A TREATISE

ON THE

LAW OF RAILROADS

CONTAINING A CONSIDERATION OF THE ORGANIZATION, STATUS AND POWERS OF RAILROAD CORPORATIONS; AND OF THE RIGHTS AND LIABILITIES INCIDENT TO THE LOCATION, CONSTRUCTION AND OPERATION OF RAILROADS; TOGETHER WITH THEIR DUTIES, RIGHTS AND LIABILITIES AS CARRIERS

INCLUDING

STREET AND INTERURBAN RAILWAYS

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CHAPTER XXVII.

GOVERNMENTAL CONTROL.

§ 657. Introductory.—The question as to the limitations that may be imposed upon railroad corporations, or as to the burdens which may be laid upon them, or as to the duties exacted of them, by legislative enactments passed prior to the organization or adopted at the time of the creation of the corporation, is very different from that which arises where the legislative enactments are passed subse-

quent to the creation of the corporation. The familiar doctrine, heretofore discussed, that the charter of a corporation protects it because the charter is a contract, materially limits the legislative power, but it does not, by any means, carry corporations beyond the domain over which that power extends. The legislature may effectively prescribe many regulations for the government of railway companies although the statutes prescribing the regulations may be enacted subsequent to the organization of the company. It is our purpose in this chapter to consider the nature and extent of the legislative power to enact such statutes. We shall, however, treat only incidentally of the influence of the commerce clause of the federal constitution, and of regulations operating upon railroads in their capacity of common carriers we shall do little else than make mention. The subjects just named will be considered in another part of our work, but it is necessary to speak of them—incidentally, at least—in this chapter, since in some phases they are intimately connected with the topics to the discussion of which this chapter is devoted.

§ 658. Effect of the commerce clause of the federal constitution upon the power of the states.—It is not our purpose at this place to do more than direct attention to the commerce clause of the federal constitution, and, in general terms, to say that it materially limits the power of the states. A state cannot, in any form, enact a statute which constitutes a regulation of interstate commerce, but it may effectively regulate intrastate commerce.[1] There can be no doubt

[1] Robbins v. Shelby County Taxing District, 120 U. S. 489; 7 Sup. Ct. 592, and cases cited; Western Union Tel. Co. v. Pendleton, 122 U. S. 347; 7 Sup. Ct. 1126; Telegraph Co. v. Texas, 105 U. S. 460; Norfolk &c. R. Co. v. Commonwealth, 136 U. S. 114; 10 Sup. Ct. 958; Wabash &c. R. Co. v. Illinois, 118 U. S. 557; 7 Sup. Ct. 4; Swift v. Philadelphia &c. R. Co. 58 Fed. 858; Fitzgerald v. Fitzgerald &c. R. Co. 41 Neb. 374; 59 N. W. 838; State v. Woodruff &c. Co. 114 Ind. 155; 15 N. E. 814; United States v. Michigan &c. R. Co. 43 Fed. 26; Hardy v. Atchison &c. R. Co. 32 Kan. 698; 5 Pac. 6; Carton v. Illinois &c. R. Co. 59 Iowa, 148; 13 N. W. 67; 44 Am. R. 672; Commonwealth v. Housatonic &c. R. Co. 143 Mass. 264; 9 N. E. 547; State v. Chicago &c. R. Co. 70 Iowa, 262; 30 N. W. 398; State v. Indiana &c. Co. 120 Ind. 575; 22 N. E. 778; 6 L. R. A. 579; Bangor v. Smith, 83 Me. 422; 22 Atl. 379. See, upon the general subject, Louisville &c. Co. v. Railroad Commissioners, 19 Fed. 679; Illinois &c. R. Co. v. Stone, 20 Fed. 468; Leloup v. Port of Mobile, 127 U. S. 640; 8 Sup. Ct. 1380; Fargo v. Michigan, 121 U. S. 230; Louisville &c. R. Co. v. Ken-

that the states are prohibited from regulating interstate commerce, but there is some doubt as to what shall be considered a regulation of commerce between the states, for it is not every legislative enactment which bears upon the subject that can be regarded as a regulation of interstate commerce. But as this chapter is directed to a consideration of the power of the states, and the purpose is to only touch the question of the rights and powers of the federal government, we do not here, except incidentally, consider the extent or scope of the national power.

§ 659. Legislative power over private rights of railroad companies—Nature of.—It is true that railroad corporations are in a sense public corporations, but this is true only in a qualified and limited sense.[2] They are not, as elsewhere said, governmental corporations

tucky, 183 U. S. 503; 22 Sup. Ct. 95. In the case of Chicago &c. R. Co. v. Wolcott, 141 Ind. 267; 39 N. E. 451; 50 Am. St. 320, the court seems to make the question of the power of the state to legislate turn upon the question whether the statute is in "conflict with the right of congress to legislate upon interstate commerce," but we respectfully affirm that this view is erroneous, for the states have no power at all to enact statutes that are regulations of commerce between the states. The conclusion we affirm is strongly supported by the decision in Gulf &c. R. Co. v. Hefley, 158 U. S. 98; 15 Sup. Ct. 802, in which it was held that a provision of a state statute prohibiting the collection of any greater rate of freight than that specified in the bill of lading was in conflict with the commerce clause of the federal constitution and void. The court cited, among others, the cases of Railroad Co. v. Fuller, 17 Wall. (U. S.) 560; Henderson v. Mayor, 92 U. S. 259; Morgan's &c. Co. v. Louisiana &c. 118 U. S. 455; 6 Sup. Ct. 1114; Pound v. Truck, 95 U. S. 459; Packet Co. v. Catlettsburg, 105 U. S. 559; Escanaba &c Co. v. Chicago, 107 U. S. 678; 2 Sup. Ct. 185; James Gray v. John Fraser, 12 How. (U. S.) 184; Cooley v. Board, 12 How. (U. S.) 299; Willson v. Black-bird &c. Co. 2 Pet. (U. S.) 245; Gilman v. Philadelphia, 3 Wall. (U. S.) 713; McNiel, Ex parte, 13 Wall. (U. S.) 236. In W. W. Cargill Co. v. Minnesota, 180 U. S. 452; 21 Sup. Ct. 423, it is held elevators on a railroad right of way may be classified and a license required and that the fact that grain is there stored to be shipped out of the state does not make such a license an unlawful regulation of interstate commerce.

[2] Ante, §§ 2, 33. In considering the legal status of a railroad corporation we have discussed questions closely allied to some of the questions of which this chapter treats. Ante, Chapter III.

or governmental subdivisions, and the power of the legislature over them falls far short of that which it has over governmental corporations. But, as a railroad corporation is in a sense public, the legislative power over it is greater than its power over strictly private corporations or individuals. Yet, the legislative power is only greater in so far as a railroad corporation is public, and, on principle, it is not greater over private rights, such, for instance, as contract and property rights not affecting public duties, than is its power over strictly private corporations or natural persons. There is reason for affirming that, in so far as a railroad corporation is public, the legislative power is much greater than over natural persons or strictly private corporations, but there is no valid reason for affirming that, as to purely private rights, the legislative power is greater than over strictly private corporations or individuals. Thus, for illustration, a railroad corporation, in so far as concerns its rights and duties as a common carrier, is, in a qualified sense, a public corporation, while as to its strictly private rights and duties it is a private corporation. But even as to its public rights the legislative power is limited, for under guise of controlling such rights the legislature cannot destroy private corporate rights. For instance, the legislature may regulate charges for transporting freight and passengers, but it cannot deprive the corporation of the right to compensation, nor can it fix the charges at such a low rate that the corporation cannot make a fair and reasonable profit.[3] The element of private right is so strong that it limits the legislative control over the public element which enters into the corporate being. While it is within the legislative power to regulate public rights and duties it is beyond that power to make a regulation that will destroy property or contract rights of a private nature. In other words, the public element cannot be used as a weapon to destroy vested private rights. There is, as it seems to us, no reason to doubt that the nature of the legislative power over rail-

[3] Chicago &c. R. Co. v. Dey, 35 Fed. 866; Chicago &c. R. Co. v. Becker, 35 Fed. 883; Dow v. Beidelman, 125 U. S. 680; 8 Sup. Ct. 1028; Chicago &c. R. Co. v. Minnesota, 134 U. S. 418; 10 Sup. Ct. 462, 702; Chicago &c. R. Co. v. Wellman, 143 U. S. 339; 12 Sup. Ct. 400; Reagan v. Farmers' Loan &c. Co. 154 U. S. 362; 14 Sup. Ct. 1047; Stone v. Farmers' &c. Co. 116 U. S. 307; 6 Sup. Ct. 334; Railroad Commission Cases, 116 U. S. 307; 6 Sup. Ct. 334, 348, 349, 388, 391, 1191; St. Louis &c. v. Gill, 156 U. S. 649; 15 Sup. Ct. 484. See, also, Smyth v. Ames, 169 U. S. 466; 18 Sup. Ct. 418.

road companies, in so far as their private rights are concerned, is substantially the same as that which it possesses over similar rights possessed by private corporations, or, indeed, individuals, and no greater, but that as to public rights, or matters in which the corporation is "affected by the public interest," its legislative power is much more extensive, and that, although the power over public matters is the greater, it is not extensive enough to justify the destruction of private rights vested in the corporation.[4]

§ 660. Constitutional protection.—It is evident from what has been said that, so far as concerns property or contract rights, railroad corporations are protected by the provisions of the state and federal constitution. The legislature cannot take from them any right guaranteed to them by the constitution, except in some mode not forbidden by the constitution. The principle that railroad corporations are within the protection given to property, property rights and contract rights is recognized in many cases and in a variety of forms. Thus, it is held that even where the power to amend or repeal the charter is reserved the legislature cannot authorize a seizure of the property of a railroad company for a highway without compensation, nor compel it to devote its property to the use of the public and fit it for that use.[5] So, a corporation is a person, and entitled to protection as such under the fourteenth amendment to the federal constitution.[6] So, also, railroad corporations are protected by constitu-

[4] See, generally, Wisconsin &c. R. Co. v. Jacobson, 179 U. S. 287; 21 Sup. Ct. 115; Lake Shore &c. R. Co. v. Smith, 173 U. S. 684; 19 Sup. Ct. 565; Louisville &c. R. Co. v. Kentucky, 183 U. S. 503; 22 Sup. Ct. 95.

[5] Miller v. New York &c. R. Co. 21 Barb. (N. Y.) 513; People v. Lake Shore &c. R. Co. 52 Mich. 277; 17 N. W. 841; Chicago &c. R. Co. v. Hough, 61 Mich. 507; 21 N. W. 532; Detroit v. Detroit Plank Road Co. 43 Mich. 140; 5 N. W. 275. But see Portland &c. R. Co. v. Deering, 78 Me. 61; 57 Am. R. 784; Boston &c. R. Co. v. Commissioners, 79 Me. 386; 2 Atl. 670; Illinois Central &c. R. Co. v. Willenborg, 117 Ill. 203; 7 N. E. 698; 57 Am. R. 862; Montclair v. New York &c. R. Co. 45 N. J. Eq. 436; 18 Atl. 242.

[6] Pembina &c. Co. v. Pennsylvania, 125 U. S. 181; 8 Sup. Ct. 737; Santa Clara Co. v. Southern Pacific &c. R. Co. 118 U. S. 394; 6 Sup. Ct. 1132; 24 Am. & Eng. R. Cas. 523; Minneapolis &c. Co. v. Beckwith, 129 U. S. 26; 9 Sup. Ct. 207; Smyth v. Ames, 169 U. S. 466; 18 Sup. Ct. 418, 424; McGuire v. Chicago &c R. Co. (Iowa), 108 N. W. 902.

tional provisions against unequal or double taxation. It is not within the legislative power to pass special or local laws affecting railroad companies where the constitution prohibits the enactment of such laws.[7] There is, in truth, no diversity of opinion upon the general question, but there is much diversity of opinion in the application of the principles to actual cases.

§ 661. The limits of legislative power sometimes unduly extended.—Theoretically all the courts act upon the principle that railroad corporations as to similar property and contract rights are entitled to substantially the same constitutional protection as natural persons,[8] but many of the courts, while professing to adopt the true theory, practically deny the same measure of protection to railroad corporations in respect to such rights that they yield to individual citizens. There are cases wherein statutes directed against corporations are upheld which would be overthrown if the persons against whom the statutes are directed were natural instead of artificial persons. The tendency is to strip corporations of constitutional protection, and, as it seems to us, many of the cases go too far in that direction. Differences between corporations and natural persons are often assumed to exist which are purely imaginary. This unjust assumption is made for the purpose of sustaining legislation directed against corporations, which, if directed against individuals, would be promptly condemned as unconstitutional. Burdens are frequently imposed upon railroad companies, which, in effect, constitute a taking of property without compensation. This course is generally defended

[7] Indiana &c. R. Co. v. Gapen, 10 Ind. 292; Madison &c. R. Co. v. Whiteneck, 8 Ind. 217; Chicago &c. R. Co. v. Moss, 60 Miss. 641; South &c. R. Co. v. Morris, 65 Ala. 193; Wilder v. Chicago &c. R. Co. 70 Mich. 382, 384, 385; 38 N. W. 289; Brown v. Alabama &c. R. Co. 87 Ala. 370; 6 So. 259. See, generally, Lafferty v. Chicago &c. R. Co. 71 Mich. 35; 38 N. W. 660; Schut v. Chicago &c. R. Co. 70 Mich. 433; 38 N. W. 291; Grand Rapids &c. R. Co. v. Runnels, 77 Mich. 104; 43 N. W. 1006; Smith v. Louisville &c. R. Co. 75 Ala. 449; Zeigler v. South and N. R. Co. 58 Ala. 594; South &c. R. Co. v. Morris, 65 Ala. 193.

[8] We do not mean, of course, that corporate rights are as free from limitation as the rights of natural persons. Corporate rights, as elsewhere said and as is well known, are derivative, and are limited by the charter of the corporation. But as to contract and property rights conferred by the charter the constitutional protection extends.

upon the ground that statutes imposing such burdens are enacted in the exercise of the police power. The constitutional inhibitions directed against local and special legislation are sometimes evaded by holding that the peculiar nature of a railroad corporation justifies particular legislation. It may be, and doubtless is, a reasonable basis for classification in some instances, but by indirection that is done in many instances which would be unhesitatingly overthrown if done directly. So, too, unconstitutional statutes are frequently so disguised by the form they are made to assume, that, although in their practical effect and operation they invade private rights, yet the courts, misled by form, lose sight of substance and sustain them.

§ 662. Regulations affecting acts and duties of a public nature.— Some of the cases seem to place the power of the legislature to regulate the public acts and duties of railroad companies entirely upon the police power, losing sight of the fact that as to matters wherein corporate property rights and duties are "affected by a public interest" the legislature possesses the power to enact reasonable regulations for the comfort, welfare and safety of the public, although such regulations may not be strictly police regulations. Where the rights and property of a railroad company are "affected by a public interest," the company, in accepting a special charter or availing itself of the benefit of a general act of incorporation submits its rights and property to public control, and this control extends far beyond that to which private property is subject.[9] Where the subject of the legislation is the public part, or element, of a corporation, the legislative authority does not, as we have elsewhere indicated, rest entirely upon the police power, but rather upon the right to regulate the acts, business and duties of a public corporation. The power of the legislature to make regulations concerning the public rights, duties and

[9] Munn v. Illinois, 94 U. S. 113; Chicago &c. R. Co. v. Iowa, 94 U. S. 155; Chicago &c. R. Co. v. Ackley, 94 U. S. 179; Winona &c. R. Co. v. Blake, 94 U. S. 180; Railroad Co. v. Richmond, 96 U. S. 521; Railroad Co. v. Fuller, 17 Wall. (U. S.) 560; Ruggles v. Illinois, 108 U. S. 526; 2 Sup. Ct. 832; Illinois Central R. Co. v. People, 108 U. S. 541; 2 Sup. Ct. 839; 1 Am. & Eng. R. Cas. 188; Commonwealth v. Duane, 98 Mass. 1; Sharpless v. Mayor, 21 Pa. St. 147; 59 Am. Dec. 759; Hockett v. State, 105 Ind. 250; 5 N. E. 202; 55 Am. R. 201; Rushville v. Rushville &c. Co. 132 Ind. 575; 28 N. E. 853; 15 L. R. A. 321; Zanesville v. Zanesville &c. Co. 47 Ohio St. 1; 23 N. E. 55.

acts of railroad companies is analogous to that which it possesses over municipal or governmental corporations, but is by no means so broad or comprehensive as that power. It is to be observed that, as heretofore shown, no state regulation can be valid, whether rested on the police power or in the power to control public corporations, if it is, in fact, a regulation of commerce between the states in the constitutional sense of the term. Under the power to control the public part, or element, of a railroad company, many important duties may be imposed upon it and many requirements be made that could not be made or imposed in matters of strictly private right. It has been held that under the general power to control matters of a public nature the state may require railroad companies to place in their stations blackboards, and note thereon the time of the arrival of trains, "and if late how much."[10] There are decisions adjudging that it is competent for the legislature to require railroad companies to erect and maintain suitable stations for the accommodation of passengers,[11] and to provide reasonable facilities for the interchange of freight.[12] Statutes requiring railroad companies to provide station agents with certificates of authority, and requiring such companies to redeem unused tickets, have been adjudged to be valid.[13] So, a statute has

[10] State v. Indiana &c. R. Co. 133 Ind. 69; 32 N. E. 817; 18 L. R. A. 502. The questions decided in the case are close and it may be doubted whether there is not error in some of the conclusions asserted. In the course of the opinion the court said: "While this statute may be on the border of legislative authority, yet we do not think it is an attempt to regulate commerce or to interfere with it." In State v. Kentucky &c. R. Co. 136 Ind. 195; 35 N. E. 991, it was held that the statute did not apply to cases where the time occupied in running over the entire route was less than twenty minutes. See, also, Pennsylvania &c. Co. v. State, 142 Ind. 428; 41 N. E. 937.

[11] San Antonio &c. R. Co. v. State, 79 Texas, 264; 14 S. W. 1063. See, also, Minneapolis &c. R. Co. v. Minnesota, 193 U. S. 53; 24 Sup. Ct. 396.

[12] State v. Kansas City &c. R. Co. 32 Fed. 722. See, also, Wisconsin &c. R. Co. v. Jacobson, 179 U. S. 287; 21 Sup. Ct. 115.

[13] Burdick v. People, 149 Ill. 600; 36 N. E. 948; 24 L. R. A. 152; 41 Am. St. 329; 10 Am. R. & Corp. R. 451; Fry v. State, 63 Ind. 552; 30 Am. R. 238; State v. Fry, 81 Ind. 7; Commonwealth v. Wilson, 14 Phila. (Pa.) 384; 56 Am. & Eng. R. Cas. 230; State v. Corbett, 57 Minn. 345; 59 N. W. 317; State v. Thompson 47 Or. 492; 84 Pac. 476. See State v. Ray, 109 N. Car. 736; 14 S. E. 83; 14 L. R. A. 529; State v. Clark, 14 S. E. 84.

been upheld which forbids carriers to receive for transportation uninspected hides, though consigned to points without the state.[13a] It is held competent for the legislature to compel railroad companies to provide waiting rooms,[14] to properly light and heat them,[15] to provide water closets,[16] to require rules and schedules to be posted in stations or depots,[17] to station flagmen and maintain gates at crossings,[17a] to require signals by trains approaching highway crossings,[17b] and to require its ticket office to be kept open a specified length of time before the departure of trains.[18] Some of the cases seem to hold that, independent of statute, there is an absolute duty to erect and maintain depots or stations, which performance may be coerced by mandamus,[19] but there are well-reasoned cases limiting and qualifying this broad doctrine.[20]

[13a] Territory of New Mexico v. Denver &c. R. Co. (U. S.) 27 Sup. Ct. 1.

[14] State v. St. Paul &c. R. Co. 40 Minn. 353; 42 N. W. 21; State v. Wabash &c. R. Co. 83 Mo. 144; 25 Am. & Eng. R. Cas. 133; San Antonio &c. R. Co. v. State, 79 Texas, 264; 14 S. W. 1063; 45 Am. & Eng. R. Cas. 586; State v. Kansas City &c. R. Co. 32 Fed. 722. See Kinealy v. St. Louis &c. R. Co. 69 Mo. 658; Baltimore &c. R. Co. v. Compton, 2 Gill (Md.), 20.

[15] Texas &c. Co. v. Mayes (Texas), 15 S. W. 43. See State v. Cleveland &c. R. Co. 137 Ind. 75; 36 N. E. 713.

[16] Louisville &c. R. Co. v. Commonwealth, 97 Ky. 207; 30 S. W. 616. See, also, State v. Southern Kans. R. Co. (Tex. Civ. App.) 99 S. W. 167.

[17] Chicago &c. R. Co. v. Fuller, 17 Wall. (U. S.) 560; Fuller v. Chicago &c. R. Co. 31 Iowa, 187.

[17a] Thomp. Com. Neg. (2d ed.) § 1528; State v. St. Paul &c. R. Co. (Minn.) 108 N. W. 261. But see Pennsylvania R. Co. In re, 213 Pa. St. 373; 62 Atl. 986, holding that a city has no power to compel the erection of safety gates at the expense of the railroad company.

[17b] Galena &c. R. Co. v. Appleby, 28 Ill. 283; Galena &c. R. Co. v. Loomis, 13 Ill. 548; 56 Am. Dec. 471.

[18] Brady v. State, 15 Lea (Tenn.), 628.

[19] State v. Republican Valley &c. R. Co. 17 Neb. 647; 24 N. W. 329; 52 Am. R. 424; Railroad Commissioners v. Portland &c. R. Co. 63 Me. 269; 18 Am. R. 208; State v. New Haven &c. R. Co. 43 Conn. 351; North Pacific &c. R. Co. v. Territory, 3 Wash. T. 303; 13 Pac. 604. The case last cited was reversed on appeal.

[20] Chicago &c. R. Co. v. People, 152 Ill. 230; 38 N. E. 562; 26 L. R. A. 224; Ohio &c. R. Co. v. People, 120 Ill. 200; 11 N. E. 347; People v. Chicago &c. R. Co. 130 Ill. 175; 22 N. E. 857; Mobile &c. R. Co. v. People, 132 Ill. 559; 24 N. E. 643; 22 Am. St. 556; Northern Pac. &c. R. Co. v. Washington Territory, 142 U. S. 492; 12 Sup. Ct. 283; 48 Am. & Eng. R. Cas. 475. See York &c. R. Co. v. Regina, 1 El. & B.

§ 663. Corporate rights are subject to the police power.—All corporate rights are taken subject to the great power reserved in every state and commonly known as the police power.[21] This power is governmental in the strictest sense of the term, and can neither be surrendered nor bargained away by contract. All property is subject to this power whether it belongs to natural or artificial persons. The legislature could not, if it would, grant a charter which would place corporate rights above this power. There is no contrariety of opinion, nor can there be, upon the proposition that corporate rights, no matter what their nature, are subject to the proper exercise of this high power, but there is often difficulty in determining what is or is not a valid exercise of the power. Statutes have been upheld on the ground that in enacting them the legislature exercised this power, when, in truth, the subject of the statutes was not a subject over which the police power extends. So, too, statutes have been upheld upon the theory that the legislature is the sole judge of what subjects are or are not within the police power. The courts have sometimes surrendered the power it was their clear duty to exercise, and assumed without just reason that the legislative judgment was con-

858; Commonwealth v. Fitchburg &c. R. Co. 12 Gray (Mass.), 180; State v. Southern &c. R. Co. 18 Minn. 40; People v. New York &c. R. Co. 104 N. Y. 58; 9 N. E. 856; 58 Am. R. 484; Atchison &c. R. Co. v. Denver, 110 U. S. 667; 4 Sup. Ct. 185; 16 Am. & Eng. R. Cas. 57.

[21] The principle is so familiar and so firmly established that it is hardly necessary to cite authorities, but we cite a few of the multitude of cases: Boston &c. Co. v. Massachusetts, 97 U. S. 25; Railroad Co. v. Richmond, 96 U. S. 521; Jamieson v. Indiana &c. Co. 128 Ind. 555; 28 N. E. 76; 12 L. R. A. 652; State v. Hoskins, 58 Minn. 35; 59 N. W. 545; 25 L. R. A. 759; 61 Am. & Eng. R. Cas. 571; Thorpe v. Rutland &c. R. Co. 27 Vt. 140; 62 Am. Dec. 625; Indianapolis &c. R. Co. v. Kercheval, 16 Ind. 84; Pennsylvania Co. v. Riblet, 66 Pa. St. 164; 5 Am. R. 360; Buckley v. New York &c. R. Co. 27 Conn. 479; Toledo &c. R. Co. v. Jacksonville, 67 Ill. 37; 16 Am. R. 611; Boston &c. R. Co. v. County Commissioners, 79 Me. 386; 10 Atl. 113; Kansas Pacific R. Co. v. Mower, 16 Kan. 573; Sloan v. Pacific R. Co. 61 Mo. 24; 21 Am. R. 397; Wilder v. Maine &c. R. Co. 65 Me. 332; 20 Am. R. 698; Horn v. Atlantic &c. Co. 35 N. H. 169; Jones v. Galena &c. Co. 16 Iowa, 6; Cincinnati &c. R. Co. v. Cole, 29 Ohio St. 126; 23 Am. R. 729; Sawyer v. Vermont &c. R. Co. 105 Mass. 196. See, also, Cooley Const. Lim. (6th ed) 707; Tiedeman's Limitations of Police Power, 593–602; Elliott Roads and Streets, 564, 573, 598; New York &c. R. Co. v. Bristol, 151 U. S. 556; 14 Sup. Ct. 437; Louisville &c. R. Co. v. Kentucky, 161 U. S. 677; 16 Sup. Ct. 714.

clusive and closed all inquiry and forbade all investigation. So they have in some instances adjudged the subject to be within the police power when it was not, and, again, in other instances, they have tacitly conceded that the police power is without limit. These unsound theories and undue assumptions have led to unjust results and have given force to unconstitutional measures oppressive and tyrannical in their nature and effect.

§ 664. The police power is fettered by limitations.—There are limitations upon the police power. The legislative judgment is not always conclusive. The courts are not bound to inactivity because the legislature assumes to decide that a regulation it prescribes is a valid exercise of the police power, nor are the courts invariably concluded by the legislative judgment that the subject upon which it legislates is one which falls within the scope of the police power.[22]

[22] Dobbins v. Los Angeles, 195 U. S. 223; 25 Sup. Ct. 18, and authorities there cited. The doctrine we assert is illustrated by the cases which declare and enforce the rule that the legislature can not make that a nuisance which is not, in fact, a nuisance. Janesville v. Carpenter, 77 Wis. 288; 46 N. W. 128; 8 L. R. A. 808; 20 Am. St. 123; Hutton v. Camden, 10 Vroom (N. J.), 122; 23 Am. R. 203; O'Leary, Ex parte, 65 Miss. 180; 3 So. 144; 7 Am. St. 640; Coe v. Schultz, 47 Barb. (N. Y.) 64. Judge Cooley thus lays down the law: "The limit to the exercise of the police power in these cases must be this: the regulations must have reference to the comfort, safety and welfare of society; they must not be in conflict with any of the provisions of the charter, and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchises." Cooley Const. Lim. (6th ed.) 710. Judge Dillon says: "All embracing and penetrating as the police power of the state is, and of necessity must be, it is nevertheless subject, like all other legislative powers, to the paramount authority of the state and federal constitutions. A right conferred or protected by the constitution can not be overthrown or impaired by any authority derived from the police power." 1 Dillon's Munic. Corp. (4th ed.) § 142. Mr. Tiedeman says: "And it is a judicial question whether a particular regulation is a reasonable exercise of the police power or not." Tiedeman Lim. Police Power, § 194. The Court of Appeals of New York, in Matter of Jacobs, 98 N. Y. 98; 50 Am. R. 636, 643, after citing many cases, said: "These citations are sufficient to show that the police power is not without its limitations, and that in its exercise the legisla-

When the question is one of power or no power, as, for instance, whether the subject is one over which the police power extends, or whether there was power to enact the particular statute, the question is a judicial one and is for the courts. It is always the duty of the courts to decide whether the statute is in truth a police regulation or an invasion of substantial rights under the guise of a police regulation. An arbitrary assumption that a subject is one over which the police power extends or that the regulation is valid as an exercise of that power will not remove the question from the domain of the judiciary.[23] To affirm that the legislature may by an arbitrary de-

ture must respect the great fundamental rights guaranteed by the constitution. If this were otherwise, the power of the legislature would be practically without limitation. In the assumed exercise of the police power in the interest of health, the welfare or safety of the public, every right of the citizen might be invaded and every constitutional barrier swept away." The doctrine asserted in the case last cited was approved and enforced in People v. Gillson, 109 N. Y. 389; 17 N. E. 343; 4 Am. St. 465. In the case of Toledo &c. R. Co. v. Jacksonville, 67 Ill. 37; 16 Am. 611; the court thus stated the rule: "What are reasonable regulations, and what are subjects of police powers, must necessarily be judicial questions. The law-making power is the sole judge when the necessity exists, and when, if at all, it will exercise that right to enact such laws. Like other powers of government, there are constitutional limitations to its exercise. It is not within the power of the general assembly, under the pretense of exercising the police power of the State, to enact laws not necessary to the preservation of the health and safety of the community that will be oppressive and burdensome upon the citizen. If it should prohibit that which is harmless in itself, or command that to be done which does not tend to promote the health, safety or welfare of society, it would be an unauthorized exercise of power, and it would be the duty of the courts to declare such legislation void." In the case of Lake View v. Rose Hill Cemetery Co. 70 Ill. 191; 22 Am. R. 71; it was said: "As a general proposition, it may be stated, it is the province of the law-making power to determine when the exigency exists, calling into exercise this power. What are the subjects of its exercise is clearly a judicial question. There must necessarily be constitutional limitations upon this power. It is essential that such regulations must have reference to the comfort, safety or welfare of society, and, when applied to corporations, they must not be in conflict with any of the provisions of the charter. It is not lawful, under the pretense of police regulations, to take from a corporation any of the essential rights and privileges conferred by the charter."

[23] Lawton v. Steele, 152 U. S. 133,

cision of its own foreclose controversy upon such a question is to affirm that, upon questions concerning the highest rights of property, the legislative power is unlimited. Such a doctrine is directly opposed to the foundation theory of our government.[24] The question whether there is a reasonable necessity for the exercise of the police power or not,[25] and the question whether the subject is one within the field of the police power are judicial questions or else the system of

137; 14 Sup. Ct. 499, 501; Dobbins v. Los Angeles, 195 U. S. 223; 25 Sup. Ct. 18, 20; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558; 22 Sup. Ct. 431, 438. A writer of acknowledged ability says: "It is at the same time clear that a state can not, by arbitrarily assuming that a trade or commodity is injurious to the common weal, justify the breach of a contract or impair the rights of a corporation or individual. The police power is, like all others, subject to the constitution, and can not be used as a color for the disregard of the restrictions which that imposes. Convenience, utility or profit will not alone sustain such a plea, nor can it rest on the recitals of a statute where there is no substantial basis." 1 Hare Am. Const. Law, 618. In the Slaughter House cases, 16 Wall. (U. S.) 36, 87, the court said: "But under the pretense of prescribing a police regulation, the state can not be permitted to encroach upon any of the just rights of the citizen which the constitution intended to secure against abridgment."

[24] In the case of Loan Association v. Topeka, 20 Wall. (U. S.) 655, 663, it was said: "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments." Cases decided by some of the courts tacitly disregard or are unmindful of this fundamental principle. Some of the expressions in State v. Hoskins, 58 Minn. 35; 59 N. W. 545; 25 L. R. A. 759; 61 Am. & Eng. R. Cas. 571, are opposed to this doctrine.

[25] Mr. Tiedeman, speaking of railroad companies, says: "But there is no more need for a judicial determination of the limitations of the police power in this phase of its exercise than in any other. The same principles govern its exercise in every case." Tiedeman Lim. Police Power, § 194. See, generally, Sloan v. Pacific R. Co. 61 Mo. 24; 21 Am. R. 397; Philadelphia &c. R. Co. v. Bowers, 4 Houst. (Del.) 506; Mayor v. Radecke, 49 Md. 217; 33 Am. R. 239; State v. Noyes, 47 Me. 189; Washington &c. Co. v. State, 18 Conn. 53; Commonwealth v. Pennsylvania &c. Co. 66 Pa. St. 41; 5 Am. R. 329; Bailey v. Philadelphia &c. R. Co. 4 Harr. (Del.) 389; 44 Am. Dec. 593; People v. Jackson &c. Co. 9 Mich. 284; White's Creek &c. Co. v. Davidson County, 3 Tenn. Ch. 396; Lake Shore &c. R. Co. v. Smith, 173 U. S. 684; 19 Sup. Ct. 565. But the courts will not lightly interfere with the legislature in

distributed power and checks and balances is an empty, impotent abstraction.

§ 665. The subject must be one over which the police power extends—Cases adjudging statutes invalid.—A statute professing to make a police regulation and assuming to be based upon that power is invalid, if it be clear that the subject is not one within the scope of that power.[26] In an Illinois case the statute assumed to require railroad companies to bear the expense of coroners' inquests held upon persons who died on their trains, and also the expense of the burial of such persons, but the court rightly declared the statute unconstitutional.[27] The police power will not authorize the enactment of a statute declaring a railway depot or the like to be a nuisance,[28] for such a structure of itself is not injurious to the public welfare. It is held that a statute which assumes to make a railroad company liable for stock killed by its trains, where there is no negligence on the part of the company, is unconstitutional.[29] It was held in a well-

such matters. Missouri &c. R. Co. v. May, 194 U. S. 267; 24 Sup. Ct. 638.

[26] The authorities referred to in a preceding section sustain the statement of the text, and our immediate purpose is to show the application of the general doctrine.

[27] Ohio &c. R. Co. v. Lackey, 78 Ill. 55; 20 Am. R. 259 The court, it is proper to say, does not discuss the question whether the statute could be upheld upon the ground that it was a valid exercise of the police power, but it is evident that the court did not regard the subject of the statute as within the scope of that power. But see Gano v. Minneapolis Railroad, 114 Ia. 713, 719; 87 N. W. 714; 55 L. R. A. 263; 89 Am. St. 393; Gee v. Gee, 190 U. S. 557; 23 Sup. Ct. 854.

[28] State v. Jersey City, 29 N. J. Law 170. See Yates v. Milwaukee, 10 Wall. (U. S.) 497.

[29] Schenck v. Union Pacific R. Co. 5 Wyo. 430; 40 Pac. 840. In the case the court said: "The principles upon which such statutes are held to be unconstitutional have been so often discussed that a new consideration of them would be unprofitable and tedious." The court cited Jensen v. Union Pacific R. Co. 6 Utah 253; 21 Pac. 994; 4 L. R. A. 724; Denver &c. Railway v. Outcalt, 2 Colo. App. 395; 31 Pac. 177; Parsons v. Russell, 11 Mich. 113; 83 Am. Dec. 728; Taylor v. Porter, 4 Hill. (N. Y.) 140; 40 Am. Dec. 274; Zeigler v. South &c. R. Co. 58 Ala. 594; Oregon &c. R. Co. v Smally, 1 Wash. 206; 23 Pac. 108; 22 Am. St. 145; Atchison &c. R. Co. v. Baty, 6 Neb. 37; 29 Am. R. 356. See, also, Bielenberg v. Montana &c. R. Co. 8 Mont. 271; 20 Pac. 314; 2 L. R. A. 813; 38 Am. & Eng. R. Cas. 275; Cottrel v. Union Pac. R. Co. 2 Idaho 540; 21 Pac. 416; Birmingham &c. R. Co. v. Parsons, 100 Ala. 662; 13 So. 602; 27 L. R. A. 263; 46 Am. St.

reasoned case that a statute assuming to compel persons and corporations to pay employes in full upon discharging them, although such employes by their wrongful acts may have caused injury to the employer, is not a valid exercise of the police powers, and is unconstitutional as to individuals, but is valid as to corporations under the reserved power to amend,[30] and this view as to corporations was also

92; East Kingston v. Towle, 48 N. H. 57; 97 Am. Dec. 575; People v. Tighe, 9 Misc. (N. Y.) 607; 30 N. Y. S. 368; Sioux Falls v. Kirby, 6 S. D. 62; 60 N. W. 156; 25 L. R. A. 621. Some of the cases cited bear directly upon the point that where there is a right to notice, a statute which is professedly enacted in the exercise of the police power is invalid, if it deprives the party of notice, but they serve to show that the exercise of the police power is not beyond judicial investigation as well as to show that a police regulation can not override constitutional limitations. It seems difficult to reconcile the cases holding invalid statutes assuming to make railroad companies absolutely liable with Mathews v. St. Louis &c. R. Co. 121 Mo. 298; 24 S. W. 591; 25 L. R. A. 161; Union &c. R. Co. v. De Busk, 12 Colo. 294; 3 L. R. A. 350; 13 Am. St. 221; Atchison &c. R. Co. v. Mathews, 174 U. S. 96; 19 Sup. Ct. 609; Missouri &c. R. Co. v. Beckwith, 129 U. S. 26; 9 Sup. Ct. 207; and other cases in which statutes making railroad companies absolutely liable for injuries caused by fires from their locomotives were upheld. There is, we venture to say, notwithstanding the array of authority, reason for affirming that in the class of case just referred to the doctrine has been pressed too far. In authorizing the construction and operation of railroads the legislature necessarily authorizes the use of fire and we can not perceive how a lawful and proper use of that which is lawful can be made the basis of a statute inflicting a penalty, in the form of damages upon a party whether that party be a corporation or a citizen, for doing in a lawful mode what the party is authorized by law to do. See post, § 1222, 1223.

[30] Leep v. St. Louis &c. R. Co. 58 Ark. 407; 25 S. W. 75; 41 Am. St. 109. In the opinion in the case cited the court referred with approval to the cases of the State v. Goodwill, 33 W. Va. 179; 10 S. E. 285; 6 L. A. R. 621; 25 Am. St. 863; State v. Loomis, 115 Mo. 307; 22 S. W. 350; 21 L. R. A. 789; Godcharles v. Wigeman, 113 Pa. St. 431; 6 Atl. 354; State v. Fore Creek &c. Co. 33 W. Va. 188; 10 S. E. 285; 6 L. R. A. 359; 25 Am. St. 891; Ramsey v. People, 142 Ill. 380; 32 N. E. 364; 17 L. R. A. 853; Braceville &c. Co. v. People, 147 Ill. 66; 35 N. E. 62; 22 L. R. A. 340; 37 Am. St. 206; Commonwealth v. Perry, 155 Mass. 117; 28 N. E. 1126; 14 L. R. A. 325; 31 Am. St. 533; San Antonio &c. R. Co. v. Wilson (Texas), 19 S. W. 910, and disapproved the cases of State v. Peel &c. Co. 36 W. Va. 802; 15 S. E. 1000; 17 L R. A. 385, and Hancock v. Yaden, 121 Ind. 366; 23 N. E. 253; 6 L. R. A. 576; 16 Am. St. 396. The court justly discriminated the decision in Hancock v. Yaden,

taken by the Supreme Court of the United States.[31] A statute providing that, upon filing a sworn statement showing that the company is indebted for work and labor performed or for services rendered it, the court should issue an injunction restraining the company from operating its road, was held unconstitutional upon the ground that it made it obligatory upon the courts to grant the injunction and deprived the company of a hearing, and, in effect, was a taking of the property without due process of law.[32] And a statute providing that, in an action against a railroad company for personal injury inflicted in another state, it shall not be competent for the company to plead or prove the decisions or statute of such other state as a defense, has likewise been held unconstitutional.[33]

§ 666. Police power—Legislative and judicial questions.—It is clear that, if the question which the legislature is required to decide is a legislative one, the decision of the legislature is conclusive.[34] The difficulty is to determine what are and what are not legislative questions. So far as concerns matters of policy and expediency there is no doubt that the legislative decision is final.[35] But it is by no means

and said that the "statute was held to be constitutional" on the ground that "it protected and maintained the medium of payment established by the sovereign power of the nation." The holding in Hancock v. Yaden as cited in Leep v. St. Louis &c. R. Co. supra, proceeds upon the theory that the state may protect the money of the national government by interdicting parties from contracting in advance that some other thing than money shall be taken as payment. See, generally, State v. Brown &c. Co. 18 R. I. 16; 25 Atl. 246; 17 L. R. A. 856.

[31] St. Louis &c. Co. v. Paul, 173 U. S. 404; 19 Sup. Ct. 419.

[32] Creech v. Pittsburgh &c. R. Co. 29 W. L. Bull. 112.

[33] Baltimore R. Co. v. Reed, 158 Ind. 25; 62 N. E. 488; 56 L. R. A. 468; 92 Am. St. 293. See, also, Hovey v. Elliott, 167 U. S. 409; 17 Sup. Ct. 841.

[34] State v. Wiley, 109 Mo. 439; 19 S. W. 197; Stockton v. Powell, 29 Fla. 1; 10 So. 688; 15 L. R. A. 42, 50; Elliott Gen. Prac. § 148.

[35] The principle to which we refer is a familiar one and was thus stated in the License Tax Cases, 5 Wall. (U. S.) 462: "This court can know nothing of public policy except from the constitution and the laws, and the course of administration and decision. It has no legislative powers. It can not modify or amend any legislative acts. It can not examine any questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must be addressed to the legislature. Questions of policy there are concluded here." See, also, McGuire v. Chicago &c. R. Co. (Ia.) 108 N. W. 902.

within the legislative power to shut out judicial investigation and judgment. It is true that judicial investigation very often ends with the discovery that the question is one of policy or expediency. This is far from being true, however, in all cases. It often becomes necessary for the courts to ascertain and decide whether a constitutional provision is violated under the pretense of exercising the police power. The legislature cannot make that a legislative question which is a judicial one. If, for instance, a trade or occupation is not injurious to the community the legislature cannot arbitrarily decide that it is injurious, and by that decision exclude the interference of the judiciary.[36] If the case is one wherein due process of law requires notice, then the legislature cannot arbitrarily decide, without providing for notice, that an act shall or shall not be done.[37] "Due process of law" and the "law of the land" are terms of great force, and the requirements made by such terms are not satisfied by a legislative enactment which denies a hearing where a hearing is provided for by the organic law.[38] The power to adjudicate where adjudication is necessary is judicial and not legislative.[39] If, therefore, an adjudication is essential, the legislature, while it may prescribe regulations,

[36] State v. Moore, 113 N. C. 697; 18 S. E. 342; 22 L. A. R. 472; Bertholf v. O'Reilly, 74 N. Y. 509; 30 Am. R. 323; People v. Marx, 99 N. Y. 377; 2 N. E. 29; 52 Am. R. 34; ante, § 664.

[37] The principle considered in the text is illustrated by the cases which hold that although the legislature may confer authority to summarily seize property it can not authorize a destruction of the property without giving the owner a hearing. Lowry v. Rainwater, 70 Mo. 152; 35 Am. R. 420; Attorney-Gen. v. Justices &c. 103 Mass. 456; State v. Robbins, 124 Ind. 308; 24 N. E. 978; 8 L. R. A. 438. See Lincoln v. Smith, 27 Vt. 328; Wynehamer v. People, 13 N. Y. 378; People v. Haug, 68 Mich. 549; 37 N. W. 21; Robison v. Miner, 68 Mich. 549; 37 N. W. 21. See, also, authorities cited in note to the preceding section, and Chicago &c. R. Co. v. Kieth, 67 Ohio St. 279; 65 N. E. 1020; 60 L. R. A. 525.

[38] Taylor v. Porter, 4 Hill 140; Norman v. Heist, 5 Watts & S. (Pa. St.) 171; Hoke v. Henderson, 15 N. C. 1; 25 Am. Dec. 677; Dash v. Van Kleeck, 7 Johns. (N. Y.) 477; 5 Am. Dec. 291; Goshen v. Stonington, 4 Conn. 209; 10 Am. Dec. 121; Fletcher v. Peck, 6 Cranch (U. S.) 87; Ervine's Appeal, 16 Pa. St. 256, 266; 55 Am. Dec. 499; Trustee &c. v. Bailey, 10 Fla. 238.

[39] Taylor v. Place, 4 R. I. 324; Greenough v. Greenough, 11 Pa. St. 489; 51 Am. Dec. 567; People v. Board of Supervisors, 16 N. Y. 424; Cincinnati &c. R. Co. v. Commissioners, 1 Ohio St. 77; Merrill v. Sherburne, 1 N. H. 199, 203; 8 Am. Dec. 52.

cannot make an adjudication, that is, it cannot adjudicate in the sense that a court of justice does when it pronounces judgment. If the case be one in which the organic law secures to the party a hearing, then the legislature cannot abridge that right by arrogating to itself the power to decide arbitrarily and conclusively. The duty of the courts is to ascertain if the case is one in which the party is entitled to a hearing, and, in the event that it be found that he is entitled to a hearing, overthrow the statute if it denies the right to a hearing. So it is often necessary for the courts to ascertain and decide whether, under the pretense of a police regulation, there is, in fact, an attempt to authorize the taking of property without compensation. It has been adjudged that the legislature cannot arbitrarily fix the value of animals killed by the trains of a railroad company, for the question of value is one upon which there is a right to "a day in court."[40] It has also been held that the legislature cannot, under the police power, authorize a railroad company to utilize a public highway as its roadbed in elevating its tracks to abolish a grade crossing without making compensation for the destruction of access of the abutter who owns the fee.[41]

§ 667. The police power and the commerce clause of the federal constitution.—The police power is resident in the states,[42] and may be exercised by them upon interstate railroads, but not in such a way as to unlawfully interfere with commerce between the states.[43] The

[40] Wadsworth v. Union Pacific R. Co. 18 Colo. 600; 33 Pac. 515; 23 L. R. A. 812; 36 Am. St. 309; 56 Am. & Eng. R. Cas. 145. In the case referred to the court quoted the well-known statement of Webster: "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial."

[41] McKeon v. N. Y. &c. R. Co. 75 Conn. 343; 53 Alt. 656; 61 L. R. A. 730; affirmed in 189 U. S. 508; 23 Sup. Ct. 853.

[42] Mugler v. Kansas, 123 U. S. 623; 8 Sup. Ct. 273; Prigg v. Pennsylvania, 16 Pet. (U. S.) 539; United States v. De Witt, 9 Wall (U. S.) 41; Patterson v. Kentucky, 97 U. S. 501; Jamieson v. Indiana &c. Co. 128 Ind. 555; 28 N. E. 76; 12 L. R. A. 652; Cooley Const. Lim. 574.

[43] Leisy v. Hardin, 135 U. S. 100; 10 Sup. Ct. 681; Bowman v. Chicago &c. R. Co. 125 U. S. 465; 8 Sup. Ct. 689; Chicago R. Co. v. Minnesota, 134 U. S. 418; 10 Sup. Ct. 462; Wilkerson v. Rahrer, 140 U. S. 545; 11 Sup. Ct. 865; Rahrer, In re, 140 U. S. 545; 11 Sup. Ct. 865; State v. Gooch, 44 Fed. 276; Western Union Tel. Co. v. Pendleton, 122 U. S. 347; 7 Sup. Ct. 1126; Lyng v. Michigan,

commerce clause of the federal constitution is, as we have seen, a limitation upon the police power of the states, but it does not destroy that power. Where, however, the power of the federal government and the power of the state to enact police regulations come in conflict, the federal power will prevail. It follows from the rule just stated that if, under pretense of prescribing a police regulation, the legislature in fact assumes to regulate interstate commerce, the statute will be void.[44] But police regulations may be valid although they do affect interstate commerce, provided they are not in fact regulations of commerce between the states.[45]

§ 668. Regulations that have been held valid.—It is now firmly settled that statutes requiring railroad companies to fence their tracks are valid.[46] Railroad companies may be compelled to conduct exam-

135 U. S. 161; 10 Sup. Ct. 725; Beine, In re, 42 Fed. 545; Spickler, In re, 43 Fed. 653, 659; Spellman v. New Orleans, 45 Fed. 3; United States v. Fiscus, 42 Fed. 395; American &c. Co. v. Board &c. 43 Fed. 609; Cuban &c. Co. v. Fitzpatrick, 66 Fed. 63; Scott, Ex parte, 66 Fed. 45; Plumley v. Commonwealth, 155 U. S. 461; 15 Sup Ct. 154.

[44] Chy Lung v. Freeman, 92 U. S. 275; Henderson v. Mayor &c. of New York, 92 U. S. 259; Hannibal &c. R. Co. v. Husen, 95 U. S. 465; Kimmish v. Ball, 129 U. S. 217; 9 Sup. Ct. 277; Minnesota v. Barber, 136 U. S. 313. See Telegraph Co. v. Texas, 105 U. S. 460; 10 Sup. Ct. 862; Pensacola Tel. Co. v. Western Union Tel. Co. 96 U. S. 1.

[45] Western Union Tel. Co. v. Pendleton, 122 U. S. 347; 7 Sup. Ct. 1126. The court said in the case cited that: "Undoubtedly under the reserved powers of the state, which are designated under that somewhat ambiguous term of 'police powers,' regulations may be prescribed for the good order, peace, and protection of the community." In Hannibal &c. R. Co. v. Husen, 95 U. S. 465, the court said: "Many acts of a state may, indeed, affect commerce without amounting to any regulation of it in the constitutional sense of the term." See Smith v. Alabama &c. R. Co., 124 U. S. 465; 8 Sup. Ct. 564; Nashville &c. R. Co. v. Alabama, 128 U. S. 96; 9 Sup. Ct. 28; Sherlock v. Alling, 93 U. S. 99; Siebold, Ex parte, 100 U. S. 371; Wilson v. McNamee, 102 U. S. 572; State v. Penny, 19 S. Car. 218; Pittsburg &c. Co. v. Bates, 156 U. S. 577; 15 Sup. Ct. 415; McGuire v. Chicago &c. R. Co. (Ia)., 108 N. W. 902.

[46] The decisions upon this question are very numerous, but the rule is so well established that it is only necessary to cite a few of the many cases: Thorpe v. Rutland &c. R. Co. 27 Vt. 140; 62 Am. Dec. 625; Gorman v. Pacific &c. R. Co. 26 Mo. 441; 72 Am. Dec. 220; New Albany &c. R. Co. v. Tilton, 12 Ind. 3; 74 Am. Dec. 195; Wilder v. Maine &c. R. Co., 65 Me. 332; Corwin v. New York &c. R. Co. 13 N. Y. 42; Horn v. Atlantic

inations to ascertain the qualifications of their employes.[47] It has been held that a statute prohibiting railroad companies from making "flying" or "running switches," and making them liable to a person injured, although such person is guilty of contributory negligence, is a valid exercise of the police power.[48] There are also cases affirming that railroad companies may be compelled to heat their cars in some other mode than by stoves.[49] So, too, there are decisions that it is competent for the legislature to enact a law applicable exclusively to

&c. R. Co. 35 N. H. 169; Bulkley v. New York &c. R. Co. 27 Conn. 479; Jones v. Galena &c. R. Co. 16 Iowa 6; Winona &c. R. Co. v. Waldron, 11 Minn. 515; 88 Am. Dec. 100; Sawyer v. Vermont &c. R. Co. 105 Mass. 196; Pennsylvania Co. v. Riblet, 66 Pa. St. 164; 5 Am. R. 360; Kansas &c. R. Co. v. Mower, 16 Kan. 573; Illinois Central R. Co. v. Arnold, 47 Ill. 173; Quackenbush v. Wisconsin &c. R. Co. 62 Wis. 411; 52 N. W. 519; O'Bannon v. Louisville &c. R. Co. 8 Bush (Ky.) 348; Burlington &c. R. Co. v. Webb, 18 Neb. 215; 24 N. W. 706; 53 Am. R. 809; Owensboro &c. R. Co. v. Todd, 91 Ky. 175; 15 S. W. 56; 11 L. R. A. 285; Missouri Pac. R. Co. v. Humes, 115 U. S. 512; 6 Sup. Ct. 110. In the case of the Birmingham &c. R. Co. v. Parsons, 100 Ala, 662; 13 So. 602; 27 L. R. A. 263; 46 Am. St. 92, a different view of the question is taken, the court holding that as the legislature may make the duty to build fences absolute it may leave the question whether a fence shall be built to the decision of the land-owner. In that case the court sanctions the doctrine that land-owners may release the company from the duty to fence, but we suppose that a release by a land-owner would not avail the company if the breach of duty to fence was the proximate cause of an injury to a passenger or other person having a right of action against the damages for injuries resulting from negligence.

[47] Nashville &c. R. Co. v. State, 83 Ala. 71; 3 So. 702; Nashville &c. R. Co. v. Alabama, 128 U. S. 96; 9 Sup. Ct. 28; Smith v. Alabama, 124 U. S. 465; 8 Sup. Ct. 564; McDonald v. State, 81 Ala. 279; 2 So. 829. In Nashville &c. R. Co. v. Alabama, 128 U. S. 96; 9 Sup. Ct. 28, it was said in the course of the opinion that the company could be compelled to bear the expense of such examinations. Louisville &c. R. Co. v. Baldwin, 85 Ala. 619; 5 So. 311; 7 L. R. A. 266; 38 Am. & Eng. R. Cas. 5.

[48] Jones v. Alabama &c. R. Co. 72 Miss. 32; 16 So. 379. That such a statute as the one under consideration in the case cited is valid where the switches are made entirely on the exclusive private property of the company is not so clear on principle, but the general trend of the decisions seems to warrant the conclusion that such a statute is valid, although there is conflict upon the general question.

[49] People v. New York &c. R. Co. 55 Hun (N. Y.), 409; 8 N. Y. S. 672; People v. Clark, 14 N. Y. S. 642. It has also been held that a railroad company may be required to light

railroad companies, prescribing who shall and who shall not be deemed fellow servants of a common master.[50] It has been held that a statute making railroad companies absolutely liable to persons injured on their trains, except where the injury is attributable to the criminal negligence of the person injured or to a violation of a rule or regulation of the company, is constitutional.[51] Statutes requiring trains to stop at crossings of other roads, at county seats and the like, have been held valid.[52] A statute requiring railroad companies to stop their trains for five minutes at each station on the line of their

and heat its station buildings. Texas &c. R. Co. v. Mayes (Tex.) 15 S. W. 43.

[50] Campbell v. Cook, 86 Texas 630; 26 S. W. 486; 40 Am. St. 878; Georgia &c. R. Co. v. Miller, 90 Ga. 571; 16 S. E. 939; Missouri Pac. R. Co. v. Mackey, 127 U. S. 205; 8 Sup. Ct. 1161; Missouri Pac. R. Co. v. Mackey, 33 Kan. 298; 6 Pac. 291; Herrick v. Minneapolis &c. R. Co. 31 Minn. 11; 16 N. W. 413; 47 Am. R. 771; 11 Am. & Eng. R. Cas. 256; Georgia R. Co. v. Ivey, 73 Ga. 499; 28 Am. & Eng. R. Cas. 392; Austin Rapid Transit Co. v. Groethe (Texas Civil App.) 31 S. W. 197; Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494; 60 N. E. 943; 54 L. R. A. 787; Pittsburgh &c. R. Co. v. Hosea, 152 Ind. 412; 53 N. E. 419; Pittsburgh &c. R. Co. v. Montgomery, 152 Ind. 1; 49 N. E. 582; 69 L. R. A. 75; 71 Am. St. 300. See generally as to regulation of the relation of master and servant. Ten Hour Law, In re, 24 R. I. 603; 54 Atl. 602; 61 L. R. A. 612; Atchison &c. R. Co. v. Matthews, 174 U. S. 96; 19 Sup. Ct. 609; St. Louis &c. R. Co. v. Paul, 173 U. S. 404; 19 Sup. Ct. 491.

[51] Union Pacific R. Co. v. Porter, 38 Neb. 226; 56 N. W. 808; 55 L. R. A. 610. See also McGuire v. Chicago &c. R. Co. (Ia.) 108 N. W. 902.

[52] Illinois Central R. Co. v. People, 143 Ill. 434; 33 N. E. 173; 19 L. R. A. 119 (reversed, however, in 163 U. S. 142; 16 Sup. Ct. 1096); People v. Louisville &c. R. Co. 120 Ill. 48; 10 N. E. 657; Chicago &c. R. Co. v. Suffern, 129 Ill. 274; Chicago &e. R. Co. v. People, 105 Ill. 657; Ohio &c. R. Co. v. People, 29 Ill. App. 561; St. Louis &c. R. Co. v. B'Shears, 59 Ark. 237; 27 S. W. 21; 61 Am. & Eng. R. Cas. 556. The English cases hold that an agreement to stop trains at a particular station for a designated length of time is valid and enforceable. Rigby v. Great Western &c. R. Co 14 M. & W. 811. See Phillips v. Great Western &c. R. Co. L. R. 7 Ch. 409; Greene v. West Cheshire Lines &c. L. R. 13 Eq. 44; 41 L. J. Ch. 17; Raphael v. Thames Valley &c. R. Co. L. R. 2 Ch. 147; Turner v. London and South Western &c. R. Co. L. R. 17 Eq. 561; Burnett v. Great North &c. R. Co. L. R. 10 App. 147; Price v. Bala &c. R. Co. 50 L. T. R. 787; Flood v. North Eastern &c. R. Co. 21 L. T. R. 258. As the first and highest duty of a railroad company is to discharge its duties to the public there is, at least, fair reason for the conclusion that such

roads has been upheld,[53] but it seems to us that the decisions upholding the statute are of doubtful soundness. The Supreme Court of Illinois holds that, under the police power, the construction of farm crossings may be compelled,[54] but this seems to us a very great stretch of the police power, at least as to cases where the right of way was secured prior to the enactment of the statute; and the Illinois statute requiring all regular passenger trains to stop a sufficient time at all railroad stations and county seats to receive and discharge passengers has been held invalid as applied to a fast mail train engaged in interstate commerce, where the train was required to go three miles out of its way to stop at a station.[55] In Texas it is correctly held that, where the right of way was obtained prior to the enactment of the statute, there is no power to compel the construction of farm crossings.[56] It is held by the Supreme Court of Ohio that

contracts must yield to the public necessity. The rapid progress and the great changes wrought by time in this country must, as it seems to us, be influential considerations in cases such as are here under immediate mention, and these matters must be regarded as matters of which parties must take notice when they enter into contracts. A statute requiring railroad companies to stop at its intersections or crossings of other railroads and prescribing a penalty for failure to do so has also been held constitutional in State v. Chicago &c. R. Co. 122 Ia. 22; 96 N. W. 904; 101 Am. St. 254.

[53] Galveston &c. R. Co. v. La Gierse, 51 Texas 189. See also Lake Shore &c. R. Co. v. State, 173 U. S. 285; 19 Sup. Ct. 465.

[54] Illinois Central R. Co. v. Willenborg, 117 Ill. 203; 7 N. E. 698; 57 Am. R. 862; 26 Am. & Eng. R. Cas. 358.

[55] Illinois Cent. R. Co. v. State, 163 U. S. 142; 16 Sup. Ct. 1096.

[56] Gulf &c. R. Co. v. Rowland, 70 Texas 298; 35 Am. & Eng. R. Cas. 286. In the case cited the court said: "The main case relied upon by the appellee, in order to sustain the constitutionality of the act in question is Thorpe v. Rutland &c. R. Co. 27 Vt. 140; 62 Am. Dec. 625. That case maintained the validity of an act of the legislature requiring railroad companies to put in cattle-guards at farm crossings. It seems to us that requirements for fence and cattle-guards stand upon the same principle. They are necessary for the protection of such domestic animals as are likely to stray upon the track, and more especially for the safety of passengers and employes of the railroad companies. Farm crossings are for the sole convenience of the owners of the land, and stand upon a different ground. Besides it does not appear in that case that the owner of the farm had been in any manner compensated for the expense of constructing his own crossings or cattle-guards. That decision, though it extends, as we think, the doctrine of the police power to its

railroad companies may be compelled to light their tracks situated within the limits of incorporated villages and cities,[57] and if this decision is to be understood as holding that companies may be compelled to light crossings and places to which the public have a right of access we think it is correct, but if it is to be understood as holding that railroad companies may be compelled to maintain lights at places where the members of the community have no right to go, that is, places owned by the companies, and to which they have an exclusive right, we cannot regard the decision as sound, for, while we believe that the legislature has power to provide for the safety and welfare of the public, we do not believe that the power extends to the control of private property, where no rights of the public are involved,

extreme limits, is not in conflict with the views expressed in this opinion. We think it would have been competent for the legislature, in providing for fences, to have required the companies to put in farm crossings, as a regulation of its undoubted power to require such fences. All subsequent rights of way would be presumed to have been acquired with reference to that law, and the land-owner would not have been presumed to have assumed the burden of their construction. We, therefore, think that, as in all subsequent acquisition of rights of way, in the absence of some express or implied agreement to the contrary, the railroad companies will be charged with the duty imposed by the statute, and the measure of the compensation will be regulated accordingly; therefore, as to such future cases, in our opinion, the statute should be constitutional in so far as it applies to crossings without enclosures. Smith v. New York &c. Railroad Co. 63 N. Y. 58." The opinion from which we have quoted justly discriminates between matters affecting public interest and matters of private concern. The distinction drawn in the opinion referred to is often lost sight of, and the result of losing sight of it is confusion and error. An exercise of the police power for purely private benefit can no more be defended than can the exercise of the right of eminent domain for a private purpose. But railroad commissioners may be authorized to compel the removal of a dangerous grade crossing. New York &c. R. Co. v. Bristol, 151 U. S. 556; 14 Sup. Ct. 437.

[57] Cincinnati &c. R. Co. v. Sullivan, 32 Ohio St. 152. In the case cited the court held that under the police power railroad companies may be compelled to light their tracks situated within the limits of incorporated villages and cities, and that in the event of the failure of a company to provide lights the municipality might do so at the expense of the company, but that the expense could not be regarded as an assessment or a tax, but must be enforced by an action against the company.

although it is owned by a railroad company, nor do we believe that the legislature can prescribe the particular or specific kind of light that shall be used,[58] for, as we believe, the legislative power extends no further than the enactment of a statute requiring tracks to be so lighted as to afford protection to the members of the community. The speed of trains through towns and cities may be regulated. The authorities are agreed that where the trains move upon or across highways their speed may be regulated, but there is a contrariety of opinion as to whether the speed of trains operating exclusively upon the private property of the company can be limited.[59] It is competent for the legislature to require railroad companies to keep tracks clear of weeds and other combustible materials,[60] and a statute so

[58] To hold that the legislature may arbitrarily and conclusively determine exactly what kind of a light should be used would be to confer upon it the absolute power to choose between different kinds of light, and this would make the legislature the absolute arbiter of all questions of fact, such as the sufficiency of the light, its suitableness for the purpose and like questions, thus denying a hearing upon such questions. We do not mean to say that the legislature may not provide that a general kind of light may be used, as, for instance, electric lights or gas lights, but what we mean is that the legislature can not arbitrarily require the use of a lamp or lamps of a particular pattern or description.

[59] Gratiot v. Missouri Pacific R. Co. 116 Mo. 450; 21 S. W. 1094; 16 S. W. 384; Mobile &c. R. Co. v. State, 51 Miss. 157; Whitson v. City of Franklin, 34 Ind. 392; Penna. R. Co. v. Lewis, 79 Pa. St. 33; Chicago &c. R. Co. v. Reidy, 66 Ill. 43; Merz v. Missouri Pac. R. Co. 88 Mo. 672; State v. Jersey City, 29 N. J. L. 170; Crowley v. Burlington &c. R. Co. 65 Iowa, 658; Haas v. Chicago &c. R. Co. 41 Wis. 44; Horn v. Chicago &c. R. Co. 38 Wis. 463; Cleveland &c. R. Co. v. Harrington, 131 Ind. 426; Clark v. Boston &c. R. Co. 64 N. H. 323; 31 Am. & Eng. R. Cas. 548; Toledo &c. R. Co. v. Deacon, 63 Ill. 91.

[60] Diamond v. Northern Pac. R. Co. 6 Mont. 580; 13 Pac. 367. See, upon the general subject, State v. Nelson, 52 Ohio St. 88; 39 N. E. 22; 26 L. R. A. 317; 10 Lewis' Am. & Corp. 771; State v. Hoskins, 58 Minn. 35; 59 N. W. 545; 25 L. R. A. 759; Ditberner v. Chicago &c. R. Co. 47 Wis. 138; 2 N. W. 69; Kent v. New York Central R. Co. 12 N. Y. 628; Pratt v. Atlantic &c. R. Co. 42 Me. 579; Branch v. Wilmington, 77 N. Car. 347; Sioux City &c. Co. v. Sioux City, 138 U. S. 98; 11 Sup. Ct. 226; American Rapid Tel. Co. v. Hess, 125 N. Y. 641; 26 N. E. 919; 13 L. R. A. 454; 21 Am. St. 764; 4 Lewis' Am. R. & Corp. 199; City &c. R. Co. v. Mayor &c. of Savannah, 77 Ga. 731; 4 Am. St. 106; Nelson v. Vermont &c. R. Co. 26 Vt. 717; Tombs v. Rochester &c. R. Co. 18

providing, and making the company liable, in case of neglect to comply with it, for resulting damages, and reasonable attorneys' fees, has been upheld.[61] But a statute providing that railroad companies failing to pay claims less than a certain sum for labor, overcharges on freight, or for stock killed, within thirty days after presentation, shall be liable for attorney's fees, has been held void as depriving the companies of the equal protection of the law.[62] Railroad companies may also be compelled to keep flagmen at crossings where the public safety or welfare requires the presence of flagmen.[63] So, an ordinance prohibiting whistling by locomotives, except when necessary for brake signals or to prevent injuries to persons or property, and prohibiting the escape of steam from cylinder cocks when the engine is running in the street, has been upheld as a valid exercise of the police power of the city.[63a]

§ 669. The power to impose penalties in favor of private persons —Constitutional questions.—There is a stubborn conflict of authority upon the question of the power of the legislature to impose penalties, in the form of double damages and the like, upon railroad companies, for the benefit of persons who have a cause of action against such companies. Many statutes give individuals a right to double damages and the like against railroad companies, and in so doing enact a law that can only apply to a single class and a particular kind of actions, namely, civil actions against railroad companies. It seems to us that many of the courts, in sustaining such statutes, have disregarded the constitutional provisions prohibiting special and local legislation. Where there are no constitutional provisions inhibiting the enactment of local and special laws there is less difficulty in sus-

Barb. (N. Y.) 583. See also as to drainage, Chicago &c. R. Co. v. Keith, 67 Ohio St. 279; 65 N. E. 1020; 60 L. R. A. 525, and compare Chicago &c. R. Co. v. Illinois, 200 U. S. 561; 26 Sup. Ct. 341.

[61] Cleveland &c. R. Co. v. Hamilton, 200 Ill. 633; 66 N. E. 389. See, also, Peoria &c. R. Co. v. Duggan, 109 Ill. 537; 50 Am. R. 619; Atchison &c. R. Co. v. Matthews, 174 U. S. 96; 19 Sup Ct. 609. But compare Wilder v. Railway Co. 70 Mich. 382; 38 N. W. 289; Joliffe v. Brown, 14 Wash. 155; 44 Pac. 149; 53 Am. St. 868.

[62] Gulf &c. R. Co. v. Ellis, 165 U. S. 150; 17 Sup. Ct. 255.

[63] Toledo &c. R. Co. v. Jacksonville, 67 Ill. 37; 16 Am. R. 611; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 30 Ohio St. 604; Erie v. Erie Canal Co. 59 Pa. St. 174.

[63a] Chicago &c. R. Co. v. Steckman, 224 Ill. 500; 79 N. E. 602.

taining such statutes, but where there are such prohibitions it seems to us that statutes making special rules for the government of railroad companies cannot be upheld except where the subject of the statute is peculiar to railroad companies. It has been held by the Supreme Court of the United States that a statute which gives a landowner a right of action against railroad companies which fail to fence their roads, for consequential damages, does not conflict with the provisions of the federal constitution, though consequential damages are not recoverable under the laws of the state against any other persons or corporations except railway companies.[64] The weight of authority is that legislation directed against railroad companies, and not against any other corporations or persons, is not local or special, but on this point there is conflict of authority.[65] The reasoning of

[64] Minneapolis &c. R. Co. v. Emmons, 149 U. S. 364; 13 Sup. Ct. 870. In the course of the opinion the court answering the contention of counsel that the statute denied to railroad companies the equal protection of the laws, said: "The answer to this is that there is no inhibition upon a state to impose such penalties for disregard of its police regulations as will insure prompt obedience to their requirements. For what injuries the party violating their requirements shall be liable, whether immediate or remote, is a matter of legislative discretion. The operating of railroads without fences and cattle-guards undoubtedly increases the danger which attends the operation of all railroads. It is only by such fences and guards that the straying of cattle running at large upon tracks can be prevented, and security had against accidents from that source; and the extent of the penalties which should be imposed by the state for any disregard of its legislation in that respect is a matter entirely within its control. It was not essential that the penalty should be confined to damages for the actual loss to the owner of cattle injured by the want of fences and guards. It was entirely competent for the legislature to subject the company to any incidental or consequential damages, such as loss of rent, the expenses of keeping watch to guard cattle from straying upon the tracks, or any other expenditure to which the adjoining owner was subjected in consequence of failure of the company to construct the required fences and cattle guards. No discrimination is made against any particular railroad companies or corporations. All are treated alike and required to perform the same duty; and, therefore, no invasion was attempted of the equality of protection ordained by the fourteenth amendment."

[65] Affirming the validity of such statutes, Gulf &c. R. Co. v. Ellis, 87 Texas 19; 26 S. W. 985; 61 Am. & Eng. R. Cas. 357; Peoria &c. R. Co. v. Duggan, 109 Ill. 537; 50 Am. R. 619; 20 Am. & Eng. R. Cas. 489; Perkins v. St. Louis &c. R. Co. 103 Mo. 52; 15 S. W. 320; 11 L. R. A. 426; Dow v. Beidelman, 49 Ark.

many of the cases is, we venture to say, not entirely satisfactory. It may be true that, as to matters peculiar to railroad companies which are not characteristics of any other corporation, a law applying to such companies exclusively is not special, but surely this is not true where the matter is a general one not peculiar to railroad companies. That some of the cases go too far is, as we believe, unquestionably true, but it must be said that it is not easy to draw a line between general and special statutes. So far as concerns the public duties of railroad companies there can, of course, be no reasonable controversy, for it is clear that as to such matters the legislature has power to enforce police regulations by imposing penalties for violations of law, but where the right exercised by railroad companies is a private right, and in its general character the same as that exercised by corporations generally, there is very great, if not insurmountable, difficulty in sustaining statutes which apply exclusively to railroad companies.

§ 670. Regulating speed of trains.—There is no doubt that the legislature has power to make reasonable regulations as to the speed at which railroad trains shall run, and that it may confer power upon the municipalities of the state to make and enforce such regulations. We think that municipal ordinances may be so unreasonable as to

455; 5 S. W. 297; 31 Am. & Eng. R. Cas. 14; Burlington &c. R. Co. v. Dey, 82 Iowa, 312; 48 N. W. 98; 112 L. R. A. 436; 31 Am. St. 477; 45 Am. & Eng. R. Cas. 391; Wortman v. Kleinschmidt, 12 Mont. 316; 30 Pac. 280; Jacksonville &c. R. Co. v. Prior, 34 Fla. 271; 15 So. 760; Missouri Pac. R. Co. v. Humes, 115 U. S. 512; 6 Sup. Ct. 110; Kansas Pac. R. Co. v. Mower, 16 Kan. 573; Illinois Central R. Co. v. Crider, 91 Tenn. 489; 19 S. W. 618; 56 Am. & Eng. R. Cas. 157. Denying the validity of such statutes, Chicago &c. R. Co. v. Moss, 60 Miss. 641; South &c. R. Co. v. Morris, 65 Ala. 193; Wilder v. Chicago &c. R. Co. 70 Mich. 382; 38 N. W. 289; Schut v Chicago &c. R. Co. 70 Mich. 433; 38 N. W. 291; Zeigler v. South &c. R. Co. 58 Ala. 594; Smith v. Louisville &c. R. Co. 75 Ala. 449; State v. Divine, 98 N. Car. 778; 4 S. E. 477; Indiana &c. R. Co. v. Gapen, 10 Ind. 292; Madison &c. R. Co. v. Whiteneck, 8 Ind. 217; St. Louis &c. R. Co. v. Williams, 49 Ark. 492. See, generally, Van Zant v. Waddel, 2 Yerg. (Tenn.) 260; Janes v. Reynolds, 2 Texas 250; Durkee v. Janesville, 28 Wis. 464; 9 Am. R. 500; Gordon v. Winchester, 12 Bush. (Ky.) 110; 23 Am. R. 713; Wally's Heirs v. Kennedy, 2 Yerg. (Tenn.) 554; 24 Am. Dec. 511; Bull v Conroe, 13 Wis. 233, 244; Calder v. Bull, 3 Dall (U. S.) 386, 388.

authorize the courts to adjudge them ineffective.[66] Upon the same principle on which schedules of rates fixed by railroad commissioners are held unreasonable and ineffective, ordinances of municipal corporations may be adjudged invalid if their effect is clearly and surely to practically disable a railroad company from properly discharging its public duties. But many ordinances prescribing a very low rate of speed have been upheld.[67]

§ 670a. Stopping trains at highway crossings.—Statutes and municipal ordinances have been enacted in some jurisdictions requiring railroad trains to be brought to a full stop on approaching highway crossings. Of such enactments it has been said by one author: "It is believed that these statutes and ordinances cannot be upheld as valid police regulations unless in cases of crossings where the danger is exceptional. Railway trains could not be run at any considerable rate of speed if they were obliged to come to a full stop at every highway grade crossing. Such a statutory requirement, unless embodied in the charter of the company or in an applicatory statute existing at the time of its creation, would plainly have the effect of impairing the obligation of the contract created between the corporation and the state by the grant of its franchises by the state and their acceptance by the corporators. It would be destructive of its business, and, as business is property, it would hence operate to deprive it of its property without due process of law. As applied to interstate trains, it would constitute such an embargo upon interstate commerce as the commerce clause of the Constitution of the United States, according to its interpretation by the Supreme Court of the United States, has placed outside the power of the states. Aside from this, it would be an intolerable burden upon the public entitled to the benefit of rapid transit. Such provisions are more apt to be found in local municipal ordinances, whose authorities, in enacting them, look primarily to the protection of the inhabitants of the particular municipality than in general statutes enacted by legislatures which may be supposed to have some regard to the general public interest."[68] In one case an

[66] Evison v. Chicago &c. R. Co. 45 Minn. 370; 48 N. W. 6; 11 L. R. A. 434; Meyers v. Chicago &c. R. Co. 57 Iowa 555; 10 N. W. 896; 42 Am. R. 50; 7 Am. & Eng. R. Cas. 406; Burg. v. Chicago, &c. R. Co. 90 Iowa 106; 57 N. W. 680; 60 Am. & Eng. R. Cas. 159; 48 Am. St. 419.

[67] See post § 1082.

[68] 2 Thomp. Neg. (2nd Ed.) § 1899. But see as to stopping at crossing or intersection of another road,

ordinance requiring railroad companies crossing specified streets of the city to first come to a full stop was held to operate unreasonably against a particular company, where its road was the only one crossing these streets, and there were other streets more frequented by travelers which were crossed by the roads of other companies, and no similar restriction was placed on such roads.[69]

§ 670b. Fencing tracks.—The cases show that railroad companies have frequently sought to avoid the additional burden imposed upon them by statutes compelling them to fence their tracks, on the ground that their charters were contracts, the obligation of which the state legislature had no power to impair, unless the right to alter and amend was reserved. The courts have universally decided against this theory. As these statutes are in the nature of police regulations designed for the protection of the lives and property of the traveling public, there is no reason why an artificial person should not be subject to such an exercise of the police power of the sovereignty as well as natural persons.[70] Thus it was held in New York that a statute requiring railroad companies to construct and maintain fences with necessary and suitable gates at farm crossings was not inconsistent

State v. Chicago &c. R. Co. 122 Ia. 22; 96 N. W. 904; 101 Am. St. 254.

[69] Buffalo v. New York &c. R. Co. 152 N. Y. 276; 46 N. E. 496. See, also, Staal v. Grand Rapids &c. R. Co. 57 Mich. 239; 23 N. W. 795.

[70] Gorman v. Pacific &c. R. Co. 26 Mo. 441; 72 Am. Dec. 220; Ohio &c. v. McClelland, 25 Ill. 140; Galena &c. R. Co. v. Crawford, 25 Ill. 529; Wilder v. Maine &c. R. Co. 65 Me. 333; Waldron v. Rensselaer &c. R. Co. 8 Barb. (N. Y.) 390; Clark v. Hannibal &c. R. Co. 36 Mo. 203; Suydam v. Moore, 8 Barb. (N. Y.); 358; Thorpe v. Rutland &c. R. Co. 27 Vt. 141; New Albany &c. R. Co. v. Tilton, 12 Ind. 3; 74 Am. Dec. 195; New Albany &c. R. Co. v. Maiden, 12 Ind. 10; Indianapolis &c. R. Co. v. Parker, 29 Ind. 471; Kansas &c. R. Co. v. Mower, 16 Kan. 573; Nelson v. Vermont &c. R. Co. 26 Vt. 717; 62 Am. Dec. 614; Blair v. Milwaukee &c. R. Co. 20 Wis. 254; Indianapolis &c. R. Co. v. Townsend, 10 Ind. 38; Jeffersonville &c. R. Co. v. Applegate, 10 Ind. 49; Indianapolis &c. R. Co. v. McKinney, 24 Ind. 283; Gilmore v. European R. Co. 60 Me. 237; Rhodes v. Utica &c. R. Co. 5 Hun (N. Y.) 344; McCall v. Chamberlain, 13 Wis. 640; Staats v. Hudson River R. Co. 4 Abb. App. Dec. (N. Y.) 287; Gillam v. Sioux City &c. R. Co. 26 Minn. 268; Minneapolis &c. R. Co. v. Emmons, 149 U. S. 364; 13 Sup. Ct. 870; 37 L. Ed. 769; Whittier v. Chicago &c. R. Co. 24 Minn. 394; Cairo &c. R. Co. v. Peoples, 92 Ill. 97; 34 Am. R. 112; Cairo &c. R. Co. v. Warrington, 92 Ill. 157.

with the prior enactments of the charter of a company requiring it to fence its road, and permitting the adjoining land-owner to erect gates at proper and convenient places, etc., and providing that they should "be kept in repair by the persons using the same;" and that, notwithstanding such charter, the company was liable for injuries consequent upon a defective maintenance of the gates.[71] Courts generally construe these statutes to apply to corporations existing prior to their passage and as not objectionable as retrospective legislation affecting vested rights. In Massachusetts a statute clearly prospective in its terms has been held to apply only to roads thereafter to be constructed, and not to a road which had been located and partially graded before the passage of the act.[72]

§ 671. Grade crossings.—The legislature of a state, in the exercise of the police power, may compel a railroad company to change a grade crossing.[73] It has been adjudged that a crossing at grade may

[71] Staats v. Hudson River R. Co. 4 Abb. App. Dec. (N. Y.) 287.

[72] Sterns v. Old Colony &c. R. Co. 1 Allen (Mass.) 493; Baxter v. Boston &c. R. Co. 102 Mass. 383.

[73] New York &c. R. Co. v. Bristol, 151 U. S. 556; 14 Sup. Ct. 437, citing Woodruff v. Catlin, 54 Conn. 277; 6 Atl. 849; Westbrook's Appeal, 57 Conn. 95; 17 Atl. 368; Woodruff v. New York &c. R. Co. 59 Conn. 63; 20 Atl. 17; Doolittle v. Selectmen, 59 Conn. 402; 22 Atl. 336; New York &c. R. Co. v. Waterbury, 60 Conn. 1; 22 Atl. 439; Middletown v. New York &c. R. Co. 62 Conn. 492; 27 Atl. 119. In the first of the cases cited the court said: "It is likewise thoroughly established in this court that the inhibitions of the constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process of law, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection can not be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied governmental regulation in particulars essential to the preservation of the community from injury. Beer Co. v. Massachusetts, 97 U. S. 25; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Barbier v. Connolly, 113 U. S. 27; 5 Sup. Ct. 357; New Orleans Gas Co. v. Louisiana &c. Co. 115 U. S. 650; 6 Sup. Ct. 252; Budd v. New York, 143 U. S. 517; 12 Sup. Ct. 468." See, also, upon the subject of the power to compel change of crossings, Elliott Roads and Streets, 166, 334, 598; Northampton, In re, 158 Mass. 299; 33 N. E. 568; 55 Am. & Eng. R. Cas. 31; Roxbury v. Boston &c. R. Co. 6 Cush. (Mass.) 424; Commonwealth v. Eastern R. Co. 103 Mass. 254; 4

be deemed a nuisance, and as such be subject to change or removal.[74] The cases to which we refer lay down the doctrine in very broad terms, but we suppose that, as it was not necessary in those cases to determine what limitations there are upon the power, these cases cannot be regarded as adjudging that the legislative judgment is conclusive in all cases, and entirely precludes the courts from deciding upon the validity of the statutory requirement.

§ 671a. Grade crossings, continued.—It might seem, at first blush, that a statute requiring a railroad company to erect and maintain, at its own expense, a crossing, whenever a new highway shall be established across its tracks, would lay a burden upon the franchises conferred upon it for the public benefit without compensation, and hence impair the obligation of the contract created by the grant of its charter and its acceptance, and deprive it of its property without due process of the law. In conformity with this view, decisions are encountered to the effect that such statutes are not to be construed as applying to existing lines of road unless their language renders such a construction unavoidable;[75] and there are decisions to the effect that, where a highway is laid out so as to cross a railway already built, the railway company is entitled to damages for the taking of so much of its land, consisting of its right of way, for that public purpose, just as any other landlord would, under like circumstances, be entitled to damages.[76] But in Massachusetts and some other states a railroad company is not entitled to damages for the cost of operating the gates rendered necessary by a new crossing.[77] Opposed to the doctrine first stated is a class of decisions holding that the legislature may provide that an existing railroad company shall maintain so much

Am. R. 555; Mayor &c. of Worcester v. Norwich &c. R. Co. 109 Mass. 103; Northampton, In re, 158 Mass. 299; 33 N. E. 568; Boston &c. Co. v. County Commissioners, 79 Me. 386; 10 Atl. 113; State v. Wabash &c. R. Co. 83 Mo. 144; 25 Am. & Eng. R. Cas. 133; Wabash R. Co. v. Defiance, 167 U. S. 88; 17 Sup. Ct. 748; Chicago &c. R. Co. v. Nebraska, 170 U. S. 57; 18 Sup. Ct. 513.

[74] New York &c. R. Co.'s Appeal, 58 Conn. 532; 20 Atl. 670.

[75] State v. Minneapolis &c. R. Co. 39 Minn. 219; 39 N. W. 153; Tyler v. St. Joseph &c. R. Co. 43 Kan. 543; 23 Pac. 585. See, also, Perry Co. v. Fink, 65 Ark. 492; 47 S. W. 301. But see post § 1102.

[76] Chicago &c. R. Co. v. Chautauqua Co. 49 Kan. 763; 31 Pac. 736; Boston &c. R. Co. v. Cambridge 159 Mass. 283; 34 N. E. 382.

[77] Boston &c. R. Co. v. Cambridge, 159 Mass. 283; 34 N. E. 382.

of a highway, crossing its track at grade, as comes within its limits;[78] or that existing railroad companies shall construct and keep in repair suitable highway crossings; and this is not deemed unconstitutional as imposing a burden on the railway company that did not exist at its incorporation.[79] Under statutes requiring railroad companies to construct and keep in repair suitable highway crossings, it has been held the duty of the company to make such crossings with approaches, notwithstanding the highway was laid out after the railroad was built.[80]

§ 672. Requiring services and denying compensation.—It is quite clear that the legislature cannot compel a railroad company to render services without compensation. This is decided in the Railroad Commission cases and other cases referred to in the preceding section. The conclusion we affirm rests on elementary principles of constitutional law and is strongly fortified by decisions of analogous cases.[81] So, it has been held that a statute requiring railroad companies to furnish free transportation to shippers of livestock, without any compensation therefor, is void as a deprivation of property without due process of law, and as a denial of the equal protection of the laws.[82]

[78] Boston &c. R. Co. v. County Commissioners, 79 Me. 386; 10 Atl. 113.

[79] State v. Chicago &c. R. Co. 29 Neb. 412; 45 N. W. 469.

[80] State v. Chicago &c. R. Co. 29 Neb. 412; 45 N. W. 469. See, also, the chapter on Highway Crossings, where many other authorities are cited to the same effect, especially post § 1102, et seq. As to power of municipalities to require change of grade, see Houston &c. R. Co. v. Dallas, 98 Tex. 396; 84 S. W. 648; 70 L. R. A. 850, and note; also, post chapter on Railroads in Streets.

[81] Georgia &c. R. Co. v. Smith, 128 U. S. 174; 9 Sup. Ct. 47; Ruggles v. Illinois, 108 U. S. 526; 2 Sup. Ct. 832; Connecticut &c. R. Co. v. County Commissioners, 127 Mass. 50; 34 Am. R. 338; Drury v. Midland &c. R. Co. 127 Mass. 571; Mercantile Trust Co. v. Texas &c. R. Co. 51 Fed. 529; Wynehamer v. People, 13 N. Y. 378; Roberts v. Northern Pacific &c. R. Co. 158 U. S. 1; 15 Sup. Ct. 756. See Rippe v. Becker, 56 Minn. 100; 57 N. W. 331; 22 L. R. A. 857; State v. Billings, 55 Minn. 467; 57 N. W. 206, 794; 43 Am. St. 524; Evison v. Chicago &c. R. Co. 45 Minn. 370; 48 N. W. 6; 11 L. R. A. 434; Eaton v. Boston &c. R. Co. 51 N. H. 504; 12 Am. R. 147; Thompson v. Androscoggin &c. R. Co. 54 N. H. 545; State v. Beackmo, 8 Blckf. (Ind.) 246; State v. Ravine &c. Com. 39 N. J. L. 665; Vanhorne v. Dorrance, 2 Dall. (U. S.) 304.

[82] Atchison &c. R. Co. v. Campbell, 61 Kan. 439; 59 Pac. 1051; 48 L. R. A. 251; 78 Am. St. 328.

Under the form of regulating the compensation for transporting freight and passengers the legislature cannot compel a railroad corporation to carry freight and passengers unless compensation is adequately provided. In our opinion the legislature has no power to require a railroad company to carry freight or passengers without compensation in money, and cannot substitute for money property or claims against some other company or person.[83] There may be, and probably is, an exception to the general rule that compensation must be made in money, and that is where the sovereign requires the services, for there is authority for holding that, where the sovereign takes property, it need not pay the compensation at the time.

§ 673. Federal corporation—State cannot transform into a domestic corporation.—It is beyond the power of a state to transform a corporation created by the federal congress into a state corporation.[84] In the cases referred to in the note, the state of Wisconsin had given its consent to a railroad company created by the United States to enter its territory, and it was held that the state had no power to enact a statute making the corporation a domestic one, and take away its status as a federal corporation, and that, notwithstanding such a statute, it remained a federal corporation, and, as such, derived its rights from the general government.[85] The Supreme Court of the United States, while professing to distinguish the decisions of the state court, practically denied their authority.[86]

[83] The conclusion we affirm is fully sustained by the reasoning in Attorney-General v. Old Colony R. Co. 160 Mass. 62; 35 N. E. 252; 22 L. R. A. 112. It certainly rests on solid principle. The decision in the case of Reagan v. Farmers' Loan &c. Co. 154 U. S. 362; 14 Sup. Ct. 1047, as it seems to us, declares the principle which we have asserted. In the case last cited the court adjudged that the decision in Budd v. New York, 143 U. S. 517; 12 Sup. Ct. 468, did not assert a contrary doctrine.

[84] Roberts v. Northern Pacific R. Co. 158 U. S. 1; 15 Sup. Ct. 756.

[85] See Pacific Railroad Removal Cases, 115 U. S. 1; 5 Sup. Ct. 1113; Olcott v. Supervisors, 16 Wall. (U. S.) 678; Osborn v. Bank, 9 Wheat. (U. S.) 737, 817; Cromwell v. County of Sac, 94 U. S. 351; Johnson Co. v. Wharton, 152 U. S. 252; 14 Sup. Ct. 608.

[86] The case of Ellis v. Northern Pac. R. Co. 77 Wis. 114; 45 N. W. 811, was practically overruled. So, also, was Whiting v. Sheboygan &c. Railroad Co. 25 Wis. 167; 3 Am. R. 30.

CHAPTER XXVIII.

STATE RAILROAD COMMISSIONERS.

§ 674. Introductory.—The system of governing and regulating railroads by commissions is, in most of the states, borrowed in the main from the English statutes.[1] The statutes enacted by the states are essentially different in matters of detail,[2] but all are directed to the attainment of the same general object, namely, the regulation of the duties of railroads as common carriers and the regulation of the management and control of railroads, so far as they are affected by a public interest. The power to establish such commissions is rested upon the general principle that the state has control over property and pursuits of a public nature.[3] It has been said that the statutes

[1] For the principal features of the English system, see 1 Hodges Railways (7th ed.), pp. 175, 348, 308. See 2 Redfield Railways, 606; 1 Woods Railroads, p. 658.

[2] In some of these states the commissioners are little else than mere advisory officers, while in other states they have power to make orders which in their nature closely resemble judgments and to invoke the aid of the courts to compel obedience to their orders. People v. New York &c. R. Co. 104 N. Y. 58; 9 N. E. 856; 58 Am. R. 484; 29 Am. & Eng. R. Cas. 480; Interstate Commerce Commission v. Brimson, 154 U. S. 447; 14 Sup. Ct. 1125; State v. Fremont &c. R. Co. 22 Neb. 313; 35 N. W. 118; McWhorter v. Pensacola &c. R. Co. 24 Fla. 417; 5 So. 129; 2 L. R. A. 504; 12 Am. St. 220; 37 Am. & Eng. R. Cas. 566; State v. Chicago &c. R. Co. 38 Minn. 281; 37 N. W. 782; Board v. Oregon &c. R. Co. 17 Ore. 65; 19 Pac. 702; 2 L. R. A. 195.

[3] Chicago &c. R. Co. v. Iowa, 94 U. S. 155; Peik v. Chicago &c. R. Co. 94 U. S. 164; Stone v. Farmers' &c. Trust Co. 116 U. S. 307; 6 Sup. Ct. 348, 388, 1191; Ruggles v. Illinois, 108 U. S. 526; 2 Sup. Ct. 832; Stone v. Natchez &c. R. Co. 62 Miss. 646. See post, § 676. In Wellman v. Chicago &c. R. Co. 83 Mich. 592; 47 N. W. 489; 45 Am.

create no new or additional duties,[4] but this statement, as applied to some of the state statutes, requires qualification. The principal and leading purpose of most of the statutes is to control and regulate the charges for the transportation of freight and passengers, but the provisions of the statutes generally go far beyond the regulation of charges for transportation and confer comprehensive powers over the maintenance, management and operation of railroads.[5] It is not our purpose in this chapter to treat very fully of the power of state railroad commissions to regulate the charges made by railroad companies in performing services and duties as common carriers, nor to treat of the power of the states to enact statutes relating to interstate railroads, although we shall incidentally discuss those subjects, since they naturally fall within the general scope of this chapter, but as those subjects will be considered in the part of our work devoted to a discussion of the rights, duties and liabilities of railroads as common carriers, we pass them without an extended or elaborate consideration.

§ 675. Nature of state railroad commissions. — Governmental control of railroads in many of the states is exercised through the instrumentality of officers generally called railroad commissioners. These officers, of course, derive all their powers from the statute which creates the commission, and a railroad commission is a tribunal possessing naked statutory powers. It is not a court, although it may exercise powers of a judicial nature.[6] The fact that powers in their nature judicial are exercised by an officer, a board of officers, or

& Eng. R. Cas. 249, the question of the power of a state to establish a railroad commission received careful consideration.

[4] Atchison &c. R. Co. v. Denver &c. R. Co. 110 U. S. 667; 4 Sup. Ct. 185; 16 Am. & Eng. R. Cas. 57.

[5] See State v. Jacksonville Terminal Co. 41 Fla. 377; 27 So. 221; State v. Chicago &c. R. Co. 86 Ia. 641; 53 N. W. 323; People v. Railroad Com'rs, 53 N. Y. App. Div. (N. Y.) 61; 65 N. Y. S. 597, affirmed in 164 N. Y. 572; 58 N. E. 1091.

[6] Interstate Commerce Com. v. Cincinnati &c. Co. 64 Fed. 981; Kentucky &c. Bridge Co. v. Louisville &c. R. Co. 37 Fed. 567, 612. The principle asserted in the text is laid down in the cases which hold that state tax boards and similar tribunals are not courts, although they are invested with quasi judicial power. Langenberg v. Decker, 131 Ind. 471; 31 N. E. 190; 16 L. R. A. 108; State v. Wood, 110 Ind. 82; 10 N. E. 639; Kuntz v. Sumption, 117 Ind. 1; 19 N. E. 474; 2 L. R. A. 655. Compare Commonwealth v. Atlantic &c. R. Co. (Va.) 55 S. E. 572.

by a body of officers, does not make the officer a judge, nor does it constitute the body or board a court.[7] The truth is that all officers who have discretionary duties to perform exercise quasi judicial power. A constable who takes a bond, a sheriff who levies a writ, or a governor who decides upon the validity of a requisition for a fugitive from justice exercises a power that is in its nature judicial, but it is not a judicial power in the same sense as the power of a court or judge. The functions and duties of railroad commissioners are administrative or ministerial, and neither legislative nor judicial. Their powers cannot be legislative, for legislative powers cannot be delegated,[8] nor can their powers be judicial in the proper sense of the

[7] Flournoy v. Jeffersonville, 17 Ind. 169; 79 Am. Dec. 468; Wilkins v. State, 113 Ind. 514, 519; 16 N. E. 192; Betts v. Dimon, 3 Conn. 107; Crane v. Camp, 12 Conn. 463. The decisions recognize the constitutionality of the act of congress creating the federal interstate commerce commission and affirm that the powers of that tribunal are not judicial in the proper sense of the term. Interstate Commerce Commission v. Brimson, 154 U. S. 447; 14 Sup. Ct. 1125. In the case last cited the decision in Interstate Commerce Commission, Re, 53 Fed. 476, was reversed, and it was held that the provision of the act of congress authorizing the commission to apply to the courts to punish a witness who refused to give testimony or produce documents was constitutional. The court cited the cases of Smith v. Adams, 130 U. S. 167; 9 Sup. Ct. 566; Osborn v. Bank, 9 Wheat. (U. S.) 738; Cherokee Nation v. Southern Kans. &c. R. Co. 135 U. S. 641; 10 Sup. Ct. 965; Gordon v. United States, 117 U. S. 697; Sanborn, In re, 148 U. S. 222; 13 Sup. Ct. 577; De Groot v. United States, 5 Wall. (U. S.) 419; Anderson v. Dunn, 6 Wheat. (U. S.) 204; Kilbourn v. Thompson, 103 U. S. 168, 190; Whitcomb's Case, 120 Mass. 118, and after commenting on those cases, said that: "The views we have expressed in the present case are not inconsistent with anything said or decided in those cases. They do not in any manner infringe upon the salutary principle that congress, excluding the special cases provided for in the constitution—as, for instance—in section 2 of article 2, may not impose upon the courts of the United States any duties that are not strictly judicial." The court asserted by its line of reasoning that the commission was not a court nor its duties judicial in the proper sense of the term. See Pacific R. Com'n. Re, 32 Fed. 241; Interstate Commerce Com. v. Cincinnati &c. Co. 64 Fed. 981.

[8] Cooley Const. Lim. (6th ed.) 137; (7th ed.) 163. In Chicago &c. R. Co. v. Dey, 35 Fed. 866, the court adjudged that in creating a board of railroad commissioners and investing it with authority to regulate freight tariffs and the like the legislature did not delegate legislative powers. It is difficult

term, for the judicial power can only be exercised by courts and judges.[9]

§ 676. The power to create railroad commissions.—The power to create a board of railroad commissioners rests, as we believe, upon the principle that where rights or property are "affected with a public interest" they are subject to legislative control. Many of the cases which uphold statutes creating such boards, however, proceed upon the theory that such statutes rest upon the police power. But whatever may be the true theory as to the principle on which such statutes rest, there can be no doubt as to their validity. There is practically no diversity of judicial opinion upon the general question.[10]

to define with precision the line between legislative and ministerial power, but it is clear that where a law is enacted providing general rules for the government of officers charged with the administration of the law there is no delegation of legislative power although the officers may be invested with authority to make rules and regulations. But see Georgia &c. R. Co. v. Smith, 70 Ga. 694, and see Southern Pac. Co. v. Colorado &c. Co. 101 Fed. 779, to the effect that they can not fix a rate as that would be legislative. Nor can they change the rule as to the time when liability as a common carrier ceases and that of a warehouseman begins. State v. Railroad Commission (S. Car.), 56 S. E. 666.

[9] Interstate Commerce Commission v. Brimson, 154 U. S. 447; 14 Sup. Ct. 1125; Hayburn's Case, 2 Dall. (U. S.) 409; United States v. Ferreira, 13 How. (U. S.) 40, note; Gans, Ex parte, 17 Fed. 471; Burgoyne v. Supervisors, 5 Cal. 9; Allen, In re, 19 Fed. 809; State v. Noble, 118 Ind. 350; 21 N. E. 244; 4 L. R. A. 101; 10 Am. St. 143; Van Slyke v. Trempealeau &c. Co. 39 Wis. 390; 20 Am. R. 50; Vandercook v. Williams, 106 Ind. 345; 1 N. E. 619; 8 N. E. 113. See leading article in 62 Cent. Law Jour. 199, for a discussion of the nature of the powers of such commissioners. But compare Interstate Com. Com'rs v. Cincinnati &c. R. Co. 167 U. S. 479; 17 Sup. Ct. 896; Atlantic Exp. Co. v. Wilmington &c. R. Co. 111 N. Car. 463; 16 S. E. 393; 18 L. R. A. 393; 32 Am. St. 805.

[10] The federal courts have affirmed the validity of the act of congress establishing the interstate commerce commission, and the principle asserted applies to state railroad commissions. Interstate Commerce Commission v. Brimson, 154 U. S. 447; 14 Sup. Ct. 1125; Kentucky &c. Co. v. Louisville &c. Co. 37 Fed. 567; Fargo v. Michigan, 121 U. S. 230, 239; 7 Sup. Ct. 857; Interstate Commerce Com. v. Cincinnati &c. Co. 64 Fed. 981. The federal courts have also upheld state statutes creating boards of railroad commissioners. Stone v. Farmers' Loan &c. Co. 116 U. S. 307; 6 Sup. Ct. 334; Chicago &c. Co. v. Dey, 35 Fed. 866, 875; Tilley v. Savannah &c. R. Co. 5 Fed. 641. In the case of Reagan

§ 677. Strictly judicial powers cannot be conferred upon administrative or ministerial officers.—We have elsewhere suggested that purely or strictly judicial power cannot be conferred upon railway commissioners, for they are administrative or ministerial officers. The constitutional provision relative to the separation of the departments of government is not a mere empty declaration, but is a part of the organic law, and is of great force and vigor. It forbids the blending of judicial duties and functions with those that are ministerial or administrative. In accordance with this fundamental principle it is held that the legislature has no power to invest railway commissioners with authority to define offenses and prescribe punish-

v. Farmers' &c. Co. 154 U. S. 362; 14 Sup. Ct. 1047, the court said: "Passing from the question of jurisdiction to the act itself there can be no doubt of the general power of the statute to regulate the fares and freights which may be charged by railroads or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the state for the purpose of carrying into effect the will of the state as expressed by its legislation. Railroad Commission Cases, 116 U. S. 307; 6 Sup. Ct. 334. No valid objection, therefore, can be made on account of the general features of this act —those by which the state has created a railroad commission and intrusted it with the duty of prescribing rates of freights and fares, as well as other regulations, for the management of the railroads of the state." In the case of the Charlotte &c. R. Co. v. Gibbes, 142 U. S. 386; 12 Sup. Ct. 255, the court upheld a state statute creating a board of railroad commissioners, and, in the course of the opinion, in speaking of railroad companies, said: "Being the recipients of special privileges from the state to be exercised in the interest of the public, and assuming the obligations thus mentioned, their business is deemed affected with a public use, and to the extent of that use is subject to legislative regulation. Georgia &c. Banking Co. v. Smith, 128 U. S. 174, 179; 9 Sup. Ct. 47." The state courts have uniformly adjudged such statutes to be valid. State v. Chicago &c. R. Co. 38 Minn. 281; 37 N. W. 782; State v. Fremont &c. R. Co. 22 Neb. 313; 35 N. W. 118, and 23 Neb. 117; 36 N. W. 308; Charlotte &c. R. Co. v. Gibbes, 27 S. Car. 385; 4 S. E. 49; 31 Am. & Eng. R. Cas. 464; Stone v. Natchez &c. R. Co. 62 Miss. 646; 21 Am. & Eng. R. Cas. 6; Georgia &c. R. Co. v. Smith, 70 Ga. 694; 9 Am. & Eng. R. Cas. 385; Stone v. Yazoo &c. R. Co. 62 Miss. 607; 21 Am. & Eng. R. Cas. 6; 52 Am. R. 193; Board of R. Com. v. Oregon R. &c. Co. 17 Ore. 65; 19 Pac. 702; 2 L. R. A. 195; 35 Am. & Eng. R. Cas. 542; Chicago &c. R. Co. v. Jones, 149 Ill. 361; 37 N. E. 247; 24 L. R. A. 141; 41 Am. St. 278; Norfolk &c. Co. v. Commonwealth, 103 Va. 289, 294; 49 S. E. 39; Winchester &c. R. Co. v. Commonwealth (Va.), 55 S. E. 692.

ment.[11] So it has been held that a state railroad commission is not a court within the meaning of the statute forbidding the federal courts to enjoin proceedings in a state court.[12] It has, however, been held that a railroad commission may be constituted a court, and as such invested with judicial power.[13] The attention of the court in the case to which we refer does not seem to have been directed to the principle that the departments of government are separate, and that judicial power and administrative power can not be blended and bestowed upon a board of public officers. It may possibly be that where the constitution of the state does not provide that the departments shall be separate, judicial and ministerial powers may be blended and bestowed upon a board or commission, but we believe that the principle that the departments of government are separate is fundamental and essential to the existence of a republican government,[14] and that no statute can be valid which violates that principle. It is, at all events, quite clear that where the state constitution requires that the departments shall be kept separate the legislature cannot unite the powers and bestow them upon a single tribunal.[15]

[11] State v. Gaster, 45 La. Ann. 636; 12 So. 739. The reasoning of Baxter, J., in Louisville &c. R. Co. v. Railroad Commission, 19 Fed. 679, supports the doctrine of the text.

[12] Mississippi Railroad Commission v. Illinois Central R. Co. (U. S.) 27 Sup. Ct. 90.

[13] Atlantic Express Co. v. Wilmington &c. R. Co. 111 N. C. 463; 16 S. E. 393; 18 L. R. A. 393; 32 Am. St. 805, citing Durham &c. R. Co. v. Richmond &c. R. Co. 104 N. C. 673; 10 S. E. 664; Georgia R. &c. Co. v. Smith, 70 Ga. 694. See, also, State v. Wilmington &c. R. Co. 122 N. Car. 877; 29 S. E. 334, and an order of the commission, like a judgment, has been held binding upon the successor of the company. Interstate Com. Com. v. Western &c. R. Co. 82 Fed. 192. The cases cited do not, however, go to the question of the power to make a board of railroad commissioners a court, but to the general question of the right to regulate railroads because a public use is impressed upon them.

[14] Cooley Principles of Const. Law, 41, 44; Black's Constitutional Law, 72; Montesquieu Spirit of the Laws, book II, ch. 6; 1 Bryce Am. Com. 3; Wilson Congressional Government, 12, 36; Sill v. Village of Corning, 15 N. Y. 297, 303; Calder v. Bull, 3 Dall. (U. S.) 386; Greenough v. Greenough, 11 Pa. St. 489; 51 Am. Dec. 567; Alexander v. Bennett, 60 N. Y. 204; State v. Noble, 118 Ind. 350; 21 N. E. 244; 4 L. R. A. 101; 10 Am. St. 143. See, also, 62 Cent. Law Jour. 199. But compare Winchester &c. R. Co. v. Commonwealth (Va.), 55 S. E. 692; Dreyer v. Illinois, 187 U. S. 71; 23 Sup. Ct. 28, 32.

[15] Perkins v. Corbin, 45 Ala. 103; 6 Am. R. 698; People v. Albertson,

§ 678. Granting authority to make regulations not a delegation of legislative power.—It is sometimes difficult to clearly define the line between a delegation of legislative power and a grant of authority to perform acts which are in their nature quasi legislative, but not strictly so. The constitutional inhibition which prevents the delegation of legislative power does not prevent the grant of authority to make rules and regulations for the government of a particular subject. In creating a board of railroad commissioners and investing it with authority to make rules and regulations for the government of railroads, the legislature really enacts the law which governs the subject but intrusts to the board the execution of the law. For the law the statute must be looked to, as the commissioners cannot enact laws, although they may make reasonable rules and regulations where the authority to make such rules and regulations is expressly or impliedly conferred upon them by the statute.[16]

55 N. Y. 50; Missouri &c. Co. v. First National Bank, 74 Ill. 217; Pacific Railway Co. In re, 32 Fed. 241, 267; Turner v. Althaus, 6 Neb. 54; Kilbourn v. Thompson, 103 U. S. 168; People v. Keeler, 99 N. Y. 463; 52 Am. R. 49; Wright v. Defrees, 8 Ind. 298; Smythe v. Boswell, 117 Ind. 365; 20 N. E. 263, and authorities cited; Houston v. Williams, 13 Cal. 24; 73 Am. Dec. 565; Hawkins v. Governor, The, 1 Ark. 570; 33 Am. Dec. 346; Randolp Ex parte, 2 Brock, 447; Vaughn v. Harp, 49 Ark. 160; 4 S. W. 751.

[16] In Atlantic &c. Co. v. Wilmington &c. R. Co. 111 N. C. 463; 16 S. E. 393; 18 L. R. A. 393; 32 Am. St. 805, the court quoted with approval from the opinion in Georgia R. Co. v. Smith, 70 Ga. 694, the following: "The difference between the power to pass a law and the power to adopt rules and regulations to carry the law into effect is apparent and great, and this we understand to be the distinction recognized strikingly by all the courts as the true rule in determining whether or not in such cases a legislative power is granted. The former would be unconstitutional whilst the latter would not." See Storrs v. Pensacola R. Co. 29 Fla. 617; 11 So. 226; Woodruff v. New York &c. R. Co. 59 Conn. 63; 20 Atl. 17. In Port Royal Min. Co. v. Hagood, 30 S. Car. 519; 9 S. E. 686, 688; 3 L. R. A. 841, the general subject of delegation of legislative authority is considered, and it is said: "It is undoubtedly true that the legislative power cannot be delegated, but it is not always easy to say what is or what is not legislative power in the sense of the principle. The Legislature is only in session for a short period each year, and during the recess cannot attend to what might be called the business affairs of the state. From the necessity of the case, as well as the character of the business itself, that must be performed by agents for that purpose—such as the Railroad Commission, regents of the lunatic asylum, the state board of

§ 679. Legislature cannot authorize a railroad commission to make unjust discriminations.—The decisions which declare that statutes are valid although they enact rules that apply only to the class of corporations known as railroad companies carry the doctrine quite as far as it can be done with reason, and, indeed, it may well be doubted if some of those decisions do not go too far. If they can be defended upon principle at all it must be upon the ground that railroad companies constitute a general distinctive class of corporations, and that for this reason there is a sufficient basis of classification. If there be no such basis of classification, and a mere naked arbitrary singling out of railway corporations and the imposition upon them of special burdens and penalties, there is, as it seems to us, an infraction of the federal constitution forbidding the denial to any person of the equal protection of the laws. For illustration, if a statute should provide that all contracts of railroad companies for the purchase or sale of lands should be stamped with a government stamp of a particular value, and should not require such a stamp from other persons, it seems to us that the constitutional provision would be violated. So, too, such a statute would, as we believe, transgress the constitutional provisions incorporated in the constitution of most of the states prohibiting the enactment of special or local laws. All things being equal, a railroad commission must, as we suppose, place all railroad companies upon an equality and not unjustly discriminate between them.[17] Doubtless there may be cases where the commission

canvassers of elections, sinking fund commission, etc. The numerous authorities cited in the argument show conclusively that while it is necessary that the law should be full and complete, as it comes from the proper law-making body, it may be, indeed, must be, left to agents, in one form or another, to perform the acts of executive administration, which are in no sense legislative. Without incumbering this opinion with the authorities, we think the view is well stated in Lock's Appeal, 72 Pa. 491; 13 Am. Rep. 716. 'Then the true distinction, I conceive, is this: the Legislature cannot delegate its power to make a law, but it can make a law to delegate its power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation.' "

[17] Dow v. Beidelman, 125 U. S. 680; 8 Sup. Ct. 1028; Dow v. Beidelman, 49 Ark. 325; 5 S. W. 718; Little Rock &c. R. Co. v. Hanni-

may make a difference between railroad companies,[18] but to authorize such a course there must, in our opinion, be some substantial basis for the discrimination, for surely neither the caprices of the commissioners nor their mere arbitrary conclusions can be permitted to control where to permit such a thing would result in an unjust and groundless discrimination. In a strongly-reasoned case it is held that the legislature cannot delegate to a railroad commission the power to prescribe penalties for acts not defined and declared offenses by the legislature,[19] nor can the power be committed to the unlimited discretion of a jury. It has also been held that the legislature cannot lawfully authorize a commission to take entire control of the business and operation of a railroad company.[20]

§ 680. Members of railroad commission are public officers.—A member of a railroad commission created by the state, whether elected

ford, 49 Ark. 291; 5 S. W. 294; Chicago &c. R. Co. v. Iowa, 94 U. S. 155.

[18] Louisville &c. R. Co. v. Railroad Commission, 19 Fed. 679.

[19] Louisville &c. R. Co. v. Railroad Commission, 19 Fed. 679, 683. It was said by Baxter, J., that: "We think the property of a citizen—and a railroad corporation is, in legal contemplation, a citizen—can not be thus imperiled by such vague, uncertain, and indefinite enactments. The corporations and persons against whom this act is directed can do nothing under it with reasonable safety. They may take counsel of the commission, act upon their advice, and honestly endeavor to conform to the statute. But if a jury before whom they may be subsequently arraigned shall, in their judgment and upon such arbitrary basis as they are at liberty to adopt, conclude that the commissioners misadvised or that the managers of the accused railroad corporation made a mistake in regulating their charges upon a 5 per cent., instead of a 4 per cent. basis, the honesty and good faith of the accused will go for nothing, and penalty upon penalty may be added until the defendants' property shall be gradually transferred to the public. This can not be permitted. Penalties can not be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power. The legislature can not delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a 'fair and just return' on its investments, it must, in order to the validity of the law, define with reasonable certainty what would constitute such 'fair and just return.' The act under review does not do this, but leaves it to the jury to supply the omission."

[20] Louisville &c. R. Co. v. Railroad Commission, 19 Fed. 679.

by the voters of the state, or by the legislature, or appointed by the governor, is a public officer. The general rules which apply to the term, tenure, and duties of public officers apply to members of a state board of railway commissioners so far as the statute does not otherwise provide. Thus it is held that where there is a failure to elect a railroad commissioner at the time prescribed by statute the incumbent under a prior election will hold over under the general law providing that officers shall hold until their successors are elected and qualified.[21] The statute, it is barely necessary to suggest, governs, and to the statute recourse must be had to ascertain what are the particular rights, powers and duties of railway commissioners, but where there is no statutory provision to the contrary the general rules of law are of controlling influence.[22]

§ 681. Qualifications of commissioners.—The legislature, within constitutional limits, may prescribe the qualifications of the members of railway commissions. It is to the statute that recourse must be had to determine what qualifications are made requisite. The constitutional principle that no man can be a judge in his own case forbids a person who has a substantial and direct interest in questions before the commission from sitting as a member when those questions are under consideration.[23] There is authority, however, to the effect

[21] Eddy v. Kincaid, 28 Ore. 537; 41 Pac. 156, citing State v. Simon, 20 Ore. 365; 26 Pac. 170; Gosman v. State, 106 Ind. 203; 6 N. E. 349; State v. Harrison, 113 Ind. 434; 16 N. E. 384; 3 Am. St. 663; State v. Howe, 25 Ohio St. 588; 18 Am. R. 321; People v. Tilton, 37 Cal. 614; Badger v. United States, 93 U. S. 599; Scott County v. Ring, 29 Minn. 398; 13 N. W. 181; State v. Wells, 8 Nev. 105; Mayor v. Horn, 2 Harr. (Del.) 190; State v. Kurtzeborn, 78 Mo. 98; Charman v. Daniel, 6 Jones (N. C.), 444.

[22] Where the statute creating a board of railroad commissioners expressly provides that the executive council may remove members of the board from office and appoint others to fill their places and does not provide for assigning causes for the removal, the executive council may, at its discretion, remove a commissioner from office. The discretion so vested in the council can not be controlled by the courts. State v. Mitchell, 50 Kan. 289; 33 Pac. 104; 20 L. R. A. 306.

[23] Dimes v. Grand Junction &c. Co. 3 H. L. C. 759; Cooley Const. Lim. 175; Elliott Gen. Pr. § 210. As to the nature of the interest which will disqualify, see Sauls v. Freeman, 24 Fla. 209; 4 So. 525; 12 Am. St. 190; Northampton v. Smith, 11 Metc. (Mass.) 390; Gregory v. Cleveland &c. R. Co. 4 Ohio St. 675; Sjoberg v. Nordin, 26 Minn.

that the interest of one of the commissioners as a shipper of a commodity, on which the rate is reduced, will not invalidate the decision reducing the rate where the vote of this commissioner was not necessary to the decision.[24] It has also been held that the fact that a member of the commission had pledged himself before his election to make a certain rate will not affect the validity of a rate made in accordance with this pledge, since the real question on an inquiry of this character is solely as to the reasonableness of rates fixed.[25]

§ 682. Powers of railroad commissioners—Illustrative cases.—As the powers of railroad commissioners are statutory[26] it is not possible to determine what effect a given decision may have in any other state than that in which it is rendered except when general principles are involved. But while the effect of a given decision cannot be accurately ascertained without an examination of the statute upon which it is based, still, the decisions almost always illustrate some general principle or enforce some rule of statutory construction. With these prefatory suggestions we direct attention to some of the decided cases. It has been held that where there is statutory power to order a relocation of tracks near a station as the public interest may require, the board has authority in ordering one company to take the tracks of another to make it a condition of the taking of such tracks that the company taking the track shall permit the company from which they are taken to use its tracks.[27] The statutes usually grant to the board of commissioners power to order the location and relocation of stations,[28] and the decision of the board in such matters can-

501; 5 N. W. 677; Elliott Gen. Pr. § 212. See, also, State v. Wilson, 121 N. Car. 425; 28 S. E. 555; and compare Woodruff v. New York &c. R. Co. 59 Conn. 63; 20 Atl. 17.

[24] Southern Pacific Co. v. Railroad Commissioners, 78 Fed. 236.

[25] Southern Pacific Co. v. Railroad Commissioners, 78 Fed. 236.

[26] And it is held that their authority must affirmatively appear. Railroad Com'rs v. Oregon &c. R. Co. 17 Oreg. 65; 19 Pac. 702; 2 L. R. A. 195. That railroad commissioners have such powers only as are expressly or impliedly conferred on them by statute, see State v. Atlantic &c. R. Co. (Fla.) 40 So. 875.

[27] Providence &c. R. Co. v. Norwich &c. R. Co. 138 Mass. 277; 22 Am. & Eng. R. Cas. 493.

[28] State v. Chicago &c. R. Co. 19 Neb. 476; 27 N. W. 434; State v. Alabama &c. R. Co. 67 Miss. 647; 7 So. 502; State v. Des Moines &c. R. Co. 84 Iowa, 419; 49 Am. & Eng. R. Cas. 186; State v. Kansas &c. R. Co. 47 Kan. 497;

not be overthrown unless it is affirmatively shown that it proceeded in violation of some provision of the constitution or the statute, or grossly abused the power conferred upon it. Very important powers in relation to the matter of requiring railroad companies to construct and maintain crossings are generally granted to the commissioners.[29] It is held that jurisdiction of applications to condemn lands may be conferred upon railroad commissioners in cases where the land is required for a depot.[30] Jurisdiction to compel companies to resume or continue operation of lines of railroad may be conferred upon the commissioners.[31] But it is held that the commissioners cannot make

28 Pac. 208; 49 Am. & Eng. R. Cas. 176; State v. Fremont &c. R. Co. 22 Neb. 313; 35 N. W. 118; 32 Am. & Eng. R. Cas. 426; Board v. Oregon &c. R. Co. 17 Ore. 65; 19 Pac. 702; 2 L. R. A. 195; 35 Am. & Eng. R. Cas. 542; State v. Chicago &c. R. Co. 12 S. Dak. 305; 81 N. W. 503; 47 L. R. A. 569; State v. Railroad Com'rs, 56 Conn. 308; 15 Atl. 756. The Minnesota court has held the orders of the board conclusive. State v. Chicago &c. R. Co. 38 Minn. 281; 37 N. W. 782; Railroad &c. Co. v. Railroad &c. Commission, 39 Minn. 231; State v. Minneapolis &c. R. Co. 40 Minn. 156; 39 N. W. 150. But in so holding the court was in error. See State v. Chicago &c. R. Co. 86 Iowa, 304; 53 N. W. 323; 53 N. W. 253; State v. Alabama &c. R. Co. 68 Miss. 653; 7 So. 502. And the Alabama statute does not give the commission authority to order a change of location of a station. State v. Nashville &c. R. Co. (Ala.) 39 So. 984; Nashville &c. R. Co. v. State, 137 Ala. 439; 34 So. 401.

[29] State v. Des Moines &c. R. Co. 84 Iowa, 419; 51 N. W. 38; 49 Am. & Eng. R. Cas. 186; Doolittle v. Selectmen, 59 Conn. 402; 22 Atl. 336; New York &c. R. Company's Appeal, 62 Conn. 527; 26 Atl. 122; Smith v. New Haven &c. R. Co. 59 Conn. 203; 22 Atl. 146; Railroad Commissioners, In re, 83 Me. 273; 22 Atl. 168; State v. Chicago &c. R. Co. 29 Neb. 412; 45 N. E. 469; State v. Shardlow, 43 Minn. 524; 46 N. W. 74; Detroit &c. R. Co. v. Probate Judge, 63 Mich. 676; 30 N. W. 598; 28 Am. & Eng. R. Cas. 285. See Cambridge v. Railroad Commissioners, 153 Mass. 161; 26 N. E. 241; Fort Street &c. Co. v. State &c. Board, 81 Mich. 248; 45 N. W. 973; Guggenheim v. Lake Shore &c. R. Co. 66 Mich. 150; 33 N. W. 161; 32 Am. & Eng. R. Cas. 89. And to put in switches and interchange cars where the track of one company crosses or intersects that of another. State v. Wrightsville &c. R. Co. 104 Ga. 437; 30 S. E. 891; Burlington &c. R. Co. v. Dey, 82 Ia. 312; 48 N. W. 98; 12 L. R. A. 436; 31 Am. St. 477; Jacobson v. Wisconsin &c. R. Co. 71 Minn. 519; 74 N. W. 893; 40 L. R. A. 389; 70 Am. St. 358.

[30] Jager v. Dey, 80 Iowa, 23; 45 N. W. 391; 42 Am. & Eng. R. Cas. 683.

[31] See Winsford &c. Board v. Cheshire &c. L. R. 24 Q. B. D. 456; Dickson v. Great Northern &c. R. Co. L. R. 18 Q. B. D. 176.

a palpably unreasonable requirement of a railroad company in respect to change of stations or tracks.[32] Commissioners are authorized in some of the states to make and enforce orders requiring railroad companies to provide suitable reception rooms[33] and bulletin boards[34] at stations, to place flagmen at crossings,[35] and to require railroad companies to fence their tracks.[36] Authority conferred upon a board of commissioners to regulate rates does not, however, empower it to compel the opening of offices for public accommodation.[37]

§ 682a. Powers of commissioners—Other cases.—We have not enumerated, nor shall we attempt to enumerate, all the powers granted to railroad commissioners under the various statutes. But in the last preceding section, and others which follow, are mentioned those most often granted. A few others, however, will be referred to in this section. In a very recent case it is held that the state railroad commission, under the North Carolina statute, has authority to require a railroad company to place track scales at points where the business justifies the same.[38] And in another case the same court held that the commission had power to require a railroad company to have a train arrive at a certain station at a certain time, so as to connect with a train on another road.[39] In a Louisiana case the gen-

[32] State v. Des Moines &c. R. Co. 87 Iowa, 644; 54 N. W. 461; State v. Chicago &c. R. Co. 86 Iowa, 304; 53 N. W. 253.

[33] Stone v. Yazoo &c. R. Co. 62 Miss. 607; 52 Am. R. 193; Railroad Comn. Cases, 116 U. S. 307; 6 Sup. Ct. 334, 348, 349, 388, 391, 1191.

[34] Stone v. Yazoo &c. R. Co. 62 Miss. 607; 52 Am. R. 193.

[35] Guggenheim v. Lake Shore &c. R. Co. 66 Mich. 150; 33 N. W. 161; 32 Am. & Eng. R. Cas. 89.

[36] Davidson v. Michigan &c. R. Co. 49 Mich. 428; 13 N. W. 804; 13 Am. & Eng. R. Cas. 650.

[37] State v. Western Union Tel. Co. 113 N. C. 213; 18 S. E. 389; 22 L. R. A. 570.

[38] North Carolina &c. Comn. v. Atlantic Coast Line R. Co. 139 N. Car. 126; 51 S. E. 793.

[39] North Carolina &c. Comn. v. Atlantic Coast Line R. Co. 137 N. Car. 1; 49 S. E. 191, affirmed in 27 Sup. Ct. 585. The court cited, among other cases as more or less in point, the following: Cantrell v. Railroad, 176 Ill. 512; 52 N. E. 292; 35 L. R. A. 656; Morgan's &c. R. Co. v. Louisiana, 109 La. Ann. 247; 33 So. 214; Gladson v. Minnesota, 166 U. S. 430; 17 Sup. Ct. 627, 628; Wisconsin v. Jacobson, 179 U. S. 287, 297; 21 Sup. Ct. 115. See, also, Commonwealth v. Louisville &c. R. Co. 27 Ky. 497; 85 S. W. 712. The North Carolina statute is very broad, however, and the North Carolina court has been inclined to go at least as far as the law justifies upon this general subject in several cases.

eral proposition is laid down that the authority of the commissioners is not limited to public safety or health, but extends also to matters concerning the public comfort and convenience, and they may thus require a depot to be erected at a place where the public convenience demands it, even though the business may not be remunerative to the company at such place.[40] The same court has also held that the commission has power to prevent the abandonment of a spur in the use of which the public are interested.[41] But it is held, under the Alabama statute, the commission had no authority to order a railroad company to locate a station at a certain point, and what kind of a depot to build.[42] In South Dakota the statute seems to authorize the commission to compel companies connecting by intersection to so unite and connect their tracks as to permit the transfer of cars from the track of one to that of the other, but it is held that the order must not be too indefinite, and that in an action by the commission to enforce it the complaint must allege the performance of every condition precedent in the proceeding before the commission.[43] The equal protection of the laws is not denied by a statute prohibiting companies in the state from charging more for a shorter than for a longer haul except by permission of the railroad commissioners after special investigation, nor is the guaranty of due process of law violated by such a statute giving the commission power to make such exceptions after special investigation, and a possible interference with interstate commerce under such a statute is too remote and indirect to be regarded as an unconstitutional interference therewith.[44] And so, where a railroad company has been notified, has appeared, and has contested the matter, it has been held that the company cannot afterwards urge that an order of the commission requiring it to stop certain trains at a station deprived it of its property without due process of law.[45] An order of a railroad commission compelling

[40] Morgan's &c. R. Co. v. Railroad Commission, 109 La. Ann. 247; 33 So. 214.

[41] Railroad Commission v. Kansas City &c. R. Co. 111 La. Ann. 133; 35 So. 487.

[42] Nashville &c. R. Co. v. State, 137 Ala. 439; 34 So. 401.

[43] State v. Chicago &c. R. Co. 16 S. Dak. 517; 94 N. W. 406.

[44] Louisville &c. R. Co. v. Kentucky, 183 U. S. 503; 22 Sup. Ct. 95. See, also, Minneapolis &c. R. Co. v. Minnesota, 193 U. S. 53; 24 Sup. Ct. 396.

[45] Railroad Commissioners v. Atlantic &c. R. Co. 71 S. Car. 130; 50 S. E. 641.

through mail trains to stop at county seat points has been held an interference with interstate commerce where it appeared that the county seats interested were supplied with proper and adequate railway passenger facilities by means of other trains.[46] The Kansas statute, giving the commissioners power to hear and determine an application of a railroad company to cross the tracks of another company, is held inapplicable to a case where the applicant seeks to cross the track of a company whose line is operated entirely by electricity.[47] The Vermont statute authorizes the commission to investigate railroad accidents on notice, and to direct changes in the manner of operating the road where the evidence shows the necessity therefor, but the hearing to determine this matter cannot go beyond the grounds set out in the notice to the railroad company.[48] The railroad commissioners of Florida have been held without power to require a railroad company to transport freight from any point on its own line within the state to a destination on a connecting line, where it did not appear that it held itself out to the public to perform such services.[49]

§ 683. Jurisdiction of railroad commissioners.—A board of railroad commissioners is, as we have said, a tribunal invested with quasi judicial power, so that it is not improper to apply to it the term jurisdiction. In ascertaining the jurisdiction of such a tribunal the statute creating it must always, it is obvious, be consulted, since the only jurisdiction it possesses is such as the statute confers.[50] We suppose that the ordinary rules which govern quasi judicial tribunals created by statute and invested with naked statutory powers govern boards of railroad commissioners, and that nothing can be intended to be within their jurisdiction which is not placed there by the statute. It is not necessary, as we believe, that the statute should expressly and explicitly define the jurisdiction of the commissioners, but it is sufficient if jurisdiction is conferred in general terms. If jurisdiction over a general subject is conferred, then authority over branches and

[46] Railroad Commission v. Illinois Cent. R. Co. (U. S.) 27 Sup. Ct. 90. See, also, post, § 1668; and compare Hutchison v. Southern R. Co. 140 N. Car. 123; 52 S. E. 263.

[47] Kansas City &c. R. Co. v. Railroad Commissioners (Kan.), 84 Pac. 755.

[48] Rutland R. Co. In re, (Vt.) 64 Atl. 233.

[49] State v. Louisville &c. R. Co. (Fla.) 40 So. 855.

[50] Railroad Com'rs v. Oregon &c. R. Co. 17 Oreg. 65; 19 Pac. 702; 2 L. R. A. 195.

details of that subject is conferred by necessary implication. Statutes creating railroad commissions are to be construed according to the general rules laid down for the construction of statutes, and the cardinal rule that the intention of the legislature is to be sought and enforced prevails in cases where such statutes are under consideration.[51] The courts will not, if their assistance is properly invoked, permit a railroad commission to deal with matters not within its jurisdiction, for such tribunals are not above the law nor beyond judicial control.[52] Where, however, the matter is one entirely within

[51] This general rule was applied to a statute, creating a board of railroad commissioners by the supreme court of Maine in Canadian Pacific R. Co. In re, 87 Me. 247; 32 Atl. 863. In the course of the opinion there given it was said: "To place all railroad crossings within the limits of the state under the control of the railroad commissioners has manifestly been the paramount object of the legislation on this subject since the enactment of 1878. The several provisions in regard to the right of application, and the apportionment of the expense, enacted in different years, are of a subordinate character, and of secondary importance. They are not all conditions precedent to the judisdiction of the railroad commissioners in unincorporated places. The fact that all the provisions of the statute respecting the right of application, and the adjustment of the expense in the case of cities and towns, are not also applicable to unincorporated places, can not take away the jurisdiction of the railroad commissioners over the latter while there is an express provision, applicable to all crossings, authorizing an application by the railroad company, and also placing upon the company the burden of the expense. In the case of cities or towns, either the municipal officers or the railroad companies may invoke the jurisdiction of the railroad commissioners; and thereupon the expense of building the way within the limits of the railroad may all be imposed on the railroad company, or be apportioned between the railroad company and the town as the commissioners may determine. But with respect to ways in unincorporated places, where there are no municipal officers, the application can only be made by the parties owning or operating the railroad; and inasmuch as there is no provision for the payment or apportionment of the expense applicable to such a case, except that which places this burden on the railroad company, 'the expense of building and maintaining so much thereof as is within the limits of such railroad shall be borne by such railroad company.'"

[52] Toomer v. London &c. R. Co. L. R. 2 Exch. Div. 450; Southeastern R. Co. v. Railway Commissioners, L. R. 6 Q. B. D. 586. See Hall v. London &c. Co. L. R. 17 Q. B. D. 230. In Georgia R. Co. v. Smith, 70 Ga. 694, the court said: "While we hold the act of October 14, 1879, constitutional and the orders of the commission valid and binding, yet we are not to be understood as

the jurisdiction of the commission, and it is invested with discretionary powers in relation to the subject, the courts will not control the exercise of such powers although they will interfere where there is a clear abuse of those powers resulting in injury to the complainant. It has been held that a statute giving railroad commissioners supervision over railroads operated by steam impliedly denies them power over railroads operated only by electricity.[53]

§ 684. Jurisdiction of commission not extended by implication—General rule.—The general rule is that the jurisdiction of a statutory tribunal will not be extended by implication except in cases where the implication necessarily arises from a consideration of the objects or language of the statute.[54] The rule that, where new rights are created and new remedies prescribed, the construction of the statute creating such rights and prescribing such remedies shall be strict, is an influential one.[55] The Supreme Court of Oregon adjudged that the jurisdiction of the commission could not be extended by implication, but must be confined to the cases clearly placed within its jurisdiction by the statute.[56]

holding that their powers are unlimited or beyond the legal control by the proper authorities of the state. On the contrary, we hold that the powers which have been conferred upon them are to be exercised within the legal and constitutional limitations and in such a way as not to invade the rights of others."

[53] Kansas City &c. Electric R. Co. v. Railroad Commissioners (Kan.) 84 Pac. 755.

[54] Beekman Street, Matter of, 20 Johns. (N. Y.) 269; Thatcher v. Powell, 6 Wheat. (U. S.) 119; Kansas City &c. R. Co. v. Campbell, 62 Mo. 585; Shivers v. Wilson, 5 Harr. & John. (Md.) 130; 9 Am. Dec. 497; Ryan v. Commonwealth, 80 Va. 385; Beebe v. Scheidt, 13 Ohio St. 406; Keitler v. State, 4 Greene (Iowa) 291; School Inspectors v. People, 20 Ill. 525; Pringle v. Carter, 1 Hill L. (S. Car.) 53; Thompson v. Cox, 8 Jones L. (N. Car.) 311. See authorities cited Elliott Gen. Pr., § 256, note. See, also, Traders &c. Un. v. Philadelphia &c. R. I. Int. Com. Rep. 371; Sprigg v. Baltimore &c. R. Co. 8 Int. Com. R. 443; Transportation of Fruit, Re, 10 Int. Com. Rep. 360.

[55] Keller v. Corpus Christi, 50 Texas 614; 32 Am. R. 613; Willard V. Fralick, 31 Mich. 431; Dent v. Ross, 52 Miss. 188; Bloom v. Burdick, 1 Hill (N. Y.) 130; 37 Am. Dec. 299; Staples v. Fox, 45 Miss. 667; Anness v. Providence, 13 R. I. 17; Walker v. Burt, 57 Ga. 20; Monk v. Jenkins, 2 Hill Ch. (S. Car.) 9.

[56] Board v. Oregon &c. Co. 17 Ore. 65; 19 Pac. 702; 2 L. R. A. 195. It was said by the court that: "It has for a very long time been considered the safer and better rule, in determining questions of jurisdiction of

§ 685. Incidental powers of a railroad commission.—A railroad commission, although it is a statutory tribunal, with naked statutory powers, necessarily possesses some incidental or implied powers. The implied powers are such as by necessary implication result from the principal powers granted by the statute creating the commission. It is held in accordance with this general principle that the power to make rates carries, by necessary implication, the power to ascertain what corporation is in control of the line.[57]

§ 686. Right of railroad companies to a hearing.—The fundamental rule is that there is not due process of law unless a party is

boards and officers exercising powers delegated to them by the legislature, to hold that their authority must affirmatively appear from the commission under which they claim to act. There is too strong a desire in the human heart to exercise authority, and too much of a disposition on the part of those intrusted with it to extend it beyond the design for which, and the scope within which, it was intended it should be exercised, to leave the question of its extent to inference. Should it be so left serious disturbances might arise, involving a conflict of jurisdiction, which would be highly detrimental to the community. It is not, it seems to me, requiring too much of the legislative branch of the government to exact that when it creates a commission and clothes it with important functions, it shall define and specify the authority given it so clearly that no doubt can reasonably arise in the mind of the public as to its extent." See, generally, Railroad Commissioners, In re, 83 Me. 273; 22 Atl. 168; Cambridge v. Railroad Commissioners, 153 Mass. 161; 26 N. E. 241.

[57] State v. Western Union &c. Co. 113 N. C. 213; 18 S. E. 389; 22 L. R. A. 570; State v. Mason City &c. R. Co. 85 Iowa 516; 52 N. W. 490. In the case first cited the court held, citing Mayo v. Western &c. Co. 112 N. C. 342; 16 S. E. 1006; and Atlantic Express Co. v. Wilmington &c. R. Co. 111 N. C. 463; 16 S. E. 393; 18 L. R. A. 393; 32 Am. St. 805; that the commission is a court, but we very much doubt the soundness of this conclusion. We do not believe that ministerial and strictly judicial duties can be conferred upon a single tribunal, nor do we believe that the legislature can make such a board or body of officers as a railroad commission a court of record, although it may confer upon such a board, as upon any board, quasi judicial powers. See, ante, § 677. As to power to investigate and require information generally, see Railroad Commission cases, 116 U. S. 307; 6 Sup. Ct. 334, 348, 349, 388, 391, 1191; Chicago &c. R. Co. v. Dey, 38 Fed. 656; Atlantic Exp. Co. v. Wilmington &c. R. Co. 111 N. Car. 463; 16 S. E. 393; 18 L. R. A. 393; 32 Am. St. 805. But compare State v. United States Express Co. 81 Minn. 87; 83 N. W. 465; 50 L. R. A. 607; 83 Am. St. 366.

given an opportunity to be heard before he is subjected to a burden or deprived of property rights, and this principle applies to the proceedings of a state railroad commission. The right of a railroad company to receive reasonably remunerative compensation for carrying property and passengers is a property right of which it cannot be deprived, and hence it is entitled to a hearing upon the question whether rates fixed by the commission are reasonable. If there is no opportunity for a hearing before the final decision of that question there is not due process of law.[58]

§ 687. Orders of commissioners not contracts.—The orders of a board of railroad commissioners are not contracts within the meaning of the provisions of the federal constitution prohibiting the states from enacting laws impairing the obligation of a contract. In accordance with the doctrine stated it was held by the Supreme Court of the United States that the approval of the board of commissioners of the application of a railroad company to discontinue a station did not constitute a contract, although the statute authorized the company to discontinue stations in cases where the board directed it.[59] Where, however, the legislature authorizes the board of commissioners to enter into a contract with a railroad company, and a contract is entered into, a consideration being yielded by the company, the state cannot by a subsequent statute impair the obligation of the contract. The state may, it seems clear, authorize a board of commissioners to make contracts, but by simply authorizing a board to make orders regulating charges for transporting freight and passengers, or regulating the operation of the road, the legislature does not empower the board to enter into contracts with railroad companies.

§ 688. Certificates of commissioners that rates are reasonable—Effect of.—It has been held that the provisions of a statute making

[58] Chicago &c. R. Co. v. State, 134 U. S. 418; 10 Sup. Ct. 462; reversing State v. Chicago &c. R. Co. 38 Minn. 281; 37 N. W. 782, citing Stone v. Farmers' Loan &c. Co. 116 U. S. 307; 6 Sup. Ct. 334, 388, 1191; Minneapolis &c. R. Co. v. State, 134 U. S. 467; 10 Sup. Ct. 473; 134 U. S. 418; 10 Sup. Ct. 702, reversing State v. Minneapolis &c. R. Co. 40 Minn. 156; 41 N. W. 465; Richmond &c. R. Co. v. Trammel, 53 Fed. 196. See, also, State v. Chicago &c. R. Co. 16 S. Dak. 517; 94 N. W. 406.

[59] New Haven &c. R. Co. v. Hammersely, 104 U. S. 1; 2 Am. & Eng. R. Cas. 418.

the certificate of the commissioners prima facie evidence that the maximum rate fixed by them is reasonable are valid.[60] It was also

[60] Chicago &c. Co. v. Jones, 149 Ill. 361; 24 L. R. A. 141, 146; 37 N. E. 247. In the course of the opinion the court said: "It is argued that the provision of the statute making the schedule of the commissioners prima facie evidence that the rates therein fixed are reasonable maximum rates of charges is unconstitutional and void, not only as depriving the carriers of their property without due process of law, but as infringing upon the right of trial by jury. We do not think that this objection should be sustained. In the first place the act does not deprive the railroad corporations of the right to have a judicial determination of the reasonableness of the rates, if they are not satisfied with the schedule made by the commission. The courts are open to them for a review of the acts of the commissioners in fixing the rates of charges. In the next place, the provision is an exercise by the legislature of its undoubted power to prescribe the rules of evidence. 2 Rice Ev. 806, 807; Commonwealth v. Williams, 6 Gray (Mass.) 1; State v. Hurley, 54 Me. 562. Such provisions are not unusual. Cases have arisen in this state under a statute making the fact of injury caused by sparks from a locomotive passing along the road prima facie evidence of negligence, and no question has ever been raised as to the validity of the statute. Pittsburg &c. R. Co. v. Campbell, 86 Ill. 443; St. Louis &c. R. Co. v. Funk, 85 Ill. 460; Toledo &c. R. Co. v. Larmon, 67 Ill. 68; Rockford &c. Co. v. Rogers, 62 Ill. 346; Chicago &c. R. Co. v. Clampit, 63 Ill. 95; Chicago &c. R. Co. v. Quaintance, 58 Ill. 389. Acts making tax deeds prima facie evidence of the regularity of the proceedings antecedent to the deed have been held to be valid. 2 Rice Ev. 607; Hand v. Ballou, 12 N. Y. 541; Delaplaine v. Cook, 8 Wis. 44; Allen v. Armstrong, 16 Iowa 508; Wright v. Dunham, 13 Mich. 414; Gage v. Caraher, 125 Ill. 447. See, also, Williams v. German Mut. F. Ins. Co. 68 Ill. 387. Cases referred to by counsel, which involve the validity of acts providing for references to auditors or referees, and making the finding of facts by them in their reports prima facie evidence of the facts in trials before juries, will be found to be clearly distinguishable from the case at bar. The supreme court of Iowa has decided that a provision making the schedule of the commission prima facie evidence of the reasonableness of the rates of charges, as contained in the statute of that state similar to the said act of 1873, was not obnoxious to the objections here urged against it, saying: 'The provision of the statute that the rates fixed by the commissioners shall be regarded as prima facie reasonable is not of an unusual character, and was enacted in the exercise of the undoubted power of the state to prescribe rules of evidence in all proceeding under the laws of the state. The law presumes the acts of officers of the state to be rightfully done, and gives them faith accordingly. This rule is not unlike the provision of

held in the case referred to that, as the statute related to matters of procedure, it took effect immediately and governed pending cases. But, as the authorities referred to in the preceding section show, the legislature cannot confer upon the commission power to finally fix the charges to be made for carrying freight and passengers without giving the parties a right to be heard.[61]

§ 689. **Regulation of charges for transporting property and passengers.**—The field in which the power of railroad commissioners is best displayed and most strongly developed is that of regulating charges of railroad companies in their capacity of common carriers. Over the matter of regulating charges for the transportation of passengers and property the powers of railway commissioners are very broad and full.[62] The principal restraint upon their power over that subject is that imposed by the commerce clause of the federal constitution, for that firmly prohibits any regulation of commerce between the states.[63] There are, of course, other constitutional re-

the statute complained of by the plaintiff.' Burlington &c. R. Co. v. Dey, 82 Iowa 312; 48 N. W. 98; 12 L. R. A. 436; 31 Am. St. 477. See, also, Chicago &c. R. Co. v. People, 67 Ill. 11; 16 Am. R. 599." See, also, Richmond &c. R. Co. v. Trammel, 53 Fed. 196; State v. Minneapolis &c. R. Co. 80 Minn. 191; 83 N. W. 60; 89 Am. St. 514.

[61] Richmond &c. R. Co. v. Trammel, 53 Fed. 196. And provision is usually made for giving notice of the time and place of fixing the rate. Stone v. Farmers &c. Co. 116 U. S. 307; 6 Sup. Ct. 334, 388, 1191; Burlington &c. R. Co. v. Dey, 82 Ia. 312; 48 N. W. 98; 12 L. R. A. 436; 31 Am. St. 477.

[62] Georgia &c. R. Co. v. Smith, 128 U. S. 174; 9 Sup. Ct. 47; Winsor Coal Co. v. Chicago &c. Co. 52 Fed. 716; Chicago &c. R. Co. v. Dey, 38 Fed. 656; Reagan v. Trust Co. 154 U. S. 413; 14 Sup. Ct. 1060, and cases cited; Burlington &c. R. Co. v. Dey, 82 Iowa 312; 48 N. W. 98; 12 L. R. A. 436; 31 Am. St. 477. See, also, Charlotte &c. R. Co. v. Gibbes, 142 U. S. 386; 12 Sup Ct. 255; Matthews v. Corp. Com'rs, 97 Fed. 400; Coyle v. Southern R. Co. 112 Ga. 121; 37 S. E. 163; Railroad Com'rs v. Wabash R. Co. 123 Mich. 669; 82 N. W. 526; Railroad Com'rs v. Railroad Co. 22 S. Car. 220. As to charter exemption, see Georgia &c. R. Co. v. Smith, 128 U. S. 174; 9 Sup. Ct. 47; Stone v. Yazoo &c. R. Co. 62 Miss. 607; 52 Am. R. 193; Mississippi R. Com. v. Gulf &c. R. Co. 78 Miss. 750; 29 So. 789.

[63] Among the great number of cases bearing upon this question are the following: Cunningham v. Macon &c. R. Co. 109 U. S. 446; 3 Sup. Ct. 292; Reagan v. Farmers' Loan &c. Co. 154 U. S. 362; 14 Sup. Ct. 1047; Gloucester &c. Co. v. Pennsylvania, 114 U. S. 196; 5 Sup. Ct. 826; Cuban &c. Co. v. Fitzpatrick, 66 Fed. 63; Cutting v. Florida &c. Co. 46 Fed. 641; Lord v. Steamship Co. 102 U. S. 541; Pacific

straints, some of which have already been considered, and others that will be hereafter discussed. But, as we have said, we do not intend in this chapter to do much more than incidentally treat of the power to regulate charges for transporting property and passengers, and we pass the subject without further comment except in so far as we may touch upon the subject in speaking of domestic or interstate commerce and matters therewith connected. It may be well, in this connection, however, to call attention to a recent case in which a company which had reorganized and reincorporated was compelled by mandamus to reduce its rates in accordance with the schedule provided in the new act, under which it was incorporated, although the old company was authorized to charge higher rates. The state court, at the suit of the railroad commission, awarded a writ of mandate on the ground that the company was estopped to question the law under which it had incorporated, and the Supreme Court of the United States affirmed the decision of the supreme court of the state.[64]

§ 690. Domestic commerce.—The power to regulate domestic or intrastate commerce resides in the states. The states may make such regulations as they deem expedient or politic for the government of commerce within their own borders, provided that the regulations do not violate some constitutional provision. If the places from which the passengers or property are transported are within the state, and the places to which they are carried are also within the limits of the same state, the transportation being wholly therein, the commerce is domestic, and not interstate commerce, and, as domestic commerce, is subject to state control.[65] It has also been held that if the place from

&c. Co. v. Board of Railroad Com. 18 Fed. 10; Sternberger v. Cape Fear &c. R. Co. 29 S. Car. 510; 7 S. E. 836; 2 L. R. A. 105; Railroad Commissioners v. Railroad Co. 22 S. Car. 220; Bangor v. Smith, 83 Me. 422; 22 Atl. 379; Council Bluffs v. Kansas City &c. R. Co. 45 Iowa, 338; 24 Am. R. 773.

[64] Grand Rapids &c. R. Co. v. Osborn, 193 U. S. 17; 24 Sup. Ct. 310, affirming Com'rs of Railroads v. Grand Rapids &c. R. Co. 130 Mich. 248; 89 N. W. 967.

[65] Interstate commerce is "commerce which concerns more states than one." Gibbons v. Ogden, 9 Wheat. (U. S.) 1; Reagan v. Mercantile Trust Co. 154 U. S. 413; 14 Sup. Ct. 1060; Interstate Com. Com. v. Cincinnati &c. R. Co. 4 Int. Com. R. 582; Louisville &c. v. Mississippi, 133 U. S. 587; 10 Sup. Ct. 348; Georgia &c. Co. v. Smith, 128 U. S. 174; 9 Sup. Ct. 47; Pacific &c. Co. v. Seibert, 142 U. S. 339; 12 Sup. Ct. 250.

which passengers and property are transported, and the place to which they are carried, are both within the territorial limits of the state, and the carriage is continuous, then the transportation is intrastate commerce, although in course of carriage passengers or property may, on the line of transportation, pass beyond the borders of the state,[66] but this doctrine seems to be denied by the Supreme Court of the United States in its most recent decision upon the subject.[67] To the rule that where both the place where the passengers or property are received, and the place of destination, are within the territorial limits of the same state, the commerce is usually intrastate, and subject to state regulation, there is an exception, and that exception is this: If the carriage is over the high seas, although from place to place in the same state, it is interstate commerce, and cannot be regulated by the state.[68] If the property has begun to move from one state to another, then commerce between the states as to that property has commenced.[69] The time and place of making

[66] Campbell v. Chicago &c. R. Co. 86 Iowa 587; 53 N. W. 351; 17 L. R. A. 443; Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192; 12 Sup. Ct. 806; Seawell v. Kansas City &c. R. Co. 119 Mo. 224; 24 S. W. 1002. See State v. Chicago &c. R. Co. 40 Minn. 267; 41 N. W. 1047; 3 L. R. A. 238; Commonwealth v. Lehigh Valley &c. R. Co. (Pa. St.) 17 Atl. 179; State v. Western &c. Co. 113 N. C. 213; 18 S. E. 389; 22 L. R. A. 570; 44 Am. & Eng. Corp. Cas. 377; 18 S. E. 389; Scammon v. Kansas City &c. R. Co. 41 Mo. App. 194; Chicago &c. R. Co. v. Jones, 149 Ill. 361; 41 Am. St. 278; 37 N. E. 247; 24 L. R. A. 141; Pacific &c. R. Co. v. Board of Railroad Commissioners, 9 Sawyer (U. S.) 253; Fort Worth &c. R. Co. v. Whitehead, 6 Texas Civil App. 595; 26 S. W. 172; Harmon v. Chicago, 140 Ill. 374; 26 N. E. 697; 29 N. E. 732; 43 Alb. L. J. 375; Kieffer, Ex parte, 40 Fed. 399; State v. Stilsing, 52 N. J. L. 517; 20 Atl. 65. The business of soliciting freight and passengers for interstate railroads is interstate commerce. McCall v. California, 136 U. S. 104; 10 Sup. Ct. 881; 42 Alb. L. J. 42. The case of Sternberger v. Cape Fear &c. R. Co. 29 So. Car. 510; 7 S. E. 836; 2 L. R. A. 105, has been thought to be overruled by the decision in Lehigh Valley Co. v. Pennsylvania, supra, in so far at least as it holds that where there is continuous carriage from point to point within the same state, the commerce is interstate if in course of transit the goods or passengers are temporarily on the soil of another state. But it is cited with approval in the case referred to in the next following note.

[67] Hanley v. Kansas City &c. R. Co. 187 U. S. 617; 23 Sup. Ct. 214; and see post § 1671.

[68] Lord v. Steamship Co. 102 U. S. 541. See The City of Salem, 37 Fed. 846.

[69] The Daniel Ball, 10 Wall (U. S.) 557; State v. Indiana &c. Co. 120

transfers of articles of commerce from one interstate carrier to another cannot, it has been held, be regulated by a state.[70]

§ 691. Reasonableness of freight and fare tariff of rates—How far a judicial question.—The question as to the power of the courts to set aside a schedule of charges for the transportation of property and passengers, framed either by a state legislature directly or by a board of commissioners acting under authority of a state statute, can no longer be regarded as an open one, for the power has been adjudged to exist by many decisions of the court of last resort. The question may be presented in opposing an application to enforce an order of the board, by an injunction to restrain the enforcement of an order, and in other modes. In a recent case the Supreme Court of the United States held that a railroad company, in defending an action to recover a penalty, might show that the rate fixed by the commissioners was an unreasonable one.[71] In the case to which we

Ind. 575; 22 N. E. 778; 6 L. R. A. 579; 30 Cent. L. J. 179; 41 Alb. L. J. 187. See Coe v. Errol, 116 U. S. 517; 6 Sup. Ct. 475; Corson v. Maryland, 120 U. S. 502; 7 Sup. Ct. 655; Railroad Co. v. Husen, 95 U. S. 465; Western Union Co. v. Massachusetts, 125 U. S. 530; 8 Sup. Ct. 161; Greene, In re, 52 Fed. 104; Woodruff &c. Co. v. State, 114 Ind. 155; 15 N. E. 814; Kidd v. Pearson, 128 U. S. 1; 9 Sup. Ct. 6; Delaware &c. Co. v. Commonwealth (Pa.), 17 Atl. 175.

[70] Council Bluffs v. Kansas City &c. R. Co. 45 Iowa 338; 24 Am. R. 773. See State v. Chicago &c. R. Co. 33 Fed. 391; Hart v. Chicago &c. R. Co. 69 Iowa 485.

[71] St. Louis &c. R. Co. v. Gill, 156 U. S. 649; 15 Sup. Ct. 484. In that case it was said: "This court has declared in several cases that there is a remedy in the courts for relief against legislation establishing a tariff of rates, which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, especially may the courts of the United States treat such a question as a judicial one and hold such acts of legislation to be in conflict with the constitution of the United States, as depriving them of the equal protection of the laws." The court referred to the fact that in some of the states commissions were established, and said: "But there are other cases, and the present is one, where the legislature chooses to act directly on the subject by themselves establishing a tariff of rates, and prescribing penalties. In such cases there is no opportunity of resorting to a compendious remedy, such as a proceeding in equity, because there is no public functionary or commission, which can be made to respond, and, therefore, if the companies are to have any relief, it must be found in a right to raise the question of the reasonableness

refer the railroad company was defeated, not, however, because the defense that the rate fixed was an unreasonable one might not be interposed, but because the company did not satisfactorily prove that the rate was unreasonable. The courts will decide whether the rate prescribed is or is not a reasonable one,[72] but they will not fix the rate.[73] The question as to how far the courts can go is not free from difficulty, but it is quite clear that they have no power to make a tariff of rates. For this conclusion there are, at least, two reasons: (1) The power to fix rates is by law conferred upon a tribunal composed of administrative or ministerial officers; (2) The power to fix rates is a ministerial and not a judicial power, and hence cannot be exercised by the courts. The legislature cannot directly, or through the medium of commissioners, make rates so low as to deprive a railroad company of a fair and reasonable remuneration, for while there is power to regulate there is no power to deprive the company of the right to tolls, freights or fares.[74] It is to be understood, of course,

of the statutory rates by way of defense to an action for the collection of the penalties." See, also, Burlington &c. R. Co. v. Dey, 82 Ia. 312; 48 N. W. 98; 12 L. R. A. 436; 31 Am. St. 477.

[72] Dow v. Beidelman, 125 U. S. 680; 8 Sup. Ct. 1028; Dow v. Beidelman, 49 Ark. 325; 5 S. W. 718; 31 Am. & Eng. R. Cas. 14; Railroad Commission Cases, 116 U. S. 307; 6 Sup. Ct. 334; Chicago &c. R. Co. v. Minnesota, 134 U. S. 418; 10 Sup. Ct. 462; Railway Co. v. Wellman, 143 U. S. 339; 12 Sup. Ct. 400; Reagan v. Farmers' Loan &c. Co. 154 U. S. 362; 14 Sup. Ct. 1047; St. Louis &c. R. v. Gill, 156 U. S. 649; 15 Sup. Ct. 484; Southern Pac. Co. v. Railroad Com'rs, 78 Fed. 236.

[73] In St. Louis &c. Co. v. Gill, 156 U. S. 649; 15 Sup. Ct. 484, the court, after reviewing the cases, said of the case of Reagan v. Trust Co. 154 U. S. 362; 14 Sup. Ct. 1037, that: "The opinion of this court on appeal was that while it was within the power of the court of equity in such case to decree that the rates so established by the commission were unreasonable and unjust, and to restrain their enforcement it was not within its power to establish rates itself, or to restrain the commission from again establishing rates." See, also, Southern Pac. Co. v. Colorado &c. Co. 101 Fed. 779; Interstate Com. Com. v. Cincinnati &c. R. Co. 167 U. S. 479; 17 Sup. Ct. 896; Interstate Com. Com. v. Alabama &c. R. Co. 168 U. S. 144; 18 Sup. Ct. 45. But see last chapter on Rate Regulation and Interstate Commerce.

[74] Stone v. Farmers' Loan &c. Co. 116 U. S. 307; 6 Sup. Ct. 339, 388, 1191; Attorney-General v. Germantown &c. Road, 55 Pa. St. 466; Miller v. New York &c. R. Co. 21 Barb. (N. Y.) 513; Koehler, Ex parte, 30 Fed. 867; 21 Am. & Eng. R. Cas. 52. See, also, Reagan v. Farmers' &c. Co. 154 U. S. 362, 367; 14 Sup. Ct. 1047; Clyde v. Richmond &c. R.

that a state cannot enact a statute, which, within the meaning of the constitution, is a regulation of interstate commerce.

§ 692. Regulation of charges—Test of reasonableness.—The courts have, as is evident from their opinions, been perplexed by the question as to the tests which shall be employed in determining whether tariffs of rates established by a state legislature directly, or through the instrumentality of a board of railroad commissioners, are so unreasonable as to require judicial condemnation. The question cannot, as yet, be regarded as settled.[75] That a tariff of rates so unreasonable as to deprive a company of fair and just remuneration is invalid has been clearly and unequivocally adjudged, but we can find no case which satisfactorily defines what constitutes an unreasonable rate. In our opinion no precise definitions can be framed, nor can any rules be formulated that will fitly apply to or govern all cases. Outlines may be sketched, and general directions given, but exact rules or precise definitions cannot be safely stated. Some tests have been suggested, and, so far as concerns the particular case, they are well enough, but when it is attempted to carry the tests beyond particular cases confusion arises, and error is almost certain to result. It is safe to say that if the rates established are such as to prevent a company from making any net earnings, the act establishing such rates is invalid.

§ 693. Tariff of rates—Tests of reasonableness.—In the preceding section we said that as yet no satisfactory test by which the question of the reasonableness of a tariff of rates can be solved has been constructed or formulated by the courts, but there are cases which directly bear upon the general question. It has been adjudged by the Supreme Court of the United States that, whether a tariff of rates is or is not a reasonable one, is to be ascertained by its effect upon the line of road, and not merely upon part of it.[76] The language em-

Co. 57 Fed. 436; Chicago &c. R. Co. v. Minnesota, 134 U. S. 418; 10 Sup. Ct. 462. See Stone v. Natchez &c. R. Co. 62 Miss. 646; Tilley v. Savannah &c. Co. 5 Fed. 641.

[75] In the case of Ames v. Union Pacific R. Co. 64 Fed. 165, Mr. Justice Brewer said: "What is the test by which the reasonableness of rates is determined? This has not yet been fully settled. Indeed, it is doubtful whether any single rule can be laid down applicable to all cases."

[76] In St. Louis &c. R. Co. v. Gill, 154 U. S. 649; 15 Sup. Ct. 484, the court said: "It, therefore, appears that the allegations made and the

ployed in the opinion given in the case referred to is very broad, and seems to deny that the effect of a tariff of rates upon part of a road can be considered as unreasonable in any case, if the entire line within the state can, under the tariff, earn remunerative freights and fares. So, it has been held that it is not beyond the power of the commission to reduce the freight upon a particular article so long as the company is able to earn a fair profit upon the entire business, and that the burden is upon the company to impeach the action of the commission.[77] We venture to suggest that there may be cases where a tariff, although affecting part only of a road, might be so palpably unjust and unreasonable as to make it the duty of the courts to adjudge it ineffective. If the traffic between two towns of the same state is the principal intrastate traffic, we do not believe that the state legislature could fix the rate for transporting passengers and property so low that the company must suffer a serious loss on every passenger and all freight that it transports, even though the rates fixed for car-

evidence offered did not cover the company's railroad as an entirety, even in the state of Arkansas, but were made in reference to that portion of the road originally belonging to the St. Louis, Arkansas and Texas Railway Company and extending from the northern boundary of Arkansas to Fayetteville in said state. In this state of facts, we agree with the supreme court of Arkansas, as disclosed in the opinion contained in the record, and which was to the effect that the correct test was the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company can not claim the right to earn a net profit from every mile, section or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some part would be unremunerative; that it would be practically impossible to ascertain in what proportion the several parts would share with others in the expenses and receipts in which they participated; and, finally, that to the extent that injustice is to be determined by the effect of the act of the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the state of Arkansas." See, also, Cantrell v. Railroad, 176 Ill. 512; 52 N. E. 292; 35 L. R. A. 656.

[77] Minneapolis &c. R. Co. v. Minnesota, 186 U. S. 257, 261; 22 Sup. Ct. 900, 902. But under several of the state statutes it has been held that the company must be allowed a fair return on the state business without regard to its interstate business. Northern Pac. R. Co. v. Keyes, 91 Fed. 47. But see Seaboard Air Line R. v. Florida (U. S.), 27 Sup. Ct. 109.

riage on other parts of the road should be such as to leave the company reasonable net earnings. If, for illustration, the companies should adopt a schedule, providing that, from the station of Buffalo, in New York, to the station of Utica, in the same state, the company should charge each passenger one penny for carriage, and charge half penny a ton for transporting property, of which the actual cost of carriage was more than tenfold the rates fixed, would the action of the commissioners in establishing such a tariff be sustained even though taking the entire line, say from Buffalo to the City of New York, the tariff would yield fair remuneration? It seems to us that it could not, yet there are intimations in some of the decisions that render this doubtful. We believe that reasonable remuneration must be provided for carriage from station to station where the distance is considerable, but we do not believe that it is necessary that it should be such as will make every "mile or section" of the road yield net earnings. To us it seems that the question must be determined upon the facts of each particular case and that broad general rules can not be safely laid down. The court cannot even say that in every instance a rate which deprives investors of profit is necessarily an unreasonable one. There cannot be a rigid general rule making the fact that no profits can be realized the universal, or, indeed, even the uniform test,[78] although, ordinarily, the company should be allowed a fair return. It has always been the rule that common carriers cannot make unreasonable charges,[79] and to permit them to make such charges would be to depart from long-settled law and enable such carriers to injure others; on the other hand, to compel them to do business without reaping a profit seems palpably unjust. It is no easy matter to escape from the dilemma which naturally arises from a consideration of the conflicting rights and interests. There may be, as pointed

[78] In Reagan v. Trust Co. 154 U. S. 413; 14 Sup. Ct. 1060, the court said: "It is unnecessary to decide, and we do not wish to be understood as laying down an absolute rule, that in every case a failure to produce some profit, to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without injury to others." As a general rule the rates should be such as to allow the company a fair return on the value of what it employs for the public. Southern Pac. R. v. Railroad Com'rs, 78 Fed. 236; Smyth v. Ames, 169 U. S. 466; 18 Sup. Ct. 418, 419.

[79] Chicago &c. R. Co. v. Osborne, 52 Fed. 912; 3 C. C. A. 347.

out by a distinguished federal judge,[80] changes of such a radical character as to make it unsafe and unjust to take as a test the right to reap profits from the business conducted by a railroad company. But a rate fixed by a state railroad commission for a particular article carried over specified railroads will not be held a deprivation of the property of such railroads without due process of law, even if the total receipts from local freight rates are insufficient to meet what can properly be cast as a burden upon that particular form of transportation, where, so far as evidence shows, the regulations can have no other effect than to make the rates the same as those obtaining generally in the state.[81] A railroad company claiming that a rate violates the fourteenth amendment of the Constitution must show the cost of transportation, the amount of the specified article transported,

[80] In Ames v. Union Pacific R. Co. 64 Fed. 165, 177, Mr. Justice Brewer used this language: "If it be said that the rates be such as to secure to the owners a reasonable per cent on the money invested, it will be remembered that many things have happened to make the investment far in excess of the actual value of the property, injudicious contracts, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management of the property. These and many other things, as is well known, are factors which have largely entered into the investments with which many railroad properties stand charged. Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property and not the cost is that which they would have to pay. In like manner, it may be argued that, when the legislature assumes the right to reduce, the rates so reduced can not be adjudged unreasonable if, under them, there is earned by the railroad company a fair interest on the actual value of the property. It is not easy to always determine the value of railroad property, and if there is no other testimony in respect thereto, than the amount of stocks and bonds outstanding, or the construction account, it may be fairly assumed that one or the other of these represents it, and computation as to the compensatory quality of rates may be based on such amounts. In the cases before us, however, there is abundant testimony that the cost of reproducing these roads is less than the amount of the stock and bond account, or the cost of construction and that the present value of the property is not accurately represented by either the stocks and bonds, or the original construction account. Nevertheless, the amount of money that has gone into the railroad property—the actual investment, as expressed, theoretically, at least, by the amount of stocks and bonds—is not to be ignored, even though such sum is far in excess of the present value."

[81] Seaboard Air Line R. Co. v. Florida (U. S.), 27 Sup. Ct. 109.

and the effect which the rate established by the commission will have upon its income.[82] It is safe to say, it seems to us, that a rate which is not sufficient to pay the costs of service is an unreasonable one.[83] The state cannot require any person, artificial or natural, to render service without receiving in return the cost of the service, since that would be to deprive such person of property without compensation, but we suppose that if the company, by its own fault or wrong, increases the costs of service beyond that which, if there were no wrong, would be the actual cost, it cannot be heard to say that the rate established is unreasonable because less than the costs of service. We think that when the courts speak of the costs of the service they must mean such costs as are incurred in the good faith conduct and management of the business. If, for instance, extravagant and unreasonable salaries are paid to officers they could not, as we conceive, be justly considered in determining the costs of service, but if the salaries were paid in good faith, and were not palpably beyond reason, they may justly be regarded as part of such costs. Here, again, we come to the point where general rules cannot be safely laid down, for it is manifest that what is or is not a palpably unreasonable salary must be determined from the facts of the particular case. The question as to the elements to be considered in determining the reasonableness of rates will be further considered when we come to treat of rate regulation and the interstate commerce law.

[82] Seaboard Air Line R. Co. v. Florida (U. S.), 27 Sup. Ct. 108.

[83] In the case of Clyde v. Richmond &c. R. Co. 57 Fed. 436, 440, this language was used: "The question in the case under discussion is, is this rate recently established by the respondents, be it a change of rate or a new classification, just and reasonable? Mr. Justice Brewer, while on the circuit bench, defines what are just and reasonable rates, or rather states what rates are not just and reasonable. 'A schedule of rates, when the rates prescribed do not pay the costs of service, can not be enforced.'" Chicago &c. R. Co. v. Becker, 35 Fed. 883. In another case (Chicago &c. R. Co. v. Dey, 35 Fed. 866) he enters into an elaborate illustration of those terms. "When the rates prescribed will not pay some compensation to the owners, then it is the duty of the courts to interfere, and protect the companies from such rates." He defines "compensation" to mean, enough to pay costs of service, fixed charges of interest, and a dividend however small. See Mercantile &c. Co. v. Texas &c. R. Co. 51 Fed. 529; Chicago &c. R. Co. v. Dey, 38 Fed. 656; Tilley v. Savannah &c. R. Co. 5 Fed. 641; Chicago &c. R. v. Tompkins, 176 U. S. 167; 20 Sup. Ct. 336; Chicago &c. R. v. Becker, 35 Fed. 883.

§ 693a. Tariff of rates—Discrimination in intrastate rates.—State railroad commissions have the power to prevent discrimination in rates by making the rate in favor of certain shippers of a commodity, in a proper case, the rate to all shippers of the same article. In a case where a low rate to a point in the state was given shippers of a certain city, receiving grain from points outside the state, and the state railroad commission had made this rate a flat rate to all shippers of grain between the two points, the Supreme Court of the United States, in a decision sustaining this action, said: "Even if a state may not compel a railroad company to do business at a loss, and conceding that a railroad company may insist, as against the power of the state, upon the right to establish such rates as will afford reasonable compensation for the services rendered, yet, when it voluntarily establishes local rates for some shippers, it cannot resist the power of the state to enforce the same rates for all. The state may insist upon equality as between all its citizens, and that equality cannot be defeated in respect to any local shipments by arrangements made with or to favor outside companies."[84]

§ 694. Stations—Power to order company to provide.—The question as to the power of a railroad commission to order a railroad company to provide new or additional stations is not free from difficulty. We suppose that it is within the power of the legislature to authorize the commission to require railroad companies to provide reasonable facilities for receiving or discharging traffic, as well as reasonable accommodations for passengers.[85] But we do not believe that the

[84] Alabama &c. R. Co. v. Mississippi Railroad Commission (U. S.), 27 Sup. Ct. 163.

[85] Southeastern &c. R. Co. v. Railroad Commissioners, 3 Nev. & Mac. 464, L. R. 6 Q. B. D. 586; Commonwealth v. Eastern R. Co. 103 Mass. 254; 4 Am. R. 555; Railroad Commissioners v. Portland &c. R. Co. 63 Me. 269; 18 Am. R. 208; State v. Kansas City &c. R. Co. 32 Fed. 722. See Northern Pacific &c. R. Co. v. Territory, 142 U. S. 492; 12 Sup. Ct. 283; 48 Am. & Eng. R. Cas. 475; People v. Chicago &c. R. Co. 130 Ill. 175; 22 N. E. 857; Mobile &c. R. Co. v. People, 132 Ill. 559; 24 N. E. 643; 22 Am. St. 556; 42 Am. & Eng. R. Cas. 671; Texas &c. R. Co. v. Marshall, 136 U. S. 393; 10 Sup. Ct. 846; 42 Am & Eng. R. Cas. 637; State v. Alabama &c. Co. 68 Miss. 653; 9 So. 469; 50 Am. & Eng. R. Cas. 14. See State v. Wabash &c. R. Co. 83 Mo. 144; 25 Am. & Eng. R. Cas. 133; State v. New Haven &c. R. Co. 43 Conn. 351; State v. Kansas City &c. R. Co. 32 Fed. 722; Cunningham v. Board of Railroad

commission can be invested with power to arbitrarily require a company to provide stations wherever the commission may deem necessary, although some of the decisions go almost to that extent.[86] We believe that the decisions which adjudge that the legislature cannot fix rates so low as to deprive railroad companies of reasonable remuneration for carrying freight and passengers support our conclusion. We do not believe that railway commissioners can rightfully be invested with the control of a railroad, and this would be the practical effect of holding that railroad commissioners may compel railroad companies to provide stations at all points the commissioners might select. Our judgment is that the only power that the legislature can bestow upon a commission is the power to regulate, and that it cannot, under the guise of conferring power to regulate, take the control of a railroad from its owner and vest it in a board of commissioners. If it be affirmed that a railway commission may, at its own uncontrolled pleasure, order a company to provide stations, the result will be that the commission may so burden a company as to destroy its ability to earn reasonable compensation for the duties and services it performs. We do not mean to be understood as affirming that broad and comprehensive powers may not be conferred upon a railway commission, nor that such a body may not be empowered to compel railroad companies to provide stations where they are required by the public interest, but we do believe that an arbitrary power to compel railroad companies to establish stations wherever it may be the pleasure of the commissioners to locate them cannot be rightfully conferred upon a railway commission. It seems to us that there is a limit to the right to regulate, and that this limit cannot be passed without violating the constitution. It seems to us, also, that there must be a reasonable necessity for the establishment of a station in order to warrant the commission in compelling a railroad company to establish it. Whether there is such a necessity is a matter to be determined after a hearing, and not summarily or arbitrarily. Doubtless the courts would be reluctant to overthrow the decision of the commission as to the necessity for a station, but, nevertheless, if it clearly and satisfactorily appears that there was no such necessity, the courts would not hesitate to review, and, if need be, re-

Commissioners, 158 Mass. 104; 32 N. E. 959; 56 Am. & Eng. R. Cas. 301; Florida &c. Co. v. State, 31 Fla. 482; 13 So. 103; 20 L. R. A. 419; 56 Am. & Eng. R. Cas. 306.

[86] See, also, ante, § 682a.

verse the decision of the commissioners.[87] Thus, in a recent decision, the Supreme Court of Mississippi held that the statute authorizing the railroad commission to designate the location of station houses, in cases where the site selected by the railroad was inconvenient, did not give the commission power to maintain in one town two detached depots, one for freight and one for passengers.[88]

§ 695. Procedure before the commissioners.—The procedure in matters brought before a board of commissioners is so much a matter of statutory regulation that general rules cannot be safely stated. It seems to us that, even in the absence of statutory provisions requiring it, the board should make a record of its proceedings, since it is implied in the manner of its organization and the object for which it was organized that it shall act as a board and put its proceedings on record.[89] It is probably not necessary unless so required by statute to keep a regular and formal record, such as is kept by a court, but there should be such a written record of the proceedings as can be used as an instrument of evidence. It has been held that the commissioners may proceed without a petition or complaint, and this, we suppose, is true where there is no statute requiring the filing of a written petition, application, or complaint.[90] It is competent

[87] State v. Des Moines &c. R. Co. 87 Iowa, 644; 54 N. W. 461. In the case cited the court reversed the order of the commissioners, saying, among other things: "There is nothing in the case which tends to show that the managers of the road had any intention to deprive any one of proper facilities for transacting business with the company. The income of the road did not warrant the maintenance of extensive stations, but demanded the strictest economy. It was thought by the management that, by establishing two stations at points nearer the junction of the other roads named, the defendant would be able to control more traffic, by being nearer to the inhabitants residing in the vicinity of Osceola and Van Wert. It appears to us that the owners of the road should not be interfered with in the management of their property, including the location of their stations, where, as in this case, there is no competent evidence that any patron of the road has been deprived of reasonable facilities for transacting business with the defendant."

[88] State v. Yazoo &c. R. Co. 87 Miss. 679; 40 So. 263.

[89] State v. Chicago &c. R. Co. 86 Iowa, 642; 53 N. W. 323; Boston &c. Co. v. Nashua &c. Co. 157 Mass. 258; 31 N. E. 1067.

[90] State v. Chicago &c. R. Co. 86 Iowa, 642; 53 N. W. 323; 55 Am. & Eng. R. Cas. 487. But see Boston &c. Co. v. Nashua &c. Co. 157 Mass. 258; 31 N. E. 1067.

for the commissioners to make reasonable rules and regulations governing matters of procedure, but they cannot, of course, rightfully adopt rules or regulations which are in conflict with the rules of law.[91] Authority to adopt and enforce rules and regulations is implied from the grant of power to hear and determine. The object and purpose being specified, the authority to effect that object and carry into effect that purpose necessarily carries the incidental authority to adopt appropriate and reasonable means for accomplishing the object for which the board was created. It seems to us that there must be notice, for without notice the interested parties are deprived of their right without such a hearing as due process of law requires that they should have.[92] It has been held that notice of the official action of the board of commissioners, given by its secretary in response to a telegram of a party interested in and affected by its decision, is binding upon the board.[93] We suppose, however, that, as a rule, the board is not bound by the action of its secretary or by any individual action, but that it is bound where the facts or circumstances are sufficient to authorize the inference that he acted as its representative. It is held in an English case that commissioners have no authority to compel a railroad company to pay costs of a petitioner whose petition is denied.[94]

§ 696. Effect of the decision of the commissioners that a com-

[91] Atlantic &c. Co. v. Wilmington &c. R. Co. 111 N. C. 463; 16 S. E. 393; 18 L. R. A. 393; 32 Am. St. 805; 55 Am. & Eng. R. Cas. 498.

[92] See State v. Chicago &c. R. Co. 16 S. Dak. 517; 94 N. W. 406. Business Men's Ass'n v. Chicago &c. R. 2 Int. Com. Rep. 48.

[93] Chicago &c. R. Co. v. Dey, 35 Fed. 866; 1 L. R. A. 744. In the case cited it was said: "It is insisted by the defendants that this action was taken, not by the board, but by one commissioner acting independently, the others not consenting or being aware of the action. Upon this matter there was considerable discussion, both as to the sufficiency of the notice, the number of times publication was required, the fact of the two publications of the notice, the power of one commissioner to make the change, etc. I deem it unnecessary to consider these, nor do I express any opinion upon the rights of any other corporations than the four who united in the telegram to defendants. An official board acts through its secretary. This complainant, with others, addressed an official communication to the board. It received an answer in the regular way, one signed by the secretary as secretary. Equity and good faith forbid going behind such notification."

[94] Foster v. Great Western &c. R. Co. L. R. 8 Q. B. D. 515.

pany has not committed an act authorizing a forfeiture.—It has been held by the Court of Appeals of New York that, as against the state, the certificate of the board of railroad commissioners that the public interests do not require the extension of a road is conclusive against the state, and constitutes a complete defense to an action to forfeit the charter for failure to build the road.[95] The decision goes very far, and seems to trench upon the rule that ministerial officers cannot be clothed with judicial power. There is, however, force and vigor in the reasoning of the court.

§ 697. Enforcing the orders of the commissioners—Generally.—Where the commissioners have jurisdiction to make an order, and they do make a valid order upon due process of law, the courts will, upon proper application, compel compliance with it. The legislature, in conferring authority upon railroad commissioners, impliedly grants,

[95] People v. Ulster &c. R. Co. 128 N. Y. 240; 28 N. E. 635. The court said in the course of the opinion that: "By this enactment the state has indicated in the most imperative form its will in respect to such actions. It thereby declared that the certificate of the railroad commissioners to the effect that no public interests were involved should thereafter be a conclusive answer to any attempt to annul the existence of a reorganized railroad corporation for a failure to make an extension of its road. By this act the state devolved upon the railroad commissioners the duty, previously performed by its attorney-general, of inquiring whether the public interests required it to enforce an alleged forfeiture against a reorganized railroad corporation, and necessarily thereby deprived other departments of the government of the power of determining the preliminary question upon which the action of the state in instituting and prosecuting such actions must be founded. By leaving to another department of the state the determination of a question upon which its own action was thereafter to be controlled, it neither delegated legislative power to, or conferred judicial functions upon, such department. It simply institutes an ex parte inquiry to determine its own future action, as had been the uniform practice of the state government for many previous years. The question whether the public interests are involved is always a condition precedent to the right of maintaining any action by the attorney-general for the forfeiture of corporate rights, and the state by this act says that it will hereafter leave this question in certain cases to railroad commissioners to determine, instead of to the attorney-general, by whom it had theretofore been decided. In other words it has made the railroad commissioners' certificate conclusive evidence of the non-existence of any sufficient ground of forfeiture."

as we believe, a right to successfully invoke the aid of the courts to make the order effective. To hold otherwise would be, in effect, to adjudge that the orders of the commissioners are mere empty declarations, without force or effect. If the statute gives a right there must be a remedy, for the existence of a right implies the existence of a remedy. If a right is given, and no specific remedy is provided, then the courts will enforce the right by the appropriate remedy. A statute does not stand alone, detached and isolated from other statutes, or other rules of law, but takes its place as part of a uniform system of law.[96] It is aided by other statutes and by the recognized rules of law, and to give it force and effect other statutes and the general rules of law may be considered and applied. The general rule is that where a new right is created and no new remedy provided the courts will enforce the right by means of the appropriate remedy. If the remedy be in equity, then the right may be enforced by the appropriate suit in equity; if the remedy be at law, then by the proper action.[97] The constitution of Louisiana has been held to give the commission of that state authority to impose a penalty for a violation of its orders, subject, of course, to review by the courts.[98]

§ 698. Enforcing the orders of the commissioners—Mandamus.—Where there is no other remedy provided by statute and no other adequate common law remedy, we can see no reason why the valid and imperative orders of a board of railroad commissioners may not be enforced by mandamus. The grant of authority to the commissioners to make orders gives to their orders a legal force and effect sufficient to impose upon the railroad company a specific and imperative duty. There must, of course, be jurisdiction, the order must be made in

[96] Humphries v. Davis, 100 Ind. 274; 50 Am. R. 788; Rushville &c. Co. v. Rushville, 121 Ind. 206, 213; 23 N. E. 72; 6 L. R. A. 315; 16 Am. St. 388, and cases cited; Hyland v. Brazil &c. Co. 128 Ind. 335, 341; 26 N. E. 672; Bishop Written Laws, §§ 86, 113a.

[97] This principle is strikingly illustrated by the cases which hold that where a state statute creates a right the federal courts will enforce it by means of the remedy which, by the rules of those courts, is the appropriate one. Fitch v. Creighton, 24 How. (U. S.) 159; Clark v. Smith, 13 Pet. (U. S.) 195; Holland v. Challen, 110 U. S. 15; 3 Sup. Ct. 495. See, also, Tift v. Southern R. Co. 123 Fed. 789. But compare Knapp v. Lake Shore &c. R. 197 U. S. 536; 25 Sup. Ct. R. 538.

[98] Railroad Commission v. Kansas City &c. R. Co. 111 La. 133; 35 So. 487.

due course of law, and must be specific and mandatory.[99] It has been held that where the railroad commissioners have jurisdiction to order the location of a station, and an imperative order is made locating a station, the order may be enforced by mandamus.[100] So, upon the same general principle, it has been held that, where the commissioners have authority to order a railroad company to construct a crossing, mandamus will lie to enforce obedience to the order.[101] The enforcement of an order made by a board of commissioners requiring a railroad company to conform to a schedule of rates established by the commissioners, is a matter of public interest, and hence an action is properly brought in the name of the state.[102]

[99] Mandamus will lie to enforce obedience to the requirements of the ordinances of the governing bodies of municipal corporations, county supervisors or commissioners, and the like, and it seems to us that the principles which are declared in cases of the class mentioned require the conclusion that mandamus will lie to compel obedience to the orders of railroad commissioners. State v. Janesville &c. R. Co. 87 Wis. 72; 57 N. W. 970; 22 L. R. A. 759; 41 Am. St. 23; Union Pacific R. Co. v. Hall, 91 U. S. 343; People v. Chicago &c. R. Co. 130 Ill. 175; 22 N. E. 857; State v. Northeastern &c. R. Co. 9 Rich. (S. C.) 247; 67 Am. Dec. 551; People v. Chicago &c. R. Co. 67 Ill. 118; Indianapolis &c. R. Co. v. State, 37 Ind. 489; People v. Boston &c. R. Co. 70 N. Y. 569; Railroad Commissioners v. Atlantic &c. R. Co. 71 S. C. 130; 50 S. E. 641. In granting power to a board of railroad commissioners to make orders, the legislature authorizes the board to do what the legislature had it so elected might have directly done, so that the orders of the board have all the force and effect that a statute could put into the orders of any board of public officers. See, generally, as to mandamus being the proper remedy. Railroad Com'rs v. Wabash R. Co. 123 Mich. 669; 82 N. W. 526; State v. Minneapolis &c. R. Co. 80 Minn. 191; 83 N. W. 60; 89 L. R. A. 514; State v. Fremont &c. R. Co. 22 Neb. 313; 35 N. W. 118; State v. Jacksonville Terminal Co. 41 Fla. 377; 27 So. 225; Woodruff v. New York &c. R. Co. 59 Conn. 63; 20 Atl. 17; Chicago &c. R. Co. v. Becker, 32 Fed. 849; State v. Atlantic Coast Line R. Co. (Fla.) 40 So. 875; Railroad Commissioners v. Atlantic &c. R. Co. 71 S. C. 130; 50 S. E. 641.

[100] Railroad Commissioners v. Portland R. Co. 63 Me. 269; 18 Am. R. 208. The statute involved in the case cited provided that the commissioners might apply to the courts for the enforcement of its orders.

[101] State v. Chicago &c. R. Co. 29 Neb. 412; 45 N. W. 469; 42 Am. & Eng. R. Cas. 248.

[102] Campbell v. Chicago &c. R. Co. 86 Iowa, 587; 53 N. W. 351; 17 L. R. A. 443.

§ 699. Mandamus—Enforcing orders of commissioners—Illustrative cases.—In addition to the cases referred to in discussing the general question of enforcing the orders of railroad commissioners, we refer to other cases which illustrate the general doctrine. In a Florida case it was held that mandamus was the appropriate remedy to compel a railroad company to comply with the order of the commissioners requiring schedules to be posted, but it was held that the court could not, in the absence of an order of the commissioners specifically prescribing the kind and size of type that should be used, specifically direct what kind and size of type the company should use.[103] In one of the reported cases the relator asked for a writ to compel the railroad company to locate a station at a place where by contract it had agreed with the relator that it should be located, but the court denied the writ, holding that a private obligation of the nature of the one relied upon by the relator could not be enforced by mandamus.[104] If the duties required are discretionary, performance can not be coerced by mandate.[105] Where the charter of a railroad company expressly requires it to build and maintain its line to a designated point, the duty created is a specific and imperative one, and its performance may be coerced by mandamus,[106] and we can see no reason why the rule laid down does

[103] State v. Pensacola &c. R. Co. 27 Fla. 403; 9 So. 89; 46 Am. & Eng. R. Cas. 704. In this case the court decided that schedules "must be kept continuously posted."

[104] Florida Central &c. R. Co. v. State, 31 Fla. 482; 20 L. R. A. 419; 34 Am. St. 30; 56 Am. & Eng. R. Cas. 306, citing State v. Paterson &c. R. Co. 43 N. J. L. 505; Parrott v. City, 44 Conn. 180; 26 Am. R. 439.

[105] People v. New York &c. R. Co. 104 N. Y. 58; 9 N. E. 856; 58 Am. R. 484; Northern Pacific R. Co. v. Territory, 142 U. S. 492; 12 Sup. Ct. 283; 48 Am. & Eng. R. Cas. 475, overruling Northern Pacific &c. R. Co. v. Territory, 3 Wash. Ter. 303; 13 Pac. 604.

[106] Union Pac. R. Co. v. Hall, 91 U. S. 343. See State v. Hartford &c. Railroad, 29 Conn. 538; New Orleans &c. R. Co. v. Mississippi, 112 U. S. 12; 5 Sup. Ct. 19; People v. Boston &c. Railroad Co. 70 N. Y. 569. In Northern Pacific &c. R. Co. 142 U. S. 492; 12 Sup. Ct. 283; 48 Am. & Eng. R. Cas. 475, the court approves the cases of York &c. R. Co. v. Queen, 1 El. & Bl. 858; Commonwealth v. Fitchburg Railroad, 12 Gray (Mass.), 180; State v. Southern &c. R. Co. 18 Minn. 40; Atchison &c. R. Co. v. Denver &c. R. 110 U. S. 667; 4 Sup. Ct. 185; South Eastern R. Co. v. Commissioners, 6 Q. B. Div. 586, and denied the doctrine of State v. Republican &c. R. Co. 17 Neb. 647; 24 N. W. 329; 52 Am. R. 424.

not apply to specific and imperative orders made by railroad commissioners under legislative authority. It was held that, under the Iowa statute, which conferred authority upon the courts to enforce the orders of the board of commissioners by "equitable actions" in the "name of the state," mandamus is not the exclusive remedy.[107] We do not, however, understand the case referred to as deciding that mandamus is not an appropriate remedy, but we understand it as simply deciding that mandamus is not the only remedy, although it is an appropriate one.[108] It is held that although a penalty is prescribed for disobeying the orders of the commissioners, mandamus will lie,[109] but other cases assert a different doctrine.[110] We think that the mere fact that a penalty is prescribed is not sufficient to defeat an application for mandamus, for the recovery of a penalty may not afford adequate relief.[111] Where mandamus is brought to enforce an order of the railroad commissioners, it should appear on its face to be within their authority, and if the order contains a material provision which does not appear from the alternative writ

[107] State v. Mason City R. Co. 85 Iowa, 516; 52 N. W. 490; 55 Am. & Eng. R. Cas. 73. See, also, Campbell v. Chicago &c. R. Co. 86 Ia. 587; 53 N. W. 351; 17 L. R. A. 443.

[108] In the case referred to the court said: "It was held in Boggs v. Chicago &c. R. Co. 54 Iowa, 435; 6 N. W. 744, that mandamus was a proper remedy to such a right, and other cases have been prosecuted by such a proceeding, but it is not held that such a remedy is exclusive. It should not be claimed that but a single remedy can be available to a party. The doctrine of the election of remedies is old and familiar." But the rule is that where there is another adequate remedy parties can not resort to the extraordinary remedy of mandamus.

[109] State v. Chicago &c. R. Co. 79 Wis. 259; 48 N. W. 243; 12 L. R. A. 180. The same court has held that a mandatory injunction will be awarded. Jamestown v. Chicago &c. R. Co. 69 Wis. 648; 34 N. W. 728; Oshkosh v. Milwaukee &c. R. Co. 74 Wis. 534; 43 N. W. 489; 17 Am. St. 175. See People v. Mayor &c. 10 Wend. (N. Y.) 393. Objection to the remedy must be taken by answer or demurrer, or on the trial, or it will be unavailing. Buffalo &c. Co. v. Delaware &c. R. Co. 130 N. Y. 152; 29 N. E. 121; Elliott Appellate Procedure, §§ 658, 679.

[110] State v. Mobile &c. R. Co. 59 Ala. 321; Railroad Commissioners v. Railroad Co. 26 S. Car. 353; 2 S. E. 127. To authorize recovery of penalty, order must be specific in directing what the company shall do. State v. Alabama &c. R. Co. 67 Miss. 647; 7 So. 502. See, generally, United States v. Delaware &c. R. Co. 40 Fed. 101.

[111] Rex v. Barker, 3 Burr. 1265.

to be within their powers, and such writ commands a compliance forthwith a demurrer thereto should be sustained.[112]

§ 700. Suits against railroad commissioners are ordinarily not suits against the state.—The settled general rule is that a suit can not be successfully prosecuted against a state except by its consent. This rule applies to actions against officers if the result will be to create a claim against the state. If the action is actually against the state, although nominally against its officers, the suit can not be maintained.[113] In one of the reported cases it was held that so far as the suit against the commissioners sought to enjoin them from formulating a schedule it was not a suit against the state, but that so far as it sought to enjoin the commissioners from bringing a suit in the name of the state to collect penalties it was a suit against the state.[114] The general rule as affirmed by the federal courts, and it is one resting on sound principle, is that suits against railroad commissioners are not suits against the state.[115]

§ 701. Remedies for illegal acts of railroad commissioners.—It seems to us to be clear, on principle, that where railroad commissioners exceed their jurisdiction, or by wrongful acts invade the rights of others, the parties may resort to the appropriate remedies for a vindication of their rights, whether those remedies be legal or equita-

[112] State v. Atlantic &c. R. Co. (Fla.) 40 So. 875.

[113] Louisiana v. Jumel, 107 U. S. 711; 2 Sup. Ct. 128; Cunningham v. Macon &c. R. Co. 109 U. S. 446; 3 Sup. Ct. 292, 609; Hagood v. Southern, 117 U. S. 52; 6 Sup. Ct. 608; Ayers, In re, 123 U. S. 443; 8 Sup. Ct. 164; Virginia Coupon Cases, 114 U. S. 270; 5 Sup. Ct. 903, 923, 925, 928, 931, 932, 962, 1020; State v. Burke, 33 La. Ann. 498; Weston v. Dane, 51 Me. 461; Marshall v. Clark, 22 Texas, 23; Houston &c. R. Co. v. Randolph, 24 Texas, 317; Printup v. Cherokee R. Co. 45 Ga. 365; Moore v. Tate, 87 Tenn. 725; 11 S. W. 935; 10 Am. St. 712. See, generally, Baltzer v. State, 104 N. Car. 265; 10 S. E. 153; Lincoln County v. Luning, 133 U. S. 529; 10 Sup. Ct. 363.

[114] McWhorter v. Pensacola &c. R. Co. 24 Fla. 417; 5 So. 129; 2 L. R. A. 504; 12 Am. St. 220.

[115] Reagan v. Farmer's Loan &c. Co. 154 U. S. 362; 14 Sup. Ct. 1047; 9 Lewis' Am. R. & Corp. Cas. 641; Tindal v. Wesley, 167 U. S. 204, 220; 17 Sup. Ct. 770; Smyth v. Ames, 169 U. S. 466; 18 Sup. Ct. 418, 423; Railroad Co. v. Tennessee, 101 U. S. 337; Mississippi Railroad Commission v. Illinois Central R. Co. (U. S.) 27 Sup. Ct. 90; Prout v. Starr, 188 U. S. 537; 23 Sup. Ct. 398; Story Const. (5th ed.) § 1685.

ble. If a right be established and its wrongful invasion shown the courts will apply the appropriate remedy.[116] The proper remedy is, of course, to be determined from the nature of the case and the character of the relief sought; but, given a case where remediable rights are shown, the courts will find a remedy. If an exclusive statutory remedy is given, that remedy must be pursued.[117] The complainant who seeks to recover under the statute must plead such facts as bring his case fully within the statutory provisions.[118]

§ 702. Specific statutory remedy—Federal rule.—The general rule is that where a statute creates a new right the remedy specifically provided must be pursued.[119] The federal courts do not, however, give full effect to this rule, but maintain that the procedure of the federal tribunals can not be regulated by state statutes.[120] We do

[116] Murray v. Chicago &c. R. Co. 62 Fed. 24; Chicago &c. R. Co. v. Osborne, 52 Fed. 912; 3 C. C. A. 347.

[117] Winsor &c. Co. v. Chicago &c. R. Co. 52 Fed. 716; Young v. Kansas City &c. R. Co. 33 Mo. App. 509. It is held in the first of the cases cited that the remedy given by statute to recover extortionate charges supersedes the common law remedy. It was also held that unless the carrier charges more than the maximum rate fixed by statute, no action will lie, citing Burlington &c. R. Co. v. Dey, 82 Iowa, 312; 48 N. W. 98; 12 L. R. A. 436; 31 Am. St. 477; State v. Fremont &c. R. Co. 22 Neb. 313; 35 N. W. 118; Sorrell v. Central R. Co. 75 Ga. 509; Chicago &c. R. Co. v. People, 77 Ill. 443. But see Little Rock &c. R. Co. v. East Tennessee &c. R. Co. 47 Fed. 771, where it is held that the statutory remedy is cumulative.

[118] Winsor &c. Co. v. Chicago &c. R. Co. 52 Fed. 716, citing Kennayde v. Railroad Co. 45 Mo. 255; King v. Dickenson, 1 Saund. 135; Bayard v. Smith, 17 Wend. (N. Y.) 88.

[119] Chandler v. Hanna, 73 Ala. 390; Janney v. Buell, 55 Ala. 408; Dudley v. Mayhew, 3 N. Y. 9; Hollister v. Hollister Bank, 2 Keyes (N. Y.), 245; Dickinson v. Van Wormer, 39 Mich. 141; Carolina &c. R. Co. v. McKaskill, 94 N. C. 746; McIntire v. Western &c. R. Co. 67 N. C. 278; Indiana &c. R. Co. v. Oakes, 20 Ind. 9.

[120] Clark v. Smith, 13 Pet. (U. S.) 195; Fitch v. Creighton, 24 How. (U. S.) 159; Mills v. Scott, 99 U. S. 25; Van Norden v. Morton, 99 U. S. 378; Cummings v. National Bank, 101 U. S. 153; Holland v. Challen, 110 U. S. 15; 3 Sup. Ct. 495; Reynolds v. Crawfordsville &c. Bank, 112 U. S. 405; 5 Sup. Ct. 213; Orvis v. Powell, 98 U. S. 176, 178; Connecticut &c. Co. v. Cushman, 108 U. S. 51; 2 Sup. Ct. 236; Flash v. Wilkerson, 22 Fed. 689; Borland v. Haven, 37 Fed. 394; Davis v. Jones, 2 Fed. 618; Fechheimer v. Baum, 37 Fed. 167.

not understand the federal courts to hold that rights given by state statutes will not be enforced; on the contrary, our understanding is that such rights will be enforced, but the remedy and procedure will be such as prevail in the courts of the nation. In a case in one of the United States circuit courts the railroad commissioners had made an order classifying the railroads of the state and fixing a tariff of charges. The railroad company insisted that the rates fixed by the commissioners were unreasonable and sued for an injunction, the commissioners contended that the federal court had no jurisdiction because there existed an adequate remedy by petition to the supreme court of the state, but the court denied the contention of the commissioners and held that it had jurisdiction.[121]

[121] Ames v. Union Pacific R. Co. 64 Fed. 165, 172. In the course of the opinion of the court prepared by Mr. Justice Brewer, it was said: "It is further insisted by defendants that this court has no jurisdiction over these actions. First, because, in the act itself, an adequate legal remedy is provided by petition to the supreme court of the state and courts of equity may not interfere when adequate legal remedies are provided; secondly, because the rates are prescribed by a direct act of the legislature, and not fixed by any commission. I am unable to assent to either of these contentions. The remedy referred to is found in section 5, which authorizes any railroad company, believing the rates prescribed to be unreasonable and unjust, to bring an action in the supreme court of the state, and that if that court is satisfied that the rates are, as claimed, unjust and unreasonable to such company, it may make an order directing the board of transportation to permit the railroad to raise its rates to any sum in the discretion of the board, provided that the rates so raised shall not be higher than were those charged by such railroad on the first day of January, 1893. But this comes very far short of being an adequate legal remedy." The court also said: "An adequate legal remedy is one which secures, absolutely and of right, to the injured party relief from the wrong done. But even if it were a full and complete legal remedy, it is one which can be secured only in a single court, and that a court of the state. And, as was held in the case of Reagan v. Farmers' &c. Co. 154 U. S. 362; 14 Sup. Ct. 1047, it is not within the power of the state to tie up citizens of other states to the courts of that state for the redress of their rights, and for the protection against wrong. The laws of congress, passed under the authority of the constitution of the United States, open the doors of the federal courts to citizens of other states to suits and actions for the prevention or redress of wrong, and the state can not close those doors. Whatever the effect such legislation may have upon the courts of the state, the courts of the United States are as open now as they

§ 703. Parties to suits against railroad commissioners.—The complainant in a suit to enjoin a board of railroad commissioners from establishing a schedule of rates can not, it has been held, succeed unless he shows an interest in the controversy peculiar to himself and not common to the public.[122] The fact that a state ships goods over a railroad does not make it a party to a suit to determine the validity of rates of freight established by the commissioners.[123] Railroad commissioners who grant authority to one railroad company to cross the tracks of another are held to be mere nominal parties to a suit to enjoin the commissioners from rehearing the case upon the application of the company whose road the other company was granted a right to cross.[124]

§ 704. Review by certiorari.—In jurisdictions where the practice of bringing before the court for review the proceedings, "of an inferior court tribunal, or officer exercising judicial authority, whose proceedings are summary or in a course different from the common law,"[125] by a writ of certiorari prevails, we suppose that in many

were to actions for the protection of citizens of other states in their property rights within the state of Nebraska." This case is affirmed in Smyth v. Ames, 169 U. S. 466; 18 Sup. Ct. 418.

[122] Board of Railroad Commissioners v. Symns &c. Co. 53 Kan. 207; 9 Lewis Am. R. & Corp. Cas. 676, citing Scofield v. Railway Co. 43 Ohio St. 571; 3 N. E. 907; 54 Am. R. 846; Commissioners v. Smith, 48 Kan. 331; 29 Pac. 565. The court discriminated the case before it from the cases of Chicago &c. R. Co. v. Dey, 35 Fed. 866; Chicago &c. R. Co. v. Minnesota, 134 U. S. 418; 10 Sup. Ct. 462; Budd v. People, 143 U. S. 517; 12 Sup. Ct. 468, saying: "We are cited to cases where injunction was maintained by the railroad company against the enforcement of the order of such a board, but in these cases it was held to be maintainable because the rates proposed to be put in force were so unreasonable as to be confiscatory. The railroad company, being a public carrier and obliged to transport commodities offered for shipment, and use their property in so doing, it was held that a provision requiring the carriage of a person or property without reward amounted to the taking of private property for a public use without just compensation, or without due process of law, and hence a court of equity might prevent the enforcement of such a provision." See State v. Chicago &c. R. Co. 86 Iowa, 304; 53 N. W. 253.

[123] Clyde v. Richmond &c. R. Co. 57 Fed. 436.

[124] Union &c. R. Co. v. Board of Railroad Commissioners, 52 Kan. 680; 35 Pac. 224.

[125] Farmingham &c. Co. v. County Commissioners, 112 Mass. 206; Elliott Roads and Streets, 271 (2d ed., § 371, et seq.).

instances the appropriate mode of reviewing the proceedings of a board of railroad commissioners would be by certiorari. The board of commissioners is an inferior tribunal invested with powers in their nature judicial, so that it would seem that in the proper case their proceedings are reviewable by certiorari. In a Massachusetts case it was assumed that certiorari was a proper remedy, but it was held that the petition must be dismissed for the reason among others that the petitioners were not parties to the proceedings.[126]

§ 705. Injunction against commissioners—Generally.—The illegal and unauthorized acts of a board of railroad commissioners may be restrained by injunction. Where a state statute is unconstitutional, the board of commissioners will be enjoined from enforcing orders assumed to be made by authority of such statute.[127] The earlier English statute recognized the power of the courts to enjoin the proceedings of railway commissioners in cases where they assumed powers they did not possess or violated settled rules of law,[128] but the courts of England reluctantly interfere with the decisions of the commissioners, and will do so only in clear cases.[129] In this country courts have jurisdiction over the proceedings of railroad commissioners, although there may be no statute specifically or expressly conferring it. Granting to railroad commissioners power to make orders does not necessarily take away the jurisdiction of the courts. The general rule is that jurisdiction once granted is not divested unless there is a clear statutory provision divesting it.[130] But the power of the courts rests on higher grounds. The legislature does not create or vest the judicial power of the commonwealth; that is done by the constitution; the legislature simply distributes the power.

[126] Cunningham v. Board, 158 Mass. 104; 32 N. E. 959; 56 Am. & Eng. R. Cas. 301.

[127] Chicago &c. R. Co. v. Dey, 35 Fed. 866; 1 L. R. A. 744; Piek v. Chicago &c. R. Co. 6 Biss. (U. S.) 177; Louisville &c. R. Co. v. Railroad Commission, 19 Fed. 679; Farmers' Loan &c. Co. v. Stone, 20 Fed. 270; Reagan v. Farmers' Loan &c. Co. 154 U. S. 362; 14 Sup. Ct. 1047; Chicago &c. R. Co. v. Dey, 35 Fed. 866, overruling Chicago &c. R. Co. v. Becker, 32 Fed. 883; McWhorter v. Pensacola &c. R. Co. 24 Fla. 417; 5 So. 129; 2 L. R. A. 504; 12 Am. St. 220; Seawell v. Kansas City &c. R. Co. 119 Mo. 224; 24 S. W. 1002; 9 Lewis Am. R. & Corp. Cas. 606.

[128] 1 Hodges Railways, 431, note f.

[129] Barret v. Great Northern &c. R. Co. 1 C. B. (N. S.) 423; 28 L. T. 254; 38 Eng. L. & Eq. 218.

[130] Sutherland Stat. Const. § 395.

The legislature has no judicial power, for its power is exclusively legislative, and as it has no judicial power, it can not, in the proper sense, delegate such power.[131]

§ 706. Where commissioners exceed their jurisdiction injunction will lie.—If railway commissioners exceed their jurisdiction, and their acts are more than mere fugitive or transient trespasses, injunction will lie. The rule that where a tribunal, such as a board of railroad commissioners, transcends its powers, injunction is the appropriate remedy, is a familiar one. The difficulty in practically applying the rule stated is in determining whether the commissioners have exceeded their jurisdiction. As their jurisdiction is wholly statutory, they exceed it whenever they do an act not authorized by the statute from which they derive their powers.[132]

§ 707. Vacating orders of commissioners on the ground of fraud.—A board of railroad commissioners is subject to the equity jurisdiction of the courts.[133] If it makes an order which is fraudulent

[131] Greenough v. Greenough, 11 Pa. St. 489; 51 Am. Dec. 567; Perkins v. Corbin, 45 Ala. 103; 6 Am. R. 698; Vandercook v. Williams, 106 Ind. 345; Smythe v. Boswell, 117 Ind. 365; 20 N. E. 268. Authorities cited, Elliott Appellate Proc. §§ 1, 2, 3 and notes. Mr. Bryce says: "But in America a legislature is a legislature and nothing more. The same instrument which creates it creates also the executive, governor and the judges. They hold by a title as good as its own. If the legislature should pass a law depriving the governor of an executive function conferred by the constitution, that law would be void. If the legislature attempted to interfere with the courts, their action would be even more palpably illegal and ineffectual." Bryce Am. Con. 429. It is not to be understood, however, that the legislature may not interfere with the courts, so far as concerns matters of procedure, but judicial powers resident in courts legislative action is ineffective to take away or bestow upon administrative or ministerial officers.

[132] South Eastern &c. R. Co. v. Railway Commissioners, L. R. 6 Q. B. D. 586, per Lord Selborne, vide, p. 591; Great Western R. Co. v. Railroad Commissioners, L. R. 7 Q. B. D. 182; South Eastern R. Co. v. Railway Commissioners, L. R. 5 Q. B. D. 217; Regina v. Railway Commissioners, L. R. 22 Q. B. D. 642. See, Caterham &c. R. Co. v. London &c. R. Co. 1 C. B. (N. S.) 410; Bennett v. Manchester &c. R. Co. 6 C. B. (N. S.) 707, 714; Pelsall &c. R. Co. v. London &c. R. Co. L. R. 23 Q. B. D. 536; Tift v. Southern R. Co. 123 Fed. 789.

[133] Clyde v. Richmond &c. R. Co. 57 Fed. 436.

in its nature, the order may be vacated by a decree of a court of chancery.[134] To entitle a party to a decree vacating or annulling an order upon the ground of fraud it must be made to appear that there was actual fraud in obtaining the order, and if there be no fraud the order will not be vacated, although the parties who obtained it were influenced by corrupt motives.

§ 708. Federal question—Removal of causes from state courts. —It has been held that where a state board of railroad commissioners brings an action to enforce obedience to its orders the case can not be removed to the federal court, although it appears that a federal question is involved.[135] The court suggested that the proper course was to put in a pleading presenting the federal question, and in the event of an adverse decision by the highest court of the state, carry the case to the supreme court of the United States by a writ of error. In another case,[136] however, the doctrine of the case referred to is denied, and it is asserted that the case may be removed. The case last referred to holds that if the petition for removal[137] shows that a federal question is involved, a removal will be ordered, but in so holding it seems to us that the court was in error. The law as declared by the supreme court of the United States is, that a cause is not removable as involving a federal question unless the facts making it removable appear from the plaintiff's statement of his claim.[138]

[134] Coe v. Aiken, 61 Fed. 24. In the case cited the court said: "With reference to the second objection there is no doubt in my mind that a court of equity may set aside the action of a tribunal of this character, if it is fraudulent in its nature or essence, or was fraudulently obtained. It may even go further, and for the same reasons, set aside the judgments of a judicial tribunal. This is a fundamental principle of law."

[135] Dey v. Chicago &c. R. Co. 45 Fed. 82.

[136] State v. Coosaw &c. Co. 45 Fed. 804.

[137] The court, in the case referred to, State v. Coosaw &c. Co. 45 Fed. 804, 811, cited in support of its conclusion, Metcalf v. Watertown, 128 U. S. 589; 9 Sup. Ct. 173; State v. Illinois &c. R. Co. 33 Fed. 721; Austin v. Gagan, 39 Fed. 626; McDonald v. Salem &c. Co. 31 Fed. 577; Johnson v. Accident Insurance Co. 35 Fed. 374, but as appears from the cases referred to in the following note those cases were wrongly decided.

[138] Chappell v. Waterworth, 155 U. S. 102; 15 Sup. Ct. 34; East Lake &c. Co. v. Brown, 155 U. S. 488; 15 Sup. Ct. 357; Tennessee v. Union &c. Bank, 152 U. S. 454; 14 Sup. Ct. 654.

CHAPTER XXIX.

PENAL OFFENSES BY AND AGAINST RAILROAD COMPANIES.

§ 709. Penal offenses by railroad companies—Generally.—Railroad corporations are the subject of much legislation by congress, legislatures and municipalities, within their respective spheres. Regulations arising from the power to regulate commerce are usually such as apply to common carriers generally, but many statutes and ordinances enacted in the exercise of the police power look particularly to the peculiar nature of the operation of railroads and often apply to steam railroads exclusively. It is thoroughly established that legislatures, within their spheres, have power to compel railroad companies to discharge their duties and obligation to shippers and the public by reasonable statutory regulations, which may be enforced by fines and penalties.[1] Some courts have held that corporations are not included in general penal statutes forbidding the commission of particular acts unless included in express language,[2] and base their decisions upon the rule that penal statutes must be strictly construed, maintaining that the term "person" under such strict construction can not apply to a corporation,[3] but it seems to be the

[1] McGowan v. Wilmington &c. R. Co. 95 N. C. 417; 27 Am. & Eng. R. Cas. 64; Branch v. Wilmington &c. R. Co. 77 N. Car. 347; Missouri Pacific R. Co. v. Humes, 115 U. S. 512; 6 Sup. Ct. 110; 22 Am. & Eng. R. Cas. 557. See chapter on governmental control. In the peculiar case of Goodspeed v. Ithaca St. Ry. Co. 184 N. Y. 351; 77 N. E. 392, a carrier was held exempt from the penalty for an overcharge on the ground that it had honestly mistaken its statutory rights. The Texas statute imposing a penalty of not less than $100 or more than $500 on a carrier refusing to redeem its unused tickets has been held not open to the objections that it was unreasonably excessive. Texas &c. R. Co. v. Mahaffey (Tex. Civ. App.), 81 S. W. 1047.

[2] In Benson v. Monson &c. R. Co. 9 Met. (Mass.) 562, it was held that a statute imposing a penalty upon "the owner, agent, or superintendent of any manufacturing establishment" did not apply to a "manufacturing corporation." See 5 Thomp. Corp. § 6285.

[3] In Cumberland &c. Co. v. Portland, 56 Me. 77, the court held that an action for penalty could not be maintained against a municipal corporation which had violated a statute imposing a penalty upon "any person or persons." Another Maine decision asserts that an action can not be maintained against a corporation for the commission of an offense forbidden by a penal statute applying in terms to "any person," and which, in another section, provided that the offense should constitute larceny, for the double reason that criminal intent can not be imputed to a corporation, and that such statutes are not to be enlarged by construction. Androscoggin &c. Co. v. Bethel &c. Co. 64 Me. 441. See, also, Commonwealth v. Swift Run Gap Turn-

sound rule, supported by the weight of authority, that corporations are amenable to penal statutes forbidding the commission of offenses by "persons," when the circumstances in which they are placed are identical with those of a natural person expressly included in the statute, and where the statute can be applied equally well to them as corporations.[4] It is generally held that corporations are indictable for non-feasance in the cases in which a natural person would be indictable,[5] but there is conflict as to whether they are thus indictable for acts of misfeasance. It is maintained by some courts, and it seems with good reason, that a corporation may be indicted for misfeasance, or the doing of an act unlawful in itself and injurious to the rights of others, as well as for an omission of duty,[6] but it is said that they can not be indicted for offenses which derive their criminality from evil intent, or which are simply violations of the social duties peculiar to natural persons.[7] Lord Coke early laid down the rule that corporations are persons within the purview

pike, 2 Va. Cas. 362; State v. Ohio &c. R. Co. 23 Ind. 362; Indianapolis &c. R. Co. v. State, 37 Ind. 489, 493.

[4] 5 Thomp. Corp. § 6285; State v. Morris &c. R. Co. 23 N. J. L. 360; State v. Vermont Cent. R. Co. 27 Vt. 103; Stewart v. Waterloo Turn Verein, 71 Iowa, 226; 32 N. W. 275; 60 Am. R. 786; South Carolina R. Co. v. McDonald, 5 Ga. 531; Wales v. Muscatine, 4 Iowa, 302; State v. Security Bank, 2 S. Dak. 538; 51 N. W. 337; State v. First Nat. Bank, 2 S. Dak. 568; 51 N. W. 587. See State v. Baltimore &c. R. Co. 15 W. Va. 362; 36 Am. R. 803, for a review of the authorities.

[5] Bishop Crim. Law, § 503; Gillett Criminal Law, § 4; Angell and Ames Corp. (11th ed.) § 394; Texas &c. R. Co. v. State, 41 Ark. 498; 20 Am. & Eng. R. Cas. 626; People v. Albany, 11 Wend. (N. Y.) 539; 27 Am. Dec. 95, and note; Waterford &c. v. People, 9 Barb. (N. Y.) 161; Queen v. Birmingham &c. R. Co. 2 Gale & D. 236; Commonwealth v. Central Bridge Corp. 12 Cush. (Mass.) 242; Louisville &c. R. Co. v. Commonwealth, 13 Bush. (Ky.) 388; 26 Am. R. 205, and note; Boston &c. R. Co. v. State, 32 N. H. 215.

[6] Commonwealth v. Prop. of New Bedford Bridge, 2 Gray (Mass.), 339; Queen v. Great &c. R. Co. 9 Q. B. 315; 10 Jur. 755; State v. Morris &c. R. Co. 23 N. J. L. 360; State v. Vermont Cent. R. Co. 27 Vt. 103; State v. Baltimore &c. Co. 15 W. Va. 362; 36 Am. R. 803, citing authorities. See, also, Commonwealth v. Lehigh Valley R. Co. 165 Pa. St. 162; 30 Atl. 836; 27 L. R. A. 231.

[7] It has been held that an action of trespass for false imprisonment will lie against a corporation, but an action on the case for malicious prosecution will not lie for the reason that malicious intent can not be imputed to a corporation. Owsley v. Montgomery &c. R. Co. 37 Ala. 560.

of penal statutes, and Mr. Justice Story, "finding, therefore, no authority at common law, which overthrows the doctrine of Lord Coke," refused to "engraft any such constructive exception upon the text of the statute."[8] The act, to be punishable by penalty, must come within the scope of the duty or power of the corporation,[9] otherwise the penalty can only be inflicted upon the members and officers or representatives of the corporation,[10] who may be presumed to have acted as individuals. But the members and officers are not always criminally liable when the corporation is.[11] Where a railroad is in the hands of a receiver the corporation can not be prosecuted for crimes or misdemeanors committed by the agents or servants of the receiver.[12] Under the rule of strict construction it has been held that a penalty denounced against a "railway company" is not recoverable against a "receiver."[13] But it has been held that receivers appointed by the federal courts do not fall under this rule as they are required by a federal statute to operate the roads under and in compliance with the laws governing railway companies in the states respectively in which the property is situated.[14]

§ 710. Penal statutes strictly construed—No extraterritorial effect.—The rigid rules of the common law with reference to the liability of common carriers should not be applied in cases involving the violation of a penal statute, for a penal statute is to be construed strictly in favor of one charged with violating it,[15] but it has

[8] United States v. Amedy, 11 Wheat. 393, 412; Queen v. Great &c. R. Co. 9 Q. B. 315; 10 Jur. 755; Louisville &c. R. Co. v. State, 3 Head (Tenn.), 523; 75 Am. Dec. 778.

[9] Reg. v. Great North of England Railway, 9 Q. B. 315, 326; Bishop Crim. Law, § 506.

[10] Kane v. People, 3 Wend. (N. Y.) 363; Edge v. Commonwealth, 7 Pa. St. 275.

[11] State v. Barksdale, 5 Humph. (Tenn.) 154; 1 Bishop Crim. Law, § 507. Stockholders are not usually liable individually. State v. Gilmore, 24 N. H. 461.

[12] State v. Wabash R. Co. 115 Ind. 466; 17 N. E. 909; 1 L. R. A. 179; 35 Am. & Eng. R. Cas. 1.

[13] Bonner v. Franklin Co-op. Assn. 4 Tex. Civil App. 166; 23 S. W. 317; Turner v. Cross, 83 Tex. 218; 18 S. W. 578; 15 L. R. A. 262, and note; Texas &c. R. Co. v. Barnhart, 5 Tex. Civil App. 601; 23 S. W. 801; Missouri &c. R. Co. v. Stoner, 5 Tex. Civil App. 50; 23 S. W. 1020. See, however, and compare Arkansas Cent. R. Co. v. State, 72 Ark. 252; 79 S. W. 772.

[14] Bonner v. Franklin Co-op. Assn. 4 Tex. Civil App. 166; 23 S. W. 317.

[15] Whitehead v. Wilmington &c. R. Co. 87 N. C. 255; 9 Am. & Eng.

been held that "this rule is not violated by adopting the sense of the words which best harmonize with the object and intent of the legislature, and the whole context of the statute must be construed together."[16] The declaration or complaint must present a case strictly within the provisions of the statute, not leaving any essential facts to be gathered by argument or inference.[17] Besides being strictly construed, these statutes carry no extraterritorial effect, whether the penalty be to the public or to persons, and they can not be enforced in the courts of another state, either by force of the statute or upon the principles of comity.[18] The supreme court of the United

R. Cas. 168; Bond v. Wabash &c. R. Co. 67 Iowa, 712; 25 N. W. 892; 23 Am. & Eng. R. Cas. 608; Omaha &c. R. Co. v. Hale, 45 Neb. 418; 63 N. W. 849; Chicago &c. R. Co. v. People, 217 Ill. 164; 75 N. E. 368.

[16] State v. Indiana &c. R. Co. 133 Ind. 69; 32 N. E. 817; 18 L. R. A. 502; State v. Hirsch, 125 Ind. 207; 24 N. E. 1062; 9 L. R. A. 170. In United States v. Wiltberger, 5 Wheaton (U. S.), 76, Marshall, C. J., said: "Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction." In United States v. Hartwell, 6 Wall. (U. S.) 385, Swayne, J., said: "The object in construing penal as well as other statutes is to ascertain the legislative intent. That constitutes the law. If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and overstrict construction."

[17] State v. Androscoggin R. Co. 76 Me. 411; 20 Am. & Eng. R. Cas. 624; Barter v. Martin, 5 Me. 76; Western U. Tel. Co. v. Wilson, 108 Ind. 308; 9 N. E. 172; 16 Am. & Eng. Corp. Cas. 257; Whitecraft v. Vanderver, 12 Ill. 235. Where the statute says that the action shall be brought in the name of the people of the state of Michigan, an action in the name of the prosecuting attorney for and on behalf of the people of the state of Michigan will lie. People v. Brady, 90 Mich. 459; 51 N. W. 537.

[18] Blaine v. Curtis, 59 Vt. 120; 7 Atl. 708; 59 Am. R. 702; Ogden v. Folliott, 3 T. R. 726; Scoville v. Canfield, 14 Johns. (N. Y.) 338; 7 Am. Dec. 467; First National Bank v. Price, 33 Md. 487; 3 Am. R. 204; Derrickson v. Smith, 27 N. J. L.

States has held, however, that a statute making directors personally liable to creditors of a corporation for making false reports may be enforced anywhere, deciding that while such a statute is penal in the sense that it should receive a strict construction, it is not penal in the sense that it can not be enforced in a foreign state, for it gives a civil remedy at the suit of the creditor only, measured by the amount of the debt.[19] It has also been held by the supreme court of the United States that the question whether a statute is penal in such a sense as to forbid its enforcement in a foreign jurisdiction, "depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."[20]

§ 711. Right of action as affected by penal statutes—Effect of violation as proof of negligence.—Unless the common law right of action is thereby taken away in express terms or by necessary implication, the penalty imposed by a penal statute is cumulative only, and the common law right of action continues to exist unimpaired.[21] It may, perhaps, be laid down as a general rule that the enactment

166; Carnahan v. W. U. Tel. Co. 89 Ind. 526; 46 Am. R. 175; Taylor Priv. Corp. § 393; Story, Confl. of Laws, §§ 620, 621. See Western U. Tel. Co. v. Hamilton, 50 Ind. 181; Henry v. Sargeant, 13 N. H. 321; 40 Am. Dec. 146.

[19] Huntington v. Attrill, 146 U. S. 657; 13 Sup. Ct. 224, per Gray, J. See Boyce v. Wabash &c. Co. 63 Iowa, 70; 18 N. W. 673; 50 Am. R. 730; 23 Am. & Eng. R. Cas. 172; in which an Iowa court allowed an action for double damages provided by an Illinois statute.

[20] Huntington v. Attrill, 146 U. S. 657; 13 Sup. Ct. 224, per Gray, J.; Dennick v. Railroad Co. 103 U. S. 11; Herrick v. Minneapolis &c. R. Co. 31 Minn. 11; 16 N. W. 413; 47 Am. R. 771; Chicago &c. R. Co. v. Doyle, 60 Miss. 977; Knight v. West Jersey R. Co. 108 Pa. St. 250; 56 Am. R. 200; Morris v. Chicago &c. Ry. Co. 65 Iowa, 727; 23 N. W. 143; 54 Am. R. 39; Higgins v. Central &c. R. Co. 155 Mass. 176; 29 N. E. 534; 31 Am. St. 544. In Mexican Natl. R. Co. v. Jackson (Tex. Civil App.), 32 S. W. 230, it was held that a law of Mexico making negligence resulting in injury to another a penal offense, and also giving a right of action civil in nature, was not penal in the sense that the civil remedy could not be enforced in the courts of Texas, and the Texas court awarded damages, although the injury occurred in Mexico. See, also, 2 Am. L. Reg. & Rev. (N. S.) 725.

[21] See post, § 712; United States v. Howard, 17 Fed. 638; Caswell v. Worth, 5 El. & Bl. 848, per Coleridge, J.; Couch v. Steel, 3 El. & Bl. 402; Aldrich v. Howard, 7 R. I. 199; Tyler v. W. U. Tel. Co. 54 Fed. 634.

of a penal statute does not establish a new liability aside from the penalty denounced by the statute itself. In other words, a penal statute can not ordinarily be regarded as the foundation of a new right of action in addition to that prescribed, and the best reasoned cases hold that the only new liability arising from the neglect of such purely statutory duty is for the prescribed penalty,[22] except, perhaps, where the statute prescribes that the duty shall be to particular persons or to a particular class of persons, and not purely a public duty.[23] In one instance, however, the supreme court of the

[22] Holwerson v. St. Louis &c. R. Co. 157 Mo. 216; 57 S. W. 770; 50 L. R. A. 850, 861 (quoting the text as stating the law); Flynn v. Canton Co. 40 Md. 312; 17 Am. R. 603; Taylor v. Lake Shore &c. R. Co. 45 Mich. 74; 7 N. W. 728; 40 Am. R. 457, per Cooley, J.; Hartford v. Talcott, 48 Conn. 525; 40 Am. R. 189; Heeney v. Sprague, 11 R. I. 456; 23 Am. R. 502; Vandyke v. Cincinnati, 1 Disney (Ohio), 532; Kirby v. Boylston Market Asso. 14 Gray (Mass.), 249; 74 Am. Dec. 682; Philadelphia R. Co. v. Ervin, 89 Pa. St. 71; 33 Am. R. 726. But see Bott v. Pratt, 33 Minn. 323; 23 N. W. 237; 53 Am. R. 47, 53 n.; Jetter v. N. Y. &c. R. Co. 2 Abb. Dec. 458. In his opinion in the Michigan case, supra, Judge Cooley said: "If it was only a public duty it can not be pretended that a private action can be maintained for a breach thereof. . . . Nevertheless, the burden that individuals are required to bear for the public protection or benefit may in part be imposed for the protection or benefit of some particular individual or class of individuals also, and then there may be an individual right of action as well as a public prosecution of a breach of duty which causes individual injury. . . . The nature of the duty and the benefits to be accomplished through its performances must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit." In Aldrich v. Tripp, 11 R. I. 141; 23 Am. R. 434, the plaintiff sought to recover damages for an injury arising from a violation of an ordinance which created a new duty. The court said: "We do not suppose that the creation of new civil liabilities between individuals was any part of the object for which the power to enact ordinances was granted." On the other hand, in Jetter v. N. Y. &c. R. Co. 2 Abb. Dec. 458, the court, taking an extreme view and overruling some previous decisions, said: "It is an axiomatic truth that every person, while violating an express statute, is a wrong-doer, and as such is ex necessitate negligent in the eye of the law, and every innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to a civil remedy for such injury, notwithstanding any redress the public may also have."

[23] Taylor v. Lake Shore &c. R. Co. 45 Mich. 74; 7 N. W. 728; 40 Am. R. 457. See, also, Monteith v. Ko-

United States held in the case of the death of a boy resulting from a violation of an ordinance requiring railroad companies to fence their right of way in a prescribed manner, that "the duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery."[24] It is also well settled that where the statute prescribes a duty which is owing to an individual or class of individuals, the fact of its violation may constitute negligence, or at least prima facie evidence thereof, and contribute an important element of the injured person's cause of action,[25] even though the omission of the duty may not have constituted negligence before the passage of the law. It has been held that non-performance of such statutory duty, resulting in injury to another, may be pronounced to be negligence as a conclusion of law.[26] There is, however, much conflict among the authorities as to how far the violation of these statutory duties should be deemed to constitute negligence. In some states the statutes themselves provide that where injury follows violation, the violation shall constitute a prima facie case of negligence,[27] and in one of these states where violation of the statute is followed by injury, the element of proximate cause has been conclusively presumed by the courts.[28] These last decisions are, as it seems to us, unsound, and the rule, supported by the weight of authority, is that while one who violates

komo &c. Co. 159 Ind. 149, 152, 153; 64 N. E. 610; 58 L. R. A. 944, and cases cited.

[24] Hayes v. Michigan Cent. R. Co. 111 U. S. 228; 4 Sup. Ct. 369, per Matthews, J.

[25] Hayes v. Michigan Cent. R. Co. 111 U. S. 228; 4 Sup. Ct. 369.

[26] Terre Haute & Indianapolis R. Co. v. Voelker, 129 Ill. 540; 22 N. E. 20; 39 Am. & Eng. R. Cas. 615; Central R. &c. Co. v. Smith, 78 Ga. 694; 3 S. E. 267; 34 Am. & Eng. R. Cas. 1. See, also, Stafford v. Chippewa &c. R. Co. 110 Wis. 331; 85 N. W. 1036, 1045, citing text.

[27] In Mississippi, Georgia and Tennessee. See Chicago &c. R. Co. v. Trotter, 60 Miss. 442; Mobile &c. R. Co. v. Dale, 61 Miss. 206; 20 Am. & Eng. R. Cas. 651; Columbus &c. R. Co. v. Kennedy, 78 Ga. 646; 3 S. E. 267; 31 Am. & Eng. R. Cas. 92; Tennessee R. Co. v. Walker, 11 Heisk. (Tenn.) 383. See, also, Stafford v. Chippewa &c. R. Co. 110 Wis. 331; 85 N. W. 1036.

[28] Tennessee R. Co. v. Walker, 11 Heisk. (Tenn.) 383; Hill v. Louisville &c. R. Co. 9 Heisk. (Tenn.) 823; Nashville &c. R. Co. v. Thomas, 5 Heisk. (Tenn.) 262. But see Louisville &c. R. Co. v. Connor, 9 Heisk. (Tenn.) 19.

a statute or an ordinance[29] may be regarded as a wrong-doer, and the act regarded as negligence, still it may or may not be the proximate cause of the injury complained of according to the facts of the particular case. In some courts, however, it is held that the mere violation of a municipal ordinance is not negligence per se, but merely evidence of it.[30] It is generally held, and this we regard as the true doctrine, that the element of proximate cause must be established, and that it will not necessarily be presumed from the fact that an ordinance or statute has been violated.[31] Negligence,

[29] Wesley City Coal Co. v. Healer, 84 Ill. 126; Pennsylvania Co. v. Hensil, 70 Ind. 569; 36 Am. R. 188; 6 Am. & Eng. R. Cas. 79; Chicago &c. R. Co. v. Boggs, 101 Ind. 522; 51 Am. R. 761; Pennsylvania R. Co. v. Stegemeier, 118 Ind. 305, 309; 20 N. E. 843; 10 Am. St. 136; Indiana &c. R. Co. v. Barnhart, 115 Ind. 399, 410; 16 N. E. 121; Pennsylvania R. Co. v. Horton, 132 Ind. 189; 31 N. E. 45; Wanless v. N. E. R. W. Co. L. R. 6 Q. B. 481 (L. R. 7 H. L. Cas. 12); Railway Co. v. Schneider, 45 Ohio St. 678; 17 N. E. 321; Baker v. Pendergast, 32 Ohio St. 494; 30 Am. R. 620; St. Louis &c. R. Co. v. Dunn, 78 Ill. 197; Correll v. Burlington &c. R. Co. 38 Iowa, 120; 18 Am. R. 22; San Antonio &c. Ry. Co. v. Bowles, 88 Tex. 634; 32 S. W. 880. See, also, Salisbury v. Herchenroder, 106 Mass. 458; 8 Am. R. 354; Baltimore City R. Co. v. McDonnell, 43 Md. 552.

[30] Lane v. Atlantic Works, 111 Mass. 136; Hanlon v. South Boston &c. R. Co. 129 Mass. 310; Liddy v. St. Louis R. Co. 40 Mo. 506; Kelley v. Hannibal &c. R. Co. 75 Mo. 138; Baltimore &c. R. Co. v. McDonnell, 43 Md. 534; Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91; 2 Am. & Eng. R. Cas. 172; Van Horn v. Burlington &c. R. Co. 59 Iowa, 33; 12 N. W. 752; 7 Am. & Eng. R. Cas. 591; Faber v. St. Paul &c. R. Co. 29 Minn. 465; 13 N. W. 902; 8 Am. & Eng. R. Cas. 277; Knupfie v. Knickerbocker &c. Co. 84 N. Y. 491; Hayes v. Michigan Cent. R. Co. 111 U. S. 228; 4 Sup. Ct. 369; Meek v. Pennsylvania R. Co. 38 Ohio St. 632; 13 Am. & Eng. R. Cas. 643, and note. Upon principle this seems to us to be a better rule than that which makes the violation of an ordinance, or even a statute, conclusive proof of negligence or negligence per se. See, also, Henderson v. Durham Traction Co. 132 N. Car. 779; 44 S. E. 598, 600.

[31] Hayes v. Michigan Cent. R. Co. 111 U. S. 228; 4 Sup. Ct. 369; 15 Am. & Eng. R. Cas. 394; Pennsylvania R. Co. v. Hensil, 70 Ind. 569; 36 Am. R. 188; Baltimore &c. R. Co. v. Young, 146 Ind. 374; 45 N. E. 479; Lake Erie &c. R. Co. v. Mikesell, 23 Ind. App. 395; 55 N. E. 488; Philadelphia &c. R. Co. v. Stebbing, 62 Md. 504; 19 Am. & Eng. R. Cas. 36; Cooley Torts, 657, 658; Patterson's Ry. Accident Law, 40; Kelley v. Hannibal &c. R. Co. 75 Mo. 138; 13 Am. & Eng. R. Cas. 638. See, also, post, §§ 1155, 1156. The text is also quoted with ap-

no matter in what it consists, can not create a right of action unless it is the proximate cause of the injury complained of by the plaintiff.

§ 711a. Whether private injury essential to recovery of penalty.—Proof of private injury is not required under the Wisconsin statute[32] which provides that if any railroad corporation shall violate any of the regulations of the statute it shall be liable to any person injured for all damages and "in addition" shall forfeit not less than the sum specified as a penalty to be recovered in an action in the name of the state.[33]

§ 712. Action for enforcement of penal statutes.—Actions for the enforcement of statutory penalties against corporations are generally held to be civil actions.[34] In jurisdictions in which corporations are held to be included in the term "persons" in general statutes, the action should conform to the usual or prescribed action under such statutes, be it civil or criminal. It is held in some jurisdictions which still recognize common law crimes and actions, that the statutory penalty may be recovered by indictment or information unless such mode is excluded by the statute, and that the prescribed remedy is only cumulative to the one given by the common law.[35] In some other jurisdictions it has been held that both the

proval in Henderson v. Durham Traction Co. 132 N. Car. 779; 44 S. E. 598, 600.

[32] Revised Statutes Wisconsin 1898, § 1809a.

[33] State v. Wisconsin &c. R. Co. 128 Wis. 79; 107 N. W. 295.

[34] Katzenstein v. Raleigh &c. R. Co. 84 N. Car. 688; 6 Am. & Eng. R. Cas. 464; Rockwell v. State, 11 Ohio, 130; Edenton v. Wool, 65 N. Car. 379; 3 Black's Com. 160. See, also, McCoun v. New York Central &c. R. Co. 50 N. Y. 176; Durham v. State, 117 Ind. 477; 19 N. E. 327; Western Union Tel. Co. v. Scircle, 103 Ind. 227; 2 N. E. 604; Corporation &c. v. Eaton, 4 Cranch (U. S.), 352; Davis v. State, 119 Ind. 555; 22 N. E. 9; Chaffee v. United States, 18 Wall. 516. As elsewhere stated, however, it is held that an action to recover a penalty, although civil in form, is essentially criminal in its nature. Ante, § 646, p. 930, note 1. But it is held that the state need not prove the offense beyond a reasonable doubt. State v. Chicago &c. R. Co. 122 Ia. 22; 96 N. W. 904; 101 Am. St. 254.

[35] United States v. Howard, 17 Fed. 638; State v. Wabash &c. R. Co. 89 Mo. 562; State v. Corwin, 4 Mo. 609; Hodgman v. People, 4 Den. (N. Y.) 235; State v. Helgen, 1 Speer (S. Car.), 310; State v. Meyer, 1 Speer (S. Car.), 305; State v. Maze, 6 Humph. (Tenn.) 17. It is held that the Missouri

statutory penalty and the actual damages may be recovered in one action where both arise from the same transaction.[36] In these actions it has been held that it is not required that the plaintiff should prove his case with the same degree of certainty that he would if the action were criminal in form.[37]

§ 713. The informer's rights—Parties.—The informer can not maintain an action in his own name unless plainly authorized by statute, nor can he control such action, without such authority, when brought.[38] It is held that the penalty is a forfeiture to the sovereign for the violation of the law and the share accorded the informer is simply an inducement to the citizen to apprise the public officer of violations.[39] It has also been held that a complaint is defective, on demurrer, if the informer is made plaintiff when only the state can sue, and in one case leave to amend by making the state plaintiff was refused,[40] but other courts have permitted amendments.[41] Where the statute provides for a recovery of the penalty by an action in the name of the state by the prosecuting attorney for the benefit of himself and the school fund the case is not removable to the federal court, although the company is a citizen of another state, on the ground that the prosecuting attorney is the real party in interest.[42] It is said that the same strict construction precludes the state from prosecuting an action where the statute gives that right to the in-

statute permits one bringing a qui tam action to bring the action either civilly or criminally by information. State v. Hannibal &c. Co. 30 Mo. App. 494.

[36] Kansas City &c. R. Co. v. Spencer, 72 Miss. 491; 17 So. 168; Hodges v. Wilmington &c. R. Co. 105 N. Car. 170; 10 S. E. 917; Wells v. New Haven &c. Co. 151 Mass. 46; 23 N. E. 724; 21 Am. St. 423; 44 Am. & Eng. R. Cas. 491, n. See, also, McFarland v. Mississippi River &c. Ry. Co. 175 Mo. 422; 75 S. W. 152.

[37] Texas &c. R. Co. v. Mahaffey (Tex. Civ. App.), 81 S. W. 1047.

[38] Omaha &c. R. Co. v. Hale, 45 Neb. 418; 63 N. W. 849; 50 Am. St. 554, and note; Colburn v. Swett, 1 Metc. (Mass.) 232; Fleming v. Bailey, 5 East, 313; Barnard v. Gostling, 2 East, 569; Drew v. Hilliker, 56 Vt. 641; Nye v. Lamphere, 2 Gray (Mass.), 297; Seward v. Beach, 29 Barb. (N. Y.) 239. But see Chicago &c. Co. v. Howard, 38 Ill. 414.

[39] Omaha &c. R. Co. v. Hale, 45 Neb. 418; 63 N. W. 849; 50 Am. St. 554, and note.

[40] St. Louis &c. R. Co. v. State, 56 Ark. 166; 19 S. W. 572.

[41] See Maggett v. Roberts, 108 N. Car. 174; 12 S. E. 890.

[42] Southern Ry. Co. v. State (Ind. App.), 72 N. E. 174. See, also, Huntington v. Attrill, 146 U. S. 657; 13 Sup. Ct. 224.

former,[43] but to exclude the state, the right in the informer must be plainly conferred by the statute, although not necessarily in express words,[44] and it has been held that where one moiety goes to the state, the state may prosecute for the whole, unless the informer has commenced a qui tam action.[45] It would seem that the offense should not go unpunished and the state thereby lose its portion of the penalty, simply because no citizen has elected to prosecute an action in the role of informer. It has also been held that where the state prosecutes a civil action for the penalty or when the grand jury returns an indictment it must appear of record that the informer complained in the prescribed manner, under the statute,[46] or the whole penalty will go to the state. No acts can render one an informer unless he actually gave the information leading to conviction,[47] nor can a person claim an informer's share of the penalty simply because he is the sole witness in the case.[48] Some of the courts hold that if the party injured is authorized to sue for the penalty, any one of several parties jointly injured by the same offense may sue and recover the penalty,[49] but it has been held, on the other hand, that a penal action can not be maintained by several persons jointly as common informers unless the statute authorizes such a proceeding,[50] although it seems that if the penalty is specific and does not rest in computation, only one action can be brought,

[43] Higby v. People, 5 Ill. 165; United States v. Laescki, 29 Fed. 699. See, also, McFarland v. Mississippi River &c. R. Co. 175 Mo. 422; 75 S. W. 152.

[44] The clause "who may prosecute," or "who prosecutes" has been held sufficient to show the legislative intent. Drew v. Hilliker, 56 Vt. 641. A common informer has the right to sue under a statute giving the penalty "to any person who may prosecute therefor." Nye v. Lamphere, 2 Gray (Mass.), 297. In United States v. Laescki, 29 Fed. 699; the use of the language "recoverable, one-half to the use of the informer" in the statute was held to authorize the informer to sue. See, also, Lynch v. The Economy, 27 Wis. 69.

[45] Commonwealth v. Howard, 13 Mass. 221; State v. Bishop, 7 Conn. 181; Rex. v. Hymen, 7 T. R. 532.

[46] Commonwealth v. Frost, 5 Mass. 53; Commonwealth v. Davenger, 10 Phila. (Pa.) 478; State v. Smith, 49 N. H. 155.

[47] Brewster v. Gelston, 1 Paine (U. S.), 426.

[48] Williamson v. State, 16 Ala. 431. See United States v. Conner, 138 U. S. 61; 11 Sup. Ct. 229.

[49] Phillips v. Bevans, 23 N. J. L. 373.

[50] Commonwealth v. Winchester, 3 Pa. L. J. Rep. 34.

and the parties injured must join in a single action in order that all may secure their respective shares.[51] The party who first commences a qui tam action thereby acquires an interest in the penalty of which he can not be divested by a subsequent suit by another informer, even though judgment first be awarded in the latter suit,[52] but while the informer, by first instituting suit or, perhaps by giving the necessary information to the prosecutor, acquires a right superior to any other informer of the same offense, he does not acquire a vested right to the penalty until after judgment,[53] and his right to a share of a forfeiture does not vest until the money is ready for distribution. Accordingly, his share of the penalty will be determined by the law in force at the time of the final decree directing distribution.[54] By some of the statutes a private citizen is given the right to sue in his own name to recover the penalty, where, after a certain time, the proper officers having had notice of the offense, fail to sue for the state, and in such a case it is no defense that the suit is brought without authority of such officers or without notice to them.[55] Upon recovery, the informer properly designated on the record as such may secure his share of the penalty by motion to have it paid to him.[56] It has been held that the fact that the informer rode on trains repeatedly for the sole purpose of accumulating penalties accruing by reason of overcharges in fare will not constitute a defense, and the penalties may be collected.[57] In one instance it

[51] Edwards v. Hill, 11 Ill. 22.

[52] Beadleston v. Sprague, 6 Johns. (N. Y.) 101; Pike v. Madbury, 12 N. H. 262.

[53] St. Mary's v. State, 12 Ga. 475; Chicago &c. R. Co. v. Adler, 56 Ill. 344; Confiscation cases. 7 Wall. (U. S.) 454.

[54] United States v. About Twenty-five Thousand Gallons &c. 1 Ben. (U. S.) 367; United States v. Twenty-five Thousand Segars, 5 Blatchf. (U. S.) 500; United States v. Eight Barrels Distilled Spirits, 1 Ben. (U. S.) 472; United States v. Connor, 138 U. S. 61; 11 Sup. Ct. 229. But in Indiana, Missouri, Kentucky and elsewhere this common law rule has been altered somewhat by statute and it is only necessary that the penalty should have accrued before the repeal of the statute imposing it.

[55] Commissioners v. Purdy, 13 Abb. Pr. (N. Y.) 434; 36 Barb. (N. Y.) 266; Root v. Alexander, 63 Hun (N. Y.), 557; 18 N. Y. S. 632. See Pomroy v. Sperry, 16 How. Pr. (N. Y.) 211.

[56] Hull v. Welsh, 82 Iowa, 117; 47 N. W. 982.

[57] St. Louis &c. R. Co. v. Gill, 54 Ark. 101; 15 S. W. 18; 11 L. R. A. 452; Fisher v. New York &c. R. Co. 46 N. Y. 644; Parks v. Nashville &c. R. Co. 13 Lea (Tenn.), 1; 49 Am. R. 655; 18 Am. & Eng. R. Cas. 404.

was held that in case of the compromise of an action for a penalty the informer was entitled to his share of the amount the same as if it had been prosecuted to judgment.[58] But, ordinarily, penal actions brought qui tam cannot be compromised without leave of the court,[59] and as a general rule it will require that the portion due the state be paid.[60] Furthermore, the law does not concern itself with the motives of the party seeking to enforce a penalty. This is entirely outside the issue, and it is not in any wise material that the informer at the time of noting a violation of the law had in mind the matter of collecting the statutory penalty.[61]

§ 714. The penalty—Computation.—Where the statute simply prescribes a maximum and minimum penalty, and does not specify who shall fix the amount, it has been held that the question is for the jury.[62] And if the statute directs that the penalty shall equal double the value of certain goods, the jury may determine the value of the goods by verdict, and the court may double the amount,[63] but if, after proper instructions, the jury find for a specific sum, that sum is presumed to be twice the value of the goods, unless otherwise shown in the verdict.[64] If the offense is single and continuous and it is plain that the statute only contemplates one offense, it is held that only one penalty will have accrued up to the time the action is brought,[65] but where a specific penalty is declared for each separate

[58] Hull v. Welsh, 82 Iowa, 117; 47 N. W. 982.

[59] Middleton v. Wilmington &c. R. Co. 95 N. Car. 167; Caswell v. Allen, 10 Johns. (N. Y.) 118; Raynham v. Rounseville, 9 Pick. (Mass.) 44.

[60] Wardens v. Cope, 2 Ired. (N. Car.) 44. See Bradway v. LeWorthy, 9 Johns. (N. Y.) 251; Haskins v. Newcomb, 2 Johns. (N. Y.) 405.

[61] Hennion v. New York St. R. Co. 101 N. Y. S. 100.

[62] McDaniel v. Gate City Co. 79 Ga. 58; 3 S. E. 693; Hines v. Darling, 99 Mich. 47; 57 N. W. 1081. It seems to us that a statute which does not designate the penalty, or give some rule for ascertaining it, should be held invalid.

[63] Dygert v. Schenck, 23 Wend. (N. Y.) 446; 35 Am. Dec. 375, and note.

[64] Cross v. United States, 1 Gall (U. S.), 26.

[65] It has also been held that if the offense was committed by several persons, only one penalty can be recovered, and the offense will not be regarded a distinct offense by each. Palmer v. Conly, 4 Den. (N. Y.) 374; Conley v. Palmer, 2 N. Y. 182; Ingersoll v. Skinner, 1 Den. (N. Y.) 540. Held, under Ohio statute providing that railway companies shall provide a blackboard and register the time

offense, or for each day or week of its continuance, the amount of the judgment may be a matter of computation for the court, after conviction for each offense.[66] In some cases, however, it has been maintained that it was not the legislative intent that an informer be allowed to open a book account of penalties earned, and, delaying suit a year, bring an action for an enormous sum, and that but one penalty could be recovered for all delinquencies prior to each action,[67] and this is on the additional ground that the penalty is not for the satisfaction of the injured party, for he still has his action for damages. But where the language of the statute is plain, courts, although sometimes reluctant, have felt bound to award a penalty for each violation, where the sum amounted to many thousands of dollars.[68] Following the rule of strict construction, it has been held that only one penalty can be assessed where the plaintiff has paid, in one payment, an account covering a large number of overcharges, where the statute provided a penalty for each "collection or demand."[69] In enforcing the federal statute relating to confinement of animals, the courts have refused to construe the law so as

of arrival, lateness, etc., of each train, and providing a penalty of §10 for "each violation of the provisions of the act," that failure to provide a blackboard renders the company liable to only one penalty, although a large number of trains were unregistered. State v. Cleveland &c. R. Co. 8 Ohio C. C. 604. Under the differently worded Indiana statute it was held that one penalty could be collected for each train not registered, no blackboard having been erected. State v. Indiana &c. R. Co. 133 Ind. 69; 32 N. E. 817; 18 L. R. A. 502.

[66] Where the penalty was for each day's continuance, it was held unnecessary to declare in separate counts, but all were properly grouped together. Toledo &c. R. Co. v. Stephenson, 131 Ind. 203; 30 N. E. 1082. But the second offense must be of the same nature as the first, and there must be conviction. Scot v. Turner, 1 Root (Conn.), 163.

[67] Fisher v. New York &c. R. Co. 46 N. Y. 644; Parks v. Nashville &c. R. Co. 13 Lea, 1; 49 Am. R. 655; Murray v. Galveston &c. R. Co. 63 Tex. 407; 51 Am. R. 650, and note. This seems to us the true doctrine. But the statute may so plainly provide for separate prosecutions that nothing remains for the courts but to enforce it as it is written. The Indiana statute in regard to noting the time of arrival of trains on a blackboard authorizes a cumulative penalty. Southern R. Co. v. State (Ind. App.), 72 N. E. 174; 165 Ind. 613; 75 N. E. 272; State v. Indiana &c. R. Co. 133 Ind. 69; 32 N. E. 817; 18 L. R. A. 502.

[68] See State v. Kansas City R. Co. 32 Fed. 722, per Brewer, J.

[69] Porter v. Dawson Bridge Co. 157 Pa. St. 367; 27 Atl. 730. The

to make the confinement of each animal a separate offense, where a large shipment was made.[70] And in a recent Texas case, where the statute provided that the company should be liable for a certain penalty for each week it failed to have water closets at passenger stations, it was held that the penalty could be recovered for each week the company failed to comply with the statute at any station in the county, but not for each station at which it failed to comply with the statute.[71] We have elsewhere discussed the constitutionality of statutes giving double damages.[72] Such statutes are in their nature penal,[73] but are construed by some courts as remedial. Statutes giving the party injured by overcharges a right of action for an amount equal to three and even five times the legal amount of freight have been upheld.[74]

§ 715. When "penalty" and when "liquidated damages."—It is often a close question whether the statute in prescribing an amount to be paid to the person injured by its disregard contemplates the enforcement of a penalty or the liquidation of damages. It arises when the court proceeds to give effect to the widely different rules of construction which apply respectively to penal statutes and to statutes creating or defining a civil liability. It has been held in condemnation proceedings where by the terms of the inquisition the company is required to pay a fixed sum to the owner in case it fails to perform specified conditions that such sum is not a penalty but liquidated damages.[75] And the rule was held to be substantially the same as that which prevails in cases of contracts. Where it is stated

practice of giving penalties to informers has been condemned by able jurists, and certainly statutes giving such penalties should not be extended by construction.

[70] United States v. Boston &c. R. Co. 15 Fed. 209.

[71] Missouri &c. R. Co. v. State (Tex. Civ. App.), 97 S. W. 724.

[72] See ante, § 669.

[73] Bettys v. Milwaukee &c. R. Co. 37 Wis. 323; Missouri Pac. R. Co. v. Humes, 115 U. S. 512; 6 Sup. Ct. 110; 22 Am. & Eng. R. Cas. 557.

[74] Burkholder v. Union Trust Co. 82 Mo. 572; 23 Am. & Eng. R. Cas. 656; Missouri Pac. R. Co. v. Humes, 22 Am. & Eng. R. Cas. 557, and authorities cited; Spealman v. Missouri Pac. R. Co. 71 Mo. 434. A statute awarding five times the legal freight rate to the victim of overcharges was upheld in Herriman v. Burlington &c. R. Co. 57 Iowa, 187; 9 N. W. 378; 10 N. W. 340; 9 Am. & Eng. R. Cas. 339.

[75] Pennsylvania R. Co. v. Reichert, 58 Md. 261; 10 Am. & Eng. R. Cas. 429.

in "clear and unambiguous terms that a certain sum shall be paid by way of compensation upon a breach of the contract, or where the covenant is to do several acts the damages arising from the breach of which are uncertain, and incapable of being ascertained by any fixed pecuniary standard," the sum so fixed will be considered as liquidated damages and not as a penalty.[76] On the other hand it has been as clearly laid down that where the breach is capable of accurate valuation and the parties have agreed on a different sum to be paid in default, such sum is to be regarded as a penalty and not as liquidated damages.[77] The reasoning in these cases has been applied to statutes, in regard to which the same distinction has been drawn, and it has been held that laws prescribing the amount to be paid upon a violation, where without reference to the statute the person injured has a cause of action, simply prescribe the measure of damages and do not denounce a penalty;[78] in other words, that such statutes are not penal but remedial.[79] In some states it is held that the "forfeiture" as designated by the statute is a penalty as is also the attorney's fee allowed,[80] but while the attorney's fees may be allowed in addition to the statutory amount prescribed, it is said that it can not be maintained that they constitute a "penalty for exercising the right of defense."[81] The Connecticut statute providing that railroad companies shall be liable for fires kindled by sparks from their locomotives, although they are free from negligence, is held not to be penal but remedial,[82] and statutes allowing treble the usurious interest collected, double damages for fraudulently removing property, and double damages for injuries resulting from defects in highways have respectively been held to be remedial statutes which should be liberally construed.[83] Even revenue laws imposing

[76] Geiger v. The Western Maryland R. Co. 41 Md. 4.

[77] St. Louis &c. R. Co. v. Shoemaker, 27 Kan. 677; 11 Am. & Eng. R. Cas. 379.

[78] Houston &c. R. Co. v. Harry, 63 Tex. 256; 18 Am. & Eng. R. Cas. 502.

[79] Frohock v. Pattee, 38 Me. 103; Quimby v. Carter, 20 Me. 218; Reed v. Northfield, 13 Pick. (Mass.) 94; 23 Am. Dec. 662, and note.

[80] Dow v. Beidelman, 49 Ark. 455; 31 Am. & Eng. R. Cas. 14; Kansas Pac. R. Co. v. Mower, 16 Kan. 573; Kansas Pac. R. Co. v. Yanz, 16 Kan. 583.

[81] Burlington &c. R. Co. v. Dey, 82 Iowa, 312; 48 N. W. 98; 12 L. R. A. 436, and note; 31 Am. St. 477.

[82] Newton v. New York &c. R. Co. 56 Conn. 21; 12 Atl. 644; 32 Am. & Eng. R. Cas. 347. In our opinion this doctrine is of doubtful soundness.

[83] Gray v. Bennett, 3 Met. (Mass.)

forfeitures for fraud were held by the supreme court of the United States not to be technically penal in such a sense as to require strict construction.[84] On the other hand, it is held that statutes relating to criminal offenses and all statutes which impose as punishment any penalties, pecuniary or otherwise, or forfeitures of money or other property, or which provide for the recovery of damages beyond just compensation to the party injured, whether recovered in a suit by the state or by a private individual, are penal in the sense that they fall under the rule of strict construction.[85] This is the only doctrine that can be defended on principle. The question must, however, necessarily depend largely upon the language of the particular statute and is to be determined, in part, by the apparent intention that the statute carries of providing for redress or for punishment.

§ 716. Indictment of railroad companies for causing death.—In some of the states railroad companies are by statute made subject to indictment and fine in case the death of any person is caused by their negligence or that of their servants. Such statutes have been held constitutional and valid.[86] It has been held under the old New Hampshire statute that the form of the indictment is governed, in the main at least, by the principles of the criminal law,[87] but as the fine or penalty is recoverable, under most of the statutes, for the

522; Stanley v. Wharton, 9 Price, 301; Reed v. Northfield, 13 Pick. (Mass.) 94; 23 Am. Dec. 662. But see, contra, Hines v. Wilmington &c. R. Co. 95 N. Car. 434; 59 Am. R. 250; Coble v. Shoffner, 75 N. Car. 42; Bay City &c. R. Co. v. Austin, 21 Mich. 390; Cohn v. Neeves, 40 Wis. 393.

[84] Taylor v. United States, 3 How. (U. S.) 197.

[85] Henderson v. Sherborne, 2 M. & W. 236; Nicholson v. Fields, 7 H. & N. 810; Brooks v. Western Union Tel. Co. 56 Ark. 224; 19 S. W. 572; Cumberland &c. Canal Corp. v. Hitchings, 57 Me. 146; Bay City &c. R. Co. v. Austin, 21 Mich. 390; Camden &c. R. Co. v. Briggs, 22 N. J. L. 623; Schooner Bolina, 1 Gall. (U. S.) 75; Hines v. Wilmington &c. R. Co. 95 N. Car. 434; 59 Am. R. 250. See 23 Am. & Eng. Cyc. of Law, 374, 378, 379.

[86] Boston &c. R. Co. v. State, 32 N. H. 215, and authorities cited in following notes infra. But see Smith v. Louisville &c. R. Co. 75 Ala. 449; 21 Am. & Eng. R. Cas. 157.

[87] State v. Manchester &c. R. Co. 52 N. H. 528; State v. Wentworth, 37 N. H. 196. For the history of the New Hampshire legislation and the present statute in that state, see French v. Mascoma &c. Co. 66 N. H. 90; 20 Atl. 363; Tiffany Death by Wrongful Act, § 47.

widow, children, next of kin, heirs or other designated person more or less dependent upon the deceased, it is said that such statutes are designed to take the place of Lord Campbell's act,[88] and it is held that the indictment must show the existence of some person of the class designated.[89] It is also held, for the same reason, that the same rules of evidence and principles of law are to be applied on the trial as in analogous civil actions for damages.[90] Thus, under the Maine statute, it has been held that the deceased must be shown to have been free from contributory negligence.[91] But the contrary has been held as to passengers in Massachusetts.[92] In Maine, but not in Massachusetts, it seems that the remedy by indictment is limited to cases where the injured person dies immediately, and is not an employe of the company.[93] The proof should support the theory of the indictment, and a material variance may be fatal to a recovery.[94]

§ 717. Violation of Sunday laws.—It has been held in some in-

[88] State v. Grand Trunk R. Co. 58 Me. 176; 4 Am. R. 258.

[89] State v. Grand Trunk &c. R. Co. 60 Me. 145; Commonwealth v. Eastern R. Co. 5 Gray (Mass.), 473; State v. Gilmore, 24 N. H. 461. Compare Commonwealth v. Boston &c. R. Co. 11 Cush. (Mass.) 517.

[90] State v. Grand Trunk R. Co. 58 Me. 176; 4 Am. R. 258; State v. Maine Cent. R. Co. 77 Me. 490; 21 Am. & Eng. R. Cas. 216; State v. Manchester &c. R. Co. 52 N. H. 528.

[91] State v. Maine Cent. R. Co. 76 Me. 357; 49 Am. R. 622, and note; 19 Am. & Eng. R. Cas. 312; State v. Maine Cent. R. Co. 81 Me. 84; 16 Atl. 368. See, also, State v. Manchester &c. R. Co. 52 N. H. 528.

[92] Commonwealth v. Boston &c. R. Co. 134 Mass. 211; Merrill v. Eastern R. Co. 139 Mass. 252; 29 N. E. 666. As to one not a passenger the same ruling was made as in Maine. Commonwealth v. Boston &c. R. Co. 126 Mass. 61.

[93] State v. Maine Cent. R. Co. 60 Me. 490; State v. Grand Trunk &c. R. Co. 61 Me. 114; 14 Am. R. 552. But see Commonwealth v. Metropolitan &c. R. Co. 107 Mass. 236; Daley v. Boston &c. R. Co. 147 Mass. 101; 16 N. E. 690; 33 Am. & Eng. R. Cas. 298; Commonwealth v. Boston &c. R. Co. 133 Mass. 383; 8 Am. & Eng. R. Cas. 297. The Massachusetts statute has been changed several times, and under some of the acts death need not result, and special provision is also made for recovery where a servant is killed.

[94] See Commonwealth v. Fitchburg R. Co. 120 Mass. 372; Commonwealth v. Fitchburg R. Co. 126 Mass. 472; State v. Maine Cent. R. Co. 81 Me. 84; 16 Atl. 368; Commonwealth v. Boston &c. R. Co. 133 Mass. 383; 8 Am. & Eng. R. Cas. 297.

stances that a railroad company is a person within the purview of general penal statutes against "persons" requiring the observance of Sunday.[95] Many states have regulations looking particularly to the operation of railroads on that day. Some prohibit the running of freight or excursion trains, and the loading or unloading of freight. Some designate the hours during which trains may run or the emergency which shall excuse their running during the prohibited hours.[96] These statutes are upheld as falling properly within the police power, and they are enforced by penalty recoverable sometimes by civil action and in some states by indictment. The weight of authority, however, is to the effect that the running of trains is excluded from the statute on the ground of its being "a work of necessity," where such exception is made,[97] but some well reasoned decisions have held it not to be so.[98] The Georgia statute, prohibiting the running of freight trains on the Sabbath, has been held not to apply to a railroad which begins and ends in other states and which does not run a distance greater than thirty miles in Georgia.[99]

§ 718. Indictment of railroad company for maintaining a nuisance.—A railroad company may be indicted for maintaining a nuisance.[100] Thus, railroad companies have been indicted for placing

[95] State v. Baltimore &c. R. Co. 15 W. Va. 362; 36 Am. R. 803; Sparhawk v. Union &c. R. Co. 54 Pa. St. 401, 439. In West Virginia the law has since been changed by statute. State v. Norfolk &c. R. Co. 33 W. Va. 440; 10 S. E. 813; 43 Am. & Eng. R. Cas. 330.

[96] 2 Stimson Am. Stat. § 8824. See Jackson v. State, 88 Ga. 787; 15 S. E. 905.

[97] Commonwealth v. Louisville &c. R. Co. 80 Ky. 291; 44 Am. R. 475; Augusta R. Co. v. Renz, 55 Ga. 126; Smith v. New York &c. R. Co. 46 N. J. L. 7; 18 Am. & Eng. R. Cas. 399. Carrying forward of trains loaded with stock is a work of necessity and not illegal. Philadelphia &c. R. Co. v. Lehman, 56 Md. 209; 40 Am. R. 415.

[98] Sparhawk v. Union &c. R. Co. 54 Pa. St. 401; Commonwealth v. Jeandell, 2 Grant's Cas. (Pa.) 506; Johnston v. Com. 22 Pa. St. 102. This rule has been changed by statute in Pennsylvania. The decision of Strong, J., in Sparhawk v. Union &c. R. Co. supra, is a valuable contribution to the law on this subject.

[99] Griggs v. State (Ga.) 55 S. E. 179.

[100] Northern Cent. R. Co. v. Commonwealth, 90 Pa. St. 300; 5 Am. & Eng. R. Cas. 318; State v. Vermont Cent. R. Co. 27 Vt. 103; Commonwealth v. New Bedford &c. Co. 2 Gray (Mass.), 339; Reg. v. Great North &c. R. Co. 9 Q. B. 315; Louisville &c. R. Co. v. State, 3 Head (Tenn.), 523; 75 Am. Dec. 778; note

and leaving cars in a public highway,[101] for failing to keep a crossing in repair,[102] for failure to give warnings or signals at crossings,[103] for unlawfully cutting through and obstructing a public highway,[104] and for permitting pools of water to form on their land and become stagnant.[105] So, they are liable for maintaining a private nuisance to those who are specially injured thereby.[106] But there are many acts that might constitute a nuisance if performed by an individual which will not constitute a nuisance by a railroad company. This is especially true where the alleged nuisance merely affects the public. A railroad company authorized by the legislature to construct and operate a road for the public use is thereby relieved from many of the consequences attending the construction and operation of a road by an individual without such authority, and it may, perhaps, be stated as a general rule that, so long as it keeps within the scope of the powers and authority granted, a railroad company is not liable either civilly or criminally for a nuisance which is the necessary result of the construction and operation of its road, in accordance

in 14 Am. & Eng. R. Cas. 152, and authorities in following notes, infra.

[101] State v. Morris &c. R. Co. 23 N. J. L. 360; Cincinnati R. Co. v. Commonwealth, 80 Ky. 137; State v. Western &c. R. Co. 95 N. Car. 602; State v. Troy &c. R. Co. 57 Vt. 144; post, § 719. See, also, Becker v. State, 33 Ind. App. 261; 71 N. E. 188; Mason v. Ohio River R. Co. 51 W. Va. 183; 41 S. E. 418, 421, citing text.

[102] State v. Morris &c. R. Co. 23 N. J. L. 360, and authorities cited; Paducah &c. R. Co. v. Commonwealth, 80 Ky. 147; 10 Am. & Eng. R. Cas. 318; Memphis &c. R. Co. v. State, 87 Tenn. 746; 11 S. W. 946; People v. New York &c. R. Co. 74 N. Y. 302; post, § 719.

[103] Louisville &c. R. Co. v. Commonwealth, 13 Bush (Ky.), 388; 26 Am. R. 205, and note; Louisville &c. R. Co. v. Commonwealth, 80 Ky. 143; 44 Am. R. 468.

[104] Reg. v. Longton Gas Co. 2 El. & E. 651; Commonwealth v. Nashua &c. R. Co. 2 Gray (Mass.), 54; Pittsburgh &c. R. Co. v. Reich, 101 Ill. 157; Fanning v. Osborne, 102 N. Y. 441; Elliott Roads and Streets, 479; post, § 719.

[105] Salem v. Eastern R. Co. 98 Mass. 431; 96 Am. Dec. 650. This, however, was not a prosecution by indictment, but was an action by a city, under a statute, to recover the expense of removing the nuisance.

[106] Baltimore &c. R. Co. v. Fifth Baptist Church, 108 U. S. 317; 2 Sup. Ct. 719; 11 Am. & Eng. R. Cas. 15; Little Rock R. Co. v. Brooks, 39 Ark. 403; 43 Am. R. 277; 17 Am. & Eng. R. Cas. 152; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316; 7 Atl. 432; 56 Am. R. 1; Cogswell v. New York &c. R. Co. 103 N. Y. 10; 8 N. E. 537; 56 Am. R. 6, and note; Brown v. Eastern &c. R. Co. 22 Q. B. 391; 37 Am. & Eng. R. Cas. 558; Jones v. Railroad Co. 107 Mass. 261.

with its charter,[107] although it may be made liable for many acts of commission or omission by express legislation under the police power. It has been held that a provision in the charter of a turnpike company imposing a penalty for failing to keep its road in repairs does

[107] State v. Louisville &c. R. Co. 86 Ind. 114; 10 Am. & Eng. R. Cas. 286; Uline v. New York Cent. &c. R. Co. 101 N. Y. 98; 4 N. E. 536; 54 Am. R. 661; Danville &c. R. Co. v. Commonwealth, 73 Pa. St. 29; Randall v. Jacksonville &c. R. Co. 19 Fla. 409; 17 Am. & Eng. R. Cas. 184; Chope v. Detroit &c. R. Co. 37 Mich. 195; 26 Am. R. 512; Eaton v. Boston &c. R. Co. 51 N. H. 504; 12 Am. R. 147; Rogers v. Kennebec &c. R. Co. 35 Me. 319; Rex v. Pease, 4 B. & Ad. 30; Georgia R. &c. Co. v. Maddox, 116 Ga. 64; 42 S. E. 315, 321, citing text. See, also, Louisville &c. Co. v. Jacobs, 109 Tenn. 727; 72 S. W. 954; 61 L. R. A. 188, 189, citing text. Certainly this is true as to the state, but it is frequently said that the legislature can not authorize a private nuisance, and it can not take away or destroy individual rights, such as the right of access by authorizing additional burdens upon a highway. Elliott Roads and Streets, 484, 485, and authorities cited. Where property has been taken, however, under the right of eminent domain the property owners are presumed to have been compensated at the time it was taken, for the inconvenience arising from the ordinary operation of the road. Clark v. Hannibal &c. R. Co. 36 Mo. 202; Porterfield v. Bond, 38 Fed. 391; Dearborn v. Boston &c. R. Co. 24 N. H. 179; Chicago &c. Co. v. Loeb, 118 Ill. 203; 8 N. E. 460; 59 Am. R. 341, and note, and numerous authorities cited; Lafayette &c. Co. v. New Albany &c. Co. 13 Ind. 90; 74 Am. Dec. 246; Swinney v. Fort Wayne &c. Co. 59 Ind. 205; Lafayette &c. Co. v. Murdock, 68 Ind. 137; Indiana &c. Co. v. Allen, 113 Ind. 308; 15 N. E. 451; 3 Am. St. 650; White v. Chicago &c. Co. 122 Ind. 317; 23 N. E. 782; 7 L. R. A. 257. "Railroads cannot be operated without fuel, and proper structures for supplying engines therewith at convenient points for that purpose. They are necessarily incidental to the operation of the road. The owners of property near a railroad necessarily suffer inconvenience, such as detention by trains upon the track, the noise of passing trains, the smoke emitted from engines and the like, for which they cannot recover in a suit for damages." Pierce Railroads, 210; Rorer Railroads, 457; Randle v. Pacific &c. Co. 65 Mo. 325; Parrot v. Cincinnati &c. Railway Co. 10 Ohio St. 624; Cosby v. Owensboro Railway Co. 10 Bush (Ky.), 288; Struthers v. Dunkirk &c. Railway Co. 87 Pa. St. 282; Dunsmore v. Central &c. R. Co. 72 Iowa, 182; 33 N. W. 456. See, also, Pennsylvania Co. v. Lippincott, 116 Pa. St. 472; 9 Atl. 871; 2 Am. St. 618; Pennsylvania R. Co. v. Marchant, 119 Pa. St. 541; 13 Atl. 690; 4 Am. St. 659. A city ordinance attempting to authorize the obstructing of a highway crossing for thirty minutes has been held unreasonable. J. K. & W. H. Gilcrest Co. v. Des Moines, 128 Ia. 49; 102 N. W. 831.

not, ipso, facto, take away its liability to indictment,[108] and it has also been held, on the other hand, that a corporation can not be indicted for maintaining a nuisance while in the hands of a receiver.[109] But, while this is doubtless true when the nuisance is created and maintained by the receiver, we think there may be cases where the company remains in existence, in which the company might be held liable for a nuisance caused by itself and not connected with the operation of the road by the receiver.

§ 718a. Indictment under separate coach act—Variance.—In many states there are statutes requiring separate coaches for white people and for colored people. A railroad company, indicted for failure to furnish separate coaches for the transportation of white and colored passengers under a statute making that an offense, can not be convicted where the proof merely shows a discrimination in the quality and convenience of the separate coaches, and this is made another offense by the statute.[110]

§ 719. Obstruction of highways.—Railroad companies, in many jurisdictions, are liable to indictment for the obstruction of public highways, sometimes under general statutes and sometimes under statutes directed specifically against them.[111] In Tennessee it is held that a railroad company is indictable, under the common law, for obstructing highways while constructing their road, if they can prevent obstruction of the highway by building bridges or substituting a road, which must be done within a reasonable time, and that this is the rule, whether the charter prohibits the obstruction or not.[112]

[108] Susquehanna &c. Turnpike Co. v. People, 15 Wend. (N. Y.) 267; President &c. v. People, 9 Barb. (N. Y.) 161.

[109] State v. Vermont Cent. R. Co. 30 Vt. 108; State v. Wabash R. Co. 115 Ind. 466; 17 N. E. 909; 1 L. R. A. 179.

[110] Illinois &c. R. Co. v. Commonwealth, 74 S. W. 1076; 25 Ky. L. 295.

[111] State v. Morris &c. R. Co. 23 N. J. L. 360; State v. Vermont Cent. R. Co. 27 Vt. 103, 107; Louisville &c. R. Co. v. State, 3 Head (Tenn.), 523; 75 Am. Dec. 778; Northern Cent. R. Co. v. Commonwealth, 90 Pa. St. 300. See, also, Becker v. State, 33 Ind. App. 261; 71 N. E. 188.

[112] Louisville &c. R. Co. v. State, 3 Head (Tenn.), 523; 75 Am. Dec. 778, citing Redfield Railways, 515–518; Commonwealth v. Erie &c. R. Co. 27 Pa. St. 339; 67 Am. Dec. 471.

In most of the states the matter is regulated by statutes which prescribe the penalty and the mode of collecting it,[113] but in the absence of statutes the railroad company is amenable to the common law. In Indiana the statute imposes a penalty upon "any person" who shall, "unnecessarily and to the hindrance of passengers," obstruct any highway, and declares that the word "persons" shall here include corporations. Strictly construing this statute, the court held that an action seeking to recover the penalty for failure to restore a highway, after construction of the railroad, would not lie, but said that the company could be compelled, by mandate, to restore the highway to its original condition.[114] Under the same statute the company was required to pay the penalty for each day of the continuance of obstruction, where the road was constructed at such a grade as to make the highway passing under it impassable.[115] Railroad companies, in most states, are made liable to penalties for obstructing a passage over a highway by allowing their trains to stand on crossings beyond a reasonable or necessary time.[116] It has been held that the simple stopping of trains on the highway does not constitute the offense unless it has actually obstructed travel.[117] A railroad company has been held not to be liable to a fine for obstructing a street in a town having no ordinance on the subject where the statute provides for a fine for obstructing a street for a longer time "than the ordinance shall prescribe."[118] So a railroad company may be liable for the acts of its servants in obstructing streets in violation of law, notwithstanding its instructions to its servants to conform

[113] See Northern Cent. R. Co. v. Commonwealth 90 Pa. St. 300; Pittsburgh &c. R. Co. v. Commonwealth, 101 Pa. St. 192; Illinois &c. R. Co. v. State, 71 Miss. 253; 14 So. 459; State v. Floyd, 39 S. Car. 23; 17 S. E. 505; State v. Dubuque &c. Railroad Co. 88 Iowa, 508; 55 N. W. 727; Corning v. Head, 33 N. Y. S. 360; 86 Hun (N. Y.), 12.

[114] Cummins v. Evansville &c. R. Co. 115 Ind. 417; 18 N. E. 6, citing Indianapolis &c. R. Co. v. State, 37 Ind. 489; State v. Demaree, 80 Ind. 519; Clawson v. Chicago &c. R. Co. 95 Ind. 152.

[115] Toledo &c. R. Co. v. Stephenson, 131 Ind. 203; 30 N. E. 1082.

[116] See Commonwealth v. Boston &c. R. Co. 135 Mass. 550; Illinois &c. R. Co. v. State, 71 Miss. 253; 14 So. 459; ante, § 718.

[117] Illinois &c. R. Co. v. People, 49 Ill. App. 538, 540, 542. See, also, Hinchman v. Pere Marquette R. Co. 136 Mich. 341; 99 N. W. 277; 65 L. R. A. 553; Crowley v. Chicago &c. R. Co. 122 Wis. 287; 99 N. W. 1016. But this must depend upon the particular statute involved.

[118] Illinois &c. R. Co. v. State, 71 Miss. 253; 14 So. 459.

to the law.[119] Railroad companies necessarily have the right to construct their road upon their right of way over highways, but the common law, and, in many states, special laws relating to highways, require that they shall do so without unnecessary inconvenience to the public. The right of way over public highways is generally obtained on the condition, either implied or specified in the grant or condemnation proceedings, that after construction the highway shall be restored to a condition at least as good as the original, and upon failure of such restoration prosecution may follow,[120] and it is not necessary that a demand first be made upon the defendant to restore the highway.[121] Where the company claims to have constructed a sufficient substitute for the highway impaired the question is for the jury.[122]

§ 720. **Failure to maintain accommodations at stations.**—It is generally conceded that railroad companies may, by statute, be required to maintain such station-houses as will accommodate their passengers, and it has even been held by some courts, in the absence of express statutory requirement, that mandamus will lie to compel the construction of a station at a proper and necessary place.[123] But in some states there are statutes prescribing penalties for such omission, which may be enforced by suit,[124] and it has been held, in the

[119] Commonwealth v. New York &c. R. Co. 112 Mass. 412.

[120] State v. Ohio River R. Co. 38 W. Va. 242; 18 S. E. 582; State v. Monongahela R. Co. 37 W. Va. 108; 16 S. E. 519; Chicago &c. R. Co. v. People, 44 Ill. App. 632; People v. New York &c. R. Co. 89 N. Y. 266; 10 Am. & Eng. R. Cas. 266; People v. Chicago & Alton R. Co. 67 Ill. 118; Paducah &c. R. Co. v. Commonwealth, 80 Ky. 147; 10 Am. & Eng. R. Cas. 318; Pittsburgh &c. R. Co. v. Commonwealth, 101 Pa. St. 192; 10 Am. & Eng. R. Cas. 321. See Louisville &c. R. Co. v. Commonwealth, 16 Ky. L. 68; 26 S. W. 536.

[121] Corning v. Head, 33 N. Y. S. 360; 86 Hun (N. Y.), 12.

[122] State v. Monongahela R. Co. 37 W. Va. 108; 16 S. E. 519; Roberts v. Chicago &c. R. Co. 35 Wis. 679.

[123] State, ex rel. Mattoon v. Republican &c. R. Co. 17 Neb. 647; 52 Am. R. 424; 22 Am. & Eng. R. Cas. 500; State, ex rel. Moore v. Chicago &c. R. Co. 19 Neb. 476; 27 N. W. 434. But see ante, § 641.

[124] Bonham v. Columbia &c. R. Co. 26 S. Car. 353; 2 S. E. 127; 30 Am. & Eng. R. Cas. 177; State v. Wabash &c. R. Co. 83 Mo. 144; 25 Am. & Eng. R. Cas. 133; State v. Concord &c. R. Co. 59 N. H. 85; State v. Alabama &c. Co. 67 Miss. 647; 7 So. 502; 42 Am. & Eng. R. Cas. 681; State v. Kansas City &c. R. Co. 32 Fed. 722.

absence of a penal statute, that where the station is poorly kept and is unsuitable for its purpose, the company may be liable to indictment and fine for criminal negligence in the performance of its public duties.[125] Where two companies had both violated a statute by not providing waiting-rooms at the crossing of their roads, it was held that either was liable separately, and that they need not be joined as defendants, and one company was compelled to pay the penalty for each day of the continuance of the violation.[126] Where it was made the duty of the railroad commission to direct the building of station-houses and to prescribe their dimensions, the company was held not liable to the penalty for each day of a violation of the order of the commission, as the commissioners had failed to prescribe the dimensions.[127] In most of the states there are statutes requiring railway companies to maintain stations and freight depots either under the order of railway commissioners or where some prescribed population or amount of business exists to demand them, and in some cases the offices and waiting rooms are required to be open and in condition to receive the public for a designated time before the arrival of trains. In some instances the neglect to follow the statute constitutes a misdemeanor on the part of the officer or servant, and in other cases the statute denounces a penalty against the corporation.[128] A statute imposing penalties for the failure of railroad companies to maintain water closets at passenger stations has been sustained against the objection that it amounted to a deprivation of property without due process of law.[129] But it has been held that a statute requiring water closets at stations does not apply to mere flag stations at which there are no buildings and no agent.[130]

§ 720a. Indictment for failure to maintain accommodations.— Under the Kentucky statute requiring every railroad company to

[125] McKinney v. I. C. R. Co. 6 Iowa Ry. Com. 557.

[126] State v. Kansas City &c. R. Co. 32 Fed. 722, per Brewer, J.

[127] State v. Alabama &c. R. Co. 67 Miss. 647; 7 So. 502; 42 Am. & Eng. R. Cas. 681. As to extent of power of railroad commissions, see chapter on State Railroad Commissions, ante.

[128] 2 Stimson Am. Stat. § 8803.

[129] Missouri &c. R. Co. v. State (Tex. Civ. App.), 97 S. W. 720.

[130] State v. Baltimore &c. R. Co. (W. Va.) 56 S. E. 518. And so as to a statute requiring ticket offices and waiting rooms to be kept open at least thirty minutes before the schedule time for the departure of passenger trains. Sandifer v. Louisville &c. R. Co. 28 Ky. L. 464; 89 S. W. 528.

provide a suitable waiting room in cities and towns, and at such other stations as the railroad commissioners of the state may require, an indictment against a railroad company for failing to provide a waiting room at a certain village on its line was held fatally defective because of its failure to charge that the railroad commission had ordered the company to maintain such a station.[131]

§ 721. Statutory signals—Stops at crossings.—The legislatures of the different states possess and freely exercise the power to prescribe regulations for the moving and operation of trains with safety both to the passengers and to the public. In most cases they require that each locomotive shall carry a bell and whistle and prescribe the signals which shall be given upon approaching crossings, upon starting trains, or while moving through populous neighborhoods. Most cities exercise the power through ordinances.[132] These regulations are enforced sometimes by penalty against the corporation and sometimes by fine or even imprisonment of the servant who disregards them.[133] Where the statute imposes a penalty for each failure to give the statutory signals, the penalty may be collected once for each time a crossing is passed without the giving of the signals,[134] and it has been held that the regulation applies whether the crossing be at grade or not.[135] While, ordinarily, an action for damages

[131] Commonwealth v. Illinois Cent. R. Co. 27 Ky. L. 763; 86 S. W. 542.

[132] Pittsburgh &c. Co. v. Brown, 67 Ind. 45; 33 Am. Rep. 73; Galena &c. R. Co. v. Loomis, 13 Ill. 548; 56 Am. Dec. 471; Commonwealth v. Eastern R. Co. 103 Mass. 254; 4 Am. R. 555; Kaminitsky v. Northeastern R. Co. 25 S. Car. 53; Galena &c. R. Co. v. Appleby, 28 Ill. 283. See 2 Stimson American Statutes, §§ 8814, 8822.

[133] People v. New York &c. R. Co. 25 Barb. (N. Y.) 199; State v. Kansas City &c. R. Co. 54 Ark. 546; 16 S. W. 567; St. Louis &c. R. Co. v. State, 58 Ark. 39; 22 S. W. 918; Missouri &c. R. Co. v. Reynolds (Tex.), 26 S. W. 879; Beck v. Portland &c. R. Co. 25 Ore. 32; 34 Pac. 753; Western Union R. Co. v. Fulton, 64 Ill. 271; St. Louis &c. R. Co. v. State, 55 Ark. 200; 17 S. W. 806. An ordinance imposing imprisonment upon the person in charge of train who crosses a street, upon which street cars run, without being signaled by the watchman required to be at the crossing is held valid as within the grant of powers of the city. State v. Cozzens, 42 La. Ann. 1069; 8 So. 268.

[134] People v. New York &c. R. Co. 25 Barb. (N. Y.) 199.

[135] People v. New York &c. R. Co. 13 N. Y. 78; Johnson v. Southern Pac. R. Co. 147 Cal. 624; 82 Pac. 306; Contra, Jenson v. Chicago &c. R. Co. 86 Wis. 589; 57 N. W. 359; 22 L. R. A. 680. It has been held

will lie where injury results from failure to observe these regulations, there are instances in which the only liability is the penalty.[136] Statutes requiring signals are mandatory, and there is ordinarily no question for the jury where the facts showing a failure to give the signals are undisputed.[137] The enforcement is often by indictment.[138] In many states trains are required to come to a full stop at the crossing with other railroads, except where safety appliances are used or where watchmen are kept constantly, and failure to stop is punishable, under some of the statutes, by indictment.[139]

§ 722. Blackboards and bulletins at stations.—In Indiana and Ohio railroad companies are required to erect at each station having a telegraph office a blackboard, upon which it is the duty of the agent to record the time of the arrival of trains, and "if late, how much." Both statutes have been upheld as constitutional, and the language of the Ohio statute has been construed to impose but one penalty where no blackboard was erected at all, on the ground that the failure to erect the board was a necessary part of each violation.[140] The more explicit language of the Indiana statute has been held to authorize a penalty for each train not recorded after a reasonable time being allowed for the erection of the blackboard, and a large accumulation of penalties has several times been allowed,[141]

that a statute requiring a whistle to be blown at least eighty rods from a crossing does not impose that duty when the train starts within that distance. Gulf &c. R. Co. v. Hall, 34 Tex. Civ. App. 535; 80 S. W. 133.

[136] Chicago &c. R. Co. v. McDaniels, 63 Ill. 122.

[137] Havens v. Erie R. Co. 53 Barb. (N. Y.) 328; Semel v. New York &c. R. Co. 9 Daly (N. Y.), 321. We suppose, however, that there may be cases where necessity will excuse or justify the failure to give the prescribed signals.

[138] Commonwealth v. Boston &c. R. Co. 133 Mass. 383; 8 Am. & Eng. R. Cas. 297, and note citing authorities.

[139] Commonwealth v. Chesapeake &c. R. Co. 16 Ky. L. 481; 29 S. W. 136.

[140] State v. Cleveland &c. R. Co. 8 Ohio C. C. R. 604. It is doubtful whether these statutes referred to in the text are constitutional, but they have been upheld. Pennsylvania Co. v. State, 142 Ind. 428; 41 N. E. 937.

[141] State v. Indiana &c. R. Co. 133 Ind. 69; 32 N. E. 817; 18 L. R. A. 502; State v. Penn. R. Co. 133 Ind. 700; 32 N. E. 822; Pennsylvania Co. v. State, 142 Ind. 428; 41 N. E. 937; Southern R. Co. v. State (Ind. App.), 72 N. E. 174; Same v. Same, 165 Ind. 613; 75 N. E. 272. It has been held that the statute does not apply to night trains at

but it is held not to apply to a company operating a line, the regular time of passage from one end to the other of which is less than the time required to elapse between the posting of the bulletin and the arrival of the train, for the reason that it would be useless, impracticable, and not within the implication of the statute.[142] It has been held that the owner of a railway not operating it is not within the letter or spirit of the act, and that a railway company created by the consolidation of two companies is not liable for a failure of the lessee of one of the extinguished companies to give the blackboard notices.[143] It is also held a valid exercise of the police power to require a railroad company to annually fix its passenger and freight rates and post a schedule in each of its depots or stations, and such a requirement is not a regulation of interstate commerce.[144]

§ 722a. Failure to furnish cars.—Under the rule of strict construction of penal statutes the Texas statute imposing a penalty on a railroad company for failure to furnish cars on demand has been held not to impose the duty on a railroad company to furnish cars for use beyond its own lines.[145] The statute of this state requires the application for cars to state the time when they are desired. An application for a car "as soon as possible" is not sufficient to bring the applicant within the statute.[146] There is authority that an unprecedented demand on a railroad company for cars will excuse the company for failing to provide the cars demanded where the company has sufficient equipment for ordinary demands upon it.[147]

§ 723. Unlawful speed.—The speed of trains moving through cities and towns where not regulated by statute is usually governed by ordinances enacted within the local exercise of the police power. The statutory limitations upon the rate of speed of trains at highway crossings are held to be limitations upon the company's fran-

stations where there is no night telegraph operator. Terre Haute &c. R. Co. v. State, 142 Ind. 428; 41 N. E. 952.

[142] State v. Kentucky &c. Bridge Co. 136 Ind. 195; 35 N. E. 991.

[143] State v. Pittsburgh &c. R. Co. 135 Ind. 578; 35 N. E. 700.

[144] Chicago &c. R. Co. v. Fuller, 17 Wall. (U. S.) 560, affirming Fuller v. Chicago &c. R. Co. 31 Iowa, 187.

[145] Houston &c. R. Co. v. Buchanan (Tex. Civ. App.), 94 S. W. 199.

[146] Texas &c. R. Co. v. Hughes (Tex.), 91 S. W. 567.

[147] St. Louis &c. R. Co. v. Leder Bros. (Ark.) 95 S. W. 170.

chises, and a violation may be prosecuted by indictment or otherwise.[148] Where the penalty is awarded to "the person aggrieved," it has been held to be collectible at the suit of one who suffered injury resulting from the frightening of his horse because of the illegal rate of speed, although no actual collision occurred.[149]

§ 723a. Penalties for detention of baggage.—An Iowa statute provides, "that for every day's detention to travelers in consequence of damage as before described, and necessary delay in suit for same, said companies, owners, or agents shall pay to each person so delayed a sum of not less than three dollars, which amount shall be added to the judgment for damages to property, should the action be sustained."[150] This was held to apply to the delay caused by damage or injury to the baggage only, and not to that consequent upon a detention of the same, or a failure to deliver it.[151] The statute only covers articles that are strictly baggage; it does not apply, for example, to sample cases of merchandise checked as baggage.[152]

§ 724. Other penal regulations.—There are many penal regulations applying to the operation of railroads which are not easily classified. In some states railroad commissioners have jurisdiction to require gates, flagmen, or electric signals at railroad crossings.[153] In other states this power is to a limited extent conferred upon the county commissioners, and may be exercised by the towns and cities through ordinances, and in most of the states the municipal corporations are granted the power to make reasonable regulations.[154]

[148] Horn v. Chicago &c. R. Co. 38 Wis. 463; Mobile &c. R. Co. v. State, 51 Miss. 137; Merz v. Missouri Pac. R. Co. 88 Mo. 672; Haas v. Chicago &c. R. Co. 41 Wis. 44; People v. Boston &c. R. Co. 70 N. Y. 569; Buffalo &c. R. Co. v. Buffalo, 5 Hill (N. Y.), 209; Chicago &c. R. Co. v. Haggerty, 67 Ill. 113; Whitson v. Franklin, 34 Ind. 393; Clark v. Boston &c. R. Co. 64 N. H. 323; 31 Am. & Eng. R. Cas. 548; Pennsylvania &c. R. Co. v. Lewis, 79 Pa. St. 33.

[149] Chicago &c. R. Co. v. People, 120 Ill. 667; 12 N. E. 207; Grand Trunk R. Co. v. Rosenberger, 9 Can. S. C. 311; 19 Am. & Eng. R. Cas. 8.

[150] McClain's Ann. Code, Iowa, § 3370.

[151] Anderson v. Toledo &c. R. Co. 32 Iowa, 86.

[152] McElroy v. Iowa Cent. R. Co. (Iowa), 110 N. W. 915.

[153] Massachusetts, Vermont, Connecticut, Ohio, Michigan, South Carolina. See People v. Long Island R. Co. 58 Hun (N. Y.), 412; 34 N. Y. S. 715.

[154] See 2 Stimson Am. Stat. § 8814; R. S. Ind. 1894, § 5174.

Where a crossing was over a switch track only, and such track was not in use after six o'clock in the evening nor on Sundays or legal holidays, an ordinance requiring the company to maintain a flagman at such crossing "between the hours of 7 o'clock A. M. and 9 o'clock P. M. of each and every day of the year" was held unreasonable and void.[155] Railroads are often required to provide large signs at road crossings to warn travelers of the proximity of the track and its danger, and to maintain and keep in repair proper crossings.[156] In Indiana cities and towns have power to require railroad intersection with streets to be lighted at night.[157] Different states make it a penal offense to place a freight car in the rear of a passenger coach in mixed trains.[158] And most states have regulations requiring that cars shall be rendered comfortable and safe, that tools shall be carried to be available in case of accident, that certain combustibles be not carried, and in several states automatic couplers are required on all freight and passenger cars.[159] Penalties are exacted of railroads in some jurisdictions where employes are retained who are color blind, or in the habit of becoming intoxicated; and in a number of states the law designates the number of brakemen to accompany a train, and prescribes the use of air brakes or others equally as good.[160] Railroad companies are generally required to fence their

[155] Southern Ind. R. Co. v. Bedford, 165 Ind. 272; 75 N. E. 268.

[156] 2 Stimson Am. Stat. § 8814.

[157] R. S. Ind. 1894, § 5173. Also Ohio. See Cincinnati &c. R. Co. v. Sulivan, 32 Ohio St. 152. Several ordinances under the Indiana statute have been held too uncertain and indefinite in two cases. Shelbyville v. Cleveland &c. R. Co. 146 Ind. 66; 44 N. E. 929; Cleveland &c. R. Co. v. Connersville, 147 Ind. 277; 46 N. E. 579; 37 L. R. A. 175; 62 Am. St. 418. But these decisions were modified and an ordinance was upheld in the recent case of Chicago &c. R. Co. v. Crawfordsville, 164 Ind. 70; 72 N. E. 1025.

[158] R. S. Ind. 1894, § 5191; Cook Penal Code (N. Y.), § 422; 2 Stimson Am. Stat. § 8823.

[159] 2 Stimson Am. Stat. § 8821. As to heating cars, see People v. Clark, 14 N. Y. S. 642; People v. N. Y. &c. R. Co. 55 Hun (N. Y.), 409; 8 N. Y. S. 672.

[160] 2 Stimson Am. Stat. §§ 8820, 8825, 8826. Regulation as to color blindness held valid and violation punishable by indictment. Nashville &c. R. Co. v. State, 83 Ala. 71; 3 So. 702, affirmed 128 U. S. 96; 9 Sup. Ct. 28; 38 Am. & Eng. R. Cas. 1. See, also, Baldwin v. Kouns, 81 Ala. 272; 2 So. 638; 31 Am. & Eng. R. Cas. 347. Legislative requirements as to qualifications of employes are valid. Smith v. Alabama, 124 U. S. 465; 8 Sup. Ct. 560; 33 Am. & Eng. R. Cas. 425.

right of way, and to maintain cattle-guards at public crossings. Failure to do so is sometimes punished by specific penalties, but in many cases by imposing an absolute liability for stock killed by reason of the neglect.[161] Sometimes the kind of switch to be used is prescribed by law, and the company is required to construct switches, frogs, guard rails, and the like, in such a manner as to insure the minimum danger to employes or others walking over them.[162] In many states the laws regulate the stopping of trains at stations, designating the length of time a train must stop and the frequency of stopping to be observed at stations of certain descriptions.[163] It is sometimes made a penal offense to fail to announce the stopping place previous to arrival at each station.[164] In a number of states it is provided that upon demand of the federal authorities any or all trains must carry mail or transport troops in time of war, and a heavy penalty is denounced for refusal.[165] There are many other penal regulations in the different states, which we will not enumerate here, but which will be treated under the subject of carriers, and the discussion of the operation of the road.[166]

§ 725. Violations of federal regulations.—Under the constitutional power to regulate commerce congress has enacted federal statutes, which, for the most part, relate to the duties of the railroad as a common carrier, and sometimes extend to legislation for the safety of passengers, and the expeditious and safe carriage of live stock. It has been held that the power to regulate commerce includes that of punishing all offenses against commerce, such as larceny, where it does not thereby interfere with the internal police regula-

[161] Stimson Am. Stat. § 8815.

[162] Stimson Am. Stat. § 8811.

[163] See Davidson v. State, 4 Tex. App. 545; 30 Am. R. 166; Galveston &c. R. Co. v. La Gierse, 51 Tex. 189; Davis v. State, 6 Tex. App. 166. Compare State v. Noyes, 47 Me. 189; 2 Stimson Am. Stat. § 8803.

[164] Parks v. Nashville &c. R. Co. 13 Lea (Tenn.), 1; 49 Am. R. 655; 18 Am. & Eng. R. Cas. 404.

[165] 2 Stimson Am. Stat. §§ 8804, 8805.

[166] See, also, Rohrig v. Chicago &c. R. Co. 130 Ia. 380; 106 N. W. 935 (penalty for failure to redeem tickets); Clark v. American Exp. Co. 130 Ia. 254; 106 N. W. 642; St. Louis &c. R. Co. v. Clay, 77 Ark. 357; 92 S. W. 531; Geer v. Michigan Cent. R. Co. 142 Mich. 511; 106 N. W. 72; Hawes v. Southern R. Co. 73 S. Car. 274; 53 S. E. 285; San Antonio &c. R. Co. v. Burnes (Tex. Civ. App.), 89 S. W. 21.

tions of a state.[167] These statutes being penal are strictly construed, yet the construction must be fair and reasonable so as to give effect to the legislative will. Thus it was held that a statute forbidding the shipment of nitroglycerine on passenger trains extended to a shipment of dynamite and the statutory penalty was exacted.[168]

§ 726. Penalty for confinement of live stock.—Outside of the interstate commerce act of 1887, with its later amendments, there has been little affirmative federal legislation affecting railroad traffic, the most important act looking to the humane treatment of live stock, and requiring that animals shall not be confined in shipment more than twenty-eight hours continuously without unloading for food, rest and water, and providing a penalty for its violation to be recovered in a civil action in the name of the United States.[169] The statute requires that the time of confinement, immediately prior to delivery to the particular carrier, shall be included in estimating the period, and it is held that the carrier who has possession at the time the period expires is alone liable, although the first carrier may have contracted for through carriage,[170] and the statute has been held to apply only to shipments from one state to another.[171] The liability of the company on account of omission of the duty imposed by this statute has been held to be avoided by a special contract by which the shipper agrees to feed and water the stock himself, but this doctrine has been questioned, although followed in many states which have their own regulations.[172] Non-compliance with the statute is not excused by an accident resulting from negligence of the company.[173] In addition to the penalty, the carrier is liable to the owner in actual damages, but it has been held that

[167] United States v. Coombs, 12 Pet. (U. S.) 72; Kentucky &c. Bridge Co. v. Louisville &c. R. Co. 37 Fed. 567; 2 L. R. A. 289; and see penal clauses of various statutes.

[168] United States v. Saul, 58 Fed. 763; Rev. St. U. S. § 5353, and following.

[169] Rev. Stat. U. S. §§ 4386–4389; 5 Thomp. Corp. § 6435. Upheld as constitutional in United States v. Boston &c. Co. 15 Fed. 209. But see recent act of June, 1906, extending the time, under certain circumstances, to thirty-six hours.

[170] Rev. Stat. U. S. § 4386; United States v. Louisville &c. R. Co. 18 Fed. 480.

[171] United States v. East Tennessee &c. R. Co. 13 Fed. 642.

[172] Missouri Pac. R. Co. v. Texas &c. R. Co. 41 Fed. 913.

[173] Newport &c. Co. v. United States, 61 Fed. 488.

the owner must affirmatively plead that the failure to feed, water and provide rest did not fall within the exceptions named in the statute.[174] The courts have refused to construe the statute so as to make the unlawful confinement of each animal a separate offense and thus multiply the penalty.[175]

§ 726a. Penalty for confinement of live stock—State legislation. —Under a Massachusetts statute limiting the time of confinement of animals during transportation,[176] it has been held that it is the duty of the company, in a case where a part of the statutory period of confinement was spent on a connecting road outside the Commonwealth, to refuse the cars, unless they could be unloaded lawfully within the time fixed by the statute limiting the period of continuous confinement.[177] The failure of a railroad company to furnish the necessary facilities for unloading, feeding and watering need not be wanton to render the company liable under the South Carolina statute.[178] And the statute of that state expressly provides that the time the animals have been confined on connecting roads shall be included in estimating the time of confinement.[179] The Texas statute makes it the duty of the carrier to feed and water not oftener than an ordinary prudent person would feed and water his own stock under the same circumstances, and allows this duty to be shifted to the shoulders of the shipper by contract, notwithstanding a provision in the laws of that state denying the common carrier the right to limit his common-law liability.[180] And it is not regarded as necessary to the validity of such contract that a reduction of rates should have been granted.[181] Under this statute it is the duty of the carrier undertaking to transport cattle in cars which are not properly constructed for feeding and watering stock, to furnish places where the stock may be unloaded, watered and fed without injury in all kinds of weather.[182] A shipper who tenders

[174] Hale v. Mo. &c. Co. 36 Neb. 266; 54 N. W. 517.

[175] United States v. Boston &c. R. Co. 15 Fed. 209.

[176] Mass. Pub. Stat. 1882, ch. 207, § 55.

[177] Hendrick v. Boston &c. R. Co. 170 Mass. 44; 48 N. E. 835.

[178] S. Car. Rev. St. 1893, § 1678; Comer v. Columbia &c. R. Co. 52 S. Car. 36; 29 S. E. 637.

[179] Comer v. Columbia &c. R. Co. 52 S. Car. 36; 29 S. E. 637.

[180] Texas &c. R. Co. v. Davis (Tex. Civ. App.), 40 S. W. 167.

[181] Texas &c. R. Co. v. Peters, 31 Tex. Civ. App. 6; 71 S. W. 70.

[182] International &c. R. Co. v. Rae,

his cattle to the carrier in a starved and famished condition for a haul of a few hours, cannot compel the carrier to feed them or incur the penalty provided by the Texas statute for failure to do so.[183]

§ 727. Offenses against railroads—Obstructing mails and interfering with interstate commerce.—Obstructing the United States mails,[184] or unlawfully conspiring and interfering with the passage of trains engaged in interstate commerce,[185] is indictable as a crime under the United States statutes. This has been announced as the law, not only in the cases to which we have just referred, but also in many other cases, elsewhere referred to, growing out of railroad strikes. In one of them, boys only twelve years old, who obstructed a mail car during a strike, were held liable to indictment and punishment for obstructing the mails.[186]

§ 727a. English statutory penalties for riding without paying fare.—In England it is provided by statute,[187] that "if any person travel, or attempt to travel, in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare, and with intent to avoid payment thereof; or if any person, having paid his fare for a certain distance, knowingly and willfully proceed in any such carriage beyond such distance without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof; or if any person knowingly and willfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall, for every such offense, forfeit to the company a sum not exceeding forty shillings." By the same statute it is provided:[188] "For better enforcing the observance of all or any

82 Tex. 614; 18 S. W. 672; 27 Am. St. 926.

[183] Texas &c. R. Co. v. Stribling (Tex. Civ. App.), 34 S. W. 1002.

[184] Charge to Grand Jury, In re, 62 Fed. 828; United States v. Thomas, 55 Fed. 380; United States v. Clark, Fed. Cas. 14805; United States v. Kirby, 7 Wall. (U. S.) 482; United States v. Kane, 9 Sawy. (U. S. C. C.) 614.

[185] Grand Jury, In re, 62 Fed. 834, 840; Thomas v. Cincinnati &c. R. Co. 62 Fed. 803; United States v. Debs, 64 Fed. 724; United States v. Elliott, 62 Fed. 801.

[186] United States v. Thomas, 55 Fed. 380.

[187] Companies Clauses Consolidation Act, 8 Vict. c. 20, § 103.

[188] Ibid. § 109.

of such regulations, it shall be lawful for the company, subject, etc., to make by-laws; * * * provided that such by-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special act; * * * and any person offending against any such by-law shall forfeit for every such offense any sum not exceeding five pounds, to be imposed by the company in such by-laws as a penalty for any such offense." * * * Under § 103 of the foregoing provisions it is held that fraudulent intention is the gist of the offense of traveling without having paid the fare;[189] and the fact that a person rode beyond the station for which he had purchased a ticket, but, on getting out of the train, tendered the full local fare charged by the company for this extra distance, after delivering up his ticket, was no evidence of an intention to defraud the company.[190] Under § 103, by-laws were frequently made requiring a passenger not producing or delivering up his ticket, to pay his fare from the place from which the train originally started, or in default thereof forfeit a sum not exceeding forty shillings. In one case,[191] a by-law of this description, made under the provisions of an act incorporating the railway company, similar in effect to the provisions above set out from the Companies Clauses Consolidated Act, was held not to impose a penalty, and did not, therefore, justify the arrest and imprisonment of a passenger committing a breach of it, in accordance with other provisions for the enforcement of penalties in the act incorporating the company.[192] But the contrary was intimated in another case.[193] In still another case,[194] the express ground of the decision of the Court of Appeal was that such a by-law did impose a penalty, recoverable only before justices, according to the provisions of the act,[195] and not as a debt in a court of civil jurisdiction.

[189] Dearden v. Townsend, L. R. 1 Q. B. 10; Bentham v. Hoyle, L. R. 3 Q. B. Div. 289; London &c. R. Co. v. Watson, L. R. 3 C. P. Div. 429; 4 C. P. Div. 118. See, also, Regina v. Frere, 4 El. & Bl. 598; McCarthy v. Dublin &c. R. Co. Irish, 3 C. L. 511.

[190] Dearden v. Townsend, L. R. 1 Q. B. 10.

[191] Chilton v. London &c. R. Co. 16 Mee. & W. 212.

[192] See, also, Barr v. Midland R. Co. Irish Rep. 1 C. L. 130.

[193] Brown v. Great Eastern R. Co. L. R. 2 Q. B. Div. 406.

[194] London &c. R. Co. v. Watson, L. R. 4 C. P. Div. 118; 3 C. P. Div. 429.

[195] Section 145.

§ 728. **Sale of tickets without authority—"Scalpers."**—Some of the states prohibit "ticket scalping," or the sale, by others than ticket agents of the respective roads, of railroad tickets. Such a statute being in the nature of a police regulation, it is held not to be a regulation of interstate commerce, and does not violate the constitution of the United States, nor does it violate the provision of a state constitution that "no person shall be deprived of life, liberty or property without due process of law."[196] But this regulation is generally held not to apply to the sale by a traveler of an unused portion of a ticket purchased for his own use.[197]

§ 729. **Climbing on cars—Evading payment of fare.**—Numerous special provisions for the protection of railroad companies in the operation of their roads and of the public patronizing them have been made by law in the various states. In many of the states, clinging to or climbing upon railroad engines or cars by one not a passenger or employe is made a misdemeanor.[198] So, in some states a penalty is prescribed for riding upon freight trains without lawful authority,

[196] Fry v. State, 63 Ind. 552; 30 Am. R. 238; Burdick v. People, 149 Ill. 600; 36 N. E. 948; 24 L. R. A. 152, and note; 41 Am. St. 329; Commonwealth v. Wilson, 37 Legal Intelligencer (Pa.), 484; 56 Am. & Eng. R. Cas. 230; Burdick v. People, 149 Ill. 600; 36 N. E. 948; 24 L. R. A. 152, and note; 41 Am. St. 329; Commonwealth v. Keary, 198 Pa. St. 500; 48 Atl. 472; Samuelson v. State (Tenn.), 95 S. W. 1012. But see Tyroler v. Warden, 157 N. Y. 116; 51 N. E. 1006; 43 L. R. A. 264; 68 Am. St. 763; People v. Caldwell, 168 N. Y. 671; 61 N. E. 1132; affirming 64 App. Div. (N. Y.) 46. As to injunction in such a case, see Schubach v. McDonald, 179 Mo. 163; 78 S. W. 1020; 65 L. R. A. 136; 101 Am. St. 452; Nashville R. Co. v. McConnell, 82 Fed. 66.

[197] In North Carolina the statute provides that "it shall be unlawful for any person to sell or deal in tickets issued by any railroad company unless he is a duly authorized agent of said railroad company." It was held that the prohibition does not extend to the simple sale of a ticket an individual may happen to have that he can not use, since such a sale is not "dealing in tickets," and is not within the reason for the statute. State v. Ray, 109 N. Car. 736; 14 S. E. 83; 14 L. R. A. 529, and note; 52 Am. & Eng. R. Cas. 157; State v. Clark, 109 N. Car. 739, note; 14 S. E. 84. In Indiana the statute does not apply to special, half-fare, or excursion tickets; and the sale of a ticket marked with the word "special" is prima facie not unlawful. State v. Fry, 81 Ind. 7.

[198] R. S. Ind. 1894, § 2290; Laws Md. 1892, Ch. 397; p. 543; Moore's & Elliott Ind. Crim. L. § 670 (form of indictment, § 1190).

and for entering passenger trains furtively, with the intention of riding thereon, and evading the payment of fare.[199] The Georgia statute, making it an offense to steal a ride on a railroad train, was held violated in a case where a person without fare or ticket was ordered to leave the train, and after an opportunity to comply with the demand he concealed himself in the car and continued his journey, and it was held no defense that he was under the influence of liquor at the time.[200]

§ 730. Placing obstruction on track.—It is made a penal offense in nearly all the states to place any obstruction upon the track of a railroad, or to wilfully or maliciously commit any other act in order to throw from the track the engine and cars.[201] It is not material, in making out an offense under such a statute, to show that the railroad company whose track was obstructed was duly incorporated.[202] The offense may be committed by obstructing the track of a railroad operated by private individuals.[203] It is not necessary to show that any engine or car was actually stopped or impeded.[204] The principal ele-

[199] Laws Md. 1892, Ch. 17, p. 17; Dyer v. Placer, 90 Cal. 276; 27 Pac. 197. See Regina v. Frere, 4 El. & Bl. 598; Queen v. Paget, L. R. 8 Q. B. D. 151.

[200] Brazzell v. State, 119 Ga. 559; 46 S. E. 837.

[201] Clifton v. State, 73 Ala. 473; Riley v. State, 95 Ind. 446; Coghlll v. State, 37 Ind. 111; State v. Beckman, 57 N. H. 174; State v. Kilty, 28 Minn. 421; 10 N. W. 475; State v. Douglass, 44 Kan. 618; 26 Pac. 476; Barton v. State, 28 Tex. App. 483; 13 S. W. 783; Commonwealth v. Bakeman, 105 Mass. 53; Hodge v. State, 82 Ga. 643; 9 S. E. 676; Crawford v. State, 15 Lea (Tenn.), 343; 54 Am. R. 423; People v. Adams, 16 Hun (N. Y.), 549; State v. Hessenkamp, 17 Iowa, 25; People v. Dunkel, 39 Mich. 255; State v. Kluseman, 53 Minn. 541; 55 N. W. 741; State v. Bisping, 123 Wis. 267; 101 N. W. 359; State v. Stubblefield, 157 Mo. 360; 58 S. W. 337; Davis v. State, 51 Neb. 301; 70 N. W. 984; Moores & Elliott Ind. Crim. L. §§ 398, 989 (form of indictment). The word "railroad" in such an act includes street railroads. Commonwealth v. McCaully, 2 Pa. Dist. 63.

[202] See Duncan v. State, 29 Fla. 439; 10 So. 815; Hodge v. State, 82 Ga. 643; 9 S. E. 676; State v. Wentworth, 37 N. H. 196; Alsobrook v. State (Ga.), 54 S. E. 805.

[203] Hodge v. State, 82 Ga. 643; 9 S. E. 676. See, also, Walker v. State, 97 Ga. 213; 22 S. E. 528. Under the California penal code the malicious destruction of a railroad track is a felony; and this applies to a track which is used for the running of cable street cars. People v. Stites, 75 Cal. 570; 17 Pac. 693; Commonwealth v. McCaully, 2 Pa. Dist. 63.

[204] State v. Kilty, 28 Minn. 421; 10 N. W. 475; State v. Clemens,

ment of criminality in the offense is the endangering of life or property, and it is sufficient to show that the act tended to render dangerous the passage of trains over the road.[205] No intent to injure any particular person need be shown,[206] nor need a specific intent to do an injury to life or property be shown.[207] Thus, under a statute punishing any person who should "wilfully and maliciously" place any obstruction on a railroad track, a person who placed an obstruction on the track for the purpose of obtaining a reward from the railroad company by giving notice of the obstruction was held guilty, though

38 Iowa, 257. To sustain a conviction under the Texas statute, the evidence must show that the obstruction was such as might have endangered human life. Bullion v. State, 7 Tex. App. 462. But the persons whose lives were endangered need not be specified. Barton v. State, 28 Tex. App. 483; 13 S. W. 783.

[205] State v. Wentworth, 37 N. H. 196. As to sufficiency of indictment, see State v. Oliver, 55 Kan. 711; 41 Pac. 954. In Riley v. State, 95 Ind. 446, the court says: "We suppose that if the obstruction was apparently sufficient to endanger the passage of trains or to throw the engine or cars from the track, the offender ought not to be acquitted merely because, through a lack of judgment, he did not provide sufficient means to accomplish his criminal purpose. Under 3 and 4 Vict. Ch. 97, § 15, it is a crime to place an obstruction upon a railway track, even though the road has not yet been opened up for traffic. Regina v. Bradford, 8 Cox C. C. 309. But in Tennessee, the statute provided a punishment for the obstruction of a railroad track, whereby cars are thrown off the track. It was held that to make out the offense, some vehicle mentioned in the statute must be shown to have been thrown from the track, and that where it appeared that a handcar only had been derailed by the obstruction, a conviction could not be sustained, since the statute did not mention handcars. Harris v. State, 14 Lea (Tenn.), 485. It is not necessary to prove that all the obstructions named in the indictment were placed upon the road. It is sufficient, in making out the crime, to show that the road was obstructed by any one of the articles alleged to have been placed thereon. Allison v. State, 42 Ind. 354.

[206] Commonwealth v. Bakeman, 105 Mass. 53. It is sufficient to charge the crime in the language of the statute, without setting out in the indictment the names of the persons whose lives were endangered. Barton v. State, 28 Tex. App. 483; 13 S. W. 783. As to indictment, see Riley v. State, 95 Ind. 446; State v. Kluseman, 53 Minn. 541; 55 N. W. 741; Commonwealth v. Hicks, 7 Allen (Mass.) 573; State v. Wentworth, 37 N. H. 196; McCarty v. State, 37 Miss. 411.

[207] Clifton v. State, 73 Ala. 473; People v. Adams, 16 Hun (N. Y.), 549; State v. Bisping, 123 Wis. 267; 101 N. W. 359.

he intended to and did signal and stop the train so as to prevent injury.[208] Evidence that the road was so obstructed as to endanger the passage of trains, and that the person obstructing it knew at the time that it was being used and operated as a railroad, will raise the presumption of malicious intent.[209] And this presumption cannot be overcome by proof that the intention was merely to stop the train and claim a reward, or to do some other mischievous act by which no injury should be permitted to accrue to life or property.[210] The fact that the railroad has never become the legal owner of its right of way across defendant's land, or has been guilty of a breach of the contract by which such right was acquired, is no defense to an indictment against a land-owner for obstructing a railroad track where it crosses his land.[211] Evidence that the defendant placed a similar obstruction on another part of the track a short time after the offense under consideration has been held competent in trying an indictment for a crime of this character, as tending to raise the presumption of the defendant's guilt,[212] and as part of the res gestæ.[213] The English statute is designed to prevent any and all interference with the operation of railroads, and is much more general in its prohibition than the statutes of most of the states.[214] Under this statute it has been held a crime to place an obstruction on the track of a railroad which had not yet been opened up for traffic.[215] And one who piles rubbish on

[208] Crawford v. State, 15 Lea (Tenn.), 343; 54 Am. R. 423.

[209] State v. Hessenkamp, 17 Iowa, 25. Evidence of the probable consequences of the act is sufficient to warrant the jury in inferring a criminal purpose. Commonwealth v. Bakeman, 105 Mass. 53.

[210] State v. Beckman, 57 N. H. 174; State v. Johns, 124 Mo. 379; 27 S. W. 1115; Crawford v. State, 15 Lea (Tenn.), 343; 54 Am. R. 423. But advising and encouraging another to place an obstruction on the track, believing that it is so placed with malicious intent, is not sufficient to constitute a crime under such a statute where the person placing the obstruction on the track is a detective seeking evidence against the accused, and only places the obstruction for the purpose of obtaining such evidence. State v. Douglass, 44 Kan. 618; 26 Pac. 476. See, also, Nowell v. State, 94 Ga. 588; 21 S. E. 591, and Reg v. Holroyd, 2 M. & Rob. 339, as to accidental obstruction.

[211] State v. Hessenkamp, 17 Iowa, 25.

[212] State v. Wentworth, 37 N. H. 196.

[213] Barton v. State, 28 Tex. App. 483; 13 S. W. 783. See, also, Stanfield v. State, 43 Tex. Crim. 10; 62 S. W. 917.

[214] 24 and 25 Vict. Ch. 97, § 15.

[215] Regina v. Bradford, 8 Cox C. C. 309.

the track of a railroad,[216] or alters signals,[217] or stands upon the railroad right of way and makes gestures with his hands and arms,[218] thereby causing trains to stop, or otherwise interfering with the operation of the road, is guilty of obstructing the road within the meaning of the statute. In a recent Georgia case it is held that an indictment charging accused with maliciously attempting to obstruct a railroad track, and that he procured a cross-tie and carried the same to the track with the intent to place said cross-tie upon the track to wreck a railroad train, but was prevented from so doing, simply charges an attempt to obstruct the track under one provision of the Penal Code, and not an attempt to wreck a railroad train under an entirely different section.[219]

§ 731. Shooting or throwing missile at car.—Many states prescribe a penalty for shooting at or throwing any missile at a railroad car.[220] Under the North Carolina statute the indictment must charge that the car was in motion or stopped merely for a temporary purpose at the time the alleged offense was committed.[221] The court, in the case referred to, construed the statute as intended to secure the safety of persons upon the train and protect the cars while in use, and not when in the round-house or in the yards of the company with no one upon them. But, under the Massachusetts statute, throwing a missile at a car is a penal offense, whether the car is in use at the time or not.[222] Where the offense denounced by the statute consists in merely shooting or throwing at a car, it is, of course, unnecessary to prove that the car was struck.[223] And, where the statute making it an of-

[216] Roberts v. Preston, 9 C. B. N. S. 206.

[217] Regina v. Hadfield, 11 Cox C. C. 574, L. R. 1 Cr. Cas. Res. 253.

[218] Regina v. Hardy, 11 Cox C. C. 656.

[219] Alsobrook v. State (Ga.), 54 S. E. 805.

[220] See Burkhart v. Commonwealth, 119 Ky. 317; 83 S. W. 633; 26 Ky. L. 1245. Under the Indiana statute it is murder to kill any human being by shooting or throwing at a car. R. S. Ind. 1894, §§ 2036, 2037. An indictment for shooting at and injuring a car under the Georgia statute must aver that the car belonged to a "chartered" railway company. Kiser v. State, 89 Ga. 421; 15 S. E. 495. An indictment under the Florida statute must set forth the facts and circumstances which constitute the offense. Hamilton v. State, 30 Fla. 229; 11 So. 523.

[221] State v. Boyd, 86 N. Car. 634; 9 Am. & Eng. R. Cas. 155. See, also, State v. Hinson, 82 N. Car. 597.

[222] Commonwealth v. Carroll, 145 Mass. 403; 14 N. E. 618.

[223] State v. Hinson, 82 N. Car. 597.

fense to hurl any missile at or into a moving train, it was held that one who throws a missile into a coach in a moving train, although standing on the platform of the coach at the time, was punishable under the statute.[224]

§ 732. Breaking into depot or car—Burglary.—Breaking and entering a railroad depot,[225] or station-house,[226] or a railroad car,[227] with intent to commit a felony, is made burglary by the statutes of most of the states. Breaking into a ticket office in the day-time, with intent to steal, is merely a misdemeanor in Massachusetts.[228] This is the general rule. In the absence of a statute changing the rule, the breaking and entering must be in the night-time in order to constitute burglary.[229] And in Texas it is held that a mere attempt to break and enter a car is not a penal offense.[230] In charging the burglary of a railroad car it is not necessary to allege that the railroad company is a corporation, partnership or stock company. The corporate existence will be implied.[231] But if that fact is alleged it would seem that the allegation must be proved.[232]

[224] State v. Ray, 87 Miss. 183; 39 So 521.

[225] State v. Scripture, 42 N. H. 485. If the depot was jointly used or occupied by two railroad corporations, it may be so charged in the indictment. State v. Edwards, 109 Mo. 315; 19 S. W. 91; State v. Bishop, 51 Vt. 287; 31 Am. R. 690, and note.

[226] Norton v. State, 74 Ind. 337. This case holds that it is sufficient to designate the railroad company by its corporate name in the indictment without averring its corporate existence, since that will be implied. In deciding this case the court said: "No innocent man can ever be put in peril by the adoption of this rule, and many guilty ones may by its operation, be prevented from escaping merited punishment." Burke v. State, 34 Ohio St. 79.

[227] Boyer v. Commonwealth, 14 Ky. L. 167; 19 S. W. 845; Lyons v. People, 68 Ill. 271; Nicholls v. State, 68 Wis. 416; 32 N. W. 543; 60 Am. R. 870; State v. Parker, 16 Nev. 79. On a trial under the Alabama statute for breaking into a railroad car "upon or connected with a railroad in this state," it is not necessary to prove that the car was "standing on" the tracks of the railroad company. Johnson v. State, 98 Ala. 57; 13 So. 503.

[228] Commonwealth v. Carey, 12 Cush. (Mass.) 246.

[229] 2 Bish. Crim. L. § 106; 2 Am. & Eng. Ency. of L. 659, 686.

[230] Summers v. State (Tex. Cr. App.), 90 S. W. 310.

[231] Norton v. State, 74 Ind. 337; State v. Watson, 141 Mo. 338; 42 S. W. 726; State v. Shields, 89 Mo. 259; 1 S. W. 336.

[232] Johnson v. State, 73 Ala. 483; but see Crawford v. State, 44 Ala. 382.

§ 733. Injury to railroad property—Malicious trespass.—Injury to or interference with railroad property is made an offense by special statute in many states.[233] Even in the absence of such a special statute an injury to the property of a railroad company, if committed with a malicious intent, would doubtless be punishable as malicious mischief or malicious trespass in most of the states.[234] But employes of a railroad company who remove a fence from real estate claimed by the company are not guilty of malicious trespass in the absence of any malicious intent.[235]

§ 734. Other crimes against railroad companies.—We have treated at some length many of the offenses against railroad companies which are specifically denounced by statute in most of the states; but there are many other crimes from which railroad companies as well as individuals may suffer, even though they are not expressly named in the statute defining the offense. We shall mention some of the most common offenses of this character, without considering them in detail. Railroad officers and employes have often been held guilty of embezzlement under general statutes,[236] and third persons have been held

[233] Clifton v. State, 73 Ala. 473. Offenses against property of steamboats, railroads and other carriers made punishable. Act July 1, 1890 (Acts La. 1890, No. 47, p. 40). Malicious injury to railroad tracks, bridges, etc., punished by imprisonment at hard labor. Act March 2, 1891 (Laws Wash. 1891, c. 69, § 4, p. 120). The wilfull injury to or interference with railroad property made a misdemeanor. Act March 19, 1891 (St. Nev. 1891, c. 67, p. 78). The Minnesota statute declares that "any person who displaces, removes, injures or destroys a rail, sleeper, switch, bridge, viaduct, culvert, embankment, or structure, or any part thereof attached to or appertaining to or connected with a railway" shall be punished. It was held that this did not apply to a fence or other structure not constituting a part of the railroad proper. State v. Walsh, 43 Minn. 444. Those structures forming parts of railway beds by which they span streams, chasms, ditches, etc., are "bridges," the wilful and malicious burning of which is prohibited by the Florida statute. Duncan v. State, 29 Fla. 439; 10 So. 815.

[234] See State v. Simpson, 2 Hawks (N. Car.) 460; Rex v. Bowry, 10 Jur. 211; 1 Bish. Crim. L. § 1004; 2 Bish. Crim. L. § 955, et seq.

[235] Hughes v. State, 103 Ind. 344; 2 N. E. 956.

[236] See Ricord, Ex parte, 11 Nev. 287; Calkins v. State, 18 Ohio St. 366; 98 Am. Dec. 121, and note; Commonwealth v. Tuckerman, 10 Gray (Mass.), 173; State v. Goode, 68 Iowa, 593; 27 N. W. 772; State v. Porter, 26 Mo. 201. Compare

indictable for obtaining goods or money from railroad companies by false pretenses.[237] So, it has been held that the fraudulent and unlawful counterfeiting of a railroad ticket is forgery at common law.[238] Stealing a railroad ticket may also constitute larceny,[239] but not, it has been held, where it is not signed and stamped,[240] and so, of course, may the stealing of grain or other property from a car.[241] An Illinois statute making it unlawful to use or attempt to use any pass, "which, by conditions expressed thereon, is not transferable,"[242] has been held not to cover the case of one using a pass containing no other restriction as to its transferability than the endorsement, "if presented by any other person than the person named thereon, the conductor will take up pass and collect fare."[243] An interesting question arose in a recent case in which the defendant was charged with feloniously breaking and entering a freight car in the night-time with intent to commit larceny. The entry was made in one county, while the car was moving, and the defendant continued in the car, with the same felonious intent, until after the car had passed into another county, in which the defendant was indicted. The court held that there was, in law, a fresh entry in the latter county, and that the defendant was indictable therein.[244]

Panama R. Co. v. Johnson, 63 Hun, 629; 17 N. Y. Sup. 777; State v. Mims, 26 Minn. 191; 2 N. W. 492.

[237] Reg. v. Boulton, 2 C. & K. 917; 13 Jur. 1034, distinguished in Reg. v. Kilham, 11 Cox C. C. 561; 22 L. T. 625. See, also, White v. State, 86 Ala. 69; 5 So. 674; State v. Haven, 59 Vt. 399; 9 Atl. 841.

[238] Commonwealth v. Ray, 3 Gray (Mass.), 441. See, also, State v. Weaver, 94 N. Car. 836; 55 Am. R. 647, and note; Reg. v. Boult, 2 C. & K. 604; 61 Eng. C. L. 603.

[239] Eaton v. Farmer, 46 N. H. 200; McDaniels v. People, 118 Ill. 301; 8 N. E. 687; State v. Brin, 30 Minn. 522; 16 N. W. 406. But see State v. Hill, 1 Houst. Crim. (Del.) 421; State v. Musgang, 51 Minn. 556; 53 N. W. 874.

[240] McCarty v. State, 1 Wash. St. 377; 25 Pac. 299. See, also, Millner v. State, 15 Lea (Tenn.), 179.

[241] Price v. State, 41 Tex. 215; Manson v. State, 24 Ohio St. 590; State v. Poynier, 36 La. Ann. 572; State v. Sharp, 106 Mo. 106; 17 S. W. 225; Smith v. State, 28 Ind. 321; Lucas v. State, 96 Ala. 51; 11 So. 216; Rogers v. State, 90 Ga. 463; 16 S. E. 205; Sikes v. State, (Tex. Crim. App.), 28 S. W. 688.

[242] Act June 10, 1897.

[243] Allardt v. People, 197 Ill. 501; 64 N. E. 533.

[244] Powell v. State, 52 Wis. 217; 9 N. W. 17; 9 Am. & Eng. R. Cas. 156.

CHAPTER XXX.

TAXATION OF RAILROAD PROPERTY.

§ 735. Taxation of railroads—Preliminary.—The power of a state to tax railroad property of every description is a sovereign power, and over purely domestic or intrastate railroad companies the power of the state is supreme, but over railroad companies engaged in interstate commerce the power of the state is necessarily abridged to some extent by the commerce clause of the federal constitution. The prop-

erty of a railroad company engaged in interstate commerce which is not used in any way in its business of conducting commerce between the states is, of course, subject to taxation by the state to the same extent as the like property of any artificial or natural person. If, for instance, a railroad company is the owner of lots which are not used in connection with its business as a carrier of articles of interstate commerce the lots are subject to taxation by the state to the same extent as similar property of natural persons, and the power to tax such property is not affected by the commerce clause of the federal constitution.[1] As the federal constitution exerts such an important influence upon the subject of taxation the subject can be more clearly presented by treating the class of railroad companies which may be denominated interstate railroads in a separate chapter, and accordingly we have adopted that method.

§ 736. Legislative power.—The legislature is invested with supreme power over the subject of taxation, except in so far as the constitution limits and abridges the power. Taxes must be levied by the legislature and the mode of assessing property must be prescribed by statute.[2] We do not mean, of course, that the exact sum shall be

[1] See, also, as to taxation on property having a situs in the state although employed in interstate commerce. Atlantic &c. Tel. Co. v. Philadelphia, 190 U. S. 160; 23 Sup. Ct. 817. As to realty not essential to the operation of the road being assessable by local authorities, see St. Louis &c. R. Co. v. Miller, 67 Ark. 498; 55 S. W. 926; Chicago &c. R. Co. v. People, 195 Ill. 184; 62 N. E. 869; Harter v. Chicago &c. R. Co. 114 Ia. 330; 86 N. W. 266; State v. Chicago &c. R. Co. 162 Mo. 391; 13 S. W. 495; Erie R. Co. Matter of, 64 N. J. L. 123; 44 Atl. 976.

[2] Wisconsin Cent. R. v. Taylor Co. 52 Wis. 37; 8 N. W. 833; State v. Central &c. Co. 21 Nev. 260; 30 Pac. 689; Porter v. Rockford &c. Co. 76 Ill. 561; Louisville &c. Co. v. Commonwealth, 10 Bush (Ky.), 43; Dubuque v. Chicago &c. Co. 47 Iowa, 201; Railroad Co. v. Pennsylvania, 15 Wall. (U. S.) 300; North Missouri &c. Co. v. Maguire, 20 Wall. (U. S.) 46; Bragg v. Tufts, 49 Ark. 554; 6 S. W. 158; State Railroad Tax Cases, 15 Wall. (U. S.) 284; Delaware Railroad Tax Case, 18 Wall. (U. S.) 206; State v. Bentley, 23 N. J. L. 532; State v. Flavell, 24 N. J. L. 370; State Railroad Tax Cases, 92 U. S. 575; Turner v. Althaus, 6 Neb. 54; Union Pacific &c. Co. v. Peniston, 18 Wall. (U. S.) 5; Ottawa v. McCaleb, 81 Ill. 559; Meriwether v. Garrett, 102 U. S. 472, 515; Rees v. Watertown, 19 Wall. (U. S.) 107, 116; Heine v. Levee Commissioners, 19 Wall (U. S.) 655; Hyland v. Brazil, 128 Ind. 335; 26 N. E. 672. See Michigan

designated by statute, but we do mean that the tax shall be provided for by statute and the rate fixed or due authority conferred upon state, county or municipal officers to designate the amount of the tax that shall be assessed. All taxation must rest upon legislation, and the law-making department must provide the mode of assessment. Defects in the mode cannot be remedied by the judiciary, but where a mode is provided, and an exemption is made which the legislature had no power to make, the provision making the exemption will fall and the other part of the statute will stand.[3] Of all matters of policy and expediency, the legislature is the exclusive judge, and its determination is final and conclusive.[4] The policy of the law is to compel all property held or used for purposes of gain or profit to bear its burden of taxation, but as there can be no effective assessment of taxes without legislative authority, it is evident that the failure to include all property may have the effect to relieve it from taxation. A causus omissus cannot be supplied by the courts,[5] and where the legislature omits to subject property to taxation it may escape, for the courts have no power to lay taxes upon property. It has been held that, where a method is not specifically prescribed for taxing corporate property, the tax must be paid by the owner of the shares of stock, but we suppose that this can be true only in cases where provision is made for taxing the stock in the hands of the stockholders.[6]

§ 736a. Whether boards of assessment and equalization have judi-

Cent. R. Co. v. Powers, 201 U. S. 245; 26 Sup. Ct. 459. Judge Cooley again and again emphasizes the rule that the whole subject belongs to the legislative department. Cooley Taxation, 200, 378; Cooley Const. Lim. (5th ed.) 637. In Meriwether v. Garrett, supra, it was said: "The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature."

[3] Little Rock &c. Co. v. Worthen, 46 Ark. 312; Huntington v. Worthen, 120 U. S. 97; 7 Sup. Ct. 469; Norris v. Boston, 4 Met. (Mass.) 282.

[4] Spinney, Ex parte, 10 Nev. 323; Cooley Taxation, 165, 324, 378; Cooley Const. Lim. (5th ed.) 637, 638. See, also, Board &c. v. Harrell, 147 Ind. 500; 46 N. E. 124; Dubuque v. Chicago &c. R. Co. 47 Ia. 196; State Tax Railway Gross Receipts, 15 Wall. (U. S.) 284.

[5] Gwynne v. Burnell, 7 Cl. & F. 572, 696; Jones v. Smart, 1 T. R. 44; State Board of Tax Comrs. v. Holliday, 150 Ind. 216; 49 N. E. 14; 42 L. R. A. 826.

[6] Conwell v. Connersville, 15 Ind. 150; King v. Madison, 17 Ind. 48. See Wright v. Southwestern R. Co. 64 Ga. 783; Georgia R. &c. Co. v. Wright, 124 Ga. 596; 53 S. E. 251

cial powers.—Boards having power to assess property and equalize values for purposes of taxation are generally not regarded as judicial officers, in the strict sense, and, hence, their action is not to be invalidated on the sole ground that the law creating the board invested executive officers with judicial powers in violation of the constitutional rule. Thus, a statute making specified state officers members of the state tax board, with power to ascertain the valuation of intangible property and report it for assessment to the local assessors, was held not void on this ground, especially since the board was not given power to make the assessment.[7] In Indiana, the board of equalization has power to inspect and examine the books of taxpayers,[8] and its powers are quasi judicial, so that its judgment is not subject to collateral attack.[9]

§ 737. Appropriate method of assessing.—The best method of taxing the property of a railroad company forming part of its line and used in the operation of its road is by regarding it as a unit and assessing the property as an entirety, since any other method would dissect the property into fragmentary parts and tend to lead to confusion and injustice.[10] Some of the courts hold that the property can only

[7] Missouri &c. R. Co. v. Shannon (Tex. Civ. App.), 97 S. W. 527. See, also, State v. Thorne, 112 Wis. 81; 87 N. W. 797; and compare Cleveland &c. R. Co. v. Backus, 133 Ind. 513, 547; 33 N. E. 421; 18 L. R. A. 729; Langenberg v. Decker, 131 Ind. 471; 31 N. E. 190, 193; 16 L. R. A. 108.

[8] Co-operative &c. Assn. v. State, 156 Ind. 463; 60 N. E. 146; Satterwhite v. State, 142 Ind. 1; 40 N. E. 654, 1087. See, also, People v. National Bank, 123 Cal. 63; 55 Pac. 685; 69 Am. St. 32.

[9] Senour v. Matchett, 140 Ind. 636; 40 N. E. 122; Biggs v. Board, 7 Ind. App. 142; 34 N. E. 500. See, also, Stanley v. Albany Co. 121 U. S. 535; 7 Sup. Ct. 1234; East St. Louis &c. R. Co. v. People, 119 Ill. 182; 10 N. E. 397. But see as to its lack of power under the Act of 1881 to increase assessment of railroad personal property as made and returned by township assessors, Cleveland &c. R. Co. v. Board, 19 Ind. App. 58; 49 N. E. 51.

[10] Detroit &c. R. Co. v. Common Council, 125 Mich. 673; 85 N. W. 96; 84 Am. St. 589, 597 (quoting text). See, also, Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 220; 17 Sup. Ct. 305; Louisville &c. R. Co. v. Bate, 12 Lea (Tenn.), 581; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; 11 Sup. Ct. 876; Western Un. Tel. Co. v. Taggart, 141 Ind. 281; 40 N. E. 1051; State v. Canadian Pac. R. Co. 100 Me. 202; 60 Atl. 901; 60 L. R. A 671n; Cooley Taxation (2d ed.), 383; State v. Savage, 65 Neb. 714; 91 N. W. 716; State v. Back (Neb.), 100 N. W. 952; Chicago &c. R. Co. v. Richardson Co. (Neb.) 100 N. W.

be taxed as an entirety,[11] but in our opinion the legislature is, in the absence of constitutional provisions prescribing the method of assessing the property, the sole judge of the method that shall be pursued. The power of the legislature is so broad and comprehensive that it is difficult to conceive upon what principle it can be correctly held that the only method that it can provide is that of assessing the property as an entirety.[12]

§ 738. Methods of taxation.—The four principal methods of taxation are, (1) on the capital stock, (2) on the corporate property, (3) on the franchises, (4) on the business done by the corporation.[13] As

950; Cincinnati &c. R. Co. v. Commonwealth, 81 Ky. 492; Chicago &c. R. Co. v. State (Wis.), 108 N. W. 557. In the last case just cited it is said: "The property of a public-service corporation is to be valued for taxation as a unit, the franchise element and tangible elements, whether in land or movables, being regarded as inseparable parts of one thing in which the former so far predominates as to stamp all with the impress of personal property."

[11] Applegate v. Ernst, 3 Bush (Ky.), 648; 96 Am. Dec. 272. See, generally, Graham v. Mt. Sterling Coal Co. 14 Bush (Ky.), 425; Franklin County v. Nashville &c. Co. 12 Lea (Tenn.), 521; 17 Am. & Eng. R. Cas. 445; Railroad School Tax, In re, 78 Mo. 596; 17 Am. & Eng. R Cas. 491.

[12] There are many cases recognizing the validity of assessments by counties. Huntington v. Central Pacific &c. Co. 2 Sawy. (U. S.) 503; People v. Placerville &c. Co. 34 Cal. 656; People v. McCreey, 34 Cal. 432; Orange &c. Co. v. Alexandria, 17 Gratt. (Va.) 176; Albany &c. Co. v. Canaan, 16 Barb. (N. Y.) 244; Albany &c. Co. v. Osborn, 12 Barb. (N. Y.) 223; Mohawk &c. Co. v. Clute, 4 Paige (N. Y.), 384; Wilson v. Weber, 96 Ill. 454; 5 Am. & Eng. R. Cas. 112; State v. Illinois Central R. Co. 27 Ill. 64; 79 Am. Dec. 396; Sangamon &c. Co. v. Morgan, 14 Ill. 163; 56 Am. Dec. 497; Providence &c. Co. v. Wright, 2 R. I. 459. See, generally, Missouri River &c. Co. v. Morris, 7 Kan. 210; State v. Severance, 55 Mo. 378; Richmond &c. Co. v. Alamance Ccunty, 84 N. Car. 504; Chicago &c. Co. v. Davenport, 51 Iowa, 451; 1 N. W. 720; The Tax Cases, 12 Gill & J. (Mo.) 117.

[13] Tennessee v. Whitworth, 117 U. S. 129; Louisville &c. Co. v. State, 8 Heisk. (Tenn.) 663, 795. See Cleveland &c. Co. v. Backus, 133 Ind. 513; 33 N. E. 421; 18 L. R. A. 729; State v. Hamilton, 5 Ind. 310; King v. Madison, 17 Ind. 48; Whitney v. Madison, 23 Ind. 331, 335. There is reason for saying that there is a fifth method, namely a tax on the profits of the business, but we have followed the usual course in naming the methods of taxation. Beach Corp. § 798; Cook Stockholders (3d ed.), § 562; Pierce Railroads, 474. The reason giving for not making a separate division of profits of the busi-

the levying of taxes and the mode of assessment are matters for legislative consideration and determination, the legislature may, where no constitutional provision forbids a choice of methods, select the method, and the method selected is exclusive. While the courts may declare invalid a statute which is in conflict with the constitution, they cannot supervise or control legislative discretion, nor can they dictate the policy to be pursued.[14]

§ 738a. What is meant by "roadway" in revenue laws.—In states where the "roadway" or the "right of way" is assessed by a state assessing board, and other railroad property is assessed by local assess-

ness is that it is included in the third method of tax on the franchise, but the reason is hardly satisfactory. In Detroit &c. R. Co. v. Common Council, 125 Mich. 673; 85 N. W. 96; 84 Am. St. 589, it is held that the franchise to exist as a corporation has no cash value within the meaning of the tax law, but special privileges and franchises of that nature have, especially in connection with the property used therewith. In State v. Galveston &c. Ry. Co. (Tex.), 97 S. W. 71, a tax of a certain per cent. of gross receipts was held an occupation tax and not objectionable as double taxation although the franchise was subject to an ad valorem tax. But see Galveston &c. R. Co. v. Davidson (Tex. Civ. App.), 93 S. W. 436; and see, also, Central Granaries &c. Co. v. Lancaster Co. (Neb.) 109 N. W. 384, where it was held that a tax on the average capital is a tax on property and not on business, and that, where real estate and other tangible property was taxed, and grain in elevators on a certain day was also taxed there was double taxation.

[14] Mr. Justice Bradley forcibly expressed the general rule in Legal Tender Cases, 12 Wall. (U. S.) 457, 561. "The legislative department," said that able judge, "being the nation itself speaking by its representatives, has a choice of methods and is the master of its own discretion." The State v. Haworth, 122 Ind. 462, 467; 23 N. E. 946; 7 L. R. A. 240; Carr v. State, 127 Ind. 204, 208; 26 N. E. 778; 11 L. R. A. 370n; 22 Am. St. 624n; Dubuque v. Chicago &c. Co. 47 Iowa, 196; Davenport v. Chicago &c. Co. 38 Iowa, 633; Dubuque v. Illinois &c. Co. 39 Iowa, 56. In State v. Kolsem, 130 Ind. 434, 440; 29 N. E. 595; 14 L. R. A. 566n, it was said: "Where the principal subject belongs, there the incidents belong. Means, methods and the like belong to the department that is invested with power over the general subject. It is for that department to make choice of modes and means." Cooley Const. Lim. (4th ed.) 129, 637; Cook Stockholders, § 562; Cooley Taxation, 378, 324; Desty Taxation, 83, 84. See, also, State v. Savage, 65 Neb. 714; 91 N. W. 716, 733 (citing text); Missouri &c. Ry. Co. v. Shannon (Tex. Civ. App.), 97 S. W. 527.

ing officers or boards, it is a matter of some importance to know what is meant by this term. The decisions on the question are in hopeless conflict, for the term "roadway" is used in the same connection, and yet a different construction is given it, in the decisions of both California and North Dakota. In the former state the term is strictly limited to the continuous strip upon which the railroad is constructed, and excludes tracts of land used for cattle yards, switch yards and depot purposes.[15] In the latter state it is broadly held that the term will include not only the strip of land upon which the main line is located, but also all ground necessary for the construction of sidetracks, turnouts, station houses, freight houses, and all other accommodations reasonably necessary to accomplish the objects for which the railroad was incorporated.[16] It is thought that the weight of authority is in favor giving the more enlarged meaning in such cases.[17] In line with this view there is a class of cases which hold that the exemption of local taxation covers such property, and only such, as might be taken by condemnation proceedings.[18] Under either theory land not used as part of the roadway or right of way, though bought with the intent to use it for that purpose when necessary, is not a part of the roadbed, and should be assessed by the local assessors.[19] So it has been held that land belonging to railroad companies and leased for commercial purposes will not be regarded as "necessary or in use in the proper operation" of the road, and is to be assessed by the local officers.[20] But the Illinois courts have held that land adjoining the right of way of a railroad and used as a reservoir from which it ob-

[15] San Francisco &c. R. Co. v. Stockton (Cal.), 84 Pac. 771.

[16] Chicago &c. R. Co. v. Cass Co. 8 N. D. 18; 76 N. W. 239.

[17] Chicago &c. R. Co. v. People, 98 Ill. 350; Chicago &c. R. Co. v. People, 99 Ill. 464; Pfaff v. Terre Haute &c. R. Co. 108 Ind. 144; 9 N. E. 93; Central R. Co. of N. J. In re, 71 N. J. L. 475; 58 Atl. 1089; People v. Illinois Central R. Co. 215 Ill. 177; 74 N. E. 116 (includes bridges and approaches). See, generally, ante, § 5.

[18] State v. Hancock, 33 N. J. L. 315; Milwaukee &c. R. Co. v. Milwaukee, 34 Wis. 271.

[19] Red Willow Co. v. Chicago &c. R. Co. 26 Neb. 660; 42 N. W. 879; San Francisco &c. R. Co. v. Stockton (Cal.), 84 Pac. 771; Republican Valley &c. R. Co. v. Chase Co. 33 Neb. 759; 51 N. W. 132. See, also, State v. St. Louis &c. R. Co. 117 Mo. 1; 22 S. W. 910.

[20] Grand Rapids &c. R. Co. v. Grand Rapids, 137 Mich. 587; 100 N. W. 1012. See, also, Adams County v. Kansas City &c. R. Co. (Neb.) 49 N. W. 245. See, also, Central R. Co. In re, (N. J.) 59 Atl. 1062.

tains water for its locomotives, and other purposes connected with the operation of the road, is assessable as railroad track by the State Board of Equalization, and not by local assessors.[21]

§ 738b. Railroad bridges and bridge companies.—A bridge owned by a railroad company and used as part of its roadbed and tracks is assessable as part of the railroad itself and not as a separate structure, and this has been so held where the bridge was used as a toll bridge.[22] Another case is authority to the effect that a bridge owned by a corporation organized under the Railroad Incorporation Act, whose business it was to build and own a bridge used solely for railroad purposes, and which has always reported the property for taxation as railroad property, is regarded as a railroad, and is taxable as such.[23] But a bridge owned by a bridge company, although used exclusively for railroad purposes, and leased forever to a railroad company, but subject to determination of the lease for default of the lessee in regard to its terms and conditions, has been held not to be railroad property which could be assessed as such along with the railroad track by the Illinois State Board of Equalization instead of the local authorities.[24]

§ 739. Statutory method of assessment exclusive.—Where the statute prescribes a specific method for assessing or valuing the property of railroad companies the method prescribed excludes all others and must be pursued.[25] The legislative method is always exclusive. The rule is settled that where the legislature classifies property and prescribes the mode in which it shall be taxed, neither the taxing officers nor the courts can prescribe any other.

§ 740. Legislative discretion — Classification. — The legislature may, in its discretion, provide different methods for assessing corpora-

[21] Chicago &c. R. Co. v. People, 218 Ill. 463; 75 N. E. 1021.

[22] State v. Louisiana &c. R. Co. (Mo.) 94 S. W. 279; People v. Atchison &c. R. Co. (Ill.) 80 N. E. 272.

[23] Sault St. Marie Bridge Co. v. Powers, 138 Fed. 262.

[24] Chicago &c. R. Co. v. People, 153 Ill. 409; 38 N. E. 1075; 29 L. R. A. 69; and see note as to assessment of bridges between states and the like; also Henderson Bridge Co. v. Commonwealth, 99 Ky. 623; 31 S. W. 486; 29 L. R. A. 73, affirmed in 166 U. S. 150; 17 Sup. Ct. 532.

[25] Louisville &c. Co. v. Warren County, 5 Bush (Ky.), 243; State v. Savage, 65 Neb. 714; 91 N. W. 716, 733 (citing text). See, also, Chicago &c. R. Co. v. People, 213 Ill. 458; 72 N. E. 1105.

tions of different classes, and a statute cannot be successfully assailed upon the ground that it prescribes a method of assessing railroad corporations different from that prescribed for assessing other corporations.[26] Classifications may be made and railroad corporations may constitute a distinct and separate class of corporations, and a mode of assessing and valuing their property may be prescribed different from that prescribed for taxing and valuing the property of other corporations. So, it has been held that the difference between an ordinary commercial railroad and a street railroad may warrant diversity in the mode of taxation.[27] The legislative discretion is broad, and no matter how unjustly or capriciously it may be exercised the courts are powerless to interfere, but they may interfere in cases where the legislature transcends its constitutional powers. The question is power or no power; if there be power the judiciary cannot alter, amend or annul the statute; if there be no power the courts may annul the statute by adjudging it to be void.

§ 741. Equality and uniformity.—Where the constitution requires that taxes shall be equal and uniform the mode of assessing railroad

[26] Chamberlain v. Walter, 60 Fed. 788; St. Louis &c. Co. v. Worthen, 52 Ark. 529; 13 S. W. 254; 7 L. R. A. 374; Cincinnati &c. Co. v. Kentucky, 115 U. S. 321; 6 Sup. Ct. 57; Kentucky Railroad Tax Cases, 92 U. S. 663; Bell Gap R. Co. v. Pennsylvania, 134 U. S. 232; 10 Sup. Ct. 533; Pacific Express Co. v. Seibert, 142 U. S. 339; 12 Sup. Ct. 250; Ancona v. Becker, 14 Pa. Co. Ct. 73; Western Union &c. Co. v. Poe, 64 Fed. 9, overruling Western Union &c. Co. v. Poe, 61 Fed. 449; State v. Jones, 51 Ohio St. 492; 37 N. E. 945; Cummings v. Merchants' &c. Bank, 101 U. S. 160; San Francisco &c. Co. v. State Board, 60 Cal. 12; Central Iowa Co. v. Board, &c. 67 Iowa, 199; 25 N. W. 128; Pulaski County &c. Cases, 49 Ark. 518; 6 S. W. 1; Missouri v. Lewis, 101 U. S. 22; Home &c. Co. v. New York, 134 U. S. 594; 10 Sup. Ct. 593; Missouri &c. Co. v. Mackey, 127 U. S. 205; 6 Sup. Ct. 1161; 33 Am. & Eng. R. Cas. 390; Minneapolis &c. Co. v. Beckwith, 129 U. S. 26; 9 Sup. Ct. 207. See, also, Peacock v. Pratt, 121 Fed. 772; Kidd v. Alabama, 188 U. S. 730; 23 Sup. Ct. 401; Florida Cent. R. Co. v. Reynolds, 183 U. S. 471; 22 Sup. Ct. 176; Chicago &c. R. Co. v. State, 128 Wis. 553; 108 N. W. 557; Louisville &c. R. Co. v. State, 25 Ind. 177; 87 Am. Dec. 358; Pittsburgh &c. R. Co. v. Backus, 133 Ind. 625; 33 N. E. 432.

[27] Savannah &c. R. Co. v. Mayor, 198 U. S. 392; 25 Sup. Ct. 690 (a privilege tax or tax on business). See, also, Chamberlain v. Walter, 60 Fed. 788; American Sugar &c. Co. v. City, 181 U. S. 277; 21 Sup. Ct. 646.

companies must be uniform, that is, one company of the same class and character cannot be assessed in one method and another company of precisely the same kind and character in a materially different method.[28] Corporations of different classes may be assessed in different methods, but corporations of the same class cannot be assessed in different methods. The general rule is as we have stated it, but it is possible that in very rare instances there may be some peculiar elements that will carry the case out of the operation of the general rule. Where the constitution of the state requires equality and uniformity of taxation the tax upon railroad property cannot rightfully be materially or essentially greater than that imposed upon other property, although, as we have seen, the mode of assessment may be different. This is so independently of the influence of the federal constitution.[29] But absolute uniformity in every detail is usually unattainable, and uniformity of burden or result, rather than uniformity of method in all respects, is what is required.[30] The rule as to uniformity has been

[28] Worth v. Wilmington &c. Co. 89 N. Car. 291; 45 Am. R. 679; Illinois Tax Cases, 92 U. S. 575; Durach's Appeal, 62 Pa. St. 491; State v. Lathrop 10 La. Ann. 398; Kneeland v. Milwaukee, 15 Wis. 454; New Orleans v. Kaufman, 29 La. Ann. 283; 29 Am. R. 328; Pittsburg &c. R. Co. v. State, 49 Ohio St. 189; 16 L. R. A. 380; Shenandoah Val. &c. R. Co. v. Clarke Co. Suprs. 78 Va. 269. A statute providing for raising a fund for the salaries and current expenses of a state railroad commission by taxing the property of railroad companies only, violates the rule as to uniformity and equality. Atchison &c. R. Co. v. Howe, 32 Kan. 737; 5 Pac. 397. But see Chicago &c. Co. v. Siders, 88 Ill. 320.

[29] Board of Assessment v. Alabama &c. R. Co. 59 Ala. 551; Schmidt v. Galveston &c. Co. (Tex. Civ. App.) 24 S. W. 547; Board &c. v. Chicago &c. R. Co. 44 Ill. 229; Chicago &c. Co. v. Board &c. 44 Ill. 244; Cumberland &c. Co. v. Portland, 37 Me. 444; State Treas. &c. v. Auditor &c. 46 Mich. 224; 13 Am. & Eng. Cas. 296; Teagan Transp. Co. v. Board of Assessors, 139 Mich. 1; 102 N. W. 273; 69 L. R. A. 431, and note. See, however, Dubuque v. Illinois Cent. Co. 39 Iowa, 56; Mississippi Mills v. Cook, 56 Miss. 40; Williams v. Rees, 9 Biss. (U. S.) 405; Francis v. Atchison &c. Co. 19 Kan. 303. See, also, State v. Canada Cattle Car. Co. 85 Minn. 457; 89 N. W. 66; Jones v. Stokes Co. (N. Car.) 55 S. E. 427; State v. Chicago &c. R. Co. 195 Mo. 228; 93 S. W. 784; Michigan Cent. R. Co. v. Powers, 201 U. S. 245; 26 Sup. Ct. 459.

[30] Chicago &c. R. Co. v. State, 128 Wis. 553; 108 N. W. 557; Boston &c. R. Co. v. State, 60 N. H. 87; Boston &c. R. v. State, 63 N. H. 571; 4 Atl. 571; Wagner v. Loomis, 37 Ohio St. 571; State &c. v. Jones, Auditor, 51 Ohio St. 492; 37 N. E. 945; State Board &c. v. Railroad

held not violated by the assessment of railroads extending into unorganized territory, though other property therein escapes taxation by reason of the want of a county government.[31]

§ 741a. Equality and uniformity—Double taxation.—On this subject it has been said by one able court: "The general policy of the law is to avoid duplicate taxation. No one subject of taxation ought to be required to contribute more than once to the same public burden, while other subjects of taxation, belonging to the same class, are required to contribute but once. In the exposition of any tax law, therefore, a construction leading to any such result should be avoided, unless the cogency of some express provision or unavoidable implication of the statutes compels its adoption."[32] Double taxation is not favored and is never presumed.[33] In one case it was held that double taxation was imposed where a tax was levied against a railroad company upon all its property and a tax was also levied upon the value of the shares in the hands of the stockholders. The court regarded it as clear that the elements which made up the value of the property of the railroad company and those which made the value of the shares of the stockholders were one and the same thing, and that the taxation of both amounted to a plain violation of the rule.[34]

Co. 48 N. J. L. 146; 4 Atl. 578; State &c. v. Aitken, 62 Neb. 428; 87 N. W. 153; State v. Back (Neb.), 100 N. W. 952; 69 L. R. A. 447; State &c. v. Severance, 55 Mo. 378; Pittsburgh &c. R. Co. v. Backus, 133 Ind. 625; 33 N. E. 432; Baltimore &c. R. Co. v. Koontz, 77 Va. 698; Shenandoah Val. R. Co. v. Clark Co. 78 Va. 269; Commonwealth v. Brown, 91 Va. 762; 21 S. E. 357; 28 L. R. A. 110; Gulf R. v. Morris, 7 Kan. 210; Central Iowa R. Co. v. Board of Supervisors, 67 Iowa, 199; 25 N. W. 128; Louisville &c. R. Co. v. State, 25 Ind. 177; 87 Am. Dec. 358; Applegate &c. v. Ernst, 3 Bush (Ky.), 648; 96 Am. Dec. 272; Franklin County v. Nashville &c. R. 12 Lea (Tenn.), 521; Chattanooga v. Railway, 7 Lea (Tenn.), 561; Dayton v. Coal & Iron Co. 99 Tenn. 578; 42 S. W. 444; Pacific National Bank v. Pierce County, 20 Wash. 675; 56 Pac. 936; Adams Express Co. v. Ohio State Auditor, 165 U. S. 194; 17 Sup. Ct. 305; 41 L. Ed. 683; Adams Express Co. v. Ohio State Auditor, 166 U. S. 185; 17 Sup. Ct. 604; 41 L. Ed. 965; Kentucky R. Tax Cases, 115 U. S. 337; 6 Sup. Ct. 57.

[31] Francis v. Railroad Co. 19 Kan. 303.

[32] Rice Co. v. Bank, 23 Minn. 280.

[33] Tennessee v. Whitworth, 117 U. S. 137; 6 Sup. Ct. 645; State v. Louisiana &c. R. Co. 196 Mo. 523; 94 S. W. 279; Georgia &c. R. Co. v. Wright, 125 Ga. 589; 54 S. E. 52.

[34] Georgia &c. R. Co. v. Wright, 125 Ga. 589; 54 S. E. 52. See, also,

§ 742. Duties of corporation—Rights of stockholders.—Where the tax is laid upon the corporation the corporate officers must make the required returns and pay the taxes. The tax in such a case is laid upon the legal entity and must be paid out of the corporate revenues. If the tax is unauthorized and not enforceable the resistance to its enforcement is properly made by the corporation and not its members. Where there are errors or irregularities prejudicial to the interests of the corporation it is incumbent upon the corporate officers to take measures to secure the proper correction or appropriate relief. The shareholders, however, have an interest in preventing the enforcement of illegal taxes against the corporation and in having errors corrected, and this enables them to invoke judicial assistance in the event that the corporate officers refuse to perform their duty.[35] To entitle a stockholder to relief he must show, in addition to the other essential facts, that the corporate officers have been guilty of fraud, or, upon proper request, have refused to take proper steps to protect the corporate interests.

§ 743. Failure of the corporation to make return — Effect on stockholder.—Corporations may be made the instrumentalities for

Stroh v. Detroit, 131 Mich. 109; 90 N. W. 1029; Central Granaries &c. Co. v. Lancaster County (Neb.), 109 N. W. 384; State v. Hannibal &c. R. Co. 37 Mo. 268; Commonwealth v. American &c. Co. 2 Dauph. Co. Rep. (Pa.) 212. But compare Durham County v. Blackwell Co. 116 N. Car. 441; 21 S. E. 423; Wilmington &c. R. Co. v. Brunswick County, 72 N. Car. 10; Greenleaf v. Board of Review, 184 Ill. 226; 56 N. E. 295; 75 Am. St. 168; Commonwealth v. Charlottesville &c. Co. 90 Va. 790; 20 S. E. 364; 44 Am. St. 950; Shelby County v. Union &c. Bank, 161 U. S. 149; 16 Sup. Ct. 558; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664; 19 Sup. Ct. 537; South Nashville St. R. Co. v. Morrow, 87 Tenn. 406; 11 S. W. 348; 2 L. R. A. 853; Chicago &c. R. Co. v. Siders, 88 Ill. 320; Porter v. Rockford &c. R. Co. 76 Ill. 561.

[35] Bailey v. Atlantic &c. Co. 3 Dill. (U. S.) 22; Parmley v. St. Louis &c. R. Co. 3 Dill. (U. S.) 13; Greenwood v. Freight Co. 105 U. S. 13; Davenport v. Dows, 18 Wall. (U. S.) 626; Louisville v. Louisville &c. 90 Ky. 409; 14 S. W. 408; 9 L. R. A. 629n; Lenawee &c. Bank v. Adrian, 66 Mich. 273; Dodge v. Woolsey, 18 How. (U. S.) 331; Foote v. Linck, 5 McLean (U. S.), 616; Paine v. Wright, 6 McLean (U. S.), 395; State Bank &c. v. Knoop, 16 How. (U. S.) 369; Wilmington &c. Co. v. Reed, 13 Wall. (U. S.) 264; Davenport v. Dows, 18 Wall. (U. S.) 626. The corporation is a necessary party to such a suit, and the suit should be brought in behalf of all the stockholders.

collecting from the stockholders the tax, or the tax may be laid directly on the shares of stock in the hands of the shareholders, or it may be laid upon the corporation.[36] Where the tax is laid on the shares of stock in the hands of the stockholders it cannot be accurately said that the tax is laid on the corporation, for, where the tax is placed upon the stock in the hands of the shareholders the tax is really laid upon individual and not upon corporate property. If the tax is laid on the corporation, and not on the members, the breach of duty in failing to make returns is that of the corporation, and the members cannot be in fault for failing or refusing to return the property for taxation. The corporation may, if guilty of a culpable breach of duty, be liable to such penalties as may be provided, but the stockholder cannot be.[37]

§ 743a. Situs of stock of nonresident corporation owned by domestic corporation.—Under a provision in a tax law requiring the assessment of property "located in each county," the Supreme Court of Georgia has held that stock in a nonresident corporation owned by a domestic railroad company is located, within the meaning of the stat-

[36] See South Nashville St. R. Co. v. Morrow, 87 Tenn. 406; 11 S. W. 348; 2 L. R. A. 853; United States v. Baltimore &c. R. Co. 17 Wall. (U. S.) 322; St. Albans v. National Car Co. 57 Vt. 68; note to State Board of Equalization v. People, 191 Ill. 528; 58 L. R. A. 513.

[37] Whitaker v. Brooks, 90 Ky. 68; 13 S. W. 355; Gillespie v. Gaston, 67 Texas. 599; 4 S. W. 248. In the first of the cases cited it was said: "It seems to us it is a sufficient answer by the stockholder when called upon to assess his stock to say the law requires the corporation to assess its corporate property and declares that the stock of the shareholder shall be exempt. It matters not to him whether the corporation has done so or not. If not, it should be made to do so. The grant of exemption to the stockholder has not been made to depend upon this being done. If it can not be done under existing law, then resort must be had to additional legislation, instead of a court attempting to annul a plain legislative grant of exemption to one because another has failed to perform what is perhaps a legal duty. If the statute declares without condition (as it does) that the corporation, and not the stockholder, shall answer for the tax, then it is immaterial to him in the present condition of the law whether the corporation has or has not listed its property and paid the tax. He need only show that the law places the burden upon the corporation." See State v. Chicago &c. R. Co. 128 Wis. 449; 108 N. W. 594; Ridpath v. Spokane Co. 23 Wash. 436; 63 Pac. 261.

ute, in the county and city where the principal office of the corporation owning the stock is located.[38] This seems to be in accord with the general rule that shares of stock are taxable at the domicile of the owner.[39]

§ 743b. Situs of rolling stock.—Where there is no statute to the contrary, rolling stock is usually taxable at the head or home office of the company.[40] But it has been held that if the charter does not fix any such place the domicile for taxing purposes will be held to be where the by-laws require the stockholders to meet,[41] and in another case it was held that the personal property was taxable at the place where it was used and the business done.[42] So, it has been held that the legislature may provide, in a proper case, for taxing the rolling stock at some place or places where it is used other than the head office of the company.[43] Questions as to the taxation of property in more than one state, as to taxation of property habitually used elsewhere, and as to the effect of the Federal Constitution, are considered in another chapter.[44]

§ 744. Discrimination.—Where the constitution of the state requires equality and uniformity there cannot be a material and unjust discrimination against railroad property.[45] This is so, independently

[38] Green Co. v. Wright (Ga.), 54 S. E. 951.

[39] See State v. Kidd, 125 Ala. 413; 28 So. 480, affirmed in 188 U. S. 730; 23 Sup. Ct. 401; Greenleaf v. Board of Review, 184 Ill. 226; 56 N. E. 295; 75 Am. St. 168; note to Buck v. Miller, 147 Ind. 586; 45 N. E. 647; 47 N. E. 8; 37 L. R. A. 384; 62 Am. St. 458.

[40] Sangamon &c. R. Co. v. Morgan County, 14 Ill. 163; 56 Am. Dec. 497; Appeal Tax Court v. Northern &c. R. Co. 50 Md. 417; Philadelphia &c. R. Co. v. Appeal Tax Court, 50 Md. 397; Baltimore &c. R. Co. v. Allen, 22 Fed. 376; Commonwealth v. Chesapeake &c. R. Co. 25 Ky. L. 1126; 77 S. W. 186; Detroit v. Wayne Circuit Judge, 127 Mich. 604; 86 N. W. 1032.

[41] Grundy County v. Tennessee &c. Co. 94 Tenn. 295; 29 S. W. 116.

[42] Atlantic &c. R. Co. v. Lesueur, 2 Ariz. 428; 19 Pac. 157; 1 L. R. A. 244.

[43] State v. Severance, 55 Mo. 378; Richmond &c. R. Co. v. Alamance, 84 N. Car. 504; Baltimore &c. R. Co. v. Wicomico County, 93 Md. 113; 48 Atl. 853; State v. Back (Neb.), 100 N. W. 952; 69 L. R. A. 447. See, also, Old Dominion S. S. Co. v. Virginia, 198 U. S. 299; 25 Sup. Ct. 686; Columbus Southern R. Co. v. Wright, 151 U. S. 470; 14 Sup. Ct. 396.

[44] See post, §§ 755, 756.

[45] In Chicago &c. Co. v. Board, 54 Kan. 781; 39 Pac. 1039, the court said: "While exact uniformity and

of any federal questions or rules. The requirement of equality and uniformity is violated by unjustly imposing a burden upon railroad companies heavier than that imposed upon other persons or corporations. We suppose, however, that the burden imposed must be palpably and materially greater than that imposed upon other property, since in all systems of taxation there is some inequality.[46]

§ 745. Lien of assessment.—The principle that railroad property is assessed as a unit requires the conclusion that the lien for the taxes assessed attaches to the entire property.[47] The question may, of course, be controlled by statutory provisions, but where there are no statutory provisions prescribing a different rule the lien will fasten upon the entire property within the state. We suppose, however, that taxing officers could not sell the property lying outside of the limits of the state for the reason that a state law can have no extraterritorial effect.

equality can not be had, and while mistakes and omissions by assessors may not, in all cases, be the subject of adequate remedy in the courts, yet for the gross injustice and violation of the law complained of, there ought to be some remedy." At another place it was said: "We do not think the courts are powerless to prevent such a gross discrimination in the assessment and taxation of property as is shown in this case, where one class of property is assessed and taxed at its actual value, and all other property in the same county is assessed and taxed at only twenty-five per cent. of its value." See Stanley v. Supervisors, 121 U. S. 535; 7 Sup. Ct. 1234.

[46] If property of other persons and corporations is taxed only once, double taxation of railway property would be a discrimination, against which the courts should interpose their power. Cumberland Marine &c. Co. v. Portland, 37 Me. 444; New York &c. R. Co. v. Sabin, 26 Pa. St. 242; Osborn v. New York &c. 40 Conn. 491; Hannibal &c. Co. v. Shacklett, 30 Mo. 550; State v. Hannibal &c. Co. 37 Mo. 265. But see Dunleith &c. Co. v. Dubuque, 32 Iowa, 427; Orange &c. Co. v. Alexandria, 17 Gratt. (Va.) 176. This general doctrine obtains where there is a constitutional limitation requiring equality and uniformity, but some of the decisions hold that it does not prevail where there is no such limitation. United States &c. Co. v. State, 79 Md. 63; 28 Atl. 768.

[47] Maricopa &c. R. Co. v. Arizona, 156 U. S. 347; 15 Sup. Ct. 391. Taxes upon the capital stock have been held to constitute a lien on the real property of the company. Union Trust Co. v. Weber, 96 Ill. 346. And its personal property is within a statute providing that the state shall have a lien on the railroad and all its appurtenances. Stevens v. Lake George &c. R. Co. 82 Mich. 426; 46 N. W. 730.

§ 745a. Taxation of street and interurban railroads.—Owing largely to the difference in the nature of franchises of railroads and street railways, and to the fact that the value of the different portions of a street railway line vary according to the density of the population of the localities traversed, it has been held that "street railways" are not generally included within the term "railroads," as used in revenue laws.[48] An interurban railway is defined in the Iowa laws as any railway operated upon the streets of any city or town by other power than steam, and extending beyond the corporate limits to any other city or town. One section of the law provides that such roads and the companies operating them shall be governed by the same laws that govern railroad and railway companies. Another section provides that any interurban railway shall, within the limits of any city or town, upon such streets as it shall use for transporting passengers, be deemed a street railway, and be subject to the laws governing street railways. The supreme court of that state, being recently called upon to construe this law, has held that the last section operates merely to render the interurban company liable to the obligations and entitled to the rights of a street railway as to those portions of its lines within the city or town limits, but does not give this portion of the line the character of a street railway strictly, so as to render them subject to assessment as street railroads, instead of railroads as provided in the previous section.[49]

§ 746. Relinquishment of the power of taxation.—The general rule is that, where there is no constitutional prohibition interdicting it, the power of taxation may be relinquished in particular instances.[50] It may well be doubted whether the cases which hold this doctrine

[48] San Francisco &c. R. Co. v. Scott, 142 Cal. 222; 75 Pac. 575. See, also, Savannah &c. R. Co. v. Mayor, 198 U. S. 392; 25 Sup. Ct. 690. But see Philadelphia v. Philadelphia Traction Co. 206 Pa. 35; 55 Atl. 762, where it is held that the words "Railroad" and "Railway" as used in the Pennsylvania statute are synonymous, and apply to both steam and street railways, unless the context clearly shows a different intent.

[49] Cedar Rapids &c. R. Co. v. Cummins, 125 Ia. 430; 101 N. W. 176.

[50] New Jersey v. Wilson, 7 Cranch. (U. S.) 164; Tomlinson v. Branch, 15 Wall. (U. S.) 460; Tomlinson v. Jessup, 15 Wall. (U. S.) 454; Home of Friendless v. Rouse, 8 Wall. (U. S.) 430; Ohio &c. Co. v. Debolt, 16 How. (U. S.) 416; Humphrey v. Pegues, 16 Wall. (U. S.) 244; Pacific &c. Co. v. Maguire, 20 Wall. (U. S.) 36; McGee v. Mathis, 4 Wall. (U. S.) 143; Railroad Co.

have not departed from principle since the power of taxation, being a sovereign one, is incapable of abdication or surrender, but the decisions have settled the question. The presumption is that there has been no relinquishment of the power, and the party who insists that it has been relinquished must clearly and fully establish his assertion, otherwise it will be adjudged that there was no relinquishment.[51]

v. Loftin, 105 U. S. 258; Dodge v. Woolsey, 18 How. (U. S.) 331; Mobile &c. Co. v. Tennessee, 153 U. S. 486; 14 Sup. Ct. 968; Franklin Branch Bank v. State, 1 Black (U. S.), 474; Wright v. Sill, 2 Black (U. S.), 544; Piqua Bank v. Knoop, 16 How. (U. S.) 369; Columbia &c. Co. v. Chilberg, 6 Wash. 612; 34 Pac. 163; State v. Wright, 41 N. J. L. 478; Natchez &c. Co. v. Lambert, 70 Miss. 779; 13 So. 33; Commonwealth v. Philadelphia &c. Co. 164 Pa. St. 252; 30 Atl. 145; Barnes v. Kornegay, 62 Fed. 671; Louisville &c. v. Gaines, 3 Fed. 266; South Pacific Co. v. Laclede County, 57 Mo. 147; Gardner v. State, 21 N. J. L. 557; LeRoy v. East-Saginaw Railroad Co. 18 Mich. 233; 100 Am. Dec. 162; State Bank v. People, 5 Ill. 303; St. Louis v. Manufacturers' Savings Bank, 49 Mo. 574; Farmers' Bank v. Commonwealth, 6 Bush (Ky.), 127; Mobile v. Stonewall Insurance Co. 53 Ala. 570.

[51] Keokuk &c. Co. v. State, 152 U. S. 301; 14 Sup. Ct. 592; Mobile &c. Co. v. Tennessee, 153 U. S. 486; 14 Sup. Ct. 986; People v. Cook, 148 U. S. 397; 13 Sup. Ct. 645; Yazoo &c. R. Co. v. Adams, 180 U. S. 1; 21 Sup. Ct. 240; New Orleans &c. R. Co. v. New Orleans, 143 U. S. 192; 12 Sup. Ct. 406; Rochester v. Rochester R. Co. 182 N. Y. 99; 74 N. E. 953; 70 L. R. A. 773; Wells v. Hyattsville, 77 Md. 125; 26 Atl. 357; 20 L. R. A. 89; Vicksburg R. Co. v. Dennis, 116 U. S. 665; 6 Sup. Ct. 625; Richmond v. Richmond &c. Co. 21 Gratt. (Va.) 604; Louisville &c. Co. v. Gaines, 3 Fed. 266; Cook v. State, 33 N. J. Eq. 474; Wisconsin &c. Co. v. Taylor County, 52 Wis. 37; 8 N. W. 833; 1 Am. & Eng. Cases, 532; Railroad Co. v. Maine, 96 U. S. 499; Portland v. Portland &c. Co. 67 Me. 135; State v. Baltimore &c. Co. 48 Md. 49; Illinois &c. Co. v. Goodwin, 94 Ill. 262; Mobile &c. Co. v. Moseley, 52 Miss. 127; Grand Gulf &c. Co. v. Buck, 53 Miss. 246; Scotland Co. v. Missouri &c. Co. 65 Mo. 123; Atlantic &c. Co. v. Allen, 15 Fla. 637; Oliver v. Memphis &c. Co. 30 Ark. 128. In Baltimore &c. R. Co. v. Wicomico County Com'rs 103 Md. 277; 63 Atl. 678, 681, it is said: "Every reasonable intendment must be made that it was not the design to surrender the power of taxation or to exempt any property from its due proportion of the burden of taxation." Citing Buchanan v. Talbot Co. 47 Md. 293; State v. Baltimore &c. R. Co. 48 Md. 73; Appeal Tax Court v. Rice, 50 Md. 312; Appeal Tax Court v. University, 50 Md. 465; Memphis &c. R. Co. v. Berry, 112 U. S. 609; 5 Sup. Ct. 299; 28 L. Ed. 837; Chesapeake &c. R. Co. v. Miller, 114 U. S. 186; 5 Sup. Ct. 813; 29 L. Ed. 121; Picard v. East Tennessee &c. R. Co. 130 U. S. 641; 9 Sup. Ct. 640; 32 L. Ed. 1051; New York v. Cook,

§ 747. Exemption from taxation—Consolidation.—The rule that exemption from taxation does not exist unless the exemption is conferred by clear statutory provisions would seem to require the conclusion that, where two railroad corporations are consolidated, the right to exemption is lost unless expressly or impliedly saved by the statute authorizing the consolidation. The theory of the adjudged cases, however, is that, where the consolidated corporation becomes essentially a new corporation, the right of exemption is lost, but if the identity of the two corporations is preserved the right of exemption is not destroyed.[52] Whether the right of exemption is lost must depend almost

148 U. S. 409; 13 Sup. Ct. 645; 37 L. Ed. 498; Phoenix Fire &c. Co. v. Tennessee, 161 U. S. 174; 16 Sup. Ct. 471. So, as said by the Supreme Court of the United States, "exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and therefore, not to be extended beyond the exact and express requirements of the language used, construed strictessimi juris." Vicksburg &c. R. Co. v. Dennis, 116 U. S. 665; 6 Sup. Ct. 625; Yazoo &c. R. Co. v. Thomas, 132 U. S. 174; 10 Sup. Ct. 68.

[52] In the case of Shields v. Ohio, 95 U. S. 319, 323, the court said, speaking of the consolidation: "It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporation subsisted. All the old and the new could not co-exist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to a dissolution. This being done, eo instante the new corporation came into existence." In Keokuk &c. Co. v. State, 152 U. S. 301; 14 Sup. Ct. 592, the court held that the consolidated corporation was a new corporation and did not acquire a right of exemption conferred upon one of the constituent companies. The court said: "It follows that when the new corporation came into existence it came precisely as if it had been organized under a charter granted at the date of the consolidation and subject to the constitutional provisions then existing, which required (Art. 11, § 16) that no property, real or personal, should be exempted from taxation, except such as was used exclusively for public purposes; in other words, that the exemption from taxation contained in section 9 of the original charter of the Alexandria and Bloomfield Railway Company did not pass to the Missouri, Iowa and Nebraska Company. As was said of an Arkansas corporation in St. Louis &c. R. Co. v. Berry, 113 U. S. 465, 475; 5 Sup. Ct. 529: 'It came into existence as a corporation of the state of Arkansas, in pursuance of its constitution and laws, and subject in all respects to their restrictions and limitations. Among these was that one which declared that the property of corporations, now existing, or hereafter created, shall forever be sub-

entirely upon the statutes under which the consolidation is effected, but in construing the statutes the court should, we venture to affirm, keep in mind the general principle forbidding the bargaining away of the powers of government, as well as the salutary rule that justice requires that the burden of taxation shall fall equally and uniformly upon all property, and that exemptions cannot exist except when clearly granted by constitutional statutes. The right of exemption does not extend to lines of railroad leased to the corporation to which the exemption is granted.[53] There is no consolidation in such

ject to taxation the same as property of individuals. This rendered it impossible for the consolidated corporation to receive by transfer from the Cairo and Fulton R. Company, or otherwise, the exemption sought to be enforced in this suit.' See, also, Memphis &c. R. Co. v. Railroad Com'rs, 112 U. S. 609; 5 Sup. Ct. 299; Shields v. Ohio, 95 U. S. 319; Railroad Co. v. Palmes, 109 U. S. 244; 3 Sup. Ct. 193. Nor was the exemption saved by section 3 of article 11, providing that 'all statute laws of this state now in force, not inconsistent with this constitution, shall continue in force until they shall expire by their own limitation, or be amended or repealed by the general assembly.' This referred to statutes in force at the time the constitution was adopted, the operation of which is continued, notwithstanding the constitution. In this case, however, the exemption contained in section 9 of the charter of the Alexandria and Bloomfield Railway Company ceased to exist, not by the operation of the constitution, but by the dissolution of the corporation to which it was attached." See, also, Tomlinson v. Branch, 15 Wall. (U. S.) 460; Philadelphia &c. Co. v. State, 10 How. (U. S.) 376; Delaware Railroad Tax, 18 Wall. (U. S.) 206; Central &c. Co. v. Georgia, 92 U. S. 665; Chesapeake &c. Co. v. Virginia, 94 U. S. 718; Green Co. v. Conness, 109 U. S. 104; 3 Sup. Ct. 69; Tennessee v. Whitworth, 117 U. S. 139; 6 Sup. Ct. 649; Railroad Co. v. Maine, 96 U. S. 499; Railroad Co. v. Georgia, 98 U. S. 359; St. Louis &c. R. Co. v. Berry, 113 U. S. 465; 5 Sup. Ct. 529; McMahan v. Morrison, 16 Ind. 172; Scovill v. Thayer, 105 U. S. 143; Railroad Co. v. Gaines, 97 U. S. 697; State v. Keokuk &c. Co. 99 Mo. 30; 12 S. W. 290; 6 L. R. A. 222; Rochester v. Rochester Ry. Co. 182 N. Y. 99; 74 N. E. 953; 70 L. R. A. 773; San Antonio Co. v. Altgelt, 200 U. S. 304; 26 Sup. Ct. 261.

[53] Lake Shore &c. Co. v. Grand Rapids, 102 Mich. 374; 60 N. W. 767. Nor, it seems, does the exemption of the lessor extend to the lessee. Rochester v. Rochester R. Co. 182 N. Y. 99; 74 N. E. 953; 70 L. R. A. 773. See, also, State v. Northern Pac. R. Co. 32 Minn. 294; 20 N. W. 234; State v. Chicago &c. R. Co. 89 Mo. 523; 14 S. W. 552. But compare State Board v. Morris &c. R. Co. 49 N. J. L. 193; 7 Atl. 826. A lease for a thousand years, without reversion, upon consideration of completing the road in a certain time, has been held to

cases, and there cannot be any implication or presumption that leased property is exempt, for the presumption, in the absence of countervailing facts, is always against exemptions and in favor of equality and uniformity.

§ 748. Right of exemption non-assignable.—The courts have generally manifested a reluctance to extend the doctrine that the power of taxation can be relinquished, and, wherever possible, without denying the doctrine of the earlier cases, have limited the rule. The rule is, in our judgment, not only unwise, but is also opposed to the principle that the powers of government cannot be bargained away, abrogated, or surrendered, and there is, therefore, strong reason for confining its operation within narrow limits. The cases which hold that the right cannot be assigned assert a wise doctrine, but, it must be confessed that it is difficult to see how this result can be logically reached if it be true that the right of exemption is one created by contract, and as such protected by the constitution, since it would seem to necessarily follow that, if the right is one of contract, it may be sold and assigned. The decisions of the court of final resort, however, have settled the question by adjudging that the right is not assignable.[54]

extinguish an exemption from taxation. Commonwealth v. Nashville &c. R. Co. 93 Ky. 430; 20 S. W. 383.

[54] The question was considered in Louisville &c. Co. v. Palmes, 109 U. S. 244; 3 Sup. Ct. 193, and the court, referring to the case of Morgan v. Louisiana, 93 U. S. 217, held the right to be not assignable. In the case first named it was said, "The exemption from taxation, created by the eighteenth section of the internal improvement act of 1855, is in every respect similar to that which was declared in Morgan v. Louisiana, 93 U. S. 217, to be not assignable. No words of assignability are used by the legislature of the state in the language creating it, and from its nature and context it is to be inferred that the exemption of the property of the company was intended to be of the same character as that declared in reference to its capital stock and to its officers, servants and employes, and that all alike were privileges personal to the corporation, or to individuals connected with it, entitled to them by the terms of the law. This exemption, therefore, did not pass from the Alabama and Florida Railroad Company to the Pensacola and Louisville Railroad Company by the conveyances which passed the title to the railroad itself, and to the franchises connected with and necessary in its construction and operation." See, also, Wilmington &c. Co. v. Alsbrook, 146 U. S. 279; 13 Sup. Ct. 72; Baltimore &c. Ry. Co. v. Mayor, 89 Md. 89; 42 Atl. 922;

Thus, it has been held that the purchaser at a mortgage foreclosure sale does not acquire an exemption from taxation which the mortgagor had.[55]

§ 749. Immunity from taxation not a franchise.—There is conflict in the cases upon the question whether immunity from taxation is a franchise,[56] and it is unsafe to assume to express an opinion upon the

Wilmington &c. Co. v. Alsbrook, 110 N. Car. 137; 14 S. E. 652, citing Southwestern R. Co. v. Wright, 116 U. S. 231; Chicago &c. R. Co. v. Guffey, 120 U. S. 569; State v. Mercantile Bank, 95 Tenn. 212; 31 S. W. 989; Bloxam v. Florida &c. R. Co. 35 Fla. 625; 17 So. 902; Rochester v. Rochester Ry. Co. 182 N. Y. 99; 74 N. E. 953; 70 L. R. A. 773. But compare Detroit &c. R. Co. v. Common Council, 125 Mich. 673; 85 N. W. 96; 84 Am. St. 589; Traverse Co. v. St. Paul &c. R. Co. 73 Minn. 417; 76 N. W. 217.

[55] Baltimore &c. R. Co. v. Wicomico County Com'rs, 103 Md. 277; 63 Atl. 678. But the Federal Court took a different view under the statute there involved. Wicomico County Com'rs v. Bancroft, 135 Fed. 977, from which, however, a writ of certiorari has been granted to the Supreme Court of the United States. 26 Sup. Ct. 756. See, also, to the effect that immunity from taxation does not ordinarily pass on foreclosure sale. Morgan v. Louisiana, 93 U. S. 217; Pickard v. East Tenn. &c. R. Co. 130 U. S. 637; 9 Sup. Ct. 640; Arkansas &c. R. Co. v. Berry, 44 Ark. 17.

[56] In Keokuk &c. Co. v. Missouri, 152 U. S. 301; 14 Sup. Ct. 592, the court said: "Whether under the name franchises and privileges an immunity from taxation would pass to the new company may admit of some doubt in view of the decisions of this court, which upon this point are not easy to be reconciled. In Chesapeake &c. R. Co. v. Miller, 114 U. S. 176; 5 Sup. Ct. 813, it was held that an immunity from taxation enjoyed by the Covington and Ohio Railroad Company did not pass to a purchaser of such road under foreclosure of a mortgage, although the act provided that 'said purchaser shall forthwith be a corporation' and 'shall succeed to all such franchises, rights and privileges . . . as would have been had . . . by the first company but for such sale and conveyance.' It was held, following in this particular, Morgan v. Louisiana, 93 U. S. 217, that the words 'franchises, rights and privileges' did not necessarily embrace a grant of an exemption or immunity. See, also, Picard v. East Tennessee R. Co. 130 U. S. 637; 9 Sup. Ct. 640. Upon the other hand, it was held in Tennessee v. Whitworth, 117 U. S. 139, 6 Sup. Ct. 649, that the right to have shares in its capital stock exempted from taxation within the state is conferred upon a railroad corporation by state statutes granting to it 'all the rights, powers and privileges' conferred upon another corporation named, if the latter corporation possesses by law such right of exemption; citing in sup-

question. We think that the rule should be that the immunity cannot be regarded as a franchise passing by assignment, unless that conclusion is imperatively required by the provisions of the statute, and if there be doubt it must be resolved against the claim that the immunity is a franchise. It is bad enough to permit the immunity to be granted as a contract right, and to extend the erroneous rule beyond what a rigid adherence to the earlier cases require would be to give to a pernicious doctrine a very wide and evil influence.

§ 750. Exemption of property used in operating railroad.—The cardinal and well-known rule of construction is that a statute exempting property from taxation is to be strictly construed. The general rule is settled and familiar, but its practical application is not always free from difficulty. It would not be profitable to comment upon the cases in which the rule has been applied, for they are numerous, and the statutes to which it has been applied differ in many material particulars.[57] The courts are often called upon to determine the meaning of such phrases as "all property used by a railroad company," or "all property used for railroad purposes." In such cases the decisions have generally been that it is only such property as is actually used or required in operating the railroad that is exempt. There is, however, difficulty in determining what is such use as will bring the particular case within the exemption, and there is some confusion among the authorities upon the question.[58] A great diversity of opinion pre-

port of this principle a number of prior cases. See, also, Wilmington &c. R. Co. v. Alsbrook, 146 U. S. 279, 297; 13 Sup. Ct. 72." See, also, Detroit R. Co. v. Guthard, 51 Mich. 180. For a full discussion and later authorities, see ante, § 330.

[57] See, generally, State v. Receiver &c. 38 N. J. L. 299; 13 Am. R. 50; Schuylkill &c. Co. v. Commissioners, 11 Pa. St. 202; Baltimore v. Baltimore &c. Co. 6 Gill (Md.), 288; 26 Am. Dec. 576; State v. Branin, 23 N. J. L. 484; County Com'rs v. Farmers' National Bank, 48 Md. 117; Hope Mining Co. v. Kennon, 3 Mont. 35; Atlantic &c. Co. v. Allen, 15 Fla. 637; Vicksburg &c. Co. v. Bradley, 66 Miss. 518; 6 So. 321; Atlantic &c. Co. v. Lesueur, 1 L. R. A. 244; 2 Inter. Com. R. 189.

[58] Wilmington &c. Co. v. Reid, 13 Wall. (U. S.) 264; Milwaukee &c. Co. v. Milwaukee, 34 Wis. 271; County of Erie v. Erie &c. Co. 87 Pa. St. 434; De Soto Bank v. Memphis, 6 Baxt. (Tenn.) 415; Day v. Joiner, 6 Baxter (Tenn.), 441; St. Louis &c. Co. v. Loftin, 30 Ark. 693; State v. Woodruff, 36 N. J. L. 94; State v. Haight, 35 N. J. L. 40; State v. Wetherill, 41 N. J. L. 147; State v. Collector &c. 38 N. J. L. 270; Railroad Co. v. Berks,

vails, although all the cases profess adherence to the cardinal rule. Some of the courts enforce the rule with rigid strictness, holding that there must be actual use for railroad purposes, and not merely a use for a purpose indirectly connected with the operation of the railroad, while other courts extend the exemption to property incidentally connected with the operation of the railroad.[59] As much as can be safely said is that in each particular case the question is one of legislative intention, that intention being gathered from the particular statute strictly construed against the corporation which claims that its property is exempt from taxation, and it appearing clearly that the property claimed as exempt is essential and not barely convenient to the operation of the railroad.[60] The statement made does not advance us

County, 6 Pa. St. 70; Wayne County v. Delaware &c. Co. 15 Pa. St. 351; Milwaukee &c. Co. v. Board of Supervisors, 29 Wis. 116; Chicago &c. Co. v. Board of Supervisors, 48 Wis. 666; State v. Baltimore &c. Co. 48 Md. 49; New York &c. Co. v. Sabin, 26 Pa. St. 242; Lackawanna &c. Co. v. Luzerne County, 42 Pa. St. 424; Atlanta &c. Co. v. Atlanta, 66 Ga. 104; Detroit &c. Co. v. Detroit, 88 Mich. 347; 50 N. W. 302; State v. Nashville &c. Co. 86 Tenn. 438; 6 S. W. 880; Swigert, In re, 119 Ill. 83; 6 N. E. 469; 59 Am. R. 789; Milwaukee &c. Co. v. Milwaukee, 34 Wis. 271; Northampton &c. Co. v. Lehigh &c. Co. 75 Pa. St. 461; Northern Pac. Co. v. Carland, 5 Mont. 146; 3 Pac. 134; Portland &c. R. Co. v. Saco, 60 Me. 196; Todd Co. v. St. Paul &c. Co. 38 Minn. 163; 36 N. W. 109; Whitcomb v. Ramsey County, 91 Minn. 238; 97 N. W. 879; Illinois Central Co. v. Irvin, 72 Ill. 452; Osborn v. Hartford &c. Co. 40 Conn. 498; State v. Haight, 34 N. J. L. 319; State v. Newark, 26 N. J. L. 520.

[59] It has been held that an inn used exclusively by passengers and employes traveling on railroad trains comes within the exemption of "property necessarily used in operating the railroad." Milwaukee &c. Co. v. Board of Supervisors, 29 Wis. 116. But see State v. Mansfield, 23 N. J. L. 510; 57 Am. Dec. 409n, and compare State v. Baltimore &c. R. Co. 48 Md. 49. As to grain elevators, see Detroit Union &c. Co. v. Detroit, 88 Mich. 347; 50 N. W. 302; State v. Nashville &c. R. Co. 86 Tenn. 438; 6 S. W. 880; Pennsylvania R. Co. v. Jersey City, 49 N. J. L. 540; 9 Atl. 782; 60 Am. Rep. 648; aff'd in 51 N. J. L. 564; 20 Atl. 60; Petersburgh R. Co. v. Northampton County, 81 N. Car. 487; Chicago &c. R. Co. v. Bayfield, 87 Wis. 188; 58 N. W. 245. But compare Erie County v. Erie &c. Transp. Co. 87 Pa. St. 434; Milwaukee &c. R. Co. v. Milwaukee, 34 Wis. 271; Illinois Cent. R. Co. v. People, 119 Ill. 137; 6 N. E. 451.

[60] Property not used for railroad purposes is taxable as provided for taxing property of like character, in the hands of ordinary corporations or of individuals. Osborn v. Hartford &c. Co. 40 Conn. 498;

very far, for the question of importance and difficulty which must be solved is as to what property is reasonably necessary to the proper operation of the railroad, but it is not possible to give any general rule which will enable the investigator to work out a solution of the legal problem.

§ 750a. Withdrawal of exemption.—It may be said generally that, where there is no true contract or meeting of the state and the beneficiary of an exemption statute on a basis of bargain and consideration, the statute granting the exemption will be regarded merely as an expression of the present will of the state on the subject, and, like other general laws, subject to modification or repeal in the legislative discretion, though the parties have acted in reliance upon it while it continued in force.[61] Thus, a provision in a general tax law that railroad companies thereafter building and operating roads in specified districts shall be exempt from taxation for a named period, unless the gross earnings shall exceed a certain sum, was held not to rise to the dignity of a covenant of contract within the meaning of the constitutional provision as to the impairment of contracts.[62] In the case announcing this principle the court said: "The broad view in a case like this is, that, in view of the subject-matter, the legislature is not making a promise, but forming a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out it may open a chance for benefit to those who comply with its conditions, but it does not address them, and, therefore, it makes no promises to them. It simply indicates a course of conduct to be pursued until circumstances or its views of policy change."[63] But provisions in a state statute for a special rate of taxation in respect to the particular corporation, made with a view of inducing large expenditures, and which are formally accepted and complied with, will

United &c. Co. v. Jersey City, 53 N. J. L. 547; 22 Atl. 59; State v. Hancock, 33 N. J. L. 315; Toledo &c. Co. v. Lafayette, 22 Ind. 262; Chicago &c. Co. v. Paddock, 75 Ill. 616; Applegate v. Ernst, 3 Bush (Ky.), 648; 96 Am. Dec. 272; Pfaff v. Terre Haute &c. Co. 108 Ind. 144, 153; 9 N. E. 93; People v. Chicago &c. Co. 116 Ill. 181; 4 N. E. 480; 24 Am. & Eng. Cases, 612; Santa Clara Co. v. Southern &c. Co. 118 U. S. 394; 6 Sup. Ct. 1132.

[61] Cooley Taxation (3rd ed.), 111. See, also, Stone v. Mississippi, 101 U. S. 814.

[62] Wisconsin &c. R. Co. v. Powers, 191 U. S. 379; 24 Sup. Ct. 107.

[63] Wisconsin &c. R. Co. v. Powers, 191 U. S. 379; 24 Sup. Ct. 107.

amount to a contract, within the protection of the impairment clause of the Federal Constitution, and no other tax can be imposed on the corporation.[64] It is clear that, where property of a railroad company is exempt from taxation, title adverse to the company cannot be acquired by a sale for unpaid taxes levied and assessed during the period of exemption.[65] It is held, in a recent case, that a repealable exemption from state taxation was withdrawn by the enactment of a statute which directed a new assessment of all the property in the state and expressly declared that the property of every railroad should be assessed for county and municipal purposes, except where protected by an irrepealable exemption.[66]

§ 751. Remedies—Injunction.—We believe the true rule to be that, where the tax sought to be enforced is illegal and void, its enforcement will be restrained by injunction except in cases where an adequate remedy is provided by statute. The rule we have stated is, as we believe, supported by sound principle, and it is well fortified by authority.[67] We can see no reason for holding that the enforcement of

[64] Powers v. Detroit &c. R. Co. 201 U. S. 543; 26 Sup. Ct. 556. See, also, Bennett v. Nichols (Ariz.), 80 Pac. 392.

[65] Raquette Falls Land Co. v. Hoyt, 109 App. Div. (N. Y.) 119; 95 N. Y. S. 1029.

[66] Wicomico v. Bancroft (U. S.), 27 Sup. Ct. 21.

[67] Illinois Cent. &c. Co. v. McLean County, 17 Ill. 291; Small v. Lawrenceburg &c. Co. 128 Ind. 231; 27 N. E. 500; Topeka &c. Co. v. Roberts, 45 Kan. 360; 25 Pac. 854; Pelton v. Bank, 101 U. S. 143; Cummings v. Bank, 101 U. S. 153; Fargo v. Hart, 193 U. S. 490; 24 Sup. Ct. 498; 48 Law Ed. 761; Lefferts v. Board, 21 Wis. 697; People v. Weaver, 100 U. S. 539; Chicago &c. Co. v. Board, 54 Kan. 781; 39 Pac. 1039; Schmidt v. Galveston &c. Co. 24 Texas Civ. App. 547; 24 S. W. 547; Cook v. Galveston &c. Co. 5 Texas Civ. App. 644; 24 S. W. 544; Railroad Co. v. Hodges, 113 Ill. 323; Chicago &c. Co. v. Vollman, 213 Ill. 609; 73 N. E. 360; Keokuk &c. Bridge Co. v. People, 185 Ill. 276; 56 N. E. 1049; Crim v. Philippi, 38 W. Va. 122; 18 S. E. 466; Bramwell v. Gukeen, 2 Idaho, 1069; 29 Pac. 110; Stewart v. Hovey, 45 Kan. 708; 26 Pac. 683; Kerr v. Woolly, 3 Utah, 456; 24 Pac. 831; Woodruff v. Perry, 103 Cal. 611; 37 Pac. 526; McTwiggan v. Hunter, 18 R. I. 776; 30 Atl. 362; Arthur v. School District, 164 Pa. St. 410; 30 Atl. 299; Board of Assessors of Parish of New Orleans v. Pullman Co. 60 Fed. 37. If the statute expressly provides a remedy for relief against taxes illegally assessed and the remedy is adequate injunction will not lie. Albuquerque National Bank v. Perea, 147 U. S. 87; 13 Sup. Ct. 194; Bellevue &c. Co. v. Bellevue, 39 Neb. 876; 58 N. W. 446; Thatcher v.

an illegal tax may not be enjoined, although it may be void. Even a void proceeding may cloud title and do injury to a property owner, and there is no remedy except that of injunction, which will effectively prevent or redress the injury. It seems to us that where the entire controversy can be settled by the comprehensive equity remedy, and all complications prevented, the remedy should be applied rather than drive the taxpayer to an action for damages. There is certainly no objection to the employment of the equitable remedy except that which grows out of the old doctrine established when the strife between courts of law and courts of equity was bitter, and, as that doctrine is now of comparatively little practical importance, there is reason for extending, as many courts are doing, the remedy of injunction. We think it wiser to restrain by injunction than to compel an action against the officer whose duty it is to collect the tax. There is, however, conflict of authority upon this question.[68] If there is nothing more than a mere irregularity in the proceedings injunction will not lie.[69]

Adams, 19 Neb. 485; 27 N. W. 729; Caldwell v. Lincoln City, 19 Neb. 569; 27 N. W. 647; Price v. Lancaster County, 18 Neb. 199; 24 N. W. 705; Stanley v. Supervisors, 121 U. S. 535; 7 Sup. Ct. 1234; Robinson v. Wilmington, 65 Fed. 856, citing Kirtland v. Hotchkiss, 100 U. S. 491; Shelton v. Platt, 139 U. S. 591; 11 Sup. Ct. 646; Tyler, In re, 149 U. S. 164; 13 Sup. Ct. 785.

[68] United States Co. v. Grant, 137 N. Y. 7; 32 N. E. 1005; Mayor &c. v. Davenport, 92 N. Y. 604; Delaware &c. Co. v. Atkins, 121 N. Y. 246; 24 N. E. 319; Dusenbury v. Mayor &c. 25 N. J. Eq. 295; Hannewinkle v. Georgetown, 15 Wall. (U. S.) 547, 548; McClung v. Livesay, 7 W. Va. 329; Bull v. Read, 13 Gratt. (Va.) 78; Cook Co. v. Chicago &c. 35 Ill. 460; Lucas County v. Hunt, 5 Ohio St. 488; Williams v. Mayor, 2 Gibbs. (Mich.), 560; Clarke v. Ganz, 21 Minn. 387; Scribner v. Allen, 12 Minn. 148; Laughlin v. Santa Fe, 3 N. Mex. 264; 5 Pac. 817; City Council v. Sayre, 65 Ala. 564; Sayre v. Tompkins, 23 Mo. 443; Barrow v. Davis, 46 Mo. 394; Gregg v. Sanford, 65 Fed. 151; Harkness v. District, 1 McArthur (D. C.), 121; Warden v. Board, 14 Wis. 672; Mills v. Gleason, 11 Wis. 493; Greene v. Mumford, 5 R. I. 472; 73 Am. Dec. 79; Dodd v. Hartford, 25 Conn. 232; Hixon v. Oneida County, 82 Wis. 515; 52 N. W. 445; Odlin v. Woodruff, 31 Fla. 160; 12 So. 227; 22 L. R. A. 699.

[69] Ricketts v. Spraker, 77 Ind. 371; Delphi v. Bowen, 61 Ind. 29; Hunter Stone Co. v. Woodard, 152 Ind. 474; 53 N. E. 947; Alexander v. Dennison, 2 McArthur (D. C.), 562; Montgomery v. Sayre, 65 Ala. 564; Simmons v. Mumford, 5 R. I. 472; 73 Am. Dec. 79; Sherman v. Leonard, 10 R. I. 469; Porter v. Milwaukee, 19 Wis. 625; 88 Am. Dec. 711; Youngblood v. Sexton, 32 Mich. 406; 20 Am. R. 654; Loud v. Charlestown, 99 Mass. 208; Whiting v. Mayor

§ 751a. Remedies—Injunction—Suit by taxpayer.—The decisions are not harmonious on the question of right of an individual taxpayer to institute proceedings to restrain or compel action of tax officers where the interest of the taxpayer is not different from that of other taxpayers. Some courts hold that it requires some individual interest distinct from that which belongs to every inhabitant of a town or county to give the party complaining a standing in court where an alleged delinquency in the administration of public affairs is called in question and the fact of owning taxable property is not such a peculiarity as takes the case out of the rule.[70] Elsewhere, notably in Iowa, a different rule obtains, and there an individual taxpayer has this right, and, as intimated in the preceding section, we think this right exists in a proper case.[71] There is also authority to the effect that the holder of mortgaged bonds of a railroad company has such an interest in the property as entitles him to maintain a suit to enjoin illegal taxation of property of railroad companies, where a proper showing is made or the refusal of mortgage trustees to prosecute such a suit.[72]

§ 751b. Inequality no ground for injunction.—Railroad taxes will not be enjoined solely because other property in the state is undervalued where this inequality is not a result of a scheme or agreement against taxing officers. To authorize this remedy it must be shown that the inequality was caused intentionally and systematically.[73]

&c. Boston, 106 Mass. 350; Rockingham &c. v. Portsmouth, 52 N. H. 17; Deane v. Todd, 22 Mo. 90; Sayre v. Tompkins, 23 Mo. 443; Mayor &c. v. Baltimore &c. Co. 21 Md. 50; Douglass v. Harrisville, 9 W. Va. 162; 27 Am. R. 548; Armstrong v. Taylor, 41 W. Va. 602; 24 S. E. 993; Covington v. Rockingham, 93 N. Car. 134; Jones v. Sumner, 27 Ind. 510; Litchfield v. Polk Co. 18 Iowa, 70; Smith v. Osborn, 53 Iowa, 474; 5 N. W. 681; Gates v. Barrett, 79 Ky. 295; Darling v. Gunn, 50 Ill. 424; Iowa &c. Co. v. Carroll County, 39 Iowa, 151; Robinson v. Wilmington, 65 Fed. 856.

[70] Doolittle v. Broone Co. 18 N. Y. 155; Roosevelt v. Draper, 23 N. Y. 318; Craft v. Jackson Co. 5 Kan. 518; Wyandotte &c. Bridge Co. v. Wyandotte Co. 10 Kan. 326. See, also, cases cited in second note to last preceding section.

[71] Collins v. Davis, 57 Ia. 256; 10 N. W. 643; State v. Smith, 7 Ia. 244; Collins v. Ripley Co. 8 Ia. 129. See, also, authorities cited in the first note to the last preceding section. And see, as to mandamus, Loewenthal v. People, 192 Ill. 222; 61 N. E. 462; People v. Wilson, 119 N. Y. 515; 23 N. E. 1064; State v. Assessors, 52 La. Ann. 223; 26 So. 872.

[72] Wicomico v. Bancroft, 139 Fed. 977.

[73] Chicago &c. R. Co. v. Babcock

Neither is it a ground for injunction that the law authorizing taxation of railroad property at the average rate of taxation imposed on other property in the state does not make any provisions for an equalization of the railroad property with other property, if the statute expressly names the time and place for sessions of the assessing board and gives interested persons a right to be heard, and authorizes the board to correct valuations.[74] And equity will usually refuse relief unless it is shown that a wrong is about to be inflicted which is not remediable by the special method, if any, pointed out by statute, or that there is no adequate remedy at law.[75]

§ 752. Tender of amount of taxes owing is required.—Upon the principle that he who asks equity must do equity, a tender of the amount of the tax owing from the plaintiff is usually, if not invariably, required.[76] Considerations of policy are sometimes urged, and with force, in support of the general rule we have stated,[77] but its

(U. S.), 27 Sup. Ct. 326; Coulter v. Louisville &c. R. Co. 196 U. S. 599; 25 Sup. Ct. 324; 49 Law Ed. 615; Louisville &c. R. Co. v. Coulter, 131 Fed. 282; Georgia R. &c. Co. v. Wright, 125 Ga. 589; 54 S. E. 52. Unless it is so unequal and discriminating as to violate the law of the land. Cummings v. Merchants' Nat. Bank, 101 U. S. 153; Semple v. Langlade Co. 75 Wis. 354; 44 N. W. 749.

[74] Mich. Cent. R. Co. v. Powers, 201 U. S. 245; 26 Sup. Ct. 459.

[75] See Taylor v. Louisville &c. R. Co. 88 Fed. 350; State Railroad Tax Cases, 92 U. S. 575; Houston &c. R. Co. v. Presidio County, 53 Tex. 518; Stephens v. Texas &c. R. Co. (Tex.) 97 S. W. 309.

[76] Albuquerque National Bank v. Perea, 147 U. S. 87; 13 Sup. Ct. 194; State Railroad Tax Cases, 92 U. S. 575; Morrison v. Jacoby, 114 Ind. 84; 14 N. E. 546; 15 N. E. 806; Baily v. Atlantic &c. Co. 1 Cent. L. J. 502; Hagaman v. Commissioners, 19 Kan. 394; Smith v. Humphrey, 20 Mich. 398. See, also, Buck v. Miller, 147 Ind. 586; 45 N. E. 647; 37 L. R. A. 384; 62 Am. St. 436n; Bundy v. Summerland, 142 Ind. 92; 41 N. E. 322; Grand Rapids &c. R. Co. v. Auditor General, 144 Mich. 77; 107 N. W. 1075; Hewin v. Atlanta, 121 Ga. 723; 49 S. E. 765; 67 L. R. A. 795; Hacker v. Howe (Neb.), 101 N. W. 255; Wead v. Omaha (Neb.), 102 N. W. 67; Douglas v. Fargo, 13 N. D. 467; 100 N. W. 919; Fargo v. Hart, 193 U. S. 490; 24 Sup. Ct. 498; 48 Law Ed. 761. But compare Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273; 26 Sup. Ct. 252.

[77] In State Railroad Tax Cases, 92 U. S. 575, 616, it was said: "It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when, in the end, it is found that but a small part

chief support is the elementary principle referred to by us. Where no part of the tax is due, the reason of the rule fails, and no tender is required.[78]

of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted.

[78] Walla Walla &c. Bank v. Hungate, 62 Fed. 548; Guidry v. Broussard, 32 La. Ann. 924. See, also, Yocum v. First Nat. Bank, 144 Ind. 272; 43 N. E. 231.

CHAPTER XXXI.

TAXATION AS AFFECTED BY THE FEDERAL CONSTITUTION.

§ 753. Taxing interstate commerce railroads.—The power of a state to tax property of all kinds and classes within its territorial limits is broad and comprehensive, but this power, great as it is, is

not unlimited. The commerce clause of the federal constitution restrains this power and limits its exercise. It is not easy to define the extent of the limitation imposed by the federal constitution. It is safe, however, to say that the power cannot be so exercised as to obstruct commerce between the states, or to restrain or defeat the power of the federal congress to regulate commerce.[1]

§ 754. Interstate commerce—Obstruction of.—It is settled law that, under the guise of taxing railroads, a state can neither obstruct nor regulate commerce between the states. The power to regulate

[1] In the case of Brown v. Maryland, 12 Wheat. (U. S.) 419, Chief Justice Marshall, speaking of the taxing power, said: "We admit this power to be sacred, but can not admit that it may be so used as to obstruct the free exercise of a power given to congress. We can not admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the power remaining with the states may be so exercised as to come in conflict with those vested in congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing power of the state must have some limits." In the State Freight Tax Case, 15 Wall. (U. S.) 232, Mr. Justice Wayne expressed the same general doctrine in this language: "While on the one hand it is of the utmost importance that the states should possess the power to raise revenue for all the purposes of a state government, by any means and in any manner not inconsistent with the powers which the people of the state have conferred upon the general government, it is equally important that the domain of the latter should be preserved from invasion and that no state legislation should be sustained which defeats the avowed purpose of the federal constitution, or which assumes to regulate or control subjects committed by the constitution exclusively to the regulation of congress." See, also, Osborne v. State, 33 Fla. 162; 14 So. 588; 25 L. R. A. 120; 39 Am. St. 99. The authorities are collected and classified, and the following propositions laid down in substance in Atlantic &c. Tel. Co. v. Philadelphia, 190 U. S. 160; 23 Sup. Ct. 817. 1. The power of congress in proper cases is exclusive. 2. No state can compel a party, whether individual or corporation, to pay for the privilege of engaging in interstate commerce. 3. This immunity does not prevent a state from imposing ordinary property taxes on property having a situs within its territory. 4. The franchise of a corporation is, as a part of its property, subject to state taxation, at least if it is not derived from the United States.

interstate commerce is in the federal government, not in any state, so that if the tax so operates as to regulate interstate commerce there is an invasion of the domain of the federal government. If a state tax operates so as to obstruct such commerce, then the statute providing for levying the tax is void, since no state can impede or obstruct commerce between the states. The mere form of the statute is not of controlling importance, for its validity depends upon its operation and effect.[2] The general principle is easily understood, but there is difficulty in applying it. Each particular case stands, in a great measure, upon its own facts, and whether in the particular case the statute obstructs or regulates commerce is a question which is not always easy of solution.

§ 755. Railroad property used in interstate commerce is taxable by the states.—The fact that property is used in the business of interstate commerce does not exonerate it from taxation by the states.[3] Property within the state may be taxed, although it may be employed exclusively in interstate traffic, but the business of interstate commerce

[2] State Freight Tax, 15 Wall. 232, 272; Commerce v. New York City, 2 Black. (U. S.) 620; The Bank Tax Case, 2 Wall. (U. S.) 200; Society for Savings v. Coite, 6 Wall. (U. S.) 594; Provident Bank v. Massachusetts, 6 Wall. (U. S.) 611. In Fairbank v. United States, 181 U. S. 283; 21 Sup. Ct. 648, it is held that a stamp tax imposed on a foreign bill of lading is in effect a tax on the property and invalid. But in New York v. Reardon (U. S.), 27 Sup. Ct. 184, 190, it is held that a tax on transfers of stock of a foreign railway company as applied to a sale in the state between two non-residents, is valid. See, generally, as to license taxes held an interference with interstate commerce under the circumstances. Norfolk &c. R. Co. v. Sims, 191 U. S. 411; 24 Sup. Ct. 151; McCall v. California, 136 U. S. 104; 10 Sup. Ct. 881; Caldwell v. North Carolina, 187 U. S. 622; 23 Sup. Ct. 229. And compare Heymann v. Southern Ry. Co. (U. S.) 27 Sup. Ct. 104, and other liquor cases there reviewed.

[3] Delaware Railroad Tax, 18 Wall. (U. S.) 206, 232; Telegraph Co. v. Texas, 105 U. S. 460, 464; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 206; 5 Sup. Ct. 826; Western Union Telegraph Co. v. Attorney-General, 125 U. S. 530, 549; 8 Sup. Ct. 961; Marye v. Railroad Co. 127 U. S. 117, 124; 8 Sup. St. 1037; Leloup v. Mobile, 127 U. S. 640, 649; 8 Sup. Ct. 1380; American Refrigerator Transit Co. v. Hall, 174 U. S. 70; 19 Sup. Ct. 599, affirming 24 Colo. 291; 51 Pac. 421; 65 Am. St. 223; 56 L. R. A. 89; Sandford v. Poe, 69 Fed. 546; 60 L. R. A. 641, and elaborate note; Henderson Bridge Co. v. Kentucky, 166 U. S. 150; 17 Sup. Ct. 532; McGuire v. Chicago &c. R. Co. (Iowa), 108 N. W. 902.

itself cannot be burdened by state taxes. There is a difference between taxing the business done by the company and taxing the property of which it is the owner.[4] But to authorize the taxing of property employed in interstate commerce, it is necessary that it should, in a sense at least, have its situs in the state which imposes the tax. Property merely passing through the state, or temporarily there while in actual use for interstate commerce purposes, cannot be taxed.[5] The

[4] Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18; 11 Sup. Ct. 876; 46 Am. & Eng. R. Cas. 236; Pullman &c. Co. v. Commonwealth, 107 Pa. St. 156; Pittsburgh &c. Co. v. Backus, 154 U. S. 421; 14 Sup. Ct. 1114; Denver &c. Co. v. Church, 17 Colo. 1; 28 Pac. 468; 31 Am. St. 252. See, generally, Bain v. Richmond &c. Co. 105 N. C. 363; 11 S. E. 311; 8 L. R. A. 299, and note; 18 Am. St. 912; Pullman &c. Co. v. Gaines, 3 Tenn. Ch. 587; Pittsburg &c. Co. v. Commonwealth, 66 Pa. St. 73; 5 Am. R. 344; Dubuque v. Illinois Cent. R. Co. 39 Iowa, 56; Western Un. Tel. Co. v. Taggart, 141 Ind. 281; 40 N. E. 1051; Adams Express Co. v. Ohio, 165 U. S. 194; 17 Sup. Ct. 305.

[5] Hays v. Pacific Mail Steamship Co. 17 How. (U. S.) 596; St. Louis v. Ferry Co. 11 Wall. 423; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365; 2 Sup. Ct. 257; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; 5 Sup. Ct. 826; Pickard v. Pullman So. Car. Co. 117 U. S. 34, 46; 6 Sup. Ct. 635; Tennessee v. Pullman So. Car Co. 117 U. S. 51; 6 Sup. Ct. 643; State v. Stephens, 146 Mo. 662; 48 S. W. 929; 69 Am. St. 625; Bain v. Richmond &c. R. Co. 105 N. Car. 363; 11 S. E. 311; 8 L. R. A. 299; 18 Am. St. 912. In Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; 11 Sup. Ct. 676, the court said: "The cars of this company within the state of Pennsylvania are employed in interstate commerce, but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania it could not be doubted that the state could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, can not affect the power of the state to levy a tax upon them. The state having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were in its borders. The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars

doctrine we have stated is peculiarly applicable to vessels traversing navigable waters, but we suppose it must apply to all the agencies of interstate commerce where it is clear that such agencies are temporarily in the state and have a fixed and known situs elsewhere. We do not mean, of course, that a mileage basis of valuation and assessment may not be adopted where the corporation owning the property regularly or generally uses it in the state; what we mean is that where a car or locomotive is brought into a state for a purely temporary purpose, and is owned by a railroad company which does not regularly or generally conduct business in that state, it is not subject to taxation. A different rule would probably obtain if the car or locomotive were generally, habitually, or regularly used in the state, although it might not permanently be kept or used therein.[6] Property, even of a domestic corporation, cannot be taxed if it is permanently out of the state,[7] but it is otherwise if it only leaves the state during part of the

within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the state. The mode which the state of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that state was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles in that and other states over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more. The validity of this mode of appropriating such a tax is sustained by several decisions of this court in cases which came up from the circuit courts of the United States, and in which, therefore, the jurisdiction of this court extends to the determination of the whole case, and was not limited, as upon writs of error to the state courts, to questions under the constitution and laws of the United States."

[6] See authorities cited in notes to last preceding section, also, Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149; 20 Sup. Ct. 631; Marye v. Baltimore &c. R. Co. 127 U. S. 117; 8 Sup. Ct. 1037; Reinhart v. McDonald, 76 Fed. 403; as to this rule of "average habitual use," and the right now established to tax as suggested in the text. See, also, Old Dominion Steamship Co. v. Virginia, 198 U. S. 299; 25 Sup. Ct. 686; Wisconsin &c. R. Co. v. Powers, 191 U. S. 379; 24 Sup. Ct. 107.

[7] Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194; 26 Sup.

taxing year, for "the state of origin remains the permanent situs of the property notwithstanding its occasional excursions to foreign parts."[8]

§ 756. Interstate commerce—Taxation of property brought from one state into another.—Where property is brought from one state into another, the latter state being its destination, it may be there taxed.[9] This must be the rule, otherwise property might entirely escape taxation. The doctrine, as declared by the Supreme Court of the United States, is a broad one, since it authorizes taxation of property by the state into which it is brought, although taxes were paid upon it in the state from which it came.[10] It is, as we suppose, always to be understood that taxes cannot be so levied as to unlawfully restrict interstate commerce.[11]

Ct. 36; Louisville &c. Ferry Co. v. Kentucky, 188 U. S. 385; 23 Sup. Ct. 468; Delaware &c. R. Co. v. Pennsylvania, 198 U. S. 341; 25 Sup. Ct. 669. See, also, Fargo v. Hart, 193 U. S. 490; 24 Sup. Ct. 498.

[8] New York &c. R. Co. v. Miller, 202 U. S. 584; 26 Sup. Ct. 714; 717; Ayer &c. Co. v. Kentucky, 202 U. S. 409; 26 Sup. Ct. 679.

[9] Brown v. Houston, 114 U. S. 622; 5 Sup. Ct. 1091. Citing Woodruff v. Parham, 8 Wall. (U. S.) 123; Brown v. Maryland, 12 Wheat. (U. S.) 419; Cooley v. Board of Wardens, 12 How. 299; Welton v. State, 91 U. S. 275; Pittsburgh &c. Co. v. Bates, 156 U. S. 577; 15 Sup. Ct. 415. But a state has no jurisdiction to tax property where neither it nor its owner is within the state and has no situs or domicile there. Yost v. Lake Erie &c. Transp. Co. 112 Fed. 746; St. Louis v. Wiggins Ferry Co. 11 Wall. (U. S.) 425; Young v. South Tredegar &c. Co. 85 Tenn. 189; 2 S. W. 202; 4 Am. St. 752.

[10] In Brown v. Houston, 114 U. S. 622; 5 Sup. Ct. 1091, the court said: "Of course the assessment should be a general one, and not discriminative of goods between different states. The taxing of goods coming from other states, as such or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom which congress has seen fit should remain undisputed. But if, after their arrival in the state, that being their destination for use or trade—if after this they are subjected to a general tax laid on all alike, we fail to see how such a tax can be deemed a regulation of commerce which would have the objectionable feature referred to." The court discriminated the case from that of Woodruff v. Parham, 8 Wall. (U. S.) 123, and marked, in a general way, the line of difference.

[11] Moran v. New Orleans, 112 U. S. 69; 5 Sup. Ct. 38, citing Sinnot v. Davenport, 22 How. (U. S.) 227; Telegraph Co. v. Texas, 105 U. S. 460; Case of State Freight

§ 757. Railroad in more than one state.—The decisions affirm that, in valuing railway property for taxation, the taxing officers may take into consideration the part lying in an adjoining state for the purpose of determining the value of the entire line. This, unless carefully limited to the portion within the state, although considered in relation to the whole, seems to us very much like an unjust discrimination. It is difficult to conceive why it is not unequal taxation and an unwarrantable burden upon instrumentalities of interstate commerce. The owner of a large manufacturing establishment situated in one state can only be taxed in that state, although the principal part of his business may be done in another state, and yet, according to the decisions, a railway company may be taxed in two or more states. The question is, however, settled by the adjudged cases.[12] But it is held that one state cannot tax a franchise granted by another state and having its situs in the latter.[13]

§ 758. Mileage basis of valuation.—The doctrine of the court of last resort is that the taxing officers may make a valuation upon a

Tax, 15 Wall. (U. S.) 232; Crandall v. Nevada, 6 Wall. (U. S.) 35; Osborne v. Mobile, 16 Wall. (U. S.) 479; Transportation Co. v. Wheeling, 99 U. S. 273; Morgan v. Parham, 16 Wall. (U. S.) 471; Hays v. Pacific Mail Steamship Co. 17 How. (U. S.) 596; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365; 2 Sup. Ct. 257.

[12] Pittsburgh &c. Co. v. Backus, 154 U. S. 421; 14 Sup. Ct. 1114, citing State Railroad Tax Cases, 92 U. S. 575; Columbus &c. Ry. Co. v. Wright, 151 U. S. 470; 14 Sup. Ct. 396; Delaware Railroad Tax, 18 Wall. (U. S.) 206; Erie R. Co. v. Pennsylvania, 21 Wall. (U. S.) 492; Western Union Tel. Co. v. Attorney-General, 125 U. S. 530; 8 Sup. Ct. 961; Pullman &c. Co. v. Pennsylvania, 141 U. S. 18; 12 Sup. Ct. 121; Charlotte &c. R. Co. v. Gibbes, 142 U. S. 386; 12 Sup. Ct. 255; Franklin County v. Nashville &c. R. Co. 12 Lea (Tenn.), 521. To the same effect is the decision in Cleveland &c. Co. v. Backus, 154 U. S. 439; 14 Sup. Ct. 1122. See, also, State v. New York &c. R. Co. 60 Conn. 326; 22 Atl. 765; Adams Express Co. v. Kentucky, 166 U. S. 171; 17 Sup. Ct. 527. It is evident that the rule sanctioned by the supreme court must lead to confusion and that under it double taxation of a vicious character is almost unavoidable. In Pittsburgh &c. Co. v. Backus, supra, the court says that "there may be exceptional cases," and granting this it seems difficult to see how double and unequal taxation can be avoided, since so much is left to the judgment or discretion of the taxing officers of the different states through which the railroad runs.

[13] Louisville &c. Ferry Co. v. Ken-

mileage basis although the property assessed is used as an instrumentality of commerce between the states.[14] A distinction is made between the cases which deny the right of a state to lay a tax upon the business of interstate commerce itself and those which affirm that a tax may be laid on property within the limits of the state. The doctrine is, indeed, extended, as we have elsewhere shown, to property beyond the state boundaries.[15] But it has recently been held that interstate commerce is not unlawfully interfered with by a franchise tax on a domestic railway corporation because no deduction is allowed from

tucky, 188 U. S. 385; 23 Sup. Ct. 463.

[14] Western Union Tel. Co. v. Massachusetts, 125 U. S. 530; 8 Sup. Ct. 961; Pullman &c. Co. v. Pennsylvania, 141 U. S. 18; 11 Sup. Ct. 876; Maine v. Grand Trunk &c. Co. 142 U. S. 217; 12 Sup. Ct. 121, 163; Railroad Co. v. Gibbs, 142 U. S. 386; Pittsburgh &c. Co. v. Backus, 154 U. S. 421; 14 Sup. Ct. 1114. See, also, Western Un. Tel. Co. v. Missouri, 190 U. S. 412; 23 Sup. Ct. 730.

[15] In the case of Pullman &c. Co. v. Pennsylvania, 141 U. S. 18; 11 Sup. Ct. 876, it was said: "Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one state can not be taxed by another state for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. Moran v. New Orleans, 112 U. S. 69, 74; 5 Sup. Ct. 38; Pickard v. Car Co. 117 U. S. 34, 43; 6 Sup. Ct. 635; Robbins v. Shelby County Taxing Dist. 120 U. S. 489, 497; 7 Sup. Ct. 592; Leloup v. Mobile, 127 U. S. 640, 644; 8 Sup. Ct. 1380. For the same reason, a tax upon the gross receipts derived from the transportation of passengers and goods between one state and other states or foreign nations has been held to be invalid. Fargo v. Michigan, 121 U. S. 230; 7 Sup. Ct. 867; Philadelphia &c. Steamship Co. v. Pennsylvania, 122 U. S. 326; 7 Sup. Ct. 1118. The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on or because of the transportation or the right of transit of persons or property through the state, to other states or countries. The tax is imposed equally on corporations doing business within the state, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation on account of its property within the state is, in substance and effect, a tax on that property. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 209; 5 Sup. Ct. 826; Western Union Tel. Co. v. Attorney-General, 125 U. S. 530, 552; 8 Sup. Ct. 961. This is not only admitted, but insisted on by the plaintiff in error."

the capital stock, taken as the basis of the tax, notwithstanding a considerable proportion of the rolling stock is generally absent from the state in the usual course of railway business.[16]

§ 759. License tax.—A license tax imposed upon an interstate railroad for carrying on interstate business is invalid. Such a tax is not a tax upon property, nor is it the exaction of a fee for the privilege of becoming a corporation, or of effecting a consolidation under the laws of the state.[17] As we shall presently show, a privilege tax cannot be imposed, and we regard a license tax as substantially the same as a privilege tax, but a decision in regard to what is called an excise tax has produced some confusion.[18] A license tax, assigning to the term license tax the meaning generally given by the authorities, and this is the meaning in which we employ the term, is a tax imposed as a condition of permitting business to be conducted within the state, and hence is a tax upon commerce between the states. But a franchise tax on a railroad company for carrying on a cab service wholly within the taxing state, for the purpose of conveying its pas-

[16] New York &c. R. Co. v. Miller, 202 U. S. 584; 26 Sup. Ct. 714.

[17] McCall v. California, 136 U. S. 104; 10 Sup. Ct. 881; Norfolk &c. Co. v. Pennsylvania, 136 U. S. 114; 10 Sup. Ct. 958; Leloup v. Mobile, 127 U. S. 640; 8 Sup. Ct. 1380; Crutcher v. Kentucky, 141 U. S. 47; 11 Sup. Ct. 851; Inman Steamship Co. v. Tinker, 94 U. S. 238; Telegraph Co. v. Texas, 105 U. S. 460; Norfolk &c. Company v. Pennsylvania, 136 U. S. 114; 10 Sup. Ct. 958; Brennan v. Titusville, 153 U. S. 289; 14 Sup. Ct. 829; Robbins v. Shelby County Taxing Dist. 120 U. S. 489; 7 Sup. Ct. 592; Lyng v. Michigan, 135 U. S. 161; 10 Sup. Ct. 725; Asher v. Texas, 128 U. S. 129; 9 Sup. Ct. 1; Stoutenburg v. Hennick, 129 U. S. 141; 9 Sup. Ct. 256. In the case of Cutcher v. Commonwealth, supra, the court said: "We have repeatedly decided that a state law is unconstitutional which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it." In the case of Brennan v. Titusville, 153 U. S. 289; 14 Sup. Ct. 829, the court said: "The case of Ficklen v. Shelby County Taxing Dist. 145 U. S. 1; 12 Sup. Ct. 810, is no departure from the rule of decision so firmly settled by the prior decisions." See, also, Atlantic &c. Co. v. Philadelphia, 190 U. S. 160; 23 Sup. Ct. 817.

[18] Maine v. Grand Trunk &c. Co. 142 U. S. 217; 12 Sup. Ct. 163. See, also, New York &c. R. Co. v. Pennsylvania, 158 U. S. 431; 15 Sup. Ct. 896; State v. Galveston &c. R. Co. (Tex.) 97 S. W. 71; Osborne v. Florida, 164 U. S. 650; 17 Sup. Ct. 214.

sengers to and from its ferry landing, the charges for which are entirely separate from those for its railroad and interstate transportation, is held valid, and not a burden on interstate commerce.[19]

§ 760. Privilege tax on interstate railroads.—The settled rule that a state has no power to regulate or burden interstate commerce precludes a state from taxing a railroad company for the privilege of conducting the business of interstate commerce within its territorial limits. Exacting a license from such companies, as a condition precedent to the right to do business in the state, is, it seems to us, substantially the same thing as imposing a tax upon the privilege of doing business in the state, but there is a shade of difference between the two classes of cases. The attempt to restrict or regulate interstate commerce is always abortive no matter in what form it is made, but the difficulty is to determine what is a restriction or regulation and what is a property tax.[20]

[19] New York v. Knight, 192 U. S. 21; 24 Sup. Ct. 202. In the course of the opinion it is said: "Wherever a separation in fact exists between transportation service wholly within the state and that between states, a like separation may be recognized between the control of the state and that of the nation. Osborne v. Florida, 164 U. S. 650; 17 Sup. Ct. 214; Pullman Co. v. Adams, 189 U. S. 420; 23 Sup. Ct. 494." See, also, Detroit &c. R. Co. v. Interstate Commerce Comm. 74 Fed. 803; 167 U. S. 633; 17 Sup. Ct. 986.

[20] Pickard v. Pullman &c. Co. 117 U. S. 34; 6 Sup. Ct. 635, citing Almy v. State, 24 How. (U. S.) 169; Woodruff v. Parham, 8 Wall. (U. S.) 123, 138; Crandall v. Nevada, 6 Wall. (U. S.) 35; State Freight Case, 15 Wall. (U. S.) 232; Railroad Co. v. Maryland, 21 Wall. (U. S.) 456; Head Money Cases, 112 U. S. 580; 5 Sup. Ct. 247; Guy v. Baltimore, 100 U. S. 434; Moran v. New Orleans, 112 U. S. 69; 5 Sup. Ct. 38. See Tennessee v. Pullman &c. Co. 117 U. S. 51; 6 Sup. Ct. 643; Allen v. Pullman's Palace Car Co. 191 U. S. 171; 24 Sup. Ct. 39; People v. Wemple, 138 N. Y. 1; 33 N. E. 720; 19 L. R. A. 694, with which compare People v. Wemple, 131 N. Y. 64; 29 N. E. 1002; 27 Am. St. 542, and People v. Knight, 171 N. Y. 354; 64 N. E. 152; 98 Am. St. 610. The decision in the case of Pullman &c. Co. v. Gaines, 3 Tenn. Ch. 587, was overruled or rather reversed in the case of Tennessee v. Pullman Co. supra. See, also, Pullman &c. Co. v. Nolan, 22 Fed. 276. In the paragraph which follows we have referred to a case which discriminates between a property tax and a privilege tax, and it must be confessed that the distinction made in that case is a very fine one, and much that is there said is not easily harmonized with rulings in other cases.

§ 761. Privilege tax discriminated from a property tax.—A statute laying a tax on property as property, where the property is within the state, does not violate the federal constitution, but a privilege tax is not, as we have seen in the preceding section, a property tax. Whether the tax is laid upon property or imposed upon a corporation for the privilege of conducting business in the state is to be determined from the operation and practical effect of the state statute, and not from its mere form. The distinction between a privilege tax and a property tax is a subtle one, and it is not easy to plainly mark the line which separates them.[21] As already intimated, it is difficult to determine

[21] The question received consideration in the case of the Postal &c. Co. v. Adam, 155 U. S. 688; 15 Sup. Ct. 268, where it was held that a tax of a designated sum per mile of telegraph wire in the state was a tax on property and not a mere privilege tax. The court used this language: "As pointed out by Mr. Justice Field in Horn Silver Min. Co. v. New York, 143 U. S. 305; 12 Sup. Ct. 403, the right of a state to tax the franchise or privilege of being a corporation as personal property has been repeatedly recognized by this court, and this, whether the corporation be domestic or a foreign corporation, doing business by its permission within the state. But a state can not exclude from its limits a corporation engaged in interstate or foreign commerce, or a corporation in the employment of the general government, either directly in terms or indirectly by the imposition of inadmissible conditions. Nevertheless the state may subject it to such property taxation as only incidentally affects its occupation, as all business, whether of individuals or corporations, is affected by common governmental burdens. Ashley v. Ryan, 153 U. S. 436; 14 Sup. Ct. 865, and cases cited. Doubtless no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax or the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution. Cleveland &c. R. Co. v. Backus, 154 U. S. 439, 445; 14 Sup. Ct. 1122. The method of taxation by 'a tax on privileges' has been determined by the supreme court of Mississippi to be in harmony with the constitution of that state, and that 'where the particular arrangement of taxation, provided by legislative wisdom, may be accounted for on the assumption of compromising or commuting for a just equivalent, according to the determination of the legislature, in the general scheme of taxation, it will not be condemned by the courts

the exact state of the law upon this subject, and to reconcile all the decisions of the Supreme Court of the United States. This is shown in several recent cases by the fact that different judges took different views.[22] It may be that, as to local business, which the company is permitted to do or not to do, at its own option, an interstate company may be made to pay for the privilege if it chooses to exercise it;[23] but we think it cannot thus be made to pay for carrying on interstate commerce, and this is certainly true as to federal corporations.[24]

§ 762. Excise tax.—The court of last resort has adjudged that an excise tax may be imposed upon an interstate railroad company. The cases denying the power to levy a privilege tax are not expressly denied, but it is held that a state is not precluded from levying an excise tax.[25] We suppose that if a state, under the guise of imposing

as violative of the (state) constitution.' Vicksburg Bank v. Worrell, 67 Miss. 47; 7 So. 219. In that case privilege taxes imposed on bank of deposit or discount, which varied with the amount of capital stock or assets, and were declared to be 'in lieu of all other taxes, state, county or municipal, upon the shares and assets of said bank,' came under review, and it was decided that the privilege tax, to be effectual as a release from liability for all other taxes, must be measured by the capital stock, and entire assets or wealth of the bank, and that real estate bought with funds of the bank was exempt from the ordinary ad valorem taxes, but was part of the assets of the bank to be considered in fixing the basis of its privilege tax."

[22] In State v. Chicago &c. R. Co. 128 Wis. 449; 108 N. W. 594, a majority of the court held that an exaction tax based on the business of the road, in lieu of exemption from ordinary taxation, was valid and not a tax on property. But a minority dissented and held it was a tax on property. See, also, Delaware &c. R. Co. v. Pennsylvania, 198 U. S. 341; 25 Sup. Ct. 669. So, in State v. Galveston &c. R. Co. (Tex.) 97 S. W. 71, the supreme court of Texas held such a tax an occupation tax and valid, whereas the civil court of appeals had held the other way in 93 S. W. 436.

[23] Pullman Co. v. Adams, 189 U. S. 420; 23 Sup. Ct. 494; Osborne v. Florida, 164 U. S. 650; 17 Sup. Ct. 214.

[24] State v. Texas &c. R. Co. (Tex.) 98 S. W. 834.

[25] In the case of Maine v. Grand Trunk &c. Co. 142 U. S. 217; 12 Sup. Ct. 163, the court said: "The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the state of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of the state to levy there can be no question. The designation does not always indicate merely an

an excise tax, should levy a direct privilege tax, the statute providing for such a tax would be ineffective. The difference between an excise tax of the character contained in the case referred to in the note is not a very plain one, and there is, it seems to us, great difficulty in giving the doctrine of the majority, in the case mentioned, practical effect. We venture to say, and with utmost deference, that the doctrine of the minority opinion is the sounder and better one.[26] And

inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises. It is used more frequently, in this country, in the latter sense than in any other. The privilege of exercising the franchises of a corporation within a state is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the state, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the state, in its judgment, may deem most conducive to its interest or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period, or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the state in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the state and the corporation taxed." See, also, to the same effect, Osborne v. Florida, 164 U. S. 650; 17 Sup. Ct. 214; State v. Galveston &c. R. Co. (Tex.) 97 S. W. 71.

[26] Mr. Justice Bradley, who wrote the minority opinion (concurred in by Harlan, Lamar and Brown, JJ.), said: "But passing this by, the decisions of this court for a number of years past have settled the principle that taxation (which is a mode of regulation) of interstate commerce, or of the revenues derived therefrom (which is the same thing), is contrary to the constitution. Going no further back than Pickard v. Pullman &c. Car Co. 117 U. S. 34; 6 Sup. Ct. 635, we find that principle laid down. There a privilege tax was imposed upon Pullman's Palace Car Company by general legislation, it is true, but applied to the company, of $50 per annum on every sleeping car going through the state. It was well known, and appears by the record, that every sleeping car going through the state carried passen-

in a recent case it is held that an excise or privilege tax upon sleeping-car companies doing business in the state, and whose principal business is interstate, which makes no distinction between cars used in interstate traffic and those used wholly within the state, is invalid as an attempt by the state to impose a burden on interstate commerce, but that an annual tax upon sleeping-car companies which carry one or more local passengers, on cars operating within the state, is not void where the company is free to decline all local business if it sees fit.[27]

gers from Ohio and other northern states to Alabama, and vice versa, and we held that Tennessee had no right to tax those cars. It was the same thing as if they had taxed the amount derived from the passengers in the cars. So, also, in the case of Leloup v. Port of Mobile, 127 U. S. 640; 8 Sup. Ct. 1380, we held that the receipts derived by the telegraph companies from messages sent from one state to another could not be taxed. So in the case of Norfolk &c. R. Co. v. Pennsylvania, 136 U. S. 114; 10 Sup. Ct. 958, where the railroad was a link in a through line by which passengers and freight were carried into other states, the company was held to be engaged in the business of interstate commerce, and could not be taxed for the privilege of keeping an office in the state. And in the case of Crutcher v. Kentucky, 141 U. S. 47; 11 Sup. Ct. 851, we held that the taxation of an express company for doing an express business between different states was unconstitutional and void. And in the case of Philadelphia &c. Steamship Co. v. Pennsylvania, 122 U. S. 326; 7 Sup. Ct. 1118, we held that a tax upon the gross receipts of the company was void, because they were derived from interstate and foreign commerce. A great many other cases might be referred to showing that in the decisions and opinions of this court this kind of taxation is unconstitutional and void. We think that the present decision is a departure from the line of these decisions. The tax, it is true, is called a 'tax on a franchise.' It is so called, but what is it in fact? It is a tax on the receipts of the company derived from international transportation. This court and some of the state courts have gone a great length in sustaining various forms of taxes upon corporations. The train of reasoning upon which it is founded may be questionable. A corporation, according to this class of decisions, may be taxed several times over. It may be taxed for its charter, for its franchises, for the privilege of carrying on its business; it may be taxed on its capital, and it may be taxed on its property. Each of these taxations may be carried to the full amount of the property of the company." See Adams Express Co. v. Ohio, 165 U. S. 194; 17 Sup. Ct. 305.

[27] Allen v. Pullman's Palace Car Co. 191 U. S. 171; 24 Sup. Ct. 39. See State v. Northern Exp. Co. 27 Mont. 419; 71 Pac. 404.

§ 763. Tax on passengers carried.—It results from the doctrine of the cases that a tax cannot be levied upon each passenger carried by an interstate railroad through a state.[28] To permit this to be done would be to authorize a tax upon commerce itself. The carriage of passengers is commerce, and to impose a tax upon each passenger would be just as much a restriction or regulation of commerce as a tax upon each ton of freight carried through the state would be.

§ 764. Tax on interstate freight.—It has been held in numerous cases that a state cannot lay a tax on freight transported in interstate commerce traffic.[29] Such a tax is regarded as laid upon interstate com-

[28] Head Money Cases, 112 U. S. 580; 5 Sup. Ct. 247; The Passenger Cases, 7 How. (U. S.) 282; Henderson v. Mayor, 92 U. S. 259; Commissioners &c. v. North German Lloyd &c. Co. 92 U. S. 259; People v. Compaignie &c. 107 U. S. 59; 2 Sup. Ct. 87; Tennessee v. Pullman Co. 117 U. S. 51; 6 Sup. Ct. 643; State v. Woodruff &c. Co. 114 Ind. 155; 15 N. E. 814. In the case last cited the court quoted with approval from the State Freight Tax Case, 15 Wall. (U. S.) 232, the statement that "a tax upon freights and fares is a tax upon the transportation itself." In Tennessee v. Pullman &c. Co. supra, the court said, "The principles which governed the decisions in Welton v. Missouri, 91 U. S. 275; Guy v. Baltimore, 100 U. S. 434; Moran v. New Orleans, 112 U. S. 69; 5 Sup. Ct. 38, holding unlawful the state taxes on interstate commerce in merchandise, are equally applicable to the tax in this case on the transit of passengers." See, also, Brown v. Houston, 114 U. S. 622; 5 Sup. Ct. 1091; Chy Lung v. Freeman, 92 U. S. 275; State v. Steamship &c. 42 Cal. 578; 10 Am. R. 303; Clarke v. Philadelphia &c. Co. 4 Houst. (Del.) 158; Piek v. Chicago &c. Co. 6 Biss. (U. S.) 177; Council Bluffs v. Kansas City &c. R. Co. 45 Iowa, 338; 24 Am. R. 773; Crandall v. Nevada, 6 Wall. (U. S.) 35; Sweatt v. Boston &c. Co. 3 Cliff. (U. S.) 339; People v. Raymond, 34 Cal. 492; People v. Pacific Co. 16 Fed. 344; People v. Downer, 7 Cal. 169; Pullman &c. Co. v. Nolan, 22 Fed. 276. But compare State v. Delaware &c. R. Co. 30 N. J. L. 473.

[29] State Freight Tax Case, 15 Wall. (U. S.) 232; Railroad Co. v. Maryland, 21 Wall. (U. S.) 456, 472; Head Money Cases, 112 U. S. 580; 5 Sup. Ct. 247; Welton v. Missouri, 91 U. S. 275; Moran v. New Orleans, 112 U. S. 69; 5 Sup. Ct. 826; Woodruff v. Parham, 8 Wall. (U. S.) 123; Hall v. DeCuir, 95 U. S. 485; Erie Co. v. State, 31 N. J. L. 531; 86 Am. Dec. 226; Wabash &c. Co. v. Illinois, 118 U. S. 557; 7 Sup. Ct. 4; Baird v. St. Louis &c. Co. 41 Fed. 592; United States &c. Co. v. Hemmingway, 39 Fed. 60; Brumagin v. Tillinghast, 18 Cal. 265; 79 Am. Dec. 176; Howe &c. Co. v. Gage, 100 U. S. 676; State v. Engle, 34 N. J. L. 425; The Daniel Ball v. United States, 10 Wall. (U. S.) 557; Koehler Ex parte, 30

merce itself, and in some of the cases it is said that, where such a tax is enforced, it falls upon those for whom the property is carried. But whatever doubt there may be as to the true reason for the rule there is no doubt as to its existence and effect. Freight destined to a point within the state and placed on the cars at a point in the same state has been held not to be interstate freight, although in the course of continuous transit it may pass through parts of another state.[30]

§ 765. Tax on gross receipts of interstate commerce corporations. —The decisions are uniformly to the effect that a tax cannot be laid on the business of interstate commerce. There is, however, some difficulty in giving practical effect to the general rule. Taxes may be assessed upon a mileage basis and upon tangible property having its situs within the state, since these methods of taxation are not regarded as a tax upon the business of interstate commerce itself.[31] It has been held, however, that a tax cannot be laid upon the gross receipts of an interstate company for the reason that such a method is a tax upon interstate commerce.[32] But it has been held recently that a law im-

Fed. 867; Ogilvie v. Crawford Co. 7 Fed. 745; Osborne v. Mobile, 16 Wall. (U. S.) 479; Fargo v. Michigan, 121 U. S. 230; 7 Sup. Ct. 857; State v. Carrigan, 39 N. J. L. 35; State v. Cumberland &c. Co. 40 Md. 22.

[30] Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 205; 12 Sup. Ct. 806; Campbell v. Chicago &c. Co. 86 Iowa, 641; 53 N. W. 351. Citing the above case and the cases of Welton v. Missouri, 91 U. S. 275; Mobile County v. Kimball, 102 U. S. 691; Gibbons v. Ogden, 9 Wheat. (U. S.) 189. But if destined to a consignee in another state by continuous trip it is held interstate commerce although the initial carrier only contracted to carry to a point within the state. Mexican Nat. R. Co. v. Savage (Tex. Civ. App.), 41 S. W. 663. See, also, State v. Southern Kans. R. Co. (Tex. Civ. App.) 49 S. W. 252. So, for other purposes than taxation, if part of the route is in another state, although the transportation begins and ends in the same state, it has lately been regarded as interstate commerce. See post, § 1671; Hanley v. Kansas City &c. R. Co. 187 U. S. 617; 23 Sup. Ct. 214.

[31] Or on the property and business within the state. Wisconsin &c. R. Co. v. Powers, 191 U. S. 379; 24 Sup. Ct. 107.

[32] State Freight Tax, 15 Wall. (U. S.) 232; Telegraph Co. v. Texas, 105 U. S. 460; Philadelphia &c. Co. v. Pennsylvania, 122 U. S. 326; 7 Sup. Ct. 1118; Fargo v. Michigan, 121 U. S. 230; 7 Sup. Ct. 857; Ratterman v. Western Union &c. Co. 127 U. S. 411; 8 Sup. Ct. 1127; Gloucester Ferry Co. v. Pennsylvania Co. 114 U. S. 196; 5 Sup. Ct. 826; McCall v. California, 136 U. S. 104; 10 Sup. Ct. 881; Norfolk

posing a tax on railroads equal to one per cent of their gross receipts was an occupation tax, and not a tax on the gross receipts of railroads, and, hence, not an interference with interstate commerce. In this case the reference to the gross receipts was regarded merely as a convenient method of ascertaining the amount of the tax.[33]

§ 766. Fees for the right to be a corporation not taxes.—A state has power to exact fees of an association which asks the right or privilege of being a corporation, and the exaction of such fees is not the imposition of a tax upon interstate commerce.[34] The court concedes

&c. Co. v. Pennsylvania, 136 U. S. 114; 10 Sup. Ct. 958; New York &c. R. Co. v. Pennsylvania, 158 U. S. 431; 15 Sup. Ct. 896; Commonwealth v. Lehigh Valley R. Co. (Pa.) 17 Atl. 179; Northern Pac. R. Co. v. Raymond, 5 Dak. 356; 40 N. W. 538; 1 L. R. A. 732; 37 Am. & Eng. R. Cas. 379; Vermont &c. R. Co. v. Vermont Cent. R. Co. 63 Vt. 1; 21 Atl. 262, 731; 10 L. R. A. 562. The decisions are not harmonious. State Tax Gross Receipts, 15 Wall. (U. S.) 284, is opposed to the later decisions, and there are some expressions in other cases which seem to indicate that gross receipts may be taxed. We do not understand that the cases which declare that a mileage basis is valid authorize the conclusion that a state may tax gross receipts. We think the court intended to make a distinction between the two methods, and that it has done so. We can see no escape from the conclusion that a tax upon gross receipts is a tax upon interstate commerce itself, and if it be, it is certainly levied in violation of the commerce clause of the constitution. In the case of Philadelphia &c. Co. v. Pennsylvania, 122 U. S. 326; 7 Sup. Ct. 1118, 1123, the court said: "A review of the question convinces us that the first ground on which State Tax on Railway Gross Receipts was placed is not tenable, that it is not supported by anything decided in Brown v. Maryland, but, on the contrary, that the reasoning in that case is decidedly against it." But see as to tax on gross earnings where there is no question of contract or interstate commerce. McHenry v. Alford, 168 U. S. 651; 18 Sup. Ct. 242; and see notes to preceding sections.

[33] State v. Galveston &c. R. Co. (Tex.) 97 S. W. 71. But see Galveston &c. R. Co. v. Davidson (Tex. Civ. App.), 93 S. W. 436; and see ante, § 762.

[34] Ashley v. Ryan, 153 U. S. 436; 14 Sup. Ct. 865, citing California v. Central Pacific Co. 127 U. S. 1, 40; 8 Sup. Ct. 1073; Home Ins. Co. v. New York, 134 U. S. 594; 10 Sup. Ct. 593; Bank v. Earle, 13 Pet. 517; Lafayette Insurance Co. v. French, 18 How. (U. S.) 404; Paul v. Virginia, 8 Wall. (U. S.) 168; Ducat v. Chicago, 10 Wall. (U. S.) 410; Railroad Co. v. Maryland, 21 Wall. (U. S.) 456; Philadelphia &c. Co. v. New York, 119 U. S. 110. The court marks the distinction between a tax imposed upon the privilege of doing business in the state and the exaction of a fee

that the exaction of such fees may incidentally affect interstate commerce, but denies that such an exaction is a regulation of commerce between the states, in such a sense as to be within the inhibition of the constitution. The theory of the court is that the state has power to grant or refuse a charter, and hence may prescribe the terms upon which it will grant the corporate privileges and franchises asked by the persons who desire to organize a corporation under its laws.

§ 767. **Municipal tax as compensation for use of streets.**—The right of a municipal corporation to impose a tax as compensation for the use of its streets was asserted in a recent case.[35] The court ad-

for the privilege of becoming a corporation, saying: "The question here is not the power of the state of Ohio to lay a charge on interstate commerce, or to prevent a foreign corporation from engaging in interstate commerce within its confines, but simply the right of the state to determine upon what conditions its laws as to the consolidation of corporations may be availed of." See, also, Chicago &c. R. Co. v. State, 153 Ind. 134; 51 N. E. 924, and compare Pullman's Palace Car Co. v. Hayward, 141 U. S. 36; 11 Sup. Ct. 883. But see as to taxing franchise of federal corporation, Keokuk &c. Bridge Co. v. Illinois, 175 U. S. 626; 20 Sup. Ct. 205; California v. Central Pac. R. Co. 127 U. S. 1; 8 Sup. Ct. 1073; State v. Texas &c. R. Co. (Tex.) 98 S. W. 834.

[35] St. Louis v. Western Union Tel. Co. 148 U. S. 92; 13 Sup. Ct. 485. In the course of the opinion in that case, it was said: "And first with reference to the ruling that this charge was a privilege or license tax. To determine this question, we must refer to the language of the ordinance itself, and by that we find that the charge is imposed for the privilege of using the streets, alleys and public places, and is graduated by the amount of such use. Clearly, this is no privilege or license tax. The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. 'A tax is a demand of sovereignty; a toll is a demand of proprietorship.' State Freight Tax Case, 15 Wall. (U. S.) 232, 278. If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its polls, the section would no longer have any application to it. That by it the city receives something which it may use as revenue does not determine the character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes. Supposing the city of St. Louis should find its city hall

judged that such a tax was neither a license tax nor a privilege tax. There is reason for discriminating between a privilege or license tax and a requirement that compensation be paid for the use of city streets, or for local governmental supervision,[36] but the difference between such cases is somewhat indistinct and shadowy. Unless restrained by clearly defined rules there is danger of great abuses flowing from the doctrine of the case referred to in the note. It is always a delicate thing for courts to interfere in cases where the existence of the power asserted is conceded and the suitor seeks assistance solely upon the ground that the power has been abused or transcended, and it is so in dealing with municipal taxation of the character of that under consideration in the case cited.

§ 768. Impairing obligation of a contract.—We have elsewhere discussed the question of the effect of a provision in the charter of a railroad corporation exempting it from taxation, and have said that under the federal decisions it is to be regarded as a contract right protected by the clause of the federal constitution forbidding the impairment of the obligation of a contract.[37] The question is, of course, a federal one, and the decisions of the Supreme Court of the United States are final and conclusive. It is true that, so far as concerns

too small for its purposes, or too far removed from the center of business, and should purchase or build another more satisfactory in this respect, it would not therefore be forced to let the old remain vacant or to immediately sell it, but might derive revenue by renting its various rooms. Would an ordinance fixing the price at which those rooms could be occupied be in any sense one imposing a tax? Nor is the character of the charge changed by reason of the fact that it is not imposed upon such telegraph companies as by ordinances are taxed on their gross income for city purposes. In the illustration just made in respect to a city hall, suppose that the city, in its ordinance fixing a price for the use of rooms, should permit persons who pay a certain amount of taxes to occupy a portion of the building free of rent, that would not make the charge upon others for their use of rooms a tax." See, also, Savannah &c. R. v. Mayor, 198 U. S. 392; 25 Sup. Ct. 690.

[36] See Atlantic &c. Co. v. Philadelphia, 190 U. S. 160; 23 Sup. Ct. 817; Western U. Tel. Co. v. New Hope, 187 U. S. 419; 23 Sup. Ct. 204; Savannah &c. R. v. Mayor, 198 U. S. 392; 25 Sup. Ct. 690.

[37] Pacific &c. Co. v. Maguire, 20 Wall. (U. S.) 36; State v. Miller, 1 Vroom (N. J.), 368; 86 Am. Dec. 188; State v. Winona &c. Co. 21 Minn. 315. See, also, the elaborate note to Adams v. Yazoo &c. R. Co. 77 Miss. 194; 24 So. 200, 317; 60 L. R. A. 33, et seq.

purely local questions and matters involving the construction of state constitutions and statutes, the general rule is that the federal courts follow the decisions of the state courts.[38] Those decisions, indeed, become part of the statutes much to the same extent as if written in the text.[39] But the statute or charter must contain a contract in all that the term implies.[40] There must, of course, be a consideration for the contract, but it is held that no consideration beyond that which is to be expected to result from the formation of the corporation is required.[41] It is not every charter which provides for exemption that can be considered as a contract, since the exemption may be in the nature of a mere donation, or bounty, and if there is nothing more than a gift or a provision for a bounty there is no contract upon which the constitution can operate.[42] Federal courts do not accept the de-

[38] Nesmith v. Sheddon, 7 How. (U. S.) 812; Green v. Neal, 6 Peters (U. S.) 289; Suydam v. Williamson, 24 How. (U. S.) 427; Cross v. Allen, 141 U. S. 528; 12 Sup. Ct. 67; Shelly v. Guy, 11 Wheat. (U. S.) 361; Stutsman County v. Wallace, 142 U. S. 293; 12 Sup. Ct. 227; Detroit v. Osborne, 135 U. S. 492; 10 Sup. Ct. 1012; Bucher v. Railroad Co. 125 U. S. 555; 8 Sup. Ct. 974; Burgess v. Seligman, 107 U. S. 20; 2 Sup. Ct. 10; Claiborne v. Brooks, 111 U. S. 400; 4 Sup. Ct. 489; Chicago &c. Co. v. Stahley, 62 Fed. 363, and cases cited. See, also, Northern C. R. Co. v. Maryland, 187 U. S. 258; 23 Sup. Ct. 62. But the federal court, while leaning to the construction of the state court, on writ of error, to the state court, determines for itself the power of the state and existence or non-existence of the contract the obligation of which alleged to have been impaired. Stearns v. Minnesota, 179 U. S. 223; 21 Sup. Ct. 73, and authorities cited.

[39] Douglas v. County of Pike, 101 U. S. 677; Anderson v. Santa Ana, 116 U. S. 356; 6 Sup. Ct. 413; Ohio &c. Insurance Co. v. Debolt, 16 How. (U. S.) 115; Gelpecke v. Dubuque, 1 Wall. (U. S.) 175; Olcott v. Supervisors, 16 Wall. (U. S.) 678; Taylor v. Ypsilanti, 105 U. S. 60.

[40] "It is to be kept in mind that it is not the charter which is protected, but any contract which the charter may contain. If there is no contract there is nothing on which the constitution can act." Per Waite, C. J., in Stone v. Mississippi, 101 U. S. 814.

[41] Home of the Friendless v. Rouse, 8 Wall. (U. S.) 430. See, also, Powers v. Detroit &c. R. Co. 201 U. S. 543; 26 Sup. Ct. 556, 558.

[42] Christ's Church v. Philadelphia, 24 How. (U. S.) 300; Wisconsin &c. R. Co. v. Powers, 191 U. S. 379; 24 Sup. Ct. 107; East Saginaw &c. Co. v. East Saginaw, 19 Mich. 259; 2 Am. R. 82; East Saginaw &c. Co. v. East Saginaw, 13 Wall. (U. S.) 373; Detroit v. Plankroad Co. 43 Mich. 140; 5 N. W. 275; Welch v. Cook, 97 U. S. 541. In the case last cited the court, in speaking of the act of congress under considera-

cision of the state tribunals as to what is or is not a contract. That is a question which the federal court will determine for itself.[43] The

tion, said: "This is a bounty law, which is good as long as it remains unrepealed, but there is no pledge that it shall not be repealed at any time." See note in 60 L. R. A. 64, et seq.

[43] This question received careful consideration in the case of Mobile &c. Co. v. Tennessee, 153 U. S. 486; 14 Sup. Ct. 968. In that case it was said: "It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect of some provision of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of, impairs its obligation. A brief reference to some of the authorities is sufficient to show this: In Bank v. Shelby, 1 Black (U. S.), 436, 443, it was said by this court: 'Its (the supreme court) rule of interpretation has invariably been that the constructions given by courts of the states to state legislation and to state constitutions have been conclusive upon this court, with a single exception, and that is when it has been called upon to interpret the contracts of states, though they had been made in the forms of law, or by the instrumentality of a state's authorized functionaries, in conformity with state legislation. It has never been denied, nor is it now, that the supreme court of the United States has an appellate power to revise the judgment of the supreme court of a state whenever such court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one within the meaning of that clause of the constitution of the United States which inhibits the states from passing laws impairing the obligation of contracts. Of what use would the appellate power be to a litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the supreme court of a state, whether or not the phraseology of an instrument in controversy was expressive of a contract, and within the protection of the constitution of the United States, and that its obligation should be enforced notwithstanding a contrary decision by the supreme court of a state?'" See, also, New Orleans &c. Co. v. Louisiana &c. Co. 125 U. S. 18, 38; 8 Sup. Ct. 741; Railroad Co. v. Alsbrook, 146 U. S. 279; 13 Sup. Ct. 72; Huntington v. Attrill, 146 U. S. 657; 13 Sup. Ct. 224; East Hartford v. Hartford &c. Co. 10 How. (U. S.) 536; University v. People, 99 U. S. 309, 321; Louisville &c. Co. v. Citizens' &c. Co. 115 U. S. 683;

federal court must, therefore, determine whether the particular statute granting the exemption does or does not constitute an inviolable contract in every case where the state court has denied that it does constitute a contract between the state and the corporation. In several cases, as already shown, although not without question, it has been held that an exaction tax, or charge for the privilege of exercising the franchises in the state, in lieu of all ordinary taxes, may become a matter of contract.[44]

§ 769. Impairing obligation of contracts—Tax on bonds.—A state has no power to compel an interstate railroad company doing business within the state boundaries, by permission granted by statute, to deduct from the interest on its bonds, issued prior to the enactment of the statute, the tax levied by the state, and pay such tax to the state. The court held that the statute assuming to require the company to assess and collect the tax impaired the obligation of the contract between the state and the company. The statute under which the company obtained the right to enter and do business in the state was held to be a contract, and to preclude the state from imposing any additional burdens on the corporation.[45]

6 Sup. Ct. 265; Railroad Co. v. Dennis, 116 U. S. 665; 6 Sup. Ct. 625; Railroad Co. v. Thomas, 132 U. S. 174; 10 Sup. Ct. 68; Bryan v. Board, 151 U. S. 639; 14 Sup. Ct. 465; Stearns v. Minnesota, 179 U. S. 223; 21 Sup. Ct. 73.

[44] State v. Chicago &c. R. Co. 128 Wis. 449; 108 N. W. 594. See, also, Powers v. Detroit &c. Ry. Co. 201 U. S. 543; 26 Sup. Ct. 556 (also holding that where the supreme court of the state has held that the statute is valid and applicable and a valid contract is created, the United States Supreme Court accepts that decision, where a valid contract appears, and starts with the question as to the contract); Jersey City &c. Co. v. United &c. Co. 46 Fed. 264; Standard &c. Cable Co. v. Att'y-Gen. 46 N. J. Eq. 270; 19 Atl. 733; 19 Am. St. 394; Bain v. Seaboard &c. R. Co. 52 Fed. 450.

[45] New York &c. Co. v. Pennsylvania, 153 U. S. 628; 14 Sup. Ct. 952, citing Crutcher v. Commonwealth, 141 U. S. 47; 11 Sup. Ct. 851; Clark v. Iowa City, 20 Wall. (U. S.) 583; Hartman v. Greenhow, 102 U. S. 672, 684; Koshkonong v. Benton, 104 U. S. 668; State Tax Foreign Held Bonds, 15 Wall. (U. S.) 300; Railroad Co. v. Jackson, 7 Wall. (U. S.) 262; St. Louis v. Ferry Co. 11 Wall. (U. S.) 423; Delaware Railroad Tax Case, 18 Wall. (U. S.) 206. The cases of Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232; 10 Sup. Ct. 533; Jennings v. Coal Co. 147 U. S. 147; 13 Sup. Ct. 282, were distinguished. See, generally, Dewey v. Des Moines, 173 U. S. 193; 19 Sup. Ct. 379; Commonwealth v. New York &c. R. Co. 129 Pa. St.

§ 770. Exemption of railroad property—Contract—Alteration of charter.—As we have elsewhere shown, the exemption of the property of a railroad company may constitute a part of the contract and be within the provision of the federal constitution forbidding the states from impairing the obligation of contracts.[46] The rule which protects an exemption clause as part of the contract does not preclude a state from enacting a statute subjecting the property of the railroad company to taxation in cases where the power to alter or amend the charter or act of incorporation is expressly reserved. The reservation of the right to alter, amend or repeal, invests the state with ample power to withdraw the exemption,[47] but where the rights of third persons intervene, and the alteration, amendment or repeal would destroy those rights, the power to withdraw the exemption cannot, as it has been held, be exercised.[48] We suppose, however, that the rights of

463; 18 Atl. 412; 15 Am. St. 724; South Nashville St. R. Co. v. Morrow, 87 Tenn. 406; 11 S. W. 348; 2 L. R. A. 853.

[46] See upon the general subject the elaborate note to Adams v. Yazoo &c. R. Co. 77 Miss. 194; 24 So. 200; 60 L. R. A. 33, et seq., and see, also, King v. Madison, 17 Ind. 48.

[47] Tomlinson v. Jessup, 15 Wall. (U. S.) 454, cited with approval in New York &c. Co. v. Bristol, 151 U. S. 556; 14 Sup. Ct. 437; Holyoke &c. Co. v. Lyman, 15 Wall. (U. S.) 500; State v. Atlantic &c. Co. 60 Ga. 268; Hoge v. Richmond &c. Co. 99 U. S. 348; New York &c. Co. v. Waterbury, 60 Conn. 1; 22 Atl. 439; State v. Miller, 1 Vroom (N. J. L.) 368; 86 Am. Dec. 188; State v. Miller, 2 Vroom (N. J. L.), 561; State v. Chambersburg, 8 Vroom (N. J. L.), 228; West &c. Co. v. Supervisors, 35 Wis. 257. See, generally, Close v. Glenwood Cemetery, 107 U. S. 466; 2 Sup. Ct. 267; Waterworks v. Schottler, 110 U. S. 347; 4 Sup. Ct. 48; Pennsylvania College Cases, 13 Wall. (U. S.) 190; St. Paul v. St. Paul &c. Co. 23 Minn. 469; State v. Maine &c. Co. 66 Me. 488; Maine &c. v. Maine, 96 U. S. 499; State v. Northern &c. Co. 44 Md. 131; Roxbury v. Boston &c. Co. 6 Cush. (Mass.) 424; note in 60 L. R. A. 69, et seq.

[48] In Tomlinson v. Jessup, 15 Wall. (U. S.) 454, 458, the court said: "There is no subject over which it is of greater moment for the state to preserve its power than that of taxation. It has nevertheless been held by this court, not, however, without occasional earnest dissent from a minority, that the power of taxation over particular parcels of property, or over property of particular persons or corporations, may be surrendered by one legislative body, so as to bind its successors and the state. It was so adjudged at an early day in New Jersey v. Wilson, 7 Cranch (U. S.), 164; the adjudication was affirmed in Jefferson Bank v. Skelly, 1 Black, 436, and has been repeated in several cases within the past few years, and notably so

third persons must be property rights, and in the nature of vested rights, in order to preclude a state from withdrawing or annulling the exemption granted by the corporate charter.[49] And the reserved power to repeal, alter or amend does not include power to arbitrarily violate fundamental principles and deprive a corporation of the equal protection of the laws, or authorize the taking of property without due process of law.[50]

§ 771. Due process of law in tax proceedings.—The federal con-

in the cases of The Home of the Friendless v. Rouse, 8 Wall. (U. S.) 430, and Wilmington Railroad v. Reid, 13 Wall. (U. S.) 264. In these cases, and in others of a similar character, the exemption is upheld as being made upon considerations moving to the state which give to the transaction the character of a contract. It is thus that it is brought within the protection of the federal constitution. In the case of a corporation the exemption, if originally made in the act of incorporation, is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter. When made, as in the present case, by an amendment of the charter, it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation. Immunity from taxation constituting in these cases a part of the contract with the government, is by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state. Rights acquired by third parties, and which have become vested, under the charter, in the legitimate exercise of its powers stand upon a different footing."

[49] Brightman v. Kirner, 22 Wis. 54.

[50] Stearns v. Minnesota &c. R. Co. 179 U. S. 223; 21 Sup. Ct. 73; Louisville Water Co. v. Clark, 143 U. S. 1; 12 Sup. Ct. 346; St. Louis &c. R. Co. v. Paul, 173 U. S. 404; 19 Sup. Ct. 419. It was held in the first case cited that the power to amend or repeal a statute exempting a railroad company from all other taxes on payment of a percentage of its gross earnings cannot be so exercised as to continue in full the obligation as to payment of such percentage and at the same time deny to the company the exemption conferred by the contract. See, also, Duluth &c. R. Co. v. County of St. Louis, 179 U. S. 302; 21 Sup. Ct. 124.

stitution requires due process of law in tax proceedings, as well as in other proceedings where property rights are involved. The requirement of due process of law does not demand that the person upon whose property a tax is imposed shall be present when the assessment is made. Notice of some kind is necessary, but it need not be personal notice.[51] Where provision is made for the establishment of a board or tribunal to value and assess property, and the taxpayer is by law required to report or return his property to such board or tribunal, the sittings of which are designated by law, the requirements of the constitution as to notice are satisfied.[52]

[51] County of San Mateo v. Southern Pac. R. Co. 13 Fed. 722; Santa Clara Co. v. Southern Pacific R. Co. 18 Fed. 385; Hagar v. Reclamation Dist. 111 U. S. 701; 4 Sup. Ct. 663; Garvin v. Daussman, 114 Ind. 429; 16 N. E. 826; 5 Am. St. 637; Kentucky Tax Cases, 115 U. S. 321; 6 Sup. Ct. 57; Stuart v. Palmer, 74 N. Y. 183; 30 Am. R. 289; Kuntz v. Sumption, 117 Ind. 1; 9 N. E. 474; 2 L. R. A. 665, and note; Johnson v. Joliet &c. Co. 23 Ill. 124; Scott v. Toledo, 36 Fed. 385; 1 L. R. A. 688; Palmer v. McMahon, 133 U. S. 660; 10 Sup. Ct. 324; Spencer v. Merchant, 125 U. S. 345, 356; 8 Sup. Ct. 921; Paulsen v. Portland, 149 U. S. 30; Ford, Matter of, 6 Lans (N. Y.) 92; Minard v. Douglas Co. 9 Oregon, 206; Weimer v. Bunbury, 30 Mich. 201; Trustees, Matter of, 31 N. Y. 574; Cooper v. Board, 108 Eng. C. L. R. 181; Davidson v. New Orleans, 96 U. S. 97; Hurtado v. California, 110 U. S. 535, 536; 4 Sup. Ct. 292; Desty Taxation, § 114, p. 601; Cooley Taxation, 51. Judge Cooley says: "It has been decided that the revenue laws of a state may be in harmony with the fourteenth amendment, though they do not provide for giving a party an opportunity to be present when the tax is assessed against him, and to be then heard, if they give him the right to be heard afterwards in a suit to enjoin the collection, in which both the validity of the tax and the amount of it may be contested." As to notice by publication of the like, see Lent v. Tillson, 140 U. S. 316; 11 Sup. Ct. 825; Campbellsville &c. Co. v. Hubbert, 112 Fed. 718; Wabash Eastern R. Co. v. East Lake &c. Dist. 134 Ill. 384; 25 N. E. 781; 10 L. R. A. 285, and note.

[52] Pittsburgh &c. Co. v. Backus, 154 U. S. 421; 14 Sup. Ct. 1114; Kentucky Railroad Tax Cases, 115 U. S. 321, 331; 6 Sup. Ct. 57; State Railroad Tax Cases, 92 U. S. 609; Railway Co. v. Wright, 151 U. S. 470; 14 Sup. Ct. 396; Wyerhauser v. Minnesota, 176 U. S. 550; 20 Sup. Ct. 477; Michigan Cent. R. Co. v. Powers, 201 U. S. 24; 26 Sup. Ct. 459; Smith v. Rude &c. Co. 131 Ind. 150; 30 N. E. 947; Hyland v. Brazil &c. Co. 128 Ind. 335; 26 N. E. 672; Neal v. Delaware, 103 U. S. 370; Bell's Gap &c. Co. v. Pennsylvania, 134 U. S. 232; 10 Sup. Ct. 533; Adsit v. Lieb, 76 Ill. 198; Porter v. Railroad Co. 76 Ill. 561; Oregon &c. R. Co. v. Lane Co. 23 Oreg. 386; 31 Pac. 964; Railroad Co. v. Commonwealth, 81 Ky. 492; St. Louis &c. Co. v. Worthen, 52

§ 772. Equal protection of the laws.—The fourteenth amendment to the federal constitution prohibits the states from denying to citizens the equal protection of the laws, and a state statute which violates the provisions of the amendment is, of course, invalid. There is no difficulty in declaring the general rule, and in asserting that there may be a denial of the equal protection of the laws by a statute subjecting railroad property to taxation,[53] but there is real difficulty in determining what constitutes a denial of the equal protection guaranteed by the federal constitution. It may be said, generally, that where there is a palpably unjust and arbitrary discrimination against railroad companies, the result of which is to put upon them an oppressive burden much greater and essentially different from that placed upon other property subject to taxation, there is a violation of the constitutional provision, but merely providing different methods of assessing railroad corporations or providing different boards or tribunals from those provided for assessing the property of other corporations or persons is not a violation of the constitutional provision under consideration.[54]

Ark. 529; 13 S. W. 254; 7 L. R. A. 374; State v. Runyon, 41 N. J. L. 98; Hannibal &c. Co. v. State Board, 64 Mo. 294. See, also, Corry v. Baltimore, 196 U. S. 466; 25 Sup. Ct. 297. But see, generally, Ormsby v. Louisville, 79 Ky. 197. So it has been held under an Indiana statute that where a railroad company returns a schedule and valuation of its personal property to the county auditor, and he submits it to the assessor for assessment, the company is not entitled to notice before the assessor can make the assessment at a greater valuation than that returned by the company. Chicago &c. R. Co. v. John, 150 Ind. 113; 48 N. E. 640. See, also, Hubbard v. Goss, 157 Ind. 485; 62 N. E. 36. Collection has been enjoined for want of an opportunity to be heard. Negley v. Henderson Bridge Co. 107 Ky. 414; 54 S. W. 171.

[53] In Santa Barbara Co. v. Southern Pacific R. Co. 18 Fed. 385, 399, the question was ably discussed by Mr. Justice Field, who said inter alia: "It is a matter of history that unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppression, and the cause of more commotions and disturbances in society, of insurrections and revolutions than any other cause in the world. It would indeed be a charming spectacle to present to the civilized world, as counsel in the San Mateo ironically observed, if the amendment were to read, as contended it does in law, 'Nor shall any state deprive any person of his property without due process of law, except it be in the form of taxation, nor deny to any person within its jurisdiction the equal protection of the law, except it be by taxation.'"

[54] Cincinnati &c. Co. v. Common-

§ 772a. Equal protection of the laws—Continued.—On this subject it has been very aptly observed by one court "that it was not designed by the fourteenth amendment to the constitution to prevent a state from changing its system of taxation in all proper and reasonable ways, nor to compel states to adopt an iron rule of equality, to prevent the classification of property for purposes of taxation or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice."[55] Thus, it has been held that a street railway company was not denied the equal protection of

wealth, 115 U. S. 321; 6 Sup. Ct. 57; Missouri v. Lewis, 101 U. S. 22, 30; Columbus &c. Co. v. Wright, 151 U. S. 470; 14 Sup. Ct. 396; State Railroad Tax Cases, 92 U. S. 575; Charlotte &c. R. Co. v. Gibbes, 42 U. S. 386; 12 Sup. Ct. 255; Railroad Co. v. Beckwith, 129 U. S. 26; 9 Sup. Ct. 207; Columbus &c. Co. v. Wright, 89 Ga. 574; 15 S. E. 293; Cincinnati &c. Co. v. Commonwealth, 81 Ky. 492; Cleveland &c. Co. v. Backus, 133 Ind. 513; 33 N. E. 421; 18 L. R. A. 729. See also Western Un. Tel. Co. v. Indiana, 165 U. S. 304; 17 Sup. Ct. 345; Cargill Co. v. Minnesota, 180 U. S. 452; 21 Sup. Ct. 423; Michigan Cent. R. Co. v. Powers, 201 U. S. 245; 26 Sup. Ct. 459, 462, and authorities there cited.

[55] Wanty, J., in Michigan Railroad Tax Cases, 138 Fed. 223, citing: Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232; 10 Sup. Ct. 533; 33 L. Ed. 892; Giozza v. Tiernan, 148 U. S. 657-662; 13 Sup. Ct. 721; 37 L. Ed. 599; Adams Express Co. v. Ohio, 165 U. S. 194-288; 17 Sup. Ct. 305; 41 L. Ed. 683; Magoun v. Illinois &c. Bank, 170 U. S. 283; 18 Sup. Ct. 594; 42 L. Ed. 1037; Billings v. Illinois, 188 U. S. 97; 23 Sup. Ct. 272; 47 L. Ed. 400; Merchant's &c. Bank v. Pennsylvania, 167 U. S. 461; 17 Sup. Ct. 829; 42 L. Ed. 236; Kentucky Railroad Tax Cases, 115 U. S. 321; 6 Sup. Ct. 57; 29 L. Ed. 414; Home Ins. Co. v. New York State, 134 U. S. 594; 10 Sup. Ct. 593; 33 L. Ed. 1025; Gulf &c. R. Co. v. Ellis, 165 U. S. 150; 17 Sup. Ct. 255; 41 L. Ed. 666; Clark v. Titusville, 184 U. S. 329; 22 Sup. Ct. 382; 46 L. Ed. 569; American Sugar Refining Co. v. Louisiana, 179 U. S. 89; 21 Sup. Ct. 43; 45 L. Ed. 102; New York State v. Barker, 179 U. S. 279; 21 Sup. Ct. 121; 45 L. Ed. 194; Charlotte &c. R. Co. v. Gibbes, 142 U. S. 386; 12 Sup. Ct. 255; 35 L. Ed. 1051; Traveler's Ins. Co. v. Connecticut, 185 U. S. 364; 22 Sup. Ct. 673; 46 L. Ed. 949; Kidd v. Alabama, 188 U. S. 730; 23 Sup. Ct. 401; 47 L. Ed. 669; Turpin v. Lemon, 187 U. S. 51; 23 Sup. Ct. 20; 47 L. Ed. 70; Florida &c. R. Co. v. Reynolds, 183 U. S. 471; 22 Sup. Ct. 176; 46 L. Ed. 283. Judge Wanty's opinion, from which we have quoted, is approved in Michigan Cent. R. Co. v. Powers, 201 U. S. 245; 26 Sup. Ct. 459, 462.

the laws by a municipal tax on its business at a specified rate per mile, or fraction of a mile of its trackage in the city streets, because a steam railway making an extra charge for local deliveries on freight brought over its road from outside the city was not also subjected to this tax.[56]

§ 773. Equal protection of the laws—Corporations are persons.—Railroad corporations are persons within the meaning of the constitution, and cannot be denied the equal protection of the laws.[57] Corporations are not within the constitutional provision which declares that "citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."[58] The distinction made between the two clauses of the federal constitution is an important one, but does not exert a direct influence upon the subject under immediate discussion, yet it seems necessary to refer to it in order to prevent possible confusion.

§ 774. Equal protection of the laws—What is a denial of.—We suppose that a tax designedly made unequal and intended to impose upon a special class a burden clearly unjust and plainly beyond that imposed upon other classes of persons would come within the prohibition of the fourteenth amendment, for a tax which would burden a special class grossly more than other classes would be a denial of the fundamental principle of law that the burden of taxation shall be

[56] Savannah &c. R. Co. v. Savannah, 198 U. S. 392; 25 Sup. Ct. 690; 49 L. Ed. 1097. The application to railroad property of the average rate of taxation of other property has also been upheld. Michigan Cent. R. Co. v. Powers, 201 U. S. 245; 26 Sup. Ct. 459. See, also, Boston &c. R. Co. v. State, 60 N. H. 87; Gottlieb v. Metropolitan Street R. Co. 161 Mo. 189, 199; 61 S. W. 603.

[57] Pembina &c. Co. v. Commonwealth, 125 U. S. 181; 8 Sup. Ct. 737; Santa Clara Co. v. Southern Pacific R. Co. 118 U. S. 39; 6 Sup. Ct. 1132; Minneapolis &c. Co. v. Beckwith, 129 U. S. 26; 9 Sup. Ct. 207; Cleveland &c. Co. v. Backus, 133 Ind. 513; 6 Sup. Ct. 421; 18 L. R. A. 729. See, also, Atchison &c. R. Co. v. Clark, 60 Kans. 826; 58 Pac. 477; 47 L. R. A. 77. But compare Northwestern Nat. Life Ins. Co. v. Riggs (U. S.), 27 Sup. Ct. 126.

[58] Paul v. Virginia, 8 Wall. (U. S.) 168; Railroad Co. v. Koontz, 104 U. S. 5; Pensacola &c. Co. v. Western Union Tel. Co. 96 U. S. 1, 19; Ducat v. Chicago, 10 Wall. (U. S.) 410; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404; Doyle v. Continental Ins. Co. 94 U. S. 535, 539; Elston v. Piggott, 94 Ind. 14, 17; People v. Fire Association, 92 N. Y. 311; 44 Am. R. 380, and note.

equalized as nearly as practicable. We do not mean, of course, that there must be absolute equality, nor, indeed, that there must be substantial equality or uniformity. There probably never was a tax levied that was truly uniform and equal, and, certainly, the federal tribunals would not interfere where nothing more than inequality was shown, even though the inequality be manifest and material. It cannot be justly said that there is a denial of the equal protection of the laws where there is a simple error of judgment or an unwise or even unjust exercise of legislative discretion, but there may be a denial of the equal protection of the laws where there is a design and purpose to relieve from taxation many classes by placing an unjust, oppressive and unequal burden upon a special class.[59] It may possibly be true that, where the statute so operates as to place an unjust and oppressive burden upon a special class, it will be held invalid, although it cannot be said that there was a formed design or purpose to make an unjust discrimination,[60] but this could be true only in an extreme case,

[59] In the case of Bell's Gap R. Co. v. Commonwealth, 134 U. S. 232; 10 Sup. Ct. 533, the court said: "The provision in the fourteenth amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways." It was also said: "It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for the payment of money; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character and unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be unwise and impracticable to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise." The court adopted the rule stated in Barbier v. Connelly, 113 U. S. 27, 31; 5 Sup. Ct. 357.

[60] The operation of a statute, rather than its form, determines its character. Yick Wo v. Hopkins, 118 U. S. 356; 6 Sup. Ct. 1064; State v. The Judges, 21 Ohio St. 1; Westerfield, Ex parte, 55 Cal. 550; 36 Am. R. 47; State v. Herrmann, 75 Mo. 340; Nichols v. Walters, 37 Minn. 264; 33 N. W. 800. See, also, Henderson v. Mayor, 92 U. S. 259; Hannibal &c. R. Co.

where, to permit the statute to stand, would be to practically authorize confiscation of property or to uphold an enforced and unequal contribution to the revenues of the state. A recent Missouri case seems to disclose a plain contravention of the equal protection clause of the federal constitution. The voters of that state in 1900 ratified an amendment to the state constitution which authorized the county courts, in the several counties in the state not under township organization, and the township board of directors in counties under township organization, in their discretion, to levy an additional tax of fifteen mills, to be used for road and bridge purposes, and exempted from its operation the cities of St. Louis, Kansas City and St. Joseph. Two of the cities—Kansas City and St. Joseph—were located in counties containing other towns and villages not subject to the exemption, which made the provision a plain violation of the rule that taxes must be uniform and equal, co-extensive with the territory to which the tax applies. The state supreme court found no difficulty in holding that the amendment denied to some of the persons within the state the equal protection of the laws guaranteed by the constitution.[61]

§ 775. Fourteenth amendment—Unequal taxation—Generally.—It is difficult to precisely define the line which separates the rightful domain of a state from the domain of the federal government in the field of taxation for general revenue purposes and declare when the federal judiciary may rightfully interfere. That a tax levied by a state legislature may be so grossly unequal and so palpably unjust that the federal tribunals will overthrow the statute which levies the tax seems clear, but what will constitute the inequality or unjust discrimination that will authorize the exercise of the federal jurisdiction is as yet clouded by confusion and doubt. There must be inequality great enough to be justly characterized as a denial of the equal protection of the laws, for, manifestly, if all persons are treated alike, although the burdens imposed may be unjust and oppressive, the jurisdiction of the federal tribunals cannot be successfully invoked.[62] It is not a

v. Husen, 95 U. S. 465; Easton v. Iowa, 188 U. S. 220; 23 Sup. Ct. 288.

[61] State v. Chicago &c. R. Co. 195 Mo. 228; 93 S. W. 784.

[62] In the case of San Mateo County v. Southern Pacific R. Co. 13 Fed. 722, Mr. Justice Field said: "It is undoubtedly true that the hardship and injustice of a tax levied by the state, considered with reference to its amount, are not subjects of federal cognizance." See, also, Merchants' Bank v. Pennsylva-

question of hardship or oppression, but of unjust discrimination against a class of persons or property resulting in an inequality of taxation, constituting a denial of the equal protection of the laws.

§ 776. Classification not a denial of equal protection.—A state is not bound to provide the same method of taxing all classes of property, but, as we have elsewhere shown, the legislature has a choice of methods, so that in classifying property for taxation and prescribing modes for valuing and assessing it there is no transgression of the fourteenth amendment, provided there is no hostile and unjust discrimination. It is possible to prescribe a method that necessarily discriminates against a special class to such an extent as to deprive it of the equal protection of the laws, but this result does not follow simply because the method adopted is unwise or leads to some inequality.[63] It is not enough, as we believe, to bring a case within the constitutional prohibition that there be some discrimination, for mere discrimination cannot be said to be, of itself, a denial of the equal protection of the laws.

§ 777. Fourteenth amendment—Tax for salaries of railroad commissioners.—The extent to which a state may go without violating the provisions of the fourteenth amendment is strikingly illustrated by the cases which adjudge that railroad companies may be taxed to pay the salaries of the members of a railroad commission.[64] This seems to us a very strong assertion of the power of the states, and,

nia, 167 U. S. 461; 17 Sup. Ct. 829; Peacock v. Pratt, 121 Fed. 772.

[63] Home Ins. Co. v. New York, 134 U. S. 594; 10 Sup. Ct. 593; Pacific Express Co. v. Seibert, 142 U. S. 339; 12 Sup. Ct. 250; Charlotte &c. Railroad Co. v. Gibbes, 142 U. S. 386; 12 Sup. Ct. 255; Missouri &c. R. Co. v. Mackey, 127 U. S. 205; 8 Sup. Ct. 1161. See, generally, Kentucky Railroad Tax Cases, 115 U. S. 321; 6 Sup. Ct. 57; State Railroad Tax Cases, 92 U. S. 575; Cleveland &c. Co. v. Backus, 133 Ind. 513; 33 N. E. 421; 18 L. R. A. 729; Pittsburgh &c. Co. v. Backus, 154 U. S. 421; 14 Sup. Ct. 1114; Cleveland &c. Co. v. Backus, 154 U. S. 439; 14 Sup. Ct. 1122; Dow v. Beidelman, 125 U. S. 680; 8 Sup. Ct. 1028; Michigan Cent. R. Co. v. Powers, 201 U. S. 245; 26 Sup. Ct. 459, and authorities there cited; Coulter v. Louisville &c. R. Co. 196 U. S. 599; 25 Sup. Ct. 342.

[64] Charlotte &c. Co. v. Gibbes, 142 U. S. 386; 12 Sup. Ct. 255, citing Georgia &c. Banking Co. v. Smith, 128 U. S. 174; 9 Sup. Ct. 47; New York v. Squire, 145 U. S. 175; 12 Sup. Ct. 880.

with all deference to the great tribunal which asserted the doctrine, a very dangerous and doubtful rule. The reasoning of the court necessarily leads to the conclusion that like commissions may be created for all classes of corporations having duties and powers of a public nature, and the business of maintaining them imposed on such corporations, and this would be to put upon them a much heavier and essentially different burden from that imposed upon other bodies politic and corporate. It is to be noted, we may properly say in passing, that the decisions of the supreme court go only to the federal side of the question, and have no direct influence upon a question arising under a state constitution forbidding special legislation and requiring equality and uniformity of taxation.[65]

§ 778. Corporations deriving rights from the United States.—The property of a private corporation having its situs in a state may be taxed by the state, although the corporation may derive privileges and franchises from the United States. It is the property that is the subject of taxation, for in the case of an interstate corporation the business or operations cannot be taxed by the state, since that would be to tax interstate commerce itself. It is important, in all phases of the subject, to keep in mind the distinction between taxing the property of an interstate corporation situated within the boundaries of a state and taxing the business or operation of the corporation engaged in carrying articles of commerce from state to state, for confusion will result if this distinction is not observed.[66]

§ 779. Land grants.—Land granted to a railroad company by the United States is subject to taxation by the state in which the land is situated, and this is true, although the railroad company transports freight and passengers for the government.[67] The conclusion stated

[65] See Atchison &c. R. Co. v. Howe, 32 Kans. 737; 5 Pac. 397.

[66] Railroad Co. v. Peniston, 18 Wall. (U. S.) 5; Thomson v. Pacific R. Co. 9 Wall. (U. S.) 579; Reagan v. Mercantile Trust Co. 154 U. S. 413; 14 Sup. Ct. 1060; Western Union Tel. Co. v. Att'y-Gen'l, 125 U. S. 530; 8 Sup. Ct. 961; St. Louis v. Western Union Tel. Co. 148 U. S. 92; 13 Sup. Ct. 485. That the franchise granted by congress can not be taxed by a state, see California v. Central Pac. R. Co. 127 U. S. 1; 8 Sup. Ct. 1073; Keokuk &c. Bridge Co. v. Illinois, 175 U. S. 626; 20 Sup. Ct. 205.

[67] Railroad Company v. Peniston, 18 Wall. (U. S.) 5; Lane County v. Oregon, 7 Wall. (U. S.) 71; Thom-

seems to us the just one, but there was stubborn conflict of opinion upon the question when it was before the court. If land becomes the property of a private corporation, yielding to that corporation revenues and profits, it is justly taxable, no matter from what grantor the land was derived, nor is the question, as we believe, changed by the fact that use is made of the railroad by the general government, for, after all, the corporation exists, and its business is conducted for the private benefit of its stockholders.

§ 780. Domestic commerce.—Intrastate or domestic commerce is under the dominion of the state, for it is only commerce between the states upon which the commerce clause of the federal constitution operates.[68] The state may regulate domestic commerce as it deems prop-

son v. Pacific Railroad, 9 Wall. (U. S.) 579; Reagan v. Mercantile Trust Co. 154 U. S. 413; 14 Sup. Ct. 1060; Reagan v. Farmers' &c. Co. 154 U. S. 362; 14 Sup. Ct. 1047; citing Railroad Commission Cases, 116 U. S. 307; 6 Sup. Ct. 334; Mercantile Trust Co. v. Texas R. Co. 51 Fed. 529. See, generally, Chicago &c. Co. v. Davenport, 51 Iowa, 451; 1 N. W. 720; West &c. R. Co. v. Supervisors, 35 Wis. 257. But where land is granted by the United States, it is not taxable by the state until the title vests in the grantee. Railway Co. v. Prescott, 16 Wall. (U. S.) 603; Cass Co. v. Morrison, 28 Minn. 257; 9 N. W. 761; Wheeler v. Merriman, 30 Minn. 372; 15 N. W. 665. See, upon the general subject, McGregor &c. Co. v. Brown, 39 Iowa, 655; Grant v. Iowa &c. R. Co. 54 Iowa, 673; 7 N. W. 113; Doe v. Iowa &c. R. Co. 54 Iowa, 657; 7 N. W. 118; Central &c. Co. v. Howard, 52 Cal. 227; Hunnewell v. Cass Co. 22 Wall. (U. S.) 464; Colorado Co. v. Commissioners, 95 U. S. 259; Litchfield v. Webster Co. 101 U. S. 773.

[68] Postal Tel. Co. v. Charleston, 153 U. S. 692; 14 Sup. Ct. 1094; Home Ins. Co. v. Augusta, 93 U. S. 116; Ratterman v. Western Union &c. Co. 127 U. S. 411; 8 Sup. Ct. 1127; Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192; 12 Sup. Ct. 806; Western Union &c. Co. v. Alabama State Board, 132 U. S. 472; 10 Sup. Ct. 161; Pacific Express Co. v. Seibert, 142 U. S. 339; 12 Sup. Ct. 250; Western Union Tel. Co. v. Charleston, 56 Fed. 419, citing Western Union Tel. Co. v. Attorney-General, 125 U. S. 530; 8 Sup. Ct. 961; Delaware &c. Co. v. Commonwealth, 2 Inters. Com. R. 222; 1 L. R. A. 232; Knoxville &c. R. Co. v. Harris, 99 Tenn. 684; 43 S. W. 115; 53 L. R. A. 921. But see People v. Morgan, 168 N. Y. 1; 60 N. E. 1041. In the case of Western Union Tel. Co. v. Texas, 105 U. S. 460, a distinction between interstate and domestic commerce was drawn and it was held that property within the state was subject to taxation. The question was considered in the case of Lehigh &c. Co. v. Pennsylvania, 145 U. S. 192; 12 Sup. Ct. 806, where it was said: "Taxation is undoubtedly one

er, unaffected by the clause of the national constitution, which governs the subject of interstate commerce, but a state cannot, of course, enact any statute in reference to domestic commerce which will impair the obligation of a contract, deny the equal protection of the laws, or violate any other provision of the federal constitution.

of the forms of regulation, but the power of each state to tax its own commerce, and the franchises, property or business of its own corporations engaged in such commerce has always been recognized, and the particular mode of taxation in this instance is conceded to be in itself not open to objection, and while interstate commerce can not be regulated by a state by the laying of taxes thereon in any form, yet whenever the subject of taxation can be separated, so that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the distinction will be acted upon by the courts, and the state permitted to collect that arising upon commerce solely within its own territory."

CHAPTER XXXII.

LOCAL ASSESSMENTS.

§ 781. Assessments and taxes—Distinction.—There is a broad distinction between a local assessment and a tax levied for the purpose of raising governmental revenue.[1] The principal ground for the distinction is that local assessments are founded upon the theory that there is a special benefit resulting from the expenditure of the money derived from the assessment, while in the case of ordinary taxes there is a common benefit. Taxes proper, or ordinary taxes, are levied upon all property except certain classes specially exempted, such as property

[1] Roosevelt Hospital v. Mayor, 84 N. Y. 108. In Mix v. Ross, 57 Ill. 121, it is said: "There is a plain distinction between taxes, which are burdens or charges imposed upon persons or property to raise money for public purposes, and assessments for city or village improvements, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement." See, also, Elliott Roads and Streets (2d ed.), §§ 542, 547, 549.

used for religious, charitable and kindred purposes, in order to secure revenue to defray the expenses of the general government.[2] No special benefit accrues to anyone from the payment of taxes; the benefit is general, and accrues to all citizens and property alike, and consists in the general benefits which the government guarantees in the protection and enjoyment of life and property, and the promotion of those institutions which have for their object the welfare of all. Local assessments are not levied in order to raise general revenue for the purposes of government, but are charges assessed against the property of some particular locality because that property derives some special benefit from the expenditure of the money collected by the assessment in addition to the general benefit accruing to all property or citizens of the commonwealth.[3] The distinction is very clearly pointed out in

[2] Loan Association v. Topeka, 20 Wall. (U. S.) 655, 664; Illinois Central &c. Co. v. Decatur, 147 U. S. 190; 13 Sup. Ct. 293; Rich v. Chicago, 152 Ill. 18; 38 N. E. 255; Elliott Roads and Streets (2d. ed.), § 542, et seq.

[3] Chicago &c. Co. v. Joliet, 154 Ill. 522; 39 N. E. 1077; Palmer v. Stumph, 29 Ind. 329; Cleveland v. Tripp, 13 R. I. 50; Richmond &c. Co. v. Lynchburg, 81 Va. 473; McGehee v. Mathis, 21 Ark. 40; King v. Portland, 2 Oreg. 146; Palmyra v. Morton, 25 Mo. 593; People v. Mayor, 4 N. Y. 419; 55 Am. Dec. 266, and note; Lexington v. McQuillan, 9 Dana (Ky.), 514; Moale v. Baltimore, 5 Md. 314; 61 Am. Dec. 276; Hurford v. Omaha, 4 Neb. 336; Charnock v. Levee Co. 38 La. Ann. 323; Norfolk City v. Ellis, 26 Gratt. (Va.) 224; Emery v. San Francisco &c. Co. 28 Cal. 345; Willard v. Presbury, 14 Wall. (U. S.) 676; Commonwealth v. Woods, 44 Pa. St. 113; State v. Dean, 23 N. J. L. 335; Hines v. Leavenworth, 3 Kan. 186; Sewall v. St. Paul, 20 Minn. 511; New Albany v. McCulloch, 127 Ind. 500; 26 N. E. 1074; Sheehan v. Good Samaritan &c. 50 Mo. 155; 11 Am. R. 412; Illinois &c. Co. v. Decatur, 147 U. S. 190; 13 Sup. Ct. 293; Denver v. Knowles, 17 Colo. 204; 30 Pac. 1041; 17 L. R. A. 135; Farrar v. St. Louis, 80 Mo. 379; Hammett v. Philadelphia, 65 Pa. 146; 3 Am. R. 615; Speer v. Athens, 85 Ga. 49; 11 S. E. 802; 9 L. R. A. 402; Hoyt v. East Saginaw, 19 Mich. 39; 2 Am. R. 76; Cain v. Commissioners, 86 N. Car. 8; Allen v. Galveston 51 Tex. 302; Hale v. Kenosha, 29 Wis. 599; Cooley Taxation (3d ed.), 1153, 1154; Winona &c. Co. v. Watertown, 1 S. Dak. 46; 44 N. W. 1072; Rich v. Chicago, 152 Ill. 18; 38 N. E. 255. "Taxes are impositions for purposes of general revenue; assessments are special and local impositions upon property in the immediate vicinity for an improvement for the public welfare, which are necessary to pay for the improvement, and laid with reference to the special benefit which such property derives from such expenditure." Reeves v. Treasurer, 8 Ohio St. 333. The distinction between a tax and a local assessment is very

those cases which hold that a statute exempting property from taxation does not exempt it from local assessments,[4] and also in those which hold that the levy of a local assessment does not violate constitutional provisions requiring uniformity of taxation.[5]

clearly pointed out by Chief Justice George in the case of Macon v. Patty, 57 Miss. 378, 386; 34 Am. R. 451, as follows: "A local assessment can only be levied on land; it can not, as a tax can, be made a personal liability of the tax-payer; it is an assessment on the thing supposed to be benefited. A tax is levied on the whole state or a known political subdivision, as a county or a town. A local assessment is levied on property situated in a district created for the express purpose of the levy, and possessing no other function, or even existence, than to be the thing on which the levy is made. A tax is a continuing burden, and must be collected at stated short intervals for all times, and without it government can not exist. A local assessment is exceptional, both as to time and locality—it is brought into being for a particular occasion, and to accomplish a particular purpose, and dies with the passing of the occasion and the accomplishment of the purpose. A tax is levied, collected and administered by a public agency, elected by and responsible to the community upon which it is imposed; a local assessment is made by an authority ab extra, yet it is like a tax in that it is imposed under an authority derived from the legislature, and is an enforced contribution to the public welfare, and its payment may be enforced by the summary method allowed for the collection of taxes. It is like a tax in that it must be levied for a public purpose, and must be apportioned by some reasonable rule among those upon whose property it is levied. It is unlike a tax in that the proceeds of the assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed."

[4] Roosevelt Hospital v. Mayor, 84 N. Y. 108; First Presbyterian Church v. Fort Wayne, 36 Ind. 338; 10 Am. R. 35; Illinois &c. Co. v. Decatur, 126 Ill. 92; 18 N. E. 315; 1 L. R. A. 613, and note, affirmed in 147 U. S. 190; 13 Sup. Ct. 293; Chicago &c. Co. v. People, 120 Ill. 104; 11 N. E. 418; Buffalo Cemetery v. Buffalo, 46 N. Y. 506; Olive Cemetery v. Philadelphia, 93 Pa. St. 129; 39 Am. R. 732, and note; Mayor &c. of Baltimore v. Greenmount Cemetery, 7 Md. 517; Bridgeport v. New York &c. R. Co. 36 Conn. 255; 4 Am. R. 63; Edwards &c. Co. v. Jasper County, 117 Ia. 365; 90 N. W. 1006; 94 Am. St. 301. See, also, State v. Binninger, 42 N. J. 528; 1 Am. & Eng. R. Cas. 410; Cooley Taxation (3d ed.), 362, 363; Winona &c. Co v. Watertown, 1 S. Dak. 46; 44 N. W. 1072; Illinois Cent. Co. v. Decatur, 154 Ill. 173; 38 N. E. 626; Ford v. Delta &c. Co. 164 U. S. 662; 17 Sup. Ct. 230.

[5] Chamberlain v. Cleveland, 34 Ohio St. 551; Zanesville v. Richards, 5 Ohio St. 589; Denver v. Knowles, 17 Colo. 204; 30 Pac. 104; 17 L. R. A. 135; Mayor of Birming-

§ 782. Local assessments—Power to levy.—The authority or power to levy local assessments has for its foundation the general taxing power of the commonwealth.[6] The power to levy general taxes and local assessments comes from the same source. The power is usually conferred through legislative enactments upon local governmental instrumentalities, such as counties, cities, towns, and the like. For a time there was much doubt as to the validity of statutes conferring upon municipalities the power to levy assessments to pay for local improvements, but the validity of such statutes is now so firmly established by judicial decisions as to be no longer considered an open question.[7] The right to levy a local assessment proceeds, and is justified, upon the theory that the property against which the assessment is placed is enhanced in value by the construction of the improvement to an amount equal to the assessment exacted.[8] It has been held that if

ham v. Klein, 89 Ala. 461; 8 L. R. A. 369; Reeves v. Treasurer, 8 Ohio St. 333.

[6] Winona &c. Co. v. Watertown, 1 S. Dak. 46; 44 N. W. 1072; McComb v. Bell, 2 Minn. 256; Pray v. Northern Liberties, 31 Pa. St. 69; Walsh v. Mathews, 29 Cal. 123; New Orleans Praying for Opening of Streets, 20 La. Ann. 497; Reeves v. Treasurer, 8 Ohio St. 333; Hines v. Leavenworth, 3 Kan. 186; Van Antwerp, In re, 56 N. Y. 261; People v. Mayor, 4 N. Y. 419; 55 Am. Dec. 266, and note; Keith v. Bingham, 100 Mo. 300; 13 S. W. 683; St. Louis v. Allen, 53 Mo. 44; Sheehan v. Good Samaritan &c. 50 Mo. 155; 11 Am. R. 412; Austin v. Austin &c. Co. 69 Tex. 180; 2 S. W. 852; Monticello v. Banks, 48 Ark. 251; Allen v. Drew, 44 Vt. 174; Adams County v. Quincy, 130 Ill. 566; 22 N. E. 624; 6 L. R. A. 155; State v. Fuller, 34 N. J. L. 227; State v. Newark, 35 N. J. L. 168; Weeks v. Milwaukee, 10 Wis. 242; Motz v. Detroit, 18 Mich. 494; Baltimore v. Greenmount Cemetery, 7 Md. 517; Beach Pub. Corp. § 1072; Glasgow v. Rowse, 43 Mo. 479. In the case of Vacation of Centre Street, In re, 115 Pa. St. 247; 8 Atl. 56, it is said: "Muncipal assessments for grading, paving, opening, widening or vacating streets, and other purposes for which, within proper limits, they may be authorized, are referable solely to the taxing power. Indeed, there is nothing else upon which they can be sustained."

[7] Raleigh v. Peace, 110 N. Car. 32; 14 S. E. 521; 17 L. R. A. 330; Stroud v. Philadelphia, 61 Pa. St. 255; Wilmington v. Yopp, 71 N. C. 76; Cooley Const. Lim. 506; Elliott Roads and Streets (2d. ed.), § 542; Tiedeman, Munic. Corp. § 259a. "The subject has been thoroughly discussed and every principle bearing upon it severely analyzed in almost every state of the Union where the power has been exercised; and it is now as firmly established as any other doctrine of American law." Palmyra v. Morton, 25 Mo. 593

[8] Lockwood v. St. Louis, 24 Mo. 20; Wright v. Boston, 9 Cush.

the property against which an assessment has been levied has not been benefited by the improvement, the collection of the assessment may be enjoined,[9] but this doctrine is to be taken with careful qualification, for it is only in very clear cases that the courts can interfere.[10] Since the power to levy a local assessment depends upon a statutory enactment, it can have no existence unless there be a valid statute conferring it upon the municipality which claims the right to exercise it.[11] The general authority to levy taxes for municipal purposes is not broad

(Mass.) 233; McGonigle v. Allegheny City, 44 Pa. St. 118; Litchfield v. Vernon, 41 N. Y. 123; New Orleans Praying for Opening of Streets, 20 La. Ann. 497; Allen v. Drew, 44 Vt. 174; Paterson v. Society, 24 N. J. L. 385; Auburn v. Paul, 84 Me. 212; 24 Atl. 817; Municipality No. 2 v. Dunn, 10 La. Ann. 57; Philadelphia v. Tryon, 35 Pa. St. 401; State v. Judges, 51 Minn. 539; 53 N. W. 800; Preston v. Rudd, 84 Ky. 150; Fort Wayne v. Shoaff, 106 Ind. 66; Mock v. Muncie, 9 Ind. App. 536; 37 N. E. 281; 32 N. E. 718; Davies v. Los Angeles, 86 Cal. 37; 24 Pac. 771; Illinois Central R. Co. v. Decatur, 147 U. S. 190; 13 Sup. Ct. 293; Oregon &c. Co. v. Portland, 25 Ore. 229; 35 Pac. 452; 22 L. R. A. 713; Mt. Pleasant v. Baltimore &c. R. Co. 138 Pa. St. 365; 20 Atl. 1052; 11 L. R. A. 520. "The principle upon which rests that numerous class of statutes which charge lots of ground with the expense of grading and paving the streets in front of them is, that the value of the lots is enhanced by the public expenditure." Schenley v. Commonwealth, 36 Pa. St. 29; 78 Am. Dec. 359, and note.

[9] Oregon &c. Co. v. Portland, 25 Ore. 229; 35 Pac. 452; 22 L. R. A. 713. See Bloomington v. Chicago &c. R. Co. 134 Ill. 451; 26 N. E. 366; Mount Pleasant v. Baltimore &c. Co. 138 Pa. St. 365; 20 Atl. 1052; 11 L. R. A. 520; New York &c. R. Co. v. New Haven, 42 Conn. 279; 19 Am. R. 534.

[10] Where the question of the amount of the benefit is committed to the judgment of the municipal officers, the courts can not control the assessment in that respect. Motz v. Detroit, 18 Mich. 494; Le Roy v. Mayor, 20 Johns. (N. Y.) 430; 11 Am. Dec. 289; Mayor &c. Ex parte, 23 Wend. (N. Y.) 277; Mooers v. Smedley, 6 Johns. Ch. (N. Y.) 28; Commonwealth v. Woods, 44 Pa. St. 113; Brooklyn v. Meseroole, 26 Wend. (N. Y.) 132; Lyon v. Brooklyn, 28 Barb. (N. Y.) 609; Ft. Wayne v. Cody, 43 Ind. 197. See, also, French v. Barber &c. Co. 181 U. S. 324; 21 Sup. Ct. 625; Schaefer v. Werling, 188 U. S. 516; 23 Sup. Ct. 449; Seattle v. Kellegher, 195 U. S. 351; 25 Sup. Ct. 44; Louisville &c. R. Co. v. Barber &c. Co. 197 U. S. 430; 25 Sup. Ct. 466; Chadwick v. Kelley, 187 U. S. 540; 23 Sup. Ct. 175.

[11] Griswold v. Pelton, 34 Ohio St. 482; Second Ave. Church, Matter of, 66 N. Y. 395; Niklaus v. Conkling, 118 Ind. 289; 20 N. E. 797; Marion Trust Co. v. Indianapolis (Ind. App.), 75 N. E. 834, 836.

enough to confer the right to levy assessments for local improvements.[12] A statute conferring such a power upon a municipality must be strictly construed in favor of the person against whom the assessment is levied.[13]

§ 783. Statute must be complied with.—Where the statute prescribes the mode in which the improvement shall be made and the assessment levied, that mode must be strictly pursued by the municipal authorities in making the levy.[14] "The mode constitutes the measure of power."[15] But the rule of construction is not so strict that a literal compliance with the statute in immaterial matters is necessary

[12] Drake v. Phillips, 40 Ill. 388; Minn. &c. Co. v. Palmer, 20 Minn. 468; Mayor &c. of Savannah, v. Hartridge, 8 Ga. 23; Lott v. Ross, 38 Ala. 156; Hare v. Kennerly, 83 Ala. 608; 3 So. 683; Mays v. Cincinnati, 1 Ohio St. 268; Cincinnati v. Bryson, 15 Ohio, 625; 45 Am. Dec. 593; Chicago v. Wright, 32 Ill. 192; Leavenworth v. Norton, 1 Kan. 432; Richmond v. Daniel, 14 Gratt. (Va.) 385; Kyle v. Malin, 8 Ind. 34; Green v. Ward, 82 Va. 324; Com'rs of Asheville v. Means, 7 Ired. (Law) 406; Fairfield v. Ratcliff, 20 Iowa, 396; Annapolis v. Harwood, 32 Md. 471; 3 Am. R. 151; Board of Winston v. Taylor, 99 N. C. 210; 6 S. E. 114.

[13] Second Avenue Church, Matter of, 66 N. Y. 395; Niklaus v. Conkling, 118 Ind. 289; 20 N. E. 797; Griswold v. Pelton, 34 Ohio St. 482; Allentown v. Henry, 73 Pa. St. 404; Reed v. Toledo, 18 Ohio, 161; Augusta v. Murphey, 79 Ga. 101; 3 S. E. 326; Walker v. District of Columbia, 6 Mackey (D. C.), 352; 12 Cent. R. 408; Oshkosh &c. R. Co. v. Winnebago County, 89 Wis. 435; 61 N. W. 1107.

[14] Taylor v. Downer, 31 Cal. 480; Smith v. Davis, 30 Cal. 536; Merritt v. Portchester, 71 N. Y. 309; 27 Am. R. 47; White v. Saginaw, 67 Mich. 33; 34 N. W. 255; Massing v. Ames, 37 Wis. 645; State v. Bayonne, 44 N. J. L. 114; Newman v. City, 32 Kan. 456; 4 Pac. 815; St. Louis v. Ranken, 96 Mo. 497; 9 S. W. 910; Bouldin v. Baltimore, 15 Md. 18; Sewall v. St. Paul, 20 Minn. 511; Chicago v. Wright, 32 Ill. 192; Brophy v. Landman, 28 Ohio St. 542; Butler v. Nevin, 88 Ill. 575; Leach v. Cargill, 60 Mo. 316; Hager v. Burlington, 42 Iowa, 661; Allen v. Galveston, 51 Tex. 302; Hurford v. Omaha, 4 Neb. 336; Cambria Street, In re, 75 Pa. St. 357; Lexington v. Headley, 5 Bush (Ky.), 508; Fayssoux v. Succession of Baroness De Chaurand, 36 La. Ann. 547. The provisions of the statute conferring the power to levy assessments should be construed as mandatory rather than directory. Merritt v. Portchester, 71 N. Y. 309; 27 Am. R. 47; Starr v. Burlington, 45 Iowa, 87; State v. Jersey City, 38 N. J. L. 85; Cambria Street, 75 Pa. St. 357.

[15] Zottman v. San Francisco, 20 Cal. 96; 81 Am. Dec. 96, and note. See, also, Murphy v. Louisville, 9 Bush (Ky.), 189; Nicolson Paving Co. v. Painter, 35 Cal. 699.

in every case. If there is a substantial compliance with the mode prescribed the assessment will usually be held valid.[16] So where the statute does not prescribe in detail the manner or mode in which an improvement shall be made and the assessment to pay for the same levied, but does in general terms grant the principal power to levy the assessment, the courts have held that all subordinate and incidental powers necessary to a valid exercise of the rights conferred by the statute pass with the grant of the principal power.[17] As the power to improve streets and the like is a continuing one, it has been held that the levy of one local assessment does not exhaust the power of the municipality, and second and subsequent assessments may be levied against the same property to pay for repairs, repaving, additional improvements, and the like.[18] It is obvious that if this power were not a continuing one it would be impossible to repair, replace or extend an improvement when the same becomes out of repair, or inadequate for the purposes for which it was made.

§ 784. Property subject to local assessment—General rule.—The general rule is that all lands lying within the designated limits of the district or locality for which a local improvement is made, by whomsoever held or owned, are subject and liable to an assessment to aid in paying the cost of constructing such improvement,[19] and this rule is

[16] State v. South Orange, 46 N. J. L. 317; Stebbins v. Kay, 4 N. Y. S. 566; Lynam v. Anderson, 9 Neb. 367; 2 N. W. 532; Springfield v. Sale, 127 Ill. 359; 20 N. E. 86; Jenkins v. Stetler, 118 Ind. 275; 20 N. E. 788; Parish v. Golden, 35 N. Y. 462.

[17] Schenley v. Commonwealth, 36 Pa. St. 29; 78 Am. Dec. 359; and note; Bigelow v. Perth Amboy, 26 N. J. L. 297; McNamara v. Estes, 22 Iowa, 246; Smith v. Madison, 7 Ind. 86; Smith v. Newbern, 70 N. C. 14; 16 Am. R. 766; Spaulding v. Lowell, 23 Pick. (Mass.) 71; Cook Co. v. McCrea, 93 Ill. 236; State v. Jersey City, 30 N. J. L. 148.

[18] Wilkins v. Detroit, 46 Mich. 120; 8 N. W. 701; Sheley v. Detroit, 45 Mich. 431; 8 N. W. 52; State v. Hotaling, 44 N. J. L. 347; Board v. Fullen, 111 Ind. 410; Burmeister, In re, 76 N. Y. 174; Farrar v. St. Louis, 80 Mo. 379; Estes v. Owen, 90 Mo. 113; Goszler v. Georgetown, 6 Wheat. (U. S.) 593; Chicago &c. Co. v. Quincy, 136 Ill. 563; 27 N. E. 192; 29 Am. St. 334.

[19] Elliott Roads and Streets, 376. (2d ed. § 549, et seq.) See Broadway Church v. McAtee, 8 Bush (Ky.), 508; 8 Am. R. 480. In Louisville Transfer Co. v. Obst (Ky.), February, 1875, the court said: "Real property held by railroad companies within the corporate limits of the city of Louisville is not exempt from street taxation. The terms of the grant of the pow-

enforced, even though there be a statute exempting particular property from taxation. Thus it has been held that statutes exempting cemeteries, churches, charitable institutions and the like from taxation, does not relieve them from assessments to pay for local improvements from which they derive a special benefit.[20] Statutes under which an exemption from local assessment is asserted must be strictly construed against the person claiming the exemption, and liberally in favor of the assessment.[21]. The enforcement of such assessment is placed on the ground that the statutes are intended only to relieve from the burdens of general taxation, and that local assessments are a species of special taxation not included in the general term taxation. But where the statutes provide that the property shall be exempt from taxation and assessments of every kind, it has been held that local assessments cannot be levied against such property.[22]

§ 785. Property of railroad companies.—As to the liability of lands owned by railroad companies as part of their right of way, or as necessary to the operation of their roads, to local assessments, there is some conflict among the authorities.[23] Some of the authorities make

er to tax for such purposes includes all real estate, and that held by railroad companies, like that held by churches, colleges, hospitals, and other institutions of like character, must bear its proportion of the local burden. There is no constitutional restriction to impose local taxation upon railroad companies. It is merely a question of local policy."

[20] Authorities, ante, § 781; Chicago &c. Co. v. People, 120 Ill. 104; 11 N. E. 418; Paterson v. Society, 24 N. J. L. 385; State v. Newark, 27 N. J. L. 185; Sheehan v. Good Samaritan, 50 Mo. 155; 11 Am. R. 412; Beals v. Providence Rubber Co. 11 R. I. 381; 23 Am. R. 472; Worcester Agricultural Society v. Worcester, 116 Mass. 189; Harvey v. South Chester, 99 Pa. St. 565; Sewickley &c. Church's Appeal, 165 Pa. St. 475; 30 Atl. 1007; Allen v. Galveston, 51 Tex. 302; Illinois Central Co. v. Decatur, 147 U. S. 190; 13 Sup. Ct. 293; Chicago &c. R. Co. v. Milwaukee, 89 Wis. 506; 62 N. W. 417; 28 L. R. A. 249. And it has been held that a railway is not a "public highway" within a statute exempting public highways from local assessments. Nevada v. Eddy, 123 Mo. 546; 27 S. W. 471.

[21] Roosevelt Hospital v. Mayor, 84 N. Y. 108.

[22] Brightman v. Kirner, 22 Wis. 54; First Division St. Paul &c. Co. v. St. Paul, 21 Minn. 526. A statute providing that "no tax or impost" shall be levied does not exempt from local assessments. State v. Jersey City, 42 N. J. L. 97; 1 Am. & Eng. R. Cas. 406; State v. Elizabeth, 37 N. J. L. 330.

[23] There can be no doubt that property held by a railroad company for purposes not connected with

a distinction on the ground of the nature of the uses to which the lands are put. For the purposes of our discussion we will divide the lands owned by railroads into two classes, viz., that occupied by and used as a right of way, and that used for other purposes, such as shops, warehouses, depots, depot grounds, and the like. The liability of the right of way to local assessments will be considered in the next and succeeding sections. While there may be some conflict in the decisions, the overwhelming weight of authority is that depots, depot grounds, and other lands owned by railway companies and not occupied as a right of way, are subject to local assessments the same as the lands owned by any individual.[24]

the operation of the road is subject to assessment in a proper case. Where the property is not used in operating the road the company holds it substantially as property is held by individuals or strictly private corporations.

[24] Ludlow v. Cincinnati Southern, 78 Ky. 357; 7 Am. & Eng. R. Cas. 231; New York &c. R. Co. v. New Britain, 49 Conn. 40; Reopening of Berks St. 12 W. N. C. 10; Burlington &c. Co. v. Spearman, 12 Iowa, 112; Mt Pleasant v. Baltimore &c. Co. 138 Pa. 365; 20 Atl. 1052; 11 L. R. A. 520; Alexander Ave. In re, 17 N. Y. S. 933; Chicago &c. Co. v. People, 120 Ill. 104; 11 N. E. 418; New Jersey &c. Co. v. Mayor, 42 N. J. L. 97; Erie R. Co. v. Mayor (N. J.), 59 Atl. 1031; Morris &c. R. Co. v. Jersey City, 65 N. J. L. 683; 48 Atl. 1117; Nevada v. Eddy, 123 Mo. 546; 27 S. W. 471; Bradley v. New York &c. Co. 21 Conn. 294; Chicago &c. Co. v. Chicago, 139 Ill. 573; 28 N. E. 1108; Chicago &c. R. Co. v. Milwaukee, 89 Wis. 506; 28 L. R. A. 249. See, also, Illinois Cent. R. Co. v. Decatur, 147 U. S. 190; 13 Sup. Ct. 293; Illinois Cent. R. Co. v. People, 170 Ill. 224; 48 N. E. 215; Pittsburgh &c. R. Co. v. Hays, 17 Ind. App. 261; 44 N. E. 375; 45 N. E. 675; 46 N. E. 597; Philadelphia v. Philadelphia &c. R. Co. 177 Pa. St. 292; 35 Atl. 610; 34 L. R. A. 564; Atchison &c. R. Co. v. Peterson, 58 Kans. 818; 51 Pac. 290. In the case of Chicago &c. Co. v. People, 120 Ill. 667; 12 N. E. 207; 31 Am. & Eng. R. Cas. 487, the court said: "Whatever may be said in regard to the mere track of the railway, it is impossible to see why depot grounds, and other real estate used by the company, may not be benefited by improvements of the character here contemplated, at least, as much as may be the public square occupied by the county court-house, the canal lands, and the lot occupied by the church, by like improvements; and since the question of jurisdiction turns upon the right of inquiry, and not upon the correctness of decision, it is enough that railroad property may sometimes, under certain circumstances, be specially benefited by improvements of the general character of the present." "We are of the opinion that, while the road-bed or right of way of a railroad company is not the subject of the claim for paving, it does not fol-

§ 786. Right of way—Whether subject to assessment.—As said in the preceding section, there is a conflict in the adjudicated cases as to whether or not the right of way of a railroad company is subject to local assessments. The question has been discussed in a great number of instances, and different conclusions reached in apparently similar cases. The latest authorities on the subject, however, recognize what we believe to be the true rule, and that is, that, where the right of way receives a benefit from the improvement for which the assessment is levied, and there is no statute exempting the railroad company from local assessments in clear and unequivocal terms, it is subject to assessment.[25] Some of the authorities hold that the making of a

low that a passenger depot or freight depot, the ground belonging to the company and used as a lumber yard, or other purpose, may not be subject to such a charge." Borough v. Baltimore &c. Co. supra. Contra, New York &c. Co. v. New Haven, 42 Conn. 279; 19 Am. R. 534. The decision in this case, it seems, was placed on the ground that it was not shown that the railway company reaped any advantage from the improvement.

[25] Ludlow v. Cincinnati &c. R. Co. 78 Ky. 357; State v. Passaic, 54 N. J. L. 340; Jacksonville R. Co. v. Jacksonville, 114 Ill. 562; 2 N. E. 478; Chicago &c. Co. v. People, 120 Ill. 104; 11 N. E. 418; Lightner v. Peoria, 150 Ill. 80; 37 N. E. 69; Illinois &c. Co. v. Mattoon, 141 Ill. 32; 30 N. E. 773; Illinois Central Co. v. Decatur, 147 U. S. 190; 13 Sup. Ct. 293; 54 Am. & Eng. R. Cas. 282; Illinois Central v. Mattoon, 141 Ill. 32; 30 N. E. 773; Illinois Central v. Decatur, 126 Ill. 92; 18 N. E. 315; 1 L. R. A. 613, and note; Chicago v. Baer, 41 Ill. 306; Northern &c. Co. v. Connelly, 10 Ohio St. 159; 36 Am. Dec. 82, and note; Burlington &c. Co. v. Spearman, 12 Iowa, 112; Peru &c. Co. v. Hanna, 68 Ind. 562; Pittsburgh &c. R. Co. v. Taber (Ind.), 77 N. E. 741; Illinois Cent. R. Co. v. People, 170 Ill. 224; 48 N. E. 215; Atchison &c. R. Co. v. Peterson, 58 Kans. 818; 51 Pac. 290; Kuehner v. Freeport, 143 Ill. 92; 32 N. E. 372; 17 L. R. A. 774; Little v. Chicago, 46 Ill. App. 534; State v. Passaic, 54 N. J. L. 340; 23 Atl. 945; Transportation Co. v. Elizabeth, 37 N. J. L. 330; Railroad Co. v. Jersey City, 42 N. J. L. 97; Rich v. Chicago, 152 Ill. 18; 38 N. E. 255; Muscatine v. Chicago &c. R. Co. 79 Iowa, 645; 44 N. W. 909. See Trustees v. Chicago, 12 Ill. 403. In Northern &c. R. Co. v. Connelly, supra, it was said: "If railroad tracks are taxable, for general purposes, it is difficult to perceive why they should not be subject also to special taxes or assessments. The company, to advance its own interests, has seen fit to appropriate to its use grounds within the corporate limits of the city of Toledo, and over which the city had the power of making assessments to defray the expense of local improvements, and why should not the company be held to have taken it cum onere? A citizen would

local improvement, such as a street, along or near a railway right of way, cannot possibly be a benefit to the company; that it can run its trains as well without the improvement as with it, and therefore that no assessment can be levied.[26] One court, addressing itself to this subject, has said: "Where we can declare as a matter of law no such benefit can arise, the legislature is powerless to impose such a burden. It would not be a tax in any proper sense of the term; it would be in the nature of a forced loan, and would practically amount to confiscation."[27] Thus, where a street crosses a railway right of way at right angles, it has been held that no benefit accrues to the railway company from the improvement of the street, and that no assessment can be levied.[28] And where a railway company has a mere right of way

scarcely claim exemption, because he had devoted his lot to uses which the improvement could not in any way advance, and we see no good reason why a railroad company should be permitted to do so. The company have the exclusive right to the possession, so long as it is used for the road, and if the road-bed was exempt from taxation for general purposes, it would by no means follow that it was not liable for such special assessments" In Chicago &c. Co. v. Joliet, 153 Ill. 649; 39 N. E. 1079, it was said: "Where a railway is contiguous to a proposed street improvement, it falls within the designation of property that may be specially taxed for the making of the local improvement." Contra, Allegheny &c. Co. v. Western &c. Co. 138 Pa. St. 375.

[26] Philadelphia v. Philadelphia &c. Co. 33 Pa. St. 41; Bridgeport v. New York &c. Co. 36 Conn. 255; 4 Am. R. 63; Public Parks, Matter of, 47 Hun (N. Y.), 302; Detroit &c. R. Co. v. Grand Rapids, 106 Mich. 13; 63 N. W. 1007; 28 L. R. A. 793; Chicago &c. R. Co. v. Milwaukee, 89 Wis. 506; 62 N. W. 417; 28 L. R. A. 249. In Mt. Pleasant v. Baltimore &c. Co. 138 Pa. St. 365; 20 Atl. 1052, the court said: "It requires no argument to show that the paving of a footway by the side of a railroad track can confer no possible benefit upon the property known as the right of way, hence the whole theory which justifies such charges fails in this instance. But this reason does not apply to a railroad station where passengers assemble to take a train; much less does it apply to ground used as a freight station or lumber yard."

[27] Allegheny City v. West Pennsylvania R. Co. 138 Pa. St. 375; 21 Atl. 763. See, also, Farmers' &c. Co. v. Ansonia, 61 Conn. 76; 23 Atl. 705; Boston v. Boston &c. R. Co. 170 Mass. 95; 49 N. E. 95; Detroit &c. R. Co. v. Grand Rapids, 106 Mich. 13; 63 N. W. 1007; 28 L. R. A. 793; 58 Am. St. 466.

[28] Junction &c. Co. v. City, 88 Pa. St. 424; New York &c. Co. v. Morrisania, 7 Hun (N. Y.), 652; State v. Elizabeth, 37 N. J. L. 330; Great Eastern &c. Co. v. Hackney District, L. R. 8 App. Cas. 687. See Salem v. Henderson, 13 Ind. App.

across a lot to which it does not hold title, it cannot be assessed for

563; 41 N. E. 1062. If the right of way is broader than necessary for the track, the surplus may be assessed. New York &c. Co. v. Morrisania, supra. Compare Northern &c. Co. v. Connelly, 10 Ohio St. 159; 36 Am. Dec. 82, and note; Chicago &c. Co. v. Chicago, 139 Ill. 573; 28 N. E. 1108. The doctrine of the text was declared and enforced in the recent case of Detroit &c. R. Co. v. Grand Rapids, 106 Mich. 13; 63 N. W. 1007; 28 L. R. A. 793; 58 Am. St. 466, where it was said: "The right of way so assessed contains the main track and one side track. It has nothing else upon it, and is used for no other purpose. It has already been dedicated to a public use, and the question is presented whether a railroad right of way can be assessed by municipal corporations for public improvements. So far from being any benefit, it is established by the evidence that the opening and paving of the street were a damage to the complainant. A right of way can not be benefited by the opening and paving of a street across it. None of the buildings of the complainant are within two blocks of this crossing. We can see no benefits, immediate or prospective, to the complainant. The division of the right of way into three parcels was arbitrary, as were also the valuations and supposed benefits. The point is so clearly and concisely stated by the court of Pennsylvania, that we quote the opinion in Philadelphia v. Philadelphia W. & B. R. Co. 33 Pa. St. 41: 'The municipal authorities paved the Gray's Ferry road for a considerable distance, at a place where it lies side by side with the defendant's railroad, and now seek to charge them with the half of the cost of it; but they can not do it. Their claim has no foundation, either in the letter of the law or in its spirit, or in the form of the remedy. Not in the letter, because the defendants do not own the land sought to be charged, and have only their right of way over it. Not in the spirit, because the paving laws are means of compulsory contribution among the common sharers in a common benefit, and as a railroad can not, from its very nature, derive any benefit from the paving, while all the rest of the neighborhood may, we can not presume that the compulsion was intended to be applied to them. Not in the form of the remedy, because the execution of this sort of claim is, levari facias, a writ not commonly allowed against corporations, and which would hardly produce much when directed against a public right of way. It would be strange legislation that would authorize the soil of one public road to be taxed in order to raise funds to make or improve a neighboring one.' The same doctrine is held in Junction R. Co. v. Philadelphia, 88 Pa. 424; State v. Elizabeth, 37 N. J. L. 331; New York &c. R. Co. v. Morrisania Trustees, 7 Hun (N. Y.), 652; Bloomington v. Chicago & A. R. Co. 134 Ill. 451; 26 N. E. 366; Bridgeport v. New York &c. R. Co. 36 Conn. 255; 4 Am. R. 63; South Park Comrs. v. Chicago &c. R. Co. 107 Ill. 105; New York &c. R. Co. v. New Haven, 42 Conn. 279; 19 Am. R. 534." See Pittsburgh &c. R. Co.

the construction of an improvement adjoining the lot.[29] In many of the cases in which it was held that the right of way could not be assessed, the improvement, to pay for which the assessment was sought to be levied, was a street, and it clearly appeared that no benefit resulted to the right of way, but where it clearly appears that a benefit results from the improvement, such as the benefit derived from the construction of a street drain, sewer, or the like, the levy of the assessment may be proper and valid.[30] So, it has been held that the fact that the only use made of a lot abutting on a street improvement is for a railroad right of way, does not make an assessment thereon invalid on the alleged ground that there can be no benefit.[31]

§ 787. Abutting property—Right of way is not.—Where a railway company has its track or right of way in a street, it has been held that the right of way is not assessable as property "abutting on the street,"[32] or as property "bordering on or touching the street."[33] It is held that where the only interest a railway company has in a right

v. Taber (Ind.), 77 N. E. 741, where it is held that the abutting railroad right of way is subject to assessment for improvement of the part of a street through the right of way, though the fee of such land is in the railroad company subject to the easement of the street.

[29] Muscatine v. Chicago &c. Co. 88 Iowa, 291; 55 N. W. 100.

[30] Bloomington v. Railroad Co. 134 Ill. 451; 26 N. E. 366; Troy &c. Co. v. Kane, 9 Hun (N. Y.), 506; Louisville &c. Co. v. State, 122 Ind. 443; 24 N. E. 350; Louisville &c. Co. v. Boney, 117 Ind. 501; 20 N. E. 432; 3 L. R. A. 435, and note; North Beach &c. Co. Appeal of, 32 Cal. 499. Thus a street railway has been held liable to an assessment for the widening of a street. North Beach &c. R. Co. Appeal of, 32 Cal. 499.

[31] Louisville &c. R. Co. v. Barber &c. Co. 197 U. S. 430; 25 Sup. Ct. 466. Compare Chicago &c. R. Co. v. Chicago, 166 U. S. 226; 17 Sup. Ct. 581; Martin v. District of Columbia (U. S.), 27 Sup. Ct. 440.

[32] South Park Commissioners v. Chicago &c. Co. 13 Am. & Eng. R. Cas. 415; State v. Mayor (N. J.), 50 Atl. 620 (citing text). See, also, Oshkosh City R. Co. v. Winnebago Co. 89 Wis. 435; 61 N. W. 1107; People v. Gilon, 126 N. Y. 147; 27 N. E. 282; O'Reilly v. Kingston, 114 N. Y. 439; 21 N. E. 1004; State v. District Court, 31 Minn. 354; 17 N. W. 954. But see post, § 788.

[33] O'Reilly v. Kingston, 114 N. Y. 439; 21 N. E. 1004. Statutes conferring authority to levy and enforce are, as we have seen, to be strictly construed, and it is difficult to perceive any valid reason for holding a right of way on which tracks are laid to be property or lots fronting, abutting or bordering on a street.

of way laid in a street is the right to run its trains over the track, it cannot be assessed for a local improvement.[34] But where the tracks of a company are laid in a street the company is liable to assessment for keeping the street in repair.[35] And it has also been held that a railroad right of way located in a public street is liable to assessment for a local improvement under the Illinois statute, providing for local improvements by special assessment of "contiguous property."[36] But it is held in Iowa that a railroad right of way alongside, but not in a street, cannot be assessed under a statute authorizing assessments against lots and parcels of land fronting on the highway or upon a railroad occupying a portion of a street, and that a lessee which has agreed to pay all taxes and assessments is not liable to a city or contractor, neither of whom is in privity with it, for the amount of a local assessment.[37]

§ 787a. Whether street railroads are subject to assessment.—The same lack of harmony in the decisions noted in the preceding section is shown in the cases relating to the right of a city to levy special assessments on street railway tracks laid in the streets. Special assessment statutes have been regarded as in derogation of the rights of property, and hence to be strictly construed.[38] In conformity with this view it has been held that street surface railroads are not subject to assessment for street improvements unless the law has made them specially liable thereto.[39] Thus, statutes placing the

[34] Louisville &c. Co. v. East St. Louis, 134 Ill. 656; 25 N. E. 962.

[35] Chicago v. Baer, 41 Ill. 306; Fair Haven &c. Co. v. New Haven, 38 Conn. 422; 9 Am. R. 399. See, also, Page v. Chicago, 60 Ill. 441; People v. Chicago &c. R. Co. 67 Ill. 118; Louisville &c. R. Co. v. State, 3 Head (Tenn.), 524; Memphis &c. R. Co. v. State, 87 Tenn. 746; 11 S. W. 946; Eyler v. Allegheny Co. 49 Md. 257; 33 Am. R. 249; Elliott Roads and Streets, 591, 592 (2d ed.), § 772, et seq. Contra, Mayor v. Royal &c. Co. 45 Ala. 322. The question as to the liability of street railway companies and the distinction between improvements and repairs in such cases will be treated in another chapter.

[36] Rich v. Chicago, 152 Ill. 18; 38 N. E. 255. See, also, Chicago &c. R. Co. v. Joliet, 153 Ill. 649; 39 N. E. 1077, 1079; Chicago &c. R. Co. v. Elmhurst, 165 Ill. 148, 152; 46 N. E. 437.

[37] Chicago &c. R. Co. v. Ottumwa, 112 Ia. 300; 83 N. W. 1074; 51 L. R. A. 763.

[38] Oshkosh &c. R. Co. v. Winnebago Co. 89 Wis. 435; 61 N. W. 1107.

[39] People v. Gilon, 126 N. Y. 147; 27 N. E. 282.

burden on "abutting" property will not cover street railway tracks, since the street railroad company does not own any part of the street, nor is it abutting property.[40] Neither does the fact that the street railroad company is bound by law to make permanent repairs upon the portion of the street between its tracks render the property subject to these assessments.[41] And it has been held that the track is not "real estate" within the meaning of a charter making real estate liable to special assessment for street improvements.[42] Another case holds that a statute providing that the track and right of way of railroad companies shall be exempt from taxation, "except that the same shall be subject to special assessments for local improvements in cities and villages," is, at most, a mere general declaration that the property shall be subject to such assessment in cases provided by law, and hence the power to levy such an assessment must be found in some other statute.[43] Under the Illinois statute, which makes contiguous property liable to assessment, the authorities are numerous and consistent, to the effect that the street railroad track is subject to assessment. Here it is held that the property of a street railroad company is of a character to be substantially and directly benefited by the proposed paving of a street, and that in proportion as it is thus benefited it should contribute its share to the cost of the improvement in common with the property on the street.[44] The same rule is held to apply to an elevated

[40] Koons v. Lucas, 52 Ia. 177; 3 N. W. 84; South Park Com'rs v. Chicago &c. R. Co. 107 Ill. 105; Indianapolis &c. R. Co. v. Capitol Pav. &c. Co. 24 Ind. App. 114; 54 N. E. 1076; Houston &c. R. Co. v. Storrie (Tex. Civ. App.), 44 S. W. 693; O'Reilly v. Kingston, 114 N. Y. 499; 21 N. E. 1004; Oshkosh &c. R. Co. v. Winnebago County, 89 Wis. 435; 61 N. W. 1107.

[41] Conway v. Rochester, 24 App. Div. (N. Y.) 489; 49 N. Y. S. 244; Oshkosh &c. R. Co. v. Winnebago Co. 89 Wis. 435; 61 N. W. 1107. See, also, Farmer's T. Co. v. Ansonia, 61 Conn. 76; 23 Atl. 705.

[42] State v. District Court, 31 Minn. 354; 17 N. W. 954.

[43] Oshkosh &c. R. Co. v. Winnebago Co. 89 Wis. 435; 61 N. W. 1107.

[44] Chicago v. Baer, 41 Ill. 306; Parmelee v. Chicago, 60 Ill. 267; Kuehner v. Freeport, 143 Ill. 92; 32 N. E. 372; 17 L. R. A. 774; Lightner v. Peoria, 150 Ill. 80; 37 N. E. 69; Billings v. Chicago, 167 Ill. 337; 47 N. E. 731; West Chicago &c. R. Co. v. Chicago, 178 Ill. 339; 53 N. E. 112; Cicero &c. R. Co. v. Chicago, 176 Ill. 501; 52 N. E. 866. Such is the prevailing rule where the statute is broad enough. Shreveport v. Shreveport &c. R. Co. 104 La. 260; 29 So. 129; New Haven v. Fair Haven &c. R. Co. 38 Conn. 422; 9 Am. R. 399; Freeport St. R. Co. v. Freeport, 151 Ill. 451; 38 N. E. 137; Troy &c. R. Co. v. Kane, 9 Hun (N. Y.), 506.

railroad.[45] It is clear that the street railroad company will be liable to assessment where it accepts a charter under which it consents to bear its proportion of the cost of the improvement of streets traversed by it.[46]

§ 788. **Right of way—Mode of assessing.**—Where the right of way of a railroad company is liable to an assessment to pay for a local improvement there seems to be no distinction between the mode of assessing it and other lands subject to the assessment for the same improvement, where the right of way bears the same relation to the street as other lands adjoining the street. But where the railway runs longitudinally along the street a special rule usually applies. The different modes of assessment which have been held valid in assessing local charges against the lands of individuals and lands not occupied as a right of way by a railway company seem to be equally applicable to lands occupied as a railway right of way. Thus, where the mode of assessment to pay for the improvement of a street was by assessments levied in proportion to the front feet abutting on the improvement, it was held that a railway right of way abutting on the improvement was subject to assessment as abutting property, the same as other lands or lots.[47] Where a railroad track ran longitudinally through a street, a statute making the company liable to local assessment for improving the street for the proportional amount of the street occupied by the track was held to be valid.[48]

[45] Lake St. El. R. Co. v. Chicago, 183 Ill. 75; 55 N. E. 721; 47 L. R. A. 624.

[46] Schmidt v. Market St. &c. R. Co. 90 Cal. 37, 39; 27 Pac. 61.

[47] Northern &c. Co. v. Connelly, 10 Ohio St. 159; 36 Am. Dec. 82, and note; Chicago v. Baer, 41 Ill. 306; Burlington &c. Co. v. Spearman, 12 Iowa, 112; Illinois Cent. Co. v. Decatur, 126 Ill. 92; 18 N. E. 315; 1 L. R. A. 613, and note; Lake Erie &c. Co. v. Walters, 9 Ind. App. 684; 37 N. E. 295; Chicago &c. Co. v. Joliet, 153 Ill. 655; 39 N. E. 1077. See, also, Pittsburgh &c. Ry. Co. v. Taber (Ind.), 77 N. E. 741. But it seems to us that there is reason to doubt the soundness of the doctrine of some of the cases cited. In Peru &c. Co. v. Hanna, 68 Ind. 562, it was said by the court: "We are of the opinion that the track of a railroad company, when it borders on a street, is properly assessable for its due proportion of the cost of the improvement of such street under an ordinance of the city." Much depends upon the particular statute under which the assessment is levied, and it is unsafe to accept as indicative of a general rule cases decided upon particular statutes.

[48] Lake Shore &c. Co. v. Dunkirk, 20 N. Y. S. 596.

§ 788a. Assessment for drainage purposes.—It is certainly within the power of the legislature, in proper cases, to require a railroad company, whose right of way is benefited by a system of drainage, to bear its proportion of the expense of this work.[49] The method of assessment of railroad property in cases of this character is the subject of a special statute in Illinois, which provides that, when a railroad will be benefited, the commissioners may assess the road in proportion to the benefits received, "which shall be determined by estimating the amount of benefits to the entire district, including the benefits to . . . such railroad, and also the benefit to . . . the railroad, then the fractional figures expressing the ratio between the sum of the benefits for the whole district, and the sum found to be the benefit to the . . . railroad shall express the proportional part of the corporate taxes of the district to be paid by such . . . railroad." This proportional classification is subject to review at the instance of the railroad company in the same manner as is provided for individual landowners affected.[50] This statute has been upheld against the objection that it authorized unlimited expenditure and disregarded the necessary equality between expenditure and benefits.[51] There is authority to the effect that where the statute creating a lien upon a railroad for drainage assessments does not authorize a sale of the body of the road to satisfy the lien, an order of the court directing such sale is void.[52]

§ 788b. Bridges over natural watercourses utilized for drainage purposes.—The adequacy of a bridge over a stream, and the opening under it for the passage of the water at the time of its construction, does not determine for all time the obligation of the railroad company. The law goes further, and charges the company with the duty to maintain an opening under the bridge that will be adequate and effectual for increases in the volume of the water resulting from reasonable and lawful drainage regulations.[53] Conformably to this doctrine the Supreme Court of the United States has held that the

[49] Illinois Central R. Co. v. Drainage Commissioners, 129 Ill. 417; 21 N. E. 925.

[50] Act of Illinois June 27, 1885, § 40.

[51] Illinois Central R. Co. v. Drainage Commissioners, 129 Ill. 417; 21 N. E. 925.

[52] Louisville &c. R. Co. v. State, 122 Ind. 443; 24 N. E. 351.

[53] Chicago &c. R. Co. v. People, 200 U. S. 561; 26 Sup. Ct. 341, affirming 212 Ill. 103; 72 N. E. 219.

charging upon a railroad company of the entire cost of removal and rebuilding a railroad bridge and culvert, made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under a state law authorizing such action, does not violate the due process or equal protection clauses of the federal constitution.[54]

§ 789. Lien of the assessment.—The statutes conferring upon municipalities the power to levy local assessments to pay for local improvements usually, if not always, provide that the amount of the assessment shall be a lien upon the lots or lands against which the assessment is levied. These liens are purely statutory, and their existence, force and extent depend upon the terms of the statute creating them.[55] Such liens are ordinarily superior to all liens except general taxes, and the authority of the legislature to make them such is firmly established. The assessments being made on the theory that the property is benefited and enhanced in value in a sum equal to the amount of the assessment, no injury can result to other lienholders, such as mortgagees, mechanic lien holders, and the like. In addition to the lien given against the property benefited, some of the statutes make the property owner personally liable for the assessment. This personal liability, however, cannot exist in any event, in ordinary cases, unless there is a valid statute creating it.[56] There is very grave doubt as to the constitutionality of such a statute.[57] Imposing

[54] Chicago &c. R. Co. v. People, 200 U. S. 561; 26 Sup. Ct. 341, affirming 212 Ill. 103; 72 N. E. 219.

[55] Gause v. Bullard, 16 La. Ann. 197; Philadelphia v. Greble, 38 Pa. St. 339; State v. Aetna Life Ins. Co. 117 Ind. 251; 20 N. E. 144; Kiphart v. Pittsburgh &c. Co. 7 Ind. App. 122; 34 N. E. 375.

[56] Ivanhoe v. Enterprise, 29 Oreg. 245; 45 Pac. 771; 35 L. R. A. 58, 61 (citing Elliott Roads and Streets (2d ed.), § 567); Green v. Ward, 82 Va. 324; Wolf v. Philadelphia, 105 Pa. St. 25; McCrowell v. Bristol, 89 Va. 652; 16 S. E. 867; 20 L. R. A. 653, and note. But where, as in case of railroad companies, the property can not be sold piecemeal without injury to the public there may be reason for rendering a personal judgment or the company might otherwise escape.

[57] In our opinion there can, upon principle, be no personal liability since the whole right to levy a local assessment rests upon the ground that the property is benefited to the extent of the assessment. See, for discussion of the subject, and authorities on both sides, Elliott Roads and Streets (2d ed.), § 568.

such a liability on the owner would in many cases be a great hardship, for it is easy to conceive of cases where the assessment might be so heavy that the property would not sell for enough to pay it. The weight of authority, if numerical superiority controls, seems to be in favor of the constitutionality of such statutes,[58] but there is very great conflict.[59] The statutes creating a lien for local assessments being

[58] Muscatine v. Chicago &c. Co. 79 Iowa, 645; 44 N. W. 909; Lake Shore &c. Co. v. Dunkirk, 65 Hun (N. Y.), 494; 20 N. Y. S. 596; Nichols v. Bridgeport, 23 Conn. 189; 60 Am. Dec. 636; New Orleans v. Wire, 20 La. Ann. 500. See, also, Pittsburgh &c. R. Co. v. Hays, 17 Ind. App. 261; 44 N. E. 375; 45 N. E. 675; 46 N. E. 597; Hazard v. Heacock, 39 Ind. 172; Pittsburgh &c. R. Co. v. Taber (Ind.), 77 N. E. 741.

[59] Seattle v. Yesler, 1 Wash. Ter. 571; Higgins v. Ausmuss, 77 Mo. 351; Taylor v. Palmer, 31 Cal. 240; Burlington v. Quick, 47 Iowa, 222; Virginia v. Hall, 96 Ill. 278; Macon v. Patty, 57 Miss. 378; 34 Am. R. 451; Cooley Taxation, 674; Sweaney v. Kansas City &c. Co. 54 Mo. App. 265. In Neenan v. Smith, 50 Mo. 525, 528, it is said: "All taxation is supposed to be for the benefit of the person taxed. That for raising a general revenue is imposed primarily for his protection as a member of society, both in his person and his property in general and hence the amount assessed is against him to be charged against his property, and may be collected of him personally. But on the other hand, local taxes for local improvements are merely assessments upon the property benefited by such improvements, and to pay for the benefits which they are supposed to confer; the lots are increased in value, or better adapted to the uses of town lots, by the improvement. Upon no other ground will such partial taxation for a moment stand. Other property held by the owner is affected by this improvement precisely and only as is the property of all other members of the community, and there is no reason why it should be made to contribute, that does not equally apply to that of all others. The sole object, then, of a local tax being to benefit local property, it should be a charge upon that property only, and not a general one upon the owner. The latter, indeed, is not what is understood by local or special assessment, but the very term would confine it to the property in the locality; for if the owner be personally liable, it is not only a local assessment but also a general one as against the owner. The reasonableness of this restriction will appear when we reflect that there is no call for a general execution until the property charged is exhausted. If that is all sold to pay the assessment, leaving a balance to be collected otherwise, we should have the legal anomaly—the monstrous injustice —of not only wholly absorbing the property supposed to be benefited and rendered more valuable by the improvement, but also of entailing upon the owner the loss of his other property. I greatly doubt whether the legislature has the power to authorize a general charge upon

remedial in their nature, and intended to secure the person constructing the improvement for his outlay, should be liberally construed to accomplish that purpose.[60] A statute which provides for the recovery of a reasonable attorney's fee in actions to foreclose the lien of an assessment for a local improvement is constitutional.[61]

§ 789a. Property secondarily liable—Back-lying property.—In some states the statute makes abutting property primarily liable for a certain distance back of the front property line, and further provides that, if the land is subdivided or platted, and that primarily liable is insufficient to pay the cost of the improvement, other parcels of the back-lying property back to a specified distance shall be liable in their order. Under such a statute it has been held, in a case where the back-lying property was the right of way of a railroad company, that the lien extended to all of the property; all persons owning property within the district, both abutting owners and owners of the back-lying property could be made parties to a suit to collect the assessment and the whole matter determined; and that the complaint must show, as against the owners of the back-lying property as well as the abutters, that all jurisdictional steps were taken.[62]

the owner of local property which may be assessed for its special benefit, unless the owners of all taxable property within the municipality are equally charged. As to all property not to be so specially benefited, he stands upon the same footing with others; he has precisely the same interests, and should be subject to no greater burdens."

[60] Chaney v. State, 118 Ind. 494; 21 N. E. 45.

[61] Lake Erie &c. R. Co. v. Walters, 13 Ind. App. 275; 41 N. E. 465; Brown v. Central Bermudez Co. 162 Ind. 452; 69 N. E. 150.

[62] Cleveland &c. R. Co. v. Edward C. Jones Co. 20 Ind. App. 87, 90, 91; 50 N. E. 319. In the course of the opinion it is said: "In the case at bar the abutting owners and those owning lots within the limit of one hundred and fifty feet were joined as defendants, and we think this is permissible under the statute. The statute intends that if the abutting property is insufficient to pay the assessment other property back one hundred and fifty feet shall then be liable. We see no reason for not determining the whole question in one suit. The engineer, it is true, has no power to assess, in the first instance, property secondarily liable; nor does the statute provide for a separate assessment upon such property by the engineer after the abutting property has been exhausted. But from the language of the whole statute it must be held that it was the intention of the act to carry the balance of such an assessment to such other property as lies within the limit, and

But it has also been held under the same statute that a suit to foreclose the assessment on the abutting property does not estop the plaintiff from afterwards foreclosing the lien on the back-lying property for the balance where the abutting property fails to sell for enough to pay the assessment.[63] It has also been held, under the Indiana statute, that an assessment for a gross sum against two distinct tracts described by metes and bounds is invalid, and that a condition in a deed of land for a street that the grantor and remaining portion of the lot should not be liable for any street improvement assessment is ultra vires and void.[64]

§ 790. Assessment of right of way—Enforcing assessment.—While it is probably true that there may be a lien on the right of way of a railroad for a local assessment, where such assessment is authorized by statute, the manner of enforcing such assessment is not clearly settled. The right of way of a railway company is a part of the company's property, without which it could not perform the duties it owes to the public. To subject a portion of the right of way to a sale to enforce a local improvement would greatly embarrass, if not entirely destroy, the ability of the company to perform its public functions.[65] The rights of the public are regarded as superior to the

that without any separate assessment being made on such property. The act itself fixes a lien for the unpaid balance upon property secondarily liable. If we are right in this view of the statute, it necessarily follows that, in an action seeking to fix a secondary liability upon such property, it must be made to appear that the municipality took the statutory steps necessary to fix the lien. The waiver signed by the abutting property owners has no effect in any way in determining the rights and liabilities of appellants. Without holding to what extent such a waiver would be conclusive against the abutting property owners who signed it, it is evident that such waiver can in no way affect the rights of persons whose property is only secondarily liable. Appellants waived no defects, and the statute empowers no one to waive such defects for them. They can rightfully insist that appellee shall show that such steps were taken as result in a valid lien."

[63] Cleveland &c. R. Co. v. Porter (Ind. App.), 74 N. E. 260; 76 N. E. 179; Voris v. Pittsburgh &c. Co. 163 Ind. 559; 70 N. E. 249. It is also held in the first case cited that an attorney's fee may also be recovered in such suit under the statute.

[64] Pittsburgh &c. R. Co. v. Oglesby, 165 Ind. 542; 76 N. E. 165.

[65] Chicago &c. R. Co. v. Milwaukee, 89 Wis. 506; 62 N. W. 417; 28 L. R. A. 249; Detroit &c. R. Co. v.

rights of any individual, or group of individuals. Local assessments are usually levied on a small portion of a railway right of way, varying from a few feet in length to miles in length. To permit such portion to be sold would prevent the operation of the road, and, on grounds of public policy, it is held that the ordinary remedy of enforcing the collection of a local assessment by a sale of the property benefited does not apply to the enforcement of an assessment against the right of way of a railway company. While there is a conflict of authority on this subject, the decided weight is that the right of way, if sold to pay the assessment, must be sold as a whole, and not in broken fragments.[66] "The public have a right to have a railway re-

Grand Rapids, 106 Mich. 13; 63 N. W. 1007; 28 L. R. A. 793; 58 Am. St. 466. As we have elsewhere shown the rule is that a railroad is to be treated as a unity, and this rule would forbid the sale of a part, as a few hundred feet, or the like, to pay a local assessment.

[66] Lake Shore &c. R. Co. v. Grand Rapids, 102 Mich. 374; 60 N. W. 676; 29 L. R. A. 195; Detroit &c. R. Co. v. Grand Rapids, 116 Mich. 13; 28 L. R. A. 793; 58 Am. St. 466; Louisville &c. Railway Co. v. State, 122 Ind. 443; 24 N. E. 350; Midland R. Co. v. Wilcox, 122 Ind. 84; 23 N. E. 506; Muller v. Dows, 94 U. S. 444; Dano v. Mississippi &c. R. Co. 27 Ark. 564; Cox v. Western Pacific R. Co. 44 Cal. 18; Cox v. Western Pacific R. Co. 47 Cal. 87; Knapp v. St. Louis &c. R. Co. 74 Mo. 374; Cranston v. Union Trust Co. 75 Mo. 29; Louisville &c. Co. v. State, 122 Ind. 443; 24 N. E. 350; Indianapolis &c. Co. v. State, 105 Ind. 37; 4 N. E. 316; Ammant v. President &c. 13 S. & R. (Pa.) 210; Dunn v. North &c. Co. 24 Mo. 493; Macon &c. Co. v. Parker, 9 Ga. 377. "We fully agree with appellant's counsel that a continuous line of railroad is to be treated as an entirety, and we adjudge that as such it must be sold, for it would be unjust to lien holders, as well as to the railroad company, to sell a bridge, a culvert or a few rods, or even a mile of a railroad." Farmers' &c. Co. v. Canada &c. R. Co. 127 Ind. 250; 26 N. E. 784; 11 L. R. A. 740, and note. "For the sake of the public whatever is essential to the corporate functions shall be retained by the corporation. The only remedy which the law allows to creditors against property so held is sequestration, and that remedy is consistent with corporate existence, whilst a power to alien, or liability to levy and sale on execution, would hang the existence of the corporation on the caprices of the managers or on the mercy of its creditors." Plymouth R. Co. v. Colwell, 39 Pa. St. 337; 80 Am. Dec. 526. But in Illinois it was held that the portion of the right of way of a railway company lying within a drainage district might be sold to pay the assessment for constructing the drain. In Wabash &c. Co. v. East Lake Fork District, 134 Ill. 384; 10 L. R. A. 285, it is said: "Again, it is urged that the decree

main an entirety, and it would be destructive to public interest to permit it to be broken up into disjointed and practically useless fragments."[67] Even if it be conceded that a personal judgment for the amount of the assessment can be rendered,[68] still it does not follow that a railroad can be sold in fragments.

is erroneous in directing a sale of a portion of the railroad for the satisfaction of the lien. This proposition was presented and considered in Illinois Cent. R. Co. v. Commissioners of, &c. 129 Ill. 417; 25 N. E. 781, and it was there held that an order for the sale of the track and right of way of the railroad company within the district for the payment of the assessment was proper. We are still inclined to adhere to the conclusion to which we arrived in that case." See, also, Little v. Chicago, 46 Ill. App. 534; Kansas City &c. R. Co. v. Waterworks Imp. Dist. 68 Ark. 376; 59 S. W. 248, to same effect.

[67] Farmers' &c. Co. v. Canada &c. Co. 127 Ind. 250; 26 N. E. 784; 11 L. R. A. 740, and note. See, also, the following authorities, which declare and enforce the same doctrine: Indiana &c. Co. v. Allen, 113 Ind. 581; 15 N. E. 446; Black v. Delaware &c. Co. 22 N. J. Eq. 130; Thomas v. West Jersey R. Co. 101 U. S. 71; East Alabama &c. Co. v. Doe, 114 U. S. 340; 5 Sup. Ct. 869; Stewart's Appeal, 56 Pa. St. 413; Richardson v. Sibley, 11 Allen (Mass.), 65; 87 Am. Dec. 700; Foster v. Fowler, 60 Pa. St. 27; Southern Cal. R. Co. v. Workman, 146 Cal. 80; 79 Pac. 586; Chicago &c. R. Co. v. Milwaukee, 89 Wis. 506; 62 N. W. 417, 419; 28 L. R. A. 249; Sweaney v. Kansas City R. Co. 54 Mo. App. 266; Detroit &c. R. Co. v. Grand Rapids, 106 Mich. 13; 63 N. W. 1007; 28 L. R. A. 793; 58 Am. St. 466. The text is quoted with approval in Dobbins v. Colorado &c. R. Co. 19 Colo. App. 257; 75 Pac. 156, 157; 58 Cent. Law Jour. 330, 331.

[68] Louisville &c. Co. v. State, 8 Ind. App. 377; 35 N. E. 916; Lake Shore &c. v. Dunkirk, 65 Hun (N. Y.), 494; 20 N. Y. S. 596; Louisville &c. v. State, 122 Ind. 443; 24 N. E. 350; Lake Erie &c. R. Co. v. Bowker, 9 Ind. App. 428; 36 N. E. 864. "The proceeding to enforce a lien for an assessment on account of street improvements is in rem, and ordinarily no personal judgment may be rendered against the owner in such proceedings. The only reason why a personal judgment may become a proper and available remedy in certain cases of this character, where the proceeding is against a railway company to enforce a lien upon its railroad property and franchises, is that it would be contrary to public policy to decree the sale of the specific property to which the lien has attached, and as the lessor might otherwise be left without any remedy whatever, equity will, in a proper case, award such lienor the right of collecting the amount due him by virtue of the lien, in the way of such personal judgment." Lake Erie &c. Co. v. Walters, 9 Ind. 684; 37 N. E. 295. And to same effect, see Pittsburgh &c. R. Co. v. Fish, 158 Ind. 525; 63 N. E. 454.

§ 791. **Procedure.**—The matter of procedure is so much a matter of statutory regulation that we shall not attempt to give the subject much consideration. It may be said that direct proof of the assessment must be made and a county tax list is incompetent for that purpose.[69] And where the statute so provides an attorney's fee may be recovered.[70] The lien, it has been held, may be enforced against the property-owner whether the work was completed according to the original plans and specifications or not, if it appear that the contractor performed his work as far as it was in his power to do, or where the municipality waived a strict compliance with the ordinance directing the improvement.[71] Where the statute prescribes what steps shall be taken in order to the existence of a valid assessment there must be a substantial compliance with its provisions. The general rule is that where the statute specifically provides a remedy for the enforcement of the assessment, that remedy must be pursued, but if a right be given and no remedy prescribed the courts will usually provide the appropriate remedy.[72]

[69] Muscatine v. Chicago &c. Co. 88 Iowa, 291; 55 N. W. 100.

[70] Lake Erie &c. R. Co. v. Walters, 13 Ind. App. 275; 41 N. E. 465; Cleveland &c. R. Co. v. Porter (Ind. App.), 76 N. E. 179; Pittsburgh &c. R. Co. v. Taber (Ind.), 77 N. E. 741.

[71] Lake Erie &c. R. Co. v. Walters, 13 Ind. App. 275; 41 N. E. 465. See, also, Elliott Roads and Streets (2d ed.), §§ 586, 601, et seq.

[72] Dobbins v. Colorado &c. R. Co. 19 Colo. App. 257; 75 Pac. 156, 157 (quoting text).

CHAPTER XXXIII.

LAND GRANTS.

§ 792. The grounds upon which public aid to railroads rests.—The public nature of railroads authorizes the use of public money or property in aid of their construction and maintenance. Even in jurisdictions where the legislature has no power to appropriate money or property to private individuals aid may be given or granted to railroad companies because they are not strictly private corporations. Burdens may be placed upon them because they are "affected with a

public interest," and for the same reason benefits may be bestowed upon them that cannot be rightfully bestowed on strictly private corporations. The construction and maintenance of railroads has been generally considered a matter of public concern, and the machinery of government, local, state, and national, has been liberally employed in aiding to build new lines of road, not only between centers of trade, but far out into unsettled portions of the country where the operation of a railroad can prove a profitable business only after settlers have developed the resources of the country. It will be found, upon examination of the cases decided by the federal courts hereafter referred to, that the policy of the government in granting land to railroad companies exerts an important influence upon the construction of such grants for the construction given them is a very liberal one, the courts assuming that by making such grants congress intended to encourage the building of railroads.

§ 793. Land grants.—The term "land grants," when used in the branch of the law relating to railroads, has a peculiar meaning. It does not, as ordinarily used, mean a grant by an individual, but means a grant by the nation or by a state. Aid has been given to railroads in many instances by a direct grant of land by the federal government, and in other cases the grant is made to a state for the benefit of the railroad company. Where the grant is made to the state for the benefit of a company the position of the state is that of a trustee for the company.[1]

§ 794. Construction of land grants.—A congressional grant of land is a peculiar one, for there is both a statute and a conveyance, so that the rules for construing conveyances made by individuals do not fully apply to land grants.[2] A land grant has the effect of a

[1] Rice v. Minnesota &c. R. Co. 1 Black (U. S.), 358; Kansas City &c. R. Co. v. Attorney-General, 118 U. S. 682; 7 Sup. Ct. 66; Leavenworth &c. R. Co. v. United States, 92 U. S. 733; Litchfield v. Webster Co. 101 U. S. 773; Wolsey v. Chapman, 101 U. S. 755; Van Wyck v. Knevals, 106 U. S. 360; 1 Sup. Ct. 336; Hannibal &c. R. Co. v. Smith, 9 Wall. (U. S.) 95; Schulenberg v. Harriman, 21 Wall. (U. S.) 44; Grinnell v. Chicago &c. R. Co. 103 U. S. 739; Railroad Land Co. v. Courtright, 21 Wall. (U. S.) 310; Miller v. Swann, 89 Ala. 631; 7 So. 771. The term "land grants," as we here use it, means grants of lands by the federal government or by a state.

[2] Missouri &c. R. Co. v. Kansas Pacific R. Co. 97 U. S. 491; Hall v. Russell, 101 U. S. 503.

legislative enactment, and the intention of the legislature is to be sought and enforced.[3] The statute making the grant abrogates common-law rules so far as they conflict with its provisions.[4] Statutes granting lands to aid in building railroads are liberally construed in favor of the grantees, to enable them to carry out the purposes of the grant. Thus a grant to a railroad "of every alternate section of public land designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad on the line thereof," was held not to be limited to lands situated on lines at right angles to the general line of the road, where, in consequence of turns or changes of direction in the road, such a rule of selection would cause an overlapping on one side, and leave a vacancy on the other.[5] But the grant to the Illinois Central Railroad Company of "lands, waters and materials" necessary for the construction, alteration and operation of its road, has been held not to include submerged lands along the shore of Lake Michigan.[6] As we have said, land grants are usually construed to pass the land at once, but to convey it upon condition subsequent, although, of course, a grant may be upon condition pre-

[3] Winona &c. R. Co. v. Barney, 113 U. S. 618; 5 Sup. Ct. 606; United States v. Denver &c. R. Co. 150 U. S. 1; 14 Sup. Ct. 11; Bradley v. New York &c. R. Co. 21 Conn. 294; Pierce Railroads, 491. See Brewster v. Kansas City &c. R. Co. 25 Fed. 243.

[4] St. Paul &c. R. Co. v. Greenhalgh, 26 Fed. 563; Kansas &c. R. Co. v. Dunmeyer, 113 U. S. 629; 5 Sup. Ct. 566.

[5] United States v. Union Pac. R. Co. 2 Denver Leg. News, 37 Fed. 551; 83. But it was held that the acts of congress granting to the state of Alabama, in aid of the construction of railroads in that state every alternate section of land designated by odd numbers, and within six miles of either side of the projected line of said roads, does not embrace, by implication, land within six miles of that portion of the roads constructed through the state of Georgia. Swann v. Jenkins, 82 Ala. 478; 2 So. 136. The Joint Resolution of Congress of May 31, 1870, giving the Northern Pacific Railroad Company, in the event of there not being within the limits prescribed by its charter the amount of lands per mile which had been granted to it, the right to make up the deficiency from sections designated by odd numbers within ten miles "on each side of the said road beyond the limits prescribed in said charter," was held to give the company an additional ten-mile indemnity limit, and not to restrict it to a loss of land occurring subsequent to the grant, nor does it restrict it to the state or territory where such deficiency occurs. Northern Pac. R. Co. v. United States, 36 Fed. 282.

[6] Illinois Cent. R. Co. v. Chicago, 176 U. S. 646; 20 Sup. Ct. 509.

cedent.[7] Whether the grant is upon condition precedent or upon condition subsequent must, it is obvious, be determined from the language of the statute making the grant.[8] In other words, the grant is usually regarded as conveying a present title but upon condition subsequent. It is upon this principle that it is held that possession under the grant for the statutory period will give title by limitation.[9] The rule is that where a railway company fails to comply with the provisions of the act of Congress granting the right of way to railroads through the public lands of the United States, it has no right to run its road through the land of a homesteader who has complied with the terms of the homestead law, although he has not at the time received his patent, as, in such case, his claim is superior to that of the company.[10]

§ 795. Construction of land grants—Illustrative cases.—Under acts granting a right of way over all government lands along certain routes, the railroad has been held to acquire a right of way over sections numbered sixteen and thirty-six, although such sections have been, before the grants were made, designated generally as school sections, but have not been definitely disposed of.[11] Grants to railroads by Congress cannot be construed to include routes not contemplated

[7] United States v. Southern Pacific R. Co. 39 Fed. 132; Shepard v. Northwestern Life Ins. Co. 40 Fed. 341; New Orleans &c. R. Co. v. United States, 124 U. S. 124; 8 Sup. Ct. 417; Farnsworth v. Minnesota &c. R. Co. 92 U. S. 49; Cedar Rapids &c. R. Co. v. Herring, 110 U. S. 27; 3 Sup. Ct. 485; Chamberlain v. St. Paul &c. R. Co. 92 U. S. 299; Vicksburg &c. R. Co. v. Sledge, 41 La. Ann. 896; 6 So. 725. See United States v. Southern Pac. R. Co. 62 Fed. 531; Buttz v. Northern Pac. R. Co. 119 U. S. 55; 7 Sup. Ct. 100; St. Paul &c. R. Co. v. Northern Pacific R. Co. 139 U. S. 1.

[8] State v. Rusk, 55 Wis. 465; 10 Am. & Eng. R. Cas. 642; Rogers v. Port Huron &c. R. Co. 45 Mich. 460; 10 Am. & Eng. R. Cas. 635; United States v. Southern Pacific R. Co. 62 Fed. 531.

[9] Wheeler v. Chicago, 68 Fed. 526.

[10] Savannah &c. R. Co. v. Davis, 25 Fla. 917; 43 Am. & Eng. R. Cas. 542; 7 So. 29.

[11] Coleman v. St. Paul &c. R. Co. 38 Minn. 260; Union Pac. R. Co. v. Douglas Co. 31 Fed. 540. The grant of a right of way over the school sections of the public domain, acquired by a railroad company under an act of congress and a subsequent territorial statute, was not a grant in praesenti, but in futuro; and must be used under the statute referred to, if at all, before the sale of the land by the state. Radke v. Winona &c. R. Co. 39 Minn. 262; 39 N. W. 624.

by the charters of the companies at the time of the grant.[12] Where the act of Congress authorized the Northern Pacific Railroad Company to construct a road from Lake Superior westerly by the most eligible route within the United States north of 45 degrees of latitude, to Puget's Sound, with a branch via the valley of the Columbia river to Portland, Oregon, it was held that the company, upon finding a more eligible route, could follow down the Columbia river to and past Portland, cross over and go north to Puget's Sound, thereby dispensing with its branch to Portland.[13] And where the title of the Indians and their right of occupation of certain lands in Michigan had been fully extinguished, they were held to pass under the act of Congress of June 3, 1856, notwithstanding they were held by the United States in trust to sell them for the benefit of the Indians.[14] To the extent of such claims, when the grant was for lands with specific boundaries, or known by a particular name, and also to the extent of the quantity named within boundaries containing a greater area, Mexican claims are excluded from a grant to a railroad company.[15] And lands "claimed to be included in a Mexican grant of a specific boundary, which grant was sub judice at the time of the grant of March 3, 1871, were not public land at that date, and did not pass by the grant, though they were afterwards held not to be embraced by the Mexican grant."[16] But a railroad land grant embracing within its boundaries Mexican floating grants takes effect except as to the quantity of land granted in the Mexican grant; and the railroad company is entitled to patents for the odd sections of the remainder.[17]

[12] Jackson v. Dines, 13 Colo. 90; 21 Pac. 918.

[13] United States v. Northern Pac. R. Co. 41 Fed. 842. At all events the resolution of congress of May 31, 1870, recognized and approved this location. United States v. Northern Pac. R. Co. 41 Fed. 842.

[14] Shepard v. Northwestern Life Ins. Co. 40 Fed. 341.

[15] Foss v. Hinkell, 78 Cal. 158; 20 Pac. 393; Doolan v. Carr, 125 U. S. 618; 8 Sup. Ct. 1228.

[16] United States v. Southern Pac. R. Co. 39 Fed. 132, construing Southern Pac. R. Land Grants; Southern Pacific R. Co. v. Brown, 68 Fed. 333. And the same is true as to a floating Mexican grant, to the extent of the lands embraced by it. United States v. McLaughlin, 30 Fed. 147, construing the Central Pacific R. Land Grant with reference to its fraudulent Mosquelamous grant; United States v. McLaughlin, 127 U. S. 428; 8 Sup. Ct. 1177; Carr v. Quigley, 79 Cal. 130; 21 Pac. 607, construing the Western Pac. R. Land Grant with reference to a valid Mexican grant.

[17] State v. McLaughlin, 127 U. S. 428; 8 Sup. Ct. 1177; United States v. Curtner, 38 Fed. 1.

Where lands had been granted to the state to aid in building railroads under certain restrictions, the legislature was held, in a Michigan case, to have authority to accept a surrender of the grant and to re-grant the lands to another company; and a transfer of the lands, which was in form a sale to another company of the lands granted, upon condition that it would complete the first company's road, made by authority of the legislature, was construed to be such a surrender and regrant.[18] But where there is no authority to execute a certificate of surrender, the certificate is ineffective, and the filing of it in the general land office does not transfer title to the United States.[19] The courts will not presume that the officers of the land department erred in carrying out the provisions of such an act, but will uphold their acts done in pursuance of the construction which they have given it, unless a very clear case of error is presented; especially where the actions of the officers have been acquiesced in until the lands have in large part been sold by the company.[20] The ruling in the cases decided by the Supreme Court of the United States is that where the grant is to be satisfied out of sections along the line of the road the implication, in the absence of a specific designation or of some provision to the contrary, is that the grant conveys the land in sections of the character specified nearest the line of the road, but, of course, does not convey lands previously disposed of.[21] Where there is a conflict between two companies, both claiming, under the same grant, they take in undivided moieties.[22] Where the grant expressly reserves

[18] Jackson &c. R. Co. v. Davison, 65 Mich. 416; 32 N. W. 726.

[19] Lake Superior &c. R. Co. v. Cunningham, 155 U. S. 354; 15 Sup. Ct. 103. In Lake Superior &c. R. Co. v. Finan, 155 U. S. 385; 15 Sup. Ct. 115, it was held that an entry upon land granted to a railroad company gave no title to person entering, and the case was distinguished from the first of the cases cited in this note.

[20] United States v. Union Pac. R. Co. 37 Fed. 551; United States v. Missouri &c. R. Co. 37 Fed. 68. A patent to the S. P. R. Co., for land which, at the time of its grants, was within the exterior limits of a Mexican or Spanish grant then sub judice, is void from the beginning. Foss v. Hinkell, 78 Cal. 158.

[21] Wood v. Burlington &c. R. Co. 104 U. S. 329; Ryan v. Central &c. R. Co. 99 U. S. 382.

[22] St. Paul &c. R. Co. v. Winona &c. R. Co. 112 U. S. 720; 5 Sup. Ct. 334; post, § 805. See, generally, Verdier v. Port Royal &c. R. Co. 15 S. Car. 476; Sams v. Port Royal &c. R. Co. 15 S. Car. 484; United States v. Union Pacific R. Co. 37 Fed. 551; Farmers' &c. Co. v. Chicago &c. R. Co. 39 Fed. 143; Southern Pacific R. Co. v. Esquibel, 4 New Mex. 337; 20 Pac. 109; Eldred v. Sex-

from its operation all lands to which the right of preemption or homestead settlement is attached when the line is fixed, the land commissioner is without power on his own motion, prior to the location of the line, to withdraw any of such lands from preemption or homestead settlement.[23]

§ 796. Effect of grant.—Where a grant of land to a railroad company becomes effective it relates back to the time of the enactment of the statute.[24] The general rule as to the time such grants become effective is that they take effect when the road is located and the sections thereby identified;[25] that is, they are usually grants in præsenti, which, when maps of definite location are filed and approved, take effect by relation as of the date of the act.[26] It is generally held that

ton, 30 Wis. 193; Platt v. Union Pacific R. Co. 99 U. S. 48; Wood v. Burlington &c. R. Co. 104 U. S. 329; Bullard v. Des Moines &c. R. Co. 122 U. S. 167; 7 Sup. Ct. 1149; St. Louis &c. R. Co. v. McGee, 115 U. S. 469; 6 Sup. Ct. 123.

[23] Brandon v. Ard (Kan.), 87 Pac. 687.

[24] Winona &c. Co. v. Barney, 113 U. S. 618; 5 Sup. Ct. 606; Van Wyck v. Knevals, 106 U. S. 360; 1 Sup. Ct. 336; Schulenberg v. Harriman, 21 Wall. (U. S.) 44; Railroad Co. v. Baldwin, 103 U. S. 426; Broder v. Natoma Water Works Co. 101 U. S. 274; St. Paul &c. Co. v. Winona &c. Co. 112 U. S. 720; 5 Sup. Ct. 334.

[25] St. Paul &c. R. Co. v. Northern Pacific R. Co. 139 U. S. 1; 11 Sup. Ct. 389; United States v. Southern Pacific R. Co. 146 U. S. 570; 13 Sup. Ct. 152; Northern Pacific R. Co. v. Musser &c. Co. 68 Fed. 993.

[26] Southern Pac. R. Co. v. Lipman 148 Cal. 445; 83 Pac. 445; Walbridge v. Board (Kans.). 86 Pac. 473; Wiese v. Union Pac. R. Co. (Neb.) 108 N. W. 175; United States v. Southern Pac. R. Co. 146 U. S. 570; 13 Sup. Ct. 152. "The grant made by the United States by Act July 25, 1866, c. 242, 14 Stat. 239, to aid in the construction of a railroad and telegraph line, from the Central Pacific Railroad Company in California to Portland in Oregon, of "every alternate section of public land, not mineral," within 20 miles on each side of said railroad line, with a provision for selection of lands in lieu of any of those within such primary limits, which should be found to have been occupied by homestead or pre-emption settlers or in any manner disposed of within 10 miles beyond such limits, was a grant in praesenti, and did not embrace land which was at the time of the passage of the act subject to a live homestead entry, although such entry was relinquished prior to the filing of the map of definite location and survey of any part of its road by the railroad company; such land not having been "public land," within the meaning of the grant." United State v. Oregon &c. R. Co. 143 Fed. 765. The Act Cong. July 26, 1866, granting to the Union Pacific Rail-

Congress, by a grant of land to a railroad to aid in its construction, confers a present title to the designated sections along its route, with such restrictions upon their use and disposal as to secure them for the purposes of the grant, subject to be defeated, however, on non-compliance with the terms of the grant.[27] In other words, the grant is regarded as immediately conveying title, but conveying it upon condition subsequent. It is upon this principle that it has been held that no one but the grantor can take advantage of a breach of the condition.[28] Under the various acts by which such grants have been made, the title has been held in most instances to vest in the railroad when a map of the proposed route has been duly filed;[29] but the filing of

road Company a right of way through the Osage ceded lands, was an absolute grant in praesenti vesting title from the date of the act, and persons subsequently purchasing any of the land did so with notice of the railroad company's rights. Missouri &c. R. Co. v. Watson (Kan.), 87 Pac. 687.

[27] Wisconsin C. R. Co. v. Price County, 133 U. S. 496; 10 Sup. Ct. 341; 41 Am. & Eng. R. Cas. 669; Washington &c. R. Co. v. Northern Pac. R. Co. 2 Idaho, 513; 21 Pac. 658; United States v. Curtner, 38 Fed. 1; Southern Pac. R. Co. v. Orton, 32 Fed. 457; California &c. Land Co. v. Munz, 29 Fed. 837; United States v. Northern Pac. R. Co. 6 Mont. 351; 12 Pac. 769; Coleman v. St. Paul &c. R. Co. 38 Minn. 260; 36 N. W. 638; United States v. Northern Pac. R. Co. 41 Fed. 842; Jackson &c. R. Co. v. Davison, 65 Mich. 416; 32 N. W. 726. Among the many cases holding the grant to be in praesenti may be cited in addition to those already cited the following: Summers v. Dickinson, 9 Cal. 554; Lee v. Summers, 2 Ore. 260; Blakesly v. Caywood, 4 Ore. 279; Hall v. Russell, 101 U. S. 503; Fremont v. United States, 17 How. (U. S.) 542; Southern Pac. R. Co. v. Lipman, 148 Cal. 445; 83 Pac. 445. The words "shall be and are hereby granted," are held to always import a grant in praesenti. Wright v. Roseberry, 121 U. S. 488; 7 Sup. Ct. 985; Martin v. Marks, 97 U. S. 345; Hannibal &c. R. Co. v. Smith, 9 Wall. (U. S.) 95; Winona &c. R. Co. v. Barney, 113 U. S. 618; 5 Sup. Ct. 606.

[28] Wheeler v. Chicago, 68 Fed. 526.

[29] Coleman v. St. Paul &c. R. Co. 38 Minn. 260; 36 N. W. 638; Southern Pac. R. Co. v. Poole, 32 Fed. 451; United States v. Curtner, 38 Fed. 1; United States v. McLaughlin, 30 Fed. 147; Sioux City &c. Co. v. Griffey, 72 Iowa, 505; 34 N. W. 304; Southern Pac. R. Co. v. Orton, 32 Fed. 457; Walbridge v. Board (Kans.), 86 Pac. 473. That the title does not vest until the profile is approved by the secretary of the interior, see Phoenix &c. R. Co. v. Arizona Eastern R. Co. (Ariz.) 84 Pac. 1097. But in some cases the right of the railroad company to lands is suspended until a certain portion of the road is built and the lands are selected. The sale by the railroad of any

the map does not preclude a change of route where the rights of third persons have not intervened.[30] No notice of the filing of such a map or of the withdrawal from entry of the lands granted need be given by the United States officers in order to vest the title in the railroad company, unless the act specially requires it.[31] The secretary of the interior has no authority to suspend or modify a statute withdrawing lands from preemption, and any orders he may make as to lands within the limits of the grant will not affect the rights of the railroad company.[32] The rule is that all claims which subsequently attach, either by homestead or preemption, or claims of right of way by other roads under grants subsequently made by the government, are ineffective as against a railroad company holding an effective grant.[33] It is not necessary that a patent should be issued to the company,[34] since the effect of a patent to lands granted by such an act is not to vest title to them, but to afford record evidence thereof.[35] By operation of the act itself, the conditions having been fully complied with

specific parcels of lands not exceeding the quantity earned, and lying within the limits specified in the grant, would, to that extent, be an effectual selection. Jackson &c. R. Co. v. Davison, 65 Mich. 416; 32 N. W. 726; Shepard v. Northwestern Life Ins. Co. 40 Fed. 341.

[30] Washington &c. R. Co. v. Coeur D'Alene &c. Co. 60 Fed. 981.

[31] The neglect of the secretary of the interior to file a map furnished by a railroad company showing the route of its road can not impair the company's rights. United States v. Northern Pac. R. Co. 41 Fed. 842.

[32] Northern Pac. R. Co. v. Orton, 32 Fed. 457. See, also, Howard v. Perin, 200 U. S. 71; 26 Sup. Ct. 195; Sjoli v. Dreschel, 199 U. S. 564; 26 Sup. Ct. 154.

[33] Washington &c. R. Co. v. Northern Pac. R. Co. 2 Idaho, 513; 21 Pac. 658; United States v. Curtner, 38 Fed. 1; Southern Pac. R. Co. v. Orton, 32 Fed. 457; United States v. Northern Pacific R. Co. 41 Fed. 842. See, also, Wiese v. Union Pac. Ry. Co. (Neb.) 108 N. W. 175.

[34] Whitehead v. Plummer, 76 Iowa, 181; 40 N. W. 709; Minnesota &c. Co. v. Davis, 40 Minn. 455; 42 N. W. 299. The failure to pay the expense of surveying as required by the act of congress only prevents the issue of the patent. It does not prevent the title attaching under the congressional grant Francoeur v. Newhouse, 40 Fed. 618; 40 Am. & Eng. R. Cas. 439.

[35] Pengra v. Munz, 29 Fed. 830; California &c. Co. v. Munz, 29 Fed. 837. The title which vests under the congressional grant of lands to the Central Pacific Railroad Company, and the performance of the prescribed conditions, is a legal title, and an action of ejectment may be maintained upon it before the patent issues. Francoeur v. Newhouse, 40 Fed. 618; 40 Am. & Eng. R. Cas. 439.

as to a portion of the road, the railroad company's title to lands given along that portion becomes perfect and indefeasible.[36] The general rule is that, until a survey and definite location of the road have been made, and a map of the proposed route has been filed, the railroad acquires no rights adverse to those of others taking claims under general laws.[37]

§ 797. Effect of grant—Illustrative cases.—It has been held that where the condition of the grant is that two roads shall be built, the grant is not fully effective, unless the two roads are built, and that it is not satisfied by the building of one.[38] If the state holds lands as a trustee for a railroad company, Congress can, at any time before the execution of the trust, annul the power of the state by repealing the statute.[39] The state may impose conditions[40] upon its own grant, but if it does not impose conditions the grantee company will take all the

[36] United States v. Northern Pacific R. Co. 41 Fed. 842. Under an act of congress granting the odd-numbered sections for a prescribed width on each side of a railroad, with a right of selection, when the line of road should be definitely fixed, to make up any deficiencies the title to specific lands between the two limits does not vest until selection and approval. Musser v. McRae, 38 Minn. 409; 38 N. W. 103; Elling v. Thexton, 7 Mont. 330; 16 Pac. 931.

[37] Sioux City &c. Co. v. Griffey, 72 Iowa, 505; 34 N. W. 304; Weeks v. Bridgman, 41 Minn. 352; 43 N. W. 81; Larsen v. Oregon R. &c. Co. 19 Ore. 240; 23 Pac. 974; 44 Am. & Eng. R. Cas. 92. See Southern Pac. R. Co. v. Orton, 32 Fed. 457, in which it is held that where lands had been set apart by act of congress to aid in the construction of a railroad, and unconditionally withdrawn from pre-emption, no pre-emption right could be acquired in them even if the grantee at the time of an attempted pre-emption was not authorized to take title. After settlement on public lands and properly filing of the homestead claim, it ceases to be public land through which a railroad can acquire the right of way by complying with the act of congress of March 3, 1875. Larsen v. Oregon R. &c. Co. 19 Ore. 240; 23 Pac. 974; 44 Am. & Eng. R. Cas. 92. But actual construction of the road has been held a definite location although no profile map has been filed. Jamestown &c. R. Co. v. Jones, 177 U. S. 125; 20 Sup. Ct. 568.

[38] Brewster v. Kansas City &c. R. Co. 25 Fed. 243.

[39] Rice v. Minnesota &c. R. Co. 1 Black (U. S.), 358. But see Nash v. Sullivan, 29 Minn. 206; 12 N. W. 698; 10 Am. & Eng. R. Cas. 552

[40] State v. Rusk, 55 Wis. 465; 13 N. W. 452; 10 Am. & Eng. R. Cas. 642; Rogers v. Port Huron &c. R. Co. 45 Mich. 460; 10 Am. & Eng. R. Cas. 635.

title the state could convey.[41] A patent from the state conveys whatever title was vested in the state by the act of Congress, but it does not prove that the state had title,[42] and we suppose the same rule must apply to a land grant by the state. The effect of a grant of a right of way over the public lands is to confer upon the railroad company a right to construct and operate a railroad upon lands not previously preempted or in some other mode disposed of by the government.[43] Where the grant provided that the company should take on the line of the road, and in equal quantities on each side thereof, it was held that the company could not take more land on the one side of the road than on the other.[44] Where lands are granted by a joint resolution of Congress, and its effect made contingent upon the favorable action of the President thereon, the resolution becomes effective as a land grant upon the issuing of an order declaring the executive judgment and setting apart the land.[45]

§ 798. **Reserved lands.**—A grant of lands by the federal Congress does not operate upon lands theretofore reserved.[46] Lands withdrawn

[41] Railroad Land Co. v. Courtright, 21 Wall. (U. S.), 310; Miller v. Iowa &c. Co. 56 Iowa, 374; 9 N. W. 316; 3 Am. & Eng. R. Cas. 27.

[42] Musser v. McRae, 38 Minn. 409; 38 N. W. 103.

[43] Tuttle v. Chicago &c. R. Co. 61 Minn. 190; 63 N. W. 618; Missouri &c. R. Co. v. Kansas &c. R. Co. 97 U. S. 491; St. Joseph &c. R. Co. v. Baldwin, 103 U. S. 426; 2 Am. & Eng. R. Cas. 510. See Simonson v. Thompson, 25 Minn. 450; Wilkinson v. Northern Pacific R. Co. 5 Mont. 538; 6 Pac. 349; 10 Am. & Eng. R. Cas. 320; Flint &c. R. Co. v. Gordon, 41 Mich. 420; 2 N. W. 648; Rider v. Burlington &c. R. Co. 14 Neb. 120; 15 N. W. 371; 10 Am. & Eng. R. Cas. 688. See Oregon &c. R. Co. v. United States, 67 Fed. 650.

[44] United States v. Burlington &c. R. Co. 98 U. S. 334. See Neer v. Williams, 27 Kan. 1; 10 Am. & Eng. R. Cas. 561; Brown v. Carson, 16 Ore. 388; 19 Pac. 66; 21 Pac. 47.

[45] Republican &c. Co. v. Kansas Pacific R. Co. 12 Kan. 409.

[46] Northern Pacific R. Co. v. Musser &c. Co. 68 Fed. 993; Kansas &c. R. Co. v. Atchison &c. R. Co. 112 U. S. 414; 5 Sup. Ct. 208; United States v. McLaughlin, 127 U. S. 428; 8 Sup. Ct. 1177; Wisconsin &c. R. Co. v. Price Co. 133 U. S. 496; 10 Sup. Ct. 341; United States v. Missouri &c. R. Co. 141 U. S. 358; 12 Sup. Ct. 13. See Oregon &c. R. Co. v. United States, 67 Fed. 650; McIntyre v. Roeschlaub, 37 Fed. 556; United States v. Northern Pacific R. Co. 152 U. S. 284; 14 Sup. Ct. 598. See, also, Oregon &c. R. Co. v. United States, 190 U. S. 186; 23 Sup. Ct. 673; Little Rock &c. R. Co. v. Greer, 77 Ark. 387; 96 S. W. 129.

from sale are reserved.[47] It follows from these settled rules that where lands are reserved they do not vest in a railroad company receiving a grant. Until the road is located or the route determined, the grant is "in the nature of a float;" "the title does not attach to any specific sections" until they are capable of identification, but "when once identified the title attaches to them as of the date of the grant."[48] Where there is a grant to a railroad company of land the effect of the grant to the extent and purposes thereof is to withdraw the land granted from the operation of a prior act of reservation. When the land is so withdrawn the effect of the withdrawal, so far as concerns the property and rights withdrawn, is to re-establish the dominion of the state or territory.[49] So, lands valuable chiefly for granite quarries have been held to be "mineral lands" within the reservation or exception of mineral lands in the grant to the Northern Pacific Railroad Company.[50]

§ 798a. Withdrawal—When land becomes part of public domain. —In a recent case the question arose as to whether land which was within the lines designated by the accepted map of the general route

[47] Wisconsin &c. Railroad Co. v. Forsythe, 159 U. S. 46; 15 Sup. Ct. 1020. See Kansas City &c. R. Co. v. Attorney-General, 118 U. S. 682; 7 Sup. Ct. 66; Johnson v. Towsley, 13 Wall. (U. S.) 72; Shepley v. Cowan, 91 U. S. 330; Doolan v. Carr, 125 U. S. 618; 8 Sup. Ct. 1228; United States v. Missouri &c. R. Co. 141 U. S. 358; 12 Sup. Ct. 13; Oakes v. Myers, 68 Fed. 807.

[48] St. Paul &c. R. Co. v. Northern Pacific R. Co. 139 U. S. 1; 11 Sup. Ct. 389; United States v. Southern Pacific R. Co. 146 U. S. 570; 13 Sup. Ct. 152; Northern Pacific R. Co. v. Musser &c. Co. 68 Fed. 993; Schulenberg v. Harriman, 21 Wall. (U. S.) 44; Leavenworth &c. R. Co. v. United States, 92 U. S. 733; Railroad Co. v. Baldwin, 103 U. S. 426; Wolcott v. Des Moines Company, 5 Wall. (U. S.) 681; Dubuque &c. Railroad Co. v. Litchfield, 23 How. (U. S.) 66; Southern &c. R. Co. v. Groeck, 68 Fed. 609.

[49] Maricopa &c. R. Co. v. Arizona, Territory, 156 U. S. 347; 15 Sup. Ct. 391, citing Utah &c. R. Co. v. Fisher, 116 U. S. 28; 6 Sup. Ct. 246; Harkness v. Hyde, 98 U. S. 476. See, generally, Wolcott v. Des Moines Co. 5 Wall. (U. S.) 681; Riley v. Welles, 154 U. S. 578; 14 Sup. Ct. 1166. See Hamblin v. Western &c. Co. 147 U. S. 531; 13 Sup. Ct. 353.

[50] Northern Pac. R. Co. v. Soderberg, 188 U. S. 526; 23 Sup. Ct. 365. Lands within the twenty-mile limit of the grant to the Texas Pacific Railroad Company are also held excepted from the grant to the Southern Pacific Railroad Company and can not be selected by it as indemnity lands. Southern Pac. R. Co. v. United States, 189 U. S. 447; 23 Sup. Ct. 567.

of the Lake Superior and Mississippi Railroad Company, and after the withdrawal by the land department of the lands covered by such map for the benefit of such company, was public land within a subsequent grant of "public land" to the Northern Pacific Railroad Company, and as to whether such grant attached to it when the Northern Pacific Railroad Company was definitely located thereafter. The court held that such land was not "public land" within the meaning of such later grant, and did not pass under it when it was subsequently ascertained that the land was without the line of the definite location of the Lake Superior and Mississippi Railroad, and was within the place limits of the Northern Pacific Railroad, as defined by its map of definite location, but, when freed from the earlier grant, became a part of the public domain, subject only to be disposed of under the general land laws.[51] It was also held, in the same case, that an order

[51] Northern Lumber Co. v. O'Brien (U. S.), 27 Sup. Ct. 249. The court cited St. Paul &c. R. Co. v. Northern Pac. R. Co. 139 U. S. 1, 5; 11 Sup. Ct. 389, 390; Bardon v. Northern Pac. R. Co. 145 U. S. 535; 12 Sup. Ct. 856; Kansas &c. R. Co. v. Dunmeyer, 113 U. S. 629; 5 Sup. Ct. 566; United States v. Southern Pac. R. Co. 146 U. S. 570; 13 Sup. Ct. 152; Whitney v. Taylor, 158 U. S. 85; 15 Sup. Ct. 796; Spencer v. McDougal, 159 U. S. 65; 15 Sup. Ct. 1026; Northern Pac. R. Co. v. Musser &c. Co. 168 U. S. 604; 18 Sup. Ct. 205, and Northern Pac. R. Co. v. De Lacey, 174 U. S. 622; 19 Sup. Ct. 791; and distinguished United States v. Oregon &c. R. Co. 176 U. S. 28; 20 Sup. Ct. 261, and Wilcox v. Eastern Oregon &c. Co. 176 U. S. 51; 20 Sup. 269, saying as to these last two cases: "The principal point decided in those cases was that nothing in the act of 1864 prevented Congress by legislation from appropriating for the benefit of other railroad corporations lands that might be or were embraced within the general route of the Northern Pacific Railroad; and this for the reason that an accepted map of general route only gave the company filing it an inchoate right, and did not pass title to specific sections until they were identified by a definite location of the road. Besides, in neither case was there in force, at the date of the later grant, an accepted, effective order of the Land Department withdrawing the lands there in dispute pursuant to an accepted map of the general route of the Northern Pacific Railroad. If there had been an order of that kind, it would still have been competent for Congress to dispose of the lands within such general route, as it saw proper, at any time prior to the definite location of the road under the later grant. In conformity with prior decisions it was so adjudged in the two cases above cited. Those cases did not adjudge that a grant of "public land," with the usual reservations, embraced any lands which, at the time, were formally withdrawn by the Land Department from pre-emption, settlement, or

of the land department to suspend from preemption, settlement and sale, a "body of land about twenty miles in width" was sufficiently definite under the circumstances of the case.

§ 799. Indemnity lands.—In order to secure to the company the quantity of land granted to it and prevent a deficiency by reason of some of the land being preempted or taken up, it is usually provided that the company may take lands from other parts of the public domain. The loss of land covered by the grant is made good to the company where the land is taken up as homesteads out of the lands designated in the statute. As appears from what has been elsewhere said, and from the authorities referred to, the government is careful to encourage and protect the settlers who preempt land, and also to preserve the rights of the railroad under the grant, so that a liberal construction is given to the statutes providing indemnity lands.[52] While it is well settled that what are called "place lands" pass in præsenti, there is conflict upon the question whether indemnity lands pass in præsenti.[53] "The ordinary rule with respect to indemnity lands is that no title passes until after selection."[54] But as between two companies claiming under grants it is not necessary, in order to give priority to the company claiming under the earlier grant, that there should have been a formal selection.[55]

§ 799a. Rules laid down by Supreme Court of United States.—Upon this general subject the following rules have been laid down by

sale, for the benefit of a prior grant."

[52] Kansas &c. R. Co. v. Atchison &c. R. Co. 112 U. S. 414; 5 Sup. Ct. 208; Wisconsin Central R. Co. v. Price County, 133 U. S. 496; 10 Sup. Ct. 341; Barney v. Winona &c. R. Co. 117 U. S. 228; 6 Sup. Ct. 654; Southern Pacific &c. R. Co. v. Tilley, 41 Fed. 729.

[53] Railroad Co. v. Barnes, 2 N. Dak. 310; 51 N. W. 386. But in Grandin v. La Bar, 3 N. Dak. 447; 57 N. W. 241, a different doctrine was declared. The court in the latter case discussed the decisions in Railroad Co. v. Wiggs, 43 Fed. 333; St. Paul &c. R. Co. v. Northern Pacific R. Co. 139 U. S. 1; 11 Sup. Ct. 389, and held that they did not decide that indemnity lands passed in praesenti. In the case of Railroad Co. v. Barnes, supra, C. J. Corliss, in a very vigorous opinion, dissented, and we think his opinion expresses the law.

[54] United States v. Colton &c. Co. 146 U. S. 615; 13 Sup. Ct. 163; United States v. Southern Pac. R. Co. 146 U. S. 570; 13 Sup. Ct. 152.

[55] St. Paul &c. R. Co. v. Northern Pacific R. Co. 139 U. S. 1; 11 Sup. Ct. 389. See Smith v. Northern Pacific R. Co. 58 Fed. 513.

the Supreme Court of the United States in a recent case: "That the railroad company will not acquire a vested interest in particular lands, within or without place limits, merely by filing a map of general route and having the same approved by the Secretary of the Interior, although, upon the definite location of its line of road, and the filing and acceptance of a map thereof in the office of the Commissioner of the General Land Office the lands within primary or place limits not theretofore reserved, sold, granted, or otherwise disposed of, and free from preemption or other claims or rights, become segregated from the public domain, and no rights in such place lands will attach in favor of a settler or occupant who becomes such after definite location; that no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior; that up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the preemption and homestead laws of the United States; and that the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road."[56]

[56] Sjoli v. Dreschel, 199 U. S. 564; 26 Sup. Ct. 154, 155, citing Hewitt v. Schultz, 180 U. S. 139; 21 Sup. Ct. 309; 45 L. Ed. 463; Nelson v. Northern P. R. Co. 188 U. S. 109; 23 Sup. Ct. 302; 47 L. Ed. 406; United States v. Northern P. R. Co. 152 U. S. 284, 296; 14 Sup. Ct. 598; 38 L. Ed. 443, 448; Northern P. R. Co. v. Sanders, 166 U. S. 620, 634, 635; 17 Sup. Ct. 671; 41 L. Ed. 1139, 1144; Menotti v. Dillon, 167 U. S. 703; 17 Sup. Ct. 945; 42 L. Ed. 333; United States v. Oregon &c. R. Co. 176 U. S. 28; 20 Sup. Ct. 261; 42, 44 L. Ed. 358, 364; St. Paul &c. R. Co. v. Northern P. R. Co. 139 U. S. 1, 5; 11 Sup. Ct. 389; 35 L. Ed. 77, 79; St. Paul &c. R. Co. v. Winona &c. R. Co. 112 U. S. 720, 726; 5 Sup. Ct. 334; 28 L. Ed. 872; 874; Missouri &c. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 501; 24 L. Ed. 1095, 1098; Cedar Rapids &c. R. Co. v. Herring, 110 U. S. 27; 3 Sup. Ct. 485; 28 L. Ed. 56; Grinnell v. Chicago &c. R. Co. 103 U. S. 739; 26 L. Ed. 456; Kansas P. R. Co. v. Atchison &c. R. Co. 112 U. S. 414; 5 Sup. Ct. 208; 28 L. Ed. 794; Wilcox v. Eastern Oregon Land Co. 176 U. S. 51; 20 Sup. Ct. 269; 44 L. Ed. 368; Northern P. R. Co. v. Miller, 7 Land Dec. 109, 120; Northern P. R. Co. v. Davis, 19 Land Dec. 87, 90; Spicer v. Northern P. R. Co. 10 Land Dec. 440, 443; Northern P. R. Co. v. McCrimmon, 12 Land Dec. 554; Northern P. R. Co. v. Plumb, 16 Land Dec. 80. See, also,

§ 800. Priority of rights.—If there are two conflicting grants the first in point of time usually has priority.[57] If the company having the priority of right locates its road, files the proper map, and the map is approved by the Secretary of the Interior, its rights are vested subject to be divested if conditions subsequent are not performed. If a forfeiture is declared because of a breach of conditions the land reverts to the United States, and does not pass to the company having a grant junior to the company which secured the prior right.[58] In a case where rival claimants for the same right of way filed profiles covering the same right of way at about the same time, it was held the duty of the Secretary of the Interior to determine from the facts which company had the superior right to have its profile approved.[59]

§ 801. Breach of condition—Forfeiture.—The railroad company may, of course, lose the benefit of a grant by failure to perform the conditions imposed upon it, but in order to constitute a forfeiture action must be taken by the government.[60] It is held that when a grant has once vested it can only be defeated by breach of conditions, and divestiture of title thereupon by proper proceedings on behalf of the United States,[61] but, while a judicial proceeding is the usual and

Oregon &c. R. Co. v. United States, 190 U. S. 186; 23 Sup. Ct. 673; Dougherty v. Minneapolis &c. R. Co. (N. D.) 107 N. W. 971.

[57] United States v. Southern Pacific R. Co. 146 U. S. 570; 13 Sup. Ct. 152. But see Southern Pac. R. Co. v. Bovard (Cal.), 87 Pac. 203.

[58] United States v. Southern Pacific R. Co. 146 U. S. 570; 13 Sup. Ct. 152; United States v. Northern Pacific R. Co. 152 U. S. 284; 14 Sup. Ct. 598; 57 Am. & Eng. R. Cas. 362; Sioux City &c. R. Co. v. Countryman, 159 U. S. 377; 16 Sup. Ct. 28. See Chicago &c. R. Co. v. United States, 159 U. S. 372; 16 Sup. Ct. 26; Sioux City &c. R. Co. v. United States, 159 U. S. 349; 16 Sup. Ct. 17.

[59] Phoenix &c. R. Co. v. Arizona Eastern R. Co. (Ariz.) 84 Pac. 1097.

[60] Bybee v. Oregon &c. R. Co. 139 U. S. 663; 11 Sup. Ct. 641. See, also, Utah &c. R. Co. v. Utah &c. R. Co. 110 Fed. 879.

[61] United States v. Curtner, 38 Fed. 1. If the company conveys any of the lands before constructing its road, and the grant is subsequently revoked for a failure to comply with the conditions subsequent upon which it was made, the title of the company's grantees will fail. Shepard v. Northern Life Ins. Co. 40 Fed. 341; Southern Pac. R. Co. v. Esquibel, 4 N. M. 337; 20 Pac. 109. It has been held that sales made in excess of the amount earned by a railroad company which is entitled, by the terms of

appropriate one, it has been held that a forfeiture may be declared by Congress. A third person will not be heard to question the title of the corporation on the ground that it had no authority to take the land, for this is a question between the government and the corporation.[62] Where a statute assumes to convey the title to lands adjoining the right of way of a railroad, its effect in passing the title to particular tracts cannot be questioned by a third person.[63] In Louisiana it was held that the United States government is the only claimant that can dispute the validity of rights to such lands acquired with the sanction and authority of the state legislature, and that parties who have acquired title through a sale under a mortgage authorized by the legislature have the legal title to the lands, as against a party claiming no title except by possession, and who went on the land, expecting it to be thrown open to public sale and entry.[64] All the cases agree,

the grant, to a certain quantity of land upon the completion of a stated number of miles of its road, are absolutely void, even though the road afterwards earns the lands sold. Jackson &c. R. Co. v. Davison, 65 Mich. 416; 32 N. W. 726; Swann v. Miller, 82 Ala. 530; 1 So. 65. See Lake Superior &c. Co. v. Cunningham, 44 Fed. 587; Grinnell v. Chicago &c. R. Co. 103 U. S. 739; St. Paul &c. R. Co. v. St. Paul &c. R. Co. 68 Fed. 2; Sioux City &c. R. Co. v. Countryman, 159 U. S. 377; 16 Sup. Ct. 28. In Bybee v. Oregon &c. R. Co. 139 U. S. 663; 11 Sup. Ct. 641, the court distinguished the cases of Union Hotel Co. v. Hersee, 79 N. Y. 454; 35 Am. R. 536; Farnham v. Benedict, 107 N. Y. 159; 13 N. E. 784; Brooklyn &c. Co. v. Brooklyn, 78 N. Y. 524, holding that the legislative act did not avoid the grant by forfeiture upon the non-performance of the conditions, but because the corporate existence had expired.

[62] Schulenberg v. Harriman, 21 Wall. (U. S.) 44; United States v. Repentigny, 5 Wall. (U. S.) 211, 268; Southern Pac. R. Co. v. Orton, 32 Fed. 457. See Kennett v. Plummer, 28 Mo. 142; Cowell v. Springs Co. 100 U. S. 55; American &c. Christian Union v. Yount, 101 U. S. 352, 361; Cole &c. Mining Co. v. Virginia &c. Co. 1 Sawyer (U. S.), 478; Rutland &c. Railroad Co. v. Proctor, 29 Vt. 93; Bissell v. Michigan &c. R. Co. 22 N. Y. 258; Natoma &c. Mining Co. v. Clarkin, 14 Cal. 544; Missouri &c. R. Co. v. Watson (Kan.), 87 Pac. 687; Van Wyck v. Knevals, 106 U. S. 360; 1 Sup. Ct. 336; United States v. Loughrey, 71 Fed. 921; Chicago &c. R. Co. v. Grinnell, 51 Iowa, 476; 1 N. W. 712; Chicago &c. R. Co. v. Lewis, 53 Iowa, 101; 4 N. W. 842; Johnson v. Thornton, 54 Iowa, 144; 6 N. W. 65; Northern Pacific R. Co. v. Majors, 5 Mont. 111; 2 Pac. 322.

[63] Minnesota Land &c. Co. v. Davis, 40 Minn. 455; 42 N. W. 299. See Vicksburg &c. R. Co. v. Sledge, 41 La. Ann. 896; 6 So. 725.

[64] Vicksburg &c. R. Co. v. Sledge, 41 La. Ann. 896; 6 So. 725.

however, that the state has no power to sanction any disposition of the lands which will tend to defeat or to render impossible the performance of conditions upon which the grant was made by Congress.[65]

§ 802. Legislative declaration of forfeiture.—It is held by the Supreme Court of the United States that, where the statute containing the grant provides for a forfeiture within a specified time, the legislature may effectively declare a forfeiture, and that it is not necessary to obtain a declaration of forfeiture by judicial proceedings.[66] It is said that where the declaration is made by Congress it must be "direct, positive, and free from all doubt and ambiguity."[67] It is, of course, competent for the legislature to avert a forfeiture by dispensing with performance of the conditions.[68]

§ 803. Cancellation of grants and entries.—The cancellation of a homestead entry after a subsequent grant to a railroad and the definite location of its line of road does not inure to the benefit of the railroad company, but the land reverts to the government, and becomes a part of the domain, subject to appropriation by the first legal applicant.[69] The voluntary filing of an amended preemption claim operates as a cancellation of a previous claim or entry, although there is no formal record of cancellation.[70] The federal courts will enter-

[65] Miller v. Swann, 89 Ala. 631; 7 So. 771; Vicksburg &c. R. Co. v. Sledge, 41 La. Ann. 896; 6 So. 725; Jackson &c. R. Co. v. Davison, 65 Mich. 416; 32 N. E. 726.

[66] Farnsworth v. Minnesota &c. R. Co. 92 U. S. 49; Bybee v. Oregon &c. R. Co. 139 U. S. 663; 11 Sup. Ct. 641; United States v. Repentigny, 5 Wall. (U. S.) 211, 267; McMicken v. United States, 97 U. S. 204; Atlantic &c. R. Co. v. Mingus 7 N. Mex. 360; 34 Pac. 592.

[67] St. Louis &c. R. Co. v. McGee, 115 U. S. 469, 473; 6 Sup. Ct. 123.

[68] United States v. Denver &c. R. Co. 150 U. S. 1; 14 Sup. Ct. 11.

[69] Hastings & Des Moines R. Co. v. Whitney, 132 U. S. 357, 363; 10 Sup. Ct. 112; 40 Am. & Eng. R. Cas. 426. A homestead entry made before the definite location of a railroad, but voluntarily abandoned before location, although the filing was not canceled until after the location, will not except the land from the grant to the company, under an act of congress donating lands to aid in the construction of railroads. Young v. Goss, 42 Kan. 502; 22 Pac. 572; 40 Am. & Eng. R. Cas. 435.

[70] Amacker v. Northern Pac. R. Co. 58 Fed. 850. See Bardon v. Northern Pac. Railroad Co. 145 U. S. 535; 12 Sup. Ct. 856; Hastings &c. Railroad Co. v. Whitney, 132 U. S. 357; 10 Sup. Ct. 112; Kansas Pac. R. Co. v. Dunmeyer, 113 U. S. 629; 5 Sup. Ct. 566; Galliher

tain a suit by the United States to cancel patents erroneously issued by its officers in derogation of rights previously acquired by homestead or preemption, or otherwise under existing laws.[71] A bona fide purchaser of lands conveyed to a railroad company by patent, but which were in fact not included in the grant, may successfully defend against a suit to cancel the patent, but not where he is not a bona fide purchaser, because the lands were already occupied under a recorded preemption claim.[72] Where a preemption claim was filed but canceled because the claimant had not lived on the land, the land was held to be exempted from the grant.[73] A company, by laches, may lose its right to have a patent canceled.[74]

§ 803a. Condition that land shall revert to United States if not disposed of within a fixed time.—Under a condition in the land grant to the Union Pacific Railroad that lands not sold or disposed of before the expiration of three years after the completion of the road should be subject to settlement and preemption like other lands, it has been held that lands covered by a mortgage executed by the railroad company were to be regarded as disposed of within the meaning of the condition, and hence were not subject to settlement or preemption at the expiration of three years from the completion of the road. The mortgage amounted to a hypothecation of the fee, and not merely an estate terminable at the expiration of the three years mentioned in

v. Cadwell, 145 U. S. 368; 12 Sup. Ct. 873. See Northern Pacific R. Co. v. De Lacy, 66 Fed. 450.

[71] United States v. Missouri &c. R. Co. 141 U. S. 358; 12 Sup. Ct. 13, reversing 37 Fed. 68. See, also, Southern Pac. R. Co. v. United States, 200 U. S. 341; 26 Sup. Ct. 296.

[72] United States v. Winona &c. R. Co. 67 Fed. 969, affirmed in Winona &c. R. Co. v. United States, 165 U. S. 483; 17 Sup. Ct. 381; United States v. Winona &c. R. Co. 165 U. S. 463; 17 Sup. Ct. 368. See, generally, as suits to determine rights and correcting mistakes under the Act of March 3, 1887, and subsequent acts. United States v. Southern Pac. R. Co. 117 Fed. 544; Gertgens v. O'Connor, 191 U. S. 237; 24 Sup. Ct. 94; Knepper v. Sands, 194 U. S. 476; 24 Sup. Ct. 744. See, also, United States v. Southern Pac. R. Co. 184 U. S. 49; 22 Sup. Ct. 285; Clark v. Herington, 186 U. S. 206; 22 Sup. Ct. 872.

[73] Whitney v. Taylor, 158 U. S. 85; 15 Sup. Ct. 796, citing Bardon v. Northern Pac. R. Co. 145 U. S. 535; 12 Sup. Ct. 856; Newhall v. Sanger, 92 U. S. 761; Hastings &c. R. Co. v. Whitney, 132 U. S. 357; 10 Sup. Ct. 112. See Wood v. Beach, 156 U. S. 548; 15 Sup. Ct. 410.

[74] Curtner v. United States, 149 U. S. 662; 13 Sup. Ct. 985; Sage

the grant.[75] It is not the law that settlers can take possession of such lands after the failure of the railroad company to comply with the condition and before the government has declared a forfeiture. It is well settled that a private person cannot institute proceedings for forfeiture. The right, as we have seen,[76] to insist upon a forfeiture in proper proceedings therefor, belongs exclusively to the government.[77]

§ 804. Staking and surveying line does not conclude the company.—A railroad company is not concluded by surveying and staking a line of road. For purposes concerning the land grant it is not concluded until a map is made and filed. It has a right to survey and stake many lines, since that course is necessary in order to enable it to finally decide upon the line on which it will construct its road.[78] The doctrine of the cases referred to in the note was applied to the decision of commissioners appointed to decide and report upon the construction of the road.[79]

§ 805. Aid to two companies by same grant.—The rule is that where two lines of road are aided by land grants made by the same act, and the lines of the roads cross or intersect the lands within the "place" limits of both, the lands do not pass to either company in preference to the other, no matter which road may be first located and built, but pass in equal undivided moieties.[80] Where the lands are granted to the state for the accomplishment of specific purposes those purposes cannot be defeated by the state or by any corporations which are beneficiaries under the grant, so that where the state attempts to release the land to one of the companies and the release is effective

v. Winona &c. R. Co. 58 Fed. 297; Southern &c. R. Co. v. St. Paul &c. R. Co. 55 Fed. 690.

[75] Platt v. Union Pacific R. Co. 99 U. S. 48; 25 L. Ed. 424.

[76] Ante, § 801.

[77] Vicksburg &c. R. Co. v. Elmore, 46 La. Ann. 1237; 15 So. 701.

[78] Sioux City &c. Land Co. v. Griffey, 143 U. S. 32, 39; 12 Sup. Ct. 362; Kansas Pac. R. Co. v. Dunmeyer, 113 U. S. 629; 5 Sup. Ct. 566; Van Wyck v. Knevals, 106 U. S. 360, 366; 1 Sup. Ct. 336.

[79] Smith v. Northern Pacific R. Co. 58 Fed. 513. See, generally, Blum v. Houston &c. R. Co. 10 Tex. Civ. App. 312; 31 S. W. 526.

[80] Southern Pac. R. Co. v. United States, 183 U. S. 519; 22 Sup. Ct. 154; Donahue v. Lake Superior &c. R. Co. 155 U. S. 386; 15 Sup. Ct. 115, citing St. Paul &c. R. Co. v. Winona &c. R. Co. 112 U. S. 720; 5 Sup. Ct. 334; Sioux City &c. R. Co. v. Chicago &c. R. Co. 117 U. S. 406; 6 Sup. Ct. 790.

only in part, the state and the United States will hold the land not effectively released in undivided portions.[81]

§ 806. Grants by the government—Estoppel.—The general rule is that a state is not bound by the unauthorized acts of its officers, and that an estoppel arising from such acts will not operate against it.[82] But this general rule has its limitations and exceptions.[83] A state, as the owner of property, and as a party to a contract, is not always, by any means, entitled to assert its rights as a sovereign, for, in relation to property and to contracts, there are cases in which it may be regarded substantially as a private corporation or an individual citizen.[84] It does not follow, because a state cannot be sued,[85]

[81] Donahue v. Lake Superior &c. R. Co. 155 U. S. 386; 15 Sup. Ct. 115.

[82] Crane v. Reeder, 25 Mich. 303; Ellsworth v. Grand Rapids, 27 Mich. 250; Rogers v. Port Huron &c. Railroad Co. 45 Mich. 460; 8 N. W. 46; Lake Shore &c. R. Co. v. People, 46 Mich. 193; 9 N. W. 249; Plumb v. Grand Rapids, 81 Mich. 381; 45 N. W. 1024; Hull et al. v. Marshall County, 12 Iowa, 142; Whiteside v. United States, 93 U. S. 247; McCaslin v. State, 99 Ind. 428; Brown v. Ogg, 85 Ind. 234; Vail v. McKernan, 21 Ind. 421; Ferris v. Cravens, 65 Ind. 262; Skelton v. Bliss, 7 Ind. 77; Reid v. State, 74 Ind. 252; Bigelow Estoppel, 246.

[83] State v. Flint &c. R. Co. 89 Mich. 481; 51 N. W. 103; Attorney-General v. Ruggles, 59 Mich. 123; 26 N. W. 419; United States v. McLaughlin, 30 Fed. 147; State v. Milk, 11 Fed. 389; Cahn v. Barnes, 5 Fed. 326; Hough v. Buchanan, 27 Fed. 328; Pengra v. Munz, 29 Fed. 830; United States v. Missouri &c. R. Co. 37 Fed. 68; United States v. Willamette &c. Co. 54 Fed. 807; Bigelow Estoppel (4th ed.), 131. See United States v. Alabama &c. R. Co. 142 U. S. 615; 12 Sup. Ct. 306; United States v. Hill, 120 U. S. 169; 7 Sup. Ct. 510.

[84] Carr v. State, 127 Ind. 204; 26 N. E. 778; 11 L. R. A. 370; Hartman v. Greenhow, 102 U. S. 672; Poindexter v. Greenhow, 114 U. S. 270; 5 Sup. Ct. 903; Keith v. Clark, 97 U. S. 454; Murray v. Charleston, 96 U. S. 432; Fletcher v. Peck, 6 Cranch (U. S.), 87; Terrett v. Taylor, 9 Cranch (U. S.), 43; Wabash &c. Co. v. Beers, 2 Black (U. S.), 448; Davis v. Gray, 16 Wall. (U. S.) 203; Hall v. Wisconsin, 103 U. S. 5; State v. Cardozo, 8 S. Car. 71; 28 Am. R. 275; People v. Canal Commissioner, 5 Denio (N. Y.), 401; Georgia &c. Co. v. Nelms, 78 Ga. 301; Lowry v. Francis, 2 Yerg. (Tenn.) 534; Grogan v. San Francisco, 18 Cal. 590.

[85] Hans v. Louisiana, 134 U. S. 1; 10 Sup. Ct. 504; State v. Lazarus, 40 La. Ann. 856; 5 So. 289; Commonwealth v. Weller, 82 Va. 721; 1 S. E. 102; Ayers, In re, 123 U. S. 443; 8 Sup. Ct. 164; Murdock &c. Co. v. Commonwealth, 152 Mass. 28; 24 N. E. 854; 8 L. R. A. 399, and notes.

that it cannot be estopped, for there is an essential difference between its exemption as a sovereign from suit and its right to enforce a contract or assert a cause of action where equity and good conscience forbid. Upon sound principle it is held that, where the officers of the state assuming to act for the state and under its authority, grant lands to a railroad company to aid it in constructing its road, and there is long acquiescence and all the elements of estoppel exist, the state cannot maintain a suit to avoid the grant, although the officers exceeded their authority.[86] The doctrine of estoppel has been applied to the case of a county granting land to a railroad company, and the reasoning by which the court reached its conclusion would seem to support the conclusion that a state may be estopped.[87] In one of the cases it is held that the United States is not estopped by a failure to promptly take measures to set aside the certification of land to the state.[88]

§ 807. Where state renders performance of condition impossible, grant is not defeated.—The well-known general rule that, if the grantee, by his own act, renders the performance of a condition subsequent impossible, he cannot enforce a forfeiture of the estate for nonperformance of the condition, applies to land grants. A state cannot

[86] State v. Jackson &c. R. Co. 69 Fed. 116, citing United States v. Alabama &c. R. Co. 142 U. S. 615; 12 Sup. Ct. 306; United States v. Macdaniel, 7 Pet. (U. S.) 1; United States v. Union Pacific R. Co. 37 Fed. 551; Michigan &c. Co. v. Rust, 68 Fed. 155.

[87] Roberts v. Northern Pacific R. Co. 158 U. S. 1; 15 Sup. Ct. 756.

[88] United States v. Winona &c. R. Co. 67 Fed. 969, citing Lea v. Polk &c. Copper Co. 21 How. (U. S.) 493, 498; Noyes v. Hall, 97 U. S. 34; Siebert v. Rosser, 24 Minn. 155; Lindsey v. Miller, 6 Pet. (U. S.) 666; United States v. Knight, 14 Pet. (U. S.) 301; Gilson v. Chouteau, 13 Wall. (U. S.) 92; United States v. Thompson, 98 U. S. 486; Fink v. O'Neil, 106 U. S. 272; 1 Sup. Ct. 325; United States v. Nashville &c. R. Co. 118 U. S. 120; 6 Sup. Ct. 1006; United States v. Beebe, 127 U. S. 338; 8 Sup. Ct. 1083. It is not easy to reconcile the decision in the first of the cases cited in this note with that in State v. Jackson &c. R. Co. 69 Fed. 116. We think that the rule laid down in the latter case is the correct one, and that it is probable that there may be a distinction between the two cases, but there is conflict in the statements of the opinions in those cases. The case was affirmed, however, in 165 U. S. 483; 17 Sup. Ct. 381. But see United States v. Winona &c. Co. 165 U. S. 463; 17 Sup. Ct. 368; United States v. Des Moines &c. R. Co. 84 Fed. 40. See, generally, St. Paul &c. R. Co. v. Sage, 49 Fed. 315; 1 C. C. A. 256.

defeat the estate of the grantee by a wrongful act of its own which disables or prevents a railroad company, the beneficiary in a grant, from performing the conditions of the grant. This doctrine was applied to a state which, by seceding from the Union, rendered it impossible for the railroad company to perform the conditions subsequent embodied in the grant of land to it.[89]

§ 808. Partial failure to perform conditions.—In some of the grants provision is made that, in the event that a certain part of the road is completed within a designated time, title to a specified quantity of land shall vest in the company, and another designated part shall vest when another or other parts of the road are completed, and under such grants it is held that, upon the completion of a part of the road entitling it to a designated quantity of land, title to that quantity will vest although the other part of the road may not be completed within the time limited.[90] As we have elsewhere shown, a trespasser or intruder cannot successfully raise the question whether there has or has not been either part or full performance of the condition subsequent.[91]

§ 809. Notice by possession—Adverse possession.—The general rule that a party is bound to take notice of the rights of a person in possession of land has been applied to a railroad company under a land grant. It was held that where the claimant was in possession under "a preemption filing," his possession was notice to the company claiming title under a grant made by statute.[92] The fact that the claimant

[89] Davis v. Gray, 16 Wall. (U. S.) 203.

[90] Courtright v. Cedar Rapids &c. R. Co. 35 Iowa, 386; Iowa &c. Co. v. Courtright, 21 Wall. (U. S.) 310. See, generally, Sioux City &c. R. Co. v. Osceola Co. 43 Iowa, 318; Dubuque &c. R. Co. v. Des Moines &c. R. Co. 54 Iowa, 89; 6 N. W. 157.

[91] Hannibal &c. R. Co. v. Moore, 45 Mo. 443; Leavenworth &c. R. Co. v. United States, 92 U. S. 733; Grinter v. Kansas Pacific R. Co. 23 Kan. 642. See Cooper v. Roberts, 18 How. (U. S.) 173.

[92] United States v. Winona &c. R. Co. 67 Fed. 969, citing Lea v. Polk &c. Copper Co. 21 How. (U. S.) 493, 498; Noyes v. Hall, 97 U. S. 34, 37; Siebert v. Rosser, 24 Minn. 155; 16 Am. & Eng. Ency. of Law, 800. See, also, Nelson v. Northern Pac. R. Co. 188 U. S. 108; 23 Sup. Ct. 302. The court discriminated the case before it from United States v. Winona &c. R. Co. 67 Fed. 948; Spokane Falls &c. R. Co. v. Ziegler, 61 Fed. 392.

was in possession under his preemption claim was said to be "a decisive fact." But adverse possession for private use under a state statute of limitation cannot give an individual title to part of a right of way granted by Congress to a railroad company and essential to its proper performance of the duties imposed upon it.[93] It is the province of the courts to determine who are purchasers without notice and to protect the rights of bona fide purchasers of public lands.[94]

§ 810. Injunction on the application of company.—There can, of course, be no doubt that, after the location of the road and the identification of the land, a company receiving a grant may maintain injunction to prevent the destruction of timber, where the destruction of timber would work irreparable injury.[95] The question as to the right to an injunction is not so clear where there has been no location, and, consequently, no identification of the land. But it has been held, and with reason, that the company, even before the location of the road, may maintain a suit to enjoin the destruction of timber.[96]

§ 811. Effect of reservation of right to use railroad as a highway.—In some of the land grants Congress incorporated a provision read-

[93] Northern Pac. Ry. Co. v. Townsend, 190 U. S. 267; 23 Sup. Ct. 671.

[94] Bogan v. Edinburgh &c. Co. 63 Fed. 192; Cunningham v. Ashley, 14 How. (U. S.) 377; Garland v. Wynn, 20 How. (U. S.) 6; Lytle v. State, 22 How. (U. S.) 193; Lindsey v. Hawes, 2 Black (U. S.), 554; Johnson v. Towsley, 13 Wall. (U. S.) 72; Bernier v. Bernier, 147 U. S. 242; 13 Sup. Ct. 244. See. also, Tarpey v. Madsen, 178 U. S. 215; 20 Sup. Ct. 849. But compare Northern Pac. R. Co. v. Colburn, 164 U. S. 383; 17 Sup. Ct. 98.

[95] Erhardt v. Boaro, 113 U. S. 537; 5 Sup. Ct. 565.

[96] Northern Pacific R. Co. v. Hussey, 61 Fed. 231, citing Frasher v. O'Connor, 115 U. S. 102; 5 Sup. Ct. 1141; Doe v. Wilson, 23 How. (U. S.) 457; Dubuque &c. R. Co. v. Litchfield, 23 How. (U. S.) 66; Ross v. McJunkin, 14 Serjt. & R. (Pa.) 364; Toledo &c. R. Co. v. Pennsylvania Co. 54 Fed. 746; 19 L. R. A. 395. An incipient location of land gives the person making the location an equitable interest in the land which he can sell. Kingman v. Holthaus, 59 Fed. 305, distinguishing Lessieur v. Price, 12 How. (U. S.) 59; Rector v. Ashley, 6 Wall. (U. S.) 142; Gilson v. Chouteau, 13 Wall. (U. S.) 92; Shepley v. Cowan, 91 U. S. 330, citing Bush v. Marshall, 6 How. (U. S.) 285; Landes v. Brant, 10 How. (U. S.) 348; Levi v. Thompson, 4 How. (U. S.) 17; Callahan v. Davis, 90 Mo. 78; 2 S. W. 216; Massey v. Papin, 24 How. (U. S.) 362.

ing as follows: "The said railroad shall be and remain a public highway for the use of the government of the United States, free from all toll or other charge for the transportation of any property or troops," and it has been held that this provision secures to the government the free use of the road, but does not entitle it to have troops or property transported free of charge.[97] The reasoning of the court was that reference should be had to the conditions existing at the time the act was passed; and that Congress, in adopting the act, was influenced by the mode in which railroads were then used. Cases were cited holding that persons or corporations might run cars over the tracks of the company.[98] It has also been held that the act of Congress requiring land-grant railroads to carry freight for the use of the army at not exceeding fifty per cent of the tariff rates charged the general public, does not entitle the government to a reduced rate for the carriage of such freight between two points by a railroad company which received no land grant, merely because its trains run for a part of the distance over the track of a land-grant road.[99]

§ 811a. Right to take timber and material from adjacent lands.— Under the Act of Congress of March 3, 1875, railroad companies which have obtained a right of way over public lands of the United States, as therein prescribed, are granted the right "to take from the public lands, adjacent to the line of said road, material, earth, stone and timber" necessary for its construction, also a certain amount of ground adjacent for station buildings, shops, side-tracks, and the like. The word "adjacent" has been, and should be, somewhat liberally construed in this connection, and it has been held that a railroad company has the right to cut and take timber or material from public lands adjacent to the line of the road at one point and use it on portions of its line remote from such point.[100] But, while a liberal construction should be given to the act in regard to taking timber and material from adjacent land, yet land many miles distant from the

[97] Lake Superior &c. R. Co. v. United States, 93 U. S. 442; Boyle v. Philadelphia &c. R. Co. 54 Pa. St. 310.

[98] King v. Severn R. Co. 2 B. & A. 646; Queen v. Grand Junction &c. R. Co. 4 Q. B. 18; 2 Redfield Ry. § 249; Pierce Railroads, 519.

[99] United States v. Astoria &c. R. Co. 131 Fed. 1006.

[100] United States v. Denver &c. R. Co. 150 U. S. 1; 14 Sup. Ct. 11; United States v. Hynde, 47 Fed. 297.

line of the road and not immediately accessible from it cannot be said to be adjacent within the meaning of the act.[101]

[101] United States v. St. Anthony R. Co. 192 U. S. 524; 24 Sup. Ct. 333. See, also, Stone v. United States, 64 Fed. 667; 167 U. S. 178; 17 Sup. Ct. 778. And see as to action by United States in trover for cutting timber. United States v. Denver &c. R. Co. 191 U. S. 84; 24 Sup. Ct. 33. See, also, for case in which it was held that a bill in equity would not lie, United States v. Bitter Root &c. Co. 200 U. S. 451; 26 Sup. Ct. 318.

CHAPTER XXXIV.

PUBLIC AID.

§ 812. State aid.—Where there is no constitutional provision prohibiting it a state may aid in the construction of a railroad although the railroad is owned by a railroad corporation.[1] Where a change in

[1] Cooley Taxation, 213 If, as held in the cases hereafter cited, the state may authorize municipalities to grant such aid, it necessarily

the constitution withdraws power from the legislature or makes the right to grant aid depend upon a popular vote the legislature cannot grant aid after the change in the constitution where the change operates as a withdrawal of the power, or, where the constitution so requires, without submitting the matter to a vote of the people.[2] The statute granting the aid and the acceptance of the company constitutes the contract, and if the statute does not expressly or by fair implication provide that the stockholders of the company shall be personally liable, then no such liability exists.[3]

§ 813. State aid—Lien of state.—A state, by guarantying the bonds of a railway company, or by issuing its own bonds in aid of a railway company, does not secure a lien on the property of the company or on any specific fund, unless the statute expressly and clearly provides that the state shall have a lien.[4] It has, however, been held that a statute may be so framed as to give the state a lien on the property, or a right to a specific fund.[5] The rule that a state, when it enters into a contract, is to be regarded substantially as any other contracting party, requires the conclusion that, unless a lien is provided for by the statute or contract, none exists. Where a lien exists in favor of the state, it cannot be divested except by the state, or by a valid decree.[6]

§ 814. Constitutionality of statutes authorizing municipal aid to railroads.—The question as to the power of the legislature to author-

follows that the state may grant it directly. See post, § 814.

[2] McKittrick v. Arkansas Central R. Co. 152 U. S. 473; 14 Sup. Ct. 661, citing Aspinwall v. Davies County, 22 How. (U. S.) 364; Wadsworth v. Supervisors, 102 U. S. 534; State v. Little Rock &c. R. Co. 31 Ark. 701.

[3] United States v. Stanford, 69 Fed. 25, citing United States v. Union Pac. R. Co. 91 U. S. 72; Sinking Fund Cases, 99 U. S. 700; Union Pac. R. Co. v. United States, 104 U. S. 662; Hudson Canal Co. v. Pennsylvania &c. Co. 8 Wall. (U. S.) 276; Hale v. Finch, 104 U. S. 261, 269; Carrol v. Green, 92 U. S. 509.

[4] Tompkins v. Little Rock &c. R. Co. 125 U. S. 109; 8 Sup. Ct. 762; McKittrick v. Arkansas &c. R. Co. 152 U. S. 473; 14 Sup. Ct. 661.

[5] Ketchum v. St. Louis, 101 U. S. 306; Knevals v. Florida &c. R. Co. 66 Fed. 224; 13 C. C. A. 410; Wilson v. Ward &c. Co. 67 Fed. 674.

[6] Wilson v. Boyce, 92 U. S. 320; Whitehead v. Vineyard, 50 Mo. 30; Choteau v. Allen, 70 Mo. 290, 327, 328. See Wilson v. Beckwith, 117 Mo. 61; 22 S. W. 639; Hawkins v. Mitchell, 34 Fla. 405; 16 So. 311.

ize municipal corporations to aid railroad companies by donations or subscriptions cannot now be regarded as an open one. The question has been much debated, but the overwhelming weight of authority sustains the validity of statutes authorizing public corporations to aid in building railroads.[7] The prevailing doctrine has met with opposition, but it is now too thoroughly settled to be successfully assailed. It is true that money cannot be raised by taxation for the benefit of private persons or purely private corporations,[8] but a railroad is, as

[7] Of the great number of cases upon this subject we cite: Railroad Company v. Otoe County, 16 Wall. (U. S.) 667; Olcott v. Supervisors, 16 Wall. (U. S.) 678; Rogers v. Keokuk, 154 U. S. 546; 14 Sup. Ct. 1162; Sharpless v. Mayor &c. 21 Pa. St. 147; 59 Am. Dec. 759; Opelika v. Daniel, 59 Ala. 211; Stockton &c. Co. v. Stockton, 41 Cal. 147; Harney v. Indianapolis R. Co. 32 Ind. 244; Pitzman v. Freeburg, 92 Ill. 111; Hawkins v. Carroll County, 50 Miss. 735; Reineman v. Covington &c. R. Co. 7 Neb. 310; Bridgeport v. Housatonic Co. 15 Conn. 475; Winn v. Macon, 21 Ga. 275; Powers v. Inferior Court &c. 23 Ga. 65; Quincy &c. R. Co. v. Morris, 84 Ill. 410; Douglas v. Chatham, 41 Conn. 211; Cotton v. County Commissioners, 6 Fla. 610; Leavenworth Co. v. Miller, 7 Kan. 479; 12 Am. R. 425; Courtney v. Louisville, 12 Bush (Ky.), 419; State v. Linn Co. 44 Mo. 504; Augusta Bank v. Augusta, 49 Me. 507; Perry v. Keene, 56 N. H. 514; Louisville &c. Co. v. Davidson County, &c. 1 Sneed (Tenn.), 637; 62 Am. Dec. 424; People v. Mitchell, 35 N. Y. 551; Walker v. Cincinnati, 21 Ohio St, 14; 8 Am. R. 24; Lamville &c. Co. v. Fairfield, 51 Vt. 257; Hill v. Commissioners, 67 N. C. 368; Harcourt v. Good, 39 Texas, 455; Longhorne v. Robinson, 20 Gratt. (Va.) 661; State v. Charleston, 10 Rich. L. (S. Car.) 491. See Cooley's Const. Lim. (6th ed.) 263; Elliott Roads and Streets (2d ed.), 380, et seq; Dillon Municipal Corp. (4th ed.) §§ 153–160. It is even held that the legislature may authorize such aid although the railroad is located partly or wholly outside the municipality or state. Chicago &c. R. Co. v. Otoe Co. 16 Wall. (U. S.) 667; Atlantic Trust Co. v. Darlington, 63 Fed. 76; Louisville &c. R. Co. v. Davidson Co. 1 Sneed (Tenn.) 637; 62 Am. Dec. 424; St. Joseph &c. R. Co. v. Buchanan Co. 39 Mo. 485. See Municipal Trust Co. v. Johnson City, 116 Fed. 459, as to evidence as to whether the municipality was dealing with a foreign or domestic company.

[8] Loan Association v. Topeka, 20 Wall. (U. S.) 655; Lowell v. Boston, 111 Mass. 454; 15 Am. R. 39; Feldman v. Charleston, 23 S. Car. 57; 55 Am. R. 6; Parkersburg v. Brown, 106 U. S. 487; 1 Sup. Ct. 442; 2 Am. & Eng. Corp. Cas. 263; Curtis v. Whipple, 24 Wis. 350; 1 Am. R. 187; Blair v. Cuming Co. 111 U. S. 363; 4 Sup. Ct. 449; Cole v. La Grange, 113 U. S. 1; 5 Sup. Ct. 416; 7 Am. & Eng. Corp. Cas. 379; State v. Osawkee Township, 14 Kan. 418; 19 Am. R. 99; Weismer v. Village of Douglas, 64 N. Y. 91; 21 Am. R. 586; Brewer Brick Co. v. Brewer,

we have elsewhere shown, a public enterprise, and, theoretically, if not always practically, does promote the public welfare. Because of its public nature it is subjected to many burdens from which private corporations and individual citizens are free.[9] There is, therefore, reason supporting the accepted doctrine, although, as often happens, there are reasons supporting a different view. It is to be remarked that it is solely upon the ground that a railroad is a matter of public concern that the power to lay a tax upon the inhabitants of a municipality can be sustained.[10] So that if a corporation has, if we may use the term, a public and a private side, it is only to the public side that municipal aid can be given.[11]

§ 815. Construction of constitutional provisions.—It seems to us where the constitution provides that specified acts shall be done, before aid can be given, that such provisions should be regarded as mandatory, for, in our judgment, all the provisions of the constitution should be regarded as mandatory unless the context clearly shows that they were intended to be directory,[12] but, as will be presently

62 Me. 625; 16 Am. R. 395; Coates v. Campbell, 37 Minn. 498; 35 N. W. 366.

Northern Pacific R. Co. v. Roberts, 42 Fed. 734. In this case the court denied the doctrine of Whiting v. Sheboygan &c. R. Co. 25 Wis. 167; 3 Am. R. 30, and declared that it was opposed to the doctrine asserted in Pratt v. Brown, 3 Wis. 603; Hasbrouck v. Milwaukee, 13 Wis. 37; 80 Am. Dec. 718, and note; Robbins v. Milwaukee &c. R. Co. 6 Wis. 636; Soens v. Racine, 10 Wis. 271; Brodhead v. Milwaukee, 19 Wis. 624; 88 Am. Dec. 711, and note; Roberts v. Northern Pacific R. Co. 158 U. S. 1; 15 Sup. Ct. 756.

In the case of Northern Pacific R. Co. v. Roberts, 42 Fed. 734, the court treats a railroad as a public highway. The question is well considered in the case referred to, and many cases are cited, some already referred to by us, and others, among them, Beekman v. Saratoga &c. R. Co. 3 Paige (N. Y.), 45; 22 Am. Dec. 679, and note; Brocaw v. Board, 73 Ind. 543; Bennington v. Park, 50 Vt. 178; Hallenbeck v. Hahn, 2 Neb. 377; Selma &c. R. Co. Ex parte, 45 Ala. 696; 6 Am. R. 722.

[11] It has been held that although a private corporation is organized for the double purpose of building and operating a railroad and erecting a cotton compress, the former a public improvement, and the latter a private enterprise, a special tax which is voted by a municipal corporation in its behalf, in aid of the construction of the former alone, is valid. McKenzie v. Wooley, 39 La Ann. 944; 3 So. 128.

[12] Varney v. Justice, 86 Ky. 596; May v. Rice, 91 Ind. 546; State v. Johnson, 26 Ark. 281; Cannon v. Mathes, 8 Heisk. (Tenn.) 504;

shown, some of the adjudged cases do not adhere very closely to this principle. So, where specific things are enumerated, it seems to us that the enumeration should be held to exclude things not enumerated, for, as we believe, the rule that the express mention of one thing excludes others applies with even greater force to written constitutions than to any other instruments.[13] In accordance with what we believe to be the true rule it has been held that a provision requiring publication for a designated length of time prior to the enactment of a statute is mandatory.[14]

§ 816. Corporate purpose—Constitutional limitation.—The question has arisen in some jurisdictions as to whether the grant of aid can be justly regarded as a "corporate purpose." The power to grant aid, as we have seen, is not an ordinary or incidental corporate power, and exists only by virtue of legislative enactment. But it does not follow, because the power to grant aid is not an ordinary corporate power, that granting aid is not a "corporate purpose." No constitutional provision forbidding, any public purpose not palpably foreign to the object of a municipal corporation may be regarded as "a corporate purpose," where the legislature so enacts. We should very much doubt whether a statute assuming to make that a corporate purpose which palpably and unmistakably could not be a corporate purpose would be valid, since such a rule would make the provisions of the constitution limiting the power to tax to corporate purposes practically inoperative.[15] But whatever may be the extent to which the legisla-

Cooley Const. Lim. (6th ed.) 114, et seq. See, also, Gulf &c. R. Co. v. Miami County, 12 Kan. 230; Portland R. Co. v. Standish, 65 Me. 63; Leavenworth R. Co. v. Platte County, 42 Mo. 171.

[13] Page v. Allen, 58 Pa. St. 338; 98 Am. Dec. 272; State v. Blend, 118 Ind. 426; 21 N. E. 267; 4 L. R. A. 93, and note.

[14] The constitution of Maryland contains a provision wherein it is declared that no county shall contract any debt or obligation in the construction of a railroad, nor give or loan its credit to a corporation, unless authorized by an act of the assembly, "which shall be published for two months before the next election for members of the house of delegates in the newspapers published in said counties," and this was held to mandatory. Baltimore & D. R. Co. v. Pumphrey, 74 Md. 86; 21 Atl. 559.

[15] In the case of Atlantic Trust Co. v. Darlington, 63 Fed. 76, it was said: "The constitution permits the legislature to authorize municipal corporations to assess and collect taxes for corporate purposes (Section 8, Article 9), and none

ture can go, there can be no doubt that the legislature may confer the right to aid railroad companies, although the power to levy taxes is limited to taxes for "corporate purpose."[16]

§ 817. Constitutional prohibitions.—A provision in a state constitution forbidding municipal corporations from becoming stockholders in railroad corporations, and from raising money for such a corpora-

other. A municipal corporation is not only a representative of the state, but a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the state. United States v. Railroad Co. 17 Wall. (U. S.) 322. The powers of a municipal corporation, dependent wholly upon the source whence they are derived, may be enlarged at any time by the legislature. Rogers v. Burlington, 3 Wall. (U. S.) 654. The legislature then determines the purpose for which they have been created, and clothes them with the means of attaining them. These purposes are their corporate purposes. The legislature may declare that corporate purposes may be promoted by affording aid to a railroad. The unchanging course of legislation shows that this is a public purpose, as well as a corporate purpose; and, without question, cities, towns, villages, and counties, have again and again been clothed with this power. It is true that in Floyd v. Perrin, 30 S. C. 1; 8 S. E. 14, arguendo, the court says that counties have the right to aid in such construction, because they have jurisdiction over highways, and a railroad is a highway. But streets in cities, towns and villages are also highways; and, although the authority of the county over its highways ends at its boundaries, a county has the right to aid a railroad whose termini are in other counties,—perhaps in other states. Floyd v. Perrin, relied on in argument, does not decide that aid to a railroad can not be a corporate purpose." The doctrine is broadly stated in the opinion from which we have quoted, but there can be no doubt that the power of the legislature to determine what are corporate purposes is very broad and comprehensive. Railroad aid bonds can not be issued where the statute prohibits the municipality from incurring any indebtedness, except such as shall be "necessary to the administration of internal affairs." Lewis v. Pima Co. 155 U. S. 54; 15 Sup. Ct. 22; Darlington v. Atlantic Trust Co. 68 Fed. 849.

[16] Johnson v. Stark Co. 24 Ill. 75; Perkins v. Lewis, 24 Ill. 208; Chicago &c. Co. v. Smith, 62 Ill. 268; 14 Am. R. 99; Butler v. Dunham, 27 Ill. 473; Keithsburg v. Frick, 34 Ill. 405; County of Livingston v. Darlington, 101 U. S. 407, 411. Analogous cases fully support the statement of the text. Taylor v. Thompson, 42 Ill. 9; Henderson v. Lagow, 42 Ill. 360; Briscoe v. Allison, 43 Ill. 291; Johnson v. Campbell, 49 Ill. 316; Middleport v. Aetna Life Ins. Co. 82 Ill. 562.

tion, or loaning their credit thereto, is violated by a statute which assumes to empower a township to construct a railroad within the limits of the township, which road is designated to form part of a line of road owned by a railroad company.[17] Bonds issued under such a statute are void in the hands of bona fide holders.[18] It was also held in the first of the cases referred to in the note that the township might prove the facts averred in its answer, which tended to establish the unconstitutionality of the statute.

§ 818. Direct limitations upon the state not limitations upon power to authorize municipalities to grant aid.—The adjudged cases favor the doctrine that constitutional provisions prohibiting the state from taking stock in a corporation, lending its credit to a corporation, and incurring an indebtedness in aid of a corporation, do not restrain the legislature from empowering public corporations to grant aid to railroad companies.[19] Thus a constitutional provision that the state shall not subscribe for the stock of a railroad has been held not to affect the right of the legislature to authorize a municipal corporation to do so.[20] So, it has been held, limitations upon the power of the

[17] Aetna Life Ins. Co. v. Pleasant Township, 53 Fed. 214; Aetna Life Ins. Co. v. Pleasant Township, 62 Fed. 718; Pleasant Township v. Aetna Life Ins. Co. 138 U. S. 67; 11 Sup. Ct. 215; Wyscaver v. Atkinson, 37 Ohio St. 80; Counterman v. Dublin Township, 38 Ohio St. 515. The case of Walker v. Cincinnati, 21 Ohio St. 14; 8 Am. R. 24, was distinguished, and it was held not to be inconsistent with the decisions in the cases last cited. We do not believe, we may say, by the way, that townships can embark in the business of building and operating railroads. But see Sun Printing &c. Ass'n v. Mayor, 152 N. Y. 257; 46 N. E. 499; 37 L. R. A. 788.

[18] The conclusion stated in the text is clearly right. The statute being void there was no power to issue the bonds, and the entire absence of power is always a defense.

[19] The tendency of the decisions is to support statutes authorizing municipalities to grant aid to railroad companies.

[20] Prettyman v. Supervisors, 19 Ill. 406; 71 Am. Dec. 230; Dubuque County v. Dubuque &c. R. Co. 4 G. Greene (Iowa), 1; Leavenworth Co. v. Miller, 7 Kan. 479; 12 Am. R. 425; Aurora v. West, 9 Ind. 74; Slack v. Maysville &c. R. Co. 13 B. Monr. 1; Robertson v. Rockford, 21 Ill. 451; Clark v. Janesville, 10 Wis. 136; Taylor v. Yipsilanti, 105 U. S. 60; 26 L. Ed. 1008; Cotton v. Leon Co. 6 Fla. 610. But see Griffith v. Commissioners of Crawford County, 20 Ohio, 609; People v. State Treas. 23 Mich. 499. See, generally, Cass v. Dillon, 2 Ohio St. 607; Clark v. Janesville, 10 Wis.

state to incur indebtedness to aid in internal improvements do not prevent the legislature from granting power to municipalities to issue railroad aid bonds.[21] Indeed, so far has judicial construction been carried in support of the system of aiding railroads by public funds, that an article in the constitution of Ohio declaring that, "The general assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money or loan its credit to, or in aid of, any such company, corporation, or association," was held not to prohibit the legislature from authorizing a city to issue its bonds in payment of a loan of ten million dollars, to be expended in the construction of a railroad lying almost entirely outside the state.[22] But where there is an express limitation upon the power of a public corporation the legislature cannot confer upon it authority to grant aid to railroad companies.[23]

§ 819. Constitutional restrictions operate prospectively.—The general rule is that constitutional provisions operate prospectively and not retroactively. Under this rule it is held that, where there is a statute in force, a constitutional provision adopted after proceedings resulting in a contract were had under the statute, does not invalidate or impair the validity of such proceedings.[24] If, however, a constitu-

136; Sioux City v. Weare, 59 Iowa, 95; 12 N. W. 786. A restriction as to counties does not apply to cities. Thompson v. Peru, 29 Ind. 305; Aurora v. West, 9 Ind. 74. But see as to township. Harshman v. Bates Co. 92 U. S. 569; 23 L. Ed. 747.

[21] Thompson v. Peru, 29 Ind. 305; Slack v. Maysville &c. R. Co. 13 B. Mon. (Ky.) 9; Prettyman v. Supervisors, 19 Ill. 406; 71 Am. Dec. 230; Police Jury v. McDonogh, 8 La. Ann. 341.

[22] Walker v. Cincinnati, 21 Ohio St. 14; 8 Am. R. 24.

[23] A statute of Ohio which authorized a certain township to construct a few miles of railroad within its limits, intended to ultimately form part of a continuous line of road to be operated and equipped by private capital, was held to violate a constitutional provision, which prohibits the general assembly from authorizing any county, city, town, or township to become a stockholder in any private corporation, or to raise money for or loan its credit to or in aid of such corporation. Pleasant Tp. v. Aetna Life Ins. Co. 138 U. S. 67; 11 Sup. Ct. 215.

[24] Norton v. Board &c. 129 U. S. 479; 9 Sup. Ct. 322; 26 Am. & Eng. Corp. Cas. 583; Aspinwall v. Commissioners, 22 How. (U. S.) 364; Wadsworth v. Supervisors, 102 U. S. 534; Scotland Co. v. Hill, 132 U. S. 107; 10 Sup. Ct. 26; Callaway Co. v. Foster, 93 U. S. 567; Henry Co. v.

tional provision is adopted before proceedings are taken under the statute, the proceedings are not effective.[25] Constitutional or statutory provisions may, however, be so worded as to affect prior proceedings,[26] but contract rights cannot be impaired.

§ 820. Limitation upon the power of municipalities to incur debts. —A constitutional provision prohibiting a municipal corporation from

Nicolay, 95 U. S. 619; Schuyler Co. v. Thomas, 98 U. S. 169; Cass Co. v. Gillett, 100 U. S. 585; Ralls Co. v. Douglass, 105 U. S. 728. See Green County v. Conners, 109 U. S. 104; 3 Sup. Ct. 69; Livingston Co. v. First Nat. Bank 128 U. S. 102; 9 Sup. Ct. 18. Contra, State v. Dallas Co. &c. 72 Mo. 329; State v. County Court, 51 Mo. 522; State v. Gurroutte, 67 Mo. 445. See, also, Decker v. Hughes, 68 Ill. 33; Maxcy v. Williamson Co. 72 Ill. 207; Board v. Bolton, 104 Ill. 220; Mason v. Shawneetown, 77 Ill. 533; Knox County v. Ninth Nat. Bank, 147 U. S. 91; 13 Sup. Ct. 267; Nelson v. Haywood Co. 87 Tenn. 781; 11 S. W. 885; 4 L. R. A. 648.

[25] Concord v. Robinson, 121 U. S. 165; 7 Sup. Ct. 937; Citizens' &c. Asso. v. Perry Co. 156 U. S. 692; 15 Sup. Ct. 547. See, also, Buffalo &c. R. Co. v. Falconer, 103 U. S. 821.

[26] Wadsworth v. Supervisors, 102 U. S. 534; Railroad Co. v. Falconer, 103 U. S. 821. Upon the general subject, see Supervisors v. Galbraith, 99 U. S. 214; Fairfield v. Gallatin Co. 100 U. S. 47; Dodge v. Platte Co. 16 Hun (N. Y.), 285; State v. Green Co. 54 Mo. 540; State v. Clark, 23 Minn. 422; Fosdick v. Perrysburg, 14 Ohio St. 472; Slack v. Maysville &c. R. Co. 13 B. Mon. (Ky.) 1. It was held, in Louisville v. Savings Bank, 104 U. S. 469, that the constitution of Illinois, adopted on July 8, 1870, did not invalidate bonds issued in pursuance to a vote of the township on the same day that the constitution was adopted, although it provides that "no county, city, township or other municipality shall ever become a subscriber to the capital of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation," unless the subscription shall have been authorized under existing laws, by a vote of the people prior to such adoption. The court says that they will presume the vote upon the question of levying the tax to have been completed before the close of the day, since the meeting for an election was called for nine o'clock in the morning and only fifty-two votes were cast. But the supreme court of Illinois holds that where the issuance of railroad aid bonds is authorized by a vote at the same election at which this amendment to the constitution was adopted, the issue is unconstitutional. People v. Dolton, 111 Ill. 124; 53 Am. R. 605. The party asserting the validity of bonds issued after this provision referred to in the above case took effect is held to have the burden of proof to show that they come within the exception. Williams v. People, 132 Ill. 574; 24 N. E. 647.

aiding a railroad by subscriptions or donations would, it is hardly necessary to say, place it beyond the power of the legislature to empower municipal corporations to grant such aid.[27] But a provision of the constitution prohibiting municipal corporations from incurring a debt in aid of a corporation does not necessarily prohibit the municipalities from giving aid to railroad companies. The effect of such a provision is to preclude the municipalities from incurring a debt, but it does not preclude them from raising money by taxation in aid of railroad companies. There can be no debt created, but a donation or subscription may be authorized.[28] In jurisdictions where municipalities are forbidden to incur an indebtedness the railroad company is not, as it is held, entitled to the money until it is collected.[29]

§ 821. Constitutional questions—Delegation of legislative power. —It is a well-known principle of constitutional law that legislative power can neither be surrendered nor delegated. This principle, however, does not forbid the legislature from enacting a law authorizing the inhabitants of a locality to determine by ballot, petition or otherwise, whether they will lay a tax upon themselves to aid a railroad company by donation or subscription.[30] In enacting a general law

[27] Norton v. Board of Commissioners, 129 U. S. 479; 9 Sup. Ct. 322; Wadsworth v. Supervisors, 102 U. S. 534; Buffalo &c. R. Co. v. Falconer, 103 U. S. 821; Kelley v. Milan, 127 U. S. 139, 154; 8 Sup. Ct. 1101; Mayor &c. v. Gilmore, 21 Fed. 870; Taxpayers &c. v. Tennessee &c. R. Co. 11 Lea (Tenn.), 329; List v. Wheeling, 7 W. Va. 501.

[28] Lafayette &c. R. Co. v. Geiger, 34 Ind. 185; Harney v. Indianapolis &c. R. Co. 32 Ind. 244; Aurora v. West, 9 Ind. 74; Dronberger v. Reed, 11 Ind. 420; Evansville &c. Co. v. Evansville, 15 Ind. 395; Board v. Bright, 18 Ind. 93; Aspinwall v. Commissioners, 22 How. (U. S.) 364; Concord v. Portsmouth Savings Bank, 92 U. S. 625; Falconer v. Buffalo &c. R. Co. 69 N. Y. 491.

[29] Bittinger v. Bell, 65 Ind. 445; Board v. Louisville &c. R. Co. 39 Ind. 192; Sankey v. Terre Haute &c. R. Co. 42 Ind. 402; Petty v. Myers, 49 Ind. 1; Jager v. Doherty, 61 Ind. 528; Pope v. Board, 51 Fed. 769; Board v. State, 115 Ind. 64; 4 N. E. 589; 17 N. E. 855. Where aid is voted and an additional levy is required a tax-payer may have mandamus to compel the proper officers to make the additional levy of taxes. Board v. State, 86 Ind. 8. See, also, Board v. Montgomery, 106 Ind. 517; 6 N. E. 915; Board v. State, 109 Ind. 596; 10 N. E. 625; State v. Board (Ind.), 76 N. E. 986. It is held, that where a tax is levied the railroad company acquires such an interest therein as will pass to a company with which it consolidates. Scott v. Hansheer, 94 Ind. 1; Pope v. Board, 51 Fed. 760.

[30] Cincinnati &c. R. Co. v. Clinton

authorizing public corporations to aid railroad companies, there is no delegation of legislative power, nor is the taking effect of the law made to depend upon the act or authority of any other persons or bodies than that of the lawmakers. The law is effective when it leaves the hands of the law-making power, and all that is left to the inhabitants of a locality is to determine whether they will avail themselves of the provisions of the law.[31] If, however, the legislature should provide that a law should take effect only in the event that the people should vote in favor of its taking effect the enactment would not be valid,[32] but this is a very different thing from enacting a general law and simply leaving it to localities to take action under it.

§ 822. Submission to vote.—The general legislative practice is to provide for submitting the question of granting aid to a railroad to the people and allowing them to determine, either by ballot or by petition, whether aid shall be granted, but where there is no constitutional provision requiring it the legislature may authorize a municipality to grant aid without submitting the matter to the people. The subject is essentially legislative, and the legislature is not bound to provide for a vote or petition by the inhabitants of the municipality, except where a provision of the constitution so requires.[33] If the legislature does provide for a submission to vote or petition, then there must be

Co. 1 Ohio St. 77; Lafayette &c. R. Co. v. Geiger, 34 Ind. 185, 220; Baltimore &c. R. Co. v. Jefferson Co. 29 Fed. 305; Clarke v. Rochester, 24 Barb. (N. Y.) 446; Starin v. Genoa, 23 N. Y. 439; Louisville &c. R. Co. v. County Court, 1 Sneed (Tenn.), 637; 62 Am. Dec. 424; Lafayette &c. R. Co. v. Geiger, 34 Ind. 185; Hobart v. Supervisors, 17 Cal. 23; Stein v. Mobile, 24 Ala. 591; Cotton v. Leon Co. 6 Fla. 610; Slack v. Maysville &c. R. Co. 13 B. Mon. (Ky.) 1; Police Jury v. McDonogh, 8 La. Ann. 341; Cincinnati &c. R. Co. v. Clinton Co. 1 Ohio St. 77; Moers v. Reading, 21 Pa. St. 188.

[31] Aspinwall v. Daviess Co. 22 How. (U. S.) 364; Board v. Spitler, 13 Ind. 235; Thompson v. Peru, 29 Ind. 305; Robinson v. Schenck, 102 Ind. 307; 1 N. E. 698.

[32] State v. Young, 26 Iowa, 122; 2 Am. & Eng. R. Cas. 348.

[33] Ralls Co. v. Douglass, 105 U. S. 728; Thomson v. Lee Co. 3 Wall. (U. S.) 327; McCallie v. Chattanooga, 3 Head (Tenn.), 317; Long v. New London, 9 Biss. (U. S.) 539; Livingston Co. v. Darlington, 101 U. S. 407, 415; Keithsburg v. Frick, 34 Ill. 405; Marshall v. Silliman, 61 Ill. 218; Quincy &c. R. Co. v. Morris, 84 Ill. 410. But see Union Bank v. Board Comrs. 116 N. Car. 339; 21 S. E. 410.

an election held as the enabling act requires or such a petition as the act prescribes.[34]

§ 823. Submission to popular vote—Constitutional requirements. —Where the constitution requires the question of granting aid to a railroad company to be submitted to a vote of the taxpayers or inhabitants of the municipality, the requirement is mandatory and must be obeyed. The legislature in such a case has no power to authorize the grant of aid without submitting the question to the people of the locality. Where a specified number of votes in favor of the aid is required by the constitution in order to authorize the municipality to grant the aid it is not in the power of the legislature to provide that aid may be granted unless the vote prescribed is given in favor of granting the aid.[35] There is a difference between cases where the statute assumes to authorize municipal officers to grant aid without submitting the question to a vote and cases where the statute provides for a submission, but the municipal officers do not submit the question to the voters as the statute requires. If it appears on the face of the statute that the legislature has assumed to confer authority upon the municipal officers to grant aid without submitting the matter to the voters of the locality there can be no power, since, if the statute be in conflict with the constitution, it is void, and a void statute cannot confer authority or right. In such a case there can be no estoppel, for when the constitution is consulted and the statute tested by it the absence of legislative power is at once revealed. No person can be heard to say that he was ignorant of the constitution or the statute under which public corporations are organized, so that there is no ground upon which an estoppel can be founded. Where, however, the legislature obeys the constitutional mandate and provides for a submission

[34] See Lewis v. Bourbon Co. 12 Kans. 186; Rich v. Mentz Twp. 134 U. S. 623; 10 Sup. Ct. 610; Jacksonville R. Co. v. Virden, 104 Ill. 339.

[35] Hill v. Memphis, 134 U. S. 198; 10 Sup. Ct. 562; Hill v. Memphis, 23 Fed. 872. In the case of Hill v. Memphis, 134 U. S. 198; 10 Sup. Ct. 562, the court held that a vote of two-thirds of the electors in favor of subscribing for the stock of a railroad company did not authorize the municipal authorities to issue bonds of the municipality. The principles declared by the cases below cited were applied. Police Jury v. Britton, 15 Wall. (U. S.) 566; Kelley v. Milan, 127 U. S. 139; 8 Sup. Ct. 1101; Young v. Clarendon Township, 132 U. S. 340; 10 Sup. Ct. 107; Claiborne Co. v. Brooks, 111 U. S. 400; 4 Sup. Ct. 489.

of the question to the voters of the municipality, and the municipal officers do not follow the provisions of the statute, then there is reason for holding that there may be an estoppel in cases where the other elements essential to the existence of an estoppel are present.

§ 823a. Necessity of regularity in the election.—The rule demanding a strict compliance with statutory requirements in making subscriptions to the capital of railroad companies applies with particular force to the manner of holding the election to authorize the subscription. The purpose of the election is to ascertain the public mind on the proposed question and the legislative method is presumed the best method of obtaining this result. Thus, where registration of voters is required, and no registration is had, it has been held that the election will be declared illegal and the bonds invalid.[36] So, where a statute required an election board composed of three judges and two clerks, a bond election held by one judge with one clerk was held to confer no authority on the municipality to issue the bonds.[37] Where, however, the statute is silent as to the manner of holding and conducting the election, then it may be conducted in the manner prescribed by the law of the organization of the body in which it is held.[38]

§ 823b. Form of the ballot.—Great strictness as to the form of the ballot is not demanded. It is generally held sufficient if the ballot substantially complies with the statute and does not tend to deceive the voter, and, when voted, shows his preference.[39] Thus, it has been held that votes "For subscription" and "Against subscription" did not substantially depart from the statutory requirement that the ballot should be "Subscription" and "No subscription."[40] And in another

[36] People v. Santa Anna, 67 Ill. 57; People v. Laenna, 67 Ill. 65. See, also, Kentucky Un. R. Co. v. Bourbon Co. 85 Ky. 98; 2 S. W. 687; Wilmington &c. R. Co. v. Onslow County, 116 N. Car. 563; 21 S. E. 205; Pacific Imp. Co. v. Clarksdale, 74 Fed. 528.

[37] Chicago &c. R. Co. v. Mallory, 101 Ill. 583. And it must be called by proper officers. Cedar Rapids &c. R. Co. v. Boone Co. 34 Ia. 45; Young v. Webster City &c. R. Co. 75 Ia. 140; 39 N. W. 234; Jacksonville &c. R. Co. v. Virden, 104 Ill. 339.

[38] People v. Dutcher, 56 Ill. 144.

[39] State v. Bissel, 4 Green (Ia.), 328; West v. Whitaker, 37 Ia. 598.

[40] Claybrook v. Rockingham Co. 114 N. Car. 453; 19 S. E. 593. But ballots must be furnished by the designated authorities. Current v. Luther, 164 Ind. 252; 72 N. E. 556.

case, where the statutory form of ballot for those opposed to the issue of bonds was "Against taxation," it was held proper to count the ballots of those opposed to the proposition which bore the words "against taxation for the benefit of railroad companies or any other monopolies to the indebtedness of the poor man."[41]

§ 824. Constitutional power—Compelling public corporations to aid railroad companies.—The power of the legislature over public corporations is, as we have seen, very great. It seems to be a necessary conclusion from the rule asserted by the weight of authority that the legislature may, without consulting the citizens of a locality, compel them to tax themselves to aid public enterprises.[42] Accordingly it has been held that it may compel the various municipalities through which the railroad passes to take stock in the enterprise, even against the will of the inhabitants,[43] though this right is denied by some authorities,[44] and but few attempts have been made to exercise it.

[41] Cattell v. Lowry, 45 Ia. 478.

[42] This is the general rule. Martin v. Dix, 52 Miss. 53; 24 Am. R. 661; United States v. Memphis, 97 U. S. 284; New Orleans v. Clark, 95 U. S. 644, 654; Gordon v. Cornes, 47 N. Y. 608; Madera &c. Dist. In re, 92 Cal. 296; 14 L. R. A. 755, and note; 27 Am. St. 106; Napa Valley R. Co. v. Napa County, 30 Cal. 435; Walker v. Tarrant Co. 20 Tex. 16; Marks v. Purdue University, 37 Ind. 155; Jewell v. Weed, 18 Minn. 272; Bass v. Fountleroy, 11 Tex. 698; Livingston Co. v. Darlington, 101 U. S. 407. Although it seems to be an arbitrary rule to compel taxpayers to burden themselves in order to aid railroad companies, it is difficult to perceive why it is not a necessary conclusion from the settled principle. But see Choisser v. People, 140 Ill. 21; 29 N. E. 546; Cairo &c. R. Co. v. Sparta, 77 Ill. 505; Horton v. Thompson, 71 N. Y. 513.

[43] Napa Valley R. Co. v. Napa Co. 30 Cal. 435. Permitting the authorities to subscribe without a submission of the question to the people may amount to a compulsory assessment of taxes, but the right of the legislature to do this has been upheld. Thompson v. Perrine, 106 U. S. 589; 1 Sup. Ct. 564; Ralls Co. v. Douglass, 105 U. S. 728; Thomson v. Lee Co. 3 Wall. (U. S.) 327; McCallie v. Chattanooga, 3 Head (Tenn.), 317; Long v. New London, 9 Biss. (U. S.) 539. And even where the state constitution prohibits the passage of laws for the benefit of individuals, the legislature may enact a valid law permitting certain counties to grant aid without a preliminary vote of the inhabitants, when the general law requires such a vote. Tipton Co. v. Rogers L. &c. Works, 103 U. S. 523.

[44] People v. Batchellor, 53 N. Y. 128; 13 Am. R. 480; Horton v. Thompson, 71 N. Y. 513; Cairo &c. R. Co. v. Sparta, 77 Ill. 505; Williams v. Roberts, 88 Ill. 11; Sykes v. Columbus, 55 Miss. 115. See

§ 825. Scope of the legislative power.—The scope of the legislative power, when not fenced about by constitutional limitations, is very wide and far reaching. The subject of taxation is a legislative one, and where it is not restricted by constitutional provisions the legislature may authorize a tax for almost any strictly public purpose. The power to tax has, however, inherent limitations, since it is always implied that the power to raise revenues by taxation is limited by the subject itself, insomuch as taxes can only be levied for public or governmental purposes. As it is settled that using money to aid in building a railroad is devoting it to a public purpose, it necessarily follows that the legislature has very great and extensive power over the subject of granting aid to railroad companies. So great and extensive is this power that it is competent for the legislature to authorize a municipality to give aid to a railroad, although the railroad may not be located within the territorial limits of the municipality. The legislature, where no constitutional limitation prohibits, may doubtless group counties and townships together, or may separate them into districts for the purpose of authorizing them to grant aid to railroad companies.[45] The decisions which lay down the rule that the legislature may create taxing or assessment districts support the rule we have stated.[46]

§ 826. Scope of the legislative power—Illustrative cases.—The power of the legislature to authorize a municipal corporation to aid in the construction of a railroad was recognized in a case wherein it was held that the action of the municipality granting aid to a railroad company, under a statute providing that townships might subscribe to the stock of any railway company, "building or proposing to

Choisser v. People, 140 Ill. 21; 29 N. E. 546; Post v. Pulaski Co. 49 Fed. 628; 1 C. C. A. 405.

[45] McFerron v. Alloway, 14 Bush. (Ky.), 580. See, also, Breckenridge County v. McCracken, 61 Fed. 191.

[46] Howell v. Buffalo, 37 N. Y. 267, 273; Challis v. Parker, 11 Kan. 394; Langhorne v. Robinson, 20 Gratt. (Va.) 661; Hingham &c. Turnpike Corp. v. County of Norfolk, 6 Allen (Mass.), 353; Gilson v. Board. 128 Ind. 65; 27 N. E. 234; 11 L. R. A. 835; Scovill v. Cleveland, 1 Ohio St. 126; Hill v. Higdon, 5 Ohio St. 243, 245; 67 Am. Dec. 289, and note; Philadelphia v. Field, 58 Pa. St. 320. See, generally, Merrick v. Amherst, 12 Allen (Mass.), 500; Burr v. Carbondale, 76 Ill. 455; Hensley Township v. People, 84 Ill. 544; Livingston Co. v. Darlington, 101 U. S. 407; Waterville v. Kennebec Co. 59 Me. 80; Litchfield v. Vernon, 41 N. Y. 123; Shaw v. Dennis, 10 Ill. 405.

build a railroad into, through or near such township," was conclusive upon the courts, although the railroad was nine miles distant from the township.[47] Where the building of a road will tend to increase the business of other roads leading to the municipality it is held that aid may be given, although the road aided lies at a distance from the municipality authorized to aid it.[48] It has also been held that where counties through which a proposed road will run are authorized to aid the construction of it or its connecting lines, aid in the construction of the latter may lawfully be extended, as soon as the construction of such a connecting line has been duly authorized by charter, and a contract for its construction has been entered into.[49] Municipalities may exercise the same privilege of taking stock to aid in building branches of a railroad that they may exercise in aid of the main road, in case the company is chartered to build the road with branches.[50] It has been held that a railroad may be lawfully aided by a subscription to its stock, although it lies outside the state,[51] and, indeed, even if it lies outside the country.[52] There are also cases holding that the legislature may confer the power to subscribe to a corporation not in existence, but to be subsequently created.[53] A provision in the charter

[47] Kirkbride v. Lafayette County, 108 U. S. 208; 2 Sup. Ct. 501. See, also, Brocaw v. Board, 73 Ind. 543; Nixon v. Campbell, 106 Ind. 47; 4 N. E. 296; 7 N. E. 258; Walker v. Cincinnati, 21 Ohio St. 14; 8 Am. R. 24.

[48] In the case of Van Hostrup v. Madison City, 1 Wall. (U. S.) 291, it was held that authority "to take stock in any chartered company for making a road, or roads, to said city," empowered the city of Madison to take stock in the Columbus and Shelby Railroad, which approached no nearer to Madison than forty-six miles distant, at which point it connected with another road running to that city.

[49] Kenicott v. Supervisors, 16 Wall. (U. S.) 452.

[50] Tyler v. Elizabethtown &c. R. Co. 9 Bush (Ky.), 510.

[51] Chicago &c. R. Co. v. Otoe Co. 16 Wall. (U. S.) 667; Quincy &c. R. Co. v. Morris, 84 Ill. 410; State v. Charleston, 10 Rich. L. (S. Car.) 491. See Falconer v. Buffalo &c. R. Co. 69 N. Y. 491; Walker v. Cincinnati &c. R. Co. 21 Ohio St. 14; 8 Am. R. 24. In Moulton v. Evansville, 25 Fed. 382, it was held that the constitution of Indiana presents no obstacle to a grant by the legislature to a city in that state of power to aid a railroad corporation whose road lies entirely in other states, and which connects with such city by means of a line of boats running from its terminus.

[52] In White v. Syracuse &c. R. Co. 14 Barb. (N. Y.) 559, it is held that the statute of New York, authorizing railway companies of that state to subscribe for stock in the Great Western Railway, Canada West, is constitutional.

[53] James v. Milwaukee, 16 Wall.

of a railroad company, authorizing any town or village along the line of its route to extend aid to it, will, as it has been held, confer such power upon a village which comes into existence after the charter is granted.[54] The legislature may authorize subscriptions to aid a railroad company whose charter empowers it to carry on some other business in connection with the operation of its road, as dealing in coal, or mining,[55] but we suppose that it is only in so far as the business is of a public nature that aid can be given by public corporations. It has been expressly held that a general power to subscribe aid to a railroad may be exercised by making a subscription to the stock of a company chartered to build and operate a railroad, even though it also engaged in the business of mining, and in other transactions expressly authorized by its charter. And bonds issued in pursuance of such subscriptions were held valid.[56]

§ 827. Power to aid railroads—Statutory authority.—Statutory authority is essential to the existence of power in a municipal or governmental corporation to aid railroad companies by donations or subscriptions. Upon this point there is no diversity of opinion.[57] In the

(U. S.) 159. It is held that the provisions of a general act, conferring on counties, cities, and towns, generally, power to make donations to railroad companies, practically become a part of all subsequent charters of cities and towns. Madry v. Cox, 73 Tex. 538; 11 S. W. 541. See, also, MacKenzie v. Wooley, 39 La. Ann. 944; 3 So. 128.

[54] Perrin v. New London, 67 Wis. 416; 30 N. W. 623.

[55] Kentucky Improvement Co. v. Slack, 100 U. S. 648; Randolph Co. v. Post, 93 U. S. 502; MacKenzie v. Wooley, 39 La. Ann. 944; 3 So. 128, where the railroad company was also to erect and operate a cotton compress. But the subscription must be used only to aid in constructing the railroad. MacKenzie v. Wooley, 39 La. Ann. 944; 3 So. 128.

[56] Randolph Co. v. Post, 93 U. S. 502.

[57] Kelley v. Milan, 127 U. S. 139; 8 Sup. Ct. 1101; Norton v. Dyersberg, 127 U. S. 160; 8 Sup. Ct. 1111; Young v. Clarendon Township, 132 U. S. 340; 10 Sup. Ct. 107; Concord v. Robinson, 121 U. S. 165; 7 Sup. Ct. 937; Daviess Co. v. Dickinson, 117 U. S. 657; Lewis v. Shreveport, 108 U. S. 282; 2 Sup. Ct. 634; Claiborne Co. v. Brooks, 111 U. S. 400; 4 Sup. Ct. 489; South Ottawa v. Perkins, 94 U. S. 260; Wells v. Supervisors, 102 U. S. 625; Weightman v. Clark, 103 U. S. 256; Coloma v. Eaves, 92 U. S. 484; St. Joseph Township v. Rogers, 16 Wall. (U. S.) 644; Kenicott v. Supervisors, 16 Wall. (U. S.) 453; Thomson v. Lee Co. 3 Wall. (U. S.) 327; Marsh v. Fulton Co. 10 Wall. (U. S.) 676; Commercial Nat. Bank v. Iola, 2

absence of express legislative enactment the power cannot exist inasmuch as the power to aid a railroad company by donations or subscriptions is not an inherent or incidental corporate power. Statutory authority to manage or control the affairs and business of a public or governmental corporation is not sufficient to authorize aid to a railroad company.[58] The power to aid railroad companies is said by some of the authorities to be an extraordinary power,[59] and this is true. But, while the power is not an ordinary one, yet it is one that is often essential to the interests of municipalities and to the exercise of which many counties, towns and cities owe their development and prosperity. If it be the object of law to promote the public welfare, as unquestionably it is, statutes conferring authority to aid in constructing improvements of a public character are wise and politic. Because a power may be abused is not, as it seems to us, a sufficient reason for con-

Dillon (U. S. C. C.) 353; Katzenberger v. Aberdeen, 16 Fed. 745; New Orleans &c. R. Co. v. Dunn, 51 Ala. 128; Aurora v. West, 22 Ind. 88; 85 Am. Dec. 413; Starin v. Genoa, 23 N. Y. 439; Bridgeport v. Housatonic &c. R. Co. 15 Conn. 475; Cook v. Sumner &c. Manufacturing Co. 1 Sneed (Ky.), 698; Johnson City v. Charlestown &c. R. Co. 100 Tenn. 138; 44 S. W. 670; State v. Whitesides, 30 S. Car. 579; 9 S. E. 661; 3 L. R. A. 777, and note; McCoy v. Briant, 53 Cal. 247; St. Louis v. Alexander, 23 Mo. 483; Board &c. v. McClintock &c. 51 Ind. 325; Jeffries v. Lawrence, 42 Iowa, 498; Atchison v. Butcher, 3 Kan. 104; Clay v. Nicholas Co. 4 Bush (Ky.), 154; Kentucky Union R. Co. v. Bourbon Co. 85 Ky. 98; 2 S. W. 687; Hawkins v. Board &c. 50 Miss. 735; Reineman v. Covington &c. Co. 7 Neb. 310; Welch v. Post, 99 Ill. 471; Gaddis v. Richland Co. 92 Ill. 119; 36 Central L. J. 133; Fisk v. Kenosha, 26 Wis. 23; Pennsylvania R. Co. v. Philadelphia Co. 47 Pa. St. 189.

[58] In the case of Lewis v. Pima Co. 155 U. S. 54; 15 Sup. Ct. 22, the statute of the United States provided, inter alia, that the general assembly of the territory should have power to create towns, cities or other municipal corporations and to confer upon them corporate powers and privileges necessary to their local administration, but also provided that the corporations should not be invested with power to incur any debt or obligation "other than such as shall be necessary to the administration of its internal affairs," and the court held that municipal corporations could not incur any debt to aid a railroad company. The court, in the course of the opinion, said: "It could never have been contemplated, however, that this power would be used to incur obligations in favor of a railroad operated by a private corporation for private gain, though also subserving a public purpose."

[59] 1 Dillon Municipal Corp. (4th ed.) 153.

demning legislative action in granting it to municipalities. The danger of abuse may be, and doubtless is, sufficient reason to call for great care in guarding and limiting the grant of the power. The power is so far an extraordinary one as to require that it be not held to exist in municipal corporations unless conferred by clear statutory provisions, and to require, also, that the construction of statutes conferring such power be strict, as against railroad companies claiming aid.[60]

§ 828. **Power to grant aid is continuous.**—Where power is conferred upon a municipal corporation to aid a railroad company, it is a continuous power, and is not exhausted by a single exercise.[61] Where a limit is fixed by the enabling act, the municipality may repeatedly exercise the power, provided it does not go beyond the limit fixed by the statute. A failure at one meeting or at one election to order the granting of aid does not preclude the municipality from holding other meetings or elections.[62] It has been held that a general authority to accept, by a two-thirds vote, a power conferred upon the municipality to subscribe in aid of a railroad, is not exhausted by a single vote, and that the power will survive repeated rejections, and that a two-thirds vote at a subsequent meeting will be a valid acceptance of the power to extend the desired aid.[63] The common council of a city can-

[60] Empire Township v. Darlington, 101 U. S. 87; Brocaw v. Board, 73 Ind. 543, 548.

[61] Demaree v. Johnson, 150 Ind. 419; 49 N. E. 1062; Harding v. Rockford &c. R. Co. 65 Ill. 90; Smith v. Omaha &c. R. Co. 97 Ia. 545; 66 N. W. 104; Bowling Green &c. R. Co. v. Warren Co. 10 Bush (Ky.), 711.

[62] Society for Savings v. New London, 29 Conn. 174.

[63] Society for Savings v. New London, 29 Conn. 174. See Woodward v. Calhoun Co. 2 Cent. L. Jour. 396. In the absence of any prohibition in the statutes against submitting the question to the electors more than once, a second vote may be taken. Supervisors v. Galbraith, 99 U. S. 214. A township subscribed to the stock of a railroad, on the condition, among others, that a depot should be built at a certain place. By mistake this place, as set out in the petition and notices of election, was different from that intended, and from that where the depot was built. Upon discovery of this mistake, it was attempted to hold another election, in which the true route of the road and place for the depot should be set out, relying on the provisions of the statute that a second election should be held "for the same purpose" as the first, under certain circumstances. In the preliminaries for the second election a different amount for the subscription, and a different route and time of completion of the road, were specified.

not, however, two years after having rejected a petition presented by the stockholders, asking that aid be given to a certain railroad, reconsider such petition and extend the aid for which it asks.[64] But the doctrine of the case cited in the note cannot be understood as preventing a second or subsequent petition from being presented to and acted upon by the common council. A general authority to subscribe to the capital stock of any railroad does not fail with a single exercise, but subscriptions may be made to the stock of any number of companies, so long as the terms of the statute are followed in each case.[65] And a municipality may make several subscriptions to the same company if their sum does not exceed the amount which it is empowered to subscribe in aid of such company.[66]

§ 829. Railroad aid laws not restricted to new companies.—It is obvious that the welfare of a community may be promoted by the extension of an existing railroad, and hence there is no reason for denying that a statute authorizing, in general terms, the grant of aid to railroad companies may apply to the extension of the road of an existing company. The theory upon which railroad aid laws principally

The court held that the election was not for the same purpose as the first, and the subscription was invalid. Kansas City &c. R. Co. v. Rich Tp. 45 Kan. 275; 25 Pac. 595.

[64] Madison v. Smith, 83 Ind. 502.

[65] Chicot Co. v. Lewis, 103 U. S. 164. Provided, of course, that the total of the subscriptions does not exceed the amount that the municipality has power to subscribe. It is held, under the provisions of the Kansas statute limiting the amount of subscription or loan to a railroad by a county, city or township, that such limit is not confined to the subscription or loan to any one railroad, but restricts indebtedness for railroad purposes generally, whether the aid be extended to one or more corporations. Chicago &c. R. Co. v. Freeman, 38 Kan. 597; 16 Pac. 828. Under the New Mexico statute, authorizing any county to issue county bonds to assist in the construction of any railroad passing through the county, "not exceeding five per centum of the assessed value of the property of the county," bonds to the extent of five per centum may be issued to each road passing through the county, when so ordered by a vote of the people. Coler v. Santa Fe Co. 6 N. M. 88; 27 Pac. 619.

[66] Empire Township v. Darlington, 101 U. S. 87; Brocaw v. Board of Commissioners, 73 Ind. 543; Scotland Co. v. Thomas, 94 U. S. 682; Henry Co. v. Nicolay, 95 U. S. 619; People v. Waynesville, 88 Ill. 469; Hurt v. Hamilton, 23 Kan. 76; First Nat. Bank v. Concord, 50 Vt. 257.

rests is that the construction of the road is a benefit to the municipality, and as the extension of an old road into a municipality is a benefit to the municipality there is no just ground upon which it can be held that aid may not be granted in order to secure an extension.[67] It may, perhaps, be competent for the legislature to limit the power to grant aid to new roads, but where there is no provision limiting the authority conferred upon the municipal corporation to grant aid to corporations newly created the courts cannot make such a limitation, since that would be to legislate.

§ 830. Taxing the property of one railroad company to aid in the construction of the road of another company.—The property of a railroad company within the limits of a municipality which has voted aid to a competing railroad is subject to taxation to pay the aid voted.[68] It is affirmed in the case referred to in the note that all property subject to taxation must be made to bear its share of the burden, otherwise the tax would not be equal and uniform.[69] The court refused assent to the argument of counsel that, as the existing company could not be benefited by the construction of a rival road, there was no power to levy the tax.[70] The good of the local public is to be regarded, not that of particular corporations or persons, and it is for the majority to determine what is for the good of the municipality. It is evident that if particular corporations or persons could defeat a tax because they were not benefited the public good might be sacrificed to private interests. Such a result is always to be avoided, since it is opposed to fundamental principles of government.

[67] Pittsburgh &c. R. Co. v. Harden, 137 Ind. 486; 37 N. E. 324.

[68] Pittsburgh &c. R. Co. v. Harden, 137 Ind. 486; 37 N. E. 324.

[69] Citing Cooley Taxation, 130, 134.

[70] On this point it was said: "There may always be found one or more persons who might make the claim that the tax imposed is of no benefit to them; and there are many more persons who, by reason of absence, sex, infancy or other disability, are denied a voice in the imposition of the tax. Yet, when a majority have determined in favor of the burden, it is taken as the voice of the whole community; and not only those who do not or can not vote upon the proposition, but even those who vote against it are equally bound by the result. The majority of the voters proceeding under the forms and by the authority sanctioned by the legislature, speaks for the general good. Even the rival railroad company participates in the increased prosperity caused by the construction of the new road."

§ 831. Construction of statutes conferring authority to aid railroad companies.—As the power to aid railroad companies is not an ordinary corporate power, but exists only by virtue of express statutory grant,[71] it necessarily follows that statutes conferring power to aid railroad companies must be strictly construed. The cardinal rule that the legislative intention is to be ascertained and carried into effect controls, but nevertheless the construction is to be strict as against the company and liberal in favor of the public. The construction, to be sure, is not to be so strict as to defeat the intention of the framers of the statute, but the statute cannot be construed as granting authority that is not conferred either expressly or by clear and necessary implication.[72]

§ 831a. Inadequacy of statute.—It has been held that a statute authorizing cities to procure land to be donated to a railroad company for depot grounds, engine houses, and the like, but containing

[71] Ante, § 827; Lynchburg v. Slaughter, 75 Va. 57; Brodie v. McCabe, 33 Ark. 690; Barnes v. Lacon, 84 Ill. 461; Campbell v. Paris &c. R. Co. 71 Ill. 611; Lamoille &c. R. Co. v. Fairfield, 51 Vt. 237; Northern Bank v. Porter Township, 110 U. S. 608; 4 Sup. Ct. 254; Bissell v. Kankakee, 64 Ill. 249; 16 Am. R. 554. See, also, Mellen v. Lansing, 11 Fed. 820, 829; Purdy v. Lansing, 128 U. S. 557; 9 Sup. Ct. 172; Sutherland Stat. Constr. (2d ed.) §§ 536, 541, 549. There must, in every instance, be a valid statue. Amoskeag Bank v. Ottawa, 105 U. S. 667; Turner v. Commissioners, 27 Kan. 314; Gilson v. Dayton, 123 U. S. 59; 8 Sup. Ct. 66.

[72] Pitzman v. Freesburg, 92 Ill. 111; Lewis v. Shreveport, 3 Woods, 205; Lewis v. Shreveport, 108 U. S. 282; 2 Sup. Ct. 634; Allen v. Louisiana, 103 U. S. 80; Marsh v. Fulton Co. 10 Wall. (U. S.) 676; Leavenworth Co. v. Miller, 7 Kan. 479; 12 Am. R. 425. See State v. Charleston, 10 Rich. L. (S. C.) 491; City Council v. Wentworth &c. Baptist Church, 4 Strob. 306, 308; Singer &c. Co. v. Elizabeth, 42 N. J. L. 249; State v. Board (Ind.), 76 N. E. 986, 996, citing text. In the case of Meyer v. Muscatine, 1 Wall. (U. S.) 384, a broader doctrine than that stated in the text was announced, but we think that the decision in that case is greatly modified if not entirely overruled by later and better considered cases. Kelley v. Milan, 127 U. S. 139; 8 Sup. Ct. 1101; 22 Am. & Eng. R. Cas. 1; Merrill v. Monticello, 138 U. S. 673; 11 Sup. Ct. 441; Brenham v. German Am. Bank, 144 U. S. 173; 12 Sup. Ct. 559; Claiborne Co. v. Brooks, 111 U. S. 400; 4 Sup. Ct. 489; State v. Glover, 155 U. S. 513; 15 Sup. Ct. 186; Coffin v. Indianapolis, 59 Fed. 221, and cases cited. See, also, United States v. Oregon &c. R. Co. 164 U. S. 526; 17 Sup. Ct. 165.

no provision authorizing the levy of a tax to meet the indebtedness in procuring such grounds, and creating no funds to pay for same, only gives the city the right to pay for the site with warrants payable out of its general or incidental funds, and does not empower the city to issue its bonds for this purpose.[73]

§ 832. Impairment of contract rights.—The obligation of a contract is protected by the federal constitution against the people of a state, as well as against a state legislature. A contract right cannot, therefore, be impaired by an amendment to a state constitution, nor by a change thereof.[74] It is quite clear that the rights of a railroad company, when vested by virtue of an effective contract, cannot be impaired, but the difficulty is in determining when there is an effective contract. It cannot be held that a mere vote or order declaring that aid be granted constitutes a contract, but if the railroad company should accept the proffered aid, and especially if it should, in reliance on the offer of aid, actually undertake the work of constructing the road, and should expend money in the work, there would, as we believe, be a contract within the protection of the constitution.[75] If, however, the offer of aid should be withdrawn before acceptance, there would be no contract. It has been held that the contract is not complete until the subscription is actually placed upon the books of the railroad company,[76] but this seems to us a doctrine that cannot justly be extended to cases where the railroad company, acting upon the order granting aid and influenced thereby, has expended money in the construction of the road. It is held in a recent case, however, that it is not to be supposed that a railroad was built for the purpose of selling stock or obtaining a donation; that the performance of conditions precedent by the company under the statute does not constitute a con-

[73] Swanson v. Ottumwa (Ia.), 106 N. W. 9.

[74] Gunn v. Barry, 15 Wall. (U. S.) 610; United States v. Jefferson Co. 1 McCrary (U. S.), 356.

[75] Even in those jurisdictions where the rule is that the railroad company is not entitled to the money until it is collected, it is held that it has such an interest as will pass to the consolidated corporation, of which it forms part. Scott v. Hansheer, 94 Ind. 1; Pope v. Board, 51 Fed. 769. But see State v. Board (Ind.), 76 N. E. 986. See ante, § 329, and authorities cited in note 1.

[76] Aspinwall v. Commissioners &c. 22 How. (U. S.) 364; List v. Wheeling, 7 W. Va. 501; Cumberland &c. R. Co. v. Barren Co. &c. 10 Bush. (Ky.) 604; Land Grant &c. Co. v. Davis Co. 6 Kan. 256.

tract, and that, under the Indiana statute, although the road had been completed and a special tax levied against the township, the company had no interest therein as against the township, and could not maintain mandamus to compel the collection of the tax.[77] Where there is a failure to perform the acts required, in order to entitle the railroad company to the aid ordered or voted it, there is no contract,[78] for until those acts are performed the agreement is not complete. If, however, there is a complete agreement, the failure to do what is required will not, as we believe, destroy or annul the contract, but may be cause for defeating a claim to the aid, or for adjudging the contract to be ineffective. Where the constitution declares that its provisions shall not apply to prior proceedings, they are not, it is obvious, affected by such provisions.[79] Where bonds are issued and sold there can be no question as to the existence of a contract within the protection of the federal constitution, although there may be a question as to the validity of such bonds, as, for instance, where the conditions essential to the existence of power to issue them were not complied with by the municipal officers. But where the statute provided for assessments to meet interest on bonds, but made it unlawful to levy more than five mills on the dollar, it was held that the rate was left to the discretion of the levying authority, within the prescribed limit, and that a constitutional provision prohibiting a levy of more than one-half of one per cent for all purposes, except to pay indebtedness existing at the time of the ratification of the constitution, in which case it was provided that an additional one-half percent might be levied, did not impair the obligation of the contract with the bondholders.[80]

§ 833. Impairment of contract rights—Illustrative cases.—Where rights become contract obligations they will not be affected by consti-

[77] State v. Board (Ind.), 76 N. E. 986. The statute provided that the board of county commissioners might make a donation after the assessment had been levied and collected.

[78] Jeffries v. Lawrence, 42 Iowa, 498; Falconer v. Buffalo R. Co. 69 N. Y. 491; Birch Cooley v. First Nat. Bank, 86 Minn. 385; 90 N. W. 788.

[79] Fairfield v. Gallatin Co. 100 U. S. 47; Louisville v. Portsmouth &c. Bank, 104 U. S. 589; Lippincott v. Pana, 92 Ill. 24; Middleport v. Aetna &c. Co. 82 Ill. 562; Clay Co. v. Society &c. 104 U. S. 579; People v. Hamill, 134 Ill. 666; 17 N. E. 799; 22 Am. & Eng. Corp. Cas. 39; Moultrie Co. v. Fairfield, 105 U. S. 370; 7 Am. & Eng. R. Cas. 194.

[80] Desha Co. v. State, 73 Ark. 387; 84 S. W. 625.

tutional amendments adopted after the date of their acquisition.[81] But it has been held that where a railroad company, after the adoption of a new constitution, accepts an amendment to its charter, authorizing its extension through other counties not included in the route designated in the original charter, all subscriptions by counties along such extension will be controlled by the provisions of the new constitution.[82] A repeal of the act authorizing the issue of municipal bonds in aid of a railroad will not affect the liability of the municipality upon bonds issued under authority of such act before its repeal, and the municipality may be compelled by mandamus to raise a tax with which to pay them.[83]

§ 834. Construction of statutes—Implied powers.—Statutes conferring power upon municipalities to aid railroad companies usually prescribe the nature of the aid that may be given and provide what means shall be adopted for paying the donations or subscriptions, but in many cases no provision is made as to the mode for paying the subscriptions or the bonds, so that resort must be had to other statutes or to the general rules of law. A statute is not to be considered as an isolated or detached fragment of law, but as a part of one uniform system of laws,[84] hence a statute providing for giving aid to a railroad company, not fully effective in itself, may be made entirely effective by the help of other statutes or the general rules of the unwritten law. It may happen, it is true, that a statute may be so vague and indefinite as to be incapable of enforcement, but this can very seldom occur. A rule which often aids in giving effect to statutes is this: the grant of a principal power carries with it such incidental powers as are necessary to effectuate it. By force of this rule statutes empowering a municipal corporation to grant aid to a railroad give power to levy a tax to raise the money necessary to pay the donation or subscription, or, if bonds are lawfully issued, to pay the

[81] Kansas City &c. R. Co. v. Nodaway Co. 47 Mo. 349; Slack v. Maysville &c. R. Co. 13 B. Mon. (Ky.) 1; Henry Co. v. Nicolay, 95 U. S. 619.

[82] State v. Saline Co. 51 Mo. 350; 11 Am. R. 454.

[83] St. Joseph &c. R. Co. v. Buchanan County Ct. 39 Mo. 485; People v. Tazewell Co. 22 Ill. 147; Sibley v. Mobile, 3 Woods (U. S.), 535; 4 Am. L. Times (N. S.), 226; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535.

[84] Humphries v. Davis, 100 Ind. 274; 50 Am. R. 788; Bishop Written Laws, §§ 86, 113a, 242b.

bonds.[85] Where a tax is provided for, and no specific provision is made for collecting it, the implication is that it is to be collected as taxes are ordinarily collected, with the usual interest and penalties for delinquencies.[86] The rule that a statute forms part of a uniform system authorizes the conclusion we have stated. It may be noted, also, that the rule is that statutes will not be suffered to fail, if, by considering them in connection with other statutes, or with principles of the common law, they can be given effect. Reference may be had to other statutes to determine whether delinquents can be charged with a penalty.[87]

§ 835. Construction of statutes conferring authority to aid railroad companies—Illustrative instances.—Authority conferred upon a county to aid a company which constructs a road through the county does not empower the county to vote aid to a company that locates and builds its road entirely outside of the county.[88] Where authority is conferred to grant aid to a designated road and to a certain other road, aid may be given to either.[89] Power conferred by the charter of a municipal corporation to "borrow money and issue bonds therefor" does not confer authority to aid railroad companies.[90] While the later cases must be regarded as settling the law and as adjudging that authority to aid a railroad company by subscriptions does not carry with it power to execute negotiable instruments, still the language of the statute may be such as to carry such authority.[91] A statute con-

[85] Nelson v. Haywood Co. 87 Tenn. 781; 11 S. W. 885; 4 L. R. A. 648; Nichol v. Mayor &c. 9 Humph. (Tenn.) 251; Ralls Co. v. United States, 105 U. S. 735, 736.

[86] Bothwell v. Millikan, 104 Ind. 162; 3 N. E. 816.

[87] Although the statute specifically limits the tax that may be assessed to a designated per centum, a penalty may be charged against delinquent tax-payers. Chicago &c. Co. v. Hartshorn, 30 Fed. 541; Tobin v. Hartshorn, 69 Iowa, 648; 29 N. W. 764. See Snell v. Campbell, 24 Fed. 880. In the case last cited it was held that the state might remit the penalties, but this was denied in Tobin v. Hartshorn, supra, and in Chicago &c. Co. v. Hartshorn, supra, the court followed Tobin v. Hartshorn.

[88] State v. Hancock Co. 11 Ohio St. 183.

[89] First National Bank v. Concord, 50 Vt. 257.

[90] Jonesboro City v. Cairo &c. R. Co. 110 U. S. 192; 4 Sup. Ct. 67; Lewis v. Shreveport, 108 U. S. 282; 2 Sup. Ct. 634.

[91] Ashley v. Board, 60 Fed. 55; Commonwealth v. Williamston, 156 Mass. 70; 30 N. E. 472; Evansville v. Woodbury, 60 Fed. 718. See, generally, Nolan Co. v. State, 83 Texas, 182; 17 S. W. 823; Brenham v.

ferring authority to subscribe for stock and issue bonds does not empower the municipality to make a donation of property;[92] neither does a statute authorizing a subscription to the stock of a railroad company empower the city to endorse its bonds. Under such a statute the city receives something in return for its money, but an endorsement creates a liability, being, in effect, a contract of suretyship.[92a] A sale of stock back to the company and a nominal consideration paid in bonds does not, it has been held, render the bonds invalid in the hands of a bona fide holder, although the statute requires stock to be subscribed and does not provide for a donation,[93] but on this point there is a conflict of authority.[94] Where cities are authorized to aid railroad companies they may exercise the power, although they form part of townships to which a like power is given.[95] It was held under a statute authorizing "any village, city, county or township" to aid a railroad company that aid might be given by an incorporated town, as towns were included in the term any vilage,[96] but upon this point there is some conflict of authority.[97] So, upon a somewhat similar line of reasoning to that pursued by the Supreme Court of the United States in one of the cases referred to,[98] it was held that a city incorporated by a special charter might grant aid, although one of the state statutes provided that "no general laws as to the powers of cities shall be construed to extend to cities organized under a special charter."[99] A statute authorizing aid when "necessary to aid in the completion of any railroad" has been held not to au-

German Am. Bank, 144 U. S. 173; 12 Sup. Ct. 555; Coffin v. Board, 57 Fed. 137; Dodge v. Memphis, 51 Fed. 165.

[92] Choisser v. People, 140 Ill. 21; 29 N. E. 546. See Sampson v. People, 140 Ill. 466; 30 N. E. 689; Post v. Pulaski Co. 49 Fed. 628.

[92a] Blake v. Macon, 53 Ga. 172.

[93] Cairo v. Zane, 149 U. S. 122; 13 Sup. Ct. 803; Enfield v. Jordan, 119 U. S. 680; 7 Sup. Ct. 358.

[94] Board v. State, 115 Ind. 64; 4 N. E. 589; 17 N. E. 855; Choisser v. People, 140 Ill. 21; 29 N. E. 546; Post v. Pulaski Co. 49 Fed. 628. See Olcott v. Supervisors, 16 Wall. (U. S.) 678; Queensbury v. Culver, 19 Wall. (U. S.) 83.

[95] Bard v. Augusta, 30 Fed. 906; Iola v. Merriman, 46 Kan. 49. But we suppose that if the language of the statute conferred power upon the townships only it could not be exercised by cities.

[96] Enfield v. Jordan, 119 U. S. 680; 7 Sup. Ct. 358; Martin v. People, 87 Ill. 524.

[97] Welch v. Post, 99 Ill. 471. See Sampson v. People, 141 Ill. 17; 30 N. E. 781.

[98] Enfield v. Jordan, 119 U. S. 680; 7 Sup. Ct. 358.

[99] Bartemeyer v. Rohlfs, 71 Iowa, 582; 32 N. W. 673.

thorize aid to a road not yet begun.[100] But the United States Circuit Court of Appeals took a different view of the statute and refused to follow the state court.[101]

§ 836. Construction of enabling acts—Adjudged cases.—Questions of construction present themselves in different forms, and it is very difficult to state rules. Not only is it true that it is difficult to state rules, but it is also true that a better practical conception of the prevailing doctrines can be obtained by a reference to the adjudged cases, and for that reason we refer to cases in addition to those to which we have already directed attention. The statute which confers the power must be reasonably construed to carry into effect the purposes of its enactment,[102] and such of its provisions as are merely directory need not always be strictly complied with.[103] The authority by which a

[100] Graves v. Moore Co. Com'rs, 135 N. Car. 49; 47 S. E. 134; Commissioners v. Snuggs, 121 N. Car. 394; 28 S. E. 539; 39 L. R. A. 439.

[101] Board v. Coler, 113 Fed. 705. This case and those cited in the last preceding note also contain a review of the authorities as to the effect of recitals in bonds. The decision of the circuit court of appeals was affirmed in Stanley Co. v. Coler, 190 U. S. 437; 23 Sup. Ct. 811. See, also, Wilkes County v. Coler, 113 Fed. 725; 180 U. S. 506; 21 Sup. Ct. 458; Wilkes County v. Coler, 190 U. S. 107; 23 Sup Ct. 738; and compare Stanley Co. v. Coler, 96 Fed. 284.

[102] Curtis v. Butler, Co. 24 How. (U. S.) 435; Woods v. Lawrence Co. 1 Black (U. S.), 386. The term "village," in the Illinois act amending the charter of the Illinois Southeastern Railway Company, authorizing "any village, city, county or township" along the route of the road to subscribe or make donations to the stock of the company, and to issue bonds therefor, includes "towns," and the bonds of an incorporated town issued thereunder are valid. Enfield v. Jordan, 119 U. S. 680; 7 Sup. Ct. 358. The notice provided that "one-half of the tax should be levied and collected in the year 1887, and the other half in the year 1888." As the board of supervisors had no power to levy taxes and collect them the same year, but the taxes levied in one year were not collectible until the next, the clause of the notice was held to mean that the levy should be made within such time as that the tax would be collectible in the year 1887, and a levy made in 1886 was proper. Bartemeyer v. Rohlfs, 71 Iowa, 582; 32 N. W. 673.

[103] As to what provisions are merely directory and what are mandatory, see the following cases: Wood v. Lawrence Co. 1 Black (U. S.), 386; McPherson v. Foster, 43 Iowa, 48; 22 Am. R. 215; Wilmington &c. R. Co. v. Commissioners, 116 N. Car. 563; 21 S. E. 205; Redd v. Commissioners, 31 Gratt. (Va.) 695; Board v. Texas &c. R.

municipality is enabled to subscribe aid to a railroad may be contained in the charter of the railroad company, and such a grant will generally carry with it by necessary implication the power to levy taxes to meet the subscription.[104] If the power to subscribe be granted to all the towns and villages along the line of the road, which is undetermined, a town will have no authority to subscribe until the road is finally and definitely located with reference to it.[105] Such a subscription can be voted only to a corporation authorized to receive it, and it can be made only to the corporation designated in the vote.[106] A grant to a rail-

Co. 46 Tex. 316; Vicksburg v. Lombard, 51 Miss. 111; State v. Saline Co. Ct. 48 Mo. 390; 8 Am. R. 108; Mt. Vernon v. Hovey, 52 Ind. 568; Eagle v. Kohn, 84 Ill. 292; Society for Saving v. New London, 29 Conn. 174; Deming v. Houlton, 64 Me. 254; 18 Am. R. 253, and note; Hardensbergh v. Van Keuren, 16 Hun (N. Y.), 17; Draper v. Springport, 104 U. S. 501; Stanton v. Alabama &c. R. Co. 2 Woods (U. S.), 523; Roberts v. Bolles, 101 U. S. 119; Cass Co. v. Gillett, 100 U. S. 585; Supervisors v. Galbraith, 99 U. S. 214; Coloma v. Eaves, 92 U. S. 484. But it must be borne in mind that the interpretation of the statute is very much more liberal when the validity of bonds actually issued is in question than when the question arises between the original parties before the aid has been given. A statute provided that the clerk of the election should certify the result of the election, together with the time, terms, and conditions upon which the tax, when collected, should be paid to the railroad company, and also provided that the order of the board of supervisors making the levy should indicate upon what conditions the tax should be paid over to the railroad company. The clerk made out his certificate, as required, and the supervisors, in making the levy, had this certificate before them, but failed to direct in their order upon what terms the railroad should be entitled to the tax. The court held that this was a mere omission, not of the essence of the thing done, and that it did not affect the validity of the levy, especially as the certificate of the clerk had made all the stipulations and conditions of record. Meriwether v. Muhlenburg Co. 120 U. S. 354; 7 Sup. Ct. 563.

[104] Peoria &c. R. Co. v. People, 116 Ill. 401; 6 N. E. 497. See, also, Loan Assn. v. Topeka, 20 Wall. (U. S.) 655; Nelson v. Haywood Co. 87 Tenn. 781; 11 S. W. 885; 4 L. R. A. 648. But we think that the rule that the authority of the municipality to subscribe may be given in the charter of the company can not apply under constitutions forbidding special or local laws, and requiring legislative acts to embrace only one subject.

[105] Purdy v. Lansing, 128 U. S. 557; 9 Sup. Ct. 172.

[106] Bates Co. v. Winters, 97 U. S. 83; Marsh v. Fulton Co. 10 Wall. (U. S.) 676; Bell v. Mobile &c. R. Co. 4 Wall. (U S.) 598; Big Grove v. Wells, 65 Ill. 263; Board &c. Fulton Co. v. Mississippi &c. R. Co. 21 Ill. 338. But compare Denison

road of power to receive aid from certain classes of municipalities will not necessarily authorize such municipalities to grant the aid. Such a grant has been construed to be made with reference to an existing general statute by which only a portion of the municipalities were empowered to make subscriptions of this character, and it was held that the charter did not extend the powers contained in the general act to other municipalities not embraced by its terms.[107] But the general rule is that a special act will be construed to be independent of a prior general act, and in addition thereto, if it makes no reference to the general act. And the powers conferred by the different acts may be separately exercised.[108] So, where a charter authorized the railroad to receive subscriptions from a county upon certain terms, it was held that the validity of bonds issued in accordance therewith was not affected by a prior special act of the legislature requiring the question of issuing such bonds to be submitted to a vote of the taxpayers.[109]

v. Columbus, 62 Fed. 775. A proposition submitted to the voters of a county, in which it is proposed to vote the bonds of such county to a railroad company, must specifically designate the donee. A proposition in the alternative, to issue to a certain corporation named, or to another designated corporation, is not sufficient to authorize the bonds, although adopted by the legal voters. State v. Roggen, 22 Neb. 118; 34 N. W. 108. An order submitting to the voters of a county a proposition to subscribe stock in aid of a railroad under the general railroad law of Missouri, need not specify the name of the corporation, where the proposition describes the proposed route of the road with the requisite certainty. Ninth Nat. Bank v. Knox Co. 37 Fed. 75. See, also, MacKenzie v. Wooley, 39 La. Ann. 944; 3 So. 128; Kentucky Union R. Co. v. Bourbon Co. 85 Ky. 98; 2 S. W. 687; Young v. Webster City &c. R. Co. 75 Iowa, 140; 39 N. W. 234; State v. Harris, 96 Mo. 29; 8 S. W. 794; Onstott v. People, 123 Ill. 489; 15 N. E. 34.

[107] Pitzman v. Freeburg, 92 Ill. 111. See, also, Campbell v. Paris &c. R. Co. 71 Ill. 611; East Oakland v. Skinner, 94 U. S. 255.

[108] See Stevens v. Anson, 73 Me. 489, where two several subscriptions were made under a general and a special act, and both were held valid. The Kansas act for the organization of cities of the third class, providing that such cities shall remain a part of the corporate limits of the townships in which they are situated, for various purposes, including that of subscribing stock in aid of constructing railroads, is held not to exclude such cities from the power to issue railroad aid bonds. Bard v. Augusta, 30 Fed. 906.

[109] Burr v. Chariton Co. 2 McCrary (U. S.), 603. But the bonds in this case were in the hands of innocent purchasers. See Butz v. Muscatine, 8 Wall. (U. S.) 575; Quincy v. Jackson, 113 U. S. 332; 5 Sup. Ct. 544.

Where a special act refers to a prior general act as fixing the limits of the authority conferred by it and defining the mode of its exercise, the court will construe the special act as conferring the powers enumerated in the general act.[110] A general act forbidding municipal subscriptions in aid of railroads has been construed to repeal special acts authorizing them.[111] But it has been held that the facts which would authorize a writ of mandamus to compel a subscription do not necessarily establish a binding contract. And the repeal of a statute under which a subscription was made, and to enforce the provisions of which the proceedings in mandamus were pending, was held to defeat the proceedings.[112]

§ 837. Means and methods.—Where there are no limiting constitutional provisions the legislature has a choice of means and methods, and may provide how and upon what terms and conditions donations or subscriptions in aid of railroads may be made. The subject is legislative, and, in the absence of constitutional limitations, the general rule is that it is for the legislature to determine the means and methods that shall be employed.[113] Municipal corporations are creatures of legislation and subject to legislative control, so that it is within the power of the legislature, except where limitations are imposed by the constitution, to control the action of such corporations.[114] The general doctrines to which we have referred give to the legislature very extensive dominion over the subject of aiding railroads, for the subject lies within the legislative domain, and the legislative decision upon questions of policy and expediency is conclusive. It is only

[110] Henderson v. Jackson Co. 2 McCrary (U. S.), 615.

[111] Jeffries v. Lawrence, 42 Iowa, 498.

[112] Covington &c. R. Co. v. Kenton County Court, 12 B. Mon. (Ky.) 144, 152. See State v. Garroutte, 67 Mo. 445; People v. Pueblo Co. 2 Col. 360.

[113] Legal Tender Cases, 110 U. S. 421; 4 Sup. Ct. 122; State v. Haworth, 122 Ind. 462; 23 N. E. 946; 7 L. R. A. 240; Hancock v. Yaden, 121 Ind. 366; 23 N. E. 235; 6 L. R. A. 576; State v. Kolsem, 130 Ind. 434, 442; 29 N. E. 595; 14 L. R. A. 566, and note; Cooley's Const. Lim. (7th ed.) 167, 168.

[114] Laramie Co. v. Albany Co. 92 U. S. 307, 308; People v. Morris, 13 Wend. (N. Y.) 325; Meriwether v. Garrett, 102 U. S. 472, 511; Cheaney v. Hooser, 9 B. Monr. (Ky.) 330; Mobile v. Watson, 116 U. S. 289; 6 Sup. Ct. 398; State v. Jennings, 27 Ark. 419; Clinton v. Cedar Rapids &c. R. Co. 24 Iowa, 455; Demarest v. New York, 74 N. Y. 161; David v. Portland &c. Co. 14 Ore. 98; 12 Pac. 174.

where some constitutional provision is violated that the courts can interfere.

§ 838. Requirements of statute—Classes of cases.—It seems to us that there are two general classes of cases, namely, those in which taxpayers bring suit before the acquisition of rights by third persons, and those in which the rights of third persons are acquired before suit is brought. There is an essential difference between the two classes, and there should be, as we believe, different rules for each class. If interested persons have an opportunity to test the proceedings of municipal officers and negligently fail to make use of it until third persons acquire rights, they should not be allowed to avail themselves of irregularities or errors to defeat the proceedings unless the errors go to the question of power or jurisdiction. The distinction between the two classes of cases is lost sight of or disregarded by some of the courts, for they apply quite as strict rules in cases where the rights of third persons have intervened as in cases where suit is brought before the acquisition of rights by third persons. It is true that the power is purely statutory, and that where a power is statutory the provisions of the statute conferring it must be strictly pursued, but statutory provisions may be waived either by words or conduct, and persons who stand by until third persons acquire rights should be held to have waived a compliance with the requirements of the statute except where the failure to comply affects the question of power or jurisdiction.

§ 839. Power to aid by subscription does not authorize the execution of bonds.—Power conferred upon a municipal corporation to aid a railroad company, by subscribing for stock, does not empower the municipality to issue bonds. The power to issue municipal bonds, whether aid bonds or any other class of bonds, is not, as a rule, to be implied from the mere grant of authority to aid railroad companies by donations or subscriptions.[115] The later decisions very much, and,

[115] Kelley v. Milan, 127 U. S. 139; 22 Am. & Eng. Corp. Cas. 1; Daviess County v. Dickinson. 117 U. S. 657; 6 Sup. Ct. 897; Marsh v. Fulton Co. 10 Wall. (U. S.) 676; Wells v. Supervisors. 102 U. S. 625; 2 Am. & Eng. R. Cas. 605; Ottawa v. Carey, 108 U. S. 110; 2 Sup. Ct. 361; Mayor &c. of Pulaski v. Gilmore, 21 Fed. 870; Tax-payers v. Tennessee &c. Railroad Co. 11 Lea (Tenn.), 330; Norton v. Dyersburg, 127 U. S. 160; 8 Sup. Ct. 1111; Hill v. Memphis, 134 U. S. 198;

as we believe, very wisely, restrict the earlier decisions.[116] It seems to us that, as municipal corporations are not business or trading corporations, but instrumentalities of government,[117] it should be held that there is no power to issue negotiable bonds or promissory notes, unless the power is conferred by statute. Persons who deal in municipal bonds ought to be made to understand that municipal corporations have only such powers as are clearly conferred by statute, so that in dealing with municipal corporations they must ascertain whether power to issue the bonds exist, and where they are fully put upon inquiry and there is no element of estoppel, determine for themselves whether the bonds are valid.

§ 840. Levy of taxes—Withdrawal of power—Time.—Where power is expressly conferred upon a municipal corporation to incur an indebtedness the power to provide for its payment by taxation is implied.[118] The power to tax cannot be withdrawn until the debt is satisfied.[119] The failure, neglect or refusal of the municipal officers

10 Sup. Ct. 562; Scipio v. Wright, 101 U. S. 655; Barnum v. Okolona, 148 U. S. 393; 13 Sup. Ct. 638; Sheboygan Co. v. Parker, 3 Wall. (U. S.) 93; Claiborne Co. v. Brooks, 111 U. S. 400; 4 Sup. Ct. 489; Young v. Clarendon, 132 U. S. 340; 10 Sup. Ct. 107.

[116] Brenham v. German Am. Bank, 144 U. S. 173; 12 Sup. Ct. 559; Merrill v. Monticello, 138 U. S. 673; 11 Sup. Ct. 441; Jonesboro City v. Cairo &c. R. Co. 110 U. S. 192; 4 Sup. Ct. 67; Concord v. Robinson, 121 U. S. 165; 7 Sup. Ct. 937; Katzenberger v. Aberdeen, 121 U. S. 172; 7 Sup. Ct. 947; Norton v. Dyersberg, 127 U. S. 160; 8 Sup. Ct. 1111. In Barnum v. Okolona, 148 U. S. 393; 13 Sup. Ct. 638, it was said, in speaking of authority to aid railroad companies: "... that such legislative permission does not carry with it authority to execute negotiable securities except subject to the conditions and restrictions of the enabling act, are propositions so well settled by frequent decisions that we do not pause to consider them." Such cases as Rogers v. Burlington, 3 Wall. (U. S.) 654, and Mitchell v. Burlington, 4 Wall. (U. S.) 270, can not be regarded as authority, for the doctrine they assert has been repeatedly denied.

[117] White v. Board, 129 Ind. 396; 28 N. E. 846; Claiborne Co. v. Brooks, 111 U. S. 400; 4 Sup. Ct. 489; Elliott Roads and Streets, 317.

[118] United States v. Jefferson Co. 5 Dill. (U. S.) 310; Riggs v. Johnson, 6 Wall. (U. S.) 166, 194; Loan Association v. Topeka, 20 Wall. (U. S.) 655; United States v. New Orleans, 98 U. S. 381, 393; Ralls Co. v. United States, 105 U. S. 733, 735; Parkersburg v. Brown, 106 U. S. 487; 1 Sup. Ct. 442; United States v. Macon, 99 U. S. 582; Quincy v. Jackson, 113 U. S. 332; 5 Sup. Ct. 544; 7 Am. & Eng. Corp. Cas. 368.

[119] Ralls County Ct. v. United

to levy the tax at the time designated by the statute does not impair the authority to make the levy,[120] nor does one levy exhaust the power.

§ 841. Donations and subscriptions.—If the legislature has authority over the general subject, then upon the principle that it has a choice of means and methods and is "master of its own discretion," it may determine whether the aid shall be given by way of donation or by subscription to the capital stock of the company. The legislature may, if no constitutional provision forbids, determine the mode in which the aid shall be granted. If it deems proper the legislature may leave it to the inhabitants of the local governmental subdivision to determine whether they will aid by subscription or donation.[121]

States, 105 U. S. 733; Louisiana v. Pilsbury, 105 U. S. 278; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535; Edwards v. Kearzey, 96 U. S. 595; State v. Mayor, 109 U. S. 285; 3 Sup. Ct. 211; Galena v. Amy, 5 Wall (U. S.), 705; Rees v. Watertown, 19 Wall. (U. S.) 107; Mobile v. Watson, 116 U. S. 289; 6 Sup. Ct. 398; Cape Girardeau Co. Ct. v. Hill, 118 U. S. 68; 6 Sup. Ct. 951; People v. Common Council, 140 N. Y. 300; 37 Am. St. 563; McGahey v. Virginia, 135 U. S. 662; 10 Sup. Ct. 972; Lansing v. County Treasurer, 1 Dill. (U. S.) 522; United States v. Jefferson Co. 1 McCreary (C. C.), 356; State v. Milwaukee, 25 Wis. 122; Western Saving Fund Society v. Philadelphia, 31 Pa. St. 175; 72 Am. Dec. 730; Beckwith v. English, 51 Ill. 147; Commissioners v. Rather, 48 Ala. 433; Edwards v. Williamson, 70 Ala. 145; Vance v. Little Rock, 30 Ark. 435, 440; Trustees v. Bailey, 10 Fla. 112; 81 Am. Dec. 194; Coffin v. Rich, 45 Me. 507; 71 Am. Dec. 559; Henderson &c. R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173; 66 Am. Dec. 148; Williams v. Johnson, 30 Md. 500; 96 Am. Dec. 613.

[120] Commissioners v. Rather, 48 Ala. 433; Darlington v. Atlantic Trust Co. 68 Fed. 849.

[121] The legislature has the same right to authorize a donation of money or property to a railway company by a municipal corporation that it has to authorize a subscription to the capital stock of such a company. Scott v. Hansheer, 94 Ind. 1; Converse v. Fort Scott, 92 U. S. 503. The court will not presume, in the absence of proof, that a donation was intended, although the consideration is grossly inadequate to a sale of bonds, as where fifty thousand dollars of municipal bonds were sold to the railroad company for one dollar. County Court of Madison Co. v. People, 58 Ill. 456. See, also, Roberts v. Northern Pac. R. Co. 158 U. S. 1; 15 Sup. Ct. 756, distinguishing Whiting v. Sheboygan &c. R. Co. 25 Wis. 167; 3 Am. R. 30. Where a county agreed, by popular vote, to subscribe for $100,000 of stock in a railroad company, and to issue bonds therefor, but, before delivery of the bonds, the county authorities agreed to sell and did sell the stock back to the

§ 842. Repeal of the enabling act—Withdrawal of authority.—It is obvious that if an enabling act is repealed before a subscription is made the authority of the municipal corporation is taken away. It is equally clear that if rights in the nature of a contract have been acquired prior to the repeal of the act under which they were acquired the repeal does not destroy those rights.[122] The question of difficulty, as suggested in another connection, is as to when the rights of a railroad company can be regarded as so far fixed by contract as to be within the protection of the constitution. If there is a complete right to the aid, then, as we believe, the right cannot be rendered nugatory by a refusal to levy the necessary tax or issue the proper bonds.[123] In one of the cases it was held that, although there was no

company in exchange for $30,000 in said bonds, which were returned to the county, the court held that the $70,000 of bonds delivered to the company were void, since the transaction, being in effect a gift instead of a subscription, was not authorized by the popular vote. Sampson v. People, 140 Ill. 466; 30 N. E. 689; Choisser v. People, 140 Ill. 21; 29 N. E. 546; Post v. Pulaski Co. 49 Fed. 628; 9 U. S. App. 1. But see Cairo v. Zane, 149 U. S. 122; 13 Sup. Ct. 893. In the case of the Board &c. v. Center Township, 105 Ind. 422; 2 N. E. 368; 7 N. E. 189, it appeared that a donation of money was voted in aid of a railroad in 1870, that the money was collected in 1871 and 1873 and placed in the county treasury, and that the road was not completed until 1880, and the court held it entitled to the donation.

[122] Nelson v. Haywood Co. 87 Tenn. 781; 11 S. W. 885; 4 L. R. A. 648; Murfreesboro R. Co. v. Commissioners, 108 N. C. 56; 12 S. E. 952; Scotland Co. Ct. v. Hill, 140 U. S. 41; 11 Sup. Ct. 697; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535; Wolff v. New Orleans, 103 U. S. 358. See, generally, State v. Commissioners, 38 Kan. 317; 16 Pac. 337; Barthel v. Meader, 72 Iowa, 125; 33 N. W. 446; Richeson v. People, 115 Ill. 450; 5 N. E. 121; Louisville v. Savings Bank, 104 U. S. 469; Louisiana v. Taylor, 105 U. S. 454; Henry Co. v. Nicolay, 95 U. S. 619; State v. Greene Co. 54 Mo. 540; East St. Louis v. Maxwell, 99 Ill. 439; List v. Wheeling, 7 W. Va. 501; Jeffries v. Lawrence, 42 Iowa, 498; United States v. Norton, 97 U. S. 164; County of Ray v. Vansycle, 96 U. S. 675; People v. Logan Co. 63 Ill. 374; Kennedy v. Palmer, 6 Gray (Mass.), 316; People v. Clark, 1 Cal. 406; Hays v. Dowes, 75 Mo. 250; Edwards v. Williamson, 70 Ala. 145; Fairfield v. Gallatin Co. 100 U. S. 47; Randolph Co. v. Post, 93 U. S. 502.

[123] Babcock v. Helena, 34 Ark. 499; State v. Lancaster Co. 6 Neb. 214. See Callaway Co. v. Foster, 93 U. S. 567; Macon Co. v. Shores, 97 U. S. 272; Huidekoper v. Dallas Co. 3 Dill. (U. S.) 171; Louisiana v. Taylor, 105 U. S. 454; Schuyler Co. v. Thomas, 98 U. S. 169; Henry Co. v. Nicolay, 95 U. S. 619;

binding contract between the town and the railroad company, but the company had done work on the faith of the action of the town authorities, the court would so construe the statute as to preserve the rights of the company and relieve the legislature from the imputation of bad faith.[124] It was also held in the case referred to, that, after the company had done all that it was required to do, a repeal of the statute under which the town officers acted would not impair the rights of the railroad company.[125] In order to entitle the railroad company to the aid ordered to be given it by a popular vote it must show, it has been held, that the company acted upon the belief that it would receive the aid, and in that belief expended money in the construction of the road prior to the repeal of the statute under which the aid was voted.[126] But it was held by the same court that, if the company does act on the faith of the vote, and does expend money in the construction of its road, the repeal of the statute will not sweep away its rights,[127] and this seems to us to be the sound doctrine, notwithstanding the decisions to which we have elsewhere referred.[128]

Nicolay v. St. Clair Co. 3 Dill. (U. S.) 163; Moultrie Co. v. Rockingham &c. Bank, 92 U. S. 631; Supervisors v. Galbraith, 99 U. S. 214.

[124] Red Rock v. Henry, 106 U. S. 596; 1 Sup. Ct. 434, citing Broughton v. Pensacola, 93 U. S. 266.

[125] Red Rock v. Henry, 106 U. S. 596; 1 Sup. Ct. 434. In the course of the opinion it was said: "The amendatory act of March 2, 1871, with its repealing clause, can have no effect on this controversy. That act was passed more than six months after the railroad had fully complied with all the conditions upon which the town of Red Rock had agreed to issue its bonds. It was too late then for the legislature to interfere. The railroad company was entitled to the bonds, and any attempt by the legislature to forbid their issue would be unconstitutional."

[126] Barthel v. Meader, 72 Iowa, 125; 33 N. W. 446. In this case the tax was voted but the statute under which it was voted was repealed before the levy was made and the company in whose favor the tax was voted had not, prior to the repeal, expended any money in reliance upon the tax in constructing the road and never did construct it, but transferred its rights by perpetual lease to another company which did construct it, but there was no mention of the tax in the transfer to the other company, and it did not appear that the lessee company had built the railroad relying on the tax. It was held that the tax was void and its collection properly enjoined.

[127] Burges v. Mabin, 70 Iowa, 633; 27 N. W. 464; Cantillon v. Dubuque &c. R. Co. 78 Iowa, 48; 42 N. W. 613; 5 L. R. A. 726, and note.

[128] Wadsworth v. Supervisors, 102 U. S. 534; Railroad Co. v. Falconer, 103 U. S. 821.

§ 843. Validating proceedings—Retrospective laws.—Where there is no constitutional provision interdicting it the legislature has power to pass laws curing or healing defects in proceedings had in aid of railroad companies.[129] The plenary nature of the legislative power, the fact that the subject of aiding railroads is essentially legislative, and the fact that the power of the legislature over municipal corporations is so broad and comprehensive, require the conclusion we have stated. If vested rights have intervened, or if constitutional limitations forbid, then, of course, defects cannot be remedied by retroactive statutes.[130] In illustration of the principle stated we may refer to the cases which hold that the legislature has power to pass retrospective statutes confirming the validity of railroad bonds that have been illegally issued.[131] A validation by competent legislative power

[129] Rogers v. Keokuk, 154 U. S. 546; 14 Sup. Ct. 1152; Bolles v. Brimfield, 120 U. S. 759; Jonesboro City v. Cairo &c. R. Co. 110 U. S. 192; 4 Sup. Ct. 67; Quincy v. Cooke, 107 U. S. 549; Elmwood v. Marcy, 92 U. S. 289; Supervisors v. Schenck, 5 Wall. (U. S.) 772; Anderson v. Santa Anna, 116 U. S. 356; 6 Sup. Ct. 413; Pompton v. Cooper Union, 101 U. S. 196; Grenada Co. v. Brogden, 112 U. S. 261; 5 Sup. Ct. 125; Katzenberger v. Aberdeen, 121 U. S. 178; 7 Sup. Ct. 947; Dennison v. Mayor &c. 62 Fed. 775; Board v. Bright, 18 Ind. 93; Brown v. Mayor, 63 N. Y. 239; Knapp v. Grant, 27 Wis. 147; Cairo &c. R. Co. v. Sparta, 77 Ill. 505; Steines v. Franklin County, 48 Mo. 167; 8 Am. R. 87; Otoe Co. v. Baldwin, 111 U. S. 1; 4 Sup. Ct. 265; Bell v. Farmville &c. R. Co. 91 Va. 99; 20 S. E. 942; State v. Harper, 30 S. Car. 586; 9 S. E. 664.

[130] Where the subject is one upon which the legislature is prohibited from enacting special laws a special curative statute will be invalid, but a general statute may be effective. Atchison &c. R. Co. v. Commissioners, 17 Kan. 29. See, generally, upon the subject of curative statutes, State v. Saline Co. 48 Mo. 390; 8 Am. R. 108; Kunkle v. Franklin, 13 Minn. 127; 97 Am. Dec. 226; Wilson v. Hardesty, 1 Md. Ch. 66; New Orleans v. Poutz, 14 La. Ann. 853; Williams v. Roberts, 88 Ill. 11.

[131] Kenosha v. Lamson, 9 Wall. (U. S.) 477; Bissell v. Jeffersonville, 24 How. (U. S.) 287; Kimball v. Rosendale, 42 Wis. 407; 24 Am. R. 421; Duanesburgh v. Jenkins, 57 N. Y. 177; People v. Mitchell, 35 N. Y. 551; Black v. Cohen, 52 Ga. 621; Knapp v. Grant, 27 Wis. 147; Steines v. Franklin Co. 48 Mo. 167; 8 Am. R. 87. This doctrine is announced in many cases where the bonds passed into the hands of bona fide holders, and the ratifying act protects their interests. The legislature had a right to assume, from the fact that the townships had voted aid to the railroads, that a public purpose existed, warranting the exercise of the taxing power. State v. Whitesides, 30 S. Car. 579; 9 S. E. 661; 3 L. R. A. 777 and note; State

is in effect equivalent to precedent legislative authority.[132] The question is always one of power, and if the legislature had no power to authorize the proceedings or the issue of bonds in the first instance, it cannot validate them by a curative act.[133] There is, however, some apparent, if not actual, conflict of authority upon this question, for the existence of such a power is denied by some of the cases.[134] An emphatic assertion of the general rule is found in the cases which

v. Harper, 30 S. Car. 586; 9 S. E. 664; State v. Neely, 30 So. Car. 587; 9 S. E. 664; 3 L. R. A. 672. See Hayes v. Holly Spring, 114 U. S. 120; 5 Sup. Ct. 785; Otoe Co. v. Baldwin, 111 U. S. 1; 4 Sup. Ct. 265; Gardner v. Haney, 86 Ind. 17; Dows v. Elmwood, 34 Fed. 114; Thompson v. Perrine, 103 U. S. 806; Bolles v. Brimfield, 120 U. S. 759; 7 Sup. Ct. 736; Kimball v. Rosendale, 42 Wis. 407; 24 Am. R. 421; Bissell v. Jeffersonville, 24 How. (U. S.) 287; Kenosha v. Lamson, 9 Wall. (U. S.) 477; Black v. Cohen, 52 Ga. 621; Duanesburgh v. Jenkins, 57 N. Y. 177.

[132] Jasper Co. v. Ballou, 103 U. S. 745; Shaw v. Norfolk &c. R. Co. 5 Gray (Mass.) 180; Wilson v. Hardesty, 1 Md. Ch. 66.

[133] Single v. Supervisors, 38 Wis. 364; Hardenbergh v. Van Keuren, 4 Abb. (N. Y.) 43; Katzenberger v. Aberdeen, 121 U. S. 172; 7 Sup. Ct. 947; Sykes v. Columbus, 55 Miss. 115; Katzenberger v. Aberdeen, 16 Fed. 745; People v. Batchellor, 53 N. Y. 128; 13 Am. R. 480; Horton v. Thompson, 71 N. Y. 513; Marshall v. Silliman, 61 Ill. 218; Elmwood v. Marcy, 92 U. S. 289. If there is an entire absence of power to authorize the proceedings in aid of railroad companies, then no validating or curative act can be effective, but some of the cases referred to in the note seem to go further and deny the power to validate where there was original power to authorize the proceedings. So far as the cases can be regarded as holding the doctrine stated we believe them to be wrongly decided. The decision in Horton v. Thompson, 71 N. Y. 513, was denied by the supreme court of the United States in Thompson v. Perrine, 103 U. S. 806.

[134] Horton v. Thompson, 71 N. Y. 513; People v. Batchellor, 53 N. Y. 128; 13 Am. R. 480. In Thompson v. Perrine, 103 U. S. 806, the court refused to follow Horton v. Thompson, and referred to Bank of Rome v. Rome, 18 N. Y. 38; People v. Mitchell, 35 N. Y. 551, and Williams v. Duanesburgh, 66 N. Y. 129, as declaring a different doctrine. See Richland Co. v. People, 3 Brad. (Ill.) 210; Marshall v. Silliman, 61 Ill. 218; Williams v. Roberts, 88 Ill. 11; Gaddis v. Richland Co. 92 Ill. 119; Choisser v. People, 140 Ill. 21; 29 N. E. 546; Post v. Pulaski Co. 49 Fed. 628; 9 U. S. App. 1. The power may exist and yet not be effectively exercised. Thus, for example, a special act may be void if enacted in cases where only general laws are valid. But it does not follow that because special laws are not effective there is no power to enact general curative statutes.

hold that the legislature may confirm and make valid bonds issued by the municipality, although no authority whatever existed in the municipality at the time the bonds were issued,[135] unless prohibited by the state constitution.[136] Upon the same general principle it is held that Congress may ratify and render valid an unauthorized subscription in aid of a railroad made by a municipal corporation in one of the territories.[137] But if the legislature could not, at the time the bonds were issued, give authority to issue them in the way they were issued, it cannot afterward confirm and make valid the bonds so issued.[138] It has been held that an act purporting only to cure irregularities will not validate bonds which were issued without legal authority.[139] It may be remarked, in passing, that where the local officers have no authority whatever to grant aid, their proceedings are not simply irregular, but are acts performed where no jurisdiction exists, so that a statute assuming to do no more than cure irregularities cannot be extended to a case where there was an entire absence of authority. If, however, the terms of the statute clearly embrace unauthor-

[135] Cumberland Co. v. Randolph, 89 Va. 614; 16 S. E. 722; Thompson v. Perrine, 103 U. S. 806; First National Bank v. Yankton Co. 101 U. S. 129. See Napa Valley R. Co. v. Napa Co. 30 Cal. 435; State v. Charleston, 10 Rich. L. (S. Car.) 491; Shelby Co. v. Cumberland &c. R. Co. 8 Bush (Ky.), 209; Bridgeport v. Housatonic R. Co. 15 Conn. 475; Bouknight v. Davis, 33 S. Car. 410; 12 S. E. 96. The South Carolina act, declaring all township bonds theretofore issued in aid of a railroad to be a debt of the township, authorizing the levy of a tax to pay it, and providing that the bonds might be used as evidence of the amount and character of such debt, was held to impress such debt on the township, proprio vigore, and it was bound therefor, although the act authorizing the issue of the bonds was unconstitutional and the bonds void. Granniss v. Cherokee, 47 Fed. 427.

[136] See Gaddis v. Richland Co. 92 Ill. 119; People v. Batchellor, 53 N. Y. 128; 13 Am. R. 480; Horton v. Thompson, 71 N. Y. 513. Such an act will be construed to affect only aid voted before its passage, and will not be held to validate acts subsequently done. Concord v. Robinson, 121 U. S. 165; 7 Sup. Ct. 937; Post v. County of Pulaski, 47 Fed. 282.

[137] First National Bank v. Yankton Co. 101 U. S. 129.

[138] Elmwood v. Marcy, 92 U. S. 289. Such, for example, as a subscription made without a preliminary vote, where the constitution permits the legislature to confer the power of subscribing only after the proposition has been accepted by a popular vote.

[139] Williamson v Keokuk, 44 Iowa, 88.

ized acts, then it will, as a rule, validate them.[140] Where a constitutional provision forbidding the grant of aid has taken effect before the ratifying act is passed, the legislature cannot validate a prior subscription made without authority.[141]

§ 844. Legislative power to authorize ratification.—Where the legislature has power in the first instance to impose or dispense with conditions at its discretion, it may authorize a ratification, although conditions prescribed by the enabling act were not complied with in granting the aid. It has been held, in New York, that conditions imposed by the enabling act may be waived and acts done in disregard of its requirements may be ratified by the legislature, even during litigation.[142] There is a difference, as appears from what has been elsewhere said, between cases where there has been some irregularity and cases where there is an entire absence of power. There is, however, some diversity of opinion, for it has been held, erroneously, as we are inclined to think, that irregularities may prevent legislative ratification.[143]

[140] It is to be understood, of course, that no curative statute can be valid if the provisions of the constitution are infringed, but a curative act, although retrospective, is not from that fact alone to be always regarded as void.

[141] Sykes v. Columbus, 55 Miss. 115; People v. Jackson Co. 92 Ill. 441.

[142] Duanesburgh v. Jenkins, 57 N. Y. 177. The Wisconsin act providing that all proceedings on the part of a certain county, heretofore had, in subscribing and paying for any stock of a designated railway company, "are hereby legalized and declared to be of the same legal force and effect as though the law governing the mode and procedure" in such cases "had been in all respects complied with," was held to cure any defects in such proceedings, although it was enacted after the commencement of a suit based on alleged defects in the proceedings. Hall v. Baker, 74 Wis. 118; 42 N. W. 104.

[143] Where an act was passed by the legislature legalizing a special election to vote aid to a railroad, and certain acts of the board of county commissioners in levying the tax so voted, such note and subsequent acts having been so irregularly performed that a suit was even then pending to set the whole proceedings aside, the supreme court of Indiana held the act to be unconstitutional. The court said: "It seems very clear, we think, that in the enactment and approval of the statute now under consideration, the legislative and executive departments of our state government have exercised, or attempted to exercise, judicial functions. . . . The powers of the general assembly are almost unlimited; but they can not, as a rule, try

§ 845. Curative statutes—Requisites of.—The constitutional power of the legislature to validate proceedings granting aid to railroad companies must be exercised by a valid statute. In jurisdictions where special laws are prohibited and general laws required, a special curative statute would not be effective.[144] The intention of the legislature to validate prior proceedings must be expressed with reasonable clearness and precision. The intention to validate the proceedings must not be left to conjecture in cases where the aid was granted in the first instance without complying with conditions which the constitution made it the duty of the legislature to impose.[145] It seems, indeed, a little difficult to sustain the conclusion that proceedings not taken in conformity to the provisions of the constitution can be cured

and determine the rights of parties to a pending law suit." Columbus &c. R. Co. v. Board of Commissioners, 65 Ind. 427. See, also, Allison v. Louisville &c. R. Co. 9 Bush (Ky.), 247. As we have elsewhere shown, it is well settled that municipalities have no inherent or implied right to subscribe stock or issue bonds in aid of a railroad company, although the purpose may be to enable such company to construct its road by or through such municipality, and that where the claim of authority rests upon mere inference it will not be sustained. Town of South Ottawa v. Perkins, 94 U. S. 260; Ogden v. Daviess Co. 102 U. S. 634; Cagwin v. Hancock, 84 N. Y. 532; Welch v. Post, 99 Ill. 471; Goddard v. Stockman, 74 Ind. 400; Pennsylvania R. Co. v. Philadelphia, 47 Pa. St. 189; Lamoille Valley R. Co. v. Fairfield, 51 Vt. 257; Board &c. of Delaware County v. McClintock, 51 Ind. 325; Jeffries v. Lawrence, 42 Iowa, 498; French v. Teschemaker, 24 Cal. 518; Brodie v. McCabe, 33 Ark. 690; Young v. Clarendon, 132 U. S. 340; 10 Sup. Ct. 107; Campbell v. Paris &c. R. Co. 71 Ill. 611; East Oakland v. Skinner, 94 U. S. 255; Macon &c. R. Co. v. Gibson, 85 Ga. 1; 11 S. E. 442; 21 Am. St. 135; 43 Am. & Eng. R. Cas. 318. But it does not follow from this settled principle that ratification of proceedings granting aid may not be authorized by subsequent statutes. Whether ratification may be authorized does not depend upon the principle that express statutory authority is essential to the existence of authority to grant aid, but upon entirely different principles.

[144] State v. Riordan, 24 Wis. 484; State v. Supervisors, 25 Wis. 339; Zeigler v. Gaddis, 44 N. J. L. 363; Hodges v. Baltimore &c. Co. 58 Md. 603; Davis v. Woolnough, 9 Iowa, 104; Brown v. Denver, 7 Col. 305. The legislature may enact special laws where there is no constitutional provision prohibiting it.

[145] Hayes v. Holly Springs, 114 U. S. 120; 5 Sup. Ct. 705; Beloit v. Morgan, 7 Wall. (U. S.) 619; Brown v. New York, 63 N. Y. 239; Grenada Co. v. Brogden, 112 U. S. 261; 5 Sup. Ct. 125; Erskine v. Nelson Co. 4 N. Dak. 66; 60 N. W. 1050; 27 L. R. A. 696.

since it would seem that, where there is a failure to comply with constitutional requirements, there is an absence of power, and where power is absent the proceedings are void.[146] The legislature has no power to validate a debt incurred in violation of a constitutional provision, and hence cannot validate bonds issued in excess of the amount designated by the constitution.[147]

§ 846. Division of municipal corporations for purpose of voting. —The principle laid down in the cases which hold that the general power of the legislature over the subject of taxation authorizes it to create taxing districts, supports the conclusion that the legislature may divide townships or other municipal corporations into districts for the purpose of voting aid to railroad companies unless there is some provision in the constitution forbidding such a division. The whole subject of aid to railroad companies is so essentially a legislative one that it is not easy to set bounds to the legislative power, except, of course, in those jurisdictions where the power is limited and defined by the constitution. The adjudged cases show that the legislative power is one of wide sweep. The general rule is that the legislature is not confined to fixed limits of municipal bodies in laying taxation for local purposes, but may authorize their imposition upon such particular districts as are to be benefited thereby.[148] It has been held that a portion only of a county may be authorized to subscribe aid, where its interests are more immediately dependent upon the success of the enterprise than are those of other portions.[149] So, it

[146] St. Joseph v. Rogers, 16 Wall. (U. S.) 644; Buchanan v. Litchfield, 102 U. S. 278; Dixon Co. v. Field, 111 U. S. 83; 4 Sup. Ct. 315; Doon v. Cummins, 142 U. S. 366; 12 Sup. Ct. 220. See Beard v. Hopkinsville, 95 Ky. 215; 24 S. W. 872; 44 Am. St. 222; Sutro v. Pettit, 74 Cal. 332; 16 Pac. 7; 5 Am. St. 442; First National Bank v. District, 86 Iowa, 330; 53 N. W. 301; 41 Am. St. 489; Citizens' Bank v. Terrell, 78 Texas, 450; McPherson v. Foster, 43 Iowa, 48; 22 Am. R. 215; State v. Mayor &c. 32 Neb. 568; 49 N. W. 272; Dunn v. Great Falls, 13 Mont. 58; 31 Pac. 1017.

[147] Mosher v. Independent &c. District, 44 Iowa, 122; State v. Stoll, 17 Wall. (U. S.) 425; Erskine v. Nelson Co. 4 S. Dak. 66; 60 N. W. 1050; 27 L. R. A. 696. See McBryde v. Montesano, 7 Wash. 69; 34 Pac. 559; Massachusetts &c. Co. v. Cane Creek Tp. 45 Fed. 336.

[148] Lexington v. McQuillan's Heirs, 9 Dana (Ky.), 513; 35 Am. Dec. 159; People v. Mayor &c. of Brooklyn, 4 N. Y. 419; 55 Am. Dec. 266, and note.

[149] Shelby Co. v. Shelby R. Co. 5 Bush (Ky.), 225, 229. See Deland v. Platte Co. 54 Fed. 823; Ogden v. Daviess Co. 102 U. S. 634. The

has been held that contiguous territory may be added to a city for the purpose of subscribing.[150]

§ 847. What corporations may be authorized to grant aid.—The general rule is that counties, townships, cities and incorporated towns and villages which are invested with taxing power may be empowered by express statute to grant aid to railroad companies.[151] Much, of course, depends upon the constitution of the state, for it is obvious that a tax cannot be authorized where it is forbidden by constitutional provisions. It is generally held that aid cannot be granted where the construction of a railroad is foreign to the purpose for which the

New York bonding act of 1869 transformed towns from mere divisions of the state into municipal corporations, with power to borrow money to aid railroads, upon the consent of the tax-payers, after the requisite statutory proceedings and the proper adjudication by the county judge. Brownell v. Greenwich, 114 N. Y. 518; 22 N. E. 24; 4 L. R. A. 685.

[150] Henderson v. Jackson Co. 12 Fed. 676. Authority given to a city to tax property outside its corporate limits to pay bonds issued in aid of a railroad was sustained in Langhorne v. Robinson, 20 Gratt. (Va.) 661. Contra, Wells v. Weston, 22 Mo. 384; 66 Am. Dec. 627; Cameron v. Stephenson, 69 Mo. 372. The trustees of a township within which a city is located, and which embraces territory not within the city limits, are the proper persons to order an election to determine whether aid should be voted to a railroad company. Young v. Webster City &c. R. Co. 75 Iowa, 140; 39 N. W. 234. For such a city forms a part of the township for the purposes of voting aid and of taxation to pay the aid voted. Young v. Webster City &c. R. Co. 75 Iowa, 140; 39 N. W. 234; Scott v. Hansheer, 94 Ind. 1. See, also, Waterville v. County Commissioners, 59 Me. 80. And where such aid is voted by the township the tax is properly levied upon all the taxables within the township, including those within the limits of a city or town in such township. Reynolds v. Faris, 80 Ind. 14.

[151] Folsom v. Ninety-six, 159 U. S. 611; 16 Sup. Ct. 174, 179; Livingstone Co. v. Darlington, 101 U. S. 407; Harter v. Kernochan, 103 U. S. 562, 571; Anderson v. Santa Anna, 116 U. S. 356; 6 Sup. Ct. 413; Bolles v. Brimfield, 120 U. S. 759; 7 Sup. Ct. 736; Johnson v. Stark Co. 24 Ill. 75; Chicago &c. Railroad Co. v. Smith, 62 Ill. 268; 14 Am. R. 99; Nichol v. Mayor &c. 9 Humph. 252; Brown v. Commissioners, 100 N. Car. 92; 5 S. E. 178; Hackett v. Ottawa, 99 U. S. 86; State v. Chester &c. R. Co. 13 S. Car. 290; Floyd v. Perrin, 30 S. Car. 1; 8 S. E. 14; 2 L. R. A. 242; State v. Whitesides, 30 S. Car. 579, 584; 9 S. E. 661; 3 L. R. A. 777, and note; State v. Neely, 30 S. Car. 587; 9 S. E. 664; 3 L. R. A. 672; Atlantic &c. Co. v. Darlington, 63 Fed. 76, affirmed by Darlington v. Atlantic &c. Co. 68 Fed. 849; 16 C. C. A. 28.

public corporation was created.[152] Taxation by municipal or public corporations must be for a corporate purpose. It is not always easy to decide whether a certain tax is within or without this limitation; but it may be safely said that, as a general rule, a corporate purpose must be some purpose which is germane to the general scope of the object for which the corporation was created.[153] This principle would preclude corporations formed for educational purposes and the like from making subscriptions or donations to railroad companies, since aiding in the construction of railroads cannot be regarded as a corporate purpose in such a case.

§ 848. Subscription to unorganized company.—It has been held, where the statute makes it a prerequisite to the right to do corporate business, that a designated amount of stock shall be subscribed, and the designated amount has not been subscribed, a municipality cannot make a valid subscription to such corporation.[154] The decision in the case referred to may, perhaps, be sustained upon the ground that there was not even a de facto corporation, but if the decision is to be regarded as going to the extent that there cannot be an effective municipal subscription to a de facto corporation, we think that it must be regarded as unsound. If there be a de facto corporation, that is, a corporation assumed to be formed under a valid statute, authorizing the formation of such a corporation, and also acts performed as a corporation, then, as we believe, there may be an effective municipal subscription.[155] It is probably true, however, that if it should be shown by a taxpayer, or other party having a right to complain, that the corporation had not even a de facto existence, or that, having a bare de facto existence, cause existed for a quo warranto, and there is a likelihood that the state will proceed by quo warranto, the courts would enjoin the granting of aid, or if the rights of third persons had not intervened, enjoin the enforcement of the order or vote granting the aid.

[152] Johnson v. Campbell, 49 Ill. 316; Harvard v. St. Clair &c. Dist. 51 Ill. 130; Madison Co. v. People, 58 Ill. 456; Trustees v. People, 63 Ill. 299; People v. Depuyt, 71 Ill. 651; People v. Trustees &c. 78 Ill. 136.

[153] Weightman v. Clark, 103 U. S. 256, 260.

[154] Allison v. Louisville &c. R. Co. 9 Bush (Ky.), 247. See, also, Farnham v. Benedict, 107 N. Y. 159; 13 N. E. 784. But see ante, §§ 102, 826, note 5, p. 1152.

[155] See Douglas Co. v. Bolles, 94 U. S. 104; Kingman Co. v. Cornell University, 57 Fed. 149.

§ 849. Votes—Voters—Majority of votes.—In construing statutes empowering municipal corporations to aid railroad companies, it often becomes important to determine the meaning of the terms employed in the statutes. Ordinarily rules of construction applicable to statutes granting a right not possessed by the public generally, are, of course, to be applied to aid statutes, but there are some applications of those rules which it is important to consider. The phrase, a "majority of the voters," in such a statute, is held to mean a majority of those depositing ballots,[156] unless so qualified as to show distinctly that another meaning is intended.[157] It is generally held that all the voters

[156] Cass Co. v. Johnston, 95 U. S. 360; Douglass v. Pike Co. 101 U. S. 677; Carroll Co. v. Smith, 111 U. S. 556; 4 Sup. Ct. 539; Louisville &c. R. Co. v. County Court, 1 Sneed (Tenn.), 638; Slack v. Maysville &c. R. Co. 13 B. Mon. (Ky.) 1; Melvin v. Lisenby, 72 Ill. 63; Reiger v. Commissioners, 70 N. Car. 319; Louisville &c. R. Co. v. State, 8 Heisk. (Tenn.) 663. A majority of those voting on the particular proposition. Murphy v. Long Branch (N. J.), 61 Atl. 593. But see the reasoning in McWhorter v. People, 65 Ill. 290; Hawkins v. Carroll Co. 50 Miss. 735; Webb v. Lafayette Co. 67 Mo. 353; Denny, In re, 156 Ind. 104; 59 N. E. 359, 361; 51 L. R. A. 722; Cleveland Cotton Mills v. Cleveland Co. 108 N. Car. 684; 13 S. E. 271. In State v. Harris, 96 Mo. 29; 8 S. W. 794, it is held, that in order that a county court may subscribe to the stock of a railroad company, it must appear that two thirds of the qualified voters of the county, at an election held thereon, assented to the subscription by voting in favor of it; and the fact that a voter does not vote does not express his assent, within the Missouri constitution. In another case it was held that where a statute provides for an election, and requires that a majority of the qualified voters of a county assent to a county subscription to the capital stock of a railway construction company, it is necessary to look to the whole number of registered "qualified voters" in the county in order to determine the result of the election; and a majority of the votes actually cast is not sufficient to give validity to a subscription under such statute when such majority is not a majority of the whole number of registered qualified voters. McDowell v. Rutherford R. Const. Co. 96 N. Car. 514; 2 S. E. 351. See, generally, Pacific Imp. Co. v. Clarksdale, 74 Fed. 528; Cedar Rapids &c. R. Co. v. Boone Co. 34 Ia. 45.

[157] Where the statute required a majority of the legal voters living in the county, and the result of the election showed that by the county record a majority of the voters had voted for the subscription, and the order of the county court recited that all the conditions prescribed for the election had been complied with, the court held that the number of legal voters living in the county was a matter dehors the record which the county court could only determine by investigation, and that its finding was con-

who do not exercise the right to vote will be presumed to assent to the expressed will of a majority of those voting.[158] It is held, under the Minnesota statute, that the question of giving aid must be submitted to the legal voters of the town, and cannot be voted upon by all resident taxpayers without regard to whether they are legal voters or not.[159] Where it appears that some of those voting for the subscription are aliens, and that a majority of the legal voters have not authorized it, the company cannot compel a subscription.[160] But it has been held that the fact that a portion of the voters are absent in military service, and the question has not been submitted to them, is not a valid objection to the making of a subscription authorized by the voters who cast ballots at a properly conducted election.[161] A mere majority vote cannot dispense with conditions annexed to a resolution to extend aid, adopted by a two-thirds vote.[162] It is the doctrine of some of the cases that, where a majority vote is obtained by means of bribery, the election will be vitiated, and the vote will confer no authority.[163] But we think that this doctrine cannot apply where the rights of third persons, who have acted in good faith, have intervened.

clusive, and the county was estopped to show the contrary. Citizens' &c. Assn. v. Perry Co. 156 U. S. 692; 15 Sup. Ct. 547.

[158] Cass Co. v. Johnston, 95 U. S. 360. See, also, Hawkins v. Carroll Co. 50 Miss. 735; Milner v. Pensacola, 2 Woods (U. S.), 632; Taylor v. McFadden, 84 Ia. 262; 50 N. W 1070; Bryan v. Lincoln, 50 Neb. 620; 70 N. W. 252; 35 L. R. A. 752.

[159] Harrington v. Plainview, 27 Minn. 224; 6 N. W. 777. In the contemplation of the constitution and laws of Louisiana, the property taxpayers who are entitled to vote on the levy of a special tax, for the purposes therein mentioned, are only those who are entitled to vote at a general election under the election laws of the state. MacKenzie v. Wooley, 39 La. Ann. 944; 3 So. 128.

[160] People v. Cline, 63 Ill. 394. But where it does not appear how many illegal votes were cast for the subscription nor that a majority of the legal votes cast were against the subscription, and it is shown that the exact number of such votes could be ascertained with judicial certainty, the court will presume in favor of the legality of the proceedings. Woolley v. Louisville &c. R. Co. 93 Ky. 223; 19 S. W. 595.

[161] Cedar Rapids &c. R. Co. v. Boone Co. 34 Iowa, 45.

[162] Portland &c. R. Co. v. Hartford, 58 Me. 23. It has been held that a subsequent vote can not change the conditions, either directly or indirectly. People v. Waynesville, 88 Ill. 469. But we think this doctrine of doubtful soundness.

[163] People v. Supervisors, 27 Cal. 655; Butler v. Dunham, 27 Ill. 473; Chicago &c. R. Co. v. Shea, 67 Iowa,

Doubtless a railroad company that should directly or indirectly take part in bribing voters or in corrupting election officers could not take any benefit from the election, but if rights were acquired by it in good faith the wrongs of others should not be allowed to prejudice those rights.

§ 850. Failure to conform to the requirements of the enabling act —Illustrative cases.—Some of the courts lay down a very strict rule, and hold that they will not undertake to say that any of the requirements of the statute are immaterial;[164] but this we regard as an extreme doctrine. We think that there may be provisions a departure from which the courts may well adjudge of such little importance as not to invalidate the proceedings.[165] Statutes empowering municipalities to grant aid to railroad companies are, unquestionably, to receive a strict construction, but not such a construction as will make matters important that are clearly immaterial. It has been held that the fact that the meeting for an election was not called by the particular officer designated for that duty,[166] or that notice of such meeting was not given for the requisite number of days,[167] or that a vote viva voce was taken when the statute required a vote by ballot, will be

728; 25 N. W. 901. See Woolley v. Louisville &c. R. Co. 93 Ky. 223; 19 S. W. 595.

[164] Merritt v. Portchester, 71 N. Y. 309; 27 Am. R. 47.

[165] A substantial compliance with the law by county commissioners, is, in the absence of fraud, sufficient. Wilmington &c. R. Co. v. Comrs. 116 N. C. 563; 21 S. E. 205.

[166] Supervisors v. Schenck, 5 Wall. (U. S.) 772; Richland Co. v. People, 3 Brad. (Ill.), 210. See Bowling Green &c. R. Co. v. Warren Co. 10 Bush (Ky.), 711. But it is held in Iowa that the majority of the board of township trustees may order an election to determine whether aid shall be voted to a railroad company, where a petition therefor is signed by a majority of resident freeholders of the township, although the other trustees are not notified, being absent from the township and inaccessible for notice. Young v. Webster City &c. R. Co. 75 Iowa, 140; 39 N. W. 234.

[167] Harding v. Rockford &c. R. Co. 65 Ill. 90; Williams v. Roberts, 88 Ill. 11. So, where a proposition to vote bonds was so modified just before the election as to become a new proposition, a vote upon such new proposition without again giving notice for the required time will confer upon the municipal authorities no right to extend aid of any kind. Packard v. Jefferson Co. 2 Col. 338. Where thirty days' notice is required, the fact that the order calling the election was entered less than thirty days before the election was held, is sufficient evidence that no legal notice of the election was given. Williams v. People, 132 Ill. 574; 24 N. E. 647.

sufficient grounds for setting aside any action of the municipal officers based thereon.[168] So, it is held that, where the town is authorized to vote an appropriation in aid of a railroad at any "regular" town meeting, it cannot pass a valid vote to that effect at a special meeting called for that purpose,[169] but we do not believe that this doctrine can apply where the rights of persons acting in good faith have intervened or where there are effective elements of an estoppel. It has been held that a failure of the commissioners of estimate to take the prescribed oath will render the assessment void, but we cannot believe this doctrine to be sound, although it may be that under the particular statute such a conclusion is the only admissible one.[170] Where counties are authorized to submit the question of giving aid at some general or special election, authority to hold a special election for that purpose will be implied.[171] The laws of Nebraska[172] authorize a city to issue bonds in aid of a railroad, provided the city council "shall first submit the question of the issuing of such bonds to a vote of the legal voters" of said city; and provide that "the proposition of the question must be accompanied by a provision to levy a tax annually for the payment of the interest on said bonds as it becomes due," and "shall state the rate of interest such bonds shall draw, and when the principal and interest shall be made payable." In an action to enjoin the issuing of certain bonds of a city under this statute in aid of a railway, it appeared that the whole question had not been submitted to the electors of the city and that no vote had been submitted or adopted for the payment of the principal at any time. The court held that an injunction should be granted.[173]

[168] New Haven &c. R. Co. v. Chatham, 42 Conn. 465. If it plainly appears by the pleadings that a majority of the legal voters did not vote for the subscription the court will not hesitate to set aside all the acts of the municipal officers based thereon. People v. Logan Co. 63 Ill. 374.

[169] Pana v. Lippincott, 2 Brad. (Ill.) 466. In Indiana a petition may be presented to the board of county commissioners at any regular or special meeting, and no restrictions are placed upon the calling of a special meeting for any purpose which the auditor may think a public interest requires. Jussen v. Board &c. 95 Ind. 567; Oliver v. Keightley, 24 Ind. 514.

[170] Merritt v. Portchester, 71 N. Y. 309; 27 Am. R. 47.

[171] Cedar Rapids &c. R. Co. v. Boone Co. 34 Iowa, 45.

[172] Comp. Stat. Neb. Ch. 45.

[173] Cook v. Beatrice, 32 Neb. 80; 48 N. W. 828. See State v. Babcock, 21 Neb. 599; 33 N. W. 247; 59 Am. R. 849; Williams v. People, 132 Ill. 574; 24 N. E. 647. Where

§ 851. Conditions, performance of—Excuses for non-performance—Illustrative cases.—The general rule is, as elsewhere shown, that conditions prescribed by the statute must be complied with, but there may be cases in which the doctrine of estoppel will preclude the taxpayers and the municipalities from successfully insisting upon nonperformance as a defense, and so, it seems, there may be cases where performance will be excused. It has been held that a condition which cannot lawfully be fulfilled may be annexed to a subscription, although the impossibility of a performance of such condition might render the subscription void.[174] Thus, in the case cited, a city, under legislative authority, issued bonds as a donation to a railroad, conditioned that they should be paid out of money to be raised by a special tax upon property in a certain part of the city. The court held that the city had a right to impose the condition, although the constitution of the state forbade the collection of such a tax; and since the condition could not be complied with, it was held that the bonds could not be enforced.[175] There is a conflict in the authorities as to whether time is of the essence of the contract where the subscription of a town is conditioned upon the completion of the road to a certain point within a limited time.[176] But the better opinion seems to be that the failure of a railway company to comply with a condition that it shall construct its road from a certain point to a certain other point within a certain time will defeat the subscription,[177] unless there is some ele-

an act authorizing the issuance of aid bonds fails to provide for an election on the question, the election by necessary implication should be conducted under the existing laws relating to the borrowing of money by municipalities; and bonds issued pursuant to such an order are valid in the hands of bona fide holders. Union Bank v. Oxford, 116 N. Car. 339; 21 S. E. 410.

[174] Chicago &c. R. Co. v. Aurora, 99 Ill. 205.

[175] Chicago &c. R. Co. v. Aurora, 99 Ill. 205.

[176] In the case of Kansas City &c. R. Co. v. Alderman, 47 Mo. 349, it is said by the court that a failure to complete the road within the time limited may entitle the county to an abatement in the shape of damages, but not to an entire release from payment of bonds issued to pay a subscription, where it is shown that the road has, in fact, been built.

[177] Memphis &c. R. Co. v. Thompson, 24 Kan. 170; Chicago &c. R. Co. v. Marseilles, 84 Ill. 145; McManus v. Duluth &c. R. Co. 51 Minn. 30; 52 N. W. 980; Clark v. Rosedale, 70 Miss. 542; 12 So. 600. See ante, § 111. As to what is a compliance with a condition as to completion and operation of the road within a certain time, see also, Provident &c. Co. v. Mercer Co.

ment of waiver, or estoppel, or some legal excuse. It has been held that this is so, even though the company is prevented by rains and floods from completing its line within the time specified, but afterward completes it.[177] It has also been held that an agreement of a railroad company to refund to a municipal corporation the money received for bonds of the latter issued in payment for stock of the company, in case of a failure to construct the road within a certain time, may be strictly enforced against the railroad company upon its failure to complete its line before the expiration of the time specified in the agreement.[178] Where a subscription was made by a town upon condition that the railroad company should locate its machine shops at a certain point, which was accordingly done, and the subscription was paid, it was held that the town could not recover against a good faith purchaser of the property and franchise of the railroad company for removing the machine shops to another town. The contract was personal, and gave the town no lien upon the property of the railroad company.[179] But it is held that the maintenance and operation of the road during the life of the company, as fixed by the charter, is a consideration or condition of the grant of aid by a municipality, and if, during such time, the company abandons its road, the municipality has a cause of action against it on common law principles.[180]

§ 851a. Other illustrative cases.—The authorities are in conflict on the question of the right of the railroad company to claim the aid voted for the construction of the line, where it does not, in fact, construct the road, but purchases an existing line. It would seem that the purpose of the voters to aid the construction of an independent line would be defeated by such action.[181] There are cases which sus-

170 U. S. 593; 8 Sup. Ct. 788; People v. Holden, 82 Ill. 93; Ogden v. Kirby, 79 Ill. 555; Manchester &c. R. Co. v. Keene, 62 N. H. 81; Hodgman v. St. Paul &c. R. Co. 23 Minn. 153; Southern &c. R. Co. v. Towner, 41 Kans. 72; 21 Pac. 221; Chicago &c. R. Co. v. Makepeace, 44 Kans. 676; 24 Pac. 1104; West Virginia &c. R. Co. v. Harrison Co. Court, 47 W. Va. 273; 34 S. E. 786; Birch Cooley v. First Nat. Bank, 86 Minn. 385; 90 N. W. 789.

[177] Memphis &c. R. Co. v. Thompson, 24 Kan. 170. See McManus v. Duluth &c. R. Co. 51 Minn. 30; 52 N. W. 980.

[178] Chicago &c. R. Co. v. Marseilles, 84 Ill. 145.

[179] Elizabethtown v. Chesapeake &c. R. Co. 94 Ky. 377; 22 S. W. 609.

[180] Hinckley v. Kettle River R. Co. 70 Minn. 105; 72 N. W. 835.

[181] Lamb v. Anderson, 54 Iowa, 190; 3 N. W. 116; 6 N. W. 268;

tain this procedure where inconsiderable portions of existing lines are acquired;[183] but the case against such action would seem clear where the railroad company acquires only the mere lease of a portion of another line which is terminable by notice.[184] A condition that the road shall be built for use within a specified time is to be reasonably construed, however, and is generally regarded as complied with when the road is built so as to be in as reasonably fit condition and as safe and convenient for the public use as new roads usually are in similar localities.[185] So, it has been held that, where a tax is voted in aid of railroad construction under a notice providing that the tax should be paid on the road being put in operation between two certain points, the tax is earned when the road is in actual operation between those points, regardless of the financial ability or inability of the company to extend it further.[186]

§ 851b. Time for completion of road where not fixed in contract. —Where no time is fixed for the completion of the road the law will imply a reasonable time for the performance of this condition.[187] There are holdings that the time may be limited, in such cases, by an amendment to the charter of the railroad company before the issue of the bonds requiring construction within a specified time,[188] or by no-

Meeker v. Ashley, 56 Iowa, 188; 9 N. W. 124; Iowa &c. R. Co. v. Schenck, 56 Iowa, 628; 10 N. W. 215.

[183] Bradley-Ramsay Lumber Co. v. Perkins, 109 La. 317; 33 So. 351; People v. Holden, 82 Ill. 93; Chicago &c. R. Co. v. Makepeace, 44 Kan. 676; 24 Pac. 1104; State v. Clark, 23 Minn. 422; Stockton &c. R. Co. v. Stockton, 51 Cal. 328.

[184] People v. Clayton, 88 Ill. 45.

[185] Manchester &c. R. Co. v. Keene, 62 N. H. 81. See, also, Guillory v. Avoyelles R. Co. 104 La. 11; 28 So. 899; Chicago &c. R. Co. v. Shea, 67 Iowa, 728; 25 N. W. 901. But see Hodgman v. St. Paul &c. R. Co. 23 Minn. 153, where upon the issue as to whether a railroad company had fully constructed and equipped its road for the carriage of freight by a certain date so as to entitle it to aid bonds, it was held that the trial court properly admitted evidence that the railroad company after that date had shipped all of its heavy freight over another line controlled by it.

[186] Whitney v. Chicago &c. R. Co. (Ia.) 110 N. W. 912. And the condition was held sufficiently complied with by the erection of a permanent depot at the place prescribed although off of the main line and on a spur track. See, also, Railway v. Rich, 33 Ia. 113.

[187] Green v. Dyersburg, 2 Flip. (U. S.) 477; Fed. Cas. No. 5, 756.

[188] Green v. Dyersburg, 2 Flip. (U. S.) 477; Fed. Cas. N. 5, 756.

tice of the municipality, duly served, that it will insist on the completion of the road within a reasonable time.[189]

§ 852. Conditions—Power of municipality to prescribe.—Where the statute specifically and definitely prescribes the terms or conditions upon which aid may be granted to railroad companies it impliedly excludes authority to dispense with such terms or conditions or to impose any others. Where, however, there are no specific provisions as to terms and conditions, a different rule applies. It may be laid down as a general rule that a subscription may be made by a municipal corporation upon conditions annexed by the legislature, by the municipal officers who are given discretion in the matter, by the voters in their petition or vote, or by an agent appointed to make the subscription.[190] It is implied, it may be said, to prevent misunderstanding, that the general power of a public corporation to prescribe conditions does not authorize it to prescribe illegal conditions or such as are antagonistic to the general rules of law. The enabling act must take its place in the great system of law as part thereof, and cannot be regarded as an isolated fragment standing by itself and apart from

[189] Lynch v. Eastern &c. R. Co. 57 Wis. 430; 15 N. W. 743.

[190] Merrill v. Welsher, 50 Iowa, 61; Bittinger v. Bell, 65 Ind. 445; People v. Waynesville, 88 Ill. 469; People v. Dutcher, 56 Ill. 144; Chicago &c. R. Co. v. Aurora, 99 Ill. 205; People v. Holdan, 91 Ill. 446; Falconer v. Buffalo &c. R. Co. 69 N. Y. 491; Cooper v. Sullivan Co. 65 Mo. 542; Justices of Campbell Co. v. Knoxville &c. R. Co. 6 Coldw. (Tenn.) 598; Virginia &c. R. Co. v. Lyon Co. 6 Nev. 68; Bucksport &c. R. Co. v. Brewer, 67 Me. 295; Brocaw v. Board, 73 Ind. 543; State v. County Court, 51 Mo. 522; Port Clinton &c. R. Co. v. Cleveland &c. R. 13 Ohio St. 544, 549; Baltimore &c. R. Co. v. Pumphrey, 74 Md. 86; 21 Atl. 559; West Virginia &c. R. Co. v. Harrison County Ct. 47 W. Va. 273; People v. Glann, 70 Ill. 232. Compare Louisville &c. R. Co. v. Sumner, 106 Ind. 55; 55 Am. R. 719. Where an act provides for a town meeting, "to see what sum the town will vote to raise and appropriate as a gratuity to" a railroad, "said road to be completed on or before" a day named, the town is empowered to vote a gratuity upon condition that the road be completed in a reasonable time, but where the town voted aid to a railroad, provided that it completed the road before January 1, 1878, but the clerk failed to record the provision as to time, and the road was completed in August, 1878, an amendment of the record in September, 1878, by inserting the condition as to time within which the road was required to have been completed, will not be allowed to defeat the railroad's claim. Sawyer v. Manchester and K. Railroad, 62 N. H. 135; 13 Am. St. 541.

other laws. It has been held that specifications in the proposition submitted to the township by the railroad to be voted upon may amount to conditions precedent to the payment of the subscription.[191]

§ 853. Change of municipality.—The plenary power of the legislature over municipal corporations empowers it to make changes in the boundaries and organizations of such corporations, but where private contract rights have been acquired by third persons such rights cannot be impaired. But, while such rights cannot be impaired, there may be a change in the boundaries of public corporations if such rights are protected. The division of a county or other municipal corporation after a subscription has been made will not affect its liability to pay the stock taken or bonds issued in exchange therefor.[192] But the portion so detached will not be relieved from liability by such a division, but may be compelled, at the suit of the original county, to contribute to such payment.[193] And where, after the division of a county, funding bonds were issued by the original county to take up bonds issued before the division, on terms more favorable to the county than those upon which the loan was first made, the court held

[191] Platteville v. Galena &c. R. Co. 43 Wis. 493. Bonds were voted by a county to a railroad company in payment of subscription to its capital stock, on the condition, among others, that the bonds should be delivered when the road was "built of standard gauge, and completed as first-class, and in operation by lease or otherwise." The court held that, to entitle plaintiff to receive the bonds of the county, its road, if constructed according to the terms of the contract, need not have been perfect in every respect at the prescribed date for its completion, but it should have been completed and in operation at that date in such a manner that it might be properly and regularly used for the purpose of transporting freight and passengers. Southern &c. R. Co. v. Towner, 41 Kan. 72; 21 Pac. 221.

[192] Columbia Co. v. King, 13 Fla. 451. It is said in Hurt v. Hamilton, 25 Kan. 76, that if a town or county is divided after aid has been voted, and the legislature provides that both parts shall remain liable for its debts as before, only the proportion of a debt created in extending such aid may be collected from each part which its valuation bears to the whole valuation at the time the aid was voted. But a more reasonable and logical rule, in case bonds have been issued, would be that stated in the text; since the holder's right to enforce payment can not be defeated nor apportioned by subsequent legislation, but is a matter of arrangement between the counties. Columbia Co. v. King, supra.

[193] Sedgwick Co. v. Bailey, 11 Kan. 631. Contra, State v. Lake City, 25 Minn. 404.

the detached territory liable on such funding bonds to the same extent that it had been liable on the railroad bonds.[194] In case of the extinction of a municipality by legislative action after it has incurred obligations in aid of such an enterprise, they will survive against the corporation into which it is merged, to the extent to which it succeeds to the property of the extinct corporation.[195] In one case a strip of territory along the side of a township was annexed after an election at which an appropriation was voted, and the railroad was built through this strip instead of through the township as it stood at the time of the election according to the proposition as voted upon by the electors. The right of the company to the appropriation was denied, since it was plain that no votes were cast in favor of the road as located, and the court refused to indulge the presumption that the voters would have approved of the change of route.[196]

§ 853a. Effect of change of name of corporation.—It is the general rule that a change in the name of a corporation, either by the legislature or by the stockholders of the corporation under legislative authority, does not effect the identity of the corporation or in any way effect the rights, privileges or obligations previously acquired or incurred by it.[197] It follows that taxes collected, or subscriptions made to aid in the building of a railroad, are not invalidated by a change in the name of a railroad company.[198] As observed in one of the cases, "the mere change of names does not and cannot change things or their properties, nor does the change of a name of a thing imply any such change of properties."[199]

§ 854. Limitations upon the amount.—The usual course is to prescribe in the enabling act the amount of aid that may be granted, and where the amount is fixed the municipality has no power to go beyond it. But the amount is not always fixed by the statute, nor is there always a constitutional limitation upon the power of municipalities to incur debts. Where the discretionary power or fixing the

[194] Marion Co. v. Harvey Co. 26 Kan. 181.

[195] Mount Pleasant v. Beckwith, 100 U. S. 514.

[196] Alvis v. Whitney, 43 Ind. 83.

[197] Clark & Marshall Corp. § 51.

[198] Commonwealth v. Pittsburg, 41 Pa St. 278; Reading v. Wedder, 66 Ill. 80.

[199] Reading v. Wedder, 66 Ill. 80.

amount is vested in the voters,[200] or in certain designated officers,[201] it should be exercised by fixing the amount before a subscription can lawfully be made. It has been held that a vote that an amount not exceeding a certain sum shall be subscribed will not confer authority to make the subscription. We suppose, however, that where a discretionary power respecting the amount of aid that shall be granted is vested in the municipality, a failure to designate the amount prior to making the final contract would not make the proceedings void as against third persons who had acquired rights in good faith and upon the belief that the proceedings were regular. If the proceedings were void in the proper sense of the term, and not simply irregular, then, as we believe, the principle of estoppel would be applied for the protection of third persons who had acquired rights in good faith, but if the proceedings were absolutely void, then an estoppel could not arise. There is difficulty in some instances in determining when the proceedings are void and when only voidable.[202] The fact that a township or a city is indebted to the full constitutional amount will not operate to prevent a county or township, in which it is included, from also voting aid within the limits prescribed for such a political sub-

[200] Cincinnati &c. R. Co. v. Wells, 39 Ind. 539.

[201] Mercer Co. v. Pittsburgh &c. R. Co. 27 Pa. St. 389. An act amending an act incorporating the Pittsburgh & Erie Railroad Company, provides that subscriptions to the stock of said railroad company by certain counties "shall be made by the county commissioners after, and not before, the amount of such subscriptions shall have been designated, advised, and recommended by the grand jury." Bonds of Mercer county given for stock subscribed for by the commissioners, on the mere recommendation of the grand jury that they subscribe for an amount not exceeding $150,000, were held to be illegal, on the ground that all the discretionary power was vested in the grand jury by said act and could be exercised by no one else. Frick v. Mercer Co. 138 Pa. St. 523; 21 Atl. 6; 27 W. N. C. (Pa.) 352. Failure to state the maximum amount proposed to be subscribed will not invalidate an order directing the submission to the voters of the question of a subscription to aid a railroad, under a charter providing for subscriptions according to the forms prescribed by the Virginia code of 1873. Taylor v. Board of Supervisors, 86 Va. 506; 10 S. E. 433; 13 Va. L. J. 802; 29 Am. & Eng. Corp. Cas. 187.

[202] The general rule is that objections, because of formalities and irregularities in the proceedings, must be made before the rights of innocent third persons have intervened. Johnson v. Stark Co. 24 Ill. 75; Jasper Co. v. Ballou, 103 U. S. 745.

division.[202a] Where a statutory requirement is violated in designating the amount, then the proceedings may usually be regarded as void, since the question is one of power to be determined from an examination of a public statute. If the statute specifically limits the amount and the municipality assumes to grant aid in violation of the statutory provisions, there is no foundation for the proceedings, for the reason that it is established law that a municipality cannot aid in the construction of a railroad except by virtue of a valid statute expressly conferring upon it authority to grant such aid.

§ 855. Valuation of property.—It is often provided in the enabling acts that the limit shall not exceed a designated per centum upon the value of property subject to taxation, and it is sometimes difficult to determine the valuation intended. The valuation must, of course, be that referred to by the statute, but it is not always easy to determine what that valuation is. It has been held that, where the statute confers authority to vote aid in a sum not exceeding a certain per cent of the valuation of property in the municipality, the valuation in force at the time the vote is taken will control, although another valuation is even then in process of completion, and takes effect before the subscription is made.[203] It is obvious that, unless the words of the statute clearly require a different construction, the natural construction is that an existing valuation is meant since it cannot be presumed that the action of the municipal voters or officers was based on a valuation not known at the time the action was taken.

§ 856. Conditions must be performed.—Where the question is not affected by the doctrine of estoppel the conditions prescribed in granting the aid must, as a general rule, be performed. A railroad company, or one claiming through it, there being no estoppel, must perform the conditions prescribed or else there can be no effective claim to the aid. The conditions relating to a vote of the people of the municipality to a preliminary petition, or the like, must, as a rule, be substantially complied with or the proceedings will not be effective. The construction of the road substantially upon the route as chartered by the legislature is generally a condition precedent to the payment

[202a] Irwin v. Lowe, 89 Ind. 540. See Municipal Trust Co. v. Johnson City, 116 Fed. 458.
[203] Hurt v. Hamilton, 25 Kan. 76.

of the subscription.[204] But in all such matters the statute governs, and regard must always be had to its provisions. It has been held that a tax voted by a town in aid of a railroad whose charter stated that its object was to construct, operate, and maintain a railroad from Dubuque, in a western and northwestern direction in Iowa, Minnesota, and Dakota, to a junction with the Northern Pacific, was not invalidated by the fact that the company sold and merged its line with that of another company after it had completed fifty miles of road in Iowa, where the road of such consolidated company extended from Dubuque to St. Paul, in Minnesota, and where the tax was not conditioned upon the construction of the original road as specified by its charter.[205]

[204] See Jacks v. Helena. 41 Ark. 213; Meeker v. Ashley, 56 Ia. 188; 9 N. W. 124; Illinois Midland R. Co. v. Barnett, 85 Ill. 313; Ravenswood &c. R. Co. v. Ravenswood, 41 W. Va. 732; 24 S. E. 597; 56 Am. St. 906. For other conditions generally, see Citizens' Sav. &c. Ass'n, v. Perry Co. 156 U. S. 692; 15 Sup. Ct. 547; Casey v. People, 132 Ill. 546; 24 N. E. 570; People v. Glann, 70 Ill. 232; Bradley-Ramsay &c. Co. v. Perkins, 109 La. 317; 33 So. 357; Atchison &c. R. Co. v. Jefferson Co. 21 Kans. 229; Chicago &c. R. Co. v. Chase County, 49 Kans. 399; 30 Pac. 456; Irwin v. Lowe, 89 Ind. 540; Coe v. Caledonia &c. R. Co. 27 Minn. 197; 6 N. W. 621; Missouri Pac. R. Co. v. Tygard, 84 Mo. 263; 54 Am. R. 97. As to statutory conditions, see Breckenridge Co. v. McCracken, 61 Fed. 191; Sellers v. Beaver, 97 Ind. 111; Marion Co. v. Center Twp. 105 Ind. 422; 2 N. E. 368; Nixon v. Campbell, 106 Ind. 47; 4 N. E. 296; McManus v. Duluth &c. R. Co. 51 Minn. 30; 52 N. W. 980; Lamb v. Anderson, 54 Ia. 190; 3 N. W. 416. As to effect of departure from route specified in charter, see Cantillon v. Dubuque &c. R. Co. 78 Ia. 48; 42 N. W. 613; 5 L. R. A. 726, and note.

[205] Cantillon v. Dubuque &c. R. Co. 78 Iowa, 48; 42 N. W. 613; 5 L. R. A. 726, and note; Lamb v. Anderson, 54 Iowa, 190; 3 N. W. 416; Noesen v. Port Washington, 37 Wis. 168. See Platteville v. Galena &c. R. Co. 43 Wis. 493. Where the county commissioners were authorized to subscribe to the capital stock of any railway company which might locate its road through the county, and to issue its bonds in payment thereof, it was held that the fact that the road had never been located through or in the county was a sufficient defense to a suit upon bonds purporting to have been issued in aid of a railway company, even though they were in the hands of a bona fide holder. State v. Hancock Co. 11 Ohio St. 183. In Indiana the statute suspends the company's right to aid voted by townships until the road is completed and a train of cars is run over the same. Board &c. v. Louisville &c. R. Co. 39 Ind. 192. Where an interest coupon covers a period before

§ 857. Preliminary survey.—In some of the states a survey is required as a condition precedent to the exercise of the power to vote aid. If such a survey is not made the proceedings will fall before a direct attack. It is held, however, that a popular election held in pursuance of the provisions of such a statute to determine the question of subscription to the stock is not invalid for lack of a final and definite survey and location of the entire line of the company's road, and that a substantial location, defining the general direction and route, and specifying the termini of the road, with an estimate of the cost of construction, is sufficient.[206] Much, it is obvious, depends upon the statute governing the particular case, and where the statute requires a survey it must be made as the statute requires. As the power to aid a railroad enterprise comes from the enabling act, the authority conferred by it must be exercised in substantial conformity to the letter and spirit of the statute; and the preliminary conditions imposed by it must be substantially performed in order to sustain the subscription.[207] Where the rights of third persons have not intervened and there is no element of estoppel, a taxpayer of the municipality may have an injunction to restrain the levy of a tax in pursuance of such

and after the completion and acceptance of the road, only so much of the interest thereon as was earned after such completion can be recovered under the act providing that no tax shall be levied to pay any interest which may have accrued on railroad aid bonds prior to completion and acceptance of the road. Grannis v. Cherokee, 47 Fed. 427. Where the petition did not designate the time within which the road should be completed, an injunction will not lie against the collection of the tax before the completion of the road, since the commissioners may withhold the money until the road is completed. Pittsburgh &c. R. Co. v. Harden, 137 Ind. 486; 37 N. E. 324. A donation may be made for the completion of a railroad already so far laid as to admit of running cars over it, by the construction of grades, digging ditches, and furnishing and laying ties and iron. Barner v. Bayless, 134 Ind. 600; 33 N. E. 907; 34 N. E. 502.

[206] Wilson Co. v. National Bank, 103 U. S. 770. This, however, was an action to enforce payment of bonds by bona fide holders, and the rule might be different in a direct proceeding to test the validity of the election before the rights of third parties had intervened. See Purdy v. Lansing, 128 U. S. 557; 9 Sup. Ct. 172.

[207] People v. Smith, 45 N. Y. 772. Commissioners appointed under the statute have no power to bind the town by an act not done in strict compliance with the authority conferred by vote of the tax-payers. Horton v. Thompson, 71 N. Y. 513.

a vote or subscription, if all the substantial requirements of the statute have not been met.[208]

§ 858. Petition—Requisites of—Petitioners—Qualifications of.—In many of the states a petition of a designated number of the tax-payers is made necessary to confer authority upon the county officials to extend aid or to order an election for the purpose of determining whether aid shall be extended.[209] There is much diversity of opinion as to the rules which govern such petitions. Some of the courts lay down very strict rules,[210] while others, with more reason, as it seems to us, adopt more liberal rules. It may be said that the authorities generally affirm that the petition must conform, in all substantial respects, to the requirements of the statute. In such a case the requisite number of signers must be procured before any steps can legally be taken toward granting the aid.[211] Where such a peti-

[208] Peed v. Millikan, 79 Ind. 86; Alvis v. Whitney, 43 Ind. 83. See People v. Waynesville, 88 Ill. 469; People v. Spencer, 55 N. Y. 1; Daviess Co. v. Howard, 13 Bush (Ky.), 101; Lawson v. Schnellen, 33 Wis. 288.

[209] R. S. N. Y. 1880, Ch. 1869, title 907, §§ 1–6; Ch. 1872, title 883; R. S. Ind. 1894, § 3612, § 3613, § 5340; Laws, Iowa, 1884, Ch. 159, §6; Laws, Iowa, 1890, Ch. 19; Laws, Iowa, 1182, Ch. 133; Gen. Stat. Kan. 1889, Ch. 23, §§ 126, 149, and other statutes of various states.

[210] Where a verification is required it should always be made. It has been held, pressing the doctrine very far, that the verification must cover all the essential allegations of the petition or it will be held fatally defective. Angel v. Hume, 17 Hun (N. Y.), 374. We can not believe that the doctrine of the case cited can be correct, if sound in any case, where the attack upon the proceedings is collateral. Where the assault is a direct one and made before rights are acquired by third persons a different rule prevails from that which obtains where the proceedings of the municipality are assailed in a collateral proceeding. Loesnitz v. Seelinger, 127 Ind. 422; 26 N. E. 887; Jones v. Cullen, 142 Ind. 335; 40 N. E. 124. See, upon the general question, Longfellow v. Quimby, 29 Me. 196; 48 Am. Dec. 525; State v. Prince, 45 Wis. 610; Parks v. Boston, 8 Pick. (Mass.) 218; 19 Am. Dec. 322; Dwight v. Springfield, 4 Gray (Mass.), 107; Gay v. Bradstreet, 49 Me. 580; 77 Am. Dec. 272; Ballard v. Thomas, 19 Gratt. (Va.) 14; Maxwell v. Board, 119 Ind. 20; 19 N. E. 617.

[211] People v. Hughitt, 5 Lans. (N. Y.) 89. Under the New York statute providing that a majority of the tax-payers, other than those only taxed for dogs and highways, of any municipal corporation, may petition the county judge for the issue of railroad aid bonds by their municipality, the petition must aver that its signers are a majority of tax-payers, excluding those taxed

tion is required it has been held that several petitions may be circulated at once and presented at different times.[212] The term "taxpayers" will be given a liberal construction; and it has been held that persons representing property in the payment of taxes should be counted, even though they do not own the property.[213] Joint owners of property and partners, it has been held, must be counted separately.[214] And non-residents who pay taxes must be counted like other taxpayers,[215] unless the statute restricts the right of petition to residents of the municipality.[216] But it has been held that the agent of a taxpayer is not a proper party to such a petition.[217] Where there is a direct attack upon the proceedings the petitioners must be identified as the taxpayers of the county. The fact that the names are the same as those on the assessment roll is prima facie evidence that the persons

for dogs and highways only, though the act itself defines the word "taxpayers" as used therein as excluding that class. Mentz v. Cook, 108 N. Y. 504; 15 N. E. 541; Rich v. Mentz, 134 U. S. 632; 10 Sup. Ct. 610; Strang v. Cook, 47 Hun (N. Y.), 46.

[212] People v. Hughitt, 5 Lans. (N. Y.) 89. And that the initials of the Christian name may be used in signing. Good v. Burk (Ind.), 77 N. E. 1080.

[213] People v. Hulbert, 59 Barb. (N. Y.) 446. The petition for an election to authorize a township to subscribe to the capital stock of a railroad company was in all respects in conformity with the provisions of the statute, save that it purported to be signed by two-fifths of the "legal voters" of the township, instead of "tax-payers," as required by the statute. The voting at the election was general, and a majority of the votes being for the subscription, the subscription was treated as valid by all parties, and the railroad company, on the faith of it, changed the location of the road to conform to its conditions, at an additional expense, and constructed the road, ready for operation. The township brought suit to enjoin the issue of bonds in payment of the railroad company's stock, as contemplated by the subscription, on the ground that the petition was defective as purporting to be signed by "legal voters" instead of "tax-payers." The railroad was allowed to show that the petition was signed by tax-payers, as required by the statute. Kansas City &c. R. Co. v. Rich, 45 Kan. 275; 25 Pac. 595.

[214] People v. Franklin, 5 Lans. (N. Y.) 129; People v. Hughitt, 5 Lans. (N. Y.) 89.

[215] People v. Oliver, 1 T. & C. (N. Y.) 570.

[216] In Indiana, the right is given to resident freeholders in cities (R. S. 1895, §§ 3612, 3613), and to freeholders in townships (R. S. 1894, § 5340). In Iowa resident freehold tax-payers (Laws Iowa, 1884, Ch. 159, § 2), and in Kansas resident tax-payers (Gen. Stat. 1889, Ch. 23, § 149) may petition for a submission to the voters of the question of giving aid.

[217] People v. Smith, 45 N. Y. 772.

are the same as those paying taxes.[218] It is held that, where the petition is required to be signed by "legal voters," proof that they are "citizens" of the municipality is insufficient,[219] but this doctrine cannot, as we believe, be justly applied where there is a collateral and not a direct attack. It has been held that a town is not bound by the decision of its assessor that a majority of the taxpayers have signed the petition,[220] but the question must depend very largely upon the provisions of the statute involved in the particular case. If the officer is invested with power to decide, then, as against a collateral attack, his decision is conclusive. Where there is a direct attack upon the proceedings they will fail if the petition be insufficient. If, however, facts sufficient to confer jurisdiction over the general subject are alleged, a collateral attack will not prevail, although the petition may be defective. Strictly speaking, all of the matters required by statute should be fully set out in the petition,[221] but a failure to set them out will not always invalidate the proceedings. It has been held essential that the petition should direct whether the money raised by an issue of bonds should be invested in stock or in bonds of the railroad;[221a] and this ruling is correct where there is a direct attack, but we think that it cannot be the law where the attack is collateral. So it has been held that the petition should specify the amount proposed to be appropriated,[222] and that it must designate with certainty the road to

[218] People v. Smith, 45 N. Y. 772.

[219] People v. Supervisor of Oldtown, 88 Ill. 202.

[220] People v. Barrett, 18 Hun (N. Y.) 206. But see Andes v. Ely, 158 U. S. 312; 15 Sup. Ct. 954; Cherry Creek v. Becker, 123 N. Y. 161.

[221] See, generally, as to the petition, Scipio v. Wright, 101 U. S. 665; Rich v. Mentz, 134 U. S. 632; 10 Sup. Ct. 610; Andes v. Ely, 158 U. S. 312; 15 Sup. Ct. 954; State v. Kokomo, 108 Ind. 74; 18 N. E. 718; Evansville &c. R. Co. v. Evansville, 15 Ind. 395; Wellsborough v. New York &c. R. Co. 76 N. Y. 182; State v. Tomahawk, 96 Wis. 73; 71 N. W. 86.

[221a] People v. Van Valkenburgh, 63 Barb. (N. Y.) 105. But under the Indiana statute it is held unnecessary to state in the petition whether the money is to be donated or used for the purchase of stock. Jussen v. Board, 95 Ind. 567; Petty v. Myers, 49 Ind. 1. It is held in Indiana that the levy of a tax to aid in the construction of a railroad is not vitiated by any uncertainty or ambiguity in the language of the petition for the appropriation, when it appears that no one was deceived thereby, nor in fact could be, since the intention of the petitioners could not be misapprehended. Jussen v. Board &c. 95 Ind. 567. See, also, Scott v. Hansheer, 94 Ind. 1; Goddard v. Stockman, 74 Ind. 400.

[222] Wilson v. Board, 68 Ind. 507; Detroit &c. R. Co. v. Bearss, 39

which the aid shall be given, where the municipality is authorized to aid either of two or more roads.[223]

§ 859. Notice of election.—Where, as is usually the case, notice of an election is required by the enabling act, the notice required must be given.[224] Here, again, it is necessary to direct attention to the doctrine of estoppel and to the difference between a direct and a collateral attack. The doctrine of estoppel may often so operate as to preclude taxpayers from taking advantage of defects in a notice, and defects may be available in a direct attack which would be unavailing if the attack were a collateral one.[225] Formal defects in a notice or defects that are not of any materiality ought not to be held to render the election ineffective. In Wisconsin it is held that the requirement that notices of an election to determine whether aid shall be granted shall be posted by the town clerk or supervisors need not be literally complied with; but it is sufficient if others post the notices for them.[226] Other cases hold that a notice of such an election will be held sufficient if it sets forth with reasonable certainty the matters to be acted upon.[227]

Ind. 598. But see State v. Knowles, 117 La. 129; 41 So. 439.

[223] Monadnock R. Co. v. Peterborough, 49 N. H. 281.

[224] See, generally, as to the notice, McClure v. Oxford Tp. 94 U. S. 429; Knox Co. v. New York Ninth Nat. Bank, 147 U. S. 91; 13 Sup. Ct. 267; Williams v. Roberts, 88 Ill. 11; Yarish v. Cedar Rapids &c. R. Co. 72 Ia. 556; 34 N. W. 417; Demaree v. Johnson, 150 Ind. 419; 49 N. E. 1062. As to when there is a presumption of proper notice, see Knox Co. v. New York Ninth Nat. Bank, 147 U. S. 91; 13 Sup. Ct. 267; Wilmington &c. R. Co. v. Onslow County, 116 N. Car. 563; 21 S. E. 205; State v. Lime, 23 Minn. 521.

[225] It is held by some of the courts that the decision of the local officers, such as the board of county commissioners, board of supervisors or the like is conclusive as against a collateral assault where there is some notice, although it may be defective. Hilton v. Mason, 92 Ind. 157; Faris v. Reynolds, 70 Ind. 359; Reynolds v. Faris, 80 Ind. 14.

[226] Philips v. Albany, 28 Wis. 340; Lawson v. Milwaukee &c. R. Co. 30 Wis. 597.

[227] Belfast &c. R. Co. v. Brooks, 60 Me. 568, where the meeting was called "to see if the town will loan its credit to aid in the construction" of the railroad. An order of the county court submitting to the voters of the county a proposition to subscribe for stock in aid of a railroad, under the laws of Missouri in force March 4, 1867, was not defective because it failed to specify the name of the corporation, where it had described the proposed route with requisite certainty. Ninth Nat. Bank v. Knox County

§ 859a. Notice of election—Strictness with reference thereto.—The Supreme Court of Illinois has stated the rule under this head thus: "where a municipality is empowered to subscribe to the capital stock of a railroad company and issue its bonds in payment of the subscription, but it is also required that there shall first be an affirmative vote of a majority of the electors of the municipality to that effect, no power exists to make the subscription and issue the bonds until after such vote shall have been obtained at an election held for that purpose, called by the authority prescribed by law, and upon such notice of the time and place of holding the election as the law shall direct; and that whoever deals in municipal bonds is chargeable with knowledge whether these precedent conditions to the existence of the power of making the subscription and issuing the bonds have been complied with.[228] Thus, where a statute required a certain number of notices to be posted for a specified time, it was held that this requirement must be complied with in order to render the subscription and bonds issued in payment therefor valid and binding on the municipality.[229] So it has been held that the notice must show the particular railroad to the capital stock of which the subscription was to be made.[230] Aid bonds are generally held invalid where the insufficiency of the notice of the election appears on the face of the bonds."[231]

37 Fed. 75. Under the general law of Iowa, requiring that the notice of a railroad aid tax to be voted shall specify the line of railroad to be aided, it was held that a notice naming the railroad, and giving location of line in direction and terminal points, meets the requirements of the statute. Yarish v. Cedar Rapids &c. R. Co. 72 Iowa, 556; 34 N. W. 417; Burges v. Mabin, 70 Iowa, 633; 27 N. W. 464.

[228] Williams v. Roberts, 88 Ill. 11. See, also, People v. Logan, 63 Ill. 384; Stebbins v. Perry Co. 167 Ill. 567; 47 N. E. 1048; Middleport v. Aetna Ins. Co. 82 Ill. 562; Packard v. Board &c. 2 Colo. 338; Jones v. Hulburt, 13 Neb. 125; 13 N. W. 5; Wells v. Ponponpoc Co. 102 U. S. 625; Lincoln v. Iron Co. 103 U. S. 412; Demaree v. Johnson, 150 Ind. 419; 49 N. E. 1062; Yarish v. Cedar Rapids &c. R. Co. 72 Ia. 556; 34 N. W. 417; Justices v. Knoxville &c. R. Co. 6 Coldw. (Tenn.) 598.

[229] Harding v. Rockford &c. R. Co. 65 Ill. 90. See, also, Windsor v. Hallett, 97 Ill. 204; Sauerhering v. Iron Ridge &c. R. Co. 25 Wis. 447; Philips v. Albany, 28 Wis. 340; McClure v. Oxford Tp. 94 U. S. 429.

[230] Ferris v. Reynolds, 70 Ind. 359.

[231] McClure v. Oxford Tp. 94 U. S. 429; George v. Oxford, 16 Kan. 72.

§ 860. Influencing voters.—Some of the courts hold that oral misrepresentations made to voters to induce them to vote for furnishing aid will not affect the validity of the tax[232] if voted without conditions, although such misrepresentations are made by the agents of the company,[233] but there is conflict among the authorities.[234] So it has been held that the fact that the officers of the municipality were induced by means of false and fraudulent promises to submit the question to a popular vote will not be sufficient grounds for setting aside the proceedings.[235] It seems to us that, where there is no ground of estoppel, and the vote in favor of the aid has been procured by the fraud of the beneficiary company, it should be set aside upon opportune and appropriate application to the courts, or, at least, that such fraud may be shown as a defense to an action by the company, or an injunction granted in a proper case. But, of course, to warrant this conclusion, there must be fraud in all that the term implies on the part of the beneficiary.

[232] Cedar Rapids &c. R. Co. v. Boone Co. 34 Iowa, 45; Platteville v. Galena &c. R. Co. 43 Wis. 493.

[233] Illinois Midland R. Co. v. Barnett, 85 Ill. 313, where the proposed route was misrepresented. State v. Lake City, 25 Minn. 404, where the alleged misrepresentations related to the location of car and machine shops, etc.

[234] Many who signed a petition for the calling of an election to vote for the issue of bonds by the township in aid of a railroad, as authorized by the laws of Nebraska, were induced to sign the petition by representations on behalf of the railroad that it would locate a depot on a certain section. After the bonds were authorized the depot was located on another section and the aggrieved petitioners were granted an injunction restraining the issue of the bonds, on account of the false representations. In this case two agents of the company were engaged in the common purpose of soliciting the freeholders of a town to sign a petition for an election to vote bonds in aid of the railroad. One made promises and inducements to the freeholders, and shortly afterward the other secured their signatures to the petition. The court held that such promises and inducements were a part of the res gestae. Wullenwaber v. Dunigan, 33 Neb. 477; 47 N. W. 420. See also People v. San Francisco, 27 Cal. 655; Chicago &c. R. Co. v. Shea, 67 Ia. 628; 25 N. W. 901; People v. Logan Co. 63 Ill. 374; Wooley v. Louisville &c. R. Co. 93 Ky. 223; 19 S. W. 595; Bish v. Stout, 77 Ind. 255; Kentucky &c. R. Co. v. Bourbon Co. 85 Ky. 98; 2 S. W. 687; Goforth v. Rutherford &c. Co. 96 N. Car. 535; 2 S. E. 361; Chicago &c. R. Co. v. Chase Co. 43 Kans. 760; 23 Pac. 1064; Demaree v. Johnson, 150 Ind. 419; 49 N. E. 1062.

[235] State v. Lake City, 25 Minn. 404.

§ 861. Vote does not of itself constitute a contract.—A vote in favor of granting aid, when a vote is required by the enabling act, is the foundation of the power to contract. It authorizes the municipality to enter into a contract, but is not, of itself, a contract. In order that there may be an effective contract there must be appropriate action upon the vote by the municipality. Such a vote does not constitute a subscription, and the power to subscribe may be taken away by the legislature after the vote is taken and before a binding subscription is made,[236] or agreed to be made.[237] But after the agreement to subscribe has been fully entered into it constitutes a contract which cannot be impaired by the laws of the state.[238] Where the statute requires something to be done by the officers after the vote of the directors, wherein such officers are allowed any discretion, the preliminary vote confers no rights upon the company to which the aid is voted, until the officers have acted in making the subscription.[239]

[236] Aspinwall v. Commissioners, 22 How. (U. S.) 364; Concord v. Portsmouth Savings Bank, 92 U. S. 625; Cumberland &c. R. Co. v. Washington Co. 10 Bush (Ky.) 564; List v. Wheeling, 7 W. Va. 501; State v. Garroutte 67 Mo. 445. Thus where a railroad was entitled to the aid voted only on condition that the road was completed within a specified time "from the date of the subscription," it was held that the subscription was consummated when the mayor signed the subscription as directed by a resolution of the council, and not at the time of the passage of the resolution. Red River Furnace Co. v. Tennessee Cent. R. Co. 113 Tenn. 697; 87 S. W. 1016. Under the Indiana statute of 1869, the simple voting of aid by a township is not a subscription to the stock of a railroad company, but the subscription can be perfected only by the county board, and until the subscription is so made no liability attaches. Hamilton Co. v. State, 115 Ind. 70; 17 N. E. Rep. 855.

[237] Concord v. Portsmouth Sav. Bank, 92 U. S. 625. In Iowa it is held that if money be expended before the repeal of a statute, upon the faith of a tax provided for by it, the repeal does not invalidate the tax and it may be collected. Burges v. Mabin, 70 Iowa, 633; 27 N. W. 464; Barthel v. Meader, 72 Iowa, 125; 33 N. W. 446.

[238] Cases cited, supra.

[239] Wadsworth v. St. Croix Co. 4 Fed. 378; People v. Pueblo Co. 2 Colo. 360; Cumberland &c. R. Co. v. Barren Co. 10 Bush (Ky.), 604. And so where the vote is for a subscription upon condition, the railroad company has a right to the voted aid only upon a strict performance of the conditions. Brocaw v. Gibson Co. 73 Ind. 543; Memphis &c. R. Co. v. Thompson, 24 Kan. 170; Chicago &c. R. Co. v. Aurora, 99 Ill. 205; People v. Hitchcock, 2 T. & C. (N. Y. Sup.) 134.

§ 862. Aid authorized by popular vote—Duty of local officers.—Where the statute requires that aid be granted by popular vote, and the voters are empowered to prescribe conditions and do prescribe conditions, the local officers must carry out the will of the voters. In such case the administrative officers appointed to carry the vote into effect cannot make any change in the conditions upon which the subscription is voted.[240] It is the duty of such officers to obey the expressed will of the voters, and if they disobey it their proceedings will not be effective except where the doctrine of estoppel applies. Leaving out of consideration the principle of estoppel, it may be said that the conditions prescribed by the voters, where they are in accordance with the statute, constitute, in a great degree, the measure of power. Local officers cannot, without statutory authority, organize taxing districts, and a vote by an arbitrarily organized district, and acts done in pursuance thereof, are not valid. It has been held that such a proceeding cannot be validated by a subsequent enactment of the legislature, since such acts could not be said to be done by the representatives of the people affected by the tax.[241] It may, however, be doubted whether the broad doctrine of the case cited can be sustained since the general rule is that what the legislature can authorize it may validate,[242] but it is also to be kept in mind that acts which are absolutely void cannot be validated by subsequent legislation.[243] Where commissioners are appointed, under authority of the enabling act, to make a subscription for a municipality, they are the agents of

[240] People v. Waynesville, 88 Ill. 469. See, also, State v. Daviess Co. 64 Mo. 30.

[241] Williams v. Roberts, 88 Ill. 11.

[242] May v. Holdridge, 23 Wis. 93; Pelt v. Payne, 60 Ark. 637; 30 S. W. 426; State v. Guttenberg, 38 N. J. L. 419; Unity v. Burrage, 103 U. S. 447; Bennett v. Fisher, 26 Iowa, 497; Allen v. Archer, 49 Me. 346; Commonwealth v. Marshall, 69 Pa. St. 328; Shaw v. Norfolk R. Co. 5 Gray, 162; Brewster v. Syracuse, 19 N. Y. 116; Kunkle v. Franklin, 13 Minn. 127; 97 Am. Dec. 226; Boyce v. Sinclair, 3 Bush (Ky.), 261.

[243] Kimball v. Rosendale, 42 Wis. 407; 24 Am. R. 421; Maxwell v. Goetschius, 40 N. J. L. 383; 29 Am. R. 242; People v. Lynch, 51 Cal. 15; 21 Am. R. 677; Thames &c. Co. v. Lathrop, 7 Conn. 550; Abbott v. Lindenbower, 42 Mo. 162; Johnson v. Board, 107 Ind. 15; 8 N. E. 1; Andrews v. Beane, 15 R. I. 451. See Hasbrouck v. Milwaukee, 13 Wis. 37; 80 Am. Dec. 718, and note; Yeatman v. Day, 79 Ky. 186; Roche v. Waters, 72 Md. 264; 18 Atl. 866; 7 L. R. A. 533; State v. Doherty, 60 Me. 504; Pryor v. Downey, 50 Cal. 388; 19 Am. R. 656.

the corporation to the extent of making the subscription, and it may adopt or reject their acts done outside the limits of their authority. If they annex to the subscription conditions beyond what are contained in the instrument of assent by which they received their appointment and authority, their act in so doing is not void, but such conditions are binding unless repudiated by the municipality.[244] Such commissioners cannot bind the town by a waiver of any of the conditions imposed, or by an agreement that other terms and conditions shall be substituted.[245] And where a subscription, absolute in form, was made by commissioners appointed by a town to make the subscription upon certain conditions, and it appeared at the hearing of an application for a peremptory writ of mandamus to compel the delivery of bonds by the town, that the subscription was made under the belief, induced in part by the representations of the railroad company's officers, that the town could not be compelled to deliver the bonds until an agreement as to the performance of the conditions had been made, and that the conditions had not been performed by the relator, the writ was denied.[246]

§ 863. Contract granting aid — Subscription — Enforcement.— Where the statute conferring power to grant aid has been complied with, and the railroad company has fully complied with the terms and conditions of the statute and agreement, a contract exists which cannot be annulled except, of course, for sufficient legal or equitable cause. Thus, it has been held that authority to make a subscription to be paid by the issue of municipal bonds only after the road is open for traffic will enable a town to make a binding subscription from which it cannot be released without the consent of the railroad company, and that valid bonds may be issued after the completion of the road although the statute authorizing the subscription has, in the

[244] Danville v. Montpelier &c. R. Co. 43 Vt. 144. Where a petition of tax-payers, relating to an issue of railroad aid bonds, provides that a certain quantity shall be issued when the road is located through the town, the commissioners appointed in pursuance of the petition are thereby authorized to postpone their issue to a later stage in the progress of the work, by contract with the company. Cherry Creek v. Becker, 2 N. Y. S. 514.

[245] Falconer v. Buffalo &c. R. Co. 69 N. Y. 491. Nor can they bind the town by any act not done in compliance with the authority conferred by the vote of the inhabitants, Horton v. Thompson, 71 N. Y. 513.

[246] People v. Hitchcock, 2 Thompson & C. (N. Y.) 134.

meantime, been repealed.[247] It may be laid down as a general rule that, where the statute has been pursued in all its requirements, and the aid regularly voted, and the railroad company has complied with the conditions imposed, the corporation or its creditors may have a writ of mandamus to compel the issue of the bonds by officers whose only duties are ministerial, and who are given no discretion in the matter.[248] If no conditions are imposed, the officers may be compelled

[247] Concord v. Portsmouth Sav. Bank, 92 U. S. 625; Livingston Co. v. First Nat. Bank, 128 U. S. 102, 126; 9 Sup. Ct. 18. The repeal of the law under which a tax was voted will not invalidate the tax where the proceedings have been regular, and the company has, on the faith of the vote, expended money in constructing its line in the town which voted the tax. Cantillon v. Dubuque &c. R. Co. 78 Iowa, 48; 42 N. W. 613; 5 L. R. A. 726, and note. See, also, Powell v. Brunswick Co. 88 Va. 707; 14 S. E. 543.

[248] Chicago &c. R. Co. v. St. Anne, 101 Ill. 151; Brodie v. McCabe, 33 Ark. 690; Howland v. Eldeidge, 43 N. Y. 457; Louisville &c. R. Co. v. County Court, 1 Sneed (Tenn.), 637; 62 Am. Dec. 424; Mt. Vernon v. Hovey, 52 Ind. 563; Cumberland &c. R. Co. v. Washington Co. 10 Bush (Ky.), 564; Cincinnati &c. R. Co. v. Clinton Co. 1 Ohio St. 77; Raleigh &c. R. Co. v. Jenkins, 68 N. C. 502; Napa Valley R. Co. v. Napa Co. 30 Cal. 435; Selma &c. R. Co. Ex parte, 45 Ala. 696; 6 Am. R. 722; Muscatine v. Mississippi &c. R. Co. 1 Dill. (U. S.) 536; United States v. Clarke Co. 96 U. S. 211. Under the Kansas act of 1885, relating to municipal aids to railroads, providing that townships shall issue no more than $15,000 and five per cent on its assessed value for such purpose, a subscription to the amount limited, duly made and accepted by the company, is a contract binding on the township, and the conditions being performed, the company is entitled to the township bonds to the exclusion of another road, to whose stock the town has afterwards subscribed, though the latter perform its conditions first. Chicago &c. R. Co. v. Board, &c. 38 Kans. 597; 16 Pac. 828. In case of a subscription to the stock of a railroad company by the county board, the certificate of stock thus subscribed may be demanded as a condition of the payment of the money, and where the property of such company is sold on foreclosure, and bought in by a new company having no power to issue stock of the old company, such new company can not, by mandamus, compel the levy of a tax for the purpose of paying them the amount voted to be paid for stock in the original company. Board of Commissioners v. State, 115 Ind. 64, 70; 4 N. E. 589; 7 N. E. 855. If one whose land has been taken for use in the construction of a railroad without compensation so assents to the entry of the railroad as to waive his right to dispossess it, the omission to make such compensation can not be urged as a defense to an action by a railroad to recover money voted by a city

to make the subscription as soon as it is fully authorized by a vote and the rights of the beneficiary become vested.[249] But until there is an effective contract there is no right to a mandamus. The general rule is that the subscription will be held to have been made as of the date when it became the duty of the officers to make it. There is a sufficient subscription to entitle the railroad company to all the rights which a manual subscription on its books would confer, whenever the corporation, in the mode prescribed by the statute, directs its officers to subscribe for a certain amount of its stock, and there is either an actual or constructive acceptance on its part.[250] A manual subscription is not necessary on their part, however, but the agreement to take stock may be made binding by a resolution or vote of the municipal authorities or officers charged with discretion in the matter, if designed to have that effect, and passed for the purpose of completing the agreement.[251] The burden of proof is upon a railroad

to the railroad company to be paid on completion of the road. Manchester &c. R. Co. v. Keene, 62 N. H. 81.

[249] People v. Cass Co. 77 Ill. 438; People v. Logan Co. 63 Ill. 374. The supreme court of Kansas has held that the vote of the people of a county to subscribe for the stock of a railroad company and to issue its bonds, does not create a contract between the county and the company, even though such vote was upon conditions which the company subsequently performed; and the court refused a mandamus to compel the subscription. Land Grant &c. R. Co. v. Davis Co. 6 Kan. 256.

[250] Nugent v. Supervisors, 19 Wall. (U. S.) 241; State v. Jennings, 48 Wis. 549. As to what constitutes an effective contract, see Nugent v. Supervisors, 19 Wall. (U. S.), 241; Clarke Co. v. Paris &c. Turnpike Co. 11 B. Mon. (Ky.) 143; Shelby Co. Court v. Cumberland &c. R. Co. 8 Bush (Ky.), 209; Welch v. Post, 99 Ill. 471; Clay Co. v. Society for Savings, 104 U. S. 579. The mere vote by the inhabitants of a municipality to the effect that bonds shall be issued does not make the contract to issue them a binding one. State v. Lancaster Co. 6 Neb. 214; Harshman v. Bates Co. 92 U. S. 569; Chesapeake &c. R. Co. v. Barren Co. 10 Bush (Ky.), 604; Bound v Wisconsin R. Co. 45 Wis. 543; Jeffries v. Lawrence, 42 Iowa, 498; Land Grant R. Co. v. Davis Co. 6 Kan. 256.

[251] Cass Co. v. Gillett, 100 U. S. 585; Illinois Midland R. Co. v. Barnett, 85 Ill. 313; Justices County Ct. v. Paris &c. Turnp. Co. 11 B. Mon. (Ky.) 143. See, also, Bates Co. v. Winters, 112 U. S. 325; 5 Sup. Ct. 157; State v. Delaware Co. 92 Ind. 499; Nelson v. Haywood County, 87 Tenn. 781; 11 S. W. 885; 4 L. R. A. 648. Where the order is that a subscription be made with conditions and terms annexed, and it is not of itself final and complete, such order must be fully obeyed to render the subscription

company asking the enforcement of the issuance of bonds, to show that the bonds are authorized to be issued by a vote of the people had pursuant to laws existing at the time the company was entitled thereto.[252]

§ 864. Power of municipal officers where the statute requires submission to popular vote.—Municipal officers, as is well known, have only such powers as the statute confers upon them, and municipalities can only grant aid when expressly authorized by statute, so that it follows that, where a vote is required, there is no power to enter into a contract until the vote prescribed has been taken. It is correctly held that a contract with reference to the giving of aid made in advance of a popular vote will not be regarded as valid, even though it is made to procure such vote, and the vote is afterward obtained.[253] The vote is the foundation of the power, and until it has been taken it cannot be justly said that the municipality had any power to contract.

§ 865. Decision of local officers as to jurisdictional facts.—Some of the cases hold that a municipality is not bound by the decision of its officers as to jurisdictional facts, unless the rights of innocent third parties have so intervened as to estop it from disputing the correctness of such decision, and that a court of chancery may investigate the election and other preliminary acts conferring the alleged right to extend aid.[254] But there is conflict upon this general question, and

binding. County of Bates v. Winters, 97 U. S. 83. Where the law requires stock to be paid for at the time it is subscribed, the railroad company has no right to the voted aid until the stock is subscribed and the money paid. And it can not by mandate compel the levy of a tax voted by a municipality to pay for stock which the municipality proposes to take. Board &c. v. State, 115 Ind. 64; 4 N. E. 859; 7 N. E. 855; Board &c. v. Louisville &c. R. Co. 39 Ind. 192. All the steps which precede the taking of stock, or the making of a donation by a county in such a case, are between the people of the county and its officers only, and only a voter can maintain a suit for mandate for this purpose. Board of Commissioners v. Louisville &c. R. Co. 39 Ind. 192; Caffyn v. State, 91 Ind. 324.

[252] Chicago &c. R. Co. v. Mallory, 101 Ill. 583.

[253] People v. Cass Co. 77 Ill. 438. But see Chicago &c. R. Co. v. Ozark, 46 Kan. 415.

[254] Winston v. Tennessee &c. R. Co. 1 Baxter (Tenn.), 60. See Horton v. Thompson, 71 N. Y. 513. An entry and order made by the board of county commissioners to the

we are of the opinion that, where the attack is collateral, the decision is conclusive, except, perhaps, where no action constituting a change of position has been taken by the railroad company, and no third persons have acquired rights.[255] As between the municipality and inno-

effect that a subscription in aid of railroads submitted to the sense of the "qualified voters" of the county had been carried by a majority of such voters, while it can not be attacked collaterally does not so adjudicate the question of the legality of the election that it can not be contested by a direct proceeding for that purpose. Nor do the facts that the county commissioners have subscribed for shares of the capital stock of the railroads, and that the latter have made engagements and contracts based upon that subscription, prevent the election being contested and its validity determined by such a proceeding. Goforth v. Rutherford R. Const. Co. 96 N. C. 535; 2 S. E. 361; McDowell v. Rutherford R. Const. Co. 96 N. C. 514; 2 S. E. 351. The bonds in excess of the amount which a township was authorized to issue were obtained from the state treasurer on a false certificate by the township trustee that the conditions on which they were issued had been complied with. The railway company was cognizant of the fraud and receipted to the treasurer for the bonds, but never had actual possession of them, though it assented to their delivery to the contractor by the township trustee in payment for construction work. It was held that this did not constitute a negotiation of the bonds to an innocent purchaser; and, as the conditions on which they were issued had not been complied with, the consideration had failed, and the township was entitled to a decree for their surrender and cancellation. Wilson v. Union Sav. Assn. 42 Fed. 421. The acts of a Kentucky county court, in ascertaining the result of an election upon the question whether the county shall subscribe to the stock of the Kentucky Union Railway Company, under the Kentucky act of March 10, 1854, and in subscribing the stock, are ministerial, and not judicial, and the tax-payers are not confined to the remedy by appeal, but may maintain an action in the district court to declare the subscription void, and to enjoin the collection of the tax to pay it, on the ground of the illegality of the election. Holt, J., dissenting. Kentucky Union R. Co. v. Bourbon Co. 85 Ky. 98; 2 S. W. 687. From this doctrine we dissent.

[255] Commissioners of Knox Co. v. Aspinwall, 21 How. (U. S.) 539; Coloma v. Eaves, 92 U. S. 484; Commissioners &c. v. Bolles, 94 U. S. 104; Venice v. Murdock, 92 U. S. 494; Bissell v. Jeffersonville, 24 How. (U. S.) 287; Bank of U. S. v. Dandridge, 12 Wheat. (U. S.) 64, 70; Knox Co. v. Ninth &c. Bank, 147 U. S. 91; 13 Sup. Ct. 267; Ryan v. Varga, 37 Iowa, 78; Koehler v. Hill, 60 Iowa, 543; 14 N. W. 738; 15 N. W. 609; Spaulding v. North &c. Assn. 87 Cal. 40; 24 Pac. 600; 25 Pac. 918; Ela v. Smith, 5 Gray (Mass.), 121; 66 Am. Dec. 356; Tucker v. Sellers, 130 Ind. 514, 517; 30 N. E. 531; Demaree v. Bridges, 30 Ind. App. 131; 65 N.

cent third persons, the decision of the board of officers who are appointed to determine whether the conditions precedent to the making of a subscription have been observed is final and conclusive on the municipality.[256] It has been held that, where a petition is necessary, it must show that it is signed by the required number of the class authorized to present such a petition, or it will fail to confer jurisdiction.[257] We do not believe, however, that this can be the correct doc-

E. 601; State v. Nelson, 21 Neb. 572; 32 N. W. 589; State v. Weatherby, 45 Mo. 17; Camden v. Mulford, 26 N. J. L. 49; Porter v. Purdy, 29 N. Y. 106; 86 Am. Dec. 283; Roderigas v. East River &c. 76 N. Y. 316; 32 Am. R. 309; Landford v. Dunklin, 71 Ala. 594; Goodwin v. Sims, 86 Ala. 102; 5 So. 587; 11 Am. St. 21; Cherry Creek v. Becker, 123 N. Y. 161; 25 N. E. 369; Henline v. People, 81 Ill. 269; Chicago &c. Co. v. Chamberlain, 84 Ill. 333; Brittain v. Kinnaird, 1 Brod. & Bing. 432; Betts v. Bagley, 12 Pick. (Mass.) 572; Martin v. Mott, 12 Wheat. (U. S.) 19; Vanderheyden v. Young, 11 Johns. (N. Y.) 150. See authorities cited Elliott Gen. Prac. § 260, notes. See Citizens' &c. Assn. v. Perry County, 156 U. S. 692; 15 Sup. Ct. 547.

[256] Knox Co. v. Aspinwall, 21 How. (U. S.) 539, 544; Bissell v. Jeffersonville, 24 How. (U. S.) 287; Coloma v. Eaves, 92 U. S. 484. On a question as to the validity of certain bonds issued by a county to a railway company, it was claimed that the issue was not authorized by two-thirds of the qualified voters, as required by statute, and that such fact would appear from an inspection of the registration lists, although the board of supervisors, in the performance of their duties, had declared that two-thirds of the voters had voted for the measure. The court held that a bona fide purchaser was not required to go behind such returns, and one who purchased for value, without actual notice of any wrong, was entitled to recover. Madison County v. Brown, 67 Miss. 684; 7 So. 516.

[257] Wilson v. Caneadea, 15 Hun (N. Y.), 218; Angel v. Hume, 17 Hun (N. Y.), 374. See Williams v. Roberts, 88 Ill. 11. Where under the Kansas statutes an election is ordered in a county for the purpose of authorizing a subscription to the capital stock of a railroad company, and an issue of the bonds of the county in payment for such stock, the election is ordered upon a petition presented to the county board, which does not contain the requisite number of names, but which the county board declares to be sufficient, and the election is held, returns canvassed, and the result declared in favor of subscribing for the stock and issuing the bonds, and the clerk is ordered by the board to make the subscription, and does so, the election can not stand but must be deemed to be void because of want of a sufficient petition. Chicago &c. R. Co. v. Board of Com'rs, 43 Kan. 760; 23 Pac. 1064.

trine in cases where the local officers are empowered to determine jurisdictional facts.[258]

§ 866. **Acceptance of aid.**—The general rule is that, where an act is beneficial to a party, acceptance on his part may be presumed. This principle applies to cases where aid is granted to railroad companies. As a rule no formal acceptance of the subscription is necessary on the part of the company. If it complies with the terms upon which a subscription is voted by the municipality an acceptance will be presumed.[259]

§ 867. **Ratification of subscription.**—Where there is an entire absence of power to subscribe to the stock of a railroad company, the municipal corporation assuming to make the subscription cannot validate it by subsequent ratification. Possibly a statute might authorize a valid ratification, but even this is doubtful. It seems clear, at all events, that where there is no such statute, and where the municipality had no authority to make the subscription, it cannot ratify a subscription so as to give it any validity.[260]

§ 868. **Stock subscribed by municipality—Legislative control of.**—The legislative power over the property of a public or municipal corporation is, as we have seen, very broad and comprehensive. The rule that property held by a municipal corporation is under legislative control applies to stock subscribed by it in aid of a railroad company. The fact that such stock is already in the hands of the municipality will not prevent the legislature from transferring it to the taxpayers, at least in the case of imperfectly organized municipal corporations,

[258] Evansville &c. R. Co. v. Evansville, 15 Ind. 395. See authorities cited in second preceding note.

[259] State v. Lime, 23 Minn. 521; State v. Hastings, 24 Minn. 78; Augusta v. Maysville &c. R. Co. 97 Ky. 145; 30 S. W. 1.

[260] Treadway v. Schnauber, 1 Dak. 236; Ryan v. Lynch, 68 Ill. 160. If a municipal corporation votes to subscribe for stock of a railroad before its own charter goes into effect, the vote is a nullity, and no ratification by its officers after the charter takes effect can give it validity. Clark v. Janesville, 13 Wis. 414; 10 Wis. 136; Berliner v. Waterloo, 14 Wis. 378; Winchester &c. Co. v. Clarke Co. 3 Met. (Ky.) 140; Rubey v. Shain, 54 Mo. 207. But see County of Daviess v. Huidekoper, 98 U. S. 98, where bonds were held valid although authorized by a popular vote before the organization was completed.

such as counties and townships.[261] The legislative discretion, where discretion exists, is not subject to judicial surveillance, for the only question for the courts in such cases is power or no power. Under the general power which it possesses, the legislature may direct that the stock so taken by a municipality shall be divided amongst the taxpayers from whom the money with which it was purchased was collected, without laying the statute open to the objection that it compels persons to become stockholders in a private enterprise.[262]

[261] Lucas v. Board of Commissioners, 44 Ind. 524; Board of Commissioners v. Lucas, 93 U. S. 108. In New York the taxes collected from the railroad must be paid to the county treasurer to form a sinking fund for the payment of the bonds issued to aid it. Laws N. Y. 1869, c. 907, as amended by Laws 1871, c. 283, and c. 925. This act is constitutional. Clark, In re, v. Sheldon, 106 N. Y. 104; 12 N. E. 341; Vinton v. Board of Supervisors, 50 Hun (N. Y.), 600; 2 N. Y. S. 367. It applies, not only in the case of railroads constructed under the act of 1869, but to all towns bonded in aid of railroads constructed in or through them. Clark, In re, v. Sheldon, 106 N. Y. 104; 12 N. E. 341. Taxes collected by a city from a railroad company, to aid which it had issued bonds, were paid over to the county treasurer and by him mingled with the county moneys, and never invested, but paid over by him to his successor. The court held that the successor was authorized, under the statute, to invest them for the benefit of the city. Spaulding v. Arnold, 6 N. Y. S. 336. The provisions of the North Carolina statute, by which the county taxes, levied on property and franchises of a railroad in a certain township, in aid of the construction of which railroad the township has voted its bonds, are to be applied to pay interest on such bonds, not interfering with the levy of taxes, are not unconstitutional and only direct the application of county revenue. Brown v. Commissioners, 100 N. C. 92; 5 S. E. 178.

[262] By an act passed March 15, 1851, the legislature of Kentucky incorporated the Shelby Railroad Company, and authorized the county of Shelby to subscribe for stock, and to levy taxes to pay therefor, each person paying such tax to become entitled to his pro rata share of the stock. By an amendment of February 3, 1869, a specified portion of Shelby county was authorized to subscribe for stock, issue bonds in payment thereof, and levy taxes, with the provision that stock for which certificates had been issued to tax-payers should be voted by the individuals holding the same. By act March 11, 1870, the charter was again amended, so as to provide that any county, or part of a county, which had delivered bonds in payment of stock, should be entitled to representation, and to vote the amount of such stock through the county judge and justices of the peace. It was held that taxes paid and used merely to discharge the interest on the bonds did not entitle the tax-payers to stock, and the

§ 869. Rights and liabilities of municipal corporations as stockholders.—It is held that where a municipal corporation, under legislative authority, subscribes for stock without paying for it in full, it stands in the same relation to the company and its creditors that any other subscriber does who owes for an unpaid subscription.[263] But, of course, much depends upon the provisions of the statute which authorizes the municipality to subscribe, since the legislature has power to prescribe the rights and liabilities of the public corporation. In general, however, it takes its stock with all the incidents which attach to the position of a stockholder.[264] Thus it may be held liable for labor and material furnished to the company under a statute making stockholders liable therefor,[265] unless the statute authorizing the subscription expressly provides otherwise.[266]

§ 870. Defenses to municipal subscriptions.—Taxpayers may defend against subscriptions upon the ground that there has been a failure to comply with the requirements of the statute, and so, in some cases, may the municipality. It may be said that the general rule is that the same defenses to the payment of subscriptions, made upon

corporation itself was entitled to vote the stock represented by the amount of bonds still outstanding. Hancock v. Louisville &c. R. Co. 145 U. S. 409; 12 Sup. Ct. 960; Shelby R. Co. v. Louisville &c. R. Co. 145 U. S. 409; 12 Sup. Ct. 969. Tax-payers do not acquire an equitable lien upon the property of a railroad company, in the hands of a purchaser after a foreclosure sale subject to equitable liens, by reason of payments made by them upon a subscription of the county to the capital stock of such company, and the refusal of the company to issue stock to them therefor, whether such payments entitle them to stock or not. The fact that the payments were made to one of the contractors for building the road makes no difference. Spurlock v. Missouri Pac. R. Co. 90 Mo. 199; 2 S. W. 219.

[263] Morgan Co. v. Allen, 103 U. S. 498; Morgan Co. v. Thomas, 76 Ill. 120. See, also, French v. Teschemaker, 24 Cal. 518.

[264] Shipley v. Terre Haute, 74 Ind. 297. See Murray v. Charleston, 96 U. S. 432; National Bank v. Case, 99 U. S. 628; Missouri River &c. R. Co. v. Miami Co. 12 Kans. 482; Cairo v. Zane, 149 U. S. 122; 13 Sup. Ct. 803; Hancock v. Louisville &c. R. Co. 145 U. S. 409; 12 Sup. Ct. 969; Kreiger v. Shelby R. Co. 84 Ky. 66.

[265] Shipley v. Terre Haute, 74 Ind. 297.

[266] Rev. Stat. Ind. 1894, § 5364, provides that no county or township which has become the owner of any stock, shall, in any case, be liable for work or materials furnished the railroad, though the assets of the company be exhausted.

condition, are open to municipalities that may be interposed by others making conditional subscriptions. It is true, however, as elsewhere indicated, that the municipality and the taxpayers may be estopped by their conduct to defend against the subscriptions.[267]

§ 871. Estoppel of taxpayers.—Taxpayers may, by silence and acquiescence, estop themselves from successfully objecting that the proceedings have not been conducted in conformity to the statute. If objections are seasonably and appropriately made they will often avail where they would be unavailing if made after rights have been acquired by the railroad company or third persons. It may be safely said that the general rule is that if the taxpayers stand by without objection while considerable sums of money are expended in the construction of the road, the courts will hold them estopped to aver that there were irregularities in the proceedings.[268] This doctrine cannot

[267] See Arkansas So. R. Co. v. Wilson (La. Ann.), 42 So. 976. A township subscribed certain warrants in aid of a railroad, which were to be issued when the company should have built and put in operation, "with cars running thereon, by lease or otherwise, its said railroad, between two designated cities." The railroad company built its road from one to within 111 feet of the city limits of the other, at which point it intersected another road, and by running its cars over the other road to its depot from this intersection, it continuously operated the road between the two cities. The court held that this was a substantial compliance with the conditions of the subscription, and that mandamus would lie to compel the issue of the warrants. Chicago &c. R. Co. v. Makepeace, 44 Kan. 676; 24 Pac. 1104. Where a county subscribes under an act authorizing counties to subscribe to the construction of a railroad, such county, and all the citizens thereof, must be taken to have acted with reference to the fact that the charter was liable to be amended as occasion should require. Powell v. Supervisors Brunswick Co. 88 Va. 707; 14 S. E. 543. Amendments to the charter, which have not been acted upon by the company, do not release the county from its subscription. Taylor v. Board, 86 Va. 506; 10 S. E. 433. See, also, Kleise v. Galusha, 78 Iowa, 310; 43 N. W. 217; Murfreesboro R. Co. v. Hertford Co. 108 N. Car. 56; 12 S. E. 952; Baltimore &c. R. Co. v. Pumphrey, 74 Md. 86; 21 Atl. 559.

[268] Jones v. Cullen, 142 Ind. 335; 40 N. E. 124; Moulton v. Evansville, 25 Fed. 382; Ricketts v. Spraker, 77 Ind. 371; Kellogg v. Ely, 15 Ohio St. 64; Menard v. Hood, 68 Ill. 121; New Haven v. Fair Haven &c. R. Co. 38 Conn. 422; 9 Am. R. 399; Rochdale Co. v. King, 16 Beav. 630; Dows v. Chicago, 11 Wall. (U. S.) 108; Muncey v. Joest, 74 Ind. 409; Johnson v. Kessler, 76 Iowa, 411; 41 N. W. 57. After the collection

apply, however, where there is an entire absence of power, but it does apply where power exists, although there may be many material errors and irregularities.[269]

§ 872. Remedies of taxpayers.—The validity of a municipal subscription or donation, or the issue of bonds thereunder, may in some jurisdictions be tested in many cases by certiorari,[270] bill of review, or writ of error.[271] But the remedy most often resorted to by taxpayers to prevent illegal municipal aid, or the unlawful levy of a tax to pay the same, is that by way of injunction. As a general rule, any one or more taxpayers of the municipality may institute a suit in behalf of all to enjoin the unauthorized levy of a tax or the illegal issue or payment of bonds.[272] So, the payment of bonds or a subscription

and payment into the county treasury of taxes voted by a township in aid of a railway, the county can not set up the defense that the railway company had sold and disposed of its property and franchises before the taxes became due. Merrill v. Marshall Co. 74 Iowa, 24; 36 N. W. 778. Where a township voted bonds to aid in the construction of a railroad, made a subscription to the capital stock, and received and retains the certificates of stock issued to it, the proceedings having been regular and duly authorized, and the railroad was constructed through the township in strict compliance with the terms of the subscription, and is being regularly operated, the township is estopped in an action of mandamus to compel the issue and delivery of the bonds voted, from asserting that the petition presented to the board of county commissioners, requesting an election to be called at which to vote the bonds, was not signed by two-fifths of the resident tax-payers of the township, where the board of county commissioners had found and determined at the time of its presentation that it was so signed, and was legal in all other respects. Hutchinson &c. R. Co. v. Board of Comrs. 48 Kan. 70; 28 Pac. 1078; 15 L. R. A. 401; 30 Am. St. 273; Chicago &c. R. Co. v. Board of Comrs. 49 Kan. 399; 30 Pac. 456.

[269] Sinnett v. Moles, 38 Iowa, 25 (election invalidated by fraud).

[270] Harris Certiorari, §§ 28, 210, 215; 2 Beach Inj. §§ 1189, 1202.

[271] Anderson Co. v. Houston &c. R. Co. 52 Tex. 228. See, as to action of board of commissioners in regard to cancelling aid voted being final unless appealed from, and the effect of dismissing an appeal, State v. Burgett, 151 Ind. 94; 51 N. E. 139.

[272] Bittinger v. Bell, 65 Ind. 45; Hill v. Probst, 120 Ind. 528; 22 N. E. 644; Alvis v. Whitney, 43 Ind. 83; Redd v. Henry Co. 31 Gratt. (Va.) 695; New Orleans &c. R. Co. v. Dunn, 51 Ala. 128; State v. Hager, 91 Mo. 452; Rutz v. Calhoun, 100 Ill. 392; Nefzger v. Davenport &c. R. Co. 36 Iowa, 642; Winston v. Tennessee &c. R. Co. 1 Baxt. (Tenn.) 60; Campbell v. Paris &c.

may be enjoined by the taxpayers, in a proper case, where the company has not performed the conditions upon which the subscription was made or the bonds issued.[273] But it has been held that injunction will not lie until after a forfeiture has been declared.[274] Where the amount of taxes that may be voted and levied in aid of a railroad company is limited by law, no authority exists to submit to the electors the question of voting aid in excess of that amount, and taxes levied under such a vote may be enjoined.[275] But, as a general rule, injunction will not lie at the suit of taxpayers to prevent an election under legislative authority to enable the citizens of the municipality to vote to levy or not to levy a tax upon themselves in aid of a railroad.[276] And mere irregularities, which do not prejudice any substantial rights, will not be sufficient ground for an injunction.[277] So, it has been held that after a tax has been voted and levied, the suffi-

R. Co. 71 Ill. 611. See, also, Morris v. Merrill, 44 Neb. 423; 62 N. W. 865; Gregg v. Sanford, 65 Fed. 151; Flack v. Hughes, 67 Ill. 384; Finney v. Lamb, 54 Ind. 1; Bronenberg v. Board, 41 Ind. 502; Cattell v. Lowry, 45 Iowa, 478; Blunt v. Carpenter, 68 Iowa, 265; 26 N. W. 438; Kentucky &c. R. Co. v. Bourbon County, 85 Ky. 98; 2 S. W. 687; Metzger v. Attica &c. R. Co. 79 N. Y. 171; Graves v. Moore Co. Comrs. 135 N. Car. 49; 47 S. E. 134. It has been held that an allegation that the railroad company did not "legally" commence work was not equivalent to an averment that the company failed to commence work upon its road within two years from the levying of the tax. Sellers v. Beaver, 97 Ind. 111.

[273] Wagner v. Meety, 69 Mo. 150. See, also, Midland v. County Board, 37 Neb. 582; 56 N. W. 317; Lamb v. Anderson, 54 Iowa, 190; Peed v. Millikan, 79 Ind. 86; Chicago &c. R. Co. v. Marseilles, 84 Ill. 145. But it is held that insolvency of the company does not necessarily render a tax previously levied invalid. Wilson v. Hamilton Co. 68 Ind. 508.

[274] Nixon v. Campbell, 106 Ind. 47; 4 N. E. 296; 7 N. E. 258; Pittsburg &c. R. Co. v. Harden, 137 Ind. 486; 37 N. E. 324. See, also, Demaree v. Bridges, 30 Ind. App. 131; 65 N. E. 601.

[275] Burlington &c. R. Co. v. Clay, Co. 13 Neb. 367. See, also, Hedges v. Dixon Co. 150 U. S. 182; 14 Sup. Ct. 71.

[276] Roudanez v. New Orleans, 29 La. Ann. 271.

[277] Ricketts v. Spraker, 77 Ind. 371; Lafayette &c. R. Co. v. Geiger, 34 Ind. 185; Demaree v. Johnson, 150 Ind. 419; 49 N. E. 1062; 50 N. E. 376; Louisville &c. R. Co. v. Davidson Co. 1 Sneed (Tenn.), 637; 62 Am. Dec. 424; Milwaukee &c. R. Co. v. Kossuth Co. 41 Iowa, 57; Texas &c. R. Co. v. Harrison Co. 54 Tex. 119. See, also, Chicago &c. R. Co. v. Grant, Clerk &c. 55 Kan. 386; 40 Pac. 654; Robinson v. Wilmington, 65 Fed. 856; 2 Beach Inj. §§ 1193, 1195, 1200; Whitney v. Chicago &c. R. Co. (Ia.) 110 N. W. 912.

ciency of the petition or the result of the vote as declared by the canvassing board cannot be collaterally assailed or inquired into in a suit by the taxpayers to enjoin the collection of the taxes.[278] This is, indeed, the general rule.[279] As in other cases in which an injunction is sought, the plaintiff should act promptly, and show the necessary grounds for the interposition of a court of equity.[280] If a taxpayer delays action until after the tax has been collected and the money paid over to the bondholders of the railroad company, when he might have obtained an injunction restraining the collection of the tax by acting in time, he cannot recover the amount of the tax paid by himself from the treasurer of the municipality,[281] but there are cases in which the payment of the tax to the company may be restrained even after it has been collected.[282] After bonds have been issued and a tax levied to pay them, a taxpayer can enjoin its collection in a suit against the municipality and its treasurer only upon grounds constituting a good defense on the part of the city to the payment of the bonds in the hands of the present holders.[283]

§ 873. Remedies of municipalities.—The rights and remedies of a municipal corporation which has subscribed for stock in aid of a railroad are, in the main, the same as those of an individual subscriber.[284]

[278] Ryan v. Varga, 37 Iowa, 78; Dwyer v. Hackworth, 57 Tex. 245.

[279] Jones v. Cullen, 142 Ind. 335; 40 N. E. 124, and numerous authorities there cited; Board v. Hall, 70 Ind. 469; Pittsburg &c. R. Co. v. Harden, 137 Ind. 486; 37 N. E. 324; Bell v. Maish, 137 Ind. 226; 36 N. E. 358, 1118; Demaree v. Bridges, 30 Ind. App. 131; 65 N. E. 601; Citizens' Sav. & L. Assn. v. Perry Co. 156 U. S. 692; 15 Sup. Ct. 547. But see Kentucky Union Ry. Co. v. Bourbon Co. 85 Ky. 98; People v. Spencer, 55 N. Y. 1; McPike v. Pen, 51 Mo. 63; DeForth v. Wisconsin &c. R. Co. 52 Wis. 320; 9 N. W. 17; 38 Am. R. 737; 5 Am. & Eng. R. Cas. 28; Harding v. Rockford &c. R. Co. 65 Ill. 90.

[280] Chamberlain v. Lyndeborough, 64 N. H. 563; 14 Atl. 865; Vickery v. Blair, 134 Ind. 554; 32 N. E. 880; Jones v. Cullen, 142 Ind. 335; 40 N. E. 124; Trustees &c. School Dist. v. Garvey, 80 Ky. 159; Menard v. Hood, 68 Ill. 121; Moulton v. Evansville, 25 Fed. 382; 10 Am. & Eng. Ency. of Law, 802, 857, et seq.; ante, § 871.

[281] Butler v. Fayette County, 46 Iowa, 326.

[282] Missouri &c. R. Co. v. Miami Co. 12 Kan. 230.

[283] Wilkinson v. Peru, 61 Ind. 1.

[284] It occupies, in general, the same position as any other subscriber—no better and no worse. Pittsburg &c. R. Co. v. Allegheny Co. 79 Pa. St. 210; Shipley v. Terre

As a general rule, any act of the railroad company that would release an individual subscriber will release the municipality as between it and the company, and, in a proper case, a bill will lie for the rescission of the subscription.[285] So, the municipality may, in a proper case, obtain an injunction restraining the company from violating conditions upon which the subscription was made,[286] or a rescission of a fraudulent contract into which it has entered.[287] The municipality may enforce the delivery of the stock in the same manner, and, as a rule, under the same circumstances as an individual subscriber.[288] A provision in the enabling act that the citizens who pay the tax shall receive from the municipality, with its consent, the stock delivered to it by the railroad company has been held not to invalidate the tax or relieve the municipality of the obligation to pay its subscription.[289] Where bonds have been issued fraudulently or without authority of law, the municipality may maintain a suit to have them declared void and canceled by making the bondholders parties.[290] As we shall hereafter show, a municipality which has authority to issue negotiable bonds may be estopped from questioning their validity in the hands of bona fide purchasers; but it has been held that it is not estopped from enjoining the officers of a railroad company from disposing of bonds irregularly issued by the mere fact that it has accepted the

Haute, 74 Ind. 297; Noesen v. Port Washington, 37 Wis. 168; Morgan Co. v. Allen, 103 U. S. 498; Murray v. Charleston, 96 U. S. 432; Morgan Co. v. Thomas, 76 Ill. 120; State v. Holladay, 72 Mo. 499. Part of a county may be considered as a municipality for the purpose of owning and voting stock in a railroad company. Hancock v. Louisville &c. R. Co. 145 U. S. 409; 12 Sup. Ct. 969.

[285] Crawford Co. v. Pittsburgh &c. R. Co. 32 Pa. St. 141; Lawrence Co. v. Northwestern R. Co. 32 Pa. St. 144; Lawrence County's Appeal, 67 Pa. St. 87.

[286] Platteville v. Galena &c. R. Co. 43 Wis. 493. See, also, Perkins v. Port Washington, 37 Wis. 177.

[287] People v. Logan Co. 63 Ill. 374.

[288] Wapello v. Burlington &c. R. Co. 44 Iowa, 585.

[289] Talbot v. Dent, 9 B. Mon. (Ky.) 526; Slack v. Maysville &c. R. Co. 13 B. Mon. (Ky.) 1.

[290] Waverly v. Auditor, 100 Ill. 354; Paola &c. R. Co. v. Anderson Co. 16 Kan. 302; Comrs. of Anderson Co. v. Paola &c. R. Co. 20 Kan. 534. See Brooklyn v. Insurance Co. 99 U. S. 362; Roberts v. Bolles, 101 U. S. 119; Springport v. Teutonia &c. Bank, 75 N. Y. 397; Chester &c. R. Co. v. Caldwell Co. 72 N. Car. 486. An action may also lie to correct errors in the bonds and make them conform to the vote authorizing their issue. Essex v. Day, 52 Conn. 483.

stock, and levied a tax to pay the interest upon the bonds.[291] It has also been held that an officer of a railroad company, who, with full knowledge that the bonds have become invalid because the company has ceased to exist, negotiates them to innocent purchasers, is liable to the municipality for what it is compelled to pay such purchasers,[292] and a county may have the assistance of a court of equity to restrain its treasurer from wrongfully applying funds in his hands to the payment of void bonds.[293]

§ 874. Remedies of railroad companies.—Where all the preliminary steps requisite to the valid issue of bonds or the collection of the money voted in aid of a railroad company have been taken, and nothing remains but the ministerial duty to issue the bonds, levy the taxes, or make the collection, the company, having performed all necessary conditions on its part, may compel the performance of such duty by mandamus.[294] It has been held, however, that, unless the law makes it the duty of the municipality or its proper officers to make the subscription or issue bonds,[295] so that they have no discretion in the matter, the mere fact that an election has resulted in favor of making such subscription or issuing the bonds creates no contract

[291] Madison Co. v. Paxton, 57 Miss. 701.

[292] Farnham v. Benedict, 107 N. Y. 159; 13 N. E. 784. So where the company unlawfully and fraudulently negotiates the bonds. Plainview v. Winona &c. R. Co. 36 Minn. 505, 517; 32 N. W. 745.

[293] Missouri River &c. R. Co. v. Miami Co. 12 Kan. 230. See, also, Midland v. County Board, 37 Neb. 582; 56 N. W. 317.

[294] Cherokee Co. v. Wilson, 109 U. S. 621; 3 Sup. Ct. 352; United States v. Clark Co. 96 U. S. 211; Chicago &c. R. Co. v. St. Anne, 101 Ill. 151; People v. Getzendaner, 137 Ill. 234; 34 N. E. 297; California &c. R. Co. v. Butte Co. 18 Cal. 671; Napa Valley R. Co. v. Napa Co. 30 Cal. 435; Louisville &c. R. Co. v. Davidson Co. 1 Sneed (Tenn.), 637; 62 Am. Dec. 424; Raleigh &c. R. Co. v. Jenkins, 68 N. Car. 502; People v. Batchellor, 53 N. Y. 128; 13 Am. R. 480; People v. Allen, 52 N. Y. 538; Jager v. Doherty, 61 Ind. 528; Augusta v. Maysville &c. R. Co. 97 Ky. 145; 30 S. W. 1; Duncan v. Mayor, 8 Bush (Ky.), 98; Columbia Co. v. King, 13 Fla. 451; Commonwealth v. Pittsburgh, 34 Pa. St. 496; High Ex. Rem. §§ 282, 393. Mandamus will lie to compel the proper officers to promulgate the result of an election to determine whether a tax shall be levied in aid of a railroad. State v. Monroe, 46 La. Ann. 1276; 15 So. 625.

[295] People v. Dutcher, 56 Ill. 144; People v. Holden, 91 Ill. 446; People v. Logan Co. 63 Ill. 374.

with the company, and mandamus will not lie.[296] But when the subscription has once been legally made, mandamus will lie, upon tender of the stock, to compel the municipality to issue bonds[297] or take steps to raise the money to pay the subscription in accordance with the statute.[298] If, however, the aid is unauthorized,[299] or necessary conditions have not been complied with,[300] the writ will be refused. But mere delay on the part of the railroad company in enforcing its rights, where no one is injured thereby, has been held insufficient to prevent it from afterwards enforcing them by mandamus.[301] It has been held that, where a perpetual injunction has been granted prohibiting the officers from making a subscription, mandamus will not afterwards lie at the suit of the railroad company to compel them to do so,[302] and so, on the other hand, it has been held that, if a mandamus has first been awarded, injunction will not lie to prevent them from doing what they have been ordered to do by the mandate of the court.[303]

[296] Land Grant R. &c. Co. v. Davis Co. 6 Kan. 256; State v. Roscoe, 25 Minn. 445; People v. Fort Edward, 70 N. Y. 28. See, also, Chicago &c. R. Co. v. St. Anne, 101 Ill. 151; Crawford Co. v. Louisville &c. R. Co. 39 Ind. 192; Chicago &c. R. Co. v. Olmstead, 46 Iowa, 316; State v. Garoutte, 67 Mo. 445; Cumberland &c. R. Co. v. Barren Co. 10 Bush (Ky.), 604; State v. Board (Ind.), 76 N. E. 986.

[297] State v. Jennings, 48 Wis. 549; Atchison &c. R. Co. v. Jefferson Co. 12 Kan. 127; State v. Lake City, 25 Minn. 404; Selma &c. R. Co. Ex parte, 45 Ala. 696; 6 Am. R. 722.

[298] Clark Co. v. Paris &c. Co. 11 B. Mon. (Ky.), 143; Osage Valley &c. R. Co. v. Morgan Co. 53 Mo. 156; Cincinnati &c. R. Co. v. Clinton Co. 1 Ohio St. 77.

[299] State v. Highland, 25 Minn. 355; State v. Minneapolis, 32 Minn. 501; 21 N. W. 722; State v. Tappan, 29 Wis. 664; 9 Am. R. 622; Norton v. Dyersburg, 127 U. S. 160; 8 Sup. Ct. 1111. See, also, Clay Co. v. McAleer, 115 U. S. 616; 6 Sup. Ct. 199; United States v. Macon Co. 99 U. S. 582; Supervisors v. United States, 18 Wall. (U. S.) 71; State v. Rainey, 74 Mo. 229; People v. Logan Co. 63 Ill. 374; Brownsville v. Loague, 129 U. S. 493; 9 Sup. Ct. 327.

[300] People v. Waynesville, 88 Ill. 469; People v. Holden, 91 Ill. 446; People v. Glann, 70 Ill. 232; Essex Co. R. Co. v. Luneuburgh, 49 Vt. 143. See Casady v. Lawry, 49 Iowa, 523.

[301] State v. Jennings, 48 Wis. 549; 4 N. W. 641. See, also, Merrill v. Marshall Co. 74 Iowa, 24; 36 N. W. 778; Merrill v. Welsher, 50 Iowa, 61.

[302] Ohio &c. R. Co. v. Commissioners, 7 Ohio St. 278. See, also, Fleming, Ex parte, 4 Hill (N. Y.), 581; State v. Board, 162 Ind. 580; 68 N. E. 295; 70 N. E. 373, 984. But compare Knox Co. v. Aspinwall, 24 How. (U. S.) 376.

[303] Cumberland &c. R. Co. v.

The mere pendency of quo warranto proceedings against the company or the individuals composing it is not, however, a good defense to mandamus proceedings instituted by the company to compel the municipality to issue its bonds in a proper case.[304] Other remedies may doubtless be resorted to in some cases, but mandamus is usually the most desirable remedy, and is frequently the only remedy of the railroad company.[305]

§ 874a. Remedies of railroad companies—Continued.—In a proceeding to enforce a tax in aid of a railroad, it has been held sufficient to aver as a fact that the railroad company has been permanently located in the township without alleging that this fact has been judicially determined.[306] It has also been held that a proper record of the county board appropriating money to aid a railroad company, and showing all the facts necessary to give jurisdiction, is sufficient evidence of the appropriation and the corporate existence of the railroad company seeking the relief,[307] and cannot be collaterally attacked.[308] But this might not be true in all jurisdictions and under all statutes. It is clear, however, that, in a petition for mandamus to enforce the levy of a railroad tax, it is not necessary to state every detail of the election; and in a recent case in Louisiana it is held that all that is necessary is to give the requisite particulars serving as a basis for the mandamus, as that, on a certain day, the authorities of the defendant town held an election to take the sense of the taxpayers of the town touching the imposition of a tax of so many mills for so many years in aid of the construction of the plaintiff railroad, and that the result of the election was duly ascertained and proclaimed by the authorities of the town, and was favorable to the tax, and that the railroad has

Judge, 10 Bush (Ky.), 564. But see Commissioners Brownsville Tax Dist. v. Loague, 129 U. S. 493; 9 Sup. Ct. 327; McKinney v. Frankfort &c. R. Co. 140 Ind. 95; 38 N. E. 170; 39 N. E. 500, with which compare, however, State v. Board, 162 Ind. 580; 68 N. E. 295; 70 N. E. 373, 984.

[304] Oroville &c. R. Co. v. Plumas Co. 37 Cal. 354.

[305] See Smith v. Bourbon Co. 127 U. S. 105; 8 Sup. Ct. 1034; 22 Am. & Eng. Corp. Cas. 74, 78.

[306] Caffyn v. State, 91 Ind. 324.

[307] Caffyn v. State, 91 Ind. 324. See, also, Nixon v. Campbell, 106 Ind. 47; 4 N. E. 296; 7 N. E. 258.

[308] Board v. Montgomery, 106 Ind. 517; 6 N. E. 915. See also, Jones v. Cullen, 142 Ind. 335; 40 N. E. 124.

been duly completed according to agreement, and the tax earned.[309] The fact that a township is not made a defendant in a suit to enjoin a board of county commissioners and county officers from enforcing a railroad aid tax voted by the township, in Indiana, does not render the injunction decree void as to those who were made parties and duly served with process, and mandamus will not lie to compel the board to order the collection of the tax where such board had already been enjoined from so doing and the personnel of the board has since changed.[310]

[309] Arkansas So. R. Co. v. Wilson (La. Ann.), 42 So. 976. It is also held in this case that "the assignment by the railroad company to private individuals of the right to the avails of such a tax will not operate an abandonment of the tax, where the right to assign the tax has been unconditionally granted to the railroad. A private individual may be the beneficiary of such a tax as well as a corporation, where he becomes so by assignment; and it is no concern of the town, or of the taxpayers, whether such assignment has been with or without consideration."

[310] State v. Board, 162 Ind. 580; 68 N. E. 295; 70 N. E. 373, 984. See, also, State v. Board (Ind.), 76 N. E. 986.

CHAPTER XXXV.

MUNICIPAL AID BONDS.

§ 875. Power to issue aid bonds.—The power of a municipality to aid a railroad company, as we have elsewhere shown, is not an ordinary or implied corporate power, but exists only in cases where it is clearly granted by statute.[1] The whole subject of granting aid is a statutory one, and it is always necessary to look to the statute to ascertain the nature and extent of the power.[2] The rule which is, as

[1] Ante, §§ 825, 829.

[2] See Hutchinson v. Self, 153 Ill. 542; 39 N. E. 27; Columbus v. Dennison, 69 Fed. 58; United States v. Macon Co. 99 U. S. 582; United States v. Clark Co. 96 U. S. 211; State v. Shortridge, 56 Mo. 126; State v. Macon Co. 41 Mo. 453. It has been held that general authority to subscribe to the stock of a railroad company or to make a donation of money to aid in the construction of its road, carries with it by necessary implication the power to borrow money for that purpose, and to issue bonds and sell them as a means to that end. Seybert v. Pittsburg, 1 Wall. (U. S.) 272; United States v. New Orleans, 98 U. S. 381; United States v. Macon Co. 99 U. S. 582; Thompson v. Peru, 29 Ind. 305; Hancock v. Chicot Co. 32 Ark. 575; Nichol v. Nashville, 9 Humph. (Tenn.) 252. Authority "to obtain money on loan on the faith and credit of the city for the purpose of contributing to works of internal improvement," was held to confer upon the city the power to guarantee payment of the bonds of a railroad company. Savannah v. Kelly, 108 U. S. 184; 2 Sup. Ct. 468. And it was held that an act which authorized a town to subscribe for shares in the capital stock of a railroad company, and to raise by loans or taxes the money required to pay the installments of the subscription, conferred on the town by implication the power to issue bonds. Commonwealth v. Williamstown, 156 Mass.

we believe, supported by principle, and sanctioned by authority, is that there is no power to issue bonds to aid a railroad company unless the power is clearly conferred by statute.[3] A municipal corporation is in no sense a business or trading corporation, but is a governmental instrumentality, so that the true and just view is, that it has no power to issue bonds to aid in the construction of a railroad, unless the power is expressly conferred by statute.[4] The power to issue negotiable bonds is a high and important one, and there is strong reason for holding that, unless expressly conferred, it does not exist. Some of the cases take a different view of the general question, but, in our opinion,

70; 30 N. E. 472. But it has also been held that power to levy a tax, and make a donation to a railroad, or purchase its stock, confers no authority to issue bonds in anticipation of the tax. Middleport v. Aetna Life Ins. Co. 82 Ill. 562; Lippincott v. Pana, 92 Ill. 24; Winston v. Tennessee &c. R. Co. 1 Baxter (Tenn.) 60; Daviess Co. v. Howard, 13 Bush (Ky.), 101; Leavenworth &c. R. Co. v. Commissioners of Douglas Co. 18 Kan. 169; Wellsborough v. New York &c. R. Co. 76 N. Y. 182; Concord v. Robinson, 121 U. S. 165; 7 Sup. Ct. 937; Wells v. Supervisors, 102 U. S. 625; Katzenberger v. Aberdeen, 121 U. S. 172; 7 Sup. Ct. 947; Kelley v. Milan, 127 U. S. 139; 8 Sup. Ct. 1101.

[3] Ante, § 839.

[4] Ante, § 839. The rule that is best sustained by authority is thus stated by the supreme court of the United States: "It is well-settled that a municipal corporation, in order to exercise the power of becoming a stockholder in a railroad corporation, must have such power expressly conferred upon it by a grant from the legislature; and that even the power to subscribe for such stock does not carry with it the power to issue negotiable bonds in payment for the subscription, unless the power to issue such bonds is expressly or by necessary implication conferred by statute." Kelley v. Milan, 127 U. S. 139; 8 Sup. Ct. 1101, citing Pulaski v. Gilmore, 21 Fed. 870; Tax Payers v. Tennessee Central R. Co. 11 Lea (Tenn.), 329; Marsh v. Fulton County, 10 Wall. (U. S.) 676; Wells v. Supervisors, 102 U. S. 625; Ottawa v. Carey, 108 U. S. 110; 2 Sup. Ct. 361; Daviess County v. Dickinson, 117 U. S. 657; 6 Sup. Ct. 897. The grant of power to a municipality to subscribe for stock in a railroad does not imply the power to issue bonds therefor. Norton v. Dyersburg, 127 U. S. 160; 8 Sup. Ct. 1111; Hill v. Memphis, 134 U. S. 198; 10 Sup. Ct. 562. Under a Kansas statute which provides that no bonds except for the erection and furnishing of school houses shall be voted for and issued by any county or township within one year after the organization of such new county, a newly organized county can not legally vote for an issue bonds in aid of a railroad company within one year after the county has been organized. State v. Haskell Co. 40 Kan. 65; 9 Pac. 362.

they are not well decided. Authority to issue bonds to aid in the construction of a railroad may, however, give power to make the bonds negotiable, being such as are usually issued in such cases.[5]

§ 876. Legislative authority requisite.—There is no power, as elsewhere demonstrated, to issue bonds to aid a railroad company except where it is conferred by express statute.[6] Thus, a mere voluntary vote of the people of a city under a city ordinance, and without any authority from the legislature, will not confer any rights upon the city to extend aid to a railroad.[7] Authority to issue bonds to pay debts or to borrow money for municipal purposes does not confer power to issue bonds as a donation to a railroad.[8] It may be said generally that, if no power to issue the bonds existed at the time they

[5] Jefferson v. Jennings B. &c. Co. 35 Tex. Civ. App. 74; 79 S. W. 876. And it is held in this case that they may be issued to a vender of land to be used as a railroad depot.

[6] Ante, §§ 827, 839; Young v. Clarendon Tp. 132 U. S. 340; 10 Sup. Ct. 107; Kelley v. Milan, 127 U. S. 139; 8 Sup. Ct. 110; Concord v. Robinson, 121 U. S. 165; 7 Sup. Ct. 937; Norton v. Dryersburg, 127 U. S. 160; 8 Sup. Ct. 1111; Daviess County v. Dickinson, 117 U. S. 657; 6 Sup. Ct. 897; Hill v. Memphis, 134 U. S. 198; 10 Sup. Ct. 562; Wells v. Supervisors, 102 U. S. 625. See Lafayette v. Cox, 5 Ind. 38; People v. Coon, 25 Cal. 635; Milan v. Tennessee &c. R. Co. 11 Lea (Tenn.), 329; Justices v. Knoxville &c. R. Co. 6 Coldw. (Tenn.) 598; Ottawa v. Carey, 108 U. S. 110; 12 Sup. Ct. 861; Fisk v. Kenosha, 26 Wis. 23; Pennsylvania R. Co. v. Philadelphia, 47 Pa. St. 189; Clay v. Nicholas County, 4 Bush (Ky.), 154; Jeffries v. Lawrence, 42 Iowa, 498; Savannah v. Kelly, 108 U. S. 184; 2 Sup. Ct. 468.

[7] Quincy &c. R. Co. v. Morris, 84 Ill. 410.

[8] Ryan v. Lynch, 68 Ill. 160. A city was duly authorized, by a popular vote, to subscribe $100,000 to the stock of a railroad company, and to issue its bonds to an equal amount in payment therefor. Afterward the city council passed a resolution binding the city to sell to the company all this stock for $5,000, to be paid by a return of its bonds to that amount. The bonds were issued, and by direction of the council placed in escrow, to be delivered to the company upon the performance of certain conditions, the depositary being authorized and directed, upon receipt of the stock, to sell the same to the railroad company for $5,000 of the city bonds. There was nothing to show that the railroad company had agreed to purchase the stock, but, after the stock and bonds were duly exchanged, the stock was sold in the manner proposed. The court held that this transaction did not convert the "subscription," which was authorized by the statute, into an unauthorized do-

were issued, they are void in whatever or whosesoever hands they may be.[9] But a general statute, granting authority to cities to issue such bonds, applies, and gives authority to cities incorporated thereafter as well as before.[10]

§ 877. Constitutional questions—Completed road.—The decisions which support the doctrine that a municipal corporation may be empowered to aid in the construction of a railroad proceed upon the theory that the road will be a benefit to the local community. It is doubtful whether the principle can apply where the road has been completed and all the benefit that can accrue has been secured.[11] But a railroad is not regarded as complete unless equipped with depots and side-tracks, and hence a municipality authorized to aid in the construction of a railroad may vote bonds to aid in the construction of these accessories though the railroad proper is built and in operation.[11a] It is, at all events, quite clear that bonds cannot be issued to an insolvent company which has completed its road in order to enable it to pay claims of creditors, since that would be to authorize the levy of a tax for a private purpose, and this the constitution will not permit.[12]

nation of $95,000, and, if any wrong was done by the council in thus disposing of the stock, it did not vitiate the bonds in the hands of a bona fide purchaser. Cairo v. Zane, 149 U. S. 122; 13 Sup. Ct. 803. See, ante, § 841, note 2.

[9] Anthony v. Jasper Co. 101 U. S. 693; McClure v. Oxford, 94 U. S. 429; Elmwood v. Marcy, 92 U. S. 289; Thomas v. Richmond, 12 Wall. (U. S.) 349; Marsh v. Fulton Co. 10 Wall. (U. S.) 676; Weismer v. Douglas, 64 N. Y. 91; 21 Am. R. 586; State v. Union, 15 Ohio St. 437; Hopple v. Hipple, 33 Ohio St. 116; Hancock v. Chicot Co. 32 Ark. 575; Hamlin v. Meadville, 6 Neb. 227; Lippincott v. Pana, 92 Ill. 24; Williams v. Roberts, 88 Ill. 11; Williamson v. Keokuk, 44 Iowa, 88; Woodruff v. Okolona, 57 Miss. 806; Steines v. Franklin Co. 48 Mo. 167; 8 Am. R. 87; Missouri River &c. R. Co. v. Miami Co. 12 Kan. 230; Burhop v. Milwaukee, 21 Wis. 257; Delaware Co. v. McClintock, 51 Ind. 325.

[10] Schmitz v. Zeh, 91 Minn. 290; 97 N. W. 1049.

[11] Baltimore &c. R. Co. v. Spring, 80 Md. 510; 31 Atl. 208; 27 L. R. A. 72. But compare Napa Valley R. Co. v. Napa County, 30 Cal. 435. In Water &c. Co. v. Hutchinson Interurban Ry. Co. (Kan.), 87 Pac. 883, it was held that the statute should be strictly construed and that it did not authorize aid bonds for a company whose entire line was within the city.

[11a] Rock Creek v. Strong, 96 U. S. 271.

[12] Baltimore &c. R. Co. v. Spring, 80 Md. 510; 31 Atl. 208; 27 L. R. A. 72. The decision in the case re-

§ 878. Governmental subdivisions may be authorized to issue bonds.—The power of the legislature over the subject of taxation is very broad and comprehensive, and it may organize taxing districts. Upon the same principle it may, where there is no constitutional interdiction, provide for the formation of districts for the purpose of aiding railroad companies. Thus it has been held that "magisterial precincts" may be authorized to subscribe to the stock of railroad companies and to issue bonds to pay such subscriptions.[13]

§ 879. Execution of the power to issue aid bonds—Generally.—In our opinion the true rule is that the power to issue railroad aid bonds must be as strictly pursued as any part of the power to extend aid to a railroad enterprise,[14] and in cases where the statute has

ferred to asserts, as we believe, a just conclusion, but we are inclined to think some of the statements of the opinion go too far. It seems to us that the court trenches somewhat upon the rule that where a question is a legislative one the decision of the legislature is conclusive. There is reason for affirming that the legislature has power to decide what railroad companies may receive aid, and if the power exists it is not subject to judicial surveillance or control.

[13] Breckinridge Co. v. McCracken, 61 Fed. 191, 194, citing Lexington v. McQuillan's Heirs, 9 Dana (Ky.), 513; 35 Am. Dec. 159; County Judge v. Shelby R. Co. 5 Bush (Ky.), 225; Kreiger v. Shelby R. Co. 84 Ky. 66; Carter Co. v. Sinton, 120 U. S. 517; 7 Sup. Ct. 650; Hancock v. Louisville &c. R. Co. 145 U. S. 409; 12 Sup. Ct. 969. But, as a rule, it is only governmental corporations that can be authorized to grant aid to railroad companies. Ante, § 847. But see Kennebec Water Dist. v. Waterville, 96 Me. 234; 52 Atl. 774; Wilson v. Sanitary Dist. 133 Ill. 443; 27 N. E. 203.

[14] Kokomo v. State, 57 Ind. 152, 163; Madison v. Smith, 83 Ind. 502; Wheatland v. Taylor, 29 Hun (N. Y.), 70; Cairo &c. R. Co. v. Sparta, 77 Ill. 505. It is not necessary that the commissioners to sell the bonds should act personally in selling them and investing the proceeds, but they may do so through the medium of a broker. Brownell v. Greenwich, 114 N. Y. 518; 22 N. E. 24; 4 L. R. A. 685, and note. Where the act authorizing a city to issue bonds is silent as to the kind of currency in which such negotiable bonds shall be paid, the city has power to make them payable "in gold coin of the United States of the present standard weight and fineness." Judson v. Bessemer, 87 Ala. 240; 6 So. 267; 4 L. R. A. 742. See, also, Moore v. Walla Walla, 60 Fed. 961; Winston v. Ft. Worth (Tex. Civ. App.), 47 S. W. 740; Farson v. Com'rs, 97 Ky. 119; 30 S. W. 17; Packwood v. Kittitas County, 15 Wash. 88; 55 Am. St. 875. But compare Woodruff v. State, 66 Miss. 298; 6 So. 235;

not been substantially followed in making the subscription or in issuing bonds, such bonds will be invalid.[15] We do not mean to say that there may not be cases where the statutory provisions are so clearly directory that a failure to comply with them may be justly regarded as unimportant, nor do we mean to say that there may not be instances where a deviation from a mandatory provision may be so plainly immaterial as to be justly held not to affect the validity of the bonds, but we do mean to say that such cases and instances form exceptions to the general rule, for, as we believe, the general rule is that the provisions of such statutes are mandatory unless the context clearly shows the contrary, and must be substantially pursued. We may add, to prevent misunderstanding, that we are here considering the question entirely independent of the doctrine of estoppel.

§ 880. Execution of the power to issue aid bonds—Implied powers.—It is very seldom that the enabling act goes into detail, for in almost all cases power to issue bonds is granted in general terms. It is sometimes provided that bonds shall run for a designated length of time, or shall be of a particular tenure, and, where this is so, and there is no effective estoppel, a material departure from the statute may be cause for refusing to enforce the bonds. But as a general rule, the power is a general one, and matters of detail are left to the municipality, and, where this is so, there are, necessarily, implied powers conferred upon the municipality. Such a general power will, as a rule, authorize the bonds to be made payable at any place within or without the state.[16] So, too, such a general power will authorize the

Burnett v. Maloney, 97 Tenn. 697; 37 S. W. 689; 34 L. R. A. 541.

[15] People v. Smith, 45 N. Y. 772; People v. Hurlburt, 46 N. Y. 110; Horton v. Thompson, 71 N. Y. 513; Williams v. Roberts, 88 Ill. 11; People v. Santa Anna, 67 Ill. 57; Sinnett v. Moles, 38 Iowa, 25.

[16] Evansville &c. R. Co. v. Evansville, 15 Ind. 395, 412; Maddox v. Graham, 2 Met. (Ky.) 56; Meyer v. Muscatine, 1 Wall. (U. S.) 384; Skinker v. Butler Co. 112 Mo. 332; 20 S. W. 613; Austin v. Gulf &c. R. Co. 45 Tex. 236; Kunz v. School Dist. 11 S. Dak. 578; 79 N. W. 844. It is held in Illinois, under the provisions of an act which authorizes the interest on such bonds to be made payable at any place which the county court may direct, that the principal be made payable only at the office of the treasurer. Prettyman v. Tazewell Co. 19 Ill. 406; 71 Am. Dec. 230; Pekin v. Reynolds, 31 Ill. 529; 83 Am. Dec. 244. But it is held that a provision making them payable at another place will not invalidate the bonds, although the provision will be void.

municipality to determine the form and tenure of the bonds, provided the municipality does not, in executing the bonds, go beyond the general power conferred upon it. And where this power exists and is exercised, and bonds payable at a particular place are issued and sold, neither the legislature nor the municipality can change the place of payment without the consent of the holders of the bonds.[17]

§ 881. Formal execution of bonds.—So far as concerns the mere formal parts of bonds, the courts are very liberal in upholding the rights of bona fide holders, and will not allow those rights to be defeated because of formal defects. Thus, in one case the municipality was enjoined from setting up the defense that the corporate seal was not affixed to the bonds.[18] Bonds should be executed by the proper officers of the municipality, however, and, if there is no estoppel, bonds executed by other representatives are not enforceable.[19] It is

Sherlock v. Winnetka, 68 Ill. 530. Nor will it affect their negotiable character. Enfield v. Jordan, 119 U. S. 680; 7 Sup. Ct. 358. Municipal bonds in the absence of any provisions as to the place of payment, are payable at the treasury of the municipality. Friend v. Pittsburgh, 131 Pa. 305; 18 Atl. 1060; 6 L. R. A. 636; 17 Am. St. 811; Skinker v. Butler Co. 112 Mo. 332; 20 S. W. 613. The fact that the act authorized the bonds to be issued, bearing interest at the legal rate where they were payable, which is in another state, where the legal rate is larger than in Tennessee, did not render them void for usury. Nelson v. Haywood Co. 3 Pickle (Tenn.), 781. Where the statute fixes the rate of interest that the bonds shall bear, the municipal officers can not contract to pay a greater rate. English v. Smock, 34 Ind. 115; 7 Am. R. 215.

[17] Dillingham v. Hook, 32 Kan. 185; 4 Pac. 166.

[18] Bernards v. Stebbins, 109 U. S. 341; 3 Sup. Ct. 252. See, also, D'Estene v. New York, 104 Fed. 605; Catron v. Lafayette County, 106 Mo. 659; 17 S. W. 577.

[19] Walnut v. Wade, 103 U. S. 683; People v. Smith, 45 N. Y. 772; Danville v. Montpelier &c. R. Co. 43 Vt. 144; Douglas v. Niantic &c. Bank, 97 Ill. 228. See Wetumpka v. Winter, 29 Ala. 651; Mercer Co. v. Pittsburgh &c. R. Co. 27 Pa. St. 389; First National Bank v. Arlington, 16 Blatchf. (U. S.) 57; Bank of Statesville v. Statesville, 84 N. Car. 169. As to what officers may execute. County of Kankakee v. Aetna Life Ins. Co. 106 U. S. 668; 2 Sup. Ct. 80. As to bona fide holders, it is sufficient if bonds are signed by officers de facto. Ralls Co. v. Douglass, 105 U. S. 728. See Middleton v. Mullica Tp. 112 U. S. 433; 5 Sup. Ct. 198; Sauerhering v. Iron Ridge &c. R. Co. 25 Wis. 447; Wayauwega v. Ayling, 99 U. S. 112; Waite v. Santa Cruz, 89 Fed. 619.

held that where the statute specifically provides what the denomination of the bonds shall be it must be obeyed.[20]

§ 881a. Execution of bonds—Delivery.—A valid delivery of a bond is essential to its existence. Although drawn and signed, so long as it is undelivered, it is a nullity; not only does it take effect only by delivery, but also only on delivery.[21] A premature delivery may be enjoined, and this is a proper remedy where the bonds are not to be delivered until the railroad is completed and it is proposed to issue and sell the bonds in advance of the proper time for delivery, though the funds realized are to be held by the municipality until the conditions are complied with by the railroad company.[22] But, in a case where a town had ample authority for issuing its bonds to a railroad company, and the bonds were executed in proper form and made payable to the proper company, but were not delivered to such company but to an officer of a new company, and there was nothing pertaining to them or that could have been ascertained from the record indicating this misdelivery, it was held that they could be enforced in the hands of an innocent purchaser.[23]

§ 882. Nature of municipal aid bonds.—It is competent for the legislature to provide that aid bonds shall not be negotiable. This it may do by directly declaring that they shall not be negotiable, or by clearly making them payable out of a specific fund and no other.[24] Ordinarily, municipal bonds issued in aid of a railroad are commercial paper, and bona fide holders for value take them freed from all equities of which they do not have notice.[25] Being commercial paper,

[20] Greene Co. v. Daniel, 102 U. S. 187. So as to time of payment. Davis v. Yuba Co. 75 Cal. 452; 13 Pac. 874; 17 Pac. 533; Alpena Co. v. Simmons, 104 Mich. 305; 62 N. W. 292.

[21] Young v. Clarendon, 132 U. S. 340; 10 Sup. Ct. 107; 33 L. Ed. 356.

[22] Neale v. Co. Court of Wood Co. 43 W. Va. 90; 27 S. E. 370.

[23] Prairie v. Lloyd, 97 Ill. 179.

[24] Blackman v. Lehman, 63 Ala. 547; 35 Am. R. 57.

[25] Mercer Co. v. Hacket, 1 Wall. (U. S.) 83; Cass Co. v. Gillett, 100 U. S. 585; Cromwell v. Sac Co. 94 U. S. 351; 96 U. S. 51; Board v. Texas &c. R. Co. 46 Tex. 316; Tucker v. New Hampshire Sav. Bank, 58 N. H. 83; 42 Am. R. 580; Arents v. Commonwealth, 18 Gratt. (Va.) 750; State v. Union, 8 Ohio St. 394. See, generally, Clapp v. Cedar Co. 5 Iowa, 15; 68 Am. Dec. 678, and note; Hannibal &c. R. Co. v. Marion Co. 36 Mo. 294; Aurora v. West, 22 Ind. 88; 85 Am. Dec.

they are not within the rule of lis pendens.[26] But, of course, where there is actual notice to the purchaser, he is not protected as a bona fide holder of commercial paper. It has been held that, even where a subscription to the capital stock cannot legally be made until after the railroad corporation is organized, bonds may be valid in the hands of bona fide holders,[27] and it is also held that the fact that the popular vote authorizing the subscription was taken before the organization was completed will not be a defense to an action by an innocent holder upon bonds issued after its completion.[28]

§ 883. Proceedings of municipal officers must conform to the statute.—Where there is no estoppel the rule is that the officers of the municipality must in all material respects obey the requirements of the enabling act.[29] Thus the provisions of the act in respect to elec-

413; Society &c. v. New London, 29 Conn. 174; Barrett v. Schuyler Co. 44 Mo. 197; Consolidated Association &c. v. Avegno, 28 La. Ann. 552; Elizabeth v. Force, 29 N. J. Eq. 587; Lindsey v. Rottaken, 32 Ark. 619. It will be presumed, in the absence of proof, that members of a railroad commission not present at a meeting at which bonds were ordered to be issued had notice that the meeting was to be held in accordance with the statute, authorizing a majority to act at any meeting of which all had notice. Hill v. Peekskill Sav. Bank, 46 Hun (N. Y.), 180. Though all the bonds were dated on the same day, and payable twenty years from date, while the amendatory act provided that but ten per cent of them should mature during any one year, they would not be invalid as to plaintiff, who was not shown to have knowledge of the irregularity, or that any other bonds were issued besides those he purchased. Brownell v. Greenwich, 114 N. Y. 518; 22 N. E. 24; 4 L. R. A. 685, and note. The fact that a vote of the people of a town for the issuing of railroad aid bonds, pursuant to lawful authority, was upon the condition that the road build its shops in the town, will not invalidate the bonds, the purpose for which they were issued not being changed by such condition. Casey v. People, 132 Ill. 546; 24 N. E. 570.

[26] Tucker v. New Hampshire Sav. Bank, 58 N. H. 83; 42 Am. R. 580; Board v. Texas &c. R. Co. 46 Tex. 316; Warren Co. v. Marcy, 97 U. S. 96; Cass Co. v. Gillett, 100 U. S. 585; Winston v. Westfeldt, 22 Ala. 760; 58 Am. Dec. 278; Kieffer v. Ehler, 18 Pa. St. 388; Stone v. Elliott, 11 Ohio St. 252; Leitch v. Wells, 48 N. Y. 586.

[27] Rubey v. Shain, 54 Mo. 207.

[28] Daviess Co. v. Huidekoper, 98 U. S. 98. Where there is an entire absence of power to issue bonds recitals therein will not estop the municipality. Hancock v. Chicot Co. 32 Ark. 575; Anthony v. Jasper Co. 4 Dill. (U. S.) 136.

[29] Ante, § 856.

tions, petitions, and the like, must be complied with, but unimportant deviations from the act will not invalidate the bonds.[30] But it is to be kept in mind that where, as is generally true, third persons have purchased the bonds, the question as to whether there has been a compliance with the provisions of the statute is seldom of practical importance, since the doctrine of estoppel often cuts off inquiry.

§ 884. Want of power—Definition.—Confusion has arisen from a failure to discriminate between a want of power and an irregular or defective exercise of power. In considering the doctrine of ultra vires we pointed out the distinction between a want of power and a defective or irregular exercise of power conferred by statute. It is difficult to precisely define the meaning of the term "want of power," as used in relation to the rights of bona fide holders of municipal bonds. Judge Dillon, whose learning and ability always command respect, says that the term means "the want of legislative power, under any circumstances or conditions, to do the particular act in question."[31] This definition is, perhaps, as good as can be framed, but it is, we venture to say with great deference, somewhat broader than the decisions warrant. It is unquestionably true, however, that there are cases holding that there is a "want of power," although there is a general statute conferring authority. The definition we have quoted will not always apply, nor can any general definition be formulated upon which it will be safe to act in all cases.

§ 885. Conflict of authority.—Upon the question as to what shall be deemed "want of authority" there is much conflict of opinion.

[30] Ante, §§ 858, 859. As to elections, see Claybrook v. Board, 114 N. C. 453; 19 S. E. 593; Sampson v. People, 141 Ill. 17; 30 N. E. 781; Hill v. Memphis, 134 U. S. 198; 10 Sup. Ct. 562; Norton v. Taxing District, 129 U. S. 479; 9 Sup. Ct. 322. As to specifying place of hearing petition, Andes v. Ely, 158 U. S. 312; 15 Sup. Ct. 954. Presumptions as to notice of elections, Knox Co. v. Ninth National Bank, 147 U. S. 91; 13 Sup. Ct. 267, citing Bank v. Dandridge, 12 Wheat. (U. S.) 64, 70. See, generally, Dallas Co. v. McKenzie, 110 U. S. 686; 4 Sup. Ct. 184; Oregon v. Jennings, 119 U. S. 74; 7 Sup. Ct. 124; Carroll Co. v. Smith, 111 U. S. 556; 4 Sup. Ct. 539; Gilson v. Dayton, 123 U. S. 59; 8 Sup. Ct. 66; Grenada Co. Super. v. Brogden, 112 U. S. 261; 5 Sup. Ct. 125; German Ins. Co. v. Manning, 95 Fed. 597; Bolles v. Perry Co. 92 Fed. 479.

[31] Dillon Munic. Corp. (4th ed.) § 548.

There is, it is evident, a failure on the part of some of the courts to discriminate between an entire absence of power and a defective exercise of a power conferred by statute. The decisions of many of the state courts are not in harmony with those of the United States courts above cited, for the reason that a failure to observe the precedent conditions imposed, which the latter hold to be a defective exercise of an existing power, is, in many cases, held by the former to prevent such power from vesting in the municipality or its officers.[32] Some of the decisions referred to in the note confuse the want of power with a defective exercise of power, and the courts have fallen into error.

§ 886. Consolidation does not take away right to bonds.—The general rule that a consolidated company succeeds to the rights of the constituent companies requires the conclusion that aid bonds voted to one of the constituent companies belong to the consolidated company. It is necessary, of course, for the consolidated company to possess the substantial rights of the constituent company to which it is voted to the extent, at least, that it may build and operate the line of road for which the aid was granted. The authorities are in substantial agreement upon the general question,[33] but there are cases which hold that,

[32] Mercer Co. v. Pittsburgh &c. R. Co. 27 Pa. St. 389; Aurora v. West, 22 Ind. 88; 85 Am. Dec. 413; Marshall County v. Cook, 38 Ill. 44; 87 Am. Dec. 282; St. Louis v. Alexander, 23 Mo. 483; Hancock v. Chicot Co. 32 Ark. 575; Veeder v. Lima, 19 Wis. 280; State v. Goshen Tp. 14 Ohio St. 569. In Williams v. People, 132 Ill. 574, the court, in an opinion holding that bonds issued by authority of an election held without proper notice are void even in the hands of innocent purchasers, says: "Persons purchasing such bonds are bound to take notice of the provisions of acts of the legislature authorizing the election and the subscription, and of the proceedings on record in the county court in relation thereto, and of the requirements of the fundamental law upon the subject." See, also, as to being bound to take notice of the statutory provisions. Ogden v. Daviess Co. 102 U. S. 634; Barnett v. Denison, 145 U. S. 135; 12 Sup. Ct. 819; Rathbone v. Kiowa Co. 73 Fed. 395. And as to municipal records, see Crow v. Oxford Twp. 119 U. S. 215; 7 Sup. Ct. 180.

[33] Columbus v. Dennison, 69 Fed. 58; Livingston Co. v. First National Bank, 128 U. S. 102; 9 Sup. Ct. 18; State v. Greene Co. 54 Mo. 540; Scotland Co. v. Thomas, 94 U. S. 682; East Lincoln v. Davenport, 94 U. S. 801; Bates Co. v. Winters, 97 U. S. 83; Wilson v. Salamanca, 99 U. S. 499; Menasha v. Hazard, 102 U. S. 81; Harter v. Kernochan, 103 U. S. 562; New Buffalo v. Iron &c. Co. 105 U. S. 73; Empire v.

under peculiar statutes, the consolidated company is not entitled to the bonds.[34] There are other cases which hold that a consolidation which works such a fundamental change as to release stockholders will deprive the consolidated company of a right to the bonds.[35]

§ 887. Purchasers of aid bonds—Duty to ascertain that power to issue bonds exists.—As we shall hereafter show, the doctrine of estoppel exerts an important influence upon the rights of holders of municipal aid bonds, but this doctrine will not protect such holders where there is an entire want of power to issue the bonds. It is the

Darlington, 101 U. S. 87; Tipton Co. v. Locomotive Works, 103 U. S. 523; County of Henry v. Nicolay, 95 U. S. 619; Nugent v. Supervisors, 19 Wall (U. S.) 241; Atchison &c. R. Co. v. Phillips Co. 25 Kan. 261; Mt. Vernon v. Hovey, 52 Ind. 563; Scott v. Hansheer, 94 Ind. 1; Jussen v. Board, 95 Ind. 567. It has been held that a company which purchases the road of the company to which the aid is granted can not secure bonds. Board v. State, 115 Ind. 64. See Cantillon v. Dubuque &c. R. Co. 78 Iowa, 48; 35 N. W. 620; 5 L. R. A. 726, and note; Nelson v. Haywood County, 87 Tenn. 781; 11 S. W. 885; 4 L. R. A. 648; Manning v. Mathews, 66 Iowa, 675; 24 N. W. 271; Barthel v. Meader, 72 Iowa, 125; 33 N. W. 446; Southern Kansas R. Co. v. Towner, 41 Kan. 72; 21 Pac. 221; Chicago &c. Co. v. Shea, 67 Iowa, 728; 25 N. W. 901; Sparrow v. Evansville &c. R. Co. 7 Ind. 369; Bishop v. Brainerd, 28 Conn. 289; Schnectady &c. Co. v. Thatcher, 11 N. Y. 102; Buffalo &c. Co. v. Dudley, 14 N. Y. 336; South Bay &c. Co. v. Gray, 30 Me. 547; Terre Haute &c. R. Co. v. Earp, 21 Ill. 291; Illinois &c. R. Co. v. Beers, 27 Ill. 185; Noyes v. Spaulding, 27 Vt. 420; Pacific &c. R. Co. v. Renshaw, 18 Mo. 210; Fry v. Lexington, 2 Metcf. (Ky.) 314; Agricultural &c. R. Co. v. Winchester, 13 Allen (Mass.), 29. See as to power to aid consolidated company, Board v. Travelers' Ins. Co. 128 Fed. 817.

[34] Harshman v. Bates Co. 92 U. S. 569; Bates Co. v. Winters, 97 U. S. 83. See Marsh v. Fulton Co. 10 Wall. (U. S.) 676.

[35] Lynch v. Eastern &c. R. Co. 57 Wis. 430; 15 N. W. 734, 825. It is upon this principle that it is held that where a company sells all of its property the right to aid bonds is lost. Cantillon v. Dubuque &c. R. Co. 78 Iowa, 48; 35 N. W. 620; 5 L. R. A. 726, and note. But where there is nothing more than a mere change of name the right to the bonds is not impaired. Society &c. v. New London, 29 Conn. 174. See, also, Howard County v. Booneville &c. Bank, 108 U. S. 314; Commonwealth v. Pittsburgh, 41 Pa. St. 278; Lewis v. Clarendon, 5 Dill. (U. S.) 329; Chickaming v. Carpenter, 106 U. S. 663; 1 Sup. Ct. 620; Chicago &c. R. Co. v. Putnam, 36 Kan. 121; 12 Pac. 593; Rochester &c. R. Co. v. Cuyler, 7 Lans. (N. Y.) 431; Taylor v. Board, 86 Va. 506; 10 S. E. 433; Muscatine &c. R. Co. v. Horton, 38 Iowa, 33.

duty of persons who are about to become purchasers of municipal aid bonds to ascertain whether the municipality had power to issue them.[36] It is obvious that, as the question of power or no power depends upon the decision of the question whether there was a valid statute authorizing the issue of the bonds, the purchaser must, at his peril, ascertain whether there is or is not such a statute.

§ 888. Bonds issued in excess of the limits prescribed by the constitution.—Some of the authorities make a distinction between cases where bonds to an amount beyond that limited by the constitution are issued and cases where the limit prescribed by statute is exceeded. The rule in relation to bonds issued beyond the constitutional limit is that they are void even in the hands of a bona fide holder. The rule goes further, for it denies that there can be an estoppel in cases where the limit prescribed by the constitution is exceeded.[37] We believe the rule to rest on solid principle, but it is somewhat difficult to perceive why the same rule should not apply where the bonds exceed the limits prescribed by statute. Where aid bonds are issued in violation of the constitution, there can be no recovery against the municipality upon an implied contract.[38] The advantages derived from the construction of the railroad do not constitute such an equitable consideration as will entitle the bondholders to relief.

§ 889. Limitation of amount — Construction of statute.—Where the constitution limits the amount of aid which may be granted, it is,

[36] Dixon Co. v. Field, 111 U. S. 83; 4 Sup. Ct. 315; Coloma v. Eaves, 92 U. S. 484, 490; Marst v. Fulton County, 10 Wall. (U. S.) 676; Northern Nat. Bank v. Porter Township, 110 U. S. 608, 615; 4 Sup. Ct. 524; Anthony v. Jasper Co. 101 U. S. 693, 697; McClure v. Oxford, 94 U. S. 429.

[37] Hedges v. Dixon Co. 150 U. S. 182; 14 Sup. Ct. 71; 9 Am. R. & Corp. R. (Lewis). 520; Hedges v. Dixon Co. 37 Fed. 304; Buchanan v. Litchfield, 102 U. S. 278; Quaker City Nat. Bank v. Nolan Co. 59 Fed. 660; Millsaps v. Terrell, 60 Fed. 193; Risley v. Howell, 57 Fed. 544. See State v. Columbia, 111 Mo. 365; 20 S. W. 90. See, also, Gunnison Co. v. Rollins, 173 U. S. 255; 19 Sup. Ct. 395; Lake Co. v. Dudley, 173 U. S. 243; 19 Sup. Ct. 398; Holliday v. Hilderbrandt, 97 Ia. 177; 66 N. W. 89. But compare Sioux City &c. R. Co. v. Osceola Co. 45 Ia. 168.

[38] Hedges v. Dixon Co. 150 U. S. 182; 14 Sup. Ct. 71, citing Magniac v. Thomson, 15 How. (U. S.) 281; Aetna Life Insurance Co. v. Middleport, 124 U. S. 534; 8 Sup. Ct. 625; Litchfield v. Ballou, 114 U. S. 190; 5 Sup. Ct. 820.

of course, controlling, and bonds issued in excess of the amount fixed by the constitution cannot be enforced. The legislative power is limited by such a constitutional provision, and, as everyone knows, if the legislature assumes to transgress the provisions of the constitution its enactments are void;[39] but where a statute can be so construed as to prevent its being brought into conflict with the constitution, the courts will so construe it, provided the construction be at all reasonable.[40] This general doctrine supports the ruling in the case wherein it was held that where the constitution limited the amount of aid to a designated per cent of the taxable property a statute providing that aid "to any amount" might be granted was not invalid, insomuch as the courts must construe the statute to mean any amount within the constitutional limitation.[41]

§ 890. Bonds in excess of the limit prescribed by statute.—As we have said, a distinction is made, at least in some of the decisions, be-

[39] See East Moline v. Pope, 224 Ill. 386; 79 N. E. 587.

[40] Ferguson v. Stamford, 60 Conn. 432; Jamieson v. Indiana &c. Co. 128 Ind. 555, 569; 28 N. E. 76; 12 L. R. A. 652; Dow v. Norris, 4 N. H. 16, 18; 17 Am. Dec. 400; Cooley Const. (7th ed.) 255.

[41] Atlantic &c. Co. v. Darlington, 63 Fed. 76, 82. In the course of the opinion it was said: "Is it in conflict with section 17, article 9, because no limit is fixed as to the amount of aid to be given to railroads? The constitution and the act must be read in pari materia. The legislature must be presumed to have enacted the act in view of the constitution. It cannot be assumed that the legislature went in the teeth of the constitution. Such a construction must be put on this act as will reconcile it with the constitution. 'Ut res magis valeat quam pereat.' We must hold it to mean, 'may issue bonds in any amount within the constitutional limitation.' As a conclusion of law, the act is not in conflict with section 17, article 9, in this respect." The judgment in the case from which we have quoted was affirmed in Darlington v. Atlantic &c. Co. 68 Fed. 849, where the cases of State v. Neely, 30 S. Car. 587; 9 S. E. 664; 3 L. R. A. 672; Floyd v. Perrin, 30 S. Car. 1; 8 S. E. 14; 2 L. R. A. 242, and State v. Whitesides, 30 S. Car. 579; 9 S. E. 661; 3 L. R. A. 777, and note, are reviewed. As to how the valuation of taxables is to be determined and at what time, see Colburn v. McDonald (Neb.), 100 N. W. 961; Bound v. Wisconsin Cent. R. Co. 45 Wis. 543; Falconer v. Buffalo &c. R. Co. 69 N. Y. 495; Coe v. Caledonia &c. R. Co. 27 Minn. 197; 6 N. W. 621; Kent v. Dana, 100 Fed. 56; Rathbun v. Board, 83 Fed. 125; Municipal Trust Co. v. Johnson City, 116 Fed. 468.

tween bonds issued in excess of the constitutional limit and bonds issued beyond the limit prescribed by statute, and it is held in the one case that there can be no estoppel, but that there may be in the other. Yet, where bonds are issued in excess of the amount limited by statute, and there is no estoppel, the bonds are void, although purchased before maturity and for a valuable consideration.[42] The prevailing rule is that all of the bonds are void where there is no estoppel and they are beyond the limit fixed by law.[43] It is held, however, that, if the municipality authorizes an issue of the proper amount, but the officers wrongfully issue a greater amount than that authorized, the bonds are not all void.[44]

[42] Merchants' Bank v. Bergen Co. 115 U. S. 384; 6 Sup. Ct. 88; Buchanan v. Litchfield, 102 U. S. 278; Dixon Co. v. Field, 111 U. S. 83; 4 Sup. Ct. 315; Lake Co. v. Graham, 130 U. S. 674; 9 Sup. Ct. 654; Gould v. Paris, 68 Tex. 511; 17 Am. & Eng. Corp. Cas. 340; Cumins v. Lawrence Co. 1 S. Dak. 158; 46 N. W. 182.

[43] Hedges v. Dixon Co. 37 Fed. 304; Reineman v. Covington &c. R. Co. 7 Neb. 310. See McPherson v. Foster, 43 Iowa, 48; 22 Am. R. 215; Hedges v. Dixon Co. 150 U. S. 182; 14 Sup. Ct. 71; 9 Am. R. & Corp. (Lewis), 520; Reynolds &c. Co. v. Police Jury, 44 La. Ann. 863; 11 So. 236; Millerstown v. Frederick, 114 Pa. St. 435. See Iola v. Merriman, 46 Kan. 49; 26 Pac. 485; Perrin v. New London, 67 Wis. 416.

[44] In Hedges v. Dixon Co. 37 Fed. 304, it was said: "Counsel cites the case of Daviess Co. v. Dickinson, 117 U. S. 657; 6 Sup. Ct. 897, in which the county having authority to issue bonds to the amount of $250,000, the county officers issued $320,000, and the county was held liable for the $250,000, but the cases were not all parallel. In that the principal had proposed a valid contract. It had done that which it had a right to do, and the wrong or misconduct of its agents, the county officers, was held not to invalidate that which the county had lawfully authorized. In this there is no breach of duty charged upon the county officers. The agents have not departed from their instructions. The trouble lies in the action of the principal itself. Its act was unauthorized, and, being without warrant of law, or rather in defiance of law, created no valid obligation." In the case of Hedges v. Dixon Co. 150 U. S. 182; 14 Sup. Ct. 71, affirming judgment below, the cases of Louisiana v. Wood, 102 U. S. 294; Read v. Plattsmouth, 107 U. S. 568; 2 Sup. Ct. 208; Daviess Co. v. Dickinson, 117 U. S. 657; 6 Sup. Ct. 897, were distinguished, and the court said: "Recitals in bonds issued under legislative authority may estop the municipality from disputing their authority, as against a bona fide holder for value, but when the municipal bonds are issued in violation of a constitutional provision no such estoppel can arise by reason of any recitals contained in the bonds."

§ 891. Bonds running beyond time prescribed.—The highest tribunal of the nation has held that, where the enabling act provides that bonds shall be payable in a designated number of years, the municipality has no power to issue bonds payable after a longer period, and that the bonds are void.[45] The reasoning of the court is that the limitation is a restriction upon the power of the municipality, and so operates to invalidate the bonds. We believe this doctrine to be sound, but it is difficult to harmonize it with some of the rules declared in other cases.

§ 892. Bonds payable out of a specific fund.—Where a specific fund is provided by statute for the payment of the bonds, and the

Lake Co. v. Rollins, 130 U. S. 662; 9 Sup. Ct. 651; Lake Co. v. Graham, 130 U. S. 674; 9 Sup. Ct. 654; Sutliff v. Lake Co. 147 U. S. 230; 13 Sup. Ct. 318. To the effect that where there is authority but an excessive issue the bonds are valid in the hands of bona fide holders to the extent that they are not in excess of the authorized issue, see Daviess v. Dixon Co. 117 U. S. 657; 6 Sup. Ct. 897; Columbus v. Woonsocket Inst. 114 Fed. 162; Aetna Life Ins. Co. v. Lyon Co. 95 Fed. 325; McPherson v. Foster, 43 Ia. 48; 22 Am. R. 215; Culbertson v. Fulton, 127 Ill. 30; 18 N. E. 781; Nolan Co. v. State, 83 Tex. 182; 17 S. W. 823; Schmitz v. Zeh, 91 Minn. 290; 97 N. W. 1049, and additional authorities there cited. See also Winamac v. Hess, 151 Ind. 229, 238, 239; 50 N. E. 81.

[45] Barnum v. Okolona, 148 U. S. 393; 13 Sup. Ct. 638. In the case cited it was said: "That municipal corporations have no power to issue bonds in aid of a railroad except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds except subject to the restrictions and conditions of the enabling act—are propositions so well settled by frequent decisions of this court that we need not pause to consider them. Sheboygan Co. v. Parker, 3 Wall. (U. S.) 93, 96; Wells v. Supervisors, 102 U. S. 625; Claiborne Co. v. Brooks, 111 U. S. 400, 4 Sup. Ct. 489; Young v. Clarendon, 132 U. S. 340, 10 Sup. Ct. 107. Accordingly, if in the present instance, the legislature of Mississippi, in authorizing the town of Okolona to subscribe for stock in a railroad company and to pay for the same by an issue of bonds, prescribed that such bonds should not extend beyond ten years from the date of issuance, such limitation must be regarded as in the nature of a restriction on the power to issue bonds. Norton v. Dyersburg, 127 U. S. 160; 8 Sup. Ct. 1111; Brenham v. German-American Bank, 144 U. S. 173; 12 Sup. Ct. 559."

bonds on their face convey notice of the purpose for which they were issued and of the statute under which they are issued, purchasers are bound to take notice of the provisions of the statute, and cannot treat the bonds as the general obligations of the municipality. But it is not of itself sufficient to take from the bonds the character of general obligations of the municipal corporation that they show on their face that they were issued for a special purpose.[46] If, however, the purpose for which the bonds are issued appears on their face, and the statute under which they are issued is referred to, and that statute expressly provides that they shall be payable out of a special fund, and limits the power to tax to particular persons or property, they cannot be enforced as general obligations of the municipality.[47]

§ 893. Performance of conditions.—We have elsewhere shown that the conditions imposed by the enabling act must be substantially performed.[48] It is evident that, as the authority of the municipality depends upon the enabling act, the requirements of the act must be obeyed. The authority is not, as we have repeatedly said, general, but is an express statutory authority. It is generally held that, if the preliminary conditions necessary to give jurisdiction to issue the bonds have not been fully performed, their issue may be enjoined at the suit of a taxpayer,[49] provided there are no facts creating an estoppel. So,

[46] Olcott v. Supervisors, 16 Wall. (U. S.) 678; United States v. Clark Co. 95 U. S. 769; 96 U. S. 211; Supervisors v. United States, 18 Wall. (U. S.) 71; Macon Co. v. Huidekoper, 99 U. S. 592, note; Knox Co. v. Harshman, 109 U. S. 229; 3 Sup. Ct. 131.

[47] United States v. Macon Co. 99 U. S. 582; United States v. Macon Co. 35 Fed. 483; State v. Macon Co. 68 Mo. 29; Braun v. Board, 66 Fed. 476; 70 Fed. 369; Strieb v. Cox, 111 Ind. 299; 12 N. E. 481; Quill v. Indianapolis, 124 Ind. 292; 23 N. E. 788; 7 L. R. A. 681; Adams v. Ashland, 26 Ky. L. 184; 80 S. W. 1105; Swanson v. Ottumwa, 118 Ia. 161; 91 N. W. 1048; 59 L. R. A. 620. But see Kimball v. Board, 21 Fed. 145; Fowler v. Superior, 85 Wis. 411; 54 N. W. 800; State v. Fayette Co. 37 Ohio St. 526; Austin v. Seattle, 2 Wash. St. 667; 27 Pac. 557.

[48] Ante, §§ 856, 858, 859.

[49] Redd v. Henry Co. 31 Gratt. (Va.) 695; Wagner v. Meety, 69 Mo. 150; Lawson v. Schnellen, 33 Wis. 288; Wright v. Bishop, 88 Ill. 302; Daviess Co. v. Howard, 13 Bush (Ky.), 101; Wellsborough v. New York &c. R. Co. 76 N. Y. 182. See State v. Morristown, 93 Tenn. 239; 24 S. W. 13; Board v. Chesapeake &c. R. Co. 94 Ky. 377; 22 S. W. 609. There may be acts creating an effective estoppel, and there may also be a conclusive adjudication upon jurisdictional

it is held that payment of such bonds may be enjoined after their issue at the suit of one or more of the taxpayers, if the suit is brought while the bonds remain in the hands of the railroad company to which they were originally issued.[50] But even as to the railroad company the doctrine of estoppel may often be available. So, too, the enforcement of the bonds may sometimes be enjoined while they are in the hands of a purchaser with notice.[51]

§ 893a. Right of railroad company to money or bonds on stock subscription.—Where the people have determined at the election to take stock in a railroad company, the company is bound by this con-

facts which will repel a collateral attack. Ante, §§ 865, 871.

[50] Mercer County v. Pittsburgh &c. R. Co. 27 Pa. St. 389; Nefzger v. Davenport &c. R. Co. 36 Iowa, 642; New Orleans &c. R. Co. v. Dunn, 51 Ala. 128; Campbell v. Paris &c. R. Co. 71 Ill. 611; Winston v. Tennessee &c. R. Co. 1 Baxt. (Tenn.) 60; Redd v. Henry Co. 31 Gratt. (Va.) 695. Where, under the law of its organization, a railroad company becomes extinct for failure to begin construction, municipal bonds issued in its aid become void in the hands of itself and its agent, at the date of its extinction. Farnham v. Benedict, 107 N. Y. 159; 13 N. E. 784. Where no part of the road was built in the township as required by the enabling act it was held that the railroad company was not entitled to the bonds. Midland v. County Board, 37 Neb. 582; 56 N. W. 582. See State v. Morristown, 93 Tenn. 239; 24 S. W. 13; Echols v. Bristol, 90 Va. 165; 17 S. E. 943.

[51] A town for which railroad aid bonds have been issued may sue in equity to restrain the payment of interest, and to require them to be surrendered and canceled, and the town need not await a suit on the bonds in order to deny their validity. Cherry Creek v. Becker, 50 Hun (N. Y.), 601; 2 N. Y. S. 514. The court will, in a proper case, decree the cancellation of bonds illegally issued. Springport v. Teutonia Savings Bank, 75 N. Y. 397. But an injunction to restrain payment of bonds after they have been issued will not be granted unless the municipality has a valid defense to them. Wilkinson v. City of Peru, 61 Ind. 1. Where, by the statute, a tax-payer is authorized to sue to prevent the payment of certain railroad aid bonds, it is no defense to the suit that the objection set up as a ground for canceling the bonds might be shown as a defense in a suit on the bonds. Strang v. Cook, 47 Hun (N. Y.), 46. Where the statute provides that the president of the company shall give bond to secure the application of the avails of bonds issued by a municipal corporation, the fact that the president does not execute such a bond does not invalidate the aid bonds where the road is completed before their delivery. Breckinridge Co. v. McCracken, 61 Fed. 191.

dition, and cannot successfully demand that money to an amount equal to the stock shall be paid over to it as a donation.[52] A provision in the charter that a certain per cent of its stock shall be paid in cash is without application to aid extended by municipalities in the construction of railroads by an exchange of the bonds of the municipality for stock.[53]

§ 894. Ratification of bonds irregularly issued.—The weight of authority is that the municipality may, where it has power to issue bonds, ratify them by subsequent action, although the proceedings were irregular or defective. But, where a vote of the inhabitants is required in order to authorize the execution of bonds, the municipal officers cannot, of their own motion, validate bonds issued in cases where the proceedings prior to the election were substantially defective. There may, however, be such acts on the part of the representatives of the municipality as will constitute an estoppel.[54] Acts of the municipality or its officers, when invested with authority,[55] or of the legislature, ratifying and making valid a municipal subscription, may validate the bonds issued in payment thereof.[56]

[52] Hamilton Co. v. State, 115 Ind. 64; 4 N. E. 589; 17 N. E. 855. Citing Faris v. Reynolds, 70 Ind. 359; Bittinger v. Bell, 65 Ind. 445; Irwin v. Lowe, 89 Ind. 540; Brocaw v. Board, 73 Ind. 543.

[53] Austin v. Gulf &c. R. Co. 45 Tex. 234.

[54] Ante, §§ 843, 844, 845; Treadway v. Schnauber, 1 Dak. 236; 46 N. W. 464; Andes v. Ely, 158 U. S. 312; 15 Sup. Ct. 954, citing Williams v. Duanesburgh, 66 N. Y. 129; Horton v. Thompson, 71 N. Y. 513; Rogers v. Stephens, 86 N. Y. 623. See, also, Schmitz v. Zeh, 91 Minn. 290; 97 N. W. 1049; Brown v. Bon Homme Co. 1 S. Dak. 216; 46 N. W. 173; Brown v. Milliken Co. Clerk, 42 Kans. 769; 23 Pac. 167.

[55] Marcy v. Oswego, 92 U. S. 637; Converse v. Fort Scott, 92 U. S. 503; Randolph Co. v. Post, 93 U. S. 502; Orleans v. Platt, 99 U. S. 676; Gause v. Clarksville, 1 Fed. 353; McGillivray v. School Dist. 112 Wis. 354; 88 N. W. 310; 58 L. R. A. 100; 88 Am. St. 969.

[56] Bates Co. v. Winters, 97 U. S. 83; South Ottawa v. Perkins, 94 U. S. 260; St. Joseph Tp. v. Rogers, 16 Wall. (U. S.) 644; January v. Johnson Co. 3 Dill. (U. S.) 392; Bridgeport v. Housatonic R. Co. 15 Conn. 475; Alexander v. McDowell Co. 70 N. Car. 208; Sykes v. Columbus, 55 Miss. 115; Shelby Co. Ct. v. Cumberland &c. R. Co. 8 Bush (Ky.), 209; Keithsburg v. Frick, 34 Ill. 405. Where railroad aid bonds were issued after the adoption of the Illinois constitution of 1870, which forbade the issuance of such bonds except where they had been authorized before such adoption by a vote of the people under "existing laws," but such bonds

§ 894a. **Ratification of invalid bonds.**—Where negotiable railway aid bonds issued by a city are void for want of authority in the city to issue the same, the mere fact that the city is authorized by statute to refund its indebtedness and can issue its warrants for the particular purpose for which the bonds were issued will not operate to validate the bonds in the absence of some act by the city in the direction of a refundment in the manner indicated. It is not the law that an unauthorized act, which may be ratified, is binding whether ratified or not.[57]

§ 895. **When bonds are void.**—We have heretofore shown that bonds issued in cases where there is an entire absence of power cannot be enforced, even by one who has bought them in good faith, and this is substantially equivalent to saying that they are void, but we do not mean to say that bonds issued without statutory authority are incapable of ratification by an effective curative statute. We employ the term "void" in this connection in the sense in which it is often used, although the term "voidable" would, perhaps, be the more accurate one. We think that, where there is legislative power to authorize a municipality to issue bonds, but the bonds are issued without a statutory grant of power, they are not absolutely void, that is to say, they are not "a mere nothing incapable of ratification" by legislative enactment. Bonds issued without statutory authority,[58] or by au-

were authorized at an election irregularly held, which, however, was ratified by the legislature before the adoption of the constitution, such ratification does not validate the bonds issued after the constitution was adopted, since the "existing laws" referred to in the constitution are the laws in force when the election was held. Williams v. People, 132 Ill. 574; 24 N. E. 647, disapproving Jonesboro v. Cairo &c. R. Co. 110 U. S. 192; 4 Sup. Ct. 67. But an act which declares the aid proposed to be given to be a debt on the township, and provides for its payment, but does not validate the bonds illegally issued under a void vote to give such aid, and does not legalize the proceedings by which such bonds were issued, will not entitle the railroad company to a writ of mandamus to compel the township officers to sign a certificate of the completion of the road by means of which the company may obtain delivery of the bonds. State v. Whitesides, 30 S. Car. 579; 9 S. E. 661; 3 L. R. A. 777, and note; State v. Harper, 30 S. Car. 586; 9 S. E. 664.

[57] Swanson v. Ottumwa (Ia.), 106 N. W. 9; 5 L. R. A. (N. S.) 860.

[58] German &c. Bank v. Franklin Co. 128 U. S. 526; 9 Sup. Ct. 159; Purdy v. Lansing, 128 U. S. 557; 9 Sup. Ct. 172; Ottawa v. Carey, 108 U. S. 110; 2 Sup. Ct. 361; Cit-

thority of an unconstitutional statute,[59] are often said to be void, even in the hands of bona fide purchasers,[60] and it is said that no recitals which they contain can so estop the municipality as to give them validity. We say, to avoid possible misunderstanding, that bonds which can be ratified are not, in the strict sense, void, but bonds that cannot be ratified by legislative enactment are absolutely void. It is, therefore, strictly accurate to say that bonds issued in violation of the constitution are absolutely void. Upon the principle that an act which violates the constitution is entirely destitute of force, the federal courts hold that an issue of bonds in excess of the limit of indebtedness pre-

izens' &c. Loan Assoc. v. Topeka, 20 Wall. (U. S.) 655; St. Joseph Tp. v. Rogers, 16 Wall. (U. S.) 644; Aspinwall v. Commissioners, 22 How. (U. S.) 364; Millerstown v. Frederick, 114 Pa. St. 435; 7 Atl. 156; Duke v. Brown, 96 N. Car. 127; 1 S. E. 873; Eddy v. People, 127 Ill. 428; Williamson v. Keokuk, 44 Iowa, 88; Sykes v. Columbus, 55 Miss. 115; Agawam Nat. Bank v. South Hadley, 128 Mass. 503.

[59] Harshman v. Bates Co. 92 U. S. 569; Wells v. Supervisors, 102 U. S. 625; Ogden v. Daviess Co. 102 U. S. 634; Allen v. Louisiana, 103 U. S. 80; Jarbolt v. Moberly, 103 U. S. 580; Howard Co. v. Paddock, 110 U. S. 384; 4 Sup. Ct. 24. Since the constitution of Missouri requires the consent of two-thirds of the qualified voters before a municipality can grant aid to a railroad, a statute is void which assumes to give authority to issue bonds without any vote. Hill v. Memphis, 134 U. S. 198; 10 Sup. Ct. 562. The United States courts have held the "Township Aid Act" of Missouri of March 23, 1868, to be constitutional and that bonds issued by authority of that act are valid. Cass Co. v. Johnston, 95 U. S. 360. And this decision was adhered to after the supreme court of Missouri in State v. Brassfield, 67 Mo. 331, had held the act unconstitutional. Foote v. Johnson County, 5 Dillon (U. S.), 281. This being the case it is held that bonds issued under the act are proper subjects of compromise, and a tax levied to pay such compromise bonds issued under 2 Rev. St. Mo. 1879, p. 848, is valid. State v. Hannibal &c. R. Co. 101 Mo. 136.

[60] A distinction is taken between an entire absence of power to issue bonds and a defective execution of an existing power, acts done under the latter being held to bind the corporation in certain cases, while acts done in the absence of power to perform them never do. German &c. Bank v. Franklin Co. 128 U. S. 526; 9 Sup. Ct. 159; St. Joseph v. Rogers, 16 Wall. (U. S.) 644; and cases cited supra. In Northern Bank v. Porter Tp. 110 U. S. 608; 4 Sup. Ct. 254, the court says: "The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company, can not be concluded by mere recitals; but, the power existing, the municipality may be estopped by the recitals to prove irregularity in the exercise of that power."

scribed by the state constitution is void, and that no acts of the municipality, nor any recitals which may appear in the bonds, can give such bonds any validity.[61] The distinction which is made between such a case and the cases where an issue of bonds is allowed only upon certain conditions prescribed by statute has been thus stated: "In this case the standard of validity is created by the constitution. . . . These being the exactions of the constitution itself, it is not within the power of the legislature to dispense with them, either directly or indirectly, by the creation of a ministerial commission whose finding shall be taken in lieu of the facts."[62]

[61] Buchanan v. Litchfield, 102 U. S. 278; Dixon Co. v. Field, 111 U. S. 83; 4 Sup. Ct. 315; Litchfield v. Ballou, 114 U. S. 190; 5 Sup. Ct. 820; Katzenberger v. Aberdeen, 121 U. S. 172; Lake Co. v. Rollins, 130 U. S. 662; 9 Sup. Ct. 651. Where an issue of county bonds for donation to a railroad has been adjudged void because in excess of the constitutional limit of indebtedness, equity has no power to reduce the issue to the limit, and enforce it against the county, the contract being indivisible, and void in toto, and there being no executed consideration to support an implied promise. Hedges v. Dixon Co. 37 Fed. 304. See, also, Balch v. Beach, 119 Wis. 77; 95 N. W. 132.

[62] Lake Co. v. Graham, 130 U. S. 674; 9 Sup. Ct. 654. The reasons here assigned would seem to cover a failure to observe any other precedent conditions prescribed by the constitution, such as a failure to hold a required election, etc. See Hill v. Memphis, 134 U. S. 198; 10 Sup. Ct. 562. An agreement entered into between a railway company and the authorities of a town, upon petition of a majority of the tax-payers in pursuance of the laws of Minnesota, for the issuance of the bonds of such town, but which was not submitted to a vote as required by a section of the law, is invalid, and imposes no legal obligation upon the town, by reason of the unconstitutionality of the statute; and the town in its corporate capacity, is not estopped to resist the enforcement of bonds so issued by the completion of a line of railroad under the agreement by such company. Plainview v. Winona &c. R. Co. 36 Minn. 505; 32 N. W. 745; Elgin v. Winona &c. R. Co. 36 Minn. 517; 32 N. W. 749; Harrington v. Plainview, 27 Minn. 224; 6 N. W. 777. Under the law of Mississippi, which declares that the legislature shall not authorize any county, city, or town to aid any corporation, unless two-thirds of the qualified voters of such municipality shall assent thereto at a special election, it was held railroad aid bonds were not invalidated in the hands of innocent purchasers by the fact that less than such majority voted for them, where more than two-thirds of the votes cast were in favor of issuing the bonds. Madison County v. Priestly, 42 Fed. 817.

§ 895a. Form of bonds—To whom payable.—A statute under which bonds of a county were issued required that they should be made payable to a railroad company "and their successor and assigns," but they were drawn payable to the company or bearer. It was contended that this variance from the prescribed formula was a fatal defect, but the court held that the requirement was only directory, and that, the irregularity having been committed by the servant of the city, the latter was in no position to take advantage of it.[63]

§ 895b. Form of bonds—Lack of seal.—Bonds regularly issued by a municipal corporation, and otherwise legal, will not be rendered invalid by the omission of the corporate seal.[64] In a case involving this question it was said: "It is apparent from the law that the substantial thing authorized to be done on behalf of the town was to pledge the credit of the town in aid of the railroad company in the construction of its road, by subscribing to its capital stock and issuing the obligations of the town in payment thereof. The technical form of the obligation was a matter of form rather than of substance. The issue of bonds under seal, as contradistinguished from bonds or obligations without seal, was merely a directory requirement."[65]

§ 896. Bona fide holders of aid bonds.—The courts have gone very far in protecting bona fide holders of aid bonds. They have extended the doctrine of estoppel to great lengths for the protection of that class of persons. They have also liberally construed statutes in order to give validity to bonds in the hands of bona fide holders, and the federal courts have held that, where a state court gives a construction to a statute which upholds the bonds, it will not be allowed to change its decision so as to invalidate the bonds in the hands of a bona fide holder who had acquired the bonds while the earlier decision was in force.[66] "To be a bona fide holder, one must be himself a purchaser

[63] Calhoun Co. v. Galbraith, 99 U. S. 214; 25 L. Ed. 410. See, also, Indianapolis R. Co. v. Horst, 93 U. S. 291; Rock Creek Tp. v. Strong, 96 U. S. 271; Bargate v. Shortridge, 5 H. L. Cas. 297.

[64] Draper v. Springport, 104 U. S. 501; San Antonio v. Mehaffey, 96 U. S. 312; Bernards Tp. v. Stebbins, 109 U. S. 341; 3 Sup. Ct. 252.

[65] Draper v. Springport, 104 U. S. 501.

[66] Douglass v. Pike Co. 101 U. S. 677; Gelpoke v. Dubuque, 1 Wall. (U. S.) 175; Taylor v. Ypsilanti, 105 U. S. 60; Insurance Co. v. De Bolt, 16 How. (U. S.) 115; Anderson v.

for value without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained with reasonable diligence. Every dealer in municipal bonds, which upon their face refer to the statute under which they are issued, is bound to take notice of the statute and its requirements."[67] The general rule is that no one can claim to be a bona fide holder when the bonds themselves contain recitals showing that they were not issued in accordance with any existing law.[68] Thus, where the bonds recited that they were issued under a statute which had been declared to be void, it was held that such a recital was notice to the purchaser of their invalidity.[69] But such a recital will not prevent the holder of the bonds from showing that they were really issued by

Santa Anna, 116 U. S. 356; 6 Sup. Ct. 413.

[67] McClure v. Oxford, 94 U. S. 429. In the case cited the purchaser of bonds was held bound to take notice of the time the enabling act went into force. In the course of the opinion it was said: "The statute under which the bonds now in question were issued, and which is referred to in the bonds, though passed and approved March 1, 1872, was not by its terms to go into effect until after its publication in the 'Kansas Weekly Commonwealth.' Of this every purchaser of the bonds had notice, because it was part of the statute he was bound to take notice of. A purchaser would, therefore, be put upon inquiry as to the time of the publication, and by reasonable diligence could have ascertained that this did not take place until March 21. This being the case, the law charges him with knowledge that the statute did not go into effect until that date." See, generally, as to making inquiry, Cromwell v. Sac Co. 96 U. S. 51; Francis v. Howard Co. 54 Fed. 487; Ball v. Presidio Co. 88 Tex. 60; 29 S. W. 1042.

[68] Harshman v. Bates Co. 92 U. S. 569; McClure v. Oxford, 94 U. S. 429; Bates Co. v. Winters, 97 U. S. 83; Anthony v. Jasper Co. 101 U. S. 693; Barnes v. Lacon, 84 Ill. 461; Johnson v. Butler, 31 La. Ann. 770; Woodruff v. Okolona, 57 Miss. 806; Dodge v. Platte Co. 82 N. Y. 218.

[69] Gilson v. Dayton, 123 U. S. 59; 8 Sup. Ct. 66; Crow v. Oxford, 119 U. S. 215; 7 Sup. Ct. 180. In this latter case it is held that the certificate of the state auditor, as to matters which he was not authorized by the statute under which the bonds were issued to certify, is of no avail against the municipality, although it procured such certificate to be indorsed upon the bonds. The New York act of 1869 was amended in 1871, so as to authorize the issuance of railroad aid bonds upon the petition of a majority of the tax-payers "who are taxed or assessed for property, not including those taxed for dogs or highway tax only, upon the last preceding assessment roll, . . and who . . . represent a majority of

authority of a different act than the one referred to, in which case they may be valid.[70] It has also been held that purchasers of county bonds issued under statutory authority to aid in the completion of any railroad in which the citizens of the county have an interest, are not entitled to assume, for the purpose of sustaining the validity of the bonds, that the railroad had been begun before the adoption of a provision of the constitution antedating the charter of the company, but that a recital in the bonds that they were issued under the authority of such statute entitled bona fide purchasers to assume that the condition of the road as to construction, and the interest of the county therein, were such as were required by such statute to exist before the bonds could be lawfully issued.[71]

§ 897. Estoppel by recitals in bonds—General doctrine.—The courts regard with favor bona fide holders of aid bonds, and liberally apply the doctrine of estoppel, in order to protect such holders. Recitals are given great force and effect. It is an established rule in the United States courts, where most of the litigation involving the validity of such bonds is carried on, that, where power exists to issue bonds upon certain conditions, and the question of compliance with those conditions is left by the statute to the officers issuing the bonds for decision, or, it seems, where the existence of the facts warranting an exercise of the power is peculiarly within the knowledge of such officers, the municipality will be bound by the recital of the bonds as to such matters.[72] The rule has been thus stated: "Where legislative

the taxable property." It was held, in a suit to enforce bonds issued after the amended act was passed, that a petition, after the enactment of the later statute which followed the language of the act of 1869, and did not show that petitioners were a majority of the tax payers exclusive of those "taxed for dogs or highways only," conferred no power on the county judge, and an adjudication thereon which was similarly defective, and bonds issued on it, which recited that they were issued under the act of 1869, were void. Rich v. Mentz, 134 U. S. 632; 10 Sup. Ct. 610.

[70] Anderson Co. Commrs. v. Beal, 113 U. S. 227; 5 Sup. Ct. 433; Ninth Nat. Bank v. Knox Co. 37 Fed. 75; Knox County v. Ninth National Bank, 147 U. S. 91; 13 Sup. Ct. 267.

[71] Stanley Co. v. Coler, 190 U. S. 437; 23 Sup. Ct. 811.

[72] New Providence v. Halsey, 117 U. S. 336; 6 Sup. Ct. 764; Menasha v. Hazard, 102 U. S. 81; Pompton v. Cooper Union, 101 U. S. 196; Hackett v. Ottawa, 99 U. S. 86; Daviess Co. v. Huidekoper, 98 U. S.

authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with powers to decide whether the condition has been complied with, their recital that it has been made in the bonds issued by them, and held by a bona fide purchaser, is conclusive of the fact and binding upon the municipality, for the recital itself is a decision of the fact by the appointed tribunal."[73] The doctrine of the federal tribunals is very generally adopted and asserted by the state courts.[74]

98; Warren Co. v. Marcy, 97 U. S. 96; San Antonio v. Mehaffy, 96 U. S. 312; Douglas Co. v. Bolles, 94 U. S. 104; Coloma v. Eaves, 92 U. S. 484; Columbus v. Dennison, 69 Fed. 58; Block v. Commissioners, 99 U. S. 686; Commissioners v. January, 94 U. S. 202; Commissioners v. Clark, 94 U. S. 278; Brooklyn v. Insurance, 99 U. S. 362; Moran v. Commissioners, 2 Black (U. S.), 722. See, also, Waite v. Santa Cruz, 184 U. S. 302; 22 Sup. Ct. 327; Fairfield v. Rural Independent School Dist. 116 Fed. 838; Gunnison Co. v. E. H. Rollins & Sons, 173 U. S. 255; 19 Sup. Ct. 390; Chaffee Co. v. Potter, 142 U. S. 355; 12 Sup. Ct. 1040; Kent v. Dana, 100 Fed. 56; Clapp v. Marice City, 111 Fed. 103; Municipal Trust Co. v. Johnson City, 116 Fed. 458; Independent School Dist. v. Rew, 111 Fed. 1; 55 L. R. A. 364, and numerous authorities there cited.

[73] Coloma v. Eaves, 92 U. S. 484; Buchanan v. Litchfield, 102 U. S. 278; Northern Bank v. Porter Tp. 110 U. S. 608; 4 Sup. Ct. 254; Dixon Co. v. Field, 111 U. S. 83; 4 Sup. Ct. 315; Anderson Co. v. Beal, 113 U. S. 227; 5 Sup. Ct. 433; Phelps v. Lewiston, 15 Blatchf. (U. S.) 131; Irwin v. Ontario, 3 Fed. 49; Platt v. Hitchcock County, 139 Fed. 929. Where the county court has been designated by the statute as the proper authority to determine the existence of the conditions necessary to authorize the subscription by the township to the railroad company's stock, and the consequent issuance of bonds, the fact of the issue thereof by the county court under its seal, with the recital that all the necessary steps have been taken, together with the fact that the county has for several years paid interest on the bonds, estop it from setting up, as against a bona fide holder, any mere irregularity in making the subscription or issuing the bonds. Livingston Co. v. First Nat. Bank, 128 U. S. 102; 9 Sup. Ct. 18; Hopper v. Covington, 8 Fed. 777; Carrier v. Shawangunk, 10 Fed. 220; Anderson Co. v. Houston &c. R. Co. 52 Tex. 228; Lane v. Embden, 72 Me. 354.

[74] Burlington &c. R. Co. v. Stewart, 39 Iowa, 267; Sauerhering v. Iron Ridge &c. R. Co. 25 Wis. 447; New Haven &c. R. Co. v. Chatham, 42 Conn. 465; Chicago &c. R. Co. v. Shea, 67 Iowa, 728; 25 N. W.

§ 898. Estoppel by recitals in bonds—Illustrative cases.—In a recent case it was held that a recital in aid bonds estopped the municipality from questioning the qualifications of the county judge,[75] and from questioning the corporate existence of the railroad company.[76] In the case referred to the court carried the doctrine of estoppel very far, holding that the municipality was estopped, although the bonds were signed by commissioners appointed by the county judge and not by the regular municipal officers.[77] We cannot escape

901; Kerr v. Corry, 105 Pa. St. 282; Johnson v. Stark Co. 24 Ill. 75; Clarke v. Hancock Co. 27 Ill. 305; Leavenworth &c. R. Co. v. Douglass Co. 18 Kan. 169; Lamb v. Burlington &c. R. Co. 39 Iowa, 333; Dodge v. Platte Co. 16 Hun (N. Y.), 285; Jefferson Co. v. Lewis, 20 Fla. 980; Lane v. Embden, 72 Me. 354; Gould v. Sterling, 23 N. Y. 456; Williams v. Roberts, 88 Ill. 11; Clark v. Janesville, 10 Wis. 136; Chicago &c. R. Co. v. Commissioners, 49 Kan. 399; 30 Pac. 456; Kansas City &c. R. Co. v. Rich, 45 Kan. 275; 25 Pac. 595. But see Cagwin v. Hancock, 84 N. Y. 532. See, generally, State v. Commissioners, 37 Ohio St. 526; Shelby Co. v. Jarnagin (Tenn.), 16 S. W. 1040; Gaddis v. Richland Co. 92 Ill. 119; Lippincott v. Pana, 92 Ill. 24; State v. School Dist. 10 Neb. 544; 7 N. W. 315; Lindsey v. Rottaken, 32 Ark. 619.

[75] Andes v. Ely, 158 U. S. 312; 15 Sup. Ct. 954. It was said in the opinion in the case cited: "But further, in view of the recitals on the bonds, are these questions open for inquiry? Ample authority was given by the statutes of the state referred to. Whether the various steps were taken, which, in this particular case, justified the issue of the bonds, was a question of fact; and when the bonds, on their face, recite that those steps have been taken, it is the settled rule of this court that in an action brought by a bona fide holder, the municipality is estopped from showing the contrary. See the multitude of cases commencing with Commissioners v. Aspinwall, 21 How. (U. S.), 539, and ending with Citizens' &c. Asso. v. Perry Co. 156 U. S. 692; 15 Sup. Ct. 547.

[76] In the case referred to in the preceding note the court cited, upon the point that a party contracting with a corporation is estopped to aver that it is not a corporation de jure, the cases of Leavenworth Co. v. Barnes, 94 U. S. 70; Commissioners v. Bolles, 94 U. S. 104; Casey v. Galli, 94 U. S. 673; Chubb v. Upton, 95 U. S. 665. See, also, Municipal Trust Co. v. Johnson City, 116 Fed. 458. As to the effect of legislative recognition, the court cited Comanche Co. v. Lewis, 133 U. S. 198; 10 Sup. Ct. 286; State v. Commissioners, 12 Kan. 426; State v. Hamilton, 40 Kan. 323; 19 Pac. 723. See, also, Macon Co. v. Shores, 97 U. S. 272, 276; Dallas Co. v. Huidekoper, 154 U. S. 655; 14 Sup. Ct. 1190; Smith v. Clark Co. 54 Mo. 58.

[77] Andes v. Ely, 158 U. S. 312; 15 Sup. Ct. 954. It was said in the opinion that: "It may be said

the conclusion that the case referred to is an extreme one, and that its doctrine should be limited rather than extended. It seems to us that, where the statute provides that a municipality shall be represented by officers selected by its electors, a county judge has no authority to appoint agents to execute negotiable bonds in its behalf. It may, perhaps, be true that, if the municipality secures the benefit of the bonds in tangible property or money, it should be held liable therefor, but we cannot believe that the bonds can be considered as the obligations of the public corporation, unless executed by the officers constituted by law the representatives of the public corporation. If there is power to appoint corporate agents, and to delegate to them authority to execute negotiable bonds in behalf of the municipality, then it may well be held that bonds executed by such agents are the obligations of the municipality. It is held that a municipality is estopped to dispute its liability upon bonds in the hands of bona fide holders, upon the ground that the election authorizing their issue was not properly conducted,[78] or that the persons giving their written as-

that those decisions are not wholly in point, inasmuch as these bonds were signed, not by regular officers, but by commissioners specially appointed, and that, before a recital made by them can be held to conclude the town, it must appear that they were duly appointed, and thus had authority to act. Doubtless this distinction is not without significance. Yet they were acting commissioners, and their authority was recognized, for each bond was registered in the office of the county clerk and attested by the signature of the county clerk with the seal of the county; and if we go back of that to the records of the county judge—the appointing power— there appears a separate order in due form, appointing them commissioners, which order recites a prior adjudication of all the essential facts. Giving full force to the distinction which exists between the action of general and special officers, there must be even in respect to the latter, some point in the line of inquiry, back of which a party dealing in bonds of a municipality is not bound to go in his investigations as to their authority to represent the municipality, and that point, it would seem, was reached when there is found an appointment, in due form, made by the appointing tribunal named in the statute."

[78] Knox Co. v. Aspinwall, 21 How. (U. S.) 539; Mercer County v. Hacket, 1 Wall. (U. S.) 83; Supervisors v. Schenck, 5 Wall. (U. S.) 772; Lynde v. The County, 16 Wall. (U. S.) 6; Coloma v. Eaves, 92 U. S. 484; Leavenworth Co. v. Barnes, 94 U. S. 70; Cass Co. v. Johnston, 95 U. S. 360; Hackett v. Ottawa, 99 U. S. 86; Anthony v. Jasper Co. 101 U. S. 693; Northern Bank v. Porter, 110 U. S. 608; 4 Sup. Ct. 254; Webb v. Commis-

sent did not constitute two-thirds of the resident taxpayers,[79] or that the required proportion of the voters had not signed the necessary petition,[80] or that the amount of bonds issued was a greater per cent of the taxable valuation of the municipality than it was empowered to issue,[81] or that the proper recommendation of the grand jury as to the amount of bonds to be issued was not had,[82] where the bonds, as issued, contained a recital that such prerequisite conditions had been observed.[83] It has been held that, where the bonds contained a recital

sioners of Herne Bay, L. R. 5 Q. B. 642. A recital in a bond issued in payment of a subscription to railway stock, that it is authorized by a certain statute, will not estop the municipal corporation from asserting that the issue was not authorized by a proper vote, as required by law. Carroll Co. v. Smith, 111 U. S. 556; 4 Sup. Ct. 539. But see Commissioners v. Aspinwall, 21 How. (U. S.) 539.

[79] Venice v. Murdock, 92 U. S. 494.

[80] Bissell v. Jeffersonville, 24 How. (U. S.) 287.

[81] Marcy v. Oswego, 92 U. S. 637; Humboldt v. Long, 92 U. S. 642; New Providence v. Halsey, 117 U. S. 336; 6 Sup. Ct. 764; Coler v. Board of Commissioners, 27 Pac. 619; Chaffee Co. v. Potter, 142 U. S. 355; 12 Sup. Ct. 216. But where the amount to be issued was limited to a certain fixed sum, bonds containing no recitals, issued in excess of that sum, were held void for lack of power to issue them, even in the hands of bona fide holders. Daviess Co. v. Dickinson, 117 U. S. 657; 6 Sup. Ct. 897; Merchants' Bank v. Bergen Co. 115 U. S. 384.

[82] Mercer Co. v. Hacket, 1 Wall. (U. S.) 83.

[83] Northern Bank v. Porter Tp. 110 U. S. 608; 4 Sup. Ct. 254; Ottawa v. Nat. Bank, 105 U. S. 342; Menasha v. Hazard, 102 U. S. 81; Foote v. Pike Co. 101 U. S. 688, note; Douglass v. Pike Co. 101 U. S. 677; Pompton v. Cooper Union, 101 U. S. 196; Roberts v. Bolles, 101 U. S. 119; Anthony v. Jasper Co. 101 U. S. 693; Lyons v. Munson, 99 U. S. 684; Block v. Commissioners, 99 U. S. 686; Orleans v. Platt, 99 U. S. 676; Wilson v. Salamanca, 99 U. S. 499; Supervisors v. Galbraith, 99 U. S. 214; Hackett v. Ottawa, 99 U. S. 86; Daviess Co. v. Huidekoper, 98 U. S. 98; Macon Co. v. Shores, 97 U. S. 272, 279; Warren Co. v. Marcy, 97 U. S. 96; San Antonio v. Mehaffy, 96 U. S. 312; Rock Creek v. Strong, 96 U. S. 271; Cass Co. v. Johnston, 95 U. S. 360; Comrs. of Douglas Co. v. Bolles, 94 U. S. 104; Randolph Co. v. Post, 93 U. S. 502; Venice v. Murdock, 92 U. S. 494; Coloma v. Eaves, 92 U. S. 484; Pendleton Co. v. Amy, 13 Wall. (U. S.) 297; St. Joseph Tp. v. Rogers, 16 Wall. (U. S.) 644; Kenicott v. Supervisors, 16 Wall. (U. S.) 452; Lynde v. The County, 16 Wall. (U. S.) 6; Grand Chute v. Winegar, 15 Wall. (U. S.) 355; Lexington v. Butler, 14 Wall. (U. S.) 282; Supervisors v. Schenck, 5 Wall. (U. S.) 772; Cincinnati v. Morgan, 3 Wall. (U. S.) 275; Meyer v. Muscatine, 1 Wall. (U. S.) 384, 393; Van

that they had been issued in pursuance of a subscription to the capital stock of a railroad company, made under the authority of a certain statute, the corporation was estopped from setting up the fact that the subscription was made after the authority to make it had expired, as a defense to a suit by a bona fide holder of such bonds.[84] In the case referred to three of the members of the court dissented, and, as it seems to us, with good reason, for we believe that the question was one of power to be determined by an examination of public laws. Bonds were held valid in a case where the subscription was made upon conditions which the municipality had power to impose, and bonds were issued reciting that such conditions had been performed, when, in fact, they had not; and it was held that the application of the rule was not affected by the fact that the statute declared that such bonds should not be binding until after the performance of the prescribed conditions.[85] And the purchaser is held not to be charged with constructive notice of anything in the public records of the municipality, which would show that such recitals are really false.[86] But where the statute makes an accessible public record the test, a recital contradicting it is held not to constitute an estoppel.[87]

Hostrup v. Madison, 1 Wall. (U. S.) 291; Mercer Co. v. Hacket, 1 Wall. (U. S.) 83; Bissell v. Jefferson, 24 How. (U. S.) 287; Commissioners v. Aspinwall, 21 How. (U. S.) 539; Third Nat. Bank v. Seneca Falls, 15 Fed. 783; Cary v. Ottawa, 8 Fed. 199; Nicolay v. St. Clair Co. 3 Dill. (U. S.) 163; Mygatt v. Green Bay, 1 Biss. (U. S.) 292; Moran v. Commissioners, 2 Black (U. S.), 722; Woods v. Lawrence Co. 1 Black (U. S.), 386; St. Louis v. Shields, 62 Mo. 247; Smith v. County of Clark, 54 Mo. 58, 81; Shorter v. Rome, 52 Ga. 621; Wilkinson v. Peru, 61 Ind. 1; Bargate v. Shortridge, 5 H. L. Cas. 297; Imperial Land Co. In re, L. R. 11 Eq. 478; Webb v. Commissioners of Herne Bay, L. R. 5 Q. B. 642; Royal British Bank v. Turquand, 6 El. & Bl. 325.

[84] Moultrie Co. v. Rockingham &c. Sav. Bank, 92 U. S. 631. The court discriminates the case before it from that of Concord v. Portsmouth Savings Bank, 92 U. S. 625, but it seems to us that the principle is the same in both cases.

[85] Insurance Co. v. Bruce, 105 U. S. 328.

[86] Marcy v. Oswego, 92 U. S. 637; Humboldt v. Long, 92 U. S. 642. See, also, Stanley Co. v. Coler, 190 U. S. 437; 23 Sup. Ct. 811.

[87] Sutliff v. Board, 147 U. S. 230; 13 Sup. Ct. 318; Dixon Co. v. Field, 111 U. S. 83; 4 Sup. Ct. 315. See, also, Sutro v. Rhodes, 92 Cal. 117; 28 Pac. 98; Citizens' Bank v. Terrell, 78 Tex. 450; 14 S. W. 1003; National L. Ins. Co. v. Mead, 13 S. Dak. 37, 342; 82 N. W. 78; 48 L. R. A. 785; 79 Am. St. 876. So, where the constitution contains an absolute limitation or prohibition it is held that a ministerial board or offi-

§ 899. Recitals in bonds not always conclusive.—As we have elsewhere seen, recitals in bonds or statements in certificates of officers are not conclusive where the municipality has no power to issue bonds, but there are also other cases in which they are held not to be effective as an estoppel. Where there is notice of defects, and no change of position, made in good faith, and no laches or acquiescence, there can be no estoppel, notwithstanding the recitals in the bonds. Where the enabling act expressly requires that the bonds shall be registered, and provides that, if not registered, they shall be void, the certificate of the officer is held not to estop the municipality from showing that the provisions of the enabling act were not complied with.[88] In other cases bonds have been held void and the doctrine of estoppel denied application.[89]

§ 900. Official certificates—Conclusiveness of.—Where the law imposes upon a municipal officer the duty of certifying that certain facts exist, or that certain proceedings have been had, or invests him with authority to make such a certificate, the general rule is that, as to

cer can not determine the matter to the contrary so as to create an estoppel by recitals. Hedges v. Dixon Co. 150 U. S. 182; 14 Sup. Ct. 71; Lake Co. v. Dudley, 173 U. S. 243; 19 Sup. Ct. 398; Shaw v. Independent School Dist. 77 Fed. 277. See, also, First Nat. Bank v. District Twp. 86 Ia. 330; 53 N. W. 301; 41 Am. St. 489.

[88] In German Savings Bank v. Franklin County, 128 U. S. 526; 9 Sup. Ct. 159, the case was distinguished from Lewis v. Commissioners, 105 U. S. 739, and it was said: "The registration of the bonds by the state auditor has nothing to do with any of the terms or conditions on which the stock was voted and subscribed. Neither the registration nor the certificate of registry covers or certifies any fact as to compliance with the conditions prescribed in the vote, on which alone the bonds were to be issued. The recital in the bonds does not contain any reference to the act of April 16, 1869, or certify any compliance with the provisions of that act; and the certificate of registry merely certifies that the bond has been registered in the auditor's office pursuant to the provisions of the act of April 16, 1869. The statute does not require that the auditor shall determine or certify that the bonds have been regularly or legally issued."

[89] Randolph Co. v. Post, 93 U. S. 502; Concord v. Robinson, 121 U. S. 165; 7 Sup. Ct. 937. In German &c. Bank v. Franklin County, 128 U. S. 526; 9 Sup. Ct. 739, the cases of Insurance Co. v. Bruce, 105 U. S. 328; Pana v. Bowler, 107 U. S. 529; 2 Sup. Ct. 704, and Oregon v. Jennings, 119 U. S. 74; 7 Sup. Ct. 124, are reviewed and their effect defined.

bona fide purchasers of bonds, the certificate is conclusive.[90] In order that a certificate shall be conclusive in itself, it is essential that it should be made by an officer or agent invested with authority, since the certificate of a person having no authority whatever to make such a certificate is, of itself, of no force or effect.[91] It is important to bear in mind, in applying the rule stated, that it applies only in cases of persons who acquire rights without notice of defects in the proceedings. It is evident that it cannot apply in any case where there is an entire absence of power to issue bonds.[92] Where there is power to issue bonds the rule is of general application, since a purchaser of bonds is not bound to examine the municipal records in cases where the constitution or statute does not make them the test and the recitals of the bonds show a compliance with the law, or the certificate of an authorized officer or agent recites that the steps required by law have been taken.

[90] Block v. Commissioners, 99 U. S. 686; State v. Hancock Co. 12 Ohio St. 596; Ontario v. Hill, 99 N. Y. 324; Hannibal v. Fauntleroy, 105 U. S. 408; Gelpcke v. Dubuque, 1 Wall. (U. S.) 175; Bank of Rome v. Rome, 19 N. Y. 20; 75 Am. Dec. 272; San Antonio v. Lane, 32 Tex. 405; Hannibal &c. R. Co. v. Marion Co. 36 Mo. 294; Humboldt Tp. v. Long, 92 U. S. 642. See, generally, Wilson v. Salamanca, 99 U. S. 499; Davis v. Kendallville, 5 Biss. (U. S.) 280; Nicolay v. St. Clair Co. 3 Dill. (U. S.) 163; Sherman Co. v. Simons, 109 U. S. 735; Pollard v. Pleasant Hill, 3 Dill. (U. S.) 195; Van Hostrup v. Madison, 1 Wall. (U. S.) 291. See, also, Independent School Dist. v. Rew, 111 Fed. 1, 8; 55 L. R. A. 364, where many other authorities are cited.

[91] Dixon Co. v. Field, 111 U. S. 83; 4 Sup. Ct. 315; Anthony v. Jasper Co. 101 U. S. 693; Daviess Co. v. Dickenson, 117 U. S. 657; 6 Sup. Ct. 897; Jefferson Co. v. Lewis, 20 Fla. 980; State v. Commissioners, 11 Ohio St. 183. See, also, Brown v. Ingalls Twp. 81 Fed. 485; Spitzer v. Blanchard, 82 Mich. 234; 46 N. W. 400.

[92] Allen v. Louisiana, 103 U. S. 80; Lippincott v. Pana, 92 Ill. 24; Chicago &c. R. Co. v. Aurora, 99 Ill. 205; Ogden v. Daviess Co. 102 U. S. 634; Sherrard v. Lafayette Co. 3 Dill. (U. S.) 236; Clay v. Hawkins Co. 5 Lea (Tenn.), 137; State v. School Dist. 10 Neb. 544; 7 N. W. 315; People v. Jackson Co. 92 Ill. 441; Wells v. Supervisors, 102 U. S. 625; Phillips v. Albany, 28 Wis. 340. See Plainview v. Winona &c. R. Co. 36 Minn. 505; 32 N. W. 745; Harrington v. Plainview, 27 Minn. 224; 6 N. W. 777; Cromwell v. Sac Co. 96 U. S. 51; State v. Montgomery, 74 Ala. 226; Cagwin v. Hancock, 84 N. Y. 532; Lincoln v. Iron Co. 103 U. S. 412; Williams v. Roberts, 88 Ill. 11; People v. Oldtown, 88 Ill. 202; Ryan v. Lynch, 68 Ill. 160; Treadway v. Schnauber, 1 Dak. 236; 46 N. W. 464.

§ 901. Recitals in bonds to constitute an estoppel must be of facts.—To constitute an estoppel it would seem that the recitals in bonds must be of matters of fact. Thus it has been held that a recital which amounts to no more than a statement, "that a subscription to the capital stock of the company was authorized by the statutes mentioned, and that the sum mentioned in the bond was part of it," will not constitute an estoppel.[93] It is quite difficult to reconcile the statements found in the opinions delivered in the many cases upon this subject. It may, however, be said that, to be sufficient to work an estoppel, the recitals must always be of matters of fact, but what shall be considered matters of fact it is not easy to determine with accuracy or precision. In one of the cases it was held that estoppels can result only from "matters of fact, which the corporate officers have authority to certify," but it was also held that it is "not necessary that the recital should enumerate each particular fact essential to the existence of the obligation." It was said in the case referred to that, "A general statement that the bonds have been issued in conformity with the law will suffice so as to embrace every fact which the officers making the statement are authorized to determine and certify."[94] And in many cases a recital that the bonds are issued in pursuance of the statutory authority or in conformity with law has been held to have the effect indicated and to constitute an estoppel.[95]

§ 902. No estoppel where the officer ordering bonds to issue had no jurisdiction.—It has been held that, where it appears that the officer directing bonds to issue had no jurisdiction of the subject, the

[93] Carroll Co. v. Smith, 111 U. S. 556; 4 Sup. Ct. 539.

[94] Dixon Co. v. Field, 111 U. S. 83; 4 Sup. Ct. 315. The statement copied in the text asserts the rule as generally enforced, but there is some conflict in the cases as to the application of the rule. Van Hostrup v. Madison City, 1 Wall. (U. S.) 291; Hayes v. Holly Springs, 114 U. S. 120; 5 Sup. Ct. 785; Ogden v. Daviess Co. 102 U. S. 634; Commissioners of Knox Co. v. Aspinwall, 21 How. (U. S.) 539; Moultrie Co. v. Rockingham Savings Bank, 92 U. S. 631; Marcy v. Oswego, 92 U. S. 637; Coloma v. Eaves, 92 U. S. 484; School District v. Stone, 106 U. S. 183; 1 Sup. Ct. 84; Clay Co. v. Society &c. 104 U. S. 579; Warren Co. v. Marcy, 97 U. S. 96; Pana v. Bowler, 107 U. S. 529; 2 Sup. Ct. 704; Quincy &c. R. Co. v. Morris, 84 Ill. 410. Ante, § 900, authorities cited in notes.

[95] Evansville v. Dennett, 161 U. S. 434; 16 Sup. Ct. 613; and Stanly Co. v. Coler, 190 U. S. 437; 23 Sup. Ct. 811, are among the latest decisions to such effect.

bonds are void even in the hands of a bona fide holder.[96] It is not easy to reconcile some of the broad statements made in the opinions given in the cases referred to, by the federal courts of original jurisdiction, with some of the statements in other cases, but the conclusion reached is, as we believe, unquestionably correct. We think that dealers in municipal bonds must always ascertain that the power to execute the bonds has been conferred upon the municipal officers who assume to issue them,[97] and that the rule protecting such dealers has been in some instances unjustly extended. It is known to every one that municipal officers exercise limited delegated powers,[98] and hence there is reason for requiring persons who purchase municipal bonds to ascertain that the authority assumed to be exercised has been conferred by a valid statute.

§ 903. Estoppel — Otherwise than by recitals — Illustrative instances.—Estoppel may be created by acts which make it against equity and good conscience to permit the municipality to deny the validity of the bonds. It is impossible to lay down accurate general rules, for cases are usually to be determined upon particular facts. We refer to some of the cases upon the general subject. It has been held that the levy by town officers of taxes to pay interest on railroad aid bonds does not of itself estop taxpayers from contesting their validity,[99] but on this point there is an apparent, if not actual, con-

[96] Rich v. Mentz Tp. 134 U. S. 632; 10 Sup. Ct. 610; Cowdrey v. Caneadea, 16 Fed. 532; Rich v. Mentz, 19 Fed. 725. See, also, People v. Smith, 45 N. Y. 772; Mentz v. Cook, 108 N. Y. 504; 15 N. E. 541; People v. Smith, 55 N. Y. 135; Wellsborough v. New York &c. R. Co. 76 N. Y. 182; Metzger v. Attica &c. R. Co. 79 N. Y. 171; Hills v. Peekskill &c. Bank, 101 N. Y. 490; 5 N. E. 327. In the first case cited, the court declared that it was bound to follow the decisions of the state court, and referred to the cases of Meriwether v. Muhlenburg Co. 120 U. S. 354, 357; 7 Sup. Ct. 563; Claiborne Co. v. Brooks, 111 U. S. 400, 410; 4 Sup. Ct. 489.

[97] In Cowdrey v. Caneadea, 16 Fed. 532, the court said: "Purchasers of municipal bonds, executed by agents, must ascertain at their peril that the delegated authority assumed has been conferred."

[98] Union School v. First National Bank, 102 Ind. 464, 470; Lowell &c. Bank v. Winchester, 8 Allen (Mass.), 109; Dickinson v. Conway, 12 Allen (Mass.), 487; Benoit v. Conway, 10 Allen (Mass.), 528; Railroad Nat. Bank v. Lowell, 109 Mass. 214.

[99] Cherry Creek v. Becker, 2 N. Y. S. 514; 50 Hun (N. Y.), 601; Citi-

flict of authority.[100] Payment of interest on bonds is not of itself necessarily sufficient to create an estoppel, but the fact that the county has paid interest on such bonds is a circumstance to be considered in deciding whether the acts of the municipality work an estoppel against it.[101] Where interest has been paid for a long period of time it has been held that it will estop the municipality to take advantage of irregularities or defects.[102] Voting as a stockholder has been regarded as sufficient to create an estoppel,[103] but there is authority to the contrary.[104] It has been held that substituting bonds for those originally issued will estop the municipality from setting up as a defense that the original proceedings were defective or irregular.[105] It is to be noted, however, that where there was an entire absence of power to issue the original bonds, and no curative statute or statute authorizing substitution, there can be no effective exchange or substitution of bonds.[106] Where there is an exchange of bonds for stock, or of stock

zens' Sav. &c. Assn. v. Topeka, 20 Wall. (U. S.) 655; Lippincott v. Pana, 92 Ill. 24.

[100] Eminence v. Grasser, 81 Ky. 52; Cass Co. v. Gillett, 100 U. S. 585; Moultrie Co. v. Rockingham &c. Bank, 92 U. S. 631.

[101] Livingston Co. v. First Nat. Bank, 128 U. S. 102; 9 Sup. Ct. 18; Moulton v. Evansville, 25 Fed. 382.

[102] A county which issued bonds containing a recital that they were issued under the act, delivered them to the railroad company and paid interest on them for fifteen years, can not set up an irregularity in the election, as against an innocent purchaser of the bonds. Nelson v. Haywood Co. 3 Pickle (Tenn.), 781; 11 S. W. 885; State v. Anderson Co. 8 Baxter (Tenn.), 249; Portsmouth Savings Bank v. Springfield, 4 Fed. 276; Clay Co. v. Society &c. 104 U. S. 579. See, also, Colburn v. McDonald (Neb.), 100 N. W. 961; Keith Co v. Citizens' &c. Co. 116 Fed. 13.

[103] Cass Co. v. Gillett, 100 U. S. 585.

[104] Supervisors v. Paxton, 57 Miss. 701.

[105] Jasper Co. v. Ballou, 103 U. S. 745; see Washington &c. R. Co. v. Cazenove, 83 Va. 744; 3 S. E. 433; Randolph Co. v. Post, 93 U. S. 502; Leavenworth &c. R. Co. v. Commissioners, 18 Kan. 169. See Warren Co. v. Marcy, 97 U. S. 96; Solon v. Williamsburgh &c. Bank, 114 N. Y. 122; 21 N. E. 168; Hills v. Peekskill &c. Bank, 101 N. Y. 490; 5 N. E. 327; Deyo v. Otoe Co. 37 Fed. 246; Plattsmouth v. Fitzgerald, 10 Neb. 401; 6 N. W. 470; Douglass Co. v. Bolles, 94 U. S. 104; Marcy v. Oswego, 92 U. S. 637; Gause v. Clarksville, 1 McCrary (U. S.), 78.

[106] Horton v. Thompson, 71 N. Y. 513; McKee v. Vernon Co. 3 Dill. (U. S.) 210. The decision in the first of the cases cited is, as elsewhere shown, of doubtful soundness upon some of the questions involved, but as to the immediate

for bonds, and long acquiescence, an estoppel arises.[107] Where there has been no change of position, and no acquiescence, the general rule is that there can be no estoppel.[108] The general rule is that taxpayers who stand by, and, without objection, see expenditures of money made upon the faith that the subscription or bonds are valid and enforceable, are estopped from denying their validity, and we can see no reason why this general doctrine should not apply to the municipality.[109] The tendency of the decisions is to extend the principle of estoppel for the protection of bona fide holders of municipal aid bonds. Circumstances which, in ordinary cases, would hardly be regarded as sufficient to constitute an estoppel, are often held to create an estoppel in favor of bondholders.[110]

§ 904. Estoppel by retention of stock.—The doctrine of some of the cases is that, if the stock received for the bonds is retained by the municipality, it is estopped to deny the validity of the bonds. We incline to think this doctrine of doubtful soundness. If there was no power to issue the bonds, then it seems clear that there could be no

point to which it is here cited it is not justly subject to criticism.

[107] Pendleton Co. v. Amy, 13 Wall. (U. S.) 297.

[108] Portland &c. R. Co. v. Hartford, 58 Me. 23; Union &c. R. Co. v. Lincoln Co. 3 Dill. (U. S.) 300; Union &c. R. Co. v. Merrick Co. 3 Dill. (U. S.) 359.

[109] Ante, § 871; Planet &c. Co. v. St. Louis &c. R. Co. 115 Mo. 613; 22 S. W. 616; Simpson Co. v. Louisville &c. R. Co. (Ky.) 19 S. W. 665; Jones v. Cullen, 142 Ind. 335; 40 N. E. 124; Vickery v. Blair, 134 Ind. 554; 32 N. E. 880. See, generally, New Orleans &c. R. Co. v. New Orleans, 44 La. Ann. 748; 11 So. 77, and 44 La. Ann. 728; 11 So. 78; Seattle v. Columbia &c. R. Co. 6 Wash. 379; 33 Pac. 1048; 56 Am. & Eng. R. Cas. 618; Spokane &c. R. Co. v. Spokane Falls, 6 Wash. 521; 33 Pac. 1072; Fort Worth &c. Co. v. Smith Bridge Co. 151 U. S. 294; 14 Sup. Ct. 339; 44 Am. & Eng. R. Corp. Cas. 604.

[110] Supervisors v. Schenck, 5 Wall. (U. S.) 772. But see Supervisors v. Cook, 38 Ill. 44; 87 Am. Dec. 282; Redd v. Henry Co. 31 Gratt. (Va.) 695. See, also, Ray Co. v. Van Sycle, 96 U. S. 675; Luling v. Racine, 1 Biss. (U. S.) 314; Beloit v. Morgan, 7 Wall. (U. S.) 619; Butler v. Durham, 27 Ill. 473; McPherson v. Foster, 43 Iowa, 48; 22 Am. R. 215; New Haven &c. R. Co. v. Chatham, 42 Conn. 465; Goshen v. Shoemaker, 12 Ohio St. 624; 80 Am. Dec. 386; Lane v. Schomp, 20 N. J. Eq. 82; Alvord v. Syracuse &c. Bank, 98 N. Y. 599; Belo v. Commissioners, 76 N. C. 489; Whiting v. Potter, 18 Blatchf. (U. S.) 165. See for numerous cases in which it was held that there was an estoppel. Independent School Dist. v. Rew, 111 Fed. 1, 5; 55 L. R. A. 364.

estoppel, although the municipality might be liable for the value of the stock. We cannot assent to the broad doctrine that, so long as the municipality retains the stock which it received in exchange for bonds, it will be estopped from defending against them on the ground that they are invalid.[111] It seems to us that the doctrine of estoppel cannot apply where there is an entire absence of power, but that it does apply where there is power, although it is improperly or irregularly exercised. There may be circumstances in addition to the retention of the stock which will create an estoppel, but we think that the mere retention of the stock will not, of itself, create an estoppel. It has been held that the corporation will be estopped to deny the validity of the bonds issued in exchange for stock, where it has held the stock for years and exercised the rights of a stockholder by virtue of holding such stock.[112]

§ 905. Recitals in bonds — Effect of against bondholders.—The principle upon which rests the doctrine that recitals in bonds estop the municipality does not apply, in full vigor at least, as against the bondholder. Thus, a recital in a bond that it was issued under a particular statute may estop the municipality, but it does not, according to the adjudged cases, estop the holder of the bond.[113] Where there are two statutes the bondholder may show under which of the two the bonds were issued.[114] It has been held that where there is a valid statute, and the bonds recite that they are issued "in pursuance of an act of the legislature," it will be presumed that the bonds were issued under a valid act and not under an invalid act.[115] It is somewhat difficult to reconcile the doctrine of the cases referred to in the notes with the elementary principle that an estoppel must be reciprocal, but there may possibly be some reason for denying the application of this

[111] Pendleton Co. v. Amy, 13 Wall. (U. S.) 297; Whiting v. Potter, 2 Fed. 517; Munson v. Lyons, 12 Blatchf. (U. S.) 539.

[112] Munson v. Lyons, 12 Blatchf. (U. S.) 539; Whiting v. Potter, 2 Fed. 517; Pendleton Co. v. Amy, 13 Wall. (U. S.) 297.

[113] Knox Co. v. Ninth National Bank, 147 U. S. 91; 13 Sup. Ct. 267; Commissioners v. January, 94 U. S. 202.

[114] Ninth National Bank v. Knox Co. 37 Fed. 75, 79, citing Commissioners v. January, 94 U. S. 202; Anderson Co. v. Beal, 113 U. S. 227; 5 Sup. Ct. 433, and distinguishing Crow v. Oxford, 119 U. S. 215; 7 Sup. Ct. 180; Gilson v. Dayton, 123 U. S. 59; 8 Sup. Ct. 66.

[115] Moulton v. Evansville, 25 Fed. 382, 387. See, also, Municipal Trust Co. v. Johnson City, 116 Fed. 458.

general principle. The bondholder relies upon the recitals, and may derive benefit from them, and it is not easy to perceive how he can assert an estoppel against the municipality and yet affirm that the recitals do not operate against him. If there is a clear, express and unmistakable identification of a particular statute, we cannot conceive on what ground, except, perhaps, that of fraud or mistake, the purchaser of the bonds can be heard to aver that they were issued by authority of some other statute than that designated. Where there is no specific designation of a statute and a general or indefinite reference to legislative acts, there is reason for permitting the bondholder to show under which of two statutes the bonds were issued.

§ 906. Refunding—Substitution.—Where the statute specifically prescribes how the power to issue bonds shall be exercised, and upon what conditions, it must be substantially complied with, and if there be no element of estoppel, bonds issued in a mode not authorized by the statute are voidable. But where a choice of means and methods is left to the municipality it may adopt such means or methods, within the range of the power conferred, as it may deem best. It has been held that a municipal corporation which has issued legal bonds in aid of a railroad may lawfully take them up and issue others in their stead without any additional grant of authority, where the exchange can be made on terms favorable to the municipality.[116] We can see no reason why there may not be a refunding where the statute does

[116] Rogan v. Watertown, 30 Wis. 259; Commonwealth v. Commissioners, 37 Pa. St. 237; Merchants &c. Bank v. Pulaski Co. 1 McCrary (U. S.), 316; Gause v. Clarksville, 5 Dill. (U. S.) 165. When bonds, issued in aid of a railroad, are afterwards replaced by new bonds issued in place of those that had matured, under an act authorizing the issue of the new bonds and declaring them to be a continuation of the former liability, it is not necessary that the question of issuing the new bonds should be submitted to the voters of the county in pursuance of this section having reference to the contracting of debts, and not to antecedent obligations, or the use of the means necessary for their discharge. Blanton v. Board of Commissioners, 101 N. Car. 532; 8 S. E. 162; Jasper Co. v. Ballou, 103 U. S. 745; Little Rock v. National Bank, 98 U. S. 308; Portland &c. v. Evansville, 25 Fed. 389; Sullivan v. Walton, 20 Fla. 552; People v. Lippincott, 81 Ill. 193; Galena v. Corwith, 48 Ill. 423; 95 Am. Dec. 557. See, also, Board v. Travelers' Ins. Co. 128 Fed. 817; Pierre v. Dunscomb, 106 Fed. 617; Hughes Co. v. Livingston, 104 Fed. 306.

not expressly or impliedly interdict it, but, of course, if the statute, either expressly or by implication, forbids a refunding, then there can be no valid refunding. It has also been held that bonds of the new series may be enforced even though the manner of issuing them as prescribed by law was not followed,[117] but we suppose this doctrine cannot obtain where there has been a substantial departure from the statute unless there is an effective estoppel. We regard statutes granting power to give aid to railroad companies as within the rule that grants of corporate power are to be strictly construed, and for that reason we think the doctrine of the case referred to should be limited rather than extended. The power is one of an extraordinary nature, and is liable to great abuse, so that courts are bound to require a substantial compliance with the provisions of the enabling act. Courts move on dangerous ground when they assume to dispense with obedience to such statutes or to adjudge their provisions to be merely directory.

§ 907. Discretionary powers and peremptory duty.—There is, it is obvious, a clear distinction between the exercise of a discretionary power and the performance of a peremptory duty. Courts cannot control the action of officers invested with discretionary powers, but they may compel the performance of a specific duty. The general rule is that, if a discretionary power is conferred upon the officers of a municipality as to whether they will issue bonds in pursuance of the authority contained in a popular vote, they will not be compelled to do so.[118] Where the power of determining the course to be pursued is vested in the municipal authorities, they are the judges of what will best promote the interests of the municipality. It has been held that where bonds are issued they may be exchanged directly for stock of the railroad company without any special power in the act authorizing their issue,[119] but this doctrine can not prevail where the statute

[117] See McKee v. Vernon Co. 3 Dill. (U. S.) 210, where the bonds substituted were engraved instead of being signed as required by law, but the county retained the consideration for which the original bonds were given, and paid interest for two years on the engraved bonds.

[118] People v. Cass Co. 77 Ill. 438.

[119] Evansville &c. R. Co. v. Evansville, 15 Ind. 395; Slack v. Maysville &c. R. Co. 13 B. Mon. (Ky.) 1; Commonwealth v. Pittsburgh, 41 Pa. St. 278; Meyer v. Muscatine, 1 Wall. (U. S.) 384. Even where there is a doubt as to the right to make the exchange under the strict terms of the statute, the

expressly or impliedly forbids such exchange. Where the duty to execute bonds is peremptory, and all the preliminary conditions have been fulfilled, a writ of mandamus will be awarded to compel the municipal officers to act.[120]

§ 908. **Registration.**—The decisions of the courts place great stress upon provisions in enabling acts requiring bonds to be registered, and hold that such provisions must be strictly obeyed. It seems difficult to harmonize the statements found in the decisions referred to with those made in the many cases broadly asserting and enforcing the doctrine of estoppel by recitals.[121] It is held, where all bonds issued to aid a railroad company were required by law to be registered with the state auditor before being negotiated, and bonds which were not so registered were declared by statute to be void, that bonds issued after the act went into force were void, although they were dated as of a time prior to the passage of the act.[122]

municipality cannot deny the validity of the bonds merely upon that account after having received full consideration, and after making use of the stock to carry its purposes into effect. Bridgeport v. Housatonic R. Co. 15 Conn. 475. Where a town subscribes for shares in the capital stock of a railroad, and issues bonds for the payment thereof, it is not necessary that the bonds be sold in the market for cash, in order that the money be paid to the railroad company, when the latter is willing to take the bonds at their full value. Commonwealth v. Williamstown, 156 Mass. 70; 30 N. E. 472.

[120] People v. Cline, 63 Ill. 394; People v. Cass Co. 77 Ill. 438.

[121] This is especially true of the case of German Savings Bank v. Franklin Co. 128 U. S. 526; 9 Sup. Ct. 159.

[122] Anthony v. Jasper Co. 101 U. S. 693, affirming Anthony v. Jasper Co. 4 Dillon (U. S.), 136; Hoff v. Jasper County, 110 U. S. 53; 3 Sup. Ct. 476; German Savings Bank v. Franklin Co. 128 U. S. 526; 9 Sup. Ct. 159; Bissell v. Spring Valley, 124 U. S. 225; 8 Sup. Ct. 495; Crow v. Oxford, 119 U. S. 215; 7 Sup. Ct. 180; Dixon Co. v. Field, 111 U. S. 83; 4 Sup. Ct. 315; Eagle v. Kohn, 84 Ill. 292; Richeson v. People, 115 Ill. 450; 5 N. E. 121; Parker v. Smith, 3 Bradw. (Ill.) 356. In the case of Concord v. Portsmouth Savings Bank, 92 U. S. 625, the opinon is expressed that a recital in the bonds that a subscription had been made before a constitutional provision forbidding such subscriptions took effect, and that the bonds were issued in pursuance of such subscription and in conformity with the provisions of the act under which that subscription purported to have been made, being a recital of matters of fact peculiarly within the knowledge of the municipal officers, would operate as an estoppel against the municipality

§ 909. Rights of bona fide holders not affected by sale of bonds at a less sum than that prescribed by statute.—A bona fide holder of aid bonds who acquires them in the usual course of business is entitled to enforce them against the municipality, although they were originally sold at a sum less than that prescribed by the enabling act. In one of the cases the statute provided that the railroad company should not sell the bonds "at less than their par value," but the court held that the fact that the company did sell the bonds for less than their par value did not constitute a defense on the part of the municipality.[123] In another case which arose under a statute similar to that acted upon in the case referred to, the court held that the bonds were enforceable in the hands of a bona fide holder, although the railroad company had sold them for sixty-four cents on the dollar.[124]

§ 910. Subrogation of holder of invalid bonds.—As we have seen, the power to grant aid does not necessarily carry with it the power to issue negotiable bonds, so that there may be power to subscribe to the stock of a railroad company and pay the subscription in money, but no power to issue negotiable bonds in payment of the subscription. The power to issue bonds depends entirely upon the statute, and if there be no power the bonds are void. But where bonds are acquired in good faith, and in the belief that they were valid, the holder may be entitled to be subrogated to the rights of the municipality to the extent of the interest represented by his bonds. The general principles of subrogation authorized this conclusion, for the person who purchases the bonds is not a mere volunteer. In accordance with this general doctrine, it has been justly held that, where there was power to subscribe to the stock of a railroad company, but no power to issue bonds, the purchaser of such bonds was entitled to stock.[125] But it

which would prevent it from denying its liability upon the bonds. A recovery of the sum actually paid for the bonds was allowed in a case where the public corporation had power to borrow money, and the avails of the bonds were used by the corporation for legitimate corporate purposes. Wood v. Louisiana, 5 Dill. (U. S.) 122; Louisiana v. Wood, 102 U. S. 294, citing Moses v. McFerlan, 2 Burr. 1005; Marsh v. Fulton Co. 10 Wall. (U. S.) 676.

[123] Woods v. Laurence Co. 1 Black (U. S.), 386, 410.

[124] Richardson v. Lawrence Co. 154 U. S. 536; 14 Sup. Ct. 1157.

[125] Illinois &c. R. Co. v. Wade, 140 U. S. 65, 70; 11 Sup. Ct. 709. To the point that the bonds were void the court cited Wade v. Walnut, 105 U. S. 1.

has also been held that a purchaser of bonds in the open market is a mere volunteer, and is not entitled to be subrogated to the equity of contractors to whom the bonds were issued for work done by them.[126]

§ 911. Liability of municipality to purchaser of invalid bonds.—It is held that, where a municipality having power to issue bonds disposes of bonds which, by reason of a defective execution of the power it possesses, are invalid, the holder of the bonds may recover back the sum actually paid for them in an action for money had and received.[127] But where the issue of the bonds is positively forbidden by law, as where the municipality is forbidden by the state constitution to incur the debt for which they are issued, the purchaser is without remedy, since the corporation cannot indirectly become liable on an indebtedness which it is forbidden to assume directly.[128]

§ 912. Right of municipality to recover money paid because of wrongful acts of the railroad company.—It seems just to hold that where the wrongful acts of the railroad company compel the municipality to pay illegal bonds it may have an action for the recovery of the money it has been compelled to pay. In a case where the railroad company procured negotiable bonds to be illegally issued by the officers of a town, which were in form the obligations of the town, and recited that they were legally issued, and such bonds were negotiated and transferred by it for the full face value thereof, and were subsequently negotiated and sold to the citizens of another state, who, in

[126] O'Brien v. Wheelock, 78 Fed. 673.

[127] Wood v. Louisiana, 5 Dillon (U. S.), 122; Louisiana v. Wood, 102 U. S. 294; Paul v. Kenosha, 22 Wis. 266; 94 Am. Dec. 598; Gause v. Clarksville, 5 Dillon (U. S.), 165. A municipality which issued bonds in payment of a stock subscription cannot, in an action on such bonds, when they have been held void as ultra vires, be held to liability on the subscription. Norton v. Dyersburg, 127 U. S. 160; 8 Sup. Ct. 1111.

[128] Litchfield v. Ballou, 114 U. S. 190; 5 Sup. Ct. 820. In this case bonds were sold in excess of the constitutional limit of city indebtedness and the proceeds were used in part payment for a system of water-works which the city erected on land previously acquired. The bonds having been declared void, a suit was brought to have the purchase-price declared a lien in equity against the water-works, but the court held that the city could not render itself or its property liable in any way for the debt which the bonds evidenced. See Agawam Nat. Bank v. South Hadley, 128 Mass. 503; Railroad Nat. Bank v. Lowell, 109 Mass. 214.

an action in the circuit court of the United States, brought against the town to recover overdue interest, and tried upon the merits, recovered final judgment therefor, which fixed the liability of the town for the whole amount of such bonds to the holders thereof, it was held that, by reason of such wrongful acts of the company, a cause of action arose in favor of the town, and against the company, for the recovery of the amount of such bonds, with interest.[129] We think that, while there may possibly be cases where money can be recovered from a wrong-doing company, they are very rare. We do not believe that there can be a recovery where the company acts in good faith and the loss is solely attributable to a mistake of law. In a case where an officer of the company, after the corporate existence of an alleged railroad corporation had ceased by failure to comply with the law regulating such corporations, knowing its condition, and having in its hands bonds given by plaintiff village to such corporation, and knowing that such bonds were void, and could not be enforced by such corporation, fraudulently sold them to innocent parties, representing them to be bona fide securities, and valid bonds of plaintiff village, it was held that such officer, by his fraud, became liable to the village for the value of the bonds negotiated by him, and the fact that he had accounted to his company for the proceeds did not release him.[130] We regard the doctrine of the case referred to as sound, for there was clearly actionable fraud causing damages.

§ 913. Defenses to aid bonds.—It may be said, generally, that the entire absence of power to issue bonds is always a sufficient defense to an action on the bonds, but that, as a rule, the irregular or improper exercise of a power duly conferred does not furnish sufficient grounds for a defense against bonds in the hands of a bona fide holder.[131] Pay-

[129] Plainview v. Winona &c. R. Co. 36 Minn. 505; 32 N. W. 745. As the bonds in this case were issued under a statute which was declared unconstitutional, and the town had received the benefits from the construction of the road, it is doubtful if this case can be sustained on principle. It seems to us that the case cited carries the doctrine too far, for, as we conceive, there was no actionable wrong, nor anything more than a mere mistake of law.

[130] Farnham v. Benedict, 107 N. Y. 159; 13 N. E. 784.

[131] See, generally, as to defenses. D'Esterre v. Brooklyn, 90 Fed. 586 (failure of consideration not); Anderson Co. v. Beal, 113 U. S. 227; 5 Sup. Ct. 433, and Cairo v. Zane, 149 U. S. 122; 13 Sup. Ct. 803 (certain misconduct not); Huron v.

ment of the bonds cannot be successfully resisted upon grounds which are insufficient to release the corporation from its subscription, such as the wrongful acts of the corporation or its officers,[132] or any acts done by it in pursuance of a power to lease, consolidate, increase the capital stock, or the like, which existed at the time the bonds were issued.[133] The failure of the officer issuing the bonds to annex to his signature words indicating his official position does not invalidate the bonds, but the fact that he is an officer of the municipality may be proven by extrinsic evidence.[134] And the fact that the officers by whom the bonds were executed were not legally elected will not avail as a

Second Ward Sav. Bank, 86 Fed. 272; 49 L. R. A. 534; Loesnitz v. Seelinger, 127 Ind. 422; 25 N. E. 1037; 26 N. E. 887; Cromwell v. Sac Co. 96 U. S. 51; and Clapp v. Cedar Co. 5 Ia. 15; 68 Am. Dec. 678 (fraud or misapplication of proceeds not). Want of power is, ordinarily at least, the only defense against a bona fide holder relying upon the authorized recitals. St. Joseph Twp. v. Rogers, 16 Wall. (U. S.) 644; Brenham v. German Am. Bank, 144 U. S. 173; 12 Sup. Ct. 559; Bissell v. Kankakee, 64 Ill. 249; 16 Am. R. 554.

[132] Ottawa &c. R. Co. v. Black, 79 Ill. 262; Illinois Midland R. Co. v. Barnett, 85 Ill. 313.

[133] Menasha v. Hazard, 102 U. S. 81; Wilson v. Salamanca, 99 U. S. 499; Henry Co. v. Nicolay, 95 U. S. 619; East Lincoln v. Davenport, 94 U. S. 801; Nugent v. Supervisors, 19 Wall. (U. S.) 241; 3 Biss. (U. S.) 105; Mt. Vernon v. Hovey, 52 Ind. 563; Edwards v. People, 88 Ill. 340; Illinois Midland R. Co. v. Barnett, 85 Ill. 313; State v. Greene Co. 54 Mo. 540. The fact that a railroad company to whom bonds were authorized to be issued was consolidated by statute with another, after notice of an election began to run, does not render the bonds void because issued to the consolidated company, where the consolidation act took effect before the election. Nelson v. Haywood Co. 3 Pickle (Tenn.), 781. An agreement by a railroad company, executed after a county had subscribed to its stock, to sell and transfer its road after completion, in order to obtain money for its construction, does not release the county from the payment of its subscription which was payable when the road was completed "and in operation by lease or otherwise." Southern Kansas R. Co. v. Turner, 41 Kan. 72; 21 Pac. 221. Under the Missouri act to authorize the consolidation of railroad companies in that state with companies in adjoining states, the consolidated company is entitled to the same privileges under the laws of Missouri that the Missouri corporation was entitled to at the time of the consolidation, including the privilege of collecting a subscription to stock by a township. Livingston Co. v. First Nat. Bank, 128 U. S. 102; 9 Sup. Ct. 18.

[134] County Commissioners v. King, 13 Fla. 451. See, also, Board of Com'rs of Onslow Co. v. Tollman, 145 Fed. 753.

defense against a suit to enforce payment, if they were serving as de facto officers with the acquiescence of the municipality. The invalidity of aid bonds, on the ground that the town had no constitutional or statutory authority to issue the same, can be urged as a defense by the town, though it has paid installments on the bonds.[135]

§ 914. Bondholders not bound by proceedings to which they are not parties.—The familiar elementary rule is that no person is bound by a judgment or decree rendered in an action or suit to which he is not a party or privy. It is necessary, therefore, in order to secure a judgment or decree binding a bondholder, that he should be brought into court. The rule is that the court will not pass upon any questions touching the bonds unless the bondholders are before the court. And it has refused to adjudge bonds fraudulent as between the railroad and the municipality, and to decree that the railroad should pay them, in the absence of those to whom the bonds had been assigned.[136]

§ 915. Following state decisions.—Questions as to the validity of municipal aid bonds very often depend upon the construction given state statutes by the courts of the state by which the statute is enacted. The federal courts, as a rule, follow state decisions, construing state constitutions or statutes, but do not, unless they regard them as sound, follow them upon general questions of law. The Supreme Court of the United States holds itself bound by the settled construction given to a state statute, in so far as it affects the validity of bonds issued after the statute has been so construed,[137] but it holds that it is not concluded by any decisions of the state courts made after the bonds have been negotiated, at least where such decisions are based

[135] Glenn v. Wray, 126 N. C. 730; 36 S. E. 167; Buncombe v. Payne, 120 N. C. 432; 31 S. E. 711; Doon Tp. v. Cummins, 142 U. S. 366; 12 Sup. Ct. 220; Marsh v. Fulton Co. 10 Wall. (U. S.) 676; Daviess Co. v. Dickinson, 117 U. S. 657; 6 Sup. Ct. 897; Norton v. Shelby Co. 118 U. S. 425; 6 Sup. Ct. 1121.

[136] Ralls Co. v. Douglass, 105 U. S. 728. See also Anthony v. State, 49 Kans. 246; 30 Pac. 488; Hoppock v. Chambers, 96 Mich. 509; 56 N. W. 86; California v. Southern Pac. Co. 157 U. S. 229; 15 Sup. Ct. 591; Minnesota v. Northern Sec. Co. 184 U. S. 199; 22 Sup. Ct. 308; Grand Trunk Ry. Co. v. Chicago &c. R. Co. 141 Fed. 785; Mitau v. Roddan (Cal.), 84 Pac. 145.

[137] Wilkes Co. v. Coler, 180 U. S. 506; 21 Sup. Ct. 458; Board v. Traveler's Ins. Co. 128 Fed. 817; Folsom v. Ninety-six, 159 U. S. 611, 624; 16 Sup. Ct. 174; Board v. Texas &c. R. Co. 46 Tex. 316.

upon general principles of law. And it will decide the case according to its own rules of construction, where the points raised have never been adjudicated in the state courts.[138]

§ 916. Jurisdiction of federal courts.—It is not our purpose to enter into any extended discussion of the question of the jurisdiction of the federal courts, nor, indeed, to do more than make a very few brief suggestions.[139] It is barely necessary to say that the jurisdiction in suits and actions upon municipal bonds depends upon the same principles as those which prevail in ordinary cases. There is nothing in the nature of a municipal bond that of itself gives federal jurisdiction. Bonds of this character are so generally in the hands of persons living in other states than those authorizing the issue, that, for this reason, and also for the reason that the current of judicial decision of the United States courts is favorable to the bondholders, nearly all the litigation of this character is carried on in those courts. There must, however, in all such cases where relief is sought upon municipal bonds, be diverse citizenship, or the federal courts will not have jurisdiction.[140] The fact that so much of the litigation is in

[138] German Savings Bank v. Franklin Co. 128 U. S. 526, 538; 9 Sup. Ct. 159; Anderson v. Santa Anna, 116 U. S. 356; 6 Sup. Ct. 413; Green Co. v. Conness, 109 U. S. 104; 3 Sup. Ct. 69; Burgess v. Seligman, 107 U. S. 20; 2 Sup. Ct. 10; Columbia Ave. &c. Co. v. Dawson, 130 Fed. 152; Shelby Co. v. Union &c. Bank, 161 U. S. 149; 16 Sup. Ct. 558; Mobile &c. R. Co. v. Tennessee, 153 U. S. 486; 14 Sup. Ct. 968; Stanly Co. v. Coler, 190 U. S. 437; 23 Sup. Ct. 811; Douglass v. Pike Co. 101 U. S. 677, where the court says: "After a statute has been settled by judicial construction the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself."

[139] Olcott v. Supervisors, 16 Wall. (U. S.) 678; Pine Grove v. Talcott, 19 Wall. (U. S.) 666; Claiborne Co. v. Brooks, 111 U. S. 400; 4 Sup. Ct. 489. But possibly the holding would be different if the decision of the state court was based upon the peculiar construction of a local statute and not upon general principles. Elmwood v. Marcy, 92 U. S. 289. See Venice v. Murdock, 92 U. S. 494. In Gelpcke v. Dubuque, 1 Wall. (U. S.) 175, and City v. Lamson, 9 Wall. (U. S.) 477, the decisions of the court are placed upon the ground that the supreme courts of Iowa and Wisconsin respectively, had been so vacillating that there was authority for either view of the question that the United States court chose to take.

[140] Federal courts have jurisdiction over a suit brought by an assignee of a municipal bond which is in form a simple acknowledg-

the federal courts makes it desirable that the rules established by the Supreme Court of the United States should be accepted as the law by the state courts. The decisions of that court, except as to federal questions, are, it is true, not binding on the state tribunals, but if they were followed much confusion would be avoided.

§ 917. Compelling issue of bonds.—The well-known general rule that, where municipal officers are under an imperative duty to perform an act, mandamus will lie to coerce performance, but will not lie where the duty is purely discretionary, applies to cases where railroad companies or purchasers are entitled to municipal bonds. If there is a mandatory duty resting on the municipal officers to execute and deliver bonds the party entitled to the bonds may compel their delivery by a writ of mandamus.[141] The party who asks the writ must show that there is a duty to issue the bonds, otherwise the writ will be denied. Thus, where the notice of the election was insufficient, the writ was refused, although the aid had been voted.[142] But we suppose that the doctrine of the case just referred to cannot apply

ment of indebtedness and an unconditional promise to pay a certain sum at a certain time. Porter v. Janesville, 3 Fed. 617. But no recovery can be had upon municipal bonds transferred by citizens of the state where the municipality is situated, to a citizen of another state, for the sole purpose of giving jurisdiction to the courts of the United States. New Providence v. Halsey, 117 U. S. 336; 6 Sup. Ct. 764. And the same rule applies to assignments of coupons. Farmington v. Pillsbury, 114 U. S. 138; 5 Sup. Ct. 807.

[141] Smith v. Bourbon Co. 127 U. S. 105; 8 Sup. Ct. 1043; Massachusetts &c. Co. v. Cherokee, 42 Fed. 750; State v. Jennings, 48 Wis. 549; 4 N. W. 641; People v. Ohio Grove Township, 51 Ill. 191; Santa Cruz &c. R. Co. v. Board &c. Santa Cruz Co. 62 Cal. 239; People v. Walter, 2 Hun (N. Y.), 385; Humphreys County v. McAdoo, 7 Heisk. (Tenn.) 585; Chicago &c. R. Co. v. Mallory, 101 Ill. 583; People v. Oldtown, 88 Ill. 202; State v. Lake City, 25 Minn. 404. In Massachusetts &c. Co. v. Township of Cherokee, supra, it was held that specific performance of the duty to deliver would be decreed, but it seems to us that mandamus is the appropriate remedy where there is a peremptory official duty. Analogous cases support this conclusion Selma &c. R. Co. Ex parte, 45 Ala. 696; 6 Am. R. 722; Pfister v. State, 82 Ind. 382; Commissioners v. Hunt, 33 Ohio St. 169; Carpenter v. County Commissioners, 21 Pick. (Mass.) 258; Cincinnati &c. R. Co. v. Clinton Co. 1 Ohio St. 77; Osage Valley &c. R. Co. v. County Ct. 53 Mo. 156.

[142] McMahon v. Board &c. 46 Cal. 214.

where there are acts constituting an estoppel, since errors and irregularities in conducting the election cannot be made available to defeat the rights of one who has acted in good faith without notice, and who would suffer loss if the municipality were permitted to take advantage of errors and irregularities.

§ 918. Remedies of bondholders.—Where the bonds are issued by municipal corporations and are the general obligations of the corporations issuing them, the holder may maintain an ordinary action at law and secure judgment. He cannot, according to some of the decisions, resort to mandamus in the first instance in cases where the bonds are general corporate obligations, since he has an adequate remedy at law.[143] Where a judgment is obtained on the bonds, and the municipal officers refuse to levy a tax to pay the judgment, mandamus will lie to compel the municipal officers to make the proper levy.[144] The right of the bondholders to have a tax levied cannot be defeated by the resignation of the municipal officers.[145] It was held by a federal circuit court that, where bonds are void, but a judgment by default has been rendered upon the coupons, the municipality will

[143] Sharp v. Mayor &c. 40 Barb. (N. Y.) 256; People v. Hawkins, 46 N. Y. 9; Lynch, Ex parte, 2 Hill (N. Y.), 45.

[144] Board &c. v. Aspinwall, 24 How. (U. S.) 376; East St. Louis v. Amy, 120 U. S. 600; 7 Sup. Ct. 739; State v. Police Judge, 111 U. S. 716; 4 Sup. Ct. 648; Kelley v. Milan, 127 U. S. 139; 8 Sup. Ct. 1101; Norton v. Dyersburg, 127 U. S. 160; 8 Sup. Ct. 1111; United States v. Jefferson Co. 5 Dill. (U. S.) 310; Commonwealth v. Pittsburgh, 88 Pa. St. 66; State v. Davenport, 12 Iowa, 335; Flagg v. Palmyra, 33 Mo. 440; Morgan v. Commonwealth, 55 Pa. St. 456; State v. Gates, 22 Wis. 210; Commonwealth v. Pittsburg, 34 Pa. St. 496; Robinson v. Butte Co. 43 Cal. 353; Maddox v. Graham, 2 Metcf. (Ky.) 56; State v. New Orleans, 34 La. Ann. 477. A return to the alternative writ that the tax has been levied is sufficient. Bass v. Taft, 137 U. S. 458; 11 Sup. Ct. 154.

[145] Meriwether v. Muhlenburg Co. 120 U. S. 354; 7 Sup. Ct. 563. But it is difficult to reconcile the doctrine of the case cited with the cases which hold that courts can not levy taxes. Upon the general subject of compelling by mandamus county officers to levy a tax to pay municipal bonds or subscriptions, see United States v. Lincoln Co. 5 Dill. (U. S.) 184; United States v. Jefferson Co. 1 McCrary (U. S.), 356; Shelby Co. v. Cumberland &c. R. Co. 8 Bush (Ky.), 209; Commonwealth v. Commissioners, 32 Pa. St. 218; State v. Johnson Co. 12 Iowa, 237; Brodie v. McCabe, 33 Ark. 690; Moore v. New Orleans, 32 La. Ann. 726; McLendon v. Anson Co. 71 N. C. 38.

not be allowed to set up as a defense to a mandamus on the judgment that there is no statute requiring the tax to be levied.[146] But the judgment in the case referred to was reversed.[147] Some of the courts will not issue a writ where the liability on the bonds is doubtful and is controverted until a judgment has been obtained on the bonds,[148] nor will the writ issue, except, perhaps, to put the officers in motion, where the municipal officers have a discretionary power as to the mode of payment or the like.[149] Where there is a judgment rendered by a court possessing jurisdiction adjudging the bonds to be valid, the municipality cannot set up the invalidity of the bonds as a defense to the action for mandamus.[150] The Supreme Court of the United States has modified, if not denied, the doctrine of some of the earlier cases, for it has held that, where the bondholder goes behind the judgment

[146] Loague v. Taxing Dist. 36 Fed. 149.

[147] Brownsville v. Loague, 129 U. S. 493; 9 Sup. Ct. 327. See Hill v. Scotland Co. 32 Fed. 716; Harshman v. Knox Co. 122 U. S. 306; 7 Sup. Ct. 1171; Moore v. Edgefield, 32 Fed. 498; Hill v. Scotland Co. 32 Fed. 714; Ralls Co. v. United States, 105 U. S. 733. See Scotland Co. v. Hill, 132 U. S. 107; 10 Sup. Ct. 26. As to the rule where the municipal officers have a discretionary power as to the mode of paying a judgment, see Grand Co. v. King, 67 Fed. 202. See, generally, upon the subject of mandamus to compel levy of taxes, State v. Yellowstone Co. 12 Mont. 503; 31 Pac. 78; Wells v. Commissioners, 77 Md. 125; 26 Atl. 357; 20 L. R. A. 89; Wayne County &c. Bank v. Supervisors, 97 Mich. 630; 56 N. W. 944; State v. Tappan, 29 Wis. 664; 9 Am. R. 622; Wilkinson v. Cheatham, 43 Ga. 258; Bassett v. Barbin, 11 La. Ann. 672; Meyer v. Porter, 65 Cal. 67; Pegram v. Cleveland Co. 64 N. C. 557; State v. Beloit, 20 Wis. 79; County Comrs. v. King, 13 Fla. 451.

[148] Commonwealth v. Pittsburgh, 34 Pa. St. 496; State v. Mayor &c. 52 Wis. 423; State Board v. West Point, 50 Miss. 638. See, generally, Leach v. Fayetteville, 84 N. C. 829; State v. Clay Co. 46 Mo. 231; Mansfield v. Fuller, 50 Mo. 338; School Dist. v. Bodenhamer, 43 Ark. 140; Coy v. Lyons City, 17 Iowa, 1; 85 Am. Dec. 539, and note; People v. Clark Co. 50 Ill. 213.

[149] Board of Commissioners v. King, 67 Fed. 202. See, generally, as to the right to exercise an option, Queen v. Southeastern R. Co. 4 H. L. Cas. 471; State v. Union, 43 N. J. Law, 518. As to the exercise of discretionary powers, United States v. Seaman, 17 How. (U. S.) 225; Heine v. Levee Commissioners, 19 Wall. (U. S.) 655; United States v. Lamont, 155 U. S. 303; 15 Sup. Ct. 97.

[150] United States v. New Orleans, 98 U. S. 381; Ralls County Ct. v. United States, 105 U. S. 733; Loague v. Brownsville, 36 Fed. 149; State v. Gates, 22 Wis. 210. See Boyd v. Alabama, 94 U. S. 645.

upon some of the points adjudged, he cannot successfully aver that the judgment conclusively establishes the validity of the bonds.[151] The bondholder entitled to money collected to pay bonds and in the hands of a municipal officer can compel its payment to him by mandamus,[152] for in such a case there is a peremptory duty to pay the money over to the party entitled to it. It is held by the Supreme Court of the United States that, where the specific tax is insufficient to pay the bonds, the holder is entitled to payment out of the general funds of the municipality,[153] but it seems to us this cannot be the rule where the statute under which the bonds are issued clearly and unequivocally confines the right to payment from a specific fund.[154] The right of a bona fide holder of bonds to compel the municipal officers to levy the necessary tax is not defeated by the repeal of the statute under which the bonds were issued.[155] Where the bonds have been held invalid in a proceeding for writ of mandamus, the judgment concludes the plaintiff from successfully prosecuting an action on the bonds themselves,[156] but the question of the validity of the bonds must be one which was litigated, or which might have been litigated, in the mandamus proceedings, and there must be jurisdiction of the subject matter and of the person in order to make the judgment conclusive. The courts will not compel municipal officers to do that which they have no power to do under the law.[157] Where the power of a mu-

[151] Brownsville v. Loague, 129 U. S. 493; 9 Sup. Ct. 327, citing Norton v. Board &c. 129 U. S. 479; 9 Sup. Ct. 322, and distinguishing Harshman v. Knox Co. 122 U. S. 306; 7 Sup. Ct. 1171.

[152] State v. Craig, 69 Mo. 565; State v. McCrillus, 4 Kan. 250; 96 Am. Dec. 169.

[153] United States v. Clark, 96 U. S. 37; Olcott v. Supervisors, 16 Wall. (U. S.) 678.

[154] Ante, § 892. Quill v. Indianapolis, 124 Ind. 292, 299; 23 N. E. 788; 7 L. R. A. 681; Spidell v. Johnson, 128 Ind. 235, 238, 239; 25 N. E. 889; United States v. County of Macon, 99 U. S. 582.

[155] Deere v. Rio Grande County, 33 Fed. 823. See, also, Seibert v. Lewis, 122 U. S. 284; 7 Sup. Ct. 1190; Peoria &c. R. Co. v. People, 116 Ill. 401; 6 N. E. 497.

[156] Block v. Commissioners, 99 U. S. 686; Louis v. Brown, 109 U. S. 162; 3 Sup. Ct. 92; Corcoran v. Chesapeake &c. Co. 94 U. S. 741.

[157] Supervisors v. United States, 18 Wall. (U. S.) 71, 77; United States v. Macon Co. 99 U. S. 582; County of Macon v. Huidekoper, 99 U. S. 592, note; Brownsville v. Loague, 129 U. S. 493; 9 Sup. Ct. 327. See United States v. Clark, 96 U. S. 37; Butz v. Muscatine, 8 Wall. (U. S.) 575; State v. Whitesides, 30 S. Car. 579; 9 S. E. 661; 3 L. R. A. 777, and note; Board of Commissioners v. King, 67 Fed. 202, 205.

nicipality is specifically limited to a given percentage on all taxable property, and it is confessed by the demurrer to the answer that the entire sum realized from the tax is required for the proper maintenance of the municipal government, a mandamus will not be awarded.[158] It is held that the court will not itself appoint officers to levy the tax.[159] This doctrine proceeds upon the ground that the duty of levying taxes is not judicial, and cannot be exercised by the courts.[160] The decisions establish the rule as we have stated it, but it seems to us that courts have power to do complete justice and to make their writs effective, and that, where there is a clear, unquestionable right to relief, they have power to grant it, even though they may be compelled to appoint ministerial agents to perform the duties of municipal officers who refuse to perform the duties enjoined on them by law. The power to "do justice, and that not by halves," is, as we believe, ample foundation for the authority to provide for the assessment and collection of taxes where there is a clear right in the creditor and a peremptory duty resting on the municipality and its officers. The principle which empowers a court to appoint receivers and take control of property, is, as we conceive, broad enough to authorize courts to appoint officers or agents to levy and collect a tax.[161] Where there is no statute authorizing a tax, then, of course, the courts are powerless, but where there is a statute and a refusal to perform official duties required by law, courts ought to have power to award complete relief. Giving force to a state statute, it has been held that, where the municipal officers refuse to act, in obedience to a peremptory writ of mandamus, a marshal or commissioner may be appointed to act.[162]

[158] Clay Co. v. McAleer, 115 U. S. 616; 6 Sup. Ct. 199. See McAleer v. Clay Co. 42 Fed. 665; Board of Commissioners v. King, 67 Fed. 202; United States v. Miller Co. 4 Dill. (U. S.) 233.

[159] Heine v. Levee Commissioners, 19 Wall. (U. S.) 655; Rees v. Watertown, 19 Wall. (U. S.) 107; Board of Commissioners v. King, 67 Fed. 202, 205; O'Brien v. Wheelock, 78 Fed. 673; Pierce Co. v. Merrill, 19 Wash. 178; 52 Pac. 854.

[160] Thompson v. Allen Co. 115 U. S. 550; 6 Sup. Ct. 140; Rees v. Watertown, 19 Wall. (U. S.) 107, 124; Meriwether v. Garrett, 102 U. S. 472, 518. But see Meriwether v. Muhlenburg Co. 120 U. S. 354; 7 Sup. Ct. 563.

[161] Garrett v. Memphis, 5 Fed. 860, and cases cited. See Thompson v. Allen Co. 13 Fed. 97, and authorities cited in the dissenting opinion in Thompson v. Allen Co. 115 U. S. 550; 6 Sup. Ct. 140.

[162] Supervisors v. Rogers, 7 Wall. (U. S.) 175; Lansing v. County Treasurer, 1 Dill. (U. S.) 522.

This power should, as we have substantially said, reside in the courts, otherwise cases might arise in which payment might be delayed, or possibly avoided by a municipal corporation, and justice defeated. Officers who refuse to obey a writ of mandate may, it is true, be punished as for contempt, but punishment for contempt may not always be an adequate remedy for the enforcement of payment of the bonds. The duty to levy taxes to pay bonds is ordinarily a continuing one, and if one or more levies will not produce a sum sufficient to pay the bonds, the municipal officers may be compelled to make another levy.[163]

§ 918a. **Miscellaneous.**—It is held by the Supreme Court of the United States in a recent case that county auditors and treasurers, being the instruments employed by the state legislature to assess and collect taxes, may be compelled by mandamus to levy a tax to pay a judgment on township bonds notwithstanding the township has been abolished by an amendment to the state constitution, and its corporate agents removed.[164] Such a proceeding is not a suit against the state within the meaning of the inhibition of the constitution of the United States even though such officers have been forbidden by the state legislature to exercise such power; and the exercise by a state of its right to alter or destroy its municipal corporation is ineffectual

[163] State v. Madison, 15 Wis. 30; Benbow v. Iowa City, 7 Wall. (U. S.) 313; Robinson v. Butte Co. 43 Cal. 353. As to the power of the federal courts, see Welch v. St. Genevieve, 1 Dill. (U. S.) 130; United States v. Muscatine Co. 2 Abbott (U. S.), 53; Riggs v. Johnson Co. 6 Wall. (U. S.) 166. As to the necessity of first reducing the claim on the bonds to judgment, see Greene Co. v. Daniel, 102 U. S. 187; 3 Am. & Eng. R. Cas. 105. See, generally, East St. Louis v. Underwood, 105 Ill. 308. As to presentation of bonds for allowance, see Greene Co. v. Daniels, 102 U. S. 187; 3 Am. & Eng. R. Cas. 105; Commissioners' Court v. Rather, 48 Ala. 433. Matters of pleading, People v. Colorado &c. R. Co. 42 Fed. 638; United States v. Elizabeth, 42 Fed. 45. Actions on bonds, New Providence v. Halsey, 117 U. S. 336; 6 Sup. Ct. 764; Ninth National Bank v. Knox Co. 37 Fed. 75. Evidence on part of plaintiff, Hannibal v. Fountleroy, 105 U. S. 408; Massachusetts &c. Co. v. Cherokee, 42 Fed. 750. See, generally, Houston v. People, 55 Ill. 398; People v. Jackson Co. 92 Ill. 441; Lamoille Valley R. Co. v. Fairfield, 51 Vt. 257; Morgan Co. v. Allen, 103 U. S. 498; Smith v. Railroad, 99 U. S. 398.

[164] Graham v. Folson, 200 U. S. 248; 26 Sup. Ct. 245.

to destroy the obligation of valid municipal contracts.[165] Where bonds in aid of a railroad had been issued under an election held valid by the supreme court of the state and the county had paid interest thereon for a number of years, it was held that they were valid in the hands of one who had purchased them for value and in good faith, without notice of any defect or illegality, and that taxes levied and collected by the county to pay the interest thereon, in compliance with law, were held by the county treasurer as his trustee, and it was the duty of such treasurer to pay over the same on presentation of the coupon.[166] In another recent case bonds were issued under statutory authority to pay a county subscription for stock of a railroad company and the statute directed an annual levy of taxes sufficient to pay the interest on such bonds, and principal when it should become due, provided that the company should make a preliminary survey of its route within a year after the passage of the statute and should commence work in good faith within the next year and perform each year thereafter one-fifth of the necessary work required to complete the road. It was held that the county's liability to levy the tax did not depend upon the performance of the conditions of such proviso, but on the answer to the inquiry as to whether the bonds had been so issued as to bind the county.[167] It was also held in the same case that as the county judge in Kentucky, was the presiding officer of the fiscal court and general business agent of the county, and the legislature had authorized such court to subscribe for such stock, it was competent for such court, after having determined to make the subscription, to delegate to the county judge the ministerial duties involved; that the fact that the bonds were delivered before any work was done, though in violation of the statute, did not necessarily render them void; and that where the county had appeared and contested the regularity and sufficiency of the proceedings for the issuance of such bonds in a state court in a suit to compel their issuance and then in a federal court in a suit to recover on the

[165] Graham v. Folsom, 200 U. S. 248; 26 Sup. Ct. 245. See, also, Mt. Pleasant v. Beckwith, 100 U. S. 514; Mobile v. Watson, 116 U. S. 289; 6 Sup. Ct. 398; Shapleigh v. San Angelo, 167 U. S. 646; 17 Sup. Ct. 957.

[166] Tollman v. Board of Comrs. of Onslow Co. 140 Fed. 89, affirmed in 145 Fed. 753. See, also, McKee v. Lamon, 159 U. S. 317, 322; 16 Sup. Ct. 11; Coler v. Board, 89 Fed. 257, 260.

[167] Estell Co. v. Embry, 144 Fed. 913.

coupons, brought by a privy to the plaintiff, and the whole issue was adjudged to be valid, the county was estopped by such decree from thereafter contesting the validity of the bonds in a proceeding to compel the levy of a tax to pay them.[168] It has also been held that a board of county commissioners authorized by statute to sue and be sued, to make contracts and hold such personal property as may be necessary in the exercise of their powers, and to make such orders for the disposition or use of their property as the interest of the inhabitants may require, has power to compromise a suit by a railroad company to compel the delivery of county railroad aid bonds by surrendering the right to stock of the railroad company of comparatively little value in consideration of the company's surrender of the right to receive a substantial portion of the bonds which the county had bound itself to deliver.[169]

[168] In Board of Comrs. of Onslow Co. v. Tollman, 145 Fed. 753, it was held that the bonds were properly executed by the county's board of commissioners, and that the delivery by such board did not invalidate them although the statute, which was held merely directory, provided that they should be delivered by a board of trustees therein provided for.

[169] Board of Comrs. of Onslow Co. v. Tollman, 145 Fed. 753.

CHAPTER XXXVI.

LOCATION OF THE ROAD.

§ 919. Choice of location—How determined.—The legislature may fix the exact location of the road of a company incorporated by special charter,[1] or it may merely define the general route and termini and leave the company to exercise its discretion as to the location of the road between the points named. Indeed, it may even authorize

[1] Coney Island &c. R. Co. In re, 12 Hun (N. Y.), 451; Mississippi &c. R. Co. v. Cross, 20 Ark. 443. In Macon &c. R. Co. v. Gibson, 85 Ga. 1; 11 S. E. 442; 43 Am. & Eng. R. Cas. 318; 21 Am. St. 135, it was held that, under a reserved power to amend the charter of a railroad company, the legislature could require it to build its road upon a designated route, by an act passed after the company had exercised the discretion conferred upon it by its original charter, to locate its road, but before it had begun its construction.

the company to select both the general and particular location and termini of the road. If the charter does not designate the exact route, but gives the company a general authority to build its road between certain points, the company is invested with full discretion as to the location of its road within those limits, and maps or plans that were exhibited to the legislature by which the charter was granted, but which are not referred to in the charter, are not admissible to prove the legislative intent in granting it.[2] Where the route and termini are stated in general terms by the charter its language must be given a reasonable construction with reference to the subject-matter of the grant, and the purposes to be attained.[3] If the road is required to run through several towns, it is not essential that it should pass through them in the order named.[4] And it is held that the requirement that one terminus of the road shall be at or near a certain point leaves a large discretion to be exercised by the railroad company in locating its road, the exercise of which will not be reviewed unless it has clearly exceeded its just limits or acted in bad faith.[5]

§ 919a. Circular or belt road.—The question has arisen in several

[2] Boston &c. R. Co. v. Midland R. Co. 1 Gray (Mass.), 340; Commonwealth v. Fitchburg R. Co. 8 Cush. (Mass.) 240; Reg. v. Caledonian R. Co. 16 Q. B. 19; North British R. Co. v. Tod, 5 Bell's App. Cas. (Scotland), 184. The fact that plans and maps are referred to in the charter for one purpose does not make them admissible for another. Reg. v. Caledonian R. Co. supra. That the company may determine the route in its discretion, see, also, Chicago &c. R. Co. v. Dunbar, 100 Ill. 110.

[3] Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325; 94 Am. Dec. 84. All railroad charters that do not directly express the contrary must be taken to allow the exercise of such a discretion in the location of the route as is incident to an ordinary practical survey, but not deviating substantially from the course and direction indicated by the charter. Southern Minnesota R. Co. v. Stoddard, 6 Minn. 150. The selection made by the officers in the exercise of the discretion given them by the charter should not be disturbed unless they have clearly erred. Hentz v. Long Island R. Co. 13 Barb. (N. Y.) 646. See, also, Newcastle &c. R. Co. v. Peru &c. R. Co. 3 Ind. 464; Pennsylvania R. Co's Appeal, 116 Pa. St. 55; 8 Atl. 914; Baldwin v. Hillsborough &c. R. Co. 1 Ohio Dec. 532; Frankford &c. Turnpike Co. v. Philadelphia &c. R. Co. 54 Pa. 345; 93 Am. Dec. 708.

[4] Commonwealth v. Fitchburg &c. R. Co. 8 Cush. (Mass.) 240.

[5] Fall River &c. Co. v. Old Colony, &c. R. Co. 5 Allen (Mass.), 221; Georgia R. &c. Co. v. Maddox, 42 Ga. 315; 42 S. E. 315, 317 (quoting text). See, also, Collier v. Union

cases as to whether a circular or belt road may be organized and located under a statute providing that the points from which and to which it runs should be stated. It is held in Tennessee, under such a statute, that such a road, embracing within itself a reasonable area, such as the limits of a city, is authorized, and may be organized and located, although its route is circular, or in the shape of a polygon, and although it begins and ends at the same place, if the several connecting routes and their termini are duly stated.[6] So, it is held in Ohio, under a statute authorizing a road between the points named in the articles of incorporation, commencing at or within, and extending to or into, any city, village, town, or place named as its terminus, a road may be organized and located having both of its terminal points within the same city.[7] Other authorities are to the same effect.[8]

§ 920. Discretion of company in determining location—How exercised.—The general laws for the incorporation of railroads that have been passed in most of the states,[9] and in England, give a company incorporated thereunder discretionary power to select its route between charter points, and to appropriate land and establish grades subject to restrictions therein contained.[10] This discretion must be exercised by the company, and can not be controlled by previous acts or contracts of its agents.[11] Where the duty of locating the road is

R. Co. 113 Tenn. 96; 83 S. W. 155; Bridwell v. Gate City Terminal Co. (Ga.) 56 S. E. 624; Pedrick v. Raleigh &c. R. Co. (N. Car.) 55 S. E. 877.

[6] Collier v. Union R. Co. 113 Tenn. 96; 83 S. W. 155.

[7] State v. Union Terminal R. Co. 72 Ohio, 455; 74 N. E. 642.

[8] See State v. Martin, 51 Kans. 462; 33 Pac. 9; Long Branch Com'rs v. West End. R. Co. 29 N. J. Eq. 566; National Docks R. Co. v. Central R. Co. 32 N. J. Eq. 755; Bridwell v. Gate City Terminal Co. (Ga.) 56 S. E. 624.

[9] See Stimson Am. St. §§ 8741, 8742, 8743.

[10] Chicago &c. R. Co. v. Dunbar, 100 Ill. 110. The railroad company may use its discretion in the location of the line where it is not definitely located in the charter. Tennessee Cent. R. Co. v. Campbell, 109 Tenn. 655; 73 S. W. 112.

[11] The act of the engineer in making a preliminary survey and staking off the line of the proposed road does not constitute a binding location. Williamsport &c. R. Co. v. Philadelphia &c. R. Co. 141 Pa. St. 407; 21 Atl. 645; 12 L. R. A. 220, and note. See, also, Kauffman v. Pittsburgh &c. R. Co. 210 Pa. St. 440; 60 Atl. 2. And an agreement between the land-owner and the attorney of the company that the road shall be of a less width than is afterward fixed upon by the directors in making the location does

imposed by statute upon the president and directors of the company, an exercise of discretion on their part is called for which cannot be delegated. And a location made by an executive committee provided for in the by-laws of the company is inoperative, and cannot be ratified by the company so as to make it valid as against the rights of another company which have attached to the property in question prior to such ratification.[12] The exercise of this discretion by the company will not be disturbed except where there is a plain case of abuse of it.[13] It may be said generally, however, that a construction of a charter which would give the railroad company absolute discretion, uncontrolled by the courts, to locate its line or stations where its interests or favoritism might suggest, without regard to the public interest, would be contrary to public policy, and should not be adopted if any other construction be possible.[14] Where a statute gives the railroad company power to carry its tracks over or under a public highway, "as may be found most expedient," it is held that the railroad company is clothed with authority to determine the expediency of the different modes of crossing; and an indictment against the company for maintaining a nuisance cannot be sustained by proof that it erected a bridge to carry the highway over its tracks when it would have been more expedient to carry the railroad tracks over the

not control the width of the land which the company is authorized to condemn. Central Mills Co. v. New York &c. R. Co. 127 Mass. 537. See, generally, Chicago &c. R. Co. v. Dunbar, 100 Ill. 110; and see, also, Bridwell v. Gate City Terminal Co. (Ga.) 56 S. E. 624; 628 (citing text).

[12] Weidenfeld v. Sugar Run R. Co. 48 Fed. 615. See, also, Washington &c. R. Co. v. Coeur D'Alene &c. Co. 16 Sup. Ct. 239.

[13] Walker v. Mad River &c. R. Co. 8 Ohio, 38; Hentz v. Long Island R. Co. 13 Barb. (N. Y.) 646; Fall River Iron Works v. Old Colony R. Co. 5 Allen (Mass.), 221; Parke's Appeal, 64 Pa. St. 137; Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325; 94 Am. Dec. 84; Struthers v. Dunkirk &c. R. Co. 87 Pa. St. 282; People v. New York Central R. Co. 74 N. Y. 302; Southern Minn. R. Co. v. Stoddard, 6 Minn. 150; Ford v. Chicago &c. R. Co. 14 Wis. 609; 80 Am. Dec. 791; Colorado &c. R. Co. v. Union Pac. R. Co. 41 Fed. 293; post, § 970; Woods R. Law, 744. See, also, State v. District Court (Mont.) 88 Pac. 44. Where the contract for a right of way releases a strip of land of a certain width through a certain tract of land, and no more definitely, it vests in the railroad company the right to select the particular location. Burrow v. Terre Haute &c. R. Co. 107 Ind. 432; 8 N. E. 167.

[14] Northern Pacific R. Co. v. Territory, 3 Wash. T. 303; 13 Pacific, 604.

highway. When the railroad company has, in good faith, determined the question as to the relative expediency of the different modes of crossing, its determination is final, and, even though erroneous, can not be reversed by a jury.[15] And where the line is located upon a direct and convenient route between the termini, the fact that another route is available, for which land could be purchased, does not prove that land sought to be taken by condemnation proceedings is not necessary for the use of the petitioner.[16] A railroad company cannot, however, under a mere general authority to locate its road, acquire any right in lands already acquired by another company, and devoted to public uses, further than is necessary in crossing other roads lying between its termini.[17]

§ 920a. Determination of question of necessity and convenience of proposed railroad.—A New York statute[18] prohibits a railroad corporation from exercising any of the powers conferred by law upon

[15] People v. New York &c. R. Co. 74 N. Y. 302; New York &c. Co. v. People, 12 Hun (N. Y.), 195.

[16] Colorado Eastern R. Co. v. Union Pac. Co. 41 Fed. 293; 44 Am. & Eng. R. Cas. 10. In this case the C. E. Co. sought to appropriate for storehouses, switches, turnouts, and the like, land held by the U. P. Co. for its own use at such time as it should be required in caring for its increasing business. It was the only land available for switching purposes along the line of the C. E. Co.'s road as located, but it appeared that by making a detour to the north other suitable lands could be reached. The court held that the location of its road upon these lands was within the discretion given to the C. E. Co. by its charter. See, also, State v. District Court (Mont.), 88 Pac. 44. But where the termini are stated in the articles or charter, it is held that there should be a reasonable directness in the route between such points. Leverett v. Middle Georgia &c. R. Co. 96 Ga. 385; 24 S. E. 154; People v. Louisville &c. R. Co. 120 Ill. 48; 10 N. E. 657; Attorney General v. Erie &c. R. Co. 55 Mich. 15; 20 N. W. 696.

[17] Lake Shore &c. R. Co. v. New York &c. R. Co. 8 Fed. 858; Chicago &c. R. Co. v. Chicago &c. R. Co. 112 Ill. 589. See Winchester &c. R. Co. v. Commonwealth (Va.), 55 S. E. 692. A railroad company, organized under the New York general railroad act of 1850, having filed a map and survey of its proposed line of road, and having notified all persons to be affected by it, thereby acquires the right to construct its road upon such line, as against all other railroad corporations. Rochester &c. R. Co. v. New York &c. R. Co. 13 Cent. 232; 110 N. Y. 128; 17 N. E. 680.

[18] Laws N. Y. 1890, Ch. 565, as amended by Laws 1892, Ch. 676 and Law 1895, Ch. 545.

such a corporation until the board of railroad commissioners shall certify that "public convenience and necessity require the construction of the railroad as proposed in the articles of association." It is given as a reason for the enactment of this statute that "railroad construction was often threatened, and sometimes undertaken, with the view of securing for its promoters tribute from a railroad corporation thus threatened with competition. And again, the interests of the investors in railroad enterprises seem to require that the promoters of such enterprises should not be permitted to undertake the construction of such a work where it was clear that public convenience and necessity did not require. These and other considerations undoubtedly moved the legislators to provide a method by which the question of public convenience and necessity should be judicially determined at the very beginning of the corporate life of a railroad corporation, and to accomplish that result it conferred upon the board of railroad commissioners the power and duty to hear and decide this question in all cases."[19] Under this statute the commissioners are confined to the approval or disapproval, in whole or in part, on the route specified in the articles of incorporation.[20] It has been held that their decision of the question is final, and cannot be afterwards collaterally questioned in condemnation proceedings.[21] It is not sufficient to justify the issuance of the certificate that the charges of existing railroads are excessive, since this is a matter covered by the existing statutory remedies.[22] In one case the refusal to grant the certificate was sustained where it appeared that the road, when constructed, would cross several city streets at grade. Courts, in reviewing the question of the weight of evidence to support the conclusion of the commissioners, apply the same rules as on motions to set aside ordinary verdicts.[23]

§ 921. Conflicting grants — Priority of location.—Where both companies were organized under the same general law, the prior appropriation of a right of way constitutes a prior grant from the state,[24]

[19] People v. Railroad Commissioners, 160 N. Y. 202; 54 N. E. 697; Ticonderoga Union Terminal R. Co. In re, 101 N. Y. S. 107.

[20] People v. Railroad Com. 92 App. Div. (N. Y.) 126; 87 N. Y. S. 334.

[21] People v. Railroad Com. 160 N. Y. 202; 54 N. E. 697.

[22] Amsterdam &c. R. Co. In re, 86 Hun (N. Y.), 578; 33 N. Y. S. 1009.

[23] New Hamburgh &c. R. Co. In re, 76 Hun (N. Y.), 76; 27 N. Y. S. 664.

[24] Boston &c. R. Co. v. Lowell &c. R. Co. 124 Mass. 368; Atchison &c. R. Co. v. Mecklim, 23 Kan. 167; New Brighton &c. R. Co. v. Pitts-

and it is the settled rule that, of two conflicting grants of a particular location, the earlier grant must prevail.[25] This rule has been held to apply to the case of a line extending through a mountain pass so narrow that the right of way of the first company occupies the entire pass.[26] But, where explicit authority is given to locate a railroad through a pass already occupied by another road, the grant includes authority to use the right of way of the first if the second cannot be built without it.[27] It has been held that a location, as between rival

burgh &c. R. Co. 105 Pa. St. 13; Chicago &c. R. Co. v. Chicago &c. R. Co. 112 Ill. 589. But see Marion Co. Lumber Co. v. Tilghman Lumber Co. 75 S. Car. 220; 55 S. E. 337. In Morris &c. R. Co. v. Blair, 9 N. J. Eq. 635, it appeared that two companies had each been authorized in general terms to construct a railroad to the Delaware river, both acts providing in substantially the same language that "when the route of such road shall have been determined upon, and a survey of such route deposited in the office of the secretary of state, then it shall be lawful for said companies to enter upon," etc. Surveys by the two companies were filed on the same day, showing a conflict between the routes selected through certain passes. One of the companies, which was chartered seven days after the act incorporating the other company was passed, was shown to have been the first to make an actual survey of the route in question, but its rival was the first to make a definite adoption of the route, and also filed its survey with the secretary of state at an earlier hour of the same day that the other survey was filed. It was held that the company which first adopted the line was entitled to priority. See. also, People v. Adirondack R. Co. 160 N. Y. 225; 54 N. E. 689; Pittsburgh &c. R. Co. v. Pittsburgh &c. R. Co. 159 Pa. St. 331; 28 Atl. 155; Barre R. Co. v. Montpelier &c. R. Co. 61 Vt. 1; 17 Atl. 923; 4 L. R. A. 785, and note; 15 Am. St. 877; Kanawha &c. R. Co. v. Glen Jean &c. R. Co. 45 W. Va. 119; 30 S. E. 86; Chesapeake &c. R. Co. v. Deepwater R. Co. 57 W Va. 461; 50 S. E. 890; Fayetteville St. R. v. Aberdeen &c. R. Co. (N. C.) 55 S. E. 345; Cumberland R. Co. v. Pine Mountain R. Co. (Ky.) 96 S. W. 199; Sioux City &c. R. Co. v. Chicago &c. R. Co. 27 Fed. 770.

[25] Chesapeake &c. Canal Co. v. Baltimore &c. R. Co. 4 Gill & J. (Md.) 1; Boston &c. R. Co. v. Lowell &c. R. Co. 124 Mass. 368; Morris &c. R. Co. v. Blair, 9 N. J. Eq. 635, 644. See, also, as to rights of company against a city subsequently incorporated. Dowie v. Chicago &c. R. Co. 214 Ill. 49; 73 N. E. 354.

[26] Contra Costa &c. R. Co. v. Moss, 23 Cal. 323.

[27] Denver &c. R. Co. v. Denver &c. R. Co. 17 Fed. 867; Anniston &c. R. Co. v. Jacksonville &c. R. Co. 82 Ala. 297; 2 So. 710; Montana Cent. R. Co. v. Helena &c. R. Co. 6 Mont. 416; 12 Pac. 916; Buffalo Matter of, 68 N. Y. 167.

companies, need not be exact as to the width of the right of way claimed, or other matters of mere detail. If the site intended to be held is substantially shown, the location is sufficient.[28]

§ 922. Location of road upon property already devoted to public use.—The legislature has power to authorize the condemnation of railroad property and franchises,[29] and may authorize one railroad company to use, not only the right of way, but the tracks of another company, upon making due compensation.[30] But no implication in favor of such authority arises from the grant of power to build a second railroad unless there is a necessity so absolute that, without it, the grant itself will be defeated. So, it is said that, "while a public service corporation like a railroad company is bound to render to the public certain services appropriate to its particular functions, it is

173. See, also, Railway Co. v. Alling, 99 U. S. 463.

[28] Chesapeake &c. R. Co. v. Deepwater R. Co. 57 W. Va. 641; 50 S. E. 890.

[29] Alexandria &c. R. Co. v. Alexandria &c. R. Co. 75 Va. 780; 40 Am. R. 743, and note; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 30 Ohio St. 604; White River Turnp. Co. v. Vermont Cent. R. Co. 21 Vt. 590; Metropolitan City R. Co. v. Chicago &c. R. Co. 87 Ill. 317; Commonwealth v. Pittsburg &c. R. Co. 58 Pa. St. 26; New York Cent. &c. R. Co. v. Metropolitan Gas Light Co. 63 N. Y. 326; Springfield v. Connecticut River R. Co. 4 Cush. (Mass.) 63; Fitchburg &c. R. Co. v. Boston &c. R. Co. 3 Cush. (Mass.) 58; Eastern &c. R. Co. v. Boston &c. R. Co. 111 Mass. 125; 15 Am. R. 13; Tuckahoe Canal Co. v. Tuckahoe &c. R. Co. 11 Leigh (Va.), 42; 36 Am. Dec. 374; Baltimore &c. Co. v. Union R. Co. 35 Md. 224; 6 Am. R. 397; Newcastle &c. R. Co. v. Peru &c. R. Co. 3 Ind. 464; Richmond R. Co. v. Louisa R. R. Co. 13 How. (U. S.) 71; New York R. Co. v. Boston R. Co. 36 Conn. 196; Union Pac. R. Co. v. Burlington &c. R. Co. 1 McCrary (U. S.), 452; Elliott Roads and Streets, 164, et seq.

[30] Providence &c. R. Co. v. Norwich &c. R. Co. 138 Mass. 277; 22 Am. & Eng. R. Cas. 493; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812; Kinsman St. R. Co. v. Broadway &c. R. Co. 36 Ohio St. 239; Toledo &c. R. Co. v. Toledo &c. R. Co. (Ohio), 1 Am. & Eng. R. Cas. (N. S.) 230, and note; St. Louis &c. R. Co. v. Southern R. Co. 105 Mo. 577; 15 S. W. 1013; 16 S. W. 960; Sixth Ave. R. Co. v. Kerr, 45 Barb. (N. Y.) 138; North Baltimore &c. R. Co. v. North Ave. R. Co. 75 Md. 233; 23 Atl. 466; Compare Pacific R. Co. v. Wade, 91 Cal. 449; 27 Pac. 768; 13 L. R. A. 754; 25 Am. St. 201; 50 Am. & Eng. R. Cas. 362; New Orleans &c. R. Co. v. New Orleans, 44 La. Ann. 728; 11 So. 78; 50 Am. & Eng. R. Cas. 391.

not bound to permit its property to be subjected to use by a rival corporation, unless by express statutory enactment and by due process of law thereunder."[31] And, where the appropriation of the franchise of a street railroad company by a railroad company was made merely as a matter of economy, and to avoid the purchase of valuable property which the railroad company must have acquired to reach its terminus without interfering with the street railroad, it was held that no such necessity existed.[32] A right to cross an existing railroad or highway may often be implied where a right to take it longitudinally could not be implied.[33] Thus, where authority is granted to locate and construct the road from one specified point to another, the right to cross other railroads and highways lying between the two points is necessarily implied,[34] and authority to cross any "public road or way" has been held to include the right to cross city streets;[35] but the right to take an existing road or highway longitudinally is essentially different, and would not, ordinarily, be implied in such a case. It must be granted expressly or by necessary implication.[36] By act of Congress[37] it is provided that no company building its road upon or across governmental lands, which shall locate its lines through any canyon, pass, or defile in the mountains, shall prevent any other com-

[31] Evansville &c. Traction Co. v. Henderson Bridge Co. 134 Fed. 973, 978 (citing text).

[32] Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150; 3 Am. & Eng. R. Cas. 507. See, also, Elliott Roads and Streets (2d. ed.), § 221.

[33] Elliott Roads and Streets (2d ed.), § 221.

[34] Morris &c. R. Co. v. Central R. Co. 31 N. J. L. 205; Ft. Wayne v. Lake Shore &c. R. Co. 132 Ind. 558; 32 N. E. 215; 18 L. R. A. 367, and note; 32 Am. St. 277, 283; Lake Erie &c. R. Co. v. Kokomo, 130 Ind. 224; 29 N. E. 780; Providence &c. R. Co. v. Norwich &c. R. Co. 138 Mass. 277; Bridgeport v. New York &c. R. Co. 36 Conn. 255; 4 Am. R. 63.

[35] Canton v. Canton &c. Co. 84 Miss. 268; 36 So. 266; 65 L. R. A. 561; 105 Am. St. 428. See, also, Hamline v. Southern R. Co. 76 Miss. 417; 25 So. 295.

[36] Alexandria &c. R. Co. v. Alexandria &c. R. Co. 75 Va. 780; 40 Am. R. 743, and note; Housatonic R. Co. v. Lee &c. R. Co. 118 Mass. 391; Lewis v. Germantown &c. Co. 16 Phila. (Pa.) 608; Ft. Wayne v. Lake Shore &c. R. Co. 132 Ind. 558; 32 N. E. 215; 18 L. R. A. 367, and note; 32 Am. St. 277; Illinois Cent. R. Co. v. Chicago &c. R. Co. 122 Ill. 473; 13 N. E. 140; Chattanooga &c. R. Co. v. Felton, 69 Fed. 273, and authorities, p. 280; 41 Cent. L. J. 444; Barre R. Co. v. Montpelier &c. R. Co. 61 Vt. 1; 15 Am. St. 877, and note; 4 L. R. A. 785, and note.

[37] Act of March 3, 1875, 1 Sup. Rev. St. U. S. 91.

pany from the use or occupancy of the same canyon, pass or defile, for the purpose of its road in common with the road first located. And several of the states have statutes to the same effect.[38] Under this law it is held that, where a canyon is broad enough to enable both roads to proceed without interfering with each other in the construction of their respective roads, the second company should be permitted to put down a track parallel with that of the first company,[39] encroaching upon its right of way only where the character of the surface will not permit it to use adjoining ground.[40] And if, in any portion of the canyon, it is impracticable or impossible to lay down more than one roadbed and track, a court of equity will, upon proper application, make such orders as will secure to the second company the right to use, upon just and equitable terms, the roadbed and track constructed by the first company.[41] A railroad may, under a general grant of power to exercise the right of eminent domain, without special authority, condemn property of another railroad not held or used for the purposes of the road.[42] And where land has been held for five years by a railroad company without being used in any way, the fact that the company anticipates using it at some future time does not exempt it from condemnation by another company which desires to build a railroad across it. The prospective use should yield to the more immediate necessities.[43] It has been held that a location made

[38] Stimson Am. St. (1892), § 8744.

[39] Railway Co. v. Alling, 99 U. S. 463.

[40] Denver &c. R. Co. v. Denver &c. R. Co. 17 Fed. 867; 14 Am. & Eng. R. Cas. 83.

[41] Railway Co. v. Alling, 99 U. S. 463; Denver &c. R. Co. v. Denver &c. R. Co. 17 Fed. 867. See, also, Springfield v. Connecticut River R. Co. 4 Cush. (Mass.) 72; Lowell &c. R. Co. v. Boston &c. R. Co. 7 Gray (Mass.), 27; Western North Carolina R. Co. v. Georgia &c. Co. 88 N. Car. 79. A railroad company has a right to construct its track through a canyon, though it is compelled in doing so to run parallel with and in close proximity to an existing highway. Fares v. Rio Grande Western R. Co. 28 Utah, 132; 77 Pac. 230.

[42] Sioux City &c. R. Co. v. Chicago &c. R. Co. 27 Fed. 770; 25 Am. & Eng. R. Cas. 150. The unnecessary use of land by one railroad company is no defense to condemnation proceedings instituted by another company to take the same land. Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812. And the fact that land owned by one railroad company is held for public convenience and for purposes of quasi public character, does not protect it from condemnation. New York &c. R. Co. In re, 99 N. Y. 12.

[43] Colorado Eastern R. Co. v. Union Pacific R. Co. 41 Fed. 293; 44 Am. & Eng. R. Cas. 10.

before the incorporation of a railroad company was ineffective to preserve the location as against another legally incorporated railroad company afterwards making and adopting the same location. The location was not preserved by ratification after the incorporation of the company.[43a]

§ 922a. Location on abandoned right of way.—A general grant of power to a railroad company to condemn abandoned roadbeds does not authorize a railroad to enter upon and condemn a roadbed abandoned by a former locator, and afterwards located upon by another company which had completed a valid location. Under these circumstances the roadbed was not an abandoned roadbed.[44] The South Carolina case, announcing this rule, held that the first location on the abandoned roadbed was completed when the right of way was clearly defined and staked out, and the route so marked was adopted by the company, and that the entry of an engineer and a survey was not required.[45]

§ 923. Branch and lateral roads.—It has been held that authority to locate and construct a railroad carries by implication the right to construct branches and sidings to carry out the purposes of the company's charter,[46] but, while the right to construct ordinary side-tracks and switches may be included,[47] we think authority to locate the road on a certain line does not, ordinarily, carry with it the right to construct branch or lateral roads running in a different direction.[48] These

[43a] New Brighton &c. R. Co. v. Pittsburgh &c. R. Co. 105 Pa. St. 13.

[44] Fayetteville Street R. Co. v. Aberdeen &c. R. Co. (N. C.) 55 S. E. 345.

[45] Fayetteville Street R. Co. v. Aberdeen &c. R. Co. (N. Car.) 55 S. E. 345.

[46] Schofield v. Pennsylvania R. Co. 2 Pa. Dist. Ct. 57. But see Edgewood R. Co.'s Appeal, 79 Pa. St. 257; Philadelphia &c. R. Co. v. Philadelphia &c. R. Co. 1 Pa. Dist. Ct. 73.

[47] Arrington v. Savannah &c. R. Co. 95 Ala. 434; 11 So. 7; New York Cent. &c. R. Co. Matter of, 77 N. Y. 248; People v. Brooklyn &c. R. Co. 89 N. Y. 75; Philadelphia &c. R. Co. v. Williams, 54 Pa. St. 103; Boston &c. R. Co. Matter of, 53 N. Y. 574; Central Branch &c. R. Co. v. Atchison &c. R. Co. 26 Kan. 669; Toledo &c. R. Co. v. Daniels, 16 Ohio St. 390; Protzman v. Indianapolis &c. R. Co. 9 Ind. 467; 68 Am. Dec. 650.

[48] Chicago &c. R. Co. v. Wiltse, 116 Ill. 449; 6 N. E. 49; Illinois Cent. R. Co. v. Chicago, 138 Ill. 453; 28 N. E. 740. See, also, Baltimore &c. R. Co. v. Union R. Co. 35 Md. 224; 6 Am. R. 397; Morris

may, however, be authorized for a public purpose;[49] and provision is usually made for locating and constructing them under statutory authority. It has also been held by some of the courts that the legislature may constitutionally authorize them to be constructed so as to connect the main line with manufacturing establishments and mines, and that the power of eminent domain may be exercised for that purpose.[50] But this is denied by other courts.[51] This question, however, is considered in another chapter.[52] Where the charter authorizes the company to locate and construct branches or lateral roads it has been held that it may build a branch line running in the same general direction as the main line, and connecting such main line with another railroad.[53] In other words, the branch may be practically an extension of the main line as well as a line running off at

&c. R. Co. v. Central R. Co. 31 N. J. L. 205; Knight v. Carrolton R. Co. 9 La. Ann. 284; Brigham v. Agricultural Branch R. Co. 1 Allen (Mass.), 316.

[49] Toledo &c. R. Co. v. East Saginaw, 72 Mich. 206; 40 N. W. 436; Newhall v. Galena &c. R. Co. 14 Ill. 273; Secombe v. Railroad Co. 23 Wall. (U. S.) 108; Howard Co. v. Booneville Cent. Nat. Bank, 108 U. S. 314; 2 Sup. Ct. 689; Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641; 10 Sup. Ct. 965; Beekman v. Saratoga &c. R. Co. 3 Paige (N. Y.), 45; 22 Am. Dec. 679, and note; Union El. R. Co. Matter of, 113 N. Y. 275; 21 N. E. 81; Tyler v. Elizabethtown &c. R. Co. 9 Bush (Ky.), 510.

[50] Getz's Appeal, 10 W. N. C. (Pa.) 453; 3 Am. & Eng. R. Cas. 186; Slocum's Appeal, 12 W. N. C. (Pa.) 84; Hays v. Risher, 32 Pa. St. 169; Harvey v. Thomas, 10 Watts (Pa.), 63; 34 Am. Dec. 141. See, also, New York &c. R. Co. v. Metropolitan &c. Co. 63 N. Y. 326; Clarke v. Blackmar, 47 N. Y. 150; South Chicago R. Co. v. Dix, 109 Ill. 237; Fisher v. Chicago &c. R. Co. 104 Ill. 323; Kettle River R. Co. v. Eastern R. Co. 41 Minn. 461; 43 N. W. 469; Phillips v. Watson, 63 Iowa, 28; 18 N. W. 659; Hibernia R. Co. v. DeCamp, 47 N. J. L. 518; 4 Atl. 318; 54 Am. R. 197; New Cent. &c. Co. v. George's &c. Coal Co. 37 Md. 537; Dietrich v. Murdock, 42 Mo. 279; Rudolph v. Pennsylvania &c. Co. 166 Pa. St. 430; 31 Atl. 131.

[51] See Split Rock Cable R. Co. Matter of, 128 N. Y. 408; 28 N. E. 506; Weidenfeld v. Sugar Run R. Co. 48 Fed. 615; People v. Dist. Ct. 11 Colo. 147; Rochester &c. R. Co. In re, 58 Hun (N. Y.), 601; 12 N. Y. S. 566; Railroad Co. v. Iron Works, 31 W. Va. 710; 2 L. R. A. 680, and note; Chicago &c. R. Co. v. Wiltse, 116 Ill. 449; 6 N. E. 49; Mikesell v. Durkee, 34 Kan. 509; 9 Pac. 278; State v. Railway Co. 40 Ohio St. 504.

[52] See post, § 961.

[53] Blanton v. Richmond &c. R. Co. 86 Va. 618; 10 S. E. 925; 43 Am. & Eng. R. Cas. 617; Atlantic &c. R. Co. v. St. Louis, 66 Mo. 228; McAboy's Appeal, 107 Pa. St. 548; Delabole State Co. v. Bangor &c.

an intermediate point. So, there may be a branch from a branch, all having a common stem in the main line.[54] But it has been held that authority to construct "branch roads from the main line to other points or places in the several counties through which said road may pass," does not give the company the right to construct a branch through more than one county; that is, any one branch must begin and end in the same county.[55] A track connecting the line of one railroad with that of another for the purpose of exercising a right of passage over the latter road, as secured by a lease, is neither a relocation of the main line of such road nor the construction of a branch line, but is merely a side-track, the construction of which is included in the general power to build the railroad itself.[56] It has been held that power to construct or extend a line, as the board of directors may determine and designate, includes the power to acquire and use a bridge, a station, and the tracks of another company beyond terminals originally selected, and in another state, on the determination of the board of directors, and on compliance with the laws of both states relative to the acquisition and use of property by a corporation therein.[57] Where railroad directors act in good faith in determining the question of the advisability of the construction of a branch line, their decision will generally be regarded as conclusive, and not subject to review by the courts.[58]

§ 924. Exempt property.—In some of the states the general railroad laws forbid a railroad to locate its line so as to take, without the

R. Co. 6 North. Co. (Pa.) 337. It may cross another railroad. Hays v. Briggs, 74 Pa. St. 373.

[54] Wheeling &c. R. Co. v. Camden &c. Co. 35 W. Va. 205; 13 S. E. 369. See, also, Atlantic &c. R. Co. v. St. Louis, 66 Mo. 228.

[55] Works v. Junction R. Co. 5 McLean (U. S.), 425. See, also, Currier v. Marietta &c. R. Co. 11 Ohio St. 228; Baltimore &c. R. Co. v. Union R. Co. 35 Md. 224; 6 Am. R. 397. It has also been held that power to locate, construct and operate a branch road does not authorize the purchase of a road already constructed. Gulf &c. R. Co. v. Morris, 67 Tex. 692; 4 S. W. 156; 35 Am. & Eng. Cas. 94; Campbell v. Marietta &c. R. Co. 23 Ohio St. 168.

[56] Lake Shore &c. R. Co. v. Baltimore &c. R. Co. 149 Ill. 272; 37 N. E. 91.

[57] Union Pac. R. Co. v. Mason City &c. R. Co. 128 Fed. 230, affirming 124 Fed. 409.

[58] Ulmer v. Lime Rock R. Co. 98 Me. 579; 57 Atl. 1001; 66 L. R. A. 387; Price v. Pennsylvania R. Co. 209 Pa. St. 81; 58 Atl. 137.

consent of the owners, cemeteries,[59] churches,[60] dwelling-houses,[61] or the yard, kitchen or garden thereunto attached.[62] A dwelling-house has been held to include so much of the yard and curtilage as is necessary for its reasonable enjoyment,[63] though this has been denied where the statute was silent on the subject.[64] Under a charter which provided that the president and directors of the railroad company should have power to determine and locate the route of the railroad, as they might deem expedient, not, however, passing through any burying-ground or place of public worship, or any dwelling-house in the occupancy of the owner without his consent, it was held that a house, to be exempt, must be bona fide the residence of the owner, and that, where the line of a railroad has been surveyed so as to cut through a dwelling-house occupied by a tenant, the owner cannot, by moving into the house for the mere purpose of defeating the proposed improvement, or of extorting excessive compensation, render it "a dwelling-house in the occupancy of the owner," within the meaning of the

[59] Stimson's Am. Stat. (1892), § 8743, citing laws of Maine, North Carolina, Vermont, Florida, Louisiana. Except by the unanimous approval of the railroad commissioners. Pub. Stat. 1887, Conn. § 3463.

[60] Rev. Stat. 1883, Me. Ch. 51, § 17.

[61] Stimson Am. Stat. (1892) § 8743; State v. Troth, 34 N. J. L. 377; McConiha v. Guthrie, 21 W. Va. 134; 17 Am. & Eng. R. Cas. 1. The word "house" has been construed by the English courts to include court yard, office, garden, unfinished houses, and all that is necessary to the enjoyment of the house, if within the same ambit or circuit, whether attached to the main building or not, and though purchased after the main building was erected. Governors &c. v. Charing Cross &c. R. Co. 30 L. J. R. (Ch.) 395; Mason v. London &c. R. Co. 37 L. J. R. (Ch.) 483; Dakin v. London &c. R. Co. 26 L. J. R. (Ch.) 734, note; 3 De Gex & S. 414; King v. Wycombe R. Co. 29 L. J. R. (Ch.) 462; Cole v. West London &c. R. Co. 27 Beav. 242; Alexander v. West End &c. R. Co. 31 L. J. R. (Ch.) 500; Grosvenor v. Hempstead &c. R. Co. 26 L. J. R. (Ch.) 731, cited in 23 Am. & Eng. R. Cas. 2, note.

[62] Voorhis Rev. Laws, 1884, La. § 705; Code 1883, N. Car. § 1701. See Richmond &c. R. Co. v. Wicker, 13 Gratt. (Va.) 375.

[63] Swift's Appeal, 111 Pa. St. 516; 2 Atl. 539; Damon's Appeal, 119 Pa. St. 287; 13 Atl. 217. But it does not include a part of a lot one hundred and twenty-five feet away from the house and not reasonably essential to the use and enjoyment of the house. Rudolph v. Pennsylvania &c. R. Co. 166 Pa. St. 430; 31 Atl. 131. See, also, Lyle v. McKeesport &c. R. Co. 131 Pa. St. 437; 18 Atl. 1111.

[64] Wells v. Somerset &c. R. Co. 47 Me. 345.

law, so as to prevent its condemnation.[65] Where the statute prohibited the taking of a dwelling-house, or any space within sixty feet thereof, it was held that the limitation applied only to land belonging to the owner of the dwelling, and that it did not prohibit the location of a road within sixty feet of the land of another.[66] And a billiard saloon attached to a tavern and used for the entertainment of the guests was held to be part of a dwelling.[67]

§ 925. Preliminary survey.—Railroad companies are given power by the statutes of almost all of the states to enter by their officers or agents upon the land of any person, and cause an examination and survey of their proposed route to be made,[68] subject, however, in some of the states, to liability for actual damages.[69] A preliminary survey for this purpose does not constitute a taking in the sense in which that term is used in the law of eminent domain and in the various state constitutions;[70] but where the survey is conducted in an unreasonable manner it may be actionable, and may even constitute a taking where the soil is disturbed and trees are cut down, or the like.[71] The right to make a preliminary survey does not include the right to make experiments upon the land, without compensation, for the purpose of ascertaining whether it is a suitable route.[72]

[65] Hagner v. Pennsylvania &c. R. Co. 154 Pa. St. 475; 25 Atl. 1082; 57 Am. & Eng. R. Cas. 648. See Stahl v. Pennsylvania R. Co. 155 Pa. St. 309; 26 Atl. 437. The exemption must be asked in good faith. It will not apply to a shanty built on the line of a railway, and occupied by some negroes who were induced to live there for the purpose of enabling the owner to evade the condemnation law. Morris v. Schallsville &c. R. Co. 4 Bush (Ky.), 448; Carris v. Commissioners of Waterloo, 2 Hill (N. Y.), 443.

[66] Richmond &c. R. Co. v. Wicker, 13 Gratt. (Va.) 375.

[67] State v. Troth, 36 N. J. L. 422.

[68] Stimson Am Stat. (1892), § 8741.

[69] Stimson Am. Stat. (1892), § 8741. They are not trespassers where they enter and make the survey under statutory authority. Burrow v. Terre Haute &c. R. Co. 107 Ind. 432; 8 N. E. 167.

[70] Elliott Roads and Streets, (2d ed.), § 212; Randolph Em. Domain, § 195; Bonaparte v. Camden &c. R. Co. Bald. (U. S. C. C.) 209; Polly v. Saratoga &c. R. Co. 9 Barb. (N. Y.) 449; Oregonian R. Co. v. Hill, 9 Ore. 377; Fox v. Western P. R. Co. 31 Cal. 538; Chambers v. Cincinnati &c. R. Co. 69 Ga. 320.

[71] Orr v. Quimby, 54 N. H. 590; Morris & E. R. Co. v. Hudson &c. Co. 25 N. J. Eq. 384.

[72] People v. Loew, 102 N. Y. 471; Ash v. Cummings, 50 N. H. 591. See, also, Davis v. San Lorenzo &c. Co.

§ 926. Perfecting location—Maps of proposed route.—A defective location may be perfected by legislative confirmation, since the legislature has the same right to confirm an existing location that it has to authorize a location to be made in the future. But such an act does not relieve the railroad company from the consequences of illegal acts done before its passage.[73] In some states the company is required to submit a map of its proposed route to the railroad commissioners for their approval, while in most of the others such a map must be filed or recorded in each of the counties through which the line extends.[74] In some of the states the statute merely requires the map to be filed before the construction of the road is begun, and permits the right of way to be condemned before such filing.[75] In others the map is filed with the secretary of state after the location of the road.[76] Some states require that the road shall be located and a "survey" thereof shall be filed,[77] in which case the survey may be aided by plans and maps filed with it.[78] Similar provisions are frequently found in special charters granted to railroad companies. Such statutes should receive a reasonable construction, such as will substantially protect private rights without needless embarrassment to public improvements.[79] Where a survey, map, or location is required to be filed

47 Cal. 517; California &c. Co. v. Central &c. Co. 47 Cal. 528; Toledo &c. R. Co. v. Loop, 139 Ind. 542; 39 N. E. 306.

[73] Salem v. Eastern R. Co. 98 Mass. 431; 96 Am. Dec. 650; Commonwealth v. Old Colony R. Co. 80 Mass. (14 Gray) 93.

[74] Stimson Am. Stat. (1892) § 8748.

[75] Missouri River &c. R. Co. v. Shepard, 9 Kan. 647; Chicago &c. R. Co. v. Grovier, 41 Kan. 685; 21 Pac. 779; Detroit &c. R. Co. v. Campbell, 140 Mich. 384; 103 N. W. 856, 861 (citing text). See Wheeling Bridge &c. R. Co. v. Camden &c. Co. 35 W. Va. 205; 13 S. E. 369; 47 Am. & Eng. R. Cas. 27. The requirement of the North Carolina statute that railroad corporations within a reasonable time file a map and profile of their route and right of way with the corporation commission is held not to require such filing as an essential of a completed location of the right of way as against another company. Fayetteville St. R. Co. v. Aberdeen &c. R. Co. (N. C.) 55 S. E. 345.

[76] Stimson Am. Stat. § 8748.

[77] United New Jersey R. Co. v. National &c. R. Co. 52 N. J. L. 90.

[78] Grand Junction R. Co. v. County Comrs. 14 Gray (Mass.), 553; Drury v. Midland R. Co. 127 Mass. 571; Portland &c. R. Co. v. County Comrs. 65 Me. 292; Quincy &c. R. Co. v. Kellogg, 54 Mo. 334.

[79] Lansing v. Caswell, 4 Paige (N. Y.), 519; Lewis' Eminent Domain, (2d ed.), § 281.

as a precedent condition to the institution of condemnation proceedings, the particular property to be taken must be clearly pointed out.[80] In New Jersey it is held that the survey of the route of a railroad, filed in the office of the secretary of state, limits the right of condemnation to the lands included in its description. This affords the only evidence of the grant by the state to the corporation, and land not specified in such survey cannot be condemned by the railroad as a right of way.[81] In West Virginia, neither the filing of the map and profile of the proposed line, nor the commencement of condemnation proceedings, is an essential step in making the location. Both may be deferred until after the location is perfected.[82] In New York it is held that the filing of the map vests the railroad company with a right to the land therein specified as its proposed right of way, subject only to the right of the landowner to have his damages assessed and paid. A map showing but a single line, without anything to indicate whether it is the center or one of the boundary lines of the right of way, and containing no statement of the width of the land taken, has been held not to be a sufficient compliance with the law as to location to authorize condemnation proceedings where the statute requires a map of the proposed location to be filed before such proceedings are begun.[83] The owner is entitled to information as to the exact property which it is proposed to take.[84] Since the map required

[80] United New Jersey &c. R. Co. v. National Docks &c. R. Co. 52 N. J. Law, 90; 18 Atl. 574.

[81] Rochester &c. R. Co. v. New York &c. R. Co. 110 N. Y. 128; 17 N. E. 680; 35 Am. & Eng. R. Cas. 267.

[82] Chesapeake &c. R. Co. v. Deepwater &c. R. Co. 57 W. Va. 641; 50 S. E. 890. The case also holds that a mere survey made by the engineers of the company not adopted or determined upon by the corporation itself by an act of its board of directors as the location of the road is not an appropriation or location giving rights against third persons. Chesapeake &c. R. Co. v. Deepwater &c. R. Co. 57 W. Va. 641; 50 S. E. 890.

[83] New York &c. R. Co. v. New York &c. R. Co. 11 Abb. (N. Y.) N. C. 386. Where the line of the road was indicated in the vote of the directors adopting a location only by reference to the course followed by the center line of the road, without any specification as to the width to be taken, it was held that the location was fatally defective. New York &c. R. Co. v. New York &c. R. Co. 52 Conn. 274; 25 Am. & Eng. R. Cas. 215.

[84] Housatonic R. Co. v. Lee &c. R. Co. 118 Mass. 391; Heise v. Pennsylvania R. Co. 62 Pa. St. 67; Vail v. Morris &c. R. Co. 21 N. J. L. 189; Strang v. Beloit &c. R. Co. 16 Wis. 635. See, generally, Wilder v. Boston &c. R. Co. 161 Mass. 387;

to be filed is intended mainly for the purpose of acquiring property necessary to be taken, it is sufficient if it shows the alignment and profile of the proposed road and designates the width of the right of way. It need not show the connections, turnouts and switches.[85] The fact that the map of the route as filed stops short of one of the chartered termini does not work a change in the termini nor amount to an abandonment by the company of a portion of the authorized road, and its right to operate the road throughout its entire length as laid down in the charter cannot, on that account, be questioned by the state.[86]

§ 927. Effect of location—When location is complete.—When a proposed line has been regularly located and staked off, and the expense thereof has been paid, the corporation by which it is done has a prior claim to the right of way for a reasonable time, which cannot be defeated by another company that procures voluntary conveyances from the owners before the proceedings in condemnation instituted by the first company have terminated.[87] The first company, in such a

37 N. E. 380; Conver's Appeal, 18 Mich. 459; People v. Brooklyn &c. R. Co. 89 N. Y. 75; Hetfield v. Central R. Co. 29 N. J. L. 571. But he may, by his actions after having received actual knowledge of the proposed route, waive his right to objection to condemnation proceedings upon the grounds of indefiniteness in the location of the road as approved by the railroad commissioners. New York &c. R. Co. v. New York &c. R. Co. 52 Conn. 274; Duck River &c. R. Co. v. Cochrane, 3 Lea (Tenn.), 478; Atchison &c. R. Co. v. Mecklim, 23 Kan. 167; Drury v. Midland R. Co. 127 Mass. 571; Harding v. Biggs, 172 Mass. 590; 52 N. E. 1060; Denver &c. R. Co. v. Canon City &c. R. Co. 99 U. S. 463.

[85] State v. Brooklyn &c. R. Co. 89 N. Y. 75.

[86] People v. Brooklyn &c. R. Co. 89 N. Y. 75; 9 Am. & Eng. R. Cas. 454; Mason v. Brooklyn &c. R. Co. 35 Barb. (N. Y.) 373.

[87] Sioux City &c. R. Co. v. Chicago &c. R. Co. 27 Fed. 770; 25 Am. & Eng. R. Cas. 150; Barre R. Co. v. Montpelier &c. R. Co. 61 Vt. 1; 17 Atl. 923; 4 L. R. A. 785, and note; 15 Am. St. 877; Morris &c. R. Co. v. Blair, 9 N. J. Eq. 635; Titusville &c. R. Co. v. Warren &c. R. Co. 12 Phila. (Pa.) 642; Williamsport &c. R. Co. v. Philadelphia &c. R. Co. 141 Pa. St. 407; 21 Atl. 645; 12 L. R. A. 220, and note. See Boston &c. R. Co. v. Lowell &c. R. Co. 124 Mass. 368; Denver &c. R. Co. v. Canon City &c. R. Co. 99 U. S. 463; Sulphur Springs &c. R. Co. v. St. Louis &c. R. Co. 2 Tex. Civ. App. 650; 22 S. W. 107; Pittsburgh &c. R. Co. v. Pittsburgh &c. R. Co. 159 Pa. St. 331; 28 Atl. 155. The text is quoted with approval in Kanawha &c. R. Co. v. Glen Jean &c.

case, it has been held, can condemn the right of way in the hands of the purchasing company in the same manner that it might have condemned it in the hands of the original owners.[88] The location of the road results only from some definite action on the part of the corporation itself. An engineer alone cannot locate a railroad so as to give title to the company that employs him; and a preliminary survey made by an engineer, which has never been reported to or adopted by the company, does not constitute a legal location of the line of the railroad which will give such company priority over another company that has adopted a line covering a portion of the same territory.[89]

R. Co. 45 W. Va. 119; 30 S. E. 86, 88. See, also, Chesapeake &c. Ry. Co. v. Deepwater R. Co. 57 W. Va. 641; 50 S. E. 890. But it is otherwise where the conveyance is obtained and recorded before the location is made by the company seeking to condemn. Elting &c. Co. v. Williams, 36 Conn. 310. And see Atlanta &c. R. Co. v. Southern R. Co. 131 Fed. 657; Minneapaolis &c. R. Co. v. Chicago &c. R. Co. 116 Ia. 681; 88 N. W. 1082.

[88] Sioux City &c. R. Co. v. Chicago &c. R. Co. 27 Fed. 770. In this case Judge Shiras said: "The injustice and injury to private and public rights alike, which would arise were it held that after a company has duly surveyed and located its line of railway, and is in good faith preparing to carry forward the construction of its road, some other company may, by private purchase, procure the right of way over parts of the located line, and either prevent the construction of the road or extort a heavy and exorbitant payment from the company first locating its line as a condition to the right to build the same as originally located, are strong reasons for holding that the first location, if made in good faith, and followed up within a reasonable time, may confer the prior right, even though a rival company may have secured the conveyance of the right of way by purchase from the property-owners after the location, but before the application to the sheriff for the appointment of commissioners." But see this case distinguished in Minneapolis &c. R. Co. v. Chicago &c. R. Co. 116 Ia. 681; 88 N. W. 1082, 1085. Abandonment of a surveyed branch railroad can be asserted only by the state, not by another company attempting to use the right of way. Pittsburgh &c. R. Co. v. Pittsburgh &c. R. Co. 159 Pa. St. 331; 28 Atl. 155.

[89] Williamsport &c. R. Co. v. Philadelphia &c. R. Co. 141 Pa. St. 407; 21 Atl. 645; 12 L. R. A. 220, and note; 47 Am. & Eng. R. Cas. 224. An engineer may make explorations in advance of a location, or he may remark the line or adjust the grades after the adoption of a location, but an engineer alone can not locate a railroad so as to give title to the company that employs him. He is not the company. The right of eminent domain does not reside in him.

Where two or more experimental surveys were made in succession, and various resolutions were passed by the directors adopting the different routes surveyed, it was held that the location of the road involved the abandonment of the route previously adopted; and that, where the route first surveyed was abandoned and then re-adopted, the rights of the corporation dated from the passage of the resolution by which it was finally designated as the line of the road, although the preliminary survey had been made several months before.[90] In some of the states, as we have already seen, a map of the proposed route must be filed with a designated public officer of each county through which the proposed road runs, and notice given to the land-owners before the "location" is complete.[91] And this requirement is usually made where grants of public land are made to railroads.[92] But when the required map is filed and notice given, the company acquires a prior right to construct a railroad upon such line, exclusive of all other railroad corporations and free from the interference of any party, and this right ripens into title as soon as the land is purchased or taken and compensation is paid under proper condemnation proceedings.[93] If the statute does not provide for a survey or location,

Williamsport &c. R. Co. v. Philadelphia &c. R. Co. supra. See, also, Northern Pac. R. Co. v. Doherty, 100 Wis. 39; 75 N. W. 1079; and Kanawha &c. R. Co. v. Glen Jean &c. R. Co. 45 W. Va. 119; 30 S. E. 86, 88 (quoting text).

[90] Hagner v. Pennsylvania &c. R. Co. 154 Pa. St. 475; 25 Atl. 1082.

[91] Stimson Am. Stat. (1892), § 8748, citing laws of Massachusetts, Vermont, New York, Connecticut, Indiana, Michigan, Wisconsin, West Virginia, Kansas, North Carolina, Missouri, Arkansas, Texas, Nevada, California, North Dakota, Idaho, Utah, New Mexico. The filing of a map was not essential to the location of a road in North Carolina prior to 1872. Purifoy v. Richmond &c. R. Co. 108 N. Car. 100; 12 S. E. 741; 46 Am. & Eng. R. Cas. 232.

[92] See Hannibal &c. R. Co. v. Smith, 41 Mo. 310; Western Pac. R. Co. v. Tevis, 41 Cal. 489; Baker v. Gee, 1 Wall. (U. S.) 333. The filing of the map definitely fixes the location, although no survey has been made. Southern Pac. R. Co. v. United States, 69 Fed. 47; Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629; 5 Sup. Ct. 566.

[93] Rochester &c. R. Co. v. New York &c. R. Co. 110 N. Y. 128; 17 N. E. 680; 35 Am. & Eng. R. Cas. 267. The map and profile filed in the clerk's office, with proof of the construction of the road on the line indicated, is sufficient to show such a permanent location as to entitle it to have a tax voted to it put upon the tax-duplicate, under the Indiana statute. Chaffyn v. State, 91 Ind. 324.

nor require a map, survey or description to be recorded, the company which first institutes proceedings to condemn a particular tract of land will have priority of right to appropriate it,[94] provided such proceedings have been lawfully begun.[95] Where the statute does not require a railroad company, after making a location, to keep stakes in position along the proposed line, or to file or record a map of its proposed route, a failure to keep its lines staked out will not imply an abandonment of the location so as to estop the company from denying the right of another company to construct its road thereon.[96] As

[94] Lake Merced Water Co. v. Cowles, 31 Cal. 215. But see Atlanta &c. R. Co. v. Southern R. Co. 131 Fed. 657, 666, in which, however, the text is cited with approval. See, also, Minneapolis &c. R. Co. v. Chicago &c. R. Co. 116 Ia. 681; 88 N. W. 1082, 1085, also citing text. It should be noted that in these cases the company against which the condemning company was unsuccessfully claiming a prior right was a purchaser, or treated as a purchaser, rather than as an appropriator under the eminent domain, and the statutes were also different from those involved in some of the other cases. We quote from the opinion of the able judge in the federal case, as follows: "The appellant acquired no title or interest in the land by merely commencing a proceeding for its appropriation, nor the land-owner any right to require the petitioner to take the land it sought to appropriate. The purpose to appropriate may be abandoned even after the assessment of damages. (Citing a number of authorities.) The only right which can be said to result from mere priority of time in the institution of such a proceeding is an equitable right of priority over a later effort to acquire the same property for a like purpose, whether by a like proceeding or contract with notice, actual or constructive. The case of Barre R. Co. v. Montpelier Companies, 61 Vt. 1; 17 Atl. 923; 4 L. R. A. 785; 15 Am. St. 877, and similar cases therein cited, stands upon the effect of the filing and registering of a definite survey and location made in pursuance of statute law. That case, and those upon which it rests, are placed upon the ground that by the requirement of a definite survey, and its registration, the Legislature intended that thereby a prior right to appropriate the lands pointed out should inure, and that this right is a lien or right or interest in the land, which would ripen into a title upon a purchase or condemnation. Mere priority of right accorded to one petitioner over another, upon the ground of priority in time should not have any retrospective operation, so as to give precedence over an earlier acquisition of the same right of way by contract."

[95] San Francisco &c. Co. v. Alameda Water Co. 36 Cal. 639.

[96] Pittsburgh &c. R. Co. v. Pittsburgh &c. R. Co. 159 Pa. St. 331; 28 Atl. 155; 57 Am. & Eng. R. Cas. 46. In this case it was held that the lapse of five years and two

against the land-owner himself, under the laws of most of the states, the corporation acquires no rights by the act of location except a paramount right of purchase or condemnation for railroad purposes as soon as the value of the land has been legally ascertained and compensation paid.[97] It cannot enter upon the land for the purpose of constructing its road until the damages have been assessed and paid or secured.[98] Where, however, the right to the location has become fixed, the railroad company cannot be deprived of its priority by the subsequent incorporation of a city which included the lands through which the railroad was laid out.[99]

§ 927a. Construction of "from" and "to"—Terminus "at or near." —The question has often arisen whether a charter granting the right to construct a railroad "from" one named terminus "to" another authorizes the construction of a road into the corporate limits of these cities or towns, or whether it only confers the right to construct the road to the boundaries of the termini. The great weight of authority regards these terms as inclusive, and as giving the railroad company

months' time after the location of a branch road, without anything being done toward its construction, is not sufficient evidence of the abandonment of the location. See New Brighton &c. R. Co. v. Pittsburgh &c. R. Co. 105 Pa. St. 13; Washington &c. R. Co. v. Coeur D'Alene &c. Co. 160 U. S. 77; 16 Sup. Ct. 231.

[97] In Sioux City &c. R. Co. v. Chicago &c. R. Co. 27 Fed. 770, Judge Shiras said: "The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but as against the railroad company, it may have a prior right and better equity. The right to the use of the way is a public, not a private right. It is, in fact, a grant from the state, and although the payment of the damages to the owner is a necessary prerequisite, the state may define who shall have the prior right to pay the damages to the owner, and thereby acquire a perfected right to the easement. The owner can not by conveying the right of way to A., thereby prevent the state from granting the right to B. All that the owner can demand is that his damages shall be paid."

[98] Stimson Am. Stat. (1892), § 8753; Elliott Roads and Streets, 180. When the company locates its line over land it secures a vested right to enter and occupy the lands covered as soon as the damages have been paid or secured. Lafferty v. Schuylkill &c. R. Co. 124 Pa. St. 297; 16 Atl. 869; 3 L. R. A. 124, and note; 10 Am. St. 587; 36 Am. & Eng. R. Cas. 575.

[99] Dowie v. Chicago &c. R. Co. 214 Ill. 49; 73 N. E. 354.

the right to enter the terminus.[100] And the case is especially clear where the railroad company, by its charter, is authorized to bring its road to a city and is also given the right to acquire property within it.[101] But it would seem that a railroad company having built its road to the town named as a terminus under a charter thus limited cannot be compelled to run its tracks into and construct depots in the town.[102] The terminus is sometimes indefinitely designated in the charter as "at or near" a specified town. This term will receive a reasonable construction. In one case, where a charter authorized a terminus thus designated, it was held that a location one and one-half miles from the town named was not an abuse of the company's discretion.[103]

§ 928. Contracts to influence location.—Contracts made with the officers of a railroad company, and for their own personal benefit, by which it is sought to influence them to procure the road to be built on a particular location,[104] or to procure the location of a depot at a particular point,[105] are absolutely void. Thus a contract by which the officers of the company are to be given a share in certain lands, on condition that the railroad shall be so located as to pass through them, is illegal and void.[106] Such an agreement, it is said, must either be

[100] Chicago &c. R. Co. v. Chicago &c. R. Co. 112 Ill. 589; St. Louis &c. R. Co. v. Hannibal &c. Co. 125 Mo. 82; 28 S. W. 483; Waycross &c. R. Co. v. Offerman &c. R. Co. 109 Ga. 827; 35 S. E. 275; Western Pennsylvania R. Co.'s Appeal, 99 Pa. St. 155; Tennessee &c. R. Co. v. Adams, 40 Tenn. 596; Rio Grande R. Co. v. Brownsville, 45 Tex. 88. See, also, ante, § 41. But see Northeastern R. Co. v. Payne, 8 Rich. L. (S. Car.) 177; Commonwealth v. Erie &c. R. Co. 27 Pa. St. 339; 67 Am. Dec. 471, and note.

[101] Moses v. Pittsburgh &c. R. Co. 21 Ill. 516.

[102] People v. Louisville &c. R. Co. (Ill.) 5 N. E. 379.

[103] Park's Appeal, 64 Pa. St. 137.

[104] Berryman v. Cincinnati &c. R. Co. 14 Bush (Ky.), 755; Bestor v. Wathen, 60 Ill. 138; Fuller v. Dame, 18 Pick. (Mass.) 472.

[105] Pacific R. Co. v. Seely, 45 Mo. 212; 100 Am. Dec. 369; Holladay v. Patterson, 5 Ore. 177.

[106] Cook v. Sherman, 20 Fed. 167; 16 Am. & Eng. R. Cas. 561; Woodstock Iron Co. v. Richmond Extension Co. 129 U. S. 643; 9 Sup. Ct. 402; 38 Am. & Eng. R. Cas. 683. In Union Pacific R. Co. v. Durant, 3 Dill. (U. S.) 343; 1 Cent. L. J. 581, it was held by Judge Dillon that where the president uses his power oppressively and by threats to compel citizens to convey lands to him for the company, the court will decree a reconveyance to the grantors. In Fuller v. Dame, 18 Pick. (Mass.) 472, the owner of

in the nature of a bribe to procure the location of the road where it would not be of the greatest benefit to the stockholders, or it is a contract to pay the directors for doing what they were already bound to do but were fraudulently claiming they would not do, and is, therefore, without consideration; and in either case it cannot be enforced.[107] Such a contract will not be enforced even when the officers profess to act for the company in making it. Thus a contract to lay off 160 acres of land into town lots, and to make a deed to one-fourth of the lots to such persons as the directors might designate, in consideration that a depot should be located on the lands, is contrary to sound public policy, and cannot be enforced even at the suit of the railroad company.[108] Contracts by which some benefit is secured to the corporation itself by the choice of a particular location are upheld so long as they do not infringe the rights of the public, and for this reason contracts of subscription and grants of land, conditioned upon the location of the road or a depot at a particular place, if fairly made, are upheld in most of the states.[109] But contracts by which it is sought to prevent the establishment of a rival depot at some other point, where the interests of the corporation and of the public de-

a large tract of land in the south part of Boston agreed with one of the stockholders of a railroad company to pay him $9,600 for his services in inducing the company to run its road through that land, and to fix its termination and principal depot at a certain point. Suit having been brought upon the note, it was held that the contract was contrary to public policy, and that the note given in consideration of it was void.

[107] Bestor v. Wathen, 60 Ill. 138.

[108] Pacific R. Co. v. Seely, 45 Mo. 212; 100 Am. Dec. 369.

[109] Cook Stock and Stockholders (3d ed.), § 83; ante, §§ 121, 362, 385, 386. See, also, Piper v. Choctaw &c. Co. 16 Okl. 436; 85 Pac. 965. In Louisville &c. R. Co. v. Sumner, 106 Ind. 55; 5 N. E. 404; 55 Am. R. 719, the court said: "Public policy as declared by the legislature and enforced by this court, permits counties, cities and townships to make subscriptions or donations to railway corporations, subject to conditions in respect to the location of depots. We can see no good reason why the courts should declare a different policy as between individuals and railway companies." But in Dix v. Shaver, 14 Hun (N. Y.), 392, it was held that an agreement by a land-owner that, if the railroad company will construct its road on a specified line, he will pay a certain sum of money, is against public policy and can not be enforced. And see Fort Edward &c. Co. v. Payne, 15 N. Y. 583; Butternuts &c. Turnp. Co. v. North, 1 Hill (N. Y.), 518.

mand it,[110] and contracts by which it is sought to bind the corporation to select a particular route cannot be enforced against the company to the injury of the public.[111]

§ 929. Change of location—When authorized.—The general railroad laws of many of the states provide for slight changes in the route of a railroad whenever it is necessary to improve the location[112] and the change can be made without departing from the general route or avoiding any points named in the company's charter. Indeed, it is held that a railroad company may, under the general power to locate its road, change its location whenever it is shown to be necessary, so long as no steps have been taken toward securing possession of the first location.[113] Gross injustice might arise from holding a company

[110] Louisville &c. R. Co. v. Sumner, 106 Ind. 55; 5 N. E. 404; 55 Am. R. 719; 24 Am. & Eng. R. Cas. 641; Williamson v. Chicago &c. R. Co. 53 Iowa, 126; 4 N. W. 870; 36 Am. R. 206, and note; Marsh v. Fairbury &c. R. Co. 64 Ill. 414; 16 Am. R. 564; St. Louis &c. R. Co. v. Mathers, 71 Ill. 592; 22 Am. R. 122; St. Louis &c. R. Co. v. Mathers, 104 Ill. 257; 9 Am. & Eng. R. Cas. 600; St. Joseph &c. R. Co. v. Ryan, 11 Kan. 602; 15 Am. R. 357. But see Mahaska Co. R. Co. v. Des Moines &c. R. Co. 28 Iowa, 437.

[111] But damages may be awarded against a railroad company for the breach of an agreement made in consideration of a right of way across the plaintiff's lands, by which the company undertook to maintain its track at certain places and to provide the plaintiff with private side tracks connecting with his warehouse. Chapman & Harkness v. Mad River &c. R. Co. 6 Ohio St. 119. See, also, Louisville &c. R. Co. v. Sumner, 106 Ind. 55; 5 N. E. 404; 55 Am. R. 719.

[112] Stimson Am. Stat. (1892) § 8757.

[113] Mahaska Co. R. Co. v. Des Moines Valley R. Co. 28 Iowa, 437; Hagner v. Pennsylvania &c. R. Co. 154 Pa. St. 475; 25 Atl. 1082; 57 Am. & Eng. R. Cas. 648. In this last case the court said: "It may be said that the company, having made its location, should be held to it. This would impose unnecessary hardship upon the company. The location may have been made in good faith, but subsequent investigation or action may show that a construction according to the location is not feasible. Suppose, in this case, the company had been restrained from crossing the Philadelphia and Reading road under grade, because of unnecessary injury to the road so crossed. To hold that in such a case the company had exhausted its powers, and could not change the location, might deprive the public of necessary railroad facilities. . . . We are aware that it has been decided that a railroad company may not change its location after damages for land taken are assessed (Neal v. Pittsburgh &c. R. Co. 31 Pa. St. 19; Beale v. Pennsylvania &c. R. Co.

bound by all the details of an experimental survey,[114] and the company has, in general, full power and discretion to correct any errors in its first survey. And it will not be disturbed in the exercise of this discretion unless it has clearly erred.[115] The Supreme Court of Vir-

86 Pa. St. 509); but these decisions are based upon the ground that a railroad company has no right to experiment upon the question of damages. It can not change its location to escape the payment of unsatisfactory damages. But in the case before us no work was done on the original line at the time the change was made, and no steps were taken to assess damages; therefore the grounds upon which the foregoing decisions are based do not exist in our case. If changes in location can not be made when proper railroad construction demands them, the public must suffer as well as the corporation. Mistakes will happen in engineering, as well as in other work, and such mistakes may not be discovered until after the location of the road. While the location continues, the owner, by reason of the appropriation of his land, may sustain some damages. These should be paid, and when they are paid no one is injured by a change of location made in good faith." See, also, Washington &c. R. Co. v. Coeur D'Alene &c. Co. 60 Fed. 881, affirmed in 160 U. S. 77; 16 Sup. Ct. 231; Memphis &c. R. Co. v. Union R. Co. (Tenn.) 95 S. W. 1019.

[114] In 19 Am. & Eng. Enc. of Law, 830, it is said: "The correct rule, therefore, seems to be that while a railroad company may not change its location from motives of caprice, or for the sake of private individual convenience, it may do so whenever the interest or convenience of the public is to be subserved thereby and where it is essential to the accomplishment of the ends for which the road is being built." See Mississippi &c. R. Co. v. Devaney, 42 Miss. 555; 2 Am. 608; South Carolina R. Co. Ex parte, 2 Rich. L. (S. Car.) 434; South Carolina R. Co. v. Blake, 9 Rich. L. (S. Car.) 228; New Orleans &c. R. Co. v. Second Municipality, 1 La. Ann. 128; Atlantic R. Co. v. St. Louis, 66 Mo. 228; Works v. Junction R. Co. 5 McLean (U. S.), 425; Eel River &c. R. Co. v. Field, 67 Cal. 429; 7 Pac. 814; 22 Am. & Eng. R. Cas. 91; McCartney v. Chicago &c. R. Co. 112 Ill. 611; Minneapolis &c. R. Co. v. St. Paul &c. R. Co. 35 Minn. 265; 28 N. W. 705; 26 Am. & Eng. R. Cas. 638; Hewitt v. St. Paul &c. R. Co. 35 Minn. 226; 28 N. W. 705; 27 Am. & Eng. R. Cas. 342; New York &c. R. Co. In re, 88 N. Y. 279; 10 Am. & Eng. R. Cas. 113; Mahaska Co. R. Co. v. Des Moines Valley R. Co. 28 Iowa, 437; Hoard v. Chesapeake &c. R. Co. 123 U. S. 222; 8 Sup. Ct. 74; North Missouri R. Co. v. Lackland, 25 Mo. 515; Collier v. Union R. 113 Tenn. 96; 83 S. W. 155 (deviation to avoid destruction of mill justified). But compare Lake Shore &c. R. Co. v. Baltimore, 149 Ill. 272; 37 N. E. 91; State v. New Haven &c. R. Co. 45 Conn. 346; Leverett v. Middle Georgia &c. R. Co. 96 Ga. 385; 24 S. E. 154.

[115] Hentz v. Long Island R. Co. 13 Barb. (N. Y.) 646. Equity will not restrain the directors of a rail-

ginia has held that a railroad company accepting an amendment to its charter, allowing it to reach its terminal over a connecting line instead of over a line of its own construction, as required by original charter, cannot urge, as excuse for failure to avail itself of either method of reaching the terminal, that both methods would have resulted in financial loss to the company.[116]

§ 930. Change of location after first location is finally completed. —When the company has exercised its discretion by making a final location of its road and filing a map of its proposed route, thereby fastening upon the right of way its claim for an easement,[117] and especially after the damages have been assessed,[118] the company cannot change its route and invoke the power of eminent domain to procure another right of way except for reasons amounting to a legal necessity for the second taking,[119] and a successor to the original company has no greater rights as to a relocation after its predecessor has exercised its discretion in the matter.[120] "Once located," it is said, "a railroad is permanently located for the whole term of its existence, subject only to the exceptions of a specially granted express legis-

road company unless it is shown that they wantonly or capriciously disregard the rights of others. Anspach v. Mahanoy &c. R. Co. 5 Phil. (Pa.) 491.

[116] Winchester &c. R. Co. v. Commonwealth (Va.), 57 S. E. 692.

[117] Neal v. Pittsburgh &c. R. Co. 2 Grant's Cas. (Pa.) 137; 31 Pa. St. 19; Old Colony R. Co. v. Miller, 125 Mass. 1; 28 Am. R. 194; Davidson v. Boston &c. R. Co. 3 Cush. (Mass.) 91; San Francisco &c. R. Co. v. Mahoney, 29 Cal. 112.

[118] Railway companies, it is said, may make experimental surveys at pleasure, before finally locating their route. But they can not have experimental suits at law, as means of chaffering with the land-owners for the cheapest route. The power of taking any man's land by such company is exhausted by a location. It can not be indulged with another choice. Neal v. Pittsburgh &c. R. Co. 2 Grant's Cases (Pa.), 137; 31 Pa. St. 19; Beale v. Pennsylvania &c. R. Co. 86 Pa. St. 509.

[119] Moorhead v. Little Miami R. Co. 17 Ohio, 340; Little Miami R. Co. v. Naylor, 2 Ohio St. 235; 59 Am. Dec. 667; Griffin v. House, 18 Johns. (N. Y.) 397; Brown v. Atlantic &c. R. Co. 126 Ga. 248; 55 S. E. 24. A railroad company may condemn land for its relocation, if there be a manifest necessity for the change of location, and no detriment accrues to the public. Mississippi &c. R. Co. v. Devaney, 42 Miss. 555; 2 Am. R. 608. But as to what is not such a necessity, see Lusby v. Kansas City &c. R. Co. 73 Miss. 360; 19 So. 239; 36 L. R. A. 510, and note; State v. New Haven &c. R. Co. 45 Conn. 346.

[120] Brown v. Atlantic &c. R. Co. 126 Ga. 248; 55 S. E. 24.

lative enactment, authorizing a change or relocation."[121] If a change of location is made under statutory authority after condemnation proceedings have begun, and because the award of damages is unsatisfactory, and the proceedings are abandoned, the railroad company must pay all damages and costs occasioned by their institution.[122] After the road has been constructed the company will not be permitted to change its route and exercise the power of eminent domain to procure a new right of way, excepting where it has statutory authority to make the change.[123] Some courts, however, hold that a railroad company may condemn land for the purpose of varying, altering, and repairing the road upon a proper showing of its necessity. But in such a case the petition for condemnation must allege in detail the facts showing the taking to be necessary, and such allegations are traversable by the land-owner.[124] Where the power to change the location of a railroad whenever that location could be improved was expressly given by statute, it was held that the power could be exercised after a partial construction of the road.[125] And it is firmly set-

[121] State v. Mobile &c. R. Co. 86 Miss. 172; 38 So. 732.

[122] North Missouri R. Co. v. Reynal, 25 Mo. 534; Leisse v. St. Louis &c. R. Co. 2 Mo. App. 105; 72 Mo. 561; 6 Am. & Eng. R. Cas. 611, note; Hudson River R. Co. v. Outwater, 3 Sandf. (N. Y.) 689; Drath v. Burlington &c. R. Co. 15 Neb. 367; 18 N. W. 717; 20 Am. & Eng. R. Cas. 385. In Hagner v. Pennsylvania &c. R. Co. 154 Pa. St. 475; 25 Atl. 1082, the opinion is expressed that the mere location of a railroad across land may give a claim for damages, though the land is never condemned. The court says: "While the location continues, the owner, by reason of the appropriation of his land, may sustain some damages. These should be paid, and when they are paid, no one is injured by a change of location made in good faith."

[123] Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325; 94 Am. Dec. 84; Works v. Junction R. Co. 5 McLean (U. S.), 425. See, also, State v. Norwalk &c. Turnp. Co. 10 Conn. 157; Louisville &c. Turnp. Co. v. Nashville &c. Turnp. Co. 2 Swan (Tenn.), 282; Brown v. Atlantic &c. R. Co. 126 Ga. 248; 55 S. E. 24. But see Colorado Eastern R. Co. v. Union Pac. R. Co. 41 Fed. 293.

[124] South Carolina R. Co. v. Blake, 9 Rich. L. (S. Car.) 228; Knight v. Carrolton R. Co. 9 La. Ann. 284; Mississippi &c. R. Co. v. Devaney, 42 Miss. 555; 2 Am. R. 608.

[125] Lewis Eminent Domain (1888), § 258, citing Eel River &c. R. Co. v. Field, 67 Cal. 429; 7 Pac. 814; Cape Girardeau &c. R. Co. v. Dennis, 67 Mo. 438. In the case of Eel River &c. R. Co. v. Field, the statute provided as follows: "If at any time after the location of the railroad and the filing of the maps and profiles thereof, as provided in the preceding section, it appears that the location can be improved,

tled by the weight of authority that making one appropriation does not exhaust the power, but new appropriations of land for the construction of additional tracks, turnouts, engine houses, and other railroad facilities, may be made from time to time as the necessities of the road may require.[126] The right to change the location does not, as a rule, authorize a change in the termini, but only alterations in the route between the same termini.[127] It has been held, however, that a railroad company, having authority to construct branches, may effect a virtual change, not only of a portion of its route, but of its terminus, by the construction of a branch road, beginning at a point near the end of the line and running in the same general direction as the main line of the road.[128] It has been held that a grant contained in a special charter, of authority to vary the route and change the location of a railroad whenever a better and cheaper route could be had, or whenever any obstacle occurred, either by way of difficulty

the directors may . . . alter or change the same and cause new maps and profiles to be filed showing such changes, in the same offices where the originals are on file, and may proceed in the same manner as the original location was acquired to acquire and take possession of such new line, and must sell or relinquish the lands owned by them for the original location within five years after such change. No new location shall, as herein provided, be so run as to avoid any points named in their articles of incorporation." Cal. Civ. Code, § 467.

[126] Central Branch Union Pac. R. Co. v. Atchison &c. R. Co. 26 Kan. 669; St. Louis &c. R. Co. v. Petty, 57 Ark. 359; 21 S. W. 884; 20 L. R. A. 434, and note; Ligat v. Commonwealth, 19 Pa. St. 456; Black v. Philadelphia &c. R. Co. 58 Pa. St. 249; Philadelphia &c. R. Co. v. Williams, 54 Pa. St. 103; Water Comrs. v. Lawrence, 3 Edw. Ch. (N. Y.) 552; South Carolina R. Co. v. Blake, 9 Rich. L. (S. Car.) 228. "It would be, indeed, a disastrous rule to hold that a railroad company must, in the first instance, acquire all the ground it will ever need for its own convenience or the public accommodation. . . . The greatest degree of sagacity could hardly determine precisely what conveniences the future might demonstrate to be necessary to do its business with facility." Chicago &c. R. Co. v. Wilson, 17 Ill. 123. See, also, Toledo &c. R. Co. v. Daniels, 16 Ohio St. 390; Prather v. Jeffersonville &c. R. Co. 52 Ind. 16, 42. But see Lodge v. Philadelphia &c. R. Co. 8 Phila. (Pa.) 345.

[127] Attorney-General v. West Wisconsin R. Co. 36 Wis. 466; Snook v. Georgia Imp. Co. 83 Ga. 61; 9 S. E. 1104. But, see, Protzman v. Indianapolis Co. 9 Ind. 467; 68 Am. Dec. 650.

[128] Atlantic &c. R. Co. v. St. Louis, 66 Mo. 228.

of construction or inability to procure a right of way at reasonable cost, does not include authority to relocate the line after the road has been constructed, and to condemn land on which to build the road as relocated.[129] Indeed, most of the special charters granted to railroads have been construed to authorize but one exercise of the power of locating the road, and after this power has been exercised and a final location made, the power is held to be exhausted, and no change can thereafter be made, except by express consent of the legislature.[130] Where the charter enumerates the causes for which a change or relocation may be made, the route can only be changed for some cause that is fairly within the terms of the statute.[131] In New York, North Carolina and New Hampshire, provision is made for the relocation of a proposed railroad upon the petition of any land-owner aggrieved by the location as made by the company whenever a better route is shown to exist.[132] Where the company has built its road with-

[129] Atkinson v. Marietta &c. R. Co. 15 Ohio St. 21; Little Miami R. Co. v. Naylor, 2 Ohio St. 235; 59 Am. Dec. 667; Moorhead v. Little Miami R. Co. 17 Ohio, 340.

[130] Moorhead v. Little Miami R. Co. 17 Ohio, 340; Morris &c. R. Co. v. Central R. Co. 31 N. J. L. 205; Doughty v. Somerville &c. R. Co. 21 N. J. L. 442; People v. New York &c. R. Co. 45 Barb. (N. Y.) 73; Hudson &c. Canal Co. v. New York &c. R. Co. 9 Paige Ch. (N. Y.) 323; State v. Norwalk &c. R. Co. 10 Conn. 157; Hastings v. Amherst &c. R. Co. 9 Cush. (Mass.) 596; Brigham v. Agricultural &c. R. Co. 1 Allen (Mass.), 316; Works v. Junction R. Co. 5 McLean (U. S.), 425; Brooklyn Cent. R. Co. v. Brooklyn City R. Co. 32 Barb. (N. Y.) 358.

[131] Works v. Junction R. Co. 5 McLean (U. S.), 425; New York &c. R. Co. In re, 88 N. Y. 279; McRoberts v. Southern Minn. R. Co. 18 Minn. 108. In Works v. Junction R. Co. supra, it was held that the fact that a town situated upon the line of the road refused to contribute toward its construction was not sufficient reason for the relocation of the route under a charter authority to vary the location "either for the difficulty of construction, or of procuring a right of way at a reasonable cost, or whenever a better and cheaper route can be had."

[132] Laws 1890, N. Y. Ch. 565, § 2; Code of 1883, N. C. § 1952; Pub. Stat. (1892), N. H. Ch. 158, § 7. Where, in a proceeding under the New York statute, it appears that notice of the application for commissioners has not been given to an individual whose lands will be affected thereby such proceeding is wholly void. Norton v. Wallkill Valley R. Co. 63 Barb. (N. Y.) 77. The commissioners appointed by the court at the petition of a land-owner, as provided by the New York statute, have jurisdiction of the entire subject of the location of the route through the county

out resorting to the power of eminent domain, and is able to acquire a new right of way by purchase, or otherwise, without condemnation, it has authority to make any changes in its route that do not interfere with the rights of the public.[133] And the general rule against changing the location does not apply to a mere change of track from one part of the right of way to another.[134] It has been held that a provision in the charter of a railroad company requiring it to establish a terminal at one of two points named does not require it to maintain a terminal at each of these points, though it has constructed its road to both and established terminals at both.[135]

§ 931. Abandonment of location.—It is provided by statute, in many of the states, that a failure on the part of a railroad company to begin the construction of its road within a time limited shall amount to an abandonment of its location,[136] and many of the states

in which the land of the person applying for their appointment is situated, and are not confined to the consideration of necessary changes in that part of the route which passes through the land of the petitioner. Long Island R. Co. In re, 45 N. Y. 364. But they have no power to so change a portion of the proposed route as to leave it disconnected at either end with the other portions. People, ex rel. Erie &c. R. Co. v. Tubbs, 49 N. Y. 356. See, generally, under the New York statute, New York &c. R. Co. Matter of, 99 N. Y.) 388; 2 N. E. 35; Erie R. Co. v. Steward, 170 N. Y. 172; 63 N. E. 118.

[133] Mine Hill &c. R. Co. v. Lippincott, 86 Pa. St. 468. See, also, Dewey v. Atlantic Coast Line, 142 N. Car. 392; 55 S. E. 292; Chicago &c. R. Co. v. People, 222 Ill. 396; 78 N. E. 784. But where, in consideration of locating its machine shop and general offices in a certain city, it has received lands and other concessions from the city and citizens, it is held that it can not, by amending its charter, remove them to another city, and that the court may enforce specific performance by enjoining such removal. Tyler v. St. Louis &c. R. Co. (Tex.) 91 S. W. 1.

[134] Stark v. Sioux City &c. R. Co. 43 Ia. 501; Minneapolis &c. R. Co. v. St. Paul &c. R. Co. 35 Minn. 265; 28 N. W. 705; Dougherty v. Wabash &c. R. Co. 19 Mo. App. 419. But see Lake Shore &c. R. Co. v. Baltimore &c. R. Co. 149 Ill. 272; 37 N. E. 91; Chapman v. Mad River &c. R. Co. 6 Ohio St. 119, as to the effect of constructing a side-track or parallel road.

[135] Sherwood v. Atlantic &c. R. Co. 94 Va. 291; 26 S. E. 943.

[136] Stimson's Am. Stat. (1892), §§ 8759, 8908. See Fernow v. Chicago &c. R. Co. 75 Iowa, 526; 39 N. W. 769. Where the statute provided that in case any railroad company should not, within twelve months after the acceptance of the route by the commissioners, pay for a right of way over all the land cov-

which authorize a company to change its proposed route provide that such a change shall work an abandonment of so much of the old line as is affected by the change.[137] By abandoning its location the company loses all right thereto, and the land reverts to the owner.[138] In the absence of an express legislative enactment on the subject, perhaps, no court would be justified in fixing a limit at which a failure to construct its road should be held to be an abandonment of its location on the part of the company, but, if not controlled by the rule as to the loss of rights by prescription[139] the question is largely one of intention. Accordingly, it is held that a failure on the part of the company to construct its road for a number of years is not of itself sufficient to show an abandonment of its right of way.[140] Neither does

ered by its location, such acceptance should be void, it was held that such failure to pay for the right of way was not in the nature of a forfeiture, to be taken advantage of only by the state in a direct proceeding against the company, but that the whole proceeding became of no effect upon the expiration of twelve months. New York &c. R. Co. v. Boston &c. R. Co. 36 Conn. 196.

[137] Stimson Am. Stat. (1892), § 8757.

[138] Roanoke Investment Co. v. Kansas City &c. R. Co. 108 Mo. 50; 17 S. W. 1000; 51 Am. & Eng. R. Cas. 426; Hastings v. Burlington &c. R. Co. 38 Iowa, 316; Fernow v. Chicago &c. R. Co. 75 Iowa, 526; 39 N. W. 869; New York &c. R. Co. v. Boston &c. R. Co. 36 Conn. 196; Troy &c. R. Co. v. Boston &c. R. Co. 86 N. Y. 107; Girard College &c. R. Co. v. Thirteenth &c. R. Co. 7 Phila. (Pa.) 620; Harrison v. Lexington &c. R. Co. 9 B. Mon. (Ky.) 470. See, also, Mobile &c. R. Co. v. Kamper (Miss.), 41 So. 513; Spencer v. Wabash R. Co. (Ia.) 109 N. W. 453. But not where the railroad company has been deeded the land in fee by warranty deed. Enfield Mfg. Co. v. Ward, 190 Mass. 314; 76 N. E. 1053.

[139] Pittsburgh &c. R. Co. v. Pittsburgh &c. R. Co. 159 Pa. St. 331; 28 Atl. 155; 57 Am. & Eng. R. Cas. 46; Western Pennsylvania R. Co.'s Appeal, 104 Pa. St. 399. It has been held that an adjoining owner may obtain title to a part of the right of way of a railroad company by adverse possession, where its conduct shows a purpose to abandon the part of its location of which he has taken possession. Norton v. London &c. R. Co. L. R. 9 Ch. Div. 623; L. R. 13 Ch. Div. 268.

[140] Barlow v. Chicago &c. R. Co. 29 Iowa, 276 (thirteen years); Durfee v. Peoria &c. R. Co. 140 Ill. 435; 30 N. E. 686 (ten years); Pittsburgh &c. R. Co. v. Pittsburgh &c. R. Co. 159 Pa. St. 331; 28 Atl. 155; 57 Am. & Eng. R. Cas. 46 (five years); Roanoke Investment Co. v. Kansas City &c. R. Co. 108 Mo. 50; 17 S. W. 1000; 51 Am. & Eng. R. Cas. 426 (thirteen years); Western Pennsylvania R. Co.'s Appeal, 104 Pa. St. 399; Kansas City &c. R. Co. v. Kansas City &c. R. Co. 129 Mo. 62; 31 S. W. 451. Un-

the use of a part of the right of way for the erection of restaurants and places of amusement constitute an abandonment of the part so used if such structures conduce to the comfort of its passengers and augment its business.[141] Nor does the erection of a public elevator or warehouse by the company, or its licensee, to be used to facilitate the business of the company,[142] even if such use of its lands could be considered as unauthorized.[143] A sale or transfer of its right of way to another company, by whom the road is completed and operated, is not an abandonment.[144] And it has been held that the fact that a

der the Iowa statute a right of way of a railroad, "not used nor operated for a period of eight years," reverts to the owner of the land from which it was taken. Fernow v. Chicago &c. Co. 75 Iowa, 526; 39 N. W. 869; 36 Am. & Eng. Cas. 420.

[141] Prospect Park &c. R. Co. v. Williamson, 91 N. Y. 552. Where it was shown that the depot was not constructed upon ground condemned for depot purposes, but the land adjoined the depot and was improved and used for beautifying the depot grounds, it was held that the question whether the land was abandoned should be left to the jury. Muhle v. New York &c. R. Co. 86 Tex. 459; 25 S. W. 607, reversing (Tex. Civ. App.) 23 S. W. 809.

[142] Gurney v. Minneapolis &c. Co. 63 Minn. 70; 65 N. W. 136; 30 L. R. A. 534.

[143] Gurney v. Minneapolis &c. Co. 63 Minn. 70; 65 N. W. 136; 30 L. R. A. 534, citing Roby v. New York R. Co. 142 N. Y. 176; 36 N. E. 1053; Peirce v. Boston &c. R. Co. 141 Mass. 481; 6 N. E. 96.

[144] Crolley v. Minneapolis &c. R. Co. 30 Minn. 541; 16 N. W. 422; Henry v. Dubuque &c. R. Co. 2 Iowa, 288; Noll v. Dubuque &c. R. Co. 32 Iowa, 66; Junction R. Co. v. Ruggles, 7 Ohio St. 1; Hatch v. Cincinnati &c. R. Co. 18 Ohio St. 92; United States v. Little Miami &c. R. Co. 1 Fed. 700; 9 Reporter, 676; Commonwealth v. Central Pass. R. Co. 52 Pa. St. 506; State v. Rives, 5 Ired. L. (N. C.) 297; Commonwealth v. Tenth Mass. Turnpike Co. 5 Cush. (Mass.) 509. But in State v. Atchison &c. R. Co. 24 Neb. 143; 38 N. W. 43; 8 Am. St. 164, and note; 32 Am. & Eng. R. Cas. 388, it was held that a lease of its road without statutory authority was such an abandonment as to incur a forfeiture of the franchises of the company under a statute making the abandonment of its road or a material part thereof by a railroad company a cause of forfeiture. See, also, Blakely v. Chicago &c. R. Co. 46 Neb. 272; 64 N. W. 972 (sale an abandonment). In Roanoke Investment Co. v. Kansas City &c. R. Co. 108 Mo. 50; 51 Am. & Eng. R. Cas. 426, 435; 17 S. W. 1000, the court said: "It is not the policy of the law to permit a railroad to acquire a right of way to build a railroad, do some work on it, and then, after changing its route, and abandoning the easement, still claim and exercise the right to sell the right of way to another. The statute permitting it to acquire land limits

railroad company has entered into a contract to run its trains over the road of another company, and has taken up part of its own track, and permitted the owner of the adjoining lands to take possession thereof for cultivation, does not show an abandonment of another part of the right of way which is retained for use as a switch.[145] No general rule of law, applicable to all cases, can be laid down as to what constitutes abandonment of the whole or a part of its right of way by a railroad company, but the question whether abandonment exists in a given case must be determined by the particular circumstances of that case.[146] It is largely a question of intent, and, while long nonuser may be evidence of abandonment, yet mere nonuser does not of itself constitute an abandonment where there is no intent to abandon.[147] The relocation of part of a railroad in order to avoid real or

it to its own corporate purposes. It is not allowed to enter the market and speculate in real estate in this manner. When it ceases to use the land for the legitimate purposes indicated in its charter, the lands revert to the owner." A lease of land to a coal company for a coal yard into which the railroad company extended a switch by which they delivered coal to the lessee was held not to constitute an abandonment. Roby v. New York &c. R. Co. 142 N. Y. 176; 36 N. E. 1053. Where a railroad company not prohibited by statute from acquiring by purchase or condemnation the fee-simple of land, on abandoning for railroad purposes land whose fee it had bought conveys such fee to a purchaser for purposes unconnected with its road,—since there could be no reversion to the company's grantor, who had been paid full value for the fee, nor to his heirs—the title conveyed is at least good as against any private person. Chamberlain v. Northeastern R. Co. 41 S. Car. 399; 19 S. E. 743; 25 L. R. A. 139, and note; 44 Am. St. 717.

[145] Columbus v. Columbus &c. R. Co. 37 Ind. 294. Where a street railroad having a double track took up one of its tracks and operated its line as a single track road for a period of ten years, it was held that its right to operate a double track was not thereby lost, but that the company could relay the track which it had taken up. Hestonville R. Co. v. Philadelphia, 89 Pa. St. 210. But see Hickox v. Chicago &c. R. Co. 94 Mich. 237; 53 N. W. 1105.

[146] See Attorney-General v. Eastern R. Co. 137 Mass. 45; Henderson v. Central Pass. R. Co. 21 Fed. 358; Columbus v. Columbus &c. R. Co. 37 Ind. 294; Central Iowa R. Co. v. M. & A. R. Co. 57 Iowa, 249; 10 N. W. 639. In Muhle v. New York &c. R. Co. 86 Tex. 459; 25 S. W. 607, the question of what constitutes abandonment is held to be one for the jury.

[147] Nicomen Boom Co. v. North Shore &c. Co. 40 Wash. 315; 82 Pac. 412, 416 (citing text); Townsend v. Mich. Cent. R. Co. 101 Fed. 757; St. Louis &c. R. Co. v. Foltz, 52 Fed. 627, 633; Northern

seeming difficulties in the way of its construction upon the line as originally laid out amounts to an implied abandonment of a portion of the old line,[148] and permitting another company to occupy and use the land included within its location may estop a railroad company from denying that such location had been abandoned,[149] as will also, in general, any acts by which a clear intention to abandon is shown.[150]

Pac. R. Co. v. Smith, 171 U. S. 260; 18 Sup. Ct. 794; Southern Pac. R. Co. v. Hyatt, 132 Cal. 240; 64 Pac. 272; 54 L. R. A. 522; Durfee v. Peoria &c. R. Co. 140 Ill. 435; 30 N. E. 686; Barlow v. Chicago &c. R. Co. 29 Ia. 276; Morgan v. Des Moines &c. R. Co. 113 Ia. 561; 85 N. W. 902; Hummel v. Cumberland &c. R. Co. 175 Pa. St. 537; 34 Atl. 848; Virginia &c. R. Co. v. Crow, 108 Tenn. 17; 64 S. W. 485; 3 Elliott Ev. §§ 1578, 1579. Intention and non-user must co-exist. Stannard v. Aurora &c. Ry. Co. 220 Ill. 469; 77 N. E. 254.

[148] Stacey v. Vermont Central R. Co. 27 Vt. 39; Hagner v. Pennsylvania &c. R. Co. 154 Pa. St. 475; 25 Atl. 1082; 57 Am. & Eng. Cas. 648; Louisville &c. R. Co. v. Louisville &c. R. Co. 2 Duv. (Ky.) 175. In Colorado, upon the relocation of a railroad, the old location reverts to the land-owners on payment by them to the railroad company of the damages paid by the company to secure such previous right of way. Gen. Stat. 1883, Col. Sec. 2795. A provision evidently enacted at the instigation of the railroads themselves. But see Hickox v. Chicago &c. R. Co. 94 Mich. 237; 53 N. W. 1105.

[149] Coe v. New Jersey Midland R. Co. 31 N. J. Eq. 105; Chesapeake &c. Canal Co. v. Baltimore &c. R. Co. 4 G. & J. (Md.) 1.

[150] Where a route was wholly disused for a period of ten years, during which the company operated a competing line, and no disposition to relay the road was manifested until ten years had elapsed, and until after there was a move made by another railway company to obtain the route and operate a street railway over it, the court held that the evidence established an intention to abandon. Henderson v. Central Pass. R. Co. 21 Fed. 358. See, also, Louisville Trust Co. v. Cincinnati, 76 Fed. 296. But compare Wright v. Milwaukee &c. Co. 95 Wis. 29; 69 N. W. 791; 36 L. R. A. 47; 60 Am. St. 74; Denison &c. R. Co. v. St. Louis &c. Co. 30 Tex. Civ. App. 474; 72 S. W. 201. In Central Iowa R. Co. v. M. & A. R. Co. 57 Iowa, 249; 10 N. W. 639, the court held that making a survey of the unfinished portion of its line, and building station houses and sidetracks along the part which had been built was not satisfactory evidence that a company, which had done nothing toward building the part of road that remained incomplete, suspended operations with a bona fide intention of resuming them at some time in the future. A failure to run passenger trains is not evidence of abandonment where the road is regularly used for hauling freight, and, because of competition, no passengers are offered to the company for transportation at a price that would be a reasonable compensation for the service. Commonwealth v. Fitch-

The doctrine of abandonment will be applied with greater strictness, it seems, in a suit by the state against the company for nonuser of its franchises than in a suit by another corporation or a private individual, claiming title to the abandoned right of way.[151] And, under the Mississippi statute, it has been held that the state may enjoin the company from abandoning a portion of its road running through a town where it had maintained a depot.[152]

§ 931a. Relocation of stations.—A railroad company has the undoubted right, in the absence of anything to the contrary, to deter-

burg R. Co. 12 Gray (Mass.), 180. Leasing a parallel road for a period of ten years, and taking up its track, and allowing its right of way to be fenced in by the owner of the adjoining land during all of said ten years, is not an abandonment, where the intention to resume the use of the right of way at the expiration of the lease is clearly proved. Durfee v. Peoria &c. R. Co. 140 Ill. 435; 30 N. E. 686. Where a company had shown a disposition to abandon its proposed route, and, upon being remonstrated with by a committee of citizens from a town upon that route, replied through its chief engineer that the grade was so heavy that the road could not be built, where it then built its road over another route, did nothing toward building upon the land in dispute for a period of thirteen years, permitted the original owner and his assignee to make costly improvements, and even to fill up the cut which it had made without offering any protest, and finally conveyed its rights in the proposed route to another company, it was held that the evidence of abandonment was conclusive. The court said: "We think the intention to abandon and the absolute abandonment were consummated, the easement was lost, and the lands in question became discharged of this burden. Acts so decisive and conclusive in character as these have but one meaning. They indicate and prove a clear intention to abandon the right of way. Moore v. Rawson, 3 Barn. & Cr. 332; Liggins v. Inge, 7 Bing. 682; Louisville & N. R. Co. v. Covington, 2 Bush (Ky.), 526."

[151] State v. Atchison &c. R. Co. 24 Neb. 143; 38 N. W. 43; 8 Am. St. 164, and note; Crolley v. Minneapolis &c. R. Co. 30 Minn. 541; 16 N. W. 422. See, also, Chesapeake Beach R. Co. v. Washington &c. R. Co. 199 U. S. 247; 26 Sup. Ct. 25; Chicago &c. R. Co. v. Wright, 153 Ill. 307; 38 N. E. 1062. In the last case above cited, it was held that failure to complete the road within the time limited by its charter is not such an abandonment that it can be taken advantage of by third persons, in the absence of any action by the state.

[152] State v. Mobile &c. R. Co. 86 Miss. 172; 38 So. 732. See, also, Kansas City &c. Ry. v. Davis, 197 Mo. 669; 95 S. W. 881; Seaboard Air Line R. Co. v. Olive (N. Car.), 55 S. E. 263.

mine the location of its stations, provided it takes into account the convenience of the public and the interest of the company in deciding the matter, and this right, similarly limited, applies to the relocation of stations already established. An important inquiry in a proceeding to prevent abandonment and relocation is, whether persons previously using the station are deprived of reasonable facilities to transact business with the railroad company by reason of the change.[153] The mere fact that private citizens may have constructed residences or established business enterprises in view of the expectation that a depot established and maintained by a railroad company for many years would continue to be a regular stopping place for the trains of the company will not influence the court, in a mandamus proceeding, to compel the continuance of the depot and the stopping of trains there, where it appears that the patrons of the company in the vicinity suffer no inconvenience or hardship from the change.[154] The convenience of the railroad company, in making the change, is not the sole consideration. One court, addressing itself generally to this question, has said: "It would seem to be now well-settled, upon principles of public policy, that the decisive question in such a case should not be the convenience and benefit of the railway companies alone. They undoubtedly have a right to consider their own profit and convenience largely, but also owe duties to the public, for which reasons they have been permitted to establish their roads, and enjoy many substantial privileges depending on benefits which will accrue to patrons adjacent to their lines, and incidental to the obligations thus imposed must be the duty to treat the public fairly, and furnish them with reasonable facilities to enjoy the benefits they confer; hence the discontinuance of an established railway station, which their patrons have been permitted to use for years, upon the faith of whose location the people

[153] Mobile &c. R. Co. v. People, 132 Ill. 559; 24 N. E. 643; 22 Am. St. 556; State v. Des Moines &c. R. Co. 87 Ia. 644; 54 N. W. 461; State v. Alabama &c. R. Co. 68 Miss. 653; 9 So. 469; Chicago &c. R. Co. v. People, 222 Ill. 396; 78 N. E. 784; Butler v. Tifton &c. R. Co. 121 Ga. 817; 49 S. E. 763. A recent decision holds that the location of a union depot at the terminus of an important and much frequented street, 210 feet from the corporate line, within four blocks of the former depot in the city, and within the police jurisdiction of the city, will not be restrained because of its being beyond the city limits. Dewey v. Atlantic Coast Line (N. C.), 55 S. E. 292.

[154] Chicago &c. R. Co. v. People, 222 Ill. 396; 78 N. E. 784.

of a village and the surrounding country have depended, cannot be determined solely by the consideration whether a railway station is profitable to the road, nor upon its convenience and the adaptation of its affairs to the increased advantages and methods of transacting its business, nor by the test whether the continuance of a station will require it to incur increased expense. This wholesome conclusion is supported by authority, and is founded upon equity and reasonable grounds of general utility."[155]

[155] State v. Northern &c. R. Co. 90 Minn. 277; 96 N. W. 81, citing Railway Commrs. v. Portland &c. R. Co. 63 Me. 269; 18 Am. R. 208; People v. Louisville &c. R. Co. 120 Ill. 48; 10 N. E. 657; People v. Chicago &c. R. Co. 130 Ill. 175; 22 N. E. 857; Mobile &c. R. Co. v. People, 132 Ill. 559; 24 N. E. 643; 22 Am. St. 556; State v. Sioux City &c. R. Co. 7 Neb. 357; Gladson v. State, 166 U. S. 427; 17 Sup. Ct. 627; 41 L. Ed. 1064.

CHAPTER XXXVII.

ACQUISITION OF RIGHT OF WAY.

§ 932. How right of way may be acquired.—A right of way may be acquired by a railroad company by purchase, by grant, by dedica-

tion,[1] by adverse possession, by license, or by condemnation under the power of eminent domain. We have already treated of the acquisition of a right of way by public grant, and we shall consider the subject of eminent domain in a subsequent chapter. In this chapter we shall consider the other modes of acquiring a right of way. The first is by purchase.

§ 933. Authority to purchase.—Railroads are generally authorized to purchase the necessary lands for a right of way and for the erection of station-houses, repair shops, and other accommodations for the transaction of their business,[2] or to take such land by gift[3] or as a consideration for any agreement which the company is empowered to make. Indeed, an attempt to purchase or agree upon the compensation is usually made a condition precedent to the exercise of the power of eminent domain.[4] But, even without special statutory authority, a railroad company could, if not expressly forbidden to do so,

[1] But see post, § 947. In Clark v. Wabash R. Co. (Ia.) 109 N. W. 309, it is said that "a railroad right of way is an easement which can be acquired only by grant, either from the owner or from the state, through the exercise of the right of eminent domain, or by prescription;" but there was no question of dedication in the case.

[2] Stimson Am. Stat. (1892), § 8702. In Indiana the guardian of an infant or of a person non compos may agree with the railroad company for the sale of a right of way across his ward's land, if the court will approve of such agreement. 2 R. S. 1894, § 5160. That they have the right to purchase the right of way, see Munson v. Syracuse &c. R. Co. 103 N. Y. 58; 8 N. E. 355; McClure v. Missouri River R. Co. 9 Kans. 373; Chamberlain v. Northwestern R. Co. 41 S. Car. 399; 19 S. E. 743; 25 L. R. A. 139, and note; 44 Am. St. 717; Williamsport &c. R. Co. v. Philadelphia &c. R. Co. 141 Pa. St. 407; 21 Atl. 645; 12 L. R. A. 220, and note; State v. Boston &c. R. Co. 25 Vt. 433.

[3] Stimson Am. Stat. (1892), § 8702.

[4] See Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 116 Ind. 578; 19 N. E. 440; Terre Haute &c. R. Co. v. Scott, 74 Ind. 29; Ells v. Pacific R. Co. 51 Mo. 200; Powers v. Hazelton &c. R. Co. 33 Ohio St. 429; Brown v. Rome &c. R. Co. 86 Ala. 206; 5 So. 195; 36 Am. & Eng. Cas. 571; Omaha R. v. Gerrard, 17 Neb. 587; 24 N. W. 279; O'Hara v. Pennsylvania R. Co. 25 Pa. St. 445; Pennsylvania R. Co. v. National Docks &c. Co. 57 N. J. L. 86; 30 Atl. 183; Prospect Park &c. R. Co. In re, 67 N. Y. 371; Oregon &c. R. Co. v. Oregon &c. Co. 10 Ore. 444; Toledo &c. R. Co. v. Detroit &c. R. Co. 62 Mich. 564; 29 N. W. 500; 28 Am. & Eng. Cas. 272; 4 Am. St. 875; Cooley Const. Lim. § 761.

purchase such lands under its implied power as a corporation to acquire and hold whatever property is reasonably useful and convenient in attaining its legitimate ends.[5] A grantee in existence, and capable of taking, is ordinarily essential to every conveyance. Accordingly it has been held that, in the absence of special statutory authority, a railroad company can take nothing by a conveyance executed before its organization.[6] But it is competent for the legislature to authorize conveyances to be made to a corporation by name in advance of its organization as an inducement to the formation of the company, and such conveyances, upon ratification by the company after its organization, by entering upon the land and locating its line upon the same, become binding upon the grantor and the company.[7] So, of course, a conveyance may be taken by individuals in trust for the company when formed.[8] So, it has been held that a nonresident company which has no authority to condemn land may nevertheless acquire it by contract with the owner, and that the latter, by taking part in the condemnation proceedings and accepting the award, is estopped to deny that there was an implied contract for the right of way.[9]

§ 934. Who may convey.—A conveyance to a railroad company

[5] Blanchard's Gun Stock &c. Factory v. Warner, 1 Blatchf. (U. S.) 258; Old Colony R. Co. v. Evans, 6 Gray (Mass.), 25; 66 Am. Dec. 394; Moss v. Averell, 10 N. Y. 449; Spear v. Crawford, 14 Wend. (N. Y.) 20; 28 Am. Dec. 513; Ryan v. Leavenworth &c. R. Co. 21 Kan. 365, 400; Page v. Heineberg, 40 Vt. 81; 94 Am. Dec. 378, and note; Thompson v. Waters, 25 Mich. 214, 227; 12 Am. R. 243; Royal Bank of India's Case, L. R. 4 Ch. App. 252; L. R. 7 Eq. Cas. 91; 1 Bl. Com. 475, 478; 2 Kent's Com. 227; Morawetz Priv. Corp. (2d ed.) 327. In some states, foreign railroad companies are forbidden to acquire a right of way within the state until duly incorporated therein. Constitution of Nebraska (1875), Art. 11, § 8; Constitution of Mississippi (1890), § 197. But it has been held that a non-resident corporation may acquire a right of way and land for depot grounds, yards and machine shops by contract, although prohibited from doing so by condemnation. St. Louis &c. R. Co. v. Foltz, 52 Fed. 627. See American &c. Co. v. Minnesota &c. Co. 157 Ill. 641; 42 N. E. 153.

[6] Gage v. New Market &c. R. Co. 18 Q. B. (Eng.) 457. See Boston &c. R. Co. v. Babcock, 3 Cush. (Mass.) 228, and compare Chattanooga &c. Co. v. Evans, 66 Fed. 809. See Ante, § 409.

[7] Bravard v. Cincinnati &c. R. Co. 115 Ind. 1; 17 N. E. 183. Ante, § 409.

[8] Burrow v. Terre Haute &c. R. Co. 107 Ind. 432; 8 N. E. 167.

[9] St. Louis &c. R. Co. v. Foltz, 52 Fed. 627.

is subject to the same restrictions and conditions as if made to a person not possessing the right of eminent domain. The grantor can ordinarily convey only his own interest. A deed from the husband does not convey the wife's land,[10] and the same is true of a conveyance by the wife in which her husband does not join, where the husband is required by statute to join in all conveyances of land by the wife.[11]

[10] Galveston &c. R. Co. v. Donahoo, 59 Tex. 128; Texas &c. R. Co. v. Durrett, 57 Tex. 48; Pilcher v. Atchison &c. R. Co. 38 Kan. 516; 16 Pac. 945; 5 Am. St. 770. In Chicago &c. R. Co. v. Anderson, 42 Kan. 297; 21 Pac. 1059, it is held that the husband or wife had such an interest in the lands of the other as to be a necessary party to condemnation proceedings. But it has been held that where the husband is, in law, the absolute owner of all lands held in his name, and possessed of an absolute power of sale or alienation, that a statutory inhibition against the conveyance of any part of the "homestead" without the consent of the wife does not deprive the husband of the right to release to the railroad a right of way over which it has located its line. The railroad company could take the property by process of condemnation, if it were not released, in which case the damages assessed would be payable to the husband, and a release from him is merely a release of his claim for damages. Randall v. Texas Central R. Co. 63 Tex. 586; 22 Am. & Eng. R. Cas. 102. In Iowa, decisions to the same effect are put upon the ground that a release of a mere easement through a homestead for the construction of a railroad may be made by the husband without the consent of the wife if the occupancy of the right of way will not materially interfere with the use of the homestead premises as such. Chicago &c. R. Co. v. Swinney, 38 Iowa, 182. In Ottumwa &c. R. Co. v. McWilliams, 71 Iowa, 164; 32 N. W. 315; 29 Am. & Eng. R. Cas. 544, the same court held that a railroad running through a forty-acre homestead tract, through a cut, the edge of which was ninety-five feet, and the deepest part, in which the track was laid, 144 feet from the dwelling-house, did not destroy the homestead or defeat its occupancy as such. This was an action on a contract by which the husband bound himself to convey a fee-simple title to a strip of ground for a right of way for the railroad. The court below directed the conveyance of an easement, and its decree was approved on appeal. In Canty v. Latterner, 31 Minn. 239, it was held that the husband has the sole right to damages awarded on condemnation of property for a railroad right of way through a homestead, from which the doctrine of Randall v. Texas Central R. Co. would logically follow. But this position is denied in Iowa, and the court holds that the damages awarded are a part of the homestead. Kaiser v. Seaton, 62 Iowa, 463; 17 N. W. 664.

[11] Colorado Central R. Co. v. Allen, 13 Colo. 229; 22 Pac. 605; 44 Am. & Eng. R. Cas. 193. In this case it was held that the wife could con-

Nor does the deed of the mortgagor affect the mortgagee's interest.[12] A guardian cannot bind the trust estate by his deed for a right of way unless it is made with the approval of the court.[13] Nor can an executor or administrator, unless he has a power to sell.[14] If, however, the owner of an equitable interest in lands conveys to a railroad a right of way across them, and afterward perfects his title, it has been held that the new rights which he acquires will inure to the benefit of the railroad company.[15] A life tenant may convey the land during his tenancy for any use which does not injure the inheritance,[16] but he cannot bind the reversioner.[17] As in the case of private individuals,

vey her land to a railroad company without joining her husband under the act removing the disabilities of married women, even though the law required her husband to be joined with her in a suit by the railroad company to take the land under the power of eminent domain. In Texas &c. R. Co. v. Durrett, 57 Tex. 48, it was held that the husband could not, without the concurrence and consent of the wife as prescribed by statute, grant to a railroad company a right of way across the separate property of the wife. In Pickert v. Ridgefield Park R. Co. 25 N. J. Eq. 316, it is held that the wife can not, after the company has entered into possession and begun the construction of its road under an agreement with her husband who held the record title to the property and who made the agreement with her knowledge, enjoin the further prosecution of the work on the ground that she holds an unrecorded deed to the property, of which the railroad company had no opportunity to acquire knowledge.

[12] Wade v. Hennessy, 55 Vt. 207.

[13] Indiana &c. R. Co. v. Brittingham, 98 Ind. 294; Indiana &c. R. Co. v. Allen, 100 Ind. 409; State v. Commissioners, 39 Ohio St. 58. See, also, Myers v. McGavock, 39 Neb. 843; 58 N. W. 522; 42 Am. St. 627.

[14] Rush v. McDermott, 50 Cal. 471; Tompkins v. Augusta &c. R. Co. 21 S. Car. 420; Hankins v. Kimball, 57 Ind. 42.

[15] Indianapolis &c. R. Co. v. Rayl, 69 Ind. 424.

[16] Chicago &c. R. Co. v. Goodwin, 111 Ill. 273; 53 Am. R. 622; Tutt v. Port Royal &c. R. Co. 16 S. Car. 365; Hope v. Norfolk &c. R. Co. 79 Va. 283. See, also, Bentonville R. v. Baker, 45 Ark. 252.

[17] Bradley v. Missouri Pac. R. Co. 91 Mo. 493; 4 S. W. 427; Hope v. Norfolk &c. R. Co. 79 Va. 283; Bentonville R. v. Baker, 45 Ark. 252; Chicago &c. R. Co. v. Goodwin, 111 Ill. 273; 53 Am. R. 622; Austin v. Rutland &c. R. Co. 45 Vt. 215. Where the reversioner, and her trustee know of the grant of a right of way across the estate, and acquiesce in the construction and operation of the railroad thereon for many years, the trustee can not recover the land in the lifetime of the life tenant upon allegations of forfeiture for waste. Tutt v. Port Royal &c. R. Co. 20 S. Car. 110. Under the Canadian statute a tenant for life is authorized to convey to a railroad company, and the

the railroad company takes only the estate which its grantors had in the land. Thus the holder of a leasehold interest cannot be divested of his estate by a conveyance by his landlord.[18] Neither can the title of the landlord be prejudiced by a deed from the tenant.[19] Where the company enters under a deed from one tenant in common, it has been held a trespasser as to the other tenants in common who do not join in the deed.[20] Where the joint deed of husband and wife is nec-

latter remains liable to the reversioner or remainder-man for the proportion of the price due to his interest. Midland Railroad v. Young, 22 Can. S. C. 190.

[18] Chattanooga &c. R. Co. v. Brown, 84 Ga. 256; 10 S. E. 730; 43 Am. & Eng. R. Cas. 611; Burbridge v. New Albany &c. R. Co. 9 Ind. 546; Crowell v. New Orleans &c. R. Co. 61 Miss. 631.

[19] Toledo &c. R. Co. v. Dunlap, 47 Mich. 456; 11 N. W. 271.

[20] Rush v. Burlington &c. R. Co. 57 Iowa, 201; 10 N. W. 628. But in Charleston &c. R. Co. v. Leech, 33 S. Car. 175; 11 S. E. 631; 26 Am. St. 667; 43 Am. & Eng. R. Cas. 588, it was held that a railroad company, which had built its road across a farm belonging to its grantor and her three children as tenants in common, was entitled to an order compelling a partition of the land as upon the application of the grantor, and directing that, if possible, the allotment to the grantor should include the strip over which the company had constructed its road; and that proceedings instituted by the minor children to recover damages to their interests should be enjoined pending the partition proceedings. The court says: "Suppose the proceedings instituted by the minors for compensation and damages are allowed to proceed to final judgment before any partition is made. Of course the plaintiff would be compelled to pay them the amount so adjudged. And suppose that after this, when partition is made, it shall turn out that the railroad does not go through or over any portion of the land allotted to the minors, but goes only over the land allotted to Mrs. Leech, would not this be the greatest injustice to the plaintiff? For, in such case, the plaintiff will have been required to pay for a right of way over land for which it holds a grant, and to persons who, as it turns out, are not entitled to a foot of the land over which such right of way has been paid for." But the doctrine of this case is manifestly unsound, since the construction of a railroad across the property may have damaged it to a greater or less extent, and such damage could not be taken into account by the commissioners and charged against the interest of the grantor in effecting a partition. Indeed, it is conceivable that a tract of land of which but a small part was taken, should be damaged by the construction of a railroad across it to an amount greater than the entire interest of the tenant in common by whom alone its construction was authorized. Upon the general proposition that one tenant in common can not convey to a stranger a specific portion of the

essary to convey her real estate, a release of damages by a married woman, in which her husband does not join, has been held inoperative for any purpose.[21] Contracts of this kind, like all other contracts, are not binding upon the company unless those assuming to act for the corporation had the requisite authority, or their acts are afterwards ratified.[22]

§ 934a. Construction of deeds and contracts for right of way.— The ordinary rules governing the construction of similar instruments apply in general to the construction of deeds and contracts for a railroad right of way. Statutory provisions, and the nature and purpose for which a right of way is acquired and used, and other circumstances, may sometimes result, however, in causing a different interpretation, construction, or effect to be given to such a contract or some of its provisions from that which might be given to an ordinary deed or contract between indivduals for land or for a private right of way. The construction of provisions as to the location and extent of the right of way, and the particular rules applicable to conditions and covenants, are considered in subsequent sections in this chapter. Where, as is usually the case, the statute authorizes only an easement or interest in land, and not a fee to be taken by condemnation proceedings, a deed will not be construed to convey a fee in the absence of a clearly apparent intention to that effect.[23] Even where an agreement purported to grant and convey to a railroad company a "full right of way of the width of fifty feet," but closed with a statement that the

common estate so as to prejudice the rights of his co-tenants in the part conveyed, see Shepardson v. Rowland, 28 Wis. 108; Mattox v. Hightshue, 30 Ind. 95; Marsh v. Holley, 42 Conn. 453; Jewett v. Stockton, 3 Yerg. (Tenn.) 492; 24 Am. Dec. 594; Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139; Markoe v. Wakeman, 107 Ill. 251; Ballou v. Hale, 47 N. H. 347; 93 Am. Dec. 438; Dennison v. Foster, 9 Ohio, 126; 34 Am. Dec. 429; Good v. Coombs, 28 Tex. 34. See, also, Draper v. Williams, 2 Mich. 536. But compare Casteel v. St. Louis &c. R. Co. (Ark.) 99 S. W. 540.

[21] Delaware &c. R. Co. v. Burson, 61 Pa. St. 369. But see Mills Em. Dom. § 111. Where the statute authorizes the railroad company to acquire title by a release from the "owner," the fact that the wife does not release her inchoate right of dower is immaterial. Chouteau v. Missouri Pacific R. Co. 122 Mo. 375; 22 S. W. 458.

[22] Reynolds v. Dunkirk &c. R. Co. 17 Barb. (N. Y.) 613; Central Mills Co. v. New York &c. R. Co. 127 Mass. 537.

[23] See post, § 938. See, also, Shepard v. Suffolk &c. R. Co. 140 N. Car. 391; 53 S. E. 137.

land-owner also covenanted and agreed, when required by the company, to execute "a deed conveying to said company in fee-simple the land hereinbefore described," and the company did not demand a deed until the discovery, some years afterwards, that the land was valuable for gas and oil, it was held that the company took only an easement, and that nothing more was intended to be conveyed.[24] It was also said, in the same case, that as the agreement was prepared by the railroad company, and was ambiguous, the construction should be favorable to the land-owner, and the doubt "should be solved adversely to the railway company." On the other hand, it has been held that a deed granting a "right of way of sufficient width for the track, cuts and embankments of the said road, as also for turnouts and all other extensions and enlargements, or repair of the same from time to time, not to exceed one hundred feet on each side, with the right to use the earth, stone, and timber within the said tract for the construction, extension, or repair of the same road," conveys such rights as the company would be presumed to have acquired if it acquired them by condemnation proceedings under the statute.[25] Where the right of way is obtained by contract, as well as where it is acquired by condemnation, the company has a right to use suitable material, found within the limits of the right of way, for the construction of its road, but not to take it from the land outside of such limits unless there is additional compensation or an agreement to that effect.[26] It has also been held, in other cases, that a deed for a right of way gives the company the right to use it as the statute provides,[27] but that the

[24] Lockwood v. Ohio River R. Co. 103 Fed. 243. See, also, South Penn. Oil Co. v. Calf Creek Oil &c. Co. 140 Fed. 507.

[25] Harman v. Southern R. 72 S. Car. 228; 51 S. E. 689. See and compare § 938. See, also, Colgate v. New York &c. R. Co. 100 N. Y. S. 650; Seaboard Air Line R. Co. v. Olive (N. Car.), 55 S. E. 263. And the presumption is that the company in obtaining a right of way by agreement did not intend to barter away the right to make necessary improvements authorized by statute. Lilley v. Pittsburgh &c. R. Co. 213 Pa. St. 247; 62 Atl. 852.

[26] Hendler v. Lehigh Valley R. Co. 209 Pa. St. 256; 58 Atl. 486; 103 Am. St. 1005. In this case however, the right to take timber was excepted by the statute and the agreement was treated as having the same effect.

[27] Missouri &c. R. Co. v. Mott, 98 Tex. 91; 81 S. W. 285, 287, citing Calcasieu Lumber Co. v. Harris, 77 Tex. 18; 13 S. W. 453. See, also, Mobile &c. R. Co. v. Kamper (Miss.), 41 So. 513.

language of the deed should be interpreted in the light of the surrounding circumstances, in order to arrive at the intention of the parties,[28] and that, although it contains a clause giving the company the right to establish on the right of way so conveyed "any business connected with said railway or incident thereto," this does not give the right to erect and maintain stock pens that would constitute a nuisance.[29] A deed of a right of way given to correct a prior deed therefor, and expressly reserving to the grantor all rights under the former deed, has been held not to be a waiver of a former abandonment of the right of way by the company.[30] In another case, a deed granting a railroad company a right of way of a certain width across grantor's land, followed by the clause, "this right of way to be exclusive for one year," was held not to impose on the company the duty of entering within the year under penalty of a reversion of the grant, but merely to give to the company an exclusive right for one year to a way over grantor's land, after which the grantor was at liberty to grant other rights of way to other companies.[31] An election not to take advantage of an option to purchase land for right of way purposes is shown by the commencement of condemnation proceedings.[32]

§ 934b. Where route is not described in deed.—Generally, where a right of way is granted to a railroad company without any particular description of the route in the deed, the occupancy of a route by the railroad company with the consent of the grantor will sufficiently identify and locate the route granted.[33] And, in a recent case, where a description was insufficient in itself, but the company had been put in possession and had built the road, the court enforced the contract.[34]

§ 935. Enforcement of agreement to sell—Specific performance.—The railroad company may make a binding agreement for the pur-

[28] Missouri &c. R. Co. v. Mott, 98 Tex. 91; 81 S. W. 285, 288; Newaygo Mfg. Co. v. Chicago &c. R. Co. 64 Mich. 114; 30 N. W. 910.

[29] Missouri &c. R. Co. v. Mott, 98 Tex. 91; 81 S. W. 285.

[30] Gill v. Chicago &c. R. Co. 117 Iowa. 278; 90 N. W. 606.

[31] Virginia &c. R. Co. v. Crow, 108 Tenn. 17; 64 S. W. 485.

[32] Stamnes v. Milwaukee &c. R. Co. (Wis.) 109 N. W. 100.

[33] Gaston v. Gansville &c. R. Co. 120 Ga. 516; 48 S. E. 188. See, also, Wynkoop v. Burger, 12 Johns. (N. Y.) 222.

[34] Hoard v. Huntington &c. R. Co. (W. Va.) 53 S. E. 278.

chase of lands to be conveyed to it at some future time,[35] and may, in a proper case, enforce specific performance of the agreement on the part of the land-owner, under the rules governing decrees for specific performance of contracts in general.[36] These rules are briefly, but comprehensively, stated by Justice Story,[37] as follows: "An agreement, to be entitled to be carried into specific performance, ought to be certain, fair and just in all its parts. Courts of equity will not decree a specific performance in cases of fraud or mistake; or of hard and unconscionable bargains; or where the decree would produce injustice; or where it would compel the party to an illegal or immoral act; or where it would be against public policy; or where it would involve a breach of trust; or where a performance has become impossible; and, generally, not in any cases where such a decree would be inequitable under all the circumstances."[38] If, for any reason, it would be inequitable to compel performance, the party will usually be left to his remedy at law.[39] But a decree for specific performance of a contract may be granted in a proper case, even though the plaintiff has a remedy at law.[40] A defective description of land in an agreement to convey may be cured by putting the vendee into posses-

[35] Dayton &c. R. Co. v. Lawton, 20 Ohio St. 401; 55 Am. Dec. 464; Ross v. Chicago &c. R. Co. 77 Ill. 127.

[36] See, in general, Purinton v. Northern Illinois &c. R. Co. 46 Ill. 297; Telford v. Chicago &c. R. Co. 172 Ill. 559; 50 N. E. 105; Minneapolis &c. R. Co. v. Cox, 76 Ia. 306; 41 N. W. 24; 14 Am. St. 216; Clarke v. Rochester &c. R. Co. 18 Barb. (N. Y.) 350; Coe v. N. J. Midland R. Co. 31 N. J. Eq. 105; Boston &c. R. Co. v. Babcock, 3 Cush. (Mass.) 228; Blanchard v. Detroit &c. R. Co. 31 Mich. 43; 18 Am. R. 142; South Wales R. Co. v. Wythes, 5 DeG., M. & G. 880; Holmes v. Eastern Counties R. Co. 3 K. & J. 675; Flanagan v. Gt. Western R. Co. L. R. 7 Eq. 116; Hood v. Northeastern R. Co. L. R. 5 Ch. 525.

[37] Story's Equity Juris. § 769.

[38] See note, 43 Am. & Eng. R. Cas. 645.

[39] Coe v. New Jersey &c. R. Co. 31 N. J. Eq. 105; Whitney v. New Haven, 23 Conn. 624. The land-owner, as well as the railroad company, may have his action for damages for breach of the contract by the other party. Morss v. Boston &c. R. Co. 2 Cush. (Mass.) 536; Houston R. Co. v. McKinney, 55 Tex. 176; Hubbard v. Kansas City R. Co. 63 Mo. 68; Sherwood v. St. Paul &c. R. Co. 21 Minn. 122; Mills Em. Dom. § 113. Specific performance was refused for fraud in procuring the contract in Grand Tower &c. R. Co. v. Walton, 150 Ill. 428; 37 N. E. 920.

[40] Eastern Counties R. Co. v. Hawkes, 5 H. L. Cas. 331; Blanchard v. Detroit &c. R. Co. 31 Mich. 43; 18 Am. R. 142.

sion of a tract to which the description may be made to apply.[41] In such a case, conveyance of the tract so delivered to the vendee may be enforced in a court of equity.[42] And the mere fact that the value of the land exceeds the price agreed upon will not prevent a decree for specific performance, where the construction of the road is a part of the consideration.[43] The right to compel a specific performance of an agreement is reciprocal, and the land-owner may, in a proper case, compel the company to perform a contract to purchase.[44] A

[41] Purinton v. Northern Ill. R. Co. 46 Ill. 297; Ottumwa &c. R. Co. v. McWilliams, 71 Iowa, 164. See Burrow v. Terre Haute &c. R. Co. 107 Ind. 432; 8 N. E. 167; Indianapolis &c. R. Co. v. Rayl, 69 Ind. 424. In Hall v. Peoria &c. R. Co. 143 Ill. 163; 32 N. E. 598, it was held that a court of equity would decree a specific performance of the contract, though it was not in writing, where one agreed to convey land to a railroad company for depot purposes, the consideration being paid and accepted, and the land staked out by the grantor and occupied by the railroad company for twenty years, with valuable improvements. See, also, Sands v. Kagey, 150 Ill. 109; 36 N. E. 956; Cherokee &c. R. Co. v. Renken, 77 Ia. 316; 42 N. W. 307.

[42] Ottumwa &c. R. Co. v. McWilliams, 71 Iowa, 164; 32 N. W. 315. In this case suit was brought to enforce a contract to convey "a right of way" of a designated width "by deed in fee-simple," and the court decreed the conveyance of an easement for a right of way, and the supreme court affirmed the decree, saying: "The purposes for which the land was to be used, and the object of the plaintiff in securing the contract, was to secure a right of way, and not a fee-simple title to the land."

[43] Ottumwa &c. R. Co. v. McWilliams, 71 Iowa, 164; 32 N. W. 315. See Western R. Co. v. Babcock, 6 Met. (Mass.) 346.

[44] Viele v. Troy &c. R. Co. 20 N. Y. 184; Inge v. Birmingham &c. R. Co. 3 DeG., M. & G. 658; Williams v. St. George's Harbor Co. 2 DeG. & J. 547. Or recover damages. Minneapolis &c. R. Co. v. Cox, 76 Ia. 306; 41 N. W. 24; 14 Am. St. 216. In Hoard v. Huntington &c. R. Co. (W. Va.) 53 S. E. 278, the description was held insufficient, but as the company had been put in possession and had built the road it was held that the vendor should make a proper deed and that the company should pay the purchase money with interest. The fact that an application to parliament was necessary to make a good title, was held not to be a valid objection to a decree for the specific performance by a railroad company of its contract for the purchase of lands. Eastern Counties R. Co. v. Hawkes, 5 H. L. Cas. 331; Hawkes v. Eastern Counties R. Co. 1 DeG., M. & G. 737. But where the location of the railway for which the land was taken has been abandoned, and it would be inequitable to require the company to pay a price for the land based upon damages which were never inflicted, the court will not decree

contract signed by only one of the contracting parties cannot ordinarily be enforced by the signer,[45] but it may be enforced against him by the other party upon proof that he has acted upon it.[46]

§ 936. When specific performance will not be enforced.—Equity will not, as a rule, decree the specific performance of a contract to do a succession of acts extending through a long period of time, and requiring the exercise of skill and discretion in their performance.[47] Accordingly, the land-owner cannot enforce specific performance of a contract made in consideration of the grant of a right of way, by which the railroad undertakes to build a branch road,[48] to operate a line of railroad,[49] to stop daily trains a certain point on the

a specific performance. Webb v. Direct London &c. R. Co. 9 Hare, 129; 1 DeG., M. & G. 521; Whitney v. New Haven, 23 Conn. 624.

[45] Boston &c. R. Co. v. Bartlett, 10 Gray (Mass.), 384; Jacobs v. Peterborough &c. R. Co. 8 Cush. (Mass.) 223. And where the contract was a mere option to purchase it was held that the railroad company had elected not to take advantage of it by beginning condemnation proceedings. Stamnes v. Milwaukee &c. R. Co. (Wis.) 109 N. W. 100.

[46] Old Colony R. Co. v. Evans, 6 Gray (Mass.), 25; 66 Am. Dec. 394. But in Hall v. Peoria &c. R. Co. 143 Ill. 163; 32 N. E. 598, it was held that a court of equity would decree a specific performance of the contract, though it was not in writing, where one agreed to convey land to a railroad company for depot purposes, the consideration being paid and accepted, and the land staked out by the grantor and occupied by the railroad company for twenty years with valuable improvements. East Tennessee &c. R. Co. v. Davis, 91 Ala. 615; 8 So. 349.

[47] Marble Co. v. Ripley, 10 Wall. (U. S.) 339; Ross v. Union Pac. Co. Woolw. (U. S.) 26; Blanchard v. Detroit &c. R. Co. 31 Mich. 43; 18 Am. R. 142; South Wales R. Co. v. Wythes, 1 K. & J. (Eng.) 186; Ranger v. Great Western R. Co. 1 Eng. R. & Canal Cas. 1.

[48] Peto v. Brighton &c. R. Co. 1 H. & Miller, 468; South Wales R. Co. v. Wythes, 1 K. & J. 186; Munro v. Wivenhoe &c. R. Co. 4 DeG. J. & S. 723; Heathcote v. North Staffordshire R. Co. 20 L. J. N. S. Ch. 82; Waring v. Manchester &c. R. Co. 7 Hare, 482; Ross v. Union Pacific R. Co. Woolw. (U. S.) 26. In Hoard v. Chesapeake &c. R. Co. 123 U. S. 222; 8 Sup. Ct. 674, the court declined to enforce the specific performance of an agreement to build the railroad across certain lots through which it was granted a right of way.

[49] Port Clinton R. Co. v. Cleveland R. Co. 13 Ohio St. 544. In this case the P. C. Co. conveyed its line to the Cleveland Co. by lease in partial consideration of a covenant on the part of the Cleveland Co. to keep the road in operation. A railroad corporation, in consideration

road,[50] or to erect fences and cattleguards and keep them in repair.[51] But it has been held that the breach of such a contract may be prevented by injunction.[52] Where the railroad company makes a contract with

of a grant of the right of way through the premises of S., contracted to place beside their road, on said premises, a platform convenient for lading and unlading cars, and to take from that platform all produce to be shipped by S., and to bring and place on it all freight shipped by or for him to that place from any other point on their road, provided that the railroad had three days' notice of any such freight to be transported. Held, that a bill in equity would not lie to compel a specific performance of the contract. Atlanta &c. R. Co. v. Speer, 32 Ga. 550; 79 Am. Dec. 305.

[50] Blanchard v. Detroit &c. R. Co. 31 Mich. 43; 18 Am. R. 142. In this case the court said: "If the writing embodies any promissory agreement at all, it is that when and so long as trains run on the road, one train each way shall every day stop at that place, and also that passengers and freight shall there be regularly received and discharged. . . . Waiving all considerations of possible future action by the government under the postal, war, police or other powers, inconsistent with any particular decree which might now be made, can the court see that in all coming time these requirements are carried out? Can it know or keep informed whether trains are running, and what accommodations are suitable to the public interest? Can it see whether the proper stoppages are made each day? Can it take notice, or legitimately and truly ascertain from day to day, what amounts to regularity in the receipt and discharge of passengers and freight? Can it have the means of deciding at all times whether the due regularity is observed? Can it superintend and supervise the business, and cause the requirements in question to be carried out? If it can, and if it may do this in regard to one station on the road, it may with equal propriety upon a like showing to the same in regard to all stations on the road, and not only so, but in regard to all stations on all the present and future roads in the state."

[51] Cincinnati &c. R. Co. v. Washburn, 25 Ind. 259; Columbus &c. R. Co. v. Watson, 26 Ind. 50. But see opinion in Dayton v. Lewton, 20 Ohio St. 401; 55 Am. Dec. 464; Aikin v. Albany &c. R. Co. 26 Barb. (N. Y.) 289; Midland R. Co. v. Fisher, 125 Ind. 19; 24 N. E. 756; 8 L. R. A. 604, and note; 21 Am. St. 189. A covenant by a railroad company in consideration of a grant of a right of way to fence it and put in cattle-guards and crossings runs with the land, and is binding upon immediate and subsequent grantees, and passes to immediate and remote grantees of both the easement and the fee-simple. Toledo &c. R. Co. v. Cosand, 6 Ind. App. 222. See, also, Lake Erie &c. R. Co. v. Priest, 131 Ind. 413; 31 N. E. 77.

[52] It is now firmly established that the court will often interfere by injunction to restrain acts in violation of a lawful contract, although

persons who are known to have no interest in the lands through which it desires to run, by which such persons bind themselves to procure the owners to grant a right of way across such lands to the railroad, it cannot have a decree for specific performance, but must be left to its action at law for damages. The court will not command the defendants to control the actions of other persons not before the court.[53]

§ 937. Effect of conveyance or release of damages.—The conveyance of land to a railroad for a right of way[54] or the execution of a release of damages for its construction[55] usually has the same effect as the assessment and payment of damages under proceedings for condemnation, and the land-owner can claim no further damages for the legal and proper construction of the railroad.[56] The same effect has been given to a receipt by the owner for the amount of damages

the nature of the contract is such that specific performance would not be enforced. Singer Sewing Machine Co. v. Union &c. Co. 1 Holmes (U. S.), 253; Western Union Tel. Co. v. Union Pac. R. Co. 3 Fed. 423, 429; Coe v. Louisville &c. R. Co. 3 Fed. 775; Wells, Fargo & Co. v. Oregon &c. R. Co. 18 Fed. 517; Wells, Fargo & Co. v. Northern Pac. R. Co. 23 Fed. 469; Chicago &c. R. Co. v. New York &c. R. Co. 24 Fed. 516; 22 Am. & Eng. R. Cas. 265, and note on page 271. See, also, Tyler v. St. Louis &c. R. Co. (Tex.) 91 S. W. 1. For instances where affirmative acts have been required similar to those prayed for in the cases cited in preceding notes, see ante, § 635, et seq.

[53] Chicago &c. R. Co. v. Durant, 44 Minn. 361; 46 N. W. 676; 46 Am. & Eng. R. Cas. 488.

[54] St. Louis &c. R. Co. v. Hurst, 14 Ill. App. 419; St. Louis &c. R. Co. v. Walbring, 47 Ark. 330; 1 S. W. 545.

[55] Eaton v. Boston &c. R. Co. 51 N. H. 504; 12 Am. R. 147. See Trickey v. Schlader, 52 Ill. 78; Freeman v. Weeks, 45 Mich. 335; 7 N. W. 904.

[56] Norris v. Vermont Central R. Co. 28 Vt. 99; Gilbert v. Savannah &c. R. Co. 69 Ga. 396; Stodghill v. Chicago &c. R. Co. 43 Iowa, 26; 22 Am. R. 211; Houston &c. R. Co. v. Adams, 58 Tex. 476; International &c. R. Co. v. Bost, 2 Tex. Ct. App. (Civ. Cas.) 334; McCarty v. St. Paul &c. R. Co. 31 Minn. 278; 17 N. W. 616; Chicago &c. R. Co. v. Smith, 111 Ill. 363; Benson v. Chicago &c. R. Co. 78 Mo. 504; McDonald v. Southern California R. Co. 101 Cal. 206; 35 Pac. 643; North &c. R. Co. v. Swank, 105 Pa. St. 555; Watts v. Norfolk &c. R. Co. 39 W. Va. 196; 19 S. E. 521; 23 L. R. A. 674; 45 Am. St. 894; Croft v. London &c. R. Co. 3 B. & S. 436; 113 Eng. C. L. R. 435; Kirk v. Kansas City &c. R. Co. 51 La. Ann. 667; 25 So. 457, 461 (citing text). But it has been held that he is not barred from an action for damages caused by the construction of the road across the land of an adjoining proprietor Eaton v. Boston &c. R. Co. 51 N. H.

agreed upon.[57] It has been held that a release, to be binding, must have been executed by the owner while free from legal disabilities,[58] and must be free from fraud.[59] If it was made upon a condition, the performance of the condition must be shown.[60] It will be presumed, however, that a deed to the right of way, or a release of damages, was executed in contemplation of the lawful and proper construction of the road, and the land-owner will be permitted to recover for damages occasioned by negligence and lack of skill,[61] such as a failure to provide necessary culverts,[62] the diversion of a stream of water,[63] the negligent removal of earth by which the adjoining soil is deprived of support,[64] or the construction of its embankment in such a way as

504; 12 Am. R. 147; St. Louis &c. R. Co. v. Harris, 47 Ark. 340; 1 S. W. 609. See, also, Egbert v. Lake Shore &c. R. Co. 6 Ind. App. 350; 33 N. E. 659; Hartley v. Keokuk &c. R. Co. 85 Iowa, 455; 52 N. W. 352; Longworth v. Meriden &c. R. Co. 61 Conn. 451; 23 Atl. 827.

[57] Rockland Water Co. v. Tillson, 69 Me. 255.

[58] Delaware &c. R. Co. v. Burson, 61 Pa. St. 369.

[59] Rockford &c. R. Co. v. Shunick, 65 Ill. 223.

[60] Rockford &c. R. Co. v. Shunick, 65 Ill. 223. See, also, Humphreys v. Richmond &c. R. Co. 88 Va. 431; 13 S. E. 985; Bredin v. Pittsburgh &c. R. Co. 165 Pa. St. 262; 31 Atl. 39. But compare Matson v. Port Townsend &c. R. Co. 9 Wash. 449; 37 Pac. 705. In a recent case before the Missouri Supreme Court, it was held that the railway company's charter, by providing for relinquishment of the right of way by the "owner," impliedly made it unnecessary for the wife to join in the conveyance by reason of her inchoate right of dower, and it made no difference that the husband did not convey directly to the railroad, but by mesne conveyances. Chouteau v. Missouri Pac. R. Co. 122 Mo. 375; 22 S. W. 458; 30 S. W. 299.

[61] Hortsman v. Lexington &c. R. Co. 18 B. Mon. (Ky.) 218; Ludlow v Hudson River R. Co. 6 Lans. (N. Y.) 128; Spencer v. Hartford &c. R. Co. 10 R. I. 14; Hatch v. Vermont Central R. Co. 25 Vt. 49, 70; Jacksonville &c. R. Co. v. Cox, 91 Ill. 500. See, also, Sims v. Ohio River &c. R. Co. 56 S. Car. 30; 33 S. E. 746; Georgetown &c. R. Co. v. Eagles, 9 Colo. 544; 13 Pac. 696; Ohio &c. R. Co. v. Thillman, 143 Ill. 127; 32 N. E. 529; 36 Am. St. 359.

[62] Heath v. Texas &c. R. Co. 37 La. Ann. 728. See, also, Van Wert Co. v. Peirce, 90 Fed. 764; O'Connell v. East Tenn. &c. R. Co. 87 Ga. 246; 13 S. E. 489; 13 L. R. A. 394, and note; 27 Am. St. 246; Emery v. Raleigh &c. R. Co. 102 N. Car. 209; 9 S. E. 139; 11 Am. St. 727; Chicago &c. R. Co. v. Ely (Neb.), 110 N. W. 539.

[63] Stodghill v. Chicago &c. R. Co. 43 Iowa, 26; 22 Am. R. 211; Toledo &c. R. Co. v. Chicago &c. R. Co. 155 Ill. 9; 39 N. E. 809.

[64] Ludlow v. Hudson River R. Co. 6 Lans. (N. Y.) 128. See, also, Nading v. Denison &c. R. Co. (Tex.

to unnecessarily flood the grantor's land,[65] or leave dirt and rock upon a part not granted.[66] It has also been held that, where the statute requires a railroad company to fence its right of way, a conveyance of a right of way in consideration of a promise to fence is without consideration, and does not prevent the grantor from afterwards having his damages assessed.[67] So, it was held, in another case, that a deed conveying a right of way, and releasing all damages by reason of the location and construction of the railroad, did not release the grantor's right to a way of necessity across the land conveyed.[68]

§ 938. What estate is taken.—An estate in fee may be acquired by purchase, even though the corporation is created for a limited period, and the fee so acquired may be transferred to the successor or assignee of the company.[69] The question as to what estate is acquired by the railroad company under a grant must usually be settled by reference to the deed of conveyance.[70] And the mere fact that the railroad company's charter empowered it to acquire a greater estate than that which it contracted for does not affect its rights in the land

Civ. App.) 62 S. W. 97. It has been held that a general release of damages covered all damages from the making of cuts necessary to the proper enjoyment of the right of way, and that the company is not bound to build walls to prevent the banks from falling. Hortsman v. Covington &c. R. Co. 18 B. Mon. (Ky.) 218. See post, § 977.

[65] St. Louis &c. R. Co. v. Morris, 35 Ark. 622; New York &c. R. Co. v. Hamlet Hay Co. 149 Ind. 344; 49 N. E. 269; Hunt v. Iowa Cent. R. Co. 86 Ia. 15; 52 N. W. 668; 41 Am. St. 473.

[66] Watts v. Norfolk &c. R. Co. 39 W. Va. 196; 19 S. E. 521; 23 L. R. A. 674; 45 Am. St. 894.

[67] Shortle v. Terre Haute &c. R. Co. 131 Ind. 338; 30 N. E. 1084.

[68] New York &c. R. Co. v. Railroad Com'rs, 162 Mass. 81; 38 N. E. 27.

[69] Nicoll v. New York &c. R. Co. 12 N. Y. 121; Holt v. City &c. of Somerville, 127 Mass. 408; Hill v. Western Vermont R. Co. 32 Vt. 68. See, also, Coburn v. Coxeter, 51 N. H. 158; Page v. Heineberg, 40 Vt. 81; 94 Am. Dec. 378, and note; Watkins v. Iowa Central R. Co. 123 Iowa, 390; 98 N. W. 910; Enfield Mfg. Co. v. Ward, 190 Mass. 314; 76 N. E. 1053. In Wisconsin it is held that a railroad taking a warranty deed to a strip of land for its track acquires a title in fee, subject, at most, to forfeiture for nonuser or misuser, and not a mere easement. Hicks v. Smith, 109 Wis. 532; 85 N. W. 512.

[70] Cincinnati &c. R. Co. v. Geisel, 119 Ind. 77; 21 N. E. 470. See, also, as to the width, Olive v. Sabine &c. R. Co. (Tex.) 33 S. W. 139; Indianapolis &c. R. Co. v. Reynolds, 116 Ind. 356; 19 N. E. 141.

purchased.[71] Under the Missouri statute, however, it has been held that a railroad company takes only an easement under a deed purporting to convey the fee.[72] The courts of North Carolina[73] and Iowa[74] seem to take the same position, and hold that a deed conveying land to a railroad for a right of way gives the railroad no more rights than it would have acquired by condemnation. In the latter state it is said: "The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad which is usually a permanent improvement, a perpetual highway of travel and commerce, and will rarely be abandoned by nonuser. The exclusive use of the surface is acquired, and damages are assessed, on the theory that the easement will be perpetual; so that, ordinarily, the fee is of little or no value unless the land is underlaid by quarry or mine."[75] Where the intention to convey a fee does not appear,[76] as in case of the conveyance of a "right of way" for the railroad through certain lands,[77] the com-

[71] Cincinnati &c. R. Co. v. Geisel, 119 Ind. 77; 21 N. E. 470.

[72] Chouteau v. Missouri Pac. R. Co. 122 Mo. 375; 22 S. W. 458; 30 S. W. 299; Union Depot Co. v. Frederick, 117 Mo. 138; 21 S. W. 1118; St. Louis &c. Co. v. Clark, 121 Mo. 169; 25 S. W. 192, 906; 26 L. R. A. 751. "The term 'easement,' as employed in those cases, was not used in its strict, technical sense, but partakes, rather, of the meaning of an interest in the land, than of the original meaning given to the term, 'easement;' that is, a right in common, with the owner or others." Boyce v. Missouri Pac. R. Co. 168 Mo. 583; 68 S. W. 920; 58 L. R. A. 442.

[73] Shepard v. Suffolk &c. R. Co. 140 N. C. 391; 53 S. E. 137. See, also, to same effect, Hodges v. Telegraph Co. 133 N. C. 225; 45 S. E. 572.

[74] Smith v. Hall, 103 Iowa, 95; 72 N. W. 427.

[75] Smith v. Hall, 103 Iowa, 95; 72 N. W. 427.

[76] Junction R. Co. v. Ruggles, 7 Ohio St. 1.

[77] Cincinnati &c. R. Co. v. Geisel, 119 Ind. 77; 21 N. E. 470; Blakely v. Chicago &c. R. Co. 46 Neb. 272; 64 N. W. 972; Uhl v. Ohio River R. Co. 51 W. Va. 106; 41 S. E. 340; Cincinnati &c. R. Co. v. Wachter, 70 Ohio St. 113; 70 N. E. 974. Where the deed conveys the land absolutely "for railroad purposes," it has been said that the railroad company takes a base or qualified fee, liable to be divested whenever the land is devoted to other uses. State v. Brown, 27 N. J. L. 13. A deed to a railroad company entitled "Deed of Right of Way," but in the form of a regular warranty deed, will convey the fee and not merely an easement. Ballard v. Louisville &c. R. Co. 9 Ky. L. 523; 5 S. W. 484. A contract releasing to a railroad company a right of way of indefinite size and location, through certain land, and agreeing to convey a strip of ground by metes and bounds, by

pany takes an easement only.[78] When the width of the right of way is not specified in the grant the company will, in general, acquire only so much as is actually taken and used,[78a] or is reasonably necessary,[79] and the acts and declarations of the parties are admissible to

deed in fee-simple, when desired, has, however, been held to be a contract for the conveyance of an easement merely and not the fee. Ottumwa &c. R. Co. v. McWilliams, 71 Iowa, 164; 32 N. W. 315.

[78] In Williams v. Western Union R. Co. 50 Wis. 71; 5 Am. & Eng. R. Cas. 290, Judge Orton, speaking for the court, said: "'Right of way,' in its strict meaning, is 'the right of passage over another man's ground;' and in its legal and generally accepted meaning, in reference to a railway, it is a mere easement in the lands of others, obtained by lawful condemnation to public use or by purchase. (Mills Em. Dom. § 110.) It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee-simple of lands to be used for a railway or any other kind of way." See Stuyvesant v. Woodruff, 21 N. J. L. 133; 47 Am. Dec. 156; Bodfish v. Bodfish, 105 Mass. 317; Blakely v. Chicago &c. R. Co. 46 Neb. 272; 64 N. W. 972; Wild v. Deig, 43 Ind. 455; 13 Am. R. 399; Lake Erie &c. R. Co. v. Ziebarth, 6 Ind. App. 228; 33 N. E. 256; Pfaff v. Terre Haute &c. R. Co. 108 Ind. 144; 9 N. E. 93; Jones v. Van Bochove, 103 Mich. 93; 61 N. W. 342; Walker v. Illinois Cent. R. Co. 215 Ill. 610; 74 N. E. 812. Where a land-owner conveys to a railroad company a right of way, and the property and franchises of the company to which the conveyance is made are subsequently mortgaged and sold on a decree of foreclosure, the railroad company which becomes the owner of such property and franchises, and constructs a railroad on the right of way, will be entitled to the easement granted to the company by which the mortgage was executed. Columbus &c. R. Co. v. Braden, 110 Ind. 558; 11 N. E. 357. Under a written agreement a land-owner granted and conveyed to a railroad company "the full and free right of way, of the width of 50 feet," through his land on a line previously surveyed and covenanted to execute a deed when required by the railroad company, conveying the land in fee-simple. The instrument was signed and acknowledged by the grantor alone and filed for record by the railroad company and some 16 years afterward when oil was discovered on the right of way, the railroad company demanded a deed. It was held that a right of way only was intended to be conveyed and that the railroad company took only an easement in the land. Lockwood v. Ohio River R. Co. 103 Fed. 243.

[78a] Fort Wayne &c. Co. v. Sherry, 126 Ind. 334; 25 N. E. 898; 10 L. R. A. 48; Peoria &c. R. Co. v. Attica &c. R. Co. 154 Ind. 218; 56 N. E. 210; Lake Erie &c. R. Co. v. Michener, 117 Ind. 465; 20 N. E. 254. See, also, Morgan v. Railroad Co. 96 U. S. 716; Nashville &c. R. Co. v. Hammond, 104 Ala. 191; 15 So. 935.

[79] See Grafton v. Moir, 130 N. Y. 465; 29 N. E. 974; 27 Am. St. 533;

determine the width.[80] There is much reason, however, for holding that, where the width is not specified, and there is nothing either in the contract or in the acts of the parties to indicate that less than the statutory width was granted, it will be presumed that a right of way of the full statutory width was intended.[81] Where land is conveyed to a railroad company in fee-simple, the company may devote it to any use to which a private owner might put his land without incurring a liability to the adjoining land-owner. Thus, it is held that it may lease a portion of the land over which its track runs, for use as a lumber yard, and may permit the erection of necessary buildings for handling and storing lumber, where such a use of its land will not interfere with the transaction of its business as a common carrier.[82]

§ 938a. What estate is taken—Continued.—It has been held that

Jones v. Erie &c. R. Co. 169 Pa. St. 333; 32 Atl. 535; 47 Am. St. 916.

[80] Indianapolis &c. R. Co. v. Lewis, 119 Ind. 218; 21 N. E. 660; Indianapolis &c. R. Co. v. Reynolds, 116 Ind. 356; 19 N. E. 141. See, also, Jennison v. Walker, 11 Gray (Mass.), 423; Onthank v. Lake Shore &c. R. Co. 71 N. Y. 194; 27 Am. R. 35; Pennsylvania R. Co. v. Pearsol, 173 Pa. St. 496; 34 Atl. 226.

[81] See Hargis v. Kansas City &c. R. Co. 100 Mo. 210; 13 S. W. 680; Indianapolis &c. Railway Co. v. Rayl, 69 Ind. 424; Campbell v. Indianapolis &c. R. Co. 110 Ind. 490; 11 N. E. 482; Prather v. Western Un. Tel. Co. 89 Ind. 501; Duck River &c. R. Co. v. Cochrane, 3 Lea (Tenn.), 478; Philadelphia &c. R. Co. v. Obert, 109 Pa. 193; 1 Atl. 398; Morris &c. R. Co. v. Bonnell, 34 N. J. L. 474; Jones v. Erie &c. R. Co. 144 Pa. St. 629; 23 Atl. 251; Nashville &c. R. Co. v. McReynolds (Tenn. Ch.), 48 S. W. 258. But see Nashville &c. R. Co. v. Hammond, 104 Ala. 191; 15 So. 935; Ft. Wayne &c. R. Co. v. Sherry, 126 Ind. 334; 25 N. E. 898; 10 L. R. A. 48. In Cedar Rapids &c. Co. v. Burlington &c. R. Co. 120 Ia. 724; 95 N. W. 195, it is said that there is such a presumption but that it was overcome by other facts in that case.

[82] Calcasieu Lumber Co. v. Harris, 77 Tex. 18; 43 Am. & Eng. R. Cas. 570. See, also, Cleveland &c. R. Co. v. Huddleston, 21 Ind. App. 621, 627; 52 N. E. 1008; 69 Am. St. 385 (citing text). The company is not liable for the expense of removing a building on the right of way purchased by it. Delsol v. Spokane &c. R. Co. 4 Idaho, 456; 40 Pac. 59. But a grant of a right of way 100 feet wide, with the right to use such additional land as may be necessary for the construction and maintenance of the roadbed, does not give the right to permanently appropriate and cut timber on the land outside of the right of way. Gulf &c. R. Co. v. Richards, 11 Tex. 95; 32 S. W. 96. See, also, Hendler v. Lehigh Valley R. Co. 209 Pa. St. 256; 58 Atl. 486; 103 Am. St. 1005.

a railroad company, without power to acquire a fee in its right of way but only an easement therein, will take a valid title to a right of way transferred to it under a warranty deed. The transaction, even though ultra vires in a sense, is regarded as valid until assailed in a direct proceeding brought for that purpose by the government. Private persons cannot attack the title in a collateral action.[83] Another decision is to the effect that a railroad company, taking possession of land for its right of way under a verbal gift, and maintaining such possession for the statutory period, will acquire only an easement in such right of way, and not the fee.[84]

§ 938b. Conveyance of right of way by railroad companies.—A railroad company, acquiring title to land for railroad purposes either by purchase or condemnation, and constructing its railroad thereon, has been held to have such an interest in the land that, without intending to abandon the same, it may sell to another railroad company for like purposes all or part of the premises so acquired.[85] Thus, under an Alabama statute giving a railroad company power to lease or purchase any part of any railroad constructed by any other corporation, if its line be continuous or connecting, it has been held that a railroad company was authorized to convey to a connecting railroad company lands acquired by it for right of way.[86] So, it has been held that a railroad company may lease a portion of its right of way for business purposes with a view to securing freight. Such a contract, it was held, is not opposed to public policy.[87]

§ 939. Conditional conveyances.—A railroad company may, in

[83] Hicks v. Smith, 109 Wis. 532; 85 N. W. 512. See, also, Farwell v. Wolfe, 96 Wis. 10; 70 N. W. 289; 37 L. R. A. 138; 65 Am. St. 22.

[84] Capps v. Texas &c. R. Co. 21 Tex. Civ. App. 85; 50 S. W. 643.

[85] Garlick v. Pittsburg &c. R. Co. 67 Ohio St. 223; 65 N. E. 896. So, where a city grants a right of way in an alley to a railroad company, it has been held that the company may transfer such right to another company, though it has never used the alley for railroad purposes. Morgan v. Des Moines U. R. Co. 113 Iowa, 561; 85 N. W. 902. Even though such a conveyance should be regarded as an abandonment it would only be taken advantage of by the owner of the fee, and can not avail a city which claims the land for public purposes through a dedication made by a lessee of the railroad company. Durham v. Southern R. Co. 121 Fed. 894.

[86] Coyne v. Warrior Southern R. Co. 137 Ala. 553; 34 So. 1004.

[87] Detroit v. C. H. Little R. Co. (Mich.) 109 N. W. 671; 13 Det. Leg. N. 803.

general, accept a conveyance of land upon any conditions that may lawfully be annexed to an ordinary grant.[88] And, generally speaking, it may be said that an agreement with a railroad company for a right of way stands upon the same footing as any other contract for the conveyance of an interest in land.[89] Where title is not expressly made to depend upon the performance of certain conditions, stipulations contained in a deed will usually be construed to amount to covenants only, since conditions by which title is prevented from vesting, or by which forfeitures are incurred, are not favored in law.[90] But provisos[91] and recitals of the considerations for which the deed was made[92] have been construed to amount to implied conditions, upon a

[88] Hammond v. Port Royal &c. R. Co. 15 S. Car. 10. And conditions may be either conditions precedent or conditions subsequent. Gray v. Chicago &c. R. Co. 189 Ill. 400; 59 N. E. 950; Cleveland &c. R. Co. v. Coburn, 91 Ind. 557; Louisville &c. R. Co. v. Power, 119 Ind. 269; 21 N. E. 751; Hannibal &c. R. Co. v. Frowein, 163 Mo. 1; 63 S. W. 500; New York &c. R. Co. v. Providence, 16 R. I. 746; 19 Atl. 759; Monat v. Seattle &c. R. Co. 16 Wash. 84; 47 Pac. 233.

[89] Littlejohn v. Chicago &c. R. Co. 219 Ill. 584; 76 N. E. 840, 841; St. Louis &c. R. Co. v. Van Hoorebeke, 191 Ill. 633; 61 N. E. 326.

[90] Midland R. Co. v. Fisher, 125 Ind. 19; 24 N. E. 756; 8 L. R. A. 604, and note; 21 Am. St. 189; Jeffersonville &c. R. Co. v. Barbour, 89 Ind. 375; Georgia Southern R. Co. v. Reeves, 64 Ga. 492. If it be doubtful whether a clause in a deed is a condition or a covenant the courts will incline against the condition, for a covenant is far preferable. Roanoke Invest. Co. v. Kansas City &c. R. Co. 108 Mo. 50; 51 Am. & Eng. R. Cas. 426, 433, quoting 4 Kent's Com. 132. See, also, Pittsburg &c. R. Co. v. Wilson, 34 Ind. App. 324; 72 N. E. 666; Krueger v. St. Louis &c. R. Co. 185 Mo. 227; 84 S. W. 8^8; Gratz v. Highland &c. R. Co. 165 Mo. 211; 65 S. W. 223, 225.

[91] Taylor v. Cedar Rapids &c. R. Co. 25 Iowa, 371; Southard v. Central R. Co. 26 N. J. L. 13. In this latter case, the owner of land conveyed a part thereof for the purposes of a depot and passenger refreshment room by a deed containing a proviso that if the railroad company should erect and use any other buildings within a mile for the same purposes, the deed should be avoided. In Rathbone v. Tioga Navigation Co. 2 W. & S. (Pa.) 74, land was conveyed to a railroad company upon which to build its road, "provided the same does not interfere with buildings on the grantor's land," and it was held that the company took the land subject to an obligation to construct its road so far away from said buildings as not to endanger them or prevent their usefulness.

[92] Indianapolis &c. R. Co. v. Hood, 66 Ind. 580. In this case the deed recited that it was made "for and in consideration of the permanent location and construction of the

breach of which the land would revert to the grantors.[93] And if it clearly appears by the form and terms of a clause in a deed that it is, in legal effect, a condition, the fact that the parties make use of the word "covenant" will not alter its legal character.[94]

§ 940. Difference between conditions precedent and conditions subsequent—Effect of failure to perform conditions precedent.—Where an act is required to be done before the title vests, it is a condition precedent,[95] and the company can assert no rights under the deed without showing the performance of the condition.[96] But, "if the act or condition required do not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate; or, if from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condition is subsequent."[97] The same words have been con-

depot of said railroad" thereon, and the court held that upon the removal of the depot by the railroad, the land reverted to the grantor. But see contra, East Line R. Co. v. Garrett, 52 Tex. 133; Blanchard v. Detroit &c. R. Co. 31 Mich. 43; 18 Am. R. 142.

[93] In Aikin v. Albany &c. R. Co. 26 Barb. (N. Y.) 289, the owner of a farm granted to a railway company a right of way through it by a deed which contained, inter alia, the following clause: "The said Albany Northern Railroad is to construct and maintain two good farm crossings." The court intimated the opinion that this was properly a condition, but, in order to aid the grantor, it was construed in that case to amount to a covenant only. In Donisthorpe v. Fremont &c. R. Co. 30 Neb. 142; 27 Am. St. 387; 43 Am. & Eng. R. Cas. 583, it was held that parol evidence was admissible to annex the condition that the property should be used only for the main line and not for side tracks, to a deed which expressly stipulated that the grantor thereby released the grantee, its successors and assigns, from all costs, expenses and damages sustained by the construction, building and use of the railroad. And the grantor was held entitled to damages for the construction of side tracks upon the right of way.

[94] Blanchard v. Detroit &c. R. Co. 31 Mich. 43; 18 Am. R. 142.

[95] Nicoll v. New York &c. R. Co. 12 N. Y. 121; Rome &c. R. Co. v. Gleason, 42 App. Div. (N. Y.) 530; 59 N. Y. S. 647.

[96] Crosbie v. Chicago &c. R. Co. 62 Iowa, 189; 17 N. W. 481; 14 Am. & Eng. R. Cas. 463.

[97] Underhill v. Saratoga R. Co. 20 Barb. (N. Y.) 456; Parmelee v. Oswego &c. R. Co. 6 N. Y. 74. See, also, Bright v. Louisville &c. R. Co. (Ky.) 87 S. W. 780. For rule for

strued differently, and the question whether a condition, precedent or subsequent, is created, is always one of intention.[98] The distinction between conditions precedent and conditions subsequent, while difficult to define, is very important, since a condition precedent must be fulfilled before the title vests, and in case it be impossible or unlawful, or the grantee neglect to perform, the title remains with the grantor.[99] But in case of a grant upon condition subsequent the title vests at once, and in case an illegal condition is imposed the condition is treated as a nullity and the estate is held to be absolute.[100] Thus, where land is deeded to a railroad company upon condition that it shall locate its road upon a certain route, it has been held that the company acquires no rights under the deed until the route is located in substantial compliance with the condition.[101] So, where land is conveyed upon condition that the railroad is to be built by a certain date, it has been held that a failure to comply with the condition will deprive the company of the right to locate thereon under the deed.[102] After performance on the part of the grantee, it is entitled to the property in the same manner that it would be after payment in case of an ordinary contract of purchase.[103]

determining whether condition is precedent or subsequent, see Rannals v. Rowe, 145 Fed. 296.

[98] Finlay v. King, 3 Pet. (U. S.) 346, 374, per Marshall, Ch. J.; Hotham v. East India Co. 1 T. R. 638; Parmelee v. Oswego &c. R. Co. 6 N. Y. 74; Rannels v. Rowe, 145 Fed. 296.

[99] 2 Washburn Real Property, 946, citing Co. Litt. 206; Co. Litt. 218a; Vanhorne's Lessee v. Dorrance, 2 Dall. (U. S.) 304; Taylor v. Mason, 9 Wheat. (U. S.) 325; Mizell v. Burnett, 4 Jones L. 249; Martin v. Ballou, 13 Barb. (N. Y.) 119; Bertie v. Falkland, 2 Freem. 222.

[100] Story's Eq. Juris. 288; Co. Litt. 206, a and b; Co. Litt. 217a; Bertie v. Falkland, 2 Freem. 220; 2 Washburn Real Property, 946; 2 Bl. Com. 156, 157. But the breach of a condition subsequent may work a forfeiture. Pierce Railroads, 136; Indianapolis &c. R. Co. v. Hood, 66 Ind. 580. See, also, Morrill v. Wabash &c. R. Co. 96 Mo. 174; 9 S. W. 657; Gratz v. Highland &c. R. Co. 165 Mo. 211; 65 S. W. 223; Cleveland &c. R. Co. v. Coburn, 91 Ind. 557. It does not, ordinarily, produce a reversion of the title, without some proper step being taken to consummate a forfeiture. Rannels v. Rowe, 145 Fed. 296.

[101] Crosbie v. Chicago &c. R. Co. 62 Iowa, 189; 17 N. W. 481; Detroit &c. R. Co. v. Forbes, 30 Mich. 165. See, also, Littlejohn v. Chicago &c. R. Co. 219 Ill. 584; 76 N. E. 840 (license also given to take possession).

[102] Peterson v. Atlantic &c. R. Co. 120 Ga. 967; 48 S. E. 372.

[103] Chicago &c. R. Co. v. Boyd, 118 Ill. 73; 7 N. E. 487; Borders v. Murphy, 78 Ill. 81.

§ 941. Conditions subsequent—What is sufficient performance—Effect of failure to perform.—Conveyances of land to railroad companies are very frequently made upon conditions subsequent, as that the property shall be used for railroad purposes,[104] that a depot shall be permanently located thereon,[105] that the railroad shall be con-

[104] Boone v. Clark, 129 Ill. 466; 21 N. E. 850; 5 L. R. A. 276, and note. A conveyance to a railroad company of the right of way for its road, the consideration for which is shown to be the construction and permanent maintenance of the road upon the line so granted, and the erection and maintenance of its depot upon adjoining lands, is a condition subsequent, and if such depot and tracks be afterward abandoned, it is a breach of the condition, which defeats the grant. Cleveland &c. R. Co. v. Coburn, 91 Ind. 557; 17 Am. & Eng. R. Cas. 37. Where a grant was of land to be used for the raceway of a mill, it was held to be no breach of the condition that it was also used for a towpath, or that a building encroached upon it, so long as it continued to be used as a raceway. McKelway v. Seymour, 29 N. J. L. 321. See cases in next note. The limitation that the estate is to exist only so long as the property is used for a specified purpose is distinguished from the ordinary condition subsequent, inasmuch as it marks the limit or boundary beyond which the estate conveyed can not continue to exist. Mayor &c. Macon v. East Tennessee &c. R. Co. 82 Ga. 501; 40 Am. & Eng. R. Cas. 462; 9 S. E. 17.

[105] Taylor v. Cedar Rapids &c. R. Co. 25 Iowa, 371; New York &c. R. Co. v. Stanley, 34 N. J. Eq. 55; Vicksburg &c. R. Co. v. Ragsdale, 54 Miss. 200; Indianapolis &c. R. Co. v. Hood, 66 Ind. 580; Jeffersonville &c. R. Co. v. Barbour, 89 Ind. 375; Horner v. Chicago &c. R. Co. 38 Wis. 165; Close v. Burlington &c. R. Co. 64 Iowa, 149; 19 N. W. 886; 17 Am. & Eng. R. Cas. 33. See note 38 Am. & Eng. R. Cas. 711; Jessup v. Grand Trunk R. Co. 28 Grant's Ch. (Up. Can.) 583. Contracts for the location of a depot at a certain point are generally sustained where the contract does not prohibit the location of depots at other points, and the agreement is fairly made for a valuable consideration. Louisville &c. R. Co. v. Sumner, 106 Ind. 55; 5 N. E. 404; 55 Am. R. 719; Vicksburg &c. R. Co. v. Ragsdale, 54 Miss. 200; Kansas Pac. R. Co. v. Hopkins, 18 Kan. 494; McClure v. Missouri River &c. R. Co. 9 Kan. 373; Kinealy v. St. Louis &c. R. Co. 69 Mo. 658; Missouri Pac. R. Co. v. Tygard, 84 Mo. 263; 54 Am. R. 97; Cedar Rapids &c. R. Co. v. Spafford, 41 Iowa, 292; Courier v. Concord R. Co. 48 N. H. 321; Texas &c. R. Co. v. Robards, 60 Tex. 545; 48 Am. R. 268; Cumberland Valley R. Co. v. Baab, 9 Watts (Pa.), 458; 36 Am. Dec. 132. But some courts have held that an agreement by which a railroad company undertakes to locate and maintain a station at a particular point is void, as being contrary to the public policy which demands that stations shall be located with a view to the best interests of the public and of the stockholders, and can not be hampered by private

structed across the grantor's land upon a particular route,[106] or that the company maintain crossings and cattle-guards,[107] or build a dam or embankment,[108] or keep open certain portions of the land conveyed as a public street,[109] or keep up a certain system of drainage,[110] or furnish the grantor and his family annual passes during their lives.[111] The performance of a condition subsequent may be excused when its performance becomes impossible by the act of God,[112] or the company is prevented by the grantor from performing it.[113] Performance is also unnecessary where the condition is opposed to positive law or public policy,[114] as in case the conveyance is made upon condition

contracts. Mobile &c. R. Co. v. People, 132 Ill. 559; 24 N. E. 643; 22 Am. St. 556; Pacific R. Co. v. Seely, 45 Mo. 212; 100 Am. Dec. 369.

[106] Douglass v. New York &c. R. Co. Clarke's Ch. (N. Y.) 174; Cleveland &c. R. Co. v. Coburn, 91 Ind. 557. A condition in a deed to a railroad company providing that the same shall be void unless the railroad shall be built upon a particular route, and one of its stations located at a particular point, is not void as being opposed to public policy. McClure v. Missouri &c. R. Co. 9 Kan. 373. See Chicago &c. R. Co. v. Estes, 71 Iowa, 603; 33 N. W. 124; 30 Am. & Eng. R. Cas. 276, as to what constitutes a contract upon such a condition.

[107] Dayton v. Lewton, 20 Ohio St. 401; 55 Am. Dec. 464. Where the maintenance of fences between the railroad right of way and the adjoining property is expressly made a condition of holding title to the land, a failure to maintain the fences will defeat the title. Emerson v. Simpson, 43 N. H. 475; 80 Am. Dec. 184; Hartung v. Witte, 59 Wis. 285; 18 N. W. 175.

[108] Underhill v. Saratoga &c. R. Co. 20 Barb. (N. Y.) 455.

[109] Such a condition is not void as imposing upon the company a duty or trust inconsistent with its business and foreign to the objects for which it was formed. Tinkham v. Erie R. Co. 53 Barb. (N. Y.) 393.

[110] Hammond v. Port Royal &c. R. Co. 15 S. Car. 10; 11 Am. & Eng. R. Cas. 352.

[111] Ruddick v. St. Louis &c. R. Co. 116 Mo. 25; 22 S. W. 499; 38 Am. St. 570; 57 Am. & Eng. R. Cas. 290. In this case it was held that the railroad company's successor took subject to the condition annexed to its deed, and that, upon its failure to furnish the passes, the land-owner could maintain an action to recover the land. But see Dickey v. Kansas City &c. R. Co. 122 Mo. 223; 26 S. W. 685, and post, § 946. See, also, for other conditions subsequent, Rannels v. Rowe, 145 Fed. 296; Schlesinger v. Railway, 152 U. S. 444; 14 Sup. Ct. 647; Nicoll v. New York &c. R. Co. 12 N. Y. 121.

[112] Stuyvesant v. Mayor of New York, 11 Paige Ch. (N. Y.) 414.

[113] Jones v. Chesapeake &c. R. Co. 14 W. Va. 514.

[114] 2 Washburn Real Property (6th ed.), § 943.

that no stations shall be established within a certain distance of one to be located upon the land conveyed.[115]

§ 942. Remedies of grantor for failure of company to perform conditions subsequent.—In case of a failure on the part of the grantee to comply with a condition subsequent in the deed the grantor may usually re-enter and maintain ejectment to recover the property,[116] or he may waive the forfeiture, and sue for damages,[117] or, in some cases, he may bring a bill for specific performance by the railroad company of its implied agreement to perform the conditions.[118] A

[115] Williamson v. Chicago &c. R. Co. 53 Iowa, 126; 4 N. W. 870; 36 Am. R. 206, and note; St. Louis &c. R. Co. v. Mathers, 71 Ill. 592; 22 Am. R. 122; 104 Ill. 257; St. Joseph &c. R. Co. v. Ryan, 11 Kan. 602; 15 Am. R. 357; Holladay v. Patterson, 5 Ore. 177. In McClain v. Chicago &c. R. Co. 90 Iowa, 646; 57 N. W. 594, it was held that the provisions of the code declaring that eight years' non-user of a railroad right of way shall work a reversion does not forbid forfeiture for abandonment by non-user in accordance with the conditions of a deed.

[116] 2 Washburn Real Property (6th ed.), § 940; Indianapolis &c. R. Co. v. Hood, 66 Ind. 580. See, also, and compare Gratz v. Highland &c. R. Co. 165 Mo. 211; 65 S. W. 223; McClellan v. St. Louis &c. R. Co. 103 Mo. 295; 15 S. W. 546. In Close v. Burlington &c. R. Co. 64 Iowa, 149; 19 N. W. 886, it was held that a railroad company did not, by accepting a conveyance of land in consideration of one dollar "and the permanent location of a depot on the grounds conveyed" render itself liable in damages for a failure to maintain the depot; but that this provision was a condition subsequent, for a breach of which the estate could be forfeited. But see Hubbard v. Kansas City &c. R. Co. 63 Mo. 68, and Bright v. Louisville &c. R. Co. 27 Ky. L. 1052; 87 S. W. 780. The grantor can only enter for breach of an entire condition, and such an entry affects the entire tract conveyed. And where a grantor parts with his right of re-entry as to part of a tract, the condition is destroyed. Tinkham v. Erie R. Co. 53 Barb. (N. Y.) 393.

[117] Rush v. Burlington &c. R. Co. 57 Iowa, 201; 10 N. W. 628; Gray v. Burlington &c. R. Co. 37 Iowa, 119; Joliet &c. R. Co. v. Jones, 20 Ill. 221; Kankakee &c. R. Co. v. Fitzgerald, 17 Ill. App. 525; Baker v. Chicago &c. R. Co. 57 Mo. 265. See Hubbard v. Kansas City &c. R. Co. 63 Mo. 68; Thornton v. Sheffield &c. R. Co. 84 Ala. 109; 4 So. 197; 5 Am. St. 337. In Jones v. St. Louis &c. R. Co. 79 Mo. 92, the court held that the proper remedy of a grantor of land upon condition that it be used for depot purposes alone, was to re-enter for condition broken in the event of its being devoted to other purposes, and not by suit to set aside the deed.

[118] Aikin v. Albany &c. R. Co. 26 Barb. (N. Y.) 289; Gray v. Burlington &c. R. Co. 37 Iowa, 119; Hubbard v. Kansas City &c. R. Co.

waiver by the grantor of a breach of the conditions in a deed relieves the estate from the forfeiture, even though it does not affect the grantor's right to have the condition performed.[119] Thus, where a grant to a railroad company of land was upon condition that the road should be completed by a certain time, and the company failed to complete it before the time expired; and after that, the grantor, knowing the fact, suffered the company to go on and incur expenses in constructing their road, and made no objection, it was held to be a waiver of the condition and forfeiture.[120] A breach of a condition subsequent can only be taken advantage of by the grantor or his heirs,[121] and a person to whom he has conveyed his interests either before or after the breach acquires no rights as against the company.[122] The general rule is that a forfeiture for this cause can only be enforced by an actual entry[123] with intent to defeat the estate,[124] or at least by some act equivalent thereto. But in an Iowa case, where a right of way was deeded to a railroad company upon condition that the company's depot should be located near a certain point, and the condition was not complied with, it was held that the breach of this condition forfeited the title, and that, the estate being less than a freehold, no

63 Mo. 68. But see Hoard v. Chesapeake &c. R. Co. 123 U. S. 222; 8 Sup. Ct. 74; Tyler v. St. Louis &c. R. Co. (Tex. Civ. App.) 87 S. W. 238 (reversed in 91 S. W. 1).

[119] 2 Washburn Real Property (6th ed.), 943.

[120] Ludlow v. New York &c. R. Co. 12 Barb. (N. Y. 440; Baker v. Chicago &c. R. Co. 57 Mo. 265.

[121] 2 Washburn Real Property (6th ed.), § 940. This rule has been changed by statute in some of the states in favor of devisees and some others. Southard v. Central R. Co. 26 N. J. L. 13; McKissick v. Pickle, 16 Pa. St. 140; Hayden v. Stoughton, 5 Pick. (Mass.) 528; Austin v. Cambridgeport Parish, 21 Pick. (Mass.) 215. In Rice v. Boston &c. R. Co. 12 Allen (Mass.), 141, it is held that a son of the grantor, to whom he conveyed the adjoining property by deed, could not take advantage of the breach of a condition, since he claimed by grant and not by descent. Hooper v. Cummings, 45 Me. 359.

[122] Nicoll v. New York &c. R. Co. 12 N. Y. 121; Paul v. Connersville &c. R. Co. 51 Ind. 527; Rice v. Boston &c. R. Co. 12 Allen (Mass.), 141; Hooper v. Cummings, 45 Me. 359; Underhill v. Saratoga &c. R. Co. 20 Barb. (N. Y.) 455; 4 Kent's Com. 129.

[123] Fonda v. Sage, 46 Barb. (N. Y.) 109; Hall v. Pickering, 40 Me. 548.

[124] Rollins v. Riley, 44 N. H. 9; Ruddick v. St. Louis &c. R. Co. 116 Mo. 25; 22 S. W. 499; 38 Am. St. 570; 57 Am. & Eng. R. Cas. 290. As to whether the right can be assigned, see Bouvier v. Baltimore &c. R. Co. 67 N. J. L. 281; 51 Atl. 781; 60 L. R. A. 750, and note.

formal act of entry was necessary to enable the land-owner to proceed under the statute for an assessment of his damages.[125] Other strong courts take a like stand, and hold that it is not necessary that the grantor demand compliance with the conditions in the deed before bringing suit for a decree of forfeiture of the right of way. In this view the commencement of the action stands in lieu of entry and demand of possession.[126]

§ 943. Construction of conditions subsequent—Compliance with conditions.—Conditions subsequent are not favored in law,[127] but are strictly construed, and a substantial compliance with the conditions is generally held sufficient.[128] Thus, a railroad company will hold a right of way conveyed to it for the location, construction and maintenance of its road, and conditioned upon the continued maintenance and operation thereof, provided it builds and operates the road across the land conveyed; and the fact that it does not build a road the full extent of its charter route will not work a forfeiture.[129] A conveyance recited that the ground was deeded "expressly for the use and purpose of depot grounds" for a railroad company, and provided that in case

[125] Taylor v. Cedar Rapids &c R. Co. 25 Iowa, 371.

[126] Lyman v. Suburban R. Co. 190 Ill. 320; 60 N. E. 515; 52 L. R. A. 645; Cowell v. Colorado Springs Co. 100 U. S. 55, citing Austin v. Cambridgeport, 21 Pick. (Mass.) 215; Cornelius v. Ivins, 2 Dutch. (N. J. L.) 376; Ruch v. Rock Island, 97 U. S. 693. See, also, Maison St. Joseph du Sault au Recollet v. Montreal Park &c. R. Co. Rap. Jud. Que. 19 C. S. 484.

[127] Hammond v. Port Royal &c. R. Co. 15 S. Car. 10; 11 Am. & Eng. R. Cas. 352, 369; Jeffersonville &c. R. Co. v. Barbour, 89 Ind. 375; Ellis v. Elkhart Car Works Co. 97 Ind. 247; Sumner v. Darnell, 128 Ind. 38; 27 N. E. 162; 13 L. R. A. 173, and note.

[128] Hoyt v. Kimball, 49 N. H. 322; Voris v. Renshaw, 49 Ill. 425. Locating the depot upon a five-acre tract of land which touched the corner of a designated field was held to be a substantial compliance with a condition requiring the depot to be located on a five-acre tract adjoining that field. Fitzgerald v. Britt, 43 Iowa, 498. Building a depot a quarter of a mile from the edge of the town plat, and stopping trains there, was held a compliance with a condition that a certain town should be made a station on the road. Jenkins v. Burlington &c. R. Co. 29 Iowa, 255; Meader v. Lowry, 45 Iowa, 684. And see Cedar Falls &c. R. Co. v. Rich, 33 Iowa, 113; Courtright v. Stickler, 37 Iowa, 382.

[129] Morrill v. Wabash &c. R. Co. 96 Mo. 174; 9 S. W. 657; 36 Am. & Eng. R. Cas. 425. See, also, Union Stockyards Co. v. Nashville &c. Co. 140 Fed. 701.

the grantee "shall fail to erect buildings and occupy said ground for the use and purpose above mentioned," it should revert to the donor. The buildings were erected and the ground used for depot purposes for thirty-three years, after which the depot was removed to another location, and the tract in question ceased to be used for such purposes. The court held that the condition had been fully performed, and that the title of the railroad company was absolute.[130] But a mere colorable compliance with a condition that the road over a certain tract shall be used and operated as a railway, by using it for the storage of cars, while trains are run over another route, is not sufficient to prevent a forfeiture.[131] It has been held that a city is without power to release a railroad company from the performance of these conditions by ordinance, as this would amount to the impairment of a contract.[132] "In determining whether a condition subsequent in a deed has been broken or not, construction is required in nearly every case. But little assistance can be had from examining other cases, except to ascertain rules for interpretation. Each case differs so widely from all others that even rules of construction cannot be wholly depended upon. The application of good sense and sound equity are as much to be relied upon as subtle and artificial rules of construction. The point, of course, to be arrived at in every case, is to ascertain the intention of the parties."[133]

[130] Jeffersonville &c. R. Co. v. Barbour, 89 Ind. 375. The court said: "The condition of the grant in the present case was in effect that the grantee should locate and occupy the lots as depot grounds. No time was mentioned, and the language does not, strictly construed, mean perpetuity. We think thirty years' occupancy of the lots as depot grounds was a substantial compliance with the condition."

[131] Hickox v. Chicago &c. R. Co. 78 Mich. 615; 43 Am. & Eng. R. Cas. 613. But see dissenting opinion of Judges Campbell and Champlin, to the effect that the words "used and operated" in the deed under consideration referred to the railroad as a whole. And that the fact that the track laid upon this particular tract was used for switching purposes, while the cars were run over a parallel track, passing through the stations nearest to the plaintiff's farm, was not a breach of the condition. See, also, in support of text, Lyman v. Suburban R. Co. 190 Ill. 320; 60 N. E. 515; 52 L. R. A. 645.

[132] Lyman v. Suburban R. Co. 190 Ill. 320; 60 N. E. 515; 52 L. R. A. 645.

[133] Jeffersonville &c. R. Co. v. Barbour, 89 Ind. 375, 379, per Hammond, J. It was held under a deed obligating the railroad company to establish and maintain a station on the land conveyed that the erection of a small building called

§ 944. When equity will interfere in case of a breach of conditions subsequent.—Equity will not, as a general rule, lend its aid to enforce a forfeiture for the breach of a condition subsequent, but will sometimes cancel a deed as a cloud upon the grantor's title, where the right to a forfeiture is clear, and there is no adequate remedy at law.[134] Even after entry for condition broken the railroad company has a right to proceed under the statute to condemn the land it occupies for a right of way.[135] And, in view of the hardship attending the ejectment of a railroad company from any part of its right of way, equity will enjoin proceedings to oust it from land upon which it has in good faith constructed its road, until it can have an opportunity to acquire title by condemnation.[136]

§ 945. Covenants running with the land.—An important difference between conditions and covenants is in the remedy allowed for a breach of them, and it has been held that words which may import either will be construed as one or the other, according to which construction is necessary that the party for whose benefit the provision

a "depot" for temporary purposes, until the grantee could build a permanent structure, was not a compliance with the contract; and neither the grantee, nor a company which purchased its property and franchises, having ever erected a permanent structure, the purchaser must respond in damages for the breach of contract. Ecton v. Lexington &c. R. Co. 59 S. W. 864; 22 Ky. L. 1133. In another case a condition in a deed of land for a railroad right of way that the company should stop all its accommodation passenger trains at the point thereon where its passenger depot was then located on the premises was held to continue so long as the grantee holds and uses the land. Gray v. Chicago &c. R. Co. 189 Ill. 400; 59 N. E. 950.

[134] Memphis &c. R. Co. v. Neighbors, 51 Miss. 412; Vicksburg &c. R. Co. v. Ragsdale, 54 Miss. 200; Stringer v. Keokuk &c. R. Co. 59 Iowa, 277; 13 N. W. 308.

[135] New York &c. R. Co. v. Stanley, 35 N. J. Eq. 283; 10 Am. & Eng. R. Cas. 345.

[136] South &c. R. Co. v. Alabama &c. R. Co. 102 Ala. 236; 14 So. 747; New York &c. R. Co. v. Stanley, 35 N. J. Eq. 283; Harrington v. St. Paul &c. R. Co. 17 Minn. 215; Jones v. Great Western R. Co. 1 Eng. R. & Canal Cas. 684. See, also, Silver Springs &c. R. Co. v. Van Ness, 45 Fla. 559; 34 So. 884, 888 (citing text). In Pittsburgh &c. R. Co. v. Bruce, 102 Pa. St. 23, the court said, that an injunction might be obtained to restrain the execution of a judgment in ejectment that had been recovered until an assessment of damages under the statute could be had. Justice v. Nesquehoning Valley R. Co. 87 Pa. St. 28.

is made may have a remedy.[137] The breach of a covenant involves the payment of damages only, and because of the hardship which usually attends the enforcement of a forfeiture, and the consequent aversion to forfeitures on the part of the courts,[138] stipulations and agreements contained in deeds are usually construed as covenants running with the land where complete relief can be given by a decree for specific performance or an award of damages, or where the language of the deed admits of a doubt as to whether a condition is intended.[139] Thus stipulations in the deed that the grantee shall fence its right of way[140] or construct farm crossings, or other conveniences,[141] or that it shall locate and maintain a depot at a certain point,[142] will be construed

[137] Aikin v. Albany &c. R. Co. 26 Barb. (N. Y.) 289.

[138] See Louisville &c. R. Co. v. Taylor, 96 Ky. 241; 28 S. W. 666; Lake Erie &c. R. Co. v. Lee, 14 Ind. App. 328; 41 N. E. 1058; Chicago &c. R. Co. v. Titterington, 84 Tex. 218; 19 S. W. 472; 31 Am. St. 39; Kemble v. Philadelphia &c. R. Co. 140 Pa. St. 14; 21 Atl. 225; Hornback v. Cincinnati &c. R. Co. 20 Ohio St. 81; Sappington v. Little Rock &c. R. Co. 37 Ark. 23. Relief from forfeiture is always proper when compensation in damages can be calculated with certainty. Giles v. Austin, 62 N. Y. 486; Nelson v. Carrington, 4 Munf. (Va.) 332; 6 Am. Dec. 519; Hill v. Barclay, 16 Ves. 402. See Hagar v. Buck, 44 Vt. 285; 8 Am. R. 368; Messersmith v. Messersmith, 22 Mo. 369; Walker v. Wheeler, 2 Conn. 299; Voorhis v. Murphy, 26 N. J. Eq. 434.

[139] Blanchard v. Detroit &c. R. Co. 31 Mich. 43; 18 Am. R. 142; Hornback v. Cincinnati &c. R. Co. 20 Ohio St. 81; 2 Washburn Real Prop. 5. See, also, Gatz v. Highland &c. R. Co. 165 Mo. 211; 65 S. W. 223, 225; Union Stock Yards Co. v. Nashville &c. Co. 140 Fed. 70.

[140] Hornback v. Cincinnati &c. R. Co. 20 Ohio St. 81; Dayton &c. R. Co. v. Lewton, 20 Ohio St. 401; 55 Am. Dec. 464; Louisville &c. R. Co. v. Power, 119 Ind. 269; 21 N. E. 751; Kentucky Cent. R. Co. v. Kenney, 82 Ky. 154; Kelly v. Nypano R. Co. 23 Pa. Co. Ct. 177. But see Railway v. Bosworth, 46 Ohio St. 81; 38 Am. & Eng. R. Cas. 290; 2 L. R. A. 199, and note. In Martin v. New York &c. R. Co. 36 N. J. Eq. 109, the court enforced a covenant to fence which had been stricken out of the deed before it was signed, upon the promise of the receiver of the grantee company that the fences should be maintained. See Donisthorpe v. Fremont &c. R. Co. 30 Neb. 142; 46 N. W. 240; 27 Am. St. 387; 43 Am. & Eng. R. Cas. 583.

[141] Aikin v. Albany &c. R. Co. 26 Barb. (N. Y.) 289; Congregation &c. v. Texas Pac. R. Co. 41 Fed. 564. See, also, Illinois Cent. R. Co. v. Willenborg, 117 Ill. 203; 7 N. E. 698; 57 Am. R. 862; Hull v. Chicago &c. R. Co. 65 Iowa, 713; 22 N. W. 940; Elizabethtown &c. R. Co. v. Killen, 21 Ky. L. 122; 50 S. W. 1108; Hall v. Clearfield &c. R. Co. 168 Pa. St. 64; 31 Atl. 940.

[142] Georgia So. R. Co. v. Reeves, 64 Ga. 492; 11 Am. & Eng. R. Cas.

as covenants unless the language clearly makes them conditions. And the company will become bound to observe covenants contained in a deed which it accepts, to the same extent that it would be bound by the execution of an instrument signed by itself.[143] A railroad may covenant to pave and repair a street along which its track is laid,[144] or to permit other railroads, upon certain conditions, to use the right of way granted,[145] or to construct a switch upon the lands conveyed, and to stop trains thereat,[146] or to pay a rental for the land used for railroad purposes.[147] Covenants such as these, which are connected with, or require something to be done on or about the land, and become united with, and form a part of, the consideration for which the land, or some interest in it, is parted with, run with the land,[148]

333; Galveston &c. R. Co. v. Pfeuffer, 56 Tex. 66; Gilmer v. Mobile &c. R. Co. 79 Ala. 569; 58 Am. R. 623; Dorsey v. St. Louis &c. R. Co. 58 Ill. 65; Pitkin v. Long Island &c. R. Co. 2 Barb. Ch. (N. Y.) 221; 47 Am. Dec. 320; Sayre v. New York &c. R. Co. 3 Duer (N. Y.), 54. See, also, Little Rock &c. R. Co. v. Birnie, 59 Ark. 66; 26 S. W. 528. But stipulations of this kind are often construed as conditions subsequent. Taylor v. Cedar Rapids &c. R. Co. 25 Iowa, 371; Horner v. Chicago &c. R. Co. 38 Wis. 165; Blanchard v. Detroit &c. R. Co. 31 Mich. 43; 18 Am. 142. Where a deed recites that it is made "in consideration of the sum of one dollar, and the permanent location of a depot on grounds conveyed," the stipulation is a condition subsequent which imposes no personal obligation upon the grantee. Close v. Burlington &c. 64 Iowa, 149; 19 N. W. 886.

[143] Georgia S. R. Co. v. Reeves, 64 Ga. 492; Taylor Landlord and Tenant (9th ed.), § 245.

[144] Mayor &c. New York v. Second Ave. R. Co. 102 N. Y. 572; 7 N. E. 905; 55 Am. R. 839.

[145] Joy v. St. Louis, 138 U. S. 1; 11 Sup. Ct. 243; 45 Am. & Eng. R. Cas. 655.

[146] Lydick v. Baltimore &c. R. Co. 17 W. Va. 427; 11 Am. & Eng. R. Cas. 336; Pitkin v. Long Island &c. R. 2 Barb. Ch. (N. Y.) 221; 47 Am. Dec. 320; Gilmer v. Mobile &c. R. Co. 79 Ala. 569; 58 Am. R. 623.

[147] Hastings v. Northeastern R. 67 L. J. Ch. 590 (1898), 2 Ch. 674; 78 L. T. (N. S.) 812; 47 Wkly. Rep. 59; 63 J. P. 36, affirmed (1899), 68 L. J. Ch. 315 (1899), 1 Ch. 656; 80 L. T. (N. S.) 217.

[148] Ruddick v. St. Louis &c. R. Co. 116 Mo. 25; 22 S. W. 499; 38 Am. St. 570, per Burgess, J., Peden v. Chicago &c. R. Co. 73 Iowa, 328; 35 N. W. 424; 5 Am. St. 680; St. Louis &c. Co. v. O'Baugh, 49 Ark. 418; 5 S. W. 711; Lake Erie &c. R. Co. v. Priest, 131 Ind. 413; 31 N. E. 77; Kentucky Cent. R. Co. v. Kenney, 82 Ky. 154; 20 Am. & Eng. R. Cas. 458; Avery v. New York &c. R. Co. 106 N. Y. 142; 12 N. E. 619, and cases cited in preceding notes. See, also, Scowden v. Erie R. Co. 26 Pa. Super. Ct. 15; Chicago &c. R. Co. v. McEwen, 35 Ind. App. 251; 71 N. E. 926.

and bind it in the hands of any one who claims title through or under the covenantor,[149] with notice of the covenant. And the fact that the covenant is contained in the covenantor's title deeds is sufficient notice to bind his assignee.[150]

§ 946. Other covenants.—So a railroad company may bind itself by a covenant to give a free annual pass over its road to the grantor and his family,[151] or to run trains to a certain point in a town,[152] or to employ the land-owner to transport freight across a certain river,[153] or to do or refrain from doing any act within the range of its power to contract.[154] But covenants of this kind, by which the grantee undertakes to do something for the personal convenience or benefit of the land-owner wholly disconnected from the use and occupation of

[149] A covenant running with the land "is a covenant beneficial to the owner of the estate, and to no one but the owner of the estate, and which, therefore, may be said to be beneficial to the estate." Best, J., in Vernon v. Smith, 5 B. & Ald. 1; Vyvyan v. Arthur, 1 B. & C. 410; Aikin v. Albany R. Co. 26 Barb. (N. Y.) 289. A successor of the original company, by purchase at judicial sale, is bound by the covenant to fence. Midland R. Co. v. Fisher, 125 Ind. 19; 24 N. E. 756; 8 L. R. A. 604, and note; 21 Am. St. 189, and cases there cited. See, generally, to the effect that the successor is bound by such a covenant. Chappell v. New York &c. R. Co. 62 Conn. 195; 24 Atl. 997; 17 L. R. A. 420; Toledo &c. R. Co. v. Cosand, 6 Ind. App. 222; 33 N. E. 251; Ruddick v. St. Louis &c. R. Co. 116 Mo. 25; 22 S. W. 499; 38 Am. St. 570; Kansas Pac. R. Co. v. Hopkins, 18 Kans. 494; Ecton v. Lexington &c. R. Co. 22 Ky. L. 1133; 59 S. W. 864.

[150] Joy v. St. Louis, 138 U. S. 1; 11 Sup. Ct. 243.

[151] Dodge v. Boston &c. R. Co. 154 Mass. 299; 28 N. E. 243; 13 L. R. A. 318, and note. See Pennsylvania Co. v. Erie &c. R. Co. 108 Pa. St. 621; Eddy v. Hinnant, 82 Tex. 354; 18 S. W. 562; Ruddick v. St. Louis &c. R. Co. 116 Mo. 25; 22 S. W. 499; 38 Am. St. 570.

[152] People v. Louisville &c. R. Co. 120 Ill. 48; 25 Am. & Eng. R. Cas. 235; 5 N. E. 379; 10 N. E. 657.

[153] Wiggins Ferry Co. v. Chicago &c. R. Co. 73 Mo. 389; 39 Am. R. 519; 5 Am. & Eng. R. Cas. 1.

[154] A landowner may bind himself by a covenant with a railroad company for the shipment over its road of the entire product of his quarries or iron furnaces, but such a covenant does not bind his assignees, unless they expressly assume the obligation. Kettle River R. Co. v. Eastern R. Co. 41 Minn. 461; 40 Am. & Eng. R. Cas. 449; 43 N. W. 469; 6 L. R. A. 111; Kippell v. Bailey, 2 Mylne & K. 517. But see Bald Eagle &c. R. Co. v. Nittany Val. R. Co. 171 Pa. St. 284; 33 Atl. 239; 29 L. R. A. 423; 50 Am. St. 807; Tulk v. Moxhay, 2 Phil. (Eng. Ch.) 774.

the land conveyed, do not, as a general rule, run with the land,[155] and cannot be enforced against an assignee of the covenantor, unless the grant is expressly made subject to the condition that the estate shall be forfeited for a breach of the covenant.[156]

§ 946a. Right of way over mineral lands—Reservation of right to mine.—It has been properly held that one selling a railroad right of way with a reservation of the right to mine must so exercise this right as not to undermine the surface support or let down the tracks, unless that right is clearly reserved by express words or by necessary implication.[157] "The court," it is said in the case cited, "must be able to see clearly, from the language used, that the right reserved was to extend to letting down the road or undermining the surface support, before the reservation will be construed to give that power."[158]

§ 946b. Use of lands acquired for right of way purposes.—It may be said generally that a railroad company is entitled to use the right of way acquired by it for all purposes incident to its business as a railroad company and for which such a right of way may properly be used, and the mere fact that the company does not occupy or make use of the right of way to its full width does not abridge this right.[159]

[155] 1 Washburn Real Prop. § 672, et seq.; Gulf &c. R. Co. v. Smith, 72 Tex. 122; 9 S. W. 865; 2 L. R. A. 281; West Virgina Trans. Co. v. Ohio River &c. Co. 22 W. Va. 600; 46 Am. R. 527; Dickey v. Kansas City &c. R. Co. 122 Mo. 223; 26 S. W. 685. A covenant to have a terminus at a certain place, and not to extend the road beyond it, will not bind another corporation which succeeds to the ownership of the road. Lynn v. Mount Savage &c. Co. 34 Md. 603. See, also, Piper v. Union Pac. R. Co. 14 Kan. 568; Close v. Burlington &c. R. Co. 64 Iowa, 149; 19 N. W. 886; Hammond v. Port Royal &c. R. Co. 16 S. Car. 567; Guilfoos v. New York &c. R. Co. 69 Hun (N. Y.), 593; Wilder v. Maine &c. R. Co. 65 Me. 332.

[156] Ruddick v. St. Louis &c. R. Co. 116 Mo. 25; 22 S. W. 499; 38 Am. St. 570. But see Bald Eagle R. Co. v. Nittany Val. R. Co. 171 Pa. St. 284; 33 Atl. 239; 29 L. R. A. 423; 50 Am. St. 807.

[157] Silver Springs &c. R. Co. v. Van Ness, 45 Fla. 559; 34 So. 884. See, also, Montana Ore Purchasing Co. v. Boston &c. Min. Co. 20 Mont. 533; 52 Pac. 375.

[158] See, also, Caledonian R. Co. v. Sprot, 2 Jur. (N. S.) 623; Bell v. Earl of Dudley (1895), L. R. 1 Ch. Div. 182; Robertson v. Youghiogheny &c. Co. 172 Pa. St. 566; 33 Atl. 706; Mickle v. Douglas, 75 Ia. 78; 39 N. W. 198.

[159] Mt. Pleasant Coal Co. v. Delaware &c. R. Co. 6 Lack. Leg. N. 1. See, also, Hargis v. Kansas City &c.

It has the right to change its grade from time to time as required by the exigencies of traffic and the public interest.[160] Among other things, it has the right to construct necessary switches and turn tables,[161] to erect water tanks,[162] and, in a proper case and for a proper purpose, to build and maintain hotels and eating houses on the right of way.[163] In Texas, where the term "right of way" is used in the statute in contradistinction to depots, shops, etc., and in the sense of land required for roadbed, a conveyance of land to a railroad company for right of way is held not to authorize its use for a switch-yard.[164] In the case announcing this principle the court declared that the facts that the land was near a city, was valuable for residence purposes, that a yard could not be constructed on a right of way twice as wide as that conveyed, and that the land was used for many years only as a main track, tended to show that it was the intention of the parties that the land should not be used for a switch-yard.[165]

§ 946c. Title on abandonment of right of way.—It is essential to an abandonment of land for railroad purposes that there should be an intention to abandon the land; mere nonuser is not alone sufficient.[166] But nonuser may exist for such a length of time as to show an intention to abandon the right of way, and this was held to be true

R. Co. 100 Mo. 210; 13 S. W. 680; Clark v. Hannibal &c. R. Co. 36 Mo. 202; post, § 1004.

[160] Kotz v. Ill. Central R. Co. 188 Ill. 578; 59 N. E. 240; Liedel v. Northern Pac. R. Co. 89 Minn. 284; 94 N. W. 877.

[161] Ill. Cent. R. Co. v. Anderson, 73 Ill. App. 621.

[162] Louisville &c. R. Co. v. French, 100 Tenn. 209; 43 S. W. 771; 66 Am. St. 752.

[163] Abraham v. Oregon &c. R. Co. 41 Ore. 550; 69 Pac. 653.

[164] Missouri &c. R. Co. v. Anderson, 36 Tex. Civ. App. 121; 81 S. W. 781.

[165] Missouri &c. R. Co. v. Anderson, 36 Tex. Civ. App. 121; 81 S. W. 781.

[166] Stannard v. Aurora &c. R. Co. 220 Ill. 469; 77 N. E. 254; Garlick v. Pittsburgh &c. R. Co. 67 Ohio St. 223; 65 N. E. 896; Enfield Mfg. Co. v. Ward, 190 Mass. 314; 76 N. E. 1053; Gaston v. Gainesville R. Co. 120 Ga. 516; 48 S. E. 188; Holmes v. Jones, 80 Ga. 659; 7 S. E. 168; Denison &c. R. Co. v. St. Louis &c. R. Co. 96 Tex. 233; 72 S. W. 161. Thus, it has been held that mere nonuser by a railroad company for a period of five years of a portion of a strip of land over which it has laid its tracks, by reason of obstructions caused by a land slide, the remaining part being used by it for storing cars, is not an abandonment of its easement in the strip. Scarritt v. Kansas City &c. R. Co. 148 Mo. 676; 50 S. W. 905.

where the construction of a railroad was delayed for thirty-four years.[167] A section of the Iowa Code provides for a reversion of a railroad right of way where it is not used for a period of eight years.[168] Under this provision it was held that a land-owner was entitled to the possession of the right of way through his land where the only use made of it by the railroad company during this period was to occasionally shove an old, worn-out car upon the track, and allow it to stand there for months, while the other portions of the right of way were used for legitimate railroad purposes.[169] It has been held, under a conveyance of land for railroad purposes solely, to revert to the grantor if not so used, that the operation only of gravel trains from time to time, though at no stated times, did not amount to an abandonment and work a forfeiture to the grantor.[170] A mere deflection of the road from the granted right of way does not amount to an abandonment and will not work a forfeiture.[171] Where a railroad company has merely an easement in the right of way, and the abandonment is established, it has been held that the right of way reverts to the owner of the land at the time of the abandonment, and not to the original owner.[172]

§ 947. Dedication of land to use of railroad.—The question as to whether land can be acquired by a railroad company by a common law dedication must be considered an open one, with the weight of authority apparently to the effect that, in a strict sense, there can be no such dedication to a railroad company. The question has arisen in a number of cases, in some of which it is said that a railroad is so far a public highway that, whenever the owner of the land has shown, by an unequivocal act or declaration, his purpose to dedicate the land to the use of a railway, and the company engaged in building the railway has acted in reference to and upon the faith of such declaration, the title of the railway company is complete.[173] But it has been

[167] Pollock v. Maysville &c. R. Co. 19 Ky. L. 1717; 44 S. W. 359.

[168] Code Iowa, § 2015.

[169] Gill v. Chicago &c. R. Co. 117 Ia. 278; 90 N. W. 606.

[170] Behlow v. Southern &c. R. Co. 130 Cal. 16; 62 Pac. 295.

[171] Dickson v. St. Louis &c. R. Co. 168 Mo. 90; 67 S. W. 642.

[172] McLemore v. Charleston &c. R. Co. 111 Tenn. 639; 69 S. W. 338. See, also, Mobile &c. R. Co. v. Kamper (Miss.), 41 So. 513; Missouri Pac. R. Co. v. Bradbury, 106 Mo. App. 450; 79 S. W. 966.

[173] Texas &c. R. Co. v. Sutor, 56 Tex. 496; 11 Am. & Eng. R. Cas. 506. See Morgan v. Railroad Co.

held that a dedication will not be presumed from the peaceable occupancy and user of land for a right of way or for depot purposes by the company for any period less than that required to confer title by prescription under the statute of limitations.[174] And this occupancy must have been continuous, and with the actual knowledge of the owner, or of some one having full power to represent him in disposing of the land.[175] In those states where the statute provides that the designation of land upon a duly acknowledged and recorded plat of a town or addition thereto, as belonging to any individual or corporation, shall operate as a conveyance of such land for the uses and purposes therein specified or intended,[176] there can be no doubt as to the right of a railway company to claim lands dedicated to it in this manner, since the making and recording of such a plat amounts to the execution of a conveyance to the company of the designated land.[177] But it is held that the intention to dedicate must be evidenced by the plat alone, and cannot be proven by parol.[178] A common law or parol dedication can only be made to the public.[179] And since the

96 U. S. 716; Denver Circle R. Co. v. Nestor, 10 Colo. 403; 15 Pac. 714; Texas &c. R. Co. v. Sutor, 59 Tex. 29.

[174] Jones v. New Orleans &c. R. Co. 70 Ala. 227.

[175] Daniels v. Chicago &c. 35 Iowa, 129; 14 Am. R. 490.

[176] For instances of such statutes, see Rev. Stat. Ill. 1874, Ch. 109, § 3; Rev. Stat. Ind. 1894, § 4412.

[177] Morgan v. Railroad Co. 96 U. S. 716. In Ohio, it is held that the recording by a husband and wife, of a plat of an addition to a town or city, the title to which is in the wife, with a lot of ground designated as the depot of a railroad company whose road extends over the same ground, operates to invest the title of the lot in the company, either as a conveyance or by dedication. A feme covert in Ohio can only divest herself of title to realty by an act of conveyance made in conformity to the statute. Todd v. Pittsburgh &c. R. Co. 19 Ohio St. 514, holding that marking upon a plat one lot "depot of O. & P. Railroad" does not dedicate it. See Watson v. Milwaukee &c. R. Co. 46 Minn. 321; 48 N. W. 1129; 46 Am. & Eng. R. Cas. 543.

[178] Watson v. Chicago &c. R. Co. 46 Minn. 321; 48 N. W. 1129; 46 Am. & Eng. R. Cas. 543. See, also, Louisville &c. R. Co. v. Stephens, 76 Ky. 401; 29 S. W. 14; Noblesville v. Lake Erie &c. R. Co. 130 Ind. 1; 29 N. E. 484. But compare Morgan v. Railroad Co. 96 U. S. 716.

[179] Washburn Easements (2d ed.), 129, 175; Dillon Munic. Corp. § 510; Goddard Easements, 263; Todd v. Pittsburgh &c. R. Co. 19 Ohio St. 514; Carpenter v. Gwynn, 35 Barb. (N. Y.) 395; McWilliams v. Morgan, 61 Ill. 89. But see Morgan v. Railroad Co. 96 U. S. 716). Illinois Cent. R. Co. v. Indiana &c. R. Co. 85 Ill. 211; State v. Strong, 25 Me. 297.

lands acquired by a railroad corporation for the purposes of its enterprise are, so far as the right of property is concerned, strictly private property, over which the corporation exercises exclusive control, the better opinion seems to be that property cannot be dedicated by a common law dedication either for depot grounds,[180] or for a right of way[181]

[180] Todd v. Pittsburg &c. R. Co. 19 Ohio St. 514.

[181] Lake Erie &c. R. Co. v. Whitham, 155 Ill. 514; 40 N. E. 1014; 28 L. R. A. 612; 46 Am. St. 355; Louisville &c. R. Co. v. Stephens, 96 Ky. 401; 29 S. W. 14; 49 Am. St. 303; Minneapolis &c. R. Co. v. Marble, 112 Mich. 4; 70 N. W. 319; Currie v. Natchez &c. R. Co. 61 Miss. 725; Watson v. Chicago &c. R. Co. 46 Minn. 321; 48 N. W. 1129; 46 Am. & Eng. R. Cas. 543. In this last case the court, by Gilfillan, C. J., said: "There are two principal questions in the case—First, Was there a statutory donation or grant of the land in controversy to the defendant Clark W. Thompson, by means of the plat of the town of Wells? Second, May a railroad corporation acquire an easement in lands by a common-law dedication of it to public use for railroad purposes? For, if the second question be answered in the affirmative, there can be no doubt of the defendant's title, as the facts found are sufficient to establish a dedication. The first of these questions is really covered by the decision in County Commissioners of Hennepin Co. v. Dayton, 17 Minn. 260. . . . Such a donation or grant must be evidenced wholly by the plat. It can not rest partly upon the plat and partly in parol, any more than can a conveyance by deed. The intent to donate or grant must appear from the plat itself. . . . It is remarkable that there are so few decisions touching in any way the capacity of a railroad company to receive a common-law dedication of land for the purpose of a railway. The appellant refers us to 1 Ror. R. p. 322, where the author assumes that such dedication may be made, and to Daniels v. Chicago &c. R. Co. 35 Iowa, 129; 14 Am. R. 490; Texas &c. R. Co. v. Sutor, 56 Tex. 496; 11 Am. & Eng. R. Cas. 506; and Morgan v. Chicago &c. R. Co. 96 U. S. 716,—in which the same thing seems to have been assumed, though in none of them is there anything to indicate that the question was raised. In Todd v. Pittsburg &c. R. Co. 19 Ohio St. 514, referred to by the respondent, the court held directly that a railroad company can not acquire title to land by dedication. The appellant argues that, whenever the right of eminent domain may be exercised to appropriate private property to public use, the property, or an easement in it, may pass by a common-law dedication; and therefore, as lands for the use of a railroad company may be appropriated under the right of eminent domain, such a dedication may be made to a railroad company. It is not true, however, that a public use, which will justify taking private property under the right of eminent domain, will in all cases sustain a dedication to public use. . . . The rule that a right in the public to use the land of an individual may be vested by dedica-

for a railroad unless the dedication is made in accordance with a

tion, by acts in pais, when such a right can vest in an individual only by grant, is anomalous, and grows out of the necessity of the case, and has been accounted for on the ground that there is no grantee in esse capable of taking. The origin of the doctrine of dedication has sometimes been ascribed to Lade v. Shepherd, 2 Strange, 1004, decided about 150 years ago. That is the earliest case in which we find the word 'dedication' used, and in which some of the requisites of a dedication are suggested. But, though it has been greatly developed and modified since that time, to meet the altered condition of public needs, the doctrine had its roots in the common law for centuries before that case. The public right, however, was not described as held by dedication, but by custom. As to the rights of the public, some requisites of a good custom are not retained in the law of dedication, most notably that in relation to the time of duration of the public uses. Others are, a custom to take a profit out of the land of another to use it for purposes of profit was not good. Gateward's Case, 6 Coke, 60; Grimstead v. Marlowe, 4 Term R. 717; Mellor v. Spateman, 1 Saund. 339; Blewett v. Tregonning, 3 Adolph. & E. 1002; Waters v. Lilley, 4 Pick. (Mass.) 145; 16 Am. Dec. 333; Pearsall v. Post, 20 Wend. (N. Y.) 111; Post v. Pearsall, 22 Wend. (N. Y.) 425; Littlefield v. Maxwell, 31 Me. 134; 50 Am. Dec. 653. All that could be claimed was an easement, as a right of way. The claim of right to take a profit from the soil of another had to be supported by grant or by prescription, which supposes a grant; and as the public, as such, could not take a grant, of course it could not take such a right. We have not been referred to any decided case, nor been able to find any, which decides that the law of dedication is not subject to this restriction, or which holds that a dedication may be made to take a profit out of the land, or to use it for purposes of profit. The case of Pearsall v. Post, especially, in the court of errors, goes over the whole doctrine, and denies that such a right can be claimed by dedication. Most of the land throughout the country, appropriated under the right of eminent domain, is taken and employed in the public use, through the agency of business corporations. They are authorized to employ the land taken, not only for the public benefit, in the public use, but for carrying on the business they are authorized to transact, not only to serve the public, but to serve their own private interests,—to make for themselves a profit out of the use of the land taken. Where land is to be employed in the public use, by a business corporation or an individual, there is no reason, founded on necessity, for the doctrine of dedication; because there is, in such case, a grantee in esse capable of taking a grant. Private property can not be acquired by dedication. . . . The lands acquired by the corporation, for the purposes of its enterprise, are, so far as the right of property is concerned, private property. If purchased, the corporation pays for them; if taken in the exercise of

statute, by which it is given the force and effect of a grant.[182]

the right of eminent domain, it pays the compensation. It is true they are charged with a public duty, which the corporation, in consideration of the rights and powers conferred on it by the state, assumes to perform, and which the state can compel it to perform. But its rights in the lands as its own property are secure and inviolable. State v. Chicago &c. R. Co. 36 Minn. 402; 31 N. W. 365. The corporation, for its own profit and advantage, accepts the franchises offered by the state, and assumes to perform the functions and duties required by the state, not with property furnished it by the state, but with its own property. The ownership of the property is private, though the use required to be made of it is public. The private ownership prevents the acquisition of it by dedication."

[182] Morgan v. Railroad Co. 96 U. S. 716; Watson v. Chicago &c. R. Co. 46 Minn. 321; 48 N. W. 1129; 46 Am. & Eng. R. Cas. 543. But while Watson v. Railroad Co. supra, holds that the evidence of such a dedication must be made certain and complete by the map on which an intention to dedicate is noted, and that parol evidence of acts and declarations of the landowner which accompanied or followed the recording of the map can not be received to prove an intention to dedicate, Morgan v. Railroad Co. supra, holds the contrary. In the latter case, in construing the Illinois statute with regard to dedication, which provides that a donation or grant marked or noted on the map or plat duly executed and recorded, shall vest in the grantee a fee-simple title to the land "for uses and purposes therein named, expressed or intended," the court said: "The purposes of the grant are not required to be set forth, nor is there any limitation as to what they shall be. The power and will of the donor are unfettered. The provisions are simply a mode of conveyance which the grantor may pursue, if he chooses to do so. The language of the statute is clear and explicit. There is no room for doubt. . . . Was the intention of the appellant to dedicate the premises to the railroad company for its use for depot purposes, as claimed, 'named, expressed or intended'? Either, as to the use, is, according to the statute, sufficient. The facts to which we have adverted in the previous parts of this opinion seem to us conclusive upon the subject. The question must be resolved in the affirmative. If this view be correct, the legal title, by virtue of the statute, passed to the corporation with the right of user as to the premises for all depot purposes, but for none other. 'No particular form of words is required to the validity of a dedication. The dedication may be made by a survey and plat alone, without any declaration, either oral or on the plat, that it was the intention of the proprietor to set apart certain grounds for the use of the public. An examination of the cases referred to in the argument will show that dedications have been established in every conceivable way by which the intention of the dedicator could be evinced.' Godfrey v. Alton, 12 Ill. 29; 52 Am. Dec. 476.

§ 948. Title by adverse possession.—A railroad company may acquire title to land by adverse possession for the full period prescribed by the statute of limitations in the same manner as an individual.[183] But such possession must be continuous and under claim of right,[184] and of such a character as to give notice to the land-owner of the company's claim of title to the land.[185] Thus, where a railway com-

[183] Sherlock v. Louisville &c. Ry. Co. 115 Ind. 22; 17 N. E. 171; Myers v. McGavock, 39 Neb. 843; 58 N. W. 522; 42 Am. St. 627; Texas &c. R. Co. v. Gaines (Tex.), 27 S. W. 266; Organ v. Railway Co. 51 Ark. 235; 11 S. W. 96; Cogsbill v. Railway Co. 92 Ala. 252; 9 So. 512, and authorities cited in following notes. See, also, Turner v. Union Pac. R. Co. 112 Mo. 542; 20 S. W. 673; American Bank Note Co. v. New York &c. R. Co. 129 N. Y. 252; 29 N. E. 302; St. Louis &c. R. Co. v. Nugent, 152 Ill. 119; 39 N. E. 263; McCutchen v. Texas &c. R. Co. (La.) 43 So. 42; Louisville &c. R. Co. v. Smith, 128 Fed. 1; Boyce v. Missouri Pac. R. Co. 168 Mo. 583; 68 S. W. 920; 58 L. R. A. 442; Waggoner v. Wabash &c. R. Co. 185 Ill. 154; 56 N. E. 1050; Brinker v. Union Pac. R. Co. 11 Colo. App. 166; 55 Pac. 207; Fortune v. Chesapeake &c. R. Co. (Ky.) 58 S. W. 711; Perkins v. Maine Cent. R. Co. 72 Me. 95; Newcastle v. Lake Erie &c. R. Co. 155 Ind. 18; 57 N. E. 516; LeBlanc v. Illinois Cent. R. Co. 72 Miss. 669; 18 So. 381; Wolfard v. Fisher (Oreg.), 84 Pac. 850, 851 (citing text). Compare Narron v. Wilmington &c. R. Co. 122 N. Car. 856; 29 S. E. 356; 40 L. R. A. 415, with Purifoy v. Richmond &c. R. Co. 108 N. Car. 100; 12 S. E. 741. In most instances, however, that which is acquired is only a kind of easement rather than a fee-simple. But see Connellsville Gas Co. v. Baltimore &c. R. Co. (Pa.) 65 Atlantic, 669, where it is held that a railroad company taking land for its right of way without compensation can not acquire title by adverse possession.

[184] Lehigh Valley R. Co. v. McFarlan, 43 N. J. L. 605; St. Paul v. Chicago &c. R. Co. 63 Minn. 330; 63 N. W. 267; 65 N. W. 649; 68 N. W. 458; Peck v. Louisville &c. R. Co. 101 Ind. 366. See, also, Borden v. Southside R. Co. 5 Hun (N. Y.), 184; Blaisdell v. Portsmouth &c. R. Co. 51 N. H. 483; Peoria &c. R. Co. v. Tamplin, 156 Ill. 285; 40 N. E. 960. A right to alter the grade of a street and lay additional track can only be acquired by twenty-one years' adverse user. Little Miami R. Co. v. Hambleton, 40 Ohio St. 496.

[185] A mere permissive enjoyment of land or of an easement thereon does not confer any adverse right. The claim must be of the entire title, exclusive of the title of any other person. Jones v. New Orleans &c. R. Co. 70 Ala. 227; Peoria &c. R. Co. v. Tamplin, 156 Ill. 285; 40 N. E. 960. Where a railroad company entered into possession of land under an agreement for the payment of rent, its successor by purchase or consolidation could not claim to hold by adverse possession until it had given notice to the land-holder of its claim of title.

pany has made no attempt to use for a right of way certain lands adjoining its location, and is possessed of no paper title thereto, the fact that it has dug away some of the soil and piled some ties upon the land will not give it a title under adverse possession where these acts were not done under claim of ownership.[186] In the case cited the court said: "Mere acts of trespass upon vacant and unincumbered land, not amounting to an exclusive appropriation thereof, and not made under a bona fide claim of ownership, or under circumstances indicating such a claim, do not constitute an adverse possession within the meaning of the limitation laws. such adverse possession cannot be inferred, but must be proved."[187] The acts of ownership on the part of the railroad company, however, need be only such as the nature of the property and the condition of the road require. Thus, where a railroad company, under a verbal agreement with the owner of a tract of land, staked off a right of way one hundred feet wide across the tract, and built its road upon the middle twenty-five feet of the strip which it had staked off, and continued in exclusive possession of the twenty-five foot strip for the full period of the statute of limitations, under claim of title to the full width of one hundred feet, and during most of that period maintained a section house at one point within this tract which extended back to the edge of the one-hundred-foot strip originally staked off, it was held that the railroad company acquired title to the entire one hundred feet.[188] Where a railroad company having the right to exercise eminent domain takes

And a mere failure to pay rent is not such a notice. Wittman v. Milwaukee &c. R. Co. 51 Wis. 89; 8 N. W. 6. The right to have and maintain a culvert, so constructed as to cause plaintiff's land to be overflowed, can be acquired by a railroad company by proof of twenty years' user. But the user must have been such as to have subjected the company to an action at any time during the twenty years, and it must be shown that the overflow has, at regular or irregular intervals during the twenty years, covered the very land in controversy. Emery v. Raleigh &c. R. Co. 102 N. Car. 209; 9 S. E. 139; 11 Am. St. 727.

[186] Chicago &c. R. Co. v. Galt, 133 Ill. 657; 23 N. E. 425; 44 Am. & Eng. R. Cas. 43. See, also, Merritt v. Northern R. Co. 12 Barb. (N. Y.) 605. But the possession of the contractors engaged in constructing the road is the possession of the company and starts the running of the statute of limitations if it has not already started. Snyder v. Chicago &c. R. Co. 112 Mo. 527; 20 S. W. 885.

[187] McClellan v. Kellogg, 17 Ill. 498; Ambrose v. Raley, 58 Ill. 506.

[188] Hargis v. Kansas City &c. R.

land as a purchaser from one holding adverse possession, its title will become good when the combined adverse possession of the railroad company and its grantor exceeds the statutory period.[189] Where, however, there is no color of title, and the right claimed depends solely upon user, the general rule is that the easement is measured by the user, and will not extend beyond the pedis possessio.[190] This rule has been applied to highways and in other analogous cases, and we do not believe the fact that the statute allows a right of way of a certain width to be condemned necessarily gives a railroad company a right of way of the full statutory width by prescription where it has had adverse possession of a much narrower strip only. But it is doubtful if the general rule to which we have referred can be applied in all its strictness to railroad companies. It certainly cannot be that they are confined to the exact width occupied by their track, for they must have room to safely operate their road. If they have no rights beyond their track, then an abutter might build up to the track and entirely prevent its use. As suggested in the Missouri case already cited, the nature of the road, its necessities, and the character of the use should be taken into consideration, together with the acts of the company, and the extent of the company's claim, as thus shown, should, we think, be deemed to determine the extent of its right. Much must necessarily depend upon the peculiar circumstances of each particular case. What we mean to say is that if the character and extent of the possession and the acts of the company, considered with reference to the nature of railroads, are such as to clearly indicate an adverse

Co. 100 Mo. 210; 13 S. W. 680. See, also, Campbell v. Indianapolis &c. R. Co. 110 Ind. 490; 11 N. E. 482; Florida Southern R. Co. v. Loring, 51 Fed. 932.

[189] Covert v. Pittsburg &c. R. Co. 204 Pa. 341; 54 Atl. 170.

[190] See Brinker v. Union Pac. R. Co. 11 Colo. App. 166; 55 Pac. 207; Zahn v. Pittsburgh &c. R. Co. 184 Pa. St. 66; 39 Atl. 24; Leidigh v. Philadelphia &c. R. Co. 215 Pa. St. 342; 64 Atl. 539; Elliott Roads and Streets, 136 (2d ed.) § 174, and authorities there cited. Approved in Bartlett v. Beardmore, 77 Wis. 356; 46 N. W. 494, 496, and in Marchand v. Maple Grove, 48 Minn. 281; 51 N. W. 606, 607. See, also, Wray v. Chicago &c. R. Co. 86 Ill. 424; Illinois Cent. R. Co. v. Indiana &c. R. Co. 85 Ill. 211; Jones v. Erie &c. R. Co. 169 Pa. St. 333; 32 Atl. 535; 47 Am. St. 916. So it has been held that the erection, maintenance, and operation of a telegraph line by a railroad corporation are not an appropriation of the strip of land between the poles and the line of the railroad, so as to give the corporation title thereto after 20 years. Pittsburgh &c. R. Co. v. Beck, 152 Ind. 421; 53 N. E. 439.

claim to a right of way of a certain width, a right of way to that extent may be acquired by prescription, although it is not all occupied by the track or any other structure.[191]

§ 948a. Adverse possession as against municipality.—It is the general rule that the statute of limitations does not run against a municipal corporation as to its streets and public property, and that no right to maintain a permanent obstruction in a street can be acquired by prescription or adverse possession.[192] Thus, it has been held that no lapse of time will give a railroad company a right to maintain an unlawful bridge or structure in a city street.[193] But municipal corporations are generally authorized to permit or grant the right to railroad companies to run along streets, and, where such is the case, there is, perhaps, good reason for holding that the general rule does not apply. The right to lay tracks in streets is granted by the legislature or authorized by it to be granted by municipalities, so far as the public is concerned, because it is for the public use and benefit, whereas there is no such reason for granting the right to an individual to obstruct a street for a private enterprise. So, in the one case, there never could have been a grant to obstruct the street, where-

[191] See Prather v. Jeffersonville &c. R. Co. 52 Ind. 16, 39, 41; Prather v. Western Union Tel. Co. 89 Ind. 501; Brinker v. Union Pac. R. Co. 11 Colo. App. 166; 55 Pac. 207, 208. But compare Indianapolis &c. R. Co. v. Reynolds, 116 Ind. 356; 19 N. E. 141; Ft. Wayne &c. R. Co. v. Sherry, 126 Ind. 334; 25 N. E. 898; 10 L. R. A. 48; Peoria &c. R. Co. v. Attica &c. R. Co. 154 Ind. 218, 222; 56 N. E. 210; Louisville &c. R. Co. v. Smith, 141 Ala. 335; 37 So. 490. As to right to accretion, see Chicago &c. R. Co. v. Groh, 85 Wis. 641; 55 N. W. 714; Saunders v. New York &c. R. Co. 144 N. Y. 75; 38 N. E. 992; 26 L. R. A. 378; 43 Am. St. 729; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387; 13 Sup. Ct. 110.

[192] See Elliott Roads & Streets, (2d ed.), §§ 882, 883, where the authorities are reviewed. See, also, People v. Harris, 203 Ill. 272; 67 N. E. 785; 96 Am. St. 304; St. Paul &c. R. Co. v. Duluth, 73 Minn. 270; 76 N. W. 35; 43 L. R. A. 433.

[193] Delaware &c. R. Co. v. Buffalo, 4 App. Div. (N. Y.) 562; 38 N. Y. S. 510; Windsor v. Delaware &c. Co. 92 Hun (N. Y.), 127; 36 N. Y. S. 863, affirmed in 155 N. Y. 645; 49 N. E. 1105; Philadelphia &c. R. Co. v. State, 20 Md. 157; Hamden v. New Haven &c. Co. 27 Conn. 158; Raht v. Southern R. Co. (Tenn.) 50 S. W. 72; State v. Louisville &c. R. Co. 86 Ind. 114; Little Miami &c. R. Co. v. Greene Co. 31 Ohio St. 338. See, also, Wiltman v. Milwaukee &c. R. Co. 51 Wis. 89; 8 N. W. 6; Knapp &c. Co. v. New York &c. R. Co. 76 Conn. 311; 56 Atl. 512; 100 Am. St. 512.

as in the other such a grant could have been made to the railroad company to lay a track in a street. It has, therefore, been held that a railroad company may acquire the right to maintain a track in a city street by more than twenty years' continuous adverse possession.[194] But it has been held that an entry by a railroad company on a street, under a resolution of the common council reciting that it was owned by the city, is permissive, and is presumed to so continue unless an adverse claim is duly made, and a deed of a portion of the fee of the street by the city's grantor to the railroad company thereafter is not such an adverse claim.[195]

§ 949. Rights of railroad company acquired by entry under license.—A license to enter upon land and construct a railroad thereon operates as a perfect defense to all acts done within the scope of such license, so long as proper skill and care are used,[196] for that which is done under authority given by a man is, in effect, his own act, and he cannot make another responsible to him for his own acts. So, where a railroad has been located and constructed under a parol license which remains unrevoked, the company has the same right to prevent another company from taking its tracks as if it had condemned the land.[197] A license to do a certain act or series of acts carries with it all the incidents necessary to its exercise. Thus, a license to take wood or stone from the grantor's land includes the right to enter with teams

[194] Newcastle v. Lake Erie &c. R. Co. 155 Ind. 18; 57 N. E. 516. See, also, Wolfard v. Fisher (Oreg.), 84 Pac. 850. But compare Indianapolis &c. R. Co. v. Ross, 47 Ind. 25; Noblesville v. Lake Erie &c. R. Co. 130 Ind. 1; 29 N. E. 484. And see as to limits of right acquired, Jones v. Erie &c. R. Co. 169 Pa. St. 333; 32 Atl. 535; 47 Am. St. 916.

[195] Lewis v. New York &c. R. Co. 162 N. Y. 202; 56 N. E. 540. But see and compare Muhlker v. New York &c. R. Co. 173 N. Y. 549; 56 N. E. 558, and Muhlker v. New York &c. R. Co. 197 U. S. 544; 25 Sup. Ct. 522.

[196] Louisville &c. Co. v. Thompson, 18 B. Mon. (Ky.) 735; Foot v. New Haven &c. R. Co. 23 Conn. 214; Currie v. Natchez &c. R. Co. 61 Miss. 725; Miller v. Auburn &c. R. Co. 6 Hill (N. Y.), 61; Blaisdell v. Portsmouth &c. R. Co. 51 N. H. 483; Tompkins v. Augusta &c. R. Co. 21 S. Car. 420. See, also, Newcastle v. Lake Erie &c. R. Co. 155 Ind. 18; 57 N. E. 516. As to the extent of the right acquired, see Louisville &c. R. Co. v. Smith, 141 Ala. 335; 37 So. 490.

[197] Barre R. Co. v. Montpelier &c. R. Co. 61 Vt. 1; 17 Atl. 923; 4 L. R. A. 785, and note; 15 Am. St. 877. See, also, Omaha Bridge &c. R. Co. v. Whitney, 68 Neb. 389; 94 N. W. 513.

to haul it away.[198] And a license to build a railroad across certain lands carries with it the right to make the excavations and embankments which the character of the surface renders necessary.[199] But a railroad company is liable for damages caused by its negligence in the construction or operation of its road under a license from the landowner.[200] A mere naked parol license to do certain acts upon the land of another does not create a permanent easement therein, but such a license may be revoked at any time before it has been acted upon by the licensee.[201] The death of the licensor before the license is acted upon amounts to a revocation of a license granted by parol.[202] There is a strong line of cases holding that a parol license to lay railroad tracks, or to erect other structures for the use of a railway company upon a person's land, is revocable even after the track is laid or the buildings constructed,[203] and that the licensor is not estopped to main-

[198] Clark v. Vermont &c. R. Co. 28 Vt. 103.

[199] See Blaisdell v. Portsmouth &c. R. Co. 51 N. H. 483.

[200] Selden v. Delaware &c. Canal Co. 29 N. Y. 634; Mathews v. St. Paul &c. R. Co. 18 Minn. 434.

[201] Messick v. Midland R. Co. 128 Ind. 81; 27 N. E. 419; Northern Pac. R. Co. v. Barnsville &c. R. Co. 4 Fed. (2 McCrary, 203), 298; 1 Am. & Eng. R. Cas. 8; Minneapolis &c. R. Co. v. Marble, 112 Mich. 4; 70 N. W. 319; Minneapolis &c. R. Co. v. Minneapolis &c. R. Co. 58 Minn. 128; 59 N. W. 983; Bigelow Estoppel, 227, 228.

[202] Eggleston v. New York &c. R. Co. 35 Barb. (N. Y.) 162; Watson v. Chicago &c. R. Co. 46 Minn. 321; 48 N. W. 1129; 46 Am. & Eng. R. Cas. 543; Bridges v. Purcell, 1 Dev. & B. (N. Car.) 492.

[203] Richmond &c. R. Co. v. Durham &c. R. Co. 104 N. Car. 658; 10 S. E. 659; Jackson & Sharp Co. v. Philadelphia &c. R. Co. 4 Del. Ch. 180; Foot v. New Haven &c. R. Co. 23 Conn. 214; Hetfield v. Central R. Co. 29 N. J. L. 571; Central R. Co. v. Hetfield, 29 N. J. L. 206; Johanson v. Atlantic City R. Co. (N. J.) 64 Atl. 1061; New Orleans &c. R. Co. v. Moye, 39 Miss. 374; Eggleston v. New York &c. R. Co. 35 Barb. (N. Y.) 162; Selden v. Delaware &c. Canal Co. 29 N. Y. 634; 24 Barb. 362; Murdock v. Prospect Park &c. R. Co. 73 N. Y. 579; Mathews v. St. Paul &c. R. Co. 18 Minn. 434; Blaisdell v. Portsmouth &c. R. Co. 51 N. H. 483; Hosher v. Kansas City &c. R. Co. 60 Mo. 329; Irish v. Burlington &c. R. Co. 44 Iowa, 380; Maxwell v. Bay City Bridge Co. 41 Mich. 453; 2 N. W. 639; Baltimore &c. R. Co. v. Algire, 63 Md. 319; Stevens v. Stevens, 11 Metcalf (Mass.), 251; 45 Am. Dec. 203; Woodward v. Seely, 11 Ill. 157; 50 Am. Dec. 445, and note; St. Louis Stock Yards v. Wiggins Ferry Co. 112 Ill. 384; 54 Am. R. 243; Hewlins v. Shippam, 5 B. & C. 221; Cocker v. Cowper, 1 C. M. & R. 418; Louisville &c. R. Co. v. Liebfried (Ky.), 50 Am. & Eng. R. Cas. 202; Stratton's Independence v. Midland Terminal R. Co. 32 Colo. 493; 77 Pac. 247.

tain an action at law for the recovery of the land by the fact that valuable improvements have been made upon the faith of the license.[204] And most of these cases hold that the licensor is not bound, in order to maintain an action of ejectment, to reimburse the company for damages sustained by the revocation.[205] But the courts in

Where city has no express power to grant a permanent easement in a street, it has been held that a license to a railroad company can not be construed as a grant of a permanent easement. State v. Atlantic &c. R. Co. (N. Car.) 53 S. E. 290. See, also, where condition is broken, Edwards v. Pittsburgh &c. R. Co. 215 Pa. St. 597; 64 Atl. 798.

[204] Wood v. Michigan Air Line Co. 90 Mich. 334; 51 N. W. 263. In the note to Prince v. Case and Rerick v. Kern, 2 Amer. Leading Cases, 546, 557, 558, it is said: "An attempt to charge land with the burden of a way or other easement otherwise than by deed will consequently fail, from the insufficiency of the means employed, if the question arises at law, and is determined on strict legal principles. An additional safeguard was, moreover, given by the statute of frauds, under which no incorporeal hereditament can be granted or assigned without a writing signed by the party to be charged. It follows that no easement or charge on land can be created by an oral license, even when the intent is plain, because the parties choose to rest satisfied with unwritten evidence, while the law requires a writing, signed and under seal. . . . Title is the right to possession and enjoyment, and an irrevocable authority to possess and enjoy is virtually a title. If I can use the land of another for a purpose of my own, under an authority which he can not recall, the ownership relatively to that purpose is in me and not in him. To give an oral license an effect which is denied to a contract is, therefore, virtually to abrogate the statute of frauds." Citing Desloge v. Pearce, 38 Mo. 588; Houston v. Laffee, 46 N. H. 505. "These principles are so plain as to be indisputable at law, and the only question is how far they should be modified by equity. A chancellor may control the words of the statute in order to prevent it from being used as a cover for the commission of the frauds which it was meant to suppress, but the power to do this belongs solely to equity, and can not be exercised by a common law tribunal, without confounding jurisdictions which have hitherto been kept separate." Winslow v. Cooper, 104 Ill. 235; Wood v. Michigan Air Line R. Co. 90 Mich. 334; 51 N. W. 263.

[205] Batchelder v. Hibbard, 58 N. H. 269, and cases in preceding note. The land-owner's right to revoke a parol license and bring an action of ejectment is not impaired by mere inaction or delay in bringing suit, within the time allowed by the statute of limitations. Kremer v. Chicago &c. R. Co. 51 Minn. 15; 52 N. W. 977; 38 Am. St. 468; 51 Am. & Eng. R. Cas. 382; Galway v. Metropolitan El. R. Co. 128 N. Y. 132; 28 N. E. 479; 13 L. R. A. 788. A land-owner is not es-

most of the states where this rule is followed hold that a land-owner who grants permission to a railroad company to enter upon his lands and construct its road thereon may be enjoined from revoking the license until the company can perfect its title by condemnation,[206] and in Minnesota it is provided by statute that an action of ejectment brought by the land-owner in such a case may be converted into condemnation proceedings by the railroad company.[207] In those states

topped to maintain an action of ejectment by the mere fact that he granted the company parol license to proceed with the road and occupy the land. Wood v. Michigan Air Line R. Co. 90 Mich. 334; 51 N. W. 263; 52 Am. & Eng. R. Cas. 37. See, also, Johanson v. Atlantic City R. Co. (N. J.) 64 Atl. 1061; Bork v. United N. J. &c. Co. 70 N. J. L. 268; 57 Atl. 412; 64 L. R. A. 836; 103 Am. St. 808. Contra, Baker v. Chicago &c. R. Co. 57 Mo. 265.

[206] Conger v. Burlington &c. R. Co. 41 Iowa, 419; Pickert v. Ridgefield Park R. Co. 25 N. J. Eq. 316; New York &c. R. Co. v. Stanley, 35 N. J. Eq. 283; Detroit &c. R. Co. v. Brown, 37 Mich. 533; Brown v. Bowen, 30 N. Y. 519; 86 Am. Dec. 406; Cook v. Pridgen, 45 Ga. 331; 12 Am. R. 582; Baltimore &c. R. Co. v. Algire, 63 Md. 319; 65 Md. 337; 4 Atl. 293; Foster v. Browning, 4 R. I. 47; 67 Am. Dec. 505; Lacy v. Arnett, 33 Pa. St. 169. But though a parol license, amounting in terms to an easement, is revocable, as to future enjoyment, at law, and is determined by a conveyance of the estate upon which it was to be enjoyed, this is not the rule, in all cases, in courts of equity. In these courts, the future enjoyment of an executed parol license, granted upon a consideration, or upon the faith of which money has been expended, will be enforced at all events, where adequate compensation in damages could not be obtained. This will be done upon the two grounds of estoppel on account of fraud, and specific performance of a party executed contract to prevent fraud. Snowden v. Wilas, 19 Ind. 10, 14; 81 Am. Dec. 370.

[207] Minneapolis Western R. Co. v. Minneapolis &c. R. Co. 58 Minn. 128; 59 N. W. 983. In this case the court said: "The finding, therefore, is of a naked license, carrying no estate in the land, and revocable at the will of the licensor. Johnson v. Skillman, 29 Minn. 95; 12 N. W. 149; 43 Am. R. 192, and note; Wilson v. St. Paul &c. R. Co. 41 Minn. 56; 42 N. W. 600; 4 L. R. A. 378; Minneapolis Mill Co. v. Minneapolis &c. R. Co. 51 Minn. 304; 53 N. W. 639. This would seem to be entirely decisive of the case, but defendant claims that, because plaintiff purchased after these tracks had been constructed, therefore it took the premises subject to the incumbrance of an easement in defendant to permanently maintain the tracks. The mere statement of the proposition carries with it its own refutation; for, plainly stated, it is that a conveyance of the premises by the licensor to a third party converts a mere license (which creates no

of the Union where law and equity are administered by the same court, relief is afforded in any given suit where a case for equitable relief is presented.[208] In the case cited the action was, in form, an action at law for damages, and an answer showing a parol license and the expenditure of money on the faith thereof was held good. And in the courts of Maine,[209] New Hampshire,[210] Pennsyl-

estate in the land) into an easement, which is an interest in the land, and lies only in grant. We do not see why, on this line of reasoning, the same result would not have followed had defendant been a mere intruder or trespasser, for counsel's argument is that the purchaser must be deemed to have taken the land subject to the visible incumbrance then on it. So far from such being the case, the law is that a revocable license is revoked by a conveyance of the land by the licensor. Johnson v. Skillman, supra; Wilson v. Railway Co. supra. Counsel's argument is all based on a false premise, which begs the whole question. He assumes that when a railway company enters and builds its track on land under a license from the owner, it acquires a permanent easement in the land by virtue of the license thus acted on, and that thereafter the only right of the land-owner is his claim for compensation for the taking of the land for railway purposes. In some states—notably Wisconsin and Illinois—either by statute or by judicial decision, founded on supposed considerations of public policy, this is substantially the law; all actions by the land-owner, whatever their form, being in effect actions to recover compensation for the permanent appropriation of land already taken. If such were the law in this state, there would be at least some plausibility to defendant's contention. But we have repeatedly held that the law is otherwise. Watson v. Chicago &c. R. Co. 46 Minn. 321; 48 N. W. 1129; Lamm v. Chicago &c. R. Co. 45 Minn. 71; 47 N. W. 455; 10 L. R. A. 268, and note; Minneapolis Mill Co. v. Minneapolis &c. R. Co. 51 Minn. 304; 53 N. W. 639. Under our statute the land-owner may revoke his license, and bring ejectment, which the railway company may, if it so elects, turn into a condemnation proceeding, and it is only then, and through that proceeding, that the railroad company acquires any easement in the land, or the land-owner any right to compensation for taking it for railway purposes. The defendant could not acquire title by prescription, because its possession was not adverse."

[208] Snowden v. Wilas, 19 Ind. 10; 81 Am. Dec. 370; Perkins, J. In Indiana a land-owner will not be permitted to revoke a parol license under which the railroad company has actually built its road. Buchanan v. Logansport &c. R. Co. 71 Ind. 265; Campbell v. Indianapolis &c. R. Co. 110 Ind. 490; 11 N. E. 482.

[209] Ricker v. Kelly, 1 Me. 117; 10 Am. Dec. 38, and note; Clement v. Durgin, 5 Me. 9.

[210] Ameriscoggin Bridge Co. v. Bragg, 11 N. H. 102. But see Batchelder v. Hibbard, 58 N. H. 269, and Blaisdell v. Portsmouth

vania,[211] Ohio,[212] Georgia,[213] Indiana,[214] Iowa,[215] and some other states,[216] it is held that where a parol license has been given, upon the faith of which moneys have been expended, the licensor and those claiming under him, with notice, will be estopped from revoking such license, when the licensee cannot be placed in statu quo.[217] The occupancy and use of a strip of land by a

&c. R. Co. 51 N. H. 483, holding that a parol license is revocable.

[211] Rerick v. Kern, 14 S. & R. (Pa.) 267; 16 Am. Dec. 497, and note; Lacy v. Arnett, 33 Pa. 169; Campbell v. McCoy, 31 Pa. St. 263; Cumberland Valley R. Co. v. McLanahan, 59 Pa. St. 23.

[212] Wilson v. Chalfant, 15 Ohio, 248; 45 Am. Dec. 574; Pierson v. Cincinnati &c. Canal Co. 2 Disney (Ohio), 100. See, also, Columbus &c. R. Co. v. Williams, 52 Ohio St. 268; 41 N. E. 261.

[213] Sheffield v. Collins, 3 Ga. 82; Southwestern R. Co. v. Mitchell, 69 Ga. 114; Cook v. Pridgen, 45 Ga. 331; 12 Am. R. 582. See, also, Charleston &c. R. Co. v. Hughes, 105 Ga. 1; 30 S. E. 972; 70 Am. St. 17; Atlanta &c. R. Co. v. Barker, 105 Ga. 534; 31 S. E. 452.

[214] Snowden v. Wilas, 19 Ind. 10; 81 Am. Dec. 370; Buchanan v. Logansport &c. R. Co. 71 Ind. 265; Evansville &c. R. Co. v. Nye, 113 Ind. 223; 15 N. E. 261; Newcastle v. Lake Erie &c. R. Co. 155 Ind. 18, 26; 56 N. E. 516.

[215] Beatty v. Gregory, 17 Iowa, 109; 85 Am. Dec. 546; Wickersham v. Orr, 9 Iowa, 253; 74 Am. Dec. 348. See, also, Des Moines &c. R. Co. v. Lynd (Iowa), 62 N. W. 806. But compare Conger v. Burlington &c. R. Co. 41 Iowa, 419.

[216] Washburn Real Prop. 548; 2 Am. Leading Cases, 682, note; Ames, C. J., in Foster v. Browning, 4 R. I. 47; 67 Am. Dec. 505. In the following cases it has been decided that licenses could not be revoked after the expenditure of money on the faith of them. Clark v. Glidden, 60 Vt. 702; 15 Atl. 358; Williams v. Flood, 63 Mich. 487; 30 N. W. 93; Baker v. Chicago &c. R. Co. 57 Mo. 265; Rhodes v. Otis, 33 Ala. 578; 73 Am. Dec. 439; Williamston &c. R. Co. v. Battle, 66 N. C. 540; New Orleans &c. R. Co. v. Moye, 39 Miss. 374. See, also, Norfolk &c. R. Co. v. Perdue, 40 W. Va. 442; 21 S. E. 755; Roberts v. Northern Pac. R. Co. 158 U. S. 1; 15 Sup. Ct. 756; Chicago &c. Railroad Co. v. Goodwin, 111 Ill. 273; 53 Am. R. 622; Pryzbylowicz v. Missouri &c. R. Co. 17 Fed. 493; Chicago &c. R. Co. v. Englehart, 57 Neb. 444; 77 N. W. 1092; Texas &c. R. Co. v. Jarrell, 60 Tex. 267; Taylor v. Chicago &c. R. Co. 63 Wis. 327; 24 N. W. 84; Louisville &c. R. Co. v. Pittsburgh &c. Co. 111 Ky. 960; 64 S. W. 969; 55 L. R. A. 601; 98 Am. St. 447; Northern Pac. R. Co. v. Smith, 171 U. S. 260; 18 Sup. Ct. 794, 799; Ft. Worth &c. R. Co. v. Sweatt, 20 Tex. Civ. App. 543; 50 S. W. 162.

[217] Messick v. Midland R. Co. 128 Ind. 81; 27 N. E. 419; Campbell v. Indianapolis &c. R. Co. 110 Ind. 490; 11 N. E. 482; Midland R. Co. v. Smith, 113 Ind. 233; 15 N. E. 256; Currie v. Natchez &c. R. Co. 61 Miss. 725. See this subject elaborately discussed in 2 Am. Leading Cases, 684.

railway company for its roadbed and track, and for the running of its trains, is sufficient notice of its equity to bind a purchaser from the original licensor,[218] and it is held that a land-owner is chargeable with knowledge that a railroad is of such a permanent character that it cannot well be removed or abandoned,[219] and that, when he permits its construction across his land, he thereby waives his remedy by injunction or action for ejectment or trespass for operating the road,[220] and is relegated to a proceeding for damages under the statute.[221] In

[218] Campbell v. Indianapolis &c. R. Co. 110 Ind. 490; 11 N. E. 482; Roberts v. Northern Pac. R. Co. 158 U. S. 1; 15 Sup. Ct. 756; Northern Pac. R. Co. v. Smith, 171 U. S. 260; 18 Sup. Ct. 794. See, also, Harman v. Southern R. 72 S. Car. 228; 51 S. E. 689. The habitual use of a passway under a railroad, stipulated for in the oral grant of the right of way, is sufficient to charge the purchaser of the road at a judicial sale with knowledge of the grantor's rights therein. Swan v. Burlington &c. R. Co. 72 Iowa, 650; 34 N. W. 457.

[219] Harlow v. Marquette &c. R. Co. 41 Mich. 336; 2 N. W. 48. But see Wood v. Michigan Air Line R. Co. 90 Mich. 334; 51 N. W. 263.

[220] Milwaukee &c. R. Co. v. Strange, 63 Wis. 178; 23 N. W. 432; 20 Am. & Eng. R. Cas. 413; Roberts v. Northern Pac. R. Co. 158 U. S. 1; 15 Sup. Ct. 756; Hanlin v. Chicago &c. Railway Co. 61 Wis. 515; 21 N. W. 623; Taylor v. Chicago &c. R. Co. 63 Wis. 327; 24 N. W. 84; 22 Am. & Eng. R. Cas. 123; Provolt v. Chicago &c. R. Co. 57 Mo. 256; McAulay v. Western Vt. R. Co. 33 Vt. 311; 78 Am. Dec. 627; McClellan v. St. Louis &c. R. Co. 103 Mo. 295; 15 S. W. 546; 46 Am. & Eng. R. Cas. 501; Reichert v. St. Louis &c. R. Co. 51 Ark. 491; 11 S. W. 696; 5 L. R. A. 183, and note. See Holloway v. Louisville &c. R. Co. 92 Ky. 244; 17 S. W. 572. And see authorities cited and reviewed in City of New York v. Pine, 185 U. S. 93; 22 Sup. Ct. 592, 595, 596.

[221] Richards v. Buffalo &c. R. Co. 137 Pa. St. 524; 19 Atl. 931; 21 Am. St. 892; Denver &c. R. Co. v. School Dist. 14 Colo. 327; 23 Pac. 978; Baker v. Chicago &c. R. Co. 57 Mo. 265; Cassidy v. Chicago &c. R. Co. 70 Wis. 440; 35 N. W. 925; Buchner v. Chicago &c. R. Co. 60 Wis. 264; 19 N. W. 56. "One who permits a railroad company to occupy and use his lands and construct its road (a quasi public work) thereon without remonstrance or complaint, can not afterward reclaim it free from the servitude he has permitted to be imposed upon it. His acquiescence in the company's taking possession and constructing its works under circumstances which made imperative his resistance, if he ever intended to set up illegality, will be considered a waiver. But while this presumed waiver is a bar to his action to dispossess the company, he is not deprived of his action in damages for the value of the land or for injuries done him by the construction or operation of the road." St. Julien v. Morgan &c. R. Co. 35 La. Ann. 924.

such a proceeding, it has been held that the owner of the land should be awarded damages as of the date that the land was taken, and not the value of his land as increased by reason of the completion and operation of the road.[222] Where a license is granted by contract in writing for a valuable consideration, and coupled with an interest, the license is generally held to be irrevocable.[223] A license to occupy land for the right of way for a railroad will, in the absence of anything to the contrary, be construed to be a license to occupy the full width which the railroad is authorized by statute to acquire.[224] A railroad company, which has laid a track under a parol license from the land-owner, can enter upon the land and remove the rails and ties used in its construction, after the license is revoked.[225] But it has been held

That acquiescence in the construction of the road does not bar the land-owner's right to recover damages, see Harlow v. Marquette &c. R. Co. 41 Mich. 336; 2 N. W. 48; Perkins v. Maine Cent. R. Co. 72 Me. 95; Thornton v. Sheffield &c. R. Co. 84 Ala. 109; 4 So. 197; 5 Am. St. 337; Western Pa. R. Co. v. Johnston, 59 Pa. St. 290; Galveston &c. R. Co. v. Pfeuffer, 56 Tex. 66; Payne v. Morgan &c. R. Co. 43 La. Ann. 981; 10 So. 10.

[222] Texas &c. R. Co. v. Sutor, 56 Tex. 496. See Baltimore &c. R. Co. v. Algire, 65 Md. 337; 4 Atl. 293. In Watson v. Chicago &c. R. Co. 46 Minn. 321; 48 N. W. 1129; 46 Am. & Eng. R. Cas. 543, the court held that an action of ejectment could not be maintained against a railroad company for the recovery of land upon which it had constructed its road with the consent of the owner. And that the mesne profits from the date of the revocation of the license by the death of the licensor should be allowed as damages. In Kremer v. Chicago &c. R. Co. 51 Minn. 15; 52 N. W. 977; 38 Am. St. 468; 51 Am. & Eng. R. Cas. 382, an assessment of damages as for a condemnation of the land was had in an action in ejectment for land held by a railroad company under a parol license, the railroad company having put in an answer praying for a condemnation; and the action of the court was approved on appeal.

[223] Williamston &c. R. Co. v. Battle, 66 N. C. 540; Messick v. Midland R. Co. 128 Ind. 81; 27 N. E. 419; Burrow v. Terre Haute &c. R. Co. 107 Ind. 432; 8 N. E. 167. It is a settled rule of law that a license can not be revoked so long as it is essential to the enjoyment of a vested interest created by the licensor. Provolt v. Chicago &c. R. Co. 57 Mo. 256; McAulay v. Western Vt. R. Co. 33 Vt. 311; 78 Am. Dec. 627; New Jersey &c. R. Co. v. Van Syckle, 37 N. J. L. 496.

[224] Hargis v. Kansas City &c. R. Co. 100 Mo. 210; 13 S. W. 680. But see ante, § 948.

[225] Northern Central R. Co. v. Canton Co. 30 Md. 347; Dietrich v. Murdock, 42 Mo. 279; Justice v. Nesquehoning Valley R. Co. 87 Pa.

that, where its occupation of the land is wrongful, its track becomes a part of the realty and cannot be removed.[226] The conveyance of an easement by deed cannot be revoked.[227]

St. 28. See Richmond &c. R. Co. v. Durham &c. R. Co. 104 N. C. 658; 10 S. E. 659.

[226] Meriam v. Brown, 128 Mass. 391. In this case the court said: "Not having filed any written location, the corporation has not taken or appropriated the plaintiff's land to its own use in such a sense as to justify its entry upon it or to obtain any legal title or right to use or occupy it. Hazen v. Boston &c. R. Co. 2 Gray (Mass.), 574. It cannot enter upon it, except as a trespasser, even for the purpose of removing the rails which it has placed there, and which, by their annexation to the soil, it has lost the right to remove." But see post, §§ 997, 998.

[227] New Jersey &c. R. Co. v. Van Syckle, 37 N. J. L. 496; Hudson v. Leeds &c. R. Co. 16 Q. B. 796. See, also, Galveston &c. R. Co. v. Pfeufer 56 Tex. 66.

CHAPTER XXXVIII.

APPROPRIATION UNDER THE EMINENT DOMAIN.

§ 950. Definition and nature of the eminent domain.—In addition to the modes of acquiring a right of way, of which we have already treated, there is another of equal or greater importance, namely, the appropriation of property under the power of eminent domain. Of this power we shall treat generally in the present chapter in so far as it affects railroads. Eminent domain is the right or power of a sovereign state to appropriate private property to particular uses for the purpose of promoting the general welfare.[1] It is distinguished from the power of taxation in that its exercise operates upon an individual without reference to what is exacted from any other individual or class of individuals, and without reference to his ability to contribute toward the necessities of government.[2] It is also dis-

[1] Lewis Eminent Domain (2d ed.) § 1. See, also, 1 Redfield Railways, p. 228; Dillon Munic. Corp. § 584; Cooley Const. Lims. (7th ed.) 753; Randolph Eminent Domain, § 2; Mills Eminent Domain, § 2; East Tennessee &c. R. Co. v. Love, 3 Head (Tenn.), 63; Consumers' &c. Trust Co. v. Harless, 131 Ind. 446; 29 N. E. 1062; 15 L. R. A. 505; Pollard's Lessee v. Hogan, 3 How. (U. S.) 212; Pittsburg &c. Co. v. Benwood Iron Works, 2 L. R. A. 680, and note; Mifflin Bridge Co. v. Juniata County, 13 L. R. A. 431, and note. It is "the power of the state to apply private property to public purposes on payment of just compensation to the owner." 10 Am. & Eng. Ency. of Law (2d ed.), 1047. See, also, United States v. Jones, 109 U. S. 513; 3 Sup. Ct. 346; Board of Health v. Van Hoesen, 87 Mich. 533; 49 N. W. 894; 14 L. R. A. 114; Beekman v. Saratoga &c. R. Co. 3 Paige (N. Y.), 72; 22 Am. Dec. 679, and note; Healy Lumber Co. v. Morris, 33 Wash. 490; 74 Pac. 681; 63 L. R. A. 820; 99 Am. St. 964; note in 102 Am. St. 811.

[2] People v. Mayor &c. of Brooklyn, 4 N. Y. 419; 55 Am. Dec. 266, and note; Hammett v. Philadelphia, 65 Pa. St. 146; 3 Am. R. 615; Aurora v. West, 9 Ind. 74; Cincinnati &c. R. Co. v. Clinton Co. 1 Ohio St. 77, 102; Griffin v.

tinguished from the police power, by which the state assumes to direct the use that an owner shall make of his property so as not to interfere with the reasonable use and enjoyment by others of their property,[3] and also from the power, exercised by states, of taking or destroying property in the course of actual warfare,[4] for the owner of the property taken or damaged in the exercise of these powers is not entitled to compensation,[5] whereas the power of eminent domain can be effectively exercised only where due compensation is made. But the power of eminent domain embraces all cases where, by authority of the state, and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use, either by the state itself or by a corporation, public or private, or by a private citizen,[6] provided only that the use be a pub-

Dogan, 48 Miss. 11. Special assessments for betterments are also referable to the power of taxation and not that of eminent domain. Hagar v. Board of Supervisors, 47 Cal. 222; Williams v. Mayor of Detroit, 2 Mich. 560; White v. People, 94 Ill. 604; Garrett v. St. Louis, 25 Mo. 505; 69 Am. Dec. 475; State v. Blake, 36 N. J. L. 442; 35 N. J. L. 208; Baltimore v. Greenmount Cemetery, 7 Md. 517; Woodhouse v. Burlington, 47 Vt. 300; Hill v. Higdon, 5 Ohio St. 243; Macon v. Patty, 57 Miss. 378; 34 Am. R. 451; Hammett v. Philadelphia, 65 Pa. St. 146; 3 Am. R. 615; Davidson v. New Orleans, 96 U. S. 97.

[3] Chicago &c. R. Co. v. Iowa, 94 U. S. 155; Peik v. Chicago &c. R. Co. 94 U. S. 164; Munn v. People, 69 Ill. 80; affirmed Munn v. Illinois, 94 U. S. 113; Hine v. New Haven, 40 Conn. 478; Watertown v. Mayo, 109 Mass. 315; 12 Am. R. 694; Roosevelt v. Godard, 52 Barb. (N. Y. 533; Bass v. State, 34 La. Ann. 494; Davenport v. Richmond City, 81 Va. 639; Houston &c. R. Co. v. Dallas (Tex.) 84 S. W. 648. Forbidding a railroad company to use its property in a way that would be dangerous to the lives of people is not a taking for public uses. Woodruff v. New York &c. R. Co. 59 Conn. 63; 20 Atl. 17; 45 Am. & Eng. R. Cas. 109, 112, note.

[4] Bell v. Louisville &c. R. Co. 1 Bush (Ky.), 404; 89 Am. Dec. 632; Ford v. Surget, 46 Miss. 130; Article in 13 Amer. Law Reg. N. S. 401; Lewis' Eminent Dom. (2d ed.) § 8.

[5] See cases in preceding notes; also Aitken v. Wells River, 70 Vt. 308; 40 Atl. 829; 41 L. R. A. 566; 67 Am. St. 672. And the right to destroy property to prevent the spreading of a fire, the ravages of a pestilence or other public calamity, is distinct from the right of eminent domain, and the owner can not claim compensation for property destroyed, even though the persons destroying it acted under authority of statute. American Print Works v. Lawrence, 23 N. J. L. 9 and 590, 615.

[6] Lewis Eminent Domain (2d ed.), § 1. The right which belongs to the society or to the sovereign, of disposing, in case of necessity, and

lic one.[7] The establishment of a railroad as a purely private enter-

for the public safety, of all the wealth in the state, is called the eminent domain. Vattel, B. I. C. 20, § 244; Pollard's Lessee v. Hogan, 3 How. (U. S.) 212. See Enfield Toll Bridge v. Hartford &c. R. Co. 17 Conn. 40; 42 Am. Dec. 716, and note; Edgewood R. Company's Appeal, 79 Pa. St. 257; Nichols v. Somerset &c. R. Co. 43 Me. 356; McLauchlin v. Charlotte R. Co. 5 Rich. L. (S. Car.) 583; Beekman v. Saratoga &c. R. Co. 3 Paige Ch. (N. Y.), 45; 22 Am. Dec. 679, and note; Freedle v. North Carolina R. Co. 4 Jones (N. C.) L. 89; Brown v. Beatty, 34 Miss. 227; 69 Am. Dec. 389; Evansville &c. R. Co. v. Grady, 6 Bush (Ky.), 144; Orr v Quimby, 54 N. H. 590, 611; Todd v. Austin, 34 Conn. 78; Giesy v. Cincinnati &c. R. Co. 4 Ohio St. 308. Any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is a taking, within the constitutional provision that private property shall not be taken or damaged for public use without just compensation, to the extent of the damage suffered, even though the title and possession of the owner remain undisturbed. Stockdale v. Rio Grande Western R. Co. 28 Utah 201; 77 Pac. 849. The property of a railroad company is not arbitrarily taken from it without compensation by a statute which imposed upon it the burden of showing, in proceedings to compel it to provide a station at an incorporated village on its line, that the establishment of a station there is unreasonable and unnecessary. Judgment, State v. Minneapolis &c. R. Co. 87 Minn. 195; 91 N. W. 465, affirmed Minneapolis &c. R. Co. v. Minnesota, 193 U. S. 53; 24 S. Ct. 396; 48 L. Ed. 614. A statute requiring railroads to keep their rights of way clear of dry vegetation and undergrowth, so as to prevent fires, and providing that any corporation failing to comply therewith shall incur a penalty and be liable for all damages occasioned by such neglect, does not violate the constitutional inhibitions against taking private property for public use without compensation. McFarland v. Mississippi River &c. R. Co. 175 Mo. 422; 75 S. W. 152.

[7] Boom Co. v. Patterson, 98 U. S. 403; Chicago &c. R. Co. v. Wiltse, 116 Ill. 449; 6 N. E. 49; Giesy v. Cincinnati &c. R. Co. 4 Ohio St. 308; County Court v. Griswold, 58 Mo. 175. It rests in the wisdom of the legislature to determine when, and in what manner, the public necessities require its exercise, and with the reasonableness of the exercise of that discretion the courts will not interfere. Swan v. Williams, 2 Mich. 427; Wilkin v. First Div. St. Paul &c. R. Co. 16 Minn. 271; Central &c. R. Co. v. Atchison &c. R. Co. 28 Kan. 453; Seacomb v. Milwaukee &c. R. Co. 29 How. (N. Y.) Pr. 75; Bachler's Appeal, 90 Pa. St. 207. Some courts consider the necessity for the taking as an important element in deciding whether the property is to be employed for a public use. And that to justify the exercise of the power, "it must be impossible, or very difficult, at least, to secure the same public uses and

prise cannot be aided by the power of eminent domain.[8] The power of eminent domain has existed in all ages as an acknowledged attribute of sovereignty.[9] It is inherent in every sovereign government,[10] and is not conferred by constitutions, but is limited and regulated by them.[11] It cannot be surrendered by grant or contract,[12] since its

purposes in any other way than by authorizing the condemnation of private property." Varner v. Martin, 21 W. Va. 534; Dayton Min. Co. v. Seawell, 11 Nev. 394; Jordan v. Woodward, 40 Me. 317; Ryerson v. Brown, 35 Mich. 333; 24 Am. R. 564. But this is decidedly opposed to the weight of authority. It is no objection to the exercise of the power, that lands equally feasible could be obtained by purchase. Giesy v. Cincinnati &c. R. Co. 4 Ohio St. 308. It has been held that a law requiring a railroad company which has purchased the property of another railroad company at a mortgage foreclosure sale to pay a judgment against the latter company is an attempt to require private property to a private purpose. Woodward v. Central Vermont R. Co. 180 Mass. 599; 62 N. E. 1051.

[8] Maginnis v. Knickerbocker Ice Co. 112 Wis. 385; 88 N. W. 300; 69 L. R. A. 833, and note. See post, §§ 960–961a.

[9] "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." 1 Redfield Railways, p. 230. See, also, Scudder v. Trenton &c. Co. 1 N. J. Eq. 694; 23 Am. Dec. 756.

[10] Brown v. Beatty, 34 Miss. 227; 69 Am. Dec. 389; United States v. Jones, 109 U. S. 513; 3 Sup. Ct. 346; Penn. Mut. &c. Ins. Co. v. Heiss, 141 Ill. 35; 31 N. E. 138; 33 Am. St. 273; Water Works Co. v. Burkhart, 41 Ind. 364; Weir v. St. Paul &c. R. Co. 18 Minn. 155; Beekman v. Saratoga &c. R. Co. 3 Paige (N. Y.), 45; 22 Am. Dec. 679, and note; Noll v. Dubuque &c. R. Co. 32 Iowa, 66; White v. Nashville &c. R. Co. 7 Heisk. (Tenn.) 518; Baltimore &c. R. Co. v. Pittsburg &c. R. Co. 17 W. Va. 812, 841; Hollister v. State, 9 Idaho 8; 71 Pac. 541. Being an attribute of sovereignty, the power of eminent domain does not inhere in a territorial government. Pratt v. Brown, 3 Wis. 603; Newcomb v. Smith, 1 Chandler (Wis.), 71. But a territory may exercise the power by express delegation of authority from congress. Warren v. First Div. St. Paul &c. R. Co. 18 Minn. 384. The Cherokee Nation is not a sovereign state and, therefore, does not possess the power of eminent domain. Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641; 10 Sup. Ct. 965.

[11] Elliott Roads and Streets (2d ed.), § 181, and other authorities there cited. See, also, Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525; 5 Sup. Ct. 995; West River Bridge Co. v. Dix, 6 How. (U. S.), 507; United States v. Jones,

continued exercise is essential to the existence of organized society.[13] This power exists in each of the states of the Union whether it is expressly conferred by the constitution or not,[14] and may extend to taking public lands of the United States that lie within the borders of the state exercising the power.[15] And it may also be exercised by the United States government in the discharge of its constitutional powers to secure land for military roads, light houses, and other conveniences and necessities of government.[16] This power extends to taking property for any purpose and in any manner, by which the

109 U. S. 518; 3 Sup. Ct. 346; Bloodgood v. Mohawk &c. R. Co. 18 Wend. (N. Y.) 9; 31 Am. Dec. 313; Central Branch &c. R. Co. v. Atchison &c. R. Co. 28 Kan. 453; 10 Am. & Eng. R. Cas. 528.

[12] Cooley Const. Lim. *281, *525; Greenleaf's Cruise Real Property, Vol. II. p. 67, note; Elliott Roads & Streets (2d ed.), § 186. See Eastern R. Co. v. Boston &c. R. Co. 111 Mass. 125; 15 Am. R. 13; Illinois &c. Canal v. Chicago &c. R. Co. 14 Ill. 314; Baltimore &c. Turnpike Co. v. Union R. Co. 35 Md. 224; 6 Am. R. 397; People v. Mayor &c. of New York, 32 Barb. (N. Y.) 102; Alabama &c. R. Co. v. Kenney, 39 Ala. 307; Long Island &c. Co. v. Brooklyn, 166 U. S. 685; 17 Sup. Ct. 718; Lock Haven Bridge Co. v. Clinton Co. 157 Pa. St. 379; 27 Atl. 726. In his work on Constitutional Limitations Judge Cooley says: "When the existence of a particular power in the government is recognized on the ground of necessity, no delegation of the legislative power of the people can be held to vest authority in the department which holds it in trust, to bargain away such power, or to so tie up the hands of the government as to preclude its repeated exercise, as often and under such circumstances as the needs of the government may require." Cooley Const. Lim. (7th ed.) 754.

[13] Raleigh &c. R. Co. v. Davis, 2 Dev. & B. Law (N. C.) 451. "The right of eminent domain, that is, the ultimate right of the sovereign power to appropriate, not only the public property, but the private property of all the citizens within the territorial sovereignty, to public purposes, is inherent in the government; without this power, the state could not establish and open a highway of any kind. No railroad, canal or turnpike could be constructed; no ground upon which to build a public building could be procured by the state or government, in any other way than by contract with the owner." Water Works Co. v. Burkhart, 41 Ind. 364, per Osborn, J.

[14] Boom Co. v. Patterson, 98 U. S. 403; Brown v. Beatty, 34 Miss. 227; 69 Am. Dec. 389.

[15] United States v. Railroad Bridge Co. 6 McLean (U. S.), 517. See and compare § 965.

[16] United States, Matter of, 96 N. Y. 227; People v. Humphrey, 23 Mich. 471; 9 Am. R. 94; Darlington v. United States, 82 Pa. St. 382; 22 Am. R. 766; United States v. Oregon R. &c. Co. 16 Fed. 524; 14 Am. & Eng. R. Cas. 23; Kohl v. United States, 91 U. S. 367;

general welfare may be advanced, excepting so far as it is limited by constitutional restrictions.[17]

United States v. Gettysburg &c. R. Co. 160 U. S. 668; 16 Sup. Ct. 427; Chappell v. United States, 160 U. S. 499; 16 Sup. Ct. 397; Nahant v. United States, 136 Fed. 273; Elliott Roads and Streets (2d ed.), §§ 184, 185. But the United States may, and usually does, make use of the officers, tribunals and institutions of the states as its agents, in the accomplishment of its governmental functions, where this can be done with the consent of the state. And, in the absence of any declaration to the contrary, the consent of the state will be presumed. Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525–532; 5 Sup. Ct. 995; United States v. Jones, 109 U. S. 513; 3 Sup. Ct. 346; Matter of United States, supra. And in some cases it has been held that the legislature can delegate to the agent of the United States the right of eminent domain for the purpose of obtaining land for a site for a post-office or other public buildings. Burt v. Merchants' Ins. Co. 106 Mass. 356; 8 Am. R. 339; Gilmer v. Lime Point, 18 Cal. 229; Reddall v. Bryan, 14 Md. 444; 74 Am. Dec. 550. There is strong authority, however, for holding that a state can not exercise the power of eminent domain on behalf of another sovereignty, and that condemnation proceedings on behalf of the United States must be prosecuted by authority of its own laws. People v. Humphrey, 23 Mich. 471; 9 Am. R. 94, per Cooley, J.; Darlington v. United States, 82 Pa. St. 382; 22 Am. R. 766; Jones v. United States, 48 Wis. 385; 4 N. W. 519.

[17] The accepted theory upon this subject appears to be this: In every sovereign state there resides an absolute and uncontrolled power of legislation. In Great Britain this complete power rests in the parliament; in the American states it resides in the people themselves as an organized body politic. But the people, by creating the constitution of the United States, have delegated this power as to certain subjects, and under certain restrictions, to the congress of the Union, and that portion they can not resume, except as it may be done through amendment of the national constitution. For the exercise of the legislative power, subject to this limitation, they create, by their state constitution, a legislative department upon which they confer it; and granting it in general terms, they must be understood to grant the whole legislative power which they possessed, except so far as at the same time they saw fit to impose restrictions. While, therefore, the parliament of Britain possesses completely the absolute and uncontrolled power of legislation, the legislative bodies of the American states possess the same power except, first, as it may have been limited by the constitution of the United States; and, second, as it may have been limited by the constitution of the state. A legislative act can not, therefore, be declared void, unless its conflict with one of these instruments can be pointed out." Cooley Const. Limit. (7th ed.) 241; People v. New York Cent. R. Co. 34 Barb. (N. Y.) 123, 138; Peo-

§ 951. Constitutional provisions and questions.—The constitution of the United States[18] and the constitutions of nearly all the states of

ple v. Supervisors, 17 N. Y. 235; Gentry v. Griffith, 27 Tex. 461; Derby Turnpike Co. v. Parks, 10 Conn. 522, 543; 27 Am. Dec. 700; Danville v. Pace, 25 Gratt. (Va.) 1; 18 Am. R. 663; Chicago &c. R. Co. v. Smith, 62 Ill. 268; 14 Am. R. 99; Yancy v. Yancy, 5 Heisk. (Tenn.) 353; 13 Am. R. 5; Norris v. Abingdon Academy, 7 Gill & J. (Md.) 7; Hobart v. Supervisors, 17 Cal. 23; Williams v. Detroit, 2 Mich. 560; Macon &c. R. Co. v. Davis, 13 Ga. 68; Cotten v. County Commissioners, 6 Fla. 610; Butler's Appeal, 73 Pa. St. 448; Inhabitants of Durham v. Lewiston, 4 Me. 140; Challiss v. Atchison &c. R. Co. 16 Kan. 117; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812, 841; Winona &c. R. Co. v. Waldron, 11 Minn. 515, 539; 88 Am. Dec. 100, and note; United States v. Jones, 109 U. S. 518; 3 Sup. Ct. 346; Raleigh &c. R. Co. v. Davis, 2 Dev. & B. Law (N. C.) 451; Central R. Co. v. Hetfield, 29 N. J. L. 206. In some cases it is said that the only limitation upon the exercise of the right of eminent domain—the power of the state to take or authorize the taking of private property for public use—is that contained in the state constitutions. Wilson v. Baltimore &c. R. Co. 5 Del. Ch. 524. But see Elliott Roads and Streets, 142. For cases holding that the legislature can not pass any law opposed to natural right and justice, see Bowman v. Middleton, 1 Bay (S. Car.), 252; Harness v. Chesapeake &c. Canal Co. 1 Md. Ch. 248; Bradshaw v. Rodgers, 20 Johns. (N. Y.) 103; Terrett v. Taylor, 9 Cranch (U. S.), 43, per Story, J.; Cairo &c. R. Co. v. Turner, 31 Ark. 494; 25 Am. R. 564; Doe v. Georgia R. &c. Co. 1 Ga. 524; Johnston v. Rankin, 70 N. C. 550; Petition of Mount Washington Road Co. 35 N. H. 134. The legislature under the power of eminent domain may authorize the condemnation of the stock of minority or dissenting stockholders in railroad corporations and statutes authorizing this procedure in furtherance of a public object are not open to the objection that they impair the obligation of contracts. Spencer v. Seaboard Air Line R. Co. 137 N. C. 107; 49 S. E. 96; Offield v. New York &c. R. Co. (U. S.) 27 Sup. Ct. 72.

[18] Amendments of 1791, Art. 5. The provision in the constitution of the United States that private property shall not be taken for public use without just compensation, applies only to the operations of the federal government, and is not a limitation upon the power of the states. Pumpelly v. Green Bay Co. 13 Wall. (U. S.) 166; Barron v. Baltimore, 7 Peters (U. S.), 243; Winona Point &c. Club v. Caspersen, 193 U. S. 189; 24 Sup. Ct. 431; Concord R. Co. v. Greely, 17 N. H. 47; Cairo &c. R. Co. v. Turner, 31 Ark. 494; 25 Am. R. 564; Raleigh &c. R. Co. v. Davis, 2 Dev. & B. L. (N. Car.) 451; Livingston v. New York, 8 Wend. (N. Y.) 85; 22 Am. Dec. 622, and note; Martin v. Dix, 52 Miss. 53; 24 Am. R. 661; Renthorp v. Bourg, 4 Martin (O. S.), (La.) 97; Parham v. Justices, 9 Ga. 341; Lewis Em. Dom.

the Union[19] require a just compensation to be made for all property taken for public use, and most of them require the compensation to be paid or secured before the property is taken.[20] It can only be taken pursuant to "the law of the land," and, as constitutions do not create or execute the right of eminent domain, there must be a statute, in some way authorizing the seizure,[21] but, when a valid statute is enacted conferring the right to condemn, and providing for "due process of law," it stands as the law of the land.[22] The constitutional provision that "the right of trial by jury shall remain inviolate" does not require that a jury trial should be provided for in condemnation cases, and the legislature may deny a trial by jury.[23] But the con-

(2d ed.) § 11. Contra, Doe v. Georgia R. &c. Co. 1 Ga. 524; Scudder v. Trenton &c. Co. 1 N. J. Eq. 694; 23 Am. Dec. 756. The fourteenth amendment, however, does seem to apply to state action. Elliott Roads and Streets (2d ed.), § 188, note; Randolph Em. Dom. § 36. See Davidson v. New Orleans, 96 U. S. 97; Kentucky Railroad Tax Cases, 115 U. S. 321; 6 Sup. Ct. 57; Scott v. Toledo, 36 Fed. 385; 1 L. R. A. 688; Chappell v. United States, 160 U. S. 499; 16 Sup. Ct. 397; Chicago &c. R. Co. v. Chicago, 166 U. S. 226; 17 Sup. Ct. 581; Nahant v. United States, 136 Fed. 273, and compare Eldridge v. Binghamton, 120 N. Y. 309; 24 N. E. 462; Wilson v. Baltimore &c. R. Co. 5 Del. Ch. 524.

[19] Lewis Eminent Dom. §§ 14 to 52 (1888); Stimson Am. Stat. § 91 (1886).

[20] Stimson Am. Stat. § 93 (1886), citing constitutions of New Jersey, Pennsylvania, Ohio, Indiana, Michigan, Iowa, Minnesota, Kansas, Maryland, West Virginia, Kentucky, Arkansas, Texas, California, Oregon, Nevada, South Carolina, Georgia, Alabama, Louisiana. But in Indiana, Michigan, Texas and Oregon compensation need not precede the taking, where property is taken by the state; nor in New Jersey, West Virginia and California, when the property is taken either by the state or a municipal corporation. Stimson Am. Stat. § 93 (1886). It is not competent for the legislature to prescribe the amount of compensation to be paid for the property. What is "just compensation" is a judicial question. Pennsylvania R. Co. v. Baltimore &c. R. Co. 60 Md. 263.

[21] 2 Dillon's Munic. Corp. §§ 602, 604; Elliott Roads and Streets (2d. ed.), §§ 194, 194a; Chicago &c. Railroad Co. v. Lake, 71 Ill. 333; Galveston &c. R. Co. v. Mud Creek &c. Co. 1 Tex. App. (Civil Cases), 169; Phillips v. Dunkirk &c. R. Co. 78 Pa. St. 177; Allen v. Jones, 47 Ind. 438; Mills Em. Dom. 384.

[22] Cooley's Const. Lim. (7th ed.) 760; Alexander &c. R. Co. v. Alexander &c. R. Co. 75 Va. 780; 40 Am. R. 743, and note; Secombe v. Railroad Co. 23 Wall. (U. S.) 108. See, also, note to Bank v. Cooper, 24 Am. Dec. 537; Mills Em. Dom. § 84; Barr v. New Brunswick, 67 Fed. 402.

[23] Elliott Roads and Streets (2d ed.), § 196; Beekman v. Saratoga &c. R. Co. 3 Paige Ch. (N. Y.) 45; 22 Am. Dec. 679; Scudder v.

stitutions of some of the states expressly require that the compensation shall be determined by a jury.[24] The constitutional provision against the taking of property for a public use without compensation does not operate to prevent the acquisition of an easement in a right of way by adverse possession.[25]

§ 952. Public use and necessity—Who determines.—The courts almost uniformly agree in holding that property can only be taken under the power of eminent domain for some use in which the public interest is involved,[26] unless the power to condemn property for private uses has been expressly delegated by a provision in the constitution.[27] They also agree that the power of eminent domain can

Trenton &c. Co. 1 N. J. Eq. 694; 23 Am. Dec. 756; Backus v. Lebanon, 11 N. H. 19; 35 Am. Dec. 466; Copp v. Henniker, 55 N. H. 179; 20 Am. R. 194; Willyard v. Hamilton, 7 Ohio 111; 30 Am. Dec. 195. See, also, United States v. Engerman, 46 Fed. 176; State v. Lyle, 100 N. Car. 497; 6 S. E. 379; Long Island &c. Co. v. Brooklyn, 166 U. S. 685; 17 Sup. Ct. 718.

[24] Randolph Em. Dom. § 316.

[25] Boyce v. Missouri Pacific R. Co. 168 Mo. 583; 68 S. W. 920; 58 L. R. A. 442.

[26] Concord R. Co. v. Greely, 17 N. H. 47; Bloodgood v. Mohawk &c. R. Co. 18 Wend. (N. Y.) 9, 56; 31 Am. Dec. 313, and note; Bangor R. Co. v. McComb, 60 Me. 290; Beekman v. Railroad Co. 3 Paige (N. Y.), 45; 22 Am. Dec. 679, and note; New Central Coal Co. v. George's Creek Coal &c. Co. 37 Md. 537; Waddell's Appeal, 84 Pa. St. 90; Sadler v. Langham, 34 Ala. 311; Tyler v. Beacher, 44 Vt. 648; 8 Am. R. 398; Valley City Salt Co. v. Brown, 7 W. Va. 191; Varner v. Martin, 21 W. Va. 534; Osborn v. Hart, 24 Wis. 89; 1 Am. R. 161; Witham v. Osborn, 4 Ore. 318; 18 Am. R. 287; Bankhead v. Brown, 25 Iowa, 540; Brown v. Beatty, 34 Miss. 227; 69 Am. Dec. 389; Lorenz v. Jacob, 63 Cal. 73; McQuillen v. Hatton, 42 Ohio St. 202; Dickey v. Tennison, 27 Mo. 373; Hand Gold Min. Co. v. Parker, 59 Ga. 419; United States v. Baltimore &c. R. Co. 27 App. (D. C.) 105; Western Union Tel. Co. v. Pennsylvania R. Co. 123 Fed. 33. The power can only be exercised to supply some existing public need or to gain some present public advantage; not with a view to contingent results dependent on a projected speculation. Edgewood R. Co.'s Appeal, 79 Pa. St. 257.

[27] In Coster v. Tide Water Co. 18 N. J. Eq. 54, 63, the chancellor says: "There is no prohibition in the constitution of this state, or in any of the state constitutions, that I know of, against taking private property for private use. But the power is nowhere granted to the legislature. The constitution vests in the senate and general assembly the legislative or law-making power. They can make laws, the rules prescribed to govern our

only be exercised to meet some public necessity; that it is created by and grows out of an existing necessity. But the legislature is the proper authority to determine whether a necessity exists for the exercise of the power, and its determination of the question is conclusive.[28] The propriety of the exercise of the right of eminent domain

civil conduct. They are not sovereign in all things; the executive and judicial power is not vested in them. Taking the property of one man and giving it to another is not making a law or rule of action, it is not legislation, it is simply robbery." See this subject fully discussed in Lewis Em. Dom. (2d ed.) § 157, et seq.; Cooley Const. Limit. (7th ed.) 763, et seq. The provision of the Colorado constitution, recognizing the right to appropriate private property for private ways of necessity, does not include the right to take and use it for the construction of private railroads. People v. District Court, 11 Colo. 147; 17 Pac. 298.

[28] National Docks R. Co. v. Central R. Co. 32 N. J. Eq. 755, 763; Baltimore &c. R. Co. v. Pittsburg &c. R. Co. 17 W. Va. 812; Beekman v. Saratoga &c. R. Co. 3 Paige (N. Y.), 45; 22 Am. Dec. 679, and note; Buffalo &c. R. Co. v. Brainard, 9 N. Y. 100; Brown v. Gerald, 100 Me. 351; 61 Atl. 785; 70 L. R. A. 472; 109 Am. St. 526; United States v. Oregon R. &c. Co. 16 Fed. 524; Aldridge v. Tuscumbia &c. R. Co. 2 Stew. & P. (Ala.) 199; 23 Am. Dec. 307; Whiteman's Exr. v. Wilmington &c. R. Co. 2 Harr. (Del.) 514; 33 Am. Dec. 411; Challiss v. Atchison &c. R. Co. 16 Kan. 117, 126; Chicago &c. R. Co. v. Lake, 71 Ill. 333; Water Works Co. v. Burkhart, 41 Ind. 364; Consumers' &c. Trust Co. v. Harless, 131 Ind. 446; 29 N. E. 1062; 15 L. R. A. 505; Speck v. Kenoyer, 164 Ind. 431; 73 N. E. 896, 897, 898; Moore v. Sanford, 151 Mass. 285; 24 N. E. 323; 7 L. R. A. 151, and note; Lent v. Tillson, 72 Cal. 404; 14 Pac. 71; Savannah v. Hancock, 91 Mo. 54; 3 S. W. 215; Tyler v. Beacher, 44 Vt. 648; 8 Am. R. 398; Chicago &c. R. Co. v. Wiltse, 116 Ill. 449; 6 N. E. 49; Pittsburgh &c. R. Co. v. Sanitary Dist. 218 Ill. 286; 75 N. E. 892; 2 L. R. A. (N. S.) 226; Cherokee v. Sioux City &c. Co. 52 Iowa, 279; 3 N. W. 42; Roanoke City v. Berkowitz, 80 Va. 616; Shoemaker v. United States, 147 U. S. 282; 13 Sup. Ct. 361; Elliott Roads and Streets, 145, 146. Like the power to tax, it resides in the legislative department to which the delegation is made. It may be exercised directly or indirectly by that body, and it can only be restrained by the judiciary when its limits have been exceeded or its authority has been abused or perverted. Kramer v. Cleveland &c. R. Co. 5 Ohio St. 140. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. Boom Co. v. Patterson, 98 U. S. 403; Chicago &c. R. Co. v. Wiltse, 116 Ill. 449; 6 N. E. 49; County Court v. Griswold, 58 Mo. 175; Giesy v. Cincinnati &c. R. Co. 4 Ohio St. 308. The burden of proving the necessity in the particular case is held to be upon the railroad company seeking to condemn in Louisiana &c. Co. v. Xavier

is a political or legislative, and not a judicial, question; and the manner of its exercise by the legislature, except as to the matter of compensation, is unrestricted. The legislature is not bound to submit the question of the propriety of the exercise of the right of eminent domain to a judicial tribunal, but may exercise it itself, or delegate it to a jury, commission, or any other body, as it sees fit.[29] It has been held, however, that no more property can be taken than is required to meet the necessity which the legislature has declared to exist, and that the legislature cannot authorize a corporation to take all of a tract of land without the owner's consent when only a part thereof is necessary for the prosecution of a public enterprise.[30] And

Realty, 115 La. Ann. 328; 39 So. 1, and when a local board or body attempts to exercise a power of eminent domain not conferred on it by the Legislature, its action is subject to review and control by the courts, state or federal. Chicago &c. R. Co. v. Williams, 148 Fed. 442.

[29] State v. Rapp, 39 Minn. 65; 38 N. W. 926; State v. Stewart, 74 Wis. 620; 43 N. W. 947; 6 L. R. A. 394; People v. Smith, 21 N. Y. 595; Chicago &c. R. Co. v. Lake, 71 Ill. 333; Challiss v. Atchison &c. Co. 16 Kan. 117; Elliott Roads and Streets (2d ed.), § 190.

[30] Dunn v. Charleston, Harper (S. Car.) Law, 189; Baltimore v. Calumet, 23 Md. 449; Albany Street, In re, 11 Wend. (N. Y.) 149; 25 Am. Dec. 618, and note; Embury v. Conner, 3 Comst. (N. Y.) 511. In this latter case, Jewett, J., speaking for the court, said: "It needs no argument to show that the end and design of this section was not to take private property for the use of the public. It manifestly goes upon the ground that the property so authorized to be taken is not wanted for the purpose of forming or improving a street, the object in view for which the proceedings are instituted." And he refers with approval to Albany Street, In re, supra, in which the court holds that if the provision was meant to authorize the corporation to take additional property not needed for public use, with the consent of the owner, it was valid. "But if it was to be taken literally, that the commissioners might, against the consent of the owner, take the whole lot, when only a part was required for public use, and the residue to be applied to private use, it assumed a power which the legislature did not possess." See, also, Louisiana &c. Co. v. Xavier Realty Co. 115 La. Ann. 328; 39 So. 1; Chicago &c. R. Co. v. Williams, 148 Fed. 442 (holding that the court may examine into question of necessity of taking property already devoted to a public use). In England, under the statute, where the taking of a part of the premises destroys the value of the remaining portion for the purpose for which it is used, the owner can compel the company to take the whole. Thus a man having his dwelling-house in a tract of two and one-eighth acres of ground, sur-

the question as to whether the particular use for which property is sought to be taken in any case is a public use, unlike the somewhat similar question of the necessity or expediency of taking property for public use, is a judicial question.[31] And it has been held in Colorado

rounded by brick walls, used part of the land as a nursery garden for trade purposes. It was held that he was entitled under § 92 of the land clause act, 1845, to compel a railway company, proposing, without actually touching the house, to take the greenhouses and a part which had been planted and used for ornamental purposes, to take the whole of the land. Salter v. Metropolitan District R. Co. L. R. 9 Eq. 432. And a manufactory which run partly by water-power was permitted to compel a railroad company that proposed to take the bed of the stream from which the water-power was obtained, to take the whole manufactory. Furniss v. Midland R. Co. L. R. 6 Eq. 473.

[31] Pittsburgh &c. R. Co. v. Benwood Iron Works, 31 W. Va. 710; 8 S. E. 453; 2 L. R. A. 680; Sadler v. Langham, 34 Ala. 311; McQuillen v. Hatton, 42 Ohio St. 202; St. Paul &c. R. Co. In re, 34 Minn. 227; 25 N. W. 345; Stewart v. Great Northern R. Co. 65 Minn. 515; 68 N. W. 208; 33 L. R. A. 427; Savannah v. Hancock, 91 Mo. 54; 3 S. W. 215; St. Joseph &c. R. Co. v. Hannibal &c. R. Co. 94 Mo. 535; 6 S. W. 691; Concord R. Co. v. Greely, 17 N. H. 47; New Central Coal Co. v. George's Creek Coal &c. Co. 37 Md. 537; Consolidated Channel Co. v. Central Pac. R. Co. 51 Cal. 269; Stockton &c. R. Co. v. Stockton, 41 Cal. 147; Varner v. Martin, 21 W. Va. 534, 550; Dayton &c. Mining Co. v. Seawell, 11 Nev. 394; Coster v. Tide Water Co. 18 N. J. Eq. 54; Bankhead v. Brown, 25 Iowa, 540; Loughbridge v. Harris, 42 Ga. 500; Deansville Cemetery Assn. Matter of, 66 N. Y. 569; 23 Am. R. 86; Tyler v. Beacher, 44 Vt. 648; 8 Am. R. 398; Talbot v. Hudson, 16 Gray (Mass.), 417; Anderson v. Turbeville, 6 Coldw. (Tenn.) 150; Denver &c. Co. v. Union Pac. R. Co. 34 Fed. 386; Logan v. Stogdale, 123 Ind. 372; 24 N. E. 135; 8 L. R. A. 58, and note; Brown v. Gerald, 100 Me. 351; 61 Atl. 785; 70 L. R. A. 472; 109 Am. St. 526; Mountain Park Terminal R. Co. v. Field, 76 Ark. 239; 88 S. W. 897, 898 (citing text); Cozad v. Kanawha &c. Co. 139 N. Car. 283; 51 S. E. 932. In Bridwell v. Gate City Terminal Co. (Ga.) 56 S. E. 624, 627, it is said: "In determining whether the use to which it is sought to appropriate land of a property owner is a public or a private use, all the facts and circumstances throwing light on that subject may be considered, and the mere fact that the company may have a charter to build a railroad, regular on its face, is not conclusive as to the question of the purpose for which the property is actually sought to be taken." See, also, New Orleans Terminal Co. v. Teller, 113 La. Ann. 733; 37 So. 624; 38 Am. & Eng. R. Cas. 64. In one case where no objection was made to the appointment of commissioners, and no attempt was made to submit to the court questions of whether the taking of the

that the question of necessity is not to be determined by commissioners; their duty is merely to determine the quantity of land needed.[32]

§ 952a. Public use and necessity—What constitutes public use.—The authorities as to what constitutes a public use are hopelessly conflicting, some cases holding that the term "public use" is equivalent to "public benefit,"[33] and that whatever is beneficially employed for the community is of public use,[34] while some other cases hold that, to constitute a public use, the public must assume control of the property taken, or some right to use the property must pass to the public.[35] It is generally conceded that, to be public, it is not essential that the user should be such as to directly benefit all, or any considerable part, of the entire community,[36] but the use and benefit must,

land was for a private use, or whether there was a necessity therefor until after the report was filed, it was held that the right to have such questions determined by the court was waived. Union Pac. R. Co. v. Colorado Postal Tel. Cable Co. 30 Colo. 133; 69 Pac. 564.

[32] Union Pacific R. Co. v. Colorado &c. Cable Co. 30 Colo. 133; 69 Pac. 564. See, also, Vinegar Bend Lumber Co. v. Oak Grove &c. R. Co. (Miss.) 43 So. 292.

[33] Olmstead v. Camp, 33 Conn. 532; 89 Am. Dec. 221; Seely v. Sebastian, 4 Ore. 25; Talbot v. Hudso, 16 Gray (Mass.), 417; Beekman v. Saratoga &c. R. Co. 3 Paige (N. Y.), 45, 73; 22 Am. Dec. 679, and note; Pittsburgh v. Scott, 1 Pa. St. 309; Bellona Company's Case, 3 Bland. Ch. (Md.) 442; Hand Gold Min. Co. v. Parker, 59 Ga. 419. But see Brown v. Gerald, 100 Me. 351; 61 Atl. 785; Gaylord v. Sanitary Dist. 204 Ill. 576; 68 N. E. 522; 63 L. R. A. 582; 98 Am. St. 235; Niagara Falls R. Co. In re, 108 N. Y. 375; 15 N. E. 429; and note in 22 Am. Dec. 688, 704; and 102 Am. St. 813, 822, et seq.

[34] Aldridge v. Tuscumbia &c. R. Co. 2 Stew. & P. (Ala.) 199; 23 Am. Dec. 307.

[35] Varner v. Martin, 21 W. Va. 534; Sholl v. German Coal Co. 118 Ill. 427; 10 N. E. 199; 59 Am. R. 379; Memphis Freight Co. v. Memphis, 4 Coldw. (Tenn.) 419; Jenal v. Green Island Drainage Co. 12 Neb. 163; 10 N. W. 547; Eureka &c. Manf. Co. Matter of, 96 N. Y. 42; West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 546. See, also, De Camp v. Hibernia R. Co. 47 N. J. L. 43; Twelfth St. Market Co. v. Philadelphia &c. R. 142 Pa. St. 580; 21 Atl. 902, 989.

[36] Gilmer v. Lime Point, 18 Cal. 229; Sherman v. Buick, 32 Cal. 241; 91 Am. Dec. 577, and note; Sadler v. Langham, 34 Ala. 311; Warren v. Bunnell, 11 Vt. 600; O'Reiley v. Kankakee Valley &c. Co. 32 Ind. 169; Aldridge v. Tuscumbia &c. R. Co. 2 Stew. & Por. (Ala.) 199; 23 Am. Dec. 307; Bloomfield &c. Co. v. Richardson, 63 Barb. (N. Y.) 437; Chicago &c. R. Co. v. Porter, 43 Minn. 527; 2 Lewis Am. R. & Corp. R. 415, and note on page 425; Talbot v. Hudson, 16 Gray

as a general rule, be common to all members of the community who choose to avail themselves of it,[37] although it has been held that a union depot company organized to provide depot and terminal facilities for a number of railroads may be authorized to condemn property for that purpose.[38] There is a late decision to the effect that a statute giving a street railroad a right to use a certain amount of the tracks of another street railroad company, on payment of damages, is unconstitutional, as an exercise of the right of eminent domain. It was held that the object of the statute was not the benefit of the general public, but a scheme to aid a new corporation in taking possession of the franchises of the old corporation for its own benefit, and a clear violation of the principles underlying the right of eminent domain.[39] But the mere fact that the advantage of the railroad inures to a particular individual or class of individuals will not deprive it of its public character.[40] And it has been held that the question of public use does not depend on the length of the road,[41] or whether it

(Mass.), 417; Shaver v. Starrett, 4 Ohio St. 494; McQuillen v. Hatton, 42 Ohio St. 202; Riche v. Bar Harbor Water Co. 75 Me. 91; 28 Alb. L. J. 498; Elliott Roads and Streets (2d ed.), §§ 192, 193, quoted with approval in Madison v. Gallagher, 159 Ill. 105; 42 N. E. 316, 317, and in Cozad v. Kanawha &c. Co. 139 N. Car. 283; 51 S. E. 932, 934.

[37] Coster v. Tide Water Co. 18 N. J. Eq. 54; Williams v. School District, 33 Vt. 271; Olmstead v. Camp, 33 Conn. 532; 89 Am. Dec. 221; McQuillen v. Hatton, 42 Ohio St. 202; Township Board v. Hackmann, 48 Mo. 243; Ulmer v. Lime Rock R. Co. 98 Me. 579; 57 Atl. 1001; 66 L. R. A. 387; Madera R. Co. v. Raymond Granite Co. (Cal. App.) 87 Pac. 27; Elliott Roads and Streets (2d ed.), §§ 192, 193. See, also, note in 102 Am. St. 813. It does not depend upon the amount of business, but upon the right of the public generally to use the road or conduct business with it as a common carrier. Kettle River R. Co. v. Eastern R. Co. 41 Minn. 461; 43 N. W. 469; 6 L. R. A. 111; 40 Am. & Eng. R. Cas. 449; Concord R. Co. v. Greely, 17 N. H. 47. But see Pittsburgh &c. R. Co. v. Benwood Iron Works, 31 W. Va. 710; 8 S. E. 453; 2 L. R. A. 680, and note. The furnishing of electricity for the use of extensive street surface railroads, constitutes a "public use" within the meaning of that phrase in relation to eminent domain. Niagara &c. Power Co. In re, 111 App. Div. (N. Y.) 686; 97 N. Y. S. 853.

[38] Fort Street Union Depot Co. v. Morton, 83 Mich. 265; 47 N. W. 228; 3 Lewis Am. R. & Corp. Cas. 438; Riley v. Charleston &c. Co. 71 S. Car. 457; 51 S. E. 485.

[39] Philadelphia &c. R. Co. In re, 203 Pa. 354; 53 Atl. 191.

[40] Madera R. Co. v. Raymond Granite Co. (Cal.) 87 Pac. 27.

[41] Madera R. Co. v. Raymond Granite Co. (Cal.) 87 Pac. 27.

is only a branch road,[42] or that its rolling stock is to be furnished by another corporation,[43] or that its stockholders are also stockholders in a corporation which will be primarily benefited by its construction.[44]

§ 952b. Public use and necessity—Continued.—On this subject the New York Court of Appeals has said: "To justify the taking of land, in invitum its owner, for railroad purposes, not only the necessity must exist, but that necessity must be recognized by statute and be provided for in some plain grant of power. That a railroad purpose usually subserves a public use is true; but the precise authority to take the land desired by condemnation proceedings must always be found, and whether it exists, and whether it is available, in the case presented, are questions for judicial determination. The courts are to decide whether the uses, for which the land is demanded, are, in fact, public, and within the intendment of the statute."[45] The question of the right of interurban roads to exercise this power is elsewhere considered, but it is said, in a recent case, that the courts proceed upon the theory that the road must be of benefit to the rural inhabitants along the route traversed, and not that only those living in towns where regular stations shall be maintained shall be the beneficiaries, and the courts, applying this principle, held that, where the country districts are so sparsely settled that the traffic along railroad lines paralleled by such interurban lines will not support the electric railroads, then their construction is not a public necessity, and the power of eminent domain cannot be called into action on their behalf under the Illinois statute.[46] It has been held that the fact that citizens guarantee a railroad company that property needed for its terminal facilities shall not cost beyond a certain amount, does not make the use of such terminal facilities a private use so as to prevent the company from taking the property under the power of eminent domain.[47]

§ 952c. Exercise of power by corporation exercising both public

[42] Madera R. Co. v. Raymond Granite Co. (Cal.) 87 Pac. 27.

[43] Madera R. Co. v. Raymond Granite Co. (Cal.) 87 Pac. 27.

[44] Madera R. Co. v. Raymond Granite Co. (Cal.) 87 Pac. 27.

[45] Erie R. Co. v. Steward, 170 N. Y. 172; 63 N. E. 118.

[46] Hartshorn v. Illinois &c. T. Co. 210 Ill. 609; 71 N. E. 612.

[47] Louisiana &c. R. Co. v. Moseley, 117 La. 313; 41 So. 585.

and private functions.—The question has been raised whether a corporation authorized to pursue private, as well as public objects, may exercise the right of eminent domain at all. Those raising this question contend that, to permit condemnation by such corporations, would be equivalent to allowing the taking of private property for private purposes. The point seems well taken in cases where it is sought to condemn the property for one of the private objects for which the company was incorporated, but is without force where the property is demanded for a public use under the articles of incorporation.[48] In one of the decisions reaching this conclusion it was said: "If a private use is combined with a public one in such a way that the two cannot be separated, then unquestionably the right of eminent domain could not be invoked to aid the enterprise, but it has been said, and it seems to us that it is a better reason, that, where the two are not so combined as to be inseparable, the good may be separated from the bad, and the right exercised for the uses that are public."[49] Another court says: "We see no greater reason for denying to a private corporation the power of eminent domain for the promotion of a public use because, by its charter, it is also authorized to engage in a private enterprise, than to deny to a private person the same power because he is inherently endowed with the same authority."[50] But, where a proceeding is instituted to condemn, for both public and private use, that is, for a purpose part public and part private, the right to proceed is usually denied.[51]

§ 953. Delegation of the power of eminent domain.—The legislature may appropriate property under the power of eminent domain by an act specifying the property required and the use to which it is to be devoted,[52] and when it has declared the necessity for taking

[48] State v. Centralia-Chehalis &c. Co. 42 Wash. 632; 85 Pac. 344.

[49] State v. Centralia-Chehalis &c. Co. 42 Wash. 632; 85 Pac. 344. See, also, Brown v. Gerald, 100 Me. 351; 61 Atl. 785; 70 L. R. A. 472; Niagara Falls &c. R. Co. In re, 108 N. Y. 375; 15 N. E. 429; Bridwell v. Gate City Terminal Co. (Ga.) 56 S. E. 625.

[50] Irrigation Co. v. Klein, 63 Kan. 484; 65 Pac. 684.

[51] Minnesota &c. Co. v. Koochiching Co. 97 Minn. 429; 107 N. W. 405; 5 L. R. A. (N. S.) 638; Chicago &c. R. Co. v. Galt, 133 Ill. 657; 23 N. E. 425; 24 N. E. 674; Gaylord v. Sanitary Dist. 204 Ill. 576; 68 N. E. 522; 63 L. R. A. 582; 98 Am. St. 235.

[52] Mims v. Macon &c. R. Co. 3 Ga. 333; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812; Hingham &c. Turnpike Co. v.

certain property by regular enactment such act must be held to be, for this purpose, the law of the land, and no further finding or adjudication on that subject can be essential, unless the constitution of the state expressly so requires;[53] or it may declare the purpose for which property is to be taken and leave the selection of the property to be taken to whatever agencies it pleases, for it has the sole power to judge what persons, corporations, or other agencies may properly be clothed with this power, subject only to the limitations imposed by the constitution.[54] Thus, the right to take private property for a recognized public use may be conferred upon an individual,[55] or upon a corporation, whether municipal,[56] or private,[57] except in so far as the consti-

County of Norfolk, 6 Allen (Mass.), 353; Township of Mahoney v. Comry. 103 Pa. St. 362; Towanda Bridge Co. In re, 91 Pa. St. 216; Smedley v. Irwin, 51 Pa. St. 445; Genet v. Brooklyn, 99 N. Y. 296; Application of New York, Matter of, 99 N. Y. 569 (affirming 34 Hun, 441); Union Ferry Co. Matter of, 98 N. Y. 139; Boom Co. v. Patterson, 98 U. S. 403; Lewis Eminent Domain (2d ed.), § 242.

[53] Kramer v. Cleveland &c. R. Co. 5 Ohio St. 140; Secombe v. Railroad Co. 23 Wall. (U. S.) 108; Alexandria &c. R. Co. v. Alexandria &c. R. Co. 75 Va. 780; 40 Am. R. 743, and note; 10 Am. & Eng. R. Cas. 23; Cooley's Constitutional Limitations (7th ed.), 760.

[54] Ash v. Cummings, 50 N. H. 591; Gilmer v. Lime Point, 18 Cal. 229; Concord R. Co. v. Greely, 17 N. H. 47; Tide Water Canal Co. v. Archer, 9 Gill & J. (Md.) 479; Yost's Report, 17 Pa. St. 524; Elliott Roads and Streets (2d ed.), §§ 189, 190.

[55] Petition of Kerr, Matter of, 42 Barb. (N. Y.) 119; Lebanon v. Olcott, 1 N. H. 339; Pratt v. Brown, 3 Wis. 603; Lawrence v. Morgan's La. &c. R. Co. 39 La. Ann. 427; 2 So. 69; 4 Am. St. 265; Morgan v. Louisiana, 93 U. S. 217; Clark v. Nash, 198 U. S. 361; 22 Sup. Ct. 676, affirming 27 Utah, 158; 75 Pac. 371; 101 Am. St. 953; Moran v. Ross, 79 Cal. 159; 21 Pac. 547; 39 Am. & Eng. R. Cas. 1. The provision of the Cal. Const. Art. 1 § 14, that a corporation can not exercise the right of eminent domain except upon certain conditions, does not imply a prohibition against the exercise of such right by individuals. And it is immaterial to the right of an individual to condemn land for a railroad that a railroad corporation had previously located a road on that line, and built on a part of it. Moran v. Ross, supra. But see as to right of courts to examine into question of necessity where only a general power is conferred on the agency of the state which is seeking to retake property already devoted to a public use. Chicago &c. R. Co. v. Williams, 148 Fed. 442.

[56] Wayland v. County Commissioners, 4 Gray (Mass.), 500; Gardner v. Newburgh, 2 Johns. (N. Y.) Ch. 162; Mayor &c. of New York v. Bailey, 2 Denio (N. Y.), 433; Rochester Water Commissioners, In re, 66 N. Y. 413; Ham v. Salem, 100

tution forbids. And it may be conferred by a general act or general incorporation laws upon all individuals or corporations complying with the terms of such laws.[58]

§ 954. Delegation of the power to railroad companies—Extent of authority.—Since railroads are regarded as of public utility, the delegation to a railroad corporation of the power to take, by proceedings in invitum, the necessary lands upon which to build its road, is upheld by all the courts.[59] But a general law in regard to the assess-

Mass. 350; Reddall v. Bryan, 14 Md. 444; 74 Am. Dec. 550; Kane v. Baltimore, 15 Md. 240; Burden v. Stein, 27 Ala. 104; 62 Am. Dec. 758. The right to condemn property under the laws of the state may be conferred on the United States government. Gilmer v. Lime Point, 18 Cal. 229; Burt v. Merchants' Ins. Co. 106 Mass. 356; 8 Am. R. 339; Ante, § 950.

[57] Bloodgood v. Mohawk &c. R. Co. 18 Wend. (N. Y.) 9; 31 Am. Dec. 313, and note; Buffalo &c. City R. Co. v. Brainard, 9 N. Y. 100; Concord R. Co. v. Greely, 17 N. H. 47; Mims v. Macon &c. R. Co. 3 Ga. 333; Hand Gold Mining Co. v. Parker, 59 Ga. 419; Louisville &c. R. Co. v. Chappell, Rice L. (S. C.) 383; Tide-Water Canal Co. v. Archer, 9 Gill & J. (Md.) 479.

[58] National Docks R. Co. v. Central R. Co. 32 N. J. Eq. 755; Central R. Co. v. Pennsylvania R. Co. 31 N. J. Eq. 475; Weir v. St. Paul &c. R. Co. 18 Minn. 155. A general statute authorizing the creation of an indefinite number of railroad corporations, making such corporations common carriers, and requiring them to be constantly engaged in such public employment, may also constitutionally authorize them to take private property for their roads on making compensation. Buffalo &c. R. Co. v. Brainard, 9 N. Y. 100.

[59] Beekman v. Saratoga R. Co. 3 Paige Ch. (N. Y.) 45; 22 Am. Dec. 679, and note; Rensselaer &c. R. Co. v. Davis, 43 N. Y. 137; Buffalo, In re, 68 N. Y. 167; Kramer v. Cleveland &c. R. Co. 5 Ohio St. 140; Ash v. Cummings, 50 N. H. 591; London &c. R. Co. v. Grand Junction Canal Co. 1 Eng. R. & Canal Cas. 224; Cairo &c. R. Co. v. Turner, 31 Ark. 494; 25 Am. R. 564; Enfield Toll Bridge v. Hartford &c. R. Co. 17 Conn. 40; 42 Am. Dec. 716, and note; Buffalo Bayou &c. R. Co. v. Ferris, 26 Tex. 588; San Francisco &c. R. Co. v. Caldwell, 31 Cal. 367; Lexington &c. R. Co. v. Applegate, 8 Dana (Ky.), 289; 33 Am. Dec. 497, and note; Louisville &c. R. Co. v. Chappell, Rice L. (S. C.) 383; Secomb v. Milwaukee &c. R. Co. 49 How. Pr. (N. Y.) 75; Bonaparte v. Camden &c. R. Co. 1 Baldwin (U. S.), 205. For many additional authorities, see post, § 960. The legislature can not, in the exercise of the right of eminent domain, provide for the appropriation of private property to a mere private enterprise, in which the public have manifestly no interest. But railroad companies, even when owned by individuals, are not private en-

ment of damages in condemnation proceedings will not supersede the provisions of special charters on the subject,[60] unless a clear legislative intent to give it that effect is manifested.[61] Where the power to take all necessary lands for use in the construction of a public work is delegated to one or more individuals or to a corporation, the courts are generally concluded, by the good faith determination of such agency, as to the necessity for taking any particular lands,[62] or at

terprises merely, and the legislature may authorize such incorporations to take the necessary private property to the use of their roads in invitum. Brown v. Beatty, 34 Miss. 227; 69 Am. Dec. 389.

[60] Norfolk &c. R. Co. v. Ely, 95 N. C. 77; State v. Trenton, 36 N. J. L. 198; State v. Clarke, 25 N. J. L. 54; North Missouri R. Co. v. Gott, 25 Mo. 540; Hudson River R. Co. v. Outwater, 3 Sandf. (N. Y.) 689. See Seaboard Air Line R. Co. v. Olive (N. Car.), 55 S. E. 263.

[61] McCrea v. Port Royal R. Co. 3 S. Car. 381; 16 Am. R. 729; Moore v. Superior &c. R. Co. 34 Wis. 173; Lewis Em. Dom. (2d ed.) § 248. But a corporation whose charter provides a mode of condemnation may proceed under the general law for the assessment of damages when it chooses to do so. Cascades R. Co. v. Sohns, 1 Wash. Ter. 557.

[62] Smith v. Gould, 59 Wis. 631; 18 N. W. 457; 61 Wis. 31; 20 N. W. 369. See Chicago &c. R. Co. v. Town of Lake, 71 Ill. 333; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812; Doe v. North Staffordshire R. Co. 16 Q. B. 526. But see Louisiana R. &c. Co. v. Xavier Realty, 115 La. Ann. 328; 39 So. 1; Riley v. Charleston &c. Co. 71 S. Car. 457; 51 S. E. 485. In Deitrichs v. Lincoln &c. R. Co. 13 Neb. 361; 13 N. W. 624, it is said that the question as to the necessity of taking the lands is prima facie a question for the corporation to determine. A large discretion must be accorded to a railroad company in determining its route and the location of its tracks, turnouts, switches, and depot-houses, for which land may be taken, subject, of course, to judicial supervision to prevent abuse of such discretion. Colorado E. R. Co. v. Union P. R. Co. 7 R. & Corp. L. J. 373; 41 Fed. 293. See, also, Zircle v. Southern R. Co. 102 Va. 17; 45 S. E. 802, and note; 102 Am. St. 805, and note; Memphis &c. R. Co. v. Union R. Co. (Tenn.) 95 S. W. 1019, 1027; United States v. Baltimore &c. R. Co. 27 App. (D. C.) 105. In New York Central R. Co. v. Metropolitan Gas Light Co. 5 Hun (N. Y.), 201, Davis, P. J., speaking for the court, said: "Upon the point that the lands proposed to be taken are not necessary, because it might be practicable for the respondents to lay their tracks upon their own lands by adopting another curve, we are not prepared to concur with the appellant's counsel. It is not a question of possibilities, nor of strict practicabilities within the opinion of engineers. No route was ever surveyed for a railroad which was not open to such objections, and if the right

least they will not interfere therewith, so long as the use to which they are to be devoted is a public use.[63] But this rule is subject to the limitation that the taking must be within the delegated power. Thus an authority to condemn lands "adjoining their road as constructed on their right of way as located," does not include power to take lands which merely adjoin a side-track leading from the railroad route to a freight house,[64] and authority to take necessary lands to "widen" the right of way does not confer power to take adjoining lands upon which to relay the main track at such a distance from the former line as to amount to a relocation.[65] So, where the charter of a railroad company authorized it to take land contiguous to the line of its road for depots and other appurtenances, provided the amount so taken should not exceed five acres, it was held that the company could not take, without the consent of the owner, as a site for a warehouse, a tract of land four hundred yards from the line of their road, together with a narrow strip of land extending from their main track to the site of the proposed warehouse, on which to build a side-track or branch road, although the whole quantity required for the warehouse and the road leading to it would not exceed five acres.[66] It is

to take lands was to be determined by conflicting evidence whether, after all, the tracks might not, with greater or equal convenience, be laid elsewhere, the construction of a road would be attended with the most serious embarrassments. Reasonable necessity must be shown, but a reasonable discretion must be allowed to the officers who locate the tracks of a railroad, for it can not be presumed that the corporation is unnecessarily incurring heavy expenses in obtaining lands, when those it already has would answer its purposes. We think enough has been shown to bring this case within the rule of the authorities in respect to this question. N. Y. & Harlem R. Co. Matter of, v. Kip, 46 N. Y. 546; 7 Am. R. 385; Boston & Albany R. Co. Matter of, 53 N. Y. 574."

[63] Courts have the right to determine whether the use is public or not, and to restrain the appropriation of lands for any other than a public use. Consolidated Channel Co. v. Central Pacific R. Co. 51 Cal. 269; Stockton &c. R. Co. v. Stockton, 41 Cal. 147; St. Paul &c. R. Co. In re, 34 Minn. 227; 25 N. W. 345; New Central Coal Co. v. George's Creek Coal &c. Co. 37 Md. 537; Concord R. Co. v. Greely, 17 N. H. 47; Sadler v. Langham, 34 Ala. 311; McQuillen v. Hatton, 42 Ohio St. 202.

[64] State v. United New Jersey &c. R. Co. 43 N. J. L. 110. See, also, Tudor v. Chicago &c. R. Co. 154 Ill. 129; 39 N. E. 136.

[65] Beck v. United New Jersey &c. R. Co. 39 N. J. L. 45.

[66] Bird v. Wilmington &c. R. Co. 8 Rich. (S. Car.) Eq. 46; 64 Am. Dec. 739.

said that the power of a railroad to take lands is limited to what is necessary in order that it may fulfill its public duties.[67] But the necessity which will justify a taking is not such an imperative necessity as renders the lands sought to be condemned indispensable to the operation of the road, for the company may take lands which are reasonably requisite to its use.[68] The fact that other lands may be taken by which the route of a railway between its charter termini can be shortened,[69] or that another location would do less damage,[70] or

[67] Tracy v. Elizabethtown &c. R. Co. 80 Ky. 259. See South Carolina R. Co. v. Blake, 9 Rich. L. (S. Car.) 228. In the first case cited the court said: "Even where it is conceded that the use is public, the necessity and extent of the exercise of the power of eminent domain belongs to the legislature, subject to two conditions—first, that just compensation shall be made; and, second, that the property desired to be condemned will conduce, to some extent, to the accomplishment of the public object to which it is to be devoted. With the degree of necessity, or the extent to which the property will advance the public purpose, the courts have nothing to do." And in the case from South Carolina it was held that an application by a railroad company for the appointment of commissioners to assess the value of land sought to be taken should set forth the particular purpose for which it is needed, and should be accompanied by affidavits or other evidence showing the necessity for the appointment and if the land-owner traverses the existence of a necessity justifying the condemnation, a trial and decision must be had.

[68] New York Central R. Co. Matter of, 77 N. Y. 248; Philadelphia &c. R. Co. v. Williams, 54 Pa. St. 103; Toledo &c. R. Co. v. Daniels, 16 Ohio St. 390; Eldridge v. Smith, 34 Vt. 484; Hannibal &c. R. Co. v. Muder, 49 Mo. 165; Southern Pac. R. Co. v. Raymond, 53 Cal. 223; Mansfield &c. R. Co. v. Clark, 23 Mich. 519; Sadd v. Maldon &c. R. Co. 6 Exch. 143. A railroad corporation which has full authority to construct its road upon any route which it may adopt, subject to the condition that it shall not cross the streets of a city without permission from the city council, can lay out its road through the city and condemn and for a right of way without first obtaining permission to cross intervening streets. The necessity for the use of certain property in the construction and operation of a railroad need not be made certain before the property is condemned. Chicago &c. R. Co. v. Dunbar, 100 Ill. 110; Memphis &c. R. Co. v. Union R. Co. (Tenn.) 95 S. W. 1019; California Southern R. Co. v. Kimball, 61 Cal. 90; Gilbert Elevated R. Co. Matter of, 70 N. Y. 361; Stoughton v. Paul, 173 Mass. 148; 53 N. E. 272.

[69] South Minnesota R. Co. v. Stoddard, 6 Minn. 150; Hentz v. Long Island R. Co. 13 Barb. (N. Y.) 646.

[70] New York &c. R. Co. v. Young, 33 Pa. St. 175; New York &c. R. Co. v. Metropolitan Gas-Light Co.

that other lands in the vicinity which would answer its purpose just as well could be obtained by purchase,[71] is not sufficient reason for interference by the courts with the action of a railroad corporation in locating its road.[72] So the fact that passengers may rarely, if ever, travel over the tracks of a terminal railroad whose principal business is the shifting of cars from one railroad to another, will not deprive it of the right to exercise the power of eminent domain, if it is, as a matter of fact, organized to do a general railroad business.[73] A railroad company which has leased land to other parties for purposes which increased railroad travel is not required to resume possession of such land under a power reserved by the lease, and employ it for its own necessary structures before it can condemn other land for that purpose. In a recent case, in proceedings to condemn land, it appeared that the petitioner's road ran to a beach much frequented as a summer resort, and furnished the transportation thereto, and that there was great need of a station, for the accommodation of passen-

5 Hun (N. Y.), 201. A particular route sought to be condemned by a railroad company for the use of its road is not rendered unnecessary because of the existence of another route equally good and convenient, both for the property-owner and the company. California &c. R. Co. v. Hooper, 76 Cal. 404; 18 Pac. 599. See, also, Colorado &c. R. Co. v. Union Pac. R. Co. 41 Fed. 293.

[71] Eldridge v. Smith, 34 Vt. 484; Ford v. Chicago &c. R. Co. 14 Wis. 609; 80 Am. Dec. 791; Lodge v. Philadelphia &c. R. Co. 8 Phila. (Pa.) 345; New York &c. R. Co. v. Kip, 46 N. Y. 546; 7 Am. R. 385.

[72] See, also, Kansas &c. R. v. Northwestern &c. Co. 161 Mo. 288; 61 S. W. 684; 51 L. R. A. 936; 84 Am. St. 717; Postal Tel. &c. Co. v. Oregon &c. R. Co. 23 Utah, 474; 65 Pac. 735; 90 Am. St. 705. The discretion exercised by a railway corporation in selecting land for its purposes will not be interfered with unless it clearly appears that it has exceeded its powers or acted in bad faith. Fall River Iron Works v. Old Colony R. Co. 5 Allen (Mass.), 221; Virginia R. Co. v. Elliott, 5 Nev. 358; South Carolina R. Co. v. Blake, 9 Rich. L. (S. Car.) 228; Cotton v. Mississippi &c. Co. 22 Minn. 372; Board of Supervisors v. Gorrell, 20 Gratt. (Va.) 484. But see Rainey v. Red River &c. R. Co. (Tex.) 89 S. W. 768; 3 L. R. A. (N. S.) 590. The general allegation in a petition for the condemnation of certain lands by a railroad company, that "a part of each of said lands is necessary to petitioner for its right of way, side-tracks, depot and depot grounds, freight yards, shops and appurtenances, for the construction and operation of its road," was held to be a sufficient statement of the purposes for which the land was sought to be condemned. Suver v. Chicago &c. R. Co. 123 Ill. 293; 14 N. E. 12.

[73] Collier v. Union R. Co. 113 Tenn. 96; 83 S. W. 155.

gers. The petitioner owned land at the beach, which had been leased to persons who had fitted it up as a pleasure ground, for the accommodation of visitors to the beach; and a station built on this land would destroy, in a large measure, the usefulness of the place as a summer resort, whereby the petitioner's business would be injured. It was held that the petitioner was entitled to have land condemned for such station purposes, even though the land owned and leased by it was available.[74] But one court has held that a railroad company cannot condemn lands for any purpose when it already owns lands equally useful for that purpose.[75]

§ 954a. Company may be compelled to condemn.—It is not only true that the right to condemn may be delegated to a railroad company, but such a corporation may also be required to condemn in order to perform the duties lawfully devolved upon it. This has been so decided by the Supreme Court of the United States. Thus, a statute requiring a company to furnish track connections, when a reasonable regulation in the interests and for the accommodation of the public has been held constitutional, although it necessitated the exercise of the power of eminent domain by the company and the incurring of some slight expense.[76]

[74] In re, New York Central &c. R. Co. 55 Hun (N. Y.), 603; 8 N. Y. S. 290, affi'd 121 N. Y. 665, mem, 24 N. E. 1093.

[75] New Central Coal Co. v. George's Creek Coal Co. 37 Md. 537. In Rainey v. Red River &c. R. Co. (Tex.) 89 S. W. 768; 3 L. R. A. (N. S.) 590, it is held that statutory authority to condemn for machine shops and terminals does not give a railroad company power to act arbitrarily, and that the needless location of such shops and terminals near private property so as to constitute a nuisance, may be enjoined. Citing Baltimore &c. R. Co. v. Fifth Baptist Church, 108 U. S. 317; 2 Sup. Ct. 719; Ridge v. Pennsylvania R. Co. 58 N. J. Eq. 176; 43 Atl. 275; Louisville &c. Terminal Co. v. Jacobs, 109 Tenn. 727; 72 S. W. 954; 61 L. R. A. 188; Willis v. Kentucky &c. Co. 104 Ky. 186; 46 S. W. 488. But compare Dolan v. Chicago &c. R. Co. 118 Wis. 362; 95 N. W. 385; Austin v. Augusta &c. R. Co. 108 Ga. 671, 686; 34 S. E. 852; 47 L. R. A. 755.

[76] Wisconsin &c. R. Co. v. Jacobson, 179 U. S. 287; 21 Sup. Ct. 115. See, also, Worcester v. Norwich &c. R. Co. 109 Mass. 112; Green v. Dutchess &c. R. Co. 58 N. Y. 152, 163; People v. New York &c. R. Co. 104 N. Y. 58, 67; 9 N. E. 856; 58 Am. R. 484; Muhlker v. New York &c. R. Co. 197 U. S. 544; 25 Sup. Ct. 522, 524; Gates v. Boston &c. R. Co. 53 Conn. 333; 5 Atl. 695.

§ 955. Construction of statutes granting right to condemn.—The exercise of the power of eminent domain by a railroad or other corporation for public use being against common right, it cannot, ordinarily, be implied or inferred from a mere grant of authority to construct public works,[77] but must be given in express terms or by necessary implication.[78] And it is said that an implication in favor of such right will not control unless it arises from a necessity so absolute that, without it, the grant itself will be defeated.[79] Statutes granting the power of eminent domain to corporations will be strictly construed.[80] But such a construction will be given, if possible, as will carry into effect the manifest purpose for which the act was passed.[81]

[77] Allen v. Jones, 47 Ind. 438; People v. Rochester, 50 N. Y. 525. See, also, Murphy v. Kingston &c. R. Co. 11 Ont. R. 582; Leeds v. Richmond, 102 Ind. 372; 1 N. E. 711; Boston &c. R. Corp. v. Salem &c. R. Co. 2 Gray (Mass.), 1.

[78] Miami Coal Co. v. Wigton, 19 Ohio St. 560; Schmidt v. Densmore, 42 Mo. 225; Butler v. Thomasville, 74 Ga. 570; Phillips v. Dunkirk &c. R. Co. 78 Pa. St. 177.

[79] Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150.

[80] Chicago &c. R. Co. v. Wiltse, 116 Ill. 449; 6 N. E. 49; Lieberman v. Chicago &c. R. Co. 141 Ill. 140; 30 N. E. 544; Waterbury v. Platt, 75 Conn. 387; 53 Atl. 958; 96 Am. St. 229; Chestatee &c. Co. v. Cavenders Creek Co. 119 Ga. 354; 46 S. E. 422; 100 Am. St. 174, and note; Goddard v. Chicago &c. R. Co. 104 Ill. App. 526, affi'd in 202 Ill. 362; 66 N. E. 1066; Erie R. Co. v. Steward, 61 App. Div. (N. Y.) 480; 70 N. Y. S. 690; Alabama Gt. Southern R. Co. v. Gilbert, 71 Ga. 591; Jersey City v. Central R. Co. 40 N. J. Eq. 417; 2 Atl. 262; Pittsburgh &c. R. Co. v. Bruce, 102 Pa. St. 23; Southern Pac. R. Co. v. Wilson, 49 Cal. 396; Spofford v. Bucksport &c. Co. 66 Me. 26; Lea v. Johnston, 9 Ired. (N. C.) Law 15; Washington Cemetery v. Prospect &c. R. Co. 68 N. Y. 591; Norfolk &c. R. Co. v. Lynchburg Cotton Mill Co. (Va.) 56 S. E. 146; Cooley Const. Lim. (7th ed.) 762, 763. "An act of this sort deserves no favor; to construe it liberally would be sinning against the rights of property." Bland, J., in Binney's Case, 2 Bland Ch. (Md.) 99. "There is no rule more familiar or better settled than this: that grants of corporate power, being in derogation of common right, are to be strictly construed; and this is especially the case where the power claimed is a delegation of the right of eminent domain, one of the highest powers of sovereignty pertaining to the state itself, and interfering most seriously and often vexatiously with the ordinary rights of property." Currier v. Marietta &c. R. Co. 11 Ohio St. 228. See, also, Platt v. Pennsylvania Co. 43 Ohio St. 228; 1 N. E. 420; Puyallup v. Lacey (Wash.), 86 Pac. 215.

[81] Pittsburgh v. Scott, 1 Pa. St. 309; Bellona Company's Case, 3 Bland Ch. (Md.) 442; Lewis Eminent Domain (2d ed.), § 254. Thus it has been recently held that though a statute providing for the

And generally, though the legislative determination that the use for which property authorized to be taken by eminent domain is a public one is subject to review by the courts, they will indulge a reasonable presumption in favor of the legislative decision.[82]

§ 956. Right of foreign and consolidated companies to condemn. —A foreign corporation may be authorized to exercise the power of eminent domain, in the absence of any constitutional provision to the contrary.[83] But foreign corporations are forbidden to exercise that power by the constitutions of some of the states,[84] and a statute con-

sale of property and franchise of a corporation does not expressly declare that the purchaser shall have the right to take lands by eminent domain, a provision therein that it shall be entitled to all the rights, liberties, privileges and franchises of the corporation whose property is sold is sufficient to save that right. Brinkerhoff v. Newark &c. Traction Co. 66 N. J. L. 478; 49 Atl. 812. "The power given to a railroad company to condemn private property for its own use is to be exercised within strict limits. The law does not authorize the incorporating of a company with a roving commission to go to any points in the state at will and condemn land in spots. It is required of the parties seeking to be incorporated as a railroad company that they state in their articles of association the places from and to which the road is to be constructed, and beyond the course between the points named (except as the law authorizes branches) the corporation has no right to go." Kansas City &c. R. Co. v. Davis, 197 Mo. 669; 95 S. W. 881.

[82] Ulmer v. Lime Rock R. Co. 98 Me. 579; 57 Atl. 1001; 66 L. R. A. 387.

[83] Abbott v. New York &c. R. Co. 145 Mass. 450; 15 N. E. 91; Peter Townsend, Matter of, 39 N. Y. 171; New York &c. R. Co. v. Young, 33 Pa. St. 175; Baltimore &c. R. Co. v. Harris, 12 Wall. (U. S.) 65; Southwestern &c. R. Co. v. Southern &c. Co. 46 Ga. 43; 12 Am. R. 585; Gray v. St. Louis &c. R. Co. 81 Mo. 126; Marks, In re, 6 N. Y. S. 105; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812; State v. Sherman, 22 Ohio St. 411; Dodge v. Council Bluffs, 57 Iowa, 560; 10 N. W. 886. See, also, State Ex rel. St. Louis &c. R. Co. v. Cook, 171 Mo. 348; 71 S. W. 829; Southern Illinois &c. R. Co. v. Stone, 174 Mo. 1, 32; 73 S. W. 453; 63 L. R. A. 311; New York &c. R. Co. v. Welsh, 143 N. Y. 411; 38 N. E. 378; 42 Am. St. 734. That the right does not otherwise exist, see Illinois State Trust Co. v. St. Louis &c. R. Co. 208 Ill. 419; 70 N. E. 357; Chestatee &c. Co. v. Cavenders Creek Co. 119 Ga. 354; 46 S. E. 422; 100 Am. St. 174.

[84] Foreign corporations are forbidden to exercise the right of eminent domain in Arkansas. Const. 1874, Art. 12, § 11. In Nebraska this restriction applies only to foreign railroad corporations. Const. 1875, Art. 11, § 8. Under said section, no foreign railroad corpora-

ferring the right of eminent domain upon "railroad corporations organized under the laws of this state" has been held to operate as a denial of the right to foreign railroad corporations.[85] So, under the Kentucky statute which provides that no foreign railroad corporation shall have the right to condemn until it shall have first complied with the provisions of the statute, it has been held that the company cannot condemn unless it not only files a copy of its articles of incorporation in the office of the secretary of state, but also makes proof that a certain amount per mile has been subscribed, and a certain percentage thereof paid in, as required of domestic corporations.[86] A domestic railroad company does not lose its right to condemn by consolidation, under the laws of its own state, with a foreign railroad company.[87]

tion doing business in the state can exercise the right of eminent domain, or have power to acquire right of way or real estate for depot or other uses, unless it organizes as a corporation under the state laws. State v. Scott, 22 Neb. 628; 36 N. W. 121; Trester v. Missouri Pac. R. Co. 23 Neb. 242; 36 N. W. 502. A foreign corporation, which has not become a corporation under the laws of Nebraska, can not avail itself of the services of another corporation to acquire a right of way, and may be enjoined from appropriating property for a right of way, although the property has been condemned in the name of another corporation. Koenig v. Chicago &c. R. Co. 27 Neb. 699; 43 N. W. 423. The article of the Nebraska constitution which provides that no foreign railroad corporation, doing business in that state, shall exercise the right of eminent domain, or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate, pursuant to and in accordance with the laws of that state, does not prohibit existing companies, one of which is a domestic corporation, from becoming a body corporate by consolidation, providing such consolidation is made pursuant to the laws permitting the same, and by which it became "a body corporate, pursuant to and in accordance with the laws of this state." State v. Chicago &c. R. Co. 25 Neb. 156; 41 N. W. 125; 2 L. R. A. 564, and note; State v. Missouri Pac. R. Co. 25 Neb. 164; State v. Chicago &c. R. Co. 25 Neb. 165; 41 N. W. 128.

[85] Holbert v. St. Louis &c. R. Co. 45 Iowa, 23. And it has been held that a statute conferring the right of eminent domain on any mining company does not include foreign companies. Chestatee &c. Co. v. Cavenders Creek Co. 119 Ga. 354; 46 S. E. 422; 100 Am. St. 174. See, also, St. Louis &c. R. Co. v. Foltz, 52 Fed. 627, where it was held that even if the company could not condemn land for a right of way and depot grounds, it might acquire the same by contract or estoppel.

[86] Evansville &c. Traction Co. v. Henderson Bridge, 141 Fed. 51.

[87] Toledo &c. R. Co. v. Dunlap, 47 Mich. 456; 11 N. W. 271; Min-

The consolidated corporation, in such a case, is regarded as a domestic corporation within the meaning of the statutes regulating condemnation proceedings.[88] But, as shown in the next section, there must be some law authorizing or ratifying the consolidation.[89]

§ 957. Exercise of the right by de facto corporations.—As a rule the legal existence of a de facto corporation can be questioned only by the state in a direct proceeding instituted for that purpose. Accordingly, the courts will not enjoin a corporation from condemning land for a public purpose on the ground that the corporation was irregularly organized,[90] nor will they, in many jurisdictions, allow the legality of the incorporation of a de facto railroad corporation to be questioned in condemnation proceedings.[91] And it has been held a

eral Range R. Co. v. Detroit &c. Co. 25 Fed. 515. See, also, Trester v. Missouri Pac. R. Co. 33 Neb. 171, 178; 49 N. W. 1110; Trenton, St. R. Co. In re (N. J.), 47 Atl. 819. Nor by the fact that its stock is held abroad. Amoskeag &c. Co. v. Worcester, 60 N. H. 522.

[88] St. Paul &c. R. Co. In re, 36 Minn. 85; 30 N. W. 432; State v. Chicago &c. R. Co. 25 Neb. 156; 41 N. W. 125; 2 L. R. A. 564, and note; Trester v. Missouri Pac. R. Co. 33 Neb. 171, 178; 49 N. W. 1110. See, also, California Cent. R. Co. v. Hooper, 76 Cal. 404; 18 Pac. 599; Postal Tel. &c. Co. v. Oregon Short Line R. Co. 23 Utah, 474; 65 Pac. 735; 90 Am. St. 705.

[89] American &c. Co. v. Minnesota &c. R. Co. 157 Ill. 641; 42 N. E. 153; post, § 957, note 75.

[90] Reisner v. Strong, 24 Kan. 410; McAuley v. Columbus &c. R. Co. 83 Ill. 348; Aurora &c. R. Co. v. Miller, 56 Ind. 88; Oregon Short Line R. Co. v. Postal Tel. &c. Co. 111 Fed. 842. A court of equity will not extend its aid by injunction to an assignee of a lease of land through which a railroad company seeks to condemn a right of way, when it is shown that the assignee who is denying the power of the company to condemn land under its charter, is the president of a rival road, but he will be left to his remedy at law. Piedmont &c. R. Co. v. Speelman, 67 Md. 260; 10 Atl. 77, 293. In Ward v. Minnesota &c. R. Co. 119 Ill. 287; 10 N. E. 365, the court held that the fact that an engineer had been appointed, that the line of the proposed road had been located, and other steps taken toward the building of the road, being corporate acts, tended to show that petitioner was a corporation de facto.

[91] Brown v. Calumet Riv. R. Co. 125 Ill. 600; 18 N. E. 283; Thomas v. South Side Elevated R. Co. 218 Ill. 571; 75 N. E. 1058; Illinois State Trust Co. v. St. Louis &c. R. Co. 208 Ill. 419; 70 N. E. 357; Niemeyer v. Little Rock &c. R. Co. 43 Ark. 111; 20 Am. & Eng. R. Cas. 174; Cincinnati &c. R. Co. v. Danville &c. R. Co. 75 Ill. 113; National Docks &c. R. Co. v. Central R. Co. 32 N. J. Eq. 755; Oregon Cascade Co. v. Baily, 3 Ore. 164; Aurora

land-owner should not be permitted to prove, as a defense to condemnation proceedings instituted by a regularly organized railroad

&c. R. Co. v. Miller, 56 Ind. 88; Morrison v. Indianapolis &c. R. Co. (Ind.) 76 N. E. 961 (citing text). In this last case it is said that, while there is conflict among the authorities, the rule stated in the text is supported by the weight of authority and reason, and the following authorities are cited in its support: Aurora &c. R. Co. v. Lawrenceburg, 56 Ind. 80; Aurora &c. R. Co. v. Miller, 56 Ind. 88; 3 Elliott Railroads, § 957; 15 Cyc. pp. 867, 868; Niemeyer v. Little Rock &c. R. Co. 43 Ark. 111; Spring Valley Waterworks v. San Francisco, 22 Cal. 434; Union Pacific R. Co. v. Colorado Postal Co. 30 Colo. 133; 69 Pac. 564; 97 Am. St. 106; Brown v. Calumet River R. Co. 125 Ill. 600; 18 N. E. 283; St. Louis &c. R. Co. v. Belleville St. R. Co. 158 Ill. 390; 41 N. E. 916; Reisner v. Strong, 24 Kan. 410; Portland &c. Turnpike Co. v. Bobb, 88 Ky. 226; 10 S. W. 794; Briggs v. Cape Cod Ship Canal Co. 137 Mass. 71; Shroeder v. Detroit &c. R. Co. 44 Mich. 387; 6 N. W. 872; Traverse City &c. R. Co. v. Seymour, 81 Mich. 378; 45 N. W. 826; Minneapolis &c. R. Co. In re, 36 Minn. 481; 32 N. W. 556; National Docks R. Co. v. Central R. Co. 32 N. J. Eq. 755, and cases cited; Wellington &c. R. Co. v. Cashie Lumber Co. 114 N. C. 690; 19 S. E. 646; Farnham v. Delaware &c. Canal Co. 61 Pa. St. 265, 271; Postal Tel. &c. Co. v. Oregon &c. R. Co. 23 Utah, 474; 65 Pac. 735; 90 Am. St. 705; Oregon &c. R. Co. v. Postal Tel. &c. Co. 111 Fed. 842; 49 C. C. A. 663; 10 Am. & Eng. Enc. Law, p. 1059; Mills Eminent Domain (2d ed.), § 61; Lewis Eminent Domain (2d. ed.), § 391. See, also, Philadelphia &c. Co. v. Inter City Link R. Co. (N. J.) 62 Atl. 184. But it has been held in Ohio that corporate existence and the right to exercise the power of eminent domain can only be derived from legislative enactment. And that a company claiming to act under a special charter must show that both have been conferred upon it by a valid law, and that it has substantially complied with the conditions which that law has annexed to the power, before it can demand a judgment of condemnation. Atkinson v. Marietta &c. R. Co. 15 Ohio St. 21. And that a railroad company organized under the general railroad law of that state must, in order to sustain a proceeding for appropriating land, show the certificate and public record of its organization to be strictly in conformity with the requisitions of the law. Atlantic &c. R. Co. v. Sullivant, 5 Ohio St. 276. See, also, New York &c. Co. v. New York, 104 N. Y. 1; 10 N. E. 332; St. Joseph &c. R. Co. v. Shambaugh, 106 Mo. 557; 17 S. W. 581; Brooklyn &c. R. Co. Matter of, 72 N. Y. 245; Miller v. Prairie &c. R. Co. 34 Wis. 533; Orrick School Dist. v. Dorton, 125 Mo. 439; 28 S. W. 765; Lewis Em. Dom. (2d. ed.) § 391. And a de jure corporation can not ignore its statutory entity and limitations and claim the right to condemn as a de facto corporation beyond its charter limitations. Boca &c. R. Co. v. Sierra Valley R. Co. (Cal. App.) 84 Pac. 298.

corporation, that the company was incorporated not for a public use, but for the private purposes of the corporators only, and that there was no public necessity for the road.[92] But, to constitute even a de facto corporation, there must be some law under which it could legally have been incorporated, and an attempt to consolidate, where there is no law authorizing it, will not enable the consolidated company to acquire a right of way either by condemnation or contract.[93] Furthermore, it is said that a corporation cannot "act simultaneously in the dual capacity of a corporation de jure and a corporation de facto." It can not exercise its full powers as a corporation and then act in matters outside these powers and justify the latter action as an act of a de facto corporation. Thus, it has been held that a railroad company authorized to condemn lands for its purposes over specified lines cannot use all these powers and then condemn other lands over other lines as a de facto corporation.[94]

§ 958. Right to condemn where road is leased or in hands of a receiver.—It is said that personal rights and privileges granted to a corporation can only be exercised by its board of directors[95] or other governing body. The power of eminent domain is granted as a personal trust, and cannot be delegated or transferred without legislative sanction; accordingly, it is held that neither the purchasers,[96] nor the

[92] Powers v. Hazelton &c. R. Co. 33 Ohio St. 429. See, also, Rudolph v. Pennsylvania &c. R. Co. 166 Pa. St. 430; 31 Atl. 131; Aurora &c. R. Co. v. Lawrenceburgh, 56 Ind. 80.

[93] American &c. Co. v. Minnesota &c. R. Co. 157 Ill. 641; 42 N. E. 153, and authorities cited. See, also, New Brighton &c. R. Co. v. Pittsburgh &c. R. Co. 105 Pa. St. 14, approved in Washington &c. R. Co. v. Coeur D'Alene R. &c. Co. 160 U. S. 101; 16 Sup. Ct. 231; American Loan &c. Co. v. Minnesota &c. R. Co. 157 Ill. 641; 42 N. E. 153; Brown v. Atlanta R. &c. Co. 113 Ga. 462; 39 S. E. 71.

[94] Boca &c. R. Co. v. Sierra Valleys R. Co. (Cal. App.) 84 Pac. 298.

[95] Eastern R. Co. v. Boston &c. R. Co. 111 Mass. 125; 15 Am. R. 13. See, also, Bridewell v. Gate City Terminal Co. (Ga.) 56 S. E. 627; but compare State v. Proprietors (N. J.), 33 Atl. 252; Tennessee Cent. R. Co. v. Campbell, 109 Tenn. 655; 73 S. W. 112.

[96] Atkinson v. Marietta R. Co. 15 Ohio St. 21; Mahoney v. Spring Valley Water Works, 52 Cal. 159; Braslin v. Somerville Horse R. Co. 145 Mass. 64; 13 N. E. 65. See, also Little Rock &c. R. Co. v. McGehee, 41 Ark. 202; Platt v. Pennsylvania Co. 43 Ohio St. 228; 1 N. E. 420. But see, as to purchaser at judicial sale, North Carolina &c. R. Co. v. Carolina Cent. R. Co. 83 N. Car. 489; Lawrence v. Mor-

lessees,[97] of a railroad can exercise the right without express authority.[98] And, where its road cannot be successfully operated without

gan's &c. R. Co. 39 La. Ann. 427; 2 So. 69; 4 Am. St. 265; Lake Erie &c. R. Co. v. Griffin, 107 Ind. 464; 8 N. E. 451; Brinkerhoff v. Newark &c. Traction Co. 66 N. J. L. 478; 49 Atl. 812; Ante, § 519.

[97] Mayor of Worcester v. Norwich &c. R. Co. 109 Mass. 103; Lewis v. Germantown &c. R. Co. 16 Phila. (Pa.) 608; Western Un. Tel. Co. v. Pennsylvania R. Co. 195 U. S. 594; 25 Sup. Ct. 150. As a manufacturing company can not, by lease from a railroad company, acquire the right of eminent domain, a municipal council can not authorize it to build a railroad track on a street, such track being shown to be a nuisance. Appeal of Hartman Steel Co. (Pa.) 18 Atl. 553.

[98] See Lawrence v. Morgan's La. &c. R. Co. 39 La. Ann. 427; 2 So. 69; 4 Am. St. 265, as to the effect of a transfer of its franchises by a corporation under legislative authority. In Abbott v. New York &c. R. Co. 145 Mass. 450; 15 N. E. 91, Holmes, J., speaking for the court, said: "It seems to us clear that a corporation, by consent of the legislature, may take this power as quasi successor of another corporation to which it was originally granted, and it is not very material whether the legislative consent be regarded as authorizing a transfer of the old power, or more strictly as delegating a new power in the same terms as the old. See State v. Sherman, 22 Ohio St. 411, 428. The substance of the transaction is seen in the cases of Boston &c. Railroad Co. v. Midland R. Co. 1 Gray (Mass.), 340. But there is reason to confine it to such cases. See Atkinson v. Railroad Co. 15 Ohio St. 21; Coe v. Columbus &c. R. Co. 10 Ohio St. 372, 387; 75 Am. Dec. 518, and note; Hall v. Sullivan Railroad Co. 21 Law. Rep. 138, 141. When the power is claimed under the form of a transfer, rather than of an original grant, the legislative consent or grant may be inferred somewhat more readily than when the whole question is new, because the legislature has already adjudicated the use to be public, and has granted a co-extensive power. See Black v. Delaware &c. Canal Co. 22 N. J. Eq. 130, 402. For, while it is very plain that the power could not be transferred to or exercised by a purchaser from the original donee, without such consent or grant in this commonwealth (Braslin v. Somerville &c. R. Co. 145 Mass. 64; 13 N. E. 65; Com. v. Smith, 10 Allen, 448; 87 Am. Dec. 672), the reasons which have led some courts and judges to doubt the need of such consent for the transfer of franchises show that the delectus personarum is of little more than theoretical importance, and is the least determining element in the more common cases where the power is conferred. Shepley v. Atlantic &c. Railroad Co. 55 Me. 395, 407; Kennebec &c. R. Co. v. Portland &c. R. Co. 59 Me. 9, 23; Miller v. Rutland &c. R. Co. 36 Vt. 452, 492; Bickford v. Grand Junction R. Co. 1 Can. Sup. Ct. 696, 738. And this reasoning is of equal force, whether the power to take land by eminent domain is called a franchise or not. Coe v.

the acquisition of the property sought to be condemned, a company which has leased all its property and franchises[99] may exercise the right of eminent domain, even though the lease is for the entire life of the corporation and the property is taken solely for the use of the lessee.[100] It has been held that a railroad company, leasing the property and franchises of another, the corporate identity of the lessor being maintained, may exercise the power of the lessor to widen its roadbed, though the exercise of the power is practically for the benefit of the lessee.[101] As the corporate existence is not terminated by the appointment of a receiver, it would seem that the right to condemn remains in the corporation,[102] and does not, ordinarily, pass to the receiver. But it has been held that a receiver may condemn land for

Railroad Co. 10 Ohio St. 372; 75 Am. Dec. 518, and note; Chicago &c. R. Co. v. Dunbar, 95 Ill. 571; Pierce v. Emery, 32 N. H. 484, 507, 511, 513. Finally, the legislative consent may be expressed by way of ratification of what purports to be a transfer already executed. Shaw v. Norfolk &c. R. Co. 5 Gray (Mass.), 162, 180; 16 Gray, 407, 410; Galveston R. Co. v. Cowdrey, 11 Wall. (U. S.) 459. And it may be gathered by implication from a series of acts. East Boston &c. R. Co. v. Eastern R. Co. 13 Allen (Mass.), 422." But it is held that a railroad company which has leased its property and franchises for the entire term of its corporate existence may condemn land to serve the necessities of its lessee. New York &c. R. Co. Matter of, 35 Hun, 220, affirmed, 99 N. Y. 12; 1 N. E. 27. See Deitrichs v. Lincoln &c. R. Co. 13 Neb. 361; Kip v. New York &c. R. Co. 67 N. Y. 227; Chicago &c. R. Co. v. Ill. Cent. R. Co. 113 Ill. 156. And a domestic corporation, organized at the instance of a foreign company, which is forbidden to exercise the power of eminent domain, may condemn land for the purpose of leasing it to such foreign corporation. Lower v. Chicago &c. R. Co. 59 Iowa, 563.

[99] New York &c. R. Co. Matter of, 99 N. Y. 12; 1 N. E. 27; 35 Hun 220; Kip v. New York &c. R. Co. 67 N. Y. 227; Metropolitan Elevated R. Co. Re, 18 N. Y. S. 134; 2 N. Y. S. 278; Chicago &c. R. Co. v. Ill. Cent. R. Co. 113 Ill. 156; Deitrichs v. Lincoln &c. R. Co. 13 Neb. 361; 13 N. W. 624. See, also, New York &c. R. Co. In re, 63 Hun 629; 17 N. Y. S. 778; Memphis &c. R. Co. v. Railroad Comrs. 112 U. S. 609; 5 Sup. Ct. 299; State, ex rel. v. King County Super. Ct. 31 Wash. 445; 72 Pac. 89; 66 L. R. A. 897.

[100] New York &c. R. Co. Matter of, 99 N. Y. 12; 1 N. E. 27; 35 Hun 220.

[101] Glaser v. Glenwood R. Co. 208 Pa. 328; 57 Atl. 713.

[102] Detroit &c. R. Co. v. Campbell, 140 Mich. 384; 103 N. W. 856, 858, 860 (citing text). See, also, Morrison v. Forman, 177 Ill. 427; 53 N. E. 73.

the purpose of completing an undertaking already begun,[103] and, if this be true, it would seem that he might condemn land when necessary to the maintenance and operation of a road already completed. He should, however, first obtain authority to do so from the court in which the receivership is pending.[104]

§ 959. Right to condemn cannot be delegated to contractor or construction company.—A corporation which is empowered to take materials for the construction of works of a public nature cannot delegate this power to a contractor who engages to furnish his own materials.[105] It may, however, appropriate materials by condemnation for the benefit of a contractor who is building its works under such a contract.[106] A construction company cannot take land for railway purposes, and if the railroad company adopts its acts in appropriating land it must pay just compensation.[107] But if the railroad company does not authorize or ratify the act of a contractor in taking land his action is not binding upon the company.[108]

§ 960. Purposes for which a railroad company may condemn.—A railroad company which is charged with the performance of the duties of a common carrier is, as we have seen, so far a public enterprise that it may be empowered to condemn the lands needed for the construction and maintenance of its line.[109] But experience has shown

[103] Moran v. Lydecker, 27 Hun (N. Y.), 582. See Lehigh &c. Co. v. Cent. R. Co. 35 N. J. Eq. 379.

[104] Minneapolis &c. R. Co. v. Minneapolis &c. R. Co. 61 Minn. 502; 63 N. W. 1035.

[105] Lyon v. Jerome, 26 Wend. (N. Y.) 485; 37 Am. Dec. 271; Schmidt v. Densmore, 42 Mo. 225; contra, Lesher v. Wabash Navigation Co. 14 Ill. 85; 56 Am. Dec. 494, and note. It has been held that the railroad company may authorize the contractor to condemn property in its name. Buchanan &c. Bank v. Cedar Rapids &c. R. Co. 62 Iowa, 494.

[106] Ten Broeck v. Sherrill, 71 N. Y. 276. And where the statute authorizes any agent or servant of the corporation to enter upon contiguous lands belonging to private owners and take therefrom materials for use in the construction of its road, the corporation may authorize the contractors to take materials whenever they can not be readily obtained by purchase. Vermont Ceneral R. Co. v. Baxter, 22 Vt. 365; Bliss v. Hosmer, 15 Ohio 44.

[107] Bloomfield R. Co. v. Grace, 112 Ind. 128; 13 N. E. 680.

[108] Waltemeyer v. Wisconsin &c. R. Co. 71 Iowa, 626; 33 N. W. 140.

[109] New York &c. R. Co. v. Kip, 46 N. Y. 546; 7 Am. R. 385; Beekman v. Saratoga R. Co. 3 Paige Ch.

that corporations are sometimes formed under the general railroad laws for the furtherance of mere private enterprises. Accordingly, it

(N. Y.) 45; 22 Am. Dec. 679, and note; Brown v. Beatty, 34 Miss. 227; 69 Am. Dec. 389; Enfield Toll Bridge Co. v. Hartford &c. R. Co. 17 Conn. 40; 42 Am. Dec. 716, and note; Ash v. Cummings, 50 N. H. 591; Kramer v. Cleveland &c. R. Co. 5 Ohio St. 140. But it has been held that a private railroad for the carriage of coal or ores from the company's mines can not be built or operated under the power of eminent domain. People v. Pittsburgh &c. R. Co. 53 Cal. 694; McCandless' Appeal, 70 Pa. St. 210; Edgewood R. Co.'s Appeal, 79 Pa. St. 257. See, also, Sholl v. German Coal Co. 118 Ill. 427; 10 N. E. 199; 59 Am. R. 379; Leigh v. Garysburg Mfg. Co. 132 N. Car. 167; 43 S. E. 632; Breaux v. Bienvenu, 51 La. Ann. 687; 25 So. 321. Under a charter declaring that a corporation may operate a railroad, with necessary lines of telegraph and with power to construct branches, the fact that it is given authority to extend its road to coal lands which it owns has been held not to take away its character as a public railroad corporation, which can exercise the power of eminent domain. Colorado &c. R. Co. v. Union Pac. R. Co. 7 R. & Corp. L. J. 373; 41 Fed. 293. Where land is taken for its use by a railway corporation having the right to exercise the power of eminent domain, the question whether the use is public or private depends upon the right of the public to use the road and to require the corporation, as a common carrier, to transport freight or passengers over the same, and not upon the amount of business. Kettle River R. Co. v. Eastern R. Co. 41 Minn. 461; 43 N. W. 469; 6 L. R. A. 111. If all the people have a right to use it the use is public, although the number who require the use may be small. Chicago &c. R. Co. v. Porter, 43 Minn. 527; 46 N. W. 75; 43 Am. & Eng. R. Cas. 170; Zircle v. Southern Ry. Co. 102 Va. 17; 45 S. E. 802; 102 Am. St. 805, and note; Butte &c. Ry. Co. v. Montana &c. R. Co. 16 Mont. 504; 41 Pac. 232; 50 Am. St. 508; 31 L. R. A. 298. It was held by the court of appeals of New York that a railroad in the gorge of the Niagara River from the falls to the whirlpool, which did not connect with any public highway, which could only be reached by passing over the state reservation or private lands; which could have no habitations along or freight traffic over the road; whose sole business would be to convey sight-seers along Niagara River; and the season of whose operations is confined to four months of the year, could not be built under the general railroad law of that state; and that such a road would not be such a public use as could justify the exercise of the power of eminent domain in its behalf. Niagara Falls &c. R. Co. In re, 108 N. Y. 375; 15 N. E. 429. See Denver R. &c. Co. v. Union Pac. R. Co. 34 Fed. 386; Split Rock Cable Co. Re, 128 N. Y. 408; 28 N. E. 506; Memphis Freight Co. v. Memphis, 44 Tenn. (4 Cold.) 419. See the following authorities in support of the prop-

is held that the corporation which claims the right to exercise the power of eminent domain must not only be able to show a legislative warrant, but it must be able, further, to establish, if the right is challenged, that the particular scheme in which it is engaged is a railroad enterprise within the true meaning of the decisions which justify the taking of private property for railroad purposes; and that the taking of private property for the purposes to which the corporation proposes to devote it is a taking for public use.[110] The question as to what are the legitimate uses which a railroad may make of property in its public character has given rise to much litigation. It is held that a railroad company may condemn land for a right of way, not only for its main road, but for any branch or lateral roads which its charter authorizes,[111] that it may take lands for depots,[112]

osition that a railroad is such a public use that the power of eminent domain may be exercised in its behalf. Bloodgood v. Mohawk &c. R. Co. 14 Wend. (N. Y.) 52; 18 Wend. (N. Y.) 9; 31 Am. Dec. 313, and note; Buffalo &c. R. Co. v. Brainard, 9 N. Y. 100; Bradley v. New York &c. R. Co. 21 Conn. 294; Louisville &c. R. Co. v. Chappell, Rice L. (S. Car.) 383; Concord R. Co. v. Greely, 17 N. H. 47; San Francisco &c. R. Co. v. Caldwell, 31 Cal. 367; Contra Costa R. Co. v. Moss, 23 Cal. 323; Weir v. St. Paul &c. R. Co. 18 Minn. 155; Newby v. Platte County, 25 Mo. 258; Aldridge v. Tuscumbia &c. R. Co. 2 S. & P. (Ala.) 199; 23 Am. Dec. 307; O'Hara v. Lexington &c. R. Co. 1 Dana (Ky.), 232; Arnold v. Covington &c. Bridge Co. 1 Duv. (Ky.) 372; Whiteman v. Wilmington &c. R. Co. 2 Harr. (Del.) 514; 33 Am. Dec. 411; Raleigh &c. Co. v. Davis, 2 D. & B. L. (N. Car.) 451; Buffalo Bayou &c. R. Co. v. Ferris, 26 Tex. 588; Bonaparte v. Camden &c. R. Co. 1 Baldw. (U. S.) 205.

[110] Niagara Falls &c. R. Co. In re, 108 N. Y. 375; 15 N. E. 429; Denver R. &c. Co. v. Union Pacific R. Co. 34 Fed. 386; Rochester &c. R. Co. In re, 59 Hun (N. Y.), 617; 12 N. Y. S. 566.

[111] Newhall v. Galena &c. R. Co. 14 Ill. 273; Chicago &c. R. Co. v. Morehouse, 112 Wis. 1; 87 N. W. 849; 56 L. R. A. 240; 88 Am. St. 918 (reviewing authorities); Ulmer v. Lime Rock R. Co. 98 Me. 579; 57 Atl. 1001; 66 L. R. A. 387; Zircle v. Southern Ry. Co. 102 Va. 17; 45 S. E. 802; 102 Am. St. 805 and note. Where the construction of terminal branches and spur tracks of a railroad to points upon a river front, for the accommodation of business and shipping interests, is essential to any successful operation of a railroad, they must be held to be for public use as much as the main line. Toledo &c. R. Co. v. East Saginaw &c. R. Co. 72 Mich. 206; 40 N. W. 436.

[112] Hannibal &c. R. Co. v. Muder, 49 Mo. 165; Giesy v. Cincinnati &c. R. Co. 4 Ohio St. 308; Small v. Georgia &c. R. Co. 87 Ga. 602; 13 S. E. 694. The power of a railroad company to take lands for a rail-

freight houses,[113] turnouts and side-tracks,[114] yard room,[115] shops

road implies the power to take them for depot buildings. State v. Railroad Comrs. 56 Conn. 308; 15 Atl. 756. See Jager v. Dey, 80 Iowa, 23; 45 N. W. 391; 42 Am. & Eng. R. Cas. 683; Carmody v. Chicago &c. R. Co. 111 Ill. 69; note in 9 L. R. A. 295.

[113] New York Central R. Co. Matter of, 77 N. Y. 248; New York &c. R. Co. Matter of v. Kip, 46 N. Y. 546; 7 Am. R. 385; New York &c. R. Co. In re, 77 N. Y. 248. But see Cumberland Valley R. Co. v. McLanahan, 59 Pa. St. 23. See New York Central &c. R. Co. v. Metropolitan Gas Light Co. 5 Hun (N. Y.), 201; post, p. 356.

[114] Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325; 94 Am. Dec. 84; Philadelphia &c. R. Co. v. Williams, 54 Pa. St. 103; Protzman v. Indianapolis &c. R. Co. 9 Ind. 467; 68 Am. Dec. 650; Toledo &c. R. Co. v. Daniels, 16 Ohio St. 390; St. Louis &c. R. Co. v. Petty, 57 Ark. 359; 20 L. R. A. 434, and note; State v. Toledo &c. Terminal Co. 24 Ohio Cir. Ct. 321. In Getz's Appeal, 3 Am. & Eng. R. Cas. 186; 10 W. N. C. (Pa.) 453, the court held that the right to condemn land for the construction of sidings to private warehouses and manufacturing establishments is clearly within the constitutional power of the legislature to confer upon railroad companies, because the public interest is thereby subserved by reason of the increased facilities afforded for developing the resources of the state and promoting the general wealth and prosperity of the community. And in South Chicago R. Co. v. Dix, 109 Ill. 237, the court held that: "A side track can surely be none the less such, because, in addition to the purposes of a side track proper, it subserves some other private individual use." But the court admitted that the railroad company could not take land for the construction of an independent branch road to subserve only private interests. And in a later case before the same court, where the question whether a private branch road could be constructed by a railroad under its power of eminent domain at a point where a switch was not needed, was directly presented and the court held that it could not. The court said: "The fact that the building of collateral branch roads may add to the earnings of the main line and increase its business will not authorize appellant to build the same under its charter and condemn lands therefor. . . . Nor is it material to the determination of this question that the proposed track is only a half or three-quarters of a mile in length, or that great loss would occur to the brickworks company, if it be not built. Appellee's land is sought to be taken, and it can, as to his right, make no possible difference whether the proposed line is long or short. If the railroad company may condemn appellee's land for the purposes indicated, why may it not build any distance it may choose for like purposes, or from Danville, its eastern terminus, to St. Louis, if thereby its revenues would be increased, and the interests of the points to which it should build be promoted thereby? The legislature has conferred no such power upon appellant. It is apparent from the proofs

to repair cars and engines used for the road,[116] or other similar conveniences which require a particular location with reference to the company's road.[117] And it has been held that a railway company may take lands under the general law for the purpose of laying tracks from its main line to stock-yards which it has established for convenience in handling live stock transported over its road,[118] and the fact that

that the purpose and use intended was not such a use as is contemplated by the grant of power under which appellant was acting, and that, therefore, no appropriation of appellant's land for such purpose could be made." Chicago &c. R. Co. v. Wiltse, 116 Ill. 449; 6 N. E. 49. See post, §§ 961, 971.

[115] Rensselaer &c. R. Co. v. Davis, 43 N. Y. 137; Eldridge v. Smith, 34 Vt. 484.

[116] Southern Pac. R. Co. v. Raymond, 53 Cal. 223; Hannibal &c. R. Co. v. Muder, 49 Mo. 165; Chicago &c. R. Co. v. Wilson, 17 Ill. 123; Low v. Galena &c. R. Co. 18 Ill. 324; State v. Comrs. of Mansfield, 23 N. J. L. 510; 57 Am. Dec. 409, and note; Virginia &c. R. Co. v. Elliott, 5 Nev. 358; State v. District Court (Mont.), 88 Pac. 44.

[117] Graham v. Connersville &c. R. Co. 36 Ind. 463; 10 Am. R. 56; Ewing v. Alabama &c. R. Co. 68 Miss. 551; 9 So. 295; Nashville &c. R. Co. v. Cowardin, 11 Humph. (Tenn.) 348; Long Island R. Co. In re, 143 N. Y. 67; 37 N. E. 636; Dillon v. Kansas City &c. R. Co. 67 Kans. 687; 74 Pac. 251 (water station). Protzman v. Indianapolis &c. R. Co. 9 Ind. 467; 68 Am. Dec. 650; Mansfield &c. R. Co. v. Clark, 23 Mich. 519; Lawrence v. Morgan &c. Co. 39 La. Ann. 427; 2 So. 69; 4 Am. St. 265; Reed v. Louisville Bridge Co. 8 Bush (Ky.) 69; South Carolina R. Co. v. Blake, 9 Rich. L. (S. Car.) 228; Sadd v. Maldon &c. R. Co. 6 Exchq. 143; Lewis Eminent Domain, § 170. Railroads have been permitted to condemn land for parallel tracks along the whole line of a road. New York Central R. Co. In re, 67 Barb. (N. Y.) 426. For a telegraph line along the right of way. Prather v. Jeffersonville &c. R. Co. 52 Ind. 16. And for stockyards at a station upon the line. New York Cent. R. Co. In re, 63 N. Y. 326. To deny a petition of a railway company for the condemnation of land for a side-track or similar appurtenance, it should appear that the property sought to be taken is not required for the convenient operation of the road. New York Central R. Co. In re, 77 N. Y. 248; Boston &c. R. Co. Matter of, 53 N. Y. 574; South Chicago &c. R. Co. v. Dix, 109 Ill. 237; Smith v. Chicago &c. R. Co. 105 Ill. 511; Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325; 94 Am. Dec. 84. Where a railroad was prohibited from holding land except for the "construction of the road or for depots, toll-houses, and other necessary works," it was held that the railroad had no implied authority to take and hold land for a warehouse. Cumberland Valley R. Co. v. McLanahan, 59 Pa. St. 23.

[118] New York &c. R. Co. v. Metropolitan Gas Light Co. 5 Hun (N. Y.), 201; 6 Hun (N. Y.), 149, af-

such tracks will also pass by private business establishments is no objection to the exercise of the power.[119] After the railroad company has taken property it may devote it to any of these or similar uses without incurring a forfeiture or becoming liable to a new assessment of damages.[120] A railroad company may also condemn land over which to divert the course of a stream where it is found necessary in the construction of the road.[121] It may take springs near its road

firmed 63 N. Y. 326. See, also, Covington v. Stock Yards Co. 139 U. S. 128; 11 Sup. Ct. 461. The first time this case was before the court, Davis, P. J., speaking for the court, said: "It hardly needs an argument to establish that in a city like New York depots for freight and for the vast number of cattle and other live stock that are constantly being transported to the city, are as much within the purposes for which railroads are constructed, and as necessary to their operation as depots for the accommodation of passenger traffic. The argument, indeed, is more strongly in favor of the former, for while a railroad company might, with safety to itself, leave its passengers upon a public street to take care of themselves upon their individual responsibility, it could not do so with respect to the animals it transported, but must securely keep them from injuring and annoying the public, until proper delivery to owners or consignees. . . . A railroad corporation can not take land under the right of eminent domain for the purpose of founding a town or city on the plea that when founded it will furnish business to the road of the company. But it is quite another question if the company be the lawful owner of lands on which it has founded and erected a city, whether it may not lawfully acquire, under eminent domain, the lands necessary to connect its tracks, being within its lawful route, within that city. A fortiori would the same reasoning apply where the track to be laid was primarily to erections within the rule of necessity and only incidentally to the those which fall within the class of business conveniences. We are therefore of opinion that the appellants are not protected by the rule that lands can not be taken 'for subsidiary and extraordinary purposes,' but that this case is clearly covered by the ruling of the court of appeals in the matter of the petition of the New York & Harlem R. Co. v. Kip, 46 N. Y. 546; 7 Am. R. 385."

[119] New York Central R. Co. v. Metropolitan Gas Light Co. 5 Hun (N. Y.), 201.

[120] Curtis v. St. Paul &c. R. Co. 20 Minn. 28. See "Right of Way of Rail Road Company," 42 Cent. L. J. 156.

[121] Baltimore &c. R. Co. v. Magruder, 34 Md. 79; 6 Am. R. 310; Valley R. Co. v. Bohm, 34 Ohio St. 114; Johnson v. Atlantic &c. R. Co. 35 N. H. 569; 69 Am. Dec. 560; Pugh v. Golden Valley R. Co. L. R. 12 Ch. Div. 274. An act granting to railroad corporations the right to condemn property for the purpose of diverting a stream of water too

for a supply of water for its engines upon making compensation therefor when it cannot be otherwise obtained.[122] And it has been held that it may condemn land for a track to a public landing,[123] or

frequently crossed by its road, or in any case where the safety and convenience of the operation of the road will be promoted, was upheld by the supreme court of Iowa, in so far as it authorized the condemnation of land to make changes, which would promote the safety of the travelling public, the court holding that taking property for such an object was taking it for public use. But the court refused to decide whether the legislature could constitutionally authorize the taking of land for such a purpose, merely to promote the convenience and economy of the company. Reusch v. Chicago &c. R. Co. 57 Iowa, 687; 11 N. W. 647. See, also, State v. District Court (Mont.), 88 Pac. 44. It is only in case of necessity that such power exists. Mere convenience of saving of expense to the company will not justify it. Pugh v. Golden Valley R. Co. L. R. 12 Chi. Div. 274; Scranton Gas &c. Co. v. Northern Coal &c. Co. 192 Pa. St. 80; 43 Atl. 470; 73 Am. St. 798. See Stodghill v. Chicago &c. R. Co. 43 Iowa, 26; 22 Am. R. 211. Under a power to condemn lands it was held that the right to the flow of the stream could not be taken without taking the bed of the stream. Watson v. Acquackanonck Water Co. 36 N. J. L. 195, and see Garwood v. New York Cent. R. Co. 83 N. Y. 400; 38 Am. R. 452. A railroad charter authorizing it to enter upon lands necessary for the construction and maintenance of its road gives it power to take land for railroad purposes only, and not for the purpose of widening or altering streets, and an attempt upon the part of a railroad company to take the land of a citizen for the latter purpose is a nullity. Chicago &c. R. Co. v. Galt, 133 Ill. 657; 24 N. E. 674.

[122] Strohecker v. Alabama &c. R. Co. 42 Ga. 509. Where a spring is destroyed, the owner can recover compensation therefor. Lehigh Valley R. Co. v. Trone, 28 Pa. St. 206; Winklemans v. Des Moines &c. R. Co. 62 Iowa, 11; 17 N. W. 82; Peoria &c. R. Co. v. Bryant, 57 Ill. 473; Parker v. Boston &c. R. Co. 3 Cush. (Mass.) 107; 50 Am. Dec. 709, and note. But damages caused by draining a spring in making excavations to build the road will be presumed to have been included in the sum awarded by the commissioners on condemnation, or agreed upon by the landowner and the company in case the right of way was purchased. Hougan v. Milwaukee &c. R. Co. 35 Iowa, 558; 14 Am. R. 502; Aldrich v. Cheshire R. Co. 21 N. H. 359; 53 Am. Dec. 212.

[123] Toledo &c. R. Co. v. East Saginaw &c. R. Co. 72 Mich. 206; 40 N. W. 436; Rensselaer &c. R. Co. v. Davis, 43 N. Y. 137. See, also, Collier v. Union Ry. Co. 113 Tenn. 96; 83 S. W. 155; Lanssig v. St. Louis Transfer R. Co. 133 Fed. 220. Under the Illinois water-craft act of July 1, 1887, a railroad company can not condemn land for a landing for water-craft. Thomas v. St. Louis &c. R. Co. 37 Fed. 839.

to a public warehouse or elevator.[124] So, it has been held, under a statute granting the power to electric lines and imposing no limitations as to the location of its appurtenances, that an electric railroad may condemn land for power purposes however distant from the line.[125] But it has been held, on the other hand, that a railroad company cannot condemn lands for uses not connected with the conduct of its business of a common carrier, such as the erection of dwellings for its employes,[126] or the erection of a manufacturing establishment to supply the road with rolling stock and other necessary equipment,[127]

[124] Fisher v. Chicago &c. R. Co. 104 Ill. 323; Chicago &c. R. Co. v. Garrity, 115 Ill. 155; 3 N. E. 448. A railroad may take land on which to pile lumber to be used on the road and brought to it to be transported thereon. Eldridge v. Smith, 34 Vt. 484.

[125] State v. Centralia-Chehalis Electric &c. Co. 42 Wash. 632; 85 Pac. 344.

[126] Rensselaer &c. R. Co. v. Davis, 43 N. Y. 137; State v. Commissioners of Mansfield, 23 N. J. L. 510; 57 Am. Dec. 409, and note (criticised in State v. Hancock, 35 N. J. L. 537); Eldridge v. Smith, 34 Vt. 484; Nashville &c. R. Co. v. Cowardin, 11 Humph. (Tenn.) 347.

[127] New York &c. R. Co. Matter of, v. Kip, 46 N. Y. 546; 7 Am. R. 385; West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 546. In Eldridge v. Smith, 34 Vt. 484, 493, the court says: "Is an establishment for the manufacture of railroad cars a legitimate purpose, so that the company would have a right to take land for it against the will of the owner? The defendants say, that as the company must necessarily have cars in order to carry on their business, therefore they must have the right to manufacture them, and have works for that purpose. But this argument proves too much. Railroads must have iron in great quantities, for their track and other purposes. Does this authorize them to take ore beds and lands for forges and foundries, and manufacture their own iron? They must have wood, sleepers and timber for depots, and large quantities of lumber of various kinds. Does this authorize them to take timbered lands, and sites for mills, against the will of the owners? They must have glass, nails, paint, and many other things. Can they, by compulsory measures, provide themselves the means to manufacture them all? We think it clear they can not. If the company must manufacture their own cars or go without, then, doubtless, their manufacture would be regarded as a necessity of the railroad, but the manufacture of cars and engines is a distinct branch of mechanical industry, carried on wholly independent of any connection with railroads, and is a branch of business in which railroads do not usually engage at all; and in this case it seems to have been quickly demonstrated, that it was better to rely on supplying themselves with cars by purchase from those whose legitimate business it was to make them. Although railroad companies must have engines and

or for a park at its terminal.[128] Where the statute expressly authorizes it, a railroad company may condemn lands lying outside the location for the purpose of procuring materials, if the purpose for which they are taken is disclosed in the petition,[129] but under a general authority to condemn land for the purposes of the road it has been held that no such power can be exercised.[130] Where the charter of a railroad company authorizes it to enter upon lands adjacent to its roadway and to occupy them "for any purpose useful or necessary in the construction or repair of such roads," upon payment of damages, it has been held that the company, by its servants and employes, has a right to enter upon lands adjoining its roadway, and erect temporary buildings for the use of its workmen, such as stables, wagon houses, blacksmith

cars, iron, lumber, wood and many other things in large quantities, in order to build and operate their roads, it is supposed they can supply themselves as private persons do, by purchase in the ordinary way, and they are not created or designed to be independent of all other branches of industry and business in the country, but to be additional aids to their successful development. The company must have shops for the repair of cars and engines, as they are so often needed, and as they can not well be moved for repairs, nor can facilities be found for repairs in the country generally, but the company were already supplied with all necessary accommodations for repairs. We are of opinion that an establishment for the manufacture of cars is not a legitimate railroad necessity so that the company could properly condemn land on which to erect one."

[128] Great Falls Power Co. v. Great Falls &c. R. Co. 104 Va. 416; 52 S. E. 172; Niagara Falls &c. R. Co. In re, 108 N. Y. 375; 15 N. E. 429.

[129] Valley R. Co. v. Bohm, 34 Ohio St. 114; Vermont Central R. Co. v. Baxter, 22 Vt. 365. The general railroad laws of twenty-seven states authorize the taking of land in addition to the specified width of the railroad right of way for procuring materials, such as stone, gravel and timber. Stimson Am. Stat. (1892) § 8742.

[130] New York &c. R. Co. v. Gunnison, 1 Hun (N. Y.), 496. A railroad company which constructs a branch line through a man's land under a permissive license from him to construct and use the track thereon, and use the same as long as it shall be used for railroad purposes, acquires no title to stone excavated in building the road but not required in its construction. And it can not remove such stone and devote it to other purposes without his permission. Chapin v. Sullivan R. Co. 39 N. H. 564; 75 Am. Dec. 237. Land required only for the purpose of excavating materials can not be permanently taken under a power to take the land that may be necessary in constructing the road. Eversfield v. Mid-Sussex R. Co. 3 DeG. & J. 286.

shops, depots, and the like, provided it takes no more land than is necessary for its purposes.[131]

§ 961. Roads to mines or manufacturing establishments—Right to condemn upheld.—In several of the states provision has been made for the construction of short lateral railroads leading from mills, quarries, mines, or other real estate requiring development, to some navigable stream, railroad or canal, and authorizing the exercise of the power of eminent domain in building them. The most elaborate provision for such roads is made in Pennsylvania,[132] where, as long ago as 1832, an act was passed providing that the owner of any land, mills, quarries, coal mines, lime kilns, or other real estate, might condemn lands for a railroad to any existing railroad, canal or navigable stream, not exceeding a distance of three miles, and imposing upon railroads built under the act the duty of carrying freight for whomsoever would pay a specific compensation.[133] Statutes authorizing the construction of similar roads have been upheld in Maryland and Missouri upon the ground that the roads, when constructed, were charged with the duties of common carriers of all freight and passengers offered for transportation, and were therefore public high-

[131] Lauderbrun v. Duffy, 2 Pa. St. 398; Vermont Central R. Co. v. Baxter, 22 Vt. 365.

[132] See a summary of the legislation and decisions on this subject in Waddell Appeal, 84 Pa. St. 90.

[133] Purdon's Statutes, p. 492; Boyd v. Negley, 40 Pa. St. 377; Lewis Eminent Domain (2d ed.), § 171. Of this act, the supreme court of Pennsylvania speaks as follows: "The truth is, when a lateral railroad is laid upon intervening lands, private property is not taken for private use. . . . The private property is taken for public use,—for clear and definite objects of a public nature which are of sufficient importance to attract the sanction of the sovereign. That an individual expects to gain thereby, and has private motives for risking the whole of the necessary investment and acquires peculiar rights in the work, detracts not a whit from the public aspects of it. . . . It was found, as public improvements penetrated the interior, that many productive mines and manufactories situated near them were still separated by the land of an unneighborly owner, which must be crossed or tonnage lost to the public improvements. To compel such owners to admit a right of passage was not to take away from them a fair participation in the public improvements, and to compensate them for the land occupied was to do all they had a right to claim. They hold their land, as every man does, subject to the call of the government." Hays v. Risher, 32 Pa. St. 169.

ways.[134] And in New Jersey the courts have sustained an act which

[134] New Central Coal Co. v. George's Creek Coal Co. 37 Md. 537; Dietrich v. Murdock, 42 Mo. 279. See Brown v. Corey, 43 Pa. St. 495; Colorado Eastern R. Co. v. Union Pacific R. Co. 41 Fed. 293; 44 Am. & Eng. R. Cas. 10. In this latter case, Phillips, J., said: "The character of this corporation is first to be determined from the language of its charter. It is declared to be a railroad to be operated as such between given points, with necessary lines of telegraphs and with power to construct branches. As incident to its apparent character, the general statute of the state imposed upon it the burden and duty of acting as a common carrier of freight and passengers. . . . Does the fact that the grant authorizing the company to extend its road from the eastern designated point of Sand creek to its coal lands, with branches to other lands, ex vi termini, destroy or take away its character as a public railroad corporation? I am unable to discover sufficient reason or authority for such conclusion. In the first place, if this extension can be deemed a special power, it in no sense is inconsistent with, or contradictory of, the general terms of the grant, so that they may not stand together; and, second, the power to build to the coal or other lands of the petitioner, without more, should in favor of the legality of the franchise be considered as merely designating the terminus of the eastern extension of the road, or the termini of its branches, and not as a palpable indication that the real motive of its promoters was to develop their coal fields, and conduct a private traffic in their products. If such object in fact existed, it was in pais, and must be found in evidence, dehors the record." After stating that the evidence showed the road to extend from Denver to the coal fields, a distance of seventeen miles, and to have been constructed at a cost of $80,000, by a company with a nominal capital of $500,000, four-fifths of which consisted of its coal lands, that it was built through a sparsely settled country, in which the population had since increased, and that it had from the first run trains daily, carrying the United States mail, and such passengers and freight as were offered for transportation, he continued: "Its beginning may have been small, but if the right to exercise the power of eminent domain should have been denied in the early history of railroads in this country, because of their small beginnings, it is not too much to say that some of the great, mammoth railroad enterprises which have developed and strengthened the commerce and wealth of the country would have perished in their infancy. In Chicago &c. R. Co. v. Chicago &c. R. Co. 112 Ill. 589; 25 Am. & Eng. R. Cas. 158, the court says: 'The company, as we have just seen, was organized under a valid charter, and is shown to have done corporate acts under it. That was sufficient to establish a prima facie right to take the property in question; . . . and this prima facie right can not be successfully assailed in a mere collateral proceeding, as is sought to be done here.' And in the later case of Ward v.

authorizes the condemnation of land for building short underground

Minnesota &c. R. Co. 119 Ill. 287; 10 N. E. 365, the chief justice says: 'There is some proof that the petitioner is a corporation de facto, and that is all the law requires in this class of cases. There is evidence, although it may be slight, of corporate acts done by petitioner. It appears that an engineer has been appointed, the line of the proposed road has been located, and other steps taken toward the building of the road. . . . These are corporate acts, and tend to show petitioner is a corporation de facto.' It does seem to me that the right of eminent domain should not necessarily be denied to a railroad corporation because of the fact that the primary and chief inducement moving its promoters was to develop private coal mines, and bring their products to market. 'The true criterion by which to judge of the character of the use is whether the public may enjoy it by right, or only by permission, and not to whom the tax or toll for supporting them is paid.' Mill Em. Dom. § 14. And Lewis Em. Dom. (2d ed.) §§ 160, 161, asserts that: 'In determining whether the use in such case is public or not, it is an immaterial consideration that the control of the property is vested in private persons, who are actuated solely by motives of private gain. . . The inquiry must necessarily be, what are the objects to be accomplished? not who are the instruments for attaining them? . . . The public use required need not be the use or benefit of the whole public or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be common, not to particular individuals or estates.' Or, as 1 Wood Ry. Law, § 226, puts it: 'The question is whether it is of so much benefit or advantage to the community, either directly or indirectly, that it can not be said to be wholly private in its effect and operation.' In Contra Costa R. Co. v. Moss, 23 Cal. 323, the court says: 'It is urged that the plaintiffs are constructing a railroad from a coal mine in the mountains, through a desolate region, to navigable waters, to enable it to get coal ready to market, and that this is a mere private use, and therefore they have no right to appropriate the property of others to its purposes without its consent. . . The plaintiffs, in common with other railroad companies organized under this act, are bound by these provisions which make it obligatory upon them to act as common carriers. . . . The fact that their road does not connect points of present commercial importance can not affect the rights of the plaintiffs. Railroads often make commercial points by their construction, and a large and cheap supply of coal . . . is one of the greatest necessities of the state, and a matter in which the whole state is interested.' In the progress of civilization, municipal existence as well as the maintenance of rural populations without timber supply, may be so dependent upon a large supply of coal for fuel as to render railroads for its transportation alone of imperative public necessity. It would, in fact, be difficult to conceive of an object of greater public use. It

railroads leading from mines to points from which the products of

is as much so as the freightage of breadstuffs, meats and other necessary supplies for human sustenance in our large cities, or compact communities, depending upon exterior sources for their production. It would be no answer to their claim to be public corporations to say, for instance, that a community like Denver was not wholly dependent upon this road for its supply of fuel, as there are other railroads which may bring such supply. Competition is not only the life of trade (or at least is yet supposed to be by the common people), but the multiplication of products and the facilities for getting them to market, tend to cheapen the necessaries of life to the masses; and in the most beneficent and legitimate sense they should retain their character as public necessities. Government itself is maintained to promote the general welfare, and the right of eminent domain has its root in this soil. Be this as it may in the light of adjudications, certainly it comes both within the letter and the spirit of a public railroad corporation where such an object, as above indicated, is coupled with the obligation, inseparably affixed by the statute to the franchise itself, to become also a common carrier of passengers and freight, and the corporation actually performs such duty to the public. The evidence in this case shows that for the greater period, and in the latter years, of the existence and operation of this road, its business has been confined principally to the carrying of passengers and general freight, however small it may have been. What is said by Depue, J., in Decamp v. Hibernia Underground R. Co. 47 N. J. L. 43, respecting a like proceeding, where a railroad began in a mine, is quite pertinent. 'This enterprise does not lose the character of a public use because of the fact that the projected railroad is not a thoroughfare, and that its use may be limited by circumstances to a comparatively small part of the public. Every one of the public having occasion to send materials, implements, or machinery for mining purposes into, or to obtain ores from, the several mining tracts adjacent to the location of this road, may use the railroad for that purpose, and of right may require the company to serve him in that respect; and that is the test which determines whether the use is public. Nor will any motive of personal gain which may have influenced the projectors in undertaking the work take from it its public character. . . . A particular improvement palpably for private advantage only will not become a public use because of the theoretical right of the public to use it. But where the franchise is in its nature a public franchise, as the transportation of freight is, and the object to be promoted is one that concerns the public interests, as the development of the mining resources of a state does, the improvement is essentially a public benefit and advantage; and if there be no restriction on the right of the public to use it, and no inability to use it, except such as arises from the circumstances, the court, in determining whether the im-

such mines can readily be sent to market, and expressly requiring roads built under its provisions to carry freight for anyone having occasion to make use of them.[135] In Iowa a mine owner is permitted by statute to condemn land for a "public way" to any highway or railroad. In sustaining a proceeding under this act the supreme court of that state said: "We think that it makes no difference that the mine owner may be the only member of the public who may have occasion to use the way after it has been established. The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it it is a public way, although the number who have occasion to exercise the right is very small."[136] And a well-known text-writer[137] has expressed the opinion that there is no reason why lateral roads should not be constructed, if they are required to serve the public, as occasion requires. In South Carolina it is held that, under the constitution of that state, corporations created for mining or manufacturing purposes may be authorized by statute to construct and operate a railroad, tramway, turnpike or canal for their own use and purposes, to and from their works, or place of business, or to connect with some navigable stream, or with some existing railroad, turnpike or other public highway, not to exceed ten miles in length, and may be empowered to condemn, for the use of such road, the right of way in lands over which the road

provement is such a public use as that the right of condemnation shall extend to it, will not scan closely the number of individuals profited by it. Indeed, it would not be possible to indicate the number of persons, or define the area of the limits to which the benefit of such an improvement may extend.'"

[135] DeCamp v. Hibernia Underground R. Co. 47 N. J. L. 43; affirmed 47 N. J. L. 518; 54 Am. R. 197. In this case the road constructed was only two-thirds of a mile long.

[136] Phillips v. Watson, 63 Iowa, 28; 18 N. W. 659. In Lower v. Chicago &c. R. Co. 59 Iowa, 563; 13 N. W. 718, the right of the company to build a lateral road, 15 miles long, was sustained, although the road was built at the instigation of private individuals and from motives of private gain. See, also, Morrison v. Thistle Coal Co. 119 Ia. 705; 94 N. W. 507.

[137] 1 Lewis' Eminent Domain (2d ed.), § 171. A road or canal constructed by the public or a corporation is a public highway for the public benefit if the public have a right of passage thereon by paying a reasonable, stipulated, uniform toll. Bonaparte v. Camden &c. R. Co. Baldw. (U. S.) 205; National Docks R. Co. v. Central R. Co. 32 N. J. Eq. 755.

may pass, upon making compensation therefor to the owner.[138] And the weight of authority, as well as the better reason, seems to be to the effect that lines of railroad, branches or spurs to mines, manufacturing establishments, and the like, are a public use for which land may be condemned where the general public have the right to use them or to be served without discrimination.[139]

§ 961a. Right to condemn for road to private enterprise denied.[140] —On the other hand, the Supreme Court of Illinois has held that a right of way for a short railroad or tramway leading from a coal mine to a railroad cannot be taken by condemnation proceedings instituted by the company owning the coal mine, placing its decision on the ground that the business of mining coal is of a strictly private character, and that the coal company would be at liberty to operate the tramway or not, at its pleasure, and without regard to the interests of the public.[141] So, where a company was organized merely to construct and operate a railroad from a coal mine to a navigable river, but carried no passengers, and no freight except coal, it was held that this was a mere private use.[142] And several of the courts have held that railroad corporations have no authority to condemn land for sidetracks or switches leading to private manufacturing establishments, for their own private benefit.[143] The Supreme Court of West Virginia

[138] Bacot, Ex parte, 36 S. Car. 125; 50 Am. & Eng. R. Cas. 597; 15 S. E. 204; 16 L. R. A. 586.

[139] Ulmer v. Lime Rock R. Co. 98 Me. 579; 57 Atl. 1001; 66 L. R. A. 387; Toledo &c. R. Co. v. East Saginaw &c. R. Co. 72 Mich. 206; 40 N. W. 436; Chicago &c. R. Co. v. Porter, 43 Minn. 527; 46 N. W. 75; Chicago &c. R. Co. v. Morehouse, 112 Wis. 1; 87 N. W. 849; 56 L. R. A. 240; 88 Am. St. 918; Butte &c. R. Co. v. Montana &c. R. Co. 16 Mont. 504; 41 Pac. 232; 31 L. R. A. 298; 50 Am. St. 508; Zircle v. Southern R. Co. 102 Va. 17; 45 S. E. 802; 102 Am. St. 805.

[140] Part of this section was originally part of § 961.

[141] Sholl v. German Coal Co. 118 Ill. 427; 10 N. E. 199; 59 Am. R. 379. See Edgewood R. Co.'s Appeal, 79 Pa. St. 257.

[142] People v. Pittsburgh R. Co. 53 Cal. 694. See, also, Chicago &c. R. Co. v. Wiltse, 116 Ill. 449; 6 N. E. 49; Memphis Freight Co. v. Memphis, 44 Tenn. (4 Cold.) 419.

[143] Chattanooga &c. R. Co. v. Felton, 69 Fed. 273. A spur track from the line of a railroad with which it does not connect except at one point, running to mills belonging to private concerns and operated for private profit, is not for a public use which will authorize the condemnation of land for a right of way. Kyle v. Texas &c. R. Co. (Tex.) 4 L. R. A. 275. Evidence that all who wish to avail

has held that a road from a salt mine was not of such a public char-

themselves of a proposed railroad switch, branch road, or lateral work, can do so, is not sufficient to show that the use of the work will be for the benefit of the public. Pittsburgh &c. R. Co. v. Benwood Iron Works, 31 W. Va. 710; 8 S. E. 453; 2 L. R. A. 680; 5 R. & Corp. L. J. 324. In St. Louis &c. R. Co. v. Petty, 57 Ark. 359; 21 S. W. 884; 20 L. R. A. 434, and note, which was a case in which a railroad sought to condemn land for a side-track near the lands of a coal company, Cockrill, C. J., said: "The vexed question for determination is, is the company seeking to condemn the land for railroad purposes—that is, for public use? The appellee argues that the proof shows that the railway's proceeding to condemn is prosecuted, not for its own use, but for the use and benefit of the Western Coal and Mining Company—a corporation which owns and operates a coal mine near the appellant's line of railway. The managers of the railway were probably instigated by the coal company to institute the condemnation proceedings, and they doubtless intended that the coal company should derive a benefit therefrom. But those facts alone do not furnish a legal reason sufficient to warrant judicial interference with the power delegated to the corporation by the legislature. If the land is needed for legitimate railroad purposes, the motive which influenced the railway managers in undertaking the work will not take from it its public character. A proposed public user will not be enjoined by the courts upon the ground that it will further private interest. De Camp v. Hibernia &c. R. Co. 47 N. J. L. 43; National Docks R. Co. v. Central R. Co. 32 N. J. Eq. 755; South Chicago &c. R. Co. v. Dix, 109 Ill. 237; Dunham v. Hyde Park, 75 Ill. 371; Lewis Em. Dom. (2d ed.) § 646. A railway can not exercise the right of eminent domain to establish a private shipping station for an individual shipper. If the station is for the exclusive use of a single individual, or of a collection of individuals less than the public, that stamps it as a private use, and private property can not be taken for private use. The fact that the railway's business would be increased by the additional private facilities is not enough to make the use public. Rensselaer &c. R. Co. v. Davis, 43 N. Y. 137. To the public, the user must concern the public. If it is an aid in facilitating the business for which the public agency is authorized to exercise the power to condemn, or if the public may enjoy the use of it, not by permission, but of right, its character is public. When once the character of the use is found to be public, the court's inquiry ends, and the legislative policy is left supreme, although it appears that private ends will be advanced by the public user. It is common for the interest of some individuals to be advanced, while that of others is prejudiced, by the location of railway stations and switches, when there is no motive on the part of the railway officials to discriminate between them. The same effect is seen in the original location of every line of railway. But the courts do not assume to inter-

acter as to permit the condemnation of a right of way.[144] And, in a late case,[145] the same court held that even a corporation formed under the general railroad law of the state could not condemn land on which to build a short line of road for the declared purpose of "transporting freight to and from certain steel works." The court said: "The mere declaration in a petition that the property is to be appropriated to public use does not make it so, and evidence that the public will have a right to use it amounts to nothing in the face of the fact that the

fere with the right of the company to locate its line stations, or switches. In this case the railway located its side-tracks contiguous to the mine of the coal company, rather than to that of the appellee, who is a rival miner. The evidence is abundant that side-tracks were necessary to facilitate and hasten the business offered to the company at that point. That of itself is sufficient to give public character to the use to which the land was to be devoted. Moreover at that point, upon this very land, as the proof shows, there is established a shipping station for coal. The railway's franchise empowers it to establish none but public stations. It can place no unreasonable restraint on the right of the public to use it. If the railway maintains a coal-shipping station at that point, and unreasonably refuses to accord to the appellee, or others who have occasion to ship coal therefrom, facilities for doing so, the courts can afford a remedy for the wrong; and if the railway abuses the privileges of condemning private property to a public use, by turning the property acquired to a private use, doubtless the easement it acquired by condemnation may be revoked, and the possession restored to the owner of the fee. The fact that the tracks are extended upon the lands of the coal company for its exclusive use is not a matter to concern the appellee, for the reason before stated; that is, a public use is first subserved. If no use could be made of the side-tracks except to subserve the interest of the coal company, the power to condemn could not be exercised for that purpose. Sholl v. German Coal Co. 118 Ill. 427; 10 N. E. 199; 59 Am. R. 379. But, as we have seen, that is not this case. . . . . There are numerous cases holding that a railway built for the purpose of reaching a coal mine or a manufacturing establishment is a public enterprise, entitled to use the power of eminent domain, provided the public has the power to use it. That right makes the use public. Lewis Em. Dom. § 171, and cases cited in notes; Mills Em. Dom. § 28; Kettle River R. Co. v. Eastern R. Co. of Minnesota, 41 Minn. 461; 43 N. W. 469; 6 L. R. A. 111; Phillips v. Watson, 63 Iowa, 28; 18 N. W. 659; DeCamp v. Hibernia Railroad Co. 47 N. J. L. 43; Hays v. Risher, 32 Pa. St. 169, 177."

[144] Salt Co. v. Brown, 7 W. Va. 191.

[145] Pittsburgh &c. R. Co. v. Benwood Iron Works, 31 W. Va. 710; 8 S. E. 453; 2 L. R. A. 680.

only incentive to ask for the condemnation was private gain, and it was apparent that the general public had no interest in it."[146] In a late case in one of the United States courts it was held that a projected railroad twelve miles long, connecting two other railroads, and passing through valuable timber lands from which the projector and principal stockholder expected to procure bark for his tanneries, was a private enterprise, and that the company seeking to construct it was not entitled to exercise the right of eminent domain.[147] The

[146] Pittsburgh &c. R. Co. v. Benwood Iron Works, 31 W. Va. 710; 8 S. E. 453; 2 L. R. A. 680, and note; 36 Am. & Eng. R. Cas. 531. This case contains an exhaustive review of the authorities touching the power to condemn land for a railroad leading to a private establishment. See, also, Denver R. &c. Co. v. Union Pac. R. Co. 34 Fed. 386, where it was said, per Judge Hallett: "The inquiry is not as to what the company was organized for, or whether it will be a public or private corporation, but what the road will be, the structure itself, if any such thing will be made." Chicago &c. R. Co. v. Wiltse, 116 Ill. 449; 6 N. E. 49.

[147] Weidenfeld v. Sugar Run R. Co. 48 Fed. 615. Judge Reed said: "Whether the use is a public one, for which private property may be taken, is a judicial question. If the use itself is found to be only private, or, further, if the use being public, the appropriation can in no respect be subservient thereto, it is the duty of the judicial department to protect the citizen by proper remedies from the taking of his property, whether attempted in open disregard of, or under color of law. Pierce Railw. 146; Boom Co. v. Patterson, 98 U. S. 403. . . . In the case of Edgewood R. Company's Appeal, 79 Pa. St. 257, it appeared, as in this case, that a number of persons had procured a charter for a railroad company, and, under cover of constructing a railroad for public use, were engaged in the construction of a railroad from a tract of coal owned by themselves, to the Pennsylvania Railroad. A bill was filed by a property-owner to restrain the appropriation, by virtue of the power of eminent domain conferred upon the railroad company, of a portion of his property for its uses. The supreme court of Pennsylvania, finding the facts to be that the railroad was projected and constructed with the primary object of connecting the coal mines with the Pennsylvania Railroad, held that the railroad was being constructed for private purposes under cover of a charter obtained under the general railroad laws of the state; that there appeared a perversion of an enactment passed for one purpose in order to subserve other and inconsistent purposes; that the charter of the defendant company did not warrant the appropriation of the land of the plaintiff for the purpose to which the defendant had applied it; and that it did not possess the right or franchise to do the acts which had resulted in the injury of which the plaintiff complained." In Western

corporation was organized under the general railroad law of the state, and its projectors claimed that it was organized for a public purpose, but failed, on the trial, to show any public use or necessity for the railroad, or that it would obtain any public traffic when constructed.[148] It has been held by the Court of Appeals of New York that a company organized under the general laws of that state for the formation of elevated tramway corporations, and owning a road one terminus of which was upon private property, and could only be reached by means of a private road, and which was used solely for the transportation of stone for a private corporation in which the incorporators were financially interested, could not exercise the power of eminent domain. The fact that the corporation was ready to carry freight offered to it by any person, providing that such freight was suitable for transportation in the overhead buckets with which the road was provided in lieu of cars, to the extent of its surplus capacity after supplying the wants of the private corporation, was held insufficient to show that it was a public use.[149] Some of these cases, it seems to us, are contrary to the weight of authority, but most of them can be distinguished.

§ 962. Condemnation of land for future use—Second appropriation.—It has been held that a railroad company may take lands that will be required in the future to accommodate a growing business,

Pennsylvania R. Company's Appeal, 104 Pa. St. 399, the same court, commenting upon the Edgewood R. Co. Case, said: "A charter authorizing the building of a public railroad did not warrant the construction of a purely private one. . . . The question was one of corporate power, and that question was determined by the inspection of the charter of the company proposing to exercise the power."

[148] It would seem that this point made by the court was not well taken, as it had been shown to the court that another railroad company was seeking to build a railroad over nearly the same route chosen by the Sugar Run Co., and it was as one of the stockholders of that other company that the plaintiff claimed the right to sue.

[149] Split Rock Cable Road Co. In re, 128 N. Y. 408; 28 N. E. 506. See, also, Leigh v. Garysburg Mfg. Co. 132 N. Car. 167; 43 S. E. 632. To be public, the user must concern the public. If it is an aid in facilitating the business for which the public agency is authorized to exercise the power to condemn, or if the public may enjoy the use of it, not by permission, but of right, its character is public. St. Louis &c. R. Co. v. Petty, 57 Ark. 359; 21 S. W. 359; 20 L. R. A. 434, and note.

where it acts in good faith.[150] But it can not, under pretense of acquiring lands for future use, take them for purposes of speculation, or to prevent their acquisition by competing lines.[151] Nor will a collateral enterprise remotely connected with the operation of the road justify the assertion of the right of eminent domain without authority other than a general law to condemn for railroad purposes.[152] Thus, in New York, it has been held that the railroad law of that state, giving power to condemn land necessary for the construction, operation and maintenance of a railroad, does not authorize a railroad corporation having a completed line through an incorporated village to condemn land for a new and straighter line through the town, to be used as a cut-off and an additional line.[153] In determining the quantity to be taken, however, where the authority exists, the prospective needs of the company may be considered to a reasonable extent.[154] As a general rule, a single appropriation does not exhaust the power,[155] and new appropriations may be made from time to time as the necessities of the road may require.[156] So, of course, a

[150] Lodge v. Philadelphia &c. R. Co. 8 Phila. (Pa.) 345.

[151] Rensselaer &c. R. Co. v. Davis, 43 N. Y. 137; New York Cent. &c. R. Co. In re, 59 Hun (N. Y.), 7; 8 N. Y. S. 290. See, also, Scranton Gas &c. Co. v. Northern Coal &c. Co. 192 Pa. St. 80; 43 Atl. 470; 73 Am. St. 798.

[152] Rochester &c. R. Co. In re, 110 N. Y. 119; 17 N. E. 678.

[153] Erie R. Co. v. Steward, 170 N. Y. 172; 63 N. E. 118.

[154] New York &c. R. Co. In re, 77 N. Y. 248; Lodge v. Philadelphia &c. R. Co. 8 Phila. (Pa.) 345.

[155] Elliott Roads and Streets (2d ed.), § 231; Randolph Eminent Domain, § 116; Ewing v. Alabama &c. R. Co. 68 Miss. 551; 9 So. 295; Contra Mills Em. Dom. § 58.

[156] Prather v. Jeffersonville &c. R. Co. 52 Ind. 16; Peck v. Louisville &c. R. Co. 101 Ind. 366; Deitrichs v. Lincoln &c. R. Co. 13 Neb. 361; 13 N. W. 624; Atchison &c. R. Co. v. Patch, 28 Kan. 470; New York &c. R. Co. v. Welsh, 69 Hun (N. Y.), 619; 23 N. Y. S. 195; New York &c. R. Co. In re, 67 Barb. (N. Y.) 426; South Carolina &c. R. Co. v. Blake, 9 Rich. L. (S. Car.) 228; Virginia &c. Co. v. Lovejoy, 8 Nev. 100; Chicago &c. R. Co. v. Wilson, 17 Ill. 123; Fisher v. Chicago &c. Co. 104 Ill. 323. See, also, Kenny v. Pittsburgh &c. R. Co. 208 Pa. St. 30; 57 Atl. 74; Gardner v. Georgia &c. R. Co. 117 Ga. 522; 43 S. E. 863; Hopkins v. Philadelphia &c. R. Co. 94 Md. 257; 51 Atl. 404; Middlesex &c. Traction Co. v. Metlar, 70 N. J. L. 98; 56 Atl. 142; post, § 971. But see Mason v. Brooklyn &c. Co. 35 Barb. (N. Y.) 373; Kenton Co. v. Bank Lick Turnpike Co. 10 Bush (Ky.), 529; Brigham v. Agricultural &c. Co. 1 Allen (Mass.), 316; Morris &c. R. Co. v. Central &c. Co. 31 N. J. L. 205.

futile effort to condemn does not exhaust the power and prevent the company from afterwards proceeding in the proper manner to condemn.[157] A reorganized company cannot, of course, condemn lands where the company it succeeds has exhausted all this power given it by its charter.[158]

§ 963. What may be appropriated — Generally.—All kinds of property, and every variety and degree of interest in property, may be taken under the power of eminent domain by the state, or by a corporation acting under the authority of the legislature.[159] Mortgaged property,[160] easements,[161] property in the hands of a receiver,[162] and property held by the petitioner under a lease, may all be taken by a railroad corporation under a general grant of power to condemn prop-

[157] State v. Dover &c. R. Co. 43 N. J. L. 528; 14 Am. & Eng. R. Cas. 87; Cincinnati &c. R. Co. v. Haas, 42 Ohio St. 239; 22 Am. & Eng. R. Cas. 164; Williams v. Hartford &c. R. Co. 13 Conn. 397. See also, Bouvier v. Baltimore &c. R. Co. 51 N. J. L. 781; 53 Atl. 1040. But compare New York &c. R. Co. v. Boston &c. R. Co. 36 Conn. 196; Brooklyn &c. R. Co. Matter of, 72 N. Y. 245; Peavy v. Calais R. Co. 30 Me. 498.

[158] Erie R. Co. v. Steward, 170 N. Y. 172; 63 N. E. 118.

[159] New York &c. R. Co. v. Boston &c. R. Co. 36 Conn. 196; Metropolitan City R. Co. v. Chicago West. Div. R. Co. 87 Ill. 317; Eastern R. Co. v. Boston &c. R. Co. 111 Mass. 125; 15 Am. R. 13; Alabama &c. R. Co. v. Kenney, 39 Ala. 307; People v. Baltimore &c. R. Co. 117 N. Y. 150; 22 N. E. 1026; Water Works Co. v. Burkhart, 41 Ind. 364; Lewis Eminent Domain, § 262; Long Island &c. Co. v. Brooklyn, 166 U. S. 685; 17 Sup. Ct. 718. In New York &c. R. Co. v. Offield, 77 Conn. 417; 59 Atl. 510, it is held that the legislature may authorize stock in one railroad to be condemned by another under certain circumstances where it is for the public interest.

[160] Alabama &c. R. Co. v. Kenney, 39 Ala. 307; Long Island Dock &c. Co. v. Morris &c. R. Co. (N. J.) 30 Am. & Eng. R. Cas. 431, and note.

[161] Buffalo &c. R. Co. v. Overton, 35 Hun (N. Y.), 157; Rensselaer v. Leopold, 106 Ind. 29; Johnston v. Old Colony R. Co. 18 R. I. 642; 29 Atl. 594; 49 Am. St. 800. Rights of way may be taken. Galena &c. R. Co. In re, 73 Ill. 494; Boston Gas Light Co. v. Old Colony R. Co. 14 Allen (Mass.), 444; Baltimore &c. R. Co. v. Reaney, 42 Md. 117; Sixth Ave. R. Co. v. Kerr, 72 N. Y. 330; Brown v. Corey, 43 Pa. St. 495. But there must be compensation. Central Pass. R. Co. v. Philadelphia &c. Ry. Co. 95 Md. 428; 52 Atl. 752; Southern Kans. R. Co. v. Oklahoma City, 12 Okl. 82; 69 Pac. 1050.

[162] Western Union Tel. Co. v. Atlantic &c. Tel. Co. 7 Biss. (U. S.) 367; Central R. Co. v. Pennsylvania R. Co. 31 N. J. Eq. 475.

erty necessary for its use.[163] The fact that the petitioner has confirmed certain rights to a land-owner by contract does not preclude it from condemning those rights.[164] So, land taken from the possession of the railroad company for breach of a condition subsequent in a deed conveying same may be repossessed in condemnation proceedings.[165] Thus, where a land-owner had contracted with a railroad company for the construction of a particular crossing, his right to have it constructed was held subject to condemnation,[166] and where one railroad accepted from another a grant of a right of way across the grantor's road thirty feet wide, on condition that it should only be used for two tracks, it was held that the grantee could condemn an additional twenty feet to be occupied by two more tracks.[167] And the fact that the land was granted, with covenants for quiet enjoyment by the state or municipality which seeks to condemn it, does not affect the power,[168] since it cannot be surrendered by grant or contract,[169] and all grants by the state are held to be made upon the implied condition that the property conveyed shall be subject to the power of eminent domain.[170] Land or any estate therein may be taken

[163] De Camp v. Hibernia Underground R. Co. 47 N. J. L. 43; Coster v. New Jersey &c. R. Co. 24 N. J. L. 730; Kip v. New York &c. R. Co. 6 Hun 24, affirmed, 67 N. Y. 227; Secomb v. Milwaukee &c. R. Co. 49 How. Pr. (N. Y.) 75.

[164] Brimmer v. Boston, 102 Mass. 19.

[165] Bouvier v. Baltimore &c. R. Co. 69 N. J. L. 149; 53 Atl. 1040.

[166] New York &c. R. Co. Matter of, 44 Hun (N. Y.), 194. The right of eminent domain can not be impaired or defeated by any private contract between a corporation and the owner of property which the legislature may subsequently deem necesssary for public use. Cornwall v. Louisville &c. R. Co. 87 Ky. 72; 9 Ky. L. 924; 7 S. W. 553.

[167] Chicago &c. R. Co. v. Illinois Cent. Co. 113 Ill. 156. Where land is dedicated for the use of a railroad, upon the condition that no greater width than that dedicated shall ever be taken, the condition will not prevent the condemnation of other land subsequently needed; but equity may compel the company to compensate the owner for all the land, both that dedicated and that condemned, as a condition of allowing more land to be taken. Cornwall v. Louisville &c. R. Co. 87 Ky. 72; 7 S. W. 553.

[168] Brimmer v. Boston, 102 Mass. 19; Philadelphia &c. R. Co. v. Philadelphia, 9 Phila. (Pa.) 563; Beekman v. Saratoga &c. R. Co. 3 Paige (N. Y.), 45; 22 Am. Dec. 679, and note; Young v. McKenzie, 3 Ga. 31; Jackson v. Winn's Heirs, 4 Littell (Ky.), 322.

[169] Cooley Const. Lim. (7th ed.) pp. 395, 754; ante, § 950.

[170] Beekman v. Saratoga &c. R. Co. 3 Paige 45; 22 Am. Dec. 679;

although the owner is under legal disabilities.[171] Dwelling-houses and other buildings may also be taken when necessary, under statutory authority.[172]

§ 964. Property of other corporations.—The property of a corporation, as well as that of an individual, is liable to be taken under the right of eminent domain, when authorized by the legislature, upon payment of just compensation.[173] Thus, the property of colleges may be taken,[174] and so, also, may the property of turnpikes[175] or toll-bridge companies,[176] railroad companies,[177] and other corporations of

Todd v. Austin, 34 Conn. 78; Harding v. Goodlett, 3 Yerg. (Tenn.) 41.

[171] East Tennessee &c. R. Co. v. Love, 3 Head (Tenn.), 63; Watson v. New York Central R. Co. 47 N. Y. 157; North Pennnsylvania R. Co. v. Davis, 26 Pa. St. 238; Alabama &c. R. Co. v. Kenney, 39 Ala. 307; Indiana &c. R. Co. v. Brittingham, 98 Ind. 294; Hotchkiss v. Auburn &c. R. Co. 36 Barb. (N. Y.) 600.

[172] Wells v. Somerset &c. R. Co. 47 Me. 345; Forney v. Fremont &c. R. Co. 23 Neb. 465; 36 N. W. 806; Marlor v. Philadelphia &c. R. Co. 166 Pa. St. 524; 31 Atl. 255. But, as we shall hereafter see, it is frequently provided that such property shall not be taken.

[173] Eastern R. Co. v. Boston &c. R. Co. 111 Mass. 125; 15 Am. R. 13; Alabama &c. R. Co. v. Kenney, 39 Ala. 307; East &c. R. Co. v. East Tennessee &c. R. Co. 75 Ala. 275; Toledo &c. R. Co. v. Detroit &c. R. Co. 62 Mich. 564; 29 N. W. 500; 4 Am. St. 875; Lake Shore &c. R. Co. v. Chicago &c. R. Co. 97 Ill. 506; 2 Am. & Eng. R. Cas. 440; Terre Haute v. Evansville &c. R. Co. 149 Ind. 174; 46 N. E. 77 (citing text); Bridgeport &c. R. Co. v. New York, &c. R. Co. 36 Conn. 255; 4 Am. R. 63; note in 9 Am. St. 137; Chicago &c. R. Co. v. Metropolitan &c. R. Co. 152 Ill. 519; 38 N. E. 736; Old Colony R. Co. v. Framingham &c. Co. 153 Mass. 561; 27 N. E. 662; 13 L. R. A. 332, and note; New York &c. R. Co. v. Metropolitan &c. Co. 63 N. Y. 326; notes to 24 Am. R. 551; 10 Am. & Eng. R. Cas. 31; 14 Am. & Eng. R. Cas. 42; Mills Em. Dom. § 41, and authorities cited in following notes, infra.

[174] St. Paul &c. R. Co. In re, 34 Minn. 227; 25 N. W. 345; University of Minnesota v. St. Paul &c. R. Co. 36 Minn. 447; 31 N. W. 936; Trustees of Belfast Academy v. Salmond, 11 Me. 109. So may the cemetery of a religious corporation. New York Street &c. Re, 133 N. Y. 329; 31 N. E. 102; 16 L. R. A. 180; 28 Am. St. 640.

[175] Lafayette Plank Road Co. v. New Albany &c. R. Co. 13 Ind. 90; 74 Am. Dec. 246; Armington v. Barnet, 15 Vt. 745; 40 Am. Dec. 705; Backus v. Lebanon, 11 N. H. 19; 35 Am. Dec. 466; Baltimore &c. Turnp. v. Baltimore &c. R. Co. 81 Md. 247; 31 Atl. 854.

[176] West River Bridge Co. v. Dix, 6 How. (U. S.) 507; Enfield Toll Bridge Co. v. Hartford &c. R. Co. 17 Conn. 454; 44 Am. Dec. 556, and note; Northampton Bridge Case,

a public or quasi public character[178] where such taking is authorized by the legislature, but not otherwise.[179] Any property may be taken

116 Mass. 442; Crosby v. Hanover, 36 N. H. 404; Red River Bridge Co. v. Clarksville, 1 Sneed (Tenn.), 176; 60 Am. Dec. 143.

[177] Iron R. Co. v. Ironton, 19 Ohio St. 299; Chicago &c. R. Co. v. Lake, 71 Ill. 333; Pennsylvania R. Co. v. Baltimore &c. R. Co. 60 Md. 263; Northern Pac. Co. v. St. Paul &c. R. Co. 3 Fed. 702; Sixth Avenue R. Co. v. Kerr, 45 Barb. 138, affirmed 72 N. Y. 330; New York &c. R. Co. v. Boston &c. R. Co. 36 Conn. 196; Baltimore &c. R. Co. v. North, 103 Ind. 486; 3 N. E. 144; St. Paul Union Depot Co. v. St. Paul, 30 Minn. 359; 15 N. W. 684; Terre Haute v. Evansville &c. R. Co. 149 Ind. 174; 46 N. E. 77; 37 L. R. A. 189 (citing text); Pittsburgh &c. R. Co. v. Sanitary Dist. 218 Ill. 286; 75 N. E. 892; 2 L. R. A. (N. S.) 226 (strip of railroad land taken for Chicago drainage). This rule, it is said, is subject to the limitation that property can only be taken from the hands of one individual or corporation and placed in the hands of another under the power of eminent domain to serve a different public use. And whether the new use is different from the present one is a judicial question for the courts to decide. Lake Shore &c. R. Co. v. Chicago &c. R. Co. 100 Ill. 21. Taking the property of one man and giving it to another, is not making a law, or rule of action; it is not legislation, it is simply robbery. Coster v. Tide Water Co. 18 N. J. Eq. 54, 63. In Googins v. Boston &c. R. Co. 155 Mass. 505; 30 N. E. 71, it was held competent for the legislature to authorize one railroad company to appropriate the land on which another railroad was constructed. And that, by such authority the second company could take the land absolutely, and not merely the rights of the first company therein.

[178] West Boston Bridge Co. v. County Comrs. 10 Pick. (Mass.) 270; Hazen v. Essex Co. 12 Cush. (Mass.) 475; White v. South Shore R. Co. 6 Cush. (Mass.) 412; Boston Water Power Co. v. Boston &c. R. Co. 23 Pick. (Mass.) 360; New York Central &c. R. Co. v. Metropolitan Gas Light Co. 63 N. Y. 326; Brooklyn In re, 143 N. Y. 596; 38 N. E. 983; 26 L. R. A. 270; Hyde Park v. Oakwoods Cemetery Association, 119 Ill. 141; 7 N. E. 627; Opening Twenty-second Street In re, 15 Phila. 409; affirmed 102 Pa. St. 108.

[179] Enfield Toll Bridge Co. v. Hartford &c. R. Co. 17 Conn. 454; 44 Am. Dec. 556, and note; Smith v. Conway, 17 N. H. 586; Barber v. Andover, 8 N. H. 398; Board of Supervisors v. McFadden, 57 Miss. 618; Kenton County Court v. Bank Lick Turnpike Co. 10 Bush (Ky.) 529; State v. Newark, 28 N. J. L. 529 (canal can not be condemned); State v. Montclair R. Co. 35 N. J. L. 328. The proprietary right which a street railway has in its track is subject to the right of eminent domain. Canal &c. R. Co. v. Crescent City R. Co. 41 La. Ann. 561; 6 So. 849. A contract by a railroad company giving a street railway the exclusive right to build its road over its land to its depot, is not a monopoly, but an easement granted by the owner of the

of either a private or a quasi public corporation not used or needed for the transaction of its business,[180] or in which the necessary easement can be taken without detriment to the public interests.[181] Gen-

fee, and can be taken for public use by due process of law. Fort Worth St. R. Co. v. Queen City R. Co. 71 Tex. 165; 9 S. W. 94. The statute of Virginia, which provides that telegraph companies may construct their lines "along and parallel to any of the railroads of the state," does not authorize the condemnation of a right of way by a telegraph company along and upon the right of way of a railroad company. Lewis, P., and Hinton, J., dissenting. Postal Telegraph Cable Co. v. Norfolk &c. Co. 88 Va. 920; 14 S. E. 803.

[180] Oregon &c. R. Co. v. Baily, 3 Ore. 164; Peoria &c. R. Co. v. Peoria &c. R. Co. 66 Ill. 174; Iron R. Co. v. Ironton, 19 Ohio St. 299; New York Central &c. R. Co. Matter of v. Metropolitan &c. Co. 63 N. Y. 326; Atchison &c. R. Co. v. Kansas City &c. R. Co. 67 Kans. 569; 70 Pac. 939. "Lands held by a corporation or by a public body, but not used for or necessary to a public purpose, but simply as a proprietor and for any private purpose to which they may be lawfully applied, may be taken as if held by an individual owner. The property rights of a corporation in lands not held in trust for a public use, are no more sacred than those of individual proprietors. The law only protects from condemnation for public purposes lands actually held by authority of the sovereign power for or necessary to some public purpose or use. Lands held upon a special trust for a public use can not be appropriated to another public use without special authority from the legislature." Matter of Rochester Water Commissioners, 66 N. Y. 413; Cincinnati &c. R. Co. v. Belle Centre, 48 Ohio St. 273; 27 N. E. 464.

[181] Rochester Water Works, Matter of, 66 N. Y. 413; Morris R. Co. v. Central R. Co. 31 N. J. L. 205; New York Central &c. R. Co. Matter of v. Metropolitan &c. R. Co. 63 N. Y. 326. When the latter case was first before the supreme court sub nom New York Central R. Co. v. Metropolitan Gas Light Co. 5 Hun (N. Y.), 201, the court said: "The courts will act circumspectly and only on strong necessity, in allowing property devoted to uses of great public benefit to be taken; but where such necessity is shown to exist the power to act seems entirely clear. In this case the property sought to be taken is not, and never has been, in actual use for the purposes of the gas company. Doubtless, the use of their lands in the future, when the appellants come to need them, as they anticipate will be more convenient without the additional tracks of the railroad than with them; but the railroad now crosses their land with several tracks, and the addition of two or three more, on land adjoining the present tracks does not strike us as necessarily destructive of the uses to which the appellants wish to put their lands. The injury can not be, as it seems to us, so greatly enhanced beyond what is already done, that their remaining land becomes useless to

eral authority to condemn is usually deemed sufficient in such cases;[182]

them. It is to be presumed that they will be protected to the extent that the act provides for, in their facilities of crossing and enjoying access to and from the divided parcel of their land, by the commissioners, or by the court, on the coming in of their report. And this, we think, is all, under the circumstances they are entitled to claim."

[182] Boston Water &c. Co. v. Boston &c. R. Co. 23 Pick. (Mass.) 360; St. Louis &c. R. Co. v. Hannibal &c. Co. 125 Mo. 82; 28 S. W. 483; Baltimore &c. R. Co. v. Pittsburg &c. R. Co. 17 W. Va. 812, 852; Pittsburg &c. R. Co. v. Southwest &c. R. Co. 77 Pa. St. 173; North Carolina &c. R. Co. v. Carolina Cent. R. Co. 83 N. Car. 489; New York &c. R. Co. v. Boston &c. R. Co. 36 Conn. 196; Wheeling Bridge &c. v. Wheeling &c. Co. 34 W. Va. 155; 11 S. E. 1009; New York &c. R. Co. Matter of, 99 N. Y. 12; 1 N. E. 27, and authorities cited in last two notes, supra. See, also, Atlanta &c. R. Co. v. Atlanta &c. R. Co. 124 Ga. 125; 52 S. E. 320, 322, where it is said: "Where property is already dedicated to a public use, it may, under the exercise of the power of eminent domain, be subjected to another use, but with the restriction that it can not generally be so subjected if the second use either destroys or seriously impairs the first use. A condemnation having such an effect can only be had when there is expressed, unequivocal legislative authority permitting it. A general legislative authority to condemn will not be construed to give power to take, when such taking will be inconsistent with a prior public use to which the property has been dedicated. Under a general power to condemn property, a railroad company can not condemn the property of another company, already used by it for railroad purposes, when the effect of such condemnation would be to destroy the use of the property by the former company, or to seriously impair the rights of the former company therein. City Council v. Georgia R. Co. 98 Ga. 161; 26 S. E. 499. Under a general power to condemn, one railroad company can not acquire property of another railroad company, already set apart for use as a depot or as a yard for the drilling of cars, when it is manifest that the appropriation by the second company would be either to destroy the rights of the first company, or seriously impair the first company in the use of its property for the purpose of which it was set apart. Where a company has acquired property for the purpose of enlarging its depot, or its yard, or its terminal facilities, and is presently proceeding to adapt such newly-acquired property to the use for which it was acquired, such newly-acquired property would, under such circumstances, as to the rights of another company to condemn, be fully safeguarded by the same restrictions as if the plans which were actually in progress had become completed when the condemnation proceedings were instituted. But where a railroad company, in anticipation of its future needs, acquires property, and it is not in use, and not presently needed, and it is merely

but where the property is already devoted to the public use, and is reasonably necessary to enable the corporation to perform all its duties to the public, general authority is not, ordinarily, sufficient to justify its taking for an inconsistent use.[183]

§ 965. Property of state or United States.—Property held by the state,[184] or by the United States,[185] for sale or settlement, may be taken for railroad purposes, but not that devoted to particular uses of

held to be used in the future at such times as the needs of the company may require it, the right of condemnation exists in favor of another company, which can only be defeated by showing that the condemnation would interfere with a present necessity of the company which owned the property."

[183] Pitts. Junction R. Co. appeal of, 122 Pa. St. 511; 6 Atl. 564; 9 Am. St. 128; Armiston &c. R. Co. v. Jacksonville &c. R. Co. 82 Ala. 297; 2 So. 710; Housatonic R. Co. v. Lee &c. R. Co. 118 Mass. 391; Providence &c. R. Co. v. Norwich &c. R. Co. 138 Mass. 277, 279; Baltimore &c. R. Co. v. North, 103 Ind. 486; Suburban R. &c. Co. v. New York, 128 N. Y. 510; 28 N. E. 525; Lake Shore &c. R. Co. v. New York &c. R. Co. 8 Fed. 858; Evergreen Cemetery Assn. v. New Haven, 43 Conn. 234; Dublin &c. R. Co. v. Navan &c. R. Co. 5 Ir. Rep. (Eq. Ser.) 393. See, also, post, § 966. The authority must be expressly granted or implied from "a necessity so absolute," it is said, "that, without it the grant itself will be defeated." Sharon R. Co. appeal of, 122 Pa. St. 533; 17 Atl. 234; 9 Am. St. 133, and note; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150; Springfield v. Connecticut &c. R. Co. 4 Cush. (Mass.) 63; Hickock v. Hine, 23 Ohio St. 523; 13 Am. R. 255; Milwaukee &c. R. Co. v. Faribault, 23 Minn. 167; Barre R. Co. v. Montpelier &c. R. Co. 61 Vt. 1; 17 Atl. 923; 15 Am. St. 877; 4 L. R. A. 785, and note.

[184] See Indiana Central R. Co. v. State, 3 Ind. 421. Most of the states in which public lands are still held for sale provide by statute for the assessment of damages for lands of the state taken for railroad uses. See Stimson's Am. Stat. (1892) § 8745. See also Burbank v. Fay, 65 N. Y. 57; New York &c. R. Co. In re, 29 Hun (N. Y.), 269; New York, &c. R. Co. In re, 77 N. Y. 248; Hobart v. Ford, 6 Nev. 77; Benson v. Mayor, 10 Barb. (N. Y.) 223. But in some states there is a prohibition against taking state property under ordinary circumstances, and a general statute may not include state lands. See Seattle &c. R. Co. v. State, 7 Wash. 150; 34 Pac. 551; 22 L. R. A. 217; 38 Am. St. 866 (tide lands).

[185] United States v. Railroad Bridge Co. 6 McLean (U. S.), 517; Union Pacific R. Co. v. Burlington &c. R. Co. 3 Fed. 106; Grinter v. Kansas Pac. R. Co. 23 Kan. 642; Hendricks v. Johnson, 6 Porter (Ala.), 472. See, also, Flint &c. R. Co. v. Gordon, 41 Mich. 420; 2 N. W. 648; Texas &c. R. Co. v. Kirk, 115 U. S. 12; 5 Sup. Ct. 1113.

the government.[186] In Indiana it has been held, erroneously, as we are inclined to think, that where the legislature authorizes a company to construct its road between two designated points the company has a right to take any land of the state between such points, on the authorized line, which may be necessary for its purpose, and the court refused to enjoin a company which had located its road across a portion of the land which had been purchased by the state for its institution for educating the deaf and dumb.[187] In Illinois, however, it has been held that a charter giving authority "to enter upon, take possession of, and use any lands, streams, and materials of every kind," and granting to the company "all such lands, materials and privileges belonging to the state," did not give such company a right to take land owned by the state as a site for its institution for the education of the blind.[188] It is said that, "if it is necessary that the United States government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it."[189] But, as a general rule, "while a grant from one government may supersede and abridge franchises and rights held at the will of the grantor, it cannot abridge any property rights of a public character, created by the authority of another sovereignty," and property of a state, although devoted to a public use, such as a street or road, "is property devoted to the public uses of the state, and it is not within the competency of the national government to dispossess the state of such control and use or appropriate the same to its own benefit, or the benefit, if any, of its corporations or grantees, without suitable compensation to the state.[190] A railroad company chartered by congress is not such a federal agency

[186] United States v. Ames, 1 W. & M. (U. S.) 76; United States v. Chicago, 7 How. (U. S.) 185; Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525; 5 Sup. Ct. 995. See, also, Barrett v. Palmer, 135 N. Y. 336; 17 L. R. A. 720, and note; 31 Am. St. 835. But compare United States v. Railroad Bridge Co. 6 McLean, 517.

[187] Indiana Cent. R. Co. v. State, 3 Ind. 421.

[188] St. Louis &c. R. Co. v. Illinois Inst. for the Blind, 43 Ill. 303. See, also, Oregon R. Co. v. Portland, 9 Oreg. 231; State v. Cincinnati &c. R. Co. 37 Ohio St. 157; 10 Am. & Eng. R. Cas. 83; Seattle &c. R. Co. v. State, 7 Wash. 150; 34 Pac. 551; 22 L. R. A. 217; 38 Am. St. 866; Atlanta v. Central R. Co. 53 Ga. 120; Ninth Ave. Matter of, 45 N. Y. 729.

[189] Stockton v. Baltimore &c. R. Co. 32 Fed. 9.

[190] St. Louis v. Western Un. Tel. 148 U. S. 92; 13 Sup. Ct. 485.

that its property can not be taken under the eminent domain of a state.[191]

§ 965a. **Tide lands.**—In New Jersey, no grant or license can be made by the state riparian commissioners to any other person than the riparian proprietor of lands under the tidal rivers of the state, until the expiration of six calendar months after the riparian proprietor shall have been personally notified in writing by the applicant for such grant or license, and the riparian proprietor shall have neglected to apply for such grant or license and failed to pay the price fixed by the commissioners.[192] The interest acquired by the grantee from the state under this provision is as absolute as the words of the grant import.[193] And it has been held, that another law of that state, providing that no railroad shall be authorized to condemn land belonging to the state does not operate to prohibit a railroad from acquiring these tide lands by grant after the owner of the shore has failed to take the same, upon the expiration of six months' notice given to him by the railroad, nor will it prevent the condemnation of such lands after the owner of the shore has acquired the same by grant from the riparian commissioners.[194]

§ 966. **Property devoted to another public use.**—It is a general rule that lands once taken for a public use, or dedicated to such a use by the owner can not, without an express grant of authority by the legislature for that purpose, be appropriated by proceedings in invitum to a different public use.[195] One court has thus stated the

[191] North Pac. R. Co. v. St. Paul &c. Co. 3 Fed. 702; Union Pac. R. Co. v. Burlington &c. Co. 1 McCrary (U. S.), 452; Union Pac. R. Co. v. Leavenworth &c. R. Co. 29 Fed. 728.

[192] Shamberg v. Board of Riparian Commissioners, 72 N. J. 132; 60 Atl. 43.

[193] Woodcliff v. New Jersey Shore Line R. Co. 72 N. J. 137; 60 Atl. 44.

[194] Shamberg v. New Jersey Shore Line R. Co. 72 N. J. 140; 60 Atl. 46. See, also, generally, as to tide lands, New York Cent. &c. R. Co. Matter of, 77 N. Y. 248; State v. King Co. 31 Wash. 445; 72 Pac. 89; 66 L. R. A. 897, and note.

[195] Baltimore &c. R. Co. v. North, 103 Ind. 486; 3 N. E. 144; Ft. Wayne &c. R. Co. v. Lake Shore &c. R. Co. 132 Ind. 558; 32 N. E. 215; 18 L. R. A. 367, and note; 32 Am. St. 277; Terre Haute v. Evansville &c. R. Co. 149 Ind. 174; 46 N. E. 77; 37 L. R. A. 189 (citing text); Indianapolis &c. R. Co. v. Indianapolis &c. Transit Co. 33 Ind. App. 337; 67 N. E. 1013; Little Miami

principle: "While it may be true that the enterprise of petitioner is public in its nature, the public necessity which must be shown to exist before it can entirely deprive respondents of their lands is the necessity of the public to be in some manner served by the projected enterprise, and not the necessities of the projector, in order to make such enterprise a success. So far as the authority to exercise the right of eminent domain for the public uses is concerned, it is based upon the theory that the property granted the subject is upon the condition that it may be retaken to serve the necessities of the sovereign power, and to this end agencies created by the state, the purpose of which is to serve the public, may exercise this right. Where, however, land is already devoted to a public use, it would be wholly unreasonable to permit it to be taken for another public use which would nullify and defeat the one to which it is already devoted, except in cases where the overwhelming necessities of the public were such that, in order to serve their needs, or supply their necessities, the taking of such property became necessary. Unless so limited, no rule governing the rights of those engaged in conducting a business for the benefit of the public could be formulated which would afford them protection against others desiring to also engage in the transaction of a public business. While corporations engaged in business of a nature which requires them to serve the public are said to be public corporations, they are, in fact, but private enterprises, inaugurated for the benefit of their stockholders; and if one such corporation may take the property of another so as

&c. R. Co. v. Dayton, 23 Ohio St. 210; Hickok v. Hine, 23 Ohio St. 523; 13 Am. R. 255, and note; Illinois Cent. R. Co. v. Chicago &c. R. Co. 122 Ill. 473; 13 N. E. 140; Petition of Providence &c. R. Co. 17 R. I. 324; 21 Atl. 965; Boston &c. R. Co. In re, 53 N. Y. 574; Prospect Park &c. R. Co. v. Williamson, 91 N. Y. 552; St. Louis &c. R. Co. v. Haller, 82 Ill. 208 (street); Boston & Albany R. Co. Matter of, 53 N. Y. 574 (park); State v. Montclair &c. R. Co. 35 N. J. L. 328 (city reservoir). In Lake Erie &c. R. Co. v. Board of Commissioners, 57 Fed. 945, it was held that in Ohio the rule is well established that a second appropriation of lands formerly appropriated to public use can not be made when the second appropriation is inconsistent with the first, and tends to deprive the corporation first acquiring such public use of the full and free enjoyment thereof. So held in Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150; and Lake Shore &c. R. Co. v. Chicago &c. R. Co. 100 Ill. 21. See, also, ante, § 964. Elliott Roads and Streets (2d ed.), § 219.

to deprive the latter of the use to which it is devoted, except public necessity demands such taking, there would be no reasonable limit to the conditions under which the power of eminent domain might be exercised. Without the limitation suggested, the most absurd results could follow. The second might take from the first, others take from the latter, and the first turn about and retake, and thus the process go on ad infinitum."[196] Authority to build a railroad across streets,[197] canals,[198] railroad tracks,[199] or street railway tracks,[200] lying between the termini of a proposed road is necessarily implied from a grant of authority to build a railroad between such termini.[201] The same is true as to navigable waters which must necessarily be crossed in order to build a line of road between the points named in the charter.[202] But authority to bridge a navigable stream will be strictly

[196] Denver Power &c. Co. v. Denver &c. R. Co. 30 Colo. 204; 69 Pac. 568.

[197] Lewis v. Germantown &c. R. Co. 16 Phila. (Pa.) 608; Elliott Roads and Streets, 169, quoted in Lake Erie &c. R. Co. v. Kokomo, 130 Ind. 224; 29 N. E. 780.

[198] Morris Canal Co. v. State, 24 N. J. L. 62.

[199] Morris &c. R. Co. v. Central R. Co. 31 N. J. L. 205; Grand Rapids &c. R. Co. v. Grand Rapids &c. R. Co. 35 Mich. 265; 24 Am. R. 545, and note; St. Louis &c. R. Co. v. Springfield &c. R. Co. 96 Ill. 274; Lake Shore &c. R. Co. v. Chicago &c. R. Co. 97 Ill. 506; East St. Louis &c. R. Co. v. East St. Louis Union R. Co. 108 Ill. 265; Boston &c. R. Co. Matter of, 79 N. Y. 64 and 69; South Carolina R. Co. v. Columbia &c. R. Co. 13 Rich. Eq. (S. Car.) 339; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 30 Ohio St. 604; Fitchburg R. Co. v. New Haven &c. R. Co. 134 Mass. 547; Massachusetts Central R. Co. v. Boston &c. R. Co. 121 Mass. 125; Worcester &c. R. Co. v. Railroad Commissioners, 118 Mass. 561; Springfield v. Connecticut &c. R. Co. 4 Cush. (Mass.) 63; New York &c. R. Co. v. Boston &c. R. Co. 36 Conn. 196; Bridgeport v. New York &c. R. Co. 36 Conn. 255; 4 Am. R. 63; Lehigh Valley R. Co. v. Dover &c. R. Co. 43 N. J. L. 528; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812; Union Pacific R. Co. v. Burlington &c. R. Co. 1 McCrary (U. S.), 452.

[200] Lynn &c. R. Co. v. Boston &c. R. Co. 114 Mass. 88. See Market St. R. Co. v. Central R. Co. 51 Cal. 583.

[201] But such implication arises only when requisite to the enjoyment of the powers expressly granted, and can be extended no further than such necessity requires. Hickok v. Hine, 23 Ohio St. 523; 13 Am. R. 255, and note; Little Miami &c. R. Co. v. Dayton, 23 Ohio St. 510. See Buffalo, Matter of, 68 N. Y. 167, 175.

[202] Hughes v. Northern Pacific R. Co. 18 Fed. 106; Union Pacific R. Co. v. Hall, 91 U. S. 343; People v. Rensselaer &c. R. Co. 15 Wend. (N. Y.) 114; Springfield v. Connecticut &c. R. Co. 4 Cush. (Mass.)

construed, and the authority conferred or necessarily implied can not be exceeded.[203] And a general authority to bridge a navigable stream does not authorize an interference with navigation which can reasonably be avoided by the construction of draws or otherwise.[204] Neither will authority to build a railroad longitudinally along a public highway[205] or the right of way of another railroad,[206] be implied from

63; Mohawk Bridge Co. v. Utica &c. R. Co. 6 Paige (N. Y.), 554; People v. Potrero &c. R. Co. 67 Cal. 166; 7 Pac. 445. See Smith v. Louisville &c. R. Co. 62 Miss. 510; Brown v. Preston, 38 Conn. 219; Town of Weathersfield v. Humphy, 20 Conn. 218.

[203] Silver v. Missouri Pac. R. Co. 101 Mo. 79; 13 S. W. 410; Missouri River Packet Co. v. Hannibal &c. R. Co. 79 Mo. 478; Cape Elizabeth v. County Comrs. 64 Me. 456.

[204] Hickok v. Hine, 23 Ohio St. 523; 13 Am. R. 255, and note; Sweeney v. Chicago &c. R. Co. 60 Wis. 60; 18 N. W. 756. A general authority to build a railroad between two points, the natural and convenient route of which would pass over several navigable streams, authorizes the corporation to construct bridges over such streams, in a manner that will not destroy the navigation of them. But the power must be exercised with a due regard to the privileges of others. Attorney-General v. Stevens, 1 N. J. Eq. 369; 22 Am. Dec. 526. But the right of a railroad company to construct a bridge at any particular point on a navigable river lying in its course is subject to the judgment of the proper court as to whether it is being constructed without unnecessary injury to the navigability of such water, upon the complaint of any one specially injured thereby, or likely to be so injured. Hughes v. Northern Pac. R. Co. 18 Fed. 106; 13 Am. & Eng. R. Cas. 157.

[205] Kaiser v. St. Paul &c. R. Co. 22 Minn. 149; Springfield v. Connecticut River R. Co. 4 Cush. (Mass.) 63; State v. Montclair R. Co. 35 N. J. L. 328; Savannah &c. R. Co. v. Shiels, 33 Ga. 601; Elliott Roads and Streets, 169. As to power of congress and requiring changes in bridges, see United States v. Union Bridge Co. 143 Fed. 377; Willamette &c. Bridge Co. v. Hatch, 125 U. S. 1; 8 Sup. Ct. 811; Lake Shore &c. R. Co. v. Ohio, 165 U. S. 365; 17 Sup. Ct. 357; Monongahela Nav. Co. v. United States, 148 U. S. 312, 334; 13 Sup. Ct. 622; United States v. Parkersburg &c. Co. 134 Fed. 969. See, also, Kansas City &c. R. Co. v. Wingul, 82 Miss. 223; 33 So. 965; 61 L. R. A. 578; Floyd v. Rome St. R. Co. 77 Ga. 614; 3 S. E. 3.

[206] Housatonic &c. R. Co. v. Lee &c. R. Co. 118 Mass. 391; California Pac. R. Co. v. Central Pac. R. Co. 47 Cal. 549; Alexandria &c. R. Co. v. Alexander &c. R. Co. 75 Va. 780; 40 Am. R. 743, and note; Albany &c. R. Co. v. Brownell, 24 N. Y. 345; Atlanta v. Central R. Co. 53 Ga. 120; Davis v. East Tenn. &c. R. Co. 87 Ga. 605; 13 S. E. 567; Hannibal v. Hannibal &c. R. Co. 49 Mo. 480; Northern Cent. R. Co. v. Baltimore, 46 Md. 425; Crossley v. O'Brien, 24 Ind. 325; Ft. Wayne v. Lake Shore &c. R. Co. 132 Ind. 558; 32 N. E. 215; 18 L. R. A.

a general authority to build the road between certain points, unless it is absolutely necessary to give effect to the grant.[207] Where the power to condemn is conferred in general terms, the presumption is against the right to take property which is already devoted to a public use, unless both uses may stand together with a tolerable interference which may be compensated for by damages paid.[208] If such uses are not inconsistent and the second does not interfere with or impair the first, general authority for the second use may be sufficient,[209] but if they can not coexist without materially impairing the first use, authority to take for the second use can not be implied from a general grant of authority to condemn.[210] The general

367, and note; 32 Am. St. 277. See, also, Gold v. Pittsburgh &c. R. Co. 153 Ind. 232; 53 N. E. 285; South Dakota Cent. R. Co. v. Chicago &c. R. Co. 141 Fed. 578.

[207] Housatonic &c. R. Co. v. Lee &c. R. Co. 118 Mass. 391; Springfield v. Connecticut River R. Co. 4 Cush. (Mass.) 63. Where land has been acquired by one company under the right of eminent domain, it can not, in the absence of express or necessarily implied statutory authority, be taken by another company, to whom it would be convenient, but not necessary. Barre R. Co. v. Montpelier &c. R. Co. 61 Vt. 1; 17 Atl. 923; 4 L. R. A. 785, and note; 15 Am. St. 877. The Alabama Declaration of Rights, which provides that the general assembly may authorize the granting of the right of way by one person or corporation over the lands of another, upon just compensation being made, does not permit the condemnation of land in the actual use of one railroad company for the benefit of another, unless it is reasonably essential to the construction of the second road to its proposed terminus by the only practicable route. But the taking is essential when, the public convenience being equally served, the financial interests of the second company will gain more thereby than the first company would probably be injured. Mobile & G. R. Co. v. Alabama Midland Ry. Co. 87 Ala. 501; 6 So. 404.

[208] Buffalo, Matter of, 68 N. Y. 167; Chicago &c. R. Co. v. Chicago &c. R. Co. 112 Ill. 589. See, also, Seymour v. Jeffersonville &c. R. Co. 126 Ind. 466, 467; 26 N. E. 188, citing Elliott Roads and Streets, 167, 168; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812; Augusta v. Georgia &c. Co. 98 Ga. 161; 26 S. E. 499; Boston &c. R. Co. v. Cambridge, 166 Mass. 224; 44 N. E. 140.

[209] Boston v. Brookline, 156 Mass. 172; 30 N. E. 611. See also, Chicago &c. R. Co. v. Starkweather, 97 Ia. 159; 66 N. W. 87; 59 Am. St. 404; 31 L. R. A. 183; Bridgeport v. New York &c. R. Co. 36 Conn. 255; 4 Am. R. 63.

[210] Cincinnati &c. R. Co. v. Anderson, 139 Ind. 490; 38 N. E. 167; 47 Am. St. 285, and authorities there cited; Lake Erie &c. R. Co. v. Boswell, 137 Ind. 336; 36 N. E. 1103; Prospect Park &c. R. Co.

rule under this head has been thus expressed: "Property dedicated to a public use can not be taken for another public use under the general law conferring the right of eminent domain, where the second use will destroy or injure the use to which the property is already devoted. To authorize a second condemnation of such property to a second use which is subversive of the first, there must be express legislative authority.[211] And it is another expression of the principle to say: The general rule that expresses legislative authority is generally requisite, except where the proposed appropriation would not destroy or greatly injure the franchise, or render it difficult to prosecute the subject of the franchise, when a general grant would be sufficient. Land already devoted to another public use can not be taken under the general laws, when the effect would be to extinguish a franchise. If, however, the taking would not materially injure the prior holder, the condemnation may be sustained.[212]

v. Williamson, 91 N. Y. 552; Albany &c. R. Co. v. Brownell, 24 N. Y. 345; Milwaukee &c. R. Co. v. Faribault, 23 Minn. 167; St. Paul &c. R. Co. v. St. Paul, 30 Minn. 359; 15 N. W. 684; New Jersey &c. R. Co. v. Long Branch Comrs. 39 N. J. L. 28; Hannibal &c. R. Co. v. Muder, 49 Mo. 165; Winona &c. R. Co. v. Watertown, 4 S. Dak. 323; 56 N. W. 1077; Richmond &c. R. Co. v. Johnston, 103 Va. 456; 49 S. E. 496; Paterson &c. R. Co. v. Paterson, 72 N. J. L. 112; 60 Atl. 47. But see Chicago &c. R. Co. v. Morrison, 195 Ill. 271; 63 N. E. 96; Terre Haute v. Evansville &c. R. Co. 149 Ind. 174; 46 N. E. 77; 37 L. R. A. 189; Parks &c. Comrs. v. Michigan Cent. R. Co. 90 Mich. 385; 51 N. W. 447. In most of these cases it was held that a street could not be extended through depot grounds and buildings under a mere general grant of power to condemn. So, it is held that lands in use by one company for its road can not be taken by another without legislative authority. Louisiana &c. Ry. Co. v. Vicksburgh &c. Ry. Co. 112 La. Ann. 915; 36 So. 803; Atchison &c. Ry. Co. v. Kansas City &c. R. Co. 67 Kans. 569; 73 Pac. 899.

[211] Oregon Short Line R. Co. v. Postal Tel. Cable Co. 111 Fed. 842, citing Mills Em. Dom. §§ 45–47; Baltimore &c. R. Co. v. Pittsburg &c. R. Co. 17 W. Va. 812–852; Lewis Em. Dom. § 269; Steele v. Empsom, 142 Ind. 397–406; 41 N. E. 822; Winona &c. R. Co. v. Watertown, 56 S. D. 1077; 56 N. W. 1077; Baltimore &c. R. Co. v. Board of Com'rs of Jackson Co. 156 Ind. 260; 58 N. E. 837; 59 N. E. 856; Sabine &c. R. Co. v. Gulf &c. R. Co. 92 Tex. 162; 46 S. W. 784; Northwestern Tel. Co. v. Chicago &c. R. Co. 76 Minn. 334; 79 N. W. 315–317. See, also, Western Union Tel. Co. v. Pennsylvania R. Co. 120 Fed. 362, affirmed in 123 Fed. 33; Chicago &c. R. Co. v. Morrison, 195 Ill. 271; 63 N. E. 96; Atchison &c. R. Co. v. Kansas City &c. R. Co. 67 Kans. 569; 73 Pac. 899.

[212] Northwestern Tel. &c. Co. v.

§ 967. Franchises.—In the absence of an enactment in express terms, a corporation will only be justified in condemning the franchise of another public or quasi public corporation, where it appears by necessary implication that the legislature intended to grant it the power to do so. It must appear from the statute that the legislature recognized the franchise as private property, and provision must be made for the payment of just and reasonable compensation to the owner, for a grant of authority to take private property without compensation is void. If the grant of power to take property rests only in implication, and the act which is claimed to confer such power contains no provisions as to compensating the owner whose rights are injuriously affected, the courts will presume that it was not the intent of the legislature to exercise the right of eminent domain, but simply to confer a right to do the act, or exercise the power given, on first obtaining the consent of those affected.[213] It is well-settled, however, that corporate franchises although held and enjoyed under a charter which contains no reserved power of alteration or repeal,[214] may be taken under the power of eminent domain.[215]

Chicago &c. R. Co. 76 Minn. 334; 79 N. W. 315.

[213] Boston &c. R. Co. v. Salem &c. R. Co. 2 Gray (Mass.), 1; Hamilton Avenue, Matter of, 14 Barb. (N. Y.) 405; Flatbush Avenue, Matter of, 1 Barb. (N. Y.) 286.

[214] West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 532, affirming 16 Vt. 446; Central Bridge Co. v. Lowell, 4 Gray (Mass.), 474.

[215] Boston Water Power Co. v. Boston &c. R. Co. 23 Pick. (Mass.) 360; Sunderland Bridge Case, 122 Mass. 459; Grand Rapids &c. R. Co. v. Grand Rapids &c. R. Co. 35 Mich. 265; 24 Am. R. 545, and note; Lewis v. Germantown &c. R. Co. 16 Phila. (Pa.) 621; White River Turnpike Co. v. Vermont Cent. R. Co. 21 Vt. 590; Dunlap v. Toledo &c. R. Co. 50 Mich. 470; 15 N. W. 555; Armington v. Barnet, 15 Vt. 745; 40 Am. Dec. 705; Brainard v. Missisquoi R. Co. 48 Vt. 107; Lafayette Plank R. Co. v. New Albany &c. R. Co. 13 Ind. 90; 74 Am. Dec. 246; Enfield Toll Bridge Co. v. Hartford &c. R. Co. 17 Conn. 454; 44 Am. Dec. 556, and note; Petition of Ker, Matter of, 42 Barb. (N. Y.) 119; Stockton v. Central R. Co. 50 N. J. Eq. 52; 24 Atl. 964; 17 L. R. A. 97; Crosby v. Hanover, 36 N. H. 404; James River &c. Co. v. Thompson, 3 Gratt. (Va.) 270; Philadelphia &c. Co.'s Appeal, 102 Pa. St. 123; 20 Am. & Eng. R. Cas. 1, and note; Towanda Bridge Co. In re, 91 Pa. St. 216; Red River Bridge Co. v. Clarksville, 1 Sneed (Tenn.), 176; 60 Am. Dec. 143; Monongahela Nav. Co. v. United States, 148 U. S. 312; 13 Sup. Ct. 622; Canal &c. St. R. Co. v. Crescent City R. Co. 41 La. Ann. 561; 6 So. 849; North Carolina &c. R. Co. v. Carolina Cent. R. Co. 83 N. Car. 489; Lewis Em. Dom. (2d ed.) § 274; Mills Em. Dom. § 42; Elliott

The only question is as to the authority to exercise the power in the particular instance. It must be granted in express terms or by necessary implication.[216] The entire franchise may be appropriated if the public necessity requires,[217] but a part only may be taken if that is all that is required, and the corporation can not compel compensation to be paid to it for the entire franchise if part of it remains unimpaired.[218]

§ 968. Exclusive grants and franchises.—The fact that a right or privilege possessed by a corporation is exclusive,[219] and that the

Roads and Streets (2d ed.), §§ 215, 216, 217. Ante, § 922.

[216] Boston &c. R. Co. Matter of, 53 N. Y. 574; Central City &c. R. Co. v. Fort Clark &c. R. Co. 81 Ill. 523. "When a franchise is granted with power to take or acquire property for public use, it is a fair and just implication that, where large sums are invested in the enterprise, it shall not be destroyed by another company armed with power to condemn for exactly the same use and to take away the same business already done by the older company. This is inherently unjust, and is bad policy, as tending to prevent solid and solvent enterprises in the state. Mobile &c. R. Co. v. Alabama Midland R. Co. 87 Ala. 501 and 520; 6 So. 404 and 407; Ft Wayne v. Lake Shore &c. R. Co. 132 Ind. 558; 32 N. E. 215; 18 L. R. A. 367, and note; 32 Am. St. 277; Illinois Cent. R. Co. v. Chicago &c. R. Co. 122 Ill. 473; 13 N. E. 140; Postal Tel. Cable Co. v. Norfolk &c. R. Co. 88 Va. 920; 14 S. E. 803; Groff v. Bird-in-hand Turnpike Co. 144 Pa. St. 150; 22 Atl. 834; Davis v. East Tenn. &c. Railway Co. 87 Ga. 605; 13 S. E. 567; Appeal of Pittsburg Junction R. Co. 122 Pa. St. 511; 6 Atl. 564; 9 Am. St. 128; Appeal of Sharon R. Co. 122 Pa. St. 533; 17 Atl. 234; 9 Am. St. 133; Fidelity T. &c. Co. v. Mobile St. R. Co. 53 Fed. 687; Lake Erie &c. Co. v. Seneca Co. 57 Fed. 945; Minneapolis &c. R. Co. v. Minneapolis, R. Co. 61 Minn. 502; 63 N. W. 1035; St. Louis &c. Ry. Co. v. Hannibal &c. Co. 125 Mo. 82; 28 S. W. 483; Lewis Em. Dom. § 276; Rand. Em. Dom. §§ 97, 98. Cases may be found apparently holding otherwise, but, where the result does not depend on special legislation, such cases are not sound in principle, and should not be followed." Chattanooga &c. R. Co. v. Felton, 69 Fed. 273, 280.

[217] Crossley v. O'Brien, 24 Ind. 325; 87 Am. Dec. 329. See, also, Monongahela Nav. Co. v. United States, 148 U. S. 312; 13 Sup. Ct. 622; Philadelphia &c. R. Co.'s Appeal, 120 Pa. St. 90; 13 Atl. 708.

[218] Elliott Roads and Streets (2d ed.), § 216.

[219] Piscataqua Bridge Co. v. New Hampshire Bridge, 7 N. H. 35; New Orleans Gas Co. v. Louisiana &c. Co. 115 U. S. 650, 683; 6 Sup. Ct. 252; Philadelphia &c. R. Co.'s Appeal, 102 Pa. St. 123; Salem &c. Co. v. Lyme, 18 Conn. 451; Grand Rapids Street R. Co. v. West Side Street R. Co. 48 Mich. 433; 12 N. W. 643; Metropolitan &c. R. Co.

legislature has attempted to bind itself by contract to permit such exclusive right to be exercised for a certain period of time[220] only affects its value, and does not prevent it from being subject to the power of eminent domain, upon the payment of just compensation, like all other property.[221] The mere grant of a right to maintain a toll-bridge, ferry, turnpike, railroad, or the like, at a certain place or over a certain route, confers no exclusive franchise to conduct such business in the vicinity, and the mere diminution of business caused by the grant of a similar right to a competing or rival company is not a taking of the property or franchise of the former, so as to require compensation, nor does the latter grant impair the obligation of a contract.[222] But where an exclusive franchise or right to

v. Chicago &c. R. Co. 87 Ill. 317; Hyde Park v. Oakwood &c. Ass. 119 Ill. 141; 7 N. E. 627; Baltimore &c. Tel. Co. v. Morgan's Louisiana &c. R. Co. 37 La. Ann. 883; New Orleans &c. R. Co. v. Southern &c. Co. 53 Ala. 211; Western Union Tel. Co. v. American Union Tel. Co. 65 Ga. 160; 38 Am. R. 781, and note.

[220] Eastern R. Co. v. Boston &c. R. Co. 111 Mass. 125; 15 Am. R. 13; East Hartford v. Hartford Bridge Co. 17 Conn. 79; Piscataqua Bridge Co. v. New Hampshire Bridge Co. 7 N. H. 35.

[221] The state can not grant away its right to resume possession of property when it is needed for public use. Alabama &c. R. Co. v. Kenney, 39 Ala. 307; Eastern R. Co. v. Boston &c. R. Co. 111 Mass. 125; 15 Am. R. 13.

[222] Turnpike Co. v. State, 3 Wall. (U. S.) 210; Charles River Bridge v. Warren Bridge, 11 Peters (U. S.), 420; State v. Noyes, 47 Me. 189; Lafayette &c. Co. v. New Albany &c. R. Co. 13 Ind. 90; 74 Am. Dec. 246; Commonwealth v. Eastren R. Co. 103 Mass. 254; 4 Am. R. 555; Thorpe v. Rutland &c. R. Co. 27 Vt. 140; 62 Am. Dec. 625; White River Turnp. Co. v. Vermont Cent. R. Co. 21 Vt. 590; Tuckahoe Canal Co. v. Tuckahoe &c. R. Co. 11 Leigh (Va.), 42; 36 Am. Dec. 374; Illinois &c. R. Canal Co. v. Chicago &c. R. Co. 14 Ill. 314; Mohawk Bridge Co. v. Utica &c. R. Co. 6 Paige (N. Y.), 554; New York &c. R. Co. v. Forty-second St. R. Co. 50 Barb. (N. Y.) 285; Baltimore &c. Turnp. v. Baltimore &c. R. Co. 81 Md. 247; 31 Atl. 854; Trustees &c. v. Atlanta, 93 Ga. 468; 21 S. E. 74. But there may, perhaps, be an exclusive grant or "physical monopoly," in such a case of the land actually used. See Citizens' Coach Co. v. Camden &c. R. Co. 33 N. J. Eq. 267; 36 Am. R. 542; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 613; Union Ferry Co. Matter of, 98 N. Y. 139; Indianapolis &c. St. R. Co. v. Citizens' St. R. Co. 127 Ind. 369, 389; 24 N. E. 1054; 8 L. R. A. 539, and note; Elliott Roads and Streets (2d ed.), § 746 et seq. And property actually taken must be paid for. Pittsburgh &c. R. Co. v. Jones, 111 Pa. St. 204; 2 Atl. 410; 56 Am. R. 260; Baltimore &c.

carry on such business within certain limits is granted to one company, the grant of similar rights to another company to carry on a like business within those limits, without providing for compensation to the former, may impair the obligation of the contract between the state and the first grantee and amount to the taking of its property or franchise.[223] It is, otherwise, however, if, as is sometimes the case, it is found, upon a strict construction of the grant of the exclusive franchise that there is no impairment of it by the second grant and use, notwithstanding somewhat similar privileges may have been given to each company.[224]

§ 968a. Buildings on Right of Way.—Unless specially exempted by statute, it is no obstacle to the condemnation of land for right of way purposes, that there are buildings on such land.[225] A recent writer on the subject says: "The term 'land' in statutes conferring power to condemn, is to be taken in the legal sense, and includes both the soil and the buildings and other structures on it, and any and all interest therein."[226] When the land is condemned the condemnation usually carries with it all the erections on it.[227] There is a presumption that the award of the appraisers includes the value of the buildings on the right of way, and this presumption is particu-

Co. v. Union R. Co. 35 Md. 224; 6 Am. R. 397; Fayette &c. Co. v. New Albany &c. R. Co. 13 Ind. 90; 74 Am. Dec. 246.

[223] Enfield Toll Bridge Co. v. Hartford &c. R. Co. 17 Conn. 40; 42 Am. Dec. 716; St. Louis &c. R. Co. v. Northwestern &c. R. Co. 69 Mo. 65; Bridge Proprs. v. Hoboken Co. 1 Wall. (U. S.) 116; The Binghamton Bridge, 3 Wall. (U. S.) 51; St. Tammany Water Works v. New Orleans Water Works, 120 U. S. 64; 7 Sup. Ct. 405; California &c. Tel. Co. v. Alta. &c. Tel Co. 22 Cal. 398; Aikin v. Western R. Co. 20 N. Y. 370; Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35; Raritan &c. R. Co. v. Delaware &c. Co. 18 N. J. Eq. 546; Regina v. Cambrian R. Co. L. R. 6 Q. B. 422.

[224] Richmond &c. R. Co. v. Louisa R. Co. 13 How. (U. S.) 71 (exclusive franchise to carry passsengers not impaired by carrying freight); Bridge Proprs. v. Hoboken, 1 Wall. (U. S.) 116 (exclusive franchise for toll-bridge not impaired by railroad bridge); Lake v. Virginia &c. R. Co. 7 Nev. 294; Thompson v. New York &c, R. Co. 3 Sandf. Ch. (N. Y.) 625; Philadelphia &c. R. Co's Appeal, 102 Pa. St. 123.

[225] Pierce v. Somersworth, 10 N. H. 369.

[226] Lewis Em. Dom. 3d ed. § 285; see, also, Brocket v. Ohio &c. R. Co. 14 Pa. St. 241; 53 Am. Dec. 534.

[227] Mills Em. Dom. § 223.

larly strong in cases where the land-owner fails to appeal, or take other steps to review the action of the appraisers.[228] In a recent case it was held that the facts, if true, that a railroad only acquires an easement in the land condemned, and that a dwelling-house of a property owner thereon did not pass to the railroad company by virtue of the condemnation, but remained in the former owner, and that the appraisers made their award without reference to the value of the building, on the theory that it did not pass to the railroad company, did not give the property owner a right to go on the land and remove the building.[229] But the foregoing view is not everywhere recognized. In North Carolina the courts hold, that the railroad company acquires only an easement in the land condemned, with the right to actual possession of so much only thereof as is necessary for the operation of the railroad and to protect it against contingent damages, and the conclusion was reached that a house situated on the right of way at the time of the condemnation proceedings did not become the absolute property of the railroad company.[230]

§ 969. Exempt property.—Statutes sometimes prohibit the taking of particular kinds of property for railroad purposes, such as dwelling-houses,[231] or the yard, kitchen or garden adjoining, or cemeteries

[228] Stauffer v. Cincinnati &c. R. Co. 33 Ind. App. 356; 70 N. E. 543.

[229] Stauffer v. Cincinnati &c. R. Co. 33 Ind. App. 356; 70 N. E. 543.

[230] Shields v. Norfolk &c. R. Co. 129 N. Car. 1; 39 S. E. 582; citing Raleigh &c. R. Co. v. Sturgeon, 120 N. Car. 225, 26 S. E. 779; Blue v. Aberdeen &c. R. Co. 117 N. Car. 644; 23 S. E. 275.

[231] The Pennsylvania statute prohibiting the location of a railroad through any dwelling-house in the occupancy of the owner, without his consent, is not to be construed as prohibiting the occupation of grounds which are merely ornamental or pleasant as surroundings. Lyle v. McKeesport &c. R. Co. 131 Pa. 437, 25 W. N. C. 228, 18 Atl. 1111. But see as to yard or curtilage, Swift's Appeal, 111 Pa. St. 516; 2 Atl. 539; Dwelling house must have been erected in good faith. Hagner v. Pennsylvania &c. R. Co. 154 Pa. St. 475; 25 Atl. 1082; Morris v. Winchester &c. R. Co. 4 Bush (Ky.), 448. The right of a railway company to condemn buildings not exempted by statute and situated on real estate necessary for its use is an incident to the right to condemn the land. Forney v. Fremont &c. R. Co. 23 Neb. 465 s. c.; 36 N. W. R. 806; Wells v. Somerset &c. R. Co. 47 Me. 345. And see to the effect that there can be no irrevocable exemption. Boston &c. R. Co. v. York County, 79 Me. 386; 10 Atl. 113; Peru v. Gleason,

or churches,[232] without the consent of the owners.[233] Proceedings in violation of such a statute are said to be void,[234] but the benefit of the statute may be waived by the owner to be affected by any acts which amount to an implied consent.[235] And where it appears that the railroad company can efficiently locate its road between the termini without invading public grounds, such as parks, there is no necessity for warranting the condemnation of such lands and

91 Ind. 566; Butchers &c. Co. v. Crescent City &c. Co. 111 U. S. 746; 4 Sup. Ct. 652. The exemption of the "dwelling house, yard, garden and other appurtenances" in the Louisiana statute is held not to apply to a tenement bought and held merely as an investment and which the owner has never occupied as a dwelling. Louisiana &c. R. Co. v. Moseley, 117 La. Ann. 313; 41 So. 585.

[232] In the absence of such a statute, the property of a church is subject to condemnation for railroad purposes. Macon &c. R. Co. v. Riggs, 87 Ga. 158; 13 S. E. 312. In Tennessee a railroad company can not condemn lands set apart for cemeteries though such lands are not, at the time, improved or used for burial purposes. Memphis &c. R. Co. v. Forest Hill Cemetery Co. (Tenn.) 94 S. W. 69. In North Carolina where gardens are exempted it is held that where lands on the right of way are not used as a garden at the time the company completes its road thereon, and thus acquires constructive possession of the whole strip, it is immaterial that they are used for a garden when the company subsequently takes actual possession. Dargan v. Carolina Cent. R. Co. 131 N. C. 623; 42 S. E. 979. In Pennsylvania it is held that land belonging to a toll bridge corporation, but not in its actual use, or necessary to the proper or convenient exercise, present or prospective, of its franchise, may be condemned by a railroad company for its tracks. Youghiogheny Bridge Co. v. Pittsburg &c. R. Co. 201 Pa. 457; 51 Atl. 115. A constitutional provision that any association shall have the right to construct a railroad between any points in the state does not, by implication, repeal an existing statute exempting specified kinds of property from condemnation by railroad companies. Weigold v. Pittsburg &c. R. Co. 208 Pa. 81; 57 Atl. 188. See, also, Dryden v. Pittsburg &c. R. Co. 208 Pa. 316; 57 Atl. 710; Glaser v. Glenwood R. Co. 208 Pa. 330; 57 Atl. 1134 (statute inapplicable where railroad company authorized to widen right of way).

[233] In Louisiana a railroad can not take a dwelling-house or the yard, kitchen, or garden adjoining, unless the jury shall find that the line can not be diverted without great public loss and inconvenience. Rev. Laws 1884, La. § 705.

[234] Clapper, Ex parte, 3 Hill (N. Y.), 458; Cuyler v. Rochester, 12 Wend. (N. Y.) 165; Extension of Second Street, 23 Pa. St. 346.

[235] Chesapeake &c. R. Co. v. Pack, 6 W. Va. 397.

an application to do so should be refused.[236] We have elsewhere considered the subject of this section in treating of the location of railroads, and it is sufficient, in this connection, to refer to what has already been written.[237]

§ 970. Extent of taking.—Where the statute giving a corporation the right to exercise the power of eminent domain prescribes the estate and exact quantity that shall be taken, no other estate or amount of land than that prescribed can be seized under such authority.[238] But where the statute does not definitely declare what estate or what quantity of property shall be taken, the general rule is that the corporation may take so much, and only so much, as is reasonably necessary for its corporate purposes.[239] Thus, where only part of a lot or parcel of land is needed for a railroad or a street, the entire lot or tract can not be taken for such purpose. In other words, no more can be taken than is needed for the road itself, or for some purpose legitimately connected with its use and enjoyment by the public and within the scope of the statutory grant of authority to condemn.[240] In the absence of a statutory determination of the amount, no precise rule can be laid down for determining exactly what quantity of land may be taken, as the needs of the company in any particular case must necessarily depend very largely upon the

[236] Milwaukee Southern R. Co. In re, 124 Wis. 490; 102 N. W. 401.

[237] See ante, § 924.

[238] Elliott Roads and Streets (2d ed.) § 223; De Camp v. Hibernia &c. R. Co. 47 N. J. L. 43; Union Ferry Co. Matter of, 98 N. Y. 139; Hingham &c. Co. v. Norfolk, 6 Allen (Mass.), 353; Roanoke City v. Berkowitz, 80 Va. 616; Currier v. Marietta &c. R. Co. 11 Ohio St. 228; Watson v. Acquackanonck Water Co. 36 N. J. L. 195; Miller v. Windsor Water Co. 148 Pa. St. 429; 23 Atl. 1132; Hill v. Mohawk &c. R. Co. 7 N. Y. 152. Post, § 972.

[239] Johnston v. Chicago &c. R. Co. 58 Iowa 537; 12 N. W. 576; Lockie v. Mut. Un. Tel. Co. 103 Ill. 401; South Beach &c. R. Co. In re, 119 N. Y. 141; 23 N. E. 486; Forney v. Fremont &c. R. Co. 23 Neb. 465; 36 N. W. 806; Oregon &c. R. Co. v. Owsley, 3 Wash. Ter. 38; Tyler v. Hudson, 147 Mass. 609; 18 N. E. 582. See, also, O'Hare v. Chicago &c. R. Co. 139 Ill. 151; 28 N. E. 923; United States v. Baltimore &c. R. Co. 27 App. (D. C.) 105; ante § 954.

[240] Chesapeake &c. Co. v. Mason, 4 Cranch (U. S. C. C.), 123; Baltimore &c. R. Co. v. Pittsburg &c. R. Co. 17 W. Va. 812; 10 Am. & Eng. R. Cas. 444; Embury v. Conner, 3 N. Y. 511; 53 Am. Dec. 325 and note; Case v. Kelly, 133 U. S. 21; 10 Sup. Ct. 216; Georgia Pac. R. Co. v. Wilks, 86 Ala. 478; 6 So. 34.

peculiar facts and circumstances of that case.[241] It is said that the selection of the land and the amount to be taken usually rests in the discretion of the company, within statutory and constitutional limitations and this in general is true.[242] It is also said in general terms, that the legislature may leave the determination of the particular property and the amount needed "to the discretion of those upon whom the authority is conferred, with or without limitations."[243] But even if it be true that the legislature can make the determination of a company conclusive as to the amount of property necessary to be taken for its use, it is seldom that any legislature has attempted to do so without limitation. It is usually provided that the question shall be tried and determined by appraisers, commissioners, or a jury, or some other tribunal.[244] The company may have a right to exercise its discretion in the first instance and its determination may be prima facie evidence that all the land taken or sought to

[241] Nashville &c. R. Co. v. Cowardin, 11 Humph. (Tenn.) 348; Virginia &c. R. Co. v. Elliott, 5 Nev. 358; Chicago &c. R. Co. v. People, 4 Ill. App. 468. Yet, in a general sense, the necessity which justifies the condemnation relates rather to the nature of the property and the uses to which it is to be applied, than to the circumstances of the particular case. Pierce Railroads, 148.

[242] O'Hare v. Chicago &c. R. Co. 139 Ill. 151; 28 N. E. 923; Lodge v. Philadelphia &c. R. Co. 8 Phila. (Pa.) 345; Colorado &c. R. Co. v. Union Pac. R. Co. 41 Fed. 293; Southern &c. R. Co. v. Stoddard, 6 Minn. 150; Smith v. Chicago &c. R. Co. 105 Ill. 511; Chicago &c. R. Co. v. Wiltse, 116 Ill. 449; 6 N. E. 49; Deitrichs v. Lincoln &c. R. Co. 13 Neb. 361; 13 N. W. 624; Eldridge v. Smith, 34 Vt. 484. But see Postal Tel. Cable Co. v. Louisville &c. Co. 43 La. Ann. 522; 9 So. 119; Louisiana &c. R. Co. v. Xavier Realty, 115 La. Ann. 328; 39 So. 1; Riley v. Charleston Union Station Co. 71 S. Car. 457; 51 S. E. 485.

[243] Lewis Em. Dom. (2d ed.) § 286; citing Dewitt v. Duncan 46 Cal. 342; Boston Water Power Co. v. Boston &c. R. Co. 23 Pick. (Mass.) 360; Board of Supervisors v. Gorrell, 20 Gratt. (Va.) 484. See, also, to the same effect Worcester Gas Light &c. Co. v. County Comr's, 138 Mass. 289; Randolph Em. Dom. § 202; Ford v. Chicago &c. R. Co. 14 Wis. 609; 80 Am. Dec. 791; Lynch v. Forbes, 161 Mass. 302; 37 N. E. 437; 42 Am. St. 402. But compare the authorities cited in the note in the last report above referred to.

[244] Thompson, Matter of, 57 Hun (N. Y.), 419; Illinois Cent. R. Co. v. Chicago 138 Ill. 453; 28 N. E. 740; Rensselaer &c. Co. v. Davis, 43 N. Y. 137; Comrs. Court v. Bowie, 34 Ala. 461; Baltimore &c. R. Co. v. Pittsburg &c. R. Co. 17 W. Va. 812; 10 Am. & Eng. R. Cas. 444; Lecoul v. Police Jury, 20 La. Ann. 308; Power's Appeal, 29 Mich. 504; New York Cent. R. Co. Matter

be condemned is necessary for the use of the road, but it seems to us that the company should not have a right to act as final judge in its own case and conclusively determine the question, and that its discretion is subject both to such statutory and constitutional provisions as may be applicable and also to the jurisdiction and right of the courts to prevent its abuse.[245]

§ 971. Taking additional property.—The power of a railroad company to take lands by eminent domain is not exhausted by a single exercise, nor does it expire with the completion of the road so far as to put it in running order. But additional land may be taken from time to time, as may be required by the increased necessities of the company, due to growth of business, or demands for greater accommodation for the public.[246] Thus, where the necessities of the road required a terminal depot and turntable at a certain point, it was held that the company could condemn land for a side track or branch line leading to the lot on which it had erected them.[247]

of, 66 N. Y. 407; New Central &c. Co. v. George's &c. Co. 37 Md. 537; Southern Pac. R. Co. v. Raymond, 53 Cal. 223; Carolina Cent. R. Co. v. Love, 81 N. Car. 434.

[245] O'Hare v. Chicago &c. R. Co. 139 Ill. 151; 28 N. E. 923; Hays v. Risher, 32 Pa. St. 169; Southern Pac. R. Co. v. Raymond, 53 Cal. 223; New York &c. R. Co. v. Metropolitan &c. Co. 63 N. Y. 326; Tracy v. Elizabethtown R. Co. 80 Ky. 259; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812; 10 Am. & Eng. R. Cas. 444; Reed v. Louisville Bridge Co. 8 Bush. (Ky.) 69; South Carolina R. Co. v. Blake, 9 Rich. L. (S. Car.) 228; Mills Em. Dom. § 49; Webb v. Manchester &c. R. Co. 4 M. & Cr. 116; Coe v. Aiken, 61 Fed. 24; Cooley Const. Lim. (7th ed.) 777; Riley v. Charleston Union Station Co. 71 S. Car. 457; 51 S. E. 485. See, also, Chicago &c. R. Co. Williams 148 Fed. 442.

[246] Prather v. Jeffersonville, &c. R. Co. 52 Ind. 16; South Carolina &c. R. Co. v. Blake, 9 Rich. L. (S. Car.) 228; Beck v. United &c. R. Co. 39 N. J. L. 45; Toledo &c. R. Co. v. Daniels, 16 Ohio St. 390; New York Cent. &c. R. Co. In re, 67 Barb. (N. Y.) 426; Philadelphia &c. R. Co. v. Williams, 54 Pa. St. 103; Fisher v. Chicago &c. R. Co. 104 Ill. 323; Childs v. Central R. &c. Co. 33 N. J. L. 323; Hopkins v. Philadelphia &c. R. Co. 94 Md. 257; 51 Atl. 404; Florida Central &c. R. Co. v. Bell, 43 Fla. 359; 31 So. 259. See ante, § 962.

[247] New Orleans &c. R. Co. v. Second Municipality, 1 La. Ann. 128; Knight v. Carrollton R. Co. 9 La. Ann. 284. See, also, Chicago &c. Electric R. Co. v. Chicago &c. Ry. Co. 211 Ill. 352; 71 N. E. 1017. Terminal facilities may be condemned at any point which the needs of the road may dictate. Central Branch &c. R. Co. v. Atchison &c. R. Co. 26 Kan. 669.

The company may condemn land for the construction of additional side tracks,[248] or depots,[249] where the accommodation of the public demands them.[250] Land for additional shops for the repair of engines and cars used on the road may be condemned,[251] and where the right of way as originally acquired was not so wide as the company is permitted to hold for that purpose, its width may be increased, when necessary, by condemnation to the statutory limit.[252] The fact that the charter required the railroad to be "completed" by a certain time, does not necessarily limit its right to condemn additional necessary lands after expiration of that time.[253] Other phases of this subject have already been considered.[254]

§ 972. Title or interest acquired.—The legislature is the sole judge of the estate to be taken in lands required for the construction of a public work, and may authorize the taking of the fee,[255] or

[248] St. Louis &c. R. Co. v. Petty, 57 Ark. 359; 21 S. W. 884; 20 L. R. A. 434, and note; Philadelphia &c. R. Co. v. Williams 54 Pa. St. 103. See New Cent. Coal Co. v. George's Creek Coal Co. 37 Md. 537; Sherman v. Buick, 32 Cal. 241; 91 Am. Dec. 577, and note; Fisher v. Chicago &c. R. Co. 104 Ill. 323; Chicago &c. Electric R. Co. v. Chicago &c. R. Co. 211 Ill 352, 71 N. E. 1017.

[249] Deitrichs v. Lincoln &c. R. Co. 13 Neb. 361; 13 N. W. 624.

[250] See Pittsburg &c. R. Co. v. Benwood Iron Works, 31 W. Va. 710; 8 S. E. 453; 2 L. R. A. 680, and note, for a discussion of the question as to what is such a public necessity as will justify the exercise of this power.

[251] Chicago &c. R. Co. v. Wilson, 17 Ill. 123.

[252] Childs v. Central R. Co. &c. 33 N. J. L. 323. See, also, Lilley v. Pittsburg &c. R. Co. 213 Pa. St. 247; 62 Atl. 852.

[253] Brown v. Philadelphia &c. R. Co. 58 Md. 539; Philadelphia &c. R. Co. v. Williams, 54 Pa. St. 103. But such a condition may be so worded as to enable the land-owner to take advantage of it. Peavey v. Calais R. Co. 30 Me. 498; Morris &c. R. Co. v. Central R. Co. 31 N. J. L. 205.

[254] Ante, §§ 960, 961, 962.

[255] Water Works Co. v. Burkhart, 41 Ind. 364; Logansport v. Shirk, 88 Ind. 563; Sweet v. Buffalo &c. R. Co. 79 N. Y. 293; Currie v. New York Transit Co. 66 N. J. Eq. 313; 58 Atl. 308; 105 Am. St. 647; Birdsall v. Cary, 66 How. (N. Y.) Pr. 358; Malone v. Toledo, 28 Ohio St. 643; Haldeman v. Pennsylvania R. Co. 50 Pa. St. 425; Page v. O'Toole, 144 Mass. 303; 10 N. E. 851; Mason v. Lake Erie &c. R. Co. 9 Biss. (U. S.) 239; Roanoke City v. Berkowitz, 80 Va. 616; Fairchild v. St. Paul, 46 Minn. 540; 49 N. W. 325, citing Elliott Roads and Streets, 172. But see Albany Street, Matter of, 11 Wend. (N. Y.) 149; 25 Am. Dec. 618, and note; New Or-

of any less interest. But where, as is usually true in the case of railroads, an easement only is required, no greater estate can be taken unless the power to take the fee is expressly conferred.[256] Thus, where the act provided that the corporation should be "seized and possessed of the land" taken,[257] it was held that an easement only was acquired by condemnation. So, where it was provided that the title to the land taken should vest in the company,[258] and it has even been held that an act providing that a fee-simple title to its right of way should vest in a railroad company conferred upon the company only a base or terminable fee, and that the land would revert if the company ceased to use it for railroad purposes.[259] The general railroad laws of the several states usually provide that the railroad company shall have "the right to acquire title" to necessary lands by certain proceedings for that purpose.[260] Such a provision enables it to condemn merely an easement and not the fee.[261] But

leans &c. Co. v. Gay, 32 La. Ann. 471; Henry v. Dubuque R. Co. 2 Ia. 288.

[256] Henry v. Dubuque &c. R. Co. 2 Iowa 288; New Orleans R. Co. v. Gay, 32 La. Ann. 471; Fitch v. New York &c. R. Co. 59 Conn. 414; 20 Atl. 345; 10 L. R. A. 188; Washington Cemetery Co. v. Prospect Park &c. R. Co. 68 N. Y. 591; Clark v. Worcester, 125 Mass. 226; Pittsburg &c. R. Co. v. Bruce, 102 Pa. St. 23; Corwin v. Cowan, 12 Ohio St. 629; McCombs v. Stewart, 40 Ohio St. 647; New Jersey &c. Co. v. Morris &c. Co. 44 N. J. Eq. 398; 15 Atl. 227; 1 L. R. A. 133, and note; Pennsylvania R. Co. v. Breckenridge, 60 N. J. L. 583; 38 Atl. 740; Missouri &c. R. Co. v. Schmuck, 69 Kans. 272; 76 Pac. 836; Union Pacific R. Co. v. Colorado Postal Tel. Cable Co. 30 Colo. 133; 69 Pac. 564; New York &c. R. Co. v. Kip, 46 N. Y. 546; 7 Am. R. 385; Jackson v. Rutland &c. R. Co. 25 Vt. 150; 60 Am. Dec. 246; Oregon &c. R. Co. v. Oregon &c. Co. 10 Ore. 444; Lyon v. McDonald, 78 Tex. 71; 14 S. W. 261; 9 L. R. A. 295, and note; Postal Tel. &c. Co. v. Louisiana &c. R. Co. 49 La. Ann. 1270; 22 So. 219. But see New Orleans &c. R. Co. v. Gay, 31 La. Ann. 430; United States Pipe Line Co. v. Delaware &c. R. Co. 62 N. J. L. 254; 41 Atl. 749; 42 L. R. A. 572.

[257] Quimby v. Vermont Central R. Co. 23 Vt. 387.

[258] Dunham v. Williams, 36 Barb. (N. Y.) 136. But see Page v. O'Toole, 144 Mass. 303; 10 N. E. 851; Brooklyn Park Comrs. v. Armstrong, 45 N. Y. 234; 6 Am. R. 70, and note; Barnett v. Johnson, 15 N. J. Eq. 481.

[259] Kellogg v. Malin, 50 Mo. 496; 11 Am. R. 426. See Gurney v. Minneapolis &c. Co. (Minn.) 65 N. W. 136; Scott v. St. Paul &c. R. Co. 21 Minn. 232.

[260] Stimson Am. Stat. (1892) § 8740.

[261] Quick v. Taylor, 113 Ind. 540; 16 N. E. 588; Chicago & R. Co. v. Huncheon, 130 Ind. 529; 30 N. E. 636; Kansas Central R. Co. v. Allen, 22 Kan. 285; 31 Am. R. 190; Wash-

the easement usually acquired is in its nature perpetual,[262] and differs very materially from an ordinary easement.[263] It has been held, however, that where the state itself seizes land for a permanent public use it may more readily be presumed to have taken a fee, which may be transmitted by it to the corporation to which it grants the same.[264] A railroad can not condemn a less interest in land taken than that required and prescribed by the legislature. Thus, under a statute authorizing it to take land for a perpetual right of way it can not appropriate land for a temporary track, to be used while its main track is rebuilding,[265] or until the land-owners shall choose to mine the coal over which it runs.[266] But it need only take the

ington Cemetery v. Prospect Park &c. R. Co. 68 N. Y. 591. See, also, East Tenn. &c. R. Co. v. Telford, 89 Tenn. 293; 14 S. W. 776; 10 L. R. A. 855; Pittsburg &c. R. Co. v. Bruce, 102 Pa. St. 23; Commissioners v. Mich. Cent. R. Co. 90 Mich. 385; 51 N. W. 447.

[262] Chaplin v. Coms. 126 Ill. 264; 18 N. E. 765; Henry v. Dubuque &c. R. Co. 2 Iowa 288; Pilcher v. Atchison &c. R. Co. 38 Kan. 516; 16 Pac. 945; 5 Am. St. 770; Beal v. New York &c. R. Co. 3 How. Pr. N. S. (N. Y.) 329; Cummins v. Des Moines &c. R. Co. 63 Iowa 397; 19 N. W. 268. And is generally exclusive. Fitch v. New York &c. R. Co. 59 Conn. 414; 20 Atl. 345; 10 L. R. A. 188; New Mexico v. United States, 172 U. S. 171; 19 Sup. Ct. 128. See, also, Philadelphia R. Co. v. Hummell, 44 Pa. St. 375; 84 Am. Dec. 457.

[263] Bemis v. Springfield, 122 Mass. 110; Pennsylvania &c. R. Co. v. Reading Paper Mills, 149 Pa. St. 18; 20 Atl. 761; New York &c. R. Co. v. Trimmer, 53 N. J. L. 1; 20 Atl. 761. See, also, Western Un. Tel. Co. v. Pennsylvania R. Co. 195 U. S. 540; 25 Sup. Ct. 133, 141; Pittsburg &c. R. Co. v. Peet, 152 Pa. St. 488; 25 Atl. 612; 19 L. R. A. 467; Philadelphia v. Ward, 174 Pa. St. 45; 34 Atl. 458; Smith v. Hall, 103 Iowa 95; 72 N. W. 427.

[264] Haldeman v. Pennsylvania R. Co. 50 Pa. St. 425; Wyoming &c. Co. v. Price, 81 Pa. St. 156; Malone v. Toledo, 34 Ohio St. 541; Brookville &c. Co. v. Butler, 91 Ind. 134; 46 Am. R. 580; Water Works Co. v. Burkhard, 41 Ind. 364; Coster v. New Jersey &c. Co. 23 N. J. L. 227; Dingley v. Boston, 100 Mass. 544; Rexford v. Knight, 11 N. Y. 308.

[265] Currier v. Marietta &c. R. Co. 11 Ohio St. 228. In Heyneman v. Blake, 19 Cal. 579, it was held that authority to condemn private lands for use by a corporation includes the right to condemn any estate or interest therein for the same object. See, also, Charleston &c. R. Co. v. Blake, 12 Rich. L. (S. Car.) 634; Sixth Ave. R. Co. v. Kerr, 72 N. Y. 330; Jerome v. Ross, 7 Johns. Ch. (N. Y.) 315; 11 Am. Dec. 484.

[266] De Camp v. Hibernia Underground R. Co. 47 N. J. L. 43; Hibernia Underground R. Co. v. De Camp, 47 N. J. L. 518; 54 Am. R. 197; Hartford &c. R. Co. Matter of, 65 How. (N. Y.) Pr. 133; Wheel-

surface of the land with sufficient underlying strata to support the road, and is not obliged to take the mines and minerals lying beneath the surface.[267] And it has been held in California and other states that the minerals can not ordinarily be taken, but are reserved to the land-owner.[268] It has been held in Minnesota that the title, of whatsoever sort acquired, dates from the time the award is filed.[269]

§ 972a. Reversion on abandonment.—Where a railroad company acquires a mere easement in the land condemned its right to the property is dependent upon its use for public purposes, and it has been held that when this public use is abandoned or becomes impossible the right of the railroad company to hold the land ceases and the property reverts to the owner of the fee,[270] and is subject

ock v. Young, 4 Wend. (N. Y.) 647; Pinchin v. London &c. R. Co. 24 L. J. N. S. Ch. 417.

[267] Corporation of Huddersfield and Jacomb, In re, L. R. 10 Ch. 92. See, also Robert v. Sadler, 104 N. Y. 229; 58 Am. R. 498, and note; Hartford &c. R. Co. Re, 65 How. Pr. (N. Y.) 133. An entry by eminent domain upon the surface is an entry upon subjacent strata, so far as they are necessary to support the surface for the purpose of the structure for which the land is taken. Penn Gas Coal Co. v. Versailles Fuel Gas Co. 131 Pa. 522; 19 Atl. 933; Evans v. Haefner, 29 Mo. 141. See, also, Platt v. Pennsylvania Co. 43 Ohio St. 228; 1 N. E. 420; Alabama &c. R. Co. v. Gilbert, 71 Ga. 591; Lafferty v. Schuylkill &c. R. Co. 124 Pa. St. 297; 16 Atl. 869; 3 L. R. A. 124; 10 Am. St. 587; East Tennessee &c. R. Co. v. Telford, 89 Tenn. 293; 14 S. W. 776; 10 L. R. A. 855; Olive v. Sabine &c. R. Co. 11 Tex. Civ. App. 208; 33 S. W. 139; Hasson v. Oil Creek &c. R. Co. 8 Phila. (Pa.) 556; Troy &c. R. Co. v. Potter, 42 Vt. 265; 1 Am. R. 325; Hurd v. Rutland &c. R. Co. 25 Vt. 116; St. Louis &c. R. Co. v. Clark, 121 Mo. 169, 195; 25 S. W. 192, 906; 26 L. R. A. 751, as to how far the land-owner is precluded from using what is taken by the company. As to tide lands and right to take land under water, see New York Cent. &c. R. Co. Matter of, 77 N. Y. 248; State ex rel. v. King, Co. Sup. Ct. 31 Wash. 445; 72 Pac. 89; 66 L. R. A. 897, and note.

[268] Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290; 79 Pac. 961; 70 L. R. A. 221; 106 Am. St. 36, 41, and authorities there cited; notes in 85 Am. St. 295; 94 Am. St. 864.

[269] State v. Chicago &c. R. Co. 85 Minn. 416; 89 N. W. 1. But see Dowie v. Chicago &c. R. Co 214 Ill. 49; 73 N. E. 354 where it is held that the rights and interests of the parties date from the filing of the petition.

[270] Canton Co. v. Baltimore &c. R. Co. 99 Md. 202; 57 Atl. 637; Chicago &c. R. Co. v. Clapp, 201 Ill. 418; 66 N. E. 223.

to an appropriation for other public uses.[271] To have this effect, however, there must ordinarily be not only an actual relinquishment of the property by the railroad company, but also an intention to abandon it.[272] The law requires some decided act indicative of an intention to abandon and this intention must be determined from the circumstances of the case.[273] Thus it was held that an intention to abandon a right of way acquired by condemnation proceedings was not conclusively shown in the case of a railroad company financially embarrassed, by the mere fact, that it entered into an arrangement with another road by which it secured traffic facilities.[274] So in another case where a railroad company had regularly condemned land for a water station and caused it to be flooded with water for its use, it was held that a leasing of the reservoir to a fishing and boating club, reserving to the railroad company its actual possession for all the purposes for which the land was condemned with a right to cancel the lease at any time on thirty days' notice, did not show an abandonment of the land as a water station.[275] In Nebraska it is held that the failure of a railroad company for ten years to use property acquired in condemnation proceedings and afterwards conveyed to a railroad company by the owner does not show an abandonment of all title thereto and that even though an easement only was conveyed by the deed it could only be extinguished by adverse possession for the same length of time required to extinguish the title of an owner in fee.[276] On the question of intention to abandon, it has been held competent to show that the railroad was built merely for temporary purposes and that this object had been fulfilled.[277]

§ 973. Width taken for right of way.—The legislature has authority to prescribe the width of the strip to be taken by a railroad for a right of way,[278] or it may confer a general power to take the necessary land for the purpose of the corporation.[279] The width of the

[271] Crescent v. Pittsburg &c. R. Co. 210 Pa. 334; 59 Atl. 1103.

[272] Chicago &c. R. Co. v. Clapp, 201 Ill. 418; 66 N. E. 223.

[273] Canton Co. v. Baltimore &c. R. Co. 99 Md. 202; 57 Atl. 637.

[274] Canton Co. v. Baltimore &c. R. Co. 99 Md. 202; 57 Atl. 637.

[275] Dillon v. Kansas City &c. R. Co. 67 Kan. 687; 74 Pac. 251.

[276] Struve v. Republic Valley R. Co. 2 Neb. (Unoff.) 585; 89 N. W. 604.

[277] Chicago &c. R. Co. v. Clapp, 201 Ill. 418; 66 N. E. 223.

[278] See Hingham &c. Turnpike Corp. v. Norfolk, 6 Allen (Mass.) 353.

[279] Proceedings founded upon a petition by which the railroad com-

strip which a railroad company is authorized to take for a right of way is usually fixed by statute, or by the charter,[280] and no land can be taken beyond the limits of that strip, except as specially authorized.[281] In many of the states additional land may be taken[282] when necessary for cuttings or embankments, depots and stations, or side tracks, or for procuring materials for use in the construction of the road. The enumerated reasons for which a railroad may be permitted to increase the width of its right of way are exclusive, and a railroad will not be permitted to increase the width of its roadway upon any other grounds.[283] Where the company seeks to take ground outside the limits of the right of way as defined by statute, the burden is upon it to establish the necessity of such taking.[284] It has also been held that even within the limits of the maximum width prescribed for its right of way, a railroad can take only such lands as are reasonably necessary and convenient for its use.[285] If it be shown that the railroad company has made arrangement with other companies to share with them the land sought to be condemned, this, it has been held, should be taken as an admission on its part that its

pany seeks to condemn a right of way of greater width than the maximum width allowed by statute have been held void and set aside in toto. State v. Hudson Terminal R. Co. 46 N. J. L. 289. See, also, Barnes v. Chicago &c. R. Co. (Tex.) 33 S. W. 601.

[280] Stimson Am. Sat. 1892, § 8742. See, also, Nashville &c. R. Co. v. Hammond, 104 Ala. 191; 15 So. 935; Lower v. Chicago & R. Co. 59 Ia. 563; 13 N. W. 718.

[281] Kemper v. Cincinnati &c. R. Co. 11 Ohio 392; Johnston v. Chicago &c. R. Co. 58 Iowa 537; 12 N. W. 576; State v. Hudson &c. R. Co. 46 N. J. L. 289; 20 Am. & Eng. R. Cas. 294.

[282] Stimson Am. Stat. (1892) § 8742. But if the company abuses the discretion vested in it by statute, by taking additional land unnecessarily, equity may restrain it so as to keep it within the limits of its charter. Atlantic &c. R. Co. v. Penny, 119 Ga. 479; 46 S. E. 665.

[283] Brown v. Rome &c. R. Co. 86 Ala. 206; 5 So. 195; Johnston v. Chicago &c. R. Co. 58 Iowa 537; 12 N. W. 576.

[284] Jefferson &c. R. Co. v. Hazeur, 7 La. Ann. 182; Wisconsin Central R. Co. v. Cornell University, 52 Wis. 537; 8 N. W. 491. It is held in Chicago &c. R. Co. v. Dunbar, 100 Ill. 110, that the necessity need not be apparent before condemnation.

[285] Tracy v. Elizabethtown &c. R. R. Co. 80 Ky. 259; Chicago &c. R. Co. v. Dunbar 100 Ill. 110. But where it is necessary to take land upon which buildings are situated, the buildings may be condemned with the ground and afterward removed and sold. Forney v. Fremont &c. R. Co. 23 Neb. 465; 36 N. W. 806; Chicago &c. R. Co. v. Knuffke, 36 Kan. 367; 13 Pac. 582.

necessities do not require all of the land.[286] But where a petition was filed for the condemnation of a strip of land twenty feet wider than the railroad company could lawfully condemn, unless for necessary cutting and filling, and no question as to its right to condemn was made in the court below, the necessity was held to have been conceded.[287] The company may condemn a strip of the full statutory width, although it already owns the adjoining land.[288] Where no width is specified, the charter will be construed to authorize the taking of so much land as is reasonably necessary for the purposes of the company,[289] including, in some jurisdictions at least, a reasonable amount of land for the anticipated necessities of the company in the future.[290] Where a particular method is pointed out for determining how much land is necessary, as by resolution of the

[286] Swinney v. Fort Wayne &c. R. Co. 59. Ind. 205.

[287] Booker v. Venice &c. R. Co. 101 Ill. 333.

[288] Stark v. Sioux City &c. R. Co. 43 Iowa, 501. See, also, Eel River &c. R. Co. v. Field, 67 Cal. 429; 7 Pac. 814; Chicago &c. Electric Co. v. Chicago &c. R. Co. 211 Ill. 352; 71 N. E. 1017. In New Central Coal Co. v. George's Creek Coal &c. Co. 37 Md. 537 it was held that a company could not take lands in invitum where it already owned lands equally useful for its purpose. Where the railroad company has procured a strip of land for a right of way by voluntary grant it may condemn a sufficient amount of land to increase the right of way to the full statutory width. Childs v. Central R. Co. &c. 33 N. J. L. 323.

[289] Booker v. Venice &c. R. Co. 101 Ill. 333; Lockie v. Mutual Union Tel. Co. 103 Ill. 401; Sadd v. Maldon R. Co. 6 Exch. 143. A railroad company which purchased from another company a right of way twenty-five feet in width, on which a railroad track was constructed, was held to have the power to locate an additional track on land adjacent to the right of way, and it was held that it might for that purpose condemn an additional strip. Chicago &c. R. Co. v. Chicago &c. R. Co. 211 Ill. 352; 71 N. E. 1017. A voluntary conveyance of a right of way of undefined width to a railroad whose charter did not specify the width of its right of way was held to include so much land as was reasonably necessary. Day v. Railroad Co. 41 Ohio St. 392. A company has the same right to condemn land over which to swing a gate which it is compelled to maintain as it has to condemn land necessary for the construction of its track.

[290] Staten Island R. T. Co. Matter of, 103 N. Y. 251; 8 N. E. 548; Lodge v. Philadelphia &c. R. Co. 8 Phila. (Pa.) 345; Pennsylvania R. Co. v. National Docks &c. Co. 57 N. J. 86; 30 Atl. 183; State v. Propr's. Morris Aqueduct (N. J.), 33 Atl. 252; St. Louis &c. R. Co. v. Foltz, 52 Fed. 627, 633.

directors,[291] or by the report of the commissioners to assess damages,[292] that method must be followed, and the company can acquire no right to land by condemnation until the necessity for such acquisition has been duly ascertained and declared.[293] In general, however, the company is permitted a reasonable discretion in determining how much land is necessary[294] subject to the right of the court to set aside an inquisition for a clear abuse of this discretion.[295] If the company is given a general authority to take the necessary lands for a right of way, the width taken may vary in different localities according to the necessities of the company.[296] In a case where land was conveyed by a land-owner for full value to a railroad company for a right of way, the land-owner reserving a ferry landing and a private right of way, it was held that the company could, under a statute giving the railroad company power to enlarge and otherwise improve the whole or any portion of its road, condemn both the ferry landing and the reserved right of way.[297] It is not necessary that a railroad company should locate its tracks in the middle of its right of way, whether acquired by condemnation[298] or by purchase

[291] Stringham v. Oshkosh &c. R. Co. 33 Wis. 471.

[292] Carolina &c. R. Co. v. Love, 81 N. Car. 434.

[293] Johnston v. Chicago &c. R. Co. 58 Iowa, 537; 12 N. W. 576; Carolina Central R. Co. v. Love, 81 N. Car. 434; Kemp v. South Eastern R. Co. L. R. 7 Ch. 364. But see Chicago &c. R. Co. v. Dunbar, 100 Ill. 110; National Docks R. Co. v. Central R. Co. 32 N. J. Eq. 755; State v. Stewart, 74 Wis. 620; 43 N. W. 947; 6 L. R. A. 394.

[294] Smith v. Chicago &c. R. Co. 105 Ill. 511; Zircle v. Southern R. Co. 102 Va. 17; 45 S. E. 802; 102 Am. St. 805, and note. As to the power of the railroad to judge of the necessity of taking land, see New York Central &c. R. Co. In re, v. Metropolitan &c. Co. 63 N. Y. 326; Boston &c. R. Co. In re, v. Kip, 53 N. Y. 574; New Orleans &c. R. Co. v. Gay, 32 L. Ann. 471; ante, § 954.

[295] Chesapeake &c. Canal Co. v. Mason, 4 Cranch (U. S. C. C.), 123; Webb v. Manchester &c. R. Co. 4 M. & Cr. 116.

[296] Chicago &c. R. Co. v. People, 4 Bradw. (Ill.) 468. The company is not obliged to take the maximum width permitted by statute. Jones v. Erie &c. R. Co. 169 Pa. St. 333; 32 Atl. 535; 47 Am. St. 916; Indianapolis &c. R. Co. v. Rayl, 69 Ind. 424. But it is held that if it takes less it can not subsequently condemn more as against a rival company which has purchased the land in question. Joplin &c. R. Co. v. Kansas City &c. R. Co. 135 Mo. 549; 37 S. W. 540.

[297] Kenny v. Pittsburg &c. R. Co. 208 Pa. 30; 57 Atl. 74.

[298] Stark v. Sioux City &c. R. Co. 43 Iowa, 501; Dougherty v. Wabash &c. R. Co. 19 Mo. App. 419.

or voluntary grant.[299] Where the maximum width is prescribed, the presumption will be indulged that the full width allowed was taken unless the contrary affirmatively appears.[300]

§ 974. Taking right of way of another road.—Where the statute confers only a general authority to condemn property for railroad purposes land appropriated by a railroad company for public use can not afterwards be appropriated by another company for a similar use, except in case of a necessity so absolute that without such appropriation the grant to the latter company will be defeated, a necessity arising from the very nature of things, over which the company has no control, not one created by the company itself for the sake of convenience or economy.[301] As a general rule, under such authority,

[299] Munkers v. Kansas City &c. R. Co. 60 Mo. 334.

[300] Prather v. Western Union Tel. Co. 89 Ind. 501; Jones v. Erie &c. R. Co. 144 Pa. St. 629; 23 Atl. 251; Duck River Valley R. Co. v. Cochrane, 3 Lea (Tenn.), 478; Day v. Railroad Co. 41 Ohio St. 392. In an action for damages from fire set by the company's engines, the width of the right of way as held and claimed by the company, not exceeding the full statutory width may be shown by parol evidence. Gram v. Northern Pac. R. Co. 1 N. Dak. 252; 45 Am. & Eng. R. Cas. 544.

[301] Appeal of Sharon R. Co. 122 Pa. St. 533; 17 Atl. 234; 9 Am. St. 133; Pennsylvania R. Co.'s Appeal, 93 Penn. St. 150; Boston & Albany R. Co. Matter of, 53 N. Y. 574; Housatonic R. Co. v. Lee and Hudson River R. Co. 118 Mass. 391; Evergreen Cemetery Asso'n v. New Haven, 43 Conn. 234; 21 Am. R. 643; Boston &c. R. Co. v. Lowell &c. R. Co. 124 Mass. 368; Barre R. Co. v. Montpelier &c. R. Co. 61 Vt. 1; 17 Atl. 923; 4 L. R. A. 785; 15 Am. St. 886; Cincinnati &c. R. Co. v. Belle Centre, 48 Ohio St. 273; 27 N. E. 464; Mays v. Seaboard Air Line R. Co. 75 S. C. 455; 56 S. E. 455; South Dakota &c. R. Co. v. Chicago &c. R. Co. 141 Fed. 578. "Necessity" for the condemnation of the right of way of one railroad company for the use of another does not mean an absolute or indispensable necessity, but that which is reasonably requisite and proper for the accomplishment of the end in view under the particular circumstances. Such condemnation is necessary when, the public convenience being equally served, the financial benefits to the latter exceed the probable injuries to the former. Mobile &c. R. Co. v. Alabama Midland R. Co. 87 Ala. 501; 6 So. 404; 39 Am. & Eng. R. Cas. 6. In the case first cited it was held that the construction of a branch road which is but an incident to the main object of the railroad, which is already constructed, merely for the purpose of carrying its own freight to and from certain furnaces, instead of receiving it from and turning it over to another company, is not a matter of

a corporation will not be permitted to condemn property already devoted to the public use for any purpose wholly inconsistent with such use. This rule seems particularly applicable where one company is seeking to condemn and take the right of way of another company longitudinally.[302] Thus, it has been held that one railroad company can not appropriate a portion of the right of way of another railroad company for the purpose of building a parallel road.[303] Nor will one railroad company be permitted for any purpose to take such a part of the line of another road as to practically destroy such road.[304] And courts should give due consideration to the question of the future

such necessity as will authorize a condemnation therefor of land already acquired for railroad purposes by another company. Appeal of Sharon Railway, 122 Pa. St. 533; 17 Atl. 234; 9 Am. St. 133, and note. See, also, Evansville &c. Traction Co. v. Henderson Bridge, 134 Fed. 973, 978 (citing text).

[302] Ante, § 922, and authorities there cited; also, South Dakota Cent. R. Co. v. Chicago &c. R. Co. 141 Fed. 578, 584; Indianapolis &c. R. Co. v. Indianapolis &c. Transit Co. 33 Ind. App. 337; 67 N. E. 1013.

[303] Illinois Cent. R. Co. v. Chicago &c. R. Co. 122 Ill. 473; 13 N. E. 140. See Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 116 Ind. 578; 19 N. E. 440. And see, generally, as to longitudinal or parallel lines, Davis v. East Tenn. &c. R. Co. 87 Ga. 605; 13 S. E. 567; Housatonic R. Co. v. Lee &c. R. Co. 118 Mass. 391; State v. Easton &c. R. Co. 36 N. J. L. 181; Oregon Cascade R. Co. v. Bailey, 3 Oreg. 164; Alexandria &c. R. Co. v. Alexandria &c. R. Co. 75 Va. 780; 40 Am. R. 743; Northern Cent. R. Co. v. Baltimore, 46 Md. 425; Chicago &c. Electric R. Co. v. Chicago &c. R. Co. 211 Ill. 352; 71 N. E. 1017; Indianapolis &c. R. Co. v. Indianapolis &c. Transit Co. 33 Ind. App. 337; 67 N. E. 1013.

[304] Central City Horse Ry. v. Fort Clark Horse Ry. 81 Ill. 523. The right to take longitudinally is strictly construed, and can only be justified by peculiar circumstances. Boston &c. R. Co. v. Lowell &c. R. Co. 124 Mass. 368; Housatonic R. Co. v. Lee &c. R. Co. 118 Mass. 391; Worcester &c. R. Co. v. Railroad Commissioners, 118 Mass. 561; Cake v. Philadelphia &c. R. Co. 87 Pa. St. 307; Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325; 94 Am. Dec. 84; Commissioners v. Erie &c. R. Co. 27 Pa. St. 339; 67: Am. Dec. 471, and note; Tennessee &c. R. Co. v. Adams, 3 Head (Tenn.), 596; Buffalo, In re, 68 N. Y. 167; Greenwich Tp. v. Easton &c. R. Co. 24 N. J. Eq. 217; Easton &c. R. Co. v. Inhabitants &c. 25 N. J. Eq. 565; Newark &c. R. Co. v. Newark, 23 N. J. Eq. 515; Attorney-General v. Morris &c. R. Co. 19 N. J. Eq. 386; State v. Easton &c. R. Co. 36 N. J. L. 181; State v. Hoboken, 35 N. J. L. 205; Contra Costa R. Co. v. Moss, 23 Cal. 323; Attorney-General v. Ely &c. R. Co. L. R. 4 Ch. App. 194; L. R. 9 Eq. Cas. 106; Pugh v. Golden Valley R. Co. L. R. 12 Ch. Div. 274; Regina v. Wycombe R. R. L. R. 2 Q. B. 310.

needs of a railroad in fulfilling its chartered purpose and performing its public duty as a common carrier before they undertake to deprive a railroad company of any part of its right of way at the instance of another corporation.[305] Where a petition by a railroad company for the appointment of commissioners to condemn the "located route" of an existing railroad shows that it seeks to condemn a part of the route generally, and not merely for the purpose of crossing, an order made thereon will be set aside.[306] And where a railroad corporation is seeking to condemn a longitudinal section of the right of way of another company for its exclusive use, it may be restrained by injunction unless express authority to make such condemnation has been conferred.[307] But in Alabama, the probate court, in a proper proceeding and upon proper notice, has jurisdiction to inquire of and condemn a part of a right of way, already acquired by one railroad corporation, for the use of another, if it can be done without destroying its usefulness as a franchise, or impairing the capacity of the easement so as to render it unsafe, but that court has no jurisdiction to condemn the road bed of one company for the use of another. To accomplish this, an express act of the legislature would be required.[308] It is said that if the proposed appropriation

[305] Western Union Tel. Co. v. Pennsylvania R. Co. 120 Fed. 362, affirmed in 123 Fed. 33.

[306] United N. J. R. and Canal Co. v. National Docks &c. R. Co. 52 N. J. L. 90; 18 Atl. 574. See Johnson v. Freeport &c. R. Co. 116 Ill. 521; 6 N. E. 211; Brown v. Rome &c. R. Co. 86 Ala. 206; 5 So. 195.

[307] Alexandria &c. R. Co. v. Alexandria &c. R. Co. 75 Va. 780; 40 Am. R. 743, and note. See, also, Hoke v. Georgia &c. R. Co. 89 Ga. 215; 15 S. E. 124. But see Mobile &c. R. Co. v. Alabama Midland R. Co. 87 Ala. 520; 6 So. 407. A company which is proceeding in good faith to acquire land and construct its road may enjoin another company from building a switch along and upon its proposed line upon land of which it has procured a lease maliciously and in bad faith and for the sole purpose of harassing and delaying the petition. Rochester &c. R. Co. v. New York &c. R. Co. 44 Hun (N. Y.), 206; Rochester &c. R. Co. v. Babcock, 110 N. Y. 119; 17 N. E. 678.

[308] Anniston &c. R. Co. v. Jacksonville &c. R. Co. 82 Ala. 297; 2 So. 710. If a second condemnation can be so carved out of a right of way previously granted to another railroad company as to leave the latter's tracks without such hindrance or obstruction as to render it unsafe, the court has jurisdiction to order the condemnation, and an injunction will not lie. Mobile &c. R. Co. v. Alabama Midland R. Co. 87 Ala. 520; 6 So. 407; 39 Am. & Eng. R. Cas. 117.

of the property of one railroad corporation by another would not destroy or greatly injure the franchise of such other company, or render it difficult to prosecute the object thereof, a general grant of authority is sufficient to justify the condemnation.[309] Thus it has been held that a small portion of the buttress of a bridge belonging to one railroad company and not necessary to the support of the bridge or the exercise of the company's franchises may be taken by another railroad company.[310] So where land owned by a railroad company

[309] Baltimore &c. R. Co. v. Pittsburg &c. R. Co. 17 W. Va. 812; Enfield Toll Bridge Co. v. Hartford &c. R. Co. 17 Conn. 40; 42 Am. Dec. 716, and note; Little Miami R. Co. v. Dayton, 23 Ohio St. 510; Tuckahoe Canal Co. v. Tuckahoe R. Co. 11 Leigh (Va.), 42; 36 Am. Dec. 374; State v. Superior Court of Clarke County (Wash.), 88 Pac. 332; Atchison &c. R. Co. v. Kansas City &c. R. Co. 67 Kan. 569; 70 Pac. 939; Seattle &c. R. Co. v. Billingham Bay &c. R. Co. 29 Wash. 491; 69 Pac. 1107.

[310] Baltimore &c. R. Co. v. Pittsburg &c. R. Co. 17 W. Va. 812. In this case, Johnson, J., speaking for the court, said: "There is nothing so sacred in the title of a railroad company to property that it can not be taken under the exercise of the right of eminent domain. I understand the law to be that property belonging to a railroad company and not in actual use, necessary to the proper exercise of the franchise thereof, may be taken for the purposes of another railroad under the general railroad law of the state. An express legislative enactment is generally required in order to take such property in use by a railroad company, except where the proposed appropriation would not destroy or greatly injure the franchise of the company, or render it difficult to prosecute the object thereof. If such consequence would not follow, a general grant is sufficient. Enfield Toll Bridge Co. v. Hartford &c. R. Co. 17 Conn. 40; 42 Am. Dec. 716, and note; Little Miami R. Co. v. Dayton, 23 Ohio St. 510; Tuckahoe Canal Co. v. Tuckahoe R. Co. 11 Leigh (Va.), 42; 36 Am. Dec. 374. In Grand Rapids &c. R. Co. v. Grand Rapids &c. R. Co. 35 Mich. 265; 24 Am. R. 545, and note, it was held that one railroad has no right to appropriate, without compensation, the franchise or property of another for the construction of its road. The fact that property has been taken for a particular public use does not make it public property for all purposes; and the property rights of a railroad company in its right of way are protected by the same restrictions against appropriation by any other railroad company for railroad purposes or other public use, as is afforded by the constitution and laws in the case of the private property of an individual. Baltimore & Havre de Grace Transportation Co. v. Union R. Co. 35 Md. 224; 6 Am. R. 397. It is insisted by counsel for plaintiff in error that where a corporation is authorized by its charter or a general law to take by condemnation the land required for its purposes,

was not used by it and by reason of its small area and shape it was wholly unsuitable for yard purposes, for which purposes the road claimed it to be valuable, it was held that another railroad was entitled to condemn a right of way across the land, where it did not appear that other and equally practicable rights were open to the condemning company.[311] The legislature may, in cases where it is deemed necessary, provide for the condemnation by one railroad corporation of the right to use a portion of the right of way of the railroad of another corporation in common with the owner thereof.[312] And when such provision is made, the right of railway companies to use the "right of way" of another company, includes the right to use the

it can not, under such general authority, condemn property already appropriated to public use by another corporation; that to authorize it to do so, the power must be granted to it by express terms or by necessary implication. For this position they rely upon Boston & M. R. Co. v. Lowell & L. R. Co. 124 Mass. 368; Housatonic R. Co. v. Lee and Hudson River R. Co. 118 N. Y. 391; Evergreen Cemetery Association v. New Haven, 43 Conn. 234; 21 Am. R. 643; Boston &c. R. Co. Matter of, 53 N. Y. 574; Buffalo, Matter of, 68 N. Y. 167. . . . It will be observed, that in these last cases the interference with the franchise was great, and much injury would have been sustained by the companies, if their property had been taken. But the taking of a portion of a buttress might inflict no injury at all upon the Baltimore and Ohio Railroad Co. The courts will take care to see that one railroad company is not materially injured for the benefit of another, and where no such material injury will result, the onward march of improvement demands that a great work of internal improvement shall not be impeded by imaginary injury to another corporation." The section of the Washington code authorizing the appropriation by a railroad of a longitudinal section of an existing right of way through canyons, passes and defiles, is held not to exclude the appropriations of an existing right of way in all other cases. It follows that one railroad may, when necessary, condemn a right of way through the right of way of another railroad not in use for railroad purposes, and not necessary for the corporation franchise. Seattle &c. R. Co. v. Billingham Bay &c. R. Co. 29 Wash. 491; 69 Pac. 1107.

[311] Memphis &c. R. Co. v. Union R. Co. (Tenn.) 95 S. W. 1019.

[312] Kinsman St. R. Co. v. Broadway &c. R. Co. 36 Ohio St. 239; Cambridge R. Co. v. Charles River St. R. Co. 139 Mass. 454; 1 N. E. 925; Metropolitan R. Co. v. Highland St. R. Co. 118 Mass. 290; Providence &c. R. Co. v. Norwich &c. R. Co. 138 Mass. 277. See Boston Water Power Co. v. Boston &c. R. Co. 23 Pick. (Mass.) 360; Springfield v. Connecticut &c. R. Co. 4 Cush. (Mass.) 63; Bridgeport v. New York &c. R. Co. 36 Conn. 255; 4 Am. R. 63.

tracks, switches, turn-outs, turn-tables, and other terminal facilities constructed on the right of way.[313]

§ 975. **Crossing another road.**—Although, as elsewhere shown, the crossing by a street railway of the tracks of a commercial or steam railroad company at a street intersection is not a taking or an additional burden,[314] the rule is somewhat different where one commercial railroad crosses another.[315] But, as we have seen, the right of one railroad to cross the tracks of another may be implied from a general grant of authority to locate and build the road between two points.[316] And it has been held that a reasonable and a practic-

[313] Joy v. St. Louis, 138 U. S. 1; 11 Sup. Ct. 243, affirming 29 Fed. 546. Laying tracks upon the location of a railroad, or using its rails for the running of trains, under authority of law has been held to be a taking within the meaning of the constitution for which compensation must be made. Worcester &c. R. Co. v. Railroad Comrs. 118 Mass. 561; Jersey City &c. R. Co. v. Jersey City Horse R. Co. 20 N. J. Eq. 61. See Lexington &c. R. Co. v. Fitchburg R. Co. 14 Gray (Mass.), 266; Sixth Avenue R. Co. v. Kerr, 45 Barb. (N. Y.) 138. See, also, as to whether this is an additional burden for which the landowner is entitled to compensation, Miller v. Green Bay &c. R. Co. 59 Minn. 169; 60 N. W. 1006; 11 Lewis Am. R. & Corp. 246, and note. A municipality which has permitted a railroad company to construct and maintain a railroad track, depots, and appurtenances, within the municipal district, and extended to it other privileges in consideration of an agreement on the part of the company that it should permit any other company whose road terminated within the municipality to use the track and appurtenances and to enjoy the rights and privileges secured by the agreement, upon payment of a pro rata share of the cost of construction, may enforce the contract in such a manner as to give to the public the greatest convenience and enable it to reap the greatest results, and a company can not be excluded from participation in the use and enjoyment of the track on payment of its pro rata share of construction, where it appears its admission would not overburden the line, but it is in fact using it and paying tolls therefor. Louisville &c. R. Co. v. Mississippi &c. R. Co. 92 Tenn. 681.

[314] Post, § 977, note 6, p. 1407.

[315] Post, § 1126.

[316] Ante, § 922. See, also, Union Pac. R. Co. v. Burlington &c. R. Co. 1 McCrary (U. S.) 452; East St. Louis Connecting R. Co. v. East St. Louis Union R. Co. 108 Ill. 265; Lehigh Valley R. Co. v. Dover &c. R. Co. 43 N. J. L. 528; Boston &c. R. Co. Matter of, 79 N. Y. 64; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150; Minneapolis &c. R. Co. v. Chicago &c. R. Co. 116 Iowa, 681; 88 N. W. 1082; Wellsburg &c. R. Co. v. Pan Handle Traction Co. 56 W. Va. 18; 48 S. E. 746.

able crossing of one railroad track by another will be allowed, if it be in the interest of the public, though there is no statute specially allowing the condemnation of one railroad by another.[317] The test in such cases is said to be necessity and the public interest.[318] Thus, where a proposed spur track was intended for the transfer of freight in carloads to and from manufacturing establishments in a town and its use was open to the public, it was held that the railroad company building the track had the right to condemn necessary crossings over spur tracks belonging to other companies.[319] This entire subject, however, including the question as to what property may be taken,[320] the location of the crossing,[321] the number of crossings that may be made,[322] the measure of damages,[323] and the right to cross at grade,[324] is fully treated elsewhere.[325] But to what is there said, we may add that it is within the police power of the state to abolish dangerous grade crossings, and it has been held that an act requiring the railroad company to bear the entire expense of the change does not amount to a taking of property without due process of law, where the mode provided for ascertaining the result is suitable to the nature of the case.[326]

§ 975a. Condemnation of right of way for other purposes—Highways.—The authority of a municipality to extend a public street or highway across a railroad right of way, is implied in the general grant of power to lay out and establish streets and highways in cases where such action will not interfere with the proper operation of the railroad. If, however, the use of the railroad property for railway purposes will be essentially impaired or destroyed by the establishment of the highway, then express legislative authority to so extend the street is necessary.[327] And the case against this en-

[317] Houston &c. R. Co. v. Kansas City &c. R. Co. 109 La. 581; 33 So. 609.

[318] Houston &c. R. Co. v. Kansas City &c. R. Co. 109 La. 581; 33 So. 609.

[319] Kansas City &c. R. Co. v. Louisiana Western R. Co. 116 La. 178; 40 So. 627.

[320] Post, § 1121.

[321] Post, § 1120.

[322] Post, § 1124.

[323] Post, § 1127.

[324] Post, §§ 1122, 1123.

[325] Post, Chapter XLIV.

[326] New York &c. R. Co. v. Bristol, 151 U. S. 556; 14 Sup. Ct. 437; 9 Lewis Am. R. & Corp. 593; New York &c. R. Co.'s Appeal, 58 Conn. 532; 20 Atl. 17.

[327] Minneapolis &c. R. Co. v. Hartland, 85 Minn. 76; 88 N. W. 423. See, also, ante, § 966, and numerous cases there cited. Under a

forced appropriation would seem particularly strong where the railroad property is used for station grounds and yards.[328] It has been held that a city condemning a railroad right of way for the extension of a public street across it, acquires only a joint right with the railroad company for the use of the land condemned. Its interest is usually merely an easement, and it has been held that it can not deprive the company of the right to lay as many additional tracks on the right of way as the increase of business may require, provided it keeps that portion occupied by the street free and open to the use of the public as a street.[329] The decision of the city as to the necessity for the extension of the street will not be disturbed unless an extreme case of oppression or outrage is shown.[330] But the courts may intervene in a proper case.[331]

§ 975b. Condemnation of right of way for other purposes—Reservoir sites—Drainage.—Under the principle that property devoted to one public use can not be appropriated to another public use through condemnation proceedings where the later appropriation would materially impair or defeat the first use unless directly authorized by statute or justified by some superior public exigency, it has been held that the fact that a certain site over which a railroad company has a right of way is the only one at which a water company can construct a reservoir for the prosecution of its business—no public necessity for the reservoir being shown—does not authorize the condemnation of such right of way for the reservoir.[332] But the con-

Massachusetts statute providing for the laying out of roads on petition of the county commissioners, a road can be laid out over land of the railroad company outside of the line of its road, and within a location acquired for railroad purposes under the statutes of that state. Eldredge v. Norfolk Co. 185 Mass. 186; 70 N. E. 36.

[328] Chicago &c. R. Co. v. Williams, 148 Fed. 442; Richmond &c. R. Co. v. Johnston, 103 Va. 456; 49 S. E. 496; Paterson &c. R. Co. v. Paterson, 72 N. J. L. 112; 60 Atl. 47.

[329] Chicago &c. R. Co. v. Hogan, 105 Ill. App. 136.

[330] Chicago &c. R. Co. v. Morrison, 195 Ill. 271; 63 N. E. 96; Chicago &c. R. Co. v. Pontiac, 169 Ill. 155; 48 N. E. 485; Chicago &c. R. Co. v. Cicero, 154 Ill. 656; 39 N. E. 574.

[331] Chicago &c. R. Co. v. Williams, 148 Fed. 442.

[332] Denver Power &c. Co. v. Denver &c. R. Co. 30 Colo. 204; 69 Pac. 568.

demnation of a strip of railroad land for drainage has been upheld in Illinois.[333]

§ 975c. Condemnation of right of way for other purposes—Telegraph and telephone lines.—A duly incorporated[334] telegraph[335] or telephone company[336] may acquire a right of way for its line over and along the right of way of a railroad company when such use will not materially interfere with the use for which the land was originally condemned by the railroad company. Condemnation for these purposes can not be defeated unless it is made to appear that the use of the land sought to be condemned is necessary to the operation of the railroad or of other lines of telegraph already erected thereon.[337] Nor is it a valid objection that the telegraph or telephone company can obtain a right of way over other adjacent or nearby property or in other ways.[338] It has been held that it is not essential for the telegraph company to affirmatively show in proceedings for condemnation either the necessity for the condemnation of the right of way or the particular portions intended for use.[339] Under these proceedings it has been held the telegraph or telephone com-

[333] Pittsburg &c. Ry. Co. v. Sanitary Dist. 218 Ill. 286; 75 N. E. 892; 2 L. R. A. (N. S.) 226.

[334] Ft. Worth &c. R. Co. v. Southwestern Tel. &c. Co. 96 Tex. 160; 71 S. W. 270; 60 L. R. A. 145; Gulf &c. R. Co. v. Southwestern Tel. &c. Co. 25 Tex. Civ. App. 488; 61 S. W. 406. The right of a de facto telegraph company to exercise the power of eminent domain over a railroad right of way is not open to question by the railroad company on the ground that it is only a pretended, and not a real corporation. That question can only be raised by the state. Postal Tel. Cable Co. v. Oregon Short Line R. Co. 114 Fed. 787.

[335] Postal Tel. Cable Co. v. Chicago &c. R. Co. 30 Ind. App. 654; 66 N. E. 919; Postal Tel. Cable Co. v. Oregon Short Line R. Co. 23 Utah 474; 65 Pac. 735; 90 Am. St. 705; Postal Tel. Cable Co. v. Oregon Short Line R. Co. 114 Fed. 787. But see Western Union Tel. Co. v. Pennsylvania R. Co. 123 Fed. 33.

[336] Southwestern Tel. Co. v. Kansas City &c. R. Co. 108 La. 892; 33 So. 910; South Carolina &c. R. Co. v. American Tel. &c. Co. 65 S. C. 459; 34 S. E. 970.

[337] Union Pac. R. Co. v. Colorado Postal Cable Co. 30 Colo. 133; 69 Pac. 564.

[338] Ft. Worth &c. R. Co. v. Savannah Tel. &c. R. Co. 96 Tex. 160; 71 S. W. 270; 60 L. R. A. 145; Union Pac. R. Co. v. Colorado Postal Tel. Cable Co. 30 Colo. 133; 69 Pac. 564.

[339] Savannah &c. R. Co. v. Postal Tel. Cable Co. 112 Ga. 941; 38 N. E. 353.

pany acquires no more than an easement in the railroad right of way occupied by its poles with the right to enter thereon for the purpose of constructing and repairing its line.[340]

§ 976. What constitutes a taking—Generally.—As we have seen, the constitutions of the various states require that compensation must be made for all private property taken for public use under the power of eminent domain,[341] but there is great conflict in the authorities with regard to what constitutes a taking within the meaning of these constitutional provisions. Since property in land is not land itself, but the right to certain present or future privileges or advantages growing out of the land, so that a number of persons may have different estates in the same parcel of land, it would seem to follow, as a logical consequence that, as a general rule, whatever deprives a person of his rights in land and the use and enjoyment thereof constitutes a taking for which compensation should be made.[342] As was said by Chief Justice Shaw, of Massachusetts, in speaking of this subject: "The word 'property' in the tenth article of the bill of rights, which provides that 'whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation

[340] Atlantic Coast Line R. Co. v. Postal Cable Co. 120 Ga. 268; 48 S. E. 15.

[341] See ante, § 951.

[342] Chicago &c. R. Co. v. Englewood Connecting R. Co. 115 Ill. 375, 385; 4 N. E. 246; 56 Am. R. 173; Denver v. Bayer 7 Colo. 113; 2 Pac. 6; Pumpelly v. Green Bay &c. Co. 13 Wall. (U. S.) 166; Caro v. Metropolitan El. R. Co. 46 N. Y. Super. Ct. 138; Baltimore Belt R. Co. v. Sattler, 100 Md. 306; 59 Atl. 654. See a full discussion of this subject with copious citations of authorities in Lewis Em. Dom. §§ 54, 55. See, also, Randolph Em. Dom. § 134, et seq. Elliott Roads and Streets, 155; Taylor Corp. §§ 173, 473; Smith v. Rochester, 92 N. Y. 463; 44 Am. R. 393; Cumberland Tel. Co. v. United Electric R. Co. 93 Tenn. 492; 29 S. W. 104; 27 L. R. A. 236; 10 Lewis Am. R. & Corp. 549; Abendroth v. Manhattan R. Co. 122 N. Y. 1; 25 N. E. 496; 11 L. R. A. 634, and note; 19 Am. St. 461; East Penna. Co. v. Schollenberger, 54 Pa. St. 144; Walker v. Old Colony &c. R. Co. 103 Mass. 10; 4 Am. R. 509; Rumsey v. New York &c. R. Co. 133 N. Y. 79; 30 N. E. 654; 15 L. R. A. 618; 28 Am. St. 600; 6 Lewis Am. R. and Corp. R. 67, and note; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 329; 7 Atl. 432; 56 Am. R. 1, and note; 5 L. R. A. 247, and note; note to Vanderlip v. Grand Rapids, 73 Mich. 522; 41 N. W. 677; 16 Am. St. 597, 610.

therefor,' should have such liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such."[343] Accordingly, it has been held that where a railroad, by cutting through a ridge near the plaintiff's farm, destroys the natural barrier by which in times of freshet, the waters of an adjacent river were prevented from overflowing the plaintiff's land, and such waters, flowing through the cut, flood the land, bringing down and lodging upon it quantities of earth and stones and rendering it unfit for cultivation, the railroad is liable in damages, although no part of the plaintiff's land was actually taken.[344] This is upon the principle

[343] Old Colony &c. R. Co. v. Plymouth Co. 14 Gray (Mass.), 155, 161; Sedgwick Const. Law (2d ed.), 462; Lewis Em. Dom. (2d ed.) § 57. See, also, Sheldon v. Boston &c. R. Co. 172 Mass. 180; 51 N. E. 1078.

[344] Eaton v. Boston &c. R. Co. 51 N. H. 504; 12 Am. R. 147. In this, a leading case upon the subject, the court said: "The vital issue then is, whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms. To constitute 'a taking of property' it seems to have sometimes been held necessary that there should be 'an exclusive appropriation,' 'a total assumption of possession,' 'a complete ouster,' an absolute or total conversion of the entire property, 'a taking the property altogether.' These views seem to us to be founded upon a misconception of the term 'property,' as used in the various state constitutions. In a strict legal sense, land is not 'property,' but the subject of property. The term property, although in common parlance frequently applied to a tract of land or a chattel, in its legal signification, 'means only the right of the owner in relation to it.' 'It denotes a right over a determinate thing.' 'Property is the right of any person to possess, use, enjoy and dispose of a thing.' Selden, J., in Wynehamer v. People, 13 N. Y. 378, p. 433; 1 Blackstone Com. 138; 2 Austin Jurisprudence, 3d ed. 817, 818. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' pro tanto, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes the right and power of excluding others from using the land. See 2 Austin on Jurisprudence, 3d ed. 836. Wells, J., in Walker v. Old Colony &c. R. Co. 103 Mass. 10, p. 14; 4 Am. R. 509. From the very nature of these rights of user and of exclusion, it is evident that they can not be materially abridged without, ipso facto, taking the owner's property.' If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference an-

that property is taken when those proprietary rights are taken of which property consists,[345] and that the plaintiff was damaged by the infringement of his right to the protection of the neighboring ridge of land, as clearly as he would have been had his right to occupy his farm been interfered with.[346] According to this rule, which

nuls this right takes 'property'—although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to qualified ownership. Restricting A's unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title of fee-simple to one acre, leaving him the unrestricted right of using the remaining nintey-nine acres. Nobody doubts that the latter transaction would constitute a taking of 'property.' Why not the former? . . . A physical interference with the land, which substantially abridges this right, takes the owner's 'property' to just so great an extent as he is thereby deprived of his right. 'To deprive one of the use of his land is depriving him of his land,' for, as Lord Coke says: 'What is the land but the profits thereof?' Sutherland, J., in People v. Kerr, 37 Barb. (N. Y.) 357, 399; Co. Litt. 4b. The private injury is thereby as completely effected as if the land itself were 'physically taken away.' The principle must be the same, whether the owner is wholly deprived of the use of his land, or only partially deprived of it, although the amount or value of the property taken in the two instances may widely differ. If the railroad corporation take a strip four rods wide out of a farm to build their track upon, they can not escape paying for the strip by the plea that they have not taken the whole farm. So a partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. . . . If the public can take part of a man's property without compensation, they can, by successive takings of the different parts, soon acquire the whole. Or, if it is held that the complete divestiture of the last scintilla of interest is a taking of the whole for which compensation must be made, it will be easy to leave the owner an interest in the land of infinitesimal value." See, also, Brown v. Cayuga &c. R. Co. 12 N. Y. 486; Robinson v. New York &c. R. Co. 27 Barb. (N. Y.) 512; Gulf &c. R. Co. v. Jones, 63 Tex. 524; Attorney-General v. Tomline, 12 L. R. Ch. Div. 214, affirmed 14 L. R. Ch. Div. 58. But compare Transportation Co. v. Chicago, 99 U. S. 635; Meyer v. Richmond, 172 U. S. 82; 19 Sup. Ct. 106, 111, 112.

[345] Arimond v. Green Bay &c. Co. 31 Wis. 316, 335.

[346] Thompson v. The Androscoggin River Improvement Co. 54 N. H. 545, quoted at length in Lewis Em. Dom. (2d ed.) § 59.

we regard as the correct one, although some of the cases to which we have referred carry it very far in the application to particular facts, an actual physical seizure or manual possession of the land is not absolutely essential to constitute a taking for which compensation must be made.[347] On the other hand, however, it is held in many of the older authorities that to entitle the owner to protection under the clause of the constitution requiring compensation to be made for all property taken for public use, the property must be actually taken, in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damages, no matter how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain.[348] Thus it was held that a land-owner, along the border of whose land a railway is built by which he is compelled to maintain the entire line of a fence of which he formerly maintained but half is not entitled to compensation, since no part of his land had been taken.[349] Also

[347] Arnold v. Hudson River R. Co. 55 N. Y. 661; Story v. New York El. R. Co. 90 N. Y. 122; 43 Am. R. 146; Rigney v. Chicago, 102 Ill. 64; Hooker v. New Haven &c. R. Co. 14 Conn. 146; 36 Am. Dec. 477; Forster v. Scott, 136 N. Y. 577; 32 N. E. 976, 977; 18 L. R. A. 543, and note; King v. United States, 59 Fed. 9. See, also, Cincinnati &c. R. Co. v. Miller (Ind. App.), 72 N. E. 827; 73 N. E. 1001; Baltimore Belt R. Co. v. Sattler, 100 Md. 306; 59 Atl. 654; Dairy v. Iowa Cent. R. Co. 113 Ia. 716; 84 N. W. 688.

[348] Cushman v. Smith, 34 Me. 247; Bellinger v. New York Central R. Co. 23 N. Y. 42; Annold v. Hudson River R. Co. 49 Barb. (N. Y.) 108; O'Connor v. Pittsburgh, 18 Pa. St. 187; West Branch &c. Canal Co. v. Mulliner, 68 Pa. St. 357; Kennett's Petition, 24 N. H. 139; Northern Transportation Co. v. Chicago, 99 U. S. 635; Estabrooks v. Peterborough &c. R. Co. 12 Cush. (Mass.) 224; Curtis v. Eastern R. Co. 14 Allen (Mass.), 55; 98 Mass. 428; Boston &c. R. Co. v. Old Colony R. Co. 12 Cush. (Mass.) 605; Hatch v. Vermont Central R. Co. 28 Vt. 142; Norris v. Vermont Central R. Co. 28 Vt. 99; Boothby v. Androscoggin &c. R. Co. 51 Me. 318; Hotsman v. Covington &c. R. Co. 18 B. Mon. (Ky.) 218; Garrett v. Lake Roland &c. R. Co. 79 Md. 277; 29 Atl. 830; 24 L. R. A. 396; 10 Lewis' Am. R. & Corp. 39; Baltimore &c. R. Co. v. Magruder, 34 Md. 79; 6 Am. R. 310; Clark v. Hannibal &c. R. Co. 36 Mo. 202; Gould v. Hudson River R. Co. 6 N. Y. 522; Clarke v. Birmingham &c. Bridge Co. 41 Pa. St. 147; Commissioners &c. v. Withers, 29 Miss. 21; 64 Am. Dec. 126; Selden v. Jacksonville, 28 Fla. 558; 10 So. 457; 14 L. R. A. 370, and note; 29 Am. St. 278.

[349] Kennett's petition, 24 N. H. 139. In the case of Eaton v. Boston &c. R. Co. 51 N. H. 504; 12 Am. R. 147, Smith, J., points out

that a railroad company whose charter only required it to make compensation for lands which were taken for the corporate purposes, was not liable in damages to the owner of a house in front of which it had raised a high embankment, so that the owner could not pass and repass to and from the same, it being shown that the company had built its road in a prudent and reasonable manner. The court held that simply affecting land injuriously in the construction of a public work was not a taking of it for public use within the meaning of the constitution.[350] There is another class of cases in which compensation has been sought for the taking or destruction of that which the plaintiff never owned, or in which he had merely the same right possessed by the public in general. In such cases the right of recovery is uniformly denied.[351] Thus where the plaintiff watered his cattle on the farm of another, across the highway from his own farm, but had, however, no right to the water, or of access thereto, that was not common to the public, it was held that, in estimating the damage arising from the taking of a strip of plaintiff's land for the construction of a railroad, interference with the plaintiff's access to the watering place was not an element of damages.[352] So, where the state authorized a railroad company to build a bridge across a navigable river belonging to the state, thereby obstructing navigation and rendering less valuable the lands of a riparian proprietor, no part of whose land, however, was taken or flooded, it was held that such proprietor could not maintain an action for damages. Since he held no title to the right of navigating the river, other than the right common to all the public, he was only "deprived of use

the fact that all that was really decided in this case was that the statute under which the petition was prosecuted made no provision for the payment of such damages. "The construction and not the constitutionality is the point for decision."

[350] Richardson v. Vermont Central R. Co. 25 Vt. 465; 60 Am. Dec. 283; Hatch v. Vermont Central R. Co. 25 Vt. 49; 28 Vt. 142.

[351] Davidson v. Boston &c. R. Co. 3 Cush. (Mass.) 91, 106; Monongahela Bridge Co. v. Kirk, 46 Pa. St. 112; 84 Am. Dec. 527; Clarke v. Birmingham &c. Bridge Co. 41 Pa. St. 147; Shrunk v. Pres. &c. Schuylkill Nav. Co. 14 Serg. & R. (Pa.) 71; New York &c. R. Co. v. Young, 33 Pa. St. 175; Gould v. Hudson River &c. R. Co. 6 N. Y. 522; 12 Barb. (N. Y.) 616; Lee v. Pembroke Iron Co. 57 Me. 481; Canal Appraisers &c. v. People, 17 Wend. (N. Y.) 571.

[352] Gorgas v. Philadelphia &c. R. Co. 144 Pa. St. 1; 22 Atl. 715.

of what was never his own."[353] Under this class of cases may be included those in which the act complained of constituted a public nuisance, the plaintiff's damage differing in degree only, not in kind, from that sustained by the rest of the community. In such cases it is held that the proper remedy is a public prosecution and not a private action for damages.[354]

§ 977. What constitutes a taking—Illustrative cases.—A mere preliminary survey, when properly conducted, does not amount to a taking.[355] But where a railroad company diverted a stream into a new channel for a short distance, and the stream escaped from the new channel by percolation the company was held liable;[356] so, also, where the company took from a stream for the use of its locomotives, so much water as to perceptibly reduce the volume of water therein.[357] Permitting the waste water from a tank to run

[353] Gould v. Hudson River R. Co. 6 N. Y. 522; 12 Barb. (N. Y.) 616. In Canal Appraisers &c. v. People, 17 Wend. (N. Y.) 571, the majority disallowed the relator's claim to compensation for the destruction of the waterfall in the Mohawk river, upon the ground that the bed of that river belonged to the state, and an adjoining owner acquired no rights therein. See, also, Scranton v. Wheeler, 179 U. S. 141; 21 Am. St. 48; Gibson v. United States, 166 U. S. 269; 17 Sup. Ct. 578. But compare Monongahela &c. Co. v. United States, 148 U. S. 312; 13 Sup. Ct. 622. And see Richards v. New York &c. R. Co. 77 Conn. 501; 60 Atl. 295; 69 L. R. A. 929.

[354] Blood v. Nashua &c. R. Co. 2 Gray (Mass.), 137; 61 Am. Dec. 444; Boston &c. R. Co. v. Old Colony R. Co. 12 Cush. (Mass.) 605; Hatch v. Vermont Central &c. R. Co. 28 Vt. 142; Illinois Cent. R. Co. v. Trustees, 212 Ill. 406; 72 N. E. 39; Gulf &c. R. Co. v. Fuller, 63 Tex. 467.

[355] Ante, § 925. Nor does the commencement of proceedings to condemn. Duluth &c. R. Co. v. Northern Pac. R. Co. 51 Minn. 218; 53 N. W. 366; Morris v. Wisconsin &c. R. Co. 82 Wis. 541; 52 N. W. 758. But the act of location has been held to be also an act of appropriation. Hagner v. Pennsylvania &c. R. Co. 154 Pa. St. 475; 25 Atl. 1082. But see United States v. Oregon R. &c. Co. 16 Fed. 524. A temporary unintentional trespass is held not to constitute a taking in Morris v. Wisconsin Midland R. Co. 82 Wis. 541; 52 N. W. 758.

[356] Cott v. Lewiston R. Co. 36 N. Y. 214.

[357] Garwood v. New York &c. R. Co. 83 N. Y. 400; 38 Am. R. 452; Sandwich v. Great Northern R. Co. L. R. 10 Ch. Div. 707; Lord v. Meadville &c. Co. 135 Pa. St. 122; 19 Atl. 1007; 8 L. R. A. 202; 20 Am. St. 864; 2 Lewis Am. R. & Corp. 744, and note; Pennsylvania R. Co. v. Miller, 112 Pa. St. 34; 3 Atl. 780. But it has been held that a railroad company, being a riparian proprietor, may take a rea-

upon private property, where it caused damage by freezing and otherwise, has been held such an infringement of the property-owner's rights on the part of a railroad company as to render it liable in damages.[358] Where the construction of a bridge and the accompanying embankments by a railroad company changes the course,[359] or increases the current[360] of the stream crossed to the damage of private property, it has been held that compensation must be made.[361] And the fact that no part of the plaintiff's land was taken in the construction of the railroad does not affect his right to recover damages for an interference with the stream whereby rights are injuriously affected.[362] Where a railroad is built along the shore of public navigable waters, so as to shut off the riparian proprietor from access thereto, he is generally held entitled to compensation for the injury to his riparian rights, although no part of his land is taken,[363] and even though that part of his land adjoining high water

sonable amount of water for the purpose of supplying its locomotives or the like. Elliott v. Fitchburg R. Co. 10 Cush. (Mass.) 191; 57 Am. Dec. 85; Pennsylvania R. Co. v. Miller, 112 Pa. St. 34; 3 Atl. 780; Sandwich v. Great Northern R. Co. L. R. 10 Ch. Div. 707. See, also, Fay v. Salem &c. Co. 111 Mass. 27.

[358] Chicago &c. R. Co. v. Hoag, 90 Ill. 339.

[359] Union Pac. R. Co. v. Dyche, 31 Kan. 120; 1 Pac. 243; Robinson v. New York &c. R. Co. 27 Barb. (N. Y.) 512; Estabrooks v. Peterborough &c. R. Co. 12 Cush. (Mass.) 224; Dickson v. Chicago &c. R. Co. 71 Mo. 575; Chicago &c. R. Co. v. Moffitt, 75 Ill. 524. See, also, Jacksonville v. Lambert, 62 Ill. 519.

[360] Evansville &c. R. Co. v. Dick, 9 Ind. 433. But it has been held that the construction of a wall or an embankment along one side of a stream will not render the corporation liable for damage caused by forcing the water in times of flood to flow against and over property on the other side of the stream. Moyer v. New York Central &c. R. Co. 88 N. Y. 351; Lawrence v. Great Northern R. Co. 16 Q. B. 643. See, also, Salliotte v. King Bridge Co. 122 Fed. 378; 65 L. R. A. 620, and note. But see Cairo &c. R. Co. v. Brevoort, 62 Fed. 129; 25 L. R. A. 527, and note, and authorities there cited. Post, p. 1405, note.

[361] Robinson v. New York &c. R. Co. 27 Barb. (N. Y.) 512. See, also, Toledo &c. R. Co. v. Morrison, 71 Ill. 616. But see Henry v. Vermont Central R. Co. 30 Vt. 638; 73 Am. Dec. 329; Norris v. Vermont Central R. Co. 28 Vt. 99.

[362] Eastbrooks v. Peterborough &c. R. Co. 12 Cush. (Mass.) 224; Evansville &c. R. Co. v. Dick, 9 Ind. 433; Delaware &c. Canal Co. v. Lee, 22 N. J. L. 243.

[363] Diedrich v. Northwestern &c. R. Co. 42 Wis. 248; 24 Am. R. 399; Delaplaine v. Chicago &c. R. Co. 42 Wis. 214; 24 Am. R. 386; Yates v. Milwaukee, 10 Wall. (U. S.) 497; Farist Steel Co. v. Bridgeport, 60

mark has already been appropriated as a public highway.[364] Where a company builds tide water mills and other works below high water mark under an authority from the legislature, it has been held that they constitute property which can not be taken or damaged by a railroad company without compensation.[365] It has been held that where the right to erect a bridge has been purchased or condemned, no further damage can be recovered for injuries resulting from constructing the bridge in a reasonable and proper manner with a view both to the safety of passengers and the protection of the property holder.[366] But damages may be recovered for injuries resulting from

Conn. 278; 22 Atl. 544; 13 L. R. A. 590; Carli v. Stillwater Street R. &c. Co. 28 Minn. 373; 10 N. W. 205; 41 Am. R. 290; Union Depot &c. Co. v. Brunswick, 31 Minn. 297; 17 N. W. 626; 47 Am. R. 789; Brisbine v. St. Paul &c. R. Co. 23 Minn. 114; Baltimore &c. R. Co. v. Chase, 43 Md. 23; State v. Illinois Central R. Co. 33 Fed. 730; Renwick v. Dubuque &c. R. Co. 49 Iowa, 664; 102 U. S. 180; Langdon v. Mayor &c. of New York, 93 N. Y. 129; Rumsey v. New York &c. R. Co. 133 N. Y. 79; 30 N. E. 654; 15 L. R. A. 618; 28 Am. St. 600; 6 Lewis Am. R. & Corp. 67, and note, where the cases on both sides of the question are reviewed; Myers v. St. Louis, 82 Mo. 367; Wilson v. Welch, 12 Ore. 353; 7 Pac. 341; Lyon v. Fishmonger's Co. L. R. 1 App. Cas. 662. See, also, Drury v. Midland R. Co. 127 Mass. 571. Contra Stevens v. Paterson &c. R. Co. 34 N. J. L. 532; 3 Am. R. 269; Gould v. Hudson River R. Co. 6 N. Y. 522; State, ex rel. Columbia &c. R. Co. v. Prosser, 4 Wash. 816; 30 Pac. 734; Tomlin v. Dubuque &c. R. Co. 32 Iowa, 106; 7 Am. R. 176, and note; Bowlby v. Shively, 22 Ore. 410; 30 Pac. 154; Thayer v. New Bedford &c. R. Co. 125 Mass. 253; Henry v. Newburyport, 149 Mass. 582; 22 N. E. 75; 5 L. R. A. 179, and note; McKeen v. Delaware Canal Co. 49 Pa. St. 424. See Lewis Em. Dom. (2d ed.) §§ 77–84, where this subject is fully discussed and an opinion in accord with the text is expressed. But see Scranton v. Wheeler, 179 U. S. 141; 21 Sup. Ct. 48; Gibbon v. United States, 166 U. S. 269; 17 Sup. Ct. 578.

[364] Brisbine v. St. Paul &c. R. Co. 23 Minn. 114; Chesapeake &c. Canal Co. v. Union Bank, 5 Cranch (U. S.), C. C. 509.

[365] Boston Water Power Co. v. Boston &c. R. Co. 16 Pick. (Mass.) 512; Lee v. Pembroke Iron Co. 57 Me. 481; 2 Am. R. 59. But where the riparian proprietor had built his lot out into the lake past high water mark, it was held that he could not recover for the land taken by a railroad which located its line across the made land, though he might for an injury to his riparian rights. Diedrich v. Northwestern U. Ry. Co. 42 Wis. 248; 24 Am. R. 399.

[366] Evansville &c. R. Co. v. Dick, 9 Ind. 433; Norris v. Vermont Central R. Co. 28 Vt. 99; Terre Haute &c. R. Co. v. McKinley, 33 Ind. 274.

negligent or improper construction, whether there has been an assessment of damages or not.[367]

§ 977a. What constitutes a taking—Other illustrative cases.—The construction of works in a stream by which the waters are set back and made to overflow the lands of a proprietor above, constitutes a taking for which he must be compensated,[368] as does also, in many jurisdictions, the construction of an embankment or other obstruction by which surface water is prevented from flowing over the railroad company's right of way, and is made to accumulate upon private property,[369] or is collected into a channel and discharged upon

[367] Fowle v. New Hampshire &c. R. Co. 112 Mass. 334; 17 Am. R. 106; International &c. R. Co. v. Klaus, 64 Tex. 293; Brink v. Kansas City &c. R. Co. 17 Mo. App. 177; Spencer v. Hartford &c. R. Co. 10 R. I. 14; Terre Haute &c. R. Co. v. McKinley, 33 Ind. 274; Miller v. Keokuk &c. R. Co. 63 Ia. 680; 16 N. W. 567.

[368] Estabrooks v. Peterborough &c. R. Co. 12 Cush. (Mass.) 224; Omaha &c. R. Co. v. Standen, 22 Neb. 343; 35 N. W. 183; Mississippi Central R. Co. v. Mason, 51 Miss. 234; Delaware &c. Canal Co. v. Lee, 22 N. J. L. 243; Grand Rapids &c. Co. v. Jarvis, 30 Mich. 308; Barclay R. &c. Co. v. Ingham, 36 Pa. St. 194; Toledo &c. R. Co. v. Morrison, 71 Ill. 616; Arimond v. Green Bay &c. Canal Co. 31 Wis. 316; Gulf &c. R. Co. v. Donahoo, 59 Tex. 128; Wabash &c. Canal v. Spears, 16 Ind. 441; 79 Am. Dec. 444; Sheehy v. Kansas City &c. R. Co. 94 Mo. 574; 7 S. W. 579; 4 Am. St. 396, and note; Tinsman v. Belvidere Del. R. Co. 26 N. J. L. 148; Minnetonka Lake Improvement, In re, 56 Minn. 513; 45 Am. St. 494. An occasional flooding is sufficient to give the right to compensation. Weaver v. Mississippi &c. Boom Co. 28 Minn. 534; 11 N. W. 114. There is ordinarily no liability for flooding caused by ice gorges forming at a bridge. Gulf &c. R. Co. v. Pomeroy, 67 Tex. 498; 3 S. W. 722; Bellinger v. New York Central R. Co. 23 N. Y. 42; Omaha &c. R. Co. v. Brown, 14 Neb. 170; 15 N. W. 321. Unless the damage was caused by negligent and improper construction of the bridge. Abbott v. Kansas City &c. R. Co. 83 Mo. 271; 53 Am. R. 581.

[369] Owens v. Missouri Pacific R. Co. 67 Tex. 679; 4 S. W. 593; Drake v. Chicago &c. R. Co. 63 Iowa, 302; 19 N. W. 215; 50 Am. R. 746; Gillham v. Madison Co. R. Co. 49 Ill. 484; 95 Am. Dec. 627; Illinois &c. R. Co. v. Fehringer, 82 Ill. 129; Chicago &c. R. Co. v. Carey, 90 Ill. 514; Raleigh &c. R. Co. v. Wicker, 74 N. C. 220; Gulf &c. R. Co. v. Holliday, 65 Tex. 512; Sabine &c. R. Co. v. Johnson, 65 Tex. 389; Gulf &c. R. Co. v. Helsley, 62 Tex. 593; Bentonville R. Co. v. Baker, 45 Ark. 252; Payne v. Morgan's La. &c. R. Co. 38 La. Ann. 164; 58 Am. R. 174; Lewis Em. Dom. (2d ed.) §§ 88, 89. The opposite doctrine is

land where it is not accustomed to flow.[370] The question of the

held in many of the states. Greeley v. Maine Central R. Co. 53 Me. 200; Morrison v. Bucksport &c. R. Co. 67 Me. 353; Luther v. Winnisimmet Co. 9 Cush. (Mass.) 171; Waters v. Bay View, 61 Wis. 642; 21 N. W. 811; Kansas City &c. R. Co. v. Riley, 33 Kan. 374; 6 Pac. 581; Abbott v. Kansas City &c. R. Co. 83 Mo. 271; 53 Am. R. 581; Cairo &c. R. Co. v. Stevens, 73 Ind. 278; 38 Am. R. 139, and note; Shelbyville &c. Turnpike Co. v. Green, 99 Ind. 205; Jean v. Pennsylvania Co. 9 Ind. App. 56; 36 N. E. 159; Bellinger v. New York Central R. Co. 23 N. Y. 42; Sweet v. Clutts, 50 N. H. 439; 9 Am. R. 276, and note; Chatfield v. Wilson, 28 Vt. 49; Wakefield v. Newell, 12 R. I. 75; 34 Am. R. 598; Adams v. Walker, 34 Conn. 466; 91 Am. Dec. 742; Bowlsby v. Speer, 31 N. J. L. 351; 86 Am. Dec. 216; Limerick & C. Turnpike Co.'s Appeal, 80 Pa. St. 425. Even in the states holding this latter doctrine, it is conceded that if the construction of a railroad lessens the value of adjoining property by reason of the detention, diversion, or accumulation of surface water, compensation for such injury may be included in the assessment of damages. Walker v. Old Colony &c. R. Co. 103 Mass. 10; 4 Am. R. 509; Eaton v. Boston &c. R. Co. 51 N. H. 504; 12 Am. R. 147; Morrison v. Bucksport R. Co. 67 Me. 353; Pflegar v. Hastings &c. R. Co. 28 Minn. 510; 11 N. W. 72. In Cairo &c. R. Co. v. Brevoort, 62 Fed. 129; 25 L. R. A. 527, and note, the conflicting authorities as to what constitutes surface water are carefully reviewed and it is held that the waters of a river which, at times of ordinary flood, spread beyond its banks, but form one body of water flowing within its accustomed boundaries during such floods, are not surface waters within the rule announced in some jurisdictions, that they may be turned upon the land of others by one seeking to keep them off of his own land.

[370] Cairo &c. R. Co. v. Stevens, 73 Ind. 278; 38 Am. R. 139, and note; Weis v. Madison, 75 Ind. 241; 39 Am. R. 135; Fort Worth &c. R. Co. v. Scott, 2 Tex. App. Civil Cas. 137; Galveston &c. R. Co. v. Tait, 63 Tex. 223; Jacksonville R. Co. v. Cox, 91 Ill. 500; McCormick v. Kansas City &c. R. Co. 70 Mo. 359; 35 Am. R. 431, and note; Chase v. New York Central R. Co. 24 Barb. (N. Y.) 273; Whalley v. Lancashire &c. R. Co. L. R. 13 Q. B. Div. 131, affirmed 16 Ibid, 227; Huddleston v. West Bellvue, 111 Pa. St. 110; 2 Atl. 200; Pye v. Mankato, 36 Minn. 373; 31 N. W. 863; 1 Am. St. 671; Cubit v. O'Dett, 51 Mich. 347; 16 N. W. 679; Crawfordsville v. Bond, 96 Ind. 236. See Walker v. Old Colony &c. R. Co. 103 Mass. 10; 4 Am. R. 509; Ogburn v. Connor, 46 Cal. 346; 13 Am. R. 213; Minor v. Wright, 16 La. Ann. 151; Tootle v. Clifton, 22 Ohio St. 247; 10 Am. R. 732. "The reasoning which leads to the rule forbidding the owner of a field to overflow an adjoining field by obstructing a natural water course fed by remote springs applies with equal force to the destruction of a natural channel through which the surface waters derived from the rains or snow falling on such fields are

right of the owner of land on one side of a navigable river, which forms the boundary between two states, to construct a levee and turn the waters upon land on the opposite side of the river is not a local question, but depends upon general principles of law, and the decisions of a state court in conflict with those principles are not binding upon the federal courts.[371] It is a vexed question as to whether any interference by a railroad company with the right of an adjoining land-owner to lateral support constitutes a taking.[372] The weight of authority, however, in accordance with what seems to us the better reason, is to the effect that the destruction of such lateral support by excavating on the company's own land so near that of the adjoining owner as to cause his land to slide into the excavation is a taking for which he is entitled to compensation regardless of any question of negligence on the part of the railroad company.[373] A

wont to flow. What difference does it make in principle whether the water comes directly upon the field from the clouds above or has fallen upon remote hills and comes thence in a running stream upon the surface, or rises in a spring in the upper fields and flows upon the lowers." Lawrence, J., in Gormley v. Sandford, 52 Ill. 158. Contra Morrison v. Bucksport &c. R. Co. 67 Me. 353; Atchison &c. R. Co. v. Hammer, 22 Kan. 763; 31 Am. R. 216; Abbott v. Kansas City &c. R. Co. 83 Mo. 271; 53 Am. R. 581. And see Raleigh &c. R. Co. v. Wicker, 74 N. Car. 220.

[371] Cairo &c. R. Co. v. Brevoort, 62 Fed. 129; 25 L. R. A. 527, and note.

[372] Most of the authorities pro and con are cited in the principal and dissenting opinion in Parke v. Seattle, 5 Wash. 1; 20 L. R. A. 68; 34 Am. St. 839.

[373] Nichols v. Duluth, 40 Minn. 389; 42 N. W. 84; 12 Am. St. 743; McCullough v. St. Paul &c. R. Co. 52 Minn. 12; 53 N. W. 802; Dyer v. St. Paul, 27 Minn. 457; 8 N. W. 272; O'Brien v. St. Paul, 25 Minn. 331; 33 Am. R. 470; Ludlow v. Hudson River R. Co. 6 Lans. (N. Y.) 128; Ryckman v. Gillis, 6 Lans. (N. Y.) 79; Keating v. Cincinnati, 38 Ohio St. 141; 43 Am. R. 421; Williams v. Natural Bridge &c. Co. 21 Mo. 580; Richardson v. Vermont &c. R. Co. 25 Vt. 465; 60 Am. Dec. 283; Eaton v. Boston &c. R. Co. 51 N. H. 504; 12 Am. R. 147; Stearns v. Richmond, 88 Va. 992; 14 S. E. 847; 29 Am. St. 758 (damages, also, allowed for building, the weight of which did not contribute to the subsidence of the land); Mosier v. Oregon Nav. Co. 39 Oreg. 256; 64 Pac. 453; 87 Am. St. 652, 653 (citing text); note to Larson v. Metropolitan St. R. Co. 33 Am. St. 439, 446, 467; Elliott Roads and Streets (2d ed.), § 205; note to Kansas City &c. R. Co. v. Schwake, 70 Kans. 141; 68 L. R. A. 673n, 701; 78 Pac. 431. Contra Boothby v. Androscoggin &c. R. Co. 51 Me. 318; Hortsman v. Covington &c. R. Co. 18 B. Mon. (Ky.) 218. See, also, 2 Dillon Munic. Corp. § 991; Northern Transporta-

railroad company is not liable in damages, as a rule at least, for remote and indirect consequences of lawful acts done on its own land. Thus, where a railroad, by making excavations on its own land drained a spring on adjoining land, it was held not liable for the resulting damages.[374] But it has been held that such an injury to springs or wells on a tract of land would be a proper subject for consideration in assessing damages for the condemnation of a right of way across it.[375] The construction of a railroad upon land in which an easement for a turnpike,[376] or a canal[377] has been granted, entitles the owner of the fee to damages for the additional servitude.[378] This branch of our subject, however, will be fully treated when we come to consider railroads in highways.[379] Where, as in most jurisdictions, the use of a street by a street railway is regarded as a legitimate use thereof, and not an additional burden, the construction of such a railway across the tracks of a commercial railroad where they intersect a street by a company which is authorized by the municipality to do so is not such a taking of the property of the railroad company as to entitle it to compensation.[380] So, it has been held

tion Co. v. Chicago, 99 U. S. 635; Radcliff v. Mayor &c. 4 N. Y. 195; 53 Am. Dec. 357.

[374] Hougan v. Milwaukee &c. R. R. & Corp. 744; 8 L. R. A. 202; Aldrich v. Cheshire R. Co. 21 N. H. 359; 53 Am. Dec. 212; Waffle v. New York Central R. Co. 58 Barb. (N. Y.) 413; Regina v. Metropolitan Board, 3 B. & S. 710. But see Lord v. Meadville &c. Co. 135 Pa. St. 122; 19 Atl. 1007; 2 Lewis' Am. R. &. Corp. 744; 8 L. R. A. 202; 20 Am. St. 864; Sheldon v. Boston &c. R. Co. 172 Mass. 180; 51 N. E. 1078.

[375] See Trowbridge v. Brookline, 144 Mass. 139; 10 N. E. 796; Parker v. Railroad Co. 3 Cush. (Mass.) 107; 50 Am. Dec. 709, and note.

[376] Ellicottville &c. Plank R. Co. v. Buffalo &c. R. Co. 20 Barb. (N. Y.) 644; Mifflin v. Railroad Co. 16 Pa. St. 182; Mahon v. New York Central R. Co. 24 N. Y. 658; Brainard v. Missisquoi R. Co. 48 Vt. 107.

[377] LaFayette &c. R. Co. v. Murdock, 68 Ind. 137; Hatch v. Cincinnati &c. R. Co. 18 Ohio St. 92.

[378] If the railroad is not empowered to condemn the canal lands, a transfer by the canal company of its canal bed to a railroad corporation for railroad purposes amounts to such an abandonment that the land reverts to the owner of the fee, and the railroad company must pay him the full value of the land. Pittsburgh &c. R. Co. v. Bruce, 102 Pa. St. 23.

[379] Post, Chapter XLII.

[380] Chicago &c. R. Co. v. Whiting, &c. St. Ry. Co. 139 Ind. 297; 38 N. E. 604; 11 Lewis' Am. R. and Corp. 507; 47 Am. St. 264; 26 L. R. A. 337; New York &c. R. Co. v. Bridgeport Traction Co. 65 Conn. 410; 32 Atl. 953 (electric railway); 29 L. R. A. 367; Chicago &c. R. Co. v. West Chicago &c. Co. 156 Ill.

that an electric railway may be operated in a street without compensation to a telegraph or telephone company which has a prior grant to use the street.[381] The construction of a telegraph line upon a railroad company's right of way is, however, a taking of its property for which it is entitled to compensation.[382] But it has been held that the railroad company may erect such a line on its right of way for its own use without additional compensation to the land-owner,[383] although the telegraph company can not do so.[384] The use of a public toll bridge by an electric railway, on payment of adequate toll, has been held in a recent case not to be a taking of property under the eminent domain,[385] and it has also been held in another recent case that a bridge company which had long permitted its bridge to be used by railroads and induced large expenditures of money by street railways, had dedicated its bridge as a highway for use by street railways as well as other travel, and that a street railway

255; 40 N. E. 1008; 29 L. R. A. 485.

[381] Cincinnati &c. R. Co. v. City &c. R. Co. 48 Ohio St. 390; 27 N. E. 890; 12 L. R. A. 534; 29 Am. St. 559; 4 Lewis' Am. R. & Corp. 533; Cumberland Tel. &c. Co. v. United Electric R. Co. 93 Tenn. 492; 29 S. W. 104; 10 Lewis' Am. R. & Corp. 549, and note; 27 L. R. A. 236. See, also, Cumberland Tel. &c. Co. v. United Electric R. Co. 42 Fed. 273; 12 L. R. A. 544; National Tel. Co. v. Baker, 62 L. J. Ch. 699. But it is held by Pickler, J., in the second case above cited injury to the telephone plant by conduction amounts to a taking.

[382] Southwestern R. Co. v. Southern &c. Tel. Co. 46 Ga. 43; 12 Am. R. 585; Western Un. Tel. Co. v. Rich, 19 Kan. 517; 27 Am. R. 159; Atlantic &c. Tel. Co. v. Chicago &c. R. Co. 6 Biss. (U. S. C. C.) 158; 1 Am. Elec. Cas. 111. See, generally, as to condemnation by telegraph company in such cases, Union Pac. R. Co. v. Colorado &c. R. Co. 30 Colo. 133; 69 Pac. 564, and note; 97 Am. St. 106; Postal Tel. Cable Co. v. Oregon Short Line R. Co. 23 Utah, 474; 65 Pac. 735; 90 Am. St. 705; Fort Worth &c. Ry. Co. v. Southwestern Tel. Co. 96 Tex. 160; 71 S. W. 270; 60 L. R. A. 145. See, as to appropriation of railroad property for other purposes, Denver Power &c. Co. v. Colorado &c. R. Co. 30 Colo. 204; 69 Pac. 568; 60 L. R. A. 383; Pittsburgh &c. R. Co. v. Sanitary Dist. 218 Ill. 286; 75 N. E. 892.

[383] Western Un. Tel. Co. v. Rich, 19 Kan. 517; 27 Am. R. 159; Prather v. Western Union Tel. Co. 89 Ind. 501.

[384] American Tel. Co. v. Pearce, 71 Md. 535; 18 Atl. 910; 7 L. R. A. 200, and note.

[385] Pittsburgh &c. R. Co. v. Point Bridge Co. 165 Pa. St. 37; 30 Atl. 511; 26 L. R. A. 323. See, also, Berks Co. v. Reading City Pass. R. Co. 167 Pa. St. 102; 31 Atl. 474, 663.

company had a right to use it upon paying a fair rate of toll.[386] A railroad company acquires its right of way for railroad purposes, in the manner and to the extent that rights of way are ordinarily used by railroad companies as the public interest may require. So, as it is customary for railroad companies to permit other companies to use its tracks in common with itself, especially in cities, for terminal purposes, and as the public interest requires that they should do so, the abutting land-owner is not entitled to additional compensation for such use as for the imposition of an additional burden.[387] But one company can not thus authorize a second company to construct and use additional tracks upon the right of way of the former company without additional compensation to the land-owner.[388]

§ 978. Property damaged or injured—Constitutional and statutory provisions.—Because of the instances in which the infliction of injuries upon private property was held not to be a taking, all of those states which have adopted new constitutions within the past twenty-five years have added a provision that property shall not be damaged by the construction of public works without compensation.[389] Similar provisions have been made by statute in several of the states[390]

[386] Covington &c. Bridge Co. v. South Covington &c. St. R. Co. 93 Ky. 136; 19 S. W. 407; 15 L. R. A. 828. Compare, however, Floyd Co. v. Rome St. R. Co. 77 Ga. 614; 3 S. E. 3; United States v. Parkersburg &c. R. Co. 134 Fed. 969.

[387] Miller v. Green Bay &c. R. Co. 59 Minn. 169; 60 N. W. 1006; 11 Lewis' Am. R. & Corp. 246; 26 L. R. A. 443.

[388] Blakely v Chicago &c. R. Co. 34 Neb. 284; 51 N. W. 767; 6 Lewis' Am. R. & Corp. 262; Fort Worth &c. R. Co. v. Jennings, 76 Tex. 373; 13 S. W. 270; 2 Lewis' Am. R. & Corp. 121; Platt v. Pennsylvania Co. 43 Ohio St. 228; 1 N. E. 420. This is a different thing from laying additional tracks by a company upon its right of way for its own use, which may be done without additional compensation. East Tennessee &c. R. Co. v. Telford, 89 Tenn. 293; 10 L. R. A. 855; Lewis' Am. R. & Corp. 364; White v. Chicago &c. R. Co. 122 Ind. 317; 23 N. E. 782; 2 Lewis' Am. R. & Corp. 138; 23 N. E. 782; 7 L. R. A. 257.

[389] Illinois Const. 1870; Art. II, § 13; West Virginia Const. 1872, Art. III, § 9; Arkansas Const. 1874, Art. II, § 22; Missouri Const. 1875, Art. I, § 20; Nebraska Const. 1875, Art. I, § 21; Colorado Const. 1876, Art. II, § 14; Texas Const. 1876, Art. I, § 17; Mississippi Const. 1890, Art. III, § 17. Shall not be injured or destroyed. Pennsylvania Const. 1873, Art. I, § 8; Alabama Const. 1875, Art. XII, § 7.

[390] Drady v. D. M. &c. R. Co. 57 Iowa, 393; 10 N. W. 754; St. Louis &c. R. Co. v. Capps, 67 Ill. 607;

and in England.[391] In several cases, it is said in general terms that such a provision includes all damage arising from the exercise of the right of eminent domain which causes a diminution in the value of private property.[392] This statement, however, seems a little too broad. There must be an interference with some right, either appurtenant to the property or which can be made use of in connection with it, as well as depreciation in value.[393] In England, where the statute requires compensation for property "injuriously affected," the following rule of construction has been adopted: "When by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if by reason of such interference, the property, as a property is lessened in value."[394] So, in a case which is now regarded as one of the leading cases upon the subject in this country, it is said that "it must appear that there has been some direct physical disturbance of a right, either

72 Ill. 188; Bradley v. New York &c. R. Co. 21 Conn. 294; Nicholson v. New York &c. R. Co. 22 Conn. 74; 56 Am. Dec. 390; Parker v. Boston &c. R. Co. 3 Cush. (Mass.) 107; 50 Am. Dec. 709, and note; Gardner v. Boston &c. R. Co. 9 Cush. (Mass.) 1; Stimson's Am. Stat. (1892), § 8752. See, also, Whitney v. Commonwealth, 190 Mass. 531; 77 N. E. 516, 517; Hyde v. Fall River, 189 Mass. 439; 75 N. E. 953. But compare McSweeney v. Commonwealth, 185 Mass. 371; 70 N. E. 429.

[391] Knock v. Metropolitan R. Co. L. R. 4 C. P. 131. It is held under the English statute that no compensation can be claimed for any personal inconvenience or injury not connected with real property. Rickets v. Metropolitan R. Co. 34 L. J. Q. B. 257; Beckett v. Midland R. Co. L. R. 3 C. P. 82; 37 L. J. C. P. 11; Bird v. Great Eastern R. Co. 34 L. J. C. P. 366.

[392] Chicago &c. R. Co. v. Hazels, 26 Neb. 364; City of Omaha v. Kramer, 25 Neb. 489; 13 Am. St. 504; Stehr v. Mason City &c. R. Co. (Neb.), 110 N. W. 702, 703. Compare Gottschalk v. Chicago &c. R. Co. 14 Neb. 550, 560.

[393] See note of Mr. Lewis in 3 Lewis' Am. R. & Corp. 275; also Austin v. Augusta Terminal Ry. Co. 108 Ga. 671; 34 S. E. 852; 47 L. R. A. 755, and authorities cited in following notes.

[394] Metropolitan Board of Works v. McCarthy, L. R. 7 E. & I. App. 243, 253. Approved and followed in Gainesville &c. R. Co. v. Hall, 78 Tex. 169; 14 S. W. 259; 9 L. R. A. 298, and note; 22 Am. St. 42, 46.

public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally."[395] As said by still another court, the object of the constitutional and statutory provisions to which we have referred "was to grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains a special injury to such property in excess of that sustained by the public at large."[396] Where part of a tract is taken compensation should be made for damages to the entire tract, and where two lots were occupied by the buildings of a brewery, it was held that they constituted a single tract, although they were separated by an alley, under which connection was made between the several parts of the brewery establishment.[397] But the general rule is that where only part of a tract of land is taken, the remainder is not damaged, within the meaning of the law, unless its value is thereby diminished.[398] It is not necessary, however, that any part of the land should be actually taken to bring the case within the meaning of provisions

[395] Rigney v. Chicago, 102 Ill. 64. The rule is stated in similar language in Peel v. Atlanta, 85 Ga. 138; 11 S. E. 582; 2 Lewis' Am. R. & Corp. 413; 8 L. R. A. 787, and in Chicago v. Taylor, 125 U. S. 161; 8 Sup. Ct. 820, and these cases are approved in Stehr v. Mason City &c. R. Co. (Neb.) 110 N. W. 702, 703, in which it is held that "where an ordinance is passed granting the use of public streets to a railroad company for the construction and operation of its road, an abutting property owner can not be prevented from recovering from the railroad company damages to his property caused by the construction of the railroad in and across the streets by inserting in such ordinance a provision vacating the portions of the streets to be so used by the railroad company." But compare Scrutchfield v. Choctaw &c. R. Co. (Okla.) 88 Pac. 1048.

[396] Gottschalk v. Chicago &c. R. Co. 14 Neb. 550, 560; 16 N. W. 475; 17 N. W. 120.

[397] Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582. Where village lots were merely held for sale, the fact that they were separated by a street was held conclusive of the fact that they were separate tracts. Pittsburgh &c. R. Co. v. Reich, 101 Ill. 157.

[398] Metropolitan &c. R. Co. v. Stickney, 150 Ill. 362; 37 N. E. 1098; 26 L. R. A. 773; 10 Lewis' Am. R. & Corp. 1. See, also, Somers v. Metropolitan &c. R. Co. 129 N. Y. 576; 29 N. E. 802; 14 L. R. A. 344.

to which we have referred. Thus, depreciation in the value of property caused by noise, vibration, smoke and cinders from passing trains has been held in many jurisdictions to be a damage or injury to the owner's property for which he is entitled to compensation under such provisions, although none of his land is taken in the construction of the road.[399] Additional illustrations will be given when we come to consider the subject of railroads in streets, and it is sufficient at this place to refer to other authorities supporting and showing the application of the general rule without reviewing them at length.[400]

[399] Gainesville &c. R. Co. v. Hall, 78 Tex. 169; 11 S. W. 582; 22 Am. St. 42; 9 L. R. A. 298; Missouri &c. R. Co. v. Calkins (Tex. Civ. App.), 79 S. W. 852; St. Louis &c. R. Co. v. Shaw (Tex. Civ. App.), 88 S. W. 817; Omaha &c. R. Co. v. Janecek, 30 Neb. 276; 46 N. W. 478; 27 Am. St. 399; 3 Lewis' Am. R. & Corp. 268, and note; Railway Co. v. Gardner, 45 Ohio St. 309; 13 N. E. 69; Lake Erie &c. R. Co. v. Scott, 132 Ill. 429; 24 N. E. 78; 8 L. R. A. 330; Stone v. Fairbury &c. R. Co. 68 Ill. 394; 18 Am. R. 556; Turner v. Sheffield &c. R. Co. 10 Mees. & W. 425; East &c. R. Co. v. Gattke, 20 L. J. Ch. (N. S.) 217. See, also, Chicago &c. R. Co. v. Loeb, 118 Ill. 203; 8 N. E. 460; 59 Am. R. 341, and note; Chicago &c. R. Co. v. Darke, 148 Ill. 226; 35 N. E. 750; Jeffersonville &c. R. Co. v. Esterle, 13 Bush (Ky.), 667; Lahr v. Metropolitan Elevated R. Co. 104 N. Y. 268; 10 N. E. 528; Story v. New York &c. R. Co. 90 N. Y. 122; 43 Am. R. 146; Muhlker v. New York &c. R. Co. 197 U. S. 544; 25 Sup. Ct. 522. Many cases in New York growing out of the construction and operation of elevated railroads are substantially to the same effect even in the absence of such a provision. Contra Pennsylvania R. Co. v. Lippincott, 116 Pa. St. 472; 9 Atl. 871; 2 Am. St. 618; Pennsylvania R. Co. v. Marchant, 119 Pa. St. 541; 13 Atl. 690; 4 Am. St. 659, affirmed in 153 U. S. 380; 14 Sup. Ct. 894; Jones v. Erie &c. R. Co. 151 Pa. St. 30; 25 Atl. 134; 17 L. R. A. 758; 31 Am. St. 722. But compare Pennsylvania &c. R. Co. v. Walsh, 124 Pa. St. 544; 17 Atl. 186; 10 Am. St. 611. See, generally, Austin v. Augusta Terminal R. Co. 108 Ga. 671; 34 S. E. 852; 47 L. R. A. 755; Presbrey v. Old Colony &c. R. Co. 103 Mass. 6; Dimmick v. Council Bluffs &c. R. Co. 62 Ia. 409; 17 N. W. 395; Smith v. St. Paul &c. R. Co. 39 Wash. 355; 81 Pac. 840; Aldrich v. Metropolitan &c. Co. 195 Ill. 456; 63 N. E. 155; 57 L. R. A. 237; Bennett v. Long Island R. Co. 181 N. Y. 431; 74 N. E. 418.

[400] Chicago &c. R. Co. v. Ayres, 106 Ill. 511; Sheehy v. Kansas City &c. R. Co. 94 Mo. 574; 7 S. W. 579; 4 Am. St. 396, and note; Montgomery v. Townsend, 80 Ala. 489, 492; 2 So. 155; 60 Am. R. 112; Johnson v. Parkersburg, 16 W. Va. 402; 37 Am. R. 779; Chicago v. Taylor, 125 U. S. 161; 8 Sup. Ct. 820; Hot Springs R. Co. v. Williamson, 45 Ark. 429; Denver v. Bayer, 7 Col. 113; 2 Pac. 6; East St. Louis &c. R. Co. v. Eisentraut, 134 Ill. 96; 24 N. E. 760; Hatch v. Tacoma &c.

R. Co. 6 Wash. 1; 32 Pac. 1063; Gulf &c. R. Co. v. Eddins, 60 Tex. 656; Omaha &c. R. Co. v. Cable &c. Co. 32 Fed. 727; Eachus v. Los Angeles &c. R. Co. 103 Cal. 614; 37 Pac. 750; 42 Am. St. 149; Albany v. Sikes, 94 Ga. 30; 20 S. E. 257; 26 L. R. A. 653; 47 Am. St. 132; Caledonian R. Co. v. Waker's Trustees, L. R. 7 App. Cas. 259. In Kansas City &c. R. Co. v. St. Joseph &c. R. Co. 97 Mo. 457; 10 S. W. 826; 3 L. R. A. 240, it was held that a railroad company was not entitled to damages under such a provision for delay and inconvenience caused by another company crossing its tracks in a public street. Nor is danger to persons crossing or for fire a proper element to be considered as damages, Illinois &c. R. Co. v. Freeman, 210 Ill. 270; 71 N. E. 444.

CHAPTER XXXIX.

COMPENSATION AND DAMAGES.

§ 979. Compensation—Constitutional right.—The right of a citizen whose property is taken for a public use to compensation is, as we believe, fundamental. In our judgment there is a right to compensation in all cases where private property is seized under the power of eminent domain. We believe that the right exists even where there is no express constitutional provision forbidding the taking of private property without paying or tendering compensation. The right to compensation is part of the right of every freeman to hold, own and enjoy property, and he can only be deprived of his property even for a public use by due process of law and upon the payment of just compensation for whatever property may be taken from him.[1]

[1] In Sinnickson v. Johnson, 17 N. J. L. 129, 145; 34 Am. Dec. 184, it was said, of the right of eminent domain that: "This power to take private property reaches back of all constitutional provisions, and it seems to be considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power,

§ 980. Provisions of the federal constitution—Federal power.—Prior to the adoption of the fourteenth amendment it was held that the provisions of the federal constitution apply only to acts of the general government.[2] And it has been so held since the adoption of the fourteenth amendment.[3] It seems to us that there is reason for concluding that under that amendment there is not due

that the one is so inseparably connected with the other that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle." This statement of the law was approved in Pumpelly v. Green Bay Co. 13 Wall. (U. S.) 166, 178, and in Monongahela &c. Co. v. United States, 148 U. S. 312; 13 Sup. Ct. 622, and in Chicago &c. R. Co. v. Chicago, 166 U. S. 226; 17 Sup. Ct. 581, 585. The general doctrine is asserted in Chattanooga &c. R. Co. v. Felton, 69 Fed. 273, 278. See, also, Gardner v. Newburgh, 2 Johns. Ch. 162; Garvey v. Long Island R. Co. 159 N. Y. 323; 54 N. E. 57; 70 Am. St. 550, and note; Southern Kansas R. Co. v. Oklahoma City, 12 Okl. 82; 69 Pac. 1050; Watson v. Fairmount &c. R. Co. 49 W. Va. 528; 39 S. E. 193; Bristol v. New Chester, 3 N. H. 524; Harness v. Chesapeake &c. 1 Md. Ch. 248; Bonaparte v. Camden &c. R. Co. Bald. (U. S. C. C.) 205; Johnston v. Rankin, 70 N. C. 550; Staton v. Norfolk, R. Co. 111 N. C. 278; 17 L. R. A. 838, and note; Martin, ex parte, 13 Ark. 198; 58 Am. Dec. 321; Randolph Eminent Domain, §§ 225, 226; Elliott Roads and Streets (2d ed.), §§ 232, 233, et seq; 2 Kent's Com. 339, n; Pierce Railroads, 161; Cooley Blackst. Book I, p. 137. But see, Boom Co. v. Patterson, 98 U. S. 403; United States v. Jones, 109 U. S. 513; 3 Sup. Ct. 346; Lindsay v. Commonwealth, 2 Bay (S. Car.), 38; State v. Dawson, 3 Hill (S. Car.), 100; United States v. Rauers, 70 Fed. 748. A Maine statute relating to the location of street railroads in the streets and ways of cities and towns, and of the approval thereof by municipal officers, and appeals from the action of such officers is held not unconstitutional as permitting the property of the towns to be taken for street railroad purposes without compensation, as the public act through the legislature, which may regulate and control, extend or diminish the public uses as it sees fit. Appeal of Milbridge & C. Electric R. Co. 96 Me. 110; 51 Atl. 818. A land-owner is entitled to compensation for injuries to his premises caused by the erection of a dam on adjoining premises by a railroad company though it has a lawful right to erect the structure. Illinois Central R. Co. v. Lockard, 112 Ill. App. 423. The provision of the constitution of Texas that no person's property shall be taken for public use without adequate compensation, unless by the consent of the owner is held to apply only to the property of others than the state. Over the state lands there is no such restriction. Texas Central R. Co. v. Bowman, 97 Tex. 417; 79 S. W. 295.

[2] Barron v. Baltimore, 7 Pet. (U. S.) 243.

[3] Smith v. Bivens, 56 Fed. 352.

process of law when property is taken without compensation where the constitution of the state requires that compensation shall be paid or tendered.[4] We suppose that if a state statute should assume to permit some corporations to take without compensation and require others, under like circumstances, to pay or tender compensation, the statute would be void under the fourteenth amendment, for the reason that it denied the equal protection of the laws. The supreme court of the United States, in a comparatively recent case, carefully considered the question of the power of the general government in the exercise of the right of eminent domain, and laid down the general rules which govern the exercise of the right.[5] Congress may grant authority to a railroad company to condemn lands through one of the territories.[6] It is held that an act which provides that a property owner may apply to the court of claims for indemnity affords a remedy to him for the recovery of damages, but the court declined to pass upon the constitutionality of the act.[7]

See, also, Winons Point Shooting Club v. Caspersen, 193 U. S. 189; 24 Sup. Ct. 431.

[4] Scott v. Toledo, 36 Fed. 385; 1 L. R. A. 688. See Murdock v. Cincinnati, 44 Fed. 726, 729. We are inclined to believe that on principle it must be held that in all cases where there is no provision for compensation there is not due process of law. Davidson v. New Orleans, 96 U. S. 97, opinion of Bradley, J. See, also, Chicago &c. R. Co. v. Chicago, 166 U. S. 226; 17 Sup. Ct. 581. Missouri Pac. R. Co. v. Nebraska, 164 U. S. 403; 17 Sup. Ct. 130, 135; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239; 25 Sup. Ct. 251, 256. These decisions seem to settle the question in accordance with the doctrine of the text.

[5] Shoemaker v. United States, 147 U. S. 282; 13 Sup. Ct. 361. See Canal Co. v. Key, 3 Cranch (C. C.), 599; Chesapeake &c. Co. v. Union Bank, 4 Cranch (C. C.), 75; Luxton v. North River Bridge Co. 147 U. S. 337; 13 Sup. Ct. 356. As to the measure of damages, see Kerr v. South Park Commissioners, 117 U. S. 379; Shoemaker v. United States, supra. See generally, Rugheimer, In re, 36 Fed. 369; United States v. Great Falls Manufacturing Co. 112 U. S. 645; 5 Sup. Ct. 306; United States v. Gettysburg &c. R. Co. 160 U. S. 668; 16 Sup. Ct. 427; Chappell v. United States, 160 U. S. 499; 16 Sup. Ct. 397.

[6] Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641; 10 Sup. Ct. 965.

[7] Great Falls &c. Co. v. Atty-Gen'l Garland 124 U. S. 581; 8 Sup. Ct. 631; Great Falls Manufacturing Co. v. Garland, 25 Fed. 521. In the opinion in the first case cited it was said of the act of the party in submitting his claim to the court of claims that: "The plaintiff, by adopting that mode, has assented to the taking of his property by the government for public use, and has agreed to

The provision of the federal constitution that private property shall not be taken "for public use without just compensation," does not require that compensation shall be actually paid in advance of the occupancy of the land to be taken, but the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed.[8] It was also held in the case referred to that an offer to pay was not sufficient, but the money must be actually paid into court. It has been held that an act of congress, which provides that no compensation shall be paid for property seized, will not authorize the seizure of private property for a public use.[9] Congress may provide what proceedings shall be taken in cases of condemnation by the United States, or, it may provide that the proceedings shall be such as the state statute prescribes.[10] Where there is no statute prescribing the rule for measuring the compensation to be awarded, it must be determined upon the principle of the common law, and consequential damages can not be awarded.[11] It is held that private and not public property, is pro-

submit the determination of the question of compensation to the tribunal named by congress."

[8] Cherokee Nation v. Southern Kansas &c. R. Co. 135 U. S. 641; 10 Sup. Ct. 965. In the case cited the court quoted from the case of Kennedy v. Indianapolis, 103 U. S. 599, 604, the following: "On principle and authority, the rule is, under such a constitution as that of Indiana, that the right to enter and use the property is complete as soon as the property is actually appropriated under the authority of the law for a public use, but that the title does not pass from the owner without his consent, until just compensation has been made to him," and held that the rule applied to the provisions of the federal constitution. See Chattanooga &c. R. Co. v. Felton, 69 Fed. 273; Payne v. Kansas City &c. R. Co. 46 Fed. 546.

[9] Manderson, In re, 51 Fed. 501; Montgomery, In re, 48 Fed. 896.

[10] High Bridge &c. Co. v. United States, 69 Fed. 320; Kohl v. United States, 91 U. S. 367; United States v. Jones, 109 U. S. 513; 3 Sup. Ct. 346.

[11] High Bridge &c. Co. v. United States, 69 Fed. 320, citing, as to the common law rule, Transportation Co. v. Chicago, 99 U. S. 635 (wherein Pumpelly v. Green Bay Co. 13 Wall. (U. S.) 166, is criticised), and Railroad Co. v. Bingham, 87 Tenn. 522; 11 S. W. 705; 4 L. R. A. 622, and note; Smith v. Washington, 20 How. (U. S.) 135. It was also said that the decisions in Van Schoick v. Delaware &c. Canal Co. 20 N. J. L. 249, and Asher v. Louisville &c. R. Co. 87 Ky. 391; 8 S. W. 854, were based upon statutes. See, also, New York &c. R. Co. v. Blacker, 178 Mass. 386; 59 N. E. 1020. As to

tected by the provisions of the federal constitution,[12] but we suppose that the term "public property," as used in this connection, must be held to mean such as belongs to the state or nation, and not property of a public nature, that is, property public in the sense that it is "affected with a public interest." It is doubtful whether the doctrine of the case referred to can be regarded as going to the extent of denying that such a provision as that contained in the national constitution protects property held by a state or one of its municipalities for a use in its nature private, as, for instance, for a school house, a hospital for the insane or the like.[13] If it does we

the effect of an award where consequential damages are provided for by statute, the court cited, Ohio &c. R. Co. v. Thillman, 143 Ill. 127; 32 N. E. 529; 36 Am. St. 359. See, also, upon question of adopting state statutes, United States v. Engeman, 46 Fed. 898.

[12] Stockton v. Baltimore &c. R. Co. 32 Fed. 9; Frost v. Washington Co. R. Co. 96 Me. 76; 51 Atl. 806; 59 L. R. A. 68, and note.

[13] In the case under immediate mention, Stockton v. Baltimore &c. R. Co. 32 Fed. 9, the court, after showing that the lands which were the subject of controversy, were "publici juris, that is, were held for the people at large," said: "Such being the character of the state's ownership of the land under water—an ownership held, not for the purpose of emolument, but for public use, especially the public use of navigation and commerce—the question arises whether it is a kind of property susceptible of pecuniary compensation, within the meaning of the constitution. The fifth amendment provides only that private property shall not be taken without compensation, making no reference to public property. But, if the phrase may have an application broad enough to include all property and ownership, the question would still arise whether the appropriation of a few square feet of the river bottom to the foundation of a bridge, which is to be used for the transportation of an extensive commerce in aid and relief of that afforded by the water way, is at all a diversion of the property from its original public use. It is not so considered when sea-walls, piers, wing-dams and other structures are erected for the purpose of aiding commerce by improving and preserving the navigation. Why should it be deemed such when (without injury to the navigation) erections are made for the purpose of aiding and enlarging commerce beyond the capacity of the navigable stream itself, and of all the navigable waters of the country? It is commerce, and not navigation, which is the great object of constitutional care." See St. Louis &c. R. Co. v. Blind Inst. 43 Ill. 303; State v. District Court, 77 Minn. 248; 79 N. W. 971; Atlanta v. Central R. Co. 53 Ga. 120; Burbank v. Fay, 65 N. Y. 57; People v. Kerr, 27 N. Y. 188; Portland &c. R. Co. v. Portland, 14 Oreg. 188; 12 Pac. 265; 58 Am. R. 299; Pennsylvania R. Co. v. New York &c. R. Co. 23 N. J. Eq. 157; Clinton

should be inclined to doubt its soundness. The tendency of the courts is to give the word "property," as used in the constitution in this connection, a liberal construction and the word is generally held to cover every valuable interest which can be enjoyed as property and recognized as such.[14] Thus construed it includes not only real estate held in fee, but also an easement, personal property and the like, and where it is proposed to appropriate any property of this character, the owner is entitled to just compensation.[15]

§ 980a. Federal power—Abridgment of right of navigation.—The right of navigation in navigable waters is not an individual property right protected from abridgment or abolition by the constitutional provision against the taking of private property without just compensation. It is a public and not a private right, and hence the obstruction of such navigation by the government does not give the users of the water the right to demand compensation.[16] Thus

v. Cedar Rapids &c. R. Co. 24 Ia. 455; Mount Hope Cemetery v. Boston, 158 Mass. 509; 33 N. E. 695; 35 Am. St. 515.

[14] Old Colony R. Co. v. Plymouth Co. 14 Gray (Mass.), 161.

[15] Southern Kansas R. Co. v. Oklahoma City, 12 Okla. 82; 69 Pac. 1050. But see St. Louis &c. R. Co. v. Knapp &c. Co. 160 Mo. 396; 61 S. W. 300, where it is held that the words "other property," in Rev. St. Mo. § 2734, providing that in case lands or "other property" is sought to be appropriated by any railroad corporation for public use, and the owners and such corporation can not agree as to compensation, the corporation may apply to the circuit court, etc., have no reference to the words "or damaged," in Const. Mo. art. 2 § 21, declaring that private property shall not be taken "or damaged" for public use without just compensation. The latter expression refers to real estate damaged by appropriation or the manipulation of property appropriated; and damages to personal property or business interests need not be compensated for in condemnation proceedings.

[16] Frost v. Washington County R. Co. 96 Me. 76; 51 Atl. 806; 59 L. R. A. 68, and note, citing Spring v. Russell, 7 Me. 273; Rogers v. Kennebec &c. R. Co. 35 Me. 319; Gowen v. Penobscot R. Co. 44 Me. 140; Brooks v. Improvement Co. 82 Me. 17; 19 Atl. 87; 7 L. R. A. 460; 17 Am. St. 459; Miller v. New York, 109 U. S. 385; 3 Sup. Ct. 228; 27 L. Ed. 971; Gilman v. Philadelphia, 3 Wall. (U. S.) 713; 18 L. Ed. 96; Pound v. Turck, 95 U. S. 459; 24 L. Ed. 525; Hamilton v. Railroad Co. 119 U. S. 280; 7 Sup. Ct. 206; 30 L. Ed. 393; Escanaba &c. Tranp. Co. v. Chicago, 107 U. S. 678; 2 Sup. Ct. 185; 27 L. Ed. 442; Cardwell v. Bridge Co. 113 U. S. 205; 5 Sup. Ct. 423; 28 L. Ed. 959; Scranton v. Wheeler, 179 U. S. 141; 21 Sup. Ct. 48; 45 L. Ed. 126.

it has been held that the fact that the building and maintenance of a trestle and the consequent closing of a tidal channel, by a railroad company under the authority of the legislature and of congress, has seriously damaged the business of the plaintiff and the selling value of his property adjoining the channel, does not entitle him to compensation from the railroad company, none of his property having been entered upon or used by the company. It is the common case of damnum absque injuria. The company has not wronged the plaintiff.[17] But where the United States erected dams in a river for the improvement of navigation, and in so doing turned a valuable rice plantation into an irreclaimable and valueless bog, it was held that it was a taking of property for which compensation must be made.[18]

§ 981. Constitutional right to compensation does not extend to general damages.—Where a property owner sustains no special injury but does sustain an injury in common with the public he can not, it is held, successfully invoke the protection of the constitutional provision giving compensation for private property taken for a public use. Injuries common in the community which result from the construction of a railroad, the construction of which is authorized by law, are general injuries and not special to the property owner, and the rule is that for such general injuries compensation can not be recovered in the absence of a statute authorizing their recovery.[19] There is difficulty in giving practical application to the rule, and it

[17] Frost v. Washington Co. R. Co. 96 Me. 76; 51 Atl. 806; 59 L. R. A. 68, and note. See, also, as to wharfage and accretions in the case of navigable waters. Hedges v. West Shore R. Co. 150 N. Y. 150; 44 N. E. 691; 55 Am. St. 660; Chicago &c. R. Co. v. Porter, 72 Ia. 426; 34 N. W. 286; Shively v. Bowlby, 152 U. S. 1; 14 Sup. Ct. 548; Western Pac. Ry. Co. v. Southern Pac. Co. 151 Fed. 376. And see as to removal or alteration of bridges over navigable streams, United States v. Union Bridge Co. 143 Fed. 377; United States v. Parkersburg Branch R. Co. 143 Fed. 224.

[18] United States v. Lynah, 188 U. S. 445; 23 Sup. Ct. 349. But compare cases cited in last preceding note, and also Gibson v. United States, 166 U. S. 269; 17 Sup. Ct. 578.

[19] Dantzer v. Indianapolis Union R. Co. 141 Ind. 604; 39 N. E. 223; 34 L. R. A. 769; 50 Am. St. 343; Grand Rapids &c. R. Co. v. Heisel, 38 Mich. 62; 31 Am. R. 306; Chicago v. Union &c. Association, 102 Ill. 379; 40 Am. R. 598; Rigney v. Chicago, 102 Ill. 64; Illinois Cent.

seems to us that some of the cases carry it entirely too far. The general rule unquestionably is that there is a right in a street, distinct from that of the general public, which can not be taken from the abutting owner without compensation.[20] It is difficult to lay down general rules upon this subject for much depends upon the situation of the particular property and surrounding circumstances, but it will not do to broadly hold that there is no case where the vacation or closing of a street may not be such an injury as to entitle an adjoining owner to compensation. One court addressing itself to this subject has said: "The right of recovery exists where, for the benefit of the public, private property has been specially, even though lawfully damaged—that is, in a way not common to the public, and hence in excess of the damage sustained by the public generally; and such damage must be occasioned by a direct physical disturbance of a property right, of a character for which redress could have been had at the common law, if such disturbance had not been authorized by statutory enactment. It is not enough that the damage exceeds merely in amount that sustained by the public generally. It must

R. Co. v. Trustees, 212 Ill. 406; 72 N. E. 39; Smith v. St. Paul &c. R. Co. 39 Wash. 355; 81 Pac. 840; Ruckert v. Grand Ave. R. Co. 163 Mo. 260; 63 S. W. 814; Oregon Short Line R. Co. v. Fox, 28 Utah 311; 78 Pac. 800; Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323; Stockdale v. Rio Grande Western Ry. Co. 28 Utah 201; 77 Pacific 849; Nagel v. Lindell Ry. Co. 167 Mo. 89; 66 S. W. 1090; Buhl v. Fort St. &c. Depot Co. 98 Mich. 596, 608; 57 N. W. 829; 23 L. R. A. 392. See, also, Coatsworth v. Lehigh Valley R. Co. 100 N. Y. S. 504; De Lucca v. North Little Rock, 142 Fed. 597.

[20] Grand Rapids &c. R. Co. v. Heisel, 38 Mich. 62; 31 Am. R. 306, opinion by Cooley, J.; Haynes v. Thomas, 7 Ind. 38; Fossison v. Landry, 123 Ind. 136; 24 N. E. 96; Ross v. Thompson, 78 Ind. 90; Indianapolis v. Kingsbury, 101 Ind. 200; 51 Am. R. 749; Imlay v. Union Branch &c. R. Co. 26 Conn. 249; 68 Am. Dec. 392; Port Huron &c. R. Co. v. Voorheis, 50 Mich. 506; 15 N. W. 882; Chicago &c. R. Co. v. Hazels, 26 Neb. 364; 42 N. W. 93; Morgan v. Railroad Co. 96 U. S. 716; Macon v. Franklin, 12 Ga. 239; Peoria v. Johnston, 56 Ill. 45; Central Branch &c. R. Co. v. Andrews, 41 Kan. 370; 21 Pac. 276; Johnston v. Old Colony R. Co. 18 R. I. 642; 29 Atl. 594; 49 Am. St. 800; Woolrych Ways, 70, 55; 2 Dillon Munic. Corp. § 712; Tiedeman Municipal Corp. § 311; Mills Eminent Domain (2d ed.), § 206; Randolph Eminent Domain, § 416; Lewis Eminent Domain (2d ed.), § 100. Injury caused to a country place by the fact that the railroad runs between it and a city is general and not special. Little Rock &c. R. Co. v. Newman, 73 Ark. 1; 83 S. W. 653.

be greater in kind—that is, greater by reason of its peculiar nature; for if only greater in degree no recovery can be had."[21]

§ 982. Compensation must be made in money—Principle not violated by deducting special benefits.—The inflexible rule is that compensation for property seized by virtue of the power of eminent domain must be made in money.[22] The rule that benefits may be deducted from the damages has been said to violate the principle that compensation must be made in money, but this, we venture to say, is a mistake. The legislature, it is true, has no power to prescribe that compensation shall be made in anything else than money,[23] but, if a land-owner suffers no loss he can not be said to

[21] Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323; citing East St. Louis v. O'Flynn, 119 Ill. 200; 10 N. E. 395; 59 Am. R. 795; Gilbert v. Greeley &c. R. Co. 13 Colo. 501; 22 Pac. 814; Parker v. Catholic Bishop of Chicago, 146 Ill. 158; 34 N. E. 473; Chicago v. Burcky, 158 Ill. 103; 42 N. E. 178; 29 L. R. A. 568; 49 Am. St. 142.

[22] Central Ohio R. Co. v. Holler, 7 Ohio St. 220; Butler v. Sewer Commissioners, 39 N. J. L. 665; Sanborn v. Belden, 51 Cal. 266; Fletcher v. Peck, 6 Cranch 87, 145; Commonwealth v. Peters, 2 Mass. 125; Hill v. Mohawk &c. R. Co. 7 N. Y. 152; Memphis v. Bolton, 9 Heisk. (Tenn.) 508; Henry v. Dubuque &c. R. 2 Iowa 288; State v. Beackmo, 8 Blkf. 246; Winona &c. R. Co. v. Waldron, 11 Minn. 515, 539; 88 Am. Dec. 100, and note; Brown v. Beatty, 34 Miss. 227, 241; 69 Am. Dec. 389; Chesapeake &c. R. Co. v. Patton, 6 W. Va. 147; Toledo &c. R. Co. v. Munson, 57 Mich. 42; 23 N. W. 455; 20 Am. & Eng. R. Cas. 410; Burlington &c. R. Co. v. Schweikart, 10 Colo. 178; 14 Pac. 329; St. Louis &c. R. Co. v. Teters, 68 Ill. 144; Brown v. Chicago &c. R. Co. 66 Neb. 106; 92 N. W. 128.

[23] Dillon Municipal Corp. § 477; Elliott's Roads and Streets (2d ed.), § 243; Isom v. Mississippi &c. R. Co. 36 Miss. 300; Commonwealth v. Pittsburg &c. R. Co. 58 Pa. St. 26; Pennsylvania R. Co. v. Baltimore &c. R. Co. 60 Md. 263; Woodfolk v. Nashville &c. R. Co. 2 Swan. (Tenn.) 421. It is not within the power of a court to substitute the performance of some act as, for instance, the opening of a new highway, the grant of special privileges or the like for money. Chicago &c. R. v. McGrew, 104 Mo. 282; 15 S. W. 931; Burlington &c. R. Co. v. Schweikart, 10 Colo. 178; 14 Pac. 329. See Thompson v. Grand Gulf &c. R. Co. 4 Miss. 240; 34 Am. Dec. 81; Toledo &c. R. Co. v. Munson, 57 Mich. 42; 23 N. W. 455; Bloodgood v. Mohawk &c. R. Co. 18 Wend. (N. Y.) 9; 31 Am. Dec. 313, and note; Pennsylvania R. Co. v. Reichert, 58 Md. 261; Chesapeake &c. R. Co. v. Halstead, 7 W. Va. 301; Hewett v. Commissioners, 85 Me. 308; 27 Atl. 179; McArthur v. Kelly, 5 Ohio 139; New Orleans &c. R. Co. v.

be deprived of property, and if he receives benefits equal to the value of the land taken he suffers no loss. If the construction of a railroad enhances the value of lands not taken, then to the extent that such value is enhanced is the loss of the owner reduced. In allowing benefits to be considered the court simply ascertains the extent of the loss actually sustained by the land-owner and does not pay him compensation in benefits. It is obvious that on principle it is only special benefits that can be deducted since it is only such benefits that the land-owner secures as an individual, for a general benefit does not move to him in his character of an individual property owner.

§ 983. The measure of compensation is a judicial question.—The legislative department of government has no power to determine what shall be the measure of compensation. The legislature possesses no judicial power and hence can not decide what compensation shall be paid a property owner whose property has been seized under the right of eminent domain. "The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial."[24] What the legislature can not do directly it can not do by indirection; thus, it can not effectively declare that in assessing compensation certain elements which give value to the property seized shall be excluded from consideration.[25] While it is not competent for the

Murrell, 34 La. Ann. 536; Drury v. Midland R. Co. 127 Mass. 571; Chicago &c. R. Co. v. Springfield &c. R. Co. 67 Ill. 142.

[24] Monongahela &c. Co. v. United States, 148 U. S. 312; 13 Sup. Ct. 622; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 571; Commonwealth v. Pittsburg &c. R. Co. 58 Pa. St. 26, 50; Pennsylvania R. Co. v. Baltimore &c. R. Co. 60 Md. 263; Isom v. Mississippi &c. R. Co. 36 Miss. 300; Tripp v. Overocker, 7 Colo. 72; 1 Pac. 695; Vanhorne Lessee v. Dorrance, 2 Dall. (Penn.) 304; Rich v. Chicago, 59 Ill. 286; Paul v. Detroit, 32 Mich. 108; Lebanon School Dist. v. Lebanon &c. Seminary (Pa.), 12 Atl. 857. See, generally, Hughes v. Todd, 2 Duv. (Ky.) 188; People v. McDonald, 69 N. Y. 362; County Court v. Griswold, 58 Mo. 175; Cunningham v. Campbell, 33 Ga. 625; City of Kansas v. Baird, 98 Mo. 215; 11 S. W. 243, 562.

[25] Monongahela &c. Co. v. United States, 148 U. S. 312; 13 Sup. Ct. 622. But see Cambridge v. County Commissioners, 117 Mass. 79.

legislature to determine the measure of compensation, it is, nevertheless, competent for it to limit the aggregate amount that shall be expended.[26]

§ 984. Right to compensation not lost by conditional grant.—There can, of course, be no doubt that where there is an unconditional grant of a right of way the owner can not afterwards successfully prosecute proceedings to recover compensation or maintain an action for damages, but a different rule applies where there is a conditional grant and the conditions of the grant are not performed. Thus, where the grant is upon the express condition that the road shall be constructed within a designated time, and the condition is not performed and the road is built after the expiration of the time limited in the grant, the owner is entitled to compensation.[27] It

[26] Shoemaker v. United States, 147 U. S. 282; 13 Sup. Ct. 361.

[27] Bredin v. Pittsburg &c. R. Co. 165 Pa. St. 262; 31 Atl. 39. A conveyance of part of a lot for railway purposes does not operate to release the railway company from damages for injury to another lot caused by the construction of an embankment. Atchison &c. R. Co. v. Pratt, 53 Ill. App. 263. See, also, Baltimore &c. R. Co. v. Bouvier (N. J.), 62 Atl. 868. In this case the court held that where a railroad company had entered on land under a right of way deed, in which it covenanted among other things to erect a passenger station and double-track its road for a certain distance, which conditions it failed to fulfill, the improvements made by such company on the land were not to be considered in determining, in condemnation proceedings thereafter instituted, the damages suffered by the vendor; that in fixing the price of land conveyed to the railroad for right of way the benefit resulting to the landowner from improvements to be made by the railroad in the way of a passenger station and double tracks having been taken into consideration in fixing the compensation under the deed, the comparative value of the land with and without the advantages of such improvements was determinative of the abatement or allowance to the railroad company in fixing the price for the land conveyed; and that as it did not appear that any benefit would result to the vendor from such improvements, the road being distinctly one for the carriage of freight, a breach of such covenants by the railroad company did not debar it of equitable relief, in condemnation proceedings instituted by it after declaration of a forfeiture for the breach, with respect to the allowance to the vendor of compensation for improvements already made by such company on the land. But see Leeds v. Camden &c. R. Co. 53 N. J. L. 229; 23 Atl. 168; Trimmer v. Penn. &c. R. Co. 55 N. J. L. 46; 25 Atl. 932; Briggs v. Railroad Co. 56 Kans. 526; 43 Pac. 1131.

was also held in the case cited in the note that a recital of payment of damages did not take away the grantor's right to compensation for taking the land after the time limited for the construction of the road had expired.

§ 985. Time at which compensation is computed.—The general rule is that the land-owner is entitled to compensation for the value of his land at the date of the taking, and the fact that he has made improvements with the knowledge of the fact that it is proposed to build a railroad does not preclude him from claiming pay for such improvements.[28] But the authorities differ as to when the taking is complete, the question depending in a great measure upon the peculiarities of different state laws authorizing the condemnation of property for railroad purposes. In states where the payment of compensation is required to precede the taking, the date of the

[28] Driver v. Western Union R. Co. 32 Wis. 569; 14 Am. R. 726, Sherwood v. St. Paul &c. R. Co. 21 Minn. 122; Wall Street, In re, 17 Barb. (N. Y.) 617; State v. Carragan, 36 N. J. L. 52; Chicago &c. R. Co. v. Mogridge (Tenn.), 92 S. W. 1114; McElroy v. Kansas City &c. R. Co. 172 Mo. 546; 72 S. W. 913; Van Husen v. Omaha Bridge &c. R. Co. 118 Iowa 366; 92 N. W. 47. In Driver v. Western Union R. Co. supra, it appeared that "plaintiff was notified by defendants that part of certain lands bought by him to erect buildings on would be taken by defendants for their railroad, and proceedings were commenced therefor; plaintiff, notwithstanding, erected his buildings, and defendants afterward took the land. The court said: "Upon the commissioners making and filing their report, and payment or legal tender of the appraisement to the owner, or upon the payment of the amount to the clerk of the court to which the appeal has been taken, title vests in the company. Now, the 7th of May (after the buildings were erected) was the time the commissioners made and filed their award, and when the company, by depositing the amount thereof with the clerk, acquired, under the charter, the right to lot seven, this, then, was the actual taking of the property for the use of the road, and the time to fix its value, not only within the intent of the charter, but upon general principles applicable to these cases." But in Shick v. Pennsylvania R. Co. 1 Pears. (Pa.) 264; 1 Legal Gazette 61, it was held that an improvement, erected by the owner, on the property, in order to prevent its being taken for public use was not a proper subject for compensation where the company began proceedings, filed a bond and obtained an appraisement in good faith, and afterwards all the proceedings were set aside by the court, except the bond. See, to the same effect, Cobb v. Boston, 109 Mass. 438.

award of appraisers by which is determined the value to be paid before entry,[29] or the date of approval of this award by the court, where such approval is necessary to its validity,[30] is generally held to be the time to which the assessment of damages must relate. Since there can be no constitutional taking of property until after an assessment of damages to be paid or tendered, this holding seems correct upon principle,[31] though there are cases in apparent conflict with it.[32] But in states where the compensation does not necessarily

[29] Lafayette &c. R. Co. v. Murdock, 68 Ind. 137; Logansport &c. R. Co. v. Buchanan, 52 Ind. 163; Morin v. St. Paul &c. R. Co. 30 Minn. 100; 14 N. W. 460; Blue Earth v. St. Paul &c. R. Co. 28 Minn. 503; 11 N. W. 73; Jones v. New Orleans &c. R. Co. 70 Ala. 227; Stafford v. Providence, 10 R. I. 567; 14 Am. R. 710; Hampden &c. Co. v. Springfield &c. R. Co. 124 Mass. 118; West v. Milwaukee &c. R. Co. 56 Wis. 318; 14 N. W. 292; Lyon v. Green Bay &c. R. Co. 42 Wis. 538; Driver v. Western Union R. Co. 32 Wis. 569; 14 Am. R. 726; Pennsylvania R. Co. v. First German Lutheran Congregation, 53 Pa. St. 445. See, also, Georgia Southern R. Co. v. Small, 87 Ga. 355; 13 S. E. 515; and see and compare Ft. Wayne &c. Trac. Co. v. Ft. Wayne &c. R. Co. (Ind.) 80 N. E. 837. And the fact that the case is retried de novo on appeal does not extend the time, but damages, must, in such a case, be assessed as of the date of the original award. Lafayette &c. R. Co. v. Murdock, 68 Ind. 137; Logansport &c. R. Co. v. Buchanan, 52 Ind. 163. In Arnold v. Covington &c. Bridge Co. 1 Duv. (Ky.) 372, the court held that the assessment should be as of the date of the trial on appeal, but where, as is usually the case, the railroad company is entitled to take the land upon payment or tender of the original award, the date when it was made would clearly be the date of the taking.

[30] Hudson River R. Co. v. Outwater, 3 Sand. (N. Y.) 689; Beale v. Pennsylvania R. Co. 86 Pa. St. 509; Neal v. Pittsburg &c. R. Co. 31 Pa. St. 19; St. Joseph &c. R. Co. v. Orr, 8 Kan. 419.

[31] The value, according to the constitutional requirement, must be ascertained at the time of making the assessment, for, up to the moment of making the assessment the land, or its equivalent value, belongs to the owner, and it is not subject to be taken for public use until the compensation has been first made; the owner is, therefore, entitled to receive its market value at the time. California S. R. Co. v. Colton &c. Co. (Cal.) 2 Pac. 38; 14 Am. & Eng. R. Cas. 194, affirmed on authority of California S. R. Co. v. Kimball, 61 Cal. 90. See 65 Cal. xix; Bensley v. Mountain Lake Water Co. 13 Cal. 306; 73 Am. Dec. 575.

[32] Oregon &c. R. Co. v. Barlow, 3 Ore. 311. See Logansport &c. R. Co. v. Buchanan, 52 Ind. 163; Lafayette &c. R. Co. v. Murdock, 68 Ind. 137. In the case first cited the court held that the time of beginning proceedings to condemn was the time for which the assessment of damages should be made.

precede the taking, it has been variously held that the time of filing the location and map of the proposed route,[33] or the time of filing the bond to pay the damages,[34] or the time of bringing the action for condemnation by filing a petition for the assessment of damages,[35] is the time when the property is taken. In cases where the road has been constructed under a parol agreement with

[33] Charlestown Branch R. Co. v. County Commissioners, 7 Metc. (Mass.) 78 Hampden &c. Co. v. Springfield &c. R. Co. 124 Mass. 118; Hazen v. Boston &c. R. Co. 2 Gray (Mass.), 574; Whitman v. Boston &c. R. Co. 7 Allen (Mass.), 313; Old Colony R. Co. v. Miller, 125 Mass. 1; 28 Am. R. 194; Morris &c. R. Co. v. Blair, 9 N. J. Eq. 635.

[34] Schonhardt v. Pennsylvania R. Co. 216 Pa. 224; 65 Atl. 543.

[35] Northeastern &c. R. Co. v. Frazier 25 Neb. 53; 40 N. W. 609; Missouri Pac. R. Co. v. Hays, 15 Neb. 224; 18 N. W. 51; South Park Comrs. v. Dunlevy, 91 Ill. 49; Dupuis v. Chicago &c. R. Co. 115 Ill. 97; 3 N. E. 720; Chicago &c. R. Co. v. Mines, 221 Ill. 448; 77 N. E. 898; Newport News &c. Electric Co. v. Lake (Va.), 54 S. E. 328. In Missouri Pac. R. Co. v. Hays, supra, the court says: "On the part of the plaintiff it was contended on the trial, and is here, that the assessment should be made as of the time when the proceedings to condemn the property are instituted; in other words, when the petition for the appointment of commissioners to assess the damages is filed with the county judge. The court below, however, held that the jury should make the assessment as of the date of the filing of the commissioners' report, which was something over two months later. There was evidence tending to show that during this time the market value of the land had materially advanced in consequence of the location of the road. The authorities seem to agree pretty generally that the damages in such cases must be assessed as of the time of taking; also that the increased value given to the property by the location of the road should be excluded in making the estimate. The point of chief difficulty, however, seems to be found in determining as to just what constitutes a 'taking' within the meaning of the law." After reviewing the cases of Charlestown Branch R. Co. v. County Commissioners, 7 Metc. (Mass.) 78; Logansport &c. R. Co. v. Buchanan, 52 Ind. 163; Lafayette &c. R. Co. v. Murdock, 68 Ind. 137, and South Park Commissioners v. Dunlevy, 91 Ill. 49, the opinion continues: "The principle of these decisions, which requires compensation for property taken for public use to be estimated with special reference to its value at the time of the appropriation or taking, is manifestly just to all concerned. By no other rule, in cases of condemnations for uses of great public interest and local benefit, could the valuation of property in the assessment of damages be so successfully guarded against the influence of enhanced values resulting specially from the enterprise."

the owner, or under proceedings instituted in good faith, but afterwards held invalid, the time of the actual entry upon the land for the purpose of building the road has been held to be the time to which an assessment of the land-owner's damages must relate.[36]

§ 986. Time of payment of compensation.—Where the question is not controlled by statute the rule seems to be that the payment of compensation must precede the actual occupancy of the land.[37] It is well settled that a preliminary survey may be made before payment of compensation, and, indeed, without compensation, for a preliminary survey is not regarded as a taking,[38] but if injury is

[36] New York &c. R. Co. v. Stanley, 35 N. J. Eq. 283; Indiana Central R. Co. v. Hunter, 8 Ind. 74; Logansport &c. R. Co. v. Buchanan, 52 Ind. 163. See post, § 997. See, also, McElroy v. Kansas City &c. Line, 172 Mo. 546; 72 S. W. 913.

[37] Cherokee Nation v. Southern Kansas &c. R. Co. 135 U. S. 641; 10 Sup Ct. 965; Schreiber v. Chicago &c. R. Co. 115 Ill. 340; 3 N. E. 427; Chicago &c. R. Co. v. Gates, 120 Ill. 86; 11 N. E. 527; Covington &c. R. Co. v. Piel, 87 Ky. 267; 8 S. W. 449; Redman v. Philadelphia &c. R. Co. 33 N. J. Eq. 165. See Memphis &c. R. Co. v. Payne, 37 Miss. 700; Presbyterian Society v. Auburn &c. R. Co. 3 Hill (N. Y.), 567; Williams v. New York &c. R. Co. 16 N. Y. 97; 69 Am. Dec. 651, and note; Oregonian R. Co. v. Hill, 9 Ore. 377; Henry v. Dubuque &c. R. Co. 10 Iowa 540; Walther v. Warner, 25 Mo. 277. See, generally, Martin v. Tyler, 4 N. Dak. 278; 60 N. W. 392; 25 L. R. A. 838; Orr v. Quimly, 54 N. H. 590; Johnson v. Baltimore &c. R. Co. 45 N. J. Eq. 454; 17 Atl. 574; 39 Am. & Eng. R. Cas. 101; Jones v. New Orleans &c. R. Co. 70 Ala. 227; San Francisco &c. R. Co. v. Mahoney, 29 Cal. 112; Sherman v. Milwaukee &c. R. Co. 40 Wis. 645; St. Louis &c. R. Co. v. Clark, 119 Mo. 357; 24 S. W. 157; Chicago &c. R. Co. v. Douglass Co. (Neb.) 95 N. W. 339; Atlanta &c. R. Co. v. Southern R. Co. 131 Fed. 657; State v. Wells (N. C.), 55 S. E. 210; Little Rock &c. R. Co. v. Greer, 77 Ark. 387; 96 S. W. 129; Steele v. Tanana Mines R. Co. 2 Alaska, 451; Southern R. Co. v. Gregg, 101 Va. 308; 43 S. E. 570; Brown v. Chicago &c. R. Co. 64 Neb. 62; 89 N. W. 405; Stolz v. Milwaukee &c. R. Co. 113 Wis. 44; 88 N. W. 919; 90 Am. St. 833; Postal Tel. Co. v. Oregon Short Line R. Co. 23 Utah, 474; 65 Pac. 735; Sweeney v. Montana Central R. Co. 25 Mont. 543; 65 Pac. 912; Southern R. Co. v. Birmingham &c. R. Co. 130 Ala. 660; 31 So. 509. Where payment is made into court the company is generally entitled to possession. State v. McHatton, 15 Mont. 159; 38 Pac. 711. But see Pennsylvania R. Co. v. National &c. Co. 53 N. J. 178; 32 Atl. 220.

[38] Ante, §§ 925, 977; Chambers v. Cincinnati &c. R. Co. 69 Ga. 320; 10 Am. & Eng. R. Cas. 376; Republican &c. R. Co. v. Fink, 18 Neb. 82; 24 N. W. 439; Ask v. Cum-

wrongfully inflicted in making such survey an action will lie. Possession may be taken, in some instances, before compensation is actually paid, as, for instance, where money is paid into court in appropriation proceedings under a statute authorizing such a procedure, but while possession may be taken the title does not pass until payment of the compensation awarded by the court.[39] Thus, it is held in Nebraska that the deposit of money with the county judge pending condemnation proceedings does not, unless withdrawn by the property owner, discharge the obligation of the railroad company to make compensation for the property taken. And in the case cited the court said: "It is not competent for either the legislature or the courts to appoint some person without his consent, and to say that payment or deposit with such appointee shall be equivalent to payment to him. If the statue expressly so provided or was susceptible of that construction, it would be unconstitutional and void."[40]

§ 987. Benefits—General survey of the subject.—It is obvious that there must be a difference in respect to benefits in cases where land is taken for streets or highways, and cases where land is taken for a railroad, since the owner of the fee of land taken for

mings, 50 N. H. 591; Lyon v. Green Bay &c. Co. 42 Wis. 538; Orr v. Quimly, 54 N. H. 590; Burrow v. Terre Haute &c. R. Co. 107 Ind. 432; 8 N. E. 167; Nichols v. Somerset &c. R. Co. 43 N. E. 356; California &c. R. Co. v. Central &c. R. Co. 47 Cal. 528; Chicago &c. R. Co. v. Watkins, 43 Kan. 50; 22 Pac. 985. See, also, Altanta &c. R. Co. v. Southern R. Co. 131 Fed. 657.

[39] Lake Erie &c. R. Co. v. Kinsey, 8 Ind. 514; 14 Am. & Eng. R. Cas. 309; Blackshire v. Atchison &c. R. Co. 13 Kan. 514; Harness v. Chesapeake &c. R. Co. 1 Md. Ch. 248; Evans v. Missouri &c. R. Co. 64 Mo. 453; State v. Wells (N. C.), 55 S. E. 210; Southern R. Co. v. Gregg, 101 Va. 308; 43 S. E. 570; Green v. Missouri Pac. R. Co. 82 Mo. 653; Manchester &c. R. Co. v. Keene, 62 N. H. 81; Davidson v. Texas &c. R. Co. 29 Tex. Civ. App. 54; 67 S. W. 1093. But see Davis v. Russell, 47 Me. 443. So, it is held in some jurisdictions where there is no constitutional provision to the contrary and adequate provision is made by statute it may authorize an entry before payment. Carolina Cent. R. Co. v. McCaskill, 94 N. Car. 746; Northern Pac. R. Co. v. Burlington &c. R. Co. 4 Fed. 298; Cairo &c. R. Co. v. Turner, 31 Ark. 494; 25 Am. R. 564; State v. Jacksonville &c. R. Co. 20 Fla. 616, and other cases cited in 10 Am. & Eng. Ency. of Law (2d ed.), 1139, 1140. But see Steinhart v. Superior Court, 137 Cal. 575; 70 Pac. 629; 59 L. R. A. 404; 92 Am. St. 183. So, a tender may be sufficient.

[40] Brown v. Chicago &c. R. Co. 64 Neb. 62; 89 N. W. 405.

a street or highway retains a beneficial interest in the use and enjoyment of the public way,[41] whereas, in the case of the appropriation of land for railroad purposes, the right to the use and possession of the land acquired by the railroad company is generally exclusive.[42] The exclusive right acquired by a railroad company to the land appropriated excludes the use of it by the owner for the purposes of traveling thereon, whereas an urban street or rural highway affords facilities for travel. But while there is a difference in the nature of the easement acquired, the authorities lay down much the same general rules in regard to the consideration of benefits for both classes of cases. Where there is no statute to the contrary the doctrine supported by the weight of authority is that special benefits resulting from the construction and operation of the railroad may be taken into consideration in estimating compensation,[43]

[41] Elliott Roads and Streets (2d ed.), §§ 690, 703.

[42] Cairo &c. R. Co. v. Brevoort, 62 Fed. 129, 136; 25 L. R. A. 527, and note; Hayden v. Skillings, 78 Me. 413; 6 Atl 830; Brainard v. Clapp, 10 Cush. (Mass.) 6; 57 Am. Dec. 74; Hazen v. Boston &c. R. Co. 2 Gray (Mass.), 574; Proprietors &c. v. Nashua &c. R. Co. 104 Mass. 1; 6 Am. R. 181; Jackson v. Rutland &c. R. Co. 25 Vt. 150; 60 Am. Dec. 246; Connecticut &c. R. Co. v. Holton, 32 Vt. 43; Atlantic &c. Co. v. Chicago &c. R. Co. 6 Biss. (U. S.) 158; Fed. Cas. No. 632.

[43] Wyandotte &c. Co. v. Waldo, 70 Mo. 629; Ragan v. Kansas City &c. R. Co. 111 Mo. 456; 20 S. W. 234; Symonds v. Cincinnati &c. R. Co. 14 Ohio, 147; 45 Am. Dec. 529, and note; Neilson v. Chicago &c. R. Co. 58 Wis. 516; 17 N. W. 310; Whiteman v. Wilmington &c. R. Co. 2 Harr. (Del.) 514; 33 Am. Dec. 411; Indiana Central R. Co. v. Hunter, 8 Ind. 74; Holton v. Milwaukee &c. R. Co. 31 Wis. 27; New Orleans &c. R. Co. v. Lagarde, 10 La. Ann. 150; San Francisco &c. Co. v. Caldwell, 31 Cal. 367; Moran v. Ross, 79 Cal. 549; 21 Pac. 958; Mayor of Atlanta v. Central &c. R. Co. 53 Ga. 120; Alton &c. R. Co. v. Carpenter, 14 Ill. 190; Todd v. Kankakee &c. R. Co. 78 Ill. 530; Winona &c. R. Co. v. Waldron, 11 Minn. 515; 88 Am. Dec. 100, and note; Kramer v. Cleveland &c. R. Co. 5 Ohio St. 140; Columbus &c. R. Co. v. Simpson, 5 Ohio St. 251; Pennsylvania R. Co. v. Heister, 8 Pa. St. 445; Vicksburg &c. R. Co. v. Calderwood, 15 La. Ann. 481; Meacham v. Fitchburg &c. R. Co. 4 Cush. (Mass.) 291; Fremont &c. R. Co. v. Whalen, 11 Neb. 585; 10 N. W. 491; Kings Co. R. Co. In re, 58 Hun (N. Y.), 608; 12 N. Y. S. 198; Haislip v. Wilmington &c. R. Co. 102 N. C. 376; 8 S. E. 926; Delaware &c. Co. v. Burson, 61 Pa. St. 369; Long v. Harrisburgh &c. Co. 126 Pa. St. 143; 19 Atl. 39. See, also, Bauman v. Ross, 167 U. S. 548; 17 Sup. Ct. 966; Terre Haute &c. R. Co. v. Flora, 29 Ind. App. 442; 64 N. E. 648, 650; Pittsburg &c. R. Co. v. Wolcott, 162 Ind. 399; 69 N. E. 451; Abney v.

but there is conflict of authority on this point.[44] In many of the states the constitution or the statute excludes benefits from consideration, and, of course, in those states benefits can not be considered, although they may be special and substantial.[45] Some of the state constitutions use the term "just compensation," and there is great diversity of opinion as to the meaning and effect to be assigned to the term. Some of the cases affirm that it excludes benefits from consideration, others assert a contrary doctrine, and still others that it excludes the consideration of benefits as a deduction from the value of the land actually appropriated, but not as to damages for land injured but not actually taken.[46] We can see no sufficient

Texarkana &c. R. Co. 105 La. 446; 29 So. 890; Cox v. Philadelphia &c. R. Co. 215 Pa. 506; 64 Atl. 729.

[44] Alabama &c. R. Co. v. Burkett, 42 Ala. 83; St. Louis &c. R. Co. v. Anderson, 39 Ark. 167; 17 Am. & Eng. R. Cas. 97; Koestenbader v. Peirce, 41 Iowa, 204; Asher v. Louisville &c. R. Co. 87 Ky. 391; 8 S. W. 854; Brown v. Beatty, 34 Miss. 227; 60 Am. Dec. 389; New Orleans &c. R. Co. v. Moye, 39 Miss. 374; Virginia &c. R. Co. v. Lovejoy, 8 Nev. 100; Packard v. Bergen &c. R. Co. 54 N. J. L. 229; 23 Atl. 722.

[45] Atchison &c. R. Co. v. Blackshire, 10 Kan. 477; St. Joseph &c. R. Co. v. Orr, 8 Kan. 419; Reisner v. Atchison &c. R. Co. 27 Kan. 382; Britton v. Des Moines &c. R. Co. 59 Iowa, 540; 13 N. W. 710; Ham v. Wisconsin &c. R. Co. 61 Iowa, 716; 17 N. W. 157; Little Miami &c. R. Co. v. Collett, 6 Ohio St. 182; Giesy v. Cincinnati &c. R. Co. 4 Ohio St. 308; Cincinnati &c. R. Co. v. Longworth, 30 Ohio St. 108; Bowen v. Atlantic &c. R. Co. 17 S. Car. 574. See Grand Rapids &c. R. Co. v. Horn, 41 Ind. 479; White Water Valley R. Co. v. McClure, 29 Ind. 536; McMahon v. Cincinnati &c. R. Co. 5 Ind. 413; Bevier v. Dillingham, 18 Wis. 529; Swayze v. New Jersey Midland R. Co. 36 N. J. L. 295; Crater v. Fritts, 44 N. J. L. 374; Brown v. Beatty, 34 Miss. 227, 241; 69 Am. Dec. 389; Isom v. Mississippi &c. R. Co. 36 Miss. 300; New Orleans &c. R. Co. v. Moye, 39 Miss. 374; Board of Levee Commissioners v. Harkleroads, 62 Miss. 807. But see Balfour v. Louisville &c. R. Co. 62 Miss. 508. See Beveridge v. Lewis, 137 Cal. 619; 67 Pac. 1040; 70 Pac. 1083; 59 L. R. A. 581.

[46] Shipley v. Baltimore &c. R. Co. 34 Md. 336; Paris v. Mason, 37 Tex. 447; Milwaukee &c. R. Co. v. Eble, 4 Chand. (Wis.) 72; Oregon &c. R. Co. v. Wait, 3 Ore. 91; Elizabethtown &c. R. v. Helm, 8 Bush. (Ky.) 681; Louisville &c. R. Co. v. Thompson, 18 B. Mon. (Ky.) 735; Brown v. Beatty, 34 Miss. 227; 69 Am. Dec. 389; Isom v. Mississippi &c. R. Co. 36 Miss. 300; Bangor &c. R. Co. v. McComb, 60 Me. 290; Newman v. Metropolitan &c. R. Co. 118 N. Y. 618; 23 N. E. 901; 7 L. R. A. 289, and note; Dolores &c. Co. v. Hartman, 17 Colo. 138; 29 Pac. 378; Savannah v. Hartridge, 37 Ga. 113; Paducah &c. R. Co. v. Stovall, 12 Heisk. (Tenn.) 1; Laflin v. Chica-

reason for holding that the term "just" adds such force as to exclude the consideration of special or peculiar benefits, for if the land-owner's property is enhanced in value to that extent there is just compensation. It seems to us that all that is required under any law, except one directly excluding a consideration of benefits, is that the land-owner shall receive fair and reasonable compensation for the injury he sustains, and that in ascertaining the extent of his injury, special but not general benefits should be taken into consideration.[47] The matter of benefits, however, may be made the subject of a contract between the parties. In one case where a railroad company contracted with the property owner that on payment of a bonus it should have license to construct its railroad in advance of condemnation proceedings and that on these proceedings the property owner was to be paid the value of the property taken, the contract was construed to exclude consideration of special benefits and the land-owner was entitled to the entire value of his land without diminution.[48]

§ 988. Benefits—Different lines of decision.—It will be found upon a study of the authorities that where the subject is not controlled by peculiar constitutional or statutory provisions there are or have been four general lines of cases.[49] (1) Those holding that benefits can not in any case be set off against the damages.[50] (2) Those holding that special benefits may not be set off against the value

go &c. R. Co. 33 Fed. 415; Munkwitz v. Chicago &c. R. Co. 64 Wis. 403; 25 N. W. 438; 22 Am. & Eng. R. Cas. 151; Washburn v. Milwaukee &c. R. Co. 59 Wis. 364; 18 N. W. 328.

[47] Monongahela &c. Co. v. United States, 148 U. S. 312; 13 Sup. Ct. 622; Pittsburgh &c. R. Co. v. Rose, 74 Pa. St. 362. As to what is not a special benefit, see Illinois &c. R. Co. v. Borms, 219 Ill. 179; 76 N. E. 149.

[48] McElroy v. Kansas City &c. R. Co. 172 Mo. 546; 72 S. W. 913.

[49] Elliott Roads and Streets (2d ed.), § 245. We use the term incidental injuries in this immediate connection as meaning injuries to the property not actually taken.

[50] Brown v. Beatty, 34 Miss. 227; 69 Am. Dec. 389; Isom v. Mississippi R. Co. 36 Miss. 300; New Orleans &c. R. Co. v. Moye, 39 Miss. 374. See, also, Texas &c. R. Co. v. Matthews, 60 Tex. 215; Buffalo Bayou &c. R. Co. v. Ferris, 26 Tex. 588; New Orleans Pac. R. Co. v. Murrell, 36 La. Ann. 344; Vicksburgh &c. R. Co. v. Dillard, 35 La. Ann. 1045, changed as to railroads, Rev. Laws, 1884, 701; Elizabethtown &c. R. Co. v. Helm's Heirs, 8 Bush, (Ky.) 681; Louisville &c. R. Co. v. Thompson, 18 B. Mon. (Ky.) 735; Sutton's Heirs v. Louis-

of the land actually seized, but may be set off against incidental injuries sustained by the landowner.[51] (3) Those holding that special benefits may be set off against the value of the land taken as well as against incidental injuries.[52] (4) Those holding that all benefits both general and special may be set off against the damages. Our opinion is that special, but not general benefits may be deducted from the damages.[53] There are now few if any jurisdictions

ville, 5 Dana (Ky.), 28; Selma &c. R. Co. v. Keith, 53 Ga. 178; Jones v. Wills Valley R. Co. 30 Ga. 43.

[51] Savannah v. Hartridge, 37 Ga. 113; Alabama &c. Co. v. Burket, 42 Ala. 83; Woodfolk v. Nashville &c. R. Co. 2 Swan (Tenn.), 422; Memphis v. Bolton, 9 Heisk. (Tenn.) 508; Israel v. Jewett, 29 Iowa, 475; Elliott Roads and Streets (2d ed.), § 245; 10 Am. & Eng. Ency. of Law (2d ed.), 1179. See, also, Chicago &c. R. Co. v. Rottgering, 26 Ky. L. 1167; 83 S. W. 584; Morrison v. Fairmount &c. Traction Co. (W. Va.) 55 S. E. 669; Guthrie &c. R. Co. v. Faulkner, 12 Okl. 532; 73 Pac. 290; Wray v. Knoxville &c. R. Co. 113 Tenn. 544; 82 S. W. 471.

[52] McIntire v. State, 5 Blackf. (Ind.) 384; Putnam v. Douglass Co. 6 Ore. 328; 25 Am. R. 527; Hornstein v. Atlantic &c. R. Co. 51 Pa. St. 87; Roots' Case, 77 Pa. St. 276; Symonds v. Cincinnati, 14 Ohio 147; 45 Am. Dec. 529; San Francisco &c. R. Co. v. Caldwell, 31 Cal. 367; Pueblo &c. R. Co. v. Rudd, 5 Colo. 270; Adden v. White Mt. R. Co. 55 N. H. 413; 20 Am. R. 220; Swayze v. New Jersey &c. R. Co. 36 N. J. L. 299; Adams v. St. Johnsbury &c. R. Co. 57 Vt. 240; Greenville &c. R. Co. v. Partlow, 5 Rich. (S. Car.) 428; Wyandotte &c. R. Co. v. Waldo, 70 Mo. 629; Peirce Railroads, 221, 224; Woods Railroads, 1076. See, also, Mississippi &c. R. Co. v. McDonald, 12 Heisk. (Tenn.) 54; East Tennessee &c. R. Co. v. Love, 3 Head (Tenn.), 63; Washburn v. Milwaukee &c. R. Co. 59 Wis. 364; 18 N. W. 328; Driver v. Western Union R. Co. 32 Wis. 569; 14 Am. R. 726; Robbins v. Milwaukee &c. R. Co. 6 Wis. 636; Fremont &. R. Co. v. Whalen, 11 Neb. 585; 10 N. W. 491; Railroad Co. v. Foreman, 24 W. Va. 662; Railroad Company v. Tyree, 7 W. Va. 693; James River &c. Co. v. Turner, 9 Leigh (Va.), 313; Shipley v. Baltimore &c. R. Co. 34 Md. 336; Tide Water Canal Co. v. Archer, 9 Gill & J. (Md.) 479; Keithsburg &c. R. Co. v. Henry, 79 Ill. 290; St. Louis &c. R. Co. v. Kirby, 104 Ill. 345.

[53] Chicago &c. R. Co. v. Blake, 116 Ill. 163; 4 N. E. 488; 23 Am. & Eng. Cas. 97; West Side El. R. Co. v. Stickney, 150 Ill. 362; 37 N. E. 1098; 26 L. R. A. 773; Sullivan v. North Hudson Co. R. Co. 51 N. J. L. 518; 18 Atl. 689; Pittsburgh &c. R. Co. v. McCloskey, 110 Pa. St. 436; 1 Atl. 555; 23 Am. & Eng. R. Cas. 86; Little Miami &c. R. Co. v. Collett 6 Ohio St. 182; Pueblo &c. R. Co. v. Rudd, 5 Colo. 270; 10 Am. & Eng. R. Cas. 404; Grafton &c. R. Co. v. Foreman, 24 W. Va. 662; 20 Am. & Eng. R. Cas. 215; Morin v. St. Paul &c. R. Co. 30 Minn. 100; 14 N. W. 460; St. Louis &c. Co. v. Richardson, 45 Mo. 466; Pacific &c. R. Co. v.

in which it is held that in no case can any benefits be set off or considered.

§ 989. Benefits—General and special.—As indicated in the preceding section there is much conflict of opinion upon the subject of allowing a deduction of benefits, and there are cases which deny that there is a distinction between general and special benefits. We think there is a clear distinction between the two kinds of benefits and that the distinction rests upon an essential difference in the two classes of cases. Where the construction of a railroad adds increased value to the land of an individual different in its nature from the benefit to the general community he receives a special benefit which lessens his injury or loss, so that he really sustains no injury or loss except that which is above and beyond the amount of the peculiar benefit which the construction of the railroad confers upon him by enhancing the value of that part of his land which is not appropriated. But where the land-owner reaps no advantage peculiar to himself but only such as is shared by the community at large, there is reason for excluding the benefits from consideration. Special benefits may be said to be such as are direct and peculiar to the land. General benefits such as are bestowed upon other lands of similar character and situation in the same vicinity.[54]

Chrystal, 25 Mo. 544; Lipes v. Hand, 104 Ind. 503; 1 N. E. 871; 4 N. E. 160; Laflin v. Chicago &c. R. Co. 33 Fed. 415; Arbrush v. Oakdale, 28 Minn. 61; 9 N. W. 30; Missouri &c. R. Co. v. Hays, 15 Neb. 224; 18 N. W. 51; Minnesota &c. R. Co. v. Doran, 17 Minn. 188; Donovan v. Springfield, 125 Mass. 371; Forsyth v. Wilcox, 143 Ind. 144; 41 N. E. 371; Burk v. Simonson, 104 Ind. 173; 3 N. E. 826; 54 Am. R. 304; Cooley Const. Lim. (7th ed.) 820–824; 2 Dillon Municipal Corp. § 624; Elliott Roads and Streets (2d ed.), § 246; 3 Sutherland Damages, 452, 454, 462; Mills Eminent Domain, § 152; Lewis Eminent Domain (2d ed.), § 471.

[54] Dillon Municipal Corp. (4th ed.) § 624; Lewis Eminent Domain, § 476; Elliott Roads and Streets (2d ed.), § 246; Mills Eminent Domain, § 150, 153; Randolph Eminent Domain, § 270, 271; Whiteman v. Boston &c. R. Co. 3 Allen (Mass.), 133; Lipes v. Hand, 104 Ind. 503; 1 N. E. 871; 4 N. E. 160; Pottawatomic Co. v. O'Sullivan, 17 Kan. 58; Roberts v. Commissioners, 21 Kan. 247; Stattuck v. Stoneham &c. R. Co. 6 Allen (Mass.), 115; Minnesota &c. R. Co. v. McNamara, 13 Minn. 508; Pittsburgh &c. Co. v. Robinson, 95 Pa. St. 426; Washburn v. Milwaukee &c. R. Co. 59 Wis. 364; 18 N. W. 328; Childs v. New Haven &c. R. Co. 133 Mass. 253; Page v. Chicago &c. R. Co. 70 Ill. 324; Wyandotte &c. R. Co.

§ 990. Benefits confined to parcel or tract actually taken.—As we have elsewhere shown damages are confined to the parcel or tract of which part is taken,[55] and upon the same principle benefits must be confined to the tract or parcel of which part is actually appropriated.[56] That benefit to separate and distinct lots, parcels or tracts can not be considered in estimating the benefits is well settled, but what shall be considered part of the tract or parcel seized, it is sometimes difficult to determine. We suppose, however, that no general rule can be laid down which will justly apply to all cases, but that in mose instances the question is one of fact to be determined from the evidence in the particular case.

v. Waldo, 70 Mo. 629. See, generally, Donovan v. Springfield, 125 Mass. 371; Brown v. Providence &c. R. Co. 5 Gray (Mass.), 35; Hayes v. Ottawa &c. R. Co. 54 Ill. 373; Farrar v. Midland Electric R. Co. 101 Mo. App. 140; 74 S. W. 500; Carrell v. Muncie &c. R. Co. (Ind.) 78 N. E. 254; St. Louis &c. R. Co. v. Continental Brick Co. (Mo.) 96 S. W. 1011; Pochila v. Calvert &c. R. Co. 31 Tex. Civ. App. 398; 72 S. W. 255; Eastern Texas R. Co. v. Eddings, 30 Tex. Civ. App. 170; 70 S. W. 98; Guthrie &c. R. Co. v. Faulkner, 12 Okl. 532; 73 Pac. 290; Southport &c. R. Co. v. Owners of Platt Land, 133 N. Car. 266; 45 S. E. 589; Shimer v. Eastern &c. R. Co. 205 Pa. St. 648; 55 Atl. 769. But compare Sloan v. Railroad Co. 137 N. Y. 595; 33 N. E. 335; Saxton v. Railroad Co. 139 N. Y. 320; 34 N. E. 728. The erection of a depot in the vicinity can not be regarded as having especially benefited the property, so as to offset the damages, where the benefit caused by the building of the depot has affected alike all property located in its neighborhood. Pochila v. Calvert &c. R. Co. 31 Tex. Civ. App. 398; 72 S. W. 255.

[55] Post, § 992; Ham v. Wisconsin &c. R. Co. 61 Iowa, 716; 17 N. W. 157; New York &c. R. Co. v. LeFevre, 27 Hun (N. Y.), 537; Kansas City &c. R. Co. v. Merrill, 25 Kan. 421; Welch v. Milwaukee &c. R. Co. 27 Wis. 108; Paducah &c. R. Co. v. Stovall, 12 Heisk. (Tenn.) 1; Meacham v. Fitchburg R. Co. 4 Cush. (Mass.) 291; Philadelphia &c. R. Co. v. Gilson, 8 Watts (Pa.), 243; Lexington v. Long, 31 Mo. 369; St. Louis &c. R. Co. v. Brown, 58 Ill. 61; Buffalo Bayou &c. R. Co. v. Ferris, 26 Tex. 588. A personal benefit to the owner, such as his profits from the sale of materials to the company is not to be deducted from the damages to the land. Minnesota &c. R. Co. v. Doran, 17 Minn. 188.

[56] Pittsburgh &c. R. Co. v. Reich, 10 Ill. 157; Cleveland &c. R. Co. v. Ball, 5 Ohio St. 568; Louisville &c. R. Co. v. Glazebrook, 1 Bush (Ky.), 325; White Water Valley R. Co. v. McClure, 29 Ind. 536, and authorities cited in last note, supra. See, also, Cameron v. Chicago &c. R. Co. 42 Minn. 75; 43 N. W. 785; Evansville &c. R. Co. v. Charlton, 6 Ind. App. 56; 33 N. E. 129.

§ 990a. Benefits from abandonment of an existing line across premises.—The question as to the right of a railroad company to apply benefits arose in a case where a railroad company on constructing a line across a land-owner's premises abandoned its old line across the same premises but remote from the new location. The railroad company contended that it was entitled to have any benefit from the abandonment of the old line set off against the damage done the land adjoining the new line. The conclusion reached—and it seems a proper one in a case where the old line was entirely outside of the zone of damage caused by the construction of the new line and where the railroad company was not compelled to relinquish its title to the old right of way on acquiring title to the new—was, that the railroad company could only offset the benefits which directly affected the land adjacent to the new right of way.[57]

§ 991. Remote or conjectural damages can not be allowed.—Remote and fanciful injuries, which rest wholly in conjecture, and do not admit of an estimate in damages, can not be proven as elements of damage for which compensation is to be made.[58] Thus an interference with the quiet and privacy of the plaintiff's premises by the construction of a railroad overlooking them,[59] or by bringing crowds of visitors into his neighborhood,[60] is not an injury for which he can claim compensation. Neither is an injury to the plain-

[57] Oregon &c. R. Co. v. Fox, 28 Utah, 311; 78 Pac. 800, citing Chicago & E. R. Co. v. Blake, 116 Ill. 163; 4 N. E. 488; Meachem v. Fitchburg R. Co. 4 Cush. (Mass.) 291; Winona &c. R. Co. v. Waldron, 11 Minn. 515 (Gil. 392); 83 Am. Dec. 100; Chicago &c. R. Co. v. Wiebe, 25 Neb. 542; 41 N. W. 297; Little Miami R. Co. v. Collet, 6 Ohio St. 182; Cooley Const. Lim. 699.

[58] Atlantic &c. R. Co. v. Postal &c. Tel. Co. 120 Ga. 268; 48 S. E. 15; Spohr v. Chicago, 206 Ill. 441; 69 N. E. 515; St. Louis &c. R. Co. v. Knapp, 160 Mo. 396; 61 S. W. 300; Conness v. Indiana &c. R. Co. 193 Ill. 464; 62 N. E. 221, and authorities cited in following notes.

[59] Penny, In re, 7 El. & Bl. 660. An award of damages for the possible exercise by the company of a right to cut down trees on either side of the road can not be sustained. Such right should be considered only so far as it affects the present market value of the land. Ontario &c. R. Co. In re, 6 Ont. 338. See Pittsburgh &c. R. Co. v. McCloskey, 110 Pa. St. 436; 1 Atl. 555.

[60] First Parish of Woburn v. Middlesex, 7 Gray (Mass.), 106; Patten v. Northern Central R. Co. 33 Pa. St. 426; 75 Am. Dec. 612.

tiff's business resulting from competition induced by the improvement,[61] nor the liability of horses used on plaintiff's farm to take fright from passing trains,[62] nor the danger to the owner of the premises[63] or others in crossing and recrossing the proposed tracts,[64] and the increased risk of orchards through which a railroad is built by reason of leaving them more free to access of thieves is so remote and speculative an element of damages as not to be entitled to consideration by the jury.[65]

§ 991a. Remote, sentimental or conjectural damages continued.—Under the rule of the foregoing section it has been held that a landowner is not entitled to compensation for inconvenience, injury to his business, loss of profits, damage to personal property, or the expense of removing it.[66] So where the property selected for a depot was shown to have a market value capable of ascertainment, it was held that its sentimental value as an old homestead was not to be considered by the jury.[67] It has also been held that the jury may not consider the fact that the land sought to be condemned was available for a public park and that the owner intended to improve the same for that purpose and use it as a source of revenue in connection with an electric railway.[68] In another case it was found necessary to decide that the fact that the person holding

[61] Petition of Mount Washington Road Co. 35 N. H. 134; Adden v. White Mts. R. Co. 55 N. H. 413; 20 Am. R. 220; Harvey v. Lackawanna &c. R. Co. 47 Pa. St. 428.

[62] Atchison &c. R. Co. v. Lyon, 24 Kan. 745; Chicago &c. R. Co. v. Mason, 26 Ind. App. 395; 59 N. E. 185, 186 (quoting text). In Wooster v. Sugar River &c. R. Co. 57 Wis. 311; 15 N. W. 401, the court held that a witness could properly testify as to the effect upon the market value of the property due to the probability or possibility that horses might be frightened or fire communicated by passing locomotives and trains. Snyder v. Western Union R. Co. 25 Wis. 60; Hutchinson v. Chicago &c. R. Co. 37 Wis. 582; 41 Wis. 541. But see Illinois &c. R. Co. v. Freeman, 210 Ill. 270; 71 N. E. 444; Swain v. Boston El. R. Co. 188 Mass. 405; 74 N. E. 672.

[63] Chicago &c. R. Co. v. Mawman, 206 Ill. 182; 69 N. E. 66.

[64] Illinois &c. R. Co. v. Freeman, 210 Ill. 270; 71 N. E. 444.

[65] Kansas City &c. R. Co. v. Kregelo, 32 Kan. 608; 5 Pac. 58.

[66] St. Louis &c. R. Co. v. Knapp Stout & Co. 160 Mo. 396; 61 S. W. 300.

[67] Cane Belt R. Co. v. Hughes, 31 Tex. Civ. App. 565; 72 S. W. 1020.

[68] Richmond &c. R. Co. v. Seaboard &c. R. Co. 103 Va. 399; 49 S. E. 512.

title to property sought to be condemned has formulated a great plan for the upbuilding and salvation of the people, and professes to believe with his followers, that by the intervention of Divine Providence the property is rendered unusually valuable as a place of residence for his followers, does not impress the property with an increased value that must be recognized when a part of it is demanded in condemnation proceedings, but the property is to be measured as other property owned by other people in the same vicinity and similarly situated.[69]

§ 991b. Remote and speculative damages—Possibility of negligence in construction or operation of road.—The increase in the risk of loss to the owner of premises from fire, if any, may usually be considered only so far as it effects a depreciation in the market value of the property not taken. The likelihood of damage from loss by fire which may result from negligence of the railroad company is generally deemed too remote and speculative to be considered in condemnation proceedings, for the law neither presumes nor anticipates negligence.[70] "The distinction is this," says the Supreme Court of Illinois: "It is proper for the jury to consider the increased risk of loss from fire and the increased danger to live stock if, and in so far as, the market value of land not taken is thereby depreciated; but it is not proper for the jury to anticipate damages of any character which may, but will not certainly, result from the operation of the railroad and allow anything by their verdict for such anticipated damages. Damages which may in the future follow upon the happening of some possible, but uncertain, event, are not for their consideration. Whether the value of the land not taken will be depreciated in the market by increased danger from fire or by increased danger to live stock is for their consideration."[71] The rule is the same as to the likelihood of damage from the negligent construction or operation of the railroad.[72] Thus

[69] Dowie v. Chicago &c. R. Co. 214 Ill. 49; 73 N. E. 354.

[70] Chicago &c. R. Co. v. Nolin, 221 Ill. 367; 77 N. E. 435; St. Louis Belt &c. R. Co. v. Mendonsa, 193 Mo. 518; 91 S. W. 65; St. Louis &c. R. Co. v. Continental Brick Co. (Mo.) 96 S. W. 1011; Illinois &c. R. Co. v. Freeman, 210 Ill. 270; 71 N. E. 444; Conness v. Indiana &c. R. Co. 193 Ill. 464; 62 N. E. 221. But see post, § 996, note 109.

[71] Chicago &c. R. Co. v. Nolin, 221 Ill. 367; 77 N. E. 435; St. Louis &c. R. Co. v. Oliver (Okl.), 87 Pac. 423.

[72] Chicago &c. R. Co. v. Nolin, 221 Ill. 367; 77 N. E. 435; Mon-

the jury should not take into account the danger to which stock belonging to the land-owner might be exposed by reason of the negligent operation of a railroad, especially as the statutes compel railroads to fence their tracks, and create remedies to the adjacent land-owners for injuries to stock caused by a failure to observe these statutes.[73]

§ 992. Damages confined to particular tract.—The compensation is awarded only for damages to the particular tract of land of which a part is taken,[74] or to land which is used in connection with and as a part of that tract.[75] Thus, the owner of a mill, no part of which is taken, can not recover for damages inflicted upon it by the construction of a railroad, in a proceeding by the railroad to condemn another and distinct tract of land at some distance from the mill.[76]

tana R. Co. v. Freeser, 29 Mont. 210; 74 Pac. 407.

[73] Conness v. Indiana &c. R. Co. 193 Ill. 464; 62 N. E. 221.

[74] St. Louis &c. R. Co. v. Brown, 58 Ill. 61; Bangor &c. R. Co. v. McComb, 60 Me. 290; Fleming v. Chicago &c. R. Co. 34 Iowa, 353; Sherwood v. St. Paul &c. R. Co. 21 Minn. 127; St. Paul &c. R. Co. v. Murphy, 19 Minn. 500; Minnesota Valley R. Co. v. Doran, 15 Minn. 230; Matter of New York Cent. &c. R. Co. 6 Hun (N. Y.), 149; Fleming v. Chicago &c. R. Co. 34 Iowa, 353; Chicago &c. R. Co. v. Kelly, 221 Ill. 498; 77 N. E. 916; Lough v. Minneapolis &c. R. Co. 116 Iowa, 31; 89 N. W. 77; Union Traction Co. v. Pfeil (Ind. App.), 78 N. E. 1052; Meacham v. Fitchburg R. Co. 4 Cush. (Mass.) 291; Paducah &c. R. Co. v. Stovall, 12 Heisk. (Tenn.) 1; Lexington v. Long, 31 Mo. 369. So held where the tracts were divided by the right of way of another railroad. Kansas City &c. Ry. Co. v. Littler, 70 Kans. 556; 79 Pac. 114.

[75] Renwick v. Davenport &c. R. Co. 49 Iowa, 664, affirmed, 102 U. S. 180; Driver v. Western Union R. Co. 32 Wis. 569; 14 Am. R. 726; Robbins v. Milwaukee &c. R. Co. 6 Wis. 636. The fact that the land is divided by a highway or otherwise into two or more lots, does not prevent the award of damages for injuries to it as an entirety, if the several parts are still used together for a common purpose. Keithsburg &c. R. Co. v. Henry, 79 Ill. 290. Where land within a village, and adjoining farm land are owned by the same person, but held as distinct tracts and for separate uses, compensation can not be claimed for injuries to the farm because of its separation from a part of the village property by the line of a railroad. Haines v. St. Louis &c. R. Co. 65 Iowa, 216; 21 N. W. 573.

[76] Selma &c. R. Co. v. Camp, 45 Ga. 180. But where the property is used together for a common purpose the fact that different parts lie some distance from each other will not prevent them from being considered as forming a single

And where several village lots are merely held for sale or use as building lots,[77] or are permitted to lie entirely idle and unoccupied,[78] injuries to the lots not taken can not be considered in assessing damages. So, if a man owns two adjoining farms, one of which he occupies while he rents the other, the assessment of damages must be confined to the farm of which part is taken.[79] And similarly where a person owned a tract of land, from which a right of way was taken for a railroad, and also the remainder after a life estate in an undivided half of an adjacent tract, and had farmed the two tracts as one, the buildings and improvement being on the latter tract, it was held that the jury could not take into account the fact that the right of way will divide the two interests of such person in the tracts, but should consider each interest separately, since the interests in the two tracts were distinct at law.[80] But all the land owned and used as one farm must be considered as a single tract, although it is divided by a highway,[81] or canal,[82] or lies in two or more counties.[83]

property. Thus the owners of an ore mine and a railroad four or five miles long connecting the mine with a railroad are entitled, upon condemnation of a part of their line of road for railroad purposes, to damage to the whole property, including the ore mine. Poughkeepsie &c. R. Co. Matter of, 63 Barb. (N. Y.) 151.

[77] Pittsburgh &c. R. Co. v. Reich, 101 Ill. 157. See, also, Fleming v. Chicago &c. R. Co. 34 Ia. 353; Gorgas v. Philadelphia &c. R. Co. (Pa.) 64 Atl. 680.

[78] Wilcox v. St. Paul &c. R. Co. 35 Minn. 439; 29 N. W. 148.

[79] Minnesota Valley R. Co. v. Doran, 15 Minn. 230. See, also, Sharpe v. United States, 112 Fed. 893; 57 L. R. A. 932, affirmed in 191 U. S. 341; 24 Sup. Ct. 114. But the jury are entitled to pass upon the question whether two tracts of land constitute a single farm, even though they are separated by a public highway, and one has been rented for two years preceding the condemnation. St. Paul &c. R. Co. v. Murphy, 19 Minn. 500. Where a man owned two tracts of land as designated on the government survey, both of which constituted one farm, and released the right of way through one tract, it was held that he could not afterward recover for damages done to that tract by condemning a right of way across the remainder of the farm. St. Louis &c. R. Co. v. Brown, 58 Ill. 61. But it is difficult to see why a man's willingness to have a railroad built across one part of his farm should prevent him from recovering damages for the road where he did not want it built.

[80] Conness v. Indiana &c. R. Co. 193 Ill. 464; 62 N. E. 221.

[81] Ham v. Wisconsin &c. R. Co. 61 Iowa, 716; 17 N. W. 157; Hartshorn v. Burlington &c. R. Co. 52 Ia. 613; State v. Superior Court (Wash.), 87 Pac. 40; New York &c. R. Co. Matter of v. Le Fevre, 27 Hun (N. Y.), 537; Welch v. Mil-

It will not be regarded as a single body where lands intervene across which the owner has no right of passage—as for example the right of way of another railroad,[84] or the detached land is an island in a river.[85] Where the separate owners of three quarter sections of land operated them jointly as a single stock farm under a contract by which water for the whole farm was furnished by the owner of the quarter section on which water was found, it was held that in an assessment of damages for the location of a highway across the farm, such owner was entitled to damages for the interference with his rights under the contract.[86] Where two or more contiguous village lots are used together for a common purpose, they may be held to form a single tract. Thus, where land was subdivided into blocks or lots, but the lots were not sold and the land continued to be used for agricultural purposes, it was held that damages to the entire piece of land could be recovered when but a part of the lots were taken.[87]

§ 993. Injuries to part of tract or parcel of land not actually taken.—Where part only of a tract of land is taken, injuries to the part not actually taken may be caused by the construction of a railroad, and where there are such special injuries the general rule is that the property owner is entitled to compensation.[88] It is so held

waukee &c. R. Co. 27 Wis. 108; Kansas City &c. R. Co. v. Merrill, 25 Kan. 421.

[82] Boston &c. R. Co. Matter of, 31 Hun (N. Y.), 461.

[83] Atchison &c. R. Co. v. Gough, 29 Kan. 94. See, also, Keithsburg &c. R. Co. v. Henry, 79 Ill. 290; Chicago &c. R. Co. v. Huncheon, 130 Ind. 529; 30 N. E. 636.

[84] Kansas City &c. R. Co. v. Littler, 70 Kan. 556; 79 Pac. 114.

[85] St. Louis &c. R. Co. v. Aubuchon (Mo.), 97 S. W. 867.

[86] Commissioners v. Labore, 37 Kan. 480; 15 Pac. 577. Numerous cases have held that a single farm may consist of several subdivisions as laid out in the government survey. Wyandotte &c. R. Co. v. Waldo, 70 Mo. 629; Cedar Rapids &c. R. Co. v. Ryan, 37 Minn. 38; 33 N. W. 6; Wilmes v. Minneapolis &c. R. Co. 29 Minn. 242; 13 N. W. 39; Ham v. Wisconsin &c. R. Co. 61 Iowa, 716; 17 N. W. 157; Kansas City &c. R. Co. v. Merrill, 25 Kan. 421.

[87] Sheldon v. Minneapolis &c. R. Co. 29 Minn. 318; 13 N. W. 134; Welch v. Milwaukee &c. R. Co. 27 Wis. 108. See, also, Chicago &c. R. Co. v. Dresel, 110 Ill. 89; Cummins v. Des Moines &c. R. Co. 63 Ia. 397; 19 N. W. 268; Koerper v. St. Paul &c. R. Co. 42 Minn. 340; 44 N. W. 195; Reisner v. Atchison &c. Co. 27 Kans. 382; Cox v. Mason City &c. R. Co. 77 Ia. 20; 41 N. W. 475; Munkwitz v. Chicago &c. R. Co. 64 Wis. 403; 25 N. W. 438; Gorgas v. Philadelphia &c. R. Co. (Pa.) 64 Atl. 680.

[88] White v. Metropolitan &c. Co.

where a farm is divided by the line of the railroad, or where cuts, ditches or embankments are made upon the right of way where it crosses the land.[89] But it is to be observed that for remote and speculative injuries no compensation can be awarded.[90]

154 Ill. 620; 39 N. E. 270; White v. Cincinnati &c. R. Co. 34 Ind. App. 287; 71 N. E. 276; Indiana Stone R. Co. v. Strain, 27 Ind. App. 694; 62 N. E. 63; Pine Bluff &c. R. Co. v. Kelly (Ark.), 93 S. W. 562; Louisiana R. &c. Co. v. Jones, 113 La. Ann. 29; 36 So. 877; South Buffalo &c. R. Co. v. Kirkover, 176 N. Y. 301; 68 N. E. 366; Chicago &c. R. Co. v. Mawman, 206 Ill. 182; 69 N. E. 66; Illinois Central R. Co. v. Wolf, 95 Ill. App. 74; Freiberg v. South Side El. R. Co. 221 Ill. 508; 77 N. E. 920; Kucheman v. Chicago &c. R. Co. 46 Ia. 366; Selina &c. R. Co. v. Keith, 53 Ga. 178; Virginia &c. R. Co. v. Henry, 8 Nev. 165; Bangor &c. R. Co. v. McComb, 60 Me. 290; Pittsburgh &c. R. Co. v. Rose, 74 Pa. St. 362. As shown by these authorities, and others that might be cited, the general rule is that the owner is entitled to compensation not only for the part actually taken but also for damages caused to the remainder of the tract. Against the latter, however, is set off the benefits, and, in most jurisdictions such benefits may be set off as against the damages both for what is actually taken and for the injury to the rest of the tract. Tucker v. Massachusetts &c. R. Co. 118 Mass. 546; McReynolds v. Burlington &c. R. Co. 106 Ill. 152. In this latter case, it was held that the fact that evidence as to the inconvenience occasioned by a railroad track which divides a farm is largely conjectural and not capable of definite ascertainment, was not a reason for excluding such evidence from the jury. The jury are entitled to know how the line of the road divides the farm, in case of farm lands, as to the location of water, pasturage, improvements, etc., and also, the dangers and inconveniences in the perpetual use of the track for the movement of trains. Rockford &c. R. Co. v. McKinley, 64 Ill. 338. Inconvenience in opening gates and bars to cross the railroad may be considered by the jury. Minnesota &c. R. Co. v. Doran, 17 Minn. 188. So may the inconvenience and danger of frequently crossing the track (in this case as often as one hundred times a day) in hauling clay from one part of the plaintiff's brickyard to another part that has been cut off by the railroad. Sherwood v. St. Paul &c. R. Co. 21 Minn. 127. See Winona R. Co. v. Waldron, 11 Minn. 515; 88 Am. Dec. 100, and note.

[89] Missouri Pacific R. Co. v. Hays, 15 Neb. 224; 18 N. W. 51; Wilmington &c. R. Co. v. Stauffer, 60 Pa. St. 374; 100 Am. Dec. 574; Pittsburgh &c. R. Co. v. Rose, 74 Pa. St. 362; Atchison &c. R. Co. v. Blackshire, 10 Kan. 477; St. Louis &c. R. Co. v. Anderson, 39 Ark. 167. See, also, Red River &c. Ry. Co. v. Hughes, 36 Tex. Civ. App. 472; 81 S. W. 1235; Cook v. Boone &c. R. Co. 122 Ia. 437; 98 N. W. 293; note in 85 Am. St. 312; State v. Superior Court (Wash.), 87 Pac. 40.

[90] East &c. R. Co. v. Miller, 201 Ill. 413; 66 N. E. 275.

§ 994. Elements of value.—The general rule is that a single assessment should be made covering all the various items of damage,[91] and it is held that the amount of this assessment should just equal the difference between the market value of the property, after the improvement is made, and the market value of like property to which no injury has been done,[92] or the difference between the market value of the entire tract and the market value of what is left.[93] In

[91] Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323.

[92] Henry v. Dubuque &c. R. Co. 2 Iowa, 288; Chicago &c. R. Co. v. Carey, 90 Ill. 514. "The inconvenience arising from a division of the property, or from increased difficulty of access; the burden of increased fencing, the ordinary danger from accidental fires to the fences, fields or farm buildings, not resulting from negligence, and generally all such matters as, owing to the particular location of the road, may effect the convenient use and future enjoyment of the property, are proper matters for consideration, but they are to be considered in comparison with the advantages, only as they affect the market value of the land. The jury can not include in the verdict a fund to cover the costs of fencing, or to provide an indemnity against losses by fire, or casualties to the cattle and stock upon the farm. Such an assessment must necessarily be purely speculative, as the matters, thus sought to be provided against, are in their nature altogether ideal and fanciful. A rearrangement of the farm may obviate the necessity for any increased fencing; its future occupancy may be such as to require none; casualties, by fire or otherwise, may never occur; and, therefore, the injury from these causes can only be computed as they affect the market value of the land." Pittsburgh &c. R. Co. v. McCloskey, 110 Pa. St. 436; 1 Atl. 431. The cost of erecting such buildings as are upon the land taken is not an element of damage unless it is shown that they would actually increase the value of the premises to that extent. Jacksonville &c. R. Co. v. Walsh, 106 Ill. 253. See, also, Lough v. Minneapolis &c. R. Co. 116 Iowa, 31; 89 N. W. 77; Illinois Central R. Co. v. Lockard, 112 Ill. App. 423; Davenport &c. R. Co. v. Sinnet, 111 Ill. App. 75; Eastern Texas R. Co. v. Eddings, 30 Tex. Civ. App. 170; 70 S. W. 98; Illinois &c. R. Co. v. Easterbrook, 211 Ill. 624; 71 N. E. 1116; Buffalo &c. R. Co. v. Sheeps, 102 N. Y. S. 214. Where land was rendered inaccessible by the construction of a railroad embankment, etc., the difference in the value of the land just before and just after the construction of the road was the measure of damages, and not the cost of constructing a road from the land to existing highways. Red River &c. R. Co. v. Hughes, 36 Tex. Civ. App. 472; 81 S. W. 1235.

[93] St. Louis &c. R. Co. v. Anderson, 39 Ark. 167; Eberhart v. Chicago &c. R. Co. 70 Ill. 347; Freiberg v. South Side El. R. Co. 221 Ill. 508; 77 N. E. 920; Illinois Central R. Co. v. Turner, 194 Ill. 575; 62 N. E. 798; Chicago &c. R. Co. v. Kelly, 221 Ill. 498; 77 N. E. 916;

one jurisdiction the measure of damages is held to be the difference between the market value of the property just before it was generally known that the work was to be done, and the market value after the completion of the work.[94] If the property has a special value because of its adaptation for railroad purposes,[95] or for some other use for which the business needs of the neighborhood create a demand,[96] or if the owner has adapted the land to use in connection with other property, by which it has acquired a special and peculiar value, such value must be taken as the basis in assessing damages,[97] but, as elsewhere suggested the special value

Coatsworth v. Lehigh Valley R. Co. 100 N. Y. S. 504; St. Louis &c. R. Co. v. Hughes (Tex. Civ. App.), 73 S. W. 976; Farrar v. Midland Electric R. Co. 101 Mo. App. 140; 74 S. W. 500; Hewitt v. Pittsburg &c. R. Co. 19 Pa. Super. Ct. 304; Indiana &c. R. Co. v. Allen, 100 Ind. 409; Lance v. Chicago &c. R. Co. 57 Ia. 636; 11 N. W. 612; Dearborn v. Boston &c. R. Co. 24 N. H. 179; Pennsylvania &c. R. Co. v. Bunnell, 81 Pa. St. 414; William H. Mondy Mfg. Co. v. Pennsylvania R. Co. (Pa. St.) 64 Atl. 373; Parks v. Wisconsin Cent. R. Co. 33 Wis. 413; Blue Earth Co. v. St. Paul &c. R. Co. 28 Minn. 503; 11 N. W. 73; Omaha &c. R. Co. v. McDermott, 25 Neb. 714; 41 N. W. 648; notes in 5 Am. St. 537–540; 88 Am. Dec. 113–121; and 85 Am. St. 293–314.

[94] Louisville &c. R. Co. v. Cumnock, 25 Ky. L. 1330; 77 S. W. 933.

[95] Johnson v. Freeport &c. R. Co. 111 Ill. 413; Little Rock &c. R. Co. v. Woodruff, 49 Ark. 381; 5 S. W. 792; 4 Am. St. 51. But see Boston &c. R. Co. In re, 22 Hun (N. Y.), 176. In Union Depot St. R. &c. Co. v. Brunswick, 31 Minn. 297; 17 N. W. 626; 47 Am. R. 789, the court says: "Suppose a railroad was intended to be built through some canyon or mountain pass, the soil of which was of little or no practical value, would it be competent to permit the owner to show that it furnished the only possible route for the road? We apprehend not. These are extreme cases, but not different in principle from the one under consideration." Stinson v. Chicago &c. R. Co. 27 Minn. 284; 6 N. W. 784; Virginia &c. R. Co. v. Elliott, 5 Nev. 358.

[96] Boom Co. v. Patterson, 98 U. S. 403.

[97] Chicago &c. R. Co. v. Chicago &c. R. Co. 112 Ill. 589 (landing used by a railroad company); King v. Minneapolis Union R. Co. 32 Minn. 224; 20 N. W. 135; St. Louis &c. R. Co. v. Kirby, 104 Ill. 345 (training track for horses on a stock farm); Beckett v. Midland R. Co. L. R. 3 C. P. 82; Chicago &c. R. Co. v. Ward, 128 Ill. 350; 18 N. E. 828; 21 N. E. 562; Dupuis v. Chicago &c. R. Co. 115 Ill. 97; 3 N. E. 720; Ohio Valley R. Co. v. Kerth, 130 Ind. 314; 30 N. E. 298; Little Rock &c. R. Co. v. Woodruff, 49 Ark. 381; 5 S. W. 792; 4 Am. St. 51; Duluth &c. R. Co. v. West, 51 Minn. 163; 53 N. W. 197; Grand Rapids &c. R. Co. v. Weiden, 70 Mich. 390; 38 N. W. 294. "The val-

must be real and substantial, not fanciful or fictitious. The use that was made by the owner of the property taken may, of course, be shown, as bearing on the question of his damages; and the better opinion is that its adaptability for any valuable use to which a reasonably prudent man might be expected to devote it should also be considered, so far as this affects the market price.[98] The existing

ue of land consists in its fitness for use, present or future, and before it can be taken for public use the owner must have just compensation. If he has adopted a peculiar mode of using that land by which he derives profit, and he is to be deprived of that use, justice requires he should be compensated for the loss. That loss is the loss to himself. It is the value which he has, and of which he is deprived, which must be made good by compensation." St. Louis &c. R. Co. v. Kirby, 104 Ill. 345. Where a person owned a piece of ground used as a stock ranch and the railroad was so constructed as to run diagonally through one quarter section, so as to cut off the water, timber, house and corrals from the main body of the land, the owner was held entitled to recover for the injury done to the property, considered as a whole, and not for that only done to the quarter section over which the road was built. Kansas City &c. R. Co. v. Merrill, 25 Kan. 421.

[98] Furman Street, In re, 17 Wend. (N. Y.) 551, 670; New York Central &c. R. Co. In re, 6 Hun (N. Y.), 149; Cox v. Philadelphia &c. R. Co. 215 Pa. 506; 64 Atl. 729; Metropolitan St. R. Co. v. Walsh, 197 Mo. 392; 94 S. W. 860; Rieber v. Butler &c. R. Co. 201 Pa. 49; 50 Atl. 311; New York L. &c. R. Co. In re, 27 Hun (N. Y.), 116; Five Tracts of Land v. United States, 101 Fed. 661; Louisville &c. R. Co. v. Ryan, 64 Miss. 399; 8 So. 173; William H. Mondy Mfg. Co. v. Pennsylvania R. Co. (Pa. St.) 64 Atl. 373; Drury v. Midland R. Co. 127 Mass. 571; Eastern R. Co. v. Boston &c. R. Co. 111 Mass. 125; 15 Am. R. 13; First Parish v. Middlesex, 7 Gray (Mass.), 106; Young v. Harrison, 17 Ga. 30; Goodin v. Cincinnati &c. Canal Co. 18 Ohio St. 169; 98 Am. Dec. 95; Cincinnati &c. R. Co. v. Longworth, 30 Ohio St. 108; Somerville &c. R. Co. v. Doughty, 22 N. J. L. 495; Harlam v. Galena &c. R. Co. 64 Ill. 353; Chicago &c. R. Co. v. Jacobs, 110 Ill. 414; King v. Minneapolis &c. R. Co. 32 Minn. 224; 20 N. W. 135; Montana R. Co. v. Warren, 137 U. S. 348; 11 Sup. Ct. 96; West Virginia &c. R. Co. v. Gibson, 94 Ky. 234; 21 S. W. 1055; Currie v. Waverly &c. R. Co. 52 N. J. L. 381; 20 Atl. 56; 19 Am. St. 452, and note; Richmond &c. R. Co. v. Chamblin, 100 Va. 401; 41 S. E. 750; Cochran v. Missouri &c. R. Co. 94 Mo. App. 469; 68 S. W. 367; Colvill v. St. Paul &c. R. Co. 19 Minn. 283; Regina v. Brown, L. R. 2 Q. B. 630. But see Chicago &c. R. Co. v. Staley, 221 Ill. 405; 77 N. E. 437, where it is held that the only future use that can be properly considered is that to which the land is at present adapted and which affects its present value.

business and wants of the community, and such as may reasonably be expected in the immediate future, should be taken into account, together with the adaptability of the property to meet those wants.[99] But there must be substantial grounds on which to rest an expectation of future advancement in the value of the property, and conjecture is not a basis for an award of damages. Where it was shown that the land lay in the edge of the city of St. Paul, and near certain public institutions, it was held proper to prove its market value as enhanced by its adaptability for suburban residences.[100] So, where the land was shown to have a mine under its surface, it was held that that fact might be considered if the mine added to the market value of the land, even though such mine had never been used.[101] But it has been held that the intentions of the owner as to the future use of his property can not be proved,[102] nor can evidence be offered of the probable advantages from all possible uses to which the property might be put,[103] nor of any elements of damage which lie wholly

[99] Boom Co. v. Patterson, 98 U. S. 403; Gardner v. Brookline, 127 Mass. 358; Low v. Concord &c. R. Co. 63 N. H. 557; 3 Atl. 739; Munkwitz v. Chicago &c. R. Co. 64 Wis. 403; 25 N. W. 438. But see Chicago &c. R. Co. v. Staley, 221 Ill. 405; 77 N. E. 437; Sullivan v. Missouri &c. R. Co. 29 Tex. Civ. App. 429; 68 S. W. 745.

[100] Sherman v. St. Paul &c. R. Co. 30 Minn. 227; 15 N. W. 239. In Washburn v. Milwaukee &c. R. Co. 59 Wis. 364; 18 N. W. 328, it was held that if the present value of the lands taken was enhanced by reason of the fact that it might be platted and sold as city lots, such increased present value was the proper basis of assessment. To the same effect, Chicago &c. R. Co. v. Rottgering, 26 Ky. L. 1167; 83 S. W. 584.

[101] Haslam v. Galena &c. R. Co. 64 Ill. 353. See, also, Montana R. Co. v. Warren, 6 Mont. 275; 12 Pac. 641; Twin Lakes &c. Min. Co. v. Colorado &c. R. Co. 16 Colo. 1; 27 Pac. 258; Doud v. Mason City &c. R. Co. 76 Ia. 438; 41 N. W. 65; Cameron v. Chicago &c. R. Co. 51 Minn. 153; 53 N. W. 199; Burlington &c. R. Co. v. White, 28 Neb. 166; 44 N. W. 95.

[102] Sherwood v. St. Paul &c. R. Co. 21 Minn. 127; Fairbanks v. Fitchburg, 110 Mass. 224; Twin Lakes &c. Syndicate v. Colorado &c. R. Co. 16 Colo. 1; 27 Pac. 258. See Scott v. Indianapolis &c. R. Co. 10 Am. & Eng. R. Cas. 189. In Welch v. Milwaukee &c. R. Co. 27 Wis. 108, Chief-Justice Dixon said in his opinion: "And while speculative damages can not be allowed, yet actual damages, its value to the owner, his use being considered, must always be. . . . The actual use and intention of the proprietor, together with all surrounding circumstances, must be considered." See, also, Rondout &c. R. Co v. Dego, 5 Lans. (N. Y.) 438.

[103] Fleming v. Chicago &c. R. Co. 34 Iowa, 353; Powers v. Hazelton &c. R. Co. 33 Ohio St. 429; Lake

in conjecture.[104] Evidence as to the value of a reversion in the railway location will not be received, where it is impossible to know when the existing easement will terminate, or whether it will ever terminate.[105]

§ 994a. Compensation for additional burden on right of way.—The owner of a right of way is generally entitled to compensation for any new burden on the easement not contemplated in the original condemnation.[106] Such a burden, it has been held, will be imposed by the construction of a line of telegraph on the right of way unless constructed for the use and benefit of the railroad company in the operation of its road and reasonably necessary for that purpose.[107]

Shore &c. R. Co. v. Cincinnati &c. R. Co. 30 Ohio St. 604; Dorlan v. East Brandywine &c. R. Co. 46 Pa. St. 520; Searle v. Lackawanna &c. R. Co. 33 Pa. St. 57; Selma &c. R. Co. v. Keith, 53 Ga. 178; Gardner v. Brookline, 127 Mass. 358; Worcester v. Great Falls &c. Co. 41 Me. 159; 66 Am. Dec. 217. The fact that the lands taken would be rendered more valuable by the construction of a canal along the south side of the tract, which might or might not be built at sometime in the future by the public authorities, and that the railroad, as built, would cut off access to the canal from a large part of the owner's land, was held to be too remote and speculative an element of damages to sustain an assessment. Munkwitz v. Chicago &c. R. Co. 64 Wis. 403; 25 N. W. 438. In Watson v. Milwaukee &c. R. Co. 57 Wis. 332; 15 N. W. 468, an instruction was approved which laid down the rule for assessing damages, as follows: "In determining the value of land actually taken, you are to be governed by the fair market value (at the time of the taking)—what was the fair market value of the land at that time, for any purpose for which it might reasonably be used in the immediate future—not what would lots sell for in the distant future if a street were opened and lots offered for sale. Nor, indeed, is the price per lot a measure of value, either in the near or the distant future." Munkwitz v. Chicago &c. R. Co. 64 Wis. 403; 25 N. W. 438.

[104] Central Pacific R. Co. v. Pearson, 35 Cal. 247; Elizabethtown &c. R. Co. v. Helm, 8 Bush. (Ky.) 681; Troy &c. R. Co. v. Northern Turnp. Co. 16 Barb. (N. Y.) 100. See, also, Chicago &c. R. Co. v. Bowman, 122 Ill. 595; 13 N. E. 814; Union R. &c. Co. v. Moore, 80 Ind. 458; Tallman v. Metropolitan &c. R. Co. 121 N. Y. 119; 23 N. E. 1134; 8 L. R. A. 173, and note; San Diego &c. Co. v. Neale, 88 Cal. 50; 25 Pac. 977; 11 L. R. A. 604, and note.

[105] Boston &c. R. Co. v. Old Colony &c. R. Co. 3 Allen (Mass.), 142.

[106] Wallach v. New York &c. R. Co. 111 App. Div. (N. Y.) 273; 97 N. Y. S. 717.

[107] Amercian Tel. &c. Co. v.

But the fact that the line was constructed under a contract between the railroad company and the telegraph company does not entitle the land-owner to an accounting of the rents and profits received by the railroad company. The primary question is the land-owner's injury and not the other party's profit.[108] The authorities generally allow a railroad company to construct as many tracks and side tracks on its right of way as it deems necessary for the transaction of its business without paying the owner of the fee any additional compensation.[109] And it seems clear that a railroad company may change the location of its tracks, within the limits of its right of way, without being charged with subjecting the right of way to a new use.[110] Where, however, the railroad company acquires land under a deed given with the express understanding that it is to be used for a main line only, the railroad company can not lay side tracks thereon without paying additional compensation.[111]

§ 995. Measure of damages—Illustrative cases.—The general rule is that where the entire tract is taken, the measure of damages is its market value,[112] taking into consideration its surroundings, improvements, and capabilities for valuable uses of any kind.[113] And where

Smith, 71 Md. 535; 18 Atl. 910; 7 L. R. A. 200, and note; Western Union Tel. Co. v. Rich, 19 Kan. 517; 27 Am. R. 159. See post, § 996b.

[108] Chicago &c. R. Co. v. Snyder, 120 Iowa, 532; 95 N. W. 183.

[109] East Tennessee &c. R. Co. v. Telford, 89 Tenn. 293; 14 S. W. 776; 10 L. R. A. 855; Pottsville v. People's R. Co. 148 Pa. St. 175; 23 Atl. 900; White v. Chicago &c. R. Co. 122 Ind. 317; 23 N. E. 782; 7 L. R. A. 257.

[110] Brinkley v. Southern R. Co. 135 N. Car. 654; 47 S. E. 791.

[111] Donisthrope v. Fremont &c. R. Co. 30 Neb. 142; 46 N. W. 240; 27 Am. St. 387.

[112] Bangor &c. R. Co. v. McComb, 60 Me. 290; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812; Dearborn v. Boston &c. R. Co. 24 N. H. 179; Petition of Mt. Washington R. Co. 35 N. H. 134; Virginia &c. R. Co. v. Henry, 8 Nev. 165; Albany &c. R. Co. v. Dayton, 10 Abb. Pr. N. S. (N. Y.) 182. See, also, Union Trac. Co. v. Pfeil (Ind. App.), 78 N. E. 1052, 1054 (citing text). But in determining what the market value is, it is proper to take into consideration matters which give the property appropriated a special value. Mere matters of fancy, conjecture, or the like, should, however, be excluded from consideration. Kerr v. South Park Commissioners, 117 U. S. 379; 6 Sup. Ct. 801; Shoemaker v. United States, 147 U. S. 282; 13 Sup. Ct. 361.

[113] Central Branch &c. R. Co. v. Andrews, 26 Kan. 702; Little Rock &c. R. Co. v. Woodruff, 49 Ark. 381; 5 S. W. 792;

part only of a tract of land is taken, but the part taken bears such a relation to the residue of the tract, or is to be devoted to such a use (as by cuts, embankments, switch-yards, or the like) that the value of such residue is depreciated, the land-owner is entitled to damages, in most jurisdictions, not only for the value of the land actually taken, but for the injury to the part not taken. Such damages must be given whether the statute specially mentions them or not.[114] While

4 Am. St. 51; Low v. Railroad Co. 63 N. H. 557; Pittsburgh &c. R. Co. v. Vance, 115 Pa. St. 325; 8 Atl. 764; Louisville &c. R. Co. v. Ryan, 64 Miss. 399; 8 So. 173; Haslam v. Galena &c. R. Co. 64 Ill. 353; Bailey v. Boston &c. Corp. 182 Mass. 537; 66 N. E. 203; Eastern Texas R. Co. v. Eddings, 30 Tex. Civ. App. 170; 70 S. W. 98; Weyer v. Chicago &c. R. Co. 68 Wis. 180; 31 N. W. 710. Quality and productiveness of the land: Ragan v. Kansas City &c. R. Co. 144 Mo. 623; 46 S. W. 602; Weyer v. Chicago &c. R. Co. 68 Wis. 180; 31 N. W. 710. Rental value: Frement &c. R. Co. v. Bates, 40 Neb. 381; 58 N. W. 959. See, also, Mineral Springs: Kossler v. Pittsburg &c. R. Co. 208 Pa. 50; 57 Atl. 66. Factory buildings: White v. Cincinnati &c. R. Co. 34 Ind. App. 287; 71 N. E. 276. Improvements on farms: Illinois &c. R. Co. v. Humiston, 208 Ill. 100; 69 N. E. 880. Valuable frontage on another railroad destroyed: Wray v. Knoxville &c. R. Co. 113 Tenn. 544; 82 S. W. 471. Suitableness of land for raising ducks: Cox v. Philadelphia &c. R. Co. 215 Pa. 506; 64 Atl. 729. As to rights of owners of mines under the English Railway act of 1845, see Lord Gerard and London &c. In re, L. R. (1894) 2 Q. B. 915, and Chamber &c. Co. v. Rochdale Canal, L. R. (1894) 2 Q. B. 632. It has been held that although the owner had testified that a certain portion of his farm crossed by the railroad was adapted for pasturage, and that he had intended to use it for stock purposes, it was error to limit the witnesses testifying to the market value of the farm to a consideration of this particular purpose. Lough v. Minneapolis &c. R. Co. 116 Ia. 31; 89 N. W. 77.

[114] Chapman v. Oshkosh &c. R. Co. 33 Wis. 629; Parks v. Wisconsin Central &c. Co. 33 Wis. 413; Fremont &c. R. Co. v. Lamb, 11 Neb. 592; 10 N. W. 493; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812; Wyandotte &c. R. Co. v. Waldo, 70 Mo. 629; Watson v. Pittsburgh &c. R. Co. 37 Pa. St. 469; St. Louis &c. R. Co. v. Anderson, 39 Ark. 167; Wilmes v. Minneapolis &c. R. Co. 29 Minn. 242; 13 N. W. 39; Cleveland &c. R. Co. v. Ball, 5 Ohio St. 568; Walker v. Old Colony R. Co. 103 Mass. 10; 4 Am. R. 409; Raleigh &c. R. Co. v. Wicker, 74 N. Car. 220; Richmond &c. Turnp. R. Co. v. Rogers, 1 Duv. (Ky.) 135; Virginia &c. R. Co. v. Henry, 8 Nev. 165; Dearborn v. Boston &c. R. Co. 4 Fost. (N. H.) 179; Selma &c. R. Co. v. Redwine, 51 Ga. 470; Atchison &c. R. Co. v. Gough, 29 Kan. 94; Kucheman v. Chicago &c. R. Co. 46 Iowa, 366; Baltimore &c. R Co. v. Lansing, 52 Ind. 229; Peoria &c. R. Co. v. Sawyer, 71 Ill. 361; South Buffalo

damages for such incidental injuries may be awarded, the general rule, according to the weight of authority, is that purely consequential damages can not be awarded. The rule generally enforced is that the owner is entitled to the difference between the market value of the whole lot or tract before the taking, and the market value of what remains to him after such taking, uninfluenced by any general rise in values of property due to the improvement.[115] This seems

&c. R. Co. v. Kirkover, 176 N. Y. 301; 68 N. E. 366; Illinois &c. R. Co. v. Humiston, 208 Ill. 100; 69 N. E. 880; Blincoe v. Choctaw &c. R. Co. 16 Okla. 286; 83 Pac. 903.

[115] Little Rock &c. R. Co. v. Allen, 41 Ark. 431; Grand Rapids &c. R. Co. v. Heisel, 47 Mich. 393; 11 N. W. 212; Petition of Mount Washington Road Co. 35 N. H. 134; Pittsburgh &c. R. Co. v. Bentley, 88 Pa. St. 178; Pennsylvania &c. R. Co. v. Bunnell, 81 Pa. St. 414; East Brandywine &c. R. Co. v. Ranck, 78 Pa. St. 454; Hornstein v. Atlantic &c. R. Co. 51 Pa. St. 87; Harvey v. Lackawanna &c. R. Co. 47 Pa. St. 428; Searle v. Lackawanna &c. R. Co. 33 Pa. St. 57; Baltimore &c. R. Co. v. Lansing, 52 Ind. 229; Grand Rapids &c. R. Co. v. Horn, 41 Ind. 479; White Water Valley R. Co. v. McClure, 29 Ind. 536; Chicago &c. R. Co. v. Hall, 90 Ill. 42; Wilson v. Rockford &c. R. Co. 59 Ill. 273; Chicago &c. R. Co. v. Mawman, 206 Ill. 182; 69 N. E. 66; Presbrey v. Old Colony &c. R. Co. 103 Mass. 1; Meacham v. Fitchburg R. Co. 4 Cush. (Mass.) 291, 299; Brooks v. Davenport &c. R. Co. 37 Iowa, 99; Fleming v. Chicago &c. R. Co. 34 Iowa, 353; Sater v. Burlington &c. R. Co. 1 Iowa 386; Robb v. Maysville &c. R. Co. 3 Met. (Ky.) 117; Henderson &c. R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173; 66 Am. Dec. 148; Quincy &c. R. Co. v. Ridge, 57 Mo. 599; Powers v. Hazelton &c. R. Co. 33 Ohio St. 429; Cincinnati &c. R. Co. v. Longworth, 30 Ohio St. 108; Scott v. St. Paul &c. R. Co. 21 Minn. 322; Lake Superior &c. R. Co. v. Greve, 17 Minn. 322; Winona &c. R. Co. v. Waldron, 11 Minn. 515; 88 Am. Dec. 100, and note; Charleston &c. R. Co. v. Blake, 12 Rich. L. (S. Car.) 634; Greenville &c. R. Co. v. Partlow, 5 Rich. L. (S. Car.) 428; Bangor &c. R. Co. v. McComb, 60 Me. 290; Atchison &c. R. Co. v. Blackshire 10 Kan. 477; Woodfolk v. Nashville &c R. Co. 2 Swan (Tenn.), 422; Imlay v. Union Branch R. Co. 26 Conn. 249; 68 Am. Dec. 392; Driver v. Western Union R. Co. 32 Wis. 569; 14 Am. R. 726; Robbins v. Milwaukee &c. R. Co. 6 Wis. 636; Poughkeepsie &c. R. Co. In re, 63 Barb. (N. Y.) 151; Troy &c. R. Co. v. Lee, 13 Barb. (N. Y.) 169; Prospect &c. R. Co. In re, 13 Hun (N. Y.), 345; 16 Hun (N. Y.), 261; Henderson v. New York Central R. Co. 78 N. Y. 423; 17 Hun (N Y.), 344; Seattle &c. R. Co. v. Roeder, 30 Wash. 244; 70 Pac. 498; 94 Am. St. 864; Pochila v. Calvert &c. R. Co. 31 Tex. Civ. App. 398; 72 S. W. 255; Eastern Texas R. Co. v. Eddings, 30 Tex. Civ. App. 170; 70 S. W. 98. "What was the fair market value of the whole property, and then what would be the fair marketable value of the property not

to us to be the sound general doctrine.[116] By the market value, as the cases generally hold, is meant the price for which the property could be sold, not at a forced sale, but at a sale conducted by the owner with due regard to his own interest.[117] The estimate which the owner puts upon his property, so far as it is influenced by a fondness for the particular premises, is not to be taken as the true measure of damages.[118] Neither, it seems, is it conclusive what some particular person, even though willing to buy the land, will give for the land.[119] The inquiry is as to the fair market value at a sale made in ordinary course of business, taking into consideration advantages of location and like circumstances. The necessity of the

taken? The difference would be the true amount of compensation to be awarded." Canandaigua &c. R. Co. v. Payne, 16 Barb. (N. Y.) 273; Pittsburgh &c. R. Co. v. Rose, 74 Pa. St. 362; Delaware &c. R. Co. v. Burson, 61 Pa. St. 369; Chicago &c. R. Co. v. Francis, 70 Ill. 238. The fact that the land-owner obtained a reversion in the property taken does not lessen the amount of his damages, but they must be assessed by reference to the full market value of the property. Hollingsworth v. Des Moines &c. R. Co. 63 Iowa 443; 19 N. W. 325.

[116] See New Orleans &c. R. Co. v. Lagarde, 10 La. Ann. 150; Carli v. Stillwater &c. R. Co. 16 Minn. 260; Elizabethtown &c. R. Co. v. Helm, 8 Bush. (Ky.) 681; Sater v. Burlington &c. Plank R. Co. 1 Iowa, 386.

[117] Little Rock &c. R. Co. v. McGehee, 41 Ark. 202; Low v. Concord R. Co. 63 N. H. 557; 3 Atl. 739; Dupuis v. Chicago &c. R. Co. 115 Ill. 97; 3 N. E. 720; Everett v. Union Pacific R. Co. 59 Iowa, 243; 13 N. W. 109; Virginia &c. R. Co. v. Elliott, 5 Nev. 358; Somerville &c. R. Co. v. Doughty, 22 N. J. L. 495; Searle v. Lackawanna &c. R. Co. 33 Pa. St. 57; Elizabethtown &c. R. Co. v. Helm, 8 Bush. (Ky.) 681; Woodfolk v. Nashville &c. R. Co. 2 Swan (Tenn.), 422; Giesy v. Cincinati &c. R. Co. 4 Ohio St. 308, 331; Tufts v. Charlestown, 4 Gray (Mass.) 537. The price which the owner gave may be put in evidence, and the owner may show under what circumstances he purchased it, and the value of the improvements he put upon it. Swan v. Middlesex Co. 101 Mass. 177. Where the land has been fitted by the owner for use in connection with other property, and has no market value apart from such use, its value must be determined by the uses to which it is applied. Lake Shore &c. R. Co. v. Chicago &c. R. Co. 100 Ill. 21; Chicago &c R. Co. v. Jacobs, 110 Ill. 414; Chicago &c. R. Co. v. Chicago &c. R. Co. 112 Ill. 589.

[118] Furman Street, Matter of 17 Wend. (N. Y.) 649. But in Robb v. Maysville &c. 3 Met. (Ky.) 117, the peculiar value of the land to the owner was taken as the measure of damages.

[119] Chicago &c. R. Co. v. Kelly, 221 Ill. 498; 77 N. E. 916.

company is not to be considered as enhancing the value of the land,[120] nor, on the other hand, can the value be ascertained by considering what the property would bring at a forced sale. In arriving at the probable difference between the market value of the property before and after the construction of the railroad or other public work, the influence upon that value exercised by different causes is a proper subject for consideration by the jury. But neither annoyances of a kind which affect the whole public,[121] nor benefits that are shared by the community in general,[122] can be proven as affecting the question of damages. So, a mere general and public benefit or increase of value received by the plaintiff's land, in common with other lands in the neighborhood, is not to be taken into consideration.[123] Where the personal property is destroyed by the taking of land for a railroad right of way, its value is a proper element of damage. This rule is applied in cases where growing crops are destroyed in building the road,[124] and where the rights of a lessee of land are condemned.[125] There are cases holding that where the railroad has been actually

[120] Virginia &c. R. Co. v. Elliott, 5 Nev. 358; Henderson &c. R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173; 66 Am. Dec. 148; Henry v. Dubuque &c. R. Co. 2 Iowa, 288; Union Depot St. R. &c. Co. v. Brunswick, 31 Minn. 297; 17 N. W. 625; 47 Am. R. 789; St. Louis &c. R. Co. v. Knapp, Stout & Co. 160 Mo. 396; 61 S. W. 300.

[121] Gulf &c. R. Co. v. Fuller, 63 Tex. 467; Chicago &c. R. Co. v. Ritter (Tex. 1883), 10 Am. & Eng. R. Cas. 202; Ham v. Wisconsin &c. R. Co. 61 Iowa 716; 17 N. W. 157; St. Louis &c. R. Co. v. Haller, 82 Ill. 208; First Parish v. County of Middlesex, 73 Mass. (7 Gray), 106; Presby v. Old Colony &c. R. Co. 103 Mass. 1; Walker v. Old Colony &c. R. Co. 103 Mass. 10; 4 Am. R. 509. See Hatch v. Vermont Central R. Co. 28 Vt. 142; Lansing v. Smith, 8 Cow. (N. Y.) 151.

[122] Chicago &c. R. Co. v. Hall, 90 Ill. 42; Keithsburg &c. R. Co. v. Henry, 79 Ill. 290; St. Louis &c. R. Co. v. Richardson, 45 Mo. 466; Tobie v. Comrs. of Brown Co. 20 Kan. 14; Winona &c. R. Co. v. Waldron, 11 Minn. 515; 88 Am. Dec. 100, and note; Putnam v. Douglas Co. 6 Ore. 328; 25 Am. R. 527; Sexton v. North Bridgewater, 116 Mass. 200.

[123] Page v. Chicago &c. R. Co. 70 Ill. 324; Mix v. Lafayette &c. R. Co. 67 Ill. 319; Adden v. White Mountains R. Co. 55 N. H. 413; 20 Am. R. 220; Bangor &c. R. Co. v. McComb, 60 Me. 290.

[124] Lance v. Chicago &c. R. Co. 57 Iowa, 636; 11 N. W. 612; Gilmore v. Pittsburg &c. R. Co. 104 Pa. St. 275; Seattle &c. R. Co. v. Scheike, 3 Wash. 625; 29 Pac. 217; 30 Pac. 503.

[125] Booker v. Venice &c. R. Co. 101 Ill. 333. See, also, Schreiber v. Chicago &c. R. Co. 115 Ill. 340; 3 N. E. 427.

constructed at the time the assessment is made, the jury in assessing damages may take into consideration the manner in which it was actually built,[126] and may, where such right exists, consider the right of the company to change its grade and manner of construction without making additional compensation.[127] Some of the cases hold that where no part of the plaintiff's land is taken, he is not entitled to damages for annoyance caused by throwing smoke, dust and soot upon his premises, unless some peculiar constitutional or statutory provision gives damages for such injuries.[128] But it is doubtful whether the doctrine of these cases can be reconciled with that declared by the later decisions.[129]

§ 996. Matters to be considered in estimating damages—Illustrative instances.—If the construction of private or farm crossings is made necessary, the probable cost of making them must be considered by the jury in assessing damages,[130] unless the road is bound to build

[126] Thompson v. Milwaukee &c. R. Co. 27 Wis. 93; Cummins v. Des Moines &c. R. Co. 63 Iowa, 397; 19 N. W. 268; Union Railroad &c. Co. v. Moore, 80 Ind. 458. See Hayes v. Ottawa &c. R. Co. 54 Ill. 373.

[127] March v. Portsmouth &c. R. Co. 19 N. H. 372. But it seems to us that some of the cases go entirely too far, at all events the doctrine is to be carefully limited and cautiously applied. It is doubtless true that the right to make ordinary changes should be taken into consideration as well as the ordinary inconveniences resulting from the operation of the railroad in a reasonably careful mode.

[128] Hatch v. Vermont Central R. Co. 25 Vt. 49; Cogswell v. New York &c. R. Co. 48 N. Y. Super. Ct. 31, reversed 103 N. Y. 10; 8 N. E. 537; 57 Am. R. 701; Walker v. Old Colony &c. R. Co. 103 Mass. 10; 57 Am. R. 701; Dimmick v. Council Bluffs &c. R. Co. 62 Iowa, 409; 17 N. W. 595.

[129] Ante, § 978; Chicago &c. R. Co. v. Leah, 152 Ill. 249; 38 N. E. 556; Seaside El. R. Co. Matter of, 83 Hun (N. Y.), 143; 31 N. Y. S. 630; Ft. Worth &c. Co. v. Daniels (Tex. Civ. App.), 29 S. W. 695; Springer v. Chicago, 135 Ill. 552; 26 N. E. 514; 12 L. R. A. 609, and note; Lake Erie &c. R. Co. v. Scott, 132 Ill. 429; 24 N. E. 78; 8 L. R. A. 330, and note; note in 85 Am. St. 309, et seq. See, also, these cases which uphold a recovery for this species of injury. Missouri &c. R. Co. v. Calkins (Tex. Civ. App.), 79 S. W. 852; Illinois Central R. Co. v. Turner, 194 Ill. 575; 62 N. E. 798, affirming 97 Ill. App. 219; Syracuse &c. Co. v. Rome &c. R. Co. 43 App. Div. (N. Y.) 203; 60 N. Y. S. 40, affirmed in 168 N. Y. 650; 61 N. E. 1135; Baltimore Bell R. Co. v. Sattler, 100 Md. 306; 59 Atl. 654; Mason City &c. R. Co. v. Wolf, 148 Fed. 961; Davenport &c. R. Co. v. Sinnet, 111 Ill. App. 75.

[130] Cedar Rapids &c. R. Co. v. Ray-

and maintain such crossings, in which case that fact must be considered.[131] Where the construction of the road makes necessary the removal of buildings,[132] or the erection of structures of any kind in order that the property not taken may be restored to a condition for use, it has been held that the cost of such removals or erections may be considered by the jury in assessing damages.[133] But there are well considered decisions to the contrary,[134] and in any event a reasonable

mond, 37 Minn. 204; 33 N. W. 704; Atchison &c. R. Co. v. Gough, 29 Kan. 94; Mason v. Kennebec &c. R. Co. 31 Me. 215; Kittell v. Missisquoi R. Co. 56 Vt. 96; Silver Creek &c. Co. v. Mangum, 64 Miss. 682; 2 So. 11; note in 85 Am. St. 305. See, also, cases cited in notes to preceding section.

[131] Kansas City &c. R. Co. v. Kregelo, 32 Kan. 608; 5 Pac. 15; March v. Portsmouth &c. R. Co. 19 N. H. 372; Lough v. Minneapolis &c. R. Co. 116 Iowa, 31; 89 N. W. 77. Under the Minnesota statute, the land-owner has no right to private crossings except as reserved and defined by the condemnation proceedings, and the assessment should be made accordingly. Cedar Rapids &c. R. Co. v. Raymond, 37 Minn. 204; 33 N. W. 704. A Canadian court holds that where the value of a piece of land cut off from the rest of a farm by a railroad is less than the cost of constructing a farm crossing, the court may, in its discretion, authorize the payment of the value of the land to the owner, instead of requiring the construction of a crossing. Martin v. Maine Cent. R. Co. Rap. Jud. Que. 19 C. S. 561.

[132] Oregon &c. R. Co. v. Barlow, 3 Ore. 311. The jury may take the cost of removing an obstruction to the enjoyment of his property as the basis for calculating his damages. Chicago &c. R. Co. v. Carey, 90 Ill. 514. Interference with access to rooms through a hall which was torn down in the construction of the road, was held such a damage as to lessen their rental value and entitle the lessees to compensation. Ford v. Metropolitan &c. R. Co. L. R. 17 Q. B. Div. 12; 25 Am. & Eng. R. Cas. 182.

[133] Easterbrook v. Erie R. Co. 51 Barb. (N. Y.) 95; St. Louis &c. R. Co. v. Mollet, 59 Ill. 235; Chicago &c. R. Co. v. Hock, 118 Ill. 587; 9 N. E. 205; Forney v. Fremont &c. R. Co. 23 Neb. 465; 36 N. W. 806; Commonwealth v. Boston &c. R. Co. 3 Cush. (Mass.) 25; Presbrey v. Old Colony &c. R. Co. 103 Mass. 1; Chase v. Worcester, 108 Mass. 60; Bemis v. Springfield, 122 Mass. 110; Price v. Milwaukee &c. R. Co. 27 Wis. 98. In Terre Haute &c. R. Co. v. Crawford, 100 Ind. 550, the court approved an instruction by which the jury were permitted to consider the cost of filling the remaining land from two to five feet, the entire length of the line appropriated, as an element of his damages.

[134] See Central Pac. R. Co. v. Pearson, 35 Cal. 247; White v. Cincinnati &c. R. Co. 34 Ind. App. 287; 71 N. E. 276; Chicago &c. R. Co. v. Knuffke, 36 Kans. 367; 13 Pac. 582; Schuchardt v. Mayor, 53 N. Y. 202; Mississippi River Bridge Co.

expense only can be incurred for this cause, and the owner will not be permitted to collect as damages the cost of improvements by which his property is rendered more valuable that it was before any part of it was taken. So, where the construction of the road compels the land-owner to build additional fences, their cost is a proper element of damages, for which compensation must be made,[135] except where the duty of building such fences is by law imposed upon the railroad company.[136] But it is held that the expense of fencing should only

v. Ring, 58 Mo. 495; Kansas City v. Morse, 105 Mo. 510; 16 S. W. 893; St. Louis &c. Ry. Co. v. Mendensa, 193 Mo. 518; 91 S. W. 65; Finn v. Providence Gas &c. Co. 99 Pa. St. 631. This is upon the theory that he is compensated for the buildings as part of the realty. In some jurisdictions, however, the owner is entitled to remove the buildings and recover the reasonable cost of removal. See as to damage for separating part of farm with the building separated from the rest. Prather v. Chicago &c. R. Co. 221 Ill. 190; 77 N. E. 430.

[135] Raleigh &c. R. Co. v. Wicker, 74 N. Car. 220; St. Louis &c. R. Co. v. Anderson, 39 Ark. 167; Leavenworth &c. R. Co. v. Paul, 28 Kan. 816; Sacramento &c. R. Co. v. Moffatt, 6 Cal. 74; California &c. R. Co. v. Southern Pac. R. Co. 67 Cal. 59; 7 Pac. 123; Winona &c. R. Co. v. Waldron, 11 Minn. 515; 88 Am. Dec. 100, and note; New York &c. R. Co. v. Stanley, 35 N. J. Eq. 283; Pennsylvania &c. R. Co. v. Bunnell, 81 Pa. St. 414; Vandegrift v. Delaware &c. R. Co. 2 Houst. (Del.) 287; Crowell v. New Orleans &c. R. Co. 61 Miss. 631; St. Louis &c. R. Co. v. Mitchell, 47 Ill. 165; St. Louis &c. R. Co. v. Kirby, 104 Ill. 345; Greenville &c. R. Co. v. Partlow, 5 Rich. L. (S. Car.) 428. Rensselaer &c. R. Co. In re, 4 Paige (N. Y.) Ch. 553; note in 85 Am. St. 304. Where damages were assessed for the cost of fencing along the right of way, it was held that the land-owner, his heirs and assigns became legally bound to maintain fences. St. Louis &c. R. Co. v. Mitchell, 47 Ill. 165. In Northeastern R. Co. v. Sineath, 8 Rich. L. (S. Car.) 185, it was held that where the road passed through uncleared and uncultivated land, for which no fences would be required, that no damages for the increased cost of fencing could be awarded. But it would seem that the jury should have considered the increased cost of adapting the land to cultivation (including the construction of fences) as an element of damages. See Raleigh &c. R. Co. v. Wicker, 74 N. Car. 220; Montgomery &c. Co. v. Stockton, 43 Ind. 328. And see, generally, Pacific Coast R. Co. v. Porter, 74 Cal. 261; 15 Pac. 774; Newgass v. St. Louis &c. R. Co. 54 Ark. 140; 15 S. W. 188; Jones v. Western North Car. R. Co. 95 N. Car. 328; Pittsburg &c. R. Co. v. McCloskey, 110 Pa. St. 436; 1 Atl. 555; Seattle &c. R. Co. v. Gilchrist, 4 Wash. 509; 30 Pac. 738.

[136] Winona &c. R. Co. v. Waldron, 11 Minn. 515; 88 Am. Dec. 100; St. Joseph &c. R. Co. v. Shambaugh,

be considered to the extent that it depreciates the market value of the remaining land.[137] Any interference with the flow of water upon or across the land is an element of damages where the farm is thereby depreciated in value.[138] Some of the courts hold that damages to adjoining property from the vibrations occasioned by passing trains,[139]

106 Mo. 557; 17 S. W. 581. Where the company was held bound to maintain one-half of the fence, it was held that the cost of the other half, which would fall on the land-owner, was properly included in the assessment of damages. Rensselaer &c. R. Co. In re, 4 Paige (N. Y.), 553; Henry v. Dubuque &c. R. Co. 2 Iowa, 288, 305. In Baltimore &c. R. Co. v. Lansing, 52 Ind. 229, the court approved the following instruction given by the court below: "You may also consider as damages any additional amount of fencing necessary to a safe and proper use of the defendant's improved farm, or fields already enclosed, as the law does not impose on the company any obligation to fence their right of way, except so far as they may choose to do so for the protection of their own interests, the law simply imposing on them the obligation to pay for animals killed by them on their track, where it is not, but might be, securely fenced." The decisions on this point vary greatly with the fence laws of the several states. Where the company is only required to fence within six months, the jury may consider the consequences of keeping the land thrown open that long. St. Louis &c. R. Co. v. Kirby, 104 Ill. 345. In Raleigh &c. R. Co. v. Wicker, 74 N. Car. 220, the court held that the cost of fencing uncleared and uncultivated land, which the law did not require the owner to fence, could not be included in the damages awarded, basing its opinion partly upon the fact that the legislature had not deemed it necessary to require railroads to fence their roads, and that the assessment of damages for fences where none were required by law, and none would, in all probability, be built, would impose upon them the burden which the legislature had failed to impose without securing the benefits arising from requiring the road to be fenced. To the effect that a city in condemning for a street across a railroad is not bound to make compensation for fencing, flanking and the like required of the company, see Chicago &c. R. Co. v. Chicago, 166 U. S. 226; 17 Sup. Ct. 581, 591, 592, and cases cited.

[137] Pennsylvania &c. R. Co. v. Bunnell, 81 Pa. St. 414; Delaware &c. R. Co. v. Burson, 61 Pa. St. 369. Where the law requires a railroad to erect and maintain suitable cattle guards and wing fences at the points of entrance upon land through which it has obtained a right of way, the land-owner may recover the value of crops destroyed by reason of its neglect to perform this duty. Houston &c. R. Co. v. Adams, 63 Tex. 200.

[138] Pflegar v. Hastings &c. R. Co. 28 Minn. 510; 11 N. W. 72.

[139] New York Central &c. R. Co. In re, 15 Hun (N. Y.), 63; Henderson v. New York Central R. Co.

and from the annoyance due to the noise and confusion which they occasion,[140] may be recovered by the property holder.[141] The in-

17 Hun (N. Y.), 344; Croft v. London &c. R. Co. 113 Eng. C. L. (3 B. & S.) 435; Penny, In re, 90 Eng. C. L. 660; Cohen v. Cleveland, 43 Ohio St. 190.

[140] Chicago &c. R. Co. v. Nix, 137 Ill. 141; 27 N. E. 81; Mix v. Lafayette &c. R. Co. 67 Ill. 319; White v. Charlotte &c. R. Co. 6 Rich. L. (S. Car.) 47; Blue Earth Co. v. St. Paul &c. R. Co. 28 Minn. 503; 11 N. W. 73; Gainesville R. Co. v. Hall, 78 Tex. 169; 14 S. W. 259; 9 L. R. A. 298, and note; 22 Am. St. 42, and note; Gulf &c. R. Co. v. Eddins, 60 Tex. 656; Wilson v. Des Moines &c. R. Co. 67 Iowa, 509; 25 N. W. 754; Little Rock &c. R. Co. v. Allen, 41 Ark. 431; Bangor &c. R. Co. v. McComb, 60 Me. 290; Ode v. Manhattan &c. R. Co. 56 Hun (N. Y.), 199; 9 N. Y. S. 338; Duyckinck v. New York El. R. Co. 125 N. Y. 710; 26 N. E. 755; Contra New Orleans &c. R. Co. v. Barton, 43 La. Ann. 171; 9 So. 19; Republican Valley &c. R. Co. v. Linn, 15 Neb. 234; 18 N. W. 35; Hammersmith &c. R. Co. v. Brand, L. R. 4 H. L. Cas. 171; Glasgow U. R. Co. v. Hunter, L. R. 2 H. L. Sc. 78. See St. Louis &c. R. Co. v. Haller, 82 Ill. 208; Metropolitan &c. El. R. Co. v. Gall, 100 Ill. App. 323; Illinois Central R. Co. v. School Trustees, 212 Ill. 406; 72 N. E. 39. The lawful construction and operation of a horse railway in the streets of a city does not entitle the owner of property which is damaged thereby to compensation unless special damage is alleged and shown; and for this purpose evidence is admissible to prove that the damage was caused by noise, smoke, dust and the like, but these must have resulted in actual damage, and not merely in annoyance or inconvenience. Campbell v. Metropolitan St. R. Co. 82 Ga. 320; 9 S. E. 1078. Inconvenience of a permanent nature, such as rattle of train, noise of whistle, smoke, etc., are elements of damage. Bowen v. Atlantic &c. R. Co. 17 S. Car. 574. See, also, Logan v. Boston El. R. Co. 188 Mass. 414; 74 N. E. 663. See ante, § 995.

[141] But while injuries of this class are admitted as an element for consideration in estimating the depreciation in value of the residue of property, part of which has been taken, many authorities refuse to allow compensation therefor, when unaccompanied by any physical injury or taking. Bordentown &c. Turnp. Co. v. Camden &c. R. Co. 17 N. J. L. 314; Hammersmith &c. R. Co. v. Brand, L. R. 4 H. L. 171; L. R. 2 Q. B. 223; L. R. 1 Q. B. 130; Duke of Buccleuch v. Metropolitan Board of Works, L. R. 5 Exch. 221. Under the Texas constitutional provision that "no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made," one can recover for diminution in the value of his property arising from the noise, smoke, and vibration produced by the operation of a railroad near the property, though not along a public highway. Gainesville &c. R. Co. v. Hall, 78 Tex. 169; 14 S. W. 259; 9 L. R. A. 298, and note; 22 Am. St. 42, and note.

creased danger from fire emitted from the locomotives,[142] the increased

[142] Swinney v. Fort Wayne &c. R. Co. 59 Ind. 205; Lafayette &c. R. Co. v. Murdock, 68 Ind. 137; Adden v. White Mountains &c. R. Co. 55 N. H. 413; 20 Am. R. 220; St. Louis &c. R. Co. v. Springfield &c. R. Co. 96 Ill 274; Wilmington &c. R. Co. v. Stauffer, 60 Pa. St. 374; 100 Am. Dec. 574; Oregon &c. R. Co. v. Barlow, 3 Ore. 311; Colvill v. St. Paul &c. R. Co. 19 Minn. 283; Kansas City &c. R. Co. v. Kregelo, 32 Kan. 608; 5 Pac. 15; Pierce v. Worcester &c. R. Co. 105 Mass. 199; Utica &c. R. Co. In re, 56 Barb. (N. Y.) 456; St. Louis Belt &c. R. Co. v. Mendonsa, 193 Mo. 518; 91 S. W. 65 (the depreciation in value of the part not taken because of the danger from fire but not the mere possibility of the destruction of buildings); note in 85 Am. St. 308. In Ontario &c. R. Co. In re, and Taylor, 6 Ont. 338; 17 Am. & Eng. R Cas. 100, it was held that the greater liability to injury by fire by reason of the working of the railway, are too remote contingencies to be taken into consideration in estimating the value of the land taken where there are no buildings to be endangered. In Lance v. Chicago &c. R. Co. 57 Iowa, 636; 11 N. W. 612, the court held that it was error to admit evidence of the value of a grove through which the road was laid out, and of a dwelling-house standing on the opposite side of the grove, to which it was claimed that fire could run upon the dry leaves of the grove. The court said: "The compensation allowed for right of way should be direct and proximate, and not remote and contingent upon circumstances which may or may not transpire. . . . . It is plain that no estimate can be made in the way of compensation for the value of the property which may be destroyed by fire and without the fault of the railroad company. The most that can be claimed is that it is competent to take into consideration the risk of fire set out by the defendant without its fault, and by reason of the operation of the road through the premises. But this risk or hazard or exposure of the property is an entirely different question from that involved in its destruction by fire without fault of the company. In the one case, while the risk may somewhat decrease the value of the property, and is a legitimate consideration for what it may be worth, in fixing the compensation to the owner, in the other case the destruction of buildings, groves, or the like, by fires, is a field of inquiry so remote and contingent as to be without and beyond any range of damages known to the law. Of course, it will be understood that we are treating of such risks and hazard from fire as result from the operation of the road in such a manner that if fire should escape there would be no liability against the railroad company. For its negligence it would be liable to the owner, and this element should not be taken into account in estimating the compensation." For other cases in which prospective damages from fires were held not a proper element for consideration by the jury see Wilmington &c. R. Co. v. Stauffer, 60 Pa. St. 374; 100 Am. Dec. 574; Patten v. Northern Central R. Co.

cost of insuring buildings and their contents,[143] injuries to business carried on in the property taken,[144] the destruction of valuable

33 Pa. St. 426; 75 Am. Dec. 612; Lehigh Valley R. Co. v. Lazarus, 28 Pa. St. 203; Union Village &c. R. Co. In re, 53 Barb. (N. Y.) 457; Rodemacher v. Milwaukee &c. R. Co. 41 Iowa, 297; 20 Am. R. 592. Where the buildings on a tract of land are at such a distance that there is no real imminent danger from fire such danger can not be considered. Jones v. Chicago &c. R. Co. 68 Ill. 380; Hatch v. Cincinnati &c. R. Co. 18 Ohio St. 92; Proprietors of Locks and Canals v. Nashua &c. R. Co. 10 Cush. (Mass.) 385. The fact that the railroad is responsible for all damages, whether resulting from negligence or not, may properly be taken into consideration by the jury in estimating the amount of compensation. Bangor &c. R. Co. v. McComb, 60 Me. 290. But even where the railroad is so liable, depreciation in the value of property resulting from apprehension of fire has been held a proper element of damages. Keithsburg R. Co. v. Henry, 79 Ill. 290; Adden v. White Mountains R. Co. 55 N. H. 413; 20 Am. R. 220; Pierce v. Worcester R. Co. 105 Mass. 199; Sommerville R. Co. v. Doughty, 22 N. J. L. 495; Bangor R. Co. v. McComb, 60 Me. 290. But see Illinois &c. R. Co. v. Freeman, 210 Ill. 270; 71 N. E. 444, with which compare Chicago Southern R. Co. v. Nolin, 221 Ill. 367; 77 N. E. 435.

[143] Wooster v. Sugar Run V. R. Co. 57 Wis. 311; 15 N. W. 401; Lafayette &c. R. Co. v. Murdock, 68 Ind. 137; Webber v. Eastern R. Co. 2 Metc. (Mass.) 147.

[144] South Carolina R. Co. v. Steiner, 44 Ga. 546; Driver v. Western Union R. Co. 32 Wis. 569; 14 Am. R. 726; St. Louis &c. R. Co. v. Capps, 67 Ill. 607; 72 Ill. 188; Western Pennsylvania R. Co. v. Hill, 56 Pa. St. 460; Grand Rapids &c. R. Co. v. Weiden, 70 Mich. 390; 38 N. W. 294; Boston &c. R. Co. v. Old Colony R. Co. 12 Cush. (Mass.) 605; 3 Allen, 142; Lafayette &c. R. Co. v. Murdock, 68 Ind. 137; Cameron v. Charing Cross R. Co. 16 C. B. N. S. 430; Wood v. Stourbridge R. Co. 16 C B. N. S. 222. In Jacksonville &c. R. Co. v. Walsh, 106 Ill. 253, the court said: "The purposes for which [the property] was used and designed, its location and advantages as to situation were proper matters of consideration by the jury; but the profits of the business of the past and conjectural profits for the future were too speculative and uncertain upon which to ascertain the market or cash value of the property." See, also, Becker v. Philadelphia &c. R. Co. 177 Pa. St. 252; 35 Atl. 617; 35 L. R. A. 583; Edmands v. Boston, 108 Mass. 535; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 30 Ohio St. 604; Richmond &c. R. Co. v. Chamblin, 100 Va. 401; 41 S. E. 750. But see Bailey v. Boston &c. Corp. 182 Mass. 537; 66 N. E. 203, where it is held that in the absence of special statutory provisions, the loss of business as such, arising from the taking of property adjoining that on which the business was conducted for a right of way can not be considered.

accessories—as for example a frontage on another railroad;[145] the obstruction of ingress to and egress from the premises;[146] the destruction of mineral wells or springs;[147] inconvenience and increase of expense of using premises not taken;[148] and the decreased rental value of buildings,[149] occasioned by the construction of a railroad, have all

[145] Wray v. Knoxville &c. R. Co. 113 Tenn. 544; 82 S. W. 471.

[146] Cincinnati &c. R. Co. v. Miller, 36 Ind. App. 26; 72 N. E. 827.

[147] Kossler v. Pittsburg &c. R. Co. 208 Pa. St. 50; 57 Atl. 66. The value of a salt water well on the premises is to be determined not by the profits in operating the same, but from its selling value. Ibid.

[148] Richmond &c. R. Co. v. Chamblin, 100 Va. 401; 41 S. E. 750; Illinois Cent. R. Co. v. Turner, 194 Ill. 575; 62 N. E. 793; Prather v. Chicago Southern R. Co. 221 Ill. 190; 77 N. E. 430; Chicago &c. R. Co. v. Curless, 27 Ind. App. 306; 60 N. E. 467. Speculative opinions as to the amount of business that might be carried on in the property, and the probable profits therefrom have been held, in many cases, incompetent as evidence from which the jury could assess damages. Mount Washington Road Co. In re, 35 N. H. 134; Cobb v. Boston, 109 Mass. 438; Eddings v. Seabrook, 12 Rich. L. (S. Car.) 504; Ricket v. Metropolitan R. Co. 5 Best & S. 149; 117 Eng. C. L. 149; Union Village &c. R. Co. Matter of, 53 Barb. (N. Y.) 457. The rule is laid down by the Lord Chancellor in Metropolitan Board of Works v. McCarthy, L. R. 7 Eng. & I. App. Cas. 243, 253, as follows: "That where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value." Evidence as to the amount of business that was or could be done upon the property taken, or of the profits gained from past business, or that could probably be made in the future is inadmissible. Jacksonville &c. R. Co. v. Walsh, 106 Ill. 253. Under the constitution and laws of Kentucky, the jury may consider as an element of damage, the inconvenience and loss resulting to the owner of property condemned from being deprived of his home and established place of business. Covington &c. R. Co. v. Piel, 87 Ky. 267; 8 S. W. 449. The increased cost of working a mine by tunnelling under the track is a proper element of damages. Midland R. Co. v. Miles, L. R. 30 Chan. Div. 634.

[149] Lafayette &c. R. Co. v. Murdock, 68 Ind. 137. So, also, the loss of rents occasioned by the construction of the work. Henderson v. New York &c. R. Co. 17 Hun (N. Y.), 344; 78 N. Y. 423; Pittsburgh &c. R. Co. v. Rose, 74 Pa. St. 362. The fact that the plaintiff continues to occupy the

been held proper subjects for compensation in damages.[150] The use to which the land taken is to be put, as for the running of railway trains, with its probable effect upon the plaintiff's property, is also to be considered by the jury in assessing his damages.[151] Buildings on the right of way are regarded, by some courts, as a part of the frechold and to be paid for as such, and where this is the case there is a presumption that such damages are included in the award.[152] One purchasing land over which a right of way has already been taken by a railroad company is clearly entitled to nothing for the incidental injury to the land by reason of the right of way. His measure of damages, when he is entitled to recover at all, is simply the value of the ground taken.[153]

§ 996a. Measure of damages for property of railroad company

property is no defense to a claim for a decrease in its rental value due to the railroad. Scott v. Indianapolis &c. R. Co. (Marion Sup. Ct. Ind.) 10 Am. & Eng. R. Cas. 189.

[150] In Chicago &c. R. Co. v. Staley, 221 Ill. 405; 77 N. E. 437, an instruction authorizing the jury, in assessing damages, to consider danger of stock being killed or injured in the future, damage from fire by passing engines, and all other damages that the jury might believe were reasonably to be expected to ensue, was held erroneous for failure to confine the jury's consideration of such matters to their effect on the market value of the land not taken, and an instruction that, in estimating the damages to adjacent land not taken, the jury should consider the depreciation in value of such land not taken for any present or future use to which the land might conveniently and lawfully be put on account of such proposed railroad, and should allow such sum as the property taken was reasonably worth, considering its present use and any use to which it may reasonably be put in the future, was held erroneous; and the court said that the only future use that could properly be considered was that to which the land was at present adapted and which affected its present market value.

[151] Pacific R. Co. v. Chrystal, 25 Mo. 544; Cleveland &c. R. Co. v. Ball, 5 Ohio St. 568; Kucheman v. Chicago, C. & D. R. Co. 46 Iowa, 366; Bangor &c. R. Co. v. McComb, 60 Me. 290; Atchison &c. R. Co. v. Blackshire, 10 Kan. 477; Utica &c. R. Co. Matter of, 56 Barb. (N. Y.) 456. Contra, Prospect Park &c. R. Co. Matter of, 13 Hun (N. Y.), 345; Black River &c. R. Co. v. Barnard, 9 Hun (N. Y.), 104; Albany Northern R. Co. v. Lansing, 16 Barb. (N. Y.) 68. See, generally, Hamilton v. Pittsburg &c. R. Co. 190 Pa. St. 51; 42 Atl. 369; 51 L. R. A. 319, and note.

[152] White v. Cincinnati &c. R. Co. 34 Ind. App. 287; 71 N. E. 276.

[153] Whitecotton v. St. Louis &c. R. Co. 104 Mo. App. 65; 78 S. W. 318. See post, § 1000.

taken for other public use—Railroad and street railroad crossings.—A railroad,[154] or, according to some decisions, street railroad company,[155] intending to cross railroad tracks rightfully maintained in a public street can not effect the crossing until it has first compensated the railroad company for the resulting damages. In the case of a street railroad crossing it has been held that these damages will include pay for the construction of the crossing, and any change in the tracks necessitated by the crossing, but not damages for the impairment of the easement in the street.[156] In most jurisdictions it is held that a street railway is not an additional burden. The subject of compensation for railroad crossings is discussed in a later volume to which the reader is referred.[157]

§ 996b. Measure of damages for property of railroad company taken for other public use—Telegraph lines.—A telegraph company can not enter upon a railroad right of way and construct its lines until it has paid a just compensation therefor which is to be ascertained by resorting to the state laws relative to eminent domain, and this is the case though the company is authorized by federal laws to construct the line upon post roads.[158] Speaking generally the measure of damages is the decrease in the value of the right of way for railroad purposes,[159] and these damages are generally regarded as merely nominal, or practically so, since the telegraph company does not appreciably interfere with the right of way or the operation of the rail-

[154] Atlantic &c. R. Co. v. Seaboard &c. R. Co. 116 Ga. 412; 42 S. E. 761. Where a railroad company, in condemning the right to cross with its track spur tracks of another railroad, takes nothing but the easement of crossing, the interruption in business, increased liability to accident, and the flagging of trains at crossings as required by law, did not constitute elements of damage. Kansas City &c. R. Co. v. Louisiana &c. R. Co. 116 La. 178; 40 So. 627.

[155] Central Passenger R. Co. v. Philadelphia &c. R. Co. 95 Md. 428; 52 Atl. 752.

[156] Central Passenger R. Co. v. Philadelphia &c. R. Co. 95 Md. 428; 52 Atl. 752.

[157] Post, § 1127.

[158] Postal Tel. Cable Co. v. Oregon &c. R. Co. 23 Utah 474; 65 Pac. 735; 90 Am. St. 705. See, also, Kester v. Western Un. Tel. Co. 108 Fed. 926; Western Un. Tel. Co. v. Pennsylvania R. Co. 120 Fed. 362; 123 Fed. 33.

[159] Postal &c. Co. v. Oregon &c. R. Co. 23 Utah, 474; 65 Pac. 735; 90 Am. St. 705; Cleveland &c. R. Co. v. Ohio &c. Cable Co. 68 Ohio St. 306; 67 N. E. 890; 62 L. R. A. 941; Atlantic &c. R. Co. v. Postal &c. Co. 120 Ga. 268; 48 S. E. 15.

road.[160] The annoyance and inconvenience of a railroad from the construction and operation of the telegraph lines upon its right of way, to warrant the allowance of damages therefor, must be real and such as will interfere with the operation of the railroad.[161] Thus, on the ground of remoteness, it has been held that the jury could not consider as elements of damage such items, as the danger of poles falling across the tracks,[162] the added expense of burning grass on the right of way on account of the position of the poles,[163] the vague suggestion that at some future date the railroad company might lay additional tracks or build structures for railroad purposes on the right of way,[164] the benefit the railroad company might derive from a contract with another telegraph company already occupying its right of way.[165]

§ 996c. Measure of damages for property of railroad company taken for public use—Streets and highways.—Where land is taken from the right of way for a street or road the railroad company is entitled to compensatory damages properly shown and not mere nominal damages.[166] And it is said to matter not whether the right of the railroad company in the land was a mere easement or a fee-simple title. "It had acquired its right by its own condemnation proceedings and was entitled to the uninterrupted use and enjoyment of the right of way, subject only, as all property is, to the right of eminent domain; and, when even a small portion of the land composing its right of way is taken from it and dedicated to another and different

[160] Postal &c. Co. v. Oregon &c. R. Co. 23 Utah 474; 65 Pac. 735; 90 Am. St. 705; Ohio Postal Tel. Co. v. Cleveland &c. R. Co. 8 Ohio N. P. 121; 11 Ohio S. & C. P. Dec. 52. See, also, Mobile &c. R. Co. v. Postal Tel. Co. 101 Tenn. 62; 46 S. W. 571; 41 L. R. A. 403; Chicago &c. R. Co. v. Chicago, 166 U. S. 248; 17 Sup. Ct. 992; Postal Tel. Cable Co. v. Oregon Short Line R. Co. 104 Fed. 623; 111 Fed. 842; St. Louis &c. R. Co. v. Postal Tel. Co. 173 Ill. 508; 51 N. E. 382; Gulf &c. R. Co. v. Southwestern Tel. &c. Co. (Tex. Civ. App.) 52 S. W. 87.

[161] Atlantic &c. R. Co. v. Postal &c. Co. 120 Ga. 268; 48 S. E. 15.

[162] Atlantic &c. R. Co. v. Postal &c. Co. 120 Ga. 268; 48 S. E. 15.

[163] Postal &c. Co. v. Oregon &c. R. Co. 23 Utah 474; 65 Pac. 735; 90 Am. St. 705.

[164] Atlantic &c. R. Co. v. Postal &c. Co. 120 Ga. 268; 48 S. E. 15.

[165] Atlantic &c. R. Co. v. Postal &c. R. Co. 120 Ga. 268; 48 S. E. 15.

[166] Missouri Pac. R. Co. v. Cass Co. (Neb.) 107 N. W. 773. See, also, post, §§ 1103, 1104.

public use, actual and not nominal damages should be allowed."[167] On the question of the measure of damages the supreme court of the United States has said: "The value to the railroad company of that which was taken from it is, as we have said, the difference between the value of the right to the exclusive use of the land in question for the purposes for which it was being used, and for which it was always likely to be used, and that value after the city acquired the privilege of participating in such use by the opening of a street across it, leaving the railroad tracks untouched."[168] The railroad company has also been held entitled to damages for improvements it has placed in the streets which must be removed to permit the public to use the street,[169] and for the expense of changes in the tracks made necessary by the condemnation.[170] Where it was sought to condemn a way under the tracks the railroad company was held entitled to compensation for the cost of a bridge to carry its trains over the tracks.[171] And where in making proper approaches to a railroad track at a highway crossing it is necessary to grade through all the right of way on either side of the track it has been held that the railroad company should be allowed such sum for damages as the county would have been compelled to expend in making the public road had the railroad never been built.[172] But the railroad company, under the weight of authority, is not entitled to anything for the extra expense necessary for the maintenance of the crossing under mere police regulations such, for example, as the cost of putting in cattle guards, building wing fences, erecting gates, maintaining flagmen, and the like.[173] As said by the supreme court of the United States: "The expenses that will be incurred by the railroad company in erecting gates, planking the crossing and maintaining flagmen, in order that its road may be safely operated—if all that should be required—necessarily result from the maintenance of a

[167] Missouri Pac. R. Co. v. Cass Co. (Neb.) 107 N. W. 773.

[168] Chicago &c. R. Co. v. Chicago, 166 U. S. 226; 17 Sup. Ct. 581.

[169] New York &c. R. Co. v. Blackstone, 184 Mass. 491; 69 N. E. 315; Southern Kansas R. Co. v. Oklahoma City, 12 Okla. 82; 69 Pac. 1050.

[170] Southern Kansas R. Co. v. Oklahoma City (Okla.), 69 Pac. 1050.

[171] Cincinnati &c. R. Co. v. Troy, 68 Ohio St. 510; 67 N. E. 1051.

[172] Missouri Pac. R. Co. v. Cass Co. (Neb.) 107 N. W. 773.

[173] Missouri Pac. R. Co. v. Cass Co. (Neb.) 107 N. W. 773; Chicago &c. R. Co. v. Chicago, 166 U. S. 226; 17 Sup. Ct. 581; Chicago &c. R. Co. v. Chicago, 149 Ill. 457; 37 N. E. 78. See, also, post, § 1103.

public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state. What was obtained and all that was obtained, by the condemnation proceedings for the public was the right to open a street across the land within the crossing that was used, and was always likely to be used, for railroad tracks. While the city was bound to make compensation for that which was actually taken it can not be required to compensate the defendant for obeying lawful regulations enacted for the safety of the lives and property of the people."[174]

§ 996d. Railroads and street railroads in streets—Compensation to abutters.—The question whether railroads[175] and street railroads[176] imposed an additional servitude on the street or highway over which they are operated is reserved for discussion in later chapters. At this point it is only intended to refer to the matter of measure of damages, where there is a liability, against railroads. Street railroads operating strictly as such are generally not regarded as imposing any extra burden on the street. The measure of these damages in the case of railroads is usually held to be the substantial depreciation of the value of the abutting property consequent upon the use of the street by the railroad. But the difference in value must be substantial and not fanciful or conjectural.[177] In determining this question it has been held that the jury may consider the decline in the value of the property because of the noise, smoke, loss of light and air, increased risk of fire, and material interference with ingress and egress so far as they depreciate the value of the abutting property.[178] Where a railroad condemns the whole of a dedicated

[174] Chicago &c. R. Co. v. Chicago, 166 U. S. 226; 17 Sup. Ct. 581.

[175] Post, § 1085, et seq. See, also, Atlanta &c. R. Co. v. Atlanta &c. R. Co. 125 Ga. 529; 54 S. E. 736.

[176] Post, § 1096, et seq.

[177] Harrington v. Iowa Cent. R. Co. 126 Iowa, 388; 102 N. W. 139; Camden &c. R. Co. v. Smiley, 27 Ky. L. 134; 84 S. W. 523; Grossman v. Houston &c. R. Co. (Tex.) 92 S. W. 836; South Bound R. Co. v. Burton, 67 S. C. 515; 46 S. E. 340.

[178] South Bound R. Co. v. Burton, 67 S. C. 515; 46 S. E. 340. But, as elsewhere shown, all authorities do not agree as to all of these matters. See, generally, ante, § 978, and post, § 1085, et seq; Smith v. St. Paul &c. Ry. Co. (39 Wash. 355); 109 Am. St. 889, and elaborate note.

street it has been held that the abutting owner is entitled to compensation for the full value of the land taken.[179] In a case where residence property was situated on the corner of two streets, and after the construction of a railroad in one of the streets another road sought to condemn the owner's rights as abutting owner in the other street, it was held that such owner was not entitled to compensation from the condemning road because of an additional nuisance from the other road, owing to its being compelled to stop its trains in front of the residence and to give signals, as required by the statutes in relation to the intersections of railroads.[180] In the course of the decision announcing this principle the court said that when the first railroad's right of way "was acquired in front of this house, then compensation was made, or an opportunity had for compensation to be made, for all present and future damages to flow from the operation of the road in the due course of its business. It is part of the due course of the road's operation to make such stops and give such signals as the law or good railroading may require, and all annoyance, inconvenience, and injury from such an incident of railroad operation can be, and should be, compensated at the time of the acquisition of the right of way. When once acquired, then the railroad may lawfully use it in any way which good service and proper conduct of its affairs require, and for such conduct there is no resulting damage to the abutting property owner."[181]

§ 996e. Elevated railroads.—While the courts do not all agree that an elevated railroad constructed on permanent structures in the street by the consent of the municipal authorities does impose an added servitude on the street,[182] there is a general concurrence of opinion that the abutting property owner whose property is

[179] Suffolk &c. R. Co. v. West &c. Imp. Co. 137 N. C. 330; 49 S. E. 350.

[180] Bracey v. St. Louis &c. R. Co. (Ark.) 95 S. W. 151.

[181] Hill, C. J., in Bracey v. St. Louis &c. R. Co. (Ark.) 95 S. W. 151.

[182] In Missouri these railroads are held to add a burden. De Geofroy v. Merchants' &c. R. Co. 179 Mo. 698; 79 S. W. 386; 64 L. R. A. 959; 101 Am. St. 524. In Illinois the opposite conclusion is reached. Doane v. Lake St. &c. R. Co. 165 Ill. 510; 46 N. E. 520; 36 L. R. A. 97; 56 Am. St. 265. For a further consideration and statement of the rule in various jurisdictions see ante, §§ 7, 976, 978 and post § 1085. See as to viaduct, De Lucca v. North Little Rock, 142 Fed. 597, and cases there cited.

depreciated by the road, is to that extent deprived of his property under the eminent domain and is entitled to the damage suffered by him.[183] A court holding the view that an elevated railroad is not necessarily an added servitude has said: "At the time said streets were dedicated or condemned, appellants or their grantors did not part with, but retained as apurtenant to said property, the right of access to said streets, the view, and the comfortable and safe enjoyment of their property; and if the appellee has constructed and is engaged in operating an elevated railroad in said streets in front of appellant's property, the effect of which is to destroy these rights and thereby depreciate the value of appellant's property, it would seem too clear for argument that the property of the appellants had been damaged, and if damaged, that the appellants have not waived or been paid such damages."[184] A New York court stating the rule of damages has held that it was proper to award to abutting owners, not owners of the street, an amount equal to the difference between the value of the property before and after the taking, less the consequential damages due to the annoyance caused by noise, vibration, unsightliness of structure, and all elements other than the value of easements of light, air and access.[185] In a case where an elevated railroad company, having the right to construct its road on a strip of land in the center of the street, erected such structure so as to extend it beyond such strip on either side, it was held that the entire structure was unlawful, and abutting property owners were entitled to rental and fee damages for the trespass, without a deduction for the portion which could have been lawfully erected.[186]

§ 996f. Damages where land taken is abandoned before conclusion of condemnation proceedings.—Where a railroad company takes possession on instituting proceedings to condemn land for a

[183] Caldwell v. New York &c. R. Co. 111 App. Div. (N. Y.) 164; 97 N. Y. S. 588; Aldis v. Union Elevated R. Co. 203 Ill. 567; 68 N. E. 95; Baker v. Boston Elevated R. Co. 183 Mass. 178; 66 N. E. 711; Auchincloss v. Metropolitan &c. R. Co. 69 App. Div. (N. Y.) 63; 74 N. Y. S. 534; Muhlker v. New York &c. R. Co. 197 U. S. 544; 25 Sup. Ct. 522.

[184] Aldis v. Union Elevated R. Co. 203 Ill. 567; 68 N. E. 95.

[185] Brooklyn Elevated R. Co. In re, 113 App. Div. (N. Y.) 817; 99 N. Y. S. 222.

[186] Siegel v. New York &c. R. Co. 62 App. Div. (N. Y.) 290; 70 N. Y. S. 1088.

right of way and after a short use of the same abandons it, before the conclusion of the condemnation proceedings the measure of damages has been held to be the rental value of the land for the time it was occupied and the depreciation in the value thereof by reason of the acts done thereon by the railroad company, together with the damage resulting to the other land from the construction of the road bed and from the flooding of the land caused by the embankment, and this is to be computed from the time of the entry by the railroad company. All other damages, it is said, are to be recovered in a separate action specially brought for that purpose.[187] Much may depend, however, upon the statute and practice in the particular jurisdiction.[188]

§ 997. Improvements made by company under unauthorized entry—Views of the authors.—Some of the courts carry the rule against railroad companies which enter on land without authority very far and vest in the land-owner all right and title to improvements made by the company. Some of the cases, as we believe, go entirely too far, for they lose sight altogether of the doctrine of estoppel, as well as the doctrine of leave and license. Where a company enters and makes improvements under claim and color of right, even though the claim be not well founded we think that the land-owner ought not to be allowed to recover the value of such improvements, but it may perhaps be otherwise where the entry is over the objection of the owner and is a mere naked trespass. In our judgment the value of such improvements should not be included in the computation of damages where the statute permits appropriation proceedings after entry and such proceedings are taken pursuant to the statute.[189]

§ 998. Improvements made by company under unauthorized entry—Illustrative cases.—Where the company has entered upon land

[187] Pine Bluff &c. R. Co. v. Kelly (Ark.), 93 S. W. 562.

[188] See, generally, post, §§ 1032, 1033.

[189] This section is cited with approval in Charleston &c. R. Co. v. Hughes, 105 Ga. 1; 30 S. E. 972, 982. See, also, Seattle &c. R. Co. v. Corbett, 22 Wash. 189; 60 Pac. 127, and authorities cited in notes to next following section. As to whether the owner can maintain ejectment where he acquiesces, see Southern R. Co. v. Hood, 126 Ala. 312; 28 So. 662; 85 Am. St. 32, and note in 92 Am. St. 615.

with the consent of the owner and constructed its road,[190] the value of rails, ties and the like can not be considered in estimating compensation in subsequent appropriation proceedings. And even where the entry of the company amounted to a technical trespass because of its failure to pursue with strictness the appropriate proceedings to condemn, if it has acted in good faith it can afterward proceed to condemn the land upon payment of its value, not including the value of improvements which it has made.[191] Where the railroad

[190] California &c. R. Co. v. Southern Pac. R. Co. 67 Cal. 59; 7 Pac. 123; 20 Am. & Eng. R. Cas. 309; California &c. R. Co. v. Armstrong, 46 Cal. 85. See North Hudson Co. R. Co. v. Booraem, 28 N. J. Eq. 450; Mitchell v. Illinois &c. R. Co. 85 Ill. 566; Emerson v. Western Union R. Co. 75 Ill. 176; Chicago &c. R. Co. v. Goodwin, 111 Ill. 273; 53 Am. R. 622. See, also, Indiana &c. R. Co. v. Allen, 100 Ind. 409; Baltimore &c. R. Co. v. Bouvier (N. J.), 62 Atl. 868. The consent of one in possession of the land under voidable tax deeds is sufficient to relieve the railroad company of the character of a trespasser. Cohen v. St. Louis &c. R. Co. 34 Kan. 158; 8 Pac. 138; 55 Am. R. 242. See, also, Ellis v. Rock Island &c. R. Co. 125 Ill. 82; 17 N. E. 62; St. Louis &c. R. Co. v. Nyce, 61 Kans. 394; 59 Pac. 1040; 48 L. R. A. 241; St. Johnsbury &c. R. Co. v. Willard, 61 Vt. 134; 17 Atl. 38; 21 L. R. A. 528; 15 Am. St. 886. The railroad company can enter and remove rails laid by it upon the land of another under a parol license. Northern Central R. Co. v. Canton Co. 30 Md. 347; Dietrich v. Murdock 42 Mo. 279. See, also, the well considered case of Charleston &c. R. Co. v. Hughes, 105 Ga. 1; 30 S. E. 972, 982 (citing text).

[191] Jones v. New Orleans &c. R. Co. 70 Ala. 227; Hays v. Texas &c. R. Co. 62 Tex. 397; Morgan v. Chicago &c. R. Co. 39 Mich. 675; Cohen v. St. Louis &c. R. Co. 34 Kan. 158; 8 Pac. 138; 55 Am. R. 242; Toledo &c. R. Co. v. Dunlap, 47 Mich. 456; 11 N. W. 271; Daniels v. Chicago &c. R. Co. 41 Iowa, 52; Lyon v. Green Bay &c. R. Co. 42 Wis. 538. See, also, Newgass v. St. Louis &c. R. Co. 54 Ark. 140; 15 S. W. 188; Jacksonville &c. R. Co. v. Adams 28 Fla. 631; 10 So. 465; 14 L. R. A. 533; Louisville &c. R. Co. v. Dickson, 63 Miss. 380; 56 Am. R. 809; Oregon &c. R. Co. v. Mosier, 14 Oreg. 519; 13 Pac. 300; 58 Am. R. 321; Chicago &c. R. Co. v. Vaughn, 206 Ill. 234; 69 N. E. 113. This general rule is conceded, but its application is denied under the particular circumstances in Omaha Bridge &c. R. Co. v. Whitney (Neb.), 99 N. W. 525, and Van Husen v. Omaha Bridge &c. Co. 118 Ia. 366; 92 N. W. 47. In Baltimore &c. R. Co. v. Bouvier (N. J.), 62 Atl. 868, where a railroad company had entered upon land under a right of way deed binding it to double-track its road and to erect a passenger station on the vendor's property, which grant it thereafter forfeited by failure to comply with the terms thereof, and a judgment in eject-

company entered under a void charter, so that it had no authority at all for the entry, it was held in a subsequent proceeding to condemn brought by the same company operating under a new charter, that the land-owner could only claim a fair, just, and equitable compensation for his land, and that justice and equity did not require that the value added to the land by the roadbed, ties, rails, and the like placed upon it by the company, should be included in the assessment.[192] This we think is the true doctrine.[193] It has

ment was recovered against it, it was held that this did not give the vendor such a new and independent title as to prevent the application of equitable principles in condemnation proceedings thereinafter instituted, in determining whether or not the vendor was entitled to compensation for improvements made by the railroad company before the forfeiture. It has been held that a land-owner can recover damages, but such as were agreed upon when the railroad was built, although the license under which the road was constructed was given by parol. Buchanan v. Logansport &c. R. Co. 71 Ind. 265. But on this point there is conflict of authority.

[192] Greve v. First Div. St. Paul &c. R. Co. 26 Minn. 66; 1 N. W. 816.

[193] Toledo &c. R. Co. Dunlap, 47 Mich. 456; 11 N. W. 271; 5 Am. & Eng. R. Cas. 378; Morgan's Appeal, 39 Mich. 675. In the Toledo &c. Co. v. Dunlap, supra, Campbell, J., in delivering the opinion of the court, said: "The railroad company, whether rightfully or wrongfully, laid this track while in possession and for purposes entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used, and to a railway track laid on it, the technical rules which apply in some other cases to structures inseparably attached to the freehold. Whatever rule might apply in case of abandonment, it is clear that this superstructure was never designed to be incorporated with the soil except for purposes attending the possession; and in a proceeding to obtain a legal and permanent right to occupy the land for this very purpose there would be no sense in compelling them to buy their own property. Whatever right of redress, if any, Dunlap may have for the tortious occupancy previous to these proceedings, or whatever right of property he might have in case the company abandoned the road entirely and left the track intrenched, we think that so long as it is in possession and legal measures are proceeding to secure a right to retain it there, this structure belongs to the company, whether intruders or not." See, also, Illinois Cent. R. Co. v. Hoskins, 80 Miss. 730; 32 So. 150; 92 Am. St. 612; Justice v. Nesquehoning Valley R. Co. 87 Pa. St. 28. But see where the subsequent condemnation proceedings are by a different company, De Buol v. Freeport &c. R. Co. 111 Ill. 499; Trimmer v. Pennsylvania &c. R. Co. 55 N. J. L. 46; 25 Atl. 932. Compare, however, Cochran v. Missouri &c. R. Co.

been held, however, that if a railroad company enters upon the land of another without any color or claim of right or privilege whatever, and constructs a railroad track on such land, such railroad track becomes the property of the land-owner,[194] but some of the broad statements in the opinions in the cases cited we regard as clearly wrong. It has also been held that where the state constitution requires that compensation shall precede the taking of private property, the entry upon lands by a railroad company without consent of the land-owner, and without an assessment and tender of the damages, confers upon it no right whatever of which it may take advantage in a subsequent proceeding to condemn the land.[195] Of the opinion in the case cited we feel bound to say that in much of the reasoning there is manifest error. Other cases hold that where there is color or claim of right, the owner can recover damages only as of the date of the original taking or entry.[196] The presumption is that rails and similar structures placed by a railroad company upon land taken by it for a right of way are affixed to the land with a manifest intention to use them in the operation of the railroad, and hence, are not to be regarded as fixtures forming part of the real estate.[197] A land-

94 Mo. App. 469; 68 S. W. 367 (new company succeeding to rights of old).

[194] Graham v. Connersville &c. R. Co. 36 Ind. 463; 10 Am. R. 56; Long Island R. Co. In re, 6 T. & C. (N. Y.) 298; Hunt v. Missouri Pac. R. Co. 75 Mo. 252; Price v. Weehawken Ferry Co. 31 N. J. Eq, 31 Morin v. St. Paul &c. R. Co. 30 Minn. 100; 14 N. W. 460; Blue Earth Co. v. St. Paul &c. R. Co. 28 Minn. 503; 11 N. W. 73; United States v. Land in Monterey County, 47 Cal. 515; Kimball v. Adams, 52 Wis. 554; 9 N. W. 170. It has been held that the railroad company can not enter to remove rails laid upon the land of another when it has failed to file a location and to make compensation as required by law. Meriam v. Brown, 128 Mass. 391.

[195] Graham v. Connersville &c. R. Co. 36 Ind. 463, 468; 10 Am. R. 56. This decision is approved and quoted from in St. Johnsville v. Smith, 184 N. Y. 341; 77 N. E. 617, 619. See, also, St. Lawrence &c. R. Co. Matter of, 133 N. Y. 270; 31 N. E. 218.

[196] Central Branch &c. R. Co. v. Andrews, 26 Kan. 702; Cohen v. St. Louis &c. R. Co. 34 Kan. 158; 55 Am. R. 242.

[197] Northern Cent. R. Co. v. Canton Co. 30 Md. 347; Wagner v. Cleveland &c. R. Co. 22 Ohio St. 563; 10 Am. R. 770; Hays v. Texas &c. R. Co. 62 Tex. 397. The act of a railroad in entering upon land under irregular proceedings does not amount to a dedication by it to the land-owner of the property placed upon the land. Justice v. Nesquehoning Valley R. Co. 87 Pa. St. 28; Illinois Cent. R. Co. v. Hoskins, 80 Miss. 730; 32 So. 150; 92 Am. St. 612. But see Price v.

owner who knows that a railroad company is constructing a railroad upon his land for its own use can not assume that the structures placed on it are for his benefit, but, on the contrary, the assumption should be that the company placed them there as its own. If the land-owner in such a case obtains the full value of his land in the condition it was in at the time of the entry, he secures all that he is entitled to receive. In one case a railroad company which had purchased a right of way one hundred feet wide across a tract of land, went upon the adjoining land and built a section house without the consent of the land-owner, and with knowledge that it was building outside the limits of its right of way. Afterward, the land-owner instituted an action to recover the land, whereupon the railroad company began proceedings to condemn, and the court held that the house, being capable of use in connection with the land upon which it stood, without being detached and converted into personality, was not governed by the rule applying to ties and rails, but that it became a part of the freehold, and that the owner was entitled to have its value included in an assessment of his damages upon condemnation.[198]

§ 999. Deviation from proposed line—Change of route.—It is laid down in some of the cases that a railroad company is liable for injuries caused by deviation from the line upon which it proposed to construct its road.[199] We do not believe that the mere fact that there is a deviation from the line proposed will entitle the property owner to damages. We suppose, however, that if an assessment is made

Weehawken Ferry Co. 4 Stewart (N. J.), 31.

[198] Hendry v. Trinity & Sabine R. Co. (Tex.) 24 Am. & Eng. R. Cas. 286. In the case cited the court distinguished the case of Texas &c. Co. v. Hays, 5 Tex. L. 771, in which it was held that rails, ties and the like were not to be considered in estimating the land-owner's damages.

[199] Jacksonville &c. R. Co. v. Kidder, 21 Ill. 131; Peoria &c. R. Co. v. Birkett, 62 Ill. 332; Chicago &c. R. Co. v. Chicago &c. R. Co. 112 Ill. 589; Wabash &c. R. Co. v. McDougall, 118 Ill. 229; 8 N. E. 678; Kansas City &c. R. Co. v. Kregelo, 32 Kan. 608; 5 Pac. 15; Carpenter v. Easton &c. R. Co. 24 N. J. Eq. 249, 408; 26 N. J. Eq. 168. See Hill v. Mohawk &c. R. Co. 7 N. Y. 152. In Chicago &c. Co. v. Henneberry, 153 Ill. 354; 38 N. E. 1043, it was held that where there is such a material alteration of the railroad as causes the lands of an adjoining owner to overflow he is entitled to damages.

upon a designated line, which is afterwards substantially changed, and the change causes additional injury to the property owner, he is entitled to compensation to the extent of the injury caused by the change. Where there is a radical and unusual change in the line of the road, and the change is of such a character as to inflict additional injury upon the property owner, then, as we believe, the rule that damages are assessed once for all can not apply. But if the change is such as might have been reasonably contemplated at the time the assessment was made, or such as is ordinarily made by railroad companies, then, in our opinion, it is covered by the original award of compensation.[200]

§ 1000. Owner at time possession is taken is entitled to damages—Vendor and vendee.—The settled general rule is that where a railroad company has entered into actual possession of lands, the right to the damages vests in the person owning the land at the time possession is taken.[1] The right to the damages is a personal right vested in the vendor. As the right is a personal one, it is governed by the general doctrine that personal rights do not pass by a con-

[200] Perry v. Lehigh &c. R. Co. 9 Misc. (N. Y.) 515; 30 N. Y. S. 140, citing Dearborn v. Boston &c. R. Co. 24 N. H. 179, 186; Hollins v. Demorest, 129 N. Y. 676; 29 N. E. 1093; 15 L. R. A. 487, and note. See Atchison &c. R. Co. v. Pratt, 53 Ill. App. 263; Pierce Railroads, 216.

[1] Roberts v. Northern Pacific R. Co. 158 U. S. 1; 15 Sup. Ct. 756; Indiana &c. R. Co. v. Allen, 100 Ind. 409; Church v. Grand Rapids &c. R. Co. 70 Ind. 161; Walton v. Green Bay &c. R. Co. 70 Wis. 414; 36 N. W. 10; McFadden v. Johnson, 72 Pa. St. 335; 13 Am. R. 681; Warrell v. Wheeling &c. R. Co. 130 Pa. St. 600; 10 Atl. 1014; King v. Mayor &c. of New York, 102 N. Y. 171; 6 N. E. 395; McLendon v. Atlanta &c. R. Co. 54 Ga. 293; Hentz v. Long Island &c. R. Co. 13 Barb. (N. Y.) 646; Drury v. Midland R. Co. 127 Mass. 571; Wood v. Commissioners, 122 Mass. 394; Hilton v. St. Louis, 99 Mo. 199; Dunlap v. Toledo &c. R. Co. 46 Mich. 190; 9 N. W. 249; 50 Mich. 470; 15 N. W. 555; Milwaukee &c. R. Co. v. Strange, 63 Wis. 178; 23 N. W. 432; Smith v. Railway Co. 88 Tenn. 611; 13 S. W. 128; Little Rock &c. R. Co. v. Greer, 77 Ark. 387; 96 S. W. 129; Bruce v. Seaboard &c. R. Co. Fla. 41 So. 883; Green v. South-Bound R. Co. 112 Ga. 849; 38 S. E. 81; Hood v. Southern R. Co. 133 Ala. 374; 31 So. 937; Illinois Central R. Co. v. Lockard, 112 Ill. App. 423; Scovell v. St. Louis &c. R. Co. 117 La. 459; 41 So. 723. We are not at this place referring to the rights of tenants, mortgagees, lien-holders and the like, but only to the rights of vendors and vendees.

veyance of the land, and hence the right of action remains in the vendor.[2] Under a code providing for the assignment of rights of action, however, the claim may be assigned.[3]

§ 1000a. Who is owner.—It is sometimes difficult to determine who is the owner entitled to compensation. And, in many instances, compensation must be made not only to the owner of the land itself, but also to the owner of some interest or estate therein less than a fee. In considering the subject of parties in con-

[2] Schuylkill Navigation Co. v. Decker, 2 Watts (Pa.), 343; Warrell v. Wheeling &c. R. Co. 130 Pa. St. 600; 18 Atl. 1014; McFadden v. Johnson, 72 Pa. St. 334; Sargent v. Machias, 65 Me. 591; New York &c. R. Co. v. Drury, 133 Mass. 167; Pomeroy v. Chicago &c. R. Co. 25 Wis. 641; Indiana &c. R. Co. v. Allen, 100 Ind. 409; Dunlap v. Toledo &c. R. Co. 50 Mich. 470; 15 N. W. 155; Chicago &c. R. Co. v. Englehart, 57 Neb. 444; 77 N. W. 1092. But see a line of decisions in North Carolina to the effect that the purchaser is entitled to the damages to the land: Beal v. Durham &c. R. Co. 136 N. C. 298; 48 S. E. 674; Livermon v. Roanoke &c. R. Co. 109 N. C. 52; 13 S. E. 734; Phillips v. Postal &c. Co. 130 N. C. 513; 41 S. E. 1022; 89 Am. St. 868. In the case last cited the court says: "A subsequent purchaser can not recover for a completed act of injury to the land,—as, for instance, the unlawful cutting down of trees; but if the trespasser unlawfully remains upon the land after the sale, or returns and carries away the trees, he becomes liable to the then owner in the first case as for a continuing trespass, and in the latter for a fresh injury. If, in addition to this, the trespasser seeks to acquire the right to remain, he can do so only by the consent of the owner, or under the principle of eminent domain. This is not the perpetration of a wrong, but the lawful acquisition of a right, and the damages incident thereto must be paid to the owner from whom the right is acquired." In Nebraska a purchaser of land, pending proceedings to appropriate the same for public use, may prosecute a claim for damages for such appropriation in his own name when such compensation has been wholly denied to his grantor.—Ashley v. Burt County, 102 N. W. 272. Pierce Railroads, 185. See Bridgman v. St. Johnsbery &c. R. Co. 58 Vt. 198; 2 Atl. 467; Inge v. Police Jury, 14 La. Ann. 117; Wood v. Commissioners, 122 Mass. 394; Harshbarger v. Midland R. Co. 131 Ind. 177, 180; 27 N. E. 352; 30 N. E. 1083.

[3] See Frey v. Duluth &c. R. Co. 91 Wis. 309; 64 N. W. 1038, and see McFadden v. Johnston, 72 Pa. St. 335; 13 Am. R. 681; Pomeroy v. Chicago &c. R. Co. 25 Wis. 641, to the effect that the right of compensation may pass if the deed expressly so provides. See, also, Magee v. Brooklyn, 144 N. Y. 265; 39 N. E. 87.

demnation proceedings we shall have occasion to fully discuss the question as to who are "owners;"[4] but it may be said generally in this connection that the term usually includes any and all persons who have an interest in the land or property taken and who are so damaged thereby that they are entitled to compensation.[5] Thus it may happen that holders of different interests or estates are all entitled to compensation, each for the damage to his particular interest or estate.[6] But mere trespassers or the like are not owners.[7]

§ 1001. Who is entitled to the compensation where the land is conveyed after appropriation proceedings are commenced—Vendor and vendee.—The rule supported by the great weight of authority, as already indicated, is that the person who owns the property at the time possession is taken, or title vests in the railroad company, is entitled to the compensation.[8] But there is difficulty in the practical

[4] See post, § 1025.

[5] See Crane v. Elizabeth, 36 N. J. Eq. 339 (holder of equitable title); Butterworth &c. Co. v. Central R. Co. (N. J.) 66 Atl. 198 (owner of easement); Andrew v. Nantasket &c. R. Co. 152 Mass. 506; 25 N. E. 966 (holder of possessary title); Pinkerton v. Boston &c. R. Co. 109 Mass. 527; Hill v. Glendon &c. Co. 113 N. Car. 259; 18 S. E. 171 (tenants in common); Galveston &c. R. Co. v. Pfeufer, 56 Tex. 66 (same); Fulton Co. v. Amorous, 89 Ga. 614; 16 S. E. 201; Tucker v. Chicago &c. R. Co. 91 Wis. 576; 65 N. W. 515 (tenant in common having acquired entire interest entitled to entire compensation); Hutchinson v. Parkersburg, 25 W. Va. 226; Virginia &c. R. Co. v. Booker, 99 Va. 633; 39 S. E. 591; Georgia &c. R. Co. v. Scott, 38 S. Car. 34; 16 S. E. 185, 839; Pecksport &c. R. Co. v. West, 20 App. Div. (N. Y.) 636; 47 N. Y. S. 230; Ellisworth &c. R. Co. v. Gates, 41 Kans. 574; 21 Pac. 632; Spokane Falls &c. R. Co. v. Ziegler, 167 U. S. 65; 17 Sup. Ct. 728. Holder of bond for deed entitled to damages, Brown v. Arkansas Central R. Co. 72 Ark. 456; 81 S. W. 613.

[6] See post, §§ 1003, 1003a.

[7] Rosa v. Missouri &c. R. Co. 18 Kans. 124; Rooney v. Sacremento Valley R. Co. 6 Cal. 638; Norris v. Pueblo, 12 Colo. App. 290; 55 Pac. 747. See, also, Monatiquot &c. Mills v. Commonwealth, 164 Mass. 227; 41 N. E. 280 (licensee from state); Patten v. New York El. R. Co. 3 Abb. N. Cas. (N. Y.) 306; Shaaber v. Reading, 150 Pa. St. 402; 24 Atl. 692.

[8] Rice v. Chicago, 57 Ill. App. 558; Magee v. Brooklyn, 144 N. Y. 265; 39 N. E. 87; Kiebler v. Holmes, 58 Mo. App. 119; Meginnis v. Nunamaker, 64 Pa. St. 374; Carli v. Stillwater &c. R. Co. 16 Minn. 260; Bean v. Warner, 38 N. H. 247; Curran v. Shattuck, 24 Cal. 427. See Lawrence's Appeal, 78 Pa. St. 365; Davis v. Titusville &c. R. Co. 114 Pa. St. 308; 6 Atl. 736; McIntyre v. Easton &c. R. Co. 26 N. J. Eq. 425; Kuhn v. Freeman, 15 Kan.

application of the rule. If a railroad company begins proceedings against all whom the record shows to have any title to, interest or estate in the land sought to be appropriated, there is certainly some reason for holding those who acquire rights subsequently by purchase or otherwise, should be held to take notice of the proceedings, and that if the compensation is, in good faith, paid to the persons who appeared of record to be entitled thereto at the time the proceedings were commenced, the railroad company must be regarded as having done its duty and can not be made liable to one who acquires rights subsequent to the commencement of the appropriation proceedings. We do not doubt that the owner at the time the right to compensation accrues may obtain it by an intervening petition or other appropriate procedure, but we do doubt the correctness of the doctrine of some of the cases that the railroad company is bound to examine the record to ascertain what persons acquire interest after the appropriation proceedings are commenced.[9] The rule, as laid

423; Stevenson v. Loehr, 57 Ill. 509; 11 Am. R. 36; Pinkerton v. Boston &c. R. Co. 109 Mass. 527; Stokes v. Parker, 53 N. J. L. 183; 20 Atl. 174; Clarke v. Cleveland, 9 Ohio C. C. 118; Chicago &c. R. Co. v. Metropolitan &c. R. Co. 152 Ill. 519; 38 N. E. 736; Kohn v. Manhattan &c. R. Co. 11 Misc. (N. Y.) 23; 31 N. Y. S. 859. The rule asserted by the New York cases is held not to apply where the grantor reserves a right to the damages. Kingsland v. Kings County R. Co. 83 Hun (N. Y.), 151; 31 N. Y. S. 582. But see Kernochan v. New York &c. R. Co. 128 N. Y. 559; 29 N. E. 65; Pappenheim v. Metropolitan &c. R. Co. 128 N. Y. 463; 28 N. E. 518; Pegram v. New York &c. R. Co. 147 N. Y. 135; 41 N. E. 424. As to right of remainder-man to intervene in proceedings against life tenant, see Jones v. Asheville, 116 N. Car. 817; 21 S. E. 691. See, generally, Frey v. Duluth &c. R. Co. 91 Wis. 309; 64 N. W. 1038. In a case where a road was projected but abandoned and afterwards revived, it was held that one who obtained title under a sale on a judgment, was entitled to receive the compensation awarded upon the revival of the enterprise. Jones v. Miller (Va.), 23 S. E. 35.

[9] It has been held that a vendee who acquires title while the proceedings are pending and before they are concluded is entitled to the compensation. Carli v. Stillwater &c. R. Co. 16 Minn. 260; Roberts v. Williams, 15 Ark. 43; Rand v. Townshend, 26 Vt. 670; Paducah &c. R. Co. v. Stovall, 12 Heisk. (Tenn.) 1; Curran v. Shattuck, 24 Cal. 427; Bean v. Warner, 38 N. H. 247; Meginnis v. Nunamaker, 64 Pa. St. 374. See, also, Beal v. Durham &c. R. Co. 136 N. Car. 298; 48 S. E. 674; Ashley v. Burt County (Neb.), 102 N. W. 272; Condemnation of Lands, &c. In re, 93 Minn. 30; 100 N. W. 650; Chandler

down in many cases, is that it is sufficient to make parties those shown by the record or by possession to have an interest in the land,[10] and a necessary sequence is that the railroad company may safely pay such persons the compensation unless it has actual notice that they are not entitled to receive it, or, at all events, unless it has such notice or constructive notice by the recording of the conveyance before it is too late.

§ 1001a. Temporary use of premises.—A railroad company may be charged with the taking of private property, in a sense at least, where it temporarily occupies the same without the consent of the owner. This question often arises in cases where a railroad company occupies a highway during some readjustment of its tracks or roadway and thereby interferes with the use of the highway by the public and obstructs the abutting owner's ingress to or egress from his premises. The right to recover damages in such cases is upheld in a series of recent Connecticut[11] and Massachusetts[12] decisions. It is held that the fact that the tracks were placed in the highway merely as a temporary expedient in aid of a lawful work and were to be removed as soon as the work was completed did not affect the principle and was only important in determining the amount of compensation to which the owner was entitled.[13] The measure of damages

v. Morey, 195 Ill. 596; 63 N. E. 512; Northeastern &c. R. Co. v. Frazier, 25 Neb. 42; 40 N. W. 604; Virginia &c. R. Co. v. Booker, 99 Va. 633; 39 S. E. 591.

[10] Bell v. Cox, 122 Ind. 153; 23 N. E. 705; Stewart v. White, 98 Mo. 226; 11 S. W. 568; Brown v. County Commissioners, 12 Metcf. (Mass.) 208; Pickford v. Lynn, 98 Mass. 491; Drury v. Midland R. Co. 127 Mass. 571; King v. New York, 102 N. Y. 171; 6 N. E. 395; Plumer v. Wausau &c. Co. 49 Wis. 449; 5 N. W. 232. See Cool v. Crommet, 13 Me. 250; Lawrence v. Nahant, 136 Mass. 477; Birge v. Chicago &c. R. Co. 65 Iowa, 440; 21 N. W. 767; Chambers v. Carteret &c. Co. 54 N. J. L. 85; 22 Atl. 995; Gilligan v. Providence, 11 R. I. 258; Board of Levee Com. v. Johnson, 66 Miss. 248; 6 So. 199; Elliott Roads and Streets, 236.

[11] McKeon v. New York &c. R. Co. 75 Conn. 343; 53 Atl. 656; 61 L. R. A. 730; Knapp &c. Cowles Mfg. Co. v. New York &c. R. Co. 76 Conn. 311; 56 Atl. 512; 100 Am. St. 994; Vincent Bros. v. New York &c. R. Co. 77 Conn. 431; 59 Atl. 491. That no damage is recoverable for a temporary obstruction of a street, unless it is unreasonably prolonged, see Shepherd v. Railroad Co. 130 U. S. 426; 9 Sup. Ct. 598; 32 L. Ed. 970.

[12] Bailey v. Boston &c. Corp. 182 Mass. 537; 66 N. E. 203.

[13] McKeon v. New York &c. R. Co. 75 Conn. 343; 53 Atl. 656; 61 L. R. A. 730.

for a temporary occupancy which cuts off access from a place of business is held to be the reasonable value of the use of the premises to the owners for the purposes for which they were using them, including compensation for such damages to their premises and goods and necessary expenses incurred in saving them from further damage, not included in the dimunition in value of the use of the premises, as were caused by the railroad company's acts and which the owners could not have avoided by the use of reasonable care and forethought.

§ 1002. Notice to purchaser by existence of railroad.—One who purchases land after the construction of the railroad must take notice of the rights of the company as shown by the occupancy of the land and the construction of the road.[14] Such a purchaser does not obtain a title superior to that of the railroad company. He may, however, maintain an action for damages, caused by a substantial change in the construction of the road which was not contemplated in the original grant of a right of way or award of compensation.[15]

§ 1003. To whom compensation should be paid.—In considering at another place the question who should be made parties to condemnation proceedings we have discussed the question as to who is entitled to receive the compensation or damages for property appropriated under the right of eminent domain.[16] At this place we shall very briefly consider the general question and direct attention to some of the authorities. It may be said generally that compensation must be paid to the persons owning estates or interests in the property. Different interests may be held by different persons, but all must be compensated according to their respective interests or estates. It has been held that damages for land held by a trustee will belong to the cestui que trust,[17] and while this is true, we suppose that ordinarily the trustee

[14] Paul v. Connersville &c. R. Co. 51 Ind. 527; Indiana &c. R. Co. v. McBroom, 114 Ind. 198; 15 N. E. 831; Jeffersonville &c. R. Co. v. Oyler, 60 Ind. 383; Chicago &c. R. Co. v. Henneberry, 153 Ill. 354; 38 N. E. 1043; Railroad Co. v. Morgan, 72 Ill. 155; Roberts v. Northern Pac. R. Co. 158 U. S. 1; 15 Sup. Ct. 756. See, also, Whitecotton v. St. Louis &c. R. Co. 104 Mo. App. 65; 78 S. W. 318; Ante, § 949.

[15] Chicago &c. R. Co. v. Henneberry, 153 Ill. 354; 38 N. E. 1043.

[16] Post, § 1025; see ante, §§ 1000, 1001.

[17] Whitney v. Milwaukee, 57 Wis. 639; 16 N. W. 12.

would be entitled to receive and hold the money for the purposes of the trust, and that if the trustee were made a party to the proceedings the beneficiary would be bound.[18] It is held that where lands subject to a life estate are condemned the life tenant is entitled to the use of the damages during his tenancy,[19] but, ordinarily, the damages are apportioned between them.[20] If the land is in the possession of a tenant he must be compensated,[21] and if a tenant from year to year, he should receive the value of his crops, while the owner of the fee should have damages for injuries to the land.[22] It is generally held that a mortgagee of the land taken is entitled to have the damages applied in payment of his debt,[23]

[18] The general rule is that beneficiaries are bound by a judgment or decree against the trustee. Kerrison v. Stewart, 93 U. S. 155; Vatterlein v. Barnes, 124 U. S. 169; 8 Sup. Ct. 441; Shaw v. Norfolk &c. Co. 5 Gray (Mass.), 162; Campbell v. Railroad Co. 1 Woods (U. S.), 368; Rogers v. Rogers, 3 Paige (N. Y.), 379; Winslow v. Minnesota &c. R. Co. 4 Minn. 313; 77 Am. Dec. 519; Campbell v. Watson, 8 Ohio, 498; Robertson v. Van Cleave, 129 Ind. 217, 220; 26 N. E. 899; 29 N. E. 781; 15 L. R. A. 68, and note.

[19] Kansas City &c. R. Co. v. Weaver, 86 Mo. 473. In Colcough v. Nashville &c. R. Co. 2 Head (Tenn.), 171, it was held that the damages should be distributed according to the respective values of the different estates.

[20] Colcough v. Nashville &c. R. Co. 2 Head (Tenn.), 171; Burbridge v. New Albany &c. R. Co. 9 Ind. 546; Pennsylvania &c. R. Co. v. Bently, 88 Pa. St. 178; Austin v. Rutland R. Co. 45 Vt. 215; Plfegar, In re, L. R. 6 Eq. 426; Bentonville R. Co. v. Baker, 45 Ark. 252. See as to lessor being entitled to the compensation where a renewal lease was executed while the proceedings were pending. St. Louis v. Nelson, 108 Mo. App. 210; 83 S. W. 271. But compare Storms v. Manhattan R. Co. 178 N. Y. 493; 71 N. E. 3; 66 L. R. A. 625. The remainder-men are entitled to recover for their contingent interest the value of such interest at the time of taking, with interest. Charleston &c. R. Co. v. Reynolds, 69 S. C. 481; 48 S. E. 476.

[21] Ft. Smith Suburban R. Co. v. Maledon (Ark.), 95 S. W. 472.

[22] Rooney v. Sacramento Valley R. Co. 6 Cal. 638; Chicago &c. R. Co. v. Dresel, 110 Ill. 89; Baltimore &c. R. Co. v. Thompson, 10 Md. 76; Lafferty v. Schuylkill &c. R. Co. 124 Pa. St. 297; 16 Atl. 869; 3 L. R. A. 124, and note; 10 Am. St. 587.

[23] If the mortgagee is not given an opportunity to assert his rights, the better opinion is that he may proceed to foreclose against the land as if it had never been condemned, in case the remainder of the land proves insufficient to satisfy the mortgage debt. Adams v. St. Johnsbury &c. R. Co. 57 Vt. 240; Dodge v. Omaha &c. R. Co. 20 Neb. 276; 29 N. W. 936; Kennedy v. Milwaukee &c. R. Co. 22 Wis. 581; North Hudson R. Co. v.

and where he is not made a party he may maintain a bill in equity for that purpose.[24] Where land that had been duly condemned and paid for by a railroad company which had never taken possession of it was afterward condemned by a second company, it was held that the first damages should be paid to the first company and not to the original owner.[25] The court may compel rival claimants of the award to establish their respective rights by an appropriate action.[26] Where different interests are affected, as is usual in case of lessor and lessee, life tenant and remainder-man and the like, the method of determining the values of the different interests, or the compensation, is not the same in all jurisdictions, but it is said that "whatever the method of ascertaining the values of these distinct interests, it is evident that the sum of these values must be the full value of the property taken."[27]

Rooraem, 28 N. J. Eq. 450; Severin v. Cole, 38 Iowa, 463. See, also, to the effect that the compensation should go to the mortgagee, South Park Comrs. v. Todd, 112 Ill. 379; Sherwood v. Lafayette, 109 Ind. 411; 10 N. E. 89; 58 Am. R. 414; Wilson v. European &c. R. Co. 67 Me. 358; Wooster v. Sugar River &c. Co. 57 Wis. 311; 15 N. W. 401; Omaha Bridge & Terminal R. Co. v. Reed, 69 Neb. 514; 96 N. W. 276. But in a few jurisdictions it is held that it should be paid to the mortgagor, at least in the first instance. Thompson v. Chicago &c. R. Co. 110 Mo. 147; 19 S. W. 77; Chicago &c. R. Co. v. Baker, 102 Mo. 553; 15 S. W. 64; Read v. Cambridge, 126 Mass. 427; Bates v. Boston Elevated R. Co. 187 Mass. 328; 72 N. E. 1017, and not to a mortgagee out of possession. Schumacker v. Toberman, 56 Cal. 508; Rand v. Ft. Scott &c. R. Co. 50 Kans. 114; 31 Pac. 683; Whiting v. New Haven, 45 Conn. 303.

[24] Platt v. Bright, 29 N. J. Eq. 128; Wood v. Westborough, 140 Mass. 403; 5 N. E. 613. See, also, Bates v. Boston &c. R. Co. 187 Mass. 328; 72 N. E. 1017; Stamnes v. Milwaukee &c. R. Co. (Wis.) 109 N. W. 100.

[25] Dubuque &c. R. Co. v. Diehl, 64 Iowa, 635; 21 N. W. 117.

[26] Gerrard v. Omaha &c. R. Co. 14 Neb. 270; 15 N. W. 231; Metropolitan Board of Works v. Sant, 38 L. J. Ch. 7. It has been held that where the mortgagee was not a party, the corporation might pay the damages into court and apply to have the rights of the parties adjusted so that it should not have to pay twice. Wooster v. Sugar River V. R. Co. 57 Wis. 311; 15 N. W. 401.

[27] Gluck v. Baltimore, 81 Md. 315; 32 Atl. 515; 48 Am. St. 515. See, also, New York &c. R. Co. In re, 137 N. Y. 95; 32 N. E. 1054; Stamnes v. Milwaukee &c. R. Co. (Wis.) 109 N. W. 100. In the first case cited the question as to whether there is any apportionment of rent is considered and the relative rights of landlord and tenant where property is condemned are considered with a review of authorities

§ 1003a. Measure of damages to lessee.—It may be said generally that the measure of damages to a leasehold interest in land is its fair market value at the time of the appropriation and not its value to the lessee for a particular purpose.[28] But as a lease may have no market value this is not always regarded as a satisfactory test.[29] A Canadian court holds that a tenant of buildings erected on land sought to be condemned for railroad purposes should be allowed compensation for the value of his possession under the lease, as well as for the value of the improvements made by him, and this was held true, although the term expressed in the lease had expired, where the lease provided for the appraisal of the improvements made by the tenant and the payment therefor by the lessor, or the renewal of the lease on the same conditions as the original lease, and the lessor had no immediate intention of taking possession of the premises and paying for the improvements, notwithstanding the fact that no appraisal had been made.[30]

§ 1003b. Apportionment of compensation.—As will be seen from

pro and con, in Corrigan v. Chicago, 144 Ill. 537; 33 N. E. 746; 21 L. R. A. 212, and note. As to compensation as between heir and administrator or personal representative, see Peoria &c. R. Co. v. Rice, 75 Ill. 329; Neal v. Knox &c. R. Co. 61 Me. 298; Boynton v. Peterborough &c. R. Co. 4 Cush. (Mass.) 467; Oliver v. Pittsburgh &c. R. Co. 131 Pa. St. 408; 19 Atl. 47; 17 Am. St. 814, all holding that the heir is entitled if the owner dies before the land is taken; and the second and third holding also that if the land was taken during the owner's life the compensation should be paid to the administrator. To the same effect is Harshbarger v. Midland R. Co. 131 Ind. 177; 27 N. E. 352; 30 N. E. 1083. Compare Brown v. Arkansas Cent. R. Co. 72 Ark. 456; 81 S. W. 613.

[28] Kishlar v. Southern Pac. R. Co. 134 Cal. 636; 66 Pac. 848.

[29] It is said that the lessee is entitled to recover for the loss resulting from the deprivation of his right to remain in undisturbed possession to the end of his term and that while his recovery is restricted to the value of the unexpired term, the value of machinery or cost of removing or replacing it or the like, may be considered in some cases as tending to prove the value of the leasehold interest. James McMillin Printing Co. v. Pittsburg &c. R. Co. (Pa.) 65 Atl. 1091; Getz v. Philadelphia &c. R. Co. 105 Pa. St. 547, and 113 Pa. St. 214; 6 Atl. 356; Kersey v. Schuylkill &c. R. Co. 133 Pa. St. 234; 19 Atl. 553; 7 L. R. A. 409; 19 Am. St. 632. See, also, Ehret v. Railroad Co. 151 Pa. St. 158; 24 Atl. 1068; Shipley v. Pittsburg &c. R. Co. (Pa. St.) 65 Atl. 1094.

[30] McGoldrich v. King, 8 Can. Exch. 169.

an examination of the authorities referred to in the last two preceding sections, there is some conflict upon the question as to how compensation should be paid or apportioned, in some instances, as between parties having separate interests. As a general rule, where there are owners of separate interests each should receive compensation according to the damage to his own interests, or, in other words, the compensation should be apportioned according to their respective interests.[31] In a late case in which the commissioners were unable to make such apportionment it was held that they could award the compensation in gross and leave the court to make the apportionment.[32] Where the property is leased the compensation should usually be apportioned between the lessor and lessee according to their respective interests,[33] but it has been held that a lessee who takes his lease while the proceedings are pending is not entitled to have compensation awarded him.[34] So, where a lease for years provided that it should not affect the right of the lessor to demand and recover any damage resulting from the construction of railroads to the same extent as if he were in possession, it was held that the lessee could not recover any damages for injury to his term resulting from the construction of a railroad.[35] It has likewise been held that the renewal of a lease, or a holding over, after the commencement of condemnation proceedings does not give the lessee any new right

[31] Law v. Chicago Sanitary Dist. 197 Ill. 523; 64 N. E. 536; Miller v. Asheville 112 N. Car. 759; 16 S. E. 762; Baker v. New York, 31 App. Div. (N. Y.) 112; 52 N. Y. S. 533; Rimback v. Essex Co. Park Comrs. 62 N. J. L. 494; 41 Atl. 699, and authorities cited in subsequent notes to this section.

[32] Cincinnati &c. R. Co. v. Bay City &c. R. Co. 106 Mich. 473; 64 N. W. 471. This, however, was under a statute so providing.

[33] Schreiber v. Chicago &c. R. Co. 115 Ill. 340; 3 N. E. 427; Booker v. Venice &c. R. Co. 101 Ill. 333; Pitts v. Baltimore, 73 Md. 326; 21 Atl. 52; Board v. Johnson, 66 Miss. 248; 6 So. 199; Biddle v. Hussman, 23 Mo. 579; Livingston v. Sulzer, 19 Hun (N. Y.), 375; Bentonville R. Co. v. Baker, 45 Ark. 252; Douglas v. Indianapolis &c. Traction Co. (Ind. App.) 76 N. E. 892. But see Little Rock &c. R. Co. v. Allister, 62 Ark. 1; 34 S. W. 82.

[34] Davis v. Titusville &c. R. Co. 114 Pa. St. 308; 6 Atl. 736; Chicago v. Messler, 38 Fed. 302. But see Justice v. Philadelphia, 169 Pa. St. 503; 52 Atl. 592.

[35] Burbridge v. New Albany &c. R. Co. 9 Ind. 546. See, also, Illinois Cent. R. Co. v. Ferrell, 108 Ill. App. 659, where the injury from overflows was constantly recurring and existed when the land was leased.

to compensation,[36] at least unless the original lease contained a covenant for renewal; but it has been held otherwise where there was a covenant for renewal and the new lease is considered as a continuation of the old.[37] If the estates of a life tenant and remainder-man are both damaged so as to entitle them to compensation, each is entitled to compensation according to the damage to his interest, and it is apportioned accordingly.[38] As between mortgagor and mortgagee, as already intimated, the mortgagee is, in most jurisdictions, entitled to be compensated for the injury to his interest and first paid, although the residue, if any, may then go to the mortgagor;[39] but in some jurisdictions it is held that the mortgagor is entitled to be paid the entire compensation, leaving the mortgagee to his remedy against the mortgagor,[40] at least where the mortgagor is in possession.[41]

[36] St. Louis v. Nelson, 108 Mo. App. 210; 83 S. W. 271; Schreiber v. Chicago &c. R. Co. 115 Ill. 340; 3 N. E. 427; Witmark v. New York El. R. Co. 149 N. Y. 393; 44 N. E. 78.

[37] Kearney v. Metropolitan El. R. Co. 129 N. Y. 76; 29 N. E. 70; Storms v. Manhattan R. Co. 178 N. Y. 493; 71 N. E. 3; 66 L. R. A. 625; North Pennsylvania R. Co. v. Davis, 26 Pa. St. 238.

[38] Cureton v. South Bound R. Co. 59 S. Car. 371; 37 S. E. 914; Burbridge v. New Albany &c. R. Co. 9 Ind. 546; Pennsylvania R. Co. v. Bentley, 88 Pa. St. 178; Kansas City &c. R. Co. v. Weaver, 86 Mo. 473; Horney v. Coldbrook, 65 Ill. App. 477; Indiana &c. R. Co. v. Conness, 184 Ill. 178; 56 N. E. 402; Cogan v. McCabe, 23 Misc. (N. Y.) 739; 52 N. Y. S. 48.

[39] Calumet River R. Co. v. Brown, 136 Ill. 322; 26 N. E. 501; 12 L. R. A. 84; South Park Comrs. v. Todd, 112 Ill. 379; Sherwood v. Lafayette, 109 Ind. 411; 10 N. E. 89; 58 Am. St. 414; Moritz v. St. Paul, 52 Minn. 409; 54 N. W. 370; Lumbermen's &c. Co. v. St. Paul, 77 Minn. 410; 80 N. W. 357; Boutelle v. Minneapolis, 59 Minn. 493; 61 N. W. 554; Thompson v. Chicago &c. R. Co. 110 Mo. 147; 19 S. W. 77; Platt v. Bright, 29 N. J. Eq. 128; Gray v. Case, 51 N. J. Eq. 426; 26 Atl. 805; Rochester, In re, 136 N. Y. 83; 32 N. E. 702; 19 L. R. A. 161; Magee v. Brooklyn, 144 N. Y. 265; 39 N. E. 87; State &c. R. Co. v. Playford (Pa.), 14 Atl. 355; Chicago v. Tebbetts, 104 U. S. 120; Martin v. London &c. R. Co. 13 L. T. R. N. S. 355. As to his superior rights to creditors of the mortgagor, see Sawyer v. Landers, 56 Ia. 422; 9 N. W. 341; Wood v. Westborough, 140 Mass. 403; 5 N. E. 613; Keller v. Bading, 169 Ill. 152; 48 N. E. 436; 61 Am. St. 159.

[40] See Whiting v. New Haven, 45 Conn. 303; Breed v. Eastern R. Co. 5 Gray (Mass.), 470, and note; Read v. Cambridge, 126 Mass. 427; Chicago &c. R. Co. v. Baker, 102 Mo. 553; 15 S. W. 64. See, also, Aggs v. Shackelford County, 85 Tex. 145; 19 S. W. 1085 (where mortgage debt had not matured).

[41] Rand v. Ft. Scott &c. R. Co. 50 Kans. 114; 31 Pac. 683; Parish v.

§ 1003c. Occupying claimants on public lands.—It is the rule that one occupying government land as a homestead under a valid entry and having a legal vested interest therein can not be deprived of any portion of this interest except by due process of law and the payment of reasonable compensation.[42] The patent issued to such a settler is held to relate back to the date of the settlement and to cut off all intervening claimants.[43] On this general subject the supreme court of Kansas uses this language: "A settler on the public lands of the United States, who makes a valid homestead entry, and continues to reside on and improve the land entered in compliance with the land laws, has the exclusive right to its possession and use, and to the improvements made thereon; and he also acquires equities in the land itself, which increase from the time the entry is made until the complete title is earned. Such a settler may sell and transfer a portion of his homestead for a right of way for a railroad, or his interest therein may be condemned and appropriated for such purpose upon adversary proceedings, and by paying full compensation to the settler therefor. A homesteader who has entered, and is proceeding lawfully to perfect his title to the land entered, suffers an injury by the building of a railroad over his homestead which differs only in degree from that sustained from the same cause by one who has the complete title."[44]

§ 1004. Effect of assessment of damages.—The general rule is that the assessment of damages in appropriation proceedings is presumed to include all injuries resulting from the particular appropriation. The corporation acquires the right to construct its road in a suitable and proper manner for its own convenience and the accommodation of the public. And no action can be maintained by the owner either then or at any future time for damages resulting from the proper construction and maintenance of the road across his land.[45] The assessment is often said "to be made once for all."

Gilmanton, 11 N. H. 293. See, also, Schumacker v. Toberman, 56 Cal. 508.

[42] Oklahoma City v. McMasters, 12 Okla. 570; 73 Pac. 1012; Burlington &c. R. Co. v. Johnson, 38 Kan. 142; 16 Pac. 125.

[43] Witherspoon v. Duncan, 4 Wall. (U. S.) 210; 18 Law. Ed. 339. See, also, Sturr v. Beck, 133 U. S. 541; 10 Sup. Ct. 350.

[44] Burlington &c. R. Co. v. Johnson, 38 Kan. 142; 16 Pac. 125.

[45] Dearborn v. Boston &c. R. Co. 24 N. H. 179; Perley v. Boston &c. R. Co. 57 N. H. 212; Pittsburgh

The future necessities as well as the present needs of the company are conclusively presumed to have been taken into consideration, and the award of the appraisers is a bar to an action for damages for any use of the right of way which the future needs of the corporation may require.[46] The fact that the injuries were unforeseen,[47] or that, owing to the lack of any definite plan for construction on the part of the railroad, it was impossible to know at the time the damages were assessed what damages would be done in making cuts and fills, and constructing bridges,[48] does not alter the rule. The jury

&c. R. Co. v. Gilleland, 56 Pa. St. 445; 94 Am. Dec. 97; Tucker v. Erie &c. R. Co. 27 Pa. St. 281; Van Schoick v. Delaware &c. Canal Co. 20 N. J. L. 249; McCormick v. Kansas City &c. R. Co. 57 Mo. 433; Bailey v. Woburn, 126 Mass. 416; Fowle v. New Haven &c. R. Co. 112 Mass. 334; 17 Am. R. 106; Furniss v. Hudson River R. Co. 5 Sandf. (N. Y.) 551; Elizabethtown &c. R. Co. v. Combs, 10 Bush. (Ky.) 382; 19 Am. R. 67; Chesapeake &c. Canal Co. v. Grove, 11 G. & J. (Md.) 398; Porter v. Midland R. Co. 125 Ind. 476; 25 N. E. 556; White v. Chicago &c. R. Co. 122 Ind. 317; 23 N. E. 782; 7 L. R. A. 257.

[46] White v. Chicago &c. R. Co. 122 Ind. 317; 23 N. E. 782; 7 L. R. A. 257; Chicago &c. R. Co. v. Smith, 111 Ill. 363. See, also, Smith v. Hall, 103 Ia. 95; 72 N. W. 427, 428; Yazoo &c. R. Co. v. Davis, 73 Miss. 678; 19 So. 487; 32 L. R. A. 262; 55 Am. St. 562; Atchison &c. R. Co. v. Forney, 35 Neb. 607; 53 N. W. 585; 37 Am. St. 450. So it has been held that where a railroad company fails to comply with the statute as to payment of compensation and an abutting owner sues for the damages, all damages should be recovered in one action. Keyser v. Lake Shore &c. R. Co. 142 Mich. 143; 105 N. W. 143; Indiana &c. R. Co. v. Allen, 113 Ind. 308; 15 N. E. 451; 3 Am. St. 650. Where a change of location is made under authority of the legislature, the land-owner may recover damages for the alteration, if any actual damage or injury has been sustained thereby to the extent of such additional injury and no more. Baltimore &c. R. Co. v. Compton, 2 Gill (Md.), 20. A land-owner who has accepted the damages awarded to him upon condemnation and confirmed on appeal, is estopped to dispute the company's right to occupy the lands for any use authorized by the company's charter. Dodge v. Burns, 6 Wis. 514.

[47] Aldrich v. Cheshire &c. R. Co. 21 N. H. 359; 53 Am. Dec. 212. In this case, a spring which had supplied the owner's buildings with water was drained by an excavation made in constructing the road, and he was denied any additional compensation, although in the assessment of damages, the probability of destroying the spring had not been considered.

[48] Lewis' Em. Dom. (2d ed.) § 566. Where the agents of the company represented to the commissioners making the appraisement that the road would be constructed in a particular manner, thereby reducing the appraisement below

are conclusively presumed to have assessed the damages for every injury that they could legally include in their assessment.[49] If an item of damages was erroneously omitted by the commissioners or jury in making the assessment of damages, or if they proceeded upon erroneous principles, the remedy is by appeal or by proceedings to review, and not by an independent suit.[50] But where the owner ac-

what it would otherwise have been, and the company constructed the road by a different plan which caused much greater damage to the land-owner, it was held that he could not maintain an independent action for constructing the railroad contrary to the representations upon which the award was based, but that, so long as the award was not set aside by appeal or by proceedings to review, it was binding to all present or future damages growing out of the construction of the road in any careful and proper manner. Butman v. Vermont Central R. Co. 27 Vt. 500.

[49] Porter v. Midland R. Co. 125 Ind. 476; White v. Chicago &c. R. Co. 122 Ind. 317; 23 N. E. 782; 7 L. R. A. 257; Lafayette &c. R. Co. v. New Albany &c. R. Co. 13 Ind. 90; 74 Am. Dec. 246; Lafayette &c. R. Co. v. Smith, 6 Ind. 249; Mellen v. Western R. Co. 4 Gray (Mass.), 301; Stevens v. Proprietors of Middlesex Canal, 12 Mass. 466; Aldrich v. Cheshire R. Co. 21 N. H. 359; 53 Am. Dec. 212; Dearborn v. Boston &c. R. Co. 24 N. H. 179; Perley v. Boston &c. R. Co. 57 N. H. 212; Baltimore &c. R. Co. v. Magruder, 34 Md. 79; 6 Am. R. 310; Chesapeake &c. Canal Co. v. Grove, 11 G. & J. (Md.) 398; Mason v. Kennebec &c. R. Co. 31 Me. 215; Boothby v. Androscoggin &c. R. Co. 51 Me. 318; Sabin v. Vermont Cent. R. Co. 25 Vt. 363; Vermont Cent. R. Co. v. Baxter, 22 Vt. 365; Selden v. Delaware &c. Canal Co. 29 N. Y. 634; Furniss v. Hudson River R. Co. 5 Sandf. (N. Y.) 551; Fehr v. Schuylkill Nav. Co. 69 Pa. St. 161; Cumberland Valley R. Co. v. McLanahan, 59 Pa. St. 23; Philadelphia &c. R. Co. v. Williams, 54 Pa. St. 103; Pettibone v. La Crosse &c. R. Co. 14 Wis. 443; Sherman v. Milwaukee &c. R. Co. 40 Wis. 645; Lindell v. Hannibal &c. R. Co. 36 Mo. 543; Clark v. Hannibal &c. R. Co. 36 Mo. 202; Brown v. Beatty, 34 Miss. 227; 69 Am. Dec. 389; Daniels v. Chicago &c. R. Co. 35 Iowa, 129; 14 Am. R. 490; Stodhill v. Chicago &c. R. Co. 43 Iowa, 26; 22 Am. R. 211; Cairo &c. R. Co. v. Turner, 31 Ark. 494; 25 Am. R. 564; Colcough v. Nashville &c. R. Co. 2 Head. (Tenn.) 171; Tennessee &c. R. Co. v. Adams, 3 Head. (Tenn.) 596; McIntire v. Western &c. R. Co. 67 N. Car. 278; Little v. Dublin &c. R. Co. 7 Ir. C. L. 82.

[50] Butman v. Vermont Cent. R. Co. 27 Vt. 500; McArthur v. McEachin, 64 N. Car. 454; Morris Canal &c. Co. v. Seward, 23 N. J. L. 219; People v. Wasson, 64 N. Y. 167; Spaulding v. Arlington, 126 Mass. 492. So, in case the owner presented his claim for damages to the commissioners, and it was disallowed by them under a misapprehension of their authorities and duties, the owner's sole remedy is

cepts and retains the damages awarded it has been held that he can not afterwards claim greater damages either in a direct appeal or in a collateral action.[51]

§ 1005. Award of compensation does not cover negligent acts.—Compensation is awarded, no matter what may be the nature of the condemnation proceedings, for the property taken and not for injuries resulting from negligence in the construction or operation of the railroad. While it is the general rule that damages are awarded once for all, they are, nevertheless, not given to compensate a party for injuries caused him by the negligence of the railroad company in the construction or operation of its road. In awarding damages, the jury, commissioners, viewers, appraisers, or whatever tribunal makes the award, proceeds, in legal contemplation, upon the theory that in constructing and operating its road the railroad company will use ordinary and reasonable care to prevent injury to land-owners.[52] In some of the cases it is held that injuries caused

by a proceeding to review the award. Van Schoick v. Delaware &c. R. Co. 20 N. J. L. 249.

[51] Stauffer v. Cincinnati &c. R. Co. 33 Ind. App. 356; 70 N. E. 543. See, also, post, § 1052.

[52] White v. Chicago &c. R. Co. 122 Ind. 317, 329; 23 N. E. 782; 7 L. R. A. 257; Nason v. Woonsocket &c. R. Co. 4 R. I. 377; Fremont &c. R. Co. v. Whalen, 11 Neb. 585; 10 N. W. 491; Jones v. Chicago &c. R. Co. 68 Ill. 380; Sinia v. Louisville &c. R. Co. 71 Miss. 547; 14 So. 87; Wheeler v. Rochester &c. R. Co. 12 Barb. (N. Y.) 227; March v. Portsmouth &c. R. Co. 19 N. H. 372; Setzler v. Pennsylvania &c. R. Co. 112 Pa. St. 56; 4 Atl. 370; Neilson v. Chicago &c. R. Co. 58 Wis. 516; 17 N. W. 310; Spencer v. Hartford &c. R. Co. 10 R. I. 14; Hunt v. Iowa &c. R. Co. 86 Iowa, 15; 52 N. W. 668; 41 Am. St. 473. In Kansas City &c. R. Co. v. Lackey, 72 Miss. 881; 16 So. 909; 48 Am. St. 589, the rule was thus stated: "In the condemnation proceedings the owner received compensation from the railroad company only for such damages as he would sustain by the proper construction of its line. Neither the owner nor the commissioners who condemned the right of way, and awarded compensation, would have been justified, the owner in asking, or the commissioners in imposing, any sum of money for damages to be due by an improper construction of the railroad thereafter. The presumption was that the railroad would properly construct its road, and hence no damages could properly have been awarded for injuries that could never occur if appellant properly constructed its road." See Fleming v. Chicago &c. R. Co. 34 Iowa, 353; King v. Iowa &c. R. Co. 34 Iowa, 458; Miller v. Keokuk &c. R. Co. 63 Iowa, 680, 685; 16 N. W. 567;

by negligence are not covered by the assessment even though the negligent acts were done before the damages were assessed.[53] The rule applies to negligent interference with water courses, as where a stream is wrongfully diverted,[54] or otherwise interferred with by the negligent construction of a bridge.[55] The rule has been extended

Keyser v. Lake Shore &c. Ry. Co. 142 Mich. 143; 105 N. W. 143; Arkansas Cent. R. Co. v. Smith, 71 Ark. 189; 71 S. W. 947; Norfolk &c. R. Co. v. Carter, 91 Va. 587; 22 S. E. 517; Mullen v. Lake Drummond &c. Co. 130 N. Car. 496; 41 S. E. 1027; 61 L. R. A. 833, and note.

[53] Selma &c. R. Co. v. Keith, 53 Ga. 178; Missouri &c. R. Co. v. Ward, 10 Kan. 352; Blodgett v. Utica &c. R. Co. 64 Barb. (N. Y.) 580; Oregon &c. R. Co. v. Barlow, 3 Ore. 311; Mathews v. St. Paul &c. R. Co. 18 Minn. 434; McClinton v. Pittsburgh &c. R. Co. 66 Pa. St. 404. See Pierce v. Worcester &c. R. Co. 105 Mass. 199; Clark v. Vermont &c. R. Co. 28 Vt. 103. It is held that where the assessment is made after the road is constructed, the jury in assessing damages may take into account the manner in which it is built. Hayes v. Ottawa &c. R. Co. 54 Ill. 373; Dearborn v. Boston &c. R. Co. 24 N. H. 179; Watson v. Pittsburg &c. R. Co. 37 Pa. St. 469; Perley v. Boston &c. R. Co. 57 N. H. 212; Eaton v. Boston &c. R. Co. 51 N. H. 504; 12 Am. R. 147; Dearborn v. Boston &c. R. Co. 24 N. H. 179; Hooker v. New Haven &c. R. Co. 15 Conn. 312; Whitehouse v. Androscoggin R. Co. 52 Me. 208; Mason v. Kennebec &c. R. Co. 31 Me. 215; Bellinger v. New York Central R. Co. 23 N. Y. 42; Brown v. Cayuga &c. R. Co. 12 N. Y. 486; Waterman v. Connecticut &c. R. Co. 30 Vt. 610; 73 Am. Dec. 326; Clark v. Vermont &c. R. Co. 28 Vt. 103; Hatch v. Vermont Cent. R. Co. 25 Vt. 49; 28 Vt. 142; Vermont Central R. Co. v. Baxter, 22 Vt. 365; Fehr v. Schuylkill Nav. Co. 69 Pa. St. 161; Pittsburgh &c. R. Co. v. Gilleland, 56 Pa. St. 445; 94 Am. Dec. 97; Hazen v. Boston &c. R. Co. 2 Gray (Mass.), 574; Proprietors of Locks and Canals v. Nashua &c. R. Co. 10 Cush. (Mass.) 385; Southside R. Co. v. Daniel, 20 Gratt. (Va.) 344; Oregon &c. R. Co. v. Barlow, 3 Ore. 311; Baltimore &c. R. Co. v. Reaney, 42 Md. 117; Terre Haute &c. R. Co. v. McKinley, 33 Ind. 274; Gear v. Chicago, C. & D. R. Co. 43 Iowa, 83; Fleming v. Chicago &c. R. Co. 34 Iowa, 353; McCormick v. Kansas City &c. R. Co. 57 Mo. 433; Rau v. Minnesota Valley R. Co. 13 Minn. 442; Colcough v. Nashville &c. R. Co. 2 Head (Tenn.) 171; Lyon v. Green Bay &c. R. Co. 42 Wis. 538; Lawrence v. Great Northern R. Co. 16 Q. B. 643; Turner v. Sheffield &c. R. Co. 10 M. & W. 425; Brand v. Hammersmith &c. R. Co. L. R. 2 Q. B. 223; L. R. 4 H. L. 171.

[54] Stodghill v. Chicago &c. R. Co. 43 Iowa, 26; 22 Am. R. 211; Baltimore R. Co. v. Magruder, 34 Md. 79; 6 Am. R. 310.

[55] Selma &c. R. Co. v. Keith, 53 Ga. 178; Spencer v. Hartford &c. R. Co. 10 R. I. 14; Pittsburgh &c. R. Co. v. Gilleland, 56 Pa. St. 445; 94 Am. Dec. 97.

to interference with lateral support. Thus it has also been held that where excavations are made by which the adjoining soil is unnecessarily deprived of support and caused to give away and slide into the cut, the company is liable.[56] So in a case where property was damaged beyond the mere incidental inconvenience, which unavoidably follows the construction of tunnels and the operation of the railroad trains therein, it was held that property owners affected were entitled to recover the damages without proof of negligence of the railroad, though the construction of the tunnel and the operation of the trains therein were under the direct authority of the legislature of the state and city wherein the tunnels were constructed.[57]

§ 1006. Interest—Allowance of.—The general rule is that interest should be allowed to the land-owner from the time of the taking in all cases where there is any delay in making payment.[58] Thus,

[56] Dyer v. St. Paul, 27 Minn. 457; Quincy v. Jones, 76 Ill. 231; 20 Am. R. 243; Metropolitan Board of Works v. Metropolitan R. Co. 37 L. J. C. P. 281; 38 L. J. C. P. 172.

[57] Baltimore Belt R. Co. v. Sattler, 100 Md. 306; 59 Atl. 654. See, also, Davenport &c. R. Co. v. Sinnet, 111 Ill. App. 75.

[58] In Williams v. New Orleans &c. R. Co. 60 Miss. 689, it appeared that the railroad company had had the damages duly assessed some years before, but had taken and retained possession of a part of the land condemned without paying or tendering the assessed damages. The court held that "until there has been such payment or tender the one party has acquired nothing and the other lost nothing," and that, therefore, the land-owner was entitled to compensation for the value of the land taken as it was at the date of the trial. But it allowed him his election whether he would take that value or the sum awarded upon the former attempt at condemnation with interest from the date of the award. In support of the text see Concord R. Co. v. Greely, 23 N. H. 237; Shattuck v. Wilton R. Co. 23 N. H. 269; Old Colony R. Co. v. Miller, 125 Mass. 1; 28 Am. R. 194; Reed v. Hanover Branch R. Co. 105 Mass. 303; Presbrey v. Old Colony R. Co. 103 Mass. 1; Knauft v. St. Paul &c. R. Co. 22 Minn. 173; Bangor &c. R. Co. v. McComb, 60 Me. 290; Metler v. Easton &c. R. Co. 37 N. J. L. 222; Kerr v. New York El. R. Co. 96 N. Y. S. 1021; Missouri River &c. R. Co. v. Owen, 8 Kan. 409; Delaware &c. R. Co. v. Burson, 61 Pa. St. 369; Webster v. Kansas City &c. R. Co. 116 Mo. 114; 22 S. W. 474; Cincinnati v. Whetstone, 47 Ohio St. 196; 24 N. E. 409; West v. Milwaukee &c. R. Co. 56 Wis. 318; 14 N. W. 292; Miller v. St. Louis &c. R. Co. 162 Mo. 424; 63 S. W. 85. That interest can not be allowed in the absence of testimony as to when the railroad took possession, see Guinn v. Iowa &c. R. Co. (Iowa), 109 N. W. 209.

where, by the location of its road a railroad company acquires the right of immediate entry, interest must usually be allowed from the date of the location.[59] And the fact that a petition for damages, seasonably filed, is not brought to a hearing until several years thereafter does not defeat this right.[60] And where the taking is not complete until the damages are paid, if the railroad company secures possession of the land pending an appeal, by paying into court the amount of the original assessment, it will be liable for interest from that date on the amount of damages as finally determined, in case the assessment is increased.[61] Where the jury were instructed that interest from the time the property was taken constituted a part of the plaintiff's damages, it will be presumed that the interest to the date of the verdict is included therein, and judgment should be rendered simply for the amount of the verdict,[62] but, it is proper to have assessment on appeal made as of the date of the original award,

[59] Old Colony R. Co. v. Miller, 125 Mass. 1; 28 Am. R. 194.

[60] Hartshorn v. Burlington &c. R. Co. 52 Iowa, 613; 3 N. W. 648; Drury v. Midland R. Co. 127 Mass. 571. The fact that the owner was left in possession for some time after the right of possession accrued to the railroad company does not affect his right to interest. Old Colony R. Co. v. Miller, 125 Mass. 1; 28 Am. R. 194; Philadelphia v. Dyer, 41 Pa. St. 463; Warren v. First Div. of St. Paul &c. R. Co. 21 Minn. 424. But in some cases this has been deducted from the interest. See Minneapolis v. Wilkin, 30 Minn. 145; 15 N. W. 668; South Park Comrs. v. Dunlevy, 91 Ill. 49; Fink v. Newark, 40 N. J. L. 11; New York &c. Bridge, Matter of, 137 N. Y. 95; 32 N. E. 1054; Seefield v. Chicago &c. R. Co. 67 Wis. 96; 29 N. W. 904. Delay of the owner in instituting proceedings to have compensation assessed has been held not to relieve the company from paying interest from the time of taking possession. Delaware &c. R. Co. v. Burson, 61 Pa. St. 369.

[61] Warren v. St. Paul &c. R. Co. 21 Minn. 424; Atlantic &c. R. Co. v. Koblentz, 21 Ohio St. 334; Rhys v. Dare Valley R. Co. L. R. 19 Eq. 93. See, also, Reed v. Chicago &c. R. Co. 25 Fed. 886; Selma &c. R. Co. v. Gammage, 63 Ga. 604; Whitman v. Boston &c. R. Co. 7 Allen (Mass.), 313; and compare Shattuck v. Wilton R. Co. 23 N. H. 269; St. Louis &c. R. Co. v. Fowler, 113 Mo. 458; 20 S. W. 1069 (interest held payable only on the amount of increase). On the other hand where the company appeals and the award is decreased it has been held that the company is entitled to interest on the decrease, where it had paid the whole amount of the original award into court. Watson v. Milwaukee &c. R. Co. 57 Wis. 332; 15 N. W. 468. Reisner v. Atchison &c. Co. 27 Kans. 382; Scott v. St. Paul &c. R. Co. 21 Minn. 322.

[62] Diedrich v. Northwestern Union R. Co. 47 Wis. 662; 3 N. W. 749.

and the court should, in such case, add interest to the amount of the verdict in rendering judgment.[63]

§ 1007. Presumption of payment of compensation—Statute of limitations.—Upon much the same principle as that on which the doctrine of estoppel rests, it is held that if a claim for compensation is not presented within the time designated by the statute of limitations, the presumption is that the damages were paid.[64] The decisions affirm that the legislature may prescribe the time within which claims shall be presented.[65] A statute limiting the time within which proceedings may be prosecuted for the recovery of compensation, must give a reasonable time to the land-owner in which to institute his proceedings, otherwise there would be an impairment of his constitutional rights.[66] The legislature is the judge of what is a reason-

[63] Warren v. First Div. of St. Paul &c. R. Co. 21 Minn. 424; Whitacre v. St. Paul &c. R. Co. 24 Minn. 311. In St. Louis &c. Ry. Co. v. Oliver, (Okl.), 87 Pac. 423, the text is cited with approval and it is held that where the land-owner appeals from the award, and the case is tried to a jury in the district court, it is proper for the court not to permit the jury to be informed of the amount of the award made by the commissioners, and as the allowance of interest is dependent upon the question as to whether the amount of damages awarded by the jury is greater or less than the award of the commissioners, the court may, where there is no question as to the date from which interest should be allowed, reserve the question of interest for determination by the court and direct the jury not to include interest in their verdict. See, also, Reed v. Chicago &c. R. Co. 25 Fed. 886.

[64] Brookville &c. Co. v. Butler, 91 Ind. 134; 46 Am. R. 580; Nelson v. Fleming, 56 Ind. 310; Mark v. State, 97 N. Y. 572; Terry v. New York &c. R. Co. 22 Barb. (N. Y.) 574, See, also, Carter v. Ridge Turnpike Co. 208 Pa. St. 565; 57 Atl. 988; De Geofrey v. Merchants' &c. Co. 179 Mo. 698; 79 S. W. 386; 64 L. R. A. 959; 101 Am. St. 524; Tietze v. International &c. R. Co. 35 Tex. Civ. App. 136; 80 S. W. 124. But see Wheeling &c. R. Co. v. Warrell, 122 Pa. St. 613; 16 Atl. 20; Chicago &c. R. Co. v. Galt, 133 Ill. 657; 23 N. E. 425; 44 Am. & Eng. R. Cas. 43; McCormick v. Evans, 33 Ill. 327; Elliott's Roads and Streets, 206, authorities notes 4, 5.

[65] Stewart v. State, 105 N. Y. 254; 11 N. E. 652; Benedict v. State, 120 N. Y. 228; 24 N. E. 314; Rexford v. Knight, 11 N. Y. 308; Mark v. State, 97 N. Y. 572. See, also, Sweet v. Boston, 186 Mass. 79; 71 N. E. 113. In jurisdictions where special and local laws are forbidden it may be doubted whether a statute applicable solely to a special class of cases would be valid.

[66] Cooley's Const. Lim. (6th ed.) 449. See Philadelphia v. Wright, 100 Pa. St. 235.

able time, and courts can not review the legislative judgment unless the time prescribed is so clearly insufficient as to be a practical denial of the right to enforce proceedings for the recovery of compensation.[67] The right of an owner whose property is seized in proceedings in invitum to compensation is regarded with favor, and a statute limiting the time for prosecuting a claim will not be applied unless it clearly covers the case. Thus a statute limiting the time for commencing actions for trespass will not be applied to proceedings under a statute providing for appropriation proceedings.[68] The statute of limitations begins to run at the time the right of action accrues, but it is not possible to lay down any definite rule for determining when the cause of action is complete insomuch as the question depends very largely upon the statute governing the particular case.[69] It may be safely said that where the case is not controlled by particular statutory provisions, the statute of limitations begins to run from the time the owner's dominion over the property ceases.[70]

[67] Cooley's Const. Lim. (7th ed.) 523, 524. See Lincoln v. Colusa County, 28 Cal. 662; Potter v. Ames, 43 Cal. 75; Berry v. Ransdall, 4 Metc. (Ky.) 292; State &c. v. Messenger, 27 Minn. 119; 6 N. W. 457; Auld v. Butcher, 2 Kan. 135; Koshkonong v. Burton, 104 U. S. 668; King v. Belcher, 30 S. Car. 381; 9 S. E. 359; Terry v. Anderson, 95 U. S. 628; Pereles v. Watertown, 8 Biss. (U. S.) 79; Trustees of Cincinnati R. Co. v. Haas, 42 Ohio St. 239; Revere v. Boston, 14 Gray (Mass.), 218; Callison v. Hedrick, 15 Gratt. (Va.) 244; Potter v. Ames, 43 Cal. 75; Carolina &c. R. Co. v. McCaskill, 94 N. Car. 746; Welsh v. Chicago &c. R. Co. 19 Mo. App. 127.

[68] Shortle v. Louisville &c. Co. 130 Ind. 505; 30 N. E. 639, distinguishing Midland &c. R. Co. v. Smith, 125 Ind. 509; 25 N. E. 153; Strickler v. Midland &c. R. Co. 125 Ind. 412; 25 N. E. 455, and denying the doctrine of Foster v. Cumberland &c. R. Co. 23 Pa. St. 371; Union Canal Co. v. Woodside, 11 Pa. St. 176. In the first case cited it was said that the doctrine of the Pennsylvania cases cited was modified in Delaware &c. R. Co. v. Burson, 61 Pa. St. 369. See Lawrence R. Co. v. Cobb, 35 Ohio St. 94; Cohen v. Cleveland, 43 Ohio St. 190; Houston &c. R. Co. v. Chaffin, 60 Tex. 553; Donnelly v. Brooklyn, 121 N. Y. 9; 24 N. E. 17. Adverse possession may be relied on. Sherlock v. Louisville &c. R. Co. 115 Ind. 22; 17 N. E. 171; Railroad Co. v. O'Harra, 48 Ohio St. 343; 28 N. E. 175.

[69] Davis v. New Bedford, 133 Mass. 49; Brower v. Philadelphia, 142 Pa. St. 350; 21 Atl. 828; Volkmar St. 124 Pa. St. 320; 16 Atl. 867; Baltimore &c. R. Co. v. Fifth Baptist Church, 108 U. S. 317; 2 Sup. Ct. 719.

[70] See, generally, Moore v. Boston,

§ 1008. Waiver—Estoppel.—A land-owner may waive his right to compensation, and by conduct may estop himself from successfully claiming compensation or damages. It has been held that where an abutting owner invites a railroad company to construct its track in a street he is estopped to claim damages.[71] There is reason for affirming that the doctrine of some of the cases referred to in the note is to be carefully applied for, it would, as we believe, lead to injustice to hold that an owner of private property is estopped by the mere fact that he favors the location of a railroad on his land, since it may be justly presumed that he does not mean by his conduct to deprive himself of the right to the compensation to which the law entitles him.[72] There can, however, be no doubt that the doctrine of waiver and estoppel does apply to cases of the appropriation of property under the right of eminent domain. Even constitutional rights may be waived, and a party may, by his conduct, be estopped from asserting them.[73] If there is an effective estoppel against the

8 Cush. (Mass.) 274; Rider v. Stryker, 63 N. Y. 136; Hazen v. Boston &c. R. Co. 2 Gray (Mass.), 574; Davidson v. Boston &c. R. Co. 3 Cush. (Mass.) 91; Barker v. Taunton, 119 Mass. 392.

[71] Burkam v. Ohio &c. R. Co. 122 Ind. 344; 23 N. E. 799; Scarritt v. Kansas City &c. R. Co. 127 Mo. 298; 29 S. W. 1024; Penn Mutual Ins. Co. v. Heiss, 141 Ill. 35; 33 Am. St. 273; Illinois &c. R. Co. v. Allen, 39 Ill. 205; Toledo &c. Co. v. Hunter, 50 Ill. 325; Wolfe v. Covington &c. R. Co. 15 B. Mon. (Ky.) 404; Miller v. Auburn &c. R. Co. 6 Hill (N. Y.) 61; Murdock v. Prospect &c. R. Co. 10 Hun (N. Y.), 598; Shaw v. Manhattan Ave. R. Co. 35 Misc. (N. Y.), 47; 71 N. Y. S. 22; Lewis Eminent Domain, § 120; Randolph Eminent Domain, 132. Mere consent to enter has been held to waive only prepayment. Squiers v. Neenah, 24 Wis. 588; Smith v. Ferris, 6 Hun (N. Y.), 553.

[72] Consumers' &c. Co. v. Huntsinger, 12 Ind. App. 285; 39 N. E. 423, on rehearing, 42 N. E. 640; Woodward v. Webb, 65 Pa. St. 254; Humphreys v. Ft. Smith &c. Power Co. 71 Ark. 152; 71 S. W. 662; Pennsylvania R. Co. v. Bond, 202 Ill. 95; 66 N. E. 941; Craig v. Lewis, 110 Mass. 377; Gilman v. Sheboygan &c. R. Co. 40 Wis. 653; Evansville &c. R. Co. v. Charlton, 6 Ind. App. 56; 33 N. E. 129. Mere silent acquiescence is held not to be a waiver in Kine v. Cass County (Neb.), 101 N. W. 2. But while mere silence may not operate as an estoppel affirmative acts may so operate. Authorities preceding note. See Platt v. Pennsylvania Co. 43 Ohio St. 228; Niagara &c. R. Co. In re, 121 N. Y. 319; 24 N. E. 452; Moore v. Sanford, 151 Mass. 285; 24 N. E. 323; 7 L. R. A. 151, and note.

[73] Vickery v. Board, 134 Ind. 554; 32 N. E. 880; Great Falls &c. Co. v. Attorney-General, 124 U. S. 581; 8 Sup. Ct. 631; Detmold v. Drake, 46 N. Y. 318; Brooklyn v. Copeland,

owner at or prior to the time the rights of the railway company are acquired it will bind all who thereafter acquire an interest or estate in the land.[74] Some of the courts hold that conduct may estop an owner from successfully claiming that there was a trespass, and yet not estop him from claiming compensation for the property taken.[75] The principle which authorizes this distinction is the same as that which allows a claim for damages to be prosecuted in many instances, but denies a right to maintain ejectment or injunction.[76] It has also been held that a land-owner who accepts and retains the damages assessed in condemnation proceedings thereby estops himself from claiming greater damages, either in a direct appeal or in a collateral action.[77]

106 N. Y. 496; 13 N. E. 451; Embury v. Conner, 3 N. Y. 511; 53 Am. Dec. 325; Pryzbylowyicz v. Missouri &c. Railroad, 17 Fed. 492; Tharp v. Witham, 65 Iowa, 566; 22 N. W. 677; Pitkin v. Springfield, 112 Mass. 509. See, generally, Daniels v. Tearney, 102 U. S. 415; Burlington &c. R. Co. v. Stewart, 39 Iowa, 267; Ferguson v. Landram, 1 Bush. 548; 5 Bush. (Ky.) 230; 96 Am. Dec. 350; State v. Mitchell, 31 Ohio St. 592; Van Hook v. Whitlock, 26 Wend. (N. Y.) 43; 37 Am. Dec. 246; Perryman v. Greenville, 51 Ala. 507; Lee v. Tillotson, 24 Wend. (N. Y.) 337; 35 Am. Dec. 624; People v. Murray, 5 Hill (N. Y.), 468; Goodale v. Sowell, 62 S. C. 516; 40 S. E. 970; Elliott Roads and Streets (2d ed.), § 592.

[74] Moore v. Roberts, 64 Wis. 538; 25 N. W. 564; Gurnsey v. Edwards, 26 N. H. 224. See Battles v. Braintree, 14 Vt. 348; Merchants' &c. Co. v. Chicago &c. 79 Iowa, 613; 44 N. W. 900.

[75] Pennsylvania R. Co. v. Platt, 47 Ohio St. 366; 25 N. E. 1028; Erie R. Co. v. Delaware &c. R. Co. 21 N. J. Eq. 283. See Bloomfield &c. R. Co. v. Grace, 112 Ind. 128; 13 N. E. 680; Missouri &c. R. Co. v. Calkins (Tex. Civ. App.), 79 S. W. 852.

[76] Roberts v. Northern Pacific R. Co. 158 U. S. 1; 15 Sup. Ct. 756; Lexington &c. R. Co. v. Ormsby, 7 Dana (Ky.), 276; Harlow v. Marquette &c. R. Co. 41 Mich. 336; 2 N. W. 48; Cairo &c. R. Co. v. Turner, 31 Ark. 494; 25 Am. R. 564; Pettibone v. La Crosse &c. R. Co. 14 Wis. 443; Chicago &c. Railroad Co v. Goodwin, 111 Ill. 273; 53 Am. R. 622; Indiana &c. Co. v. Allen, 113 Ind. 581; 15 N. E. 446; Smart v. Portsmouth &c. R. Co. 20 N. H. 233; Harrington v. St. Paul &c. R. Co. 17 Minn. 215.

[77] Stauffer v. Cincinnati &c. R. Co. 30 Ind. App. 356; 70 N. E. 543.

CHAPTER XL.

PROCEDURE IN APPROPRIATION CASES.

§ 1009. **Procedure—Introductory.**—The procedure in cases of seizure of private property under the right of eminent domain is so largely controlled and regulated by statutes that we can not go far into details. There are, however, general principles of a fundamental nature which apply to such proceedings almost universally, and of those principles we shall treat at some length. In many respects the statutes of the different states proceed upon much the same general lines, but there is, nevertheless, a wide diversity in matters of detail. All that can be properly and successfully done in a general treatise is to state and illustrate general principles, for it would be impossible, in a work of such a character, to treat matters dependent upon legislative enactments, and this we shall not undertake to do, except incidentally and for the purpose of showing the practical application of general principles.

§ 1010. **Nature of the proceeding.**—In order that there may be due process of law, it is essential that the subject of compensation be

regulated by a legislative enactment,[1] but it is not necessary that all the details of procedure be prescribed in the statute, since the statute, when enacted, takes its place as part of a uniform system of law, and may be aided and interpreted by other statutes and the general principles of jurisprudence.[2] The proceeding must be, in its nature judicial, but it is not a proceeding in ordinary course of the common law entitling the parties to a jury trial.[3] As to whether it is a "civil

[1] See Anniston &c. R. Co. v. Jacksonville &c. R. Co. 82 Ala. 297; 2 So. 710; Martin, Ex parte, 13 Ark. 198; 58 Am. Dec. 321; Garbutt Lumber Co. v. Georgia R. &c. Co. 111 Ga. 714; 36 S. E. 942; Southwestern R. Co. v. Southern &c. Tel. Co. 46 Ga. 43; 12 Am. R. 585; Henderson &c. R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173; 66 Am. Dec. 148; Calder v. Police Jury, 44 La. Ann. 173; 10 So. 726; American Tel. &c. Co. v. Smith, 71 Md. 535; 18 Atl. 910; 7 L. R. A. 200; Connecticut River R. Co. v. Franklin Co. Comrs. 127 Mass. 50; 34 Am. R. 338; People v. Detroit &c. R. Co. 79 Mich. 471; 44 N. W. 934; 7 L. R. A. 717; State v. Chicago &c. R. Co. 36 Minn. 402; 31 N. W. 365; East End St. R. Co. v. Doyle, 88 Tenn. 747; 13 S. W. 936; 17 Am. St. 933; 9 L. R. A. 100; Mt. Washington R. Co. In re, 35 N. H. 134; Southern Kans. R. Co. v. Oklahoma City, 12 Okla. 82; 69 Pac. 1050; Adirondack R. Co. v. New York, 176 U. S. 335; 20 Sup. Ct. 460, affirming 160 N. Y. 225. In Secombe v. Railroad Co. 23 Wall. (U. S.) 108, the court, in speaking of the legislative power to prescribe the course of proceeding, said: "There is no limitation upon the power of the legislature in this respect, if the purpose be a public one and just compensation be paid or tendered to the owner for the property taken." It seems to us that the rule is not quite accurately stated in the case cited, for, as we believe, provision must be made by law for notice and compensation. See upon the general subject, Secomb v. Milwaukee &c. R. Co. 49 How. Pr. (N. Y.) 75; Weir v. St. Paul &c. R. Co. 18 Minn. 155; Langford v. Ramsey Co. Commissioners, 16 Minn. 375; Musick v. Kansas City &c. R. Co. 114 Mo. 309; 21 S. W. 491; post, § 1019.

[2] And for this reason it has been held that the want of a special provision for compensation or the mode of ascertaining it is not fatal in a special statute where it is supplied by a provision of a general statute or law. New York El. R. Co. In re, 70 N. Y. 327; Rees' Appeal (Pa. St.) 12 Atl. 427; East Union Twp. v. Comrey, 100 Pa. St. 362; Jennings v. Le Roy, 63 Cal. 397; Gregg v. Baltimore, 56 Md. 256; State v. Hogue, 71 Wis. 384; 36 N. W. 860; Ponlan v. Atlantic &c. R. Co. 123 Ga. 605; 51 S. E. 657.

[3] Ante, § 983. Expressions in some of the cases seem to affirm that the jury or commissioners are not invested with judicial functions. Grand Rapids &c. Co. v. Chesebro, 74 Mich. 466; 42 N. W. 66; 39 Am. & Eng. R. Cas. 159; Toledo &c. R. Co. v. Dunlap, 47 Mich. 456; 11 N. W. 271; 5 Am. & Eng. R. Cas.

action" or "special proceeding," within the meaning of that term, as used in the codes of the different states, is a question upon which there is some diversity of opinion, but the weight of authority is that it is, in many respects, a special proceeding and not a civil action.[4] Yet in so far as concerns the right of appeal from a trial court to an appellate tribunal we think the proceeding must be regarded as a civil action.[5] The settled rule is that the provisions of the statute prescribing the mode of proceeding must be pursued.[6]

378. Possibly this may be true where the tribunal is a temporary one, and final action is to be taken by a court, but, however this may be, we think it clear that there must be at some stage of the proceeding action by a judicial tribunal. State v. Neville, 110 Mo. 345; 19 S. W. 491. See, also, Tracy v. Elizabethtown &c. R. Co. 78 Ky. 309; Union Pac. R. Co. v. Leavenworth &c. R. Co. 29 Fed. 728. A trial of proceedings by a railroad company to condemn land is governed by the ordinary rules of law governing the trial of causes, though the tribunal having jurisdiction of such proceedings is special. Davidson v. Texas &c. R. Co. 29 Tex. Civ. App. 54; 67 S. W. 1093.

[4] Hartley v. Keokuk &c. R. Co. 85 Iowa, 455; 52 N. W. 352; New York &c. R. Co. In re, 63 How. Pr. (N. Y.) 123; Cours v. Vermont &c. R. Co. 25 Vt. 476; Colorado Fuel &c. Co. v. Four Mile R. Co. 29 Colo. 90; 66 Pac. 902; Cory v. Chicago &c. R. Co. 100 Mo. 282; 13 S. W. 346; Gill v. Milwaukee &c. R. Co. 76 Wis. 293; 45 N. W. 23; Erie R. Co. v. Steward, 59 App. Div. (N. Y.) 187; 69 N. Y. S. 57.

[5] Elliott's Appellate Procedure, § 253, note 1. Albany &c. R. Co. v. Lansing, 16 Barb. (N. Y.) 68; Pack v. Chesapeake &c. R. Co. 5 W. Va. 118; Howard v. Proprietors of Locks and Canals, 12 Cush. (Mass.) 259; Colorado Midland R. Co. v. Jones, 29 Fed. 193. See, also, King's Lake Drainage &c. Dist. v. Jameson, 176 Mo. 557; 75 S. W. 679; Littleton Bridge Co. v. Pike, 72 Vt. 7; 47 Atl. 108. Where an appeal or writ of error was allowed in civil cases, the statute has been held to apply to condemnation proceedings. Atlantic &c. R. Co. v. Sullivant, 5 Ohio St. 276; Scott v. Lasell, 71 Iowa, 180; 32 N. W. 322. See Warren v. First Division &c. R. Co. 18 Minn. 384. And a statute allowing challenges in all civil cases was held to apply to eminent domain proceedings. Convers v. Grand Rapids &c. R. Co. 18 Mich. 459. Proceedings under some statutes has been held to be special proceedings, to which acts governing civil cases do not apply. Knoth v. Barclay, 8 Colo. 300; 6 Pac. 924; Sacramento &c. R. Co. v. Harlan, 24 Cal. 334; Dukes v. Working, 93 Ind. 501. See, also, Erie R. Co. v. Steward, 59 App. Div. (N. Y.) 187; 69 N. Y. S. 57; Bowersox v. Seneca County Com'rs, 20 Ohio St. 496; Chappell v. Edmondson Ave. &c. R. Co. 83 Md. 512; 35 Atl. 19; Western Am. Co. v. St. Ann. Co. 22 Wash. 158; 60 Pac. 158.

[6] The decisions are very num-

§ 1010a. Civil action—Removal to federal court.—As intimated in the last preceding section, while a condemnation proceeding is perhaps to be regarded as a special proceeding rather than a civil action, a condemnation proceeding may nevertheless be within the meaning of some statute or rule of law relative to civil actions. Thus, it now seems to be well settled that it is a "suit at law" within the meaning of the provision giving the circuit courts of the United States jurisdiction in certain cases.[7] So, although instituted in a state court under a statute providing for appraisers or commissioners and not a common law jury, it is a civil suit within the meaning of the federal judiciary act and is removable to the federal court where the requisite diversity of citizenship exists and the jurisdictional amount is involved.[8] But after the removal

erous and we cite only a few of the great number. Charleston &c. Co. v. Comstock, 36 W. Va. 263; 15 S. E. 69; Chicago &c. R. Co. v. Galt, 133 Ill. 657; 24 N. E. 674; Mobley v. Breed; 48 Ga. 44; Tracy v. Elizabethtown &c. R. Co. 80 Ky. 259; 14 Am. & Eng. R. Cas. 407; Wilson v. Baltimore &c. R. Co. 5 Del. Ch. 524; Missouri &c. R. Co. v. Carter, 85 Mo. 448; Colorado &c. R. Co. v. Allen, 13 Colo. 229; 22 Pac. 605; Dargan v. Carolina &c. R. Co. 113 N. C. 596; 18 S. E. 653; Lewis v. St. Paul &c. R. Co. 5 S. Dak. 148; 58 N. W. 580; 57 Am. & Eng. R. Cas. 612; Galveston &c. R. Co. v. Mud Creek &c. Co. 1 Tex. App. (Civil Cases) 169; Alexandria &c. R. Co. v. Alexandria &c. R. Co. 75 Va. 780; 40 Am. R. 743, and note; 10 Am. & Eng. R. Cas. 23; New Jersey &c. Co. v. Morris &c. Co. 44 N. J. Eq. 398; 15 Atl. 227; 1 L. R. A. 133, and note; Providence &c. R. Co. Petition of, 17 R. I. 324; 21 Atl. 965; Stannards &c. Association v. Brandes, 35 N. Y. S. 1015; Dickey v. Chicago, 152 Ill. 468; 38 N. E. 932; Southern Kansas R. Co. v. Oklahoma City, 12 Okla. 82; 69 Pac. 1050; Colorado Fuel &c. Co. v. Four Mile R. Co. 29 Colo. 90; 66 Pac. 902; Florida Central &c. R. Co. v. Bear, 43 Fla. 319; 31 So. 287.

[7] Madisonville &c. Co. v. St. Bernard Min. Co. 196 U. S. 239; 25 Sup. Ct. 251, 253, 254; Kohl v. United States, 91 U. S. 367. In the last case cited it is said that "it is difficult to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statutes, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right."

[8] South Dakota &c. R. Co. v. Chicago &c. R. Co. 141 Fed. 578; Colorado Midland R. Co. v. Jones, 29 Fed. 193; Mississippi &c. Boom Co. v. Patterson, 98 U. S. 403; Searl v. School Dist. 124 U. S. 197; 8 Sup. Ct. 460; Madisonville &c. Co. v. St. Bernard Min. Co. 196 U. S. 239; 25 Sup. Ct. 251. It is also held in the first case cited that a proceeding by a railroad company to condemn right of way

the federal court proceeds under the sanction of, and according to, the state statute governing the condemnation proceedings.[9]

§ 1011. Tribunals—Generally.—As we have elsewhere shown private property can not be seized for a public use without the payment of compensation to the owner.[10] Compensation must, as we have said, be determined and fixed by a judicial tribunal, for the question of compensation, under our system, is a judicial ques-

against a number of defendants owning land in severalty presents a separable controversy with respect to each owner, and is removable by a defendant, who is a citizen of another state, where the requisite amount is involved to give the federal court jurisdiction; that an allegation in the petition for removal, that the amount in dispute exceeds $2,000, exclusive of interest and costs, is sufficient to give the federal court jurisdiction, although there may be no proof given on the trial to sustain it; that the summons being served on September 16th requiring defendant to appear and plead within 20 days, exclusive of the day of service, a petition for removal filed on October 6th was in time; that the statute, while authorizing one railroad company to "cross, intersect, join and unite its road with the railroad of any other company," did not authorize it to build its road longitudinally upon the right of way of another company, and in the absence of such statutory authority it can not condemn a right of way to do so; and that under the statute providing that, if the two companies are unable to agree as to the compensation to be made or the point or manner of crossing, the same may be determined by condemnation proceedings, an effort to make an agreement is a condition precedent to the right to maintain condemnation proceedings.

[9] Broadmoor Land Co. v. Curr, 142 Fed. 421. See, also, Madisonville &c. Co. v. St. Bernard Min. Co. 196 U. S. 239; 25 Sup. Ct. 251, 256; East Tenn. &c. R. Co. v. Southern T. Co. 112 U. S. 310; 5 Sup. Ct. 169; Postal Tel. Cable Co. v. Southern R. Co. 122 Fed. 156. It is also held by a majority decision in the case first cited, that where the statute provided that any party to proceedings for the condemnation of land "before the apointment of commissioners . . . and before the expiration of the time for the defendant to appear and answer may demand a jury of freeholders residing in the county in which the petition is filed to ascertain, determine and appraise the damages or compensation to be allowed," and a defendant land-owner removed the condemnation proceedings into a federal court and appeared therein, and answered on the date set by the court for hearing the cause, without at that time demanding a jury, it waived its right to such jury, and could not thereafter be heard to say that such date was not the time for it to appear and answer.

[10] Ante, § 979.

tion,[11] and neither legislative nor administrative. As there must be compensation, and as the question of compensation is a judicial one, provision must be made for a tribunal invested with power to determine the measure of compensation to which the land-owner is entitled. What the power of the tribunal shall be is, to a very great extent, a legislative question, but the tribunal must be, in its nature, judicial, and must have power to ascertain and determine the question of compensation. There is, as will hereafter appear, some conflict as to the power of a temporary tribunal, such as appraisers, commissioners or the like, but we think it entirely clear on principle, that before a final decision of the question of compensation there must be judicial action. We are, indeed, persuaded that on principle the temporary tribunal must be invested with quasi judicial powers at least, since the power to determine the measure of compensation can not be justly regarded as administrative, legislative or executive, but there are respectable authorities to the contrary.[12]

§ 1012. Nature of the tribunal for the assessment of benefits and damages.—In the absence of constitutional provisions prescribing the mode of creating tribunals for the assessment of benefits and damages, the legislature may establish such tribunals as it deems proper, but, as is evident from what has been said, it must provide for a judicial tribunal, that is, a tribunal having power to hear and decide, though, according to the weight of authority, not a court in the strict sense of the term. Unless the constitution so requires the legislature is not bound to submit the assessment of benefits to a jury of twelve men. The right of trial by jury, which the American constitutions generally declare shall remain inviolate, does not embrace proceedings in cases of the seizure of private property under the right of eminent domain.[13] There are cases holding that unless

[11] Ante, § 983; Elliott's Roads and Streets (2d ed.), § 272, et seq. See, also, Boston El. R. Co. v. Presho, 174 Mass. 99; 54 N. E. 348; Ames v. Lake Superior &c. R. Co. 21 Minn. 241.

[12] See notes to Bass v. Fort Wayne, 121 Ind. 389; 23 N. E. 259; 1 Am. R. & Corp. (Lewis) 173, 180. In Vinegar Bend &c. Co. v. Oak Grove &c. R. Co. (Miss.) 43 So. 292, it is held that the only question the special eminent domain court can determine is the amount of compensation and not the right to compensation or to condemn. See, also, Georgia &c. R. Co. v. Ridlehuber, 38 S. Car. 308; 17 S. E. 24.

[13] Hare's Am. Const. Law. 869,

the constitution especially provides otherwise the tribunal to assess damages upon condemnation may consist of any person or number of persons, at the option of the legislature.[14] But, we suppose that

citing Butler v. Worcester, 112 Mass. 541, 556; Anderson v. Caldwell, 91 Ind. 451; 46 Am. R. 613; Lipes v. Hand, 104 Ind. 503; 1 N. E. 871; 4 N. E. 160; Kramer v. Cleveland &c. R. Co. 5 Ohio St. 140, 145; McKinney v. Monongahela &c. Co. 14 Pa. St. 65; 53 Am. Dec. 517; Pennsylvania R. Co. v. First German Lutheran Congregation, 53 Pa. St. 445. See, also, Kansas City v. Vineyard, 128 Mo. 75; 30 S. W. 326; Evansville &c. R. Co. v. Miller, 30 Ind. 209; Indianapolis &c. Gravel Road Co. v. Christian, 93 Ind. 360; Henderson &c. R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173; 66 Am. Dec. 148; Virginia &c. R. Co. v. Elliott, 5 Nev. 358; Gold v. Vermont Cent. R. Co. 19 Vt. 478; Houston &c. R. Co. v. Milburn, 34 Tex. 224; Buffalo Bayou &c. R. Co. v. Ferris, 26 Tex. 588; Central Branch &c. R. Co. v. Atchison &c. R. Co. 28 Kan. 453; Pennsylvania R. Co. v. First German Lutheran Congregation, 53 Pa. St. 445; Kramer v. Cleveland &c. R. Co. 5 Ohio St. 140; Raleigh &c. R. Co. v. Davis, 2 Dev. & B. (N. Car.) L. 451; McIntire v. Western N. Car. R. Co. 67 N. Car. 278; Beekman v. Saratoga &c. R. Co. 3 Paige (N. Y.), 45; 22 Am. Dec. 679, and note; Mt. Washington Road Co. Petition of, 35 N. H. 134; Louisiana &c. R. Co. v. Pickett, 25 Mo. 535; Kansas City &c. R. Co. v. Kansas City &c. R. Co. 118 Mo. 599; 24 S. W. 478; Bradley, In re, 108 Ia. 476; 79 N. W. 280; Montgomery &c. R. Co. v. Sayre, 72 Ala. 443; People v. Michigan &c. R. Co. 3 Mich. 496; Bailey v. Philadelphia &c. R. Co. 4 Harr. (Del.) 389; 44 Am. Dec. 593; Whiteman v. Wilmington &c. R. Co. 2 Harr. (Del.) 514; 33 Am. Dec. 411; Cairo &c. R. Co. v. Trout, 32 Ark. 17; Ames v. Lake Superior &c. R. Co. 21 Minn. 241; Kimball v. Board &c. 46 Cal. 19; Johnson v. Joliett &c. R. Co. 23 Ill. 202; Kendall v. Post, 8 Ore. 141; Anderson v. Turbeville, 6 Caldw. (Tenn.) 150; New Orleans &c. R. Co. v. Drake, 60 Miss. 621; Bonaparte v. Camden &c. R. Co. 1 Baldwin (U. S.), 205; Missouri Pac. R. Co. v. Humes, 115 U. S. 512; 6 Sup. Ct. 110; Bauman v. Ross, 167 U. S. 548; 17 Sup. Ct. 966; Postal Tel. Co. v. Southern R. Co. 122 Fed. 176. Contra, Southwestern R. Co. v. Southern &c. Co. 46 Ga. 43; 12 Am. R. 585; Newcomb v. Smith, 1 Chandler (Wis.), 71; Salem Turnpike &c. v. Essex Co. 100 Mass. 282. See Martin v. Tyler, 4 N. Dak. 278; 60 N. W. 392; 25 L. R. A. 838; Condemnation of Independence Av. &c. In re, 128 Mo. 272; 30 S. W. 763; Kansas City v. Smart, 128 Mo. 272; 30 S. W. 773; People v. Board of Trustees, 80 Hun (N. Y), 385; 30 N. Y. S. 325.

[14] Evansville &c. R. Co. v. Miller, 30 Ind. 209; Indianapolis &c. Gravel Road Co. v. Christian, 93 Ind. 360; Raleigh &c. R. Co. v. Davis, 2 Dev. & B. (N. Car.) L. 451; Ames v. Lake Superior &c. R. Co. 21 Minn. 241; Kramer v. Cleveland &c. Co. 5 Ohio St. 140; Virginia &c. R. Co. v. Elliott, 5 Nev. 358; New Orleans &c. R. Co. v. Drake, 60 Miss. 621.

where the legislature is forbidden to enact special and local laws it can not designate particular persons to form a portion or all of such tribunal, to act in a particular case.[15] In states where the right to a jury trial in such proceedings is guaranteed by the constitution, if an assessment by commissioners is provided for, it must be reviewable by a jury on appeal.[16] In a case where the constitution provides for an assessment by a jury of twelve men, as prescribed by law, a statute providing for a decision by a majority was held invalid.[17] Where a jury is provided for by a statute and there are no words limiting or defining the meaning of the term "jury," the statute is generally held to mean a common law jury of twelve men.[18] In Colorado where the statute authorizes a party in condemnation proceedings to demand a jury to assess the damages it is held that when the hearing is in term time, the jury must be drawn from the regular panel in attendance, or from persons summoned for jury duty in term time, in the manner provided by statute.[19] But it is also held that where the constitution recognizes different kinds of juries in different tribunals, the legislature may prescribe whichever form is used in the tribunal in which the proceedings are conducted.[20]

[15] Langford v. County Commissioners, 16 Minn. 375.

[16] Aldridge v. Tuscumbia &c. R. Co. 2 Stew. & P. (Ala.) 199; 23 Am. Dec. 307; Whiteman v. Wilmington &c. R. Co. 2 Harr. (Del.) 514; 33 Am. Dec. 411; Atlanta v. Central R. Co. 53 Ga. 120; Louisville &c. R. Co. v. Dryden, 39 Ind. 393; Norristown &c. Turnp. Co. v. Burkett, 26 Ind. 53; Tharp v. Witham, 65 Iowa, 566; 22 N. W. 677; Whitehead v. Arkansas Cent. R. Co. 28 Ark. 460. And this is held sufficient. Shively v. Lankford, 174 Mo. 535; 74 S. W. 835.

[17] Jacksonville &c. R. Co. v. Adams, 33 Fla. 608; 15 So. 257; 24 L. R. A. 272; Chicago &c. R. Co. v. Hock, 118 Ill. 587; 9 N. E. 205. But where there is no such constitutional provision as that quoted in the text, provision may be made for a majority decision. Post § 1014. As to method of reaching a verdict, see Orange &c. R. Co. v. Craver, 32 Fla. 28; 13 So. 444; 57 Am. & Eng. R. Cas. 511.

[18] Chicago &c. R. Co. v. Sanford, 23 Mich. 418; Mitchell v. Illinois &c. R. Co. 68 Ill. 286; Whitehead v. Arkansas &c. R. Co. 28 Ark. 460; Clark v. Utica, 18 Barb. (N. Y.) 451; Smith v. Atlantic &c. R. Co. 25 Ohio St. 91. Questions coming before such a jury must be decided by the unanimous voice of the members. McLellan v. County Commissioners, 21 Me. 390.

[19] Colorado Fuel &c. Co. v. Four Mile R. Co. 29 Colo. 90; 66 Pac. 902.

[20] McManus v. McDonough, 107 Ill. 95. In New York, where the constitution requires the damages to be appraised by a jury or not less than three commissioners, it was held competent for the legislature

The right to a jury trial may be waived, even though the constitution provides that the damages shall be assessed by a jury,[21] and the failure to appeal from a preliminary award of appraisers has been held to amount to such a waiver.[22]

§ 1013. Creation of the tribunal—Legislative power.—Broad as is the legislative power over the subject of creating tribunals for the assessments of benefits and damages the power is by no means unlimited. The legislature can not under guise of providing rules of procedure so fetter the tribunal that it can not exercise free and impartial judgment. It may be safely laid down as a general rule that the legislature can not make arbitrary rules that will restrain the tribunal from exercising judicial functions, although it may prescribe rules of procedure. The tribunal can not be subjected to legislative dictatorship and hence the legislature can not directly or indirectly declare what the land-owner's compensation shall be, but must submit that question to an impartial tribunal.[23] The principle we have stated prohibits the legislature from effectively declaring that the tribunal shall adopt assessment or estimate of an assessor or any officer.[24]

§ 1013a. Right of land-owner to have question of right to take determined.—It does not follow from the fact that a land-owner has a constitutional right to compensation for property taken for public uses, and a right to a hearing at some stage that he has a like constitutional right to be heard upon the question whether his private

to provide for a tribunal termed a jury, consisting of less than twelve members, which should decide all questions coming before it, by a majority vote. Cruger v. Hudson River R. Co. 12 N. Y. 190.

[21] Chicago &c. R. Co. v. Hock, 118 Ill. 587; 9 N. E. 205; Chowan &c. R. Co. v. Parker, 105 N. Car. 246; 11 S. E. 328; Beynon v. Brandywine &c. Co. 39 Ind. 129.

[22] Tharp v. Witham, 65 Iowa, 566.

[23] Ante, § 983; Buffalo, Matter of, 139 N. Y. 422; 34 N. E. 1103; Rich v. Chicago, 59 Ill. 286; Ames v. Lake Superior &c. R. Co. 21 Minn. 241; People v. Kniskern, 54 N. Y. 52; Powers Appeal, 29 Mich. 504. See State v. Sewer Commissioners, 39 N. J. L. 665; Davis v. Howell, 47 N. J. L. 280; State v. Perth Amboy, 52 N. J. L. 132; 18 Atl. 670.

[24] County Court v. Griswold, 58 Mo. 175. See, generally, Pennsylvania R. Co. v. Baltimore &c. R. Co. 60 Md. 263; Commonwealth v. Pittsburgh &c. R. Co. 58 Pa. St. 26; Kansas v. Baird, 98 Mo. 215; 11 S. W. 243, 562; Rhine v. McKinney, 53 Tex. 354; Bruggerman v. True, 25 Minn. 123.

property shall be taken for such uses. It is said: "It is wholly a matter of statutory construction whether there shall be a hearing before land shall be taken for public uses under a statute allowing the taking, and what the hearing shall be, and who shall be parties to it or be heard."[25] The question of necessity for the taking is a legislative question.[26] Statutes usually provide, however, for such a hearing, especially where it is sought to take for public purpose, property already devoted to a public use.[27]

§ 1013b. Determination of right of interurban road to cross railroad tracks.—As elsewhere shown, in some jurisdictions interurban railroads are incorporated under the general railroad law. In such a jurisdiction, where an interurban road was organized under the general railroad law it was regarded as a railroad company and subject to all statutory provisions affecting the right of such companies to make crossings over the tracks of the railroad companies.[28] Under an Indiana statute requiring the manner of the crossing to be determined by commissioners appointed by the circuit court,[29] it was held that a report of the commissioners is sufficiently certain which directs that the crossing shall be a frog crossing constructed of the same weight and kind of rails as are in the tracks of the railroad, and to be of a pattern in general use, and requiring a derailing device so constructed that the electric cars could not be run over the railroad tracks except by connecting the tracks of the electric cars by a lever on the side from which the car was approaching.[30] The general subject of condemnation by interurban railroad companies is considered in the chapter devoted to the treatment of such companies.

§ 1014. Tribunal—Jurisdiction—Decision of majority.—It is es-

[25] Chandler v. Railroad Commissioners, 141 Mass. 208; 5 N. E. 509. See, also, Rensselaer &c. R. Co. v. Davis, 43 N. Y. 137; People v. Smith 21 N. Y. 595; Cooley's Const. Lim. Ch. xv, p. 663.

[26] See ante, § 952.

[27] Ante, § 966. See, also, Boston &c. R. Co. In re, 79 N. Y. 64 (railroad crossing); Kansas City &c. R. Co. v. Kansas City &c. R. Co. 118 Mo. 599; 24 S. W. 478.

[28] Malott v. Collinsville &c. Elec. R. Co. 108 Fed. 313.

[29] Burns Rev. St. 1901, § 5468e. But see Acts of 1903, page 125, et seq. and Acts of 1905, page 59, et seq.

[30] Wabash &c. R. Co. v. Ft. Wayne &c. R. Co. 161 Ind. 295; 67 N. E. 674.

sential to the validity of the decision of a tribunal that it should have jurisdiction of the general subject, for if there is no jurisdiction the proceedings are coram non judice. Where the tribunal is a temporary one of naked statutory powers there can be no doubt that jurisdiction of the subject must affirmatively appear and the weight of authority is that this is true where the tribunal is one of inferior jurisdiction although it is a permanent judicial tribunal. Jurisdiction of the subject can not be conferred by the parties, but must be given by law. These elementary principles apply to tribunals in appropriation or condemnation cases and it is not deemed necessary to do much more than barely mention them.[31] In condemnation proceedings only such questions can be tried as the statute makes provision for trying.[32] Where the jurisdiction is vested in the courts it is held that a judge can not hear the case out of court.[33] The general rule is that proceedings under the right of eminent domain must be brought in the county in which the land is situated.[34] But if the land is in more than one county it is held, under most statutes, that the proceedings may be instituted in either county.[35] Where

[31] See, generally, Gray v. St. Louis &c. R. Co. 81 Mo. 125; 22 Am. & Eng. R. Cas. 106; Long Island &c. R. Co. In re, 45 N. Y. 364; People v. Tubbs, 49 N. Y. 356; Kansas City &c. Co. v. Campbell, 62 Mo. 585; De Buol v. Freeport &c. R. Co. 111 Ill. 499; Chicago &c. R. Co. v. Young, 96 Mo. 39; 8 S. W. 776; Hughes v. Lake Erie &c. R. Co. 21 Ind. 175; Denver &c. Co. v. Otis, 7 Colo. 198; 2 Pac. 925; Denver City &c. R. Co. v. Middaugh, 12 Colo. 434; 21 Pac. 565; 13 Am. St. 234; Galveston &c. Co. v. Gulf &c. R. Co. 72 Tex. 454; 10 S. W. 537.

[32] Oregon &c. R. Co. v. Baily, 3 Ore. 164.

[33] Broadway &c. R. Co. In re, 73 Hun (N. Y.), 7; 57 N. Y. S. 108; Washington &c. R. Co. v. Coeur D'Alene &c. R. Co. 2 Ida. 991; 28 Pac. 394. See Lewis v. St. Paul &c. R. Co. 5 S. Dak. 148; 58 N. W. 580; 57 Am. & Eng. R. Cas. 612; Baltimore &c. R. Co. v. Louisiana &c. R. Co. 39 La. Ann. 659; 2 So. 67.

[34] Missouri &c. R. Co. v. Carter, 85 Mo. 448; 28 Am. & Eng. R. Cas. 249; St. Louis &c. R. Co. v. Lewright, 113 Mo. 660; California &c. R. Co. v. Southern &c. R. Co. 65 Cal. 409; 4 Pac. 388; Pool v. Simmons, 134 Cal. 621; 66 Pac. 872; Buffalo, In re, 139 N. Y. 422; 34 N. E. 1103. Condemnation proceedings should be matter of record. Lewis v. St. Paul &c. R. Co. 5 S. Dak. 148; 58 N. W. 580; 57 Am. & Eng. R. Cas. 612.

[35] Bates v. Ray, 102 Mass. 458; St. Louis &c. R. Co. v. Postal Tel. Co. 173 Ill. 508; 51 N. E. 382 (and the necessary right of way for the entire line condemned); Postal Tel. Cable Co. v. Oregon Short Line R. Co. 23 Utah, 474; 65 Pac. 735; 90 Am. St. 705; Postal Tel.

the law provides for a trial by jury and does not provide for a decision by a majority then we suppose the ordinary rule applies and the decision must be unanimous. The rule declared by some of the cases is that where there is a power granted to two or more all must unite except where provision is made to the contrary, but there is a diversity of opinion upon this question.[36] It has been held that where a general statute provides that a majority of persons designated to discharge certain duties may act the majority of commissioners appointed to assess benefits and damages may make an award.[37] The rule that where courts have concurrent jurisdiction the one which first obtains jurisdiction will retain it applies to condemnation proceedings,[38] but where the statute requires joint action by two tribunals both must act.[39]

§ 1015. Appointment of appraisers or commissioners to assess benefits and damages.—There is some diversity of opinion as to the power of a court to appoint appraisers, commissioners or the like, to

Cable Co. v. Texas &c. R. Co. (Tex. Civ. App.) 46 S. W. 912; Helena v. Rogan, 26 Mont. 452; 68 Pac. 798; 69 Pac. 709. Compare Toluca &c. R. Co. v. Haws, 194 Ill. 92; 62 N. E. 312.

[36] Virginia R. Co. v. Lovejoy, 8 Nev. 100; Beynon v. Brandywine &c. T. L. Co. 39 Ind. 129; People v. Hynds, 30 N. Y. 470; Cruger v. Hudson River R. Co. 12 N. Y. 190; Young v. Buckingham, 5 Ohio 485; Moore v. Green &c. R. Co. 3 Phila. (Pa.) 417; Griscom v. Gilmore, 16 N. J. L. 105; Galbraith v. Littiech 73 Ill. 209. Under a proper construction of the Misssouri statute directing the appointment of three commissioners to appraise land taken in invitum, the report of the commissioners is not rendered nugatory by the fact that only two of them acted and signed the report. Such a report is sufficient to authorize the court to render a judgment vesting the title of the land in the company. Quayle v. Missouri &c. R. Co. 63 Mo. 465; Louk v. Woods, 15 Ill. 256; Brooklyn, &c. R. Co. In re, 80 Hun (N. Y.), 355; 30 N. Y. S. 131. Many cases, however, hold that all the commissioners must join in the deliberations although a majority may decide. Mayor &c. New York, In re, 99 N. Y. 569; 2 N. E. 642; 34 Hun (N. Y.), 441; State v. Findley, 67 Wis. 86; 30 N. W. 224; Smith v. Trenton &c. Co. 17 N. J. L. 5; Curry v. Jones, 4 Del. Ch. 559. See, also, Chicago &c. R. Co. v. Sanford, 23 Mich. 418 (holding that all must unite in the verdict).

[37] Serrell v. Oakland Probate Judge, 107 Mich. 234; 65 N. W. 107, distinguishing Kress v. Hammond, 92 Mich. 372; 52 N. W. 728.

[38] Hughes v. Lake Erie &c. R. Co. 21 Ind. 175; Miller v. County Commissioners, 119 Mass. 485.

[39] St. Louis v. Gleason, 93 Mo. 33; 8 S. W. 348.

assess benefits and damages, some of the authorities inclining to the view that the power of appointment is an executive and not a judicial function,[40] and that appointments can not be made by the courts. In our opinion the power to appoint commissioners, appraisers or the like, to assess benefits and damages is judicial and may be exercised by the courts. The judicial power extends beyond the mere trial and decision of causes, and is broad enough to authorize the appointment of such ministers or officers as may be necessary to enable a court to effectively exercise its functions.[41] We doubt whether power to appoint agents or officers to perform duties not connected with the administration of the law by the courts, or to act in matters foreign to the purpose for which courts are organized can be conferred upon the judiciary, but we think that the assessment of benefits and damages being essentially a judicial matter and connected with the administration of the law by the courts, the courts may be empowered to appoint appraisers, commissioners or the like to assess benefits and damages. The power to appoint is not, however, exclusively judicial, for the authorities affirm the right of the legislature itself to appoint or to confer the power to appoint upon judicial, executive or administrative officers.[42] The power must be exercised by the board or tribunal upon which the power is conferred.[43] Broad as is the power which the adjudged cases accord to the legislature there is this important limitation upon it, namely, the tribunal must be an impartial one, and its action subject to judicial control at some stage of the proceedings.[44] Where there is

[40] Taylor v. Commonwealth, 3 J. J. Marsh (Ky.), 401; State v. Barbour, 53 Conn. 76; 22 Atl. 686; 55 Am. R. 65; Achley's Case, 4 Abb. Pr. (N. Y.) 35. In Penniman v. St. Johnsbury, 54 Vt. 306, it is held not to exist unless given by statute.

[41] Striker v. Kelly, 2 Denio. (N. Y.) 323; Cooper, In re, 22 N. Y. 67; State v. Noble, 118 Ind. 350, 360; 21 N. E. 244; 4 L. R. A. 101; 10 Am. St. 143. See, also, Vail v. Morris &c. R. Co. 21 N. J. L. 189; Gregory v. Cleveland &c. R. Co. 4 Ohio St. 675; Colorado &c. R. Co. v. Jones, 29 Fed. 193; Terre Haute v. Evansville &c. R. Co. 149 Ind. 174; 46 N. E. 77; 37 L. R. A. 189; Elliott Roads and Streets (2d ed.), § 278.

[42] State v. Commissioners, 28 Kan. 431; Morris v. Comptroller, 54 N. J. L. 268; 23 Atl. 664; Shoemaker v. United States, 147 U. S. 282; 31 Sup. Ct. 361; Elliott Roads and Streets (2d ed.), §§ 273, 279.

[43] House v. Rochester, 15 Barb. (N. Y.) 517; Menges v. Albany, 56 N. Y. 374.

[44] Bradley v. Frankfort, 99 Ind. 417; Hessler v. Drainage Com. 53 Ill. 105; Powers v. Bears, 12 Wis. 213; 78 Am. Dec. 733; Rhine v. McKinney, 53 Tex. 354; Lumsden

provision for an appeal the appointment of commissioners may be made by members of a public corporation.[45] While the rule declared by the authorities is that the legislature may appoint commissioners or appraisers itself or may vest the power of appointment in ministerial or executive officers, the action of appraisers and commissioners by whomsoever appointed, must be under judicial control, otherwise the fundamental principle that the award of compensation is a judicial function would be violated.[46]

§ 1016. Duty to appoint appraisers or commissioners—Mandamus.—It is broadly asserted in some of the cases that where a proper petition is presented, and proper notice is given, the appointment of commissioners or selection of a jury to assess the landowner's damages is a matter of right, and if the judge or other officer, charged with the ministerial duty of ordering a jury or appointing commissioners, refuses to act, he may be compelled, by mandamus, to do so.[47] It seems to us that there is difficulty in maintaining this doctrine where the power to appoint is conferred upon a court. If the proceedings are judicial and the duty is imposed upon a court, the refusal to make the appointment is, as we are inclined to believe, an error to be reviewed by certiorari, appeal or the like, and not upon an application for mandamus. Where, however, the duty

v. Milwaukee, 8 Wis. 485; Paul v. Detroit, 32 Mich. 108; State v. Fond du Lac, 42 Wis. 287; Nashua, Petition of, 12 N. H. 425; Mitchell v. Holderners, 29 N. H. 523; New Boston, Petition of, 49 N. H. 328; State v. Atkinson, 27 N. J. L. 420. But see Bridgeport v. Giddings, 43 Conn. 304; Johnston v. Rankin, 70 N. C. 550.

[45] Bass v. Fort Wayne, 121 Ind. 389; 23 N. E. 259; McMicken v. Cincinnati, 4 Ohio St. 394; State v. Crane, 36 N. J. L. 394; Minneapolis v. Wilkin, 30 Minn. 140; 14 N. W. 581.

[46] Ante, § 983; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420; Vanhorne's Lessee v. Dorrance, 2 Dall. (U. S.) 304; Langford v. County Commissioners, 16 Minn. 375; Cunningham v. Campbell, 33 Ga. 625; Kramer v. Cleveland &c. R. Co. 5 Ohio St. 140; Pennsylvania R. Co. v. Baltimore R. Co. 60 Md. 263; McMicken v. Cincinnati, 4 Ohio St. 394; San Francisco v. Scott, 4 Cal. 114; Elliott's Roads and Streets (2d ed), § 272, et seq.

[47] Western U. R. Co. v. Dickson, 30 Wis. 389; Thirty-fourth Street R. Co. In re 102 N. Y. 343; 7 N. E. 172; Illinois Cent. R. Co. v. Rucker, 14 Ill. 353; Chicago &c. R. Co. v. Wilson, 17 Ill. 123. See Southern &c. R. Co. In re, 146 N. Y. 352; 40 N. E. 1000; West Jersey &c. R. Co. v. Ocean City R. Co. 61 N. J. L. 506; 39 Atl. 1024.

is imposed upon administrative officers, their performance of that duty may be coerced by mandamus. But even as to ministerial officers the rule allowing a mandamus to compel the performance of a duty will not apply if the duty be purely a discretionary one.

§ 1017. Qualifications of jurors—Appraisers as commissioners.—The fundamental principle that no one can be a judge in his own case requires it to be held that the members of the tribunal appointed to assess benefits and damages should be disinterested. This principle governs although the statute may not provide that the members of the tribunal shall not be interested, since statutes are to be construed in connection with other statutes and the general principles of law.[48] Neither members of the condemning corporation nor its agent,[49] nor persons appointed by it are competent to serve as appraisers, where the other party is not also represented.[50] In

[48] Ante, § 1015; Douglass v. Byrnes, 63 Fed. 16.

[49] Powers v. Bears, 12 Wis. 213; 78 Am. Dec. 733. An employe of the company is not competent to serve as a juror. Central R. Co. v. Mitchell, 63 Ga. 173. Persons owning land in the neighborhood are not disqualified from acting as viewers where their land does not immediately adjoin the railroad. Newbecker v. Susquehanna R. Co. 1 Pears. (Pa.) 57. In Douglass v. Byrnes, 63 Fed. 16, there is a full discussion of the general question and it was held that a person who accepts a retainer as an attorney for one of the parties is disqualified. The court cited Sacramento &c. Mining Co. v. Showers, 6 Nev. 291; Pittsburgh &c. R. Co. v. Porter, 32 Ohio St. 328; Buffalo &c. Co. In re, 32 Hun (N. Y.), 289; Ensign v. Harney, 15 Neb. 330; 18 N. W. 73; 48 Am. R. 344, and note; Bowler v. Washington, 62 Me. 302; Palmer v. Utah &c. R. Co. 2 Ida. 290; 13 Pac. 429; McDaniels v. McDaniels, 40 Vt. 363; 94 Am. Dec. 408; Dond v. Guthrie, 13 Ill. App. 653; Johnson v. Hobart, 45 Fed. 542; Burke v. McDonald, 2 Ida. 1022; 29 Pac. 98; Patten's Pet. 16 N. H. 283; Beacon v. Shreve, 22 N. J. L. 176; Blake v. County Commissioners, 114 Mass. 583; Peavy v. Wolfborough, 37 N. H. 286; Phillipsburgh Bank v. Fulmer, 31 N. J. L. 53. But see Crowley v. Gallatin Co. 14 Mont. 292; 36 Pac. 313.

[50] Rhine v. McKinney, 53 Tex. 354. Citing and aproving this decision it was held in Tucker v. Paris (Tex. Civ. App.), 99 S. W. 1127, that a statute authorizing a city to condemn land by having the same appraised by a jury taken from twelve men selected by the city marshal, from which the mayor was entitled to strike three and the owner of the land three, the remainder to constitute the jury, and containing no provision for an appeal from their award, was unconstitutional as authorizing a deprivation of property without due process of law.

accordance with the general principle stated it is held that if the jury is selected exclusively from a few towns in the country whose inhabitants are deeply interested in the proposed improvement, a challenge to the array should be allowed.[51] One whose name is struck off the venire in choosing a struck jury is incompetent to fill a vacancy in such jury.[52] The fact that a commissioner to assess damages upon the condemnation of land for a railroad right of way is a stockholder in another railroad which has already acquired its right of way does not make him incompetent.[53] Objections to the competency of commissioners or jurors may be waived by agreement,[54] or otherwise. It is generally held that taking part in an inquest by interested persons with knowledge of their interest is such a waiver.[55] To prevent a waiver the objection should be taken at the earliest opportunity.[56] But if there is excusable ignorance of the disqualification the general rule stated will not prevail.[57] A corporation can not object to the award because part of the commissioners were its own stockholders,[58] but, of course, the adverse party may success-

[51] Haslam v. Galena &c. R. Co. 64 Ill. 353. The mere fact that the county of which the juror is a citizen is interested in the suit was held not to render him incompetent within the statutes of West Virginia. Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812.

[52] Detroit &c. R. Co. In re, 2 Doug. (Mich.) 367.

[53] People v. First Judge &c. 2 Hill (N. Y.), 398.

[54] People v. Taylor, 34 Barb. (N. Y.) 481. See New York &c. R. Co. Matter of, 35 Hun (N. Y.), 575.

[55] Walker v. Boston &c. R. Co. 3 Cush. (Mass.) 1; Fitchburg &c. R. Co. v. Boston &c. R. Co. 3 Cush. (Mass.) 58; Mansfield &c. R. Co. v. Clark, 23 Mich. 519; Smith v. School District, 40 Mich. 143; Crowell v. Londonderry, 63 N. H. 42; Jameson v. Androscoggin R. Co. 52 Me. 412. See, also Bradley v. Frankfort, 99 Ind. 417.

[56] Astor v. New York, 62 N. Y. 580; Hilltown Road, 18 Pa. St. 233; Burnham v. Goffstown, 50 N. H. 560; Wells Co. Road, Matter of, 7 Ohio St. 16; Emanuel Hospital v. Metropolitan R. Co. 19 L. T. N. S. 692.

[57] Giles v. Caines, 3 Caines (N. Y.) 107; Newberry v. Furnival, 56 N. Y. 638; Wolford v. Oakley, 1 Sheldon (N. Y.), 261; Elliott Appellate Procedure, §§ 676, 691. Where the act which disqualifies, as, for instance, the acceptance of a retainer, is unknown to the adverse party the failure to object is not a waiver.

[58] Strang v. Beloit &c. R. Co. 16 Wis. 635. In Rock Island R. Co. v. Lynch, 23 Ill. 645, it was held that the award of commissioners one of whom was disqualified but whose disqualification was unknown, is void even though such commissioner voted with the minority.

fully object in such a case. The general principle is well illustrated by the cases which hold that persons who are active in promoting the proposed improvement, are disqualified.[59] Stockholders in a corporation which is a party to condemnation proceedings are, it is very clear, disqualified from acting as appraisers,[60] and this rule is generally enforced although the statute is silent on the subject of the interest of appraisers.[61] In many of the states it is provided that the commissioners or jurors to assess damages upon the condemnation of land shall be disinterested,[62] and under such statutes any material interest, however slight, must, as we suppose, disqualify. In some jurisdictions the damages are assessed by the commissioners, of whom one may be designated by the plaintiff and one by the defendant.[63] We think there is reason to doubt whether a party

[59] Such a disqualification, it has been held, can not be removed by agreement of parties. Michigan &c. R. Co. v. Barnes, 40 Mich. 383. In Detroit &c. Co. v. Crane, 50 Mich. 182; 15 N. W. 73, it was held that one who has subscribed to a fund in aid of a railway is not disqualified to act as a commissioner to assess damages against another projected road which is to be leased to the first named road.

[60] Peninsular R. Co. v. Howard, 20 Mich. 18; Rock Island &c. R. Co. v. Lynch, 23 Ill. 645; Friend Appellant, 53 Me. 387. The fact that one has subscribed for stock on which he has paid nothing and is in default does not disqualify him. Chesapeake &c. Canal Co. v. Binney, 4 Cranch C. C. 68. In Georgia R. Co. v. Hart, 60 Ga. 550, it was held that a stockholder's son was disqualified because of his near relationship to a person having an interest.

[61] See Giesy v. Cincinnati &c. R. Co. 4 Ohio St. 308; Kansas City &c. R. Co. v. Campbell, 62 Mo. 585; Ames v. Lake Superior &c. R. Co. 21 Minn. 241; Buffalo Bayou &c. R. Co. v. Ferris, 26 Tex. 588; Bernet v. Camden &c. R. Co. 14 N. J. L. 145; People v. Michigan &c. R. Co. 3 Mich. 496; Pennsylvania R. Co. v. First German Lutheran Congregation, 53 Pa. St. 445; Donner v. Palmer, 23 Cal. 40; Powers v. Bears, 12 Wis. 214; Forbes v. Howard, 4 R. I. 364; Inge v. Police Jury, 14 La. Ann. 117; Thompson v. Conway, 53 N. H. 622; Bryant v. Glidden, 36 Me. 36. One may have a claim against the company and yet not have such an interest as will prevent him from serving as a commissioner to assess damages. Newbecker v. Susquehannah R. Co. 1 Pearson (Pa.), 57.

[62] Stimson Am. Stat. (1892), § 8749, citing laws of Pennsylvania, Minnesota, Wyoming, Nevada, Utah, New Mexico, New Hampshire, Virginia, Tennessee.

[63] Code, 1882, Ga. § 1689 (1); Gen. Stat. 1885, Neb. § 862. For the construction of a statute providing that the court should appoint five commissioners from a list of twelve names, six of which were furnished by the company and six by the

can be compelled to submit his rights to the decision of a tribunal thus constituted, but, of course, he may do so by consent, and acquiescence is regarded as a tacit agreement. In many states special commissioners to assess damages upon condemnation must be freeholders,[64] though such a requirement is not usually made as to jurors, whether summoned to assess the damages in the first instance,[65] or on appeal from the commissioners, and where such qualifications are prescribed, the commissioners or jurors must possess them, otherwise an objection to their competency, opportunely made, will prevail.[66]

§ 1018. Oath must be taken by jurors or commissioners.—The commissioners or jurors should in all cases be sworn as required by the statute, and some of the cases hold that a failure on their part to take the prescribed oath will render all their proceedings invalid.[67] It seems to us that the failure to take the oath ought not to be avail-

land-owner, see Troy &c. R. Co. v. Cleveland, 6 How. Pr. (N. Y.) 238.

[64] Stimson Am. Stat. (1892) § 8749, citing laws of Pennsylvania, Vermont, Connecticut, New Jersey, Indiana, Michigan, Wisconsin, Minnesota, North Carolina, Kentucky, Missouri, New Mexico, Oregon, Nevada, Texas, Montana, Wyoming, Oklahoma, Iowa, Nebraska, Virginia, West Virginia. In Mississippi it was held that one holding lands under a title bond conditioned for the conveyance to him of a fee-simple upon the payment of the purchase-money, was a freeholder within such a statute. New Orleans &c R. Co. v. Hemphill, 35 Miss. 17. It is sufficient if the commissioners become freeholders at any time before their appointment. New York &c. R. Co. v. Townsend, 36 Hun (N. Y.), 630. An heir of one who, by will directed his land to be sold, was held to be a freeholder. People v. Scott, 8 Hun (N. Y.), 566.

[65] See Laws of Maryland, Arkansas, Tennessee, Washington, Louisiana, Florida, Missouri, cited in Stimson Am. Stat. 1892, § 8749.

[66] In West Virginia the jury must consist of freeholders. Worth's Code, 1887, W. Va. Ch. 42, § 17. See Adams v. San Angelo &c. Co. (Tex. Civ. App.) 25 S. W. 165; 26 S. W. 1104.

[67] Harper v. Lexington &c. R. Co. 2 Dana (Ky.), 227; Bohlman v. Green Bay &c. R. Co. 40 Wis. 157; Keenan v. Commissioners' Court, 26 Ala. 568; State v. Bayonne, 35 N. J. L. 476; Bowler v. Perrin, Drain Commissioner, 47 Mich. 154; 10 N. W. 180; People v. Conner, 46 Barb. (N. Y.) 333; Frith v. Justices, 30 Ga. 723; Adams v. San Angelo &c. Co. (Tex. Civ. App.) 25 S. W. 165; 26 S. W. 1104. Omission of the word "faithfully" from prescribed form of the oath held sufficient to invalidate the proceedings. Gilroy, In re, 85 Hun (N. Y.), 424; 32 N. Y. S. 891. But see Cambria St. In re, 75 Pa. St. 357.

able in a collateral attack, but should be deemed a mere irregularity, not rendering the proceedings absolutely void.[68] The rule is very strictly enforced in some of the courts, and it is held that the record must show affirmatively that the jurors or commissioners were duly sworn.[69] But it is generally held that a recital in the record that the commissioners were sworn according to law is sufficient to show that they took the proper oath,[70] and this certainly is the sensible doctrine. A mere irregularity in the form of the oath taken will not be cause for setting aside the proceedings where it is apparent that the proper matters were before the jury for consideration, and the objecting party could have suffered no damages from the irregularity.[71] Proceeding to a hearing without objection and with knowledge of an omission to take the oath or of an irregularity in the manner of taking it,[72] or taking an appeal to a court in which the proceedings are tried de novo amounts to a waiver of such defects.[73]

§ 1019. Notice—General doctrine.—The authorities with very little conflict affirm that notice is essential in appropriation proceedings.[74] There is, however, a conflict upon the question whether the

[68] Huling v. Kaw Valley &c. R. Co. 130 U. S. 559; 9 Sup. Ct. 603, citing Commissioners v. Espen, 12 Kan. 531; Venard v. Cross, 8 Kan. 248; Cooper v. Reynolds, 10 Wall. (U. S.) 308; Voorhees v. Bank, 10 Pet. (U. S.) 449.

[69] Virginia R. Co. v. Lovejoy, 8 Nev. 100.

[70] Lyon v. Green Bay &c. R. Co. 42 Wis. 538; Hannibal &c. R. Co. v. Morton, 27 Mo. 317; New Orleans &c. R. Co. v. Hemphill, 35 Miss. 17; Road &c. In re, 90 Pa. St. 190; Long v. Commissioner's Court, 18 Ala. 482. Where the sole record of the oath is contained in the record certified by the commissioners themselves, the oath which they took must be set forth that it may appear that the statute was complied with. State v. Van Geison, 15 N. J. L. 339; Cambria Street, 75 Pa. St. 357. The return of the sheriff that the jury were duly impanelled and sworn according to law, to discharge their duties, "will be construed to be a statement that the jury were properly sworn, and not a recital of the substance of the oath administered." New Orleans &c. R. Co. v. Hemphill, 35 Miss. 17.

[71] Grafton &c. R. Co. v. Foreman, 24 W. Va. 662. But see Wilkinson v. Trenton, 35 N. J. L. 485; Gilroy, In re, 85 Hun (N. Y.), 424; 32 N. Y. S. 891.

[72] Rockford &c. R. Co. v. McKinley, 64 Ill. 338. Parties who were before the court will be presumed to have notice of omissions and irregularities in the proceedings. Raymond v. County Comrs. 63 Me. 110.

[73] Patton v. Clark, 9 Yerg. (Tenn.) 268.

[74] St. Paul v. Nickl, 42 Minn. 262;

statute authorizing the proceedings must provide for notice. It is held by many of the courts that, although notice is indispensable, it is not essential to the validity of the statute that it should provide for notice to the property owner,[75] if notice is, in fact, given. Other cases hold a different doctrine affirming that a statute providing for the seizure of property is not valid unless it also provides for notice.[76] In our opinion a statute which authorizes the seizure of

44 N. W. 59; 1 Am. R. & Corp. (Lewis) 127; Williams v. Monroe, 125 Mo. 574; 28 S. W. 853; Kansas City &c. R. Co. v. Fisher, 53 Kan. 512; 36 Pac. 1004; Knoblauch v. Minneapolis, 56 Minn. 321; 57 N. W. 928; Wulzen v. Board of Supervisors, 101 Cal. 15; 40 Am. St. 17, and note; Stuart v. Palmer, 74 N. Y. 183; 30 Am. R. 289; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812; Windsor v. McVeigh, 93 U. S. 274; People v. O'Brien, 111 N. Y. 1; 18 N. E. 692; 2 L. R. A. 255; 7 Am. St. 684, and note; Campbell v. Campbell, 63 Ill. 462; Happy v. Mosher, 48 N. Y. 313; Kennard v. Louisiana, 92 U. S. 480; Rowan v. State, 30 Wis. 129; 11 Am. R. 559; Garvin v. Daussman, 114 Ind. 429; 16 N. E. 826; 5 Am. St. 637; Kuntz v. Sumption, 117 Ind. 1; 19 N. E. 474; 2 L. R. A. 655, and note; Whiteford Township v. Probate Judge, 53 Mich. 130; 18 N. W. 593; Brown v. Denver, 7 Colo. 305; 3 Pac. 455; United States v. Jones, 109 U. S. 513; 3 Sup. Ct. 346; People v. Gilon, 121 N. Y. 551; 24 N. E. 944; Greenwich &c. R. Co. v. Greenwich &c. R. Co. 75 App. Div. (N. Y.) 220; 78 N. Y. S. 24; Kearney v. Ballantine, 54 N. J. L. 194; 23 Atl. 821; Leavitt v. Eastman, 77 Me. 117. See, generally, Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812; Reitenbaugh v. Chester Valley R. Co. 21 Pa. St. 100; Road &c. in re, 109 Pa. St. 118; Atlantic R. Co. v. Cumberland County Comrs. 51 Me. 36; Tracy v. Elizabethtown &c. R. Co. 80 Ky. 259; Chicago &c. R. Co. v. Smith, 78 Ill. 96; Mulligan v. Smith, 59 Cal. 206; Walbridge v. Cabot, 67 Vt. 114; 30 Atl. 805; State v. Reed, 38 N. H. 59; Thetford v. Kilburn, 36 Vt. 179; Zimmerman v. Canfield, 42 Ohio St. 463; State v. Fond du Lac, 42 Wis. 287; Lynch v. Rutland, 66 Vt. 570; 29 Atl. 1015; Gamble v. McCrady, 75 N. Car. 509; Carolina &c. R. Co. v. Penncarden &c. Co. 132 N. Car. 644; 44 S. E. 358; Chesapeake &c. Canal Co. v. Union Bank, 4 Cranch C. C. 75; Burns v. Multnomah R. Co. 8 Sawyer (U. S.), 543; Union Pac. R. Co. v. Leavenworth &c. R. Co. 29 Fed. 728.

[75] State v. Mayor &c. of Jersey City, 24 N. J. L. 662; State v. Trenton, 36 N. J. L. 499; Peoria &c. Co. v. Warner, 61 Ill. 52; Tracy v. Elizabethtown &c. Co. 80 Ky. 259; Wilson v. Baltimore &c. R. Co. 5 Del. Ch. 524; Sullivan v. Cline, 33 Oreg. 270; 54 Pac. 156; Paulsen v. Portland, 149 U. S. 30; 13 Sup. Ct. 750. These authorities generally proceed upon the theory that a provision for notice may be implied and that if it is given the failure to expressly provide for it in the statute will not render the proceedings void.

[76] Lewis Eminent Domain (2d ed.),

property, but does not prescribe what notice shall be given violates fundamental principles and should be regarded as void. It seems to us that a statute which authorizes the exercise of the extraordinary power of seizing private property should prescribe what the notice shall be insomuch as such a statute should be complete in itself in so far as regards the fundamental elements of the procedure. It ought not to be left to courts to supply such an essential part of the procedure as notice, nor ought such a question to be left in such doubt that it can only be solved by construction. If notice is not provided for by the legislature the omission can only be supplied by judicial legislation, for a right to seize private property can only be given by express statutory enactment and if the courts supply what is omitted in such a statute they act as legislators. It can not be justly said that the omission can be supplied by the aid of the rules of the common law since the right to appropriate property depends entirely upon statute and not upon the common law. If the right to seize property is entirely statutory then, as it seems to us, the notice must be provided for by the statute, since a notice not provided for by statute is not provided for by law, and notice not provided for by law is no notice at all.[77] While it is well established that notice is essential yet it is generally held that it is competent for the legislature to prescribe what the notice shall be.[78] The

§ 368, p. 480; Elliott Roads and Streets (2d ed.), § 198; Kuntz v. Sumption, 117 Ind. 1; 19 N. E. 474; 2 L. R. A. 655, and note; State v. Fond du Lac, 42 Wis. 287; Seifert v. Brooks, 34 Wis. 443. See Whiteford Township v. Probate Judge, 53 Mich. 130; 18 N. W. 593. Dissenting opinions of Cooley, C. J., Sherwood, J., and Campbell, J., in Whiteford Tp. v. Probate Judge, 53 Mich. 130; Quaere in People v. Richards, 38 Mich. 214. Dissenting opinion of Bartley, J., in Kramer v. Cleveland &c. R. Co. 5 Ohio St. 140, 165; Stuart v. Palmer, 74 N. Y. 183; 30 Am. R. 289; Savannah &c. R. Co. v. Mayor, 96 Ga. 680; 23 S. E. 847; Gatch v. Des Moines, 63 Ia. 718; 18 N. W. 310; Board of Education v. Aldredge, 13 Okla. 205; 73 Pac. 1104; Sterritt v. Young, 14 Wyo. 146; 82 Pac. 946.

[77] Norvell v. Porter, 62 Mo. 309; Osborne v. Schutt, 67 Mo. 712; Harmon v. Birchard, 8 Blkf. (Ind.) 418; Terre Haute &c. R. Co. v. Baker, 122 Ind. 433, 441; 24 N. E. 83; Scudder v. Jones, 134 Ind. 547, 551; 32 N. E. 221. Some of the cases hold that provision for notice may be implied. Branson v. Gee, 25 Ore. 462; 36 Pac. 527; 24 L. R. A. 355; Ulman v. Baltimore, 72 Md. 587; 20 Atl. 141; 21 Atl. 709; 11 L. R. A. 224. See, generally, Paulsen v. Portland, 16 Ore. 450; 19 Pac. 450; 1 L. R. A. 673.

[78] Walker v. Boston &c. R. Co. 3 Cush. (Mass.) 1; Salem v. Eastern R. Co. 98 Mass. 431; 96 Am. Dec. 650; Mason v. Messenger, 17

legislature may provide for constructive or personal notice,[79] and if the notice, no matter whether personal or constructive, be not palpably and unquestionably unreasonable it will be sufficient. Constructive notice satisfies the constitutional provision requiring due process of law.[80] The weight of authority is that the land-owner should have notice of the time when the application for the appointment of commissioners or appraisers or for the calling of a special jury to assess damages will be presented to the court,[81] in order that he may see that proper persons only are selected to make the appraisement, or may resist the application, if it is insufficient either in form or substance.[82]

Iowa, 261; Nishnabotna Drainage Dist. v. Campbell, 154 Mo. 151; 55 S. W. 276; McIntosh v. Pittsburgh, 112 Fed. 705; Middletown, Matter of, 82 N. Y. 196; Elliott Roads and Streets (2d ed), § 199.

[79] United States &c. Co. v. United States &c. Co. 18 N. Y. 199; Cupp v. Commissioners, 19 Ohio St. 173; Starbuck v. Murray, 5 Wend. (N. Y.) 148; 21 Am. Dec. 172; Owners v. Mayor, 15 Wend. (N. Y.) 374; Polly v. Saratoga &c. Co. 9 Barb. (N. Y.) 449; Wilkin v. First Division of St. Paul &c. R. Co. 16 Minn. 271; New Orleans &c. Co. v. Hemphill, 35 Miss. 17; Missouri &c. Co. v. Shepard, 9 Kan. 647; Weir v. St. Paul &c. Co. 18 Minn. 155; Wilson v. Hathaway, 42 Iowa, 173; Lent v. Tillson, 140 U. S. 316; 11 Sup. Ct. 825; Huling v. Kaw Valley &c. R. Co. 130 U. S. 559; 9 Sup. St. 603; Harvey v. Tyler, 2 Wall. (U. S.) 328; Secombe v. Railroad Co. 23 Wall. (U. S.) 108; Pennoyer v. Neff, 95 U. S. 714, 743. See, also, Dyer v. Baltimore, 140 Fed. 880.

[80] Huling v. Kaw Valley &c. R. Co. 130 U. S. 559; 9 Sup. Ct. 603; Hagar v. Reclamation Dist. 111 U. S. 701; 4 Sup. Ct. 663; McMillen v. Anderson, 95 U. S. 37; Davidson v. New Orleans, 96 U. S. 97; Boom Co. v. Patterson, 98 U. S. 403, 406; Kuschke v. St. Paul, 45 Minn. 225; 47 N. W. 786. See, also, St. Paul &c. R. Co. v. Minneapolis, 35 Minn. 141; 27 N. W. 500; Winnebago &c. Co. v. Wisconsin Midland R. Co. 81 Wis. 389; 51 N. W. 576; Wight v. Davidson, 181 U. S. 371; 21 Sup. Ct. 616.

[81] In some states, notice of the formation of a tribunal for the assessment of damages is not necessary, but notice of the hearing before such tribunal is sufficient. Zack v. Pennsylvania R. Co. 25 Pa. St. 394; Long Island R. Co. v. Bennett, 10 Hun (N. Y.), 91; Middletown, Matter of, 82 N. Y. 196; Hunter v. Matthews, 1 Rob. (Va.) 468; Weir v. St. Paul &c. R. Co. 18 Minn. 155; Chesapeake &c. Canal Co. v. Union Bank, 4 Cranch (C. C.), 75.

[82] Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812; Tracy v. Elizabethtown &c. R. Co. 80 Ky. 259; State v. Fond du Lac, 42 Wis. 287; Peoria &c. R. Co. v. Warner, 61 Ill. 52; Gamble v. McCrady, 75 N. C. 509; Central Turnpike Corp. 7 Pick. (Mass.) 13; Langford v. County Comrs. 16 Minn. 375; Lewis' Em. Dom. (2d ed.) § 366. See, also, Abney v. Clark, 87

§ 1020. Notice—Requisites of.—As notice is required in order to satisfy the provisions of the constitution requiring due process of law, it must be a reasonable notice. The subject is, as we have said, so largely a legislative one that it is competent for the legislature to prescribe the form, and, within limits, the substance of the notice. There are cases holding that where the land-owner is a resident the notice must be personal, but the great weight of authority is that the legislature may provide for notice by publication or by posting only,[83] and need not even require it to be addressed to the owners by name; but may simply require it to describe the land, to indicate the nature of the proceeding, and to specify the time when, and the place where, the parties interested must appear to protect their rights.[84] A failure to comply with the requirements of the statute as to notice will, unless waived by appearance or otherwise, render all subsequent proceedings erroneous, and they may be arrested or set aside upon motion.[85] The notice must be definite as to the

Ia. 727; 55 N. W. 6; Dixon v. Baltimore &c. R. Co. 1 Mackey (D. C.), 78; Anderson v. St. Louis, 47 Mo. 479; Union Pac. R. Co. v. Leavenworth &c. R. Co. 29 Fed. 728.

[83] Ante, § 1019; Harper v. Lexington &c. R. Co. 2 Dana (Ky.), 227; St. Paul &c. R. Co. v. Minneapolis, 35 Minn. 141; 27 N. W. 500; Polly v. Saratoga &c. R. Co. 9 Barb. (N. Y.) 449; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 27 W. Va. 812; Missouri River &c. R. Co. v. Shepard, 9 Kan. 647; Baltimore &c. R. Co. v. North, 103 Ind. 486; 3 N. E. 144; Indianapolis &c. R. Co. v. State, 105 Ind. 37; 4 N. E. 316; Wilson v. Hathaway, 42 Iowa, 173; People v. Richards, 38 Mich. 214; Road &c. In re, 114 Pa. St. 627; 7 Atl. 765; Cupp v. Commissioners, 19 Ohio St. 173; State v. Beeman, 35 Me. 242; State v. Trenton, 36 N. J. L. 499; Lent v. Tillson, 72 Cal. 404; 14 Pac. 71; Hildreth v. Lowell, 11 Gray (Mass.), 345; Methodist P. Church v. Mayor &c. of Baltimore, 6 Gill. (Md.) 391; Application of Village of Middletown, 82 N. Y. 196; Zimmerman v. Canfield, 42 Ohio St. 463.

[84] McIntyre v. Marine, 93 Ind. 193; Indianapolis &c. Road Co. v. State, 105 Ind. 37; 4 N. E. 316; McMicken v. Cincinnati, 4 Ohio St. 394. Cases in preceding note; Lewis' Em. Dom. (2d ed.) § 367. But see Ellsworth v. Chicago &c. R. Co. 91 Ia. 386; 59 N. W. 78.

[85] Appeal of Central R. Co. 102 Pa. St. 38; Reitenbaugh v. Chester Valley R. Co. 21 Pa. St. 100; New York &c. R. Co. Matter of, 62 Barb. (N. Y.) 85; Norton v. Wallkill Valley R. Co. 63 Barb. (N. Y.) 77; Morgan's Louisiana &c. R. Co. v. Bourdier, 1 McGloin (La.), 232; Brazee v. Raymond, 59 Mich. 548; 26 N. W. 699; Commissioners v. Thompson, 15 Ala. 134; Morgan v. Chicago &c. R. Co. 36 Mich. 428; New Orleans &c. R. Co. v. Frederic, 46 Miss. 1. See, also, Lyle v. Chicago &c. R. Co. 55 Minn. 223; 56 N. W. 820.

time and place where the proceeding will be had, and notice of a proceeding to be had in a certain village which covers two square miles without specifying any particular place in the village, is void for indefiniteness.[86] Where there is no notice at all the proceedings will be treated as a nullity even when attacked in a collateral proceeding.[87] Some of the cases go so far as to hold that the proceedings are void although there is notice, if the notice is defective, but it seems to us that some of the cases go too far. A provision that the notice shall recite the substance of the petition was held to be substantially complied with by a notice which informed the land-owner that the company would make application for the appointment of commissioners to view his property and assess the damages he would sustain by the establishment of a railroad across it upon a location which was particularly described, although it did not purport to recite the petition.[88] If the statute requires the notice to name the owner, the requirement must be complied with; otherwise the proceedings will be erroneous.[89]

§ 1021. Notice—Political questions—Expediency.—The rule that there must be notice in order to constitute due process of law does not extend to questions upon which the property owner is not entitled to a hearing. There are questions upon which the parties are not entitled to a hearing and as to those questions it is not necessary that

[86] Minneapolis &c. R. Co. v. Kanne, 32 Minn. 174; Johnson, In re, 49 N. J. L. 381; 8 Atl. 113; Wallkill Valley R. Co. v. Norton, 12 Abb. Pr. (U. S.) 317; Rensselaer &c. R. Co. v. Davis, 43 N. Y. 137; Broadway &c. R. Co. In re, 69 Hun (N. Y.), 275; 23 N. Y. S. 609. See Thompson v. Chicago &c. Co. 110 Mo. 147; 19 S. W. 77, as to the effect of failure to hear the application at the time specified in the notice.

[87] Hull v. Chicago &c. R. Co. 21 Neb. 371; 3 N. W. 162; Lohman v. St. Paul &c. 18 Minn. 174; Cruger v. Hudson River R. Co. 12 N. Y. 190; Leavitt v. Eastman, 77 Me. 117; Barnes v. Fox, 61 Iowa, 18; 15 N. W. 581.

[88] Quincy &c. R. Co. v. Taylor, 43 Mo. 35.

[89] Birge v. Chicago &c. R. Co. 65 Iowa, 440; 21 N. W. 767; Ellsworth v. Chicago &c. R. Co. 91 Ia. 386; 59 N. W. 78. If the notice name only a life tenant the remainder-man is not bound by the proceeding. Chicago &c. R. Co. v. Smith, 78 Ill. 96. In these cases the proceedings were held void, collaterally, as to persons not named. The interest of the life tenant is not affected by a proceeding against the remainder-man. Railroad Co. v. Boyer, 13 Pa. St. 497.

there should be notice, unless the statute requires it.[90] The question whether the proposed improvement shall be made, and in what mode, are political questions which may be settled in any manner chosen by the legislature, without any notice to the owner except such as it sees fit to prescribe,[91] provided, of course, that the proposed use is a public one,[92] and the constitution places no limit upon this right. But where the constitution permits the condemnation of the property only after a public necessity for the taking has been found by a jury, the property owner is entitled to such notice as will enable him to dispute the existence of such a necessity.[93] It has been held that at whatever stage of the proceedings the owner of land sought to be condemned is summoned to appear after such notice he has the right to contest the appropriation of his land to the petitioner's use.[94]

§ 1022. Notice—Description.—No precise and particular description of the property taken need be contained in the notice unless the statute particularly requires it,[95] and even where a description was required, it has been held sufficient to describe the land as that "now occupied by the New Jersey railroad company as the location of its track,"[96] or to describe it by reference to a map filed by the condemning company.[97] But where the statute provides for a definite

[90] Weaver v. Templin, 113 Ind. 298; 14 N. E. 600; Preble v. Portland, 45 Me. 241; People v. Smith, 21 N. Y. 595; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812; Holt v. Somerville, 127 Mass. 408. Where the statute requires that notice shall be given upon questions of policy, expediency, necessity or the like, then notice is essential. Paul v. Detroit, 32 Mich. 108; Pearsall v. Board of Supervisors, 74 Mich. 558; 52 N. W. 77; 4 L. R. A. 193; State v. Fond du Lac, 42 Wis. 287.

[91] Kramer v. Cleveland &c. R. Co. 5 Ohio St. 140; Zimmerman v. Canfield, 42 Ohio St. 463; Harper v. Lexington &c. R. Co. 2 Dana (Ky.), 227; Lent v. Tillson, 72 Cal. 404; 14 Pac. 71; Challiss v. Atchison &c. R. Co. 16 Kan. 117; Secombe v. Railroad Co. 23 Wall. (U. S.) 109; Weir v. St. Paul &c. R. Co. 18 Minn. 155.

[92] Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812.

[93] Seifert v. Brooks, 34 Wis. 443.

[94] Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812.

[95] Doughty v. Somerville &c. R. Co. 21 N. J. L. 442; Wilkin v. First Division &c. R. Co. 16 Minn. 271.

[96] Coster v. New Jersey R. Co. 23 N. J. L. 227.

[97] Hazen v. Boston &c. R. Co. 2 Gray (Mass.), 574. But see Central Park Comrs. In re, 51 Barb. (N. Y.) 277.

description, it must be strictly complied with.[98] Defective descriptions may be cured by amendment and courts will generally refuse to set aside an order appointing commissioners until the moving party has had an opportunity to apply to amend and has failed to do so.[99] The principle that if the persons entitled to notice appear and take part in the proceedings, of which they are required to be notified, failure to object operates as a waiver of objections, applies to the descriptions, and, indeed, to all other parts of the notice.[100]

§ 1023. Service of notice.—Where the mode of giving or serving notice is prescribed by statute that mode must be substantially pursued. Where notice is prescribed and the mode of service is not designated, it seems to us that service would be good if made in accordance with the general rules governing service, for the particular statute may, in that respect, be aided by other statutes and other rules of law.[101] It has been held that where service upon an agent is relied upon, it must be shown that the agent was authorized to receive

[98] Strang v. Beloit &c. R. Co. 16 Wis. 635; Vail v. Morris &c. R. Co. 21 N. J. L. 189. See, also, Midland R. Co. v. Smith, 109 Ind. 488; 9 N. E. 474; Lyle v. Chicago &c. R. Co. 55 Minn. 223; 56 N. W. 820.

[99] Woodcliff Land Imp. Co. v. New Jersey &c. R. Co. 72 N. J. L. 137; 60 Atl. 44; Savannah &c. R. Co. v. Postal Tel. &c. Co. 115 Ga. 554; 42 S. E. 1.

[100] Swinney v. Fort Wayne &c. R. Co. 59 Ind. 205, 219; Indiana &c. R. Co. v. Allen, 100 Ind. 409; East Saginaw &c. R. Co. v. Benham, 28 Mich. 459; Concord R. Co. v. Greely, 17 N. H. 47; Boston &c. R. Co. v. Folsom, 46 N. H. 64; Barre Turnpike Co. v. Appleton, 2 Pick. (Mass.) 430; Huston v. Clark, 112 Ill. 344; Atchison &c. R. Co. v. Patch, 28 Kan. 470; Stephens v. Commissioners, 36 Kan. 664; 14 Pac. 175; Brock v. Barnet, 57 Vt. 172; Muire v. Falconer, 10 Gratt. (Va.) 12; Corrigal v. London &c. R. Co. 5 M. & G. 219; 44 Eng. C. L. 123. See, also, Union Depot Co. v. Frederick, 117 Mo. 138; 21 S. W. 1118, 1130; 26 S. W. 530; Galveston &c. R. Co. v. Bandat, 18 Tex. Civ. App. 595; 45 S. W. 939.

[101] Notice by mail, unless such notice is provided for by the statute, is not sufficient. Morgan v. Chicago &c. R. Co. 36 Mich. 428. But see Crane v. Camp, 12 Conn. 464. Notice by publication, as prescribed by statute, is good. Huling v. Kaw &c. R. Co. 130 U. S. 559; 9 Sup. Ct. 603; St. Paul &c. R. Co. v. Minneapolis, 35 Minn. 141; 27 N. W. 500; 24 Am. & Eng. R. Cas. 309; Winnebago &c. Co. v. Wisconsin &c. Co. 81 Wis. 389; 51 N. W. 576; Birge v. Chicago &c. R. Co. 65 Iowa, 440; 21 N. W. 767; 20 Am. & Eng. R. Cas. 291. It is held that where personal service is required, service on the owner in another state satisfies the statute. State v. Hudson River &c. Co. (N. J.) 25 Atl. 853.

such service,[102] but this may be done by showing the duties or position of the agent, and that he is embraced within the statute authorizing service upon the agents.[103] Where the statute provides for notice by publication and the notice is published in different newspapers, sent to different subscribers for part of the prescribed time, it will not be effective although taking all the publications in the different papers, it appears that it was published the prescribed number of weeks.[104] Where the notice is by publication the affidavit prescribed by statute must be filed.[105] It is a general rule that where notice by publication is prescribed it must be given in accordance with the statute in all material particulars.[106] There are cases holding that where a part only of those entitled thereto are given notice, proceedings which are otherwise regular will bind such as are notified, but will be invalid as to those not receiving notice, but there is some diversity of opinion on the general question.[107] Where notice as to some of the land-owners is insufficient it is not improper to dismiss

[102] Memphis &c. R. Co. v. Parsons &c. Co. 26 Kan. 503; Dunlap v. Toledo &c. R. Co. 46 Mich. 190; 9 N. W. 249.

[103] St. Paul &c. R. Co. In re, 36 Minn. 85; 30 N. W. 432; 28 Am. & Eng. R. Cas. 255.

[104] Hull v. Chicago &c. R. Co. 21 Neb. 371; 32 N. W. 162.

[105] Brown v. St. Paul &c. R. Co. 38 Minn. 506; 38 N. W. 698; Barber v. Morris, 37 Minn. 194; 33 N. W. 559; 5 Am. St. 836. See, also, New Jersey Cent. R. Co.'s Apeal, 102 Pa. St. 38; Parker v. Ft. Worth &c. R. Co. 84 Tex. 333; 19 S. W. 518.

[106] Mississippi River &c. R. Co. v. Jones, 54 Mo. App. 529. See Chicago &c. R. Co. v. Smith, 78 Ill. 96; Bradley v. Missouri Pacific R. Co. 91 Mo. 493; 4 S. W. 427; 30 Am. & Eng. R. Cas. 379; Kansas City v. Mastin, 169 Mo. 80; 68 S. W. 1037; Hull v. Chicago &c. R. Co. 21 Neb. 371; 32 N. W. 162. But actual personal service on a non-resident has been held equivalent to publication. State v. Hudson River R. &c. Co. (N. J.) 25 Atl. 853. The courts of Washington hold that the statutes of that state do not require that the affidavit for service by publication should state that the owner's residence was unknown to and could not be discovered by any of the agents or officers of the corporation. Moynahan v. Superior Court, 42 Wash. 172; 84 Pac. 655; Hunt v. Smith, 9 Kan. 137.

[107] New Orleans R. Co. v. Frederic, 46 Miss. 1; Smith v. Chicago &c. R. Co. 67 Ill. 191; Detroit &c. R. Co. v. Detroit, 49 Mich. 47; 12 N. W. 904; Columbus &c. R. Co. v. Witherow, 82 Ala. 190; 3 So. 23; Moses v. St. Louis &c. Dock Co. 84 Mo. 242; State v. Easton and Amboy &c. R. Co. 36 N. J. L. 181; Garmoe v. Sturgeon, 65 Iowa, 147; 21 N. W. 493; Barlage v. Detroit &c. R. Co. 54 Mich. 564; 20 N. W. 587; 17 Am. & Eng. R. Cas. 131.

as to them and continue the proceedings as to those sufficiently notified.[108] Infants, who own an estate in common with their mother, with whom they live, are not bound by a notice addressed to the mother only.[109] Where service is required to be made upon the owner or owners it must be made upon all who come within the meaning of the term "owner" or "owners." In general, the word owner includes the holder of any legal or equitable estate, such as lessees,[110] mortgagees,[111] or vendees in possession.[112] No general designation of the "persons interested" by the language used in the statute can supply the place of the names of such persons, where the statute requires the notice to be given to "all persons interested."[113] Where one is notified as an occupant, he must defend for whatever interest he has.[114]

§ 1024. Summoning the jury or commissioners.—The general rule is that the provisions of the statute as to the appointment of com-

[108] Milwaukee Southern Ry. Co. In re, 124 Wis. 490; 102 N. W. 401.

[109] New Orleans &c. R. Co. v. Frederic, 46 Miss. 1; Swinney v. Fort Wayne &c. R. Co. 59 Ind. 205. See, generally, Lohman v. St. Paul &c. R. Co. 18 Minn. 174; Rheiner v. Union &c. R. Co. 31 Minn. 289; 17 N. W. 623; 14 Am. & Eng. R. Cas. 373. But see Charleston &c. Co. v. Comstock, 36 W. Va 263; 15 S. E. 69.

[110] Pennsylvania R. Co. v. Eby, 107 Pa. 166; Colcough v. Nashville &c. R. Co. 2 Head (Tenn.), 171; Baltimore &c. R. Co. v. Thompson, 10 Md. 76; Gilligan v. Providence, 11 R. I. 258.

[111] Dodge v. Omaha &c. R. Co. 20 Neb. 276; 29 N. W. 936; Severin v. Cole, 38 Iowa, 463. But see contra as to mortgagees and judgment creditors, Williams v. Hutchinson &c. R. Co. 62 Kans. 412; 63 Pac. 430; 84 Am. St. 408.

[112] Smith v. Ferris, 6 Hun (N. Y.), 553.

[113] Birge v. Chicago &c. R. Co. 65 Iowa, 440; 21 N. W. 767. A mortgagee is a person interested within the meaning of such a statute. Pratt v. Bright, 29 N. J. Eq. 128; Michigan &c. R. Co. v. Barnes, 40 Mich. 383; Wilson v. European &c. R. Co. 67 Me. 358. So, also, are persons holding judgment liens against the land. Watson v. New York Cent. R. Co. 6 Abb. (N. Y.) Pr. N. S. 91; State v. Easton &c. R. Co. 36 N. J. L. 181.

[114] McIntyre v. Easton &c. R. Co. 26 N. J. Eq. 425. See, generally, Platt v. Bright, 29 N. J. Eq. 128; Severin v. Cole, 38 Iowa, 463; Boynton v. Peterborough, 4 Cush. (Mass.) 467; Norton v. Wallkill &c. R. Co. 63 Barb. (N. Y.) 77; Baltimore &c. R. Co. v. Baltzell, 75 Md. 94; 23 Atl. 74; Quincy &c. R. Co. v. Taylor, 43 Mo. 35; Cory v. Chicago &c. R. Co. 100 Mo. 282; 13 S. W. 346; New York &c. R. Co. In re, 29 Hun (N. Y.), 269; Broadway &c. R. Co. In re, 34 Hun (N. Y.), 414.

missioners or the summoning of a jury must be strictly pursued.[115] But where the statute simply provides that the proceedings shall be in a certain court before a jury, the jury is to be drawn as in other cases.[116] The failure to fix a day for the jury to meet, as required by the statute, has been held to invalidate a warrant for summoning them.[117] Some of the courts hold that the order or warrant under which they act should state definitely the duties which the jury or commissioners are to perform, but this rule can not apply where the statute provides for the submission of the matter to an ordinary jury.[118] It is also held that the warrant must be returned to the proper court or all proceedings under it will be void.[119] It is said, however, that if more than the required number of jurors are summoned, the proceedings will not be erroneous, if only twelve are empanelled.[120] A jury, summoned by a disinterested deputy sheriff, while another was interested, was held to have no power to act under a statute which provided that if the sheriff or either of his deputies was interested, the jury should be summoned by the coroner.[121] And where the statute required that a precept be issued to the sheriff to summon a jury, it was held to be error for him to select the jury from a list of names prepared by his deputy.[122]

§ 1025. Parties.—The general rule is that all persons who have

[115] A substantial compliance has been held sufficient. Queen v. Lancaster &c. R. Co. 6 A. & E. N. S. 759; 51 E. C. L. 757.

[116] It is said, however, that there can not be a peremptory challenge to a juror unless it is expressly conferred by statute, and that a statute allowing peremptory challenge in "civil causes" does not apply to proceedings under the right of eminent domain. Peninsular R. Co. v. Howard, 20 Mich. 18. See Davis v. Bangor &c. 60 Me. 303. We can not believe that the doctrine of the cases cited can apply where the statute provides in general terms for a jury trial.

[117] Chesapeake &c. Canal Co. v. Key, 3 Cranch (C. C.), 599.

[118] Heise v. Pennsylvania R. Co. 62 Pa. St. 67. But see Mitchell v. Bridgewater, 10 Cush. (Mass.) 411.

[119] Cassidy v. Kennebec &c. R. Co. 45 Me. 263.

[120] Fitchburg R. Co. v. Boston &c. R. Co. 3 Cush. (Mass.) 58.

[121] Barre &c. Corporation v. Appleton, 2 Pick. (Mass.) 430. Where the officer who summoned the jury was a stockholder the proceedings were set aside and a venire de novo awarded. Woodstock R. Co. v. Tupper, 12 New Brunswick, 457. By appearing and taking part in the proceedings, the defendant waives all objections on account of the sheriff being an interested party. Corrigal v. London &c. R. Co. 5 M. & G. 219; 44 Eng. C. L. 123.

[122] Pennsylvania R. Co. v. Heister, 8 Pa. St. 445.

an estate, interest or right in the land sought to be appropriated should be parties to the proceedings.[123] As we have elsewhere said our opinion is that, while it is true that the general rule is as stated, yet it is only persons whose rights, titles, interests, or estates appear of record that must be made parties, except where possession conveys notice. We do not believe that a company desiring to appropriate land is bound to look elsewhere than to the records or to the occupancy of the lands. As a rule proceedings to secure the condemnation of lands must be prosecuted by the party entitled to the lands, and not by a contractor or agent.[124] Where damages are

[123] Grand Rapids &c. R. Co. v. Alley, 34 Mich. 18; Charleston &c. R. Co. v. Comstock, 36 W. Va. 263; 15 S. E. 69; Davis v. La Crosse &c. R. Co. 12 Wis. 16; Patterson v. Binghamton, 88 Hun (N. Y.), 272; 34 N. Y. S. 416; Chicago &c. R. Co. v. Cicero, 154 Ill. 656; 39 N. E. 574; Williams v. Monroe, 125 Mo. 574; 28 S. W. 853; Walbridge v. Cabot, 67 Vt. 114; 30 Atl. 805; Justice v. Philadelphia, 169 Pa. St. 503; 32 Atl. 592; 36 W. N. C. 509; Moore v. Mayor, 8 N. Y. 110; 59 Am. Dec. 473; Gwynne v. Cincinnati, 3 Ohio, 24; 17 Am. Dec. 576; State v. Easton R. Co. 36 N. J. L. 181; Austin v. Rutland &c. R. Co. 45 Vt. 215; Philips &c. In re, L. R. 6 Eq. 250; Pfleger, In re, L. R. 6 Eq. 426; Shelton v. Derby, 27 Conn. 414; Davidson v. Texas &c. R. Co. 29 Tex. Civ. App. 54; 67 S. W. 1093. See, also, Anderson v. Pemberton, 89 Mo. 61; 1 S. W. 216; South Carolina R. Co. v. American Tel. &c. Co. 65 S. Car. 459; 43 S. E. 970; Storm Lake v. Iowa Falls &c. R. Co. 62 Ia. 218; 17 N. W. 489; Charleston &c. R. Co. v. Hughes, 105 Ga. 1; 30 S. E. 972; 70 Am. St. 17. But it is held sufficient to make the trustee a party without the beneficiaries. Small v. Georgia So. R. Co. 87 Ga. 602; 13 S. E. 694; National R. Co. v. Easton &c. R. Co. 36 N. J. L. 181. And in a proceeding to condemn the rights of an abutting owner the municipality in which the highway lies is not a necessary party. Philadelphia &c. Co. v. Inter City Link R. Co. (N. J.) 62 Atl. 184. Some courts require the petitioner at his peril to ascertain, and name in the petition, the true owner of the land sought to be condemned and taken, and the person so named is not required to prove title. Chicago &c. R. Co. v. Diver, 213 Ill. 26; 72 N. E. 758. The Illinois courts construe a statute requiring petitions in condemnation proceeding to describe all persons interested in the property not to make it necessary that all persons interested in the property should be made parties, but damages may be assessed to the persons made parties, and they can not complain of the failure to bring in other interested persons. Dowie v. Chicago &c. R. Co. 214 Ill. 49; 73 N. E. 354.

[124] Colorado &c. R. Co. v. Ruedi, 2 Colo. App. 202; 29 Pac. 1034; Kansas &c. R. Co. v. Streeter, 8 Kan. 133. See Cory v. Chicago &c. R. Co. 100 Mo. 282; 13 S. W. 346; Deitrichs v. Lincoln &c. R. Co. 13 Neb. 361; 13 N. W. 624; Junction

sought under the statute in cases where land is appropriated the owners are, of course, the proper parties plaintiffs.[125] Proceedings for condemnation of the land should be brought in the name of the company authorized to construct the road for which it is taken. And it has been held that the fact that such company has parted with its property and franchises by sale,[126] or lease,[127] does not prevent the institution of such proceedings in its name. The proceeding may be maintained by a de facto corporation.[128] So, it has been held that the fact that proceedings are prosecuted in the name of the petitioner as agent of the railroad company does not invalidate them.[129] Where damages are to be assessed for land already appropriated, the owner of the land at the time it was taken is the proper party defendant,[130] and in case of his death pending proceedings, they should be revived in the name of his personal representatives.[131] But if a future acquisition of title is sought, the

&c. R. Co. v. Silver, 27 Kan. 741; 14 Am. & Eng. R. Cas. 324; Proprietors &c. v. Nashua &c. Co. 10 Cush. (Mass.) 385.

[125] Hibbs v. Chicago &c. R. Co. 39 Iowa 340. But it is held that unless the statute authorizes the owner to initiate the proceedings he can not do so. Indianapolis &c. Co. v. Reed, 52 Ind. 357; Bentonville &c. R. Co. v. Baker, 45 Ark. 252. In Pennsylvania the proceeding must be by the holder of the title as owner or lessee; it can not be by an administrator. Mountz v. Philadelphia &c. R. Co. 203 Pa. 128; 52 Atl. 15.

[126] Cory v. Chicago &c. R. Co. 100 Mo. 282; 13 S. W. 346. In this case it was held that a statute requiring actions to be brought in the name of the real party in interest does not embrace proceedings of this character nor affect the jurisdiction of the court.

[127] Gottschalk v. Lincoln &c. R. Co. 14 Neb. 389; 15 N. W. 695. See, also, State v. Superior Court of King County, 31 Wash. 445; 72 Pac. 89; 66 L. R. A. 897; Chicago &c. R. Co. v. Illinois Cent. R. Co. 113 Ill. 156; Metropolitan El. R. Co. In re, 18 N. Y. St. 134; 2 N. Y. S. 278.

[128] Morrison v. Indianapolis &c. R. Co. (Ind.) 76 N. E. 961, and cases there cited in the opinion of the court.

[129] Hannibal &c. R. Co. v. Morton, 27 Mo. 317.

[130] Davidson v. Boston &c. R. Co. 3 Cush. (Mass.) 91; Drury v. Midland R. Co. 127 Mass. 571. In Pennsylvania, the location of a railroad fixes its right to take any lands across which it runs, and all assessments of damages must be made with reference to the date of the location, and in favor of the person owning the land at that time. Davis v. Titusville &c. R. Co. 114 Pa. St. 308; 6 Atl. 736.

[131] Valley R. Co. v. Bohm, 29 Ohio St. 633; Peoria &c. R. Co. v. Rice, 75 Ill. 329; Darling v. Blackstone &c. Co. 16 Gray (Mass.), 187; Upper Appomattox Co. v. Hardings, 11 Gratt. (Va.) 1; Monterey County v.

owner of the land at the time the proceedings are instituted is the proper defendant.[132] If the land has been seized by the railroad company without right, and subsequently a proceeding is begun to acquire title, the owner of the land at the time the proceeding is instituted is entitled to the compensation.[133]

§ 1025a. Parties—Grantor or grantee—Interested parties generally.[134]—A right to compensation once accrued does not pass by a subsequent conveyance of the land, even with covenants of warranty, unless the deed contains an express stipulation to that effect.[135]

Cushing, 83 Cal. 507; 23 Pac. 700. But it is held in some jurisdictions at least, that the heirs should be made parties. Valley R. Co. v. Bohm, 29 Ohio St. 633; Satterfield v. Crow, 8 B. Mon. (Ky.) 553. See, also, Peoria &c. R. Co. v. Rice, 75 Ill. 329. If proceedings to assess the compensation for lands already taken are brought after the death of the owner, his personal representatives, and not the heirs or devisees, are the proper parties. Whitman v. Boston &c. R. Co. 3 Allen (Mass.), 133; Church v. Grand Rapids &c. R. Co. 70 Ind. 161; Neal v. Knox &c. R. Co. 61 Me. 298. But see Kane v. Kansas City &c. R. Co. 112 Mo. 34; 20 S. W. 532.

[132] Smith v. Chicago &c. R. Co. 67 Ill. 191; Elizabethtown &c. R. Co. v. Helm, 8 Bush. (Ky.) 681; Stewart v. White, 98 Mo. 226; 11 S. W. 568; Houston v. Paterson &c. Traction Co. 69 N. J. L. 168; 54 Atl. 403. One who was not an owner of the land at the time the proceedings were instituted can not take an appeal from the award; the fact that he has purchased the property after condemnation proceedings were begun does not make him a proper party to such proceedings. Connable v. Chicago &c. R. Co. 60 Iowa, 27; 14 N. W. 75; Cedar Rapids &c. R. Co. v. Chicago &c. R. Co. 60 Iowa, 35; 14 N. W. 76. One who purchases land after the condemnation of a right of way across it has no claim to the compensation therefor. After condemnation the claim to compensation is a personal claim of the owner in whose favor it was assessed. Dixon v. Baltimore &c. R. Co. 1 Mackey (D. C.), 78; 3 Am. & Eng. R. Cas. 201.

[133] Hatfield v. Central R. Co. 29 N. J. L. 571; Donald v. St. Louis &c. R. Co. 52 Iowa, 411; 3 N. W. 462; Harrington v. St. Paul &c. R. Co. 17 Minn. 215; Galveston &c. R. Co. v. Pfeuffer, 56 Tex. 66. Contra, McLendon v. Atlanta &c. R. Co. 54 Ga. 293. See Pomeroy v. Chicago &c. R. Co. 25 Wis. 641.

[134] Part of this section was part of § 1025 in the original edition.

[135] Drury v. Midland R. Co. 127 Mass. 571; Carli v. Stillwater &c. R. Co. 16 Minn. 260; Indiana &c. R. Co. v. Allen, 100 Ind. 409; Paducah &c. R. Co. v. Stovall, 12 Heisk. (Tenn.) 1; Pomeroy v. Chicago &c. R. Co. 25 Wis. 641; Chicago &c. R. Co. v. Maher, 91 Ill. 312; Tenbrooke v. Jahke, 77 Pa. St. 392; Davis v. Titusville &c. R. Co. 114 Pa. St. 308; 6 Atl. 736; Central

It follows from this rule that the grantor, where there is no assignment, is the proper party in the proceedings to recover the damages. Though even where the compensation is required to precede the taking, it has been held that the construction of a railroad upon the land of another with his knowledge and without any objection on his part so far fixes the rights of the parties that the subsequent conveyance of the land carries with it no right to the damages caused by such construction.[136] But the right although it does not pass with the land is an assignable one. As we have said the proceeding must be against all persons having an interest in the land sought to be taken.[137] This would seem to include mortgagees, whether in possession,[138] or not.[139] If the statute gives the right

R. Co. v. Merkel, 32 Tex. 723; McLendon v. Atlanta &c. R. Co. 54 Ga. 293; Lewis v. Wilmington &c. R. Co. 11 Rich. L. (S. Car.) 91; Indiana &c. R. Co. v. Allen, 100 Ind. 409. See, also, Little Rock &c. R. Co. v. Greer, 77 Ark. 387; 96 S. W. 129.

[136] A mortgagee in possession is entitled to the same notice as an owner. Ballard v. Ballard Vale Co. 5 Gray (Mass.), 468; Parker, Petitioner, 36 N. H. 84. In England an equitable mortgagee is entitled to notice. Martin v. London &c. R. Co. 35 L. J. Ch. 795. Where the statute simply provides for a proceeding against the "owners" and contains no provision for the protection of the inchoate rights the company may acquire the land free from all inchoate rights by simply proceeding against those holding the present title, and rights of dower, curtesy, etc., etc., can only be urged against the compensation awarded. Moore v. New York, 4 Sandf. (N. Y.) 456; McCracken v. Hayward, 2 How. (U. S.) 608.

[137] In State v. Missouri Pac. R. Co. (Neb.) 105 N. W. 983, there was a tax lien, and the lienholder was not made a party, and the court said: "The lien of these taxes was a matter of record. It could have been easily ascertained, and could have easily been provided for. Several cases have been brought to our attention in which the courts of other states have held that upon the suggestion of the railway company the court would require taxes then existing upon the land to be paid out of the condemnation money while the same was in the hands of the court. Philadelphia &c. R. Co. v. Pennsylvania &c. R. Co. 151 Pa. 569; 25 Atl. 177. However this may be, there can be no doubt that under our statute the railway company might protect itself by making lienholders parties to the proceedings, and, if it neglects to do this, and allows the holder of the fee to obtain the entire award, it can not afterwards insist that the lienholders shall, by such proceeding, be deprived of their interest in the property."

[138] Michigan &c. R. Co. v. Barnes, 40 Mich. 383; Wilson v. European &c. R. Co. 67 Me. 358; Aspinwall v. Chicago &c. Co. 41 Wis. 474;

to compensation to the person owning the property taken at a particular time, as "when the railroad is finished," a subsequent grantee can not have the damages assessed.[140] Some of the courts hold that judgment creditors are necessary parties,[141] but other courts, with better reason, hold otherwise distinguishing between a mortgage lien and a judgment lien.[142] Vendees holding under an executory contract for the purchase of the land taken, should be parties to the proceedings,[143] as well as those who are properly designated "the owners."[144] The term "owners" includes lessees,[145]

Wooster v. Sugar River Valley R. Co. 57 Wis. 311; 15 N. W. 401; Adams v. St. Johnsbury &c. R. Co. 57 Vt. 240; South Park Comrs. v. Todd, 112 Ill. 379; North Hudson &c. R. Co. v. Booraem, 28 N. J. Eq. 450; Severin v. Cole, 38 Iowa, 463; Stewart v. Raymond R. Co. 7 S. & M. (Miss.) 568; Martin v. London &c. R. Co. L. R. 1 Eq. Cas. 145; 1 Jones Mortg. § 681. In Breed v. Eastern R. Co. 5 Gray (Mass.), 470, n, it is said that the mortgagor can recover the full amount of damages without reference to the mortgagee. And a similar holding has been made in other cases. But the courts in which this rule obtains holds that the mortgage lien in equity follows the fund which is a substitute for the land, and, that by the timely application to a court of chancery, the mortgagee may have such fund applied on his debt, although it is not due. Crane v. Elizabeth, 36 N. J. Eq. 339; McIntyre v. Easton &c. R. Co. 26 N. J. Eq. 425; Farnsworth v. Boston, 126 Mass. 1; Astor v. Hoyt, 5 Wend. (N. Y.) 603.

[139] Indiana &c. R. Co. v. Allen, 100 Ind. 409. See, also, Severin v. Cole, 38 Ia. 463; Wilson v. European &c. R. Co. 67 Me. 358; Platt v. Bright, 29 N. J. Eq. 128. But compare Schumacker v. Toberman, 56 Cal. 508; Chicago &c. R. Co. v. Shelden, 53 Kans. 169; 35 Pac. 1105. See ante, § 1003a.

[140] Lewis v. Wilmington &c. R. Co. 11 Rich. L. (S. Car.) 91.

[141] Where the statute provides that a judgment shall operate as a lien upon the lands of the defendant, a payment of the damages to such a judgment creditor amounts pro tanto, to a payment to the owner. Chicago &c. R. Co. v. Chamberlain, 84 Ill. 333.

[142] Watson v. New York &c. R. Co. 47 N. Y. 157; Gimbel v. Stolte, 59 Ind. 446; Shirk v. Thomas, 121 Ind. 147, 149; 22 N. E. 976; 16 Am. St. 381. See, also, Williams v. Hutchinson &c. R. Co. 62 Kans. 412; 63 Pac. 430; 84 Am. St. 408.

[143] Pinkerton v. Boston &c. R. Co. 109 Mass. 527; Hastings &c. R. Co. v. Ingalls, 15 Neb. 123; 16 N. W. 762; St. Louis &c. R. Co. v. Wilder, 17 Kan. 239; Colcough v. Nashville &c. R. Co. 2 Head. (Tenn.) 171. The holder of an equitable interest is entitled to compensation under a statute which provides for the payment of damages to "parties interested." Drury v. Midland R. Co. 127 Mass. 571. See, also, Anderson v. Pemberton, 89 Mo. 61; 1 S. W. 216.

[144] Vendees in possession have been held to be owners. Smith v.

life tenants,[146] reversioners,[147] heirs or devisees,[148] the owner of land

Ferris, 6 Hun (N. Y.), 553. And so have mortgagees. Dodge v. Omaha &c. R. Co. 20 Neb. 276; 29 N. W. 936; Severin v. Cole, 38 Iowa, 463; Wade v. Hennessy, 55 Vt. 207.

[145] Ante, § 1023; North Pennsylvania R. Co. v. Davis, 26 Pa. St. 238; Getz v. Philadelphia &c. R. Co. 105 Pa. St. 547; Pennsylvania R. Co. v. Eby, 107 Pa. St. 166; Telephone &c. Co. v. Forke, 2 Tex. App. Civ. Cas. 318; Storm Lake v. Iowa Falls &c. R. Co. 62 Iowa, 218; 17 N. W. 489; Colcough v. Nashville &c. R. Co. 2 Head. (Tenn.) 171; Baltimore &c. R. Co. v. Thompson, 10 Md. 76; McCauley v. Brooks, 16 Cal. 11; Rogers v. Docks Co. 34 L. J. Eq. 165; Willey v. Southeastern R. Co. 1 McN. & G. 58. Where a tenancy expires pending condemnation proceedings, the tenant can not, by holding over with the consent of the owner, acquire any right as against the condemning corporation. Schreiber v. Chicago &c. R. Co. 115 Ill. 340; 3 N. E. 427. See, Englewood &c. R. Co. v. Chicago &c. R. Co. 117 Ill. 611; 6 N. E. 684. Where the land is held by lease the compensation should be apportioned between the lessor and lessee according to the value of their respective interests. Baltimore &c. R. Co. v. Thompson, 10 Md. 76. The damage to the lessee should be ascertained by reference to the difference between the annual value of the land before and after the taking. Lawrence v. Boston, 119 Mass. 126. Lessees of land with covenants of renewal are entitled to the value of their rights under such covenants, in addition to the value of the remaining term. North Pennsylvania R. Co. v. Davis, 26 Pa. St. 238; Norwich R. Co. v. Wodehouse, 11 Beav. 382. See Alabama R. Co. v. Kenney, 39 Ala. 307. Where the tenant had a reasonable expectancy of many years' possession of the land of which she had long held possession, she was held entitled to the marketable value of such expectancy. Farlow, Ex parte, 2 B. & Ad. 341. Most cases, however, hold that a tenant can assert no rights as against the condemning corporation which he could not interpose to a notice from his landlord to quit. Reg. v. Hungerford Market Co. 4 B. & Ad. 596; Reg. v. London &c. R. Co. 10 Ad. & El. 3; Rex. v. Liverpool &c. R. Co. 4 Ad. & El. 650; Palmer &c. Market Co. Matter of, 9 Ad. & El. 463. Where a new lease has been executed to take effect when the old term ends, the tenant is entitled to the value of the new lease. Cobb v. Boston, 109 Mass. 438.

[146] Railroad Co. v. Boyer, 13 Pa. St. 497; Ross v. Elizabethtown &c. R. Co. 20 N. J. L. 230; Bentonville R. Co. v. Baker, 45 Ark. 252. The value of the life-tenant's interest is to be estimated by multiplying the net annual value of the premises by the years of the life-tenant's expectancy of life, and reducing the same by calculation to a cash basis. Pittsburgh &c. R. Co. v. Bentley, 88 Pa. St. 178.

[147] Ross v. Elizabethtown &c. R. Co. 20 N. J. L. 230; Bentonville R. Co. v. Baker, 45 Ark. 252. See, also, Charleston &c. R. Co. v. Hughes, 105 Ga. 1; 30 S. E. 972; 70 Am. St. 17.

[148] Boynton v. Peterborough &c. R. Co. 4 Cush. (Mass.) 467; Pitts-

dedicated as a street, but not accepted by the public,[149] and tenants in common,[150] or persons having any other vested interest which goes to make up the entire estate.[150a] Also, persons holding an estate in trust for another[151] and persons holding under a tax deed,[152] or by adverse possession which might ripen into an absolute title,[153]

burgh &c. R. Co. v. Swinney, 97 Ind. 586. Where the owner dies after the right of compensation has accrued, the right to compensation vests in his personal representatives. Whitman v. Boston &c. R. Co. 3 Allen (Mass.) 133; Neal v. Knox &c. R. Co. 61 Me. 298; Church v. Grand Rapids &c. R. Co. 70 Ind. 161.

[149] Pease v. Paterson &c. Traction Co. 69 N. J. L. 524; 54 Atl. 524.

[150] Bowman v. Venice &c. R. Co. 102 Ill. 459; Pittsburgh &c. R. Co. v. Hall, 25 Pa. St. 336; Columbia &c. Bridge Co. v. Geise, 34 N. J. L. 268; Watson v. Milwaukee &c. R. Co. 57 Wis. 332; 15 N. W. 468. Under the statutes of some states, it has been held that the omission to make one tenant in common a party would avoid the proceedings. Grand Rapids &c. R. Co. v. Alley, 34 Mich. 16; Phillips v. Sherman, 61 Me. 548; Morgan's Louisiana &c. R. Co. v. Bourdier, McGloin (La.), 232; Railroad Co. v. Bucher, 7 Watts (Pa.), 33.

[150a] Philadelphia &c. R. Co. v. Williams, 54 Pa. St. 103; Lexington &c. R. Co. v. McMurtry, 3 B. Mon. (Ky.) 516; Colcough v. Nashville &c. R. Co. 2 Head. (Tenn.) 171; Gerrard v. Omaha &c. R. Co. 14 Neb. 270; 15 N. W. 231; Stoneham v. London &c. R. Co. L. R. 7 Q. B. 1. See, also, Grandjean v. San Antonio (Tex. Civ. App.), 38 S. W. 837; Chehalis Co. v. Ellingson, 21 Wash. 638; 59 Pac. 485. Where compensation is assessed to but one of several owners of an estate, the presumption will be that it is his interest in the premises. Rex. v. Nottingham Water Works, 6 Ad. & El. 355. Where the statute requires the company to "make compensation to the owners or proprietors of all private lands, etc., taken, or for any loss or damage they may sustain thereby," it was held that compensation must be made to any person having a beneficial interest in the land. Lister v. Lobley, 6 Nev. & M. 340; Russell v. Shenton, 3 Q. B. 449; Chauntler v. Robinson, 4 Exch. 163. The holder of an easement is entitled to compensation for the destruction of his easement. Philadelphia &c. R. Co. v. Williams, 54 Pa. St. 103.

[151] State v. Easton &c. R. Co. 36 N. J. L. 181; Davis v. Charles River &c. R. Co. 11 Cush. (Mass.) 506; Hidden v. Davisson, 51 Cal. 138. Where one partner held property in trust for the firm, it was held proper for both to join in a petition for damages. Reed v. Hanover &c. R. Co. 105 Mass. 303. Where the railroad company institutes proceedings, it is irregular to join the cestui que trust as a party. State v. Easton &c. R. Co. 36 N. J. L. 181.

[152] Gerrard v. Omaha &c. R. Co. 14 Neb. 270; 15 N. W. 231. See, also, State v. Missouri Pac. R. Co. (Neb.) 105 N. W. 983.

[153] Winder, Ex parte, L. R. 6 Ch. Div. 696.

have likewise been held to be necessary parties.[154] One who has taken steps to acquire title to public lands under the homestead or pre-emption laws has a vested right which makes him a necessary party to the condemnation of a right of way across such lands.[155] But it has been held that the holder of a mere license not coupled with an interest is not entitled to compensation for taking the lands upon which the license is to be exercised.[156] Some of the cases hold that the husband or wife of the land-owner should be made a party, that all interests in the land may be properly adjudicated,[157] but we do not believe this to be sound doctrine, where the title is wholly in the one, for we think an inchoate right is not such a right as entitles the person possessed of it to be made a party in proceedings under the right of eminent domain.[158] If the title is doubtful, all

[154] A trespasser in possession has no such interest as to entitle him to be made a party. Rosa v. Missouri &c. R. Co. 18 Kan. 124.

[155] Red River &c. R. Co. v. Sture, 32 Minn. 95; 20 N. W. 229; Doran v. Central Pacific R. Co. 24 Cal. 245; Rosa v. Missouri &c. R. Co. 18 Kan. 124. One in possession of public lands without right can not recover compensation for anything but crops and improvements. California Northern R. Co. v. Gould, 21 Cal. 254; Doran v. Central Pac. R. Co. 24 Cal. 245; Western Pac. R. Co. v. Tevis, 41 Cal. 489; Rosa v. Missouri &c. R. Co. 18 Kan. 124; Knoth v. Barclay, 8 Colo. 300; 6 Pac. 924; Allard v. Lobau, 3 Martin (La.), N. S. 293; Lewis' Em. Dom. 330.

[156] Bird v. Great Eastern R. Co. 34 L. J. C. P. 366. And it has been held that the holder of a note secured by deed of trust on the land is not entitled to notice and has no right to attack the proceedings in an independent suit in his own name. Martin v. Dist. of Columbia, 26 App. D. C. 146.

[157] East Tennessee &c. R. Co. v. Love, 3 Head. (Tenn.) 63; Corey v. Probate Judge, 56 Mich. 524; 23 N. W. 205; Lewis' Em. Dom. Sec. 323. See, also, Colorado Cent. R. Co. v. Allen, 13 Colo. 229; 22 Pac. 605. Some authorities hold that the title to land held in fee by the husband can be divested without making the wife a party. Randall v. Texas Cent. R. Co. 63 Tex. 586; Wheeler v. Kirtland, 27 N. J. Eq. 534. See Weaver v. Gregg, 6 Ohio St. 547; 67 Am. Dec. 355. After the death of the husband, his widow is a necessary party to the condemnation of land in which her right of dower has not been otherwise divested. Columbia &c. Bridge Co. v. Geise, 34 N. J. L. 268; New Orleans &c. R. Co. v. Frederic, 46 Miss. 1; 2 Scribner Dower, Chap. 2, Sec. 3. In Colorado, it is necessary to join both husband and wife as defendants in a condemnation proceeding. Colorado &c. R. Co. v. Allen, 13 Colo. 229; 22 Pac. 605.

[158] Venable v. Wabash &c. R. Co. 112 Mo. 103; 20 S. W. 493; 18 L. R. A. 68, 71, quoting Elliott Roads and Streets, 108; Baker v. Atchison

persons claiming an interest should be made parties.[159] Proceedings in which a necessary party was not joined are not binding as to such party.[160] But, according to the weight of authority, this will not necessarily invalidate the proceedings as against those who were properly made parties.[161] Where the corporation had in good faith condemned the title of all persons of whose interest it had any knowledge, and was proceeding in good faith to build its road, it was held that a court of equity should refuse to enjoin the construc-

&c. R. Co. 122 Mo. 396; 30 S. W. 301; Chouteau v. Missouri Pac. R. Co. 122 Mo. 375; 22 S. W. 458; 30 S. W. 299; 2 Dill Municipal Corp. § 594; Mills Eminent Domain, § 71.

[159] Bentonville &c. R. Co. v. Stroud, 45 Ark. 278; Lewis' Em. Dom. § 331. See, also, McCurdy v. Chestnut Hill R. Co. 8 Weekly Notes Cas. (Pa.) 143; Wade v. Hennessy, 55 Vt. 207; Charleston &c. Co. v. Comstock, 36 W. Va. 263; 15 S. E. 69. The fact that one owner is omitted does not affect the validity of the proceedings as to those who are made parties unless the statute expressly requires all parties in interest to be joined in a single proceeding. State v. Easton &c. R. Co. 36 N. J. L. 181. In some cases the fact that proceedings were void as to one party in interest has been held to invalidate them as to all. Anderson v. Pemberton, 89 Mo. 61; 1 S. W. 216; Brush v. Detroit, 32 Mich. 43.

[160] Detroit &c. R. Co. v. Detroit, 49 Mich. 47; 12 N. W. 904; Smith v. Chicago &c. R. Co. 67 Ill. 191; Indiana &c. R. Co. v. Conness, 184 Ill. 178; 56 N. E. 402; Charleston &c. R. Co. v. Hughes, 105 Ga. 1; 30 S. E. 972; 70 Am. St. 17. Under a statute providing that, in condemnation proceedings by a telegraph company to obtain a right of way along a railroad right of way, it is sufficient to give jurisdiction if the corporation owning the easement is made a party defendant, but that only the interest of the parties before the court shall be condemned in such proceedings, it has been held that the owner of the fee, who is not a party to such proceedings, is not affected by a judgment of condemnation against the railroad company. Phillips v. Postal Tel. Cable Co. 130 N. C. 513; 41 S. E. 1022; 89 Am. St. 868, judgment reversed on rehearing, 42 S. E. 587. State v. Easton &c. R. Co. 36 N. J. L. 181; Garmoe v. Sturgeon, 65 Iowa, 147; 21 N. W. 493; Columbus &c. R. Co. v. Witherow, 82 Ala. 190; 3 So. 23; Hagar v. Brainerd, 44 Vt. 294.

[161] St. Louis &c. R. Co. v. Postal &c. Co. 173 Ill. 508; 51 N. E. 382; Indiana &c. R. Co. v. Conness, 184 Ill. 178; 56 N. E. 402; Stevens v. Norfolk, 46 Conn. 227; Houston &c. R. Co. v. Postal &c. Co. 18 Tex. Civ. App. 502; 45 S. W. 179; State v. Super. Ct. King County, 31 Wash. 445; 72 Pac. 89; 66 L. R. A. 897, and note. But see Grand Rapids &c. R. Co. v. Alley, 34 Mich. 16; Morgan's Louisiana &c. R. Co. v. Bourdier, 1 McGloin (La.), 232.

tion of the road at the suit of one not made a party if the corporation would execute a sufficient bond to insure the speedy condemnation of the complainant's interests and payment of his damages.[162] In a proceeding against an infant, it is usually necessary that he be personally served with notice, and that his interests be actively defended by a guardian ad litem appointed by the court.[163] Unless the statute provides otherwise, all persons having an interest in the land sought to be taken may be joined in a single proceeding although their interests are separate.[164] But a provision that "any number of owners, residents in the same county or circuit, may be joined in one petition," was held to impliedly forbid the joinder of those not residing in the same county or circuit.[165]

§ 1026. Parties—Amendments.—There is diversity of opinion as to the right to amend, some of the cases holding that as the proceedings are in invitum, material amendments can not be allowed,

[162] Columbus &c. R. Co. v. Witherow, 82 Ala. 190; 3 So. 23. Any considerable delay on the part of a land-owner in asserting his rights will be sufficient reason to refuse an injunction restraining the operation of the railroad across his land, after the rights of the public have intervened. Whittlesey v. Hartford &c. R. Co. 23 Conn. 421. See Richards v. Des Moines Valley R. Co. 18 Iowa, 259; Irish v. Burlington &c. R. Co. 44 Iowa, 380; Torrey v. Camden &c. R. Co. 18 N. J. Eq. 293; Stretton v. Great Western &c. R. Co. 40 L. J. Eq. 50.

[163] Hotchkiss v. Auburn &c. R. Co. 36 Barb. (N. Y.) 600; Missouri Pacific R. Co. v. Carter, 85 Mo. 448; Clarke v. Gilmanton, 12 N. H. 515. But see New Orleans &c. R. Co. v. Hemphill, 35 Miss. 17.

[164] Evergreen &c. Ass'n v. Beecher, 53 Conn. 551; 5 Atl. 353; Proprietors &c. v. Nashua &c. R. Co. 10 Cush. (Mass.) 385; Reed v. Hanover Branch R. Co. 105 Mass. 303; Colcough v. Nashville &c. R. Co. 2 Head (Tenn.), 171; McKee v. St. Louis, 17 Mo. 184; Hot Springs R. Co. v. Tyler, 36 Ark. 205; Railroad v. Boyer, 13 Pa. St. 497; Getz v. Philadelphia &c. R. Co. 105 Pa. St. 547; Goodwin v. Gibbs, 70 Me. 243; Webster v. Holland, 58 Me. 168; Troy &c. R. Co. v. Cleveland, 6 How. Pr. (N. Y.) 238. Persons who are jointly interested in the land should be joined as defendants. East Saginaw &c. R. Co. v. Benham, 28 Mich. 459; Grand Rapids &c. R. Co. v. Alley, 34 Mich. 16; Southern Pacific R. Co. v. Wilson, 49 Cal. 396; Ashby v. Eastern R. Co. 5 Met. (Mass.) 368; 38 Am. Dec. 426, and note; Whitcher v. Benton, 48 N. H. 157; 97 Am. Dec. 97.

[165] Quincy &c. R. Co. v. Kellogg, 54 Mo. 334. See as to defendants, Kansas City Interurban R. Co. v. Nelson, 193 Mo. 297; 91 S. W. 1036.

but other cases take a more liberal view and allow amendments.[166] Thus it has been held that the proceedings may be amended at any time upon cause shown,[167] either by the addition of new parties,[168] or by discontinuing as to those found to have no interests.[169] Where there is a change of interest the company acquiring the interest may be substituted as petitioner.[170] The tendency of the modern cases is to liberally extend the right to make amendments, and this, we think, is the true doctrine.[171] The right to amend should not, however, be so extended as to work injustice to a party by unjustly delaying proceedings or depriving him of reasonable opportunity to prepare for trial.[172]

§ 1027. Effort to agree.—In most of the states railroad companies are only authorized to resort to an assessment of the damages for land taken under the power of eminent domain after an ineffectual attempt to agree upon a price for its purchase. The decisions upon

[166] Littlefield v. Boston &c. R. Co. 65 Me. 248; Colorado &c. R. Co. v. Allen, 13 Colo. 229; 22 Pac. 605.

[167] Chicago &c. R. Co. v. Gates, 120 Ill. 86; 11 N. E. 527; Davidson v. Boston &c. R. Co. 3 Cush. (Mass.) 91; New York &c. R. Co. In re, 26 Hun (N. Y.), 194; Bowman v. Venice &c. R. Co. 102 Ill. 459. See, generally, Quincy &c. R. Co. v. Kellogg, 54 Mo. 334; Missouri Pacific R. Co. v. Wilson, 45 Mo. App. 1; Wood v. Commissioners, 122 Mass. 394; Fitch v. Stevens, 2 Metc. (Mass.) 505.

[168] New York &c. R. Co. Matter of, 26 Hun (N. Y.), 194; Wood v. Comrs. of Bridges, 122 Mass. 394.

[169] Missouri Pac. R. Co. v. Carter, 85 Mo. 448.

[170] California &c. R. Co. v. Hooper, 76 Cal. 404; 18 Pac. 599. See, generally, Rochester &c. R. Co. In re, 54 Hun (N. Y.), 634; 26 N. Y. S. 753.

[171] The text is quoted with approval in Houston &c. R. Co. v. Postal Tel. &c. Co. 18 Tex. Civ. App. 502; 45 S. W. 179, 182.

[172] Midland &c. R. Co. v. Smith, 109 Ind. 488; 9 N. E. 474; Boyd v. Negley, 40 Pa. St. 377; Pennsylvania &c. R. Co. v. Bunnell, 81 Pa. St. 414; Young v. Laconia, 59 N. H. 534; Grand Junction &c. R. Co. v. County Com. 14 Gray (Mass.), 553; Eslich v. Mason City &c. R. Co. 75 Iowa, 443; 39 N. W. 700; Southwestern &c. R. Co. v. Hickory &c. Ditch Co. 18 Colo. 489; 33 Pac. 275; Contra Costa &c. R. Co. v. Moss, 23 Cal. 323; Windham v. Litchfield, 22 Conn. 226; Prospect &c. R. Co. Matter of, 67 N. Y. 371; Coolman v. Fleming, 82 Ind. 117; Chicago &c. R. Co. v. Hunter, 128 Ind. 213; 27 N. E. 477. But a petition can not be so amended as to bring the proceedings under a statute different from that under which they were commenced. Peoria &c. R. Co. v. Black, 58 Ill. 33.

this subject are numerous and not entirely harmonious.[173] In some of the states the statutes expressly require the petition for such an assessment to show that the company has been unable to acquire title to the land sought, and the reason of its inability to do so, and under such a statute the reason should be stated in the petition.[174] By some of the courts it is held that inability to agree is a jurisdictional fact in the absence of which the court can not entertain a proceeding to condemn property,[175] but there are decisions asserting

[173] Wilkinson v. St. Louis &c. Co. 102 Mo. 130; 14 S. W. 177; Oregon &c. R. Co. v. Oregon &c. Co. 3 Ore. 178; Reed v. Ohio &c. R. Co. 126 Ill. 48; 17 N. E. 807; 36 Am. & Eng. R. Cas. 234; Allen v. Wilmington &c. R. Co. 102 N. C. 381; 9 S. E. 4; Grand Rapids &c. R. Co. v. Weiden, 70 Mich. 390; 38 N. W. 294; Chicago &c. R. Co. v. Young, 96 Mo. 39; 8 S. W. 776; New York &c. R. Co. v. Godwin, 12 Abb. Pr. N. S. (N. Y.) 21; Neal v. Pittsburgh &c. R. Co. 2 Grant (Pa.), 137; Council Bluffs &c. R. Co. v. Bentley, 62 Iowa, 446; 17 N. W. 668; 20 Am. & Eng. R. Cas. 401; Fort Street &c. Co. v. Jones, 83 Mich. 415; 47 N. W. 349; State v. National Docks &c. Co. 55 N. J. L. 194; 26 Atl. 145; Swinney v. Fort Wayne &c. R. Co. 59 Ind. 205; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 116 Ind. 578; 19 N. E. 440; 37 Am. & Eng. R. Cas. 430; Hickory v. Southern R. Co. 137 N. C. 189; 49 S. E. 202; Marquette &c. R. Co. v. Longyear, 133 Mich. 94; 94 N. W. 670; 10 Det. Leg. N. 111; Minneapolis &c. R. Co. v. Chicago &c. R. Co. 116 Iowa, 681; 88 N. W. 1082; Suburban R. Co. v. Metropolitan &c. El. R. Co. 193 Ill. 217; 61 N. E. 1090; Sullivan v. Missouri &c. R. Co. 29 Tex. Civ. App. 429; 68 S. W. 745.

[174] Marsh, Matter of, 71 N. Y. 315.

[175] Chicago &c. R. Co. v. Chamberlain, 84 Ill. 333; Reed v. Ohio &c. R. Co. 126 Ill. 48; 17 N. E. 807; Oregon R. &c. Co. v. Oregon Real Estate Co. 10 Ore. 444; Ells v. Pacific R. Co. 51 Mo. 200; Kansas City &c. R. Co. v. Campbell 62 Mo. 585; Powers v. Hazelton &c. R. Co. 33 Ohio St. 429; Reed v. Ohio &c. R. Co. 126 Ill. 48; 17 N. E. 807; Doughty v. Somerville &c. R. Co. 21 N. J. L. 442; Coster v. New Jersey R. Co. 23 N. J. L. 227; Lincoln v. Colusa Co. 28 Cal. 662; New York &c. R. Co. Matter of, 62 Barb. (N. Y.) 85; Adams v. Saratoga &c. R. Co. 10 N. Y. 328; Williams v. Hartford &c. R. Co. 13 Conn. 397; Reitenbaugh v. Chester Valley R. Co. 21 Pa. St. 100; Whisler v. Drain Coms. 40 Mich. 591; Lockport &c. R. Co. Matter of, 77 N. Y. 557, 563; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 116 Ind. 578; 19 N. E. 440. See, also, South Dakota Cent. R. Co. v. Chicago &c. R. Co. 141 Fed. 578. In a case where a court in condemnation proceedings by a railway company decided on the issue whether, before the commencement of the proceedings, the company had made a bona fide effort to acquire the land by offering a fair price therefor, that on the evidence offered it was a case for the jury, but that the land-owner might later offer ad-

a different doctrine.[176] In some states where an attempt to agree is made necessary, proceedings in which no attempt to agree was shown, have been held void, even upon a collateral attack.[177] But it has been held that the fact that there was no failure to agree as alleged in the petition was not ground for an injunction against entry thereunder since the land-owner had a perfect remedy at law by trial in the condemnation proceeding.[178] And it is held that the effort to agree must extend to all the matters sought to be settled by the condemnation proceedings.[179] The general rule is that the petition must allege an unsuccessful attempt to agree.[180] It is generally

ditional evidence to perfect his record, it was held that the refusal of another judge hearing the case to hear such additional testimony did not oust the court of its jurisdiction to impanel the jury, and that the decision of the court that it was a proper case for the jury was a decision that the company had made a bona fide effort to acquire the land necessary as a condition precedent for the impaneling of a jury. Detroit &c. R. Co. v. Hall, 133 Mich. 302; 94 N. W. 1066.

[176] It was held in Illinois that such a provision in a statute was directory. Hall v. People, 57 Ill. 307. And in Massachusetts and Tennessee, it has been held that under the statutes in question, one of the parties could elect not to agree, and begin proceedings forthwith. Aetna Mills v. Waltham, 126 Mass. 422; Bigelow v. Mississippi Central &c. R. Co. 2 Head (Tenn.), 624. See Chicago &c. R. Co. v. Randolph &c. 103 Mo. 451; 15 S. W. 437. In Farnsworth v. Lime Rock R. Co. 83 Me. 440; 22 Atl. 373, it is held that it is not fatal to fail to allege a failure to agree as it will be presumed. See, also, Texas Midland R. Co. v. Southwestern Tel. Co. 24 Tex. Civ. App. 198; 58 S. W. 152.

[177] Whitely v. Platte County, 73 Mo. 30; Cunningham v. Pacific R. Co. 61 Mo. 33; Moses v. St. Louis Sectional Dock Co. 84 Mo. 242; Adams v. Saratoga &c. R. Co. 10 N. Y. 328. Contra, Ney v. Swinney, 36 Ind. 454. See Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 116 Ind. 578; 19 N. E. 440; Borland v. Mississippi &c. R. Co. 8 Iowa, 148; Oregonian &c. R. Co. v. Hill, 9 Ore. 377; Southern Ill. &c. Co. v. Stone, 194 Mo. 175; 92 S. W. 475.

[178] St. Louis &c. R. Co. v. Southwestern Tel. Co. 121 Fed. 276.

[179] Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 116 Ind. 578; 19 N. E. 440.

[180] Lockport &c. R. Co. Matter of, 77 N. Y. 557; Contra Costa R. Co. v. Moss, 23 Cal. 323; O'Hara v. Pennsylvania R. Co. 25 Pa. St. 445; Darlington v. United States, 82 Pa. St. 382; 22 Am. R. 766; Portland &c. Co. v. Bobb, 88 Ky. 226; 10 S. W. 794; Oregon R. &c. Co. v. Oregon &c. Co. 10 Oreg. 444. In Pennsylvania R. Co. v. Porter, 29 Pa. St. 165, the petitioner was permitted to amend its petition by inserting an allegation of inability to agree upon the compensation. See Cunningham v. Pacific &c. R. Co. 61 Mo. 33; Philadelphia &c. Co. In re,

sufficient to aver the inability to agree in the language of the statute,[181] and it is not necessary to set forth, in specific detail, what has been done.[182] The general averment of an inability "to acquire the right of way from said owners by voluntary grant or purchase" was held to be a substantial compliance with a statute authorizing condemnation only in case the compensation could not be agreed upon.[183] And under a similar statute an allegation that the parties were unable to agree as to the right of way was held sufficient after verdict.[184] The averment of an effort to agree should, however, be positive and not merely by way of recital.[185] Proof must be made of the attempt to agree in like manner with the other facts averred,[186] though it has been said that a failure to traverse the allegation of such an attempt waived the necessity for proof upon this point.[187] The affidavit of an agent of the corporation has been held sufficient prima

7 Phila. 461; Kansas City &c. R. Co. v. Campbell, 62 Mo. 585; St. Louis &c. R. Co. v. Lewright, 113 Mo. 660; 21 S. W. 210. See Toledo &c. R. Co. v. Detroit &c. R. Co. 62 Mich. 564; 29 N. W. 500; 4 Am. St. 875; 28 Am. & Eng. R. Cas. 272; Gear v. Dubuque &c. R. Co. 20 Iowa, 523; 89 Am. Dec. 550; Oregon &c. R. Co. v. Oregon &c. Co. 10 Ore. 444.

[181] Cory v. Chicago &c. R. Co. 100 Mo. 282; 13 S. W. 346; Lockport &c. R. Co. Matter of, 77 N. Y. 557; Reitenbaugh v. Chester Valley R. Co. 21 Pa. St. 100.

[182] Suburban R. T. Co. Matter of, 38 Hun (N. Y.), 553; Hannibal &c. R. Co. v. Muder, 49 Mo. 165; United States v. Oregon R. &c. Co. 16 Fed. 524. See, also, St. Louis &c. R. Co. v. Postal Tel. Co. 173 Ill. 508; 51 N. E. 382; Colorado Fuel &c. Co. v. Four Mile R. Co. 29 Colo. 90; 66 Pac. 902; Cincinnati &c. R. Co. v. Bay City &c. R. Co. 106 Mich. 473; 64 N. W. 471.

[183] Bowman v. Venice &c. R. Co. 102 Ill. 459; Chicago &c. R. Co. v. Chamberlain, 84 Ill. 333.

[184] Oregon R. &c. Co. v. Oregon &c. Co. 10 Ore. 444.

[185] Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 116 Ind. 578; 19 N. E. 440.

[186] Powers v. Hazelton &c. R. Co. 33 Ohio St. 429; Williams v. Hartford &c. R. Co. 13 Conn. 397; Gilmer v. Lime Point, 19 Cal. 47; Oregon R. &c. Co. v. Oregon &c. R. Co. 10 Ore. 444; Schnectady R. Co. v. Lyons, 41 Misc. 506; 85 N. Y. S. 40; Marsh, Matter of, 71 N. Y. 315. But see Southern Ill. &c. Co. v. Stone, 194 Mo. 175; 92 S. W. 475.

[187] Ward v. Minnesota &c. R. Co. 119 Ill. 287; 10 N. E. 365; President &c. v. Diffebach, 1 Yates (Pa.), 367. In Cory v. Chicago &c. R. Co. 100 Mo. 282; 13 S. W. 346, the plaintiff sought to set aside as void condemnation proceedings based upon a petition which contained the averment that the company "can not agree with the defendants as to the amount of compensation to be paid." The court said: "This averment conformed to the general law, was sufficient, and it was not necessary to sustain this averment of

facie evidence that it could not agree with the land-owner.[188] The attempt to agree must be made in good faith, but an attempt to buy at what the company deems a reasonable price has been held sufficient.[189] And where no answer was returned to either of two propositions submitted to the land-owner, the company was permitted to condemn.[190] Where several estates in the same land were held by different persons it was held that an inability to agree with the owner of the fee was sufficient.[191] So it has been held that an effort need not be made to obtain the consent of the mortgagee where the owner of the premises has refused his consent.[192]

§ 1028. Petition or articles of appropriation.—The pleading on the part of a party seeking to secure the condemnation of land is usually called a petition, but in some states it is called the "article of appropriation." We shall use the term "petition" as designating the pleading or instrument filed by a party who seeks to secure the condemnation of private property. According to some of the authorities a petition for the assessment of damages constitutes a complaint, the sufficiency of which may be tested as in ordinary actions,[193] but

the petition by oral testimony; nor was it competent for the plaintiff to nullify the effect of the record by denying the truth of such assertion."

[188] Doughty v. Somerville R. Co. 21 N. J. L. 442. As to proving an effort to agree, see Ward v. Minnesota &c. R. Co. 119 Ill. 287; 10 N. E. 365; Bridwell v. Gate City &c. Co. (Ga.) 56 S. E. 624; Rochester &c. R. Co. In re, 110 N. Y. 119; 17 N. E. 678; Niagara &c. R. Co. In re, 108 N. Y. 375; 15 N. E. 429; Fort Street &c. Co. v. Jones, 83 Mich. 415; 47 N. W. 349; West Virginia &c. Co. v. Volcanic &c. R. 5 W. Va. 382. See Coster v. New Jersey &c. R. Co. 23 N. J. L. 227.

[189] Prospect Park &c. R. Co. Matter of, 67 N. Y. 371.

[190] West Virginia Trans. Co. v. Volcanic Oil &c. Co. 5 W. Va. 382.

[191] Toledo &c. R. Co. v. Dunlap, 47 Mich. 456; 11 N. W. 271. See, also, Thomas v. St. Louis &c. R. Co. 164 Ill. 634; 46 N. E. 8.

[192] Coles v. Midland Tel. &c. Co. 67 N. J. L. 490; 51 Atl. 448.

[193] Church v. Grand Rapids &c. R. Co. 70 Ind. 161. In Denver &c. R. Co. v. Lamborn, 8 Colo. 380; 8 Pac. 582, it is said that proceedings to condemn land are special proceedings, and are governed by different rules of pleading and practice. The time and way to object for want of proper title, parties, etc., is by exceptions to the report of the appraisers when it is filed. Camp v. Coal Creek &c. R. Co. 11 Lea (Tenn.), 705. A petition for condemnation for a right of way, containing an accurate description of the property, and alleging the authority of the petitioner to take the property, the names of the occupants and the owners, and the pur-

additional pleadings are not contemplated under many of the statutes, and it has been held that if any are filed, they may be stricken from the files on motion.[194] The general rule is that until a proper petition is filed, the court has no power to take any action in the premises.[195] Jurisdictional facts must be averred.[196] Proceedings to condemn property under the power of eminent domain are purely statutory, and the statute must be strictly pursued,[197] and the fact that all preliminary requirements of the statute have been met should be stated in the petition,[198] except where the statute pro-

pose of the taking, and that petitioner has located its line in good faith, is a sufficient compliance with Rev. St. § 1544. Florida Cent. &c. R. Co. v. Bell, 43 Fla. 319; 31 So. 259.

[194] Smith v. Chicago &c. R. Co. 105 Ill. 511; Johnson v. Freeport &c. R. Co. 111 Ill. 413. See, also, Fayetteville &c. R. Co. v. Hunt, 51 Ark. 330; 11 S. W. 418; St. Louis &c. R. Co. v. Postal &c. Co. 173 Ill. 508; 51 N. E. 382; New Orleans &c. R. Co. v. McNeely, 47 La. Ann. 1298; 17 So. 798; Sheldon v. Minneapolis &c. R. Co. 29 Minn. 318; 13 N. W. 134. But see Reed v. Ohio &c. R. Co. 126 Ill. 48; 17 N. E. 807; Decatur v. Grand Rapids &c. R. Co. 146 Ind. 577; 45 N. E. 793; Mellichar v. Iowa City 116 Ia. 390; 90 N. W. 86. In some jurisdictions provision is made for filing written objections which may not only operate as a demurrer but may raise certain issues of fact to be determined before appraisers are appointed. Morrison v. Indianapolis &c. R. Co. (Ind.) 76 N. E. 961. And a cross-petition has been held proper in some cases. Mix v. Lafayette &c. R. Co. 67 Ill. 319; Port Huron &c. R. Co. v. Voorheis, 50 Mich. 506; 15 N. W. 882. Under the Illinois statute, where the interests of the defendant are not accurately stated in the petition, a cross-petition may be filed, setting out fully his interests. Johnson v. Freeport &c. R. Co. 116 Ill. 521; 6 N. E. 211. An answer describing land and claiming damage thereto was held to answer the purpose of a cross-petition. Chicago &c. R. Co. v. Hopkins, 90 Ill. 316. At whatever stage of the proceedings additional parties are made defendants to such a proceeding, they may, after notice to appear, contest the appropriation. Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812.

[195] Smith v. Chicago &c. R. Co. 105 Ill. 511; Toledo &c. R. Co. v. East Saginaw &c. R. Co. 72 Mich. 206; 40 N. W. 436; Flint &c. R. Co. v. Board &c. 72 Mich. 234; 40 N. W. 448.

[196] Durham &c. R. Co. v. Richmond &c. R. Co. 106 N. Car. 16; 10 S. E. 1041; 44 Am. & Eng. R. Cas. 168. See New York &c. R. Co. In re, 62 Barb. (N. Y.) 85; Norton v. Wallkill &c. R. Co. 61 Barb. (N. Y.) 476; St. Louis &c. R. Co. v. Lewright, 113 Mo. 660; 21 S. W. 210; Trester v. Missouri Pac. R. Co. 33 Neb. 171; 49 N. W. 1110.

[197] Colorado Cent. R. Co. v. Allen, 13 Colo. 229; 22 Pac. 605.

[198] Colorado Cent. R. Co. v. Al-

vides what the petition shall contain. It is competent for the legislature to prescribe what the petition shall contain, and if it conforms to the statutory requirement it is sufficient. A substantial compliance with the requirements of the statute, as to the form and wording of the petition, is sufficient,[199] but it is held that the omission of any averment required by the statute will render it fatally defective.[200] The allegations of the petition should be positive and not merely by way of recital,[1] and the facts set forth must be definitely stated.[2] The petition must be properly signed, and where the statute requires verification it must be verified by the proper party.[3] A failure to give the names of the owners in the petition has been held to be cause for demurrer,[4] but this defect

len, 13 Colo. 229; 22 Pac. 605; Durham &c. R. Co. v. Richmond &c. R. Co. 106 N. Car. 16; 10 S. E. 1041; Front &c. R. Co.'s Petition, 1 Pennew. (Del.) 370; 41 Atl. 200.

[199] Townsend v. Chicago &c. R. Co. 91 Ill. 545; Bowman v. Venice &c. R. Co. 102 Ill. 459; Indianapolis &c. R. Co. v. Christian, 93 Ind. 360; Stevens v. Board of Supervisors, 41 Iowa, 341. Where the statute authorized the land-owner to petition for the assessment of damages, a general statement of the fact that the railroad "angled" across his land was held sufficiently definite to authorize the assessment of damages for land upon which a railroad had already been constructed. Martinsville &c. R. Co. v. Bridges, 6 Ind. 400.

[200] Grove St. In re, 61 Cal. 438, (Failure to aver that "public interests required" the improvement.) Reed v. Ohio &c. R. Co. 126 Ill. 48; 17 N. E. 807; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 116 Ind. 578; 19 N. E. 440. (Failure to aver an inability to agree.) Powers v. Irish, 23 Mich. 429; Hays v. Campbell, 17 Ind. 430. (Failure to state names of owners of land taken.) Durham &c. R. Co. v. Richmond &c. R. Co. 106 N. Car. 16; 10 S. E. 1041. (Failure to allege filing of map, giving notice, etc.) Colorado Cent. R. Co. v. Allen, 13 Colo. 229; 22 Pac. 605. (No averment of value of property sought to be taken.) See United States v. Oregon R. &c. Co. 16 Fed. 524.

[1] Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 116 Ind. 578; 19 N. E. 440.

[2] Hays v. Campbell, 17 Ind. 430.

[3] Harvey v. Lloyd, 3 Pa. St. 331; Metropolitan &c. R. Co. In re, 7 N. Y. S. 708; New York &c. R. Co. In re, 33 Hun (N. Y.), 148. Verification by attorney held sufficient. St. Lawrence &c. R. Co. In re, 133 N. Y. 270; 31 N. E. 218. As to signature and execution by a corporation or its agent, see Detroit v. Beecher, 75 Mich. 454; 42 N. W. 986; 4 L. R. A. 813; Trester v. Missouri Pac. R. Co. 33 Neb. 171; 49 N. W. 1110; Coles v. Midland &c. Co. 67 N. J. L. 490; 51 Atl. 448; Metropolitan El. R. Co. In re, 26 N. Y. St. 968; 7 N. Y. S. 707; Reitenbaugh v. Chester Valley R. Co. 21 Pa. St. 100.

[4] Morton v. Franklin Co. 62 Me.

may be cured by amendment.[5] It has been held sufficient to give the names and residences of a number of land-owners, with a description of the property of each, in schedules attached to the petition.[6] If the name of one joint-owner is contained in the petition it is sufficient to give the court jurisdiction, though where the rights of one, in any material sense, depend upon the disposition of the case as to the others, each party would have a right to insist on all the parties being brought before the court before proceeding to a trial.[7] Where the petition avers ownership on the part of a defendant he need offer no proof of his title,[8] but the character of his estate may be inquired into,[9] and it has been held that naming a person as a respondent in proceedings for the condemnation of land is an admission of his title, unless it is expressly denied.[10]

§ 1029. Contents of the petition.—In many of the states the

455. See Hill v. Glendon &c. R. Co. 113 N. Car. 259; 18 S. E. 171; Peoria &c. R. Co. v. Laurie, 63 Ill. 264; Union &c. Co. v. Frederick, 117 Mo. 138; 21 S. W. 1118; 57 Am. & Eng. R. Cas. 656; California &c. R. Co. v. Colton &c. Co. (Cal.) 2 Pac. 38.

[5] Russell v. Turner, 62 Me. 496; Washington Ice Co. v. Lay, 103 Ind. 48; 2 N. E. 222; Bowman v. Venice &c. R. Co. 102 Ill. 459.

[6] Board of Commissioners, Matter of, 52 N. Y. 131.

[7] Bowman v. Venice &c. R. Co. 102 Ill. 459. Including as joint owners, persons having no interest in the property is immaterial, if the true owners are named. Boyd v. Negley, 40 Pa. St. 377. See, generaly, as to naming owners, Toledo &c. R. Co. v. Munson, 57 Mich. 42; 23 N. W. 455; Thomas v. St. Louis &c. R. Co. 164 Ill. 634; 46 N. E. 8.

[8] Selma R. Co. v. Camp, 45 Ga. 180; Norristown Turnpike Co. v. Burket, 26 Ind. 53; Peoria &c. R. Co. v. Laurie, 63 Ill. 264; St. Louis &c. R. Co. v. Teters, 68 Ill. 144; St. Paul &c. R. Co. v. Matthews, 16 Minn. 341; Rippe v. Chicago &c. R. Co. 23 Minn. 18; Crise v. Auditor, 17 Ark. 572. It is said that in all cases where the landowner seeks to recover damages for land not taken, he must establish his ownership of the land. St. Paul &c. R. Co. v. Matthews, 16 Minn. 341.

[9] International &c. R. Co. v. Benitos, 59 Tex. 326. The owner is at liberty to show that his title is different from that stated in the petition. Brisbine v. St. Paul &c. R. Co. 23 Minn. 114. Unless the statute provides for submitting the question of title to them, commissioners to assess damages, can not pass upon questions of title. Spring Valley Water Works v. San Francisco, 22 Cal. 434. As to statement of title in petition, see Sanitary Dist. v. Pittsburgh &c. R. Co. 216 Ill. 575; 75 N. E. 248.

[10] Golden &c. R. Co. v. Haggart, 9

petition must state that the taking is necessary for public use,[11] and this, in effect, is required in most of the states.[12] It seems to us that even where there is no statute requiring the petition to show that the land is needed for a public use this fact must be alleged, but that the allegation is sufficient if it shows that the land is required for legitimate railroad purposes. The purpose for which property is sought to be taken should be stated that it may be known whether such purpose is within the objects for which land may be taken by authority of the particular statute under which the proceeding is brought.[13] The authority of corporations to take land under the eminent domain should appear in the petition either by reference to the laws under which it was incorporated[14] or by other aver-

Colo. 346; 12 Pac. 215; Chicago &c. R. Co. v. Hopkins, 90 Ill. 316. See, also, Flint &c. R. Co. v. Detroit &c. R. Co. 64 Mich. 350; 31 N. W. 281.

[11] Valley R. Co. v. Bohm, 34 Ohio St. 114; Atchison &c. R. Co. v. Lyon, 24 Kan. 745; South Carolina &c. R. Co. v. Blake, 9 Rich. L. (S. Car.) 228; Grand Rapids &c. R. Co. v. Van Drielo, 24 Mich. 409; Smith v. Chicago &c. R. Co. 105 Ill. 511; Grove St. In re, 61 Cal. 438. See Colville v. Judy, 73 Mo. 651; Helena v. Harvey, 6 Mont. 114; 9 Pac. 903. The petition must be broad enough to authorize the condemnation for the use desired, for the petitioner will be confined to the use specified in the petition. Barnes v. Chicago &c. R. Co. (Tex. Civ. App.), 33 S. W. 601.

[12] In Illinois the statute requires the petition to set forth "the purpose for which said property is sought to be taken," and from this the court is required to judge of the necessity of taking the property, and of the public nature of the use for which it is sought to be taken. Smith v. Chicago &c. R. Co. 105 Ill. 511. See, also, Valley R. Co. v. Bohm, 34 Ohio St. 114; Broadway &c. R. Co. Matter of, 73 Hun (N. Y.), 7; 25 N. Y. S. 1080. But as to what is sufficient, see Fletcher v. Chicago &c. R. Co. 67 Minn. 339; 69 N. W. 1085; Mobile &c. R. Co. v. Postal Tel. &c. Co. 120 Ala. 21; 24 So. 408; Clarke v. Chicago &c. R. Co. 23 Neb. 613; 37 N. W. 484. In Minnesota and North Carolina, the public interest in the proposed improvement must be established by proof at the hearing. Gen. Stat. 1891, Minn. § 2477; Code, 1883, N. Car. § 1945. In California it is held that the petition need not contain a statement that the proposed location is compatible with the greatest public good and the least private injury is required. San Francisco &c. R. Co. v. Leviston, 134 Cal. 412; 66 Pac. 473.

[13] New York Central &c. Co. Matter of, 5 Hun (N. Y.), 86; Valley Railway Co. v. Bohm, 34 Ohio St. 114.

[14] Atkinson v. Marietta &c. R. Co. 15 Ohio St. 21. See, also, Illinois Cent. R. Co. v. Chicago, 138 Ill. 453; 28 N. E. 740; Hartford &c. R. Co. v. Wagner, 73 Conn. 506; 48 Atl. 218; Brinkerhoff v. Newark &c.

ments. But in New Jersey it is not necessary to set out that the borough consented to the location of the route.[15] In some states the petitioner may, by leave of court, amend the description contained in his petition, and the writ issued thereon for the assessment of damages.[16] If only a general description is required by statute, the courts can not require more,[17] but there should always be a reasonably accurate description of the land sought to be seized.[18] That is certain which can be made certain by references contained in the petition.[19] Stating the particular eighty acres through which the

Traction Co. 66 N. J. L. 478; 49 Atl. 812. Commissioners appointed in pursuance to such a petition have no authority to pass upon the corporate existence of the petitioner. Schroeder v. Detroit &c. R. Co. 44 Mich. 387; 6 N. W. 872.

[15] Brinkerhoff v. Newark &c. Traction Co. 66 N. J. L. 478; 49 Atl. 812.

[16] Hunt v. New York &c. R. Co. 99 Ind. 593; Midland R. Co. v. Smith, 109 Ind. 488; 9 N. E. 474.

[17] Wright v. Wilson, 95 Ind. 408.

[18] California &c. R. Co. v. Hooper, 76 Cal. 404; 18 Pac. 599; Chicago &c. R. Co. v. Chicago, 132 Ill. 372; 23 N. E. 1036; Prather v. Jeffersonville &c. R. Co. 52 Ind. 16; Manistee &c. R. Co. v. Fowler, 73 Mich. 217; 41 N. W. 261; Bay City &c. R. Co. v. Hitchcock, 90 Mich. 533; 51 N. W. 808; Ames v. Union Co. 17 Ore. 600; 22 Pac. 118; 27 Am. & Eng. Corp. Cas. 60; O'Hara v. Pennsylvania &c. R. Co. 25 Pa. St. 445; Pennsylvania &c. R. Co. v. Porter, 29 Pa. St. 165; Parker v. Fort Worth &c. R. Co. 84 Tex. 333; 19 S. W. 518; Strang v. Beloit &c. R. Co. 16 Wis. 635; Detroit &c. R. Co. v. Gartner, 95 Mich. 318; 54 N. W 946; Metropolitan &c. R. Co. v. Dominick, 55 Hun (N. Y.), 198; 8 N. Y. S. 151; St. Louis &c. R. Co. v. Lewright, 113 Mo. 660; 21 S. W. 210; State v. Hudson &c. R. Co. 38 N. J. L. 548; West v. West &c. R. Co. 61 Miss. 536; Sheldon v. Minneapolis &c. R. Co. 29 Minn. 318; 13 N. W. 134; Atchison &c. R. Co. v. Boerner, 34 Neb. 240; 51 N. W. 842; 33 Am. St. 637. See, also, San Francisco &c. R. Co. v. Gould, 122 Cal. 601; 55 Pac. 411; Omaha &c. R. Co. v. Rickards, 38 Neb. 847; 57 N. W. 739; Houston &c. R. Co. v. Postal &c. Co. 18 Tex. Civ. App. 502; 45 S. W. 179, 181 (citing text).

[19] Quincy &c. R. Co. v. Kellogg, 54 Mo. 334; Miller v. Porter, 71 Ind. 521; Lewis' Em. Dom. (2d ed.) § 350; Illinois Cent. R. Co. v. Lostant, 167 Ill. 85; 47 N. E. 62; Suver v. Chicago &c. R. Co. 123 Ill. 293; 14 N. E. 12. In a petition and warrant for the assessment of damages occasioned by one railroad building its road across the road of another, the place injured was described as a "part of the land and bridge heretofore held and occupied by the petitioners, for railroad purposes, measuring about five rods in length and forty feet in width and laying a little west of the draw in their bridge from Charleston to Somerville, and nearly contiguous thereto, with a reference added to the field location and actual construction of their road. Grand Junc-

road would run and the general direction it would follow, with a reference to a map filed with the petition was held a sufficient description.[20] Where a petition describes three different surveys and locations of a railroad, without designating which one it seeks to condemn, it has been held to be a nullity,[21] but we doubt the soundness of this decision, for we think such proceeding could not be assailed collaterally, although the petition would be insufficient as against a direct assault. It is held that a description by reference to the map and survey on file in the county register's office is not sufficient.[22] Where

tion &c. R. Co. v. County Comrs. 14 Gray (Mass.), 553. See California &c. R. Co. v. Southern &c. R. Co. 67 Cal. 59; 7 Pac. 123; Marion &c. R. Co. v. Ward, 9 Ind. 123; Cleveland &c. R. Co. v. Prentice, 13 Ohio St. 373; Bennett, Ex parte, 26 S. Car. 317; 2 S. E. 389; Ohio River &c. R. Co. v. Harness, 24 W. Va. 511; London v. Sample &c. Co. 91 Ala. 606; 8 So. 281.

[20] Kansas City &c. R. Co. v. Story, 96 Mo. 611; 10 S. W. 203; Cory v. Chicago &c. R. Co. 100 Mo. 282; 13 S. W. 346; 44 Am. & Eng. R. Cas. 183; Cincinnati &c. R. Co. v. Bay City &c. R. Co. 106 Mich. 473; 64 N. W. 471; State v. Cent. N. J. &c. Co. 53 N. J. L. 341; 21 Atl. 460; 11 L. R. A. 664; Stillwater &c. R. Co. v. Slade, 36 App. Div. (N. Y.) 587; 55 N. Y. S. 966. Aiding description by reference to maps and plats. Cory v. Chicago &c. R. Co. 100 Mo. 282; 13 S. W. 346; 44 Am. & Eng. R. Cas. 183; Kansas City &c. R. Co. v. Story, 96 Mo. 611; 10 S. W. 203; St. Louis &c. R. Co. v. Fowler, 113 Mo. 458; 20 S. W. 1069; New York &c. R. Co. In re, 70 N. Y. 191; Fremont &c. R. Co. v. Mattheis, 35 Neb. 48; 52 N. W. 698; Vail v. Morris &c. R. Co. 21 N. J. L. 189. Construction of statutes requiring maps, plans or profiles to be filed. Chicago &c. R. Co. v. Chicago &c. R. Co. 112 Ill. 589; Meriam v. Brown, 128 Mass. 391; Jacksonville &c. R. Co. v. Adams, 28 Fla. 631; 10 So. 465; 14 L. R. A. 533; Morris &c. Co. v. Central R. Co. 16 N. J. Eq. 419; South Brooklyn &c. R. Co. In re, 50 Hun (N. Y.), 405; 2 N. Y. S. 613; San Francisco &c. R. Co. v. Mahoney, 29 Cal. 112; Wheeling &c. R. Co. v. Camden &c. Co. 35 W. Va. 205; 13 S. E. 369; Chicago &c. R. Co. v. Abbott, 44 Kan. 170; 24 Pac. 52; Lansdale v. Daniels, 100 U. S. 113; Johnson v. Towsley 13 Wall. (U. S.) 72; United States v. McLaughlin, 30 Fed. 147; 127 U. S. 428; 8 Sup. Ct. 1177; Doughty v. Somerville &c. Co. 21 N. J. L. 442; Baltimore &c. Co. v. Morgan's Louisiana &c. Co. 37 La. Ann. 883; Brock v. Old Colony &c. R. Co. 146 Mass. 194; 15 N. E. 555.

[21] Gulf &c. R. Co. v. Mud Creek &c. R. C. 1 Tex. App. Civ. Cas. 169.

[22] Chicago &c. R. Co. v. Sanford, 23 Mich. 418. The petition must contain such a description of the land sought to be condemned as will show its location and boundaries. A defective description cannot be remedied by a reference in the petition to a deed. New York &c. R. Co. In re, 70 N. Y. 191. But see Grand Junction &c. R. Co.

the statute requires the petition to contain a description of each tract of land taken by map or definite survey, it is not sufficient to describe it simply "as staked out upon and across" a certain section.[23] It has been held unnecessary that the petitioner shall embrace in one petition all the descriptions in the county necessary for the construction of the road.[24] Neither should the petition include separate tracts of land lying outside the county except where one tract lies partly within and partly without the county.[25] Describing the land sought to be condemned as a certain number of feet on each side of the center line of the railroad, as the same is located, staked, and marked, has been held sufficient.[26] So, also, it seems, is the description of the right of way as extending diagonally through "a tract of land," from a point *near* the northeast corner to a point *near* the southwest corner.[27] A description of a right of way as a strip "about one hundred feet wide" extending across a quarter section "about ten rods north" of the center thereof, however, has been held insufficient.[28] The description should in all cases be sufficiently definite to enable one skilled in such matters to locate it on the ground.[29] The petition should show that the property is within

v. County Comrs. 14 Gray (Mass.), 553.

[23] Toledo &c. R. Co. v. Munson, 57 Mich. 42; 23 N. W. 455. But reference to stakes and the like may be sufficient in other cases. Chicago &c. R. Co. v. Swan, 120 Mo. 30; 25 S. W. 534; Suver v. Chicago &c. R. Co. 123 Ill. 293; 14 N. E. 12; West v. West &c. R. Co. 61 Miss. 536.

[24] Marquette &c. R. Co. v. Longyear, 133 Mich. 94; 94 N. W. 670; 10 Det. Leg. N. 111.

[25] Toluca &c. R. Co. v. Haws, 194 Ill. 92; 62 N. E. 312.

[26] Lower v. Chicago &c. R. Co. 59 Iowa, 563; 13 N. W. 718; Cleveland &c. R. Co. v. Prentice, 13 Ohio St. 373; State v. Superior Court (Wash.), 88 Pac. 334, 335 (citing text). Such a description will control other parts of the petition inconsistent therewith. Lower v. Chicago &c. R. Co. 59 Iowa, 563; 13 N. W. 718.

[27] Indianapolis &c. R. Co. v. Newsom, 54 Ind. 121.

[28] Midland R. Co. v. Smith, 109 Ind. 488; 9 N. E. 474.

[29] Spofford v. Bucksport &c. R. Co. 66 Me. 26; West v. West &c. R. Co. 61 Miss. 536; Mansfield &c. R. Co. v. Clark, 23 Mich. 519; Chicago &c. R. Co. v. Sanford, 23 Mich. 418; Toledo &c. R. Co. v. Munson, 57 Mich. 42; 23 N. W. 455; New York &c. R. Co. In re, 90 N. Y. 342; Hussner v. Brooklyn City R. Co. 96 N. Y. 18; Quincy &c. R. Co. v. Kellogg, 54 Mo. 334; Rising Sun &c. Co. v. Hamilton 50 Ind. 580; Wilkin v. First Division &c. R. Co. 16 Minn. 271; Pennsylvania R. Co. v. Porter, 29 Pa. St. 165; Ohio River R. Co. v. Harness, 24 W. Va. 511; State v. American &c. Co. 43 N. J. L. 381.

the jurisdiction of the court.[30] Some of the courts hold that the petition must state the value of the land sought to be appropriated,[31] but this is not always required.[32] The petitioner in a cross-petition praying for an award of damages to land which is not taken must allege that he is the owner of the tract alleged to be damaged, and if the petitioner desires to question such allegation it must raise the issue by appropriate pleadings.[32a]

§ 1029a. Petition—Defects and manner of testing.—As already stated, in some jurisdictions the petition is treated much as an ordinary complaint. It has been held that it may be demurred to in a proper case,[33] but that a motion to strike out[34] or dismiss it[35] will not lie. The same strictness is not usually required as in a complaint in an ordinary action,[36] and, if the petition is not attacked at the proper time, there are many defects that may be waived or cured by proof.[37]

§ 1030. Title.—After land has been condemned as the property of a defendant, the railroad company cannot, without tendering an issue as to the ownership, dispute his title on appeal.[38] Where the

[30] Collins v. Rupe, 109 Ind. 340; 10 N. E. 91; Schoff v. Upper Conn. River &c. Co. 57 N. H. 110; State v. Van Derveer, 48 N. J. L. 80; 2 Atl. 771.

[31] Colorado &c. R. Co. v. Allen, 13 Colo. 229; 22 Pac. 605; 44 Am. & Eng. R. Cas. 193. But see California &c. R. Co. v. Southern &c. R. Co. 67 Cal. 59; 7 Pac. 123; 20 Am. & Eng. R. Cas. 309; United States v. Oregon &c. R. Co. 16 Fed. 524.

[32] See cases last cited in last preceding note.

[32a] Chicago &c. R. Co. v. Diver, 213 Ill. 26; 72 N. E. 758.

[33] Johnson v. Freeport &c. R. Co. 111 Ill. 413; Parker v. Snohomish Co. Super. Ct. 25 Wash. 544; 66 Pac. 154.

[34] Johnson v. Freeport &c. R. Co. 111 Ill. 413.

[35] Willard v. Boston, 149 Mass. 176; 21 N. E. 298. See Cella v. Chicago &c. R. Co. 217 Ill. 326; 75 N. E. 373.

[36] Rochester R. Co. v. Robinson, 133 N. Y. 242; 30 N. E. 1088; Martinsville &c. R. Co. v. Bridges, 6 Ind. 400. But, as already shown, all the necessary jurisdictional facts must be stated.

[37] New Milford Water Co. v. Watson, 75 Conn. 237; 53 Atl. 57; Rochester &c. R. Co. Hartshorn, 26 N. Y. St. 753; 7 N. Y. S. 279; Washington St. Matter of, 38 N. Y. St. 346; 14 N. Y. S. 470. But see as to filing objections under the late Indiana statute, Morrison v. Indianapolis &c. Ry. Co. (Ind.) 76 N. E. 961.

[38] Republican Valley &c. R. Co. v. Hayes, 13 Neb. 489; 14 N. W. 521. See, also, Enid &c. R. Co. v. Wiley, 14 Okla. 310; 78 Pac. 96. If the title of a defendant is found to be defective, the railroad company

land-owner brings the suit, he must show that he has title to the land for which damages are sought;[39] but under some statutes it has been held that the fact of his being in possession is prima facie sufficient proof of title,[40] and that evidence to impeach his title can only be offered by the corporation under an answer setting up want of title as a defense.[41] In other states it is held that the corporation is bound to pay for only the title which it has taken, and that one who petitions for damages must prove the nature and extent of his ownership.[42]

§ 1030a. Defenses—Questions of law or fact.—As already shown, many of the condemnation statutes do not contemplate formal pleadings subsequent to the petition, yet it is customary in most jurisdictions to put the case at issue by an answer or other proper pleading, and, in general, the evidence is confined, although not always closely, to such issue or issues.[43] As a general rule the defendant may, by a

should dismiss the proceedings, or move to set the inquest aside because of his lack of ownership. Auditor v. Crise, 20 Ark. 540; Mayor v. Richardson, 1 Stew. & P. (Ala.) 12. Evidence of title may be given by producing record in partition proceedings. Tucker v. Chicago &c. R. Co. 91 Wis. 576; 65 N. W. 515.

[39] Robbins v. Milwaukee &c. R. Co. 6 Wis. 636; Directors v. Railroad Co. 7 W. & S. (Pa.) 236.

[40] Sacramento Valley R. Co. v. Moffatt, 7 Cal. 577.

[41] Daley v. St. Paul, 7 Minn. 390. Where the company claims title in itself by reason of a former condemnation proceeding against another claimant, the proper remedy for one asserting title to the land has been held to be an action of ejectment. Webster v. Southeastern R. Co. 15 Jur. (Eng.) 73.

[42] Robbins v. Milwaukee &c. R. Co. 6 Wis. 636; Allyn v. Providence R. Co. 4 R. I. 457; East Tennessee &c. R. Co. v. Love, 3 Head (Tenn.), 63; Peoria &c. R. Co. v. Bryant, 57 Ill. 473; Winebiddle v. Pennsylvania R. Co. 2 Grant's Cas. (Pa.) 32; Directors &c. R. Co. 7 W. & S. (Pa.) 236.

[43] See Colorado Cen. R. Co. v. Allen, 13 Colo. 229; 22 Pac. 605; Mix v. Lafayette &c. R. Co. 67 Ill. 319; Becker v. Philadelphia &c. R. Co. 177 Pa. St. 252; 35 Atl. 617; 35 L. R. A. 583; Barnes v. Chicago &c. R. Co. (Tex. Civ. App.) 33 S. W. 601; Northern Pac. R. Co. v. Coleman, 3 Wash. 228; 28 Pac. 514; Mason v. Iowa Cent. R. Co. (Ia.) 109 N. W. 1 (holding that although formal pleadings are not required yet defendant, having undertaken to plead formally by written answer, could not avail itself of an affirmative defense not pleaded). A plea in the nature of a plea in abatement may be filed in a proper case. Willard v. Boston, 149 Mass. 176; 21 N. E. 298.

proper pleading, set up any matters of fact constituting a valid defense.[44] But it has been held that it is not a good defense to show that the corporation is a mere de facto corporation, or is insolvent, or is improperly exercising its franchises, nor that there has been a prior condemnation.[45] As in other cases, questions of law are for the court, and questions of fact are generally for the jury or commissioners.[46]

§ 1030b. Further of defenses.—On the general ground that the matter was solely one between the state and the railroad company, and not between the land-owner and the railroad company, it has been held that the land-owner could not urge as a defense that the railroad company had no license to cross or traverse the streets of the town in which the defendant's property was located,[47] or that the condemnor had not obtained the consent of the government to the occupancy of certain public lands required for the enterprise,[48] or that the railroad company improperly occupied a public highway,[49] or that other lands necessary could not be condemned because owned by the state,[50] or

[44] St. Joseph Terminal R. Co. v. Hannibal &c. R. Co. 94 Mo. 635; 6 S. W. 691; Union Pac. R. Co. v. Colorado &c. Co. 30 Colo. 133; 69 Pac. 564; 97 Am. St. 106.

[45] Brown v. Calumet River R. Co. 125 Ill. 600; 18 N. E. 283; Thomas v. St. Louis &c. R. Co. 164 Ill. 634; 46 N. E. 8; Denver Power &c. Co. v. Denver &c. R. Co. 30 Colo. 204; 69 Pac. 568; 60 L. R. A. 383; Lester v. Ft. Worth &c. R. Co. (Tex. Civ. App.) 26 S. W. 166; Holly Shelter R. Co. v. Newton, 133 N. Car. 132; 45 S. E. 549; 98 Am. St. 701. See, also, Dowie v. Chicago &c. R. Co. 214 Ill. 49; 73 N. E. 354. But compare Great Western &c. R. Co. v. Hawkins, 30 Ind. App. 557; 66 N. E. 765.

[46] As to questions held to be for the court, see Cincinnati &c. R. Co. v. Ohio Postal Tel Co. 68 Ohio St. 306; 67 N. E. 890; 62 L. R. A. 941; St. Louis &c. R. Co. v. Southwestern Tel. &c. Co. 121 Fed. 276; Colorado Fuel Co. v. Four Mile R. Co. 29 Colo. 90; 66 Pac. 902; O'Hare v. Chicago &c. R. Co. 139 Ill. 151; 28 N. E. 923; Manistee &c. R. Co. v. Fowler, 73 Mich. 217; 41 N. W. 261; Tennessee Cent. R. Co. v. Campbell, 109 Tenn. 655; 73 S. W. 112. As to questions for the jury, see Kansas City &c. R. Co. v. Vicksburg &c. R. Co. 49 La. Ann. 29; 21 So. 144; Chicago &c. R. Co. v. Huncheon, 130 Ind. 529; 30 N. E. 636; Chicago Electric R. Co. v. Chicago &c. R. Co. 211 Ill. 352; 71 N. E. 1017.

[47] Dowie v. Chicago &c. R. Co. 214 Ill. 49; 73 N. E. 354.

[48] Denver Power &c. Co. v. Denver &c. R. Co. 30 Colo. 204; 69 Pac. 569.

[49] Collier v. Union R. Co. 113 Tenn. 96; 83 S. W. 155.

[50] Shamberg v. New Jersey Shore Line R. Co. 72 N. J. L. 140; 60 Atl.

that the railroad company had not complied with the law as to the completion of the road within the required time,[51] or that the charter of the railroad company was a fraud on the public, in that while it was obtained for general railroad purposes, it was really intended to be operated as a lumber railroad.[52] Similarly, it has been held that a railroad company could not object to the condemnation of its right of way by a telegraph company on the ground that the latter had not obtained leave from the municipal authorities to erect its line through the towns along the proposed route, as required by law.[53] But it has been held that the question of the right of a railroad company to construct and operate a parallel line contrary to statute may be raised in proceedings to construct one of the lines though the line paralleled is in another state, and that it is not necessary to resort to quo warranto.[54] It may be said generally that the selection by a railroad company of the location of its proposed road, being given by statute, courts have no right to deny the exercise of the power of eminent domain to condemn such selected right of way because they think some other location is as good or better and hence it can not be urged as a defense by the land-owner that the railroad company could have selected a better route.[55] Again the question of the good faith of the corporators can not be raised in the condemnation proceeding. This question, it is said, can be raised only by quo warranto.[56]

§ 1031. Effect of pendency of proceedings to condemn.—Where

46. But this decision was reversed in 64 Atl. 114.

[51] Brinkerhoff v. Newark &c. Trac. Co. 66 N. J. L. 478; 49 Atl. 812.

[52] Holly Shelter R. Co. v. Newton, 133 N. Car. 132; 45 S. E. 549.

[53] Union Pac. R. Co. v. Colorado &c. Cable Co. 30 Colo. 133; 69 Pac. 564.

[54] Illinois State Trust Co. v. St. Louis &c. R. Co. 208 Ill. 419; 70 N. E. 357.

[55] Kansas &c. R. Co. v. Northwestern Coal &c. Co. 161 Mo. 288; 61 S. W. 684; 51 L. R. A. 936; 84 Am. St. 717.

[56] Madera R. Co. v. Raymond Granite Co. (Cal. App.) 87 Pac. 27. Compare Colorado &c. R. Co. v. Boagni (La.), 42 So. 932. In an action against a company which had constructed a third track without authority it was held that while it could not institute condemnation proceedings it might nevertheless be considered as a corporation acting in good faith, acquiring easements in aid of the construction of its track by entering into contracts with abutting owners. Knoth v. Manhattan R. Co. (N. Y) 79 N. E. 1015.

a corporation begins proceedings for the condemnation of property, the immediate effect necessarily is to prevent the sale or improvement of such property until the condemnation proceedings are determined, and it would be manifestly unjust to a land-owner that a corporation should be permitted to harass him with a protracted suit or succession of suits for this purpose, and in case the assessment of damages proved to be more than the corporation cared to pay, that it should be at liberty to abandon the proceedings without repaying the costs and damages to which the land-owner has been subjected. In New York, it is held that the court may require the corporation to pay so much of the costs and expenses of the opposite party as may be equitable, as the condition upon which it may discontinue condemnation proceedings begun by it,[57] and a similar view has been intimated by a few other courts.[58] In other states where the right to discontinue is held to be absolute, the courts have intimated that the land-owner could recover by suit any damages to which the suit for condemnation may have subjected him.[59] The only cases, however, where such a recovery has been sustained, so far as we have been able to ascertain, have been actions in tort for the unreasonable and culpable abuse of the power of eminent domain against the owners of property not needed by the corporation,[60] or

[57] Hudson River R. Co. v. Outwater, 3 Sandf. (N. Y.) 689; New York &c. R. Co. Matter of, 1 How. Pr. (N. Y.) N. S. 190; Waverly Water Works, Matter of, 85 N. Y. 478.

[58] See Clarke v. Manchester, 56 N. H. 2; Water Comrs. Matter of, 31 N. J. L. 72; 86 Am. Dec. 199, and note; Stevens v. Duck River Nav. Co. 1 Sneed (Tenn.), 237; Manion v. Louisville &c. R. Co. 90 Ky. 491; 14 S. W. 532; St. Louis &c. R. Co. v. Southern R. Co. 138 Mo. 591; 39 S. W. 471.

[59] North Missouri R. Co. v. Lackland, 25 Mo. 515; Graff v. Mayor &c. of Baltimore, 10 Md. 544; Gear v. Dubuque &c. R. Co. 20 Iowa, 523; 89 Am. Dec. 550. See, also, Centralia &c. R. Co. v. Henry, 31 Ill. App. 456; Lohse v. Missouri Pac. R. Co. 44 Mo. App. 645.

[60] Leisse v. St. Louis &c. R. Co. 72 Mo. 561; Black v. Baltimore, 50 Md. 235; 33 Am. R. 320; Mayor &c. v. Black, 56 Md. 333; McLaughlin v. Municipality, 5 La. Ann. 504. In Carson v. Hartford, 48 Conn. 68, the plaintiff sued to recover for the depreciation in value of his land between the time that the city council voted to lay a street across such land, and caused the owner's damages to be assessed, and the time when it reconsidered its former action and abandoned the improvement, a period of three and one-half years. The court said: "The allegation that the city 'did wrongfully and unnecessarily prolong the proceedings,' is too vague

for the occupancy of the lands to which all right has been forfeited by a dismissal of the condemnation proceedings, in which case the original entry is held to have been wrongful.[61]

§ 1032. Dismissal of proceedings—Effect of.—The fact that the proceedings were dismissed has been held to be an admission that the taking was not necessary, and, therefore, that the proceedings were not in good faith,[62] but we suppose that the petitioner may explain the dismissal and show that it was in good faith and for sufficient cause. We do not believe that the mere fact of dismissal is conclusive evidence that the petitioner acted in bad faith.[63] In another case, however, it is said that the question whether the corporation was guilty of such a culpable and unreasonable delay in the prosecution and abandonment of proceedings to take land for its use as to amount to actionable negligence was a question for the jury.[64] In most of the cases, however, in which it has been sought to charge a corporation with damages due to the abandonment of condemnation proceedings, the courts have denied the right to recover.[65] In several

and general to support a judgment. It neither points to an act, nor to an omission to act for the purpose of delay, and is without suggestion as to whether the obstruction was for a day or a year. Moreover, it calls upon us to say that, of legal necessity, the intervention of three and one-half years between the first and last votes would of itself and under all circumstances subject the city to damages. This we can not do. But, while preserving to the council the privilege of considering after knowledge, we do not say that it can not abuse this privilege nor that as a consequence of such abuse, the city may not be compelled to indemnify land-owners who have suffered loss by inexcusable delay." Stevens v. Danbury, 53 Conn. 9; 22 Atl. 1071. See, also, Bergman v. St. Paul &c. R. Co. 21 Minn. 533.

[61] Pittsburgh &c. R. Co. v. Swinney, 97 Ind. 586; Van Valkenburgh v. Milwaukee, 43 Wis. 574, as explained in Feiten v. Milwaukee, 47 Wis. 494; 2 N. W. 1148; Hullin v. Second Municipality, 11 Rob. (La.) 97; 43 Am. Dec. 202. But see Pine Bluff &c. R. Co. v. Kelly (Ark.), 93 S. W. 562.

[62] Leisse v. St. Louis &c. R. Co. 72 Mo. 561; McLaughlin v. Municipality, 5 La. Ann. 504. See, also, Pittsburgh &c. R. Co. v. Swinney, 97 Ind. 536; Simpson v. Kansas City, 111 Mo. 237; 20 S. W. 38.

[63] Cooper v. Anniston &c. R. Co. 85 Ala 106; 4 So. 689; 36 Am. & Eng. R. Cas. 581. See, also, Simpson v. Kansas City, 111 Mo. 237; 20 S. W. 38.

[64] Mayor &c. v. Black, 56 Md. 333.

[65] Bergman v. St. Paul &c. R. Co. 21 Minn. 533; Martin v. Mayor &c. of Brooklyn, 1 Hill (N. Y.), 545; Whyte v. Kansas, 22 Mo. App. 409; Feiten v. Milwaukee, 47 Wis. 494;

of the states, it is provided by statute that the owner may recover damages for any unreasonable delay in prosecuting or abandoning condemnation proceedings which are not promptly carried to an issue and followed by payment of the damages awarded,[66] or for damages done by cutting or grading in the construction of the road upon a location which is afterward abandoned.[67] Such damages must be sought in a separate suit,[68] unless the statute fixes the damages in some way by which they can be definitely ascertained and expressly authorizes the assessment of such damages upon dismissal of the condemnation suit.[69] But a railroad company which dismisses condemnation pro-

2 N. W. 1148; Carson v. Hartford, 48 Conn. 68. In the first case cited the plaintiff sought to recover for his loss of time, attorney's fees and expenses in defending a condemnation proceeding begun by the defendant and afterward abandoned. The court said: "If the plaintiff is entitled to recover, it must by virtue of some contract, express or implied, or of some positive rule of law conferring upon him a right of action, or upon the ground that defendant has been guilty of tort. Certainly there is no contract here, nor is there any positive rule of law upon which the plaintiff can base a right of action. Neither is there anything in the complaint tending to show any tortious or malicious conduct on the part of the defendant. On the contrary, defendant's proceedings are expressly admitted to have been duly and regularly taken, and there is nothing whatever to raise a suspicion that defendant's motives in instituting, conducting or dismissing the proceedings were not entirely proper. In other words the complaint does not set up a cause of action in tort, nor assume to do so."

[66] Pub. Stat. 1887, § 3465; Gen. Stat. 1878, Ch. 34, §§ 29, 31.

[67] Rev. Laws, 1880, Vt. §§ 3374, 3376; Laws 1890, N. Y. Ch. 565, § 6; Laws 1889, N. Car. Ch. 391, § 1; Dig. 1881, Fla. Ch. 39, § 21; R. S. 1890, Ohio, §§ 3276, 3278; Gen. Laws, 1888, Md. Ch. 23, § 168; Statutes, 1890, Okla. § 1040. Such damages may be recovered in the absence of any statute in states where the constitution requires the payment of damages to precede the taking, if the corporation secures possession of the property under an award which is set aside, and the proceedings are afterward discontinued. Pittsburgh &c. R. Co. v. Swinney, 97 Ind. 586.

[68] Drury v. Boston, 101 Mass. 439.

[69] Minneapolis &c. R. Co. v. Woodworth, 32 Minn. 452; 21 N. W. 476. In this case the statute provided that if damages awarded were not paid within sixty days after the entry of final judgment the proceedings should be deemed to be abandoned, and the party in whose favor the award was made might have judgment entered against the corporation for damages at the rate of ten per cent from the date of the award. By another statute the land-owner was permitted to recover his costs and expenses in an abandoned condemnation proceeding, including reasonable attorney's

ceedings and withdraws the condemnation money will be estopped, when sued by the land-owner, to claim that the dismissal was ineffectual and that the land-owner should be required to have his damages assessed in the condemnation proceedings.[70]

§ 1032a. Dismissal—Other cases.—It has been held that where the property is sought to be condemned for a purpose which is partly legal and partly illegal, and it can not be determined how much of the property is necessary for the purpose that is legal, that the proceedings will be dismissed as an entirety.[71] It has also been held that the dismissal of proceedings to condemn land for railroad purposes, as to a portion of the joint owners, for want of service, is practically a dismissal as to all, since it leaves the court without power to proceed further with the inquest.[72] And in another case it was held proper, where there had been inexcusable delay, for the court to dismiss the proceedings for want of prosecution.[73]

§ 1033. Abandonment of proceedings.—The general rule is that a railroad company may, unless restrained by statute, dismiss its proceedings to condemn land at any time before final judgment.[74] And this it may do even though it has obtained possession of the premises pending proceedings by depositing in court a sum of money to secure the payment of the assessed damages.[75] But where the

fees. The court held that an adversary proceeding by which the corporation should be allowed to dispute the amount of the attorney's fees was necessary in order to the allowance of the same, and that the allowance of a fee of $50 for the land-owner's counsel, upon a dismissal of proceedings for non-payment of the award was unwarranted, and could not be sustained.

[70] Enid &c. R. Co. v. Wiley, 14 Okl. 310; 78 Pac. 96.

[71] Metropolitan Elevated R. Co. In re, 12 N. Y. S. 506.

[72] Grand Rapids &c. R. Co. v. Alley, 34 Mich. 16.

[73] Sanitary Dist. of Chicago v. Chapin (Ill.), 80 N. E. 1017.

[74] See Eureka &c. R. Co. v. McGrath, 74 Cal. 49; 15 Pac. 360; St. Louis &c. R. Co. v. Martin, 29 Kans. 750; Manion v. Louisville &c. R. Co. 90 Ky. 491; 14 S. W. 532; Kremer v. Chicago &c. R. Co. 51 Minn. 15; 52 N. W. 977; 38 Am. St. 468; North Missouri R. Co. v. Lackland, 25 Mo. 515.

[75] Union &c. Co. v. Slee, 123 Ill. 57; 12 N. E. 543; Leavenworth &c. R. Co. v. Whitaker, 42 Kan. 634; 22 Pac. 733; Manion v. Louisville &c. R. Co. 90 Ky. 491; 14 S. W. 532; 47 Am. & Eng. R. Cas. 107; Chicago &c. R. Co. v. Gates, 120 Ill. 86; 11 N. E. 527; 30 Am. & Eng. R. Cas. 268; Denver &c. R. Co. v. Lamborn, 8 Colo. 380; 8 Pac.

company has taken possession pending the proceedings, an abandonment of the proceedings forfeits its right to possession,[76] and renders the company a trespasser ab initio and liable as such for all damages done while it held possession.[77] The fact that the damages have been

582. See Pittsburgh &c. R. Co. v. Swinney, 97 Ind. 586. In Illinois, it is held that the judgment for damages should be absolute where the company is already in possession of the premises. St. Louis &c. R. Co. v. Teters, 68 Ill. 144. See Witt v. St. Paul &c. R. Co. 35 Minn. 404; 29 N. W. 161; Kremer v. Chicago &c. R. Co. 51 Minn. 15; 52 N. W. 977; Cape Girardeau &c. R. Co. v. Dennis, 67 Mo. 438; Wilcox v. St. Paul &c. R. Co. 35 Minn. 439; 29 N. W. 148; North Missouri R. Co. v. Lackland, 25 Mo. 515; Alabama &c. R. Co. v. Newton, 94 Ala. 443; 10 So. 89; Drath v. Burlington &c. R. Co. 15 Neb. 367; 18 N. W. 717; Dayton &c. R. Co. v. Marshall, 11 Ohio St. 497; State v. Cincinnati &c. R. Co. 17 Ohio St. 103; Syracuse &c. R. Co. In re, 4 Hun 311; Rhinebeck &c. R. Co. In re, 67 N. Y. 242; Hull v. Chicago &c. R. Co. 21 Neb. 371; 32 N. W. 162; Crolley v. Minneapolis &c. R. 30 Minn. 541; 16 N. W. 422; Pittsburgh &c. R. Co. v. Peet, 152 Pa. St. 488; 25 Atl. 612; 19 L. R. A. 467.

[76] Witt v. St. Paul &c. R. Co. 35 Minn. 404; 29 N. W. 161. See Hastings v. Burlington &c. R. Co. 38 Iowa, 316; Wilcox v. St. Paul &c. R. Co. 35 Minn. 439; 29 N. W. 148; Green v. Missouri &c. R. Co. 82 Mo. 653; First National Bank v. West River &c. R. Co. 49 Vt. 167; Pittsburgh &c. R. Co. v. Swinney, 97 Ind. 586; Skillman v. Chicago &c. R. Co. 78 Iowa, 404; 43 N. W. 275; 16 Am. St. 452; Hatch v. Cincinnati &c. R. Co. 18 Ohio St. 92; Cincinnati &c. R. Co. v. Zinn, 18 Ohio St. 417.

[77] Pittsburgh &c. R. Co. v. Swinney, 97 Ind. 586; Van Valkenburgh v. Milwaukee, 43 Wis. 574; Lee v. Northwestern U. R. Co. 33 Wis. 222; Hullin v. Second Municipality, 11 Rob. (La.) 97; 43 Am. Dec. 202. See, however, Louisville &c. R. Co. v. Ryan, 64 Miss. 399; 8 So. 173. The license which the statute confers upon a railroad company to take possession of land pending proceedings, upon paying into court the damages as originally assessed by the commissioners, is upon the implied, but none the less evident condition that the company will proceed in good faith, and without unnecessary delay, to have the amount, which it will be required to pay for the land, ascertained and finally established, and that it will, within a reasonable time thereafter, pay to the owner the amount thus finally established. Lee v. North Western R. Co. 33 Wis. 222; Chicago v. Barbian, 80 Ill. 482; Pittsburgh &c. R. Co. v. Swinney, 97 Ind. 586. See, generally, Leisse v. St. Louis &c. R. Co. 72 Mo. 561; Centralia &c. R. Co. v. Henry, 31 Ill. App. 456; Gibbons v. Missouri &c. R. Co. 40 Mo. App. 146; Lohse v. Missouri &c. R. Co. 44 Mo. App. 645; Lyon v. McDonald, 78 Texas, 71; 14 S. W. 261; 9 L. R. A. 295, and note; 47 Am. & Eng. R. Cas. 217; Pittsburgh &c. R. Co. v. Reed (Pa. St.), 6 Atl. 838; 34 Pitts. L. J. 191. In Pine Bluff &c. R. Co. v.

assessed does not destroy the right to abandon such proceedings, if the assessment is afterward set aside on appeal.[78] Indeed, the weight of authority holds that the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property, unless the statute gives it some greater effect, and that the company may, within a reasonable time after the judgment or confirmation, abandon its proceedings without incurring any liability to pay the damages awarded.[79] Where, however, the company has

Kelly (Ark.), 93 S. W. 562, it is held that where the company, on instituting proceedings to condemn land for a right of way, took possession, and used it for a short time, and then abandoned it, the measure of damages is the rental value of the land taken for the time it was occupied, and the depreciation in the value thereof by reason of acts done thereon, and the damage resulting to the other land from the building of the road and from flooding caused by the construction thereof, the time of the occupancy being considered, and that for all other damages occasioned torts done by the company the owner's remedy is by action to recover the same.

[78] Wright v. Wisconsin Central R. Co. 29 Wis. 341; Vail v. Fall Creek Turnp. Co. 32 Ind. 198. When the circuit court ordered a new appraisement of the land the award of the appraisers ceased to be of binding force upon the parties. . . . The subsequent dismissal of the proceedings did not reinstate the award for any purpose. Pittsburgh &c. R. Co. v. Swinney, 97 Ind. 586, 594. See, also, Denver &c. R. Co. v. Lamborn, 8 Colo. 380; 8 Pac. 582.

[79] Elizabethtown &c. R. Co. v. Thompson, 79 Ky. 52; Gear v. Dubuque &c. R. Co. 20 Iowa, 523; 89 Am. Dec. 550; Winkelman v. Chicago, 213 Ill. 360; 72 N. E. 1066; Williams v. New Orleans &c. R. Co. 60 Miss. 689; State v. Cincinnati &c. R. Co. 17 Ohio St. 103; Denver &c. R. Co. v. Lamborn, 8 Colo. 380; 8 Pac. 582; St. Louis &c. R. Co. v. Wilder, 17 Kan. 239; City of Kansas v. Kansas Pac. R. Co. 18 Kan. 331; Black v. Baltimore, 50 Md. 235; 33 Am. R. 320; Stacey v. Vermont Central R. Co. 27 Vt. 39; St. Louis &c. R. Co. v. Teters, 68 Ill. 144; Peoria &c. R. Co. v. Rice, 75 Ill. 329; Schuylkill &c. Nav. Co. v. Decker, 2 Watts (Pa.) 343; Chesapeake &c. R. Co. v. Bradford, 6 W. Va. 220; Baltimore &c. R. Co. v. Nesbit, 10 How. (U. S.) 395; Evansville &c. R. Co. v. Miller, 30 Ind. 209; Derby v. Gage, 60 Mich. 1; 26 N. W. 820; State v. Mills, 29 Wis. 322; Commonwealth v. Blue Hill Turnp. Co. 5 Mass. 420; Oregon R. Co. v. Bridwell, 11 Ore. 282; 3 Pac. 684; State v. Hug, 44 Mo. 116. Thus the courts of Kansas hold that the fact that a railroad company has conducted proceedings to condemn land to completion, and has deposited the condemnation money with the county treasurer, does not prevent it from reclaiming the deposit, if it has made no actual entry on the land, and has abandoned its intention to use the land for such

taken possession pending proceedings, under a statute permitting it to proceed with the construction of its road upon paying or securing the damages awarded by the commissioners, an absolute personal judgment should be rendered for the damages assessed on appeal.[80] The courts of Illinois hold that where the right to abandon condemnation proceedings is absolute, the defendant is not entitled on such dismissal to recover counsel fees and expenses in defending the same unless the statutes authorize their recovery.[81] The permission to take possession pending proceedings is necessarily upon the implied condition that the company will pay to the owner the value of the land taken as finally ascertained and determined.[82] In Nebraska, the supreme court has held that a final judgment on appeal from an assessment of damages stands on the same footing as any other judgment, and that execution may issue to collect the same without regard to the future intentions of the company,[83] and a similar conclusion has been reached by the court of appeals of New York.[84] Where the statute provides for issuing an execution upon the award it is held that the railroad company can not avoid its liability nor defeat the land-owner's right to an execution by the

purpose, and has given notification thereof. Atchison &c. R. Co. v. Wilson, 66 Kan. 233; 69 Pac. 342.

[80] Peoria &c. R. Co. v. Mitchell, 74 Ill. 394; St. Louis &c. R. Co. v. Teters 68 Ill. 144; Carr v. Boone, 108 Ind. 241; 9 N. E. 110; Harness v. Chesapeake &c. Canal Co. 1 Md. Ch. 248; Curtis v. St. Paul &c. R. Co. 21 Minn. 497; Robbins v. St. Paul &c. R. Co. 24 Minn. 191. Contra, Denver &c. R. Co. v. Lamborn, 8 Colo. 380; 8 Pac. 582. In Louisville &c. R. Co. v. Ryan, 64 Miss. 939; 8 So. 173, it was held that the company should be left at liberty to abandon the location and become liable as a trespasser if it so desired, and that a personal judgment was erroneous. In Pennsylvania, the location of a railroad constitutes an appropriation of the land, and the right of the land-owner to damages therefor becomes vested as soon as they are assessed, and can not be divested by a change of location made before the commissioner's report is confirmed. Beale v. Pennsylvania R. Co. 86 Pa. St. 509.

[81] Winkelman v. Chicago, 213 Ill. 360; 72 N. E. 1066.

[82] Lee v. Northwestern U. R. Co. 33 Wis. 222.

[83] Drath v. Burlington &c. R. Co. 15 Neb. 367; 18 N. W. 717; Dietrichs v. Lincoln &c. R. Co. 12 Neb. 225; 10 N. W. 718. See Brown v. Chicago &c. R. Co. 64 Neb. 62; 89 N. W. 405, where it is held that a railroad company, having abandoned a right of way, is estopped to abandon it, and is bound to pay the award to the land-owner.

[84] Rhinebeck &c. R. Co. Matter of, 67 N. Y. 242.

abandonment of its location.[85] An abandonment of the proceedings may be evidenced by a failure to pay the damages awarded within a reasonable time,[86] as well as by affirmative acts done with that end in view. In some states the time within which proceedings to condemn must be abandoned and the acts which will constitute an abandonment are prescribed by statute. Thus in Missouri, the railroad company may, "within ten days from the return of the assessment, elect to abandon the proposed appropriation of the land by an instrument in writing to that effect to be filed with the clerk;"[87] and a failure to file such an instrument within ten days fixes the rights of the parties under the assessment.[88] The courts of that state hold that the railroad on abandoning the proceedings is liable to the property owner for all costs and expenses, including attorney's fees, in resisting the proceedings.[89] In Tennessee, the petitioner on the trial on appeal can not dismiss the proceeding as to a portion of the land sought to be condemned merely because in its opinion the damages assessed were too high.[90] In states where compensation is not required to precede the taking, the legislature may authorize a railroad corporation to acquire title to lands before the institution of proceedings to ascertain their value. In such case, the abandonment of proceedings subsequently brought for this purpose does not affect the land-owner's right to compensation for the original taking and he may enforce payment of the value of his land, although the

[85] Neal v. Pittsburgh &c. R. Co. 31 Pa. St. 19. After a railroad had been partly constructed over plaintiff's land, and after the damages therefor had been awarded, an act was passed providing that, in case the route was abandoned before the payment of damages the owner should receive only his actual damages. It was held that the right of the owner to the damages awarded was complete before the act was passed, and was not affected by it. Smart v. Portsmouth &c. R. Co. 20 N. H. 233.

[86] State v. Cincinnati &c. R. Co. 17 Ohio St. 103; Bensley v. Mountain Lake Water Co. 13 Cal. 306; 73 Am. Dec. 575. See Chicago &c. R. Co. v. Chamberlain, 84 Ill. 333; Pittsburgh &c. R. Co. v. Peet, 152 Pa. St. 488; 25 Atl. 612; 19 L. R. A. 467; Ross v. Pennsylvania Co. 17 Phila. 339; Mehle v. New York &c. R. Co. 86 Tex. 459; 25 S. W. 607. See, also, Alabama Midland R. Co. v. Newton, 94 Ala. 443; 10 So. 89; Minneapolis &c. R. Co. v. Woodworth, 32 Minn. 452; 21 N. W. 476.

[87] Gen. Stat. 1865, § 3, p. 352.

[88] Gray v. St. Louis &c. R. Co. 81 Mo. 126.

[89] Sterrett v. Delmar Ave. &c. Ry. Co. 108 Mo. App. 650; 84 S. W. 150.

[90] Union R. Co. v. Standard Wheel Co. 149 Fed. 698.

company never actually occupies the property.[91] In Pennsylvania, it is held that the right to damages vests upon the location of a railroad, and that a change of location before the confirmation of the commissioner's report will not defeat this right.[92] In Wisconsin the railroad company may not, after the filing of the commissioner's report, dismiss the proceeding. The filing is regarded as a judgment fixing the rights of the parties.[93] In Illinois it is held in a case where there was an abandonment after an entry of judgment of condemnation that the measure of damages to which the land-owner was entitled was the difference between the value of the land at the time he could have sold it, but for the pendency of the condemnation proceedings, and its value at the time the proceedings were dismissed.[94] The fact that proceedings for the condemnation of property have been abandoned,[95] does not bar a new proceeding in good faith for the same purpose.[96] Where the statute provided that a failure to pay for or take possession of the land condemned for six months after the assessment of compensation should avoid the effect of the judgment, and cause a forfeiture of all the rights of the corporation in such land, it was held that after the lapse of six months new proceedings could be instituted to take the same land.[97]

§ 1034. Meetings of commissioners or jurors.—If the order appointing the commissioners fixes a time and place of meeting, they must meet in obedience to the terms of such order, or their pro-

[91] Welles v. Cowles, 4 Conn. 182; 10 Am. Dec. 115; Briggs v. Cape Cod &c. Co. 137 Mass. 71; Kimball v. Rockland, 71 Me. 137.

[92] Beale v. Pennsylvania R. Co. 86 Pa. St. 509.

[93] Sprague v. Northern Pac. R. Co. 122 Wis. 509; 100 N. W. 842.

[94] Winkelman v. Chicago, 213 Ill. 360; 72 N. E. 1066.

[95] Corbin v. Cedar Rapids &c. R. Co. 66 Iowa, 73; 23 N. W. 270.

[96] Alabama Midland R. Co. v. Newton, 94 Ala. 443, 10 So. 89; Corbin v. Cedar Rapids &c. R. Co. 66 Ia. 73; 23 N. W. 270; Cincinnati Southern R. Co. v. Haas, 42 Ohio St. 239. But see where the abandonment was in bad faith, Chicago &c. R. Co. v. Chicago, 148 Ill. 479; 36 N. E. 72. Neither does the prosecution to final judgment of proceedings which are so defective as not to transfer the title of the property sought. State v. Dover &c. R. Co. 43 N. J. L. 528.

[97] Trustees Cincinnati So. R. Co. v. Haas 42 Ohio St. 239. A failure to pay for the land taken within sixty days causes the railroad company's right to lapse in some states. Gen. Stat. 1891, Minn. § 2483; Howell's Stat. 1882, Mich. § 3329. In others for thirty days. Dig. 1884, Ark. § 5466; Comp. Laws, 1888; Utah, § 2346.

ceedings will be invalid.[98] Where the proceedings are in a court of general superior jurisdiction, holding regular terms at times designated by a public law, the parties, having proper notice, must take notice of the time of holding the terms of court and of the proceedings of the court during term.[99] Where the commissioners are allowed to fix the time and place of meeting, and are required to give notice of such meeting to the land-owner, notice must be given. After the jury commissioners have met in obedience to the order on motion they may adjourn to such other time and place as may be reasonably necessary in pursuing their investigations, notice of such adjournment being publicly announced.[100] The adjourned meeting should be regularly convened and a further adjournment had, if necessary, that the continuity of the original meeting may not be broken.[101]

§ 1035. Open and close.—In New York it has been held that it rests in the discretion of the commissioners to decide which party shall open and close.[102] In some states the land-owner has been

[98] State v. Capner, 49 N. J. L. 555; 9 Atl. 781; Roberts v. Williams, 13 Ark. 355; State v. Horn, 34 Kan. 556; 9 Pac. 208. The parties are entitled to reasonable notice of the time and place of meeting. Minneapolis &c. R. Co. v. Kanne, 32 Minn. 174; 19 N. W. 975; 17 Am. & Eng. R. Cas. 122; Manhattan &c. R. Co. v. Stroub, 68 Hun (N. Y.), 90; 22 N. Y. S. 602. See Rheiner v. Union &c. R. Co. 31 Minn. 289; 17 N. W. 623; Chicago &c. R. Co. v. Chamberlain, 84 Ill. 333; Virginia &c. R. Co. v. Lovejoy, 8 Nev. 100; Gill v. Milwaukee &c. R. Co. 76 Wis. 293; 45 N. W. 23; State v. Capner, 49 N. J. L. 555; 9 Atl. 781; Ruhland v. Jones, 55 Wis. 673; 13 N. W. 689; Williams v. Hartford &c. R. Co. 13 Conn. 397; Roosa v. St. Joseph &c. R. Co. 114 Mo. 508; 21 S. W. 1124.

[99] St. Louis v. Gleason, 15 Mo. App. 25; Board v. Magoon, 109 Ill. 142; Thorndike v. County Commissioners, 117 Mass. 566. See Exchange Alley, Matter of, 4 La. Ann. 4; New Orleans &c. R. Co. v. Bougere, 23 La. Ann. 803.

[100] Goodwin v. Wethersfield, 43 Conn. 437; Polly v. Saratoga &c. R. Co. 9 Barb. (N. Y.) 449; Leavenworth v. Meyer, 50 Kan. 25; 31 Pac. 700; Butman v. Fowler, 17 Ohio 101. See Memphis &c. R. Co. v. Parsons &c. 26 Kan. 503; Michigan &c. R. Co. v. Probate Judge, 48 Mich. 638; 14 Am. & Eng. R. Cas. 351; Masters v. McHolland, 12 Kan. 17; Commonwealth v. County Commissioners, 8 Pick. (Mass.) 343; Pegler v. Highway Commissioners, 34 Mich. 359.

[101] State v. Capner, 49 N. J. L. 555; 9 Atl. 781; McPherson v. Holdridge, 24 Ill. 38.

[102] Albany &c. R. Co. v. Lansing, 16 Barb. (N. Y.) 68; New York &c. R. Co. In re, 33 Hun (N. Y.), 148.

held entitled to this privilege, as having the affirmative of the issue as to the value of the land,[103] while in others this right has been held to be with whichever party brings the action.[104] There is much conflict of opinion, and a general rule can not be safely stated,[105] but the better rule would seem to be that where the railroad company institutes the proceedings and has the burden of proof it should have the open and close.[106]

§ 1035a. Evidence generally.—As upon the question of the right to open and close, so upon the question as to the burden of proof, there is some conflict among the authorities, but much depends upon the particular question and the way in which it is presented. Ordinarily, we think, the burden is upon the petitioner to show at least such controverted jurisdictional facts as entitle it to condemn.[107]

See, to the same effect, Charleston &c. R. Co. v. Blake, 12 Rich. L. (S. Car.) 634.

[103] Minnesota Valley R. Co. v. Doran, 17 Minn. 188; St. Paul &c. R. Co. v. Murphy, 19 Minn. 500; Charleston &c. R. Co. v. Blake, 12 Rich. L. (S. Car.) 634; Evansville &c. R. Co. v. Miller, 30 Ind. 209; Indiana &c. R. Co. v. Cook, 102 Ind. 133; 26 N. E. 203; Connecticut River R. Co. v. Clapp, 1 Cush. (Mass.) 559; Burt v. Wigglesworth, 117 Mass. 302; Oregon &c. R. Co. v. Barlow, 3 Ore. 311; Omaha &c. R. Co. v. Umstead, 17 Neb. 459; 23 N. W. 350.

[104] McReynolds v. Burlington &c. R. Co. 106 Ill. 152; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812; Montgomery &c. R. Co. v. Sayre, 72 Ala. 443; Harrison v. Young, 9 Ga. 359.

[105] Bellingham &c. R. Co. v. Strand, 4 Wash. 311; 30 Pac. 144; 51 Am. & Eng. R. Cas. 608; Indiana &c. R. Co. v. Cook, 102 Ind. 133; 26 N. W. 203; Seattle &c. R. Co. v. Murphine, 4 Wash. 448; 30 Pac. 720; Gainesville &c. R. Co. v. Waples, 3 Tex. App. Civil Cas. 482; Springfield &c. R. Co. v. Rhea, 44 Ark. 258; Connecticut &c. R. Co. v. Clapp, 1 Cush. (Mass.) 559; St. Louis &c. R. Co. v. North, 31 Mo. App. 345; Omaha &c. R. Co. v. Walker, 17 Neb. 432; 23 N. W. 348; Morris &c. R. Co. v. Bonnell, 34 N. J. L. 474; Oregon &c. R. Co. v. Barlow, 3 Ore. 311; Burt v. Wigglesworth, 117 Mass. 302. See, also, "The Right to begin and reply in Special Proceedings," 25 Cent. L. J. 483.

[106] Williams v. Macon &c. R. Co. 94 Ga. 709; 21 S. E. 997; McReynolds v. Burlington &c. R. Co. 106 Ill. 152; Ft. Worth &c. R. Co. v. Culver (Tex. Civ. App.), 14 S. W. 1013; Seattle &c. R. Co. v. Gilchrist, 4 Wash. 509; 30 Pac. 738; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812. See 1 Elliott Ev. § 138.

[107] Terre Haute &c. R. Co. v. Flora, 29 Ind. App. 442; 64 N. E. 648; Minneapolis &c. R. Co. v. Hartland, 85 Minn. 76; 88 N. W. 423; Chicago &c. R. Co. v. Porter, 43 Minn. 527; 46 N. W. 75; Ellis v. Pacific R. Co.

But as to some questions the burden has been held to be upon the land-owner,[108] and in many instances it has been held to be upon him to show the amount of his damages.[108a] Where the corporate existence of the railroad company seeking to condemn land is properly challenged, it is incumbent on it to show that it is either a dejure or de facto corporation.[109] The rules of evidence are the same in most respects, as in ordinary civil cases, except in so far as the nature of the proceedings may, in some respects, require a departure from strict rules.[110] But as the jury or commissioners usually view the

51 Mo. 200; Kountze v. Morris Aqueduct, 58 N. J. L. 303; 33 Atl. 252; Carolina &c. R. Co. v. Penncarden Lumber &c. Co. 132 N. Car. 644; 44 S. E. 358; Carolina &c. R. Co. v. Pennearden Lumber &c. Co. 132 N. Car. 644; 44 S. E. 358; Cleveland &c. R. Co. v. Ohio Postal Tel. &c. Co. 68 Ohio St. 306; 67 N. E. 890; 62 L. R. A. 941; Robinson v. Pennsylvania R. Co. 161 Pa. St. 561; 29 Atl. 268; Wisconsin Cent. R. Co. v. Kneale, 79 Wis. 89; 48 N. W. 248. As to what is sufficient proof of incorporation, see Peoria &c. R. Co. v. Peoria &c. R. Co. 105 Ill. 110; Milwaukee Southern R. Co. In re, 124 Wis. 490; 102 N. W. 401. As to proof of inability to agree, see Lake Shore &c. R. Co. v. Baltimore &c. R. Co. 149 Ill. 272; 37 N. E. 91; Grand Rapids &c. R. Co. v. Weiden, 70 Mich. 390; 38 N. W. 294. In Madera R. Co. v. Raymond Granite Co. (Cal. App.) 87 Pac. 27, it is held that the burden is on the company to show a public use, but that the good faith of the corporators in forming the corporation can not be questioned. In Southern Ill. &c. Co. v. Stone, 194 Mo. 175; 92 S. W. 475, it is held that inability to agree may be shown by facts and circumstances.

[108] Douglas v. Indianapolis &c. Traction Co. (Ind. App.) 76 N. E. 892; Minneapolis &c. R. Co. v. Hartland, 85 Minn. 76; 88 N. W. 423; Chicago &c. R. Co v. Cook, 43 Kans. 83; 22 Pac. 988; Hyde Park v. Dunham, 85 Ill. 569 (on cross-petition).

[108a] Colorado Cent. R. Co. v. Allen, 13 Colo. 229; 22 Pac. 605; Evansville &c. R. Co. v. Miller, 30 Ind. 209; Douglas v. Indianapolis &c. Traction Co. (Ind. App.) 76 N. E. 892. See, also, Los Angeles Co. v. Reyes (Cal.), 32 Pac. 233; Oregon &c. R. Co. v. Barlow, 3 Oreg. 311; Omaha &c. R. Co. v. Walker, 17 Neb. 432; 23 N. W. 348; New Milford Water Co. v. Watson, 75 Conn. 237; 52 Atl. 947; 53 Atl. 57. But compare Seattle &c. R. Co. v. Murphine, 4 Wash. 448; 30 Pac. 720; Elliott Roads and Streets (2d ed.), § 349. In several of these cases, however, the property owner had appealed or affirmatively raised the question and it was the only question to be tried.

[109] Morrison v. Indianapolis &c. R. Co. (Ind.) 76 N. E. 961.

[110] See Ball v. Keokuk &c. R. Co. 71 Ia. 306; 32 N. W. 354. See, also, Central Pac. R. Co. v. Pearson, 35 Cal. 247; Denver Power &c. Co. v. Denver &c. R. Co. 30 Colo. 204; 69 Pac. 568; 60 L. R. A. 383; Washington &c. R. Co. v. Switzer, 26

premises, and this, whether strictly evidence or not, has an important bearing upon the case, and as the tribunal, in the first instance at least, is often not expert in the law, and for other reasons peculiar to the nature of the proceedings, a considerable latitude is often allowed and the ordinary rules of evidence are not always strictly applied.[111] In two recent cases an interesting question arose as to evidence of noise, and its effect, caused by the construction and operation of a railroad. In one of them, which was a proceeding to recover damages to abutting property from the construction and operation of an elevated railway in the street, the testimony of the keeper of a restaurant on the premises that on several occasions people who came there went out, saying: "We can't talk here. Let us get out of here, and eat somewhere where we can talk and hear ourselves"—was held admissible as showing the effect of the noise of the railway.[112] In the other, which was a proceeding to condemn land for a railroad right of way, it was held that the trial court did not err in admitting the reproduction of sounds claimed to have been made by the operation of trains in proximity to the defendant's hotel, by means of a phonograph, a sufficient foundation having been first laid for the same.[113] In another case it was held that an instrument binding a land-owner to convey a right of way to a railroad company on payment of a certain sum, specified as liquidated damages, was conclusive on the question of the amount of damages, though the instrument did not bind the company to do anything, but it was shown that it was obtained by the railroad company for the purpose of constructing its road and the company was afterward permitted to enter on and appropriate the land on the faith of the

Gratt. (Va.) 661; Elliott Roads and Streets (2d ed.), § 347; post, § 1039.

[111] See St. Paul &c. R. Co. v. Covel, 2 Dak. 483; 11 N. W. 106; Port Huron &c. R. Co. v. Voorheis, 50 Mich. 506; 15 N. W. 882; Gage v. Judson, 111 Fed. 350; Columbia &c. Co. v. Geisse, 36 N. J. L. 537; White Plains &c. Com'rs, In re, 71 App. Div. (N. Y.) 544; 76 N. Y. S. 11; Post, § 1039. It has been held proper to instruct that the purpose of the view was to better enable the jury to understand the testimony and to more intelligently apply it to the issues, and that they should consider the evidence in the light of their view, but determine the facts from the evidence alone. Guinn v. Iowa &c. R. Co. (Ia.) 109 N. W. 209. See post, § 1040, notes 343, 344 for authorities on both sides of this question.

[112] Pierson v. Boston &c. R. Co. 191 Mass. 223; 77 N. E. 769.

[113] Boyne City &c. R. Co. v. Anderson (Mich.), 109 N. W. 429.

agreement.[114] Maps shown to be correct representations of the locus in quo are admissible in evidence as valuable aids to the jury in the consideration of the case.[115]

§ 1036. Evidence of value—Illustrative instances.—It is held that evidence of the selling value of lands in the neighborhood may be given as tending to establish a basis from which the land-owner's damages can be assessed in cases where the land taken is not shown to have any definite market value,[116] but as a general rule where there is a definite market value that value should be taken as the

[114] Chicago &c. R. Co. v. Douglass, 33 Tex. Civ. App. 262; 76 S. W. 449.

[115] Cox v. Philadelphia &c. R. Co. 215 Pa. St. 506; 64 Atl. 729. See, also, Atlanta &c. R. Co. v. Atlanta &c. R. Co. 125 Ga. 529; 54 S. E. 736. The last case just cited was a suit for injunction against a railroad company to prevent the laying of its tracks and operation of its trains along a street of a city by one alleging himself to be the owner of the fee in the street subject to the easement, and also the owner of the abutting property, and alleging that the proposed use of the street against his will, and without the condemnation proceedings authorized by law, was an unlawful taking and damaging of his property; and it not appearing from the evidence offered by the plaintiff that he suffered any special damage other than the mere fact of taking his property, it was held not erroneous for the court, on the hearing of the case for interlocutory injunction, to exclude as irrelevant and immaterial an affidavit offered by the defendant to the effect that the construction of the road along the street would increase the values of the abutting property. It was also held not errroneous to admit an affidvit of the surveyor attached to a plat of the land.

[116] San Diego &c. R. Co. v. Neale, 78 Cal. 63; 20 Pac. 372; 3 L. R. A. 83; Chicago &c. R. Co. v. Chicago &c. Co. 112 Ill. 589; Concordia Cemetery Assn. v. Minnesota &c. R. Co. 121 Ill. 199. See, generally, Greeley &c. R. Co. v. Yount, 7 Colo. App. 189; 42 Pac. 1023; Condemnation for New State House, In re, 19 R. I. 382; 33 Atl. 523; Teele v. Boston, 165 Mass. 88; 42 N. E. 506; Dixon v. Baltimore &c. R. Co. 1 Mackey (D. C.), 78; Pingery v. Cherokee &c. R. Co. 78 Iowa, 438; 43 N. W. 285; Friday v. Pennsylvania R. Co. 204 Pa. St. 405; 54 Atl. 339; Calvert &c. R. Co. v. Smith (Tex. Civ. App.), 68 S. W. 68. Where property devoted to a certain use—as a quarry—is sought to be taken in condemnation proceedings it may be shown that the county in which the land was situated was not a market in which a purchaser of the property could be expected to be found. Seattle &c. R. Co. v. Roeder, 30 Wash. 244; 70 Pac. 498; 94 Am. St. 864.

basis for estimating compensation.[117] Evidence of actual sales of such lands has been held admissible in cases where the market value of the land sought to be condemned was in dispute,[118] though other authorities hold such evidence inadmissible[119] upon the ground that it is the general selling price of land in the neighborhood which is the test of its value, and not the price paid for particular pieces of property.[120] The sales proven must have been of land similar in character and location to that condemned, and must have been made near the time of the taking.[121] But some of the cases hold that

[117] Missouri &c. R. Co. v. Porter, 112 Mo. 361; 20 S. W. 568; Kansas City &c. R. Co. v. Fisher, 49 Kan. 17; 30 Pac. 111; Little Rock &c. R. Co. v. Woodruff, 49 Ark. 381; 4 Am. St. 51; 5 S. W. 792; Kiernan v. Chicago &c. R. Co. 123 Ill. 188; 14 N. E. 18; Santa Ana v. Harlin, 99 Cal. 538; 34 Pac. 224; Colorado &c. R. Co. v. Brown, 15 Colo. 193; 25 Pac. 87; Currie v. Waverly &c. R. Co. 52 N. J. L. 381; 20 Atl. 56; 19 Am. St. 452, and note; 44 Am. & Eng. R. Cas. 100; Pittsburgh &c. R. Co. v. Patterson, 107 Pa. St. 461. Evidence of diminution in mere mortgage value is, it seems, inadmissible, and at all events, evidence that persons applied to were unwilling to loan on mortgage on the property an amount which had been loaned on it is not competent as evidence of diminution in market value. Pierson v. Boston &c. R. Co. 191 Mass. 223; 77 N. E. 769.

[118] Edmands v. Boston, 108 Mass. 535; Boston &c. R. Co. v. Old Colony &c. R. Co. 3 Allen (Mass.), 142; Concord R. Co. v. Greely, 23 N. H. 237; March v. Portsmouth &c. R. Co. 19 N. H. 372; King v. Iowa Midland R. Co. 34 Iowa, 458; Seattle &c. R. Co. v. Gilchrist, 4 Wash. 509; 30 Pac. 738.

[119] Stinson v. Chicago &c. R. Co. 27 Minn. 284; 6 N. W. 784; Curtin v. Nittany Valley R. Co. 135 Pa. St. 20; 19 Atl. 740; Pittsburgh &c. R. Co. v. Rose, 74 Pa. St. 362; Pennsylvania &c. R. Co. v. Bunnell, 81 Pa. St. 414; Central Pacific R. Co. v. Pearson, 35 Cal. 247; Union R. &c. Co. v. Moore, 80 Ind. 458; Witmark v. New York &c. R. Co. 149 N. Y. 393; 44 N. E. 78; Hewitt v. Pittsburg &c. R. Co. 19 Pa. Super. Ct. 304. The consideration named in deeds for contiguous lands is not admissible in proof of the value of the land sought to be condemned. Seefeld v. Chicago &c. R. Co. 67 Wis. 96; 29 N. W. 904; Esch v. Chicago &c. R. Co. 72 Wis. 229; 39 N. W. 129.

[120] A particular sale may be a sacrifice compelled by necessity, or it may be the result of mere caprice or folly. Pittsburgh &c. R. Co. v. Patterson, 107 Pa. St. 461; Pittsburgh &c. R. Co. v. Vance, 115 Pa. St. 325; 8 Atl. 764; Curtin v. Nittany Valley R. Co. 135 Pa. St. 20; 19 Atl. 740.

[121] San Jose &c. R. Co. v. Mayne, 83 Cal. 566; 23 Pac. 522; Peoria Gaslight &c. Co. v. Peoria &c. R. Co. 146 Ill. 372; 34 N. E. 550; 31 L. R. A. 373; Laing v. United N. J. &c. Co. 54 N. J. L. 576; 25 Atl. 409; 33 Am. St. 682. The value of the land before the location of the road may be shown preparato-

whether offered evidence is sufficient in these regards is largely in the discretion of the officer or judge presiding.[122] Such sales, to be admissible in evidence, must have been voluntary. The price paid upon condemnation of similar property,[123] or by agreement with the owner as a gross sum both for the land purchased and for damages resulting to the residue from the construction of the railroads,[124] is to be excluded as evidence.[125] We incline to doubt the soundness of the cases which hold evidence of particular sales to be competent, although we think it may be proper to test the knowledge of witnesses by asking them, on cross-examination, whether they know of such sales. It seems to us that to permit evidence in chief of particular sales is to let in collateral questions and lead to confusion and error. We believe the true rule is to confine the question to the market value.[126] The land-owner is at liberty, as a general rule, to prove every fact which he would naturally be expected to adduce as enhancing the price at a private sale.[127] On the other hand, the

ry to showing what it was worth after the road was constructed. Durham &c. R. Co. v. Bullock Church, 104 N. Car. 525; 10 S. E. 761.

[122] Shattuck v. Stoneham Branch R. Co. 6 Allen (Mass.), 115; Teele v. Boston, 165 Mass. 88; 42 N. E. 506; Presbrey v. Old Colony &c. R. Co. 103 Mass. 1; Stinson v. Chicago &c. R. Co. 27 Minn. 284; 6 N. W. 784; Montclair R. Co. v. Benson, 36 N. J. L. 557. For instances of the abuse of this discretion leading to a reversal of the case, Chandler v. Jamaica Pond &c. Co. 122 Mass. 305; Paine v. Boston, 4 Allen (Mass.), 168; La Mont v. St. Louis &c. R. Co. 62 Iowa, 193; 17 N. W. 465. Where there is no similarity between the land taken and other lots in the vicinity, it is error to admit evidence of the value of such lots. Cummins v. Des Moines &c. R. Co. 63 Iowa, 397; 19 N. W. 268.

[123] Bemis v. Springfield, 122 Mass. 110; White v. Fitchburgh &c. R. Co. 4 Cush. (Mass.) 440; Wyman v. Lexington &c. R. Co. 13 Met. (Mass.) 316.

[124] Presbrey v. Old Colony &c. Co. 103 Mass. 1; Cobb v. Boston, 112 Mass. 181.

[125] Pierce Railroads, 225. See, also, Peoria Gaslight &c. Co. v. Peoria &c. R. Co. 146 Ill. 372; 34 N. E. 550; 31 L. R. A. 373.

[126] Chicago &c. R. Co. v. Bowman, 122 Ill. 595; 13 N. E. 814; Giesy v. Cincinnati R. Co. 4 Ohio St. 308; Boom Co. v. Patterson, 98 U. S. 403; Harrison v. Young, 9 Ga. 359; Doud v. Mason City &c. R. Co. 76 Iowa, 438; 41 N. W. 65; Kansas City &c. R. Co. v. Kennedy, 49 Kan. 19; 30 Pac. 126; Stinson v. Chicago &c. R. Co. 27 Minn. 284; 6 N. W. 784; Kansas City &c. R. Co. v. Splitlog, 45 Kan. 68; 25 Pac. 202; Payne v. Kansas &c. R. Co. 46 Fed. 546; Esch v. Chicago &c. R. Co. 72 Wis. 229; 39 N. W. 129; 36 Am. & Eng. R. Cas. 620; Elliott Ev. § 180.

[127] Chicago &c. R. Co. v. Davidson, 49 Kan. 589; 31 Pac. 131;

defendant company may offer such evidence as will put the jury in possession of all those facts about which a prudent purchaser would inquire,[128] and will usually be permitted to prove them on cross-examination of the plaintiff, where he testifies in his own behalf as to the value of his land.[129] It is held that the company may prove the price paid by the owner for his land[130] as tending to show its value. But the owner may show by way of explanation, the circumstances under which he bought, the condition of the property at the time, the improvement he has made upon it, and any general advance in prices by which the property has been benefited.[131] An offer on his

Ohio Co. v. Kerth, 130 Ind. 314; 30 N. E. 298; Little Rock &c. R. Co. v. Woodruff, 49 Ark. 381; 5 S. W. 792; 4 Am. St. 51; Montana &c. R. Co. v. Warren, 6 Mont. 275; 12 Pac. 641; Cincinnati &c. R. Co. v. Longworth, 30 Ohio St. 108; Condemnation for New State House, In re, 19 R. I. 382; 33 Atl. 523. Building operations in process of completion on land at some distance from the land taken can not be shown in evidence, to increase the speculative price of the land as the possible site for buildings, in case the former venture should prove a success. Schuylkill River &c. R. Co. v. Stocker, 128 Pa. St. 233; 18 Atl. 399. See Hooker v. Montpelier &c. R. Co. 62 Vt. 47; 19 Atl. 775; Washburn v. Milwaukee &c. R. Co. 59 Wis. 364; 18 N. W. 328; South Park &c. v. Dunlevy, 91 Ill. 49; Sherman v. St. Paul &c. R. Co. 30 Minn. 227; 15 N. W. 239; King v. Minneapolis &c. R. Co. 32 Minn. 224; 20 N. W. 135. But the peculiar value attached to the land by the owner is not to be taken as basis of estimate. Mississippi &c. Co. v. Ring, 58 Mo. 491. See De Buol v. Freeport &c. R. Co. 111 Ill. 499.

[128] Little Rock &c. R. Co. v. Woodruff, 49 Ark. 381; 5 S. W. 792; 4 Am. St. 51; Cameron v. Chicago &c. R. Co. 51 Minn. 153; 53 N. W. 199. See, generally, Chicago &c. R. Co. v. Catholic &c. 119 Ill. 525; 10 N. E. 372; Stebbing v. Metropolitan &c. L. R. 6 Q. B. 37; Somerville &c. R. Co. v. Doughty, 22 N. J. L. 495; Pittsburgh &c. R. Co. v. Vance, 115 Pa. St. 325; 8 Atl. 764; Dupuis v. Chicago &c. R. Co. 115 Ill. 97; 3 N. E. 720; 23 Am. & Eng. R. Cas. 93.

[129] Edmands v. Boston, 108 Mass. 535; St. Louis &c. R. Co. v. Smith, 42 Ark. 265. But see San Antonio &c. R. Co. v. Ruby, 80 Tex. 172; 15 S. W. 1040. For a case in which the cross-examination let in explanatory evidence in rebuttal, see Port Townsend &c. R. Co. v. Barbare (Wash.), 89 Pac. 710.

[130] Ham v. Salem, 100 Mass. 350; Swan v. County of Middlesex, 101 Mass. 173; Sexton v. North Bridgewater, 116 Mass. 200; St. Louis &c. R. Co. v. Smith, 42 Ark. 265. But not what he paid for it seventeen years (Davis v. Pennsylvania R. Co. (Pa. St.) 64 Atl. 774), or even ten years before (Sullivan v. Missouri &c. R. Co. 29 Tex. Civ. App. 429; 68 S. W. 745).

[131] St. Louis &c. R. Co. v. Smith, 42 Ark. 265; Ham v. Salem, 100 Mass. 350.

part to sell the land at a fixed price, and the actual sale of a part of it may be proven as admissions of the owner as to its value.[132] The company may give, as original evidence, the admissions of the owner as to the value of his land, made at or near the time it was taken.[133] So a lease executed by the operators of a quarry to the owners fixing a royalty has been held admissible as tending to fix the value of the land and the leasehold.[134] Where the owner dies pending suit, his admissions may be proven against his personal representatives.[135] But a witness can not state his impressions as to

[132] East Brandywine &c. R. Co. v. Ranck, 78 Pa. St. 454. See, also, Springer v. Chicago, 135 Ill. 552; 26 N. E. 514; 12 L. R. A. 609, and note; Power v. Savannah &c. R. Co. 56 Ga. 471. The railroad company may prove that the owner sold the land in question before the action but after the railroad was located across it, and the price for which it was sold. Such evidence is admissible as an admission of the owner that the property was worth that price even with the railroad across it. Watson v. Milwaukee &c. R. Co. 57 Wis. 332; 15 N. W. 468.

[133] Concord R. Co. v. Greely, 23 N. H. 237; Central Branch R. Co. v. Andrews, 37 Kan. 162, 641; 16 Pac. 338; East Brandywine &c. R. Co. v. Ranck, 78 Pa. St. 454; Webber v. Eastern R. Co. 2 Met. (Mass.) 147; Leroy &c. R. Co. v. Butts, 40 Kan. 159; 19 Pac. 625; Power v. Savannah &c. R. Co. 56 Ga. 471; Watson v. Milwaukee &c. R. Co. 57 Wis. 332; 15 N. W. 468. The sworn valuation placed upon his property by a land-owner in making a return of the property to the assessor for taxation, was held not admissible as original evidence against him in fixing the value upon condemnation, though it was held admissible to discredit the owner's evidence. Virginia &c. R. Co. v. Henry, 8 Nev. 165. And the same holding was made as to an assessment list signed by the land-owner, but in which the values were fixed by the assessor. San Jose &c. R. Co. v. Mayne, 83 Cal. 566; 23 Pac. 522. So, in Arkansas, upon the ground that the valuation in the assessment for taxation was "made for a different purpose, and was not a fair criterion of the market value." Texas &c. R. Co. v. Eddy, 42 Ark. 527; Springfield &c. R. Co. v. Rhea, 44 Ark. 258. See Brown v. Providence &c. R. Co. 5 Gray (Mass.), 35. But in Birmingham Mineral R. Co. v. Smith, 89 Ala. 305; 7 So. 634, the court held that the owner's sworn valuation was an admission on his part as to the value of his property, remarking: "If his unsworn declarations and admissions are admissible against him, certainly his estimate of the value, made under the solemnity of an oath is equally admissible as a declaration or admission. Such valuation is not conclusive upon him, but dependent for its weight upon the circumstances."

[134] Seattle &c. R. Co. v. Roeder, 30 Wash. 244; 70 Pac. 498; 94 Am. St. 864.

[135] Power v. Savannah &c. R. Co. 56 Ga. 471; Central Branch R. Co.

what the owner has said concerning the value of his property.[136] The owner has been allowed to prove the price offered for the property a short time before its condemnation as tending to show that it has a special value above the general market value of surrounding property,[137] but most authorities hold that evidence of unaccepted offers made by third persons[138] or by the condemning corporation[139] are inadmissible to fix the value of the land. Unexecuted offers and agreements for the purchase of similar lands in the neighborhood are never competent evidence for this purpose.[140] The fact that the land sold for a particular sum shortly after the railroad was laid across it has been held entitled to great weight in getting at its value as depreciated by the location of the road.[141]

v. Andrews, 37 Kan. 641; 16 Pac. 338.

[136] New York &c. R. Co. Matter of, 33 Hun (N. Y.), 231; Lewis' Em. Dom. § 439.

[137] Johnson v. Freeport &c. R. Co. 111 Ill. 413.

[138] Selma &c. R. Co. v. Keith, 53 Ga. 178; Drury v. Midland R. Co. 127 Mass. 571; St. Joseph &c. R. Co. v. Orr, 8 Kan. 419; Watson v. Milwaukee &c. R. Co. 57 Wis. 332; 15 N. W. 468; Eastern Texas R. Co. v. Eddings, 30 Tex. Civ. App. 170; 70 S. W. 98 (offer made five years before). The owner's refusal to part with the premises for an offered sum may have proceeded from a special fondness for the land or from an opinion on his part that it would some day be a profitable investment, and can not be taken as evidence of the value of the land. Pennsylvania &c. R. Co. v. Cleary, 125 Pa. St. 442; 11 Am. St. 913; 17 Atl. 468.

[139] Davis v. Charles River Branch R. Co. 11 Cush. (Mass.) 506; Upton v. South Reading Branch R. Co. 8 Cush. (Mass.) 600. The award of commissioners appointed to appraise the land can not be introduced as evidence of its value in the trial of an appeal from such award. Sherman v. St. Paul &c. R. Co. 30 Minn. 227; 15 N. W. 239; Ennis v. Wood River &c. Railroad, 12 R. I. 73. It is incompetent to prove that, after proceedings are commenced, the company offered and an agent of the owner agreed to accept a certain price for the property. Chicago &c. R. Co. v. Catholic Bishop, 119 Ill. 525.

[140] Davis v. Charles River &c. R. Co. 11 Cush. (Mass.) 506; Winnisimmet Co. v. Grueby, 111 Mass. 543; Lehmicke v. St. Paul &c. R. Co. 19 Minn. 464; Concord R. Co. v. Greely, 23 N. H. 237; Montclair R. Co. v. Benson, 36 N. J. L. 557.

[141] Watson v. Milwaukee &c. R. Co. 57 Wis. 332; 15 N. W. 468. The necessities of the railroad company can not be proved for the purposes of augmenting damages. Virginia &c. R. Co. v. Elliott, 5 Nev. 358; Boston &c. Co. In re, 22 Hun (N. Y.), 176; Black River &c. Co. v. Barnard, 9 Hun (N. Y.), 104. See New York &c. R. Co. In re, 27 Hun (N. Y.), 116, and DeBuol v. Freeport &c. R. Co. 111 Ill. 499.

§ 1036a. Evidence of value—Further illustrative instances.—Evidence that the rates of insurance are increased by reason of the proximity of the railroad to the property in question, has been held admissible[142] and conversely where the land-owner claims damages by reason of increased exposure it is held proper for the railroad company to show that the rates will not be increased by the construction of the road.[143] Where, however, the land-owner has disclaimed any right to recover damages for increased fire risk, evidence showing insurance rates on his building and on the buildings of others in the city is irrelevant.[144] Where valuable fruit trees stand on the land appropriated for right of way their value may be shown by proof of the value of the land with and without the trees thereon.[145] It has been held not improper to admit the report of commissioners first assessing damages in a later reassessment proceeding, providing the jury were instructed that they were not to allow the amount awarded by the commissioners to influence their judgment as the amount of damages. The admission of such evidence was justified on the ground that it was necessary for the jury to know the amount of the former award in order that credit might be given the land-owner for the amount paid, and that interest might be awarded the railroad company for the excess in case the damages found by the jury should exceed that awarded by the commissioners.[146] It is clear that evidence as to the intent of the company in constructing its road, does not respond to the issue before the jury, which is solely as the damage caused by the taking of the land, and should be excluded.[147] In a recent case, which was an action to enjoin the operation of an elevated railroad on a certain street unless the owner of an abutting tract was compensated for his damages, evidence of the value and of the rental value of the entire hotel property, which not only included such tract, but extended back to another street, was admitted, and this was held erroneous, but it was also held that the error was cured by cross-

[142] Cedar Rapids &c. Co. v. Raymond, 37 Minn. 204; 33 N. W. 704.

[143] North Arkansas R. Co. v. Cole, 71 Ark. 38; 70 S. W. 312.

[144] Boyne City &c. R. Co. v. Anderson (Mich.), 109 N. W. 429.

[145] Foote v. Lorain &c. R. Co. 21 Ohio Cir. Ct. 319; 11 O. C. D. 685.

[146] Kansas City &c. R. Co. v. McElroy, 161 Mo. 584; 61 S. W. 871.

[147] Chicago &c. R. Co. v. Loer, 27 Ind. App. 245; 60 N. E. 319.

examination disclosing the value put on each part of the entire property.[148]

§ 1036b. **Tax lists and assessments as evidence of value.**—Where the owner makes out and swears to his own tax list or schedule and places the value upon the property himself it has been held that it is admissible against him as in the nature of an admission.[149] But the weight of authority is to the effect that such evidence is not admissible, except, perhaps, to discredit him.[150] And it seems clear that it is not competent where the valuation is made by the assessor and not by the owner.[151]

§ 1037. **Competency of witnesses.**—It may be said generally that any competent witness acquainted with the land taken and having knowledge of the market price of such land is competent to testify as to its value.[152] Such a witness does not testify as an expert

[148] Shaw v. New York &c. R. Co. (N. Y.) 79 N. E. 984. It was also held that an expert might testify the same general course of appreciation in values would have prevailed in the locality as elsewhere if it had not been for such road. It was the second trial of the action, and, although a company to which the road had been leased subsequent to the first trial was made a party, it was also held that testimony of a witness who had died on the first trial might be read in evidence.

[149] Birmingham &c. R. Co. v. Smith, 89 Ala. 305; 7 So. 634. See, also, King v. Turnbull &c. Co. 8 Can. Exch. 163; Chambersburg Turnpike Road, In re, 20 Pa. Super. Ct. 173.

[150] Virginia &c. R. Co. v. Henry, 8 Nev. 165; Dudley v. Minnesota &c. R. Co. 77 Ia. 408; 42 N. W. 359; Texas &c. R. Co. v. Eddy, 42 Ark. 527; San Jose &c. Co. v. Mayne, 83 Cal. 566; 23 Pac. 522; New Orleans &c. R. Co. v. Barton, 43 La. Ann. 171; 9 So. 19; Wray v. Knoxville &c. R. Co. 113 Tenn. 544; 82 S. W. 471. The refusal of a court to permit a railroad company to show on cross-examination of the owner of platted property sought to be condemned that he had for many years returned the land for taxation as acreage property and not as lots and blocks can not be complained of, unless it is shown that the valuation by acreage was less than by lots and blocks. Calvert &c. R. Co. v. Smith (Tex. Civ. App.), 68 S. W. 68.

[151] Anthony v. New York &c. R. Co. 162 Mass. 60; 37 N. E. 780; Suffolk &c. R. Co. v. West End &c. Co. 137 N. Car. 330; 49 So. 350; 68 L. R. A. 333; Ridley v. Seaboard &c. R. Co. 124 N. Car. 37; 32 S. E. 379; Nelson v. West Duluth, 55 Minn. 497; 57 N. W. 149; 1 Elliott Ev. § 181.

[152] Republican Valley R. Co. v. Arnold, 13 Neb. 485; 14 N. W. 478; Selma &c. R. Co. v. Keith, 53 Ga.

having peculiar skill or scientific attainments, but as having knowledge of the value of property.[153] The weight of the testimony depends in a great degree, of course, upon the knowledge of the witness and the facts upon which his testimony is based. An owner of land taken for a right of way by a railroad company, who has resided upon and improved it for several years, and who swears that he knows what it is worth, is a competent witness,[154] but he has only the same standing as any other witness of equal knowledge, and it is error for the court by its instructions to call special attention to the landowner's testimony.[155] A farmer living near and knowing the market value of land in the neighborhood,[156] or who has examined the land

178; Sherwood v. St. Paul &c. R. Co. 21 Minn. 127; Lehmicke v. St. Paul &c. R. Co. 19 Minn. 464; Dallas &c. R. Co. v. Chenault, 4 Tex. App. Civ. Cas. 171; 16 S. W. 173; Snyder v. Western Union R. Co. 25 Wis. 60; Rondout &c. R. Co. v. Deys, 5 Lans. (N. Y.) 298; Pittsburgh &c. R. Co. v. Rose, 74 Pa. St. 362; East Pennsylvania R. Co. v. Hiester, 40 Pa. St. 53; Tucker v. Massachusetts R. Co. 118 Mass. 546; Russell v. Horn Pond Branch R. Co. 4 Gray (Mass.), 607; Wyman v. Lexington &c. R. Co. 13 Met. (Mass.) 316; Tate v. Missouri &c. R. Co. 64 Mo. 149; Snow v. Boston &c. R. Co. 65 Me. 230; Harrison v. Iowa Midland R. Co. 36 Iowa, 323; Henry v. Dubuque &c. R. Co. 2 Iowa, 288; Frankfort &c. R. Co. v. Windsor, 51 Ind. 238; Evansville &c. R. Co. v. Cochran, 10 Ind. 560; Cleveland &c. R. Co. v. Ball, 5 Ohio St. 568; Lafayette &c. R. Co. v. Winslow, 66 Ill. 219; Illinois &c. R. Co. v. Von Horn, 18 Ill. 257; Troy &c. R. Co. v. Northern Turnp. Co. 16 Barb. (N. Y.) 100; Troy &c. R. Co. v. Lee, 13 Barb. (N. Y.) 169; 1 Elliott Ev. § 685.

[153] Johnson v. Freeport &c. R. Co. 11 Ill. 413; Diedrich v. Northwestern &c. R. Co. 47 Wis. 662; 3 N. W. 749; Frankfort &c. R. Co. v. Windsor, 51 Ind. 238; Snow v. Boston &c. R. Co. 65 Me. 230; Shattuck v. Stoneham Branch R. Co. 6 Allen (Mass.), 115. See Uniacke v. Chicago &c. R. Co. 67 Wis. 108; 29 N. W. 899.

[154] Burlington &c. R. Co. v. Schluntz, 14 Neb. 421; Sioux City &c. R. Co. v. Weimer, 16 Neb. 272; 20 N. W. 349; Edmands v. Boston, 108 Mass. 535.

[155] Jacksonville &c. R. Co. v. Walsh, 106 Ill. 253.

[156] Kansas Central R. Co. v. Allen, 24 Kan. 33; Chicago &c. R. Co. v. Cosper, 42 Kan. 561; 22 Pac. 634; Russell v. Horn Pond Branch R. Co. 4 Gray (Mass.), 607; Snyder v. Western U. R. Co. 25 Wis. 60; Robertson v. Knapp, 35 N. Y. 91; Pingery v. Cherokee &c. R. Co. 78 Iowa, 438; 43 N. W. 285; Curtin v. Nittany Valley R. Co. 135 Pa. St. 20; 19 Atl. 740; Leroy &c. R. Co. v. Ross, 40 Kan. 598; 20 Pac. 197; 2 L. R. A. 217, and note; Leroy &c. R. Co. v. Hawks, 39 Kan. 638; 18 Pac. 943; 7 Am. St. 566; Northeastern Nebraska R. Co. v. Frazier, 25 Neb. 53; 40 N. W. 609. Contra, Buffum v. New York &c. R.

with a view of buying it,[157] or a real estate man who has been dealing in lots near those sought to be condemned,[158] or an officer who has assessed the property for taxation,[159] or, in general, any person who is shown to be familiar with the value of the particular piece of land across which the railroad is being built,[160] is a competent witness as to its value.[161] The usual rule in such cases is to call a witness,

Co. 4 R. I. 221. In Brown v. Providence &c. R. Co. 12 R. I. 238, it was held that farmers were only competent to say how much land was worth for farming purposes, and not to say what it was worth generally.

[157] Pittsburgh &c. R. Co. v. Reed, (Pa. St.), 28 Am. & Eng. R. Cas. 233.

[158] Central Branch R. Co. v. Andrews, 37 Kan. 162; 14 Pac. 509. Any person knowing the selling price of lots in the vicinity may express an opinion as to the value of the land taken. Pittsburgh &c. R. Co. v. Robinson, 95 Pa. St. 426. And, in general, any person who has bought or sold land in the vicinity is a competent witness. Houston &c. R. Co. v. Knapp, 51 Tex. 592; Snow v. Boston &c. R. Co. 65 Me. 230; Curtis v. St. Paul &c. R. Co. 20 Minn. 28; Swan v. Middlesex Co. 101 Mass. 173; Diedrich v. Northwestern U. R. Co. 47 Wis. 662; 3 N. W. 749; Carter v. Thurston, 58 N. H. 104; 42 Am. R. 584.

[159] Brown v. Providence &c. R. Co. 5 Gray (Mass.), 35; Oregon Cascade R. Co. v. Baily, 3 Ore. 164. The official return of municipal assessors fixing the value of the land for purposes of taxation is not admissible in evidence; the officer must be examined under oath. Webber v. Eastern R. Co. 2 Met. (Mass.) 147; Dudley v. Minnesota &c. R. Co. 77 Iowa, 408; 42 N. W. 359. See Birmingham Mineral R. Co. v. Smith, 89 Ala. 305; 7 So. 634; San Jose &c. R. Co. v. Mayne, 83 Cal. 566; 23 Pac. 522.

[160] Blakeley v. Chicago &c. R. Co. 25 Neb. 207; 40 N. W. 956; Sioux City &c. R. Co. v. Weimer, 16 Neb. 272; 20 N. W. 349; Republican Valley R. Co. v. Arnold, 13 Neb. 485; 14 N. W. 478. Persons who have acted as commissioners in assessing damages for similar land taken for public use are competent witnesses as to its value. Webber v. Eastern R. Co. 2 Met. (Mass.) 147; Dickenson v. Fitchburg, 13 Gray (Mass.), 546. And the fact that the witness was himself a viewer to assess damages in the same case does not render him incompetent as a witness when the question of damages comes before a jury on appeal. Dorlan v. East Brandywine &c. R. Co. 46 Pa. St. 520. A witness may be asked as to his having previously testified in similar proceedings, in order to test his qualifications. Chandler v. Jamaica Pond Aqueduct Co. 125 Mass. 544.

[161] In Winklemans v. Des Moines &c. R. Co. 62 Iowa, 11; 17 N. W. 82, the court held that the fact that a witness, examined as to the value of land, based his estimate upon what he heard others say in relation thereto, will not render him incompetent, but his knowledge

and ask him, generally, if he has knowledge of the value of the property in question, or property of that kind. If he answers that he has, he is allowed to state the value in his judgment, and on cross-examination his means of knowledge, or qualifications to testify upon the subject, may be particularly inquired into. If he shows, upon the cross-examination, that he has such knowledge, although his knowledge of values is limited, his testimony is still permitted to go to the jury for what it is worth.[162] But there is no presumption in favor of the competency of a witness who offers to testify as to the value of land; and where his competency is challenged it must be shown that he has some knowledge upon which to base an opinion as to its value.[163] The extent of his knowledge should be shown

may be fully tested on cross-examination, that the jury may judge of the value of his opinion. The court said: "The knowledge which qualifies a witness to testify as to values, must necessarily consist largely of hearsay. The examination of market reports, and information acquired from others, as to sales of property qualifies a witness to testify as to values." It is not necessary that the witness should himself have been upon the land. Lehmicke v. St. Paul &c. R. Co. 19 Minn. 464. But in Le Roy &c. R. Co. v. Ross, 40 Kan. 598; 2 L. R. A. 217, and note, the court says: "The opinion of no farmer not living in the neighborhood of the land and not acquainted with its situation and fertility, its advantages, disadvantages, etc., ought to be received in regard to the value of the land. Farmers not employed in buying and selling real estate, and having no knowledge of the facts in issue, ought not to be permitted to give their opinions from a map of the route of the road, and upon hearsay evidence only." Leroy &c. R. Co. v. Hawk, 39 Kan. 638; 18 Pac. 943; 7 Am. St. 566.

[162] Winklemans v. Des Moines &c. R. Co. 62 Iowa, 11; 17 N. W. 82; Houston &c. R. Co. v. Knapp, 51 Tex. 592; Farrand v. Chicago &c. R. Co. 21 Wis. 435; Diedrich v. Northwestern R. Co. 47 Wis. 662; 3 N. W. 749; Snow v. Boston &c. R. Co. 65 Me. 230; Carter v. Thurston, 58 N. H. 104; 42 Am. R. 584; Sherwood v. St. Paul &c. R. Co. 21 Minn. 127; Johnson v. Freeport &c. R. Co. 111 Ill. 413; Swan v. Middlesex Co. 101 Mass. 173. See Minnesota &c. R. Co. v. Gluek, 45 Minn. 463; 48 N. W. 194; Wyman v. Lexington &c. R. Co. 13 Metc. (Ky.) 316; Chicago &c. R. Co. v. Woodward, 48 Kan. 599; 29 Pac. 1146; Birmingham &c. R. Co. v. Smith, 89 Ala. 305; 7 So. 634; 1 Elliott Ev. § 635.

[163] Missouri Pac. R. Co. v. Coon, 15 Neb. 232; 18 N. W. 62; Boston &c. R. Co. v. Montgomery, 119 Mass. 114; Central Pac. R. Co. v. Pearson, 35 Cal. 247; Buffum v. New York &c. R. Co. 4 R. I. 221. See, also, 1 Elliott Ev. § 635. In Markowitz v. Pittsburg &c. R. Co. (Pa. St.) 65 Atl. 1097, 1098, it is held that the competency of the witness is a preliminary question

to enable the jury to assign to his evidence the proper weight,[164] and it is proper, within reasonable limits, for a witness in his examination in chief to give the reasons upon which his opinion is based.[165] An objection to the competency of a witness must generally be made when he is offered, or it is waived.[166] The discretion exercised by the judge or presiding officer at the trail in accepting or rejecting a witness after learning what knowledge he claims and the sources of that knowledge, will only be interfered with in cases of palpable error.[167]

to be passed upon by the court after proper examination, before the witness is permitted to testify as to the value, and it is said: "The witness should have some special opportunity for observation, and, to a reasonable extent, have in his mind the data from which a proper estimate of value ought to be made. Pittsburgh &c. R. Co. v. Vance, 115 Pa. 325; 8 Atl. 764. He should be familiar with the property upon which he is asked to fix a value, its area, the uses to which it may be put, the extent and condition of its improvements, and, in addition thereto, should have some knowledge of values in the neighborhood and the general selling price of property in the locality at or near the time of the appropriation. Friday v. Pennsylvania R. Co. 204 Pa. 405; 54 Atl. 339. Where no objection was offered to the testimony of a witness in the court below, it will be presumed that he was competent to express an opinion as to the value of the land condemned. Durham &c. R. Co. v. Bullock Church, 104 N. Car. 525; 10 S. E. 761.

[164] McReyolds v. Burlington &c. R. Co. 106 Ill. 152; Johnson v. Freeport &c. R. Co. 111 Ill. 413. A witness may be interrogated on cross-examination as to the value of other real estate in the neighborhood, for the purpose of testing his competency as a judge of land values, although the land about which inquiry is made is not shown to be similar to that sought to be condemned. Uniacke v. Chicago &c. R. Co. 67 Wis. 108; 29 N. W. 899.

[165] Snyder v. Western Union R. Co. 25 Wis. 60; Brown v. Corey, 43 Pa. St. 495; McClean v. Chicago &c. R. Co. 67 Iowa, 568; 25 N. W. 782; Sawyer v. Boston, 144 Mass. 470; 11 N. E. 711; Sexton v. North Bridgewater, 116 Mass. 200; Illinois &c. R. Co. v. Von Horn, 18 Ill. 257; Lafayette &c. R. Co. v. Winslow, 66 Ill. 219. But matters not competent can not be introduced to fortify the opinion of an expert, under the guise of reasons for his opinion, though they may be gone into on cross-examination to test and diminish the weight of his opinion. Pierson v. Boston &c. R. Co. 191 Mass. 223; 77 N. E. 769. Details as to particular sales or transactions should be given only upon cross-examination. Central Pac. R. Co. v. Pearson, 35 Cal. 247. See Missouri &c. R. Co. v. Haines, 10 Kan. 439.

[166] Watts v. Derry, 22 N. H. 498.

[167] Chandler v. Jamaica Pond Aqueduct Co. 125 Mass. 544; Boston &c. R. Co. v. Montgomery, 119 Mass. 114; Tucker v. Massachusetts Cent. R. Co. 118 Mass. 546.

§ 1038. Opinions of witnesses.—Witnesses who are acquainted with the property sought to be condemned may give their opinions as to its value.[168] By some courts witnesses are also permitted to give an opinion as to the amount of damage or benefit resulting to an estate from the construction and working of the railroad.[169] This practice

[168] St. Louis &c. R. Co. v. Chapman, 38 Kan. 307; 16 Pac. 695; 5 Am. St. 744; Rumsey v. New York &c. R. Co. 133 N. Y. 79; 30 N. E. 654; 15 L. R. A. 618; Washburn v. Milwaukee &c. R. Co. 59 Wis. 364; 18 N. W. 328; Watson v. Pittsburgh &c. R. Co. 37 Pa. St. 469; Pittsburgh &c. R. Co. v. Robinson, 95 Pa. St. 426; Pennsylvania &c. R. Co. v. Bunnell, 81 Pa. St. 414; Republican Valley R. Co. v. Arnold, 13 Neb. 485; 14 N. W. 478; Tingley v. Providence, 8 R. I. 493; Cleveland &c. R. Co. v. Ball, 5 Ohio St. 568; Utica &c. R. Co. Matter of, 56 Barb. (N. Y.) 456; Troy &c. R. Co. v. Northern T. Co. 16 Barb. (N. Y.) 100; Springfield &c. R. Co. v. Calkins, 90 Mo. 538; 3 S. W. 82; Hosher v. Kansas City &c. R. Co. 60 Mo. 303; Sherman v. St. Paul &c. R. Co. 30 Minn. 227; 15 N. W. 239; Lehmicke v. St. Paul &c. R. Co. 19 Minn. 464; Hawkins v. Fall River, 119 Mass. 94; Shattuck v. Stoneham &c. R. Co. 6 Allen (Mass.), 115; Snow v. Boston &c. R. Co. 65 Me. 230; Central Branch R. Co. v. Andrews, 37 Kan. 162; 14 Pac. 509; Kansas Central R. Co. v. Allen, 24 Kan. 33; McClean v. Chicago &c. R. Co. 67 Iowa, 568; 25 N. W. 782; Winklemans v. Des Moines &c. R. Co. 62 Iowa, 11; 17 N. W. 82; Yost v. Conroy, 92 Ind. 464; 47 Am. R. 156; Indianapolis &c. R. Co. v. Pugh, 85 Ind. 279; Chicago &c. R. Co. v. Blake, 116 Ill. 163; 4 N. E. 488; Johnson v. Freeport &c. R. Co. 111 Ill. 413; Cincinnati &c. R. Co. v. Mims, 71 Ga. 240; Central Pacific R. Co. v. Pearson, 35 Cal. 247; Little Rock &c. R. Co. v. Woodruff, 49 Ark. 381; 5 S. W. 792; 4 Am. St. 51; Texas &c. R. Co. v. Kirby, 44 Ark. 103; St. Louis &c. R. Co. v. Anderson, 39 Ark. 107.

[169] Portland v. Kamm, 10 Ore. 383; Snow v. Boston &c. R. Co. 65 Me. 230; Cairo &c. R. Co. v. Woosley, 85 Ill. 370; Jacksonville &c. R. Co. v. Caldwell, 21 Ill. 75; Chicago v. McDonough, 112 Ill. 85; Brainard v. Boston &c. R. Co. 12 Gray (Mass.), 407; Shattuck v. Stoneham Branch R. Co. 6 Allen (Mass.) 115; Nevada &c. R. Co. v. De Lissa, 103 Mo. 125; 15 S. W. 366; Snyder v. Western U. R. Co. 25 Wis. 60; Diedrich v. Northwestern R. Co. 47 Wis. 662; 3 N. W. 749; Washburn v. Milwaukee &c. R. Co. 59 Wis. 364; 18 N. W. 328; Texas &c. R. Co. v. Kirby, 44 Ark. 103; Lehmicke v. St. Paul &c. R. Co. 19 Minn. 464; Sherwood v. St. Paul &c. R. Co. 21 Minn. 127; Sherman v. St. Paul &c. R. Co. 30 Minn. 227; 15 N. W. 239; Railroad Co. v. Foreman, 24 W. Va. 662; Pittsburgh &c. R. Co. v. Robinson, 95 Pa. St. 426; Utica &c. R. Co. Matter of, 56 Barb. (N. Y.) 456; Hine v. New York &c. R. Co. 36 Hun (N. Y.), 293. See contra, New York &c. R. Co. Matter of, 29 Hun (N. Y.), 609. And compare Roberts v. Railway Co. 128 N. Y. 455; 28 N. E. 486; 13 L. R. A. 499; Doyle v. Railway Co. 128 N. Y. 488; 28 N. E. 495; Union Ele-

is rejected by other courts because it calls upon witnesses to express an opinion upon the precise point which the issues present for the decision of the jury,[170] but they permit the witnesses to give an opinion as to the value of the property before and after the taking.[171] In some of the states where no allowance is made for benefits in the condemnation of land for railroad purposes, this rule is also rejected and the courts only permit the witness to state the value of the land before the taking, and the nature and extent of particular injuries, leaving the jury to estimate the compensation due to the land-owners on account of them,[172] but this rule is open to the grave objections that it necessarily assumes that the jury is acquainted with the value of all kinds of property subject to condemnation, and that they can, unaided by the opinions of witnesses, correctly estimate the effect upon that value of every possible injury that can be inflicted.[173] In states where opinions as to the amount

vated Co. v. Kansas City &c. Co. 135 Mo. 353; 36 S. W. 1071.

[170] Chicago &c. R. Co. v. Springfield &c. R. Co. 67 Ill. 142; Cleveland &c. R. Co. v. Ball, 5 Ohio St. 568; Atlantic &c. R. Co. v. Campbell, 4 Ohio St. 583; 64 Am. Dec. 607; Baltimore &c. R. Co. v. Johnson, 59 Ind. 247; Ohio &c. R. Co. v. Nickless, 71 Ind. 271. See, also, Elliott Roads and Streets (2d ed.), § 258; 1 Elliott Ev. § 674.

[171] Houston &c. R. Co. v. Knapp, 51 Tex. 592; Curtis v. St. Paul &c. R. Co. 20 Minn. 28; Sherwood v. St. Paul &c. R. Co. 21 Minn. 127; Snow v. Boston &c. R. Co. 65 Me. 230; Swan v. Middlesex Co. 101 Mass. 173; Farrand v. Chicago &c. R. Co. 21 Wis. 435; Diedrich v. Northwestern U. R. Co. 47 Wis. 662; 3 N. W. 749; Carter v. Thurston, 58 N. H. 104; 42 Am. R. 584. See, also, Pittsburgh &c. R. Co. v. Robinson, 95 Pa. St. 426; Eberhart v. Chicago &c. R. Co. 70 Ill. 347; Kansas City &c. R. Co. v. Norcross, 137 Mo. 415; 38 S. W. 299; Atchison &c. R. Co. v. Boerner, 45 Neb. 453; 63 N. W. 787.

[172] Evansville &c. R. Co. v. Fitzpatrick, 10 Ind. 120; Baltimore &c. R. Co. v. Johnson, 59 Ind. 247; Baltimore &c. R. Co. v. Stoner, 59 Ind. 579. See these cases criticised and limited in Yost v. Conroy, 92 Ind. 464; 47 Am. R. 156; Harrison v. Iowa Midland R. Co. 36 Iowa, 323; Prosser v. Wapelo County, 18 Iowa, 327; Montgomery &c. R. Co. v. Varner, 19 Ala. 185; Alabama &c. R. Co. v. Burkett, 42 Ala. 83; Lincoln v. Saratoga &c. R. Co. 23 Wend. (N. Y.) 425; Troy &c. R. Co. v. Northern Turnp. Co. 16 Barb. (N. Y.) 100; Rochester &c. R. Co. v. Budlong, 6 How. Pr. (N. Y.) 467; Elizabethtown &c. R. Co. v. Helm, 8 Bush (Ky.), 681; Burlington &c. R. Co. v. Schluntz, 14 Neb. 421; 16 N. W. 439; Alabama &c. R. Co. v. Burkett, 42 Ala. 83.

[173] Yost v. Conroy, 92 Ind. 464; 47 Am. R. 156. In the case cited it was said: "Of what assistance to a jury composed of clergymen,

of the damages are held admissible, witnesses may give their opinions as to particular matters affecting the value of the land such as the capacity of the land for valuable uses different from that to which it is devoted,[174] or the extent to which the property is damaged by any of the several items of injury that the jury are called upon to consider in estimating the owner's compensation.[175] But they are

merchants and bankers would be a description of the minutest accuracy, without some estimate of values by competent witnesses? Possibly, it would enable such a jury to form a crude conjecture; it could do but little more."

[174] Chandler v. Jamaica Pond Aqueduct Co. 125 Mass. 544. In a suit to condemn land for a railroad right of way in possession and use of a traction company, evidence that the best use to which the land in its then condition was adapted was for railroad purposes, and of the value of the land for such purposes, was held admissible. It was also held in the same case that as it was claimed that land not taken was valuable as a factory site, evidence that the building of the road would be a benefit and not an injury to such factory site was admissible, though the witnesses were unable to estimate the benefit in money that the maintenance of the traction road should be taken into consideration in estimating damages and benefits to land not taken; that the defendants, on the same day the condemnation petition was filed, having subdivided the land, which was agricultural, and filed a plat for record, showing the railroad track, and the lots could only be bought and sold with the expectancy that they would be along the car track, so as to render them accessible, the plat of such subdivision was properly admitted in evidence; and that the defendants having claimed that the taking of the land would deprive them of switch-track connections with a railroad, and in support thereof offered evidence that the railroad officials refused to connect a switch with the main line at a distance less than 3,000 feet west of a tunnel, no part of which could be on the railroad's right of way, the plaintiff was entitled to show in rebuttal that 15 years prior a switch had been placed on the right of way of the railroad company, connecting with the main line 1,762 feet west of the tunnel, for the purpose of shipping clay on a part of the land not taken. Hartshorn v. Illinois Valley R. Co. 216 Ill. 392; 75 N. E. 122.

[175] Winona &c. R. Co. v. Waldron, 11 Minn. 515; 88 Am. Dec. 100, and note; Tucker v. Massachusetts Cent. R. Co. 118 Mass. 546; Milwaukee &c. R. Co. v. Eble, 4 Chand. (Wis.) 72; Rockford &c. R. Co. v. McKinley, 64 Ill. 338; Hayes v. Ottawa &c. R. Co. 54 Ill. 373; Webber v. Eastern R. Co. 2 Met. (Mass.) 147; Pittsburgh &c. R. Co. v. Rose, 74 Pa. St. 362; Selma &c. R. Co. v. Knapp, 42 Ala. 480. See ante, §§ 995, 996. A grazier may give his opinion as to the effect upon cattle of their being disturbed by the operation of a railroad through the pasture where they are kept. Bal-

not permitted to give conjectural opinions as to matters that are speculative in their character or which rest upon future possibilities.[176] The jury are not bound by the opinions of witnesses but may consider them in connection with all other facts in evidence.[177] It has been held that a witness who has testified for the land-owner and given an opinion that the remainder of the tract would be greatly depreciated in value by the road may be asked if he knew of any farm which was depreciated in value by reason of a railroad going across it like the one in question or that had sold for less on that account.[178]

§ 1039. Power of commissioners to act upon their own knowledge—Evidence.—Upon principle no award ought to stand which is made in a case where no evidence is heard and which is based solely upon the knowledge of the jurors or commissioners. We very much doubt whether the question of a citizen's right to compensation can be made to depend upon the judgment of jurors or commissioners acting upon their own knowledge or information, for in such cases there is no hearing. But some of the courts have indicated a different doctrine.[179] Other courts hold that they are at

timore &c. R. Co. v. Thompson, 10 Md. 76. The opinion of witnesses on the question of incidental damages and benefits to the property that do not attach to other property by the construction of the road has been held admissible. Wray v. Knoxville &c. R. Co. 113 Tenn. 544; 82 S. W. 471.

[176] Boston &c. R. Co. v. Old Colony &c. R. Co. 3 Allen (Mass.), 142; Central Pac. R. Co. v. Pearson, 35 Cal. 247; Elizabethtown &c. R. Co. v. Helm, 8 Bush (Ky.), 681; Troy &c. R. Co. v. Northern T. Co. 16 Barb. (N. Y.) 100; Gardner v. Brookline, 127 Mass. 358; Fairbanks v. Fitchburg, 110 Mass. 224.

[177] Green v. Chicago, 97 Ill. 370; Princeton v. Gieske, 93 Ind. 102.

[178] Eldorado &c. R. Co. v. Everett (Ill.), 80 N. E. 281, citing Chicago &c. R. Co. v. Kelly, 221 Ill. 498; 77 N. E. 916. See, also, the case first cited for evidence held admissible in rebuttal.

[179] Columbia Delaware Bridge Co. v. Geisse, 35 N. J. L. 474; 36 N. J. L. 537. The action of the commissioners in receiving ex parte communications from one of the parties in the absence of the other party touching the merits of the controversy, has been held to vitiate their award. Lennox v. Knox &c. R. Co. 62 Me. 322; Harris v. Woodstock, 27 Conn. 567. It was not error to instruct that, in connection with the testimony as to the damages, the jury may use and be guided by their own judgment in such matters. Hoyt v. Chicago &c. R. Co. 117 Iowa, 296; 90 N. W. 724.

liberty to hear evidence if they choose, or to assess the damages from their own knowledge gained by a view of the premises.[180] In some states it is held that the jury or commissioners may base their assessment upon the knowledge gained by a view of the premises, even in opposition to the testimony which has been given before them.[181] The general doctrine is that where the statute provides for the introduction of evidence, legal evidence only can be admitted,[182] but it has been said that the court will not set aside the award for technical errors in accepting or rejecting evidence where no substantial injustice has been done.[183] The parties are, however, entitled

[180] St. Paul &c. R. Co. v. Covell, 2 Dak. 483; 11 N. W. 106; Pennsylvania R. Co. v. Keiffer, 22 Pa. St. 356; Rondout &c. R. Co. Matter of, v. Deyo, 5 Lans. (N. Y.) 298; Kramer v. Cleveland &c. R. Co. 5 Ohio St. 140. It has been held that the commissioners have no right to hear witnesses unless the statute so provides. Clarksville &c. Turnp. Co. v. Atkinson, 1 Sneed (Tenn.), 426; Vanwickle v. Camden &c. R. Co. 14 N. J. L. 162; Coster v. New Jersey R. &c. Co. 24 N. J. L. 730. In Washington &c. R. Co. v. Switzer, 26 Gratt. (Va.) 661, it was held that the provision that commissioners should hear the parties made it their duty to hear the testimony of witnesses produced by the parties. It has been held that the jury may be charged that where there is conflict in the evidence they may resort to the evidence of their own sense with a view to determine the truth. Seattle &c. R. Co. v. Roeder, 30 Wash. 244; 70 Pac. 498; 94 Am. St. 864.

[181] Peoria &c. R. Co. v. Sawyer, 71 Ill. 361; Chicago &c. R. Co. v. Hopkins, 90 Ill. 316; Peoria &c. R. Co. v. Barnum, 107 Ill. 160; Omaha &c. R. Co. v. Walker, 17 Neb. 432; 23 N. W. 348; Evansville &c. R. Co. v. Cochran, 10 Ind. 560. Overruled in Heady v. Vevay &c. Turnpike Co. 52 Ind. 117; Kansas v. Butterfield, 89 Mo. 646; 1 S. W. 831; Lehigh Valley Coal Co. v. Chicago, 26 Fed. 415. They may take into account such facts as they have learned by viewing the property, in deciding whether the construction of the improvement will permanently depreciate or increase the market value of the property. Culbertson &c. Co. v. Chicago, 111 Ill. 651. Where the jury viewed the premises and the case was submitted to them without other evidence, it was held, on appeal, that the court could not disturb the verdict since the evidence upon which they acted was not in the record. Peoria &c. R. Co. v. Barnum, 107 Ill. 160. And even where other evidence was offered, it was held that not having a knowledge of what the jury learned from a view of the property, the supreme court could not disturb the verdict on the evidence. Evansville &c. R. Co. v. Cochran, 10 Ind. 560.

[182] Rochester &c. R. Co. v. Budlong, 6 How. Pr. (N. Y.) 467; Central Pac. R. Co. v. Pearson, 35 Cal. 247. The New York Central R. Co. Matter of, 15 Hun (N. Y.), 63; 64 N. Y. 60.

[183] Michigan Air Line R. Co. v.

to a hearing,[184] and the denial to them of this right is sufficient cause for setting aside the award.[185]

§ 1040. View.—Where the statute provides that the commissioners shall view the premises, the general rule is that a view is an essential part of the proceedings.[186] If the statute is silent on the

Barnes, 44 Mich. 222; 6 N. W. 651; Port Huron &c. R. Co. v. Voorheis, 50 Mich. 506; 15 N. W. 882; California Pacific R. Co. v. Frisbie, 41 Cal. 356. See, also, Bennet v. Camden &c. R. Co. 14 N. J. L. 145; New Jersey R. Co. v. Suydam, 17 N. J. L. 25; Hannibal &c. R. Co. v. Muder, 49 Mo. 165; Kansas City &c. R. Co. v. Campbell, 62 Mo. 585; Virginia &c. R. Co. v. Elliott, 5 Nev. 358; Eastern R. Co. v. Concord &c. R. Co. 47 N. H. 108. In some cases this ruling is put upon the ground that as the jury are presumed to form their opinion largely from their own view of the premises, their report should not be set aside for errors in the admission of evidence unless there is strong evidence that the parties' interest was prejudiced thereby. Troy &c. R. Co. v. Lee, 13 Barb. (N. Y.) 169; Troy &c. R. Co. v. Northern Turnpike Co. 16 Barb. (N. Y.) 100; Willing v. Baltimore R. Co. 5 Whart. (Pa.) 460; Western Pac. R. Co. v. Reed, 35 Cal. 621; Chicago &c. R. Co. v. Hopkins, 90 Ill. 316. For instances where the award was set aside for errors committed in receiving or rejecting testimony, see New York &c. R. Co. Matter of, 35 Hun (N. Y.), 260; Goodwin v. Milton, 25 N. H. 458.

[184] Weimer v. Bunbury, 30 Mich. 201; Stuart v. Palmer, 74 N. Y. 183; 30 Am. R. 289; Readington v. Dilley, 24 N. J. L. 209; Harness v. Chesapeake &c. Canal Co. 1 Md. Ch. 248; Zimmerman v. Canfield, 42 Ohio St. 463; Gamble v. McCrady, 75 N. Car. 509.

[185] Washington &c. R. Co. v. Switzer, 26 Gratt. (Va.) 661; Central Pacific R. Co. v. Pearson, 35 Cal. 247; Jones v. Goffstown, 39 N. H. 254; Hawley &c. In re, 2 De G. & S. 33. Where the owner has been prevented by accident or mistake from being present at the hearing, and the award is clearly unjust to him, a rehearing should be granted unless such owner has been guilty of laches, by which his rights have been forfeited. New York &c. R. Co. Matter of, 63 How. Pr. (N. Y.) 265; New York Central &c. R. Co. Matter of, 64 N. Y. 60; New York &c. R. Co. Matter of, 93 N. Y. 385; 29 Hun (N. Y.), 602; Bourgeois v. Mills, 60 Tex. 76.

[186] Kankakee &c. R. Co. v. Straut, 102 Ill. 666; Galena &c. R. Co. v. Haslam, 73 Ill. 494; Charleston &c. R. Co. v. Comstock, 36 W. Va. 263; 15 S. E. 69; New York &c. R. Co. Matter of, 33 Hun (N. Y.), 148; Western Pacific R. Co. v. Reed, 35 Cal. 621. Under the New York statute, it was held that a view must be had and the report must show the fact. Albany &c. R. Co. v. Lansing, 16 Barb. (N. Y.) 68. See, generally, Fort Street &c. R. v. Backus, 92 Mich. 33; 52 N. W. 790; Gurney v. Minneapolis &c. R. Co. 41 Minn. 223; 43 N. W. 2; Mitchell v. Illinois &c. R. Co. 85 Ill. 566; Grand Rapids &c. R.

subject the court may grant a view or not, in its discretion.[187] The better opinion is that the object of the view is to enable the jury the better to understand and apply the evidence, and so to more intelligently and fairly perform their duties,[188] but some of the courts hold that the jury may act on their own judgment formed from an inspection of the premises.[189] While the jury may resort to their own general knowledge of the elements which affect the assessment, in order to determine the relative weight of conflicting testimony, their

Co. v. Chesebro, 74 Mich. 466; 42 N. W. 66; Brakken v. Minneapolis &c. R. Co. 29 Minn. 41; 11 N. W. 124. Photographic view has been held sufficient where an actual inspection of the property was impracticable. Omaha &c. R. Co. v. Beeson, 36 Neb. 361; 54 N. W. 557.

[187] King v. Iowa &c. R. Co. 34 Iowa, 458; Harper v. Lexington &c. R. Co. 2 Dana (Ky.), 227; Clayton v. Chicago &c. R. Co. 67 Iowa, 238; 25 N. W. 150; Snow v. Boston &c. R. Co. 65 Me. 230; Galena &c. R. Co. v. Haslam, 73 Ill. 494; Dearborn v. Boston &c. R. Co. 24 N. H. 179; Hopkins v. Atlantic &c. R. Co. 36 N. H. 9; 72 Am. Dec. 287; Traut v. New York &c. R. Co. 22 W. N. C. 540; 15 Atl. 678; Coughlen v. Chicago &c. R. Co. 36 Kan. 422; 13 Pac. 813; 30 Am. & Eng. R. Cas. 330; Snow v. Boston &c. R. Co. 65 Me. 230; Bellingham &c. R. Co. v. Strand, 4 Wash. 311; 30 Pac. 144; 51 Am. & Eng. R. Cas. 608. See, also, Chicago &c. R. Co. v. Curless, 27 Ind. App. 306; 60 N. E. 467; Chicago &c. R. Co. v. Winslow, 27 Ind. App. 316; 60 N. E. 466; Chicago &c. R. Co. v. Loer, 27 Ind. App. 245; 60 N. E. 319.

[188] Washburn v. Milwaukee &c. R. Co. 59 Wis. 364; 18 N. W. 328; Munkwitz v. Chicago &c. R. Co. 64 Wis. 403; 25 N. W. 438; Seefeld v. Chicago &c. R. Co. 67 Wis. 96; 29 N. W. 904; Jeffersonville &c. R. Co. v. Bowen, 40 Ind. 545; Close v. Samm, 27 Iowa, 503; Guinn v. Iowa &c. R. Co. (Ia.) 109 N. W. 209; Hoffman v. Bloomburg &c. R. Co. 143 Pa. St. 503; 22 Atl. 823; Gorgas v. Philadelphia &c. R. Co. 144 Pa. St. 1; 22 Atl. 715; Laflin v. Chicago &c. R. 33 Fed. 415; Peoria &c. Co. v. Peoria &c. R. Co. 146 Ill. 372; 34 N. E. 550; 21 L. R. A. 373; Atchison &c. R. Co. v. Schneider, 127 Ill. 144; 20 N. E. 41; 2 L. R. A. 422. See Chicago &c. R. Co. v. Parsons, 51 Kan. 408; 32 Pac. 1083; Topeka v. Martineau, 42 Kan. 387; 22 Pac. 419; 5 L. R. A. 775; Seefeld v. Chicago &c. R. Co. 67 Wis. 96; 29 N. W. 904.

[189] Toledo &c. R. Co. v. Dunlap, 47 Mich. 456; 11 N. W. 271; Remy v. Municipality, 12 La. Ann. 500. See Illinois &c. R. Co. v. Humiston, 208 Ill. 100; 69 N. E. 880; Petzel v. Chicago &c. R. Co. 103 Ill. App. 210; Groves &c. R. Co. v. Herman, 206 Ill. 34; 69 N. E. 36; Kiernan v. Chicago &c. R. Co. 123 Ill. 188; 14 N. E. 18; Parks v. Boston, 15 Pic. (Mass.) 198, 209; Harper v. Lexington &c. R. Co. 2 Dana (Ky.), 227. In Chicago &c. R. Co. v. Scott, 225 Ill. 352; 80 N. E. 204, it seems to be held that they not only may but should consider knowledge gained by the view.

assessment must be supported by the testimony, or it can not stand.[190] The provision of the Colorado statute that the jury in condemnation proceedings may go on the premises sought to be condemned in charge of a sworn bailiff is strictly construed and it is held error to appoint guides to aid the jury.[191]

§ 1040a. Instructions.—The rules relating to instructions to juries are generally the same here as elsewhere. The instructions must be confined to the issues involved and should not call the attention of the jury to outside matters.[192] Thus, it has been held that a reference should not be made in the instruction to the fact that the land was being taken against the will of the owner.[193] They must be applicable to the evidence adduced,[194] and must not be upon the weight to be attached to the evidence—since this latter matter is one solely for the jury.[195] Neither should questions of law be

[190] Washburn v. Milwaukee &c. R. Co. 59 Wis. 364; 18 N. W. 328; Peoria Gaslight &c. Co. v. Peoria &c. R. Co. 146 Ill. 372; 34 N. E. 550; 21 L. R. A. 373; Chicago &c. R. Co. v. Parsons, 51 Kans. 408; 32 Pac. 1083; Hoffman v. Bloomsburg &c. R. Co. 143 Pa. St. 503; 22 Atl. 823; Seattle &c. R. Co. v. Roeder, 30 Wash. 244; 70 Pac. 498; 94 Am. St. 864. An award, which is clearly against the evidence, will be set aside. Fitchburg R. Co. v. Eastern R. Co. 6 Allen (Mass.), 98; Wilson v. Rockford &c. R. Co. 59 Ill. 273. But an award will not, as a rule, be set aside where the evidence is conflicting. Western &c. R. Co. v. Reed, 35 Cal. 621; Virginia &c. R. Co. v. Henry, 8 Nev. 165; McReynolds v. Burlington &c. R. Co. 106 Ill. 152; Omaha &c. R. Co. v. Walker, 17 Neb. 432; 23 N. W. 348.

[191] Colorado Fuel &c. Co. v. Four Mile R. Co. 29 Colo. 90; 66 Pac. 902.

[192] Chicago &c. R. Co. v. Atterbury, 156 Ill. 281; 40 N. E. 826; Chicago &c. R. Co. v. Patterson, 26 Ind. App. 295; 59 N. E. 688; Chicago &c. R. Co. v. Winslow, 27 Ind. App. 316; 60 N. E. 466.

[193] Illinois &c. R. Co. v. Easterbrook, 211 Ill. 624; 71 N. E. 1116.

[194] Chicago &c. R. Co. v. Cosper, 43 Kan. 261; 22 Pac. 634; Fitz v. Nantasket Beach R. Co. 148 Mass. 35; 18 N. E. 592. An instruction that if the jury believed, from all the evidence, that they had, from personal examination of the premises, arrived at a more accurate judgment of the value and damages than was shown by the evidence, they might determine the value and damages at an amount approved by their judgment formed from the personal examination, though it might differ from the amount testified to was not objectionable as authorizing the jury to fix the compensation without regard to the testimony. Guyer v. Davenport &c. R. Co. 196 Ill. 370; 63 N. E. 732.

[195] Cleveland &c. R. Co. v. Polecat Drainage Dist. 213 Ill. 83; 72 N. E. 684. Where a witness as to

submitted to the jury since these are questions for the court.[196] Instructions having a tendency to mislead the jury should not be given.[197] An instruction should not be argumentative. An instruction held objectionable on this ground told the jury that they should not assess damages on the basis of what the owner would take for his property, or for what sum he or they would be willing to let the railroad go across the lands, but must keep in mind the actual fair cash market value as the only proper element of damage; and that it was the jury's duty to try the case fairly, and render a verdict on a fair consideration of the evidence, even though the manner in which the lands will be cut up might excite their sympathy.[198] An instruction already given in substance and with sufficient fullness need not be repeated.[199] Thus, where the court has properly and fully charged the jury as to the elements and measure of damages it is not error to refuse a charge that the jury should not take into consideration any speculative uses of the lands taken or those not taken.[200] The court should not express an opinion as to the amount of damages to be awarded as that would amount to an invasion of the province of the jury.[1] Legal terms used in the instructions should be explained to the jury.[2] Instructions are generally regarded

value has given his opinion, and has also stated that he would give the price named for the property, an instruction leaving the impression upon the jury that the estimate of the witness was entitled to great weight because of his apparent willingness to purchase is error. Friday v. Pennsylvania R. Co. 204 Pa. St. 405; 54 Atl. 339.

[196] Trotier v. St. Louis &c. R. Co. 180 Ill. 471; 54 N. E. 487; Elgin &c. R. Co. v. Fletcher 128 Ill. 619; 21 N. E. 577.

[197] Fifer v. Ritter, 159 Ind. 8; 64 N. E. 463; Chicago &c. R. Co. v. Goff, 158 Ill. 453; 41 N. E. 1112; Guyer v. Davenport &c. R. Co. 196 Ill. 370; 63 N. E. 732.

[198] Jacksonville &c. R. Co. v. Wilhite, 209 Ill. 84; 70 N. E. 583.

[199] Centralia &c. R. Co. v. Rixman, 121 Ill. 214; 12 N. E. 685; Chicago &c. R. Co. v. Patterson, 26 Ind. App. 295; 59 N. E. 688; Kansas City R. Co. v. McElroy, 161 Mo. 584; 61 S. W. 871.

[200] Seattle &c. R. Co. v. Roeder, 30 Wash. 244; 70 Pac. 498; 94 Am. St. 864.

[1] Weyer v. Chicago &c. R. Co. 68 Wis. 180; 31 N. W. 710; Schuylkill &c. R. Co. v. Stocker, 128 Pa. St. 233; 18 Atl. 399.

[2] Kansas City &c. R. Co. v. Dawley, 50 Mo. App. 480 (consequential damages). It is not erroneous to instruct the jury to assess damages according to the "cash market value," instead of the "fair cash market value," for the two terms are substantially synonymous. Conness v. Indiana &c. R. Co. 193 Ill. 464; 62 N. E. 221.

as sufficient if construed together they present proper rules for the guidance of the jury.[3]

§ 1041. Report of commissioners.—In many of the states the report must be comfirmed by the court by which the commissioners were appointed,[4] and it has been held that even though the statute does not expressly so provide, the report of a tribunal appointed by a court in proceedings under the right of eminent domain, may be accepted or rejected by the court, as justice may require.[5] A report

[3] Cook v. Chicago &c. R. Co. 83 Iowa, 278; 49 N. W. 92; Detroit &c. R. Co. v. Hall, 133 Mich. 302; 94 N. W. 1066; Diamond &c. Steamers v. Davenport &c. R. Co. 115 Iowa, 480; 88 N. W. 959; Union Traction Co. v. Pfeil (Ind. App.), 78 N. E. 1052. See, also, as to instructions, Peoria &c. Traction Co. v. Vance (Ill.), 80 N. E. 134; American &c. Co. v. St. Louis &c. R. Co. (Mo.) 101 S. W. 576.

[4] Stimson's Am. Stat. (1892) § 8749a. Where confirmation of the report was not asked until three years after it was made, the court refused to confirm it and held it to be invalid. Stearns v. Deerfield, 51 N. H. 372. Where several tracts of lands owned by different persons are included in one proceeding under a statute permitting it damages should be assessed to each owner, and it is erroneous to award damages in gross and direct payment to treasurer to be distributed. Convers v. Atchison &c. R. Co. 142 U. S. 671; 12 Sup. Ct. 351. Citing Bowman v. Venice &c. R. Co. 102 Ill. 459; Johnson v. Freeport &c. R. Co. 116 Ill. 521; 6 N. E. 211; Suver v. Chicago &c. R. Co. 123 Ill. 293; 14 N. E. 12.

[5] Hingham &c. Turnp. Co. v. Norfolk Co. 6 Allen (Mass.), 353; Pueblo &c. R. Co. v. Rudd, 5 Colo. 270; State v. MacDonald, 26 Minn. 445; 4 N. W. 1107; Troy &c. R. Co. v. Northern Turnp. Co. 16 Barb. (N. Y.) 100; Bennet v. Camden &c. R. Co. 14 N. J. L. 145. Where the tribunal proceeded upon erroneous principles the report should be set aside. New York &c. R. Co. Matter of, 33 Hun (N. Y.), 639; 98 N. Y. 447; 102 N. Y. 704; Van Wickle v. Camden &c. R. Co. 14 N. J. L. 162; Swayze v. New Jersey Midland R. Co. 36 N. J. L. 295; Beckett v. Midland R. Co. L. R. 1 C. P. 241. If the damages awarded are so grossly excessive or so palpably inadequate as to lead to the irresistible conclusion that the commissioners or the jury were swayed by prejudice or passion the award will be set aside. Van Wickle v. Camden &c. R. Co. 14 N. J. L. 162; New Orleans &c. R. Co. v. Zeringue, 23 La. Ann. 521; Kansas City &c. R. Co. v. Campbell, 62 Mo. 585; Clarksvile &c. Turnp. Co. v. Atkinson, 1 Sneed (Tenn.), 426; Rheiner v. Stillwater R. &c. Co. 29 Minn. 147; 12 N. W. 449; Mutual Union Tel. Co. v. Katkamp, 103 Ill. 420; Commissioners of Central Park, In re, 51 Barb. (N. Y.) 277. See Houston &c. R. Co. v. Milburn, 34 Tex. 224. But ordinarily the testimony of witnesses called to impeach the report as to the value

may be set aside for fraud or misconduct of the commissioners, even though the statute provides that it shall be final and conclusive.[6] The report of the commissioners must be in writing, and in some states should set forth facts showing their jurisdiction of the matter to which their finding relates.[7] The report should, of course, be duly signed.[8] The property sought to be appropriated should be described with reasonable certainty.[9] It may be said generally that

of the property should be given less weight than the official report of the commissioners. Eastern R. Co. v. Concord &c. R. Co. 47 N. H. 108. But where the evidence is conflicting the award will not be disturbed if any portion of it taken alone would sustain the verdict. Kansas v. Kansas City &c. R. Co. 84 Mo. 410; Selma &c. R. Co. v. Gammage, 63 Ga. 604; Virginia &c. R. Co. v. Elliott, 5 Nev. 358; Texas &c. R. Co. v. Eddy, 42 Ark. 527; Little Rock Junction R. Co. v. Woodruff, 49 Ark. 381; 5 S. W. 792; 4 Am. St. 51; Hastings &c. R. Co. v. Ingalls, 15 Neb. 123; 16 N. W. 762; Colvill v. St. Paul &c. R. Co. 19 Minn. 283; Illinois &c. R. Co. v. Von Horn, 18 Ill. 257; Chicago &c. R. Co. v. Blake, 116 Ill. 163; 4 N. E. 488; Western Pac. R. Co. v. Reed, 35 Cal. 621; Railroad Co. v. Gesner, 20 Pa. St. 240; Kyle v. Miller, 108 Ind. 90; 8 N. E. 721.

[6] Buffalo &c. R. Co. Matter of, 32 Hun (N. Y.), 289; Thompson v. Conway, 53 N. H. 622; Central Pacific R. Co. v. Pearson, 35 Cal. 247; New York &c. R. Co. In re, 64 N. Y. 60; Prospect Park &c. R. Co. In re, 24 Hun (N. Y.), 199; New York &c. R. Co. In re, 5 Hun (N. Y.), 105. See Staten Island R. Co. In re, 41 Hun (N. Y.), 392; 104 N. Y. 680; Rock Island &c. R. Co. v. Leisy &c. Co. 174 Ill. 547; 51 N. E. 572; Kansas City &c. R. Co. v. Smith, 51 La. Ann. 1079; 25 So. 955; Chapin, Matter of, 84 Hun (N. Y.), 490; 32 N. Y. S. 361. It is held that it is not illegal for commissioners to make an agreement with the company whose duty it is to pay for the services of commissioners for a fair compensation. State v. Dover &c. R. Co. 43 N. J. L. 528; 14 Am. & Eng. R. Cas. 87. But we suppose that such an agreement is to be carefully scrutinized and that it must be shown to be entirely fair and reasonable.

[7] State v. Yanger, 29 N. J. L. 384.

[8] Quayle v. Missouri &c. R. Co. 63 Mo. 465; Rochester &c. R. Co. v. Beckwith, 10 How. Pr. (N. Y.) 168. In Hanes v. North Carolina &c. R. Co. 109 N. Car. 409; 13 S. E. 896, it was held that a provision requiring the report to be under seal was merely directory.

[9] Missouri &c. R. Co. v. Carter, 85 Mo. 448; 28 Am. & Eng. R. Cas. 249; Chicago &c. R. Co. v. Randolph &c. Co. 103 Mo. 451; 15 S. W. 437; Northern &c. R. Co. v. Concord &c. R. Co. 27 N. H. 183; Hunt v. Smith, 9 Kan. 137; Kansas City &c. R. Co. v. Story, 96 Mo. 611; 10 S. W. 203; St. Louis &c. R. Co. v. Fowler, 113 Mo. 458; 20 S. W. 1069; Cory v. Chicago &c. R. Co. 100 Mo. 282; 13 S. W. 346; State v. Hudson &c. R. Co. 38 N. J. L. 548; Strang v. Beloit &c. R. Co. 13 Wis. 635; Morgan's Appeal

matters required by the statute to be set forth must appear in the report,[10] and that a failure to find upon any question which the statute requires the commissioners to pass upon is sufficient ground for setting the report aside;[11] but if no objection or motion is made to set aside the report, such an omission may be regarded as a mere irregularity not sufficient to defeat or require the proceedings to be dismissed.[12] Where several pieces of property are taken or damaged, or the interests of several owners are separately affected, the report should contain an explicit finding as to each tract and each

39 Mich. 675; New York &c. R. Co. Matter of, 21 How. Pr. (N. Y.) 434; Smith v. Connelly's Heirs, 1 T. B. Mon. (Ky.) 58. See, also, Reitenbaugh v. Chester Valley R. Co. 21 Pa. St. 100; New Jersey &c. R. Co. v. Suydam, 17 N. J. L. 25. Where the statute required the report to contain a description of the property, such a description is indispensable. Vail v. Morris &c. R. Co. 21 N. J. L. 189; Missouri Pac. R. Co. v. Carter, 85 Mo. 448; Chesapeake &c. Canal Co. v. Union Bank, 4 Cranch C. C. 75. A description of a certain number of feet on each side of the center line of a railroad, as located, staked, and marked, was held sufficient. Lower v. Chicago &c. R. Co. 59 Iowa, 563; 13 N. W. 718. The quantity of land is sufficiently shown by stating the dimensions, so that the quantity can be computed. Pennsylvania R. Co. v. Bruner, 55 Pa. St. 318. The description must be such that a person conversant with such matters can locate the part taken or it will be void for uncertainty. But it is sufficient if the description can be gathered from the whole report. Northern R. Co. v. Concord &c. R. Co. 27 N. H. 183; St. Paul &c. R. Co. v. Matthews, 16 Minn. 341. It has been held sufficient to refer to a description in the warrant or petition. Ohio River R. Co. v. Harness, 24 W. Va. 511; Chesapeake &c. Canal Co. v. Binney, 4 Cranch C. C. 68.

[10] O'Hara v. Pennsylvania R. Co. 25 Pa. St. 445; Pierce v. County Comrs. 63 Me. 252; Missouri Pac. R. Co. v. Carter, 85 Mo. 448; Central Pacific R. Co. 35 Cal. 247; Leavenworth &c. R. Co. v. Meyer, 50 Kan. 25; 31 Pac. 700; Lewis v. St. Paul &c. R. Co. 5 S. Dak. 148; 58 N. W. 580; 57 Am. & Eng. R. Cas. 612; Parker v. Fort Worth &c. R. Co. 84 Tex. 333; 19 S. W. 518. See Omaha &c. R. Co. v. Menk, 4 Neb. 21.

[11] Philadelphia &c. R. Co. v. Cake, 95 Pa. St. 139; Pueblo &c. R. Co. v. Rudd, 5 Colo. 270; Martin v. Rushton, 42 Ala. 289; Bryant v. Glidden, 36 Me. 36; New York &c. R. Co. Matter of, 35 Hun (N. Y.), 232; Damrell v. Board of Supervisors, 40 Cal. 154.

[12] Pittsburgh &c. R. Co. v. Wolcott, 162 Ind. 399; 69 N. E. 451. See, also, State v. Parker, 53 N. J. L. 183; 20 Atl. 1074; Gillett v. McGonigal, 80 Wis. 158; 49 N. W. 814.

[13] Chicago &c. R. Co. v. Sanford, 23 Mich. 418; Fitzpatrick v. Pennsylvania R. Co. 10 Phila. (Pa.) 107; Dolphin v. Pedley, 27 Wis. 469; Sharp v. Johnson, 4 Hill (N. Y.), 92; 40 Am. Dec. 259. Where the

party,[13] awarding damages to each owner by name.[14] But where several persons have joint interests in one tract, a single award may be made covering the interests of all.[15] Objections to the report which do not go to the jurisdiction of the tribunal, may be waived, and a failure to offer such objections at the time and in the manner[16]

jury is simply required to ascertain the land-owner's damages, a general award is sufficient, without stating the items of injury. Michigan &c. R. Co. v. Barnes, 44 Mich. 222; 6 N. W. 651; Ohio &c. R. Co. v. Wallace, 14 Pa. St. 245. See Illinois &c. R. Co. v. Mayrand, 93 Ill. 591. A substantial compliance with the statute as to stating the items of damages is sufficient where they are required to be given. California Pac. R. Co. v. Frisbie, 41 Cal. 356. Damages should be awarded separately for each estate or interest in a tract of land in which several persons hold distinct estates. Harris v. Howes, 75 Me. 436; Rentz v. Detroit, 48 Mich. 544; 12 N. W. 911; Chesapeake &c. Canal Co. v. Hoye, 2 Gratt. (Va.) 511; Lewis' Em. Dom. § 515.

[14] Rusch v. Milwaukee &c. R. Co. 54 Wis. 136; 11 N. W. 253; Honenstine v. Vaughan, 7 Blkf. (Ind.) 520; State v. Brands, 45 N. J. L. 332. An award to "the estate of A" is bad. Neal v. Knox &c. R. Co. 61 Me. 298; State v. Fisher, 43 N. J. L. 377. See, also, Adams v. Rulon, 50 N. J. L. 526; 14 Atl. 881. If the name is unknown the award should so state. Commonwealth v. Great Berrington, 6 Mass. 492.

[15] Pittsburgh &c. R. Co. v. Hall, 25 Pa. St. 336; East Saginaw &c. R. Co. v. Benham, 28 Mich. 459. But see Ruppert v. Chicago &c. R. Co. 43 Iowa, 490. A single owner of several lots or tracts of land may be awarded damages in gross for all. Sherwood v. St. Paul &c. R. Co. 21 Minn. 122; Kankakee &c. R. Co. v. Chester, 62 Ill. 235. In some states, it is held that the interests of tenants in common should be assessed at a gross sum. Southern Pac. R. Co. v. Wilson, 49 Cal. 396; Chicago &c. R. Co. v. Hurst, 30 Iowa, 73. By the statutes of some states, tenants in common are allowed to proceed either jointly or severally to recover damages for injuries done to their real estate. Hibbard v. Foster, 24 Vt. 542; Webber v. Merrill, 34 N. H. 202; Hobbs v. Hatch, 48 Me. 55.

[16] Application of Cooper &c. Matter of, 93 N. Y. 507; Chesapeake &c. R. Co. v. Pack, 6 W. Va. 397; Thayer v. Burger, 100 Ind. 262; Morgan Civil Township v. Hunt, 104 Ind. 590; 4 N. E. 299; Clear Lake Water Co. Matter of, 48 Cal. 586. See, also, Mattheis v. Fremont &c. R. Co. 53 Neb. 681; 74 N. W. 30; One Hundred and Sixty-Third St. In re, 131 N. Y. 569; 30 N. E. 66. Where the parties agree to a confirmation of the report before the expiration of the time allowed for filing objections, they will be considered as having waived all right to afterward offer objections. Kensington &c. Turnp. Co. In re, 97 Pa. St. 260. The acceptance by the property owner of the damages awarded is a waiver of irregularities and defects in the proceedings. Quincy &c. R.

prescribed by statute is such a waiver. Objections for lack of jurisdiction, however, may generally be made at any time.[17]

§ 1042. Report of commissioners—Requisites of—Illustrative cases.—The report, award or verdict should be reasonably certain and explicit in its statements of what was done and decided,[18] that is, it should state all material matters with such certainty as will enable the parties to fully understand the decision, but it is not necessary to state all that was done in full detail. It is not necessary, unless required by statute, to itemize the damages.[19] Where the

Co. v. Kellogg, 54 Mo. 334; Troy &c. R. Co. v. Potter, 42 Vt. 265; 1 Am. R. 325; Kile v. Yellowhead, 80 Ill. 208; Karber v. Nellis, 22 Wis. 215; Hawley v. Harrall, 19 Conn. 142. The occupation by the corporation of the land condemned estops it to object to the validity of the proceedings. Wilmington &c. R. Co. v. Condon, 8 Gill. & J. (Md.) 443. And the payment of the damages awarded has been held to estop the corporation to object to the report or the proceedings. Marquette &c. R. Co. v. Probate Judge, 53 Mich. 217; 18 N. W. 788. The fact that the commissioner's report understated the amount of land taken by a fraction of an acre was held not to invalidate their report, where damages were assessed for injuries to the whole tract. Morgan v. Chicago &c. R. Co. 39 Mich. 675.

[17] Wilkinson v. Mayo, 3 Hen. & Mun. (Va.) 565; Hughes v. Sellers, 34 Ind. 337. Upon motion to confirm the commissioners' report, the supreme court of New York has power to set aside a default entered at the hearing before commissioners and order a new hearing for any sufficient cause for which the commissioners might have set the default aside. In the matter of New York &c. R. Co. 93 N. Y. 385. The commissioners have no authority to condemn land not covered by the description in the petition, and an assessment of damages for land not embraced in such description is void for lack of jurisdiction. Spofford v. Bucksport &c. R. Co. 66 Me. 26. Proceedings were had to condemn land, which were regular except that the commissioners awarded a gross sum to all of six lot owners who held in severalty, without specifying the sum to which each was entitled. The company paid the money into court, and nothing further was done in the proceeding. It was held that the condemnation proceeding being ended, so that it was no longer possible to correct it at the instance of either party, it must be held to be void and wholly without effect upon the rights of either party. Rusch v. Milwaukee &c. R. Co. 54 Wis. 136; 11 N. W. 253.

[18] Reitenbaugh v. Chester Valley R. Co. 21 Pa. St. 100; Connecticut River R. Co. v. Clapp, 1 Cush. (Mass.) 559. See Illinois &c. R. Co. v. Mayrand, 93 Ill. 591; Connecticut &c. R. Co. v. Clapp, 1 Cush. (Mass.) 559.

[19] Michigan &c. R. Co. v. Barnes, 44 Mich. 222; 6 N. W. 651; Camp-

matter of the liability for the expenses of a crossing is fixed by statute the commissioners have no power to determine which of the companies is to bear the expense.[20] The report should show that the commissioners met at the appointed time and place.[21] An award, report or verdict in the alternative or upon condition is insufficient.[22] The commissioners or jury have no authority to award damages in anything else than money.[23] If the question whether the proposed taking is necessary for public use is submitted by statute to the commissioners their failure to find upon this question will make their report invalid.[24] Where the report is silent as to what property, if

bell, Matter of, 1 N. Y. S. 768; Flint &c. R. Co. v. Detroit &c. R. Co. 64 Mich. 350; 31 N. W. 281; American &c. R. Co. v. Huntington &c. R. Co. 130 Ind. 98; 29 N. E. 566; Port Huron &c. R. Co. v. Voorheis, 50 Mich. 506; 15 N. W. 882; Wilmington &c. R. Co. v. Smith, 99 N. Car. 131; 5 S. E. 237; Packard v. Bergen &c. Co. 54 N. J. L. 553; 25 Atl. 506. But there may be cases where items should be separately stated. Chesapeake &c. R. Co. v. Hoye, 2 Gratt. (Va.) 511; Sanford v. Chicago &c. R. Co. 2 Mich. N. P. 132 (Supp.). See, generally, Sherwood v. St. Paul &c. R. Co. 21 Minn. 127; Albany &c. R. Co. v. Dayton, 10 Abb. Pr. (N. Y.) N. S. 182; Pittsburgh &c. R. Co. v. Hall, 25 Pa. St. 336; Pennsylvania R. Co. v. Bruner, 55 Pa. St. 318.

[20] Wabash R. Co. v. Ft. Wayne &c. Traction Co. 161 Ind. 295; 67 N. E. 674.

[21] Central Pac. R. Co. v. Pearson, 35 Cal. 247.

[22] Chesapeake &c. R. Co. v. Halstead, 7 W. Va. 301; New Orleans Pac. R. Co. v. Murrell, 34 La. Ann. 536; Toledo &c. R. Co. v. Munson, 57 Mich. 42; 23 N. W. 455. Some cases hold that the verdict may contain conditions requiring the company to remove buildings, etc. Dwight v. Springfield, 6 Gray (Mass.), 442; Omaha R. Co. v. Menk, 4 Neb. 21. And others hold that by agreement of the parties a verdict imposing conditions may be rendered. Hill v. Mohawk R. Co. 7 N. Y. 152; Central &c. R. Co. v. Holler, 7 Ohio St. 220; Chesapeake R. Co. v. Patton, 6 W. Va. 147; Chicago &c. R. Co. v. Melville, 66 Ill. 329.

[23] New Orleans Pacific R. Co. v. Murrell, 34 La. Ann. 536; Chesapeake &c. R. Co. v. Halstead, 7 W. Va. 301; Pennsylvania &c. R. Co. v. Reichert, 58 Md. 261. The performance of other acts by the petitioners, such as making crossings, building fences, constructing culverts, etc., can not be prescribed as a partial compensation for the land-owner's damages. Toledo &c. R. Co. v. Munson, 57 Mich. 42; 23 N. W. 455; Chicago &c. R. Co. v. Melville, 66 Ill. 329. See Hill v. Mohawk &c. R. Co. 7 N. Y. 152; Chesapeake &c. R. Co. v. Patton, 6 W. Va. 147; Central Ohio &c. R. Co. v. Holler, 7 Ohio St. 220.

[24] Bass v. Elliott, 105 Ind. 517; 5 N. E. 663; Mansfield &c. R. Co. v. Clark, 23 Mich. 519. If a finding is made the court is bound by such

any, will be benefited, there is a presumption that there are no benefits to be assessed.[25] The finding must be in substantial compliance with the requirements of the statute,[26] but ordinarily a literal compliance is not essential, and a clearly immaterial deviation will not invalidate the report.[27]

§ 1043. Time within which report must be made.—The general rule is that if a limited time is allowed to the commissioners by statute in which to make their report, it must be made within the time, or it will be ineffective.[28] In New Jersey where the statute requires the justice appointing the commissioners to fix the date for the filing of their report it is held that this provision is mandatory and that an order omitting to fix a date is fatally defective.[29] It has been held that the parties can not extend the time by agreement, but this we regard as a very doubtful decision, for we believe that it is competent for the parties to agree to an extension of time.[30] Where the time for filing the report is fixed by the court, it may be extended by an order made before the expiration of that time.[31]

finding and must give judgment accordingly. Wilmington &c. R. Co. v. Dominguez, 50 Cal. 505.

[25] Terre Haute &c. R. Co. v. Flora, 29 Ind. App. 442; 64 N. E. 648.

[26] Hunter v. Mayor of Newport, 5 R. I. 325; Inhabitants of Cushing v. Gay, 23 Me. 9; McClary v. Hartwell, 25 Mich. 139.

[27] Technical errors which do not prejudice the substantial interests of the parties will be disregarded. New York &c. Co. In re, 61 Hun (N. Y.), 625; 15 N. Y. S. 909; Troy &c. R. Co. v. Lee, 13 Barb. 169; New York &c. R. Co. Matter of, 27 Hun (N. Y.), 116; Hunt v. Smith, 9 Kan. 137; Oregon &c. R. Co. v. Bridwell, 11 Ore. 282; 3 Pac. 684; Pacific &c. R. Co. v. Porter, 74 Cal. 261; 15 Pac. 774; 33 Am. & Eng. R Cas. 167; Detroit &c. R. Co. v. Crane, 50 Mich. 182; 15 N. W. 73. Presumption is in favor of discharge of duty. Orange &c. R. Co. v. Craver, 32 Fla. 28; 13 So. 444; New Orleans &c. Co. v. Frank, 39 La. Ann. 707; 2 So. 310; 30 Am. & Eng. R. Cas. 275. But fraud or misconduct may, of course, be shown. Orange &c. v. Craver, 32 Fla. 28; 13 So. 444; Marquette &c. R. Co. v. Probate Judge, 53 Mich. 217; 18 N. W. 788; Ortman v. Union &c. R. Co. 32 Kan. 419; 4 Pac. 858; 17 Am. & Eng. R. Cas. 136; Cadmus v. Central &c. R. Co. 31 N. J. L. 179.

[28] Anderson v. Pemberton, 89 Mo. 61; 1 S. W. 216; Metzler & Hugde's Road, 62 Pa. St. 151; Claybaugh v. Baltimore &c. R. Co. 108 Ind. 262; 9 N. E. 100.

[29] Doughty v. Atlantic City &c. Traction Co. 71 N. J. L. 131; 58 Atl. 101.

[30] Belfast, 53 Me. 431.

[31] McMullen v. State, 105 Ind. 334; 4 N. E. 903. But after the time has elapsed the court has no authority to make an order extending the

The statutes of many of the states require the report to be recorded and it has been held that under such a statute the report will have no binding force until this is done.[32]

§ 1044. Objections to report.—The appropriate mode of objecting to a report is by a written motion or petition stating the specific grounds of objection. Where the objections appear upon the face of the report there is neither necessity nor reason for resorting to extrinsic evidence. Objections based upon matters not apparent upon the face of the record may, in most jurisdictions, be proved by affidavits,[33] or by oral evidence,[34] at the discretion of the court.[35] It

time for filing the commissioners' report. Road in Salem Township, In re, 103 Pa. St. 250; Baldwin and Snowden Road, 3 Grant's (Pa.) Cas. 62. Where the report was left in the proper office within the time limited, but the officer failed to mark it filed, it was held to be valid. Reed v. Acton, 120 Mass. 130.

[32] Burns v. Multnomah R. Co. 8 Sawyer (U. S.), 543.

[33] New Jersey &c. R. Co. v. Suydam, 17 N. J. L. 25; Marquette &c. R. Co. v. Probate Judge, 53 Mich. 217; 18 N. W. 788. Where the evidence is part of the report objections may be founded on the evidence. Western &c. R. Co. v. Reed, 35 Cal. 621. See, generally, Washington &c. Co. v. Switzer, 26 Gratt. (Va.) 661; Southern &c. R. Co. v. Wilson, 49 Cal. 396. Time of objecting to report, see Washington &c. R. Co. v. Switzer, 26 Gratt. (Va.) 661; Baltimore &c. R. Co. v. Canton Co. 70 Md. 405; 17 Atl. 394; Chicago &c. R. Co. v. Eubanks, 32 Mo. App. 184; Tracy v. Elizabethtown &c. R. Co. 80 Ky. 259; Harper v. Lexington &c. R. Co. 2 Dana (Ky.), 227; Burlington &c. v. Dobson, 17 Neb. 450; 23 N. W. 353. The objections must be presented to the court having control of the proceedings. Burr v. Bucksport &c. R. Co. 64 Me. 130.

[34] Clarksville &c. Turnp. Co. v. Atkinson, 1 Sneed. (Tenn.) 425; St. Louis &c. R. Co. v. Almeroth, 62 Mo. 343; Sullivan v. Lafayette Co. 61 Miss. 271; Chesapeake &c. Canal Co. v. Mason, 4 Cranch C. C. 123. Contra, Rondout &c. R. Co. v. Field, 38 How. Pr. (N. Y.) 187. It has been held that affidavits of commissioners are admissible to impeach their report. Marquette &c. R. Co. v. Probate Judge, 53 Mich. 217; 18 N. W. 788; 14 Am. & Eng. R. Cas. 355. But see Rochester &c. R. Co. v. Beckwith, 10 How. Pr. (N. Y.) 168. A report is generally held to be prima facie correct and the burden is on the party who assails it. Crawford v. Valley R. Co. 25 Gratt. (Va.) 467.

[35] Marquette &c. R. Co. v. Probate Judge, 53 Mich. 217; 18 N. W. 788. In a Pennsylvania case the fact that "since the report of the viewers" it had altered its route through the land of some of the property-holders was held to be no ground for an exception by the company to so much of the report as assessed damages to them, since under the Pennsylvania statute, the

has been held proper to receive the affidavits or testimony of the commissioners either to impeach or support their report.[36]

§ 1045. Confirmation or rejection of report—Modification.—The rule sustained by the weight of authority is that the court must confirm or reject the report as a whole,[37] but under some statutes it has been held proper to amend or modify the report in minor particulars, and confirm it as amended,[38] or to recommit it for correction and amendment.[39] Where the property of several owners is included in a single assessment of damages but the tracts are assessed separately, it is held that the court may confirm the report as to part of such tracts and reject it as to others.[40] The practice

location of its line by the company was an appropriation of the land; and after the assessment of the damages, the right thereto was vested in the owners, and could not be divested by a subsequent change of route. Beale v. Pennsylvania R. Co. 86 Pa. St. 509. As to what evidence will authorize an order setting aside a report see, Coster v. New Jersey &c. R. Co. 23 N. J. L. 227; North Hudson &c. R. Co. v. Booraem, 28 N. J. Eq. 450.

[36] Marquette &c. R. Co. v. Probate Judge, 53 Mich. 217; New Jersey &c. R. Co. v. Suydam, 17 N. J. L. 25; Canal Bank v. Mayor of Albany, 9 Wend. (N. Y.) 244; Newport Highway, 48 N. H. 433.

[37] Winchester v. Hinsdale, 12 Conn. 88; Inhabitants of Brunswick, Appellants, 37 Me. 446; Application for Widening Roffignac Street, 4 Rob. (La.) 357; Claiborne St. Matter of, 4 La. Ann. 7; Mississippi River Bridge Co. v. Ring, 58 Mo. 491; Rochester Water Works Co. v. Wood, 60 Barb. (N. Y.) 137; 41 How. Pr. (N. Y.) 53; Herr's Mill Road, 14 S. & R. (Pa.) 204; Road in Benzinger Township, In re, 115 Pa. St. 436; 10 Atl. 35; Hanes v. North Carolina R. Co. 109 N. C. 490; 13 S. E. 896; St. Louis &c. R. Co. v. Richardson, 45 Mo. 466; Missouri Pacific R. Co. v. Wernwag, 35 Mo. App. 449. See New York &c. R. Co. Matter of, 93 N. Y. 385; 14 Am. & Eng. R. Cas. 402; New York &c. R. Co. Matter of, 64 N. Y. 60; Central Pac. R. Co. v. Pearson, 35 Cal. 247; Northern &c. R. Co. v. Concord &c. R. Co. 27 N. H. 183.

[38] New York Cent. &c. R. Co. Matter of, 35 Hun (N. Y.), 306; Florence &c. R. Co. v. Pember, 45 Kans. 625; 26 Pac. 1. See Hannibal Bridge Co. v. Schaubacker, 49 Mo. 555; Stockton &c. R. Co. v. Galgiani, 49 Cal. 139; State v. Gibbs, 44 N. J. L. 169; Greenville &c. R. Co. v. Nunnamaker, 4 Rich. L. (S. Car.) 107.

[39] Pueblo &c. R. Co. v. Rudd, 5 Colo. 270; Louisiana Western R. Co. v. Crossman, 111 La. Ann. 611; 35 So. 784; King's Co. El. R. Co. In re, 58 Hun (N. Y.), 608; 12 N. Y. S. 198.

[40] Anthony v. County Comrs. 14 Pick. (Mass.) 189. Where the statute provided that the condemning company or any defendant could move to set aside the proceedings

upon setting aside a commissioner's report is governed by the statute, and varies in the different states. But ordinarily the report is recommitted to the same or to other commissioners for review or correction.[41] The order confirming the award should be definite and certain,[42] and must conform to the provisions of the statute by which confirmation is required.[43] Where the court acts in its judicial capacity in confirming the report, it has the same authority to set aside the order of confirmation during the term at which it was made that it has to set aside its other judgments.[44] The award by the commissioners is generally regarded as an adjudication of damages by a competent tribunal, and at the expiration of the time allowed for appeal it is, to a certain extent at least, in the nature of a judgment.[45]

§ 1046. Misconduct of jurors or commissioners.—Improper be-

as to any tract of land, it was held that a motion to set aside the report as to an undivided half interest in the lands taken could not be entertained. Southern Pac. R. Co. v. Wilson, 49 Cal. 396. See Beale v. Pennsylvania R. Co. 86 Penn. St. 509.

[41] See Coleman v. Andrews, 48 Me. 562; Hannibal &c. R. Co. v. Rowland, 29 Mo. 337; George's Creek &c. Co. v. New Central Coal Co. 40 Md. 425; Commissioners of Central Park In re, 61 Barb. (N. Y.) 40; McArthur v. Morgan, 49 Conn. 347; Stinson v. Dunbarton, 46 N. H. 385; State v. Cruser, 14 N. J. L. 401; Potts' Appeal, 15 Pa. St. 414; Coleman v. Andrews, 48 Me. 562.

[42] Portland &c. R. Co. v. County Comrs. 65 Me. 292; Yeamans v. County Comrs. 16 Gray (Mass.), 36. See, also, New York &c. R. Co. v. New York &c. R. Co. 52 Conn. 274.

[43] Indianapolis &c. R. Co. v. Smythe, 45 Ind. 322; Terre Haute &c. R. Co. v. Crawford, 100 Ind. 550; State v. Cincinnati &c. R. Co. 17 Ohio St. 103; Reynolds v. Reynolds, 15 Conn. 83; State v. Dover, 10 N. H. 394; Fort Worth &c. R. Co. v. Lamphear, 1 Tex. App. Civ. Cas. 127; Snoddy v. County of Pettis, 45 Mo. 361; Oregonian &c. Co. v. Hill, 9 Ore. 377. See, generally, Wagner v. New York &c. R. Co. 38 Ohio St. 32; 10 Am. & Eng. R. Cas. 380; State v. Lubke, 15 Mo. App. 152; Reynolds, Ex parte, 52 Ark. 330; 12 S. W. 570; 44 Am. & Eng. R. Cas. 60; Dietrichs v. Lincoln &c. R. Co. 12 Neb. 225; 14 N. W. 718; Ennis v. Wood &c. R. Co. 12 R. I. 73; Provolt v. Chicago &c. R. Co. 69 Mo. 633; Drath v. Burlington &c. R. Co. 15 Neb. 367; 18 N. W. 717; St. Louis &c. R. Co. v. Wilder, 17 Kan. 239; Kansas City &c. R. Co. v. Kennedy, 49 Kan. 19; 30 Pac. 126; Oregon &c. R. Co. v. Bridwell, 11 Ore. 282; 3 Pac. 684. Form of judgment. Peoria &c. R. Co. v. Peoria &c. R. Co. 66 Ill. 174.

[44] New York Central &c. R. Co. Matter of, 64 N. Y. 60; Reiff v. Conner, 10 Ark. 241.

[45] Stauffer v. Cincinnati &c. R. Co. 33 Ind. App. 356; 70 N. E. 543.

havior on the part of the commissioners, such as receiving entertainment at the expense of one of the parties,[46] or accepting favors at his hands,[47] is sufficient to vitiate their award. But an improper motive or a tendency toward an improper influence must be shown.[48] The fact that the commissioners agreed with the condemning company as to the amount of their compensation is not cause for setting aside their award, where no definite compensation is fixed by law, and the agreement was openly made after the award had been filed, and the sum agreed upon as compensation was not excessive.[49] An agreement between the commissioners to make a verdict for the quotient to be obtained by dividing the sum of their estimates of the damages by the number of commissioners will invalidate a report based on the result of such a proceeding.[50] The report may be set aside for gross errors of the commissioners in the principles upon which they acted in making the assessment or in calculating the values.[51]

[46] Central Pacific R. Co. v. Pearson, 35 Cal. 247; Petition for a Highway, &c. 48 N. H. 433; Buffalo &c. R. Co. Matter of, 32 Hun (N. Y.), 289. It is held, however, that where there is no improper motive, or where the entertainment was furnished with the consent of the opposing party, the award will stand. Beardsley v. Washington, 39 Conn. 265; State v. Dover &c. R. Co. 43 N. J. L. 528; Staten Island R. Co. In re, 41 Hun (N. Y.), 392. See, generally, New York &c. R. Co. In re, 64 N. Y. 60; New York &c. R. Co. In re, 5 Hun (N. Y.), 105; Douglass v. Byrnes, 63 Fed. 16.

[47] New York &c. R. Co. v. Townsend, 36 Hun (N. Y.), 630.

[48] Hayward v. Bath, 40 N. H. 100. Where the counsel for one of the parties sent a paper to the commissioners, on which were certain computations which he had given orally at the hearing, this was held insufficient cause for setting aside the award. New York &c. R. Co. v. Church, 31 Hun (N. Y.), 440.

[49] State v. Dover &c. R. Co. 43 N. J. L. 528; Matter of Staten Island R. T. Co. 41 Hun (N. Y.), 392.

[50] Kansas City &c. R. Co. v. Campbell, 62 Mo. 585; Donner v. Palmer, 23 Cal. 40. See Marquette &c. R. Co. v. Probate Judge, 53 Mich. 217; 18 N. W. 788; Forbes v. Howard, 4 R. I. 364.

[51] Reitenbaugh v. Chester R. Co. 21 Pa. St. 100; Van Wickle v. Camden &c. R. Co. 14 N. J. L. 162; Coster v. New Jersey R. Co. 24 N. J. L. 730; Swayze v. New Jersey &c. R. Co. 36 N. J. L. 295; Chesapeake &c. R. Co. v. Pack, 6 W. Va. 397; New York &c. R. Co. In re, 33 Hun (N. Y.), 639; 98 N. Y. 447; St. Joseph v. Crowther, 142 Mo. 155; 43 S. W. 786. The mere fact that there is a mistake in the amount of the damages awarded is not sufficient cause for setting aside the award. Such objection must be remedied by an appeal. Seal v. Northern &c. R. Co. 1 Pears. (Pa.) 108.

And it has been held that it may be set aside as to one person or tract without affecting others.[52]

§ 1046a. Judgment.—As already stated, the procedure varies considerably in different jurisdictions, and this is true in some respects even as to the nature and scope of the judgment. In this section we shall consider some of the holdings in various jurisdictions, but some of them would not be followed in every jurisdiction. Since the proceeding, in many jurisdictions at least, is one simply for the purpose of ascertaining and fixing judicially the amount of the damages, the court, on confirming the report, should not render a personal judgment unless there is a special statutory provision authorizing such a decree or judgment. The judgment should be in the nature of an award.[53] The rule is the same on appeal. "The object of appellate proceedings is simply to correct the assessment of the commissioners. The judgment does not pass the title to the land, nor to the right of way. It simply determines the amount which the railway company shall pay to the owners, or to the county treasurer for their use, in order to secure the right of way. It is in the nature of an award of damages, such as is made by condemnation commissioners, except perhaps that as to costs it may be in the form of an ordinary personal judgment."[54] Neither is it necessary for the judgment to require the execution of a deed to the railroad company for the land condemned. The title is acquired under the statute.[55] The judgment should be one appropriating the right of way to the company on the payment of the damages assessed.[56] Where it spe-

[52] Stubbings v. Evanston, 136 Ill. 37; 26 N. E. 577; 11 L. R. A. 839; 29 Am. St. 300; McKee v. St. Louis, 17 Mo. 184.

[53] St. Louis &c. R. Co. v. Wilder, 17 Kan. 239; Lawrence &c. R. Co. v. Moore, 24 Kan. 323; Kansas City &c. R. Co. v. Kennedy, 49 Kan. 19; 30 Pac. 126; Florence &c. R. Co. v. Lilley, 3 Kan. App. 588; 43 Pac. 857; Louisville &c. R. Co. v. Ryan, 64 Miss. 399; 8 So. 173; Chesapeake &c. R. Co. v. Bradford, 6 W. Va. 220. But see Curtis v. St. Paul &c. R. Co. 21 Minn. 497; Robbins v. St. Paul &c. R. Co. 24 Minn. 191.

[54] St. Louis &c. R. Co. v. Wilder, 17 Kan. 239.

[55] Indianapolis &c. R. Co. v. Smythe, 45 Ind. 322.

[56] Oregon &c. R. Co. v. Bridwell, 11 Oreg. 282; 3 Pac. 684. Payment of award in condemnation proceedings in the manner provided by statute of money sufficient to satisfy the constitutional guaranty of a just compensation is said in a recent case to be all that is necessary in order to acquire the rights sought to be obtained and discharge

cifically refers to and affirms the report of the commissioners, it is not necessary for it to recite the names of the land-owners who are named in the report.[57] The judgment should provide for the release of mortgages on the payment of the damages assessed.[58] The judgment should conform to the relief prayed for. Relief in excess of that demanded can not be granted. Land different from that described can not be taken.[59] On appeal the property owner can not recover more damages than he claims.[60] It has been held in a proceeding to acquire the right to construct a railroad track along a street that it is not necessary that the petition should show the number of tracks proposed to be laid in the street. But where the intention to lay more than one track is not asserted, and the map shows the location of only one track, no more can be laid.[61] The land taken should be definitely described in the judgment.[62] Coming now to the sufficiency of the record to support the judgment many of the cases require that the notice required to be served should affirmatively ap-

the judgment. Stolze v. Milwaukee &c. R. Co. 113 Wis. 44; 88 N. W. 919; 99 Am. St. 833.

[57] Thompson v. Chicago &c. R. Co. 110 Mo. 147; 19 S. W. 77.

[58] Woolsey v. New York Ele. R. Co. 134 N. Y. 323; 30 N. E. 387; 31 N. E. 891.

[59] Brown v. Rome &c. R. Co. 86 Ala. 206; 5 So. 195; Chicago &c. R. Co. v. Chicago, 132 Ill. 372; 23 N. E. 1036.

[60] Houston &c. R. Co. v. Milburn, 34 Tex. 224.

[61] Bay City Belt Line R. Co. v. Hitchcock, 90 Mich. 533; 51 N. W. 808.

[62] Fore v. Hoke, 48 Mo. App. 254; Ft. Worth &c. R. Co. v. Lamphear, 1 White & W. Tex. App. Civ. Cas. Ct. § 308; Galena v. Pound, 22 Ill. 399; New York &c. R. Co. v. New York &c. R. Co. 52 Conn. 274. In a recent case an order was entered on the record books of the county court, pending trial of condemnation proceedings by a railroad company, whereby plaintiff proposed to construct and maintain certain crossings, and the order provided that the proposition should be made a part of the judgment. Subsequently a judgment was entered, assessing damages at a specified sum, but the judgment did not mention the order. Afterwards the land-owners agreed with the successor of such railroad company that on payment of the damages awarded in the condemnation proceedings the owners would transfer the benefit of the judgment to the railroad and make a deed to the right of way, which was done. The court held that the railroad company must make the crossings referred to in the order; and that contentions that the order was a mere proposition, never accepted, and that the land-owners were estopped by the contract and acceptance of the damages from requiring anything not specified in the judgment of condemnation, were without merit. Louisville &c. R. Co. v. Sale (Ky.), 93 S. W. 613.

pear in the report since this is a jurisdictional fact.[63] It should show as a condition precedent to the proceeding that the parties could not agree upon the compensation to be paid.[64] It is not necessary that it should appear of record that the appraisers or commissioners were qualified to serve as such.[65] Where the judgment has been rendered by a competent court it is not open to collateral attack except for want of jurisdiction.[66] Thus, in a collateral proceeding, a party can not raise the question as to the right of the plaintiff to condemn;[67] or as to the qualifications or competency of the commissioners;[68] or that the method adopted by the commissioners in their computation was irregular;[69] or that there was a misjoinder of parties defendant in the petition;[70] or that the description of the lands in the petition was defective;[71] or that the parties seeking condemnation were not legally incorporated.[72] The judgment until set aside or reversed is a final adjudication of the controversy.[73] It is without effect, however, as to persons who should have been but were not made parties to the proceeding.[74] Thus a judgment condemning land will

[63] Ross v. North Providence, 10 R. I. 461; Vogt v. Bexar Co. 5 Tex. Civ. App. 272; 23 S. W. 1044; Junction City &c. R. Co. v. Silver, 27 Kan. 741.

[64] Kansas City &c. R. Co. v. Campbell, 62 Mo. 585.

[65] American &c. Co. v. Huntington &c. R. Co. 130 Ind. 98; 29 N. E. 566; Gay v. Caldwell, 3 Ky. 63.

[66] Townsend v. Chicago &c. R. Co. 91 Ill. 545; Sedalia v. Missouri &c. R. Co. 17 Mo. App. 105; Secombe v. Milwaukee &c. R. Co. 90 U. S. 108; 23 L. Ed. 67; Chicago &c. R. Co. v. Springfield &c. R. Co. 67 Ill. 142; Brown v. Philadelphia &c. R. Co. 58 Md. 539; Thompson v. Chicago &c. R. Co. 110 Mo. 147; 19 S. W. 77; Allen v. Utica &c. R. Co. 15 Hun (N. Y.), 80; Weinckie v. New York &c. R. Co. 61 Hun (N. Y.), 619; 15 N. Y. S. 689; South Chicago &c. R. Co. v. Chicago, 196 Ill. 490; 63 N. E. 1046; Drouin v. Boston &c. R. Co. 74 Vt. 343; 52 Atl. 957; Davidson v. Texas &c. R. Co. 29 Tex. Civ. App. 54; 67 S. W. 1093.

[67] Foltz v. St. Louis &c. R. Co. 60 Fed. 316; Chesapeake &c. R. Co. v. Washington &c. R. Co. 99 Va. 715; 40 S. E. 20.

[68] Huling v. Kaw Valley &c. R. Co. 130 U. S. 559; 9 Sup. Ct. 603; 32 L. Ed. 1045; Cage v. Trager, 60 Miss. 563; Gulf &c. R. Co. v. Ft. Worth &c. R. Co. 86 Tex. 537; 26 S. W. 54.

[69] Union Depot R. Co. v. Frederick, 117 Mo. 138; 21 S. W. 1118, 1130; 26 S. W. 350.

[70] Thompson v. Chicago &c. R. Co. 110 Mo. 147; 19 S. W. 77.

[71] St. Joseph &c. Co. v. Cincinnati &c. R. Co. 109 Ind. 172; 9 N. E. 727; Fremont &c. R. Co. v. Mattheis, 39 Neb. 98; 57 N. W. 987.

[72] Chicago &c. R. Co. v. Chicago &c. R. Co. 112 Ill. 589.

[73] Pennsylvania &c. R. Co. v. Gorsuch, 84 Pa. St. 411.

[74] National R. Co. v. Easton &c. R. Co. 36 N. J. L. 181.

not affect a tenant thereon who is not made a party,[75] and, on the other hand, it is not binding on the owner of the ground rent where the proceeding is against a tenant only.[76] Where the proceeding for condemnation is settled by the parties and a consent decree is entered against the railroad company conferring an easement on the right of way as described, the decree has the same effect as a deed to convey the right of way.[77]

§ 1047. Waiver of objections.—The doctrine of waiver applies to proceedings under the power of eminent domain, and the general rule is that if a party has knowledge of the facts and an opportunity to present them he must avail himself of the opportunity or he will be regarded as having waived the objections. Defects in a notice may be waived,[78] and so may defects in petitions.[79] The authorities which hold that defects in notices and petitions may be waived by failure to seasonably interpose objections clearly support the conclusion that objections to the report or to any of the proceedings will be regarded as waived unless opportunely and appropriately made.[80] So, defects and irregularities in other proceedings before the trial[81] and in the award itself[82] may be waived.

[75] Baltimore &c. R. Co. v. Parrette, 55 Fed. 50.

[76] Voegtly v. Pittsburgh &c. R. Co. 2 Grant Cas. (Pa.) 243.

[77] Chicago &c. R. Co. v. Snyder, 120 Iowa, 532; 95 N. W. 183.

[78] Seifert v. Brooks, 34 Wis. 443; Damp v. Dame, 29 Wis. 419; Langford v. County Commissioners, 16 Minn. 375; Parish v. Gilmanton, 11 N. H. 293; Barre &c. Co. v. Appleton, 2 Pick. (Mass.) 430; Windsor v. Field, 1 Conn. 279; Tingley v. Providence, 9 R. I. 388; Onken v. Riley, 65 Tex. 468; Rheiner v. Union &c. R. Co. 31 Minn. 289; 17 N. W. 623; 14 Am. & Eng. R. Cas. 373; Minneapolis &c. R. Co. v. Kanna, 32 Minn. 174; Swinney v. Fort Wayne &c. R. Co. 59 Ind. 205; 219; Atchison &c. R. Co. v. Patch, 28 Kan. 470; East Saginaw &c. R. Co. v. Benham, 28 Mich. 459; Cruger v. Hudson River Co. 12 N. Y. 190. See, also, St. Louis &c. R. Co. v. Donovan, 149 Mo. 93; 50 S. W. 286.

[79] Wells v. Rhodes, 114 Ind. 467; 16 N. E. 830; Palmer v. Highway Com'r, 49 Mich. 45; 12 N. W. 903; Bacheler v. New Hampton, 60 N. H. 207.

[80] Mills' Eminent Domain (2d ed.), § 224; Lewis Em. Dom. (2d ed.) §§ 362, 407; Randolph Eminent Domain, § 388; Elliott Roads and Streets, pp. 246, 257. See upon the general subject, Chowan &c. R. Co. v. Parker, 105 N. Car. 246; 11 S. E. 328; Norfolk &c. R. Co. v. Ely, 101 N. Car. 8; 7 S. E. 476; Chicago &c. R. Co. v. Randolph &c. 103 Mo. 451; 15 S. W. 437; Mansfield &c. R. Co. v. Clark, 23 Mich. 519; Gage v. Chicago, 141 Ill. 642; 31 N. E. 163.

[81] Whitely v. Mississippi &c. Co. 38 Minn. 523; 38 N. W. 753; Lieber-

§ 1048. Remedies to enforce payment of compensation.—Where payment of compensation is required to precede the taking and the corporation has obtained or is attempting to take possession of the land before payment has actually been made, its further occupation of the land may be enjoined until the damages are paid,[83] unless the owner has, by acquiescence in the occupancy of his land until the rights of the public have intervened,[84] estopped himself to enjoin its further occupation.[85] In states which permit the corporation to

man v. Chicago &c. R. Co. 141 Ill. 140; 30 N. E. 544; Cooper, Matter of, 93 N. Y. 507.

[82] Mattheis v. Fremont &c. R. Co. 53 Neb. 681; 74 N. W. 30; Morning Side Park, In re, 10 Abb. Pr. N. S. (N. Y.) 338; Twombly v. Chicago &c. R. Co. (Tex. Civ. App.) 31 S. W. 81; Chatterton v. Parrott, 46 Mich. 432; 9 N. W. 482. And so as to qualifications of commissioners or appraisers. Tidewater R. Co. v. Cowan (Va.), 56 S. E. 819.

[83] Sturtevant v. Milwaukee &c. R. Co. 11 Wis. 63; Gilman v. Sheboygan &c. R. Co. 40 Wis. 653; Kendall v. Missisquoi &c. R. Co. 55 Vt. 438; Kittell v. Missisquoi R. Co. 56 Vt. 96; Evans v. Missouri &c. R. Co. 64 Mo. 453; Provolt v. Chicago &c. R. Co. 69 Mo. 633; White v. Nashville &c. R. Co. 7 Heisk. (Tenn.) 518; Lohman v. St. Paul &c. R. Co. 18 Minn. 174; Stewart v. Raymond R. Co. 7 S. & M. (Miss.) 568; Elwell v. Eastern R. Co. 124 Mass. 160; Freeholders of Monmouth Co. v. Red Bank &c. Co. 18 N. J. Eq. 91; Harness v. Chesapeake &c. Canal Co. 1 Md. Ch. 248; Ray v. Atchison &c. R. Co. 4 Neb. 439; Irish v. Burlington &c. R. Co. 44 Iowa, 380; Richards v. Des Moines &c. R. Co. 18 Iowa, 259; Young v. Harrison, 6 Ga. 130; Gammage v. Georgia Southern R. Co. 65 Ga. 614; Cowan v. Southern R. Co. 118 Ala. 554; 23 So. 754; Ft. Wayne v. Ft. Wayne &c. R. Co. 149 Ind. 25; 48 N. E. 342; Stolze v. Milwaukee &c. R. Co. 113 Wis. 44; 88 N. W. 919; 90 Am. St. 833; A vendee or lessee of the company may be enjoined from using the land until compensation is made. Ray v. Atchison &c. R. Co. 4 Neb. 439; Gilman v. Sheboygan &c. R. Co. 40 Wis. 653; Hibbs v. Chicago &c. R. Co. 39 Iowa, 340; Kittell v. Missisquoi R. Co. 56 Vt. 96; Provolt v. Chicago &c. R. Co. 69 Mo. 633.

[84] Where the land was taken without the consent of the owner, the public can acquire no rights therein until payment has been made therefor. Evans v. Missouri &c. R. Co. 64 Mo. 453; Stretton v. Great Western &c. R. Co. 40 L. J. Eq. 50; Zimmerman v. Kansas City &c. R. Co. 144 Fed. 622.

[85] Forward v. Hampshire &c. Canal Co. 22 Pick. (Mass.) 462; Pettibone v. LaCrosse &c. R. Co. 14 Wis. 443; Mooers v. Kennebec &c. R. Co. 58 Me. 279; Remshart v. Savannah &c. R. Co. 54 Ga. 579; Griffin v. Augusta &c. R. Co. 70 Ga. 164; Hentz v. Long Island &c. R. Co. 13 Barb. (N. Y.) 646; Reisner v. Strong, 24 Kan. 410; Goodin v. Cincinnati &c. R. Co. 18 Ohio St. 169; 98 Am. Dec. 95; Ross v. Elizabethtown &c. R. Co. 2 N. J.

acquire title to land before the damages are paid, but which do not authorize the issuing of an execution upon the judgment awarding damages it is generally held that the award may be enforced by an independent suit.[86] And where the company neglects to have the damages assessed for lands of which it has taken possession, the English courts hold that a bill in equity may be filed by the land-owner to compel it to do so.[87] It has been held that property taken in invitum is taken subject to an obligation to make compensation therefor, and that this obligation constitutes a vendor's lien upon the land taken, and can be enforced as such in a court of equity.[88] And in states where this view is held as well as in those whose courts hold that no title passes until compensation is made,[89] it is also held

Eq. 422; Wood v. Charing Cross &c. R. Co. 33 Beav. (Eng.) 290. See, also, Midland R. Co. v. Smith, 135 Ind. 348; 35 N. E. 284.

[86] In states in which the law requires security to be given before land is taken, the security may be proceeded against to recover the award. And in Pennsylvania it has been held that the land-owner can not claim any rights in the land as against a mortgagee of the railroad company, but must look to the personal responsibility of the company and the sureties on its bond. Fries v. Southern Pennsylvania R. Co. 85 Pa. St. 73. A suit may be brought directly on the award, although a bond was given to secure its payment. The bond is simply an additional security and does not destroy nor suspend other remedies. Fisher v. Warwick R. Co. 12 R. I. 287.

[87] Adams v. London and Blackwall R. Co. 18 L. J. Ch. N. S. 357; Inge v. Birmingham &c. R. Co. 3 DeG. McN. & G. 658; Mason v. Stokes Bay Pier &c. R. Co. 32 L. J. Ch. 110. And see Adams v. London &c. Blackwall R. Co. 2 McN. & G. 118; Hedges v. Metropolitan R. Co. 28 Beav. (Eng.) 109; Red River Bridge Co. v. Clarksville, 1 Sneed (Tenn.), 176; 60 Am. Dec. 143; Lewis' Em. Dom. (2d ed.) § 615.

[88] Mims v. Macon &c. R. Co. 3 Ga. 333; Dayton &c. R. Co. v. Lewton, 20 Ohio St. 401; 55 Am. Dec. 464; Kendall v. Missisquoi &c. R. Co. 55 Vt. 438; Gillison v. Savannah &c. R. Co. 7 S. Car. 173; Provolt v. Chicago &c. R. Co. 69 Mo. 633; Walker v. Ware &c. R. Co. 35 L. J. Eq. 94; Southern R. Co. v. Gregg, 101 Va. 308; 43 S. E. 570; Earl St. Germans v. Crystal Palace R. Co. L. R. 11 Eq. Cas. 568.

[89] This doctrine obtains in all states in which compensation is required to precede the taking, and also in others in which the constitution simply requires that compensation shall be made. Gilman v. Sheboygan &c. R. Co. 40 Wis. 653; Western Pennsylvania R. Co. v. Johnston, 59 Pa. St. 290; Buffalo &c. R. Co. v. Harvey, 107 Pa. St. 319; Hatry v. Painesville &c. R. Co. 1 Ohio Cir. Ct. 426; Kittell v. Missisquoi R. Co. 56 Vt. 96; Bridgman v. St. Johnsbury &c. R. Co. 58 Vt. 198; 2 Atl. 467; White v. Nashville &c. R. Co. 7 Heisk.

that those holding under the condemning company by mortgage, lease or otherwise, take the lands subject to the right of the owner to enforce payment of his damages.[90] In many of the states a suit at common law may be maintained upon the implied promise to pay a just compensation for the lands taken.[91] And for any taking or injury for which the statute does not provide a remedy, the land-owner may sue at common law.[92] Some of the courts hold that

(Tenn.) 518. See, also, Zimmerman v. Kansas City &c. R. Co. 144 Fed. 622. And see as to effect of appeal and when title passes and to what period it relates back. Cleveland &c. R. Co. v. Nowlin, 163 Ind. 497; 72 N. E. 257; Terre Haute &c. R. Co. v. Indianapolis Traction Co. (Ind.) 78 N. E. 661. And see, generally, Kennedy v. Indianapolis, 103 U. S. 599; Perkins v. Maine Cent. R. Co. 72 Me. 95; ante, § 985.

[90] In some of the states, it is held that the acceptance and use by the grantee of a corporation of lands for which the corporation has failed to make compensation as required by law, renders the grantee personally liable for the payment of such compensation. Western Pennsylvania R. Co. v. Johnston, 59 Pa. St. 290; Buffalo &c. R. Co. v. Harvey, 107 Pa. St. 319; Gilman v. Sheboygan &c. R. Co. 37 Wis. 317; Lake Erie &c. R. Co. v. Griffin, 92 Ind. 487. But the new corporation may refuse to accept property to which the old corporation has failed to acquire title, and may proceed to condemn in its own name. Adams v. St. Johnsbury &c. R. Co. 57 Vt. 240.

[91] Welsh v. Chicago &c. R. Co. 19 Mo. App. 127; Allen v. Wabash &c. R. Co. 84 Mo. 646; Donald v. St. Louis &c. R. Co. 52 Iowa, 411; 3 N. W. 462; Gulf Coast &c. R. Co. v. Donahoo, 59 Tex. 128; International &c. R. Co. v. Benitos, 59 Tex. 326; Wichita &c. R. Co. v. Fechheimer, 36 Kan. 45; 12 Pac. 362; Bentonville R. Co. v. Baker, 45 Ark. 252; Bailey v. New Orleans, 19 La. Ann. 271; Mayor &c. of Rome v. Perkins, 30 Ga. 154. See, also, Chicago &c. R. Co. v. Jones, 103 Ind. 386; 6 N. E. 8; 55 Am. R. 756; Brown v. Chicago &c. R. Co. 64 Neb. 62; 89 N. W. 405; Southern R. Co. v. Gregg, 101 Va. 308; 43 S. E. 570. Mandamus was held proper in State v. Grand Island &c. R. Co. 31 Neb. 209; 47 N. W. 857. And see as to issuing execution, State v. Withrow (Mo.), 24 S. W. 638. Where an express promise to pay is made in order to induce the land-owner to discontinue proceedings for the assessment of damages such promise may be made the basis of an action. Plott v. Western N. Car. R. Co. 65 N. Car. 74.

[92] Indiana Central R. Co. v. Boden, 10 Ind. 96; Cogswell v. Essex Mill Corp. 6 Pick. (Mass.) 94. See, also, Archer v. Board, 128 Fed. 125. Where consequential damage results to property which is not taken within the meaning of the statute for assessment of damages, but for which the constitution requires that compensation shall be made the land-owner may recover damages in a common law action. Burlington &c. R. Co. v. Reinhackle,

even though the original taking was wrongful, the land-owner may affirm the taking and sue for compensation,[93] and a recovery in such a suit vests the right to the lands in the defendant.[94] It is

15 Neb. 279; 18 N. W. 69; 48 Am. R. 342; Railroad Co. v. Hambleton, 40 Ohio St. 496; Protzman v. Indianapolis &c. R. Co. 9 Ind. 467; 68 Am. Dec. 650; Johnson v. Parkersburg, 16 W. Va. 402; 37 Am. R. 779; Taylor v. Metropolitan El. R. Co. 50 N. Y. Supr. Ct. 311; Grafton v. Baltimore &c. R. Co. 21 Fed. 309.

[93] Evansville &c. R. Co. v. Nye, 113 Ind. 223; 15 N. E. 261; Indiana &c. R. Co. v. Allen, 113 Ind. 581; 15 N. E. 446. But see Anthony v. Granger, 22 R. I. 359; 47 Atl. 1091. Or he may sue in trespass, in which case in some jurisdictions the recovery is limited to the damages accrued when the action was brought, and another suit may be prosecuted for a continuance of the trespass. Carl v. Sheboygan &c. R. Co. 46 Wis. 625; 1 N. W. 295; Gulf &c. R. Co. v. Helsley, 62 Tex. 593; Uline v. New York Central &c. Co. 101 N. Y. 98; 4 N. E. 536; 54 Am. R. 661; Dickson v. Chicago &c. R. Co. 71 Mo. 575; Ford v. Santa Cruz R. Co. 59 Cal. 290.

[94] Gulf Coast &c. R. Co. v. Donahoo, 59 Tex. 128; Wichita &c. R. Co. v. Fechheimer, 36 Kan. 45; 12 Pac. 362; Jamison v. Springfield, 53 Mo. 224. All damages, past, present and future, shall be included in the verdict in such an action. Stodghill v. Chicago &c. R. Co. 53 Iowa, 341; 5 N. W. 495; Van Orsdol v. Burlington &c. R. Co. 56 Iowa, 470; 9 N. W. 379; Miller v. Keokuk R. Co. 63 Iowa, 680; 16 N. E. 567; Troy v. Cheshire R. Co. 23 N. H. 83; 55 Am. Dec. 177; Chicago &c. R. Co. v. Maher, 91 Ill. 312; Chicago &c. R. Co. v. Loeb, 118 Ill. 203; 8 N. E. 460; 59 Am. R. 341, and note; Fowle v. New Haven &c. Co. 112 Mass. 334; 17 Am. R. 106; Kansas Pac. R. Co. v. Mihlman, 17 Kan. 224; Central Branch R. Co. v. Andrews, 26 Kan. 702; Baldwin v. Chicago &c. R. Co. 35 Minn. 354; 29 N. W. 5; Elizabethtown &c. R. Co. v. Combs, 10 Bush. (Ky.) 382; 19 Am. R. 67; Jeffersonville &c. R. Co. v. Esterle, 13 Bush. (Ky.) 667; Texas &c. R. Co. v. Long, 1 Tex. App. Civ. Cas. 281. See, also, Zimmerman v. Kansas City &c. R. Co. 144 Fed. 622, where it is said that the property owner "had a right to waive the trespass and commence his action in the district court, the same as he might have done had formal proceedings been taken by the railroad company and he had been dissatisfied with the award of the commissioners "to recover compensation for all the damages which he sustained by reason of the permanent taking and appropriation of the right of way by the railroad company." Central Branch &c. R. Co. v. Andrews, 26 Kan. 702, 710; Cohen v. St. Louis &c. R. Co. 34 Kan. 158; 8 Pac. 138; 55 Am. R. 242; Wichita &c. R. Co. v. Fechheimer, 36 Kan. 45; 12 Pac. 362; United States v. Great Falls Mfg. Co. 112 U. S. 645; 5 Sup. Ct. 306; 28 L. Ed. 846." The court also held that such judgment was conclusive against a successor company which purchased the railroad under foreclosure proceedings and

generally held, however, that where the statute authorizing a railroad company to take the lands and other property of private individuals provides a mode by which the owner may enforce payment of his damages, this remedy is exclusive of all others.[95] The general rule is that if the statute authorizes the company alone to have the damages assessed under its provisions, or makes it the duty of the company so to do, a land-owner may bring an action for any damages that are not presented to the commissioners for assessment within a

that it could only hold the land subject to the condition of paying such judgment. Citing Pfeifer v. Sheboygan &c. R. Co. 18 Wis. 155; 86 Am. Dec. 751; Chicago &c. R. Co. v. Galey, 141 Ind. 360; 39 N. E. 925; Rio Grande &c. Ry. Co. v. Ortiz, 75 Tex. 602; 12 S. W. 1129; Oregon v. Memphis &c. R. Co. 51 Ark. 235; 11 S. W. 96; Drury v. Midland R. Co. 127 Mass. 571; Bridgman v. St. Johnsbury &c. R. Co. 58 Vt. 198; 2 Atl. 467.

[95] Lafayette &c. R. Co. v. Smith, 6 Ind. 249; Leviston v. Junction R. Co. 7 Ind. 597; Mason v. Kennebec &c. R. Co. 31 Me. 215; Williams v. Camden &c. R. Co. 79 Me. 543; 11 Atl. 600; Knori v. Germantown R. Co. 5 Wharton (Pa.), 256; Cumberland Valley R. Co. v. McLanahan, 59 Pa. St. 23; Fehr v. Schuylkill Nav. Co. 69 Pa. St. 161; Brown v. Beatty, 34 Miss. 227; 69 Am. Dec. 389; Stevens v. Proprietors Middlesex Canal, 12 Mass. 466; Hazen v. Essex Co. 12 Cush. (Mass.) 475; Brickett v. Haverhill Aqueduct Co. 142 Mass. 394; 8 N. E. 119; Aldrich v. Cheshire R. Co. 21 N. H. 359; 53 Am. Dec. 212; Hurniker v. Contoocook Valley R. Co. 29 N. H. 146; Mitchell v. Franklin &c. Turnp. Co. 3 Humph. (Tenn.) 456; Colcough v. Nashville &c. Co. 2 Head (Tenn.), 171; McLaughlin v. Charlotte &c. R. Co. 5 Rich. L. (S. Car.) 583; Land v. Wilmington &c. R. Co. 107 N. C. 72; 12 S. E. 125; Allen v. Wilmington &c. R. Co. 102 N. C. 381; 9 S. E. 4; Johnson v. St. Louis &c. R. Co. 32 Ark. 758; Cairo &c. R. Co. v. Turner, 31 Ark. 494; 25 Am. R. 564; Little Miami &c. R. Co. v. Whitacre, 8 Ohio St. 590; Ohio &c. R. Co. v. Thillman, 143 Ill. 134; 32 N. E. 529; 36 Am. St. 359; Hueston v. Eaton &c. R. Co. 5 Ohio St. 685. See, also, Black Hills &c. Ry. Co. v. Tacoma &c. Co. 129 Fed. 312. But where there is no remedy provided by statute or the injury is caused by negligence the common law remedy may be invoked. Indiana &c. R. Co. v. Boden, 10 Ind. 96; Hall v. Pickering, 40 Me. 548; Drady v. Des Moines &c. R. Co. 57 Iowa, 393; 10 N. W. 754; 14 Am. & Eng. R. Cas. 130; Atlantic &c. R. Co. v. Fuller, 48 Ga. 423; Kansas &c. R. Co. v. Hopkins, 18 Kan. 494. See Cohen v. St. Louis &c. R. Co. 34 Kan. 158; 8 Pac. 138; 55 Am. R. 242; Grand Rapids &c. R. Co. v. Heisel, 47 Mich. 393; 11 N. W. 212; Ohio &c. R. Co. v. Wachter, 123 Ill. 440; 15 N. E. 279; 5 Am. St. 532, and note; 34 Am. & Eng. R. Cas. 194; St. Louis &c. R. Co. v. Brown, 34 Ill. App. 552.

reasonable time.[96] Under the constitution of many of the states the corporation is required to procure an assessment of the damages, and to pay or tender the same before it acquires any rights in the land taken by condemnation other than those of a mere trespasser. But where the land-owner waives the condition precedent and permits the corporation to construct its road under a parol license, the rule is that he can afterward only maintain an action for the damages that should have been awarded.[97]

§ 1049. Remedies of land-owner.—The general rule is that where the remedy by appeal from the proceedings is provided all questions which could be litigated on such appeal must be so litigated,[98] but there are many questions which do not arise on appeal. It may be said, generally, that in the absence of a statute controlling the

[96] Denslow v. New Haven &c. R. Co. 16 Conn. 98; Kansas Pacific R. Co. v. Streeter, 8 Kan. 133; Pettibone v. LaCrosse &c. R. Co. 14 Wis. 443; Sherman v. Milwaukee &c. R. Co. 40 Wis. 645; Eward v. Lawrenceburgh &c. R. Co. 7 Ind. 711; Nichols v. Somerset &c. R. Co. 43 Me. 356; Gowen v. Penobscot R. Co. 44 Me. 140; Cairo &c. R. Co. v. Trout, 32 Ark. 17; Bentonville R. Co. v. Baker, 45 Ark. 252. And where damage is done for which the statute fails to provide an assessment of compensation the land-owner may be allowed his common law remedy. Williams v. Camden &c. R. Co. 79 Me. 543; 11 Atl. 600; Clapp v. Manter, 78 Me. 358; 5 Atl. 773; Dean v. Colt, 99 Mass. 480; Halsey v. Lehigh Valley R. Co. 45 N. J. L. 26; Cator v. Board of Works &c. 34 L. J. Q. B. 74; Imperial Gas-Light &c. Co. v. Broadbent, 7 H. L. Cases, 600.

[97] Conger v. Burlington &c. R. Co. 41 Iowa, 419; Baltimore &c. R. Co. v. Algire, 63 Md. 319; 65 Md. 337; 3 Atl. 293; Sherman v. Milwaukee &c. R. Co. 40 Wis. 645. Where it was alleged that a land-owner had waived his equitable lien on land taken for a railroad right of way by permitting the company to construct its line on the land before payment of the award, such waiver was complete when the line was constructed, and was not affected by mere lapse of time. Southern R. Co. v. Gregg. 101 Va. 308; 43 S. E. 570. See, ante, §§ 948, 1008.

[98] An injunction will not be granted to restrain the railroad company from taking possession of land by authority of proceedings that were errroneous. Such errors must be corrected by an appeal or writ of certiorari. Phifer v. Carolina Central R. Co. 72 N. C. 433; Brown v. Beatty, 34 Miss. 227; 69 Am. Dec. 389; Tharp v. Witham, 65 Iowa, 566; 22 N. W. 677. This doctrine has been applied where condemnation proceedings of which the land-owner was duly notified resulted in no damages at all being awarded to him. Powell v. Clelland, 82 Ind. 24; Frevert v. Finfrock, 31 Ohio St. 621.

procedure that one whose lands are trespassed upon by a railroad company has a right in a proper case to sue for possession, or to enjoin the continuance of the use of the land by the railroad company, or for damages, or to institute condemnation proceedings.[99] One or more of these remedies is open to him and in some instances he may have an election. Thus an action for ejectment may be maintained where the railroad company obtains possession pending an appeal by depositing the damages awarded by the commissioners, but fails to pay an additional sum awarded by the jury on appeal,[100] for that matter is not involved in the appeal from the proceeding, or in any other case where the company entered without the owner's consent and holds possession without right.[101] In some cases the own-

[99] Clark v. Wabash R. Co. (Iowa) 109 N. W. 309. See, generally, Hughey v. Walker, 71 Ark. 644; 73 S. W. 1093; Andrews v. Delhi &c. Tel. Co. 66 App. Div. (N. Y.) 616; 73 N. Y. S. 1129, affirming 36 Misc. (N. Y.) 23; 72 N. Y. S. 50; Peck v. Schenectady R. Co. 67 App. Div. (N. Y.) 359; 73 N. Y. S. 794, judgment modified in 170 N. Y. 298; 63 N. E. 357 (injunction to restrain unauthorized occupation of street); St. Louis &c. R. Co. v. Grayson Co. 31 Tex. Civ. App. 611; 73 S. W. 64; McKennon v. St. Louis &c. R. Co. 69 Ark. 104; 61 S. W. 383 (statutory remedy exclusive and precludes ejectment); Illinois &c. R. Co. v. Hoskins, 80 Miss. 730; 32 So. 150; 92 Am. St. 612. In North Carolina it is held that where land is taken by a railroad company under a statute authorizing it to acquire a right of way, and providing for the assessment of compensation by application to the clerk of the superior court and the appointment of commissioners therefor, the compensation can not be recovered by an action of ejectment. Dargan v. Carolina &c. R. Co. 131 N. C. 623; 42 S. E. 979. It is rather broadly held by the supreme court of Utah that a party whose property is about to be specially damaged in any substantial degree for public use has the same rights and is given the same remedies for the protection of his property from the threatened injury as would be accorded him if his property was actually taken and appropriated for public use. Stockdale v. Rio Grande &c. R. Co. 28 Utah, 201; 77 Pac. 849.

[100] Lake Erie &c. R. Co. v. Kinsey, 87 Ind. 514; Levering v. Philadelphia &c. R. Co. 8 W. & S. (Pa.) 459; St. Joseph &c. R. Co. v. Callender, 13 Kan. 496; White v. Wabash &c. R. Co. 64 Iowa, 281; 20 N. W. 436; Kanne v. Minneapolis &c. R. Co. 30 Minn. 423; 15 N. W. 871. Where the company abandons the proceedings pending an appeal, and after it has obtained possession, an action of ejectment will lie. Kiecher v. Killbuck Turnp. Co. 33 Ind. 333.

[101] See McKennon v. St. Louis &c. R. Co. 69 Ark. 104; 61 S. W. 383; White v. Wabash &c. R. Co. 64 Ia. 281; 20 N. W. 436; Pfaender v. Chicago &c. R. Co. 86 Minn. 218; 90 N. W. 393; Illinois Cent. R. Co.

er's consent has been held to be immaterial, where it was given in return for promises which the railroad company has failed to fulfill,[102] but many cases hold that where a land-owner consents to the construction of valuable public works on his land, he is estopped to sue for the recovery of the land, and is limited to a proceeding to recover damages.[103] The fact that the property has passed into

v. Hoskins, 80 Miss. 730; 32 So. 150; 92 Am. St. 612; Owen v. St. Paul &c. R. Co. 12 Wash. 313; 41 Pac. 44; Kuhl v. Chicago &c. R. Co. 101 Wis. 42; 77 N. W. 155; Buckwalter v. Atchison &c. R. Co. 64 Kan. 403; 67 Pac. 831. The owner of the full equitable title is not bound by proceedings against the holder of the naked legal title. Kansas Pac. R. Co. v. McBratney, 12 Kan. 1. A railroad company holding under a lease may be ejected upon the expiration or forfeiture of the lease. Green v. Missouri &c. R. Co. 82 Mo. 653; Horton v. New York Central &c. R. Co. 12 Abb. N. C. (N. Y.) 30. See Bradley v. Missouri Pac. R. Co. 91 Mo. 493; 4 S. W. 427. In Connelsville &c. Co. v. Baltimore &c. R. Co. (Pa.) 65 Atl. 669, it is held that where a railroad company takes land without compensation it can not acquire title by adverse possession, and that the landowner may maintain ejectment, but that an execution under a judgment in his favor will be stayed to allow condemnation proceedings. See, also, Covert v. Pittsburgh &c. R. Co. 204 Pa. St. 341; 54 Atl. 170; Oliver v. Pittsburgh &c. R. Co. 131 Pa. St. 408; 19 Atl. 47; 17 Am. St. 814.

[102] Hooper v. Columbus &c. R. Co. 78 Ala. 213; Philadelphia &c. R. Co. v. Cooper, 105 Pa. St. 239. Some courts have held that execution on a judgment of ejectment against a railroad company for lands necessary in its operation should be stayed a reasonable time to enable the corporation to acquire the land by condemnation, and that a court of equity may interfere by injunction to compel such stay. Pittsburgh &c. R. Co. v. Jones, 59 Pa. St. 433; Justice v. Nesquehoning V. R. Co. 87 Pa. St. 28; Pittsburgh &c. R. Co. v. Bruce, 102 Pa. St. 23; Conger v. Burlington &c. R. Co. 41 Iowa, 419.

[103] Provolt v. Chicago &c. R. Co. 57 Mo. 256; Kanaga v. St. Louis &c. R. Co. 76 Mo. 207; Taylor v. Chicago &c. R. Co. 63 Wis. 327; 24 N. W. 84; New York &c. R. Co. v. Stanley, 34 N. J. Eq. 55; Paterson &c. R. Co. v. Kamlah, 42 N. J. Eq. 93; 4 Atl. 444; McAulay v. Western Vt. R. Co. 33 Vt. 311; 78 Am. Dec. 627; Tompkins v. Augusta &c. R. Co. 21 S. Car. 420; Evansville &c. R. Co. v. Nye, 113 Ind. 223; 15 N. E. 261; Indiana &c. R. Co. v. McBroom, 114 Ind. 198; 15 N. E. 831; Texas &c. R. Co. v. Jarrell, 60 Tex. 267. See Robinson v. Pittsburg R. Co. 57 Cal. 417; Crescent Canal Co. v. Montgomery, 143 Cal. 248; 76 Pac. 1032; 65 L. R. A. 940; Bibber-White Co. v. White River &c. R. Co. 131 Fed. 995; Charleston &c. R. Co. v. Hughes, 105 Ga. 1; 30 S. E. 972; 979 (citing text). If the owner, with full knowledge of the taking, makes no objection, but permits the railroad company to locate its road across his land, and to expend large

the hands of another company than that by which the wrongful entry was made does not preclude the land-owner from recovering in ejectment, where he has not estopped himself by acquiescence, since the second company can acquire no rights in the land superior to those of its grantor.[104] Nor does the fact that title is held subject to an easement deprive the land-owner of his action. Ejectment may be maintained by the owner of the fee against a railroad company which lays its tracks in a street in which his interest has not been

sums of money in the construction thereof, he will be estopped to eject it for non-payment of compensation. New Orleans &c. R. Co. v. Jones, 68 Ala. 48; St. Julien v. Morgan's La. &c. R. Co. 35 La. Ann. 924; McAulay v. Western Vt. R. Co. 33 Vt. 311; 78 Am. Dec. 627; Strickler v. Midland R. Co. 125 Ind. 412; 25 N. E. 455; Bravard v. Cincinnati &c. R. Co. 115 Ind. 1; 17 N. E. 183; Roberts v. Railroad Co. 158 U. S. 1; 15 Sup. Ct. 756; Buckwalter v. Atchison &c. R. Co. 64 Kans. 403; 67 Pac. 831. But see Walker v. Chicago &c. R. Co. 57 Mo. 275; Crosby v. Dracut, 109 Mass. 206. The fact that a railroad company is actually occupying a right of way across land and constructing or operating its road thereon, is constructive notice of its rights therein, sufficient to bind a subsequent purchaser of the land. Indiana &c. R. Co. v. McBroom, 114 Ind. 198; 15 N. E. 831; Detroit &c. R. Co. v. Brown, 37 Mich. 533. Where the defendant answered claiming title to all the land sued for and disclaiming title to no part thereof, it was held immaterial that the evidence showed it to be in possession of only a small part thereof. Colorado Central R. Co. v. Smith, 5 Col. 160. Acceptance by the land-owner of the damages deposited pending an appeal, will estop him to prosecute an action of ejectment to recover the land, even though the proceedings are reversed on appeal. St. Paul &c. R. Co. v. Karnes, 101 Ill. 402.

[104] Lake Erie &c. R. Co. v. Griffin, 92 Ind. 487; Gilman v. Sheboygan &c. R. Co. 37 Wis. 317; Pfeifer v. Sheboygan &c. R. Co. 18 Wis. 155; 86 Am. Dec. 751. See, also, Zimmerman v. Kansas City &c. R. Co. 144 Fed. 622. Where the receiver of an insolvent railroad corporation unlawfully appropriates land to the use of the corporation, and, after the discharge of the receiver, the corporation resumes control of the railroad, and retains possession of and uses the land, the owner can maintain an action to recover and for damages. Bloomfield &c. R. Co. v. Van Slike, 107 Ind. 480; 8 N. E. 269. Where an execution, issued on a judgment for damages for land condemned by a railroad was returned "no property found," but the company entered upon the land and constructed its road without objection from the owner, and afterward leased it to another company, it was held that the land-owner could not maintain an action to recover the land from the lessee company without notice to quit. Chicago &c. R. Co. v. Knox College, 34 Ill. 195.

condemned, and the fact that the public authorities granted the company permission to use the street for its purpose is no defense to the action.[105] Any one having a vested interest in land unlawfully taken by a railroad company is entitled to sue in trespass. A lessee,[106] or a mortgagee holding the legal title,[107] may maintain trespass for an injury to his rights although the railroad company has acquired title from the owner of the fee. Where the railroad encroaches upon land adjoining that which it has condemned,[108] or occupies a street or highway without making compensation,[109] it is liable in trespass to the owner of the fee in such land.[110] Where the railroad company took possession of lands under proceedings which were subsequently declared void for want of proper notice, and immediately after the first judgment was set aside it proceeded to condemn the lands in a lawful manner, it was held that the railroad company was not liable to the land-owner in a suit for trespass for the damage done prior to the second judgment of condemnation, but that the assessment of damages covered all injuries to the defendant's possession.[111] It

[105] Lozier v. New York &c. R. Co. 42 Barb. (N. Y.) 465; Carpenter v. Oswego &c. R. Co. 24 N. Y. 655; Wager v. Troy Union R. Co. 25 N. Y. 526; Weyl v. Sonoma V. R. Co. 69 Cal. 202; 10 Pac. 510. But in Edwardsville R. Co. v. Sawyer, 92 Ill. 377, it was held that its occupation of a public street is a matter between the railroad company and the public authorities, and can not be questioned by the land-owner in ejectment. See, also, Montgomery v. Santa Ana &c. R. Co. 104 Cal. 186; 37 Pac. 786; 25 L. R. A. 654; 43 Am. St. 89.

[106] Pennsylvania R. Co. v. Eby, 107 Pa. St. 166; Baltimore &c. R. Co. v. Thompson, 10 Md. 76.

[107] Wilson v. European &c. R. Co. 61 Me. 358.

[108] Brigham v. Agricultural Branch R. Co. 1 Allen (Mass.), 316; Hazen v. Boston &c. R. Co. 2 Gray (Mass.), 574; Eaton v. European &c. R. Co. 59 Me. 520; 8 Am. R. 430. See New Orleans &c. R. Co. v. Brown, 64 Miss. 479; 1 So. 687.

[109] Trustees v. Auburn &c. R. Co. 3 Hill (N. Y.), 567; Mahon v. New York Central &c. R. Co. 24 N. Y. 658; Sherman v. Milwaukee &c. R. Co. 40 Wis. 645; Blesch v. Chicago &c. R. Co. 43 Wis. 183; Starr v. Camden &c. R. Co. 24 N. J. L. 592; Indianapolis &c. R. Co. v. Hartley, 67 Ill. 439.

[110] See, also, Grand Rapids &c. R. Co. v. Heisel, 47 Mich. 393; 11 N. W. 212; Chicago v. Jackson, 196 Ill. 496; 63 N. E. 1013, 1135, affirming 88 Ill. App. 130. But see reasoning of the court in Edwardsville R. Co. v. Sawyer, 92 Ill. 377.

[111] Dunlap v. Toledo &c. R. Co. 50 Mich. 470; 15 N. W. 555. Where the railroad company took possession under an erroneous order permitting it to occupy the land before making compensation as required by the constitution, it was held that the entry was justifiable and

is held that where the entry of the railroad company was clearly wrongful, the fact that the lands were subsequently condemned is no bar to an action for the trespass, even though damages for the trespass were erroneously included in the award of compensation.[112] It has also been held that the measure of damages in an action of trespass against a railroad company for unlawfully constructing its road upon land belonging to another is his damages already accrued, and punitive damages in case the circumstances warrant it.[113]

§ 1049a. Remedies of land-owner — Injunction.—Injunction is often an appropriate remedy for the protection of the land-owner against wrongful proceedings conducted under color of the power of eminent domain. It may be said at the outset that injunction does

did not subject the railroad company to an action for trespass. Walker v. Likens, 24 Mo. 298. Where the owner, at the time of the entry and construction of the railroad under authority of a void condemnation proceeding, sold the land to another in whose hands it was afterward condemned, the land-owner was held entitled to recover from such purchaser the compensation paid on such second condemnation, since the purchaser must be held to have taken the land subject to the damage already done at the time of his purchase. McFadden v. Johnson, 72 Pa. St. 335; 13 Am. R. 681.

[112] Pierce v. Worcester &c. R. Co. 105 Mass. 199; Harrington v. St. Paul &c. R. Co. 17 Minn. 215; Central R. Co. v. Hetfield, 29 N. J. L. 206. Damages arising from a former trespass are no part of the damages for which compensation must be made in proceedings to condemn land. Proetz v. St. Paul &c. R. Co. 17 Minn. 163; McClinton v. Pittsburgh &c. R. Co. 66 Pa. St. 404; Selma &c. R. Co. v. Keith, 53 Ga. 178; Missouri &c. R. Co. v. Ward, 10 Kan. 352; Blodgett v. Utica &c. R. Co. 64 Barb. (N. Y.) 580. And the fact that a recovery has been had for the trespass does not lessen the damages to which the land-owner is entitled in a suit to condemn the land. Leber v. Minneapolis &c. R. Co. 29 Minn. 256; Oregon R. Co. v. Barlow, 3 Ore. 311; Blodgett v. Utica R. Co. 64 Barb. (N. Y.) 580; Chicago &c. R. Co. v. Davis, 86 Ill. 20. The mere pendency of a suit to condemn lands is no defense to an action for a former trespass. Coburn v. Pacific Lumber Co. 46 Cal. 31.

[113] Anderson &c. R. Co. v. Kernodle, 54 Ind. 314. A railroad company which takes possession of land after the owner has obtained possession thereto pursuant to a judgment in action of trespass quare clausum fregit against the company, is liable in an action of trespass for the second entry. Illinois &c. R. Co. v. Cobb, 82 Ill. 183. It is held that the value of the land itself can only be recovered by proceedings under the statute.

not lie in cases where there is a right of appeal except where the proceedings are void. But where there is no adequate remedy at law and the proceedings are void for the reason that there was no jurisdiction, injunction is held by many of the courts to be an appropriate remedy. The rule sanctioned by authority is that even if the proceedings are void a complainant will not be granted an injunction unless he shows equity.[114] Where a railroad or other corporation threatens to take possession of lands and construct its road thereon without having perfected its right of entry in the manner provided by law, it may be restrained by injunction at the suit of the owner.[115]

[114] Jones v. Cullen, 142 Ind. 335; 40 N. E. 124; Stokes v. Knarr, 11 Wis. 389; Williams v. Hitzie, 83 Ind. 303; Woods v. Brown, 93 Ind. 164; 47 Am. R. 369; Lininger v. Glenn, 33 Neb. 187; 49 N. W. 1128; Wilson v. Shipman, 34 Neb. 573; 52 N. W. 576; 33 Am. St. 660; Hamer v. Sears, 81 Ga. 288; 6 S. E. 810; White v. Hinton, 3 Wyo. 753; 30 Pac. 953; 17 L. R. A. 66. Thus it has been held that the fact that a court in condemnation proceedings may make an erroneous ruling does not entitled the aggrieved party to an injunction, but the remedy is by appeal from the ruling if authorized by statute, or, if not, by appeal from the final judgment. Boyd v. Logansport R. &c. Co. 161 Ind. 587; 69 N. E. 398. In Roberts v. West Jersey &c. R. Co. (N. J.) 65 Atl. 460, it was held that an injunction should not be granted in a suit by an owner of property in a block through which an elevated railroad was about to be constructed, crossing and vacating a street on which complainant's property abutted, unless complainant, by the undisputed facts of the case, and according to the established law of the state, established his legal private right in that part of the street which would be vacated by the construction of the road. See, also, Knoth v. Manhattan R. Co. (N. Y.) 79 N. E. 1015.

[115] Jarden v. Philadelphia &c. R. Co. 3 Whart. (Pa.) 502; Mettler v. Easton &c. R. Co. 25 N. J. Eq. 214; Chicago &c. Bridge Co. v. Pacific &c. Co. 36 Kan. 113; 12 Pac. 535; Piedmont &c. R. Co. v. Speelman, 67 Md. 260; 10 Atl. 77, 293; Wagner v. Railway Co. 38 Ohio St. 32; Warner v. Railroad Co. 39 Ohio St. 70; Field v. Carnarvon &c. R. Co. L. R. 5 Eq. Cas. 190; Bolton v. McShane, 67 Iowa, 207; 25 N. W. 135; Lohman v. St. Paul &c. R. Co. 18 Minn. 174; Spurlock v. Doman, 182 Mo. 242; 81 S. W. 412; Wilson v. D. W. Alderman &c. Co. 69 S. Car. 176; 48 S. E. 81; Atlantic &c. R. Co. v. Seaboard Air Line R. Co. 116 Ga. 412; 42 S. E. 761; Frend v. Detroit &c. R. Co. 133 Mich. 413; 95 N. W. 559; 10 Det. Leg. N. 250; Schaaf v. Cleveland &c. R. Co. 66 Ohio St. 215; 64 N. E. 145; Riley v. Charleston Union Station Co. 67 S. Car. 84; 45 S. E. 149. Where the use of a street by a railway company is not an additional servitude, entitling abutters to compensation, it has been held that the latter can not maintain a bill to enjoin the operation of the railway on the ground that the company

This relief is frequently granted in states which require the payment of compensation to precede the taking of property, where the corporation neglects or refuses to pay or deposit the just compensation as required by law.[116] And it is generally a proper remedy in cases where the corporation seeks to obtain possession of private property under color of eminent domain proceedings which, for any reason, are void.[117] A property owner is entitled to protection in his prop-

has transcended its authorized powers, since it is amenable for an excessive exercise of power only to the state. Rafferty v. Central Traction Co. 147 Pa. St. 579; 23 Atl. 884; 30 Am. St. 763, and note. See, also, Cincinnati &c. R. Co. v. Morgan Co. 143 Fed. 798.

[116] Young v. Harrison, 6 Ga. 130; Chambers v. Cincinnati &c. R. Co. 69 Ga. 320; Stewart v. Raymond R. Co. 7 S. & M. (Miss.) 568; Cameron v. Board &c. 47 Miss. 264; Verona, Appeal of, 108 Pa. St. 83; Shepardson v. Milwaukee &c. R. Co. 6 Wis. 605; Bohlman v. Green Bay &c. R. Co. 30 Wis. 105; Bohlman v. Green Bay &c. R. Co. 40 Wis. 157; Ray v. Atchison &c. R. Co. 4 Neb. 439; Shute v. Chicago &c. R. Co. 26 Ill. 436; Cobb v. Illinois &c. R. Co. 68 Ill. 233; Western &c. R. Co. v. Owings, 15 Md. 199; 74 Am. Dec. 563; New Central Coal Co. v. George's Creek &c. Co. 37 Md. 537; Mason City &c. Co. v. Mason, 23 W. Va. 211; Ross v. Elizabethtown &c. R. Co. 2 N. J. Eq. 422; Redman v. Philadelphia &c. R. Co. 33 N. J. Eq. 165; Parker v. East Tennessee &c. R. Co. 13 Lea (Tenn.), 669; Kirkendall v. Hunt, 4 Kan. 514; Cox v. Louisville &c. R. Co. 48 Ind. 178; Northern Pac. R. Co. v. St. Paul &c. R. Co. 1 McCrary (U. S.), 302. An injunction will issue to prevent the continued occupation of land wrongfully taken. Cox v. Louisville &c. R. Co. 48 Ind. 178; Gay v. New Orleans Pacific R. Co. 32 La. Ann. 277. Where a railroad company having the right under the statute to acquire a right of way over the track of another railroad company by condemnation, is about to cross the track of such other company without having acquired the right in any way, it is error for the court to provide, in a suit to restrain such crossing, that the defendant company may cross the track of plaintiff upon condition that it put in a certain described system of switches. Atlantic &c. R. Co. v. Seaboard Air Line R. 116 Ga. 412; 42 S. E. 761.

[117] Lohman v. St. Paul &c. R. Co. 18 Minn. 174; Erwin v. Fulk, 94 Ind. 235; Frizell v. Rogers, 82 Ill. 109; Piedmont &c. R. Co. v. Speelman, 67 Md. 260; 10 Atl. 77, 293; McMillan v. Baker, 20 Kan. 50; Wren v. Walsh, 57 Wis. 98; 14 N. W. 902; Rhine v. McKinney, 53 Tex. 354. See, also, Southern R. Co. v. Birmingham &c. R. Co. 131 Ala. 663; 29 So. 191; St. Louis &c. R. Co. v. Southwestern Tel. &c. Co. 121 Fed. 276. Where the power of the corporation to condemn land has been exhausted, it will be enjoined from a subsequent entry upon other lands. Moorhead v. Little Miami R. Co. 17 Ohio, 340. In a proceeding by a land-owner to enjoin the

erty rights as against those who would devote to public use property not legally taken for that purpose, and should not be driven to an action at law to obtain redress.[118] Any property rights in lands,[119]

construction of a railroad over his premises a decree ordering him to institute proceedings to have his damages ascertained is improper, as such proceedings must be instituted by the railway corporation in the manner required by the statute providing for the exercise of eminent domain. Russell v. Chicago &c. R. Co. 98 Ill. App. 347.

[118] Western &c. R. Co. v. Owings, 15 Md. 199; 74 Am. Dec. 563; Browning v. Camden &c. R. Co. 4 N. J. Eq. 47; Cobb v. Illinois &c. R. Co. 68 Ill. 233; Pennsylvania R. Co.'s Appeal, 115 Pa. St. 514; 5 Atl. 872; Bolton v. McShane, 67 Iowa, 207; 25 N. W. 135. In many of the cases it is said that such an interference with his rights would work a great and irreparable injury to the property-owner, in that it is not a mere temporary and fugitive trespass, but is a permanent appropriation of the property. Erwin v. Fulk, 94 Ind. 235; Carpenter v. Grisham, 59 Mo. 247; Bonaparte v. Camden &c. R. Co. 1 Bald. C. C. 205; 2 Story Eq. § 928; 3 Pomeroy Eq. § 1357. But where, for any reason, it would be inequitable to enjoin a further occupation of the land, the owner will be left to his remedy at law. Chesapeake &c. R. Co. v. Patton, 5 W. Va. 234; Nicholas v. Sutton, 22 Ga. 369.

[119] Sidener v. Norristown &c. Turnp. Co. 23 Ind. 623; Mettler v. Easton &c. R. Co. 25 N. J. Eq. 214; Bohlman v. Green Bay &c. R. Co. 30 Wis. 105; Russell v. Chicago &c. R. Co. 205 Ill. 155; 68 N. E. 727. In those states in which it is held that an owner of abutting property is entitled to compensation for the construction of a railroad in the street in front of his property, it is also held that he may enjoin any interference with his right in the same manner that he could enjoin the occupation of his land. Cox v. Louisville &c. R. Co. 48 Ind. 178; Williams v. New York Central R. Co. 16 N. Y. 97; 69 Am. Dec. 651, and note; Washington Cemetery Co. v. Prospect Park &c. R. Co. 68 N. Y. 591; Henderson v. New York Central R. Co. 78 N. Y. 423; Columbus &c. R. Co. v. Witherow, 82 Ala. 190; 3 So. 23; Schurmeier v. St. Paul &c. R. Co. 10 Minn. 82; 88 Am. Dec. 59; Harrington v. St. Paul &c. R. Co. 17 Minn. 215; Ford v. Chicago &c. R. Co. 14 Wis. 609; 80 Am. Dec. 791; Zook v. Pennsylvania R. Co. 206 Pa. 603; 50 Atl. 82; Rock Island &c. R. Co. v. Johnson, 204 Ill. 488; 68 N. E. 549; Paige v. Schenectady R. Co. 77 App. Div. (N. Y.) 571; 79 N. Y. S. 266. So an abutting owner of the fee in a public street may enjoin a steam railroad company from constructing and operating its road in such street to the practical exclusion of the public, where no compensation for his interest has been made, though the railroad company is acting under a city ordinance. Pennsylvania Co. v. Bond, 99 Ill. App. 535. An injunction will issue at the instance of an abutting owner to protect his own land to the center line of the road from the burden of street railroad tracks, though his neighbors

bonds,[120] or water-courses,[121] or franchises,[122] may be protected by injunction from the invasion under color of the eminent domain power. But where the corporation has taken possession in good faith, under an agreement with the owner, its further occupation of the land will not be enjoined for a subsequent violation of the agree-

on the opposite side have consented to the use of their lands by such company. North Pennsylvania R. Co. v. Inland Traction Co. 205 Pa. 579; 55 Atl. 774. Where bill is brought to prevent a railroad company from laying a siding in a street in any other manner than in accordance with the established grade, the question of the power of the city to grant permission to construct such siding can not be considered. Zook v. Pennsylvania R. Co. 206 Pa. 603; 56 Atl. 82.

[120] Garwood v. New York &c. R. Co. 17 Hun (N. Y.), 356; Higgins v. Flemington Water Co. 36 N. J. Eq. 538; Lux v. Haggin, 69 Cal. 255; 10 Pac. 674.

[121] Waterman v. Buck, 58 Vt. 519; Baltimore v. Warren &c. Co. 59 Md. 96; Middleton v. Flat River Booming Co. 27 Mich. 533; Holyoke &c. Co. v. Connecticut River Co. 22 Blatchf. (U. S.) 131.

[122] Boston &c. R. Co. v. Salem &c. R. Co. 2 Gray (Mass.), 1; Enfield Toll Bridge Co. v. Hartford &c. R. Co. 17 Conn. 40; 42 Am. Dec. 716, and note; Gifford v. New Jersey R. Co. 10 N. J. Eq. 171; Denver &c. R. Co. v. Denver City R. Co. 2 Col. 673; Hudson &c. Co. v. New York &c. R. Co. 9 Paige (N. Y.), 323; St. Louis &c. R. Co. v. Northwestern &c. R. Co. 69 Mo. 65. See, also, Michigan Cent. R. Co. v. State (Mich.), 111 N. W. 735. One railroad will be enjoined from crossing another until the law authorizing such crossings has been complied with. Central Vermont R. Co. v. Woodstock R. Co. 50 Vt. 452; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150. But see Grafton v. Buckhannon &c. R. Co. 56 W. Va. 458; 49 S. E. 532. A failure on its part to make compensation is sufficient reason for enjoining a railroad from crossing another railroad. Grand Rapids &c. R. Co. v. Grand Rapids &c. R. Co. 35 Mich. 265; 24 Am. R. 545, and note; Chicago &c. R. Co. v. Chicago &c. R. Co. 15 Ill. App. 587; Chicago &c. R. Co. v. Englewood &c. R. Co. 17 Ill. App. 141. A railroad company over whose tracks a city is attempting to condemn a street may resort to equity by filing a petition alleging facts showing that an extension of a street will unnecessarily interfere with the reasonable use of the tracks and other property affected, and the court may restrain proceedings until the claim of the company has been judicially determined. Pittsburgh &c. Ry. Co. v. Greenville, 69 Ohio St. 487; 69 N. E. 976. But a railroad company can not enjoin the construction of a street railroad on a public road which crosses its tracks and on which lands owned by it abut, where none of the rights or franchises of the railroad company are injured or invaded. North Pennsylvania R. Co. v. Inland Traction Co. 205 Pa. 579; 55 Atl. 774.

ment unless the owner's legal remedies are shown to be inadequate.[123] The injunction will not be refused on the sole ground that the company had commenced the construction of its line and had made large expenditures in the undertaking.[124] Some of the cases hold that an injunction will not be granted where the plaintiff's title to the land is in dispute.[125] And it will not be granted where the same question has been or can be passed upon in the condemnation proceedings, or, in general, where there is an adequate remedy at law.[126] So it has been said: "When, if the court acts, an important public work, designed to free public travel from peril, and to give greater security to human life, will be arrested and seriously delayed, nothing short of the threatened destruction of property of great value, by acts of wanton lawlessness, inflicting injuries which, if not prevented, must re-

[123] Coe v. Columbus &c. R. Co. 10 Ohio St. 372, 411; Provolt v. Chicago &c. R. Co. 69 Mo. 633; Irish v. Burlington &c. R. Co. 44 Iowa, 380; Sturtevant v. Milwaukee &c. R. Co. 11 Wis. 63.

[124] Paige v. Schenectady R. Co. 77 App. Div. (N. Y.) 571; 79 N. Y. S. 266. But see Hinnershitz v. United Traction Co. 199 Pa. 3; 48 Atl. 874; where it is held that a refusal of a preliminary injunction against completion of an electric railway on a turnpike at suit of adjoining landowners is warranted, though the railway company has acquired by eminent domain the right only as against the turnpike company to build the road, a considerable part of it having been built without objection.

[125] Lanterman v. Blairstown R. Co. 28 N. J. Eq. 1; Chesapeake &c. R. Co. v. Young, 3 Md. 480. Where the railroad company entered in good faith by the consent of the supposed owner, its further occupation will not be enjoined at the suit of another who claims title to the land, but he must establish his title by suit for trespass or ejectment. Erie R. Co. v. Delaware &c. R. Co. 21 N. J. Eq. 283; Pickert v. Ridgefield Park R. Co. 25 N. J. Eq. 316; Steele v. Tanana Mines R. Co. 2 Alaska, 451.

[126] Cooper v. Anniston &c. R. Co. 85 Ala. 106; 4 So. 689; Illinois Cent. R. Co. v. Chicago, 138 Ill. 453; 28 N. E. 740; Smith v. Goodknight, 121 Ind. 312; 23 N. E. 148; Piedmont &c. R. Co. v. Spielman, 67 Md. 260; 10 Atl. 77, 293; St. Louis &c. R. Co. v. Southwestern &c. Co. 121 Fed. 276. See, also, for other cases in which it is held that injunction will not lie, Detroit &c. R. Co. v. Detroit, 91 Mich. 444; 52 N. W. 52; Chattanooga &c. R. Co. v. Jones, 80 Ga. 264; 9 S. E. 1081; Van De Vere v. Kansas City, 107 Mo. 83; 17 S. W. 695; 28 Am. St. 396; Chicago &c. R. Co. v. Chicago, 151 Ill. 348; 37 N. E. 842; Manson v. South Bound R. Co. 64 S. Car. 120; 41 S. E. 832; Boyd v. Logansport &c. Traction Co. 161 Ind. 587; 69 N. E. 398; Holly Shelter R. Co. v. Newton, 133 N. C. 132, 136; 45 S. E. 549; Grafton v. Buckhannon &c. R. Co. 56 W. Va. 458; 49 S. E. 532; Black Hills &c. R. Co. v. Tacoma Mills Co. 129 Fed. 312.

sult in irreparable damage, will justify the court in issuing a command that the work shall stop."[127] It has been held that a railroad company which enters upon the use and occupation of real property under a lease, with a view to its purchase when that can properly be effected, and constructs a portion of its line thereon, is entitled to an injunction restraining its lessors for a reasonable time from proceeding to dispossess the company from the land to enable it to condemn such land in proper proceedings.[128] Where land has been regularly condemned, an encroachment upon adjoining property not covered by the condemnation proceedings may be enjoined.[129]

§ 1049b. Remedies of land-owner—Limitation of action.—In the case of injury to property by the construction and operation of a railroad the statute of limitations runs from the date of the injury or cause which produced the injury.[130] The injury inflicted by a trespass on a land-owner's premises by a railroad company is generally regarded as permanent injury and accrues at the time of the commission of the trespass within the meaning of the statute.[131] In the

[127] Dodge v. Pennsylvania R. Co. 43 N. J. Eq. 351; 11 Atl. 751. See, also, Roberts v. West Jersey &c. R. Co. (N. J. Eq.) 65 Atl. 460; Brown v. Atlanta &c. Power Co. 113 Ga. 462; 39 S. E. 71.

[128] Winslow v. Baltimore &c. R. Co. 188 U. S. 646; 23 Sup. Ct. 443; 47 L. Ed. 635.

[129] Sidener v. Norristown &c. Turnp. Co. 23 Ind. 623; Deere v. Cole, 118 Ill. 165; 8 N. E. 303; State v. Armell, 8 Kan. 288; Shipley v. Western Maryland &c. R. Co. 99 Md. 115; 56 Atl. 968; Siegel v. New York &c. R. Co. 62 App. Div. (N. Y.) 290; 70 N. Y. S. 1088; Larney v. New York &c. R. Co. 62 App. Div. (N. Y.) 311; 71 N. Y. S. 27; Dolan v. New York &c. R. Co. 175 N. Y. 367; 67 N. E. 612. But this does not authorize a court to restrain the operation of the road inside the strip to which it is entitled. Larney v. New York &c. R. Co. 62 App. Div. (N. Y.) 311; 71 N. Y. S. 27; Pape v. New York &c. R. Co. 74 App. Div. (N. Y.) 175; 77 N. Y. S. 725. Or the land-owner may have his action for damages. Eaton v. European &c. R. Co. 59 Me. 520; 8 Am. R. 430; New Orleans &c. R. Co. v. Brown, 64 Miss. 479; 1 So. 637.

[130] Illinois Cent. R. Co. v. Ferrell, 108 Ill. App. 659; Tietze v. International &c. R. Co. 35 Tex. Civ. App. 136; 80 S. W. 124. In Grossman v. Houston &c. R. Co. (Tex.) 92 S. W. 836, it was held that the cause of action for damages did not arise until a change of use by hauling freight and the substitution of heavier engines and trains.

[131] Williams v. Southern Pac. R. Co. (Cal.) 89 Pac. 599, citing Frankle v. Jackson, 30 Fed. 398; Denver v. Bayer, 7 Colo. 113; 2 Pac. 6; Chicago &c. Co. v. Loeb, 118 Ill. 203; 8 N. E. 460; 59 Am. R. 341;

case of a railroad constructed on permanent arches in the street so as to shut out light and air of the abutting owners, and interfere with the free use of the premises, it was held that since the damages caused by such a structure were completed with its erection, and capable of ascertainment in an action at that time, the action was barred if not commenced within the time limited by the statute.[132] In a recent case the question arose as to whether a claim against a village for damages caused by change of grade at a crossing could be maintained under the law relating to changes of grades of streets after the time limited by the railroad law relating to change at crossings and it was held that the railroad law governed and proceedings could not be maintained after the expiration of the time limited by that law.[133]

§ 1049c. Remedies of land-owner—Parties to proceedings.—As a general rule the action for an unauthorized appropriation can be commenced only by the person who owned the property at the time of its appropriation or injury, unless the statutes give that right to others.[134] Under this rule it has been held that the mortgagor and

Doane v. Railroad Co. 165 Ill. 510; 46 N. E. 520; 36 L. R. A. 97; 56 Am. St. 265; Rosenthal v. Railroad Co. 79 Tex. 325; 15 S. W. 268; Highland Ave. &c. R. Co. v. Matthews, 99 Ala. 24; 10 So. 267; 14 L. R. A. 462; Jacksonville &c. R. Co. v. Lockwood, 33 Fla. 573; 15 So. 327; Chicago &c. R. Co. v. O'Neill, 58 Neb. 239; 78 N. W. 521; Strickler v. Midland R. Co. 125 Ind. 412; 25 N. E. 455; Stodgill v. Chicago &c. R. Co. 53 Ia. 341; 5 N. W. 495; Troy v. Cheshire R. Co. 23 N. H. 83; 55 Am. Dec. 177.

[132] De Geofroy v. Merchants Bridge Term. R. Co. 179 Mo. 698; 79 S. W. 386; 64 L. R. A. 959.

[133] Melenbacker v. Salamanca (N. Y.), 80 N. E. 1090.

[134] Illinois Cent. R. Co. v. Ferrell, 108 Ill. App. 659; Clapp v. Boston, 133 Mass. 367; Drury v. Midland R. Co. 127 Mass. 571; Illinois Cent. R. Co. v. Lockard, 112 Ill. App. 423; King v. Southern R. Co. 119 Fed. 1017; New Jersey Cent. R. Co. v. Hetfield, 29 N. J. L. 206; Cane Belt R. Co. v. Ridgeway (Tex. Civ. App.), 85 S. W. 496; Shepard v. Manhattan R. Co. 169 N. Y. 160; 62 N. E. 151; Pope v. Manhattan R. Co. 79 App. Div. (N. Y.) 583; 80 N. Y. S. 316; Child v. New York Elev. R. Co. 89 App. Div. (N. Y.) 598; 85 N. Y. S. 604; Texas Cent. R. Co. v. Merkel, 32 Tex. 723; Walton v. Green Bay R. Co. 70 Wis. 414; 36 N. W. 10. The action can be brought by the holder of a leasehold injured by the construction of an elevated railroad. Storms v. Manhattan R. Co. 77 App. Div. (N. Y.) 94; 79 N. Y. S. 60. But where at the time the lease is executed the railroad is in full operation, of which fact the lessee is aware, he can not recover on ac-

not the mortgagee must bring the action.[135] Similarly it is the holder of the legal title and not the cestui qui trust that must bring the action where a trust estate is involved.[136] Persons jointly interested in the same tract of land may maintain an action jointly,[137] but not persons owning separate and distinct parcels of land.[138] Coming now to parties defendant it is the railroad company appropriating the land for railroad purposes that is a necessary party defendant, though it has since leased its tracks to another company.[139] Other parties having a substantial interest in the premises but who have not been named in the complaint may be brought in as to defend or may be allowed voluntarily to become parties.[140] And it has been held that a new corporation buying a railroad at a foreclosure sale may be brought in as a defendant though the land was purchased by its predecessor.[141]

§ 1049d. Remedies of land-owner—Pleading.—The petition or complaint in such proceeding should aver plaintiff's ownership of the land taken or injured,[142] and should describe the lands with sufficient precision to permit their definite location by appraisers.[143]

count of the operation of the road. Child v. New York Elev. R. Co. 89 App. Div. (N. Y.) 598; 85 N. Y. S. 604. The fact that the devisee has a right to maintain an action to enjoin the operation of an elevated railroad in front of his premises does not entitle him to recover damages that accrue during the life of his testator. Hirsch v. Manhattan R. Co. 84 App. Div. (N. Y.) 374; 82 N. Y. S. 754; 13 N. Y. Ann. Cas. 158.

[135] Farnsworth v. Boston, 126 Mass. 1; Vaugh v. Wetherel, 116 Mass. 138. But see ante, § 1025.

[136] Reed v. Hanover Branch R. Co. 105 Mass. 303; Davis v. Charles River Branch R. Co. 11 Cush. (Mass.) 506; Anderson v. Rochester &c. R. Co. 9 How. Pr. (N. Y.) 553.

[137] Moore v. Shaw, 47 Me. 88; Reed v. Hanover Branch R. Co. 105 Mass. 303; Getz v. Philadelphia &c. R. Co. 105 Pa. St. 547; Brown v. Arkansas Cent. R. Co., 72 Ark. 456; 81 S. W. 613 (widow and heirs of deceased person held under bond for deed).

[138] Guerkink v. Petaluma, 112 Cal. 306; 44 Pac. 570; Chambers v. Lewis, 9 Iowa, 583; Norfolk &c. R. Co. v. Smoot, 81 Va. 495; Younkin v. Milwaukee Light &c. Co. 112 Wis. 15; 87 N. W. 861.

[139] Atchison &c. R. Co. v. Anderson, 65 Kan. 202; 69 Pac. 158.

[140] Davidson v. Boston &c. R. Co. 3 Cush. (Mass.) 91; Hill v. Glendon &c. Mining Co. 113 N. C. 259; 18 S. E. 171; Abbott v. Upham, 13 Metc. (Mass.) 172.

[141] Drury v. Midland R. Co. 127 Mass. 571.

[142] Pittsburgh &c. R. Co. v. Harper, 11 Ind. App. 481; 37 N. E. 41.

[143] Indianapolis &c. R. Co. v. Newsom, 54 Ind. 121; Pittsburg &c.

It should set forth all facts showing the plaintiff's right to a recovery.[144] Special damages relied upon should be averred.[145] If the plaintiff desires to restrict the width of the right of way it has been held that he should allege that the full width appropriated is not necessary for the operation of the road.[146] Where there is no suggestion in the pleadings of either party as to the width of the right of way required or necessitated, it has been held that the courts will assume that it was intended to vest in the railroad company a right of way of the width fixed by the charter of the company.[147] It is not required, according to some decisions at least, that the plaintiff should negative the institution of condemnation proceedings.[148] Neither is it necessary that the pleading should allege a demand for damages and its refusal.[149] The rule as to amendment of pleadings is generally the same here as elsewhere. In a suit by the owner of property abutting on a street for an injunction restraining the erection of a railroad viaduct in the street, it appearing that the owner was entitled to damages if the allegations of the petition were true, it was held not error on the dissolution of the injunction to permit plaintiff to amend her petition so as to pray for the recovery of damages.[150] In an action of trespass against a railroad company it has been held that the answer may be either in the form of a denial,[151] or a justification.[152] Special defences under a statute or the charter of the railroad company must be specially pleaded.[153] And it has been held that defendant in ejectment can not show equitable title where none was pleaded in the answer.[154]

R. Co. v. Harper, 11 Ind. App. 481; 37 N. E. 41; Central R. Co. v. Merkel, 32 Tex. 723 (should be described by metes and bounds).

[144] Neal v. Posey County, 12 Ind. App. 533; 40 N. E. 708.

[145] Wampach v. St. Paul &c. R. Co. 21 Minn. 364; Bridgers v. Purcell, 23 N. C. 232.

[146] Beal v. Durham &c. R. Co. 136 N. C. 298; 48 S. E. 674.

[147] Beal v. Durham &c. R. Co. 136 N. C. 298; 48 S. E. 674.

[148] Hennessey v. St. Paul &c. R. Co. 30 Minn. 55; 14 N. W. 269; Gray v. St. Paul &c. R. Co. 13 Minn. 315.

[149] Chicago &c. R. Co. v. Patterson 26 Ind. App. 295; 59 N. E. 688.

[150] Camden &c. R. Co. v. Smiley, 27 Ky. L. 134; 84 S. W. 523.

[151] Pumpelly v. Green Bay &c. Canal Co. 13 Wall. (U. S.) 166; 20 L. Ed. 557.

[152] Crawfordsville &c. R. Co. v. Wright, 5 Ind. 252.

[153] Crawfordsville &c. R. Co. v. Wright, 5 Ind. 252; McKeoin v. Northern Pac. R. Co. 45 Fed. 464.

[154] Pfaender v. Chicago &c. R. Co. 86 Minn. 218; 90 N. W. 393.

§ 1049e. Remedies of land-owner—Evidence.—The law, it has been held, indulges a presumption that condemnation proceedings, under which defendant claims, were regular.[155] The property-owner has the burden of proof of all facts necessary to the relief he seeks.[156] Thus, he has the burden of proving that switches and turnouts laid in a street by a railroad company are not necessary where the law allows the railroad company to lay such tracks.[157] The defendant on his part has been held to have the burden of proving all matters of defence specially pleaded by him.[158] The rules governing the admissibility of evidence generally in actions of this character are in general the same as in other civil actions and are not essentially different from the rules of evidence in condemnation proceedings, a subject which has already received attention.[159] In addition it may be said that plaintiff's title to the land claimed to be injured may be established by proof of adverse possession;[160] that it may be shown that damages claimed by defendant to have been paid were paid to one acting as an authorized agent of the plaintiff;[161] that the diminution in the value of the premises invaded may be shown by the loss of rent therefrom.[162] The defendant in injunction proceedings to enjoin the operation of an elevated railroad has been held entitled to show benefits resulting to plaintiff from the operation of the road, since the plaintiff is entitled to an injunction only in the case of a substantial injury suffered by him.[163] In an action for damages from the operation of an elevated railroad in front of a building it was held not error to exclude evidence to show that, if the building on the opposite side of the street from plaintiff's

[155] Galena &c. R. Co. v. Pound, 22 Ill. 399.

[156] Schechter v. Denver &c. R. Co. 8 Colo. App. 25; 44 Pac. 761 (title to premises); Jackson v. Dines, 13 Colo. 90; 21 Pac. 918 (location of road); Cook v. Chicago &c. R. Co. 83 Ia. 278; 49 N. W. 92 (actual damages); New Albany v. Endres, 143 Ind. 192; 42 N. E. 683 (nonpayment of damages).

[157] Carson v. Central R. Co. 35 Cal. 325.

[158] Pochila v. Calvert &c. R. Co. 31 Tex. Civ. App. 398; 72 S. W. 255 (special benefits from construction of road); Hazen v. Boston &c. R. Co. 2 Gray (Mass.), 574 (trespass justified by authorized location on land).

[159] Ante, §§ 1035-1038.

[160] Lawrence R. Co. v. Cobb, 35 Ohio St. 9.

[161] Ragan v. Kansas City &c. R. Co. 111 Mo. 456; 20 S. W. 234.

[162] Autenreith v. St. Louis &c. R. Co. 36 Mo. App. 254.

[163] Nette v. New York El. R. Co. 2 Misc. (N. Y.) 62; 20 N. Y. S. 844.

building, was raised as high as the law and ordinances of the city allowed, the elevated structure would not intercept the direct rays of the sun toward the building occupied by plaintiff.[164]

§ 1049f. Remedies of land-owner—Damages.—The measure of damages where the appropriation is not made under condemnation proceedings is generally the same as that which prevails in condemnation cases,[165] a subject receiving extended consideration in the preceding chapter.[166] Here it may be said generally that a land-owner whose premises are entered by a railroad company without his consent and without condemnation proceedings is entitled to the value of the land when taken and the injury or diminution in value caused to the remainder.[167] Where a railroad is built in a street or highway fronting a land-owner's premises under like conditions as to consent and condemnation, the measure of damages is the decrease of value of the premises caused by the construction, that is, the difference between the value of the property with the railroad track there and the value without it, not taking into account the benefit and injury received and sustained by the community in general.[168] The compensation is intended as a reasonable compensation for the uses for which the owner could have put the land,[169] without reference to the profits made by the operation of the road.[170] On this inquiry it has been held improper to ask the plaintiff whether

[164] Fifth Nat. Bank v. New York El. R. Co. 28 Fed. 231.

[165] Davenport &c. R. Co. v. Sinnet, 111 Ill. App. 75. But where a railroad company wilfully and maliciously lays its track on an adjoining highway against the warning and protest of the land-owner in such a way as to injure his property it has been held that the company was not in a position to demand that the damages for this invasion should be assessed on the same basis as if it were done in the lawful exercise of the right of eminent domain. Becker v. Lebanon &c. R. Co. 25 Pa. Sup. Ct. 367.

[166] Ante, chap. 39.

[167] Southern &c. R. Co. v. Cowan, 129 Ala. 577; 29 So. 985.

[168] Boyer & Lucas v. St. Louis &c. R. Co. (Tex. Civ. App.) 76 S. W. 441; Illinois Cent. R. Co. v. Farrell, 108 Ill. App. 659; Klosterman v. Chesapeake &c. R. Co. 114 Ky. 426; 71 S. W. 6; 24 Ky. L. 1233; Missouri &c. R. Co. v. Calkins (Tex. Civ. App.), 79 S. W. 852.

[169] Eastern Texas R. Co. v. Scurlock (Tex. Civ. App.), 75 S. W. 366 (injury to property as homesteads); Illinois Cent. R. Co. v. Hoskins, 80 Miss. 730; 32 So. 150; 92 Am. St. 612.

[170] Illinois Cent. R. Co. v. Hoskins, 80 Miss. 730; 32 So. 150; 92 Am. St. 612.

he would ask a certain amount for the land, since the price that he would have accepted might depend on various contingencies, such as how badly he needed the money, whether the price was asked was before or after the injury sued for, or whether it included the damages for such injury.[171] These damages have been held recoverable without reference to whether the road was negligently constructed or operated.[172] Exemplary damages are not recoverable where the entry was made by the railroad company in the belief that its possession of the land was rightful under condemnation proceedings.[173] In a case where a railroad company appropriated a portion of the highway and constructed a new road near to and parallel with the old one for the distance that the latter had been appropriated it was held that the measure of damages recoverable by the county for such an appropriation was the amount required to put the new road in as good condition as the old one was in when appropriated.[174]

§ 1049g. Remedies of land-owner—Taking or injury in excess of that condemned.—Where land is seized in excess of that condemned the land-owner generally has his remedy against the railroad company by injunction, ejectment or an action for damages.[175] Where the action is brought for a permanent injury to the freehold the owner has the burden of proving freehold title in himself.[176] In one case a railroad company was held liable for permanent injury to real property resulting from its causing dirt to be thrown over an embankment constructed by it along its track on a highway to protect a passway—the dirt marring the beauty of plaintiff's property, and destroying her use of the passway—though at the time the damage occurred the railroad had acquired a prescriptive right to the use of the highway; but it did not appear, however, that this right extended farther than the embankment.[177]

[171] Rice v. Norfolk &c. R. Co. 130 N. C. 375; 41 S. E. 1031.

[172] Chicago &c. R. Co. v. Payne, 192 Ill. 239; 61 N. E. 467. See, also, Houston &c. R. Co. v. Davis (Tex. Civ. App.), 100 S. W. 1013.

[173] Illinois Cent. R. Co. v. Hoskins, 80 Miss. 730; 32 So. 150; 92 Am. St. 612.

[174] St. Louis &c. R. Co. v. Grayson Co. 31 Tex. Civ. App. 611; 73 S. W. 64.

[175] McKennon v. St. Louis &c. R. Co. 69 Ark. 104; 61 S. W. 383; Ketcham v. New York &c. R. Co. 177 N. Y. 247; 69 N. E. 533; Bass v. Ft. Wayne, 121 Ind. 389; 23 N. E. 259; Jacksonville &c. R. Co. v. Kidder, 21 Ill. 131.

[176] Waltemeyer v. Wisconsin &c. R. Co. 71 Ia. 626; 33 N. W. 140.

[177] Tietze v. International &c. R. Co. 35 Tex. Civ. App. 136; 80 S. W. 124. See, also, Houston &c. R.

§ 1049h. Remedies of land-owner—Right of company to conveyance.—It has been held that an elevated railroad company on the recovery of damages against it by a lessee of abutting property is entitled, on payment of these damages, to a release from the lessee and a conveyance of the easement, not merely during the existing term, but during future renewals stipulated for in the lease.[178]

§ 1050. Possession pending appeal.—In some states having constitutions silent as to the time of making compensation, statutes providing that the railroad company shall have possession of the land without other security than that afforded by a definite mode of ascertaining and obtaining judgment for its value have been upheld,[179] but, as elsewhere said, we believe this doctrine to be unsound. Where, however, damages are assessed and tendered or paid into court, then we think it clearly competent for the legislature to provide that the company may enter into possession although there is an appeal. It is held that the right of the railroad company to take possession pending an appeal depends wholly upon the authority of the statute, and a tender of the damages awarded confers no rights upon the company not granted by express provision of law.[180] The fact that it has not been finally determined what amount of compensa-

Co. v. Davis (Tex. Civ. App.), 100 S. W. 1013.

[178] Storms v. Manhattan R. Co. 77 App. Div. (N. Y.) 94; 79 N. Y. S. 60.

[179] Raleigh &c. R. Co. v. Davis, 2 Dev. & B. L. (N. Car.) 451; McIntire v. Western N. C. R. Co. 67 N. Car. 278; Nichols v. Somerset &c. R. Co. 43 Me. 356; Tuckahoe Canal Co. v. Tuckahoe &c. R. Co. 11 Leigh. (Va.) 42; 36 Am. Dec. 374; Hazen v. Essex Co. 12 Cush. (Mass.) 475. See Mount Washington Road Co. Petition of, 35 N. H. 134. Similar statutes have been upheld in other states in which the constitutions have since been changed. New Albany &c. R. Co. v. Connelly, 7 Ind. 32; Prather v. Jeffersonville &c. R. Co. 52 Ind. 16; Bates v. Cooper, 5 Ohio 115; Compton v. Susquehanna R. Co. 3 Bland Ch. (Md.) 386; Harness v. Chesapeake &c. Canal Co. 1 Md. Ch. 248.

[180] Browning v. Camden &c. R. Co. 4 N. J. Eq. 47; Colvill v. Langdon, 22 Minn. 565. See, also, Chambers v. Cincinnati &c. R. Co. 69 Ga. 320; Lake Erie &c. R. Co. v. Kinsey, 87 Ind. 514; Jersey City &c. R. Co. v. Central R. Co. 48 N. J. Eq. 379; 22 Atl. 728; Texas &c. R. Co. v. Orange &c. R. Co. 29 Tex. Civ. App. 38; 68 S. W. 801; Cleveland &c. R. Co. v. Nowlin, 163 Ind. 497; 72 N. E. 257; Hamilton v. Maysville &c. R. Co. 27 Ky. L. 251; 84 S. W. 778; Hausmann v. Trinity &c. R. Co. (Tex. Civ. App.) 82 S. W. 1052; Gulf &c. R. Co. v. Southwestern &c. Tel. Co. 25 Tex. Civ. App. 488; 61 S. W. 406.

tion shall be made for the property taken does not invalidate a law permitting the railroad company to take possession pending appeal upon paying the amount of the commissioner's award or depositing the same in court for the benefit of the land-owner, even in states which require payment of the compensation to precede the taking.[181] The general rule is that the railroad company may, notwithstanding such appeal, enter upon the land and proceed to construct its road upon paying or tendering the damages assessed below.[182] But if

[181] Cooper v. Chester R. Co. 19 N. J. Eq. 199; Mercer &c. R. Co. v. Delaware &c. R. Co. 26 N. J. Eq. 464; Central Branch R. Co. v. Atchison &c. R. Co. 28 Kan. 453; Railroad Co. v. Foreman, 24 W. Va. 662; St. Louis &c. R. Co. v. Evans &c. Co. 85 Mo. 307; Hastings v. Burlington &c. R. Co. 38 Iowa, 316; Downing v. Des Moines &c. R. Co. 63 Iowa, 177; 18 N. W. 862; Arnold v. Covington &c. Bridge Co. 1 Duvall (Ky.), 372; Schuler v. Northern Liberties &c. R. Co. 3 Whar. (Pa.) 555; Baltimore &c. R. Co. v. Johnson, 84 Ind. 420; Lake Erie &c. R. Co. v. Kinsey, 87 Ind. 514; New York Central &c. R. Co. Matter of, 60 N. Y. 116; New York &c. R. Co. Matter of, 98 N. Y. 12. See, also, Savannah &c. R. Co. v. Postal Tel. &c. Co. 115 Ga. 554; 42 S. E. 1; Oliver v. Union Point R. Co. 83 Ga. 257; 9 S. E. 1086; Consumers' Gas &c. Co. v. Harless, 131 Ind. 446; 29 N. E. 1062; 15 L. R. A. 505; Wabash R. Co. v. Ft. Wayne &c. Co. 161 Ind. 295; 67 N. E. 674; Terre Haute &c. R. Co. v. Flora, 29 Ind. App. 442; 64 N. E. 648. In order to be effectual in giving the railroad company the right to take possession, the deposit must be unconditional, and subject to the absolute control of the land-owner. Kanne v. Minneapolis &c. R. Co. 30 Minn. 423; Arnold v. Covington &c. Bridge Co. 1 Duvall (Ky.), 372. Where the railroad company has appealed from the award, but has deposited the damages awarded and taken possession, the land-owner is entitled to such damages upon proper demand made upon the clerk of the court. Meyer v. State, 125 Ind. 335; 25 N. E. 351. A law which permits the railroad company to take possession upon paying into court the amount of the award but provides that the money shall not be paid to the land-owner until the result of the appeal is known, is opposed to a constitutional provision that the payment of compensation must precede the taking. Meily v. Zurmehly, 23 Ohio St. 627. A land-owner who accepts the amount of the award is himself estopped to prosecute an appeal. Baltimore &c. R. Co. v. Johnson, 84 Ind. 420; Mississippi &c. R. Co. v. Byington, 14 Iowa, 572; Whittlesey v. Hartford &c. R. Co. 23 Conn. 421; Burns v. Milwaukee &c. R. Co. 9 Wis. 450; Kile v. Yellowhead, 80 Ill. 208; Felch v. Gilman, 22 Vt. 38.

[182] Stimson Am. Stat. (1892) § 8750. In most of the states in which payment of the compensation is required to precede the taking, a tender of payment or its equivalent is held to be necessary before possession can be taken.

the damages are increased on appeal, the railroad company must pay the additional sum awarded, or it will be held liable as a trespasser ab initio, and may be dispossessed by an action of ejectment.

§ 1051. Tender.—The manner in which tender of payment is required to be made to the land-owner in condemnation proceedings

Graham v. Columbus &c. R. Co. 72 Ind. 260; Cox v. Louisville &c. R. Co. 48 Ind. 178; Thompson v. Grand Gulf R. Co. 3 How. (Miss.) 240; 34 Am. Dec. 81; Stewart v. Raymond R. Co. 7 S. & M. (Miss.) 568; Memphis &c. R. Co. v. Payne, 37 Miss. 700; Evansville &c. R. Co. v. Grady, 6 Bush. (Ky.) 144; O'Hara v. Lexington &c. R. Co. 1 Dana (Ky.), 232; Shepardson v. Milwaukee &c. R. Co. 6 Wis. 605; Loop v. Chamberlain, 20 Wis. 135; Kennedy v. Milwaukee &c. R. Co. 22 Wis. 581; Bohlman v. Green Bay &c. R. Co. 30 Wis. 105; Ray v. Atchison R. Co. 4 Neb. 439; Gear v. Dubuque &c. R. Co. 20 Iowa, 523; 89 Am. Dec. 550; Richards v. Des Moines &c. R. Co. 18 Iowa, 259; Walther v. Warner, 25 Mo. 277; Levering v. Philadelphia &c. R. Co. 8 Watts & S. (Pa.) 459; McClinton v. Pittsburgh &c. R. Co. 66 Pa. St. 404; Cushman v. Smith, 34 Me. 247; New Orleans &c. R. Co. v. Lagarde, 10 La. Ann. 150; Ferris v. Bramble, 5 Ohio St. 109; Blodgett v. Utica &c. R. Co. 64 Barb. (N. Y.) 580; San Mateo W. W. v. Sharpstein, 50 Cal. 284; Sanborn v. Belden, 51 Cal. 266; Vilhac v. Stockton &c. R. Co. 53 Cal. 208. A law providing that the court, before which the proceedings to condemn land for a railroad right of way are pending, may make an order allowing the company to continue in possession, if possession has been taken, and if not, to take and keep possession of the land sought to be condemned until the proceedings are ended, upon paying into court a sufficient sum, or executing a bond to secure the payment of whatever compensation shall be legally assessed, is opposed to a constitutional provision that the payment of damages shall precede the taking of property. Davis v. San Lorenzo R. Co. 47 Cal. 517; Redman v. Philadelphia &c. R. Co. 33 N. J. Eq. 165; Morris &c. R. Co. v. Hudson Tunnel R. Co. 25 N. J. Eq. 384; Browning v. Camden &c. R. Co. 4 N. J. Eq. 47; St. Joseph &c. R. Co. v. Callender, 13 Kan. 496; Blackshire v. Atchison &c. R. Co. 13 Kan. 514; Harness v. Chesapeake &c. Canal Co. 1 Md. Ch. 248; Walther v. Warner, 25 Mo. 277; Evans v. Missouri &c. R. Co. 64 Mo. 453; Richards v. Des Moines Valley R. Co. 18 Iowa, 259; Hibbs v. Chicago &c. R. Co. 39 Iowa, 340; Conger v. Burlington &c. R. Co. 41 Iowa, 419; White v. Wabash &c. R. Co. 64 Iowa, 281; 20 N. W. 436; Levering v. Philadelphia &. R. Co. 8 Watts & S. (Pa.) 459; McClinton v. Pittsburgh &c. R. Co. 66 Pa. St. 404; Nichols v. Somerset &c. R. Co. 43 Me. 356; Enfield &c. Co. v. Hartford &c. R. Co. 17 Conn. 40; 42 Am. Dec. 716, and note; Loop v. Chamberlain, 20 Wis. 135; Fox v. Western Pacific R. Co. 31 Cal. 538; Lake Erie &c. R. Co. v. Kinsey, 87 Ind. 514; Dater v. Troy &c. R. Co, 2 Hill (N. Y.), 629; Blodgett v. Utica &c. R. Co. 64 Barb. (N. Y.) 580.

is usually governed by statute, and not by common law rules.[183] Where the statute requires a tender before entering upon the land, a tender is, of course, essential, but if the damages have been ascertained by a judicial proceeding and a tender is made and refused, the company may lawfully enter into possession. A valid tender, made after the compensation has been fixed by a competent tribunal, is effective although the land-owner may refuse to accept it and appeal from the award or judgment.[184] In order to entitle the company to possession it must tender the entire amount assessed, and it is not sufficient to tender the sum the company claims to be the proper one.[185] It is held that the tender of the amount awarded must be made before the owner appeals,[186] but we think that a tender promptly made should be regarded as sufficient although the owner does appeal, unless the statute requires the tender to be made before an appeal is taken. In some jurisdictions the rule is that a tender of the amount awarded does not preclude the company from litigating the question of the amount on appeal.[187] The tender must be made in money,[188]

[183] Stolze v. Milwaukee &c. R. Co. 113 Wis. 44; 88 N. W. 919; 90 Am. St. 833.

[184] Johnson v. Baltimore &c. R. Co. 45 N. J. Eq. 454; 17 Atl. 574; 39 Am. & Eng. R. Cas. 101; Pomona &c. R. Co. v. Camden &c. Co. (N. J.) 20 Atl. 350; 44 Am. & Eng. R. Cas. 179; Oliver v. Union &c. R. Co. 83 Ga. 257; 9 S. E. 1086. See, also, Wabash R. Co. v. Ft. Wayne &c. Co. 161 Ind. 295; 67 N. E. 674; Asher v. Louisville &c. R. Co. 87 Ky. 391; 8 S. W. 854.

[185] Mettler v. Easton &c. R. Co. 25 N. J. Eq. 214.

[186] Johnson v. Baltimore &c. R. Co. 45 N. J. Eq. 454; 17 Atl. 574; 39 Am. & Eng. R. Cas. 101.

[187] Indianapolis &c. Co. v. Brower, 12 Ind. 374. See Baltimore &c. R. Co. v. Johnson, 84 Ind. 420; 10 Am. & Eng. R. Cas. 408.

[188] Where a tender is relied upon, it must be a tender of money in order to be valid. Isom v. Mississippi R. Co. 36 Miss. 300; Brown v. Beatty, 34 Miss. 227; 69 Am. Dec. 389; Hayes v. Ottawa &c. R. Co. 54 Ill. 373; Railroad Co. v. Halstead, 7 W. Va. 301; Oregon Central R. Co. v. Wait, 3 Ore. 91; Henderson &c. R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173; 66 Am. Dec. 148; Elizabethtown R. Co. v. Helm, 8 Bush (Ky.), 681; Jones v. Wills Valley R. Co. 30 Ga. 43; Buffalo Bayou &c. R. Co. v. Ferris, 26 Tex. 588; Alabama R. Co. v. Burkett, 42 Ala. 83; Woodfolk v. Nashville &c. R. Co. 2 Swan (Tenn.) 422; New Orleans &c. R. Co. v. Lagarde, 10 La. Ann. 150. A land-owner's right to insist on having his damages first assessed and paid is waived by acquiescence on his part in the construction and operation of the road across his land; and he can not thereafter maintain ejectment to recover the land, but is limited to his action for the value of the land. McAulay v. Western &c.

and must be made in the mode prescribed by the statute. Where payment into court is required or a deposit is provided for the tender will be ineffective unless such requirements are complied with by the company.[189] The authorities declare that a statute which authorizes the condemning party to take possession pending the appeal upon depositing the sum awarded in court and that the sum shall not be paid to the land-owner until the appeal is determined is unconstitutional.[190]

§ 1052. Acceptance of damages—Estoppel.—The land-owner may be estopped from questioning the proceedings in condemnation cases by such acts or conduct as makes it inequitable for him to deny the validity of such proceedings. The rule that parties will not be permitted to occupy inconsistent positions applies to such cases. The acceptance, by the land-owner, of the damages awarded generally estops him to question the award by appeal.[191] A right to payment

R. Co. 33 Vt. 311; 78 Am. Dec. 627; Provolt v. Chicago R. Co. 57 Mo. 256; Strickler v. Midland R. Co. 125 Ind. 412; 25 N. E. 455; Smart v. Portsmouth R. Co. 20 N. H. 233.

[189] Reynolds, Ex parte, 52 Ark. 330; 12 S. W. 570; St. Joseph &c. R. Co. v. Callender, 13 Kan. 496; Gulf &c. R. Co. v. Donahoo, 59 Tex. 128; Powers v. Bears, 12 Wis. 214; Shepardson v. Milwaukee &c. R. Co. 6 Wis. 605; Leavenworth &c. R. Co. v. Whitaker, 42 Kan. 634; 22 Pac. 733; Chicago &c. R. Co. v. Watkins, 43 Kan. 50; 22 Pac. 985; 40 Am. & Eng. R. Cas. 499; Republican Valley &c. R. Co. v. Fink, 18 Neb. 82; 24 N. W. 439. See, generally, Ackerman v. Huff, 71 Tex. 317; 9 S. W. 236; 36 Am. & Eng. R. Cas. 589. A deposit on condition is not sufficient. Kanne v. Minneapolis &c. R. Co. 30 Minn. 423; 15 N. W. 871. The deposit is held to be at the risk of the company. Blackshire v. Atchison &c. R. Co. 13 Kan. 514; Toledo &c. R. Co. v. Dunlap, 47 Mich. 456; 11 N. W. 271.

[190] Consumers' Gas &c. Co. v. Harless, 131 Ind. 446; 29 N. E. 1062; 15 L. R. A. 505; Meily v. Zurmehly, 23 Ohio St. 627; State v. Lubke, 15 Mo. App. 152; St. Louis &c. R. Co. v. Evans &c. B. Co. 85 Mo. 307; New York &c. R. Co. Matter of, 98 N. Y. 12.

[191] Mississippi &c. R. Co. v. Byington, 14 Iowa, 572; Baltimore &c. R. Co. v. Johnson, 84 Ind. 420; Rentz v. Detroit, 48 Mich. 544; 12 N. W. 694, 911; Challiss v. Atchison &c. R. Co. 16 Kan. 117; Burns v. Milwaukee &c. R. Co. 9 Wis. 450; Moore v. Roberts, 64 Wis. 538; 25 N. W. 564; Kile v. Yellowhead, 80 Ill. 208; St. Louis &c. R. Co. v. Karnes, 101 Ill. 402; Hunter v. Jones, 13 Minn. 307; Whittlesey v. Hartford &c. R. Co. 23 Conn. 421; Hitchcock v. Danbury &c. R. Co. 25 Conn. 516; Marling v. Burlington &c. R. Co. 67 Iowa, 331; 25 N. W. 268; Hatch v. Hawkes, 126 Mass. 177; Brooklyn Park Co. v.

or tender of damages may be waived by conduct as well as by express contract.[192] Where credit is given the condemning party the land-owner will be estopped.[193] It is to be noted that there is a clear distinction between cases of conduct estopping a land-owner from claiming the land itself and cases of conduct estopping him from claiming compensation, for it by no means follows that one who does acts estopping him from claiming the land thereby estops himself from claiming compensation.[194]

§ 1053. Appeal.—The right of appeal where the proceedings are conducted in a judicial tribunal is a statutory right.[195] The legisla-

Amstrong, 45 N. Y. 234; 6 Am. R. 70; Chatterton v. Parrott, 46 Mich. 432; 9 N. W. 482; Logan v. Vernon &c. R. Co. 90 Ind. 552; Drouin v. Boston &c. R. Co. 74 Vt. 343; 52 Atl. 957; Parks v. Dallas Terminal R. Co. 34 Tex Civ. App. 341; 78 S. W. 533. See, also, Starrett v. Young, 14 Wyo. 146; 82 Pac. 946; Felch v. Gilman, 22 Vt. 38. But see Low v. Concord R. Co. 63 N. H. 557; 3 Atl. 739; Weyer v. Milwaukee &c. R. Co. 57 Wis. 329; 15 N. W. 481. And taking possession of the premises and paying the award has been held to estop the party condemning from denying the validity of the condemnation proceedings in a suit to recover the amount of the award. Corwith v. Hyde Park, 14 Ill. App. 635; State v. Lubke, 15 Mo. App. 152. See, also, Missouri Pac. R. Co. v. Gruendel, 3 Kans. App. 53; 44 Pac. 439. see Rothan v. Railroad, 113 Mo. 132; 20 S. W. 892; St. Louis &c. Ry. Co. v. Clark, 119 Mo. 357; 24 S. W. 157. Under some statutes the company may pay the award into court, take possession and still appeal. Douglas v. Indianapolis &c. Co. (Ind. App.) 76 N. E. 892; St. Louis &c. R. Co. v. Aubuchon (Mo.), 97 S. W. 867.

[192] Snyder v. Chicago &c. R. Co. 112 Mo. 527; 20 S. W. 885; Manchester &c. R. Co. v. Keene, 62 N. H. 81.

[193] New Orleans &c. Co. v. Jones, 68 Ala. 48; 2 Am. & Eng. R. Cas. 425. See Payne v. Morgan's &c. R. Co. 43 La. Ann. 981; 10 So. 10; Rio Grande &c. R. Co. v. Ortiz, 75 Tex. 602; 12 S. W. 1129; Northern Pac. R. Co. v. Burlington &c. Co. 4 Fed. 298.

[194] Webster v. Kansas City &c. R. Co. 116 Mo. 114; 22 S. W. 474. Estoppel by pleadings. Oregon &c. R. Co. v. Baily, 3 Ore. 164; Pennsylvania &c. R. Co. v. Bunnell, 81 Pa. St. 414.

[195] Reeves v. Grottendick, 131 Ind. 107; 30 N. E. 889; Kundinger v. Saginaw, 59 Mich. 355; 26 N. W. 634; Minneapolis v. Wilkin, 30 Minn. 140; 14 N. W. 581; La Croix v. County Commissioners, 50 Conn. 321; 47 Am. R. 648; Cake v. Philadelphia &c. R. Co. 87 Pa. St. 307; Hill v. Salem &c. Co. 1 Rob. (Va.) 263; Chesapeake &c. Co. v. Hoye, 2 Gratt. (Va.) 511; McCardle, Ex parte, 7 Wall. (U. S.) 506; State v. Slevin, 16 Mo. App. 541; Huntington Co. v. Kauffman, 126 Pa. St. 305; 17 Atl. 595; State Reservation, Matter of, 102 N. Y. 734; 7

ture may regulate the mode of taking and prosecuting appeals, and may deny an appeal, except in those states where a trial by jury is given in all cases by the constitution. In some states, where the original assessment is by a jury or judicial body, it is held that the appeal may be taken directly to the supreme court, but as a rule the case goes first into a trial court and is there tried.[196] In states where the proceedings originate in a court of superior jurisdiction, from all whose final orders judgments and decrees an appeal lies, an appeal from the judgment in such proceedings may be prosecuted to the proper appellate court.[197] In such cases appeal may be had

N. E. 916; Norfolk Southern &c. R. Co. v. Ely, 95 N. Car. 77; Sims v. Hines, 121 Ind. 534; 23 N. E. 515; Houghton, Appeal of, 42 Cal. 35. See, also, Memphis &c. R. Co. v. Birmingham &c. R. Co. 96 Ala. 571; 11 So. 642; 18 L. R. A. 166; Cockcroft's Appeal, 60 Conn. 161; 22 Atl. 482; Chappell v. Edmondson Ave. &c. R. Co. 83 Md. 512; 35 Atl. 19. But there is conflict of authority upon this point for there are cases affirming that the right of appeal can not be denied. Coon v. Mason Co. 22 Ill. 666. The right of appeal is favored and the courts generally so construe statutes as to give the right when it is possible to do so. Howard v. Drainage Comrs. 126 Ill. 53; 18 N. E. 313; Proprietors of &c. Bridge v. New Hampton, 47 N. H. 151; Hamilton v. Fort Wayne, 73 Ind. 1; Yelton v. Addison, 101 Ind. 58; Lawrenceburgh &c. Co. v. Smith, 3 Ind. 253; Elliott's Roads and Streets, 271. See, also, Atlantic Coast Line R. Co. v. South Bound R. Co. 57 S. Car. 317; 35 S. E. 553.

[196] Mississippi &c. Co. v. Rosseau, 8 Iowa, 373; York Co. v. Fewell, 21 S. Car. 106; Dunlap v. Mt. Sterling, 14 Ill. 251; Blize v. Castlio, 8 Mo. App. 290; Miller v. Prairie Du Chien &c. R. Co. 34 Wis. 533; Hardy v. McKinney, 107 Ind. 364; 8 N. E. 232. See, generally, Cooper v. Anniston &c. R. Co. 85 Ala. 106; 4 So. 689; 36 Am. & Eng. R. Cas. 581; Postal &c. Co. v. Alabama &c. R. Co. 92 Ala. 331; 9 So. 555; Memphis &c. R. Co. v. Hopkins, 108 Ala. 159; 18 So. 845; Georgia Cent. R. Co. v. Alabama &c. R. Co. 130 Ala. 559; 30 So. 566. Such an appeal is generally held to lie where the appeal from the award of the commissioners is docketed in the superior court as a civil action. St. Louis &c. R. Co. v. Evans &c. Co. 85 Mo. 307; Rice v. Danville &c. Turnpike Co. 7 Dana (Ky.), 81; Tracy v. Elizabethtown &c. R. Co. 78 Ky. 309; San Francisco &c. R. Co. v. Mahoney, 29 Cal. 112; St. Paul &c. R. Co. In re, 34 Minn. 227; 25 N. W. 345; Morris v. Chicago, 11 Ill. 650; Lewis' Em. Dom. (2d ed.) § 550. A statute giving an appeal to the supreme court in any "action or special proceeding" was held to apply to condemnation cases. Sacramento &c. R. Co. v. Harlan, 24 Cal. 334; Raleigh &c. R. Co. v. Jones, 1 Ired. L. (N. Car.) 24; Wilmington &c. R. Co. v. Condon, 8 G. & J. (Md.) 443.

[197] St. Louis &c. R. Co. v. Lux, 63 Ill. 523. The action of the court in sustaining exceptions to the com-

from the final judgment in the case, but not, as a rule, from interlocutory orders.[198] In most jurisdictions, an order merely appointing commissioners or appraisers is not a final judgment and no appeal or writ of error will lie therefrom.[199] There is a difference between

missioner's report is not an order from which an appeal may be taken. Tucker v. Massachusetts Cent. R. Co. 116 Mass. 124. Neither is the refusal to dismiss an appeal to the district court, in which case it is to be tried de novo, Minnesota Cent. R. Co. v. Peterson, 31 Minn. 42; 16 N. W. 456. In Maryland the action of the circuit court in confirming an inquisition in condemnation proceedings is exclusive and final, and appeal or error does not lie to the supreme court, if the railroad company had any right at all to make the condemnation. Hopkins v. Philadelphia &c. R. Co. 94 Md. 257; 51 Atl. 404.

[198] Hendricks v. Carolina &c. R. Co. 98 N. Car. 431; 4 S. E. 184; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co. 17 W. Va. 812; California &c. R. Co. v. Southern &c. R. Co. 65 Cal. 295; 4 Pac. 13; North Missouri R. Co. v. Reynal, 25 Mo. 534; McNamara v. Minnesota &c. R. Co. 12 Minn. 388; St. Louis &c. R. Co. v. Evans &c. B. Co. 85 Mo. 307; Jacksonville &c. R. Co. v. Adams, 29 Fla. 260; 11 So. 169; St. Paul &c. R. Co. In re, 34 Minn. 227; 25 N. W. 345; Denver &c. R. Co. v. Jackson, 6 Colo. 340; Tracy v. Elizabethtown &c. R. Co. 78 Ky. 309; San Francisco &c. R. Co. v. Mahoney, 29 Cal. 112; Johnson v. Freeport &c. R. Co. 116 Ill. 521; 6 N. E. 211. In some of the states a writ of error lies from a court in which the proceedings are conducted according to the common law. Peck v. Whitney, 6 B. Mon. (Ky.) 117. See Peoria &c. Co. v. Peoria &c. R. Co. 105 Ill. 110; Odum v. Rutledge &c. Co. 94 Ala. 488; 10 So. 222; Wilmington &c. Co. v. Condon, 8 Gill & J. (Md.) 443. As to what orders may be appealed from, see Spaulding v. Milwaukee &c. R. Co. 57 Wis. 304; 14 N. W. 368; San Francisco &c. R. Co. v. Mahoney, 29 Cal. 112; Beale v. Pennsylvania R. Co. 86 Pa. St. 509; Esch v. Chicago &c. R. Co. 72 Wis. 229; 39 N. W. 129; Rensselaer &c. R. Co. v. Davis, 43 N. Y. 137; Cumberland &c. R. Co. v. Pennsylvania R. Co. 57 Md. 267; Warren v. First Division &c. 18 Minn. 384; Wisconsin &c. R. Co. v. Cornell &c. 52 Wis. 537; 8 N. W. 491; Eureka &c. R. Co. v. McGrath, 74 Cal. 49; 15 Pac. 360.

[199] White Oak Ry. Co. v. Gordon (W. Va.) 56 S. E. 837; Cape Fear &c. R. Co. v. Steward; 132 N. C. 248; 43 S. E. 638; Lafayette &c. R. Co. v. Butner, 162 Ind. 460; 70 N. E. 529 (no appeal from order of circuit court denying application for appointment of appraisers); Holly Shelter R. Co. v. Newton, 133 N. C. 132, 136; 45 S. E. 549 (no appeal from order of court directing clerk to hear proceedings and appoint commissioners); Detroit &c. R. Co. v. Hall, 133 Mich. 302; 94 N. W. 1066 (no appeal from allowance of attorney's fees); Denver Power &c. Co. v. Denver &c. R. Co. 30 Colo. 204; 69 Pac. 568 (refusal to appoint commissioner may be reviewed); Erie R. Co. v. Steward, 59 App. Div. (N. Y.) 187; 69 N. Y. S. 57 (no appeal from judgment awarding

an appeal to a trial court and an appeal to a court of errors, for in the latter case the general rule is that only questions of law will be considered, while in the former the case is usually tried de novo. It is the rule in many jurisdictions that where the case has been tried de novo in the court to which the commissioners' award was taken for review, the supreme court will not consider matters which arose before the case reached the court in which such trial was had.[200] As the right to appeal is statutory the legislature may regulate the mode of taking appeals and provide what questions shall be considered on appeal.[201] An award of damages for land taken for public purposes does not constitute a contract within the meaning of the section of the federal constitution forbidding a state to pass laws impairing the validity of contracts.[202] And provision for the review of such proceedings may be made by the legislature even after the termination of the proceedings.[203] If an appeal is given and no

condemnation and appointing commissioners); Richmond &c. R. Co. v. Johnson, 99 Va. 282; 38 S. E. 195; 3 Va. Sup. Ct. 233 (no appeal from order appointing commissioners); Tennessee &c. R. Co. v. Birmingham &c. R. Co. 128 Ala. 526; 29 So. 455 (order of condemnation may be appealed from); Detroit &c. R. v. Oakland County Circuit Judge (Mich.) 109 N. W. 846 (order of dismissal a final judgment and mandamus will not lie).

[200] Patton v. Clark, 9 Yerg. (Tenn.) 268; Williamson v. Cass, 84 Ill. 361. No appeal lies from an order of the court confirming an inquisition condemning lands for the construction of a railroad unless the court exceeds its jurisdiction in passing such order. George's Creek Coal Co. v. New Central Coal Co. 40 Md. 425; Cumberland &c. R. Co. v. Pennsylvania R. Co. 57 Md. 267.

[201] Reeves v. Grottendick, 131 Ind. 107; 30 N. E. 889; Oliver v. Union &c. R. Co. 83 Ga. 257; 9 S. E. 1086; Central Branch &c. R. Co. v. Atchison &c. R. Co. 28 Kan. 453; 10 Am. & Eng. R. Cas. 528; Norfolk &c. R. Co. v. Ely, 95 N. Car. 77; Skinner v. Nixon, 7 Jones, L. (N. Car.) 342; Raleigh &c. R. Co. v. Jones, 1 Ired. L. (N. Car.) 24. See Rothan v. St. Louis &c. R. Co. 113 Mo. 132; 20 S. W. 892.

[202] Garrison v. New York, 21 Wall. (U. S.) 196.

[203] Baltimore &c. R. Co. v. Nesbit, 10 How. (U. S.) 395; Henderson &c. R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173; 66 Am. Dec. 148. Although an irrepealable charter gives a right of appeal to a designated tribunal the legislature may alter the charter by providing for appeal to a different court from that designated. State v. Weldon, 47 N. J. L. 59; 54 Am. R. 114; 23 Am. & Eng. R. Cas. 134; Railroad Co. v. Hecht, 95 U. S. 168. We do not believe that it is within the power of the legislature to contract that cases shall be tried in a specified court, since the power to establish courts and regulate practice therein is a governmental pow-

mode is prescribed for exercising the right, the court will adopt the practice in similar proceedings, so far as they can be made applicable.[204] Ordinarily, however, the manner of taking the appeal is prescribed by statute, in which case the provisions of the statute must be substantially complied with or the appeal will be ineffective.[205] An appeal is usually given to either party,[206] and this includes both the condemning corporation and any owner of a distinct interest in the property,[207] as, for example, a mortgagee,[208] who is

er which can not be bargained away.

[204] Peters v. Hastings &c. R. Co. 19 Minn. 260; Dubuque &c. R. Co. v. Crittenden, 5 Iowa, 514; Twombly v. Madbury, 27 N. H. 433; West v. McGurn, 43 Barb. (N. Y.) 198; Lewis' Em. Dom. (2d ed.) § 537. Where the statute simply provided that either party might take an appeal from the award of the commissioners to the district court within a limited time, it was held that filing a transcript in the district court constituted taking an appeal. Gifford v. Republican Valley &c. R. Co. 20 Neb. 533; 31 N. W. 11.

[205] Klein v. St. Paul &c. R. Co. 30 Minn. 451; 16 N. W. 265; Hartman v. Belleville &c. R. Co. 64 Ill. 24; Nebraska &c. R. Co. v. Storer, 22 Neb. 90; 34 N. W. 69; Jamison v. Burlington &c. R. Co. 69 Iowa, 670; 29 N. W. 774. See Kasson v. Brocker, 47 Wis. 79; 1 N. W. 418; Curtis v. Jackson, 23 Minn. 268. In New York a condemnation of land under the statute is a "proceeding" and not an "action" and hence no appeal can be taken under the statute authorizing appeals in actions. Erie R. Co. v. Steward, 59 App. Div. (N. Y.) 187; 69 N. Y. S. 57.

[206] Lee v. Northwestern U. R. Co. 33 Wis. 222; People v. May, 27 Barb. (N. Y.) 238; Hartman v. Belleville &c. R. Co. 64 Ill. 24; Chesterfield &c. R. Co. v. Johnson, 58 S. Car. 560; 30 S. E. 919. The corporation can not appeal from an order apportioning the damages among the several owners of the estate taken. Haswell v. Vermont Central R. Co. 23 Vt. 228; Spaulding v. Milwaukee &c. R. Co. 57 Wis. 304; 14 N. W. 368; 15 N. W. 482; Chicago &c. R. Co. v. Baker, 102 Mo. 553; 15 S. W. 64. See Chicago &c. R. Co. v. Grovier, 41 Kan. 685; 21 Pac. 779; 39 Am. & Eng. R. Cas. 146; Troy &c. R. Co. v. Northern &c. Co. 16 Barb. (N. Y.) 100; Chicago &c. R. Co. v. Easley, 46 Kan. 337; 26 Pac. 731; Connable v. Chicago &c. R. Co. 60 Iowa, 27; 14 N. W. 75; Cedar Rapids &c. R. Co. v. Chicago &c. R. Co. 60 Iowa, 35; 14 N. W. 76; Michigan &c. R. Co. v. Barnes, 40 Mich. 383; Chicago &c. R. Co. v. Ellis, 52 Kan. 41 and 48; 33 Pac. 478; 34 Pac. 352.

[207] Washburn v. Milwaukee &c. R. Co. 59 Wis. 379; 18 N. W. 431; Wilkin v. St. Paul &c. R. Co. 22 Minn. 177; Dixon v. Rockwell &c. R. Co. 75 Ia. 367; 39 N. W. 646; Gage v. Chicago, 141 Ill. 642; 31 N. E. 163; Chicago &c R. Co. v. Ellis, 52 Kans. 41; 33 Pac. 478. The owner of any distinct interest in property in which others also hold an estate may appeal separately. Lance v.

made a party to the record.[209] Where notice of an appeal is required by statute it must be given in the manner and within the time prescribed,[210] but in many jurisdictions parties in court must take

Chicago &c. R. Co. 57 Iowa, 636; 11 N. W. 612. In this case, the owner and the mortgagee were proceeded against jointly and it was held that the owner could appeal from the award without joining the mortgagee. One joint owner can not prosecute a separate appeal, but all must unite in a single appeal. Watson v. Milwaukee &c R. Co. 57 Wis. 332, 15 N. W. 468; Chicago &c. R. Co. v. Hurst, 30 Iowa, 73. Separate appeals by landlord and tenant can not be consolidated. Ortman v. Union Pacific R. Co. 32 Kan. 419.

[208] Omaha Bridge & Terminal Co. v. Reed, 69 Neb. 5, 14; 96 N. W. 276, and this has been so held where the action had been discontinued as to him. Michigan Air Line R. Co. 40 Mich. 383.

[209] Cedar Rapids &c. Co. v. Chicago &c. R. Co. 60 Ia. 35; 14 N. W. 76. In some jurisdictions any person directly affected may appeal. Chicago &c. R. Co. v. Grovier, 41 Kas. 685; 21 Pac. 779; Michigan Air Line R. Co. v. Barnes, 40 Mich. 383. Appeals by tenants in common, see Ruppert v. Chicago &c. R. Co. 43 Iowa, 490. It has been held that where the land in controversy is conveyed before the expiration of the time limited for appealing the grantee may appeal. Carli v. Stillwater, 16 Minn. 260. But compare Connable v. Chicago &c. R. Co. 60 Ia. 27; 14 N. W. 75; Rines v. Portland, 93 Me. 227; 44 Atl. 925. See Trogden v. Winona &c. R. Co. 22 Minn. 198; Blackshire v. Atchison &c. R. Co. 13 Kan. 514; McIntyre v. Easton &c. R. Co. 26 N. J. Eq. 425.

[210] Neff v. Chicago &c. R. Co. 14 Wis. 370; Klein v. St. Paul &c. R. Co. 30 Minn. 451; 16 N. W. 265; Maxwell v. La Brune, 68 Iowa, 689; 28 N. W. 18. See, also, United States v. Crooks, 116 Cal. 43; 47 Pac. 870; Atlantic Coast Line R. Co. v. South Bound R. Co. 57 S. Car. 317; 35 S. E. 553; Woolard v. Nashville, 108 Tenn. 353; 67 S. W. 801. Where notices of the appeal was required to be served on the opposite party, it was held insufficient to serve notice on the attorney of the railroad company. Hartman v. Belleville &c. R. Co. 64 Ill. 24. See Contra, Hahn v. Chicago &c. R. Co. 43 Iowa, 333. But where the land-owner was authorized to serve notice of appeal upon an agent of the railroad company, service upon the civil engineer employed to survey and locate its route was held good. Jamison v. Burlington &c. R. Co. 69 Iowa, 670; 29 N. W. 774. Under a Wisconsin statute, notice of the appeal need not be served on the opposite party. Weyer v. Milwaukee &c. R. Co. 57 Wis. 329; 15 N. W. 481. Objections to the jurisdiction for this cause are not waived by the appearance of the defendant in obedience to a summons to testify as a witness. People v. Osborn, 20 Wend. (N. Y.) 186. Nor by a special appearance on his part to move to dismiss the appeal for lack of jurisdiction. Klein v. St. Paul &c. R. Co. 30 Minn. 451; 16 N. W. 625. But see Nicoll v. New York &c. Co. 62 N.

notice of the appeal. In some jurisdictions, issues formed in the court below are passed upon in the same manner as if the action were originally brought in the appellate court.[211] The general rule is that questions not made in the court of original jurisdiction will not be considered on appeal.[212] Another generally accepted rule is that damages awarded in condemnation proceedings will not be disturbed on appeal on conflicting evidence particularly where the jury or the judge as the jury viewed premises unless the award is clearly against the weight of the evidence or the jury or the commissioners proceeded upon an erroneous principle or were influenced by passion and prejudice.[213] And where the amount allowed in condemnation

J. L. 733; 42 Atl. 583; 72 Am. St. 666.

[211] Phifer v. Carolina Central R. Co. 72 N. C. 433; Schermeely v. Stillwater &c. Co. 16 Minn. 506; Breitweiser v. Fuhrman, 88 Ind. 28; Hord v. Nashville &c. R. Co. 2 Swan (Tenn.), 497. In some states the appellate court must proceed according to the practice prescribed for the commissioners. Gold v. Vermont Central R. Co. 19 Vt. 478.

[212] Secombe v. Railroad Co. 23 Wall. (U. S.) 108; Baltimore &c. R. Co. v. Pittsburgh &c. Co. 17 W. Va. 812; Booker v. Venice &c. R. Co. 101 Ill. 333; 5 Am. & Eng. R. Cas. 357; Webster v. Kansas City &c. R. Co. 116 Mo. 114; 22 S. W. 474; Fitchburg R. Co. v. Boston &c. Co. 3 Cush. (Mass.) 58. See, also, Mitchell v. Metropolitan El. R. Co. 132 N. Y. 552; 10 N. E. 385; Eno v. Manhattan R. Co. 21 App. Div. (N. Y.) 548; 48 N. Y. S. 516; Colorado Midland R. Co. v. Brown, 15 Colo. 193; 25 Pac. 87; Lake Erie &c. R. Co. v. Kokomo, 130 Ind. 224; 29 N. E. 780; Benton Harbor Terminal R. Co. v. King, 131 Mich. 377; 91 N. W. 641; Colorado Fuel & Iron Co. v. Four Mile R. Co. 29 Colo. 90; 66 Pac. 902.

[213] Metropolitan &c. R. Co. v. McFarland, 20 App. (D. C.) 421; Lanquist v. Chicago, 200 Ill. 69; 65 N. E. 681; East &c. R. Co. v. Miller, 201 Ill. 413; 66 N. E. 275; Chicago &c. R. Co. v. Morrison, 195 Ill. 271; 63 N. E. 96; Conness v. Indiana &c. R. Co. 193 Ill. 464; 62 N. E. 221; Illinois &c. R. Co. v. Humiston, 208 Ill. 100; 69 N. E. 880; St. Louis &c. R. Co. v. Union Trust & Sav. Bank, 209 Ill. 457; 70 N. E. 651; Dowie v. Chicago &c. R. Co. 214 Ill. 49; 73 N. E. 354; Brown v. Illinois &c. R. Co. 209 Ill. 402; 70 N. E. 905; Chicago &c. R. Co. v. Loer, 27 Ind. App. 245; 60 N. E. 319; Houston &c. R. Co. v. Kansas City &c. R. Co. 109 La. 581; 33 So. 609; Abney v. Texarkana &c. R. Co. 105 La. 446; 29 So. 890; Opelonsas &c. R. Co. v. Bradford (La.), 43 So. 79; Natchitoches &c. R. Co. v. Henry, 109 La. 669; 33 So. 725; Texas &c. R. Co. v. Wilson, 108 La. 1; 32 So. 173; Detroit &c. R. Co. v. Hall, 133 Mich. 302; 94 N. W. 1066; Marquette &c. R. Co. v. Longyear, 133 Mich. 94; 94 N. W. 670; 10 Det. Leg. N. 111; Buffalo &c. R. Co. v. Phelps, 102 N. Y. S. 214; Long Island &c. R. Co. v. Reilly, 89 App. Div. (N. Y.) 166; 85 N. Y. S. 875; Manhattan R. Co.

proceedings for damage to lands not taken is within the range of the testimony, the award for such damage should not be disturbed for errors in instructions which could not have operated to petitioner's prejudice.[214] If an appeal is taken from an award of damages covering more than one tract of land, the order may be reversed as to one of the tracts and affirmed as to another.[215] In some jurisdictions the effect of an appeal is to vacate the proceedings appealed from,[216] but in other jurisdictions a different rule prevails.[217]

§ 1053a. Appeal—Miscellaneous matters.—In Louisiana, the supreme court has jurisdiction of all questions of law and fact, and all findings of an expropriation jury are reviewable on appeal to that court.[218] In that state it is held that the report of commissioners in condemnation proceedings may be set aside by the district court, like the verdict of a jury, on the ground that the amount allowed is too large, but it can not be increased if too small, though the law

v. Comstock, 74 App. Div. (N. Y.) 341; 77 N. Y. S. 416; Southport &c. R. Co. v. Owners of Platt Land, 133 N. C. 266; 45 S. E. 589.

[214] Groves &c. R. Co. v. Herman, 206 Ill. 34; 69 N. E. 36.

[215] Stockton &c. R. Co. v. Galgiani, 49 Cal. 139; Chicago &c. R. Co. v. Hildebrand, 136 Ill. 467; 27 N. E. 69. See, also, Bigelow v. Draper, 6 N. Dak. 152; 69 N. W. 570. But compare Peak v. Kings County &c. R. Co. 83 App. Div. (N. Y.) 631; 81 N. Y. S. 926. The objection that several tracts of land were improperly joined in a single joint assessment can not be made for the first time on appeal. Kankakee &c. R. Co. v. Chester, 62 Ill. 235. Where a single owner takes several appeals as to different tracts of land for which the damages were assessed in a single proceeding the appeals may be consolidated. Washburn v. Milwaukee &c. R. Co. 59 Wis. 364; 18 N. W. 328. See, generally, upon the subject of reversing in part, Wisconsin &c. R. Co. v. Cornell &c. 49 Wis. 162; 5 N. W. 331.

[216] Kansas v. Kansas Pacific R. Co. 18 Kan. 331; Pool v. Breese, 114 Ill. 594; 3 N. E. 714. Where the land-owner appeals, a discontinuance of the proceeding by the railroad company will permanently vacate the award. Wright v. Wisconsin Central R. Co. 29 Wis. 341.

[217] Lake Erie &c. R. Co. v. Kinsey, 87 Ind. 514; 14 Am. & Eng. R. Cas. 309; St Louis &c. R. Co. v. Clark, 119 Mo. 357; 24 S. W. 157. See, generally, Peterson v. Ferreby, 30 Iowa, 327; Corbin v. Cedar Rapids &c. R. Co. 66 Iowa, 73; 23 N. W. 270; New York &c. R. Co. v. Townsend, 36 Hun (N. Y.), 630; Sedalia v. Missouri &c. R. Co. 17 Mo. App. 105; Jersey City &c. R. Co. v. Central R. Co. 48 N. J. Eq. 379; 22 Atl. 728.

[218] Louisana &c. R. Co. v. Vicksburg &c. R. Co. 112 La. 915; 36 So. 803.

gives the court the right to "modify" the report of the commissioners.[219] In Indiana, it is expressly provided by statute, that no questions can be determined on appeal from the report of commissioners, condemning a highway across railroad tracks, except those of the regularity of the proceedings and of the amount of damages.[220] And a railroad company succeeding to the rights of another company pending condemnation by such company, may prosecute an appeal in its own name from the award.[221] Technical exactness and nicety is not demanded in the pleadings on the appeal from the commissioners' actions. Thus, it has been held not error to overrule a motion to make a bill of particulars more definite and certain where it was not misleading, though not as perfect as an ordinary petition should be.[222] So a verdict good in substance, will not be vitiated merely because of some irregularity in form.[223] A land-owner failing to appeal, is conclusively bound by the award and can not avail himself of an appeal by a mortgagee of the premises.[224] But the railroad may bring in such land-owner if necessary to protect its rights.[225] It has been held that a mortgagee would not lose his right of appeal by reason of having filed a claim for payment of the mortgage against the estate of the mortgagor.[226] The question whether certain persons, who were not parties to the condemnation proceedings, were entitled to damages will not be considered on appeal.[227] The statutory provision that an appeal shall be governed by the same law as in other causes, except the judgment of the county court shall not be suspended thereby, has been held not to authorize an appeal by property owners who have accepted money paid into court on the condemnation judgment and executed receipts in full therefor.[228]

[219] Louisiana Western R. Co. v. Crossman, 111 La. 611; 35 So. 784.

[220] Terre Haute &c. R. Co. v. Flora, 29 Ind. App. 442; 64 N. E. 648.

[221] Union Traction Co. v. Basey, 164 Ind. 249; 73 N. E. 263.

[222] Missouri &c. R. Co. v. Schmuck, 69 Kans. 272; 76 Pac. 836.

[223] Atlantic &c. R. Co. v. Postal &c. Co. 120 Ga. 268; 48 S. E. 15.

[224] Omaha Bridge &c. R. Co. v. Reed, 69 Neb. 514; 96 N. W. 276.

[225] Omaha Bridge &c. R. Co. v. Reed, 69 Neb. 514; 96 N. W. 276.

[226] Omaha Bridge &c. R. Co. v. Reed (Neb.), 92 N. W. 1021, affirmed on rehearing 69 Neb. 514; 96 N. W. 276.

[227] Marquette &c. R. Co. v. Longyear, 133 Mich. 94; 94 N. W. 670; 10 Det. Leg. N. 111.

[228] Parks v. Dallas Terminal &c. Co. 34 Tex. Civ. App. 341; 78 S. W. 533.

§ 1054. Certiorari.—In some jurisdictions an appropriate mode of reviewing proceedings in cases involving the exercise of the power of eminent domain is by certiorari.[229] In some of the states, in cases where the court has failed to acquire jurisdiction of the defendant's person, this writ is the proper remedy.[230] This is a common-law writ which is usually granted only where appeal is not available,[231]

[229] Willson v. Gifford, 42 Mich. 454; 4 N. W. 170; Adams v. Newfane, 8 Vt. 271; Chicago &c. R. Co. v. Young, 96 Mo. 39; 8 S. W. 776; State v. Ashland, 71 Wis. 502; 37 N. W. 809; Freeman v. Ogden, 40 N. Y. 105; People v. Hildreth, 126 N. Y. 360; 27 N. E. 558; Tennessee Cent. R. Co. v. Campbell, 109 Tenn. 640; 75 S. W. 1012.

[230] Dunlap v. Toledo &c. R. Co. 46 Mich. 190; 9 N. W. 249; Bixby v. Goss, 54 Mich. 551; 20 N. W. 581; South Wales R. Co. v. Richards, 6 Eng. Railw. & Canal Cas. 197. It is said that, ordinarily, the court will refuse to grant a writ of certiorari where the lack of jurisdiction appears on the face of the proceedings, but will leave the party to his action for trespass. Baltimore &c. R. Co. v. Northern &c. R. Co. 15 Md. 193; Reg. v. Bristol &c. Ry. 11 Ad. & Ell. 202; 2 Eng. Railw. & Canal Cas. 99. One against whom it is sought to enforce a judgment although he was not a party, may apply for a certiorari. Clary v. Hoagland, 5 Cal. 476. A writ of certiorari has been granted to review proceedings in which an order was made which the court had no jurisdiction to make, when the petitioner was about to proceed under this void order, to commit a trespass on the land concerning which it was made. California Pac. R. Co. v. Central Pac. R. Co. 47 Cal. 528. In Washington where no review on appeal of the question of public use and interest involved in the exercise of eminent proceedings is allowed it is held that the supreme court had jurisdiction to issue certiorari to bring up for review the record in an action adjudging the right of way of one railroad necessary for another road, that the intended use was a public one, and that the public interest required its appropriation. Seattle &c. R. Co. v. Bellingham &c. R. Co. 29 Wash. 491; 69 Pac. 1107.

[231] Boston &c. R. Co. v. Folsom, 46 N. H. 64; Dunlap v. Toledo &c. R. Co. 46 Mich. 190; 9 N. W. 249; Cedar Rapids &c. R. Co. v. Whelan, 64 Iowa, 694; 21 N. W. 141; Tennessee Cent. R. Co. v. Campbell, 109 Tenn. 640; 75 S. W. 1012; State v. Fifth Judic. Dist. Ct. 29 Mont. 153; 74 Pac. 200; State v. King Co. Super. Ct. 30 Wash. 219; 70 Pac. 484; State v. Superior Court (Wash.), 89 Pac. 879. The granting of a writ of certiorari is largely in the discretion of the court, and it will not be granted to review the technical errors where substantial justice has been done. Boston &c. R. Co. v. Folsom, 46 N. H. 64; Board v. Magoon, 109 Ill. 142; Keys v. Board &c. 42 Cal. 252. For other cases in which certiorari has been granted, see Delaware &c. R. Co. v. Burson, 61 Pa. St. 369; Joliet &c. R. Co. v. Barrows, 24 Ill. 562; Central R. Co. v. Pennsylvania R. Co. 31 N. J. Eq. 475; State v. Mont-

upon petition, stating a sufficient cause,[232] and properly supported by affidavit.[233] Upon the return of the writ, the proceedings of

clair R. Co. 35 N. J. L. 328; Fitchburg R. Co. v. Boston &c. R. Co. 3 Cush. (Mass.) 58; Worcester R. Co. v. Railroad Commissioners, 118 Mass. 561. After the time for an appeal has been suffered to elapse the court will not grant a writ of certiorari to review the proceedings unless some good excuse for the delay is shown. Dunlap v. Toledo &c. R. Co. 46 Mich. 190; 9 N. W. 249. See, also, Slocum v. Neptune Twp. 58 N. J. L. 595; 53 Atl. 301. An error in the amount of damages awarded can not be corrected by certiorari. The proper course is to appeal. Detroit &c. R. Co. v. Graham, 46 Mich. 642.

[232] Some injury must be shown to have resulted from the errors complained of. Boston &c. R. Co. v. Folsom, 46 N. H. 64; Pagels v. Oaks, 64 Iowa, 198; 19 N. W. 905; Pickford v. Mayor &c. of Lynn, 98 Mass. 491. A timely application for the writ must be made or it will be refused. Wilder v. Hubbell, 43 Mich. 487; 5 N. W. 673; Spofford v. Bucksport &c. R. Co. 66 Me. 26. Where the writ was asked to review the action of the county commissioners in dismissing the petition to revise the award, because of a failure to prosecute the same, it was held that the provisions of the statute directing the dismissal of such a petition if the party failed to prosecute it at the next regular term after it was filed, unless good cause for delay was shown, conferred upon the commissioners authority to decide whether the excuse offered for the delay was sufficient, and that the supreme court would not revise that decision. Portland &c. Co. v. County Commissioners, 64 Me. 505. Where the record of the proceedings of a board of commissioners in locating railroad crossings, and altering the courses of roads, were so defective as to be unintelligible without the aid of parol evidence, it was held proper to grant a writ of certiorari to review them. Portland &c. R. Co. v. County Commissioners, 65 Me. 292. But see State v. Miller, 23 N. J. L. 383. In many of the states a party who shows equity may have an injunction in cases where the proceedings are void because jurisdiction does not exist. "An application for certiorari, praying for a review of an adjudication that the right of way of one railroad can be condemned for the use of another railroad, or that it is for a public use, and required by the public interest, and denying the power to appropriate such property because it is already appropriated for the construction and operation of a railroad, states sufficient cause for the issuance of the writ." Seattle &c. R. Co. v. Bellingham Bay &c. R. Co. 29 Wash. 491; 69 Pac. 1107.

[233] State v. Little, 49 N. J. L. 182; 6 Atl. 519; Chambers v. Lewis, 9 Iowa, 583. Counter affidavits are admissible to show the waiver of the alleged irregularities. Spofford v. Bucksport &c. R. Co. 66 Me. 26; Bresler v. Ellis, 46 Mich. 335; 9 N. W. 439. The fact that improper items of injury were considered in estimating the damages may be shown by affidavit. Penny, In re, 7 Ell. & Bl. 660. The affidavits must show positively that

the inferior tribunal, as shown by the record,[234] are examined, and its judgment affirmed or set aside, as the proceedings are shown to have been authorized by law and conducted in accordance with correct principles or not.[235] No question which did not properly come before the commissioners can be considered on certiorari to review their action. If they are found to have had jurisdiction, the court will not only inquire whether their proceedings have been legally conducted.[236]

§ 1055. Company a trespasser where proceedings are void.—It is held in a number of cases that unless it has pursued the statutory method for acquiring property, a railroad company which takes possession of property without the consent of the land-owner is a trespasser.[237] But in our opinion the company should not be re-

the errors have been committed. Reg. v. Manchester &c. R. Co. 8 Ad. & Ell. 413.

[234] Philadelphia &c. R. Co. In re, 6 Whart. (Pa.) 25; 36 Am. Dec. 202; Church v. Northern Central R. Co. 45 Pa. St. 339. See, also, Ann Arbor R. Co. v. Beach, 110 Mich. 209; 68 N. W. 124; McCulley v. Cunningham, 96 Ala. 583; 11 So. 694. It is held that the return to the writ is conclusive. Traverse City &c. R. Co. v. Seymour, 81 Mich. 378; 45 N. W. 826; Forbes v. Delashmutt, 68 Iowa, 164; 26 N. W. 56. As to requisites of return, see Palmer v. Forsyth, 4 Barn. & C. 401; Stone v. New York, 25 Wend. (N. Y.) 157; Starr v. Rochester, 6 Wend. (N. Y.) 565. As to what questions may be considered on the hearing, see Schroeder v. Detroit &c. R. Co. 44 Mich. 387; 6 N. W. 872; New Jersey &c. R. Co. v. Suydam, 17 N. J. L. 25; Chambers &c. R. Co. v. Carteret &c. R. Co. 54 N. J. L. 85; 22 Atl. 995; Church v. Northern &c. R. Co. 45 Pa. St. 339.

[235] Questions of law only are usually considered on certiorari. Schroeder v. Detroit &c. R. Co. 44 Mich. 387; 6 N. W. 872; Germantown Avenue, In re, 99 Pa. St. 479; Low v. Galena &c. R. Co. 18 Ill. 324; Everett v. Cedar Rapids &c. R. Co. 28 Iowa, 417. See People v. Hildreth, 126 N. Y. 360; 27 N. E. 558.

[236] Crandell v. Taunton, 110 Mass. 421; Commissioners v. Supervisors, 27 Ill. 140; McAllilley v. Horton, 75 Ala. 491. Commissioners to assess damages for land taken by a railroad company have no authority to decide as to its corporate existence and right to take land in invitum, and a writ of certiorari to review their action brings no such question before the court. Schroeder v. Detroit &c. R. Co. 44 Mich. 387; 6 N. W. 872.

[237] Bothe v. Dayton &c. R. Co. 37 Ohio St. 147; Hull v. Chicago &c. R. Co. 21 Neb. 371; 32 N. W. 162; Kanne v. Minneapolis &c. R. Co. 33 Minn. 419; 23 N. W. 854; Memphis &c. R. Co. v. Parsons Town Co. 26 Kan. 503; Adams v. Saratoga &c. R. Co. 10 N. Y. 328; Ells

garded as a naked trespasser where it acts in good faith and enters into possession under color and claim of right. Where there is good faith and color of right the company ought, as we believe, to be held to pay just compensation and damages, but should not be compelled to lose the improvements it has made.[238] As we have elsewhere shown, the adjudged cases declare that a company that enters, without right, may be ousted by an action of ejectment,[239] but we

v. Pacific R. Co. 51 Mo. 200; Moses v. St. Louis Sectional Dock Co. 84 Mo. 242; Harris v. Marblehead, 10 Gray (Mass.), 40; Blaisdell v. Winthrop, 118 Mass. 138; Smith v. Chicago &c. R. Co. 67 Ill. 191; Peoria &c. R. Co. v. Schertz, 84 Ill. 135; Illinois Central R. Co. v. Hoskins, 80 Miss. 730; 32 So. 150; 92 Am. St. 612; Ewing v. St. Louis, 5 Wall. (U. S.) 413.

[238] Ante, §§ 997, 998.

[239] McClinton v. Pittsburgh &c. R. Co. 66 Pa. St. 404; Justice v. Nesquehoning Valley R. Co. 87 Pa. St. 28; Wilmington &c. R. Co. v. High, 89 Pa. St. 282; Daniels v. Chicago &c. R. Co. 35 Iowa, 129; 14 Am. R. 490; Conger v. Burlington &c. R. Co. 41 Iowa, 419; Jones v. New Orleans &c. R. Co. 70 Ala. 227; Smith v. Inge, 80 Ala. 283; Walker v. Chicago &c. R. Co. 57 Mo. 275; Stewart v. Camden &c. R. Co. 33 N. J. L. 115; Graham v. Columbus &c. R. Co. 27 Ind. 260; 89 Am. Dec. 498; Cox v. Louisville &c. R. Co. 48 Ind. 178; Robinson v. Pittsburgh R. Co. 57 Cal. 417; Gilman v. Sheboygan R. Co. 40 Wis. 653; Rusch v. Milwaukee &c. R. Co. 54 Wis. 136; 11 N. W. 253; Galveston &c. R. Co. v. Pfeuffer, 56 Tex. 66; St. Joseph &c. R. Co. v. Callender, 13 Kan. 496; Harrington v. St. Paul &c. R. Co. 17 Minn. 215; Baker v. Long Island R. Co. 1 How. Pr. (N. Y.) 214; Lozier v. New York Cent. R. Co. 42 Barb. (N. Y.) 465. In states where the compensation is not required to precede the taking, a mere entry is held not to be a trespass. Louisville &c. R. Co. v. Quinn, 14 Lea (Tenn.), 65; Turrell v. Norman, 19 Barb. (N. Y.) 263. But if compensation is not made within a reasonable time the corporation may be held liable as a trespasser ab initio. Cushman v. Smith, 34 Me. 247. Where the owner consented to an entry in reliance upon a promise of the company to make compensation, it was held that, upon its failure to fulfill this promise, the land-owner could sue in trespass. Evansville &c. R. Co. v. Grady, 6 Bush (Ky.), 144. If the consent of the owner was upon condition, all conditions must be shown to have been fulfilled before the land-owner will be enjoined from prosecuting an action of trespass for the damages done by the construction of the railroad and operation of its trains across his land. Baltimore &c. R. Co. v. Algire, 65 Md. 337; 4 Atl. 293. Where a land-owner has expressly forbidden a railroad company to enter upon her land, mere acquiescence on her part in the subsequent construction of the road across her land will not estop her to sue in trespass for damages. Currie v. Natchez &c. R. Co. 61 Miss. 725; 62 Miss. 506.

think this rule does not apply where there is an estoppel or unexcused acquiescence, but that there should be full compensation for the property taken and the injury inflicted.[240] Where the entry is without right the land-owner is entitled to full compensation for the loss suffered by him, and, according to the weight of authority, may, if there is no element of estoppel, proceed against the company as a trespasser.[241] It seems to us that where there is good faith and color of right, the company may, on payment or tender of full compensation, hold the land in cases where it has constructed its road, but that in order to give it this right, payment or tender should be made within a reasonable time.

[240] Ante, §§ 1048, 1049.

[241] Mueller v. St. Louis &c. R. Co. 31 Mo. 262; Jones v. New Orleans &c. R. Co. 70 Ala. 227; Hursh v. First Division St. Paul &c. R. Co. 17 Minn. 439; Schroeder v. De Graff, 28 Minn. 299; Hooker v. New Haven &c. R. Co. 14 Conn. 146; 36 Am. Dec. 477; Baltimore &c. R. Co. v. Boyd, 63 Md. 325; Atchison &c. R. Co. v. Weaver, 10 Kan. 344; President &c. Crawfordsville &c. R. Co. v. Wright, 5 Ind. 252; Anderson &c. R. Co. v. Kernodle, 54 Ind. 314; Smart v. Portsmouth &c. R. Co. 20 N. H. 233; Eaton v. Boston &c. R. Co. 51 N. H. 504; 12 Am. R. 147; Potter v. Ames, 43 Cal. 75; Buffalo Bayou &c. R. Co. v. Ferris, 26 Tex. 588; Loop v. Chamberlain, 20 Wis. 135; Rusch v. Milwaukee &c. R. Co. 54 Wis. 136; 11 N. W. 253; Terpening v. Smith, 46 Barb. (N. Y.) 208; Secomb v. Milwaukee &c. R. Co. 49 How. Pr. (N. Y.) 75; Blodgett v. Utica &c. R. Co. 64 Barb. (N. Y.) 580; Memphis &c. R. Co. v. Payne, 37 Miss. 700; Prescott v. Patterson, 44 Mich. 525; 7 N. W. 237; Wamesit &c. Co. v. Allen, 120 Mass. 352; Warren v. Spencer Water Co. 143 Mass. 9; 8 N. E. 606; Murray v. Fitchburg R. Co. 130 Mass. 99; Storer v. Hobbs, 52 Me. 144; Henry v. Dubuque &c. R. Co. 10 Iowa, 540; Birge v. Chicago &c. R. Co. 65 Iowa, 440; 21 N. W. 767; Taylor v. Marcy, 25 Ill. 518; Capers v. Augusta &c. R. Co. 76 Ga. 90; Whitehead v. Arkansas Central R. Co. 28 Ark. 460; Ramsden v. Manchester &c. R. Co. 1 Exch. 723.

CHAPTER XLI.

CONSTRUCTION AND CONSTRUCTION CONTRACTS.

§ 1056. Duty to construct—Authority and care required in construction.—Many of the specific subjects which we have already considered, or will hereafter consider, are intimately connected with the general subject of this chapter. Some of them, indeed, are parts of the same great subject; but, because of their importance and their completeness in themselves, it has been deemed advisable to treat them separately. Thus, the subject of the construction of crossings and that of the construction of fences will be hereafter considered in separate chapters. So, the duty of railroad companies to construct their roads,[1] the time within which they must be constructed,[2] in order to obtain a conditional subscription, or public aid, or to prevent a forfeiture, and the like, are matters that have already been considered. The duty to construct their roads may not only extend to the construction of roadbeds and tracks, but may also include the establishment of stations or depots. This is frequently required by statute, and, as we have already seen, there are some authorities which hold that this is a common-law duty which may be enforced by mandamus, even in the absence of any statute upon the subject.[3] The company must, however, have authority to construct its road as located, must keep clearly within the bounds of the authority granted by the legislature,[4] and must use due care in the

[1] See ante, §§ 635, 638, 639. It has been held that words of mere permission in a charter do not per se make it obligatory upon the company to construct a road. York &c. R. Co. v. Reg. 1 El. & B. 858; Rex v. Birmingham &c. Nav. 2 W. Black. 708.

[2] As to when the road or its construction is to be deemed to have been commenced, see State v. Wheadon, 39 Ind. 520; State v. Bergen &c. R. Co. 33 N. J. L. 108; 20 Atl. 762; Ontario &c. R. Co. v. Canadian Pac. R. Co. 14 Ont. 432.

[3] See ante, § 641.

[4] Hazen v. Boston &c. R. Co. 2 Gray (Mass.), 574; Eaton v. European &c. R. Co. 59 Me. 520; 8 Am. R. 430; Lafayette &c. Co. v. New Albany &c. R. Co. 13 Ind. 90; Worster v. Forty-Second St. R. Co. 50 N. Y. 203; Georgetown &c. R. Co. v. Eagles, 9 Colo. 544; 13 Pac. 696; 30 Am. & Eng. R. Cas. 228;

construction.[5] If it constructs a road without authority or in an unauthorized place and manner it may thus subject itself to liability as for a nuisance.[6]

Schuylkill &c. Co. v. McDonough, 33 Pa. St. 73; Little Miami &c. R. Co. v. Naylor, 2 Ohio St. 235; 59 Am. Dec. 667; Metropolitan &c. Co. In re, 111 N. Y. 588; 19 N. E. 645; Concord v. Concord &c. Co. 65 N. H. 30; 18 Atl. 87; Biscoe v. Great Eastern R. Co. 16 L. R. Eq. 636; Jones v. Festiniog R. Co. 3 L. R. Q. B. 733. But general authority to construct the road usually includes the power to construct necessary side tracks, switches, terminals and the like. Lake Shore &c. R. Co. v. Baltimore &c. R. Co. 149 Ill. 272; 37 N. E. 91; Protzman v. Indianapolis &c. R. Co. 9 Ind. 467; 68 Am. Dec. 650; Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325; 94 Am. Dec. 84. See, also, as to gauge and kind of rail, Millvale v. Evergreen R. Co. 131 Pa. St. 1; 18 Atl. 993; 7 L. R. A. 369. In State v. District Court (Mont.), 88 Pac. 44, it was held that a railroad company had the right to select the route which seemed most advantageous, though crossing a river several times, and to secure land necessary for its use in constructing the road thereon in such manner as to afford security for life and property; that under a statute empowering railroads to lay out their roads not exceeding in width 100 feet on each side of the center line unless a greater width be required for excavations or embankments and to construct and maintain them with a double or single track and with such appendages and adjuncts as may be necessary for their convenient use, it was not limited from securing land for railroad purposes generally, such as for necessary side tracks, turn-outs, machine shops, and depots; and that the only limits on the amount of land to be acquired are that the right of way shall not exceed 200 feet in width except where more is needed for excavations and embankments, and that the land for excavations, embankments, side tracks, and other purposes shall not exceed in extent the amount necessary for such purposes.

[5] Gilbert v. Savannah &c. R. Co. 69 Ga. 396; Ohio &c. R. Co. v. Wachter, 123 Ill. 440; 15 N. E. 279; 5 Am. St. 532; Chicago &c. R. Co. v. Henneberry, 42 Ill. App. 126; Chicago &c. R. Co. v. Schaffer, 124 Ill. 112; 16 N. E. 239; Brewer v. Boston &c. R. Co. 113 Mass. 52; Spencer v. Hartford &c. R. Co. 10 R. I. 14; Kansas Pac. R. Co. v. Lundin, 3 Colo. 94; Colorado &c. Co. v. O'Brien, 16 Colo. 219; 27 Pac. 701; Van Orsdol v. Burlington &c. R. Co. 56 Iowa, 470; 9 N. W. 379; Heath v. Texas &c. R. Co. 37 La. Ann. 728; Libby v. Maine &c. R. Co. 85 Me. 34; 26 Atl. 943; 20 L. R. A. 812.

[6] Commonwealth v. Old Colony &c. R. Co. 14 Gray (Mass.), 93; Commonwealth v. Erie &c. R. Co. 27 Pa. St. 339; 67 Am. Dec. 47; McCandless' Appeal, 70 Pa. St. 210. See, also, Mahon v. New York &c. Railroad Co. 24 N. Y. 658; Stewart's Appeal, 56 Pa. St. 413; Graham v. Chicago &c. Ry. Co. (Ind. App.) 77 N. E. 57, 1055.

§ 1056a. Location of round-houses, shops, cattle yards, etc.— The doctrine is well-supported that a railroad company in selecting places for its round-houses, shops, cattle yards and the like and in maintaining and operating the same is entitled to no superior rights of immunity for injuries to property resulting from the operation of these facilities in such a manner as to create a nuisance.[7] And it may be said further that statutory authority to construct such works does not authorize railroad companies to place them wherever they may desire without any reference to the property rights of others. The principle is distinctly recognized both in England and this country that a statutory sanction can not be pleaded in justification of acts which by the general rules of law constitute a nuisance to private property unless they are expressly authorized by the statute, under which the justification is made or by the plainest and most necessary implication from the powers expressly conferred.[8] In addressing himself to this issue Justice Field in the leading case on this question uses these words: "In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road, did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the capitol, or in the most densely populated locality. Indeed, the corporation does assert a right to place its works upon property it may acquire anywhere in the city. Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works

[7] Louisville &c. Terminal Co. v. Jacobs, 109 Tenn. 727; 72 S. W. 954; 61 L. R. A. 188; Louisville &c. Terminal Co. v. Lellyett, 114 Tenn. 368; 85 S. W. 881; Beseman v. Pennsylvania R. Co. 50 N. J. L. 235; 13 Atl. 164; see, also, to the same effect, Cogswell v. New York &c. R. Co. 103 N. Y. 10; 8 N. E. 537; 57 Am. R. 701; Baltimore &c. R. Co. v. Fifth Baptist Church, 108 U. S. 317; 2 Sup. Ct. 719; 27 Law. Ed. 739. See, also, Rogers v. Philadelphia &c. Co. 182 Pa. St. 473; 38 Atl. 389; 61 Am. St. 716.

[8] Cogswell v. New York &c. R. Co. 103 N. Y. 10; 8 N. E. 537; 57 Am. R. 701; Truman v. London &c. R. Co. L. R. 25 Ch. Div. 423; Louisville &c. Terminal Co. v. Jacobs, 109 Tenn. 727; 72 S. W. 954; 61 L. R. A. 188; Louisville &c. Terminal Co. v. Lellyett, 114 Tenn. 368; 85 S. W. 881; Baltimore &c. R. Co. v. Fifth Baptist Church, 108 U. S. 317; 2 Sup. Ct. 719; 27 Law Ed. 739.

should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teachings of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred. . . . . It admits, indeed, of grave doubt whether Congress could authorize the company to occupy and use any premises within the city limits, in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from the liability to suit for damages or compensation, to which individuals acting without such authority would be subject under like circumstances. Without expressing any opinion on this point, it is sufficient to observe that such authority would not justify an invasion of others' property, to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to justify acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation, if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyance. The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."[9] In regard to the matter of dam-

[9] Baltimore &c. R. Co. v. Fifth Baptist Church, 108 U. S. 317; 2 Sup. Ct. 719; 27 Law. Ed. 739. See, also, in support of the doctrine of this section, Chicago &c. R. Co. v. Methodist Church, 102 Fed. 85; 42 C. C. A. 178; 50 L. R. A. 488; Stevens v. New York Elev. R. Co. 29 N. Y. St. 361; 8 N. Y. S. 313; Lahr v. Metropolitan Elev. R. Co. 104 N. Y. 268; 10 N. E. 528; Kane v. New York Elev. R. Co. 125 N. Y. 164; 26 N. E. 278; 11 L. R. A. 640; Drucker v. Manhattan R. Co. 106 N. Y. 157; 12 N. E. 568; 60 Am. R. 437; Duyckinck v.

ages for this species of injuries it has been held that where terminal facilities were carefully operated, the measure of damages was the injury to the fee or permanent value of the property by the permanent operation of such terminal facilities.[10]

§ 1056b. Connection of tracks with those of other railroads.— It is well-settled that the legislature, under the police power, may require railroad companies, whose roads cross or meet each other, to construct such switches, side-tracks and connections as will enable them to transport cars to and from each other's lines.[11] A regulation of this character does not amount to the taking of the property of a railroad company for which compensation may be provided.[12] These statutes usually contemplate a mechanical or physical connection with roads of similar gauge so as to permit the running of cars from one road to the other.[13] A business connection is not intended by the provision generally found in such statutes and the statute does not require any interchange of traffic at the point of junction.[14]

New York Elev. R. Co. 125 N. Y. 710; 26 N. E. 755; Cogswell v. New York &c. R. Co. 103 N. Y. 10; 8 N. E. 537; 57 Am. R. 701; Peyser v. Metropolitan Elev. R. Co. 13 Daly (N. Y.), 122; Smith v. New York Elev. R. Co. 44 N. Y. St. 875; 18 N. Y. S. 132; Bohm v. Metropolitan Elev. R. Co. 129 N. Y. 576; 29 N. E. 802; 14 L. R. A. 344. But see Walther v. Chicago &c. R. Co. 215 Ill. 456; 74 N. E. 461, where it is held that the erection by a railroad company of switch tracks, and a freight depot in a residence neighborhood directly across the street from complainant's residence and flat building, and the construction of an elevated drive way from the street to the tracks and depot, but in such a manner as not to cause the traffic to interfere with the use of complainant's property any more than any other constant use of the street would do, can not be enjoined as a nuisance, there being no showing that the depot was not necessary, or that it could have been as conveniently built elsewhere. See, also, post, § 1057j.

[10] Louisville &c. Terminal Co. v. Lellyett, 114 Tenn. 368; 85 S. W. 881.

[11] Atlantic &c. R. Co. v. State, 42 Fla. 358; 29 So. 319; 89 Am. St. 233; Portland &c. R. Co. v. Grand Trunk R. Co. 46 Me. 69.

[12] Atlantic &c. R. Co. v. State, 42 Fla. 358; 29 So. 319; 89 Am. St. 233.

[13] Altoona &c. R. Co. v. Beech Creek R. Co. 177 Pa. 443; 35 Atl. 734.

[14] Kentucky &c. Bridge Co. v. Louisville &c. R. Co. 37 Fed. 567; 2 L. R. A. 289. See, also, Atchison &c. R. Co. v. Denver &c. R. Co. 110 U. S. 667; 4 Sup. Ct. 185. But see Georgia &c. R. Co. v. Maddox, 116 Ga. 64; 42 S. E. 315.

Neither does a bare power to connect or unite authorize the purchase or even the lease of the roads joined or any union of their franchises.[15] In Texas where this matter is regulated by the railroad commissioners, it has been held that this body is authorized to require two roads crossing each other to connect their tracks, although they do not cross at grade.[16] These statutes usually provide for the appointment of commissioners to determine the place and manner of making the connection where the railroad companies can not agree,[17] and one railroad can not enter upon the right of way of another for the purpose of connecting therewith without previous agreement or condemnation proceedings.[18] In some jurisdictions the right to make connection can be enforced by eminent domain proceedings.[19] It is generally agreed that the grant of a right to a railroad company to extend and unite with any other railroad authorizes the extension to any other road within the prescribed limits,[20] though the lines do not cross, but are contiguous or so near each other that public interest requires facilities for the interchange of freight and passenger cars.[21] Provisions in these statutes as to the point of intersection are reasonably construed by the courts. Thus, where a railroad company was empowered to connect with another railroad "at" a certain city "at the point which may be found most practicable" it was held that a connection made at a point one thousand yards outside the city limits, at the most practicable point satisfied the statute. The word "at" does not necessarily and always mean "in."[22] Under the New York statute governing this matter it has been held that the mere fact that the place at and on which a new road located a switch or turn-out, for intersecting with an old road, prior to the application therefor, is devoted by the old road to a specific use in the discharge of its public duties as a railroad company, is not

[15] Louisville &c. R. Co. v. Kentucky, 161 U. S. 677; 16 Sup. Ct. 714.

[16] International &c. R. Co. v. Railroad Comrs. (Tex.) 89 S. W. 961.

[17] Jennings v. Delaware &c. R. Co. 103 App. Div. (N. Y.) 164; 93 N. Y. S. 374; Richmond &c. R. Co. v. Raleigh, 104 N. C. 654. See, also, Smith v. Chicago &c. R. Co. 86 Ia. 202; 53 N. W. 128.

[18] Richmond &c. R. Co. v. Durham &c. R. Co. 104 N. C. 658; 10 S. E. 659.

[19] East St. Louis &c. R. Co. v. Belleville R. 159 Ill. 544; 42 N. E. 974.

[20] Belleville &c. R. Co. v. Gregory, 15 Ill. 20.

[21] New York &c. R. Co. v. Erie R. Co. 31 App. Div. (N. Y.) 378; 52 N. Y. S. 318.

[22] Purifoy v. Richmond &c. R. Co. 108 N. C. 100; 12 S. E. 741.

a bar to the new company's right to the intersection, so long as the new road does not invade or take such lands, so that the use to which they have been appropriated will thereby be rendered ineffectual.[23] In Georgia it has been held that a statute authorizing a railroad company to construct its line from a given initial point to another city with power to connect with other railroads, gave the railroad company the power to connect with railroads with which it might come in contact only, but gave it no power to make connections with other railroads at the initial point, and a further provision for the enforcement of the right to connect in the event of refusal by condemnation, was held to give the power to condemn the property of the refusing road, but not power to condemn the property of other persons. Under this statute the railroad had no power to run its lines across a city to connect with another line unless otherwise authorized to do so.[24] An agreement of a railroad company not to make a connection authorized by statute—if valid—is regarded as a mere personal contract binding on the company and its legal successors, but not conclusive as against the public.[25] In New York it has been held that electric railways are entitled to track connections with intersecting commercial steam railroad companies where the statute gives such right to "every railroad corporation," especially where the incorporaiton of both classes of roads is provided for in the same statute containing such provision.[26]

§ 1056c. Mandamus to compel the restoration and maintenance of abandoned railroads.—It is well-settled that a writ of mandamus to compel a railroad company to do a particular act in the construction and operation of its road will be issued only where there is a legal duty on its part to do that act and a clear breach of that duty.[27]

[23] Jennings v. Delaware &c. R. Co. 103 App. Div. (N. Y.) 164; 93 N. Y. S. 374.

[24] Augusta v. Port Royal &c. R. Co. 74 Ga. 658. But see Long Branch Comrs. v. West End R. Co. 29 N. J. Eq. 566.

[25] Menasha v. Milwaukee &c. R. Co. 52 Wis. 414; 9 N. W. 396. Where a connection is made under a valid contract, it has been held that its continuance may be enforced, in a proper case, in equity, unless it has been terminated by the parties, in which event equity will not interfere. Androscoggin R. Co. v. Androscoggin R. Co. 52 Me. 417. See, generally, Hoyt v. Chicago &c. R. Co. 93 Ill. 601.

[26] Stillwater &c. St. R. Co. v. Boston &c. R. Co. 171 N. Y. 589; 64 N. E. 511; 59 L. R. A. 489.

[27] Northern Pac. R. Co. v. Territory, 142 U. S. 492; 12 Sup. Ct. 283; 35 Law Ed. 1092.

And it is equally well-settled that a railroad company merely authorized to construct its road to a given terminus, but under no charter obligation to do so, can not be compelled to build to such point when it would not be remunerative to do so.[28] The rule is the same where a line of railroad owned by an insolvent corporation has been abandoned because it could not be operated except at a great loss. Here the courts uniformly refuse to issue the writ since it would be useless or futile and of no public benefit.[29] "No principle of law is better settled than that the writ should not be granted in any case where it is clear that it would prove unavailing; as where the act sought to be enforced is from its very nature physically impossible or where from extrinsic causes it has become so, or where performance, though not absolutely impossible, is from any cause not within the power of the defendant."[30] The fact that the railroad does not pay the expense of running trains is very persuasive evidence that the service to the public does not require it to be kept in operation.[31] These rules apply, of course, only under the limitations noted and do not prevent the issuance of the writ in cases where the railroad company has wilfully and wrongfully attempted to put it out of its power to perform the required act.[32]

§ 1057. Liability for injuries caused by construction—Consequential damages.—It is a general rule that the rightful and proper exercise of a lawful power or authority "can not afford a basis for an action."[33] It follows, therefore, that, in the absence of any statutory

[28] Northern Pac. R. Co. v. Territory, 142 U. S. 492; 12 Sup. Ct. 283; 35 Law. Ed. 1092; York &c. R. Co. v. Reg. 1 El. and Bl. 858; Great Western R. Co. v. Reg. 1 El. and Bl. 874; Commonwealth v. Fitchburg R. Co. 12 Gray (Mass.), 180; State v. Southern Minn. R. Co. 18 Minn. 40.

[29] State v. Dodge City &c. R. Co. 53 Kan. 329; 36 Pac. 755; 24 L. R. A. 564; State v. Jack, 145 Fed. 281; Ohio &c. R. Co. v. People, 120 Ill. 200; 11 N. E. 347.

[30] Ohio &c. R. Co. v. People, 120 Ill. 200; 11 N. E. 347.

[31] Ohio &c. R. Co. v. People, 120 Ill. 200; 11 N. E. 347; State v. Jack, 145 Fed. 281; Morawetz Priv. Corp. § 1119.

[32] Ohio &c. R. Co. v. People, 120 Ill. 200; 11 N. E. 347.

[33] Slatten v. Des Moines Valley R. Co. 29 Iowa, 154; 4 Am. R. 205; Dodge v. County Comrs. 3 Met. (Mass.) 380; Hatch v. Vermont Cent. R. Co. 25 Vt. 49; Radcliff v. Mayor, 4 N. Y. 195; 53 Am. Dec. 357, and note, citing and reviewing numerous authorities. See, also, Transportation Co. v. Chicago, 99 U. S. 635; Mersey Docks Trus-

or constitutional provision to the contrary, a railroad company is not liable for consequential damages, arising from the construction of its road, so long as it keeps within the bounds of its authority and is not negligent in the manner of doing the work or exercising such authority.[34] The theory is that all damages incident to the author-

tees v. Gibbs, L. R. 1 H. L. 93, 112; Bennett v. Long Island R. Co. 181 N. Y. 431; 74 N. E. 418; Georgia R. &c. Co. v. Maddox, 116 Ga. 64; 42 S. E. 315.

[34] Pierce Railroads, 197, 263, 264; 2 Wood Railroads, § 275; Boothby v. Androscoggin R. Co. 51 Me. 318; Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325; 94 Am. Dec. 84; Hougan v. Milwaukee R. Co. 35 Iowa, 558; 14 Am. R. 502; Sunbury &c. R. Co. v. Hummell, 27 Pa. St. 99; Burroughs v. Housatonic R. Co. 15 Conn. 124; 38 Am. Dec. 64, and note; Aldrich v. Cheshire R. Co. 21 N. H. 359; 53 Am. Dec. 212; Hodge v. Lehigh Valley R. Co. 39 Fed. 449; McCormick v. Kansas City &c. R. Co. 57 Mo. 433; Lynn &c. R. Co. v. Boston &c. R. Co. 114 Mass. 88; Brown v. Providence &c. R. Co. 5 Gray (Mass.), 35; Terre Haute &c. R. Co. v. McKinley, 33 Ind. 274; Stone v. Fairbury &c. R. Co. 68 Ill. 394; 18 Am. R. 556. See, also, Wabash &c. Canal v. Spears, 16 Ind. 441; 79 Am. Dec. 444; State v. Louisville &c. R. Co. 86 Ind. 114; Shepherd v. Baltimore &c. R. Co. 130 U. S. 426; 9 Sup. Ct. 598; Fitch v. New York &c. R. Co. 59 Conn. 414; 20 Atl. 345; 10 L. R. A. 188; Losee v. Buchanan, 51 N. Y. 476; 10 Am. R. 623; Beseman v. Pennsylvania R. Co. 50 N. J. L. 235; 13 Atl. 164; Struthers v. Dunkirk &c. R. Co. 87 Pa. St. 282; Aldrich v. Metropolitan &c. R. Co. 195 Ill. 456; 63 N. E. 155; 57 L. R. A. 237, and authorities cited in note and abstract of briefs; Frost v. Washington County R. Co. 96 Me. 76; 51 Atl. 806; 59 L. R. A. 68, and note. But in some jurisdictions it is held that this immunity does not extend to private or quasi public corporations, such as a railroad company, although it does to strictly public corporations, and that the legislature can not give a railroad company any other rights in this respect as against a land-owner than an individual would have. See Cogswell v. New York &c. Railroad Co. 103 N. Y. 10; 57 Am. R. 701; 8 N. E. 537; Booth v. Rome &c. R. Co. 140 N. Y. 267; 35 N. E. 592; 24 L. R. A. 105; 9 Lewis' Am. R. & Corp. 92; 37 Am. St. 552, followed in French v. Vix, 143 N. Y. 90; 37 N. E. 612. (But see Bellinger v. New York &c. R. Co. 23 N. Y. 42; Conklin v. New York &c. R. Co. 102 N. Y. 107; 6 N. E. 663). Evansville &c. R. Co. v. Dick, 9 Ind. 433, followed in Egbert v. Lake Shore &c. R. Co. 6 Ind. App. 350; 33 N. E. 659; Staton v. Norfolk &c. R. Co. 111 N. Car. 278; 16 S. E. 181; 17 L. R. A. 838, and note; Baltimore &c. R. Co. v. Reaney, 42 Md. 117; Alton &c. R. Co. v. Deitz, 50 Ill. 210; 99 Am. Dec. 509; Baltimore &c. R. Co. v. Fifth Baptist Church, 108 U. S. 317; 2 Sup. Ct. 719; Delaware &c. Canal Co. v. Lee, 22 N. J. L. 243; Northern Pac. R. Co. v. United States, 104 Fed. 691; 59 L. R. A. 80, and note. It may be that authority to inflict consequential damages

ized construction of the road in a careful and lawful manner are taken into consideration in determining the amount of compensation when the property is condemned or the right of way obtained.[35] But where its authority is negligently, unlawfully or improperly exercised the company may be held liable in damages to one who is injured thereby. Thus, it is liable for negligently or unlawfully throwing debris, dirt and rocks upon adjoining land,[36] or for trespassing thereon and digging up the soil,[37] or appropriating and converting material without authority.[38] So, railroad companies have been held liable for negligently constructing embankments in such a manner as

should be more readily inferred in the case of a public corporation than in that of a private corporation, but we do not believe there is any radical distinction which prevents the legislature from giving a quasi public corporation the same protection from liability for consequential injuries, not amounting to a taking, that it may give a public corporation. Randolph on Em. Dom. § 139.

[35] Pierce Railroads, 197, 264; Dearborn v. Boston &c. R. Co. 24 N. H. 179; Clark v. Hannibal &c. R. Co. 36 Mo. 202; Pittsburg &c. R. Co. v. Gilleland, 56 Pa. St. 445; 94 Am. Dec. 97; Van Schoick v. Delaware &c. Co. 20 N. J. L. 249; New Orleans &c. R. Co. v. Brown, 64 Miss. 479; 1 So. 637; Watts v. Norfolk &c. R. Co. 39 W. Va. 196; 19 S. E. 521; 23 L. R. A. 674; 45 Am. St. 894; Blackwell v. Lynchburg &c. R. Co. 111 N. Car. 151; 16 S. E. 12; 17 L. R. A. 729n; 32 Am. St. 786; Johnson v. Atlantic &c. R. Co. 35 N. H. 569; 69 Am. Dec. 560; Porterfield v. Bond, 38 Fed. 391; ante, § 1004. See, also, Gilbert v. Savannah &c. R. Co. 69 Ga. 396; Kotz v. Illinois Cent. R. Co. 188 Ill. 578; 59 N. E. 240; Gartner v. Chicago &c. R. Co. (Neb.) 98 N. W. 1052; Fremont &c. R. Co. v. Gayton, 67 Neb. 263; 93 N. W. 163. Compare Lewis' Em. Dom. (2d ed.) §§ 565, 566, 567.

[36] Georgetown &c. R. Co. v. Eagles, 9 Colo. 544; 13 Pac. 696; 30 Am. & Eng. R. Cas. 228; Hendershott v. Ottumwa, 46 Iowa, 658; 26 Am. R. 182; Hay v. Cohoes Co. 2 N. Y. 159; 51 Am. Dec. 279, and note; Norfolk &c. R. Co. v. Carter, 91 Va. 587; 22 S. E. 517; Nicholson v. New York &c. R. Co. 22 Conn. 74; 56 Am. Dec. 390; Elliott Roads and Streets, 157; Chicago &c. R. Co. v. Robbins, 159 Ill. 598; 43 N. E. 332; Norfolk &c. R. Co. v. Carter, 91 Va. 587; 22 S. E. 517.

[37] Cairo &c. R. Co. v. Woosley, 85 Ill. 370; Doud v. Mason City &c. Co. 76 Iowa, 438; 41 N. W. 65; Waltemeyer v. Wisconsin &c. R. Co. 71 Ia. 626; 33 N. W. 140; Chicago &c. R. Co. v. Willits, 45 Kans. 110; 25 Pac. 576; Ryan v. Mississippi Valley R. Co. 62 Miss. 162.

[38] Railroad Co. v. Hutchins, 37 Ohio St. 282; 4 Am. & Eng. R. Cas. 219; Parsons v. Howe, 41 Me. 218; Moore v. City of Albany, 98 N. Y. 396; Vermont Cent. R. Co. v. Baxter, 22 Vt. 365. See, also, Hendler v. Lehigh Valley R. Co. 209 Pa. St. 256; 58 Atl. 486; 103 Am. St. 1005.

to cause water to overflow the land of others,[39] for negligently depriving adjacent land of its lateral support,[40] for obstructing navigation,[41]

[39] Lawrence v. Great Northern &c. Co. 16 Ad. & El. (Q. B.) 643; 20 L. J. Q. B. 293; Kansas City &c. R. Co. v. Lackey, 72 Miss. 881; 16 So. 909; 48 Am. St. 589; Hunt v. Iowa Cent. R. Co. 86 Iowa, 15; 52 N. W. 668; 41 Am. St. 473; Henry v. Ohio &c. R. Co. 40 W. Va. 234; 21 S. E. 863. See, also, Staton v. Norfolk &c. R. Co. 111 N. Car. 278; 16 S. E. 181; 17 L. R. A. 838; Eaton v. Boston &c. R. Co. 51 N. H. 504; 12 Am. R. 147; Galveston &c. Co. v. Bibb, 3 Tex. Civ. App. 330; Ohio &c. R. Co. v. Thillman, 143 Ill. 127; 32 N. E. 529; 36 Am. St. 359; Chicago &c. R. Co. v. Ely (Neb.), 110 N. W. 539; White v. Chicago &c. R. Co. 122 Ind. 317; 23 N. E. 782; 7 L. R. A. 257; Baltimore &c. R. Co. v. Quillen, 34 Ind. App. 330; 107 Am. St. 158; 72 N. E. 661; Kelly v. Pittsburgh &c. R. Co. 28 Ind. App. 457; 63 N. E. 233; 91 Am. St. 134; note in 59 L. R. A. 862, 863, et seq.; Alabama &c. R. Co. v. Prouty (Ala.), 43 So. 352; Savannah &c. R. Co. v. Buford, 106 Ala. 303; 17 So. 395. But the right to properly erect embankments may be implied from the power and duty to provide suitable and safe roadways. Kansas City &c. R. Co. v. Smith, 72 Miss. 677; 17 So. 78; 27 L. R. A. 762; 48 Am. St. 579; Hodge v. Lehigh Valley R. Co. 39 Fed. 449. See, also, Cleveland &c. R. Co. v. Huddleston, 21 Ind. App. 621; 52 N. E. 1008; 69 Am. St. 385. And the liability in most states does not extend to injuries caused by properly fighting off surface water. Missouri Pac. R. Co. v. Renfro, 52 Kan. 237; 34 Pac. 802; 39 Am. St. 344; Bunderson v. Burlington &c. R. Co. 43 Neb. 545; 61 N. W. 721; Jordan v. St. Paul &c. R. Co. 42 Minn. 172; 43 N. W. 849; 6 L. R. A. 573, and note; Hannaher v. St. Paul &c. R. Co. 5 Dak. 1; 37 N. W. 717; Atchison &c. R. Co. v. Hammer, 22 Kan. 763; 31 Am. R. 216; Edwards v. Charlotte &c. R. Co. 39 S. Car. 472; 18 S. E. 58; 22 L. R. A. 246; 39 Am. St. 746; Mills Em. Dom. §§ 187, 189; Cairo &c. R. Co. v. Stevens, 73 Ind. 278; 38 Am. R. 139, and note; Jean v. Pennsylvania Co. 9 Ind. App. 56; 36 N. E. 159. As to what is surface water, see Cairo &c. R. Co. v. Brevoort, 62 Fed. 129; 25 L. R. A. 527, and note, and authoriteis there cited. See, generally, 23 Am. & Eng. Ency. of Law (2d ed.), 715, 716, and authorities there cited; also Harvey v. Mason &c. R. Co. 129 Ia. 465; 105 N. W. 958.

[40] Larson v. Metropolitan &c. Co. 110 Mo. 234; 10 S. W. 416; 16 L. R. A. 330; 33 Am. St. 439, and note; Richardson v. Vermont &c. R. Co. 25 Vt. 465; 60 Am. Dec. 283; Parke v. Seattle, 5 Wash. 1; 20 L. R. A. 68; 34 Am. St. 839; Rau v. Minnesota Valley R. Co. 13 Minn. 442; Charless v. Rankin, 22 Mo. 566; 66 Am. Dec. 642, and note; Quincy v. Jones, 76 Ill. 231; 20 Am. R. 243; Nading v. Denison &c. Ry. Co. (Tex. Civ. App.) 62 S. W. 97. We do not here consider whether there is a liability in the absence of negligence nor whether this constitutes a taking. There is conflict among some of the authorities upon that point, as well as to how

for negligently leaving work in a public street in a dangerous condition so that one who is properly using the street is injured thereby,[42] and for various other negligent acts in the construction of the road resulting in injury to others.[43] The question as to the liability of railroad companies for injuries or damages caused by blasting has given rise to some difference of opinion. There can be no doubt that the company is liable for injuries proximately caused by its negligence in blasting,[44] and some courts seem to hold that it may be

far the right to lateral support extends. See elaborate note to Larson v. Metropolitan &c. Co. 33 Am. St. 439, 446, et seq.; Elliott Roads and Streets, 157, 350; Nichols v. Duluth, 40 Minn. 389; 42 N. W. 84; 12 Am. St. 743; Parke v. Seattle, 5 Wash. 1; 31 Pac. 310; 32 Pac. 82; 34 Am. St. 839; 20 L. R. A. 68, and authorities cited in both the prevailing and dissenting opinion. Compare Hortsman v. Covington &c. R. Co. 18 B. Mon. (Ky.) 218, with Eaton v. Boston &c. R. Co. 51 N. H. 504; 12 Am. R. 147, and see Lewis Em. Dom. (2d ed.) § 569. See, also, ante, § 977.

[41] Tuckahoe Canal Co. v. Tuckahoe &c. R. Co. 11 Leigh (Va.), 42; 36 Am. Dec. 374. See, also, Philadelphia &c. R. Co. v. Philadelphia &c. Co. 23 How. (U. S.) 209. And see elaborate notes in 59 L. R. A. 33–94.

[42] Gudger v. Western &c. R. Co. 87 N. Car. 325; 19 Am. & Eng. R. Cas. 144; Hogan v. Kentucky Union R. Co. (Ky.) 21 S. W. 242.

[43] See Watts v. Norfolk &c. R. Co. 39 W. Va. 196; 19 S. E. 521; 23 L. R. A. 674; 45 Am. St. 894; Hunt v. Iowa Cent. R. Co. 86 Iowa, 15; 52 N. W. 668; 41 Am. St. 473; Roushlange v. Chicago &c. R. Co. 115 Ind. 106; 17 N. E. 198; Payne v. Morgan's &c. Co. 38 La. Ann. 164; 58 Am. R. 174; DeBaker v. Southern Cal. R. Co. 106 Cal. 257; 39 Pac. 610; 46 Am. St. 237; Peabody v. Boston &c. R. Co. 181 Mass. 76; 62 N. E. 1047; Kansas City &c. R. Co. v. Lackey, 72 Miss. 881; 16 So. 909; 48 Am. St. 589; Missouri &c. R. v. Mott, 98 Tex. 91; 81 S. W. 285 (stock pens constituting a nuisance). As to measure of damages depending on whether nuisance is temporary or permanent, see Cleveland &c. R. Co. v. King, 23 Ind. App. 573; 55 N. E. 875; Cleveland &c. R. Co. v. Dugan, 18 Ind. App. 435; 48 N. E. 238; Baltimore &c. R. Co. v. Quillen, 34 Ind. App. 330; 72 N. E. 661; 107 Am. St. 158; Railroad Co. v. Higdon, 111 Tenn. 121; 76 S. W. 895; Sedgwick on Damages (8th ed.), §§ 91, 92. See, also, Knapp &c. Co. v. New York &c. R. Co. 76 Conn. 311; 56 Atl. 512; 100 Am. St. 994; and compare McElroy v. Kansas City &c. R. Co. 172 Mo. 546; 72 S. W. 913; Carl v. Sheboygan &c. R. Co. 46 Wis. 625; 1 N. W. 295; Harvey v. Mason &c. R. Co. 129 Ia. 465; 105 N. W. 958.

[44] Sabin v. Vermont Cent. R. Co. 25 Vt. 363; Blackwell v. Lynchburg &c. R. Co. 111 N. Car. 151; 16 S. E. 12; 17 L. R. A. 729, and note; 32 Am. St. 786; Tissue v. Baltimore &c. R. Co. 112 Pa. St. 91; 3 Atl. 667; 56 Am. R. 310; Beauchamp v. Saginaw &c. Co. 50 Mich.

liable, even in the absence of negligence.[45] Thus, in one case it was held that a hotelkeeper could recover for loss of business, or rents and profits, caused by his guests and tenants leaving the hotel in fear of falling rock and debris resulting from the blasting, although there was nothing to show that it was negligently done.[46] But where there is no physical invasion and no negligence, as, for instance, in cases in which the injury is caused by mere vibration necessarily resulting from the blasting, it seems that the company is not liable.[47] So, upon the theory that all damages likely to arise from necessary and proper blasting should be considered and allowed in the condemnation proceedings, and may be presumed to have been so considered and allowed, it is generally held that the company is not liable for casting rocks and debris upon adjoining land in the proper and careful exercise of its authority to use all necessary and appropriate means to construct its road, although it may be liable for not removing the

163; 15 N. W. 65; 45 Am. R. 30; Hinkle v. Richmond &c. R. Co. 109 N. Car. 472; 13 S. E. 884; 26 Am. St. 581; Klepsch v. Donald, 4 Wash. 436; 30 Pac. 991; 31 Am. St. 936. See, also, Chicago v. Murdock, 212 Ill. 9; 72 N. E. 46; 103 Am. St. 221.

[45] Carman v. Steubenville &c. R. Co. 4 Ohio St. 399; Hay v. Cohoes Co. 2 N. Y. 159; 51 Am. Dec. 279; Scott v. Bay, 3 Md. 431; Colton v. Onderdonk, 69 Cal. 155; 16 Pac. 395; 58 Am. R. 556; Munro v. Pacific &c. R. Co. 84 Cal. 515; 24 Pac. 303; 18 Am. St. 248.

[46] Georgetown &c. R. Co. v. Doyle, 9 Colo. 549; 30 Am. & Eng. R. Cas. 231; Georgetown &c. R. Co. v. Eagles, 9 Colo. 544; 13 Pac. 699; 30 Am. & Eng. R. Cas. 228. See, also, Hunter v. Farren, 127 Mass. 481; 34 Am. R. 423.

[47] Booth v. Rome &c. R. Co. 140 N. Y. 267; 35 N. E. 592; 9 Lewis' Am. R. & Corp. R. 92; 37 Am. St. 552; 24 L. R. A. 105; Louisville &c. R. Co. v. Bonhayo, 94 Ky. 67; 21 S. W. 526. See, also, Fenwick v. East London &c. R. Co. L. R. 20 Eq. 544; French v. Vix, 143 N. Y. 90; 37 N. E. 612; Benner v. Atlantic &c. Co. 134 N. Y. 156; 31 N. E. 328; 17 L. R. A. 220; 30 Am. St. 649; Cary Bros. &c. v. Morrison, 129 Fed. 177; 65 L. R. A. 659. In the first case above cited, it was held that the company was not liable in the absence of negligence, although the court which decided it has gone as far at least as any other court towards holding that a railroad company is no more protected from liability in such a case than an individual and that the rule which protects a public corporation does not apply to a railroad company. But see Fitzsimons &c. Co. v. Braun, 199 Ill. 390; 65 N. E. 249; 59 L. R. A. 421; also, as to blasting constituting a private nuisance by an individual. Longten v. Persell, 30 Mont. 306; 76 Pac. 699; 65 L. R. A. 655; 104 Am. St. 723.

debris within a reasonable time,[48] and the rule is the same where the land for the right of way is sold outright to the railroad company.[49] It would seem, however, that this rule exempting the company from further liability where the injury was taken into consideration or may be presumed to have been taken into consideration in allowing damages in the condemnation proceedings, can not apply where the injury caused by blasting is to persons and property not affected by the original condemnation proceedings. A more specific consideration of many of the matters mentioned in this section will be found in the following sections.

§ 1057a. Raising grade so as to necessitate changes in adjoining warehouses and business buildings.—It has been held that a railroad company, having the right under a deed of a right of way to change its grade, and doing so in response to the demands of several property owners and as a public necessity, to more effectually handle freight and to conform to the grade of the connecting main line, is not liable to an abutting owner who thereby has to raise his buildings to conform to the new grade.[50] Other cases relating to change of grade and track elevation generally are cited below.[51]

[48] Whitehouse v. Androscoggin R. Co. 52 Me. 208; Sabin v. Vermont Cent. R. Co. 25 Vt. 363; Dodge v. County Commissioners, 3 Metc. (Mass.) 380; Brown v. Providence &c. R. Co. 5 Gray (Mass.), 35; Proprietors of Locks v. Nashua &c. R. Co. 10 Cush. (Mass.) 385; Watts v. Norfolk &c. R. Co. 39 W. Va. 196; 19 S. E. 570; 23 L. R. A. 674; 45 Am. St. 894; Blackwell v. Lynchburg &c. R. Co. 111 N. Car. 151; 16 S. E. 12; 17 L. R. A. 729, and note; 32 Am. St. 786.

[49] St. Louis &c. R. Co. v. Hanks (Ark.), 97 S. W. 666. See, also, St. Louis &c. Ry. Co. v. Walbrink, 47 Ark. 330; 1 S. W. 545.

[50] Liedel v. Northern Pac. R. Co. 89 Minn. 284; 94 N. W. 877.

[51] Muhlker v. New York &c. R. Co. 197 U. S. 544; 25 Sup. Ct. 522 (reversing 173 N. Y. 549; 66 N. E. 558); Birrell v. New York &c. R. Co. 198 U. S. 390; 25 Sup. Ct. 667; Siegel v. New York &c. R. Co. 200 U. S. 615; 26 Sup. Ct. 756; Ranson v. Sault Ste. Marie, 143 Mich. 661; 107 N. W. 439; Atlantic &c. Ry. Co. v. McKnight, 125 Ga. 328; 54 S. E. 148; State v. Indianapolis &c. R. Co. 160 Ind. 45; 66 N. E. 163; 60 L. R. A. 831; Houston &c. R. Co. v. Dallas, 98 Tex. 396; 84 S. W. 648; 70 L. R. A. 850, and note, with which compare, however, De Lucca v. North Little Rock, 142 Fed. 597; McKeon v. New York &c. R. Co. 75 Conn. 343; 53 Atl. 656; 61 L. R. A. 730; Dolan v. New York &c. R. Co. 175 N. Y. 367; 67 N. E. 612; and see post, §§ 1091, 1113.

§ 1057b. Excavation for right of way injuring lateral support.—A railroad company, like any other proprietor, may be liable to an adjoining property owner for injuries caused by the disturbance of the lateral support to his land in making excavation on the right of way for a road-bed. This right of lateral support from the adjacent soil is an absolute right of property and under the law the owner has a legal remedy for any injury to his soil resulting from the removal of the natural support to which it is entitled. The right to a recovery, it has been held, does not necessarily depend upon negligence but upon the violation of the right of property.[52] The actionable wrong, however, in the case of a railroad excavation, is not simply the excavation, but the act of allowing the abutting owner's land to fall.[53] The damages recoverable in such a case, it has been held, are restricted to the special injury sustained by the land-owner and he cannot recover damages for injury to the lateral support of his property until it has suffered injury, that is, until the earth is so much disturbed that it slides or falls.[54]

§ 1057c. Bridges over navigable waters.—A state has the power to authorize the construction of bridges over navigable rivers situated within its limits in the absence of any action of congress upon the subject.[55] The authority of the United States in this matter is dor-

[52] Schultz v. Bower, 57 Minn. 493; 59 N. W. 631; 47 Am. St. 630. See, also, Nichols v. Duluth, 40 Minn. 389; 42 N. W. 84; 12 Am. St. 743; Foley v. Wyeth, 2 Allen (Mass.), 131; 79 Am. Dec. 771; Gilmore v. Driscoll, 122 Mass. 199; 23 Am. R. 312; McGuire v. Grant, 23 N. J. L. 362; 67 Am. Dec. 49; Kansas City &c. R. Co. v. Schwake, 70 Kan. 141; 78 Pac. 431; Nading v. Denison &c. R. Co. (Tex. Civ. App.) 62 S. W. 97; Bradley v. New York &c. R. Co. 21 Conn. 294, 312; Roushlange v. Chicago &c. R. Co. 115 Ind. 106; 17 N. E. 198; Costigan v. Pennsylvania R. Co. 54 N. J. L. 233; 23 Atl. 810; Mosier v. Oregon &c. Co. 39 Oreg. 256; 64 Pac. 453; 87 Am. St. 652.

[53] Kansas City &c. R. Co. v. Schwake, 70 Kan. 141; 78 Pac. 431. See, also, Backhouse v. Bonomi, 1 Best & Smith R. 970; Schultz v. Bower, 57 Minn. 493; 59 N. W. 631; 47 Am. St. 630.

[54] Kansas City &c. R. Co. v. Schwake, 70 Kan. 141; 78 Pac. 431. For a review of the cases upon both sides of the general question, see note to Larson v. Metropolitan &c. R. Co. 110 Mo. 234; 19 S. W. 416; 16 L. R. A. 330; 33 Am. St. 439, 446, and both principal and dissenting opinions in Parke v. Seattle, 5 Wash. 1; 31 Pac. 310; 32 Pac. 82; 20 L. R. A. 68; 34 Am. St. 839.

[55] Gilman v. Philadelphia, 3 Wall. (U. S.) 713; Monongahela Nav. Co.

mant and inoperative until aroused by some action of congress; but when congress undertakes to act, its regulations are supreme.[56] On this question of conflicting jurisdiction between congress and the state, the supreme court of the United States has said: "It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The States have always exercised this power, and from the nature and objects of the two systems of government, they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the States shall be exerted within the sphere of the commercial power which belongs to the nation."[57] But railroads authorized by either of these powers to erect bridges over navigable waters, should construct the bridges so as not to interfere unnecessarily with the free navigation of the waters they cross.[58] An obstruction to a reasonable extent not preventing navigation, is generally allowed in the erection and repair of bridges.[59] It has been held that the owners of a bridge are not

v. United States, 148 U. S. 312; 13 Sup. Ct. 622; Wilson v. Black Bird Creek Marsh Co. 2 Pet. (U. S.) 245; Kansas City &c. R. Co. v. Wiygul, 82 Miss. 223; 33 So. 965; 61 L. R. A. 578. But see as to bridges over rivers constituting boundaries of states. Covington &c. Bridge Co. v. Kentucky, 154 U. S. 204; 14 Sup. Ct. 1087; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; 5 Sup. Ct. 826; Luxton v. North River Bridge Co. 153 U. S. 525; 14 Sup. Ct. 891.

[56] Pennsylvania v. Wheeling &c. Bridge Co. 13 How. (U. S.) 515; United States v. Union Bridge Co. 143 Fed. 377.

[57] Gilman v. Philadelphia, 3 Wall. (U. S.) 713. That the act of congress leaving it to the Secretary of War to determine whether a certain fact exists necessary to make it lawful is valid, see Miller v. New York, 109 U. S. 385; 3 Sup. Ct. 228; Lake Shore &c. R. Co. v. Ohio, 165 U. S. 365; 17 Sup. Ct. 357.

[58] Illinois River Packet Co. v. Peoria Bridge Assn. 38 Ill. 467; Bailey v. Philadelphia &c. Co. 4 Har. (Del.) 389; 44 Am. Dec. 593; Hickok v. Hine, 23 Ohio St. 523; 13 Am. R. 255; The Nonpariel, 149 Fed. 521. See, also, Harrison v. Hughes, 125 Fed. 860; Clement v. Metropolitan &c. R. Co. 123 Fed. 271.

[59] State v. Portland &c. R. Co. 57 Me. 402; Monongahela Bridge Co. v. Kirk, 46 Pa. St. 112; 84 Am.

liable for accidental obstructions not caused by the construction of the bridge, although the bridge may have contributed thereto.[60] And where a bridge is erected as authorized both by the State and by Congress, or by either when one alone is sufficient, it is not a public nuisance and can not be successfully complained of by one who owns or leases a warehouse above it and merely suffers inconvenience or possible loss of business in common with the rest of the public.[61]

§ 1057d. Obstruction of stream by bridges, trestles and culverts.—The rule is well-settled that a railroad company constructing a bridge or other structure over a stream in so negligent a manner as to divert the stream from its natural course and cause it to set back and overflow the land of an adjoining owner is liable in damages for the injuries thus sustained, unless the flood or freshet was so extraordinary and unprecedented as to amount to an act of God.[62]

Dec. 527; Clarke v. Birmingham &c. Bridge Co. 41 Pa. St. 158; Central Trust Co. v. Wabash &c. R. Co. 32 Fed. 566; Green &c. Nav. Co. v. Chesapeake &c. R. Co. 88 Ky. 1; 10 S. W. 6; 2 L. R. A. 540, and note.

[60] St. Joseph Co. v. Pidge, 5 Ind. 13.

[61] Miller v. New York 109 U. S. 385; 3 Sup. Ct. 228. And the right so granted by congress includes the right to make repairs and renew the superstructure where necessary. United States v. Parkersburg &c. R. Co. 143 Fed. 224; Kansas City &c. R. Co. v. Wiygul. 82 Miss. 223; 33 So. 965; 61 L. R. A. 578. In a very recent case it is held by the supreme court of the United States that the appropriation by eminent domain of land for approaches and terminal facilities necessary to the use of a bridge erected, under the authority of the act of congress of January 26, 1901, over a navigable stream, is not forbidden by that act because the plans submitted to the Secretary of War, and approved by him, although fully subserving the purpose of showing the extent to which navigation would be affected, do not include such terminal and connecting facilities, and can not, under such act, be altered without his consent; and that the owner of property so taken is denied no Federal right because the erection of the bridge was not begun within the time limit set by congress, where the bridge has been constructed without complaint by the Federal authorities, especially as congress, by the act of January 18, 1904, extended the time for its completion. Stone v. Southern &c. Bridge Co. (U. S.) 27 Sup. Ct. 615.

[62] Kankakee &c. R. Co. v. Horan, 131 Ill. 288; 23 N. E. 621; St. Louis &c. R. Co. v. Winkelman, 47 Ill. App. 276; Sherlock v. Louisville &c. R. Co. 115 Ind. 22; 17 N. E. 171; Union Trust Co. v. Cuppy, 26 Kan. 754; Piedmont &c. R. Co. v. McKenzie, 75 Md. 458; 24 Atl. 157; Mellen v. Western &c. R. 4

The railroad company is not bound to provide for an unprecedented flood which could not have been foreseen, but must anticipate and make provisions for such floods as may occur in the ordinary course of nature. It must foresee and provide for unusual storms such as occasionally occur whether they are called ordinary or extraordinary. But the railroad company is not guilty of negligence in failing to provide for a flood which is not only extraordinary, but unprecedented and could not reasonably have been foreseen.[63] It is not enough that the structure was erected according to plans of skillful and competent engineers employed by the company, since it is not the danger which a competent and skillful engineer does in fact anticipate but that which, in the reasonable exercise of his skill, he ought to have anticipated, which the company is bound to provide for.[64] Furthermore if the negligence of the railroad company in the manner of constructing its bridge concurred with the unprecedented flood in producing the overflow the railroad company will be responsible providing the injury would not have happened, but for its negligent acts.[65] The mere fact that the adjoining land-owner gave the railroad company the right to cross his land, which implied his

Gray (Mass.), 301; Abbott v. Kansas City, 83 Mo. 271; 53 Am. R. 581; Omaha &c. R. Co. v. Brown, 16 Neb. 161; 20 N. W. 202; Conhocton &c. Co. v. Buffalo &c. R. Co. 3 Hun (N. Y.), 523; Pittsburg &c. R. Co. v. Gillelana, 56 Pa. St. 445; 94 Am. Dec. 97; Houston &c. R. Co. v. Parker, 50 Tex. 330; Taylor v. Baltimore &c. R. Co. 33 W. Va. 39; 10 S. E. 29; Houghtaling v. Chicago &c. R. Co. 117 Ia. 540; 91 N. W. 811; Jones v. Seaboard Air Line R. Co. 67 S. C. 181; 45 S. E. 188; Berninger v. Sunbury &c. R. Co. 203 Pa. 516; 53 Atl. 361; Standley v. Atchison &c. R. Co. (Mo. App.) 97 S. W. 244; Edwards v. Missouri &c. R. Co. 97 M. App. 103; 71 S. W. 366; International &c. R. Co. v. Walker (Tex. Civ. App.), 97 S. W. 1081; Lampley v. Atlantic Coast Line R. Co. 71 S. C. 156; 50 S. E. 773; Chicago &c. R. Co. v. Buel (Neb.), 107 N. W. 590; Denison v. Barry, 98 Tex. 248; 83 S. W. 5; Atchison &c. R. Co. v. Herman (Kan.), 85 Pac. 817.

[63] Houghtaling v. Chicago &c. R. Co. 117 Ia. 540; 91 N. W. 811; Baltimore &c. R. Co. v. Sulphur Springs School Dist. 95 Pa. 65; 42 Am. R. 529; Libby v. Railroad Co. 85 Me. 34; 26 Atl. 943; 20 L. R. A. 812; Railroad Co. v. Davidson, 25 Tex. Civ. App. 134; 60 S. W. 278; San Antonio &c. R. Co. v. Kiersey, 98 Tex. 590; 86 S. W. 744; Price v. Oregon &c. R. Co. 47 Ore. 350; 83 Pac. 843.

[64] Houghtaling v. Chicago &c. R. Co. 117 Ia. 540; 91 N. W. 811.

[65] Vyse v. Chicago &c. R. Co. 126 Ia. 90; 101 N. W. 736; Jones v. Seaboard Air Line R. Co. 67 S. Car. 181; 45 S. E. 188.

consent to the construction of a bridge over a stream, does not exempt the railroad company from liability for injuries caused by its negligence in the construction of the bridge.[66] But it has been held that the land-owner cannot recover for injuries to which his own negligence has contributed, as for example, where he has constructed dikes along the banks of the stream fencing its flow into a narrow channel and thereby adding to the formation of an ice gorge against the bridge which caused the flooding of his lands.[67] It has been held that the plaintiff in an action for damages for injuries caused by the obstruction of the flow of the stream by a bridge, has the burden of proof to show that the railroad company did not construct the bridge with proper care and skill, having regard to the land-owners above and below the bridge,[68] and that there is a presumption at the outset that there was no negligence in the design and construction of the bridge and this presumption must be overcome.[69] In a recent case in Iowa

[66] Jones v. Seaboard Air Line R. Co. 67 S. Car. 181; 45 S. E. 188. So, it has been held that damages are recoverable by a land-owner against a railway company for negligently maintaining an insufficient culvert or drain in an embankment, whereby his lands are flooded, although damages may have been recovered by plaintiff or his grantor for the location of the road, because the damages then recoverable were to be estimated upon the theory that the road would be constructed and maintained in a reasonably proper and skillful manner. Chicago, Rock Island &c. Ry. Co. v. Andreesen, 62 Neb. 456; 87 N. W. 167; Chicago &c. R. Co. v. Ely (Neb.), 110 N. W. 539.

[67] Peoria &c. R. Co. v. Barton, 38 Ill. App. 469. But compare Harvey v. Mason City &c. R. Co. 129 Ia. 465; 105 N. W. 958.

[68] Chicago &c. R. Co. v. Schaffer, 26 Ill. App. 280.

[69] Berninger v. Sunbury &c. R. Co. 203 Pa. 516; 53 Atl. 361. In Cleveland &c. R. Co. v. Wisehart, 161 Ind. 208; 67 N. E. 993, it is said: "The statute hereinbefore set out expressly authorized the railroad company to construct its road upon or across the stream or water course in controversy, subject to the conditions therein provided, and merely doing what the law authorized certainly affords appellee no cause of action. Appellant undoubtedly had the right to construct the trestle bridge and the embankment, as shown, on its own premises or right of way. These were necessary, as we may assume, to the successful operation of its road. Therefore, to render tortious the act of appellant in allowing or causing the dirt used in the construction of the said embankment to spread or fill up the ditch or water way as alleged, there should have been some averments or allegations to show that the act of filling up the ditch on its own lands, and thereby obstructing the flow of the water, was either willfully or negligently done, to the injury of appellee. Bellinger v. New York &c. R.

several important questions were decided relative to this topic.[70] The railroad company had obtained the right, by condemnation or purchase, to construct its land across the plaintiff's farm and through a shallow pond thereon in 1902. The track was laid on an embankment about six feet high and in constructing the roadbed the defendant attempted to provide for the escape of drainage from the pond in the direction of its natural flow by putting in a tile culvert, which proved insufficient to carry off the water in times of flood and set it back, causing injury to the plaintiff's land and crops. The plaintiff brought the action to recover damages in September, 1903. The court held that an actionable injury was shown; that the fact that after the construction of the culvert the plaintiff dug certain drainage ditches on his land, draining the water in the direction of the culvert, did not affect his right to recover, unless there was evidence showing that the flow of water to be discharged through the culvert was thereby augmented; and that whether the plaintiff was guilty of contributory negligence in regard to such matter, under the evidence, was a question for the jury.[71] The court also laid down in substance the

Co. 23 N. Y. 42; Wallace v. Columbia &c. R. Co. 34 S. C. 62; 12 S. E. 815; Koch v. Delaware &c. R. Co. 54 N. J. L. 401; 24 Atl. 442; Pittsburg &c. R. Co. v. Gilleland, 56 Pa. 445; 94 Am. Dec. 98; Terre Haute &c. R. Co. v. McKinley, 33 Ind. 274; Pennsylvania &c. R. Co. v. Marion, 104 Ind. 239; 3 N. E. 874; Powers v. St. Louis &c. R. Co. 71 Mo. App. 540; 3 Elliott Railroads, §§ 937, 1005, 1057; 1 Chitty Pleading, p. *403. The rule is well-settled that if a person does a lawful act on his own premises he is not liable for damages resulting therefrom, unless the act was so done as to constitute actionable negligence. Wallace v. Columbia &c. Co. supra, is a case, at least to an extent, very similar to the one at bar. The railroad company therein was charged with having obstructed and stopped the natural flow of a stream of water by reason of constructing a dam on its right of way, and thereby causing the water to back upon and flood the lands of the plaintiff to his damage. It was held by the court that in an action against a railroad company for damage done to plaintiff's land, through which a right of way had been given, caused by the obstruction by defendant of flowing streams, the complaint fails to state facts sufficient to constitute a cause of action where it does not allege any facts tending to show that the railroad company, in constructing its roadbed, wantonly or negligently or unskillfully obstructed these streams at their crossing."

[70] Harvey v. Mason City &c. R. Co. 129 Ia. 465; 105 N. W. 958.

[71] The court, indeed, seemed to doubt whether the doctrine of contributory negligence had any proper application in or to such cases,

proposition stated in the syllabus that "where the injury to land caused by the damming of surface waters is one which will continue indefinitely, without change from any cause but human labor, the damages are original, and but one recovery can be had for the decrease in the fair market value of the property on account of the injury; but where the injury is temporary, or of a continuing or intermittent character, the damages are ordinarily regarded as continuous, and one recovery against the wrongdoer is not a bar to separate actions for damages thereafter accruing from the same wrong."[72] And it was held that even if there was no evidence affording a proper measure of actual damages the plaintiff was nevertheless entitled to go to

and apparently left it an open question, citing Randolf v. Bloomfield, 77 Ia. 50; 41 N. W. 562; 14 Am. St. 268, and Correll v. Cedar Rapids, 110 Ia. 333; 81 N. W. 724.

[72] After citing authorities to the effect that the proper test is as above stated, the court said: "Applying the test suggested by the foregoing discussion, we are disposed to hold that damages arising from the occasional flooding of land by reason of an insufficient culvert upon the land of an adjacent proprietor are not original, although if the claim for damages be made and the action be tried on the theory that they are original, the parties will be bound thereby. In this conclusion we are supported by the great preponderance of the authorities. Railroad Co. v. Anderson, 79 Tex. 427; 15 S. W. 484; 23 Am. St. 350; Athens v. Rucker, 80 Ga. 291; 4 S. E. 885; Reid v. Atlanta, 73 Ga. 523; Colrick v. Swinburne, 105 N. Y. 503; 12 N. E. 427; Wells v. Railroad Co. 151 Mass. 46; 23 N. E. 724; 21 Am. St. 423; Hargreaves v. Kimberly, 26 W. Va. 787; 57 Am. R. 121; Esty v. Baker, 48 Me. 495; Canal Co. v. Hitchings, 65 Me. 140; Thayer v. Brooks, 17 Ohio St. 489; 49 Am. Dec. 474; Plate v. Railroad, 37 N. Y. 473; Railroad Co. v. Wachter 123 Ill. 440; 15 N. E. 279; 5 Am. St. 532; Smith v. Railroad, 23 W. Va. 453; Burnett v. Nicholson, 86 N. C. 99; Railroad Co. v. Thillman, 143 Ill. 127; 32 N. E. 529; 36 Am. St. 359; Dorman v. Ames, 12 Minn. 451 (Gil. 347); Carriger v. Railroad Co. 7 Lea (Tenn.), 388; Jungblum v. Railroad Co. 70 Minn. 153; 72 N. W. 971; Railroad Co. v. Schaffer, 124 Ill. 112; 16 N. E. 239. The case of Fowle v. Railroad Co. 107 Mass. 352, which has been quite frequently cited as sustaining the opposite theory is, upon that point, expressly disapproved by the same court in the later case of Aldworth v. Lynn, 153 Mass. 53; 26 N. E. 229; 10 L. R. A. 210; 25 Am. St. 608." The court also distinguished and criticised the case of Powers v. Council Bluffs. 45 Ia. 652; 24 Am. R. 792. As shown in another place, there is considerable conflict upon the general subject, and the holding in this case is not entirely beyond question. See Chicago &c. R. Co. v. Reuter, 223 Ill. 387; 79 N. E. 166.

the jury for nominal damages,[73] if the facts were as claimed, and that the recovery of nominal damages "would operate as an adjudication of the insufficiency of the culvert and be binding upon the parties, in any subsequent action brought for the continuance of the nuisance."

§ 1057e. Artificial channel where natural channel is closed.—A railroad company, if it closes a natural channel, must not violate its duty to land-owners in so doing. On this subject it has been said that a railroad company, which for its own convenience elects to close a natural water course and provide an artificial channel is charged with the duty to make such channel of sufficient capacity to properly carry not only the water then carried by such natural channel but also to anticipate and provide for any lawful increase of the water flow.[74]

§ 1057f. Embankments and structures interfering with the flow of surface waters.—"Surface water," it has been said, "is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters, whether derived from the surface or springs, and it then becomes the running water of the streams and ceases to be surface water."[75] Many of the courts hold that the term does not cover overflow water of a river, which forms a continuous body with the water flowing in the ordinary channel, or water which has departed from the channel presently to return. The identity of the river or

[73] Citing Woodman v. Tufts, 9 N. H. 88; Casebeer v. Mowry, 55 Pa. 423; 93 Am. Dec. 766; Dorman v. Ames, 12 Minn. 451 (Gil. 347); Jackman v. Arlington, 137 Mass. 277; Hooten v. Barnard, 137 Mass. 36; Wells v. New Haven &c. Co. 151 Mass. 46; 23 N. E. 724; 21 Am. St. 423; Gould Waters (3d ed.), § 210; Hathorne v. Stinson, 12 Me. 183; 28 Am. Dec. 167; Plate v. Railroad Co. 37 N. Y. 472; Dixon v. Clow, 24 Wend. (N. Y.) 188; Foster v. Elliott, 33 Iowa, 216; Plumleigh v. Dawson, 1 Gilman (Ill.), 552; 41 Am. Dec. 199; Watson v. Van Meter, 43 Iowa, 76; Tootle v. Clifton, 22 Ohio St. 247; 10 Am. R. 732. Upon the question as to the measure of actual damages under proper evidence, the court also cited and reviewed a number of cases.

[74] Atchison &c. R. Co. v. Jones, 110 Ill. App. 626.

[75] Crawford v. Rambo, 44 Ohio St. 279; 7 N. E. 429; see also, Gould Waters, §§ 263, 264.

stream does not depend on the volume of the water which may happen to flow down its course at any particular season.[76] But there is not entire unanimity among the courts on this question. There are decisions which hold that the flood water of a stream is surface water.[77] In a case where the Mississippi river overflowed its banks and levees into another water course to such an extent that the waters of the latter overflowed its flood channel and were caused to back up over plaintiff's land by defendant railroad company's trestle, which was so constructed as to permit the unobstructed flow of flood waters naturally flowing in such water course, it was held that the water so escaping from the river was surface water.[78] In this country there are two well-defined theories relating to the right and liabilities of different proprietors including railroad companies, as to this water. The common law regards surface waters as a common enemy which every proprietor may fight or get rid of as best he may. He may, broadly speaking, appropriate them to his own use when they come on his premises, or he may obstruct or divert their flow without necessarily incurring any liability to his neighbor, whether above or below him.[79]

[76] Uhl v. Ohio River R. Co. 56 W. Va. 494; 49 S. E. 378; 68 L. R. A. 138; Jones v. Seaboard Air Line R. Co. 67 S. Car. 181; 45 S. E. 188; Fordham v. Northern Pac. R. Co. 30 Mont. 421; 76 Pac. 1040; 66 L. R. A. 556; Crawford v. Rambo, 44 Ohio St. 279; 7 N. E. 429; Barden v. Portage, 79 Wis. 126; 48 N. W. 210; O'Connell v. East Tennessee &c. R. Co. 87 Ga. 246; 13 S. E. 489; 13 L. R. A. 397; 27 Am. St. 246; Sullens v. Chicago &c. R. Co. 74 Ia. 659; 38 N. W. 545; 7 Am. St. 501; Moore v. Chicago &c. R. Co. 75 Ia. 263; 39 N. W. 390; Byrne v. Minneapolis &c. R. Co. 38 Minn. 212; 36 N. W. 339; 8 Am. St. 668; Price v. Oregon R. Co. 47 Ore. 350; 83 Pac. 843.

[77] Cairo &c. R. Co. v. Stevens, 73 Ind. 278; 38 Am. St. 139; New York &c. R. Co. v. Speelman, 12 Ind. App. 372; 40 N. E. 541; Cairo &c. R. Co. v. Brevoort, 62 Fed. 129; 25 L. R. A. 527, and note; Chicago &c. R. Co. v. Reuter, 223 Ill. 387; 79 N. E. 166; Pinkstaff v. Steffy, 216 Ill. 406; 75 N. E. 163 (at least in case of a small stream); Morris v. Council Bluffs, 67 Ia. 343; 25 N. W. 274; 56 Am. R. 343. See, also, McCormick v. Kansas City &c. R. Co. 70 Mo. 359; 35 Am. R. 431, where it is held that a channel or other depression in the ground forms a bank of a river through which water escapes only at the time of high water in the river, is not a natural water course.

[78] Johnson v. Gray's Point &c. R. Co. 111 Mo. App. 378; 85 S. W. 941.

[79] Gould Waters, § 265. See, also, Cleveland &c. R. Co. v. Huddleston, 21 Ind. App. 621; 52 N. E. 1008.

This rule seems to be accepted in Connecticut,[80] Delaware,[81] Indiana,[82] Kansas,[83] Maine,[84] Massachusetts,[85] Minnesota,[86] Mississippi,[87] Missouri,[88] Nebraska,[89] New Jersey,[90] New York,[91] Oregon,[92] South Carolina,[93] Virginia,[94] Wisconsin,[95] Rhode Island,[96] West Virginia.[97] Under the other theory, that of the civil law, the lower of the adjacent proprietors owes a servitude to the upper to receive all natural drainage; and the lower owner cannot reject, nor can the upper owner withhold the supply. Interference with the natural flow of surface water under this theory, is regarded as a nuisance.[98] This theory seems to be accepted by the courts of Alabama,[99] California,[100] Georgia,[101] Illinois,[102] Iowa,[103] Louisiana,[104]

[80] Grant v. Allen, 41 Conn. 156; Chadeayne v. Robinson, 55 Conn. 345; 11 Atl. 592; 3 Am. St. 55.

[81] Chorman v. Queen Anne's R. Co. 3 Penn. (Del.) 407; 54 Atl. 687.

[82] Cairo &c. R. Co. v. Stevens, 73 Ind. 278; 38 Am. R. 139; Jean v. Pennsylvania Co. 9 Ind. App. 56; 36 N. E. 159; Hill v. Cincinnati &c. R. Co. 109 Ind. 511; 10 N. E. 410.

[83] Atchison &c. R. Co. v. Hammer, 22 Kan. 763; 31 Am. R. 216; Chicago &c. R. Co. v. Steck, 51 Kan. 737; 33 Pac. 601.

[84] Greeley v. Maine Cent. R. Co. 53 Me. 200.

[85] Cassidy v. Old Colony R. Co. 141 Mass. 178; 5 N. E. 142.

[86] Rowe v. St. Paul &c. R. Co. 41 Minn. 384; 43 N. W. 76; 16 Am. St. 706, and note; Brown v. Winona &c. R. Co. 53 Minn. 259; 55 N. W. 123; 39 Am. St. 603.

[87] Yazoo &c. R. Co. v. Davis, 73 Miss. 678; 19 So. 487; 32 L. R. A. 262; 55 Am. St. 562; Sinai v. Louisville &c. R. Co. 71 Miss. 547; 14 So. 87.

[88] Cox v. Hannibal &c. R. Co. 174 Mo. 588; 74 S. W. 854.

[89] Lincoln &c. R. Co. v. Sutherland, 44 Neb. 526; 62 N. W. 859; Morrissey v. Chicago &c. R. Co. 38 Neb. 406; 56 N. W. 946.

[90] Davison v. Hutchison, 44 N. J. Eq. 474; 15 Atl. 257.

[91] Moyer v. New York Cent. R. Co. 88 N. Y. 351.

[92] Morton v. Oregon &c. R. Co. (Ore.) 87 Pac. 151.

[93] Edwards v. Charlotte &c. R. Co. 39 S. C. 472; 18 S. E. 58; 22 L. R. A. 246; 39 Am. St. 746.

[94] Norfolk &c. R. Co. v. Carter, 91 Va. 587; 22 S. E. 517.

[95] Schmeckpepper v. Chicago &c. R. Co. 116 Wis. 592; 93 N. W. 533; Johnson v. Chicago &c. R. Co. 80 Wis. 641; 50 N. W. 771; 14 L. R. A. 495; 27 Am. St. 76.

[96] Sweet v. Conley, 20 R. I. 381; 39 Atl. 326.

[97] Neal v. Ohio River R. Co. 47 W. Va. 316; 34 S. E. 914.

[98] Gould Waters, § 266.

[99] Shahan v. Alabama &c. R. Co. 115 Ala. 181; 22 So. 449; 67 Am. St. 20; Central &c. Ry. Co. v. Keyton (Ala.), 41 So. 918.

[100] Gray v. McWilliams, 98 Cal. 157; 32 Pac. 976; 21 L. R. A. 593, and note; 35 Am. St. 163.

[101] Farkas v. Towns, 103 Ga. 150; 29 S. E. 700; 68 Am. St. 88.

Maryland,[105] Nevada,[106] North Carolina,[107] Ohio,[108] Pennsylvania,[109] and Tennessee.[110] In New Hampshire neither of these theories is unqualifiedly accepted. There it is the rule that a lower land-owner has the right to obstruct the flow of surface water upon his premises in the reasonable use and improvement of his land, but he is liable for any injury resulting from an unreasonable obstruction or diversion.[111] Thus in a case where the overflow of a swamp on adjacent lands could not reasonably have been foreseen, by the construction of a side track by a railroad company without a ditch in connection therewith, it was held that the company, if the side track was a reasonable use of the land, was not made liable for the injuries resulting from the original failure to construct the ditch.[112]

§ 1057g. Further of obstruction of surface waters.—Neither of the theories as to the disposition of surface waters, referred to in the last preceding section, authorizes a railroad company to concentrate or accumulate surface waters on its lands and cast them in great volume and force on the lands of another proprietor.[113] But unless standing water on the right of way is a nuisance, a railroad company

[102] Gilham v. Madison Co. R. Co. 49 Ill. 484; 95 Am. Dec. 627; Toledo &c. R. Co. v. Morrison, 71 Ill. 616; Chicago &c. Ry. Co. v. Reuter, 223 Ill. 387; 79 N. E. 166.

[103] Pohlman v. Chicago &c. R. Co. (Iowa), 107 N. W. 1025; Wirds v. Vierkandt (Iowa), 108 N. W. 108.

[104] Martin v. Jett, 12 La. 501; 32 Am. Dec. 120.

[105] Philadelphia &c. R. Co. v. Davis, 68 Md. 281; 11 Atl. 822; 6 Am. St. 440.

[106] Boynton v. Longley, 19 Nev. 69; 6 Pac. 437; 3 Am. St. 781.

[107] Mullen v. Lake Drummond &c. Co. 130 N. C. 496; 41 S. E. 1027; 61 L. R. A. 833, and note.

[108] Butler v. Peck, 16 Ohio St. 335; 88 Am. Dec. 452.

[109] Glass v. Fritz, 148 Pa. St. 324; 23 Atl. 1050; Pfeiffer v. Brown, 165 Pa. St. 267; 30 Atl. 844; 44 Am. St. 600.

[110] Carriger v. East Tennessee &c. R. Co. 7 Lea (Tenn.), 388.

[111] Rindge v. Sargent, 64 N. H. 294; 9 Atl. 723; Priest v. Boston &c. R. Co. 71 N. H. 114; 51 Atl. 667.

[112] Priest v. Boston &c. R. Co. 71 N. H. 114; 51 Atl. 667.

[113] Frisbie v. Cowen, 18 App. (D. C.) 381; Clay v. Pittsburg &c. R. Co. 164 Ind. 439; 73 N. E. 904; New Jersey &c. R. Co. v. Tutt (Ind.), 80 N. E. 420; Ready v. Missouri Pac. R. Co. 98 Mo. App. 467; 72 S. W. 142; Chorman v. Queen Ann's R. Co. 3 Penn. (Del.) 407; 54 Atl. 687; Wickham v. Lehigh Valley R. Co. 85 App. Div. (N. Y.) 182; 83 N. Y. S. 146; Rice v. Norfolk &c. R. Co. 130 N. Car. 375; 41 S. E. 1031; Craft v. Norfolk &c. R. Co. 136 N. Car. 49; 48 S. E. 519; Tyrus v. Kansas City &c. R. Co. 114 Tenn. 579; 86 S.

will not be held negligent in discharging such water on a portion of its own land. It is under a duty in this respect towards other owners only.[114] A Texas statute imposes upon railroad companies in that state the duty to construct necessary culverts and sluices in its road-bed required by the natural lay of the land for necessary drainage thereof, and makes them liable in damages to persons injured by a failure to observe the statute. Where the statute is obeyed the railroad companies are not liable.[115] Under this statute it is not a defense that the company exercised due care in seeking to make sufficient outlets if it did not in fact do so.[116] The duty to construct these culverts cannot be delegated so as to absolve the company from liability for injuries resulting from failure to properly construct the culverts.[117] In the states accepting the civil law on this subject it is required that the railroad company should so construct the outlets as to provide for such heavy and extraordinary rain falls as may be reasonably anticipated in the locality.[118] It is the general rule, that the person entitled to the damages from flooded lands is the one who owned and was in possession of the land when the injury was done and not a subsequent purchaser.[119] The dam-

W. 1074; Gulf &c. R. Co. v. Ryon (Tex. Civ. App.), 72 S. W. 72; Gulf &c. R. Co. v. Harbison (Tex. Civ. App.), 88 S. W. 452; Toole v. Delaware &c. R. Co. 27 Pa. Super. Ct. 577; Branson v. New York Cent. &c. R. Co. 111 App. Div. (N. Y.) 737; 97 N. Y. S. 788.

[114] Fremont &c. R. Co. v. Gayton, 67 Neb. 263; 93 N. W. 163.

[115] Rev. Stat. Tex. 1895, art. 4436. See, also, McFadden v. Missouri &c. R. Co. (Tex. Civ. App.) 92 S. W. 989; Houston &c. R. Co. v. Barr (Tex. Civ. App.), 99 S. W. 437; Taylor v. San Antonio &c. R. Co. 36 Tex. Civ. App. 658; 83 S. W. 738; San Antonio &c. R. Co. v. Dickson (Tex. Civ. App.), 93 S. W. 481.

[116] McFadden v. Missouri &c. R. Co. (Tex. Civ. App.) 92 S. W. 989; San Antonio &c. R. Co. v. Gurley (Tex. Civ. App.), 83 S. W. 842; St. Louis &c. R. Co. v. Baer (Tex. Civ. App.), 86 S. W. 653.

[117] Denison &c. R. Co. v. Barry, 98 Tex. 248; 80 S. W. 634; 83 S. W. 5.

[118] Houghtaling v. Chicago &c. R. Co. 117 Ia. 540; 91 N. W. 811; Texas &c. R. Co. v. Whitaker, 36 Tex. Civ. App. 571; 82 S. W. 1051.

[119] Texas &c. R. Co. v. Brown (Tex. Civ. App.), 86 S. W. 659; Gulf &c. R. Co. v. Provo (Tex. Civ. App.), 84 S. W. 275; Fremont &c. R. Co. v. Gayton, 67 Neb. 263; 93 N. W. 163. A railroad company changed the natural topography of a tract of land, which it then owned, by the digging of a ditch, so as to turn the surface water from its track. Afterwards part of this tract, upon which was the ditch, was old; the purchaser buy-

ages paid for the location of the road are generally held not to include damages from this source. The compensation for the land is estimated on the theory that the road will be constructed in a reasonably proper manner.[120] It has been held, that the question whether water has been diverted from its natural course is an issue of fact for the jury, while the effect of such diversion is a question of law for the court.[121] Where insufficient methods have beeen devised for allowing the flow of surface water through culverts in the roadbed, the company owning the road at the time of the injury is liable, at least after notice thereof, though the embankment was constructed by a predecessor.[122] The construction of an embankment in such a way as to prevent the flow of eighty per cent of the water through the openings has been held proof of negligent construction, in violation of the rights of adjoining land-owners.[123] In a state adopting the common-law view, it has been held that a railroad company may construct its road upon or across water courses and canals, but the law makes it their duty where they cross public ditches and drains, to restore them to their original state and usefulness.[124] The measure of damages for permanent injuries from flooding lands by the erection of these embankments, in jurisdictions where such damages are

ing with the fact of the change having been made open to his observation. Upon his obstructing the ditch suit was brought. It was held that, so far as the defendant is concerned, the natural topography was and is the ground as it was located when he bought it, and he had no right to change what had thus become the natural topography by obstructions causing the water to flow upon the property of the railroad company. Louisville &c. R. Co. v. Binkley, 1 Tenn. Ch. App. 531.

[120] Chicago &c. R. Co. v. Ely (Neb.), 110 N. W. 539; Childers v. Louisville &c. R. Co. 24 Ky. L. 2375; 74 S. W. 241.

[121] Rice v. Norfolk &c. R. Co. 130 N. Car. 375; 41 S. E. 1031.

[122] Chicago &c. R. Co. v. Reuter, 223 Ill. 387; 79 N. E. 166. It is held in Graham v. Chicago &c. R. Co. (Ind. App.) 77 N. E. 57, 1056, that where it is in defiance of statute the purchaser or grantee is liable no matter whether it has notice or not. But compare Cleveland &c. R. Co. v. Wisehart, 161 Ind. 208; 67 N. E. 993.

[123] Lampley v. Atlantic Coast Line R. Co. 63 S. Car. 462; 41 S. E. 517.

[124] Pittsburgh &c. R. Co. v. Greb, 34 Ind. App. 625; 73 N. E. 620; Terre Haute &c. R. Co. v. Soice, 128 Ind. 105, 107; 27 N. E. 429; Lake Erie &c. R. Co. v. Cluggish, 143 Ind. 347; 42 N. E. 743; New York &c. R. Co. v. Hamlet Hay Co. 149 Ind. 344, 347; 47 N. E. 1060, 1061; 49 N. E. 269.

recoverable, has been held to be the depreciation in the value of the land, and is the difference in the value of the land immediately before and immediately after the overflow, and not the difference in value immediately before and after the construction of the embankment.[125] In other jurisdictions, in some instances at least, the measure of damages is held to be the difference in the rental value of the land before and after the injury.[126] In Missouri—a state recognizing the common-law theory—it is held that the measure of recovery for injuries caused by the collection of surface water on the railroad company's premises and its discharge in large quantities on the premises of another, is the actual damage sustained by the land owner up to the beginning of the action, and not the difference between the value of the land just before and just after the injury.[127] For injury to crops, the measure of damages is the value of the crop destroyed, and not the expense of the removal of the obstruction which was the efficient cause of the injury, particularly where the land-owner to have removed such obstruction would have constituted himself a trespasser.[128] It has also been held, that the damages for the destruction of crops consists of the rental value of the land, the cost of fertilization, cost of preparation and cultivation of the crops, value of the services of the owner in overlooking the work, and interest on the amount lost until verdict.[129] The railroad company is in no event liable for damages resulting from causes for which it was not responsible.[130] It has also been held that the land-owner on his

[125] Atlanta &c. R. Co. v. Higdon, 111 Tenn. 121; 76 S. W. 895; Houston &c. R. Co. v. Lensing (Tex. Civ. App.), 75 S. W. 826; Missouri &c. R. Co. v. Bell (Tex. Civ. App.), 93 S. W. 198; Denison &c. R. Co. v. Barry, 98 Tex. 248; 83 S. W. 5, modifying (Tex. Civ. App.) 80 S. W. 634; Texas &c. R. Co. v. Whitaker, 36 Tex. Civ. App. 571; 82 S. W. 1051; Missouri &c. R. Co. v. Green (Tex. Civ. App.), 99 S. W. 573; San Antonio &c. R. Co. v. Kiersey, 98 Tex. 590; 86 S. W. 744.

[126] Baltimore &c. R. Co. v. Quillen, 34 Ind. App. 330; 72 N. E. 661; Atchison &c. R. Co. v. Jones, 110 Ill. App. 626; Standley v. Atchison &c. R. Co. (Mo. App.) 97 S. W. 244.

[127] Ready v. Missouri &c. R. Co. 98 Mo. App. 467; 72 S. W. 142.

[128] Cincinnati &c. R. Co. v. Ward, 120 Ill. App. 212.

[129] Lampley v. Atlantic Coast Line R. Co. 63 S. Car. 462; 41 S. E. 517.

[130] Taylor v. San Antonio &c. R. Co. (Tex. Civ. App.) 83 S. W. 738. In an action against a railroad company for overflowing land by the construction of an embankment, it has been held that where the

part rests under the duty of using efforts to minimize his damages, and cannot recover damages which he could have prevented by the exercise of reasonable care. Thus, it has beeen held proper to admit evidence to prove that the owner of land which has been damaged by reason of obstruction of its system of drainage, could have lessened his damage by constructing another system.[131]

§ 1057h. Hastening the flow of surface water so as to injure land above.—In a recent Iowa case the rather unusual or uncommon question was presented as to whether a railroad company was liable in trespass for accelerating the flow of surface water from its land in such a manner as to draw it from the higher adjoining land so rapidly as to wear away the soil and make ditches in such upper land. It was held that the company was not liable.[132] The surface water was treated as a common enemy and the owner of the servient estate held entitled to get rid of it as best he could, except that he must receive the flowage and could not, therefore, by dams or artificial structures back it up and flood the dominant estate.[133]

§ 1057i. Injuries from stagnant waters.—A railroad company is liable on the principle of nuisance, to an abutting owner where it constructs a ditch along its right of way in such a manner as to allow waters to collect therein and stagnate and pollute the air.[134] In cases of this character where the injury is temporary, the courts generally

evidence shows that the embankment was partially constructed by another, acting independently of defendant, defendant would be liable only for the proportion of the injury contributed to by it; but, if both acted in concert, or if defendant consented to or participated in the conduct of such other in the construction of the embankment, both or either are liable for the entire damages resulting. San Antonio &c. R. Co. v. Gurley (Tex. Civ. App.), 83 S. W. 842.

[131] Atchison &c. R. Co. v. Jones, 110 Ill. App. 626.

[132] Pohlman v. Chicago &c. R. Co. (Ia.) 107 N. W. 1025; 6 L. R. A. (N. S.) 146.

[133] The court said: "We can not conceive that any such further burden may be imposed (upon the owner of the servient estate). This must be so because the necessity out of which the servitude is born is obviously satisfied by acceptance at all times of the water to the extent of the natural flow. Where necessity ends, the reason for the rule, and hence the rule itself, ends."

[134] Cane Belt R. Co. v. Ridgeway (Tex. Civ. App.), 85 S. W. 496.

hold that the measure of damages is the depreciation in the rental value of the property during the time the nuisance exists. Where the injury is permanent the measure of damages has been held to be the difference in the market value of the land before and after the construction of the ditch.[135]

§ 1057j. Other acts constituting a nuisance.—Notwithstanding the general rule that an action can not be maintained for incidental damages which are the result of loss or inconvenience, that is, the necessary consequence of an authorized thing done in an authorized manner and the principle, often invoked and sometimes misleading, that what the legislature has authorized can not well be a nuisance, there are many other instances, in addition to those considered in preceding sections, in which railroad companies have been held liable in damages as for maintaining a nuisance or the like, although they were exercising an authorized power. In most, if not all of them, however, they were guilty of negligence or in some respect exercising the power in a manner not authorized. In a recent case a railroad company had erected and maintained, on a lot occupied by it outside its right of way, a spur track on a trestle ten feet high, extending within five or six feet of the line fence of the adjoining owners, who had acquired their property before the erection of the line, and extending to within about twenty-seven feet of their dwelling and sleeping apartments, and its cars were several times wrecked and dropped over toward the adjoining owners' dwelling, so that they had reasonable grounds to believe and did believe that they were in danger of being hurt, and it was held that the operation of the track constituted a nuisance, for which the railroad was liable.[136] An instruction was also approved, in the same case, to the effect that if trains were negligently operated upon such spur tracks, and kept adjoining owners in constant dread, and because of the proximity of the track to their house, and because of the soot, cinders and smoke, their house was rendered less valuable as a residence and was made uncomfortable and disagreeable to the owners, such facts, if proven by greater weight of evidence, constituted a nuisance, for which the defendant

[135] Cane Belt R. Co. v. Ridgeway (Tex. Civ. App.), 85 S. W. 496.

[136] Thomason v. Seaboard &c. Ry. (N. Car.) 55 S. E. 198. The court distinguished Romer v. Railway Co. 75 Minn. 211; 77 N. W. 825; 74 Am. St. 455, and Dolan v. Railroad, 118 Wis. 362; 95 N. W. 385.

was liable. There are several other decisions in somewhat similar cases to much the same effect.[137] But, on the other hand, the mere construction and use of switch tracks or depots or even of switch yards, in a residence neighborhood, has been held not to render the company liable where they were authorized and due care was used in locating, constructing and operating the same.[138] Where a public road was laid out and opened to the ordinary width, and the statute required railroad companies to reconstruct any such road changed by them, it was held that it must be reconstructed of the original width and that if the company erected buildings of its own within the legal limits or extended a chute across it, though above the surface, the same would constitute a nuisance, and the company should be enjoined.[139] So, damages have been allowed to property owners whose access was cut off or seriously impeded by the obstruction of a street in constructing a railroad, even though the obstruction was not permanent but would terminate with the completion of the work of construction.[140]

§ 1058. Construction contracts.—It is said that it is against public policy to let contracts for the construction of a railroad to a director or officer of the company as "the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal"[141] and on

[137] Baltimore &c. R. Co. v. Fifth Baptist Church, 108 U. S. 317; 2 Sup. Ct. 719; Chicago &c. R. Co. v. First Methodist Church, 102 Fed. 85; 50 L. R. A. 488; Ridge v. Pennsylvania R. Co. 58 N. J. Eq. 172; 43 Atl. 275; Bates v. Holbrook, 171 N. Y. 460; 64 N. E. 181; Willis v. Kentucky &c. Co. 20 Ky. L. 475; 46 S. W. 488; Louisville Terminal Co. v. Jacobs, 109 Tenn. 727; 72 S. W. 954; 61 L. R. A. 188, and other cases cited in notes to section 1056, ante. See, also, Fisher v. Railroad, 102 Va. 363; 46 S. E. 381.

[138] Walther v. Chicago &c. R. Co. 215 Ill. 456; 74 N. E. 461; Georgia R. &c. Co. v. Maddox, 116 Ga. 64; 42 S. E. 315; Dolan v. Railroad, 118 Wis. 362; 95 N. W. 385; Romer v. Railway Co. 75 Minn. 211; 77 N. W. 825; 74 Am. St. 455. But compare Anderson v. Chicago &c. Ry. Co. 85 Minn. 337; 88 N. W. 1001.

[139] Commonwealth v. Delaware &c. R. Co. (Pa.) 64 Atl. 417.

[140] McKeon v. New York &c. R. Co. 75 Conn. 343, 347; 53 Atl. 656; 61 L. R. A. 730, reversed in 189 U. S. 508; 23 Sup. Ct. 853. See, also, Putnam v. Boston &c. R. Co. 182 Mass. 351; 65 N. E. 790.

[141] Flint &c. R. Co. v. Dewey, 14 Mich. 477; Thomas v. Brownville &c. R. Co. 109 U. S. 522; 3 Sup. Ct. 315; 16 Am. & Eng. R. Cas. 557;

the same grounds it has been held that such a contract can not be assigned to a director or officer.[142] An agreement by which directors are to share with the contractor in the profits of a contract with the company can only be confirmed, so as to be binding, by the stockholders and not by the board of directors of which the guilty parties are a part,[143] and even if confirmed by the stockholders and the company, such a contract is open to attack by creditors or bondholders affected by the fraud and may be set aside by a court of equity.[144] Where a construction contract was otherwise free from fraud, however, the fact that the president of the company had an interest in it unknown to the directors, was held, in a recent case, not to render it absolutely void, and all parties interested having tacitly ratified the contract after discovering his interest they were not allowed to disaffirm it long afterwards.[145] But all such contracts are regarded with suspicion and, at least in the absence of good faith, are voidable, or according to some authorities, "void, upon the clearest principles of public policy."[146] Where a construction contract is signed by the

Blake v. Buffalo &c. R. Co. 56 N. Y. 485; European &c. R. Co. v. Poor, 59 Me. 277; Ryan v. Leavenworth &c. R. Co. 21 Kan. 365; Gilman &c. R. Co. v. Kelly, 77 Ill. 426; Wardell v. Union Pac. R. Co. 4 Dill. (U. S.) 330; United States v. Union Pac. R. Co. 98 U. S. 569, 610; Woodstock Iron Co. v. Richmond &c. Co. 129 U. S. 643; 9 Sup. Ct. 402. See, also, McGourkey v Toledo &c. R. Co. 146 U. S. 536; 13 Sup. Ct. 170. Stockholders or bondholders, or a corporation itself may bring suit to set aside a construction contract with a dominant stockholder for his own benefit. Central Trust Co. v. Bridges, 57 Fed. 753; 6 C. C. A. 539.

[142] Paine v. Lake Erie &c. R. Co. 31 Ind. 283; Flint &c. R. Co. v. Dewey, 14 Mich. 477.

[143] Paine v. Lake Erie &c. R. Co. 31 Ind. 283.

[144] Paine v. Lake Erie &c. R. Co. 31 Ind. 283. Such contracts when executed are voidable only upon attack by stockholders or existing creditors, i. e., parties affected by the fraud, and can not be denied on the same ground by the contractor. Robison v. McCracken, 52 Fed. 726, citing Barr v. New York &c. R. Co. 125 N. Y. 263; 26 N. E. 145; Thomas v. Brownville &c. R. Co. 109 U. S. 522; 3 Sup. Ct. 315; Railroad Co. v. Durant, 95 U. S. 576. See Union Pac. R. Co. v. Credit Mobilier, 135 Mass. 367; 16 Am. & Eng. R. Cas. 570.

[145] Augusta &c. R. Co. v. Kittel, 52 Fed. 63. A president of a railway corporation taking an assignment of such a contract will hold it in trust for the company. Risley v. Indianapolis &c. R. Co. 1 Hun (N. Y.), 202; 62 N. Y. 240.

[146] Ante, §§ 276, 348; Wardell v. Union Pac. R. Co. 4 Dill. (U. S.) 330, per Miller, J. See, also, Gilman

company only, but is assigned by the contractor, the assignment is held to be evidence of acceptance by the contractor,[147] and so on the other hand, a company can not repudiate a contract by questioning the authority of the officer who executed it, when the contractor has performed and received pay for a large portion of the work with the knowledge and ratification of the company, and the contractor may recover damages for a wrongful obstruction of the progress of his work.[148] So where contractors submitted bids to receivers for the completion of construction in accordance with the order of the court and a written contract was drawn up and signed by the contractors, and one of the receivers testified that the receivers accepted the same while the other receiver knew the work was going on, but professed ignorance of the contract, it was held that the evidence justified a finding that the work was done under a valid contract with the receivers.[149] Contracts for the construction of railways are subject, in general, to the same rules of construction as other contracts,[150]

&c. R. Co. v. Kelly, 77 Ill. 426; European &c. R. Co. v. Poor, 59 Me. 277; York &c. R. Co. v. Hudson, 19 Eng. L. & Eq. 365; Shepang Voting Trust Cases, 60 Conn. 553; 24 Atl. 32. In Union Pac. R. Co. v. Credit Mobilier, 135 Mass. 367; 16 Am. & Eng. R. Cas. 570, it was held that the granting of a construction contract to a company in which the railway officers were interested was not fraud where the railway stockholders had opportunity to become stockholders in the construction company.

[147] Western M. R. Co. v. Orendorff, 37 Md. 328.

[148] Buffalo &c. Co. v. Whitehead, 8 Grant's Ch. (U. C.) 157.

[149] Girard &c. Co. v. Cooper, 51 Fed. 332; 4 U. S. App. 631.

[150] Williams v. Chicago &c. R. Co. 153 Mo. 487; 54 S. W. 689; Baltimore &c. R. Co. v. Resley, 7 Md. 297. For construction of particular contracts, see Mansfield v. New York &c. R. Co. 102 N. Y. 205; 6 N. E. 386; 24 Am. & Eng. R. Cas. 628; Campbell v. Trustees of Cincinnati &c. Co. 9 Ky. L. 799; 6 S. W. 337; 34 Am. & Eng. R. Cas. 113; Wright v. Kentucky &c. R. Co. 117 U. S. 72; 6 Sup. Ct. 697; 24 Am. & Eng. R. Cas. 312; Brownlee v. Lowe, 117 Ind. 420; 20 N. E. 301; Laidlou v. Hatch, 75 Ill. 11; Ayres v. Chicago &c. R. Co. 52 Iowa, 478; 3 N. W. 522; Smith v. Boston &c. R. Co. 36 N. H. 458; Woodruff v. Rochester &c. R. Co. 108 N. Y. 39; 14 N. E. 832; Wolff v. McGavock, 29 Wis. 290; Snell v. Cottingham, 72 Ill. 161; Hutchinson v. New Sharon &c. R. Co. 63 Iowa, 727; 18 N. W. 915; 16 Am. & Eng. R. Cas. 617; Louisville &c. R. Co. v. Holerbach, 105 Ind. 137; 5 N. E. 28; 24 Am. & Eng. R. Cas. 340; Dudley v. Toledo &c. R. Co. 65 Mich. 655; 32 N. W. 884; 30 Am. & Eng. R. Cas. 236. Time of payment where not specified. Boody v. Rutland &c. R. Co. 24 Vt. 660. Payment on forfeiture. Hennessey

but for the reason that the time within which a railroad must be completed is often prescribed in the charter of the company and that it is a matter of public concern that the road should be well and safely constructed, the law sometimes allows and enforces provisions in this class of contracts which would not usually be binding in ordinary contracts.[151] The right to terminate the contracts is often reserved to the railway company, when, in its opinion, the work is not progressing properly, or the contractor is not duly complying with the provisions of the contract, or his acts are negligent and wrongful.[152] Such a reservation is not equivalent to an arbitrary power to terminate a contract without cause and must be exercised in good faith,[153]

v. Farrell, 4 Cush. (Mass.) 267; Phelan v. Albany &c. R. Co. 1 Lans. (N. Y.) 258. On contract to construct road-bed between two towns, construction to the corporate limits of each will not complete performance. Western Union R. Co. v. Smith, 75 Ill. 496. The practical construction given by the parties should control. Galveston &c. R. Co. v. Johnson, 74 Tex. 256; 11 S. W. 1113. As to classification of material, provisions as to "hard pan," "solid rock" and the like, see Choctaw &c. R. Co. v. Newton, 140 Fed. 225; Fruin-Bambrick Const. Co. v. Ft. Smith &c. R. Co. 140 Fed. 465; Fruin v. Crystal R. Co. 89 Mo. 397; 14 S. W. 557; Wilkin v. Ellersburg Water Co. 1 Wash. 236; 24 Pac. 460. As to the written terms of the contract generally controlling specifications, see Meyer v. Berlandi, 53 Minn. 59; 54 N. W. 937; Early v. O'Brien, 51 App. Div. 569; 64 N. Y. S. 848; Harvey v. United States, 8 Ct. of Cl. 501.

[151] 2 Wood Railroads, § 277; 1 Redfield Law of Railways, § 112.

[152] The validity of such reservations is denied by some authorities which hold that they do not preclude resort to the courts. Kistler v. Indianapolis &c. R. Co. 88 Ind. 460; 12 Am. & Eng. R. Cas. 314; Louisville &c. R. Co. v. Donnegan, 111 Ind. 179; 12 N. E. 153; 34 Am. & Eng. R. Cas. 116. See, also, Starkey v. DeGraff, 22 Minn. 431. But the weight of authority sustains the doctrine that such a stipulation precludes an action at law concerning the matters embraced in the stipulation, unless the estimate of the arbiter is assailed by allegations of fraud or gross error implying bad faith. See Grant v. Savannah &c. R. Co. 51 Ga. 348; Martinsburg &c. R. Co. v. March, 114 U. S. 549; 5 Sup. Ct. 1035; Chicago &c. R. Co. v. Price, 138 U. S. 185; 11 Sup. Ct. 290; 47 Am. & Eng. R. Cas. 298; Fox v. Hempfield R. Co. 2 Abb. (U. S.) 151; Lauman v. Young, 31 Pa. St. 306, and cases cited.

[153] 1 Rorer Railroads, 461; Philadelphia &c. R. Co. v. Howard, 13 How. (U. S.) 307; 1 Am. R. Cas. 70; Martinsburg &c. R. Co. v. March, 114 U. S. 549; 5 Sup. Ct. 1035; Wood v. Chicago &c. R. Co. 39 Fed. 52. However, it has been held that a provision in the contract making the company itself sole arbiter is valid and binding.

but the burden is upon the contractor to show a fraudulant exercise of the reserved power.[154] Although the right be enforced and the contract thus terminated the contractor will not thereby necessarily forfeit such money as he had already earned.[155] It is not unusual for the contract to contain a provision that the contractor shall pay or forfeit a certain sum as liquidated damages, for delay in the work or other deviations from the terms of the agreement, and even though it may be called a penalty such sum is usually regarded as in the nature of liquidated damages.[156] Provision is also sometimes made for payment, in part at least in bonds and stock of the company, and this has been held valid.[157] In defense to a suit against the company

Gray v. Central R. Co. 11 Hun (N. Y.), 70.

[154] 1 Rorer Railroads, 460. Where the contract provides that the estimate of the engineer shall be final and conclusive it will stand until impeached by evidence of fraud or such gross mistake as would imply bad faith. Martinsburg &c. R. Co. v. March, 114 U. S. 549; 5 Sup. Ct. 1035. Citing Kihlberg v. United States, 97 U. S. 398; Sweeney v. United States, 109 U. S. 618; Wood v. Chicago &c. R. Co. 39 Fed. 52.

[155] Philadelphia &c. R. Co. v. Howard, 13 How. (U. S.) 307; 1 Am. Ry. Cas. 70; Memphis &c. R. Co. v. Wilcox, 48 Penn. St. 161; 2 Wood Railroads, § 278. In case of such termination of the contract any percentum reserve retained by the company out of the previous earnings does not inure to the company, but is at once payable to the contractor, less damages incurred, if any, by failure of the contractor to perform. Philadelphia &c. R. Co. Howard, 13 How. (U. S.) 307; 1 Am. R. Cas. 70. Unless the reserve fund is forfeited by terms of the contract. Hennessey v. Farrell, 4 Cush. (Mass.) 267.

[156] Ranger v. Great Western R. 5 Ho. Lds. Cas. 72; 27 Eng. L. & Eq. Cas. 35, 61; Faunce v. Burke, 16 Pa. St. 469; 55 Am. Dec. 519; Philadelphia &c. R. Co. v. Howard, 13 How. (U. S.) 307; Nilson v. Jonesboro, 57 Ark. 168; 20 S. W. 1093; Texas &c. R. Co. v. Rust, 19 Fed. 239; Wolf v. Des Moines &c. R. Co. 64 Iowa, 380; 20 N. W. 481; Easton v. Penn. &c. Canal Co. 13 Ohio, 79; Geiger v. Western &c. R. Co. 41 Md. 4; Elizabethtown &c. R. Co. v. Geoghegan, 9 Bush. (Ky.) 56. See, also, Alcoy &c. R. Co. v. Greenhill, 76 L. T. N. S. 542; Florida Northern R. Co. v. Southern &c. Co. 112 Ga. 1; 37 S. E. 130. But see Cochran v. People's R. Co. 113 Mo. 359; 21 S. W. 6; Clements v. Schuylkill &c. R. Co. 132 Pa. St. 445; 19 Atl. 274. See, generally, 3 Elliott Ev. § 2000. As to value of use of railroad as measure of damages, see Snell v. Cottingham, 72 Ill. 161; but compare Washington &c. R. Co. v. American Car Co. 5 App. Cas. (D. C.) 524. For case in which time was held not to be of the essence of the contract, see Cleveland &c. Ry. Co. v. Scott (Ind. App.), 79 N. E. 226.

[157] See Wells v. Northern Trust

for damages arising from a termination of the contract the company may show the inability of the contractor to perform his obligations and it is not necessary that the company wait until too late to complete the contract before terminating it and thus delay the enterprise when it is obvious that the contractor is unable to perform.[158] But the company has no right to terminate a contract on account of the insolvency of the surety without giving the contractor opportunity to furnish new surety.[159]

§ 1058a. Construction of particular terms.—Cases illustrating the rules of construction and showing the interpretation of many particular contracts are cited in a note to the last preceding section.[160] The classification of material and the construction of many more or less technical terms will often be found somewhat difficult. Many of the terms used in such contracts have come before the courts, and, while their meaning must sometimes depend upon the contest, a reference to the cases in which their meaning has been determined or considered will be of value in determining the meaning of the same term in any particular contract or case. We shall not attempt to define such terms, as they can be better understood by consulting the decisions to which reference is made. Among the terms that have been construed, defined or considered by the courts are "hard pan,"[161] "solid rock,"[162] "loose rock,"[163] "grading,"[164] "surfaced,"[165] "filling

Co. 195 Ill. 288; 63 N. E. 136; Orange &c. R. Co. v. Placide, 35 Md. 315; Hatch v. Minnesota &c. Const. Co. 26 Minn. 451; Barr v New York &c. R. Co. 125 N. Y. 263; 26 N. E. 145; Cleveland &c. R. Co. v. Kelly, 5 Ohio St. 180; McElrath v. Pittsburg &c. R. Co. 55 Pa. St. 189; Boody v. Rutland &c. R. Co. 24 Vt. 660; Kidwell v. Baltimore &c. R. Co. 11 Gratt. (Va.) 676.

[158] Waco Tap. R. Co. v. Shirley, 45 Tex. 355; 13 Am. R. 233.

[159] Waco Tap. R. Co. v. Shirley, 45 Tex. 355; 13 Am. R. 233.

[16] See ante, § 1058, note 150.

[161] Mansfield &c. R. Co. v. Veeder, 17 Ohio, 385; Fruin v. Crystal R. Co. 89 Mo. 397; 14 S. W. 557; Choctaw &c. R. Co. v. Newton, 140 Fed. 225, 236. See, also, Williams v. Chicago &c. R. Co. 153 Mo. 487; 54 S. W. 689.

[162] Fruin-Bambrick Const. Co. v. Ft. Smith &c. Co. 140 Fed. 465.

[163] Lewis v. Chicago &c. R. Co. 49 Fed. 708.

[164] Snell v. Cottingham, 72 Ill. 161.

[165] Western &c. R. Co. v. Smith, 75 Ill. 496.

[166] East Tenn. &c. R. Co. v. Matthews, 85 Ga. 457; 11 S. E. 841.

[167] Central Trust Co. v. Condon, 67 Fed. 84; Barker v. Troy &c. R. Co. 27 Vt. 766.

in,"[166] "build and complete road,"[167] "between termini,"[168] and "borrow pits."[169].

§ 1059. Engineers' estimates and certificates.—Contracts for the construction of railways ordinarily contain stipulations that the company's engineer shall make estimates as to the value, character and progress of the work, and that his decision shall be conclusive and binding upon both parties. Such stipulations are upheld as founded upon a consideration which enters into and becomes a part of the contract.[170] Unlike a submission to arbitration, which can usually be withdrawn before an award is made, these stipulations, having been made upon a consideration, are held irrevocable in the absence of fraud in the procurement of the contract.[171] This view has been criticised by some of the courts on the ground that any agreement intended to preclude resort to the courts would, if valid, render the contract as a basis for legal redress wholly idle, and as against public policy and void,[172] and such seems to be the doctrine announced in

[168] Western &c. R. Co. v. Smith, 75 Ill. 496.

[169] Choctaw &c. R. Co. v. Newton, 140 Fed. 225, 235. See, also, Fruin-Bambrick Const. Co. v. Ft. Smith &c. R. Co. 140 Fed. 465, 469.

[170] Summers v. Chicago &c. R. Co. 49 Fed. 714; Williams v. Chicago &c. R. Co. 112 Mo. 463; 20 S. W. 631; 34 Am. St. 403; McMahon v. New York &c. R. Co. 20 N. Y. 463; Denver &c. Construction Co. v. Stout, 8 Colo. 61; 5 Pac. 627; Delaware &c. R. Co. v. Penn. Coal Co. 50 N. Y. 250; Wilson v. York &c. R. Co. 11 Gill & J. (Md.) 58; Martinsburg &c. R. Co. v. March, 114 U. S. 549; 5 Sup. Ct. 1635; Mitchell v. Kavanagh, 38 Iowa, 286; Candon v. Southside R. Co. 14 Gratt. (Va.) 302; Mansfield &c. R. Co. v. Veeder, 17 Ohio, 385; Easton v. Penn. &c. Canal Co. 13 Ohio, 79; Vanderwerker v. Vermont &c. R. Co. 27 Vt. 130; Howard v. Allegheny &c. R. Co. 69 Pa. St. 489; Lauman v. Young, 31 Pa. St. 306; McCauley v. Keller, 130 Pa. St. 53; 18 Atl. 607; 17 Am. St. 758; 40 Am. & Eng. R. Cas. 509; Snell v. Brown, 71 Ill. 133; Herrick v. Belknap's Estate and Vermont &c. R. Co. 27 Vt. 673; O'Reilly v. Kerns, 52 Pa. St. 214. See, also, Kansas City &c. R. Co. v. Perkins, 88 Tex. 66; 29 S. W. 1048; Fruin-Bambrick Const. Co. v. Ft. Smith &c. R. Co. 140 Fed. 465.

[171] Denver &c. Construction Co. v. Stout, 8 Colo. 61; Herrick v. Belknap's Estate and Vermont &c. R. Co. 27 Vt. 673; O'Reilly v. Kerns, 52 Pa. St. 214; Howard v. Allegheny &c. R. Co. 69 Pa. St. 489.

[172] 1 Redf. Railways, 454; Kistler v. Indianapolis &c. R. Co. 88 Ind. 460; 12 Am. & Eng. R. Cas. 314; Louisville &c. R. Co. v. Donnegan, 111 Ind. 179; 12 N. E. 153; 34 Am. & Eng. R. Cas. 116; Bauer v. Samson Lodge, 102 Ind. 262; 1 N. E.

other analogous cases,[173] but the large majority of American cases involving contracts for the construction of railroads uphold the validity of such an agreement.[174] Even those authorities, however, which maintain most strongly the validity of such stipulations agree that an estimate or certificate which is fraudulent or so grossly erroneous as to imply bad faith on the part of the engineer may be corrected by a court of equity,[175] and that in case estimates are not furnished at the proper time, the contractor may otherwise prove the

571. See 1 Elliott Gen. Pr. § 464, and authorities cited on general question. Also, Hart v. Lauman, 29 Barb. (N. Y.) 410.

[173] It has been decided in many cases that parties can not by contract oust the courts of their ordinary jurisdiction. The clause requiring arbitration is not a condition precedent, but is an independent covenant, for whose breach damages may be recovered in an independent action, but which can not be pleaded in bar of abatement of a suit on the insurance certificate. Smith v. Preferred &c. Assn. 51 Fed. 520; Laflin v. Chicago &c. R. Co. 34 Fed. 859; Tobey v. Bristol, 3 Story (U. S.), 800; Scott v. Avery, 5 H. L. Cas. 811; 1 Story Eq. Jur. § 670.

[174] Mundy v. Louisville &c. R. Co. 67 Fed. 633; Fox v. Hempfield R. Co. 2 Abb. (U. S.) 151; Lauman v. Young, 31 Pa. St. 306; Martinsburg &c. R. Co. v. March, 114 U. S. 549; 5 Sup. Ct. 1035; Chicago &c. R. Co. v. Price, 138 U. S. 185; 11 Sup. Ct. 290; 47 Am. & Eng. R. Cas. 298; Galveston &c. R. Co. v. Henry, 65 Tex. 685; 25 Am. & Eng. R. Cas. 265; Wood v. Chicago &c. R. Co. 39 Fed. 52; Lewis v. Chicago &c. Co. 49 Fed. 708; Choctaw &c. R. Co. v. Newton, 140 Fed. 465; Williams v. Chicago &c. R. Co. 112 Mo. 463; 20 S. W. 631; 34 Am. St. 403; 59 Am. & Eng. R. Cas. 4; Kidwell v. Baltimore &c. R. Co. 11 Gratt. (Va.) 676; St. Paul &c. R. Co. v. Bradbury, 42 Minn. 222; 44 N. W. 1. Under a contract which provided that in case of dispute the decision of the engineer should be final and conclusive, a suit can not be maintained. Howard v. Allegheny &c. R. Co. 69 Pa. St. 489; Reynolds v. Caldwell, 51 Pa. St. 298; O'Reilly v. Kerns, 52 Pa. St 214.

[175] Martinsburg &c. R. Co. v. March, 114 U. S. 549; 5 Sup. Ct. 1035; Kidwell v. Baltimore &c. R. Co. 11 Gratt. (Va.) 676; Kihlberg v. United States, 97 U. S. 398; Gray v. Central Railroad Co. 11 Hun (N. Y.), 70; Wood v. Chicago &c. R. Co. 39 Fed. 52; Grant v. Savannah &c. R. Co. 51 Ga. 348; O'Reilly v. Kerns, 52 Pa. St. 214; Herrick v. Belknap's Est. & Vermont &c. R. Co. 27 Vt. 673; Baltimore &c. R. Co. v. Polly, 14 Gratt. (Va.) 447; Baltimore &c. R. Co. v. Laffertys, 14 Gratt. (Va.) 478. Engineers estimates are not binding when so plainly a violation of the terms of the contract as to amount to fraud. Mills v. Norfolk &c. R. Co. 90 Va. 523; 19 S. E. 171; Dorwin v. Westbrook, 86 Hun (N. Y.), 363; 33 N. Y. Supp. 449.

value of his work.[176] It is well-settled that the engineer's decision can be conclusive only as to matters designated in the contract, and that his powers can not be extended by implication,[177] but there is some difference among the authorities which uphold these stipulations as to how far and over what subjects the engineer's authority extends.

§ 1059a. Engineer's decision—Fraud—What is covered.[178]—Many well-reasoned decisions hold that clear proof of fraud or of such gross error as necessarily implies bad faith is necessary in order to successfully assail the engineer's certificate.[179] There are other decisions to the effect that the courts will relieve against mistakes in

[176] Fletcher v. New Orleans &c. R. Co. 19 Fed. 731; Bean v. Miller, 69 Mo. 384; Crumlish v. Wilmington &c. R. Co. 5 Del. Ch. 270; Crawford v. Wolf, 29 Iowa, 567; Starkey v. DeGraff, 22 Minn. 431; Herrick v. Belknap's Est. & Vt. &c. R. Co. 27 Vt. 673; McMahon v. New York &c. R. Co. 20 N. Y. 463; Williams v. Chicago &c. R. Co. 112 Mo. 463; 20 S. W. 631; 34 Am. St. 403; 59 Am. & Eng. R. Cas. 4.

[177] Galveston &c. R. Co. v. Henry, 65 Tex. 685; 25 Am. & Eng. R. Cas. 265; Lauman v. Young, 31 Pa. St. 306; Drhew v. Altoona City, 121 Pa. St. 401; 15 Atl. 636; Hostetter v. Pittsburgh, 107 Pa. St. 419; Starkey v. DeGraff, 22 Minn. 431; 18 Am. R. 444; Campbell v. Trustees Cincinnati &c. R. Co. 9 Ky. L. 799; 6 S. W. 337; 34 Am. & Eng. R. Cas. 113; Annapolis &c. R. Co. v. Ross, 68 Md. 310; 11 Atl. 820; McGovern v. Bockius, 10 Phila. (Pa.) 438; Denver &c. R. Co. v. Riley, 7 Colo. 494; 4 Pac. 785. See, also, Gubbins v. Lautenschlager, 74 Fed. 160. He can not alter the terms of the contract. Sharpe v. San Paulo &c. R. Co. 27 L. T. R. 699, L. R. 8 Ch. App. Cas. 605n. Where there is an essential alteration of the written contract the engineer's decision will not be conclusive as to the alterations, nor to the balance of the contract if not separated. Malone v. Philadelphia &c. R. Co. 157 Pa. St. 430; 27 Atl. 756.

[178] Part of this section was originally part of § 1059.

[179] If the engineer's decision in such case be honest and does not appear to be tainted with fraud, it will stand, even if somewhat arbitrary and unreasonable. Kidwell v. Baltimore &c. R. Co. 11 Gratt. (Va.) 776; Gray v. Central R. Co. 11 Hun (N. Y.), 70; Zaleski v. Clark, 44 Conn. 218; 26 Am. R. 446; Gibson v. Cranage, 39 Mich. 49; Martinsburg &c. R. Co. v. March, 114 U. S. 549; 5 Sup. Ct. 1035; Kihlberg v. United States, 97 U. S. 398; Sweeney v. United States, 109 U. S. 618; 3 Sup. Ct. 344; McCauley v. Keller, 130 Pa. St. 53; 18 Atl. 607; 17 Am. St. 758; 40 Am. & Eng. R. Cas. 509; Sweet v. Morrison, 116 N. Y. 19; 22 N. E. 276; 15 Am. St. 376; Yeats v. Ballentine, 56 Mo. 530; Bowman v. Stewart, 165 Pa. St. 394; 30 Atl. 988; Central &c. R. Co. v. Spurck, 24 Ill. 587.

measurements and calculation that are apparent on the face of the estimate, or that can be clearly proved, although the contract contains a provision that the engineer's decision upon "every question which can or may arise between the parties in the execution of this contract shall be final."[180] It is held by still other courts that it is in the province of the court to construe the agreement, and that the engineer's general authority to conclusively decide all questions arising between the parties does not extend to questions of construction of the contract.[181] Decisions of the engineer as to the quality of material, efficiency of work, or any question involving the judgment and skill of the engineer will not be disturbed unless bad faith is proven.[182] In a recent decision the general rule is stated that in

[180] Lewis v. Chicago &c. R. Co. 49 Fed. 708. Engineer's estimates may be avoided in chancery on ground of fraud, gross negligence or mistake of fact. Wood v. Chicago &c. R. Co. 39 Fed. 52. "The most irrefragable proof of mistake in fact" may be ground for recovery. Vanderwerker v. Vermont &c. R. Co. 27 Vt. 130. A court of equity has power to correct the estimate for fraud or mistake. Mansfield &c. R. Co. v. Veeder, 17 Ohio, 385. See, also, Baltimore &c. R. Co. v. Scholes, 14 Ind. App. 524; 43 N. E. 156; 56 Am. St. 307, and note; Williams v. Chicago &c. R. Co. 112 Mo. 463; 20 S. W. 631; Norfolk &c. R. Co. v. Mills, 91 Va. 613; 22 S. E. 556. The estimate of the engineer is to be tested by its correctness. Memphis &c. R. Co. v. Wilcox, 48 Pa. St. 161. The presumption is that the engineer's measurements are correct and the burden is upon the plaintiff to overthrow them. Torrance v. Amsden, 3 McLean, 509; Bumpass v. Webb, 4 Port. (Ala.) 65; 29 Am. Dec. 274; Pleasants &c. Co. v. Ross, 1 Wash. (Va.) 156; 1 Am. Dec. 449.

[181] King Iron Bridge &c. Co. v. St. Louis, 43 Fed. 768; 10 L. R. A. 826, and note; Lewis v. Chicago &c. R. Co. 49 Fed. 708; Galveston &c. R. Co. v. Henry & Dilley, 65 Tex. 685; 25 Am. & Eng. R. Cas. 265; Galveston &c. R. Co. v. Johnson, 74 Tex. 256; 11 S. W. 1113; Martinsburg &c. R. Co. v. March, 114 U. S. 549; 5 Sup. Ct. 1035. If the engineer bases his estimates upon an erroneous view of the contract they will not conclude the parties. McAvoy v. Long, 13 Ill. 147; Alton &c. R. Co. v. Northcott, 15 Ill. 49. It is presumed that the parties contract "to abide by a legal award and not an illegal award." Atlanta &c. R. Co. v. Mangham & Prickett, 49 Ga. 266. But if the contractor accepts an estimate based upon a particular construction of the contract he is bound by it. Kidwell v. Baltimore &c. R. Co. 11 Gratt. (Va.) 676.

[182] Ranger v. Great Western &c. R. Co. 1 Eng. R. & Canal Cas. 1; 13 Simons, 368; Lewis v. Chicago &c. R. Co. 49 Fed. 708.

order to successfully attack the engineer's decision, it must be shown that he "was guilty of collusion or fraud or exhibited such an arbitrary and wanton disregard of the complainant's plain rights under the contract as to be equivalent to fraud, or committed errors or mistakes to the complainant's prejudice so gross and palpable as to leave no doubt in the mind of the court that grave injustice was done."[183] In order that the engineer's certificate shall be conclusive the contract must expressly stipulate that his estimate shall be a final adjudication of disputed matters, and it must be plain that the subject is clearly within the submission as his absolute authority can not be extended by implication.[184] It is the general rule that an engineer is not disqualified by reason of being a stockholder in the company, for he is employed by and stands for the company by which he is paid, and ownership of stock does not change his relation to the parties,[185] but it has been held that where an engineer was a

[183] Fruin-Bambrick Const. Co. v. Ft. Smith &c. R. Co. 140 Fed. 465, 468, citing Mundy v. Louisville &c. R. Co. 67 Fed. 633; Lewis v. Chicago &c. R. Co. 49 Fed. 708; Choctaw &c. R. Co. v. Newton, 140 Fed. 225. In the first case cited the evidence was held sufficient to show collusion and bad faith.

[184] Lauman v. Young, 31 Pa. St. 306; Hostetter v. Pittsburg, 107 Pa. St. 419; Drhew v. Altoona City, 121 Pa. St. 401; 15 Atl. 636; Memphis &c. R. Co. v. Wilcox, 48 Pa. St. 161. A provision in a construction contract that there should be a final estimate, by the engineer, of the quantity, character and value of the work according to the terms of the contract, and that upon receiving this certificate and signing a release, the contractor should be paid in full, does not bind the contractor to accept the engineer's estimate as final and conclusive. Central Trust Co. v. Louisville &c. R. Co. 70 Fed. 282. The engineer can not, ordinarily, change the contract and thereby bind the company. Baltimore &c. R. Co. v. Jolly Bros. 71 Ohio St. 92; 72 N. E. 888. See, also, White v. San Rafael &c. R. Co. 50 Cal. 417; Thayer v. Vermont Cent. R. Co. 24 Vt. 440; Alexander v. Robertson, 86 Tex. 511; 26 S. W. 41.

[185] Williams v. Chicago &c. R. Co. 112 Mo. 463; 20 S. W. 631; 34 Am. St. 403; 59 Am. & Eng. R. Cas. 4; Ranger v. Great Western &c. R. Co. 5 H. L. Cas. 72; Monongahela Navigation Co. v. Fenlon, 4 Watts and S. (Pa.) 205; Faunce v. Burke, 16 Pa. St. 469; 55 Am. Dec. 519; Baltimore &c. Railroad Co. v. Polly, 14 Gratt. 447; Smith v. Boston &c. Railroad, 36 N. H. 458. The company itself may be the sole arbiter. Gray v. Central R. Co. 11 Hun (N. Y.), 70. It is held that the engineer of a railway company is not disqualified from certifying payments to a contractor although he has become lessee of the railway and the amount of rent depends upon the payments so certified. Hill

stockholder in the company, and that fact was unknown to the contractors at the time of the agreement making him arbitrator, he was by that reason disqualified and his award was set aside by a court of equity.[186] A duty rests upon the company to employ competent and trustworthy engineers, and to see that estimates are made in a proper time and manner,[187] and in one case it was held that, where the contract provides that the decision of the engineer shall be final as to measurements and estimates of the amount of labor performed, the contractor is entitled to notice and opportunity to be present, and is not concluded by measurements made ex parte.[188] Standing, as he does, in the employ of one of the parties, it is held in some jurisdictions that the estimates and awards of the engineer should receive the closest scrutiny of the courts.[189] Where an estimate by the engineer is required by the terms of the agreement before either an installment or final payment may be demanded, such stipulation is held to be a condition precedent to payment, and the parties, if a dispute arises, must refer the matter in question to the tribunal provided by the contract before resort may be had to the courts,[190] but if the engineer fails or refuses to make estimates or render decisions, it is held that an action at law will lie for compensation.[191]

v. South Staffordshore R. Co. 11 Jur. N. S. 192; 12 L. T. R. 63. But it seems to us that this case carries the doctrine beyond reasonable limits.

[186] Milnor v. Georgia &c. R. Co. 4 Ga. 385.

[187] Smith v. Boston &c. R. Co. 36 N. H. 458; Herrick v. Belknap's Est. and Vermont &c. R. Co. 27 Vt. 673; McMahon v. New York &c. R. Co. 20 N. Y. 463; Kistler v. Indianapolis &c. R. Co. 88 Ind. 460. See Washington Bridge Co. v. Land &c. Co. 12 Wash. 272; 40 Pac. 982.

[188] McMahon v. New York &c. R. Co. 20 N. Y. 463. See, also, Wilson v. York &c. R. Co. 11 Gill & J. (Md.) 58.

[189] Wood v. Chicago &c. R. Co. 39 Fed. 52.

[190] McNamara v. Harrison, 81 Iowa, 486; 46 N. W. 976; President &c. Delaware &c. Canal Co. v. Pennsylvania &c. Co. 50 N. Y. 250; Jackson v. Cleveland, 19 Wis. 400; Hudson v. McCartney, 33 Wis. 331; United States v. Robeson, 9 Pet. (U. S.) 319; Reynolds v. Caldwell, 51 Pa. St. 298; Humaston v. Telegraph Co. 20 Wall. (U. S.) 20; Fox v. The Railroad, 3 Wall. (U. S.) Jr. 243; Herrick v. Belknap's Est. and Vermont &c. R. Co. 27 Vt. 673. It is held in Pennsylvania that the contractor is not entitled to an action in court against the company unless the action of the engineer has been influenced by the company. Reynolds v. Caldwell, 51 Pa. St. 298; Howard v. Allegheny &c. R. Co. 69 Pa. St. 489.

[191] Starkey v. DeGraff, 22 Minn. 431; Wood v. Chicago &c. R. Co.

Estimates having been made or decisions rendered, it has been held that relief can only be found in a court of equity.[192] It has been held that in case of fraudulent estimates, the remedy of the contractor is against the engineer guilty of the fraud, and not against the company,[193] but it seems to us that this decision is unsound, as the engineer, while in one sense an arbitrator, is employed and paid by the company, and stands in its place, and good conscience will not allow the company to profit by his fraud and thus escape liability to the contractor. If the contract provides that the company's engineer shall himself measure and estimate the work, it is essential that its terms be strictly complied with, and an estimate made by a third person, although approved by the engineer, is not binding,[194] but it has been held that if it is provided that the "engineer's certificates" shall be final, the actual measurements and estimates may be made by subordinates.[195] This is determined, of course, by the language of the particular contract. The same rules as to the validity

39 Fed. 52; Kistler v. Indianapolis &c. R. Co. 88 Ind. 460; United States v. Robeson, 9 Pet. (U. S.) 319, 326; Herrick v. Belknap's Est. & Vermont &c. R. Co. 27 Vt. 673. See, also, St. Louis &c. R. Co. v. Kerr, 153 Ill. 182; 38 N. E. 638. If the company should fail to appoint an engineer the contractor has right to action at law. North Lebanon &c. R. Co. v. McGrann, 33 Pa. St. 530; 75 Am. Dec. 624. Unreasonable delay in making estimates, if from fault of company or engineer, entitles the contractor to bring an action at law. Grant v. Savannah &c. R. Co. 51 Ga. 348; Atlanta &c. R. Co. v. Mangham & Prickett, 49 Ga. 266. A request made to the company for such estimates is sufficient, and if they are not produced recovery may be had upon other evidence. McMahon v. New York &c. R. Co. 20 N. Y. 463. But see McIntosh v. Great Western &c. R. Co. 2 De G. & S. 758.

[192] Sharpe v. San Paulo Railway Co. L. R. 8 Ch. 597; Wood v. Chicago &c. R. Co. 39 Fed. 52; Grant v. Savannah &c. Railroad Co. 51 Ga. 348; Mansfield &c. Railroad Co. v. Veeder, 17 Ohio, 385; Lauman v. Young, 31 Pa. St. 306; Martinsburg &c. R. Co. v. March, 114 U. S. 549; 5 Sup. Ct. 1035.

[193] Reynolds v. Caldwell, 51 Pa. St. 298; Howard v. Allegheny &c. R. Co. 69 Pa. St. 489.

[194] Wilson v. York &c. R. Co. 11 Gill & J. (Md.) 38; Snell v. Brown, 71 Ill. 133. See North Lebanon R. Co. v. McGrann, 33 Pa. St. 530; 75 Am. Dec. 624; Sweet v. Morrison, 116 N. Y. 19; 22 N. E. 276; 15 Am. St. 376; McMahon v. New York &c. R. Co. 20 N. Y. 463. Where estimates are prevented by death of the engineer, equity will afford relief. Firth v. Midland R. Co. L. R. 20 Eq. 100.

[195] Chicago &c. R. Co. v. Price, 138 U. S. 185; 11 Sup. Ct. 290; 47 Am. & Eng. R. Cas. 298.

and binding force of engineer's estimates and certificates are held to apply to contracts between contractors and subcontractors, as between the company and contractor, and upon the same grounds.[196]

§ 1060. Extra work.—Where work is performed at the request of the company in addition to that required by the plans, specifications and stipulations in the contract, or, if those plans and specifications are so changed by the company as to require extra work, the contractor is entitled to compensation for the excess, unless the extra labor has been rendered necessary by his own negligence or lack of skill.[197] Thus, where a contractor, at the request of the company encased the embankments with stone to protect them from flood, he was allowed extra compensation, it being shown that the work was not necessary to protect his other construction,[198] but in another case the contractor was required to remove, without compensation, dirt which fell in after cuts had been made.[199] Where the contractor has bound himself to complete the railway for a prescribed amount of money and the agreement waives any claim for extra work or damages or provides that the specified sum shall be the limit of the company's liability, he can not recover beyond the stipulated sum,[200] but if a clause in the contract provides that the engineer may make

[196] O'Reilly v. Kerns, 52 Pa. St. 214; Reynolds v. Caldwell, 51 Pa. St. 298; Guilbault v. McGreevy, 18 Can. Sup. Ct. 609.

[197] Fruin v. Crystal R. Co. 89 Mo. 397; 14 S. W. 557; Seymour v. Long Dock Co. 20 N. J. Eq. 396; Western Union R. Co. v. Smith. 75 Ill. 496; Orange &c. R. Co. v. Placide, 35 Md. 315; Henderson Bridge Co. v. McGrath, 134 U. S. 260; 10 Sup. Ct. 730. For a case in which it was held he could not recover for extra work necessitated by his own negligence, see Vanderhoof v. Shell, 42 Oreg. 578; 72 Pac. 126.

[198] Western Union R. Co. v. Smith, 75 Ill. 496. See, also, Wyandotte &c. R. Co. v. King Bridge Co. 100 Fed. 197; Carroll County v. O'Connor, 137 Ind. 622; 35 N. E. 1006; 37 N. E. 16.

[199] Woodruff v. Rochester &c. R. Co. 108 N. Y. 39; 14 N. E. 832. So, ordinarily, the contractor can not recover for work as extra where it was caused by the engineer rejecting part of the work or the like as authorized by the contract. Bowe v. United States, 42 Fed. 761; Richards v. May, 10 Q. B. D. 400. But see where there is no such provision in the contract, Ohio &c. R. Co. v. Crumbo, 4 Ind. App. 456; 30 N. E. 434.

[200] Sharpe v. San Paulo &c. R. Co. L. R. 8 Ch. 605n; 27 L. T. R. 699; Berlinquet v. Queen, 13 Can. Sup. Ct. 26; Jones v. Queen, 7 Can. Sup. Ct. 570. The contractor takes the risk in such cases of the work be-

changes which shall be paid for by the company, the contractor may recover for the extra work occasioned by such changes.[201] One who contracted for a certain sum to erect depot buildings according to plans and dimensions to be adopted and fixed by the engineer was refused an extra allowance because the buildings required were of larger dimension than the engineer indicated at the time the contract was signed.[202] Under a contract to build and complete a railroad at a stipulated price per mile, side tracks and Y's, being necessary to the operation of the road, are held to be included although not enumerated, and the contractor is not entitled to extra compensation for building them,[203] especially where the contractor, by not asking for an extra allowance therefor in his monthly estimate, has

ing more difficult and expensive than he anticipated, and the like. Venable Const. Co. v. United States, 114 Fed. 763; Moffett v. Rochester, 91 Fed. 28; South &c. R. Co. v. Highland &c. R. Co. 98 Ala. 400; 13 So. 682; 39 Am. St. 74; St. Paul &c. R. Co. v. Bradbury, 42 Minn. 222; 44 N. W. 1; Groton &c. Co. v. Alabama &c. R. Co. 80 Miss. 162; 31 So. 739; Indiana &c. R. Co. v. Adamson, 114 Ind. 282; 15 N. E. 5; Nesbitt v. Louisville &c. R. Co. 2 Spears L. (S. Car.) 697; Sanitary Dist. v. Ricker, 91 Fed. 833; Elliott Roads & Streets (2d ed.), § 534. Mere estimates made by the company or builder do not ordinarily affect the rule. St. Paul &c. R. Co. v. Bradbury, 42 Minn. 222; 44 N. W. 1; Sullivan v. Village of Sing Sing, 122 N. Y. 389; 25 N. E. 366; Cannon v. Wildman, 28 Conn. 472.

[201] Logan v. Stranaham, 12 U. C. Q. B. 15. See, also, Houston &c. R. Co. v. Trentum, 63 Tex. 442; Henderson Bridge Co. v. McGrath, 134 U. S. 260; 10 Sup. Ct. 730; Chicago &c. R. Co. v. Moran, 187 Ill. 316; 58 N. E. 335. But the engineer has no discretion to extend the work and bind the company for payment when not so provided in the contract. O'Brien v. Mayor &c. of New York, 139 N. Y. 543; 35 N. E. 323, affirmed 142 N. Y. 671; 37 N. E. 465; Thayer v. Vermont Cent. R. Co. 24 Vt. 440; Howard v. Pensacola &c. R. Co. 24 Fla. 560; 5 So. 356; Baltimore Cemetery Co. v. Coburn, 7 Md. 202; Woodruff v. Rochester &c. R. Co. 108 N. Y. 39; 14 N. E. 832.

[202] Cannon v. Wildman, 28 Conn. 472. One contracting to make excavations at an agreed price per yard of earth is not entitled to extra pay for removal of hardpan unexpectedly found. Nesbitt v. Louisville &c. R. Co. 2 Spears (S. Car.), 697. But where on account of the unexpected hardship the contractor abandoned the contract, but returned under an agreement by the company to pay him reasonable compensation, the company was held liable under the new contract. Hart v. Lauman, 29 Barb. (N. Y.) 410.

[203] Barker v. Troy &c. R. Co. 27 Vt. 766; Central Trust Co. v. Condon, 67 Fed. 84.

given a practical construction to the contract.[204] Practical construction by the parties in such cases is usually of great and often controlling weight.[205] Under such a contract, extra compensation has also been refused for the building of cattle guards, water-tanks, stock gaps and slides, for the reason that they are considered necessary to the complete construction of the road,[206] but by binding himself "to build and complete the railroad" the contractor did not obligate himself to equip the road with rolling stock or to pay the expenses of engineering, and the court held that he was entitled to compensation for building a temporary track around a mountain so that the road might be in operation while a more direct route was being constructed.[207] Some of the courts have held that where the contract expressly provides that no allowance will be made for extra work unless authorized in writing by the engineer, or some other designated agent, the contractor, in the absence of such writing, can not recover either at law or in equity, although the agent of the company verbally assured him that he would be paid,[208] but on the other hand, it has been held by other courts that where the company had knowledge of the work while it was progressing it could not enjoy the benefit without paying therefor although the contractor might not be able to recover on the express contract.[209] It has also been held that where the contract provides that changes may be

[204] Barker v. Troy &c. R. Co. 27 Vt. 766. But it has been held that the fact that the company had paid similar claims to others does not give such practical construction to the contract as will bind the company, unless the contractor was thereby influenced to perform the work. Vanderwerker v. Vermont &c. R. Co. 27 Vt. 125.

[205] Fulton Co. v. Gibson, 158 Ind. 471; 63 N. E. 982; Galveston &c. R. Co. v. Johnson, 74 Tex. 256; 11 S. W. 1113; Henderson Bridge Co. v. O'Connor, 88 Ky. 303; 11 S. W. 957. See, also, Kidwell v. Baltimore &c. R. Co. 7 Gratt. (Va.) 676; McGrann v. North Lebanon &c. R. Co. 29 Pa. St. 82; Western R. Co. v. Smith, 75 Ill. 496.

[206] Central Trust Co. v. Condon, 67 Fed. 84.

[207] Central Trust Co. v. Condon, 67 Fed. 84.

[208] Thayer v. Vermont &c. R. Co. 24 Vt. 440; Herrick v. Belknap's Est. and Vermont &c. R. Co. 27 Vt. 673; Vanderwerker v. Vermont &c. R. Co. 27 Vt. 125, 130; White v. San Rafael &c. R. Co. 50 Cal. 417; Simpson v. New York &c. R. Co. 19 J. & S. (N. Y.) 419. See, also, Abbott v. Gatch, 13 Md. 314; 71 Am. Dec. 635.

[209] Dyer v. Jones, 8 Vt. 205; Gilman v. Hall, 11 Vt. 510; 34 Am. Dec. 700; Nixon v. Taff &c. R. Co. 7 Hare, 136. See, also, Houston &c. R. Co. v. Trentem, 63 Tex. 442; McLeod v. Gennis, 31 Neb. 1; 47 N.

made and extra work be performed it is usually to be at the contract rate.[210]

§ 1060a. Bonds of contractors—Rights and liabilities of sureties. —Contractors for railroad construction are usually required to give a bond to secure the performance of the contract. Such bonds and the rights and liabilities of the parties are, in general, the same as in other cases where similar bonds are given. They usually provide that the contractor shall pay all claims for labor and materials, and in many, but not all, jurisdictions, the laborer or material man may sue on the bond.[211] The rights and liabilities of the sureties are the same, in general, as in other similar cases.[212] Where the contract expressly provides that changes may be made the surety is usually

W. 473; Lovelock v. King, 1 M. & Rob. 60; Chicago &c. R. Co. v. Mohan, 187 Ill. 281; 58 N. E. 335; Miller v. McCaffrey, 9 Pa. St. 245. See as to when notice is necessary, Kinsley v. Charnley, 33 Ill. App. 553; Essex v. Murray, 29 Tex. Civ. App. 368; 68 S. W. 736; Gibbons Case, 15 Ct. Cl. 174. As to the right to recover on the quantum meruit, see Hinkle v. San Francisco &c. R. Co. 55 Cal. 627; 6 Am. & Eng. R. Cas. 595; Jammison v. Gray, 29 Iowa, 537; Chicago &c. R. Co. v. Vosburgh, 45 Ill. 311; Davis v. Badders, 95 Ala. 348; 10 So. 422; Adams v. Cosby, 48 Ind. 153. The burden, of course, is upon the party claiming extra compensation to show the extra work. Nesbitt v. Louisville &c. R. Co. 2 Spears (S. Car.), 697; Crocker v. United States, 21 Ct. Cl. 255.

[210] Chicago &c. R. Co. v. Vosburgh, 45 Ill. 311, 314. See, also, Board Carrol Co. v. O'Connor, 137 Ind. 622, 631; 35 N. E. 1006; Eigemann v. Board, 82 Ind. 413; Sullivan v. President &c. 122 N. Y. 389; 25 N. E. 366; Clark v. Mayor, 4 N. Y. 338, 340; 53 Am. Dec. 379. But not when of a different character. Wood v. Ft. Wayne, 119 U. S. 312; 7 Sup. Ct. 219.

[211] Young v. Young, 21 Ind. App. 509; 52 N. E. 776. And see as to the rule in other jurisdictions, Mangrum v. Truesdale, 128 Cal. 145; 60 Pac. 775; Baker v. Bryan, 64 Ia. 561; 21 N. W. 83; St. Louis v. Von Puhl, 133 Mo. 561; 34 S. W. 843; 54 Am. St. 695; Fitzgerald v. McClay, 47 Neb. 816; 66 N. W. 828; Buffalo &c. Co. v. McNaughton, 90 Hun (N. Y.), 74; 35 N. Y. S. 453; Gastonia v. McEntee &c. Co. 131 N. Car. 363; 42 S. E. 858; Hamilton v. Gambell, 31 Oreg. 328; 48 Pac. 433; Spokane &c. Co. v. Loy, 21 Wash. 501; 58 Pac. 672. See, also, Elliott Roads & Streets (2d ed.), § 532.

[212] See as to stricter construction against a compensated surety than against a simple accommodation surety, Cowles v. United States &c. Guaranty Co. 32 Wash. 120; 72 Pac. 1032; 98 Am. St. 838; American Surety Co. v. Pauly, 170 U. S. 133, 144; 18 Sup. Ct. 552.

bound by such changes as are made under the contract.[213] It has also been held that even if building or construction contract provides for a written order of the architect or other written notice of the change, it may be waived by the contractor without releasing a compensated surety.[214]

§ 1061. Subcontractors.—A subcontractor is one who takes from the principal contractor a specific part of the work,[215] contracting under and with the principal contractor.[216] The courts have clearly marked and enforced the distinction between subcontractors and laborers, as well as between subcontractors and material men,[217] and

[213] American Surety Co. v. Lauber, 22 Ind. App. 326; 53 N. E. 793; Schreiber v. Worm, 164 Ind. 7; 72 N. E. 852; Fidelity &c. Co. v. Robertson, 136 Ala. 379; 34 So. 933; People's &c. Co. v. Gillard, 136 Cal. 55; 68 Pac. 576; Getchell &c. Co. v. National Surety Co. 124 Ia. 617; 100 N. W. 556; Moore v. School Comrs. (Miss.), 8 So. 509; Howard County v. Baker, 119 Mo. 397; 24 S. W. 200; De Mattos v. Jordan, 15 Wash. 378; 46 Pac. 402.

[214] Cowles v. United States &c. Co. 32 Wash. 120; 72 Pac. 1032; 98 Am. St. 838; Grafton v. Hinkley, 111 Wis. 46; 86 N. W. 859; Village of Chester v. Leonard, 68 Conn. 495; 37 Atl. 397. See, also, Smith v. Molleson, 148 N. Y. 241; 42 N. E. 669.

[215] "We suppose a subcontractor to be one who takes from the principal contractor a specific part of the work, as for instance, one who agrees with the principal contractor to construct ten miles of a railroad out of a line of twenty or more miles which the principal contractor has undertaken to build." Farmers' Loan and Trust Co. v. Canada &c. R Co. 127 Ind. 250; 26 N. E. 784; 11 L. R. A. 740, and note. "A subcontractor is one who has entered into a contract, express or implied, for the performance of an act with a person who has already contracted for its performance." Phillips on Mechanics' Liens, § 44; Lester v. Houston, 101 N. Car. 605; 8 S. E. 366.

[216] Richmond &c. Co. v. Richmond &c. R. Co. 68 Fed. 105; 34 L. R. A. 625. The term contractor as used in statutes may include subcontractors where the context of the statute demands such construction. Kent v. New York &c. R. Co. 12 N. Y. 628; Peters v. St. Louis &c. R. Co. 24 Mo. 586; Mundt v. Sheboygan &c. R. Co. 31 Wis. 451. But if it appear that the term contractor is used in a more limited sense a subcontractor will be excluded. Dawson v. Harrington, 12 Ill. 300. See Phillips Mechanics' Liens, § 44.

[217] Farmers' Loan &c. Co. v. Canada &c. R. Co. 127 Ind. 250; 26 N. E. 784; 11 L. R. A. 740, and note; Barker v. Buell, 35 Ind. 297; Colter v. Frese, 45 Ind. 96; Duncan v. Bateman, 23 Ark. 327; 79 Am. Dec. 109; Huck v. Gaylord, 50 Tex. 578; Pitts v. Bomar, 33 Ga. 96; Chicago &c. R. Co. v. Sturgis, 44 Mich.

the subcontractor is not entitled to a lien under a statute thus protecting "laborers" and "material men." In most states the subcontractor, especially in railway construction, is by statute given a lien on the road or property of the company for his compensation.[218] Stipulations that the estimates and certificates of the company's engineer shall be final and conclusive are binding as between contractor and subcontractor to the same extent, and may be enforced or assailed in the same manner as like stipulations between the original contractor and the company.[219] The subcontractor may be excused from performance by failure of the company to procure right of way,[220] to fix the grade as promised,[221] or by the failure of the contractor to furnish cars as required by the contract,[222] and if, on the strength of promises, he holds himself ready to prosecute the work he can recover for his enforced idleness, as well as for his estimated loss of profits on the contract.[223] Where his contract provides that the work shall be done under the specifications and on the same terms as the original contract, the subcontractor is bound by the same conditions and entitled to the same benefits thereof as the first contractor under the original contract,[224] which is construed with the second contract and as a part of it, as between the contractor and subcontractor. He can not pass by his immediate employer and recover of the company,[225] but if, on default of the contractor, the company, by a duly authorized agent, make such representations or

538; 7 N. W. 213; 6 Am. & Eng. R. Cas. 619.

[218] See post, §§ 1066, 1070.

[219] Faunce v. Burke, 16 Pa. St. 469; 55 Am. Dec. 519; Monongahela &c. Co. v. Fehon, 4 Watts & S. (Pa.) 205; Guilbault v. McGreevy, 18 Can. Sup. Ct. 609; Thayer v. Vermont &c. R. Co. 24 Vt. 440. See Hendrie v. Canadian Bank, 49 Mich. 401; 13 N. W. 792; Maloney v. Malcolm, 31 Mo. 45. See as to general subject, ante, § 1059.

[220] Bean v. Miller, 69 Mo. 384.

[221] Hammond v. Beeson 112 Mo. 190; 20 S. W. 474; O'Connor v. Smith, 82 Tex. 232; 19 S. W. 168.

[222] McAndrews v. Tippett, 39 N. J. L. 105.

[223] Hammond v. Beeson, 112 Mo. 190; 20 S. W. 474; Smith v. O'Donnell, 8 Lea (Tenn.), 468; Phila. &c. R. Co. v. Howard, 13 How. (U. S.) 307; McAndrews v. Tippett, 39 N. J. L. 105.

[224] Price v. Garland, 3 N. Mex. 285; 6 Pac. 472. See, also, Collins v. Barnes, 83 Pa. St. 15.

[225] Lake Erie &c. R. Co. v. Eckler, 13 Ind. 67; Branin v. Connecticut &c. R. Co. 31 Vt. 214. See, also, Powrie v. Kansas Pac. R. Co. 1 Colo. 529; Kelly's Appeal (Pa.), 12 Atl. 256. Compare O'Brien v. Champlain Const. Co. 107 Fed. 338.

promises as induces the subcontractor to go on with the work, a contract based upon a valid consideration arises between the subcontractor and the company, and he will be protected.[226] The subcontractor having contracted for the performance of a particular contract with the principal contractor cannot under his contract be compelled to perform other services outside the contract on the same terms. As to these matters a new contract must be entered into. This principle is illustrated by a case where a contractor having a contract to furnish 100,000 cubic yards of riprapping on a railroad division, contracted with a subcontractor to perform all of the provisions of his contract with the railroad company, and that he, the principal contractor, should be entitled to increase the quantity to an amount not exceeding 300,000 cubic yards if the amount was increased by the railroad company, provided necessary proportional time was given the subcontractor to furnish the increased amount, and that, if a greater price could be obtained therefor, the subcontractor should have the benefit of the proportional increase. Under this contract it was held that the principal contractor's right to require materials to the extent of 300,000 cubic yards from the subcontractor was dependent on the action of the railroad company under its contract with the principal contractor and that neither he nor his successor in interest were entitled to call on the subcontractor to furnish materials to the extent of 300,000 cubic yards for use in other contracts than that entered into with the railroad company.[227] The company has been held liable for materials furnished the subcontractor at its order and on its promise to pay therefor, although not indebted to the contractor,[228] but in the

[226] Chapman v. Pittsburgh &c. R. Co. 18 W. Va. 184; 9 Am. & Eng. R. Cas. 484. Where a sub-contractor placed material on the company's ground and the company took possession of it, although the contractor had defaulted and the subcontractor had failed to perform his contract within the time limited, the company was held liable. Sherwood v. Saginaw &c. R. Co. 53 Mich. 317; 19 N. W. 14; 16 Am. & Eng. R. Cas. 605. So, where drafts of the company are accepted by its treasurer as payment to a sub-contractor for labor, the sum becomes the debt of the company. Ney v. Dubuque &c. R. Co. 20 Iowa, 347. See, also, Iron Mountain &c. R. Co. v. Stansell, 43 Ark. 275; Indianapolis &c. R. Co. v. Miller, 71 Ill. 463. See Mann v. Burt, 35 Kan. 10; 10 Pac. 95.

[227] Shanklin v. Brown, 102 App. Div. (N. Y.) 473; 92 N. Y. S. 860.

[228] Chicago &c. R. Co. v. West, 37 Ind. 211.

absence of any agreement or promise to pay, or any statutory provision to that effect, the liability of the company can not be so extended.[229] The subcontractor, has no right to pledge the credit of the contractor for supplies furnished by third persons, and it has been held that the payment by the contractor of a portion of the bills presented does not amount to a ratification of such a pledge.[230] A subcontractor, employed by an independent contractor is in no such privity of contract with the company as will render it liable for his negligent acts in building its road,[231] unless it assumes direction and control of the work; nor such as will render it liable, either to him or to those employed by him for work performed on the road of the company,[232] unless the contractor stands in the relation of an agent for the railway company in subletting the contract.[233] A subcontractor who has completed his portion of the work to the satisfaction of the chosen engineer is entitled to recover of the contractor the amount agreed upon, and the contractor cannot withhold the percentage reserved to insure good faith performance for the reason that he has not completed his original contract and the company withholds from him an agreed amount.[234]

§ 1062. Breach of contract—Remedies.—Courts of equity usually refuse to enforce specific performance of contracts for the construction of a railroad, for the reason that it would entail upon

[229] St. Louis &c. R. Co. v. Ritz, 30 Kan. 30; 1 Pac. 27; 11 Am. & Eng. R. Cas. 35; Atchison &c. R. Co. v. Davis, 34 Kan. 199; 8 Pac. 146; 25 Am. & Eng. R. Cas. 305.

[230] Wells v. Martin, 32 Mich. 478.

[231] Town v. Rutland &c. R. Co. 28 Vt. 297; Cuff v. Newark &c. R. Co. 35 N. J. L. 17; 10 Am. R. 205.

[232] Not liable to laborers employed by sub-contractor. Indianapolis &c. R. Co. v. O'Reily, 38 Ind. 140; Marks v. Indianapolis &c. R. Co. 38 Ind. 440.

[233] As to what does not constitute such a relation. See Baltzer v. Raleigh &c. R. Co. 115 U. S. 634; 6 Sup. Ct. 216; 24 Am. & Eng. R. Cas. 354. The fact that the contractor is the largest and controlling stockholder in the railroad company does not make him the agent of the company in subletting contracts, although the sub-contractor is ignorant of the relation. Central Trust Co. v. Bridges, 57 Fed. 753.

[234] Blair v. Corby, 29 Mo. 480; McBrien v. Shanly, 24 U. C. C. P. 28. Where such is the agreement the contractor may withhold estimates and pay the laborers and creditors of the sub-contractor and such sums will be applied to the discharge of his debt to the sub-contractor. Solomon v. Nicholas, 113 Ill. 351; 1 N. E. 901.

the courts the supervision of a great number of acts extending over a long period of time, and thus involve an immense amount of labor and detail which does not properly belong to them,[235] and it follows that if the courts will not decree specific performance against the contractor, they will not enforce such contract in favor of the contractor as against the railroad company, since it is well settled that equity will only exercise the power against one party where it can enforce the contract against the other party as well.[236] But in rare instances the court has appointed a receiver to complete the construction of the railroad where the company was out of funds and failure to construct within a limited time would cause the lapse of a land grant, which was the principal security of the bondholders.[237] The contractor may, in a proper case abandon his contract and recover compensation for work already done and profits which he would have otherwise earned if at any time the company, without good cause, prevents him from completing the

[235] Ross v. Union Pacific R. Co. 1 Woolw. (U. S.) 26; South Wales R. Co. v. Wythes, 1 K. & J. 186; Fallon v. Missouri &c. R. Co. 1 Dill (U. S.), 121; Danforth v. Philadelphia &c. R. Co. 30 N. J. Eq. 12; 18 Am. Ry. Rep. 66; Heathcote v. North Staffordshire R. Co. 6 Eng. R. & Canal Cas. 358, 369; Ranger v. Great Western &c. R. Co. 1 Eng. R. & Canal Cas. 1. See, also, Lone Star Salt Co. v. Texas &c. R. Co. (Tex.) 90 S. W. 863, and cases there cited. In Ross v. Union Pac. R. Co. 1 Woolw. (U. S.) 26, the court said: "Years must elapse before this work can be done and paid for. At every step in its progress, the interposition of the court, either by orders in this case, or by decrees in successive cases, may be invoked, if we are at this time to lend the aid of chancery to either of the parties. It is not difficult to foresee the mischiefs of such a course. The rule is settled, even in the English chancery, where the jurisdiction is greatly extended in all such cases, that it will decree specific performance only when it can dispose of the matter by an order capable of being enforced at once; that it will not decree a party to perform a continuous duty, extending over a number of years, but will leave the opposite party to his remedy at law."

[236] Munro v. Wivenhoe &c. R. Co. 4 DeG. J. & S. 723; Peto v. Brighton &c. R. Co. 1 H. & M. 468; Heathcote v. North Staffordshire R. Co. 6 Eng. R. & Canal Cas. 358; Waring v. Manchester &c. R. Co. 7 Hare, 482; Ross v. Union Pac. R. Co. 1 Woolw. (U. S.) 26. See Texas Pac. Co. v. Marshall, 136 U. S. 393; 10 Sup. Ct. 846; 42 Am. & Eng. R. Cas. 637.

[237] Kennedy v. St. Paul &c. R. Co. 2 Dillon (U. S.), 448; Allen v. Dallas &c. R. Co. 3 Woods (U. S.), 316; ante, § 547.

contract,[238] or repeatedly defaults in payment.[239] It has been held however, that where but one default occurred, upon which the contractor abandoned the work, he could not recover damages for the remainder of the work since the breach of the company did not deny the right to complete it.[240] If, by virtue of the stipulation in the contract giving it the right to terminate the contract whenever its engineer was not satisfied with the work or its progress,

[238] Cox v. Western Pac. Co. 47 Cal. 87; Lake Shore &c. R. Co. v. Richards, 40 Ill. App. 560; Whitfield v. Zellnor, 24 Miss. 663. See, also, Roberts v. Glass, 112 Ga. 456; 37 S. E. 704; Vaughn v. Digman, 19 Ky. L. 1340; 43 S. W. 251; American Bonding &c. Co. v. Baltimore &c. R. Co. 124 Fed. 866; Lee v. Briggs, 99 Mich. 487; 58 N. W. 477. The acts of the company must be such as to indicate an intention to prevent completion of the contract, and must in effect prevent performance. Lake Shore &c. R. Co. v. Richards, 40 Ill. App. 560. The measure of damages as regards the uncompleted portion is the difference between the contract price for completing it and the actual cost to the contractor of completing it. Grand Rapids &c. R. Co. v. Van Dusen, 29 Mich. 431; Masterton v. Brooklyn, 7 Hill (N. Y.), 61; 42 Am. Dec. 38, and note. Where one party absolutely repudiates the contract, the other is released from further performance and may sue for damages. Cort v. Ambergate &c. R. 17 Q. B. 127; 6 Eng. L. & Eq. 230; Hochster v. De La Tour, 2 El. & Bl. 678; 20 Eng. L. & Eq. 157.

[239] Grand Rapids &c. R. Co. v. Van Dusen, 29 Mich. 431; Bean v. Miller, 69 Mo. 384; Dobbins v. Higgins, 78 Ill. 440; Wharton v. Winch, 140 N. Y. 287; 35 N. E. 589. See, also, Eastern Arkansas &c. Co. v. Tanner, 67 Ark. 156; 53 S. W. 886; San Francisco &c. Co. v. Dumbarton Land Co. 119 Cal. 272; 51 Pac. 335; Springtown &c. R. Co. v. Riley, 8 Ky. L. 267. Where the contractor has given bond for faithful performance he is entitled to be paid in the manner provided in the contract. If the company withhold money to pay laborers or sub-contractors he may abandon the contract and recover damages. Dobbins v. Higgins, 78 Ill. 440. But where the company, in order to protect itself against liens of laborers and material men, paid their claims, the amount of such claims may be set off in a suit by the contractors against the company, although the abandonment was caused by a breach of the company. Moore v. Taylor, 42 Hun (N. Y.), 45, 651.

[240] Moore v. Taylor, 42 Hun (N. Y.), 45, 651; Wharton v. Winch, 140 N. Y. 287; 35 N. E. 589. But if after breaches of the company have occurred, causing delay, the contractor resumes the work and makes no claim for damages, his assignee in bankruptcy can make no claim for such damages. Geiger v. Western Maryland R. Co. 41 Md. 4.

the company should annul the contract merely for the purpose of injuring or oppressing the contractor or getting the work done cheaper, the contractor is entitled to recover damages for loss of profits.[241] The contractor may recover for any damages resulting to him from delay caused by the negligence or lack of due diligence of the company in performing its part of the contract or in providing him the necessary access or means to prosecute his work; as where the company neglected to procure the dissolution of an injunction which the contractor was bound to obey,[242] to make the necessary preliminary surveys,[243] to procure right of way,[244] or where the contractor was delayed by reason of the failure of the company to do certain preliminary work,[245] or to furnish cars for transportation of material.[246] Where the right is reserved by the company to suspend or delay the work, the company is only authorized to suspend for a reasonable time, after which the contractor may proceed and recover his compensation when the work is completed, and if, during the suspension, he is requested to keep his plant in readiness to proceed, the company is liable for expenses so incurred.[247] It has been held that where the company terminates the contract,

[241] Philadelphia &c. R. Co. v. Howard, 13 How. (U. S.) 307. See, also, Myers v. York &c. R. Co. 2 Curtis (U. S.), 28; South &c. R. Co. v. McLendon, 63 Ala. 266; Black River Lumber Co. v. Warner, 93 Mo. 374; 6 S. W. 210; Smith v. O'Donnell, 8 Lea (Tenn.), 468. In such case it has been held the contractor can recover on the quantum meruit. Merrill v. Ithaca &c. R. Co. 16 Wendell, 586; 30 Am. Dec. 130, and note; 2 Am. R. Cas. 421. But if the company has reserved the right to terminate the contract whenever the enterprise should prove unprofitable the contractor can not insist that the work proceed in the face of failure. Zimmer v. Brooklyn &c. R. Co. 53 Hun (N. Y.), 637; 6 N. Y. S. 316.

[242] Philadelphia &c. R. Co. v. Howard, 13 How. (U. S.) 307.

[243] O'Connor v. Smith, 84 Tex. 232; 19 S. W. 168; Hammond v. Beeson, 112 Mo. 190; 20 S. W. 474.

[244] Bean v. Miller, 69 Mo. 384; Lauman v. Young, 31 Pa. St. 306; Elizabethtown &c. R. Co. v. Pottinger, 10 Bush (Ky.) 185.

[245] Louisville &c. R. Co. v. Hollerbach, 105 Ind. 137; 5 N. E. 28; 24 Am. & Eng. R. Cas. 340.

[246] Louisville &c. R. Co. v. Hollerbach, 105 Ind. 137; 5 N. E. 28; 24 Am. & Eng. R. Cas. 340. See, also, Memphis &c. R. Co. v. Wilcox, 48 Pa. St. 161; McAndrews v. Tippett, 39 N. J. L. 105; McPherson v. San Joaquin Co. (Cal.) 56 Pac. 802; Western &c. R. Co. v. Smith, 75 Ill. 496.

[247] Curnan v. Delaware &c. R. Co. 138 N. Y. 480; 34 N. E. 201.

it can not, on estimates of work already done, retain the per cent reserved to insure good faith performance, beyond actual damages suffered, but the contractor is entitled to the amount beyond indemnity to the company.[248] And where the work was not being completed within the specified time, but the company waived the right to terminate the contract, it was held also to have waived the right to an absolute forfeiture on such account.[249] The amount of the liability of the contractor to the company for failure to complete the work within the time limited or in a proper manner is generally fixed in the contract as a stipulated penalty or forfeiture, which is regarded and enforced as in the nature of liquidated damages.[250]

§ 1063. Liability of the company for injuries resulting from negligence of contractor or his servants.—The liability of the company for injuries resulting from the negligence of the contractor usually depends primarily upon whether or not he is an independent contractor. An independent contractor may be defined as one who, in the course of an independent occupation, prosecutes and directs the work himself, using his own method to accomplish it, and representing the will of the company only as to the result of his work.[251]

[248] Philadelphia &c. R. Co. v. Howard, 13 How. (U. S.) 307; Ricker v. Fairbanks, 40 Me. 43. In one case it was held that the forfeiture provided in the contract could only be enforced within the time fixed for the completion of the work. Walker v. London &c. R. Co. L. R. 1 C. P. D. 518; 36 L. T. R. 53.

[249] Henderson Bridge Co. v. O'Connor, 88 Ky. 303; 11 S. W. 18 and 957. But see McDonell v. Canada &c. R. Co. 33 U. C. Q. B. 313. See, generally, as to waiver, United States v. Walsh, 108 Fed. 502; Woodruff v. Hough, 91 U. S. 596; Austin v. Austin, 47 Vt. 311; Oregon Imp. Co. v. Roach, 117 N. Y. 527; 23 N. E. 168; Atlantic &c. R. Co. v. Delaware Const. Co. 98 Va. 503; 37 S. E. 13.

[250] See ante, § 1058. A fuller treatment of the general subject of breach of the contract, partial performance, and the rights and remedies of the parties, with the citation of numerous authorities, will be found in 30 Am. & Eng. Ency. of Law (2d ed.), 1218–1233, under the head of "Working Contracts."

[251] Jaggard Torts, 229 Shearm. & Redf. Neg. (2d ed.) § 73; 1 Thomp. Neg. (2d ed.) 622; Cooley on Torts, 548; Elliott Roads and Streets, 466; Wabash &c. R. Co. v. Farver, 111 Ind. 195; 12 N. E. 296; 60 Am. R 696; 31 Am. & Eng. R. Cas. 134; Edmundson v. Pittsburgh &c. Co. 111 Pa. St. 316; 2 Atl. 404; Knowlton v. Hoit, 67 N. H. 155; 30 Atl 346; Harrison v. Collins, 86 Pa St. 153; 27 Am. R. 699, and note; Savannah &c. R. Co. v. Phillips, 90 Ga. 829; 17 S. E. 82; Alabama

Generally, where an independent contractor is employed to perform a work lawful in itself and not intrinsically dangerous, the company, if it is not negligent in selecting the contractor, is not liable for the wrongful acts or negligence of such contractor,[252] and in order that the company shall be liable in such a case it must appear that it either exercised or reserved the right to exercise control over the

&c. R. Co. v. Martin, 100 Ala. 511; 14 So. 401. See, also, Boyd v. Chicago &c. R. Co. 217 Ill. 332; 75 N. E. 496, 498.

[252] Boyd v. Chicago &c. Ry. Co. 217 Ill. 332; 75 N. E. 496, 497, 498 (citing text); Chicago &c. R. Co. v. Ferguson, 3 Colo. App. 414; 33 Pac. 684; Wabash &c. R. Co. v. Farver, 111 Ind. 195; 12 N. E. 296; 60 Am. R. 696; 31 Am. & Eng. R. Cas. 134; Waltemeyer v. Wisconsin &c. R. Co. 71 Iowa, 626; 33 N. W. 140; 30 Am. & Eng. R. Cas. 384; St. Louis &c. R. Co. v. Willis, 38 Kan. 330; 16 Pac. 728; 33 Am. & Eng. R. Cas. 397; Speed v. Atlantic &c. R. Co. 71 Mo. 303; Casement v. Brown, 148 U. S. 615; 13 Sup. Ct. 672; McCafferty v. Spuyten &c. R. Co. 61 N. Y. 178; 19 Am. R. 267; Kansas &c. R. Co. v. Fitzsimmons, 18 Kan. 34; Cuff v. Newark &c. R. Co. 35 N. J. L. 17; 10 Am. R. 205; Powlet v. Rutland &c. R. Co. 28 Vt. 297; West v. St. Louis &c. R. Co. 63 Ill. 545; Hughes v. Cincinnati &c. R. Co. 39 Ohio St. 461; Conlon v. Eastern R. Co. 135 Mass. 195; 15 Am. & Eng. R. Cas. 99; Cunningham v. International R. Co. 51 Tex. 503; 32 Am. R. 632; Burton v. Galveston &c. R. Co. 61 Tex. 526; 21 Am. & Eng. R. Cas. 218; King v. New York &c. R. Co. 66 N. Y. 181; 23 Am. R. 37; Bailey v. Troy &c. R. Co. 57 Vt. 252; 52 Am. R. 129; Eaton v. European &c. R. Co. 59 Me. 520; 8 Am. R. 430; Tibbetts v. Knox &c. R. Co. 62 Me. 437; Sweeney v. Boston &c. R. Co. 128 Mass. 5; Edmundson v. Pittsburgh &c. R. Co. 111 Pa. St. 316; 23 Am. & Eng. R. Cas. 423; Elliott Roads and Streets, 466, and cases cited. The rule is more fully and precisely stated by Judge Cooley, who says: "Where the contract is for something that may lawfully be done, and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it and no general control reserved, either as respects the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, the latter is neither liable to third persons for the negligence of the contractor as his master, nor is he master of the persons employed by the contractor, so as to be responsible to third persons for their negligence." Cooley Torts, 548. But see where the contractor is exercising a special charter power of the company. Lesher v. Wabash &c. Co. 14 Ill. 85; 56 Am. Dec. 494; Chicago &c. R. Co. v. McCarthy, 20 Ill. 385; 71 Am. Dec. 285; Cairo &c. R. Co. v. Woolsley, 85 Ill. 370; North Chicago St. R. Co. v. Dudgeon, 184 Ill. 477; 56 N. E. 796.

work, or had the power to choose, direct and discharge the employes of the contractor.[253] In general it may be said that the liability of the company depends upon whether or not it has retained control and direction of the work.[254] But neither the reservation of the power to terminate the contract when in the discretion of the engineer the work is not progressing satisfactorily,[255] the right to exercise general supervision and inspect the work as it progresses,[256] nor the right to enforce forfeitures will change the relation so as to render the company liable.[257] The company may reserve the right to determine what work shall be done,[258] but, as a general rule, the contractor must have control of the means by which it is to be accomplished, or he will not be liable for the consequences.[259] The

[253] Boswell v. Laird, 8 Cal. 469; 68 Am. Dec. 345; Hughes v. Cincinnati &c. R. Co. 39 Ohio St. 461; 15 Am. & Eng. R. Cas. 100; New Orleans &c. R. Co. v. Norwood, 62 Miss. 565; 52 Am. R. 191; Hackett v. W. U. Tel. Co. 80 Wis. 187; 49 N. W. 822; Speed v. Atlantic &c. R. Co. 71 Mo. 303; Burmeister v. New York &c. R. Co. (15 J. & S.) 47 N. Y. S. C. 264; Wabash &c. R. Co. v. Farver, 111 Ind. 195; 12 N. E. 296; 60 Am. R. 696; Cunningham v. International Railroad Co. 51 Tex. 503; 32 Am. R. 632; Hunt v. Pennsylvania R. Co. 51 Pa. St. 475. See 41 Cent. L. J. 6.

[254] Fuller v. Cit. N. B. 15 Fed. 875; Samuelson v. Cleveland &c. Co. 49 Mich. 164; 13 N. W. 499; 43 Am. R. 456; 14 Am. & Eng. Ency. of Law, 830; Warburton v. Great Western R. Co. L. R. 2 Exch. 30; Fulton &c. St. R. Co. v. McConnell, 87 Ga. 756; 13 S. E. 828; New Orleans &c. R. Co. v. Hanning, 15 Wall. (U. S.) 649; 1 Jaggard Torts, 229.

[255] Reedie v. London &c. Co. 4 Exch. 244; Blake v. Ferris, 5 N. Y. 48; 55 Am. Dec. 304, and note; Cuff v. Newark &c. R. Co. 35 N. J. L. 17; 10 Am. R. 205; Wray v. Evans, 80 Pa. St. 102; Schular v. Hudson River R. Co. 38 Barb. (N. Y.) 653.

[256] Eaton v. European &c. R. Co. 59 Me. 520; 8 Am. R. 430; Hunt v. Pennsylvania R. Co. 51 Pa. St. 475; Steel v. Southeastern R. Co. 32 Eng. L. & Eq. 366; Wray v. Evans, 80 Pa. St. 102; Casement v. Brown, 148 U. S. 615; 13 Sup. Ct. 672; Carman v. Steubenville &c. R. Co. 4 Ohio St. 399; Allen v. Willard, 57 Pa. St. 374; Kelly v. Mayor, 11 N. Y. 432.

[257] Tibbetts v. Knox &c. R. Co. 62 Me. 437; Allen v. Willard, 57 Pa. St. 374. This section is quoted this far and approved in St. Louis &c. R. Co. v. Gillihan, 77 Ark. 551; 92 S. W. 793, and in Louisville &c. R. Co. v. Cheatham (Tenn.), 100 S. W. 902, 907.

[258] Schular v. Hudson &c. R. Co. 38 Barb. 653; Callahan v. Burlington &c. R. Co. 23 Iowa, 562. See note to Stone v. Cheshire &c. R. Co. (19 N. H. 427); 51 Am. Dec. 192, 203.

[259] Burmeister v. New York &c. R. Co. (15 J. & S.) 47 N. Y. S. C. 264; Hughes v. Cincinnati &c. R.

fact that the contractor is paid by the day,[260] or that the company pays the employes of the contractor directly,[261] does not necessarily destroy the independent character of the employment. If the company has a public duty to perform, or if statutory duties rest upon it, the employment of an independent contractor, with entire control of prescribed work, can not avert its liability; it must perform those duties or be directly liable for any neglect thereof.[262] If the contract be in itself unlawful, as where the prosecution or result of the work is necessarily a nuisance, the company can not escape liability by letting the work to a contractor.[263] And if the work be intrinsically dangerous in its nature the company will be held

Co. 39 Ohio St. 461; King v. New York &c. R. Co. 66 N. Y. 181; 23 Am. R. 37; New Orleans &c. R. Co. v. Hanning, 15 Wall. (U. S.) 649.

[260] Corbin v. American Mills, 27 Conn. 274; 71 Am. Dec. 63; Forsyth v. Hooper, 11 Allen (Mass.), 419; Harrison v. Collins, 86 Pa. St. 153; 27 Am. R. 699; Hexamer v. Webb, 101 N. Y. 377; 4 N. E. 755; 54 Am. R. 703; 23 Cent. L. J. 249.

[261] Rourke v. White Moss Colliery Co. L. R. 1 C. P. Div. 556.

[262] Carrico v. West Virginia &c. R. Co. 39 W. Va. 86; 19 S. E. 571; 24 L. R. A. 50; Donovan v. Oakland &c. Co. 102 Cal. 245; 36 Pac. 516; Nelson v. Vermont &c. R. Co. 26 Vt. 717; 62 Am. Dec. 614; Houston &c. R. Co. v. Meader, 50 Tex. 77; Bay City &c. R. Co. v. Austin, 21 Mich. 390; Lowell v. Boston &c. R. Co. 23 Pick. (Mass.) 24; 34 Am. Dec. 33, and note; Gray v. Pullen, 34 L. J. Q. B. 265; West Riding &c. R. Co. v. Wakefield Local Board, 33 L. J. M. C. 174; Rockford &c. R. Co. v. Heflin, 65 Ill. 366; Chicago &c. R. Co. v. McCarthy, 20 Ill. 385; 71 Am. Dec. 285; Montgomery &c. Co. v. Montgomery &c. R. Co. 86 Ala. 372; 5 So. 735; City &c. R. Co. v. Moores, 80 Me. 348; 30 Atl. 643; Hole v. Settingbourne R. Co. 6 H. & N. 488; 30 L. J. N. S. Exch. 81; Storrs v. City of Utica, 17 N. Y. 104; 72 Am. Dec. 437; Woodman v. Metropolitan R. Co. 149 Mass. 335; 21 N. E. 482; 14 Am. St. 427; 4 L. R. A. 213; Anderson v. Fleming, 160 Ind. 597; 67 N. E. 443; 66 L. R. A. 119, and extended note; Senford v. Pawtucket St. R. Co. 19 R. I. 537; 35 Atl. 67; 33 L. R. A. 564; Hilliard v. Richardson, 3 Gray (Mass.), 349; 63 Am. Dec. 743. But see Blake v. Ferris, 5 N. Y. 48; 55 Am. Dec. 304.

[263] Stone v. Cheshire &c. R. Co. 19 N. H. 427; 51 Am. Dec. 192, and note; Carmen v. Steubenville &c. R. Co. 4 Ohio St. 399; King v. New York &c. R. Co. 66 N. Y. 181; 23 Am. R. 37; Sabin v. Vermont Central R. Co. 25 Vt. 363. See, also, Southern Ohio R. Co. v. Morey, 47 Ohio St. 207; 24 N. E. 269; 7 L. R. A. 701; North Chicago St. R. Co. v. Dudgeon, 184 Ill. 477; 56 N. E. 796; Chicago v. Murdock, 212 Ill. 9; 72 N. E. 46; 103 Am. St. 221; note to Thomas v. Harrington, 65 L. R. A. 742.

liable for such injuries as might have been contemplated.[264] However, if the nuisance is not a necessary incident to the work, but arises from the manner in which it is conducted,[265] or if the contractor use unnecessarily dangerous means not contemplated by the parties, the fault is imputed to him alone.[266] Where blasting is contemplated by the contract, the company may be liable for such injuries as will result directly from the acts which the contractor is authorized to do, if he does them in a proper manner; but for those injuries which arise from the careless or wrongful acts of the contractor or his servants in employing blasting as a means of performing the work or in conducting the blasting authorized by the contract, the company will be in nowise liable.[267] Where the company contracts to haul the material for the contractor and operates its trains for such purpose entirely by its own employes, the contractor having no control of the train, the company is liable for injuries resulting from the negligent running of the train,[268] but where the contract gives

[264] Booth v. Rome &c. R. Co. 17 N. Y. S. 336; Stone v. Cheshire &c. R. Co. 19 N. H. 427; 51 Am. Dec. 192; Carman v. Steubenville &c. R. Co. 4 Ohio St. 399; Joliet v. Harwood, 86 Ill. 110; 29 Am. R. 17; Logansport v. Dick, 70 Ind. 65; 36 Am. R. 166. See, also, note to Jacobs v. Fuller &c. Co. 65 L. R. A. 833.

[265] Tibbetts v. Knox &c. R. Co. 62 Me. 437; McCafferty v. Spuyten &c. R. Co. 61 N. Y. 178; 19 Am. R. 267; Bailey v. Troy &c. R. Co. 57 Vt. 252; 52 Am. R. 129; Atlanta &c. R. Co. v. Kimberly, 87 Ga. 161; 27 Am. St. 231, and note; 13 S. E. 277.

[266] West v. St. Louis &c. R. Co. 63 Ill. 545; Hackett v. W. U. Tel. Co. 80 Wis. 187; 49 N. W. 822. See Elliott Roads and Streets (2d ed.), § 633; 14 Am. & Eng. Ency. of Law, 832n.

[267] McCafferty v. Spuyten &c. R. Co. 61 N. Y. 178; 19 Am. R. 267; Tibbetts v. Knox &c. R. Co. 62 Me. 437; Edmundson v. Pittsburgh &c. R. Co. 111 Pa. St. 316; 2 Atl. 404; Booth v. Rome &c. R. Co. 17 N. Y. S. 336; 63 Hun (N. Y.), 624; Carman v. Steubenville &c. R. Co. 4 Ohio St. 399; Tiffin v. McCormack, 34 Ohio St. 638; 32 Am. R. 408; See, also, Cuff v. Newark R. Co. 35 N. J. L. 17; 10 Am. R. 205. But see, ante, § 1057. An examination of the cases shows that the conflict sometimes referred to by writers is only an apparent one and that the rules laid down in the text have been followed in both classes of cases. See note to Blumb v. City of Kansas, 84 Mo. 112; 54 Am. R. 87. See, also, and compare notes in 65 L. R. A. 644, 645, 742, 833.

[268] Burton v. Galveston &c. R. Co. 61 Tex. 526; 21 Am. & Eng. R. Cas. 218; Chicago &c. R. Co. v. Clark, 26 Neb. 645; 42 N. W. 703; 38 Am. & Eng. R. Cas. 192; Railroad v. Norwood, 62 Miss. 565; 52 Am. R. 191. But see Illinois Central R.

the contractor the right to control the train, the liability rests upon him.[269] However, it is held that if the railroad be operated by the contractor for purposes of traffic with the knowledge or authority of the company, he is considered the agent of the company for that purpose, and the company is liable for his negligence.[270] For trespass in entering upon land under the franchise of a railroad company, the company may be held liable, although the actual entry was made by contractors. So, where the contractor cuts trenches and throws up embankments, hauls stone across adjacent premises, cuts down trees, or leaves waste dirt upon arable land, in the exercise of the charter power, the company is liable, unless the contractor has exceeded his authority,[271] and a wrongful appropriation by an

Co. v. Finnigan, 21 Ill. 646; Chicago &c. R. Co. v. Whipple, 22 Ill. 105.

[269] Miller v. Minnesota &c. R. Co. 76 Iowa, 655; 39 N. W. 188; 38 Am. & Eng. R. Cas. 234; 14 Am. St. 258; Cunningham v. International R. Co. 51 Tex. 503; 32 Am. R. 632; Central R. & B. Co. v. Grant, 46 Ga. 417; Union &c. R. Co. v. Hause, 1 Wyo. 27; Meyer v. Midland &c. R. Co. 2 Neb. 319; Kansas &c. R. Co. v. Fitzsimmons, 18 Kan. 34; Rome &c. R. Co. v. Chasteen, 88 Ala. 591; 7 So. 94; Powell v. Construction Co. 88 Tenn. 692; 13 S. W. 691; 17 Am. St. 925.

[270] Lakin v. Willamette &c. R. Co. 13 Ore. 436; 11 Pac. 68; 57 Am. R. 25, and note; Cogswell v. West &c. Elec. Ry. Co. 5 Wash. 46; 31 Pac. 411; 7 Lewis' Am. R. & Corp. 48; Chattanooga &c. R. Co. v. Whitehead, 89 Ga. 190; 15 S. E. 44.

[271] West v. St. Louis &c. R. Co. 63 Ill. 545; Rockford &c. R. Co. v. Wells, 66 Ill. 321; St. Louis &c. R. Co. v. Drennan, 26 Ill. App. 263; Vermont &c. R. Co. v. Baxter, 22 Vt. 365; Alabama &c. R. Co. v. Williams, 92 Ala. 277; 9 So. 293. See, also, Alabama Midland R. Co. v. Martin, 100 Ala. 511; 14 So. 401; St. Louis &c. R. Co. v. Knott, 54 Ark. 424; 16 S. W. 9; Bloomfield R. Co. v. Grace, 112 Ind. 130; 13 N. E. 680; Hughes v. Cincinnati &c. R. Co. 39 Ohio St. 461; New Orleans &c. R. Co. v. Reese, 61 Miss. 581. There are many authorities that hold that the company is liable for improper entries, and all abuses of the right of eminent domain committed by the contractor. Lesher v. Wabash Nav. Co. 14 Ill. 85; 56 Am. Dec. 494, and note; Chicago &c. R. Co. v. Whipple, 22 Ill. 105; Chicago &c. R. Co. v. Woosley, 85 Ill. 370; Vermont &c. R. Co. v. Baxter, 22 Vt. 365; Macon &c. R. Co. v. Mayes, 49 Ga. 355; 15 Am. R. 678; Cunningham v. International R. Co. 51 Tex. 503; 32 Am. R. 632. See, also, Ullman v. Hannibal &c. R. Co. 67 Mo. 118; Leber v. Minneapolis &c. R. Co. 29 Minn. 256; 13 N. W. 31; Houston &c. R. Co. v. Meador, 50 Tex. 77. Land-owners who stand by and permit contractors to commit waste on adjacent soil without objection can not recover damages in a court of equity. Murdfeldt v. New York &c. R.

independent contractor will render a company liable if it ratifies his acts.[272] But for trespasses by contractors or subcontractors, which were not the natural result of the work, or were not authorized or directed by the company, and not done under its charter, no liability attaches to the company.[273] The negligent selection of an incompetent contractor may render the company liable for his negligent or wrongful acts,[274] and where injury is caused by defective construction, which was inherent in the original plan of the employer, the fault is imputed to him.[275] Where the contract provides that the company shall furnish appliances or material the liability of the company for injuries resulting from defects in such appliances or material furnished depends largely upon the circumstances of each case.[276]

Co. 102 N. Y. 703; 7 N. E. 404; 25 Am. & Eng. R. Cas. 144.

[272] Bloomfield R. Co. v. Grace, 112 Ind. 128; 13 N. E. 680; Lesher v. Wabash Nav. Co. 14 Ill. 85; 56 Am. Dec. 494. See, also, Eaton v. European &c. R. Co. 59 Me. 520; 8 Am. R. 430.

[273] Eaton v. European &c. R. Co. 59 Me. 520; 8 Am. R. 430; St. Louis &c. R. Co. v. Knott, 54 Ark. 424; 16 S. W. 9; Hughes v. Cincinnati &c. R. Co. 39 Ohio St. 461; Steel v. South Eastern R. Co. 16 C. B. 550; Waltemeyer v. Wisconsin &c. R. Co. 71 Iowa, 626; 33 N. W. 140; 30 Am. & Eng. R. Cas. 384; Clark v. Vermont &c. R. Co. 28 Vt. 103; Clark v. Hannibal &c. R. Co. 36 Mo. 202; Callahan v. Burlington &c. R. Co. 23 Iowa, 562. See Salliotte v. King Bridge Co. 122 Fed. 378; 65 L. R. A. 620, and note; St. Louis &c. R. Co. v. Gillihan, 77 Ark. 551; 92 S. W. 793 (citing text).

[274] Jaggard Torts, 232; 1 Thomp. Neg. (2d ed.), § 677; Berg v. Parsons, 84 Hun (N. Y.), 60; 31 N. Y. S. 1091; Norwalk Gas Light Co. v. Norwalk, 63 Conn. 495; 28 Atl. 32; Cuff v. Newark &c. Railroad Co. 35 N. J. L. 17; 10 Am. R. 205; Robbins v. Chicago City, 4 Wall. (U. S.) 657.

[275] Atlanta &c. R. Co. v. Kimberly, 87 Ga. 161; 13 S. E. 277; 27 Am. St. 231, and note, and cases cited.

[276] See King v. New York &c. R. Co. 66 N. Y. 181; 23 Am. R. 37; Tobin v. Portland &c. R. Co. 59 Me. 183; 8 Am. R. 415. Where a poisonous substance was applied to timber to prevent decay and a servant of the contractor was injured thereby the company was held not liable. West v. St. Louis &c. R. Co. 63 Ill. 545. Where a derrick was supplied by the company, which being defective, fell and injured a servant, it was held that no implied duty to keep in repair existed as the relation to the contractor was not that of a master and servant, and the company was held not liable. King v. New York &c. R. Co. 66 N. Y. 181. But see contra, Conlon v. Eastern R. Co. 135 Mass. 195; 15 Am. & Eng. R. Cas. 99.

§ 1064. Liability of contractor—Joint liability.—As a general rule the independent contractor is alone liable to third persons for the consequence of his own negligence and that of his servants,[277] and where the contract is for the delivery of the completed work his liability continues until the work is accepted,[278] when, it is held, that of the employer begins.[279] If the contractor employ means unnecessarily dangerous, not contemplated in the agreement, or commit an unauthorized trespass, or neglect to use proper precaution in conducting dangerous work which could be safely conducted by the means prescribed in the contract, the liability rests upon him alone.[280] But where the work is wrongful or unlawful in itself, or if done in the ordinary manner would result in a nuisance or injury to others,

[277] City &c. Ry. Co. v. Moores, 80 Md. 348; 30 Atl. 643; 45 Am. St. 345; Wabash &c. R. Co. v. Farver, 111 Ind. 195; 12 N. E. 296; 60 Am. R. 696; Hitte v. Republican &c. R. Co. 19 Neb. 620; 28 N. W. 284; 29 Am. & Eng. R. Cas. 586; Miller v. Minnesota &c. R. Co. 76 Iowa, 655; 39 N. W. 188; 14 Am. St. 258; West v. St. Louis &c. R. Co. 63 Ill. 545; Whitney &c. Co. v. O'Rourke, 172 Ill. 177; 50 N. E. 242. The contractor must answer for his own wrongs committed in the course of the work by his servants. 1 Thomp. Neg. (2d ed.), § 685; Crenshaw v. Ullman, 113 Mo. 633; 20 S. W. 1077. See, also, authorities cited in last section. We do not, of course, mean that the contractor's servant may not also be held liable for his own negligence. What we mean is that the company is not liable.

[278] St. Louis &c. R. Co. v. Knott, 54 Ark. 424; 16 S. W. 9; Atlanta &c. R. Co. v. Kimberly, 87 Ga. 161; 13 S. E. 277; 27 Am. St. 231, and note.

[279] Sturges v. Society, 130 Mass. 414; 39 Am. R. 463; Gorham v. Gross, 125 Mass. 232; 28 Am. R. 224; Cork v. Blossom, 162 Mass. 330; 38 N. E. 495; 26 L. R. A. 256; 44 Am. St. 362; Harding v. City of Boston, 163 Mass. 14; 39 N. E. 411. See, also, Daugherty v. Herzog, 145 Ind. 255; 44 N. E. 457; 32 L. R. A. 837; 57 Am. St. 204; First Presb. Cong. v. Smith, 163 Pa. St. 561; 30 Atl. 279; 43 Am. St. 808; 26 L. R. A. 504, and note.

[280] Burke v. Anderson, 69 Fed. 814; West v. St. Louis &c. R. Co. 63 Ill. 545; Hackett v. Western &c. Co. 80 Wis. 187; 49 N. W. 822; Chicago &c. R. Co. v. Ferguson, 3 Colo. App. 414; 33 Pac. 684; McDonnell v. Rifle Boom Co. 71 Mich. 61; 38 N. W. 681; Atlanta &c. R. Co. v. Kimberly, 87 Ga. 161; 13 S. E. 277; 27 Am. St. 231, and note; Fulton County St. R. Co. v. McConnell, 87 Ga. 756; 13 S. E. 828; McCann v. Kings County R. Co. 19 N. Y. S. 668; City &c. R. Co. v. Moores, 80 Md. 348; 30 Atl. 643; 45 Am. St. 345; Wabash &c. R. Co. v. Farver, 111 Ind. 195; 12 N. E. 296; 60 Am. R. 696; Cuff v. Newark &c. R. Co. 35 N. J. L. 17; 10 Am. R. 205.

the company and contractor may be jointly liable.[281] And so if the company's contractor by its direction enters upon lands before the right to do so has been acquired they are both trespassers and are jointly liable.[282] It has been held, however, that where the company can foresee the danger attendant upon the construction it is incumbent upon the company to take precautions against it, and that if the work be done in a careful manner no liability attaches to the contractor.[283] The employer will share the liability where he selects an incompetent contractor to perform dangerous work, notwithstanding the contractor may have agreed to assume all risk.[284] The contractor stands in the relation of master to those immediately employed by him and his liability to them is determined by the settled rules determining the liability of master to servant.

§ 1065. Rights of laborers.—In many of the states statutes have been enacted giving the laborers employed in the construction of a railway a claim upon the company for any arrears of wages.[285] In

[281] Atlanta &c. R. Co. v. Kimberly, 87 Ga. 161; 13 S. E. 277; 27 Am. St. 231, and note; Ohio &c. R. Co. v. Morey, 47 Ohio St. 207; 24 N. E. 269; 7 L. R. A. 701; Chicago City v. Robbins, 2 Black (U. S.), 418; Robbins v. Chicago City, 4 Wall. (U. S.) 657; Hughes v. Cincinnati &c. R. Co. 39 Ohio St. 461; 15 Am. & Eng. R. Cas. 100; Booth v. Rome &c. R. Co. 63 Hun (N. Y.), 624; 1 Thomp. Neg. (2d ed.) §§ 652, 903. See, also, Lemaitre v. Davis, 19 Ch. D. 281. And where an independent contractor made an excavation on the depot grounds and he and the company were negligent in not barricading or lighting it, both were held liable to one who fell into it while about to take passage on a train. Louisville &c. R. Co. v. Cheatham (Tenn.), 100 S. W. 902.

[282] St. Louis &c. R. Co. v. Knott, 54 Ark. 424; 16 S. W. 9; Ullman v. Hannibal &c. Railroad Co. 67 Mo. 118; McKinley v. Chicago &c. Railroad Co. 40 Mo. App. 449; Turman v. Bell, 54 Ark. 273; 15 S. W. 886; 26 Am. St. 35.

[283] Atlanta &c. R. Co. v. Kimberly, 87 Ga. 161; 13 S. E. 277; 27 Am. St. 231, and note, citing Bower v. Peate, L. R. 1 Q. B. Div. 321; Tarry v. Ashton, L. R. 1 Q. B. Div. 314; Pickard v. Smith, 10 C. B. (N. S.) 470. So held as to defects in plan or material selected and furnished by the builder. Pearson v. Zable, 78 Ky. 170; McCall v. Pacific &c. Co. 123 Cal. 42; 55 Pac. 706. See, also, Charlock v. Freel, 125 N. Y. 357; 26 N. E. 262; First Presb. Cong. v. Smith, 163 Pa. St. 561; 30 Atl. 279; 26 L. R. A. 504, and note; 43 Am. St. 808; 1 Thomp. Neg. (2d ed.) § 652.

[284] Berg v. Parsons, 84 Hun (N. Y.), 60; 31 N. Y. S. 1091; Cuff v. Newark &c. R. Co. 35 N. J. L. 17; 10 Am. R. 205; Eaton v. European &c. R. Co. 59 Me. 520; 8 Am. R. 430, and cases cited infra.

[285] 2 Stimson Am. Stat. §§ 8551,

the absence of a statute whose terms are broad enough to include them, the laborers employed by a contractor or subcontractor are not in such privity of contract with the company as to render it liable for their wages.[286] In several states the statutes are broad enough to include the laborers employed by contractors and subcontractors as well as the immediate servants of the company, while in others only laborers employed directly by the company are so protected.[287] Such statutes have been upheld as constitutional, as they

8553. The liability is the same whether the work is performed under a contract or at a stipulated price or on a quantum meruit. Chapman v. Utica &c. R. Co. 4 Lans. (N. Y.) 96.

[286] Indianapolis &c. R. Co. v. O'Reily, 38 Ind. 140; Marks v. Indianapolis &c. R. Co. 38 Ind. 440; Gallaghar v. Ashby, 26 Barb. (N. Y.) 143; Bontwell v. Townsend, 37 Barb. (N. Y.) 205; Rogers v. Dexter &c. R. Co. 85 Me. 372; 21 L. R. A. 528; 27 Atl. 257. See, also, Galveston &c. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459; Toledo &c. R. Co. v. Hamilton, 134 U. S. 296; 10 Sup. Ct. 546. An unwritten promise by a railroad company to assume a contractor's obligations to his employes has been held insufficient to sustain an action. Bottomley v. Port Huron &c. R. Co. 44 Mich. 542; 7 N. W. 214.

[287] See Indiana &c. R. Co. v. Larrew, 130 Ind. 368; 30 N. E. 517; Farmers' Loan &c. Co. v. Canada &c. R. Co. 127 Ind. 250; 26 N. E. 784; 11 L. R. A. 704, and note; 47 Am. & Eng. R. Cas. 271; Reynolds v. Manhattan Trust Co. 83 Fed. 593; St. Louis &c. R. Co. v. Kerr, 153 Ill. 182; 38 N. E. 638; Gulf &c. R. Co. v. Winder, 26 Tex. Civ. App. 263; 63 S. W. 1043; Texas &c. R. Co. v. Dorman (Tex. Civ. App.), 62 S. W. 1086. A superintendent and time-keeper are not within the statute. Missouri &c. R. Co. v. Baker, 14 Kan. 563. Laborers employed by a sub-contractor have their remedy under the statute. Mann v. Corrigan, 28 Kan. 194; Mundt v. Sheboygan &c. R. Co. 31 Wis. 451; Kent v. New York &c. R. Co. 12 N. Y. 628; Branin v. Connecticut &c. R. Co. 31 Vt. 214; Peters v. St. Louis &c. R. Co. 24 Mo. 586. See Hart's Appeal, 96 Pa. St. 355. The sub-contractor himself is not included, although his employes are. Rogers v. Dexter &c. R. Co. 85 Me. 372; 27 Atl. 257; 21 L. R. A. 528. The liability extends to labor of teams as well as of direct manual labor. Branin v. Connecticut &c. R. Co. 31 Vt. 214. But see contra, Atcherson v. Troy &c. R. Co. 6 Abb. Pr. N. S. (N. Y.) 329, and cases cited; Groves v. Kansas City &c. R. Co. 57 Mo. 304. As to construction of such statutes and compliance with them, see Mundt v. Sheboygan &c. R. Co. 31 Wis. 451; Redmond v. Galena &c. R. Co. 39 Wis. 426; 13 Am. Ry. 400; Cartwright v. New York &c. R. Co. 59 Vt. 675; 9 Atl. 370; 30 Am. & Eng. R. Cas. 234; Chapman v. Utica &c. R. Co. 4 Lans. (N. Y.) 96; Grannahan v. Hannibal &c. R. Co. 30 Mo. 546; Cosgrove

can neither be regarded as special legislation nor as an impairment of the obligation of contracts, and they apply as well to companies chartered before the passage of the law as to those chartered afterward.[288] In a number of states labor claims of the company are made a liability of the stockholder, in some instances to the amount of the stock, and in others they are made an individual liability to the full amount of the claims.[289] In other states the company making contracts for building must require a bond from the contractor securing payment of all material men and labor and if it fails to take such a bond it is liable to the full extent of such unpaid debts.[290]

v. Tebo &c. R. Co. 54 Mo. 495; Dudley v. Toledo &c. R. Co. 65 Mich. 655; 32 N. W. 884; Quackenbush v. Chicago &c. R. Co. 91 Mich. 308; 51 N. W. 883; National Bank v. Gulf &c. R. Co. 95 Tex. 176; 66 S. W. 203; Spafford v. Duluth &c. R. Co. 48 Minn. 515; 51 N. W. 469.

[288] Luther v. Saylor, 8 Mo. App. 424; Peters v. St. Louis &c. R. Co. 23 Mo. 107; Grannahan v. Hannibal &c. R. Co. 30 Mo. 546; Conner v. Hannibal &c. R. Co. 30 Mo. 549; Branin v. Connecticut &c. R. Co. 31 Vt. 214; Shipley v. Terre Haute, 74 Ind. 297; 4 Am. & Eng. R. Cas. 345. But they are not retroactive so as to apply to claims previously accrued. Vanderpool v. La Crosse &c. R. Co. 44 Wis. 652; Arbuckle v. Illinois Midland R. Co. 81 Ill. 429; Central &c. R. Co. v. Henning, 52 Tex. 466.

[289] 2 Stimson Am. Stat. § 8553. In Michigan, liable only to the amount of the stock. Peck v. Miller, 39 Mich. 594. A suit against a railroad company for a labor debt can be maintained only on the theory that the company is owner of the road, and not upon the theory that it is agent of the owner. Chicago &c. R. Co. v. Sturgis, 44 Mich. 538; 7 N. W. 213. A city having subscribed to stock as authorized by statute is bound by the same liability as attaches to the ordinary stockholder for labor done in construction of the road. Shipley v. Terre Haute, 74 Ind. 297; 4 Am. & Eng. R. Cas. 345.

[290] 2 Stimson Am. Stat. § 8551. The Kansas statute requires the company to take a bond of the contractor, and failing to do so the company is liable to laborers and their assignees. Missouri &c. R. Co. v. Brown, 14 Kan. 557; Maun v. Corrigan, 28 Kan. 194. But, ordinarily, the statute giving a lien does not make the railroad company personally liable. Bethune v. Cleveland &c. R. Co. 149 Mo. 587; 51 S. W. 465; Morgan v. Chicago &c. R. Co. 76 Mo. 161. The statute of Washington which provides that every person performing labor or furnishing material to be used in the construction of any railroad shall have a lien, provided that every railroad company shall take from a contractor a bond conditioned to pay all laborers and materialmen working for or supplying such contractor, which bond shall be filed in the office of the county auditor, and that, if any

But the most common remedy of the unpaid laborer is the lien given him by statute upon the property of the company.[291]

§ 1065a. Guaranty of payment of claims by railroad company.—It has been held in Ohio that a railroad company may guaranty the payment of the claims of persons furnishing labor, materials and supplies to its contractors, and this may be done by the publication of notices undertaking to protect such claims, and that an obligation of this character may be enforced by one furnishing such labor or articles in reliance on the notice, though the time for filing a lien under the statute has expired. But such contracts are strictly construed. Thus, in a case where a railroad company improving its road-bed posted notices that it would "protect all claims for materials, labor and board," it was held that a claim for hay and feed furnished to a contractor for teams employed by the latter on said work is not a claim for either material, labor, or board within the meaning of the notice.[292]

§ 1066. Mechanics' liens—General laws do not include railroads.—The ordinary mechanics' lien laws do not, as a rule, embrace railroads. They may, of course, expressly provide for liens upon railroads, or, although the term, "railroad" is not used, the language and intent of the statute may be such as to clearly include railroads; but the courts will not presume that the legislature intended to subject the public to the annoyances and inconveniences which would necessarily attend the enforcement of a mechanics' lien against a railroad under a general mechanics' lien law, and will not so construe it unless such an interpretation is clearly required.[293] Thus, although

railroad company fail to take such bond, it shall be liable to the laborers and materialmen to the full extent of the debts contracted by the contractor, has been held to mean that railroad property is excepted from liens where the specified security is taken, and not that when the company fails to take a bond an action will lie directly against the company without any notice of the lien. Laidlaw v. Portland &c. Ry. Co. 42 Wash. 292; 84 Pac. 855.

[291] See post, § 1067, et seq.

[292] Pennsylvania Co. v. Mehaffey (Ohio), 80 N. E. 177.

[293] Buncombe Co. Comrs. v. Tommey, 115 U. S. 122; 5 Sup. Ct. 626, 1186; Pennsylvania &c. Co. v. J. E. Potts &c. Co. 63 Fed. 11; Newcastle R. Co. v. Simpson, 26 Fed. 133; Tyler R. Co. v. Driscol, 52 Tex. 13; La Crosse &c. Co. v.

a railroad is, in a general sense, a structure, it has been held in several cases that a statute giving a lien for materials and labor upon any "house, mill, manufactory, building or other structure," does not include a railroad.[294] But this may depend very largely upon the context, under the maxim noscitur a sociis, and the phrase "any other structure" has been held to include a railroad when preceded by a specific enumeration of works or property of a somewhat similar character.[295] So, the poles and wires of an electric light system have been held to constitute a structure within the meaning of the mechanics' lien law.[296] And a statute providing for a lien on buildings or bridges has been held to cover a building or a bridge constructed for a railroad company.[297]

§ 1067. Statutes authorizing liens.—If it is clear that the statute includes railroads, we suppose that it should be liberally construed as in other cases.[298] It was held in a recent case, however, that a

Vanderpool, 11 Wis. 119, 124; 78 Am. Dec. 691, and note; Esterley's Appeal, 54 Pa. St. 192. See, also, Cleveland &c. R. Co. v. Knickerbocker Trust Co. 86 Fed. 73; Pittsburg &c. Laboratory v. Milwaukee El. R. &c. Co. 110 Wis. 633; 86 N. W. 592, 595 (quoting text); 84 Am. St. 948; Huntley Mfg. Co. v. Michigan Cent. R. Co. 76 Ill. App. 387; Dunn v. North Missouri R. Co. 24 Mo. 493.

[294] Rutherford v. Cincinnati &c. R. Co. 35 Ohio St. 559; Graham v. Mt. Sterling C. Co. 14 Bush (Ky.) 425; 29 Am. R. 412; Pennsylvania &c. Co. v. J. E. Potts &c. Co. 63 Fed. 11.

[295] Giant Powder Co. v. Oregon Pac. R. Co. 42 Fed. 470; 8 L. R. A. 700. See, also, Central Trust Co. v. Sheffield &c. Co. 42 Fed. 106; 9 L. R. A. 67.

[296] Forbes v. Willamette &c. Co. 19 Ore. 61; 23 Pac. 670; 20 Am. St. 793. See, also, Helm v. Chapman, 66 Cal. 291; 5 Pac. 352; Putnam v. Ross, 46 Mo. 337; Taggard v. Buckmore, 42 Me. 77; Schmidt, Ex parte, 62 Ala. 252; Buchanan v. Smith, 43 Miss. 90.

[297] Botsford v. New Haven &c. R. Co. 41 Conn. 454; Hill v. La Crosse &c. R. Co. 11 Wis. 214; Purtell v. Chicago &c. Co. 74 Wis. 132; 42 N. W. 265; Smith Bridge Co. v. Bowman, 41 Ohio St. 37; 52 Am. R. 67. See, also, Schaghticoke &c. Co. v. Greenwich &c. R. Co. 183 N. Y. 306; 76 N. E. 153.

[298] Flagstaff &c. Co. v. Cullins, 104 U. S. 176; Texas &c. R. Co. v. Orman, 3 N. Mex. 308; 9 Pac. 253; Kiel v. Carll, 51 Conn. 440; Bradish v. James, 83 Mo. 313; Montandon v. Deas, 14 Ala. 33; 48 Am. Dec. 84; White Lake &c. Co. v. Russell, 22 Neb. 126; 34 N. W. 104; 3 Am. St. 262; Edwards v. Derrickson, 28 N. J. L. 39; Schulenburg v. Memphis &c. R. Co. 67 Mo. 442; Railway Co. v. Cronin, 38 Ohio St. 122, 127. Such statutes will not, however, be construed as retroact-

statute giving laborers a lien upon a "railroad" or "any other structure" did not authorize a lien upon a street railway where the fee of the street was in the city.[299] Other decisions showing that the right to acquire a lien upon a railroad must be clearly given and that a general statute will not be extended by construction so as to include railroads, are reviewed in the preceding section. It has been held that a statute expressly giving a lien upon a railroad for materials furnished and used in its construction is, in effect, a legislative declaration that prior statutes did not cover such cases.[300] Statutes giving a preference or lien to laborers and material men upon the insolvency of the company are to be distinguished from ordinary mechanics' lien statutes, and one who has lost his right to enforce his lien under the mechanics' lien statutes, by failing to file his notice in time can not enforce it as a preferred claim under the statute giving preferences to certain classes of claims upon the insolvency of the company, unless he shows that it is within the terms of such statute.[301] For instance, as held in the case just cited, where the mechanics' lien statute authorizes a lien in favor of "contractors" and another statute provides that the claims of "employes" shall be preferred and constitute a lien, upon the insolvency of the company, a contractor who has not filed notice of his lien as required by the former statute, is not entitled to a preference or a lien under the latter statute.

§ 1068. For what lien may be obtained.—The nature of the claim for which a lien may be acquired depends, of course, upon the governing statute in each particular case. It is generally required that the labor should be performed or the material used in the construction of the road.[302] Under such a statute it has been held that giant

ive and authorizing a lien for work done or materials furnished before their passage. Arbuckle v. Illinois Midland R. Co. 81 Ill. 429; Parker v. Massachusetts R. Co. 115 Mass. 580; Central &c. R. Co. v. Henning, 52 Tex. 466.

[299] Front Street Cable R. Co. v. Johnson, 2 Wash. 112; 25 Pac. 1084; 11 L. R. A. 693. This decision seems to be of questionable soundness. See St. Louis &c. Co. v. Donahoe, 3 Mo. App. 559; Pittsburg &c. Laboratory v. Milwaukee Elec. R. &c. Co. 110 Wis. 633; 86 N. W. 592; 84 Am. St. 948; Bethune v. Cleveland &c. R. Co. 149 Mo. 587; 51 S. W. 465.

[300] Tod v. Kentucky Un. R. Co. 52 Fed. 241; 18 L. R. A. 305.

[301] Tod v. Kentucky Un. R. Co. 52 Fed. 241; 18 L. R. A. 305.

[302] St. Louis &c. Ry. Co. v. Love, 74 Ark. 528; 86 S. W. 395, 397 (cit-

powder furnished to be used, and used, by the contractor in constructing the road is "material" for the value of which a lien may be acquired;[303] but where powder was sold to a contractor to quarry rock from his own land to be delivered to the railroad company on its cars, and it was not stated in the contract where and for what purpose the rock was to be used, it was held that the person who furnished such powder was not entitled to a lien under a statute giving a lien to all persons who furnish material to any railroad.[304] So a lien can not be obtained for machinery furnished to a contractor to be used in doing the work upon a bridge, under a statute authorizing a lien for all materials "used in and about" the construction of the bridge.[305] So, of course, groceries and food furnished for the workmen, while, in a sense, used in the construction of the road, are not materials which so enter into its construction that a lien can be based upon them.[306] So the right to a lien has been denied to a person furnishing coal consumed in the operation of a steam shovel used by a contractor in the construction of a railroad.[307] Nor can

ing text); St. Louis &c. R. Co. v. Henry, 75 Ark. 603; 86 S. W. 841; Gordon Hardware Co. v. San Francisco &c. R. Co. 86 Cal. 620; 22 Pac. 406; 23 Pac. 1025; 25 Pac. 125; Ferguson v. Despo, 8 Ind. App. 523; 34 N. E. 575; Pennsylvania Co. v. Mehaffey (Ohio), 80 N. E. 177.

[303] Giant Powder Co. v. Oregon Pac. R. 42 Fed. 470; 8 L. R. A. 700; Rapauno &c. Co. v. Greenfield &c. R. Co. 59 Mo. App. 6. See, also, Hercules Powder Co. v. Knoxville &c. R. Co. 113 Tenn. 382; 106 Am. St. 836; 83 S. W. 354; 67 L. R. A. 487 (quoting and distinguishing text). "Timber" has been held to include railroad ties. Kollock v. Parcher, 52 Wis. 393; 9 N. W. 67.

[304] Indiana Powder Co. v. St. Louis &c. R. Co. 116 Mo. App. 364; 92 S. W. 150. See, also, Cincinnati &c. R. Co. v. Shera, 36 Ind. App. 315; 73 N. E. 293.

[305] Basshor v. Baltimore &c. R. Co. 65 Md. 99; 3 Atl. 285. See, also, Gordon &c. Co. v. San Francisco &c. R. Co. 86 Cal. 620; 22 Pac. 406; 23 Pac. 1025; 25 Pac. 125; First Nat. Bank v. Perris &c. Dict. 107 Cal. 55; 40 Pac. 45. But compare Perry v. Duluth &c. R. Co. 56 Minn. 306; 57 N. W. 792.

[306] Ferguson v. Despo, 8 Ind. App. 523, 528; 34 N. E. 575; Dudley v. Toledo &c. R. Co. 65 Mich. 655; 32 N. W. 884; 30 Am. & Eng. R. Cas. 236. Nor is lumber sold to a contractor on a railroad for shanties for his employes or stables for his teams. Stewart &c. Co. v. Missouri Pac. R. Co. 33 Neb. 29; 49 N. W. 769. See, also, Central Trust Co. v. Texas &c. R. Co. 23 Fed. 703; Central Trust Co. v. Texas &c. R. Co. 27 Fed. 178.

[307] Cincinnati &c. R. Co. v. Shera, 36 Ind. App. 315; 73 N. E. 293.

one who furnishes an electric light plant for hotel premises at the instance of a railroad company obtain a lien therefor under a statute authorizing a lien for labor performed or materials furnished for the construction of the road, depot buildings or water tanks.[308] So it has been held that coal and oil and tools were not within a statute giving a lien to the furnisher of "material" for the construction or repair of a railroad.[309] And there can be no lien for material contracted for and prepared but never delivered.[310] But it has been held that one who is employed to grub and clear the right of way and construct the road-bed may take and enforce a lien for the grubbing and clearing as well as for constructing the road-bed where all the work is necessary in constructing the road.[311] So, it has been held that one who furnishes materials for the construction of a road in one state under a contract made therein is entitled to a lien against the road although the materials are delivered in another state,[312] but not so, it seems, according to another decision, for materials

[308] Industrial &c. Co. v. Electrical &c. Co. 58 Fed. 732.

[309] Waters-Pierce Oil Co. v. United States &c. Trust Co. (Tex. Civ. App.) 99 S. W. 212.

[310] Richmond &c. Co. v. Richmond &c. R. Co. 68 Fed. 105; 34 L. R. A. 625. This case also holds that there can be no lien where the material is lost through the negligence of the party who claims the lien, although the title had passed, that furnishing a right of way is not furnishing "material," and that legal services are not "labor." See, also, Weir v. Barnes, 38 Neb. 875; 57 N. W. 750; Lee v. King, 99 Ala. 246; 13 So. 506, and compare Howes v. Reliance Wire Works Co. 46 Minn. 44; 48 N. W. 448; Huttig Bros. &c. Co. v. Denny &c. Co. 6 Wash. 122; 32 Pac. 1073; Trammell v. Mount, 68 Tex. 210; 4 S. W. 377; 2 Am. St. 479. But in Tennis Bros. Co. v. Wetzel &c. R. Co. 140 Fed. 193, it is held that the fact that all the material had not been used at the time the railroad company terminated the contract did not affect the right to a lien therefor.

[311] Dean v. Reynolds, 12 Ind. App. 97; 39 N. E. 763. See, also, Wabash R. Co. v. Achermire, 19 Ind. App. 482; 49 N. E. 835 (for digging a well).

[312] Carnegie Bros. v. Lancaster &c. R. Co. 1 Ohio N. P. 300; Westinghouse &c. Brake Co. v. Kansas City &c. R. Co. 137 Fed. 26, 34, 35; St. Louis &c. R. Co. v. Memphis &c. R. Co. 72 Mo. 664. See St. Louis &c. R. Co. v. Memphis &c. R. Co. 72 Mo. 664; Thompson v. St. Paul &c. R. Co. 45 Minn. 13; 47 N. W. 259; Mallory v. La Crosse &c. Co. 80 Wis. 170; 49 N. W. 1071. But compare Bagnell Timber Co. v. Missouri &c. R. Co. 180 Mo. 420; 79 S. W. 1130.

furnished for use in a state having no railroad lien law.[313] The word "provisions" has been held to include corn, oats and bran.[314] It is frequently provided that the material must be furnished for, as well as used in, the construction of the road or property upon which the lien is claimed, and it has been held that an allegation in a finding that it was purchased for such purpose is not equivalent to an averment or a finding that it was furnished for that purpose.[315] Elsewhere it is regarded as sufficient that plaintiff has in good faith complied with the statute in furnishing fit materials and he is not required to show their application for the purpose for which they were procured.[316]

§ 1069. Upon what lien may be acquired.—It has been held that a mechanics' lien may be taken upon a stable built by a street railway company,[317] or a depot of a commercial railroad company.[318] But, as elsewhere shown, where materials are furnished or labor is performed in the construction of the road the statutes are usually construed as giving a lien upon the entire road, and the general

[313] Midland Valley R. Co. v. Moran Nut and Bolt Mfg. Co. (Ark.) 97 S. W. 679.

[314] Kansas City &c. R. Co. v. Graham, 67 Kan. 791; 74 Pac. 232.

[315] Crawfordsville v. Barr, 45 Ind. 258; Lawton v. Case, 73 Ind. 60; Jones v. Hall, 9 Ind. App. 458; 35 N. E. 923. Compare Jeffersonville &c. Co. v. Riter, 138 Ind. 170; 37 N. E. 652; Neeley v. Searight, 113 Ind. 316; 15 N. E. 598; Smith v. Newbaur, 144 Ind. 95; 42 N. E. 40.

[316] Westinghouse Air Brake Co. v. Kansas City &c. R. Co. 137 Fed. 26, citing Central Trust Co. v. Chicago &c. R. Co. 54 Fed. 598; Thompson v. St. Paul City R. Co. 45 Minn. 13; 47 N. W. 259; Neilson v. Iowa East. R. Co. 51 Iowa, 184; 1 N. W. 434; 33 Am. R. 124. See, also, Tennis Bros v. Wetzel &c. R. Co. 140 Fed. 193.

[317] McIlvain v. Hestonville &c. R. Co. 5 Phila. (Pa.) 13.

[318] Hill v. La Crosse &c. R. Co. 11 Wis. 214. See, also, Purtell v. Chicago &c. R. Co. 74 Wis. 132; 42 N. W. 265; Botsford v. New Haven &c. R. Co. 41 Conn. 454; Smith Bridge Co. v. Bowman, 41 Ohio St. 37; 52 Am. R. 67. But compare King v. Alford, 9 Ont. R. 643; 24 Am. & Eng. R. Cas. 331; Breeze v. Midland R. Co. 26 Gr. Ch. (Can.) 225; Shrainka v. Rohan, 18 Mo. App. 340. The Texas constitution and laws are construed not to give to one furnishing material for construction or repair of a railroad a lien on the railroad, but only on the particular building or article made or repaired with the material furnished. Waters-Pierce Oil Co. v. United States &c. Trust Co. (Tex. Civ. App.) 99 S. W. 212.

rule is that it can not be sold in parcels to satisfy the lien.[319] It has been held, however, that, unless the statute so provides, the lien does not extend to the cars and other movable property of the company,[320] and that even where it does, such property need not all be sold as an entirety in order to satisfy the lien.[321] So, in a recent case it was held, chiefly upon the ground of public policy, that, as the statute did not authorize a lien upon the franchise, it could not be acquired and enforced against a water-works "plant" which the purchaser would have no franchise or authority to operate.[322]

§ 1070. Who may acquire lien.—Only those who are members of one of these classes designated by the statute can acquire a mechanics' lien upon a railroad for material furnished or labor performed in its construction. Nearly all the statutes give such a lien to laborers and material men, and some of them extend it to contractors and subcontractors. We have elsewhere attempted to show who are laborers within the meaning of these and similar statutes.[323]

[319] Post, § 1074. See, also, Steger v. Arctic &c. Co. 89 Tenn. 453; 14 S. W. 1087; 11 L. R. A. 580; Brooks v. Railway Co. 101 U. S. 443; Midland R. Co. v. Wilcox, 122 Ind. 84; 23 N. E. 506; Farmers' &c. Co. v. Candler, 87 Ga. 241; 13 S. E. 560; Pittsburg &c. Laboratory v. Milwaukee Elec. R. &c. Co. 110 Wis. 633; 86 N. W. 592, 595; 84 Am. St. 948 (citing and approving text and criticising the Wisconsin cases cited in the last preceding notes).

[320] Neilson v. Iowa &c. R. Co. 51 Iowa, 184; 1 N. W. 434; 33 Am. R. 124. See, also, New England &c. R. Co. v. Baltimore &c. R. Co. 11 Md. 81; 69 Am. Dec. 181.

[321] Knapp v. St. Louis &c. R. Co. 74 Mo. 374; 7 Am. & Eng. R. Cas. 394; Cranston v. Union T. Co. 75 Mo. 29.

[322] Chapman &c. Co. v. Oconto Water Co. 89 Wis. 264; 60 N. W. 1004; 46 Am. St. 830. But compare Oconto Water Co. v. National &c. Co. 59 Fed. 19.

[323] Ante, §§ 186, 605. See, also, note to Tod v. Kentucky Un. R. Co. in 18 L. R. A. 305 (where most of the authorities are collected and reviewed); McDonald v. Charleston &c. R. Co. 93 Tenn. 281; 24 S. W. 252; McElwaine v. Hosey, 135 Ind. 481; 35 N. E. 272. A time-keeper, in the employ of a railroad contractor, is not a laborer within the meaning of the Kansas statute. Missouri &c. R. Co. v. Baker, 14 Kan. 563. Nor is the secretary of a railroad company a servant or employe within the meaning of such a statute. Wells v. Southern &c. R. Co. 1 Fed. 270. But a corporation employed to supervise the construction of an electric railway by means of the personal services of its officers and servants has been held entitled to a lien therefor, under the West Virginia statute providing that every workman, labor-

A corporation is a person within the meaning of a statute authorizing a lien in favor of "any person" who furnishes materials to be used in the construction of the road.[324] Many of the statutes authorize a lien in favor of contractors and subcontractors as well as in favor of laborers, but when a lien is authorized in favor of only one of these classes, it can not be acquired by those who are members of a different class. Thus, a lien in favor of contractors alone does not extend to subcontractors,[325] and a lien in favor of subcontractors does not extend to persons who furnish material under a contract with them.[326] So, neither a contractor nor a subcontractor can obtain a lien as a laborer under a statute authorizing liens in favor of "laborers."[327] Under some of the statutes the lien of the subcon-

er or "other person" who shall do any work or labor by virtue of any contract for any incorporated company. Wetzel &c. R. Co v. Tennis Bros. Co. 145 Fed. 458. A sub-contractor procuring railroad construction work to be done through the labor of others is not a laborer entitled to a lien under the Texas statute. Eastern Tex. R. Co. v. Davis (Tex. Civ. App.), 83 S. W. 883.

[324] Dallas &c. Co. v. Wasco &c. Co. 3 Ore. 527. See, also, Fagan v. Boyle &c. Co. 65 Tex. 324; Doane v. Clinton, 2 Utah, 417; South Carolina R. Co. v. McDonald, 5 Ga. 531. So, a foreign corporation may have a lien where it is authorized in favor of "any person." Chapman v. Brewer, 43 Neb. 890; 62 N. W. 320; 47 Am. St. 779. See, also, Tennis Bros. Co. v. Wetzel St. Ry. Co. 140 Fed. 193, affirmed in 145 Fed. 458. There may, perhaps, be a stronger reason for giving such a lien to laborers, but there is no reason why the legislature may not just as well give it to corporations who furnish material as to material men generally or ordinary contractors.

[325] Cartter v. Rome &c. R. Co. 89 Ga. 158; 15 S. E. 36; Arbuckle v. Illinois Cent. R. Co. 81 Ill. 429; Tucker v. St. Louis &c. R. Co. 59 Ark. 81; 26 S. W. 375. But see Vaughn v. Smith, 58 Iowa, 533; 12 N. W. 604; 7 Am. & Eng. R. Cas. 82. In McDonald v. Charleston &c. R. Co. 93 Tenn. 281; 24 S. W. 252, one who contracted with a construction company was held, as against creditors, to be a contractor with the railroad company under the peculiar circumstances of the case.

[326] Cairo &c. R. Co. v. Watson, 85 Ill. 531; Schaar v. Knickerbocker &c. Co. 149 Ill. 441; 37 N. E. 54; Smith Bridge Co. v. Louisville &c. R. Co. 72 Ill. 506; Baltzer v. Raleigh &c. R. Co. 115 U. S. 634; 6 Sup. Ct. 216; Mills v. Paul (Tex.), 30 S. W. 558; Farmers' Loan &c. Co. v. Canada &c. R. Co. 127 Ind. 250; 26 N. E. 784; 11 L. R. A. 740, and note; 47 Am. & Eng. R. Cas. 271. See, also, St. Louis &c. R. Co. v. Rogers, 72 Ark. 270; 79 S. W. 794, where a lien was denied to one acting as clerk for a subcontractor.

[327] Chicago &c. R. Co. v. Sturgis,

tractor is entirely independent of that of the contractor and neither an agreement by the latter to keep down liens nor payment to him can affect the right of the subcontractor to his lien.[328] But subcontractors are usually required to give notice to the owner of the property, and, in most of the states payment to the contractor in good faith before such notice is given will relieve him from liability to the subcontractors.[329] The Arkansas statute which provides that every mechanic, laborer, or other person who shall perform any work on the construction, equipment, or repair of any railroad, whether under contract with the railroad or with a contractor or subcontractor thereof, shall have a lien therefor, is held to include the services of a foreman who, under contract with a subcontractor, superintends and directs the laborers in the construction or repair.[330] In some jurisdictions, one who furnishes material or performs labor for a subcontractor may acquire a lien, while in others the materials must be furnished or the labor performed directly for the owner or the contractor, and in some of them it must be shown that the credit was given to the property. All these matters, however, depend upon the peculiar provisions of the particular statute under consideration. The only general rule that can be laid down, perhaps, is that one who asserts a lien must bring himself and his claim within the purview of the statute. A mere creditor of a material man or laborer is not entitled to a lien which his debtor might have acquired,

44 Mich. 538; 7 N. W. 213; Tod v. Kentucky Un. R. Co. 52 Fed. 241; 18 L. R. A. 305; Vane v. Newcombe, 132 U. S. 220; 10 Sup. Ct. 60; Savannah &c. R. Co. v. Callahan, 49 Ga. 506; St. Johns &c. R. Co. v. Bartola, 28 Fla. 82; 9 So. 853; Parks v. Loche (Tex. Civil App.), 25 S. W. 702; Krakauer v. Locke, 6 Tex. Civ. App. 446; 25 S. W. 700. See, also, Eastern Tex. R. Co. v. Davis (Tex. Civ. App.), 83 S. W. 883.

[328] Central Trust Co. v. Richmond &c. R. Co. 68 Fed. 90; 41 L. R. A. 458; Spokane &c. Co. v. McChesney, 1 Wash. 609; 21 Pac. 198; Henry &c. Co. v. Evans, 97 Mo. 47; 10 S. W. 868; 3 L. R. A. 332; Ammendale &c. Inst. v. Anderson, 71 Md. 128; 17 Atl. 1030. See, also, Norfolk &c. R. Co. v. Howison, 81 Va. 125.

[329] Spaulding v. Thompson &c. Society, 27 Conn. 573; Roland v. Centreville &c. R. Co. 61 Iowa, 380; 16 N. W. 355; 11 Am. & Eng. R. Cas. 47; Whelan v. Young, 21 D. C. 51; Crane v. Genin, 60 N. Y. 127; Geiger v. Hussey, 63 Ala. 338; Griswold v. Wright, 69 Wis. 1; 31 N. W. 20; Whittier v. Hollister, 64 Cal. 283; 30 Pac. 846; Rivers v. Mulholland, 62 Miss. 766; Central Trust Co. v. Bridges, 57 Fed. 753.

[330] St. Louis &c. R. Co. v. Love, 74 Ark. 528; 86 S. W. 395.

even though the debt may have been incurred for money with which to purchase and furnish the material.[331] Nor will the fact that money obtained on a draft given by a railroad company to the contractor engaged in constructing its road was used by him to pay for labor and material entitle the holder of the draft to a mechanic's or material man's lien on the road.[332]

§ 1071. **Mode of acquiring lien.**—As the lien is wholly statutory, it must not only be such as the statute provides for, both as to the claim upon which it is based and the person in whose favor it is claimed, but the statutory mode must also be pursued in order to obtain it.[333] A common requirement is that notice shall be given to the owner of the property or his agent.[334] It has been held that

[331] Ray &c. Bank v. Cramer, 54 Mo. App. 587. See, also, Mellon v. Morristown &c. R. Co. (Tenn.) 35 S. W. 464; Pere Marquette R. Co. v. Smith, 36 Ind. App. 439; 74 N. E. 545. Under the railroad lien act of Arkansas, providing that any person furnishing material which entered into the construction, equipment, or repair of a railroad, whether furnished to the contractor or subcontractor, or directly to the railroad company, shall have a lien therefor, a materialman furnishing material to a subcontractor for railroad construction is entitled to such lien. Midland Valley R. Co. v. Moran &c. Mfg. Co. (Ark.) 97 S. W. 679. But see St. Louis &c. R. Co. v. Henry, 75 Ark. 603; 86 S. W. 841. In Indiana even a laborer of one having a subcontract under a subcontractor may have a lien. Pere Marquette R. Co. v. Smith, 36 Ind. App. 439; 74 N. E. 545; Pere Marquette R. Co. v. Baertz, 36 Ind. App. 408; 74 N. E. 51.

[332] Central Trust Co. v. Bridges, 57 Fed. 753.

[333] See Cleveland &c. R. Co. v. Knickerbocker Trust Co. 86 Fed. 73; Houston First Nat. Bank v. Ewing, 103 Fed. 168; Templin v. Chicago &c. R. Co. 73 Ia. 548; 35 N. W. 634; Lounsbury v. Iowa &c. R. Co. 49 Ia. 255; Coleman v. Oregonian R. Co. 25 Oreg. 286; 35 Pac. 656, and authorities cited in following notes. In Tennessee, for instance, notice must be given by the person claiming the lien and can not be given by his assignee. P. H. Norman & Co. v. Edington &c. 115 Tenn. 309; 89 S. W. 744.

[334] As to the necessity for giving such a notice as the statute requires and complying with the essential provisions of the statute in all respects, see note to Farmers' Loan &c. Co. v. Canada &c. R. Co. 11 L. R. A. 740; and note to Giant Powder Co. v. Oregon Pac. R. Co. 8 L. R. A. 700, where the recent decisions upon the subject are collected and classified by states; Greeley &c. R. Co. v. Harris, 12 Colo. 226; 20 Pac. 764; Arkansas Cent. R. Co. v. McKay, 30 Ark. 682; Cherry v. North &c. R. Co. 65 Ga. 633; Arbuckle v. Illinois

a notice served upon the secretary of the company is sufficient, where the statute makes no provision as to the mode of service of such a notice upon a corporation, and no higher officer can be found.[335] So, it has been held that such a notice may be served upon the station agent of a foreign corporation.[336] And under a statute providing that the notice should be served "upon the secretary or other officer or agent" of the company, it was held sufficient to serve it upon a director of the company.[337] But the mere fact that a director happened to be present on one occasion and saw that work was being done has been held insufficient notice to the company to validate the lien.[338] Under the Missouri statute declaring that lien claimants must serve a copy of the account on the person or corporation owning or operating the road, a personal service is required and service upon a station agent will not suffice.[339] Another common provision is that notice of the lien or claim shall be filed in a certain office within a specified time. If not so filed within the time designated the lien can not be enforced.[340] But if a proper notice is filed within such time, the fact that a defective notice had previously been filed is immaterial.[341] Where a road runs through a number of different counties and the statute simply contains a general provision that

&c. R. Co. 81 Ill. 429; Cairo &c. R. Co. v. Cauble, 4 Ill. App. 133; Cairo &c. R. Co. v. Cauble, 85 Ill. 555; Lounsbury v. Iowa &c. R. Co. 49 Iowa, 255; Roland v. Centreville &c. R. Co. 61 Iowa, 380; 16 N. W. 355; Scioto Valley R. Co. v. Cronin, 38 Ohio St. 122; Tod v. Kentucky Un. R. Co. 52 Fed. 241; 18 L. R. A. 305.

[335] Heltzell v. Chicago &c. R. Co. 77 Mo. 315; 16 Am. & Eng. R. Cas. 619. Compare Rapauno &c. Co. v. Greenfield &c. R. Co. 59 Mo. App. 6; Union Pac. R. Co. v. Davidson, 21 Colo. 93; 39 Pac. 1095.

[336] Morgan v. Chicago &c. R. Co. 76 Mo. 161.

[337] Railway Co. v. Cronin, 38 Ohio St. 122, 127. See, also, Barnes v. Thompson, 2 Swan (Tenn.), 313; Buck v. Brian, 2 How. (Miss.) 874; Railway Co. v. McCoy, 42 Ohio St. 251.

[338] Lothian v. Wood, 55 Cal. 159. Mere knowledge on the part of the owner that materials are being furnished or that work is being done is not equivalent to the statutory notice generally required. Neeley v. Searight, 113 Ind. 316; 15 N. E. 598.

[339] Dalton v. St. Louis &c. R. Co. 113 Mo. App. 71; 87 S. W. 610; Williams & Pearson v. Dittenhoefer, 188 Mo. 134; 86 S. W. 242.

[340] Delaware &c. Co. v. Davenport R. Co. 46 Iowa, 406; Central Trust Co. v. Richmond &c. R. Co. 68 Fed. 90; 41 L. R. A. 458; Alexandria &c. Co. v. McHugh, 12 Ind. App. 282; 40 N. E. 80.

[341] Williams v. Chicago &c. R. Co. 112 Mo. 463; 20 S. W. 631; 34 Am.

the notice shall be filed in a certain office "in the county," it is a question of some doubt as to whether the notice must be filed in every county through which the road extends. In a recent case, after a careful consideration of the subject, it was held sufficient to file the notice in the proper office in the county in which the work was done and the materials were furnished, and that the lien should be enforced against the entire road.[342] A different view, however, seems to have been taken by another court.[343]

§ 1072. **Priority of liens.**—The general rule is that liens on railroad property have priority according to the order of time or date at which they attached, as in ordinary cases.[344] It is the spirit and intent of most of the mechanics' lien laws, however, that all

St. 403; 7 Lewis' Am. R. & Corp. 86. But successive valid liens for the same thing can not be filed by the same party under one entire contract. Battle v. McArthur, 49 Fed. 715; Cox v. West. Pac. R. Co. 44 Cal. 18; 47 Cal. 87. In Tennessee it is held that where materials for the construction of a railroad are furnished or delivered pursuant to a contract to furnish same as needed by the purchaser, the several deliveries are so connected as an entirety that a notice of lien within 90 days from date of last delivery secures the lien on all the deliveries, though some were made more than 90 days before such notice of lien. And the fact that the last shipment of materials for which a lien is claimed was not delivered because of the notice that the purchaser was insolvent, and had abandoned the work, does not affect the seller's right of lien for prior materials furnished, though furnished more than 90 days prior to the notice of lien. Hercules Powder Co. v. Knoxville &c. R. Co. 113 Tenn. 382; 83 S. W. 354; 67 L. R. A. 487.

[342] Farmers' Loan &c. Co. v. Canada &c. R. Co. 127 Ind. 250; 26 N. E. 784.

[343] Boston &c. Co. v. Chesapeake &c. R. Co. 76 Va. 180; 12 Am. & Eng. R. Cas. 263. In Giant Powder Co. v. Oregon Pac. R. Co. 42 Fed. 470; 8 L. R. A. 700, the court held that it was sufficient to file this notice in the county in which that portion of the road for which it was furnished and used was situated, and that the lienor had a right to limit the lien by such notice to that section of the road, even if the whole road had to be sold, which the court inclined to doubt. See, also, Richmond &c. Co. v. Richmond &c. R. Co. 68 Fed. 105; 34 L. R. A. 625.

[344] Galveston R. Co. v. Cowdrey, 11 Wall. (U. S.) 459 (and not as in maritime cases); Fox v. Seal, 22 Wall. (U. S.) 424; Howard v. Railway Co. 101 U. S. 837; Coe v. New Jersey &c. R. Co. 31 N. J. Eq. 105; Phillips Mechanics' Liens, § 225. See, also, Central Trust Co. v. Louisville &c. R Co. 70 Fed. 282. Ante, § 500.

such liens, whether for work performed or for materials furnished, should stand upon an equality and share pro rata in the proceeds of that which all the lien-holders contributed in creating.[345] There are also cases in which a mechanics' lien may take precedence of a prior mortgage. Thus, it has been held that where the railroad has not been constructed or completed when a mortgage is given upon it the mortgagees must take notice of that fact and of the fact that labor and materials would be needed to construct or complete it, and that a mechanics' lien for materials furnished or work and labor performed in constructing or completing it will take precedence of the mortgage.[346] So, it has been held that a mortgage executed before the company has acquired any title to the property is subordinate to a lien thereon for labor performed after the execution of the mortgage and before the acquisition of the title.[347] As we have elsewhere shown, persons who perform labor or furnish materials may also be preferred, in certain cases, over mortgage bondholders where the mortgage is foreclosed or the property placed in the hands of a receiver.[348] This rule is applied in proper cases, however,

[345] Phillips Mechanics' Liens, § 251, et seq.; Choteau v. Thompson, 2 Ohio St. 114; Moxley v. Shepard, 3 Cal. 64; Crowell v. Gilmore, 18 Cal. 370; Wing v. Carr, 86 Ill. 347; Rosenthal v. Maryland &c. Co. 61 Md. 590; Willamette &c. Co. v. Riley, 1 Ore. 183; Pennsylvania &c. R. Co. v. Leuffer, 84 Pa. St. 168; 24 Am. R. 189.

[346] Farmers' Loan &c. Co. v. Canada &c. R. Co. 127 Ind. 250; 26 N. E. 784; 11 L. R. A. 740; Kilpatrick v. Kansas City R. Co. 38 Neb. 620; 57 N. W. 664; 41 Am. St. 741; Brooks v. Railway Co. 101 U. S. 443; Meyer v. Hornby, 101 U. S. 728; Railroad Co. v. Meyer, 100 U. S. 457; Neilson v. Iowa &c. R. Co. 44 Iowa, 71; Taylor v. Burlington &c. Co. 4 Dill. (C. C.) 570. See, also, Carew v. Stubbs, 155 Mass. 549; 30 N. E. 219; Chicago &c. R. Co. v. Union &c. Co. 109 U. S. 702; 3 Sup. Ct. 594; Addison v. Lewis, 75 Va. 701; 9 Am. & Eng. R. Cas. 702, and note. But compare Central Trust Co. v. Cameron &c. Co. 47 Fed. 136; Toledo &c. R. Co. v. Hamilton, 134 U. S. 296; 10 Sup. Ct. 546. It is held that a prior mortgage on the entire road takes precedence of liens for repairs or improvements forming an integral part of the road as it already existed. Bear v. Burlington &c. R. Co. 48 Iowa, 619; Coe v. New Jersey &c. R. Co. 31 N. J. Eq. 105. See, also, Tommey v. Spartanburg &c. R. Co. 7 Fed. 429; Boston &c. R. Co. v. Chesapeake &c. R. Co. 76 Va. 180; 12 Am. & Eng. R. Cas. 263; Phillips Mechanics' Liens, § 237.

[347] Botsford v. New Haven &c. R. Co. 41 Conn. 454. See, also, Phoenix &c. Co. v. Batchen, 6 Ill. App. 621.

[348] Ante, §§ 528, 590, 592, 593.

even where a preferred claim does not constitute a statutory lien, but such claims are frequently given priority as liens, or otherwise, by express provision of the statute.[349] The courts of Texas hold that claims for material furnished for the construction of a railroad are subordinate to the rights of holders of mortgage bonds where the mortgage was on the railroad at the time of the inception of the lien, unless the material was for new construction constituting a betterment whereby the security of the mortgage was increased.[350] It may be said to be the general rule, subject to exceptions on account of peculiar equities, that preferential claims for labor or materials furnished for the operation of a railroad must accrue within approximately six months preceding the impounding of the income and seizure of the property by the mortgage bondholders.[351] Specific statutory liens acquired before the property passes into the hands of the receiver or the court are superior to the general equitable liens of creditors of an insolvent corporation upon the fund brought into the court for distribution.[352]

§ 1073. Assignability of lien.—There is some conflict among the authorities as to whether a lien for work done or materials furnished in the construction of a railroad can be assigned. The matter may, of course, be regulated by statute, but there is seldom any express statutory provision upon the subject. At common law choses in action were not assignable; but in equity they were, and we think the better rule is that such liens are assignable,[353] at least under most

[349] See Blair v. St. Louis &c. R. Co. 25 Fed. 232.

[350] Waters-Pierce Oil Co. v. United States &c. Trust Co. (Tex. Civ. App.) 99 S. W. 212.

[351] Westinghouse Air Brake Co. v. Kansas City &c. R. Co. 137 Fed. 26.

[352] Farmers' L. &c. Co. v. Canada &c. R. Co. 127 Ind. 250; 26 N. E. 784; 11 L. R. A. 740, and note. See, also, Brown v. Buck, 54 Ark. 453; 16 S. W. 195.

[353] Midland R. Co. v. Wilcox, 122 Ind. 84; 23 N. E. 506; Texas &c. R. Co. v. McCaughey, 62 Tex. 271; Austin &c. R. Co. v. Daniels, 62 Tex. 70; Skyrme v. Occidental &c. Co. 8 Nev. 219; Tuttle v. Howe, 14 Minn. 145; 100 Am. Dec. 205; Stryker v. Cassidy, 76 N. Y. 50; 32 Am. R. 262, and note; Rogers v. Omaha &c. Co. 4 Neb. 54; Mason v. Germaine, 1 Mont. 263. See, also, Linnemann v. Bieber, 66 N. Y. St. 739; 33 N. Y. S. 129; Cairo &c. R. Co. v. Fackney, 78 Ill. 116; Iaege v. Bossieux, 15 Gratt. (Va.) 83; 76 Am. Dec. 189; Davis v. Crookston &c. Co. 57 Minn. 402; 89 N. W. 482; 47 Am. St. 622; Kerr v. Moore, 54 Miss. 286; Brown v. Harper,

of the modern statutes, which have adopted the old equity rule, and many of which permit the assignee to sue in his own name. In some jurisdictions, however, he must sue in the name of his assignor,[354] and several of the courts have held that a mechanics' lien is in the nature of a personal privilege and can not be assigned.[355] It has also been held that the assignment of an order drawn by a subcontractor in favor of a laborer is not a good assignment of the debt or claim itself.[356] But it has been held that the purchase of time checks of laborers showing the amounts due them for labor constitutes an assignment of the claims with the statutory lien securing same particularly where the transaction was suggested by the maker of the check.[357]

§ 1074. **Enforcement of lien.**—Where the statute gives a right, as in the case of a mechanics' lien, it may provide the remedy that shall be pursued, and one who obtains a lien in the authorized mode "has a right to have it enforced as the law directs, and not otherwise."[358] In some of the states scire facias has been adopted as the

4 Ore. 89; Kent v. Muscatine &c. R. Co. 115 Ia. 383; 88 N. W. 935; Little Rock Trust Co. v. Southern Missouri &c. R. Co. 195 Mo. 669; 93 S. W. 944; Pere Marquette R. Co. v. Baertz, 36 Ind. App. 408; 74 N. E. 51; Phillips Mechanics' Liens, §§ 54, 55.

[354] Murphy v. Adams, 71 Me. 113; 36 Am. R. 299; Caldwell v. Lawrence, 10 Wis. 331. See, also, Rollin v. Cross, 45 N. Y. 766; Phoenix &c. Co. v. Batchen, 6 Ill. App. 621.

[355] Ruggles v. Walker, 34 Vt. 468; Fitzgerald v. Trustees &c. 1 Mich. N. P. 243; Dano v. Mississippi &c. R. Co. 27 Ark. 564. See, also, Tewksbury v. Bronson, 48 Wis. 581; 4 N. W. 749; St. John v. Hall, 41 Conn. 522. To the effect that the claim can not be assigned before the lien is obtained so as to enable the assignee to perfect the lien, see Frailey v. Winchester &c. R. Co. 96 Ky. 570; 29 S. W. 446; O'Connor v. Current River R. Co. 111 Mo. 185; 20 S. W. 16.

[356] Dudley v. Toledo &c. R. Co. 65 Mich. 655; 32 N. W. 884; 30 Am. & Eng. R. Cas. 236. See, also, Frailey v. Winchester &c. R. Co. 96 Ky. 570; 29 S. W. 446; Texas &c. R. Co. v. Dorman (Tex. Civ. App.), 62 S. W. 1086. But see Midland R. Co. v. Wilcox, 122 Ind. 84, 91; 23 N. E. 506; Skyrme v. Occidental &c. Co. 8 Nev. 219. In California the assignment must be in writing. Ritter v. Stevenson, 7 Cal. 388. See and compare McCrea v. Johnson, 104 Cal. 224; 37 Pac. 902; Murray v. Micolino, 83 Hun (N. Y.), 564; 31 N. Y. S. 1109.

[357] Pere Marquette R. Co. v. Baertz, 36 Ind. App. 408; 74 N. E. 51.

[358] Farmers' Loan &c. Co. v. Canada &c. R. Co. 127 Ind. 250, 259; 26

appropriate remedy for the enforcement of a mechanics' lien,[359] but in most jurisdictions a foreclosure suit, similar to a suit in equity to foreclose a mortgage, is the proper remedy.[360] And in a recent case it is held that where there is a right to the lien under the statute and also upon an equitable preference the union of both grounds in the same bill does not render it multifarious.[361] As we have elsewhere shown, it would be detrimental to the interest of the public as well as to that of the railroad company and the lien-holders, to permit a railroad to be broken up and sold in practically useless fragments,[362] and, for this reason it is generally held that the lien must be enforced against the entire road and all of it may be sold, in a proper case, to satisfy a lien thereon.[363] In some instances, however, the lien has been satisfied by sequestrating the earnings of the corporation or appointing a receiver, without a sale of the road.[364]

N. E. 784; 11 L. R. A. 740, and note; Delaware &c. Co. v. Davenport &c. R. Co. 46 Iowa, 406; Lounsbury v. Iowa, &c. R. Co. 49 Iowa, 255; Cranston v. Union Trust Co. 75 Mo. 29.

[359] Phillips Mechanics' Liens, § 410.

[360] See Albrecht v. Foster Lumber Co. 126 Ind. 318; 26 N. E. 157, and authorities there cited; Hamilton v. Dunn, 22 Ill. 259; McGraw v. Bayard, 96 Ill. 146; Davis v. Alvord, 94 U. S. 545; Willer v. Bergenthal, 50 Wis. 474; 7 N. W. 352; Maxwell Code Pl. 238. See, also, Central Trust Co. v. Condon, 67 Fed. 84.

[361] Westinghouse &c. Co. v. Kansas City &c. R. Co. 137 Fed. 26.

[362] Ante, §§ 520, 522.

[363] Louisville &c. R. Co. v. Boney, 117 Ind. 501; 20 N. E. 432; Farmers' Loan &c. Co. v. Canada &c. R. Co. 127 Ind. 250; 26 N. E. 784 (so holding although notice of the lien was filed in only one of the counties through which the road ran); Midland R. Co. v. Wilcox, 122 Ind. 84; Pere Marquette R. Co. v. Baertz, 36 Ind. App. 408; 74 N. E. 51; Muller v. Dows, 94 U. S. 444; Dano v. Miss. &c. R. Co. 27 Ark. 564; Cox v. Western Pac. R. Co. 44 Cal. 18; Knapp v. St. Louis &c. R. Co. 74 Mo. 374; Cranston v. Union Trust Co. 75 Mo. 29; Connor v. Tennessee Cent. R. Co. 109 Fed. 931, 939, 940; 54 L. R. A. 687, 694, 695 (citing text). See, also, Graham v. Mt. Sterling &c. R. Co. 11 Bush (Ky.), 425; 29 Am. R. 412; Bagnell Timber Co. v. Missouri &c. R. Co. 180 Mo. 420; 79 S. W. 1130; Wetzel &c. R. Co. v. Tennis Bros. Co. 145 Fed. 458. See Ireland v. Atchison &c. R. Co. 79 Mo. 572; 20 Am. & Eng. R. Cas. 493, where this general rule was admitted, but it was held that the lien could only be enforced against that portion of the road within the state.

[364] See Phillips Mechanics' Liens, § 460; Foster v. Fowler, 60 Pa. St. 27.

§ 1074a. Further of enforcement of lien.—The statutes giving these liens usually fix the time within which actions for their enforcement are to be brought after their accrual, and it goes without saying that the action will be barred unless brought within this time. In a case where the date of the suit was not disclosed by the record, but an amended complaint was shown to have been filed on a certain date, an appellate court treated the date of filing the amended complaint as the date of the commencement of the suit for the purpose of testing the plea of limitation.[365] But the limitation will not, in any event, begin to run until the suit can be brought, and, if the wages subject to lien are payable in the future, not until the time specified has come.[366] The railroad company owning and operating the road at the time the action is brought is a necessary party to an action to establish the lien.[367] Likewise a contractor is a necessary party to an action to enforce a laborer's lien for material and labor furnished in the construction of a railroad under a contract with the contractor.[368] It has been held that, while the Missouri statute providing for the filing of railroad liens does not require the lien to be verified, yet, where such a lien has an affidavit attached, the signature to which, is the only means of identifying the paper or connecting plaintiff with it, it must be regarded as an entire instrument, so that the plaintiff is not entitled to read the lien to the jury, omitting the affidavit.[369] The doctrine of the last preceding section against the sale of a portion of a railroad to satisfy a lien where such a procedure would interfere with the carrier's duty to the public has been held to apply to a road practically completed, though the company was not yet engaged in the business of a common carrier.[370] In these cases it is generally deemed proper for the court, in the exercise of its equity powers, to direct a personal judgment against the railroad company.[371] It has been held in an action to enforce a lien under the Arkansas statute where a contractor was the primary

[365] St. Louis &c. R. Co. v. Love, 74 Ark. 528; 86 S. W. 395.

[366] Gulf &c. R. Co. v. Berry (Tex. Civ. App.), 72 S. W. 1049.

[367] Little Rock &c. Co. v. Southern &c. R. Co. 195 Mo. 669; 93 S. W. 944.

[368] Eastern Texas R. Co. v. Davis (Tex. Civ. App.), 83 S. W. 883.

[369] Bagnell Timber Co. v. Missouri &c. R. Co. 180 Mo. 420; 79 S. W. 1130.

[370] Pere Marquette R. Co. v. Smith, 36 Ind. App. 439; 74 N. E. 545.

[371] Pere Marquette R. Co. v. Baertz, 36 Ind. App. 408; 74 N. E. 51.

debtor, but was a nonresident of the state, that a personal judgment against the contractor was not a prerequisite to the declaration of a lien against the property of the railroad, but it was sufficient to bring the nonresident contractor into the case by constructive service of process for the purpose of ascertaining the amount of the debt.[372]

§ 1075. Waiver of lien.—A mechanics' lien may, of course, be waived by the voluntary act or agreement of the lienholder.[373] It may also be waived, in some cases, by inconsistent acts, although he may have had, in fact, no intention to waive it, but the intent of the parties is usually controlling. The rule is thus stated in a recent case: "It may be admitted that lien laws do not, in general, create a lien in favor of one who accepts in full a different security at the time the contract or agreement is made, or who has entered into any other agreement which manifestly indicates a clear purpose and intention to waive the benefit of the statutory lien. A contract for a security which is inconsistent with the intention that a mechanics' lien should exist will be held, generally, as a waiver of the statutory lien; but it is well-settled that though the owner obligate himself to give a security inconsistent with the intention that a mechanics' lien should exist, or where the contract is to pay in land, or other specific article of property, yet if the owner fail to fulfill the agreement for such mode of payment, or for different security, it will not be taken as an agreement to waive the mechanics' lien in case payment is not made in the manner provided for, or the security is not given according to the obligation of the owner."[374] According to this

[372] St. Louis &c. R. Co. v. Love, 74 Ark. 528; 86 S. W. 395.

[373] See Harris v. Youngstown Bridge Co. 93 Fed. 355; Portsmouth Iron Co. v. Murray, 38 Ohio St. 323; Griffin v. Booth, 152 Ill. 219; 38 N. E. 551; Hughes v. Lansing, 34 Oreg. 118; 55 Pac. 95; 75 Am. St. 574; Davis v. La Crosse &c. 121 Wis. 579; 99 N. W. 351.

[374] Central Trust Co. v. Richmond &c. R. Co. 68 Fed. 90; 41 L. R. A. 458. Citing Grant v. Strong, 18 Wall. (U. S.) 623; Reiley v. Ward, 4 G. Greene (Iowa), 21; McMurray v. Brown, 91 U. S. 257. In the latter case it is said: "If the labor has been performed, or the materials furnished, no matter in what the owner agreed to pay, if he has not paid in any way, the laborer or mechanic has a right to resort to the security provided by law, unless the rights of third parties intervene before he gives the required notice. Liens of the kind, except where the statute otherwise provides, arise by the operation of law, independent of the express terms of the contract, in case the

rule, taking a mortgage or other security may operate as a waiver of the lien.[375] but it does not necessarily do so unless such was the intention of the parties,[376] and it seems that, as between the parties at least, the presumption will be indulged, in the absence of anything to the contrary, that the lien was not intended to be waived unless the conditions of the contract as to the security or manner of payment are performed.[377] The mere fact that a note is taken for the amount due does not operate as a waiver of the lien in the absence of any such intention.[378] Nor does the recovery of a personal judgment, which remains unpaid, merge or waive the lien.[379] It has also

stipulated labor is performed, or the promised materials are furnished; the principle being that the parties are supposed to contract on the basis that if the stipulated labor is performed, or the promised materials are furnished, the laborer or material man is entitled to the lien which the law affords, provided he gives the required notice within the specified time." Chicago &c. R. Co. v. Union Rolling Mill Co. 109 U. S. 702, 721, 722; 3 Sup. Ct. 594; Van Stone v. Stillwell &c. Manufacturing Co. 142 U. S. 128; 12 Sup. Ct. 181. See note in 41 Am. Dec. 221, and note in 41 Am. St. 761; Reynolds v. Manhattan Trust Co. 83 Fed. 593; Firth v. Rehfeldt, 164 N. Y. 588; 58 N. E. 1087.

[375] Willison v. Douglas, 66 Md. 99; 6 Atl. 530; Picket v. Bullock, 52 N. H. 354; Trustees of German &c. Congregation v. Heise, 44 Md. 453; Hale v. Burlington &c. R. Co. 2 McCrary (U. S. C. C.), 558; Davis v. Bowsher, 5 Durnf. & East, 488; Barrows v. Baughman, 9 Mich. 213; Gorman v. Sagner, 22 Mo. 137.

[376] Union &c. Bank v. Baker, 42 Neb. 880; 61 N. W. 91; Chapman v. Brewer, 43 Neb. 890; 62 N. W. 320; 47 Am. St. 779; Gilcrest v. Gottschalk, 39 Iowa, 311; Kilpatrick v. Kansas City &c. R. Co. 38 Neb. 620; 57 N. W. 664; 41 Am. St. 741, and note; Taliaferro v. Stevenson (N. J.), 33 Atl. 383; Maryland &c. Co. v. Spilman, 76 Md. 337; 25 Atl. 297; 17 L. R. A. 599; 35 Am. St. 431.

[377] See authorities cited in note 1, p. 1607, supra; Barnard &c. Co. v. Galloway, 5 S. Dak. 205; 58 N. W. 565; Kingsland &c. Co. v. Massey, 69 Miss. 296; 13 So. 269. See, also, review of authorities in note to Kilpatrick v. Kansas City &c. R. Co. 41 Am. St. 741.

[378] Delaware &c. Co. v. Oxford &c. Co. 33 N. J. Eq. 192; Poland v. Lamoille Valley R. Co. 52 Vt. 144; Barnacle v. Henderson, 42 Neb. 169; 60 N. W. 382; Wisconsin Trust Co. v. Robinson &c. Co. 68 Fed. 778, 781; Smith &c. Co. v. Butts, 72 Miss. 269; 16 So. 242; Hill v. Alliance &c. Co. 6 S. Dak. 160; 60 N. W. 752; Aiken v. Steamboat, 40 Mo. 257; Linneman v. Bieber, 33 N. Y. S. 129; Goble v. Gale, 7 Blackf. (Ind.) 218; 41 Am. Dec. 219, and note. But see authorities cited in next to last note to this section.

[379] Marean v. Stanley, 5 Colo. App. 335; 38 Pac. 395; United

been held that giving credit beyond the time allowed for filing notice of the lien does not waive the lien where the notice is duly filed.[380] The doctrine of estoppel may, however, prevent a lienholder from enforcing his lien against innocent third persons whom he has misled. This is generally true where he purposely conceals the fact that he is entitled to take a lien and induces others to act, to their injury, upon the belief that he has no such right, or represents that he has been paid, or the like, so that the assertion of the lien upon his part would operate as a fraud upon innocent third persons.[381] So, it has been held that the acceptance for the debt of a promissory note which matures subsequent to the time fixed by statute for the commencement of an action to foreclose the mechanics' lien estops the creditor from enforcing such lien and destroys it, and that, in the absence of fraud or mistake, it can not be revived, by subsequent delivery of materials under the same contract or the like.[382] But it has been held that a sub-contractor is not estopped from enforcing his lien by the mere fact that a settlement is made in his presence between the owner and the contractor.[383]

States &c. Co. v. Spencer, 40 W. Va. 698; 21 S. E. 769; Germania &c. Asso. v. Wagner, 61 Cal. 349; Holbrook v. Ives, 44 Ohio St. 516; Kirkwood v. Hoxie, 95 Mich. 62; 35 Am. St. 549. See as to waiver of equitable preferential claim by filing mechanic's lien under statute. State Trust Co. v. Kansas City &c. R. Co. 129 Fed. 455.

[380] Chicago &c. R. Co. v. Union &c. Co. 109 U. S. 702; 3 Sup. Ct. 594; Chisholm v. Williams, 128 Ill. 115; 21 N. E. 215; Kaufman &c. Co. v. Christophel, 59 Mo. App. 80. But see Paul v. Frost, 40 Me. 293; Green v. Fox, 7 Allen (Mass.), 85; Ehlers' Adm. v. Elder, 51 Miss. 495; Pryor v. White, 16 B. Mon. (Ky.) 605; Dey v. Anderson, 39 N. J. L. 199; Jones v. Hurst, 67 Mo. 568.

[381] Hinchley v. Greany, 118 Mass. 595; Chapman v. Hamilton, 19 Ala. 121; McGraw v. Bayard, 96 Ill. 146; Scott v. Orbison, 21 Ark. 202; Howard v. Tucker, 1 B. & Ad. 712; West v. Klotz, 37 Ohio St. 420. See, also, Heidenbluth v. Rudolph, 152 Ill. 316; 38 N. E. 930; Goldman v. Brinton, 90 Md. 259; 44 Atl. 1029; Bristol &c. Co. v. Bristol &c. Co. 99 Tenn. 371; 42 S. W. 19.

[382] Westinghouse &c. Co. v. Kansas City &c. R. Co. 137 Fed. 26. See, also, Harris v. Youngstown &c. Co. 90 Fed. 323, 326; 33 C. C. A. 69; Blakeley v. Moshier, 94 Mich. 299; 54 N. W. 54, 56; Flenniken v. Liscoe, 64 Minn. 269; 66 N. W. 979.

[383] Haveghart v. Lindberg, 67 Ill. 463. If, however, it had appeared that the owner had no knowledge of the subcontractor's claim, that it had never been filed or recorded, and that the subcontractor knew that the settlement was made in full, without deducting the amount

due him, we think he would have been estopped. But see, also, as holding that estoppel of contractor does not estop subcontractor. Green v. Williams, 92 Tenn. 220; 21 S. W. 520; 19 L. R. A. 478.

END OF VOLUME II.