. 2 Seld. 522. Nor has the state any such right in flats, where the tide ebbs and flows, as to require a railway company to pay damages for the right of passage. Walker *v.* Boston & Maine Railroad Co., 3 Cush. 1; s. c. 1 Am. Railw. Cas. 462.

[7] Zimmerman *v.* Union Canal Co., 1 Watts & S. 346.

[8] Shrunk *v.* Schuylkill Navigation Co., 14 S. & R. 71.

[9] Commonwealth *v.* Ritcher, 1 Penn. 467.

[10] Susquehannah Canal Co. *v.* Wright, 9 Watts & S. 9; Monongahela Navigation Co. *v.* Coons, 6 Watts & S. 101.

*SECTION II.

Taking Lands in Invitum.

1. Legislative grant requisite to compulsory taking.
2. Compensation must be made.
3. Consequential damages. Whether paid for.
4. Extent of liability for consequential damages.
5, 8, 9. Grants of such powers strictly but reasonably construed.
6. Limitation of the power to take lands.
7. Interference of courts of equity.
10. Rights acquired by company. Right to enter without process.
11. Rights limited by the grant.
12. Rights of municipal corporation more extensive.

§ 64. 1. In England railways can take lands by compulsion, only in conformity to the terms of their charters and the general laws defining their powers.[1] (*a*) And in this country a railway

[1] Taylor *v.* Clemson, 2 Q. B. 978; s. c. 3 Railw. Cas. 65. Tindal, C. J., here said, that authority to take land, if exercised adversely, and not by consent, was undoubtedly an authority to be carried into effect by means unknown to the common law. And in Barnard *v.* Wallis, 2 Railw. Cas. 177, the Master of the Rolls declares, that aside from the provisions of the act of parliament, the owner of one rod of land may insist on his own terms, to the utter overthrow of the most important public work. All kinds of property and estate are subject to this right of eminent domain, and a dwelling-house, so long regarded as the inviolable sanctuary of the owner or occupant, forms no exception. Wells *v.* Somerset & Kennebec Railroad Co., 47 Me. 345. The right of compensation for property taken by virtue of the right of eminent domain is regarded as a fundamental principle of the common law of England and of the other European nations. Pumpelly *v.* Green Bay Co., 13 Wal. 166.

(*a*) The question whether the right of eminent domain shall be exercised is a matter exclusively of legislative and not of judicial cognizance. Chicago, Rock Island, & Pacific Railroad Co. *v.* Lake, 71 Ill. 333; United States *v.* Oregon Railway & Navigation Co., 16 Fed. Rep. 524. So of the question whether in the exercise of that right particular property shall be taken. Baltimore & Ohio Railroad Co. *v.* Pittsburg, Wheeling, & Kentucky Railroad Co., 17 W. Va. 812. The right lies dormant in the state until the legislature in some way points out the modes, the conditions, and the agencies for its exercise. Alexandria & Fredericksburg Railway Co. *v.* Alexandria & Washington Railroad Co., 75 Va. 780. The statutory mode is exclusive of all others. International & Great Northern Railway Co. *v.* Benitos, 10 Am. & Eng. Railw. Cas. 122; Cairo & Fulton Railroad

company or other corporation must show, not only the express warrant of the legislature[2] (which it must for all its acts) for taking the land of others for their own uses, but also that the legislature, in giving such warrant, conformed to the constitutions of the states, in most of which it is expressly required that compensation should be made for all lands taken. (*b*) And upon this subject, the circumspection of the English courts, in requiring damage and loss to the land-owners to be fairly met, is shown very fully by the language of Lord Chief Justice DENMAN in The Queen *v.* The Eastern Counties Railway.[3]

*2. "We think it not unfit to premise, that when such large powers are intrusted to a company to carry their works into execution, without the consent of the owners and occupiers of the land, it is reasonable and just that any injury to property which can be shown to arise from the prosecution of those works should be fairly compensated for to the party sustaining it." (*c*)

3. In the English statute, too, railway companies are made liable to pay damage to the owner of all lands "injuriously affected" by any of their works. Such a provision does not exist in many of the American states, and consequently no liability is imposed

[2] Hickok *v.* Plattsburgh, 15 Barb. 435; 4 Barb. 127; Halstead *v.* New York, 3 Comst. 430; Hart *v.* Albany, 9 Wend. 571, 588; 2 Denio, 110; Dunham *v.* Rochester, 5 Cow. 462.

[3] 2 Q. B. 347; s. c. 2 Railw. Cas. 736, 752. It has been repeatedly decided that the corporate authorities of a city have no power to confer on any person, natural or corporate, the franchise of operating a railway. Such a grant for an indefinite period is void as a perpetuity. Such powers are held by the city for the public benefit, and cannot be abrogated or delegated. And such a grant is not an act of municipal legislation merely, but a contract which, if valid, it could not revoke or limit, and which is consequently void as a perpetuity. Milhau *v.* Sharp, 27 N. Y. 611; *infra*, § 76.

Co. *v.* Turner, 31 Ark. 494; Johnson *v.* St. Louis, Iron Mountain, & Southern Railway Co., 32 Ark. 758.

The taking of land for a railway is an appropriation to all necessary or incidental uses. Cassidy *v.* Old Colony Railroad Co., 23 Am. & Eng. Railw. Cas. 83; s. c. 24 Am. & Eng. Railw. Cas. 271.

(*b*) So it must show that it has fully organized and is unable to agree with the property owner as to compensation. A railway is a highway within the meaning of U. S. Rev. Sts. § 2477, granting the right of way across the public lands.

(*c*) Acceptance of damages awarded precludes the owner from making further claim. Baltimore & Ohio Railroad Co. *v.* Johnson, 84 Ind. 502.

for merely consequential damages to lands, no part of which is taken.[4] (*d*)

4. Under the English statute, giving damage where lands are "injuriously affected," railways have been held liable for all acts, which, if done without legislative grant, would constitute a nuisance, and by which a particular party incurs special damage.[5]

5. These grants, being in derogation of common right, are to receive a reasonably strict and guarded construction.[6] (*e*) The Master * of the Rolls, in this last case, says, "In these cases it is

[4] Hatch *v.* Vermont Central Railroad Co., 25 Vt. 49; Philadelphia & Trenton Railroad Co., 6 Whart. 25; Monongahela Navigation Co. *v.* Coon, 6 Watts & S. 101. See also Protzman *v.* Indianapolis & Cincinnati Railroad Co., 9 Ind. 467; Evansville & Crawfordsville Railroad Co. *v.* Dick, 9 Ind. 433. But the full extent of the doctrine in the text seems to be questioned or doubted in Pumpelly *v.* Green Bay Co., 13 Wal. 166.

[5] Queen *v.* Eastern Railway Co., 2 Q. B. 347; Glover *v.* North Staffordshire Railway Co., 16 Q. B. 912; s. c. 5 Eng. L. & Eq. 335. The English rule of compensation seems to be to estimate what the land-owner will lose rather than what the company will gain. Stebbing *v.* Metropolitan Board, Law Rep. 6 Q. B. 37.

[6] Gray *v.* Liverpool & Bury Railway Co., 9 Beav. 391; s. c. 4 Railw. Cas. 235–240. Hence under a general grant of power to take land for the track of a railway, with sidings and branches to the towns along the line, the company have no power to take land for a temporary track during the period of constructing the main line. Currier *v.* Marietta & Cincinnati Railroad Co., 11 Ohio St. 228. Nor can a railway company, under its general powers, take lands at a distance from its line not intended to be used in its construction. Waldo *v.* Chicago, St. Paul, & Fond du Lac Railroad Co., 14 Wis. 575. Nor can a railway company take land compulsorily for the purpose of erecting a manufactory of railway cars, or dwellings to be rented to the employés of the company. But it may take land for the purpose of storing wood and lumber used on the road, or brought there for transportation on it. And when land is taken for a legitimate purpose, the decision of the locating officers of the company is conclusive as to the extent required for that purpose, unless the quantity so taken is clearly beyond any just necessity. Vermont & Canada Railroad Co. *v.* Vermont Central Railroad Co., 34 Vt. 2.

(*d*) And see *In re* New York Central & Hudson River Railroad Co., 6 Hun, 149. But otherwise by statute in Pennsylvania. See Penn. St. Feb. 19, 1849; Hoffer *v.* Pennsylvania Canal Co., 87 Penn. St. 221. See *infra*, § 9.

(*e*) Webb *v.* Manchester & Leeds Railway Co., 1 Eng. Railw. & C. Cas. 576; Southern Pacific Railroad Co. *v.* Wilson, 49 Cal. 396; Mississippi River Bridge Co. *v.* Ring, 58 Mo. 491; Oregonian Railway Co. *v.* Hill, 9 Oreg. 377.

always to be borne in mind, that the acts of parliament are acts of sovereign and imperial power, operating in the most harsh shape in which that power can be applied in civil matters, — solicited, as they are, by individuals, for the purpose of private speculation and individual benefit." And in another case[7] the rule of construction is thus laid down: —

6. "These powers extend no further than expressly stated in the act, except where they are necessarily and properly acquired for the purposes which the act has sanctioned." This last category, as here observed, is often a most perplexing one, in regard to its true extent and just limits. And doubtful grants are to be construed most favorably towards those who seek to defend their property from invasion.[8] And a railway, having an option between different routes, can only take lands on that route which they ultimately adopt; and if they contract for land upon the other routes, cannot be compelled to take it.[9] The time for exercise of these compulsory powers, by the English statutes, is limited to three years,[10] except for improvements necessary for the public safety, in conformity with the certificate of the Board of Trade.

It was decided by the House of Lords, reversing the judgment of the Lords Justices, but affirming that of the Vice-Chancellor, that where the legislature authorizes a railway company to take, for their purposes, any lands described in their act, it constitutes

[7] Colman *v.* Eastern Counties Railway Co., 10 Beav. 1; s. c. 4 Railw. Cas. 513, 524; State *v.* Baltimore & Ohio Railroad Co., 6 Gill, 363; Simpson *v.* South Staffordshire Waterworks Co., 11 Jur. N. S. 453. And in a case in Kentucky, the rule is thus stated: The rules of construction which apply to charters delegating sovereign power to corporations do not depend on the question whether the corporation is a private or a public one, but on the character of the powers conferred, and the purposes of the organization. The power of a railway, or other private corporation, to take private property for its use, being a delegation of sovereign power, must be construed as it would be if delegated to a municipal corporation. And the powers of private and public corporations with respect to their property, are governed by the same principles, and, in the absence of express provisions of law, depend upon the purposes for which the corporation was formed. Bardstown & Louisville Railroad Co. *v.* Metcalfe, 4 Met. Ky. 199.

[8] Sparrow *v.* Oxford, Worcester, & Wolverhampton Railway Co., 9 Hare, 436; s. c. 12 Eng. L. & Eq. 249; Shelf. Railw. 233.

[9] Tomlinson *v.* Manchester & Birmingham Railway Co., 2 Railw. Cas. 104; Webb *v.* Manchester & Leeds Railway Co., 1 Railw. Cas. 576.

[10] Such a limitation is held obligatory wherever it exists. Peavy *v.* Calais Railroad Co., 30 Me. 498; s. c. 1 Am. Railw. Cas. 147.

* them the sole judges as to whether they will or will not take those lands, provided that they take them *bona fide* with the purpose of using them for the purposes authorized by the legislature, and not for any sinister or collateral purpose.[11] And that a court of equity cannot interfere, even upon the decision of an engineer, to curtail the power of the company, in regard to the quantity of land sought to be obtained by it, so long as it acts in good faith. But in a later case[12] it was said that the House of Lords, in the case of Stockton & Co. *v.* Brown, did not decide that the company, by its engineer, had an unlimited discretion to take any land which the engineer would make affidavit the company required for use in the construction of their works, without stating what works; but that it must appear to what use they proposed to put the lands, and if that came fairly within the range of their powers, the company could not be controlled in the *bona fide* exercise of its discretion as to the mode of constructing their works, within the powers confided to them by the legislature. The company will not be restrained from taking land for the purpose of depositing waste upon, although not confident of requiring it for any other purpose connected with the construction.[13]

7. As a general rule in the English courts of equity, if the construction of a railway charter be doubtful, they will remit the party to a court of law to settle the right, in the mean time so exercising the power of granting temporary injunctions as will best conduce to the preservation of the ultimate interests of all parties.[14]

8. Similar rules of construction have prevailed in the courts of this country. The language of TANEY, C. J., in the leading case upon this subject, in the national tribunal of last resort, is very explicit. "It would present a singular spectacle, if, while the courts of England are restraining within the strictest limits the spirit of monopoly and exclusive privilege in nature of monopoly,

[11] Stockton & Darlington Railway Co. *v.* Brown, 6 Jur. N. S. 1168; S. C. 9 H. L. Cas. 246; North Missouri Railroad Co. *v.* Lackland, 25 Mo. 515; Same *v.* Gott, 25 Mo. 540.

[12] Flower *v.* London, Brighton, & South Coast Railway Co., 2 Drewry & S. 330; S. C. 11 Jur. N. S. 406.

[13] Lund *v.* Midland Railway Co., 34 Law J. Ch 276.

[14] Clarence Railway Co. *v.* Great North of England Railway Co., 2 Railw. Cas. 763. But the practice of courts of equity, in this respect, is by no means uniform. See *infra*, § 205, *et seq.*

and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging * these privileges by implication." [15] And in commenting upon the former decisions of that court upon this subject, the same learned judge here says, "The principle is recognized, that in grants by the public nothing passes by implication." [16] And other cases are here referred to in the same court, in support of the same view.[17]

9. But it is not to be inferred that the courts in this country, or in England, intend to disregard the general scope and purpose of the grant, or reasonable implications resulting from attending circumstances. But if doubts still remain, they are to be solved against the powers claimed.[18]

10. But where the right of the company to appropriate the land is perfected under the statute, they may enter upon it without any process for that purpose, and the resistance of the owner is unlawful, and he may be restrained by injunction, but that is unnecessary. The statute is a warrant to the company.[19]

11. But a grant to a railway to carry passengers and merchandise from A. to M., does not authorize them to transport mer-

[15] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420.

[16] United States *v.* Arredondo, 6 Pet. 691, 738.

[17] Jackson *v.* Lamphire, 3 Pet. 280; Beaty *v.* Knowler, 4 Pet. 152, 168; Providence Bank *v.* Billings, 4 Pet. 514. And that court not only adheres to the same view still, but may have carried it in some instances to the extreme of excluding all implied powers. See also, upon this subject, Commonwealth *v.* Erie & Northeast Railroad Co., 27 Penn. St. 339; and Bradley *v.* New York & New Haven Railroad Co., 21 Conn. 294.

[18] Perrine *v.* Chesapeake & Delaware Canal Co., 9 How. 172; Enfield Toll-Bridge *v.* Hartford & New Haven Railroad Co., 17 Conn. 454; Springfield *v.* Connecticut River Railroad Co., 4 Cush. 63. The following cases will be found to confirm the general views of the text: Tuckahoe Canal Co. *v.* Tuckahoe Railroad Co., 11 Leigh, 42; 2 Cruise Dig. Greenl. ed. 67, 68; Thompson *v.* New York & Harlem Railroad Co., 3 Sandf. Ch. 625; Oswego Falls Bridge Co. *v.* Fish, 1 Barb. Ch. 547; Moorhead *v.* Little Miami Railroad Co., 17 Ohio, 340; Stormfeltz *v.* Manor Turnpike Co., 13 Penn. St. 555; Toledo Bank *v.* Bond, 1 Ohio St. 636; Cincinnati College *v.* State, 19 Ohio, 110; Camden & Amboy Railroad Co. *v.* Briggs, 2 Zab. 623; Carr *v.* Georgia Railroad & Banking Co., 1 Kelly, 524; Macon *v.* Macon & Western Railroad Co., 7 Ga. 221; New London *v.* Brainard, 22 Conn. 552; Bradley *v.* New York & New Haven Railroad Co., 21 Conn. 294; Barrett *v.* Stockton & Darlington Railway Co., 2 M. & G. 134.

[19] Niagara Falls & Lake Ontario Railroad Co. *v.* Hotchkiss, 16 Barb. 270.

chandise from their depot in the city of M. about the city, or to other points, for the accommodation of customers.[20]

12. There has been considerable discussion in the English *courts, within the last few years, in regard to many recent statutes there, for the improvement of markets and streets in the metropolis or districts adjoining, through the agency of the municipal corporations. And while the courts there, and especially the House of Lords, in one case,[21] adhere strenuously to the former rule, in regard to private corporations, — that they can only take lands compulsorily for the needful purposes of the works which they are authorized by the legislature to construct; on the other hand, they hold that it is competent and proper under parliamentary powers granted for that purpose, to allow municipal corporations to reimburse the expense of any improvements which they are authorized to carry forward, in their streets and squares or markets, by taking the lands adjoining such improvements, at the price of their value before such improvements, and selling them at the advanced prices caused by such improvements. And it was held that the municipality having, before the act passed, contracted for the sale of such of the lands so to be taken as they should not require for the purpose of the public improvement, did not disqualify them from exercising the discretion reposed in them by the act, as to how much land they would take. This rule of law in regard to the proper mode of reimbursing the expense of great public improvements is not very different from that which has been extensively in use in America under the name of betterment acts, whereby the expense is assessed upon the adjoining property-owners, upon some scheme of equalization, presumptively apportioning the loss and benefit equitably.[22]

[20] Macon *v.* Macon & Western Railroad Co., 7 Ga. 221.

[21] Galloway *v.* London, 12 Jur. N. S. 747; S. C. Law Rep. 1 H. L. 34.

[22] *Infra*, § 235, and cases cited in notes 22, 23.

SECTION III.

Conditions Precedent.

1. Company must comply with conditions precedent.
2. Compliance must be alleged in petition.
3. Payment as a condition precedent to vesting of title in company.
4. Filing the location in the land office, notice to subsequent purchasers.
5. Damages assessed and confirmed by the court, the owner is entitled to execution.
6. Company in possession, equity will enforce payment and enjoin use in default thereof.
7. Subscriptions to stock payable in land on condition precedent, condition waived by conveyance, &c.

§ 65. 1. It has been held that a railway company must comply with all the conditions in its charter, or the general laws of the *state, requisite to enable it to go forward in its construction, before it acquires any right to take land by compulsion. (*a*) In England one of these conditions in the general law is, that stock, to the amount of the estimated cost of the entire work, shall be subscribed. And where the charter, or the general laws of the state, gave the right to take land for the roadway only upon the legislature having approved of the route and termini of the line, it was held the company could not proceed to condemn lands for that purpose until this approval was made.[1]

2. And where the act of the legislature, under which a railway was empowered to take lands, required the company to apply to the owner, and endeavor to agree with him as to the compensation, unless the owner be absent or legally incapacitated, they have no right to petition for viewers until that is done. The petition should allege the fact that they cannot agree with the owner.[2]

[1] Gillinwater *v.* Mississippi & Atlantic Railroad Co., 13 Ill. 1.

[2] Reitenbaugh *v.* Chester Valley Railroad Co., 21 Penn. St. 100. But where the company has the right to lay its road, not exceeding six rods in width, and has fixed the centre line of the same, it may apply for the appointment of appraisers, and determine the width of the road, any time before the appraisal. Williams *v.* Hartford & New Haven Railroad Co., 13 Conn. 110. But slight, if indeed any, evidence of this failure to agree with the land-

(*a*) Thus, where the statute requires the projectors to file a map and profile, and give notice thereof to all affected land-holders, it cannot be dispensed with. *Ex parte* New York & Boston Railway Co., 62 Barb. 85.

The right of such companies to take land is held in some states to depend upon the legal sufficiency and validity of the certificate and public record of organization; and it was held the company must show these prerequisites to be strictly in conformity with the requirements of the law.[3]

3. Where the charter of a railway company provides that the title of land condemned for the use of the company shall vest in the company, upon the payment of the amount of the valuation, no title vests until such payment.[4] (*b*) In a late case,[5] the law upon * this subject is thus summed up: Where the charter of the company provides, that after the appraisal of land for their use, "*upon the payment of the same*," or deposit (as the case may be), the company shall be deemed to be seised and possessed of all such lands, "they must pay or deposit the money before any such right accrues." — "The payment or deposit of the money awarded is a condition precedent to the right of the company to enter upon the land for the purposes of construction; and without compliance with it they may be enjoined by a court of

owner is required, where the claimant appears and makes no objection on that ground. Doughty *v.* Somerville & Easton Railroad Co., 1 Zab. 442. And the petition may be amended where this averment is omitted. Pennsylvania Railroad Co. *v.* Porter, 29 Penn. St. 165.

[3] Atlantic & Ohio Railroad Co. *v.* Sullivant, 5 Ohio St. 276.

[4] Baltimore & Susquehanna Railroad Co. *v.* Nesbit, 10 How. 395. See, also, Compton *v.* Susquehanna Railroad Co., 3 Bland, 385, 391; Van Wickle *v.* Railroad Co., 2 Green, 162; Stacy *v.* Vermont Central Railroad Co., 27 Vt. 39; Levering *v.* Railroad Co., 8 Watts & S. 459. And on payment of the compensation assessed by commissioners, and taking possession afterward, the title of the company is perfected, as against the party to the proceedings. Bath River Navigation Co. *v.* Willis, 2 Railw. Cas. 7.

[5] Stacey *v.* Vermont Central Railroad Co., 27 Vt. 39.

(*b*) Payment is a condition precedent to title or use. Lee *v.* Northwestern Union Railway Co., 33 Wis. 222; Provolt *v.* Chicago, Rock Island, & Pacific Railroad Co., 57 Mo. 256; Colgan *v.* Allegheny Valley Railroad Co., 3 Pittsb. 394; Chambers *v.* Cincinnati Railroad Co., 10 Am. & Eng. Railw. Cas. 376. And mortgage of the road and sale on foreclosure will make no difference. Kendall *v.* Missisquoi & Clyde River Railroad Co., 55 Vt. 438. On payment, title passes. St. Louis & Southeastern Railway Co. *v.* Teters, 68 Ill. 141; Chicago & Iowa Railroad Co. *v.* Hopkins, 90 Ill. 316. But the owner may waive his right to prepayment. New Orleans & Selma Railroad Co. *v.* Jones, 68 Ala. 48. In general, as to when title vests in company, see *In re* Rhinebeck & Connecticut Railroad Co., 8 Hun, 31; s. c. affirmed, 67 N. Y. 242.

equity, or prosecuted in trespass at law, for so doing. The right of the land-owner to the damages awarded is a correlative right to that of the company to the land. If the company has no vested right to the land, the land-owner has none to the price to be paid."

4. And where the charter contained the usual power to take land, it was held, that after laying out their road and filing the location in the land-office, the company had acquired a right of entry which subsequent purchasers were bound to respect.[6]

5. And where the road has been laid and the damages assessed and confirmed by the court, the owner of the land is entitled to execution, although the company have not taken possession of the land, and may desire to change the route.[7] (*c*)

6. But where the company enters into the possession of the land, and constructs its road without having paid the whole of the damages assessed therefor, a court of equity will enforce the payment by an order for such payment within a time named, and in default will restrain the company by injunction from using the land until the price is paid.[8] In one case it was held, that where the railway is surveyed and located and the land-owner consents to the company entering and building their road before the damages are ascertained, under an agreement that this shall be done thereafter, and the road is thereupon constructed, the title to the land passes, and the owner retains no lien thereon for his damages, but must look for payment to the party contracting.[9] But in an English case,[10] it was held that the owner of lands * taken possession of by a railway company, either under statutory power or by agreement, has a lien thereon for the purchase-

[6] Davis *v.* East Tennessee & Georgia Railroad Co., 1 Sneed, 94.

[7] Neal *v.* Pittsburgh & Connellsville Railroad Co., 31 Penn. St. 19.

[8] Cozens *v.* Bognor Railway Co., Law Rep. 1 Ch. Ap. 591; s. c. 12 Jur. N. S. 738.

[9] Knapp *v.* McAuley, 39 Vt. 275. But in Vermont the vendor's lien on real estate for the price is expressly repealed by act of the legislature.

[10] Walker *v.* Ware, Hadham, & Buntingford Railway Co., Law Rep. 1 Eq. 195.

(*c*) But on trial of an appeal execution may not be awarded by the circuit court. St. Louis, Lawrence, & Denver Railroad Co. *v.* Wilder, 17 Kan. 239. See as to stay under the Penn. Stat., Harrisburg & Potomac Railroad Co. *v.* Peffer, 84 Penn. St. 295; Boyce *v.* Northern Central Railway Co., 1 Pearson, 113.

money, and also for the damages to the adjoining land, if not the subject of a special agreement inconsistent with the continuance of such lien. Of this lien he is not deprived by a deposit and bond under the statute, or by accepting a deposit, less than the whole amount due him, and a court of equity will enforce this lien, although the railway has been opened for public use.

7. And where a subscription of land is made to a railway company, upon some condition precedent to be performed by the company, such condition is waived by conveying the land and accepting certificates of stock. But if such conveyance is induced by false representations, the company may be compelled to perform it, or by tendering a return of the certificates the entire conveyance may be set aside, even after the company have conveyed the land to others conusant of the facts at the time of such conveyance.[8]

SECTION IV.

Preliminary Surveys.

1. Preliminary survey may be made without compensation.
2. Compensation may be required by statute, but company not trespasser.
3. Company may make temporary entry, in England, for what purposes.
4. Company liable for materials.
5. Right to take materials. Liability therefor, how ascertained.
6, 7. Liability of company for entering before location.

§ 66. 1. It is settled that the legislature may authorize railway companies to enter upon lands for the purpose of preliminary surveys, without making compensation therefor, doing as little damage as possible, and selecting such season of the year as will do least damage to the growing crops. The proper rule to be observed, in this respect, being such as a prudent owner of the land would be likely to adopt, in making such surveys for his own advantage.[1]

2. In the English statutes, and in many of the special charters and general railway acts in the American states, the company are

[1] Cushman *v.* Smith, 34 Me. 247; Polly *v.* Saratoga & Washington Railroad Co., 9 Barb. 449; Bloodgood *v.* Mohawk & Hudson Railroad Co., 14 Wend. 51; s. c. 18 Wend. 9; s. c. 1 Redf. Am. Railw. Cas. 209; Mercer *v.* McWilliams, Wright, 132. But in some states the party is made liable by statute for damages for temporary occupation.

bound to make compensation for such temporary use of the land, * where they do not ultimately take the land. But in such case, where the statute authorizes the entry upon the land, the company are not to be treated as trespassers, and even where the statute provides for no compensation, it is not regarded as taking private property for public use, within the provisions of the American state and United States constitutions.

3. Under the English statute the notice to use lands for temporary purposes should specify the particular purpose for which the lands are required.[2] By the English statute,[3] the company may make a temporary entry upon land for the following purposes: (1) For the purpose of taking earth, or soil, by side cuttings. (2) For the purpose of depositing soil. (3) For the purpose of obtaining materials for the construction or repair of the railway. (4) For the purpose of forming roads to, from, or by the side of the railway.[4] (5) By section 42, if the owner of such lands as the company give notice of temporary occupation, elect to sell to the company and give them notice accordingly, they are compellable to buy, and in all other cases to make compensation for all injury to the same.

4. It has been held, in regard to the right of railway companies to take materials from lands adjoining their survey to build their road,[5] that the damages need not be appraised till after the materials were taken; that the commissioners had authority to assess damages for every act which the company might lawfully do under their charter; that the company had the right to take such materials, *in invitum*, and to use other land, without their survey,

[2] Poynder *v.* Great Northern Railway Co., 16 Sim. 3; s. c. 5 Railw. Cas. 196.

[3] Statute 8 & 9 Vict. c. 20, § 32.

[4] In Webb *v.* Manchester & Leeds Railway Co., 4 Myl. & C. 116; s. c. 1 Railw. Cas. 576, 599, Lord Chancellor COTTENHAM, is reported to have said: "The powers given to these companies are so large, and frequently so injurious to the interests of individuals, that I think it is the duty of every court to keep them most strictly within those powers, and if there is any reasonable doubt as to the extent of their powers, they must go elsewhere and get enlarged powers, but they will get none from me, by way of construction of the act."

[5] Vermont Central Railroad Co. *v.* Baxter, 22 Vt. 365. See also Bliss *v.* Hosmer, 15 Ohio, 44; Lyon *v.* Jerome, 15 Wend. 569; Wheelock *v.* Young, 4 Wend. 647. Also Lesher *v.* Wabash Navigation Co., 14 Ill. 85. See *infra*, § 68.

for * preparing stone for their use; that the same right equally resided in the contractors to build the road; and that the corporation is liable to the land-owner for materials so taken by the contractors, notwithstanding any stipulations in the contract of letting exempting them from such liability, as between themselves and the contractors.

5. It has sometimes been made a question, in this country, how far the legislature could confer upon railway companies the power to take materials, without the limits of their survey, *in invitum*.[5] And in a somewhat recent case,[6] where the charter of the company authorized them to take land, so much as might be necessary for their use, and also to take for certain purposes earth, gravel, stone, timber, or other materials, on or from the land *so taken*, it was held the company were not thereby empowered to take materials from land not taken.

6. But a railway company, who enter upon land to construct their road before the time for filing the location of their line, are liable as trespassers, if the location when filed does not cover the land so entered upon.[7]

7. And the *onus* is upon the company to justify by showing that the land is covered by the authorized location.[7] The location filed by the company is conclusive evidence of the land taken and cannot be controlled by extrinsic evidence, though a plan or map, made a part of the description of the location, and filed with the written location, may be referred to for explanation, but not to modify or control the written location.[7]

[5] Parsons *v.* Howe, 41 Me. 218. And under the English statute it has been held that the company is not justified in taking compulsorily land required, not for the location of any portion of the works, but to supply earth or other material to be used on other land. Bentinck *v.* Norfolk Estuary Co., 8 De G. M. & G. 714.

[7] Hazen *v.* Boston & Maine Railroad Co., 2 Gray, 574; Stone *v.* Cambridge, 6 Cush. 270; Hayes *v.* Shackford, 3 N. H. 10; Lewiston *v.* County Commissioners, 30 Me. 19; Little *v.* Newport, Abergavenny, & Hereford Railway Co., 12 C. B. 752; s. c. 14 Eng. L. & Eq. 309; Springfield *v.* Connecticut River Railroad Co., 4 Cush. 63, 69, 70.

*SECTION V.

Power to take temporary Possession of Public and Private Ways.

1. Company in England may take possession of public or private ways, in building its works. Compensation.
2. Remedy for obstruction under the statutes, unless damage is special.
3. Person excavating highway in building sewer responsible only for restoration.

§ 67. 1. Under the English statute,[1] the company have the power, upon notice, to take temporary possession of private roads; and by other sections, they may take possession of, cut through, and interrupt public roads. But in all such cases the damage is to be compensated, and the road restored, when practicable, and if not, a substituted one made.

2. If a private way be obstructed, the remedy is to sue for penalty under the statute, or to bring an action under the statute for special damage. But it is said an action upon the case for the obstruction cannot be maintained, except in the case of special damage, which is expressly saved by the statute.[2]

3. A party who excavates a public highway for the purpose of constructing a sewer, by contract with the public authorities, and who properly restores the same at the termination of his work, is not further responsible. But the parish must look after the subsequent repairs, whether rendered necessary by the natural subsidence of the earth, by reason of the former excavation, or by ordinary wear and tear.[3]

[1] Statute 8 & 9 Vict. c. 20, § 30.

[2] Watkins *v.* Great Northern Railway Co., 16 Q. B. 961; s. c. 6 Eng. L. & Eq. 179. But in Rangeley *v.* Midland Railway Co., Law Rep. 3 Ch. Ap. 306, it is said the company has no power under the statute to divert a public foot-path, so as to place it on land of which it had not acquired the title.

[3] Hyams *v.* Webster, Law Rep. 2 Q. B. 264.

*SECTION VI.

Land for Ordinary and Extraordinary Uses.

1, 2. Uses for which land may be taken. Necessary uses.
3. Implied right of company in adjoining state forming junction at state line.

§ 68. 1. By the English statutes, railway companies may not only purchase land for the purpose of the track, but also for all such extraordinary uses as will conduce to the successful prosecution of their business.[1] (*a*) This includes the site of stations,

[1] Statute 8 & 9 Vict. c. 20, § 45. This section is operative to enable the company to take land for extraordinary purposes, beyond the line of deviation, only by consent of the owners. But the justices have no jurisdiction, under the Railway Clauses Consolidation Act, to determine when accommodation works are necessary, but only what works are necessary, assuming that some such works are to be made. Regina *v.* Waterford Railway Co , 2 Ir. Law, 580. See *infra*, § 93 *et seq.* In Chicago, Burlington, & Quincy Railroad Co. *v.* Wilson, 17 Ill. 123, it was held, that a grant to a railway company to construct a road, with such appendages as might be deemed necessary for the convenient use thereof, authorized the taking of land for workshops. And this power is not exhausted by the apparent completion of the road. If an increase of business shall require other appendages, or more room for tracks, it may in like manner be taken, *toties quoties*. But the land-owner may traverse the right of the company to take the land, and have it determined by the proper tribunal. South Carolina Railroad Co. *v.* Blake, 9 Rich. 228. So also the company may take land for erecting a paint-shop and lumber and timber-sheds for the use of the company. Low *v.* Galena & Chicago Union Railroad Co., 18 Ill. 324. And the company may take all lands requisite for stations, for the storing and keeping of cars and engines, for the receipt and delivery of freight and for its safe storage. And it is no answer to this claim that there are other lands suitable for those uses which the company might purchase, or that the company already has a limited interest in the lands proposed to be taken. *In re* New York & Harlem Railroad Co., 46 N. Y. 546.

(*a*) New York Central & Hudson River Railroad Co. *v.* Metropolitan Gas-Light Co., 5 Hun, 201 ; s. c. 63 N. Y. 326; Cother *v.* Midland Railway Co., 2 Phillips, 469. Under the New York statute the company has in a considerable degree the power to determine the measure of its wants and to select locations. New York Central & Hudson River Railroad Co. *v.* Metropolitan Gas-Light Co., 5 Hun, 201; s. c. 63 N. Y. 326. As to the taking of additional ground at a junction, to give more track room, &c., see

yards, wharves, places for the accommodation of passengers, and the deposit of freight, both live and dead, and for the erection of weighing-machines, toll-houses, offices, warehouses, and other buildings and conveniences; land for ways to the railway while in the course of construction, and to stations always. But a railway company in England cannot acquire the fee of land for the mere purpose of excavating soil in order to construct an embankment.[2] (*b*) And it has been decided that a railway company cannot take land for any subsidiary purpose, even where the direct act of the company comes within the powers granted them.[3] As where they proposed * to alter the course of the road, in such a manner as to accommodate an adjoining land-owner, in consideration of which he proposed to pay a portion of the expense of the alteration, the company were enjoined from making the alteration, although coming clearly within their powers if done solely for their own accommodation. The ground of the injunction was, that the alteration required the removal of the house of A., and the change was made partly for the accommodation of B., a purpose not within the powers granted the railway company. But it is incident to the grant of a railway, that it may lay down as many sidings and other collateral tracks as are fairly requisite to accommodate its business.[4] But this will not allow the company to build a branch road on a different route from that embraced in its charter.[4]

2. The same may undoubtedly be done in this country, whether any express provision to that effect is contained in the charter of the company, or the general statutes of the state, or not; such

[2] Eversfield *v.* Midsussex Railway Co., 1 Gif. 151; s. c. affirmed, 3 De G. & J. 286.

[3] Dodd *v.* Salisbury & Yeovil Railway Co., 1 Gif. 158; s. c. on appeal, 5 Jur. N. S. 782.

[4] Bangor, Oldtown, & Milford Railroad Co. *v.* Smith, 47 Me. 34. A grant to cross a highway will not justify running parallel to and upon it. Ib.

Union Railroad Transfer & Stockyard Co. *v.* Moore, 80 Ind. 458. And as to ground for workshops, see Southern Pacific Railroad Co. *v.* Raymond, 53 Cal. 223.

(*b*) Nor can it in this country acquire land outside its way by the exercise of the right of eminent domain for the procurement of gravel for ballast. New York & Canada Railroad Co. *v.* Gunnison, 3 Thomp. & C. 632. But see Valley Railway Co. *v.* Bohm, 34 Ohio St. 114.

power being necessarily implied, as indispensable to the accomplishment of the general purposes of the corporation, and the design of the legislative grant. (*c*)

3. And the same implied power is to be extended to a railway corporation, in a neighboring state, with which, by express statute, railways of the state where the lands lie have the right to unite at the line of the state,[5] or to extend their road into

[5] State *v.* Boston, Concord, & Montreal Railroad Co., 25 Vt. 433; s. c. 1 Redf. Am. Railw. Cas. 84. In this case a railway company in New Hampshire had constructed a road to the line of Vermont (where by statute of Ver-

(*c*) To condemn property for the use of a railway, it is necessary that the use should be public. Tracy *v.* Elizabethtown Railroad Co., 80 Ky. 259; Edgewood Railroad Co.'s Appeal, 79 Penn. St. 257; Hoggatt *v.* Vicksburg, Shreveport, & Pacific Railroad Co., 31 La. An. 624. Land cannot be taken for a purely private industry, not, e. g., to build a flume to carry off the tailings from a mine. Consolidated Channel Co. *v.* Central Pacific Railroad Co., 51 Cal. 269. If the use be falsely represented as public and the court so induced to condemn, the state may interpose by its proper law officer to correct the abuse. People *v.* Pittsburg Railroad Co., 53 Cal. 694. The right is limited to such property as is necessary. *In re* New York Central & Hudson River Railroad Co., 77 N. Y. 248; Chicago & Western Indiana Railroad Co. *v.* Dunbar, 100 Ill. 110; Tracy *v.* Elizabethtown Railroad Co., 80 Ky. 259. But see Sadd *v.* Maldon, Witham, & Braintree Railway Co., 6 W. H. & G. 143. *Prima facie* the decision of the general manager of a railroad is a proper measure of the necessity. Dietrichs *v.* Lincoln & Northwestern Railroad Co., 13 Neb. 361. And see Smith *v.* Chicago & Western Indiana Railroad Co., 105 Ill. 511; Stringham *v.* Oshkosh & Mississippi Railroad Co., 33 Wis. 471. As to what is deemed necessary under the statutes of Maine, see Spofford *v.* Bucksport & Bangor Railroad Co., 66 Me. 26. As to the width of the right of way, whether one hundred feet or more, see Chicago, Rock Island, & Pacific Railroad Co. *v.* People, 4 Brad. Ap. 468; Wisconsin Central Railroad Co. *v.* Cornell University, 52 Wis. 537; Johnston *v.* Chicago, Milwaukee, & St. Paul Railway Co., 58 Iowa, 537. Nor does the law require the company to condemn all the land it may need at once. It may acquire additional land as it is needed for its business. Central Branch Union Pacific Railroad Co. *v.* Atchison, Topeka, & Santa Fe Railroad Co., 26 Kan. 669; Dietrichs *v.* Lincoln & Northwestern Railroad Co., *supra;* Fisher *v.* Chicago & Springfield Railroad Co., 101 Ill. 323. As to what land may be so taken, see State *v.* United New Jersey Railroad & Canal Co., 43 N. J. Law, 110; Curtis *v.* St. Paul, Stillwater, & Taylor's Falls Railroad Co., 20 Minn. 28. Land for widening roadway. Beck *v.* United New Jersey Railroad & Canal Co., 39 N. J. Law, 15. Land for sidetracks. Getz's Appeal, 3 Am. & Eng. Railw. Cas. 186; Fisher *v.* Chicago & Springfield Railroad Co., 101 Ill. 323. Land for wharves on the Hudson. *In re* New York Central & Hudson River Railroad Co., 77 N. Y. 248.

this state.[6] * And for the purpose of exercising the rights conferred by their act upon the company, the contractor for the execution of railway works must be deemed an agent of the company.[7]

mont, two other roads were permitted to unite with any New Hampshire road), and had there purchased land, adjoining the terminus of its road, on the western bank of the Connecticut River, the bridge being all in New Hampshire except the western abutment, which was on Vermont soil. The company had no express grant from the legislature of Vermont. A controversy arose between the New Hampshire company and the Vermont companies in regard to the terms of junction, and a *quo warranto* was prosecuted on behalf of the state, to determine the right of the New Hampshire company to purchase and hold lands in Vermont. It was attempted to maintain, on the part of the prosecution, that there existed a right in any state to confiscate or escheat lands held by a foreign corporation. But the court repudiated the proposition, and held that the New Hampshire company, by the grant from Vermont to the Vermont roads of the right to form a junction, at the state line, had by implication acquired permission to purchase and hold so much land as was necessary for the accommodation of its business, present and prospective, at that point, whether any junction had yet been arranged or not; and that fifteen acres was not an unreasonable amount of land for such purposes. The court did not hold that the New Hampshire company had any right to take land by compulsory proceedings in Vermont, or that its purchase would deter the Vermont roads from taking by statutory compulsion from them such portions of the same land as they might require for their purposes. See also Nashville Railroad Co. *v.* Cowardin, 11 Humph. 348. In New Hampshire, Crosby *v.* Hanover, 20 Law Rep. 646, it was held that the franchise of a toll-bridge across the Connecticut River might be taken for a free highway, on compensation being made to the proprietors; and that it made no difference that one of the abutments of the bridge was in Vermont, and consequently could not be taken by any proceedings in New Hampshire. s. c. 36 N. H. 404.

[6] New York & Erie Railway Co. *v.* Young, 33 Penn. St. 175.

[7] Semple *v.* London & Birmingham Railway Co., 9 Sim. 209; s. c. 1 Railw. Cas. 480; Vermont Central Railroad Co. *v.* Baxter, 22 Vt. 365; *supra*, § 66; Lesher *v.* Wabash Navigation Co., 14 Ill. 85.

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SECTION VII.

Title acquired by Company.

1, 7, 8. Company acquires only right of way. Right to herbage and minerals.
2. Can take nothing from soil except for construction.
3. Deed in fee may convey only right of way, company being incapable of holding fee.
4. Whether company has an estate subject to execution.
5. Whether company having right to cross way of another, bound to purchase.
6. Conflicting rights in different companies.
9–11. Fee in, and right of company to use, streets of a city.
12, 13. Land reverts to the owner on discontinuance of public use.
14. True rule stated.
15. Title of company depending on conditions, conditions must be performed.
16. Further assurance of title.
17. Condemnation cannot be impeached.
18. Fee acquired by public, no reverter on discontinuance of public use.

§ 69. 1. Questions have sometimes arisen in regard to the precise title acquired by a railway company in lands purchased by them, where the conveyance is a fee-simple. It is certain, in this country, upon general principles, that a railway company, by virtue of their *compulsory powers, in taking lands, could acquire no absolute fee-simple, but only the right to use the land for their purposes. And it is very questionable whether a railway, in such case, is entitled to the herbage growing upon the land, or to cultivate the same, or to dig for stone or minerals in the land, beyond what is necessary for their purposes in construction.

2. In England, the statutes[1] (*a*) give all such minerals to the

[1] Statute 8 & 9 Vict. c. 20, § 17. In Connecticut & Passumpsic Rivers Railroad Co. *v.* Holton, 32 Vt. 43, it was decided, that the land-owner, after his land has been legally appropriated for the track of a railway, has no right to enter on

(*a*) See Leavenworth, Topeka, & Southwestern Railway Co. *v.* Paul, 28 Kan. 816, as to the right to herbage. In *In re* Hartford & Connecticut Western Railroad Co., 65 How. Pr. 133, it was held that the company acquired only the right to use the land for the purposes of its incorporation, and hence need not pay for minerals under the surface.

The title acquired under statute is sufficient in defence of an ejectment against the company. Great Western Railway Co. *v.* Lutz, 32 U. C., C. P. 166.

In Mississippi River Bridge Co. *v.* Ring, 58 Mo. 491, it was held that on condemnation of land the buildings thereon belonged to the company, and that trespass would lie for their removal. So of trees, which may be useful in the construction of the road. Taylor *v.* New York & Long Branch Railroad Co., 38 N. J. Law, 28.

former owner of the land, except such as are necessary in construction, unless the same shall have been expressly purchased. And in this country, no doubt, the same construction would be adopted, in regard to all lands taken by compulsory proceeding.[2]

*3. But it admits of some question, we think, what is the precise effect of a deed, in fee-simple, to a railway company. It would seem, upon general principles, that the grantor should be estopped from claiming any interest in the land, after the execution of his deed. But it seems to be agreed, in all the books, that, to the efficacy of a deed of land, it is requisite that the grantee be capable of taking the estate. And if the grantee be an alien, or a corporation incapable of holding such estate, the deed is inoperative. Hence, in some of the cases, it seems to be a just inference from the reasoning of the court, that a railway, by a deed in fee-

it or use it for any purpose which in the least endangers or embarrasses its use for any purpose for which the railway has appropriated it. No right, e. g., to enter with teams to remove turf, the effect of which would be to enhance the danger of cattle getting on the track, and to increase the dust by the passage of the cars. Nor can the owner cross the track at any point other than that established by the taking of the land; nor can he build a farm-crossing, unless established by law. In Troy & Boston Railroad Co. *v.* Potter, 42 Vt. 265, it was decided that the owner of the fee of land condemned for the use of a railway has no right to enter on the land while in the use of the railway, and take therefrom the herbage and other products of the soil. And the company may maintain trespass for all unlawful entries and acts on the land appropriated to its use when such acts interfere with their exclusive possession. S. P. in North Pennsylvania Railroad Co. *v.* Rehman, 5 Am. Law Reg. N. S. 49.

[2] Baker *v.* Johnson, 2 Hill, N. Y. 342. It was held here, that a contractor to build a canal, who stipulated to find all the materials, with the privilege of using all the earth obtained by excavation, might also use the stone obtained by excavating the bed of the canal across plaintiff's land. Timber standing on land taken for a railway belongs to the owner of the land, except so far as necessary for the construction and repair of the road. Preston *v.* Dubuque & Pacific Railroad Co., 11 Iowa, 15. Earth and minerals above the grade of the road may be used by the company, but those below belong to the owner of the land. Evans *v.* Haefner, 29 Mo. 141.

The condemnation of land for the construction of a railway justifies the entry and necessary excavation of the soil by the company and its servants. Green *v.* Boody, 21 Ind. 10. But stone excavated in the construction, and not used on any portion of the line, belongs to the owner of the land. Chapin *v.* Sullivan Railroad Co., 39 N. H. 564. But it seems from this, and from the general practice in the construction of railways, that earth or any other material excavated on one portion of the line may be used on any other portion, if required.

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simple, acquires only a right of way,[3] that being all which such corporation is capable of taking.

4. It has been held in some of the states, that the lands of a railway company are subject to sale upon execution against them, or may be assigned by them.[4] So, too, they may purchase and

[3] Dean *v.* Sullivan Railroad Co., 2 Fost. N. H. 316; United States *v.* Harris, 1 Sumner, 21. It is held in some cases, that a grant to a railway, before its incorporation, is valid, not being the conveyance of a fee, and, to its operation and effect, not requiring the existence of a grantee, at the time of the conveyance. Rathbone *v.* Tioga Navigation Co., 2 Watts & S. 74. But it seems now to be considered that railway companies may acquire the absolute fee in land by purchase and deed in fee-simple, and the title will remain in the company after it has changed the location of its road, and ceased to use it for corporate purposes. Page *v.* Heineberg, 40 Vt. 81.

[4] Arthur *v.* Commercial & Railroad Bank, 9 Sm. & M. 394. But this right to levy on the lands of a railway company extends to such lands only, however acquired, as are not requisite to the full exercise and enjoyment of the corporate franchise. Plymouth Railroad Co. *v.* Colwell, 39 Penn. St. 337. And a canal basin is not such a legitimate incident of a railway franchise as to be protected from levy, where there is no authorized canal connection. Ib. And town lots held by a railway company are not to be regarded as an incident of the franchise, so as to pass by a mortgage of the road "with its corporate privileges and appurtenances," unless directly appurtenant to the road and indispensably necessary to the exercise of its franchises. Shamokin Valley Railroad Co. *v.* Livermore, 47 Penn. St. 465. It has been held, that railway bonds were liable to levy on execution, but that seems questionable. Hetherington *v.* Hayden, 11 Iowa, 335.

In Hill *v.* Western Vermont Railroad Co., 32 Vt. 68, the company, before the road was laid out or surveyed, procured a bond from one for such of his lands as should be required for the road. The charter provided that the directors might cause a survey, and fix the line, and that the company might enter and take such lands as were necessary for the road and accommodations. The survey of the road, made by order of the directors, designated certain land belonging to such person as depot grounds; and the company paid him for it, but never took a conveyance. The plaintiff levied on a portion of land as the property of the company, and brought ejectment for possession. The referee found that a part of the land embraced in the levy was not necessary to the company, and would not become so. It was held, that the company was not entitled to conveyance of any greater quantity than it required for depot accommodations; that under the charter the company could not acquire any more land, or any greater estate therein, than was really requisite; that the estate requisite was a mere easement, and therefore, not subject to levy; that when taken for such purposes, the rule was the same, whether the land was taken compulsorily or under an agreement; that under the charter the directors had power to lay out the road and stations as they saw fit; and that, so long as they acted in good faith, their decision as to the quantity of land required for depot accommodations would be conclusive.

* hold land for the procurement of materials, or for the economical construction of the road.[5] (*b*) In an English case,[6] it was held that the railway could not use land, thus conveyed, for any other purpose than that expressed in the acts of parliament, by virtue of which the company exercised their functions.

5. It has been held that, where one railway has power in their act to cross another railway, there being no express permission in the act for one company to take land, or for the other company to sell, that the first company could not be compelled, by mandamus, to purchase any of the land upon which the other road was constructed, their only claim being one for damages.[7] So, also, the right to make a junction with a pre-existing railway does not imply the power to take the title to any of the lands of such railway, unless that is indispensable to effect the junction, but only to enter upon such lands, by way of easement, for the purpose of effecting the junction.[8]

6. But where the legislature confer the power upon two railway * companies to purchase compulsorily the same piece of land, and one company has taken the land and constructed their road upon it, equity will enjoin the other company from proceeding to take it compulsorily for their use, until the conflicting rights of the companies are determined by a trial at law.[9]

7. The general course of decisions in this country coincides with the English common-law rule, in regard to the title acquired by the public, by the exercise of the right of eminent domain, that is, that no more of the title is divested from the former owner than what is necessary for the public use. The owner may still maintain trespass for any injury to the freehold by a stranger.[10]

[5] Overmyer *v.* Williams, 15 Ohio, 26.

[6] Bostock *v.* North Staffordshire Railway Co., 3 Smale & G. 283.

[7] Regina *v.* South Wales Railway Co., 13 Q. B. 988; s. c. 6 Railw. Cas. 489.

[8] Oxford, Worcester, & Wolverhampton Railway Co. *v.* South Staffordshire Railway Co., 1 Drewry, 255; s. c. 19 Eng. L. & Eq. 131.

[9] Manchester, Sheffield, & Lincolnshire Railway Co. *v.* Great Northern Railway Co., 9 Hare, 284; s. c. 12 Eng. L. & Eq. 216.

[10] Dovaston *v.* Payne, 2 H. Bl. 527; Rust *v.* Low, 6 Mass. 90; Jackson *v.* Rutland & Burlington Railroad Co., 25 Vt. 151; s. c. 1 Redf. Am. Railw. Cas. 362; 2 Rol. Abr. 566, pl. 1.

(*b*) A company may not take the fee merely for the purpose of procuring soil to make an embankment. Eversfield *v.* Mid-Sussex Railway Co., 1 Gif. 153.

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8. And in regard to railways, in particular, it has been repeatedly decided in the different states, that they take only an easement in land condemned for their use.[11] In an important case[12] in the Supreme Court of the United States, involving questions of title in regard to the streets in the city of Pittsburgh, Mr. Justice McLean thus sums up the general doctrine : —

"By the common law, the fee in the soil remains in the original owner where a public road is established over it; but the use of the road is in the public. The owner parts with this use only; for * if the road shall be vacated by the public he resumes the exclusive possession of the ground; and while it is used as a highway he is entitled to the timber and grass which may grow upon the surface, and to all minerals which may be found below it. He may bring an action of trespass against any one who obstructs the road."

9. But a query is expressed here, as in many other cases, whether this rule applies to the streets and thoroughfares of cities. In a case in one of the British provinces on this continent, Nova Scotia, it is said to have been held, by a divided court, after long debate and deliberation, that the title to land covered by a highway or street, vested absolutely in the crown, and that the owner had no reversionary interest.[13]

10. Some of the American cases seem to intimate a different rule from that which generally prevails in reference to highways,

[11] Railroad Co. *v.* Davis, 2 Dev. & Bat. 457; Dean *v.* Sullivan Railroad Co., 2 Fost. N. H. 316; Ellicottville & Great Valley Plank Road *v.* Buffalo & Pittsburg Railroad Co., 20 Barb. 644; Weston *v.* Foster, 7 Met. 297. In a case in Ohio, where the subject seems to have been examined with care, it is laid down, that only such interest as will answer the public wants can be taken; and that it can be held only so long as it is used by the public, and cannot be diverted to any other purpose. Giesy *v.* Cincinnati, Wilmington, & Zanesville Railroad Co., 4 Ohio St. 308. See also Hooker *v.* Utica & Minden Turnpike Co., 12 Wend. 371; People *v.* White, 11 Barb. 26; Blake *v.* Rich, 34 N. H. 282. The title of the land-owner is thus defined in this last case: The exclusive right of property in the land, in the trees and herbage on its surface, and in the minerals below it, remains unchanged, subject always to the right of the company to construct and operate its road in any legally authorized mode.

[12] Barclay *v.* Howell, 6 Pet. 498. Cases going to this point are very numerous, and they may be found collected in 3 Kent Com. 432, and notes. By the civil law, it is said, the soil of public highways is in the public, and the law of Louisiana is the same. Renthorp *v.* Bang, 4 Mart. La. 97.

[13] Koch *v.* Dauphin, James, 159.

in regard to the title acquired by railway companies.[14] (*c*) But in one case[15] it was held, that the municipal authority of a city have no power to grant permission to a railway company to take or injure the property of a citizen; but the companies have an implied authority to make such side-tracks and continuations at the termini of their road as may be reasonable and necessary for the transaction of their business and the accommodation of the public, and may take private property for these purposes. The right to * use and enjoy the street is an appurtenance to the adjoining land, and an injury to the appurtenance is an injury to the whole property; and as for such an injury the statute prescribes no remedy, the land-owner must resort to his common-law remedy.

11. But in a case in Massachusetts,[16] the title seems to us

[14] Wheeler *v.* Rochester & Syracuse Railroad Co., 12 Barb. 227; Munger *v.* Tonawanda Railroad Co., 4 Comst. 349; Coster *v.* New Jersey Railroad Co., 3 Zab. 227. The New York Court of Appeals, on elaborate examination, came to the conclusion, that a deed to a railway company, granting land to it and its successors, conveys an estate in fee. Nicoll *v.* New York & Erie Railroad Co., 12 N. Y. 121. But see Henry *v.* Dubuque & Pacific Railroad Co., 2 Iowa, 288. In De Varaigne *v.* Fox, 2 Blatchf. C. C. 95, it was held, that where the statute conferred the right to take the fee of land, and it was taken on compensation accordingly, the court will not construe the grant as a conditional fee or usufruct, leaving a possible reverter to the original proprietor, but will regard the entire property as vested in the grantee forever; and that if any right accrues to the former owner in consequence of the change of the destination of the property, after the continuance of the use for twenty-six years, it is an equitable and not a legal right.

[15] Protzman *v.* Indianapolis & Cincinnati Railroad Co., 9 Ind. 467. What shall be a reasonable extension of the track of a railway in a city beyond the depot is here discussed. It seems to be more a question of fact than of law. Evansville & Crawfordsville Railroad Co. *v.* Dick, 9 Ind. 433.

[16] Hazen *v.* Boston & Maine Railroad Co., 2 Gray, 574. But the company has no right to do any act on the land not conducive to the use of the land for the purposes of the grant; but of the character of the act the

(*c*) Oregon Railway & Transportation Co. *v.* Oregon Real Estate Co., 10 Oreg. 444; Williams *v.* Western Union Railway Co., 50 Wis. 71; Kansas Central Railway Co. *v.* Allen, 22 Kan. 285. The legislature has power, however, to provide that the fee may be acquired. Sweet *v.* Buffalo, New York, & Philadelphia Railway Co., 13 Hun, 643; s. c. affirmed 79 N. Y. 293; Scott *v.* St. Paul & Chicago Railway Co., 21 Minn. 322; Challis *v.* Atchison, Topeka, & Santa Fe Railroad Co., 16 Kan. 117. And accordingly in proceedings under statutes making such provisions a fee is acquired. Challis *v.* Atchison, Topeka, & Santa Fe Railroad Co., *supra*.

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to be explicitly and fully stated, and the only ground of distinction between railways and common highways, as to the title of the land taken, very intelligibly pointed out. The court here say, "The right acquired by the corporation, although technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically exclusive."

12. Hence, it seems to be admitted that, even in cases where the statute provides for the taking of the fee, upon the discontinuance of the public use, the land reverts to the former owner.[17] But where a special act authorizes a municipal corporation to hold the fee of the soil for the site of an almshouse, it was held that the original owner and his representatives could claim no exclusive interest therein, or any reversionary title thereto, after the removal of the almshouse to another site.[18]

* 13. In some of the cases in this country, it has been held that it is only the residuum of title remaining in the corporation, at the time a railway is discontinued, that reverts to the former owner of the land, and that, in the mean time, the company may wholly defeat the reversion, by a conveyance in fee-simple; and this remarkable proposition is distinctly announced in one case:[19] — "Corporations have a fee-simple for purposes of alienation, but they have only a determinable fee for purposes of enjoyment."

14. If it were said that corporations, created for special purposes of intercommunication, like railways and canals, and invested with the sovereign prerogative of eminent domain for these purposes only, had no interest, or estate, in lands whatever, except for the mere purpose of carrying on the functions with which they were invested by the state, and could neither use nor convey the lands, to be used for any other purpose whatever, it would

company is the judge. Brainard *v.* Clapp, 10 Cush. 6. In this case, Shaw, C. J., defines the title of the railway, in lands taken for its use. See Chicago & Mississippi Railroad Co. *v.* Patchin, 16 Ill. 198.

[17] People *v.* White, 11 Barb. 26; United States *v.* Harris, 1 Sumner, 21. But by the repeal of a charter the lands do not revert. The franchises of the corporation are resumed by the state, and the railway remains public property, subject to the management and control of the state. Erie & Northeast Railroad Co. *v.* Casey, 26 Penn. St. 287. But see Rexford *v.* Knight, 11 N. Y. 308.

[18] Hayward *v.* New York, 3 Seld. 314. So also in regard to lands appropriated to the use of the state canals. Rexford *v.* Knight, 11 N. Y. 308.

[19] Nicol *v.* New York & Erie Railway Co., 12 Barb. 460. See State *v.* Rives, 5 Ire. 297.

seem far more in accordance with established principles and generally received notions upon the subject. In the same case it is said, a grant to a corporation, created only for a term of years, purporting to convey a fee, will not be construed to convey only a term for years.

15. In all these cases where the title of the company depends upon conditions, they must be strictly performed and strictly construed.[20] (*d*)

16. But where, by the law of the state, railways, upon discovery that the title they are acquiring may prove defective, have the right to take new proceedings, it was held, that the discovery of a mortgage upon lands will justify the abandonment of pending process, and instituting procedure under the section which allows them to extinguish incumbrances on that portion required for their road.[21] And the appraisal of land subject to an easement in the grantor is irregular, and no title passes.[22]

17. After land is condemned for the use of a railway, the adjudication * can no more be impeached by any collateral proceeding, or by evidence, than the judgment of any other court of exclusive jurisdiction.[23] And it was held, under the Pennsylvania statute,[24] that after the award of land damages, and payment of the money, the company become the owners of the land notwithstanding the pendency of a *certiorari* to remove the case into the Supreme Court.[25]

18. Where the Commonwealth of Pennsylvania, in the construction of her public works, acquired the fee-simple of land taken therefor, either by purchase or the right of eminent domain, and the land was devoted to the use of a highway, a cessation of that use does not revest the title in the former owner.[26]

[20] Bangor & Piscataqua Railroad Co. *v.* Harris, 8 Me. 533; Levering *v.* Philadelphia, Germantown, & Norristown Railroad Co., 8 Watts & S. 459; Munger *v.* Tonawanda Railroad Co., 4 Comst. 349; Carr *v.* Georgia Railroad & Banking Co., 1 Kelly, 524.

[21] *In re* New York Central Railroad Co., 20 Barb. 419.

[22] Hill *v.* Mohawk & Hudson Railroad Co., 3 Seld. 152.

[23] Hamilton *v.* Annapolis & Elk Ridge Railroad Co., 1 Md. Ch. 107.

[24] Stat. of 1829, § 15.

[25] Schuler *v.* Northern Liberties & Penn Township Railroad Co., 3 Whart. 555; *supra*, § 65; *infra*, § 73.

[26] Haldeman *v.* Pennsylvania Central Railroad Co., 50 Penn. St. 425. See also

(*d*) See *supra*, part 3, c. 11, § 3.

*SECTION VIII.

Corporate Franchises condemned.

1. Road franchise may be taken.
2. Compensation must be made.
3. Railway franchise may be taken for another company.
4. Rule defined. Grant of land for one public use must yield to that of another more urgent.
5, 6. Constitutional restrictions. Obligation of charter contract.
7. Inviolable contract rights not taken by implication.
8. Legislative discretion, former grant not exclusive.
9. Highways and railways compared.
10. Exclusive character of grant does not preclude exercise of the right of eminent domain.
11. Exclusiveness of the grant, a subordinate franchise.
12. Legislature cannot create a franchise, above the reach of eminent domain.
13. Legislature may apply streets in city to any public use.
14. Compensation in such cases to the owner of the fee. Converting canal into railway.

§ 70. 1. The franchise of a turnpike, or bridge, or other similar corporation may be taken for a free road, or for a railway, which, as we have said, is an improved highway.[1] (*a*) And it will make

as to proceedings under Lateral Railroad Acts of Pennsylvania, Brown *v.* Peterson, 40 Penn. St. 373; Boyd *v.* Negley, 40 Penn. St. 377; Pittsburg *v.* Pennsylvania Railroad Co., 48 Penn. St. 355. It seems scarcely necessary to state that the final judgment of condemnation and the payment of the award vests in the company the absolute right to use the land embraced in the judgment for all its legitimate purposes. Dodge *v.* Burns, 6 Wis. 514; Burns *v.* Milwaukee & Mississippi Railroad Co., 9 Wis. 450. And the acceptance of the value of the land by the land-owner, however the amount may have been ascertained, is an acquiescence in the taking, as much as a conveyance by deed. Ib. He cannot accept the amount of an award of damages, and also appeal therefrom. Mississippi & Missouri Railroad Co. *v.* Byington, 14 Iowa, 572. But where the parties refer the question of the amount of damages, and the award is that the amount be paid simultaneously with the making of conveyance, and the company offers to perform but the owner declines, he cannot, many years afterwards, maintain an action against the company for not performing. Smith *v.* Boston & Maine Railroad Co., 6 Allen, 262.

[1] Armington *v.* Barnet, 15 Vt. 745; West River Bridge *v.* Dix, 6 How. 507; s. c. 16 Vt. 446; White River Turnpike Co. *v.* Vermont Central Railroad Co., 21 Vt. 594; Boston Water Power Co. *v.* Boston & Worcester Railroad Co., 23 Pick. 360; Central Bridge Corporation *v.* Lowell, 4 Gray, 474.

(*a*) Lands taken for purposes of a station cannot be condemned afterwards for a highway. Prospect Park & Coney Island Railroad Co. *v.* William-

no difference that the franchise is situate partly within the limits of different states, as in the case of a bridge across a river which forms the divisional line between different states. But the proceedings in one state can only take what lies within its limits.[2]

2. But compensation, either for the entire franchise, which is the more common course and ordinarily the only just mode of procedure, or for the special injury, must be made.[3] But it is no objection to the validity of an act of the legislature, allowing a railway to carry its track across the land of a mill-dam company, incorporated by the legislature, that it contains no express provision for compensation to such mill-dam company. This is implied, as in other cases, where land is taken.[4] And the same implication has been held to extend to the case of a subsequent grant of a railway which materially depreciated the use and value of a prior grant of a bridge.[5] But it is the more commonly received opinion, that a subsequent grant, which only incidentally * oper-

[2] Crosby *v.* Hanover, 36 N. H. 404.

[3] West River Bridge *v.* Dix, 6 How. 507; Boston Water Power Co. *v.* Boston & Worcester Railroad Co., 22 Pick. 360. And see *infra*, note (*b*). But see 11 Leigh, 42.

[4] Boston Water Power Co. *v.* Boston & Worcester Railroad Co., *supra*.

[5] Enfield Toll-bridge Co. *v.* Hartford & New Haven Railroad Co., 17 Conn. 454; s. c. 17 Conn. 40.

son, 91 N. Y. 552; St. Paul Union Depot Co. *v.* St. Paul, 30 Minn. 359; Atlanta *v.* Central Railroad & Banking Co., 53 Ga. 120.

And in a proper case any corporate franchise may be taken in the exercise of the right of eminent domain. Philadelphia & Gray's Ferry Passenger Railway Co.'s Appeal, 102 Penn. St. 123. But not without statute. Baltimore & Ohio & Chicago Railroad Co. *v.* North, 23 Am. & Eng. Railw. Cas. 36. See *In re* New York, Lackawanna, & Western Railroad Co., 99 N. Y. 12. And statutory intent to that end is not to be implied. Baltimore & Ohio & Chicago Railroad Co. *v.* North, *supra*.

On repeal of a statute incorporating a railway company, the legislature may permit a new company incorporated instead of the old one to take its franchises. Greenwood *v.* Freight Co., 105 U. S. 13. But though a franchise may be taken, the right is not to be implied except in a case of clear necessity. Pennsylvania Railroad Co.'s Appeal, 93 Penn. St. 150.

The right of one railroad company to condemn a part of the lands of another is open for trial in condemnation proceedings. Cumberland & Pennsylvania Railroad Co. *v.* Pennsylvania Railroad Co, 57 Md. 267. And see Brown *v.* Philadelphia, Wilmington, & Baltimore Railroad Co., 58 Md. 539.

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ates injuriously to an earlier one, does not require compensation to be made for such injury, unless expressly so provided.[6]

3. So also may the franchise of one railway be taken for the construction of another railway.[7] (*b*)

[6] White River Turnpike Co. *v.* Vermont Central Railroad Co., 21 Vt. 594.

[7] Grier, J., in Richmond Railroad Co. *v.* Louisa Railroad Co., 13 How. 81, 82; s. c. 2 Redf. Am. Railw. Cas. 600; Newcastle & Richmond Railroad Co. *v.* Peru & Indianapolis Railroad Co., 3 Ind. 461.

(*b*) But of course the property of a railway company may not be taken without compensation. The property rights of such companies are as inviolable as those of persons. Grand Rapids, Newaygo, &c. Railroad Co. *v.* Grand Rapids & Indiana Railroad Co., 35 Mich. 265; Lake Shore & Michigan Southern Railway Co. *v.* Chicago & Western Indiana Railroad Co., 100 Ill. 21. Nor may land, necessary to the enjoyment of the essential franchises of such a company, be taken without special legislative authority. Dublin & Drogheda Railway Co. *v.* Navan & Kingscourt Railway Co., 5 Ir. Eq. 393; Lake Shore & Michigan Southern Railway Co. *v.* New York, Chicago, & St. Louis Railway Co., 8 Fed. Rep. 858; *In re* Cleveland & Pittsburg Railroad Co. 2 Pittsb. 348. Not even for a joint use with the elder company. Central City Horse Railway Co. *v.* Fort Clark Horse Railway Co., 81 Ill. 523. But land acquired by the exercise of the right of eminent domain, not necessary to the exercise of the franchise, may be taken by another company by the exercise of the same right. North Carolina Railroad Co. *v.* Carolina Central Railway Co., 83 N. C. 489; Peoria, Pekin, & Jacksonville Railroad Co. *v.* Peoria & Springfield Railroad Co., 66 Ill. 174. And a way may be taken across the way of another road. Great North of England Railway Co. *v.* Clarence Railway Co., 1 Coll. 507; St. Louis, Jacksonville, & Chicago Railroad Co. *v.* Springfield & Northwestern Railroad Co., 96 Ill. 274. But not without express authority. Clarence Railway Co. *v.* Great North of England Railway Co., 4 Q. B. 46. In making a crossing, temporary scaffolding may be placed on the land of the elder company. Great North of England Railway Co. *v.* Clarence Railway Co., 1 Coll. 507. As to damages for crossings, see St. Louis, Jacksonville, & Chicago Railroad Co. *v.* Springfield & Northwestern Railroad Co., 96 Ill. 271; Lake Shore & Michigan Southern Railway Co. *v.* Chicago & Western Indiana Railway Co., 100 Ill. 21. The condemnation of lands of a company which are not used for railroad purposes, for use in the construction of another road, will not avail in condemnation of the franchise. The right of way and the power to cross the track of the former road are all that will be acquired. State *v.* Eastern & Amboy Railroad Co., 36 N. J. Law, 180. A general grant of power to establish a road across a track, though sufficient to warrant the laying of a road wherever public necessity may demand, does not include power to appropriate the property of the company in such a way as to destroy or greatly injure its franchise. Hannibal *v.* Hannibal & St. Joseph Railway Co., 49 Mo. 480. For the location of a way across a track the

4. In one case the law upon this subject is thus stated, by SHAW, C. J.: "The court are of opinion, that it is competent for the legislature, under the right of eminent domain, to grant authority to a railway corporation to take a highway longitudinally in the construction of their road. The power of eminent domain is a high prerogative of sovereignty, founded upon public exigency, according to the maxim, *Salus reipublicæ lex suprema est*, to which all minor considerations must yield, and which can only be limited by such exigency. The grant of land for one public use must yield to that of another more urgent." [8]

5. The great question of the inviolability of corporate franchises, which we shall have occasion to discuss more at large hereafter,[9] is no doubt to a certain extent involved here. For, upon general principles of legislative authority, there could be no question that a corporation, which is the mere creature of the legislature, might be at once and unconditionally extinguished, by repeal of the charter. This is confessedly within the power of the legislative authority of the British parliament; and the legislative authority of the parliament of Great Britain is no more extensive than that of the legislatures of the American states, aside from restrictions contained in the constitutions of the United States and of the several states.[10]

6. The only limitation upon this power over private corporations, in most of the states, perhaps in all, is found in that provision of the United States Constitution which prohibits the legislatures of the several states from passing any law impairing the * obligation of contracts. And the proper limits of this re-

[8] Springfield *v.* Connecticut River Railroad Co., 4 Cush. 63; s. c. 1 Redf. Am. Railw. Cas. 299. See also, on the general subject, Chesapeake & Ohio Canal Co. *v.* Baltimore & Ohio Railroad Co., 4 Gill & J. 1; Forward *v.* Hampshire & Hampden Canal Co., 22 Pick. 462, where the prior company is held bound by acquiescence in the transfer of its franchises to another company. Irvin *v.* Turnpike Co., 2 Penn. 466; Rogers *v.* Bradshaw, 20 Johns. 735; Backus *v.* Lebanon, 11 N. H. 19.

[9] *Infra*, § 231.

[10] Dartmouth College *v.* Woodward, 4 Wheat. 518.

company is entitled to damages; but interference with the running of trains, the inconvenience and increased risk and expense, are not to be considered. Portland & Rochester Railroad Co. *v.* Deering, 23 Am. & Eng. Railw. Cas. 51. *Contra*, Chicago & Western Indiana Railroad Co. *v.* Englewood Connecting Railroad Co., 23 Am. & Eng. Railw. Cas. 56.

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striction, in regard to corporations, is not altogether well defined in the different opinions of the several judges of the supreme national tribunal upon this subject; nor is there any thing approaching unanimity among them.

7. But it may perhaps be regarded as settled, for the time at least, that where exclusive privileges are conferred upon private corporations, by express words or necessary implication, the grant is irrevocable and inviolable. But that the grant of any privilege or franchise carries no implied exclusion of similar privileges and franchises being conferred upon other persons, natural or corporate.[11] (*c*)

8. The legislature may in all instances determine when and where the public necessities require additional facilities, of a similar or analogous character, where the former grant is not exclusive.[11]

9. And in some cases of exclusive and perpetual grants, for common highways or bridges, it has been held, that this did not preclude the legislature from granting railways and railway bridges within the limits of the former grant.[12] In the case just referred to,[12] the court held, that a perpetual grant of a toll-bridge across the Cape Fear River, which in terms subjected all persons to a penalty for transporting persons or property across that river in any other manner, within six miles of the plaintiff's bridge, would not subject the defendant's company to the penalty for carrying persons and property across the river, upon their road, by means of a bridge erected within the six miles; that the grant was intended to be exclusive only as to all modes of travel and transportation then known, but not to exclude all improvements thereon, in all future time.[13]

[11] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; Thorpe *v.* Rutland & Burlington Railroad Co., 27 Vt. 140; s. c. 2 Redf. Am. Railw. Cas. 587; Boston & Lowell Railroad Co. *v.* Salem & Lowell Railroad Co., 2 Gray, 1; Mohawk Bridge Co. *v.* Utica & Schenectady Railroad Co., 6 Paige, 551; Hudson & Delaware Canal Co. *v.* New York & Erie Railroad Co., 9 Paige, 323.

[12] McRee *v.* Wilmington & Raleigh Railroad Co., 2 Jones, N. C. 186. But see Enfield Bridge Co. *v.* Hartford & New Haven Railroad Co., 17 Conn. 40, 454.

[13] But this distinction is certainly not attempted to be maintained in the majority of the cases on this subject, either in England or in this country. *Infra*, § 231 *et seq.*

(*c*) St. Clair County Turnpike Co. West Jersey Railroad Co., 101 U. S. *v.* Illinois, 96 U. S. 63; Thomas *v.* 71.

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10. But the exclusive character of a corporate grant will not preclude the power to take the franchise, upon making compensation, * under the right of eminent domain, the stipulation in the charter, that the grant shall be exclusive of all others, being subject to the same law as other property, whether in possession or action; all which is confessedly subject to the exercise of the right of eminent domain, by the sovereign.[14]

11. It has sometimes been characterized as a refinement or an invention, to identify the covenant, in the charter of a private corporation, that the grant shall be exclusive of all others, with the charter itself, and thus subject it to the law of eminent domain. But it seems to us entirely a sound view, in all cases where the whole franchise of the corporation is proposed to be taken, and that the charge of refinement is rather to be laid at the door of such as attempt to raise a distinction between the exclusiveness of the grant and the grant itself, in order to preserve the inviolability of the former, which is the lesser and subordinate franchise, when the latter, and paramount, and vital franchise of a corporation is confessedly subject to the law of eminent domain.[15]

12. It is intimated in West River Bridge Company *v.* Dix, by WOODBURY, J., that if the charter of the corporation contained an express stipulation against the exercise of the right of eminent domain upon the corporation, this might secure the franchise. But this is certainly not the prevailing opinion.[16] (*d*)

[14] Enfield Toll Bridge Co. *v.* Hartford & New Haven Railroad Co., 17 Conn. 40, 454. This doctrine has been repeatedly asserted in all the courts of the country. And the right to take the franchise of another corporation, by parity of reason, carries the right to impair another franchise to any extent on making indemnity. *In re* Kerr, 42 Barb. 119.

[15] West River Bridge Co. *v.* Dix, 16 Vt. 446; s. c. 6 How. 507, 539, per WOODBURY, J. who argues that it is difficult to comprehend why the *exclusiveness* of the grant to a private corporation should, on principle, be any more inviolable by legislative authority than any other part of the corporate franchise. It is only as property that it is valuable, or that it is protected at all. And all property is, in cases of proper necessity, subject to the law of eminent domain. It is very questionable whether this law should be held to extend to those portions of public works which may always be obtained in the market, and where, by consequence, there is no practical necessity.

[16] In regard to the right of eminent domain, it seems now to be conceded,

(*d*) See *supra*, notes (*a*), (*b*).

* 13. The fee of the streets of a city, where it has been acquired by the municipality under the right of eminent domain, becomes * a public trust for general public purposes, and is under the unqualified control of the legislature, and any legislative appropriation of it to public use is not to be regarded as the appropriation of private property, so as to require compensation to the city or municipality to render it constitutional.[17] The mere possibility * of reverter to the original owner, or his heirs or grantees, is not regarded in such cases as any appreciable interest requiring to be compensated.[17]

14. Courts seem sometimes to have entertained doubts if it is competent for a railway company to appropriate the franchise of a canal company along the same line so as to supersede the canal by its own works.[18] But we apprehend there can be little doubt on that point; and the case last cited holds, that if this is attempted and acquiesced in by the canal company, it is not competent for the owner of the fee in the land to claim a reverter of the title by reason of the want of power in the railway company. The most the owner of the fee could claim in such case is to recover compensation for any additional land taken, and for any additional burden imposed upon the land appropriated to the canal, as well as for any additional damage to the adjoining lands of the same owner.[18] (*e*)

that no legislature, on any consideration or pretence whatever, can deprive a future legislature of its exercise, to the absolute annihilation of corporate franchises, on just and adequate compensation. In Backus *v.* Lebanon, 11 N. H. 19, Parker, C. J., gave a very able exposition of the question. See also, to the same effect, the opinion of Mr. Justice Grier, in the United States Circuit Court, in Milnor *v.* New Jersey Railroad Co., 6 Law Reg. 6, 7; and Crosby *v.* Hanover, 20 Law Rep. 646; s. c. 36 N. H. 404.

[17] People *v.* Kerr, 27 N. Y. 188. See also Philadelphia & Reading Railroad Co. *v.* Philadelphia, 47 Penn. St. 325.

[18] Hatch *v.* Cincinnati & Indiana Railroad Co., 18 Ohio St. 92.

(*e*) The owner of the fee is entitled to compensation. Pittsburg & Lake Erie Railroad Co. *v.* Bruce, 10 Am. & Eng. Railw. Cas. 1; Lafayette, Muncie & Bloomington Railroad Co. *v.* Murdock, 68 Ind. 137.

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SECTION IX.

Compensation: Mode of Estimating.

1. Nature of the general inquiry.
2. Damage and benefits shared by the public not to be considered.
3. General rule for estimating compensation.
4. Prospective as well as present damages assessed.
5. In some states value "in money" is the measure of compensation.
6, 7. Damage and benefits cannot be considered in such cases.
8. Under the English statute consequential injuries to lands not taken compensated.
9. Compensation in view of farm accommodations.
10. Benefits and damage, if required, must be stated.
    n. 13. Course of the trial in estimating land damages.
11. Items of damage not indispensable to be stated.
12. In contracts for land statutory privileges, to be secured must be stated.
13. Questions of doubt referred to experts.
14. Special provisions as to crossing streets only permissive.
15. Award of farm accommodations within a certain time, time of the essence of the award.

§ 71. 1. The inquiry in regard to what compensation shall be made for land taken for public works would, on the face of it, seem to be a very simple one. One would naturally suppose the value of the land taken or the damage sustained to be the fair measure of compensation, and that there could be no serious difficulty in ascertaining the amount.

2. But in consequence of numerous ingenious speculations in regard to possible advantages and disadvantages arising from the public works for which lands are taken, the whole subject has become, in this country especially, involved in more or less uncertainty. All the cases seem to concur in excluding mere general and public benefit, in which the owner of land shares in common with the rest of the inhabitants of the vicinity, from being taken into consideration in estimating compensation. (*a*)

(*a*) Pittsburg, Bradford, & Buffalo Railroad Co. *v.* McCloskey, 23 Am. & Eng. Railw. Cas. 86; Chicago & Evanston Railway Co. *v.* Blake, 24 Am. & Eng. Railw. Cas. 288.

But special benefits, such as are personal to the owner, are to be considered. Quincy, Missouri, & Pacific Railroad Co. *v.* Ridge, 57 Mo. 599; Mississippi River Bridge Co. *v.* Ring, 58 Mo. 491; Hosher *v.* Kansas City, St. Joseph, & Council Bluffs Railroad Co., 60 Mo. 303; Tebo & Neocho Railway Co. *v.* Kingsberry, 61 Mo. 51; Wyandotte, Kansas City, & Northwestern Railroad Co. *v.* Waldo, 70 Mo. 629; Alden *v.* White Mountains Railroad Co., 55 N. H. 413; Raleigh & Augusta Air Line Railroad Co. *v.* Wicker, 74 N. C. 220; Chapman

3. It has been said, the appraisers are not to go into conjectural and speculative estimations of consequential damages,[1] (*b*) but

[1] Meacham *v.* Fitchburg Railroad Co., 4 Cush. 291; s. c. 1 Redf. Am. Railw. Cas. 276. Upton *v.* South Reading Branch Railroad Co., 8 Cush. 600; Albany Northern Railroad Co. *v.* Lansing, 16 Barb. 68; Canandaigua & Niagara Railroad Co. *v.* Payne, 16 Barb. 273; Greenville & Columbia Railroad Co. *v.* Partlow, 5 Rich. 428; White *v.* Charlotte & South Carolina Railroad Co., 6 Rich. 47; Alton & Sangamon Railroad Co. *v.* Carpenter, 14 Ill. 190; Symonds *v.* Cincinnati, 14 Ohio, 147; Brown *v.* Cincinnati, 14 Ohio, 541; McIntire *v.* State, 5 Blackf. 384; State *v.* Digby, 5 Blackf. 543; James River & Kanawha Co. *v.* Turner, 9 Leigh, 313; Schuylkill Co. *v.* Thoburn, 7 S. & R. 411. A jury, in estimating the damages, may consider the effect the construction of the railway will have in diminishing deposits of sediment, made by a river in high water flowing on the land and greatly enriching it. Concord Railroad Co. *v.* Greeley, 23 N. H. 237. Also the deterioration of adjacent land, not taken, either for agriculture, or for sale for building lots; and the risk from fire, care of family and stock, inconvenience caused by embankments, excavations, and obstructions to the free use of buildings. Somerville & Easton Railroad Co. *v.* Doughty, 2 Zab. 495. The increase or decrease in the price of the remaining land, and the expense of fencing, are to be taken into the account, in assessing compensation. Greenville & Columbia Railroad Co. *v.* Gray, 5 Rich. 407; Oshkosh & Mississippi River Railroad Co., 33 Wis. 629; Philadelphia & Erie Railroad Co. *v.* Cake, 95 Penn. St. 139; Chicago & Mexican Central Railway Co. *v.* Ritter, 10 Am. & Eng. Railw. Cas. 202; New Orleans Pacific Railway Co. *v.* Gay, 31 La. An. 430; Todd *v.* Kankakee & Illinois River Railroad Co., 78 Ill. 530.

This does not include general advance in value of land. Mississippi Railway Co. *v.* McDonald, 12 Heisk. 54. But anything and everything connected with the general improvement which tends to an increase of value or usefulness, &c. Pittsburg & Lake Erie Railroad Co. *v.* Robinson, 95 Penn. St. 126. Although it affects other lands in the vicinity. Credit Valley Railway Co. *v.* Spragge, 24 Grant Ch. 231.

As to what may not be allowed by way of benefits, see Swayze *v.* New Jersey Midland Railway Co., 36 N. J. Law, 295; St. Louis, Arkansas, & Texas Railroad Co. *v.* Anderson, 39 Ark. 167; Todd *v.* Kankakee & Illinois River Railroad Co., *supra;* Cincinnati & Springfield Railway Co. *v.* Longworth, 30 Ohio St. 108. See, also, Pennsylvania & New York Railroad Co. *v.* Bunnell, 81 Penn. St. 414. In Munkwitz *v.* Chicago, Milwaukee, & St. Paul Railway Co., 22 Am. & Eng. Railw. Cas. 151, it is held that the possible future drainage of land (part of which is taken) to the enhancement of its value, possibility cut off by the taking, is too remote and problematical. As to damages which are general and shared by all the public, see Chicago & Pacific Railroad Co, *v.* Stein, 75 Ill. 41.

(*b*) Thus they are not to consider the danger to trains or persons. McReynolds *v.* Baltimore & Ohio Railroad Co., 106 Ill. 152. But see *In re* New York, Lackawanna, & Western Railway Co., 29 Hun, 1. See further, *infra*, § 74.

confine * themselves to estimating the value of the land taken to the owner. This is most readily and fairly ascertained by determining the value of the whole land, without the railway, and of the portion remaining after the railway is built. The difference is the true compensation to which the party is entitled.[2] (*c*)

bia Railroad Co. *v.* Partlow, 5 Rich. 428. The value of the land taken, considering its relation to the land from which it is severed, is to to be given, and such further sum as the incidental injury to the land not taken, from the construction of the road, exceeds the incidental benefits. Nashville Railroad Co. *v.* Dickerson, 17 B. Monr. 173, 180. Louisville & Nashville Railroad Co. *v.* Thompson, 18 B. Monr. 735.

[2] Troy & Boston Railroad Co. *v.* Lee, 13 Barb. 169, 171; *In re* Furman Street, 17 Wend. 649; Canal Co. *v.* Archer, 9 Gill & J. 480; Parks *v.* Boston, 15 Pick. 198; Somerville & Easton Railroad Co. *v.* Doughty, 2 Zab. 495; Hornstein *v.* Atlantic & Great Western Railroad Co., 51 Penn. St. 87; San Francisco, Alameda, & Stockton Railroad Co. *v.* Caldwell, 31 Cal. 367. See, also, Wilmington & Reading Railroad Co. *v.* Stauffer, 60 Penn. St. 374; Pittsburg, Fort Wayne, & Chicago Railroad Co. *v.* Gilleland, 56 Penn. St 445; Walker *v.* Old Colony & Newport Railroad Co., 103 Mass. 10; and Arnold *v.* Hudson River Railroad Co., 49 Barb. 108, as to damage to land not taken. See also *In re* Utica Railroad Co., 56 Barb. 456. But no account is to be taken, in estimating land damages, of the benefit the railway may have been to other property of the plaintiff, disconnected with that taken. Railroad Co. *v.* Gilson, 8 Watts, 243; but see Columbus, Piqua, & Indiana Railroad Co. *v.* Simpson, 5 Ohio St. 251; Rochester & Syracuse Railroad Co. *v.* Budlong, 6 How. Pr. 467; Sater *v.* Burlington & Mount Pleasant Plank Road Co., 1 Iowa, 386. The value of the land, at the time of trial, or at any time subsequent to the construction of the work, cannot be referred to in determining the benefits conferred on the land not taken. Indiana Central Railroad Co. *v.* Hunter, 8 Ind. 74.

(*c*) St. Louis, Arkansas, & Texas Railroad Co. *v.* Anderson, 39 Ark. 167; East Brandywine & Waynesburg Railroad Co. *v.* Ranck, 78 Penn. St. 454; Danville, Hazleton, & Wilkesbarre Railroad Co. *v.* Gearhart, 81½ Penn. St. 260.

The value to be put upon the land taken is the fair market value. Page *v.* Milwaukee & St. Paul Railway Co., 70 Ill. 324; Jacksonville & Southeastern Railway Co. *v.* Walsh, 106 Ill. 253; Russell *v.* St. Paul, Minneapolis, & Manitoba Railway Co., 20 Am. & Eng. Railw. Cas. 191; Fremont, Elkhorn, & Missouri Valley Railroad Co. *v.* Whalen, 11 Neb. 585; Pittsburg, Bradford, & Buffalo Railroad Co. *v.* McCloskey, 23 Am. & Eng. Railw. Cas. 86; Duynies *v.* Chicago & Northwestern Railway Co., Ib. 93. The fair market value, i. e., for the use to which it may be most advantageously applied, and for which it would sell for the highest price in the market. King *v.* Minneapolis Union Railway Co., 17 Am. & Eng. Railw. Cas. 93; Chicago & Evanston Railroad Co. *v.* Jacobs, 110 Ill. 414. Johnson *v.* Freeport & Mississippi

4. But the appraisers are to assess all the damages, present and prospective, to which the party will ever be entitled, by the prudent construction and operation of the road.[3]

[3] Dearborn *v.* Boston, Concord, & Montreal Railroad Co., 24 N. H. 179; Clark *v.* Vermont & Canada Railroad Co., 28 Vt. 103. The expense of fencing is to be included in the estimate of land damages. Winona & St. Peter Railroad Co. *v.* Denman, 10 Minn. 267. The matter of estimating land damages to the owner of a farm, a portion of which is taken for the construction of a railway, is discussed with a considerate regard to the equitable interests of all parties, in the case of Robbins *v.* Milwaukee & Horicon Railroad Co., 6 Wis. 636. Damages done to mill property in lessening the advantages of the water-power, present and prospective, should be taken into account in estimating land damages. Dorlan *v.* East Brandywine & Waynesburg Railroad Co., 46 Penn. St. 520.

River Railroad Co., 111 Ill. 413; Low *v.* Concord Railroad Co., 25 Am. & Eng. Railw. Cas. 199. As to what is market value, see Sherman *v.* St. Paul, Minneapolis, & Manitoba Railway Co., 30 Minn. 227; Everett *v.* Union Pacific Railroad Co., 59 Iowa, 243; Paducah & Memphis Railroad Co. *v.* Stovall, 12 Heisk. 1; Boston, Hoosac Tunnel, & Western Railway Co., 22 Hun, 176. In Brisbine *v.* St. Paul & Sioux City Railroad Co., 23 Minn. 114, the value of the land as an exclusive means of approach to a city was considered. Depreciation in the value of the residue may also be considered. Cincinnati & Springfield Railway Co. *v.* Longworth, 30 Ohio St. 108; Fremont, Elkhorn, & Missouri Valley Railroad Co. *v.* Whalen, *supra*. But only so far as it follows from a proper construction of the road. Fremont, Elkhorn, & Missouri Valley Railroad Co. *v.* Whalen, *supra;* Burlington & Missouri River Railroad Co. *v.* Schluntz, 14 Neb. 421.

So far as it results from an anticipated improper construction it is too speculative. Fremont, Elkhorn, & Missouri Valley Railroad Co. *v.* Whalen, *supra*. Nor can any account be taken of the state of the owner's business. Pittsburg & Lake Erie Railroad Co. *v.* Robinson, 95 Penn. St. 426. Or of benefits arising from improvements in the market, &c. St. Louis, Jerseyville, & Springfield Railroad Co. *v.* Kirby, 104 Ill. 345. Or of the special value of the property as prospectively a monopoly of a roadway to lands of other persons. Powers *v.* Hazelton & Setonia Railroad Co., 33 Ohio St. 429. Nor, without a cross-bill, of damage to contiguous lands. Jones *v.* Chicago & Iowa Railway Co., 68 Ill. 380. But where there are connected parcels, the damage to all should be estimated, and not merely the damage to the parcels touched. Wyandotte, Kansas City, & Northwestern Railway Co. *v.* Waldo, 70 Mo. 629.

As to damages where parts of town lots are taken or a part of land laid out into town lots, see Hooper *v.* Savannah & Memphis Railroad Co., 69 Ala. 529; Watson *v.* Milwaukee & Madison Railway Co., 57 Wis. 332; Cincinnati & Springfield Railway Co. *v.* Longworth, *supra;* Todd *v.* Kankakee & Illinois Railroad Co., 78 Ill. 530; Hartshorn *v.* Burlington, Cedar Rapids, & Northern Railway Co., 52

* 5. Some of the state constitutions in terms provide that compensation for private property, taken for public use, shall be made "in money," and many eminent jurists have strenuously maintained that compensation, to the extent of the value of the land taken, must always be made in money, (*d*) and that no deduction can be made on account of any advantage which is likely to accrue to other property of the owner, by reason of the public work for which the property is taken.[4] Such accidental advan-

[4] 2 Kent Com. 7th ed. 391, and note; Jacob *v.* Louisville, 9 Dana, 114; People *v.* Brooklyn, 6 Barb. 209. But this last case was subsequently reversed

Iowa, 613; Everett *v.* Union Pacific Railway Co., 59 Iowa, 243. As to taking under the English statute of a part of property constituting a manufactory, see Richards *v.* Swansea Improvement & Tramways Co., Law Rep. 9 Ch. 425. See also Falkner *v.* Somerset & Dorset Railway Co., Law Rep. 16 Eq. 458.

As to damages where the lands taken are farm lands, see Michigan Air Line Railway Co. *v.* Barnes, 44 Mich. 222; Mississippi River Bridge Co. *v.* Ring, 58 Mo. 491; Harrison *v.* Iowa Midland Railroad Co., 36 Iowa, 323; Union Railroad Transfer & Stockyard Co. *v.* Moore, 80 Ind. 458; Brooks *v.* Davenport & St. Paul Railroad Co., 37 Iowa, 99. The cost of fencing is not an element, but how much the burden of fencing will depreciate value, is a proper question. Pittsburg, Bradford, & Buffalo Railway Co. *v.* McCloskey, 23 Am. & Eng. Railw. Cas. 86. The owner of farmland has a reasonable right to farm crossings. Kansas City & Emporia Railway Co. *v.* Kregelo, 32 Kan. 608.

Where part of a tract is taken, the injury to the whole must be considered. Sheldon *v.* Minneapolis & St. Louis Railway Co., 29 Minn. 318: Reisner *v.* Union Depot Co., 27 Kan. 382; Bigelow *v.* West Wisconsin Railway Co., 27 Wis. 478. See Chicago & Evanston Railway Co. *v.* Dresel, 110 Ill. 89. As to what will be considered an entire tract within the meaning of this rule, see Wilmes *v.* Minneapolis & Northwestern Railway Co., 29 Minn. 242; Hartshorn *v.* Burlington, Cedar Rapids, & Northern Railway Co., 52 Iowa, 613; Atchison & Nebraska Railroad Co. *v.* Gough, 29 Kan. 94; Kuthsburg & Eastern Railroad Co. *v.* Henry, 79 Ill. 290; Kansas City, Emporia, & Southern Railway Co. *v.* Merrill, 25 Kan. 421; Parks *v.* Wisconsin Central Railroad Co., 33 Wis. 413; St. Paul & Sioux City Railway Co. *v.* Murphy, 19 Minn. 500. The way in which land is cut, whether so as to sever it and to result in inconvenience to the owner, should be considered. Brooks *v.* Davenport & St. Paul Railroad Co., 37 Iowa, 99; Dreher *v.* Iowa Southwestern Railway Co., 10 Am. & Eng. Railw. Cas. 221. But further as to inconvenience from fire, smoke, fencing, &c., see *infra*, § 74. The value of a building destroyed is to be considered, and its value is its value as a building, not for the materials of which it is composed. Lafayette, Bloomington, & Mississippi Railroad Co. *v.* Winslow, 66 Ill. 219. In case of injury, general depreciation must be distinguished. Chicago & Eastern Illinois Railroad Co. *v.* Hall, 8 Brad. 621.

(*d*) Chesapeake & Ohio Railroad Co. *v.* Patton, 6 W. Va. 147.

tages to the portion of land not taken as drainage by means of cuts in the soil from grading the railway cannot be taken into account.[5]

6. In a case in Vermont the court held, that taking land for a public highway is not appropriating it to public use, within the meaning of the constitution of that state, which requires compensation in such cases to be made "in money," but that this provision only applies, where the fee of the land is taken; and that where an easement only is taken for the purpose of a highway, and the remaining land is worth more than the whole was before the laying out of the road, the party is entitled to no compensation.[6]

in the Court of Appeals. 4 Comst. 419. And see Rice *v.* Turnpike Co., 7 Dana, 81; Woodfolk *v.* Nashville & Chattanooga Railroad Co., 2 Swan, 422. In the last-named case it was said, benefits to the remaining land may be set off against injury, but the party cannot be compelled to apply such benefits towards the price of his land. New Orleans, Opelousas, & Great Western Railway Co. *v.* Lagarde, 10 La. An. 150. Under such a provision in the constitution of Ohio, it was held, that in assessing damages, the jury had no right to take into consideration the fact, that the value of the land had been increased by the proposal or construction of the work. Giesy *v.* Cincinnati, Wilmington, & Zanesville Railroad Co., 4 Ohio St. 308. General benefits resulting from the erection of a railway, to all who own property in the vicinity, are not to be taken into the account, in estimating land damages; and it was doubted if special benefits, accruing to the remainder of the land, could be so taken into account. Little Miami Railroad Co. *v.* Collett, 6 Ohio St. 182; Pacific Railroad Co. *v.* Chrystal, 25 Mo. 544.

[5] Evansville & Crawfordsville Railroad Co. *v.* Fitzpatrick, 10 Ind. 120, 560.

[6] Livermore *v.* Jamaica, 23 Vt. 361. This case has been questioned. 1 Shelf. Railw. Bennett's ed. 441. And the opposite view maintained in Pumpelly *v.* Green Bay Co., 13 Wal. 166. See also Reitenbaugh *v.* Chester Valley Railroad Co., 21 Penn. St. 100. *Contra*, McMahon *v.* Cincinnati & Chicago Short-Line Railroad Co., 5 Ind. 413. Benefits arising to the owner of the land "by the construction of the road" held not to have reference to the whole work, but to that particular portion which runs through the party's land. Milwaukee & Mississippi Railroad Co. *v.* Eble, 4 Chand. 72. An act which provides for setting off the advantages to other land against the value of the land taken, is not, on that account, unconstitutional. McMasters *v.* Commonwealth, 3 Watts, 292. But it has often been held, that such accidental advantages, especially where they are not peculiar to the particular land-owner, cannot be set off against the specific value of the land taken. State *v.* Miller, 3 Zab. 383; Woodfolk *v.* Nashville & Chattanooga Railroad Co., 2 Swan, 422; Hill *v.* Mohawk & Hudson Railroad Co., 5 Denio, 206; Keasy *v.* Louisville, 4 Dana, 154; Sutton *v.* Louisville, 5 Dana, 28; People *v.* Brooklyn, 6 Barb. 209. But many cases hold the contrary. People *v.* Brooklyn, 4 Comst. 419, where s. c. 6 Barb. 209, is re-

* 7. This is certainly not in conformity with the general course of decision upon this subject. It is the only case probably, where an attempt is made to escape from such a constitutional provision, in this manner. Some will doubtless regard it as too refined to be sound. And if it is true, as is sometimes claimed, that the legislature had no right to resume the fee of land for highways and railways, such a constitutional provision, with such a construction, would have little application to the taking of land for such uses.[7]

versed; Rexford *v.* Knight, 15 Barb. 627. But where profits are to be taken into the account, the title to have them considered obtains at the time the servitude is located. Palmer Co. *v.* Ferrill, 17 Pick. 58. Benefits by increase of business and population, markets, schools, stores, and other like improvements, cannot be considered, in estimating damages, for flowing land by a mill-dam. Ib.

In a case in New Hampshire, *In re* Mount Washington Road Co., 35 N. H. 134, it was decided, that in assessing damages for land taken for a turnpike or free highway, compensation is to be given for the actual value of the land taken, without regard to any speculative advantages or disadvantages to the owner. See Cushman *v.* Smith, 34 Me, 247. But in Indiana Central Railroad Co. *v.* Hunter, 8 Ind. 74, the rule of Livermore *v.* Jamaica, *supra*, is adopted. And in Whitman *v.* Boston & Maine Railroad Co., 7 Allen, 313, it was decided, that in estimating the damages to land by reason of the location of a railway across it, and the filling up of a canal in which the owner of the lot had a privilege, if the value of the lot was so enhanced that what remained was worth more than the whole lot was before, the owner had no claim for damages. S. P. in S. C., 3 Allen, 133. But the benefits to be deducted from the value of land taken must accrue to the remaining land, and not to all land in the same vicinity. Winona & St. Peter Railroad Co. *v.* Waldron, 11 Minn. 515.

[7] Hatch *v.* Vermont Central Railroad Co., 25 Vt. 49; S. C. 1 Redf. Am. Railw. Cas. 285; Reitenbaugh *v.* Chester Valley Railroad Co., 21 Penn. St. 100. *Contra*, Little Miami Railroad Co. *v.* Naylor, 2 Ohio St. 235. And in a case in Mississippi, Brown *v.* Beatty, 34 Miss. 227, where the constitution required "compensation first to be made" for land taken, it was held the provision secured to the owner the right to receive the cash value in money, and, in addition, full indemnity for all damages by means of severance, and that no enhanced value of the portion of land not taken could be taken into the account. See also Branson *v.* Philadelphia, 47 Penn. St. 329; Henry *v.* Dubuque & Pacific Railroad Co., 10 Iowa, 540. It is said in one case, what is very nearly a truism, that corporate existence and the right of eminent domain can be derived only from legislative grant, and that both must be shown, and also compliance with all conditions of the grant, to justify taking lands compulsorily. Atkinson *v.* Marietta & Cincinnati Railroad Co., 15 Ohio St. 21. *Infra*, § 76. The dedication of land to the use of a street will not authorize the

* 8. The English statute provides, that, in estimating compensation for land damages "regard shall be had, not only to the land taken, but also to damage by reason of severance from other lands or otherwise injuriously affecting such lands." There are, too, in the English statute, provisions for compensation to sundry subordinate interests in lands, as to lessees for years and to tenants from year to year. And also in regard to mines. The company are not entitled to mines or minerals under lands, except such parts as shall be necessary to use in the construction of the road, unless expressly purchased. It has been held that stone got from quarries are minerals,[8] and that mines are quarries, or places where anything is dug.[9] By the English statute, the company may remove or displace gas or water pipes, making compensation to all parties injured.

9. And where commissioners appraise the damages upon the basis of the railway making and maintaining certain works for the accommodation of the land-owner, as a culvert and waste-way, &c., it was held this portion of the award was not void; but if acquiesced in by the company, and the land taken, and compensation made * upon that basis, they thereby became bound by its provisions.[10] But where it was referred to arbitration to estimate the damages caused to the plaintiff, and the company by the express terms of its charter was bound to make suitable crossings for the accommodation of land-owners through whose land the right of way was taken, and the land-owner told the agents of the

legislature to appropriate it to the use of a railway track without compensation to the owner, and, if this is attempted, it may be restrained by injunction. Schurmeier *v.* St. Paul & Pacific Railroad Co., 10 Minn. 82.

[8] Micklethwait *v.* Winter, 6 Exch. 644; s. c. 5 Eng. L. & Eq. 526.

[9] Hodges Railw. 238, note (*y*). The more common mode of estimating land damages unquestionably is, to give the company the specific benefit to land, a portion of which is taken, in enhancing its value, and only to allow the land-owner such a sum as will leave him as well off in regard to the particular land as if the works had not been built, or his land taken. This is done by giving the land-owner a sum equal to the difference between what the whole land would have sold for before the road was built, and what the remainder will sell for after the construction. Harvey *v.* Lackawanna & Bloomsburg Railroad Co., 47 Penn. St. 428. But this rule will, in many cases, prove entirely inadequate and unsatisfactory, and where it has been adopted it may be regarded as only extending to other cases of a very similar character. Winona & St. Peter Railroad Co. *v.* Denman, 10 Minn. 267.

[10] Morse, Petitioner, 18 Pick. 443.

company, at the hearing before the arbitrators, that he should require a crossing to be provided for his convenience; and the agents claimed that the arbitrators had nothing to do with this matter, and that claim was acquiesced in by the arbitrators and the parties, and the award only embraced the damage to the land, and subsequently the land-owner was induced to convey to the company the right of way, without annexing a condition binding the company to maintain a crossing for his accommodation; upon the assurance of the counsel of the company that such deed would not affect his right to claim a crossing, it was held, upon a bill to reform the deed and to establish his right to the crossing, that he was entitled to the relief sought, and an injunction was granted accordingly.[11] But where a private way crossed the line of railway obliquely, and the award of land damages only indicated the point at which the company were to supply a crossing, it was held a sufficient compliance with the obligation of the company to give a crossing at right angles, although this did not connect with the termini of the road or afford any access to it.[12]

10. In some of the states in this country, the advantages and disadvantages of taking land for a railway are required to be stated in the report of appraisal, and the omission to make such specific statement was held a fatal omission.[13] (*e*) So, too, where

[11] Green *v.* Morris & Essex Railroad Co., 1 Beasley, 165.

[12] Mann *v.* Great Southern & Western Railway Co., 9 Ir. Com. Law, 105.

[13] Ohio & Pennsylvania Railroad Co. *v.* Wallace, 14 Penn. St. 245; Reitenbaugh *v.* Chester Valley Railroad Co., 21 Penn. St. 100; Railroad Co. *v.* Gilson, 8 Watts, 243; Zack *v.* Pennsylvania Railroad Co., 25 Penn. St. 394. But it has been held, in some cases, where the advantages resulting to the land-owner were to be taken into the account, that in an award the value of the land need not be stated separately from the damage, but only the amount of the whole injury. At all events, such amendments will be allowed, as to cure such defects. Greenville & Columbia Railroad Co. *v.* Nunnamaker, 4 Rich. 107. Questions have sometimes been made, in regard to which party, in proceedings of this character, is entitled to go forward in the proofs and argument. Upon principle, and in analogy to similar proceedings, we think there can be little doubt that this right is with the land-owner, in proceedings before the jury or where he is to all intents actor. But after having obtained an award, it has been more usual, in practice, to allow the excepting party to go

(*e*) In McReynolds *v.* Baltimore & Ohio Railroad Co., 106 Ill. 152, it is held that the company has the right to open and close.

*additional expense of fencing is allowed in improved land, the report must specify that fact.[14]

11. But in general there is no discrimination made in the report estimating damages for taking land for public works, between the value of the land appropriated and the incidental injury from severance and otherwise; and, unless specially required by the charter of the company or some other legislative act, such discrimination does not seem indispensable to the validity of the report; but would unquestionably, in the majority of cases, tend to render the report more satisfactory.[15]

*12. In contracts between railway companies and land-owners, in regard to farm accommodations, if the company desire to retain

forward. 1 Greenl. Ev. §§ 76, 77; Connecticut River Railroad Co. *v.* Clapp, 1 Cush. 559; s. c. 1 Am. Railw. Cas. 450; Mercer *v.* Whall, 5 Q. B. 447. But see Albany Northern Railroad Co. *v.* Lansing, 16 Barb. 68, where the court say, "The commissioners have the right and power to exercise their own discretion in reference to the order that they take in appraising the land. They may view the land first and hear the proofs and allegations afterwards, or *vice versa*. So whether one party or the other should first be heard, is for them to determine. Having decided that the railway corporation might open and close the hearing, the defendant was concluded by their decision, as also would their decision have been conclusive on the company had the same privilege been awarded to the owner of the land." But where the error in the exercise of this discretion does manifest wrong, at *nisi prius*, the verdict will be set aside for this reason alone. 1 Greenl. Ev. 104, § 76, and note.

Awards of land damages have been set aside for excessive damages. Somerville & Easton Railroad Co. *v.* Doughty, 2 Zab. 495. But this subject was somewhat considered in Troy & Boston Railroad Co. *v.* Lee, 13 Barb. 169; Lee *v.* Northern Turnpike Co., 16 Barb. 100; and it was held that the award should not be set aside, unless it appeared that the commissioners erred in the principles by which their judgment should be guided, or were clearly mistaken in the application of correct principles. This is putting such awards much on the ground of other awards. And in Walker *v.* Boston & Maine Railroad Co., 3 Cush. 1, it was held, that the Common Pleas, to which the verdict of a sheriff's jury is to be returned, and which may set the same aside, for any good cause, was justified in doing so, for irregularity in impanelling the jury, or in the conduct of the jury, or in the instructions given the jury by the sheriff; or for facts affecting the purity, honesty, or impartiality of the verdict, such as tampering with the jury or other misconduct of the party; or any irregularity or misconduct of the jurors. But in a court of error the verdict can only be set aside for error appearing of record. But see *infra*, § 72; Nicholson *v.* New York & New Haven Railroad Co., 22 Conn. 74.

[14] New Jersey Railroad Co. *v.* Suydam, 2 Harr. 25.

[15] Trenton Water Power Co. *v.* Chambers, 2 Beas. 199.

any special distinction conferred by statute, they must incorporate the statute, either in terms or by reference, into the contract. Otherwise the company will be held strictly to the terms of the contract as applied to the subject-matter.[16]

13. Where there is any controversy in regard to the mode of crossing highways and turnpikes by railway companies, the court will refer the matter to men of experience and skill in such questions.[17]

14. A permission in a railway charter to cross a street or highway by a level crossing, by making a bridge over the street for the accommodation of foot passengers, is not peremptory upon the company. They may still be permitted to cross the street otherwise than on a level, on their undertaking to abide by any order the court might make as to damages.[18]

15. Where land is sold to a railway company upon condition of furnishing such farm accommodations as the land-owner should notify to the company within one month, time is regarded as of the essence of the condition, and if notice is not given within the time limited the court will not order the company to make such accommodations as are demanded, nor even such as are proper.[19]

[16] Clarke *v.* Manchester, Sheffield, & Lincolnshire Railway Co., 1 Johns. & H. 631.

[17] Attorney-General *v.* Dorset Railway Co., 3 Law T. N. S. 608.

[18] Dover Harbor *v.* London, Chatham, & Dover Railway Co., 7 Jur. N. S. 453.

[19] Darnley *v.* London, Chatham, & Dover Railway Co., 3 De G. J. & S. 24; S. C. 11 Jur. N. S. 520; S. C. 9 Jur. N. S. 148, where the Vice-Chancellor decided otherwise.

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*SECTION X.

Mode of Procedure.

1. In general legislature may prescribe the mode.
2. Proceedings must be upon proper notice.
3. Formal exceptions waived by appearance.
4. Unless they are made to appear of record.
5. Proper parties, those in interest.
6. Title of the claimant may be examined.
7. Parties who join must show joint interest.
8. Jury may find facts and refer title to the court.
9. Land must be described in verdict.
   n. (g) Jury, in some states may view the premises.
10. Distinct finding on each item of claim.
11. Different interests. Presumption as to finding.
12, 13. Evidence admissible to prove value.
14. Opinion of witnesses. Admissibility.
15. Testimony of experts. Admissibility.
16. Matters incapable of description.
17. Costs. Allowance, in general.
18. Costs and expenses. Meaning of the term.
19. Commissioners' fees. Party liable.
20. Appellant failing must pay costs.
21. Competency of jurors.
22. Power of court to revise proceedings.
23. Debt will not lie on conditional report.
24. Excessive damages ground for setting aside verdict.
    n. (m) Matters of jurisdiction, pleading, practice, judgment, appeal, &c.
25. No effort to agree required in order to give jurisdiction.
26. Interest on value from time of taking.

§ 72. 1. It seems to be universally admitted, that where the organic law of the state does not prescribe the mode of procedure, in estimating land damages, for the use of a railway company or other public work, it is competent for the legislature to prescribe the mode, and that the mode, so prescribed, must be strictly followed.[1] (*a*)

2. Thus, it has been held, that notice in writing to the owner of the land to be taken, its situation and quantity, must be given.[2] (*b*)

[1] Bonaparte *v.* Camden & Amboy Railroad Co., Bald. 205; Bloodgood *v.* Mohawk & Hudson Railroad Co., 14 Wend. 51; s. c. 18 Wend. 9; s. c. 1 Redf. Am. Railw. Cas. 209.

[2] Vail *v.* Morris & Essex Railroad Co., 1 Zab. 189. But the notice to appoint commissioners need not describe the land. Doughty *v.* Somerville & Easton Railroad Co., 1 Zab. 442.

(*a*) Secombe *v.* Milwaukee & St. Paul Railway Co., 49 How. Pr. 75; Secombe *v.* Milwaukee & St. Paul Railway Co., 23 Wall. 108.

(*b*) Junction City & Fort Kearney Railway Co. *v.* Silver, 27 Kan. 741. Chicago & Alton Railroad Co. *v.* Smith, 78 Ill. 96; Cairo & Fulton Railroad Co. *v.* Trout, 32 Ark. 17; Baltimore & Ohio Railroad Co., *v.* Pittsburg, Wheeling, & Kentucky Railroad Co., 17 W. Va. 812. See also Burns *v.*

But the form of the notice, or whether signed by the company or by the commissioners, is not important.[3] And it is requisite, not only that proper notice should be given, but that it should appear upon the face of the proceedings that the particular notice required by the statute was given.[4] But in general, we apprehend, if it appears upon the proceedings that notice was given to the land-owner, it might, upon general principles, be presumed it was the notice required.

* 3. But merely formal exceptions to the mode of procedure and the competency of the triers, in such cases, must be taken at the earliest opportunity, where there is an appearance, or they will be regarded as waived.[5]

4. And after appeal, it should appear by the record that merely formal exceptions were made in the proceedings below, and overruled, or they cannot be revised.[5] So, too, where the

[3] Ross *v.* Elizabethtown & Somerville Railroad Co., Spencer, 230.

[4] Van Wickle *v.* Camden & Amboy Railroad Co., 2 Green, 162. See also Bennet *v.* Camden & Amboy Railroad Co., 2 Green, 145.

[5] Fitchburg Railroad Co. *v.* Boston & Maine Railroad Co., 3 Cush. 58; s. c. 1 Am. Railw. Cas. 508; Walker *v.* Boston & Maine Railroad Co., 3 Cush. 1; Pittsfield & North Adams Railroad Co. *v.* Foster, 1 Cush. 480; Field *v.* Vermont & Massachusetts Railroad Co., 4 Cush. 150; Taylor *v.* County Commissioners, 13 Met. 449; Porter *v.* County Commissioners, 13 Met. 479; Meacham *v.* Fitchburg Railroad Co., 4 Cush. 291; s. c. 1 Redf. Am. Railw. Cas. 276; Davis *v.* Charles River Branch Railroad Co., 11 Cush. 506.

Multnomah Railway Co., 8 Sawyer, 543, where it is said that this necessarily follows from the constitutional inhibition of the taking of private property for public use without compensation.

An accurate description of the land is essential to jurisdiction. *In re* New York Central & Hudson River Railroad Co., 90 N. Y. 342. So, if notice be sent by mail, that it be sent to the proper address. Morgan *v.* Chicago & Northeastern Railroad Co., 36 Mich. 428. If proper notice be not given so that the land-owner has not been heard, the court may refuse to confirm the report of the commissioners, and direct a rehearing. *In re* New York, Lackawanna, & Western Railway Co., 29 Hun, 602. Either the land-owner or the company may apply for an assessment of damages. Cairo & Fulton Railroad Co. *v.* Trout, 32 Ark. 17. In Wisconsin, by statute, the initiative is with the company. Sherman *v.* Milwaukee, Lake Shore, & Western Railroad Co., 40 Wis. 645. Notice as to a deceased holder of a life estate, without notice to the remainderman, will not be good as against the latter. Cairo & Alton Railroad Co. *v.* Smith, 78 Ill. 96. A mortgagee is entitled to notice. Platt *v.* Bright, 29 N. J. Eq. 128. Want of notice is waived by appearance. East Saginaw & St. Clair Railroad Co. *v.* Benham, 28 Mich. 459.

party excepting to proceedings before commissioners, applies for a jury to revise the assessment of damages, it will be regarded as a waiver of the exceptions.[5] He should have applied for a *certiorari*, if he intended to revise the case upon his exceptions.[5]

5. In regard to the proper parties to such proceedings, almost infinite variety of questions will arise. The only general rule which can be laid down, perhaps, is, that those having an interest in the question may become parties plaintiff, or be made parties defendant, according to the character and quality of the interest.[6] (*d*)

6. In the English courts, it has been held, that these summary tribunals for estimating land damages are not to inquire into the

[6] Fitchburg Railroad Co. *v.* Boston & Maine Railroad Co., 3 Cush. 58; Ashby *v.* Eastern Railroad Co., 5 Met. 368; Greenwood *v.* Wilton Railroad Co., 3 Fost. N. H. 261; Parker *v.* Boston & Maine Railroad Co., 3 Cush. 107; Mason *v.* Kennebec & Portland Railroad Co., 31 Me. 215; Atlantic & St. Lawrence Railroad Co. *v.* Cumberland County Commissioners, 51 Me. 36. And it seems to be regarded as indispensable that parties under disability should be properly represented in the proceedings, the same as in other suits. Hotchkiss *v.* Auburn & Rochester Railroad Co., 36 Barb. 600. But where a demand and tender of the value of land taken, together with other legal damages, are required before instituting compulsory proceedings, the requirement cannot apply to the case of an infant, whose rights will be saved till of full age. Indiana Central Railroad Co. *v.* Oakes, 20 Ind. 9. Judgment creditors are not necessary parties. Watson *v.* New York Central Railroad Co., 47 N. Y. 157.

(*d*) Peoria & Rock Island Railway Co. *v.* Rice, 75 Ill. 329. Suit revived in name of heirs. Valley Railway Co. *v.* Bohm, 29 Ohio St. 633. As to corporations, by and in whose name and for whose benefit proceedings may be taken: — Foreign corporations, see Holbert *v.* St. Louis, Kansas City, & Northern Railway Co., 45 Iowa, 23. Corporations *de facto*, see McAuley *v.* Columbus, Chicago, & Indiana Central Railway Co., 83 Ill. 348; Reisner *v.* Strong, 24 Kan. 410. Consolidated corporations, see Toledo, Ann Arbor, & Grand Trunk Railway Co. *v.* Dunlap, 47 Mich. 456. Corporations that have leased their lines, see Kip *v.* New York & Harlem Railroad Co., 6 Hun, 24; s. c. 67 N. Y. 227; Dietrichs *v.* Lincoln & Northwestern Railroad Co., 13 Neb. 36. Corporations that are but nominal parties, their franchises being used for the benefit of other corporations, see Aurora & Cincinnati Railroad Co. *v.* Miller, 56 Ind. 88; Lower *v.* Chicago, Burlington, & Quincy Railroad Co., 59 Iowa, 563; Swinney *v.* Fort Wayne, Muncie, & Cincinnati Railroad Co., 59 Ind. 205; Coe *v.* New Jersey Midland Railway Co., 31 N. J. Eq. 105.

A lessee for nine hundred and ninety-nine years is not a necessary party. Englewood Connecting Railroad Co. *v.* Chicago & Eastern Illinois Railroad Co., 25 Am. & Eng. Railw. Cas. 227.

title of the claimants.[7] But in some cases in this country, it has been held, that the claimant's title to the land is a proper subject of inquiry before the jury, in estimating damages.[8] (*e*) And where the commissioners refuse to allow the petitioner damages on * account of his not being the owner of the land, this is such a final decision as may be revised by a jury, and the Supreme Court will allow a mandamus, if that is denied.[9]

7. Parties who join must show a joint interest in the land, but this need not always be shown by deed. Oral evidence is sometimes admissible, where one owns the fee, and others have a joint interest, in consequence of erections, and the jury may properly pass upon the title as matter of fact.[10]

8. But the jury are not bound to decide upon conflicting titles, but may report the facts without determining the owner.[11] And it has been held that the jury are not bound to find a special verdict, in regard to the title of the claimant, or where there are conflicting claims, but may do so with propriety.[12] (*f*)

[7] *Infra*, § 98.

[8] Directors of Poor *v.* Railroad Co., 7 Watts & S. 236. Allyn *v.* Providence, Warren, & Bristol Railroad Co., 4 R. I. 457.

[9] Carpenter *v.* Bristol County Commissioners, 21 Pick. 258. The trustee, and not the *cestui que trust*, is the proper party to such proceeding. Davis *v.* Charles River Branch Railroad Co., 11 Cush. 506. The title of the petitioner may be inquired into, either on the return of the petition or of the report. Church *v.* Northern Central Railroad Co , 45 Penn. St. 339. The mode of proceeding on *certiorari*, and in other writs, is here discussed.

[10] Ashby *v.* Eastern Railroad Co., 5 Met. 368. So also where the land belonged to a partnership, and was not needed for the payment of partnership debts, one of the partners having died, it was held that the title remained in the partners as tenants in common, and that proceedings to recover damages by reason of laying a railway upon it, were properly taken in their joint names. Whitman *v.* Boston & Maine Railroad Co., 3 Allen, 133.

[11] *In re* Anthony Street, 19 Wend. 678. So, too, where one owns the fee, and another has a bond for a deed, the condition of which is not yet performed, they may join. Locks & Canals Proprietors *v.* Nashua & Lowell Railroad Co., 10 Cush. 385.

[12] Davidson *v.* Boston & Maine Railroad Co., 3 Cush. 91; 1 Am. Railw. Cas. 534. The sheriff is bound to give the jury definite instructions in regard to the effect of a conveyance. Ib.

(*e*) See Trogden *v.* Winona & St. Peter Railroad Co., 22 Minn. 198.

(*f*) The jury have no power, without consent of parties, to bind the company to erect, or the land-owner to accept, a wagon bridge as part of the damages. The damages are to be computed on a money basis. Toledo

9. The jury should describe the land with intelligible boundaries.[13] (*g*)

* 10. Where the claim for damages consists of several items, it is more conducive to a final disposition of the case to state the finding upon each item. In such case any objectionable item may be remitted or deducted without the necessity of a rehearing.[14]

11. But where the petition alleges several distinct causes of damage, and a general verdict is rendered, if one or more of the causes is insufficient, it will not be presumed the jury gave any damages, on such insufficient claims, in the absence of any instructions by the sheriff in relation to them.[15] But it is not necessary to apportion the damages to several joint-owners, and a tenant for life may take proceedings to obtain damages done to his estate by the construction of a railway, without joining the remainderman.[16]

[13] Vail *v.* Morris & Essex Railroad Co., 1 Zab. 189. But see Philadelphia Railroad Co. *v.* Trimble, 4 Whart. 47. The jury are not to include in their estimate the expense of farm accommodations, which it is the duty of the railway to furnish. Ib. But if this be done, and the party have judgment on the verdict, he is bound to make the erections. Curtis *v.* Vermont Central Railroad Co., 23 Vt. 613. One tenant in common cannot proceed in his own name to have the damages done by a railway to the common land assessed, even where he has authority from his co-tenant to do so. Railroad Co. *v.* Bucher, 7 Watts, 33.

But if the petition be signed by the lessee and the agent of the owner of mines, this is a sufficient representation of the interest. Harvey *v.* Lloyd, 3 Penn. St. 331. See also Shoenberger *v.* Mulhollan, 8 Penn. St. 134. And see Cleveland & Toledo Railroad Co. *v.* Prentice, 13 Ohio St. 373; Strang *v.* Beloit & Madison Railroad Co., 16 Wis. 635. It is here said that the description, by way of an approximating diagram, may be sufficient without an actual survey.

[14] Fitchburg Railroad Co. *v.* Boston & Maine Railroad Co., 3 Cush. 58; s. c. 1 Am. Railw. Cas. 508.

[15] Parker *v.* Boston & Maine Railroad Co., 3 Cush. 107.

[16] Railroad Co. *v.* Boyer, 13 Penn. St. 497; Directors of Poor *v.* Railroad Railroad Co. *v.* Munson, 20 Am. & Eng. Railw. Cas. 410.

(*g*) The jury in some states may view the premises. As to decisions under statutes giving such right, see Wakefield *v.* Boston & Maine Railroad Co., 63 Me. 385; Galena & Southern Wisconsin Railroad Co. *v.* Haslam, 73 Ill. 494; McReynolds *v.* Baltimore & Ohio Railroad Co., 106 Ill. 152; Kankakee & Seneca Railroad Co. *v.* Straut, 102 Ill. 666; Peoria & Farmington Railway Co. *v.* Barnum, 107 Ill. 160; Washburn *v.* Milwaukee & Lake Winnebago Railroad Co., 59 Wis. 364; Toledo, Ann Arbor, & Grand Trunk Railway Co. *v.* Dunlap, 47 Mich. 456.

12. The character of the proof admitted to enable the triers to learn the value of land is so various, that it is not easy to fix any undeviating rule upon the subject. It seems to have been the intention of the courts to allow only strictly legal evidence to be received, such as would be admissible in the trial of similar questions before a jury in ordinary cases.[17] (*h*)

13. It has been allowed to show what price the company had paid by voluntary purchase for land adjoining, but in the same case it was held not competent to inquire of adjoining landowners, who were farmers, and had occasionally bought and sold land, what was the value of their own land adjoining.[18] Nor is * it

Co., 7 Watts & S. 236; Pittsburg & Steuben Railroad Co. *v.* Hall, 25 Penn. St. 336. In Ross *v.* Elizabethtown & Somerville Railroad Co., Spencer, 230, it was said to be the duty of the commissioners to assess damages to joint owners jointly. See also Colcough *v.* Nashville & Northwestern Railroad Co., 2 Head, 171.

[17] Troy & Boston Railroad Co. *v.* Northern Turnpike Co., 16 Barb. 100; Johnson, J., in Rochester & Syracuse Railroad Co. *v.* Budlong, 6 How. Pr. 467; Lincoln *v.* Saratoga & Schenectady Railroad Co., 23 Wend. 425, 432.

[18] Wyman *v.* Lexington & West Cambridge Railroad Co., 13 Met. 316. But in Robertson *v.* Knapp, 35 N. Y. 91, it was held, that farmers and residents of the immediate neighborhood are competent to fix the price of land in their vicinity; that one who has been a farmer, but has changed his occupa-

(*h*) Washington, Cincinnati, & St. Louis Railroad Co. *v.* Switzer, 26 Grat. 661; Peoria, Atlanta, & Decatur Railroad Co., 71 Ill. 361. Award of commissioners as evidence on subsequent trial by jury. Ennis *v.* Wood River Branch Railroad Co., 12 R. I. 739. Declarations of land-owner as evidence. East Brandywine & Waynesburg Railroad Co. *v.* Ranck, 78 Penn. St. 454; Power *v.* Savannah Railroad Co., 56 Ga. 471. Evidence of annual net profits of the land for a particular use held inadmissible. Stockton & Copperopolis Railroad Co. *v.* Galgiani, 49 Cal. 139. Evidence of sales of other lands. Pittsburg, Virginia, & Charleston Railroad Co. *v.* Rose, 74 Penn. St. 362; Stinson *v.* Chicago, St. Paul, & Minneapolis Railroad Co., 27 Minn. 281; Everett *v.* Union Pacific Railway Co., 59 Iowa, 243; Watson *v.* Milwaukee & Madison Railway Co., 57 Wis. 332; Lehmicke *v.* St. Paul, Stillwater, & Taylor's Falls Railroad Co., 19 Minn. 464. Evidence of value at other times. Dietrichs *v.* Lincoln & Northwestern Railroad Co., 12 Neb. 225; Montclair Railway Co. *v.* Benson, 36 N. J. Law, 557. Other evidence, what and what not admissible. Smalley *v.* Iowa Pacific Railroad Co., 36 Iowa, 571; Peoria & Pekin Union Railway Co. *v.* Peoria & Farmington Railway Co., 105 Ill. 110; Dreher *v.* Iowa Southwestern Railroad Co., 59 Iowa, 599; Montclair Railway Co. *v.* Benson, 36 N. J. Law, 557; Childs *v.* New Haven & Northampton Railroad Co., 133 Mass. 253; Boston & Maine Railroad Co. *v.* Montgomery, 119 Mass. 114.

competent to show for what price one had contracted to buy land adjoining.[19] Nor can the claimant prove, what the company have offered him for the land;[20] nor what the company have been compelled to pay for land adjoining, which was taken compulsorily.[21]

* 14. And it has been held that witnesses cannot be allowed to give their opinion of the value of the land or materials taken.[22] (*i*)

tion to that of a mechanic, is competent. And in Shattuck *v.* Stoneham Branch Railroad Co., 6 Allen, 115, it was held, that in such proceedings the land-owner, being a competent witness, may testify to his opinion of the amount of damage he has sustained, and may prove recent sales of other lands similarly situated; but that he cannot give evidence of the opinions of others. It is rather matter of discretion with the court, whether sales of other lands were sufficiently recent, or the land sufficiently like that in question, to afford aid to the jury. And on such hearing the company may prove that it has located a passenger station, since the hearing began, near the petitioner's land.

[19] Chapin *v.* Boston & Providence Railroad Co., 6 Cush. 422.

[20] Upton *v.* South Reading Railroad Co., 8 Cush. 600.

[21] White *v.* Fitchburg Railroad Co., 4 Cush. 440. Only such damages as are peculiar to the owner of the land taken, and not those common to all land in the vicinity, can be considered. Freedle *v.* North Carolina Railroad Co., 4 Jones, N. C. 89. It has been held that the benefits resulting to the land-owner from the construction of the road are to be deducted, in estimating damages for land taken for a railway; and that consequently a statute providing for such deduction is not for that reason unconstitutional. Columbus, Piqua, & Indiana Railroad Co. *v.* Simpson, 5 Ohio St. 251. But as the constitution of Ohio expressly requires compensation to the land-owner to be made *in money*, it seems scarcely consistent to say that the benefits to the land-owner can in all cases be deducted, since in some cases the benefits to the particular piece of land, a portion of which is taken, might more than compensate for that which is taken, thus leaving nothing to be compensated "in money." The force of this embarrassment was felt by the court in a highway case in Vermont, where the constitution provides, that "whenever private property is taken for public use, the owner ought to receive an equivalent in money." The court escaped from its embarrassment by saying, that as the constitution applied only to property "taken for public use," it did not reach cases where only an easement in property was taken. The court might, with almost equal propriety, have said, that the language in the provision of the constitution "ought to receive," being in the optative mood, did not imply an imperative duty, as few persons expect to *obtain* by process of law all which they "ought to receive." Livermore *v.* Jamaica, 23 Vt. 361, Redfield, J., dissenting, *sub silentio*. *Supra*, § 71, pl. 6. See also Cleveland & Pittsburg Railroad Co. *v.* Ball, 5 Ohio St. 568; Kramer *v.* Cleveland & Pittsburg Railroad Co., 5 Ohio St. 140.

[22] Montgomery & West Point Railroad Co. *v.* Varner, 19 Ala. 185; Concord

(*i*) Witnesses may not give their opinion as to the amount of damages in gross. Baltimore, Pittsburg, & Chicago Railway Co. *v.* Johnson, 59

This inquiry leads to the discussion of the general question of what matters may be proved, by the opinion of witnesses who are not possessed of any peculiar knowledge, skill, or experience upon the subject.

15. And it must be admitted the cases are not altogether reconcilable upon the subject. Experts are admitted to express their opinions, not only upon their own observation, but upon testimony given in court by other witnesses, and where the testimony is conflicting, upon a hypothetical state of facts.[23] The testimony

Railroad Co. *v.* Greely, 23 N. H. 237; Buffum *v.* New York and Boston Railroad Co., 4 R. I. 221; Cleveland & Pittsburg Railroad Co. *v.* Ball, 5 Ohio St. 568. But the witness may give an opinion as to the value of the whole land, both before and after the location of the road. Ib. And so also in Illinois & Wisconsin Railroad Co. *v.* Van Horn, 18 Ill. 257. See also Dorlan *v.* East Brandywine, & Waynesburg Railroad Co., 46 Penn. St. 520. In East Pennsylvania Railroad Co. *v.* Hiester, 40 Penn. St. 53, it is said that the only proper test of the value of land so taken is the opinion of witnesses as to its value in view of its location and productiveness, its market value, or the general selling price of land in the neighborhood. And this seems to us exceedingly sensible and free from refinement or conceit. See also East Pennsylvania Railroad Co. *v.* Hottenstine, 47 Penn. St. 28.

[23] 1 Greenl. Ev. § 440. Thus the testimony of persons employed in making insurance of buildings against fire, may, in actions against railways for consequential damages to buildings, by the near approach of the track, express their

Ind. 247, 480; Baltimore, Pittsburg, & Chicago Railway Co. *v.* Stoner, 59 Ind. 579; Brown *v.* Providence, & Springfield Railroad Co., 12 R. I. 238. Nor as to separate items of damage. *In re* New York, West Shore, & Buffalo Railway Co., 29 Hun, 609. Nor as to the value of the land subject to the right of way. Fremont, Elkhorn, & Missouri Valley Railroad Co. *v.* Whalen, 11 Neb. 585. But witnesses may testify to their opinion of the value of the land. Curtis *v.* St. Paul, Stillwater, & Taylor's Falls Railroad Co., 20 Minn. 28; Sherwood *v.* St. Paul & Chicago Railroad Co., 21 Minn. 127; Sherman *v.* St. Paul, Minneapolis, & Manitoba Railway Co., 30 Minn. 227; Indianapolis, Decatur, & Springfield Railroad Co. *v.* Pugh, 85 Ind. 279; Republican Valley Railroad Co. *v.* Arnold, 13 Neb. 485; Snow *v.* Boston & Maine Railroad Co., 65 Me. 230. As to who has knowledge enough to testify, see Pittsburg & Lake Erie Railroad Co. *v.* Robinson, 95 Penn. St. 426; Pennsylvania & New York Railroad Co. *v.* Bunnell, 81 Penn. St. 414; Frankfort & Kokomo Railroad Co. *v.* Windsor, 51 Ind. 238; Lehmicke *v.* St. Paul, Stillwater, & Taylor's Falls Railroad Co., 19 Minn. 464; Diedrichs *v.* Northwestern Union Railway Co., 47 Wis. 662; Burlington & Missouri River Railroad Co. *v.* Schluntz, 14 Neb. 421. A farmer may testify as an expert as to the value of land for farm purposes, but not generally. Brown *v.* Providence & Springfield Railroad Co., 12 R. I. 238; Kansas Central Railway Co. *v.* Allen, 24 Kan. 33.

of such witnesses is intended to serve a double purpose, that of instruction to the jury upon the general question involved, and elucidation of the particular question to be considered by them.[23] The resort to the assistance and instruction of persons skilled in particular departments of art or science is constantly adverted to, as of great advantage in enabling the triers to properly comprehend those subjects out of the range of their general knowledge, * or the particular studies of judges, or jurors, in some of the best-considered English cases, within the last few years.[24] But the testimony of scientific witnesses will not establish facts in conflict with the axiomatic principles of science and philosophy, or those which contradict the evidence of the senses or of consciousness.[24]

16. But there is certainly a very considerable number of subjects, in regard to which the jury are supposed to be well instructed, and altogether capable of forming correct opinions, and in regard to which the testimony of experts is not competent, or not requisite, but which it is more or less difficult for the witnesses to describe accurately, so as to place them fully before the minds of the jury, as they exist in the minds of the witnesses. Among these are inquiries in regard to the extent of one's property, solvency, health, affection, or antipathy, character, sanity, and some others. In such cases the witnesses' knowledge is chiefly matter of opinion, and it is impossible to enumerate each particular fact. Of this character seem to us to be questions in regard to the quality and value of property. One may enumerate some of the leading facts upon which such an opinion is based; but after all, the testimony as to facts is excessively meagre, without the opinion of the witness, either upon the very subject of inquiry, or some one as near it as can be supposed. Hence in those courts where the opinion of witnesses, in regard to the

opinion of the effect thereby produced on the rent, or the rate of insurance of such buildings. Webber *v.* Eastern Railroad Co., 2 Met. 147. See also Henry *v.* Dubuque & Pacific Railroad Co., 2 Clarke, 288. And in the case of Brown *v.* Providence, Warren, & Bristol Railroad Co., 5 Gray, 35, it was held, that the company could not show that liquors were sold, or to be sold, on land, as a part of the inducement to pay so high a rent, or that it was "*contemplated*" having a station near the point; such testimony being too indefinite and remote.

[24] Broadbent *v.* Imperial Gas Co., 7 De G. M. & G. 436, 466, *per* Lord Chancellor Cranworth.

value of property, real or personal, is not admitted, it leads to sundry shifts and evasions, in the course of the examination of witnesses upon that subject, which, while it is not a little embarrassing in itself, at the same time illustrates the inconsistency, not to say absurdity, of the rule.[25]

[25] See the opinion of the court in Concord Railroad Co. *v.* Greely, 23 N. H. 237. On an inquiry as to the value of a cargo of flour, it would sound strange to hear witnesses testify what precisely similar flour is worth, and at the same time hear them gravely told, that they were studiously to avoid expressing any opinion as to the value of this very flour, which they had seen and examined, and in regard to which the whole testimony was received. Yet, such is, from necessity, the course resorted to under the rule. The more general course is, we think, to receive the opinion of witnesses acquainted with the property and the state of the market, as to the value of the particular property in question. White *v.* Concord Railroad Co., 10 Fost. N. H. 188. But in New Hampshire, it has been held, that the opinion of witnesses in regard to apparent health is competent, and this seems to be yielding the main point of exclusion before insisted on. Spear *v.* Richardson, 34 N. H. 428. In the same case the opinion of witnesses as to whether a horse was sound, or had the heaves, was excluded because the witness was not shown to be an expert. Naturally the judge regarded the distinction as "somewhat nice." And in Currier *v.* Boston & Maine Railroad Co., 34 N. H. 498, it was held that a witness could give an opinion in regard to the occurrence of hardpan in an excavation; and in Hackett *v.* Boston, Concord, & Montreal Railroad Co., 35 N. H. 390, it was held that a witness might express an opinion in regard to distances, dimensions, and qualities. See also Rochester & Syracuse Railroad Co. *v.* Budlong, 6 How. Pr. 467.

In Illinois & Wisconsin Railroad Co. *v.* Van Horn, 18 Ill. 257, it is held that it is proper to have the opinion of witnesses in regard to the value of city lots, "as they have no stated value." Butler *v.* Mehrling, 15 Ill. 488; Kellogg *v.* Krauser, 14 S. & R. 137. In Cleveland & Pittsburg Railroad Co. *v.* Ball, 5 Ohio St. 568, it is said that witnesses may be allowed to express an opinion as to the value of the land taken, but not as to the extent of damages which the land-owner will sustain by the appropriation of the land to public use, that being the very question to be settled by the triers. This seems to place the matter on its proper basis. One must have had experience bearing on the particular point, in order to give an opinion of the extent of the injury caused thereby, and it is not sufficient that he may have had experience and skill in other matters pertaining to the building and operation of railways. Boston & Worcester Railroad Co. *v.* Old Colony & Fall River Railroad Co., 3 Allen, 142. The court have declined to set aside the verdict for land damages, because testimony of the sale of upland at a considerable distance from the wharf, and of the price paid four months before the time of making the location, was received, and also of the number of trains passing over the land taken, and of the number of vessels and amount of lumber, wood, coal, &c., coming to the wharf.

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* 17. In regard to costs, in such proceedings, the more general rule is not to allow them, unless specifically given by statute.[26] (*j*) * But where the statute provides for an assessment of land damages, by a jury, at the suit of the party aggrieved, the costs to be paid by the company, this was held not to include the fees of witnesses examined by the jury, on the part of the claimant.[27]

18. But the terms "costs and expenses incurred," were held to include the costs of witnesses and of summoning the viewers.[28]

19. If the act makes no provision for compensation to the commissioners, they have no power to order the company to pay the cost of their expenses and services.[29]

20. But where the party whose costs are rightfully denied in the Court of Common Pleas, appeals upon that question, and the judgment is affirmed, he must pay costs to the other party consequent upon the appeal.[30]

[26] Herbein *v.* Railroad Co , 9 Watts, 272. The English statute, 8 Vict. c. 18, provides that where the land-owner refuses an offer equal to or exceeding his recovery, he shall recover no costs. This is construed to embrace all offers up to the time of the land-owner taking steps to have his case tried. Lord Fitz-Hardinge *v.* Gloucester & Berkeley Canal Co., 20 W. R. 800. The party taking the initiative in proceedings to estimate land damages under this statute is required to state at what price he will sell or purchase the land, and the other party may accept or modify the offer, and costs are awarded with reference to the party obtaining an assessment better for him than the offer of the other party. This seems reasonable, independent of the statute.

[27] Railroad Co. *v.* Johnson, 2 Whart. 275.

[28] Pennsylvania Railroad Co. *v.* Keiffer, 22 Penn. St. 356; Chicago & Milwaukee Railroad Co. *v.* Bull, 20 Ill. 218.

[29] Atlantic & St. Lawrence Railroad Co. *v.* Commissioners, 28 Me. 112.

[30] Harvard Branch Railroad Co. *v.* Rand, 8 Cush. 218; Commonwealth *v.*

(*j*) *In re* New York, Lackawanna, & Western Railway Co., 63 How. Pr. 123; Metler *v.* Easton & Amboy Railroad Co., 37 N. J. Law, 222. As to what is properly charged as costs, see Bliss *v.* Connecticut & Passumpsic Rivers Railroad Co., 47 Vt. 715; Roble *v.* Albia, Knoxville, & Des-Moines Railroad Co., 44 Iowa, 410. Costs on abandonment of proceedings. Loisse *v.* St. Louis & Iron Mountain Railroad Co., 2 Mo. Ap. 105; s. c. 72 Mo. 561. Costs on appeal, who must pay, and what taxable. Conway *v.* McGregor & Missouri River Railroad Co., 43 Iowa, 32; People *v.* McRoberts, 62 Ill. 38; Rensselaer & Saratoga Railroad Co. *v.* Davis, 55 N. Y. 145; Goodwin *v.* Boston & Maine Railroad Co., 63 Me. 363; *In re* Syracuse, Binghamton, & New York Railroad Co., 4 Hun, 311; Metler *v.* Easton & Amboy Railroad Co., 37 N. J. Law, 222; Carolina Central Railway Co. *v.* Phillips, 78 N. C. 49; New Orleans Pacific Railway Co. *v.* Gay, 31 La. An. 430.

21. It is no objection to the competency of a juror, in this class of cases, that he had been an appraiser of damages upon another railway, in the same county, or that he is a stockholder in another railway which had long before acquired the lands necessary for its use.[31] (*k*)

* 22. Courts do not generally possess the power to revise the assessment of land damages, by a jury or other tribunal appointed by them for that purpose, upon its merits, and set it aside, upon the mere ground of inadequacy or excess of damages.[32] (*l*)

23. Where commissioners assessed land damages at a sum named, and stated further, that the plaintiff was to receive an additional sum in a certain contingency, and the report became

Boston & Maine Railroad Co., 3 Cush. 56. But see *supra*, § 71, note 12, in regard to the course of proceeding, in estimating land damages. Where the statute gives an appeal, in estimating land damages, to a court of common-law jurisdiction, and does not prescribe the mode of trying the appeal, it will be tried by commissioners, the usual triers in cases of that class, in common-law courts. And a statute permitting a trial by jury, in all cases proper for a jury, will not alter the mode of trial. Gold *v.* Vermont Central Railroad Co., 19 Vt. 478.

[31] People *v.* First Judge of Columbia, 2 Hill, N. Y. 398. The tribunal for assessing land damages should be free from interest or bias in order to meet the constitutional requirement for just compensation. Powers *v.* Bears, 12 Wis. 213. But see Strang *v.* Beloit & Madison Railroad Co., 16 Wis. 635. But where it clearly appears that injustice has been done through some mistake or misapprehension of the jury, the verdict should be set aside. Cadmus *v.* Central Railroad Co., 2 Vroom, 179.

[32] Willing *v.* Baltimore Railroad Co., 5 Whart. 460. As to what is good cause for setting aside the report of commissioners, see Bennet *v.* Camden & Amboy Railroad Co., 2 Green, 145; Van Wickle *v.* Railroad Co., 2 Green, 162; Rochester & Syracuse Railroad Co. *v.* Budlong, 6 How. Pr. 467. In Missouri, when the report of commissioners is set aside, the court must appoint a new board. Hannibal & St. Joseph Railroad Co. *v.* Rowland, 29 Mo. 337. But this rule will not apply where the report is recommitted to the same board, with instructions to pursue a different rule in estimating damages. Ib.

(*k*) Nor that he is a subscriber in aid of a company lessor of the road for whose use the land is to be condemned. Detroit Western Transit Railroad Co. *v.* Crane, 50 Mich. 182.

But it is an objection that he has given his note to aid in the construction of the road. Nor can the disqualification be removed by agreement of parties. Michigan Air Line Railway Co. *v.* Barnes, 40 Mich. 383.

(*l*) But see *In re* New York Central & Hudson River Railroad Co., 5 Hun, 105; s. c. 64 N. Y. 60. See also Philadelphia & Erie Railroad Co. *v.* Cake, 95 Penn. St. 139, which holds that the court may set aside the report of the viewers where the damages awarded are grossly excessive.

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matter of record, it was held that debt would not lie for the additional sum, upon averring the happening of the contingency.[33]

24. Where the statute gave the court a discretion, to accept and confirm the inquest of land damages, or order a new inquest, "if justice shall seem to require it," it was held they might set aside the report for mere excess of damages, and that the Supreme Court might do the same, when the proceedings are brought up by *certiorari*.[34] (*m*)

[33] Winchester & Potomac Railroad Co. *v.* Washington, 1 Rob. Va. 67. See also Dimick *v.* Brooks, 21 Vt. 569.

[34] Pennsylvania Railroad Co. *v.* Heister, 8 Penn. St. 445; s. c. 2 Am. Railw. Cas. 337.

There are other decisions on matters of practice in assessing land damages: All the commissioners must be present and act, in all matters of a judicial character. Crocker *v.* Crane, 21 Wend. 211; s. c. 1 Redf. Am. Railw. Cas. 42. In regard to the mode of selecting and impanelling juries, for assessing land damages against railways, see Pennsylvania Railroad Co. *v.* Heister, *supra*, which decides that where the statute requires the sheriff to summon the jury, it is irregular for him to select them from a list prepared by his deputy; and see Vail *v.* Morris & Essex Railroad Co., 1 Zab. 189, where it is held, that commissioners appointed to value the land of a person named on one route, adopted by the company, cannot appraise the land of the same person, when the company adopt a different route across the land.

In regard to the right of appeal, which is given in terms to the party aggrieved, it has been held to extend to the railway company, as well as the land-owner. Kimball *v.* Kennebec & Portland Railroad Co., 35 Me. 255.

In New York no appeal lies from the order of the Supreme Court, confirming the report of commissioners on the appraisal of land damages for land taken under the general railway act. The act provides for no such appeal, and the remedy, in the act, is intended to be exclusive. And besides, the Supreme Court exercises a discretion, to some extent, in confirming such reports, and on general principles an appeal would not lie to revise such adjudications. New York Central Railroad Co. *v.* Marvin, 11 N. Y. 276; Troy & Boston Railroad Co. *v* Northern Turnpike Co., 16 Barb. 100.

Where the special act of a railway company required ten days' notice to the land-owner of the time when a jury would be drawn to assess damages, it was held that a strict compliance with that requirement was necessary to jurisdiction, and that the objection was not waived by appearance before the officer at the time the jury was drawn, and objection to the regularity of the proceedings without stating the grounds, or by appearance before the jury,

(*m*) A motion to set aside the verdict is addressed to the court to which the verdict is returned. Burr *v.* Bucksport & Bangor Railroad Co., 64 Me. 130. Verdict will not be set aside for improper admission of evidence unless

* 25. It does not seem important, where the statute in terms allows either party to take compulsory proceeding to assess land

when on their meeting to appraise the damages, and objection to one of them, who was set aside. Cruger *v.* Hudson River Railroad Co., 12 N. Y. 190.

Mere informalities in the summons, which do not mislead the company, will not avoid the proceeding. Eastham *v.* Blackburn Railway Co., 9 Exch. 758; s. c. 25 Eng. L. & Eq. 498.

It is not important that the award should specify the finding on the separate items of claim. *In re* Bradshaw, 12 Q. B. 562.

Where a special act prescribes a mode of procedure, in condemning land, different from that required by a general law of the state subsequently passed, the company may pursue the course prescribed by the special act. Clarkson *v.* Hudson River Railroad Co., 12 N. Y. 304. But it seems to be here considered, that the company may, on the contrary, adopt the course prescribed by the general act. And on general principles it would seem that it should do so, unless there is something in the general act by which the existing railways are at liberty to proceed under their charters. This is the ground of the decision in the last case. North Missouri Railroad Co. *v.* Gott, 25 Mo. 540.

Where the company's special act vests specific powers for the benefit of the public, as to build stations of given dimensions larger than the general act provides, it is not controlled by subsequent general acts. London & Blackwall Railway Co. *v.* Board of Works, 3 Kay & J. 123; s. c. 28 Law T. 140. In regard to the mode of proceeding in such cases, see Coster *v.* New Jersey Railroad & Transportation Co., 4 Zab. 730; Green *v.* Morris & Essex Railroad Co., 4 Zab. 486; Pittsfield & North Adams Railroad Co. *v.* Foster, 1 Cush. 480.

substantial injustice has been done. Detroit, Western Transit, & Junction Railroad Co. *v.* Crane, 50 Mich. 182.

Jurisdiction. — Service of process by collusion on one not interested in the land gives no jurisdiction. Dunlap *v.* Toledo, Ann Arbor, & Grand Trunk Railway Co., 46 Mich. 190. Service must be made, when. Bowman *v.* Venice & Carondelet Railway Co., 102 Ill. 472; Liebengut *v.* Louisville, New Albany, & St. Louis Railway Co., 103 Ill. 431. Petition must make *prima facie* case. State *v.* Hudson Tunnel Railroad Co., 38 N. J. Law, 548; Quayle *v.* Missouri, Kansas, & Texas Railway Co., 63 Mo. 465; Spofford *v.* Bucksport & Bangor Railroad Co., 66 Me. 26; Smith *v.* Chicago & Western Indiana Railroad Co., 105 Ill. 511. Failure to serve notice of motion to confirm, will not deprive the court of jurisdiction already acquired. Allen *v.* Utica, Ithaca, & Elmira Railroad Co., 15 Hun, 80. Jurisdiction is not open to question in collateral proceedings. Townsend *v.* Chicago & Alton Railroad Co., 91 Ill. 545.

Pleadings, Practice, Evidence, &c. — Land must be described, how in pleadings. Indianapolis & Vincennes Railroad Co. *v.* Newsom, 54 Ind. 121; Spofford *v.* Bucksport & Bangor Railroad Co., 66 Me. 26; *In re* New York Central & Hudson River Railroad Co., 70 N. Y. 191; Lower *v.* Chicago, Burlington, & Quincy Railroad Co., 59 Iowa, 563. Allegation of special damage. North Pacific Railroad Co. *v.* Reynolds, 50 Cal. 90. Filing of answer unnecessary in Illinois. Smith *v.*

damages upon the parties failing to agree, that there should have been any previous attempt to agree, in order to give jurisdiction to the courts to assess the amount of such compensation.[35]

[35] Bigelow *v.* Mississippi Central & Tennessee Railroad Co., 2 Head, 624.

Chicago & Western Indiana Railroad Co., 105 Ill 511. Amendment of petition. *In re* New York & West Shore Railroad Co., 89 N. Y. 453. Dismissal of proceedings. St. Louis, Fort Scott, & Wishita Railroad Co. *v.* Martin, 29 Kan. 750. Opening of default when default is excused. *In re* New York, Lackawanna, & Western Railroad Co., 93 N. Y. 385. What evidence admissible. Quincy, Missouri, & Pacific Railroad Co. *v.* Ridge, 57 Mo. 599; Wilmington & Reading Railroad Co. *v.* High, 89 Penn. St. 282. Conditions precedent must be performed. Kansas City, St. Joseph, & Council Bluffs Railroad Co. *v.* Campbell, 62 Mo. 585. Other matters of practice. Port Huron & Southwestern Railway Co. *v.* Voorheis, 50 Mich. 506; East Tennessee Railroad Co. *v.* Burnett, 11 Lea, 525; Galena & Southern Wisconsin Railroad Co. *v.* Birkbeck, 70 Ill. 208. Irregularity of proceedings as affecting validity of assessment. Detroit, Monroe, & Toledo Railroad Co. *v.* Detroit, 49 Mich. 47. Effect of abandonment of proceedings. Seine *v.* St. Louis & Iron Mountain Railroad Co., 72 Mo. 561.

Report, Judgment, &c. — Description in award. Michigan Air Line Railway Co. *v.* Barnes, 44 Mich. 222; Morgan *v.* Chicago & Northeastern Railroad Co., 39 Mich. 675. Award, how made where there are several owners. Rusch *v.* Milwaukee, Lake Shore, & Western Railway Co., 54 Wis. 136. Return, how made under statutes of Massachusetts. Wyman *v.* Eastern Railroad Co., 128 Mass. 346. Exceptions, what sufficient. Tucker *v.* Massachusetts Central Railroad Co., 116 Mass. 124. Report of commissioners. Crawford *v.* Valley Railroad Co., 25 Grat. 467; Childs *v.* New Haven & Northampton Railroad Co., 133 Mass. 253. Conclusiveness of second award. Provalt *v.* Chicago, Rock Island, & Pacific Railroad Co., 69 Mo. 633; *In re* Prospect Park & Coney Island Railroad Co., 27 Hun, 184. Report, when set aside. Pueblo & Arkansas Valley Railroad Co. *v.* Rudd, 5 Col. 270. Judgment, entry, form and effect. Chesapeake & Ohio Railroad Co. *v.* Bradford, 6 W. Va. 220; Curtis *v.* St. Paul, Stillwater, & Taylor's Falls Railroad Co., 21 Minn. 497; Indianapolis & St. Louis Railroad Co. *v.* Smythe, 45 Ind. 322; Pennsylvania Railroad Co. *v.* Gorsuch, 84 Penn. St. 411; Robbins *v.* St. Paul, Stillwater, & Taylor's Falls Railroad Co., 24 Minn. 191; Chicago & Western Indiana Railroad Co. *v.* Prussing, 96 Ill. 203; Williams *v.* New Orleans, Mobile, & Texas Railroad Co., 60 Miss. 689; Secombe *v.* Railroad Co., 23 Wall. 108. Execution, form, entry, *nunc pro tunc*, stay. St. Louis, Lawrence, & Denver Railroad Co. *v.* Wilder, 17 Kan. 239; Lexington & St. Louis Railroad Co. *v.* Mockbee, 63 Mo. 348; Harrisburg & Potomac Railroad Co. *v.* Peffer, 84 Penn. St. 295. Commissioners may not amend record by inserting names of new parties. Littlefield *v.* Boston & Maine Railroad Co., 65 Me. 248. Verdict sufficiently certain. Illinois Western Extension Railroad Co. *v.* Mayrand, 93 Ill. 591.

26. It has been decided that where land is taken for a railway, the owner is entitled to recover damages assessed, as of the time of taking, with interest thereon to the time of the assessment.[36] (*n*)

[36] Reed *v.* Hanover Branch Railroad Co., 105 Mass. 303.

Must be for money and not for labor. New Orleans Pacific Railway Co. *v.* Murrell, 34 La. An. 536. Correction of verdict. St. Paul & Sioux City Railroad Co. *v.* Murphy, 19 Minn. 500. What finding sufficient. East Saginaw & St. Clair Railroad Co. *v.* Benham, 28 Mich. 459.

Appeal and Error, &c. — Taking of appeal and its effect as an appearance, waiving want of notice. Beckwith *v.* Kansas City & Olathe Railroad Co., 28 Kan. 484; Atchison, Topeka, & Santa Fe Railroad Co. *v.* Patch, 28 Kan. 470. Bond on appeal, when filed, what sufficient amendment, &c. Rippe *v.* Chicago, Dubuque, & Minnesota Railroad Co., 22 Minn. 44; St. Louis, Lawrence, & Denver Railroad Co. *v.* Wilder, 17 Kan. 239; Nebraska Railway Co. *v.* Van Dusen, 6 Neb. 160; Selma, Rome, & Dalton Railroad Co. *v.* Gammage, 63 Ga. 604; Lovitt *v.* Willington & Western Railway Co., 26 Kan. 297. As to where *certiorari* will lie, &c., see California Pacific Railroad Co. *v.* Central Pacific Railroad Co., 47 Cal. 528; Portland & Ogdensburg Railroad Co. *v.* Commissioners, 64 Me. 505; Schroeder *v.* Detroit, Grand Haven, & Milwaukee Railroad Co., 44 Mich. 387; Dunlap *v.* Toledo, Ann Arbor, & Grand Trunk Railway Co., 46 Mich. 390. As to what is open, Republican Valley Railroad Co. *v.* Hayes, 13 Neb. 489. Notice of appeal, how signed, how served, publication. East Saginaw & St. Clair Railroad Co. *v.* Benham, 28 Mich. 459; Haber *v.* Chicago, Omaha, & St. Joseph Railroad Co., 43 Iowa, 333; Weyer *v.* Milwaukee & Lake Winnebago Railroad Co., 57 Wis. 329; *In re* New York Central & Hudson River Railroad Co., 60 N. Y. 112; Klein *v.* St. Paul, Minneapolis, & Manitoba Railway Co., 30 Minn. 451. Who may appeal, purchaser pending appeal. Bower *v.* Grayville & Mattoon Railroad Co., 92 Ill. 223; Trogden *v.* Winona & St. Peter Railroad Co., 22 Minn. 198; Connable *v.* Chicago, Milwaukee, & St. Paul Railway Co., 10 Am. & Eng. Railw. Cas. 520. Joinder of husband. Wilkin *v.* St. Paul, Stillwater, & Taylor's Falls Railroad Co., 22 Minn. 177. Effect of appeal to carry up the whole case. Phifer *v.* Carolina Central Railroad Co., 72 N. C. 433; Wooster *v.* Sugar River Valley Railroad Co., 57 Wis. 311. Deposit by company pending appeal of sum found, and withdrawal of same. Toledo, Ann Arbor, & Grand Trunk Railway Co. *v.* Dunlap, 47 Mich. 456; Blackshire *v.* Atchison, Topeka, & Santa Fe Railroad Co., 13 Kan. 514; Weyer *v.* Milwaukee & Lake Winnebago Railroad Co., 57 Wis. 329. No reversal for mere irregularity. Louisville, New Albany, & Chicago Railroad Co. *v.* Winderlick, 10 Am. & Eng. Railw. Cas. 410. Possession pending appeal. Central Branch Union Pacific Railroad Co. *v.* Atchison, Topeka, & Santa Fe Railroad Co., 28 Kan. 453; Mettler *v.* Easton & Amboy Railroad Co., 25 N. J. Eq. 214.

(*n*) So held in Warren *v.* St. Paul & Pacific Railroad Co, 21 Minn. 424; Lafayette, Muncie, & Bloomington Railroad Co. *v.* Murdock, 68 Ind. 137;

*SECTION XI.

Time of making Compensation.

1, 2. Compensation must precede possession.
3. So by the Code Napoleon.
4. Thus under most of the state constitutions it must be concurrent with the taking.
5. Otherwise by the English cases.
6. Adequate legal remedy sufficient?
7. Payment, where required, is requisite to vest the title.
8. Some states hold that no compensation is requisite.

§ 73. 1. In general, railway acts require compensation to be made, before the company take permanent possession of the land.[1] And it has even been made a question, in this country, whether the legislature could give a railway company authority to take permanent possession of lands, required for their use, previous to making or tendering or depositing, in conformity with their charter or the general law, compensation for the same.[2] (*a*)

[1] Lands Clauses Consolidation Act, 8 Vict. c. 18, § 84 *et seq.;* Ramsden *v.* Manchester & South Junction & Altrincham Railway Co., 1 Exch. 723; s. c. 5 Railw. Cas. 552. In such cases courts of equity will enjoin the company from taking possession until compensation is made, unless the owner consent. Ross *v.* Elizabeth-Town & Somerville Railroad Co., 1 Green Ch. 422.

[2] Thompson *v.* Grand Gulf Railroad Co., 3 How. Miss. 240. The constitution of the state, however, requires a previous compensation to be made. See also Cushman *v.* Smith, 34 Me. 247.

Hampden Paint Co. *v.* Springfield, Athol, & Northeastern Railroad Co., 124 Mass. 118; Logansport Railway Co. *v.* Buchanan, 52 Ind. 163. In Wisconsin, however, the value is that of the date of appraisement. Lyon *v.* Green Bay & Minnesota Railway Co., 42 Wis. 538.

In general, interest should be allowed from the date of the award. Pigott *v.* Great Western Railway Co., Law Rep. 18 Ch. 146; Mettler *v.* Easton & Amboy Railroad Co., 37 N. J. Law, 222; Drury *v.* Midland Railroad Co., 127 Mass. 571.

So on appeal, where a larger sum is awarded. Warren *v.* St. Paul & Pacific Railroad Co., 21 Minn. 424; Selma, Rome, & Dalton Railroad Co. *v.* Gammage, 63 Ga. 601; Hartshorn *v.* Burlington, Cedar Rapids, & Northern Railway Co., 52 Iowa, 613; Sioux City Railroad Co. *v.* Brown, 13 Neb. 317. But not when the damages are reduced. Reisner *v.* Union Depot Co., 27 Kan. 382. See Whitacre *v.* St. Paul & Sioux City Railroad Co., 24 Minn. 311; Mettler *v.* Easton & Amboy Railroad Co., 37 N. J. Law, 222. In West *v.* Milwaukee, Lake Shore, & Western Railway Co., 56 Wis. 318, it is held that on appeal damages should be assessed as of the date of the taking, and interest added from that time.

(*a*) Under the constitution payment or security therefor must pre-

2. The learned and sensible author of the Commentaries on American Law[3] thus states the rule upon this subject: "The settled and fundamental doctrine is, that government has no right to take private property for public purposes, without giving just compensation; and it seems to be necessarily implied, that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception, concurrently, in point of time, with the actual exercise of the right of eminent domain."

3. The language of the Code Napoleon[4] is specific upon this point: "No one can be compelled to give up his property except * for the public good, and for a just and previous indemnity." A similar provision existed in the Roman civil law.

4. It is embodied, in different forms of language, into the written constitutions of most of the American states, but not generally in terms requiring the indemnity concurrently with the appropriation. But practically that view has generally prevailed in the courts.[5]

[3] 2 Kent Com. 340, 393, and note. Milwaukee & Mississippi Railroad Co. *v.* Eble, 4 Chand. 72; Cushman *v.* Smith, 34 Me. 247.

[4] Code Nap., B. II. tit. II. 545.

[5] Lyon *v.* Jerome, 26 Wend. 485, 497; Case *v.* Thompson, 6 Wend. 634, *per* SUTHERLAND, J. In this case it was held, that it was not indispensable to the opening of a road over the land of an individual, that the price should be paid or assessed even, before the opening of the road. And in Bonaparte cede possession. Colgan *v.* Allegheny Valley Railroad Co., 3 Pittsb. 394; New Orleans & Selma Railroad Co. *v.* Jones, 68 Ala 48. And see Chambers *v.* Cincinnati Railroad Co., 10 Am. & Eng. Railw. Cas. 376; Lee *v.* Northwestern Union Railway Co., 33 Wis. 222; Jamaica & Brooklyn Plank Road Co. *v.* New York & Manhattan Beach Railway Co., 25 Hun, 585. Hence a statute authorizing the taking for a railroad owned by the state of land to be paid for from earnings, is unconstitutional. Connecticut River Railroad Co. *v.* Franklin County Commissioners, 127 Mass. 50. And such taking may be prevented by writ of prohibition. And the undertaking of sureties in a bond to answer for damages is not just compensation within the meaning of the constitution. Vilhac *v.* Stockton & Ione Railroad Co., 53 Cal. 208. Full compensation must be made in money paid or deposited. St. Joseph and Denver Railroad Co. *v.* Callender, 13 Kan. 496. And it makes no difference that the landowner has appealed, and on appeal recovered judgment. Ib. And see Oregonian Railway Co. *v.* Hill, 9 Oreg. 377; Sherman *v.* Milwaukee, Lake Shore, & Western Railroad Co., 40 Wis. 645.

* 5. It was held in one case,[6] where the act of parliament gave the right to take lands for the purpose of building a turnpike-

v. Camden & Amboy Railroad Co., 1 Baldw. 205, 216, it was held, that a law taking private property without providing for compensation was not void, for it was said that compensation might be provided by a subsequent law. But the appropriation was enjoined, in that case, till compensation should be made. See also Gardner *v.* Newburgh, 2 Johns. Ch. 162; Henderson *v.* New Orleans, 5 La. 416; Rogers *v.* Bradshaw, 20 Johns. 735; DUNCAN, J., in Eakin *v.* Raub, 12 S. & R. 330, 366, 372; O'Hara *v.* Lexington Railroad Co., 1 Dana, 232; Hamilton *v.* Annapolis & Elkridge Railroad Co., 1 Md. Ch. 107; *Ex parte* Martin, 13 Ark. 198. In Bloodgood *v.* Mohawk & Hudson Railroad Co., 14 Wend. 51, it is held that this constitutional requirement merely contemplates a legal provision for compensation, and not that such property shall be actually paid for before taken. s. c. reversed, 18 Wend. 9; s. c. 1 Redf. Am. Railw. Cas. 209. In Boynton *v.* Peterboro' & Shirley Railroad Co., 4 Cush. 467, SHAW, C. J., says, "The right to damages for land taken for public use accrues and takes effect at the time of taking, though it may be ascertained and declared afterwards. That time in the case of railroads, *prima facie*, and in the absence of other proof, is the time of the filing of the location." Charlestown Branch Railroad Co. *v.* Middlesex, 7 Met. 78; s. c. 1 Am. Railw. Cas. 383; Davidson *v.* Boston & Maine Railroad Co., 3 Cush. 91.

In Massachusetts the remedy is limited to three years by statute, and the time begins from the filing of the location. Charlestown Branch Railroad Co. *v.* Middlesex County Commissioners, 7 Met. 78; s. c. 1 Am. Railw. Cas. 383; Boston & Providence Railroad Co. *v.* Midland Railroad Co., 1 Gray, 340, 360; Drake *v.* Hudson River Railroad Co., 7 Barb. 508, 552. By the New York statute of 1851, railway companies have no right to enter upon, occupy, or cross a turnpike or plank road without consent of the owners, except on condition of first making compensation. Plank Road Co. *v.* Buffalo Railroad Co., 20 Barb. 644.

In those states, where the constitutions contain express provisions requiring a previous compensation, as in Pennsylvania, Wisconsin, Kentucky, and Mississippi, the decisions would not be much of an indication of the general rule. But see Harrisburg *v.* Crangle, 3 Watts & S. 460.

In some of the states, even where a concurrent right to compensation, with the appropriation of the land, is recognized, it seems to be considered that a statute, authorizing the appropriation of land for public uses, but making no provision for compensation, is not on that account unconstitutional. See Rogers *v.* Bradshaw, 20 Johns. 735.

But the prevailing opinion even in New York, seems to be, that the statute

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[6] Lister *v.* Lobley, 7 A. & E. 124, Lord DENMAN says: "The amount of compensation cannot generally be ascertained till the work is done. The effect of the words in question is that they shall not do it without being liable to make compensation." It seems to have been supposed here, that if the company did not make compensation it might be compelled to do so by mandamus.

road, * making or tendering satisfaction, that this need not be done before, or at the time of entering upon or taking the lands.

6. But this subject was largely discussed, in an early case in New York,[7] and finally determined by the court of errors reversing

should provide some available remedy for adequate compensation, and that unless that is done, the act, if not positively unconstitutional, is so defective that no proceedings should be suffered under it, until compensation is secured, and that a court of equity should interfere. Gardner *v.* Newburgh, 2 Johns. Ch. 162; Rexford *v.* Knight, 11 N. Y. 308; Willyard *v.* Hamilton, 7 Ham. 449, Rubottom *v.* McCluer, 4 Blackf. 505; McCormick *v.* Lafayette, Smith, Ind. 83; Mercer *v.* McWilliams, Wright, 132.

Respecting the necessity for a previously ascertained and concurrently available compensation, some cases distinguish cases where the property is put to the use of the state directly, and hold that such compensation is not indispensable. Young *v.* Harrison, 6 Ga. 130.

The grant of the right to bridge a navigable river, or arm of the sea, or to obstruct the flow and reflow of the tide on the flats of private persons, although it may abridge their beneficial use, is not such an invasion of private property as to entitle the party to compensation. It is but the regulation of public rights, and if private persons thereby suffer damage it is *damnum absque injuria*. Davidson *v.* Boston & Maine Railroad Co., 3 Cush. 91. See, also, Zimmerman *v.* Union Canal Co., 1 Watts & S. 346; Philadelphia & Reading Railroad Co. *v.* Yeiser, 8 Penn. St. 366; 2 Am. Railw. Cas. 325; Commonwealth *v.* Fisher, 1 Penn. 462; *supra*, § 63.

But it is very generally held, that in the absence of all express provision by statute in regard to the time when compensation shall be made, the party is at all events entitled to have it ascertained and ready for his acceptance, concurrently with the actual appropriation of the estate to public use, and that he is not obliged to wait till the work is completed. People *v.* Hayden, 6 Hill, N. Y. 359; Baker *v.* Johnson, 2 Hill, N. Y. 342.

But in most of the states, no right to compensation vests in the land-owner till the acceptance and confirmation of the appraisal by the proper tribunal, and until then, the company may change the location of the road, and abandon proceedings pending against land-owners, on the first surveyed route, by paying costs already assessed. Hudson River Railroad Co. *v.* Outwater, 3 Sandf. 689.

And where the statute provides that no valuation of property taken for railway and canal purposes need be made before taking possession of the same, in those cases where the property is not obscured, so that its value cannot be judged of, there should be no unreasonable delay in having the valuation made. Compton *v.* Susquehanna Railroad Co., 3 Bland, 386.

[7] Bloodgood *v.* Mohawk & Hudson Railroad Co., 14 Wend. 51; s. c. 18 Wend. 9, 59; s. c. 1 Redf. Am. Railw. Cas. 209. See, also, on this subject, Fletcher *v.* Auburn & Syracuse Railroad Co., 25 Wend. 462; Smith *v.* Helmer, 7 Barb. 416; Pittsburgh *v.* Scott, 1 Penn. St. 309; People *v.* Michigan Southern Railroad Co., 3 Gibbs, 496. In this case it is said the party who makes no appli-

* the judgment of the court below, that if provision was made for compensation in the act giving power to take the lands, it was not

cation for compensation for many years should be regarded as having waived all claim. Ib. 506. See, also, Smith *v.* McAdam, 3 Gibbs, 506. A statutory provision for a deposit of the value of the land before entry, is a provision for the security of the land-owner, and may be waived; and if entry is made without making the deposit, the owner may recover the assessment in an action of debt. Smart *v.* Railroad Co., 20 N. H. 233. But in one case it was held indispensable to the validity of the power, that the party, whose land was taken, should have something more than a right of action for the value of his land. Shepardson *v.* Milwaukee & Beloit Railroad Co., 6 Wis. 605. See Powers *v.* Bears, 12 Wis. 213; Ford *v.* Chicago & Northwestern Railway Co., 14 Wis. 609.

By the construction of the statute of Maine, a railway corporation, as soon as the track is located, may take immediate possession, and the land-owner, failing to agree with the company as to the amount of damages, may apply to the courts to have the same assessed, and thereupon the company must pay or give security for the same, and right of possession is suspended until the requirement is complied with; but no action of trespass lies in such cases. Davis *v.* Russell, 47 Me. 443. Where by statute a bond is required to be filed by the company to secure damages to the land-owner, on failure of the parties to agree on the amount, such bond extends to all the lawful damage caused to the owner by the construction of the company's works; and the fact of its being approved and ordered to be filed is presumptive proof that the parties had failed to agree. Wadhams *v.* Lackawanna & Bloomsburg Railroad Co., 42 Penn. St. 303.

But in most of the states the assessment of the damages due to the land-owner, and the payment, tender, or deposit of the same, is held a condition precedent to the right of entry, and the company entering before compliance therewith will, *prima facie*, be regarded as trespassers. Memphis & Charleston Railroad Co. *v.* Payne, 37 Miss. 700; Henry *v.* Dubuque & Pacific Railroad Co., 10 Iowa, 540; Evans *v.* Haefner, 29 Mo. 141; Burns *v.* Dodge, 9 Wis. 458.

In McAulay *v.* Western Vermont Railroad Co., 33 Vt. 311; s. c. 1 Redf. Am. Railw. Cas. 245, it was decided that the payment of land damages was a condition precedent to the acquiring of title; but that where the land-owner acquiesces in occupation without prepayment on a contract or understanding for future payment, and the road is constructed and put in operation, he cannot afterwards, on failure to obtain payment, maintain trespass or ejectment for the land. And whether, under such circumstances, he would still retain an equitable lien on the land, seems doubtful. The mere prosecution of a controversy before commissioners or on appeal, as to the amount of the damages, is not such a prohibition of the taking of the land without prepayment as is necessary to enable the owner to maintain trespass or ejectment after the road is put in operation. Nor will notice to the laborers on the railway employed by the contractor be considered as sufficient to entitle the owner to maintain trespass or ejectment against the company, the company not being

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indispensable that the amount should be actually ascertained and paid before the appropriation of the property.

7. In Mississippi it is required, by the constitution of the state, that the compensation be paid before the right to use the land is vested.[8] So also in Georgia the title does not vest in the company until the ascertained compensation is paid or tendered.[9] (*b*) A

affected by such notice. In Dayton Railroad Co. *v.* Lawton, 20 Ohio St. 401, where the defendant agreed to convey the right of way through on payment of the agreed price, and the company entered before payment, it was held that the land-owner had a lien on the land for the unpaid purchase-money, which could be enforced by the sale of the whole road. In Jersey *v.* Briton Ferry Floating Dock Co., Law Rep. 7 Eq. 409, it was held that the owner, after the construction of the works, had no lien on the lands for payment of a rent-charge. Wickens, Vice Chancellor, said the enforcement of such a lien by entry on the land would be contrary to any probable intention of the parties. But in Winchester *v.* Mid-Hants Railway Co., Law Rep. 5 Eq. 17, the court held that where railway companies had been allowed to build across lands on promise of payment of agreed damages in six months after the completion of the works, the vendor's lien might be enforced against the companies by appointing a receiver, or in any other proper manner. See, also, Munns *v.* Isle of Wight Railway Co., Law Rep. 8 Eq. 653, where the Vice-Chancellor said the land-owner, after having obtained a decree for payment of land damages, had the right to say to the company, "pay me the purchase-money or give me back my property."

[8] Stewart *v.* Raymond Railroad Co., 7 Sm. & M. 568. See also Thompson *v.* Grand Gulf Railroad Co., 3 How. Miss. 240.

[9] Doe *v.* Georgia Railroad Banking Co., 1 Kelly, 524.

(*b*) So in Indiana under the constitution of 1856. And thence it follows that it is the duty of the company to commence the proceedings for the assessment of damages. Cox *v.* Louisville, New Albany, & Chicago Railroad Co., 48 Ind. 178. But see *infra*, § 96, note (*a*). So payment is a condition precedent under the constitution of Kansas; and a judgment unpaid and unsecured will not suffice. Pryzbylowicz *v.* Missouri River Railroad Co., 3 McCrary, 586. A statute permitting entry on payment pending appeal of the amount awarded into the court of the county where the land lay, was held unconstitutional, as not requiring precedent payment or tender of compensation. Redman *v.* Philadelphia, Marlton, & Medford Railroad Co., 33 N. J. Eq. 165. So of a statute authorizing entry upon tender pending appeal, without awaiting the issue. Watson *v.* Pittsburg & Connellsville Railroad Co., 2 Pittsb. 99. And a statutory provision to enable the court to permit the company to take possession pending proceedings to condemn, without providing compensation for use and waste, is also unconstitutional. Davis *v.* San Lorenzo Railroad Co, 47 Cal. 517; California Pacific Railroad Co. *v.* Central Pacific Railroad Co., 47 Cal. 528. But in New Jersey, under the act of 1873, the company may take possession pending an ap-

similar decision was made by the Supreme Court of the United States,[10] where the charter of the company provided that the payment, or tender, of the valuation should vest the estate in the company, as *fully as if it had been conveyed. And a similar decision was also made by the Supreme Court of Vermont.[11]

8. In one case in North Carolina,[12] it was held that compensation need not be made prior to appropriating land for public use. The constitution of the state is said to contain no prohibition against taking private property for public use, without compensation. And the same is true of the constitution of South Carolina. And the latter state held[13] that private property might be taken without compensation. But this decision is certainly at variance with the generally received notions upon that subject, since the period of the Roman Empire.

[10] Baltimore & Susquehanna Railroad Co. *v.* Nesbit, 10 How. 395.

[11] Stacey *v.* Vermont Central Railroad Co., 27 Vt. 39. The opinion of ISHAM, J., in this case, shows the correlative rights of the company and land-owner, and by what act the right of each becomes perfected. Where the statute requires the company to contract in writing, it is not competent to show title in any other mode, unless by formal conveyance. Harborough *v.* Shardlow, 2 Railw. Cas. 253; s. c. 7 M. & W. 87. In Graff *v.* Baltimore, 10 Md. 544, it was held, under a statute to enable the city to supply pure water, and to take land on valuation by a jury and compensation to the owners, which provided that where "such valuation is paid, or tendered, to the owner or owners" of the property, it "shall entitle the city to the use, estate, and interest in the same, thus valued, as fully as if it had been conveyed by the owners;" that the city was not bound by the mere inquisition and judgment thereon, but could rightfully abandon the location; and that payment, or tender, under the statute, was indispensable to the vesting of the title. But it was held, that the city might be made liable, in another form of proceeding, to the land-owner, for any loss or damage he might have sustained, by reason of the conduct of the municipal authority in the premises.

[12] Raleigh & Gaston Railroad Co. *v.* Davis, 2 Dev. & Bat. 451. But in New Jersey it was held that the supervisors, in laying out roads, were bound to award damages to land-owners, with their return, and that if they did not the whole proceeding would be illegal and void. State *v.* Garretson, 3 Zab. 388.

[13] State *v.* Dawson, 3 Hill S. C. 100. In this case Mr. Justice RICHARDSON dissents from the decision of the court, and it is generally allowed that his opinion states the law. See 2 Kent Com. 339, note (*f*). See Louisville Railroad Co. *v.* Chappell, 1 Rice, 383; Lindsay *v.* Commissioners, 2 Bay, 38.

peal on payment or tender pursuant to the act. Mercer & Somerset Railway Co. 26 N. J. Eq. 464. And see Mitchell *v.* Illinois & St. Louis Railroad & Coal Co., 68 Ill. 286, where it is held that possession may be taken pending appeal, under the act of 1852, on giving of a bond.

*SECTION XII.

Appraisal includes Consequential Damages.

1. Appraisal bars claim for consequential damage.
2. Damage, for instance, by blasting rock.
3. But not damage by the unnecessary using of other land.
4. Loss by fires, obstruction of access, and cutting off of springs, barred.
5. But not loss by flowing land.
6. Damages, from not building on the plan contemplated, are barred.
7. Special statutory remedies reach such damages.
8. Exposure of land to fires not to be considered.
9. No action lies for damage sustained by the use of a railway.

§ 74. 1. It is requisite that the tribunal appraising land damages for lands condemned for railways, should take into consideration all such incidental loss, inconvenience, and damage, as may reasonably be expected to result from the construction and use of the road, in a legal and proper manner. And as all tribunals, having jurisdiction of any particular subject-matter, are presumed to take into consideration all the elements legally constituting their judgments, such incidental loss and damage will be barred by the appraisal, whether in fact included in the estimate or not. (*a*)

(*a*) Consequential damages caused by acts duly authorized, necessary to the exercise of the franchise, and performed with due care and skill, are not to be considered, although they lessen the value of property,— damages e.g., from noise, smoke, cinders, &c. Cogswell *v.* New York, New Haven, & Hartford Railroad Co., 48 N. Y. 31.

The inconvenience resulting from the division of a farm, separation of wood or water from the rest of the farm, &c., is matter for compensation. Chicago & Iowa Railroad Co. *v.* Hopkins, 90 Ill. 316; Hartshorn *v.* Burlington, Cedar Rapids, & Northern Railway Co., 52 Iowa, 613; Bourn *v.* Atlantic Railroad Co., 17 S. C. 574; Tucker *v.* Massachusetts Central Railroad Co., 118 Mass. 546; Peoria, Atlanta, & Decatur Railroad Co. *v.* Sawyer, 71 Ill. 361; Parks *v.* Wisconsin Central Railroad Co., 33 Wis. 413. So is the inconvenience of having one's land temporarily thrown open while construction of the road is going on. St. Louis, Jerseyville, & Springfield Railroad Co. *v.* Kirby, 104 Ill. 345. So is damage from mere severance. Galena & Southern Wisconsin Railroad Co. *v.* Birkbeck, 70 Ill. 208; St. Louis, Arkansas, & Texas Railroad Co. *v.* Anderson, 39 Ark. 167; McReynolds *v.* Baltimore & Ohio Railway Co., 106 Ill. 152; Old Colony Railroad Co. *v.* Miller, 125 Mass. 1; Harrison *v.* Iowa Midland Railroad Co., 36 Iowa, 323. So is damage to growing crops. Lance *v.* Chicago, Milwaukee, & St. Paul Railroad Co., 57 Iowa, 636. Or to an orchard. Selma, Rome, & Dalton Railroad Co. *v.* Redwine, 51 Ga. 470. So is damage resulting from interference with

2. Hence damage done by the contractors to the remaining land, by blasting rocks, in the course of construction, has been held to be barred, as included in the estimated compensation for the land taken.[1]

[1] Dodge *v.* County Commissioners, 3 Met. 380; s. c. 1 Redf. Am. Railw. Cas. 279; Sabin *v.* Vermont Central Railroad Co., 25 Vt. 363; s. c. 1 Redf. Am. Railw. Cas. 282; Dearborn *v.* Boston, Concord, & Montreal Railroad Co., 4 Fost. N. H. 179, 187; Whitehouse *v.* Androscoggin Railroad Co., 52 Me. 208. But in Hay *v.* Cohoes Co., 2 Comst. 159, a company dug a canal on its own land, for the purposes authorized by the charter. In so doing, it was necessary to blast rocks, and the fragments were thrown against and injured the plaintiff's dwelling, on land adjoining, and it was held that the company was liable to a special action for the injury, although no negligence or want of skill was alleged or proved; and in Tremain *v.* Cohoes Co., 2 Comst. 163, a precisely similar action, it was held that evidence to show that the work was done in the most careful manner was inadmissible, there being no claim for exemplary damages. But there is probably an essential difference between the case of a railway in the construction of which blasting rocks is almost indispensable, and that of a manufacturing company, or other proprietor, who may find it convenient to blast rocks on his premises, to increase their utility or beauty. But for doing what the act does not authorize, or doing improperly what it does authorize, a railway company is liable to an action. Turner *v.* Sheffield & Rotherham Railroad Co., 10 M. & W. 425. In Carman *v.* Steubenville & Indiana Railroad Co., 4 Ohio St. 399, it seems to be taken for granted, that throwing fragments of rock, by blasting, on the land of adjoining proprietors, is an actionable injury.

The result of the cases would seem to be, that where the damage done by blasting rocks, or the like, in the construction of a railway, is damage to land, a portion of which is taken by the company under compulsory powers, it will not lay the foundation of an action in any form, as it should be taken into account in estimating the compensation to the land-owner for the land taken. Brown *v.* Provinence, Warren, & Bristol Railroad Co., 5 Gray, 35. And if not included in the appraisal, it is nevertheless barred. Dodge *v.* County Commissioners, *supra*. But if the damage is to land, no part of which is taken, and where no land of the same owner is taken, it may be recovered, under the stat-

the flow of surface water. Pflegar *v.* Hastings & Dakota Railway Co., 28 Minn. 510; Hardman *v.* Northeastern Railway Co., Law Rep. 3 C. P. 168. So is damage by way of increased difficulty in renting. Pittsburg, Virginia, & Charleston Railroad Co. *v.* Rose, 74 Penn. St. 362. The necessity for additional fences is also an element of damage. Raleigh & Augusta Railroad Co. *v.* Wicker, 74 N. C. 220; Pennsylvania & New York Railroad Co. *v.* Bunnell, 81 Penn. St. 414; Leavenworth, Topeka, & Southwestern Railroad Co. *v.* Paul, 28 Kan. 816; Baltimore, Pittsburg, & Chicago Railroad Co. *v.* Lansing, 52 Ind. 229; New York & Greenwood Lake Railway Co. *v.* Stanley, 35 N. J. Eq. 283.

* 3. But it was held that this did not preclude the land-owner from recovering damages for using land adjoining the land taken * for a cart-way, where six rods were allowed to be taken by the company throughout the line of the road, which would give ample space for cart-ways upon the land taken.[2] But it was held, in another case, that the company were not liable for entering upon the adjoining lands, and occupying the same with temporary dwellings, stables, and blacksmith shops, provided no more was taken than was necessary for that purpose.[3]

4. So it is settled that the appraisal of land damages is a bar to claims for injuries by fire, from the engines obstructing access to buildings, exposing persons or cattle to injury, and many such risks.[4] (*b*) And it will make no difference, that the damages were

ute, if provision is made for giving compensation for consequential damage, or where lands are "injuriously affected." But if the statute contain no such provision, the only remedy will be by a general action. And in this view many of the cases cited above seem to assume, that blasting rocks, by an ordinary proprietor of land, is a nuisance to adjoining proprietors if so conducted as to do them serious damage. And this is the ground on which the case of Carman *v.* Steubenville & Indiana Railroad Co., is decided, without much examination of this point, indeed, and by a divided court. But if a railway is not liable for necessary consequential damage, unless the statute gives a remedy (*infra*, § 75), it may perhaps be questioned how far a recovery could be maintained, in a general action for damage done by blasting rocks, as that is confessedly within the range of their powers. See Dodge *v.* County Commissioners, 3 Met. 380, *per* SHAW, C. J., where it is said that an "authority to construct any public work carries with it an authority to use the appropriate means." See also Pottstown Gas Co. *v.* Murphy, 39 Penn. St. 257; Whitehouse *v.* Androscoggin Railroad Co., 52 Me. 208. In the latter case it was held that the damage resulting to the land-owner, for not removing the stone thrown upon land adjoining that taken, could not be considered in estimating damages, since it was presumable that the company would remove them in proper time, according to its duty; and, if it did not, the remedy would be by special action.

[2] Sabin *v.* Vermont Central Railroad Co., 25 Vt. 363; s. c. 1 Redf. Am. Railw. Cas. 282; Eaton *v.* European & North American Railway Co., 59 Me. 520.

[3] Lauderbrun *v.* Duffy, 2 Penn. St. 398. But it seems questionable whether the rule laid down here can be maintained. If, however, a party is entitled to compensation for injuries of this kind, as where his lands adjoining a railway are injuriously affected, as by blasting rocks, his only remedy is under the statute. Dodge *v.* County Commissioners, 3 Met. 380.

[4] Philadelphia & Reading Railroad Co. *v.* Yeiser, 8 Penn. St. 366; but

(*b*) As to damage by interference with the means of access through a way public or private, see Caledonian Railway Co. *v.* Walker, Law Rep. 7

not known to the appraisers, or capable of anticipation at the time of assessing land damages;[5] as where a spring of water is cut off by an excavation for the bed of a railway fifteen feet below the surface, from which the plaintiff's buildings had been supplied with water.

* 5. But it was held, that where, in the construction of a canal, with waste weirs, erected by direction and under the inspection of the commissioners appointed to designate the route of the canal, with all the works connected therewith, and to appraise damages, the waste water, after flowing over the land of adjoining proprietors, flowed upon the land of the plaintiff, and thereby greatly injured it, that he was entitled to recover damages.[6]

this is regarded as overruled by Lehigh Valley Railway Co. *v.* Lazarus, 28 Penn. St. 203; s. c. 2 Am. Railw. Cas. 325; Aldrich *v.* Cheshire Railroad Co., 1 Fost. N. H., 359; s. c. 1 Am. Railw. Cas. 206; Mason *v.* Kennebec & Portland Railroad Co., 31 Me. 215. See also Furniss *v.* Hudson River Railway Co., 5 Sandf. 551; Huyett *v.* Philadelphia & Reading Railroad Co., 23 Penn. St. 373; *supra*, §§ 71, 72. See also Lafayette Plank-Road Co. *v.* New Albany Railroad Co., 13 Ind. 90. The land-owner can claim no additional damages because the company moves its track in the street nearer to the land than it was at first laid. Snyder *v.* Pennsylvania Railroad Co., 55 Penn. St. 340.

[5] Aldrich *v.* Cheshire Railroad Co., 1 Fost. N. H. 359. But see Lawrence *v.* Great Northern Railway Co., 16 Q. B. 643; s. c. 4 Eng. L. & Eq. 265. So, also, where the company's works cut off a spring of water below high-water mark, on a navigable river, the riparian owner is entitled to damages on that account, in a proceeding under the statute. Lehigh Valley Railroad Co. *v.* Trone, 28 Penn. St. 206.

[6] Hooker *v.* New Haven & Northampton Co., 14 Conn. 146; s. c. 15 Conn. 312. But in such case, the owner of property overflowed by water, through the defective construction of a railway, is bound to use reasonable care, skill, and diligence, adapted to the occasion, to arrest the injury; and if he do not, notwithstanding the first fault was on the part of the company, he must be regarded as himself the cause of all damage, which he might have prevented by the use of such care, diligence, and skill. Chase *v.* New York Central Railroad Co., 24 Barb. 273. See Lemmex *v.* Vermont Central Railroad Co. See also *infra*, § 191.

The assessment of compensation for land taken for a railway covers all damages, whether foreseen or not, and whether actually estimated or not, which result from the proper construction of the road. But the company is liable to an action for damages resulting to any one from the defective construction of

Ap. Cas. 259. As to damage by interference with the means of access to a portion of a flat through tide-water, see Drury *v.* Midland Railroad Co., 127 Mass. 571.

But the occasional flow of land by water, caused by public works, is to be estimated as part of the damages under the English statute.[7]

6. And where the appraisal of land damages is reduced below what it otherwise would have been, by the representations of the agents of the company that the road would be constructed in a particular manner, made at the time of the appraisal to the commissioners, * and which representations are not fulfilled in the actual construction of the road, whereby the plaintiff sustained serious loss and injury, it was held, that the adjudication of the commissioners was a merger of all previous negotiations upon the subject, and that no action could be maintained for constructing the railway contrary to such representations, provided it was done in a prudent and proper manner.[8]

7. But where no part of the plaintiff's land is taken, and the statute gives all parties suffering damage by the construction of railways the right to recover, as in England and some of the American states, and the water is drawn off from plaintiff's well upon lands adjoining the railway, he may recover.[9] So, too, may

the road, the want, e. g., of suitable bridges and culverts to convey the water across the railway, at or near the places where it naturally flows (such being necessary to the proper construction of the road), except where they cannot be made, or where the expense of making them is greatly disproportionate to the interests to be preserved by them. Johnson *v.* Atlantic & St. Lawrence Railroad Co., 35 N. H. 569.

[7] Ware *v.* Regent's Canal Co., 3 De G. & J. 212.

[8] Butman *v.* Vermont Central Railroad Co., 27 Vt. 500. See also Railroad Co. *v.* Washington, 1 Rob. 67; Baltimore & Susquehanna Railroad Co. *v.* Compton, 2 Gill, 20, 28; *supra*, § 71; Kyle *v.* Auburn & Rochester Railroad, 2 Barb. Ch. 489. But see Wheeler *v.* Rochester & Syracuse Railroad Co., 12 Barb. 227, where it is held that a railway company will be enjoined from building a road-crossing at a different place from that named at the time damages were assessed. But it has been held that the company may show, by experts, the *necessity* of putting a culvert through an embankment, at a particular point, in order to preserve the work, as an answer to a claim for damages on account of the prospective obstruction of the water, and setting it back upon the land at that point. But it should be shown that such culvert is absolutely indispensable, before any deduction can be made on that account, unless the company is in some legal way bound to make it. The company is not estopped from proving this necessity because the plat of the location of the road does not indicate a culvert at that point. Nason *v.* Woonsocket Union Railroad Co., 4 R. I. 377; *infra*, § 93.

[9] Parker *v.* Boston & Maine Railroad Co., 3 Cush. 107.

the proprietor of a mill-pond recover damages, sustained by the construction of a railway across the same, although the dam was authorized by the legislature, upon a navigable river; and in constructing it, the conditions of the act were not complied with.[10]

8. But it has been held that the appraisers are not to estimate increased damages to a land-owner in consequence of the exposure of the remaining land to fires by the company's engines.[11] (*c*)

[10] White *v.* South Shore Railroad Co., 6 Cush. 412.

[11] Sunbury & Erie Railroad Co. *v.* Hummel, 27 Penn. St. 99, Lewis, C. J., and Black, J., dissenting. The general current of authority seems to be with the minority of the court. It has been held that the appraisers of lands are to consider, in estimating the damage done to the owner, the depreciation in value to his estate caused by the proximity of the railway, so far as it is brought about solely by reason of taking the land. Walker *v.* Old Colony & Newport Railway Co., 103 Mass. 10. And the turning of surface water by reason of a railway embankment is also to be considered in estimating the damages to the owner of the estate. Ib. See also Presbrey *v.* Old Colony & Newport Railway Co., 103 Mass. 1. But in trespass against a company for constructing its road through plaintiff's land, the preventing of his cattle from thriving, is not so remote a consequence of the act charged that it may not be made a ground of damage. Baltimore & Ohio Railroad Co. *v.* Thompson, 10 Md. 76. The ground assumed by the court in Pennsylvania is, that an injury to buildings, standing near the line of a railway, by fire from the company's engines, when properly constructed and prudently managed, is too remote and uncertain to form an element in estimating damages to the land-owner, either when part of the land is taken, or the statute provides for damages to all persons "injuriously affected" by the company's works. There is an embarrassment attending all attempts to define the class of injuries which do, or which do not, come within the rule of legal consequential injuries, by the construction or operation of railways. But it seems important to distinguish between a railway, as one of the legitimate uses to which the proprietor of land may put it, for the purpose of private transportation, and on which he might no doubt use locomotive steam-engines, and the use of such engines on a public railway. In the former case the land-owner would not be liable to an adjoining proprietor except for want of care, skill, or prudence in the construction or use of his engines. The same would probably be true of a public company, if the legislature did not subject it to any consequential damage resulting from the nature of the business. But where they are, as in England, and many of the American states, made liable, either as part of the price of land taken or as a distinct

(*c*) Lance *v.* Chicago, Milwaukee, & St. Paul Railroad Co., 57 Iowa, 636. But see *contra*, Colvill *v.* St. Paul & Chicago Railway Co., 19 Minn. 283; Adden *v.* White Mountains Railroad Co., 55 N. H. 413; and, in Indiana, under special statute, Swinney *v.* Fort Wayne, Muncie, & Cincinnati Railroad Co., 59 Ind. 205; Lafayette, Muncie, & Bloomington Railroad Co. *v.* Murdock, 68 Ind. 137.

* Nor can any common-law action be sustained for such damage unless where actual loss intervenes through the negligence of the company.

* 9. In an English case [12] it was held, after extended argument

ground of claim, to all consequential damage caused to the land-owner, by both the construction and the operation of their roads or either of them, in a prudent and proper manner, it seems difficult to escape the conclusion, that the exposure of property along the line of a railway to loss by fires communicated by the company's engines, is one of the most direct sources of consequential injury which can be imagined. It is more direct and substantial than that from noise, dirt, dust, smoke, and vibration of the soil, all of which, under circumstances, have been held proper elements of damage to be considered. Perhaps none of them are absolute grounds of damage in all cases. That depends very much on the nearness of the track to the land; and other circumstances may perhaps deserve consideration, in many cases. But where the track passes directly through lands, near where buildings are already erected, it is difficult to conjecture on what ground it could be claimed that the increased exposure to fire was not a serious detriment to the owner. It is certain it must very seriously enhance the rate of insurance, and proportionally diminish the value of the rent, and of the buildings. As was said by SHAW, C. J., in Locks & Canals Proprietors *v.* Nashua & Lowell Railroad Co., 10 Cush. 385, it is incumbent on one who claims damage on this ground to show that the company's track ran so near his buildings "as to cause *imminent* and *appreciable* danger by fire." When it is undertaken to be decided, as a question of law, that in no case is danger from fire, by the proper use of the company's engines, to be considered in estimating land damages, it is certainly contrary to the general course of decisions upon the subject, if not to the very principle upon which such companies have been subjected to such damages as they cause to land-owners, beyond what accrues from the ordinary use of lands for building and agricultural purposes. These decisions in Pennsylvania are still maintained there, and the rule has been applied to the case of buildings where the owner is compelled to pay a higher rate of insurance in consequence of the proximity of the railway. Patten *v.* Northern Central Railroad Co., 33 Penn. St. 426. It is here maintained that any claim for damages in consequence of the mere intrusion of noise and bustle upon one's seclusion is essentially antisocial, and at war with the fundamental laws of society, which we should not be inclined to question. And as to all mere conjectural or contingent advantages and disadvantages, it may well be said they are too remote to form an element in estimating land damages. Searle *v.* Lackawanna Railroad Co., 33 Penn. St. 57. But we cannot admit that either of these rules has any just application to exposure to fire from the company's engines, where the danger is certain and inevitable. *Infra*, § 82.

[12] Brand *v.* Hammersmith & City Railroad Co., Law Rep. 2 Q. B. 223; s. c. 12 Jur. N. s. 336; s. c. affirmed in House of Lords by a majority of the law lords, Lord CAIRNS and a majority of the judges dissenting, 18 W. R. 12; Law Rep. 4 H. L. 171. See also Lafayette Plank-Road Co. *v.* New Albany Railroad Co., 13 Ind. 90.

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and careful consideration, that the owner of a house situated close to a railway, and which suffers depreciation in value from vibration and smoke, not caused by any negligent use of the railway, but being the inevitable result of the ordinary use, has no right to compensation under the English statute or by distinct action at law. The case is put upon the ground that the legislature having legalized the use of locomotive steam-engines by railway companies, adjoining proprietors must submit to the inevitable consequences of a lawful business, however inconvenient it may become; and can sustain no action for damages any more than for the exercise of any other legal business which might depreciate the value of property in the neighborhood. The English statutes are construed to give compensation only for injuries sustained by the construction and not by the use of a railway.

*SECTION XIII.

Action for Consequential Damages.

1. Statute remedy for lands "injuriously affected."
2. Without statute an action will not lie.
3. But otherwise for negligence in construction, or use.
4. Statute remedy exclusive.
5. Minerals reserved. Working of mine prevented.
6. Damages for taking land of railway for highway.
7. Compensation for minerals, when recoverable.

§ 75. 1. The liability of railways for consequential damage to the adjoining land-owners must depend upon the provisions in their charters, and the general laws of the state. In England railway companies are, by express statute,[1] made liable to the owners of all lands "injuriously affected" by their railways. And under this statute it has been determined, that if the company do any act, which would be an actionable injury without the protection of the special act of the legislature, they are liable under the statute.[2] So that, there, any act of a railway company amounting to a nuisance in a private person, and causing special

[1] Statute 8 & 9 Vict. c. 8, § 68.

[2] Glover *v.* North Staffordshire Railroad Co., 16 Q. B. 912; s. c. 5 Eng. L. & Eq. 335; *infra*, § 82.

damage to any particular land-owner, is good ground of claiming damages under this section of the statute.[3] (*a*)

2. But in the absence of all statutory provision upon the subject, railways are not liable for necessary consequential damages to land-owners, no portion of whose land is taken, where they construct and operate their roads in a skilful and prudent manner.[4]

[3] Hatch *v.* Vermont Central Railroad Co., 25 Vt. 49; s. c. 1 Redf. Am. Railw. Cas. 285; see *infra*, § 82.

[4] Monongahela Navigation Co. *v.* Coons, 6 Watts & S. 101; Radcliff *v.* Brooklyn, 4 Comst. 195; Philadelphia & Trenton Railroad Co., 6 Whart. 25; Seneca Road Co. *v.* Auburn & Rochester Railroad Co., 5 Hill, N. Y. 170; Hatch *v.* Vermont Central Railroad Co., 25 Vt. 49; Richardson *v.* Vermont Central Railroad Co., 25 Vt. 465; Arnold *v.* Hudson River Railroad Co., 49 Barb. 108; Cleveland & Pittsburg Railroad Co. *v.* Speer, 56 Penn. St. 325. And even such acts of a railway company as might have been taken into account in estimating land damages, will afford no ground of action against the company. Pittsburg, Fort Wayne, & Chicago Railroad Co. *v.* Gilleland, 56 Penn. St. 445.

There are many other cases confirming the same general view stated in the text. Henry *v.* Pittsburgh & Alleghany Bridge Co., 8 Watts & S. 85; Canandaigua & Niagara Railroad Co. *v.* Payne, 16 Barb. 273, where it is held, that injury to a mill on another lot of the same land-owner, in consequence of the construction and operation of the railway, is a matter with which the commissioners have nothing to do in estimating damages for land. So in Troy & Boston Railroad Co. *v.* Northern Turnpike Co., 16 Barb. 100, it was held that the consideration that the business of a turnpike, which claimed damage, would be diminished by the construction of the railway along the same line of travel, should be disregarded in estimating damage to such turnpike. "Every public improvement," say the court, "must affect some property favorably, and some unfavorably, from the necessity of the case. When this effect is merely consequential the injury is *damnum absque injuria*. Though their property has undoubtedly depreciated by the construction of the railway, yet the turnpike company enjoy all the rights and privileges secured to them by their charter, and no vested rights have been violated."

Nor is one entitled to damage, in consequence of a highway being laid upon his line, thus compelling him to maintain the whole fence. Kennett's Petition, 4 Fost. N. H. 139. In Albany Northern Railroad Co. *v.* Lansing, 16

(*a*) Thus, in Hopkins *v.* Great Northern Railway Co., Law Rep. 2 Q. B. 224, it was held that a company was not liable to the owner of an ancient ferry for loss of traffic consequent upon the erection of a bridge with a footway erected to provide for a new traffic. But in Chapman *v.* Oshkosh & Mississippi River Railroad Co., 33 Wis. 629, it was held that the company was liable for damage done to mill property by rendering it unsafe for the storage of lumber, through construction of road over other lots accessible through the public streets and used in connection with the mill property.

* 3. But if the railways are guilty of imprudence, or want of skill, either in the construction or use of their road, they are liable * to any one suffering special damage thereby,[5] as in needlessly

Barb. 68, it is said, "The commissioners, in estimating the damages, should not allow consequential and prospective damages."

In Plant *v.* Long Island Railroad Co , 10 Barb. 26, it is held not to be an illegal use of a street to allow a railway track to be laid on it, and that the temporary inconvenience to which the adjoining proprietors are subject while the work of excavation and tunnelling is going on is *damnum absque injuria*. So also in regard to the grade of a street having been altered by a railway, by consent of the common council of the city of Albany, who by statute were required to assess damages to any freeholder injured thereby, and who had done so in this case, it was held that no action could be maintained against the railway. Chapman *v.* Albany & Schenectady Railroad Co., 10 Barb. 360; Adams *v.* Saratoga & Washington Railroad Co., 11 Barb. 414.

And in Wolfe *v.* Covington & Lexington Railroad Co., 15 B. Monr. 404, it was held, that the municipal authority of a city might lawfully alter the grade of a street, for any public purpose, without incurring any responsibility to the adjacent landholders, and might authorize the passage of a railway through the city, along the streets, and give it the power to alter the grade of the streets, as might be requisite for that purpose, this being done at the expense of the company, and by paying damages to such adjacent proprietors as should be entitled to them. But one who urged the laying of the road in that place, on the ground that it would benefit him, and who was thereby benefited, cannot recover damages of the company, upon the maxim, "*volenti non fit injuria*." A railway, when so authorized, "is not a *purpresture*, or encroachment, upon the public property or rights."

And where a railway company erect a fence on land which it owns in fee, for the purpose of keeping the snow off the road, it is not liable for damages sustained by the owner of land on the opposite side of the fence, by the accumulation of snow, occasioned by the fence. Carson *v.* Western Railroad Co., 20 Law Rep. 350; s. c. 8 Gray, 423. See also Morris & Essex Railroad Co. *v.* Newark, 2 Stockt. Ch. 352.

And where the act complained of is the construction of an embankment, by a railway company, at the mouth of a navigable creek, in which the plaintiff has a prescriptive right of storing, landing, and rafting lumber, for the use of his sawmill, whereby the free flow of the water is obstructed, and the plaintiff thereby deprived of the full enjoyment of his privilege, the injury is regarded as the direct and immediate consequence of the act of the company, and it is liable for the damages. Tinsman *v.* Belvidere Delaware Railroad Co., 2 Dutcher, 148.

See also Rogers *v.* Kennebec & Portland Railroad Co., 35 Me. 319; Burton *v.* Philadelphia, Wilmington, & Baltimore Railroad Co., 4 Harr. 252; Hollister *v.* Union Co., 9 Conn. 436; Whittier *v.* Portland & Kennebec Railroad Co., 38 Me. 26.

[5] Whitcomb *v.* Vermont Central Railroad Co., 25 Vt. 69; Hooker *v.* New York & New Haven Railroad Co., 14 Conn. 146; *infra*, § 79. And there is

diverting watercourses and streams, and not properly restoring them,[5] whereby lands are overflowed or injured.[5]

4. And the remedy given by statute for taking or injuriously affecting lands is exclusive of all remedies at common law, by action, or bill in equity, unless provided otherwise in the statute.[6]

5. But in one English case,[7] the House of Lords held, that * a

the same liability although the lands are not situate on the stream. Brown *v.* Cayuga & Susquehanna Railroad Co., 12 N. Y. 486.

A party is liable to an action at the suit of the mill-owner, for diverting the water from a spring, which ran in a well-defined channel into a stream supplying a mill, notwithstanding he had permission from the owner of the land where the spring arose. *Aliter* if the spring spread out on the land, having no channel. As the land-owner might drain his land, so he may give permission to others to do so. Dudden *v.* Union, 1 H. & N. 627. See also Brown *v.* Illius, 27 Conn. 84; Robinson *v.* New York & Erie Railroad Co., 27 Barb. 512; Waterman *v.* Connecticut & Passumpsic Rivers Railroad Co., 30 Vt. 610; Henry *v.* Vermont Central Railroad Co., 30 Vt. 638. But in this last case it was decided that the effect of erecting a bridge in a stream on the course of the current below was so far incapable of being known or guarded against, that there was no duty imposed on railway companies to guard against an injury to land-owners below by a change of the current. See also New Albany & Salem Railroad Co. *v.* Higman, 18 Ind. 77; Same *v.* Huff, 19 Ind. 315; Colcough *v.* Nashville & Northwestern Railroad Co., 2 Head, 171. And in Cracknell *v.* Thetford, Law Rep. 4 C. P. 629, it was held that where a municipality, by act of parliament, is authorized to improve the navigation of a river, and in so doing erect staunches in the stream, whereby seaweed and sand accumulate, so as to cause the stream to overflow and do damage to a riparian owner, he will have no remedy against the corporation, unless some duty, in that respect, was imposed by the act.

[6] Regina *v.* Eastern Counties Railway Co., 2 Q. B. 347, 569; s. c. 3 Railw. Cas. 466. But in this case the act expressly provided, that the verdict and judgment should be conclusive and binding, which most railway acts do not; but it seems questionable if this will make any difference. East & West India Docks & Birmingham Junction Railway *v.* Gattke, 3 Macn. & G. 155; s. c. 3 Eng. L. & Eq. 59; *infra*, § 81.

[7] Caledonia Railroad Co. *v.* Sprot, 2 Macq. Ap. Cas. 499; s. c. 39 Eng. L. & Eq. 16. But in Bradley *v.* New York & New Haven Railroad Co., 21 Conn. 294, where the defendants' charter gave power to take land, being liable for all damages to any person or persons, and it excavated a lot (the plaintiff's) so as to weaken the foundations of his house, and erected an embankment in the highway opposite his house, so as to obscure the light, and render it otherwise unfit for use, it was held, that this did not constitute a taking of plaintiff's land, but that defendants were liable to consequential damage under the charter.

But in the early case of the Wyrley Navigation *v.* Bradley, 7 East, 368, where the act of parliament reserved to the proprietor of mines the right to dig coal, unless the company, on notice, elected to purchase and make com-

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railway company which had been condemned to pay for land, the owner reserving the minerals, were not liable to the land-owner, by reason of his inability to work a mine which he had discovered under the railway. The Lord Chancellor said, "The conveyance of the surface of land gives to the grantee an implied right of support, sufficient for the object contemplated, from the soil of the grantor adjacent as well as subjacent."

6. And it has been held, that in estimating damages to a railway in consequence of laying a highway across land occupied by them, it is not proper to take into account the probable increase of business to the company in consequence.[8]

7. And where the company take land, but decline to purchase the minerals after notice from the owner of his intention to work them, pursuant to the English statute, the company is not entitled to the subjacent or adjacent support of the minerals. And where the company gave notice, under the statute, that the working of the mines was likely to injure the railway, the owner was held entitled to recover compensation which had been assessed under the statute.[9]

pensation, it is held that where the canal was damaged by the near approach of the mine, after such notice, and no compensation made, the coal-owner was not liable, although it is there said to be otherwise in case of a house undermined by digging on the soil of the grantor. But this case seems to turn on the reservation in the grant.

[8] Boston & Maine Railroad Co. *v.* Middlesex County, 1 Allen, 324. The reservation in a deed of land to a railway company of the right to make a crossing over the land, creates an easement in the land, but does not extend such easement across the other lands of the company. Ib.

[9] Fletcher *v.* Great Western Railway Co., 4 H. & N. 212. And in North Eastern Railway Co. *v.* Elliott, Johns. & H. 145; s. c. 6 Jur. N. s. 817, it was held that the general principle, that a vendor of land sold for a particular use cannot derogate from his own grant by doing anything to prevent the land sold from being put to that use, applies to sales to railways under compulsory powers; but that this principle will not compel the vendor of land to perpetuate anything on the portion of the land retained by him, which is merely accidental, though existing and of long standing at the date of the sale. Hence, where a railway company took land for a bridge in a mining district, where a shaft had been sunk many years before, but the working of the mines had been abandoned and the shaft filled with water for a long time before the taking of the land, it was held that the land-owner was not precluded from draining the water and working the mine, although the effect must be to lessen the support of the bridge to some extent, by withdrawing the hydrostatic pressure on the roof of the mine, and the consequent support of the superincumbent strata of earth.

*SECTION XIV.

Right to occupy Highway.

1. Decisions as to the right of abutting owners to compensation conflicting.
2. First held that owners of the fee were entitled to additional damages.
3. Principle would seem to support such a rule.
4. But many cases are the other way.
5. Legislatures should require additional compensation.
6. Equity will not enjoin railways from occupying streets of a city.
7. Such compensation required in some of the states.
8. Recent decisions show an inclination to require compensation.

n. (a) Right of the owner of the fee to additional compensation would seem to be settled.

§ 76. 1. The decisions are contradictory in regard to the right of a railway company to lay its track along a common highway, without making additional compensation to land-owners adjoining such highway, and who, in the country, commonly own to the middle of the highway. (*a*)

(*a*) There seems now to be a settled distinction between cases where the fee is in the abutter and those where it is not. Thus, various courts have held that mere dedication of a street to public use will not authorize its use for a railway without compensation to the abutters. Cosby *v.* Owensboro & Russellville Railroad Co., 10 Bush, 288; Jeffersonville Railroad Co. *v.* Esterle, 13 Bush, 667 ; Sherman *v.* Milwaukee, Lake Shore, & Western Railroad Co., 40 Wis. 645; Cox *v.* Louisville, New Albany, & Chicago Railroad Co., 48 Ind. 178; Terre Haute & Indianapolis Railroad Co. *v.* Scott, 74 Ind. 29; Grand Rapids & Indiana Railroad Co. *v.* Heisel, 38 Mich. 62; Same *v.* Same, 47 Mich. 393; Gulf, Colorado, & Santa Fe Railway Co. *v.* Graves, 10 Am. & Eng. Railw. Cas. 199; Hastings & Grand Island Railroad Co. *v.* Ingalls, 15 Neb. 123. Although the exclusive use of the street is in the public even, the fee being in the abutter. Jeffersonville Railroad Co. *v.* Esterle, 13 Bush, 667. And although abutters hold subject to the right to appropriate the street to such uses, compatible with the end for which the street was established, as the general good may require. Cosby *v.* Owensboro & Russellville Railroad Co., 10 Bush, 288. And so various courts have held that in general an abutter not owning the fee of the street, cannot recover for the mere use of the street for railway purposes. Barney *v.* Keokuk, 94 U. S. 324; Rio Grande Railroad Co. *v.* Brownsville, 45 Tex. 88; Elizabethtown & Paducah Railroad Co. *v.* Thompson, 79 Ky. 52; Houston & Texas Central Railroad Co. *v.* Odum, 53 Tex. 343; Botts *v.* Missouri Pacific Railroad Co., 11 Mo. Ap. 589;

2. In some of the early cases upon this subject it seems to have been considered, that, under such circumstances, the land-

Greene *v.* New York Central & Hudson River Railroad Co., 12 Ab. N. Cas. 124; Simplot *v.* Chicago, Milwaukee, & St. Paul Railway Co., 16 Fed. Rep. 350; Indianapolis, Bloomington, & Western Railroad Co. *v.* Hartley, 67 Ill. 439; Stetson *v.* Chicago & Evanston Railroad Co., 75 Ill. 74. But that he may, for direct damage resulting from the construction or operation of the road, as, e. g., from smoke, cinders, sparks, or from the cracking of walls by the rapid moving of heavy trains, or from interference with the means of ingress and egress. Stone *v.* Fairbury, Pontiac, & Northwestern Railroad Co., 68 Ill. 394; Jeffersonville Railroad Co. *v.* Esterle, 13 Bush, 667; Elizabethtown & Paducah Railroad Co. *v.* Combs, 10 Bush, 382. But see Struthers *v.* Dunkirk, Warren, & Pittsburg Railway Co., 87 Penn. St. 282. Or for an obstruction of the street by cars or the like, causing a nuisance. Grand Rapids & Indiana Railroad Co. *v.* Heisel, 38 Mich. 62; Severy *v.* Central Pacific Railroad, Co., 51 Cal. 194. And see Bracken *v.* Minneapolis & St. Louis Railway Co., 29 Minn. 41; Hussner *v.* Brooklyn City Railroad Co., 30 Hun, 409. But see Gear *v.* Railroad Co., 43 Iowa, 83. Or for any damages other and different from those sustained by the general public. Chicago & Western Indiana Railroad Co. *v.* Ayres, 106 Ill. 511; Gottschalk *v.* Chicago, Burlington, & Quincy Railroad Co., 14 Neb. 550. The person entitled to recover for injury from the laying of the track is the owner at the time when the laying is done, not a subsequent grantee. Dixon *v.* Baltimore & Potomac Railroad Co., 1 Mackey, 78. And title may be proved by adverse possession. Lawrence Railroad Co. *v.* Cobb, 35 Ohio St. 94.

As to injury to the abutter from embankments, see Cosby *v.* Owensboro & Russellville Railroad Co., 10 Bush, 288; Burritt *v.* New Haven, 42 Conn. 174; Pekin *v.* Winkel, 77 Ill. 56; Tate *v.* Missouri, Kansas, & Texas Railway Co., 64 Mo. 149; Karst *v.* St. Paul, Stillwater, & Taylor's Falls Railroad Co., 23 Minn. 401. As to injury from additional tracks, see Davis *v.* Chicago & Northwestern Railway Co., 46 Iowa, 389; Ingram *v.* Chicago, Dubuque, & Minnesota Railroad Co., 38 Iowa, 669. As to injury from change of grade, see Central Branch Union Pacific Railroad Co. *v.* Twine, 23 Kan. 585; Pittsburg, Virginia, & Charleston Railroad Co. *v.* Rose, 74 Penn. St. 362; Nottingham *v.* Baltimore & Potomac Railroad Co., 3 McArthur, 517; Kaiser *v.* St. Paul, Stillwater, & Taylor's Falls Railroad Co., 22 Minn. 149; Buchner *v.* Chicago, Milwaukee, & Northwestern Railway Co., 56 Wis. 403. As to injury from fire, smoke, cinders, &c., see Chicago & Western Indiana Railroad Co. *v.* Berg, 10 Brad. Ap. 607; Same *v.* George, Ib. 646; Same *v.* Phillips, Ib. 648; Cosby *v.* Owensboro & Russellville Railroad Co., 10 Bush, 288; Elizabethtown, Lexington, & Big Sandy Railroad Co. *v.* Combs, 10 Bush, 382. As to injury from negligence in construction, see Ford *v.* Santa Cruz Railroad Co., 59 Cal. 290; Brewer *v.* Boston, Clinton, & Fitchburg Railroad Co., 113 Mass. 52; Cadle *v.* Muscatine Western Railroad Co., 44 Iowa, 11. As to the measure of damages, see Mix *v.* Lafayette, Bloom-

owners were entitled to additional compensation, when the land was converted from a common carriage-way to a railway.[1]

[1] Presbyterian Society *v.* Auburn & Rochester Railroad Co., 3 Hill, N. Y. 567. The case of Fletcher *v.* Auburn & Syracuse Railroad Co., 25 Wend.

ington, & Mississippi Railway Co., 67 Ill. 319; St. Louis, Vandalia, & Terre Haute Railroad Co. *v.* Capps, 72 Ill. 188; Hartz *v.* St. Paul & Sioux City Railroad Co., 21 Minn. 358; *In re* New York, West Shore, & Buffalo Railway Co., 29 Hun, 646; Syracuse & Northern Railroad Co. *v.* Alexander, 3 Thomp. & C. 784; Chicago, Burlington, & Quincy Railroad Co. *v.* McGinnis, 79 Ill. 269; Jeffersonville Railroad Co. *v.* Esterle, 13 Bush, 667; Grand Rapids & Indiana Railroad Co. *v.* Heisel, 38 Mich. 62; Henderson *v.* New York Central Railroad Co., 78 N. Y. 423; Kucheman *v.* Chicago, Clinton, & Dubuque Railway Co., 46 Iowa, 366; O'Connor *v.* St. Louis, Kansas City, & Northern Railway Co., 56 Iowa, 735; Chicago & Western Indiana Railroad Co. *v.* Berg, 10 Brad. Ap. 607; Pittsburg, Virginia, & Charleston Railroad Co. *v.* Rose, 74 Penn. St. 362; Mix *v.* Lafayette, Bloomington, & Mississippi Railway Co., 67 Ill. 319.

The legislature has power to authorize the construction of a railway in a highway or a street. *In re* Prospect Park & Coney Island Railroad Co., 8 Hun, 30; s. c. 67 N. Y. 371; Atlantic & Pacific Railroad Co. *v.* St. Louis, 3 Mo. Ap. 315; Danville, Hazleton, & Wilkesbarre Railroad Co. *v.* State, 73 Penn. St. 29; Brainard *v.* Missisquoi Railroad Co., 48 Vt. 107; Perry *v.* New Orleans, Mobile, & Chattanooga Railroad Co., 55 Ala. 413; Washington Cemetery *v.* Prospect Park & Coney Island Railroad Co., 68 N. Y. 591. It cannot be constructed without such authority. Pennsylvania Railroad Co.'s Appeal, 93 Penn. St. 150. And this, as in Iowa, without consent of municipal authority. Chicago, Newton, & Southwestern Railroad Co. *v.* Newton, 36 Iowa, 299; Hines *v.* Keokuk & Des Moines Railroad Co., 42 Iowa, 636; State *v.* Davenport & St. Paul Railroad Co., 47 Iowa, 507. But a grant of a right to run a road through a town does not operate as a grant of the use of the street. St. Louis, Vandalia, & Terre Haute Railroad Co. *v.* Haller, 82 Ill. 208. But see Houston & Texas Central Railroad Co. *v.* Odum, 53 Tex. 343, where it is held that a charter to a road to be built to a certain city imported authority to enter the city and use a street. Grant of a right to lay a track in a street does not deprive the abutter of his right to damages. Frith *v.* Dubuque, 45 Iowa, 406; Washington Cemetery *v.* Prospect Park & Coney Island Railroad Co., *supra*.

And so the legislature may give a city exclusive control of its streets and alleys, as it has in Illinois. Chicago, & Vincennes Railroad Co. *v.* People, 92 Ill. 170. And in such case the city may authorize the construction of railways in the streets. Quincy *v.* Chicago, Burlington, & Quincy Railroad Co., 92 Ill. 21; Korlmel *v.* New Orleans Railroad Co., 27 La. An. 442. Or in the alleys. Heath *v.* Des Moines & St. Louis Railroad Co., 10 Am. & Eng. Railw. Cas. 313. And see Cook *v.* Burlington, 36 Iowa, 357. And where permission is to be given by

* 3. There is certainly great reason in this view, inasmuch as the land-owner's entire damage is to be assessed, at once, and it

462, might have been put on the same ground, but it was not. The ground assumed is, that the land-owners are entitled to consequential damage, in consequence of the new use to which the land is put, which amounts to nearly the same thing. Philadelphia & Trenton Railroad Co., 6 Whart. 25; Miller *v.* Auburn & Syracuse Railroad Co., 6 Hill, N. Y. 61; Mahon *v.* Utica & Schenectady Railroad Co., Hill & Den. Supp. 156. And in Ramsden *v.* Manchester South Junction & Altrincham Railway Co., 1 Exch. 723, the Court of Exchequer expressly decide, that a railway company has no right even to tunnel under a highway, without making previous compensation to the land-owner. Seneca Road *v.* Auburn & Rochester Railroad Co., 5 Hill, 170; Troy *v.* Cheshire Railroad Co., 3 Fost. N. H. 83. But a distinction is taken between the property of adjoining land-owners in the highway or street in cities, and in the country. In the former it has been held that the fee of the streets is under the sole control of the municipal authorities, and that it is no perversion of the legitimate use of the streets to allow a railway company to lay its track on them. Plant *v.* Long Island Railroad Co., 10 Barb. 26; Adams *v.* Saratoga & Washington Railroad Co., 11 Barb. 414; Chapman *v.* Albany & Schenectady Railroad Co., 10 Barb. 360; Drake *v.* Hudson River Railroad Co., 7 Barb. 508; Applegate *v.* Lexington & Ohio Railroad Co., 8 Dana, 289; Wolfe *v.* Covington & Lexington Railroad Co., 15 B. Monr. 404.

In Williams *v.* New York Central Railroad Co., 18 Barb. 222, 216, the court say: "A railroad is only an improved highway, and the use of a street by a railway is one of the modes of enjoying a public easement." But see this case reversed, *infra*. A general power to pass highways in the construction of a canal or railway has been held to include turnpikes also. Rogers *v.* Bradshaw, 20 Johns. 735; White River Turnpike Co. *v.* Vermont Central Railroad Co., 21 Vt. 590. But the grant of a railway from one terminus to another, without prescribing its precise course and direction, does not, *prima facie*, confer power to lay out the railway on and along an existing highway. The legislature, however, may grant such authority, either by express words or necessary implication; and such implication may result either from the language of the act or from its being shown, from an application of the act to the subject-matter, that the railway cannot, by reasonable intendment, be laid in any other line. Springfield *v.* Connecticut River Railroad Co., 4 Cush. 63; s. c. 1 Redf. Am. Railw. Cas. 299. But in general, the owner of land adjoining a highway is entitled to additional compensation where it is put to a different and more dangerous use. And towns have an interest in highways and bridges which will enable them to maintain an action on the case for their obstruction or destruction, and the conversion of the materials.

ordinance, a resolution will answer the purpose. Quincy *v.* Chicago, Burlington, & Quincy Railroad Co., *supra*. Repeal of the ordinance will not render the road a nuisance. Ingram *v.* Chicago, Dubuque, & Minnesota Railroad Co., 38 Iowa, 669.

* could never be done understandingly, unless the use to which it were to be put were known to the assessors. And it is obvious,

Troy *v.* Cheshire Railroad Co., 3 Fost. N. H. 83. But the town is not liable to pay damages assessed by the selectmen in laying out a highway, at the request of a railway company, made necessary to supply the place of one taken by the company for a track. Ellis *v.* Swanzey, 6 Fost. N. H. 266.

In general, it may be stated as the settled doctrine of most of the states, that the owner of land bounded on a highway owns to the centre of the way. Buck *v.* Squiers, 22 Vt. 484, 495. The general rule as to monuments referred to in deeds of land undoubtedly is, that the centre of such monuments is intended, whether it be stake, stone, tree, rock, or a highway or stream. It is undoubtedly more a rule of policy than of intention, and as such, to answer its end, should be applied in every case, unless a clearly defined intention to the contrary be made to appear. 3 Kent Com. 433; Chatham *v.* Brainerd, 11 Conn. 60; Champlin *v.* Pendleton, 13 Conn. 23; Livingston *v.* New York, 8 Wend. 85, 106; Starr *v.* Child, 20 Wend. 149; s. c. 4 Hill, 369; Canal Commissioners *v.* People, 5 Wend. 423; s. c. 13 Wend. 355; Johnson *v.* Anderson, 18 Me. 76; Bucknam *v.* Bucknam, 3 Fairf. 463; Leavitt *v.* Towle, 8 N. H. 96; Dovaston *v.* Payne, 2 Sm. Lead. Cas. 199, and notes by Hare & Wallace; Nicholson *v.* New York & New Haven Railroad Co., 22 Conn. 74.

But the owner of the fee of land over which a highway passes cannot maintain a bill in equity to enforce an order of commissioners as to the manner of constructing a railway where it crosses the highway, but the same should be brought by the principal executive officers of the town or city. Brainard *v.* Connecticut River Railroad Co., 7 Cush. 506. The court say: "It is only where the owner suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him; and certainly no rule of law rests on a wiser or more sound policy. Were it otherwise, suits might be multiplied to an indefinite extent, so as to create a public evil, in many cases, much greater than that which was sought to be redressed." Stetson *v.* Faxon, 19 Pick. 147; Quincy Canal Proprietors *v.* Newcomb, 7 Met. 276; Smith *v.* Boston, 7 Cush. 254; Hughes *v.* Providence & Worcester Railroad Co., 2 R. I. 493.

In Williams *v.* Natural Bridge Plank-Road Co., 21 Mo. 580, it is held that the grant of the right of locating a plank-road on a county road does not exclude the idea that the owner of the soil over which the road passes should have compensation for any injury he may sustain by converting a county road into a plank-road. This case is put by the court on the ground that the plank-road is an additional burden on the soil, and that for this the landowner is as much entitled to compensation as if his land had originally been taken for the purpose of a plank-road; and that to deny all redress in such case is a virtual violation of that article of the Constitution which gives compensation to the owner of property taken for public use.

This is undoubtedly the rule of the English Law, and of reason and jus-

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* that it would ordinarily be attended with far more damage to the remaining land to have a railway than a common highway laid across it.

* 4. If the rule of estimating damages according to the money value of the land taken, were adopted, there would be more * reason in saying the public would thereby acquire the right to use it for any purposes of a road, which any future improvement * might suggest. And this is the view which seems very extensively to prevail in this country. It was long since settled that * the land-owner was not entitled to any additional damage, by reason of any alteration in the construction of the highway.[2] Or in applying it to the use of a turnpike road where toll was paid, this being but a

tice, and it should prevail more extensively in this country. The American courts seem to have been sometimes led astray on this subject by the fallacy that a railway is merely an improved highway, — which for many purposes it is, but not for all, any more than a canal is. See also *Ex parte* Railroad Co., 2 Rich. 431.

And the New York statute giving railways the right to pass on or over turnpikes, plank-roads, rivers, &c., by restoring such ways, rivers, &c. so as not unnecessarily to impair their usefulness, was construed not to preclude a plank-road from recovering damages in a common action for damages under the code, the company having entered on the plank-road without causing damages to be assessed under the statute. Ellicottville & Great Valley Plank-Road Co. *v.* Buffalo & Pittsburg Railroad Co., 20 Barb. 644. In Williams *v.* New York Central Railroad Co., 16 N. Y. 97, it was held that the dedication of land to the use of the public as a highway does not authorize its being taken by a railway company for a track without compensation to the owner of the fee, although done with the consent of the legislature and of the municipal authorities. It has been sometimes held that the laying out and operating of a horse-railway in the streets of a city is not an additional servitude upon the soil, for which the owner is entitled to compensation. Brooklyn Central & Jamaica Railroad Co. *v.* Brooklyn City Railroad Co., 33 Barb. 420. And if one company lay its track across the track of another, it is entitled to no compensation. Ib.

[2] Zimmerman *v.* Union Canal Co., 1 Watts & S. 316; Mayor *v.* Randolph, 4 Watts & S. 514; Plate Manufacturers *v.* Meredith, 4 T. R. 790; Sutton *v.* Clark, 6 Taunt. 29; Bolton *v.* Crowther, 2 B. & C. 703; Rex *v.* Pagham, 8 B. & C. 355; Henry *v.* Alleghany & Pittsburgh Bridge Co., 8 Watts & S. 86; Shrunk *v.* Schuylkill Navigation Co., 14 S. & R. 71; Commonwealth *v.* Fisher, 1 Penn. 467; Hatch *v.* Vermont Central Railroad Co., 25 Vt. 49; Taylor *v.* St. Louis, 14 Mo. 20; Richardson *v.* Vermont Central Railroad Co., 25 Vt. 465; Callender *v.* Marsh, 1 Pick. 418; Rounds *v.* Mumford, 2 R. I. 154; O'Connor *v.* Pittsburgh, 18 Penn. St. 187; Plum *v.* Morris Canal & Bank Co., 2 Stockt. 256.

different mode of supporting the highway, of which the land-owner had no just cause of complaint, since it did not materially alter the use of the land.[3] And the same rule has now been pretty extensively extended to improvements in erecting railways along the streets and highways.[4] These questions depend much upon the terms of the charter of the railway company.

* 5. And as it is confessedly competent for the legislature to require railways, in laying their track along the highways, to make compensation to the adjoining land-owners for any increased detriment, or to be liable for all consequential damage,[5] and as it is assuredly just and equitable to do so, it seems desirable it should be done. And in those states and countries where such enterprises have become so far matured as to have assumed the form of a settled system, it more commonly is done. And where it is not, it may be regarded as the result of oversight in the legislature. It was held that a railway is liable to pay damages for crossing a turnpike company's road, notwithstanding the legislature gave the right.[6]

6. Injunctions in equity have been denied, when applied for, to restrain railways from occupying the streets of cities and towns with their track,[7] (*b*) by consent of the municipal authority.

[3] Wright *v.* Carter, 3 Dutcher, 76.

[4] Plant *v.* Long Island Railroad Co., 10 Barb. 26. But see Mifflin *v.* Harrisburg, Portsmouth, Mountjoy & Lancaster Railroad Co., 16 Penn. St. 182. In this case the act required payment of damage to all who were injured by converting a turnpike into a railway, and it was held that a receipt in full to the turnpike company did not bar the claim of an adjoining land-owner for additional damages. But the levelling of a street, preparatory to laying the structure of a railway, is not an obstruction. McLaughlin *v.* Charlotte & South Carolina Railroad Co., 5 Rich. 583; Benedict *v.* Coit, 3 Barb. 459.

[5] Bradley *v.* New York & New Haven Railroad Co., 21 Conn. 294.

[6] Seneca Railroad Co. *v.* Auburn & Rochester Railroad Co., 5 Hill, 170. And the amount of damage is immaterial. The maxim, *de minimis*, does not apply to cases of plain violation of right. Id., per Cowen, J.

[7] Hamilton *v.* New York & Harlem Railroad Co., 9 Paige, 171; Hentz *v.*

(*b*) But where the fee is in the abutting owner, the use of the street without compensation may be restrained by injunction. Henderson *v.* New York Central Railroad Co., 17 Hun, 344; Same *v.* Same, 78 N. Y. 423; Railway Co. *v.* Lawrence, 38 Ohio St. 41. And see Chicago & Pacific Railroad Co. *v.* Francis, 70 Ill. 238.

* 7. But in one well-considered case,[8] it was held, that where a railway company, in carrying their road through the streets of

Long Island Railroad Co., 13 Barb. 646; Chapman *v.* Albany & Schenectady Railroad Co., 10 Barb. 360; Lexington & Ohio Railroad Co. *v.* Applegate, 8 Dana, 289; Drake *v.* Hudson River Railroad Co., 7 Barb. 508; Wetmore *v.* Story, 22 Barb. 414; Milhau *v.* Sharp, 15 Barb. 193. But where the railway is constructed without the legal permission of the municipal authorities or the legislature, along the streets of a populous city, it becomes a nuisance, and courts of equity will prohibit its continuance, at the suit of individuals who are tax-payers and property owners on the streets through which the rails are laid. In Morris & Essex Railroad Co. *v.* Newark, 2 Stockt. 352, the right of a railway company to occupy the streets of a city seems to have been examined with considerable care, but the cases on the subject are not examined very extensively, and reliance is there placed on the case of Williams *v.* New York Central Railroad Co., 18 Barb. 222, which has since been reversed. *Supra*, note 1.

There is one distinction here adverted to that is not named in other cases, so far as we have noticed, viz.: that so long as the highway or street continues to be used as such, the concurrent use of it by a railway company for its track, by consent of the legislature and the municipal authorities, does not entitle the owner of the fee to additional compensation. But if it is appropriated exclusively to the use of the railway, the owner is then, by constitutional provision, entitled to compensation, the discontinuance of the highway causing a reverter of the fee to the owner. This qualification takes away the most offensive feature of what is claimed, in some of the cases, — the right, in the legislature and the municipal authorities, to transmute a common highway or street into a public railway, as one of those improvements in the mode of intercommunication which the progress of events had brought about, and which must be regarded as fairly within the contemplation of the parties at the time of the original taking. But, in the present case, there being no

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[8] Nicholson *v.* New York & New Haven Railroad Co., 22 Conn. 74. If there is any departure from general principles, in this case, it is in holding the railway company justified in making alterations in highways, which cause no appreciable injury to the landholders, and this certainly commends itself to one's sense of reason and justice. It may be questionable, perhaps, whether the charge of the judge, who tried the case at the circuit, was not based on the technical rules applicable to the case, viz., that the company was, at all events, liable for nominal damages, and for all actual damages in addition. But where a railway company, by consent of a city, under the statutes, raises a street in order to carry the road under it, it becomes primarily liable to the adjoining land-owners for any damage to their estates thereby. And it makes no difference that the city took of them a bond of indemnity, and appointed a superintendent to take care of the public interests in the execution of the work. Gardiner *v.* Boston & Worcester Railroad Co., 9 Cush. 1.

the city of New Haven, found it necessary to carry one of the streets over the railway, upon a high bridge, with large embankments at each end, the plaintiff owning the land upon both sides of the street, and no compensation being assessed to him, he * might recover of the company in an action of trespass for any appreciable incidental damages occasioned by thus constructing their road, and the consequent alteration of the highway or street. And as the company, in thus constructing their road, acted under the authority of the legislature, they were, *prima facie*, not to be regarded as trespassers, but where they caused any appreciable damage to the land-owners along the line of the road, they were liable in this form of action. The court in this case, HINMAN, J., assumed the distinct ground, that the railway, by laying their track upon the plaintiff's land, which was before subject to the servitude of the highway, or street, would become liable "for such entry" upon the land. "In such case," says the learned judge, "the subjecting the plaintiff 's property to an additional servitude, is an infringement of his right to it, and is therefore an injury and damage to him. It would be a taking of the property of the plaintiff, without first making compensation." And the same court, in a later case,[9] held that the location of a railway upon a public highway is the imposition of a new servitude upon the land, and the owner of the fee is entitled to compensation for the

necessity for the use of the street, and no express consent of the municipal authorities for such use, it was held that no right to such use could be implied, from the grant of the charter, for a road between certain *termini*, which might be built by a route less injurious to the public; and that the consent of the municipal authorities was not to be inferred from non-interference until the track had been laid and used for several years, and large sums of money thus invested and important interests accrued; and the injunction restraining the authorities from removing the track was dissolved. The extent to which a railway company must obstruct the highway, at an intersection, to create an actionable impediment to the public travel, is extensively considered in the case of Great Western Railroad Co. *v.* Decatur, 33 Ill. 381. It was there decided, that to leave twelve feet of the highway unobstructed, so that a steady team might pass in safety, was not enough. The obstruction of the public right of way in a river, whether navigable in the old sense of being a tidal stream, or not, is a public nuisance, for which an injunction will be granted at the suit of one suffering special damage, or of the Attorney-General. Attorney-General *v.* Lonsdale, 17 W. R. 219; s. c. Law Rep. 7 Eq. 377.

[9] Imlay *v.* Union Branch Railroad Co , 26 Conn. 249.

damage caused thereby. And this includes all incidental damage to land adjoining, and which belongs to the same proprietor. In a case in Pennsylvania,[10] it is held that the legislature may authorize the construction of a railway on a street, or public highway, and the inconvenience thereby incurred by the citizens must be borne for the sake of the public good. But where this is claimed by construction and inference, all doubts are to be solved against the company. And where, by the act of incorporation of a municipality, it was provided that the "streets, lanes, and alleys thereof" should forever be and remain public highways, it was held that the municipal authorities could not authorize the construction of a railway thereon.[10] But where the state conveys to a city the title of a common, reserved in the grant of the township for a "common pasture," subject to the easement of the lot-holders, of common of pasturage, * it was held that the city might lawfully grant a portion of the same to a railway company for the purpose of constructing their road.[11]

[10] Commonwealth *v.* Erie & Northeast Railroad Co., 27 Penn. St. 339. See also Alleghany *v.* Ohio & Pennsylvania Railroad Co., 26 Penn. St. 355.

[11] Alleghany *v.* Ohio & Pennsylvania Railroad Co., 26 Penn. St. 355. But the grant of fifty feet through such a common, in a densely populated city, will convey only the right to make a road thereon, and to receive and discharge passengers and freight, and will not give the right to erect depots, car-houses, or other structures, for the convenience or business of the road; or to permit cars and locomotives to remain on the track longer than necessary to receive and discharge freight and passengers. Ib.

And it might have been regarded as the settled doctrine of the New York courts, until the case of Williams *v.* New York Central Railroad Co., *supra*, note 1, that the owner of the fee of land dedicated to the use of a highway or street, and which the legislature devote to the use of a railway, had no claim on the company for compensation, by reason of the additional servitude thereby imposed on the land. Corey *v.* Buffalo, Corning, & New York Railroad Co., 23 Barb. 482; Radcliff *v.* Brooklyn, 4 Comst. 195; Gould *v.* Hudson River Railroad Co., 2 Seld. 522. But this is now otherwise in New York.

In 1857, the subject was elaborately examined by Vice-Chancellor Kindersley, in Thompson *v.* West Somerset Railway Co., 29 Law T. 7, in relation to the *cestuis que trust* of a pier, over which the act of parliament, in express terms, authorized the company to construct a road, which the company had constructed without proceeding under the statutes to appraise compensation, and the court held them trespassers, and an injunction was granted until the company made compensation.

The subject has been considered in Indiana also, and although the author-

* 8. Since the second edition of this work, the decisions have been considerably numerous in regard to the right of railways to occupy the streets and highways, without making additional compensation to the owners of the fee of the lands across which the same are laid. The principles involved are much the same as have been already stated; but it will be important to the profession to know them in detail.

In a somewhat recent case [12] it was decided, that the occupation of the highway by the track of a railway company is the imposition of an additional servitude, and is the taking of the property of the owner of the fee in the lands over which the same is laid, within those constitutional prohibitions requiring compensation where private property is taken for public use; and that

ities are not much reviewed, the conclusions of the court conform to reason and justice. A city ordinance authorized the construction of a railway on either of two streets, through the corporate limits, under suitable restrictions as to grade. It was held that the ordinance did not authorize the company substantially to alter the grade of the street, and that, besides the right of way, which the public have in a street, there is a private right which passes to a purchaser of a lot on the street, as appurtenant to it, which he holds by an implied covenant that the street in front of his lot shall forever be kept open for his enjoyment, for any obstruction whereof to his injury he may maintain an action. In Tate *v.* Ohio & Mississippi Railroad Co., 7 Ind. 149, it was held that the right which the owner of a lot has to the enjoyment of an adjoining street is part of his property, and can be taken for public use, only on just compensation being made, pursuant to the constitution. And in Haynes *v.* Thomas, 7 Ind. 38, where the cases are more fully examined, the same general propositions are maintained. It is there said, the right of the owner of a town lot abutting on a street, to use the street, is as much property as the lot itself, and the legislature has as little power to take away one as the other. Although on principle, the right as against a railway company should be placed on the basis of its being an additional and more oppressive burden and servitude on the land, which entitles the land-owner to additional compensation, there can be, in our judgment, no manner of question of the general soundness of the above decisions. The last named case, being that of the voluntary dedication of property by the owner, for the purposes of a street and highway, well illustrates the injustice of wresting such use to the purposes of a railway, so much more burdensome and injurious. Thus the general current of American law on this subject may now be regarded as the same with the English rule already stated. Protzman *v.* Indianapolis & Cincinnati Railroad Co., 9 Ind. 467; Evansville & Crawfordsville Railroad Co. *v.* Duke, 9 Ind. 433. See also Salisbury *v.* Great Northern Railway Co., 5 C. B. N. S. 174; S. C. 5 Jur. N. S. 70.

[12] Craig *v.* Rochester City & Brighton Railroad Co., 39 Barb. 494.

[*309]

consequently the company can acquire no right to such use, under legislative and municipal license, without compensation, and that there is no difference in this respect between railways operated by steam and by other motive power. But in another case it was held, that any legislative act empowering a railway company to occupy certain streets and avenues in the city of New York, should not be construed as not intended to give such permission without compensation.[13] In the main, this case assumes the opposite ground from that declared by Craig *v.* Rochester City & Br. Railway Co.[12] The question came up for revision in the Court of Appeals, in the case of the People *v.* Kerr,[14] where the court maintained * the proposition that the construction of a city railway upon the surface of the streets and without change of grade, is an appropriation of the land to some extent to public use, but the court held that the original owner of the fee of the streets in the city of New York had no such remaining interest as to justify any demand for compensation on his part, for reasons before stated.[15]

The same distinction, as to the right of the owner of the fee to demand compensation, between the use of the streets of towns and cities for the track of railways, and of highways in the country, is observed in many of the other states. Thus in two cases in Iowa this distinction is maintained.[16]

The question of the location of railways across or along the streets and highways of cities and towns as well as in the rural districts, is extensively discussed in a case in Maine, which came more than once before the courts.[17] But most of the propositions here maintained are more or less affected by statutory provisions. It is here declared (which indeed is found in many other cases, and is sufficiently obvious in itself) that statutes regulating the operation of railways are to be considered as affecting only the general police of the state, and as applying equally to existing and

[13] People *v.* Kerr, 37 Barb. 357.

[14] 27 N. Y. 188. This case must be regarded as settling the law in New York, notwithstanding some conflict in the decisions of the different supreme courts.

[15] *Supra*, § 70, pl. 13.

[16] Milburn *v.* Cedar Rapids, Chicago, Iowa, & Nebraska Railroad Co., 12 Iowa, 246; Haight *v.* Keokuk, 4 Iowa, 199.

[17] Veazie *v.* Mayo, 45 Me. 560; s. c. 49 Me. 156.

future railways; but even matters of police affecting the construction of railways cannot reasonably be construed as having a retroactive operation, so as to require a railway company to undo and do over again the work of construction.

The cases decided in Ohio,[18] in regard to the use of highways * and streets for the purpose of street railways, do not appear to be altogether decisive of the principle involved. It seems to be there regarded, so far as a street or highway can be appropriated for such use, without appreciable damage to the owner of the land adjoining, that he is not entitled to any additional compensation, but that if from change of grade or any other cause, there is any essential damage inflicted upon the abutters, by obstructing access to lands or buildings, or in any other respect, more than would have resulted from the use in the ordinary mode for a highway, the owner of the fee will be entitled to demand additional compensation.

But it is obvious that the difficulty, in point of principle, lies somewhat deeper. For although the rule there laid down, in point of equity, may be entirely just and reasonable, it must always prove embarrassing in practice, and compel an appraisement in each particular case, in order to insure security. The true principle undoubtedly is, that if the use is substantially the same as that of an ordinary highway, no additional compensation can be required; but if the use is new, and distinct from that of an ordinary highway, the owner of the fee is entitled to additional compensation in every case, without reference to special damages; so that the question turns upon the point whether the use of a street or highway for the support of a railway track, is using it for a highway only. As such use of the street for street railways is of necessity solely under municipal control, and is a use to which the municipal authorities might themselves devote the street by constructing the tracks at their own expense, allowing all travellers to use them with every species of carriage, it seemed natural to conclude that it could not be regarded as an additional servitude; but the current of authority seems to be setting in the opposite direction.

The present inclination seems to be to make no distinction

[18] Crawford *v.* Delawne, 7 Ohio St. 459; Cincinnati & Spring Grove Avenue Railroad Co. *v.* Cumminsville, 14 Ohio St. 523.

between the use of streets by steam and street railways, and to require compensation in both cases alike.[19] (*c*)

There are some few cases in different states which still adhere * to the doctrine that the laying of a railway track for the passage of street railways, at the ordinary grade of the highway, is not an appropriation of any estate in the land to public use beyond that already appropriated by devoting the land to the use of a highway or street.[20] And there is an elaborate opinion of Mr. Justice Ellsworth, of the Connecticut Supreme Court,[21] where the same views are maintained, and, as it seems to us, with more plausibility than any case we have found in the opposite direction.

The explanation of the singular vacillation of the courts upon the subject of railways being located on the highways, and whether the owner of the fee was thereby entitled to additional compensation, seems to arise in the following manner. At the first it was so common to designate steam railways as only an improved highway that the courts, almost universally in this country, held the owner of the fee entitled to no additional compensation by reason of such railways being laid upon the highway, either across or along their route. But this view, upon more careful consideration, being found untenable, the retrocession of the courts from their former false assumption naturally gave them an unnatural impulse in the opposite direction, by which the conclusion was arrived at, that all railways must equally be an additional burden upon the fee. Whether the proper distinction between street railways and those occupying a distinct route and transacting mainly a distinct business will ever be clearly defined is perhaps questionable.

[19] Ford *v.* Chicago & Northwestern Railway Co., 14 Wis. 609; Janesville *v.* Milwaukee & Mississippi Railroad Co., 7 Wis. 484; Pomeroy *v.* Chicago & Milwaukee Railroad Co., 16 Wis. 640; Warren *v.* State, 5 Dutcher, 393; Veazie *v.* Penobscot Railroad Co., 49 Me. 119. The same principle is maintained in Brown *v.* Duplessis, 14 La. An. 842. But by statute in that state the cities may sell the use of the streets for city passenger railway purposes.

[20] New Albany & Salem Railroad Co. *v.* O'Daily, 12 Ind. 551.

[21] Elliott *v.* Fairhaven & Westville Railroad Co., 32 Conn. 579.

(*c*) But in Stange *v.* Dubuque Street Railway Co., 54 Iowa, 669, it was held that a street railway company was liable for special injury to adjoining property from the use of steam in the streets.

It seems very certain that the grant to a railway company of the right to pass along the streets of a city or town can confer no right to erect stations and other permanent structures in the streets and thereby render them unfit for use as streets.[22] In such cases the adjoining land-owners will be entitled to redress by way of damages, whether they own to the middle line of the street or only to the margin.[22]

But the owner of an unimproved building lot upon a street cannot be regarded as suffering any such injury from the location of a railway along the public street adjoining as will entitle him to an injunction.[23] And the fact that the defendant owned the * land across which a railway track is laid, and had never released the right of way to the railway, is no ground of defence for placing obstructions upon the track.[24] Nor will the breach of contract by which the company secured the right of way give any color of justification to the land-owner for placing any such obstructions on the track.[24]

Some recent cases affecting the location of street railways in the city of New York may be of interest to the profession, and we have therefore inserted in the note below[25] the leading points decided. (*d*)

[22] Lackland *v.* North Missouri Railroad Co., 31 Mo. 180.

[23] Zabriskie *v.* Jersey City & Bergen Railroad Co., 2 Beasley, 314.

[24] State *v.* Hessenkamp, 17 Iowa, 25.

[25] In Sixth Avenue Railroad Co. *v.* Kerr, 45 Barb. 138, it was held that where a railroad is laid in a public street, on permission to use a portion of the street for that purpose, the company does not acquire the same unqualified

(*d*) Somewhat analogous to the questions relating to the occupation of highways are the questions relating to the occupation of commons, parks, and public squares. Thus it has been held that abutting owners have such an easement in a public square as will entitle them to enjoin its use for railroad purposes without compensation. Pratt *v.* Buffalo City Railway Co., 19 Hun, 30. And that a park acquired for public use under statute cannot be taken for the purposes of a railway without legislative authority. *In re* New York & Brighton Beach Railroad Co., 20 Hun, 201. But that an owner of lands merely cornering on a park has no easement entitling him to complain of the use of the park for a station. Greene *v.* New York Central & Hudson River Railroad Co., 65 How. Pr. 154. In Jacksonville *v.* Jacksonville Railway Co., 67 Ill. 540, a company was perpetually enjoined at suit of a city from laying a road over a public square which had been dedicated to the city and around which lots had been sold and improved in faith of its continuance.

*SECTION XV.

Conflicting Rights in different Companies.

1. Company subservient to another can take of the other land enough only for its track.
2. Where no apparent conflict in route, company whose road is first located acquires superior right.

§ 77. 1. Where the defendants' statutory powers were subject to those conferred upon the plaintiffs, whose charter was first granted, providing that the plaintiffs' powers shall not be so exercised as to prevent the defendants from compulsorily taking and using land sufficient to construct their branch lines, not exceeding twenty-two feet in width, at the level of the rails, the plaintiffs having first purchased, with the consent of the owner, lands which the defendants proposed to take, beyond the twenty-two feet, for purposes of building stations, &c., it was held, that the plaintiffs, having occupied the ground first, were entitled to hold so much as was not actually necessary for the formation of defendants' railway.[1] (*a*)

title and right of disposition to the land occupied which individuals have in their lands; that the only exclusive power conferred by such grants is that of using railway carriages in the same manner as the grant of a stage line confers, for the time being, — the grant of a monopoly of using such stages; that after a railway company has obtained permission from the common council to lay a railway through certain streets, and such grant is subsequently confirmed by the legislature, the legislature may grant similar privileges to another company, and authorize the latter to run upon, intersect, or use any portion of the tracks already laid, on condition of making compensation, the grantees of such grants holding for the public use; that the right to grant a crossing of the road necessarily involves a right to pass over a larger portion of such road, when the legislature so directs; that a railway corporation, by acquiring the right to construct a road across a highway, and obtaining title to the land for its roadbed, does not destroy or impair the public easement, but that the perfect and unqualified right of every citizen to pass over the road at that point remains the same as before. The cases of People *v.* Third Avenue Railroad Co. 45 Barb. 63; People *v.* New York & Harlem Railroad Co., 45 Barb. 73, decide some further points as to extensions, double tracks, &c.

[1] Lancaster & Carlisle Railroad Co. *v.* Maryport & Carlisle Railroad Co., 4 Railw. Cas. 504; *infra*, § 105.

(*a*) Where two roads proceed between different points and regions they are for a different use, so that in Illinois condemnation of a part of the property of one, for the use of the other, may properly be authorized. Lake Shore & Michigan Southern Railroad Co. *v.* Chicago & Western Indiana Railroad Co., 97 Ill. 506.

2. Where two railway companies were incorporated to complete independent lines across the state, only the termini of either being prescribed, there being no apparent or necessary conflict of the routes, it was held, that the company which first surveyed and adopted a route, and filed the survey in the proper office, were entitled to hold it, without reference to the date of the charters, both being granted at the same session of the legislature.[2]

*SECTION XVI.

Right to Build over Navigable Waters.

1. Legislature may grant right to build over navigable waters.
2. Riparian proprietor along navigable water owns only to the water.
   n. (a) But *quære* if this does not depend on the local law.
3. His rights in the water subservient to public use.
4. Legislative grant valid, subject to paramount power of Congress.
5. State interest in flats where tide ebbs and flows.
6. Rights of littoral proprietors in Massachusetts.
7. Grant to railway company of shipping place on navigable river.
8. Principal grant carries its incidents.
9. Grant of right to construct a harbor includes right to make necessary erections.
10, 11. Rivers in fact navigable, navigable in contemplation of law.
12. Land being cut off from wharves deemed "injuriously affected."
13. Infringement of paramount rights of Congress creates a nuisance.
15. Obstruction, if illegal, *per se* a nuisance.
16. Public reservations applied to use of railway.

§ 78. 1. In regard to navigable streams, it seems to be a conceded point, that the owner of land adjoining the stream has no

[2] Morris & Essex Railroad Co. *v.* Blair, 1 Stockt. 635. A decision similar in principle was made in Gawthern *v.* Stockport, Disley, & W. Railway Co., 29 Law T. 308, where the railway first chartered, laid out, and partly built, had been lying by some time, and the Master of the Rolls held a subsequent railway not precluded from interfering with its contemplated route. A railway may be laid across the line of another company, but the latter will be entitled to damages, although the former is laid on piles over tide-water. Grand Junction Railroad & Depot Co. *v.* County Commissioners, 14 Gray, 553. And it is here said, where two companies file a joint location, they are jointly liable for damages to land-owners; and a location may refer to a plan so as to make that part of the location.

property in the bed of the stream, and hence that the legislature in England may give permission to a railway company to so construct their road as to interfere with and alter the bed of such a stream, to the damage of any owner of adjoining land, in regard to flowage, or otherwise, even to the hindrance of accustomed navigation, without compensation; and that the railway company, in constructing their road within the provisions of the act, do not become liable to an action for damages to any such proprietor of adjoining land.[1]

* 2. The same point has been often decided in this country.[2] (*a*) Whether waters are navigable or not, is determined by the ebb

[1] Abraham *v.* Great Northern Railway Co., 16 Q. B. 586; s. c. 5 Eng. L. & Eq. 258. "The legislature might authorize defendants to construct a causeway or bridge across navigable or tide-waters, although the navigation might be thereby impaired." And in Regina *v.* Musson, 8 Ellis & B. 900; s. c. 30 Law T. 272, it is held that a pier built into the sea is not liable to the parish rates, except so far as it is above high-water mark. See Parker *v.* Cutler Milldam Co., 20 Me. 353; opinion of court in Brown *v.* Chadbourne, 31 Me. 9; Shepley, C. J., in Rogers *v.* Kennebec & Portland Railroad Co., 35 Me. 319. So, too, to construct a road across the basins of a water company to their injury, on making compensation. Boston Water Power Co. *v.* Boston & Worcester Railroad Co., 23 Pick. 360; s. c. 1 Am. Railw. Cas. 298. The grant of power to construct a railway between two points carries authority to cross navigable waters, if that is reasonably necessary, in the construction of the works. Fall River Iron Works *v.* Old Colony & Fall River Railroad Co., 5 Allen, 221.

[2] Gould *v.* Hudson River Railroad Co., 6 N. Y. 522; *infra*, § 206.

(*a*) So it is now held that whether on navigable waters, above the ebb and flow of the tide, the riparian proprietor has a right to the shore and the bed of the river, depends on the law of the state where the land is situated. Barney *v.* Keokuk, 94 U. S. 324. *Semble* that the true rule, however, since all waters in fact navigable have been held (see *infra*, note (*b*)) navigable in contemplation of law, would hold proprietorship to be in the state. Ib. See further, St. Paul & Pacific Railroad Co. *v.* Schurmeir, 7 Wall. 272. But see Houghton *v.* Railroad Co., 47 Iowa, 370, and Chicago, Rock Island, & Pacific Railroad Co., 11 Am. & Eng. Railw. Cas. 499, which hold that the riparian proprietor owns to high-water mark. As to the rights of riparian proprietors under the statutes of Iowa, see Barney *v.* Keokuk, 94 U. S. 324; Davenport & Northwestern Railway Co. *v.* Renwick, 102 U. S. 180; Renwick *v.* Davenport & Northwestern Railway Co., 49 Iowa, 664. As to the question of ownership in general, see Ormerod *v.* New York, West Shore, & Buffalo Railroad Co., 13 Fed. Rep. 370; Diedrichs *v.* Northwestern Union Railway Co., 12 Wis. 248.

and flow of the tide. And although streams, above that point, are navigable often for steamboats and lesser water craft, and are public highways for such purposes, and often become highways by prescription for purposes of inferior navigation, as floating timber and wood, and possibly they may be regarded as such even independent of such prescription; yet the ownership of the riparian proprietor to the middle of the stream, *ad medium filum aquæ*, is not excluded, except in tide-waters,[3] and such large rivers, in this country, as by authority of Congress or common consent have acquired or assumed the character of navigable waters, although not coming strictly within the common-law definition.[4] (*b*)

[3] 1 Hargrave's Law Tracts, 12, 13, 85; Angell Tide-Waters, 71–174.

[4] Champlain & St. Lawrence Railroad Co. *v.* Valentine, 19 Barb. 484. But in Bell *v.* Gough, 3 Zab. 624, it is held that if the riparian owner has made improvements on the land below high water, so as to have reclaimed it, the part so reclaimed belongs to him, and cannot be granted by the state. And three of the nine judges in the appellate court held that riparian owners have a vested right in the benefits and advantages arising from their adjoining the water, of which they cannot be deprived without compensation. But this case, although exhibiting great research and ability, is not altogether in accordance with the general current of the decisions on the subject, and is probably based on the custom or usage which has prevailed to a great extent in some sections of the country from its first settlement, originally founded on Colonial statutes, probably, and in others, perhaps, growing up by common consent, as a kind of local law. In a later case before the same court, Paterson & Newark Railroad Co. *v.* Stevens, 10 Am. Law Reg. N. S. 165, in a very elaborate and learned opinion by Chief Justice Beasley, it was decided, in conformity to the general law, that the state is the absolute owner of the land below high-water mark under all navigable water within its territorial limits, and that such land can be granted to any purpose, either public or private, without making compensation to the owner of the shore. But a grant of a railway along the shore of such waters carries no implication of the

(*b*) It is now held that waters are to be deemed navigable where they are in fact navigable, whether tide-water or not. The Daniel Ball, 10 Wall. 557; Miller *v.* New York, 109 U. S. 385. And see The Genessee Chief *v.* Fitzhugh, 12 How. 443; Fretz *v.* Bull, Id. 466; Jackson *v.* James, 20 How. 296; The Hine *v.* Trevor, 4 Wall. 555; The Eagle, 8 Wall. 15; The Montello, 20 Wall. 430; *Ex parte* Boyer, 109 U. S. 629, in which the question of navigability, as bearing on the question of jurisdiction of courts of admiralty, is fully considered. Statutory declaration of navigability is unnecessary. Little Rock, Mississippi River, & Texas Railroad Co. *v.* Brooks, 39 Ark. 403.

3. But in tide-waters, and navigable lakes, the rights of the owner of land adjoining such waters are subservient to the public rights, and are consequently subject to legislative control, and any loss the owner of such land may thereby sustain is *damnum absque injuria*.[4]

4. It seems to be considered, that the state legislatures have unlimited power to erect bridges and railways, and make any other public works across navigable waters, subject only to the paramount authority of the national government.[5] (*c*)

right to use the lands of the state below the high-water mark. Where the riparian owner on the Milwaukee River built a wharf in front of his land projecting into the stream, it was held that the city of Milwaukee, being empowered by statute to establish along the shore of the river dock and wharf lines, and to prevent encroachments on such line, could not declare the plaintiff's wharf a nuisance on the ground of its encroaching on the line established by the city; that whether the riparian owner's title extended beyond the dry land or not, he had a right to build a wharf for his own and the public use, subject to such regulations as the legislature might establish; and that if the city deemed its removal necessary for the public good it should make compensation to the owner. Yates *v.* Milwaukee, 10 Wall. 497.

[5] People *v.* Rensselaer & Saratoga Railroad Co., 15 Wend. 113; Bailey *v.* Philadelphia & Wilmington Railroad Co., 4 Harring. Del. 389; People *v.* St. Louis, 5 Gilman, 351; Spooner *v.* McConnell, 1 McLean, 337; Pennsylvania *v.* Wheeling Bridge Co., 13 How. 518; Willson *v.* Blackbird Creek Marsh Co., 2 Pet. 245; Hogg *v.* Zanesville Canal Co., 5 Ohio, 410; United States *v.* New Bedford Bridge, 1 W. & M. 401; Attorney General *v.* Hudson River Railroad Co., 1 Stockt. 526; Getty *v.* Same, 21 Barb. 617.

In Smith *v.* Maryland, 18 How. 71, it was held that the soil below low-water mark in the shores of Chesapeake Bay in Maryland belonged to the state, subject to any prior lawful grants by the state or the sovereign power before the Declaration of Independence. But that this right of soil in the state is a trust, for the enjoyment by the citizens of certain public rights, among which is the common right of fishery; that the state may lawfully regulate the exercise of

(*c*) Gilman *v.* Philadelphia, 3 Wall. 713; Escanaba & Lake Michigan Transportation Co. *v.* Chicago, 107 U. S. 678; Cardwell *v.* American Bridge Co., 113 U. S. 205; Hunt *v.* Kansas & Missouri Bridge Co., 11 Kan. 412. Congress has power to regulate or prohibit the erection of bridges over the navigable rivers of the United States, and it may delegate that authority to the head of a department. Miller *v.* New York, 109 U. S. 385; United States *v.* Milwaukee & St. Paul Railroad Co., 5 Biss. 410, 420. As to interference by Congress with a bridge erected pursuant to its own resolutions and to licenses from the state, see Newport & Cincinnati Bridge Co. *v.* United States, 105 U. S. 470.

*5. The Commonwealth of Massachusetts has no interest in flats where the tide ebbs and flows, which it is necessary to have *appraised, under the statute, when such land is taken, as appurtenant to the upland, for the purpose of building a railway.[6] And

this right, and declare vessels forfeit for violations of regulations so established; and that the exercise of such powers by the state is no infringement of the paramount authority of Congress, or of the exclusive admiralty and maritime jurisdiction of the United States courts.

In Milnor *v.* Railroad & Plank-Road Cos., 6 Am. Law Reg. 6, where it was sought to restrain the companies from bridging the Passaic River below Newark, a port of entry having some foreign commerce and some internal navigation, it was held that a federal court had no jurisdiction to restrain the erection of a bridge over a navigable river wholly within a particular state, the erection being authorized by the state — and this, although Congress had created a port of entry above the point where the bridge was to cross. Willson *v.* Blackbird Creek Marsh Co., 2 Pet. 245, was relied on as an authority, the *dicta* in Devoe *v.* Penrose Ferry Bridge Co., 3 Am. Law Reg. 83, were overruled, and Pennsylvania *v.* Wheeling Bridge Co., 13 How. 579; Gibbons *v.* Ogden, and Willson *v.* Blackbird Creek Marsh Co., explained and reconciled so as to permit a state to authorize such an erection.

[6] Walker *v.* Boston & Maine Railroad Co., 3 Cush. 1; s. c. 1 Am. Railw. Cas. 462. Under a colonial ordinance of 1647, of the flats on creeks, coves, and arms of the sea, in Massachusetts, where the tide ebbs and flows, one hundred rods are appurtenant to the upland, and the owners of the adjoining land have an estate in fee therein, subject to the paramount right of the state to make public erections, and subject also to such restraints and limitations of the proprietors' use of them as the legislature may see fit to impose for the preservation and protection of public and private rights. Commonwealth *v.* Alger, 7 Cush. 53. And a similar custom or usage prevailed to some extent in some of the other American colonies, traces of which will be found in some of the more recent decisions in the states which have succeeded them. The question of the right of riparian owners in Massachusetts is learnedly discussed in Commonwealth *v.* Roxbury, 9 Gray, 451, and the reporter's note, by Mr. Justice GRAY.

In 1760 the legislature of New Jersey passed an act to enable the owners of meadows along a small creek emptying into the Delaware, into which the tide ordinarily flowed for about two miles, to support and maintain a dam, to shut out the tide and drain the meadows. The act provided that the bank, dam, and other waterworks then or thereafter to be erected, should be erected and supported at the equal expense of all the owners of the meadows, and provided the way in which the natural watercourse should be kept clear, and for the annual election of managers empowered to assess the owners for repairing and maintaining the dam. The act was accepted, managers elected, and a large amount expended, from time to time. In 1854 the legislature declared the creek to be a public highway, and empowered the municipal authorities to remove the dam, and open the creek to navigation. It was held,

as * the owner has the right to raise such flats, by filling up, if he is compelled to do more filling up to secure free access to other * lands, by reason of the construction of a railway, it is proper to be considered by the jury in estimating land damages to such owner.[7] But the owner of a tide-mill has no right to have such riparian flats as he owns, kept open and unobstructed for the free flow of tide-water to his mill.

6. The adjoining owners of such flats in Massachusetts have the right to build solid structures to a certain extent, and thus obstruct the ebb and flow of the tide, if in so doing they do not wholly obstruct the access of other proprietors to their houses and lands; and if the mill-owner and other proprietors suffer damage therefrom, it is *damnum absque injuria*.[8] (*d*) "Therefore," say the * court, "so far as the railroad erected by the legislature affected the right of the claimants to pass and repass to and from their lands and wharves with vessels, it was a mere regulation of a public right, and not a taking of private property for a public use, and gave no claim for damages."

7. The grant of a railway "to the place of shipping lumber" on a tide-water river, justifies an extension across flats and over

on a bill to restrain the township committee from performing this duty, that the legislature had the right to make the grant, there being nothing to show that the public interest demanded the navigation of the creek, and was the sole judge of the navigability of such streams; that the act of 1760 not only authorized the owners of the meadows to continue the dam, but gave the authority of the state to compel its continuance; that the act of 1851 was in violation of the Federal Constitution, inhibiting the several states from passing laws impairing the obligation of contracts, and also repugnant to the state constitution, as a taking of private property for public use, without just compensation, a partial destruction or diminution of the value of property being, to that extent, a taking. Glover *v.* Powell, 2 Stockt. 211.

[7] Commonwealth *v.* Boston & Maine Railroad Co., 3 Cush. 25; s. c. 1 Am. Railw. Cas. 482; Fitchburg Railroad Co. *v.* Boston & Maine Railroad Co., 3 Cush. 58; s. c. 1 Am. Railw. Cas. 508.

[8] Davidson *v.* Boston & Maine Railroad Co., 3 Cush. 91; s. c. 1 Am. Railw. Cas. 534; s. p. Stevens *v.* Paterson & Newark Railroad Co., 5 Vroom, 532.

(*d*) In Massachusetts the littoral proprietor owns to low-water mark, subject to a right in the public to use the space between high and low water mark for purposes of navigation as long as he allows it to remain unoccupied, and subject to restrictions imposed by the state, in the exercise of its power to protect public harbors, &c., and prevent encroachments thereon. Boston *v.* Lecrow, 17 How. 426; Richardson *v.* Boston, 24 How. 188.

tide-water to a point at which lumber can be conveniently shipped.[9]

8. In a case in the House of Lords,[10] it was held, that where a statute authorizes a company to construct certain works, as a harbor, it is to be presumed they were to have power to execute all works incidental to their main purpose, and which they deem necessary, provided they act *bona fide*.

9. Accordingly, when public trustees for improving the navigation of the Clyde were authorized by statute to acquire lands adjoining the river, and to construct a quay, or harbor, and having acquired part of A.'s land proposed to erect a large goods-shed fronting the river, and between the rest of A.'s land and the river, it was held, that although the statute gave no express power to erect sheds, it must be presumed that a harbor, equipped with all the most approved appliances for trade, was intended by the legislature, and that therefore a power to erect sheds was implied.[10]

10. An interesting case[11] has been determined by the * Supreme Court of Iowa in regard to the important question, to what extent the large rivers in this country, as the Mississippi, are to be regarded as navigable waters, above where the tide ebbs and flows.

11. It is there held, that all waters are to be regarded as navigable, above where the tide ebbs and flows, which are of common use to all the citizens of the republic for purposes of navigation, or

[9] Peavy *v.* Calais Railroad Co., 30 Me. 498; s. c. 1 Am. Railw. Cas. 147. See also Babcock *v.* Western Railroad Co., 9 Met. 553; s. c. 1 Redf. Am. Railw. Cas. 191. So the grant of a railway between certain *termini*, the line between which passes over navigable rivers, authorizes the company to bridge such rivers. Attorney-General *v.* Stevens, Saxton, 369.

[10] Wright *v.* Scott, 34 Eng. L. & Eq. 1; *supra*, § 63.

[11] McManus *v.* Carmichael, 5 Am. Law Reg. 593. It is maintained in this case upon great research, that a large number of the states have adopted similar views in regard to their large rivers. See also Bowman *v.* Wathen, 2 McLean, 376, where the learned judge lays down the rule that, except for certain purposes such as the erection of wharves, &c., which do not obstruct navigation, the riparian right on navigable streams cannot extend generally beyond high-water mark; but that on the Ohio the right extends to the water, with the right of fishing and every other right properly appurtenant to the soil, and that any act of a state short of an exercise of the power to appropriate private property for public use, attempting a transfer of those rights without the consent of the proprietor, would be inoperative. See also Lehigh Valley Railroad Co. *v.* Trone, 28 Penn. St. 206.

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that navigability, in fact, is to be regarded as the decisive test, rather than the ebb and flow of the tide. And it is here maintained, that the acts and declarations of the United States constitute the Mississippi a public highway, and that consequently the riparian proprietors have no interest in the lands below high-water mark. (*e*)

12. And where one, upon the shore of a navigable stream or arm of the sea, is cut off by a railway or other public work from all communication with the navigation, to the injury of wharves or other erections which the party made upon his land, it has been held that such person is entitled to damages under the statutes allowing parties compensation where their estate is "injuriously affected." [12]

13. And it seems to be regarded as settled, that where the grant of any authority, by the state legislature, in regard to navigable waters, in its exercise works an interference with the exclusive power of Congress to regulate commerce, whether foreign or internal, such interference, being unlawful, is a nuisance, and any private person suffering special damage thereby is entitled to an action at law, or to maintain a bill in equity for a perpetual injunction.[13]

* 14. The questions are very numerous which have arisen in regard to the conflicting rights of different grantees, affecting franchises and easements of different kinds. In a case in New

[12] Bell *v.* Hull & Selby Railway Co., 6 M. & W. 699.

[13] Pennsylvania *v.* Wheeling Bridge Co., 13 How. 518; s. c. 18 How. 421. The same principle is recognized in other cases. Works *v.* Junction Railroad Co., 5 McLean, 425; United States *v.* Railroad Bridge Co., 6 McLean, 517. When the case of Pennsylvania *v.* Wheeling Bridge Co. was last before the court, it was held, that the authority of Congress to regulate commerce included the power to determine what was an obstruction to navigation; and Congress having legalized the bridge in question, after judgment of the court to abate it, but before the judgment was carried into effect, it was held, that the occasion for executing the judgment was thereby removed. Mr. Justice Nelson, among other things said that although riparian owners might construct wharves, &c., for the purpose of subjecting the stream to the various uses to which it might be applied, yet if those structures materially interfered with the public right they might be removed or abated, and that the internal streams of a state were, as to the public right of navigation, exclusively under state control.

(*e*) See *supra*, note (*a*).

Hampshire,[14] some questions affecting the construction of grants, and reservations of this kind, are very extensively discussed.

15. It seems to be well settled, both in England and in this country, that if there is no legal authority for the erection of a pier in a navigable river, such erection will become a nuisance *per se*, and that no evidence can be received to show that although illegal it will do no harm, that question being wholly immaterial.[15]

16. Where the act of Congress, laying out the city of Burlington, Iowa, reserved a strip of land along the bank of the Mississippi River, to be forever used for a highway and other public uses, and, after the sale of lots abutting upon the reservation, Congress released its title to the city, it was held that the dedication of the strip of land was a contract, and could not be repealed, or revoked; and that the title of the city was subject to the original conditions of the reservation; and that the accretions from the river were the same as the rest of the strip; that adjoining land-owners had such an interest that they could restrain the city from applying the land to private uses; but that it might be applied to the uses of a railway, for any such purposes as would justify the exercise of the right of eminent domain.[16] (*f*)

[14] Goodrich *v.* Eastern Railroad Co., 37 N. H. 149.

[15] People *v.* Vanderbilt, 38 Barb. 282.

[16] Cook *v.* Burlington, 30 Iowa, 94.

(*f*) Confirmed in Cook *v.* Burlington, 36 Iowa, 357.

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SECTION XVII.

Obstruction of Streams by Company's Works.

1. Company cannot divert stream, without making compensation.
2. Company liable for defective construction.
3. So also for the use of defective works built by others.
4. Company liable to action where mandamus will not lie.
5. Company liable for defective works done according to its plans.
6. When a railway "cuts off" wharves from the navigation.
7. Stream diverted must be restored and maintained.
8. Company cannot cast surface water on adjoining land except from strict necessity.
9. Public company exceeding its powers liable to an action.
10. In such cases equity will relieve by injunction.

§ 79. 1. In regard to the obstruction of streams by building railways, the better opinion seems to be, that the company are bound to do as little damage to riparian proprietors as is reasonably * consistent with the enjoyment of their grant.[1] (*a*) The state cannot grant the power to divert a stream of water without compensation.[2] (*b*)

[1] Boughton *v.* Carter, 18 Johns. 405; Hooker *v.* New Haven & Northampton Co., 14 Conn. 116.

[2] Gardner *v.* Newburgh, 2 Johns. Ch. 162. But where a railway takes the land under its general powers, and in estimating damages calls the attention of the jury to the fact that it will become necessary to divert a stream of water crossing it, the owner of the land will have no additional claim for damages when the stream is diverted. And it is not essential to the right of the company to divert the stream, that an express grant for that purpose should be contained in the inquisition. Baltimore & Potomac Railroad Co. *v.* Magruder, 34 Md. 79.

(*a*) An action for damages for obstructing a navigable stream is an action in tort. Doughty *v.* Atlantic & North Carolina Railroad Co., 78 N. C. 22. That a simple obstruction is a nuisance is a matter of fact for the jury. Delaware & Hudson Canal Co. *v.* Lawrence, 2 Hun, 163.

(*b*) But where a company acts within the limits of its franchises, and has the right of way and uses due care and skill, it is not liable for injuries, the natural and unavoidable effect of the road. St. Louis, Iron Mountain, & Southern Railway Co. *v.* Morris, 35 Ark. 622. Thus, it is not liable for the overflow of a stream caused by the necessary and proper elevation of its roadbed on its own land, and not in the channel of the stream. Moyer *v.* New York Central & Hudson River Railroad Co., 88 N. Y. 351. As to the diversion of streams under the English statutes, See Pugh *v.* Golden Valley Railway Co., Law Rep. 12 Ch. 274; s. c. Law Rep.

2. Thus if by making needless obstructions in streams, in the erection of bridges, or by imperfect or insufficient sluices or ducts for the passage of streams, intersected by a railway, the land or adjoining property is injured, the company are liable.[3] (*c*)

[3] Hatch *v.* Vermont Central Railroad Co., 25 Vt. 49 *et seq.*; Mellen *v.* Western Railroad Co., 4 Gray, 301; March *v.* Portsmouth & Concord Railroad Co., 19 N. H. 372. In Brickett *v.* Morris, 12 Jur. N. S. 803, the House of Lords, in a Scottish appeal, for the first time, as was claimed by Lord WESTBURY, established the proposition that where an adjoining riparian proprietor builds in the channel of a running stream, it is incumbent on him to show that no detriment will thereby ensue to the adjoining proprietor. The propositions here declared are, that riparian proprietors have a common interest in the water of a running stream, and a separate property in the *alveus*, or channel thereof, *usque ad medium filum fluminis*. But no proprietor may so use his property in the channel as to affect the interest of the opposite owner; and, in order to entitle a riparian proprietor to relief against building on the channel, it is not necessary to prove that damage to him has been, or is likely to be, caused thereby. In such case the *onus* of showing that no damage will arise, lies on the person making the encroachment. Anything done in the channel which produces no sensible effect on the stream is allowable. Upon the question whether any such rule, as to the burden of proof in such cases, could fairly be applied to railway structures necessarily built in the channel in crossing a running stream, the company having the right to make the erections in the most prudent manner, it would seem that the company could be held responsible only for such present or prospective damage as could be established by legal evidence. And no presumption against the company should be raised on the mere ground of its having done what its powers allowed it to do. But the owner of the stream is not responsible for damage resulting to riparian owners in consequence of erections by other parties acting under an independent claim of right. Saxby *v.* Manchester, Sheffield, & Lincolnshire Railway Co., Law Rep. 4 C. P. 198. Consent of the land-owner to the erections being made will not affect his remedy under the statute. Thames Conservators *v.* Pimlico Railway Co., Law Rep. 4 C. P. 59.

15 Ch. 330. Under the statutes of Ohio, see Valley Railway Co. *v.* Bohm, 34 Ohio St. 114. Under the statutes of Iowa see Rensch *v.* Chicago, Burlington, & Quincy Railroad Co., 57 Iowa, 687. Right of way does not include the right to divert a stream from its natural channel to the injury of the land-owner. Stodghill *v.* Chicago, Burlington, & Quincy Railroad Co., 43 Iowa, 26; Chicago, Rock Island, & Pacific Railroad Co. *v.* Carey, 90 Ill. 514. Nor by unskilful construction to overflow lands. St. Louis, Iron Mountain, & Southern Railway Co. *v.* Morris, 35 Ark. 622.

(*c*) A company is bound to provide culverts, &c., and is liable for injury to adjacent lands caused by an overflow resulting from a failure to perform that duty. Carriger *v.* East Tennessee, Virginia, & Georgia Railroad Co., 7 Lea, Tenn. 388; Mississippi Central Railroad Co. *v.* Caruth, 51 Miss. 77;

3. So, too, the company are liable to pay damages for an injury caused to the plaintiff by flowing his land in a great freshet, in consequence of their bridges damming up the water, although the bridges were erected by another company before the defendants' company was chartered,[4] and there had been no request to the defendants to remove the obstruction.[5]

4. And where the waters on certain lowlands were flowed back upon the plaintiff's land, by reason of insufficient openings in a railway constructed across such lowlands, it was held that the company were liable to make good the damages sustained by plaintiff, although no statute required them to make the openings, and they could not be compelled to do so by writ of mandamus.[6] (*d*)

[4] Brown *v.* Cayuga & Susquehannah Railroad Co., 12 N. Y. 486.

[5] *Per* Denio, J., in Brown *v.* Cayuga & Susquehannah Railroad Co., 12 N. Y. 486. But the question as to the liability of the company for continuing the obstruction, in the absence of notice to remove it, was not decided. The necessity of a special request is discussed in Norton *v.* Valentine, 14 Vt. 239, 244. In Hubbard *v.* Russell, 24 Barb. 404, it is held, that in order to recover damages of the "continuator of a private nuisance, originally erected by another," there must be proof of a request to remove it. But where a railway company bought up a navigation company, and suffered the works to fall to decay, so that the harbor was damaged, the company was held liable to the municipality. Although but a non-feasance in form, it operated substantially as a misfeasance, the locks of the navigation company having been maintained and used in such a state as to cause the injury Preston *v.* Eastern Counties Railway Co., 30 Law T. 288; s. c. *nom.* Preston *v.* Norfolk Railway Co., 2 H. & N. 735.

[6] Lawrence *v.* Great Northern Railway Co., 4 Eng. L. & Eq. 265; s. c. 16 Q. B. 643, and 6 Railw. Cas. 656.

Same *v.* Mason, Ib. 234. And bound also to employ the knowledge and skill in engineering which is ordinarily known and practised in such works; but it is not liable merely for not constructing a culvert sufficient to pass extraordinary floods. Baltimore & Ohio Railroad Co. *v.* Sulphur Spring School District, 96 Penn. St. 65. See also Illinois Central Railroad Co. *v.* Bethel, 11 Brad. Ap. 17; Houston & Great Northern Railroad Co. *v.* Parker, 50 Tex. 330; Ellet *v.* St. Louis, Kansas City, & Northern Railway Co., 76 Mo. 518. But see Union Trust Co. *v.* Cuppy, 26 Kan. 754, where it is said that the company is bound to provide against such floods as may reasonably be expected. Nor is the company, though bound to provide suitable culverts, ditches, &c., liable for such injuries as the land-owner might prevent by the use of reasonable means. Munkers *v.* Kansas City, St. Joseph, & Council Bluffs Railroad Co., 72 Mo. 514. Where practicable a culvert should be so constructed as to permit the passage of a stream in its natural channel. Van Orsdol *v.* Burlington, Cedar Rapids, & Northern Railway Co., 56 Iowa, 470

(*d*) Right of action for damages caused by an overflow, the result of

So, too, in regard to other public works, if damage accrue to others in consequence of their imperfect construction, the proprietors are * liable, as for instance a municipal corporation, for insufficient sewers, whereby plaintiff's factory was overflowed in a freshet, and the property therein seriously injured.[7]

5. In a case, where the plaintiff's garden was overflowed, by the manner in which an excavation was made, in the course of construction of a railway across a road, or highway, by carelessly cutting into a drain, or culvert, and letting out the water,[8] it seems to have been admitted, on all hands, that the company would have been liable for the injury if it had been done by persons under their control, or in compliance with the directions of their surveyor or engineers.[8]

[7] Rochester White Lead Co. *v.* Rochester, 3 Comst. 463. See also Radcliff *v.* Brooklyn, 4 Comst. 195; New York *v.* Furze, 3 Hill, 612; Bailey *v.* New York, 3 Hill, 531.

[8] Steel *v.* Southeastern Railway Co., 16 C. B. 550; s. c. 32 Eng. L. & Eq. 366. See *infra*, § 129, for a full statement of this case. But there is no liability incurred to a mill-owner below, by cutting off springs, in sinking wells on one's own land. Chasemore *v.* Richards, 2 H. & N. 168; s. c. 29 Law T. 230.

narrowness in the span of a bridge, does not accrue on the construction of the bridge, but only on the overflow. Moison *v.* Great Western Railway Co., 14 U. C., Q. B. 109; Vanhour *v.* Grand Trunk Railway Co., 18 U. C., Q. B. 356. But see Carron *v.* Great Western Railway Co., 14 U. C., Q. B. 192. As to liability in particular cases of overflow, and defences to actions therefor, see McCormick *v.* Kansas City, St. Joseph, & Council Bluffs Railroad Co., 70 Mo. 359; Houston & Great Northern Railroad Co. *v.* Parker, 50 Tex. 330; St. Louis, Iron Mountain, & Southern Railway Co. *v.* Morris, 35 Ark. 622. As to the measure of damages, see Chicago, Rock Island, & Pacific Railroad Co. *v.* Carey, 90 Ill. 514; St. Louis, Iron Mountain, & Southern Railway Co. *v.* Morris, *supra*; Van Hoozier *v.* Hannibal & St. Joseph Railroad Co., 70 Mo. 145; Chicago, Rock Island, & Pacific Railroad Co. *v.* Moffitt, 75 Ill. 524; Wagner *v.* Long Island Railroad Co., 2 Hun, 633.

For the abatement of a nuisance by obstruction to navigation a private person cannot maintain a suit unless he has suffered special injury. Jarvis *v.* Santa Clara Valley Railroad Co., 52 Cal. 438.

For the turning of a current so as to wash away soil, the land-owner may recover for prospective injury, and such recovery will bar an action for damages caused by a subsequent unusual flood. Fowle *v.* New Haven & Northampton Co., 112 Mass. 334. And see Stodghill *v.* Chicago, Burlington, & Quincy Railroad Co., 53 Iowa, 341. But where the damage is by annual overflow and injury to crops, redress may be had by successive actions. Van Hoozier *v.* Hannibal & St. Joseph Railroad Co., 70 Mo. 145.

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6. And where the plaintiff owned a dock on the east side of Hudson River, on the margin of a bay, under a charter from the state, in 1849, and the Hudson River Railway, in pursuance of its charter granted in 1846, constructed their road across the bay on piles, about nineteen hundred feet west of the dock, with a drawbridge sufficient to allow a passage to such vessels as had before navigated the bay, the charter of the railway containing a provision, that if any dock shall be "cut off" by the railway, the company shall extend the same to their road, it was held that this dock was not "cut off" within the meaning of the provision.[9] (*e*)

7. And under the New York statute, and the same rule would probably apply in other states, a railway company which is compelled to divert a stream of water in the construction of its road is bound not only to restore it as nearly as practicable to its former state, but also to maintain it there, since the mere restoration of the stream may not leave it as secure as before.[10]

8. But surface water produced by the excavation in building the railway is not to be regarded in the same light as water confined to a natural channel, and in such case the company will be *liable to an action for turning it upon the land of an adjoining proprietor, unless that becomes indispensable in order to maintain the railway, and is done in a manner to do the least injury to the land-owner.[11] (*f*)

9. In an English case,[12] before the Lords Justices on appeal, where the defendants had obtained parliamentary powers to take the water from certain springs, being the feeders of a river upon which mills and shops were in operation, upon building a compensation reservoir to supply the deficiency caused by such diversion, by saving the waters at flood-tide for use in dry times; and where they had built such reservoir, and one of the riparian

[9] Tillotson *v.* Hudson River Railroad Co., 15 Barb. 406.

[10] Cott *v.* Lewiston Railroad Co., 36 N. Y. 214.

[11] Curtis *v.* Eastern Railroad Co., 14 Allen, 55.

[12] Clowes *v.* Staffordshire Potteries Water-Works Co., 21 W. R. 32.

(*e*) Who may maintain an action for an obstruction of the approach to a dock. Chicago & Alton Railroad Co. *v.* Maher, 91 Ill. 312.

(*f*) Interference with the flow of surface water is matter for an action and damages. Hurdman *v.* Northeastern Railway Co., Law Rep. 3 C. P. 168; Pflegar *v.* Hastings & Dakota Railway Co., 25 Minn. 510.

owners complained against them for fouling the water and rendering it so muddy, by reason of the reservoir, as to make it unfit for use in his dyeing establishment, and praying for an injunction against the defendants, it was held their parliamentary powers gave them no right to foul the water, and consequently they were liable to an action.

10. It was further held that this was a proper case for a court of equity to interfere by way of injunction: (1) On the ground of saving a multiplicity of actions; (2) on the ground that the court will always restrain a public company from exercising their statutory powers in such a manner as to interfere with the rights of others. (*g*)

SECTION XVIII.

Obstruction of Private Ways.

1. Obstruction of private way question of fact for a jury.
2. Farm road on one's own land, not a private way.
3. Obstruction of right of way by passage of railway along street.

§ 80. 1. Where the statute gives a right of action against the company, when in the construction or management of their road they shall obstruct the safe and convenient use of a private way, it was held not necessary to the maintenance of the action that the railway should be constructed or managed in an illegal and improper manner.[1] (*a*) But if the railway be shown to have been

[1] Concord Railroad Co. *v.* Greely, 23 N. H. 237.

(*g*) Equity may compel the removal of obstructions. Lamar *v.* Railroad Co., 10 S. C. 476. But where a taking of water from a watercourse interferes with the working of a mill for a few minutes in the day only, the court will not interpose. Sandwich *v.* Great Northern Railway Co., Law Rep. 10 Ch. 707. Nor where water taken from the stream by an upper proprietor, though used, is returned unpolluted. Kensit *v.* Great Eastern Railway Co., Law Rep. 23 Ch. 566.

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(*a*) The owner of the way may have damages, but not necessarily to the amount required to construct another. Gear *v.* Railway Co., 39 Iowa, 23.

By using a dock one cannot acquire such a right of way as will entitle him to damages for the construction of a railway across it without a draw, preventing vessels from coming to his private wharf. Thayer *v.* New Bedford Railroad Co., 125 Mass. 253.

constructed and managed in a proper manner, and a passage over the railway provided for the private way, the court cannot decide, as matter of law, whether the safe and convenient use of the way is obstructed or not. That is a question of fact to be settled by the jury.[2]

2. But a farm road, which the owner of the land has constructed for the convenient use of his farm, is not to be regarded as a private way, within the meaning of a railway act.[3] A private way, within the construction of the railway acts, is a way, or right of way, which one man has in the land of another.[4] The owner of a private way, for the purpose of recovering penalties for its obstruction, is the person who, for the time being, owns such road in possession.[5]

3. But it has been held,[6] that, where the plaintiff's right of way * in another's land was obstructed by the passage of a railway through the streets of a town, in accordance with their charter, no action for damages could be maintained, and that the party could have no redress, unless his case came within the provisions of the statute allowing compensation.

[2] Greenwood *v.* Wilton Railroad Co., 23 N. H. 261.

[3] Clark *v.* Boston, Concord, & Montreal Railroad Co., 24 N. H. 114; s. p. Presbrey *v.* Old Colony & Newport Railroad Co., 103 Mass. 1.

[4] Bliss *v.* Connecticut & Passumpsic Rivers Railroad Co., Vermont, not reported.

[5] Mann *v.* Great Southern & Western Railway Co., 9 Ir. Com. Law, 105.

[6] McLaughlin *v.* Charlotte & South Carolina Railroad Co., 5 Rich. 583. But this decision seems to rest on the peculiar views in that state on that subject, that it is lawful to take private property for public use without compensation, the state constitution containing no provision on the subject. But the reported cases in that state, from the first, Dun *v.* Charleston, 1 Harper, 189, manifest a scrupulous regard for the rights of property-owners, when interfered with for other than strictly public purposes. And it would seem that practically, and as a general thing, the legislature has not exercised the theoretical right which it possesses, of taking private property for public use without compensation.

SECTION XIX.

Statute remedy Exclusive.

1, 7. Statute remedy for land taken, generally exclusive of any other.
2. But if company does not pursue statute it is liable in trespass; and for negligence liable also in action on the case.
3, 4. Courts of equity often interfere by injunction.
5. But right at law must be first established.
6. Where statute remedy fails, common-law remedy exists.
8. Company adopting works responsible for amount awarded for land damages.

§ 81. 1. It seems to be well settled, notwithstanding some exceptional cases, that the remedy given by statute to land-owners for injuries sustained by taking land for railways, is exclusive of all other remedies, and not merely cumulative.[1] (*a*)

[1] East & West India Dock & Birmingham Junction Railway Co. *v.* Gattke, 3 Macn. & G. 155; s. c. 3 Eng. L. & Eq. 59; Watkins *v.* Great Northern Railway Co., 16 Q. B. 961; s. c. 6 Eng. L. & Eq. 179; Kimble *v.* White Water Valley Canal, 1 Cart. 285; Knorr *v.* Germantown Railroad Co., 1 Whart. 256; Mason *v.* Kennebec & Portland Railroad Co, 31 Me. 215; s. c. 1 Am. Railw. Cas. 62; McCormack *v.* Terre Haute & Richmond Railroad Co., 9 Ind. 283. But in Carr *v.* Georgia Railroad & Banking Co., 1 Kelly, 524, it was held, that the statute remedy was not exclusive, but merely cumulative. This case professes to go upon the authority of Crittenden *v.* Wilson, 5 Cow. 165, where it was held, that the party whose lands had been overflowed, by means of a dam erected by the authority of the legislature, which contained a provision for estimating damages to land-owners, might maintain an action as at common law. These decisions go upon the principle, found in some of the elementary books, that a statutory remedy for what was actionable at common law is *prima facie* to be regarded as cumulative merely. It seems now to be

(*a*) To that effect are Cairo & Fulton Railroad Co. *v.* Turner, 31 Ark. 494; Johnson *v.* St. Louis, Iron Mountain, & Southern Railway Co., 32 Ark. 758; International & Great Northern Railway Co. *v.* Benitos, 10 Am. & Eng. Railw. Cas. 122; Halloway *v.* University Railroad Co., 85 N. C. 452. But *contra* under the statutes of particular states. In some of the states trespass will lie. Atlantic & Gulf Railroad Co. *v.* Fuller, 48 Ga. 423; Little Rock & Fort Smith Railroad Co. *v.* Dyer, 35 Ark. 360; Grand Rapids & Indiana Railroad Co. *v.* Heisel, 47 Mich. 393. In Tennessee the owner may have a jury of inquest or an action on the case for the value of the land and damages. Duck River Valley Railroad *v.* Cochrane, 3 Lea, Tenn. 478. Under the English Railways Clauses Consolidation Act of 1845, see Loosemoore *v.* Tiverton & North Devon Railway Co., Law Rep. 22 Ch. 25.

*2. But if the railway company have assumed to appropriate the land in violation of the provisions of the statute to be complied with on their part, their acts are ordinarily to be regarded as trespasses; and where they have acquired the right to the use of the land, but have omitted some duty imposed by the statute, or where they have been guilty of negligence, or want of skill, in the exercise of their legal rights, they make themselves liable to an action upon the case at common law.[2] (*b*)

the generally received opinion, that the statutory remedy, being more ample and more specific, is ordinarily to be regarded as exclusive. But the settled difference of opinion among the judges of the Queen's Bench, in Kennett Navigation Co. *v.* Withington, 18 Q. B. 531; s. c. 11 Eng. L. & Eq. 472, shows that the matter is not quite settled in England. The learned editors of the American Railway Cases have an able and very satisfactory note on this subject in which most of the authorities bearing on the point are thoroughly reviewed. 1 Am. Railw. Cas. 166 *et seq.* In Aldrich *v.* Cheshire Railroad Co., 1 Fost. N. H. 359; s. c. 1 Am. Railw. Cas. 206, it is held, that the statute remedy is exclusive of all others. So also in Troy *v.* Cheshire Railroad Co, 3 Fost. N. H. 83, it is held, that the statute remedy must be followed, as far as it extends, but if it extend to part only of the injury occasioned, the party may have his action at common law for the residue. But where a railway company is ordered to make and maintain a private way for the benefit of a party, and fails to comply, the appropriate remedy is the one pointed out in the statute. White *v.* Boston & Providence Railroad Co., 6 Cush. 420. And where the statute provides no specific remedy in such a case, an action on the case will probably lie.

In Ambergate, Nottingham, & Boston & Eastern Junction Railroad Co. *v.* Midland Railway Co., 2 Ellis & B. 823; s. c. 22 Eng. L. & Eq. 289, under a statute giving a penalty for one company running its engines on the track of another company, without first having obtained the requisite certificate of approval of the engines by the second company, it was held, that this did not take away the common-law right of seizing the engines, while on the track, damage feasant; and the distress having been so made, and the first company having demanded a surrender, after the engine had been removed from the defendant's line, with the declared purpose of using it again in the same way, that such demand was illegal, and the defendant justified in not acceding to it. See also New Albany & Salem Railroad Co. *v.* Connelly, 7 Ind. 32; Leviston *v.* Junction Railroad Co., 7 Ind. 597; Lebanon *v.* Olcott, 1 N. H. 339; Victory *v.* Fitzpatrick, 8 Ind. 281. See, also, Colcough *v.* Nashville & Northwestern Railroad Co., 2 Head, 171; Brown *v.* Beatty, 34 Miss. 227; Indiana Central Railroad Co. *v.* Oakes, 20 Ind. 9.

[2] Watkins *v.* Great Northern Railway Co., 12 Q. B. 961; s. c. 6 Eng. L. & Eq. 179; Deau *v.* Sullivan Railroad Co., 2 Fost. N. H. 316; s. c. 1 Am.

(*b*) Burlington & Missouri River 421. And see St. Joseph & Denver Railroad Co. *v.* Schluntz, 14 Neb. Railroad Co. *v.* Callender, 13 Kan.

*3. And the courts of equity will in many cases interfere by injunction, where railway companies are proceeding to take land contrary to the provisions of the act of parliament.[3]

4. In the House of Lords, in one case,[4] this principle is very extensively discussed, although not arising in the case of a railway, or where the land itself was proposed to be taken. But

Railw. Cas. 214; Lichfield *v.* Simpson, 8 Q. B. 65; Furniss *v.* Hudson River Railroad Co., 5 Sandf. 5 51; Turner *v.* Sheffield & Rotherham Railway Co., 10 M. & W. 425. In the last named case, the injury complained of was the obstruction of ancient lights by the erection of the company's station-house; and the dust, &c., from the station-house and embankment drifting into the plaintiff's house. The plaintiff's house not being on the schedule attached to the bill, the company had no right under the act to take it, or injuriously to affect it. So that the parties stood as at common law. See also Shand *v.* Henderson, 2 Dowl. P. C. 519; Davis *v.* London & Blackwall Railway Co., 2 Scott N. R. 74; s. c. 2 Railw. Cas. 308.

[3] Stone *v.* Commercial Railway Co., 9 Sim. 621; s. c. 1 Railw. Cas. 375; Lord Chancellor in Manser *v.* Railway Co., 2 Railw. Cas. 380, 391; Priestly *v.* Manchester & Leeds Railway Co., 4 Y. & Col. Ex. 63; s. c. 2 Railw. Cas. 134; London & Birmingham Railway Co. *v.* Grand Junction Canal Co., 1 Railw. Cas. 224. In this case, as well as the last preceding, it is said the company is to be the judge of the most feasible mode of carrying forward its own operations, and is not to be called to account for the exercise of this discretion, so long as it acts *bona fide*, and with common prudence. But it affords no just ground of equitable interference, that the special tribunal, provided by statute to have exclusive jurisdiction of certain claims, is altogether incompetent to decide such questions as naturally arise. If any such defect exists, the legislature alone can afford redress. Barnsley Canal Co. *v.* Twibell, 7 Beav. 19; s. c. 3 Railw. Cas. 471. Nor is the land-owner entitled to maintain a common-law action, because he refused to join in the proceedings under the statute, the company having proceeded *ex parte*, and caused an appraisal, and deposited the sum awarded for compensation. Hueston *v.* Eaton & Hamilton Railroad Co., 4 Ohio St. 685. See also Western Maryland Railroad Co. *v.* Owings, 15 Md. 199; Sturtevant *v.* Milwaukee, Watertown, & Baraboo Valley Railroad Co., 11 Wis. 61; Powers *v.* Bears, 12 Wis. 213; Davis *v.* La Crosse & Milwaukee Railroad Co., 12 Wis. 16; Burns *v.* Milwaukee & Mississippi Railroad Co., 9 Wis. 450.

[4] Imperial Gas Light & Coke Co. *v.* Broadbent, 7 H. L. Cas. 606; s. c. 5 Jur. N. S. 1319.

496; McLenden *v.* Atlanta & West Point Railroad Co., 54 Ga. 293; Dunlap *v.* Toledo, Ann Arbor, & Grand Trunk Railway Co., 50 Mich. 470.

But where the owner of land consents either expressly or tacitly that the company enter and construct its road, he cannot maintain trespass, but only proceed under the statute for compensation. Hanlin *v.* Chicago & Northwestern Railway Co., 61 Wis. 515.

here the injury complained of was, that the company's works, in the manner in which they had been carried on, rendered the respondent's land useless. This was done by means of the gas escaping from the company's works deadening the life of vegetation, the respondent being a market-gardener. The respondent had brought an action against the company for the nuisance, which by agreement, upon the suggestion of the court, had been referred to an arbitrator, who had reported damages, as having accrued in the mode complained of, to a considerable extent. * The company were now proceeding to make a very extensive addition to their works, when the respondent obtained an injunction against them, which, upon final hearing before the Chancellor, assisted by the common-law judges, had been made perpetual,[5] and the question was then appealed by the company into the House of Lords.

5. It was here held, affirming the decision below, that in such case the plaintiff in equity cannot claim a perpetual injunction, until his right is first established at law. But this was sufficiently done, in the present case, by the award of the arbitrator. But after the right is once established at law, it is the province of the equity judge to determine how far the cause of complaint may have been removed by any subsequent alteration of the works; and this question will not be referred to a trial at law.

6. It was also held here that the respondent had no remedy under the statute, and consequently, although such statutory remedy to its extent was necessarily exclusive of all others, yet where the wrong done is not authorized by these powers, the common-law right of action still remained.[6]

7. The general principle that the statute remedy, as far as it extends, is exclusive, seems to be universally adhered to in the American courts, with slight modifications, some of which are, and some are not, perhaps, entirely consistent with the maintenance of the general rule.[7]

[5] s. c. before Vice Chancellor Wood, 2 Jur. N. S. 1132; before the Chancellor, 3 Jur. N. S. 221.

[6] See Hole v. Barlow, 4 C. B. N. S. 334; Attorney-General v. Sheffield Gas Consumers' Co., 3 De G. M. & G. 304; Attorney-General v. Nichol, 16 Ves. 338; Wynstanley v. Lee, 2 Swanst. 333; Haines v. Taylor, 10 Beav. 75.

[7] Pettibone v. La Crosse & Milwaukee Railroad Co., 14 Wis. 443; Vilas v. Milwaukee & Mississippi Railroad Co., 15 Wis. 233.

8. It was held in one case, where the land damages had been assessed under the statute, and judgment rendered for the amount against the company, that a subsequent company, formed by the mortgagees of the first company, were responsible for the amount of such judgment, if they continued to operate the road and use the right of way for which the judgment was rendered.[8] But this seems a considerable stretch of construction, although eminently just and reasonable.

*SECTION XX.

Lands injuriously affected.

1. Obstruction of way, loss of custom.
2. Equity will not enjoin the exercise of a clear legal right.
3. Company liable for building railway, so as to cut off wharf.
4. But not for crossing highway near a dwelling on level.
5. English statute only includes damages by construction only, not by use.
6. Equity will not enjoin the assertion of a doubtful claim.
7. Damages unforeseen at the time of the appraisal, recoverable in England.
8. Injuries to ferry and towing path compensated.
9, 10. Remote injuries not within the statute.
11. Damages compensated, under statute of Massachusetts.
12. Damages not compensated, as being too remote.
13. Negligence in construction remediable at common law.
14. So of neglect to repair.
15. Recovery under the statute, &c.
16. Possession by company, notice of extent of title.
17. Companies have right to exclusive possession of roadway.

§ 82. 1. The right of a party to claim consequential damages, where his land was not taken, but only injuriously affected, (*a*) was

[8] Pfeifer *v.* Sheboygan & Fond du Lac Railroad Co., 18 Wis. 155.

(*a*) As to injuries to abutting owners from the construction, &c., of railroads in streets and highways, by way of embankments, excavations, changing of grades, from smoke, cinders, dust, &c., see *supra*, § 76.

Where land is protected from overflow by a ridge on land of an adjoining proprietor, the owner may recover for a cutting thereof by a railway so that the water flows through in times of flood, and deposits sand, gravel, &c. Eaton *v.* Boston, Concord, & Montreal Railroad Co., 51 N. H. 504.

A riparian owner, cut off from access to a navigable river by a highway built between high water and low water mark, has no claim to damages. Tomlin *v.* Dubuque Railway Co., 32 Iowa, 106. And possible damages to bush land from greater exposure to winds and storms and greater liability to injury by fire from engines, are too remote. Ontario & Quebec Railway Co. *v.* Tay-

very thoroughly discussed by Lord Truro, Chancellor, in one case,[1] where the defendant, a furrier, claimed damage, in consequence of the dust and dirt, occasioned by the company, having injured his goods, and that his customers had been compelled, by the obstruction caused by the company's works, to quit the side of the road upon which the defendant's shop was situated, before they arrived at that point, and cross the street to get along, by reason whereof he had lost custom. The defendant also claimed that the company had obstructed a passage to his buildings, by which he had an entrance to the back part of his premises. The Lord Chancellor considered that if the party had any claim for compensation it was to be procured under the statute and estimated by the sheriff's jury, and dissolved the injunction. It seems now to be settled by the decision of the House of Lords (Ricket *v.* Metropolitan Railway), that unless the injury is of such a nature as to be actionable aside from the statute, it will not entitle the party to compensation under the statute, and that interruption of business therefore, by making access more inconvenient, will not entitle the party to such compensation.[2] (*b*) But where the * works of a railway diminish the light of premises, although the pecuniary value of plaintiff's interest is not diminished, property in the neighborhood generally having advanced in price, the owner is entitled to compensation.[3] Where the value of a

[1] East & West India Docks & Birmingham Junction Railway Co. *v.* Gattke, 3 Macn. & G. 155; s. c. 3 Eng. L. & Eq. 59.

[2] Law Rep. 2 H. L. 175.

[3] Eagle *v.* Charing Cross Railway Co., Law Rep. 2 C. P. 638. A. owned a house on a highway. A railway company, under powers given them by statute, made an embankment on the highway opposite the house, thereby narrowing the road from fifty to thirty-three feet, thus materially diminishing the value of the house for sale or letting, and obstructing the access of light and air. It was held that A. had sustained particular damage from the works; that the damage would have been actionable if not authorized by statute; that

lor, 6 Ont. Q. B. 100. Nor is the company liable for an obstruction to the flow of mere surface water. Hanlin *v.* Chicago & Northwestern Railway Co., 61 Wis. 515; Kansas City & Emporia Railroad Co. *v.* Riley, 20 Am. & Eng. Railw. Cas. 116.

(*b*) But see Caledonian Railway Co. *v.* Walker, Law Rep. 7 Ap. Cas. 259; and see also Glover *v.* North Staffordshire Railway Co., 16 Q. B. 912, holding lands injuriously affected where a private right of way over a highway crossed by the road, appurtenant to the land, was rendered less convenient, and the value of the land thereby lessened.

house is lessened by railway works producing noise, smoke, and vibration, the party is entitled to compensation under the statute.[4] But where the railway company lowered a highway several feet, thereby greatly obstructing access to plaintiff's dwelling, and obliging him to make use of a ladder for that purpose, it was held that no claim could be maintained under that clause in the statute for injuriously affecting land, the injury complained of being one of a permanent nature, and therefore the subject of compensation under the general provision for land damages.[5] But where the works of a railway intercepted water which would have percolated through the strata of the earth into plaintiff's well, and also drained off water which had reached the well by such percolation,[6] (*c*) it was held the land-owner had no remedy either under the statute or at common law.

2. This case was an application, by the company, for an injunction to restrain the party from proceeding under the statute, and the court held, that as the party had a clear legal right, under the act of parliament, they could not be deprived of pursuing it in the * mode pointed out, and fully affirmed the views of Lord DENMAN, C. J., in Regina *v.* Eastern Counties Railway Company,[7] where

the injury done was an injury to his estate, and not a mere injury to him personally or to his trade; and that, these three things concurring, he was entitled to compensation under statute 8 Vict. cc. 18, 20. Beckett *v.* Midland Railway Co., Law Rep. 3 C. P. 82.

[4] Brand *v.* Hammersmith & City Railway Co., Law Rep. 2 Q. B. 223; s. c. reversed in Law Rep. 4 H. L. 171. See also *infra*, pl. 8, note 16.

[5] Moore *v.* Great Southern & Western Railway Co., 10 Ir. Com. Law, 46; Tuohey *v.* Great Southern & Western Railway Co., 10 Ir. Com. Law, 98. But the English courts seem to consider that compensation in such a case may be given under the provision for damages where land is injuriously affected. Chamberlain *v.* West End of London & Crystal Palace Railway Co., 2 B. & S. 617; s. c. 3 B. & S. 768; 8 Jur. N. S. 935.

[6] New River Co. *v.* Johnson, 2 Ellis & E. 435; s. c. 6 Jur. N. S. 374. This question is a good deal discussed in a later case, Regina *v.* Metropolitan Board of Works, 3 B. & S. 710, where it was held that the railway company was not responsible for underground currents of water intercepted by its works, either at common law or under the statute.

[7] 2 Q. B. 317. See *infra*, § 99. Here the court held that the injuries complained of clearly came within the act, and Lord DENMAN, in closing his

(*c*) As to diversion or obstruction of streams or of surface water, see *supra*, §§ 78, 79.

the damage claimed was by lowering a road upon which the land abutted, so as to impede the entrance to the land and compel the owner to build new fences.

3. The construction of a railway across flats, in front of plaintiff's wharf, gives him a right to damage under the statute of Massachusetts, although the wharf itself remained uninjured.[8] (*d*) But the charter of a railway company having authorized them to make certain specified erections between the channels of two rivers, and such erections having so changed the currents of the rivers as to render more sea-wall necessary to secure certain wharves and flats in the vicinity, it was held that the damage thereby occasioned was *damnum absque injuria*.[9]

4. One cannot claim damage of a railway company, by reason of their track crossing a public highway near his dwelling, upon a level, the highway being the principal approach to his grounds.[10]

5. It is held that the English statute,[11] (*e*) giving compensa-

opinion, makes a very significant reply to a class of arguments, not uncommon on any subjects. "Before we conclude, we shall briefly advert to an argument much pressed upon us; that if we make this rule absolute, *any* injury to land, at any distance from the line of railway, may become the subject of compensation. If extreme cases should arise, we shall know how to deal with them; but in the present instance, the alleged injury is to land adjoining a road, which has been 'lowered' under the provisions of the act, and which is therefore land *injuriously affected*, by an act expressly within the powers conferred by the company."

[8] Ashby *v.* Eastern Railroad Co., 5 Met. 368; s. c. 1 Am. Railw. Cas. 356. And in Bell *v.* Hull & Selby Railway Co., 2 Railw. Cas. 279, a similar decision is made under the English statute. But see Gould *v.* Hudson River Railroad Co., 6 N. Y. 522.

[9] Fitchburg Railroad Co. *v.* Boston & Maine Railroad Co., 3 Cush. 58; s. c. 1 Am. Railw. Cas. 508; *supra*, § 75.

[10] Caledonian Railway Co. *v.* Ogilvy, 2 Macq. Ap. Cas. 229; s. c. 29 Eng. L. & Eq. 22.

[11] Law T., February, 1857, 329.

(*d*) So where access to a part of the flats from tide water is cut off. Drury *v.* Midland Railroad Co., 127 Mass. 571.

(*e*) Under the English statute where one has a range on his own land for rifle practice, and an arrangement with an adjoining owner, terminable on notice by either party, for annual commutation for injuries to stock from bullets going over his land, he may recover of a railway company for running a railway through the adjoining land, and so rendering it impossi-

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tion, where lands are injuriously affected, was intended to include only such damages as were caused by the erection of the company's works, and not such as might in future be caused by the use of the works, this being the case of Gas Works, and the 68th section of the Land Clauses Acts * being made a part of the company's special act. But this certainly could not extend to the ordinary use of a railway, which is the only or the principal mode of injuriously affecting lands not taken, and which could be as strictly estimated, at the time of the company's works being erected, as from time to time thereafter.

6. In one case,[12] where the lessee of an inn and premises, situated near a tunnel on the company's road, claimed damages, because the vibration caused by the trains prevented his keeping his beer in the cellar in a fit state for his customers, and the value of the house was thereby lessened, being rendered unfit for a public-house, and the plaintiffs moved for an injunction to restrain the defendant from proceeding to assess damages under the statute, the Lord Chancellor denied the motion, upon the ground that the remedy at law was altogether adequate. But his lordship intimated a very decided opinion that no such damages could be recovered. He says, "Whether an action will lie on behalf of a man who sustains a private injury, by the exercise of parliamentary powers, done judiciously and cautiously, is not an easy question, or rather it is not easy to come to the conclusion that an action will lie. I entertain a decided opinion (probably, however, erroneous) that no such action will lie." [13]

7. And where the plaintiff's damages for land taken by the company, and by severance and otherwise, were determined by

[12] London & Northwestern Railway Co. *v.* Bradley, 3 Macn. & G. 366; s. c. 6 Railw. Cas. 551; Hammersmith Railway Co. *v.* Brand, Law Rep. 4 H. L 171.

[13] Hatch *v.* Vermont Central Railroad Co., 25 Vt. 49; s. c. 28 Vt. 142. The difficulty of access to a mill, by reason of the frequent passing of trains rendering it unsafe, is proper to be considered in estimating land damages. Western Pennsylvania Railroad Co. *v.* Hill, 56 Penn. St. 460.

ble for him to continue rifle practice. Holt *v.* Gas Light & Coke Co., Law Rep. 7 Q. B. 728. And so a lessee of premises on the Thames in London opposite a draw dock may recover for being cut off from the dock by the erection of the Thames Embankment. McCarthy *v.* Metropolitan Board, Law Rep. 7 C. P. 508.

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an arbitrator,[14] but from the road being built across certain flats, with insufficient openings, the waters became dammed up and injured the plaintiff's remaining lands, it was held, he was entitled to recover "*as for an unforeseen injury arising from the manner in which the railway was constructed.*" But it is here said, "The company might, by erecting their works with proper caution, have avoided the injury." It seems this is the only ground of an action.

8. In a doubtful case the court issued an alternative mandamus and required a return of the facts.[15] So, too, a party whose ferry has been materially lessened in value, by obstructing access to it, may recover damages of the company under the statute.[16] So, too, if a towing-path be obstructed, or the navigation diverted from it, the owner under a similar statute may have compensation.[17] So,

[14] Lawrence *v.* Great Northern Railway Co., 16 Q. B. 643; s. c. 6 Railw. Cas. 656; s. c. 4 Eng. L. & Eq. 265; *supra*, § 79, note 6; § 74, note 5; Lancashire & Yorkshire Railway Co. *v.* Evans, 15 Beav. 322; s. c. 19 Eng. L. & Eq. 295. Under most of the American statutes, the damages, as well prospective as present, must be assessed at once, and no recovery can be had for unforeseen injury, more than in any case of a recovery of damages for a tort. But in the case of Lancashire & Yorkshire Railway Co. *v.* Evans, it is obvious, that the English courts now regard the land-owner as entitled to make new claims, from time to time, as they occur, for any injurious consequence of the construction of the works. For any unlawful act, in the construction or use of the works, an action at common law is the proper remedy.

[15] Queen *v.* North Union Railway Co., 1 Railw. Cas. 729.

[16] *In re* Cooling, 19 Law J. N. S. Q. B. 25; s. c. *nom.* Cooling *v.* Great Northern Railway Co., 15 Q. B. 486; Hodges Railw. 277. It is said here that a ferry is different from a public-house, whose custom is said to be injured by obstructing the travel and access to the house, by cutting through thoroughfares leading to it, which, it has been held, is no ground for damage under a similar statute. King *v.* London Dock Co., 5 A. & E. 163. But this case is considered as overruled by Regina *v.* Eastern Counties Railway Co., 2 Q. B. 347; Chamberlain *v.* West End of London & Crystal Palace Railway Co., 2 B. & S. 617; s. c. 3 B. & S. 768; 8 Jur. N. S. 935. Where a railway company was empowered by act of parliament to construct a bridge and to include a passage for foot-passengers and take toll thereon, so near an ancient ferry as greatly to reduce its traffic, it was held that the ferry being a franchise, and therefore a hereditament, was "lands" within the meaning of the act of parliament allowing compensation for "lands injuriously affected" by the construction of a railway. Queen *v.* Cambrian Railway Co., Law Rep. 6 Q. B. 422; Ricket *v.* Metropolitan Railway Co., Law Rep. 2 H. L. 175, and Brand *v.* Hammersmith Railway Co., Law Rep. 4 H. L. 171, were distinguished from the present case.

[17] King *v.* Commissioners of Thames & Isis, 5 A. & E. 804.

also, an occasional flooding of lands, caused by a proper execution of parliamentary powers, is within the remedy given by statute.[18]

9. Some questions under this head have arisen, in regard to mines and minerals, not of sufficient importance to be stated in detail.[19] Where the damage resulted from the company turning a brook, the court ordered a mandamus.[20] But brewers, accustomed to take water from a public river, are not entitled to receive compensation when the waters were deteriorated by the works of a dock company.[21]

10. It was held that a tithe-owner is not entitled to compensation * unless the act contain an indemnity in his favor.[22] The interest of a tithe-owner is too remote and incidental to be the subject of general indemnity. It often forms the basis of special statutory provisions for indemnity.

11. In a well-considered case, the rule in regard to what damage is to be included under the terms "lands injuriously affected," or equivalent terms, is thus laid down: "All direct damage to real estate by passing over it, or part of it, or which affects the estate directly, although 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 of earth, the draining of wells, the diversion of water-courses," by the proper erection and maintenance of the

[18] Ware *v.* Regent's Canal Co., 3 De G. & J. 212.

[19] Fenton *v.* Trent & Mersey Navigation Co., 9 M. & W. 203; Cromford Canal Co. *v.* Cutts, 5 Railw. Cas. 442; King *v.* Leeds & Selby Railway Co., 3 A. & E. 683.

[20] Regina *v.* North Midland Railway Co., 11 A. & E. 955; s. c. 2 Railw. Cas. 1.

[21] King *v.* Bristol Dock Co., 12 East, 429. But where mines below the company's works are injured in consequence of negligent or imperfect construction, &c., of the company's structures and cuttings, the owner may maintain a common-law action against the company. Bagnall *v.* London & Northwestern Railway Co., 7 H. & N. 423. Affirmed in Exchequer Chamber, 31 Law J. 480. See also Regina *v.* Fisher, 3 B. & S. 191; s. c. 9 Jur. N. S. 571; Elliot *v.* Northeastern Railway Co., 9 Jur. N. S. 555; s. c. 10 H. L. Cas. 333.

[22] Rex *v.* Commissioners of Nene Outfall, 9 B. & C. 875; London & Blackwall Railway Co. *v.* Letts, 3 H. L. Cas. 470; s. c. 8 Eng. L. & Eq. 1; Hodges Railw. 289, n. (*m*). The taking of lands compulsorily by a railway company and the erection of its works thereon is no breach of a covenant by the owner not to build on the land. Baily *v.* De Crespigny, 17 W. R. 494; s. c. Law Rep. 4 Q. B. 180.

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company's works. "Also, as being of like character, blasting a ledge of rocks so near houses or buildings as to cause damage; running a track so near as to cause imminent and appreciable danger by fire; obliterating or obstructing private ways leading to houses or buildings," — all these, and some others, doubtless, are included.

12. "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 railroads and railroad trains, and their natural incidents."[23] (*f*)

* 13. It is held also in this case, that no damages can be assessed under the statute for cutting through a watercourse, in making an embankment without making a culvert, whereby the water is made to flow back and injure the plaintiff's land, at a distance from the railway, no part of which is taken, the remedy being by action at common law.[23]

[23] Locks & Canals Proprietors *v.* Nashua & Lowell Railroad Co., 10 Cush. 385, 391, 392, *per* SHAW, C. J. Nor is one whose lands lie near a railway line, entitled to compensation, for being injuriously affected by persons in the trains overlooking the grounds, thus rendering them less comfortable and secluded for the walks of the family and visitors. Nor can he claim compensation for vibration of the ground caused by the use of the road, the statute only extending to damages caused by the *construction* of the works. Regina *v.* Southeastern Railway Co., 7 Ellis & B. 660; *supra*, pl. 5. But actual injury during the construction of a railway, by vibration caused by the ballast trains, is to be compensated; but by CAMPBELL, C. J., it is said such vibration caused by running trains after the road is completed will merit a different consideration. Ib. See also Croft *v.* London & Northwestern Railway Co., 3 B. & S. 436.

(*f*) Loss of custom by an innkeeper not compensated. Queen *v.* Vaughan, Law Rep. 4 Q. B. 190. Nor the lessening in value of premises by reason of noise, smoke, cinders, &c., from an adjacent engine-house. Cogswell *v.* New York, New Haven, & Hartford Railroad Co., 48 N. Y. 31. But an ancient ferry held to be lands under statute 8 Vict. c. 18, and the diversion of business therefrom by a railway bridge subject for compensation. Queen *v.* Cambrian Railway Co., Law Rep. 6 Q. B., 422. But see Hopkins *v.* Great Northern Railway Co., Law Rep. 2 Q. B. 224.

14. And where the company, by consent of the land-owner, enters upon the land and makes the requisite erections, which are subsequently conveyed to it with the land by the land-owners, it was held such grantor is not estopped from claiming damages resulting from want of proper care and skill in constructing the works, or from neglect to keep them in repair.[24]

15. The rule of the English courts that damages can only be recovered for injuriously affecting land, where but for the statute the act complained of would be just ground of action at common law, does not apply where part of the land is taken and damages are sought, not only for the part taken, but for the rest of the land being injuriously affected, either by severance or otherwise.[25] And it was here held that the owner of a mill was entitled to have damages assessed to him for the increased exposure of the same to fire by the passage of the company's trains. But loss of trade caused by the operations of the company during the construction of their works is not damages for which the party is entitled to compensation.[26] But a person may claim damages on the ground of being injuriously affected on account of the obstruction or diversion of a public way by the construction of the works of a railway.[27]

16. The owners of land adjoining a railway track are affected with presumptive notice of the rights of the company from long * use, the same as in regard to other owners in possession.[28] And equity will enjoin an adjoining owner to a railway track against making erections which will interfere with the company repairing its track.[29]

17. It seems scarcely needful to repeat, what has been so often

[24] Morris Canal & Banking Co. *v.* Ryerson, 3 Dutcher, 457; Waterman *v.* Connecticut & Passumpsic Rivers Railroad Co., 30 Vt. 610; Lafayette Plank-Road Co. *v.* New Albany & Salem Railroad Co., 13 Ind. 90.

[25] *In re* Stockport, Timperley, & Altringham Railway Co., 10 Jur. N. S. 614.

[26] Senior *v.* Metropolitan Railway Co., 2 H. & C. 258; Cameron *v.* Charing Cross Railway Co., 16 C. B. N. S. 430; overruled in Exchequer Chamber by Ricket *v.* Metropolitan Railway Co., 5 B. & S. 149; S. C. 13 W. R. 455, where the proposition of the text is established. But see S. C. Law Rep. 2 H. L. 175, where the doctrine of the court below is not sustained.

[27] Wood *v.* Stourbridge Railway Co., 16 C. B. N. S., 222. See also Boothby *v.* Androscoggin & Kennebec Railroad Co., 51 Me. 318.

[28] Macon & Western Railroad Co. *v.* McConnell, 27 Ga. 481.

[29] Cunningham *v.* Rome Railroad Co., 27 Ga. 499.

declared by the courts, that railways have the exclusive right to possession of their roadway, and to exclude all intrusions thereon, whether from persons or structures.[30]

SECTION XXI.

Different Estates Protected.

1. Tenant's good-will and chance of renewal protected.
2. Tenants entitled to compensation for change of location.
3. Church property in England, how estimated.
4. Tenant not entitled to sue, as owner of private way.
5. Heir and not administrator should sue for compensation.
6. Lessor and lessee both entitled to compensation.
7. Right of way, from necessity, protected.
8. Mill-owner entitled to action for obstructing water.
9. Occupant of land entitled to compensation.
10. Tenant, without power of alienation, forfeits his estate, by license to company.
11. Damages accrued not transferred by deed of land.

§ 83. 1. The English statute provides for the protection of the interests of lessees in certain cases.[1] And lessees from year to year have recovered, for the good-will of the premises, which would have been valuable as between the tenant and a purchaser, although it was not a legal interest as against the landlord.[2] But not when the tenancy was from year to year, determinable at three months' notice, with a stipulation against underletting without leave.[2] So, too, an under-tenant is entitled to compensation for good-will.[3] But in a lease for fourteen years, with covenant to yield up the premises at the end of the term, with all fixtures and improvements, where the company suffered the lease to expire and * then turned out the tenant, held that he was entitled to compensation for good-will and the chance of beneficial renewal, but not for improvements; but, nevertheless, these might

[30] Railroad Co. *v.* Hummell, 44 Penn. St. 375; Harvey *v.* Lackawanna & Bloomsburg Railroad Co., 47 Penn. St. 428.

[1] Statute 8 & 9 Vict. c. 18, §§ 119-122; 8 & 9 Vict. c. 20, § 43.

[2] *Ex parte* Farlow, 2 B. & Ad. 341; Palmer *v.* Hungerford Market, 9 A. & E. 463.

[3] Rex *v.* Hungerford Market, 4 B. & Ad. 592.

be considered by the jury in estimating the chance of beneficial renewal.[4] (*a*)

2. The loss which a brewer sustained by having to give up his business till he could procure other premises, suitable for carrying it on, was held a proper subject of compensation under a similar statute.[5] Where the act required tenants from year to year to

[4] Rex *v.* Hungerford Market, 4 B. & Ad. 592. But the case of Rex *v.* Liverpool & Manchester Railway Co., 4 A. & E. 650, seems to treat a similar estate as absolutely gone, at the end of the term, and the company as bound to make no compensation. But where the company stipulated with a tenant, having a doubtful right of renewal, to compensate him for the same on his establishing the right, and subsequently became the owner of the reversion, it was held that the tenant might maintain a bill in equity for the declaration of his rights as to renewal and compensation therefor. Bogg *v.* Midland Railway Co., Law Rep. 4 Eq. 310.

[5] Jubb *v.* Hull Dock Co., 9 Q. B. 443.

(*a*) As to allowing a lessee for anticipated profits of the land taken, see Brooks *v.* Venice & Carondelet Railway Co., 101 Ill. 333. The lessee of a fishery injuriously affected held entitled to compensation. Alexandria & Fredericksburg Railroad Co. *v.* Faunce, 31 Grat. 761.

As to the valuing of life estates in land taken, see Pittsburg, Virginia, & Charleston Railway Co. *v.* Bentley, 88 Penn. St. 178. As to estate of mortgagee, see Wilson *v.* European & North American Railway Co., 67 Me. 358; North Hudson Railroad Co. *v.* Booraem, 28 N. J. Eq., 593; Michigan Air Line Railway Co. *v.* Barnes, 40 Mich. 383; Wooster *v.* Sugar River Valley Railroad Co., 57 Wis. 311. As to estate of remainderman, see Lauterman *v.* Blairstown Railroad Co., 28 N. J. Eq. 1. As to estate of tenant in common, parties, proceedings, apportionment, appeal, &c., see Grand Rapids Railroad Co. *v.* Alley, 34 Mich. 16; Ruppert *v.* Chicago, Omaha, & St. Joseph Railroad Co., 43 Iowa, 490; Grayville & Mattoon Railroad Co. *v.* Christy, 92 Ill. 337; Morin *v.* St. Paul, Minneapolis, & Manitoba Railway Co., 30 Minn. 100; Bowman *v.* Venice & Carondelet Railway Co., 102 Ill. 459; Watson *v.* Milwaukee & Madison Railway Co., 57 Wis. 332. Who is to be deemed an owner. State *v.* Easton & Amboy Railroad Co., 36 N. J. Law, 181; Gerrard *v.* Omaha, Niobrara, & Black Hills Railroad Co., 14 Neb. 270; St. Louis, Lawrence, & Denver Railroad Co. *v.* Wilder, 17 Kan. 239. Proof and disproof of ownership. St. Louis & Southeastern Railway Co. *v.* Teters, 68 Ill. 144; Knauft *v.* St. Paul, Stillwater, & Taylor's Falls Railroad Co., 22 Minn. 173; Brisbine *v.* St. Paul & Sioux City Railroad Co., 23 Minn. 114; Republican Valley Railroad Co. *v.* Hayes, 13 Neb. 489; Dietrichs *v.* Lincoln & Northwestern Railroad Co., 14 Neb. 355. Possession as proof of ownership. Sherwood *v.* St. Paul & Chicago Railway Co., 21 Minn. 127; Rosa *v.* Missouri, Kansas, & Texas Railway Co., 18 Kan. 124. As to partition of award among owners, Spaulding *v.* Milwaukee, Lake Shore, & Western Railway Co., 57 Wis. 304.

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give up premises to the company, upon six months' notice to quit, without reference to the time when their term began, but allowed them compensation, if required to leave before their term expired, it was held, that when the six months' notice required the tenant to leave at the end of his term, he was not entitled to compensation.[6] But where a tenant gives up premises under a six months' notice from a railway company, when he is entitled to compensation, without demanding it of the company, he is still bound to pay full rent to his landlord.[7]

3. Church property in England is estimated with reference to the cost of a new site and similar erections, to be fixed by agreement between the company and the diocesan and archbishop of the province. But after this appropriation of the site of a church to secular purposes, the rector is entitled to have his interest in the premises connected therewith estimated at its value for secular uses.[8]

4. Where the charter of a company imposed a penalty upon them for any obstruction or interruption of a road, and in the case of a private road gave the right to recover the penalty to the owner of the road, it was held, that the tenant of the farm over which the road passed could not sue for the penalty.[9]

*5. Where land of a deceased person is taken for a railway, the heir and not the administrator is entitled to the damages for such taking, and to prosecute for the recovery thereof, although the administrator had previously represented the estate insolvent, and afterwards obtained a license to sell the real estate for the payment of debts.[10]

6. And a tenant, whose lease began before, and who was in possession at the time an injury was done, is entitled to recover damages for an injury sustained by him in building a turnpike road.[11] But the lessor and lessee are each entitled to recover compensation for the damage sustained by them respectively.[12]

[6] Queen *v.* London & Southampton Railway Co., 10 A. & E. 3; s. c. 1 Railw. Cas. 717.

[7] Wainwright *v.* Ramsdem, 5 M. & W. 602; s. c. 1 Railw. Cas. 714.

[8] Hilcoat *v.* Archbishops of Canterbury & York, 10 C. B. 327.

[9] Collinson *v.* Newcastle & Darlington Railway Co., 1 Car. & K. 516.

[10] Boynton *v.* Peterboro & Shirley Railroad Co., 4 Cush. 467.

[11] Turnpike Road *v.* Brosi, 22 Penn. St. 29.

[12] Parks *v.* Boston, 15 Pick. 198. See also Burbridge *v.* New Albany & Salem Railroad Co., 9 Ind. 546.

7. And where the plaintiff had no access to his land except over the land of his grantor, it was held, that he had a way by necessity across such land, and that he was entitled to maintain an action against a railway company for obstructing it.[13]

8. So also where the free flow of water from a saw-mill is obstructed by the erection of a railway bridge below the mill, the company are liable to the owner of the mill in an action of tort. But they are not liable for any increased expense thereby occasioned to the mill-owner, in getting logs up the stream to his mill, whether the stream be navigable for boats and rafts or not.[14]

9. Where the statute gives remedy against all persons interested, the occupant of land is liable to be affected by the proceedings, and a similar construction will prevail where the remedy is given to all interested.[15] It seems indispensable to the asserting of any valid claim for land damages that the claimant prove the character and extent of his title.[16] And it is here said that possession alone will not be * regarded as ground of presumption of title in fee. And where the entire fee in the land is condemned to the use of the railway, and the money paid into court, it must be apportioned to the several owners of different interests in the land, as nearly as possible, as if it were the land itself. And the same result will follow where a permanent right of way is given in any form to a perpetual corporation.[17]

[13] Kimball *v.* Cocheco Railroad Co., 7 Fost. N. H. 448.

[14] Blood *v.* Nashua & Lowell Railroad Co., 2 Gray, 137.

[15] Gilbert *v.* Havermeyer, 2 Sandf. 506. The term "owner" in a statute requiring compensation for land taken includes every person having any title to or interest in the land, capable of being injured by the construction of the road, and extends to the interest of a lessee or termor. Baltimore & Ohio Railroad Co. *v.* Thompson, 10 Md. 76; Lewis *v.* Railroad Co., 11 Rich. 91; Sacramento Railroad Co. *v.* Moffatt, 7 Cal. 577.

[16] Robbins *v.* Milwaukee & Horicon Railroad Co., 6 Wis. 636.

[17] Ross *v.* Adams, 4 Dutcher, 160; Hagar *v.* Brainerd, 44 Vt. 294. In such case the party having an unexpired lease will be entitled to so much only of the interest of the fund in court as will indemnify him for his loss of rent, and the rest of the income must accumulate till the expiration of the lease. Wootton's Estate, Law Rep. 1 Eq. 589. And all costs of parties summoned by the railway in order to get a perfect title, must be paid by the company. Haynes *v.* Barton, Law Rep. 1 Eq. 422. And the costs of paying money out of court for the benefit of a charity must also be borne by the company.

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10. And where a tenant, who held the land for a term of years, with a strict clause against alienation or subletting, assigned a small portion to a railway, for a temporary purpose, the company not dealing with the landlord, or giving him any compensation for the use of the land, it was held, that he was entitled to maintain ejectment against the company and his tenant, for the forfeiture incurred by this subletting.[18]

11. And the damages assessed are payable to the owner of the land at the date of the adjudication, and do not pass by deed to a subsequent purchaser.[19] And where the company gave notice to treat for land to a tenant at will, and were allowed to take possession and complete their line, a person who had subsequently purchased an undivided portion of the land was not allowed to maintain a bill to restrain the company from the use of the land.[20]

* SECTION XXII.

Arbitration.

1. Attorney, without express power, may refer disputed claim.
2. Award binding, unless objected to in court.

§ 84. 1. It was held that an attorney, who had no authority under seal either to defend or refer suits, might nevertheless

Lathropp's Charity, Law Rep. 1 Eq. 467. A person not summoned, although having knowledge of proceedings to condemn land, is not bound thereby; but may have an action to protect his interest. Martin *v.* London, Chatham, & Dover Railway Co., Law Rep. 1 Eq. 145; s. c. Law Rep. 1 Ch. Ap. 501. See also *In re* London, Brighton, & South Coast Railway Co., as to costs of parties summoned. Law Rep. 1 Ch. Ap. 599.

[18] Legg *v.* Belfast & Ballymena Railway Co., 1 Ir. Com. Law, 124, n.

[19] Lewis *v.* Wilmington & Manchester Railroad Co., 11 Rich. 91. But where a third person agreed to pay the land-owner interest on the agreed compensation for his land damages "if said railway shall be kept in operation," his object being to secure the beneficial operation of the railway by running passenger and freight trains, it was held he was not bound to perform on his part, merely because the railway occasionally ran a freight train. Jepherson *v.* Hunt, 2 Allen, 417.

[20] Carnochan *v.* Norwich & Spalding Railway Co., 26 Beav. 169.

make a valid reference of a disputed claim against the company, under a judge's order.[1]

2. And if the company object that the arbitrator awarded upon matters not submitted, they should have applied to the court to revoke the submission or set aside the award, upon its return into court; but not having done so, the claim being set up and entertained by the arbitrator, the award is binding.[1] (*a*) The same principles would probably obtain in the American courts.

SECTION XXIII.

Statute of Limitations.

1. General limitation of actions applies to land claim.
2. Filing petition will not save bar.
3. Acquiescence of forty years by landowner, effect of.
4. Bar effectual where the use is clearly adverse.

§ 85. 1. Where neither the general statutes nor the special act contain any specific limitation, in regard to claims upon railway companies for land damages, it has been held that the general statute of limitation of actions for claims of a similar character will apply. (*a*) And where the claim was for an injury to an island, caused by the erection of a railway bridge, and to the award of the

[1] Faviell *v.* Eastern Counties Railway Co., 2 Exch. 344. In England it is generally held that an attorney should be appointed under seal to prosecute and defend suits, on the part of corporations. Thames Haven Dock & Railway Co. *v.* Hall, 5 Man. & G. 274; Arnold *v.* Poole, 4 Man. & G. 860. But where the directors are empowered to appoint and displace any of the officers of the company, the appointment of an attorney, by the company, need not be under seal. See *infra*, § 141.

(*a*) As to the time within which the arbitrators must make their award, under statute 8 Vict. c. 18, see Skerratt *v.* North Staffordshire Railroad Co., 2 Phil. 475. As to injunction upon proceedings pending the making of an administration bond pursuant to the same statute, see Poynder *v.* Great Northern Railroad Co., 2 Phil. 330.

(*a*) Simms *v.* Memphis, Clarksville, &c. Railroad Co., 12 Heisk. 621. And statutes of limitation are valid in such cases. Ib. Thus it has been held that the right to compensation is barred in twenty years. Ross *v.* Grand Trunk Railway Co., 10 Ont. Q. B. 447.

* viewers, and the company plead *actio non infra sex annos*, the plea was held good.[1]

2. And where the statute provides, that no process to recover compensation for land or property taken by a railway shall "be sustained unless made within three years from the time of taking the same," a mere filing of an application with the clerk of the county commissioners, without bringing it to the notice of the commissioners, or any action of theirs thereon until the three years have elapsed, will not save the bar of the statute.[2] (*b*) The land-owner may also traverse the right of the company to take the land, either originally, for the location and construction of their road, on the ground that it does not come within their line or the line of deviation from the prescribed route, or that they have not taken the proper preliminary steps, or for any other cause; or, when the company propose to change their route or to enlarge their accommodation works, on the ground of having made their exclusive election in one case, or the want of necessity in the other.[3]

3. Where the land-owner had allowed the company, upon an appraisal in the alternative stating both the value of the land and of the annual use, to occupy the same for the purposes of a canal for more than forty years, paying an annual sum about the same which had been awarded, the award being defective in law, in that no person had been made a party to the proceeding who was authorized to represent the land-owner, who was an infant, it was held that this was no ground of presuming a contract on the part of the land-owner to convey the land in fee in consideration of a rent charge.[4] But it was held that an ejectment on the part of the land-owner, and the erection of a bridge by him, ought to be restrained by injunction, on the ground of acquiescence, the company undertaking to put in force their parliamentary powers, which had not expired, and thus obtain the land.

[1] Forster *v.* Cumberland Valley Railroad Co., 23 Penn. St. 371.

[2] Charles River Railroad Co. *v.* Norfolk County Commissioners, 7 Gray, 389.

[3] South Carolina Railroad Co. *v.* Blake, 9 Rich. 228; *supra*, § 72; *infra*, § 105, note 14.

[4] Somerset Canal Co. *v.* Harcourt, 2 De G. & J. 596.

(*b*) Nor will proceedings suspended without assessment made and without due continuances, the statute period having elapsed. Waring *v.* Cheraw & Darlington Railroad Co., 16 S. C. 416. As to the effect of a saving of the rights of *femes covert* and infants. Ib.

4. But in another case, where the party had, by contract with the original land-owner, used the land of others for more than fifty years, first for a tramway and subsequently for a railway in a * different place across the same land, it was held that the present land-owner was concluded by the agreement, and that the change of one place for another would not defeat the estoppel. All the party can claim is, to have damages under the statute.[5]

[5] Mold *v.* Wheatcroft, 29 Law J. Ch. 11; s. c. 27 Beav. 510.

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*CHAPTER XII.

REMEDIES BY LAND-OWNERS UNDER THE ENGLISH STATUTE.

SECTION I.

Company bound to purchase the whole of a House, etc.

1. Company to take the accessories with the house.
2. But the owner has an election as to whether company shall take the whole.
3. Company bound to make deposit of the appraised value of all it is bound to take.
4. Company bound to take all of which it takes part, and pay special damage besides.
5. Company having given notice of desire to take part, not bound to take whole if it waives its intention.
6. Land separated from house by highway not part of premises.

§ 86. 1. By the English statute[1] (*a*) railway companies are bound to purchase the whole of a house and lands adjoining, if required, when they give notice to take part; and also if the house or the principal portion of it be within fifty feet of the railway, and deteriorated by it. The act includes house, garden, yard, warehouse, building or manufactory; but it was considered that this did not extend to a lumber-yard.[2] (*b*) Under a similar provision, in a

[1] Statute 8 & 9 Vict. c. 18, § 92.

[2] Stone *v.* Commercial Railway Co., 9 Sim. 621; s. c. 1 Railw. Cas. 375; Regina *v.* Middlesex, 3 Railw. Cas. 396. But it will include an open space in front of a public house used by guests for the purpose of access to the house with vehicles, the land having passed with the lease of the house for many years. Marson *v.* London, Chatham, & Dover Railway Co., Law Rep. 6 Eq. 101.

(*a*) This statute is to be construed strongly against the corporation. Walker *v.* London & Blackwall Railway Co., 3 Q. B. 744.

(*b*) To take greenhouses situated with a dwelling-house in an inclosure of about two acres, all used together as a nursery garden, the company must take all of the land. Salter *v.* Metropolitan District Railway Co., Law Rep. 9 Eq. 432. As to taking part of a block and so impairing means of access to the rest, see Ford *v.* Metropolitan Railway Co., Law Rep. 17 Q. B. 12.

special charter, it was held, that the company were not bound to take the entire premises, where the principal dwelling-house only was within the prescribed limit.[3]

2. It has been considered that this statute gave an option to the land-owner, whether the company should take the whole or part of the house, so situated.[4] And in this last case it was held, * that a narrow strip of land adjoining an iron and tin-plate factory, which had been used as a place of deposit for rubbish, and over which a person had a right of way, was such a part of the manufactory, that the company were bound to take the whole.[4] (*c*)

3. And the statute requiring a deposit of the appraised value of the land taken by a railway company, before entering upon the same, imports the value of the whole premises, in all cases where the company give notice of requiring part, and the owner elects, according to the terms of the statute, that they shall take the whole.[5]

4. Where three adjoining houses had gardens laid out from the * plat of land upon which they were built for the accommodation of each, and a railway company proposed to take a strip of land from the gardens attached to two of the houses upon the side

[3] Regina *v.* London & Greenwich Railway Co., 3 Railw. Cas. 138.

[4] Sparrow *v.* Oxford, Worcester, & Wolverhampton Railway Co., 2 De G. M. & G. 94; s. c. 13 Eng. L. & Eq. 33, *per* Lord CRANWORTH and Sir KNIGHT BRUCE, L. J. See also Barker *v.* North Staffordshire Railway Co., 2 De G & S. 55; s. c. 5 Railw. Cas. 401, 419, where Lord COTTENHAM, Chancellor, intimates an opinion, that certain parcels of land, with a brine-pit and steam-engine on one of them, adjoining salt-works, are not a part of the manufactory.

In Sparrow *v.* Oxford Railway Co., 2 De G. M. & G. 94; s. c. 13 Eng. L. & Eq. 33, involving the question of the right of a company to tunnel under a manufactory without making compensation, Lord CRANWORTH, L. J., made some very significant suggestions in regard to the rights of land-owners in such cases. In Ramsden *v.* Manchester, South Junction, & Altringham Railway Co., 1 Exch. 723, it was determined that a railway company could not tunnel even a highway, without first making compensation to the owner of the freehold, under the Land Clauses Act. The company is not bound to take property more than fifty feet from the centre line of the road, unless it is incapable of separation. Queen *v.* London & Greenwich Railway Co., 3 Q. B. 166.

[5] Underwood *v.* Bedford & Cambridge Railway Co., 11 C. B. N. S. 442; s. c. 7 Jur. N. S. 941. So an offer of compensation to the party must be distinct from costs. Balls *v.* Metropolitan Board, Law Rep. 1 Q. B. 337.

(*c*) So of a row of cottages standing on premises used as a manufactory. Richards *v.* Swansea Tramways Co., Law Rep. 9 Ch. 425.

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most remote from the houses, and the owner elected to have the company take the houses, which they declined to do, but took the land; the company were held liable to purchase the whole of the two houses, the gardens being part of the houses to which they were attached, and also to make compensation for any injury sustained in respect of the other house.[6] (*d*)

5. It has also been determined, that the railway, after giving notice to purchase part of a house, &c., and being required by the owner to take the whole, cannot be compelled by mandamus to take the whole, as the act of parliament imposes no such obligation. The statute is intended to protect the owner from being compelled to sell a part, but does not compel a company, wanting a part only, to take the whole, if they chose to waive their claim altogether, and the mandamus having claimed the whole could not go for a part only.[7]

[6] Cole *v.* Crystal Palace Railway Co., 5 Jur. N. S. 1114; S. C. 27 Beav. 212. The term "house" in the statute includes all that would pass by the same word in an ordinary conveyance. Hewson *v.* London & Southwestern Railway Co., 8 W. R. 467; Ferguson *v.* Brighton & South Coast Railway Co., 9 Law T. N. S. 134; S. C. 30 Beav. 100. It will therefore embrace all of a series of gardens connected by a gravel walk passing through the walls of the different gardens. Ib. See King *v.* Wycombe Railway Co., 6 Jur. N. S. 239; S. C. 28 Beav. 104. A hospital may compel a railway company to take the whole of the hospital if it take one wing used for the same purposes as the rest of the building, although connected only by a wall. St. Thomas Hospital *v.* Charing-Cross Railway Co., 1 Johns. & H. 400; S. C. 7 Jur. N. S. 256. Houses in the course of construction come within the statute. Alexander *v.* Crystal Palace Railway Co., 8 Jur. N. S. 833; S. C. 30 Beav. 556. See also Chambers *v.* London, Chatham, & Dover Railway Co., 8 Law T. N. S. 235. Land used for purposes of pastime, as archery and dancing, but chiefly as a pasture for cows, although important to the enjoyment of the house, is not so a part of the same premises as to require the company to take it with the house or the house with that. Pulling *v.* London, Chatham, & Dover Railway Co., 10 Jur. N. S. 665; S. C. 33 Beav. 614.

[7] Queen *v.* London & Southwestern Railway Co., 12 Q. B. 775; S. C. 5 Railw. Cas. 669.

(*d*) Where in the execution of a charity trustees had projected a row of almshouses, with a hall in the centre and a garden in front, a company taking land which would be in front of a part of some of the almshouses takes a part of a house within the meaning of the statute, although nothing more than the hall has been built. Grosvenor *v.* Hampstead Junction Railway Co., 1 De G. & J. 446.

6. The plaintiff was an owner in fee of a house on one side of *a high road, where he had resided for a great number of years. Some years ago he purchased six acres of land on the other side of the road, upon part of which there were built three houses. Two of the houses were let to tenants, the third house was occupied by the plaintiff's groom, and other servants; the rest of the land, which lay beyond the houses, was used by the plaintiff for pasturing his cows, horses, &c. The plaintiff alleged that the six acres were indispensable to the enjoyment of the house by him. A railway wanting part of the six acres, which lay about 250 yards from the plaintiff's house, the plaintiff sought to compel the company to take the house also, on the ground that the land formed part of his house, within the 92d section of the Act. But the motion for injunction having been denied by the Vice-Chancellor, WOOD, his judgment was affirmed in the Court of Chancery Appeal, Lord Justice KNIGHT BRUCE *dubitante* [8]

SECTION II.

Company compellable to take intersected Lands, and Owner to sell.

1. When less than half an acre remains on either side, company must buy.
2. Owner must sell where land of less value than railroad crossing.
3, 4. Word "town," how construed.

§ 87. 1. By the 93d section of the English statute the company is compellable to take lands, not in a town or built upon, which are so intersected by the works as to leave either on one or both sides a less quantity of land than half a statute acre.

2. And by section 94, if the quantity of land left on either side of the works [1] is of less value than a railway crossing, and the

[8] Steele *v.* Midland Railway Co., Law Rep. 1 Ch. 275; s. c. 12 Jur. N. S. 218.

[1] Statute 8 & 9 Vict. c. 18, §§ 93, 94; Falls *v.* Belfast & Ballymena Railway Co., 11 Ir. Law, 184. This statute has been held not to apply to lands in a town or land built upon. Marriage *v.* Eastern Counties Railway Co., 30 Law T. 264; s. c. 9 H. L. Cas. 32, where the judgment of the Exchequer Chamber, 2 H. & N. 649, is reversed, and the statute held to apply to all intersected lands, whether in a town or not. A land-owner is not entitled to the costs of

* owner have not other lands adjoining, and require the promoters to make the crossing, the owner may be compelled to sell the land.

3. It was held, that the term "town," in a turnpike act, imported a "collection of houses," and that the extent of the town was to be determined by the popular sense of the term, and to include all that might fairly be said to dwell together.[2]

4. And in another case, it is said, that the term includes all the houses which are continuous, and that this includes all open spaces occupied, as mere accessories to such houses.[3]

SECTION III.

Effect of Notice to Treat for the purchase of Land.

1. Institution of proceedings. Effect under statute of limitations.
2. Company compelled to summon jury.
3. Ejectment not maintainable against company.
4. Powers to purchase or enter, how saved.
5. Subsequent purchasers affected by notice to treat as the inception of title.
6. But notice may be withdrawn before anything is done under it.
7. Not necessary to declare the use, nor that it is for station in use of which another company is to participate.

§ 88. 1. Inasmuch as the time for taking land, by the English statute, is limited to three years, an important question has arisen there, in regard to the effect of instituting proceedings by giving notice to treat, within the time limited, although not in season to have the matter brought to a close before its expiration.

2. This having been done, and the land-owner having intimated his desire that a jury should be summoned, but the company taking no further steps, the question was whether a writ of mandamus would lie, after the prescribed period had elapsed, to

an inquiry whether the land is of less value than the cost of crossing. Cobb *v.* Mid Wales Railway Co., Law Rep. 1 Q. B. 342.

[2] Regina *v.* Cottle, 3 Eng. L. & Eq. 474; s. c. 16 Q. B. 412.

[3] Elliott *v.* South Devon Railway Co., 2 Exch. 725. See also Carington *v.* Wycombe Railway Co., Law Rep. 2 Eq. 825.

compel the company to proceed to summon a jury. It was determined in the affirmative.[1]

* 3. So, too, where the company have taken possession of land, by depositing the value of the land in the Bank of England, and executing a bond to the party to secure payment, subject to future proceedings, as they may do, and where the company took no further steps to ascertain the sum to be paid by them, as compensation, until the time limited for exercising their compulsory powers had expired, it was held, that having rightfully entered upon the land before the expiration of the prescribed period, an ejectment could not be maintained against them after that period. The proper remedy for the land-owner is by writ of mandamus.[2]

4. So, also, if they have made the deposit, and given a bond for the payment of the price, under this same section,[3] a day before the efflux of the time limited, although they had not entered

[1] Queen *v.* Birmingham & Oxford Junction Railway Co., 15 Q. B. 634; s. c. 6 Railw. Cas. 628; Birmingham & Oxford Junction Railway Co. *v.* Regina, 1 Ellis & B. 293; s. c. 4 Eng. L. & Eq. 276, where the judgment of the Queen's Bench was fully affirmed in the Exchequer Chamber. But where an annuitant, having power to enter upon land and distrain for his security, was served with notice by a railway company of intention to purchase, and the company subsequently purchased the property of a prior mortgagee, who had a power of sale, it was held that in the absence of fraud, the annuitant could not compel the company to pay the owners of the annuity. Hill *v.* Great Northern Railway Co., 5 De G. M. & G. 66; s. c. 27 Eng. L. & Eq. 198, reversing the decision of one of the Vice-Chancellors in s. c. 23 Eng. L. & Eq. 565. See also Metropolitan Railway Co. *v.* Woodhouse, 11 Jur. N. S. 296. If the land-owner lie by an unreasonable time, he cannot maintain mandamus, or where the company abandons its notice to take part of land upon the owners serving notice to take the whole. *Ex parte* Quicke, 13 W. R. 94.

[2] Armistead *v.* North Staffordshire Railway Co., 16 Q. B. 526; s. c. 4 Eng. L. & Eq. 216. The expression "deviation," which appears in the acts of parliament and in the English cases, is here determined to import distance from the line of the parliamentary plans which are the basis of the charter, and one hundred yards "deviation" is commonly allowed, in the acts. Worsley *v.* South Devon Railway Co., 16 Q. B. 539; s. c. 16 Q. B. 223. See also Lind *v.* Isle of Wight Ferry Co., 7 Law T. N. S. 416. The courts will restrain the company within the limits of deviation allowed by the act, even where the plans deposited contain no limitation. Higley *v.* Lancashire & Yorkshire Railway Co., 4 De G. M. & G. 352. The line of deviation controls the right rather than the delineations on the plan. Weld *v.* Southwestern Railway Co., 32 Beav. 340; Knapp *v.* London, Chatham, & Dover Railway Co., 2 H. & C. 212.

[3] Salisbury *v.* Great Northern Railway Co., 17 Q. B. 840; s. c. 10 Eng. L. & Eq. 344. The position is here distinctly assumed, that after the notice to

upon * the land, their powers to purchase or enter upon the lands are saved.[3]

5. And where a railway company gave notice to a tenant at will to take part of the lands, and the company were allowed to take possession and complete their line, and afterwards a person, who had, subsequently to the notice, purchased one-ninth of the land, filed a bill merely praying an injunction to restrain the railway company from entering upon, continuing in possession of, or otherwise interfering with the land, the bill was dismissed with costs.[4]

6. But it seems to be considered that mere notice by a railway company of an intention to take land, may be withdrawn if done before the company have taken possession of the land, or done anything in pursuance of the notice.[5] And this is especially true where the land consists of a house and appurtenances, and the notice only extends to taking a part of the land, and the owner requires the company to take the whole land with all the buildings.

7. It is no objection to a notice to take land for the use of a railway company that it does not declare the use for which it is

treat, the parties stand in the relation of vendor and purchaser, and the company is not at liberty to recede. All the after proceedings are merely for the purpose of ascertaining the price of the land. Sparrow *v.* Oxford & Worcester Railway Co., 9 Hare, 436; s. c. 12 Eng. L. & Eq. 249. The owner of the land on which a railway has been constructed by the consent of such owner, still retains his lien on the land for the price. Pell *v.* N. & B. Railway Co., 16 W. R. 1077; s. c. 17 W. R. 506; Eyton *v.* Denbigh, Ruthin, & Corwen Railway Co., 17 W. R. 516.

[4] Carnochan *v.* Norwich & Spalding Railway Co., 26 Beav. 169. But a notice to treat, in order to become the inception of title, must be followed up within a reasonable time, or it will be regarded as abandoned. Hedges *v.* Metropolitan Railway Co., 28 Beav. 109; s. c. 6 Jur. N. S. 1275.

[5] King *v.* Wycombe Railway Co., 6 Jur. N. S. 239; s. c. 28 Beav. 101; Gardner *v.* Charing-Cross Railway Co., 2 Johns. & H. 248; s. c. 8 Jur. N. S. 151. Where the company agrees verbally to take the whole of a house and land, that is a valid waiver of notice under the statute, and will be enforced in equity. Binney *v.* Hammersmith & City Railway Co., 9 Jur. N. S. 773. A tenant coming into possession of land after notice to treat, and before proceedings taken, is entitled to renewal of notice, so as to be made a party. Carter *v.* Great Eastern Railway Co., 9 Jur. N. S. 618. And a notice to take land will not enable the company to proceed and complete title after its powers for compulsory purchase have ceased. Richmond *v.* North London Railway Co., Law Rep. 5 Eq. 352. But see *infra*, § 89, pl. 2, note 4.

proposed to be taken; nor will it affect the title of the company that it is taken for a station for the joint use of that and another company, which latter company could not have taken the land for their own use alone.[6]

*SECTION IV.

Requisites of the Notice to Treat.

1. Notice to treat must, in terms or by reference, accurately describe land.
2. Company cannot retract after giving notice to treat.
3. New notices given for additional lands.
4. Power to take land not lost by former unwarranted attempt.
5. Lands may be taken for branch railway.
6. Effect of notice in case of a public park.

§ 89. 1. As by the English statute the notice to treat is made the act of purchase, it is of the first importance that it should describe the lands accurately. But even where the notice was indefinite, if it be accompanied with a plan which shows the very land proposed to be taken, it will be sufficient; or reference may be made to the parliamentary plan.[1] The company can only claim to use what their notice and the annexed plan show clearly was submitted to the appraisers to value.[2]

2. It was held long ago in the English courts, under similar statutes for taking land by compulsion, that the notice to treat constituted the act of purchase, and that after giving it there remained no longer to the company any power to retract, and they will be compelled by mandamus to complete the purchase.[3] (*a*)

[6] Wood *v.* Epsom & Leatherhead Railway Co., 8 C. B. N. S. 731.

[1] Sims *v.* Commercial Railway Co., 1 Railw. Cas. 431; Hodges Railw. 197.

[2] Kemp *v.* London & Brighton Railway Co., 1 Railw. Cas. 495.

[3] King *v.* Hungerford Market Co., 4 B. & Ad. 327; King *v.* Manchester Commissioners, 4 B. & Ad. 332, n.; Doo *v.* London Railway Co., 1 Railw. Cas. 257; Burkinshaw *v.* Birmingham & Oxford Junction Railway Co., 5 Exch. 475; s. c. 4 Eng. L. & Eq. 489; Edinburgh & Dundee Railway Co. *v.* Leven, 1 Macq. Ap. Cas. 284; Stone *v.* Commercial Railway Co., 9 Sim. 621; s. c. 1 Railw. Cas. 375. When variance from notice will not vitiate precept, see Walker *v.* London & Blackwall Railway Co., 3 Q. B. 744; Regina *v.* York & North Midland Railway Co., 1 Ellis & B. 178, 858; Regina

(*a*) Harding *v.* Metropolitan Railway Co., Law Rep. 7 Ch. 154.

Nor can the company after requiring the tenant to give up to them the possession of his land before the expiration of his term, afterwards surrender the same, especially where damage has accrued to the premises in consequence of the company taking possession. They must pay money into court.[4]

* 3. And where the company had given notice to take twenty perches of land, they cannot subsequently give notice to restrict the land to one perch.[5] But the company having issued one notice, may issue a second, requiring additional lands.[6] They are at liberty, by new notices from time to time, to take such additional lands as the progress of the work shows will be requisite.

4. Nor will the company be deprived of the power to take land for the necessary use of the works, when the emergency arises, by having previously attempted to take it for other purposes not warranted by their act.[7]

5. And the company, having opened their main line for travel, but not completed the stations and works, are at liberty

v. Ambergate, Nottingham, & Boston Railway Co., 1 Ellis & B. 372. See *supra*, § 88, pl. 6, and notes.

[4] Pope *v.* Great Eastern Railway Co., Law Rep. 3 Eq. 171. Notice to treat is not equivalent to requiring the tenant to surrender the possession. Queen *v.* Stone, Law Rep. 1 Q. B. 529. But where the land-owner is served by the company with notice that it purposes to take land of such owner, at the end of six months, under the statute, this will bind the company to proceed and give notice to treat and take the land; and if the company delay beyond the time fixed by the statute, the land-owner will be entitled to substantial damages, and to have the contract carried into effect by mandamus. Morgan *v.* Metropolitan Railway Co., Law Rep. 4 C. P. 97, affirming s. c. Law Rep. 3 C. P. 553; 17 W. R. 261. In such cases the courts of equity will decree specific performance, especially where the defendants had been let into possession of the land on the faith of the contract. Harding *v.* Metropolitan Railway Co., Law Rep. 7 Ch. Ap. 151. But the court will not restrain the company from running trains during the pendency of an order of sale to enforce a vendor's lien. Lycett *v.* Stafford & Uttoxeter Railway Co., Law Rep. 13 Eq. 261; St. Germans *v.* Crystal Palace Railway Co., Law Rep. 11 Eq. 568, was not followed here.

[5] Tawney *v.* Lynn & Ely Railway Co., 4 Railw. Cas. 615.

[6] Stamps *v.* Birmingham, Wolverhampton, & Stour Valley Railway Co., 6 Railw. Cas. 123; s. c. 7 Hare, 251.

[7] Webb *v.* Manchester & Leeds Railway Co., 1 Railw. Cas. 576; Simpson *v.* Lancaster & Carlisle Railway Co., 15 Sim. 580, s. c. 4 Railw. Cas. 625; Williams *v.* South Wales Railway Co., 13 Jur. 413; s. c. 3 De G. & S. 354.

to take any lands within the limits of deviation for a branch railway.[8] (*b*)

6. But it was held, that where the Commissioners of Woods and Forests gave notice of taking lands for a public park, as they were acting in a public capacity, the notice given by them did not constitute a *quasi* contract, enforceable by mandamus.[9]

SECTION V.

Notice may be Waived.

1. Notice must be set forth in proceedings.
2. Agreement to waive operates an estoppel.
3. *Certiorari* denied where party has suffered no injury.

§ 90. 1. It is a general rule, in regard to all summary and inferior jurisdictions, that the basis of their jurisdiction must appear upon the face of the proceedings.[1] Hence in proceedings to take land *in invitum*, under a notice to treat, the notice being regarded * as essential to the jurisdiction, it has more generally been held indispensable to the jurisdiction that it should be set forth upon the proceedings.[1]

2. But where the land-owner enters into negotiation with the company, and agrees to waive the notice, he is afterwards estopped from taking the objection, that he never received notice.[2] (*a*) And it was held, that the party whose duty it was to give the notice, and who was shown by the returns to have appeared before the jury, cannot object to the inquisition upon the ground that it did not disclose a proper notice to treat.[3]

[8] Sadd *v.* Maldon, Withan, & Braintree Railway Co., 6 Exch. 143; s. c. 2 Eng. L. & Eq. 410.

[9] Queen *v.* Woods & Forests Commissioners, 15 Q. B. 761.

[1] Rex *v.* Bagshaw, 7 T. R. 363; Rex *v.* Mayor of Liverpool, 4 Bur. 2244; Rex *v.* Norwich Roads Trustees, 5 A. & E. 563.

[2] Regina *v.* South Holland Drainage Committee, 8 A. & E. 429.

[3] Regina *v.* Swansea Harbor Trustees, 8 A. & E. 439.

(*b*) This is affirmed in Murphy *v.* Kingston & Pembroke Railway Co., 11 Ont. Ch. 302.

(*a*) Notice may also be withdrawn. Grierson *v.* Cheshire Lines Committee, Law Rep. 19 Eq. 83.

3. In another case, where application was made to the King's Bench to issue a *certiorari*, to bring up and quash an inquisition for land damages in a railway case, on the ground of some alleged defect, the court say, the granting the writ is matter of discretion, though there are fatal defects on the face of the proceedings which it is sought to bring up; and that it is almost an invariable rule to deny the writ, where it appears the party has suffered no injury or has assented to the proceedings below.[4]

SECTION VI.

Title of the Claimant must be distinctly stated.

1. Claimant's reply to notice should be clear and accurate.
2. Award bad, which does not state claimant's interest.
3. Lands held by receiver or commission for a lunatic.
n. 3. Analogous American cases.

§ 91. 1. In reply to a notice to treat, the claimant may state the particulars of his claim and proceed to treat. In this case the statement should give a clear description of the claimant's interest in the land, as a defect here is liable to affect the validity of the after proceedings.

2. In one case where the claimant's answer to the notice to treat stated that, as trustees under a will, they claimed an estate in copyhold, and a certain sum as compensation for their interest in the lands, and appointed an arbitrator, and the other party * appointing one, and an umpire being agreed upon, he awarded a certain sum as the value to be paid to the trustees "for the purchase of the fee-simple, in possession, free from all incumbrances;" the company applying to set aside the award, upon the ground that other persons claimed an interest in the lands, the court held the award bad, for not finding the interest of the claimants in the land, or that they had a fee-simple which it appraised. But the court did not set the award aside, but left the company to dispute it when it should be attempted to be enforced.[1]

[4] Regina *v.* Manchester & Leeds Railway Co., 8 A. & E. 413.
[1] North Staffordshire Railway Co. *v.* Landor, 2 Exch. 235.

3. If the lands are in possession of a receiver, or the committee of a lunatic, a special application should be made to the Court of Chancery.[2] The claimant cannot object that the award describes the land as a fee-simple in possession, whereas the land is in possession of a tenant. Lord DENMAN, C. J., in giving judgment, says, "The answer is that such assumption, if really made, is in favor of the claimant, and therefore no matter of complaint for him. But it does not appear clearly that any such assumption was made. The expression 'fee-simple in possession,' in the claim, is used in contradistinction to fee-simple in reversion or remainder."[3]

[2] *In re* Taylor & York North Midland Railway Co., 1 Hall & T. 432; s. c. 6 Railw. Cas. 741.

[3] *In re* Bradshaw, 12 Q. B. 562. The vendor of land to a railway company does not waive his lien for damages by accepting a certificate of deposit for the purchase-money, the money not being paid when called for. Mims *v.* Macon & Western Railroad Co., 3 Kelly, 333. Where a company received a grant of certain salt mines, subject to a condition which it did not comply with, but retained the lands for a different purpose, and afterwards, when the period for performing the condition had expired, a general grant of all unoccupied salt lands in the state, necessary to use for constructing a railway, was made to a railway company, which proceeded and occupied, it was held that the first grantors had no interest or title enabling them to maintain an action for damages. Parmelee *v.* Oswego & Syracuse Railroad Co., 7 Barb. 599.

Under the statute of Pennsylvania which gives the right to construct lateral railways over intervening lands, to the owner of lands, mills, quarries, coal, or other mines, lime-kilns, or other real estate, in the vicinity of any railway, canal, or slack-water navigation, it has been held, that one in possession of land, in which there is a coal-mine, who has erected a dwelling-house, is an owner of the mine within the meaning of the act. Shoenberger *v.* Mulhollan, 8 Penn. St. 134. It is sufficient in such case that the petition be signed by the lessee and agent of the owner. Harvey *v.* Lloyd, 3 Penn. St. 331. It is considered necessary that the mortgagee of land should become a party to the proceedings for condemning or granting land to a railway, in order to give good title to the company. Stewart *v.* Raymond Railroad Co., 7 Sm. & M. 568. Or that he should give his consent, in writing, to the proceeding taken by the mortgagor in the case. Meacham *v.* Fitchburg Railroad Co., 4 Cush. 291; s. c. 1 Am. Railw. Cas. 584; s. c. 1 Redf. Am. Railw. Cas. 276. But the mortgagor may recover the full amount of damage, without regard to mortgages. Breed *v.* Eastern Railroad Co., 5 Gray, 470. Where the state held land for a state prison, and granted the charter of a railway, in the usual form, authorizing the company to locate the road, so that it might pass over the land of the state so held, but without any expression in the act of a design to aid the company in its undertaking, it was held the state might recover

*SECTION VII.

Claim of Land-owner must correspond with Notice.

§ 92. In one case the claim of the land-owner described more land than the notice to treat, being intersected land, less than one-half acre, which the company are bound to take if so required. But the claim did not properly designate the portion which, it was claimed, the company should take under their notice, and that which they were required to take, as intersected land. The umpire received evidence as to the value of the intersected land, and awarded one entire sum as compensation for the whole. Held that the award was bad, there being no valid submission as to intersected lands.[1]

damages for the land taken. The court say they think if the legislature had intended to aid the enterprise by an appropriation of money, land, or other means, the purpose to do so would have been in some way expressed. Commonwealth *v.* Boston & Maine Railroad Co., 3 Cush. 25; s. c. 1 Am. Railw. Cas. 482, 496, 497.

[1] North Staffordshire Railway Co. *v.* Wood, 2 Exch. 244.

*CHAPTER XIII.

ENTRY ON LANDS BEFORE COMPENSATION IS ASSESSED.

SECTION I.

Lands taken or Injuriously Affected, without previous Compensation to Parties.

1. Under English statutes no entry without previous compensation, except for preliminary survey.
2. Remedies against company offending.
3. Taking possession under statute, what acts constitute.
4. Company may enter with land-owner's consent after agreement for arbitration.
5. Or on giving a bond conditioned for payment or deposit of value of land.
6. Company restrained from using land until price paid.

§ 93. 1. The eighty-fourth section of the English statute, The Lands Clauses, &c., provides, that no entry shall be made upon any lands by the company until compensation shall have been made under the act, or deposited in the Bank of England, except for the purpose of preliminary surveys and probing or boring to ascertain the nature of the soil, which may be done by giving notice, not more than fourteen days or less than three days, and making compensation for any damage thereby occasioned to the owners or occupiers of such lands.

2. It has been considered that if the company enter upon lands without complying with the requisitions of the statute, they are liable in trespass or ejectment.[1] (*a*) And in some cases an injunc-

[1] Hutchinson *v.* Manchester, Bury, & Rosendale Railway Co., 14 M. & W. 687; Graham *v.* Columbus & Indianapolis Railroad Co., 27 Ind. 260. In this country a legislature may give railway companies the right to enter upon lands for the purpose of preliminary surveys without compensation. Fox *v.* Western Pacific Railroad Co., 31 Cal. 538.

(*a*) Smith *v.* Chicago & Alton Railroad Co., 67 Ill. 191; Hibbs *v.* Chicago & Southwestern Railway Co., 39 Iowa, 340; Ring *v.* Mississippi River Bridge Co., 57 Mo. 496; Conger *v.* Burlington & Southwestern Railway Co., 41 Iowa, 419; Donald *v.* St. Louis, Kansas City, & Northern Railway Co., 52

tion will be granted.(*b*) But where the company entered to make preliminary surveys, without giving the requisite notice, the court

Iowa, 411; Leber *v.* Minneapolis & Northwestern Railway Co., 29 Minn. 256; Rusch *v.* Milwaukee, Lake Shore, & Western Railway Co., 54 Wis. 136. And mere delay in proceeding without knowledge of or acquiescence in the acts of the company will not estop the owner. Bothe *v.* Dayton & Michigan Railroad Co., 37 Ohio St. 147. Nor will mere permission to enter and construct the road. Conger *v.* Burlington & Southwestern Railway Co., 41 Iowa, 419. Nor will mere silence and inaction with knowledge that the company is proceeding to construct its road. Walker *v.* Chicago, Rock Island, & Pacific Railroad Co., 57 Mo. 275. But where the company expends money, &c., it will be otherwise. The owner may not then have an ejectment. New Orleans & Selma Railroad Co. *v.* Jones, 68 Ala. 48; Pryzbylowicz *v.* Missouri River Railroad Co., 17 Fed. Rep. 492. But he may still have his action for damages. Ring *v.* Mississippi River Bridge Co., 57 Mo. 496. And if one of two tenants in common convey a right of way on conditions which the company does not perform, the grantor may have an action for damages for breach of contract, and his cotenant an action for trespass. Rush *v.* Burlington, Cedar Rapids, & Northern Railway Co., 57 Iowa, 201. An abutting owner may have ejectment where the company lays its track in the street, if he own the fee. Terre Haute & Southeastern Railroad Co. *v.* Rodel, 89 Ind. 128. The owner cannot recover damages for the taking where he can recover the land itself. Atlantic & Great Western Railway Co. *v.* Robbins, 35 Ohio St. 531. As to what may be recovered as damages, see Morin *v.* St. Paul, Minneapolis, & Manitoba Railway Co., 30 Minn. 100; Leber *v.* Minneapolis & Northwestern Railway Co., 29 Minn. 256; Chicago & Iowa Railroad Co. *v.* Davis, 86 Ill. 20; Hartz *v.* St. Paul & Sioux City Railroad Co., 21 Minn. 358. As to fixtures put upon the land by the trespassing company, see California Pacific Railroad Co. *v.* Armstrong, 46 Cal. 85; Justice *v.* Nesquehoning Valley Railroad Co., 87 Penn. St. 28; Morgan *v.* Chicago & Northeastern Railroad Co., 39 Mich. 675; Toledo, Ann Arbor, & Grand Trunk Railway Co. *v.* Dunlap, 47 Mich. 456; Van Size *v.* Long Island Railroad Co., 3 Hun, 613; Blue Earth County *v.* St. Paul & Sioux City Railroad Co., 28 Minn. 503; Greve *v.* St. Paul & Pacific Railroad Co., 26 Minn. 66; Jones *v.* New Orleans & Selma Railroad Co., 70 Ala. 227. As to punitive damages, see Anderson Railroad Co. *v.* Kernodle, 54 Ind. 314. For a second intrusion the owner may maintain a second action. Illinois & St. Louis Railroad & Coal Co. *v.* Cobb, 82 Ill. 183.

(*b*) An attempt to take land without valid proceedings for its condemnation, may be restrained by injunction. Bohlman *v.* Green Bay & Minnesota Railway Co., 40 Wis. 157. So of an attempt to take possession without assent and payment or tender of payment. Northern Pacific Railroad Co. *v.* Barnesville & Moorhead Railroad Co., 4 Fed. Rep. 298; Diedrichs *v.* Northwestern Union Railway Co., 33 Wis. 219; White *v.* Nashville & Northwestern Railroad Co., 7 Heisk. 518; Provolt *v.* Chicago, Rock Island, & Pacific Railroad Co., 69 Mo. 633;

refused to order the injunction, but reserved the question of costs.[2]

* 3. And where the entry was regularly made upon the land, for preliminary surveys, and afterwards the contractors, without the knowledge of the corporation, but with the consent of the occupying tenants, brought some of their wagons and rails and other implements upon the land, but did not commence the works or do any damage, and this was without the assent of the owner, and his agent thereupon filed a bill to obtain an injunction against taking possession of the lands until they had complied with the statute, the Vice-Chancellor said, that although the company were bound by the acts of their contractors, the acts done were not a taking possession within the meaning of the statute, and that the bill was improperly filed.[3]

4. But where the company agreed with the land-owner that the question of compensation should be settled by arbitration, and thereupon entered upon the land, by consent of the owner, and the arbitrator made an award, which became the subject of dispute, and the owner thereupon gave the company notice to quit, and brought ejectment, it was held he could not recover, although the company had not tendered the money awarded, or a conveyance, but that the owner's remedy was to proceed upon the award.[4]

[2] Fooks *v.* Wilts, Somerset, & Weymouth Railway Co., 5 Hare, 199; s. c. 4 Railw. Cas. 210. In this case the injunction was denied, chiefly on the ground that the alleged trespass was complete before the application. The court intimate that if the company should attempt to proceed further it might be proper to restrain it by injunction. The point that the company was in the wrong, is distinctly recognized.

[3] Standish *v.* Liverpool, 1 Drewry, 1; s. c. 15 Eng. L. & Eq. 255.

[4] Hudson *v.* Leeds & Bradford Railway Co., 16 Q. B. 796; s. c. 6 Eng. L. & Eq. 283. The decision here goes chiefly on the ground of the consent of

Freshwater *v.* Pittsburg, Wheeling, & Kentucky Railroad Co., 6 W. Va. 503; Omaha & Northwestern Railroad Co. *v.* Menk, 4 Neb. 21; Ray *v.* Atchison & Nebraska Railroad Co., 4 Neb. 439. And see Irish *v.* Burlington & Southwestern Railroad Co., 44 Iowa, 380; Evans *v.* Missouri, Iowa, & Nebraska Railway Co., 64 Mo. 453; Gammage *v.* Georgia Southern Railroad Co., 65 Ga. 614, where equity interposed in peculiar circumstances. But see Remshart *v.* Savannah & Charleston Railroad Co., 54 Ga. 579, where the court said there was a remedy at law, and Watson *v.* New York, West Shore, & Buffalo Railroad Co., 64 How. Pr. 220, in which the court refused an injunction.

The notice to quit under the circumstances did not make the company trespassers.

5. By the eighty-fifth section, if the company find it necessary to enter upon land, for the purpose of carrying forward their works, before the amount of compensation can be settled, they may deposit in the bank the amount claimed, or in other cases the appraisal, and also give the party a bond with surety, to be approved by two justices, in a penal sum equal to the amount so deposited, conditioned for the payment or deposit of the amount finally fixed as the ultimate value and interest thereon, and then take possession of the land and proceed with their works. The company can obtain their money so soon as the condition of the bond has been complied with. But the vendor must join in the petition for the money to be paid the company, or else it must * be shown that he has been served with a copy of the petition.[5]

the land-owner to the entry of the company, and to a reference of the question of compensation to an arbitrator.

[5] *Ex parte* South Wales Railway Co., 6 Railw. Cas. 151. But in *Ex parte* Eastern Counties Railway Co., 5 Railw. Cas. 210, the money was ordered to be paid to the company on affidavits showing the claim settled. The land-owner has no lien on the money deposited for costs, but the company is entitled to the money on payment of the sum finally settled for the value of the land. *Ex parte* Great Northern Railway Co., 5 Railw. Cas. 269; London & South Wales Railway Co., 5 Railw. Cas. 437. The bond must be given in the very terms of the statute. Hosking *v.* Phillips, 3 Exch. 168, opinion of Parke, B. And it will make no difference that the obligee is a gainer by the deviation from the statute. Poynder *v.* Great Northern Railway Co., 16 Sim. 3; s. c. 5 Railw. Cas. 196. But where the company chooses to treat for the claimant's title only, it is sufficient if the bond follow the statute, so far as it applies to that particular case. Willey *v.* Southeastern Railway Co., 1 Hall & T. 56; s. c. 6 Railw. Cas. 100. If the company enters by consent of the tenant, and does permanent damage to the land, the *owner* may nevertheless obtain an injunction and compel a deposit and the giving of a bond as required by the statute. Armstrong *v.* Waterford & Limerick Railway Co., 10 Irish Eq. 60. If there be a mortgage on land, the company must treat with the mortgagee, or provide for the expense of reinvestment for his benefit, or the entry will be regarded as unlawful. Ranken *v.* East & West India Docks & Birmingham Junction Railway Co., 12 Beav. 298; 19 Law J. Ch. 153. Under the general statutes, in many of the American states, where there are conflicting claims to the land required by a railway company, the company is required to make application to the Court of Chancery, and deposit the money in bank, subject to the final order of that court. In such case it has been considered that the company has no interest in the controversy, after depositing the money for the price of the land. Haswell *v.* Vermont Central Railroad Co., 23 Vt. 228.

It does not invalidate the bond, if it bear date before the date of the valuation.[6]

6. Where a railway company took land for the construction of their road, without paying the price, and after completing their works leased the line to another company, it was held, upon a bill against both companies, to compel the payment of the land damages, that a decree must pass for the plaintiff for payment by the first company, and in default that both companies be restrained from using the land.[7] But where the price of lands so taken had been secured by bond, which had not been paid, it was held the company, after having constructed their road, could not be restrained * by injunction from continuing to occupy the land until they paid the purchase-money.[8] And this, it seems to us, is the correct view of the matter, that the land-owner, by accepting security, or even the promise of the company, for land damages, and allowing them to apply the land to the purposes of constructing their works, so essentially converted its nature as to lose all lien upon it for the price.[9]

SECTION II.

Proceedings requisite to enable Company to enter.

1. Provisional valuation under English statutes.
2. Irregularities in proceedings.
3. Penalty for irregular entry upon lands.
4. Entry after verdict estimating damages, but before judgment.
5. Charter mode of assessing damages not superseded by subsequent general act.

§ 94. 1. In some cases specified in the English statute, it is necessary to have a provisional valuation of land, by a surveyor appointed by two justices, to determine the amount of the security

[6] Stamps *v.* Birmingham, Wolverhampton, & Stour Valley Railway Co , 6 Railw. Cas. 123.

[7] Cozens *v.* Bognor Railway Co., Law Rep., 1 Ch. Ap. 594, TURNER, L. J., dissenting. But see *supra*, § 73, note 7.

[8] Pell *v.* Northampton & Banbury Railway Co., Law Rep. 2 Ch. Ap. 100; s. c. 12 Jur. N. S. 897. The lessee is a proper party in such case. Winchester *v.* Mid-hants Railway Co., Law Rep. 5 Eq. 17.

[9] *Supra*, § 73, and notes; § 65, pl. 6, and cases cited.

to be given before the entry of the company upon the land. Where in such cases the justices appointed a surveyor, who had all along acted for the company, to appraise the value, it was held no sufficient reason to interfere, by injunction, but the court reprobated such a practice. The court also declined to interfere, by injunction, on the ground that the sureties on the bond were the company's solicitors, and were upon similar bonds to a large amount.[1]

2. In the same case it was considered that depositing money and executing a bond to tenants in common, in their joint names, was irregular.[1] It was held that the proceedings under the 85th section of the English act, to obtain possession of the land before the * amount of compensation is settled, may be *ex parte*, and altogether without notice.[2]

3. The English statute subjects the company to a penalty for entering upon lands before taking the steps required by the statute, but provides, that the penalty shall not attach to any company who have *bona fide* done what they deemed to be a compliance with the statute.[3]

4. If one enter upon lands after verdict estimating damages, but before judgment on the verdict, he is liable in trespass, but only for the actual injury, and not for vindictive or exemplary damages.[4] (*a*)

[1] Langham *v.* Great Northern Railway Co., 1 De G. & S. 486; s. c. 5 Railw. Cas. 265, 266. This case was in favor of five plaintiffs, three tenants in common, and two devisees in trust for the sale of the lands, and it was queried, whether there was not a misjoinder.

[2] Bridges *v.* Wilts, Somerset, & Weymouth Railway Co., 4 Railw. Cas. 622. This is a decision of the Lord Chancellor affirming that of the Vice-Chancellor of England. Poynder *v.* Great Northern Railway Co., 16 Sim. 3; s. c. 5 Railw. Cas. 196. In this case the bond was held to be informal, for being made to be performed "on demand;" and the Lord Chancellor refused a perpetual injunction, but allowed it till the bond was corrected.

[3] Hutchinson *v.* Manchester, Bury, & Rosendale Railway Co., 15 M. & W. 314. Pollock, C. B., thus lays down the rule of construction of this statute: "A penal enactment ought to be strictly construed, but a proviso, which has the effect of saving parties from the consequences of a penal enactment, should be liberally construed.

[4] Harvey *v.* Thomas, 10 Watts, 63.

(*a*) As to trespass as a remedy for the land-owner generally, see *supra*, § 93.

5. It has often been made a question in this country, where the charter of a railway provides one mode of assessing land damages, and a subsequent general railway act provides a different mode, which the company are bound to pursue. It has been held the company might still pursue the course pointed out in their charter.[5]

SECTION III.

Mode of obtaining Compensation where no Compensation is offered.

1. Claimant may have an assessment by arbitrators or by jury.
2. Method of procedure in either case.

§ 95. 1. Where land is taken by the company, or injuriously affected by their works, and no compensation has been offered by the company, the claimant may, where the amount exceeds * £50, have the same assessed, either by arbitrators or a jury, at his election.

2. If he desire to have the same settled by arbitration, he shall give notice to the company of his claim, stating his interest in the land and the amount he demands, and unless the company within twenty-one days enter into a written agreement to pay the amount claimed, the same shall be settled by arbitration, in the manner pointed out in the statute; or, if the party desire to have the same settled by a jury, he shall so state in his notice of claim, and unless the company agree to pay the sum claimed, in the manner stated above, they shall within twenty-one days issue their warrant to the sheriff to summon a jury to settle the same, in the manner pointed out in the act, and in default thereof they shall be liable to pay the amount claimed, to be recovered in the superior courts.[1]

[5] Visscher *v.* Hudson River Railroad Co., 15 Barb. 37; Hudson River Railroad Co. *v.* Outwater, 3 Sandf. 689; *supra*, § 72, note at the end.

[1] Statute 8 & 9 Vict. c. 18, § 68.

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SECTION IV.

Onus of carrying forward Proceedings.

1. Onus rests on claimant after company has taken possession.
2. Pending questions in equity first disposed of. Notice of warrant for jury.
3. Proceedings cannot be had unless actual possession is taken or injury done.

§ 96. 1. It has been held, under the English statutes, that after the company have taken possession of land, either by right or by wrong, the onus of taking the initiative steps to have the purchase-money or compensation assessed, lies upon the claimant.[1] (*a*) It was considered in this case, that the remedy under the sixty-eighth section[2] applied to all cases where the company took possession of the land under the eighty-fifth section.[3]

2. But if questions in equity are pending, they must be disposed * of before the common-law remedy can be pursued.[4] This was a case where the determination of the matters pending in equity was necessary to enable the parties to know what was to be submitted to the assessors.[4] In proceedings under the sixty-eighth section, it is not necessary for the company to give the claimant notice of their issuing a warrant to the sheriff to summon a jury, ten days before they issue it, as is required in proceedings under the other sections.[5] It was held, that if the

[1] Adams *v.* London & Blackwall Railway Co., 2 Hall & T. 285; s. c. 6 Railw. Cas. 271, 282. It was also considered, in this case, that if the company failed to perform its duties in the proceedings, the more appropriate remedy was mandamus, and not specific performance.

[2] See *supra*, § 95.

[3] See *supra*, §§ 93, 94; Armistead *v.* North Staffordshire Railway Co., 16 Q. B. 526; s. c. 4 Eng. L. & Eq. 216.

[4] Southwestern Railway Co. *v.* Coward, 5 Railw. Cas. 703; s. c. 1 Hall & T. 377, note.

[5] Railstone *v.* York, Newcastle, & Berwick Railway Co., 15 Q. B. 404. This case is questioned in Richardson *v.* Southeastern Railway Co., 11 C. B. 151;

(*a*) In this country variously regulated by statute. In Wisconsin, the corporation must take the initiative. So in Indiana. Cox *v.* Louisville, New Albany & Chicago Railroad Co, 48 Ind. 178. Sherman *v.* Milwaukee, Lake Shore, & Western Railroad Co , 40 Wis. 645. In Arkansas, either party may apply for an assessment. Cairo & Fulton Railroad Co. *v.* Trout, 32 Ark. 17.

claimant recover a larger sum than was offered by the company, he is entitled to recover costs under section sixty-eight, as well as under other sections.[5]

3. It is considered that the land must be actually taken, or actually injuriously affected by the company, before the claimant can take proceedings under section sixty-eight. Hence if the company give notice of their intention to take lands, but do not afterwards actually take possession or injuriously affect them, the claimant can only proceed by mandamus. It has been decided that the claimant in such case cannot make a demand of a certain sum, and then recover it if the company do not issue their warrant to the sheriff.[6]

SECTION V.

Injunction will not issue because Lands are being injuriously affected, without Notice to Treat or previous Compensation.

1. Company proceeding under its powers, claimant must wait until works are completed.
2. Even if appearance of land will be greatly altered.
3. How far equity interferes where legal claim of party is denied.
4. Where a special mode of compensation has been agreed on.

§ 97. 1. It is said courts of equity will not interfere by injunction, because lands are being injuriously affected by the * company's works, and no notice to treat or previous compensation has been made, if it appears the company are only exercising their statutory powers. The claimant should allow the works to be completed, and then take his remedy under the statute.[1]

2. It was objected, in one case, that the company would be likely to greatly alter the appearance of the land which they had entered upon, and that a jury could not understandingly assess

s. c. 6 Eng. L. & Eq. 426. But on error, in the Exchequer Chamber, 9 Eng. L. & Eq. 464, the question as to costs was affirmed, and the court said, it was not necessary to say whether the case of Railstone *v.* York, Newcastle, & Berwick Railway Co., was to be considered sound or not, as it did not necessarily affect the question before the court.

[6] Burkinshaw *v.* Birmingham & Oxford Junction Railway Co., 5 Exch. 475.

[1] Statute 8 & 9 Vict. c. 18, § 68.

the value after the damages were sustained, but the court said it was no ground for the interference of a court of equity.[2]

3. The courts in England hold, that in this class of claims it is proper to wait till the full extent of the injury is known.[3] And equity will not enjoin the party from proceeding under the statute, in a case where it is alleged that he has no legal claim under the statute,[4] as in such case the company may defend against the award, and this seems to be the course finally determined upon. But some actions at law have been brought and sustained to try the right, by order of the courts of equity.[5]

4. So, too, where the bill alleges that the party has upon consideration agreed to receive compensation in a particular mode, equity will enjoin him from taking proceedings under the statute.[6]

*SECTION VI.

Right in the Claimant not determined by Jury or Arbitrator.

1-3. Arbitrators and sheriff's jury determine only the amount of damages.

4. In most American states assessment is final.

5. Plaintiff will recover damages assessed if he suffered any legal injury.

§ 98. 1. There has been some contrariety of opinion among the English judges in regard to the right of the company, before

[2] Langham *v.* Great Northern Railway, 1 De G. & S. 486; s. c. 5 Railw. Cas. 263. The counsel for defendant was not called to answer this portion of plaintiff's argument.

[3] Hutton *v.* London & Southwestern Railway Co., 7 Hare, 259

[4] East & West India Docks & Birmingham Junction Railway Co. *v.* Gattke, 3 Macn. & G. 155; s. c. 3 Eng. L. & Eq. 59; South Staffordshire Railway Co. *v.* Hall, 1 Sim. N. S. 373; s. c. id. 105. In this last case, the opinion of Lord Cranworth seems to overrule that of Lord Cottenham in London & Northwestern Railway Co. *v.* Smith, 1 Hall & T. 361; s. c. 5 Railw. Cas. 716. Sutton Harbor Improvement Co. *v.* Hitchins, 15 Beav. 161; s. c. 9 Eng. L. & Eq. 41; London & Northwestern Railway Co. *v.* Bradley, 3 Macn. & G. 366; s. c. 6 Railw. Cas. 551. See also Monchet *v.* Great Western Railway Co., 1 Railw. Cas. 567. But see the case of Lancashire & Yorkshire Railway Co. *v.* Evans, 14 Beav. 529; s. c. 19 Eng. L. & Eq. 295, where the case of London & Northwestern Railway Co. *v.* Smith is still further questioned.

[5] Glover *v.* North Staffordshire Railway Co., 16 Q. B. 912; s. c. 5 Eng. L. & Eq. 335.

[6] Norfolk *v.* Tennant, 9 Hare, 745; s. c. 10 Eng. L. & Eq. 237.

the sheriff's jury, to raise the question of the claimant's right to recover any compensation, under the sixty-eighth section, where lands are taken or alleged to be injuriously affected by the works of the company, and whether the jury can go into any inquiry beyond that of the value of the claimant's interest in the land. The latest decisions upon this point hold, that the jury is confined to the question of the amount of compensation.[1]

2. In the very latest English case (1857), upon this subject,[2] (*a*) the judges of the Court of Queen's Bench differed in opinion, and delivered opinions *seriatim*. COLERIDGE, J., and Lord CAMPBELL, C. J., and WIGHTMAN, J., holding that the jury had nothing before them but the *quantum* of damages, and that whether the company declined to issue their warrant to the sheriff, or did issue it, in both cases, the right to recover any damage on account of a claim for the injurious affecting of land was to be tried upon the action, to recover the amount assessed, in the courts. The proceedings under the statute were held, by the majority of the court, to be merely for the purpose of fixing the amount of the claim. If, indeed, the company stood still upon the question of right, they were liable, in the event of the claimant's recovery, for the full amount of the claim made; but if they proceeded to a hearing before the arbitrator or a jury, * whichever course the claimant should elect, they might not only contest the amount there, but the right of any recovery in the action which the claimant was compelled to bring to obtain execution against the company, but that it was improper to go into any inquiry before the arbitrator or the jury, in regard to the right to recover anything, inasmuch as this tended improperly to embarrass the mind of the triers in regard to the damages. And in this case, where the jury went into the question of right, and determined the claimant had no right, but added, if he had such

[1] Regina *v.* Metropolitan Sewers Commissioners, 1 Ellis & B. 694; s. c. 18 Eng. L. & Eq. 213.

[2] Regina *v.* London & Northwestern Railway Co., 3 Ellis & B. 443; s. c. 25 Eng. L. & Eq. 37. And the same rule is extended to the finding of arbitrators that premises were injuriously affected by the narrowing of a way of approach, by means of the company's embankment; the award is not conclusive on the point of the injurious effect. Beckett *v.* Midland Railway Co., Law Rep. 1 C. P. 241.

(*a*) And see Chapman *v.* Monmouthshire Railway Co., 2 H. & N. 267.

right his claim should be valued at £150, the majority of the court determined that the former part of the verdict could not be rejected, and let the verdict stand as a good finding of the sum named; which last point seems rather too refined for common apprehension, even after reading attentively the elaborate opinion of the majority of the court by COLERIDGE, J.

3. Mr. Justice ERLE dissented from the principal decision of the court, and held the verdict good in all respects. But this case must be regarded as settling the question of the right of the jury to pass upon the claim beyond its mere amount, at least under the English statutes.

4. In most of the American states the assessment of land damages, by whatever tribunal, becomes final, unless appealed from, and execution issues without resort to a future action; or, if an action is necessary upon awards of arbitrators, this will not justify a re-examination of the case, either upon the question of title or amount of damages. But in some of the states, the proceedings are similar to those above-named in the English courts.[3]

5. And under the English statutes, where the claim is for injuriously affecting land, the plaintiff must recover the entire amount of damages assessed to him for land taken by a railway, unless the defendant's pleas show that he had no right to recover to any extent.[4]

*SECTION VII.

Extent of Compensation to Land-owners, and other Incidents by the English Statutes.

1. Liberal compensation allowed.
2. Decisions under English statutes.
3. Limit of period for estimating damages.
4. Whether claim for damages passes to the devisee or executor.
5. Vendor generally entitled to damages accruing during his time.

§ 99. 1. In one of the early cases[1] upon this subject, Lord DENMAN, C. J., said, we think it not unfit to premise, "that where

[3] *Supra*, § 72.

[4] Mortimer *v.* South Wales Railway Co., 5 Jur. N. S. 784; s. c. 1 Ellis & E. 375.

[1] Regina *v.* Eastern Counties Railway Co., 2 Q. B. 347.

such large powers are intrusted to a company to carry their works through so great an extent of country, without the consent of the owners and occupiers of land through which they are to pass, it is reasonable and just that any injury to property, which can be shown to arise from the prosecution of those works, should be fairly compensated to the party sustaining it." But this must be received under some limitations. For it is supposable, that possible remote injuries may accrue to property, of a general and public character, which it was never intended to compensate. (*a*)

2. Some points arising under the English statute may be here referred to. It was held that where the powers conferred upon a canal company were unlimited as to time, no limitation as to their exercise could be assigned, so as to require their exercise within a reasonable time, and consequently that the works might be resumed at any period.[2] Future damages to accrue to land-owners cannot be estimated properly until after the completion of the works.[3] The compensation, when given, fixes the rights of the parties upon the basis of its estimation, as, if the estimation is had upon the footing of an entire severance of the land, the land-owner has no right to cross the track.[4] And where this did not * sufficiently appear by the record of the verdict, that not having been made, held that parol evidence might be given of the finding, and of the grounds upon which it proceeded.[4]

3. Where consequential damages to existing works by the erection of new ones are required to be compensated, the period for estimation is limited to the yearly value of the works, antecedent to the passing of the act.[5]

[2] Thicknesse *v.* Lancaster Canal Co., 4 M. & W. 472. Lord ABINGER, C. B., intimates an opinion here, that possibly, after a long delay of the company to proceed with its works, and the erection of fences and buildings by the land-owners in faith of the abandonment of the works by the company, a court of equity might restrain the company from completing the enterprise, notwithstanding the grant of power by parliament; but that a court of law could do no such thing.

[3] Lee *v.* Milner, 2 M. & W. 824.

[4] Manning *v.* Eastern Counties Railway Co., 12 M. & W. 237. But unless it appeared by the record on what basis the assessment was made, it seems questionable, whether, on general principles, oral evidence is admissible to show that basis. *Supra*, § 74, note 6.

[5] Manning *v.* Commissioner, 9 East, 165.

(*a*) As to damages in general, see *supra*, § 71.

4. The devisee is entitled to claim consequential damages, and not the executor.[6] But where one contracted to sell freehold estates and died before the money was paid; under the London Bridge Improvement Act, it was held the money should go to the executor.[7] But the cases are not uniform upon this subject, and the usual course seems to be, that the money for consequential damage goes to the party interested in the inheritance, or else is divided according to the interest of the several estates.[8] In one case it was held, that the vendee was entitled to compensation, which accrued during the time of the vendor's title, but not liquidated till after the conveyance.[9]

5. But in general the vendor is entitled to land damages accruing during his time, although not collected, and often where the works are not completed till after the conveyance.[10] The presumption is, if the jury assess compensation to one person, that it is only for his interest in the premises.[11]

* SECTION VIII.

Right to Temporary Use of land to enable the Company to make Erections on other lands.

1. Right to cross another railway by a bridge gives right to temporary use of the company's land, but not to build abutments.
2. Right to bridge a canal gives right to build a temporary bridge.
3. And if erected *bona fide* it may be used for other purposes.

§ 100. 1. Where one railway act gives the company power to pass another railway, by means of a bridge, provided the width between the abutments of the bridge is not less than twenty-six feet, and at the points where the bridge is to be built, the land of

[6] King *v.* Commissioner, 12 East, 477.

[7] *Ex parte* Hawkins, 3 Railw. Cas. 505, and note. No other party seems to have had a counter interest in this case.

[8] Midland Counties Railway Co. *v.* Oswin, 1 Col. C. C. 71, 80; s. c. 3 Railw. Cas. 497; Danforth *v.* Smith, 23 Vt. 247.

[9] King *v.* Witham Navigation Co., 3 B. & Ald. 451.

[10] Rand *v.* Townshend, 26 Vt. 670.

[11] Rex *v.* Nottingham Old Waterworks, 6 A. & E. 355.

the second company is forty-seven feet wide, the first company have no right to build the abutments of their bridge upon the land of the second company, but having purchased adjoining land for that purpose, they have a right at law to the temporary use of the land of the second company, for the purpose of building, and this right was in effect secured to the first company by an injunction out of chancery.[1]

2. So, too, where a railway company had permission to carry their road over a canal, by means of a bridge of a given description, it was held that they might, as incident to the right of erecting the bridge, make a temporary bridge over the canal, supported partly on piles driven into the bed of the canal, to enable them to transport earth across the canal to build the necessary embankment, in the construction of the permanent bridge.[2]

3. And such temporary bridge having been erected for the *bona fide* purpose of building the permanent bridge, might also be used for other purposes, for which alone it could not have been erected.[3]

*SECTION IX.

Reservations to Land-owners to build Private Railway across Public Railway.

§ 101. Where the special act of a railway company provided, that nothing in the act contained shall prevent any owner or occupier of any ground through which the railway may pass from carrying, at his or their own expense, any railway, or other road, any cut or canal which he or they may lawfully make in their own land, across the said main railway, within the lands of such owner or occupier, it was held, that this provision was not confined to the owners or occupiers of such land at the time, but

[1] Great North of England, Clarence, & Hartlepool Junction Railway Co. *v.* Clarence Railway Co., 1 Col. C. C. 507.

[2] London & Birmingham Railway Co. *v.* Grand Junction Canal Co., 1 Railw. Cas. 224.

[3] Priestley *v.* Manchester & Leeds Railway Co., 4 Y. & Col. Ex. 63; s. c. 2 Railw. Cas. 134.

was intended to apply to all future time, so long as such principal railway shall continue, and extended to all persons owning or occupying lands adjoining the railway, upon opposite sides, whenever the title was acquired, even where they purchased the land upon opposite sides at different times.[1]

SECTION X.

Disposition of Superfluous Lands.

1. Under English statute superfluous lands vest in adjoining owner unless disposed of in ten years.
2. Former owner not excluded; effect of cottage in field.

§ 101 *a.* 1. By the English statute, railways are required, where they have acquired more lands under their powers than are required for their purposes, to sell the same within ten years from the passing of the act, and that superfluous lands, then remaining unsold, should vest in the owners of adjoining lands, in proportion to the amount of their lands respectively adjoining the same. That time was by a subsequent act extended five years more. It has been held that the act embraced lands the reversion of which had been bought by the company; and also that the superfluous land was to be divided among the owners of the adjoining property, * in proportion to the frontage of each; meaning by that the length of the line of contact, without reference to the extent of the land in other directions, and that the later act did not defeat titles already vested under the former act.[1]

2. It has also been held that the former owner of the lands from which they were severed, is entitled to share in the same under the statute, and that the fact that a cottage stands in the field, part of such superfluous lands, will not bring them within the exception of lands built on or used for building purposes.[2]

[1] Monkland Railway Co. *v.* Dixon, 1 Bell Ap. Cas. 317; s. c. 3 Railw. Cas. 273. The court here denied an interdict against such owner or occupier prolonging his railway for the benefit of any persons with whom he might make an agreement for that purpose.

[1] Moody *v.* Corbett, Law Rep. 1 Q. B. 510.

[2] Carington *v.* Wycombe Railway Co., Law Rep. 2 Eq. 825.

*CHAPTER XIV.

MODE OF ASSESSING COMPENSATION UNDER THE ENGLISH STATUTES.

SECTION I.

Assessment by Justices of the Peace.

1. Assessment where the compensation claimed does not exceed £50.
2. Procedure in enforcement of award.
3. Value of land and injury accruing from severance to be considered.

§ 102. 1. By the English statute, where the compensation claimed shall not exceed £50, the same is to be settled by two justices. So, also, as to damages claimed for lands injuriously affected. So, too, if the company enter upon any private road or way. And justices may fix the compensation, in certain cases, for the temporary use of land; and the compensation to tenants for a year, or from year to year. They may apportion the rent, too, where the whole land is not taken. In some of these cases their jurisdiction extends beyond £50.

2. The mode of enforcing payment of money awarded by such justices, is to obtain an order, which may be enforced by distress, upon the goods and chattels of the party liable. The *certiorari* is taken away in such cases, but an order of such justices may still be brought up, to be quashed, for want of jurisdiction.[1]

3. The justices are to take into consideration the value of the land, and any injury which may accrue from severance.

SECTION II.

Assessment by Surveyors.

§ 103. The assessment of compensation by surveyors, under the English statutes, is merely provisional in most cases, as where the party is out of the kingdom, or cannot be found, two justices

[1] See the subject discussed *infra*, §§ 163–165.

*are required to nominate an able practical surveyor, who is, under certain solemnities, required to make a valuation of the land taken or injuriously affected, the amount of which the company are required to deposit in the bank, before proceeding with the works. And if such party be dissatisfied with the sum thus deposited, he may, before applying to Chancery for the money, require the question to be submitted to arbitration, as in other cases of disputed compensation. Surveyors are required to assess damages for severance of land, the same as justices of the peace.[1] (a)

SECTION III.

Assessment by Arbitrators.

1. Assessment by arbitrators in cases exceeding jurisdiction of justices of the peace.
2. Proceedings in selection of arbitrators.
3. Notice of appointment. What sufficient.
4. Arbitrator's power limited to award of pecuniary compensation.
5. Where land-owner gives no notice of claim, company may treat it as case of disputed compensation.
6. Similar rule under Massachusetts statute regarding alteration of highways.
7. Under that statute land-owners may recover without waiting for selectmen to act.
8. Company estopped in such case from denying that road was constructed by its servants.
9. Finality of award silent as to severance damages.
10. Submission not revoked by death of land-owner. Damages embraced.
11. Construction of general award.

§ 104. 1. By the English statutes, if the amount of compensation claimed exceed the jurisdiction of two justices, any party claiming compensation may compel an arbitration, by taking the requisite steps in due time. Unless both parties concur in the same arbitrator, each party, upon the request of the other, is required to name one. The appointment of the arbitrator is to be under the hand of the party, and delivered to the arbitrator, and is to be deemed a submission by such party. Such submission is irrevocable, even by the death of the party.

[1] Hodges Railw. 250, 251, 252.

(a) Notice of intention to apply for the appointment of a surveyor does not amount to a contract to take the property. Grierson v. Cheshire Lines Committee, Law Rep. 19 Eq. 83.

2. If either party neglect, for fourteen days after request by the other party, to name an arbitrator, one may be named by the other party, who shall decide the controversy. If either party name an arbitrator who is incompetent, the other party must retire from the arbitration, or he will be bound by his acquiescence.[1] * The secretary of a railway company, by the English statutes, would seem to have power to bind the company, by signing the submission, whether the arbitration is compulsory or not.[2]

3. It was held that the appointment of an arbitrator or referee implied the notification of such appointment to the other party within the time limited in the submission, or the doings of such referee were void.[3] And not only so, but the notice must be explicit. It is not sufficient to say, "Take notice, that it is *my intention* to nominate S. M.," notwithstanding it was added, "if the company fail to appoint, I, the said T. B., will appoint S. M. to act on behalf of both parties."[4] And in this case it is said, it would seem that the appointment by the claimant of an arbitrator to act for both parties is not valid, unless he has previously appointed an arbitrator, on his part, and notified such appointment to the company. There should be two separate appointments, although it may be of the same person, it is here suggested.[5]

4. The arbitrator has no power beyond the awarding of a pecuniary compensation for the land taken by the company, and cannot direct what right of way shall remain in the tenant to the portion of land not taken. Nor can he apportion the rent to the tenant.[6]

[1] *In re* Eliott, 2 De G. & S. 17.

[2] Collins *v.* South Staffordshire Railway Co., 7 Exch. 5; s. c. 21 Law J. Ex. 247; s. c. 12 Eng. L. & Eq. 565.

[3] Tew *v.* Harris, 11 Q. B. 7.

[4] Bradley *v.* London & Northwestern Railway Co., 5 Exch. 769.

[5] But where both parties petition for a jury to revise the damages, one warrant is sufficient. Davidson *v.* Boston & Maine Railroad Co., 3 Cush. 91. And if two warrants are issued, the sheriff should execute, and return them as one. Ib. And where there are several applications, which by statute are to be determined by one jury, the proper mode is to issue but one warrant to the sheriff; but if several warrants issue irregularly, and the officer summon but a single jury, who hear and determine each case, their verdicts will not be set aside for such irregularity. Wyman *v.* Lexington & West Cambridge Railroad Co., 13 Met. 316.

[6] Ware *v.* Regent's Canal Co., 9 Exch. 395; s. c. 25 Eng. L. & Eq. 444. Nor can the tenant recover damages for the depreciation of the use of premises

5. If the land-owner gives no notice of claim, in reply to the notice to treat, the company may treat it as a case of disputed compensation.[7] If the compensation claimed be less than £50, it may be settled by two justices. But if more than £50 be claimed, or offered, and the claimant desire to have it settled by arbitration, * it is at his option, and he must give notice of such desire before the company issue their warrant to the sheriff to summon a jury to assess the compensation, which they may do in ten days after giving the claimant notice that they shall do so, unless in the mean time he elect to have the matter settled by arbitration.[7]

6. And under the Massachusetts statute giving railways the right to alter highways, upon giving notice to the selectmen of the towns where such highways are situated, and conforming to their requirements or the decision of the county commissioners, in regard to the alteration of the highway, it was held, that if the selectmen give no notice to the company, as to what alterations they require, the presumption is that they require none, but leave the whole matter to the company.

7. And to entitle adjoining land-owners to recover damages of the railway under the statute of Massachusetts, it is not necessary that the selectmen should have acted in the premises. The remedy in such case is not by an action against the town, but by proceedings under the statute against the company.[8]

8. In such case the company are estopped to deny, that the construction of their road, as in fact made, was done by their servants in compliance with the requirement of the charter.[8] And embankments made by them for the purpose of carrying a highway over the railway, are to be regarded as a part of the railway.[9]

9. By a submission to arbitration it was provided that the arbitrator should determine what sum should be paid for the purchase of land, and what "other, if any, sum for severance damage, and the arbitrator after reciting" the submission, and that he had considered the matters so referred to him, awarded a certain sum

used for a public house, during the pendency of the proceedings after notice. Queen *v.* Vaughan & Metropolitan District Railway Co., Law Rep. 4 Q. B. 190.

[7] Statute 8 & 9 Vict. c. 18, §§ 21, 22, 23, 38.

[8] Parker *v.* Boston & Maine Railroad Co., 3 Cush. 107.

[9] *In re* Swansea Harbor Trustees, 6 Jur. N. S. 979; S. C. *nom.* Beaufort *v.* Swansea Harbor Trustees, 8 C. B. N. S. 146.

to be paid for the purchase of the land, without saying anything about severance damage; it was held that the award was final and good, — that the arbitrator by his silence negatived any right to compensation on account of severance damage.

10. A submission to arbitration under the English statute for assessing land damages is not revoked by the death of the land-owner.[10] It was here considered that the award was valid, although * not made within the statute period of three months; that the arbitrator may employ an expert and consult men of science, if necessary; that the right to compensation extends to any land injured by the severance of that which was taken, or by the works which the company is authorized to construct, and may include damages likely to be caused to the tenants of the land-owner. The right to compensation depends on cause and effect, and not on "proximity or distance."

11. The award of a gross sum for damages for drainage which lessened a water-power upon which a mill had been erected, was held presumptively to apply to the damage to the mill, and not to the unemployed water-power, which might be available for the proprietor of the other side of the river.[11] (*a*)

[10] Caledonia Railway Co. *v.* Lockhart, 3 Macq. Ap. Cas. 808; s. c. 6 Jur. N. S. 1311.

[11] St. George *v.* Reddington, 10 Ir. Ch. 176.

(*a*) Under statute 8 Vict. c. 18, the umpire in case of arbitration has an additional three months after the matter devolves upon him, in which to make his award. Skerratt *v.* North Staffordshire Railway Co., 2 Phil. 475. An award, like the finding of a jury in like case, concludes nothing but the amount of damages. The claimant's right to compensation is left open. *In re* Newbold & Metropolitan Railway Co., 14 C. B. N. S. 405.

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PART IV.

THE LAW OF CONTRACTS AS APPLIED TO THE CONSTRUCTION OF RAILWAYS AND TELEGRAPHS; TOLLS, ETC.

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THE LAW OF CONTRACTS AS APPLIED TO THE CONSTRUCTION OF RAILWAYS AND TELEGRAPHS; TOLLS, ETC.

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*CHAPTER XV.

CONSTRUCTION OF RAILWAYS.

SECTION I.

Line of Railway. — Right of Deviation.

1, 2. Manner of defining the route in English charters.
3. Plans binding only for the purpose referred to in the act.
4. Contractor bound by contract notwithstanding deviation, unless he object.
5. Equity will not enforce contract for crossing on level, not authorized by act. Against public security.
6. Right to construct accessory works.
7, 8. Company may take lands designated, in its discretion.
9. Equity cannot enforce contract not incorporated in the act.
10 Right of deviation lost by location.
11. Railway between two towns, extent of grant.
12. Grant of right to take land for railway includes right to take for accessories.
13. Route designated need not be followed precisely.
14. Terminus, being the boundary of a town, is not extended as the boundary extends.
15. Land-owner accepting compensation waives informality.
16. Powers limited in time expire with limitation.
17. Construction of charter as to extent of route.
18. Map may be made to yield to other grounds of construction.
19. Power to change location must be exercised before construction.
20. Binding force of plans made part of charter.
21. Grant terminating at town liberally construed.

§ 105. 1. The English railway acts are granted altogether, after full surveys of the route and with reference to definite plans of the engineers, which, when referred to generally in the act, thus become so far a part of it as to be binding upon the company, to the extent of determining the datum line and the line of railway

measured with reference to that datum line, and the level of the railway with reference to the datum line; but not the surface-levels, unless expressly so provided in the act.[1]

* 2. The question in this last case was in regard to the right to intersect an approach, leading to a mansion-house, at a different * level from that laid down in the parliamentary plans, in which it appeared as a cutting of fifteen feet, and the way raised * upon a bridge two feet. The owner of the house, it seems, had opposed the railway being carried through his avenue, but, relying upon the representations contained in the plan and sections, was induced to abstain from opposing the bill. The line of deviation is marked upon the plan, and is by the act limited to ten yards in passing through villages, and one hundred yards in the open country.

3. In this case it was decided, that the plans were only binding upon the company to the extent to which they were referred to in the act, and that it made no difference that the deposited plans were so incorrect as altogether to mislead the owner of the lands, in reference to the manner in which his property would be affected by the railway works. The plans not being referred to in the act, or only referred to, as in the present case, to determine * the datum line with reference to lateral deviation, could not control beyond the matter of lateral deviation.

[1] North British Railway Co. *v.* Tod, 5 Bell Ap. Cas. 184; s. c. 4 Railw. Cas. 449. This was an appeal from the judgment of the Court of Sessions in Scotland. The opinions of Lord Chancellor LYNDHURST, and of Lord Chief Justice CAMPBELL, exhibit the rule of the English law on this subject very fully and very ably.

See also Beardmer *v.* London & Northwestern Railway Co., 1 Hall & T. 161; s. c. 5 Railw. Cas. 728. The same rule obtains in this country. Boston & Providence Railroad Co. *v.* Midland Railroad Co., 1 Gray, 340; Commonwealth *v.* Fitchburg Railroad Co., 8 Cush. 240. It seems that the deviation of five feet, which, by § 11, Railway Clauses Act of 1845, is allowed in regard to levels, is to be reckoned with reference to the level of the datum line, and not with reference to the surface-levels delineated on the plans. And any greater deviation in regard to levels, which may be obtained, under certain conditions, in certain emergencies, is subject to the discretion of the railway commissioners; and at the suit of land-owners affected by such deviation, beyond the limits allowed by the act, the Court of Chancery will restrain the company from proceeding until it obtains the judgment of such commissioners. Pearce *v.* Wycombe Railway Co., 1 Drewry, 244; s. c. 19 Eng. L. & Eq. 122.

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4. This subject is incidentally connected with the performance of construction contracts. But it has been held, where the company deviate from the intended line of the road, even beyond what was permitted by their act, with the consent of the land-owner, and the contractor never objected to the deviation, but continued to receive certificates of estimates, and payments, in precisely the same mode in which he would have received them had the deviation not taken place, that it did not affect his liability upon the contract.[2]

5. A reference in the special act to the deposited plans, for one purpose, does not make them binding for all purposes.[3] So, too, where, by the general acts, a railway company has power to pass highways and other roads, by bridges or excavation, in their discretion, but their special act gives them power to pass them on a level, this will not compel them to do so; they may still exercise the power conferred by the general acts. And a special agreement with land-owners, that they will pass such roads on a level, being a contract in derogation of public right, inasmuch as the public security is greatly jeopardied thereby, will not be specifically enforced in a court of equity.[4]

6. The extent of deviation is to be measured from the line delineated upon the plans to the actual *medium filum* of the railway as constructed, and the fact of the embankments extending beyond that distance is no violation of the right of deviation allowed in the act.[5] Where a tunnel is marked upon the plans referred to in the act, it must be made in the exact position indicated,* and the general right of deviation does not apply.[6] But

[2] Ranger *v.* Great Western Railway Co., 5 H. L. Cas. 72; s. c. 27 Eng. L. & Eq. 35.

[3] Regina *v.* Caledonia Railway Co, 16 Q. B. 19; s. c. 3 Eng. L. & Eq. 285. Where there is a power given for deviation in the construction, which would render some portion of the delineated surveys impracticable, it must be taken, as of necessity, that the legislature intended the omission of such particulars as became impracticable in a given contingency allowed by the act.

[4] Braynton *v.* London & Northwestern Railway Co., 4 Railw. Cas. 553. But the Lord Chancellor, on appeal, considered that the agreement extended only to the land to be purchased, and that it contained nothing intended to limit the powers given to the company by the general acts.

[5] Payne *v.* Bristol & Exeter Railway Co., 2 Railw. Cas. 75; s. c. 6 M. & W. 320; Armistead *v.* North Staffordshire Railway Co., 16 Q. B. 526; s. c. 4 Eng. L. & Eq. 216.

[6] Little *v.* Newport, Abergavenny & Hereford Railway Co., 12 C. B. 752; s. c. 14 Eng. L. & Eq. 309.

the company may take lands within the line of deviation for a branch railway.[7] Under an act allowing land to be "taken when necessary for making and maintaining the said railway and works," it was held that the company might take lands for forming or enlarging stations, or places for carriages to collect and wait till trains are ready to start; and the Lord Chancellor said, in one case,[8] "The term railway, by itself, includes all works authorized to be constructed; and for the purpose of constructing the railway, the company are authorized to construct such stations and other works as they may think proper."

7. And it would seem that, where lands are designated by numbers on the plans, although not altogether within the line of deviation, they may be taken by the company when necessary for stations.[9]

And it has recently been decided in the House of Lords, that where the legislature authorized a railway company to take, for the purpose of their undertaking, any lands specially described in the act, it constitutes them the judges as to whether they will or will not take those lands, provided they take them *bona fide*, with the object of using them for the purposes authorized by the legislature, and not for any sinister or collateral purpose.[10] And after referring the question, as to the propriety or right to take the land, to an engineer, who decided against the company and in favor of the land-owner, the court ultimately held that neither the opinion of the engineer nor of the court could curtail the power of the company in respect to the quantity of land which * the company, *bona fide* acting under its statutory powers, sought to obtain.

[7] Sadd *v.* Maldon, Witham, & Braintree Railway Co., 6 Exch. 143.

[8] Cother *v.* Midland Railway Co., 2 Phil. 469.

[9] Crawford *v.* Chester & Holyhead Railway Co., 11 Jur. 917; 1 Shelf. Railw. Bennet's ed. 617. But the deviation is not authorized for the purpose of taking materials alone. Bentinck *v.* Norfolk Estuary, 32 Law T. 29.

[10] Stockton & Darlington Railway Co. *v.* Brown, 9 H. L. Cas. 246; s. c. 6 Jur. N. S. 1168. But a railway cannot take the fee of land for the purpose of supplying soil to build an embankment. Eversfield *v.* Midsussex Railway Co., 1 Gif. 153; s. c. affirmed 5 Jur. N. S. 776; s. c. 3 De G. & J. 286. Nor can land be taken within the range of the powers conceded by the act, except for the exclusive purpose of the works named in the act, and if any subsidiary object is embraced in the purpose of taking, as, to give a more convenient road for an ordinary land-owner, who was to pay part of the expense, the company will be restrained by injunction. Dodd *v.* Salisbury & Yeovil Railway Co., 1 Gif. 158; 5 Jur. N. S. 782.

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8. And where, by a special act, a company were empowered to erect a market-house on land described in the deposited plans, it was held, that as the land of the plaintiff was described in the plans, and as it might be wanted, the company were authorized to take it, and that the company were to be regarded as the proper judges of what lands were necessary for the works.[11]

9. The trustees of a turnpike-road agreed to assent to a bill in parliament for the formation of a railway, on the condition that the railway should pass over the road at a sufficient elevation, and the road be not lowered, or otherwise prejudiced. It was held that this modified assent, not being embodied into any agreement between the trustees and company, or incorporated into the act, afforded no equitable ground for restraining the company from the exercise of all their powers under their act; that the company were authorized to sink the original surface of a turnpike-road to gain the requisite elevation for the arch of a bridge to carry the railway over the road, notwithstanding the effect might be to render the road liable to be occasionally flooded.[12] Any omission, misstatement, or erroneous description in the parliamentary plans referred to in the act, may be corrected on application to two justices, in the mode prescribed in the act.[13]

10. By statute, in some of the states, a railway company who file the location of their road in the requisite office, are allowed to deviate, to any extent consistent with their charter, in the course of construction.[14] But it has been held, that after once

[11] Richards *v.* Scarborough Public Market Co., 23 Eng. L. & Eq. 343.

[12] Aldred *v.* North Midland Railway Co., 1 Railw. Cas. 404.

[13] Taylor *v.* Clemson, 2 Q. B. 978; s. c. 3 Railw. Cas. 65, shows the mode of procedure in such cases.

[14] Boston & Providence Railroad Co. *v.* Midland Railroad Co., 1 Gray, 340. The charter gave the company power to construct the road in five-mile sections, but not to begin the work within a prescribed distance of one terminus, nor until all its stock was taken by responsible persons, and a certain sum paid into the treasury. It was held, that this requirement of subscription and payment of stock did not fix a limitation on the company in building the whole road not in sections. The courts, in interpreting an act of incorporation, will not consider what took place while it was passing through the legislature. Pennyslvania Bank *v.* Commonwealth, 19 Penn. St. 144. And in Commonwealth *v.* Fitchburg Railroad Co., 8 Cush. 240, it was held, that the petitions to the legislature on which the act was granted were inadmissible on the question of the construction of the act, relative to the course and direction of the line of the road.

*locating their road their power to re-locate, and for that purpose to occupy the land of another or the public street, ceases.[15]

11. It has been held, that a grant to a railway company to construct their road between two towns gave them implied authority to construct a branch to communicate with a depot and turn-table, on a street in one of the towns (New Orleans) off the direct line.[16]

12. The grant to take land implies power to take buildings.[17] And a grant to take land for the company's road implies the right to take land for all the necessary works of the company, such as depots, car and engine houses, tanks, repairing shops, houses for switch and bridge tenders, and coal and wood yards, but not for the erection of houses for servants, car and engine factories, coal-mines, &c.[18]

[15] Little Miami Railroad Co. *v.* Naylor, 2 Ohio St. 235. And an authority to change the location of the line, during the work, does not imply power to change it after the road is complete. Moorhead *v.* Little Miami Railroad Co., 17 Ohio, 340. The same view is maintained by Lord ELDON, in Blakemore *v.* Glamorganshire Canal Co., 1 Myl. & K. 154. But a different rule seems to be intimated in *Ex parte* South Carolina Railroad Co., 2 Rich. 434, and in Mississippi & Tennessee Railroad Co. *v.* Devaney, 42 Miss. 555. But see Canal Co. *v.* Blakemore, 1 Cl. & F. 262; State *v.* Norwalk & Danbury Turnpike Co., 10 Conn. 157; Turnpike Co. *v.* Hosmer, 12 Conn. 364; Louisville & Nashville Branch Turnpike Co. *v.* Nashville & Kentucky Turnpike Co., 2 Swan, 282, where the proposition of the text is maintained. But in South Carolina Railroad Co. *v.* Blake, 9 Rich. 229, it is held, that a railway company has the same power to acquire land, either by grant or by compulsory proceedings, for the purpose of varying, altering, and repairing its road, as for the original purpose of locating and constructing it; but that the company is not the final judge of the exigency for taking the land. The petition of the company for taking the land should allege in detail the necessity for taking it, and the land-owner may traverse these allegations, and in that case this is tried as a preliminary question. *Infra*, § 123 *a*.

[16] Knight *v.* Carrolton Railroad Co., 9 La. An. 284; New Orleans & Carrolton Railroad Co. *v.* New Orleans Second Municipality, 1 La. An. 128. But where by the charter of a railway the company was authorized to construct its road "from Charleston" to certain other points, it was held that this gave it no authority to enter the city, but that the boundary of the city was the terminus *a quo*. Northeast Railroad Co. *v.* Payne, 8 Rich. 177.

[17] Brocket *v.* Ohio & Pennsylvania Railroad Co., 14 Penn. St. 241.

[18] State *v.* Mansfield Commissioners, 3 Zab. 510; Vermont Central Railroad Co. *v.* Burlington, 28 Vt. 193; Nashville & Chattanooga Railroad Co. *v.* Cowardin, 11 Humph. 348. The company may also take land on which to construct highways substituted in the place of those put to the use of the rail-

13. And a charter allowing the company to extend their line to a certain point, "thence running through Acton, Sudbury, Stow, Marlborough," &c., does not oblige the company to locate their road through these towns, in the order named in the charter. And a location of the road from Acton through Stow to Sudbury, and thence through Stow again to Marlborough, was held to be a sufficient compliance with the grant.[19]

14. If the charter of a railway limit the line of construction by the boundaries of a borough, and the boundaries of such borough are subsequently extended, that will not alter the right of the company in regard to the location of their road.[20] And an exclusive grant for a railway within certain limits, defined at one terminus by a city, is to be restrained to the limits of the city at the date of the grant.[21]

15. A party whose land was taken by a railway company for the purposes of their road, and the damages assessed and deposited for, and accepted by him, with full knowledge of all the proceed-

way in its construction. And the company is not prohibited from so taking land because it already has land on which such substituted highway may be built, but which it designs for other lawful uses. Lamb *v.* North London Railway Co., 17 W. R. 746; s. c. Law Rep. 4 Ch. Ap. 522.

[19] Commonwealth *v.* Fitchburg Railroad Co., 8 Cush. 240. See also Brigham *v.* Agricultural Branch Railroad Co., 1 Allen, 316. It seems agreed that slight deviations from the route prescribed in the charter will not release the stockholders from the obligation of their subscriptions, but that any substantial deviation will. The precise line of distinction between the two classes of cases must be left to the construction of the courts in each particular case. The stockholders may enjoin the company in the course of construction from making an essential deviation, and after the road is completed, the company may, by *scire facias*, be called to account for not building on the route indicated in the charter. But where all interested acquiesce in the route adopted, until the road is completed, it will require a very clear case to induce the courts to interfere. The following cases bear on the general question: Ashtabula & New Lisbon Railroad Co. *v.* Smith, 15 Ohio St. 328; Champion *v.* Memphis & Charleston Railroad Co., 35 Miss. 692; Fry *v.* Lexington & Big Sandy Railroad Co., 2 Met. Ky. 314; Aurora *v.* West, 22 Ind. 88; Smith *v.* Allison, 23 Ind. 366; Mississippi, Ouachita, & Red River Railroad Co. *v.* Cross, 20 Ark. 443; Witter *v.* Cross, 20 Ark. 463; Illinois Grand Trunk Railroad Co. *v.* Cook, 29 Ill. 237. See also Kenosha, Rockford, & Rock Island Railroad Co. *v.* Marsh, 17 Wis. 13; Morris & Essex Railroad Co. *v.* Central Railroad Co., 2 Vroom, 205.

[20] Commonwealth *v.* Erie & North East Railroad Co., 27 Penn. St. 339.

[21] Pontchartrain Railroad Co. *v.* Lafayette & Pontchartrain Railroad Co., 10 La. An. 741.

ings and of any defect therein, and who allowed the company to occupy the land and make improvements thereon, without remonstrance, for two years, and who then brought an action of trespass against the company, on the ground that their proceedings were irregular and void, was held to have waived all right to object to them on that ground.[22]

16. And where the company by charter had power to take land * for engine and water stations, within five years from the date of their grant, it was held they could not exercise such powers after the expiration of the time limited, although, operating their line by horse power during that time, they had not required the exercise of such powers on that account.[23]

17. Where a charter was for a railway, "to commence at some convenient point in the city of Brooklyn, and to terminate at Newtown, Queen's county, — to be located in King's and Queen's counties, and its length to be about twenty-five miles;" there being both a town and village of the name of Newtown, and the boundary of the town being also the boundary of the city of Brooklyn, it was held that the natural and only consistent construction was, to regard Newtown as the village of that name, and thus extend the railway through a portion of both counties named, and not restrict it to the limits of the city of Brooklyn.[24]

18. It is here declared, that where the charter, as applied to the route indicated, defines a precise line, that line becomes as binding upon the company as if it formed a portion of the charter itself; and that where a map is filed in conformity with the charter, which does not embrace the entire route indicated by the charter as applied to the subject-matter, in order to reconcile the apparent conflict, the map may be regarded as intended to give only a portion of the route; or, in case of irreconcilable conflict, the map must yield to the express provisions of the charter.[24] The distinction between terms indicating the route of a railway and terms defining its termini, is considerably discussed in a case in New Jersey.[25]

19. A power to change the location of a railway, on account of the difficulty of construction and other causes, may be exercised

[22] Hitchcock *v.* Danbury & Norwalk Railroad Co., 25 Conn. 516.

[23] Plymouth Railroad Co. *v.* Colwell, 39 Penn. St. 337.

[24] Mason *v.* Brooklyn & Newtown Railroad Co., 35 Barb. 373.

[25] McFarland *v.* Orange & Newark Horse-Car Railroad Co., 2 Beas. 17.

at any time before the construction is finished at the particular point.[26]

20. The lines and works of a railway are sufficiently indicated by black lines upon the plan, and dotted lines around them to mark the limits of deviation.[27] And where the deposited plans and sections specify the span and height of a bridge by which the railway is to be carried over a turnpike road, the company will *not, in the construction of the bridge, be allowed to deviate from the plans and sections.[28]

21. Under a charter which fixes the terminus of a railway at or near a certain point, a large discretion is conferred upon the company, in locating their road, which will not be controlled by the courts, unless for very clear excess, or where bad faith is shown. And where a company is empowered to extend their line from a point at or near its present terminus, "in Fall River, in a southerly direction to the line of Rhode Island," a location starting from a point on the line 2,475 feet from the terminus was held authorized.[29]

SECTION II.

Distance, how measured.

1. Measurement of distance is affected by subject-matter.
2. Contracts to build railway, by rate per mile.
3. General rule to measure by straight line.
4. Rule the same in measuring turnpike-roads.
5. Rate fixed by mile means full mile; no charge for fractions.

§ 106. 1. Questions of some perplexity sometimes arise in regard to the mode of measuring distance, in a statute or contract. The import of terms defining distance will be sometimes controlled by the context, or the subject-matter. (*a*) In one

[26] Atkinson *v.* Marietta & Cincinnati Railroad Co., 15 Ohio St. 21.

[27] Weld *v.* London & Southwestern Railway Co., 32 Beav. 340; s. c. 9 Jur. N. S. 510.

[28] Attorney-General *v.* Tewksbury & Great Malvern Railroad Co., 1 De G. J. & S. 423; s. c. 9 Jur. N. S. 951.

[29] Fall River Iron Works *v.* Old Colony & Fall River Railroad Co., 5 Allen, 221.

(*a*) A contract to grade a road between two places specified, will not be satisfied by grading to corporate limits, but only by grading from ter-

case,[1] where the assignor of the lease of a public-house in London covenanted that he would not keep a public-house within half a mile from the premises assigned, it was held that the distance should be computed by the nearest way of access.

2. And contracts to be paid for constructing a turnpike, or railway, a given price by the mile, would ordinarily, no doubt, require an admeasurement upon the line of the road. It was held, in a late case in Vermont, that in such cases the contractor is not entitled to compute the length of track, and thus include turnouts and side-tracks.[2] But this might not exclude branch lines extending any considerable distance from the main track.

*3. But, in general, the English courts have chosen to adhere to the rule laid down by PARKE, J., in Leigh *v.* Hind, that distance is to be measured in a direct line, through a horizontal plane. Thus, in settlement cases, where the pauper laws provide that no person shall retain a settlement gained by possessing an estate or interest in a parish for a longer time than he shall inhabit "within ten miles thereof," it was held, that the distance was to be measured in a direct line from the residence to the nearest point of the parish.[3] And the twenty miles within which the parties are required to reside, in certain cases affecting the jurisdiction of the county courts, by the recent statute,[4] are to be computed in a direct line, without reference to the course of travel.[5]

4. And where a turnpike act provided, that no toll-gate should be erected nor any toll taken, within three miles of B., and the

[1] Leigh *v.* Hind, 9 B. & C. 774. But PARKE, J., was of a different opinion, and said: "I should have thought that the proper mode of measuring the distance would be to take a straight line from house to house, in common parlance, as the crow flies."

[2] Barker *v.* Troy & Rutland Railroad Co., 27 Vt. 766.

[3] Regina *v.* Saffron-Walden Railroad Co., 9 Q. B. 76.

[4] Statute 9 & 10 Vict. c. 95, § 128.

[5] Stokes *v.* Grissell, 14 C. B. 678; s. c. 25 Eng. L. & Eq. 336; Lake *v.* Butler, 5 Ellis & B. 92; s. c. 30 Eng. L. & Eq. 264.

minus to terminus as indicated by station grounds. Western Union Railway Co. *v.* Smith, 75 Ill. 496. But a charter to run "to" or "from" a town means no particular spot within its limits. People *v.* Louisville & Nashville Railroad Co., 25 Am. & Eng. Railw. Cas. 235. It seems now to be settled, however, that distance is to be measured in the line delineated on the map or plat, without regard to inequalities of surface or to the curvature of the surface of the earth. Moufflet *v.* Cole, 21 W. R. 175.

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road did not extend to B., but connected with another turnpike which did, and also a public road made since the act was passed, it was held, that the three miles should be measured "in a straight line on a horizontal plane, and not along any of the roads."[6]

5. And where the rate of fare is fixed by the mile, and no provision made for fractions of a mile, the company can only charge the prescribed tariff for the full mile traversed.[7] But the English statute[8] provides specially for fractions of a mile.

*SECTION III.

Mode of Construction; Company to do least possible Damage.

1. Rule under English statute does not extend to form of road, but to mode of construction.
2. Special provisions of act not controlled by this general one.
3. Works interfered with, to be restored, for all uses.

§ 107. 1. It has been held, that the general provision of the Railway Clauses Consolidation Act, that in the exercise of their powers the company shall do as little damage as possible, and shall make satisfaction to all parties interested, for all damages sustained by them, does not extend to the form of constructing the railway. It does not apply to what is done, but to the manner of doing.

2. Hence, if by other sections of the statute or special act the company are required to build bridges in a particular form, they may still do so, notwithstanding it may cause more damage to the owners of land than to build them in some other form.[1]

3. And where, in a parliamentary contract between the promoters of a railway and the proprietors of a ropery, it was stipulated that the railway should be so constructed, that when finished the level of the ropery should not be altered, nor the

[6] Jewell *v.* Stead, 6 Ellis & B. 350; s. c. 36 Eng. L. & Eq. 114.

[7] Rice *v.* Dublin & Wicklow Railway Co., 8 Ir. Com. Law, 160.

[8] Statute 21 & 22 Vict. c. 75, § 1.

[1] Regina *v.* East & West India Docks & Birmingham Junction Railway, 2 Ellis & B. 466.

surface of the ropery in the least diminished, it was held the company were bound to restore the surface, so as to be available for all purposes to which it might have been applied before the construction of the railway, and not for the purposes of the ropery only.[2]

*SECTION IV.

Mode of crossing Highways.

1. English statutes forbid crossings at grade.
2. Or otherwise provides that gates be erected and tended.
3. And if near a station, that trains shall not run faster than four miles an hour.
4. Company cannot alter course of highway.
5. Right to use highway gives no right to appropriate military road.
6. Mandamus does not lie to compel particular form of crossing where company has an election.
7. Company cannot alter highway to avoid building bridge.
8. Extent of repair of bridge over railway.
9. Permission to connect branches with main line not revocable.
10. Grant of right to build railways across main line implies right to use them as common carriers.
11. Company liable for dangerous state of highway caused by works.
12. Right to lay line across railway carries right to lay as many tracks as are convenient for the business.
13. Damages for laying highway across railway.
14. Laying highway across railway at grade. Company not estopped by contract with former owner of land.
15. Towns not at liberty to interfere with railway structures.

§ 108. 1. By the general English statutes upon the subject of railways it is provided, "that if the line of the railway pass any turnpike-road, or public highway, then (except when otherwise provided by the special act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge."[1] (*a*)

[2] Harby *v.* East & West India Docks & Birmingham Junction Railway, 1 De G. M. & G. 290.

[1] Railway Clauses Consolidation Act, § 46. Mandamus requiring the company to carry its road over a highway, by means of a bridge, when that was the only mode in which it could be done, according to the level of the line of the railway at the time, was held bad. Southeastern Railway Co. *v.* Queen, 17 Q. B. 485.

(*a*) What are highways within the meaning of the New York statutes, and what railways. Stranahan *v.* Sea View Railway Co., 84 N. Y. 308. The word "track" in a statute authorizing a crossing held to mean the

2. And by § 47 it is provided, that whenever the railway does pass any such road upon a level, the company shall maintain gates at every such crossing, either across the highway or the railway, in the discretion of the railway commissioners, and employ suitable persons to tend the same, who are required to keep them constantly shut, except when some one is actually passing the highway, or railway, as the case may be.[2]

3. And where a railway passes a highway near a station, on *a level, the trains are required to slacken their speed, so as not to pass the same at any greater speed than four miles an hour.[3]

4. The right to raise or lower highways, in the construction of a railway, does not authorize the company to change the course of the highway, even with the consent of the town council, and for so doing the company were held liable to persons who had sustained special damage thereby.[4]

5. The right to use "highways" in the construction of plank roads, contained in a general law, does not extend to military roads constructed by the United States, while the state was a

[2] A road on which toll-gates are erected and tolls taken is a turnpike road. Northam, Bridge, & Roads Co. *v.* London & Southampton Railway Co., 6 M. & W. 428; 1 Railw. Cas. 653; Regina *v.* East & West India Docks & Birmingham Junction Railway Co., 2 Ellis & B. 466.

[3] Some similar provisions, in regard to the construction of railways in this country, seem almost indispensable to the public security.

[4] Hughes *v.* Providence & Worcester Railway Co., 2 R. I. 493. It is the duty of a railway company not to obstruct public roads, where they intersect the track, either by stopping a train or otherwise; and the company must take the consequences of all such obstructions. Murray *v.* South Carolina Railroad Co., 10 Rich. 227.

entire roadbed, including turnouts and switches. Delaware & Hudson Canal Co. *v.* Whitehall, 90 N. Y. 21. The duty to maintain crossings does not depend on the legality of the highway. If it is openly and notoriously used as such, and as such recognized by the company by the ostensible maintenance of a public crossing, it is enough. Kelly *v.* Southern Minnesota Railway Co., 28 Minn. 98. In general, it is the duty of the company to leave a highway which it has crossed in safe condition for public use; and where the duty is imposed by charter it will descend upon a subsequent owner. People *v.* Chicago & Alton Railroad Co., 67 Ill. 118. Where by reason of increase of population a crossing has become inadequate, it is the duty of the company to make the necessary changes. Cooke *v.* Boston & Lowell Railroad Co., 10 Am. & Eng. Railw. Cas. 328.

territory,[5] but the legislature may grant such right, by the charter of the company.

6. And where a mandamus[6] recited that the railway, which defendants were empowered to make, crossed a certain public highway, not on a level, by means of a trench, twenty feet deep and sixty-five feet wide, through and along which the railway had been carried, and the highway thereby was cut through and rendered wholly impassable for passengers and carriages; and that a reasonable time had elapsed for defendants to cause the highway to be carried over the railway by means of a bridge, in the manner pointed out in the statute,[7] and commanded defendants to carry the highway over the railway by means of a bridge, in conformity with the statute, particularly specifying the mode: it was held, that it not being otherwise specially provided in the company's charter, they had, by the general act, an option to carry the highway over the railway, or the railway over the highway, by a bridge; and that the option was not determined by the facts alleged in the writ, and the judgment of the Exchequer, *awarding the writ, was accordingly reversed in the Queen's Bench.

7. Where the charter of a railway authorized them, by consent of the commissioners, to alter a highway whenever it became necessary in order to build the railway in the best place, and required the company to maintain all bridges made necessary to carry the highway over the railway: it was held that the company had no power to alter the course of the highway in order to avoid the expense of building a bridge; and that the old highway was still subsisting, notwithstanding the attempt thus to lay out a substitute.[8]

8. And where a railway company, under their statutory powers, in England, carry a highway over their road by means of a bridge, the company is bound to keep both the bridge and the road and

[5] Attorney-General *v.* Detroit & Erie Plank-Road Co., 2 Mich. 138.

[6] Regina *v.* Southeastern Railway Co., 15 Q. B. 313; s. c. 6 Eng. L. & Eq. 214.

[7] Statute 8 & 9 Vict. c. 20.

[8] Norwich & Worcester Railroad Co. *v.* Killingly, 25 Conn. 402. Nor has the company any right under such a power materially and essentially to change the route of a highway, that being a power resting solely in the discretion of the municipal authorities. Warren Railroad Co. *v.* State, 5 Dutcher, 393. See also Veazie *v.* Penobscot Railroad Co., 49 Me. 119; Eaton *v.* European & North American Railroad Co., 59 Me. 520.

all the approaches thereto in repair, and such repair includes not only the structure of the bridge but the superstructure, and everything requisite to put the highway in fit condition for safe use.[9] (*b*)

9. Where the proprietors of land, through which a railway company were empowered to take the right of way, had the right to lay branch railways upon the lands adjoining, and to connect them at proper points with the main line, so as not to endanger the safety of persons travelling as passengers upon the railway, and in case of difference in regard to any of these points, the same to be determined by two justices of the peace; but the company were not required to admit any such branch to connect * with their line, at any place where they should have erected any station or other building; it was held that the consent of the

[9] North Staffordshire Railway Co. *v.* Dale, 8 Ellis & B. 835. But where the expense of keeping a bridge in repair was imposed by statute on several towns and a railway company, jointly, with a provision that the municipal authorities of one of the towns should have the care and superintendence of the same, and "employ all services necessary in the care thereof," it was held that this did not impose any special obligation on that particular town, in regard to the repairs, but that all the parties still remained jointly responsible for the performance of that duty, and that the municipal authorities of that town were thereby made the agents of all the parties thus responsible; and that therefore one of the parties could not maintain an action against the town for an injury through the joint neglect of all the parties. Malden & Melrose Railroad Co. *v.* Charlestown, 8 Allen, 245.

(*b*) So in this country, and for neglect of this duty the company may be indicted. People *v.* New York Central & Hudson River Railroad Co., 74 N. Y. 302. And see People *v.* Dutchess & Columbia Railroad Co., 58 N. Y. 152; Hayes *v.* New York Central & Hudson River Railroad Co., 9 Hun, 63; People *v.* Same, 74 N. Y. 302; Farley *v.* Chicago, Rock Island, & Pacific Railroad Co., 42 Iowa, 234; Little Miami Railroad Co. *v.* Greene County Commissioners, 31 Ohio St. 338; State *v.* Dayton & Southeastern Railroad Co., 36 Ohio St. 434. The duty of restoring "the highway as near as may be to its former state, so as not to unnecessarily impair its usefulness" does not of necessity require a bridge the full width of the highway; nor where the railway crosses below grade is the bridge necessarily a nuisance because it is of less grade than the highway. People *v.* New York, New Haven, & Hartford Railroad Co., 89 N. Y. 266. A statute requiring the construction of a bridge in a specified manner is not unconstitutional because it imposes additional burdens on the company. Such burdens may be imposed for the public good. People *v.* Boston & Albany Railroad Co., 70 N. Y. 569.

company to unite with the line at a station was not in the nature of a license and could not be revoked.[10]

10. And where the owners or occupiers of adjoining land had the right to build railways, and to cross the line of the principal railway, without being liable to toll or tonnage, it was held the owners of such railways might use them as common carriers of freight and passengers.[11]

11. It has been held that railway companies are responsible for injuries, resulting from the dangerous state of highways, caused by their own works, as where one fell into a culvert, made by the company at a highway crossing, to prevent the accumulation of the water, it being invisible at the time by reason of snow.[12] So also in all cases where the defect in the highway is caused by the works of the railway company, the latter will be responsible for all injuries in consequence, although the party might also obtain redress of the town bound to maintain the highway.[13]

12. A railway corporation having acquired the right to lay its line across a highway, may lay and maintain as many tracks as are essential to the convenient transaction of its business.[14]

13. A railway corporation is entitled to damages for land taken by laying a public highway across its line, and for the expense of maintaining signs and cattle guards at the crossing, and of flooring the same and keeping it in repair; but not for any increased liability to accidents, for increased expense of ringing the bell, or for its liability to be ordered by the county commissioners to build a bridge for the highway over the track. And in assessing damages, in such a case, no supposed benefits from an increase of travel on the railway can be set off against the company.[15]

14. Under the revised statutes of Massachusetts, town or city authorities have no power to lay a highway across a railway, at grade, and the company is not estopped from objecting thereto by any agreement with the former owners of the land in regard to * the right of way to be used by them at the point where the high-

[10] Bell *v.* Midland Railway Co., 3 De G. & J. 673.

[11] Hughes *v.* Chester & Holyhead Railway Co., 8 Jur. N. S. 221.

[12] Judson *v.* New York & New Haven Railroad Co., 29 Conn. 434.

[13] Gillett *v.* Western Railroad Co., 8 Allen. 560.

[14] Commonwealth *v.* Hartford & New Haven Railroad Co., 14 Gray, 379.

[15] Old Colony & Fall River Railroad Co. *v.* Plymouth County, 14 Gray, 155.

way is laid.[16] Nor can such authorities, under the general statutes of that state, lay out a way across any portion of the land, not exceeding five rods in width, which has been taken by a railway company for their line, unless permission has been granted by the county commissioners.[17]

15. Where a railway company had rightfully carried its line through a compactly built village, by means of a deep cut running under the principal street, which had to be carried over the cut by a bridge, and had built a station supported by the walls of the excavation; it was held that the town had no right so to construct a drain as to throw the water of the street into the cut and thereby undermine its walls, even if the railway works at that point had intercepted the natural drainage, and there was no other practicable mode of remedying the evil, except at greater, although not extravagant, expense.[18] It was accordingly held the company were entitled to an injunction against the town, inhibiting the construction of the drain in that mode.

SECTION V.

Rights of Telegraph Companies.

1. Right to "pass directly across a railway," does not justify boring under it.
2. Exposition of the terms "under" and "across."
3. Erecting posts in highway a nuisance even if sufficient space remain.

§ 109. 1. Where a telegraph company had by their act the power to pass under highways, but to pass "directly but not otherwise across any railway or canal," and a railway was laid upon the level of a highway, in accordance with their special act, it was held that the telegraph company could carry their works under the highway at the point where it was intersected by the railway.[1] But the telegraph company, attempting to pass under

[16] Boston & Maine Railroad Co. *v.* Lawrence, 2 Allen, 107.

[17] Commonwealth *v.* Haverhill, 7 Allen, 523.

[18] Danbury & Norwalk Railroad Co. *v.* Norwalk, 37 Conn. 109.

[1] Southeastern Railroad Co. *v.* European & American Telegraph Co., 9 Exch. 363; s. c. 24 Eng. L. & Eq. 513.

the railway in such a manner as to disturb their works, was held liable in trespass.[2] (*a*)

2. PARKE, B., in giving judgment, said, "'Across' seems therefore different from 'under,' and the power to carry 'across' does not enable them to go under. It may be that this prohibition would not apply, if the railway were carried over a highway at a great height, for then the highway and railway might be considered independent of each other."

3. In a recent English case[3] it was decided, that a telegraph company, which erects posts in any portion of the highway, although not in the travelled portion of it, whereby the way is rendered in any respect less commodious to the public than before, is *guilty of committing a nuisance at common law; and the fact that the jury find that a sufficient space for the public use remained unobstructed will not afford any justification, unless the act is done by legislative permission. (*b*)

[2] *Infra*, §§ 130, 143, 164.

[3] Regina *v.* United Kingdom Electric Telegraph Co., 9 Cox C. C. 174; s. c. 3 F. & F. 73; s. c. 8 Jur. N. S. 1153. See particularly the leading opinion of CROMPTON, J., on the final hearing by the full bench.

(*a*) A grant from a railroad company to a telegraph company of an exclusive right to lines along its right of way is invalid as in restraint of trade. Western Union Telegraph Co. *v.* American Union Telegraph Co., 65 Ga. 160; Western Union Telegraph Co. *v.* Burlington & Southwestern Railway Co., 3 McCrary, 130. And a state statute giving a telegraph company the exclusive right to maintain lines in the state is invalid where Congress has assumed to regulate this kind of commerce between the states. Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1. And see Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 2 Woods, 643; American Union Telegraph Co. *v.* Western Union Telegraph Co., 67 Ala. 26. Under the New York statutes, a telegraph company thereby granted power to erect its lines along public roads, streets, and highways, has no right to erect its line on the right of way of a railway. New York City & Northern Railroad Co. *v.* Central Union Telegraph Co., 21 Hun, 261. The railway company itself may erect one. Western Union Telegraph Co. *v.* Rich, 19 Kan. 517; Prather *v.* Western Union Telegraph Co., 89 Ind. 501.

(*b*) When a company lays its line over a highway it must compensate the owner of the fee. Board of Trade Telegraph Co. *v.* Barnett, 107 Ill. 507. A city has the right to say how and on what conditions a telegraph company may erect its lines within the city. Mutual Union Telegraph Co. *v.* Chicago, 16 Fed. Rep. 309. And also, unless bound by contract, to take reasonable measures to have poles and

*SECTION VI.

Duty of Company in regard to substituted Works.

1. Company bound to repair bridge substituted for ford, or to carry highway over railway.
2. Same rule has been applied to drains substituted for others.
3. Extent of this duty as applied to bridge and approaches.

§ 110. 1. Where a public company, as a navigation company, under the powers conferred by the legislature, destroyed a ford *and substituted a bridge, it was held, that they were liable to keep the bridge in repair.[1] So, too, where such company cut through a highway, rendering a bridge necessary to carry the highway over the cut, the company are bound to keep such bridge in repair.[2]

2. So, where a navigation company had power to use a public drain by substituting another, or others, it was held that the company were bound to keep in repair the substituted drains, as well as to make them.[3]

3. Under the English statute,[4] where the company carries the highway by means of a bridge over the railway, it is bound to maintain the bridge and all the approaches thereto in repair; and such repair includes not only the structure of the bridge, and

[1] Rex *v.* Kent, 13 East, 220; Rex *v.* Lindsey, 14 East, 317.

[2] Rex *v.* Kerrison, 3 M. & S. 526. This duty may be enforced by indictment. Regina *v.* Ely, 19 Law J. M. C. 223. And the same obligation rests on the assignees of the company. Pennsylvania Railroad Co. *v.* Duquesne Borough, 46 Penn. St. 223.

[3] Priestly *v.* Foulds, 2 Railw. Cas. 422; 2 Man. & G. 175.

[4] Statute 8 & 9 Vict. c. 20.

wires already erected removed. Mutual Union Telegraph Co. *v.* Chicago, 11 Bissell, 539. But, under the statutes of New Jersey, none to refuse to allow a telegraph company to erect its line at all. American Union Telegraph Co. *v.* Harrison, 31 N. J. Eq. 627. Where the poles are erected on private property, the town authorities have no right to remove wires running over the streets, if they are high enough to admit of a full and safe use of the streets. American Union Telegraph Co. *v.* Harrison, *supra*. The right to erect poles in the streets does not include also the right to erect broken or unsightly poles. Forsythe *v.* Baltimore & Ohio Telegraph Co., 12 Mo. Ap. 494.

the approaches, but the metalling of the road on both.[5] But this will not include the road beyond where it may properly be regarded as forming an approach to the bridge.[6] And the same rule obtains here. In White *v.* Quincy,[7] it was held that the duty of the company as to repair extended to the whole structure which they had found it necessary to build to effect their purpose, even where it extended beyond the boundaries of the location of their line.

*SECTION VII.

Construction of Charter in regard to Nature of Works, and Mode of Construction.

§ 111. There are some cases in regard to the construction of railway works, and their requisite dimensions, which have come under the consideration of the courts, and where the decisions are of little precedent for other cases not altogether analogous, and on that account not deserving an extended analysis, but which nevertheless we scarcely feel justified in wholly omitting here.[1]

[5] Newcastle-under-Lyne & Leek Turnpike Co. *v.* North Staffordshire Railway Co., 5 H. & N. 160.

[6] Railway Co. *v.* Kearney, 12 Ir. Com. Law, 224; Fosberry *v.* Waterford & Limerick Railway Co., 13 Ir. Com. Law, 494; London & North Western Railway Co. *v.* Skerton, 5 B. & S. 559.

[7] 97 Mass. 430. See also Titcomb *v.* Fitchburg Railroad Co., 12 Allen, 254.

[1] Attorney-General *v.* London & Southampton Railway Co., 9 Sim. 78; s. c. 1 Railw. Cas. 302. This case is in regard to the width of a road under a railway bridge. Manchester & Leeds Railway Co. *v.* Reg., 3 Q. B. 528; s. c. 3 Railw. Cas. 633. The foot-paths are not to be regarded as any part of the requisite width of the bridge. Regina *v.* Rigby, 14 Q. B. 687; s. c. 6 Railw. Cas. 479; Regina *v.* London & Birmingham Railway Co., 1 Railw. Cas. 317. This is a case in regard to the width of a bridge over a highway. Regina *v.* Birmingham & Gloucester Railway Co., 2 Q. B. 47; 2 Railw. Cas. 694, which is a case in regard to the width of the approaches to a bridge across a railway. Regina *v.* Eastern Counties Railway Co., 2 Q. B. 347, 569; s. c. 3 Railw. Cas. 22, as to the right to lower a street, in order to obtain the requisite height under a bridge, notwithstanding the provisions of the local paving act. Regina *v.* Sharpe, 3 Railw. Cas. 33, as to the right to erect a bridge at a different angle from the former road. Where a special act required a company to strengthen a bridge described in the act, it was held that it might, never-

*SECTION VIII.

Terms of Contract. — Money Penalties. — Excuse for Non-Performance.

1. Contracts for construction may assume forms unusual in other contracts.
2. Quantity and quality of work generally referred to engineer.
3. Money penalties, liquidated damages. Full performance or waiver.
4. Excuses for non-performance. Injunction. New contract.
5. Penalty not incurred, unless upon strictest construction.
6, 7. Contractor not entitled to anything for part-performance.
8. Contract for additional compensation must be strictly performed.

§ 112. 1. As the time within which such works are to be accomplished is often limited in the act, and as the manner in which the work is done is of the greatest possible importance to the public safety, the law sanctions contracts for such undertakings, in forms not only unusual, but which might not be strictly binding perhaps in the case of ordinary contracts. For instance, it is not uncommon for the contract to impose penalties upon the contractor for slight deviations from the terms of agreement, and to secure to the company the absolute right to put an end to the contract, whenever they or their engineer are dissatisfied with the mode in which the work is done, or the progress made in it. (*a*)

theless, pull down the old bridge and build a new one. Wood *v.* North Staffordshire Railway Co., 1 Macn. & G. 278; Rex *v.* Morris, 1 B. & Ad. 441, as to making a railway on a turnpike road. A turnpike road, having power to take tolls on any way leading out of its road, may demand tolls of passengers crossing the road on a railway granted subsequently. Rowe *v.* Shilson, 4 B. & Ad. 726. Where a railway company, in the course of constructing its road, turned a stream, as it had power to do, restoring it as nearly as practicable to its former state, and the new channel was properly guarded, so far as could be perceived, at the time of turning it, it was held, that the company was not obliged thereafter to watch the action of the water and take precautions to prevent its encroaching on the adjoining lands. Norris *v.* Vermont Central Railroad Co., 28 Vt. 99. See also Fitchburg Railroad Co. *v.* Grand Junction Railroad & Depot Co., 4 Allen, 198, where a question in regard to apportioning the expense of a work done by the plaintiff for the mutual benefit of the parties, in conformity with statutory provisions, is considered.

(*a*) As to construction of particular contracts, see Western Union Railroad Co. *v.* Smith, 75 Ill. 496; Geiger *v.* Western Maryland Railroad Co.,

2. And it is almost universal, in these contracts in this country, to refer the quality and quantity of the work done, and the consequent amount of payments to be made from time to time, to the absolute determination of an engineer employed by the company.[1]

3. The penalties which these contracts provide, either absolutely, * or in the discretion of the company's engineer, for delay in the work, are to be regarded, commonly, in the nature of liquidated damages.[2] To entitle the party to recover for work done upon

[1] Ranger *v.* Great Western Railway Co., 13 Sim. 368; 1 Railw. Cas. 1; s. c. 5 H. L. Cas. 72; 3 H. L. Cas. 298; *supra*, § 105. And where the contract refers the umpirage to the company's engineer, by name, "so long as he shall continue the company's principal engineer," the reference is not terminated by the amalgamation of the company with another, the same engineer being continued on the old line, but not as the principal engineer of the amalgamated company. *In re* Wansbeck Railway Co., Law Rep. 1 C. P. 269.

[2] Ranger *v.* Great Western Railway Co., 5 H. L. Cas. 72; s. c. 27 Eng. L. & Eq. 61.

Where, in a contract between the original contractors for building a railway and the sub-contractors, it was provided, that the work should be subject to the supervision and control of the engineer of the company, and that he should make monthly estimates of "value," four-fifths of which should be paid to the sub-contractors; and when the work was completed, a final estimate; that the monthly and final estimates should be conclusive between the parties; that if the contractor should not truly comply with his part of the agreement, or in case it should appear to the engineer that the work did not progress with sufficient speed, the other party should have power to annul the contract, and that the unpaid portion of the work was to be forfeited by the sub-contractor, — it was held, that the award declaring the work forfeited was conclusive; that the action of the sub-contractor on the contract was in affirmance of the contract, and that he could not therefore impeach its stipulations; that the term "value" was to be distinguished from the term "price," fixed for the different classes of work, and that the engineer, in making monthly estimates, had a right to deduct from the amount of work done sufficient to bring it to the average of all the work to be done, and was not bound to allow the sub-contractor the price stipulated in the contract for work of this description; that if the company unjustly withheld funds due the sub-contractor, it could not fairly take advantage of the forfeiture declared for want of prosecution of the work; that the retention of a per cent, in case of forfeiture, was intended as the measure of reparation for the failure to perform and not as a mere penalty; and that the payment after forfeiture, by one of the original

41 Md. 4; Savannah & Charleston Railroad Co. *v.* Callahan, 56 Ga. 331; Fish *v.* Wolfe, 50 Iowa, 636; Grand Rapids & Bay City Railroad Co. *v.* Van Dusen, 29 Mich. 431; Snell *v.* Cottingham, 72 Ill. 161.

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* construction contracts, he must show, either that he has performed the labor according to the contract, or that the other party has waived strict performance, or hindered it.[3] (*b*)

4. But the party may excuse full performance by showing that he was prevented by an injunction out of Chancery, at the suit of a third party.[4] Or, that the parties had entered into a new contract for the same work, upon different terms.[5]

5. Where the work was suspended at the request of the company, with the view to a new location, the company agreeing to pay the plaintiff $750 by way of damages, if the work should not be resumed within two years, and, if it was, the plaintiff to proceed with the work at the prices stipulated, upon those sections not altered; the route being altered as to some of the sections, upon which the defendants resumed within the two years, employing others to do the work, without giving notice to plaintiff; held that the plaintiff could not recover the damages agreed, as the work was resumed within the two years, but that the plaintiff was entitled to damages for not being employed to do the work.[6]

6. Where, by the terms of the contract, a proportion of the sum * earned is to be paid monthly, and the remainder reserved, as security for the fulfilment of the contract, it was held, that nothing

contractors, of the hands who had been employed on the works by the subcontractor, and furnishing money to carry on the work, was not a waiver of the forfeiture, especially if he was then ignorant that there had been a forfeiture. Faunce *v.* Burke, 16 Penn. St. 469. In English contracts it is common to provide for the use of the contractor's plant, in case of the company's putting an end to the contract, and for the sale of the same, and crediting the money to the contractor. But this construction will not be adopted unless loss or expenses have been occasioned, for which the contractor is responsible. Garrett *v.* Salisbury & Dorset Junction Railway Co., Law Rep. 2 Eq. 358.

[3] Andrews *v.* Portland, 35 Me. 475. And it was held here, that part payment, under the contract, after the contractor had failed in strict performance, was no waiver, unless the failure was known to the employer at the time of payment.

[4] Whitfield *v.* Zellnor, 24 Miss. 663.

[5] Howard *v.* Wilmington & Susquehanna Railroad Co., 1 Gill, 311.

[6] Fowler *v.* Kennebec & Portland Railroad Co., 31 Me. 197. The construction here adopted seems not very satisfactory.

(*b*) As to what will constitute a waiver, see Phillips & Colby Construction Co. *v.* Seymour, 91 U. S. 646. As to prevention through fault of the other party, see Bean *v.* Miller, 69 Mo. 384.

was due till the day of payment, which could be attached by trustee process.[7]

7. And where, in such case, the company have the power to determine the contract, and the reserved fund is thereby to be forfeited, and the company do so, after the contractor has worked one month and part of another, and has received the proportion of payment for the first month, it was held nothing was due to the contractor.[8]

8. Where a railway company, after making a contract for the construction of its road, became embarrassed, and was unable to make payments to the contractor, and the president, who was a stockholder, and extensively interested in the success of the enterprise, made an additional agreement with the contractor that he would give him his notes to the amount of $10,000, if the work were completed by a day named, it was held, that he was not liable upon the agreement unless the contractor performed his part of the agreement by the day named. The notes were, by the terms of the agreement, to go in part-payment of what was due from the company, and the new agreement was not to affect the subsisting contract with the company.[9]

SECTION IX.

Form of Execution. — Extra Work. — Deviations.

1. Contract need be in no particular form.
2. But the express requirements of the charter must be complied with.
3. Company not liable for extra work unless it was done on the terms specified in contract.
4. *Sed quære*, if the company has had the benefit of the work.

§ 113. 1. No particular form of contract is requisite to bind the company, unless where the charter expressly requires it.[1] And although there seems still to be a failing effort in the English

[7] Williams *v.* Androscoggin & Kennebec Railroad Co., 36 Me. 201.

[8] Hennessey *v.* Farrell, 4 Cush. 267.

[9] Slater *v.* Emerson, 19 How. 224.

[1] *Infra*, §§ 130, 143, 164. Corporations cannot enter into partnerships, but two or more corporations may become jointly bound by the same contract. Marine Bank *v.* Ogden, 29 Ill. 248.

* courts to maintain the necessity of the contracts of corporations being under seal,[2] it is certain that the important business transactions of daily occurrence, in both that country and here, where no such formality is resorted to by business corporations, in matters of contract, and where to look for any such solemnity would be little less than absurd, almost of necessity drive the courts of England to disregard the old rule of requiring the contracts of corporations to be made under the corporate seal.[3]

2. But when the charter of the corporation requires any particular form of authenticating their contracts, it cannot be dispensed with. And where, by the charter of a railway company, the directors were authorized to use the common seal, and all contracts in writing relating to the affairs of the company, and signed by any three of the directors, were to be binding on the company; and the company entered into a contract, not under seal, by their secretary, to complete certain works, and, after part-performance, the contractor was dismissed by the company, it was held he could not recover the value of the work done.[3]

[2] Ludlow *v.* Charlton, 6 M. & W. 815. But see Beverly *v.* Lincoln Gas Light & Coke Co., 6 A. & E. 829; Dunstan *v.* Imperial Gas Light Co., 3 B. & Ad. 125; and Gibson *v.* East India Co., 5 Bing. N. C. 262, *per* TINDAL, C. J., from which it would seem that the English courts except from the operation of the rule only such transactions of business corporations as could not reasonably be expected to be done under seal. But see Columbia Bank *v.* Patterson, 7 Cranch, 299, and 2 Kent Com. 289, 291, and notes, where it is said the old rule is condemned, and the English and American cases are cited and commented on. *Infra*, § 143; United States Bank *v.* Dandridge, 12 Wheat. 64; Metropolis Bank *v.* Guttschlick, 14 Pet. 19; Norwich & Worcester Railroad Co. *v.* Cahill, 18 Conn. 484; San Antonio *v.* Lewis, 9 Texas, 69. See also, Weston *v.* Bennett, 12 Barb. 196; Rathbone *v.* Tioga Navigation Co., 2 Watts & S. 74.

[3] Diggle *v.* London & Blackwall Railway Co., 5 Exch. 442; s. c. 6 Railw. Cas. 590. It is said here that a contract, to be binding on a corporation when not under seal, must be one of necessity, or of too frequent occurrence, or too trivial to be made under seal. In Williams *v.* Chester & Holyhead Railway Co., 15 Jur. 828; s. c. 5 Eng. L. & Eq. 497, MARTIN, B., says persons dealing with corporations should bear in mind their peculiar character, and insist on having all contracts under seal or signed by the directors according to statute. But see *infra*, § 143, and cases cited. And where the assistant engineer on a railway, having charge of the construction of a section of the road, becoming dissatisfied with the contractor, dismissed him, and assumed the work himself, agreeing with the workmen to see them paid, it was held that his subsequent declarations could not be admitted, to charge the company

* 3. But where the contract contains express provisions that no allowance shall be made against the company for extra work, unless directed in writing under the hand of the engineer or some other person designated, or unless some other requisite formality be complied with, the party who performs extra work, upon the assurance of any agent of the company that it will be allowed by the company, without the requisite formality, must look to the agent for compensation, and cannot recover of the company, either at law or in equity.[4] (*a*) So, under the English General Company Acts, where the directors are authorized to contract on the part of the company, although not in writing, when such contracts would, if entered into by private persons, be binding in that form,

for supplies furnished the contractors, on the ground that they were not made in the course of the performance of his duty as agent of the company. Stiles *v.* Western Railroad Co., 8 Met. 44; s. c. 1 Am. Railw. Cas. 397. See also Underwood *v.* Hart, 23 Vt. 120, where the subject of the admissions of agents is discussed, and the cases reviewed. If a contract under seal be enlarged by parol and subsequently performed, or if the terms of the contract under seal be varied by parol, the proper remedy is by an action of assumpsit. Sherman *v.* Vermont Central Railroad Co., 24 Vt. 347; Barker *v.* Troy & Rutland Railroad Co., 27 Vt. 774. In Childs *v.* Somerset & Kennebec Railroad Co., Law Rep. 561, where the plaintiff, by special contract, agreed to build certain bridges and depots for the defendant corporation, for which he was to be paid partly in cash and partly in stock, and in the progress of the enterprise it became necessary to do much extra work, and furnish materials not provided for in the special contract, it was held that the plaintiff was entitled to recover the whole value of the extra work and materials thus furnished in money, on an implied assumpsit, and that the agreement to take pay in shares did not extend to this part of the work.

[4] Kirk *v.* Bromley Union Guardians, 2 Phil. 640; Thayer *v.* Vermont Central Railroad Co., 24 Vt. 440; Herrick *v.* Vermont Central Railroad Co., 27 Vt. 673; s. c. 1 Redf. Am. Railw. Cas. 305; Vanderwerker *v.* Vermont Central Railroad Co., 27 Vt. 125, 130.

(*a*) A verbal order will not suffice even though the contract also provides that the engineer may direct alterations and additions. White *v.* San Rafael & San Quentin Railroad Co., 50 Cal. 417.

Where a contract for grading permitted a change of line or grade, the contractor to be paid only for work actually done, and the line was so changed as to bring a portion consisting of excavation within a section for which the contractor was paid only for embankment, it was held that having been once paid for his work he was not entitled to payment on a sectional division which would give him more. Fish *v.* Wolfe, 50 Iowa, 636.

three directors being a quorum for that purpose, it was held that the mere fact that extra work was done with the approbation of the company's engineer, the special contract requiring written directions for all the work, had no tendency to prove a contract binding the company.[5]

* 4. In one very well considered case[6] upon the subject of extra work not authorized in the manner specified in the contract, it is said by the Vice-Chancellor: "From what I have been informed of the course taken at law in these cases, it is this: If in an action by a contractor, it appears that the company have the benefit of the work done with their knowledge, the court of law does not allow the company to take the benefit of that work without paying for it, although in covenant (or any action upon the contract) the contractor cannot recover." This may be in accordance with the general rules of law applicable to the subject.[7]

SECTION X.

Repudiation of Contract. — Other Party may sue immediately. — Inevitable Accident.

1. Repudiation by one party excuses performance by the other.
2. But he may stipulate for performance on different terms.
3. President cannot bind the company for additional compensation.
4. Effect of inevitable accident.

§ 114. 1. Questions often arise in regard to the right of a party to sue for damages before the time for payment arrives, and before he has fully performed on his part. But it seems now to be well settled, that where one party absolutely repudiates the contract on

[5] Homersham *v.* Wolverhampton Waterworks Co., 6 Exch. 137; s. c. 6 Railw. Cas. 790. Pollock, C. B., said: "The company is not bound by the mere order of the engineer, or by the contract with one director."

[6] Nixon *v.* Taff Vale Railway Co., 7 Hare, 136. But see *infra*, §§ 130, 143.

[7] Dyer *v.* Jones, 8 Vt. 205; Gilman *v.* Hall, 11 Vt. 511. But, in many cases, the work is done by a sub-contractor, and enures to the benefit of the original contractor, as in Thayer *v.* Vermont Central Railroad Co., 24 Vt. 440, and would not therefore give any right of action against the company, although in one sense the company may put the work to its own use, and so may be said to have the benefit of it to some extent.

his part, he thereby exonerates the other from further performance, and exposes himself presently to an action for damages.[1]

*2. Where the contract is unconditionally repudiated by one party, before it is fully performed, it is competent for the other to stipulate for its performance, upon different terms, no doubt. And such stipulation, although not under seal, would probably be regarded as made upon a valid and sufficient consideration; and if made by an agent of the former party to the contract, but who had not authority to bind his principal to such contract, it would nevertheless be binding upon the agent and other party contracting, and would not be required to be in writing, as it would be an original and not a collateral undertaking.

3. But it has been held, that after a railway company has entered into a written contract for the performance of certain work, the promise of its president to allow additional compensation to the contractors for the same work, is without consideration, and not binding upon the company.[2]

4. A very singular question arose in an English case.[3] The plaintiff agreed to make and erect on premises, under the control of the defendants, certain machinery, and the latter were to provide all necessary brick work, &c. Before the works were completed the buildings in which the work was to be done were

[1] Cort *v.* Ambergate, Nottingham, Boston, & Eastern Junction Railroad Co., 17 Q. B. 127; s. c. 6 Eng. L. & Eq. 230; Planche *v.* Colburn, 8 Bing. 14; Hochster *v.* De Latour, 2 Ellis & B. 678; s. c. 20 Eng. L. & Eq. 157. But in an action to recover damages on such contract, the jury are not to go into conjectured profits resulting from a sub-contract very much below what the plaintiff was to be paid. Only the difference between the contract price and the value of doing the work at the time of the breach can be given. Masterton *v.* Brooklyn, 7 Hill, 61. The repudiation of a contract by the company, followed by seizure of the works, under order of a court, will be held a waiver of its right to proceed by arbitration under the same contract on all matters involved in the question of the legality of the seizure. Putney *v.* Cape Town Railway Co., Law Rep. 1 Eq. 81; Bunger *v.* Koop, 48 N. Y. 225.

[2] Colcock *v.* Louisville Railroad Co., 1 Strob. 329; Nesbitt *v.* Louisville, Cincinnati, & Charleston Railroad Co., 2 Speers, 697. The controversy here was in regard to hard-pan excavation. It was held that as the plaintiff contracted to do all the work on the road, and to construct the road bed, and his contract only provided for earth and rock excavation, he was bound to accept his estimates under the contract, and that especially, after having done so, he could not claim extra compensation for excavating hard-pan, even if he showed that, by usage, "earth" had a technical meaning, and did not include hard-pan.

[3] Appleby *v.* Meyers, Law Rep. 1 C. P. 615; s. c. 12 Jur. N. S. 500.

destroyed by fire. It was held the plaintiffs were entitled to recover for the work already done by them before the fire, and that it was an implied term of the contract that the defendant should provide the buildings in which the work was to be done, and enable the plaintiffs to do their part of the work, and therefore that the defendant was not relieved by the occurrence of the fire; as a party who contracts to do a thing is bound to carry out his engagement, or to make compensation, notwithstanding he is prevented by inevitable accident.

*SECTION XI.

Decisions of Referees and Arbitrators in regard to Construction Contracts.

1. Award valid if substantially, though not technically correct.
2. Court will not set aside award, where it does substantial justice.

§ 115. 1. The general rule of law, in regard to the decisions of arbitrators and referees, by which they have been held binding upon the parties, although not made strictly according to the technical rules of law, if understandingly made, and exempt from fraud or partiality, has been sometimes applied to contracts for construction of railway works, the settlement of which has been determined by an umpire. (*a*) As where the contract reserved the right to the company to alter the gradients of the road, and to substitute piling for embankment without extra allowance. These alterations were made, and thus increased the expense to the contractors. The final settlement being made by referees, to whom "all matters in dispute with the contract as a basis of settlement," were referred, and they having allowed the contractor compensation for this increased expense, it was held to be within the power conferred upon the referees.[1]

[1] Porter *v.* Buckfield Branch Railroad Co., 32 Me. 539. In this case the contract provided for payment of a portion of the price of the work in stock, and the arbitrators directed, that the same proportion of the award should be paid in stock, and the award was held valid.

(*a*) A stipulation in a contract by which the parties name an umpire, and agree not to resort to the courts is void, as against public policy. Kistler *v.* Indianapolis & St. Louis Railroad Co., 88 Ind. 460.

2. So, too, where the contract specified a price for earth excavation, and another for rock excavation, but nothing was said of "hard-pan," a good deal of which occurred in the course of the work, which was admitted to be more expensive than the ordinary earth excavation; the whole subject was referred, and the plaintiff claimed in his specification thirty cents per yard for excavating hard-pan, and the referees allowed him fifty cents on trial. The defendants objected to the allowance, being more than the claim. But the court said, where the testimony was received without objection, and showed the party entitled to recover beyond his specification, the court will not set aside the report, or grant a * new trial, where it is apparent the party has not recovered more than what he is fairly entitled to.[2]

SECTION XII.

Decisions of Company's Engineers.

1. Estimates for advances, mere approximations, under English practice.
2. But where the engineer's estimates are final, can only be set aside for partiality or mistake.
3. Contractor bound by practical construction of the contract.
4. Estimates do not conclude matters not referred.
5. Contractor bound by consent to accept pay in depreciated orders.
6. Right of appeal lost by acquiescence.
7. Engineer cannot delegate his authority under reference.
8. Arbitrator must notify parties, and act *bona fide*.

§ 116. 1. The English contracts for railway construction generally contain a provision for referring the final settlement with the contractor to an indifferent board of arbitrators, or one selected by the parties respectively, with the umpirage of a third party in case of disagreement.[1] Under such contracts the provision in

[2] Du Bois *v.* Delaware & Hudson Canal Co., 12 Wend. 334.

[1] Ranger *v.* Great Western Railway Co., 5 H. L. Cas. 72; s. c. 27 Eng. L. & Eq. 35, 46. So where in a canal contract it is provided, that the engineer "shall in all cases determine the amount or quality of the several kinds of work" to be done, and the compensation therefor, and that either party may compel an indifferent reference, where he feels aggrieved by the decision of the engineer, "to investigate and determine all questions that may arise relating to compensation for work done under this contract," it was held, this

regard to monthly or semi-monthly estimates is such, that they are understood to be mere approximations, and it is only equivalent to a provision, that the company shall advance, from time to time as the work progresses, for a stipulated proportion of the work, which they shall by their engineer adjudge to be done. All that is requisite to the validity of such estimates is, that they were made *bona fide*, and with the intention of acting according to the exigency of the contract.[1]

*2. But where the contract contains provisions referring the estimate of the quantity and quality of the work absolutely to the determination of the company's engineer, or any particular party, and provides, as is not uncommon in this country, that his decision shall be final, no relief from his determination can ordinarily be obtained, even in a court of equity, unless upon the ground of partiality, or obvious mistake, which latter is held to apply rather to the quantity than the quality of the work, this being purely matter of judgment and discretion, and which was intended to be concluded by the opinion of the arbitrator.[2] (*a*)

umpirage extended only to the final account of the engineer. People *v.* Benton, 7 Barb. 209. Under a contract where the company stipulated to pay the contractor ninety per cent of work done, according to the engineer's estimate, and the engineer had the right to declare the contract abandoned, and in that event the ten per cent became forfeited; and the engineer did so declare; it was held that this did not absolve the company from the payment of the ninety per cent on the work done, before the contract was declared abandoned. Ricker *v.* Fairbanks, 40 Me. 43.

[2] Herrick *v.* Vermont Central Railroad Co., 27 Vt. 673; Kidwell *v.* Baltimore & Ohio Railroad Co., 11 Grat. 376; Alton Railroad Co. *v.* Northcott, 15 Ill. 49. In this case it was held that the estimate of the umpire will not bind the parties, if based on an erroneous view of the contract. So a court of equity may correct the mistakes of the engineer, although the contract stipulates that his decision shall be final. Mansfield & Sandusky Railroad Co. *v.* Veeder, 17 Ohio, 385. So, too, where the engineer proves to be a stockholder in the company. Milnor *v.* Georgia Railway & Banking Co., 4 Ga. 385. And in Kems *v.* O'Reilley, Leg. Int. Aug. 31, 1866, it was decided that the award of an engineer between contractor and sub-contractor is final. And in Leech *v.* Caldwell, Leg. Int. Nov. 16, 1866, it was held, that where the sub-contractor covenanted to abide the decision of the engineer of the work in any dispute arising on the contract, the alleged fraud of the engineer did not affect the covenant.

(*a*) So held in Grant *v.* Savannah Railroad Co., 51 Ga. 348. And see Loup *v.* Southern California Railroad Co., 11 Am. & Eng. Railw. Cas. 589. See also Atlanta & Richmond Air Line Railroad Co. *v.* Mangham, 49

But in an English case[3] before Vice-Chancellor STUART, where in a building contract the corporation reserved the power to determine the contract, which they afterwards exercised, and it was stipulated that any dispute or difference which might arise between the contracting parties should be referred to and settled by the engineer, that it should not be competent for either party to except at law or equity to his determination, and that without the certificate of the engineer no money should be paid to the plaintiffs; it appearing that the engineer had never refused to discharge his duty according to the contract, and had nothing to disqualify him to act, and was ready and willing to proceed and determine all matters at issue between the parties: it was held that there was no ground for the equitable interference of the court.

3. If the contractor acquiesce in a particular construction of his * contract, and allow his estimates, from time to time, to be made upon such basis, he will be bound by it thereafter.[4]

4. Where the contract specifies a price for rock excavation, and another for ordinary earth excavation, and in the course of the work a large quantity of hard-pan was excavated, for which no

[3] Scott *v.* Liverpool, 31 Law T. 147. This subject is discussed in Roberts *v.* Bury Improvement Commissioners, Law Rep. 4 C. P. 755; s. c. 5 Law Rep. 5 C. P. 310. But there is so much difference of opinion among the judges that no new principle can fairly be said to be established. See also Jones *v.* St. John's College, Law Rep. 6 Q. B. 115.

[4] Kidwell *v.* Baltimore & Ohio Railroad Co., 11 Grat. 676. See also Commonwealth *v.* Clarkson, 3 Penn. St. 277.

Ga. 266, where it is held that the award of an engineer is no more binding than that of any other arbitrator. And see also Sharpe *v.* San Paulo Railway Co., Law Rep. 8 Ch. Ap. 597, where the contract provided that the certificate of the engineer should be conclusive, and it was held that it should be so, there being no fraud, although there was an underestimate of the work in the engineer's original specifications, on the basis of which the contract was taken, and although the engineer had made verbal promises of a greater compensation. Where the engineer is made umpire to determine all questions growing out of the contract, and sole judge of the quantity of labor and materials, and a certain price for certain work is agreed on, he has no power to fix compensation after a different measure. Starkey *v.* De Graff, 22 Minn. 431. If the engineer neglects or refuses to estimate the work, recovery may be had of the correct amount otherwise proved. Ib.; Kistler *v.* Indianapolis & St. Louis Railroad Co., 88 Ind. 460. And so if by neglect or mistake he underestimate it. Kistler *v.* Indianapolis & St. Louis Railroad Co., *supra*.

provision was made in the contract, and the other party conceded that compensation was due, beyond the price fixed in the contract for ordinary earth excavation, it was decided that the contractor might recover upon a *quantum meruit* count. And where the contract also provided that the engineer should finally determine all questions necessary to the final adjustment of the *contract*, this did not render the engineer's estimate conclusive, as to the sum to be paid for excavating hard-pan.[5] These points are both decided, mainly it is presumed, upon the concession of the defendant that the hard-pan excavation was a matter altogether outside of the contract. Otherwise it might seem difficult to maintain their entire consistency with other decided cases.[6]

5. Where the contract gives the engineer power to stop the work, when the means of carrying it forward fail, and he informed the contractor it could not proceed unless he would receive his monthly pay in orders, which were at a discount, and the contractor consented to receive them, he is not entitled to recover of the company the amount of such depreciation.[7]

6. And although the contractor, by the contract, had the power to refuse to abide by the final estimates of the engineer, yet if he submitted to him his charges for the work done, and made no objection to his making up the final estimate, he is bound thereby.[7]

7. Where in a contract for work upon a railway it was stipulated that the work should be measured by defendant's engineer * or agent, which should be final and conclusive, it was held that such person could not delegate his authority, but that it was indispensable that he should himself make the admeasurement. But in making it, it is not necessary that he should give previous notice to the parties to enable them to be present.[8]

[5] Du Bois *v.* Delaware & Hudson Canal Co., 12 Wend. 334; s. c. 15 Wend. 87. See s. c. 4 Wend. 285. But see *supra*, § 111; Nesbitt *v.* Louisville, Cincinnati, & Charleston Railroad Co., 2 Speers, 697, where hard-pan seems to be regarded as earth excavation, unless there is some special provision in the contract *for estimating it otherwise*.

[6] Morgan *v.* Birnie, 9 Bing. 672. See also Sherman *v.* New York, 1 Comst. 316, 320.

[7] Kidwell *v.* Baltimore & Ohio Railroad Co., 11 Grat. 676. See also Commonwealth *v.* Clarkson, 3 Penn. St. 277, on the general subject of the conclusiveness of the engineer's estimate.

[8] Wilson *v.* York & Maryland Line Railroad Co., 11 Gill & J. 58. Gross negligence is not fraud, but evidence to be considered by the jury. Id.

8. But if such agent is to make an estimate of certain expenses to be allowed the plaintiff, and he proceeds to do so, in the absence of plaintiff and without notice, the plaintiff will not be bound by the estimate. But such estimate will not be affected by the inadequacy of the amount, or that the usual means were not resorted to for ascertaining facts, if the umpire act *bona fide*, which is a fact to be determined by the jury.[8]

SECTION XIII.

Relief in Equity from Decisions of Company's Engineers.

1. Contract referring work to engineer, engineer to be satisfied.
2. Bill for relief praying that plaintiff be permitted to go on, &c.
3. Bill sustained. Amendment alleging mistake in estimates.
4. Relief as to sufficiency of payments had only in equity.
5. Proof of fraud must be very clear.
6. Engineer a shareholder, not valid objection.
7. Decision of engineer conclusive as to quality of work, but not as to quantity.
8. New contract condonation of old claims.
9. Account ordered after company had completed work.
10. Money penalties cannot be relieved against, unless for fraud.
11. Engineer's estimates not conclusive, unless so agreed.
12. Contractor entitled to full compensation for work accepted by supplemental contract.
13. Direction of umpire binding on contracting parties, and dispenses with certificate of full performance.

§ 117. 1. In consequence of the peculiar stringency of the terms of contracts for railway construction, applications for relief in equity have not been unfrequent. In one case,[1] it was agreed

[1] Ranger *v.* Great Western Railway Co., 1 Railw. Cas. 1; s. c. 13 Sim. 368.

Where, by the contract, the work was to be done to the satisfaction of the engineer, and suit was brought without obtaining his judgment, it was held, that it could not be maintained. Parkes *v.* Great Western Railway Co., 3 Railw. Cas. 17. This case is also found in 3 Railw. Cas. 298, and in 5 H. L. Cas. 72, and in 27 Eng. Law & Eq. 35. It came before the House of Lords, on appeal for final determination just ten years after the decision in the Vice-Chancellor's court. The judgment was in the main affirmed, but in form reversed, and sent back to the Court of Chancery, for an account according to the rights established by the final decision. The case deserves careful attention.

It is regarded as questionable, how far a contract, vesting the property of

by * the contract that every fortnight the engineer of the company should ascertain the value of the work done, according to its

the contractor in the company in the event of his insolvency merely, could be maintained, as consistent with the English bankrupt and insolvent laws. Rouch *v.* Great Western Railway Co., 1 Q. B. 51; s. c. 2 Railw. Cas. 505. But this objection may be obviated by the company stipulating for a lien merely, — a right to use the tools and materials of the contractor in the completion of the work, according to and in fulfilment of his contract. Hawthorn *v.* Newcastle-upon-Tyne Railway Co, 3 Q. B. 734, note *a;* s. c. 2 Railw. Cas. 299. It is said, by a very learned equity judge, Lord REDESDALE, in O'Connor *v.* Spaight, 1 Sch. & L. 309, that where an account has become so complicated that a court of law would be incompetent to examine it at Nisi Prius, with all necessary accuracy, a court of equity will, on that ground alone, take cognizance of the case. But a court of equity will not ordinarily interfere in any such case, and especially when the party applying has been guilty of laches. Northeastern Railway Co. *v.* Martin, 2 Phil. Eng. Ch. 758. See also Taff-Vale Railway Co. *v.* Nixon, 1 H. L. Cas. 111; Foley *v.* Hill, 2 H. L. Cas. 45, 46. See also Nixon *v.* Taff-Vale Railway Co., 7 Hare, 136. It is questionable whether any such distinct ground of exclusive equity jurisdiction, in matters of account, as the complicated nature of the transactions, can be maintained, but there is little doubt that this would be regarded as an important consideration in guiding the discretion of that court, in assuming such jurisdiction, in any particular case pending in a court of law. But sometimes where the contractor claims the right to appropriate payments, made generally, to a different contract from that on which the company desires them to apply, it is necessary to draw the whole into a court of equity. Southeastern Railway Co. *v.* Brogden, 14 Jur. 795; s. c. 3 Macn. & G. 8. See on the general subject, Waring *v.* Manchester & Sheffield & Lincolnshire Railway Co., 7 Hare, 482. An important case on a contract for railway construction, finally determined in the national tribunal of last resort, on elaborate argument and great consideration, and involving most of the subjects considered in Ranger *v.* Great Western Railway Co., may be regarded, perhaps, as bearing something of the same relation to cases in this country on that subject that the English case does to cases of that kind in the English courts. This is the case of Philadelphia, Wilmington, & Baltimore Railroad Co. *v.* Howard, 13 How. 307; s. c. 1 Am. Railw. Cas. 70. It was there decided, among other things, that in such contracts the covenant to finish the work by a certain time on the one part, and to pay monthly on the other part, are distinct and independent covenants; that the right of the company to annul the contract at any time, does not include a right to forfeit the earnings of the other party for work done prior to the annulment; that a covenant to execute the work according to a schedule which says it is to be done according to the directions of the engineer, binds the company to pay for work done according to his directions, although not strictly in conformity with a profile showing the original proximate estimates; that when the contract is to place the waste earth where ordered by the engineer, it is the duty of the engineer to provide a convenient place, and if he

* quality and relative proportion to the whole work; the contractor to receive eighty per centum, the remainder being reserved

fails to do so the other party is entitled to damages; that where the contract authorizes the company to retain, until the completion of the contract, fifteen per cent of the earnings of the contractor, by way of indemnity from loss through any failure of the contractor to perform, it is not to be regarded as a forfeiture ; that where the contractor is delayed in the progress of the work by an injunction, he is entitled to no damages, unless the jury find that the company did not use reasonable diligence in obtaining a dissolution of the injunction; that if a railway company, having the power of annulling a contract for construction, "when, in their opinion, it is not in due progress of execution," or the contractor is "irregular or negligent," he is entitled to recover damages for any loss of profit he may have sustained through an oppressive use of that power.

In Herrick *v.* Vermont Central Railroad Co., 27 Vt. 673; s. c. 1 Redf. Am. Railw. Cas. 305, it was held, among other things, that a stipulation in a contract for construction, that "the engineer shall be the sole judge of the quality and quantity of the work, and from his decision there shall be no appeal," is binding and constitutes the engineer an arbitrator or umpire; that such a stipulation imposes on the company the duty of employing for such engineer a competent, upright, and trustworthy person, and of seeing that he performs the service expected of him at a proper time and in a proper manner; that the estimates in such case may be made by the assistant engineer; that where payment for the work depends as to its amount on the engineer's estimates, and the employing party performs its duty in reference to the employment of a suitable engineer, the obligation to pay will not arise until such estimates are made; but that if, through the neglect or fault of the engineer, or of the party who employs him, no estimates are made, the other party can probably recover at law for the work performed, without any engineer's estimate of it; that a contract providing for monthly estimates of the contractor's work according to which he is to be paid, imports an accurate and final, not an approximate estimate for each month; and that a court of equity has jurisdiction of a claim to be paid for a larger amount of work done under such a contract than was estimated by the engineer, where the underestimate was occasioned either by mistake or fraud.

In a contract for railway construction, where the parties by a subsequent contract stipulated for the completing of the work by a day named, for additional compensation, and that the contractor should pay a certain sum for each day's delay beyond the time specified, the company to furnish certain materials to complete the same by the day specified, the work was not finished for twenty-four days after the time specified, and the materials were not furnished to complete it sooner, the court held the covenants independent of each other, and the contractor bound to deduct the stipulated forfeiture, notwithstanding the default of the company. McIntosh *v.* Midland Counties Railway Co., 14 M. & W. 548; s. c. 3 Railw. Cas. 780. The rule of law that covenants, which are not the entire consideration for each other, will ordinarily be

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to *enforce the completion of the works: That if the engineer should not be satisfied with the works, after notice given to the contractor, *and his default in complying for seven days to take possession of the works, thereupon the plant and materials of the contractor, *and all the work done and not paid for, and the reserved fund to be forfeited to the company.

*2. The company having taken the forfeiture under the contract, the plaintiff filed his bill, insisting that the engineer had underestimated the work £30,000, and that no forfeiture had been incurred by him, and praying that the company might elect to permit the plaintiff to complete the works, or that the contract might be considered at an end, and in either case an account between the parties might be taken..

*3. The Lord Chancellor held, that the facts alleged do entitle the plaintiff to relief in equity. The plaintiff amended his bill, and alleged that the most expensive masonry had been paid for only at the price of inferior work, and claimed large sums in that respect, and also alleged fraud against the company, in the contracts and in the certificates.

4. It was held, that the investigations as to the sufficiency of the payments made could only be made in a court of equity.

5. That the evidence in support of an allegation of fraud must be very clear, and that it is not enough to show that the statements of the company as to the nature of the work gave imperfect information, but it must also be shown that the contractor could not with reasonable diligence have acquired all necessary information.

6. The fact of the engineer being a shareholder in the company is not enough to avoid his decision, as the contractor might have ascertained this fact. The character of an engineer is of more value to him than his interest as a shareholder.

7. That the decision of the engineer as to the quality of the work is conclusive, but not as to the quantity. The question of measurement and calculation will be entertained and decided by a court of equity.

8. That where the parties have entered into new contracts, it

construed as independent, unless there is something in the transaction which shows that the parties regarded them as dependent, is here carried further than reason and justice would seem to justify. The case would hardly be followed in this country.

will be considered a condonation of old injuries, unless, at the time of making the new contract, the plaintiff insisted upon his adverse claims, the parties being at liberty to proceed at law.

9. After the works were completed by the company the court ordered an account taken, directing special inquiries as to the amount and kind of work done.

10. It was held that stipulations in regard to penalties in these contracts are binding upon the parties, and no relief against them will be afforded in equity unless fraud be shown. And that, where it had been agreed that a written contract should form part of an unwritten one, this will include stipulations as to forfeiture.[1]

11. In one case in Pennsylvania[2] it was decided that the estimates and decisions of the engineer of a railway company are conclusive, in disputes with contractors, only where such is the positive stipulation of the contract; that in every other case the * correctness of such estimates is to be tested by evidence, and in an action against the company by a contractor to recover a balance claimed to be due for work, it is correct to instruct the jury to rely on the engineer's final estimates unless shown to be erroneous.

12. In such a contract, where a supplemental contract was made by the company, assuming the work, and agreeing to pay the contractor for what work he had done, and reserving no claim for damages, either on account of the suspension of the work or its not being completed, it was held that the contractor was entitled to compensation according to the stipulations of the supplemental contract, without any deductions on account of suspension of or not completing the work, and that the work done and agreed to be compensated must be estimated at what it was worth, and the contractor's claim could not be restricted to what would be coming to him under the final estimates of the engineer; nor could the company claim any deductions on account of loss incurred in completing the work.[2]

13. And where the plaintiff stipulated to perform the work of shifting the track of a railway, under the direction and to the satisfaction of the city surveyor, whose certificate that the work had been so performed was to entitle him to payment, it was held,

[2] Memphis Railroad Co. *v.* Wilcox, 48 Penn. St. 161.

that where the surveyor directed that the work should not be done beyond a certain point, that was a valid excuse for not obtaining his certificate of performance beyond that point.[3]

SECTION XIV.

Frauds in Contracts for Construction.

1. Relievable in equity on general principles.
2. Statement of leading cases upon this subject.
3. No definite contract closed, no relief granted.

§ 118. 1. It is well known that courts of equity will relieve against fraud practised by the agents of railways, in building contracts, the same as in other cases of fraud. But the importance and peculiar nature of these contracts will justify a brief note of the cases decided upon the subject.

*2. The most important case in the English books upon this subject, is that of Ranger *v.* The Great Western Railway, which we have just referred to upon another point.[1] And the statement *of that case, in the House of Lords, by the Lord Chancellor Cranworth, is a better commentary than elsewhere exists, *upon this subject. The general subject of fraud in railway companies, in regard to building contracts, is somewhat considered in a late case in the Supreme Court of Vermont.[2]

*3. But it is clear that where no binding and complete contract has been entered into by the company, although the tenders made by a contractor have been accepted by their engineer, authorized to act on their behalf, and the contractor has incurred *expense upon the faith of having the contract, in preparation to fulfil it, there being certain alternatives in the tender, which had not been decided upon, and the whole thing being given up and no specific contract made under the seal of the company, equity

[3] Devlin *v.* Second Avenue Railroad Co., 44 Barb. 81.

[1] 1 Railw. Cas. 1; s. c. 3 Railw. Cas. 298. s. c. on appeal to House of Lords, 27 Eng. L. & Eq. 35, 41; s. c. 13 Sim. 368; 5 H. L. Cas. 72.

[2] Herrick *v.* Vermont Central Railroad Co., 27 Vt. 673; s. c. 1 Redf. Am. Railw. Cas. 305.

can grant no relief.[3] For if there was no contract equity could not create one, and if there was a valid contract the remedy at law is adequate.

SECTION XV.

Engineer's Estimate wanting through Fault of Company.

1. Relief in equity where estimate of engineer is wanting through fault of company.
2. Grounds of equitable interference.
3. Contract terminated other party enjoined from interference.
4. Stipulation requiring engineer's estimate, not void.
5. Not the same as an agreement, that all disputes shall be decided by arbitration.
6. Engineer's estimate proper condition precedent.
7. Same as sale of goods at the valuation of third party.
8. Result of all the English cases, that the question of damages only properly referable to the engineer.
9. Rule in this respect different in this country.

§ 119. 1. Where, by the terms of a railway construction contract, executed under the seals of the parties, the work is to be paid for, from time to time, upon the estimate and approval of the company's principal engineer, and the amount and quality of the work finally to be determined in the same mode, no action, either at law or in equity, can be maintained until such estimate and approval is obtained, unless it is prevented by the fault of the company. But where no such engineer is furnished by the company, or where through their connivance he neglects to act, the contractor is not without remedy, in equity.[1] (*a*) Lord Chancellor COTTENHAM, in affirming this decision,[2] says: —

2. "It is true that the specification and contract constitute a relationship between the plaintiffs and the defendants, which, if correctly acted upon, would have given to the plaintiffs a legal

[3] Jackson *v.* North Wales Railway Co., 1 Hall & T. 75; s. c. 6 Railw. Cas. 112.

[1] McIntosh *v.* Great Western Railway Co., 2 De G. & S. 758. This is the decision of the Vice Chancellor, which came before the Lord Chancellor, with the result stated in the text.

[2] McIntosh *v.* Great Western Railway Co., 2 Hall & T. 250; s. c. 2 Macn. & G. 74.

(*a*) See *supra*, § 116, note (*a*).

*right, and a legal right only, to the benefits they claimed by this bill. But if the facts stated in the bill are such as, if true, deprive the plaintiffs of the means of enforcing such legal rights, and if those facts have arisen from the conduct of the defendants, or of their agent so recognized by the specification and contract, and now used for the fraudulent purpose of defeating the plaintiffs' claim altogether, the defendants cannot resist the plaintiffs' claim in equity upon the ground that their remedy is only at law; nor is it any answer to show that, if the plaintiffs cannot get at law what they contracted for, they may obtain compensation in damages. It is no answer to a bill for specific performance that the plaintiffs may bring an action for damages for a breach of the contract, or, in a proper case of a bill for discovery of some specific chattels, that damages may be recovered in trover, — the language of pleading is not that the plaintiffs have no remedy, but no adequate remedy save in a court of equity. It is therefore no answer in the present case for the defendants to urge, that if they or their agent have been neglectful of what they undertook to do, by which the plaintiffs have suffered, they may be liable in damage to the plaintiffs. They contracted for a specific thing, and are not bound to take that, or something in lieu of it, if such other thing be not what this court considers as a fair equivalent. I do not therefore consider that any answer is given to the plaintiffs' right to file a bill in this court by showing that the ground upon which they seek their right so to do, namely, the being barred of their legal remedy by the conduct of the defendants, may subject them to damages at law."

3. And where disputes arose between the contractor and the company, each charging default upon the other's part, and claiming the right to occupy the works, and the workmen of both coming in collision upon the line of the road, and the completion and opening of the road being delayed in consequence, the court, on the application of the company, restrained the contractor from continuing on the line or interfering with the operations of the company, but directed an account of what was due the contractor, without regard to the former certificates of the company's engineer, and an issue to try whether the company were justified in removing the contractor, reserving all claims for loss and compensation till the final hearing.[3]

[3] East Lancashire Railway Co. v. Hattersley, 8 Hare, 72.

*And in a somewhat recent case,[4] by the terms of the contract it was provided, that if the contractor made default the company might themselves complete the line, and that the plant, &c., upon the line belonging to the contractor should become the property of the company, and be set off against the debts, if any, due from him to the company, and that the contractor should not hinder the company from using the same. Default having been made by the contractor, the company completed the line and were proceeding to remove the plant, &c. An arbitration was pending to decide the question of amount between the contractor and the company. It was held that the company must be enjoined from removing the plant before award given.

Lord ROMILLY, M. R., here suggests that the company have no right to take the plant until it appears that the contractor is indebted to them; but we should have said that under such a contract the fair construction is that the company may take and use the plant in completing the line, making themselves debtor to the contractor for the same. The purpose of such a stipulation presumptively is, that the work may not be interrupted by the change of hands from the contractor to the company. But after the road is completed, so far as the contract extended, and the company had made no use of the plant, the view suggested by his lordship seems entirely just and reasonable.

4. The question of the right to recover at all at law, without procuring the engineer's estimate, where that is made a condition precedent in the contract, has been considerably discussed in the English courts, and especially in the important case before the House of Lords, in July, 1856;[5] and the result arrived at seems to be, that such a clause in a contract, in regard to the basis of recovery, is not equivalent to a stipulation that no action shall be brought, or that the case shall not come before the courts of law or equity, which has long since been determined to be repugnant and void.[6] (*b*)

[4] Garrett *v.* Salisbury & Dorset Junction Railway Co., Law Rep. 2 Eq. 358; s. c. 12 Jur. N. S. 495.

[5] Scott *v.* Avery, 5 H. L. Cas. 811; s. c. 36 Eng. L. & Eq. 1.

[6] Thompson *v.* Charnock, 8 T. R. 139. See also Tattersall *v.* Groote, 2 B. & P. 131.

(*b*) In Kistner *v.* Indianapolis & St. Louis Railroad Co., 12 Am. & Eng. Railw. Cas. 314, it was held that it was the duty of the company

5. The distinction is somewhat refined, and difficult of exact definition, but it seems to us not altogether without foundation. A stipulation, that no action shall ever be brought upon a contract, *or, what is equivalent, that all disputes under it shall be referred to arbitration, is a repugnancy, which if carried out literally must render the contract itself, as a mode of legal redress, wholly idle. And it is only in this view that contracts are to be considered by the courts.

6. But a stipulation that the liability under a contract or covenant shall not accrue, except upon the basis of certain previously ascertained facts, where the contract contains provisions for ascertaining them, by the action of either party, without the concurrence of the other, is no more than a limitation upon the right of action, as that no action shall be brought until after one year, or unless commenced within six months,[7] which have been held valid. And even where the concurrence of both parties is requisite and the performance of the condition fails through the refusal of one, it probably is the same as to the other as if performed.

7. Hence a contract to purchase goods at the valuation of N. and M., cannot be made the foundation of an action, without obtaining the valuation stipulated, or showing that the other party hindered it.[8] And in some cases it has been held, that if the obtaining of the estimate is withheld or defeated by the fraud of the other party, no action at law will lie, the only remedy being by a special action for the fraud, or in equity, perhaps.[9]

[7] Wilson *v.* Ætna Insurance Co., 27 Vt. 99, and cases there cited.

[8] Thurnell *v.* Balbirnie, 2 M. & W. 786; Milnes *v.* Gery, 14 Ves. 400.

[9] Milner *v.* Field, 5 Exch. 829. But in a later case in the same court it is said that the award must be obtained, or it must be shown that it is no longer practicable to obtain it. Brown *v.* Overbury, 11 Exch. 715; s. c. 31 Eng. L. & Eq. 610. This rule, with the qualification that the defendant by his own act or refusal has rendered the performance of the condition impracticable, is now, in this country certainly, held such an excuse as will enable the party to sue in a court of law. United States *v.* Robeson, 9 Pet. 319, 326. And in Snodgrass *v.* Gavit, 28 Penn. St. 221, Mr. Justice Woodward assumes it as the unquestionable rule, in that state, that "where parties stipulate that disputes, whether actual or prospective, shall be submitted to the arbitrament of a particular individual, or tribunal, they are bound by their contract, and cannot seek redress elsewhere."

to see that the engineer made his estimates, and that in default thereof an action might be maintained for the sum really due.

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8. This subject is very elaborately discussed by the judges before the House of Lords, in the case of Scott *v.* Avery,[5] and it is remarkable how wide a difference of opinion was found to exist, upon a question which might seem at first blush so simple. Of the nine judges who gave formal opinions, three were opposed to allowing any force whatever to such a stipulation. And of the *other six, four held that only the question of damages can properly be made to depend, as a condition precedent, upon the award of an arbitrator, while two held that the award may be made to include all matters of dispute growing out of the contract, which it seems to us must be regarded as equivalent to saying that no action at law or in equity shall be brought to determine any controversy growing out of the contract, which all the judges agree is a void stipulation. We therefore feel compelled to adopt the view that upon principle, and the fair balance of authority, such a stipulation, in regard to estimating labor or damages, under a contract for construction, is valid, and may be treated as a condition precedent, but that beyond that, the present inclination of the English courts is to hold that it is repugnant to sound policy, and subversive of the legal obligation of the contract, as being equivalent to a stipulation that no action at law shall be brought upon the contract, but only upon the award, if not paid.

9. But the balance of authority in this country seems to be in favor of allowing such a condition precedent, in this class of contracts, to extend to the quality of the work, as well as the quantity, and to the question, whether the work is progressing with sufficient rapidity, and whether the company on that account are justified in putting an end to the contract.[9] It seems reasonable to us, on many grounds, that contracts of this magnitude and character should receive a somewhat different interpretation in this respect from that which is applied to the ordinary commercial transactions of the country, as has been held in regard to pecuniary penalties.[10] We should not therefore feel justified in intimating any desire to see the American cases on this subject qualified.

[10] *Supra*, §§ 116, 117. Under the English statute, the Railway Arbitration Act, agreements between companies to refer all disputes between them to arbitration are peremptorily enforced by the courts. Llannelly Railway & Dock Co. *v.* London & Northwestern Railway Co., 20 W. R. 898.

SECTION XVI.

Contracts for Materials and Machinery.

1. Manufacturer of machinery, etc., not liable for latent defect in materials.
2. Contract for railway sleepers, terms stated.
3. Construction of such contract.
4. Party may waive stipulation in contract by acquiescence.
5. Company liable for materials accepted and used.

§ 120. 1. In a contract for fire engines, it was stipulated that the engines and tender should be subject to the performance of *one thousand miles, with proper loads, the manufacturers to be liable for any breakage which may occur through defect of materials or workmanship, but not where it occurs from collision, neglect, or mismanagement of the company's servants, or any other cause, except the two first named. The trial to take place within one month from the day on which any engine is reported ready to start, in default of which the manufacturers to be released from all responsibility. It was specially agreed the fire-boxes should be of copper, 7-10ths of an inch thick. One of the engines, so supplied, performed the thousand miles according to the contract; but some months after the fire-box burst, when it was discovered that the copper was reduced to 3-16ths of an inch in thickness, it being conceded it was originally of the thickness required by the contract. In an action for the price of the engine, which by the contract was to be paid upon the satisfactory completion of the trial, it was held the defendants could not give evidence of such defect in the copper, no fraud being alleged, and that, by the terms of the contract, the three months' trial having been satisfactory, released the manufacturers from all responsibility in respect of bad materials and workmanship.[1]

2. In a contract for railway sleepers,[2] it was stipulated that the plaintiffs below should supply the defendants below with 350,000 sleepers, the contract before having recited that the

[1] Sharp *v.* Great Western Railway Co., 2 Railw. Cas. 722; s. c. 9 M. & W. 7.

[2] Great Northern Railway Co. *v.* Harrison, 14 Eng. L. & Eq. 189; 12 C. B. 576; s. c. 8 Eng. L. & Eq. 469; 11 C. B. 815.

defendants were desirous of being supplied with that number of railway sleepers. The contract specified that the plaintiffs were willing to supply them according to a specification and tender, which stated that the number of sleepers required was 350,000, that one-half would have to be delivered in 1847, and the remainder by midsummer, 1848; and the contract also contained a covenant to supply the sleepers within the time specified, "as, and when, and in such quantities, and in such manner," as the engineer of the company by orders in writing, "from time to time, or at any time within the time limited by the specification, should require." The deed also contained a provision, that the engineer might vary the time of delivery; that the company should retain in their hands £2,000 as security for the performance of the contract, and should pay it over within two months after the sleepers had been delivered; and * that the contract might be determined upon the default or bankruptcy of the plaintiffs.

3. It was held that there was an implied covenant on the part of the company to take the whole number of 350,000 sleepers; that an order by the engineer was a condition precedent to any delivery of the sleepers by the plaintiffs; that the company were bound to cause such order to be given within the time limited by the specification; that although the engineer had power to alter the time for the delivery of the sleepers, such power was to be exercised within the period limited by the specification; that the engineer, as to matters in which he had a discretion, e. g., as to varying the time of delivery of the sleepers, stood in the position of arbitrator between the parties, but as to giving the order for the delivery he was a mere agent of the company; that the only legitimate rule of construction is to ascertain the meaning from the language used in the instrument, coupled with such facts as are admissible in evidence, to aid its explanation. — *Per* PARKE, B.

4. It has been held, also, in a contract with a railway company to deliver iron, "near the months of July and August," and the delivery continuing till the 25th of October, and the company not objecting to receive it, that they were bound by the terms of the contract, one of which was that they were to give their notes for each parcel of iron as it was shipped.[3]

[3] Bailey *v.* Western Vermont Railroad Co., 18 Barb. 112. It was also held, here, that the refusal of the company to give notes as stipulated, ex-

5. So, too, under the English statute,[4] which provides that the directors of a railway company may contract by parol, on behalf of the company, where private persons may make a valid parol contract, it was held, where the agent of the company agreed by parol with the plaintiff to purchase of him a quantity of railway sleepers upon certain terms, the sleepers being delivered and used by the company, that they were liable.[5]

*SECTION XVII.

Contract to Pay in the Stock of the Company.

1. Breach of such contract generally entitles the party to recover the nominal value of stock.
2. But if the party have not strictly performed, he can recover only market value.
3. Cash portion overpaid will only reduce stock portion dollar for dollar.

n. 2. Lawful incumbrance on company's property will not excuse contractor from accepting stock.

§ 121. 1. In many contracts for construction, the whole or a portion of the price is stipulated to be paid in the stock of the company, as the work progresses, at certain stages, or when it is completed. The time, place, and mode of payment in such cases will be the same ordinarily as in other contracts for payment of stock. If the company refuse or neglect to deliver the stock or the proper certificates when it becomes due, upon proper request or opportunity, they are generally liable, it is considered, as in other cases of failure to perform contracts, for a certain amount or value, in collateral articles expressed in currency.[1]

cused the plaintiff from delivering or tendering the remainder of the iron, until the company should tender notes, and entitled plaintiff to sue presently.

[4] Statute 8 & 9 Vict. c. 16.

[5] Paulding *v.* London & Northwestern Railway Co., 8 Exch. 867; s. c. 22 Eng. L. & Eq. 560. The contract was made by the engineer's clerk, who was also clerk of the company, but there was evidence of the assent of the committee. Lowe *v.* London & Northwestern Railway Co., 18 Q. B. 632; s. c. 14 Eng. L. & Eq. 18.

[1] Moore *v.* Hudson River Railroad Co., 12 Barb. 156. Here, where a portion of the price of construction was payable in stock, at par, within thirty days after the completion of the contract, it was held that the company was not bound to make any tender of the stock, as in case of contracts for specific articles,

2. But it was held, that where the plaintiff recovered a balance due on equitable grounds, and not on the ground of strict and full performance of the contract, he was precluded on like equitable grounds from recovering more for the stock portion of the contract than its market value at the commencement of the action.[2]

but that it was a payment in depreciated currency, and no tender was necessary. In *In re* Alexandra Park Co., 12 Jur. N. S. 482, where the contractor stipulated to accept a portion of his pay in stock, at the election of the company, it was held that he was not bound by such an election after the company was ordered to be wound up as insolvent, as the shares thereby became extinguished.

[2] Barker *v.* Troy & Rutland Railroad Co., 27 Vt. 766. In this case the court say: "If the defendants have, upon reasonable request, declined paying the amount due, in their stock, as stipulated, it would seem but reasonable they should pay the amount in money." See *supra*, § 38. But if the contractor perform extra work, he is entitled to recover for that, in money, on an implied promise, although by his contract he was to accept part of his pay in stock for all work done under the contract. Childs *v.* Somerset & Kennebec Railroad Co., 20 Law Rep. 561. In Cleveland & Pittsburg Railroad Co. *v.* Kelley, 5 Ohio St. 180, it is held, that where one fourth of the amount due the contractors is to be taken in the stock of the company, and the company refuses to deliver the stock on request, it is liable only for the market value of the stock at the time it should have been delivered. The court professes to base its opinion on the ground that in contracts of this character there is not understood to be any election reserved by the company to pay either in stock or in money, but that it is an absolute undertaking to deliver so much stock as shall, at its par value, be equal to one fourth the amount due the contractor. It is not clear how this relieves the question from the apparent violation of principle, in allowing the company to refuse to give certificates of its own stock, which it has contracted to do, and at the same time pay less than its par value. It is, in ordinary cases, equitable, no doubt, and always where the refusal is on the ground that nothing is due the contractor.

See also Boody *v.* Rutland & Burlington Railroad Co., 24 Vt. 660, where it was held that the company having given its creditors a mortgage on its road, after the contract with the plaintiff, did not excuse him from accepting the stipulated proportion of the payments in stock. Nor can the contractors, in such case, refuse to receive the stock, because the legislature, in the mean time, has altered the charter of the company, so as to increase the capital stock and debt of the company; nor because the company has voted not to pay interest on the stock in money, as it had before done, it not appearing that the value of the stock has been affected by either. Moore *v.* Hudson River Railroad Co., 12 Barb. 156. And where a company, in settlement with a contractor, agreed to pay him a certain amount, in stock or the bonds of the company, at his election, the company retaining the same as security for certain liabilities on account of the contractor, and gave the contractor a certificate of such stock, with an agreement endorsed, to exchange it for bonds, at

* 3. So, too, where the work is to be paid partly in stock and partly in money, if the money part be overpaid, even by doing a * portion of the work, which the party reserved the right to do in order to hasten the work, it will only reduce the stock payment * dollar for dollar, and not according to the market value of the stock at the time.[3]

SECTION XVIII.

Time and Mode of Payment.

1. No time specified, payment due only when work completed.
2. Stock payments must ordinarily be demanded.
3. But if company pay monthly, such usage qualifies contract.
4. Contract to build wall by cubic yard, implies measurement in the wall.

§ 122. 1. Where no time of payment is specified in terms in the written contract between the parties for the construction of a portion of a railway, it was held, that looking to the contract alone the contractor could not call for payment either of the cash or stock portion of the contract, until a complete performance of the contract on his part.[1] Or, upon the most favorable construction, until some distinct portion of the work, for which the contract fixed a specific price, was accomplished.[1]

2. In regard to the stock portion of the payments, a special demand was necessary before the contractor could maintain an action for it[1]

his election, and the certificates were then returned to them, as their indemnity, it was held that the company was bound to deliver the bonds, notwithstanding the treasurer had entered the shares in the books of the company as the property of the contractor, and they had in consequence been sold on execution against him. Jones *v.* Portsmouth & Concord Railroad Co., 32 N. H. 544. A contractor who agrees to take a portion of his pay in the bonds of the company, has no such interest in any question, in regard to their validity, as will prevent a court of equity from enjoining those of a county, which had been delivered to the company without a proper compliance with the conditions of the statute under which the subscription was made, the contractor having had knowledge of the facts from the first. Mercer County *v.* Pittsburgh & Erie Railroad Co., 27 Penn. St. 389.

[3] Jones *v.* Chamberlain, 30 Vt. 196.

[1] Boody *v.* Rutland & Burlington Railroad Co., 24 Vt. 660.

* 3. But where it appeared that the company were accustomed to make monthly payments to their contractors, upon the estimates of the engineer, at the end of each month, and that they had so dealt with the plaintiff, it was held that this must be considered the rule of payment under the contract, established by mutual consent and binding upon the parties.[1]

4. A contract to build "riprap" wall for fifty cents a cubic yard in the absence of proof of any general usage or uniform custom which could control the mode of measurement, was held to imply payment by the cubic yard after the wall was constructed.[2] (*a*)

SECTION XIX.

Remedy on Contracts for Railway Construction.

1. Recovery on general counts. | 2. Amount and proof governed by contract.

§ 123. 1. It is a familiar principle of law applicable to contracts for the performance of work and labor, that if the work is done so that nothing more remains but payment, there is no necessity of declaring specially upon the contract, but the recovery may be had under the general counts; and it will make no difference in this respect that it was not done within the time prescribed by the contract, if the work has been accepted by the other party, or the time for performance extended by such party, or the work has been done upon some permanent property of the other party, as in the case of building a railway.[1] (*a*)

2. But ordinarily the contract will govern as to price and other incidents, so far as it can be traced. But where the party for whom the labor is performed wilfully hinders and obstructs the progress of the work, it has been held he was liable, as upon a *quantum meruit*.[1] But in such case the party must prove the per-

[2] Wood *v.* Vermont Central Railroad Co., 24 Vt. 608.

[1] Merrill *v.* Ithaca & Owego Railroad Co., 16 Wend. 586; s. c. 2 Am. Railw. Cas. 421.

(*a*) See Fish *v.* Wolfe, 50 Iowa, 636.

(*a*) What is a sufficient pleading of the performance of conditions. Sharpe *v.* San Paulo Railway Co., Law Rep. 8 Ch. Ap. 597; Clark *v.* White, 59 Ind. 435.

formance of the labor, by such proof as would be competent in an action on the special contract, and cannot treat the dealing as if it had been matter of account from the first.[1]

*SECTION XX.

Mechanic's Lien.

1, 2. Such lien cannot exist in regard to a railway.

n. (a) Matter now generally regulated by statutes giving liens.

§ 123 *a*. 1. It has been considered that although a public railway may come within the literal import of the terms used in a statute, to secure material-men and laborers, by what is denominated a mechanic's lien upon "buildings or other improvements," yet that the public have such an interest in public works of this character, that it cannot reasonably be presumed that such terms were intended to include the bridges and culverts upon the line of a public railway.[1] (*a*)

[1] Dunn *v*. North Missouri Railroad Co., 24 Mo. 493. See McAulay *v*. Western Vermont Railroad Co., 33 Vt. 311; s. c. 1 Redf. Am. Railw. Cas. 245.

(*a*) To like effect are Graham *v*. Mount Sterling Coalroad Co., 14 Bush, 425; Rutherfoord *v*. Cincinnati & Portsmouth Railroad Co., 35 Ohio St. 559, and other cases. But *contra*, Botsford *v*. New Haven, Middletown, & Willimantic Railroad Co., 41 Conn. 454. And the matter is now regulated in many of the states by statute, under which sub-contractors, laborers, &c. have a lien. For the persons for whom, and the circumstances under which liens on such property exist, and for the proceedings necessary under the various statutes to perfect and enforce them, see the statutes. But as to limitations, see Arbuckle *v*. Illinois Midland Railway Co., 81 Ill. 429; Cherry *v*. North & South Railroad Co., 65 Ga. 633. As to priorities between such liens, other incumbrances, subsequent purchasers, &c., see Removal Cases, 100 U. S. 457; Fox *v*. Seal, 22 Wal. 424; Brooks *v*. Railway Co., 101 U. S. 443; Pear *v*. Burlington, Cedar Rapids, & Minnesota Railway Co., 48 Iowa, 619; Shamokin Valley & Pottsville Railroad Co. *v*. Malone, 85 Penn. St. 25; Coe *v*. New Jersey Midland Railway Co., 31 N. J. Eq. 105; Tommey *v*. Spartanburg & Asheville Railroad Co., 7 Fed. Rep. 429; Tyrone & Clearfield Railway Co. *v*. Jones, 79 Penn. St. 60; Woods *v*. Pittsburg, Cincinnati, & St. Louis Railway Co., 3 Am. & Eng. Railw. Cas. 525. As to registration, &c., for purposes of notice, see Delaware Railroad Construction Co. *v*. Davenport & St. Paul Railway Co., 46 Iowa, 406;

2. The language of Scott, J., shows the ground of the decision. "Although railway companies in some respects resemble private corporations, yet as they are organized for the public benefit, the state takes a deep interest in them, and regards them as matters of public concern. The establishment of this railway is regarded as a public work established by public authority, intended for the public use and benefit." The learned judge argues, that such a lien to be effectual must be liable to defeat the object of the work, and therefore, and as the legislature have provided a specific remedy for laborers, it is not to be supposed that a mechanic's lien also exists in regard to the structures on the works.

SECTION XXI.

Remedies on behalf of Laborers and Sub-contractors.

1. Sub-contractors not bound by stipulations of contractor.
2. Laborers on public works have a claim against the company.
3. But a sub-contractor cannot maintain an action against the proprietor of the works, though his employés may.

§ 123 *b.* 1. A sub-contractor who has completed his work to the acceptance of the engineers appointed to pass upon its sufficiency, is entitled to recover of the contractor the sum retained upon his * estimates, as security for the completion of the work, notwithstanding any deficiency in the performance of the con-

Morgan *v.* Chicago & Alton Railroad Co., 76 Mo. 161; Boston *v.* Chesapeake, & Ohio Railroad Co., 12 Am. & Eng. Railw. Cas. 263; Hale *v.* Burlington, Cedar Rapids, & Northern Railway Co., 13 Fed. Rep. 203; Sampson *v.* Buffalo, New York, & Philadelphia Railway Co., 13 Hun, 280; Lyon *v.* New York & New England Railroad Co., 127 Mass. 101. As to liens of sub contractors, see Cairo & St. Louis Railroad Co. *v.* Watson, 85 Ill. 531; Same *v.* Canble, 4 Brad. 133; Rowland *v.* Centreville Railroad Co., 11 Am. & Eng. Railw. Cas. 47. The sub-contractor, like the laborer, has no lien for more than is due his immediate employer. Lumbard *v.* Syracuse, Binghamton, & New York Railroad Co., 55 N. Y. 491; Utter *v.* Crane, 37 Iowa, 631; Bottomley *v.* Port Huron & Northwestern Railway Co., 44 Mich. 542. As to the necessity for a settlement of the claim which is the foundation of the lien, or of notice to the owner, see Brooks *v.* Railway Co., 101 U. S. 443; Bundy *v.* Keokuk & DesMoines Railroad Co., 49 Iowa, 207; Railway Co. *v.* Cronin, 38 Ohio St. 122.

tractor, whereby he is himself unable to recover such deficiency of the company.[1]

2. By statute in many of the states, the workmen upon a railway, although in the employment of the contractor, have a claim for any arrears of wages, not exceeding a certain period, upon the company, and this provision has been held to extend equally to workmen employed by sub-contractors.[2] (*a*) And the provisions of this statute, being only a matter of general police, will be equally binding upon all railway companies, whether chartered before or after the passing of the statute.[2]

3. But the sub-contractor himself cannot pass by his immediate employers and maintain an action against the principal proprietor of the work.[3]

SECTION XXII.

Conditions in Charter and Election.

1. Such conditions must be performed, waived, or extended.
2. Company bound by its election.

§ 123 *c*. 1. There have commonly been some limitations annexed to the exercise of the powers conferred upon railway com-

[1] Blair *v*. Corby, 29 Mo. 480, 486.

[2] Grannahan *v*. Hannibal & St. Joseph Railroad Co., 30 Mo. 546. See also McCluskey *v*. Cromwell, 11 N. Y. 593; Kent *v*. New York Central Railroad Co., 12 N. Y. 628; Peters *v*. St. Louis & Iron Mountain Railroad Co., 23 Mo. 107.

[3] Branin *v*. Connecticut & Passumpsic Rivers Railroad Co., 31 Vt. 214; Lake Erie, Wabash, & St. Louis Railroad Co. *v*. Eckler, 13 Ind 67. See Boswell *v*. Townsend, 37 Barb. 205.

(*a*) And so now in many of the states they, as well as sub-contractors in certain cases, have a lien by statute. As to the grounds and incidents of such liens, see *supra*, § 122. But the laborer, like the sub-contractor, has no remedy against the company for more than is due from the company to his immediate employer. Utter *v*. Crane, 67 Iowa, 631; Lumbard *v*. Syracuse, Binghamton, & New York Railroad Co., 55 N. Y. 491; Bottomley *v*. Port Huron & Northwestern Railway Co., 44 Mich. 512. Engineers held not to be laborers. Peck *v*. Rush, 10 Am. & Eng. Railw. Cas. 612. And see Pennsylvania & Delaware Railroad Co. *v*. Leuffer, 81 Penn. St. 168. So of contractors and sub-contractors. Chicago & Northeastern Railroad Co. *v*. Sturgis, 44 Mich. 538. As to the rights of laborers against the company under

panies; as, that the building of the road should be begun before some prescribed day, and ordinarily a certain amount of money expended, and the road completed and in operation within some other prescribed time. These conditions must of course be fairly and justly complied with, or else the time extended by the legislature, which may be implied from an additional grant of power, as well as from an express statute for that specific purpose.[1] (*a*)

2. As a general rule the practical construction which the company give of its own charter, by the location and construction of its road, will be held binding upon the company. And where the company have an election or discretion as to the route on which it will build its road, its actual construction will be regarded as having exhausted such right, and it cannot thereafter adopt a new route, although coming within the terms of the charter as originally granted.[2]

[1] Foster *v.* Fitch, 36 Conn. 236.

[2] Morris & Essex Railroad Co. *v.* Central Railroad Co., 2 Vroom, 205; Cleveland & Pittsburgh Railroad Co. *v.* Speer, 56 Penn. St. 325.

the Mass. Statute of 1873, see Parker *v.* Massachusetts Railroad Co., 115 Mass. 580; Hart *v.* Boston, Revere Beach, & Lynn Railroad Co., 121 Mass. 510.

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(*a*) Performance by a lessee held insufficient. *In re* Brooklyn, Winfield, & Newtown Railway Co., 19 Hun, 314.

*CHAPTER XVI.

EXCESSIVE TOLLS, FARE, AND FREIGHT.

1. English companies sometimes created for maintaining road only.
2. Where excessive tolls taken may be recovered back.
3. So also may excessive fare and freight.
4. Under English statute, packed parcels must be rated in mass.
5. Nature of railway traffic requires unity of management and control.
6. Tolls on railways almost unknown in this country. Fare and freight often limited.
7. Guaranty of certain profit on investment lawful.
8. Restriction of freight to certain rate per ton extends to whole line.
9. Company, in suing for tolls due, need not describe them as such.
10. Mode of establishing tariff rates, and requisite proof.
11. Provision in a charter for payment of a certain tonnage to the state only a mode of taxation.
12. Where a company is allowed to take tolls on sections of its road, each section is a distinct work.
13, 14. Discussion of cases in New York in regard to the difference between fares taken in the cars and fares taken at the stations.
15. Fares fixed by statute are payable in legal tender notes.

§ 124. 1. By the English statutes, companies are created who own the railway, stations, &c., merely, and who are empowered to demand certain tolls of other persons, or companies, for the use of such road.

2. In such cases, if illegal tolls are demanded and paid, the excess may be recovered back, as money had and received, to the use of the person paying it, upon the general principles of law applicable to the subject of tolls and the demand and receipt of excessive tolls.[1] (*a*) Where the English statute[2] gave the company the right, where any person should fail to pay the toll due

[1] Fearnley *v.* Morley, 5 B. & C. 25. See also this subject very extensively examined in Centre Turnpike Co. *v.* Smith, 12 Vt. 212; *infra*, § 143. Tolls are a payment for passing along the line of the railway, and should be received with reference to the number of carriages passing. Simpson *v.* Denison, 10 Hare, 51; s. c. 13 Eng. L. & Eq. 359.

[2] Statute 8 & 9 Vict. c. 20, § 97.

(*a*) What are tolls. McKee *v.* Grand Rapids Railway Co., 41 Mich. 274.

upon any carriage, to detain and sell the same, it was held incumbent upon the company first to demand the sum due for toll, and that this was a condition precedent to the right to sell under the statute.[3] It was also considered here that a charge for transporting carriages back is not a toll, but something which may be compensated by special agreement between the parties; and if it be demanded as part of the * toll, being an illegal claim as such, it vitiates the entire demand and renders it illegal.

3. And the same rule has been extended to the recovery of money overpaid upon an exorbitant and illegal demand of freight or fare by railways. And the recovery may be had, although the person paying it did not tender any specific sum as due, and although a portion of the overcharge was on account of what was claimed to be due another company.[4]

4. And under the English statutes, packed parcels of the same class are required to be rated in mass.[5]

5. Most of the business upon public railways, in this country, and in England, at the present time, is almost of necessity transacted by the companies themselves. The very nature of the business seems to require absolute unity in the management and control of the traffic, and especially in this country, where a large proportion of the roads are operated upon a single track, requiring the utmost watchfulness and circumspection to avoid collisions. We suppose the idea of operating a railway with large traffic, in England, upon a single track, would be regarded as too glaring an absurdity to be seriously entertained, although they have some unimportant single track railways. But in this country it is rather the rule than the exception, and many of the continental railways in Europe have only a single track.

[3] Field *v.* Newport, Abergavenny, & Hereford Railway Co., 3 H. & N. 409.

[4] Parker *v.* Bristol & Exeter Railway Co., 6 Exch. 702; s. c. 6 Railw. Cas. 776. See also Snowden *v.* Davis, 1 Taunt. 359; Atlee *v.* Backhouse, 3 M. & W. 633; and Spry *v.* Emperor, 6 M. & W. 639, where the general subject is discussed. In Parker *v.* Great Western Railway Co., 3 Railw. Cas. 563, the very point is decided. Crouch *v.* London & Northwestern Railway Co., 2 Car. & K. 789; Crouch *v.* Great Northern Railway Co., 25 Eng. L. & Eq. 449.

[5] Parker *v.* Great Western Railway Co., 11 C. B. 545; s. c. 8 Eng. L. & Eq. 426. This subject of overcharge and the right to recover back the excess, is extensively discussed in this case, and in Edwards *v.* Great Western Railway Co., 11 C. B. 588; s. c. 8 Eng. L. & Eq. 447; Crouch *v.* Great Northern Railway Co., 9 Exch. 556; s. c. 25 Eng. L. & Eq. 449.

6. The matter of tolls upon railways is a thing almost unknown in this country, and very little practised anywhere at present. But the English special acts, and the American railway charters, very often fix the maximum of freight and fare which it shall be lawful for the company to receive, and if tolls are allowed to be taken of other companies or persons, these also are limited.

*7. A guaranty of a certain amount of profit to the company, by other companies, in consideration of the right to use the track of such company, is lawful.[6]

8. The restriction in the charter of the Camden & Amboy Railway of freight to eight cents per ton per mile, extends to the whole distance of the line of said company, although some of it is by water, and includes the auxiliary roads through New Brunswick and Trenton.[7]

9. In an action to recover tolls due to a railway it is not necessary to describe the dues as tolls. Any description which sufficiently identifies the nature of the service for which compensation is demanded, is all that is required.[8]

10. Freights upon a railway may be established by the directors, or by their agents; and their assent will be presumed, if nothing appear to the contrary.[8] And where the directors are required to establish freights, and they do establish a printed tariff, that is to be regarded as the original; and where copies of such tariff are required to be posted at the depots or stations of the company, that affords sufficient excuse for the absence of such copies to justify the admission of secondary evidence.[8]

11. A provision in the charter of a railway company that it shall pay a certain tonnage to the state upon all freight transported by

[6] Great Northern Railway Co. *v.* South Yorkshire Railway Co., 9 Exch. 642.

[7] Camden & Amboy Railroad Co. *v.* Briggs, 1 Zab. 406.

Where a company leased its line to another, at a certain rate, for all minerals, &c., transported, it was held, that the owners of minerals transported could not, by injunction, compel the lessees to transport minerals on the terms agreed with the other company, the latter being a rent merely, and not a rate of toll or freight. Finnie *v.* Glasgow & Southwestern Railway Co., 2 Macq. Ap. Cas. 177.

[8] Manchester & Lawrence Railway Co. *v.* Fisk, 33 N. H. 297. Where a railway company was limited by charter to a "toll not exceeding four cents per ton per mile on merchandise and two cents a mile on each passenger" it was held that the company might charge for transportation in addition to the toll. Boyle *v.* Philadelphia & Reading Railroad Co., 51 Penn. St. 310.

it, is only a mode of taxation, and is not in conflict with any provision of the United States Constitution securing to Congress the exclusive power of regulating commerce with foreign nations and among the states, and prohibiting the states, without the consent of Congress, from levying duties on imports and exports. The company, by accepting the charter containing such a provision, virtually made an express contract to perform it, and have no just cause of complaint, treating the provision either as a law or a contract.[9]

*12. And a provision in the charter of a railway company or other road company, that it may demand tolls upon any particular portion of its road as soon as completed and in operation, has been construed to create such portion a distinct public work, not liable to be affected by failure to complete the remainder of the work embraced in the same charter. But if the work is not done in a proper manner, that will be a cause of forfeiture not cured by the provision allowing tolls to be levied upon distinct portions of the entire line.[10] But it is here left in doubt whether such defect in construction will operate to forfeit the entire road or only those sections where such defects occur.

13. We have discussed the question of railway companies making a discrimination between fares paid in the cars and at their stations.[11] Under the New York statute, which allows of this discrimination only where the company keep their ticket office open, it was held the company could only make that discrimination in the cases specified in the statute, and not in other cases, even if the passenger took the cars after midnight, the company being required to keep the ticket office open only until nine o'clock, P. M.[12]

14. This question is still further discussed in a later case;[13] but the questions turned chiefly upon the construction of the statute in force there, requiring the company to keep all their ticket offices open one hour before the trains start, except between 9

[9] Pennsylvania Railroad Co. *v.* Commonwealth, 3 Grant Pa. 128. As to the right to tax shares in a corporation for county purposes, see Lycoming County *v.* Gamble, 47 Penn. St. 106.

[10] People *v.* Jackson & Michigan Plank-Road Co., 9 Mich. 285.

[11] *Supra*, § 28.

[12] Chase *v.* New York Central Railroad Co., 26 N. Y. 523.

[13] Nellis *v.* New York Central Railroad Co., 30 N. Y. 505.

P. M., and 5 A. M., when they are only required to do so at Utica and other principal offices, and which also enacts, that if any person shall, at any station where a ticket office is kept open, enter the cars as a passenger, without having first purchased a ticket, it shall be lawful for the company to require five cents extra fare of such person; and it was decided that the extra fare could only be demanded where the company kept a ticket office open. And it will make no difference that the passenger entered the cars at an hour when the ticket offices were required to be kept open, if such was not the fact. It was also held, that the company, by so demanding * and receiving the five cents extra fare when not entitled to receive it, became liable to the penalty of $50, under the statute, for taking more fare than allowed by law.

15. Where the company is restricted by statute to the charge of two cents fare per mile, that will not justify their demanding fares in gold, or its equivalent in currency. A fare is a debt, within the terms of the act of Congress creating the legal tender notes, and is payable in that currency, as much as any other debt.[14]

[14] Lewis *v.* New York Central Railroad Co., 49 Barb. 330.

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PART V.

THE LAW OF LIABILITY FOR FIRES; INJURIES TO DOMESTIC ANIMALS; FENCES.

PART V.

THE LAW OF LIABILITY FOR FIRES; INJURIES TO DOMESTIC ANIMALS; FENCES.

*CHAPTER XVII.

LIABILITY FOR FIRES, COMMUNICATED BY COMPANY'S ENGINES.

1, 3. Fact that fires are communicated evidence of negligence.
2. This was at one time questioned in England.
4. English companies feel bound to use precautions against fire.
5. Rule of evidence, in this country, more favorable to companies.
6. But the company is liable for damage by fire caused by want of care on its part.
7. One is not precluded from recovery, by placing buildings in an exposed situation.
8. Where insurer pays damages on insured property, he may have action against company.
9. Where company made liable for injury to all property, it is allowed to insure.
10. Construction of statutes making companies liable for loss by fires.
11. Extent of responsibility of insurer of goods, to company.
12. Construction of statute as to engines which do not consume smoke.
13. Construction of Massachusetts statute and mode of trial.
14, 15. For what acts railway companies may become responsible without any actual negligence.
16, 17. Companies, when responsible for fires resulting from other fires caused by them. Late cases not sound.

§ 125. 1. In the English courts it seems to have been settled, as early as the year 1846,[1] upon great consideration, that the fact of premises being fired by sparks emitted from a passing engine is *prima facie* evidence of negligence on the part of the company, rendering it incumbent upon them to show that some precautions

[1] Piggot *v.* Eastern Counties Railway Co , 3 C. B. 229; Lackawanna & Bloomsburg Railroad Co. *v.* Doak, 52 Penn. St. 379.

had been adopted by them reasonably calculated to prevent such accidents. (*a*)

2. In an earlier case, where the facts were reported by the judge at *Nisi Prius*, for the opinion of the full court, that a stack of beans near the track of the railway was fired and consumed by sparks from the company's engine, of the ordinary construction and used in the ordinary mode, the court said the facts reported did not show, necessarily, either negligence or no negligence. That was a question for the jury.[2]

3. But the court in the case of Piggot *v.* Eastern Counties Railway, went much further. TINDAL, C. J., said: "The defendants * are a company intrusted by the legislature with an agent of an extremely dangerous and unruly character, for their own private and particular advantage; and the law requires of them, that they shall, in the exercise of the rights and powers so conferred upon them, adopt such precautions as may reasonably prevent damage to the property of third persons, through or near which their railway passes. The evidence in this case was abundantly sufficient to show that the injury of which the plaintiff complains was caused by the emission of sparks or particles of ignited coke, coming from one of the defendants' engines; and there was no proof of any precaution adopted by the company to avoid such a mischance. I therefore think the jury came to a right conclusion, in finding that the company were guilty of negligence, and that the injury complained of was the result of such negligence. There are many old authorities to sustain this view; for instance, the case of Mitchil *v.* Alestree, 1 Vent. 295, for an injury resulting to the plaintiff from the defendant's riding an unruly horse in Lincoln's Inn Fields; that of Bayntine *v.* Sharp, 1 Lutw. 90, for permitting a mad bull to be at large; and that of Smith *v.* Pelah, 2 Stra.

[2] Aldridge *v.* Great Western Railway Co., 3 M. & G. 515; 2 Railw. Cas. 852.

(*a*) In Massachusetts, under Gen. Sts. c. 63, § 101, a lessee company is liable for injuries from fires caused by its engines. Davis *v.* Providence & Worcester Railroad Co., 121 Mass. 134. So in Maine under Rev. Sts. c. 51, § 38, the lessor is liable. In Pittsburg, Cincinnati, & St. Louis Railway Co. *v.* Campbell, 86 Ill. 443, a lessee was held liable for negligence of its licensee. An action may be maintained against several defendants and a recovery had of such as are found liable. Indianapolis & St. Louis Railroad Co. *v.* Hackenthal, 72 Ill. 612.

For destruction of a meadow by fire, the measure of damages is the cost of restoration. Vermilya *v.* Chicago, Milwaukee, & St. Paul Railroad Co., 23 Am. & Eng. Railw. Cas. 108.

1264, for allowing a dog known to be accustomed to bite to go about unmuzzled. The precautions suggested by the witnesses called for the plaintiff in this case, may be compared to the muzzle in the case last referred to. The case of Beaulieu *v.* Finglam, in the Year-Books, P. 2, H. 4, fol. 18, pl. 5, comes near to this. There, the defendant was charged, in case, for so negligently keeping his fire as to occasion the destruction of the plaintiff's property adjoining. The duty there alleged was, — '*quare cum secundum legem et consuetudinem regni nostri Angliæ hactenus obtentam, quod quilibet de eodem regno ignem suum salvò et securè custodiat, et custodire teneatur, ne per ignem suum damnum aliquod vicinis suis eveniat.*' "

4. The principle of this case seems to have been acquiesced in by the railways in England,[3] and such precautions used, as * to secure the engines against emitting sparks. In this last case it was held proper evidence to go to the jury that the company's engines had before, in passing along the line, emitted sparks a sufficient distance to have done the injury in the present case, as a means of ascertaining the possibility of the building being fired in the manner alleged. The testimony in this case showed, that the danger of emitting sparks is very much increased by overtasking the engine, and that it may be altogether avoided by shutting off the steam in passing a place where there is danger from sparks, or that the danger may be guarded against by mechanical precautions. The subject has been a great deal discussed in more recent English cases.[4] In this case it was held by Bramwell, B., at the

[3] Hammon *v.* Southeastern Railway Co., Maidstone Spring Assizes, 1845, before Lord Denman, C. J., for the destruction of farm buildings, including a thatched barn, by sparks emitted from the defendants' engines in passing along the line of the railway. There was evidence that the fire was so caused, and that defendants' engines had no wire guard, or perforated plate, to prevent the escape of the sparks, although both were in use before that time. There was evidence that it was principally where the engines were overtasked that they were liable to emit sparks. His Lordship directed the jury that it lay upon the plaintiff to establish negligence; that they were to consider that the plaintiff might have saved all hazard by tiling his barn, and also whether the train was driven too fast. The plaintiff had a verdict, and the court subsequently refused a new trial. Taylor *v.* Southeastern Railway Co. was tried at same term, with similar proof and the same result. Walf. Railw. 183, 184, and notes. See also Lackawanna & Bloomsburg Railway Co. *v.* Doak, 52 Penn. St. 379, where the same rule is adopted.

[4] Vaughan *v.* Taff-Vale Railway Co., 3 H. & N. 743; s. c. 5 H. & N. 679;

jury trial, and his views seem to have been sustained by the Court of Exchequer, that the mere fact of the company using fire as a means of locomotion, from which occasional fires will be communicated, even with the utmost care to prevent it, made them responsible for damage caused thereby. But in the Exchequer Chamber the judges seem to have been agreed, that the legislature having legalized this mode of locomotion, it could not subject the company, while pursuing a legal business in a legal mode, to damage thereby caused to others, unless through some degree of neglect. If the company resort to all known precautions against fire, they are not liable.

5. But in this country it must be confessed the rule of the liability of railways for damage done by fire communicated by their engines, is more favorable to the companies than in England. It seems to have been assumed, in this country, that the business of railways being lawful, no presumption of negligence arises from the fact of fire being communicated by their engines.[5] (*b*) * But

s. c. 6 Jur. N. S. 899. See also, King *v.* Pease, 4 B. & Ad. 30, on the authority of which the preceding case was decided in Exchequer Chamber. In reference to the decision in the Court of Exchequer, it was said in a previous edition of this book that it was going further than any just principle would allow, unless the defendant's business was regarded as unlawful. *Infra*, pl. 14, 15, and note. The doctrine of the first two cases cited in this note is approved in Hammersmith Railway Co. *v.* Brand, Law Rep. 4 H. L. 171. The New York Court of Appeals, in Steinweg *v.* Erie Railway Co., 43 N. Y. 123, hold, that railway companies, as common carriers, are bound to have such vehicles and machinery for the transportation of goods as the improvements known to practical men and tested by practical use may suggest, but not to take every possible precaution which the highest scientific skill might suggest, nor to adopt any mere speculative and untried improvement.

[5] Rood *v.* New York & Erie Railway Co., 18 Barb. 80; Lyman *v.* Boston & Worcester Railroad Co., 4 Cush. 288; Burroughs *v.* Housatonic Railroad Co., 15 Conn. 124. In this case the court compares the injury to that of fire communicated by sparks from the chimney of a dwelling-house. Where the statute requires the company to show that the fire occurred "without any negligence on their part," it is sufficient to show that its engines were properly constructed, in good order, and had the usual apparatus for preventing the escape of sparks, and were managed by discreet persons. Baltimore & Susquehanna Railroad Co. *v.* Woodruff, 4 Md. 242.

(*b*) To that effect are Philadelphia & Reading Railroad Co. *v.* Yerger, 73 Penn. St. 121; Toledo, Peoria, & Warsaw Railway Co. *v.* Parker, 73 Ill. 526; McCaig *v.* Erie Railway Co., 8 Hun, 599; Ruffner *v.* Cincinnati, Hamilton, & Dayton Railroad Co , 34 Ohio St. 96; Babcock *v.* Chicago & Northwest-

after other probable modes of accounting for the fire have been disproved, the onus is on the company to prove that the fire was not communicated by the engines of their train passing at the time.[6]

6. In this country it has been held, that proof that sparks have upon other occasions been emitted and caused fires along the line of the road, is not admissible, either to show that defendants' engine caused the damage, or to rebut defendants' proof of care and diligence in using their engines.[7] But the testimony seems to have been received in other cases.[8] (*c*) All the cases upon this subject hold railways bound to the exercise of care, skill, and diligence, to prevent fires being communicated in this mode, and make them liable in case of damage through their negligence.[9] (*d*)

[6] Sheldon *v.* Hudson River Railroad Co., 14 N. Y. 218.

[7] Baltimore & Susquehannah Railroad Co. *v.* Woodruff, 4 Md. 242; *infra*, pl. 13.

[8] McCready *v.* South Carolina Railroad Co., 2 Strob. 356; Sheldon *v.* Hudson River Railroad Co., 14 N. Y. 218; s. c. 29 Barb. 226.

[9] Burroughs *v.* Housatonic Railroad Co. 15 Conn. 124; Huyett *v.* Philadelphia & Reading Railroad Co., 23 Penn. St. 373. The jury are to determine the question of negligence. Id. The company is bound to use more care in regard to fires in a very dry time, or where property is very much exposed. Id. But if there is no restriction on the company in that respect, it may place its track and stations in such proximity to other structures as it deems essential to its own interests and the public good, and it is not responsible for fires caused by its engines except through neglect of known and necessary precautions. Turnpike Co. *v.* Philadelphia & Trenton Railroad Co., 54 Penn. St. 345. The duty of railway companies in using precautions against communicating fires by its engines is here extensively discussed, and the rule laid down, that the most approved precautions and those in most extensive use must be resorted to, and that the engines must be so used and guarded as not ordinarily to emit sparks,

ern Railway Co., 11 Am. & Eng. Railw. Cas. 63; Palmer *v.* Missouri Pacific Railway Co., 76 Mo 217; Gulf, Colorado, & Santa Fe Railway Co. *v.* Holt, 11 Am. & Eng. Railw. Cas. 72. But *contra*, and in accordance with the English rule stated *supra*, pl. 1, the cases are somewhat numerous. Burke *v.* Louisville & Nashville Railroad Co., 7 Heisk. Tenn. 451; Simpson *v.* East Tennessee, Virginia, & Georgia Railroad Co., 5, Lea Tenn., 456; Spaulding *v.* Chicago & Northwestern Railway Co., 33 Wis. 582; Longabaugh *v.* Virginia City & Truckee Railroad Co., 9 Nev. 271; Coale *v.* Hannibal & St. Joseph Railroad Co., 60 Mo. 227; Brown *v.* Atlanta & Charlotte Railroad Co., 19 S. C. 39; Pennsylvania Railroad Co. *v.* Watson, 81½ Penn. St. 293.

(*c*) In Missouri Pacific Railway Co. *v.* Kincaid, 11 Am. & Eng. Railw. Cas. 83, it was held that negligence might be inferred from the frequent setting of fires.

(*d*) But for a purely accidental fire caused by the escape of sparks from an engine, a company in the usual

7. And one is not precluded from recovery in such cases, by having placed his buildings or other property in an exposed posi-

in such a manner as to endanger the structures near the line of the road. The care and caution must be in proportion to the peril. If a railway track is laid so near the plaintiff's barn as to render it useless for the ordinary purpose he may recover of the company damages under the statute for the injury. Wilmington & Reading Railroad Co. *v.* Stauffer, 60 Penn. St. 374.

and ordinary performance of its business is not liable. Leavenworth, Lawrence, & Galveston Railroad Co. *v.* Cook, 18 Kan. 261; Toledo, Wabash, & Western Railway Co. *v.* Larmon, 67 Ill. 68; Philadelphia & Reading Railroad Co. *v.* Schultz, 93 Penn. St. 341; Morris & Essex Railroad Co. *v.* State, 36 N. J. Law, 553; Collins *v.* New York Central & Hudson River Railroad Co., 5 Hun, 503; Chicago & Alton Railroad Co. *v.* Smith, 11 Brad. 348. The company is bound, however, to use the best known appliances for preventing the escape of fire. Longabaugh *v.* Virginia City & Truckee Railroad Co., 9 Nev. 271; Pittsburg, Cincinnati, & St. Louis Railroad Co. *v.* Nelson, 51 Ind. 150; Jackson *v.* Chicago & Northwestern Railway Co., 31 Iowa, 176. And bound also to use reasonable precautions to prevent the spread of fire from winds usual at time and place. Palmer *v.* Missouri Pacific Railway Co., 76 Mo. 217. Or from its own grounds to the lands of an adjoining owner. Kenney *v.* Hannibal & St. Joseph Railroad Co., 63 Mo. 99.

The cases declaring what is and what is not negligence are numerous. It is not necessarily negligence to permit dry grass and weeds to remain in the right of way. Perry *v.* Southern Pacific Railroad Co., 50 Cal. 578; Burlington & Missouri River Railroad Co. *v.* Westover, 4 Neb. 268. Nor can it be said as matter of law that it is *not* negligence, where the road runs through a prairie country, and its roadbed is covered with wild grass. Sibilrud *v.* Minneapolis & St. Louis Railway Co., 29 Minn. 58. It may be negligence in some cases to allow the accumulation of combustible matter, whether grass or other matter. Delaware, Lackawanna, & Western Railroad Co. *v.* Salmon, 39 N. J. Law, 299; Pittsburg, Cincinnati, & St. Louis Railroad Co. *v.* Nelson, 51 Ind. 150; Troxler *v.* Richmond & Danville Railroad Co., 74 N. C. 377. See Jones *v.* Michigan Central Railroad Co., 25 Am. & Eng. Railw. Cas. 482. It is for the jury to say in the light of all the circumstances whether the company has permitted such an accumulation as would not be permitted by a prudent man in the management of his own affairs. Snyder *v.* Pittsburg, Cincinnati, & St. Louis Railroad Co., 11 W. Va. 14. To throw burning brands from an engine into inflammable grass is negligence. Mobile & Ohio Railroad Co. *v.* Gray, 62 Miss. 383.

Negligence must be, when and how pleaded. Pittsburg, Cincinnati & St. Louis Railroad Co. *v.* Culver, 60 Ind. 469; Same *v.* Hixon, 79 Ind. 111; Louisville, New Albany, & Chicago Railway Co. *v.* Spenn, 87 Ind. 322; Same *v.* Ehlert, 87 Ind. 339; Same *v.* Hanmann, 87 Ind. 422. As to the averments necessary, see Toledo, Wabash, & Western Railway Co. *v.* Wand, 48 Ind. 476; Same *v.* Corn, 71 Ill. 493; Pittsburg, Cincinnati, & St. Louis Railroad Co. *v.* Nelson, 51 Ind. 150; Erie Railway Co. *v.* Decker, 78 Penn.

tion.[10] (*e*) We cannot forbear to add that the interference of the legislatures, upon this subject, in many of the American states,

[10] Cook *v.* Champlain Transportation Co., 1 Denio, 91, 99, 101. One is not precluded from recovering in such cases by reason of having left dry grass and stubble on his land adjoining the railway to which the fire was first communicated. Flynn *v.* San Francisco & St. Joseph Railroad Co., 40 Cal. 14. But in Chicago & Northwestern Railway Co. *v.* Simonson, 54 Ill. 501, where the fire was communicated through dry grass and weeds suffered to accumulate on plaintiff's land next the railway, it was held that he could not recover. The true test in such cases would seem to be, whether or not a careful man would have removed the combustible matter, if he had owned both the land and the railway. But in Kellogg *v.* Chicago & Northwestern Railway Co., 26 Wis. 223, the court seem to think it is not negligence in the land-owner to suffer such combustible matter to accumulate on his land next the line of the railway, but that it may be so for the company to suffer the same on its own land. But in Ohio & Mississippi Railroad Co. *v.* Shanefelt, 47 Ill. 497, it was held not to amount to negligence, *per se*, in the railway. And in Kesee *v.* Chicago & Northwestern Railway Co., 30 Iowa, 78, where plaintiff's hay in stack, on his own land, half a mile from the line of the railway, was set on fire by a spark

St. 293. Negligence may be proved in the case of the emission of sparks from an engine by proof of circumstances which might not be satisfactory in cases free from the difficulties which inhere in such cases, and open to clearer proofs. Garrett *v.* Chicago & Northwestern Railway Co., 36 Iowa, 121. And see Philadelphia & Reading Railroad Co. *v.* Hendrickson, 8 Penn. St. 182; Atchison, Topeka, & Santa Fe Railroad Co. *v.* Bales, 16 Kan. 252. Proof of other fires and the emission of sparks on other occasions or by other like engines. Pittsburg, Cincinnati, & St. Louis Railroad Co. *v.* Noel, 77 Ind. 110; Atchison, Topeka, & Santa Fe Railroad Co. *v.* Stanford, 12 Kan. 354; Henry *v.* Southern Pacific Railroad Co., 50 Cal. 176; Crist *v.* Erie Railway Co., 58 N. Y. 638; Nashville & Chattánooga Railroad Co. *v.* Tyne, 7 Am. & Eng. Railw. Cas. 515; Philadelphia & Reading Railroad Co. *v.* Schultz, 93 Penn. St. 341; Annapolis & Elk Ridge Railroad Co. *v.* Gantt, 39 Md. 115; Grand Trunk Railway Co. *v.* Richardson, 91 U. S. 454; Loring *v.* Worcester & Nashua Railroad Co., 131 Mass. 469. But see Coale *v.* Hannibal & St. Joseph Railroad Co., 60 Mo. 227; Lester *v.* Kansas City, St. Joseph, & Council Bluffs Railroad Co., 60 Mo. 265; Albert *v.* Northern Central Railroad Co., 98 Penn. St. 316. Proof that the same locomotive on the same trip and about the same time set other fires is admissible. Patton *v.* St. Louis & San Francisco Railroad Co., 23 Am. & Eng. Railw. Cas. 361; Lanning *v.* Chicago, Burlington, & Quincy Railroad Co., 25 Am. & Eng. Railw. Cas. 490. Other facts from which negligence may be inferred. Wiley *v.* West Jersey Railroad Co., 41 N. J. Law, 247; Reading & Columbia Railroad Co. *v.* Latshaw, 93 Penn. St. 449; Baltimore & Ohio Railroad Co. *v.* Shipley, 39 Md. 251; Karsen *v.* Milwaukee & St. Paul Railway Co., 29 Minn. 12; Brusberg *v.* Milwaukee, Lake Shore, & Western Railway Co., 55 Wis. 106.

(*e*) The cases which declare what

seems to us an indication of the public sense, in favor of placing the risk in such cases upon the party in whose power it lies most to prevent such injuries occurring. There seems to us both justice and policy in the English rule upon the subject. And in a somewhat recent case,[11] it was held, in actions against railway companies for damages caused by fires communicated by coals upon the track, just after the passing of a train, that it was competent * to show that the company's locomotives, in passing over

from defendants' engine, it was held he could not recover, if his negligence in not protecting his stack contributed to the loss. The court below charged the jury, that if the plaintiff stacked his hay in an imprudent manner he took the risk of accidental fires, but not of those caused by the defendants' carelessness. This may be the better rule in such a case.

[11] Field *v.* New York Central Railroad Co., 32 N. Y. 339.

is and what is not contributory negligence are numerous. It has been many times held that the owner of adjoining land is not bound to keep it free from leaves and other combustible material. Delaware, Lackawanna, & Western Railroad Co. *v.* Salmon, 39 N. J. Law, 299; Philadelphia & Reading Railroad Co. *v.* Schultz, 93 Penn. St. 341; Pittsburg, Cincinnati, & St. Louis Railway Co. *v.* Jones, 86 Ind. 496; Richmond & Danville Railroad Co. *v.* Medley, 75 Va. 499. Leaving a roof in disrepair is not contributory negligence. Philadelphia & Reading Railroad Co. *v.* Hendrickson, 8 Penn. St. 182. Not necessarily negligence to fail to plow around stacks. Lindsay *v.* Winona & St. Peter Railroad Co., 29 Minn. 411; Kansas City, Fort Scott, & Gulf Railroad Co. *v.* Owen, 25 Kan. 419; Burlington & Missouri River Railroad Co. *v.* Westover, 4 Neb. 268. Nor, it seems, to leave a window open so that sparks may fly in. Louisville, New Albany, & Chicago Railway Co. *v.* Richardson, 66 Ind. 43. Nor not to remove a building near the track where the road is built at such a distance that it is not likely to burn the building. Caswell *v.* Chicago & Northwestern Railway Co., 42 Wis. 193. But where one erects a building near a track he is presumed to assume some risk, and is bound to a higher degree of care than the owner of less exposed property. Chicago & Alton Railroad Co. *v.* Pennell, 94 Ill. 448. And see Kansas City, Fort Scott, & Gulf Railroad Co. *v.* Owen, 25 Kan. 419. Contributory negligence may, of course, consist in not trying to save burning property. Chicago & Alton Railroad Co. *v.* Pennell, 94 Ill. 448. But the owner is not bound to use extraordinary means. Bevier *v.* Delaware & Hudson Canal Co., 13 Hun, 254. A party cannot be charged with negligence for not doing that which if done would afford no protection. Lewis *v.* Chicago, Milwaukee, & St. Paul Railroad Co., 57 Iowa, 127. The question of contributory negligence is for the jury. Murphy *v.* Chicago & Northwestern Railway Co., 45 Wis. 222; Collins *v.* New York Central & Hudson River Railroad Co., 71 N. Y. 609; Missouri Pacific Railway Co. *v.* Cornell, 11 Am. & Eng. Railw. Cas. 56.

the road on former occasions, dropped coals upon the track at or near the same place; and also, where it was in evidence that engines properly constructed and in good order will not drop coals upon the track, that the fact of defendants' engines doing so is, in itself, evidence of negligence sufficient to charge the defendants, thus imposing upon them the burden of showing that they were not culpable.

8. And where the railway companies are made liable for all damage in this way, as they are in Massachusetts and some of the other states by statute, if one whose property is insured suffer loss in this way, and the insurers pay him his entire loss, they may recover in his name against the company.[12] (*f*) And the insurer may recover of the carrier in the name of the consignor, on whose behalf the policy was effected, after having paid the amount of the loss to the consignor.[13]

9. By statute in some of the states, as we have seen, railways are made liable for any injury to "buildings or other property of any person — by fire communicated" by their locomotive engines, and it is sometimes specially provided that railways shall have an

[12] Hart *v.* Western Railroad Co., 13 Met. 99. And under such a statute, where the sparks from the engine communicated fire to a shop, and the wind drove the sparks from the shop sixty feet across the street, and set fire to a house, it was held that the second fire must be regarded as "communicated" by the company's engine. Id. But see *infra*, pl. 16.

In a contract of insurance in favor of a railway company, on "cars of all descriptions . . . on the line of their road and in actual use," where, in answer to the inquiry, "where the property was situated," the company replied "from Boston to Fitchburg and branches this side of Fitchburg;" and the cars of the plaintiff's company loaded with ice, standing on a track belonging to the proprietors of a wharf where the ice was unloaded, but communicating with the track of the road, were burned by a fire communicated from the wharf, it was held to come within the contract, and the insurance company was held liable. Fitchburg Railroad Co. *v.* Charlestown Mutual Insurance Co., 7 Gray, 61.

[13] Burnside *v.* Union Steamboat Co., 10 Rich. 113; Garrison *v.* Memphis Insurance Co., 19 How. 312. See also Hall *v.* Nashville & Chattanooga Railway Co., 13 Wal. 367, where the rule laid down in the text is declared to be the settled law, and the cases are cited by Mr. Justice Strong.

(*f*) Ætna Insurance Co. *v.* Hannibal & St. Joseph Railroad Co., 3 Dil. 1; Kentucky Insurance Co *v.* Western & Atlantic Railroad Co., 8 Baxter Tenn. 268; Connecticut Fire Insurance Co. *v.* Erie Railway Co., 73 N. Y. 399; Swarthout *v.* Chicago & Northwestern Railway Co., 49 Wis. 625. See Cunningham *v.* Evansville & Terre Haute Railroad Co, 102 Ind. 478.

insurable interest in such property. But it has been held that such statutory liability only extends to property of a permanent nature, and upon which an insurance may be effected; and that for injuries of this kind to other property the * company will only be responsible for negligence, unskilfulness, or imprudence in running and conducting their engines.[14]

10. And where by statute railway companies are made liable for all damages caused to property so near the road as to be exposed to fire from their engines, it was held to extend to all property subject to insurance, and to include growing trees.[15]

11. Many of the English railway companies make it a condition that certain goods shall be insured and declared, or else they will not be responsible for any loss which may occur in regard to them. Such a condition seems reasonable, and it is so treated by the English courts. But to be any protection to the companies it must assume that the insurers are bound to make good any loss, as well for the benefit of the assured as for that of the company, and that the company are not responsible to the insurer unless perhaps for neglect of duty as a faithful bailee.[16] But to produce this result, the policy should specify that the insurance is for the benefit of the company as well as the owners. Strictly speaking there is no privity, in case of insurance against fire, except as to the immediate parties to the risk, and to give any other party not named in the policy the benefit of the insurance is an equitable extension, and one which the courts have declined to make sometimes, as between mortgagor and mortgagee.[17] But where the insurer pays the insurance, on the destruction of the property, it

[14] Chapman *v.* Atlantic & St. Lawrence Railroad Co., 37 Me. 92. This was an action for the loss of cedar posts, piled on land adjoining the railway, by the consent of the owner of the land, and set on fire by a spark from the defendant's engine, and the defendant was held not liable under the statute. Where an action is brought against a railway company for damage done by fire from its engines, in states where it is made responsible for such damage in all cases, it will be no defence, that in estimating damages to plaintiff's grantor damage by fire from company's engines was included. *Quære*, whether if plaintiff had been the owner of the land, at the time damage was so assessed, it would have afforded any defence? Pierce *v.* Worcester & Nashua Railroad Co., 105 Mass. 199; *infra*, pl. 13, and note.

[15] Pratt *v.* Atlantic & St. Lawrence Railroad Co., 42 Me. 579.

[16] Peck *v.* North Staffordshire Railway Co., Ellis, B. & E. 956.

[17] Columbia Insurance Co. *v.* Lawrence, 10 Pet. 507, 512, *per* STORY, J.; White *v.* Brown, 2 Cush. 412.

has been held that he will be subrogated to any claim the party insured might have against other parties,[18] unless that is excluded by the terms of the policy.

12. The English statute[19] subjects railway companies to a penalty for each day they use an engine upon their roads so constructed as not to consume its own smoke. But it has been held that this only refers to the construction of the engine when under proper management, and that the penalty is not incurred * by an engine emitting smoke instead of consuming it in consequence of bad management and not of defective construction.[20]

13. The Massachusetts statute, making railway companies responsible for loss by fire communicated by their engines, and giving them an insurable interest in the property exposed to fire in that mode, was held to embrace personal property, although the company had no knowledge or reasonable cause to believe that such property was situated where it might be so injured.[21](*g*) And in the trial of an action for such injury, where it was claimed that no burning sparks could reach far enough to communicate the fire, it is competent to show that the same engine using similiar fuel emitted sparks reaching a greater distance.[21] And where it was attempted to show that similar engines did not on other roads emit sparks reaching that distance, it is competent to prove that such engines on other roads have emitted sparks which did communicate fire at that distance.[21] In such an action, where the question of plaintiff's want of due care depends upon the consideration of the dryness of the season, the strength and direction of the wind, and the condition of the plaintiff's buildings, it is proper to submit to the jury, under general instructions, whether the plaintiff exercised due care or not, and if this is done no exception

[18] Sussex County Mutual Insurance Co. *v.* Woodruff, 2 Dutcher, 541; *supra*, pl. 8, notes 12, 13.

[19] Statute 8 & 9 Vict. c. 20, § 114.

[20] Manchester, Sheffield, & Lincolnshire Railway Co. *v.* Wood, 29 Law J. 29; s. c. 1 Law T. n. s. 31; s. c. 2 Ellis & E. 344.

[21] Ross *v.* Boston & Worcester Railroad Co., 6 Allen, 87. The company should use precautions to prevent fire escaping from its engines or it will be responsible for consequences. Bass *v.* Chicago, Burlington, & Quincy Railroad Co., 28 Ill. 9.

(*g*) The liability of companies for fires, set by engines, is regulated in some of the states in some degree by statute, as in Maryland, New Jersey, Illinois, Iowa, Missouri, Minnesota, &c.

lies to a refusal to instruct the jury that "if the season was dry, and the wind was from the railway and strong, and the plaintiff knew those facts and left a door of a shed open towards the railway, and combustible materials within the shed, and that contributed to the fire, it is evidence of negligence on his part which should preclude his recovery." [21]

14. A question of considerable practical importance has been determined by the court of Exchequer Chamber in England, which may be thought sometimes to have a bearing upon the conduct of railways. The proposition there maintained is, that if a person bring on his own land any thing, which, if it escape, may prove injurious to his neighbor's property, such as a large body of water, he is liable to make compensation for any injury that may *accrue from its escape out of his land; and it is no excuse, if it do escape and cause damage to his neighbor, that the injury was caused without any default or negligence on his part.[22] And the question has been recently presented as applied to railways, in an English case,[23] where it was held, the defendant having obtained its charter in 1832, to enable it to remove minerals upon wagons and other carriages upon its railway or tramway, but having no parliamentary power to use steam locomotive engines, but had assumed to do so, in the transportation of passengers along its line, under permission from the Board of Trade, by reason of which the plaintiff's buildings along the line had been set on fire by sparks emitted from the engines, without proof of negligence on the part of the company, that it was responsible at common law without regard to the question of negligence, inasmuch as it had no legal right to use those engines in that place.

*15. The carefully considered judgment of the full court of Exchequer Chamber by BLACKBURN, J., contains many points *bearing upon questions which are liable to arise in the course of the construction and operation of railways, and we should have inserted it here but for want of space.[22] * The opinion points out very clearly for what matters railway companies *and others are or are not to be held responsible, if there is no actual negligence on their part.

*16. A question of considerable practical importance has been

[22] Fletcher *v.* Rylands, Law Rep. 1 Exch. 265; 12 Jur. N. S. 603; S. C. 11 Jur. N. S. 714, affirmed in House of Lords, 3 H. L. Cas. 338.

[23] Jones *v.* Festiniog Railway Co., Law Rep. 3 Q. B. 733.

somewhat discussed, in regard to the extent of the responsibility * of railway companies, or others, for fires communicated by the accidental extension of other fires, for which the party through negligence or otherwise is confessedly responsible. Upon principle, it would seem, that one who is the unintentional, but careless, cause of setting a fire, should not be held responsible for damage beyond the immediate, direct, and natural consequences of the original fire. There are numerous disastrous consequences resulting sometimes from setting fires, but which are so rare as not to be fairly reckoned in the category of natural or ordinary results, by way of cause and effect. A fireman may be fatally injured and a family beggared, or a horse may be frightened, and the fathers of more than one dependent family killed, or crippled for life, in consequence. But no actions have ever been instituted for any such remote damages. And although some of the cases bear a considerably close analogy to these in principle, it must, we think, be treated as the prevailing rule of law that such remote and consequential damages will not form the ground of an action in the courts. And in Ryan *v.* New York Central Railway,[24] it was held the defendants were not responsible for the destruction of the plaintiff's house, distant one hundred and thirty feet from their shed, which had been set on fire through their own negligent conduct in regard to one of their engines, or by reason of some defect in the engine, from which the fire had communicated to the plaintiff's house. This seems a misapplication of the rule.

17. The question discussed to some extent in the preceding paragraph is constantly attracting more and more attention from the courts in different classes of cases. The necessity of the defendant's act being the proximate cause of the damage in order to hold him responsible for it in an action at law, is by no means new. It is the real distinction between privity and want of privity in matters of contract. And the same principle holds in regard to torts, whether voluntary or negligent. The defendant can only be held responsible for the immediate consequences of his act or neglect, and not for any remote and incidental result, however certain it may be that the damage really did result from such act or neglect. The question is very ably discussed by Hunt, J., in the case of Ryan *v.* New York Central Railway;[24] and the

[24] 35 N. Y. 210. But see Trask *v.* Hartford & New Haven Railroad Co., 2 Allen, 331.

case of the Pennsylvania Railway *v.* Kerr[25] adopts the same view, and discusses the cases with great clearness and force, in an opinion of considerable length by THOMPSON, C. J. The learned judge refers to several other American cases[26] bearing in the same direction. The English cases bearing upon the question do not seem to have considered the distinction between proximate and remote causes, and some of them seem to have gone upon grounds somewhat in conflict with the opinion here expressed.[27] (*h*) But

[25] 27 Leg. Int. 228; s. c. 62 Penn. St. 353.

[26] Harrison *v.* Berkley, 1 Strob. 548; LOWRIE, J., in Morrison *v.* Davis, 8 Harris, Penn. St. 171.

[27] Smith *v.* London & Southwestern Railway Co., Law Rep. 5 C. P. 98; s. c. 18 W. R. 343; 19 W. R. 230. But see Burrows *v.* March Gas & Coke Co., Law Rep. 5 Exch. 67; 7 Exch. 96, where the question of excusing the party in fault for secondary consequences of his misconduct is somewhat restricted. And in Smith *v.* London & Southwestern Railway Co., Law Rep. 6 C. P. 14, the majority of the English judges seem to think one is responsible for the remotest direct and immediate consequences of his negligence, whether he could have foreseen them or not, and this seems reasonable. The Massachusetts Supreme Court, in a late case, adopts much the same rule. Perley *v.* Eastern Railroad Co., 98 Mass. 414. But see Barron *v.* Eldredge, 100 Mass. 455. And Hart *v.* Western Railroad Co., *supra*, note 12, is precisely the same. It would seem like a misapplication of the rule to excuse one, carelessly responsible for the consequences of setting a fire, for all the damage caused by the fire except the very first object burned, on the ground that all else is but a secondary consequence of the fire, and therefore too remote to form the ground of an action. We might as well argue that all the consequences of misconduct, except the very first, were to be borne by the sufferer without redress. As where one carelessly lets out water which floods a city, and destroys millions of property, it might be said the party in fault was only responsible for the loss of the water. The truth is that all the buildings or property burned by a fire are destroyed by the negligence of the party setting the first fire, as directly as the very first building. And any attempt to define one as the proximate result, and the others as merely the remote consequences of the fire, is but a misconception and misapplication of the rule of proximate and remote causes. But see Kesee *v.* Chicago & Northwestern Railway Co., 30 Iowa, 78. Since the foregoing was written an able and learned opinion of LAWRENCE, C. J., in Feut *v.* Toledo, Peoria, & Warsaw Railroad Co., 1 Redf. Am. Railw. Cas. 350, has come to hand. The learned judge, upon a full review of the cases, comes very decidedly to the opinion here expressed. Safford *v.* Boston & Maine Railroad Co., 103 Mass. 583, adopts the same view. In a late English Case, Lord Bailiffs *v.* Trinity House, Law Rep. 5 Exch. 204, 7 Exch. 247, where the defend-

(*h*) It has been held in several cases that the cause is not too remote where the fire first burns over the premises of an intermediate proprietor, the in-

we do not apprehend the English courts can finally extend the rule of damages, in such cases, beyond the immediate and direct consequences of the defendant's act or neglect, whatever that may be. The case last cited does not seem to fairly raise the question of proximate and remote consequences of tortious acts. The real gravamen of the neglect of duty on the part of the defendant seems to have been leaving mowed grass and other "rummage," as it is here called, on the sides of the track in small heaps for two weeks in very dry weather, thus exposed to be ignited by the

ant's vessel, owing to the negligence of the defendant's servants, struck on a sand-bank, and becoming from that cause unmanageable, was driven by wind and tide upon the plaintiff's sea-wall and damaged it, it was held, both in the Court of Exchequer and in the Exchequer Chamber, that the defendant was responsible. But where the plaintiff's store was burned by fire communicated from defendant's engine, not without fault, and a large sum of money therein, which the plaintiff might have saved without danger, had he not forgotten it in saving other property, was consumed, it was held that he could not recover for the money. Toledo, Peoria, & Warsaw Railroad Co. *v.* Pinder, 53 Ill. 417.

jury being the direct consequence of the firing. Henry *v.* Southern Pacific Railroad Co., 50 Cal. 176; Atchison, Topeka, & Santa Fe Railroad Co. *v.* Bales, 16 Kan. 252. And see Butcher *v.* Vaca Valley & Clear Lake Railroad Co., 22 Am. & Eng. Railw. Cas. 644. And it will make no difference that, having at first progressed slowly and burned but little during the night, it is on the next day carried a great distance by a high wind, such winds not being unusual. Poeppers *v.* Missouri, Kansas, & Texas Railway Co., 67 Mo. 715. But see Toledo, Wabash, & Western Railroad Co. *v.* Muthersbaugh, 71 Ill. 572, where it was held that the company was not liable for the burning of a building a hundred rods from one fired by the company's negligence, the fire having been communicated not by intermediate combustible material, but by a high wind. And see Kellogg *v.* Milwaukee & St. Paul Railway Co., 5 Dillon, 537. Nor will it make any difference that the damage is caused by a fire which is the union of two fires, each of which was set by the negligence of the company. Atchison, Topeka, & Santa Fe Railroad Co. *v.* Stanford, 12 Kan. 354. The question of distance seems to be of small moment. Burlington & Missouri River Railroad Co. *v.* Westover, 4 Neb. 268; Atchison, Topeka, & Santa Fe Railroad Co. *v.* Stanford, *supra*; Poeppers *v.* Missouri, Kansas, & Texas Railway Co., *supra*. Where the fire is not set directly to the property in question, but is the result of spreading, the question of whether the burning is the natural consequence, &c., is a question for the jury. Annapolis & Elk Ridge Railroad Co. *v.* Gantt, 39 Md. 115; Perry *v.* Southern Pacific Railroad Co., 50 Cal. 578; Lehigh Valley Railroad Co. *v.* McKeen, 90 Penn. St. 122. Fire set by sparks from an engine is *prima facie* the result of the company's negligence. Kenney *v.* Hannibal & St. Joseph Railroad Co., 70 Mo. 252.

sparks from the passing engines. The company had the right to use the engines, and there was no evidence that the company did not use every precaution that science had suggested to prevent injury so far as the use of the engines was concerned. The cause of the fire was the exposed state of such combustible matter; and when the fire occurred it was not a case where the burning of the cottage two hundred yards distant could be said to be only a remote consequence of the negligence; certainly not if "remote" is used in the sense of "secondary." If that were to be so held, no railway would ever be responsible for the consequences of a fire first kindled on its own land; for all fires springing from it would be too remote consequences of the first act to form the basis of an action.

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*CHAPTER XVIII.

INJURIES TO DOMESTIC ANIMALS.

1, 2. Company not liable unless bound to keep the animals off the track.
n. (a) Liability of lessor and lessee. Regulation by statute.
3. Company not liable where the animals were wrongfully abroad.
4. Not liable for injury to animals, on land where not bound to fence.
5. Where company bound to fence, *prima facie* liable for injury to cattle.
6. But if owner is in fault, company not liable.
7. In such case company liable only for gross neglect or wilful injury.
8. Owner cannot recover, if he suffer his cattle to go at large near a railway.
9. Company not liable in such case, unless they might have avoided the injury.
n. (g) Rate of speed considered as negligence *per se*.
10. Company required to keep gates closed, liable to any party injured by omission.
11. Independently of statute, company not bound to fence.
12, 17. Not liable for consequences of the proper use of its engines.
13. Questions of negligence ordinarily to be determined by jury.
n. (i) Questions of contributory negligence, what constitutes.
14. But only where the testimony leaves the question doubtful.
15. Actions may be maintained sometimes, for remote consequences of negligence.
16–18. Especially where a statutory duty is neglected by company.
19. Question of negligence is one for the jury.
20. One who suffers an animal to go at large can recover only for gross neglect.
21. Testimony of experts receivable as to management of engines.
22. One who suffers cattle to go at large must take the risk.
23. Company owes a primary duty to passengers, &c.
24. In Maryland company liable unless for unavoidable accident.
25. In Indiana common-law rule prevails.
26. In Missouri, rule modified by statute.
27. In California cattle may lawfully be suffered to go at large.
28, 29. Various decisions in Illinois.
30. Weight of evidence and of presumption.
31. Company not liable except for negligence.
32. Company must use all statutory and other precautions.
33. Not competent to prove negligence of the same kind on other occasions.
34. Rule of damages in general, value of animal, &c.

§ 126. 1. The decisions upon the subject of injuries to domestic animals by railways are very numerous, but may be reduced to comparatively few principles. Where the owner of the animals is unable to show that as against the railway they were properly upon the track, or, in other words, that it was through the fault of the company that they were enabled to come upon the road, the

company are not in general liable, unless, after they discovered the animals, they might, by the exercise of proper care and prudence, have prevented the injury. (*a*) * The fact of killing an

(*a*) The question of what company will be liable, whether lessor or lessee, has been settled in some of the states by statute, as in Indiana, where the lessee, operating the road in its own name, is alone liable. Pittsburg, Cincinnati, & St. Louis Railway Co. *v.* Hunt, 71 Ill. 229. And in California, where the lessor is liable for want of fences. Fontaine *v.* Southern Pacific Railroad Co., 54 Cal. 645. And in Iowa, where both lessor and lessee are liable for want of cattle-guards. Downing *v.* Chicago, Rock Island, & Pacific Railroad Co., 43 Iowa, 96. And in Missouri, where the lessee operating its trains with its own men is liable in double damages for want of fences. Farley *v.* St. Louis, Kansas City, & Northern Railway Co., 72 Mo. 338. And where, if a mere licensee is running a train, the owner of the road is liable for an accident, the result of a want of fence. Kansas City, Fort Scott, & Gulf Railroad Co. *v.* Ewing, 23 Kan. 273. In Indiana, by statute, the company is jointly and severally liable with contractors. Huey *v.* Indianapolis & Vincennes Railroad Co., 45 Ind. 320. As to roads operated by trustees or receivers, see Kansas Pacific Railway Co. *v.* Wood, 24 Kan. 619; Union Trust Co. *v.* Kendall, 20 Kan. 515; Indianapolis, Cincinnati, & Lafayette Railroad Co. *v.* Ray, 51 Ind. 269.

The liability of railroad companies for injuries to domestic animals is now fixed in numbers of the states by statute. So of practice in proceedings to enforce it. See *infra*, pl. 24, *et seq.* In Alabama the company is liable whenever the injury results from the negligence of its servants; no diligence will excuse the company when the injury occurs at a public road-crossing, or at any regular stopping-place, or because of an obstruction, unless the requirements of the statute have been complied with; and, injury being shown, the burden is on the company to prove no negligence or a compliance with the statute. Mobile & Ohio Railroad Co. *v.* Williams, 53 Ala. 595; South & North Alabama Railroad Co. *v.* Thompson, 62 Ala. 494. But see Zeigler *v.* South & North Alabama Railroad Co., 58 Ala. 594. The matter is regulated by statute in Colorado. See Atchison, Topeka, & Santa Fe Railroad Co. *v.* Lujan, 6 Col. 338. In Georgia the presumption of negligence is in all cases against the company. Georgia Railroad & Banking Co. *v.* Cox, 64 Ga. 619. In Iowa it is not necessary that the animal be actually struck. Krans *v.* Burlington, Cedar Rapids, & Northern Railway Co., 55 Iowa, 338. And liability may exist though the animal was running at large. Searles *v.* Milwaukee & St. Paul Railway Co., 35 Iowa, 490. What is "running at large." Hammond *v.* Chicago & Northwestern Railroad Co., 43 Iowa, 168; Welsh *v.* Chicago, Burlington, & Quincy Railroad Co., 53 Iowa, 632. In Kansas the matter has been regulated also, and the decisions on the liability of the company under the statute are numerous. See St. Joseph & Denver Railroad Co. *v.* Graver, 11 Kan. 302 Hopkins *v.* Kansas Pacific Railway Co., 18 Kan. 462; Atchison, Topeka, & Santa Fe Railroad Co. *v.* Edwards, 20 Kan. 531, Same *v.* Jones,

animal of value by the company's engines, is not *prima facie* evidence of negligence on their part.[1] (*b*) A distinction is here taken by the court between injuries to permanent property situated along the line of the railway, as injury to buildings by fires communicated by the company's engines, and damage to cattle which are constantly changing place, there being more evidence of fault on the part of the company from the mere occurrence of the injury in the former than in the latter case.[2]

[1] Scott *v.* Wilmington & Raleigh Railroad Co., 4 Jones, N. C. 432. To render the company *prima facie* responsible for damage done to cattle, it must appear that they came upon the track through defect of fences or cattle-guards, which as between the owner and the company it was the duty of the company to maintain. Cecil *v.* Pacific Railroad Co., 47 Mo. 216; Bellfontaine Railroad Co. *v.* Suman, 29 Ind. 40; Toledo Railroad Co. *v.* Wickery, 44 Ill. 76. A railway is bound to fence its track along the tow-path of a canal, abandoned as a thoroughfare. White Water Valley Railroad Co. *v.* Quick, 30 Ind. 381.

[2] See *supra*, note 1, and also Indianapolis & Cincinnati Railroad Co. *v.* Caldwell, 9 Ind. 397.

36 Kan. 527. The statute of 1874 is constitutional. Atchison & Nebraska Railroad Co. *v.* Harper, 19 Kan. 529; and see Kansas Pacific Railway Co. *v.* Mower, 16 Kan. 573. For the bearing of the herd law on the matter, see Kansas Pacific Railway Co. *v.* Wiggins, 24 Kan. 588; Same *v.* Landis, 24 Kan. 406; Union Pacific Railway Co. *v.* Dyche, 28 Kan. 200. In Tennessee an alarm must be sounded, and the brakes applied, when an animal appears on the track. Nashville & Chattanooga Railroad Co. *v.* Anthony, 1 Lea Tenn. 516. All requirements of the statute must be observed, if possible. East Tennessee, Virginia, & Georgia Railroad Co. *v.* Scales, 2 Lea Tenn. 688. But the engine need not be reversed, if to reverse would endanger lives on the train. Nashville & Chattanooga Railroad Co. *v.* Troxlee, 1 Lea Tenn. 520. That to reverse would injure machinery, is no excuse. East Tennessee, Virginia, & Georgia Railroad Co. *v.* Selcer, 7 Lea Tenn. 557. As to need of constant lookout, see Louisville & Nashville Railroad Co. *v.* Stone, 7 Heisk. 468; Same *v.* Milton, 2 Lea Tenn. 262.

(*b*) Burlington & Missouri River Railroad Co. *v.* Wendt, 12 Neb. 76; McKissock *v.* St. Louis, Kansas City, & Northern Railway Co., 73 Mo. 456; Schneir *v.* Chicago, Rock Island, & Pacific Railroad Co., 40 Iowa, 339. But see St. Louis, Iron Mountain, & Southern Railroad Co. *v.* Hagan, 12 Ark. 122; Jones *v.* Columbia & Greenville Railroad Co., 20 S. C. 249; East Tennessee, Virginia, & Georgia Railroad Co. *v.* Bayliss, 74 Ala. 150. The negligence must be proved. Cincinnati, Hamilton, & Indianapolis Railroad Co. *v.* Bartlett, 58 Ind. 572; Turner *v.* St. Louis & San Francisco Railway Co., 76 Mo. 261; Mobile & Ohio Railroad Co. *v.* Hudson, 50 Miss. 572; Pittsburg, Cincinnati, & St. Louis Railroad Co. *v.* McMillan, 37 Ohio St. 551. But see Kentucky Central Railroad Co. *v.* Lebus, 14 Bush. 518; Durham *v.* Wilmington & Weldon Railroad Co., 82 N. C. 352

2. Most of the better considered cases certainly adopt this view of the subject, and some perhaps go even further in favor of exempting the company from liability, where they were not originally in fault, and the animals were exposed to the injury through the fault of the owner, mediately or immediately.

3. For instance, if the animal escape into the highway, and thus get upon the track of the railway where it intersects with the highway, and is killed, the company are not liable.[3] (*c*) And if the animals are trespassing upon a field, and stray from the field upon the track of the railway, through defect of fences, which the company are bound to maintain, as against the owner of the field, and are killed, the company are not liable, either at common law or under the English statute,[4] (*d*) or upon the ground that the defendant exercised a dangerous trade. The obligation to make and maintain fences, both at common law and under the statute, applies only as against the owners or occupiers of the adjoining close.[5] (*e*)

[3] Towns *v.* Cheshire Railroad Co., 1 Fost. N. H. 363; Sharrod *v.* London & Northwestern Railroad Co., 4 Exch. 580; Halloran *v.* New York & Harlem Railroad Co., 2 E. D. Smith, 257. In Maryland it was held that a statute for the protection of animals and stock did not include negro slaves. Scaggs *v.* Baltimore & Washington Railroad Co., 10 Md. 268. But even where the cattle are wrongfully at large, and thus come upon the track, yet the company has often been held responsible for killing them through neglect or mismanagement short of positive or intentional wrong. Memphis & Charleston Railroad Co. *v.* Blakeney, 43 Miss. 218; Same *v.* Orr, 43 Miss. 279; Raiford *v.* Memphis & Charleston Railroad Co., 43 Miss. 233.

[4] Statute 8 & 9 Vict. c. 20, § 68.

[5] Ricketts *v.* East & West India Docks & Birmingham Junction Railway Co., 12 C. B. 160; s. c. 12 Eng. L. & Eq. 520. See also Dawson *v.* Midland Railway Co., 21 W. R. 56. The same point is ruled in Jackson *v.* Rutland & Burlington Railroad Co., 25 Vt. 150. See also cases referred to in §§ 127, 128. And it was held, in Manchester, Sheffield, & Lincolnshire Railway Co. *v.*

(*c*) This requires some limitation, as, e. g., where the animals are running at large without fault of the owner, or where they are killed wantonly or wilfully. See *supra*, pl. 7, 9. And see Toledo, Peoria, & Warsaw Railway Co. *v.* Johnston, 74 Ill. 83; Railway Co. *v.* Howard, 11 Am. & Eng. Railw. Cas. 488; Darling *v.* Boston & Albany Railroad Co., 121 Mass. 118; Maynard *v.* Boston & Maine Railroad Co., 115 Mass. 458; McDonnell *v.* Pittsfield & North Adams Railroad Co., 115 Mass. 564.

(*d*) Curry *v.* Chicago & Northwestern Railway Co., 43 Wis. 665. And see Ellis *v.* Pacific Railroad Co., 55 Mo. 278.

(*e*) See Ohio & Mississippi Railroad Co. *v.* Jones, 63 Ill. 472.

* 4. So where the statute requires railways to fence their road, where the same passes through "enclosed or improved lands," if injury happen to another's cattle through want of fences, upon common or unenclosed land, it is not legally imputable to the negligence of the company.[6]

5. But if the railway are bound to maintain fences, as against the owner of the cattle, and they come upon the road through defect of such fences, and are injured, the company are, in general, liable without further proof of negligence.[7]

Wallis, 14 C. B. 243; s. c. 25 Eng. L. & Eq. 373, that a railroad is not bound to fence against cattle straying upon a highway running along the railway, nor liable for an injury sustained by cattle in getting from such highway on the railway, through a defect of the fences maintained by the company; although the cattle strayed on the highway without any fault of the owner. Brooks *v.* New York & Erie Railway Co., 13 Barb. 594. But in the Midland Railway Co. *v.* Daykin, 17 C. B. 126; s. c. 33 Eng. L. & Eq. 193, it was held, that the company were liable where a colt strayed from a field, on a public road, abutting which was a yard not fenced from the railway, the gate of which was, through the neglect of the company's servants, left open, and, while the colt was being driven back to the field by the servants of the owner, it escaped into the yard, and thence upon the railway, where it was killed by a passing train. But in Ellis *v.* London & Southwestern Railway Co., 2 H. & N. 424, where a railway company constructed its road across a public footway, in such a manner that no security against injury to passers on the way was afforded within the provisions of the English statute, 8 & 9 Vict. c. 20, §§ 46, 61, 68, by means of a bridge or stile, but the company erected high gates which obstructed the footway and gave the key to plaintiff's servant, which had been lost and the gates left open, without notice to the railway company, whereby the plaintiff's colts escaped from his lands adjoining, and came on the railway and were killed by a passing train, the jury having found that the plaintiff, by his own negligence and that of his servants, had contributed to the accident, it was held that he could not recover, notwithstanding the omission of duty by the company.

[6] Perkins *v.* Eastern Railroad Co., 29 Me., 307. And if by usage cattle have the right to run on unenclosed land, the owner incurs the risk of all accidents. Knight *v.* Abert, 6 Penn. St. 472; Philadelphia & Germantown Railroad Co. *v.* Wilt, 4 Whart. 143.

[7] Suydam *v.* Moore, 8 Barb. 358; Waldron *v.* Rensselaer & Saratoga Railroad Co., 8 Barb. 390; Horn *v.* Atlantic & St. Lawrence Railroad Co., 35 N. H. 169; s. c. 36 N. H. 440; Smith *v.* Eastern Railroad Co., 35 N. H. 356. But where the cattle come on the railway, at a point not proper to be fenced, as at the intersection of a highway, or at a mill yard, the company is not liable unless the plaintiff proves some fault besides the want of fences. Indianapolis & Cincinnati Railroad Co. *v.* Kinney, 8 Ind. 402; Lafayette & Indianapolis Railroad Co. *v.* Shriner, 6 Ind. 141. But the owner of cattle is not precluded

6. But where the statute imposes the duty of building fence upon the railway, they may lawfully stipulate with the land-owners to maintain it, and if such land-owner suffer his cattle to be where they may come upon the railway without building the fence, he * cannot recover of the company.[8] So, too, if the plaintiff leave down the bars at a cattle crossing, whereby his cattle go upon the railway and are killed, he cannot recover.[9] (*f*)

7. And where the cattle go upon a railway through defect of fences, which the owner is bound to maintain, and suffer damage, the owner has no claim upon the company, unless, perhaps, for what has sometimes been denominated gross negligence, or wilful injury, for in such cases the cattle are regarded as trespassers,[10] and the owner the cause of the injury sustained, unless the railway might have prevented it. But where there was no reasonable

from recovering for any damage inflicted upon his cattle by the company, whose duty it was to fence the line where it occurred, because he turned his cattle upon his land before the fence was built. McCoy *v.* California & Pacific Railroad Co., 40 Cal. 532.

[8] Tower *v.* Providence & Worcester Railroad Co., 2 R. I. 404, 411; Clark *v.* Syracuse & Utica Railroad Co., 11 Barb. 112; Cincinnati, Hamilton, & Dayton Railroad Co. *v.* Waterson, 4 Ohio St. 424. So, also, where the duty of maintaining the fence along the railway is upon the land-owner, and it is burned down by fire, communicated by the company's engines, and he suffers his fields to remain unfenced, whereby his cattle go upon the track and are killed, he cannot recover. If the company is in fault, and liable to damages in regard to the fire, this does not oblige it to rebuild the fence, nor will it justify the plaintiff in suffering his fields to remain unfenced except at his own peril. Terry *v.* New York Central Railroad Co., 22 Barb. 574.

[9] Waldron *v.* Portland, Saco, & Portsmouth Railroad Co., 35 Me. 422.

[10] Tonawanda Railroad Co. *v.* Munger, 5 Denio, 255; s. c. 4 Comst. 349; Clark *v.* Syracuse & Utica Railroad Co., 11 Barb. 112; Williams *v.* Michigan Central Railroad Co., 2 Mich. 259. In this case the horses were wrongfully on the railway, and the court say the company "cannot be held liable for any accidental injury which may have occurred, unless the lawful right of running the train was exercised without a proper degree of care and precaution, or in an unreasonable or unlawful manner." See also Garris *v.* Portsmouth & Roanoke Railroad Co., 2 Ire. 324; Cincinnati, Hamilton, & Dayton Railroad Co. *v.* Waterson, 4 Ohio St. 424; Cleveland, Columbus, & Cincinnati Railroad Co. *v.* Elliott, 4 Ohio St. 474; New Albany & Salem Railroad Co. *v.* McNamara, 11 Ind. 543.

(*f*) But otherwise where a gate is left open by trespassers in the plaintiff's absence from home. Toledo, Wabash, & Western Railway Co. *v.* Milligan, 52 Ind. 505.

ground to suppose that the portion of fence which it was the duty of the company to build would have protected the animals, and the owner was shown to have been guilty of negligence in not taking care of them, it was held there could be no recovery, since his negligence was the direct and proximate cause of the injury.[11]

8. And it was held to be gross negligence for the owner of cattle to suffer them to go at large, in the vicinity of a railway, whether the same was fenced or not.[12] And it will impose no additional * obligation upon a railway company, in regard to cattle suffered to go at large in the public highways, by order of the county commissioners having charge of the same, if the company are guilty

[11] Joliet & Northern Indiana Railroad Co. *v.* Jones, 20 Ill. 221. And even where cattle came upon a track without the fault of the owner, but escaped from their enclosure and wandered upon the track, and were there damaged by the carelessness of the engineer in not slackening the speed of the train, the company was held not responsible. Price *v.* New Jersey Railroad Co., 2 Vroom, 229. But where there is evidence of recklessness or gross negligence, in such cases the company will be held responsible. This, however, is not to be carried to such an extent as to embarrass the engineer. If he act in good faith and according to his best wisdom and discretion, the company cannot be held liable for any injury. The question is well illustrated in Card *v.* New York & Harlem Railroad Co., 50 Barb. 39. See also Eames *v.* Salem & Lowell Railroad Co., 98 Mass. 560; Chicago & Alton Railroad Co. *v.* Utley, 38 Ill. 410. But it seems to be unquestionable that even where the owner of cattle is guilty of negligence or even positive foolhardiness and wrong in allowing his cattle to come upon the track, this will not excuse the company for injuring them needlessly, or even carelessly. The company is still bound to exercise ordinary care and prudence in avoiding the infliction of injury upon them until they can be removed from the road. Needham *v.* Santa Fe & San José Railroad Co., 37 Cal. 409. See also Illinois Central Railroad Co. *v.* Middlesworth, 46 Ill. 494.

[12] Marsh *v.* New York & Erie Railroad Co., 14 Barb. 364; Talmadge *v.* Rensselaer & Saratoga Railroad Co., 13 Barb. 493; Louisville & Frankfort Railroad Co. *v.* Milton, 14 B. Monr. 75. This is where the plaintiff below suffered the company to build a railway through his field without stipulating that it should fence the track, and his cattle running upon the track while depasturing in the field were killed, and the court held the company was not liable, "unless the injury could have been avoided with reasonable care." But in Housatonic Railroad Co. *v.* Waterbury, 23 Conn. 101, it was held that in such case the company holds its easement subject to the land-owner's right to cross and recross to and from the different sections of his farm, provided the right is reasonably exercised, and that the land-owner is not chargeable with negligence in letting his cattle run on his land unfenced, unless he knew they were accustomed to keep near the track, thus imposing a duty of watchfulness on both parties.

of no negligence; in such cases, the owners of cattle killed at the road-crossings, by trains of the company, cannot recover of them.[13]

9. It has been held not to be sufficient in such cases to charge the company, to show that they were running at an unreasonable rate of speed, or without proper care in other respects.[14] (*g*) The

[13] Michigan Southern & Northern Indiana Railroad Co. *v.* Fisher, 27 Ind. 96.

[14] Vandegrift *v.* Rediker, 2 Zab. 185; Clark *v.* Syracuse & Utica Railroad Co., 11 Barb. 112; Williams *v.* Michigan Central Railroad Co., 2 Mich. 259; Lafayette & Indiana Railroad Co. *v.* Shriner, 6 Ind. 141. Here it was held that the company is liable for gross negligence, even where the cattle are wrongfully on the road.

(*g*) Thus it has been held that in the absence of statute no conceivable rate of speed is negligence *per se*. McKonkey *v.* Chicago, Burlington, & Quincy Railroad Co., 40 Iowa, 205. But it has been held also that the company will be liable where the train was moving at a greater than the lawful rate. Houston & Texas Central Railway Co. *v.* Terry, 42 Tex. 451. And also where on a straight track, in the night, the rate of speed was such that the train could not be stopped within a distance at which the engine driver could see cattle on the track by the aid of the headlight. Memphis & Charleston Railroad Co. *v.* Lyon, 62 Ala. 71. But see Louisville & Nashville Railroad Co. *v.* Milam, 9 Lea Tenn. 223, where it is held that such an arbitrary rule is unsound, and that the rate of speed must depend on circumstances. And see Alabama Great Southern Railroad Co. *v.* McAlpine, 75 Ala. 113. And see to same effect Peoria, Decatur, & Evansville Railroad Co. *v.* Miller, 11 Brad. 375. Imperfect light may be considered in determining negligence on the part of the company. St. Louis, Iron Mountain, & Southern Railway Co. *v.* Vincent, 36 Ark. 451. As to the slackening of the speed at crossings, see Chicago & Alton Railroad Co. *v.* Killam, 92 Ill. 245. It is not necessarily negligence to run at the rate of twenty-five miles an hour. Goodwin *v.* Chicago, Rock Island, & Pacific Railroad Co., 75 Mo. 73. See Fritz *v.* St. Paul & Pacific Railroad Co., 22 Minn. 404; South & North Alabama Railroad Co. *v.* Thompson, 62 Ala. 494. Negligence is presumed when the train was running in a city or village at a rate greater than permitted by statute. Cowell *v.* Burlington, Cedar Rapids, & Minnesota Railroad Co., 38 Iowa, 120; Toledo, Peoria, & Warsaw Railway Co. *v.* Deacon, 63 Ill. 91; New Orleans, Mobile, & Texas Railroad Co. *v.* Touline, 59 Miss. 284; St. Louis, Vandalia, & Terre Haute Railroad Co. *v.* Morgan, 12 Brad. 256. But see Burlington & Missouri River Railroad Co. *v.* Wendt, 12 Neb. 76. If, however, an animal suddenly leap upon the track so as to endanger the train, the speed may be increased. Chicago, St. Louis, & New Orleans Railroad Co. *v.* Jones, 59 Miss. 465. And see Chicago, Burlington, & Quincy Railroad Co. *v.* Bradfield, 63 Ill. 220. Want of skill in the engine-driver is of no consequence where it does not

only question in such case is, we apprehend, whether the company, after discovering the peril of the animals, might have so conducted as to have prevented the injury.[14] (*h*) The same rule obtains,

contribute to the accident. Culhane *v.* New York Central & Hudson River Railroad Co., 60 N. Y. 133. Nor is it negligence to run a train with the engine in the rear, where there is a man at the other end to keep a lookout and the train is moved slowly. Falconer *v.* European & North American Railway Co., 1 Pug. 179. Mere failure to sound the whistle or ring the bell at a public crossing is not such negligence as will render the company liable. Jackson *v.* Chicago & Northwestern Railway Co., 36 Iowa, 451. But see Springfield & Illinois Southeastern Railway Co. *v.* Andrews, 68 Ill. 56; Stoneman *v.* Atlantic & Pacific Railroad Co., 58 Mo. 503. But when necessary to the safety of person or property an alarm should be given. Gates *v.* Burlington, Cedar Rapids, & Minnesota Railway Co., 39 Iowa, 45. When the engineer sees an animal near the track and in danger of going on it, he must use all means to frighten it off. Alabama Great Southern Railroad Co. *v.* Powers, 73 Ala. 244. But otherwise where the animal is quietly grazing. Hannibal & St. Joseph Railroad Co. *v.* Young, 79 Mo. 336. Whether failure to sound an alarm is negligence, is a question for the jury. Holman *v.* Chicago, Rock Island, & Pacific Railroad Co., 62 Mo. 562; Indianapolis, Cincinnati, & Lafayette Railroad Co. *v.* Hamilton, 44 Ind. 76; Chicago & Alton Railroad Co. *v.* McDaniels, 63 Ill. 122; Terre Haute & Indianapolis Railroad Co. *v.* Jones, 11 Brad. 322. Necessity therefore depends on circumstances. Louisville, Nashville, & Great Southern Railroad Co. *v.* Reidmond, 11 Lea Tenn. 205; Chicago & Alton Railroad Co. *v.* Henderson, 66 Ill. 494. It is not negligence not to sound an alarm when it would be unavailing. Flattes *v.* Chicago, Rock Island, & Pacific Railroad Co., 35 Iowa, 191. Failure to sound an alarm at least eighty rods from a crossing is negligence under the Missouri statutes. Owens *v.* Hannibal & St. Joseph Railroad Co., 58 Mo. 386. And see Illinois Central Railroad Co. *v.* Gillis, 68 Ill. 317; Western & Atlantic Railroad Co. *v.* Jones, 65 Ga. 631.

(*h*) Might have so conducted, i. e., without danger to the train. It has been held that the company is bound to exercise vigilance, and bound also not to act wilfully or wantonly, but that it need not stop nor slacken speed where it would endanger the train or the property or the lives of persons on it. Sandham *v.* Chicago, Rock Island, & Pacific Railroad Co., 38 Iowa, 88; Fossier *v.* Morgan's Louisiana & Texas Railway Co., 1 McGloin, 349; Witherell *v.* Milwaukee & St. Paul Railway Co., 24 Minn. 410; O'Connor *v.* Chicago, Milwaukee, & St. Paul Railway Co., 27 Minn. 166; Wallace *v.* St. Louis, Iron Mountain, & Southern Railway Co., 74 Mo. 594; Pryor *v.* St. Louis, Kansas City, & Northern Railway Co., 69 Mo. 215. The cases in support of the general proposition that the company must exercise due care, either by slackening or stopping, or by sounding an alarm for the protection even of trespassers, are numerous. See Shuman *v.* Indianapolis & St. Louis Railroad Co., 11 Brad. 472; South & North Alabama Railroad Co. *v.* Jones, 56 Ala. 507; Missouri Pacific Railway

which does in actions for personal injuries, where there is fault in both parties. This subject is extensively discussed in Vicksburg and Jackson Railway *v.* Patton,[15] and the doctrine enunciated, that the owner of domestic animals not of a dangerous character may lawfully suffer them to depasture upon the unenclosed commons, and if they wander upon the premises of others not enclosed, the owner of the animals is not liable for any damage in consequence. But a railway, crossing such common, has the same right to its unobstructed use as the owner of cattle, and they may lawfully run their cars at all times, and at all lawful rates of speed; but if their own track be unenclosed and cattle liable to wander upon it, the company should have proper regard to so running their trains as not to injure them. And if cattle are injured through any default of the company, it is liable. It is the duty of the company * to keep their engines in good repair, and to have a sufficient number of servants to manage their trains with safety; and if through any default in any of these duties the cattle of another are injured, it will be liable. It was held in this case, contrary to the general course of practice, that it may be proved that the general character of the engineer in charge of the train was that of a reckless and untrustworthy agent. And it is here said that the company are liable to exemplary damages for such an injury occurring through the gross negligence or wanton misconduct of its agents; both of which propositions seem not entirely reconcilable with the general course of decision.

10. And it has been held where the statute, in general terms, requires railways to keep gates at road-crossings constantly closed,

[15] 31 Miss. 156; Gorman *v.* Pacific Railroad Co., 26 Mo. 441.

Co. *v.* Wilson, 28 Kan. 637; Trout *v.* Virginia & Tennessee Railroad Co., 23 Grat. 619; Little Rock & Fort Smith Railway Co. *v.* Finley, 37 Ark. 562; Same *v.* Trotter, 1b. 593. And hence it has been often held that the company will be liable for cattle injured where it has failed to observe proper care or vigilance, though the cattle were allowed to run at large. Mobile & Ohio Railroad Co. *v.* Williams, 53 Ala. 595; Kuhn *v.* Chicago, Rock Island, & Pacific Railroad Co., 42 Iowa, 420; Washington *v.* Baltimore & Ohio Railroad Co., 17 W. Va. 190; Kentucky Central Railroad Co. *v.* Lebus, 14 Bush, 518; Detroit, Eel River, & Illinois Railroad Co. *v.* Benton, 61 Ill. 293; Louisville, New Albany, & Chicago Railway Co. *v.* Whitesell, 68 Ind. 297. But see Cincinnati, Hamilton, & Dayton Railroad Co. *v.* Street, 50 Ind. 225; Williams *v.* Northern Pacific Railroad Co., 11 Am. & Eng. Railw. Cas. 421.

that one whose horses leaped from his field into the highway, and then strayed upon the railway, by reason of the gates not being kept constantly closed, and were killed, might recover of the company.[16] In such case it was held, that as to the company the horses were lawfully on the highway, as the provision in the statute in regard to keeping the gates shut was intended for the protection of all cattle, horses, &c., passing along the highway, whether strayed there or not, unless perhaps when voluntarily suffered to run at large in the highway. And the duty of keeping cattle-guards at road-crossings has been considered to extend to the protection of all animals in the street, and to be a duty which the railway owe the public generally, and not merely the owners of cattle driven along the highway, which, in strictness, is the only condition in which cattle are rightfully in the highway, at common law.[17]

[16] Fawcett *v.* York & North Midland Railway Co., 16 Q. B. 610; s. c. 2 Eng. L. & Eq. 289. But it is a question for the jury, under the circumstances, whether they believe the gates were left open by the fault of the company's servants or the tort of a stranger. Walf. Railw. 179, citing two *Nisi Prius* cases (1842), (1845).

[17] Trow *v.* Vermont Central Railroad Co., 24 Vt. 487. And in Railroad Co. *v.* Skinner, 19 Penn. St. 298, it is said that if cattle are suffered to go at large and are killed or injured on a railway, the owner has no remedy against the company, and may himself be made liable for damage done by them to the company; and it is unimportant whether the owner knew of the jeopardy of the cattle; and that it is error to submit the question of negligence to the jury, unless there is some evidence of such fact. In Richmond & Petersburg Railroad Co. *v.* Jones, 6 Am. Law Reg. 316, a case in Virginia, this matter is fully discussed. It appeared that the company had been assessed in damages to the land-owners along the line of the road, in consequence of additional fence being required, by reason of the construction of the railway. The animal, for killing which the suit was brought, was found dead near the crossing of the highway and railway in such a state as to show that it had been killed by the company's engines very near the crossing. The plaintiff had suffered the beast to run at large and graze on the unenclosed lands in the neighborhood of the railway, her own land not lying in immediate contact with the line of the railway. It was held that *prima facie* the company was not liable, even when cattle were killed at a road-crossing; that both the owner of the cattle and the company, in such case, being apparently in the exercise of their legal rights, the law would presume no breach of duty, and thus impose on the party who alleged such breach the burden of proof; that to entitle the owner in such case to recover of the company, he must prove want of care or skill on the part of the company; and that the statute depriving the company of an action against the owner of cattle, for damages caused by their straying on the

*11. In the New York & Erie Railway *v.* Skinner,[18] GIBSON, J., lays down the rule in the broadest terms, that railways, indepen-

road, does not render it lawful for cattle to be allowed to go there unrestrained by fences.

[18] 19 Penn. St. 298; s. c. 1 Am. Law Reg. 97. But in Danner *v.* South Carolina Railroad Co., 4 Rich. 329, it was held, that the fact that cattle pasturing on one's own land are injured by a train, is *prima facie* evidence of the liability of the company, and that the company could only excuse itself by showing, from the manner of the injury, that it was not guilty of negligence; that for this purpose the company must show, not only that the injury was not intentional, but that it was unavoidable, and occurred without the least fault on the part of the engineer; but that to the maintenance of an action on the case for such injury, it is requisite to show, that it arose from the negligence of the company, and if it appear to have been wilful, or accidental, this action will not lie. This seems to be assuming the extreme opposite of the case last cited. The truth will be found to lie between them, doubtless. But the rule in Danner's case does not apply where the animal killed is a dog. Wilson *v.* Railroad Co., 10 Rich. 52. But it does apply to the killing of a horse at night. Murray *v.* Same, 10 Rich. 227. By the law of South Carolina, cattle must be fenced out, not fenced in. The entry, therefore, of cattle on an unenenclosed railway track, is no trespass. Murray *v.* South Carolina Railroad Co., 10 Rich. 227. And it was held, that the owner of a horse, permitted to roam at large over unenclosed land, is not guilty of such negligence as will embarrass his recovery, should the horse be killed by the negligence of another. Ib. The Georgia statute of 1847 makes railway companies liable for all damages done to live-stock or other property. But it was held they were not liable when the damage was caused by the design or negligence of the owner. Macon & Western Railroad Co. *v.* Davis, 13 Ga. 68. And in New York it is held, that the statute, making railway companies liable for all damage done to cattle, horses, and other animals, until they shall fence their roads, renders them liable to the owner of cattle which strayed into an adjoining close, where they were trespassers, and thence upon the railway, or from the highway upon the railway; that it makes no difference how the cattle came upon the railway, unless it is by the direct act or neglect of the owner, so long as the company does not fence its road according to the requirements of the statute. Corwin *v.* New York & Erie Railway Co., 13 N. Y. 42. In this case the company had contracted with the land-owner to build the fence, which he had not done, and it was admitted, that if he had owned the cattle he could not recover. It is somewhat remarkable, that the rights of the owner of cattle trespassing should be superior to those of the owner of the land. But in Shepard *v.* Buffalo, New York, & Erie Railway Co., 35 N. Y. 641, the court advance a step further in the same direction, and declare, it is no defence that the party whose cattle are killed was legally bound to build the fence himself, under a contract between his assignor and the company. And it seems to be the disposition of the court to give the statute such an extensive operation that the company shall be absolutely responsible for all cattle injured, until it causes the erec-

dent * of statutory requisitions, and as against the adjoining landowners, are under no duty whatever to fence their road, nor are they bound to run with any reference whatever to the possibility of cattle getting upon the track. Every man is bound, at his peril, to keep his cattle off the track, and if he do not, and they suffer damage, he has no claim upon the company, or their servants, and is liable for damages done by them to the company or its passengers. The opinion contains many sensible suggestions, and is curious for the enthusiasm and zeal manifested by one already beyond the ordinary limit of human life. These views have sometimes been adopted in the jury trials in other states, and, as reported in the newspapers, in a recent case in Wisconsin, Prichard *v.* La Crosse and Milwaukee Railway. But they are certainly not maintained to the full extent, in any country where the maxim *sic utere tuo ut alienum non lædas* prevails, even to the limited extent recognized in the common law of England.

* It was held in Gorman *v.* Pacific Railway, that the company were not bound to fence their road; but it was also held that the jury should consider the fact that the road was not fenced, in determining whether the company exercised proper care under the existing circumstances; and it was said that such companies should exercise the utmost care and diligence in the exercise of their own privileges to avoid doing injury to others.[19]

12. It has been considered that a railway is not responsible for injuries to horses, in consequence of their being frightened on the road by the noise of the engine and cars, in the prudent and ordinary course of their operations.[20]

tion of proper fences according to the requirements of the statute. This seems too extreme to last or to be followed elsewhere. The same rule is reaffirmed in Tracy *v.* Troy & Boston Railroad Co., 38 N. Y. 433. It is here said that the inconvenience of building fences at railway crossings will not excuse the company from compliance with the express requirements of the statute. Nor will another company using the track be in any better condition than the first company. s. p. Toledo, Peoria & Warsaw Railroad Co. *v.* Rumbold, 40 Ill. 143.

[19] 26 Mo. 441. And the same rule of extreme care applies in those states where cattle are by law allowed to go at large in the highways, and this duty of care applies both to the railway companies and the owners of the animals, each to so exercise their own rights as not to injure the other. Hannibal & St. Joseph Railroad Co. *v.* Kenney, 41 Mo. 271; Michigan Southern & Northern Indiana Railroad Co. *v.* Fisher, 27 Ind. 96.

[20] Burton *v.* Philadelphia, Wilmington, & Baltimore Railroad Co., 4 Harring. Del. 252.

13. The subject of negligence in the plaintiff, which will prevent his recovery, is discussed much at length in Beers *v.* The Housatonic Railway,[21] and in the main the same views are adopted in regard to injuries to cattle, which we have stated in regard to injuries to persons.[22] (*i*) It is there laid down by the court, that whether there was negligence or want of care in whatever degree, by either party, is a question of fact to be determined by the jury, and that even where the circumstances are all admitted, it will not be determined as a question of law, but the inference of negligence or no negligence is one of fact for the jury. (*j*)

[21] 19 Conn. 566. And in Poler *v.* New York Central Railroad Co., 16 N. Y. 476, where a gate adjoining plaintiff's land on defendant's land got out of repair and liable to be blown open, and the plaintiff, without giving notice to defendant, took measures to secure the gate, which proved ineffectual, and his cattle escaped through the fence and were killed on the track of defendant's road, it was a question of fact whether the plaintiff was guilty of culpable negligence.

[22] *Infra*, § 193, and cases cited; Chicago & Mississippi Railroad Co. *v.* Patchin, 16 Ill. 198.

(*i*) Contributory negligence, to relieve from liability, like the negligence necessary to establish liability, must be an immediate proximate cause. Gates *v.* Burlington, Cedar Rapids, & Minnesota Railway Co., 39 Iowa, 45; Rockford, Rock Island, & St. Louis Railroad Co. *v.* Irish, 72 Ill. 404. As to what will constitute contributory negligence, see Jones *v.* Sheboygan & Fond du Lac Railroad Co., 42 Wis. 306; Union Pacific Railroad Co. *v.* Schwenck, 13 Neb. 478; Jeffersonville Railroad Co. *v.* Foster, 63 Ind. 342; Lande *v.* Chicago & Northwestern Railway Co., 33 Wis. 640; Forbes *v.* Atlantic & North Carolina Railroad Co., 76 N. C. 454; Wilder *v.* Maine Central Railroad Co., 65 Me. 332; Pacific Railroad Co. *v.* Brown, 14 Kan. 469; Washington *v.* Baltimore & Ohio Railroad Co., 17 W. Va. 190. Permitting cattle to run at large considered as contributory negligence. Jeffersonville Railroad Co. *v.* Adams, 43 Ind. 402; Hammond *v.* Sioux City & Pacific Railroad Co., 49 Iowa, 450; Evans *v.* St. Paul & Sioux City Railroad Co., 30 Minn. 489; Curry *v.* Chicago & Northwestern Railway Co., 43 Wis. 665; Fitch *v.* Buffalo, New York, & Philadelphia Railroad Co., 13 Hun, 668. It depends on circumstances whether it is or not. Cincinnati, Lafayette, & Chicago Railroad Co. *v.* Ducharme, 4 Brad. 178. Negligence is not to be inferred simply from the escape of an animal from a field, the fence being good. Spinner *v.* New York Central & Hudson River Railroad Co., 67 N. Y. 153.

(*j*) Amstein *v.* Gardner, 134 Mass. 4; Chicago, Burlington, & Quincy Railroad Co. *v.* Houch, 12 Brad. 88; Schubert *v.* Minneapolis & St. Louis Railway Co , 27 Minn. 360; Ewing *v.* Chicago & Alton Railroad Co., 72 Ill. 25; Rockford, Rock Island, & St. Louis Railroad Co. *v.* Irish, 72 Ill. 404.

14. But this, we apprehend, is true only where the circumstances leave the inference doubtful. If the proof is all one way, either in favor of or against negligence having intervened, the inference is always one of law for the court.[23]

15. There are some few cases where actions have been brought for injuries to cattle or horses, in consequence of some alleged remote negligence in the company. In one case,[24] the action was for the loss of a horse, by falling into a large well upon the company's * grounds. The plaintiff had frequent car-loads of lumber coming to the company's station, and he requested them to remove it to a position on their track where it could be discharged into his own lumber-yard, which they declining to do, he drew it with this horse to the proper point, and unloaded it. Upon another car arriving he attempted to do the same, without consulting the company, but his horse proved restive and backed off the track, and in his struggle fell into the well. The plaintiff had a verdict below, and a new trial was awarded, upon the ground that the duty of the company to exercise care and prudence depends upon the question whether the plaintiff is in the exercise of a legal right. For if not, he must show that he exercised extraordinary care before he can be permitted to complain of the negligence of another.

16. And in another case,[25] the plaintiff's horse was killed by breaking a blood-vessel in struggling from fright at the defendants' train of cars in its near approach to the turnpike road, which by their charter they were required to purchase, and in crossing all roads to restore them to their former state of usefulness. At the place of the injury the defendants excavated their road-bed upon the turnpike, some five feet below the surface, leaving a steep descent upon the railway and no fence between the track of the turnpike and railway. The plaintiff was passing along the turnpike, leading his horse at the time. It was held that under their charter the company were liable, if the excavation impaired the safety of the turnpike for public travel, and that

[23] Underhill *v.* New York & Harlem Railroad Co., 21 Barb. 189; Lyndsay *v.* Connecticut & Passumpsic Rivers Railroad Co., 27 Vt. 643; Scott *v.* Wilmington & Raleigh Railroad Co., 4 Jones N. C. 132.

[24] Aurora Branch Railroad Co. *v.* Grimes, 13 Ill. 585.

[25] Moshier *v.* Utica & Schenectady Railroad Co., 8 Barb. 427. But see Coy *v.* Utica & Schenectady Railroad Co., 23 Barb. 643.

such "encroachments of defendants upon a turnpike is a public nuisance, for which any person sustaining a particular injury may maintain an action."

17. And it has been laid down, in general terms, that a railway company, authorized to use steam locomotive engines upon their road, is not liable for the damage or disturbance caused by such use, near a turnpike road existing before the railway company, unless such engines are used in an extraordinary and unreasonable manner.[26]

18. And where the legislature imposed a penalty upon railways, of $100 for every month's delay in performing the duty of keeping * and maintaining legal and sufficient fences on the exterior lines of their road, as required by their charters, it was held that the neglect of the corporation to perform this duty rendered them liable to reimburse any person suffering injury thereby in his property, in an action at common law. And if the defect in the fences by which the injury occurs was known to the company, they are liable for the damage suffered, notwithstanding their engineer was at the time in the exercise of due care, and notwithstanding the fence was originally imperfectly built by the plaintiff for the company.[27]

19. In an action for injury to domestic animals by the passing engines of a railway company, it is not conclusive of the liability of the company that the damage occurred in consequence of the passing of their engine, and that the engineer omitted the statutory requirements of blowing the whistle, ringing the bell, reversing the engine, &c. It should still be submitted to the determination of the jury whether the damage was caused by the engineer's neglect of duty, as that is a question lying exclusively within their province.[28]

[26] Bordentown & South Amboy Turnpike *v.* Camden & Amboy Railroad Co., 2 Harrison, 314; Coy *v.* Utica & Schenectady Railroad Co., 23 Barb. 643.

[27] Norris *v.* Androscoggin Railroad Co., 39 Me. 273. In this case the fence was stone-wall, built by plaintiff, by contract with the company some two years before, and accepted by them. The gap in the wall through which the animal escaped upon the track had existed several days, and was known to the company. There was no other evidence of the manner of constructing the wall. The court held that the plaintiff stood in the same position, as to his claim, as if any other one had built the wall.

[28] Memphis & Charlotte Railroad Co. *v.* Bibb, 37 Ala. 699.

20. One who voluntarily suffers his cow to go at large in the public streets of a city, with no one to take charge of her, and thus to stray upon a railway track, at a time when cars are passing, is guilty of such carelessness that he cannot recover for any injury to the animal through any degree of negligence short of that which is gross.[29] (*k*)

21. The competency of the evidence of experts in regard to the management of locomotives so as to avoid the possibility of doing damage to animals upon the track, is discussed in a late case in Ohio.[30] It is not easy to define any very exact rule in regard to the extent of the testimony of experts as to the practicability of avoiding doing damage, under a given state of exposure * of persons or animals. The subject is a broad one, and to its full discussion would require a volume, instead of a single paragraph. But we make no question, the management of a locomotive steam-engine, under any and all conditions and circumstances, is a matter of science and skill, as to which courts and juries are not ordinarily competent to form a reliable and satisfactory judgment, and that they do therefore stand in need of aid and instruction in regard to the matter, whenever it comes before them for determination, and that consequently the testimony of experts may always be received under the ordinary limitations and restrictions.

22. The subject of the responsibility of railways for injury to cattle running at large and coming upon their track is very carefully considered in a later case in Ohio.[31] It is here declared that

[29] Bowman *v.* Troy & Boston Railroad Co., 37 Barb. 516.

[30] Bellfontaine & Iowa Railroad Co. *v.* Bailey, 11 Ohio St. 333.

[31] Central Ohio Railroad Co. *v.* Lawrence, 13 Ohio St. 66.

(*k*) It has been held, however, that the company is liable for the loss of a cow killed at a point to which she was presumed to have been attracted by salt spilled by the defendant's warehousemen in unloading cars. Crapton *v.* Hannibal & St. Joseph Railroad Co., 55 Mo. 580. So for the loss of hogs attracted by drippings of molasses. Page *v.* North Carolina Railroad Co., 71 N. C. 222. But *contra*, where cattle were attracted by hay on cars, the cars not having been left standing an unreasonable length of time. Schooling *v.* St. Louis, Kansas City, & Northern Railway Co., 75 Mo. 518. Denver & Rio Grande Railway Co. *v.* Olsen, 4 Col. 239; Van Horn *v.* Burlington, Cedar Rapids, & Northern Railway Co., 59 Iowa, 33; Indianapolis & St. Louis Railroad Co. *v.* Peyton, 76 Ill. 340; Jeffersonville Railroad Co. *v.* Underhill, 48 Ind. 389; McCandless *v.* Chicago & Northwestern Railway Co., 45 Wis. 365. But see Chicago & Alton Railroad Co. *v.* Engle, 81 Ill. 397.

the owner of cattle who does not keep them within his own enclosure, when he might do so by proper care, cannot require of a railway company to regulate the management and speed of their trains with reference to cattle coming upon their track. Such companies, like all others, have a right to regulate the management and conduct of their business solely with reference to the security of persons and property in their charge, and the meeting of their reasonable appointments in regard to them, and may make their plans upon the reasonable and legal presumption that other persons will perform all their legal obligations towards them, and consequently that the owners of domestic animals will keep them at home, where alone they belong, and not suffer them to stray upon the track of a railway company, unless they are prepared to incur the legitimate hazards of such an exposure. But when a railway company finds cattle upon its track, it is bound to avoid damage to them, if practicable, by the same degree of effort that a prudent owner of the cattle would be expected to do, properly considering the hazard both to the train and the cattle. And the proper inquiry in such a case is, whether the agents of the company exercised reasonable and proper care, in running their engine, to avoid injury to the cattle of the plaintiff; and the facts and circumstances bearing upon this question are for the exclusive consideration of the jury.

23. And much the same view is taken in a case in Kentucky,[32] where it is said that the paramount duty of a railway * company, in the conduct of a train, is to look to the safety of persons and property therein, and subordinate to this is the duty to avoid unnecessary damage to animals straying upon the road.(*l*) And while a railway company is not justified in any conduct of its agents in regard to cattle upon its track, which is needless, wanton, or wilful, it cannot be responsible for anything short of this, since the owners of cattle are specially bound to keep them off the tracks of railways.

[32] Louisville & Frankfort Railroad Co. *v.* Ballard, 2 Met. Ky. 177. But railway companies are not bound to maintain fences sufficient to exclude the possibility of cattle coming upon their line, even under the extreme duty and obligation which they owe toward the protection of their passengers. Buxton *v.* Northeastern Railway Co., Law Rep. 3 Q. B. 549.

(*l*) *Supra*, note (*h*).

24. And in a case in Maryland,[33] it was held that the well-settled principle of the common law, that a plaintiff is not entitled to recover for injuries to which his own fault or negligence has directly contributed, is not abrogated by the several acts of assembly, regulating the liabilities of railways in this state for stock killed or injured by their trains. These acts leave the question of the effect of the plaintiff's conduct upon his right to recover for the acts of others where it was at the common law. But the burden of proof is changed by the statute, and where stock is killed the law now imputes negligence to the company, unless it can show that the damage results from unavoidable accident.[33] It was not intended hereby to interfere with the time-table or the rate of speed on railways. The act leaves all this to the discretion of the companies, but imposes upon them the highest degree of care and caution; and in the absence of fault on the part of the plaintiff it must appear that the collision took place without any fault or negligence on the part of the company or its agents, in order to exonerate them. In other words, if the plaintiff is not in fault the company will be responsible, unless the damage is the result of unavoidable accident.

25. In Indiana it is held, that in an action against the company for killing stock it must appear, both in the complaint and proof, that the damage resulted from the carelessness of the company or the omission to fence their road.[34] (*m*)

26. In Missouri[35] it is determined by statute and the construction * of the courts, that if the accident occur upon a portion of the line not enclosed by a lawful fence, and not at a road or street crossing, whereby domestic animals are killed or injured, the company are responsible, at all events, and without reference to any

[33] Keech *v.* Baltimore & Washington Railroad Co., 17 Md. 32.

[34] Indianapolis, Pittsburg & Cleveland Railroad Co. *v.* Sparr, 15 Ind. 440; Same *v.* Williams, 15 Ind. 486.

[35] Meyer *v.* North Missouri Railroad Co., 35 Mo. 352; Powell *v.* Hannibal & St. Joseph Railroad Co., 35 Mo. 457; Burton *v.* North Missouri Railroad Co., 30 Mo. 372.

(*m*) The matter is now regulated by statute, both as to grounds of liability and as to practice in proceedings to enforce liability. See Jeffersonville Railroad Co. *v.* Lyon, 55 Ind. 477; Same *v.* Downey, 61 Ind. 287; Louisville, New Albany, & Chicago Railway Co. *v.* Smith, 58 Ind. 575; Baltimore, Pittsburg, & Chicago Railway Co. *v.* Thomas, 60 Ind. 167.

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question of negligence, either on their part or that of the owner of the animals. But at highway or street crossings the company are not responsible for any damage to such animals, unless it occur through some neglect or fault on their part. (*n*)

27. In California[36] it seems to be considered that the custom of the country to suffer domestic animals to go at large on the commons will override the rule of the common law, obliging the owner to restrain his cattle within his enclosures, and that consequently no negligence is imputable to the owner on account of so suffering his animals to go at large. But railway companies are not held responsible for damage inflicted upon such animals so running at large unless it might have been avoided by ordinary care and prudence on the part of the company at the time.[37]

28. There seems to have been some very nice questions raised in the courts of Illinois, for if it were not so some of the decisions would seem to partake largely of the character of incomprehensibility. For we find it gravely declared, in one case,[38] that the law does not require any different words to be used in proving a

[36] Waters *v.* Moss, 12 Cal. 535. And in Alger *v.* Mississippi & Missouri Railroad Co., 10 Iowa, 268, it was held that permitting cattle to run at large does not impute negligence to the owner, nor is he liable as a trespasser if they are found on an unfenced railway. A railway company is bound to exercise ordinary care not to injure animals coming upon its track through defect of fence. After the road is fenced the company is only liable in such cases for gross neglect. And in McCall *v.* Chamberlain, 13 Wis. 637, it is held that the duty of companies to fence their roads is intended for the protection of the public generally; and that until such fences are built the company is liable for all injuries to animals on their track, without reference to any question of their being rightfully in the adjoining land from whence they escaped upon the track. And the lessee of the company assumes all the company's responsibility.

[37] Richmond *v.* Sacramento Valley Railroad Co., 18 Cal. 351. There is no statute here requiring railways to be fenced by the companies. But when that is required, and the plaintiff alleges the duty was not performed, he must prove it as part of his case. Indianapolis, Pittsburg & Cleveland Railroad Co. *v.* Wharton, 13 Ind. 509.

[38] Ohio & Mississippi Railroad Co. *v.* Irvin, 27 Ill. 178.

(*n*) There the company is not liable for an injury resulting from anything other than an actual collision. Seibert *v.* Missouri, Kansas, & Texas Railway Co., 72 Mo. 565. Nor for an injury inflicted by a locomotive which an employé is using for his own purposes, without authority and outside the line of his employment. Cousins *v.* Hannibal & St. Joseph Railroad Co., 66 Mo. 572.

case against a railway from those used in other cases. It is only necessary the mind should be convinced of the existence of the necessary *facts. And in the same case: The presumption is that the houses compose a village, and if an animal is killed beyond the houses the presumption is that it is killed beyond the village, and if the town extends beyond the houses the defendant should know the fact; and also: Every one is supposed to have some idea of the value of such property as is in general use, and it is not necessary to have a drover or butcher to prove the value of a cow. And in another case in this state it seems to have been claimed that the declaration against a railway for injuries to domestic animals must negative the possibility of any excuse on the part of the company. But the court hold that matters of excuse on the part of the company, as, that the animals were killed at a farm-crossing, and that the road was properly fenced by them, must be shown by way of defence.[39] But it was held in another case in that state, that the plaintiff, in making out his own cause of action, must negative by proof the existence of a public crossing where the killing occurred, and should show that the defendants were bound to fence at that point.[40] And it was held in a later case, that it was negligence in a railway company to allow vegetation to grow upon its right of way, so that cattle may be concealed from view.[41](*o*)

29. If one allows stock to run in the highway near a railway crossing it is such negligence that he cannot recover for any injury thereto.[42] And if one allows his cattle so to run in the highway, and thus come upon the track of the railway, and the company use all statutory and other reasonable precautions to avoid damage to them, the owner cannot recover for any such

[39] Great Western Railroad Co. *v.* Helm, 27 Ill. 198.

[40] Ohio & Mississippi Railroad Co. *v.* Taylor, 27 Ill. 207.

[41] Bass *v.* Chicago, Burlington, & Quincy Railroad Co., 28 Ill. 9.

[42] Chicago, Burlington, & Quincy Railroad Co. *v.* Cauffman, 28 Ill. 513.

(*o*) So to allow weeds, &c., to grow in the right of way to such a height as to obstruct the view of a crossing. Indianapolis & St. Louis Railroad Co. *v.* Smith, 78 Ill. 112. Damages can be recovered under the statute only in case of actual collision. Schertz *v.* Indianapolis, Bloomington, & Western Railway Co., 107 Ill. 577. The owner of a horse permitted to run at large cannot recover, because the company had failed to fence. Peoria, Pekin, & Jacksonville Railroad Co. *v.* Champ, 75 Ill. 577.

damage, which is thus caused either wholly or in part by his own neglect, and he would also be liable for all injury to the company or to persons or property in their charge.[42] (*p*) And the omission of the company to sound the whistle or to ring the bell in such cases, will not render them responsible for damage to cattle, unless it appear that such precautions would have prevented the injury.[43]

30. In actions for injury to cattle, if negligence is clearly proved on the part of the plaintiff, the company are not responsible unless *guilty of gross negligence, which implies wilful injury.[44] In such actions founded upon the statute, the declaration should negative all the exceptions in the statute; but the plaintiff is not called upon to negative in proof the existence of any contract between himself and the company to maintain the fences along the line of the road against his land.[45]

31. As the statute does not require railway companies to fence their road within the limits of cities and villages, they are not responsible for damage to domestic animals caused by their trains within such corporate limits; and if the animal come upon their track within these limits, and is driven by the train beyond these limits and there killed, without any fault on the part of the company, it is immaterial whether the road was properly fenced at the point where the animal was killed, as it came upon the track at a point where the company were not obliged to fence.[46] The mere killing of an animal by a railway company does not render them liable, unless they have been guilty of negligence or the case comes within the statute.[46]

32. In cases where the company are required by statute to ring the bell or sound the whistle, and that is omitted, if injury occur in consequence, they will be responsible, unless the party injured was himself guilty of negligence contributing to such

[43] Illinois Central Railroad Co. *v.* Phelps, 29 Ill. 447.

[44] Illinois Central Railroad Co. *v.* Goodwin, 30 Ill. 117.

[45] Great Western Railroad Co. *v.* Bacon, 30 Ill. 347.

[46] Same *v.* Morthland, 30 Ill. 451: Galena & Chicago Railroad Co. *v.* Griffin, 31 Ill. 303. As to cases under positive statute, see Illinois Central Railroad Co. *v.* Swearingen, 33 Ill. 289.

(*p*) Toledo, Wabash, & Western Railway Co. *v.* Barlow, 71 Ill. 640; Chicago & Alton Railroad Co. *v.* McMorrow, 67 Ill. 218.

result.[47] It is here said that railway companies are responsible for injuries to persons or property, when wilfully done, or resulting from gross neglect of duty. The company to exonerate themselves must use all reasonable or statutory precautions to prevent the injury, and an omission to do so will render them responsible, if the omission produce or contribute to the injury, and the plaintiff was not himself in fault in any particular also contributing to the injury.[47]

33. But in actions of tort against railway companies to recover damages for killing cattle upon their track, it is not competent to prove the company guilty of negligence in running their other trains, beside the one by which the cattle were killed.[48]

34. The rule of damages for injuries done to cattle is the value of the animal or the actual pecuniary loss, unless there is proof of wantonness or wilful injury.[49] (*q*)

[47] Great Western Railroad Co. *v.* Geddis, 33 Ill. 304.

[48] Mississippi Central Railroad Co. *v.* Miller, 40 Miss. 45.

[49] Toledo, Peoria, & Warsaw Railroad Co. *v.* Arnold, 43 Ill. 418.

(*q*) Atlanta & West Point Railroad Co. *v.* Hudson, 62 Ga. 679; Atchison, Topeka, & Santa Fe Railroad Co. *v.* Ireland, 19 Kan. 405; Finch *v.* Central Railroad Co , 42 Iowa, 304; Central Branch Union Pacific Railroad Co. *v.* Nichols, 24 Kan. 242, and cases *passim*. Several of the states, like Arkansas, Iowa, Illinois, Missouri, have passed acts making the company liable in certain cases to double damages. The statutes of the states named have been held constitutional. Memphis & Little Rock Railroad Co. *v.* Horsfall, 36 Ark. 651; Mackie *v.* Central Railroad Co., 51 Iowa, 510; Kaes *v.* Missouri Pacific Railway Co., 6 Mo. Ap. 397; Cairo & St. Louis Railroad Co. *v.* Warrington, 92 Ill. 157. The statutes of Alabama and Nebraska have been declared unconstitutional. Ziegler *v.* South & North Alabama Railroad Co., 58 Ala. 594; Atchison & Nebraska Railroad Co. *v.* Baty, 6 Neb. 37. As to construction of such statutes, see Seaton *v.* Chicago, Rock Island, & Pacific Railroad Co., 55 Mo. 416; Miller *v.* Chicago & Northwestern Railway Co., 59 Iowa, 707; Little Rock & Fort Smith Railroad Co. *v.* Payne, 33 Ark. 816. Under the Missouri statute the verdict should be for single damages, which the court may double. Wood *v.* St. Louis, Kansas City, & Northern Railroad Co., 58 Mo. 109. Exemplary damages can be had only in case the company was reckless. Chicago, St. Louis, & New Orleans Railroad Co. *v.* Janrett, 11 Am. & Eng. Railw. Cas. 455. Interest may be allowed from commencement of action. Dean *v.* Chicago & Northwestern Railway Co., 43 Wis. 305. Not from date of injury. Toledo, Peoria, & Warsaw Railway Co. *v.* Johnston, 71 Ill. 83; Meyer *v.* Atlantic & Pacific Railroad Co., 64 Mo. 542. See Luckin *v.* Delaware & Hudson Canal Co., 22 Hun, 309. Interest is recoverable only as damages. Western & Atlantic Railroad Co. *v.* McCauley, 68 Ga. 818.

*CHAPTER XIX.

FENCES.

SECTION I.

Obligation to Maintain; Rests on whom.

1. English statute makes a separate provision for fencing.
2. Enforced against the companies by mandamus.
3. Where no such provision exists, the expense of fencing is part of the land damages.
   n. (a) Regulated by statutes in some of the states. Various provisions.
4. Where the company resists the assessment, the land-owner is in the mean time not obliged to fence.
5. In some cases held that the duty of fencing rests equally on the company and the land-owner.
6. Assessment of land-damages, on condition that company build fences, raises an implied duty on part of company.
7. In some states, owners of cattle not required to confine them on their own land.
8. Lessee of railway bound to keep up fences and farm accommodations.
9. Company bound to fence land acquired by grant as well as by proceedings *in invitum*.
10. Farm-crossings required wherever necessary.
11. Land-owner declining farm accommodations, has no redress; courts of equity will not decree specific performance.
12. Fences and farm accommodations not required for safety of servants and employés.
13. Requisite proof where company liable for all cattle killed.
14. Party bound to fence assumes primary responsibility.
15. Company not liable for injury at road-crossings.
16. Company not liable for injury to cattle by defect of fence about yard.
17. Animals escaping through defect of fence.
18. Injury must appear to have occurred through default of company.
19. Cattle-guards required in villages, but not so as to render streets unsafe.
20. Company responsible for injuries through defect of fences and cattle-guards.
21. Common-law rule as to liability maintained in New Hampshire.
22. Company responsible as long as it controls road.
23. Maintaining fences, matter of police. Duty under the English statute and at common law. Fencing against children.
24. Rule as to land-owner agreeing to maintain fence, &c.
25. Company not responsible for defect of fence where fence is not needed.
26. Company not responsible in Indiana unless in fault.
27. Company not liable where fence thrown down by others.
28. Owner in fault cannot recover unless company failed to exercise ordinary care.
29. Rule of damages for not building fence, &c.
30. Land-owner must keep up bars.
31. Illustrations of the general rule.
32. Actions under statute must be brought within it.
33. Owner in Pennsylvania must keep his cattle at home.
34. Statutory fence required.

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*§ 127. 1. By the Railway Clauses Consolidation Act[1] it is made the duty of the railways in England, before they use land for any of their purposes, to fence it, and make convenient passes for the owner, which, if the parties do not agree, are to be determined by two magistrates. Under this statute it has been held, that the railway is not excused from making the necessary accommodations to keep up communication, to the owner, between different parts of lands intersected by the line of a railway, because these are not defined in the arbitrators' award of land damages. They are totally distinct things from the land damages.[2] And where the jury, assessing land damages, also made a separate verdict for the expense of crossing the railway by a private way, it was considered that they exceeded their jurisdiction, and their proceedings were quashed.[3]

2. It is considered, in the English courts, that, the expense of building fences and crossings being imposed upon the railways by statute perpetually, and the mode of enforcing its performance pointed out in the statute, it has no connection with the land damages, but is to be enforced under the statute, and land damages are to be appraised upon the basis of that duty resting upon the railway.

3. But where the statute makes no such provision, (*a*) the ex-

[1] Statute 8 & 9 Vict. c. 20, § 10. But in Kyle *v.* Auburn & Rochester Railroad Co., 2 Barb. Ch. 489, the court declined to interfere by injunction, to compel the building of a farm-crossing, although the company assumed before the jury for assessing land damages, that they should make such a crossing, the plans showing none. It is said, that under such circumstances, it is the duty of the land-owner to make necessary crossings, and that he is a trespasser for crossing the railway without them; and this should be so considered, in assessing damages for taking the land, and compensation made for such expense.

[2] Skerrat *v.* North Staffordshire Railway Co., 5 Railw. Cas. 166, per Lord Cottenham, Chancellor. See *infra*, § 151, note 3.

[3] *In re* South Wales Railway Co. *v.* Richards, 6 Railw. Cas. 197. So too where the land-owner stipulated with the promoters for certain watering-places and other conveniences, and to accept a certain sum for special damage, and to withdraw thereupon opposition to the bill, it was held that the duty to make suitable watering-places might be enforced by mandamus. Regina *v.* York & North Midland Railway Co., 3 Railw. Cas. 761; *infra*, §§ 128, 151, 152. The provision for fences, in the English statute, being a separate, independent, general provision, is enforced, altogether aside from the proceedings to assess land damages.

(*a*) In some of the states there are statutes requiring companies to fence their roads. Such statutes are a police regulation for the safety of

pense of fencing and making crossings is an important consideration in estimating damages for the land taken, and this expense should

travellers, &c., and as such obligatory on corporations chartered after as well as before their passage. Wilder *v.* Maine Central Railroad Co., 65 Me. 332. Under some of these statutes the adjoining owner may build the fence in case the company is delinquent, and recover the expense in an action against the company. Logansport Railway Co. *v.* Wray, 52 Ind. 578; Jones *v.* Seligman, 81 N. Y. 190; Fletcher *v.* St. Louis, Kansas City, & Northern Railway Co., 73 Mo. 142; Warner *v.* Baltimore & Ohio Railroad Co., 31 Ohio St. 265. Under the New York statute the owner is not confined to that remedy. He may enforce the performance of the duty by the company. Jones *v.* Seligman, 81 N. Y. 190. See further Kane *v.* New York & New England Railroad Co., 49 Conn. 139; Ward *v.* Paducah & Memphis Railroad Co., 4 Fed. Rep. 862; Toledo, Peoria, & Warsaw Railway Co. *v.* Sieberus, 63 Ill. 217; Gowan *v.* St. Paul, Stillwater, & Taylor's Falls Railroad Co., 25 Minn. 328; Boston & Albany Railroad Co. *v.* Briggs, 132 Mass. 24. Where the statute requires the company to fence, the duty is a public one, and the owner of cattle has a right to assume that the company will perform it. St. John & Maine Railway Co. *v.* Montgomery, 5 Pugs. & Bur. 441.

For construction of that provision of the Illinois statute which requires the company to build fences within six months, see Rockford, Rock Island, & St. Louis Railroad Co. *v.* Heplin, 65 Ill. 366; Same *v.* Connell, 67 Ill. 216; Toledo, Peoria, & Warsaw Railway Co. *v.* Crane, 68 Ill. 355; Same *v.* Logan, 71 Ill. 191; Same *v.* Lavery, 71 Ill. 522. Whether the company shall fence does not depend on its ownership of the fee. It is just as much bound to fence if it has only an easement. Toledo, Peoria, & Warsaw Railway Co. *v.* Pence, 68 Ill. 524. The company is entitled to a reasonable time to repair any casual breach. Indianapolis & St. Louis Railroad Co. *v.* Hall, 88 Ill. 368; Davis *v.* Chicago, Rock Island, & Pacific Railroad Co., 40 Iowa, 292; Varco *v.* Chicago, Milwaukee, & St. Paul Railway Co., 30 Minn. 18. So of a breach made by persons not in its employ nor under its control. Chicago & Alton Railroad Co. *v.* Saunders, 85 Ill. 288. And the company is held to reasonable diligence. McCormick *v.* Chicago, Rock Island, & Pacific Railroad Co., 41 Iowa, 193; Case *v.* St. Louis & San Francisco Railroad Co., 75 Mo. 668. Where there was a delay of two days after the breach might reasonably have been repaired, it was held that there was a want of reasonable diligence. Goddard *v.* Chicago & Northwestern Railway Co., 54 Wis. 548. A defect patent and known to have existed two weeks or more held presumptive proof of negligence. Varco *v.* Chicago, Milwaukee, & St. Paul Railway Co., 30 Minn. 18. But held no unreasonable delay where the fence was burned at six or seven o'clock in the evening, and the foreman had notice at about eight, and was on the ground before six in the morning, and proceeded without unreasonable delay to repair with the company's nearest material, which was about half a mile distant. Stephenson *v.* Grand Trunk Railway Co., 34 Mich. 323. Nor is it negligence as matter of law, that the company does

* undoubtedly be borne by the company, in addition to paying the value of the land, for otherwise the land is taken without an equivalent. But the courts in most of the American states have resisted this view wherever it was practicable, more commonly upon some technical ground of presumption or inference, when, in fact, the omission of such an express provision in the charter or the general laws of the states was wholly the result of oversight in the legislatures. But it is refreshing to find some courts so far relieved from the trammels of mere technicality as not to feel compelled to sacrifice an obvious principle of justice to the shadow of a mere form. In a case in California we find an announcement upon this question which evidently comes from the right quarter, a sense of simple justice. It declares, if fences are rendered necessary

not repair at once, the weather being good, and want of repair being known to the employé before sunset. Crosby *v.* Detroit, Grand Haven, & Milwaukee Railroad Co., 23 Am. & Eng. Railw. Cas. 191. Though it is the duty of an injured party to use reasonable diligence to protect his property, he may not enter to repair fences or cattle-guards. Downing *v.* Chicago, Rock Island, & Pacific Railroad Co., 43 Iowa, 96. As to notice to the company, see Jones *v.* Chicago & Northwestern Railway Co., 49 Wis. 352; Ohio and Mississippi Railroad Co. *v.* Clutter, 82 Ill. 123; Indianapolis & St. Louis Railroad Co. *v.* Hall, 88 Ill. 368. The company is also bound to use reasonable diligence to keep gates and bars in proper condition and properly closed. Perry *v.* Dubuque, Southwestern Railway Co., 36 Iowa, 102; Hammond *v.* Chicago & Northwestern Railroad Co., 43 Iowa, 168; Mackie *v.* Central Railroad Co., 54 Iowa, 540; Toledo, Wabash, & Western Railway Co. *v.* Nelson, 77 Ill. 160; Estes *v.* Atlantic & St. Lawrence Railroad Co., 63 Me. 308. It is also the duty of the company to maintain cattle-guards as a part of a suitable fence. Pittsburg, Cincinnati, & St. Louis Railway Co. *v.* Eby, 55 Ind. 567. See Cook *v.* Milwaukee & St. Paul Railway Co., 36 Wis. 45; Welty *v.* Indianapolis & Vincennes Railroad Co., 24 Am. & Eng. Railw. Cas. 371. Whether a cattle-guard is sufficient is a question for the jury. Swartout *v.* New York Central & Hudson River Railroad Co., 7 Hun, 571; Cleveland Railroad Co. *v.* Newbrander, 11 Am. & Eng. Railw. Cas. 480. In general, contributory negligence is a defence to an action for injury where there is no fence. Curry *v.* Chicago & Northwestern Railway Co., 43 Wis. 665; Whittier *v.* Chicago, Milwaukee, & St. Paul Railway Co., 21 Minn. 391. But see Louisville, New Albany, & Chicago Railway Co. *v.* Cahill, 63 Ind. 346. As to what is contributory negligence, see Richardson *v.* Chicago & Northwestern Railway Co., 56 Wis. 347; Sandusky & Cleveland Railroad Co. *v.* Sloan, 27 Ohio St. 341; Railroad Co. *v.* Miami County Infirmary, 32 Ohio St. 566; Johnson *v.* Chicago, Milwaukee, & St. Paul Railway Co., 29 Minn. 425; Cairo & St. Louis Railroad Co. *v.* Woolsey, 85 Ill. 370.

for the protection of the crops of the land-owner by the construction of the railway through the land, the cost of such fences must be included in the compensation to be paid by the company,[4] and this by necessary consequence must include a sum sufficient to indemnify the owner against the constantly accruing expenses of maintaining such fences. And the tendency of the more recent decisions is sensibly in this direction; and we might add, without offence, that in our judgment it is the only sensible direction the decisions could take, and we have always expected them to take such a direction in the end, however late it may come.[5] (*b*)

4. And where in such circumstances the commissioners assessed the land damages, and a separate sum for building fences, and judgment was rendered in favor of the land-owner for both sums, but the payment resisted by a proceeding in Chancery, on the part of the railway, and while this was still undecided the company commenced running their engines, and the cattle of the occupier of the land strayed upon the track and were killed by the engines of the company, it was held,[6] that the obligation to maintain the *fence rests primarily upon the company, and until they have either built the fences or paid the land-owner for doing it, a sufficient time before to enable him to do it, the mere fact that cattle get upon the *road from the land adjoining is no ground for imputing negligence to the owner of the cattle.[6] (*c*)

[4] Sacramento Valley Railroad Co. *v.* Moffatt, 6 Cal. 74.

[5] Evansville Railroad Co. *v.* Fitzpatrick, 10 Ind. 120; Same *v.* Cochran, 10 Ind. 560; Same *v.* Stringer, 10 Ind. 551. This is now remedied by statute in many states.

[6] Quimby *v.* Vermont Central Railroad Co., 23 Vt. 387; see also Vanderkar *v.* Rensselaer & Saratoga Railroad Co., 13 Barb. 390. But under the English Railway Acts, where the company is required to make crossings,

(*b*) The question is differently disposed of, at least so far as form goes, in some of the cases. Thus, in Pittsburg, Bradford, & Buffalo Railroad Co. *v.* McCloskey, 23 Am. & Eng. Railw. Cas. 86, it was held that the cost of fencing, as such, was not an element of damages, but that the extent to which the burden of fencing would depreciate the value of the remaining land might properly be considered.

(*c*) In Indiana it is no answer to an action for injury of animals on the track, by reason of a want of a fence, that an allowance was made the owner for fencing in the award of land damages. It is still the duty of the road to fence. Baltimore, Pittsburg, & Chicago Railway Co. *v.* Johnson, 59 Ind. 188.

5. In some cases in this country it has been held that the railway and the adjoining land-owner are to defray equal proportions of the expense of maintaining fences, upon the principle of being adjoining

where land is divided, and the mode of determining the nature of the crossings is to be referred, "in case of any dispute," to two justices, on the application of the land-owner, it was held, that until the company has made a communication, a party whose land has been severed by the railway, has a right to pass from one portion of his property to the other across the railway, at any point, and that the section requiring the owner to pass at such a place as shall "be appointed" for crossing, means, "when such places shall have been appointed." Grand Junction Railway Co. *v.* White, 8 M. & W. 214; s. c. 2 Railw. Cas. 559. And where, at the time of appraising land damages, the land-owner, in the presence of the agents of the company, pointed out to the commissioner the place where he would have a farm-crossing, and no objection was made by the company, and the sum awarded was paid, but the company, in constructing the road, were throwing up an embankment at that point, and locating the crossing at a different place, where it would be inconvenient for the land-owner, an injunction was granted until the company should either make a suitable crossing or compensate the land-owner. Wheeler *v.* Rochester & Syracuse Railroad Co., 12 Barb. 227; Milwaukee & Mississippi Railroad Co. *v.* Eble, 4 Chand. 72. It is here held, that the land-owner is entitled to include, in his damages, the expense of fencing, as incidental to the taking of the land. But the contrary is held in a very elaborate case in Iowa, Henry *v.* Dubuque & Pacific Railroad Co., 2 Clarke, 288. The argument of the court in that case, however, is unsatisfactory. And where the railway at first contracted with the land-owner to build the fence for them at a specified price, but a controversy arising in regard to land damages, the commissioners reported a sum which was finally confirmed by the court, and an additional sum for the expense of building the fence, and the plaintiff took judgment and execution for this also, and subsequently built the fence according to his contract with the company, and sued the company for the price, it was held that he could not recover, the former judgment having merged the contract, and imposed on him the duty to build the fence, under the award and judgment. It was also held that the land-owner could not recover anything beyond the award for having built the fence according to the original contract, which rendered it more expensive to him than it would otherwise have been. Curtis *v.* Vermont Central Railroad Co., 23 Vt. 613; s. c. 1 Am. Railw. Cas. 258; see Lawton *v.* Fitchburg Railroad Co., 8 Cush. 230. And where the statute requires the company to make farm-crossings where they divide land, it is not proper for the jury, in assessing compensation to the land-owner, to include the expense of a bridge for the purpose of a farm-crossing. Philadelphia, Wilmington, & Baltimore Railroad Co. *v.* Trimble, 4 Whart. 47; s. c. 2 Am. Railw. Cas. 245. In the case of Chicago & Rock Island Railroad Co. *v.* Ward, 16 Ill. 522, where the company covenanted to maintain fences on land intersected by the road, and failed to perform the covenant, and crops were destroyed, it was held that the company was liable for the value of the crops

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proprietors, and being equally interested in having the fence maintained, unless the land-owner chooses to let his land lie in common, and in that case the company must be at the whole expense of fencing, as a necessary protection and security to their business.[7]

growing on the land and destroyed as of the time when fit for harvesting. This does not seem entirely in accordance with general principles on this question. The case professes to go upon the authority of De Wint *v.* Wiltie, 9 Wend. 325. But see §§ 145, 156.

[7] *In re* Rensselaer & Saratoga Railroad Co., 4 Paige, 553. In Northeastern Railroad Co. *v.* Sineath, 8 Rich. 185, it is held that damages are not to be assessed for fencing through unenclosed land used for grazing. In Louisville & Frankfort Railroad Co. *v.* Milton, 14 B. Monr. 75, it is held, that where one grants the right of building a railway across his land, neither the land-owner nor the company is bound to fence adjoining the railway. If the land-owner suffers his cattle to run at large, as he may, if he choose to incur the risk, he cannot recover damages of the company for any injury sustained by them, unless it might have been avoided by the agents of the company, with due regard to the safety of the train and its contents. If such cattle, permitted to run at large on the railway track, are killed accidentally by the train, when running at its customary speed, the owner cannot recover of the company. The court here discountenances the notion that seems sometimes to have prevailed, that if the company is in the right in running its train, and especially where cattle are trespassing on the track, it may destroy them at will, without incurring any responsibility. And in regard to the case of New York & Erie Railroad Co. *v.* Skinner, 19 Penn. St. 298, the court says, "it is not disposed to sanction all the legal doctrines avowed in that opinion." Railways are only bound to the use of such diligence, prudence, and skill, to avoid injury to cattle rightfully in the highway at a road-crossing, as prudent men exercise in the conduct of their own business. And as to cattle wrongfully on the railway, unless the injury is caused wilfully, or through gross negligence, the company is not liable. Chicago & Mississippi Railroad Co. *v.* Patchin, 16 Ill. 198; Great Western Railroad Co. *v.* Thompson, 17 Ill. 131; Quimby *v.* Vermont Central Railroad Co., 23 Vt. 387; Central Military Tract Railroad Co *v.* Rockafellow, 17 Ill. 541; Railroad Co. *v.* Skinner, 19 Penn. St. 298; Illinois Central Railroad Co. *v.* Middlesmith, 46 Ill. 494. But this latter case lays down the rule somewhat more stringently than the former cases.

In White *v.* Concord Railroad Co. 10 Fost. N. H. 188, it was held, that where the statute requires railways to fence and maintain proper cattle-guards, cattle-passes, and farm-crossings, for the convenience and safety of the land-owners along the side of the road, or settle with the land-owners therefor, and a railway divides a pasture, and a crossing is made, under the statute, the land-owner may let his cattle run in the pasture "without a herdsman," and the company will be liable for their destruction while crossing the track from one pasture to the other, unless the injury was caused by accident or by the fault of the owner, or unless it appears that the company has settled with the owner in relation to such guards, passes, and farm-crossings. And it was

* 6. But many of the American cases assume the ground that where there is no statute imposing the duty of fencing upon the * company, and no stipulation, express or implied, between the company and the land-owners that they shall maintain fences, * they are not bound to do so, but the common-law duty of keeping one's cattle at home rests upon the land-owner.[5] And this view is probably consistent, in principle, with the cases where such a duty is held to result from the appraisal of land damages,

held, also, in the same case, where the plaintiff deeded the land to the company on condition, "said corporation to fence the land and prepare a crossing, with cattle-guards, at the present travelled path, on a level with the track," that this was not such settlement, and did not alter the legal relations of the parties. In this case, both parties being in the right, were bound to the degree of prudence which is to be expected of prudent men. The railway, knowing of the crossing, and of the liability of cattle to be on it, was bound, rather than the land-owner, to keep a lookout. In Long Island Railroad Co., 3 Edw. Ch. 487, the Vice-Chancellor seems to consider that a railway company has no interest in having its road fenced, and is therefore not bound to contribute to the expense of fencing, which is at variance with the opinion of the Chancellor (4 Paige, 553), and equally, as it would seem, with reason and justice. See Campbell v. Mesier, 4 Johns. Ch. 334. In Sullivan v. Philadelphia & Reading Railroad Co., 6 Am. Law Reg. 342; s. c. 30 Penn. St. 234; s. c. 2 Redf. Am. Railw. Cas. 564, the subject of the duty of railway companies to fence their roads for the security of passengers is discussed, and many sensible practical suggestions made. *Infra*, § 192, note 6; § 204 a.

[5] Hurd v. Rutland & Burlington Railroad Co., 25 Vt. 116, 123; New York & Erie Railway Co. v. Skinner, 19 Penn. St. 298; Clark v. Syracuse & Utica Railroad Co., 11 Barb. 112; Dean v. Sullivan Railroad Co., 2 Post. N. H. 316; Alton & Sangamon Railroad Co. v. Baugh, 14 Ill. 211. Where, on appeal from the first appraisal of land damages where the erection of fences had been specified, that was vacated, and the new appraisal made no such requirement of the company, it was held that the presumption was, that the whole damages were appraised in money, and the company was not bound to build fences. Morss v. Boston & Maine Railroad Co., 2 Cush. 536; Williams v. New York Central Railroad Co., 18 Barb. 222. It seems impossible to estimate damages for taking land for the use of a railway, without taking into the account the expense of fencing. Henry v. Pacific Railroad Co., 2 Clarke, 228; Milwaukee & Mississippi Railroad Co. v. Eble, 4 Chand. 72; Northeastern Railroad Co. v. Sneath, 8 Rich. 185; *In re* Rensselaer & Saratoga Railroad Co., 4 Paige, 533. And those cases which hold the company not bound to fence, unless required to do so by statute or contract, go on the presumption that they have already paid the expense of fencing in the land damages. See Baltimore & Ohio Railroad Co. v. Lamborn, 12 Md. 257; Madison & Indianapolis Railroad Co. v. Kane, 11 Ind. 375; Stucke v. Milwaukee & Mississippi Railroad Co., 9 Wis. 202; Richards v. Sacramento Valley Railroad Co., 18 Cal. 351.

subject to the expense of building fences being borne by the company, or where the assessment specifically includes the expense of fencing, and that has not been paid. And in the Irish courts the company is only bound to erect such accommodation works for the benefit of the land-owners as are a compliance with the specifications in the award. This is true even where the railway crosses a private road over a farm in the right of some third party as lessee of the farm obliquely, and the award adjudicating the claim of such lessee specified only a crossing over the railway as a "level crossing" at a given point, and the company gave a crossing at right angles with the road, which did not connect the termini of the road, and gave no access to it; it was nevertheless held that this was a compliance with the award.[9] This is certainly not a fair construction of the award, as applicable to the subject-matter; and it does not require any gift of prophecy to foretell that the doctrine of * the case will not be followed in this country, and, with deference be it said, it ought not to be followed anywhere.

7. And in some of the states the rule of the common law, in regard to the duty resting upon the owner of domestic animals to restrain them, has not been adopted so as to charge the owner with negligence for suffering them to go at large.[10]

8. But it is held, that where the statute imposes upon the company the duty of maintaining fences and cattle-guards at farm-crossings, and provides that until such fences and cattle-guards shall be duly made the corporation and its agents shall be liable for all damages from such defect, this renders a lessee of the road liable for injury to cattle caused by his operating it without proper cattle-guards at farm-crossings.[11]

[9] Mann *v.* Great Southern & Western Railway Co., 9 Ir. Com. Law, 105.

[10] Kerwhacker *v.* Cleveland, Columbus, & Cincinnati Railroad Co., 3 Ohio St. 172. In such cases the company is bound to use reasonable care not to injure animals thus rightfully at large. Ib.; Cleveland, Columbus, & Cincinnati Railroad Co. *v.* Elliott, 4 Ohio St. 474. If the owner is to be charged with *remote* negligence in suffering his cattle to go at large, under such circumstances, and the servants of the company are guilty of want of care at the time of the injury, which is the *proximate* cause of it, the company is still liable. Ib.; Chicago & Mississippi Railroad Co. *v.* Patchin, 16 Ill. 198; Indianapolis & St. Louis Railroad Co. *v.* Caldwell, 9 Ind. 397.

[11] Clement *v.* Canfield, 28 Vt. 302. And the same rule applies to a company running its cars over another company's line by arrangement between the companies. If the road is not properly fenced, the company running the

9. A general statute, requiring fences to be maintained by railways upon the sides of their road, applies to land acquired by purchase as well as to that taken *in invitum*.[12]

* 10. And the statute, requiring farm-crossings "for the use of proprietors of land adjoining," has no reference to the quantity of land to be accommodated, but only that the crossing must be useful.[12] (*d*)

11. Where the statute requires the company to erect, at farm-crossings, bars or gates, to prevent cattle, &c., from getting upon the railway, and the land-owner who is entitled to such protection refuses to have such bars or gates erected, or requests the company not to erect them, or undertakes to erect them himself, he cannot maintain an action against the company for not com-

trains by which the damage is caused will be responsible, although it be the default of the other company, for which that is also responsible to the party injured. Illinois Central Railroad Co. *v.* Kanouse, 39 Ill. 272. An order on a railway for making farm accommodations must specify the time within which they shall be made. Keith *v.* Cheshire Railroad Co., 1 Gray, 614. And where the act allowing a railway company to lease its road is on the express condition that it be not thereby exonerated from any of its duties or liabilities, this must include the maintaining of fences. Whitney *v.* Atlantic & St. Lawrence Railroad Co., 44 Me. 362. Where a company permits its cattle-guards to remain filled with snow, so that cattle which have strayed upon the highway without any negligence on the part of the owner pass over such guards, and in consequence are injured by a passing train, the company is liable for the damages. Donnigon *v.* Chicago & Northwestern Railroad Co., 18 Wis. 28.

[12] Clarke *v.* Rochester, Lockport, & Niagara Falls Railroad Co., 18 Barb. 350. A fence built in zigzag form of rails, half the length on the land taken for the railway and half on the land of the adjoining proprietor, is a compliance with the statute requiring the fence to be built on the side of the road. Ferris *v.* Van Buskirk, 18 Barb. 397. And where the statute provides that, on certain proceedings, railway companies may be compelled to provide farm-crossings and cattle passes for the owners of land intersected by the company's road, and no such proceedings have been taken, the company is not liable to an action for damages resulting from the want of necessary farm-crossings and cattle passes, unless it appears that the company had contracted to build them. Horn *v.* Atlantic & St. Lawrence Railroad Co., 35 N. H. 169; s. c. 36 N. H. 410. Where the railway company contracts to build fences and farm-crossings, this obliges them to erect bars or gates at such crossings, as required by statute. Poler *v.* New York Central Railroad Co., 16 N. Y. 476.

(*d*) The owner of farm lands has a reasonable right to farm-crossings. Kansas City & Emporia Railroad Co *v.* Kregelo, 32 Kan. 608.

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plying with the statute.[13] A court of equity will not decree * specific performance of a covenant by a railway company to maintain and keep in repair the cattle-guards on the line of plaintiff's land.[14] Nor will the Court of Chancery, upon any general right, direct that farm-crossings, agreed to be built by a railway company, shall be made under its direction, or at its discretion.[15]

12. Railways are not bound to maintain fences upon their roads so as to make them liable to their own servants for injuries happening in consequence of the want of such fences. And where the statute makes them liable for all injuries done to cattle, &c., by their agents or instruments until they fence their road, the liability extends only to the owners of such cattle or other animals, and this liability is the only one incurred.[16]

[13] Tombs *v.* Rochester & Syracuse Railroad Co., 18 Barb. 583. But where the statute requires the commissioners to prescribe the "time when such works are to be made," and the owner has the right, by statute, to recover double damages, "by reason of failure to erect the works," and the commissioners fail to *prescribe the time*, no action will lie. Keith *v.* Cheshire Railroad Co., 1 Gray, 614. When the statute requires fences to be maintained by railway companies, it must be done before they begin running trains. Clark *v.* Vermont & Canada Railroad Co., 28 Vt. 103. And in Gardiner *v.* Smith, 7 Mich. 410, it was held to attach as soon as the company has possession of the land for construction. Since the decision of the case of Clark *v.* Vermont & Canada Railroad Co., *supra*, the same court held, that during the construction of a railway, the company in such case was bound, either by fences or other sufficient means, to protect the fields of land-owners adjoining the railway. And whether the company has used the proper precautions to prevent the escape of the land-owner's cattle or the intrusion of other cattle, during such construction, is a question of fact, in each particular case to be determined by the jury. Holden *v.* Rutland & Burlington Railroad Co., 30 Vt. 297. Where the contractor for building a railway took away the fences in course of construction, and the sheep of the land-owner escaped thereby and were lost, he was held responsible for the loss. Gardiner *v.* Smith, 7 Mich. 410. And it will make no difference that the land-owner turned the sheep into the lot after the land was taken possession of by the contractor, and he was constantly throwing down the fences to carry forward the work. Ib. But a railway company cannot fence its road by means of willows set on the line of the land taken, and which in growing will injure the adjoining land by the extension of their roots, there being no controlling necessity of fencing in that mode. Brock *v.* Connecticut & Passumpsic Rivers Railroad Co., 35 Vt. 373.

[14] Columbus & Shelby Railway Co. *v.* Watson, 26 Ind. 50.

[15] Darnley *v.* London, Chatham, & Dover Railway Co., Law Rep. 2 H. L. 43.

[16] Langlois *v.* Buffalo & Rochester Railroad Co., 19 Barb. 364. But in

13. Where the statute makes railways liable for cattle killed by them without reference to their negligence, all that is necessary to entitle the party to recover is to show the fact that the cattle were killed by the company and that he was the owner.[17]

14. And where it is the duty of the company to fence the land adjoining their road, and they omit to do so, whereby cattle escape upon the track and are killed, they are liable in damages without any proof of care on the part of the owner to restrain them.[18] And evidence of notice to the owner that the animal had escaped two or three times before and had been upon the track, is immaterial.[18] But where the duty of maintaining fences is upon the land-owner, and cattle escape and are killed upon * the track, the company are not liable without proof of due care on the part of the owner to restrain them.[19] The statute requiring railways thereafter constructed to fence their roads on both sides, does not apply to a road in the process of construction at the date of the act.[19] The statute requiring railways to fence their roads, and making them liable for injury to cattle without regard to the negligence of the owner, or his being an owner of adjoining land, is a police regulation.[20] But this liability does not extend to animals injured by fright.[21]

McMillan *v.* Saratoga & Washington Railroad Co., 20 Barb. 449, it is conceded the company would have been liable to the representative of the engineer, who was killed by the train running on cattle which came upon the track through defect of fences, which it was the duty of the company to maintain, if they had been shown to have had actual knowledge of such defect before the injury. See *infra*, § 131.

[17] Nashville & Chattanooga Railroad Co. *v.* Peacock, 25 Ala. 229. See also Williams *v.* New Albany & Salem Railroad Co., 5 Ind. 111; Lafayette & Indianapolis Railroad Co. *v.* Shriner, 6 Ind. 141. In this case it was held, that such a statute had no reference to the case of cattle killed at a road-crossing, as that was a place which could not be protected either by fences or cattle-guards.

[18] Rogers *v.* Newburyport Railroad Co., 1 Allen, 16.

[19] Stearns *v.* Old Colony & Fall River Railroad Co., 1 Allen, 493. And the burden is on the plaintiff in an action against a railway company for damages caused by defect of fences on its line, to show that the company was bound to maintain such fences. Baxter *v.* Boston & Worcester Railroad Co., 102 Mass. 383.

[20] Indianapolis & Cincinnati Railroad Co. *v.* Townsend, 10 Ind. 38; Jeffersonville Railroad Co. *v.* Applegate, 10 Ind. 49; Indianapolis & Cincinnati Railroad Co. *v.* Meek, 10 Ind. 502; Jeffersonville Railroad Co. *v.* Dougherty, 10 Ind. 549.

[21] Peru Railroad Co. *v.* Haskett, 10 Ind. 409. And the company is not lia-

15. Railway companies are not liable for injuries to animals at highway crossings, although the crossing had been abandoned by the public for two years and the highway changed, it not appearing to have been vacated in the mode prescribed by statute, so as to justify the company in fencing their track across it.[22]

16. Railway companies in England are not held responsible for injuries to cattle transported to their stations, where the injury is caused by their escaping upon the track through defects of the fence about the cattle-yard; nor for the cattle being frightened by one of the porters of the company coming out of the station into the cattle-yard, having a lantern, such as was ordinarily used, in his hand; it being no evidence of negligence on the part of the company's servants.[23] It was considered here that the cattle had been delivered to the plaintiff, and it was his fault, since he knew the yard was not fenced, and had himself pronounced it an unsafe place, not to guard against their escape.

17. It appeared in one case[24] that the plaintiff's horse had escaped * in the night-time from his pasture upon the railway track, on account of the want of proper fence along the line of the road, and was found in the morning a mile from the plaintiff's land in a rocky pasture seriously injured in the leg; and there was some evidence tending to show that the injury was received in the pasture where he was found. The court charged the jury that if they were satisfied there was a clear connection between the escape of the horse and the injury received, the plaintiff was entitled to recover. This was held erroneous in not requiring the jury to discriminate between a *direct* and a *remote* connection between the neglect of the company and the damage to the plaintiff's horse, as he could only recover upon the former ground.

18. In this case[24] the plaintiff's cows were killed by escaping

ble for cattle killed in the highway without its fault, where the track of the road was fully fenced. Northern Indiana Railroad Co. *v.* Martin, 10 Ind. 460.

[22] Indiana Central Railroad Co. *v.* Gapen, 10 Ind. 292.

[23] Roberts *v.* Great Western Railroad Co., 4 C. B. N. S. 506. Railway companies are not bound to fence their depot grounds. Davis *v.* Burlington & Missouri River Railroad Co., 26 Iowa, 549.

[24] Holden *v.* Rutland & Burlington Railroad Co., 30 Vt. 297. Where the plaintiff had knowledge at evening that his fence was in danger of being carried off by a flood, and knew his cattle would in consequence be liable to come upon the railway track, and refused to remove them from the pasture, and before morning the fence was carried off, and the cattle came upon the track

from the plaintiff's pasture, and going into a piece of land leased by the plaintiff to the defendants, to be used by them as a wood-yard, and from that upon the defendants' track, for want of fence about the wood-yard. The evidence left it doubtful whether the defendants were to have the exclusive occupancy of the wood-yard, or were to fence the same, as between them and the plaintiff; it was held that, in order to recover of the defendants for killing the cows, it should be found by the jury that it was the duty of the defendants to maintain the fence for defect of which the cows escaped upon the defendants' track.

19. The statute of New York, requiring railways to maintain cattle-guards at road-crossings, applies to streets in a village, but not so as to impede the passage along the streets, or render them unsafe for persons passing.[25] (*e*)

20. It has often been declared that railway companies, to relieve themselves from responsibility for damage caused by their trains to domestic animals, must not only build but maintain in good * repair all fences and cattle-guards required of them by law.[26] (*f*) If such structures are allowed to fall into decay, or are accidentally thrown open or thrown down, and not closed and restored within a reasonable time, the company are responsible to the owner of cattle injured by such neglect, provided he is not in

and were killed by a passing train, it was held that the plaintiff could not recover. Michigan, Northern, & Southern Railroad Co. *v.* Shannon, 13 Ind. 171. There are numerous cases in Indiana where matters of practice under the statute of that state are discussed. Wright *v.* Gossett, 15 Ind. 119; Indianapolis, Pittsburg & Cleveland Railroad Co. *v.* Fisher, 15 Ind. 203; Same *v.* Kercheval, 16 Ind. 84; Ohio & Mississippi Railroad Co. *v.* Quier, 16 Ind. 410. And it has been held that the killing of each of several animals killed at one time constitutes a separate and indivisible cause of action, and two of these cannot be united to give jurisdiction to the Circuit Court. Indianapolis & Cincinnati Railroad Co. *v.* Kercheval, 24 Ind. 139.

[25] Brace *v.* New York Central Railroad Co., 27 N. Y. 269.

[26] McDowell *v.* New York Central Railroad Co., 37 Barb. 195.

(*e*) So of that provision of the statute requiring the road to be fenced. Vacant lots fronting the road must be fenced. Crawford *v.* New York Central & Hudson River Railroad Co., 18 Hun, 108.

(*f*) If a gate, erected for the convenience of the land-owner, be left open continually by the agents of the company or by persons doing business with it, the fence is not maintained within the meaning of the statute. Spinner *v.* New York Central & Hudson River Railroad Co., 67 N. Y. 153.

fault himself.[26] But even where such fences and cattle-guards are properly maintained, the railway companies will be held responsible for all damage to animals caused by the wilful or negligent conduct of their agents and employés.

21. In New Hampshire the common-law rule of responsibility for damage only as to cattle rightfully in the adjoining fields is maintained in regard to the duty of railway companies to fence their track, and an omission of this duty will not render them responsible for an injury happening to cattle trespassing upon the track or upon the lands adjoining.[27] (*g*) It is here held that railway companies are not responsible to the owner of lands adjoining their track for damage done upon such lands by cattle suffered by their owners to run at large in the highway, and thence escaping upon the railway track, and thus coming upon such adjoining lands, through defect of fences, which it is the duty of the company to maintain. But this seems questionable.(*h*) We should have said, without much examination or reflection, that although the owners of the cattle are clearly responsible for all such damage, it is not quite certain the company may not also be held responsible for the same damage to the land-owner, inasmuch as the law casts upon them the duty of maintaining the fences against the land, and the damage occurred in consequence of the omission. But the court unquestionably took the surest course to visit the responsibility, in the first instance, where it ultimately belongs. It is here further said that railways are bound to maintain proper cattle-guards at farm-crossings, and are responsible for all damages to cattle rightfully there by such omission, but are not responsible for any injury to cattle suffered to go at large

[27] Chapin *v.* Sullivan Railroad Co., 39 N. H. 53.

(*g*) Giles *v.* Boston & Maine Railroad Co., 55 N. H. 552. Nor, the statute having been complied with, is the company liable for injuries to animals that have come upon the track through gates or bars left open by an adjoining proprietor, unless the injury might have been avoided by proper management of the train. Hook *v.* Worcester & Nashua Railroad Co., 58 N. H. 251.

(*h*) Such, however, is the rule under the statutes of various other states. Gowan *v.* St. Paul, Stillwater, & Taylor's Falls Railroad Co., 25 Minn. 328; Peoria, Decatur, & Evansville Railway Co. *v.* Schiller, 12 Brad. 443. But see Biggerstaff *v.* St. Louis, Kansas City, & Northern Railroad Co., 60 Mo. 567.

in the highway, or wrongfully there for any cause, although such injury may occur by reason of the omission to build and maintain such cattle-guards.[28]

22. A railway company are responsible for all damage done to cattle rightfully in lands adjoining the railway track through defect * of fences which the company are bound to maintain; and they cannot excuse themselves from responsibility by showing that the road is operated for the benefit of other parties, and especially so long as it is done under the direction and control of the company.[29]

23. The building of fences along the line of a railway track is, no doubt, in regard to the security of travel thereon, to be regarded as a matter of police, and a duty which the companies cannot shift upon others by contracts to maintain such fences.[30] And it makes no difference by whom such fences were built: the company is bound to maintain them in good condition at all times.[31] But it has been held in the English courts,[32] that the statute requiring the companies to fence their roads, as between them and the land-owners, does not impose any duty to fence them in order to secure the safety of passengers; and therefore the companies may, so far as the statute duty is concerned, contract with the land-owners to maintain the fences along the line, and will thus escape responsibility under the statute. And it is further held, in this case, that the duty of railways towards their passengers, so far as fencing their roads is concerned, as at common law, is one of diligence, in order to render the passing of trains as secure as practicable, and does not amount to a positive warranty to keep cattle off the line, or to fence the same, except so far as that may be regarded as a necessary precaution, in order to secure safety to their passengers under the circumstances. But in an American case,[33] where a child eighteen months old came upon the track of a railway, through defect of fences which it was the duty of the company to

[28] *Infra*, § 128, pl. 7.

[29] Wyman *v.* Penobscot & Kennebec Railroad Co., 46 Me. 162.

[30] New Albany & Salem Railroad Co. *v.* Tilton, 12 Ind. 3; Same *v.* Maiden, 12 Ind. 10. See also Illinois Central Railroad Co. *v.* Swearingen, 33 Ill. 389.

[31] New Albany & Salem Railroad Co. *v.* Pace, 13 Ind. 411.

[32] Buxton *v.* Northeastern Railway Co., Law Rep. 3 Q. B. 549; *supra*, § 126, note 32.

[33] Schmidt *v.* Milwaukee & St. Paul Railroad Co., 23 Wis. 186.

build, and was injured in consequence, it was held that a child so young could not be guilty of negligence, and that the omission to build the fence by the company was negligence, and made the company responsible.

24. A land-owner, who by contract with the company is bound to maintain the fences through his land, cannot recover of the company for damage to cattle by reason of defect of fences, unless he show negligence on the part of the company.[34] (*i*) But a railway company is responsible for cattle killed by their trains at a mere private road-crossing, which was not, but might have been, easily fenced by them.[35] This case was controlled by the statute. A sufficient fence in Indiana is held to be such an one as good husbandmen usually keep.[36] But in many of the states what shall constitute legal fences is defined by statute.

25. Railway companies are not responsible for damage accruing to domestic animals from want of fences, at points which do not properly admit of being fenced, as in the immediate vicinity of engine-houses, machine-shops, car-houses and wood-yards.[37] (*j*)

[34] Terre Haute Railroad Co. *v.* Smith, 16 Ind. 102.

[35] Indiana Central Railroad Co. *v.* Leamon, 18 Ind. 173.

[36] Toledo & Wabash Railroad Co. *v.* Thomas, 18 Ind. 215. If such a fence is maintained, the company is liable only as at common law for negligence. *Infra*, pl. 34.

[37] Indianapolis & Cincinnati Railroad Co. *v.* Oestel, 20 Ind. 231; Galena & Chicago Union Railroad Co. *v.* Griffin, 31 Ill. 303.

(*i*) Where the company builds a cattle-guard at the request of the adjacent proprietor, and maintains it thirty years, it may cease to maintain it without notice to the owner. Vicksburg & Meridian Railroad Co. *v.* Dixon, 61 Miss. 119.

(*j*) Or of a saw-mill or a hay-press. Pittsburg, Cincinnati, & St. Louis Railway Co. *v.* Bowyer, 45 Ind. 496; Ohio & Mississippi Railway Co. *v.* Rowland, 50 Ind. 349. Nor around a warehouse in a village adjoining a switch. Toledo, Wabash, & Western Railway Co. *v.* Chapin, 66 Ill. 504. Nor about station grounds. McGrath *v.* Detroit, Mackinac, & Marquette Railroad Co., 22 Am. & Eng. Railw. Cas. 574; Prickett *v.* Atchison, Topeka, & Santa Fe Railroad Co., 23 Am. & Eng. Railw. Cas. 232. Nor where it can fence but one side. Indiana, Bloomington, & Western Railway Co. *v.* Leak, 89 Ind. 596. But the company is not excused from fencing in a town, unless a fence would be improper. Pittsburg, Cincinnati, & St. Louis Railway Co. *v.* Laufman, 78 Ind. 319. Nor at a place where there is a switch merely, unless it is on station grounds. Comstock *v.* Des Moines Valley Railroad Co., 32 Iowa, 376. Nor along its way through a town or city, merely because it is in a town,

And where the fence along a railway line is destroyed by unavoidable accident, as by fire, and is repaired in a reasonable time, but in the mean time cattle get at large by reason of the want of fence, and are injured, the company will not be held responsible.[38] (*k*)

26. In Indiana railway companies are by statute made responsible * for animals, but not for persons, injured upon their roads, when they might be, but are not fenced, irrespective of the question of negligence.(*l*) But when a proper fence is maintained in all places where it is required to be, the company are not responsible for animals injured, except, as at common law, where there is negligence on their part conducing to the result, and none on the part of the owner.[39]

27. The requirements of railway companies as to fencing their roads are not intended exclusively for the protection of domestic animals, but also for the security of travel and transportation, and where the fence is thrown down by third persons without the knowledge of the company that it is down, and cattle stray upon the track and receive injury, the company is not responsible for the damage.[40]

28. Where the plaintiff is guilty of negligence which immediately and directly contributes to the injury of cattle, he cannot re-

[38] Toledo & Wabash Railroad Co. *v.* Daniels, 21 Ind. 256; Indianapolis, Pittsburg, & Cleveland Railroad Co. *v.* Truitt, 24 Ind. 162.

[39] Thayer *v.* St. Louis, Alton, & Terre Haute Railroad Co., 22 Ind. 26; McKinney *v.* Ohio & Mississippi Railroad Co., 22 Ind. 99, where it is held to make no difference as to the responsibility of the company that the road is operated by a receiver.

[40] Toledo & Wabash Railroad Co. *v.* Fowler, 22 Ind. 316.

whether it crosses a highway, &c., or not. Ells *v.* Pacific Railway Co., 48 Mo. 231. That there was no fence must be proved by the plaintiff; that a fence would be improper, by the defendant. Indianapolis, Peru, & Chicago Railroad Co. *v.* Lindley, 75 Ind. 426. To show that the defendant regarded the place proper for a fence, plaintiff may show that the company built one after the accident. Toledo, Wabash, & Western Railway Co. *v.* Owen, 43 Ind. 405.

(*k*) Delay of a week held unreasonable. Cleveland Railroad Co. *v.* Brown, 45 Ind. 90. Delay of four days held unreasonable, the section boss, whose duty it was to repair, having passed over the road twice daily, and held also, the company having run its trains on Sunday, that it might repair on Sunday. Toledo, Wabash, & Western Railway Co. *v.* Cohen, 44 Ind. 444.

(*l*) Louisville, New Albany, & Chicago Railway Co. *v.* Zink, 85 Ind. 219; Grand Rapids & Indiana Railway Co. *v.* Jones, 81 Ind. 523.

cover of a railway company, unless, by the exercise of ordinary care and prudence at the time, the company might have avoided inflicting the injury.[41] (*m*)

29. Where the railway company stipulated with an adjoining land-owner, to construct five "cow-pits," or cattle-guards, upon his land, but did it in so imperfect a manner as to be of no value, and the land-owner brought suit for the breach of contract, it was held he could only recover such damage as he had sustained up to the time of bringing the action, unless where he had himself constructed the cattle-guards in a proper manner, when he might also recover the expense of such construction.[42]

30. Where bars are erected at a farm-crossing at the request of the land-owner, it is his duty to keep them up; and if he fails to do so, whereby his own cattle or those of third persons straying into his field get upon the track and are injured, the owners of such cattle cannot recover of the company if guilty of no default at the time of the injury.[43]

* 31. A railway running along the line of a highway is required to be fenced with especial care and watchfulness.[44] But where an animal passes upon the track of a railway at the crossing of a highway, where it would not be proper nor practicable to make any effectual fence or cattle-guards, and is injured, the company is not responsible unless in fault in the management of the train at the time.[45] And it was here considered that notwithstanding the facts that the plaintiff was guilty of negligence in permitting the animal to stray upon the track, and was not an adjoining proprietor, he might recover for an injury thereto by the cars of a

[41] Indianapolis & Cincinnati Railroad Co. *v.* Wright, 22 Ind. 376.

[42] Indiana Central Railroad Co. *v.* Moore, 23 Ind. 14.

[43] Indianapolis Railroad Co. *v.* Adkins, 23 Ind. 340. See also Eames *v.* Boston & Worcester Railroad Co., 14 Allen, 151. In this case the company erected bars for the accommodation of the land-owner, and the animal killed escaped upon the track, by the bars being left down, and afterwards passed upon the adjoining lot, and then upon the railway again, it not appearing precisely how. The court held, that the owner could not recover without showing that the bars were down without his fault, or else that the animal, after leaving the track, came upon it again through the fault of the company.

[44] Indianapolis & Cincinnati Railroad Co. *v.* Guard, 24 Ind. 222; Same *v.* McKinney, 24 Ind. 283.

[45] Indianapolis & Cincinnati Railroad Co. *v.* McKinney, 24 Ind. 283.

(*m*) Koutz *v.* Toledo, Wabash, & Western Railway Co., 54 Ind. 515.

railway company if their track was not fenced. But where the owner of a blind horse turned him out upon the common of a town, through which a railway ran, where he was killed by a passing train, and the track was not fenced, it was held he could not recover, on account of his own gross negligence.[46]

32. In actions against railway companies, under the statute, for injury to domestic animals, it should appear affirmatively that the case comes within the provisions of the statute. Thus where railways are required to fence their roads within six months after opening them for use, on penalty of being responsible for all cattle injured, it should appear, in an action for injury by reason of such omission, that the six months had expired.[47] So if it is claimed that the injury occurred by reason of the omission to fence, it should appear that it occurred at a point in the road where the company were not excused from fencing.[48] To constitute a town or village within the statute it is not requisite there should be any plot of the same, indicating streets, &c., in the manner provided by statute.[48]

* 33. An owner of mules killed upon the track of a railway by an engine and cars, cannot recover therefor, even where they escaped from a properly fenced enclosure without his knowledge, and were on the highway at its intersection with the railway.[49]

34. There seems to be some conflict in the decisions in regard to the kind of fence the railways are required to maintain. The natural conclusion upon this point would be that it should be such fence as the statute makes legal fence in other cases; and some of the courts adopt this rule.[50] But in others it seems to have been held this is not indispensable.[51] (*n*)

[46] Knight *v.* Toledo & Wabash Railroad Co., 24 Ind. 402. A railway company is not bound to resort to any extraordinary means to insure the fence being kept up along its line night and day. Reasonable diligence is all that is required. Illinois Central Railroad Co. *v.* Dickerson, 27 Ill. 55; Same *v.* Phelps, 29 Ill. 447; Same *v.* Swearingen, 33 Ill. 289.

[47] Ohio & Mississippi Railroad Co. *v.* Meisenhiemer, 27 Ill. 30; Same *v.* Jones, 27 Ill. 41.

[48] Illinois Central Railroad Co. *v.* Williams, 27 Ill. 48.

[49] North Pennsylvania Railroad Co. *v.* Rehman, 49 Penn. St. 101.

[50] Enright *v.* San Francisco & San Juan Railroad Co., 33 Cal. 230.

[51] Eames *v.* Salem & Lowell Railroad Co., 98 Mass. 560; Chicago & Alton

(*n*) In Michigan this matter is provided for by statute. They are to be approved by the railroad commissioners. Davidson *v.* Michigan Cen-

SECTION II.

Cattle against which the Company is bound to fence.

1. Owner bound to restrain cattle at common law.
2. If bound to fence along adjoining land, only against cattle rightfully on such land.
3. Agreement that land-owner shall fence, will excuse injury to cattle.
4, 5. Owner of cattle injured by negligence of company may recover, unless guilty of express neglect.
6, 7. Duty of company to fence against cattle straying on adjoining land.
8. Company not bound to fence, liable only for injuries caused by wanton or reckless conduct.
9. Grantee of land bound by grantor's covenants as to fencing.
10. Cattle accidentally at large. Duty of company.
11. Distinction between suffering cattle to go at large and accidental escape.

§ 128. 1. At common law the proprietor of land was not obliged to fence it. Every man was bound to keep his cattle upon his own premises, and he might do this in any manner he chose.[1]

Railroad Co. *v.* Utley, 38 Ill. 410. The statute requiring railways to be fenced is peremptory, and the exercise of ordinary care in maintaining fences will not excuse any defects found in the fence. Antisdel *v.* Chicago & Northwestern Railway Co., 26 Wis. 145.

[1] Dovaston *v.* Payne, 2 H. Bl. 527; Rust *v.* Low, 6 Mass. 90, 99; Jackson *v.* Rutland & Burlington Railroad Co., 25 Vt. 157, 158; s. c. 1 Redf. Am. Railw. Cas. 362; Wells *v.* Howell, 19 Johns. 385; Manchester, Sheffield, & Lincolnshire Railway Co. *v.* Wallis, 14 C. B. 213; s. c. 25 Eng. L. & Eq. 373; Morse *v.* Rutland & Burlington Railroad Co., 27 Vt. 49; Lafayette & Indianapolis Railroad Co. *v.* Shriner, 6 Ind. 141; Woolson *v.* Northern Railroad Co., 19 N. H. 267; Indianapolis & Cincinnati Railroad Co. *v.* Kinney, 8 Ind. 402. But in Pennsylvania the common-law rule in regard to keeping one's cattle at home is reversed by statute, and improved lands must be fenced in order that the owner may recover for damages done by stray cattle. Gregg *v.* Gregg, 25 Leg. Int. 372.

tral Railroad Co., 49 Mich. 428. A bluff, ledge, or ditch, effectual as a barrier, may be regarded as a lawful fence. Hilliard *v.* Chicago & Northwestern Railway Co., 37 Iowa, 442. In Shellabarger *v.* Chicago, Rock Island, & Pacific Railway Co., 19 Am. & Eng. Railw. Cas. 527, it is held that any fence sufficient to keep cattle off the track is sufficient. The company is not bound to keep a fence that will stop unruly animals. Smead *v.* Lake Shore & Michigan Southern Railroad Co., 23 Am. & Eng. Railw. Cas. 241.

2. And where, by prescription or contract, or by statute, a land proprietor is bound to fence his land from that of the adjoining proprietor, it is only as to cattle rightfully in such adjoining land.[2] The same rule has been extended to railways.[3] (*a*) And it has been considered in some cases that where no statute, in terms, imposes upon railways the duty of fencing their roads, that they are not bound to fence, and that the owner of cattle is *bound to keep them off the road, or liable to respond in damages for any injury which may be caused by their straying upon the railway,[4] and as a necessary consequence cannot recover for any damage which may befall them.[5]

[2] Cases *supra*, note 1; Lord *v.* Wormwood, 29 Me. 282; Bemis *v.* Connecticut & Passumpsic Rivers Railroad Co., 42 Vt. 375.

[3] Ricketts *v.* East & West India Docks & Birmingham Junction Railway Co., 12 C. B. 161; s. c. 12 Eng. L. & Eq. 520; Dawson *v.* Midland Railway Co. 21 W. R. 56; Perkins *v.* Eastern Railroad Co., 29 Me. 307; Towns *v.* Cheshire Railroad Co., 1 Fost. N. H. 363; Cornwall *v.* Sullivan Railroad Co., 8 Fost. N. H. 161.

[4] Vandegrift *v.* Rediker, 2 Zab. 185; Tonawanda Railroad Co. *v.* Munger, 5 Denio, 255; s. c. 4 N. Y. 349; Clark *v.* Syracuse & Utica Railroad Co., 11 Barb. 112; Williams *v.* Michigan Central Railroad Co., 2 Mich. 259; New York & Erie Railway Co. *v.* Skinner, 19 Penn. St. 298; Mayberry *v.* Concord Railroad Co., 47 N. H. 391.

[5] Brooks *v.* New York & Erie Railroad Co., 13 Barb. 594. In this case it was held that the statute requiring railways to maintain cattle-guards at road-crossings did not extend to farm-crossings. So too it has been held that the statute requiring gates or cattle-guards at road-crossings does not extend to street-crossings. Vanderkar *v.* Rensselaer & Saratoga Railroad Co., 13 Barb. 390. In Central Military Tract Railroad Co. *v.* Rockafellow, 17 Ill. 541, the rule is laid down in regard to cattle straying upon a railway, that they are to be regarded as wrongfully on the road, and that the owner cannot recover for an injury, unless caused by wilful misconduct or gross negligence. And Illinois Central Railroad Co. *v.* Reedy, 17 Ill. 580, is to the same effect. In Munger *v.* Tonawanda Railroad Co., 4 N. Y. 349, it is held, that cattle escaping from the enclosure of the owner and straying upon the track of a railway, are to be regarded as trespassers, and no action can be maintained against the company if the negligence of the plaintiff concurred with that of the company

*(*a*) But *contra*, Gillam *v.* Sioux City & St. Paul Railroad Co., 26 Minn. 268. And companies are liable to occupants as well as owners. Veerhausen *v.* Chicago & Northwestern Railway Co., 53 Wis. 689. The company is bound to fence against cattle in the highway as much as against cattle in the fields. Evansville & Crawfordsville Railroad Co. *v.* Barber, 71 Ind. 169.

3. But where a railway is not obliged to fence unless requested * by the land-owner, and had agreed with such owner that they should not fence against his land, and a cow placed in such lands strayed upon the track of the road, and was killed by a train, it was held the owner of the cow, having by his own fault contributed to the loss, could not recover of the company.[6] (*b*)

4. In a case in Connecticut,[7] it was decided that where cattle

in producing an injury to the cattle while in that situation; and that the law charges the owner of cattle, in such case, with negligence, although his enclosures are kept well fenced, and he is guilty of no actual negligence, in suffering the cattle to escape. And it was accordingly held, that the company was not liable, under such circumstances, for negligently running an engine upon and killing the plaintiff's cattle. The same principles substantially are maintained in the same case. 5 Denio, 255. And it is further held there, that where the general statutes of the state allow towns to prescribe what shall be a legal fence, and when cattle may run at large in the highway, and forbid a recovery for a trespass by cattle lawfully in the highway, by one whose fences do not conform to the town ordinance on the subject, this will have no application to railways, and that cattle by such ordinance allowed to run in the highway, and which, while so running, enter on the lands of a railway at a road-crossing, where there is no obstruction against the intrusion of cattle, are to be regarded as trespassers.

[6] Tower *v.* Providence & Worcester Railroad Co., 2 R. I. 404. See also Illinois Central Railroad Co. *v.* Whalen, 42 Ill. 396. But in cases where the railway contracts to build the fences, the owner of the remaining land cannot justify turning in his cattle until they are built, and if he do, he cannot recover for any injury they may sustain. He should first build the fence and recover the expense of the company. Drake *v.* Philadelphia & Erie Railroad Co., 51 Penn. St. 240. But some of the cases seem to take a different view of the right of the land-owner to turn in his cattle. Fernow *v.* Dubuque & Southwestern Railroad Co., 22 Iowa, 528.

[7] Isbell *v.* New York & New Haven Railroad Co., 27 Conn. 393; s. c. 2 Redf. Am. Railw. Cas. 474. The courts in Indiana, in hearing cases in error,

(*b*) And where the owner agrees to keep the fence, and his cattle stray upon the track by reason of his neglect to do so and are injured, he cannot recover. Whittier *v.* Chicago, Milwaukee, & St. Paul Railway Co., 24 Minn. 394; Railway Co. *v.* Heiskell, 38 Ohio St. 666; Warren *v.* Keokuk & Des Moines Railroad Co., 41 Iowa, 484. And this though the insufficiency is caused by casualty, not the result of intent or gross carelessness of the defendants' servants. Pittsburg, Cincinnati, & St. Louis Railway Co. *v.* Smith, 26 Ohio St. 124. But where it is the duty of the company to fence, the mere fact that the owner has erected a fence will not relieve the company. Louisville, New Albany, & Chicago Railway Co. *v.* White, 20 Am. & Eng. Railw. Cas. 449.

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are at large without the fault of the owner, and go upon the track of a railway, and are injured through the negligence of the company in the management of their train, the owner is not precluded from recovering damages, because the cattle were trespassers upon the railway. In order to preclude the plaintiff from recovery in such case, he must have been guilty of express and not merely of constructive, wrong in suffering the cattle to go at large. (*c*)

5. We could not dissent from the propositions maintained in the preceding case, notwithstanding some hesitation in regard to the proper construction placed by the court upon the facts found in the case. The law of every case must be judged of by the facts which the court assume to be established in deciding it. It

feel bound to presume that the court below applied the testimony correctly in determining localities and geographical boundaries, and especially in matters affecting jurisdiction, as the local courts would more naturally understand these questions than another less familiar with the facts. Indianapolis & Cincinnati Railroad Co. *v.* Moore, 16 Ind. 43; Same *v.* Snelling, 16 Ind. 435. By the law of Indiana, before the statute of 1859, it must appear, in order to recover damages for animals killed or injured by a railway company, that it occurred through the negligence of the company, and without the immediate fault of the owner. Wright *v.* Indianapolis & Cincinnati Railroad Co., 18 Ind. 168; Toledo & Wabash Railroad Co. *v.* Thomas, 18 Ind. 215. The act of 1859 is prospective only. Indianapolis & Cincinnati Railroad Co. *v.* Elliott, 20 Ind. 430. It was here made a question whether a statute awarding damages to the owners of animals killed or injured by the rolling stock of any railway, applied equally to freight as to passenger trains, and it was held that it did. The wonder is that any such question should ever be made.

(*c*) When cattle are injured through neglect of the company to fence its road, the mere fact that the cattle were running at large in violation of statute will not defeat a recovery. Cairo & St. Louis Railroad Co. *v.* Murray, 82 Ill. 76; Rhodes *v.* Utica, Ithaca, & Elmira Railroad Co., 5 Hun, 344. Nor will the fact that they escaped from an enclosure without fault of the owner. Toledo, Peoria, & Warsaw Railway Co. *v.* Delehanty, 71 Ill. 615. Nor will the negligence of a boy to whom they have been entrusted, in leaving them for a short time so that they stray on the track. Brady *v.* Rensselaer & Saratoga Railroad Co., 1 Hun, 378. Nor will it make any difference that the animal was unruly. Congdon *v.* Central Vermont Railroad Co., 56 Vt. 690. Nor that it is what is called "crazy," i. e., lacking in that sense which ordinarily keeps an animal out of danger. Liston *v.* Central Iowa Railroad Co., 26 Am. & Eng. Railw. Cas 593.

would be as unfair to criticise the decision of a court, upon a new construction of the facts, as it would upon a different state of the testimony at a different trial. The decision of a court is good or bad upon the facts assumed by the judge, and no fair-minded man will attempt to escape from the weight of an authority by assuming or * even proving, that the judge took a mistaken view of the facts. It is merely an attempt to balance one assumed blunder of the court, by showing that they fell into another in an opposite direction. A decision is good upon the ground upon which it is placed, or it is wrong upon every ground.

6. We have said thus much in order to state that the case of Browne *v.* Providence, Hartford, and Fishkill Railway Company,[8] which decides that a railway corporation, which is obliged by law to make all needful fences and cattle-guards upon the sides of its track, is liable for injuries by its engines to cattle straying at large through the land of a stranger upon its road, by reason of its negligence in not erecting fences and cattle-guards as required by statute, seems clearly to have assumed a different rule of responsibility, as against railway companies, from that which has ordinarily been before applied to all lawful business, as between adjoining proprietors. Indeed the court distinctly assume the position, that the common-law responsibility imposed upon adjoining land-owners is not sufficient, and that railway companies must be held to a higher degree of responsibility, "on account of the new circumstances and condition of things arising out of the general introduction and use of railways in the country," and that the requirements of the railway companies in regard to fencing and cattle-guards "were designed for the safety of the public, and for the protection of all domestic animals, whether rightfully or wrongfully out of their owners' enclosure."

7. This decision certainly has the credit of meeting the question involved fairly and of wrestling manfully with its difficulties, and of placing it upon the only plausible ground, that the business was so dangerous to the public that it merited a more extended construction, where railways are required to fence their roads, than where other land-owners were required to do the same thing. We had always supposed that railways were required to fence their roads for the protection of their passengers, and of persons and animals rightfully in the highway or the adjoining lands. And

[8] 12 Gray, 55; *supra*, § 127, pl. 21, and notes.

we have yet to learn any sound principle upon which they can fairly be required to guard against injuries to persons or animals wrongfully upon their track, by making permanent erections to preclude such persons or animals from coming there. It is true, unquestionably, that railway companies, in common with all others, are * bound to avoid doing an injury to any one, if it can be avoided at the time, whether such person or his property be rightfully or wrongfully in their way; but that this duty extends to previous precautions against doing injuries to persons wrongfully upon their track, either personally or by their property, is more than can fairly be maintained, as it seems to us, unless railways are to be outlawed in this respect. Every one in the exercise of a lawful business has the right to expect and to conduct his business upon the expectation that others will also perform their duty, and if they do not, that they will be required by the administrators of the law to take the natural consequences of such neglect, provided that even when in fault, in exposing themselves or their property to damage and loss, from the lawful pursuit of lawful business by others, they be not wantonly damaged by such others, but only from necessity. And this is all which we understand to have been decided by the case of Isbell *v.* New York and New Haven Railway Company.[9] And in the later case in Massachusetts,[9] CHAPMAN, J., seems to assume the same ground, and it is the only one in our judgment fairly maintainable.

8. A railway company which is not bound to fence its track is not liable for injuries inflicted by its engines and trains upon cattle straying upon the track of the road, unless such injury was caused by the wanton and reckless negligence of the company through its agents and servants.[10]

9. It was held in Ohio,[11] where a land-owner granted to the company the right of way of a given width, and covenanted to maintain the fences on both sides, and subsequently conveyed the land, that the grantee of the land was so far affected by his grantor's covenant to maintain the fences on the line of the railway that he could not visit any consequences upon the company

[9] Rogers *v.* Newburyport Railroad Co., 1 Allen, 16.

[10] Louisville & Frankfort Railroad Co. *v.* Ballard, 2 Met. Ky. 177.

[11] Easter *v.* Little Miami Railroad Co., 14 Ohio St. 48. See also McCool *v.* Galena & Chicago Union Railroad Co., 17 Iowa, 461.

resulting from its not being performed, but must bear them himself.(*d*)

10. Where the owner of cattle was not in the habit of suffering his cattle to go at large on the railway track, and was not in a position to take any steps to avert the danger they might be in from the passing trains of the company, the presence of the cattle * upon the track will be regarded as accidental, and at most they will be deemed but as trespassers, and be presumed to have escaped through the insufficiency of fences, and the owner liable for any damage they might cause. But if the servants of the company used no means to avoid killing the cattle, and manifested such indifference to consequences, such a degree of rashness and wantonness as evinced a total disregard for the safety of the cattle, and a willingness to destroy them, although the destruction may not have been intentional, in justice and upon principle the company should be held responsible for the damages, unless it appear that the owner was equally in fault. The simple killing of an animal by a railway company's train is *prima facie* evidence of negligence on the part of their engineer.[12]

11. In one case [13] it was held that the negligence on the part of the owner of cattle, which shall preclude his recovery for an injury

[12] Indianapolis & Cincinnati Railroad Co. *v.* Meek, 10 Ind. 502.

[13] Northwestern Railroad Co. *v.* Goss, 17 Wis. 428. All questions of negligence, where there is any uncertainty in the facts, must be submitted to the jury under proper instructions. Congor *v.* Galena & Chicago Union Railroad Co., 17 Wis. 477. This question has been discussed in Briggs *v.* Taylor, 28 Vt. 180, 184; s. c. 2 Redf. Am. Railw. Cas. 558.

(*d*) But *contra*, Cincinnati, Hamilton, & Indianapolis Railroad Co. *v.* Ridge, 54 Ind. 39. And see Corry *v.* Great Western Railway Co., Law Rep. 7 Q. B. 322. See also Berry *v.* St. Louis, Salem, & Little Rock Railroad Co., 65 Mo. 172; and Harrington *v.* Chicago, Rock Island, & Pacific Railroad Co., 71 Mo. 384, where it is held that if it is agreed to omit a fence through a cultivated field, the company will be liable to a stranger for cattle killed through getting into the field and thence on the track, unless the field is enclosed with a lawful fence. It has been held also that the company may be liable to the tenant of the owner. Thomas *v.* Hannibal & St. Joseph Railroad Co., 82 Mo. 538. But in St. Louis, Vandalia, & Terre Haute Railroad Co. *v.* Washburne, 97 Ill. 253, it was held that the tenant of one who has agreed to keep the fence in repair, knowing of the agreement and of the condition of the fence, cannot recover on the ground of insufficiency of the fence. And see Warren *v.* Keokuk & Des Moines Railroad Co., 41 Iowa, 484. See also *supra*, note (*b*).

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to them by a railway train, must depend more upon its degree than upon the time when it occurs; and a distinction in this respect should be made, between one who suffers his cattle knowingly to go at large where they will naturally be exposed to passing trains upon a railway, and cases where the cattle get at large without the owner's knowledge, through defect of fences or their being temporarily thrown down.

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PART VI.

THE LAW OF AGENCY AS APPLIED TO RAILWAYS.

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*CHAPTER XX.

LIABILITIES IN REGARD TO CONTRACTORS, AGENTS, AND SUB-AGENTS.

SECTION I.

Liability for Acts and Omissions of Contractors and their Agents.

1. Company ordinarily not liable for an act of the contractor or his servant.
2. Otherwise in England if the contractor is employed to do the very act.
3. American courts seem disposed to adopt the same rule.
4. Distinction between cases of acts done on movable and cases of acts done on immovable property not maintainable.
5. True grounds of distinction; what they are.
6. Mode of employment, whether by day or job, no proper ground of distinction.
7. Proper basis of company's liability. Question of control.
8. Thus, in general, so long as one retains control, he is responsible.
   n. (b.) Contractor in control, however, not liable for result of defects in machinery furnished by company.
9. Master workman responsible only for the faithfulness and care of his workmen, in the business of their employment.
10. Company responsible for injuries consequent upon defects of construction, in the course of the work by a contractor.
11. Ordinarily employer not responsible for the negligent mode in which work is done, the contractor being employed to do it in a lawful and reasonable manner.

§ 129. 1. The general doctrine seems now firmly established, that the company is not liable for the act of the contractor's servant, where the contractor has an independent control, although subordinate, in some sense, to the general design of the work. The distinction, although but imperfectly defined for a long time, has finally assumed definite form, — that one is liable for the act

of his servant, but not for that of a contractor, or of the servant of a contractor.[1]

* 2. But if the contractor or his servants do an act which turns out to be illegal, or a violation of the rights of others, and it be the very act which he was employed to do, the employer is liable to an action.[2] Lord CAMPBELL, C. J., here said, "The position in effect contended for by defendants' counsel, I think wholly untenable, namely, that where there is a contractor, the employer can in no case be made liable. It seems to me, that if the contractor do that which he is ordered to do, it is the act of the employer, and this appears to have been so considered in the cases." "In these cases nothing was ordered, except that which the party giving the order had a right to order, and the contract was to do that which was legal, and the employer was held properly not liable for what the contractor did negligently, the relation of master and servant not existing. But here the defendants employ a contractor to do that which was unlawful. Upon the principle contended for, a man might protect himself in the case of a menial servant, by entering into a contract."

[1] Laugher *v.* Pointer, 5 B. & C. 547, where the subject is discussed, but not decided, the court being equally divided. Quarman *v.* Burnett, 6 M. & W. 499; Milligan *v.* Wedge, 12 A. & E. 737; Knight *v.* Fox, 5 Exch. 721; Burgess *v.* Gray, 1 C. B. 578; Overton *v.* Freeman, 11 C. B. 867; s. c. 8 Eng. L. & Eq. 479; Peachey *v.* Rowland, 13 C. B. 182; s. c. 16 Eng. L. & Eq. 442; Rapson *v.* Cubitt, 9 M. & W. 710; Reedie *v.* London & Northwestern Railway Co., 6 Railw. Cas. 184; Hobbitt *v.* Same, 6 Railw. Cas. 188; s. c. 4 Exch. 244; Steel *v.* Southeastern Railway Co., 16 C. B. 550; s. c. 32 Eng. L. & Eq. 366. In this last case, the action against the company was for flowing plaintiff's land, through a defect in certain masonry made by the workmen of a contractor with the company, under the superintendence of the company's surveyor who furnished the plans. It appeared that the injury resulted from the neglect of the workmen to follow the directions. The court held very properly that the action could not be maintained. See also Young *v.* New York Central Railroad Co., 30 Barb. 229. But if a servant of the contractor, while employed on the work, receive an injury from a passing train of the company through the fault of the company's servants, and without his own fault, he may maintain an action against the company. Ib. See also Cincinnati *v.* Stone, 5 Ohio St. 38. The master is not responsible for the act of his servant, who is loaned to and is under the direction and control and in the employ, for the time being, of another. Murray *v.* Currie, Law Rep. 6 C. P. 24.

[2] Ellis *v.* Sheffield Gas Consumers' Co., 2 Ellis & B. 767; s. c. 22 Eng. L. & Eq. 198.

3. The American cases have not as yet, perhaps, assumed that definite and uniform line of decision which seems to obtain in the English courts upon the subject. But there is a marked disposition manifested of late to adopt substantially the same view.[3] (*a*) But some of the earlier cases in this country and in England hold the employer responsible for all the acts and omissions of a contractor, the same as for those of a servant.[4]

*4. At one time a distinction was attempted to be maintained, between the liability of the owner of fixed and permanent property and the owner of movable chattels, for work done in regard to them or with them, making the employer liable in the former and not in the latter case.[5] But the distinction

[3] Kelly *v.* New York, 11 N. Y. 432; Blake *v.* Ferris, 1 Seld. 48; Pack *v.* New York, 4 Seld. 222; Hutchinson *v.* York & Newcastle Railway Co., 5 Exch. 343; s. c. 6 Railw. Cas. 580, 589.

[4] Bush *v.* Steinman, 1 B. & P. 404; Lowell *v.* Boston & Lowell Railroad Co., 23 Pick. 24. See also, on this point, New York *v.* Bailey, 2 Denio, 433; Elder *v.* Bemis, 2 Met. 599; Earle *v.* Hall, 2 Met. 353. In the latter case the subject is very ably discussed, and the early cases somewhat qualified. And in the case of Hilliard *v.* Richardson, 3 Gray, 349, there is a very elaborate and satisfactory opinion, by Mr. Justice Thomas, in which the cases are reviewed, and the old rule of Bush *v.* Steinman distinctly repudiated.

[5] Rich *v.* Basterfield, 4 C. B. 783; King *v.* Pedley, 1 A. & E. 822. And see Fish *v.* Dodge, 4 Denio, 311. Littledale, J., in Laugher *v.* Pointer, 5 B. & C. 547. Parke, B., in Quarman *v.* Burnett, 6 M. & W. 510; Randleson *v.* Murray, 8 A. & E. 109.

(*a*) McMasters *v.* Pennsylvania Railroad Co., 3 Pittsb. 1; McCafferty *v.* Spuyten Duyvil & Port Morris Railroad Co., 48 How. Pr. 44; Hofnagle *v.* New York Central & Hudson River Railroad Co., 55 N. Y. 608; Cunningham *v.* International Railroad Co., 51 Tex. 503; Kansas Central Railway Co. *v.* Fitzsimmons, 18 Kan. 34. And see s. c. 22 Kan. 686. A company was held not liable to a servant of the contractor injured by poisonous exhalations from a mixture used by the contractor to preserve timber. West *v.* St. Louis, Vandalia, & Terre Haute Railroad Co., 63 Ill. 515. But see Cairo & St. Louis Railroad Co. *v.* Woolsey, 85 Ill. 370, and Rockford, Rock Island, & St. Louis Railroad Co. *v.* Wills, 66 Ill. 321, where it is held that the company may be liable for trespasses by contractor's servants. And see Ullman *v.* Hannibal & St. Joseph Railroad Co., 67 Mo. 118, where it is held that the company is jointly liable with the contractor and his servants for trespass in an entry made by its orders in prosecution of construction. And see Bechnel *v.* New Orleans Railroad Co., 28 La. An. 522; Houston & Great Northern Railroad Co. *v.* Meador, 50 Tex. 77. Who is a contractor as distinguished from a servant. Speed *v.* Atlantic & Pacific Railroad Co., 71 Mo. 303.

was found to rest on no satisfactory basis, and was subsequently abandoned.[6]

5. The grounds of all the decisions upon this subject are fully and satisfactorily explained, in the cases of Ellis *v.* Gas Consumers' Company,[2] and Steel *v.* Southeastern Railway.[1]

6. Sometimes a distinction has been attempted to be drawn, in regard to the employer, whether the employment were by the job or by the day, making him liable for the acts of the operatives in the latter and not in the former case. But this is obviously no satisfactory ground upon which to determine the question, although it might, in point of fact, come very nearly to effecting the same, or a similar separation of the instances in which the employer is or is not liable.

7. The true ground of the distinction being, after all, not the * form of the employment, or the rule of compensation, but whether the work was done under the immediate control and direction of the employer, so that the operatives were his servants, and not the servants of another, who was himself the undertaker for accomplishing the work, and having a separate and independent and irresponsible control of the operatives, bringing the question again to the same point, — the difference between a contractor and a servant.[7]

[6] Allen *v.* Hayward, 7 Q. B. 960; Reedie *v.* London & Northwestern Railway Co., 4 Exch. 244. And it is still maintained, by some, that if the owner or occupier of real estate employ workmen under a contract which presupposes the underletting of the work, or the employment of subordinates, and in the course of the accomplishment of the work anything is done, by digging or suffering rubbish to accumulate, which amounts to a public nuisance, whereby any person suffers special damage, the owner or occupier of the premises is liable. Bush *v.* Steinman, 1 B. & P. 404; Randleson *v.* Murray, 8 A. & E. 109. But this rule is questioned. Fish *v.* Dodge, 4 Denio, 311. And after all it seems, like the other phases of the same question, to resolve itself into an inquiry, how far the first employer may fairly be said to have done, or caused to have done, the wrongful act. Burgess *v.* Gray, 1 C. B. 578. If the nuisance occurred naturally, in the ordinary course of doing the work, the occupier is liable; but if it is some irregularity of the contractor, or his servants, he alone is responsible. See Carman *v.* Steubenville & Indianapolis Railroad Co., 4 Ohio St. 399; Thompson *v.* New Orleans & Carrollton Railroad Co., 1 La. An. 178; s. c. 4 La. An. 262; s. c. 10 La. An. 403.

[7] In the case of Blackwell *v.* Wiswall, 24 Barb. 355, is an elaborate opinion by HARRIS, J., which was affirmed by the full court, which holds that the only ground on which one man can be made responsible for the wrongful acts of another is that he should have controlled the conduct of such person; that the

8. In a case before the Privy Council, where the owner of land employed Indian laborers in the Mauritius, at so much per acre, to clear it, which they did, partly by lighting a fire so negligently that sparks were carried by the wind upon the land of another, and there burned down his house, it was held, upon the ground that the owner of the land retained control of the work and made constant interference in the conduct of it, that he was responsible for the negligence of the workmen, as the relation of master and servant, or superior and subordinate, continued.[8] (*b*)

9. Where one gratuitously permits a carpenter to do a piece of work in a shed belonging to the former, and one of the workmen of the carpenter, in the course of the work, dropped a match with which he had lighted his pipe, and thereby set fire to the shed, it was held the master was not responsible for the damage; notwithstanding the jury found it occurred from the negligent act of the defendant's workman.[9] But it would have been otherwise if the negligence had occurred in the course of the employment.

person who is made liable for the acts of another must stand in the relation of superior, and hence that one who has obtained the exclusive right of a ferry, and who suffers another to operate it for his own benefit, as lessee, is not responsible for any injury inflicted on passengers, through the negligence or unskilfulness of the servants of the lessee, who conduct the ferry, and that it would make no difference if the lessee had been himself conducting the ferry, at the time the injury accrued; that if it were true that the grantee of the ferry was guilty of a breach of duty, in making the lease, it will not entitle any one to sue on that account, unless he has sustained injury resulting from the act of leasing directly, and not incidentally merely.

[8] Serandat *v.* Saisse, Law Rep. 1 P. C. 152; s. c. 12 Jur. N. S. 301. The case was governed by the rule laid down in the Code Napoleon, but that is not essentially different from the rule of the English law on the subject. The employer is responsible for injuries caused by falling into excavations made on his land by contract. Homan *v.* Stanley, 66 Penn. St. 464. But a railway company is not responsible for the act of a contractor in using a poisonous composition to prevent the decay of timber put into the road, whereby the workmen are injured in handling it. West *v.* Railroad Co., 5 Chicago Legal News, 38. The opinion in this case by Chief Justice LAWRENCE gives a very satisfactory view of the law on this question.

[9] Williams *v.* Jones, 3 H. & C. 602; s. c. 11 Jur. N. S. 813; Woodman *v.*

(*b*) Hughes *v.* Cincinnati & Springfield Railway Co., 15 Am. & Eng. Railw. Cas. 100. But though the contractor has control of the work, if injury to a stranger is caused by defective machinery which the company furnishes him for doing the work, the company may be liable. Conlon *v.* Eastern Railroad Co., 135 Mass. 195.

* 10. And where a railway company was empowered by act of parliament to build a bridge across a navigable river, but were to do it so as not to detain vessels longer than while persons and teams ready to cross the bridge were passing over; and during the construction of the work by a contractor, by some defect of construction the bridge could not be raised, and the plaintiff's vessel was detained, it was held the company were responsible.[10]

11. A person employing another to do a lawful act is presumed, in the absence of evidence to the contrary, to have employed him to do it in a lawful and reasonable manner; and, therefore, unless the parties stand in the relation of master and servant, the employer is not responsible for damages occasioned by the negligent mode in which the work is done.[11]

SECTION II.

Liability of the Company for Acts of their Agents and Servants.

1. Courts manifest disposition to give such agents a liberal discretion.
2. Company liable for torts committed by agents in discharge of their duties.
3. May be liable for wilful act of servant within the range of his employment.
4. Assent of the company, whether it is necessary to show it.
5. Most of the cases adhere to the principle of *respondeat superior*.
6, 7, 9. Should be remembered that the company is virtually present.
8. Where the company owes a special duty, the act of the servant is always that of the company.
10. Ratification of the act of an agent, what constitutes.
11. Liability of corporations for the publication of a libel.
12. Powers of a corporation such only as are conferred by charter.
13. False certificate that capital has been paid in money.
14. Gas company not bound to supply gas to all who require it.
15. Company may be responsible for false imprisonment.
16. Company responsible for injury done by vicious animals kept or suffered to remain about its stations.
17. General manager of company may bind it for medical aid for servant injured in its employment.
18. Superintendent, or general manager can give no valid authority to subordinates to do an act operating as a fraud upon the company.

§ 130. 1. The extent of the liability of railways for the acts of their servants and agents, both negative and positive, seems not

Joiner, 10 Jur. N. S. 852; Bartlett *v.* Baker, 3 H. & C. 153; Blake *v.* Thirst, 2 H. & C. 20.

[10] Hole *v.* Sittingbourne & Sheerness Railway Co., 6 H. & N. 488.

[11] Butler *v.* Hunter, 7 H. & N. 826; S. P. Eaton *v.* European & North American Railroad Co., 59 Me. 520.

very fully settled in many of its incidents. But the disposition of * the courts has been to give such agents and servants a large and liberal discretion, and hold the companies liable for all their acts, within the most extensive range of their charter powers.[1] (*a*)

2. This seems the only construction which will be safe or just, or indeed practicable. It has long been settled, that corporations are liable for torts committed by their agents, in the discharge of the business of their employment, and within the proper range of such employment.[2]

[1] Derby *v.* Philadelphia & Reading Railroad Co., 14 How. 468, 483; Noyes *v.* Rutland & Burlington Railroad Co., 27 Vt. 110; s. c. 2 Redf. Am. Railw. Cas. 150. We may suppose the officers and servants of railways to take exorbitant fare and freight, to refuse to permit passengers to have tickets at the fixed rate, or to destroy the life of animals, or of persons, by recklessness, or wantonness, in the discharge of their appropriate duties, and it would be strange if the company were liable in the former case, on account of its special duty as common carrier, and not in the latter, because it owed no duty to the public in that respect. Alabama & Tennessee Rivers Railroad Co. *v.* Kidd, 29 Ala. 221. But it has been held to make no difference, in regard to the liability of the company for the act of its servant, while acting in the due course of his employment, that he did not follow instructions, either general or special. Derby *v.* Philadelphia & Reading Railroad Co., *supra.* See also Southwick *v.* Estes, 7 Cush. 385; Ramsden *v.* Boston & Albany Railroad Co., 104 Mass. 117.

[2] Yarborough *v.* Bank of England, 16 East, 6; Queen *v.* Birmingham & Gloucester Railway Co., 3 Q. B. 223; Hay *v.* Cohoes Co., 3 Barb. 42; 2 Aik. 255, 429; Bloodgood *v.* Mohawk & Hudson Railroad Co., 18 Wend. 9; s. c. 1 Redf. Am. Railw. Cas. 209; Dater *v.* Troy Turnpike & Railroad Co., 2 Hill, 629; Chestnut Hill Turnpike Co. *v.* Rutter, 4 S. & R. 16. They are bound by estoppels *in pais.* Hale *v.* Union Mutual Fire Insurance Co., 32 N. H. 295. See also Tebbutt *v.* Bristol & Exeter Railway Co., Law Rep. 6 Q. B. 73, where three railways, terminating at one point, had their stations communicating with each other and used in common by the passengers of all the roads; and while a passenger of one of the other roads was standing on the defendants' platform, in passing from the terminus of one of the other roads to the booking office of the other company, waiting for his luggage, one of defendants' porters negligently drove a truck loaded with luggage, and a portmanteau fell off and injured the plaintiff. The court held the defendant responsible for this misfeasance of its servant; but doubted if the defendant would have been responsible for any defect in the platform over which plaintiff was allowed to pass, whereby he suffered damage.

(*a*) As to liability for acts of servants in expelling passengers from cars, see *infra*, § 203.

3. But it has been claimed sometimes, that a corporation is not liable for the wilful wrong of its agents or servants.[3] This opinion seems to rest upon those cases which have maintained that the master, whether a natural person or a corporation, is never liable for the wilful act of his servant.[4] Without stopping here to discuss the soundness of the general principle, as applicable to the relation of master and servant, it must be conceded, we think, that it is not applicable to the case of corporations, and especially such as railways. In regard to such corporations, it seems to us altogether an inadmissible proposition, to excuse them for every act of their servants and agents which is done, or claimed to have been done, positively and wilfully, and which results in an injury to some * other party, or proves to be illegal, unless directed or ratified by the corporation. Some of the cases seem to disregard any such ground of exemption for the corporation.[5]

4. But in some cases it has been held, as before stated, that the corporation is not liable for the wilful act of its agents, unless done with the assent of the corporation, seeming to imply that if the servant pursue his own whim or caprice, and act upon his own impulses, the act is his, and not that of the corporation.[6] (*b*)

[3] Foster *v.* Essex Bank, 17 Mass. 479, 510; State *v.* Morris & Essex Railroad Co., 3 Zab. 360, 367.

[4] M'Manus *v.* Crickett, 1 East, 106; Croft *v.* Allison, 4 B. & Ald. 590; Wright *v.* Wilcox, 19 Wend. 343; Jackson *v.* Second Avenue Railroad Co., 47 N. Y. 274; Isaacs *v.* Third Avenue Railroad Co., 19 Wend. 122.

[5] Edwards *v.* Union Bank, 1 Fla. 136; Whiteman *v.* Wilmington & Susquehanna Railroad Co., 2 Harring. Del. 514.

[6] Philadelphia, Germantown, & Norristown Railroad Co. *v.* Wilt, 4 Whart.

(*b*) Galveston, Harrisburg, & San Antonio Railroad Co. *v.* Donahoe, 56 Tex. 162; Priest *v.* Hudson River Railroad Co., 65 N. Y. 589. But *contra*, Quigley *v.* Central Pacific Railroad Co., 11 Nev. 350; and see Chicago & Eastern Illinois Railroad Co. *v.* Flexman, 9 Brad. 250; where it is held, e. g., that the company is liable to a passenger for a wilful assault by a brakeman. See also Illinois Central Railroad Co. *v.* Green, 81 Ill. 19, where it is held that encouragement to a passenger to get off at a watering place not a station, and a place of danger, could not be imputed to the company. And see Peeples *v.* Brunswick & Albany Railroad Co., 60 Ga. 281; Gilliam *v.* South & North Alabama Railroad Co., 70 Ala. 268. And see Marrier *v.* St. Paul, Minneapolis, & Manitoba Railway Co., 15 Am. & Eng. Railw. Cas. 135, where it is held that the company is not liable for damage by fire, the result of a fire kindled on the road-way

* 5. Most of the cases, upon the subject of the liability of railways for the acts of their officers, agents, and servants, have

143; Fox *v.* Northern Liberties, 3 Watts & S. 103. It has always seemed that the cases, which hold that the master is not liable for the wilful acts of his servant, proceed upon a misconception of the case of M'Manus *v.* Crickett, 1 East, 106, for they all profess to base themselves on that case. That case, we apprehend, was never intended to decide more than that the master is not liable, in trespass, for the wilful act of the servant. Lord Kenyon, in his opinion, expressly says, speaking of actions on the case against the master, where the servant negligently did a wrong, in the course of his employment. "The form of these actions shows, that where the servant is, in point of law, a trespasser, the master is not liable, as such, though liable to make compensation for the damage consequential from his employing of an unskilful or negligent servant." "The act of the master is the employment of the servant." This reasoning applies with the same force to cases where the act of the servant is both direct and wilful, as to those where it is only negligent. The master is not liable in either case, so much for having impliedly authorized the act, as for having employed an unfaithful servant. Whether it is done negligently or wilfully seems to be of no possible moment, as to the liability of the master, the only inquiry being whether it was done in the course of the servant's employment. And the argument, that when the servant acts wilfully, he *ipso facto* leaves the employment of the master, and if he is driving a coach-and-six, or a locomotive and train of cars, has a special property in the things, and is, *pro hac vice*, the owner, and doing his own business, may sound plausible, but we think it unsound, although quoted from so ancient a date as Rolle's Abridgment, and adopted by so distinguished a judge as Lord Kenyon. The truth is, the argument is only a specious fallacy; and whether Lord Kenyon intended really to say, that no action will lie against the master in such case, or only to say, what the case required, that the master is not liable in trespass, it is very obvious that the proper distinction cannot be made to depend on the question of the *intention* of the servant. The master has nothing to do, either way, with the intention. It is by acts that he is affected, and if these come within the range of the employment, the master is liable, whether the act be a misfeasance, or a non-feasance, an omission or a commission, carelessly or purposely done. It will happen, doubtless, where the master is under a positive duty to keep or carry things safely, as a bailee, or to carry persons safely, that while he will be liable for the mere non-feasance of the servant, the servant will not be liable to the same party, there being no privity between the servant and such party, no duty owing to such person from the servant. But in such case the servant will be liable for his positive wrongs, and wilful acts of injury, and the master liable for these latter acts, but ordinarily not in trespass as the servant is, but in case. And so, where the servant goes out of his employment, and commits a wrong, e. g. an

by section men to warm their meals which, left unextinguished, spread to adjoining land, it not appearing that the men had any supervision of the right of way.

attempted * to carry out the analogy of principal and agent, or master and servant, as between natural persons, and to apply strictly the principle of *respondeat superior.*[7] (*c*)

assault on a stranger, a theft, or any other act wholly disconnected with his employment, the master is not liable. This is the view taken of this subject by Reeve in Reeve Dom. Rel. 358, 359, 360, and it is, we think, the only consistent and rational one, and the one which must ultimately prevail. It is virtually adopted, in regard to corporations, in England. Queen *v.* Great North of England Railway Co., 9 Q. B. 315. In State *v.* Vermont Central Railroad Co., 27 Vt. 103; Maund *v.* Monmouthshire Canal Co., 4 M. & G. 452, it is held, that trespass will lie against a corporation for the act of its servant. This is familiar law in the American courts. And it is not deemed of any importance that the agent should act by any particular form of appointment; and it would be strange if the liability of the corporation could be made to depend upon the *intention* of the agent. This distinction is not claimed to be of any importance where the company owe a duty, as carriers of freight or passengers, for there the corporation is liable for all the acts of its servants; but for the acts of its servants in regard to strangers, it has been claimed there is no liability where the servant acts wilfully, unless the corporation directs or affirms the act of the servant. And to this we may assent, in a qualified sense. The corporation does virtually assent to all the acts of its agents and servants, done in the regular course of their employment. A railway or any business corporation exists and acts only by its agents and servants, and by putting them into their places, or suffering them to occupy them, the company consents to be bound by their acts. Thus, a conductor or engineer of a railway, while he acts with the instruments which the company puts into his hands is acting instead of the corporation, and his acts will

[7] Sherman *v.* Rochester & Syracuse Railroad Co., 15 Barb. 574, 577; Vanderbilt *v.* Richmond Turnpike Co., 2 N. Y. 479. In the latter case, it was held that the company was not liable for the trespass committed by its servants, although the act was directed by the president and general agent of the company, he having no authority to command an unlawful act. The same rule is laid down in Lloyd *v.* New York, 1 Seld. 369; Ross *v.* Madison, 1 Ind. 281. And in an English case, Storey *v.* Ashton, 17 W. R. 727; s. c. Law Rep. 4 Q. B. 476, it was held that the master was not liable for the act of his servant, in driving a cart against another in the street, where the servant had left the business of the master and gone some distance on his own business, when the accident occurred. s. p. Little Miami Railroad Co. *v.* Wetmore, 19 Ohio St. 110.

(*c*) Where a conductor returned to a car and asked a passenger why he did not get off at the station for which he had a ticket, the train not having stopped there, and used insulting language, he was held not acting in the discharge of his duty, and the company was held not liable. Parker *v.* Erie Railway Co., 5 Hun, 57.

*6. But they seem to have lost sight of, or not sufficiently to have considered, one peculiarity of this mode of transportation of

bind the corporation, whether done negligently or cautiously, heedlessly or purposely. It would be anomalous to hold the company liable for cattle killed carelessly on the track, but not for those killed purposely by the engineer, or other servants of the company. It is probably true, that if the engineer should kill cattle, in any way wholly disconnected with his employment, either on the land of the company or of others, the company could not be made liable; but if the engineer should destroy them wilfully, by rushing the engine upon them, the company would be liable undoubtedly, if any one were, of which there can be little question. So the company might not be liable if the engineer should drive the engine upon another road and there do damage, when his employment extended to no such transaction. The case of Southeastern Railway Co. *v.* European & American Telegraph Co., 9 Exch. 363, seems to have adopted, in principle, the view for which we contend. The act here complained of was, boring under the railway, and it was held that the company had no right to do it, and was liable, *in trespass*, for this unauthorized act of its servants. See also Sinclair *v.* Pearson, 7 N. H. 219, 227, opinion of Parker, C. J.; Philadelphia & Reading Railroad Co. *v.* Derby, 14 How. 468, 483, Grier, J.; Case of the Druid, 1 W. Rob. Adm. 391, opinion of Dr. Lushington reviewing the cases.

We do not very well see why the railway is not liable to the very same action which the servant would be, because his act is the act of the corporation, within the range of his employment. See Sharrod *v.* London & Northwestern Railway Co., 4 Exch. 580, where, for running over sheep on the track, it is held that the action must be case. The distinction between this case and that of Southeastern Railway Co. *v.* European & American Telegraph Co., *supra*, is not very obvious, unless we suppose in the latter case a vote of the corporation, which is highly improbable. See Philadelphia Railroad Co. *v.* Wilt, 4 Whart. 143, where it is said the action should be case, and that trespass will not lie unless the act is done by the command or with the assent of the corporation, which could never occur. Corporations do not vote such acts. A vote of a corporation that its engineers should run its engines over cattle would be an anomaly. In Sleath *v.* Wilson, 9 C. & P. 607, where a servant had been driving his master's carriage, and being directed to return to the stable, or while that was his duty, in the ordinary course of his employment, he went out of his way with the carriage, to do some errand of his own, and drove against a person negligently, it was held that the master was liable, this being the act of the servant, in the course of his employment, because the injury was done with the master's horses and carriage, which he put into the servant's hands. But here the servant was far more obviously going aside from his employment than in the supposed case of his assuming to do a wilful wrong in the direct course of his ordinary employment. This case certainly cannot stand with the argument of the court in M'Manus *v.* Crickett. And yet it is confirmed by other cases. Joel *v.* Morrison, 6 C. & P. 501. Any different view of this subject will bring us back to the earlier theory of the re-

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freight and passengers, — that the superior is virtually always present, in the person of any of the employés, within the range of

lation of corporations to their servants; that corporations are not liable for torts committed by their servants, they having no authority to bind the corporation by unlawful acts. There is an elaborate case in Maine, State *v.* Great Works Mill & Manufacturing Co., 20 Me. 41, taking precisely the old view of the liability of corporations for the acts of their servants, where the act proves unlawful. But most of the later cases hold the company liable for the torts of its agents, done in the course of the agency. But the company is not liable for injuries to persons or property through the recklessness and want of common care and prudence of such persons, or property, as where a slave lies down to sleep on the track of a railway and is run over by a train of cars, it not being possible to see him twenty feet away on account of the grass on the track. Felder *v.* Railroad Co., 2 McMul. Eq. 403. See also Mitchell *v.* Crassweller, 13 C. B. 237; s. c. 16 Eng. L. & Eq. 448; Leame *v.* Bray, 3 East, 593; Claflin *v.* Wilcox, 18 Vt. 605, where the principles involved in this inquiry are examined. Smith *v.* Birmingham Gas Co., 1 A. & E. 526. In two cases in Connecticut, Crocker *v.* New London, Willimantic, & Palmer Railroad Co., 24 Conn. 249, and Thames Steamboat Co. *v.* Housatonic Railroad Co., 24 Conn. 40, the general proposition is maintained, that railway companies are not liable for acts done without the command of the agent having the superior control in that department of the company's business, and out of the range of the particular employment of the servant doing the act. This seems to be a sound and just proposition. See also Giles *v.* Taff Vale Railway Co., 2 Ellis & B. 822; Glover *v.* London & Northwestern Railway Co., 5 Exch. 66.

In Illinois Central Railroad Co. *v.* Downey, 18 Ill. 259, it is said that case cannot be maintained against a corporation for injuries wilfully and intentionally committed by its servants, and not occasioned in the course of their employment in the pursuit of their regular business. The judge, in laying down the proposition, seems to found himself upon the form of the action. But if any action will lie against a corporation for the wilful misconduct of its agents, we do not see why it may not be that which is ordinarily brought against natural persons for similar injuries. But the proposition laid down in the case is not entirely clear. The act of a servant may be in the direct course of his employment and business, and still be wilful, and that was the very case before the court, if the act was done wilfully. And where a passenger got into an altercation with the baggage-master and so provoked him that he gave the passenger a blow, it was held that the company was not responsible. Little Miami Railroad Co. *v.* Wetmore, 19 Ohio St. 110. In Bayley *v.* Manchester, Sheffield, & Lincolnshire Railway Co., Law Rep. 7 C. P. 415, this question seems to be placed on its true ground. The declaration contained counts in both trespass and case. The facts were that the plaintiff had procured his ticket and was in the right carriage. But just before the train started he inquired of one of the porters of the company if he was in the right carriage and the porter told him he was not and he must come out, and

the employment, as much so as is practicable in such cases. And this * consideration, in regard to natural persons, is held sufficient to make the superior always liable for the act of the subordinate, whether done negligently or wilfully.[8]

7. And although the cases seem to treat the superior as always absent, in the case of injuries done by railways, it is submitted, that the more just and reasonable rule is to regard the principal as always present, when the servant acts within the range of his employment.[9]

8. This distinction is of no importance in regard to the liability of railways as carriers of freight and passengers, for then the law makes the company liable absolutely in one case, and in the other as far as care and diligence can effect security. Those cases, therefore, which have excused corporations as bailees of goods for hire, when they were purloined by their servants, it would seem, are necessarily wrong.[10]

9. But, as railways are, like other corporations, mere entities of the law, inappreciable to sense, we do not see why this abstraction should not be regarded as always existing and present in the discharge of its functions. It is indeed a mere fiction, whether we regard the company as present or absent. And it seems more just

just as the train was getting in motion he violently pulled him out of the carriage, and both falling on the platform the plaintiff received the injuries complained of. The porters were by law to act under the orders of the station-masters in doing the work about the stations. The by-laws forbade any one to enter or ride in a carriage except where he had procured a ticket in the direction the train was going. There was no express by-law or regulation justifying the removal of a passenger from a carriage, except where he was intoxicated or persisted in smoking in a non-smoking carriage. The court held the company responsible, on the ground that the servant was acting on behalf of the company within the scope of his employment. But it is here said by the learned judge, that the act, to bind the master, must be done by the servant in the *bona fide* pursuit of his employment, and not of his own mere caprice.

[8] Morse *v.* Auburn & Syracuse Railroad Co., 10 Barb. 621; Vanegrift *v.* Railroad Co., 2 N. J. 185, 188. See also Burton *v.* Philadelphia, Wilmington, & Baltimore Railroad, 4 Harring. Del. 252.

[9] Chandler *v.* Broughton, 1 Cromp. & M. 29. In this case it is held, that if the master is present, although passive, he is liable for the wilful act of his servant. M'Laughlin *v.* Pryor, 1 Car. & M. 354.

[10] Foster *v.* Essex Bank, 17 Mass. 479, 510. Trespass will lie against a railway company. Crawfordsville Railroad Co. *v.* Wright, 5 Ind. 252.

and reasonable, that the fiction should not be resorted to, to excuse just responsibility. It is certain we never require proof of any organic action of the corporation, to constitute railways carriers of freight and passengers. All that is required, to create the liability, is the fact of their assuming such offices. So, too, for the most part, in regard to injuries to strangers and mere torts, it is not expected that proof will be given of any express authority to the servant or employé to do the particular act.[11]

*10. What shall amount to a ratification of the acts of its agent by the stockholders of the corporation, so as to give an authority not expressly conferred, or one not intended to have been conferred, or even where the formal act of the corporation was a denial of the authority, has been a good deal discussed, and is not, perhaps, susceptible of a specific definition. The question

[11] Lowell *v.* Boston & Lowell Railroad Co., 23 Pick. 24. Numerous cases on the subject of the liability of railways show this practically. Where the company begins to run trains before condemning the land to its use, it is seldom that the act of running them is traceable directly to the corporation, except as the act of the employés. This is always done by design, and no doubt was ever entertained that the company are liable, and in trespass, to the land-owner, which could not be the case on the strict analogies referred to *supra*, note 6, unless the corporation were regarded as present and assenting to the act. Hazen *v.* Boston & Maine Railroad Co., 2 Gray, 574; Eward *v.* Lawrenceburg & Upper Mississippi Railroad Co., 7 Ind. 711; Hall *v.* Pickering, 40 Me. 548. The rule laid down on this subject by Lord Denman, in Rex *v.* Medley, 6 C. & P. 292, a case which, although at *Nisi Prius*, seems to have been examined and acquiesced in by all the judges of the King's Bench, exhibits the sagacity and wisdom of its author. That is the case of an indictment against the directors of a gas company for the act of the company's superintendent and engineer, in conveying the refuse gas into a great public river, whereby the fish are destroyed, and the water rendered unfit for use, &c., thereby creating a public nuisance. No distinction is attempted, or could fairly be made here, between the liability of the company and that of the directors. The court held the directors liable for an act done by their superintendent and engineer, under a general authority to manage the works, though they were personally ignorant of the particular plan adopted, and though such plan was a departure from the original and understood method, which the directors had no reason to suppose was discontinued. The learned judge uses this significant language, which fully justifies all that the present writer contends for: "It seems to me both common sense and law, that if persons, for their own advantage, employ servants to conduct works, they must be answerable for what is done by those servants."

is discussed and the authorities examined in Cumberland Coal Company *v.* Sherman.[12] (*d*)

11. And it seems to be settled, both in this country and in England, that a corporation may become responsible for the publication of a libel. In the English case,[13] a railway company were held responsible for telegraphing along their line, that the plaintiffs, who were bankers, had stopped payment. Lord CAMPBELL said: The allegation of malice "may be proved by showing that the publication of a libel took place by order of the defendants, and was therefore wrongful, although the defendants held no ill will to the plaintiffs, and did not mean to injure them." And the leading American case[14] decides that a railway may be liable for a libel * published and circulated in their reports, wherein they represented the plaintiff as an incompetent mechanic and builder of bridges, station-houses, and other structures, and wanting in all requisite capacity and skill for such employment. The court held that, in the absence of express malice or bad faith, the report to the stockholders is a privileged communication, but the privilege does not extend to the publication of the report and evidence in a book for distribution among the persons belonging to the corporation and others, and so far as the corporation authorized the publication in the form employed they are responsible in damages.

12. It is well settled, that corporations have no powers except such as are conferred by their charters, or incidentally requisite to carry into effect the purposes of their charters. Hence it was held, that a charter to build a road to the top of a mountain and take tolls thereon does not warrant the company in purchasing horses and carriages and establishing a stage route. Nor does an additional act for erecting and leasing buildings for the accommodation of the business of the company or others on the

[12] 30 Barb. 553.

[13] Whitefield *v.* Southeastern Railway Co., Ellis, B. & E. 115.

[14] Philadelphia, Wilmington, & Baltimore Railroad Co. *v.* Quigley, 21 How. 202; s. c. 2 Redf. Am. Railw. Cas. 330.

(*d*) Retention and promotion of the servant in his employment after notice of the commission of the act complained of, is ratification. Bass *v.* Chicago & Northwestern Railway Co., 42 Wis. 654; Gasway *v.* Atlanta & West Point Railroad Co., 58 Ga. 216. And immediate notice to the conductor of misconduct by a brakeman is notice to the company. Bass *v.* Chicago & Northwestern Railway Co., *supra*.

road have that effect. And an agent can do no act not within the corporate powers, nor can the corporation ratify any such act.[15]

13. Where the statute requires the directors of a corporation to certify the fact of the capital stock being paid into the treasury in cash, and this is done, when in fact the payment was made in property of uncertain value, such certificate is false, and the directors responsible for the debts of the company, under the statute imposing that penalty for making a false certificate in that respect.[16]

14. A gas company chartered for the purpose of lighting the streets and buildings of a town, is not obliged to supply gas to all persons having buildings on the line of their pipes, upon being tendered reasonable compensation.[17]

15. In one case[18] it is said the company are responsible for a *false imprisonment committed by its agents, and no authority under seal is requisite; but there must be evidence justifying the jury in finding that the company's servants who did the act had authority from the company to do so. In this case the plaintiff had been taken into custody by the servants of the company, and by direction of the superintendent of the line, carried before a magistrate, and charged with an attempt to travel in one of the

[15] Downing *v.* Mount Washington Road Co., 40 N. H. 230.

[16] Waters *v.* Quimby, 3 Dutcher, 198.

[17] Paterson Gas Light Co. *v.* Brady, 3 Dutcher, 245.

[18] Goff *v.* Great Northern Railway Co., 3 Ellis & E. 672; s. c. 7 Jur. N. S. 286. But where the station-master ordered the owner of a horse into custody till it could be ascertained if his claim that the horse was to be carried free of charge was well founded, it was held that, as there could be no pretence of the company's having any claim to make any such arrest, it could not be held liable for what was so manifestly a mere tort of the servant. Poulton *v.* London & Southwestern Railway Co., Law Rep. 2 Q. B. 534. But where the servant of a railway company does an act of force towards another, in the due course of his employment, or under discretionary authority from the company, as in expelling a passenger from the cars for not paying fare, under a mistake of the fact, or with needless violence, the company is responsible, and the action may be against the servant and corporation jointly. Moore *v.* Fitchburg Railroad Co., 4 Gray, 465. But the president of the company is not liable in such case for merely transmitting the general authority of the corporation to the servant, but would be if he originated the particular order. Hewett *v.* Swift, 3 Allen, 420. See St. John *v.* Eastern Railroad Co., 1 Allen, 544. So, too, the company is responsible for any negligence or misconduct of its servants, in the course of their employment, in assisting passengers to alight from the cars. Drew *v.* Sixth Avenue Railroad Co., 40 N. Y. 429.

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company's carriages without having first paid his fare and procured a ticket. The fact was, he had paid his fare and procured a ticket and mislaid it at home, and by mistake, taken another ticket accidentally laid in the same place. He explained the transaction to the company's servants, and declined to pay fare again, because he had not the means, but offered to pawn some of the tools of his trade which he had with him. The court held, that, as some one must have authority to act for the company in such emergencies, the superintendent of the line must be regarded as having that authority. The jury gave a verdict for the plaintiff for £50 damages, and the court declined to interfere on the ground that they were excessive. The wonder is that any one should have had any hesitation in regard to the acts of the agents who thus acted in matters representing the company. It should be considered in all cases, that where a servant of any corporation does any act coming fairly within the scope of the business intrusted to him, it must be held binding upon the company.

16. It seems to be considered that railway companies may be responsible where injury to passengers, or others rightfully there, occurs in consequence, for allowing a dangerous animal to remain about their stations after they have sufficient knowledge of its * vicious propensities. But the fact that a stray dog had torn the dress of one passenger a few hours before, and attacked a cat soon after, and been driven from the station by the servants of the company, and soon after returned and bit the plaintiff, will not be sufficient to render the company responsible.[19] But where injury occurred from the bite of a dog kept about the stables of a horse railway company, by a person employed by them and having charge of their stables, and with the knowledge and implied assent of their superintendent, it was held that the company might properly be regarded as the keeper of the dog, and responsible under the statute for double the damages sustained by the bite.[20]

17. The general manager of a railway has authority to bind the company to pay for medical attendance on a servant of the company, injured by an accident in their employment.[21]

[19] Smith *v.* Great Eastern Railway Co., Law Rep. 2 C. P. 4.

[20] Barrett *v.* Malden & Melrose Railway Co., 3 Allen, 101.

[21] Walker *v.* Great Western Railway Co., Law Rep. 2 Exch. 228; s. p. Toledo, Wabash, & Western Railroad Co. *v.* Rodrigues, 47 Ill. 188. See *infra*, § 182, pl. 4, note 5.

18. But the general superintendent, manager, or managing director, has no authority to bind the company to a secret and fraudulent diversion of the funds or earnings of the company by any of the subordinate employés or servants.[22]

SECTION III.

Injuries to Servants by neglect of Fellow-Servants, and use of Machinery.

1. In general, company not liable to servant for negligence of fellow-servant.
2. Otherwise if at fault in employing unsuitable servants or machinery.
3. Not liable for deficiency of help or for defect in fence, whereby cattle come on road and throw engine from track.
4. *Quære*, whether the rule applies to servants of different grades.
   n. (g) Fellow-servants within the meaning of the rule, who are.
5. Principal rule not adopted in some states, nor in Scotland.
6. Ship-owner does not impliedly contract with seaman that ship is seaworthy.
7. Rule does not apply where servant has no connection with the particular work.
8–10. Cases, English and American, illustrating the accepted doctrine.
11. Company may show in excuse, that the damage accrued through disregard by fellow-servant of settled rules.
12. Servants of one company, not fellow-servants with those of another company, using the same station where the injury occurred.
13. Injury caused by intoxication of fellow-servant. Proof of knowledge by company, that servant is an habitual drunkard, tends to show culpable neglect.
14. Employer liable where his own negligence concurs with that of fellow-servant.

§ 131. 1. It seems to be now perfectly well settled in England, and mostly in this country, that a servant, (*a*) who is injured by

[22] Concord Railroad Co. *v.* Clough, 49 N. H. 257. The facts in this case were that the rules established by the directors required the conductors to add ten cents to the fare whenever it was paid in the cars. The defendant, a conductor, received fares at a less amount than the rules required, and did not enter them on the daily way-bills filed in the ticket-master's office, but expended the money in the purchase of tickets at the ticket-offices, and after punching them, to indicate that they had been taken of passengers, in the

(*a*) As to who are servants, see Bradley *v.* New York Central Railroad Co., 3 Thomp. & C. 288; Sloan *v.* Central Iowa Railroad Co., 11 Am.

the * negligence or misconduct of his fellow-servant, can maintain no action against the master for such injury.[1] (*b*)

ordinary course of business, returned them with his other tickets taken up. This was done by the consent of the superintendent, but purposely kept from the knowledge of the directors. He also, by purchasing joint tickets of other roads and selling them to passengers, deprived the company of benefits arising from the sale of its own tickets, to a large amount. This also was done by consent of the superintendent, but without the knowledge of the directors. The conductor was held responsible.

[1] Priestly *v.* Fowler, 3 M. & W. 1; Hutchinson *v.* York, Newcastle, & Berwick Railway Co., 5 Exch. 343; Wigmore *v.* Jay, 5 Exch. 354; Skip *v.* Eastern Counties Railway Co., 24 Eng. L. & Eq. 396; Farwell *v.* Boston & Worcester Railroad Co., 4 Met. 49; Murray *v.* South Carolina Railroad Co., 1 McMul. 385; Brown *v.* Maxwell, 6 Hill, N. Y. 592; Coon *v.* Syracuse & Utica Railroad Co., 6 Barb. 231; s. c. 1 Seld. 492; Hayes *v.* Western Railroad Co., 3 Cush. 270; Sherman *v.* Rochester & Syracuse Railroad Co., 15 Barb. 574; McMillan *v.* Railroad Co., 20 Barb. 449; Honner *v.* Illinois Central Railroad Co., 15 Ill. 550; Ryan *v.* Cumberland Valley Railroad Co., 23 Penn. St. 384; King *v.* Boston & Worcester Railroad Co., 9 Cush. 112; Madison & Indianapolis Railroad *v.* Bacon, 6 Ind. 205. The same rule prevails in Virginia. Hawley *v.* Baltimore & Ohio Railroad Co., 6 Am. Law Reg. 352.

& Eng. Railw. Cas. 115. A mere volunteer, one, e. g., who gets upon a train and applies a brake to stop it, is not. Everhart *v.* Terre Haute & Indianapolis Railroad Co., 78 Ind. 292. But as to who may be deemed a mere volunteer, see Wright *v.* London & Northwestern Railway Co , Law Rep. 1 Q. B. 252, where a consignee was injured while helping to move a car so that he could get at his freight, and was held not barred of his action. See also Blair *v.* Grand Rapids & Indiana Railroad Co., 24 Am. & Eng. Railw. Cas. 430, where a stranger stopping a train at request of conductor of another train, and injured in attempting to get on the train while it was moving, was held a volunteer, and the company was held not liable.

An infant, unless of tender years, is bound by the rules which govern in case of an adult. Houston & Great Northern Railroad Co. *v.* Miller, 51 Tex. 270. But see Hamilton *v.* Galveston, Harrisburg, & San Antonio Railway Co., 54 Tex. 556, where it was held that the company was liable to the mother of an infant of fifteen injured through the negligence of a fellow-servant.

Whether the company can relieve itself from all liability to servants for personal injuries, however caused, see Darrigan *v.* New York & New England Railroad Co., 52 Conn. 285.

There is no general liability on the part of the company to pay for surgical aid, but it may be proper in case of emergency; and where a trainman is injured at a distance from the principal office of the company, and there is urgent need of a surgeon, the conductor, if the highest agent of the company on the ground, may bind the company to pay for one Terre Haute & Indianapolis Railroad Co. *v.* McMurray, 98 Ind. 358.

(*b*) Totten *v.* Pennsylvania Railroad Co., 11 Fed. Rep. 561; Brabbits

2. But it seems to be conceded, that if there be any fault in the selection of the other servants, or in continuing them in their places after they have proved incompetent, perhaps, or in the employing unsafe machinery, the master will be answerable for all injury to his servants, in consequence.[2] (*c*)

[2] Shaw, C. J., 4 Met. 49, 57; Keegan *v.* Western Railroad Co., 4 Seld. 175. But it makes no difference in regard to the liability of the company that

v. Chicago & Northwestern Railway Co., 38 Wis. 289; Michigan Central Railroad Co. *v.* Dolan, 32 Mich. 510; Houston & Great Northern Railroad Co. *v.* Miller, 51 Tex. 270; Dobbin *v.* Richmond & Danville Railroad Co., 81 N. C. 446; Hogan *v.* Central Pacific Railroad Co., 49 Cal. 128; Kansas Pacific Railroad Co. *v.* Salmon, 11 Kan. 83; Gartland *v.* Toledo, Wabash, & Western Railroad Co., 67 Ill. 498. And see Hough *v.* Texas & Pacific Railway Co., 100 U. S. 213. This general rule involves no federal question and is not open to denial in the federal courts more than elsewhere. Dillon *v.* Union Pacific Railroad Co., 3 Dil. 319. But it applies only where the servants are in the same employment, i. e., in the same department of duty. King *v.* Ohio Railroad Co., 14 Fed. Rep. 277. Or in the same enterprise under the same master. New Orleans Railroad Co. *v.* Hughes, 49 Miss. 258. Or an enterprise in which the same instrumentalities are employed. Valtez *v.* Ohio & Mississippi Railroad Co., 85 Ill. 500. And see Mobile & Montgomery Railroad Co. *v.* Smith, 59 Ala. 245. It does not apply where the servant whose act is complained of stands toward the servant injured in the relation of a superior or vice-principal. Hough *v.* Texas & Pacific Railway Co., *supra;* Miller *v.* Union Pacific Railway Co., 17 Fed. Rep. 67; Gravelle *v.* Minneapolis & St. Louis Railway Co., 11 Fed. Rep. 569; Cowles *v.* Richmond & Danville Railroad Co., 84 N. C. 309; Ragsdale *v.* Memphis & Charleston Railroad Co., 3 Baxter, Tenn. 426. And if the negligence of the company has a share in causing the injury, contributory negligence of a fellow-servant will not relieve the company from liability. Grand Trunk Railway Co. *v.* Cummings, 106 U. S. 700; Elmer *v.* Locke, 135 Mass. 575. And see Thompson *v.* Chicago, Milwaukee, & St. Paul Railway Co., 18 Fed. Rep. 239. And on the whole, the rule of Priestly *v.* Fowler (*supra*, note 1), would seem to be becoming gradually modified, a greater number of local superintendents, heads of departments, &c., being held to stand in the place of the principal, thus more fully meeting the ends of justice. See also Nashville, Chattanooga, & St. Louis Railroad Co. *v.* Wheless, 10 Lea, Tenn. 741, where it is held that the master is liable where one servant is the immediate superior of the other. And see Gilmore *v.* Northern Pacific Railroad Co., 15 Am. & Eng. Railw. Cas. 304; Chicago & Alton Railroad Co. *v.* May, 15 Am. & Eng. Railw. Cas. 320; Hannibal & St. Joseph Railroad Co. *v.* Fox, Ib. 325; Missouri Pacific Railroad Co. *v.* Watts, 63 Tex. 549; Hake *v.* St. Louis, Keokuk, & Northwestern Railroad Co., 25 Am. & Eng. Railw. Cas. 463. See further the cases collected, *infra*, note (*g*).

(*c*) Mobile & Montgomery Rail-

*In Frazier *v.* The Pennsylvania Railway Company,[3] it was held, that if the company knowingly or carelessly employ a rash

the person came into the service voluntarily, to assist the servants of the company in a particular emergency, and was killed by the negligence of some of the servants. Degg *v.* Midland Railway Co., 1 H. & N. 773. It is said, McMillan *v.* Saratoga & Washington Railroad Co., 20 Barb. 419, that the servant, in order to entitle himself to recover for injuries from defective machinery, must prove actual notice of such defects to the master. But culpable negligence is sufficient, undoubtedly, and that is such as, under the circumstances, a prudent man would not be guilty of. *Infra*, note 10, § 131; Harper *v.* Indianapolis & St. Louis Railroad Co., 47 Mo. 567; Columbus & Indianapolis Central Railroad Co. *v.* Arnold, 31 Ind. 174; Illinois Central Railroad Co. *v.* Jewell, 46 Ill. 99. The case 47 Mo. 567, was where the engineer was allowed to let the fireman take his place temporarily, when he considered him competent, and he proved incompetent, and the company was held responsible. But if the servant knows of the defects, and does not inform the master, or if the defects are known to both master and servant, and the servant makes no objection to continue the service, he probably cannot recover of the master for any damage in consequence. But if the master knows of the defect, and directs the servant to continue the service, in a prescribed manner, he is responsible for the consequences. Mellors *v.* Shaw, 7 Jur. N. S. 845. Where the defendants were joint owners and workers of a coal-mine, and one of the employés was injured by a defect in the machinery, and it appeared that one

road Co. *v.* Smith, 59 Ala. 245; Houston & Texas Central Railroad Co. *v.* Myers, 55 Tex. 110; Pennsylvania Railroad Co. *v.* Roney, 89 Ind. 453; Ohio & Mississippi Railroad Co. *v.* Collarn, 73 Ind. 261; New Orleans, Jackson, &c. Railroad Co. *v.* Hughes, 49 Miss. 258; Smith *v.* Potter, 46 Mich. 258. The care which the company should exercise in the selection of employés is such as is fairly commensurate with the perils likely to result from negligence or incompetency. Wabash Railway Co. *v.* McDaniels, 107 U. S. 454. Ordinary care is not sufficient. Due care is necessary. Alabama & Florida Railroad Co. *v.* Waller, 48 Ala. 459. To render the company liable it should appear that it knew or should have known of the servant's incompetency. Blake *v.* Maine Central Railroad Co., 70 Me. 60; Ross *v.* Chicago, Milwaukee, & St. Paul Railway Co., 2 McCrary, 235. Notice to master mechanic who employed engine-drivers held notice to company of engine-driver's incompetency. Ohio & Mississippi Railroad Co. *v.* Collarn, 73 Ind. 261. So of notice to general agent charged with duty of employing. Baulec *v.* New York & Harlem Railroad Co., 59 N. Y. 356. So of notice to superintendent having general power of management. Huntingdon & Broad Top Mountain Railroad Co. *v.* Decker, 82 Penn. St. 119. So of notice to road-master of incompetency of section foreman. McDermott *v.* Hannibal & St. Joseph Railroad

[3] 38 Penn. St. 104; Wright *v.* New York Central Railroad Co., 28 Barb. 80; Carle *v.* Bangor & Piscatuquis Canal & Railroad Co., 43 Me. 269.

or incompetent conductor, whereby the brakeman on the train is injured, the company are responsible for the injury; that the act

of the defendants personally interfered in the management of the colliery, and the jury found that defendant guilty of personal negligence, it was held sufficient to implicate both defendants, as they must be presumed to have known that improper machinery was being employed. Ashworth *v.* Stanwix, 30 Law J. Q. B. 183. But see Wright *v.* New York Central Railroad Co., 28 Barb. 80; *infra*, note 3, 20; Morgan *v.* Vale of Neath Railway Co., Law Rep. 1 Q. B. 149. The company was held responsible for an injury to one of its servants caused by want of repair in the road-bed. Snow *v.* Housatonic Railroad Co., 8 Allen, 441. But the company cannot be held as guarantors to its servants that the structures continue in proper condition. If originally properly built and properly inspected from time to time, it is all that can be required. As, for instance, if a servant is killed by the falling of a bridge, properly constructed, and carefully inspected the day before, the company is not responsible. Faulkner *v.* Erie Railway Co., 49 Barb. 324; Warner *v.* Same, 8 Am. Law Reg. N. S. 209. The general doctrine of the text is maintained and illustrated in Harrison *v.* Central Railroad Co., 2 Vroom, 293; Weger *v.* Pennsylvania Railroad Co., 55 Penn. St. 460; Shauck *v.* Northern Central Railroad Co., 25 Md. 462; Pittsburg, Fort Wayne, & Chicago Railroad Co. *v.* Devinney, 17 Ohio St. 197; Warner *v.* Erie Railway Co., 39 N. Y. 468. And if the master uses reasonable precautions and efforts to procure safe and skilful servants, but, without fault, happens to have one in his employ through

Co., 73 Mo. 516. Notice to caller of conductors of a conductor's special temporary incompetency, held not notice to the company. Michigan Central Railroad Co. *v.* Dolan, 32 Mich. 510. If the servant is so grossly and notoriously unfit that it is negligence not to know his unfitness, the law presumes notice. Chicago, Rock Island, & Pacific Railroad Co. *v.* Doyle, 18 Kan. 58. But if the fellow-servant having full notice of such incompetency continues in the service without effort at the correction of the same, he is deemed to acquiesce, and waives his right against the company. Lake Shore & Michigan Southern Railway Co. *v.* Knittal, 33 Ohio St. 468. But see Hoey *v.* Dublin & Belfast Junction Railway Co., 5 Ir. Com. Law, 206, where it is said to be but evidence of contributory negligence for the jury. The rule that a servant takes the risk

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of the negligence of fellow-servants has no application in case the injury is caused by the negligence of a servant of a connecting line. Philadelphia, Wilmington, & Baltimore Railroad Co. *v.* Maryland, 58 Md. 372.

The principles which govern in cases of injury resulting from defects in roadway, machinery, &c., are to some extent the same which govern in cases of injury from negligence of fellow-servants. Thus the company is bound to a certain degree of care to provide roadway, machinery, &c., which the employé may safely use. The company is not liable merely because contrivances used in operating the road are dangerous. Gould *v.* Chicago, Burlington, & Quincy Railroad Co., 22 Am. & Eng. Railw. Cas. 289. But where the service is dangerous the company should use all reasonable and necessary means to

of the agent of the company having charge of employing such agents or servants, and of dismissing them for incompetency, is

whose incompetency damage occurs to a fellow-servant, the master is not liable. Tarrant *v.* Webb, 18 C. B. 797. In Dynen *v.* Leach, 26 Law J. N. S. Exch. 221, it was decided, that where an injury happens to a servant in the course of his employment in the use of machinery, of the nature of which he is as much aware as his master, and the use of which is the proximate cause of the injury, the servant cannot recover, nor, if death ensues, can his personal representative recover of the master, there being no evidence of any personal negligence on his part conducing to the injury. Nor does it vary the case that the master has in use in his works an engine, or machine, less safe than some other which is in general use, or that there was another and safer mode of doing the business, which had been discarded by his orders. And in Assop *v.* Yates, 2 H. & N. 768, it was held, that if the servant knew of the exposure, and consented to continue the service, and suffered damage, he could not recover of the master for any negligence which might have contributed to the result. And if one servant knows of the incompetency of another fellow-servant, and gives no information to the employer, but continues in the service, he cannot recover for any injury sustained through such incompetency. Davis *v.* Detroit & Michigan Railroad Co., 20 Mich. 105. But if one of the servants of the company is injured in coupling cars, through defect in the apparatus, which was known to the superintendent, and about being laid aside on that account, but not known to the servant, and without fault on his part or that of any fellow-servant, the company is liable. Gibson *v.* Pacific Railroad Co., 46 Mo. 163. And where a boy, fourteen years of age, is set to tend a machine, in dangerous proximity to another machine, without being cautioned against the exposure, and he is in consequence injured without any more incaution on his part than might naturally be expected of one in his position and of his age, the employer will be liable; but if the servant understand the peril, and voluntarily incur it, he cannot recover. Coomb *v.* New Bedford Cordage Co., 102 Mass. 572. A fireman injured by a defect in the engine, which had been brought to the knowledge of the mechanics employed in repairing such engines, but which they had failed to remedy in repairing the same, was held not entitled to recover of the company, without showing notice of the defect to some agent authorized to receive such notice on behalf of the company, and want of diligence in repairing the defect. Mobile & Ohio Railroad Co. *v.* Thomas, 42 Ala. 672.

protect the employé. Missouri Pacific Railroad Co. *v.* Watts, 63 Tex. 519. Upon the cases, however, it would seem that the company is held to less care and diligence in providing safe roadway, machinery, &c., than in providing careful fellow-servants, — for no very obvious reason, unless it is a reason that defects in the one are generally visible to the servant while defects in the other are not. However that may be, the cases seem to hold companies to the use only of reasonable and ordinary care to provide safe machinery, &c. Warner *v.* Western North Carolina Railroad Co., 25 Am. & Eng. Railw. Cas. 432; Jones *v.* New York Central & Hudson River Railroad Co., 22 Hun,

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the act of the company; (*d*) but the company are not responsible for such injury, unless they were in fault in employing or con-

284; Palmer *v.* Denver & Rio Grande Railway Co., 3 McCrary, 635; Wedgewood *v.* Chicago & Northwestern Railway Co., 44 Wis. 44; Missouri Pacific Railroad Co. *v.* Lyde, 57 Tex. 505; Muldowney *v.* Illinois Central Railroad Co., 36 Iowa, 462; Houston & Texas Central Railway Co. *v.* Dunham, 49 Tex. 181. See Tinney *v.* Boston & Albany Railroad Co., 62 Barb. 218. Not to the exercise of extraordinary care. Cooper *v.* Central Railroad Co., 44 Iowa, 134. Nor to the duties which devolve upon insurers. Wabash, St. Louis, & Pacific Railway Co. *v.* Fenton, 12 Brad. 417; Michigan Central Railroad Co. *v.* Smithson, 45 Mich. 212; Lake Shore & Michigan Southern Railway Co. *v.* McCormick, 74 Ind. 440. Nor is the company bound to make use of only the safest known appliances. Lake Shore & Michigan Southern Railway Co. *v.* McCormick, Ib.; Botsford *v.* Michigan Central Railroad Co., 33 Mich. 256. And see Toledo, Wabash, & Western Railway Co. *v.* Asbury, 84 Ill. 429. But the company is bound not only to furnish proper machinery, &c., but to keep it in proper condition. Brann *v.* Chicago, Rock Island, & Pacific Railroad Co., 53 Iowa, 595; Kain *v.* Smith, 80 N. Y. 458. And in such condition as from the nature of the business the servant has a right to expect. Totten *v.* Pennsylvania Railroad Co., 11 Fed. Rep. 564; Atchison, Topeka, & Santa Fe Railroad Co. *v.* Holt, 29 Kan. 149. And upon notice of any defect, to make proper repairs or changes. Gage *v.* Delaware, Lackawanna, & Western Railroad Co., 14 Hun, 446; Kidwell *v.* Houston & Great Northern Railway Co., 3 Woods, 313. And mere lack of notice will not excuse it, if such lack is due to want of care. Columbus, Chicago, & Indiana Central Railway Co. *v.* Troesch, 68 Ill. 545. Notice to a foreman in a repair shop may be notice to the company. Brabbits *v.* Chicago & Northwestern Railway Co., 38 Wis. 289. But if a servant continue in his employment knowing or having the means of knowing of defects, &c., he is presumed to assume all consequences. Houston & Texas Central Railroad Co. *v.* Myers, 55 Tex. 110; Umback *v.* Lake Shore & Michigan Southern Railway Co., 83 Ind. 191; Baker *v.* Western & Atlantic Railroad Co., 55 Ga. 133; Price *v.* Hannibal & St. Joseph Railroad Co., 77 Mo. 508. And see Jackson *v.* Kansas City, Lawrence, & Southern Kansas Railroad Co., 15 Am. & Eng. Railw. Cas. 178. Unless he has been induced by the company to believe the defects will be remedied. Illinois Central Railroad Co. *v.* Jones, 11 Brad. 321; Texas & Pacific Railway Co. *v.* Kane, 15 Am. & Eng. Railw. Cas. 218. But if he sees that the defects have not been remedied, but still continues, he takes the risk again. Crutchfield *v.* Richmond & Danville Railroad Co., 78 N. C. 300. If, however, the defects are the result of the want of ordinary care, and are not so serious that the servant may not use the machinery with care, and the company requests him to use it, and he uses it with care, the com-

(*d*) Tyson *v.* South & North Alabama Railroad Co., 61 Ala. 554; Texas M. Railroad Co. *v.* Whitmore, 58 Tex. 276. And see Mobile & Montgomery Railroad Co. *v.* Smith, 59 Ala. 245.

tinuing the conductor in their service; that the character of such conductor for skill and faithfulness may be shown by general reputation.(*e*) The master is not in general bound to use any special precautions to secure the servant from injury in regard to matters equally within the knowledge of both.[4] But the master is liable for all injuries accruing to his servants from his own personal negligence; and this may consist in personal interference in the particular matter causing the injury, or by negligently retaining incompetent servants, producing the injury.[5] But a railway company is liable in damages for an injury resulting to any person lawfully using its road, from its neglect to introduce any improvement in its machinery or apparatus, which is known * to have been tested, and found materially to contribute to safety, and the adoption of which is within its power so as to be reasonably practicable.[6] But in another case,[7] in an action by a servant against his master for injuries sustained by the explosion of a steam-boiler used in his business, the plaintiff introduced evidence

[4] Seymour *v.* Maddox, 16 Q. B. 326.

[5] Ormond *v.* Holland, 1 Ellis, B. & E. 102.

[6] Smith *v.* New York & Harlem Railroad Co., 19 N. Y. 127.

[7] Cazyer *v.* Taylor, 10 Gray, 274.

pany will be liable. Kansas City, St. Joseph, & Council Bluffs Railroad Co. *v.* Flynn, 78 Mo. 195. And see East Tennessee, Virginia, & Georgia Railroad Co. *v.* Duffield, 12 Lea Tenn. 63; Sioux City & Pacific Railroad Co. *v.* Finlayson, 18 Am. & Eng. Railw. Cas. 68. Nor can a servant recover for an injury resulting from a risk usual to the business. Little Rock & Fort Smith Railroad Co. *v.* Duffey, 35 Ark. 602; Woodworth *v.* St. Paul, Minneapolis, & Manitoba Railway Co., 18 Fed. Rep. 282, Pennsylvania Railroad Co. *v.* Wachter, 60 Md. 395. Or in consequence of rules or methods with knowledge of which he engaged. Kelley *v.* Chicago, Milwaukee, & St. Paul Railway Co., 53 Wis. 74. And it will make no difference that there was a safer way of doing the business. Naylor *v.* Chicago & Northwestern Railway Co., 53 Wis. 661. Nor can the servant recover where he has been guilty of contributory negligence, as by attempting to board a moving train. Dowell *v.* Vicksburg & Meridian Railroad Co., 61 Miss. 519. Or by shovelling under a bank of earth that it is likely to fall, knowing that it is likely. Simonds *v.* Chicago & Tomah Railroad Co., 110 Ill. 340; Rasmusson *v.* Chicago, Rock Island, & Pacific Railroad Co., 18 Am. & Eng. Railw. Cas. 51. It is not negligence *per se* to walk along a moving train of flat cars. Atchison, Topeka, & Santa Fe Railroad Co. *v.* McCandliss, 22 Am. & Eng. Railw. Cas. 246.

(*e*) As to proof of negligence on other occasions, see Michigan Central Railroad Co. *v.* Gilbert, 46 Mich. 176; Baulec *v.* New York & Harlem Railroad Co., 48 How. Pr. 396.

without objection, that there was no such fusible safety-plug on the boiler as was required by statute; and the presiding judge excluded evidence of a custom among engineers not to use such a plug, and instructed the jury that if the defendant knowingly used the boiler without the plug, and the want of it caused the accident, the plaintiff was entitled to recover, and refused to instruct them that if the defendant used all the appliances for safety that were ordinarily used in such establishments, he was not liable, although he did not use the fusible plug required by statute, and it was held the defendant had no ground of exception. It is here declared by the court that ordinary care must be measured by the character and risks and exposures of the business, and the degree of care required is higher when life or limb is endangered, or a large amount of property is involved, than in other cases.[8]

3. But the company are not liable because there was a deficiency of help at that point.[9] And a neglect in the company to fence their road, whereby the engine was thrown from the track, by coming in contact with cattle thus enabled to come upon the road, and a servant of the company so injured that he died, will not render them liable.[10] (*f*)

4. But it has been questioned whether the rule has any just application to servants in different grades, who are subordinated the one to the other.[11] But as the ground upon which the rule

[8] *Supra;* see also Briggs *v.* Taylor, 28 Vt. 180, 184; s. c. 2 Redf. Am. Railw. Cas. 558.

[9] Skip *v.* Eastern Counties Railroad Co., 9 Exch. 223; Hayes *v.* Western Railroad Co., 3 Cush. 270.

[10] Langlois *v.* Buffalo & Rochester Railroad Co., 19 Barb. 364. But under the English statute the master has been held responsible for any omission of duty in making his business reasonably safe, whereby his servants suffered damage. Britton *v.* Great Western Cotton Co., Law Rep. 7 Exch. 130.

[11] Gardiner, J., in Coon *v.* Syracuse & Utica Railroad Co., 1 Seld. 492; s. c. 6 Barb. 231. But in Gillshannon *v.* Stony Brook Railroad Co., 10 Cush. 228, it was held to make no difference that the servants were not in a common employment. This was the case of a laborer riding on a gravel train to the place of his employment, and injured by the negligence of those in charge of the train. In Wilson *v.* Merry, Law Rep. 1 H. L. 326, it was decided, that a master is not responsible for injury to a servant caused by the negligence of

(*f*) If the servant knew of the want of a fence. Sweeney *v.* Central Pacific Railroad Co., 57 Cal. 15.

* is attempted to be maintained is one of policy chiefly, that it is better to throw the hazard upon those in whose power it is to guard against it, it seems very questionable how far any such distinction is maintainable. It has been attempted in a good many cases, but does not seem to have met with favor.(*g*)

a fellow-servant, by the mere fact that the latter is of a higher grade, e. g., a superintendent. s. p. Feltham *v.* England, Law Rep. 2 Q. B. 33. But in Haynes *v.* East Tennessee & Georgia Railroad Co., 3 Cold. 222, a somewhat different view was taken, the company being held responsible for an injury to one of the subordinate servants by the carelessness of the superintendent in starting a train at an unusual hour. And in Frost *v.* Union Pacific Railroad Co., 11 Am. Law Reg. N. S. 101, where one servant, by the direction of a superior servant, undertook to do an act not in the usual course of his employment, and was thereby injured through the negligence of the superior, the master was held liable. But where a brakeman was injured by the negligence of workmen in repairing the track, it was held they were so far fellow-servants that he could not recover. Cooper *v.* Milwaukee & Prairie du Chien Railroad Co., 23 Wis. 668. So, too, where a laborer on a construction train was injured by the engineer backing the train without a preliminary signal, it was held he could not recover of the company, it being only the carelessness of a fellow-servant. Chicago & Alton Railroad Co. *v.* Keefe, 47 Ill. 108.

(*g*) The decisions as to whether servants are fellow-servants within the meaning of the rule, where they are not employed in precisely the same way, are numerous. It has been held that a conductor and a brakeman are fellow-servants. Smith *v.* Potter, 46 Mich. 258. So of engine-drivers on different engines. Chicago, St. Louis, & New Orleans Railroad Co. *v.* Doyle, 8 Am. & Eng. Railw. Cas. 171. So of an engine-driver and a fireman on the same engine. Henry *v.* Lake Shore & Michigan Southern Railway Co., 49 Mich. 495. So of an engine-driver and a brakeman. Railway Co. *v.* Ranney, 37 Ohio St. 665; Nashville, Chattanooga, &c. Railroad Co. *v.* Wheless, 10 Lea Tenn. 741. So of an engine-driver and a telegraph operator. Dana *v.* New York Central & Hudson River Railroad Co., 23 Hun, 473. Or a train despatcher. Darrigan *v.* New York & New England Railroad Co., 52 Conn. 285. See Phillips *v.* Chicago, Milwaukee, & St. Paul Railroad Co., 23 Am. & Eng. Railw. Cas. 453. So of an engine-driver and a road-master through whose negligence a switch is misplaced. Walker *v.* Boston & Maine Railroad Co., 1 Am. & Eng. Railw. Cas. 141. So of an engine-driver and a laborer on gravel train. Kumler *v.* Junction Railroad Co., 33 Ohio St. 150. Or of such laborer and a brakeman on the train. Henry *v.* Staten Island Railway Co., 81 N. Y. 373. Or of a brakeman and a laborer employed in setting up a derrick used in widening the roadway. Holden *v.* Fitchburg Railroad Co., 129 Mass. 268. So of a car-repairer and a brakeman or head brakeman or yard-master. Besel *v.* New York Central & Hudson River Railroad Co., 9 Hun, 457. So of train-men on different trains generally. Bull *v.* Mobile & Montgomery Railway Co., 67 Ala. 206. So of

5. And the rule itself has been denied in some cases, in this country, after very elaborate consideration.[12] And it has been

[12] Little Miami Railroad Co. *v.* Stevens, 20 Ohio, 415; Cleveland, Columbus, & Cincinnati Railroad Co. *v.* Keary, 3 Ohio St. 202. These cases are placed mainly on the ground of the person injured being in a subordinate position. It was held that the rule did not apply to day laborers on a railway, who were not under any obligation to renew their work from day to day, where one, after completing his day's work, was injured through the negligence of the conductor of one of the company's trains, on which he was returning home, free of charge, but as part of the contract on which he worked. Russell *v.* Hudson River Railroad Co., 5 Duer, 39. And in Whaalan *v.* Mad River & Lake Erie Railroad Co., 8 Ohio St. 249, it was held that where one of the employés of a railway, engaged in making repairs on its track, was injured by the neglect of a fireman on one of the trains, there was no such subordination in regard to their duty as to justify any departure from the general rule excusing the master. See also Indianapolis Railroad Co. *v.* Love, 10 Ind. 554; Same *v.* Klein, 11 Ind. 38. In Hard *v.* Vermont & Canada Railroad Co., 32 Vt. 473, the plaintiff's intestate, who was an engineer on the defendant's road, was killed by the explosion of a locomotive engine which he was running, which occurred by the neglect of the company's master-mechanic in not keeping the machine in repair. It was his duty to superintend and direct the repairs on the engines. The directors of the company were not guilty of any neglect in furnishing the road, in the first instance, with suitable machinery and competent employés, and they were ignorant of any defect in this engine. The company was held not responsible for the death of plaintiff's intestate, on the ground that under the circumstances the injury must be considered as occurring from the neglect of a fellow-servant, employed in the same common business. But where a stranger, who had occasion to be on the company's grounds, was injured by the explosion of defendant's engine, it was held that the company was responsible, unless it could show that the explosion occurred without its fault. Illinois Central Railroad Co. *v.* Phillips, 49 Ill. 234.

section-men and train-men generally. Blake *v.* Maine Central Railroad Co., 70 Me. 60; Gormley *v.* Ohio & Mississippi Railway Co., 72 Ind. 31. So of a station-agent and an engineer running an engine on tracks at a station. Brown *v.* Minneapolis & St. Louis Railway Co., 15 Am. & Eng. Railw. Cas. 333. So of a section boss or a road-master and a laborer. Barringer *v.* Delaware & Hudson Canal Co., 19 Hun, 216; Chicago & Tomah Railroad Co. *v.* Simmons, 11 Brad. 147; Hoke *v.* St. Louis, Keokuk, & Northern Railway Co., 11 Mo. Ap. 575. But *contra*, Louisville & Nashville Railroad Co. *v.* Bowler, 9 Heisk. Tenn. 866. And see Atchison, Topeka, & Santa Fe Railway Co. *v.* Moore, 15 Am. & Eng. Railw. Cas. 312. So of a general traffic-manager and a section man. Conway *v.* Belfast & Northern Counties Railway Co., 9 Ir. Com. Law, 498. So of a car-inspector and a switchman. Gibson *v.* Northern Central Railway Co., 22 Hun, 289. Or of a car-inspector and a brakeman. Smith *v.* Potter, 46 Mich. 258. But

held not to apply to the case of slaves,[13] especially where the employer stipulated not to employ them about the engines and cars, unless for necessary purposes of carrying to places where their services were needed, and they were carried beyond that point, and killed in jumping from the cars.[14] The Court of Sessions in *Scotland, too, seems to have dissented from the English rule upon this subject.[15]

[13] Scudder *v.* Woodbridge, 1 Kelly, 195.

[14] Duncan *v.* Railroad Co., 2 Rich. 613.

[15] Dixon *v.* Ranken, 1 Am. Railw. Cas. 569. The remarks of Lord Cockburn are pointed and pertinent. "The English decisions certainly seem to determine that in England, where a person is injured by the culpable negli-

contra, Brann *v.* Chicago, Rock Island, & Pacific Railroad Co., 53 Iowa, 595; King *v.* Ohio & Mississippi Railway Co., 11 Bissell, 362.

But it has been held otherwise in some circumstances, of a track-repairer and a train-man. Dick *v.* Railroad Co., 38 Ohio St. 389. For example, an engine-driver. Pittsburg, Fort Wayne, & Chicago Railway Co. *v.* Powers, 74 Ill. 341. Or a fireman. Chicago & Northwestern Railroad Co. *v.* Moranda, 93 Ill. 302. Or a brakeman. Vantrain *v.* St. Louis, Iron Mountain, & Southern Railway Co., 8 Mo. Ap. 538. So of a car-loader and a switch-tender. Chicago, Rock Island, & Pacific Railroad Co. *v.* Henry, 7 Brad. 322. So of a workman and the foreman in a repair shop. Lake Shore & Michigan Southern Railway Co. *v.* Lavalley, 36 Ohio St. 221. So of an engine-driver and signal men. Swainson *v.* Northeastern Railway Co., Law Rep. 3 Exch. 341. So of a draftsman in locomotive works, injured in falling over an embankment thrown up in deepening a cellar on the premises, and workmen engaged in the same employ at digging. Baird *v.* Pettit, 29 Phila. 397. And it has been held that an engine-driver and a conductor are not fellow-servants, where they are in performance of duties under an order requiring conductors running under special or telegraphic orders to show such orders to engine-drivers, and engine-drivers to read and understand such orders. Ross *v.* Chicago, Milwaukee, & St. Paul Railway Co., 2 McCrary, 235. So it has been held that the foreman of one of numerous gangs of men working separately under a general superintendent in the construction of a road is not a fellow-servant with a man in the gang injured by the negligent thawing of giant powder by an open fire. Gilmore *v.* Northern Pacific Railway Co., 18 Fed. Rep. 866; s. c. 15 Am. & Eng. Railw. Cas. 394.

As to whether the conductor of a train is to be regarded as a vice-principal as to other train-men, see Chicago, Milwaukee, & St. Paul Railway Co. *v.* Ross, 112 U. S. 377, which holds that he is; and Cassidy *v.* Maine Central Railroad Co., 76 Me. 488, and Pease *v.* Chicago & Northwestern Railway Co., 17 Am. & Eng. Railw. Cas. 527, which hold *contra*. See Burlington & Missouri River Railroad Co. *v.* Crockett, 24 Am. & Eng. Railw. Cas. 390; Louisville & Nashville Railroad Co. *v.* Moore, 24 Am. & Eng. Railw. Cas. 413.

* 6. But it has been held, that there is no implied obligation on the part of a ship-owner towards a seaman, who agrees to

gence of a servant, that servant's master is liable in reparation, provided the injured person was one of the public, but that he is not responsible if the person so injured happened to be a fellow-workman of the delinquent servant. It is said, as an illustration of this, that if a coachman kills a stranger by improper driving, the employer of the coachman is liable, but that he is not liable if the coachman only kills the footman. If this be the law of England, I speak of it with all due respect, it most certainly is not the law of Scotland. I defy any industry to produce a single decision or *dictum*, or institutional indication, or any trace of any authority to this effect, or of this tendency, from the whole range of our law. If any such idea exists in our system, it has as yet lurked undetected. It has never been directly condemned, because it has never been stated." After citing numerous cases in their reports, where the question was involved but not raised, his lordship continues: "The new rule seemed to be recommended to us, not only on account of the respect due to the foreign tribunal, — the weight of which we all acknowledge, — but also on account of its own inherent justice. This last recommendation fails with me, because I think that the justice of the thing is exactly in the opposite direction. I have rarely come upon any principle that seems less reconcilable with legal reason. I can conceive some reasoning for exempting the employer from liability altogether, but not one for exempting him only when those who act for him injure one of themselves. It rather seems to me that these are the very persons who have the strongest claim on him for reparation, because they incur danger on his account, and certainly are not understood by our law to come under any engagement to take these risks on themselves." But these remarks have no weight beyond the argument. The English cases certainly regard the servant as impliedly stipulating to run these risks when he enters into the service. And the great preponderance of authority in this country is undoubtedly in favor of the English rule. Marshall *v.* Stewart, 33 Eng. L. & Eq. 1. Opinion of Cranworth, Chancellor. But see the very lucid and convincing argument of Shaw, C. J., in Farwell *v.* Boston & Worcester Railroad Co., 4 Met. 49, 56; s. c. 1 Redf. Am. Railw. Cas. 395; s. c. 1 Am. Railw. Cas. 339; and the most ingenious attempt at *reductio ad absurdum* upon the subject by Lord Abinger, in Priestly *v.* Fowler, 1 M. & W. 1, 6, 7, where the learned Chief Baron, among other ingenious speculations, supposes some fearful consequences if the master were to be held liable for the negligence of the chamber-maid in putting the servant into wet sheets!

If a man should receive damage in any way by his own foolhardiness, even where a fellow-servant was concerned in producing the result, obviously he could not recover of any one. Some discretion and reserve are no doubt requisite in the application of the rule of the servant's right to recover for the default of his fellow-servant, but whether the difficulty of its application will fairly justify its abandonment, would seem somewhat questionable, if the thing were *res integra*, which it certainly is not, either in the English or in the American law. In an English case in the Court of Exchequer,

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serve *on board, that the ship is seaworthy, and in the absence of any express warranty to that effect, or of any knowledge of the defect, or any personal blame on the part of the ship-owner, the seaman cannot maintain an action, by reason of the ship becoming leaky, and his being obliged to undergo extra labor.[16]

Wiggett *v.* Fox, 11 Exch. 832; s. c. 36 Eng. L. & Eq. 486, the court adhere to the rule laid down in former English cases on this subject, reiterating the same reasons, with the qualification, that if there were any reason for holding that the persons whose act caused the injury were not persons of ordinary skill and care, the case would be different, there being an implied obligation on the master not to employ such persons. With this qualification there seems to be no serious objection to the English rule. Bassett *v.* Norwich & Nashua Railroad Co., 19 Law Rep. 551. In a case in the Court of Sessions in Scotland, so late as January, 1857, the court repelled a plea, founded on the claim that the master is not liable to a servant for the negligence of a fellow-servant. The Lord Justice Clerk took occasion to remark, that the master's liability rested on the broad principle, that an employer being liable to third parties for injuries caused by his servants, *à fortiori* he is liable to the servant for injury caused by another servant. But for injury to servants through obvious or known defects of machinery in the use of the master, unknown to the servant, but which the employer by the use of ordinary care could have cured, the cases all agree that he is liable. McGatrick *v.* Wason, 4 Ohio St. 566. In the Exchequer Chamber, so late as May, 1857, in Roberts *v.* Smith, 29 Law T. 169, it was held, that where the master directs the conduct of the servant, he is liable for any injury resulting therefrom to the other servants. See also Weyant *v.* New York & Harlem Railroad Co., 3 Duer, 360. It has been held in some cases, as in Scudder *v.* Woodbridge, 1 Ga. 195, that the rule that the master is not liable for an injury to one servant inflicted by the want of care or skill in a fellow-servant, does not apply to the case of slaves, on account of their want of freedom in action and choice in continuing the service when it becomes perilous. But if an exception could be founded on any such basis, it would extend to all the subordinate relations of service, as has sometimes been attempted. But where the injury results from the habitual negligence of the engineer of a boat, whereby slaves perish by the bursting of a boiler, the master of the boat is liable, and the same rule applies to the case of freemen. Walker *v.* Bolling, 22 Ala. 294; Cook *v.* Parham, 21 Ala. 21. The court here were equally divided on the question, whether the general rule on this subject applied to the case of a slave hired on a steamboat. But the court subsequently held, on general principles, that where one employs a mechanic to repair a building which is in a ruinous state, not known to the workmen and not disclosed to the contractor, the employer is liable for all injury sustained by the contractor or his subordinates, though slaves, by reason of the peril to which they are thus fraudulently exposed, but that he will not be held so liable if he inform the contractor of the peril to which he is exposed. Perry *v.* Marsh, 25 Ala. 659.

[16] Couch *v.* Steel, 3 E. & B. 402; s. c. 24 Eng. L. & Eq. 77. But if the

7. But a carpenter employed by a railway company to build one of their bridges, and who took passage in their cars, by their directions, to go to a certain point for the purpose of loading timber to be used in building the bridge, and who was injured in the course of the passage by the negligent conduct of the train, is entitled to recover of the company, the plaintiff having no particular connection with the conduct of the business in which he was injured.[17]

8. The English courts still maintain their former stand, that all the servants of the same company engaged in carrying forward the common enterprise, although in different departments, widely separated, or strictly subordinated to others, are to be regarded as fellow-servants, bound by the terms of their employment to run the hazard of any negligence or wrong-doing which may be committed by any of the number, so far as it operates to their detriment. This is strikingly illustrated in a case in the Common * Pleas,[18] (*h*) where it was held that one employed to pick up stones from off the defendant's line, and who, while returning in the evening, after his work was over, in a train driven by the defendant's servants, was injured by a collision caused by the negligence of those who had charge of the train, it being one

master might have known the exposure of the servant, but for his own want of ordinary care, as in the use of a defective locomotive engine, which explodes and injures the servant, through defective construction, the master is liable for the injury. Noyes *v.* Smith, 28 Vt. 59. But where the danger is known to the servant and not communicated to the superior, or master, he cannot recover for any injury he may sustain in consequence. McMillan *v.* Saratoga & Washington Railroad Co., 20 Barb. 449; Hubgh *v.* New Orleans & Carrollton Railroad Co., 6 La. An. 495.

[17] Gillenwater *v.* Madison & Indianapolis Railroad Co., 5 Ind. 340; s. p. O'Donnell *v.* Allegheny Valley Railroad Co., 59 Penn. St. 239. And where laborers on a railway were transported to and from their labor and meals on the gravel trains of the company, which they were employed in loading and unloading, but had no agency in managing, and in such transportation, by the gross negligence and unskilfulness of the engineer, were injured, it was held that the company was liable. Fitzpatrick *v.* New Albany & Salem Railroad Co., 7 Ind. 436. But not where the servant is in fault in attempting to get on the train when in motion. Timmons *v.* Central Ohio Railroad Co., 6 Ohio St. 105.

[18] Tunney *v.* Midland Railway Co., Law Rep. 1 C. P. 291; s. c. 12 Jur. N. S. 691.

(*h*) See *supra*, note (*b*).

of the terms of the contract of hiring that he should return in the defendant's train, could not recover damages of the company, as he and the person guilty of the negligence resulting in the injury were fellow-servants engaged in a common employment, within the meaning of the rule of law applicable to the case.

9. This whole question is very elaborately reviewed in a case in Kentucky [19] which we shall here repeat, together with our own comments at the time upon the several propositions embraced in the opinion, at the risk of some repetition, perhaps. Where an employé upon a railway is injured by the negligence of the engineer of the company, and is himself guilty only of such neglect and want of care as would not have exposed him to the injury but for the gross neglect of the engineer, and when the engineer might with ordinary care have avoided the injury, he is not precluded from maintaining his action. What is gross neglect in the engineer may be determined by the court, as a question of law, where there is no controversy in regard to the facts. In regard to those acts of a corporation which require care, diligence, and judgment, and which it performs through the instrumentality of general superintending agents, the corporation itself is to be regarded as always present, supervising the action of its agents. The rule of law, that the master is not responsible to one of his servants for an injury inflicted through the neglect of a fellow-servant, is not adopted, to the full extent of the English decisions, in the state of Kentucky. The rule is there regarded as anomalous, inconsistent with principle, analogy, and public policy, and unsupported by any good or consistent reason. In regard to all servants of the company acting in a subordinate sphere, the one class to another, and receiving injuries while in the performance of duties, under the command of a superior, whose authority they have no right to disobey or disregard, it is the same * precisely as if the injury were inflicted by the act of the company; and if there is any want of care and skill in the superior, such as his position and duty reasonably demand, the company are responsible. In such cases there is no implied undertaking on the part of the servant to risk the consequences of the misconduct of the agent of the company under whose authority he acted, and through whose negligence he received the

[19] Louisville & Nashville Railroad Co. *v.* Collins, 5 Am. Law Reg. N. S. 265; S. C. 2 Duvall, 114.

injury. Servants so situated, in distinct grades of superiority and subordination, are not to be considered as "fellow-servants," or "in the same service;" but rather in the light of strangers to each other's duties and responsibilities; and the subordinate may recover of the company for any injury sustained by reason of the ordinary neglect of the superior. But if the subordinate is himself guilty of any want of ordinary care, whereby he is more exposed to the injury, he cannot recover, unless the superior was guilty of wilful misconduct or gross neglect, but for which he might have avoided inflicting the injury, notwithstanding the negligence of the other party. Where, therefore, an engineer, while upon his engine, ordered a common laborer to do some needed work under the engine, in fastening bolts or screws belonging to it; and such workman, while lying upon his back in the performance of the service, had both his legs cut off by the movement of the engine forward and backward, through the gross neglect or wilful misconduct of such engineer, the company are responsible for the injury, notwithstanding there might have been some want of ordinary care on the part of the subordinate, contributing to some extent to the injury, but not necessitating it, except through the gross misconduct of the superior. Per Robertson, C. J. — We do not consider that the rule exempting the company from responsibility for injuries inflicted upon their servants, through the want of ordinary care in other servants of the company, extends beyond those who are "strictly fellow-servants" in the same grade of employment, and where one is not subject to the order or control of the others. Beyond this the company is responsible for the consequences of the misconduct of superiors towards inferiors in its service, the same as towards strangers.[20]

[20] This is an extended syllabus of the case, embracing all the points on which the opinion of the court is given, without regard to their being directly and necessarily involved in the decision of the cause. Notwithstanding the avowed willingness of the learned judge to disregard the general current of authority, and the apparent spirit of freedom with which he deals with the decisions, it has to be admitted that the opinion is entirely sound in its principles, and maintained with uncommon ability in its logic as well as in its illustrations. It is to be noticed that the learned judge declares unequivocally that the corporation is to be regarded as constructively present in all acts performed by its general agents within the scope of their authority, i. e., within the range of their ordinary employment. But the profession should be warned that the decisions on the other side embrace a very large number of

* 10. The question is again reviewed by the same learned judge who gave the widely-admired opinion in Farwell *v.* Boston &

the best-considered English cases, and an almost equal number in the American states; including all, so far as we know, with the exception of Ohio, Georgia, and Kentucky. And the decisions in these latter states are all placed on peculiar grounds, thereby virtually confessing the soundness of the general rule, that one cannot recover of his employer for an injury inflicted through the want of care in a fellow-servant, employed in the same department of the master's business, and under the same general control. The consequences of mistake or misapprehension, on this point, have led many courts into conclusions greatly at variance with reason and the common instincts of humanity. The reasonableness and justice of this construction may, it is to be hoped, induce its universal adoption at no distant day. See *supra*, § 130, pl. 6, *et seq.* and notes, and cases cited.

In regard to the leading point involved in the Kentucky case, how far a servant is entitled to recover of the master for an injury inflicted by the negligence or want of skill of a fellow-servant, the doctrine of exemption was first established in the Court of Exchequer in Priestly *v.* Fowler, 3 M. & W. 1, in 1837. The rule was adopted in this country in Massachusetts, in Farwell *v.* Boston & Worcester Railroad Co., 4 Met. 49, in 1842, and supported by one of the ablest and most unexceptionable opinions ever delivered from the American Bench, — an opinion which has commanded the admiration of the entire profession, both Bench and Bar, in England and in America, and has been more extensively adopted and formally incorporated into the opinions of the English courts than perhaps any other opinion of an American judge. This case was preceded by that of Murray *v.* South Carolina Railroad Co., 1 McMullan, 385; but the former has been regarded as the leading American case. These leading opinions have been followed by many cases reaching down to the present time, most of them occupied in the discussion of what were claimed to be exceptional circumstances. In England, there are, among a multitude of others, Hutchinson *v.* York, Newcastle, & Berwick Railway Co., 5 Exch. 343; Wigmore *v.* Jay, 5 Exch. 343, 351; Skip *v.* Eastern Counties Railway Co., 9 Exch. 223; s. c. 21 Eng. L. & Eq. 396; Degg *v.* Midland Railway Co., 1 H. & N. 773; Tarrant *v.* Webb, 18 C. B. 797; s. c. 37 Eng. L. & Eq. 281; Mellors *v.* Shaw, 1 B. & S. 437; s. c. 7 Jur. N. S. 815; Seymour *v.* Maddox, 16 Q. B. 326; Ormond *v.* Holland, 1 Ellis, B. & E. 102. In this country the decisions are numerous. The following show how far the rule prevails in different states. Brown *v.* Maxwell, 6 Hill, N. Y. 592; Coon *v.* Syracuse & Utica Railroad Co., 6 Barb. 231; s. c. 1 Seld. 492, and other New York cases cited, *supra*, § 131. See also Honner *v.* Illinois Central Railroad Co., 15 Ill. 550; Ryan *v.* Cumberland Valley Railroad Co., 23 Penn. St. 384; Madison & Indianapolis Railroad Co. *v.* Bacon, 6 Porter, 205; Hawley *v.* Baltimore & Ohio Railroad Co., 6 Am. Law Reg. 352; Frazier *v.* Pennsylvania Railroad Co., 38 Penn. St. 104; Wright *v.* New York Central Railroad Co., 28 Barb. 80; Carle *v.* Bangor & Piscataquis Canal & Railway Co., 43 Me. 269; Noyes *v.* Smith, 28 Vt. 59; Indianapolis Railroad Co. *v.* Love, 10 Ind. 554; Same *v.* Klein, 11

* Worcester Railway, in a later case,[21] and the following propositions maintained. A carpenter employed by the day by a

Ind. 38. The general principle is adopted in all the other states where the question has arisen; for although in Ohio, in the cases of Little Miami Railroad Co. *v.* Stevens, 20 Ohio, 415, and Cleveland, Columbus, & Cincinnati Railroad Co. *v.* Keary, 3 Ohio St. 201, the companies are held responsible for the injury, the decisions are placed on the ground, that the persons injured were in subordinate positions. And in Scudder *v.* Woodbridge, 1 Kelly, 195, it was held that the rule did not excuse the master for injury thus caused to slaves, mainly on the same ground of their dependent and subordinate positions. And the Kentucky case is placed on the same ground. In the more recent case of Whaalan *v.* Mad River & Lake Erie Railroad Co., 8 Ohio St. 249, it was held, where one of the trackmen was injured by neglect of the fireman on one of the trains, that there was no such subordination of position as to take the case out of the general rule, and the case was decided in favor of the company, thus maintaining the soundness of the general rule in that state. The Kentucky courts do not seem to hold the master excused in such cases, unless the fellow-servant by whose act or omission the injury occurs, is competent for his duty and reasonably diligent in its performance. Louisville & Nashville Railroad Co. *v.* Felbern, 6 Bush, 574. But the fact that there is a safer mode of constructing machinery is no ground of charging the master. Wonder *v.* Baltimore & Ohio Railroad Co., 32 Md. 411.

It is safe, therefore, to state, that all the cases, both English and American, maintain the general rule to the extent of those who are strictly "fellow-servants" in the same department of service. And where this is not the fact, but the employés are so far removed from each other that the one is bound to obey the directions of the other, so that the superior may be fairly regarded as representing the master, we think it more consonant with reason and justice to treat the matter as not coming within the principle of the rule. This is so declared by GARDINER, J., in Coon *v.* Syracuse & Utica Railroad Co., 1 Seld. 492. But this qualification is denied by SHAW, C. J., in Farwell *v.* Boston & Worcester Railroad Co., 4 Met. 49, 60, 61, unless the departments of service are so far independent as to have no privity with each other, not being under the control of a common master. And it was so decided in Gillshannon *v.* Stony Brook Railroad Co., 10 Cush. 228. And it seems finally to be settled on authority, that it is sufficient to bring the case within the rule, that the servants are employed in the same common service, as in running a railway, or working a mine. Wright *v.* New York Central Railroad Co., 25 N. Y. 552, 564, by ALLEN, J. The question is whether they are under the same general control. Abraham *v.* Reynolds, 5 H. & N. 142; Hard *v.* Vermont & Canada Railroad Co., 32 Vt. 473. And there is no question that the master is responsible for any want of skill or care in employing competent and trustworthy servants, and in sufficient numbers; and in furnishing safe and suitable machinery for the work in hand, unless the servants, knowing, or having the

[21] Seaver *v.* Boston & Maine Railroad Co., 14 Gray, 466.

railway corporation * to work on the line of their road, and carried on the cars to the place of such work without paying fare, cannot maintain an * action against the corporation for injuries received while being so carried, by the negligence of the engineer employed by them for that service, or by a hidden defect in the axle, the failure to discover which, if discoverable, was occasioned by the negligence of servants of the corporation, whose duty it was to examine and keep in repair the cars, engines, and axles. In such a case, if the company exercised reasonable care in providing and using the machinery, in the use of which the plaintiff was so injured, they are not responsible for the injury.

11. And in a later case [22] before the same court, where a servant was accidentally hurt by an engine running upon him from the turn-table, through some defect in the brake, it was held competent for the company to show in defence that the person having charge of all the engines upon the road had given instructions to the engineers to have the wheels of their engines blocked while turning upon the turn-table, and that the accident occurred in consequence of some servant neglecting such instructions, although the instructions had not been communicated to the plaintiff.

12. But the servants of one railway company are not fellow-servants with the servants of another company who use the same station with the first company, and while those are subject to the direction of the station-master of that company, and the second

means of knowing, of the deficiency in furnishing proper help or machinery, consent to continue in the employment. And the neglect or want of skill of the master's general agent employed in procuring help and machinery, is the act of the master. Hard *v.* Vermont & Canada Railroad Co., *supra;* Wiggett *v.* Fox, 36 Eng. L. & Eq. 486; 11 Exch. 832; Noyes *v.* Smith, 28 Vt. 59. Indeed this exception is recognized in most of the preceding cases. Many of the late cases have turned on this point, the general rule having been regarded as settled beyond question for many years. We are not disposed to question the extent of the exceptions to the general rule; and possibly any greater extension in that direction might essentially impair the general benefit to be derived from it. But we would be content to treat all the subordinates who were under the control of a superior as entitled to hold such superior as representing the master, and the master as responsible for his incompetency or misconduct. We should regard this as a more salutary rule than the present one. But the general current of authority seems greatly in the opposite direction.

[22] Durgin *v.* Munson, 9 Allen, 396.

company is responsible for an injury to one of the servants of the first company, by the negligence of their engine-driver.[23] (*i*)

13. Although a railway company is not responsible to one whom they employ to repair their cars, for any hurt he may receive in passing upon the company's cars to and from his work, free of charge, through the misconduct of a switchman, provided the company were not in fault in his selection or retainer; but, if he were an habitual drunkard, and that known to the company, or might have been known but for their own neglect to make proper inspection of their business, and the injury resulted from this intoxication, the testimony is proper to be submitted to the jury, as tending to show culpable neglect on the part of the company.[24] (*j*) And when * this case was before the court, at another time,[25] it was held that a verdict for the plaintiff will not be disturbed in such a case, because it was, by the order of the company, the regular business of another servant of the company to manage the switch, and on this occasion it was wrongly adjusted by the flagman, who was an habitual drunkard, and had usually been intrusted with the management of the switch, and that his habits were known, or by the exercise of proper care would have been known, to the corporation. Nor will it excuse the company that due care was exercised in the original selection of such flagman, and that a proper local agent had been employed by the company with au-

[23] Warburton *v.* Great Western Railway Co., Law Rep. 2 Exch. 30.

[24] Gilman *v.* Eastern Railroad Co., 10 Allen, 233.

[25] 13 Allen, 433.

(*i*) But where different roads make joint use of a depot, each company owes to the servants of the other the same duty that it owes to its own. Illinois Central Railroad Co. *v.* Frelka, 110 Ill. 498. And where several roads use a union yard, and an employé of one company is injured on the cars and track of another, he may sue either company or both. Gulf, Colorado, & Santa Fe Railroad Co. *v.* Dorsey, 25 Am. & Eng. Railw. Cas. 446. Where a company has a right to run its cars on the road of another company, the cars while on such road to be under the control of the lessor's road-master, the road-master is so far the servant of the lessee. Wabash, St. Louis, & Pacific Railway Co. *v.* Peyton, 106 Ill. 534.

(*j*) Habitual intemperance known to the company is a ground of liability. Chicago & Alton Railroad Co. *v.* Sullivan, 63 Ill. 293. And proof thereof is admissible upon the question of the allowance of exemplary damages. Cleghorn *v.* New York Central & Hudson River Railroad Co., 56 N. Y. 44.

thority to hire and superintend such servants of the company as may be necessary. It was also held here that evidence that the flagman was commonly reputed to be an habitual drunkard, in the place where he lived, was competent evidence for the jury as tending to show that his intemperate habits should have been known to the officers of the company.

14. Where the negligence of the employer and of a fellow-servant concur in producing the injury, the employer is liable; as where insufficient trestle-work had been built over a chasm and the engineer was directed not to run his engine upon it, but nevertheless did, and the fireman was killed by the failure of the trestle-work, the company was held responsible.[26] (*k*)

SECTION III *a*.

Proof of Negligence, &c.

1. Injury to passenger raises a presumption of want of due care on the part of company.
2. That presumption may be rebutted.
3. Person riding on a pass, or in the baggage-car, may have an action for injuries caused by want of due care, if a passenger and free from fault.

§ 131 *a*. The following propositions were declared by the Supreme Court of Missouri, in the case of Hannibal and St. Joseph Railroad Company *v.* Hattie Higgins, by Eliza Higgins, her guardian:[1] —

1. The statute of Missouri giving a remedy to the representatives of a passenger killed upon a railway train, goes upon the same principle which before obtained in regard to injuries to passengers, that such injury or death *prima facie* results from want of due care in the company.

[26] Paulmie *v.* Erie Railway Co., 5 Vroom, 151.

[1] 5 Am. Law Reg. N. S. 715–721; S. C. 36 Mo. 418.

(*k*) See *supra*, note (*b*) And when a train-man is injured in collision with a train of another company, he is not precluded from recovering of that company for its negligence by negligence of the engineer on his train. Gray *v.* Philadelphia & Reading Railroad Co., 22 Am. & Eng. Railw. Cas. 351.

2. The presumption is not conclusive under the statute, but * may be rebutted by evidence of the cause of the injury. One who had been in the employment of the company as an engineer and brakeman, until his train was discontinued a few days previous, and who had not been settled with or discharged, although not actually under pay at the time, and who signalled the train to take him up, and who took his seat in the baggage-car with the other employés of the company, and paid no fare and was not expected to, although at the time in pursuit of other employment, cannot be considered a passenger. If he would secure the immunities and rights of a passenger, he should have paid his fare and taken a seat in the passenger-car.

3. It will not deprive of his remedy a passenger who comes upon the train in that character, and is so received, that he is allowed as matter of courtesy to pass free, or to ride with the employés of the road in the baggage-car. But a passenger who leaves the passenger carriages to go upon the platforms or into the baggage-car, unless compelled to do so for want of proper accommodations in the passenger carriages, or else by permission of the conductor of the train, must be regarded as depriving himself of the ordinary remedies against the company for injuries received, unless upon proof that his change of position did not conduce to the injury.[2] (*a*)

[2] The opinion in the case last cited presents several interesting practical points, in a very judicious light. It is sometimes difficult to determine, with exact precision, when a person ceases to be an employé and becomes a passenger. There is perhaps no fairer test than the one here applied, that is, the person's own claim and conduct at the time, and the acquiescence of the company. At the time, one who has recently been in the employment of the company has a motive to claim the privileges of the employment, by passing without the payment of fare. And if he claims the privilege, and it is acceded to by the officers of the company, there is great injustice in allowing the person at the same time to hold the company to the higher responsibility which it owes to passengers, from whom it derives revenue. It should therefore be made to appear, that one who passes in the character of an employé of the road was really a passenger, before he can fairly be allowed to demand the indemnity which passengers may by law require. If the person assumes one character for his advantage, and the company accede to the claim, he ought

(*a*) An employé riding to his work according to custom and understanding without paying fare, in a caboose from which all but employés are excluded, held not a passenger. Kansas Pacific Railway Co. *v.* Salmon, 11 Kan. 83.

*SECTION IV.

Injuries by Defects in Highways caused by Company's Works.

1. Company liable for injuries caused by leaving streets in insecure condition.
2. Municipalities liable primarily to travellers suffering injury.
3. Company liable over to municipality.
4. Towns liable to indictment. Company liable to mandamus or action.
5. Construction of a grant to use streets of a city.
6. Such grant gives the public no right to use the tracks.
7. Company by charter required so to construct road as not to obstruct highway, bound to keep highway in repair.
8. Municipalities not responsible for injuries resulting from proper exercise of authority to occupy street.
9. Canal company not excused from maintaining farm accommodations by railway interference.
10. Railway track crossing private way.
11. Person opening company's gates contrary to law cannot recover.

§ 132. 1. Where a public company has the right, by law, of taking up the pavement of the street, the workmen they employ *are bound to use such care and caution in doing the work as will protect the king's subjects, themselves using reasonable care, *from injury. And if they so lay the stones as to give such an appearance of security as would induce a careful person, using *reasonable caution, to tread upon them, as safe, when in fact they are not so, the company will be answerable in damages for any injury such person may sustain in consequence.[1] (*a*)

not to be allowed the benefits of any other character, unless it is very clear that such was his real position, and that this was understood by the company. The effect of free passes, and of the passenger's being out of his place in the carriages, is very fairly presented, and the principal cases are referred to on all the points.

[1] Drew *v.* New River Co., 6 Car. & P. 754. And where a railway company, in carrying its track across a street, leaves the crossing in such a state that a horse's foot is caught in the crossing and badly injured, the company is responsible, and the fact that the crossing is made in compliance with a city ordinance and to the acceptance of the city engineer, as therein required, affords no ground of defence. Delzell *v.* Indianapolis & Cincinnati Railroad Co., 32 Ind. 45.

(*a*) Mann *v.* Central Vermont Railroad Co., 55 Vt. 484; South & North Alabama Railroad Co. *v.* Chappell, 61 Ala. 527; Farley *v.* Chicago, Rock Island, & Pacific Railroad Co., 42 Iowa, 231; Cuddeback *v.* Jewett, 20 Hun, 187; Baughman *v.* Shenango & Allegheny Railroad Co., 92 Penn. St.

*And in a more recent case,[2] a canal and railway company, as early as the 28 Geo. 2, had acquired the right, by act of parliament, to construct a canal and take tolls thereon, and had built the same across an ancient highway near St. Helens, a small village, and had made a swivel bridge across the canal for the passage of the highway; and by subsequent acts, reciting the existence of such works, all persons were to have free liberty with boats to navigate the canal for the transportation of goods, and penalties were imposed upon such persons as should leave open the drawbridges. The company maintained the works and received a toll from all others using them. A boatman having opened the swivel bridge, to allow his boat to pass through, in the night-time, a person walking along the road fell into the canal and was drowned, just as the boat was coming up. When the bridge was open the highway was wholly unfenced. Two lamps had formerly been kept burning, of which one had been removed and the other was out of repair at the time. The jury found that the deceased was drowned by reason of the neglect of reasonable precautions on the part of the canal company, without any fault on his own part. Held that the defendants, having a beneficial interest in the tolls, were liable to an action, the same as any owner of private property would be for a nuisance arising therefrom. That the bridge being in the possession of defendants, the action was properly brought against them and not against the boatman. That the passing the subsequent acts, recognizing the existence of the bridge, was not a legislative declaration of its sufficiency. It was further held, that even if the bridge had been sufficient at the time of its erection, it was the duty of the company so to alter and improve its structure, from time to time, as at all times to maintain a bridge sufficient, with reference to the existing state of circumstances, and that the jury were warranted in considering the bridge, in the state in which it was, insufficient.

[2] Manley *v.* St. Helens Canal & Railroad Co., 2 H. & N. 840.

335. And a railway company cannot evade its duty in such regard by leasing its road, without consent of the state. Freeman *v.* Minneapolis & St. Louis Railway Co., 28 Minn. 443. A statute requiring companies to keep in repair crossings or regularly laid out public highways, held not to refer to crossings of ways regularly travelled for more than fifteen years, but not laid out under statute nor set apart on the records by dedication. Missouri, Kansas, & Texas Railway Co. *v.* Long, 27 Kan. 684.

[*537]

2. But it has been held, that where such companies, having the power, by law, to cut through and alter highways, either temporarily or permanently, do it in such a manner as to leave them unsafe for travellers, who in consequence sustain injury without fault on their part, that the towns or cities in which such highways or public streets are situated are primarily liable[3] for all such injuries.

3. And it is also true that such towns or cities may claim an indemnity against the railway companies who are first in fault, and in such action recover not only the damages, but the costs paid by them, and which were incurred in the reasonable and necessary defence of actions brought against them on account of the defects in such company's works.[4] *And where the injury

[3] Willard *v.* Newbury, 22 Vt. 458; Batty *v.* Duxbury, 24 Vt. 155; Currier *v.* Lowell, 16 Pick. 170; Buffalo *v.* Holloway, 14 Barb. 101. In the last-named case an opinion is intimated, that a contractor for such works is not liable to make such precautionary erections as may be requisite to guard the public against injury, no such provision being found in his contract. But is not that a duty which every one owes the public in all works which he undertakes? In Barber *v.* Essex, 27 Vt. 62, it is held that towns are primarily liable, and that an old highway, which a railway proposes to use for its track, is not considered as discontinued till the company has provided a substitute, or unless affected by some other definite legal act, or by an abandonment by legal authority, or nonuser, and that towns cannot excuse themselves from the performance of the duty by showing that a railway company, proceeding under its charter, had caused the defects complained of. The towns are bound to watchfulness upon this subject, and theirs being a primary responsibility, they cannot shift it upon the railway. See, also, to same effect, Phillips *v.* Veazie, 40 Me. 96. The obligation upon the towns to make highways safe and convenient for travellers continues when they are crossed by railways at grade, except so far as the necessary use of the crossing by the railway may prevent it, and subject to such specific directions as may be given by the county commissioners. Davis *v.* Leominster, 1 Allen, 182. But towns are not liable for obstructions caused by telegraph poles which they have no right to remove. Young *v.* Yarmouth, 9 Gray, 386. The railway is also responsible for all unlawful obstructions of the highway. Parker *v.* Boston & Maine Railroad Co., 3 Cush. 107. But where the duty of maintaining a bridge is imposed exclusively upon the railway, the town is not responsible for any defects in the same. Sawyer *v.* Northfield, 7 Cush. 490. See, also, Jones *v.* Waltham, 4 Cush. 299; Vinal *v.* Dorchester, 7 Gray, 421.

[4] Lowell *v.* Boston & Lowell Railroad Co., 23 Pick. 24; Newbury *v.* Connecticut & Passumpsic Rivers Railroad Co., 25 Vt. 377. The recovery in these cases is allowed upon the ground, that the wrong is altogether on the part of the company, and the town, standing primarily liable to the public for

did not accrue for more than six years, it was held that the railway was still liable to indemnify the town, notwithstanding the bar of the statute of limitations, reckoning the cause of action as accruing at the date of the neglect; and that it did not exonerate the company guilty of the neglect, that they had leased their road to another company who were operating it at the time the injury occurred.[5]

4. And where the statute provides that railways "shall maintain and keep in repair all bridges, with their abutments, which they shall construct for the purpose of enabling their road to pass over or under any road, canal, highway, or other way," and the company omitted to perform the duty in the manner required for the public safety, it was held that the town within which the road lay, were liable to indictment for not keeping it in safe repair, and that they may compel the railway company to make all such repairs as may be necessary, by writ of mandamus; or if they have been obliged to make expenditures therein, may reimburse themselves by an action on the case against the company.[6]

5. And where a railway company were authorized by the legislature to construct and operate their road through the streets of a city, and the city government assented to the location and construction upon a designated route, on certain conditions, it was held that the municipal authority had no power by resolution to annul or impair the grant to the company on account of its failure to complete the road within the time limited in the conditions annexed to their assent;[7] and that such condition was

the sufficiency of the highways, and being virtual guarantors against the negligence of the railway company, may therefore recover of the company an indemnity, not only for the damages they are compelled to pay, but also for the costs and expenses incurred by them in defending *bona fide* against suits brought against them for the default of the company. Duxbury *v.* Vermont Central Railroad Co., 26 Vt. 751, 752, 753; Hayden *v.* Cabot, 17 Mass. 168; Hamden *v.* New Haven & Northampton Co., 27 Conn. 158.

[5] Hamden *v.* New Haven & Northampton Co., 27 Conn. 158. But where the company has the right to lay its rails in the street, it is not responsible for any injury resulting therefrom to others, unless it has been in fault either in laying them down or in keeping them safe. Mazetti *v.* New York & Harlem Railroad Co., 3 E. D. Smith, 98; *infra*, § 225, pl. 7.

[6] State *v.* Gorham, 37 Me. 451.

[7] Brooklyn Central Railroad Co. *v.* Brooklyn City Railroad Co., 32 Barb. 358.

not to be regarded as precedent to the vesting of the estate or franchise, but only a condition subsequent, upon the non-performance of which the grantor might elect to defeat it, but that nothing short of a judicial determination would operate to divest the interest of the company.[7]

* 6. Where a railway has been laid upon a public street, it does not thereby become public property, in such a sense as to entitle the public at large or other railway companies to use the track for the passage of carriages constructed for such use.[7] Nor will the permission of the municipal authorities for that purpose give any such right.[7]

7. Where a railway company is required to construct its road so as not to obstruct the safe and convenient use of the highway, this is a continuing obligation requiring the company to so maintain their road as to leave the highway safe and convenient for public use; but this will not exonerate the towns from their primary responsibility.[8] (*b*)

8. Cities or towns are not liable for damages resulting from the proper exercise of authority in permitting railway tracks to be laid in the streets, or in raising the grade of streets, unless they exceed their lawful authority in this respect.[9] And it is

But a railway company has no such interest in the street when its line is laid as to entitle it to maintain an injunction against another company, for laying its track in the same street, but not so as to interfere with its use by the former company. New York & Harlem Railroad Co. *v.* Forty-second Street & Grand Street Ferry Co., 50 Barb. 285, 309.

[8] Wellcome *v.* Leeds, 51 Me. 313. The case of Kearney *v.* London, Brighton, & South Coast Railway Co., Law Rep. 5 Q. B. 411, presented a very unusual question. The plaintiff while passing along the highway under a bridge of the defendant was injured by the falling of a brick from the works supporting the bridge, which it was supposed might have become loose from the jar of passing trains. The majority of the court held the defendant responsible, and the judgment was affirmed in the Exchequer Chamber, 6 Law Rep. 6 Q. B. 759. Here KELLY, C. B., said that the fact that the brick fell was satisfactory evidence that it had been loosened before, "and it was the duty of the defendants from time to time to inspect the bridge and ascertain that the brick-work was in good order and all the bricks well secured."

[9] Murphy *v.* Chicago, 29 Ill. 279.

(*b*) And if the company build a bridge over a highway, it must see that though adequate when built, it does not become inadequate to increased use. Cooke *v.* Boston & Lowell Railroad Co., 133 Mass. 185.

here said to be a legitimate use of a street to allow a railway track to be laid in it.

9. Where a canal company had constructed a bridge as part of the farm accommodations of an adjoining land-owner which the company were bound to maintain, and a railway company by subsequent legislative grant had laid its track along the line of the canal, and in consequence had been compelled to alter the construction of the bridge so as to render it more expensive to maintain the same, it was held the canal company were not thereby exonerated from maintaining the bridge, but were liable to the land-owner the same as before the alteration by the railway company, notwithstanding any liability which might rest upon the railway company.[10]

10. Where a railway crossed, on a level a considerably frequented footpath, and there was no servant of the company at the crossing to warn persons of the approach of the trains, the view being somewhat obstructed by the pier of the bridge, but a person before reaching the track could see nearly three hundred yards either way along the line, and the plaintiff's wife, while crossing the line at the spot was run over and killed, it was held that the fact of the company not keeping a servant at the crossing to warn * persons of the approach of trains, was not evidence of negligence to go to the jury.[11]

11. And where it was made, by statute, the duty of a railway company to maintain gates at all level crossings of highways, and to have persons to open and shut them when any one wished to pass, but at all other times they were to be kept shut, and a person coming along the highway when no servant of the company was present, as he should have been, to open and shut the gates, the plaintiff having waited a reasonable time opened the gates himself in order that he might be able to proceed on his journey, and in doing so was injured by the closing of the gates, which were so constructed as to fall back into their places with their own weight, it was held the action would not lie, one judge dissenting.[12] This case was decided mainly upon the ground

[10] Ammermon *v.* Wyoming Land Co., 40 Penn. St. 256.

[11] Stapley *v.* London, Brighton, & South Coast Railway Co., Law Rep. 1 Exch. 21; s. c. 11 Jur. N. S. 954.

[12] Wyatt *v.* Great Western Railway Co., 6 B. & S. 709; s. c. 11 Jur. N. S. 825.

that by the act of parliament requiring the gates to be kept closed, except when opened by the servants of the company, it amounted to a virtual prohibition of any one crossing the railway at any other time, and if the plaintiff found no servant of the company to open the gate, it was his duty to wait until he could find one, and seek his remedy for the delay against the company; and being a wrong-doer in opening the gate, he could not recover of the company for any injury he thereby sustained.

SECTION V.

Liability for Injuries in the Nature of Torts.

1. Railway crossings on a level always dangerous. Need of legislation.
   n. (a) Conduct required of company and traveller at such crossings.
2. Company not excused from the exercise of care by use of the signals required by statute.
3. Traveller cannot recover if his own act contributed to his injury.
4. Unless company might have avoided the injury.
5. Omission of proper signals will not render company liable, unless it produces the injury.
6. Company not liable for injury to trespassing cattle, unless guilty of wilful wrong.
7. General rule requires of company the conduct of skilful, prudent, and discreet persons.
8. Action accrues from the doing of the injury.
9. Where injury is wanton, jury may give exemplary damages.
10. Traveller who follows direction of gate-keeper excused.
11. Company responsible for injury when the crossing is opened by flagman.
12. Responsibility of company for damages mainly matter of fact, each case depending on its peculiar circumstances.
13. Company's right of way, speed, negligence, &c.
14. Company may establish and use proper and necessary signals, e. g., by whistles in the conduct of its business.
15. Duty of company in driving trains in a city. Presumption of negligence.
16. Company responsible for damage caused by needless letting off of steam.

§ 133. 1. We have discussed the subject of this chapter, in * general, in other sections.[1] We shall here refer to some cases, where railway companies have been held liable for injuries to persons in no way connected with them by contract or duty. The

[1] *Supra*, § 130, *infra*, 193.

subject of railway crossings,[2] on a level with the highway, (*a*) has been before alluded to, as one demanding the grave consideration

[2] *Supra*, § 108.

(*a*) The company is liable, of course, for any negligence in the management of a train, &c., by reason of which one is injured at such a crossing. There must be a lookout on the engine, more or less vigilant according to the chances of access to the track. East Tennessee, Virginia, & Georgia Railroad Co. *v.* White, 5 Lea Tenn. 540; Marcott *v.* Marquette, Houghton, & Ontonagon Railroad Co., 47 Mich. 1. In general, there is no fixed limit to the rate of speed, no rate being negligence *per se*. Powell *v.* Missouri Pacific Railway Co., 76 Mo. 80; Hannibal & St. Joseph Railroad Co. *v.* Young, 79 Mo. 336. But unusual speed may be considered in determining the degree of care used. Salter *v.* Utica & Black River Railroad Co., 88 N. Y. 42; Terre Haute & Indianapolis Railroad Co. *v.* Clark, 73 Ind. 168. And high speed without warning across a much travelled public street in a village where there are obstructions to seeing, is negligence. Loucks *v.* Chicago, Milwaukee, & St. Paul Railway Co., 31 Minn. 526. And where the rate is regulated by statute, to exceed that rate will render the company liable for any accidents. Wabash Railroad Co. *v.* Henks, 91 Ill. 406. And in cities or populous towns the speed must be lessened. Pennsylvania Railroad Co. *v.* Lewis, 79 Penn. St. 33. A warning, too, should be sounded, either by the whistle or by the bell. Smedis *v.* Brooklyn & Rockaway Beach Railroad Co., 88 N. Y. 13; Philadelphia & Reading Railroad Co. *v.* Killips, 88 Penn. St. 405; Pennsylvania Railroad Co. *v.* Krick, 47 Ind. 368. But in Brown *v.* Milwaukee & St. Paul Railway Co., 22 Minn. 165, it is held not so without a statute so providing. And in Chicago, Burlington, & Quincy Railroad Co. *v.* Harwood, 90 Ill. 425, and Parker *v.* Wilmington & Weldon Railroad Co., 86 N. C. 221, it is held that omission of the warning will not render the company liable unless it appears that a warning would have prevented the injury. See Rosenberger *v.* Grand Trunk Railway Co., 8 Ont. Ap. 482; Grand Trunk Railway Co. *v.* Rosenberger, 6 Supr. Ct. Can. 8. But the cases are numerous which hold that the omission raises a question of negligence for the jury. A sign-board at a crossing is often required by statute. But if not required its omission may be negligence. Baltimore & Ohio Railroad Co. *v.* Whitacre, 35 Ohio St. 627; Shaber *v.* St. Paul, Minneapolis, & Manitoba Railway Co., 28 Minn. 103. But its omission is not a ground of liability if the traveller knew or in the exercise of ordinary care might have known of the crossing. Gulf, Colorado, & Santa Fe Railroad Co. *v.* Greenlee, 62 Tex. 344. In general, a company is not bound to keep a flagman at crossings. Delaware, Lackawanna, & Western Railroad Co. *v.* Toffey, 38 N. J. Law, 525; Welsch *v.* Hannibal & St. Joseph Railroad Co., 72 Mo. 451. At dangerous crossings both parties must exercise more than ordinary care. Wabash, St. Louis, & Pacific Railway Co. *v.* Wallace, 110 Ill. 114; New York, Lake Erie, & Western Railroad Co. *v.* Randel, 47 N. J. Law, 144; Coddington *v.* Brooklyn Cross Town Railroad Co., 26 Am.

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of the legislatures of the several states. It causes always a most painful sense of peril, especially where there is any considerable travel upon the highway, and is followed by many painful scenes of mutilation and death, under circumstances more distressing, if possible, than even the accidents, so destructive sometimes to railway passengers.

2. In a case[3] where the plaintiff was injured at a railway crossing, by collision with an engine, it was held that where the statute required, at such points, certain specified signals, the compliance with the requirements of the statute will not excuse the company from the use of care and prudence in other respects. (*b*) That it is not necessarily enough to excuse the company, that

[3] Bradley *v.* Boston & Maine Railroad Co., 2 Cush. 539. Some distinction was here made at the trial between cases of negligence which occur in long-established modes of business, and the case of the management of railway trains, the judge saying that in the former case usage, if uniform and acquiesced in by the public, may amount to a rule of law, but not in a business so recent as the management of railway trains. This view seems to be sanctioned by the Supreme Court in revising the case. See, also, Briggs *v.* Taylor, 28 Vt. 185; s. c. 2 Redf. Am. Railw. Cas. 558; Linfield *v.* Old Colony Railroad Co., 10 Cush. 562. But railways are not bound to make the signals required at road-crossings for the benefit of persons walking on their track two hundred feet from the crossing. Harty *v.* New York Central Railroad Co., 42 N. Y. 468.

& Eng. Railw. Cas. 393. As to what is negligence on the part of the company, the cases are very numerous, too numerous to be here summarized. Contributory negligence here has its usual effect, except where the negligence of the company is very gross, where the plaintiff may recover, if his negligence is slight. Manly *v.* Wilmington & Weldon Railroad Co., 74 N. C. 655; Illinois Central Railroad Co. *v.* Hammer, 85 Ill. 526. See Rine *v.* Chicago & Alton Railroad Co., 25 Am. & Eng. Railw. Cas. 545; Chicago & Eastern Illinois Railroad Co. *v.* Hedges, Ib. 550; Central Railroad Co. *v.* Brinson, 70 Ga. 207. To walk on the track is contributory negligence. Maryland *v.* Baltimore & Potomac Railroad Co., 58 Md. 482; Grethen *v.* Chicago, Milwaukee, & St. Paul Railway Co., 19 Am. & Eng. Railw. Cas. 342.

(*b*) Particularly in cities and populous villages. Zimmer *v.* New York Central & Hudson River Railroad Co., 67 N. Y. 601. But the company has precedence at the crossing. Indianapolis & Vincennes Railroad Co. *v.* McLin, 82 Ind. 435. And is not bound to stop a train for a person on the track unless there is reason to think the person under some disability. Freck *v.* Philadelphia, Wilmington, & Baltimore Railroad Co., 30 Md. 574. International & Great Northern Railway Co. *v.* Smith, 19 Am. & Eng. Railw. Cas. 21. The company may in general suppose the person will get off. Ib.

they pursued the usual course adopted by engineers in such cases. The question of negligence is one of fact, in such cases, to be submitted to the jury, under all the circumstances of the case, and to be determined by them, upon their view of what prudence and skill required.

3. But when the statute requires certain precautions against accidents, and its requirements are disregarded, the party suffering damage is not entitled to recover, if he was himself guilty of negligence which contributed to the damage.[4] (*c*) And where

[4] Parker *v.* Adams, 12 Met. 415; Eckert *v.* Long Island Railroad Co., 57 Barb. 555. But in this last case it was held, that one who rushes before a train to save the life of a child is not precluded from recovering for the damage suffered by the negligence of the company by reason of his own conduct; *infra*, § 193; Macon & Western Railroad Co. *v.* Davis, 18 Ga. 679, where the question of negligence in the conductors of a railway train in passing a road-crossing, is held to be one of fact depending on the circumstances of each particular case. Dascomb *v.* Buffalo & State Line Railroad Co , 27 Barb. 221. But the omission of any statute duty by railway companies at the time and place where an accident occurs is *prima facie* evidence of liability. Augusta & Savannah Railroad Co. *v.* McElmurry, 24 Ga. 75. In Johnson *v.* Hudson River Railroad Co., 6 Duer, 633, where the plaintiff's husband was killed in the streets of the city of New York by one of defendant's freight-cars in the nighttime, it being very dark, the company using neither lights nor bells to guard against accident. it was held, that although the law required of defendant only ordinary care towards the deceased, it should be measured by the degree of peril against which such care was to be exercised, which in the circumstances, was such as to justify the court in telling the jury that defendant was required to use every precaution in its power to insure the safety of persons passing; that if lights or bells would have contributed to that end, it was culpable for not using them. It was also held that the deceased was bound to the exercise of only ordinary care, and that his being found on the track was not sufficient ground to preclude recovery. In the case of Wakefield *v.* Connecticut & Passumpsic Rivers Railroad Co., 37 Vt. 330, it was held, that the requirements of the statute in regard to blowing the whistle and ringing the bell, a prescribed distance before crossing the highway, was a duty of the company not only in reference to travellers about crossing the track of the railway, but with reference to all persons, who being lawfully at or in the vicinity of the crossing, are exposed to accident or injury by reason of the passing train, short of actual contact with it. And it is further said here, that although there might be cases in which the company would be excused from a strict compliance with the statute, and might be justified in omitting the signals, in all cases of such omission, where damage ensued in consequence, the company must show that it was justified in the

(*c*) Shaw *v.* Jewett, 86 N. Y. 616; Meeks *v.* Southern Pacific Railroad Co., 52 Cal. 602; Chicago, Burlington, & Quincy Railroad Co. *v.* Lee, 68 Ill.

the * plaintiff's farm was intersected by the line of a railway and he, with a wagon and one horse, having his son and a servant

omission. This is a loose view of a peremptory statutory requirement, that the party is to exercise a discretion when to comply. As a rule, the party may omit any such requirement at the peril of all legal consequences. But the court seem to suppose that the statute in imposing a penalty for the "unreasonable" omission of such signals must have contemplated cases of *reasonable* omission. That may be so; but it would be more satisfactory to find such an important qualification of the leading provisions of the statute, more explicitly declared. Such construction could hardly be safely applied to these statutes generally. It would result in a virtual repeal or disregard of the statute. It would be far more salutary to have the engineer understand that he has no discretion in the matter, that he must give the signals regardless of consequences. In an important case, Shaw *v.* Boston & Worcester Railroad Co, 8 Gray, 45, the subject of injuries at railway and highway intersections is a good deal discussed. *Infra*, § 133, pl. 9, & note. It is there decided that the record of the county commissioners stating that in their opinion no flagman at the crossing was necessary, is not competent to show due care on the part of the company in omitting that precaution. The court said it was the duty of the judge in charging the jury to distinguish between such circumstances as could have been reasonably anticipated, and such as would have required extraordinary precautions, but were of so extraordinary a character as not to have been anticipated. It was also held that the degree of care required of the company and travellers, at a railway and highway crossing, is the same, being that which men of ordinary capacity would exercise under like circumstances. The fact that a collision occurred at a railway crossing, and that the plaintiff was in no fault, is not proof that the defendant was in fault. As to crossing private way, see Cliff *v.* Midland Railway Co., Law Rep. 5 Q. B. 258. The opinion of Mellor, J., affords a valuable commentary on what may be considered negligence on the part of the railway. 1 Redf. Am. Railw. Cas. 669.

576; Harlan *v.* St. Louis, Kansas City, & Northern Railroad Co., 64 Mo. 480. In approaching a crossing one is bound to exercise such caution as a prudent man would exercise in such case, but just what a person injured should have done is in general a question for a jury. Philadelphia & Reading Railroad Co. *v.* Carr, 99 Penn. St. 505; Texas & Pacific Railway Co. *v.* Chapman, 57 Tex. 75. Travellers approaching a crossing should, in general, look and listen for approaching trains. Holland *v.* Chicago, Milwaukee, & St. Paul Railway Co., 18 Fed. Rep. 213; Maryland Central Railroad Co. *v.* Newbern, 19 Am. & Eng. Railw. Cas. 261; Losan *v.* Maine Central Railroad Co., 77 Me. 85; Berry *v.* Pennsylvania Railroad Co., 26 Am. & Eng. Railw. Cas. 396. And if for any reason the traveller can do but one, the duty to do that is all the more urgent. Mynning *v.* Detroit, Lansing, & Northern Railroad Co., 23 Am. & Eng. Railw. Cas. 317. And failure of the company to give warning will not excuse the traveller. Hamilton & Indianapolis Railroad Co. *v.* Butler, 23 Am. & Eng. Railw. Cas. 262. The company and

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with * him, drove upon a trot directly over the track at a public crossing, without taking the slightest precaution to ascertain whether a locomotive was coming, it was held that he was guilty of great carelessness, (*d*) and that he could not recover for any damage he had sustained, and that it was immaterial whether the train was on time or not. It was also held, that the question of negligence, in a case of this character where the testimony was

the traveller have equal rights, but the company has the right of way. Lesan *v.* Maine Central Railroad Co., 77 Me. 85. But held not to apply to pedestrians. Zimmerman *v.* Hannibal & St. Joseph Railroad Co., 71 Mo. 476. It is not necessarily negligence to ride wrapped up to protect one's self from the weather. Salter *v.* Utica & Black River Railroad Co., 59 N. Y. 631. Nor to keep up the top of a buggy. Stackus *v.* New York Central & Hudson River Railroad Co., 79 N. Y. 464. Nor to attempt to cross after notice that the crossing is unsafe by reason of disrepair. Kelly *v.* Southern Minnesota Railway Co., 28 Minn. 98. Nor to trot a team to within a rod of the crossing without stopping to listen. Eilert *v.* Green Bay & Minnesota Railroad Co., 48 Wis. 606. But it is to attempt to drive across in full view of an approaching train. Chicago, Rock Island, & Pacific Railroad Co. *v.* Bell, 70 Ill. 102; Gothard *v.* Alabama Great Southern Railroad Co., 67 Ala. 114. Nor is it necessarily negligence to leap from a vehicle where there is imminent danger of a collision. Dyer *v.* Erie Railway Co., 71 N. Y. 228. As to what will be deemed contributory negligence in certain cases, see Parker *v.* Wilmington & Weldon Railroad Co., 86 N. C. 221; Kansas Pacific Railway Co. *v.* Twombly, 100 U. S. 78; Ingersoll *v.* New York Central & Hudson River Railroad Co., 66 N. Y. 612; Philadelphia & Reading Railroad Co. *v.* Carr, 99 Penn. St. 505; Craig *v.* New York, New Haven, & Hartford Railroad Co., 118 Mass. 431; Chicago & Northeastern Railway Co. *v.* Miller, 46 Mich. 532; Haas *v.* Grand Rapids & Indiana Railroad Co., 47 Mich. 401. The traveller is not relieved from the duty of taking due care by the fact that the train is behind time. Salter *v.* Utica & Black River Railroad Co., 75 N. Y. 273.

(*d*) Cases differing from this in no essential particular except as to the degree of care used by the injured person are numerous. In the following cases the person was held to be negligent. Schofield *v.* Chicago, Milwaukee, & St. Paul Railway Co., 2 McCrary, 268; Kearney *v.* Chicago, Milwaukee, & St. Paul Railway Co., 47 Wis. 144; Purl *v.* St. Louis, Kansas City, & Northern Railway Co., 72 Mo. 168; Stackus *v.* New York Central & Hudson River Railroad Co., 7 Hun, 559. And see Mitchell *v.* New York Central & Hudson River Railroad Co., 64 N. Y. 655. There is also a number of cases in which one has been held negligent in not seeing trains or parts of trains immediately following others, and so in going on the track after the passage of one and before that of another. See Hinckley *v.* Cape Cod Railroad Co., 120 Mass. 257; Ferguson *v.* Wisconsin Central Railroad Co., 19 Am. & Eng. Railw. Cas. 285.

all one way, was one of law to be decided by the court, and could not be left to the jury.[5] The company are bound to maintain a sign-board and other precautions required by statute at railway crossings, at the place where an open travelled street in a city

[5] Dascomb *v.* Buffalo & State Line Railroad Co., 27 Barb. 221; Mackey *v.* New York Central Railroad Co., 27 Barb. 528. It would seem to be the duty of one about to pass a railway to exercise watchfulness to know that a train is not approaching. Ib. Hanover Railroad Co. *v.* Coyle, 55 Penn. St. 396; Wilcox *v.* Rome & Watertown Railroad Co., 39 N. Y. 358; Pennsylvania Canal Co. *v.* Bentley, 66 Penn. St. 30, seem to attempt some qualification of the rule laid down in the text. The late cases all seem to require that where a traveller is crossing a railway at grade, and there are no gates or flagmen, it is his duty to stop and listen and keep a sharp lookout for trains. Ib. It is the duty both of the traveller and of the railway to keep a sharp lookout, each for the peril to be avoided at a road-crossing. Pittsburg, Fort Wayne, & Chicago Railway Co. *v.* Dunn, 56 Penn. St. 280; Baltimore & Ohio Railroad Co. *v.* Breinig, 25 Md. 378; Webb *v.* Portland & Kennebec Railroad Co., 57 Me. 117; Havens *v.* Erie Railway Co., 53 Barb. 328; Kennayde *v.* Pacific Railroad Co., 45 Mo. 255; Chicago & Alton Railroad Co. *v.* Gretzner, 46 Ill. 74. And the traveller is not exonerated from the duty of looking up and down the track of a railway to see whether a train is approaching, before going upon the same, by reason of the company omitting to ring the bell or blow the whistle, and if his omission to do so contributed to his injury he cannot recover. Havens *v.* Erie Railway Co., 41 N. Y. 296; Grippen *v.* New York Central Railroad Co., 40 N. Y. 34; Harty *v.* Same, 42 N. Y. 468; Nicholson *v.* Erie Railway Co., 41 N. Y. 525. The plaintiff cannot recover of a railway company for damages sustained at a crossing at grade, if neither himself nor his driver exercised sufficient watchfulness to see the sign-board, which might have been seen many rods before reaching the crossing, and neither of them listened to know whether a train was approaching before entering on the track. Allyn *v.* Boston & Albany Railroad Co., 105 Mass. 77. The court here decide, as matter of law, that the plaintiff cannot recover, because "there was no evidence from which the jury could reasonably and properly conclude that the plaintiff was in the exercise of due care." The same might as well be expressed by saying, that all the evidence tended to show that the plaintiff was not in the exercise of due care. But the Massachusetts law seems entirely settled, that the plaintiff must show affirmatively that he was in the exercise of due care when the damage accrued, or he cannot recover. Ib.; Warren *v.* Fitchburg Railroad Co., 8 Allen, 227; Hickey *v.* Boston & Lowell Railroad Co., 14 Allen, 429; Murphy *v.* Deane, 101 Mass. 455; Southworth *v.* Old Colony Railroad Co., 105 Mass. 342. But it seems that where the crossing of the railway and highway is arranged in such manner, that travellers cannot see or hear the approaching trains by the use of care and watchfulness, it is the duty of the company to use extraordinary means for warning travellers. Richardson *v.* New York Central Railroad Co., 45 N. Y. 846. This general subject is somewhat discussed by Mr. Justice FIELD, in Railway Co. *v.* Whitton, 13 Wal. 270.

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intersects the railway, although the street has not been so laid out and established by the municipal authorities as to make the city responsible for damages occasioned by defects therein, such passage being a "travelled route" within the meaning of the statute.[6] But it has been held, that the company is not liable for not constructing an under pass for the accommodation of the public travel, on a way which was not laid out agreeably to the statute, and had not been in use by the public twenty years.[7] It is such negligence for a deaf man to drive an unmanageable horse across a railway track when a train is approaching, that he cannot recover for any damage sustained. He should wait and avoid exposure.[8]

[6] Whittaker *v.* Boston & Maine Railroad Co., 7 Gray, 98. But later statutes adopt a different phraseology.

[7] Northumberland *v.* Atlantic & St. Lawrence Railroad Co., 35 N. H. 574.

[8] Illinois Central Railroad Co. *v.* Buckner, 28 Ill. 299. This question, as to the care required both of the company and of the person crossing a railway, is considered in Ernst *v.* Hudson River Railroad Co., 35 N. Y. 9, and held that the omission of a company to give the signals required by the statute on the approach of a locomotive within eighty rods of a highway crossing, is a breach of duty to the passengers, whose safety it imperils, and to the wayfarer, whom it exposes to mutilation and death; that such a crossing is dangerous, only when the company makes it so by propelling its engines across it; and the statute, therefore, for the protection of human life, exacts public warning of the approach of such danger; that the injunction is plain and absolute, and the company who violates it does so at its peril; that the omission of the customary signals is an assurance by the company to the traveller, that no engine is approaching from either side within eighty rods of the crossing, and he may rely on such assurance, without incurring the imputation of breach of duty to a wrong-doer; that when the passer-by knows of the immediate proximity of an advancing train, whether the warning be by signals or otherwise, and, having a safe and seasonable opportunity to stop, he voluntarily takes the risk of crossing in front of it, he is guilty of culpable negligence, and forfeits all claims to redress; that when the usual warning is withheld, the wayfarer has a right to assume that the crossing is safe, and that the company is not violating the law, and endangering human life, by running an engine without signals; that the citizen, on the public highway, is bound only to the exercise of ordinary care; and when he is injured by the negligence of a railroad company, it is no answer to his claim for redress, that, notwithstanding the omission of the signals, he might, by greater vigilance, have discovered the approach of the train, if he had foreseen a violation of the statute, instead of relying on its observance; that the traveller is not bound to stop on the highway, or to look up and down an intersecting railway track before crossing, when there are no signals of an approaching engine; that ordinarily, in cases of this de-

*4. If the plaintiff's negligence did not contribute to his injury, it will not preclude his recovering for the consequences of defendant's * wrong.[9] If the wrong on the part of the defendant

scription, the question whether the party injured was free from culpable negligence, is one of fact to be determined by the jury, under appropriate instructions, and subject to the revisory power of the courts; that where the proof is undisputed and decisive that the plaintiff was guilty of misconduct, and that this contributed to the injury, a nonsuit is matter of right; that it is equally matter of right to have the issue of negligence submitted to the jury, when it depends on conflicting evidence, or on inferences to be deduced from a variety of circumstances, in regard to which there is room for fair difference of opinion between intelligent and upright men. The same view is maintained and further illustrated in the subsequent case of Renwick *v.* New York Central Railroad Co., 36 N. Y. 132. These cases seem to develop a very important and most unquestionable rule of responsibility on the part of railway companies, in regard to injuries to persons at highway crossings; i. e., that the companies, when omitting the customary and required signals before arriving at such crossings, should expect proportionally less watchfulness on the part of travellers. That is certainly natural. In such a case the company ought not to complain, if held responsible for all consequences not the result of absolute foolhardiness. In State of Maryland *v.* Baltimore & Ohio Railroad Co., 5 Am. Law Reg. N. S. 397, s. c. 24 Md. 84, it was held, that the plaintiff cannot recover for an injury resulting from the negligence of the defendant, if by the exercise of proper prudence, care, and skill, he might have escaped from its consequences, or where his own want of such prudence, care, and skill directly contributed to produce the damage complained of. Railways owe a higher degree of watchfulness to their passengers than to mere strangers. In the former case the utmost care and skill is required, in order to avoid injuries; but in the latter case, only such as skilful, prudent, and discreet persons, having the management of such business in such a neighborhood, would naturally be expected to put forth. But to entitle one to recover of a railway company for an injury at a road-crossing it must appear that he was rightfully on the highway. Pittsburg, Fort Wayne, & Chicago Railroad Co. *v.* Evans, 53 Penn. St. 250.

[9] Kennard *v.* Burton, 25 Me. 39. In a recent trial in the Supreme Court of Pennsylvania, O'Brien *v.* Philadelphia, Wilmington, & Baltimore Railroad Co., 10 Am. Railw. T. 13, the court are reported to have charged the jury, as matter of law, that "a person about to cross a railway track [with a team] is in duty bound to stop and look in both directions, and listen before crossing." It has recently been decided by the full bench of the Supreme Court of Massachusetts, *supra*, note 4, that it is not competent for the judge to lay down any definite rule, as to the duty of the company, in regard to proper precautions in crossing highways; that the circumstances attending such crossings are so infinitely diversified that it must be left to the jury to determine what is proper care and diligence in each particular case. This we apprehend is the true rule both as to the company and travellers on the high-

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is so wanton and gross as to imply a willingness to inflict the injury, * plaintiff may recover, notwithstanding his own ordinary neglect.[10] And this is always to be attributed to defendant, if he might have avoided injuring plaintiff, notwithstanding his own negligence. So, too, if the neglect on the part of the plaintiff is not the proximate cause of the injury, it will not preclude a recovery.[11]

5. If a railway wholly omit to give the proper signal at a road-crossing, they are not necessarily liable for injury to one crossing at that moment, whose team took fright and injury ensued. It should be shown that the omission had some tendency to produce the loss.[12] The statute requiring railway companies to make signals in all cases of crossing highways, applies to crossings above or below the grade of the highway, as well as to those at grade.[13]

6. A conductor was held not liable for running the engine over an animal trespassing upon the track, unless he acted wilfully.[14] * So, too, where the train passed over slaves asleep upon the track, the company were held not liable.[15]

way, and that which will finally prevail, notwithstanding occasional attempts to simplify the matter by definitions. In Brooks *v.* Buffalo & Niagara Falls Railw., 25 Barb. 600, it is said that if one cross a railway at grade with a team, where the danger may easily be seen by looking for it, and especially where he drives on the track and there stops, looking in an opposite direction from an approaching train till it strikes him, he is guilty of such negligence as will preclude a recovery.

[10] Wynn *v.* Allard, 5 Watts & S. 524; Kerwhaker *v.* Cleveland, Columbus, & Cincinnati Railroad Co., 3 Ohio St. 172, 188.

[11] Trow *v.* Vermont Central Railroad Co., 24 Vt. 487; Isbell *v.* New York & New Haven Railroad Co., 27 Conn. 393; s. c. 2 Redf. Am. Railw. Cas. 474; Chicago & Rock Island Railroad Co. *v.* Still, 19 Ill. 499.

[12] Galena & Chicago Railroad Co. *v.* Loomis, 13 Ill. 548. A railway is not liable for an injury which happens in crossing a railway, in consequence of stationary cars of the company, on the track, obstructing the view of the plaintiff in his approach to the road. Burton *v.* Railroad Co., 4 Har. 252. See also Morrison *v.* Steam Navigation Co., 20 Eng. L. & Eq. 267, 455; 8 Exch. 733.

[13] People *v.* New York Central Railroad Co., 25 Barb. 199.

[14] Vandegrift *v.* Rediker, 2 Zab. 185. But where the act is wrongful, the action may be against both the engineer and the fireman. Suydam *v.* Moore, 8 Barb. 358.

[15] Herring *v.* Wilmington & Raleigh Railroad Co., 10 Ire. 402. In this case, it is held that the engineer might not be chargeable with the same

* 7. The duty required of railways towards those who are, at the time, in the exercise of their legal rights, is the possession of

degree of culpability in driving his train over a rational creature, or one who seemed to be such, and in the exercise of his faculties, as in doing the same when the obstruction was a brute animal. And in the case of running over a person asleep, or a deaf-mute, or an insane person, some indulgence is, doubtless, to be extended, inasmuch as the peculiar state of the person might not be readily discoverable by those in charge of the train. They would have a right to suppose that such person would conduct himself like a rational being, and step off the track. But in East Tennessee & Georgia Railroad Co. *v.* St. John, 5 Sneed, 524, it was held that the company was responsible for killing a slave asleep on the track, who might have been seen by the conductor a quarter of a mile, but who was mistaken for the garments of the laborers, and no signal given in consequence.

The practice of allowing persons to walk on a railway track is a vicious one, and one which would not be tolerated in any state or country where the railways are under proper surveillance. But as it now is in many parts of this country, an engineer will find some person on his track every mile, and in some places, every few rods. If he were required to check the train at every such occurrence, it would become an intolerable grievance. If men will insist on any thing so absurd as walking on a railway track at will, they must expect that those who are bereft of sense, but preserve the form of humanity, when they chance to come into the same peril, will perish; not so much from their own infirmities, as from the absurd practices of those who have no such infirmities. It may be urged that the companies might enforce their rights, and keep people off their tracks; but probably companies could not enforce such a regulation, in many parts of the country, without exciting a perplexing and painful prejudice, to such an extent as to endanger the safety of their business. The only effectual remedy will be found in making the act punishable by fine and imprisonment, as is done in England and some of the states, and in a strict enforcement of the law on all offenders. Every one can see that, if sane persons were excluded from the railway, the sight of a person on the track would at once arrest the attention of conductors of trains, and there would be comparatively little danger of the destruction of any one, whereas now, persons bereft of sense are almost sure to be run over. One who is engaged in sawing wood on the track of a railway by direction of the superintendent of the company, and is injured by the engine of another company, lawfully on the track, cannot recover of the latter company, although its engineer was guilty of carelessness, being himself also in fault. Railroad *v.* Norton, 24 Penn. St. 465. In Rauch *v.* Lloyd, 31 Penn. St. 358, where the state owned the railway, and its regulations were prescribed by the canal commissioners, and the state supplied the motive power, and allowed persons to use its cars, furnishing a conductor, it was held that such conductor was the responsible person in charge of the train throughout its entire route: that the agencies provided for him, whether of steam or horse power, were his agencies, and the ultimate responsibility in regard to their proper conduct, so

the most approved machinery, and such care, diligence, and skill in using it as skilful, prudent, and discreet persons would be expected to put forth, having a proper regard to the interests of the company, the demands of the public, and the interests of those having property along the road, exposed to fire and to injury in other modes.[16] They are, at least, bound to exercise as much care as if they owned the property along the line, i. e., what would be regarded as the duty of a prudent owner under all the circumstances.[17] It has been held that the company, when their

far as strangers were concerned, rested on him and on the owners of the train, whose servant he was. And where it was the practice to have cars pass over a portion of the road by the force of gravity, and after arriving at a given point, to be drawn by horse power to the storehouses, and the conductor left them standing across the usual crossing of the highway and went to his breakfast, and during his absence a lad, seven years old, attempted to crawl under the cars, in returning from an errand, and was seriously injured by the starting of the train by horses furnished on contract with the state, and driven by the owners' drivers, it was considered that the conductor and his employers were responsible for the injury. It was also held that where cars were so left standing in the highway unnecessarily, it was not a question to be submitted to the jury, whether they constituted an unlawful obstruction; that as matter of law, such obstruction, if avoidable, was unlawful. In such a case, no greater care and prudence is required to be exercised by such child than it is reasonable to expect of one of such tender years. See Galena & Chicago Railroad Co. *v.* Jacobs, 20 Ill. 478.

[16] Baltimore & Susquehanna Railroad Co. *v.* Woodruff, 4 Md. 242, 257. And it is said in Mersey Docks *v.* Gibbs, Law Rep. 1 H. L. 93, that if one would be responsible for injury resulting from a cause of mischief, of whose existence he has knowledge, he will be equally so if he is negligently ignorant of its existence.

[17] Quimby *v.* Vermont Central Railroad Co., 23 Vt. 387. And where one was injured by the company's train, at a road-crossing, by collision between the company's locomotive and the carriage in which the plaintiff was riding, it was held, that the carelessness of the driver of the carriage could not be shown by common reputation. Nor can the occupation of the plaintiff, and his means of earning support, be shown, with a view to enhancing the damages for such an injury, unless specially averred in the declaration. Baldwin *v.* Western Railroad Co., 4 Gray, 333. In O'Brien *v.* Philadelphia, Wilmington, & Baltimore Railroad Co., 10 Am. Railw. T. 13, where plaintiff was injured at a railway crossing a highway, by collision with his team, Mr. Justice Woodward, of the Pennsylvania Supreme Court, charged the jury, that the plaintiff was entitled to compensatory damages only, there being no pretence of any intentional wrong, or flagrant rashness, on the part of the agents of the company.

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* road passes the thoroughfares of a city, are bound to use extraordinary care not to injure persons in the streets.[18]

8. The general rule, in regard to the time of the accruing of the action is, that when the act or omission causes direct and immediate injury, the action accrues from the time of doing the act, but where the act is injurious only from its consequences, as by undermining a house or wall, or causing water to flow back at certain seasons of high tide or high water, the cause of action accrues only from the consequential injury.[19] In the case of Backhouse *v.* Bonomi,[20] it was held that no cause of action accrued from defendant's excavation in his own land, until it caused damage to the plaintiff's; and the case of Nicklin *v.* Williams,[21] as far as it conflicts with this, was held not maintainable. The cases were examined very thoroughly in the course of the discussion of this case before the Queen's Bench, which held that the cause of action accrued from the act of defendant, and in the Exchequer Chamber, where that judgment was reversed, and finally in the House of Lords, where the judgment of the Exchequer Chamber was affirmed. The law on this point may now be considered settled in the English courts. Where the issue is in regard to the prudent use of a highway by the company, it is * not competent to give evidence of the mode of using the same by the company at other times.[22]

9. As a general rule, in the English practice, and in most of the states of the Union, in actions for torts, where the defendant's conduct has been wanton, or the result of malice, the jury are allowed to give damages of an exemplary character, and the

[18] Wilson *v.* Cunningham, 3 Cal. 241; *infra*, pl. 15, notes 31, 32, 33.

[19] Roberts *v.* Read, 16 East, 215. Where the act complained of was maliciously opposing plaintiff's discharge as an insolvent, and the act was more than six years before action brought, but the consequent imprisonment continued within the six years, it was held that the cause of action was barred. Violet *v.* Simpson, 30 Law T. 111; s. c. 8 Ellis & B. 344. The admissions of the corporators, or of the president, are not sufficient to remove the bar of the statute of limitations, in favor of a private corporation. Lyman *v.* Norwich University, 28 Vt. 560.

[20] 9 H. L. Cas. 503; s. c. Ellis, B. & E. 646; 7 Jur. N. S. 809; s. c. 5 Jur. N. S. 1345; 4 Jur. N. S. 1182.

[21] 10 Exch. 259.

[22] Gahagan *v.* Boston & Lowell Railroad Co., 1 Allen, 187.

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term "vindictive" even is sometimes used.[23] But this is questioned by some writers, and in many cases.[24]

10. Where a level crossing over a railway is protected by a gate, established by the company and tended by one of its servants, in conformity with the law, those having occasion to cross the track, and who are injured by an attempt to cross when the gate-keeper assures them the line is clear, may recover damages of the company. It is the implied duty of the gate-keeper to know when trains are due, and to give correct information in that respect, and not open a gate for passage across the track unless he knows no duly advertised train is due. And if a train not advertised to the gate-keeper, or at a time not advertised to him, is allowed to pass, whereby injury accrues to those having just occasion to pass the track, it is the fault of the company.[25]

11. And where a railway company make a private crossing over their track, at grade, in a city, and allow the public to use it as a highway, and station a flagman there to warn persons of the approach of trains, they will be held responsible in damages to any one, who, in the exercise of proper care, is induced to cross by signal from the company's flagman that it is safe, he being damaged by collision with approaching trains, through this negligence of the flagman.[26] (*e*)

[23] Sedgw. Dam. 38, 98, 454; *infra*, §§ 176, 197. In the case of Shaw *v.* Boston & Worcester Railroad Co., *supra*, note 4, where the plaintiff's husband was killed, by the same collision, and she was shown to have had a family of young children, and to be without sufficient property for their support, it was held to be error in the court not to charge the jury, when specially requested so to do, that those facts could not be considered by them in estimating damages.

[24] Sedgw. Dam. 609; Varillat *v.* New Orleans & Carrollton Railroad Co., 10 La. An. 88; Taylor *v.* Railroad Co., 48 N. H. 304.

[25] Lunt *v.* London & Northwestern Railroad Co., Law Rep. 1 Q. B. 277; s. c. 12 Jur. N. S. 409.

[26] Sweeny *v.* Old Colony & Newport Railroad Co., 10 Allen, 368. The company is not bound to keep a flagman at road-crossings to warn travellers, unless in exceptionally dangerous places. But by keeping a flagman at a particular crossing the company may have excited such expectation of being warned of danger, as to make it negligence to withdraw such flagman. Ernst *v.* Hudson

(*e*) So where there is no flagman. Murphy *v.* Boston & Albany Railroad Co., 133 Mass. 121.

12. In the English courts, the cases in regard to responsibility on the part of the companies for injuries at the crossings of highways * and private ways, do not seem always entirely consistent with each other, the rule being never to disturb a verdict where the damages are at all reasonable, provided there was any proof, although the slightest, of the omission of duty on the part of the company's servants, and provided also that the plaintiff was not himself in fault. In two recent cases, there were no watchmen or gate-tenders present, at crossings of public ways; and in both instances foot-passengers were run down by passing trains in crossing. In one case,[27] there seemed no specific omission by the company, and the court held them not liable; in the other case,[28] the gates were partly open, contrary to the statutes, and the court refused to set aside a verdict against the company.

13. In a late case,[29] where the duty of railways at level road-crossings is considerably discussed, it is declared that the railway has the right of way before all others, and that negligence is not to be presumed from rate of speed alone. It is also here declared, that the party injured is not to be presumed innocent of all fault, but that fact must be proved, either by direct evidence or the circumstances attending the accident.

14. Where one was thrown from his carriage at the intersection of the railway and highway, his horse being rendered unmanageable by the sounding of the whistle as a signal for starting the train, it was held that railways had the right to establish and use necessary and proper signals for the conduct of their business; that this should be done with reference to the convenience of

River Railroad Co., 39 N. Y. 61. See also Beisiegel *v.* New York Central Railroad Co., 40 N. Y. 9; s. c. 1 Redf. Am. Railw. Cas. 618; Grippen *v.* Same, 40 N. Y. 34. The fact that a crossing has remained for many years without any protection, and no complaint has been made by the municipal authorities or any demand made for a gate or flagman, or any other protection to travellers, may be considered in estimating the duty of the company. The duty of the company is to be decided by the jury, under proper instructions, from a consideration of all the facts. But if there is no evidence of negligence, or it is insufficient, the verdict finding it will not be sustained. Commonwealth *v.* Boston & Worcester Railroad Co., 101 Mass. 201.

[27] Stubley *v.* London & Northwestern Railroad Co., Law Rep. 1 Exch. 13.

[28] Stapley *v.* London, Brighton, & South Coast Railroad Co., Law Rep. 1 Exch. 21; s. p. Wanless *v.* Northeastern Railroad Co., Law Rep. 6 Q. B. 481.

[29] Warner *v.* New York Central Railroad Co., 44 N. Y. 465.

others as well as themselves; and whether the company fail in so doing must be left to the jury in each case, except so far as public use and convenience have settled the matter, which may be shown by evidence.[30]

15. Where a stranger is injured by a passenger train the presumption is in favor of the carriers, and the party injured must prove negligence.[31] (*f*) The carrier by railway is bound to exercise such care and watchfulness in moving trains about a city, as a due regard to the dispatch of his own business and the safety of those in the streets will fairly justify or require.[32] But where one exposes himself recklessly, as by being in a car house without the knowledge of the company, or attempts to cross the railway track, when the train is within forty feet, he cannot recover.[33]

16. In one case [34] the court very properly held the company responsible where the engineer, near a road crossing, negligently or maliciously let off steam, whereby a person's horses about passing the crossing were frightened, and he thereby received injuries.

[30] Hill *v.* Portland & Rochester Railroad Co., 55 Me. 438. The rule of law and the mode of trial applicable to cases of this class are here considerably discussed. Passenger carriers by steamboat do not owe the same degree of care to other vessels to avoid collision, which they do to their passengers. Philadelphia, Wilmington, & Baltimore Railroad Co. *v.* Kerr, 25 Md. 521. See 1 Redf. Lead. Railw. Cas. 648, 669, *et seq.*

[31] Baltimore & Ohio Railroad Co. *v.* Bahrs, 28 Md. 647.

[32] Bannon *v.* Baltimore & Ohio Railroad Co., 24 Md. 108. The fact that the person injured was an infant will not affect the duty of the company. Ib.

[33] Lehey *v.* Hudson River Railroad Co., 4 Rob. N. Y. 204; Schwartz *v.* Same, 4 Rob. N. Y. 347. See also Edgerton *v.* New York & New Haven Railroad Co., 39 N. Y. 227.

[34] Toledo, Wabash, & Western Railroad Co. *v.* Harmon, 47 Ill. 208. This case illustrates a very common nuisance, which has attracted considerable attention in some parts of the country, where the sick, and at night even the well suffer very serious annoyance, from the continuous noise of steam whistles, made more for the amusement of the engineers than from any absolute necessity.

(*f*) But in some cases there is no presumption on either side. Richey *v.* Missouri Pacific Railway Co., 7 Mo. Ap. 150.

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SECTION VI.

Misconduct of Railway Operatives shown by Experts.

1. Train management so far matter of art and science, that testimony of experts may be received.
2. Burden of proof in cases of tort. Company, when bound to produce expert testimony in exculpation.
3. Plaintiff not bound in opening to produce testimony from experts.
4. Omission to produce such testimony, however, will often require explanation.

n. 6. General rules in regard to the testimony of experts

§ 134. 1. The conduct of a railway train is not strictly matter of science perhaps. Its laws are not so far defined, and so exempt from variation, as to be capable of perfect knowledge, like those of botany and geology, and other similar sciences, or even those of medicine and surgery perhaps, whose laws are subject to more variation.[1] But they are nevertheless so far matters of skill and experience, and are so little understood by the community generally, that the testimony of inexperienced persons in regard to the conduct of a train, on a particular occasion, or under particular circumstances, would be worthy of very little reliance. They might doubtless testify in regard to what they saw, and what appeared to be the conduct of the operatives, but those skilled in such matters might, as experts in other cases are * allowed to do, express an opinion in regard to the conduct of the train, as shown by the other witnesses, and how far it was according to the rules of careful and prudent management, and what more might, or should have been done, consistently with the safety of the train, in the particular emergency.[2] (*a*) But where the plaintiff, who claimed damages on account of the misconduct of a flagman at a railway crossing, had attempted to prove that he was a careless and intemperate person, it was held that the company might show that he was careful, attentive, and

[1] Quimby *v.* Vermont Central Railroad Co., 23 Vt. 394, 395.

[2] Illinois Central Railroad Co. *v.* Reedy, 17 Ill. 580, 583.

(*a*) Thus, one who has acted as conductor for more than seven years may be examined as an expert as to the means for stopping trains. Mobile & Montgomery Railroad Co. *v.* Blakely, 59 Ala. 471.

temperate, and that these facts might be proved by those who had seen his conduct, and need not be shown by experts.[3]

2. But a railway company, when sued for misconduct, are not bound, in the first instance, ordinarily, to show, by the testimony of experts, that they were guilty of no mismanagement. But in the case of an injury to passengers, the rule is otherwise.[4]

3. And it has been said, that one who brings an action against a railway founded upon negligence and misconduct, is not bound in opening his case, to show, that by the laws and practice of railway companies there was mismanagement in the particular case. If he sees fit to trust that question to the good sense of the jury he may.[5]

4. But it is obvious, that in cases of this kind, although the jury are ultimately to determine, upon such light as they can obtain, and will be governed a good deal by general principles of reason based upon experience, and that the testimony of witnesses unskilled in the particular craft, will doubtless have a considerable influence in establishing certain remote principles, by which all men must be governed, in extreme cases, nevertheless, in that numerous class of cases in courts of justice which have to be determined upon a nice estimate and balance of conflicting testimony, the opinion of experienced men in the particular * business must be of very controlling influence. And it is very well understood, that generally, the fact that such evidence is not produced, unless the omission is explained, will tend to raise a presumption against the party.[6]

[3] Gahagan *v.* Boston & Lowell Railroad Co., 1 Allen, 187.

[4] *Infra*, § 192; Galena & Chicago Railroad Co. *v.* Yarwood, 17 Ill. 509.

[5] Quimby *v.* Vermont Central Railroad Co., 23 Vt. 394, 395. Evidence of the good or bad habits of servants has sometimes been received in cases of alleged negligence; but in general no such evidence is admissible, since the master is responsible for what his servant does, and not for what he might have been expected to do. Hays *v.* Meller, 11 Law Reg. N. S. 370; Tenny *v.* Tuttle, 1 Allen, 185.

[6] Murray *v.* South Carolina Railroad Co., 10 Rich. 227. As there are few cases bearing on this question, in regard to railways, reference may be had to analogous subjects where the question has arisen. Nautical men may testify to their opinion, whether, on the facts proved by the plaintiff, the collision of two ships could have been avoided, by proper care on the part of defendants' servants. Fenwick *v.* Bell, 1 C. & K. 312. So, too, in regard to the proper stowage of a cargo. Price *v.* Powell, 3 Comst. 322. So a master, engineer,

and builder of steamboats, may testify to his opinion, on the facts proved, as to the manner of a collision. The Clipper *v.* Logan, 18 Ohio, 375; Sills *v.* Brown, 9 C. & P. 601. It has been held, that even experts may not be called to express an opinion, whether there was misconduct in the particular case on trial, as that is the province of the jury, but that they may express their opinion on a precisely similar case, hypothetically stated, which seems to be a very nice distinction, and which is combated in a very sensible note to Fenwick *v.* Bell, 1 Car. & K. 312. The opinion of Lord Ellenborough, in Beckwith *v.* Sydebotham, 1 Camp. 116, 117, that where there is a matter of skill or science to be decided, the jury may be assisted by the opinion of those peculiarly acquainted with it from their professions and pursuits, seems more just and wise. We have always regarded the testimony of experts as a sort of education of the jury on subjects in regard to which they are not presumed to be properly instructed. The nearer the testimony comes to the very case in hand, the more useful. And the *finesse* of keeping the very case out of sight, but describing it by supposition, in asking the opinion of the experts, serves very little purpose. But the more common practice is according to the rule in Sills *v.* Brown. In an action against a railway company for carrying its road through plaintiff's pasture, throwing down his fences, and scattering, frightening, and injuring his cattle, it was held that an experienced grazier is competent to testify as an expert on a supposed state of facts in regard to the state of cattle and to causes affecting their weight and health; but that he could not express an opinion on the facts proved in the particular case, on the point to be determined by the jury. Baltimore & Ohio Railroad Co. *v.* Thompson, 10 Md. 76. In Webb *v.* Manchester & Leeds Railroad Co., 4 Myl. & C. 116; s. c. 1 Railw. Cas. 576, a point involving questions of practical science being in dispute, and the testimony conflicting, it was referred to an engineer for his opinion, and his conclusion, in regard to the facts, was adopted and made the basis of the order of court. In the case of Seaver *v.* Boston & Maine Railroad Co., 11 Gray, 466, after several experts called by the plaintiff had testified, on a statement of facts and circumstances of the accident, what in their opinion threw the cars from the tracks, the defendants were permitted to ask a machinist who had been connected for many years with railways, and with the running of cars and engines on them, and who was in the cars at the time of the accident, and saw the occurrence and all the attending circumstances, what in his opinion threw the cars from the track, and it was held no ground of exception. Many of the principles applicable to the admissibility of the testimony of experts upon the question of mental soundness are applicable here, and so are the rules of practice. See Redf. Wills, 135 *et seq.*

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*CHAPTER XXI.

RAILWAY DIRECTORS.

SECTION I.

Extent of Authority of Directors.

1. In general, directors may do any act in the range of the company's business which company might do.
2. Applications to legislature for enlarged corporate powers, or right to sell works, require consent of shareholders.
3. Constitutional requirements as to mode of exercising corporate powers must be strictly followed.
4. Directors cannot essentially alter nature of business, nor can majority of shareholders.
5. Equity has some control, but inherent difficulty in defining the proper limits of railway enterprise.
6. Acts *ultra vires* can be confirmed only by actual assent of general body of shareholders.
7. Directors of any trading corporation may give bills of sale in security for debts.
8. Directors cannot bind company except in conformity with charter.
9. Company cannot retain money obtained by fraud of directors.
10. Fraud not made out without proof that party was misled without his own fault.
11. Company, by adopting act of directors, makes itself responsible.
12. Prospectus and report should contain the whole truth.
13. Directors cannot issue shares to procure votes and control corporation.
14. Fraud in the reports of the company, what constitutes.
15. Directors responsible for fraudulent acts and representations.
16. Directors may ratify any act which they have power to do.
17. Directors represent the company in dealing with employés.
18. Equity will not require a useless or injurious act, even to remedy a proceeding *ultra vires*.
19. Acceptance by corporation of the avails of a contract will amount to ratification.

§ 135. 1. We have elsewhere stated, in general terms, the power of the directors of the company to bind them.[1] The board of directors ordinarily may do any act, in the general range of its business, which the company can do, unless restrained by the charter and by-laws.[2] (*a*) Notice to one of a board of direc-

[1] *Supra*, § 113; *infra*, § 140.

[2] Whitwell *v.* Warner, 20 Vt. 425; s. c. 2 Redf. Am. Railw. Cas. 340. But the general agent of such a company, who performs the daily routine of

(*a*) Legally they are the agents of the company, but practically they are the company itself, and the authority of ordinary agents is derived from

tors, in *the same transaction, or express notice, is, in general, notice to the company. But the fact that one of the firm is a director in a banking company, but takes no active part in the business of the bank, is no notice to such bank of the dissolution of such partnership, or the retiring of one of its partners.[3]

2. But it is said the directors of a corporation have no authority, without a vote of the shareholders, to apply to the legislature for an enlargement of the corporate powers.[4] And it was held, that the managing directors of a joint-stock company, who had power to lease the works of a company, could not, in the lease,

the business of the company, cannot bind the company beyond the scope of his ordinary duties. Hence the law agent of a joint-stock insurance company cannot bind the company by his false representations as to the state of its finances. Burnes *v.* Penell, 2 H. L. Cas. 497. But where the directors of the company make such false representations as to the state of the finances of the company to enhance the price of stocks, they are liable to an action at the suit of the person deceived, or to criminal prosecution; and transfers of stock, made on the faith of such representations will be set aside in equity. Ib. Lord Campbell said, it was not necessary that the representation be made personally to the plaintiff. See, also, Soper *v.* Buffalo & Rochester Railroad Co., 19 Barb. 310. But where the charter of a railway company, or the general laws of the state, require the ratification of a particular contract, by a meeting of the shareholders, held in a prescribed manner, such contract, assumed by the directors only, does not bind the company, and a court of equity will not hesitate to enjoin its performance by the company at the suit of any dissenting shareholder. Zabriskie *v.* Cleveland, Columbus, & Cincinnati Railroad Co., 10 Am. Railw. T. No. 15; s. c. 23 How. 381. Where a tariff of fares of freight and passengers on a railway is established and posted up by the president of the company, and is acted on in transacting the business of the company without objection, the consent of the corporation will be presumed. Hilliard *v.* Goold, 31 N. H. 230.

[3] Powles *v.* Page, 3 C. B. 16; Dunham *v.* Troy Union Railroad Co., 10 N. Y. 543. But the secretary of a railway company cannot bind the company by admissions. Bell *v.* London & Northwestern Railroad Co., 15 Beav. 548. Nor can the directors bind the company by their declarations, unless connected with their acts, as part of the *res gestæ*. Soper *v.* Buffalo & Rochester Railroad Co., 19 Barb. 310. Notice of process to two directors of a canal company is good notice to the company, and will bind it, although never communicated to the board. Boyd *v.* Chesapeake & Ohio Canal Co., 17 Md. 195.

[4] Marlborough Manufacturing Co. *v.* Smith, 2 Conn. 579.

them. Louisville, Evansville, & St. Louis Railroad Co. *v.* McVey, 98 Ind. 382. And one of the board held out as manager may be assumed to act on authority. Walker *v.* Detroit Transit Railway Co., 17 Mich. 338.

give an option to the lessee, to purchase, or not, at a price fixed, the entire works of the company, at any time within twenty years, and that such a contract must be ratified by every member of the company to become binding upon them.[5] (*b*)

3. And where the deed of a joint-stock company enables the majority to bind the company, by a resolution passed in a certain manner, these formalities must be strictly complied with, or the minority will not be bound by the act.[6]

* 4. So, too, where the directors, or even a majority of the shareholders, assume to enter into a contract, beyond the legitimate scope of the objects and purpose of the incorporation, the contract is not binding upon the company, and any shareholder may restrain such parties by injunction out of Chancery, from applying the funds of the company to such purpose, however beneficial it may promise to become to the interests of the company. This is a subject of vast concern to the public, considering the large amount of capital invested in railways, and the uncontrollable disposition which seems almost everywhere to exist, in the utmost good faith, no doubt, to improve the business of such companies, by extending the lines of communication, and

[5] Clay *v.* Rufford, 5 De G. & S. 768; s. c. 19 Eng. L. & Eq. 350.

[6] *Ex parte* Johnson, 31 Eng. L. & Eq. 430. One railway company cannot, without the permission of parliament, purchase stock in other railway companies. Salomons *v.* Laing, 12 Beav. 339, 377; s. c. 6 Railw. Cas. 289. In the case of Ernest *v.* Nichols, 6 H. L. Cas. 401; s. c. 30 Law T. 45, decided in the House of Lords, in August, 1857, the subject of the power of the directors of a joint-stock company to bind the company, is discussed very much at length, and the conclusion reached, as in some former cases (Ridley *v.* Plymouth, Stonehouse, Devonport Grinding & Baking Co., 2 Exch. 711, and some others), that the directors could execute no binding contract on behalf of the company, except in strict conformity to the deed of settlement by which the company was constituted; and that it was no excuse for the other contracting party to say he was ignorant of the provisions of that deed. It was his folly to contract with a director or directors, under such ignorance, and he must be content to look to those with whom he contracted.

(*b*) Directors by charter empowered to manage the business of the company, have no power to lease the road without the assent of the shareholders, nor vitally to modify an existing lease. Metropolitan Elevated Railway Co. *v.* Manhattan Railway Co., 15 Am. & Eng. Railw. Cas. 1. And acceptance of rent under a lease which the company had no power to make will not impart validity to the lease. Ogdensburg & Lake Champlain Railroad Co. *v.* Vermont & Canada Railroad Co., 63 N. Y. 176.

even by the virtual purchase of other extensive works more or less nearly connected, either in fact or in apprehension, with the proper business of the company. In an English case before the Master of the Rolls, it was held, that where a railway company were required by their charter to keep up a ferry accommodation between certain points, and for that purpose were obliged to have a much larger number of steamboats on certain days than upon ordinary occasions, they were not acting *ultra vires* in employing the steamboats for excursions to a point beyond the ferry and back, when not required for the purposes of the ferry.[7] The learned judge thus defined the powers of railway companies. After saying that if every shareholder but one assented, the company could not carry on a trade perfectly distinct from that for which they were constituted, "it is impossible," said the Master of the Rolls, "for them to set up a brewery, — they cannot carry on a trade such as managing a packet company." — "And if this were the case of a railway company embarking in the formation of a packet company, for the * purpose of carrying passengers between two places, or even for the mere purpose of making excursions, I should be of opinion it was not justified. But I am of opinion, that no capital of the company is embarked expressly and solely for the purpose of making excursion trips." And in the Supreme Court of the United States[8] it has been decided, that separate railway corporations had no right to consolidate their roads into one, and put them under one management; which seems to us a very questionable proposition, to say the least, since such a combination of management is obviously the only thing which will be adequate to produce the kind and degree of concentration of effort and management in the carrying forward of railway enterprises in this country, which will make them either remunerative or useful to the public. And as there is no national supervision of these vast interests, we must find it either in the discretion of railway directors and managers, or in some new constitutional provisions in the national government, adequate to the

[7] Forrest *v.* Manchester, Sheffield, & Lincolnshire Railway Co., 30 Beav. 40; 7 Jur. N. S. 749; S. C. affirmed on appeal in Chancery, 7 Jur. N. S. 887, but on the ground that the suit was illusory, and not in fact the suit of the plaintiff, but of a rival company.

[8] Pearce *v.* Madison & Indianapolis Railroad Co., 21 How. 441 But see Rutland & Burlington Railroad Co. *v.* Proctor, 29 Vt. 93, 95.

exigency. But the proposition that such companies cannot establish a steamboat line in connection with their business, and that their joint notes given for the purchase of boats cannot be enforced, is unquestionable.[8] (*c*)

5. There can be no doubt the courts of equity hold some rightful control over these speculative schemes and enterprises. But they lie so deeply entrenched in the general spirit of the age, and receive so much countenance and sympathy from kindred enterprises, in almost all the departments of business, that it often becomes extremely difficult, if not impossible, to fix any well-defined and practicable limits to the operations of railway companies, that shall not allow them, on the one hand, the power of indefinite extension and overwhelming absorption of kindred enterprises, or which will not be regarded, on the other, as a denial of fair liberty and free scope to carry out the just objects of their creation. There is not a more just and unexceptionable commentary upon this difficult and important subject, than in the language of one of the most sober, discreet, and learned of the English equity judges, Lord LANGDALE, Master of the Rolls.[9]

[9] Colman *v.* Eastern Counties Railroad Co., 10 Beav. 1; s. c. 4 Railw. Cas. 513. The managing directors of a railway company, with the view of increasing the traffic on their line, entered into a contract with a steam-packet company, that they would guarantee the proprietors of the packet company a minimum dividend of a certain per cent on their paid-up capital until the company should be dissolved, and that, on a dissolution, the whole paid-up capital should be returned to the shareholders in exchange for a transfer of the assets and properties of the steam-packet company. One of the shareholders filed a bill on behalf of himself and all other shareholders who should contribute, except the directors, against the company and the directors, and obtained an injunction, *ex parte*, to restrain the completion of the contract. It was held,

(*c*) A charter may permit such contracts. Green Bay & Minnesota Railroad Co. *v.* Union Steamboat Co., 107 U. S. 98. It has been held *ultra vires* of a company incorporated under the Mass. statute of 1870 to guarantee the expenses of a musical festival, although in the belief that the festival will greatly increase traffic. Davis *v.* Old Colony Railroad Co., 131 Mass. 258. But it has also been held that a company may be liable on a subscription to secure the location of an agricultural fair, although there is a defect of power to make it, if it is not in violation of the charter, and the company has thereby induced one to expend money in reliance thereon. State Board, &c. *v.* Citizens' Street Railway Co., 47 Ind. 407.

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*6. In an English case,[10] it was declared by the Court of Chancery that the directors of the company were restricted, as to

on motion to dissolve the injunction, that an objection for want of parties to a suit so framed was not sustainable; that directors have no right to enter into or to pledge the funds of the company in support of any project not pointed out by their act, although such project may tend to increase the traffic on the railway, and may be assented to by the majority of the shareholders, and the object of such project may not be against public policy: that acquiescence by shareholders in a project for however long a period, affords no presumption that such project is legal; that an objection stated by affidavit and remaining unanswered, that the plaintiff was proceeding at the instigation and request of a rival company, did not deprive him of his right to an injunction, and the motion to dissolve the injunction was refused, with costs. The case was afterwards mentioned to the court, on behalf of the defendants, when his lordship stated, that the injunction was meant to refer only to the guaranty proposed to be given, and the case made by the bill, not to affect any arrangement which the directors might enter into with any steam-packet company respecting the rates and tolls to be charged on the railway.

In Salomons *v.* Laing, 12 Beav. 339, 377; s. c. 6 Railw. Cas. 301, much the same general views are taken of the powers of directors and of the effects of acquiescence on the part of shareholders. See *supra*, § 56. Where the statute prohibits the directors of a company from being concerned, directly or indirectly, in building its road, a contract between the company and two of its directors, for that purpose, is absolutely void. Barton *v.* Port Jackson, &c. Plank-Road Co., 17 Barb. 397.

The deed of a joint-stock banking company contained provisions, that the directors should be not fewer than five nor more than seven; that three, or more, should constitute a board, and be competent to transact all ordinary business; that the directors should have power to compromise debts; and that agents might be appointed by the directors to accept or draw bills, without reference to the directors. The number of directors became reduced to four, and three executed a deed, compromising a large debt due the company, taking from the debtor a mining concern, and covenanting to indemnify him against certain bills of exchange. In an action on this covenant, held that it did not bind the company, not being ordinary business, and no number of directors less than five being competent to transact it. And query, whether a board of three directors could transact even ordinary business, unless when the board consisted of five only. Kirk *v.* Bell, 16 Q. B. 290; s. c. 12 Eng.

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[10] Stanhope's case, Law Rep. 1 Ch. Ap. 161; s. c. 12 Jur. N. S. 79, reversing the decision of the Master of the Rolls in s. c. 11 Jur. N. S. 872; Lord Belhaven's case, 3 De G. J. & S. 41; s. c. 11 Jur. N. S. 572, is here denied, and Spackman's case, id. 207, approved. See also Houldsworth *v.* Evans, Law Rep. 3 H. L. 263; *supra*, § 42, pl. 4, and note; Spackman's case affirmed in the House of Lords, Law Rep. 3 H. L. 171; *infra*, in note 13.

* the extent of their authority to bind the members, by the terms of the deed of settlement or charter, or fundamental constitution * of the company; and that any arrangement *ultra vires* of the directors, by which, in consideration of a money payment by a * shareholder desiring to retire, they declared his shares forfeited, is not, nor can any lapse of time render it, binding on the general body of the shareholders, unless it is shown, not only that the latter might have been, but also that they actually were, fully aware of the transaction. This seems to us to be placing the question of ratification of an act *ultra vires* upon its only safe and salutary basis. There should always be either express or presumptive evidence of actual and unconstrained acquiescence entirely satisfactory to the court, in order to bind a principal by any act of his agent, beyond the proper limits of the authority delegated to him. This is a principle of universal acceptance and application in the law of agency.

L. & Eq. 385. But where a series of contracts have been openly made by the officers of a corporation, within the knowledge of the corporators, who have acquiesced in and derived benefit from them, the contracts are binding on the corporation, although not clearly authorized by its charter. And if it be a municipal corporation it is bound to pay whatever is due, by taxes, if it has no other means. Alleghany City *v.* McClurkan, 14 Penn. St. 81. See also Houldsworth *v.* Evans, Law Rep. 3 H. L. 263, *per* Lord Cranworth; also Evans *v.* Smallcombe, id. 249; Spackman *v.* Evans, id. 171. So also where, by consent of the board of directors, a general agent was employed in making contracts for the purchase of the right of way, and was in the habit of agreeing on the price, by submission to arbitrators, and the awards had been paid in such cases by the company's financial officers, under a general resolution to pay the amount these agents directed, it was held that such agent, and another agent employed to assist in the same service, had power to submit the question of price, in such cases, to arbitrators, and that their award was binding on the company. And it is not requisite that the contract of submission should be under the seal of the company, nor will it be avoided by the agent attaching a seal to its execution, by himself. Wood *v.* Auburn & Rochester Railroad Co., 4 Seld. 160. But the facts that the directors have executed some ten or twelve similar contracts, and that such contracts have been published in the annual reports, and distributed to the stockholders without objection, although evidence of acquiescence on their part, is not evidence of the enlargement of the charter powers of the company, so as to bind the company, as between them and the primary parties entering into the contract with them. McLean, J., in Zabriskie *v.* Cleveland, Columbus, & Cincinnati Railroad Co., 10 Am. Railw. T. No. 15; s. c. 23 How. 381; 1 Redf. Am. Railw. Cas. 61; *supra*, § 56.

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7. One of the recent English cases[11] declares, that the power of the directors to give a bill of sale, as security for debts, is incident to all trading corporations, although it be not expressly conferred by the articles of association or the constitution of the company. Mr. Chief Justice Erle said, "The fact that the company carries on a trade is a sufficient answer to the first objection. Every trading company must have the power of giving security for the debts which it contracts."

* 8. Where power is given in the charter of a corporation or in the deed of settlement, for the directors to confirm any contract made by provisional directors, or any persons acting as directors of the company in its formation, the directors alone have power to confirm such contracts by deed.[12] But the directors have no power to make any contract under seal binding upon the corporation, if the formalities prescribed by its constitution have not been complied with.[13]

9. The directors being but the servants or trustees of the company, it cannot, as before stated, retain money obtained from one by the fraudulent sale by the directors of the company property, unless the purchaser has by his own misconduct precluded himself from redress.[14] It was here held, that directors are not justified in using reports to induce a sale of property, which were true at the time they were made, if not true at the time they are so used.

10. But the last case was reversed in the House of Lords, and the decree of Vice-Chancellor Stuart[15] affirmed with costs, — his Honor not having awarded costs, — on the same grounds mainly which the Vice-Chancellor had assumed: that as no specific representations had been made by the company, and no specific inquiry by the plaintiff, his case failed on that point; and inasmuch as he completed the purchase after being informed of the facts

[11] Shears *v.* Jacobs, Law Rep. 1 C. P. 513; s. c. 12 Jur. N. S. 785.

[12] Wilkins *v.* Roebuck, 4 Drewry, 281.

[13] Hambro *v.* Hull & London Fire Insurance Co., 3 H. & N. 789. See, also, Eastwood *v.* Bain, 3 H. & N. 738; Bryon *v.* Metropolitan Saloon Omnibus Co., 3 De G. & J. 123; *Ex parte*, Baker, 4 Drewry & S. 55; s. c. 6 Jur. N. S. 240.

[14] Conybeare *v.* New Brunswick & Canada Railway Co., 1 De G. F. & J. 578; s. c. 6 Jur. N. S. 518; *supra*, § 41, pl. 2; *Re* Cork & Youghal Railway Co., 17 W. R. 873.

[15] 6 Jur. N. S. 164.

as to defect of title, he could not complain of any previous misrepresentation.[16]

11. But it was declared in the House of Lords,[16] that if reports are made to the stockholders of a company by their directors, and adopted by them at one of their appointed meetings, and afterwards circulated in their published reports, they are binding upon the company. And if erroneous statements in such reports can be clearly shown to have been the proximate and immediate cause * of shares having been bought from the company by any individuals, a court of equity will not permit the company to retain the benefit of the contract.

12. But when a company issues a prospectus, a person contracting to take shares on the faith of it has the right to claim, not only that he shall not be misled by any statements actually false, but that he shall be correctly informed by it of all the facts, the knowledge of which might reasonably have deterred him from entering into the contract.[17] But the false representation of an officer is not that of the company, even if made at the office.[18] But to become the act of the company it must be contained in a report of the company adopted at a regular meeting.[18]

13. The directors of a railway company are not justified in acting on an old resolution authorizing the issue of shares after the purpose for which the issue was authorized has ceased to be available;[19] nor in issuing shares, supposing them to possess the power, for the express purpose of procuring votes to influence a coming general meeting.[19] An injunction will be issued to restrain such action of the directors, it not being a question of the internal management of the company, but an attempt to prevent such management being legitimately carried on.

14. In a trial[20] before MARTIN, B., where it appeared that the

[16] 9 H. L. Cas. 711; s. c. 8 Jur. N. S. 575. See here Lord CHELMSFORD'S strictures on the loose mode of stating fraud. See *In re* Mixer's case, 4 De G. & J. 575. See, also, Cullen *v.* Thompson, 4 Macq. Ap. Cas. 424, in the House of Lords, where all the officers of a company participating in a fraudulent representation are held liable, although but part signed the report. 9 Jur. N. S. 85.

[17] New Brunswick & Canada Railway & Land Co. *v.* Muggeridge, 1 Drewry & S. 363; s. c. 7 Jur. N. S. 132.

[18] *In re* Royal British Bank, 3 Law T. N. S. 843.

[19] Fraser *v.* Whalley, 2 H. & M. 10.

[20] Bale *v.* Clelland, 4 F. & F. 117; Kisch *v.* Venezuela Railway Co., 3 De G.

profits of the company had been studiously misrepresented by the manner of keeping the books, and a large apparent profit on the year preceding the report presented, by not bringing all the cost of material forward into the account of the year in which it was consumed, it was held that any error in the mere mode of keeping the accounts would not be evidence of fraudulent representation, but the falsification of facts and figures was so, as against any of the officers of the company who were aware of the issue of the prospectus, and had aided or connived at the mode in which it was made up.

*15. It was also held in the last case, that as the statute required the dividend to be declared by the directors, though with the sanction of the shareholders, if to the knowledge of the directors and officers of the company such dividend so declared by the directors was paid otherwise than out of profits, they are responsible for it, and for the circulation of any declaration of it, acted upon by innocent shareholders.

16. Directors may ratify any contract made on their behalf which they have power to make themselves.[21] And where the constitution of the corporation gives to the directors, with the sanction of an extraordinary meeting of the shareholders, by a majority of two-thirds, power to do any act which might be done with the consent of all the shareholders, the directors may lease the entire business of the company in that mode.[22]

17. The board of directors of a railway company are to be regarded as its immediate representatives, and occupy the relation of master to the different classes of employés engaged in operating the road, and performing the work or transacting the business of the company in any of its departments.[23]

18. Although the directors of a railway company cannot apply the funds to any purpose, *ultra vires*, of such company, yet where

J. & S. 122; s. c. 11 Jur. N. S. 646. The question of fraud by means of inducing a shareholder to buy his shares on a misapprehension of the true condition of the company, is one of fact, to be judged of by the jury on a consideration of all the facts, and is mainly one of intent. Cleveland Iron Co. *v.* Stephenson, 2 F. & F. 428.

[21] Wilson *v.* West Hartlepool Harbor & Railway Co., 31 Beav. 187; s. c. 2 De G. J. & S. 475; 11 Jur. N. S. 124.

[22] Featherstonhaugh *v.* Porcelain Co., Law Rep. 1 Eq. 318; s. c. 11 Jur. N. S. 994.

[23] Columbus & Indianapolis Central Railroad Co. *v.* Arnold, 31 Ind. 174.

they have done so; with the *bona fide* purpose of serving the public interest and convenience, by diverting a highway, a court of equity will not compel the company to restore the highway, so as to bring their work *intra vires*, if the result will be to cause greater inconvenience to the public, or those of the public making the complaint.[24]

19. Neither the president or any, or all, of the directors of the company have any inherent power to bind the company. Their powers depend upon the general rules of the law of agency. Where, therefore, the president of a corporation executed a contract on their behalf, without previous authority, and the company subsequently accepted the benefits of such contract, having knowledge of the means by which they were obtained, it was held to operate as a ratification of the contract, and to make it binding upon the corporation from the first.[25]

SECTION II.

Personal Liability of Directors.

1. Lawful acts of directors. Directors not personally liable.
2. Otherwise if they undertake to be personally liable.
3. So if they assume to go beyond their powers.
4. Extent of powers often affected by usage and course of business.
5, 6. Contract beyond the power of the company, or not in usual form, directors personally liable.

§ 136. 1. The English statute enacts, what was the common law indeed, that no director should become personally liable by reason of any contract made, or any act done, on behalf of the company, within the scope of the authority conferred by the stat-

[24] Attorney General *v.* Ely, Haddenham, & Sutton Railway Co., Law Rep. 6 Eq. 106. The information was dismissed without costs, and without prejudice to any proceeding at law.

[25] Perry *v.* Simpson Water Proof Manufacturing Co., 37 Conn. 520. It was here held that notice to one of two general agents of a corporation was notice to the company and to the other agent. The declaration of such general agent being the notice of the company to the opposite party, that the president is authorized to contract on behalf of the corporation, and such party having acted on the faith of such declaration, the company is estopped from denying such authority. See also Whitwell *v.* Warner, *supra*, note 2.

utes of the legislature and the company, or, as it is expressed, "by reason of any lawful act done by them." (*a*) Corporations are not, in general, responsible for the unlawful or unauthorized acts of their officers.[1] But the corporation may be held responsible * for the publication of a libel, by its agents and servants in the due course of the business of the company, as where the company were the owners, and by their agents managed the electric telegraph along their line, and sent a despatch to the effect that the plaintiff's bank "had stopped payment," which proved not to be the fact. This despatch was sent for their own protection, in order to insure their agents against taking bills on such bank. But the message went beyond what was necessary for that purpose, and thus made the company responsible as for a gratuitous publication. It would have answered all purposes to have directed their agents not to take the bills, without assigning any reason.[2] So, too, in Philadelphia, Wilmington, and Baltimore Railway *v.* Quigley,[3] it was decided, that a railway may become liable for a libel in publishing and circulating among its members a statement of the report of the directors, and the evidence on which it is based, although the report itself, when made to the stockholders in good faith, and for their information upon matters affecting their interest, would be regarded as a privileged communication.

2. But directors have been held liable, in many cases, personally, where the debt was that of the company, and where it so appeared upon the face of the contract. As upon a promissory note, which was expressed, "jointly and severally we promise to pay, . . . value received for and on behalf of the Wesleyan Newspaper Association. S. & W., Directors."[4] But it is ordinarily

[1] Mitchell *v.* Rockland, 41 Me. 363. Commissioners to accept subscriptions for a corporation, who are by the charter required to give notice of the time and place of opening the books, may give such notice by a majority of their number. Penobscot Railroad Co. *v.* White, 41 Me. 512.

[2] Whitfield *v.* South Eastern Railway Co., 1 Ellis, B. & E. 115; s. c. 1 Jur. N. S. 688.

[3] 21 How. 202; s. c. 2 Redf. Am. Railw. Cas. 330.

[4] Healey *v.* Story, 3 Exch. 3. Alderson, B., said the terms "jointly and

(*a*) They are not liable personally, for instance, on an order to a bank to honor checks drawn in a particular manner. Beattie *v.* Ebury, Law Rep. 7 H. L. 102.

a question of intention, whether the directors are personally liable if they act within the powers conferred by the company.[5]

*3. But where the directors of a railway assume to do an act exceeding their power, as accepting bills of exchange, which does not come within the ordinary business of railways, they will be personally liable.[6]

severally," imported a personal undertaking, inasmuch as they could properly have no application to the company. But see Roberts *v.* Button, 14 Vt. 195, and cases cited, where the subject is examined more at length than space will here allow. Dewers *v.* Pike, Murph. & H. 131. But in the case of Lindus *v.* Melrose, 3 H. & N. 177, before the Court of Exchequer Chamber, it was held that a promissory note expressed, "For value received we jointly promise to pay," and signed by three of the directors of a joint-stock company, and countersigned by the secretary, and expressed to have been on account of stock of the company, did not bind the signers personally, but imported, on its face, a contract on behalf of the company.

[5] Tyrrell *v.* Woolley, 1 Man. & G. 809; Burrell *v.* Jones, 3 B. & Ald. 47. In Davidson *v.* Tulloch, 3 Macq. Ap. Cas. 783; s. c. 6 Jur. N. S. 543, before the House of Lords, it was determined, that an action may be maintained against the directors of a company in respect of any transactions which the body of the shareholders could not sanction, but in respect of any transactions which they might sanction, although the directors might not have been justified in what they were doing, there can be no right of action. And directors are not liable for defect of authority to make a conveyance of property, the sale of which has been broken off by an objection of the purchaser's solicitor, that the directors had not the requisite authority. Wilson *v.* Miers, 10 C. B. N. S. 348. See also Nowell *v.* Andover & Red-bridge Railway Co., 3 Gif. 112; s. c. 7 Jur. N. S. 839. The company is not liable to make good any loss sustained through the false representations of its officers, although incidentally benefited thereby, unless they entered into the scheme for the purpose of such gain. Barry *v.* Croskey, 2 Johns. & H. 1.

[6] Owen *v.* Van Uster, 10 C. B. 318; Roberts *v.* Button, 14 Vt. 195. They are in all cases responsible for the consequences of omission of duty, to the same extent as other trustees. Turquand *v.* Marshall, Law Rep. 6 Eq. 112; s. c. Law Rep. 4 Ch. Ap. 376, and referred to in Overend, Gurney & Co. *v.* Gibb, Law Rep. 5 H. L. 480, where the case is reviewed and explained. And where the directors certified that they had appointed an agent with certain powers, and it proved that they had no such power, they were held personally responsible, although acting in good faith. Australasia Bank *v.* Cherry, 17 W. R. 1031. But if the erroneous misrepresentation of the directors concerns matter of law only, and involves no error of fact, the directors will not become personally responsible. Beattie *v.* Ebury, 20 W. R. 994; s. c. Law Rep. 7 Ch. Ap. 777. And see the opinion of Mellish, L. J. An agent whose conduct is merely imprudent will not make himself personally responsible for the consequences, unless he acted rashly or recklessly, so as to be guilty of

4. But the business of railways is so much extended in this country, as borrowers of money, carriers, and contractors, in various ways, that it is not easy to determine, except from each particular case, how far the directors may draw or indorse bills, or, indeed, what particular acts they may or may not do. In one case the question of the extent of corporate powers is considerably discussed,[7] and it was held that the exercise of such powers must be conferred by their charters, but that it is the duty of courts to give the charters such a construction as to effect the leading purposes of the grant, where that can be done consistently with the grant; and that business corporations have the power to make such contracts and in such forms as are requisite to accomplish the purposes of the grant, having regard to any special limitations contained in such grants, and that promissory notes or bills made or received by such corporations are *prima facie* valid, but that it is competent to show that the transactions out of which they arise are not within the powers of the corporation, and thus defeat their operation. In another case[8] it * was held, that *prima facie* a railway company had power to execute promissory notes for its legal indebtedness, and that it could do this only by its agents; that no written or sealed authority to the agent was requisite; nor that the contract should be under seal unless specially so required by the charter; that it was not important to prove the consideration, as the law will make the same implications in favor of the note of a corporation as in other cases.

crassa negligentia. The directors of a company formed for the express purpose of buying the business of another company, and having express powers to do so, in making the purchase, are merely agents, and not trustees, and will not be held responsible unless the selling company was known to be in desperate circumstances. Overend *v.* Gibb, Law Rep. 5 H. L. 480. The dissenting stockholders may maintain a bill in equity against the directors of a corporation for perpetrating a fraud against the company, by the control of the same through the ownership of a majority of the stock, and it is not indispensable to join a majority of the directors as defendants. Brewer *v.* Boston Theatre, 104 Mass. 378.

[7] Straus *v.* Eagle Insurance Co., 5 Ohio St. 59.

[8] Hamilton *v.* Newcastle & Danville Railroad Co., 9 Ind. 359; Marion & Mississinewa Railroad Co. *v.* Hodge, id. 163. In Massachusetts it was held that the only remedy under the late statute for a corporate debt, against an officer of the corporation, was in equity. Bond *v.* Morse, 9 Allen, 171.

5. By the construction of the English statutes, if a trustee or director of any public work made a contract for any matter not provided for in the special acts of the company, or by the general statutes applicable to the subject, or in a different form from that so provided, he is taken to have intended to become personally responsible.[9]

6. Thus where a check on the company's bankers, for payment to a third party of the company's money, was drawn by three directors in the name of the company, but the document was signed by them in their own names, and countersigned by the secretary of the company, adding to his name "Secretary," and a stamp bearing the name of the company was affixed, but the three directors did not appear, on the face of the check, to be directors or to sign as such, it was held that it did not purport to be the check of the company, and was not binding on them.[10]

SECTION III.

Compensation for Service of Directors.

1. In England, directors not entitled to compensation for services.
2. Company may grant an annuity to a disabled officer, though not specially empowered.
3. In this country directors entitled to compensation, in conformity to the order of the board.
4. Some states follow the English rule.
5. Official bond strictly limited to term for which officer is elected.

§ 137. 1. In England, in the absence of contract, or usage from which one might be inferred, directors of railways and other corporations * are not entitled to compensation for services as directors. This is regarded as an office, and so an honorary service. And a resolution of the board of directors that compensation should be allowed for certain specified services, not being under seal, so as to amount to a by-law, will not entitle

[9] Parrott *v.* Eyre, 10 Bing. 283; Wilson *v.* Goodman, 4 Hare, 54, 62; Higgins *v.* Livingstone, 4 Dow, P. C. 341.

[10] Serrell *v.* Derbyshire, Staffordshire, & Worcester Junction Railway Co., 19 Law J. N. S. C. P. 371; S. C. 9 C. B. 811. It would seem, that without much latitude of construction, this case might have been otherwise ruled, and been more satisfactory.

such director to sue the company for compensation for such service.[1] (*a*)

2. But it would seem, where the company voted an annuity to a disabled officer, in the nature of a retiring pension, and the directors, by deed, in the name of the company, made a formal grant in conformity with the vote, that the contract is binding upon the company, although no power is expressly given by their charter to grant annuities.[2]

3. Railway directors in this country are generally allowed compensation, but cannot recover it beyond the rate fixed by the general resolutions of the board.[3] (*b*) And where a director acts as a member of the executive committee of the board, or in selling the bonds of the company, his service is to be regarded as in his capacity of director, and the amount of compensation is limited to that allowed directors.[3]

[1] Dunstan *v.* Imperial Gas Light Co., 3 B. & Ad. 125. But see Hall *v.* Vermont & Massachusetts Railroad Co., 28 Vt. 401. The rule of law in that respect is different in this country, a resolution of the board of directors having the same force, whether under seal or not. *Infra*, § 143; *supra*, § 130. See also Gaskell *v.* Chambers, 5 Jur. N. S. 52; S. C. 26 Beav. 360. In this case the directors transferred the business of the company to another company, and received from the latter a large sum for compensation, and withheld the particulars from their members. It was held that they were trustees of the money for the members, and the directors were ordered to pay it into court. But the directors are not the servants of the individual shareholders, and therefore such an one who feels aggrieved must seek redress through the company for any misconduct of the directors. Orr *v.* Glasgow, Airdrie & Monkland's Junction Railway Co., 3 Macq. Ap. Cas. 799; S. C. 6 Jur. N. S. 877.

[2] Clarke *v.* Imperial Gas Light Co., 4 B. & Ad. 315.

[3] Hodges *v.* Rutland & Burlington Railway Co., 29 Vt. 220. But where a director performs services for the company, disconnected with his office, he is not restricted, in regard to the compensation, by any resolution of the board in regard to the compensation to be made the directors. Henry *v.* Rutland & Burlington Railway Co., 27 Vt. 485. In another case it was held, that railway directors, as a general rule, are not entitled to compensation for their personal services, unless rendered under some express contract. Hall *v.* Vermont & Massachusetts Railroad Co., 28 Vt. 401. But an allowance to a director for extra services made by a board of which the claimant was one, and his presence indispensable to constitute a quorum, is void, and any stockholder may, on behalf of himself and others, enjoin the treasurer from payment. Butts *v.* Wood, 37 N. Y. 317.

(*a*) Nor can the company, at an ordinary general meeting, make a gift to directors for services already rendered. Hutton *v.* West Cork Railway Co., Law Rep. 23 Ch. 654.

(*b*) In Illinois they can recover

* 4. Some of the American states adopt the English rule that railway directors cannot recover compensation for services rendered in obtaining subscriptions to the capital stock of the company, before its organization; or for any other services, unless they are most unquestionably beyond the range of their official duties.[4] And it is here determined that it would make no difference that the services were rendered under an expectation and an understanding among those engaged in the enterprise that the services should be compensated by the company after its organization. And in addition to the technical embarrassment of holding the company bound by any such arrangements before its existence, the policy of the law is wholly opposed to them.[4] We think this by far the most salutary rule upon the subject.

5. It is scarcely necessary to state that official bonds for faithful administration by officers of corporations are to be limited strictly to the term for which such officer was elected. And if the office is annual, and the officer continued from year to year, without the renewal of the bond, and the officer's annual account is passed from year to year, until finally a default occur at a remote period from that covered by the bond, there is no indemnity to be obtained under the bond.[5]

[4] New York & New Haven Railroad Co. *v.* Ketchum, 27 Conn. 170; *infra*, § 140.

[5] Manufacturers' & Mechanics' Savings Loan Co. *v.* Odd Fellows Hall Association, 48 Penn. St. 446.

compensation for official services only where it is fixed beforehand by the by-laws, or by a recorded resolution of the board. Lafayette, Bloomington, & Mississippi Railway Co. *v.* Cheeney, 87 Ill. 446. But for services outside the line of their ordinary official duty, e. g., soliciting subscriptions, &c., they are entitled to compensation. Ib. But see Cheeney *v.* Lafayette, Bloomington, & Mississippi Railway Co., 68 Ill. 570, where it is held that they are not entitled to compensation for services in contracting for construction. And see also Holder *v.* Same, 71 Ill. 106, where it is held that a director appointed treasurer without provision made at the time for compensation is entitled to none.

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SECTION IV.

Records of the Proceedings of Directors.

1. English statutes require minutes of proceedings of directors, and make them evidence.
2. Presumption that minutes contain all that passed.
3. Presumption from non-production of minutes that company ratified acts of directors.

§ 138. 1. The English general statutes require the directors to keep minutes of all appointments, contracts, orders, and proceedings of the directors and committees, in books kept for that purpose, and these, duly made, are receivable as evidence, without further authentication. But this is held not to exclude other evidence of such transactions.[1]

* 2. As against the company and the members present at a particular meeting, the minutes of the directors will be held *prima facie* correct.[2] And where the proceedings of the minutes of the meeting are imperfect, it will be presumed that everything was brought before the meeting which it was requisite to bring before them to have the action of the company valid.[3]

3. The legality of the proceedings of directors in purchasing shares of the company for the company, which required the sanction of a general meeting, will be presumed either from lapse of time and no dissent on the part of the shareholders, or from the proceedings of the general meeting at which the matter would naturally have been acted upon not being forthcoming, as it was the duty of the company to keep regular minutes of such meeting.[3] And it was also here held that the company, by transferring such shares, thereby confirmed the validity of the transfer to them.[3] So also by paying an annuity, the price of such shares.[3]

[1] Inglis *v.* Great Northern Railway Co., 1 Macq. Ap. Cas. 112; s. c. 16 Eng. L. & Eq. 55. Lord St. Leonards said, in the House of Lords: "But independently of the evidence furnished by the books, the due appointment was proved by a witness, and his evidence was admissible evidence, for the act confers a privilege, but does not exclude other evidence of the fact." Miles *v.* Bough, 3 Q. B. 845.

[2] *Ex parte* Stark, 10 Jur. N. S. 790.

[3] *Ex parte* Lane, 1 De G. J. & S. 501; s. c. 10 Jur. N. S. 25.

SECTION V.

Authority of Directors to borrow Money, &c.

1. Authority of directors, express or implied, to bind company.
2. Power to bind company through agent of their appointment.
3. Contracts in excess of authority under seal of company *prima facie* binding.
4. Strangers must take notice of general want of authority in directors, but not of mere informalities.
5. Corporation cannot subscribe for stock of other companies.
6. Corporation may borrow money if requisite.
   n. (a) Or loan money to aid in auxiliary work.
7. Power of directors to accept subscription payable in land.

§ 139. 1. Joint-stock companies, under many of the English statutes,[1] are held bound by contracts made by a competent board of directors, though not under seal, and not made in strict compliance with the acts.[2] But those who seek to bind * such companies, on contracts made with the directors, must show their authority to bind the company, either by the terms of the deed of settlement, or that the body of the shareholders authorized these persons to act on their behalf. A ratification by a competent board of directors will bind the company.[2]

2. The general rule upon this subject, in regard to goods and money which is obtained by agents ostensibly clothed with competent authority, and which actually goes to the use of the company, seems to be that the company is holden. Thus where a joint-stock manufacturing company, having a board of directors, with authority to appoint officers and delegate their authority, purchased goods through the general manager of the company, or his deputy, or the secretary, all of whom were duly appointed, and when the goods were delivered on the company's premises,

[1] Statute 7 & 8 Vict. c. 110.

[2] Ridley *v.* Plymouth Baking Co , 2 Exch. 711. Where one has the actual charge and management of the business of a corporation, with the knowledge of the directors, the company will be bound by his contracts, made on their behalf, within the apparent scope of the business thus intrusted to him. Goodwin *v.* Union Screw Co , 34 N. H. 378; Chicago, Burlington, & Quincy Railroad Co. *v.* Coleman, 18 Ill. 297. In this case it is held, that the admission of the president of the company in regard to the authority and acts of a sub-agent will bind the company.

and used for their purposes, they were held liable, on the ground that the manager had authority to give such orders, in the absence of any express provision to the contrary. And it was held that, as to the other, the directors must be taken to have known that the goods had been furnished and used, and that, therefore, the company was liable to pay for them.[3]

3. A contract under the seal of the company is *prima facie* binding upon them. In such case it is not enough, in order to defeat a recovery upon the contract, to show an excess of authority on the part of the directors who made the contract.[4] The * defence must establish such an excess of authority as was known to the other party, or such as may be presumed to have been so known, and thus virtually establish *mala fides*, both on the part of the directors and the other contracting party.[4]

[3] Smith *v.* Hull Glass Co., 11 C. B. 897. And where the general agent of a manufacturing company directed the clerk to issue a promissory note in the name of the company, and it was shown that the note was in the form customarily used and always recognized by the company in like cases, it was held to be sufficient proof of the execution of the note by the company to go to the jury, and to warrant them in finding that the company had adopted, by usage, the signature of its agent as its own, and intended to be bound by it. Mead *v.* Keeler, 24 Barb. 20. Such company may borrow money for its legitimate business, and bind itself by a written obligation for its repayment. Ib. See also Curtis *v.* Leavitt, 15 N. Y. 9.

[4] Royal British Bank *v.* Turquand, 5 Ellis & B. 248; s. c. 32 Eng. L. & Eq. 273. Lord Campbell said, in giving judgment: "A good plea must allege facts to establish illegality, as was done in Collins *v.* Blantern, 2 Wils. 347, and Paxton *v.* Popham, 9 East, 408. A mere excess of authority by the directors, we think of itself would not amount to a defence. The bond being under the seal of the company, the gist of the defence must be illegality. If the directors had exceeded their authority to the prejudice of the shareholders, by executing the bond, and this had been known to the obligees, illegality, we think, would have been shown. The obligors in executing, and the obligees in accepting the bond, might be considered as combining together to injure the shareholders. The two parties would have been *in pari delicto*, and the action could not have been maintained. In such circumstances *potior est conditio defendentis*. But without the *scienter* and without prejudice to the shareholders, or any others whatsoever, illegality is not established against the obligees. If no illegality is shown as against the party with whom the company contract under the seal of the company, excess of authority is a matter only between the directors and the shareholders." And again, "The plaintiffs have *bona fide* advanced their money for the use of the company, giving credit to the representations of the directors that they had authority to execute the bond, and the money which they advanced, and which they now seek

4. The case of Royal British Bank *v.* Turquand, just referred to, was affirmed in the Exchequer Chamber,[5] in which a somewhat important distinction seems to be made between a general want of authority in the directors to do the act in question in any case, and a mere want of authority in the particular instance, for want of the requisite formalities on the part of the company, they being bound in the latter and not in the former case. JERVIS, C. J., in giving judgment, said: "Parties dealing with these joint-stock companies, through the directors, are bound to read the deed or statute limiting the directors' authority, but they are not bound to do more. The plaintiffs therefore, assuming them to have read this deed, would have found, * not a prohibition to borrow, but a permission to borrow, on certain things being done. They have, in my opinion, a right to infer, that the company which put forward their directors to issue a bond of this sort, have had such a meeting, and such a resolution passed, as are requisite to authorize the directors in so doing." This rule has been extended to negotiable paper drawn in the name of the company by the directors, beyond the scope of their powers to bind the company,[6] even while in the hands of a *bona fide* holder.

5. It was held that a joint-stock business company had no power to take stock in a savings bank, and that a loan effected by that means could only be enforced to the extent of the money actually received by the company over and above the amount retained upon the subscription.[7]

to recover, must be taken to have been applied in the business of the company and for the benefit of the shareholders." "The case of Hill *v.* Manchester Waterworks Co., 2 B. & Ad. 866, is an instance of such a bond being upheld, the pleas not disclosing any fraud or injury done to the shareholders of the company, and the case of Horton *v.* Westminster Improvement Commissioners, 7 Exch. 911; s. c. 14 Eng. L. & Eq. 378, was decided on the same principle." Agar *v.* Athenæum Life Assurance Co., 3 C. B. N. S. 725; s. c. 30 Law T. 302, is decided on the authority of Royal British Bank *v.* Turquand, *infra*, note 5. A release purporting to be under the corporate seal, and signed by the president of the company, and exhibited by the company in court, as its act, would operate as an estoppel on the company, in any suit between the party as to whom the release was given and the company. Scaggs *v.* Baltimore & Washington Railroad Co., 10 Md. 268.

[5] 6 Ellis & B. 327; s. c. 36 Eng. L. & Eq. 142.

[6] *Infra*, § 239, pl. 5.

[7] Mutual Savings Bank *v.* Meriden Agency Co., 24 Conn. 159. See also *infra*, § 211, note 3.

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6. There seems to be no question made of the general right of corporations, both public and private, to borrow money, so far as their legal functions may require it. (*a*) The rule has been extended to insurance companies.[8] But it was once doubted whether this could be done except under the corporate seal.[9] But the cases now show that no such thing is requisite.[10]

7. It is made a question in one case,[11] how far the proposition by one to subscribe to the stock of the company, payable in certain specified lands at a given price, may be lawfully accepted by the directors of the company, and whether the same should not be made by a special agent appointed for that purpose. * But it was held clearly that the separate consent of several members of the board, not shown to constitute a quorum, did not create an acceptance binding upon the company.

[8] Nelson *v.* Eaton, 26 N. Y. 410.

[9] Wilmot *v.* Coventry, 1 Y. & Col. Ex. 518.

[10] Marshall *v.* Queenborough, 1 Sim. & S. 520. See cases before referred to in this section. And it was held that the directors of a company incorporated for making a cemetery could not raise money, by indorsing and accepting bills for the purposes of the undertaking. Steele *v.* Harmer, 14 M. & W. 831. The same principle is recognized in the earlier cases. Broughton *v.* Manchester Waterworks, 3 B. & Ald. 1; Clarke *v.* Imperial Gas-Light Co., 4 B. & Ad. 315. And where the by-laws of the corporation provide that in the management of its affairs the directors shall have all the powers of the corporation not inconsistent with the by-laws or the laws of the commonwealth, and there is no prohibition in the by-laws of the directors borrowing money, issuing bonds, or conveying the lands of the company, the directors may exercise such powers. Hendee *v.* Pinkerton, 11 Allen, 381. And where municipalities are empowered to subscribe to the stock of a railway and pay the subscription in its own bonds, the company may negotiate the bonds with its own guaranty in order to raise money for its convenient uses. Railroad Co. *v.* Howard, 7 Wal. 392.

[11] Junction Railroad Co. *v.* Reeve, 15 Ind. 236.

(*a*) So also to loan money to aid in a work auxiliary to its main business. Cheever *v.* Gilbert Elevated Railway Co., 43 N. Y. Superior Ct. 178.

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SECTION VI.

Directors bound to serve the Interest of Company.

1. General duty of such officers defined. Trust relation.
2, 3. Contracts for secret service and influence with directors. Legality.
4, 5. Directors cannot buy of themselves for the company. But company may ratify.
   n. (b) Nor can they acquire for themselves property which they should acquire for company.
6. They may purchase shares of one another to promote harmony in the board.
7. May loan money to company, though forbidden to participate in profits of company's contracts.
8. Director *de facto* treated as director so far as affects claims.
9. Hotel company may lease premises to others.
10. Director cannot recover for work done for company.
11. Contract of projector with directors not binding on company, if not conditional on formation of the company.
12. Director forbidden to act where interested, may still vote as shareholder.
13. Court will not act on petition against directors brought by member who is a mere puppet for others.
14. Directors cannot charge to company costs of libel suit brought for defamation of themselves.
15. Directors responsible for wrongful acts of each other, if known at the time.
16. Right of courts to appoint receivers and take the management of corporations.
17. Directors personally responsible for money expended in raising the price of shares.

§ 140. 1. The general duty of railway directors is stated, somewhat in detail, in another part of this work.[1] It is an important and public trust, and whether undertaken for compensation or gratuitously, imposes a duty of faithfulness, diligence, and truthfulness in the discharge of its functions, in proportion to its difficulty and responsibility. (*a*)

[1] *Infra*, § 211, note 6.

(*a*) Thus they may not manage the affairs of the corporation for their private advantage, nor have any pecuniary interest in contracts made with the corporation through their influence. Ryan *v.* Leavenworth, Atchison, & Northwestern Railway Co., 21 Kan. 365. Nor can they deal in any way in their own behalf in respect to matters involving the trust. Duncomb *v.* New York, Housatonic, & Northern Railroad Co., 84 N. Y. 190; Wardell *v.* Union Pacific Railroad Co., 103 U. S. 651. And so a purchase by a director of bonds of the company below par is at peril of avoidance on application to the courts. Ib. But a contract for a sale of a part of its property to one of the directors is not void at law, it is merely voidable at suit of any one interested in the property of the road. Little Rock & Fort Smith Railway Co. *v.* Page, 35 Ark. 304.

2. An important case, involving incidentally the duty of railway directors, arose in the Superior Court of the city of New York.[2] The plaintiff claimed pay for labor and services, in procuring for the defendants the contract for the construction and equipment of the Ohio and Mississippi Railway, from Cincinnati to St. Louis. The mode of his performing this service seems to have been through one Clement, who knew nothing of defendants, but who acted upon the plaintiff's recommendation of them, and, for the agreed compensation of $10,000, secretly influenced the directors of the railway, by personal solicitation, to give the contract to the defendants.

3. Mr. Justice Hoffmann, in giving judgment, makes some suggestions upon the general subject, well worthy of our notice. * " Undoubtedly this was the employment of Clement, for a bribe, to use personal influence with the directors, to secure a lucrative contract for one of whose capacity and responsibility he was entirely ignorant. He was to use this secretly, and with individuals. The directors of this great railroad scheme, if they stood not in the capacity of public officers, owing a duty to the state, yet were trustees of the stockholders of the road, and owed the best efforts of industry, integrity, and economy to them. No one can deny, that a stipulation for any personal advantage or profit, which might attend and influence the discharge of their trust to the stockholders, would be a violation of duty; and no engagement given to them, or contracts made with them, for that object, could bear the scrutiny of the law. If, again, one of their officers, if Mitchell, for example, empowered to negotiate and finally to settle the contract with Seymour, had received an obligation for the payment of a sum of money for his services, it could never have been enforced." The learned justice cited and commented upon the following cases in support of the principle which would avoid such agreements :[3] * and continued : " I am led to the con-

[2] Davison *v.* Seymour, 1 Bosw. 88; Redmond *v.* Dickerson, 1 Stock. 507.

[3] Gray *v.* Hook, 4 Comst. 449; Waldo *v.* Martin, 1 B. & C. 319; s. c. 2 Car. & P. 1; Hanington *v.* Du Chastel, 2 Swanst. 159; Hopkins *v.* Prescott, 4 C. B. 578; Money *v.* Macleod, 2 Sim. & S. 301; Marshall *v.* Baltimore & Ohio Railroad Co., 16 How. 314, 325; Fuller *v.* Dame, 18 Pick. 472. Lord Eldon says, in regard to one acting as the agent of others, and securing a large sum to himself, without the knowledge of those on whose behalf he acted, " It is impossible for this court to sanction such a proceeding." Fawcett *v.* Whitehouse, 1 Russ. & M. 132. Shelford in Shelf. Railw. pp. 193, 194, thus

clusion, that it would be impossible to allow Clement to sustain an action upon the agreement * with him. There was in it most of the elements of a vicious contract, which have avoided similar obligations in the * leading cases cited. There was secrecy, individual application, a concealed promise of compensation, and utter ignorance and * recklessness as to the competency of the party whose cause he was promoting, and whose reward he was to receive. There is the difference, that these directors were servants of an organization inferior to that of a state, yet acting in a very spacious sphere, and representing an extensive body of constituents. The difference between their position and that of legislators, upon a question like this, appears to me but shadowy. " If, then, the claim of Clement would be promptly rejected, does the present plaintiff stand in a better position? His original employment might have been consistent with an open, avowed agency, an intent or instructions to make it known, and thus be

lays down the rule in regard to the duty of the directors: " The employment of a director is of a mixed nature, partaking of the nature of a public office. . . . If some directors are guilty of a gross non-attendance, and leave the management entirely to others, they may be guilty, by these means, of the breaches of trust which are committed by others. By accepting a trust of this sort, persons are obliged to execute it with fidelity and reasonable diligence, and it is no excuse that they had no benefit from it, and that it was merely honorary. . . . Supine and gross negligences of duty will amount to a breach of trust." See Charitable Corporation *v.* Sutton, 2 Atk. 400. The same principle, in regard to the effect of the service being gratuitous, is found in the celebrated case of Coggs *v.* Bernard, 1 Salk. 26. In Marshall *v.* Baltimore & Ohio Railroad Co., *supra*, which was an action for a large sum for secret service in getting a bill through the legislature giving the company the right of way. Mr. Justice Grier made some very pertinent remarks, in regard to the duty of courts of justice, in enforcing against railway companies contracts for obtaining legislative grants, by extraordinary efforts and influences, secretly exercised. And see Wood *v.* McCann, 6 Dana, 366; Hunt *v.* Test, 8 Ala. 713; Harris *v.* Roof, 10 Barb. 489; Rose *v.* Truax, 21 Barb. 361, in which similar opinions are expressed. The enormity of such transactions, in some quarters, if universal and concurrent general opinion may be regarded as authentic, is truly appalling. There is an instructive exposition of the subject, in an important case in New York, *In re* Lowber *v.* New York; *In re* Flagg *v.* Lowber. The gist of these cross-actions is, that by collusion with certain of the city authorities, Lowber was to receive $200,000 for a piece of land for a market on the East River. The arrangement was made by consenting to a judgment of court on the report of a referee. Comptroller Flagg, on hearing of this judgment, took measures for obtaining a stay of proceedings. See also Semmes *v.* Columbus, 19 Ga. 471. *Supra*, § 137.

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free from all objections. But we are left in ignorance of what the terms of such original agreement were, — how far they extended. All is indefinite, except merely an employment. He engages Clement, and here again, that employment may have been perfectly free from censure on the plaintiff's part. But upon the best consideration we can give, we cannot separate the act of Clement from the acts of the plaintiff. There is a legal identity for the purposes of this action. The plaintiff must be held to have employed Clement to do what he did do, or to have been bound to superintend his proceedings, and free them from what was illegal. It is impossible to permit him to profit by the misdeeds of his own agents, however ignorant and exempt from them himself. His ignorance, when knowledge was a duty, becomes equivalent to a fault."

4. The directors of a corporation, created for business purposes and profit, are trustees for the shareholders, and owe them all the duties and responsibilities which attach to other trustees and agents. If, therefore, a director enter into a contract for the company, he can derive no personal benefit from it.[4] (*b*) Accordingly, * where the company had furnished the director with a large sum of money, to enable him to purchase the concession of another company in regard to their line, and he purchased it, as it turned out, from himself, being the concealed owner of it, it was held that the transaction could not stand; but the company must adopt or repudiate it altogether. But the company having sold the concession during the pendency of a suit impeaching the transaction, it was held they could have no relief, either as to the application of the money or otherwise.[5]

5. And where the directors of an insurance company had purchased the stock of one of the board, and allowed him to retire from his position both as director and shareholder, and had used the funds of the company to compensate him for his shares, it

[4] Great Luxembourg Railway Co. *v.* Magnay, 25 Beav. 586; s. c. 1 Jur. N. S. 839; s. p. Kimber *v.* Barber, 20 W. R. 602. And the fact that the company suffer no detriment will make no difference. Flint & Pere Marquette Railroad Co. *v.* Dewey, 14 Mich. 477.

[5] See also Sturges *v.* Knapp, 31 Vt. 1.

(*b*) Nor can he acquire for himself property, e. g., right of way, which it is his duty to acquire for the company, and which is necessary for its purposes. Blake *v.* Buffalo Creek Railroad Co., 36 N. Y. 185.

was held that this was such an irregularity as could not be confirmed and legalized by a meeting of the shareholders even, unless the deed of settlement under which the company was formed provided for its being so ratified, or for its transaction by the directors.[6] And it was held, that in such case a bill in equity, filed by certain shareholders on behalf of themselves and the others against the company and the directors, praying that the directors might be decreed to restore to the company the funds so diverted by them, was maintainable.[6]

6. It seems to be regarded as a valid contract between the different directors of a corporation, by which one portion purchase the interest of another portion, to enable them to retire with a view to heal dissensions in the board; and the fact that the money is paid by the company's bankers and refunded by a resale of the shares thus purchased, will not render the contract invalid.[7]

7. But where by a constitutional provision of a corporation the director's office was vacated, if he participated in the profits of any contract with the company, but the company were empowered to borrow money on the director's own individual responsibility, or on other securities, it was held that a director, lending his own money to the company at a large interest, was not thereby disqualified from being a director.[8] (*c*)

* 8. A director who acts as such by sitting at the board and executing works for the company, will be treated as such so far as his claim against the company is concerned, although he was not properly appointed.[9]

9. It is not *ultra vires* for a hotel company to lease part of their premises to a business company, with the condition that the

[6] Hodgkinson *v.* National Live Stock Insurance Co., 5 Jur. N. S. 478, 969; S. C. 26 Beav. 473.

[7] Haddon *v.* Ayers, 1 Ellis & E. 118; S. C. 5 Jur. N. S. 408.

[8] Bluck *v.* Mullalue, 5 Jur. N. S. 1018; S. C. 27 Beav. 398. A director cannot derive any benefit, directly or indirectly, from contracts made by him with contractors for construction of the road. European and North American Railroad Co. *v.* Poor, 59 Me. 277.

[9] *In re* South Essex Gas Light & Coke Co., 20 Law J. Ch. 43.

(*c*) A director may receive property of the corporation as collateral security for an honest debt or liability. Duncomb *v.* New York, Housatonic, & Northern Railroad Co., 88 N. Y. 1.

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first company shall have the exclusive privilege of supplying the portions so leased with all provisions, wines, and liquors.[10]

10. Under the English statute[11] it is an answer to a claim for compensation for works of the company executed by the plaintiff, that he was at the time of entering into the contract interested therein, and it makes no difference that the consideration was executed, and the company had had the benefit of the contract.[12]

11. A contract made between the projector of a corporation and the directors of the company thereafter created, which is not in terms made conditional on the completion of the company, is not under the English statute binding upon the company when fully established.[13]

12. A rule of the constitution of the company, whereby a director is prohibited from voting upon any matter in which he is interested, will not preclude him from voting as a shareholder at a general meeting.[14] But the resolution of a board of directors, of which the creditor is a member, acknowledging the existence of a debt barred by the statute of limitations, will not operate to remove * such bar, if indeed any resolution of the board will bind the company to that extent.[15]

13. Although it is the unquestionable right of every member of the company to restrain the unlawful acts of the directors, still when it appears that the plaintiff is a mere puppet in the hands

[10] Simpson *v.* Westminster Palace Hotel Co., 6 Jur. N. S. 985; S. C. 2 De G. F. & J. 141; S. C. 8 H. L. Cas. 712. But where the promoters of a railway contracted with a land-owner, a peer of parliament, to pay him £20,000, for his countenance and support in obtaining their act, independent of and above all ordinary compensation for land and other damages, another separate contract defining the land to be taken and the amount to be paid therefor, the directors of the company after its organization having ratified the first contract, it was held that the original agreement and the ratification by the directors were *ultra vires* of the company, and could not be enforced against it. Shrewsbury *v.* North Staffordshire Railway Co., Law Rep. 1 Eq. 593. See also Joint-Stock Discount Co. *v.* Brown, 12 Jur. N. S. 899; S. C. Law Rep. 3 Eq. 139.

[11] Statute 7 & 8 Vict. c. 110, § 29.

[12] Stears *v.* South Essex Gas Light & Coke Co., 9 C. B. N. S. 180; S. C. 7 Jur. N. S. 447. See also *Ex parte* Walker, 8 De G. M. & G. 607.

[13] Gunn *v.* London & Lancashire Insurance Co., 12 C. B. N. S. 694.

[14] Lead Mining Co. *v.* Merryweather, 10 Jur. N. S. 1231; S. C. 2 H. & M. 254.

[15] *Ex parte* Gold Mining Co., 10 Law T. N. S. 229.

of others not members of the company, who indemnify him against the costs of the suit, the court will not interfere by interlocutory injunction.[16]

14. Where the directors, in good faith, for the benefit of the company, commenced a criminal prosecution for libel against the members of a committee of inspection and investigation of the affairs of the company and the conduct of the directors, appointed by dissatisfied shareholders, it is not competent for them to charge the costs of such prosecution against the company, or pay them out of the company funds; and a court of equity, at the suit of any dissentient shareholder, will enjoin the directors from doing so in future, notwithstanding their conduct had been sanctioned, as to a portion of the payments then made, at the half-yearly meeting of the shareholders. But as the court has a discretion in granting relief by injunction in such cases, it will not, in that mode, compel the directors to refund the money so paid by them and sanctioned by the majority of the shareholders before proceedings taken to enjoin them.[17]

15. One railway director will be held responsible for any unlawful act of the others in misapplying the funds of the company, if known to him and he took no steps to hinder it. In such cases it is his duty to take effective steps against all such acts of his co-directors; and if need be to resort to an injunction in chancery, and if he omit to do so he will be regarded as assenting to such acts.[18]

16. The courts have no visitatorial powers over corporations except what is given by statute, and can only withdraw the control of the same from the directors and shareholders and put its management into the hands of receivers, when it appears that the management of the company is conducted with a fraudulent disregard of the interests of the shareholders or the public.[19]

[16] Filder *v.* London, Brighton, & South Coast Railway Co., 1 H. & M. 489.

[17] Pickering *v.* Stephenson, 20 W. R. 654, where a very interesting opinion was delivered by Wickens, V. C; s. c. Law Rep. 14 Eq. 322.

[18] Joint-Stock Discount Co. *v.* Brown, 17 W. R. 1037; s. c. Law Rep. 8 Eq. 381. It is no excuse for the director who signed improper checks on behalf of the company, that he did it as mere routine. Ib.; Ottoman Co. *v.* Farley, 17 W. R. 761. But in the very late case, Spering *v.* Smith, 29 Leg. Int. 245, it was held that the directors of a joint-stock company were not liable to make good losses caused by their mismanagement merely. It must appear that they were guilty of fraud, wilful misconduct, or breach of trust.

[19] Belmont *v.* Erie Railway Co., 52 Barb. 637. And it was here held, that the

17. Directors will be held personally responsible for money expended by them in "rigging the market," as it is called, that is purchasing shares above par in order to raise the credit of the company.[20]

SECTION VII.

Right to dismiss Employés.— Damages for wrongful Dismissal.

1, 2. Whether employé, if wrongfully dismissed, may recover salary for full term. English courts hold not.
3. Some American cases take the same view.
4. Where the contract provides for a term of wages, after dismissal, it is to be regarded as liquidated damages.
5. Statute remedy in favor of laborers of contractors, extends to laborers of sub-contractors.

§ 141. 1. Where a railway company dismiss a servant, superintendent, or other employé, without just cause, it seems to be considered, in some cases, that they are *prima facie* liable for the salary, for the full term of the employment.[1] This proposition has been often made by judges, and seems to have been acquiesced in by the profession, to a very great extent; but in an English case,[2] where the subject is examined with great thoroughness, the opinion of the judges certainly seems to incline to a different result. Patteson, J., said: —

2. "I am not aware that this precise point has been raised in *any case. . . . Mr. Smith, 2 L. Cases, 20, says, 'that a clerk, servant, or agent, wrongfully dismissed, has his election of three

misconduct of the directors would not justify taking the control of the company from the stockholders and placing it under an officer of the court.

[20] Land Credit Co. *v.* Fermoy, 17 W. R. 562; s. c. Law Rep. 8 Eq. 7.

[1] Costigan *v.* Mohawk & Hudson Railway Co., 2 Denio, 609.

[2] Goodman *v.* Pocock, 15 Q. B. 576. In this case a clerk, dismissed in the middle of the quarter, brought an action for the wrongful dismissal, on the special contract, and, in the trial of the action, the jury were instructed that they should not, in assessing damages, take into account the services rendered by plaintiff in the broken quarter, for which he had received no pay. The plaintiff then brought this action for those services, and the court held, that those services should have been taken into account in assessing damages in the former action, and that no recovery could be had in this action, on account of the former recovery.

remedies. 1. He may bring a special action for his master's breach of contract, in dismissing him. 2. He may wait till the termination of the period for which he was hired, and may then *perhaps* sue for his whole wages, in *indebitatus assumpsit*, relying on the doctrine of constructive service. Gandell *v.* Pontigny, 4 Camp. 375. 3. He may treat the contract as rescinded, and may immediately sue upon a *quantum meruit*, for the work he actually performed. Planché *v.* Colburn, 8 Bing. 14.' I think Mr. Smith has very properly expressed himself with hesitation, as to the second of the above propositions; it seems to me a doubtful point." Lord CAMPBELL, C. J., and COLERIDGE, J., both agree that the party, dismissed without cause, may bring *indebitatus assumpsit*, for the service actually performed, or may sue for the breach of the contract in dismissing him, but cannot do both. And ERLE, J., lays down the rule very distinctly, and, as it seems to us, upon the only sound and sensible basis. "The plaintiff had the option, either to treat the contract as rescinded, and to sue for his actual service, or to sue on the contract for the wrongful dismissal. . . . As to the other option, referred to by Mr. Smith, I think that the servant cannot wait till the expiration of the period for which he was hired, and then sue for his whole wages, on the ground of a constructive service, after dismissal. I think the true measure of damages is the loss sustained at the time of dismissal. The servant after dismissal may and ought to make the best of his time, and he may have an opportunity of turning it to advantage. I should not say anything that might seem to doubt Mr. Smith's very learned note, if my opinion on this point were not fortified by the authority of the Court of Exchequer Chamber, in Elderton *v.* Emmens, 6 Com. B. 160."

3. The cases in this country[3] have sometimes taken a similar view of the rule of damages, in such cases, and the rule must, we think, ultimately prevail everywhere.[4]

[3] Algeo *v.* Algeo, 10 S. & R. 235; Donaldson *v.* Fuller, 3 S. & R. 505; Perkins *v.* Hart, 11 Wheat. 237.

[4] Spear & Carlton *v.* Newell, decided by the Supreme Court of Vermont, but not reported. In this case the plaintiff sued for the price of rags and other materials furnished, to supply a paper-mill under special contract. The materials were, at one time, unfit for use, on account of latent defects, for which by the contract the plaintiffs were liable. The defendant claimed that the rule of damages should be the rent of the mill and the expense of supplying workmen until good materials were furnished. But the court held, that

* 4. Where the contract specifies the time for which the party employed shall be entitled to wages after notice of dismissal, that is to be regarded as stipulated damages for the breach of the contract.[5] But even this cannot be recovered under the *indebitatus* count for work and labor.[6]

5. Where the statute provides, that the laborers of contractors upon a railway may give notice to the company of their wages remaining unpaid, in certain contingencies, and thus charge the company, the provision was held to extend to laborers and workmen of sub-contractors.[7]

it was the duty of the defendant to make the best of the case, on his part, and that he could recover only such damages as intervened, before he had opportunity to supply himself with proper materials.

[5] Hartley *v.* Harman, 11 A. & E. 798.

[6] Fewings *v.* Tisdal, 1 Exch. 295.

[7] Kent *v.* New York Central Railroad Co., 12 N. Y. 628; Peters *v.* St. Louis & Iron Mountain Railroad Co., 24 Mo. 586. Where the statute in such case makes the company liable for thirty days' labor of the workmen, it is not indispensable that the labor should have been performed in thirty consecutive days, to entitle them to compensation against the company. Under the new code of Missouri such claims may be sued in the name of an assignee. Ib.; *Infra*, § 244, note 12. In New York, where the general railway act gives laborers on railways a remedy against any sum due the contractor, under certain conditions, it has been decided that the provision extends only to those who perform the labor personally, and will not embrace such as procure others to perform labor on the works, or who furnish team-work, whether with or without their own personal service. Balch *v.* New York & Oswego Midland Railroad Co., 46 N. Y. 521.

*CHAPTER XXII.

ARRANGEMENTS BETWEEN DIFFERENT COMPANIES.

SECTION I.

Leases, and similar Contracts, require the Assent of Legislature.

1. In England, by statute company may contract with another for right to pass over its road. Contract binding.
2. Cannot transfer as by lease duty of one company to another, without legislative grant.
3. Leasing company still liable to public. Liability of lessee.
4. Equity will enjoin company from leasing, without legislative consent.
5. Such contracts, made under legislative permission, are to be carried into effect.
6. Majority of company may obtain enlarged powers, with new funds.
7. So the majority may defend against proceedings in legislature.
8. Legislative sanction will not render valid contracts *ultra vires*.
9. Company cannot assume duties of ferry, without legislative grant.
10. Grant to company of implied right to establish a ferry to connect its terminus with depot on opposite side of river, does not extend responsibility of company as a carrier by rail to the ferry.
11. Such ferry by gratuitous carriage of passengers may infringe franchise of another ferry.
12. Grant to company of a ferry in express terms will not authorize carriage of anything except its passengers and freight.
13. Legislative confirmation of a railway and its location will not affect past defaults.

§ 142. 1. The English statute[1] gives special permission to one company to contract with other companies for the right of passage over their track. And this has been construed to give the right to contract for the privileges ordinarily attaching to such passage, of stopping at the stations, and taking up and putting down passengers and freight.[2] The parties will be bound by the terms of the contract, notwithstanding the ninety-second section

[1] Statute 8 & 9 Vict. c. 20, § 87.

[2] Simpson *v.* Denison, 10 Hare, 51; s. c. 16 Jur. 828; 2 Shelf. Railw. Bennet's ed. 694; 13 Eng. L. & Eq. 359.

of the act, which gives all companies and persons the right to use railways upon the payment of the tolls demandable.[3] (*a*)

2. But an agreement between railway companies, without the authority of the legislature, transferring the powers of one company to the other, is against good policy, and a court of equity * will not lend its aid to carry such contract into effect.[4] (*b*) But it has been held, that a contract, by which one railway gives another the right of passage, upon the guaranty of a certain per cent profit upon their stock and all other investments, is a payment of tolls within the statute.[5] It seems to be considered, by

[3] Great Northern Railway Co. *v.* Eastern Counties Railway Co., 9 Hare, 306; 2 Shelf. Railw. Bennet's ed. 696; 12 Eng. L. & Eq. 221.

[4] Great Northern Railway Co. *v.* Eastern Counties Railway Co., 9 Hare, 306; 12 Eng. L. & Eq. 211; South Yorkshire Railway Co. *v.* Great Northern Railway Co., 19 Eng. L. & Eq. 513; Johnson *v.* Shrewsbury & Birmingham Railway Co., 3 De G. M. & G. 911; s. c. id. 581; London, Brighton, & South Coast Railway Co. *v.* London & Southwestern Railway Co., 4 De G. & J. 362; s. c. 5 Jur. N. S. 801, where the subject is extensively examined by the Lord Chancellor, and the cases commented on. In Ohio & Mississippi Railroad Co. *v.* Indianapolis & Cincinnati Railroad Co., 5 Am. Law Reg. N. S. 733, a case before the Superior Court of Cincinnati, the question of the right of a railway, chartered by one state, to contract with the railways of other states for permanent privileges in running cars on such railways, is extensively considered and denied by STORER, J. The case illustrates very forcibly the demand which obviously exists for making all lines of railway extending into different states national agencies rather than mere state institutions. For military and postal purposes railways are far more national than banks, and as means of intercommunication equally so.

[5] South Yorkshire Railway & River Dun Co. *v.* Great Northern Railway Co., 9 Exch. 55; 22 Eng. L. & Eq. 531; s. c. in Exchequer Chamber, 9 Exch. 642; s. c. 25 Eng. L. & Eq. 482. One company having made a beneficial

(*a*) A lease from one company to another, both companies having power to that end, is not vitiated by a covenant for their amalgamation, proper legislation being had, though based on that covenant. Central Railroad & Banking Co. *v.* Macon, 43 Ga. 605.

(*b*) In general, therefore, a company may not lease its road, without legislative permission. Woodruff *v.* Erie Railway Co., 25 Hun, 216; Troy & Boston Railroad Co. *v.* Boston, Hoosac Tunnel, & Western Railway Co., 86 N. Y. 107; Archer *v.* Terre Haute & Indianapolis Railroad Co., 102 Ill. 493. A lease so made is *ultra vires* and void. Thomas *v.* Railroad Co., 101 U. S. 71. But see Pittsburg, Cincinnati, & St. Louis Railway Co. *v.* Columbus, Chicago, & Indiana Central Railway Co., 8 Biss. 456. It may be otherwise however, by statute, as in Illinois. Illinois Midland Railway Co. *v.* Illinois, 84 Ill. 426.

the English courts, that one railway leasing its entire use to another company does not come within this section of the general statute, and as the public thereby lose the security of the first company, for care and diligence, in the discharge of its public duties, the contract, unless made in pursuance of an act of the legislature, or ratified by such act, is illegal, as against public policy.[6] (*c*) At all events, a court of equity may properly decline to lend its aid in enforcing a specific performance of such contract.[7]

3. But even where such contracts have been made, by permission of the legislature, it has been held, in this country, that the company leasing itself does not thereby escape all responsibility * to the public; but that the public generally may still look to the original company, as to all its obligations and duties, which grow out of its relations to the public, and are created by charter and the general laws of the state, and are independent of contract or privity between the party injured and the railway.[8] (*d*) But

contract with another company in regard to traffic, may, with a lease of itself, transfer the benefit of this contract. London & Southwestern Railway Co. *v.* Southeastern Railway Co., 8 Exch. 584; s. c. 20 Eng. L. & Eq. 417.

[6] Johnson *v.* Shrewsbury & Birmingham Railway Co., 3 De G. M. & G. 914; s. c. 19 Eng. L. & Eq. 584; Troy & Rutland Railroad Co. *v.* Kerr, 17 Barb. 581. This doctrine is reaffirmed in the House of Lords in Shrewsbury & Birmingham Railway Co. *v.* Northwestern Railway Co., 6 H. L. Cas. 113.

[7] South Yorkshire Railway & River Dun Co. *v.* Great Northern Railway Co., 19 Eng. L. & Eq. 513; Johnson *v.* Shrewsbury & Birmingham Railway Co., 3 De G. M. & G. 914; s. c. Shrewsbury & Birmingham Railway Co. *v.* London & Northwestern & Shropshire Union Railway Co., 21 Eng. L. & Eq. 319; s. c. 1 Eng. L. & Eq. 122; 3 De G. M. & G. 115. But see cases *supra*, note 5; *infra*, § 146.

[8] Nelson *v.* Vermont & Canada Railroad Co., 26 Vt. 717. But it is, perhaps, worthy of consideration, in regard to this case, that the effect of legislative consent to the lease is not made a point in this case. Sawyer *v.* Rutland & Burlington Railroad Co., 27 Vt. 370. And in Parker *v.* Rensselaer & Saratoga Railroad Co., 16 Barb. 315, where the defendants were running on the Saratoga & Schenectady Railway by virtue of a contract, and the plaintiff's cow was killed through defect of cattle-guards, which it was the duty of that company to maintain, it was held that the defendant was not liable, the

(*c*) But see Midland Railway Co. *v.* Great Western Railway Co., Law Rep. 8 Ch. 841.

(*d*) Abbott *v.* Johnstown, Gloversville, & Kingsboro Railroad Co., 80 N. Y. 27. But whether the lessor or

the party in possession of a railway, whether as lessee or trustee, under a mortgage, is primarily liable for all injuries and defaults.[9] (*e*) But there seems no good reason to excuse the com-

neglect being attributable to that company. Perhaps the only question in regard to the soundness of this decision is, whether both companies are not chargeable with negligence, the one for suffering the road to be used, and the other for using it in that condition. This is the view taken of the law in Clement *v.* Canfield, 28 Vt. 302; *supra*, § 130; Ohio & Mississippi Railroad Co. *v.* Dunbar, 20 Ill. 623.

[9] Barter *v.* Wheeler, 49 N. H. 9, and cases cited. But in the New York & Maryland Line Railroad Co. *v.* Winans, 17 How. 30, it is decided, that where a railway is chartered by one state, and all its stock owned and the road operated by a corporation erected and existing in another state, the first corporation is nevertheless liable to the patentee of an improvement in railway cars for the use of his patent, cars of that construction having been procured and used on the road by the corporation owning the stock of such company. CAMPBELL, J., said, "The corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature."

the lessee will be liable, there is a distinction between cases where the injury results from negligence, &c., in the operation of the road, or from negligence, &c., in the construction, as, e. g., a failure to construct cattle-guards according to statute. St. Louis, Wichita, & Western Railway Co. *v.* Curl, 28 Kan. 622. Thus it is held that the lessee alone is liable to passengers for injuries the result of wrongful acts of agents or servants. Mahoney *v.* Atlantic & St. Lawrence Railroad Co., 63 Me. 68. And liable where its lease binds it to keep fences in repair, for injuries to travellers on the highway through want of repair. Ditchett *v.* Spuyten Duyvil & Port Morris Railroad Co., 67 N. Y. 425. And liable also for injuries the result of want of repair of track. Wasmer *v.* Delaware, Lackawanna, & Western Railroad Co., 80 N. Y. 212. But otherwise, it seems, where the lessee is operating the road in the name of the lessor. Bower *v.* Burlington & Southwestern Railroad Co., 42 Iowa, 546. And *contra*, generally. Peoria & Rock Island Railroad Co. *v.* Lane, 83 Ill. 448. And see Cook *v.* Milwaukee & St. Paul Railway Co., 36 Wis. 45. See also Haff *v.* Minneapolis & St. Louis Railway Co., 4 McCrary, 622. And see United States *v.* Little Miami & Columbus & Zenia Railroad Co., 1 Fed. Rep. 700, which holds the lessor liable for matters prior to the lease.

(*e*) Abbott *v.* Johnstown, Gloversville, & Kingsboro Railroad Co., 80 N. Y. 27. And see *supra*, note (*d*). The lessee, although holding under a lease for which there is no statutory authority, is estopped to deny its validity in an action for rent. Woodruff *v.* Erie Railway Co., 93 N. Y. 609. And this estoppel binds those who claim under the lessee. Ib. But a lease void for want of power to make it is not validated by an acceptance of rent. Ogdensburg & Lake Champlain Railroad Co. *v.* Vermont & Canada Railroad Co., 4 Hun, 268.

pany, assuming to act as common carriers, by virtue of the lease of another company's road, from the ordinary responsibility of common carriers for the transportation across the portion of the route held by lease, on the ground of the responsibility of the company owning and leasing the road, even when the loss occurred from the default * of the latter company in not performing the stipulations in their lease.[10] Nor can the lessees of a railway excuse themselves from responsibility in such cases on the ground that their lease is void, being taken without the sanction of the legislature.[10] And a railway company is always responsible for an injury occasioned by want of proper care and prudence, on the part of its servants, in the management of a train which is under their exclusive care, management, and control, although belonging to another company.[11] But if such injury is occasioned by the negligence of another company, whose car, for the purpose of being loaded by the plaintiff, has been placed upon a side track of defendants', which is in constant use by other roads, that other company is bound to use reasonable care to prevent a collision, and if it fails to do so, whereby the plaintiff receives an injury,

But one company giving permission to another to use a part of its track, does not thereby become bound to keep the track in such repair as to be safe for use. Nor does such company thereby assume any obligation towards the passengers carried thereon by such other company. Murch *v.* Concord Railroad Co., 9 Fost. N. H. 9; *infra*, § 144. See also Briggs *v.* Ferrell, 12 Ire. 1. And in Vermont Central Railroad Co. *v.* Baxter, 22 Vt. 365, the company is held liable for the acts of the contractor in the exercise of the right of eminent domain, in obtaining materials for constructing the road. And a railway company leasing the entire use of its road to another company, is still responsible for damages caused by fires communicated by the engines of the lessees while operating the road. And it will make no difference that one of the buildings destroyed by the fire caught from another building to which the fire first communicated. Ingersoll *v.* Stockbridge & Pittsfield Railroad Co., 8 Allen, 438. But in Massachusetts the general statutes of the state expressly provide that the corporation owning the road shall remain liable for all damage done by other parties operating the road. Mass. Gen. Stat. c. 63, § 116. And there seems to be no ground to question, that on general principles, as stated in the text, when a railway and its accessories are transferred by legislative sanction to the use of other parties, whether as lessees or trustees under a mortgage, and such parties continue to operate the road, they are the party primarily responsible for all loss and damage. Barter *v.* Wheeler, 49 N. H. 9, and cases cited.

[10] McCluer *v.* Manchester & Lawrence Railroad Co., 13 Gray, 124.

[11] Fletcher *v.* Boston & Maine Railroad Co , 1 Allen, 9.

he cannot recover of the company whose cars caused the collision.[11] And if such injury results from the negligence of another company, which has a joint right with the defendants to use defendants' track under a lease, and which is running trains over defendants' road on its own account, the defendants are not responsible.[11] There can be no question of the liability of the company leasing another line of railway, whether within or beyond the limits of the state where the first company exists, for all acts and omissions whereby injury accrues to other parties, while so operating such other line, as lessees, to the same extent and in the same manner precisely as if such injury had occurred upon the line of the first company. And it seems to be the inclination of the American courts to hold this in regard even to those companies who have assumed to operate the roads of other companies, whether temporarily or permanently, and whether by express legislative sanction or not.[12] This subject is very extensively discussed in the case last referred to, and the views presented, although differing somewhat from those hitherto adopted by the English courts, certainly have very much to commend them to favorable consideration. But the original company will be responsible even for the safe delivery of goods carried over the line, where it is leased to a corporation out of the state.[13]

* 4. The English courts have in some instances even restrained railway companies from carrying contracts of leasing into effect, without the authority of the legislature.[14]

5. But such contracts being legal, and not inconsistent with the policy of the acts of parliament, are to have a reasonable construction; and where by the creation of new companies and other facilities, the business is very largely increased, the parties are still to abide by the fair construction of the original contract, as applicable to the altered circumstances.[15]

6. There is no doubt of the right of a railway company in Eng-

[12] Bissell *v.* Michigan Southern & Northern Indiana Railroad Co., 22 N. Y. 258.

[13] Langley *v.* Boston & Maine Railroad Co., 10 Gray, 103.

[14] Winch *v.* Birkenhead, Lancashire, & Cheshire Junction Railway Co., 5 De G. & S. 562; s. c. 13 Eng. L. & Eq. 506; Beman *v.* Rufford, 1 Sim. N. S. 550; s. c. 6 Eng. L. & Eq. 106.

[15] East Lancashire Railway Co. *v.* Lancashire & Yorkshire Railway Co., 9 Exch. 591; s. c. 25 Eng. L. & Eq. 465.

land to apply to the legislature for enlarged powers, even for the power to become amalgamated with other companies, so as to make one consolidated company. And contracts between the different companies, for this purpose, have been there recognized and enforced in courts of equity.[16] And while the courts of equity will enjoin the companies from applying their funds to pay the expenses of such parliamentary proceedings, they will not enjoin them from obtaining additional powers, by legislative acts, when other parties volunteer to furnish the requisite funds.[17] And there seems to be no question made in the English courts, of the power of parliament to extend the line of a railway, or to consolidate existing companies, and that the shareholders are bound by the acceptance of such legislative provisions, by a majority of the company, or by contracts to procure such powers by act of parliament.[18]

* 7. And it has accordingly been held, that a public company, as the commissioners of sewers for a county, might impose a rate to defray the expense of opposing a bill, in parliament, which threatened to affect the interests of the company unfavorably, the same as they might to defray the expense of litigation in

[16] Mozley *v.* Alston, 1 Phillips, 790, where Lord COTTENHAM said: "There is scarce a railway in the kingdom that does not come to parliament for extension of powers."

[17] Stevens *v.* South Devon Railway Co., 9 Hare, 313; Great Western Railway Co. *v.* Rushout, 5 De G. & S. 290; s. c. 10 Eng. L. & Eq. 72; *infra*, § 252.

[18] Great Western Railway Co. *v.* Birmingham & Oxford Junction Railway Co., 5 Railw. Cas. 241. The Lord Chancellor says, that to nullify, in a court of equity, all contracts made on the faith of obtaining the consent of the legislature to carry them into effect, would be "to nullify many family agreements, and all contracts by persons projecting new companies." Shrewsbury & Birmingham Railway Co. *v.* London & Northwestern Railway Co., 4 De G. M. & G. 115; s. c. 9 Eng. L. & Eq. 394. And it has been held, in Columbus, Piqua, & Indianapolis Railroad Co. *v.* Indianapolis & Bellefontaine Railroad Co., 5 McLean, 450, an important case in a federal circuit court, that an agreement between two railway companies to build their roads from certain cities, to meet at a given place, and for the regulation of charges for transportation by both companies, and also the meeting of the cars, and the through freight cars, is a valid contract, and will be enforced by injunction in equity; that to fix the charge for the transportation of passengers and freight, is the exercise of the corporate franchise of each company, and an agreement that both companies shall regulate this is no abandonment or transfer of the franchise of either.

court.[19] Lord CAMPBELL said: "Our determination rests upon the ground that this opposition was clearly *bona fide*, and clearly prudent."

8. In a case, in Vice-Chancellor WOOD'S court,[20] the defendants entered into an agreement to purchase plaintiff's property, there being at the time no legislative permission either to buy or sell such property. Subsequently such * permission was obtained, and steps taken by the defendants, under the act, to carry the contract into effect, but they ultimately refused to complete their purchase, on the ground that the original agreement was not under the seal of the corporation, nor signed by two of their directors. The plaintiffs then filed a bill for specific performance, and it was held that the bill must be dismissed, on the ground that the contract was originally *ultra vires*, not being made dependent upon obtaining the consent of the legislature. It is also said, that the contract would not be binding upon the company, unless made under their common seal, that being required in the defendants' special act, and if it were binding, that mandamus is the more appropriate remedy.

9. A railway company cannot acquire the franchise, so as to be bound to perform the duty of an existing ferry, without the

[19] Regina *v.* Norfolk Commissioners, 15 Q. B. 549. The ground on which the decisions in England and America, which hold the franchises of corporations not to be assignable except by consent of the legislature, rest, is mainly the same as that on which it has been held in this country, that such franchises are beyond legislative control, namely, that the charter constitutes a contract between the sovereignty and the corporation, on the one part, for the grant of certain privileges and immunities, and on the other for the performance of certain duties and functions, which are deemed an equivalent or consideration. And this feature is of peculiar force in the case of that class of corporations on which the legislature has conferred important public duties and functions, as railways and banks, and some others. The state confers on a railway some of its most essential powers of sovereignty, that of eminent domain, and of a virtual monopoly in transportation of freight and passengers, and in return therefor stipulates for the faithful performance of these duties by the corporation. The corporation has no more right, in equity and justice, to transfer its obligations to other companies, or to natural persons, than the state has to withdraw them altogether. Either would be regarded as an abuse of the powers conferred, or an impairing of the just obligation of the contract resulting from the grant and its acceptance.

[20] Leominster Canal Co. *v.* Shrewsbury & Hereford Railway Co., 3 Kay & J. 654; s. c. 29 Law T. 342.

authority of the legislature, given either expressly, or by necessary implication.[21]

10. And the grant to a railway company, having its terminus at the bank of the river Hudson, opposite the city of Albany, of power to connect its terminus upon one side of the river with a depot upon the opposite bank, though it does, by implication, give the right to establish a ferry, does not make it a part of the railway, so that passengers crossing the river may be regarded as carried under the general railway franchise.

11. And where the grant of such a ferry was restricted, by express condition, to the transportation of freight and persons carried by the railway, and their servants and employés, it was held that the company, by constantly carrying other persons gratuitously across their ferry, were guilty of an infringement of the franchise of a pre-existing ferry, the same as if such persons were carried for toll.[22]

12. And the grant in express terms of a ferry as a portion of the line of a railway, will not empower the railway company to use the ferry for any other purpose than the transportation of the freight and passengers of the company.[23]

13. Legislative confirmation of a railway and of its location will not exonerate the company from responsibility for injuries to public or private rights, caused by the manner in which it had constructed or was maintaining part of its road at the time of such confirmation.[24]

[21] BATTLE, J., in State *v.* Wilmington & Manchester Railroad Co., Busbee, 234.

[22] Aikin *v.* Western Railroad Co., 20 N. Y. 370.

[23] Fitch *v.* New Haven, New London, & Stonington Railroad Co., 30 Conn. 38.

[24] Salem *v.* Eastern Railroad Co., 98 Mass. 431.

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*SECTION II.

Necessity for Seal on Corporate Contracts.

1. Necessity for seal. English courts hold seal necessary; American, hold not.
3. What constitutes a seal, according to modern use.

§ 143. 1. The apparent hesitation among the English courts and text-writers[1] to accept the acknowledged rule of the American courts, that a corporation may as well contract, by mere words, without writing, or by implication of law, or by vote, or by writing without seal, as a natural person; in short, that in the case of a contract by a corporation, a seal is of no more necessity or significance than in the case of a contract by a natural person, would seem to justify some reference here to the present state of the English law upon the subject.[2] (*a*)

[1] Hodges Railw. 59, 60, 61, and notes.

[2] It would seem a very obvious view of the question, that if a seal is not, as was at one time claimed, indispensable to the authentication of a corporate contract, if, in short, it can be dispensed with in any case, it becomes merely a matter of reason and discretion, or more properly perhaps, of intention and convenience, in order to show the definite act of the company; and when it shall be required, or when a contract shall be said to be complete without it, is rather a question of usage than an unbending rule of law. Beverley *v.* Lincoln Gas Light & Coke Co., 6 A. & E. 829, is the case of gas-meters ordered for the use of the company by one of the committee, taken on trial, and not returned in a reasonable time, and the company held liable. This is the earliest case in the English books where the courts in that country made any formal departure from the old rule, and it was held, that a corporation aggregate is liable in assumpsit for goods sold and delivered. Patteson, J., refers to the American authorities on the subject, and says: "It is well known that the ancient rule of the common law, that a corporation aggregate could speak and act only by its common seal, has been almost entirely superseded, in practice, by the courts of the United States." And after stating the greater facilities here for advancement in jurisprudence, the learned judge

(*a*) That a seal is not necessary, see Whitford *v.* Laidler, 94 N. Y. 145; University Trustees *v.* Moody, 62 Ala. 389. And where a contract otherwise valid is defective for want of a seal, a court of equity will not declare it void but rather compel parties to seal it. Missouri River, Fort Scott, & Gulf Railroad Co. *v.* Miami County Commissioners, 12 Kan. 182.

* 2. The English courts in many comparatively recent cases seem to have applied the general rule of presumption, by which

enters a formal disclaimer against "the right or the wish to innovate on the law upon any ground of inconvenience, however strongly made out; . . . but when we have" says the learned judge, "to deal with a rule established in a very different state of society, at a time when corporations were comparatively few in number, and upon which it was very early found necessary to ingraft many exceptions, we think we are justified in treating it with some degree of strictness, and are called upon not to recede from the principle of any relaxation in it, which we find to have been established by previous decisions." And this seems to form the basis of the subsequent decisions of the English courts on the subject. The decisions have evinced an effort to preserve the rule, and at the same time to invent and ingraft such a number of exceptions upon it as really to meet all the inconvenience or absurdity which could fairly be objected against the old rule. But in settling the exceptions, the decisions have not always commended themselves as consistent either with reason or with each other; thus affording another striking illustration of the folly of attempting to maintain an absurd rule, through the multiplying of exceptions, each one of which is based on a principle of reason, which, if carried to its legitimate results, would subvert the rule itself. This was in 1837, in the King's Bench, and established the exception to the old rule of executed contracts for goods sold and used by the company in the business for which it was created. The next year the same court held, that a corporation might also maintain an action on an executory contract not under seal. Church *v.* Imperial Gas-Light & Coke Co., 6 A. & E. 846. This was on a contract to take gas of the company, which the defendant below declined to receive. In 1843 a case arose in the Common Pleas, Fishmongers' Co. *v.* Robertson, 5 Man. & G. 131. This was an action on a contract to pay the plaintiffs 1,000*l.* to withdraw their opposition to a bill in parliament, and to promote its passage into a law, the parties being mutually interested in the same, and alleging performance of the contract on the part of the plaintiffs. The subject was very much considered, and an elaborate opinion delivered by Tindal, C. J., and it was decided, that the contract having been executed on the part of the corporation, and the defendants having received the full consideration, the defendants were bound, and that the contract was not void as against public policy. See also Arnold *v.* Poole, 4 Man. & G. 860, to the same effect, where it is held, that no municipal corporation but that of London can appoint an attorney except under the corporate seal. Ludlow *v.* Charlton, 6 M. & W. 815. But in 1846 the Court of Queen's Bench, in Sanders *v.* St. Neot's Union, 8 Q. B. 810, held, that if work be done for a corporation, and adopted for purposes connected with the incorporation, although the contract is not under seal, they are liable for it. The case of Copper Miners *v.* Fox, 16 Q. B. 229, held that the plaintiffs could not sue on a mutual contract, because their portion of it, not being under seal, and being for the delivery of iron rails, while they were incorporated for dealing in copper, and so not coming within the proper business of the company, as a trading company, they were not bound by it, and by consequence the

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the * contracts of natural persons are to be judged, to corporations. Thus[3] it was held, that where a company has stood by and seen

defendants were not. This case admits the exception from the old rule of all contracts pertaining to the proper business of the incorporation, and then attempts a distinction between dealing in iron and copper!—a distinction which, if it be of any force, would show that the contract, being *ultra vires*, would not bind the company in any form. The next case in the order of time, Homersham *v.* Wolverhampton Waterworks, 6 Exch. 193; s. c. 6 Railw. Cas. 790, *supra*, § 113, is for extra work, under a contract, which was done in express violation of the provisions of the general contract in regard to extra work, and was not authorized, in the manner required in relation to contracts, by the company's charter. It seems to have been correctly enough decided, on either ground, that no recovery could be had. *Supra*, § 113, and cases cited. Lamprell *v.* Billericay Union, 3 Exch. 283. But Cope *v.* Thames Haven Dock & Railway Co., 3 Exch. 841, seems to be an express decision affirming the general necessity of the corporate seal to bind the company. And Diggle *v.* London & Blackwall Railway Co., 5 Exch. 442, is of the same character, being for extra work performed in express violation of the general contract; and there are some other cases of this kind in the English reports. But the next case in the order of time, involving the general question, is Finlay *v.* Bristol & Exeter Railway Co., 7 Exch. 409; s. c. 9 Eng. L. & Eq. 483, and here it was held, that although a corporation was liable for use and occupation, on a parol demise, it was liable for the actual occupation only, and that a continuous occupation, for several years, will not render the corporation tenants from year to year. In Clark *v.* Cuckfield Union, 1 Bro. C. C. 81; s. c. 11 Eng. L. & Eq. 442, the cases are all elaborately reviewed by Wightman, J., and the conclusion arrived at, that whenever the purposes for which a corporation is created render it necessary that work should be done, or goods supplied, to carry such purposes into effect, and such work is done, or such goods supplied, and accepted by the corporation, and the whole consideration for payment is executed, the corporation cannot refuse to pay, on the ground that the contract was not under seal; and the case of Lamprell *v.* Billericay Union, 3 Exch. 283, is seriously questioned. In Lowe *v.* London & Northwestern Railway Co., 17 Jur. 375; s. c. 14 Eng. L. & Eq. 18, it is held, where a railway has taken possession of land, and occupied it, by the permission of the owner, for the purposes of its incorporation, that it is liable to be sued in assumpsit, for use and occupation, although it has not entered into a contract under the common seal. But in the case of Smart *v.* West Ham Union, 10 Exch. 857; s. c. 30 Eng. L. & Eq. 560, the question came before the Court of Exchequer, and the judges manifested a firm determination to adhere strictly to the old rule. But in Australian Royal Mail Co. *v.* Marzetti, 11 Exch. 228, it is said that in small matters and matters for which the corporation was created, the corporation may contract without seal. The court

[3] Hill *v.* South Staffordshire Railway Co., 2 De G. J. & S. 230; 11 Jur. N. S. 192.

works performed, * it will be held to have assented to them, as much as if it had been a natural person. But the principle that

might have said, with equal propriety, that the principle of the decision extended to all legitimate business of corporations; for it is impossible to make any sensible distinction, between the proper business of a corporation, as appears on the face of the charter, and that which is purely incidental or ancillary to the proper business of the corporation. And this is conceded by Lord CAMPBELL, in Copper Miners *v.* Fox, *supra*, when refining upon the very elemental distinction between a trade in iron and a trade in copper. And if we allow corporations to bind themselves, without seal, in all the business created by their charter, and in all that is incidental thereto, we shall have few cases remaining. The only remaining case, directly on the subject, which has yet reached us, is that of Henderson *v.* Australian Royal Mail Steam Navigation Co., 5 Ellis & B. 409; s. c. 32 Eng. L. & Eq. 167, where the defendants, a company incorporated for the purpose of carrying the mails, passengers, and cargo, between Great Britain and the Cape of Good Hope and Australia, and for that purpose to construct and maintain steam and other vessels, and to do all such matters as might be incidental to such undertaking, entered into a contract with the plaintiff to go out to Sydney and bring home a sloop belonging to the company which was unseaworthy, and it was held, that the action might be maintained for the service performed under the contract, although the contract was not under seal. The opinion of the judges at length affords the safest commentary on the present state of the English law, and presents an instructive contrast with the settled and satisfactory state of the law in this country.

In Reuter *v.* Electric Telegraph Co., 6 Ellis & B. 346, in the court of Queen's Bench, the defendant had made a contract, under its corporate seal, with the plaintiff, to transmit all his messages, and all he could collect, for a commission not exceeding £500, nor less than £300 per annum, and while this contract was in existence, the chairman of the company entered into a parol agreement with the plaintiff, to pay him at the increased rate of £50 per cent, in consideration of the plaintiff's further services in collecting public intelligence and sending it by the company's telegraph. These additional services were found to be beneficial to the company, and this agreement was entered on the minutes of the company, and the plaintiff received £300 for services in pursuance of it. The deed of settlement provided, that all contracts, where the consideration exceeded £50, should be signed by three directors. It was held, that the parol contract having been acted on, and ratified by the company, was binding. De Grave *v.* Monmouth, 4 C. & P. 111, is a case of ratification. And in Bill *v.* Darenth Valley Railway Co., 1 H. & N. 305; s. c. 37 Eng. L. & Eq. 539, the Court of Exchequer held, that one who had served the company, as secretary, might recover compensation for his services, although the remuneration to be paid him had not been fixed at a general meeting of the company, as required by the English statute. That was held to determine the duty of the directors toward the company, and not to limit the liability of the company to third persons, which is the view taken of the sub-

a company * is not bound by a deed of agreement entered into by its directors or trustees for and on behalf of the company, which is not * under the seal of the company,[4] is still adhered to by the English and Irish courts. And to this extent the rule may not be * objectionable. But there are many American cases, where the construction in favor of the responsibility of the company for the * act of the directors, even in executing a contract under seal

ject here. Noyes *v.* Rutland & Burlington Railroad Co., 27 Vt. 110–113; *supra*, § 136, note 5. But it has been held, that if a corporation contract through an agent, who attaches a seal to his execution of the contract on its behalf, it thereby becomes the deed of the company, although the seal was not its common seal; and an action of assumpsit cannot be maintained on it. Porter *v.* Androscoggin & Kennebec Railroad Co., 37 Me. 349. But it must be executed in the name of the company. Sherman *v.* New York Central Railroad Co., 22 Barb. 239. If, in an action of assumpsit, on a contract, purporting to be executed by a railway company, the company claim that it was executed under its seal, and that therefore an action of assumpsit will not lie on it, and prevail, on this ground, it is estopped to deny, in a subsequent action of covenant on the same contract, that the seal attached to the contract is the seal of the company. Philadelphia, Wilmington, & Baltimore Railroad Co. *v.* Howard, 13 How. 307. But the English courts do not hold the corporation absolutely bound by contracts under its common seal, thus reducing the question to one of authority, in fact, to enter into the contract. Shrewsbury & Birmingham Railway Co. *v.* London & Northwestern Railway Co., 6 H. L. Cas. 113. In London Docks Co. *v.* Sinnott, 8 Ellis & B. 347, the Court of Queen's Bench maintain the general rule that "corporations aggregate can only be bound by contracts under the seal of the corporation." Lord Campbell, in giving judgment, enumerates as exceptions to the rule, mercantile contracts, contracts with customers, and such as do not admit of being executed under seal, e. g., bills of exchange. But in some English cases, it seems to be conceded that corporations may be as much bound by the contracts of their agents as natural persons. Thus in Wilson *v.* West Hartlepool Railway Co., 34 Beav. 187; s. c. 10 Jur. n. s. 1061, it was held that when a company, through its directors, holds out to the world that a person is its agent for a particular purpose, it cannot afterwards dispute acts done by him, within the scope of such agency. And accordingly where the general manager of a railway company having in several instances entered into contracts for the sale of the company's lands, which had been adopted by the company, entered into a contract with the plaintiff for the sale to him of land, and in pursuance of the terms of the contract the company's servants laid down a branch line of railway, and the plaintiff removed machinery and other effects to the land, and no act was done by the company to lead the plaintiff to believe that the contract had been entered into without authority, it was held on bill for specific performance that the case fell within the principle of the London & Birmingham Railway Co. *v.* Winter, Craig & P., 57, and specific performance was decreed.

[4] McArdle *v.* Irish Iodine Co., 15 Ir. Com. Law, 116.

without using the specific seal of the corporation, is more favorable, the directors for the time being held to have adopted the seal used as the corporate seal, the same as any number of natural persons may adopt the same seal. But this latitude of construction in regard to the seal of a corporation is not common in this country, it being generally held indispensable, to bind the company by deed, that their corporate seal should be used.

3. There has been considerable controversy, first and last, as to what, precisely, amounted to a seal. The generally received opinion upon the subject seems now to be, that a mere scroll or engraved likeness of the device of a seal will not answer the demands of the law.[5] It must be the result of the use of some adhesive or impressible material. It was at one time restricted to the use of wax, or some similar material. But it seems now to be regarded as sufficient, in the case of a corporation, if the impression is stamped into the substance of the paper on which the seal is used.[6] There is a great deal of curious learning in regard to seals, much of which will be found in a carefully prepared article upon the subject, lately published.[7]

*SECTION III.

Duty of the respective Companies to Passengers and Others.

1. Company owning road bound to keep road safe. Acts of other companies no excuse.
2. Distinction between cases of negligence in operating and cases of negligence in constructing the road.
3. Passenger carriers in general bound to make landing places safe.
4. Passengers on freight trains by favor, can require only such security as is usual on such trains.
5. Owners of all property bound to keep it in state not to expose others to injury.
6. Rule extends to railway companies, as to persons rightfully on their roads.
7. Corporation keeping open public works is bound to keep them safe for use.
8. Corporation presumptively responsible to the same extent as natural person in the same situation.
9. Railway company hauling cars of a connecting road over its line responsible as a common carrier.

§ 144. 1. A public company, like a canal or railway, who are allowed to take tolls, owe a duty to the public to remove all ob-

[5] Bates *v.* Boston & New York Central Railroad Co., 10 Allen, 251.

[6] Hendee *v.* Pinkerton, 14 Allen, 381.

[7] 1 Am. Law Rev. 649.

structions in the canal or upon the railway, although not caused by themselves or their servants, but by those who are lawfully in the use of the canal or railway, or by mere strangers.[1] (*a*) Nor can a railway company excuse themselves from liability for injury to passengers carried over any part of their road, by showing that the particular neglect was that of a servant employed and paid by a connecting road as a switchman at the junction of two railways.[2] (*b*)

*2. But it was held that a passenger, who suffered an injury in attempting to get upon the cars of one company while using the road of another company, by contract with such company, through a defect in the construction of the road of the latter company, could not maintain an action against them, there being no privity of contract between the plaintiff and such company; the remedy being in such case against the company who were carrying the plaintiff as a passenger.[3] (*c*)

[1] Parnaby *v.* Lancaster Canal Co., 11 A. & E. 223; and Lancaster Canal Co. *v.* Parnaby, 11 A. & E. 230. See *infra*, § 145, pl. 7, 8, and note.

[2] McElroy *v.* Nashua & Lowell Railroad Co., 4 Cush. 400, per Shaw, C. J. So also where a train of another company and through its own fault, ran into a train standing on its own track, but over which the other company had running powers, it was held that the company owning the track was *prima facie* responsible to its own passengers thus injured. Ayles *v.* Southeastern Railway Co., Law Rep. 3 Exch. 146. So also where a company grants the use of its track to another company, whereby through the fault of the latter company its own passengers are injured, the first company is responsible. Railway Co. *v.* Barron, 5 Wal. 90. And a railway passenger carrier is responsible for the sufficiency of a carriage which it borrows and uses to the same extent as for its own. Jetter *v.* New York & Harlem Railroad Co., 2 Keyes, 154.

[3] Murch *v.* Concord Railroad Co., 9 Fost. N. H. 9; Winterbottom *v.*

(*a*) But see *supra*, § 112, notes (*c*) and (*d*).

(*b*) See Wright *v.* Midland Railway Co., Law Rep. 8 Exch. 137. And see also Hannibal & St. Joseph Railroad Co. *v.* Martin, 11 Brad. 386, in which it is held that a company is liable for injury to a passenger inflicted by the servants of another company in making up a train in the depot of the latter company, under an arrangement with the former. But where a passenger is injured by a collision occasioned by the negligence of a company by whose road he is travelling, and of another with which he has no contract, he may maintain a suit against either company. Wabash, St. Louis, & Pacific Railway Co. *v.* Shacklet, 105 Ill. 364.

(*c*) See *supra*, note (*a*). In Smith *v.* St. Louis & San Francisco Railway Co., 9 Mo. Ap. 598, it is held that a company is not liable for injury to a passenger on one of its cars, of which another company is bailee.

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* 3. And while the cases recognize the duty in such companies as carry passengers, either upon their own road or that of other

Wright, 10 M. & W. 109. But a railway company owes a public duty, independent of all privity of contract, to keep its public works in such a state of repair, and so watched and tended as to insure the safety of all who are lawfully on them, either by their direct permission or mediately through contract with other parties. Sawyer *v.* Rutland & Burlington Railroad Co., 27 Vt. 377. The same principle is maintained in Smith *v.* New York & Harlem Railroad Co., 19 N. Y. 127, where it was decided that a switch-tender, employed by a railway company on a portion of its road on which it permits another company to run trains, is not a servant of the latter; and an engineer of the latter, injured by the negligence of such switch-tender, may maintain an action against the company employing him. But where animals were killed by the train of one company, while rightfully on the track of another company, it was held that the company owning the road was responsible for the damage. Indianapolis & Madison Railroad Co. *v.* Solomon, 23 Ind. 534. So an apothecary, who sold a deadly poison labelled as a harmless medicine, was held directly liable to all persons injured thereby, in consequence of the false label, without fault on their part. The liability of the apothecary arises, not out of any contract or privity between him and the person injured, but out of the duty which the law imposes on all, to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug, with such label, may have passed through many intermediate sales before it reaches the hands of the person injured, on the same principle that one who suffers a dangerous animal to go at large, is responsible for the consequences. Thomas *v.* Winchester, 2 Seld. 397. In Toomey *v.* London, Brighton, & South Coast Railway Co., 3 C. B. N. S. 146, the plaintiff mistook a door at a railway station, and passing through it, fell down a flight of steps and was hurt. There was a light over the door which he intended to pass through, and a printed notice showing the purpose of it. There was also an inscription over the other, but no light. The defendant could not read. There was no evidence that the steps were more than ordinarily dangerous. The company was held not liable. But a railway company is bound to fence a station so that the public may not be misled, by seeing a place unfenced, into injuring themselves by passing that way. Where a passenger, in waiting for a train, had gone to a public house for refreshments, the porter showing him the way with his lantern, and hearing the bell ring started out for the station, and mistaking the light of the engine for that of the station crossed an open space direct, and was injured by falling into a hole three feet deep, it was held the company were liable. Burgess *v.* Great Western Railway Co., 6 C. B. N. S. 923. And where a hackman was injured, while bringing a passenger to the station, by stepping, without fault, into a hole in the platform, the company being in fault for leaving the platform in that condition, it was held that he might recover. Tobin *v.* Portland, Saco, & Portsmouth Railroad Co., 59 Me. 183. And the fact that the platform was within the limits of the highway will make no difference. Ib. A railway company has been held not liable for an injury through

companies, by permission or lease, to make the approaches to such road safe, at all points where freight or passengers are usually received, this duty does not exist in regard to a passenger who, out of special favor, is allowed to get upon the train at an unusual place for receiving passengers.[3] And the same rule has been extended to the owners of docks, who keep up the gangways to ships while remaining at their docks; and where they were left unsafe by the negligence of the servants having charge of the same, and one who visited a ship in the dock on business, by invitation of the officer, was injured by the defect in the gangway without his own fault, it was held the dock owners were responsible.[4]

4. And one who, by favor, is allowed to travel upon a freight-car, contrary to the usual custom of the company, is bound to be satisfied with such facilities and accommodations as usually exist upon freight trains, as railway companies are not to be regarded as common carriers of passengers upon their freight trains, unless they make it an habitual business.[3]

5. It has been held that natural persons, who assume no public * duties, are liable, if they suffer their property to remain in a dangerous condition; as that the occupier of land is bound to fence off a hole or area upon it which adjoins or is so close to a highway that it may be dangerous to passers-by if left unguarded.[5]

a defect in a crane which it had furnished to a consignee of heavy goods to enable him to unlade them from the cars, although such crane was known to the company to be inadequate for the use for which it was furnished, the party injured having been employed to assist the consignee, and having thereby lost his life. The case was put on the ground of want of privity, it being admitted that the company in such case would have been liable to the party to whom it furnished the crane, if he or his ordinary servants had sustained injury in its prudent and lawful use. But the party here was called in for the occasion. Blakemore *v.* Bristol & Exeter Railway Co., 8 Ellis & B. 1035. It seems to us the principle of want of privity is here misapplied. This is a clear case of tort and not of contract, and the party injured, although called in for the occasion, was *pro hac vice* a servant of the borrower, and it was the same as if the borrower himself had been injured. The furnishing of the instrument had express and direct reference to its use by the consignee and his servants, extraordinary as well as ordinary.

[4] Smith *v.* London & St. Katherine's Dock Co., Law Rep. 3 C. P. 326.

[5] Barnes *v.* Ward, 2 Car. & K. 661.

6. The same rule has often been extended to turnpike roads[6] and to plank roads, where the statute made no provision for the liability of the company.[7] And the same rule has been extended generally to railway companies in this country, without question, so far as persons are rightfully in the use of the same.[8] It was held that the owner of a car which was in the use of another party, upon a railway, by contract between him and the company, and which suffered an injury by reason of the bad state of the railway, might maintain an action against the company.[8]

7. This principle or an extension of it, has been a good deal discussed in a case in the House of Lords.[9] The plaintiffs, * a

[6] Randall *v.* Cheshire Turnpike Co., 6 N. H. 147; Townshend *v.* Susquehanna Turnpike Co., 6 Johns. 90.

[7] Davis *v.* Lamoille County Plank Road, 27 Vt. 602.

In the case of Gibbs *v.* Liverpool Docks, 3 H. & N. 164; s. c. 31 Law T. 22, it was held, in the Exchequer Chamber, reversing the judgment of the Court of Exchequer, that it is the duty of those receiving tolls, whether as trustees or otherwise, not to allow a dock to remain open for public use, when they know that it is in such a state that it cannot be used without danger, citing Parnaby *v.* Lancaster Canal Co., 11 A. & E. 223, and distinguishing the case from Metcalfe *v.* Hetherington, 11 Exch. 257. But it seems the party is never liable in such case, unless he knew or might have known of the defect but for his own neglect of duty. McGinity *v.* New York, 5 Duer, 674. See *supra*, note 9.

[8] Cumberland Valley Railroad Co. *v.* Hughs, 11 Penn. St. 141.

[9] Mersey Docks & Harbor Board *v.* Penhallow, Law Rep. 1 H. L. 93; s. c. 12 Jur. N. S. 571. The recent cases bearing on the general question of the responsibility of one party for negligence in his own business incidentally operating to produce injury to another, which are here discussed by court or counsel, are the following: Metcalfe *v.* Hetherington, 5 H. & N. 719; Coe *v.* Wise, 10 Jur. N. S. 1019; Holliday *v.* St. Leonard, 8 Jur. N. S. 79; s. c. 11 C. B. N. S. 192; Pickard *v.* Smith, 10 C. B. N. S. 470; Southampton & Itchin Bridge Co. *v.* Local Board of Health, 8 Ellis & B. 801; Ruck *v.* Williams, 3 H. & N. 308; Whitehouse *v.* Fellowes, 10 C. B. N. S. 765; Brownlow *v.* Metropolitan Board, 8 Jur. N. S. 891; s. c. 13 C. B. N. S. 768; Jones *v.* Mersey Board, 11 Jur. N. S. 746. There is obviously considerable conflict in the decisions bearing on this general question. The result of the discussion in the latest case before the court of last resort in England, *supra*, seems to be, that the statute is the only and sufficient warrant for creating any such public work as a railway, harbor, or canal; that the responsibility of those to whom the power is given, depends on the provisions and construction of the statute; that it is unimportant whether the grantee of the power is a natural person or a corporation, the responsibility in either case will be the same; that in the absence of all special statutory provision to the contrary, the builders of such works, and those who operate the same for their own benefit, or the benefit of

corporation, were empowered by act of parliament to make and maintain docks for the use of the public, and to take tolls from persons using them. The corporation did not, nor did its individual members, derive any emolument from the tolls, but was bound to apply them in maintaining the docks, and in paying a debt contracted in making them. The corporation had the usual powers of appointing water-bailiffs, harbor-masters, and servants, by whose hands the duties of superintendence were carried out. A ship, in entering one of the docks, struck against a bank of mud left at its entrance, of the existence of which the corporation was either aware, or negligently ignorant. The ship and cargo being both injured, separate actions were brought by the respective owners. It was held, affirming the judgment of the Exchequer Chamber,[10] that as long as the docks were open for the use of the public, the corporation were bound, whether they received the tolls for private or fiduciary purposes, to take care that the docks were navigable without danger; and consequently that they were liable in damages.

8. It was here held, that in construing statutes creating bodies corporate, such as the plaintiffs, the legislature must be considered, unless the contrary appears, to intend that the corporate bodies shall be under the same liabilities and duties as are imposed by the general law upon private persons doing the same things.

9. A railway company which for an agreed compensation receives and draws over its own line the cars of a connecting road * is responsible, as a common carrier, for the safe delivery of the passengers and freight, the same as in other cases. And where, by an agreement between the two companies, the latter is to indemnify the former from all claims for damages in consequence of the transportation, unless caused by the default of the trans-

others, are bound to see that they are constructed with reasonable care and skill, and maintained in the same condition. It was at one time supposed that the grantee of such a power might excuse himself from all responsibility by showing good faith and diligence in the discharge of the public duty imposed by the grant of the power. Sutton r. Clarke, 6 Taunt. 29. But it has since been held that this is not enough, and that the grantees of such a power are bound to conduct themselves in a skilful manner, and to do all that any skilful person could reasonably be required to do in such a case. Jones r. Bird, 5 B. & A. 837.

[10] 3 H. & N. 164; 4 Jur. N. S. 636.

porting company, or from some defect in its road, this will leave the transporting company responsible both under the contract, and independently of it, upon general principles, for an injury caused by a defect in its track, although without its fault.[11]

SECTION IV.

Powers and Duties of Lessees of Railways.

1. Construction of a lease in an important case.
2. Lessees of railways liable for their own acts, and for many acts of lessors.

§ 145. 1. A very elaborate and important case upon the relative rights and duties of the lessors and lessees of railways came before the Court of Common Bench in June, 1851, and the Exchequer Chamber in January, 1853. The importance and difficulty of the subject, and the few cases upon it which have yet arisen, will justify an extended notice of the points decided in the court of last resort.[1] In 1836 a company (afterwards called the

[11] Vermont & Massachusetts Railroad Co. *v.* Fitchburg Railroad Co., 14 Allen, 462. A contract by the owners of a railway, to be made under an act of incorporation, with the owners of a rival railway, not to continue such road beyond a certain point, is void as contravening public policy. Such a contract does not affect a prior agreement between the owners of such road, who also owned another railway adjoining the latter, to divide the through fares of passengers on such continuous road in a certain proportion; although the former contains a provision to deduct an additional sum monthly from such through fares as a consideration for entering into such new illegal contract; and such through fares must be divided as though such second and illegal contract had never been made.

The division of the through fares of passengers on a connected line of railway, consisting of two adjoining roads, owned by different companies, according to certain regulations, for six years without objection, creates, by construction, a modification of any former contract in conflict therewith, and becomes binding on the respective parties, until annulled or suspended by a new contract. Hartford & New Haven Railroad Co. *v.* New York & New Haven Railroad Co., 3 Rob. 411. All persons who carry on the business of common carriers of goods or passengers on a railway will be held responsible to third persons for any damage sustained by their default, even when they were acting as receivers of the Court of Chancery of another state. Paige *v.* Smith, 99 Mass. 395.

[1] West London Railroad Co. *v.* London & Northwestern Railway Co., 11 C. B. 327; s. c. 18 Eng. L. & Eq. 481.

West London Railway Company) was incorporated by act of parliament for the making of a railway from the Kensington Canal to join the London and Birmingham (afterwards called the London and Northwestern) and the Great Western Railways at a place called Holsden Green, and certain duties were by the act cast upon the company; and, among other things, it was provided that, if the railway should be abandoned, or should after its completion, cease for the space of three years to be used as a railway, the land taken by the company for the purposes of the act should revert to the owners of the adjoining land. In February, 1837, the West London Railway Company entered into an agreement with the Great Western Railway Company, under which the last-mentioned company bound themselves to stop certain of their trains at a point where their railway intersected the West London Railway, for the purpose of transferring passengers and goods from one railway to the other, and to stop their trains for the purpose of meeting corresponding trains of that company, in the manner particularly detailed in the deed. In 1840 another act (3 & 4 Vict. c. 105) passed, giving further powers to the West London Railway Company; the thirty-fourth section, reciting the agreement of February, 1837, regulated the mode of crossing, until the plaintiffs' railway should be completed; the thirty-sixth section saved the plaintiffs' right under that agreement; and the thirty-seventh section provided, that if the plaintiffs' line was abandoned, or ceased to be used as a railway for three years after its completion, then, on payment or tender to them by the Great Western Railway Company of the purchase-money of the piece of land where the railways crossed, the said land should vest in the Great Western Railway Company. By a subsequent act (8 & 9 Vict. c. 156), reciting that "it had been found that the said West London Railway [which it appeared in evidence had been worked with passenger trains as well as with goods trains] could not be worked, as a separate and independent undertaking, with advantage to the proprietors thereof, but that the same might be advantageously worked and used in connection with the said London and Birmingham Railway, and the said Great Western Railway, or either of them, by both or either of the companies to whom the said last-mentioned railways belonged; that the West London Railway Company were therefore desirous of letting the said railway on lease to the London and Birmingham Railway Company;

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and that the last-mentioned company were willing to accept such lease, subject to certain terms and conditions which had been mutually agreed on between the said two companies," — the West London Railway Company was authorized to lease to the London and Northwestern Railway Company their railway, and all their rights, powers, and privileges in relation thereto, subject to the provisions of the act, and to the performance of the conditions to be mentioned in such lease. By the lease, which was afterwards executed in pursuance of this act, the London and Northwestern Railway Company covenanted, among other things, that they would "at their own expense, during the continuance of the lease, efficiently work and repair the railway and works thereby demised, and indemnify the West London Railway Company against all liabilities, loss, charges, * and expenses, claims, and demands, whether incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the same railway or works; but the West London Railway Company shall have no control whatever over the working or management by the London and Birmingham (Northwestern) Railway Company of the West London Railway or works." It was held that in order to perform their covenant to work efficiently, the defendants were not bound under all circumstances to work the line for passenger traffic, but that, if as much gross proceeds could be obtained by efficiently working the railway for goods only, as for passengers only, or for both passengers and goods, the covenant was well performed; that the agreement of February, 1837, with the Great Western Railway Company, was, by virtue of the provisions in the leasing act and the lease itself, transferred to the defendants, the lessees, and, consequently, that they had power to compel the Great Western Railway Company to stop trains on their line, pursuant to the provisions of that agreement; that, although the defendants had power to stop the Great Western trains, they were not bound to exercise it, necessarily, as a part of the efficient working of the line demised, and that they were not bound necessarily to work the demised line in connection with the trains on the Great Western Railway; that there was no covenant in the lease to bind the defendants to work the demised line in connection with their road and the Great Western Railway, or either of them, but that it would be for the jury to say whether or not they could practi-

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cally work the line efficiently, without some connection with one or other of those railways; that, for the purpose of considering the liability of the defendants, they were not to be treated by the jury as if they were lessees of a separate and independent line, having no control over the other two railways, but that the covenant to work the demised line efficiently, must be construed with reference to the subject-matter and the character of the defendants; that the obligation of the defendants under their covenant, was not limited, as decided by the court below, to the indemnification of the plaintiffs from the obligations cast upon them by their acts of incorporation. The court say, in substance: * If this railway had been leased to a simple individual, or company without any connection with any other railway, and leased alone, the measure of efficient working, we cannot help thinking, would be very different from what would be required from a company whose line was connected with it, who had the entire control over their own line, and were armed with a power of adding to the traffic of the railway, by the control possessed over another line, and whose capabilities and powers in this respect were reasons which disposed parliament to permit the lease to be made to them. It is difficult, indeed almost impossible, to define the precise nature and degree of efficient working which such a company ought to apply, under this covenant; not so difficult to say that it ought to be different and greater than would be required from a company or an individual who had nothing but the railway leased. They could only be required to supply convenient accommodation and attendance for the receipt, and sufficient means of carriage, of such goods and passengers as might be offered at one terminus, or any intermediate station, to be carried to the other terminus, or some other intermediate station; and this however small the gross receipt might be. But that would be too small a measure of efficient working, in the case of these defendants, who have the power of supplying more goods and passengers themselves by facilitating the transit of both from Holsden to the Kensington terminus or Great Western station, or by increased facilities for receiving them at the Kensington terminus, by arrangements within their power, without any serious injury to their own concern. They are certainly not bound to make a sacrifice of their own concerns for the purpose of efficiently working this line so as to produce the greatest profit to the plaintiffs and

themselves. The covenant must have a reasonable construction in this respect. But they are, we think, bound to do more than a lessee of merely the railway in question would do, unconnected with any other.

2. It seems to be regarded as settled that the persons or corporation who come into the use of a railway company's powers and privileges, are liable for their own acts while continuing such use, and also for the continuance permissively of any wrong which had been perpetrated by such company upon land-owners * or others, by means of permanent erections, which still remain in the use of their successors.[2] (*a*) Thus it has been held that the lessees of a railway are liable to a penalty, under the statute, for not having a bell upon their engines, and not ringing it, as required by the statute.[3] But the lessees of a railway are not liable for the acts of the servants of the lessors.[4]

SECTION V.

Contracts between Companies regulating Traffic.

1. Such contracts generally held valid and binding.
2. Arrangements to avoid competition valid. Pooling.
3. Construction, force, and operation of contracts between companies.

§ 146. 1. It seems in general to have been considered, that contracts between different connecting companies with a *bona*

[2] In regard to the construction of contracts between different companies for the mutual use of each other's line, or the line of one road by the other, tolls, &c., see Lancashire & Yorkshire Railway Co. *v.* East Lancashire Railway Co., 7 Exch. 126; 8 Eng. L. & Eq. 564; s. c. reversed in Exchequer Chamber, 9 Exch. 591; 25 Eng. L. & Eq. 465; and affirmed in the House of Lords, 5 H. L. Cas. 792; 36 Eng. L. & Eq. 34. It was held in a late Scotch case, on appeal in the House of Lords, that under an act of parliament requiring one company to accept a lease of and operate the other's road, so soon as it was in readiness, the lessees were bound to accept any reasonable portion of the road, when completed, it being such a portion as might be worked with advantage. Edinburgh & Glasgow Railway Co. *v.* Stirling Railway Co., 1 Macq. Ap. Cas. 790; Brown *v.* Cayuga & Susquehanna Railroad Co., 12 N. Y. 486.

[3] Linfield *v.* Old Colony Railroad Co., 10 Cush. 562.

[4] Walf. Railw. 184, citing two cases not reported.

(*a*) See *supra*, § 142.

fide view to regulate traffic, in a reasonable and just manner, were legal and binding.[1] But when it is considered that these companies have to a very great extent a monopoly of the traffic and travel of the country, the power to regulate fares and freight by arrangement between the different companies is certainly one very susceptible of abuse. But there is ordinarily very little *danger that they will willingly incur the serious reprobation of public opinion. And it has sometimes been doubted whether contracts, whereby one railway company seeks to assume the entire business of other companies, affording them a guaranty in regard to stock and profits, or either, could be regarded as coming within the fair interpretation of the English general statutes, allowing one company to contract for running upon the track of other companies, for tolls, and so could be held valid by the courts of that country, either in law or equity.[2] But some of the later cases seem to sustain such contracts.[3]

2. There is no principle of public policy which renders void a traffic arrangement between two lines of railway for the purpose of avoiding competition. And if the arrangement embrace the division of the net earnings of both companies in certain definite proportions, the court will not interfere upon the ground that one company may not adventure its profits upon the chances of the earnings of another company.[4] (*a*) And it is no valid objection that such division is based upon the experience of the result of past traffic.[4]

[1] Shrewsbury & Birmingham Railway Co. *v.* London & Northwestern Railway Co., 17 Q. B. 652; s. c. 9 Eng. L. & Eq. 394. Lord CAMPBELL says here, that if the object of the contract were to create a monopoly, and to deprive the public of all benefit of competition, it might be illegal, but that an agreement that one company shall not interfere or compete with the other, is no more illegal than a contract by which one tradesman or mechanic agrees not to continue his business in a particular place. Same case in Chancery, before Lord COTTENHAM, 2 Macn. & G. 324, where a similar view is taken of the legality of the contract. Lord LANGDALE, in Colman *v.* Eastern Counties Railway Co., 10 Beav. 1; s. c. 4 Railw. Cas. 513.

[2] Simpson *v.* Denison, 10 Hare, 51; s. c. 13 Eng. L. & Eq. 359.

[3] *Supra*, § 142.

[4] Hare *v.* London & Northwestern Railway Co., 2 Johns. & H. 80; s. c. 7 Jur. N. S. 1145; *infra*, § 148.

(*a*) Morrill *v.* Boston & Maine Railroad Co., 55 N. H. 531. But such arrangements may be forbidden, as in Maine, by statute preventing the pooling of earnings. Ib.

3. There is a case in New Hampshire,[5] where the operation and construction of a contract between different railway corporations, for conducting the traffic across both, is considerably discussed. The ordinary rules of construction of contracts were held applicable to such cases; i.e., that the existing powers and duties of the companies and the leading objects of the contract should be considered in aid of the interpretation. And it was held the contracting companies were not thereby restricted from acquiring new powers, with reference to distinct objects, but such new powers must be kept aloof from and so as not to interfere with the objects contemplated by the contract, and could not be allowed to have any operation upon its construction. The corporations may, by consent, modify the operation of such contract or the application of the earnings of the roads; but shareholders, who have not assented to such modification of the contract, may, in equity, hold both corporations to account for the net income, according to the terms of the contract. And if the contract provides for deciding all disputes under it by arbitration, a court of equity, upon such a bill, may enjoin the corporations from submitting the questions involved to such arbitration.

SECTION VI.

What constitutes a Perpetual Contract between Companies.

1. Railway connections commonly temporary.
2. Such arrangements matter mainly of public convenience and subject to legislative control.

§ 147. 1. Where in the charter of a railway company a right is reserved to the legislature to allow other railways to connect with the former, upon such terms as shall be reasonable, complying with the established regulations of such company upon the subject, and in pursuance of such reservation a junction is made by a second railway company with the first, which, in faith of such connection, proceeds to make expensive and permanent arrangements for the accommodation of the enlarged business thus brought upon its track, it was held, that this imposed no * obligation upon the second company to continue this connection

[5] Marsh *v.* Eastern Railroad Co., 43 N. H. 515.

permanently; and also that the second company might lawfully obtain an extension of their own road, so as to do their own business without continuing the connection.[1]

2. It seems that ordinarily a mere legislative permission to railway companies to connect their lines imposes no obligation upon either company to do so. And if that were to be so regarded, it is certain that no absolute vested right to insist upon the permanency of such connection could exist in either company, which it would not be competent for the legislature to dissolve. After the connection is made, it is optional with either party to discontinue it, and clearly so by legislative permission. Even after such connection is made, it is not incumbent upon either company to continue the same gauge, or, if so, such right cannot by possibility exist until the connection is made, and if, before that, either company, by legislative act, is relieved from all obligation to connect, this will terminate all possible claim on the part of the other.[2]

SECTION VII.

Contracts by Railways ultra vires *and Illegal.*

1. Contracts to make erections not authorized by their charter.
   n. (a) Contracts for sale or purchase of road.
2. Contracts to indemnify other companies against expense.
3. Contracts to divide profits.
4. Contracts for land for alteration of a branch, pending application to legislature for power to alter.
5. Acceptance of bills of exchange. No implied power.
   n. (c) Guaranty of bonds of other company. Issue of preferred stock.
6. Contracts *ultra vires* cannot be specifically enforced against the directors.
7. Money unlawfully borrowed company must refund.
8. Confirmation of acts *ultra vires*. Acquiescence does not confirm. Otherwise, sometimes, acceptance of consideration.
9, 10. Company not restrained from making unlawful payments on the ground of policy.
11. *Quære*, if there is legal distinction between matters of internal management beyond powers, and other matters beyond powers.
   n. 15. Permanent arrangements between companies in different states *ultra vires*.

§ 148. 1. It has been considered, that a contract by a railway company with the corporation of a city, by which the company

[1] Boston & Lowell Railroad Co. v. Boston & Maine Railroad Co., 5 Cush. 375.

[2] Androscoggin & Kennebec Railroad Co. v. Androscoggin Railroad Co., 52 Me. 417.

bind themselves to erect a bridge and other accessory works across a river, at a point where by their charter they are not authorized to pass, and to do this by a definite time, and in default to pay one thousand pounds as liquidated damages, * such works being, without an act of parliament, a nuisance, is an illegal contract, and equally so notwithstanding a stipulation that the company shall in the mean time exert themselves to obtain an act authorizing the erections.[1] (*a*)

2. And where the chairman of the Southeastern Railway Company promised the managing committee of a proposed railway company, that in consideration of their not abandoning their project, but pursuing it in parliament, the Southeastern Railway Company would, in case of their bill being rejected, insure the company, of which they were the managing committee, against all loss, and would pay all expenses incurred by them in endeavoring to obtain the act; and the Southeastern Railway Company were authorized, by their acts, to apply their funds in certain ways, not including this: it was held [2] that the agreement was void, as it was an agreement made by contracting parties (who must be presumed to know the powers of the defendants' company, by their acts of parliament, which are public acts) that the company should do an act which was illegal, contrary to public policy and the provisions of the statutes.[3] (*b*)

[1] Norwich *v.* Norfolk Railway Co., 4 Ellis & B. 397; s. c. 30 Eng. L. & Eq. 120. A contract by a railway company, in consideration of the conveyance to the company by a natural person of a certain piece of land (not for any of the ordinary uses of the company, as defined in its charter, but for purposes of speculation), to build one of its freight and passenger depots in a specified place, is void, both as *ultra vires*, and against public policy. Pacific Railroad Co. *v.* Seely, 45 Mo. 212.

[2] Macgregor *v.* Dover & Deal Railway Co., 16 Eng. L. & Eq. 180, in Exchequer Chamber; s. c. 18 Q. B. 618. See also East Anglian Railway Co. *v.* Eastern Counties Railway Co., 11 C. B. 775; s. c. 7 Eng. L. & Eq. 505, where the same question in effect is determined. *Supra*, § 16.

[3] *Supra*, § 56, note 3.

(*a*) In general a company may not sell its road and franchises. Middlesex Railroad Co. *v.* Boston & Chelsea Railroad Co., 115 Mass. 347. But a company having the right to construct a particular line with general power to purchase all kinds of property may buy from another company having a right to sell a road constructed on that line. Branch *v.* Jesup, 106 U. S. 468.

(*b*) A contract to supply rolling

3. And a contract by which one railway agrees to give up to another railway a part of its profits, in consideration of securing a portion of the profits of the other company, is illegal, and *ultra vires*.[4]

*4. The rule laid down upon this subject by a distinguished English judge, on a recent occasion in the House of Lords,[5] is perhaps as fair and full a definition of the doctrine as can be made. "There can be no doubt that a corporation is fully capable of binding itself by any contract under its common seal in England, and without it in Scotland, except where the statutes by which it is located or regulated expressly or by necessary implication prohibit such contracts between the parties. *Prima facie* all its contracts are valid, it lies on those who impeach any contract to make out that it is avoided. This is the doctrine of *ultra vires*, and it is no doubt sound law, though the application of it to the facts of each particular case has not always been satisfactory to my mind." His lordship here declares that it would not be *ultra vires* for a company wishing to alter one of its branches, and about to apply to parliament for authority to do so, to enter into

[4] Shrewsbury & Birmingham Railway Co. *v.* London & Northwestern Railway Co., 6 H. L. Cas. 113; s. c. 29 Law T. 186. But one company may lawfully accept the lease of an unfinished railway under a specified rent yearly after the same is finished, and may stipulate for the payment in advance of the rent for the whole term for the purpose of constructing the road; and this will be no infringement of the statute allowing the connection of the two roads, on condition that the first company shall not expend any portion of its reserved funds for the construction of the other road. This looks very much like one company's building the road of the other out of its own funds, surplus or borrowed, for the use of such road a certain number of years. If so, it is converting surplus into capital without legal warrant. The case is so near the dividing line between what is and what is not justifiable as not to be of much authority, for those who desire to protect an existing company against expending its funds in extending its line. It is one of those cases which reluctantly at declaring the *bona fide* acts of corporations *ultra vires*, where no great harm to any one is expected to ensue, and the public interest has been materially subserved. Durfee *v.* Old Colony & Fall River Railroad Co., 5 Allen, 230.

[5] Lord Wensleydale, in Scottish Northeastern Railway Co. *v.* Stewart, 3 Macq. Ap. Cas. 382; s. c. 5 Jur. N. s. 607.

stock for the use of another company held not *ultra vires*. Attorney General *v.* Great Eastern Railway Co., Law Rep. 11 Ch. D. 449.

a contract for land which would be necessary for the purpose if they should obtain the act.

5. The question how far a railway company, without special grant of power for that purpose, may accept bills of exchange, is very carefully examined and thoroughly discussed, both by court and counsel, in an English case.[6] (*c*) It seems to be there considered, * that unless the corporation is a trading company, as the Bank of England or the East India Company, there is no presumptive power to accept bills of exchange. In the case of railway corporations, created for a special purpose, there is no implied power either to borrow money or to issue or accept bills of exchange for the purpose of negotiation in the market. The rule is thus stated by one of the judges in the case last cited, speaking of trading corporations. "Such a corporation may, in some cases, bind itself by promissory notes and bills of exchange. . . . But a corporation will not have these extraordinary powers, unless the nature of the business in which it is engaged raises a necessary implication of their existence."

6. Contracts *ultra vires*, entered into by the directors, and which are not binding upon the company, cannot be specifically enforced against the directors, nor can the directors be decreed by the court to make good their representations.[7]

7. A corporation having no power to lend, made a loan to a company having no power to borrow. The borrowers were aware of those facts. They bought a canal with the money; but that

[6] Bateman *v.* Mid-Wales Railway Co., Law Rep. 1 C. P. 499; s. c. 12 Jur. N. S. 453. The language of CROMPTON, J., in Chambers *v.* Manchester & Milford Railway Co., 5 B. & S. 588; s. c. 10 Jur. N. S. 700, referring to and approving the law as laid down by PARKE, B., in the South Yorkshire Railway & River Dun Co. *v.* Great Northern Railway Co., seems to put the question on its true basis.

[7] Ellis *v.* Coleman, 25 Barb. 662.

(*c*) A company may upon sufficient consideration guarantee the bonds of another company. Low *v.* Central Pacific Railroad Co., 52 Cal. 53. But may not use its funds to purchase stock in another company. Milbank *v.* New York, Lake Erie, & Western Railroad Co., 64 How. Pr. 20; Elkins *v.* Camden & Atlantic Railroad Co., 36 N. J. Eq. 5. And a company, though without special powers to that end, may contract to issue preferred stock in order to complete its road, and make such stock the basis of the qualification of directors; and when third persons have acted on faith of it, the shareholders cannot avoid it. It is not *ultra vires*. Hazlehurst *v.* Savannah Railroad Co., 43 Ga. 605.

* was set aside, and the purchase-money ordered to be refunded. The loaning company sought a refunding of the money loaned by them, with the interest, out of the refunded purchase-money. It was held they were entitled to a decree accordingly.[8] But the lender of money to a company having no power to borrow, cannot compel the company to refund the money, unless it has been *bona fide* applied to the purposes of the company.[9] (*d*)

8. Where part of a contract only is *ultra vires* of the company, a court of equity will restrain that portion only.[10] Where there is a defect of capacity in the company to do the act, the power cannot be created by the express agreement of the shareholders; nor can it be presumed from any extent of acquiescence. But where only certain formalities are required to the valid execution of the act, as the consent of a general meeting, that will be presumed from acquiescence.[11] (*e*) But where dissentient mem-

[8] Ernest *v.* Croysdell, 2 De G. F. & J. 175; s. c. 6 Jur. N. S. 710.

[9] *In re* Troup, 29 Beav. 353; *Ex parte* Hoare, 30 Beav. 225.

[10] Maunsell *v.* Midland Great Western Railway Co., 1 Hemm. & M. 130; s. c. 9 Jur. N. S. 660. It was here held, that an agreement to contribute to the parliamentary deposit required on bills promoted by another company is *ultra vires*. So is an agreement to take shares in the future extension of another company. And so is an agreement to make traffic regulations applicable to future extensions. But no such agreement is *ultra vires* if its validity is expressly made dependent upon the sanction of parliament. Where part of an entire arrangement between two companies, the parts of which are dependent on each other, is illegal, or *ultra vires*, a court of equity will restrain the execution of every portion of the arrangement. Hattersley *v.* Shelburne, 7 Law T. N. S. 650.

[11] British Provident Life Insurance Co., 9 Jur. N. S. 631.

(*d*) Under an authority to borrow money a company may not issue irredeemable bonds entitling the holder merely to a share in the profits after payment of certain dividends. Taylor *v.* Philadelphia & Reading Railroad Co., 7 Fed. Rep. 386.

(*e*) Where a company enters into a contract which is fully performed on the other side, so that nothing remains but for it to pay, it cannot set up that the contract was *ultra vires*. Oil Creek & Allegheny River Railroad Co. *v.* Pennsylvania Transportation Co., 83 Penn. St. 160. And see Atlantic & Pacific Telegraph Co. *v.* Union Pacific Railway Co., 1 McCrary, 541. Thus, if a company issue negotiable securities without authority, although they are void, even in the hands of innocent holders, yet if the company knowingly permits performance of the consideration which goes toward legitimate corporate purposes, it will be estopped to deny its liability. Peoria & Springfield Railroad Co. *v.* Thompson, 103 Ill. 187.

bers[12] were allowed to retire by the resolution of a general meeting, it was held the other members could not be allowed to question its regularity and validity, after an acquiescence of twenty years, although *ultra vires*.

9. Directors of an insurance company offered to pay losses caused by the explosion of gunpowder, although expressly excepted from the risks assumed by the policy, at the same time not admitting any legal liability to do so. On a bill by a shareholder to restrain the directors from doing so, it appearing that it was usual and advantageous for companies to do so, although not strictly * responsible for the loss: held, that this was a mode of carrying on the business with which the court could not interfere.[13] (*f*)

10. This is a most remarkable decision, but more remarkable for the reasons and grounds upon which it is placed. The fact that the unlawful payments proposed to be made were prudent and politic, is nothing more than may be urged in favor of all proposed illegal diversion of the funds of a company. It is always proposed thereby to advance the interests of the company, and consequently the dividends to the shareholders. It is impossible to suppose that any such principle can ultimately maintain its ground in the English courts of equity.

11. The subsequent cases seem to manifest the feeling that all secure ground to rest upon is taken from under them. It is said in one case[14] that in matters strictly relating to the internal management of the company, even though not strictly within the terms of the constitution of the company, the court will not interfere. But it is here added, if the matters complained of are plainly beyond the powers of the company, and are inconsistent with the objects for which the company was constituted, the court will interfere, at the instance of the minority, to prevent the act

[12] *In re* Brotherhood, 31 Beav. 365. A restriction upon the liability of the shareholders for bills drawn by the company will not affect the responsibility of the company. State Fire Insurance Co., 8 Law T. N. S. 146.

[13] Taunton *v.* Royal Insurance Co., 2 Hemm. & M. 135; S. C. 10 Jur. N. S. 291.

[14] Gregory *v.* Patchett, 33 Beav. 595; S. C. 10 Jur. N. S. 1118.

(*f*) Recovery by the lender of money borrowed to enable the company to do an act *ultra vires*, will not be enjoined at suit of a shareholder. Bradley *v.* Ballard, 55 Ill. 413.

complained of from being carried out. If this is intelligible to others, or reconcilable with good sense and good law, it certainly passes our comprehension, and we can only say that we should not expect it to be long maintained anywhere. It is nothing more or less than paying black-mail to buy peace, and if public companies can do that with funds they hold in trust, it may be as well for courts of equity not to attempt to define what they may or may not do.[15]

[15] In Ohio & Mississippi Railroad Co. *v.* Indianapolis & Cincinnati Railroad Co., 5 Am. Law Reg. N. S. 733, a question arose as to the rights of railway corporations in one state to enter into permanent arrangements with similar corporations in other states. The plaintiff, being authorized to construct and operate a railway from Cincinnati to Vincennes, and the defendant, being authorized to construct and operate a railway of a different gauge from Indianapolis to Lawrenceburg, entered into a contract whereby the defendant, in consideration of being allowed to lay a third rail on the road of the plaintiff, and of the agreement of the plaintiff to furnish motive power for hauling the cars of the defendant on that part of the road, agreed, among other things, to lend to the plaintiff $30,000, for the purpose of erecting a depot for the plaintiff in Cincinnati, to become the property of the plaintiff at the expiration of the contract; to form no connections at or beyond Lawrenceburg prejudicial to the plaintiff; and to give the plaintiff exclusive control of the employés of the defendant while on the road of the plaintiff. A foreign corporation having no charter from the state authorizing it to construct and operate a railway in the state, could not, by a transfer of a portion of a railway already constructed in the state by legal authority, acquire a right to use and operate such railway within the state. It was held also on the construction of the charters of the plaintiff and defendant, that such contract was beyond the competency of the contracting parties, and void. The contract also provided, that the defendant should have the use of a depot and certain grounds in Cincinnati for unloading goods and lumber, for thirty years. It was held, that this created an easement in the land, and was, in connection with the laying and keeping of the third rail, in substance a lease, which the plaintiff had no authority to make, and that it, being for more than three years, was also invalid under the statute of frauds, for the * want of legal acknowledgment; also, that the defendant having as a foreign corporation no right to accept a lease of a railway in Ohio, the plaintiff could not have had a specific performance of the agreement, the remedies of the parties not being mutual. There seems to be no good ground to question the soundness of the foregoing opinion; but the case seems to exhibit in a strong light the embarrassments constantly resulting from having railway corporations restricted in their corporate functions to the limits of state lines. It would certainly seem that there is far more necessity and propriety in having all the railway corporations in the country possess a national character, than there is in giving the same character to all the banks of the country. There is every reason to regard railways as national institutions, in almost

SECTION VIII.

Companies exonerated from Contracts by Act of the Legislature.

§ 149. It seems to be conceded that a railway company may plead a subsequent act of the legislature, in bar of the performance of their covenant or contract. But it will afford no bar, * unless the act either expressly or by clear implication renders the duty of the contract unlawful or comes in conflict with it.[1]

every sense in which they possess a public character, or perform public service, with the single exception of intercommunication, which is mainly of local and state concern. They are such as an instrument in time of war, and as a means of postal communication; and the right of Congress to regulate commerce between the different states, would give the power to control, within certain limits, the transmission of freight and passengers from one state to another. And this might enable the national authority to remedy existing evils on long lines, to some extent. But what is needed seems to be the subjecting of the entire railway system, throughout the country, to a single, salutary, prudent, and, at the same time, energetic control. It seems questionable how far this can be effected, as a regulation of commerce; but that it must, in some way, be obtained by the national government seems now pretty generally conceded by those who believe that any such control is requisite for the protection of public or private interests, against the interest of private gain, through the force of an entire monopoly of intercommunication. True, the most engrossing monopoly, if wisely conducted, will not wantonly outrage the public sentiment of justice; but where the temptation is so great, it is always desirable to have some redress, which, in the language of Magna Carta, is free, cheap, and open to all; redress which need not be bought, which will not be delayed, and which cannot be denied. Any such redress from the force of state control seems now nearly, if not quite, hopeless. Whether the remedy through the national tribunals is more hopeful, is the problem hereafter to be solved.

[1] Wynn *v.* Shropshire Union Railway & Canal Co., 5 Exch. 420; Stevens *v.* South Devon Railway Co., 13 Beav. 48; s. c. 12 Eng. L. & Eq. 229. But where one was induced to give lands to a railway company, or subscribe for stock, and the essential inducement to make the contract was that the company should construct its road within some definite time, the extension of time for the construction of the road, by act of the legislature, will not exonerate the company from its obligation to such person. Henderson *v.* Railway Co., 17 Tex. 560.

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SECTION IX.

Width of Gauge. — Junction with other Roads.

1. Charter requiring broad gauge does not prohibit mixed gauge.
2. Permission to unite with other road signifies a road *de facto*.
3. Equity will sometimes enjoin company from changing gauge.
4. Contract to make gauge of the companies the same, although contrary to law of state, at its date, may be legalized by statute.
5. Import and construction of the term "railway connection."

§ 150. 1. Where the company's special act required them to lay down a railway of such gauge and construction as to be worked in connection with another company named (the broad gauge), a court of equity declined to interfere, by injunction, when the company were laying down part of the line with double tracks of the mixed gauge, there being no prohibition in the act against such a construction, the broad gauge being all which was required by the act.[1]

2. Where the act of incorporation gave the company the right to construct a road in a particular line, and also required them to purchase a former railway along the same route, and gave them the right to connect "their road with any road legally authorized to come within the limits of the city of Erie," it was held that this right extended equally to the road purchased or built by them, and that they had the right to connect with any other railway in the actual use of another company in Erie, without inquiry whether such company were in the legal use of their franchises at the time or not. That is a question which cannot be inquired into in this collateral manner.[2]

* 3. Where two railway companies agree to operate their roads in connection, between certain points, if one of the companies changes its gauge, so as to break up the connection contemplated, an injunction will be granted to enforce the contract.[3]

[1] Great Western Railway Co. *v.* Oxford, Worcester, & Wolverhampton Railway Co., 5 De G. & S. 437; s. c. 10 Eng. L. & Eq. 297.

[2] Cleveland, Painsville, & Ashtabula Railway Co. *v.* Erie, 27 Penn. St. 380.

[3] Columbus, Piqua, & Indiana Railroad Co. *v.* Indianapolis & Bellefontaine Railroad Co., 5 McLean, 450.

4. A contract entered into by railway companies to make the gauge of both the companies the same, is not illegal, although this be contrary to the law of one of the states, if the contract appear to have been made with reference to an alteration of the powers of the company, in that respect, and that such alteration was procured before any part of the track was laid.[3]

5. The subject of "railway connection" and the import of those terms, is discussed in a case in Pennsylvania,[4] and it is there held that the terms, when used without qualification, must mean, either such a union of tracks as to admit the passage of cars from one road to the other; or else such an intersection, as to admit of the convenient interchange of freight and passengers at the point of intersection. One would suppose the latter must always be implied, by the use of such terms, at the very least; and that where the roads are of the same gauge, so as to admit of a running connection, such connection would naturally be intended by the use of these terms.

[4] Philadelphia & Erie Railroad Co. *v.* Atlantic & Great Western Railroad Co., 53 Penn. St. 20.

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PART VII.

THE LAW OF MANDAMUS AND OTHER PREROGATIVE REMEDIES AS APPLIED TO RAILWAYS.

PART VII.

THE LAW OF MANDAMUS AND OTHER PREROGATIVE REMEDIES AS APPLIED TO RAILWAYS.

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*CHAPTER XXIII.

MANDAMUS.

SECTION I.

General Rules of Law governing this Remedy.

1. Supplementary remedy. Available where other remedy is wanting.
2. Mode of procedure. Matter of discretion. Alternative writ.
3. Proceedings in American courts, in general.
4. Amendment of application not allowed in England.
5. Simplified proceedings under common law. Procedure Act.
6. Trial of the truth of the return to the alternative mandamus.
7. Costs rest in the discretion of court.
8. Mode of service. Delivery of original, &c.
9. Mandamus had under late English statutes, by indorsement of claim on writ in ordinary action.

§ 151. 1. The office of the writ of mandamus is very extensive. It is the supplementary remedy where all others fail. Lord Mansfield says,[1] "It was introduced to prevent disorder, from a failure of justice and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one." "If there be a *right* and no other specific *remedy*

[1] Rex *v.* Barker, 3 Bur. 1265. See Woodstock *v.* Gallup, 28 Vt. 587; People *v.* Head, 25 Ill. 325; Draper *v.* Noteware, 7 Cal. 276. The same principles are declared by Lord Ellenborough, in King *v.* Archbishop of Canterbury, 8 East, 213, 219; 6 A. & E. 321. And where there is any other equally efficacious remedy this writ will not lie. Bush *v.* Beavan, 1 H. & C. 500; 32 Law J. Exch. 51; *infra*, § 161, pl. 3.

this should not be denied." [2] (*a*) The general rules applicable to the use, and the mode of obtaining this writ, are sufficiently discussed in the digests, abridgments, and elementary works, under this title.[3]

* 2. The mode of proceeding in obtaining the writ is controlled very much by statute in England at the present time, and in most of the American states. There are some few points which are of general application. (1) The power of granting the original prerogative writ of mandamus in England was confined to the Court of King's Bench,[3] and in most of the American states it is given, by statute, to the highest court of law of general jurisdic-

[2] Commonwealth *v.* Pittsburg, 34 Penn. St. 496; Fremont *v.* Crippen, 10 Cal. 211. In this last case it was held that mandamus would lie to compel the sheriff to execute a writ of possession, although there might be either a civil action or a criminal prosecution against him for the refusal, since neither of these remedies would do full justice to the complainant.

[3] 12 Petersd. Ab. 438; 6 Bac. Ab. tit. Mandamus, 309, 418; 3 Bl. Com. 110, 264; 1 Kent Com. 322; Curtis Dig. 333. And that the party may have some remedy in equity, will not preclude this remedy. But see *infra*. Nor that an indictment will lie. *Infra*, § 161. And it is no bar to this remedy that the party might by statute build the work at the expense of the other party, by order of a justice. Regina *v.* Norwich Railway Co., 4 Railw. Cas. 112. The legislature empowered the board of supervisors of the county of New York to cause to be raised and collected a sum not exceeding $80,000 to meet and pay whatever sum up to that amount might be found due to the contractors with the commissioners of records, and authorized the comptroller to pay "said amount when it should be judicially determined." The contractor not having the power to bring action and obtain judgment against the supervisors in the regular manner, it was held that this was not the intention of the legislature, and that, in the absence of any specific directions in the act as to how this judicial determination should be obtained, it would be unreasonable to infer that any other remedy was intended than that attainable by mandamus; and that application for mandamus was the proper remedy for the contractors, on the refusal of the comptroller to pay them the amount certified by the commissioners to be due them. People *v.* Haws, 34 Barb. 69. And see, to the same point, Regina *v.* Southampton, 1 Ellis, B. & S. 5; s. c. 7 Jur. N. S. 990; 30 Law J. Q. B. 214. And where a new right has been created by act of parliament, the proper mode of enforcing it is by mandamus at common law. Simpson *v.* Scottish Union Fire & Life Insurance Co., 9 Jur. N. S. 711; s. c. 32 Law J. Ch. 329; s. c. 1 Hemm. & M. 618. Commonwealth *v.* Pittsburg, 34 Penn. St. 496.

(*a*) The writ will not issue where full relief may be had by appeal or writ of error, or otherwise. *Ex parte* South & North Alabama Railroad Co., 65 Ala. 599.

tion.[3] This prerogative writ seems anciently to have been issued to inferior jurisdictions by the Court of Chancery in England, but not to the King's Bench.[4] This writ is not demandable as of right, but is awarded in the discretion of the court.[5] (2) The form of application is either by motion in court, and the production of affidavits in support of the ground of the motion, in which case, if the motion prevails, a rule to show cause why the writ should not issue, or an alternative mandamus issues * upon the *ex parte* hearing, and the definitive hearing is had upon the return of the rule, or the return to the alternative writ.

3. The more common practice in the American courts (which often hold but one or two short sessions annually in a county, and where, by consequence, such formal proceedings would be attended with embarrassing delays) is, by formal petition, alleging in detail the grounds of the application, which is served upon the opposite party and all parties supposed to have an interest in the questions involved, a sufficient time before the term to give an opportunity for taking the testimony upon notice; and upon the return of the petition, the case is heard upon its general merits; and in either form, if the application prevails, a peremptory mandamus issues, the only proper return to which is a certificate of compliance with its requisitions, without further excuse or delay.[6] (*b*)

[4] Rioters' Case, 1 Vernon, 175; Angell & Ames Corp. § 697. But see Rex v. Severn & Wye Railway Co., 2 B. & Ald. 646; Rex v. Dean Inclosure, 2 M. & S. 80; Rex v. Jeyes, 3 A. & E. 416.

[5] Rex v. Bishop of London, 1 T. R. 331, 331; Rex v. Bishop of Chester, 1 T. R. 396, 401, 425; 2 T. R. 336; People v. Public Accounts Auditor, 33 Ill. 9; s. c. 3 Am. Law Reg. N. S. 332. And the court will not entertain jurisdiction unless substantial interests are involved. Id.

[6] Hodges Railw. 610–614. It is indispensable first to demand of the party against whom the application is to be made, a performance of the duty, and the party must, it would seem, be made aware of the purpose of the demand. King v. Wilts & Berks Canal Navigation, 3 A. & E. 477; King v. Brecknock & Abergavenny Canal Navigation, 3 A. & E. 217; People v. Rommt, 18 Cal. 89. The refusal must be of the thing demanded, and not of the right merely.

(*b*) At common law error does not lie from an allowance of the writ, such allowance being a mere award and not a formal judgment. New Haven & Northampton Co. v. State, 44 Conn. 376. Nor will an appeal lie after the appellant has obtained an extension of time to comply with the writ. People v. Rochester & State Line Railroad Co., 15 Hun. 188.

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*4. The general rule of the English courts seems to be, that if the first application is denied on account of defects in the affida-

King *v.* Northleach & Witney Roads, 5 B. & Ad. 978. The refusal must be direct and unqualified, but may be made as effectual by silence as by words or acts, but the party should understand that he is expected to perform the required duty, on pain of legal redress without further delay. Queen *v.* Norwich & Brandon Railway Co., 4 Railw. Cas. 112; Queen *v.* Bristol & Exeter Railway Co., 4 Q. B. 162. But this should be taken as a preliminary question, according to the English practice. Queen *v.* Eastern Counties Railway Co., 10 A. & E. 531. But in Commonwealth *v.* Commissioners, 37 Penn. St. 237, a demand was held unnecessary in the case of public officers neglecting to do their duty. Conditions precedent must be shown to have been performed. But the mere requisition of an act of parliament that parties claiming damages, by reason of a railway company's works, shall enter into a bond to prosecute their complaint and pay their proportion of the costs, before the company should be obliged to issue a warrant to summon a jury, and if not so done, the company might give notice, requiring the same to be done before commencing the inquiry, was held not to be a condition precedent, unless required by the company. Queen *v.* North Union Railway Co., 1 Railway Cas. 729. And where an umpire failed to make an award, it was held that the company might be compelled by mandamus to issue a warrant for the sheriff to assess the compensation, and no formal demand was necessary. Hodges Railw. 642, and note; *In re* South Yorkshire & Goole Railway Co., 18 Law J. Q. B. 53. A return stating an excuse for non-compliance with a peremptory writ of mandamus, is not admissible. Regina *v.* Ledgard, 1 Q. B. 616. Application by the prosecutor for leave to withdraw his plea and argue the case on the return refused. Queen *v.* York, 3 Q. B. 550; *Ex parte* Strong, 20 Pick. 484. It is the practice for different persons, in the same or similar situation, to unite in the same application for a mandamus, and it is said but one writ can issue in such a case. Rex *v.* Montacute, 1 W. Bl. 60; Rex *v.* Kingston, 1 Str. 578 (note 1); Scott *v.* Morgan, 8 Dowl. P. C. 328. But it seems to be considered that where the rights are distinct and wholly independent, one writ will not be awarded, but several, and therefore the application should be several. Regina *v.* Chester, 5 Mod. 11; Andover's Case, 2 Salk. 433; Smith *v.* Erb, 4 Gill, 437; State *v.* Chester, 5 Halst. 292. And the petitioner for a mandamus must set forth clearly his interest in the matter which he presents as the ground of his application. *Ex parte* Fleming, 2 Wal. 759. But several connected matters which are not repugnant, may be included by way of defence in the return. Regina *v.* Norwich, 2 Salk. 436; Wright *v.* Fawcett, 4 Bur. 2041; Rex *v.* Taunton Churchwardens, 1 Cowp. 413. Upon a mandamus to restore a corporate officer to his functions, the return should specify the grounds of the amotion. Commonwealth *v.* Philadelphia, 6 Serg. & R. 469, unless the officer were removable on the mere motion of the corporation. Rex *v.* Thame, 1 Str. 115. It is not a sufficient reason for setting aside a peremptory mandamus that a previous alternative writ had not issued. Knox County *v.* Aspinwall, 24 How. 376.

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vits, not to permit a second application to be made; and the rule extends to other writs, resting in the discretion of the court.[7]

5. But the Common-law Procedure Acts in England 1852, 1854, apply to this class of writs, and have essentially simplified the proceedings, and rendered them more conformable to reason and justice than in some of the American courts even,[8] the rule for * the issuing of the alternative writ being now, in all cases, made absolute in the first instance, and the whole hearing had upon the return, which in our practice is still further simplified by admitting the party to make answer to the petition, alleging the grounds of his refusal, which are tried at once.[9]

[7] Queen *v.* Manchester & Leeds Railway Co., 8 A. & E. 413. And the same rule obtains where the first writ is denied because no sufficient demand had been made, and a subsequent demand is made. *Ex parte* Thompson, 6 Q. B. 721. But it is apprehended no such rule of practice could be enforced in this country, and very few, we think, would regard it as desirable. It seems to be relaxing in England, where the alteration of the affidavits is mere form. Regina *v.* Great Western Railway Co., 5 Q. B. 597, 601; Regina *v.* East Lancashire Railway Co., 9 Q. B. 980. And in Regina *v.* Derbyshire, Staffordshire, & Worcestershire Railway Co., 18 Jur. 1051; s. c. 26 Eng. L. & Eq. 101, the writ was amended, as to the name of the company. Regina *v.* Eastern Counties Railway Co., 2 Railw. Cas. 836, amendment allowed. Regina *v.* Justices of Warwickshire, 5 Dowl. P. C. 382; Regina *v.* Jones, 8 Dowl. P. C. 307; Shaw *v.* Perkins, 1 Dowl. P. C. N. S. 306; Regina *v.* Pickles, 3 Q. B. 599, note; State *v.* Hastings, 10 Wis. 518, 525.

[8] And by statute 23 & 24 Vict. c. 126, § 32, costs are to be allowed against the defendant where an absolute writ is granted, unless otherwise specially directed by the courts.

[9] Walter *v.* Belding, 24 Vt. 658; *Ex parte* Rogers, 7 Cow. 526. In this country the statute of 9 Anne, allowing the prosecutor to traverse the return to the writ or the answer to the petition, and for the court to determine the truth, either on affidavit or by the verdict of a jury, in its discretion, has been pretty extensively adopted, either in practice or by statute. People *v.* Beebe, 1 Barb. 379; People *v.* Hudson Commissioners, 6 Wend. 559; Smith *v.* Commonwealth, 41 Penn. St. 335. Where the case is fully heard on the petition or rule to show cause, and there is no dispute in regard to the facts, the court will not delay, for the issuing of the alternative writ and the return thereto, but will in the first instance issue the peremptory mandamus. *Ex parte* Jennings, 6 Cow. 518; People *v.* Throop, 12 Wend. 183. The rule for the peremptory mandamus is sometimes, in the first instance, made *nisi*, to allow the respondents to consult, if they will comply with the requirements of the judgment. Walter *v.* Belding, 24 Vt. 658. Or sometimes this is done to allow the parties to arrange the matter, or the court to consider the case. Rex *v.* Tappenden, 3 East, 186. The court has such control over its own judgments, that, if a

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6. If falsehood is alleged in the return to the alternative mandamus, it was the practice at common law to drive the party to his action for a false return. But by statute in England, and generally by practice in this country, the question is tried in the * court issuing the writ, and the remedy there applied, damages and costs being given in the discretion of the court, and execution enforced.

7. Costs in all the proceedings for mandamus rest in the discretion of the court, unless controlled by statute. By the English practice it is common to award costs where the application is denied, but not always where it prevails.[10] The more general and the more equitable rule in regard to costs, in proceedings where the court have a discretion in that respect, is to allow costs to the prevailing party, unless there is some special reason for denying them.[11]

peremptory writ of mandamus be unfairly obtained, it will be set aside on motion. People *v.* Everett, 1 Caines, 8. Courts enforce compliance with the peremptory writ by attachment, as also a return to the alternative writ, without requiring the issue of an *alias* and *pluries*, as in the early English practice. The cases are not altogether agreed, whether defects in the writ are cured by admissions in the return, but on general principles of pleading it would seem that they are. King *v.* Coopers, 7 T. R. 548. But see Regina *v.* Hopkins, 1 Q. B. 161. But where an alternative mandamus is issued, and the defendants make their return, and the relators, instead of demurring, take issue on the material allegations in the return, they thereby admit that, on its face, the return is a sufficient answer to the case made by the alternative writ. And if no material fact is disproved on the trial, the defendants will be entitled to a verdict in their favor. People *v.* Finger, 24 Barb. 341. The return should set forth an available justification for defendant's refusal to do the act sought to be enforced, and it may allege different independent facts as furnishing such justification.

[10] Regina *v.* Bridgenorth, 10 A. & E 66; Regina *v.* Eastern Counties Railway Co., 2 Q. B. 578, 579, and cases cited by counsel. Regina *v.* East Anglian Railway Co., 2 Ellis & B. 475; s. c. 22 Eng. L. & Eq. 274. Statute 1 Wm. 4, c. 21, § 6, makes costs discretionary with the courts. Statute 23 & 24 Vict. c. 126, § 132. Regina *v.* St. Saviour, 7 A. & E. 925. See Regina *v.* Brighton & South Coast Railway Co., 10 Law T. N. S. 496.

[11] Regina *v.* Thames & Isis Commissioners, 8 A. & E. 901, 905; 5 A. & E. 804; Regina *v.* Fall, 1 Q. B. 636; Regina *v.* Justices, 6 Eng. L. & Eq. 267, unless strong reasons for denying costs exist; 1 Q. B. 751. Where the prosecutor omitted to proceed with a mandamus after a return had been made, the Court of Queen's Bench compelled him to elect either to proceed or pay the costs. Regina *v.* Dartmouth, 2 Dowl. P. C. N. S. 980. If the *quo warranto*, mandamus, or other like writ, is procured by the real party in interest, who is

8. Service of such process, and indeed of all process, by summons in England, is by delivering the original where there is but *one person summoned, and where there are more than one, by showing the original, and delivering a copy to each defendant but one, and the original left with such one. But service by copy of a writ of mandamus was held sufficient.[12] (*c*)

9. By the later English statutes upon the subject of mandamus,[13] any party requiring any order, in the nature of specific performance, may commence his action in any of the superior courts of common law in Westminster Hall, except in replevin and ejectment, and may indorse upon the writ and copy to be served, that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration, either together with any other demand which may now be enforced in such action, or separately, a writ of mandamus, commanding the defendant to

able to pay costs, to be prosecuted by some one not able to pay costs, the Court of Queen's Bench will grant a rule, requiring the real party to pay costs. Regina *v.* Greene, 4 Q. B. 646. See also a general rule, adopted immediately after the decision of the last-named case, Easter Term, 1843, requiring a formal rule, for payment of costs in mandamus, to be drawn up immediately on reading all the affidavits on both sides, 4 Q. B. 653. The rule for costs is decided on the reading only of the affidavits, with reference to which the rule is drawn up. Regina *v.* St. Peter's College, 1 Q. B. 311, overruling Rex *v.* Kirke, 5 B. & Ad. 1089. The parties are, in the English cases, required to pay costs occasioned by their delay. Regina *v.* Cambridge, 4 Q. B. 801. But where the judge makes a mistake, the parties who come to defend his ruling, which they are bound to suppose correct, do not pay costs. Regina *v.* London & Blackwall Railway Co., 3 Railw. Cas. 409, and note. The party who institutes proceedings for mandamus, which he is compelled to abandon, by personal misfortune, as being pauperized by the loss of his trade, must still pay costs, as the court could only conclude he had no grounds to support his petition. Regina *v.* London & Blackwall Railway Co., 4 Jur. 859. See, also, *Ex parte* Morse, 18 Pick. 443.

[12] Regina *v.* Birmingham & Oxford Railway Co., 1 Ellis & B. 293; s. c. 16 Eng. L. & Eq. 94. The conductor of a railway train in some of the states is regarded as a "hired agent" of the company, within the meaning of the statute allowing the service of process on such agent. New Albany & Salem Railroad Co. *v.* Grooms, 9 Ind. 213.

[13] Statute 17 & 18 Vict. c. 125.

(*c*) Service on a mere financial officer of the company is not good. State *v.* Pennsylvania Railroad Co., 42 N. J. Law, 490. Nor is service on a superintendent of a division. Same *v.* Same, 41 N. J. Law, 250. But otherwise of service on the clerk of a board of county commissioners in Kansas. Commissioners *v.* Sellew, 99 U. S. 624.

fulfil any duty in the fulfilment of which the plaintiff is personally interested. And if a mandamus is awarded, it may issue peremptorily in the first instance in aid of the execution, for damages and costs. The form of the writ is very brief, and compliance with its requisition is to be enforced by attachment. The prerogative writ is still retained, but its use, and also that of decrees for specific performance in equity, seem to be superseded by these provisions,[14] at least to some extent.

*SECTION II.

Particular Cases where Mandamus lies to enforce Duty of Corporations.

§ 152. The opinion of JERVIS, C. J. in the case of York & North Midland Railway *v.* Regina,[1] is perhaps the best commentary

[14] A mandamus to a local board of health, constituted under Statute 11 & 12 Vict. c. 63, recited that the prosecutor had been injured by the board in the prosecution of its powers under the act; that he had demanded compensation from the board, and that they had denied all liability, and commanded the board that compensation be made to him out of the general or special rate to be levied under the act. The return stated that the board had not denied all liability, and that it was always ready to make compensation, as soon as it had been duly ascertained under the act; that it had not as yet been so ascertained; nor had the prosecutor as yet taken any steps to ascertain the amount, or notified the board of the amount of his claim, or appointed or given notice to appoint an arbitrator. This return was traversed, generally; and on the trial it was found that the board had denied all liability, and a verdict was entered for the prosecutor. On a motion to enter the verdict on the rest of the return for the board, and to enter judgment for the board, it was held that the mandamus was good, and that the prosecutor was entitled to a verdict on the whole of the return, and to a peremptory mandamus, on the ground that, as there did not appear by the return to be any dispute as to the amount, the rest of the allegations in the return, apart from the traverse of denial of liability, were immaterial. Regina *v.* Burslem Board of Health, 5 Jur. N. S. 1394; S. C. 1 Ellis & E. 1077, 1088. And generally, where a debt is of such a nature that mandamus will be granted to enforce its payment, it is not necessary that the amount of the debt should be previously ascertained, but such amount may be ascertained in the verdict of the jury in the action in which mandamus is claimed. Ward *v.* Lowndes, 5 Jur. N. S. 1124; S. C. in Exchequer Chamber, 1 Law T. N. S. 268; 1 Ellis & E. 940. But see McCoy *v.* Harnett County, 5 Jones N. C. 265.

[1] 1 Ellis & B. 858; S. C. 18 Eng. L. & Eq. 199. "Upon these facts several points arise: First, does the statute of 1849 cast on the plaintiffs in error a

* we could give upon the present state of the English law upon this subject.

duty to make this railway? Secondly, if it does not, is there under the circumstances a contract between the plaintiffs in error and the land-owners, which can be enforced by mandamus? Thirdly, and failing these propositions, does a work, which in its inception was permissive only, become obligatory by part-performance? These questions will be found upon examination to exhaust the subject, and to comprehend every view in which the mandamus can be supported. In substance, do these acts of parliament render the company, if they do not make this railway, liable to an indictment for a misdemeanor, and to actions by the party aggrieved? For if they do not, a mandamus will not lie, and thus the question depends entirely upon the construction of the special act, and the statutes incorporated therewith. The act of 1849 may cast the duty upon the plaintiffs in error, in one of two ways; it may do so by express words of obligation, or it may do so by words of permission only, if the duty can be clearly collected from the general purview of the whole statute. The words of the 3d section of the act of 1849, 'it shall be lawful for the said company to make the said railway,' are permissive only, and not imperative, and it is a safe rule of construction to give to the words used by the legislature their natural meaning, when absurdity or injustice does not follow from such a construction. Indeed, if there were any doubt upon this subject, other parts of the statute referred to in the argument clearly show that these words were intended to be permissive only. The distinction is well put by my brother ERLE: 'The company are permitted at their option to take lands, turn roads, alter streams, and exercise other powers, and these matters are made lawful for them; but they are commanded to make compensation for lands taken, to substitute roads for those they turn, and to perform other conditions relating to the exercise of their powers, and these matters are required of them.' It seems clear, therefore, that the duty is not cast upon the plaintiffs in error by the express words of the statute of 1849; and indeed, it was not so urged in the argument; nor was it so put by Lord CAMPBELL in his judgment in the court below. But it does not follow, merely because the words of the 3d section are permissive only, that there is no duty cast upon the plaintiffs in error, by the statute taken altogether, to make this railway. This point was not relied upon in this case in the court below, but it was made the distinct ground of a decision in another case in that court (The Queen *v.* The Lancashire & Yorkshire Railway Co.), and was much pressed in the argument before us in support of this judgment.

"It becomes necessary, therefore, to examine the statute in its general provisions, and to consider the grounds on which the Court of Queen's Bench proceeds in the case of the Queen *v.* The Lancashire & Yorkshire Railway Co., 1 Ellis & B. 228; 16 Eng. L. & Eq. 328. We agree with Lord CAMPBELL, that the portion of the line between Market Weighton and Cherry Burton, to which the mandamus applies, is not to be considered as a separate railway, or even as a separate branch of a railway, but it is to be treated as if in its present direction it had been included in the act of 1846. The acts, then, taken

*SECTION III.

Mandamus appropriate to reinstate Officers and Members of Corporations in positions taken from them by the Corporation.

1. Formerly granted only to restore to public office.
2. Now granted in all cases where the office is of value and sufficiently permanent.
3. Not available, where election annual and issue one of fact, and not triable within the term.
4. Claimant must have permanent and vested interest.

§ 153. 1. It does not come within the scope of this work to examine with minuteness all questions arising upon the law of cor-

together, in substance, recite that it will be an advantage to the public if a railway is made from York to Beverley, through Market Weighton and Cherry Burton, according to certain plans and sections deposited, as required by the practice of parliament, and referred to in the statute, and that the plaintiffs in error are willing to make that railway. On this basis the whole provisions are founded. It has been proved that the work will be advantageous to the public; it is assumed it will be profitable to the company, and that, therefore, they will willingly undertake it. Accordingly, the company are empowered to make this line. If they do make it they may take land; but if they do take land they must make compensation. If necessary, they may turn roads, or divert streams; but if they do, they must make new roads and new channels for the streams they alter. Similar provisions pervade the whole statute, and throughout the command waits upon the authority, and the distinction between 'may' and 'must' is clearly defined. But as it is manifest that such general powers must stop competition, and may, to a certain extent, be injurious to land-owners on the line, the compulsory power to take land is limited to three years, and the time for making the railway to five, after which the powers granted to the company cease, except as to so much of the line as shall have been completed, and the land, if taken by the company, reverts, on certain terms, to the original proprietors. An argument might have been founded on the terms in which the latter provision is contained. By the 10th section of the act of 1849, it is enacted that the railway shall be completed within five years from the passing of this act. That section was not referred to in the argument for this purpose, but it might be said that these words were compulsory, and imposed a duty upon the company to make the line. The context of the section, however, when examined, shows that such is not the meaning of it. If not completed within five years, the powers of the act are to expire, except as to so much of such railway as shall have been completed. If the section were intended to be obligatory, it would not contain that exception which contemplates that the line may be made in part. It is inconsistent to suppose that the legislature would say to the company in the same section, you may complete a part only, if you can, in five years, and

porations, * as affected by the writ of mandamus. But it may be useful to state that this is the appropriate remedy, where any

then as to that part the powers of the act shall continue, but you must complete the entire line in that time. Upon the whole, therefore, we find no duty cast upon the company to make this railway in any part of this act of parliament. On the contrary, the legislature seems to contemplate the possibility of the railway being made in part, or being totally abandoned. In the latter case the powers expire in three or five years; in the former the statute remains in force as to so much of the railway as shall have been completed within that time, and expires as to the residue. This provision is inconsistent with the intention to compel the company to make the entire line, as the consideration for the powers granted by the act.

"But it is said that a railway act is a contract on the part of the company to make the line, and that the public is a party to that contract, and will be aggrieved if the contract may be repudiated by the company at any time before it is acted upon. Though commonly so spoken of, railway acts, in our opinion, are not contracts, and cannot be construed as such. They are what they purport to be, and no more. They give conditional powers, which, if acted upon, carry with them duties, but which, if not acted upon, are not, either in their nature or by express words, imperative on the companies to which they are granted. Courts of justice ought not to depart from the plain meaning of the words used in acts of parliament. When they do, they make but do not construe the laws. If it had been so intended, the statute should have required the companies to make the line in express terms; indeed, some railway acts are framed upon this principle; and to say that there is no difference between words of requirement and words of authority when found in such acts, is simply to affirm that the legislature does not know the meaning of the commonest expressions. But if we were at liberty to speculate upon the intentions of the legislature when the words are clear, and to construe an act of parliament by our own notions of what ought to have been enacted upon the subject, — if, sitting in a court of justice, we could make laws, much might be said in favor of the course which, in our opinion, is taken by the legislature on such subjects. Assuming that the line, if made, would be profitable to the public, that benefit may be delayed for five years, during which time competition is suspended. On the other hand, if the line would pay, it probably will be proceeded with, unless the company having the powers is incompetent to the task. Individual land-owners may be benefited by the expenditure of capital in their neighborhood, without looking to the ultimate result; but it is not for the public interest that the work should be undertaken by an incompetent company, nor that it should be begun, if, when made, it would not be remunerative. By leaving the exercise of the powers to the option of the company, the legislature adopts the safest check on abuse in either of these respects, namely, self-interest. It seems to us, therefore, that these statutes do not cast upon the plaintiffs in error the duty, either by express words or by implication; that we ought to adhere to the plain meaning of the words used by the legislature, which are permissive only, and there is no reason, in

[*633]

* member or officer of a corporation is unlawfully deprived of his proper office or function in the affairs of the company through

policy or otherwise, why we should endeavor to pervert them from their natural meaning.

"But it is said that the land-owners are in a better situation than the public at large, and that the privilege to take their own lands is the consideration which binds the company to complete the railway. That during the currency of the three years they are deprived of their full rights of ownership, and, if not to be compensated by the construction of the railway, they would in many cases suffer a loss, because, whilst the compulsory power of purchase subsists, they are prevented from alienating their lands or houses described in the books of reference, and from applying them to any purposes inconsistent with the claim that may be made to them by the railway company. In truth, they are not prevented from so doing at any time before the notice to take their land is given, if they act *bona fide* in the mean time; the notice to take their lands being the inception of the contract between the land-owners and the company. But if this complaint was better founded, it does not follow, because certain land-owners are subjected to temporary inconvenience for the performance of a public good, that therefore the company are bound to make the whole railway. If it were a contract between the land-owners and the company, it would not be just that one should be bound and the other free. But to assert that there is a contract between the land-owners and the company, is to beg the whole question; for on this part of the case the question is, whether there is such a contract. As a matter of fact, we know that in many cases no such actual contract exists. Some few proprietors may desire and promote the railway, but many others oppose it, either from disinclination to the project or with a view to make better terms. With the dissentients there is no contract, unless it be found in the statute, and to the statute therefore we must look to see what is the obligation that is cast upon the company in respect of the land-owners upon the line. As in the former case, the words upon this subject are permissive only. The company may take land; if they do they must make full compensation. And in that state of things, if there be a bargain between the parties, what is the bargain? The company say, in the language of the statute, that the bargain is that they shall make full compensation for the land taken, and no more; the prosecutors say, that the consideration to be paid for the land is the full compensation mentioned in the act, and also the further consideration of the construction of the entire line of railway from York to Beverley. But if this is the price which the prosecutors are to have, each land-owner is entitled to the same value, and yet by this mandamus the other proprietors on the line from Market Weighton to Cherry Burton, who perhaps are hostile to the application, are constrained to sell their lands for an inadequate consideration, namely, the full compensation and a part only of the line of railway, to which, by the hypothesis, they were entitled by the original bargain. If this were the true meaning of the statute, it would indeed be unjust, more so than the imposition of the temporary inconvenience to which it is said the land-owners may be subject, and to which we

* its agency. This is somewhat questioned by some of the earlier English cases.[1]

have already referred. But that that is not the true meaning, is clear from the words of the statute, which are permissive, and only impose the duty of making full compensation to each land-owner, as the option of taking the land of each is exercised; and further, from the section to which we have already referred, which contemplates the total abandonment of the line, or a part-performance of it, and makes provision for the return of the land to the original proprietors in certain cases. Upon this part of the case the authority of Lord Eldon, in Blakemore v. The Glamorganshire Canal Company, 1 Myl. & K. 154, was much pressed upon the court. Speaking of contracts for private undertakings he says: 'When I look upon these acts of parliament I regard them all in the light of contracts made by the legislature on behalf of every person interested in anything to be done under them, and I have no hesitation in asserting that, unless that principle be applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our constitution. Such acts of parliament have now become extremely numerous, and from their number and operation they so much affect individuals, that I apprehend those who come for them to parliament do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else; that they shall do and forbear all that they are hereby required to do and forbear, as well with reference to the interest of the public as with regard to the interest of individuals.' There is nothing in that language to which it is necessary to make the least exception; indeed it is nothing more than an illustration of the obligatory nature of the duty imposed by acts of parliament, which do impose a duty with reference to other persons. In that case the statute had secured to Mr Blakemore the surplus water, and had commanded the company to do certain things that he might enjoy it. In discussing whether Mr. Blakemore's right under the statute was affected by his right before the statute, his lordship might well say he considered the statute the origin of Mr. Blakemore's right in the light of a contract, and the statute then under discussion containing express words of command, he might well add, that those who come for such acts of parliament do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do. As we understand them, the words used by Lord Eldon in no respect conflict with the view we take of this case; but if they mean that words of permission only, when used in the class of cases under consideration, should receive a construction different from their ordinary meaning, because, if construed otherwise, they might work injustice, with great respect for his high authority, we dissent from that proposition. We agree with my brother Alderson, who, in Lee v. Milner, 2 Y. & Col. 611, said: 'These acts of parliament have been called parliamentary bargains,

[1] Vaughn v. Gunmakers' Company, 6 Mod. 82; s. p. Comb. 45; White's Case, 6 Mod. 18.

* 2. But a different rule, as to requiring the office to be of a public nature to justify the writ of mandamus to restore the party

made with each of the land-owners. Perhaps more correctly they ought to be treated as conditional powers given by parliament to take the lands of the different proprietors through whose estates the works are to proceed. Each land-owner, therefore, has the right to have the power strictly and literally carried into effect as regards his own land, and has the right also to require that no variations shall be made to his prejudice in the carrying into effect a bargain between the undertakers and any one else.' — 'This,' he adds, 'I conceive to be the real view taken of the law by Lord ELDON, in the case of Blakemore *v.* The Glamorganshire Canal Company.' There remains but one further view of the case to be considered, and that we have partly disposed of in the observations we have already made; but inasmuch as Lord CAMPBELL proceeded on this ground only in the court below, although it was not much relied upon before us in the argument, we have, out of respect for his high authority, most carefully examined it, and are of opinion that the mandamus cannot be supported, on the ground that the railway company, having exercised some of their powers and made a part of their line, are bound to make the whole railway authorized by their statutes.

"It is unnecessary here to determine the abstract proposition, that a work which, before it is begun, is permissive, is, after it is begun, obligatory. We desire not to be understood as assenting to the proposition of my brother ERLE, that many cases may occur where the exercise of some compulsory powers may create a duty to be enforced by mandamus; and, on the other hand, we do not say that such may not be the law. If a company, empowered by act of parliament to build a bridge over the Thames, were to build one arch only, it would be well deserving consideration whether they could not be indicted for a nuisance in obstructing the river, or for the non-performance of duty in not completing the bridge. It is sufficient to say that in this case there are no circumstances to raise such a duty, if such a duty can be created by the acts of plaintiff himself. The plaintiffs in error have made the principal portion of their line, and they have abandoned the residue for no corrupt motive, but because Beverley has already sufficient railway communication, and because the residue of the line passes through a country thinly populated, and if made would not be remunerative. But it is said that the railway company are not in the situation of purchasers of land, with liberty to convert it to any purpose, or to allow it to be waste; that they are allowed to purchase it only for a railway, and having acquired it under the compulsory power of the act, there must be an obligation upon the company to apply the land to that and to no other purpose. Subject to the qualification in the act, this is undoubtedly true. Having acquired the lands of particular land-owners, the company could not retain them by merely laying rails on the lands so taken, and we agree it never was intended that the land-owners should be left with a high mound or a deep cutting running through their estate, and leading neither to nor from any available terminus. The precaution against such a wasteful expenditure of capital may, perhaps, safely be left to the self-interest

to * it, seems to have obtained since the case of Rex *v.* Barker,[2] and the only proper inquiry now is whether the plaintiff has any

of the company, but if such work were to be done, it would not be a practicable railway, and after five years the powers of the act would expire, and the land revest in the original proprietor. It is true that he would sustain some inconvenience without the corresponding advantage of railway communication, but in the mean time he would have received full compensation in the market value of the land, and for all damage by severance or otherwise, and would receive back the land on more reasonable terms. To be a railway it must have available termini. When the statutes passed, all persons supposed the termini would be York and Beverley; and if the arguments be well founded, and the company are bound, if they take the land upon any portion of the railway, to complete the whole line, it would seem to follow that one of the proprietary, by compelling the company to take his land on the line from Market Weighton to Cherry Burton, would thus entitle himself to a mandamus to compel them to make the line from Cherry Burton to Beverley, and the acts having expired, to apply to parliament for a renewal of their powers for that purpose. But although the termini were originally intended to be York and Beverley, it is plain that the legislature contemplated the possibility of the line being abandoned or being only partially made, because in the one case the powers of the act were to cease, and in the other they were partially continued. An option, therefore, is given to some one. By the course taken the Court of Queen's Bench has exercised that option, and said the line is to be made, not to Beverley, but to Cherry Burton. In our opinion that option is left to the company, and the company having *bona fide* made an available railway over the land taken, the obligation to the land-owner has, in that respect, been fulfilled. The cases upon this subject are very few, and the absence of authority is very striking, when we remember how many acts have passed *in pari materia*, not only for railways, but also for bridges and turnpike roads. Notwithstanding the numerous occasions on which such proceedings might have been taken, and the manifest interest of land-owners to enforce their rights, no instance can be found of an indictment for disobeying such a statute, or of a mandamus for the purpose of enforcing it. If correctly reported, Lord Mansfield determined this point in Rex *v.* Proprietors of the Birmingham Canal, 2 Bl. 708, for he says the act imports only an authority to the proprietors, not a command. They may desert or suspend the whole work, and *a fortiori*, any part of it. On the other side, the language of Lord Eldon, in Blakemore *v.* Glamorganshire Canal Company, is referred to as an authority for this mandamus. In our opinion it does not bear that construction, although it appears that the Court of Queen's Bench took a different view of that authority in the case of Regina *v.* Eastern Counties Railway Co., 10 A. & E. 531, and was inclined to act upon it, and award a mandamus. The writ was subsequently withheld in that case on another ground, but Lord Denman seems to have been of opinion that on a fit occasion a mandamus

[2] 3 Bur. 1267.

such valuable and permanent interest in the office or place as to justify the granting of the writ.[3]

3. It was held, in an early case[4] in Massachusetts, that this remedy could not be rendered available in cases where the office only extended to one year, and the question arising upon the return of the writ was one of fact, the traverse to which could not, according to the course of practice in that court, be determined before the term of the office would expire. "The cases, therefore," say the court, "in which the writ of mandamus may be an adequate remedy, in admitting or restoring to office, seem to be where the office is holden for a longer term than a year, or where the return to the writ will involve merely a question of law, so that, admitting the facts to be true, a peremptory mandamus ought to go."

4. It was accordingly held, in an English case,[5] that as mandamus to reinstate a person in office only lies where the office and its tenure are of a permanent nature, it is not an available remedy for the secretary of a benefit society, who had been dismissed by a resolution of a meeting of the society. The court here seem to consider that the office must be of such a character that the incumbent has such a vested and permanent interest in the same as that the court could render the operation of the writ of mandamus effective towards restitution, and where its operation is not liable to be countervailed by any counter agency.

ought to go. That, and the recent cases in the Queen's Bench, now under discussion, are the only cases which bear upon the subject. We feel that Lord DENMAN and Lord CAMPBELL are high authorities upon this or any other matter, and are both equally entitled to the respect of this court; but we are bound to pronounce our own judgment, and, after the most careful consideration, are of opinion that the judgment ought to be for the plaintiffs in error. The result is, that the judgment of the court below must be reversed."

[3] Angell & Ames Corp. §§ 704, 705.

[4] Howard *v.* Gage, 6 Mass. 462, 464.

[5] Evans *v.* Heart of Oak Benefit Society, 12 Jur. N. S. 163. Mandamus is the proper remedy to compel the former officers of a corporation to surrender to the newly elected board of officers, the books and papers of the company, together with all the insignia of office properly belonging to them. American Railway Frog Co. *v.* Haven, 101 Mass. 398. The general scope and operation of this remedy is here very ably and learnedly discussed by Mr. Justice AMES; S. C. 1 Redf. Am. Railw. Cas. 479.

*SECTION IV.

Mandamus to compel Company to complete Road.

1. English courts formerly required company having a general grant to complete its road.
2. Otherwise now, unless under peculiar circumstances.
3. Mandamus to compel company to operate its road.

§ 154. 1. The English courts at one time, it would seem, regarded a parliamentary grant to and acceptance by a railway company as equivalent to an agreement on their part to build the road. To make this intelligible to the American reader it is necessary to keep in mind the English parliamentary rules, in regard to passing acts of incorporation of such companies. The promoters are required to prepare plans and sections, and maps of their roads, with the line delineated thereon, so as to show its general course and direction, and to deposit copies of the same with the clerks of the peace, in the office of the Board of Trade, the Private Bill Office, in certain cases at the Board of Admiralty, and with the parish clerk of each parish through which the proposed line passes, before parliament assembles, and the plans are usually referred to in the charter as defining the course of such railway, and thus become binding upon the company, although not so regarded unless so referred to.[1] Specific notice too is to be served upon each land proprietor whose land is to be taken.[1] There is therefore some plausibility in regarding the obtaining of a charter under these circumstances as a binding obligation on the part of the company that they will build the road. No act of incorporation of a railway is passed in the British parliament until three-fourths of the estimated outlay is subscribed. Accordingly, in some of the earlier cases upon this subject, after considerable discussion and examination, it is laid down,[2] that when a railway

[1] Hodges Railw. 18, and notes; North British Railway Co. v. Tod, 5 Bell Ap. Cas. 184; s. c. 4 Railw. Cas. 449; Regina v. Caledonian Railway Co., 3 Eng. L. & Eq. 285.

[2] Queen v. York & North Midland Railway Co., 16 Q. B. 19; s. c. 16 Eng. L. & Eq. 299. This was decided by a divided court, Erle, J., dissenting, whose opinion ultimately prevailed in the Exchequer Chamber. Lord Campbell, and the majority of the court, founded their opinion chiefly on the celebrated judgment of Lord Eldon, in Blakemore v. Glamorganshire Canal

company have obtained an act of parliament, * reciting that the proposed railway will be beneficial to the public, and that the company are willing to execute it, and giving them compulsory powers upon landholders for that purpose, and in pursuance of such powers the company have taken land, and made part of their line, they are bound by law to complete such line, not only to the extent to which they have taken lands, but to the furthest point. And this is so held in some cases, although the statute enacts only that it shall be lawful for them to make the railway.

2. So also in another case,[3] where the undertaking was not yet entered upon, it was held that the company under such circumstances were bound to execute the work, from the time when such act receives the royal assent. And in another case,[4] where by the return to the writ it appeared that the company had no sufficient funds to build the road, and that the period for exercising their compulsory powers in obtaining lands had expired, and that the building of the road had thus become impossible, it was held that a mandamus must nevertheless be awarded. Writs of peremptory mandamus issued in each of the foregoing cases. But the first and last of these three cases came before the Exchequer Chamber, and were heard at great length before all the judges, and an elaborate opinion delivered by JERVIS, C. J., of the Common Bench, reversing the judgment of the Queen's Bench, chiefly on the ground that there was no implied obligation upon the company, either before or after entering upon the work, to complete it.[5] (*a*)

Navigation, 1 Myl. & K. 154. See also Regina *v.* Ambergate Railway Co., 23 Law T. 246; s. c. 17 Q. B. 362, 957; Regina *v.* Eastern Counties Railway Co., 1 Railw. Cas. 509. But the writ was held defective in this case, in not alleging that the company had abandoned or unreasonably delayed the work. Regina *v.* Eastern Counties Railway Co., 2 Railw. Cas. 260; s. c. 10 A. & E. 531; 2 Q. B. 347, 569.

[3] Regina *v.* Lancashire & Yorkshire Railway Co., 7 Railw. Cas. 266; s. c. 16 Eng. L. & Eq. 327.

[4] Regina *v.* Great Western Railway Co., 16 Eng. L. & Eq. 341. The extreme to which this very questionable doctrine was pushed in this case, seems to have proved, as is not uncommon in such cases, the point of departure, for its entire overthrow and abandonment.

[5] York & North Midland Railway Co. *v.* Regina, 1 Ellis & B. 858; s. c. 18

(*a*) Otherwise, of course, where the act expressly requires the company to complete its road. See *infra*, § 155.

* 3. This question arose and was examined in the courts of New York, somewhat, in one case,[6] where it was held that a railway corporation, which has completed its road between the terminal points named in the charter, forfeits its franchise by abandoning or ceasing to operate a part of the route. The remedy, however, in such cases, is not by injunction at the suit of the public, but by mandamus or indictment at the election of the state, or by proceeding to annul the charter of the corporation. (*b*) It is here said, that it seems that the corporation owes a duty to the public to exercise the franchise granted to it, and that it cannot abandon a portion of its road and incur a forfeiture of that portion at its mere pleasure.

Eng. L. & Eq. 199; Great Western Railway Co. *v.* Regina, 1 Ellis & B. 874. These decisions, one of which is given at length in the last section, seem to have been acquiesced in, and they certainly conform to what has ever been regarded as the law on that subject in this country. And the same principle was maintained in Scottish Northeastern Railway Co. *v.* Stewart, 3 Macq. Ap. Cas. 382; s. c. 5 Jur. N. S. 607. But see Lind *v.* Isle of Wight Ferry Co., 7 Law T. N. S. 416; Mason *v.* Stokes Bay Pier & Railway Co., 11 W. R. 80. It is here held, that where a notice from a railway company to take lands for the purposes of their undertaking has been followed by an award fixing the amount of purchase and compensation money, the court has jurisdiction to compel the company to complete the purchase. S. P. Metropolitan Railway Co. *v.* Woodhouse, 11 Jur. N. S. 296; s. c. 34 Law J. Ch. 297. But see *ex parte* Quicke, 13 W. R. 924; s. c. 12 Law T. N. S. 113.

[6] People *v.* Albany & Vermont Railroad Co., 24 N. Y. 261; s. c. 37 Barb. 216.

(*b*) McCann *v.* South Nashville Railroad Co., 2 Tenn. Ch. 773. And see *In re* New Brunswick & Canada Railway Co., 1 Pug. & B. 667, where it is held that mandamus will lie to compel the operation of the road by at least one train a day. See also Railroad Commissioners *v.* Portland & Oxford Central Railroad Co., 63 Me. 269. And it will make no difference that employés are demanding a small increase of wages. People *v.* New York Central & Hudson River Railroad Co., 9 Am. & Eng. Railw. Cas. 1.

SECTION V.

Cases in which this is the proper Remedy.

1. Compelling company to complete its road where the act is imperative.
2. Mandamus more proper remedy in such case than injunction.
3. Commissioners of public works not subject to the writ.
4. Public duties of corporations enforced by mandamus.
5. Facts tried by jury. Instances of this remedy.
6. Cannot be substituted for *certiorari* when that is taken away.
7. Issues to compel the allowance of costs.
8. Other instances of its application.
9. Lies where the duty is clear and no other remedy.
10. Not awarded to control legal discretion.
11. Nor to try the legality of an election.
12. Lies to compel transfer of stock.
13. Lies also to compel a railway company to have damages estimated under statute.

§ 155. 1. But although it must be regarded as now definitively settled that the writ will not lie, in any case, coming within the categories laid down in the foregoing opinion of JERVIS, C. J., yet where the act of the legislature is imperative upon the company to build their road, this duty will still be enforced by mandamus.[1] (*a*)

[1] Hodges Railw. 665, in note; Great Western Railway Co. *v.* Regina, 1 Ellis & B. 874; s. c. 18 Eng. L. & Eq. 211. The land-owners are so far interested in the building of a railway as to be entitled to bring the petition, and different owners of land may join. Regina *v.* York & North Midland Railway Co., 16 Eng. L. & Eq. 299. But it has been held, that a land-owner could not apply for an injunction to restrain a railway company from applying for an act of the legislature repealing a former act, and to restrain them from paying back deposits. Hodges Railw. 657, note; Anstruther *v.* East Fife Railway Co., 1 Macq. Ap. Cas. 98. Nor can a land-owner maintain a suit in equity against a company for not completing its line, in pursuance of its act of incorporation. Heathcote *v.* North Staffordshire Railway Co., 6 Railw. Cas. 358. The Lord Chancellor here held, reversing the opinion of the Vice-Chancellor, that in such case, a court of equity will leave the party to his legal rights. Regina *v.* Dundalk & Enniskillen Railway Co., 5 Law T. N. S. 25; Lind *v.* Isle of Wight Ferry Co., 7 Law T. N. S. 416; State *v.* Hartford & New Haven Railroad Co., 29 Conn. 538. And mandamus is the proper remedy by which to compel a canal company to bridge over a private way which it intersects. Habersham *v.* Savannah & Ogeechee Canal Co., 26 Ga. 665.

(*a*) It will not lie, however, where a portion of a land grant has lapsed through failure of the company to build that part of the road within the time, to compel the company to build it notwithstanding. State *v.* Southern Kansas Railroad Co., 22 Am. & Eng. Railw. Cas. 198. Where the com-

*2. But it has been held that such public duty cannot be enforced by injunction, at the suit of the attorney-general.[2] Corporations have for a very long time been compelled, by writ of mandamus to perform duties imposed by statute.[3] A turnpike company was compelled to fence its road where it passed through the land of private persons, and it was held no excuse that the company had made satisfaction for the damages awarded to the land-owner, or that, having completed their road, they had no funds with which to build the fences.[4]

3. But it has been held, that Commissioners of Woods and Forests, *who gave notice that they intended to take certain lands, in order to ascertain if they could be obtained at a certain price, and finding, by the claim of the land-owners, that the land could not be obtained, so as to bring the amount to be expended within the legislative limit and the funds at the disposal of the commissioners, abandoned their notice, could not be compelled

[2] Attorney-General *v.* Birmingham & Oxford Junction Railway Co., 3 Macn. & G. 453; s. c. 7 Eng. L. & Eq. 283.

[3] The Hartford & New Haven Railroad Co. was chartered to construct and operate a railway from Hartford to the navigable waters of the harbor of New Haven. A steamboat company was afterwards chartered to run in connection with it to New York; and the railway and steamboat line constituted a route that was of great convenience to the public. After the construction of the road and the use of it in connection with the steamboat line for several years, the railway company constructed a track diverging from its original track at a point a mile and a half from tide-water and running to the station of the New York & New Haven Railroad Co., in the city of New Haven, and discontinued the running of its passenger trains to its original terminus at tide-water. This change incommoded travellers who wished to pass by the steamboat route, of whom there were many. It was held, that a mandamus ought to be issued to compel the company to run passenger trains to its original terminus, and that the mandamus was properly applied for by the attorney for the state. State *v.* Hartford & New Haven Railroad Co., 29 Conn. 538.

[4] Regina *v.* Trustees Luton Roads, 1 Q. B. 860. Lord Denman there said, "The law orders these parties to perform the duty if they build the road." Patteson, J., said, "If they had not adequate funds they ought not to have made the road."

pany is bound to make a viaduct over its road in a city, mandamus will, in general, lie to compel the performance of that duty. Kansas *v.* Missouri Pacific Railway Co., 20 Am. & Eng. Railw. Cas. 45.

Whether the writ will issue to compel company negligently cutting down street and blocking the way to the plaintiff's premises, to arbitrate, *quære*. Quillinan *v.* Canada Southern Railway Co., 6 Ont. C. P. 31.

by mandamus to take the land, such commissioners acting in a public capacity, although the rule is otherwise as to private railway companies.[5]

4. Public duties of corporations have been enforced by mandamus, as repairing the channel and banks of a river, which, by their charter, they had been permitted to alter.[6] Also to make alterations in the sewers of a city; and where, in the act of parliament, this duty is defined, "to make such alterations and amendments in the sewers as may be necessary in consequence of the floating of the harbor," it was held this was a proper form for the command of the writ.[7] Also to restore a highway, intersected by a railway, to its former width.[8] (*b*)

[5] Regina *v.* Woods and Forests Commissioners, 15 Q. B. 761; *supra*, § 88.

[6] Regina *v.* Bristol Dock Co., 1 Railw. Cas. 548; 2 Q. B. 64; 2 Railw. Cas. 599. A return that the law imposed no such duty, but that they had performed it, "as near as circumstances permitted," is insufficient, as being a traverse of the law or an evasion of the writ. Regina *v.* Caledonian Railway Co., 16 Q. B. 19; s. c. 3 Eng. L. & Eq. 285.

[7] King *v.* Bristol Dock Co., 6 B. & C. 181. Mandamus is the appropriate remedy to compel a delinquent municipal corporation to discharge its liabilities under a subscription to stock of, or a loan of its credit to, a railway company. Commonwealth *v.* Perkins, 43 Penn. St. 400. A declaration for a mandamus to levy a rate to pay a debt is good, though it does not state the amount of the debt. Ward *v.* Lowndes, 6 Jur. N. S. 247; s. c. 29 Law J. Q. B. 40; Ellis & E. 940. But see McCoy *v.* Harnett County, 5 Jones N. C. 265. But in *Ex parte* Austin, 13 Law T. N. S. 443, it was held that the court will not in the first instance grant a rule for a mandamus calling on a public officer to make a rate for the payment of costs due to a successful appeal against a rate which had been quashed at quarter sessions. After the order for payment of costs is found good, if it is still disobeyed, a mandamus may be called for. *Ex parte* Austin, *supra*. See People *v.* Mead, 24 N. Y. 114. Mandamus will lie to compel a town committee to pay land-owners their damages for lands taken for a highway. Minhinnah *v.* Haines, 29 N. J. Law, 388; State *v.* Keokuk, 9 Iowa, 438. And see State *v.* County Judge, 12 Iowa, 237; State *v.* Davenport, 12 Iowa, 335; Knox County *v.* Aspinwall, 24 How. 376; Uniontown *v.* Commonwealth, 34 Penn. St. 293; Commonwealth *v.* Pittsburg, 34 Penn. St. 496.

[8] Regina *v.* Birmingham & Gloucester Railway Co., 2 Railw. Cas. 694; 2 Q. B. 47; Regina *v.* Manchester & Leeds Railway Co., 1 Railw. Cas. 523; 3 Q. B. 528; 2 Railw. Cas. 711. But in some cases it is requisite that the duty be strictly defined. Regina *v.* Eastern Counties Railway Co., 3 Railw. Cas. 22; 2 Q. B. 569.

(*b*) And where the company has elected to pursue a mode of restoration which is insufficient, the writ should point out in what the company has failed, and direct particularly what is to be done. New York *v.*

*5. In the English practice, questions of fact, arising on a mandamus, are tried by a jury.[9] So a railway company may by mandamus be required to establish a uniform rate of tolls.[10] (c) And also to proceed in the appraisal of land damages, after giving notice to treat.[11] So the sheriff or officer who holds the inquisition, may be compelled to proceed where he has no legal excuse, as where such officer assumed to direct a verdict against the claim, on the ground the applicant could not recover.[12]

[9] Regina *v.* London & Birmingham Railway Co., 1 Railw. Cas. 317; Regina *v.* Manchester & Leeds Railway Co., 3 Q. B. 528; s. c. 2 Railw. Cas. 711; Regina *v.* Newcastle-upon-Tyne, 1 East, 114.

[10] Clarke *v.* Leicestershire & Northamptonshire Union Canal, 6 Q. B. 898. But in this case judgment was given for defendant, by reason of the "insufficiency of the writ."

[11] *Supra*, §§ 88, 99, *et seq.*, and cases there cited.

[12] Walker *v.* London & Blackwall Railway Co., 3 Q. B. 744. In Carpenter *v.* Bristol, 21 Pick. 258, where county commissioners refused to assess damages sustained in consequence of constructing a railway, on the ground that the party applying did not own the land, and also refused to grant a warrant for a jury to revise their judgment, as required by Rev. Sts. c. 39, § 56, it was held that the party was entitled to a jury to revise, and that a mandamus would lie to compel the commissioners to grant a warrant. The court said: "Where application was made to county commissioners to estimate damages caused by the laying out of a railway, turnpike, or highway, the duty required of them would be a judicial duty. If they refused or neglected to perform it, this court would issue a mandamus commanding them to do it; that is, to exercise their judgment on the matter. But when they had performed this duty, it being within their discretion, no other tribunal would have a right to interfere with or complain of the manner in which they had performed it." So also in Chicago, Burlington, & Quincy Railway Co. *v.* Wilson, 17 Ill. 123, it was held, that on application to a judge to appoint commissioners to condemn land for the use of a railway, he is compellable to act, if a case is made under the statute, — that his duty is ministerial, and not judicial, and may be enforced by mandamus.

Dutchess & Columbia Railroad Co., 58 N. Y. 152. So mandamus will issue to compel the construction of fences and cattle-guards pursuant to statute. New York *v.* Rochester & State Line Railway Co., 76 N. Y. 294.

(c) Mandamus will not issue directing the manner of operating a road where the road is in the hands of a receiver. State *v.* Marietta & Cincinnati Railroad Co., 35 Ohio St. 154. Nor to compel a carrier to carry freight. There is a remedy by action. People *v.* New York, Lake Erie, & Western Railroad Co., 2 N. Y. Civil Proc. 82. Nor to enforce a contract with the company. State *v.* Paterson & Newark Railroad Co., 10 Am. & Eng. Railw. Cas. 334.

6. But where the statute in terms takes away the remedy by *certiorari*, the court will not indirectly accomplish the same thing by mandamus.[13]

7. A mandamus was awarded requiring the presiding officer to allow costs in a case before him,[14] for assessing land damages, including witnesses, attendance by attorney at the inquest, * conferences and briefs, but not the expenses of surveyors, as such.

8. And where the commissioners refused to assess the value of land taken for a railway, on the ground that the prosecutor had no title to the same, it was held that he is entitled to have their judgment revised by a jury, and a mandamus will lie, on his behalf, to compel the commissioners to grant a warrant for a jury.[15] And a mandamus will issue, at the suit of supervisors of a town, to compel a railway to build a highway,[16] or bridge,[17] for public use. (*d*)

[13] King *v.* Justices of West Riding of Yorkshire, 1 A. & E. 563.

[14] King *v.* Justices of the City of York, 1 A. & E. 828; Regina *v.* Sheriff of Warwickshire, 2 Railw. Cas. 661.

[15] Carpenter *v.* Bristol, 21 Pick. 258. See Smith *v.* Boston, 1 Gray, 72; s. p. Fotherby *v.* Metropolitan Railway Co., Law Rep. 2 C. P. 188.

[16] Whitmarsh Township *v.* Philadelphia, Germantown, & Norristown Railroad Co., 8 Watts & S. 365.

[17] Cambridge *v.* Charlestown Branch Railroad Co., 7 Met. 70.

(*d*) And mandamus will issue at suit of the company to compel county supervisors to subscribe to stock in the company pursuant to vote of the county. People *v.* Logan County, 63 Ill. 374. But see People *v.* Cass County, 77 Ill. 438. But not to compel the county to deliver bonds to be issued in payment of such subscription until the supervisors have subscribed. People *v.* Pueblo County Commissioners, 2 Col. 360. It will lie to compel issuance of bonds. Atchison, Topeka, & Santa Fe Railroad Co. *v.* Jefferson County Commissioners, 12 Kan. 127; Santa Cruz Railroad Co. *v.* Santa Cruz County Commissioners, 62 Cal. 239; Chicago, Danville, & Vincennes Railroad Co. *v.* St. Anne, 101 Ill. 151. But see Ham *v.* Toledo, Wabash, & Western Railway Co., 29 Ohio St. 174. And to compel payment where payment is refused on presentment without a warrant. State *v.* Craig, 69 Mo. 565. And a delay of nearly six years in applying for the writ to compel the issue of bonds may not be fatal. State *v.* Jennings, 48 Wis. 549. So it will issue to compel county commissioners to levy a tax to pay a stock subscription. Decatur County Commissioners *v.* State, 12 Am. & Eng. Railw. Cas. 604; State *v.* Rainey, 7 Am. & Eng. Railw. Cas. 183. But see Railroad Co. *v.* Olmstead, 46 Iowa, 316, where it is held that when the tax is voted and certified no further levy is required. So the writ will issue to compel a levy to pay bonds. Greene

9. No better general rule can be laid down upon this subject than that where the charter of a corporation, or the general statute in force and applicable to the subject, imposes a specific duty, either in terms or by fair and reasonable construction and implication, and there is no other specific or adequate remedy, the writ of mandamus will be awarded. But if the charter, or the general law of the state, affords any other specific and adequate remedy, it must be pursued.[18]

10. So, too, it must be a complete and perfect legal right, or the court will not award the writ.[19] And the writ of mandamus is * never awarded to compel the officers, or visitors of a corporation, who have discretionary powers, to exercise such powers according to the requisitions of the writ, but to compel them to

[18] Rex *v.* Nottingham Old Waterworks, 6 A. & E. 355; Dundalk Western Railway Co. *v.* Tapster, 1 Q. B. 667; Corrigal *v.* London & Blackwall Railway Co., 3 Railw. Cas. 411; People *v.* New York, 3 Johns. Cas. 79; Louisville & New Albany Railway Co. *v.* State, 25 Ind. 177; People *v.* Hatch, 33 Ill. 9. It seems to be considered, that *quo warranto* will not lie to an eleemosynary corporation, and therefore mandamus is the necessary remedy to correct abuses. 2 Kyd Corp. 337, note a. In King *v.* Gower, 3 Salk. 230, it was held mandamus was not the proper remedy to try the right. Rex *v.* Bank of England, Doug. 524; Shipley *v.* Mechanics' Bank, 10 Johns. 484; State *v.* Holiday, 3 Halst. 205; Asylum *v.* Phœnix Bank, 4 Conn. 172. Unless the rights of the stockholders in this respect are restricted by the charter of the corporation, or by its rules and by-laws passed in conformity thereto, stockholders have a right of access at reasonable hours to the proper sources of information, to know how the affairs of the corporation are conducted; and if such access is refused, mandamus is the appropriate remedy to enforce the right. Cockburn *v.* Union Bank, 13 La. An. 289. See also People *v.* Haws, 34 Barb. 69; Lamb *v.* Lynd, 41 Penn. St. 336. But see *Ex parte* Briggs, 1 Ellis & E. 881; s. c. 28 Law J. Q. B. 272, where the assertion of the right to inspect accounts is somewhat modified.

[19] Rex *v.* Archbishop of Canterbury, 8 East, 213; People *v.* Collins, 19 Wend. 56; 1 Wend. 318; *Ex parte* Napier, 18 Q. B. 692; s. c. 12 Eng. L. & Eq. 451.

County *v.* Daniel, 102 U. S. 187; Atchison, Topeka, & Santa Fe Railroad Co. *v.* Jefferson County Commissioners, 12 Kan. 127. But see *Ex parte* Rowland, 104 U. S. 604. Or to compel payment of a warrant issued for a judgment. United States *v.* Vernon County Court, 3 Dil. 281; United States *v.* Lincoln County, 5 Dil. 184. But see Ralls County Court *v.* United States, 105 U. S. 733. So it will issue to compel a town collector to pay over money collected to pay a subscription to stock, though he has wrongfully paid over to a supervisor. People *v.* Brown, 55 N. Y. 180.

proceed and exercise them according to their own judgment, in cases where they refuse to do so.[20] And it may be laid down as a general rule, that where any officers, or boards, have a legitimate discretion, and are acting within their appropriate jurisdiction, they cannot be controlled in their action by mandamus, issuing from a superior court.[21] (*e*) If the visitor or trustee be himself the party interested in the exercise of the function, it is said to form an exception.[22]

[20] Rex *v.* Bishop of Ely, 1 Bl. 81; Regina *v.* Chester, 15 Q. B. 513; Appleford's Case, 1 Mod. 82. Lord HALE's opinion cited with approbation by Lord CAMPBELL, 15 Q. B. 520; Rex *v.* Bishop of Ely, 2 T. R. 290; Murdock's Appeal, 7 Pick. 322; PARKER, C. J., in Attala County *v.* Grant, 9 Sm. & M. 77; Towle *v.* State, 3 Fla. 202; 2 Q. B. 433; *Ex parte* Benson, 7 Cow. 363, and cases cited; People *v.* Columbia Common Pleas, 1 Wend. 297. But the officers of a municipal corporation will be compelled to hold a court for the revision of the list of burgesses, although the time for holding the same, in compliance with the terms of the statute, has elapsed, and although the mayor, at the time of granting the mandamus, was not the same person who acted at the court. Regina *v.* Rochester, 7 Ellis & B. 910; s. c. 30 Law T. 73. But it was held, in Heffner *v.* Commonwealth, 28 Penn. St. 108, that the plaintiff to be entitled to the writ must show a specific legal right, which had been infringed, and an injury different, not only in amount or degree but in kind, from that which falls upon the public in general; that the damage suffered by him, in common with other citizens, by the neglect of a municipal corporation to lay out an alley, although as his land lying adjacent he was specially exposed to suffer loss by the neglect, would not entitle him to demand the writ; that for the redress of an omission of duty affecting only the public interest and that of individuals incidentally, the suit should be prosecuted by some public officer. So, also, where the party is entitled to costs in a proceeding before commissioners to estimate land damages against a railway, unless the duty to award such costs is one which is plain and obvious, it will not be enforced by writ of mandamus. *Ex parte* Morse, 18 Pick. 448. And the court will not grant a mandamus requiring parish officers to receive a pauper in obedience to an order of removal, the proper course being by indictment. *Ex parte* Downton, 2 Ellis & B. 856.

[21] Waterbury *v.* Hartford, Providence, & Fishkill Railroad Co., 27 Conn. 146.

[22] Regina *v.* Dean and Chapter of Rochester, 17 Q. B. 1; s. c. 6 Eng. L. & Eq. 269.

(*e*) *Ex parte* Railway Co., 101 U. S. 711. And see State *v.* Van Ness, 15 Fla. 317, where it is held that mandamus will not lie to compel a judge to hear a case which he has held himself disqualified from hearing by reason of relation of his wife to a party in interest. See also Chicago & Northwestern Railway Co. *v.* Geneseo Circuit Judge, 40 Mich. 168.

* 11. But in one case,[23] it is said to be an inflexible rule of law, that where a person has been *de facto* elected to a corporate office, and has accepted and acted in the office, the validity of the election and the title to the office can only be tried by proceeding on a *quo warranto* information. A mandamus will not lie, unless the election can be shown to be merely colorable. But where the right is clear, or where the old board refuse to surrender to the newly elected one, without any color of excuse, the new board may be put in possession of the insignia or functions of office by writ of mandamus, or, as held in some of the states, by bill in equity.[24] (*f*)

12. And this is the proper remedy to compel a corporation to allow the transfer of stock upon their books,[25] or the company may be compelled to pay damages for such refusal by an action at law.[25]

13. It was held in a Colonial Appeal to the Privy Council, that where the company proceeded to build one of their bridges so near a toll-bridge across the same water as to lessen the value of the latter, without taking any steps to have such damage estimated under the statutory provision in such cases, that this did not so render the company wrongdoers as to subject them to the ordinary action at law, which would have been the proper remedy, but for the statutory one. It was said the owner of the toll-bridge may have a writ of mandamus to compel the company to proceed and have the damage assessed under the statute.[26] (*g*)

[23] Regina *v.* Chester, 5 Ellis & B. 531; s. c. 34 Eng. L. & Eq. 59.

[24] Dart *v.* Houston, 22 Ga. 506.

[25] Helm *v.* Swiggett, 12 Ind. 194. But where a shareholder executed a transfer of his shares, which he took together with the certificate of his shares to the company's office for registration, and left the transfer, but refused to leave the certificate for the inspection of the directors, it was held that the court would not compel the company to register the transfer. *In re* East Wheal Martha Mining Co., 33 Beav. 119.

[26] Jones *v.* Stanstead & Shefford Chambly Railway Co., Law Rep. 4 P. C. 98; 8 Moore P. C. 312.

(*f*) Mandamus will not lie where a member of a corporation has been excluded for four successive meetings from speaking or voting, to restore him to his rights. Crocker *v.* Old South Church, 106 Mass. 489.

(*g*) The company not being bound when it is in possession to institute proceedings to condemn, mandamus will not lie to compel it. Smith *v.* Chicago & Alton Railroad Co., 67 Ill. 191.

SECTION VI.

Proper Exeuses, or Returns to the Writ.

1. Return that powers of company had expired at date of writ, good.
2. So of return of want of funds to perform duty.
3. Otherwise of return that road is not necessary, or would not be remunerative.
4. Part of return may be quashed and answer required to remainder.
5. Counsel for petitioner entitled to open and close.
6. Return of want of power to do the act required by the charter is bad.
7. Peremptory writ cannot issue till whole case tried.
8. Court will not quash return summarily.
9. Non-compliance with peremptory writ admits of no excuse.

§ 156. 1. It seems to be an unquestionable answer to the writ of mandamus to compel the company to complete their road, that the time for taking lands under the act had expired at the time of issuing the alternative writ, so that it had become impossible to build the road, as required in the writ.[1] But where, at the * time of the service of the alternative mandamus, the company had time to institute compulsory proceedings for taking lands, it was held, that if, instead of doing so, they attempted to defend the writ, and failed, it was at their peril, and the court would not excuse them, upon the ground that in the mean time their compulsory powers had expired.[2]

[1] Regina *v.* London & Northwestern Railway Co., 16 Q. B. 864; s. c. 6 Eng. L. & Eq. 220, denying the authority of Regina *v.* Birmingham & Gloucester Railway Co., 2 Q. B. 47, on this point, as justifying the writ. In the former case it was held, that the prosecutors were guilty of laches in not sooner applying for the writ. But a plea that the cause of action did not accrue within six years is a bad plea to a declaration for a mandamus, as the statute of limitations does not bar an action for such a writ. Ward *v.* Lowndes, 6 Jur. N. S. 247; s. c. 1 Ellis & E. 940, 956; 2 Ellis & E. 419; 29 Law J. Q. B. 40.

[2] Regina *v.* York, Newcastle, & Berwick Railway Co., 16 Q. B. 886; s. c. 6 Eng. L. & Eq. 259; Regina *v.* Lancashire & Yorkshire Railway Co., 16 Q. B. 906; s. c. 6 Eng. L. & Eq. 265; Regina *v.* Great Western Railway Co., 1 Ellis & B. 263, 744; s. c. 18 Eng. L. & Eq. 364. In this case it was held, that the return must show that the company's compulsory powers for taking land had expired, and that they could not obtain the necessary land without exercising those powers. Where, on motion for mandamus to compel the company to build a bridge, it was stated on behalf of the company that it could not build it without purchasing additional land, and that its powers for that purpose

2. And where it was attempted to defend against the writ, on the ground that it was not shown that the company had funds, the court said, in the last case referred to: "We shall presume that the company have funds." But it would seem that the want of funds, and of the ability to obtain them, if shown on the return to the alternative mandamus, might be an excuse.[3] And the company * are not estopped from making this plea by reason of having, in some instances, exercised their compulsory powers of taking land.[4]

3. But it is no sufficient excuse that the road has become unnecessary, or that it would not prove remunerative, or that, in all reasonable probability, the funds which will come to the hands of the company will prove inadequate to the completion of the work.[5]

4. By the English statute the court may quash part of a return to the writ which is bad in law, and put the prosecutor to plead to or traverse the remainder. But if the grounds of defence to

had expired, and the prosecutor stated that it could build it without taking additional land, it was held that an alternative writ of mandamus should issue to the company, and that it might return its inability from want of power to purchase land. Regina *v.* Dundalk & Enniskillen Railway Co., 5 Law T. N. S. 25. Where mandamus was issued to a railway, reciting that premises in the occupation of B. had been injuriously affected by the works of the company, and that the company having declined to join in the appointment of an arbitrator to estimate the damage to B., he had appointed an arbitrator, who had duly made his award, and commanding the company to take up his award, and the company returned that B. also occupied other lands that were taken by the company, and that, before the execution of their works, it was agreed between him and the company that the company should pay to him a certain sum in satisfaction of the lands so taken, and the premises so injuriously affected, this was held a good return. Regina *v.* West Midland Railway Co., 11 W. R. 857.

[3] Lord CAMPBELL, in Regina *v.* London & Northwestern Railway Co., 16 Q. B. 864; s. c. 6 Eng. L. & Eq. 220; Regina *v.* Ambergate, Nottingham, & Boston Railway Co., 1 Ellis & B. 372; s. c. 18 Eng. L. & Eq. 222. In Regina *v.* Eastern Counties Railway Co., 10 A. & E. 531, it was considered no objection to granting the writ that the company had not the requisite funds, and could not raise them, without a new act.

[4] Regina *v.* Ambergate, Nottingham, & Boston Railway Co., 1 Ellis & B. 372; s. c. 18 Eng. L. & Eq. 222.

[5] Regina *v.* York & North Midland Railway Co., 16 Eng. L. & Eq. 299, not reversed on these points; Regina *v.* Lancashire & Yorkshire Railway Co., 7 Railw. Cas. 266; s. c. 16 Eng. L. & Eq. 327.

the writ be repugnant, the court may, upon that ground, quash the whole.[6]

5. The counsel for the crown are allowed to begin, although the return may be in the nature of a demurrer to the writ.[7] The validity of the writ may be impeached on the return.[8]

6. In a case where the approaches to a bridge across a railway were not of the width required by the special act, a return to the writ of mandamus, that they were as convenient to the public as the original road, or as they could be made, in execution of the powers of the act, and that to widen them to the dimensions defined in the act would require more land, and that their powers for taking land compulsorily had expired before they were called upon to widen these approaches, is bad.[9]

7. The peremptory writ will not be issued until all the matters contained in the alternative writ are finally determined in favor of the application, or enough so to justify the writ.[10]

* 8. The court will not quash a return summarily, or order it taken off the file, unless it is frivolous, so as to be an obvious insult and contempt of court.[11]

9. No excuse for non-compliance with a peremptory writ of mandamus is admissible.[12] It is no ground of objection to a man-

[6] Statute 9 Anne, c. 20; Regina *v.* Cambridge, 2 T. R. 456; 4 Bur. 2008; Rex *v.* York, 5 T. R. 66.

[7] Regina *v.* St. Pancras, 6 A. & E. 314; State *v.* Bank Directors, 28 Vt. 594.

[8] Clarke *v.* Leicestershire & Northamptonshire Union Canal, 6 Q. B. 898; s. c. 3 Railw. Cas. 730.

[9] Regina *v.* Birmingham & Gloucester Railway Co., 2 Q. B. 47; 3 id. 223; 2 Railw. Cas. 694; Rex *v.* Ouse Bank Commissioners, 3 A. & E. 544.

[10] Regina *v.* Baldwin, 8 A. & E. 947. This was where the alternative writ required two sums of money to be paid, and it had been found that one of the sums was due, and the inquiry was not finished in regard to the other. The court refused to grant a peremptory writ for the payment of the one sum until the controversy about the other was ended.

[11] Regina *v.* Payn, 3 Nev. & P. 165; King *v.* Round, 5 Nev. & M. 427. But the return to a writ of mandamus must be very minute in showing why the party did not do what he was commanded to do. Regina *v.* Southampton, 1 Ellis, B. & S. 5; s. c. 7 Jur. N. S. 990; 30 Law J. Q. B. 244.

[12] Regina *v.* Poole, 1 Q. B. 616. But after judgment for the crown, on a return to a writ of mandamus, the defendants having voluntarily, and with the prosecutor's assent, done the act commanded, the court will quash a peremptory writ of mandamus as unnecessary, and an abuse of the process of the court. Regina *v.* Saddlers' Company, 3 Ellis & E. 42; s. c. 10 H. L. Cas. 404; 33 Law J. Q. B. 68.

damus, that a requisition is made on parties in the alternative, to do one of three things, if the duty enjoined by the act of parliament forms one of them, and there has been a general refusal to comply with the requisition.[13] And the demand for the rate in this case was held sufficient, notwithstanding the church-wardens required the vestry to lay the rate, or do another act, which last was illegal.[13]

SECTION VII.

Alternative Writ requiring too much, bad, for that which it might have maintained.

§ 157. It seems to be well settled in the English practice, that if the writ issue, in the first instance, for some things which defendant is not bound to do, it cannot be supported, even as to those things which he is compellable to perform.[1] But the writ may be awarded to complete such portions of their road as the company are still compellable to build, although from lapse of time it has become impossible to build the entire road.[2]

But if the alternative writ commands more than is necessary to * be done to comply with the statute, it will be quashed, notwithstanding the party might have been entitled to this remedy to a certain extent.[3]

[13] Regina *v.* St. Margarets, 8 A. & E. 889.

[1] Regina *v.* Caledonian Railway Co., 16 Q. B. 19; s. c. 3 Eng. L. & Eq. 285; Regina *v.* East & West India Docks & Birmingham Junction Railway Co., 2 Ellis & B. 466; s. c. 22 Eng. L. & Eq. 113.

[2] Regina *v.* York & North M. Railway Co., 16 Eng. L. & Eq. 299. This case was reversed in Exchequer Chamber on other grounds.

[3] York & North Midland Railway Co. *v.* Milner, 3 Railw. Cas. 774, reversing, in the Exchequer Chamber, Queen *v.* York & North Midland Railway Co., 3 Railw. Cas. 764.

SECTION VIII.

Enforcing Payment of Money awarded against Railways.

1. Enforcing payment of money by corporations by mandamus.
2. Where debt will lie, mandamus will not.
3. Mandamus proper to compel payment of compensation under statute.
4. Mandamus not allowed in matters of equity jurisdiction.
5. Contracts of company not under seal enforced by mandamus.
6. Where a statute imposes a specific duty, an action will lie.

§ 158. 1. It seems to have been the more general practice to enforce the payment of money awarded against a corporation, in pursuance of a statute duty, by mandamus, where no other specific remedy is provided.[1]

* 2. But it has been held that an action of debt will lie upon the inquest and assessment of compensation for land.[2] And

[1] King *v.* Nottingham Old Waterworks, 6 A. & E. 355; Rex *v.* Swansea Harbor, 8 A. & E. 439. In this case one party moved for a *certiorari* with a view to quash the proceedings, and the other for a mandamus to carry them into effect. The rule for the former was discharged, and for the latter made absolute. Regina *v.* Deptford Improvement Co., 8 A. & E. 910. Where a city council is authorized and required by law to levy and collect a tax on the real and personal property of the city, sufficient to pay the interest on bonds issued by the city in payment of a subscription to the stock of a railway company, and the council refuses to do so, and there is no specific legal remedy provided for such refusal, mandamus may be issued to compel them to perform that duty, at the instance of holders to whom the bonds have passed from the company. An express or explicit refusal in terms is not necessary to put the respondents in fault; it will be sufficient that their conduct makes it clear that they do not intend to do the act required. The writ, in such case, may be applied for by any of the bondholders; and it is not necessary that all the bondholders should be parties to it. Nor in Kentucky is it necessary to make the railway corporation, to which the bonds were originally executed, or the tax-payers of the city, or the commonwealth, parties to the bills. And it is no objection to the issuing of the writ that an action has been brought against the city, on some of the coupons, such action having been dismissed before judgment, on the petition for mandamus. Maddox *v.* Graham, 2 Met. Ky. 56. It is laid down in the above case, that a proceeding for a mandamus against the city council is virtually a proceeding against the corporation, and the judgment is obligatory on the members of the common council who may be in office at the time of its rendition. And a change in the membership of this council does not so change the parties as to abate the proceeding. Ib.

[2] Corrigal *v.* London & Blackwall Railway Co., 5 Man. & G. 219.

where, in granting to a railway the right to erect a bridge across the river Ouse, it was provided in the act of parliament, that, if the erection of such bridge should lessen the tolls of another bridge company upon the same river, after a trial of three years, as compared with the three years next preceding the erection of the railway bridge, the railway company should pay to the bridge company a sum equal to ten years' purchase of such annual decrease of tolls; it was held that debt will lie for such purchase, and that mandamus is no more effectual remedy and ought not to be granted.[3] If the party have no right to execution, upon an award, mandamus will be awarded, otherwise not.[4]

3. So the court will not enforce an ordinary matter of contract or right, upon which action lies in the common-law courts, as to compel common carriers to perform their public duties, or special contracts,[5] the statute not requiring them to carry all goods offered. But where compensation is claimed for damages done under a statute, the proper remedy is by mandamus, although the party may claim that the company went beyond their powers, and thus committed a wrong for which the proper remedy is an action.[6]

4. Nor will mandamus lie where the proper remedy is in equity,[7] * and the right is one not enforceable at law, but only in

[3] Regina *v.* Hull & Selby Railway Co., 6 Q. B. 70; Williams *v.* Jones, 13 M. & W. 628. Courts of equity will not interfere where there is a remedy before sheriffs' jury. East & West India Docks & Birmingham Junction Railway Co. *v.* Gattke, 3 Macn. & G. 155; s. c. 3 Eng. L. & Eq. 59.

[4] Rex *v.* St. Catherine's Dock Co., 4 B. & Ad. 360; Corpe *v.* Glyn, 3 B. & Ad. 801; Regina *v.* Victoria Park Co., 1 Q. B. 288. And in this case Lord DENMAN says the court should not go beyond its extraordinary interposition by mandamus, to require a corporation to make a call on the shareholders to pay debts, where the legislature had intrusted them with that power, and they had no standing capital.

[5] *Ex parte* Robbins, 7 Dowl. P. C. 566.

[6] Regina *v.* North Midland Railway Co., 2 Railw. Cas. 1; 11 A. & E. 955; Thicknesse *v.* Lancaster Canal Co., 4 M. & W. 472; Fenton *v.* Trent & Mersey Navigation Co., 9 M. & W. 203; Rex *v.* Hungerford Market Co., 3 Nev. & M. 622.

[7] Rex *v.* Stafford, 3 T. R. 646. See Edwards *v.* Lowndes, 1 Ellis & B. 92; 20 Law J. Q. B. 404; 16 Eng. L. & Eq. 204. The relation of trustee and *cestui que trust* gives no right of action at law for money due. Pardoe *v.* Price, 16 M. & W. 451. The proper remedy is in equity, and mandamus will not lie. Regina *v.* Balby & Worksop Turnpike, 17 Jur. 731; s. c. 16 Eng. L. & Eq. 276.

equity, as in matters of trust and confidence. But in a case where the act of incorporation allowed the company to sue and to be sued in the name of their clerk, it was held that execution could not issue against the clerk personally; and in giving judgment, TINDAL, C. J., said: "There can be no doubt but that the funds of the trustees may be made answerable for the amount ascertained in the action, in case of a refusal to apply them, either by a mandamus or a bill in equity." [8]

5. And where, after a rule *nisi*, for a mandamus to compel the company to summon a jury to assess compensation to land-owners, a contract was entered into between the land-owners and the agent of the company, wherein they agreed upon the payment of a stated sum, and also a weekly compensation; upon the payment of the stated sum, and the execution of the contract, the proceedings were discontinued. The company paid the weekly sum for a time, and then discontinued the payment. The application for mandamus being renewed, the court held, that, as the contract was not under their seal, no action will lie upon it against the company,[9] and it should therefore be enforced by mandamus.[10]

6. It seems to be the general rule of the English law, that where a statute imposes a specific obligation or duty upon a corporation, an action will lie to enforce it, founded upon the statute, either debt or case, according to the nature of the claim.[11]

[8] Wormwell *v.* Hailstone, 6 Bing. 668.

[9] Regina *v.* Stamford, 6 Q. B. 433.

[10] Regina *v.* Bristol & Exeter Railway Co., 4 Q. B. 162; s. c. 3 Railw. Cas. 777. This seems like too great a refinement. If the contract was really obligatory on the company, it might as well be the foundation of an action, as to be enforced by mandamus. In Tenney *v.* East Warren Lumber Co., 43 N. H. 343, it was held, that evidence that a deed purporting to be the deed of a corporation was executed by agents duly authorized by it, is *prima facie* evidence that any seal affixed to it has been adopted by the corporation for that occasion. And the same point is maintained in Ransom *v.* Stonington Savings Bank, 2 Beasley, 212.

[11] Tilson *v.* Warwick Gas-Light Co,. 4 B. & C. 962; Carden *v.* General Cemetery Co., 5 Bing. N. C. 253.

*SECTION IX.

Writ sometimes denied in Matters of Private Concern.

1. Denied to compel company to divide profits.
2. Allowed to compel production and inspection of corporation books.
3. Allowed to compel the performance of statute duty, but not to undo what is done.
4. Allowed to compel the production of the register of shares, or the registry of the name of the owner of shares, and in other cases.
5. Common remedy for restoring persons to corporate offices of which they are unjustly deprived.

§ 159. 1. Where the charter and subsequent acts relating to the Bank of England required the corporation to divide their profits semi-annually, a mandamus to compel the production of the books of the company, so as to show an account of their net income and profits, since the last dividend was declared, more than six months having elapsed, was denied.[1] ABBOTT, C. J., said it was in effect "an application, on behalf of one of several partners, to compel his copartners to produce their accounts of profit and loss, and to divide their profits, if any there be." It was also said, that this might very properly be done in a Court of Chancery, but a court of law is a very unfit tribunal for such a subject. "A mere trading corporation differs materially from those which are intrusted with the government of cities and towns, and therefore have important public duties to perform." BAYLEY, J., said: "The court never grant this writ, except for public purposes, and to compel the performance of public duties." BEST, J., said: "If we were to grant this rule we should make ourselves auditors to all the trading corporations in England."

2. But in a later case[2] it was held, that mandamus may be granted to compel the production and inspection of corporation books and records at the suit of a corporator, where a distinct controversy has already arisen, and the relator is interested in the question, and the former cases upon the subject are elaborately reviewed, and held to confirm this view.[3] (*a*)

[1] Rex *v.* Bank of England, 2 B. & Ald. 620.

[2] Rex *v.* Merchant Tailors' Co., 2 B. & Ad. 115.

[3] Rex *v.* Hostmen, 2 Stra. 1223. So to inspect the court roll of a manor.

(*a*) See *infra*, pl. 4.

* 3. The court has refused to grant a mandamus to a private trading corporation, to permit a transfer of stock to be made in their books.[4] In one case the writ was applied for, to compel a railway company to take the company seal off the register of shareholders.[5] Lord CAMPBELL, C. J., said: "If I had the smallest doubt, I would follow the example of the high tribunal (Q. B. in Ireland), which is said to have complied with a similar application. But having no doubt, I am bound to act on my own view. The writ of mandamus is most beneficial, but we must keep its operation within legal bounds, and not grant it at the fancy of all mankind. We grant it when that has not been done which a statute orders to be done, but not for the purpose of undoing what has been done."[6] "It is said the court will compel the corporation to affix its seal, when it refuses to do so without legal excuse, but will not try the legality of an act professedly done in pursuance of a statute." The difference seems to be one of form rather than substance, and to rest mainly upon the consideration, that, after the act is done, its legality had better be tested in the ordinary mode, by an action at law or in equity.

4. But the writ has been granted to compel the production of a register of shareholders, to enable a creditor to proceed against

at the instance of a tenant who has an interest in a pending question, and has been refused permission to inspect the court rolls by the lord of the manor. Rex *v.* Shelley, 3 T. R. 141. But not otherwise. Rex *v.* Allgood, 7 T. R. 746. It is not necessary that a suit be pending, if a distinct question have arisen. Rex *v.* Tower, 4 M. & S. 162. And in action against an incorporated company, which has ceased to carry on business, a director of the company may be ordered by the court or a judge to give the plaintiff inspection of documents not denied to be in his possession, or under his control. Lacharme *v.* Quartz Rock Mariposa Gold Mining Co., 31 Law J. Exch. 335; s. c. 1 H. & C. 134. And the corporators may compel the inspection of the stock ledger, if that contain important evidence, although the corporation do not keep the books required by law. People *v.* Pacific Mail Steamship Co., 50 Barb. 280.

[4] Rex *v.* London Assurance Co., 5 B. & Ald. 899.

[5] *Ex parte* Nash, 15 Q. B. 92.

[6] The office of the writ of mandamus is to stimulate and not to restrain the exercise of official functions; and after the officers have performed the duties imposed on them, they are no longer subject to it. Bedford Borough School Directors *v.* Anderson, 45 Penn. St. 388.

them.[7] (*b*) So, too, to compel the registry of the name of the owner of shares, properly transferred, or of the name of the personal * representative, in case of the decease of the owner.[8] But in some cases of peculiar necessity for specific aid by way of mandamus, as the delivery of a key to the party entitled to hold it, by the foundation of a private charity,[9] the writ has been awarded.

5. And there can be no doubt the Court of Queen's Bench has almost immemorially been accustomed to try the validity of municipal and other public corporate elections by *quo warranto*, which, in case of illegality found, will displace the incumbents, but not establish those rightfully entitled to the function,[10] (*c*)

[7] Regina *v.* Worcestershire & Stafford Railway Co., Q. B. W. R. 1853–54, 482.

[8] *Supra*, §§ 42, 44; Regina *v.* Londonderry & Coleraine Railway Co., 13 Q. B. 998. No question is made here but the court will compel the company, by mandamus, to enter a transfer on its books in a proper case, but the application was denied on other grounds. See Regina *v.* Midland Counties Railway Co., 15 Ir. Com. Law, 514, 525. And see Helm *v.* Swiggett, 12 Ind. 194. But not where inspection of the certificate of shares was refused to the directors. *In re* East Wheal Martha Mining Co., 33 Beav. 119.

[9] Regina *v.* Abrahams, 4 Q. B. 157.

[10] Rex *v.* Williams, 1 Bur. 402; Rex *v.* Hertford, 1 Ld. Ray. 426; 1 Salk. 374; Rex *v.* Breton, 4 Bur. 2260; Rex *v.* Cambridge, 4 Bur. 2008; Rex *v.* Tregony, 8 Mod. 111, 127; Rex *v.* Turkey Co. 2 Bur. 999; Anonymous, 2 Stra. 696. In some English cases the King's Bench seems to have altogether disregarded the distinction between public and private corporations, in exercising control over their functionaries. Rex *v.* Bishop of Ely, 2 T. R. 290. And in Rex *v.* St. Catharine's Hall, 4 T. R. 233, the refusal to grant the writ seems to be placed altogether on other grounds. But it seems a mandamus will not be awarded to compel a voluntary society to recognize the rights of the minority. King *v.* Gray's Inn, Doug. 353; Rex *v.* Lincoln's Inn, 4 B. & C. 855. Where there is already one in the office *de facto*, mandamus will not be awarded, *quo warranto* being the proper remedy to try the title of the officer in possession. Rex *v.* Colchester, 2 T. R. 259, 260. But in Rex *v.* Thatcher, 1 D. & R. 426, it was awarded to the commissioners of land tax to admit as clerk the person having the majority of legal votes. People *v.* New York, 3 Johns. Cas. 79; St. Louis County Court *v.* Sparks, 10 Mo. 117; Bonner *v.* State, 7 Ga. 473; Clayton *v.* Carey, 4 Md. 26.

(*b*) In general, mandamus will issue to compel a corporation to exhibit its stock transfer books to stockholders. *In re* Sage, 70 N. Y. 220. But not where inspection is wanted for purposes purely speculative. People *v.* Northern Pacific Railway Co., 18 Fed. Rep. 471.

(*c*) See *supra*, § 153.

mandamus being requisite for that purpose. But whatever may be the English rule in regard to merely private corporations, it is certainly settled in this country that the courts will try the validity of an election and the question of usurpations and the legality of amotions in private corporations in this mode.[11] But there is one * case where the court refused to try the title to an annual office by writ of mandamus, for the reason that it would prove unavailing.[12] But it has been awarded in England to restore a clerk to a butchers' company, a clerk to a company of masons, and sundry similar officers,[13] and in this country, to restore the trustee of a private academic corporation,[14] a member of a religious corporation, and many similar officers.[15]

[11] Commonwealth *v.* Arrison, 15 S. & R. 131; People *v.* Thompson, 21 Wend. 235; s. c. 23 Wend. 537; People *v.* Head, 25 Ill. 325; State *v.* Common Council, 9 Wis. 254; State *v.* Boston, Concord, & Montreal Railroad Co., 25 Vt. 433; *In re* White River Bank, 23 Vt. 478; Commonwealth *v.* Union Fire & Marine Insurance Co., 5 Mass. 231; State *v.* Ashley, 1 Pike, 570; St. Luke's Church *v.* Slack, 7 Cush. 226. But in Gorman *v.* Police Board, 35 Barb. 527, it is intimated that mandamus will not issue to restore an officer removed in an illegal manner, but for a sufficient cause. Martin *v.* Police Board, 35 Barb. 550. See to the same point Barrows *v.* Massachusetts Medical Society, 12 Cush. 402. And *a fortiori* mandamus lies where the office concerns the public or the administration of justice. Lindsey *v.* Luckett, 20 Tex. 516; Felts *v.* Memphis, 2 Head, 650.

[12] Howard *v.* Gage, 6 Mass. 462. But this case was decided on the ground that the statute of Anne not being in force in that state, the truth of the return to the alternative writ could not be tried till the term should expire. But the decision is scarcely maintainable even on that ground. But it was held a good defence to a writ of mandamus to compel a township treasurer to pay an order for a teacher's salary, that his term of office had expired, and all the funds in his hands had in good faith been paid over to his successor. State *v.* Lynch, 8 Ohio St. 347.

[13] Angell & Ames Corp. § 704. And where, by the custom of a parish, one churchwarden was appointed annually by the parishioners, and one annually by the rector, and the latter appointed a person who was not an inhabitant of or an occupier of property in the parish, it was held that a mandamus to the rector to appoint a churchwarden was the proper process by which to question the validity of the appointment. *In re* Barlow, 30 Law J. Q. B. 271; s. c. 5 Law T. N. s. 289. And see Regina *v.* Heart of Oak Benefit Society, 13 W. R. 724.

[14] Fuller *v.* Academic School, 6 Conn. 532. The opinion of DAGGETT, J., here discusses the power of amotion of trustees and officers by eleemosynary corporations somewhat at length, and comments very judiciously on the cases.

[15] Green *v.* African Methodist Episcopal Society, 1 S. & R. 254; Common-

*SECTION X.

Remedy lost by Acquiescence. — Proceeding must be Bona Fide.

1. Remedy must be sought at earliest convenient time.
2. Courts will not hear such applications made merely to obtain opinion of court.
3. Application any time within statute of limitations?

§ 160. 1. The right to interfere in the proceedings of a corporation by mandamus, is one of so summary a character, that it should be asserted at the earliest convenient time, or it will not be sustained.[1] And especially where, in the mean time, the facilities

wealth *v.* St. Patrick Benevolent Society, 2 Binn. 441, 448; Commonwealth *v.* Philanthropic Society, 5 Binn. 486; Commonwealth *v.* Pennsylvania Benevolent Institution, 2 S. & R. 141; Franklin Benevolent Association *v.* Commonwealth, 10 Penn. St. 357; Commonwealth *v.* German Society, 15 Penn. St. 251. But if the society have the absolute power of expulsion, it would seem that its judgment in the matter is not revisable. Ib. It was said, however, that a private person who makes a highway on his own land and dedicates it to public use, has no such interest in the highway as to enable him to sue for penalties given against a railway which had cut through the highway and not restored it, and a mandamus to enforce the recovery of such penalty was denied on the ground that the prosecutor had no public duty in regard to the highway. Regina *v.* Wilson, 11 Eng. L. & Eq. 403; s. c. 1 Ellis & B. 597.

[1] Rex *v.* Stainforth & Keadby Canal Co., 1 M. & S. 32; Rex *v.* Cockermouth Inclosure Commissioners, 1 B. & Ad. 378; Regina *v.* Leeds & Liverpool Canal Co., 11 A. & E. 316; Lee *v.* Milner, 1 Railw. Cas. 631; Regina *v.* London & Northwestern Railway Co., 16 Q. B. 864; s. c. 6 Railw. Cas. 631, and Regina *v.* Lancashire & Yorkshire Railway Co., 16 Q. B. 906; s. c. 16 Q. B. 654. So, in Connecticut, where by statute a school district can change its school-house only by a two-thirds vote, and a district which had an established school-house voted by a less majority to have the school kept for the season in a room furnished for the purpose within half a mile from the school-house, more convenient for the children generally, and the district committee kept the school there, a mandamus being applied for by some members of the district, taxpayers therein, some of whom had children whom they wished to send to the school, to compel the district committee to have the school kept in the school-house, it appearing that at the time of the application the term of the school had half expired, and had nearly expired at the time of the hearing, this was held not to be such a case as called imperatively for the interposition of the court by mandamus, it not appearing to be a permanent attempt to change the place of the school. Colt *v.* Roberts, 28 Conn. 330. See State *v.* Lynch, 8 Ohio St. 347.

for accomplishing a public work, or the public demand for it, have materially changed, the writ will not be awarded.[2] But it is often proper and necessary to wait till public works are completed, before moving for the writ.[3]

2. The English courts decline to hear applications for mandamus, * which are not *bona fide*, but merely to obtain the opinion of the court,[4] even where the prosecutor may have *bona fide* purchased shares in the corporation, but for the mere purpose of trying a question in which the public have an interest.[4]

3. In New York it was held, that as there was no special limitation upon this remedy, it might be brought within the time fixed for the limitation of other similar or analogous remedies.[5] But this rule seems liable to objection in many cases. The English rule, that the party should suffer no unreasonable delay, in the opinion and discretion of the court, seems more just and equitable, and is countenanced by other American cases.[6] The decisions of the English courts are very strict upon this point.[7]

SECTION XI.

Mandamus allowed where Indictment lies.

1. Mandamus sometimes lies where act in question is indictable.
2. Lies to compel company not to take up their rails.
3. Denied where there is other adequate remedy.

§ 161. 1. It seems to have been considered that the fact that a railway or other corporation had exposed themselves to indictment by the very act or omission proposed to be remedied by manda-

[2] Regina *v.* Rochdale & Halifax Turnpike Road, 12 Q. B. 448.

[3] *Ex parte* Parkes, 9 Dowl. P. C. 614; *Infra*, § 220; Regina *v.* Bingham, 4 Q. B. 877; 3 Railw. Cas. 390.

[4] Regina *v.* Liverpool, Manchester, & Newcastle-upon-Tyne Railway Co., 21 Law J. Q. B. 284; 16 Jur. 149; 11 Eng. L. & Eq. 408; Regina *v.* Blackwall Railway Co., 9 Dowl. P. C. 558.

[5] People *v.* West Chester Supervisors, 12 Barb. 446.

[6] Savannah *v.* State, 4 Ga. 26.

[7] Regina *v.* Townsend, 28 Law T. 100.

mus, was no sufficient answer to the application.[1] But we are not to understand by this that the two remedies are regarded as in any just sense concurrent, and at the election of the party injured. An indictment is ordinarily no adequate redress for private wrong. The case of a nuisance, put by Lord DENMAN, in the last case, illustrates the subject fairly. The indictment only redresses the public wrong inflicted by a nuisance. One who suffers special damage is entitled to a private action, and sometimes to specific redress in equity or by mandamus.

* 2. Hence, where a railway company, after having completed their road, under an act of parliament, by which it was provided the public should have the beneficial enjoyment of the same, proceeded to take up the railway, a mandamus was awarded to compel them to reinstate it.[2]

3. And it may safely be affirmed that the mandamus will be denied where there is other adequate remedy.[3]

[1] Regina *v.* Bristol Dock Co., 2 Q. B. 64; s. c. 2 Railw. Cas. 599; Regina *v.* Manchester & Leeds Railway Co., 3 Q. B. 528.

[2] Rex *v.* Severn & Wye Railway Co., 2 B. & Ald. 646. ABBOTT, C. J., said, in giving judgment: "If an indictment had been a remedy equally convenient, beneficial, and effectual as a mandamus, I should have been of opinion that we ought not to grant the mandamus;" but it is not, "for a corporation cannot be compelled, by indictment, to reinstate the road." "The court may, indeed, in case of conviction, impose a fine, and that fine may be levied by distress; but the corporation may submit to the payment of the fine and refuse to reinstate the road." Grant Corp. 270. And in State *v.* Hartford & New Haven Railroad Co., 29 Conn. 538, this writ was awarded to compel the defendants to continue to run trains to connect with the steamboats on the Sound, after the company had formed a connection with the New York & New Haven Railroad, and had discontinued running trains across that portion of its road which connected with the steamboats. And it was here considered that a contract with the connecting railway to discontinue connection with the steamboats for some equivalent benefit to both companies was void, as against good policy, and that it was a proper case for the public attorney to interfere by way of petition for mandamus.

[3] Regina *v.* Gamble & Bird, 11 A. & E. 69; Regina *v.* Victoria Park Co., 1 Q. B. 288; Draper *v.* Noteware, 7 Cal. 276; Williams *v.* County Court Judge, 27 Miss. 225; Trustees *v.* State, 11 Ind. 205; Bush *v.* Beaven, 1 H. & C. 500; s. c. 32 Law J. Exch. 51. But in People *v.* Hilliard, 29 Ill. 413, the court hold, that it is not indispensable that the petition should state that the relator is without any other sufficient remedy. If such appear to the court to be the fact, the alternative writ will not be quashed. Id. But see School Board *v.* People, 20 Ill. 525, *contra*. People *v.* Wood, 35 Barb. 653; Goodwin *v.* Glazer, 10 Cal. 333. But the existence of an equitable remedy is

SECTION XII.

Judgment upon Petition for Mandamus revisable in Error.

§ 162. In those states where the court having jurisdiction to award the writ of mandamus is not the court of last resort, the judgment upon applications for such writs is revisable upon writ * of error.[1] But it is said not to be the province of a court of error to issue the writ of mandamus, unless the power is conferred by statute.[2]

no ground for refusing mandamus. Commonwealth *v.* Alleghany Commissioners, 32 Penn. St. 218.

[1] Regina *v.* Manchester & Leeds Railway Co., 9 Q. B. 528, reversing the judgment of the King's Bench in s. c. 1 Railw. Cas. 523, this last hearing being in the Exchequer Chamber. Statute 6 & 7 Vict. c. 67, § 2, gives the right to a writ of error. But on general principles, it is as much revisable as judgment on *habeas corpus*. *Ex parte* Holmes, 14 Pet. 540. Cowell *v.* Buckelew, 14 Cal. 640. See also Columbia Insurance Co. *v.* Wheelright, 7 Wheat. 534. The matter of granting the writ of mandamus, being discretionary in the court, should not preclude a revision of the questions decided by the court below as matter of law. When the writ is denied as matter of discretion, that judgment is of course not revisable in a court of error.

[2] Angell & Ames Corp. § 697.

*CHAPTER XXIV.

CERTIORARI.

SECTION I.

To revise Proceedings against Railways.

1. Lies to bring up unfinished proceedings, or revise those not according to the common law.
   n.(a) Lies not in lieu of appeal or writ of error. Barred by statute making decision final.
2. Writ of very extensive application, unless controlled by statute.
3. Judgment in case fully heard in King's Bench on rule to show cause, judgment entered without waiting to bring up record on *certiorari*.

§ 163. 1. WHERE the proceedings against a railway are in a court of record, and according to the course of the common law, after final judgment the writ of error is the appropriate process for their revision in a superior court, and the writ of *certiorari* will not lie.[1] (*a*) But the *certiorari* is the proper process to bring up

[1] King *v.* Pennegoes, 1 B. & C. 112; s. c. 2 D. & R. 209; Queen *v.* Dixon, 3 Salk. 78. *Certiorari* is the appropriate remedy to revise erroneous rulings of county commissioners, when there is no mode of revision appointed by law. Mendon *v.* County Commissioners, 2 Allen, 463. The same principle is maintained in People *v.* Board of Delegates, 14 Cal. 479. It does not lie to review acts simply ministerial, but all acts of a judicial nature, whether of a court or a municipal board. Robinson *v.* Supervisors, 16 Cal. 208. And see, to the same point, People *v.* Board of Health, 33 Barb. 344; People *v.* Hester, 6 Cal. 679; Sewickley, 2 Grant Cas. 135; Justice of Lee County *v.* Hunt, 29 Ga. 155. But see Camden *v.* Mulford, 2 Dutcher, 49; State *v.* Jersey City, 2 Dutcher, 441. The power of review on a common-law *certiorari* extends not only to questions affecting the jurisdiction of the magistrate and the regularity of the proceedings before him, but to all other legal questions. Mullins *v.* People, 24 N. Y. 399; Jackson *v.* People, 9 Mich. 111. But see People *v.* Van Alstyne, 32 Barb. 131; People *v.* Board of Delegates, 14 Cal. 179. Only questions raised by the record can be considered. People *v.* Wheeler, 21 N. Y. 82. And see Frederick *v.* Clarke, 5 Wis. 191; Greenway *v.* Mead, 2 Dutcher, 303; Low *v.* Galena & Chicago Railway Co., 18 Ill. 321; *In re* Mayo County, 11 Ir. Com. Law, 392.

(*a*) In general *certiorari* will not issue in lieu of an appeal or of a writ of error. Scates *v.* Chicago & Northwestern Railway Co., 104 Ill. 193. But it may issue where counsel has been misled by opposing counsel as to

an unfinished proceeding,[2] in an inferior court of record, or a summary * proceeding in such court, not according to the course of the common law, after judgment thereon, and where there is alleged error in the proceedings.[2]

2. This writ is of universal application, unless taken away by the express words of the statute, or where the superior court is not the proper tribunal to proceed with the cause.[3] (*b*) And in such case the cause may be brought up, and any error corrected, and then remanded to the inferior court, with a writ of mandamus in the nature of a *procedendo;* or the mandamus may be awarded, in the first instance, directing the inferior court to proceed and finish the case upon its merits.[4]

[2] The writ of *certiorari* before judgment corresponds to the writ of error after it. Commonwealth *v.* Simpson, 2 Grant Cas. 438. And a proceeding by *certiorari* is like an appeal, and is governed by the same rules, so that the plaintiff can dismiss the case in the appellate court, and leave the whole matter as if no steps had been taken therein. Joliet & Chicago Railroad Co. *v.* Barrows, 24 Ill. 562.

[3] Where a party has had no notice of an assessment of damages for land taken, until after the time limited for the appeal has expired, he may have the decision reviewed by *certiorari.* Joliet & Chicago Railroad Co. *v.* Barrows, *supra.* And see McConnell *v.* Caldwell, 6 Jones N. C. 469; Aycock *v.* Williams, 18 Tex. 392. In the last case it was held, that, if a justice of the peace grant a new trial without notice to the adverse party, who does not appear at the second trial, the latter may either enjoin the collection of the judgment thus rendered, or remove the cause to the District Court by *certiorari.* And *certiorari* will be granted to bring up an order of Quarter Sessions which was void on the ground of interest in the justices. See McHeran *v.* Melvin, 3 Jones Eq. 195; Darling *v.* Neill, 15 Tex. 104; *In re* Robson, 6 Mich. 137; Clary *v.* Hoagland, 5 Cal. 476. And one against whom a judgment is sought to be enforced, though not a party to the proceedings, may apply for a *certiorari.* Clary *v.* Hoagland, *supra.* And see Regina *v.* Bell, 8 Cox C. C. 28; Regina *v.* Hammond, 12 W. R. 208; Regina *v.* London & Northwestern Railway Co., 12 W. R. 208.

[4] Woodstock *v.* Gallup, 28 Vt. 587; s. c. 1 Redf. Am. Railw. Cas. 485; Ottawa *v.* Chicago & Rock Island Railway Co., 25 Ill. 43. And in New York the

the time when an appeal should be taken. Parker *v.* Wilmington & Weldon Railroad Co., 84 N. C. 118.

A common-law *certiorari* as well as an appeal is barred by a statute which provides that the decision of the court shall be final. People *v.* Betts, 55 N. Y. 600.

(*b*) It will not issue from a federal circuit court to a state court for the removal of proceedings against a company, under a statute like that of Illinois of 1873. State *v.* Chicago & Alton Railroad Co., 6 Bissell, 107.

* 3. Where the case is fully heard in regard to its merits, upon the rule to show cause, and there is no dispute about the facts, it is common for the court of King's Bench to give judgment, without waiting for the record to be brought up on *certiorari*,[5] similar to the course we have intimated in regard to applications for mandamus.[6]

SECTION II.

Where there is an Excess of Jurisdiction.

§ 164. Where there is an excess of jurisdiction, the appropriate remedy ordinarily is by action of trespass. And in such cases

only way of reviewing a decision of a justice of the peace in summary proceedings is by a *certiorari*. Romaine *v.* Kinshimer, 2 Hilton, 519; Regina *v.* Bristol & Exeter Railway Co., 11 A. & E. 202; Croffe *v.* Smith, 3 Salk. 79. It is here said that there is no jurisdiction which can withstand a *certiorari*, but that if the *certiorari* be taken away, by the express words of the statute, the court will not indirectly accomplish the same thing by mandamus. Rex *v.* York Justices, 1 A. & E. 563; Rex *v.* Fell, 1 B. & A. 380; Rex *v.* Saunders, 5 D. & R. 611. Where the *certiorari* on a given subject is taken away by act of parliament, it must be understood as extending only to the terms of the act, and for something done in pursuance of it. Denman, C. J., Regina *v.* Sheffield, Ashton-under-Lyne, & Manchester Railway Co., 11 A. & E. 191; s. c. 1 Railw. Cas. 537, 545. Patteson, J., "Where there is a total want of jurisdiction and parties have proceeded in defiance of *certiorari*, it is not taken away." South Wales Railway Co. *v.* Richards, 6 Railw. Cas. 197. See Jubb *v.* Hull Dock Co., 9 Q. B. 443. Denman, C. J., intimates, that where the *certiorari* is taken away, in regard to proceedings under an act of parliament, that will not deprive the party of that remedy, when the proceeding is complained of as not coming within the act, although some part of the proceedings is confessedly within the act, citing Rex *v.* Justices of Kent, 10 B. & C. 477. See Regina *v.* St. Olaves, 8 Ellis & B. 529. The right to have proceedings revised in the Supreme Court does not deprive the party of the right to bring *certiorari*. Vanwickle *v.* Camden & Amboy Railway Co.; Bennet *v.* Same, 14 N. J. Law, 145, 162. A *certiorari* suspends all proceedings in a case till it is decided. Taylor *v.* Gay, 20 Ga. 77.

[5] *In re* Edmundson, 17 Q. B. 67; s. c. 24 Eng. L. & Eq. 169. This was a case where the statute required the complaint to be made within six months after the cause of action arose, and for non-compliance with this requirement the court held the proceedings liable to be quashed, and granted the *certiorari*.

[6] *Supra*, § 152. On *certiorari* the court will not reverse a judgment for error in taxing costs, but will correct the error. Marshall *v.* Burton, 5 Harring. Del. 295.

the court have more commonly refused to give redress, either by *certiorari* or mandamus.[1] (*a*) But it is not considered that a statutory provision, taking away the writ of *certiorari*, for anything done under the act of incorporation or the general statutes as to railways, applies to things done wholly without the jurisdiction conferred.[2]

*SECTION III.

Jurisdiction and Mode of Procedure.

1. Lies in cases of irregularity, unless taken away by statute.
2. Inquisitions before officers, not known in the law.
3. Issuing of the writ matter of discretion. Defects not amendable.
4. Not allowed for irregularity in proceedings, or evidence, or form of judgment.

§ 165. 1. Although it is held that a statutory provision, denying the *certiorari*, is to be limited to matters within the jurisdiction conferred, and will not restrict the power of the court in regard to matters wholly beyond the jurisdiction, the same rule cannot be extended to mere irregularity in the exercise of the jurisdiction. For unless the prohibition of the writ could apply to such cases,

[1] Regina *v.* Bristol & Exeter Railway Co., 2 Railw. Cas. 99; 11 A. & E. 202; Regina *v.* Sheffield & Ashton-under-Lyne & Manchester Railway Co., 11 A. & E. 194; s. c. 1 Railw. Cas. 537, 545. The court will rarely grant this writ where the party has an opportunity to litigate the question in an action at law. People *v.* Board of Health, 33 Barb. 344. And see Baltimore & Havre-de-Grace Turnpike Co. *v.* Northern Central Railroad Co., 15 Md. 193; Peabody *v.* Buentillo, 18 Tex. 313; Clary *v.* Hoagland, 13 Cal. 173.

[2] *Supra*, § 163; Regina *v.* Sheffield, Ashton-under-Lyne, & Manchester Railway Co., 11 A. & E. 194; s. c. 1 Railw. Cas. 545; South Wales Railway Co. *v.* Richards, 6 Railw. Cas. 197; Regina *v.* Lancashire & Preston Railway Co., 6 Q. B. 759; 3 Railw. Cas. 725. Where a jury, summoned under statute 8 & 9 Vict. c. 18, § 68, have taken into consideration, in awarding compensation, a claim, among others, as to which they had no jurisdiction, a *certiorari* lies, although such excess of jurisdiction does not appear on the face of the proceedings, but it may be shown by affidavit. *In re* Penny, 7 Ellis & B. 660.

(*a*) Though not to be favored where there is other adequate remedy, *certiorari* will issue to review proceedings to condemn land when void for want of jurisdiction. Dunlap *v.* Toledo, Ann Arbor, & Grand Trunk Railway Co., 46 Mich. 190.

it could have no application, and it is incumbent upon the court to give it a reasonable operation and construction.[1] (*a*)

2. An inquisition taken before two under-sheriffs extraordinary, will be set aside on that ground.[2] But an inquisition taken before a clerk of the under-sheriff, and an assessor appointed *pro hac vice* by the sheriff, although none of the persons named in the act for such an office, will not be quashed on *certiorari*.[3]

3. The granting of the *certiorari* is matter of discretion,[4] although there are fatal defects on the face of the proceedings which it is sought to bring up.[5] The affidavits should swear positively * and specifically to the existence of the defects relied upon.[5] And where the party applying for the writ fails, from incompleteness in the affidavits, he will not have a *certiorari* granted him, upon fresh affidavits supplying the defects.[5] The conduct of the prose-

[1] Regina *v.* Sheffield, Ashton-under-Lyne, & Manchester Railway Co., 1 Railw. Cas. 537; 11 A. & E. 194.

[2] Denny *v.* Trapnell, 2 Wils. 379. This decision is on the ground that the sheriff can appoint only one under-sheriff extraordinary.

[3] Regina *v.* Sheffield, Ashton-under-Lyne, & Manchester Railway Co., 11 A. & E. 194. Thus showing the disposition of the courts to sustain the proceedings when not in contravention of the express terms of the statute.

[4] State *v.* Hudson, 5 Dutcher, 115; *In re* Lantis, 9 Mich. 324; People *v.* Board of Health, 33 Barb. 344; Johnson *v.* McKissack, 20 Tex. 160; People *v.* Peabody, 26 Barb. 437; Randle *v.* Williams, 18 Ark. 380; *In re* Mayo County, 14 Ir. Com. Law, 392; Regina *v.* Reynolds, 13 W. R. 925; s. c. 12 Law T. N. S. 580.

[5] Regina *v.* Manchester & Leeds Railway Co., 8 A. & E. 413. Lord DENMAN says, "I disclaim the principle, that we are to issue a *certiorari* to bring up the inquisition, on the ground that there may probably be defects; we must clearly see that facts do exist which will bring the defects before us." And an individual member of a corporation cannot carry on suit by bringing *certiorari* in the name of the corporation without the consent of a legal major-

(*a*) A *certiorari* should not issue to remove condemnation proceedings, where the writ might do injury by causing delay, and where the questions to be raised may be raised after the inquest. Detroit Western Transit Railroad Co. *v.* Backus, 48 Mich. 582. See further, as to its employment for the revision of condemnation proceedings, California Pacific Railroad Co. *v.* Central Pacific Railroad Co., 47 Cal. 528; Portland & Ogdensburg Railroad Co. *v.* Commissioners, 64 Me. 505; Dunlap *v.* Toledo, Ann Arbor, & Grand Trunk Railway Co., 46 Mich. 190; Schroeder *v.* Detroit, Grand Haven, & Milwaukee Railway Co., 44 Mich. 387.

As to service and return, see State *v.* New Brunswick Commissioners, 37 N. J. Law, 391; Southwestern Railroad Co. *v.* Baldwin, 57 Ga. 150.

cutor, especially if it had a tendency to induce the defects complained of, is important to be considered in determining the question of discretion, in regard to issuing the writ.[6]

4. The court will not ordinarily quash proceedings in inferior tribunals for mere formal irregularity in the proceedings or the testimony received, especially when there was no objection made at the time; nor will the form of the judgment or decree be considered any sufficient ground for allowing the writ, provided substantial justice has been done.[7]

ity of the members thereof. Silk Manufacturing Co. *v.* Campbell, 3 Dutcher, 539.

[6] Regina *v.* South Holland Drainage, 8 A. & E. 429.

[7] Salem & South Danvers Railroad Co. *v.* County Commissioners, 9 Allen, 563.

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*CHAPTER XXV.

INFORMATIONS IN THE NATURE OF QUO WARRANTO.

1. General nature of the remedy. Now much controlled by statute.
2. Its exercise, in absence of statute, confined to highest court of ordinary civil jurisdiction.
3. In the English practice, this remedy extended to municipal, but not to private corporations.
4. In this country it has been extended to private corporations.
5. It will remove an usurper of office, but not restore the one rightfully entitled.
6. Nor will it lie to prevent railway company from opening part of road until rest is completed.
7. Nor against company for the issue of stock below par, or for beginning to build road before subscription is full.
8. Form of the judgment depends on facts proved and object sought.
9. Rules in regard to taxing costs.
10. Used to test corporate existence and power.
11. Penalties provided by charter cannot subsequently be increased to a forfeiture.
12. But a grant of corporate franchises may be annulled when its purposes have failed.
13. *Scire facias* the proper remedy to determine forfeiture.
14. Insufficient excuses for failure to repair a turnpike road.
15. This remedy, under some statutes, does not supersede any equitable redress.

§ 166. 1. This is a subject of very extensive application to corporations, for the purpose of determining when they have forfeited their corporate franchises, or usurped those not rightfully belonging to them, and for numerous other purposes.[1] It will be found treated very much at length in treatises upon corporations.[2] We

[1] See Palmer *v.* Woodbury, 14 Cal. 43; Gano *v.* State, 10 Ohio St. 237; Parker *v.* Smith, 3 Minn. 240; Cleaver *v.* Commonwealth, 31 Penn. St. 283; People *v.* Ridgely, 21 Ill. 65; Scott *v.* Clark, 1 Clarke, 70; Mississippi, Ouachita, & Red River Railway Co. *v.* Cross, 20 Ark. 443, 495.

[2] Angell & Ames Corp. §§ 731–765. See State *v.* Mississippi, Ouachita, & Red River Railway Co., 20 Ark. 443, 495; State *v.* Brown, 5 R. I. 1; Lindsey *v.* Attorney-General, 33 Miss. 508. The information may set forth specifically the ground of forfeiture relied on, or may call on the corporation to show by what warrant it still claims to exercise its corporate franchises; and the information, like any other criminal information, is regarded as amendable. Commonwealth *v.* Commercial Bank, 28 Penn. St. 383. And the information must acquaint the court with the charter of the company, so as to show its powers and duties. Danville & White Lick Plank-Road Co. *v.* State, 16 Ind. 456.

should scarcely feel justified in going into the subject further here than it has a special application to railways. The form of the proceedings in modern times is by information of the attorney-general, or other public prosecuting officer, on behalf of * the state, or sovereignty, in the nature of a *quo warranto*, upon which a rule issues to the defendant to show by what warrant he exercises the function or franchise called in question.[3] These proceedings are now very much controlled in England and in the American states by statute defining the jurisdiction and the form of process.

2. In the absence of special provisions, the highest courts of ordinary civil jurisdiction are accustomed to exercise the prerogative right of sovereignty, to issue this process, as well as other prerogative writs, such as a mandamus, *certiorari*, *procedendo*, prohibition, &c. In some of the states the courts refuse to exercise any such prerogative rights.[4] And in others this power is, by statute, conferred upon the Court of Chancery, but in other forms.[5]

3. The English courts do not seem to have allowed the exercise of this proceeding in the case of mere private corporations, although there are numerous cases in the English books of its exercise in regard to municipal corporations,[6] and others of an important public character.

[3] State *v.* Brown, 33 Miss. 500.

[4] State *v.* Ashley, 1 Pike, 279; State *v.* Turk, Mart. & Yerg. 287; Attorney-General *v.* Leaf, 9 Humph. 753. See also State *v.* Merry, 3 Mo. 278; State *v.* McBride, 4 Mo. 303; State *v.* St. Louis Perpetual Marine, Fire, & Life Insurance Co., 8 Mo. 330, where in the latter state it was held the writ should issue. In Pennsylvania the Supreme Court has authority to try by mandamus or *quo warranto* whether or not a contract entered into between two different corporations is in excess of the lawful powers of either, and if either corporation is exercising rights or franchises to which it is not entitled, then to oust it therefrom; and the proceeding may be either at law or in equity, provided the right of trial by jury is not interfered with. Commonwealth *v.* Delaware & Hudson Canal Co., 43 Penn. St. 295.

[5] State *v.* Turk, Mart. & Yerg. 287; State *v.* Merchants' Insurance Co., 8 Humph. 253; Attorney-General *v.* Leaf, 9 Humph. 753.

[6] Rex *v.* Williams, 1 Bur. 402; Rex *v.* Breton, 4 Bur. 2260; Rex *v.* Highmore, 5 B. & Ald. 771; Rex *v.* M'Kay, 4 B. & C. 351; *Ex parte* Smyth, 11 W. R. 754; s. c. 8 Law T. N. S. 458; Regina *v.* Hampton, 13 Law T. N. S. 431. The same rule obtains in regard to this proceeding in this respect in England as in regard to mandamus. *Supra*, § 155; Rex *v.* Lowther, 1 Stra.

*4. But there is no question that in the American states this form of proceeding is extended to aggregate corporations in general, and more especially to the case of banks and railways, which partake in some sense of a public character.[7] (*a*) The general principles which we have found applicable to the subject of mandamus, will for the most part apply to this proceeding.[8]

5. The court cannot establish corporate officers, who would have been elected had all the legal votes offered been received by the inspectors.[9] The only remedy is to set aside the election.

637; Rex *v.* Mousley, 8 Q. B. 957, decided in 1846, where it is held that the mastership of a hospital or a grammar school was not of so public a character as to justify the exercise of this remedy; nor the office of a churchwarden. *In re* Barlow, 30 Law J. Q. B. 271; s. c. 5 Law T. N. S. 289.

[7] Commonwealth *v.* Arrison, 15 S. & R. 128; People *v.* Thompson, 21 Wend. 235; s. c. 23 Wend. 537; Commonwealth *v.* Union Insurance Co., 5 Mass. 231; People *v.* River Raisin & Lake Erie Railroad Co., 12 Mich. 381. See *supra*, § 153; State *v.* Concord & Montreal Railroad Co., 25 Vt. 433; Grand Gulf Railway *v.* State, 10 Sm. & M. 427; State *v.* Hunton, 28 Vt. 594. But if an election of managers of a corporation be not disputed during their term of office by *quo warranto*, and they are permitted to act throughout their term as managers *de facto*, the legality of the next election cannot be questioned for any vice or irregularity in the first. A writ of *quo warranto* brought during the term of an office may be tried after the term has expired, but title to a term of office already expired at the issue of the writ, cannot be determined in this manner by proceedings instituted against those afterwards succeeding to the office. Commonwealth *v.* Smith, 45 Penn. St. 59. This writ will be granted, although the defendant has resigned the office, if the object of the relator is not only to cause the defendant to vacate the office, but to establish another candidate in the office, as the relator is entitled in such case to have judgment of ouster, or a disclaimer on the record. Queen *v.* Blizard, Law Rep. 2 Q. B. 55. In Neall *v.* Hill, 16 Cal. 145, it is said that the removal of a mere private or ministerial officer of a corporation is a right that belongs to the corporation alone, and the courts have no jurisdiction to remove such officer, or, it seems, even to enjoin him from acting.

[8] *Supra*, § 151 *et seq.* And see State *v.* Commercial Bank, 33 Miss. 474, where the acts and omissions that will allow a forfeiture of the charter by *quo warranto*, are discussed.

[9] *In re* Long Island Railroad Co., 19 Wend. 37; 2 Am. Railw. Cas. 453. In *quo warranto* against a usurper by a claimant, it is competent for the court

(*a*) But see Eliason *v.* Coleman, 9 Am. & Eng. Railw. Cas. 433. An action in the nature of a *quo warranto*, under the New York code, to try the title to a corporate office, is of legal cognizance, and parties have therefore a right to trial by jury. People *v.* Albany & Susquehanna Railroad Co., 57 N. Y. 161.

And the court will not proceed by mandamus to fill an office until the title is first tried.[10]

* 6. And where a railway company were authorized to make a line with branches, and they completed a portion of it, but abandoned other parts of it, this is not a public mischief, which will entitle the attorney-general to file an information, in the nature of a *quo warranto* against the company, to prevent them from opening the part completed, until the whole is perfect.[11]

7. And an information in the nature of a *quo warranto*, under the Massachusetts statute, will not lie against a railway company, in behalf of a stockholder, merely because they issued stock below the par value,[12] and began to construct their road before the requisite amount of stock was subscribed, it not appearing that the petitioner's private right was thereby put at hazard.[13]

to oust the usurper without determining the right of the claimant. Gano *v.* State, 10 Ohio St. 237. See Doane *v.* Scannell, 7 Cal. 393; People *v.* Same, 7 Cal. 432. One who is a relator in a *quo warranto*, on the ground of the use of blank voting papers, but who has previously used blank voting papers on the same and former elections, and has been formerly elected in that mode, is precluded from maintaining the writ on that ground. *Sed quære.* Queen *v.* Lofthome, Law Rep. 1 Q. B. 433.

[10] Rex *v.* Truro, 3 B. & Ald. 590.

[11] Attorney-General *v.* Birmingham & Oxford Junction Railway Co., 3 Macn. & G. 453; s. c. 8 Eng. L. & Eq. 243.

[12] See Howe *v.* Derrel, 43 Barb. 504; Commonwealth *v.* Farmers' Bank, 2 Grant. Cas. 392.

[13] Hastings *v.* Amherst & Belchertown Railroad Co., 9 Cush. 596. In this case the charter provided that the road extend "through Amherst." Another section of the charter provided that the road might be divided into two sections, one extending "to the village of Amherst," and the other from "Amherst to Montague." It was held, that taking land for the road, on a route not terminating "in either village of Amherst," was not the exercise of a franchise, granted by the charter. Any material departure from the points designated in the charter for the location of a railway is a violation of the charter, for which the franchise may be seized on *quo warranto*, unless the legislature has waived this right of the state by acts recognizing the legality of such violation. Mississippi, Ouachita, & Red River Railroad Co. *v.* Cross, 20 Ark. 443. Where an act incorporating a railway provided that no subscription should be received and allowed, unless there should be paid to the commissioners at the time of subscribing five dollars per share, and this provision was not complied with, but the corporation organized itself, elected directors, &c., and began the construction of its road, by making contracts to grade it, some of the contractors not being aware of this failure to make the stipulated payment on the shares at subscription, and one of the stockholders, who was aware of that

8. The form of the judgment in proceedings of this character will depend upon the facts proved, and the object to be attained. Where the defect in defendant's right is merely formal, like the omission to take the requisite oath, the judgment is for a suspension * of the exercise of the function until qualified by compliance with the requisite formality.[14] But if there be shown, or confessed, a total defect of title in defendant, there is a judgment of ouster or forfeiture.[15] And where it is intended to dissolve the corporation, judgment to that effect should be given in form.[15]

9. The relator is liable to costs if he fail, and is ordinarily entitled to recover costs if he prevail. But where the office is one where the party is compellable to serve, and is accepted and held in good faith, it is not common to allow costs against the incumbent upon judgment of ouster.[16]

10. In some of the states a process or proceeding under the name of "Quo Warranto" has been applied to test the question of corporate existence and power, on the ground of forfeiture of corporate rights by means of the omission to perform acts required by the charter, or of an excess of power having been resorted to, in either case in violation of granted powers and duties.[17] (*b*)

failure when he became a stockholder, and who had voted at the election of directors, and otherwise aided in setting up the corporation, applied to the court for leave to file an information in the nature of a *quo warranto* against the directors, to compel them to show by what authority they exercised their powers, it was held that this application should be rejected. Cole *v.* Dyer, 29 Ga. 434.

[14] Rex *v.* Clarke, 2 East, 75. But a judgment of ouster will conclude the party in any subsequent proceeding. Ib.

[15] State *v.* Bradford, 32 Vt. 50; Rex *v.* Tyrrell, 11 Mod. 335.

[16] Rex *v.* Wallis, 5 T. R. 375; State *v.* Bradford, *supra.*

[17] Danville & White Lick Plank-Road Co. *v.* State, 16 Ind. 456. See also People *v.* Jackson & Michigan Plank-Road Co., 9 Mich. 285, where the extent of the remedy and the form of procedure is extensively discussed, but by a divided court.

(*b*) West Jersey Railroad Co. *v.* Cape May & Schellenberger's Landing Railroad Co., 34 N. J. Eq. 164. The pendency of such proceedings founded on the allegation that the company was organized to do an illegal act, will not hinder a decision in prior proceedings to enjoin the company from going on. Aurora & Cincinnati Railroad Co. *v.* Lawrenceburg, 56 Ind. 80. As to disposition of the property on dissolution in such proceedings, see State *v.* West Wisconsin Railway Co, 34 Wis. 197. The granting of leave to file an information in the nature of a *quo warranto* is

11. And where the charter of a plank-road company provides for the security of travel, and for the enforcement of the duty of the company by suitable penalties, and the legislature, after the road was built and in use, imposed an entire forfeiture of the whole franchise of the corporation for failure to keep any portion of the road in repair, it was held to be such a modification of the charter as did not come within the proper exercise of the police power of the state, and therefore void as a violation of the contract in the grant of the charter.[18]

12. But where a turnpike charter provides penalties upon the company and its agents for neglecting to keep the road in good and perfect repair, such provision cannot be held to deprive the state of its sovereign power to annul a grant when its purposes have failed, through either the positive acts or neglect of the grantees; and when the fact of such act or neglect is duly established, the special remedy provided by the charter will be regarded as merely cumulative. It is of the very essence of a corporation, * as a political existence or abstraction, that it should always be liable to dissolution by a surrender of its corporate franchises, or by a forfeiture of them either by non-user or misuser.[19]

13. In a case where the statute directed the public prosecuting officers to take proceedings to determine whether the charter and franchises of a turnpike company had become forfeited by non-user or abuser, where no form of remedy is prescribed, it was held that *scire facias* was the proper one to be adopted, and all that is required to be set forth in the writ is enough to inform the company of the causes of complaint and the extent of redress sought.[19] This procedure is very much the same, in effect, as that by *quo warranto*, already discussed, except that it is in the form of a civil action.[19]

[18] People *v.* Jackson & Michigan Plank-Road Co., 9 Mich. 285.

[19] Washington & Baltimore Turnpike Road *v.* State, 19 Md. 239. The particular forms of the pleading, both on the part of the plaintiff and defendant, are here extensively discussed, as well as many questions in regard to the admissibility of evidence.

matter of discretion. People *v.* North Chicago Railway Co., 88 Ill. 537. As to the practice in the filing, &c. of such information, see Attorney-General *v.* Delaware & Bound Brook Railroad Co., 38 N. J. Law, 282; State *v.* Portland & Ogdensburg Railroad Co., 58 N. H. 113.

14. It is no excuse for a turnpike company not keeping its road in repair, that the state have chartered a railway along the same route, and thereby disabled the company from maintaining its road in the state of repair required by the charter.[19] Nor is it a bar to the proceedings that the company have applied all their tolls to the repair of the road.[19]

15. This remedy under the Massachusetts General Statutes,[20] in order to redress an injury to private rights or interests from the exercise by a private corporation of a franchise or privilege not conferred by law, does not supersede the jurisdiction in equity in cases of private nuisance.[21]

[20] Mass. Gen. Sts. c. 145, § 16.

[21] Fall River Iron Works *v.* Old Colony & Fall River Railroad Co., 5 Allen, 221.

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END OF VOL. I.