THE

LAW OF RAILWAYS:

EMBRACING

CORPORATIONS, EMINENT DOMAIN, CONTRACTS, COMMON CARRIERS OF GOODS AND PASSENGERS, TELEGRAPH COMPANIES, CONSTITUTIONAL LAW, INVESTMENTS, &c., &c.

BY

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FOURTH EDITION, GREATLY ENLARGED.

VOL. I.

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PREFACE TO THE FOURTH EDITION.

In presenting this edition of our first book to the profession, we have to crave the indulgence of an elder brother, in alluding briefly to the origin and history of the work. The book was undertaken at a period when we had it in our power to command considerable portions of time, in every year, for uninterrupted study. The work was therefore prepared with great labor and care; and so carefully printed as to attract special attention abroad on that account. It was everywhere received in a spirit, and with a degree of cordial commendation, both at home and abroad, which the author had scarcely dared to expect. But it was gratifying to feel that his efforts to give the entire law upon every topic he touched, as fully as if a special brief had been prepared upon the particular points, and, as nearly, as might be allowable, in the form of successive judicial opinions upon the several subjects, was duly appreciated by the profession, or certainly by those who had leisure and opportunity to examine the work carefully.

But for some reasons the first two editions did not obtain so extensive a sale as to become at all remunerative for the very large amount of labor bestowed. This led us to sus-

pect that the baldness of our title, "The Law of Railways," might have led the mass of the profession, who were not much engaged in railway litigation, to suppose that our book treated of no other topics. We were convinced that the book was not generally understood to comprehend compact treatises upon Corporations; Eminent Domain; Contracts for Construction; Mandamus; Certiorari; Equitable Control of Public Works; Taxation; Indictments against Corporations; Quo Warranto; Constitutional Questions affecting Legislative Grants; Investments, Stocks, Mortgages, Police, Amalgamation, &c., as well as all other matters in the law, more exclusively affecting railways.

When the third edition was called for, we resolved to make the treatment of the above topics, and all others in the book, as complete as possible; and to that end had expended a large amount of labor; but before the work was more than half through the press, we received an unexpected public appointment abroad, which compelled us to push the first half of the second volume through the press, in a few days, and to leave the remaining materials in very judicious hands, to be used as far as needful in completing the volume in proper size; and which we are happy to say was exceedingly well done. But the difficulty in knowing precisely what to omit, in our absence, led to the natural result of using the whole; which swelled the second volume to somewhat unwieldy proportions; and presented some matters, which we had originally prepared for other occasions, in a shape not fully assimilated to the present work.

By enlarging in the present edition the scope of the work on Common Carriers of Goods and Passengers, and Tele-

GRAPHS, so as to embrace the entire range of those topics, and form complete treatises upon those important subjects, and nearly so upon all the subjects treated; we are now enabled to omit all matter contained in the third edition, not entirely in harmony with the plan of the work. This matter will be published soon, in a separate volume of leading cases and opinions upon the Law of Railways, with extensive notes, as a supplement to the main work, but sold separately to such as may desire it, whether with or without the main work.

As this edition is but the carrying out of our original purpose in regard to the third edition, by perfecting the treatment of each topic, so as to embrace complete treatises upon each, and extending the title so as to give some hint of what the book contains; it may be proper to add, that the third edition met with a very extended and rapid sale, so as to prove more remunerative to the author in two years than in the ten preceding years. And as the work seems now to have obtained the very general confidence of the profession at home, and as the author has received many very flattering testimonials in regard to the last edition, while abroad, he trusts no apology will be required for quoting a brief extract from that of the Lord Chief Justice of England, especially as it breathes so much of that cordial fraternal spirit towards his American brothers, engaged in the same great field of labor, and which it will be the pleasure of every noble hearted and cultivated patriot, in this country, to reciprocate.

His Lordship says, in regard to the Wills and Railways: "Having now read the books through, I beg, in offering you my most sincere thanks for your gift, to add the expres-

sion of my admiration for the great learning, research, and power of reasoning, displayed in these valuable treatises. They must, I am convinced, prove standard works on the subjects of which they treat, and must prove a very valuable addition to the juridical literature, which, I am happy to think, is common to our two countries. America may indeed be proud of her jurists, who have done so much for the promotion of legal science."

We cannot but feel some well grounded trust, that the present edition will be found useful to the general practitioner, who desires to have, always at hand, in compact form, the synopsis of the law upon the many important topics discussed in these two volumes. And to that end we have done all in our power to make the book as complete as possible. There will, no doubt, be found some errors and defects, since it is not possible to exclude all errors from so extended and complicated a work, or to have it contain all that every one would most desire. If it shall prove a reasonably successful accomplishment of the author's purpose, it will be a sufficient reward for a large amount of labor, through many years, which no faithful book-maker, in the profession of the law, can reasonably expect to have fully compensated in any other mode.

I. F. R.

Boston, Sept. 1, 1869.

PREFACE.

This work was undertaken with the purpose of supplying, what seemed to the writer a want, if not a necessity, to the profession in this country; a book upon the law of railways, which should present, within reasonable compass, and in a properly digested form, the whole law upon the subject, both English and American. No treatise had attempted this. And the attempt has confirmed the expectation, that the accomplishment of such an undertaking would be attended with labor and perplexity.

It seems desirable that such a work should present every case which has been decided in both countries, in such a form as to make the point of decision plain and obvious, and at the same time not convert a treatise into a mere digest. A mere treatise, too, upon the principles involved in the several departments of the law brought under discussion in such a work, would be of little benefit except to the student. This, too, will be found in the approved treatises already published upon these several subjects. On the other hand, a digest of the cases upon any plan, however comprehensive or philosophical might be the analysis, would appear an unsatisfactory labor when we have already so much of the kind.

It is the endeavor of this undertaking to combine the two in such a manner as to render the work intelligible, and interesting as an exposition of the principles involved; and at the same time present a thorough analysis and digest of all the important cases upon the subject, in such a manner as to enable the reader at once to know the result of all the decisions upon the several topics discussed.

The plan of the work is mainly new, and the effort has been to render it natural, simple, and comprehensive. The manner of arranging the heads to the several subdivisions has been adopted chiefly with a view to enable the profession to find at once whatever the work contains upon any topic or question.

How far the design of the author has been accomplished, he submits to the indulgent judgment of his professional brethren who have hitherto shown him so much forbearance. In justice to himself, perhaps it should be here mentioned, that the work has been prepared under some disadvantages, from the constant pressure of official duties which could not be required to accommodate themselves, in any respect, to the demands of this subordinate labor. It has thus happened, that, although a considerable time has elapsed since the work was seriously taken in hand, it has of necessity been done, to a great extent, at such intervals, more or less extensive, as circumstances would allow the writer to command, and always in haste.

If some mistakes should be discovered, therefore, and some graver faults even, it is hoped that the profession will bear with them; with the assurance that, if the work should be found of sufficient importance to require another edition, they will be corrected; and that, if no such demand should be made, the work has probably received as much labor as it deserves.

I. F. R.

Windsor, Vt., Nov. 20, 1857.

ANALYSIS OF THE CONTENTS.

☞ The citations to other portions of the work are thus expressed, § — pl. n. —. and the §§ are placed in the inner margin of the pages, for convenience of reference. The paging of the third edition is preserved in this edition at the bottom of the page.

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THE LAW OF RAILWAYS.

*CHAPTER I.

INTRODUCTION.

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

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

[1] Roger North's Life of Lord Keeper North, vol. 2, p. 281; Ency. Americana, Art. Railway, vol. 10, p. 478. And in all the mediæval towns in Europe, we notice double granite flagging, along the streets, for the wheels of carriages. And in the main street in Milan, and some other Italian towns, there are double tracks of this kind for carriages to pass in opposite directions. These granite blocks in the streets, for the wheels of carriages, are seen in Canterbury and in York, England; and in most of the Italian cities. But they seem never to have suggested the idea of railways.

2. These railways, built chiefly by the owners of coal-mines * and stone-quarries, either upon their own land or by special license, called way-leave, upon the land of others, had become numerous long before the application of steam power to railway transportation.

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

[2] Walford on Railways, 2; Keppell *v.* Bailey, 2 My. & K. 517; Hemingway *v.* Fernandes, 13 Simons, 228. These cases seem to establish the rule, that a covenant to erect a railway across the land of another, and to use the same exclusively for a given transportation, is binding upon the assignees of the interest.

But a mere covenant to use an adjoining railway, and pay a specified toll, does not run with the land then used by the covenanter, and from which he derives the material transported. Id.

[3] Walford, 3-10. The points chiefly discussed in the reported cases in reference to private railways and railways at common law, are: —

1. That these way-leaves, or reservations, by which one man has the right to build a railway upon the land of others, or in the rightful occupation of others, are not to be limited to the kind of railway in use at the date of the reservation or grant, but will justify the building of a railway, suitable and convenient for the use for which the reservation or grant is made, and with all such needful or useful improvements, as the progress and improvements of art and science will enable the grantee to avail himself of. Dand *v.* Kingscote, 2 Railw. C. 27; s. c. 6 M. & W. 174. Hence it was considered that such railways might, upon the general application of steam power to railways, adopt that as an improvement, coming fairly within the contemplated use of their grant or reservation, although wholly unknown at the date of their grant. Bishop *v.* North, 3 Railw. C. 459; s. c. 11 M. & W. 429.

2. That this will not justify the grantee of a way-leave for a railway, for a special purpose, to erect one for general purposes of transporting merchandise and passengers. Dand *v.* Kingscote, 2 Railw. C. 27; s. c. 6 M. & W. 174. Farrow *v.* Vansittart, 1 Railw. C. 602; Durham & Sunderland R. *v.* Walker, 3 Railw. C. 36; s. c. 2 Q. B. 940. In this last case, which was a decision of the Exchequer Chamber, the way-leave was retained by the landlord in leasing the land, and the court say, it is not an exception, for it is not parcel of the thing granted, and it is not a reservation, as it did not issue out of the thing granted, but it is an easement, newly created, by way of grant, from the lessee. And that it was to be presumed the deed was executed by both parties, lessor and lessee.

But it was held, that where, by a canal act, (32 Geo. 3, c. 100, § 54,) the proprietors of coal-mines, within certain parishes, are empowered to make railways to convey coal over the land of others, by paying or tendering satisfaction, that this power was not limited to such persons as were the proprietors, at the date of the act, but extended to subsequent proprietors. Bishop *v.* North, 3 Railw. C. 459; s. c. 11 M. & W. 429.

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

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

3. That if the railway was such an one as the company, at the time when it was made, might lawfully make, for the purposes for which, when made, they might lawfully use it, the plaintiff, as reversioner, had no ground of complaint, by reason of the intention of the company to use it for other purposes, for which they had no right to use it, until such intentions were actually carried into effect. Durham & Sunderland R. *v.* Walker, 3 Railw. C. 36; s. c. 2 Q. B. 940.

But where other parties have acquired the right to use a railway originally erected by private enterprise and for private purposes, the English courts at an early day restrained the owners of the railway by mandamus from taking up their track, and required them to maintain it in proper condition for public use. Rex *v.* Severn R. 2 B. & Ald. 646. But see Thorne *v.* Taw Vale R. 13 Beavan, 10.

4. That such way-leaves, for the erection and use of railways upon the land of others, may exist by express contract; by presumption or prescription; from necessity, as accessory to other grants; and by acquiescence, short of the limit of prescription. Barnard *v.* Wallis, 2 Railw. C. 162; s. c. 1 Cr. & Ph. 85; Monmouth Canal Co. *v.* Harford, 1 C. M. & R. 614.

These railways, at common law and by contract, impose certain burdens upon the proprietors, as the payment of rent sometimes for the use of the land, tenant's damages, and the keeping their roads in repair, so as not to do damage to the occupiers of the adjoining lands. Wilson *v.* Anderson, 1 Car. & K. 544; Walford, *supra*.

[4] 2 Kent, Comm. 276, 277; Stockbridge *v.* West Stockbridge, 12 Mass. 400; Hagerstown Turnpike Co. *v.* Creeger, 5 Har. & J. 122; Greene *v.* Dennis, 6 Conn. 292, 302, *Hosmer* Ch. J.; Franklin Bridge Co. *v.* Wood, 14 Ga. 80. But from the case of Wilson *v.* Cunningham, 3 California 241, it seems that the municipal authorities of San Francisco did assume to grant a private railway within the limits of the city. The court held the proprietor liable for the slightest negligence in its use, whereby third parties were injured. *Post*, § 250.

[5] The celebrated trial of locomotive engines upon the Liverpool and Manchester Railway, for the purpose of determining the relative advantage of stationary and locomotive power upon such roads, and which resulted in favor of the latter, was had in October, 1829. The Quincy Railway, for the transportation of granite solely, by horse power, was constructed about two years before this. But the Boston and Lowell Railway, one of the first railways in this country for general transportation of passengers and merchandise by the use of steam power and locomotive engines, was incorporated in June, 1830. And rail-

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

ways for purposes of general traffic were constructed about the same date in most of the older States, and very soon throughout the country.

[6] *Bennett*, J., in Bank of Middlebury *v.* Edgerton, 30 Vt. 182.

* CHAPTER II.

PUBLIC RAILWAYS AS CORPORATIONS. — PRELIMINARY ASSOCIATIONS.

SECTION I.

Mode of instituting Railway Projects.

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

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

2. Under this form of association, the subscribers are bound by the act obtained, if within the powers conferred by the deed, even where it involves the purchase of canal, and other property by the company.[1] And courts of equity often interfere to restrain the provisional directors from exceeding their * powers under the deed,[2]

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

[2] Gilbert *v.* Cooper, 4 Railw. C. 396; s. c. 15 Sim. 343. All parties concerned must be made parties to the bill, even shareholders of whom it is alleged a rival company propose to purchase shares, to destroy the independence of one

or misapplying the funds, or delaying payment of the debts of the association.[3]

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

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

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

of the companies connected with the common enterprise. Greathed *v.* S. W. & Dorchester Railway, 4 Railw. C. 213; s. c. 10 Jur. 343.

[3] Lewis *v.* Billing, 4 Railw. C. 414; s. c. 10 Jur. 851. Bagshawe *v.* Eastern Union Railway, 6 Railw. C. 152; s. c. 7 Hare, 114; Bryson *v.* Warwick & Birmingham Canal Co. 23 Eng. L. & Eq. & R. 91; s. c. 4 De G. Mac. & G. 711. In this last case, the railway company being only provisionally registered, expended £10,000 in the purchase of the stock of the defendants. The railway finally failing to go into operation, in the process of winding up, one of the shareholders was allowed to institute proceedings in equity, on behalf of himself and others, being shareholders, to compel defendants to refund the money, and the court held the contract illegal, and compelled the defendants to refund the money received under it.

[4] *Post*, § 47; Birmingham, B. & Th. J. Railway *v.* Locke, 1 Q. B. 256; London Grand J. Railway *v.* Graham, id. 271; s. c. 2 Q. B. 281; The Cheltenham & G. W. U. Railway *v.* Daniel, 2 Railw. C. 728; Sheffield & A. & M. Railway *v.* Woodcock, 2 Railw. C. 522; s. c. 7 M. & W. 574.

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

[6] Hodges on Railways, 97.

[7] Kidwelly Canal Co. *v.* Raby, 2 Price, 93; Great North of Eng. Railway *v.* Biddulph, 2 Railw. C. 401; s. c. 7 M. & W. 243, where the question is raised, but not determined.

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

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

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

8. Since the publication of the second edition of this work, the mode of procedure in obtaining parliamentary powers for railways,

[8] Midland G. W. Railway *v.* Gordon, 5 Railw. C. 76; s. c. 16 M. & W. 804.

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

[10] *Post*, §§ 39, 47.

[11] Angell & Ames on Corporations, §§ 86–94.

[12] Laws of Mass. 1833, ch. 176; 2 Railroad Laws & Ch. 616; id. 657; Laws of Mass. 1848, ch. 140; Laws of Rhode Island, 1836; 2 Rail. Laws & Ch. 838;

in England, has been considerably changed. The former laws have been repealed, and the whole consolidated into one statute,[13] called "The Companies' Act, 1862," which applies to other companies as well as railways.

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

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

Laws of Conn. 1849, ch. 37; id. 1853; Rev. Statutes of Maine, ch. 81, § 1; 1 Rail. Laws & Ch. 305. Similar provisions exist in many of the other States. But they are very general, and ordinarily the plans furnished are so imperfectly made, as not to afford much protection to land-owners. And a compliance with these requirements not being, in any sense indispensable to the validity of special acts, they are probably not very strenuously enforced by legislative committees, especially in cases where opposition is not made to the new incorporation, which is not very common, unless the project interferes with some rival work.

[13] 25 & 26 Vict. c. 89.

[14] Hodges on Railways, (ed. 1865,) 2.

[15] Hamilton *v.* Smith, 5 Jur. N. S. 32; *Post*, § 4, n. 11; Norris *v.* Cooper, 3 H. Lds. Cas. 161. Statute 27 & 28 Vict. c. 121, facilitates, in certain cases, the obtaining of powers for the construction of railways. The act may be cited as "The Railways Construction Facilities Act, 1864." The recital to the preamble enumerates the cases to which the act is to apply; it recites that it is expedient to facilitate the making of branch and other lines of railway, and deviations of existing railways, and of railways in course of construction, and also the execution of new works connected with, or for the purposes of, existing railways; and that the object aforesaid would be promoted, if, where all landowners and other parties beneficially interested are consenting to the making of a railway, or the execution of a work, the persons desirous of making or executing the same were enabled to obtain power to do so, on complying with the conditions of the general Act of Parliament, without being obliged to procure a special act. The promoters having contracted for the purchase of all the lands required for the railway, they are empowered to apply for a certificate from the

*SECTION II.

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

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

§ 3. 1. The promoters of railways, in this country, where the law makes no provision for the preliminary association becoming a corporation, can only bind themselves and their associates, at most, by their contracts.[1] The promoters are in no sense * identi-

Board of Trade, in the same manner, and subject to the same incidents, as obtaining a certificate under the Railways Companies' Powers Act.

The lines and works of a railway are sufficiently shown on the plans deposited by a black line, with dotted lines on each side, to mark the limits of deviation. Weld *v.* London and South Western Railway Co., 9 Jur. N. S. 510, s. c. 11 W. R. 448; 32 Beav. 340.

Where the deposited plans and sections specify the span and height of a bridge by which a railway is to be carried over a turnpike road, the company will not, in the construction of the bridge, be allowed to deviate from the plans and sections. Attorney-General *v.* Tewkesbury and Great Malvern Railway Company, 1 De G. J. & Sm. 423; 9 Jur. N. S. 951; s. c. 8 L. T. N. S. 682.

[1] Moneypenny *v.* Hartland, 1 C. and P. 352. *Abbott*, Ch. J., said: "Before an act passes for such a work as this, the surveyor and other persons employed on it look to the committee, or body of adventurers, who first employ them." s. p. Kerridge *v.* Hesse, 9 C. & P. 200; Doubleday *v.* Muskett, 7 Bing. 110. And one who attends the meetings of such preliminary association, and takes part, will ordinarily be precluded from denying his liability as a partner. Harrison *v.* Heathorn, 6 Man. & Gr. 81; Sheffield, Ash. and M. Railway *v.* Woodcock, 7 M. and W. 574. If the defendants have suffered themselves to be held out as partners in the enterprise, and engaged in carrying it forward, and others have performed service for the association, upon their credit, they are liable. Wood *v.* The Duke of Argyll, 6 Man. & Gr. 928; Steigenberger *v.* Carr, 3 id. 191. But express proof is required of authority from the partners, or of a necessity to draw bills, in the conduct of the business, to justify the directors in drawing bills on the credit of the association. Dickinson *v.* Valpy, 10 B. & C. 128. From the foregoing cases, and Bell *v.* Francis, 9 C. & P. 66, and some others, it would seem, that the directors and managing committee are always liable for services rendered such associations, on their employment and credit, and that such other members of the association are liable also, as the terms of the association, or their own active agency in the employment of ser-

cal with the corporation, nor do they represent them, in any relation of agency, and their contracts could of course only bind the company, so far as they should be subsequently adopted by it, as their successors; much in the same mode and to the same extent, and under the same restrictions and limitations, as the contracts of one partnership bind a succeeding partnership in the same house.

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

vants and agents, fairly justify such employees in looking to for compensation. It was held, in Scott *v.* Lord Ebury, Law Rep. 2 C. P. 255, that the promoters were responsible for money expended in obtaining the act of parliament, notwithstanding the incorporation and the assumption of these acts by the company. And one of the promoters cannot in equity compel others to contribute to expenses incurred by him, unless he is willing to have all the expenses brought into one account and adjusted together. Denton *v.* Macniel, Law Rep. 2 Eq. 352. *Post*, § 4, n. 11.

In regard to admissions made by provisional committee-men, and others, who have taken part in instituting railway projects, some allowance is made in the English courts, for probable mistakes and misapprehensions, by those not well acquainted with the liabilities of such persons. Newton *v.* Belcher, 6 Railw. C. 38; s. c. 12 Q. B. 921. And where others have not acted upon such admissions, the party has been allowed to show that they were made under mistake, either of law, or fact, and if so, the party has been held not to have incurred any additional liability thereby. Newton *v.* Liddiard, 6 Railw. C. 42; s. c. 12 Q. B. 925.

The rule laid down by *Bailey*, J., in Heane *v.* Rogers, 9 B. & C. 577, upon this subject, is here expressly recognized by Lord *Denman*, Ch. J. "The general doctrine laid down in Heane *v.* Rogers, that the party is at liberty to prove that his admissions were mistaken, or untrue, and is not estopped, or concluded by them, unless another person has been induced by them to alter his condition, is applicable to mistakes, in respect of legal liability, as well as in respect of fact." And this estoppel, it was held in the principal case, only extends to parties and privies, to the particular transaction in which the admission was made, and that third parties, having no interest in it, either originally or by derivation, can claim no benefit from it. This is in accordance with the established principles of the law of evidence, at the present time. See the opinion of the court in Strong *v.* Ellsworth, 26 Vt. 366.

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

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

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

SECTION III.

Subscribers to the Preliminary Association inter sese.

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

n. 11. *No relation of general partnership subsists between subscribers.*

§ 4. 1. The project for a railway being set on foot by a *provisional committee of directors or managers, the subscribers may insist upon the terms of subscription. The subscribers are not bound by any special undertaking of the directors, or any portion of them, beyond or aside of the powers conferred by the terms of the deed or contract of association.[1]

2. And the association is not binding, until the provisions by

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

[4] Dance *v.* Girdler, 4 Bos. & P. 34. See Gittings *v.* Mayhew, 6 Md. 113.

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

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

which it is, by its own terms, to become complete, are complied with. If before that the scheme be abandoned, the provisional subscribers, or allottees, may recover back their deposits of the provisional committee, in an action for money had and received.[2] So, too, if one is induced to accept of shares in the provisional company, by fraudulent representations, he may recover back the whole of his deposits.[3]

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

4. But the contract of the directors will not excuse the subscriber from paying calls, if the terms of the subscriber's agreement require it.[6] The contract of the directors in such case, and the deed of association, are wholly independent of each other, and neither will control the other.[7]

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

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

[3] Jarrett *v.* Kennedy, 6 C. B. 319.

[4] Watts *v.* Salter, 10 C. B. 477. And if one subscribe the agreement and parliamentary contract, he will be liable, although he have not received the shares allotted to him or paid the deposits. *Ex parte* Bowen, 21 Eng. L. & Eq. 422.

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

[6] *Ex parte* Mowatt, 1 Drewry, 247.

[7] Dover & Deal Railway, *ex parte* Mowatt, 19 Eng. L. & Eq. 127; s. c. 1 Drew, 247.

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

[9] Carmichael *ex parte*, 1 Eng. L. & Eq. 66; s. c. 14 Jur. 1014; Clarke *ex parte*, id. 69; s. c. 20 L. J. N.S. ch. 14.

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

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

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

[11] The Galvanized Iron Co. *v.* Westoby, 14 Eng. L. & Eq. 386; s. c. 8 Exch. 17.

It was formerly considered, that all persons engaged in obtaining a bill in parliament for building a railway, were partners in the undertaking, and for that reason a subscriber, who acted as their surveyor, could not maintain an action for work and labor, done by him in that character, against all or any one of the subscribers. Holmes *v.* Higgins, 1 B. & C. 74. See also Goddard *v.* Hodges, 1 C. & M. 33.

But it is now regarded as well settled, in all the courts in Westminster Hall, that there subsists between the subscribers to such an enterprise no relation of general partnership whatever, and no power to bind each other for expenses incurred in carrying forward the enterprise. Each binds himself only by his own acts and declarations, unless he acts by virtue of some authority conferred by the deeds of association. *Parke*, Baron, in Bright *v.* Hutton, 3 H. L. Cases, 341, 368. And an agreement, aside of the deed of association, that one of the promoters shall indemnify another, is held valid. Connop *v.* Levy, 5 Railway C. 124; s. c. 11 Q. B. 769. But a general indemnity against costs will only extend to costs in suits lawfully brought. Lewis *v.* Smith, 2 Shelford, Bennett's ed. 1030.

And in regard to liability, for expenses incurred in carrying forward railway projects, it often happens, that one who has been active may thereby make himself liable to tradesmen and others who have performed service in behalf of the enterprise, upon the expectation he would see them paid. In Lake *v.* Duke of Argyll, 6 Q. B. 477, 479, *Denman*, Ch. J., said: "But when persons meet to prepare the measures necessary for calling the society into existence, attendance on such meeting, and concurrence in such measures, may be strong evidence, that any individual there present, and taking part in the proceedings, held himself out as a paymaster to all who executed their orders; and though not liable as a member or shareholder, yet his declared intention to become

* SECTION IV.

Contracts of the Promoters adopted by the Company.

1. *Liability may be transferred with assent of creditors. But not unless that is equitable.*
n. 3. *Powers of provisional company to contract limited by statute.*

§ 5. 1. The company when fully incorporated may assume the liabilities of the preliminary association, incurred in obtaining * the special act, or as is sometimes the case, where the association

the president, or a member, in whatever event, or to take a share under any conditions, may be material evidence to show that he authorized contracts with those whose services were required by what may be called the constituent body."

But a charge to the jury, that before surveyors, in such case, could recover of the provisional committee, they must be satisfied that defendants did, by themselves or their agent, employ the plaintiff to do the work, or that, being informed of their having done it, on their credit, by the employment of some one not authorized, they consented to be held liable, was affirmed in the Exchequer Chamber. Nevins *v.* Henderson, 5 Railway C. 684; Williams *v.* Pigott, 5 Railway C. 544; s. c. 2 Exch. 201. See also Spottiswoode's case, 39 Eng. L. & Eq. 520. Since the publication of the second edition of this work, the English courts have made numerous decisions bearing upon the general subject discussed in this note. In Maddick *v.* Marshall, 10 Jur. N. S. 1201, the defendant was employed by the parties in interest to act as provisional director in connection with others, under the assurance from the solicitor of such parties, that they were safe and would incur no personal responsibility; and the directors thereupon appointed the principal party in interest secretary, and passed a resolution to advertise, which resolution was signed by the defendant as director. The plaintiff, upon taking the order, was shown the resolution certified by the defendant as authority for the order. The court held this testimony for the jury to consider, tending to show a personal undertaking by defendant, and that they could not disturb a verdict against him. See also Swan *v.* The North British Australasian Co., 7 H. & N. 603; s. c. 8 Jur. N. S. 940, as to what acts will create an estoppel in such cases.

Under the English statute, all the subscribers are constituted directors until they designate who shall act in that capacity, and have authority to appoint one of their number to an office in the company. Eales *v.* The Cumberland Black Lead Mine Co., 6 H. & N. 481; s. c. 7 Jur. N. S. 169.

It seems to be considered essential, in order to fix the liability of a subscriber to the articles of association on that ground alone, that the subscription should be in his own handwriting, and not by procuration merely. Richardson *ex parte*, 4 Law T. N. S. 589. The company are not bound to give notice of the allotment of shares in order to bind the subscriber to take them. It is his duty to take notice of the allotment, and to make payment of all future dues fixed by law, or the terms of the contract. Bloxam *ex parte*, 10 Jur. N. S. 814; s. c. 33 Beav.

make an assignment of their property.[1] But even an express provision in the charter, that the company shall be * solely liable for the debts of the association, will not exonerate the association unless by the consent of the creditors.[2] But when the company assume the debts of the association, by the assent of their creditors, they will be relieved.[3] But where the plaintiff contracted

529. But in order to render the allottee liable to pay calls on shares, they should be specifically numbered and appropriated by number. Irish Peat Co. *v.* Phillips, 7 Jur. N. S. 413: s. c. affirmed 7 Jur. N. S. 1189, 1 B. & S. 598. But *semble* he may be estopped to deny his membership. So, too, it was considered in this case, that in order to bind an associate to pay future calls, it was essential that he should have subscribed the deed of association.

The provision of the English statute as to the period within which the register of shareholders shall be made and sealed is regarded as directory, so far as the liability of shareholders is concerned, and they will not be exonerated from responsibility by a failure of the company to comply with the direction. W. N. W. Co. *v.* Hawksford, 11 C. B. N. S. 456; 8 Jur. N. S. 844 in Exchequer Chamber.

The company, when fully incorporated, may sue in their own name upon calls made by the directors of the preliminary incorporation. Hull Co. *v.* Wellesley, 6 H. & N. 38.

A registered shareholder in a company, which was afterwards incorporated with a new company, is entitled to be regarded as a shareholder in the new company, if the act of incorporation so provide, although he may not have exchanged his certificate for shares in the old company for those in the new company. Spackman *v.* Lattimore, 3 Giff. 16; s. c. 7 Jur. N. S. 179. It was further decided in this case, that the subscribers could not charge their own subscriptions against the company as money advanced for their benefit.

Where a subscriber has paid for the expenses of the promoters all that the terms of association required, he cannot be charged further, because he made the payment without taxation. Croskey *v.* Bank of Wales, 4 Gif. 314.

The property in shares vests in the subscriber upon the execution of the deed and complete registration of the company, and the delivery of scrip certificates is not requisite to vesting the shares, but they are to be regarded merely as the indicia of property. Hunt *v.* Gunn, 3 F. & F. 223.

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

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

[3] Whitwell *v.* Warner, 20 Vt. 425. But by the English statutes companies provisionally registered are not allowed to make any contract, not indispensable to carrying forward the project to full registration. And where the directors of such a company contracted for plans, sections, and books of reference, to the value of £3,000, it was held a violation of the statute and illegal, and that no recovery could be had upon it. Bull *v.* Chapman, 20 Eng. L. Eq. 488; s. c. 8 Exch. 444; 7 & 8 Vict. ch. 110.

A contract made between the projector and the directors of a company pro-

with the promoters of a railway bill to bear the costs of obtaining it, and the bill passed with the usual clause that the costs of obtaining it should be borne by the company, it was nevertheless held, that the contract would preclude the recovery of the costs of the corporation.[4]

SECTION V.

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

Cannot assume the benefit without the burden.

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

visionally registered, but not in terms made conditional on the completion of the company, is not binding upon the subsequently completely registered company, although ratified and confirmed by the deed of settlement. Gunn *v.* London and Lancashire Assurance Co., 12 C. B. N. S. 694.

The promoters of a railway company agreed with the tenant for life of settled estates to pay him £20,000 for obtaining his support to their scheme. This agreement was afterwards adopted by the provisional committee of a second company, which stood in place of the first. The second company's bill passed, and an indenture was made under the company's seal, by which, on the ground of doubts as to the absolute right of the tenant for life to the £20,000, the company was to retain the sum and pay interest on it. Interest was paid for some years, but at length the company refused to make any further payment. Upon a bill by a subsequent tenant for life of the estates to have the company's liability declared, and obtain payment of the £20,000 for the benefit of the settled estate: Held, that the contract was *ultra vires*, and could not be enforced.

Held, also, that this was not within the meaning of the Companies' Clauses Consolidation Act, sec. 65, as being in respect of "costs incurred in obtaining the special act, and incident thereto." Lord Shrewsbury *v.* North Staffordshire Railw. *V. C. Kindersley;* 12 Jur. N. S. 63.

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

[1] Gooday *v.* The Colchester & Stour Valley Railway, 15 Eng. L. & Eq. 596; s. c. 17 Beav. 132; Preston *v.* Liverpool & M. Railway, 7 Eng. L. & Eq. 124; s. c. 1 Sim. N. S. 586; Edwards *v.* Grand Junction Railway, 1 Mylne & Cr. 650. The cases in support of this general proposition are very numerous, and will be more fully examined in the next section.

SECTION VI.

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

1. *English cases numerous.*

2–5. *Lord Eldon's opinion, in case of Vauxhall Bridge Co.*

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

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

3. The application to parliament for the plaintiffs' company, if granted, it was conceded, would injuriously affect the tolls upon another bridge not far distant. The proprietors of this bridge were opposing the plaintiffs' grant before the parliamentary committee, with a view to secure some indemnity against * such loss, to be specially provided for by the plaintiffs' act, upon condition that the plaintiffs should open their bridge for the public travel. The promoters of the plaintiffs' grant and the proprietors of the rival bridge had come to an agreement in regard to the extent of the indemnity, and upon naming it to the committee, with a view to have it inserted in the act, one member of the committee objected to such course, as calculated to sanction improper influences upon public legislation. The promoters of the new bridge then proposed to the proprietors of the rival one to give them security for the proposed indemnity, by way of bond with surety which should quiet their opposition, and the bill pass. This was acceded to and the securities given, and the bill passed accordingly. The opinion

[1] Edwards *v.* The Grand Junction Railway, 1 Mylne & Cr. 650.

[2] Vauxhall Bridge Co. *v.* The Earl of Spencer, Jacob, 64 (1821).

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

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

5. "It is then said, that the money was to be paid out of the funds of the Vauxhall Bridge Company, which by the act were devoted to other purposes. The proprietors of Battersea Bridge, however, say that they have nothing to do with the funds of the

[3] s. c. 2 Mad. 356.
[4] 1 Br. C. C. 543.
[5] Cited 11 Vesey, 536.

company; that they have contracted with a number of independent persons, to whom they look for the payment of the bonds; and if the obligors agree with the company to pay the bonds with their money, what have the obligees to do with that unless by antecedent contract? They had no demand in law or equity against the company. If, then, the Vauxhall proprietors choose to sanction what the legislature has not directed, namely, the indemnifying the persons who have become obligors in the bonds, that is one thing; if they have not, then the individual officers who have paid the money over in discharge of the bonds ought not to have paid it, and may now be called on to pay it back; as between them and the company, the money must be considered as being still in their hands. If the transaction is to be considered merely as between the obligors and the obligees, the latter not refusing the money from whatever hands it came, but not entangling themselves in any contracts between the obligors and the company, then the obligees would not be affected by those contracts. But if so, still the case depends upon the validity of the bonds; for I think the Vauxhall Bridge Company may with propriety say, if the money was paid in consequence of an arrangement for the discharge of the bonds, and if the bonds were bad, that then it may be called back. When the cause was heard by the Vice-Chancellor, he * did that which he was not bound to do; for he certainly had jurisdiction, and might have decided upon the validity of the bonds. But he directed that to be tried at law, where all the objections may be raised upon the pleadings in the same manner as here; and considering that in matters of this nature, both courts of law and equity have jurisdiction exercised upon the same principles, I do not see any occasion to vary the decree."

SECTION VII.

Contracts of the Promoters enforced in Equity.

1–3. *Case of Edwards* v. *Grand Junction Railway.*

§ 8. 1. Edwards *v.* The Grand Junction Railway,[1] is an application to a court of equity to enforce such a contract against a railway company, whose charter was obtained by means of the quieting opposition in parliament, in conformity to the contract.

[1] 1 My. & Cr. 650.

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

2. "If this proposition could be supported, it would be of extensive consequence at this time, when so much property becomes every year subjected to the power of the many incorporated companies. The objection rests upon grounds purely technical, and those applicable only to actions at law. It is said that the company cannot be sued upon this contract, and that Moss entered into a contract, in his own name, to get the company, when incorporated, to enter into the proposed contract. It cannot be denied, however, that the act of Moss was the act of the projectors of the railway; it is, therefore, the agreement of the parties who were seeking an act of incorporation, that, when incorporated, certain things should

be done by them. But the question is, not whether there be any binding contract at law, but whether this court will permit the company to use their powers under the act, in direct opposition to the arrangement made with the trustees prior to the act, upon the faith of which they were permitted to obtain such powers. If the company and the projectors cannot be identified, still, it is clear that the company have succeeded to, and are now in possession of, all that the projectors had before; they are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and in prosecution of it had entered into arrangements, and then had sold and resigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser; but in this court it would be otherwise. So here as the company stand in the place of the projectors, they cannot repudiate any arrangements * into which such projectors had entered. They cannot exercise the powers given by parliament to such projectors, in their corporate capacity, and at the same time refuse to comply with those terms, upon the faith of which all opposition to their obtaining such powers was withheld. The case of The East London Water Works Company *v.* Bailey, 4 Bing. 283, was cited to prove that, save in certain excepted cases, the agent of a corporation must, in order to bind the corporation, be authorized by a power of attorney; but it does not therefore follow that corporations are not to be affected by equities, whether created by contract or otherwise, affecting those to whose position they succeed, and affecting rights and property over which they claim to exercise control. What right have the company to meddle with the road at all? The powers under the act give them the right; but before that right was so conferred, it had been agreed that the right should only be used in a particular manner. Can the company exercise the right without regard to such an agreement? I am clearly of opinion that they cannot; and having before expressed my opinion that the contract is sufficiently proved, it follows that the injunction granted by the vice-chancellor is in my opinion proper, and that this motion to dissolve it must be refused with costs."

3. "The case of The Vauxhall Bridge Company *v.* Earl Spencer, 2 Mad. 356, Jac. 64 (4 Cond. Cha. Rep. 28), was cited for the trustees; and it certainly is a strong authority in favor of their

claim; Lord *Eldon* having in that case expressed an opinion, that the withdrawing opposition to a bill in parliament might be a good consideration for a contract, and having recognized the right of an incorporated company to connect itself with a contract made by the projectors of the company, before the act of incorporation. On the other hand Dance *v.* Girdler, 1 Bos. & Pull. N. R. 34, was cited for the railway company; but that was an attempt to make a surety liable beyond his contract; and Sir *James Mansfield*, in his judgment in that case, relied much upon the want of identity between the society with whom the contract was made and the corporation; and the question there was as to a legal liability, not as to an equitable right. It was contended for the railway company that, to enforce this *equity would be unjust towards the shareholders of the company who had no notice of the arrangement. To this two obvious answers may be made: first, that the court cannot recognize any party interested in the corporation, but must look to the rights and liabilities of the corporation itself; and, secondly, that there is nothing in the effect of the injunction inconsistent with the provisions of the act; for although the act provides that bridges shall not be less than fifteen feet in width, it does not provide that they shall not be made wider. The company might under this act clearly agree that this or any other bridge should be fifty feet wide."

SECTION VIII.

Contracts of the Promoters binding upon the Company at Law.

1–3. *Case of Howden* v. *Simpson.*

§ 9. 1. We have next in order of time the important case of Simpson *v.* Lord Howden,[1] before the Master of the Rolls, and the Lord Chancellor on appeal, where it is held, that equity will not interfere to decree the surrender of an illegal contract, where the illegality appears upon the face of the contract, the remedy at law being adequate. We have then the same case, at law, before the Queen's Bench,[2] and decided, on full argument, where it is held, that a contract to pay Lord Howden £5,000, in consideration of

[1] 1 Railway Cases, 326 (1837); 1 Keen, 583; 3 Mylne & Cr. 97.
[2] 10 Ad. & Ellis, 793.

his withdrawing opposition to a bill for incorporating "The York & North Midland Railway Company," he being a peer in parliament, and owning estates in the vicinity of the proposed line, was illegal, being a fraud upon the legislature. This decision was subsequently reversed in the Exchequer Chamber.[3] The case being the leading case upon the subject, at law * certainly, may require a more extended statement. The agreement under seal, between the plaintiff and defendant, (the case now standing, Howden *v.* Simpson,) recited that a company had been formed for making a railway; that defendants were proprietors; that a bill had been introduced into parliament, according to which the line would pass through plaintiff's estates and near his mansion, and that he was a dissentient, and opposed the passing of the bill; that defendants had proposed that, if he would withdraw his opposition, and assent to the railway, they would endeavor to deviate the proposed line: and plaintiff agreed that, on condition of the stipulations in the agreement being performed, he did thereby withdraw his opposition and give his assent; and defendants covenanted that, in case the then bill should be passed in the then session, they would, in six months after it received the royal assent, pay plaintiff £5,000 as compensation for the damage which his residence and estates would sustain from the railway passing according to the deviated line, exclusive of and without prejudice to further compensation to plaintiff, in the event of the deviated line not being ultimately adopted, and without prejudice to such further compensation for any damage as in the agreement after mentioned.

2. Plaintiff declared in debt, and averred that he withdrew his opposition to the bill, which passed into a law in the then session,

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

that six months had since elapsed, but that defendants had not paid the £5,000.

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

SECTION IX.

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

1. *Contract to take land of opposing party.* | 2. *Contract prejudicial to the public.*

§ 10. 1. Since the decision of Howden *v.* Simpson, in the Exchequer Chamber, and the House of Lords (1842), the English courts seem to have acquiesced in the principles there established, until a very recent period. The validity of such a contract is recognized, in regard to the company purchasing the interest of the lessee of lands near the line of the proposed railway.[1] And where the promoters of one railway entered into an agreement with a land-owner on the proposed line to take his land at a specified price (20,000*l.*), by which he was induced to withdraw opposition; and the promoters of a rival line, who proposed also to pass through the same land, had petitioned for a charter, and the merits of the two projects were, under the sanction of the committee of the House of Commons, referred to arbitration, and the solicitors of the two bills agreed, that the adopted line should take the engagements entered into with the land-owners, by the rejected line, it was held, that the second company prevailing, were bound, as a condition of entering upon the lands of plaintiff, to fulfil the terms of the agreement with the first company.[2]

[1] Doo *v.* The London and Croydon Railway, 1 Railw. C. 257; s. c. 3 Jur. 258.

[2] Stanley *v.* The Chester and Birkenhead Railw. 1 Railw. C. 58; 9 Simons, 264.

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

SECTION X.

Courts of Equity will enforce Contracts with the Promoters.

1. *Bona fide contract not evading statute, valid.*
n. 3. *Statement of English cases.*

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

[3] Cromford and High P. Railway *v.* Stockport, D. & W. Bridge Railway, 24 Beav. 74; s. c. 29 Law Times, 245.

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

[2] Shelford, 400.

[3] Hawkes *v.* Eastern Counties Railway Co., 1 De G. M. & G. 737; s. c. 15 Eng. L. & Eq. 358; s. c. before the Vice-Chancellor, 3 De G. & S. 314; s. c. 4 Eng. L. & Eq. 91, where it is considered that a railway company, having agreed to purchase an estate, although moved to do so for the quieting of opposition to a bill before parliament to enable them to extend a branch

*SECTION XI.

Such Contracts enforced where the Railway is abandoned.

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

§ 12. 1. It has sometimes been held, that an absolute agreement made, by the promoters of a railway, to pay one a certain

in a certain direction, which was subsequently abandoned, were nevertheless bound to perform their agreement with the owner of the estate. See also Shelford on Railways, 400. The case of Hawkes *v.* The Eastern Counties Railway Co. came before the Lord Chancellor, *St. Leonards*, on appeal from the Vice-Chancellor in 1852, where the whole subject of the legality and binding character of this class of contracts is learnedly discussed, as well as the propriety of decreeing specific performances, and most of the cases elaborately and learnedly reviewed and compared. The conclusion to which that eminent judge arrives is, that even in a case where the company were not able to carry their project into full effect, but had abandoned it, they were nevertheless bound specifically to perform contracts of this kind, and that it was no objection to decreeing specific performance, that it would involve the necessity of paying the price of the land out of the general funds of the company, which had been raised for provisional purposes merely, and with no view of ultimately purchasing land and building the road; and that the land could be of no use to the company under present circumstances. One can scarcely fail to perceive in this case, that a principle, perhaps sound and just under some circumstances, is here pushed quite to its extreme verge. Damages at law might have been the more proper disposition of all interests concerned.

The opinion of the Lord Chancellor is a masterly exposition of the view which he adopts. After disposing of the preliminary questions he proceeds: "In the case of Webb *v.* The Direct London and Portsmouth Railway, 1 De G. M. & G. 521; s. c. 9 Eng. L. & Eq. 249, there was originally a decree for specific performance, and after the decision in this case was made, — the court having relied on that case, — that decision was reversed. Now it appears to me that that case was reversed upon the uncertainty of the contract; and if it was reversed upon any other ground, I should have required further time before I could accede to the doctrine that a company entering into such a contract as this is, could, upon any grounds of supposed illegality, get rid of the contract. If, as in some of these cases, several of which have been cited, the contract is so worded that it really depends upon this, that the company are not to pay unless they require the land; that is, they are to pay when they take the land, which assumes that they are not to pay unless they do take the land, that may be considered a conditional contract. I have nothing to say to such cases; but where, as in this case, it is an absolute and unqualified contract to take the land, I should certainly hold that no subsequent conduct on the part of the company could relieve them from the obligation they were bound by at the time they entered into it. The act of parliament having

*sum to quiet opposition, is valid, notwithstanding the contemplated work is never carried forward, and the injury to the op-

passed, this was as good a contract as a man ever entered into. I must look at it at the time when it was executed, at all events, at the time the act passed. It contemplated the act passing, and the act did pass exactly in the terms pointed out in the agreement. Well, then, it is a valid contract. Suppose, as was observed in argument very properly, suppose this agreement had been entered into after the passing of the act, would any man at the bar say that was a contract not to be executed? Looking at the authorities which have concluded that question, why should it not be as binding, being entered into before the act passed, as it must be admitted it would have been if executed immediately after the act passed? There is no magic in these things. The good faith, the truth, and the honesty of the transaction are to be looked at, there is no rule of law in it. If, therefore, Webb *v.* The Direct London and Portsmouth Railway Company is considered to decide any thing adverse to the decision in this case, I should support the decision of this case, as far as my authority went. With great deference to others, I should support this decision certainly at the expense of the contrary view, that is, contrary to the view taken on that appeal, if that were to be so; but I apprehend it turned on the uncertainty of the contract. In Lord James Stuart *v.* The London and Northwestern Railway Company, the Master of the Rolls there decreed a specific performance, upon the authority of Webb *v.* The Direct London and Portsmouth Railway Company, before it was reversed. It was said that the reversal of that therefore displaced his authority. That also was reversed. There again were two questions: first, a question whether there was any concluded agreement, any binding agreement, any thing amounting to a positive contract; and next, there was great delay. Those cases were relied upon, and I can only repeat that I am not saying either of those decisions was not a proper decision, and I am not called upon to say that; but I say, if they are to be considered in opposition to a specific performance in a case like that before me, that I should totally disagree with them. It is a new view of the doctrine of this court, and it is a view which could not be supported consistently with the many authorities which exist on this subject.

"Then it is argued with great force and insisted upon that there is illegality here, because the company is applying its funds to purposes not authorized by the act of parliament. Now, for that several cases were quoted. MacGregor *v.* The Dover and Deal Railway Company, 18 Q. B. 618; s. c. 17 Jur. 21; s. c. 16 Eng. L. & Eq. 180; East Anglian Railway Company *v.* Eastern Counties Railway, 11 C. B. 775; s. c. 21 Law J. Rep. (N. S.) C. P. 23; s. c. 7 Eng. L. & Eq. 505; and the case of Bagshawe *v.* The Eastern Union Railway Company, 2 Hall & Tw. 201; s. c. 2 Mac. & Gor. 389. Those were all cases in which the company were really going beyond their powers; and one cannot but lament to see great companies like these, with an attorney always at their command, with every means of consulting counsel daily if they think proper, and which they resort to sufficiently, and with enormous capital, entering into a contract, with a full knowledge of all their powers, and with legal advice constantly at command, turning round upon the party with whom they have contracted, and endeavoring to evade the contract upon the ground that the contract they entered

*poser, which the contract of quietus assumes, is never sustained.[1] But such a contract is certainly based upon a principle

into is beyond their powers and absolutely illegal on the face of it. One cannot but regret that these companies should resort to so unseemly a defence in courts of justice. I do trust we shall not hear of many more of these cases, but that these companies will take care that in entering into contracts with individuals who are not so well protected, they do not go beyond their powers, and one cannot but feel that they do not enter into a contract of this sort, if it be illegal, without being perfectly aware of its illegality. Nothing can be more indecent than for a great company to come into a court of justice, and to say that a contract — a solemn contract which they have entered into — is void on the ground of its not being within their powers, not from any subsequent accident, not from any mistake or misapprehension, but because they thought fit to enter into it and meant to have the benefit of it, if it turned out for their benefit, and to take advantage of the illegality in case the contract should prove onerous and they should desire to get rid of it. Such highly dishonorable conduct I trust we shall not often see in courts of justice.

"Now, these cases last referred to, it is not proper for me to find fault with. They are cases in which it appears that the company did enter into engagements clearly beyond their powers, and the parties contracting with them must be supposed to have known that. It has been decided that they cannot be enforced, and I have nothing to say against those decisions; but this case does not fall within those decisions. There is nothing that has been stated to me of any sort, or kind, excepting this: That a Mr. Duncan, in part of his evidence, refers to the intention of the parties to form a junction with the Ambergate line, and in that way going right through the plaintiff's property, they being unable otherwise to get at the point which they proposed to get at by the curvilinear diverging line, which parliament rejected. Then they say, it is a fraud on the act of parliament. There is no such thing in the contract, — no such thing in the answer. This court has not permitted any evidence to be given on a point of defence that was not raised in the answer; because if it had been raised, Mr. Hawkes could have shown there was no foundation for it. I believe there is no foundation. I believe that the company had in view that they might, by this short cut through Mr. Hawkes's property, get to a certain point; but Mr. Hawkes had nothing to do with that. The act provided for taking this property for the very purpose authorized by the act of parliament itself. The cases, therefore, do not touch this question at all, and, consequently, I am not embarrassed by their authority.

"Then it is said, there is no mutuality; and, therefore, that the company could not enforce it, because they have no means of carrying the railway on; and that involves also the question of the expiration of the time. I have already referred to authority to show that expiration of time in a case of this sort amounts to nothing, where, as in this case, it is the fault of the company itself that the time has been allowed to expire. They have thought proper to allow time to

[1] Bland v. Crowley, 6 Railw. C. 756; 6 Exch. 522.

*of very questionable policy, and courts would more incline to give the contract, when consistent with the words used, such a

expire. Their conduct, upon this correspondence, admits of no excuse. With full knowledge of all they intended to do, they are told the deeds are ready to be examined with the abstracts; they make an appointment to go down, without raising a word of complaint, to examine the abstracts with the deeds. They break that appointment. They make no other appointment. They are told that the vendor has vacated the possession of the property, and that it is at their disposal, and that he has sought another residence, as he must necessarily have done, and then they serve a formal notice, telling him they will have nothing to do with the contract; that they do not want the property, and do not mean to make the line. What has mutuality to do with it? There are many cases where the court has not looked to the doctrine of mutuality as it ought to have done, and has inferred a contract against a party where that party could not have sufficiently enforced a contract against any one else. Those are cases of great hardship; but here I must look at this contract at the time the act of parliament was passed, and at the time it was entered into. Where, then, is there any want of mutuality? Could not the company, within an hour after the act passed, have enforced the contract against Mr. Hawkes? Nobody disputes or doubts it. Where, then, is the want of mutuality? It is not because a man, subsequently to the contract, chooses to introduce impediments to the performance of the contract on his own part, but it is where it is impossible to do that which he had contracted for; and he cannot, therefore, turn round against the man with whom he has contracted, and throw upon that man the loss. Who is to bear the loss in this case? The company say the loss is to fall upon Mr. Hawkes. Who is to blame? The company; not Mr. Hawkes. The company, therefore, modestly desire, in consequence of their own act, in breaking this agreement as they have done, and rejecting the line after they had obtained authority to make it, throwing up the line and endeavoring to repudiate their solemn contract, that the whole loss and burden is to be thrown on the party who is not to blame. Fortunately the law, justice, and equity of the case are agreed. There is nothing to prevent my enforcing the contract in the case.

"Then certain other cases were cited, as showing I ought not to interfere to enforce performance of the contract. Gage *v.* The Newmarket Railway Company, 18 Q. B. 457; s. c. 21 Law J. Rep. (N. S.) Q. B. 398; s. c. 14 Eng. L. & Eq. 57, was one. That seems also to turn on the conditional agreement. There was an agreement there, that the company, before they entered on the land which they might require, should pay, and it was considered there was no absolute agreement to pay. No doubt, the Lord Chief Justice said, if there had been a covenant to pay, or a covenant to pay a sum as a sum in gross, that the court would have treated it as void. The case was not before the court; but they evidently considered it within the other cases, where they had held that the company could not bind itself beyond its powers. It required great consideration how far that doctrine should be carried. I dare say it will be necessary that it should be ultimately carried elsewhere before it can be finally decided. It is a great and serious question how far these companies can be allowed to enter into contracts solemnly under their seal, and then turn round upon the parties and

* construction, that it shall be the purchase of a pecuniary interest, or indemnification for a pecuniary loss, which are legitimate

say they have exceeded their powers, and, consequently, will not perform their contract. Then in the other case of Gooday *v.* The Colchester and Stour Valley Railway Company, 17 Beav. 132; s. c. 19 Law Times, 334; s. c. 15 Eng. L. & Eq. 596, there was no agreement binding upon the company.

"I can find no authority upon the subject, (and I have looked carefully through every thing which has been cited, and I postponed disposing of the case in order that I might have that opportunity,) to shake the opinion I entertained when the argument was closed, that this is a very clear case for specific performance. I am very glad that the law turns out to be consistent with the equity of the case; and, therefore, I dismiss this appeal, and with costs."

This case was affirmed in the House of Lords, 5 House Lds. 331; s. c. 35 Eng. L. & Eq. 8, and elaborate opinions delivered, by the Lord Chancellor *Cranworth*, Lord *Campbell*, and Lord *St. Leonards*. The case is obviously put somewhat upon the ground of the peculiar state of facts involved. 1. It is a contract under the seal of an existing company, and not the contract of the projectors of a contemplated company merely. 2. Although the contract had respect to an extension of the existing line, by means of a branch line, which, as to the existing shareholders, the company had no right to construct, and even with the consent of the legislature could not construct, with funds of the existing company, yet nothing of this seems to have been known to Mr. Hawkes. He does not seem to have been made aware of any purpose of the company to do any act beyond their powers, or in conflict with the rights of the shareholders.

These several points are thus stated in the notes of the case: —

Where an act creating a railway company, or giving new powers to an existing company, authorizes the purchase of lands for extraordinary purposes, a person who agrees to sell his land to the company is not bound to see that it is strictly required for such purposes; if he does not know of any intention to misapply the funds of the company, but acts *bona fide* in the matter, he may enforce performance of the contract.

Semble, That where the directors of a railway company, wanting part of a property, purchase more of it than is required, though that may become a question between them and the shareholders, they cannot on that account avoid the contract with the seller.

Promoters of a company to make a line of railway, or persons standing in a similar situation, as directors of an existing company, applying to parliament for authority to make a new line, may lawfully enter into a contract for land that will be necessary for the proposed line should the bill pass, and when it has passed, such contract will be valid, and may be enforced. The mere want of legal power to make the contract at the moment of entering into it, will not affect its validity afterwards. *Secus*, where the act itself is illegal, and parliament is to be asked to legalize it.

Where a contract for the purchase of land is made by the projectors of a proposed line of railway, though an action at law may be maintained upon the contract, a court of equity will not, simply on that account, refuse its interference to compel specific performance.

* subjects of bargain and sale, than to regard it, as the purchase of good-will, or the price of converting ill-will unto favor, which

Under the first head, the following suggestions of Lord Chancellor *Cranworth* are of interest: "A railway company cannot devote any part of its funds to an object not within the scope of its original constitution, how beneficial soever that object might seem likely to prove.

"Thus in Colman *v.* The Eastern Counties Railway Company, 10 Beav. 1; 4 Railw. C. 513; Lord *Langdale*, at the instance of a shareholder, restrained the company and its directors from applying any part of their funds in assisting a company which had been formed for establishing a steam communication between Harwich and the northern ports of Europe. The directors of the railway company thought that such an application of a part of their funds would be likely materially to promote the interests of their shareholders, by encouraging and increasing the traffic on their line. But Lord *Langdale*, though admitting that such an expenditure might very likely conduce to the interest of the railway company, yet restrained the directors by injunction from so applying any part of their funds, on the ground that they had no right to expend the money of the company on any project not directly within the terms of its incorporation.

"In Salomons *v.* Laing, 12 Beav. 339, the same learned judge restrained the directors of the South Coast Railway Company from applying any part of the funds of that company in the purchase of shares of another company (the Portsmouth), by which purchase the defendants hoped to benefit the company of which they were directors. The court held that the defendants had no right to deal with the funds in a manner not authorized by their act.

"The same principle was recognized and acted upon by Sir James *Wigram* and Lord *Cottenham* in Bagshawe *v.* The Eastern Union Railway Company, 2 Mac. & G. 389; s. c. 2 Hall & T. 201; 6 Railw. C. 152. There the legislature had authorized the defendants to raise, by way of additional shares, two sums of £200,000 and £100,000, the former for the purpose of enabling them to construct a branch line to Harwich, and the latter for enabling them to purchase and complete a cross line to Hadleigh. The plaintiff had purchased scrip certificates for shares in these undertakings, or one of them, on which all calls had been paid, and he stated by his bill, that the directors, though the whole of the two sums, £200,000 and £100,000 had been raised, yet had abandoned the intention of constructing the Harwich line, and were about to apply the sums so raised to the completing of their line from Ipswich to Norwich. The bill prayed, amongst other things, a general account of all sums so applied, that the directors might be decreed personally to make them good, and for an injunction to restrain any further similar application of any part of the said two sums of £200,000 and £100,000. To this bill there was a general demurrer, but it was overruled, first by Sir James *Wigram*, and afterwards, on appeal, by Lord *Cottenham*; the ground of the decision there, as in the other cases, being that the directors had no right to expend any part of the sums raised for a special purpose upon any other object than that for which they were so raised.

"In all these cases, the discussion was raised by shareholders calling in question the misapplication or intended misapplication of the corporate funds by the directors. But the doctrine has been acted on in the courts of common law to

*are certainly not regarded ordinarily as the just basis of contracts.[2]

the extent of holding that a contract, even under the seal of a company, cannot in general be enforced, if its object is to cause the corporate property to be diverted to purposes not within the scope of the act of incorporation. Thus, in the case of The East Anglian Railway Company *v.* The Eastern Counties Railway Company, 11 C. B. 803; s. c. 7 Eng. L. & Eq. 505, the Court of Common Pleas, after an elaborate argument, held that no action could be maintained against the defendants on a covenant into which they had entered for payment to the plaintiffs of the costs incurred in applications to parliament, made at the instance of the defendants, for obtaining from the legislature powers which the defendants considered it desirable for their interests that the plaintiffs should possess. The Chief Justice, in delivering the judgment of the court, says, (11 C. B. 809; s. c. 7 Eng. L. & Eq. 510,) 'The statute incorporating the defendants' company, gives no authority respecting the bills in parliament promoted by the plaintiffs, and we are therefore bound to say, that any contract relating to such bills is not justified by the act of parliament, is not within the scope of the authority of the company as a corporation, and is therefore void.'

"This case was afterwards recognized and acted on by the Exchequer Chamber, in the case of MacGregor *v.* The Official Manager of the Deal & Dover Railway Company, 18 Q. B. 618; s. c. 16 Eng. L. & Eq. 180. It must, therefore, be now considered as a well-settled doctrine, that a company, incorporated by act of parliament for a special purpose, cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may appear to be.

"I have referred to these cases, and there are others to the same effect, for the purpose of showing how firmly the law on this subject is established, and of guarding myself against being supposed to throw any doubt upon it. But I do not think that the present case comes within the principle on which these decisions have rested. The making of the Wisbeach & Spalding Branch was not treated by the legislature as a new and independent object to be carried into execution by distinct funds raised for that special purpose. The power to make the new line was, according to the construction I put on the act, merely an addition to the powers conferred by the former acts. So that after the Wisbeach & Spalding act came into operation, the rights and powers of the company were to be regarded as if they had originally been powers, to make the new line and to raise the additional capital. The new works were to be considered as having formed part of the original undertaking, and the new shares were to be considered as part of the general capital. From the time, therefore, when the Wisbeach & Spalding bill received the royal assent, (and until that happened there was no binding contract,) the directors had just the same right to apply their funds to

[2] Gage *v.* Newmarket Railway Co., 18 Q. B. 457; s. c. 7 Railw. C. 168; s. c. 14 Eng. L. & Eq. 57; Porcher *v.* Gardner, 14 Jur. 43; 19 L. J. 63; 8 C. B. 461; Shelford on Railways, 402. See also Cumberland Valley Railway Co. *v.* Baab, 9 Watts, 458; Hawkes *v.* Eastern Counties Railway Co., 1 De G. M. & G. 737; s. c. 3 De G. & S. 314; 7 Railw. Cases, 219; s. c. 4 Eng. L. & Eq. 91.

*2. But in many cases these provisional contracts have been enforced, notwithstanding the projected works have been aban-

the purchase of land for the purposes of the new line, as, before the passing of that act, they had for the purchasing of land for the original line. This consideration, therefore, seems to me clearly to distinguish the present case from all those cases cited in the argument. The contract here was to apply the funds of the company to a purchase within the scope of its incorporation, and not to any purposes foreign to it, and I see no objection, therefore, to the contract on this first ground.

"But it was argued, secondly, that even supposing the contract not to be open to objection on the ground of its being an attempt to appropriate the company's funds to an object foreign to their original purposes, still, that it could not be supported, inasmuch as it was an agreement to purchase, for the new railway, lands not wanted for the purpose of making it. The directors had originally desired to obtain powers to make a staight cut from their new line to join the Ambergate, Nottingham, & Boston Railway, and for that purpose it would have been essential to them to possess the plaintiff's land, but they failed in their object of obtaining power to form this straight cut, and then there was not, it was said, any necessity for them to get possession of the plaintiff's land. A small portion only of it, about an acre and a half, is within the line of deviation, and it was argued that a contract to purchase the whole, (nearly six acres,) was a contract *ultra vires*, inasmuch as the company could only purchase what was really necessary or proper for the construction of the line. But the answer to this argument appeared to me satisfactory. The contract was not necessarily, and on the face of it, *ultra vires*. If the land in question was really wanted by the appellants for what are called extraordinary purposes, they were authorized to purchase it. Besides the line of deviation actually cuts the respondent's house in two, and in such circumstances the appellants had no right to take a part without taking the whole, if the plaintiff required them to do so; and it is a reasonable inference that the contract to purchase the whole was made, because, wanting what was within the limits of deviation, the directors knew that they could not stop short with what was within those limits. *Be that, however, as it may, there was nothing to show the respondent that his land was not wanted for the legitimate objects of the company, and in such a case it cannot be permitted to the directors to allege that the contract was invalid as being beyond their powers*; for, as argued at the bar, it could be no answer to an action for iron rails bargained and sold, that the contract had been entered into, not in order to obtain rails for the use of the line, but in order to keep them in hand for the purpose of a future use, on a speculation that iron was likely to rise in value. I consider, therefore, that this second objection is as untenable as the first."

In regard to the second point adverted to in the head notes of this case, Lord *Campbell* made some comments, which seem to us of very considerable weight as applicable to the general subject involved: "During the argument there was much discussion on the question how far such a company is bound by contracts entered into by the promoters of the act of parliament by which the company is constituted. That question really does not properly arise here; but I think it right to guard myself against the peril of being supposed to acquiesce in the doctrine

* doned.[3] But where the contract is a mere arrangement to purchase land at a specified price, for the purpose of building * the

contended for by the respondent's counsel, that there is complete identity between the promoters of the act and the company, and that as soon as the act has received the royal assent, a bill in equity might be filed against the company for specific performance of any contracts respecting land into which the promoters had entered. If the company should adopt the contract and have the full benefit of it, I think the company would be bound by it in equity, and therefore I approve of the decision in Edwards *v.* Grand Junction Canal Company, 1 Myl. & Cr. 650; 1 Railw. C. 173; although the language of Lord *Cottenham* in that case may require qualification and must be taken with reference to the facts with which he was dealing. But it seems to me that the extension contended for of the principle on which that case, and several similar cases which have followed it, rest, is quite unreasonable, and would lead to very mischievous consequences.

"Here, then, is a contract admitted to be under the common seal of the company. The appellants make an idle allegation that the seal was affixed without the sanction of a majority of the members of the company, but no fraud is imputed to Mr. Hawkes. The directors have repeatedly recognized the validity of the contract, and in an action at law upon it, under a plea of *non est factum*, they could have had no defence, though, if they could allege and prove that Mr. Hawkes was guilty of illegality in entering into it, the action would be barred.

"But dismissing the charge that he was bargaining for the application of the funds of the company to a line to be made without the authority of parliament, the contract is merely the ordinary contract between a company meaning to apply to parliament for authority to extend a line of railway, and the owners of the land through which the extended line is meant to pass, to be carried into effect if the solicited act of parliament be obtained. The shareholders of the company might if they pleased object to their funds being applied to defraying the expense of soliciting the bill, but if they remain quiet it may fairly be inferred that they all approve of the extension; and when the bill to authorize the extension has received the royal assent, no shareholder can any longer complain. According to the manner in which such bills are usually framed, the extended line becomes part of the concern to be managed by the company for the profit of the body of shareholders, power being given to the company to increase the capital, or by some means to provide the money necessary to complete the extended line. Since the case of Simpson *v.* Lord Howden, 9 Cl. & Fin. 61, it is impossible to contend that an agreement by a land-owner to withdraw opposition to a bill for a railway intended to pass through his property is not a good and

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[3] Shrewsbury & Birmingham Railway Co. *v.* London & Northwestern Railway Co., 3 Mac. & G. 70; s. c. 20 L. J. Ch. 90; s. c. 14 Jur. 921; 1 Eng. L. & Eq. 122; Hawkes *v.* Eastern Counties Railway Co., 3 De G. & S. 314; s. c. 20 L. J. 243; s. c. 4 Eng. L. & Eq. 91; Preston *v.* Liverpool, Manchester, & Newcastle-upon-Tyne Junction Railway Co., 1 Simons (N. S.) 586; 7 Railway C. 1; 7 Eng. L. & Eq. 124.

railway, and the quieting of opposition does not enter into the consideration, the company are not bound to pay over the * money,

valuable consideration. I adhere to the doctrine laid down in a passage quoted from my judgment in the case of the Mayor of Norwich *v.* The Norfolk Railway Company, 4 Ell. & Bl. 397; s. c. 30 Eng. L. & Eq. 120; but that referred to doing something which was positively criminal and indictable, the obstruction of a navigable river by building a bridge across it. This cannot lawfully be done in the hope that an act of parliament may be obtained to legalize it. But where no offence is to be committed against the public, and there is a mere want of authority for a transaction among private individuals or commercial companies, which authority can only be obtained by act of parliament, no objection whatever can be successfully made to the parties entering into an agreement for completing the transaction when the necessary authority is so obtained."

In regard to decreeing specific performance of contracts of this character, the Lord Chancellor makes some pertinent remarks: "The third point made in support of this appeal was, that even taking the contract to have been a good and valid contract, into which the company might lawfully enter, still, the case was one in which a court of equity ought not to interfere, but ought to leave the plaintiff to assert his legal rights by action. It was argued that the court has frequently acted on this principle in suits where a vendor has been seeking, as in this case, to enforce against a railway company the specific performance of a contract for the purchase of land, when the time within which the line was to be made had expired. And reference was in particular made to two cases decided by Lords Justice *Knight Bruce* and myself, when I held the office of Lord Justice. I allude to the cases of Webb *v.* The Direct London and Portsmouth Railway Company, 1 De G. Mac. & G. 521; s. c. 9 Eng. L. & Eq. 249, and Stuart *v.* The London & Northwestern Railway Company, 1 De G. Mac. & G. 721; s. c. 11 Eng. L. & Eq. 112.

"In the former of these cases (the particulars of which his lordship fully stated) the court proceeded on two grounds. In the first place, the terms in which the deed was framed were such as to lead the court strongly to the conclusion that the whole contract was meant to be conditional on the line being formed, and that if it should be (as in fact it was) abandoned by its projectors, then all the provisions of the agreement were to fall to the ground; a construction, I may observe, which receives great support from the subsequent case of Gage *v.* The Newmarket Railway Company, 18 Q. B. 457; s. c. 14 Eng. L. & Eq. 57. But independently of that difficulty the case appeared to be one in which a court of equity ought not to interfere in favor of the plaintiff, for that, by any such interference, we should be doing injustice in the attempt to add to the legal remedy. The injury which the plaintiff sustained by the non-performance of the contract was this: though he was left with the whole of his land untouched, he lost all claim to the £4,500, and might, perhaps, have sustained damage consequent on his having been for five years liable to have any portion of it, not exceeding eight acres, taken by the company for the purpose of the railway. *That was evidently a case for compensation by action for damages and not for relief by way of specific performance.* Indeed, I hardly know how a decree for specific performance could have been there enforced, for no particular

unless they enter upon some portion of the land, and under such circumstances an absolute covenant to pay the money, by the company, would be *ultra vires* and void.[4]

eight acres had been contracted for, and the company had no power to select eight acres, except for the purpose of making the railway, the power to make which had long since ceased. On these grounds the court refused to interfere, leaving the plaintiff to the legal remedy on his covenant.

"I have thought it necessary to explain the grounds on which the decision in these two cases rested, for the purpose of showing that they are not at variance with the decision now under appeal. Here there is no uncertainty as to the subject-matter of the purchase. The vendor did not sleep on his rights, and wait until it was impossible for the purchaser to make the line. On the contrary, from the very day on which the contract was to be completed, he insisted on its performance, having shortly before that time quitted possession of the property, and within less than five months afterwards he filed his bill. It is true that the directors, after the filing of the bill, allowed the time to pass within which they were bound to complete the line. But the plaintiff is not to blame for that. He did not, either actively or passively, mislead the defendants, and it would be impossible to hold that he is not entitled to the relief he asks, without going to the length of saying that no vendor of an estate, contracting to sell to a railway company, can ever have a decree for a specific performance if the company should see fit afterwards to abandon the undertaking, with a view to which the contract was made."

[4] Gage *v.* The Newmarket Railway, 18 Q. B. 457; s. c. 14 Eng. L. & Eq. 57. In this case, the views of Lord *Campbell*, in delivering the opinion of the court, do not seem to be altogether reconcilable with those expressed by the Lord Chancellor, in Hawkes *v.* The Eastern Counties Railway, but as they seem to us more consistent with the views maintained in this country, upon analogous subjects, and those which we anticipate may probably find more favor in the English courts when the outward pressure of circumstances shall, by lapse of time, be removed, we here adopt them. Lord *Campbell*, Ch. J.: "We are of opinion, that the defendants are entitled to our judgment. Taking the deed as set out on oyer, we think that there is no breach well assigned upon it. The covenant there (without saying any thing as the declaration does about 'reasonable time') is merely in these words: 'That in the event of the bill hereinbefore mentioned being passed in the present session of parliament, the said company shall, before they shall enter upon any part of the lands of the said Sir Thomas Rokewood Gage, in the said county of Suffolk, pay to the said Sir T. R. Gage, his heirs and assigns, the sum of £4,900 purchase-money, for any portion of his lands not exceeding forty-three acres, which the said company may, under the powers of their act, require and take for the purposes of their undertaking; that in addition to purchase-money as aforesaid, the said company shall pay to the said Sir T. R. Gage, his heirs and assigns, before they shall enter upon any part of the said land, the sum of £7,100 as a landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them.' The question we have to determine is whether the company, never having entered upon any part of the plaintiff's lands, he is now entitled

* In an important case[5] before the House of Lords, the doctrine of the former cases is assumed to have established the proposition, * that the acts of parliament to railway companies, empowering them to build railways, are enabling and not obligatory in their nature. And it was here considered, that upon a contract whereby the company before obtaining their act, executed a debenture bond in the sum of £14,500 to one of the land-owners, as the sum to be paid

to sue for these two sums, or either of them. The £4,900 is declared to be the purchase-money for the land to be required and taken; and the only time of payment mentioned is before the company enter on the land. Therefore, if no land is required or taken, and the company never enter on any part of the land, there seems great difficulty in saying that there has been a breach of covenant in not paying the money. So the £7,100 is declared to be a compensation for the severance of the land taken from the rest of the plaintiff's land, and the same time of payment is defined. But there has been no severance to be compensated, and the time for payment has not arrived. The deed does not bargain for a sum of money to be paid absolutely by the company to the plaintiff, as a consideration for his withdrawing his opposition to the bill, but provides a peculiar mode of estimating the value of the land to be taken, and of the compensation to be made for severance-damage, instead of the modes pointed out by the general acts upon this subject. We therefore do not think that the company can be considered as having absolutely covenanted to pay £12,000 to the plaintiff, in a reasonable time after the passing of the act. If this deed could bear such a construction, we should have thought it so far *ultra vires* and void. Here the railway company are the covenanters; and if the present action lies, the capital paid up by the shareholders must be answerable for the damages to be recovered. We consider that this would be a misappropriation of the funds of the company, which the directors could not lawfully make. All the cases relied upon by the plaintiff's counsel are clearly distinguished from the present, except Webb *v.* The London & Portsmouth Railway Company, before Vice-Chancellor *Turner*. Notwithstanding our high respect for that learned judge, we cannot concur in the reasons for his decision; and although it has not been expressly overturned, its authority was greatly shaken when it came before the Lords Justices of Appeal. We do not feel it necessary to give any opinion upon the case of Bland *v.* Crowley, in which the learned judges of the Court of Exchequer were divided, as the deed there discussed varies materially from the present. Nor would it be proper to give any opinion upon Stuart *v.* The London & Northwestern Railway Company, as we learn that when it came before the Lords Justices of Appeal, it was sent by them to be decided in a court of law. We are happy to think that the question in this case being on the record, it may be brought before a court of error." See § 16, and notes. The same principle was further enforced and illustrated, in a recent case, in the House of Lords. Edinburgh, Perth, & Dundee Railway *v.* Philip, 2 M'Queen H. of Lds. 514; s. c. 28 Law Times, 345, 39 Eng. L. & Eq. 41.

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

him before breaking ground, taking a counter obligation to repay the sum if the bill should not pass; and, having obtained their act but never exercised its powers or built their road, it must be held, that upon the fair construction of the whole transaction with reference to the more recent view taken by the courts of the law applicable to such contracts, the money stipulated was not due the land-owner except upon the company breaking ground for the purpose of constructing their works.

SECTION XII.

Practice of Courts of Equity in decreeing Specific Performance.

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

n. 2. *Statement of cases.*

§ 13. 1. The English courts of chancery have in many instances, enforced specific performance of contracts, between different lines of railway, fixing mutual arrangements, in * reference to their future operations, even where acts of parliament were necessary to carry such contracts into full effect, and sometimes after a change of circumstances, materially affecting the interest of the parties concerned. And those courts have often enforced an injunction, in cases of this kind, where interests of great magnitude were concerned, even where the right of the plaintiff was questionable, upon the ground that things were required to be kept in a safe train, until the rights of the respective parties could be definitely determined.[1]

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

[1] Great Western Railway Co. *v.* The Birmingham & Oxford Junction Railway Co. and others, 2 Phillips, Ch. Cases, 597. The remarks of *Cottenham*, Lord Chancellor, in this case, are very pointed, in defence of the practice, in the English courts of equity, of enforcing contracts, made by the projectors of railways, against the company itself, after it comes into operation.

[2] Webb *v.* Direct London & Portsmouth Railway Co., 1 De G. M. & G. 521; s. c. 9 Eng. L. & Eq. 249. When the same case was before the Vice-Chan-

the ordinary proceedings of courts of equity, in applications for specific performance.

cellor, *Turner*, he seemed to regard the plaintiff as entitled to specific performance, but the Lords Justices, upon appeal, entertained no doubt that the party should be remitted to his rights in a court of law. See Preston *v.* Liverpool, Manchester, & Newcastle Junction Railway Co., 1 Simons (N. S.) 586; S. C. 7 Eng. L. & Eq. 124. The Court of Appeal, in a similar case, Lord J. Stuart *v.* London and Northwestern Railway Co., 1 De G. M. & G. 721; S. C. 7 Railw. C. 44; 11 Eng. L. & Eq. 112, put their refusal to decree specific performance, upon the grounds, that the party, if he had any right, could obtain complete redress at law, and that, after the abandonment of the project, or material departures from it, it would be impossible for the railway to hold the land to any beneficial purpose, after paying the money, and that therefore the principle of mutuality wholly failed. The Lord Chancellor, *St. Leonards*, seemed also to be of opinion, that the only ground upon which the decision, in Webb *v.* London & Portsmouth Railway Company, 1 De G. M. & G. 521; S. C. 9 Eng. L. & Eq. 249, could be vindicated, was the want of mutuality. But it would seem, that this whole class of cases, where contracts have been made to take land, either at a given price per acre or for a gross sum, or to pay a sum of money for the damage to an estate in gross, by reason of a railway coming in a certain line, either across or near the premises of the obligee, should be regarded as conditional, unless the contrary appeared, in express terms, or by the strongest implication. Any other view of these parliamentary contracts, as they are denominated, gives them very much the air of wagering policies or legislative gambling! See also upon this subject, Potts *v.* The Thames Haven Dock & Railw. Company, 15 Jur. 1004; S. C. 7 Eng. L. & Eq. 262, where it is held, that, in pursuing a claim for specific performance of an agreement of a railway company to purchase land of trustees, the persons beneficially interested in the land were not necessary parties to the proceeding. A query is suggested, whether a specific performance could be decreed, there having been no valuation of the land, and in this case there had been great delay on the part of the company, owing to their pecuniary embarrassment, but after considerable discussion, it was agreed to give the company further time, and the claim was ordered to stand over. It has been held, where a private company leased land, with a clause of re-entry, and were subsequently incorporated, with an express provision in their charter that all contracts made before the act of incorporation shall be binding upon the corporation, and they have the same rights as if these contracts were entered into with them, they might maintain ejectment for the land. London Dock Co. *v.* Knebell, 2 M. & Rob. 66.

The case of Strasburg Railway Co. *v.* Echternacht, 21 Penn. St. 220, was this:— Several persons signed a paper agreeing that if the Strasburg Railway should be incorporated with certain privileges, they would subscribe the number of shares set opposite their names respectively, and the charter was obtained with the privileges in question, but the defendant, who was one of the subscribers above mentioned, refused to take the stock, and it was held, that the promise was without consideration, and therefore not a contract, but a mere naked expression

* SECTION XIII.

Specific Performance in Courts of Equity.

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

§ 14. But the courts of equity have been mainly influenced by what they esteem the policy of enforcing these parliamentary * con-

of intention, which equity will not enforce by decree for specific performance, and that if it was a binding agreement it should be enforced at law.

Leave has sometimes been given by courts of equity to oppose a bill in parliament, unless certain compromises between the projectors and landholders on the proposed line should be effected. Davis *v.* Combermere, 14 Sim. 402; s. c. 3 Railw. C. 506; Monypenny *v.* Monypenny, 4 Railw. C. 226.

It is said, in a late English work upon the subject, Hodges on Railways, 164, that it is well settled, that agreements made with railway companies by landholders to sell their lands, and to withdraw or withhold opposition to a bill in parliament, are not illegal. See also Capper *v.* The Earl of Lindsey, 3 House of Lords Cases, 293; s. c. 14 Eng. L. & Eq. 9. This case was first argued in the Court of Exchequer, and subsequently in the Exchequer Chamber, on error, and finally in the House of Lords in the year 1851. The case is not found in any of the English treatises on railways, except Hodges, and as it was long discussed at the bar, and thoroughly examined by almost all the judges in the House of Lords, it ought perhaps to be regarded as the final determination of the English courts upon the subject. The question of legality seems to have been taken for granted here. This case was A., a landholder, through whose estate a part of the projected railway was to pass, became a party to a deed with the projectors of the railway, by which he covenanted to withdraw his opposition to their bill and to oppose a rival bill; and they covenanted to pay him a certain sum of money in case their bill should pass within six months from the date of the deed. It was then provided that, if the bill of these projectors did not pass within six months from the date of the payment, either party might put an end to the agreement by notice. The deed then contained a covenant on the part of the projectors, by which they agreed, if the two companies should be amalgamated, to pay a certain sum within three months after such amalgamation. The deed was dated 16th March, 1846. The two companies were amalgamated in June, 1846; but no bill ever passed at the instance of these projectors alone. In November, 1846, the projectors gave notice to put an end to the agreement. The action was based upon that clause in the agreement by which the projectors were to pay a sum of money in case of the amalgamation of the companies. The defendants pleaded that their bill had never passed into a law; that at the end of six months they had given notice to put an end to the agreement, and that they had never taken the plaintiff's land. The Court of Exchequer held the plea to be a good answer to the action. This judgment was reversed in the Exchequer

tracts, for the arrangement of conflicting interests, in regard to such projected railways. And they have declined to interfere by

Chamber, and the latter judgment affirmed in the House of Lords. In the House of Lords the question was submitted to all the common-law judges, who gave a unanimous opinion, by *Parke*, B., in favor of the plaintiff, and this opinion was adopted by the House without dissent. The learned judge said, in conclusion, "The right to payment does not depend upon the fact of making a part of the railway by the amalgamated company on the plaintiff's estate, or taking, or using, or doing any injury to the plaintiff's land; the right to it depends simply upon the efflux of three months' time after the Amalgamation Act." Although this construction seems at first blush somewhat narrow, and one side of the main purpose of the agreement, it must, we think, be regarded as the only just and legitimate view. The contract did not so much contemplate the taking of any portion of plaintiff's land, or any estimable definite injury to his estate, as the privilege of doing so, if that should become desirable, and the quieting of the defendants' lawful opposition to, or control of, the enterprise, in consequence of his pecuniary interest in the same. It was the purchase, at a fixed price, of the privilege or option to deal with plaintiff's estate, as one favoring the project, and ultimately to place the projected line in such position, with reference to the estate, as they should find most advantageous to themselves. And as they had enjoyed what they bargained for, it was clearly due that they should pay the stipulated price of their purchase.

There is a recent case in New Hampshire, Low *v.* Conn. & Pass. Railroad Co., 45 N. H. 370, where the question of the right of those who have rendered extensive services in promoting the subscription to the stock of a corporation, to recover compensation of the corporation for time and money so expended, is extensively and ably discussed.

It is here said that where, after the charter and before the organization of a corporation, services are rendered which are necessary to complete that organization, and after it has been perfected the corporation elect to take the benefit of such services, knowing that they were rendered with the understanding that compensation would be made, it will be held liable therefor, upon the ground that it must take the benefit with the burden.

It was here considered that the grantees in a charter are the sole members of the corporation until associates are admitted by them, and they may act as the corporation without admitting any others. Hughes *v.* Parker, 19 N. H. 181. But to effect any binding contract or corporate act, the concurrence of at least a majority of such grantees is requisite; and that the sole power of determining by what measures and by what agency the organization shall be effected rests with the grantees, a majority of whose votes will govern.

This case seems to have gone mainly upon the authority of Hall *v.* Vt. & Mass. Railroad Co., 28 Vt. 401. But we question whether the principle of compensation is not in fact carried in both cases to the utmost verge of good policy. In the case of Low *v.* The Railway Co., the plaintiff was allowed to recover the value of a horse which he delivered to one of the efficient promoters of the enterprise upon a sort of wager, that if the road ever reached the town of Bradford in Vermont, the place of the plaintiff's residence, this promoter should have his,

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

the plaintiff's, best horse. And, of course, as a gentleman of honor, when the road reached the point indicated, he felt bound to deliver the horse. It is true that the court sent the case back to have the jury find the fact, that this promoter performed efficient service for the company in effecting its organization, and that the company adopted such service by taking the benefits of it, and that the horse was no more than a reasonable compensation for such service.

Notwithstanding our own participation in the decision of Hall *v.* Vt. & Mass. Railway, we would now feel that the rule there adopted in regard to charging service, rendered in effecting the organization of the company, to the corporation, is one of too great laxity, and too susceptible of abuse, to afford a safe guide in these lax times, when every possible avenue to corruption is sure to find some one desperate enough to enter. There should at least be proof that the service was performed under an expectation of compensation, and that the corporation expressly promised payment. And in the Earl of Lindsay *v.* The Great Northern Railway Co., 10 Hare, 665; s. c. 19 Eng. L. & Eq. 87, before V. C. *Wood*, it is said, "that the agreement is legal in itself, is now settled, by authority." In this case, which was a contract that the trains should stop at a particular station, the court decreed a specific performance, giving the companies time to make the necessary arrangements, before making the decree absolute.

But one railway company cannot bind itself to defray the expense of an application to parliament by another company, for the establishment of another line of railway, expected incidentally to benefit the first company. Such contract is beyond the ordinary scope of the powers of a railway company, and consequently illegal, and such a covenant cannot be enforced in a court of law, however beneficial to the covenanter the objects of the covenant, if carried out, might be. East Anglian Railway Company *v.* The Eastern Counties Railway Company, 11 C. B. 775; s. c. 7 Eng. L. & Eq. 505; McGregor *v.* The Deal & Dover Railway Company, 18 Q. B. 618; s. c. 16 Id. 180; *Post*, §§ 56, 187.

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

[2] Aldred *v.* North Midland Railway Company, 1 Railw. Cas. 404; Provost

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

*SECTION XIV.

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

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

§ 15. 1. It is held in the English courts of equity altogether competent and within their appropriate jurisdiction, to restrain a party from opposing a bill in parliament by petition, if a proper case is made out, and by parity of reason from pursuing a petition in favor of an act of parliament.[1] But such cases are not common in prac-

and Fellows of Eton College *v.* Great Western Railway Company, 1 Railw. Cas. 200.

[3] Gooday *v.* Colchester & Stour Valley Railway Company, 17 Beav, 132; s. c. 15 Eng. L. & Eq. 596. In this case the Master of the Rolls said: "Since the act was obtained, nothing has been done nor any step taken to construct the railway. There is no distinct evidence indeed that the railway has been abandoned, but no money has been paid, no land taken, nor any movement made towards carrying on the scheme, and the compulsory powers of the act have never ceased. Under these circumstances, I cannot say that the company has adopted the agreement, or is bound by its terms; and therefore I do not think I can compel them to admit the contract in an action at law." Very recently, in Williams *v.* The St. George's Harbor Company, 30 Law Times, 84; s. c. 2 De G. & J. 547, it was held by the Master of the Rolls, that an agreement entered into by the promoters of a company before incorporation, is not binding on the company when incorporated, unless they subsequently do some act amounting to an adoption of it. This seems now to be the settled doctrine in the English courts. *Ante*, § 3.

[1] The Stockton & Hartlepool Railway Company *v.* The Leeds & Thirsk and The Clarence Railway Companies, 2 Phillips, 666; s. c., 5 Railw. Cas. 691. In this case the injunction was granted by the Vice-Chancellor of England, *Shadwell*, but the order discharged, by the Lord Chancellor, *Cottenham*, on the ground that no proper case for the interference of a court of equity was made out, but distinctly affirming the jurisdiction. The Lord Chancellor says: "This court, therefore, if it see a proper case, connected with private property or interest, has just the same jurisdiction to restrain a party from petitioning against a bill in parliament as if he were bringing an action at law, or asserting any other right connected with the enjoyment of the property or interest which he claims." Heathcote *v.* The North Staffordshire Railway Company, 6 Railw. Cas. 358. In this last case it

tice, and dependent upon peculiar circumstances, as where proceedings in parliament are in violation of express covenants, or for some other reason, in bad faith, and where damages at law, are no adequate compensation. These cases are therefore determined much upon the same grounds as other cases of specific performance, and come properly under consideration in this connection.

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

*SECTION XV.

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

1. *Principle of foregoing decisions obscure.*
2. *Not adopted in this country unless terms inserted in charter.*
3. *Recent change of views in English courts.*
3–5. *Statement of late case in which principle of Edwards* v. *Grand Junction Railway is doubted.*
6. *Act of incorporation should not be varied by oral testimony.*
7. *Contracts to quiet opposition not favored in this country.*
n. 5. *Recent English and American decisions.*
8. *Regarded as* ultra vires.
9. *May be enforced, if legislature not exposed to be misled.*

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

was held by the Lord Chancellor, that a contract to make a railway is not one of which a court of equity will compel the specific performance, but will leave the parties to their legal rights.

[2] Steele *v.* North Met. Railw. Law Rep., 2 Eq. 237.

less-experienced person into participation in an illegal transaction, where a court of equity will compel the successful party to relinquish the fruits of the fraud, may be true. But the general proposition laid down, by Lord *Eldon*, upon this subject, in the Vauxhall Bridge case,[1] does not seem to gain much support from the case cited by him.[2]

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

Ante, § 7, Jacob, 64.

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

for their interference, to enforce an indemnity secured by the act.[3]

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

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

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

6. It seems very obvious, that, if these clauses can be foisted into the act of incorporation, by oral testimony, at the will of interested parties, it is exposing the operation of the act to all the inconveniencies and inconsistencies which might be expected to

[3] Gray *v.* The Liverpool & Bury Railway, 9 Beav. 391; s. c. 4 Railw. C. 235; *Ante*, § 11.

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

follow from subjecting written contracts to the same mode of exposition. Sound views and true policy seem to us to require a strict adherence to the act of the legislature, as in other cases.

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

[5] And in the more recent cases upon this subject very little countenance is given to the doctrine of the earlier English cases, which held the contracts of the promoters of railways binding upon the company, upon the slightest grounds of adoption, and often by the most forced constructions. In the case of Preston *v.* Liverpool, Manchester & N. Railway, 5 H. of L. 605; s. c. 35 Eng. L. & Eq. 92, although the case is professedly decided upon the construction of the particular contract, yet it is not difficult to perceive, in the very sensible reasons assigned for the construction adopted, a manifest disposition to abandon the former ground assumed by the courts upon this subject. The point is thus stated in the note to this latter case: "H. & Y., projectors of a railway company, entered into a treaty with the plaintiff (a land-owner), whereby the latter agreed not to oppose their bill in parliament, and an agreement was executed by them, as the executive directors of the railway company, by which the company, upon its incorporation, was to pay to the plaintiff £1,000 for land of which he was the freeholder, and which was required for the purpose of making the railway, and £4,000 for residential damage." There were other stipulations in regard to tunnelling a portion of plaintiff's property, and erecting a station upon another portion. The company was incorporated, but not being able to raise sufficient funds, no attempt was made to construct the railway, and the money subscribed was returned to the shareholders. "Held that the contract was conditional, upon the making of the railway, and therefore that the plaintiff was not entitled to moneys payable thereunder. And quære, whether a company can be considered as the successors or assignees of the projectors, so as to come into existence subject to their contracts." See Ed. P. & Dundee Railw. *v.* Philip, 2 M'Qu. H. of L. 514; s. c. 39 Eng. L. & Eq. 41.

There are numerous English cases upon this point since the date of the second edition of this work. In Aldham *v.* Brown, 2 El. & El. 398, in Exchequer Chamber, the extent of the responsibility of a subscriber to the preliminary as-

8. In an English case,[6] decided in the Exchequer Chamber, reversing the decision of the Court of Exchequer, it was held, that a contract by the company to pay £2,000 to a land-owner,

sociation is extensively discussed upon an extended and somewhat refined state of pleadings. The result may be briefly stated as amounting to nothing more than that such subscriber is responsible for his ratable proportion of the provisional expenses, whether the scheme is finally abandoned or not.

Where a deposit of eight per cent upon the estimated cost of a railway is paid into court, in compliance with the parliamentary orders upon filing petitions for certain railways, the proportion of such deposit will be paid out of court to the party duly representing the petitioners, upon any of the railway projects being abandoned. Aberystwith Railw., *in re* 7 Jur. N. S. 510. But upon the question being brought to the attention of the Lords Justices, id. 564, it was doubted whether the statute allowed the money to be repaid merely upon the withdrawal * of the petition, and no order was made. But upon principle it would seem there could be no difference between the cases named specifically in the statute for repayment of the money, that of withdrawal of the petition, and such as denial of the petition or refusal to allow the party to proceed. See Dartmouth & Torbay Railw. Co., *in re* 9 Weekly Rep. 609 V. C. K. It is no objection that the requisite parliamentary deposit is made from borrowed funds. Scott *v.* Oakely, 10 Jur. N. S. 431, 648. And a court of equity will enforce any agreement made with the lender to compel the repayment of such deposit, *ib.* But an agreement by an existing railway to contribute towards the deposit required to promote the grant of other lines, is held *ultra vires*. So also is an agreement by an existing railway to take shares in the projected company, or to establish traffic regulations with reference to future extensions. But such an agreement will not be *ultra vires* where its validity is expressly made dependent upon the sanction of parliament. Maunsell *v.* M. Great Western (Ireland) Railw. Co., 1 H. & M. 130; s. c. 9 Jur. N. S. 660. See Scottish N. E. Railw. *v.* Stewart, 3 Macq. H. L. Cas. 382.

But where the company stipulate to do acts *ultra vires*, there is no implication that this stipulation shall be held conditional upon the company having or being able to obtain legislative authority to do them. And if the acts so stipulated to be done are component parts of an entire agreement embracing other matters within the powers of the company, an injunction will be granted against carrying any portion of the agreement into effect. Hattersley *v.* Shelburne (Earl), 7 Law T. N. S. 650.

Where six different lines of railway, forming one general scheme, were promoted by the same persons, but subsequently four of them abandoned, and an act obtained authorizing the construction of the other two, by which it was provided that the expenses, costs, and charges of obtaining and passing the act, and incidental and preparatory thereto, should be paid by the incorporated company; it was held the costs and expenses connected with the abandoned lines were properly chargeable on the company. Tilleard, *in re*, 32 Beav. 476; s. c. 9 Jur. N. S. 1217.

[6] Taylor *v.* Chester & Midhurst Railw. Law Rep., 2 Exch. 356. *Willes* and *Blackburn*, JJ., dissenting.

who opposed the company in obtaining parliamentary powers for extending their line, for the injury he had or might sustain, in respect of the preservation of the game on his estate, by reason of the proposed extension, was *ultra vires* and did not bind the company, the covenant being absolute and not depending on the building of the railway, and the funds of the company, being both by the original and the new act appropriated to specific purposes, which did not include the consideration of this contract.

9. There is an American case,[7] where it was held, that an indemnity secured by a railway company to an individual, to quiet opposition before the legislature, for the mere purpose of protecting a private interest, and the party is thereby induced to forego his opposition, that the indemnity will be enforced, unless the case presented an instance, where the legislature was thereby exposed to be misled, and to do what it otherwise would not have done.

[7] Low *v.* Conn. & Pass. Railw., 46 N. H. 284.

*CHAPTER III.

RAILWAYS AS CORPORATIONS.

SECTION I.

Origin and Different Classes of Corporations.

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

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

2. There have existed various kinds of corporations, distinguished sometimes by the form of the association or the nature of the organization, and sometimes by the character of the work to which the corporate body was devoted. Thus corporations, in the English law, are either sole or aggregate. By the former is understood corporations existing in a single individual, as the rector of a church, or the judge of a particular court, as the judge of probate in whose name securities are taken and to be prosecuted, or any other official name, as the treasurer of a town, county, &c., in all which cases the single individual, * maintaining for the time the particular official relation, constitutes the *quasi* corporation. Aggregate corporations are where the body consists of more than

[1] 1 Kent, Comm. 524. The 8th Table, allowed societies or private companies to make their own by-laws, not being inconsistent with the public law. See also 2 Kent, Comm. 268, note; Dig. Rom. Civ. Law, 47, 22, 4.

one member, whether such members are shareholders, as in the case of a mere business corporation, or are composed of different subdivisions of the entire corporation; as the mayor, aldermen, and common council of a city or other municipality.[2]

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

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

[2] Co. Litt. 8 *b*, 250 *a*: 2 Kent, Comm. 273, 274. We have taken no time to discuss the nature or importance of sole corporations, since very few exist in the American states, and where any such do exist, it is so enacted by express statute, in order to secure perpetual succession and transmission of rights and duties, without encumbering the succession and transmission with those formalities, which would always prove laborious and sometimes difficult; and by reason thereof, there would constantly arise embarrassing questions, which, by declaring the office a perpetual corporation, is wisely saved.

In many of the cases already alluded to, and others which might be named, as to those individuals who sustain the official character of sole corporations, it is not deemed important that the statute conferring such functions should declare them corporations, or to possess corporate rights and duties. All that is required is, that it should be provided that contracts made to them may be sued in the name of their official successors, or that in any other form such individual should be declared by his official name to have the power to contract for the benefit of himself and his successors, perpetually.

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

5. Corporations, too, are divided into eleemosynary, or such as disburse only charity and subsist for that purpose only, — such as schools, colleges, and hospitals, — and those which are of a business or pecuniary character, called civil or political bodies, intrusted with certain rights or duties, and required to perform certain functions, more or less connected with the polity of the state or nation, — such as towns, counties, school districts, or railways, banks, and manufacturing, or merely business corporations.

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

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

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

[4] There is no necessity for these public functions being confined to aggregate corporations, as is the universal practice in this country. The same franchises and immunities might be conferred upon any private person, at the election of the legislature, as was done by the legislature of New York upon Fulton and Livingston, in regard to steamboat navigation, which grant was held valid but for the United States Constitution. And whoever was the grantee, the same rights, duties, and liabilities would result from the grant, whether to a natural person or to a corporation.

[5] *Ante*, § 1, pl. 6.

[6] Dartmouth College *v.* Woodward, 4 Wheaton, 518, 568; 2 Kent, Comm. 7th ed. (275) 305 and notes. If the question were entirely new, it might be regarded as admitting of some doubt, perhaps, how far the American states could with propriety undertake such extensive public works, whose benefit enures almost exclusively to private emolument and advantage. But the practice is now pretty firmly established. And there seems to be no proper tribunal to de-

to confirm this proposition, and to show that railways are private corporations, are numerous.[7]

termine such questions between the states and the citizens. Public opinion is the only practical arbiter in such cases. And that is so much under the control of interested parties, ordinarily, that its admonitions are not likely to be much dreaded by those who exercise the state patronage.

[7] Donnaher *v.* State of Mississippi, 8 Smedes & M. 649, 661. By the court, in Trustees of the Presbyt. Society of Waterloo *v.* Auburn & Rochester Railw., 3 Hill, 570; Dartmouth Coll. *v.* Woodward, 1 N. H. 111, 116; Eustis *v.* Parker, 1 N. H. 273; Dearborn *v.* Boston, C. & Montreal Railw. Co., 4 Foster, 179, 190; Ohio, &c. Railroad Co. *v.* Ridge, 5 Blackf. 78; Bonaparte *v.* Camden & Amboy R., 1 Baldwin's C. C. 205, 222; Rundle *v.* Delaware & Raritan Canal Co., 1 Wallace, Jr. 275; R. & G. R. *v.* Davis, 2 Dev. & Batt. 451; Thorpe *v.* R. & B. R. 27 Vt. 140. This last case discusses at some length the right of legislative control over private corporations, whose functions are essentially public, like those of banks and railways. The importance of such control, within reasonable limits and under proper restrictions, both to the public interest and that of these corporations, will be obvious when we consider the magnitude of the interests committed to such corporations, and the vast amount of capital invested in such enterprises. We make no account of the banking capital of the country, most of which is occupied in business more or less connected with railway traffic. But the capital and business of railways is almost incalculable.

The length of railway in the United Kingdom of Great Britain and Ireland in 1857, was 8,635 miles, and the cost, in round numbers, £311,000,000 sterling, being more than one and one-half billion of dollars. The amount invested in this country was about half as much in 1851, and the number of miles in operation nearly twice as great, and almost as much more then in progress, a large portion of which is now complete (1857). When it is considered that these private corporations, possessing such vast capital, have engrossed almost the entire travel and traffic of the country, and that their powers and functions come in daily contact with the material interests of almost every citizen of this great empire, the importance of their being subjected to a wise and just supervision can scarcely be over-estimated. This can only be permanently secured by wise and prudent legislation. And to be of much security to public interests, it must be by general acts, as it is in many of the states, and in England, since 1845. It is worthy of remark, we think, that while in the United States a large proportion of the capital invested in railways has proved hitherto wholly unproductive, and much of it has already proved a hopeless loss, and a very small proportion of the whole can be said to have been at all remunerative, in Great Britain the whole amount of their loan and preference stock, secured virtually by way of mortgage, has produced, upon an average, more than five per cent, and the ordinary stock has produced an average dividend of more than three per cent; and in France railways have proved still more productive, making average dividends throughout the empire, for the year 1857, of nine per cent upon the whole investment, some as high as sixteen per cent, and one, the Lyons and Marseilles line, twenty-three per cent. It is difficult to account for the difference in results, without

* 9. It does not alter the character of a private corporation, that the state or the United States own a portion of the stock.[8]

suspecting something wrong somewhere. Since the former edition of this work, considerable advance has been made in railway enterprise throughout the world. Railways have become so nearly a military necessity, in order to enable any nation of considerable power and prominence in relative national position to maintain its due weight and importance, that very extensive, and in some instances vast, works of that kind have been accomplished, mainly upon that ground. The experience of the national government during the late civil war has removed all question of the right of that government to charter and construct, or aid in the construction of, extensive and independent lines throughout the country for military and mail purposes alone. It is stated that the present length of railway line in the United States is about 32,000 miles, at an average cost of $40,000 per mile, equal to $1,280,000,000 in all, and there is every reason to believe the Atlantic and Pacific coasts will speedily be united by railway. The advance in Great Britain and Ireland has been very great since the first edition of this work, but probably not in the same proportion as here.

The number of miles of railway now in operation in France is about 8,000, at a cost of nearly $1,300,000,000, and producing, according to the late returns of the Minister of Public Works, a net income or dividend of nearly nine per cent. This is the same rate of income produced by the French railways in 1858, as stated above. The average income from railway investment in Great Britain and Ireland is probably not above half that sum; and, in the United States, it is perhaps even below that. But our country is so immensely extensive, and easy and rapid intercommunication between all portions of the empire so much a state necessity, that it might naturally be expected that for a long time considerable portions of the line should remain unproductive in a pecuniary point of light. There have been great changes in the policy of railway construction and management since this work first appeared, and mainly in the right direction. Reckless and destructive railway management is now, we trust, becoming the rare exception in this country, although there is still, no doubt, great room for improvement. There is probably no other country in the world where it is so difficult to bring the employees and others connected in various relations with railway management, to understand and appreciate the indispensable importance of bringing every thing to the unbending control of a single will. This is not only indispensable for success, but equally for security.

From authentic sources it now (1869) appears that the extent of railway in operation in Europe is not less than 50,000 miles. Of this, Great Britain has 14,000 miles, at a cost of £500,000,000 sterling; France has nearly 10,000 miles: Germany, including Austria, 13,000 miles; Spain, 3,000 miles; Sweden, 1,000 miles: Belgium, 1,000 miles; Switzerland and Holland, each, less than 1,000 miles; and Italy about 3,000 miles; and Russia nearly 3,000 miles. There are also more than 3,000

[8] Bank of the United States *v.* The Planters' Bank of Georgia, 9 Wheaton, 904; Miners' Bank *v.* United States, 1 Greene (Iowa), 553; Turnpike Co. *v.* Wallace, 8 Watts, 316. Bardstown & Lou. Railway *v.* Metcalfe, 4 Met. (Ky.) 199.

* But a turnpike company or other corporation, managed exclusively by state officers, and at the expense and for the benefit of the state at large, is a public corporation.[9]

* SECTION II.

How Corporations are created.

1. *Corporations created by grant of the sovereignty. This may be proved, by implication or by presumption.*
2. *The sovereignty may establish corporations by general act, or delegation or procuration.*
3. *Different forms of defining a corporation.*
4. *The corporate action of corporations restricted to state creating them.*
5. *It may act by its directors and agents in other states.*

n. 10. *But cannot properly transfer its entire business to another state.*

6. *A college located at one place cannot establish a branch at another.*

§ 17 *a.* 1. Strictly speaking, corporations can only be created by the authority of the sovereignty, either state or national.[1] Hence, the ordinary mode of creating joint stock business corporations is by charter, by way of legislative act of the several states. But as, in some cases, the record of such charters may not have been preserved, and in other cases, the grant of corporate powers

miles of railway in British India; about that extent in the Canadas; and there is more than half the extent of railway line in the United States that there is in all the rest of the world; and when the three lines of Pacific railway shall be completed, the extent will fall little short of equalling that of all the rest of the world. But a very large proportion of it is constructed with only a single track, and much of it is very imperfectly built, and has not proved remunerative as a general rule. But it is the controlling interest of the country, far more important than any other pecuniary or political interest, both in peace and in war, and without which it is impossible to calculate what might have been the result of the late civil war.

[9] Sayre *v.* North W. Turnpike Co., 10 Leigh, 454. But see Toledo Bank *v.* Bond, 1 Ohio N. S. 622, 657. Opinion of *Storrs*, J. in Bradley *v.* New Y. & New H. Railw. 21 Conn. 294, 304, 305.

[1] As the national sovereignty is limited to the subjects and powers enumerated in the Constitution, and such implied powers as are requisite to the successful exercise of those expressly granted; and as no general power to create corporations is expressly given, the construction of the court of last resort upon these questions, established at an early day, is, that Congress can charter only such corporations as are fairly to be esteemed necessary to the successful accomplishment of its delegated powers and functions. McCullough *v.* Maryland, 4 Wheaton, 316; Osborne *v.* Bank of United States, 9 Wheaton, 733.

may have been by way of implication rather than express legislative act, the courts have allowed corporations to prove their corporate character and capacity, by evidence that such character and capacity is reasonably, or necessarily, * implied from other legislative action ; [2] or else, that its existence is fairly to be presumed from the long continuance of its unquestioned exercise.[3]

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

3. A corporation is defined by Lord *Holt*, Ch. J.,[5] as an *ens civile*, a *corpus politicum*, a *persona politica*, a *collegium*, an *universitas*, a *jus habendi et agendi.* A corporation is well defined, as to the general sense of the term, by Chief Justice *Marshall*,[6] as "an artificial being, invisible, intangible, and existing only in contemplation of law." It is, in fact, the mere creature or creation of the law. Endowed by its charter with the capacity of performing certain functions, and having no rights, and possessing no powers, except those conferred by the sovereignty by which it was created.

4. It is upon this ground, that it has been declared, upon the most unquestionable basis, both of principle and authority, that a "corporation can have no legal existence out of the boundaries of the sovereignty by which it is created." [7] "It exists * only in con-

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

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

[4] 1 Bl. Comm, 474.

[5] Anonymous, 3 Salk. 102.

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

[7] *Taney*, Ch. J. in Bank of Augusta *v.* Earle, 13 Pet. U. S. 519, 588.

templation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty." And the same thing, substantially, is repeated in another case[8] by Mr. Justice *Thompson*.

5. There seems to be no question but the corporation may act, by its directors, agents, and servants, beyond the limits of the sovereignty by which it was created,[9] but its first meeting, and all its subsequent meetings, in order to bind absent and dissenting members, should, it would seem, be held within the limits and jurisdiction of the sovereignty creating the corporation.[10] But in a very recent case in New Jersey, Hilles *v.* Parrish,[11] the general rule is reaffirmed, that a corporation can hold no * meeting and transact no corporate business, except within the state from which

[8] Runyan *v.* Lessee of Costor, 14 Pet. 122, 131. The same doctrine is maintained in other American cases, Miller *v.* Ewer, 27 Me. 509; Farnum *v.* Blackstone Canal Co., 1 Sumner, 46; Day *v.* Newark India Rubber Co., 1 Blatchf. C. C. 628.

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

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

[11] 1 McCarter, 380.

they derive their charter. And it was here further held, that a resolution of the directors, at a meeting held out of the state where the corporation was created, for the purpose of transferring stock to some of their own number, was wholly inoperative. But the court declined to enjoin those holding under such title from voting at the election of corporate officers, until all parties could be heard upon the question of title.

6. But a college of learning, established in a particular place, has no power to establish a branch, for one of its departments or faculties, at a different place. It was accordingly held, that Geneva College, at Geneva, N. Y., could not establish a medical school in the city of New York.[12]

SECTION III.

The Constitution of Corporations, and mode of Proof.

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

§ 17 *b*. 1. The term "constitution," as applied to corporations, is susceptible of being used in very different senses. It may imply nothing more than the charter or formal grant of corporate organization and powers by the sovereignty, or it may be applied to certain fundamental principles, declared by the corporators themselves, as the unalterable basis of the organization of the body; or, if not wholly unalterable, not to be altered, except by the

[12] People *v.* Trustees of Geneva College, 5 Wendell, 211.

adoption and concurrence of certain formalities, not likely to occur, except in regard to changes of very obvious necessity; or the term may be used to signify the constituent members, or different bodies of which the corporation is composed.

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

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

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

[1] Joint-stock business corporations are, for the most part, composed of natural persons. But as membership in such corporations grows out of the ownership of shares, it may exist in other corporations, who subscribe for or purchase shares; or the shares may be in part owned by the sovereignty, either state or national. Bank of the United States *v.* The Planters' Bank of Georgia, 9 Wheaton, 904; Bank of South Carolina *v.* Gibbs, 3 McCord, 377. But as said by Mr. Chief Justice *Marshall*, in Bank of the United States *v.* The Planters' Bank, *supra*, "As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act."

A familiar instance of corporations, composed of different associations of natural persons, forming component parts of the corporation, will be found in the organization of municipalities, 1 Kyd. 36. So also the corporation may be composed of a defined number of persons of a particular class. As in the case of St. Mary's Church in the city of Philadelphia, 7 S. & R. 517.

And a corporation is sometimes constituted of several subordinate corporations combined. As in the case of the Dean and Canons of the English Cathedrals, 2 Burn's Eccl. Law, Tit. Monasteries, 542. The same is also true of the corporations of the English Universities, which are composed of the subordinate corporations of the different Colleges and Halls. 1 Kyd. 36. Some English towns and cities are composed of several subordinate corporations. And a freeman of the city of London must first become a freeman of some of the Trades' incorporations. Angell & Ames, § 96.

[2] 1 Kyd. 399; Angell & Ames, § 98.

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

although it may have a new charter by a new name, it thereby loses the old name.[4]

* 5. But it sometimes becomes an important and difficult consideration, how far a departure from the strict corporate name can be allowed without the violation or disregard of established principles. It was early decided,[5] that in contracts by or to corporations, it is sufficient if the name be substantially preserved. It is not requisite *ut idem nomen syllabis* be preserved, but only *in re et sensu*. The precise words of the same are not indispensable. It is sufficient if the substance and the sense be preserved. And in a case in New Hampshire, it was held not essential, in naming a corporation, that the same words should be used in the same order, provided the description was sufficient to identify the body.[6] And this rule obtains generally, in all the cases upon the subject, both English and American. If the name used to describe the corporation does not describe any other person, natural or corporate, and is sufficient to show that the particular corporation was intended, it will be sufficient.[7]

6. The constitutions and powers of all corporations must necessarily depend upon the law of the state where the same was created. And in the English courts of equity it is not the practice to interfere to restrain the majority of the shareholders from applying to parliament for enlarged powers. And the same rule is there adopted as to foreign corporations, whose shareholders prin-

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

[5] Mayor and Burgesses of Lynne Regis. 10 Co. Rep. (11 Jac. I.) 122.

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

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

* cipally reside in England, and where the principal business is transacted in that country.[8]

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

8. An application was made in a somewhat recent case,[11] for an injunction against the defendant's adoption and use of the plaintiff's name, or one so similar as to lead the public to suppose they were the same institution, upon the ground that this would tend to deprive them of the just benefits of the long period of conducting their business upon terms and in a mode most acceptable to the public. The application was based upon the same grounds that have induced courts of equity to interfere to protect parties from the fraudulent use of established trademarks, inasmuch as it tends to a double fraud, — in depriving the parties, first giving character to such mark, of the legitimate fruits of their industry; and also in that it induces the public to suppose they are obtaining the original article of the original proprietor, when in fact they are not.[12] The court, Vice-Chancellor *Stuart*, intimated no doubt of the propriety of granting the relief, upon the ground claimed in the bill, but denied the injunction upon the ground that no such case was made out at the hearing. But a company cannot by user acquire an exclusive right to use, in its title of incorporation, a term descriptive merely of the locality where the business is carried on; and the court will not restrain the use of such general term by a new company, although it appear that the former company may have been prejudiced by the similarity of name.[13]

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

[9] Attorney-General *v*. Great N. Railw., 1 Drew & Sm. 154.

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

[11] The London Insurance *v*. The London & Westminster Insurance Corporation, 9 Jur. N. S. 843.

[12] 2 Story Eq. Jur. § 951, *et seq*., in the late edition of 1866.

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

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

10. A corporation, after having claimed and exercised corporate powers for a considerable time, will be estopped from denying its corporate existence.[16] It is said in some cases, that if the corporation contracts by a style which is usual in creating corporations, and which discloses the names of no natural persons, that the corporate existence will be implied and need not be averred.[17] But in general such a proposition would not be regarded as maintainable in suits, either in favor or against a corporation: it should be described as such in the declaration, with its location at its central place of doing business.

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

12. The cases are very numerous where it has been held that a

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

[15] O'Donald *v.* E. Ind. & Cl. Railw. Co., 14 Ind. 259.

[16] Callender *v.* Painesville & H. R. R. Co., 11 Ohio N. S. 516; The Atlantic & Ohio R. R. *v.* Sullivant, 5 Ohio N. S. 276. See also Ashtabula & New L. R. R. Co. *v.* Smith, 15 Ohio N. S. 328.

[17] Stein *v.* Ind. &c., Association, 18 Ind. 237.

[18] Meikel *v.* The German Savings Fund Society, &c., 16 Ind. 181.

[19] Pochelu *v.* Kemper, 14 Louis. Ann. 308.

party who gives a written contract to a corporation by a particular name is estopped to deny the existence and name of such corporation.[20]

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

[20] Hubbard *v.* Chappel, 14 Ind. 601.

CHAPTER IV.

PROCEEDINGS UNDER THE CHARTER.

SECTION I.

Organization of the Company.

1. *Conditions precedent must be performed.*
2. *Stock must all be subscribed, ordinarily.*
3. *Charter-location of road, condition precedent.*
4. *Colorable subscriptions binding at law.*
5. *Conditions subsequent, how enforced.*
6. *Stock distributed according to charter.*
7. *Commissioners must all act.*
8. *Defect of organization must be pleaded specially.*
9. *Question cannot be raised collaterally.*
10. *Records of company, evidence.*
11. *Membership, how maintained.*
12. *By subscription and transfer of shares.*
13. *Offers to take shares not enforced in equity, and may be withdrawn.*

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

[1] Angell & Ames on Cor. ch. 3, §§ 95–112; 2 Kent, Comm. 293 *et seq.*

[2] Post, § 51, and cases cited. Bend *v.* Susquehanna Bridge, 6 Har. & Johns. 128; Gray *v.* Portland Bank, 3 Mass. 364; Minor *v.* The Mechanics' Bank of Alexandria, 1 Peters, (U. S.) 46. Opinion of *Story*, J. And where a corporation is formed, or attempted to be formed, under general statutes, the inchoate proceedings do not ripen into a corporation, until all the requirements of the statute, even the filing of the articles in the office of the Secretary of State, are complied with. And until this is done, the subscription of any one to the articles is a mere proposition to take the number of shares specified, of the capital stock of the company thereafter to be formed, and not a binding promise to pay. The obligation is merely inchoate and can never become of any force, unless the corporation goes into effect in the mode pointed out in the statute. And until that time, the subscriber may revoke the offer, and if the articles are in his possession or control, erase his name. Burt *v.* Farrar, 24 Barb. 518.

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

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

4. But it has been held, that colorable subscriptions to stock, in order to comply with the requisites of the charter, are not to be regarded as absolutely void. They are binding upon the subscribers themselves. And they are binding upon the other subscribers unless, upon their first discovery, they take steps to stay the further proceedings of the corporation, which may be *done in a court of equity. If there has been unreasonable delay in opposing the action of the corporators, upon the faith of such subscriptions, or if matters have progressed so far before the discovery of the true character of the subscriptions, by the parties liable to be injurious-

[3] King *v.* Elliott, 5 Sm. & Mar. 428; *post*, § 51. But a requirement in the charter of a railway company, that $1,000 per mile shall be subscribed, and ten per cent paid thereon in good faith, does not require ten per cent to be paid by each subscriber, in order to the performance of the condition. It is a sufficient compliance with such requirement, if that proportion on the whole subscription be paid. Ogdensb., Rome, & Clay. R. *v.* Frost, 21 Barb. 541. But under the late English Statutes corporations are allowed to organize, and make calls to some extent, before all the capital is subscribed. Or. P. W. Co. *v.* Brown, 9 Jur. N. S. 578; s. c. 2 H. & C. 63. But in America the rule that all the stock must be subscribed before the company can go into operation is strenuously adhered to. Shurtz *v.* The S. & T. Railw. Co., 9 Mich. 269. And upon general principles it seems not to be held indispensable in England that all the stock be subscribed, either to enable the corporation to go into operation, or even to borrow money on mortgage. McDougall *v.* The Jersey Imperial Hotel Co., 2 H. & M. 528; s. c. 10 Jur. N. S. 1043. But, in America, the entire capital stock must be subscribed and paid in money, and it will not be sufficient to pay it in the equivalent for money, to the acceptance of the shareholders or directors, unless the charter or general laws of the State so provide. The People *v.* The Troy House Co., 44 Barb. 625.

ly affected by them, as to render it difficult to restore the parties to their former rights, the corporation will still be allowed to proceed, notwithstanding the fraud upon the charter.[4]

5. Conditions subsequent in railway charters, by which is to be understood such acts as they are required to perform after their organization, will ordinarily form the foundation of an action at law, in favor of the party injured; or they may be specifically enforced in courts of equity, in cases proper for their interference in that mode; or if the charter expressly so provide, proceedings by way of *scire facias*, to avoid the charter may be taken.[5]

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

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

[4] Walker *v.* Devereaux, 4 Paige, 229. The entire ground of chancery jurisdiction in regard to the conduct of commissioners or corporations in making colorable subscriptions of stock is here very fully discussed by the learned Chancellor. And the conclusion arrived at seems the only practicable one, that colorable subscriptions or fraudulent distribution of stock will not defeat the legality of the organization of the corporation, unless the thing is arrested *in limine*. Johnston *v.* S. W. R. R. Bank, 3 Strob. Eq. 263; Selma & Tenn. R. *v.* Tipton, 5 Alabama, 787; Hayne *v.* Beauchamp, 5 Sm. & M. 515. The decision of the commissioners is conclusive upon the company and shareholders, at law certainly. Crocker *v.* Crane, 21 Wendell, 211. And where the charter, or act of association, names commissioners to take up subscriptions, they alone have jurisdiction of the matter, and subscriptions taken up by volunteers are not binding upon the subscribers unless adopted by the commissioners. Shurtz *v.* The S. & T. R. R. Co., 9 Mich. 269.

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

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

Receiving subscriptions is a merely ministerial act and may be performed by a number less than a majority.[6]

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

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

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

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

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

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

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

[10] Ang. & Am. § 513; Grays *v.* Lynchb. & Salem T. Co., 4 Rand. 578; Buncombe T. Co. *v.* McCarson, 1 Dev. & Bat. 306; Greenl. Ev. § 492; Rex *v.* Martin, 2 Camp. 100; Hudson *v.* Carman, 20 Law Rep. 216; s. c. 41 Me. 84.

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

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

All that a corporation is called upon to prove, to establish its existence in a litigation with individuals dealing with it, is its charter and user under it. This constitutes it a corporation *de facto*, and this is sufficient, in ordinary suits, between the corporation and its debtors. The validity of its corporate existence can only be tested by proceedings in behalf of the people. Mead v. Keeler, 24 Barb. 20. Between the company and strangers, the records of the company will ordinarily be held conclusive against them in regard to such matters as it is their duty to perform, in the manner detailed in the records. Zabriskie v. C. C. & C. Railw., 10 Am. Railw. Times, No. 15, s. c. affirmed, 23 How. 381. Heaston v. Cincinnati, &c. Co., 16 Ind. 275. See upon the general question of proof and presumption of the organization of corporations, Leonardsville Bank v. Willard, 25 N. Y. 574; Belfast and Angelica Plank Road Co. v. Chamberlain, 32 N. Y. 651; Buffalo & Allegany Railw. v. Cary, 26 N. Y. 75. Where the statute under which an incorporation is formed in another state, required, that before the corporation should commence business it should cause its articles of association to be published in a prescribed form, it was held that it might be regarded as sufficiently incorporated for the bringing of an action without the publication; and that the general reputation and notoriety of the fact that such corporation was doing business in that capacity, coupled with the fact that the contract sued upon was made payable to them, was sufficient evidence of the corporate existence. Holmes v. Gilliland, 41 Barb. 568. See Unity Ins. Co. v. Cram. 43 N. H. 636, where the rule of construction is somewhat more strict.

There seems to be no rule of practice better settled than that where the defendant, in a suit brought by a corporation, pleads the general issue, he thereby concedes the right of the plaintiff to sue in his corporate capacity. Orono v. Wedgeworth, 44 Me. 49. The members of a mutual insurance company cannot dispute the corporate existence in a suit upon the premium notes in favor of a receiver appointed to wind up the concerns of the company. Hyatt v. Whipple, 37 Barb. 595. Misnomer of corporations must be plead in abatement or it will be regarded as waived. Keech v. Balt. & Wash. Railw., 17 Md. 32.

[11] Highland Turnp. Co. v. McKean, 10 Johns. 154. See Breedlove v. M. &c. Railw. Co., 12 Ind. 114.

[12] Hicks v. Launceston, 1 Roll. Ab. 513, 514; s. c. 8 East, 272 in n. See also

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

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

*SECTION II.

Acceptance of Charter, or of Modification of it.

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

§ 19. 1. It is requisite to the binding effect of every legislative charter (or modification of such charter) of a joint-stock company,

2 Kent, Comm. 294. It is not competent for the defendant, in an action in favor of a corporation, to plead that the company has committed acts working a forfeiture of its corporate franchises. That can only be determined by a suit on behalf of the public, brought expressly to try that question. Comm. *v.* Morris, 1 Phil. 411; Coil *v.* Pittsburgh Female College, 40 Penn St. 439; Dyer *v.* Walker & Howard, id. 157. Membership in the corporation is not affected by the certificate of shares containing a promise to pay interest till a certain time. McLaughlan *v.* D. & M. R. Co., 8 Mich. 100.

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

[14] *Post*, § 34, pl. 6.

[15] Graham *ex parte*, 7 Jur. N. S. 981.

that it should be accepted by the corporators.[1] This question more commonly arises, in regard to the modification of a charter, or the granting of a new charter, the company in either case, whether under the old or the new charter, going forward to all appearance much the same as before. In such case, it has usually been regarded as important to show some definite act of at least a majority of the corporation.[2]

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

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

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

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

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

7. In a recent case in Ohio, where an amendment of the charter of a bank was passed by the legislature giving the bank certain immunities and privileges, upon the assent of all the stockholders in writing, filed with the auditor of state, to become personally responsible for the liability of the company in the manner pre-

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

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

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

[4] Charles River Bridge *v.* Warren Bridge, 7 Pick. 344; by *Parker*, Ch. J., and *Wilde*, J.

[5] Bank of U. S. *v.* Dandridge, 12 Wheat. 64, opinion of *Story*, J., and cases cited.

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

scribed in the act, it was held, that although all the stockholders did dot subscribe the required written declaration, yet if the bank had enjoyed the benefits secured by the amendment, neither those stockholders who did subscribe it, or the bank itself, can deny the acceptance of the amendment, as against the claims of third persons.[7]

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

*SECTION III.

Ordinary powers. — Control of majority.

1. *Ordinary franchises of railways.*
2, 3. *Majority control, unless restrained.*
4. *Cannot change organic law.*
5. *Except in the prescribed mode.*
6. *Cannot accept amended charter.*
7. *Or dissolve corporation.*
8. *May obtain enlarged powers.*
9. *Courts of equity will not restrain the use of their funds for that purpose.*
10. *But will, if to convert canal into railway.*
11. *Right to interfere lost by acquiescence.*
12. *Acquiescence of one plaintiff, fatal.*
13. *Railway a public trust.*
14. *Suit maintained by rival interest.*
15. *Courts of equity will not restrain the majority from winding up unless for fraud, &c.*

§ 20. 1. The ordinary powers of a railway company are the same as those pertaining to other joint-stock aggregate corporations, unless restricted by the express provisions of their charter,

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

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

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

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

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

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

4. And perhaps it is equally implied in the fundamental compact, that the majority have no power to change the organic law of

[1] Walford, 69; 1 Black. Comm. 475, 476; 2 Kent, Comm. 277; where the power of amotion of members for just cause is added.

[2] *Post*, §§ 56, 212.

[3] Louisville, Cincinnati, & Charleston Railw. *v.* Letson, 2 Howard (U. S.), 497; s. c. 15 Curtis, Cond. 193. The very definition of a corporation, that it is an artificial being composed of different members, and existing and acting as an abstraction, and having its habitation where its functions are performed, presupposes that it must act in conformity with its fundamental law, which is according to the combined results of its members, or the will of the majority. But this will cannot change its fundamental law without changing the identity of the artificial being, to which we apply the name of the corporation. See also St. Mary's Church, 7 S. & R. 517; New Orleans, Jackson, &c. Railway *v.* Harris, 27 Miss. 517; *Ex parte* Rogers, 7 Cowen, 526, which holds, that if the charter requires a certain number to be present, in order to the performance of a particular act, it is requisite that the number remain till the act is complete, and if one depart before, although wrongfully, it will defeat the proceedings.

the association, except in conformity to some express provision therein contained.

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

6. And in this country it has been held, that the acceptance by the majority of a corporation of an amendatory act, does not bind the minority.[4] An amendment to the charter of a * corporation, to become binding, must either have been applied for in pursuance of a vote of the stockholders, or else have been accepted by such vote; or it must have been acted under for such a length of time as to raise a reasonable presumption of knowledge in the shareholders and subsequent acquiescence.[5]

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

[4] New Orleans, &c. Railroad *v.* Harris, 27 Miss. 517. But this rule will be understood with some limitations. If it be an amendment within the ordinary range of the original charter, giving increased facilities for the accomplishment of the same objects, it may be accepted by the majority, so as to bind the whole company. But if it be a fundamental alteration of the constitution of the company, it must have either the express or implied assent of all the corporators, to make it binding. *Post*, pl. 8; § 56, pl. 3, 7.

[5] Illinois River Railway *v.* Zimmer, 20 Ill. 654; Same *v.* Casey, ib.

[6] Revere *v.* Boston Copper Co., 15 Pick. 351. This case, although put mainly upon the ground of plaintiff's rights being independent of the law of the association, yet incidentally involves the right of the majority of the corporators to

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

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

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

11. But this right of the minority of the shareholders to inter-

change its constitutional law. See also Von Schmidt *v.* Huntington, 1 Cal. 55, and Kean *v.* Johnson, 1 Stockton, Ch. 401, where it is held, that where the charter is granted for a limited time, it must continue in operation till the term expires, unless, perhaps, in case of serious loss, or with the consent of all the corporators, and others having any legal interest in the question. The same rule was recently declared in Louisiana. Lodge No. I. *v.* Lodge No. I., 16 La. Ann. 53. And it was here considered, that a resolution passed by the majority of the members of a corporation donating all the property of the company to a new corporation of which the members voting are also members, and the delivery of the same to such corporation in pursuance of such resolution, is void.

[7] Ware *v.* Grand Junction Waterworks, 2 Russ. & My. 470; (13 Eng. Ch. Rep. 126.) Lord *Brougham* seems here to suppose, that the right of petition to parliament, for enlargement of powers, is an implied incident of all business corporations, by which the subscribers are bound, unless some express probibition is inserted in their charter. But the more common implication in this country certainly is, that the original shareholders are not bound by any such alteration, unless such power exists, in terms, in the original charter.

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

[9] *Post*, §§ 56, 181, 212.

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

12. And if one of the shareholders, who has acquiesced in * the diversion of the funds, be joined in the suit with others who have not, no relief can be afforded.[11]

And there can be no doubt of the soundness of this principle, although the effect of its application may be to produce a fundamental alteration of the constitution of a corporation, and thus to enable them to do what they had no power before to do. But this is only applying to the case the principle of implied consent of all the shareholders, resulting from silence, which is all that is requisite in any case, to legalize the alteration of the charter of a private corporation.

13. It is said in a late case by an eminent equity judge, Vice-Chancellor *Stuart:*[12] "Although, generally speaking" "there can be no doubt of the soundness of the principle, that the directors and the majority of the company may be restrained from employing money, subscribed for one purpose, for another, however advantageous," "and although this is the law as to joint-stock companies, unincorporated and unconnected with public duties or interests, it has not been applied to corporate companies for a public undertaking, involving public interests and public duties under the sanction of parliament. In such cases the court of chancery has

[10] Graham *v.* Birkenhead, &c. Railway, 2 Mac. & G. 146; s. c. 6 Eng. L. & Eq. 132; Beman *v.* Rafford, 1 Sim. N. S. 550. Lord *Cranworth* says, "This court will not allow any of the shareholders to say, that they are not interested in preventing the law of their company from being violated." Ffooks *v.* London & S. W. R., 1 Sm. & G. 142; s. c. 19 Eng. L. & Eq. 7. But one creditor of a corporation cannot, by injunction, restrain another creditor of the same grade from obtaining prior payment by virtue of an execution issued upon a prior judgment. Gravenstine's Appeal, 49 Penn. St. 310.

[11] Ffooks *v.* London & S. W. R. 1 Sm. & G. 142; s. c. 19 Eng. L. & Eq. 7, opinion of *Stuart*, V. C. and cases cited.

[12] Ffooks *v.* London & S. W. R. *supra.*

permitted the use of the corporate seal, and the moneys of the company, to obtain the sanction of parliament to purposes materially altering the interests of the shareholders, according to the contract *inter se*. This was done in the case of Stevens *v.* South Devon Railway Company." [13] The learned judge therefore concludes, that, although the principle first stated by him may apply to the case of public railway companies in general, "it must be taken to be subject to many qualifications, and requiring much caution and consideration" in its application.

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

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

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

[14] *Re* The Imperial Mercantile Credit Association, 12 Jur. N. S. 736.

* SECTION IV.

Meetings of Company.

1. *Meetings, special and general.*
2. *Special, must be notified as required.*
3. *Special and important matters, named in notice.*
4. *Notice of general meetings need not name business.*
5. *Adjourned meeting, still the same.*
6. *Company acts by meetings, by directors, by agents.*
7. *Courts presume meetings held at proper place.*
8. *Every shareholder may vote, but not by proxy.*

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

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

3. Notice of special meetings should ordinarily specify the general purpose and object of the call. But it is said this is not indispensable, when it is for the transaction of ordinary business, and that giving security for the debt of a bank, by mortgage of its real estate, is of this character.[3] But where the business is * unusual and important, as the election or amotion of an officer, the making of by-laws, or other matter affecting the vital interests and fundamental operations of the corporation, and on a day not

[1] 8 & 9 Vict. c. 16, § 66.

[2] Wiggin *v.* Freewill Baptist Society, 8 Met. 301. This view seems to be countenanced by Lord *Kenyon*, in Rex *v.* Faversham, 8 T. R. 352; Rex *v.* May, 5 Burrow, 2681; The King *v.* Langhorn, 4 Ad. & Ellis, 538. See, also, cases cited in the argument of this case. But all the cases agree, that if the members attend even without notice, it is sufficient. The King *v.* Theodorick, 8 East, 543. A meeting may be general for most purposes, and also special for a particular purpose; Cutbill *v.* Kingdom, 1 Exch. 494.

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

appointed for the transaction of business of this character, or of all business of the corporation, the notice must state the business, or the action upon it will be held illegal and void.[4]

4. But, as a general rule, it may be safely affirmed, perhaps, that in regard to general meetings of the company, which are for the transaction of all business, no notice of the particular business to be done is necessary.[5]

And all the members of the corporation are presumed to have notice of their stated meetings and are bound by the proceedings at such meetings; but there is no presumption that they know what is done at such meetings, so as to affect them with notice of any thing done there contemplating future action at any other time than the stated meetings.[6]

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

But if the adjourned meeting be for the transaction of any other business than the mere completion of the unfinished business of the stated or special meeting, as the case may be; and more especially, where the business is of a character which could * not have been legally transacted at the former meeting, it will not afford any warrant for its legality, that it is done at an adjourned meeting from one legally constituted originally.[7] But the publicity and general notoriety of a transaction may be sufficient

[4] Rex *v.* Doncaster, 2 Burr. 738; Angell & Ames, §§ 488–496. In the case of Zabriskie *v.* C. C. & C. Railw., before the District Court for the Northern District of Ohio, 10 Am. Railw. Times, No. 15, s. c. affirmed 23 How. (U. S.) 381; this subject is discussed by Mr. Justice *McLean*, and he concludes, that where the question to be determined by the company was the guaranty of the bonds of a connecting railway to a large amount, under the statute of the state, which required the consent of a meeting of the shareholders, in which two-thirds of the capital stock should be represented, it was indispensable that the call for the meeting should state the business to be transacted, and should be given long enough before the time of the meeting to enable the remotest shareholders in the country to obtain notice and be able to attend, or communicate with their agents, or proxies, and also to enable the resident agents of foreign shareholders to communicate with the owners. This seems but a just and reasonable limitation upon the power of corporations, in regard to special meetings.

[5] Warner *v.* Mower, 11 Vt. 385; Wills *v.* Murray, 4 Exch. 843.

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

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

ground for presuming knowledge of the appointment of one to a corporate office, even to the extent of subjecting such corporator to a penalty for non-acceptance.[8]

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

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

8. Every shareholder is, ordinarily, entitled to participate in the meetings of members of the corporation duly called, and to vote upon all his shares, according to the mode prescribed in the charter and by-laws of the company, and in conformity with the general laws of the state. But it seems not well settled whether a by-law of the corporation will be sufficient to entitle the members to vote by proxy, and whether some legislative sanction is not requisite to that effect.[11] But where the charter provided that "each person being present at an election shall be entitled to vote," it was held to mean actual presence, and votes by proxy were properly excluded.[12]

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

[9] Walford on Railways, 70.

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

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

[12] Broom *v.* Comm. 2 Phila. 156.

* SECTION V.

Election of Directors.

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

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

2. The shareholders may, in a proper assembly, pass statutes, general or special, which shall control the directors, as between them and the company.[1] Where the by-laws of the company * require notice of the meeting for electing directors, but do not specify the time or mode of such notice, it must be given accord-

[1] But where the charter vests the control of the concerns of the company in a select board or body, the shareholders at large have no right to interfere with the doings of these, their charter agents. Commonwealth *v.* Trustees of St. Mary's Church, 6 Serg. & R. 508; Dana *v.* Bank of the United States, 5 Watts & Serg. 223, 247; Conro *v.* Port Henry Iron Co., 12 Barb. 27. And courts are always reluctant to interfere with the conduct of directors of a corporation, even at the instance of a majority of the shareholders, and ordinarily will not, when such directors have acted in good faith. State *v.* The Bank of Louisiana, 6 La. 745.

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

ing to the requirements of the general statutes of the state upon the subject.[2]

3. But the company cannot object that its directors, who have acted as such, were not elected at a meeting properly notified.[3] Nor can the validity of the acts of the directors be collaterally called in question on the ground of irregularity in the notice of the meeting at which they were elected.[4] Where the charter fixes the number of directors, and vacancies occur, the act of the board is not thereby invalidated, provided a quorum still remains.[5]

* 4. An election of directors will not be set aside, because the inspectors of the election were not sworn as required by the statute. This statute is merely directory, and, so far as third persons are

[2] Matter of Long Island Railroad, 19 Wend. 37; s. c. 2 Am. Railw. C. 453.

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

Held, first, that after what had taken place, it was unnecessary to determine whether the selling company had executed the purchase-deed, or whether its directors had exceeded their powers in making the sale.

Secondly, that where a purchaser has enjoyed the subject-matter of a contract, every presumption must be made in favor of its validity.

Thirdly, that if all the proceedings on the part of the directors of the purchasing company, with reference to the purchase, had not been in strict accordance with their own deed of settlement, still, if the contract with the other company was the means of the purchasing company coming into existence, they could not act in contravention of that contract.

[4] Chamberlain *v.* Painesville & Hudson Railw. Co., 15 Ohio N. S. 225.

[5] Walford on Railw. 71, 72; Thames Haven R. *v.* Rose, 4 M. & G. 552.

concerned, it is sufficient that the inspectors were elected and entered upon the duties of the office, and became officers *de facto*.[6]

SECTION VI.

Meetings of Directors.

1. *All should be notified to attend.*
2. *Adjourned meeting still the same.*
3. *Board not required to be kept full.*
4. *Usurpations tried by shareholders or courts.*
5. *Usage will often excuse irregularities.*
6. *Decisions of majority valid.*

n. 8. *Records of Proceedings, evidence.*

7. *The action must be taken at a formal meeting.*

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

[6] Matter of Mohawk & Hudson River Railw. 19 Wend. 135; s. c. 2 Am. Railw. C. 460.

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

* 2. But an adjourned general meeting of directors, which is provided for by the general regulations of the board, and is for the transaction of the general business of the company, requires no special notice of either time or place, or of the business to be transacted.[2]

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

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

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

6. The decision of a majority of the board of directors is usually

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

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

[4] *Post*, § 211.

[5] *Post*, § 166.

[6] Attorney-General *v.* Davy, cited 1 Vesey, sen. 419. It would savor of bad faith to allow the business of the company to be transacted in a particular mode, and then to attempt to repudiate the acts of their agents, because the transaction proved disadvantageous, when they were in a condition to take the benefit of it if it proved successful.

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

[7] Cram *v.* Bangor House, 3 Fairfield, 354; Sargent *v.* Webster, 13 Met. 497; 2 Kent, Comm. 293 and notes; The King *v.* Whitaker, 9 B. & C. 648; Commonwealth *v.* Canal Commissioners, 9 Watts, 466; *Ex parte* Willcocks, 7 Cowen, 402; Field *v.* Field, 9 Wend. 394, 403, where it is held, that in regard to the body of the stockholders, any number who attend is a quorum for doing business, if the others be properly summoned. But as to the directors, it is requisite that a majority attend. 2 Kent, Comm. 293; Cahill *v.* Kalamazoo Ins. Co., 2 Doug. (Mich.) 124; Holcomb *v.* N. H. D. B. Co., 1 Stockton, Ch. 457.

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

The records of the clerk of a railway company, of the proceedings of the directors, in making calls, may be used as evidence by the company in suits for calls, against one who subscribed for shares, and was one of the grantees of the charter and a director at the time of making such calls, and who had exercised the rights of a shareholder from the first. White Mountain R. *v.* Eastman, 34 N. H. 124. As to the effect of the records of the doings of the corporation kept by their own officer, being evidence, but not indispensable evidence of such facts, when proved by third parties, see Hudson *v.* Carman, 41 Me. 84; Coffin *v.* Collins, 17 Id. 440; Penobscot Railw. *v.* White, 41 Me. 512. See, also, Ind. & Cin. R. *v.* Jewett, 16 Ind. 273.

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

SECTION VII.

Qualification of Directors.

1. *One cannot be a contractor and director.*
2. *May be their banker and director.*
3. *May be director by virtue of stock mortgaged.*
4. *Bankruptcy or absence will not vacate office.*
5. *Company compelled to fill vacancies in board.*

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

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

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

4. Neither the bankruptcy nor absence of a director, and volun-

[9] D'Arcy *v.* Tamar, K. & C. Railw., 4 H. & C. 463; s. c. 12 Jur. N. S. 548.

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

[2] Foster *v.* Oxford W. & W. R., 13 C. B. 200; s. c. 14 Eng. L. & Eq. 306. This case is discussed in a later case in the House of Lords. Aberdeen Railway *v.* Blakie, 1 McQueen, H. & L. 461.

[3] Sheffield, Ash. & Man. Railw. *v.* Woodcock, 7 M. & W. 574; s. c. 2 Railw. C. 522.

[4] Cumming *v.* Prescott, 2 Y. & Coll. Eq. Exch. 488.

tarily ceasing to act as such, will put an end to his character of director, unless it be so provided in the deed of settlement.[5]

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

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

[6] Thames Haven Dock & Railway *v.* Rose, 3 Railw. C. 177, s. c. 4 Man. & Gr. 552. *Maule*, J. Mozley *v.* Alston, 1 Phillips, 790. By the Lord Chancellor.

*CHAPTER V.

PREROGATIVE FRANCHISES.

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

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

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

[1] State *v.* Boston, Concord, & Montreal R. Co., 25 Vt. 433, 442, 443. The right to build and use a railway, and take tolls or fares, is a franchise of the prerogative character, which no person can legally exercise without some special grant of the legislature. But it is competent for the legislature to confer this franchise upon a foreign corporation, so as to enable it to take land for the purpose of constructing a public improvement in the state. Morris Canal & Banking Co. *v.* Townsend, 24 Barb. 658. And what title shall be acquired by such foreign corporation, and whether the proposed amendment will be likely to prove beneficial to the citizens of the state, is a question solely within the discretion of the legislature. Ib.

*CHAPTER VI.

BY-LAWS AND STATUTES.

SECTION I.

Power of making By-Laws or Statutes.

1. *May control conduct of passengers.*
2. *Must be reasonable and not against law.*
3. *Power may be implied, where not express.*
4. *Not required to be in any particular form unless by special provision.*
6. *Model code of by-laws framed by board of trade in England.*
7. *Company may demand higher fare if paid in cars.*
8. *Public statutes control by-laws.*
9. *Cannot impose penalty.*
10. *Cannot refuse to be responsible for baggage.*
11. *Statutes operate upon members from promulgation; upon others, from knowledge of the same.*
12. *Regulations, for accommodation of passengers, must yield to the right of others to be carried.*

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

2. This power is subject to some necessary limitations. Such by-laws must not infringe the charter of the company or the laws of the state, must not be unreasonable, and must be within the range of the general powers of the corporation.[1] And the question, whether reasonable or not, is to be determined by the jury under instructions from the court, being a mixed question of law and fact.[2] But in a recent case in New Jersey[3] it was decided

[1] Elwood *v.* Bullock, 6 Q. B. 383; Calder Navigation Co. *v.* Pilling, 14 M. & W. 76; Child *v.* Hudson Bay Co., 2 Peere Wms. 207; Angell & Ames, c. 10; 2 Kent, Comm. 296; Davis *v.* Meeting H. in Lowell, 8 Met. 331. In a recent case in Kentucky it is said the power of a corporation to make by-laws is limited by the nature of the corporation and the laws of the country. It can make no rule contrary to law, good morals, or public policy. Sayre *v.* Louisville Union Benevolent Association, 1 Duvall, 143.

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

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

* that the question whether the regulation of a corporation affecting third persons is reasonable is a question of fact; but the validity of a by-law of a corporation, which affects only its members, is a question of law to be determined by the court.

The general powers of business corporations to enact by-laws was extensively and learnedly discussed in a somewhat recent case which passed through the Queen's Bench, the Exchequer Chamber, and was finally determined in the House of Lords.[4] The case turned mainly upon the reasonableness of the by-law, which excluded any person who had become bankrupt or notoriously insolvent from becoming one of the governing body of the company. The provision of the by-law was held entirely reasonable; but that having admitted the party to the office, he could not be removed without formal proceeding upon notice and hearing. And where one part of a by-law is reasonable it may stand, although connected with another part which is not reasonable.[5]

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

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

5. By many of the special railway charters in England, and by the Companies' Clauses Consolidation Act of 1845, it is provided

[4] Reg *v.* Saddlers' Company, 6 Jur. N. S. 1113; s. c. 7 id. 138; s. c. 9 id. 1081; s. c. 4 B. & S. 1059; s. c. 10 Ho. Lds. Cas. 404.

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

[6] Hayden *v.* Noyes, 5 Conn. 391; Adley *v.* The Whitstable Co., 17 Vesey, 315; Clark's case, 5 Coke, 64. When the penalty of a by-law is imprisonment, it is void as against Magna Charta. But such power may be given by statute.

[7] Child *v.* Hudson B. Co., 2 Peere Wms. 207.

[8] Walford, 249; Hodges, 552, 553.

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

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

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

[10] Hodges, 453. "1. No passenger will be allowed to take his seat in or upon any of the company's carriages, or to travel therein upon the said railway, without having first booked his place and paid his fare. Each passenger booking his place will be furnished with a ticket, which he is to show when required by the guard in charge of the train, and to deliver up before leaving the company's premises, upon demand, to the guard or other servant of the company duly authorized to collect tickets. Each passenger not producing or delivering up his ticket will be required to pay the fare from the place whence the train originally started.

"2. Passengers at the road stations will only be booked conditionally, that is to say, in case there should be room in the train for which they are booked; in case there shall not be room for all the passengers booked, those booked for the longest distance shall have the preference; and those booked for the same distance shall have priority according to the order in which they are booked.

"3. Every person attempting to defraud the company, by riding in or upon any of the company's carriages, without having previously paid his fare, or by riding in or upon a carriage of a higher class than that for which he has booked

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

8. But this may be controlled as to existing railways even, by general legislation of the state. And where a statute gave all railways the power to remove those who violated any of the by-*laws or regulations of the company from their cars, *at the regular stations*, this was held to carry an implied prohibition from removing such persons at other points.[11] And where one refuses to pay fare, and the train is stopped for the purpose of putting him off the train, at a dwelling-house, as by the statute of New York is

his place, or by continuing his journey in or upon any of the company's carriages beyond the destination for which he has paid his fare, or by attempting in any other manner whatever to evade the payment of his fare, is hereby subjected to a penalty not exceeding forty shillings.

"4. Smoking is strictly prohibited both in and upon the carriages, and in the company's stations. Every person smoking in a carriage is hereby subjected to a penalty not exceeding forty shillings; and every person persisting in smoking in a carriage or station, after being warned to desist, shall, in addition to incurring a penalty not exceeding forty shillings, be immediately, or, if travelling, at the first opportunity, removed from the company's premises, and forfeit his fare.

"5. Any person found in the company's carriages or stations in a state of intoxication, or committing any nuisance, or otherwise wilfully interfering with the comfort of other passengers, and every person obstructing any of the company's officers in the discharge of their duty, is hereby subjected to a penalty not exceeding forty shillings, and shall immediately, or, if travelling, at the first opportunity, be removed from the company's premises and forfeit his fare.

"6. Any passenger cutting the linings, removing or defacing the number-plates, breaking the windows, or otherwise wilfully damaging or injuring any of the company's carriages, shall forfeit and pay a sum not exceeding £5 in addition to the amount of damage done."

"*Note.* — Persons wilfully obstructing the company's officers, in cases where personal safety is concerned, are liable, under the 3 & 4 Vict. c. 97, section 16, to be apprehended and fined £5, with two months' imprisonment in default of payment."

[11] Stilphin *v.* Smith, 29 Vt. 160; Chicago, Burlington & Quincy R. *v.* Parks, 18 Ill. 460. See late case in New Hampshire, in which it is held, railways may lawfully discriminate between fare paid in the cars and at the stations. Hilliard *v.* Goold, 34 N. H. 230, *post*, § 28, n. 17. *Post*, § 160.

allowed, the right of the conductor is not affected by a subsequent offer to pay fare.[12] So, too, one may be ejected from the cars by the conductor for disorderly conduct, and in justification, it is competent to prove any improper conduct during the entire passage, and this cannot be controverted by general evidence of the good reputation of the person for sobriety. And one may be expelled, also, for refusing to surrender his ticket to the conductor on request, in conformity with the general regulations of the company.[13]

9. But it has been held, that a general power to make by-laws for the regulation of the use of a canal, will not justify the proprietors in closing the navigation of the canal on Sundays,[14] nor in making by-laws subjecting the shares to forfeiture for non-payment of calls, unless that power is expressly given by the charter or by statute.[15]

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

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

12. Regulations as to the accommodation of passengers must yield to the rights of others to be carried, and the accommodation of passengers during the transit is subject to such general rules

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

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

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

[15] Matter of Long Island Railw. 19 Wend. 37; s. c. 2 Am. Railw. C. 453.

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

[17] Woodfin *v.* Ins. Co., 6 Jones' Law, 558.

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

SECTION II.

By-Laws regulating the use of stations and grounds.

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

§ 27. 1. Questions have sometimes been made, in regard to the right of railway companies to exclude persons from their grounds, who had no business to transact there, connected with the com-

[18] Day *v.* Owen, 5 Mich. 520. We are aware it is the practice in America, in almost all modes of passenger transportation, to cram the carriages to the point of suffocation almost, if passengers offer. But that is never attempted or allowed, in England, or upon the Continent. Whenever the seats in a carriage, or the accommodations in a boat, are all occupied, no more are allowed to enter the carriage or the boat. This sometimes results in putting a first-class passenger into a second-class carriage, and *vice versa*. But no man in Europe would ever be allowed to take passage in a railway carriage, without having a seat. It would be deemed the height of indiscretion, almost bordering on madness, to attempt to transport passengers by railway, in a standing position. And even in omnibuses no one can enter after the seats are filled. And in Paris a prominent sign, "*Complet*," is exposed, the moment the carriage is full.

And it seems to us that a passenger-carrier who is supplied with sufficient accommodations for all who ordinarily offer, had better be excused from carrying any excess which might occasionally offer, than be compelled to carry them at the expense of the discomfort and suffering of all the other passengers. We think at least if railways took this ground, upon the score of safety merely, they would not fail to be sustained by the courts, unless the excited rush of all, to go by the first chance, is to override all other considerations, either of safety or convenience. And we trust that public opinion here is more reasonable than to make any such demands.

pany, or to establish regulations or by-laws to govern the conduct of such persons as had occasion to come there, and to exclude others. But, upon the whole, there seems little ground to question the right.[1]

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

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

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

5. But the superintendent cannot remove a person from the station and grounds of the company, merely because such person, in the judgment of the superintendent, and without proof of the fact, violated the regulations of the company, or conducted himself

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

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

offensively towards the superintendent.[3] And it was said if such person is removed for an alleged violation of the regulations of

[3] Hall v. Power, 12 Met. 482, s. c. 1 Am. Railw. C. 410. There is an apparent discrepancy in the manner of stating the point of the decision of this case, and that of The Commonwealth v. Power, 7 Met. 596, in regard to defendant being justified, if he acted in good faith, upon probable cause, which does not seem to be warranted, by any recognized distinction, between a civil suit, for damages, and a public prosecution for assault and battery, but the court evidently intend no distinction in the cases. The law is well stated, by *Shaw*, Ch. J., in the former case, 7 Met. 602: "We are therefore of opinion, that upon the evidence detailed in the judge's report, the jury should be instructed in a manner somewhat as follows: That if Power had been placed in charge of the depot by the corporation, as superintendent, he had all the authority of the corporation, both as owners and occupiers of real estate, and also as carriers of passengers, incident to the duty of control and management: That this power and authority of the corporation extended to the reasonable regulation of the conduct of all persons using the railroad, or having occasion to resort to the depots, for any purpose: That this power was properly to be executed by a superintendent, adapting his rules and regulations to the circumstances of the particular depot under his charge; and that it was not necessary that such regulations should be prescribed by by-laws of the corporation: That the opening of depots and platforms for the sale of tickets, for the assembling of persons going to take passage, or landing from the cars, amounts in law to a license to all persons, *primâ facie*, to enter the depot, and that such entry is not a trespass; but that it is a license conditional, subject to reasonable and useful regulations; and, on non-compliance with such regulations, the license is revocable, and may be revoked either as to an individual, or as to a class of individuals, by actual or constructive notice to that effect: That if the platform, as part of the depot, is appropriated to and connected with the entrance of passengers into the cars, and the exit of passengers from the cars, and for the accommodation of their baggage, and if the soliciting of passengers to take lodgings in particular public-houses, by the keepers of them or their servants, is a purpose not directly connected with the carriage of passengers by the railroad, on their entrance into or exit from cars; that if, when urged with earnestness and importunity, it is an annoyance of passengers, and interruption to their proper business of taking or leaving their seats in the cars, and procuring or directing the disposition of their baggage; or if the presence of such persons, for such a purpose, is a hindrance and interruption to the officers and servants of the corporation, in the performance of their respective and proper duties to the corporation, as passenger-carriers; then the prohibition of such persons from entering upon the platform, is a reasonable and proper regulation, and a person who, after actual or constructive notice of such regulation, violates or attempts to violate it, thereby loses his license to enter the depot; that such license as to him may be revoked; and if, upon notice to quit the depot, he refuses so to do, he may be removed therefrom by the superintendent and the persons employed by him; and if they use no more force than is necessary for that purpose, such use of force is not an assault and battery, but is justifiable: that as to the circumstances of the present case, if the superin-

the company, and it finally is shown that he did not in fact violate any of such regulations, he may recover damages of the superintendent of the station by whose order he was removed, notwithstanding such superintendent acted in good faith.[3] And in such case, it is not competent to show that the plaintiff had been guilty of former violations of other regulations of the company.[3]

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

tendent had issued a circular, giving notice to all innkeepers and landlords that he had prohibited them from entering the depot to solicit persons to go to their respective houses as guests, and if this notice came to Hall, and he afterwards, and after special notice to him personally, had attempted to violate this prohibition, and solicit passengers; and if, upon the particular occasion, he gave no notice of coming for any other purpose; and if the defendant Power met him on his way to the platform, told him he must not go there, laid his hands on him, and ordered him to leave the depot, without any inquiry as to the purposes of Hall, and Hall made no reply, but pressed forward and attempted to reach the platform, in spite of the efforts of Power; this was strong *primâ facie* evidence that he was going there with intent to solicit passengers, in violation of the notice and revocation of license; and that if he gave no notice of his intention to enter the car as a passenger, and of his right to do so; and if Power believed that his intention was to violate a subsisting reasonable regulation; then he and his assistants were justified in forcibly removing him from the depot: That if Hall gave no notice of his having a ticket, of his intention and purpose to enter the cars as a passenger, and of his right to do so, and that Power had no notice of it, then Hall could not justify his conduct, and make Power a wrong-doer, by proving the possession of such a ticket, or of his intent to go in the cars to Richmond, as a passenger; and that he was to be considered as standing on the same footing as if he had not possessed such ticket."

[4] Caterham Railw. Co. v. London & Br. Railw. Co., 40 Eng. L. & Eq. 259. s. c. 1 C. B. (N. S.) 410.

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

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

9. The Supreme Court of Vermont[7] decided that *prima facie* railway stations were open to all persons, but the company may revoke such implied license to all, and exclude all except such as have legitimate business there growing out of the operation of the road or with the officers or employees of the company. They may direct all others to leave the station, and, on refusal, may remove them. It is the duty of such persons as desire to remain in such stations, for the purpose of taking the cars or for any other lawful purpose, to make known the same to the officers and employees of the company on request. And if such is the regulation of the company, one purposing to become a passenger may be required to purchase his ticket in order to remain in the station. This right of entering the station to take the cars can only be in conformity with the regulations of the company, and within a reasonable time only before the departure of the trains, which will depend upon the particular circumstances of each case.

It is not requisite the person should enter the station with the purpose of taking passage: it is enough that he entertains the purpose at the time he refuses to leave, and conducts himself in other respects in conformity with the regulations of the company.

[5] Barret *v.* Great Northern Railw., 1 C. B. (N. S.) 423.

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

[7] Harris *v.* Stevens, 31 Vt. 79.

SECTION III.

By Laws as to Passengers.

1. *By-laws as statutes.*
2. *As mere rules, or regulations.*
3. *Requiring larger fares for shorter distances.*
4. *Requiring passengers to go through in same train.*
5. *Arrest of passenger by company's servants.*
7. *Company liable for act of servant.*
8. *By-law must be published.*
9. *Excluding merchandise from passenger-trains.*
10. *Discrimination between fares paid in cars and at stations.*
11. *Liability for excess of force.*
12. *Officer* de facto *may enforce rules of company.*
13. *Company cannot enforce rule against passenger, when in fault themselves. The consent of the company to tariff of fares how presumed.*
14. *Discrimination on the ground of color.*

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

2. But in the English cases they are both called by-laws.[2] * Thus, a by-law, that each passenger, on booking his place, should be furnished with a ticket, to be delivered up before leaving the company's premises, and that each passenger, not producing or delivering up his ticket, should be required to pay fare from the place whence the train originally started, was held not to be a by-law imposing a penalty.[2] And that therefore the non-production of the ticket, with which a passenger had been furnished, and his refusal to pay fare from the place whence the train started,

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

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

did not justify his arrest, but only rendered him liable to pay fare from the place whence the train started.

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

* 4. It has been held that a regulation requiring passengers to go through, in the same train, and that if one do not, requiring fare for the remainder of the route is valid.[5]

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

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

[5] Cheney *v.* Boston & Maine Railw., 11 Met. 121; s. c. 1 Am. Railw. C. 601. In this case the passenger, when he bought his ticket, did not know of the regulation, but was informed of it in the cars, and his money offered to be refunded, deducting what he had travelled; but he refused to make the arrangement, and demanded his ticket, in exchange for the check which had been given him,

*And where the ticket was marked "good only two days after date," it was held to be evidence of a contract to that effect * be-

marked "good for this trip only." He stopped by the way, and went on the same day in the next train; and when he presented his check, it was refused, and fare demanded, which he was obliged to pay. The court held the passenger could not recover the money of the company, and that it made no difference whether the plaintiff was aware of the regulation or not, at the time he purchased his ticket. He was bound to inform himself, or accept of the ticket, for what it entitled him to demand, by the rules of the company.

This subject is a good deal discussed in a late case in New Jersey, and a similar result arrived at. It is there said that the company may discriminate between way and through fare, unless prohibited by law. State *v.* Overton, 4 Zab. 434. In Pier *v.* Finel, 24 Barb. 514, where a person was put off the cars of a railway company for refusal to pay fare, having, and offering to the conductor, a ticket of the company, dated a few days before, and marked "good for this trip only," but unmutilated, it being the practice of the conductors upon that road, where a ticket had been used, to give it a mark; it was held that the ticket was *primâ facie* evidence that the holder had paid the regular fare for it, and of his right to be transported, at some time, between the places specified, on some passenger train; and if unmutilated, the presumption was, that it had never been used, and that it imposed upon the company the duty to so transport the holder.

It was also held that the indorsement, "good for this trip only," had reference to no particular trip, or any particular time, but only to some one continuous trip. That the passenger might demand a passage, as well on a subsequent day as the one upon which the ticket bore date, and was issued.

This decision seems to us not precisely to meet the whole question involved in the case; that is, whether such a regulation, as was claimed to be evidenced by the ticket and the indorsement, was a valid and binding regulation. There can be no doubt such a regulation exists, upon many of the roads, in this country, and that such a ticket is understood, by the community generally, as entitling the holder only to a passage on that day, at most, if not in the very next train.

We very readily perceive that the form of the ticket is susceptible of the construction put upon it by the court. But as we are satisfied that is not the understanding of those who issue such tickets, or of those who buy them, as a general thing, we should have been gratified to see the main question grappled with.

We do not intend to intimate any question of the general soundness of the views expressed in this case, upon what we regard as the true construction of the ticket. We are inclined to think they are sound. For it seems to us to be contrary to the first principles of justice and equity, if the passenger is, for sufficient cause, delayed, or hindered from going, according to his expectation, at the time he pays his fare, he should thereby lose all benefit of the payment when he does desire to go. The company may not be bound to refund the money, but they certainly are bound, upon general principles, to allow the holder of the ticket the benefit of his unused portion of it, deduct-

tween the railway and the purchaser, and to be of no force after the expiration of the term.[6] And where the regulations of the

ing, of course, any loss, or inconvenience to them, by reason of the contract not being carried into effect, according to its terms, And any regulation of the company, which should deprive the passenger of this benefit, would operate a forfeiture, which no court of justice will favor, where the passenger is not in fault. It seems, in principle, to be controlled by the rule of law applied to work done upon the company's road, but not according to the contract, and which, nevertheless, the company are benefited by, to a certain extent. In such cases the company must pay for the work, at its value to them, that is, deducting all losses, in consequence of its not being done as stipulated. *Post*, § 113, pl. 4.

So, also, if the passenger refuse to surrender his ticket in exchange for the conductor's check, according to the regulations of the company, and at any point of the route leave the cars, without surrendering his ticket, he is liable to pay fare for the distance he rode, or upon his refusal to surrender his ticket, or to pay fare, the conductor is justified in expelling him from the cars. Northern Railway *v.* Page, 22 Barb. 130. But passengers are not obliged to surrender their tickets without having a check in exchange by which they may be able to show that they have paid fare. State *v.* Thompson, 20 N. H. 250. In Hibbard *v.* New York & Erie Railway, 1 Smith, 455, New York Court of Appeals, it was held, that a regulation, made by a railway company, requiring passengers to exhibit their tickets whenever requested by the conductor, and directing those who refused to do so to be expelled from the cars, was reasonable and valid, and that passengers were bound to conform to it, and forfeited all right to be carried further by refusal to do so. And it was further held, that the binding force of such a regulation was matter of law to be decided by the court, and that under such a regulation, where a passenger refused, on request, to exhibit his ticket, a second time, the train having in the mean time passed a station, it was error in the court to charge the jury, that the passenger was bound to exhibit his ticket, when reasonably requested, and that if the conductor knew he had paid his fare he had no right to expel him from the cars.

It is intimated in this case, that one who has thus forfeited his right, cannot regain it by exhibiting his ticket after the train is stopped for the purpose of putting him off. And also, that the *company* would not be liable if the conductor put a wrong construction upon the regulation, and thus wrongfully expelled a passenger, or if he were guilty of an excess of force.

And where a person purchases a railway ticket and starts upon the road, and afterwards gives up his ticket to the conductor, he cannot, at an intermediate station, by virtue of the subsisting contract, leave his seat in that train, and subsequently claim a seat in another train. Cleveland, &c. Railw. *v.* Bartram, 11 Ohio, N. S. 457.

[6] Boston & Lowell Railway Co. *v.* Proctor, 1 Allen, 267; Shedd *v.* Troy & Boston Railw., 40 Vt. 88. And the same doctrine is maintained in Johnson *v.* Concord Railw., 46 N. H. 213. And it was here held that ignorance of the by-laws or regulations of the company will make no difference. Passengers must inquire if they desire to learn the regulations of the company. And the con-

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

5. In one case,[8] where the plaintiff, upon the information of the station-clerk that he might return at a given hour upon an excursion ticket, purchased such ticket and took the train named by such clerk to return, but the train did not pass through; and at the place where it stopped the station-clerk demanded 2*s*. 6*d*. more, saying he should not have taken that train, payment being refused, the superintendent took the plaintiff into custody: The plaintiff's attorney having written the secretary of the company, asking compensation, he requested to be furnished with the date of the transaction, and promised to make inquiries. He also stated verbally that it was an awkward business, and the blame would fall upon the station-clerk who gave the plaintiff the false information, and offered to return the 2*s*. 6*d*. It was held that, as there was no evidence of the authority of the defendants to make the arrest, and none of their having expressly or impliedly authorized or ratified it, it must be regarded as the mere tortious act of the servant, for which he alone was responsible.

* 6. But in a somewhat similar case,[9] in the Exchequer Chamber,

ductors having waived them is no evidence of their repeal unless known to the governing officers of the company.

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

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

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

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

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

8. An English railway company[12] having power by statute to make by-laws which were to be painted upon a board and hung up at the stations, and to be binding upon all parties, made, among others, a by-law that "first-class passengers shall be allowed one hundred and twelve pounds, and second-class passengers fifty-six pounds luggage each, and that the company will not be responsible for the care of the same unless booked and paid for accordingly." It did not appear that the plaintiff knew of the by-law, or that it had been posted up as required. The plaintiff became a passenger, and gave his luggage to the * servants of the company, and it had been stolen. It was held that the company were liable, unless they showed the by-law hung up at the stations, as required by the statute, or else brought it home to the knowledge of the plaintiff.

9. A by-law excluding merchandise from the passenger-trains, and confining its transportation to the freight-trains, was held

[10] *Post*, § 225 and notes. See, also, *post*, §§ 176, 183. And in Coppin *v.* Braithwaite, 8 Jurist, 875, it is said to have been ruled by *Rolfe*, B., at Nisi Prius, that a carrier having received a pickpocket as a passenger on board his vessel, and taken his fare, he cannot put him on shore at any intermediate place, so long as he is guilty of no impropriety.

[11] Philadelphia G. & N. Railw. Co. *v.* Wilt, 4 Wharton, 143; s. c. 2 Am. Railw. C. 254; Orr *v.* Bank of U. States, 1 Ohio, 36; Foote *v.* City of Cincinnati, 9 Ohio, 31. Per *Comstock* and *Brown*, JJ., in Hibbard *v.* N. Y. & Erie Railw. Co., 15 N. Y. 455.

[12] Great Western R. *v.* Goodman, 11 Eng. L. & Eq. 546.

reasonable. The company are not bound to carry a passenger daily upon his paying fare, when his trunk or trunks, contain merchandise, money, and other valuable matter known as "express matter." [13]

10. In a very recent case [14] in Connecticut, it was held by a divided court, that where a railway company established and gave notice of a discrimination of five cents between fares paid in the cars and at the stations, the regulation was valid, and that where a passenger refused to pay the additional five cents in the cars, the conductor might lawfully put him out of the cars, using no unnecessary force. Upon the trial of an action for such expulsion, it was held, that the plaintiff was not entitled to recover upon proof, that he went to the ticket-office of the company a reasonable time before the train left, to procure a ticket; that the office was closed, and so remained till the train departed, and that he so informed the conductor, before his expulsion from the cars.

* The following propositions are maintained in the opinion of the court: —

1. That the defendants, as common carriers, were under no legal obligation to furnish tickets, or to carry passengers for less than the sum demanded, if the fare was paid in the cars.

[13] Merrihew *v.* Milwaukie & Mississippi R. 5 Law Reg. 364.

[14] Crocker *v.* New London, Willimantic & Palmer Railw., 24 Conn. 249. The court were so nearly equally divided in the decision of this case, that it cannot be regarded as much authority, in itself. The leading propositions in the text were maintained, by the Chief Justice and one other judge, and dissented from by two other judges.

The only point of doubt seems to be the duty of the company, in making such discrimination, to give reasonable opportunity to passengers to obtain tickets, at the lowest rate of fare, which seems just and reasonable, and in accordance, we believe, with the generally received opinion upon the subject, and the one we should have been inclined to adopt. In Hilliard *v.* Goold, 34 N. H. 230, it was held, that a uniform discrimination between fares paid in the cars, and at the stations, not exceeding five cents, was reasonable and legal, and a passenger who had not procured a ticket, and refused to pay the additional five cents demanded of him, for fare paid in the cars, was liable to be expelled. Chicago, Burlington, & Quincy Railw. *v.* Parks, 18 Illinois, 460. And it is here held that where the passenger only pays from station to station, the additional five cents may be required at each payment.

The general proposition of the reasonableness of a discrimination between fares paid in the cars, and at the stations, is maintained in State *v.* Goold, 53 Me. 279. And the passenger is bound by such by-law, whether he knew of it or not, ib.

2. That the plaintiff's claim rested solely upon the assumption, that the defendants had undertaken to carry for the less sum, on certain conditions, which they had themselves defeated.

3. That the regulation did not constitute a contract, but a mere proposal, which they might suspend, or withdraw at any time.

4. That such proposal was withdrawn by closing the defendants' office, and the retirement of their agent therefrom.

5. The proposition being withdrawn, the parties were in the same condition as before it was made; the defendants continuing common carriers were bound to carry the plaintiff for the usual fare paid in the cars and not otherwise.

6. That the plaintiff, refusing to pay such fare, was properly removed from the cars.

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

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

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

[15] St. Louis & C. Railw. *v.* Dalby, 19 Ill. 353; Chicago, B. & O. Railw. *v.* Parks, 18 Ill. 460. And in a late case, St. Louis, Alton, & Terrehaute Railroad *v.* South, 43 Ill., not yet published, it was decided that the foregoing cases are not to be construed, as requiring railway companies to keep open their ticket offices, for the sale of tickets to passengers beyond the time fixed by their established time-tables for the departure of a train; but such companies are required to keep open their offices for the sale of such tickets as passengers are required by them to procure, for a reasonable time before the time so fixed for the departure of such train, and not up to the time of its actual departure. They are required to furnish a

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

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

13. In a late English case,[17] where the railway company had established a by-law requiring all passengers to purchase tickets before entering the cars, and to show the tickets when required so to do, and to deliver them up on request, before leaving the company's premises, and the plaintiff took tickets for himself and three boys and three horses, by a certain train, which was afterwards divided by the company's servants into two parts, one being composed of passenger carriages, and the other of horse boxes; and the plaintiff retained all the tickets and travelled by the first-mentioned portion of the train, so that the boys, who were left to go in the other portion of the train, were unable to produce their tickets when requested, and were accordingly excluded by the company's servants from entering the horse boxes; it was held a breach of contract by the company, for which they were responsible. A

convenient and accessible place for the sale of passenger tickets, and afford the public a reasonable opportunity to purchase them, and parties who do not avail themselves of the opportunity must submit to pay the extra fare required by the general regulations of the company, or on refusal, to be expelled from the cars.

It was also held in this case, that the right of railway companies to discriminate between fares paid in the cars, and at the stations, was dependent upon the fact that a reasonable opportunity had been afforded for procuring tickets at the lower rate. These doctrines seem to us reasonable and just, and we should be surprised to have them fail of general acceptance by the courts.

[16] Hilliard *v.* Goold, 34 New H. 230. State *v.* Ross, 2 Dutcher, 224. In this last case the principal evidence of excess was, that the conductor kicked a passenger who, in a state of intoxication, persisted in attempting to get upon the train, and the court held the conviction proper.

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

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

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

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

*CHAPTER VII.

CAPITAL STOCK.

SECTION I.

Limitations.

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

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

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

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

[1] Walford on Railways, 252; Penobscot Railw. *v.* White, 41 Me. 512.

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

ordinarily, by a strict and fatal necessity, and by permission of the legislature, as is generally considered.[3]

SECTION II.

Conditions precedent, which the Public Authorities may enforce.

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

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

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

[3] *Post*, §§ 197, 234, 235.

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

[2] Salem Mill-Dam Co. *v.* Ropes, 6 Pick. 23; Central Turnpike Co. *v.* Valentine, 10 Pick. 142. Where the capital stock consists of a given number of shares of given amount, no valid assessment for the general purposes of the enterprise can be made until the whole number of shares is subscribed; and if any of the subscriptions be made upon conditions precedent, it must be shown that such conditions have been waived or performed. 10 Pick. 142. But assessments to defray the expenses of the incorporation, organization, and preliminary examination, similar to those under the provisional companies in England, have been allowed to be made before the stock of the company is all subscribed. 6 Pick. 23. And in a suit upon subscriptions to stock in a corporation, where by the charter a given amount of stock is required to be subscribed before the corporation can go into operation, it is necessary to allege the latter fact, and the omission will be ground of error, although the question is not raised at the trial. Fry's Ex'r *v.* Lex. & Big S. Railw., 2 Met. (Ky.) 314.

[3] Highland Turnpike Co. *v.* M'Kean, 11 Johns. 98, 1 Caines's Cas. 85. But see *post*, § 51, where it will appear, that although the public, or the other shareholders, may insist upon the payment, in money, of the sums required by the charter to be paid at the time of subscription, this is a condition which cannot be taken advantage of by the subscriber, as between himself and the company, in an action for calls. And it has been held, that the stock subscriptions to

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

SECTION III.

Shares Personal Estate.

1. *Railway shares personal estate at common law.*
2. *Not an interest growing out of land, or goods, wares, and merchandise.*
3. *Early cases treated such shares as real estate.*

§ 31. 1. The shares of railway companies are now almost universally regarded as personal estate. The English statute so declares them. Hence the transfer of such shares is not required to be in writing, nor are they regarded as coming within the acts of

a railway, with banking privileges, cannot be paid in bills of the company, but must all be paid in specie. King *v.* Elliott, 5 Sm. & M. 428. The charter in this case required $20 paid in specie at the time of subscription. Subscriptions in the name of infants, unless some one is responsible for payment of calls, are not a compliance with the charter. Roman *v.* Fry, 5 J. J. Marshall, 634. But if the corporation acquiesce in such subscriptions, they cannot afterwards object. Creed *v.* Lancaster Bank, 1 Ohio N. S. 1. See Beach *v.* Smith, 28 Barb. 254. See, also, East Pascagoula Hotel Co. *v.* West, 13 La. Ann. 545; Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491; Fiser *v.* Miss. & Tenn. Railw. 32 Miss. 359; Hayne *v.* Beauchamp, 5 Sm. & Mar. 515, 537; Lewis *v.* Robertson, 13 id. 558; Barrington *v.* Miss. Central Railw., 32 Miss. 763; Miss. & Tenn. Railw. *v.* Harris, 36 Miss. 17.

But it has been held that a condition in the charter, that one dollar per share shall be paid at the time of subscription, and the company organized when one thousand shares are subscribed, does not apply to subscriptions made after the organization of the company, nor will the failure of the company to build its road within the time limited in the charter enable the subscribers to defend against calls. Taggart *v.* West Maryland Railw., 24 Md. 563.

[4] Norwich and Lowestoft Navigation Co. *v.* Theobald, 1 M. & M. 151. It is not competent for all the shareholders to reduce the amount of the capital stock, by mutual consent, below that fixed in the charter. If that is attempted, it will be enjoined upon a bill brought by the company against the shareholders and projectors. Society of Practical Knowledge *v.* Abbott, 2 Beavan, 559.

mortmain.[1] This has been repeatedly decided in regard * to shares of canal and dock companies, and bonds secured by an assignment of the rates.[2] Such shares may be sold by parol where the contract is executory.[3] And it would seem that the same view would prevail in the English courts, even where there is no statutory declaration that the shares shall be deemed personal estate.[3]

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

3. Some of the early English cases treated the shares of incorporated companies as real estate, where the interest grew out of the use or improvement of real estate,[6] and a similar view is taken in some of the American states.[7] But the settled rule upon the subject now, both in England and in this country, is that before stated.[8] This has often been decided in recent analogous * cases.

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

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

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

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

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

[6] Drybutter *v.* Bartholomew, 2 Peere Wms. 127; Townsend *v.* Ash, 3 Atk. 336; Buckerridge *v.* Ingram, 2 Vesey, jr. 652.

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

[8] Walford, 254; *ante*, § 31, and cases cited in notes 1, 2, 3, and 4; Tippets

The fee of land being in the corporation, vests no interest of the nature of real estate in the separate shareholders.[9]

v. Walker, 4 Mass. 595, 596, opinion of *Parsons*, Ch. J. Speaking of a turnpike company, he says: "When the road is made, the corporation is entitled to demand and receive a toll of travellers for the use of it, in trust for the members of the corporation, in proportion to their respective shares. The property of every member is the right to receive a proportional part of the tolls, which is considered as personal estate."

In Howe *v.* Starkweather, 17 Mass. 240, 243, *Parker*, Ch. J. says: "Shares in a turnpike or other incorporated company, are not chattels. They have more resemblance to choses in action, being merely evidence of property."

In 1 Greenleaf's Cruise, 39, 40, the subject is very fully and fairly presented, and the following conclusion arrived at, in regard to the state of the law in the United States: "Latterly it has been thought that railway shares were more properly to be regarded as personal estate."

The same view is held in Bank of Waltham *v.* Waltham, 10 Met. 334; Hutchins' Adm'r *v.* The State Bank, 12 Met. 421; Denton *v.* Livingston, 9 Johns. 96, 100; Planters' & Merchants' Bank *v.* Leavens, 4 Alabama 753; Union Bank of Tennessee *v.* The State, 9 Yerger, 490; Brightwell *v.* Mallory, 10 id. 196; Heart *v.* State Bank, 2 Dev. Ch. 111; State *v.* Franklin Bank, 10 Ohio, 91, 97; Slaymaker *v.* Gettysburg Bank, 10 Penn. St. 373; Gilpin *v.* Howell, 5 Penn. St., 41, 57; Johns *v.* Johns, 1 Ohio N. S. 350; Arnold *v.* Ruggles, 1 Rhode Island 165.

A distinction has sometimes been attempted between the shares of a bank or manufacturing corporation, and a turnpike or railway, in regard to their partaking of the realty. But the slightest examination will satisfy us that there is no substantial ground for any such distinction. The one may be more intimately connected, in its existence or operation, with real estate, but both must have some connection, more or less intimate, and in both the shareholders have no title to the land, that residing altogether in the corporation, while the shares are merely a right to the ultimate profits of the company, and are as really and unquestionably choses in action as promissory notes, bills of exchange, or bonds and mortgages, of natural or corporate persons. Wheelock *v.* Moulton, 15 Vt. 519; Isham *v.* Ben. Iron Co. 19 Vt. 230. See also Johns *v.* Johns, *supra*.

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

*CHAPTER VIII.

TRANSFER OF SHARES.

SECTION I.

Restrictions upon Transfer.

1. *Express provisions of charter to be observed.*
2. *If not made exclusive, held directory merely.*
3. *Unusual and inconvenient restrictions void.*
4. *Lien upon stock for the indebtedness of the owner is valid.*
5. *But such lien is not implied.*
6. *Where transfer is wrongfully refused, vendee may recover value of the company.*

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

[1] Strictly speaking, perhaps no shares in any joint enterprise are transferable so as to introduce the assignee into the association, as a member, unless it be joint-stock companies and corporations, formed in pursuance of legislative authority. And in the case of legislative incorporations, the shares are transferable only under the charter, and according to its terms. Duvergier *v.* Fellows, 5 Bing. 248, 267, opinion of *Best*, Ch. J. A mere partnership cannot be so constituted, as to release the assignor of a share from all liability to third persons, and introduce the assignee at once, and completely, into his place. Blundell *v.* Winsor, 8 Simons, 601, opinion of *Shadwell*, V. C.; Jackson *v.* Cocker, 4 Beavan, 59, 63.

In the English courts it has been held, that where the charter of a corporation or the deed of settlement required the assent of the directors to complete the title of the purchaser of shares, it was the duty of the seller to procure this assent, in order to comply with his contract to convey. Wilkinson *v.* Lloyd, 7 Q. B. 27; Bosanquet *v.* Shortridge, 4 Exch. 699.

And all corporations may, in self-defence, require all calls made upon their stock to be paid, before they will substitute the name of the purchaser of shares upon their books, for the original subscriber, as after this substitution they have no longer any claim upon such subscriber, and it would be liable to defeat many public enterprises of moment, and after large expenditures have been incurred, if the subscribers could, at will, relieve themselves from all liability to pay calls, by transferring their shares to irresponsible persons. Hall *v.* Norfolk Estuary

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

Co., 7 Railw. Cas. 503; s. c. 8 Eng. L. & Eq. 351. But the assignee of a share may always insist upon becoming a member upon paying all calls.

Questions of some difficulty often arise between shareholders and the company, in regard to an informal transfer having been confirmed by acquiescence. In Shortridge *v.* Bosanquet, 16 Beav. 84; s. c. 17 Eng. L. & Eq. 331, and in *ex parte* Bagge, 13 Beav. 162; s. c. 4 Eng. L. & Eq. 72, it is held that if the entry of the transfer is made upon the books of the company, and especially where the company have dealt with the shareholder claiming under the transfer, they cannot treat the transaction as void, for any want of form in the transfer, though in a matter specially required by the charter and not immaterial, but which their own irregularities had rendered it impossible to observe. And where the secretary of a joint-stock company fraudulently transferred shares, and the proprietor of the shares treated the transaction as being valid against the transferee, but filed a bill against the company for damages, it was held he was not entitled to relief. Duncan *v.* Luntley, 2 McN. & Gord. 30; s. c. 2 Hall & Twells, 78.

In *ex parte* Straffon's Executors, 4 De G. & S. 256; s. c. 10 Eng. L. & Eq. 275, the lord chancellor, *St. Leonards*, thus characterizes these transactions, which, although informal in some respects, are constantly acquiesced in by both parties, until there comes some crisis in the affairs of the company, perhaps, or the transferee becomes insolvent. "There would be no safety for mankind in dealings of this kind, extensive as they are, with so much money embarked in them, if the courts had ever held, as they never have held, that every minute circumstance must be obeyed, which the directors themselves ought to have obeyed; but if they disregard them, if the shareholders do not call them to account for doing so, if a course of action has been adopted in the particular company, without complaint, although they may have arrived at making a man a shareholder, by what I should call a short cut, instead of going through all the necessary formalities, they may be perfectly good as between parties thus dealing with the directors, and the directors themselves, so as to bind them."

And in Bargate *v.* Shortridge, 5 Ho. Lds. 297; s. c. 31 Eng. L. & Eq. 44, in the House of Lords, upon elaborate argument and great consideration, it seems to have been definitively settled in England, that where the deed of a joint-stock company required the certificate of consent of three directors to the transfer of the shares of the company, and in practice this had never been given, but, for ten years, transfers had continually been made upon the verbal assent of the managing director upon the spot, and about nine-tenths of the original shares had been transferred in this manner, and S. having transferred his shares in the same mode to T., and his name having been entered upon the books of the company, they could not afterwards refuse to regard T. as a member.

And in such case, where the directors afterwards cancelled the name of T. in their share register-book, on the ground that the consent of the directors was wanting, it was held that S. had ceased to be a member of the company, and was entitled to an injunction against a *scire facias* prayed out against him by a creditor of the company, as a shareholder.

It was said by Lord *St. Leonards*, who delivered the leading opinion: "Where

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

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

the directors of a company do acts in a matter in which they have no authority, such acts are altogether null and void. But where the acts are within their power and duty, and are either omitted or improperly done, and thereby third parties are damaged, neither a court of law nor of equity will allow the company to take advantage of their neglect."

This, it seems to us, is a sound distinction, and one which will have an important bearing upon the fraudulent over-issue of stock by the directors of a company whose capital is limited, and all issued and in the hands of *bonâ fide* owners. This is the same case in 4 Exch. 699. See also Taylor *v.* Hughes, 2 Jones & La Touche, 24; Humble *v.* Langston, 7 M. & W. 517; s. c. 2 Railw. C. 533; *Ex parte* Cockburn, 4 De G. & Sm. 177; s. c. 1 Eng. L. & Eq. 139.

But where the charter, or the general law, requires all debts of the owner to be paid the company before transfer of shares, the company are not bound to accept a transfer otherwise made. Reg. *v.* Wing. 33 Eng. L. & Eq. 80.

[2] Sargeant *v.* Franklin Ins. Co., 8 Pick. 90; Quiner *v.* Marblehead Ins. Co., 10 Mass. 476; Noyes *v.* Spalding, 27 Vt. 421; Bates *v.* New York Ins. Co., 3 Johns. Cas. 238; Chouteau Spring Co. *v.* Harris, 20 Missouri, 382. In this last case the charter of the company provided that the stock might be "transferred on the books of the company," and the company were authorized "to regulate the transfer of stock," by by-laws. And a provision in the charter authorized the company, in certain cases, to make *assessments* of *stockholders* beyond their shares of stock.

It was held that no such assessment could be made on a party, after he had ceased to be a member, by a transfer of his stock; that the power "to regulate the transfer" did not include the power to restrain transfers, or to prescribe to whom they might be made, but merely to prescribe the formalities to be observed in making them, and that the company could not prevent a party from selling his stock, even to an insolvent person; that an assignment "upon the books of the company" was sufficient to effect a change of ownership, without taking out a new certificate in the name of the assignee; and that any transfer in writing was valid against the company, if, being notified, they refused to allow it to be made according to their by-laws.

And in Dauchy *v.* Brown, 24 Vt. 197, which was an action against stockholders, upon the proper debt of the corporation, where the charter provided, that the persons and property of the corporators shall be holden to pay its debts,

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

4. But if the former owner was indebted to the corporation, and the charter required all such indebtedness to be liquidated, before transfer of stock, such indebtedness will remain a lien upon the stock, in the hands of the assignee.[4] And where the * charter of

and that any execution, which should issue against the corporation, might be levied upon the person or property of any individual thereof, it was held, that the stockholders were only liable, in default of the corporation, and that judgment should first be recovered against the corporation, and the statute remedy strictly pursued. See, also, in regard to the remedy against stockholders, who are by statute made personally liable, Southmayd *v.* Russ, 3 Conn. 52; Middletown Bank *v.* Magill, 5 Conn. 28; Child *v.* Coffin, 17 Mass. 64; Roman *v.* Fry, 5 J. J. Marshall, 634. And in a late English case, Robinson *v.* Chartered Bank, Law Rep. 1 Eq. 32, where the charter required that no one should become a transferee of shares unless with the approval of the directors, it was held that the directors must use this power reasonably and would be controlled in equity. But where the charter of a corporation required all transfers to be executed by both parties and approved by the directors, and the transferror's name had been entered upon the registry upon his own execution merely, and the company was being wound up, the court refused an application to remove his name from the registry. Walker's case, Law Rep. 2 Eq. 554.

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

[4] Union Bank *v.* Laird, 2 Wheaton, 390; Bank of Utica *v.* Smalley, 2 Cowen, 770; Rogers *v.* Huntingdon Bank, 12 Serg. & R. 77; Downer *v.* Bank of Zanesville, Wright, 477; Farmers' Bank of Maryland *v.* Iglehart, 6 Gill, 50; Hall *v.* U. S. Insurance Co., 5 Gill, 484. See Angell & Ames, § 355 and note. In Marlborough M. Co. *v.* Smith, 2 Conn. 579, it was said the transfer of shares to constitute the assignee a stockholder must be in strict conformity to the charter and by-laws. And in the recent case of Pittsburg & Connellsville Railw. *v.* Clark, 29 Penn. St. 146, Ch. J. *Lewis* goes into an elaborate review of the cases to show, that under the Pennsylvania statutes, which provide, that no transfer of shares shall be made while the holder remains indebted to the company, except by consent of the board of directors, and no transfer shall discharge any liabilities before incurred; that both the stock and the holder remain liable for all calls due before the transfer, and that the original subscriber, who promised to pay fifty dollars on a share, is indebted to the company, before calls made, within the meaning of the statute; and even where the transfer is made with the consent of the directors, will remain liable until all calls are paid, notwithstanding the statute subjects the transferee also to a like liability. The following extract from the opinion of the learned judge places the points

the company requires the payment of all sums due before registering a transfer, this will embrace all calls made and which are payable at the date of the transfer.[5]

decided in a clear light: "Is an original subscriber, who has bound himself in writing to pay fifty dollars per share, but who has only paid five dollars per share on his subscription, 'indebted' to the company within the meaning of the act? Why should this question receive a negative answer? His engagement to pay money is as much a debt as any other engagement for the payment of money. A debt may be contracted for stock in a railroad company as readily as for any thing else. It is true that the debt is payable by instalments when required from time to time by the directors. But it is none the less a debt on that account. It is *debitum in presenti solvendum in futuro*. It is a present debt payable at some future day. It is well settled that the lien given by statute to a corporation, upon the shares of stockholders '*indebted*' to it, extends to *all* debts, whether payable presently or at a future time, except where the statute limits the lien to debts actually due and payable, and that a stockholder indebted to the corporation, although the debt may not be due, cannot transfer his stock without the consent of the corporation. Rogers *v.* Huntingdon, 12 S. & R. 77; Grant *v.* Mechanics' Bank of Philadelphia, 15 S. & R. 140; Sewell *v.* Lancaster

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[5] Orpen *ex parte*, 9 Jur. N. S. 615. This question is elaborately discussed in a recent case in Maryland, with the following results: —

The charter of a bank provided that its shares of stock shall be transferable upon the books of the corporation only according to such rules as shall be established by the president and directors; but all debts actually due and payable to the corporation by a stockholder, requesting a transfer, must be satisfied before such transfer shall be made, unless the president and directors shall direct to the contrary.

Held, 1. That this lien on the stock is not waived by the form of a certificate for stock declaring that the stockholder "is entitled to ——— shares of stock transferable only at said bank personally or by attorney on surrender of this certificate."

2. The assignee of a stockholder takes the equitable assignment subject to the rights of the bank against the stockholder, under its charter, of which he is bound to take notice.

3. This lien attaches to balances due the bank by the stockholder, for overdrafts on checks, but not to notes or bills on which the stockholder may be a party, as maker or indorser, and not due at the time the transfer is demanded.

4. The words "debts actually due and payable," imply more than mere indebtedness; the indebtedness contemplated is only a *debitum solvendum in presenti*, not *in futuro*.

5. Where an assignee demands a transfer, but refuses to pay the debts then due the bank by the stockholder, and afterwards makes a second demand, when other notes of the stockholder had become due and payable, he cannot obtain a transfer without paying all the debts due at the time of the last demand. Reese & Fisher *v.* Bank of Commerce, 14 Md. 271.

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

Bank, 17 S. & R. 285. It is very clear that the defendants, at the time of the alleged transfer of their stock, were 'indebted' to the company to an amount nearly equal to the whole of their subscription. They had, therefore, no right whatever to transfer their stock without the consent of the board of directors. It is true that as between them and the purchaser, if the latter thought proper to contract for a contingent or uncertain interest, the transfer might be good for some purposes. 8 Pick. 90; 9 Pick. 202: 2 Cowen, 770. But it passes no title to the stock, and confers no 'privileges, immunities, or franchises' whatever upon the purchaser. The consent of the board of directors is of itself the originating act in the change of title, and does not merely operate to perfect the conveyance previously begun. Marlborough Man. Co. *v.* Smith, 2 Conn. 579; Northop *v.* Newtown & Bridgeport Turnpike Co., 6 Conn. 544; Oxford Turnpike Co. *v.* Bunnell, 6 Conn. 552. So long as the stock remains unpaid, the corporation has a right to refuse to receive new members in place of the original adventurers. Until the stock is fully paid up, and the stockholders otherwise free from debt to the company, they have no right whatever to introduce strangers into the company in their places. A right which depends upon the consent of others is no right at all. The transfer to Mr. Stanton was, therefore, of itself, a nullity. An attempt was made to give it vitality by parol evidence, from which the consent of the board of directors was to be inferred by the jury. But there is no evidence tending to show that the question was ever presented to the consideration of the board, or that any action was taken by the board in regard to the transfer. In ordinary business transactions between a corporation and strangers, the authority of agents and the existence of contracts may be implied from acquiescence and other circumstances. So where the assent of the board is required by a by-law only, the execution of the by-law may be modified by the *practice* of the corporation. Ins. Co. *v.* Smith, 1 Jones, 126. But when the act of incorporation grants a power, the mode prescribed by the statute for its exercise must be strictly pursued. 5 Barb. S. C. 613, 614; 2 Cranch. 127. The question here is, whether one member of a corporation has been legally substituted for another. The title of the original stockholder was established by written evidence, and could have no legal existence without it. Thames Tunnel *v.* Sheldon, 6 B. & C. 341. The title of the substitute must be shown by evidence of the same character. It is the duty of the directors to keep minutes of their proceedings, and the proper evidence of their assent to a transfer is a recorded resolution adopted when the board was in ses-

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

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

SECTION II.

Contracts to transfer Stock.

1. *Transfer under English statutes. Registered companies.*
2. *Contracts to transfer stock valid, where* bonâ fide.
3. *Vendor must have the stock, when due.*
n. 3. *Vendor must procure the consent of directors, where requisite.*
4. *Force of usages of stock-exchange.*
5. *Company will reform their registry at its peril.*
6, 10. *Company may compel one to accept shares on contract.*
7. *Stock standing in joint names belongs to survivors.*
8. *Mode and effect of correcting registry.*
9. *If the company vary the contract, specific performance will be denied.*
10. *Closing contracts by offer and acceptance.*
11. *Form of transfer. Two may join in one transfer.*

§ 33. 1. Questions often arise in regard to transfers of stock * in incorporated companies, as to the quantity of interest conveyed, the title of the person making the conveyance, and many other incidents. The English statutes in regard to the registration of

sion. Where the transfer is made by a director, it ought further to appear that the resolution of assent was carried without his vote. If the resolution was adopted and entered on the minutes, the loss or destruction of the entry might be supplied by parol proof. But in no other case can parol evidence be received to show that an assignee has been admitted as a member of the corporation in the place of the assignor. There was no legal evidence of the assent of the board of directors to the transfer, and therefore no legal evidence of a valid transfer of the stock. If there had been, we do not see how the defendants can claim to be discharged by it from 'liabilities' previously incurred. Their subscription to the stock of the company created a *liability* to be called upon for payment in such instalments as the directors required. Conceding that it was not an obligation for *present* payment, and supposing, for a moment, that it was not strictly a *debt*, it was certainly a '*liability*,' which is a word of more extensive signification than 'debt.' The act of assembly is express in its direction that a transfer, even with the assent of the board, shall not have the effect of discharging *any liabilities* or penalties heretofore incurred by the owner of the stock. We see no reason for restricting this *proviso* to 'liabilities' which had become *due* and *payable* before the transfer. It is sufficient to bring a 'liability' within the *proviso* that it had been 'incurred' by the owner before the transfer. It is not necessary that it should also have become due and payable." The same principle was reaffirmed in Graff *v.* Pittsburg & Steubenville Railw., 31 Penn. St. 489.

* 117, 118

railway companies are not intended to affect the property in the shares,[1] and a transfer is valid, although made before the registration.[2]

2. It would seem, too, that a contract to transfer stock in railway companies, at a future time, which the party neither has, nor is about to have, but expects to purchase in the market, for the purpose of fulfilling his undertaking, is nevertheless a valid contract, and not illegal, or against the policy of the law,[3] and that the intimation of Lord *Tenterden*,[4] that such contracts were illegal, and not to be encouraged by the law or its ministers, is * not to be regarded, at this time, as sound law, however good sense, or good morality, it may seem to be.

3. It is clearly not a stock-jobbing transaction within the English statute.[5] But to the performance of such a contract it seems

[1] The London & Brighton Railw. Co. *v.* Fairclough, 2 Railw. Cases, 544; s. c. 2 M. & G. 674.

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

[3] Hibblewhite *v.* M'Morine, 5 M. & W. 462. Mr. Walford, in his treatise, 256 and note, intimates, that the law of France regards this class of contracts as illegal, and cites Hannuic *v.* Goldner, 11 M. & W. 849, in confirmation. But the case does not expressly decide the point. That was pleaded, and the court held the plea bad, as amounting to the general issue, and the party had leave to amend. Perhaps it is charitable, both to the pleader and to the country, to suppose such is the law there, as Mr. Walford seems to have done. But where the deed of settlement requires the assent of the directors to a transfer of shares, and the vendor did not obtain it, and in the mean time the price of shares fell in the market, held the vendee might recover back his money. Wilkinson *v.* Lloyd, 7 Q. B. 27. But where the plaintiffs covenanted to subscribe for stock in a railway, and pay ten per cent thereon, and then transfer it to defendant, who agreed thereupon to pay the residue and save the plaintiffs harmless, and the plaintiffs subscribed for the stock and paid the ten per cent; but the by-laws of the company provided for the transfer of the stock on the books of the company only after the payment of thirty per cent of its amount, unless by the consent of the directors, which they refused to give, in this case, and the plaintiffs tendered the defendant an instrument whereby they assigned and transferred the stock and constituted him their attorney to transfer the same on the books of the company, which was refused as not being a compliance with the contract: It was held, in an action to recover damages for the breach of the contract, that the plaintiffs had complied with their covenant, and might recover, not the difference between the value of the stock at the time of refusal, and the sum due upon the subscription, but the whole sum due and interest. See also Orr *v.* Bigelow, 4 Kernan, 556.

[4] In Bryan *v.* Lewis, Ry. & M. 386, and in Lorymer *v.* Smith, 1 B. & C. 1.

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

to be requisite, that the seller should *bonâ fide* procure the stock, by the time appointed for the transfer.[6]

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

[6] Hibblewhite *v.* M'Morine, 2 Railw. C. 51–66; s. c. 6 M. & W. 200. The comments of *Isham*, J., in Noyes *v.* Spaulding, 27 Vt. 420, 429, may be regarded, perhaps, as giving the present state of the English law upon this subject. "Contracts for the sale of stock of this character on time are valid at common law, and can be enforced by action. The statute 7 Geo. 2, ch. 8, made perpetual by 10 Geo. 2, ch. 8, has rendered some contracts of that character illegal. They are rendered void so far as the *public stocks* of that country are concerned, when the seller had no stock at the time of making the contract, and none was ever intended to be transferred by the parties, but their intention was to pay the difference merely that may exist between the market value of the stock at the time of the transfer, and the price agreed to be paid. Such contracts are rendered void by that statute, and are treated as wagering contracts; 'the seller virtually betting that the stock will fall, the buyer that it will rise.' Chitty on Bills, 112, note (w). It has been held, that railroad stock is not within the act. Hewitt *v.* Price, 4 M. & G. 355; s. c. 3 Railw. C. 175; Fisher *v.* Price, 11 Beav. 194. In the case of Mortimer *v.* M'Callan, 6 M. & W. 70, Lord *Abinger* observed, 'that the act was made for the purpose of preventing what is declared to be illegal trafficking in the funds by selling fictitious stock merely by way of differences; but it never was intended to affect *bonâ fide* sales of stock.' Elsworth *v.* Cole, 2 M. & W. 31; 2 Kent, Comm. 468, note (b). In the case of Grizewood *v.* Blane, 20 Eng. L. & Eq. 290, it was held, that a colorable contract for the sale of railroad shares, where no transfer is intended, but merely '*differences*,' amounting to the rise or fall of the market, is gaming within the 8 and 9 Vict. ch. 109, § 18; s. c. 11 Common Bench, 538."

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

5. Where the company assume to erase transfers from their books on the alleged ground that they are merely colorable, and made for the purpose of injuriously affecting the interest of the company or others, they assume the burden of showing such to be the facts; and the transferees will be entitled to a mandamus to compel the company to restore their names to the registry as the proprietors.[8]

6. It is competent for the company to maintain a bill in equity against one upon an agreement to accept shares, although no writing has been signed by the defendant according to the statute requiring the acceptance to be in writing. The contract may be enforced, as an agreement to do what the statute requires, and the decree will settle the question whether the defendant or some other one is the lawful holder of the shares in question.[9]

7. Where stock is allowed to stand in the joint names of two persons, they will be regarded as joint tenants, unless something is shown to the contrary, and the company may treat the survivor as the owner of the whole.[10]

8. A court will not interfere to compel a joint-stock company to correct their registry by removing one name and inserting another while an action at law is pending in regard to the same matter.[11] Where the registry is altered under a misapprehension as to the genuineness of a transfer it will not have the effect to transfer the shares.[12] Specific performance of a contract to * sell shares will be decreed in equity, notwithstanding the constitution of the company provide that no shares shall be transferred except in such mode as the board shall approve, and the board refuse to give its consent to the transfer.[13]

9. If the company in their notice of allotment annex a condition which they have no power to do, it will be regarded as such a varia-

[8] Ward *v.* South Eastern Railw., 2 Ellis & Ellis, 812; s. c. 6 Jur. N. S. 890.

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

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

[11] Harris *ex parte*, 29 Law J. Exch. 364; s. c. 5 H. & N. 809.

[12] Hare *v.* London & N. W. Railw., 1 Johns. Eng. Ch. 722.

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

tion of the contract that a court of equity will not interfere to decree specific performance of the original contract. As when the company in such notice require the allottee to sign the deed of settlement on pain of forfeiture of the shares, when the constitution of the company gave no such power.[14]

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

11. The transfer of shares intended to be recorded on the books of the company should contain nothing but the transfer of the title. And where there are shares in different companies transferred between the same parties at the same time, it will be more convenient to have a separate transfer for each company.[15] But as to the mere conveyance of title between the parties, one conveyance is sufficient. And it is held even that two different owners may join in one conveyance to the same person.[16]

*SECTION III.

Intervening Calls, or Assessments.

1. *Vendor must pay calls, if that is requisite to pass title.*
2. *Generally it is matter of construction, and inference.*
n. 2. *Calls paid by vendor after executing transfer.*

§ 34. 1. It has been said, too, that the contractor to transfer stock must see to it that all calls are met, up to the time of the

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

[15] Lord *Campbell*, Ch. J., in Reg. *v.* General Cemetery Co., 6 E. & B. 415, 419; Copeland *v.* North Eastern R. Co., Id. 277.

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

transfer, as in general the charters of such companies, or their by-laws, prohibit the transfer of stock while calls remain unpaid.[1] But we have seen that this is a provision for the protection of the company, and in which they alone are interested, and which will not ordinarily avoid a sale, between other parties, otherwise valid.

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

[1] Walford, 256, 257. And under the English statute 8 Vict. ch. 16, § 16, providing that no transfer of shares shall be valid until he shall pay any call due upon such shares, or upon any other shares held by him, does not apply to the transfer of shares upon which no calls are due, notwithstanding the transferror may hold shares not fully paid up. Hubbersty *v.* Manch., Sheff. & Lincolnsh. Railw., Law Rep. 2 Q. B. 59.

[2] Shaw *v.* Rowley, 16 M. & W. 810; s. c. 5 Railw. C. 47. In this case it was held no impediment to the seller's readiness to convey the shares, that he had not paid an intervening call, as he might do it at the moment of executing the transfer, and the court say the call was ultimately to be paid by the purchaser.

In Humble *v.* Langston, 7 M. & W. 517; s. c. 2 Railw. C. 533, it is decided, that upon the sale and transfer of the shares, where the purchaser's name is not substituted, on the register of the company, for that of the seller, but the stock still standing in his name, and he is thereby subjected to the payment of future calls, he cannot recover the money of the purchaser, because there is no implied contract to that effect, resulting from the transaction. This is certainly a most remarkable decision, and it is something of a task to be able to read the opinion of the court, by which this result is reached, with tolerable patience. The conclusion is certainly not fortified either by reason or analogy.

And in the Cheltenham & Great W. Union Railw. Co. *v.* Daniel, 2 Q. B. 281; s. c. 2 Railw. C. 728, it is decided, that the purchaser of shares may, by way of estoppel *in pais*, be made liable for calls, before his name is actually substituted for that of the seller upon the register of shares. If so, both parties are liable for the calls, and the seller, while his name remains upon the register, is the mere surety of the purchaser, as to future calls. And what is a more natural or necessary conclusion in the mind of any one having the common sense of justice, than to imply, that while the purchaser suffers the seller's name to remain upon the

*SECTION IV.

Transfer by Deed in Blank.

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

§ 35. 1. Ordinarily the transfer of stock, or a contract to transfer, is not required to be in any particular form. All that is * requisite, is, the same as in any other contract, the meeting of the minds of the parties. But in some cases the shares are, by the express requirements of the charter, made transferable only, by deed executed by both parties to the transfer.

2. And in such case it was considered, that a deed executed by the seller, with a blank for the name of the transferee, was no compliance with the statute.[1] The opinion of the court seems to rest

register, and liable to the payment of calls, through his neglect, he does impliedly promise to indemnify him against all loss on that account? See Burnett *v.* Lynch, 5 B. & C. 589.

But the case of Humble *v.* Langston is reaffirmed in the subsequent case of Sayles *v.* Blane, 6 Railw. C. 79. These cases can only be accounted for, upon the principle of discouraging blank unregistered transfers, which have the effect to evade the stamp duties. Shelford, 108, and Report on Railw. 1839, No. 517, p. 4.

Since writing the above, the late case of Walker *v.* Bartlett, 18 C. B. 845; s. c. 36 Eng. L. & Eq. 368, has come to hand, where a blank transfer seems to be regarded as perfectly valid, and that the transfer in this mode does impose upon the vendee the duty of paying calls upon the shares, while they remain his property. We may be allowed to say, that this result of the English decisions, upon this subject, is not altogether without gratification, as the former decisions had so effectually mystified the subject, that it seemed not improbable that the difficulty of comprehending them might very likely be ultimately found with ourselves, rather than at the door of the eminent jurists, who have so long clung to the now acknowledged inconsistency of Humble *v.* Langston, which pertinacity in error, as a general thing, is far more uncommon in Westminster Hall than with courts of less experience.

Men of the learning and experience of the English judges, generally feel that they can afford to acknowledge their common share of human fallibility, without serious prejudice.

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

upon the early cases, in which it is held that the party cannot effectually execute a deed, leaving such important blanks as the name of the grantee, or obligee, while it is considered that less important ones, like the date, etc., may be supplied, after the execution, by permission of the party executing the same. This seems to have been the undoubted rule of the English law, from the authorities cited, in the last case.

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

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

[2] Stahl *v.* Berger, 10 S. & R. 170; Sigfried *v.* Levan, 6 id. 308; Wiley *v.* Moor, 17 id. 438; Ogle *v.* Graham, 2 Penn. 132; Woolley *v.* Constant, 4 Johns. 54, 60; *Ex parte* Kerwin, 8 Cow. 118; Boardman *v.* Gore *et al.*, 15 Mass. 331.

And the following certainly incline in the same direction. Smith *v.* Crocker, 5 Mass. 538, and the opinion of *Parsons*, Ch. J.; Hunt *v.* Adams, 6 id. 519; Warring *v.* Williams, 8 Pick. 326; Adams *v.* Frye, 3 Met. 103; Bank of Commonwealth *v.* Curry, 2 Dana, 142; Bank *v.* McChord, 4 id. 191; Johnson *v.* Bank of the United States, 2 B. Monroe, 310; Camden Bank *v.* Halls, 2 Green, 583; Duncan *v.* Hodges, 4 M'Cord, 239.

In the London & Brighton Railw. Co. *v.* Fairclough, 2 Man. & Gr. 674; s. c. 2 Railw. C. 544, the deed of transfer where one name was first inserted, as transferee, and subsequently that erased, and another inserted, and the deed re-executed, by the vendor, was held void, because it had not been restamped. *Post*, §§ 239, 241.

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

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

*SECTION V.

Sale of spurious Shares.

1. *Vendor, who acts* bonâ fide, *must refund money.*
3. *No implied warranty in such case, which will entitle the vendee to special damage.*
4. *Rule of the stock-exchange, made after the sale, not binding upon parties.*

n. 1. *Discussion of the extent of implied warranty.*

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

mont & Mass. Railw., 8 Gray, 575. See, also, White *v.* Vt. & Mass. Railw., 21 How. (U. S.) 575.

[1] Hodges, 4th ed. (1865). This writer thus defines the rule. "If a share-broker, directed to buy shares, buys what is ordinarily bought and sold in the stock-market as shares, he has fulfilled his commission, and cannot be made responsible for the fraud or misconduct of parties, who may have issued the shares without authority. There is no warranty or undertaking, on the part of the broker employed to buy shares or scrip, that the article which merely passes through his hands is any thing more than what it purports on its face to be, and what it is generally understood to be in the market. Addison on Cont. 5th ed. 191. But if a broker sell stock-shares or debentures for an undisclosed principal, and sign the sold note, he is responsible for any loss sustained by the purchaser, through the fraud of the undisclosed principal, although the purchaser knew that he was dealing with a broker. Carr *v.* Royal Exchange Insurance Co., 5 B. & S. 666; s. c. *nom.* Royal Exchange Insurance Co. *v.* Moore, 11 Weekly Rep. 592.

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

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

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

4. It was also held, that the resolution of the committee of the stock-exchange, made after the transaction was completed, however it might bind the members of that body, could not affect the defendant.[2]

*SECTION VI.

Readiness to perform.— Custom and Usage.

1. *Vendor must be ready and offer to convey.*
2. *Vendee must be ready to pay price.*
3. *General custom and local usage.*
4. *The party taking the initiative must prepare the writings.*

n. 3. *Oral evidence to explain memoranda of contract.*

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

2. The corresponding obligations upon the vendee are readiness to receive the proper conveyance, at the specified time and

[2] Westropp *v.* Solomon, 8 C. B. 345. We think it probable that the cases, in this country, would be regarded as favoring the view, that upon a sale of this kind there is an implied warranty that the article is what it purports to be, and, consequently, that the seller is liable to pay its value in the market at the time its spuriousness is discovered.

Post, § 235. It would seem that in England it is an indictable offence for persons to conspire to fabricate shares, in addition to the limited number of shares of which a company consists, in order to sell them as good shares, notwithstanding any imperfection in the original formation of the company. Rex. *v.* Mott, 2 C. & P. 521; *post*, § 37, n. 3.

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

place, and to pay the price, and it would seem to prepare a proper conveyance, and tender the same for execution, upon having a good title made out.[2]

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

[2] Lawrence *v.* Knowles, 5 Bing. (N. C.) 399; Stephens *v.* De Medina, 4 Ad. & Ellis (N. S.), 422; Bowlby *v.* Bell, 4 Railw. C. 692.

[3] Stewart *v.* Canty, 2 Railw. C. 616; 8 M. & W. 160. And one who employs a share-broker, at a particular place, to purchase shares, is bound by a usage, affecting the broker, at that particular place. As where the plaintiff, a share-broker in Leeds, bought for defendant ten railway shares to be paid for on delivery. The defendant not being ready to pay the money, the vendor made a resale, at a less price, and called upon the plaintiff for the difference, which he paid without communicating with defendant, all which was done according to the custom of the Leeds stock-exchange. It was held the plaintiff might recover of defendant the difference, in an action for money paid. Pollock *v.* Stables, 5 Railw. C. 352; s. c. 12 Q. B. 765.

And where shares had been purchased by a stock-broker, upon which a call had been made, but not then due, by the rules of the stock-exchange it was the duty of the vendee to pay the call, the vendor having paid it, to enable him to convey, the broker paid the amount to him, and it was held he might recover it of the vendee, as money paid for his use. Bayley *v.* Wilkins, 7 C. B. 886. And it would seem the party is bound by such usage, though not cognizant of it. *Parke* and *Rolfe*, BB., in Bayliffe *v.* Butterworth, 1 Exch. 425; s. c. 5 Railw. C. 283; Sutton *v.* Tatham, 10 A. & E. 27.

And where the broker could not obtain the certificate of shares for some months, on account of the delay in having them registered by the company, and in the mean time a call was made which he paid, the person for whom he purchased, having, from time to time, urged the forwarding of the scrip without delay, it was held that he could not repudiate the contract, and recover the money advanced to the broker to pay the price of the purchase. McEwen *v.* Woods, 11 Q. B. 13; 5 Railw. C. 335.

And where the defendant gave the plaintiff, a broker on the stock-exchange, an order to purchase for him fifty shares in a foreign railway company, at a time when no shares of the company were in the market, or had in fact issued, but *letters* of *allotment* were then, according to the evidence of persons on the stock-exchange, commonly bought and sold as shares, and the plaintiff bought for the defendant a letter of allotment of fifty shares, it was held that a jury might well find that this was a good execution of the order. Mitchell *v.* Newhall, 15 M. & W. 308; s. c. 4 Railw. C. 300.

And where the broker bought scrip certificates, which were sold in the market, as "Kentish Coast Railway Scrip," and were signed by the secretary of the company, but which were afterwards repudiated by the directors, as having been issued by the secretary, without authority, in an action to recover back from the broker the price paid him by the plaintiff for the scrip, and his commissions, on

negotiating similar business, and which may be fairly presumed to have been known to the parties, or which * ought to have been, and

the ground of its not being genuine, it was held that the proper question for the jury was, whether what the plaintiff intended to buy was not that which went in the market as "Kentish Coast Railway Scrip," there being no other form of that scrip in the market at the time. Lamert *v.* Heath, 15 M. & W. 486; s. c. 4 Railw. C. 302; *Ante*, § 36.

The remarks of Lord *Campbell*, Ch. J., in the very late case of Humfrey *v.* Dale, 7 El. & Bl. 266, 20 Law Rep. 227, in regard to the necessity of relaxing the rule of the admissibility of oral evidence to explain the import of commercial terms and memoranda in written contracts between merchants and business men, are certainly worthy of his lordship's eminent reputation for wisdom and learning: —

"The only remaining question is, having stated a purchase for a third person as principal, is there evidence on which they themselves can be made liable? Now neither collateral evidence, nor the evidence of a usage of trade, is receivable to prove any thing which contradicts the terms of a written contract; but subject to this condition both may be received for certain purposes. Here the plaintiff did not seek, by the evidence of usage, to contradict what the tenor of the note primarily imports; namely, that this was a contract which the defendants made as brokers. The evidence, indeed, is based on this. But the plaintiff seeks to show that, according to the usage of the trade, and as those concerned in the trade understand the words used, they imported something more; namely, that if the buying broker did not disclose the name of his principal, it might become a contract with him, if the seller pleased. The principle on which evidence is admissible is, that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which an uniform usage would annex, and according to which they must in reason be understood to contract, unless they expressly exclude them. To fall within the exception, therefore, of repugnancy, the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent. Brown *v.* Byrne, 3 Ell. & Bl. 703. [After alluding to several cases, especially Trueman *v.* Loder, 11 Ad. & Ell. 589, in which case is found a *dictum* adverse to admissibility of this evidence, the learned judge continued:] We may refer to Hodson *v.* Davies, 2 Camp. 530, not as a legal decision opposed to Trueman *v.* Loder, — for Lord *Denman*, in his judgment in the latter case, showed that it could not be supposed to carry with it the weight of Lord *Ellenborough's* decision, — but because both cases, we think, disclose how entirely the minds of lawyers are under a different bias from that which, in spite of them, will always influence the practice of traders which creates the usage of trade. Lawyers desire certainty, and would have a written contract express all its terms, and desire that no parol evidence beyond it should be receivable; but merchants and traders, with a multiplicity of contracts preparing on them, and meeting each other daily, desire to write little, and leave unwritten what they take for granted in every contract. It is the business of courts

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

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

reasonably to shape these rules of evidence so as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties, when they are to determine on the controversies which grow out of them. The rule to enter a nonsuit must be discharged." See Taylor v. Stray, 29 Law Times, 95; s. c. 2 C. B. N. S. 175.

[4] Walford, 262, note, where it is said, "It would seem, that if the vendor fails to make out a title, this dispenses with a tender of conveyance." But if stock is to be delivered on demand, it is necessary to show an actual request to deliver, in order to sustain an action for non-delivery. Green v. Murray, 6 Jur. 728. Where the contract is to deliver stock in a reasonable time, or no time being specified, which the law regards as in a reasonable time, or on or before a day named, it is presumed each party is entitled to the whole time in which to perform. Stewart v. Cauty, 2 Railw. C. 616; s. c. 8 M. & W. 160. It seems that where the deed of settlement required the consent of the directors to the validity of the transfer of shares, it is incumbent upon the vendor to obtain such consent; and where the transfer was duly made, executed, and delivered, and the money for the price paid, but the directors refused to give their assent, it was held the purchaser might recover back the money paid, and that the return of the transfer was collateral to the contract of purchase, and not a condition precedent to the plaintiff's right to recover. Wilkinson v. Lloyd, 7 Q. B. 27.

And where the charter of the company, or the statute, prohibits the transfer of the shares while calls remain due, it has been held that a deed of transfer made, while calls remained unpaid, was altogether null and void, so that the company may refuse to register such a transfer, although the calls have been subsequently paid. It is said it would be necessary to re-execute the deed, after the payment of the calls, before the company could be compelled to register it. Hodges, 121, 122. But it has been said, that if a deed be delivered as an escrow in such case, to take effect when the calls are paid, it may be good. *Patteson*, J., in Hall v. Norfolk Estuary Co., 7 Railw. Cas. 503; s. c. 8 Eng. L. & Eq. 351.

SECTION VII.

Damages. — Specific Performance.

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

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

* 2. And a court of equity will decree a specific performance of a contract to transfer railway shares, but not for the transfer of stock in the funds, as any one may always obtain that in the market, but railway stock is not always obtainable.[2] This sub-

[1] Barned *v.* Hamilton, 2 Railw. C. 624; Humble *v.* Mitchell, 11 Ad. & El. 205; s. c. 2 Railw. C. 70; Shaw *v.* Holland, 15 M. & W. 136. But the purchaser is not entitled to recover any advance in the market price of such shares, after a reasonable time for repurchase. Tempest *v.* Kilner, 2 C. B. 300; s. c. 3 C. B. 249. See also Pott *v.* Flather, 5 Railw. C. 85; Williams *v.* Archer, id. 289; s. c. 5 C. B. 318. But a broker is not entitled to commissions unless he complete the sale, but may be entitled to reimbursement of actual expenses. Durkee *v.* Vermont Central Railway, 29 Vt. 127. In a recent case in the Common Pleas, Loder *v.* Kekule, 3 C. B. N. S. 128; s. c. 30 Law Times, 64, it was decided, in regard to the subject of damages for breach of contract, by delivery of an inferior article, that if the article was one that could be immediately sold in the market, the rule was, the difference between the market value of the article delivered and that contracted for. But where the article cannot be immediately resold, as where the resale is delayed by the defendant, the measure of damages is the difference between the value of the article contracted for, at the time and place of delivery, and the amount made by the resale, within a reasonable time of the delivery of the article. See also Rand *v.* White Mountain Railw. 40 N. H. 79. It is here said that such a contract creates no debt, attachable by process of foreign attachment, but is merely a claim for unliquidated damages. And see Hager *v.* Reed, 11 Ohio N. S. 626, where the general question of the enforcement of contracts to transfer stock is considered, and the effect of judgment for the price without an actual transfer or an order of court therefor.

[2] Duncuft *v.* Albrecht, 12 Simons, 189; Shaw *v.* Fisher, 2 De G. & S. 11; s. c. 5 Railw. C. 461. Leach *v.* Fobes, 11 Gray 506. There has been the most controversy in the English courts of equity as bearing upon the question of decreeing specific performance of contracts to transfer shares in joint-stock companies, upon the point of the sufficiency of the proof. See Parish *v.* Parish, 32 Beav. 207; Bermingham *v.* Sheridan, 33 Beav. 660; s. c. 10 Jur. N. S. 415.

ject has recently been discussed in the English Court of Chancery Appeal,[3] and the same rule declared, which is stated above. But in that case the plaintiff failed to obtain a decree, for the reason that he had already conveyed the stock to the defendant's vendee, in ignorance that the defendant was the real purchaser; and the matter having lain by for a whole year, it now seemed impossible to say that the plaintiff had made, or could make, good title to the stock, which is always an insuperable barrier to a decree for specific performance. The latest case upon the subject in the English Court of Chancery Appeal holds, that an agreement to accept a transfer of railway shares, on which nothing had been paid, was not *nudum pactum*, but a contract which may be specifically enforced in equity. Lord *Chelmsford*, chancellor, in delivering his judgment, quotes with approbation the words of the Vice-Chancellor of England, in Duncuft *v.* Albrecht. "There is not any kind of analogy," said that learned judge, "between a quantity of three per cent, or any other stock of that description, (which is always to be had by any person who chooses to apply for it in the market,) and a certain number of railway shares of a particular description, which railway shares are limited in number, and which are not always to be had in the market." We regard this as the latest authoritative declaration of the English equity courts upon the subject.[4] So it was held, that a court of equity will decree a specific performance against a railway company of a contract to take land and pay a stipulated price.[5]

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

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

[5] Inge *v.* Birmingham W. & S. V. Railway Co., 3 De G. M. & G. 658; s. c. 23 Eng. L. & Eq. 601; *post*, § 213. So also in their favor, Old Colony Railw. *v.* Evans, 6 Gray, 25.

*SECTION VIII.

Specific Performance.

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

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

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

* 3. In the case of Jackson *v.* Cocker a query is started by the

[1] Wynne *v.* Price, 3 De G. & S. 310; s. c. 5 Railw. C. 465; Shaw *v.* Fisher, 2 De G. & S. 11; s. c. 5 De G., M. & G. 596. These cases were decided by V. C. *Knight Bruce*, and are obviously somewhat at variance with the principles assumed in Humble *v.* Langston, 7 M. & W. 517. The learned judge here seems to have felt a just indignation that any defence should have been attempted in such a case. "The defence," said he, "was without apology or excuse." And this same learned judge, in the case of Jacques *v.* Chambers, 2 Coll C. C. 435; 4 Railw. C. 499, held, that where a testator, at the time of his death, was possessed of fifty original shares, and seventy purchased shares in a railway, calls upon which had not all been made, by his will gave thirty whole shares in such railway to trustees, for the benefit of a married woman for life, without power of anticipation, and thirty shares to B., and twenty-five original and five purchased shares having been allotted by the executors to each of the legatees, the testator's estate was liable to pay the calls upon the shares, and a sum to pay the unpaid calls was ordered to be placed to a separate account, and laid out, and the income meanwhile paid to those entitled to the general residue. This case is decided upon the authority of Blount *v.* Hipkins, 7 Simons, 43, 51, which it is here said, "as it regards both sets of shares, cannot be substantially distinguished from Jacques *v.* Chambers." See also Duncuft *v.* Albrecht, 12 Simons, 189. But, as before said, it is well settled, that courts of equity in England will not decree specific performance of a contract to sell public stocks, which may always be had in the market. Nulbrown *v.* Thornton, 10 Vesey, 159.

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

Master of the Rolls, upon the authority of Josephs *v.* Pebrer, 3 B. & C. 639, whether a contract by which the original subscribers of shares in a railway stipulate to be relieved from their undertaking, and to substitute another party in their place, is to be regarded as legal? But the case referred to was decided upon the ground that the concern then in question was illegal in itself, within the English statute,[3] as having transferable shares, and affecting to act as a body corporate, without authority by charter or act of parliament.

4. The Court of Chancery will not decree specific performance against a railway company which promised to allot shares to the plaintiff, especially where it appears such shares have been given to others.[4] A court of equity will never, it seems, decree specific performance against a party, where it is not in his power to perform, although such incapacity be the result of his own fault. But will, in such case, leave the other party to his remedy at law, by way of damages, which is all the redress that remains.[5]

[3] 6 Geo. 1. c. 18.

[4] Columbine *v.* Chichester, 2 Phillips, C. C. 27.

[5] Greenaway *v.* Adams, 12 Vesey, 395, 400; Varick *v.* Edwards, 11 Paige, 289. In the case of Miller *v.* The Illinois Central Railw. & Robert & George Schuyler, 24 Barb. 312, it was held, that where the company, by their treasurer, gave a receipt to the Schuylers for $7,500, to be repaid with interest on demand, or received in payment of ten dollars on a share of stock, to be issued to them or their assigns, when the directors shall authorize the issue of more stock, this only gave the holder of such receipt an option to take the shares or the money, and that he could not claim to be a holder of stock, or to have any right thereto, until he had given notice of his election to take stock. And where the holder of this receipt had assigned it as collateral security to the plaintiff, with an agreement that he should have 300 of the shares, but no notice of any interest of plaintiff had been given the company, and the company made a new issue beyond what was necessary, and after the 7,500 shares had been issued to Robert Schuyler, and the 300 shares set apart by him for plaintiff, but the 300 shares were not transferred to plaintiff till after the second new issue, nor had the plaintiff knowledge of it at the time he accepted the 300 shares: It was held that the plaintiff had no claim against the company to allot him the proportion of the new issue of shares, which the 300 shares were entitled to receive, they having no notice of his equitable ownership of the 300 shares. And that although certain information came to the president, while acting in some other capacity, that some contract had been made, by which the Schuylers were to transfer a portion of the stock to the plaintiff, yet as this was not given or understood as notice to the company, or to him as president, it could not affect the company. And that the surrender of the receipt with certain indorsements, showing plaintiff's interest, after the resolution to issue the stock, fixing the mode of distribution, could not bind them to allot shares to the plaintiff upon the 300 shares.

*SECTION IX.

Trustee entitled to Indemnity against future Calls.

1. *Trustee entitled to indemnity, on general principles.*
2. *English courts hesitated in regard to railway shares.*
3, 4. *Cases reviewed.*
5. *Mortgagees liable, as stockholders, for the debts of the company.*
6. *The ostensible owner must respond to all responsibilities.*
7. *Executors responsible personally.*

§ 40. 1. It seems to be regarded as the general rule of chancery law, that the trustee of property is entitled to indemnity, for expenses *bonâ fide* incurred, in the management and preservation of the trust-fund, or estate, either out of the property, as a personal duty, from the *cestui que trust* in most cases.[1]

2. We apprehend there is no good reason why this principle should not receive a general application to the case of shares in a railway company, held as security for a debt, by way of mortgage or pledge. And it would seem, that no serious question could ever have arisen upon the subject, but for the strange inconsistencies into which the English courts and judges have been led, by attempting, for so long a period, to maintain the doctrine laid down in Humble *v.* Langston,[2] but which is now effectually overruled, in the tribunal of last resort.[3]

3. But we shall refer briefly to the decisions, upon this point, in regard to railway shares and stock, in other similar companies. * It was held, by *Wigram*, Vice-Chancellor,[4] that where there was

[1] Murray *v.* De Rottenham, 6 Johns. Ch. 52, 67; Green *v.* Winter, 1 Johns. Ch. 27; Watts *v.* Watts, 2 M'Cord, Ch. 82; Myers *v.* Myers, 2 M'Cord, Ch. 264; McMillan *v.* Scott, 1 Monroe, 151; Morton *v.* Barrett, 22 Maine, 257; Draper *v.* Gordon, 4 Sandf. Ch. 210; Egbert *v.* Brooks, 3 Harring. 110; Methodist Episcopal Church *v.* Jacques, 1 Johns. Ch. 450; Story on Bailments, §§ 306, 306 *a*, 357, 358.

[2] 7 M. & W. 517.

[3] Walker *v.* Bartlett, 18 C. B. 845.

[4] Phene *v.* Gillan, 5 Hare, 1. In this case, it was held, that where the mortgagor is entitled to claim a retransfer of shares, standing on the register of shares, in the name of the mortgagee, the debt being paid off, he is entitled to take proceedings to compel such retransfer on the books of the company, in the name of the mortgagee, giving the proper indemnity for costs. And either the company or the directors, who have prevented the shares from being transferred, are proper parties to the bill, and, it would seem, necessary parties.

a contract for retransfer, claimed by the mortgagor, or found, in express terms, in the contract of pledge, or mortgage, or inferable from circumstances, this was sufficient ground for implying a contract, by the mortgagor, to indemnify the mortgagee, against liability to the creditors of the company, for debts incurred, while his name remained upon the register of shares, as owner, and a decree was made accordingly.

4. The same learned judge, in the same case, considered, that where the mortgage was made simply as an absolute transfer, subject to redemption, and nothing had passed, binding the mortgagor to take a retransfer to the shares, the mortgagor was not bound to indemnify the mortgagee against debts incurred after the transfer made in the mortgage, and before the mortgage debt was paid off. But it is here maintained, that the mortgagee has not in such case any right, at law, against the mortgagor, as to payments, which he has been compelled to make, while he remained the ostensible owner of the shares, even where a contract for retransfer is shown. But a late English writer upon this subject[5] seems to incline to the opinion that, in such case, an action of trespass on the case might be maintained, against the purchaser of shares, who fails to cause his name to be registered as owner, or to indemnify the seller against liabilities after the sale. And the same principle will apply to the mortgagee, after the debt is paid. But all these refinements must now, we think, be regarded as effectually abrogated, by the virtual abandonment, by the English courts, of the rule laid down in Humble *v.* Langston, and the recognition of the contrary doctrine.

5. It has been held, in this country, that, where B. being indebted, transferred shares to his creditors, as security, with the power of sale, and upon condition that the shares should be * returned or accounted for, whenever the debt should be paid, the debt being paid off, and an informal power of retransfer given the mortgagee, and subsequently a more formal one, the mortgagees were to be regarded as stockholders, until the actual retransfer of the shares, and as such liable to the creditors of the company, under the charter.[6] As the case of Humble *v.* Langston is not in

[5] Hodges, 122.

[6] Adderly *v.* Storm & Bailey, 6 Hill, 624. *Bronson*, J., argues the liability of the mortgagees to the creditors of the company, while their names remained on the books of the company, as absolute shareholders, on the ground that "they

terms overruled, although it is in principle we think, we here insert the substance of the opinion of the court in Walker *v.* Bartlett, as showing the present state of the English law on the subject.[7]

might receive dividends, vote at elections, and enjoy all the rights pertaining to the ownership of the property, and with the privileges they must take the burdens of a stockholder." A query is here started whether a retransfer to the mortgagor of the shares, upon the payment of the debt, might not release the mortgagee. "The assignment, as between the parties to it, would have passed the legal interest in the stock." But are the creditors of the company bound to look beyond the register of shares? Rosevelt *v.* Brown, 1 Kernan, 148; Worrall *v.* Judson, 5 Barb. 210; Stanley *v.* Stanley, 13 Shepley, 191. In Adderly *v.* Storm, *supra* it is intimated, that a fraudulent transfer of stock by a solvent owner to an insolvent party, for the purpose of avoiding liability to the creditors of the company, might not avail the party, even at law.

[7] "The case of Wynne *v.* Price, 3 De G. & S. 310, shows that in equity the plaintiff would be entitled, under the circumstances of the present case, to indemnity; but it was contended for the defendant, that, however the case might be in equity, there was no contract for indemnity to be implied by law; and the case of Humble *v.* Langston, 7 M. & W. 517, was relied upon as a direct authority against the plaintiff upon this point; and the Court of Common Pleas, in the judgment appealed against, considered that it was bound by that decision, though it was intimated that but for that express decision their own judgment might have been different. It must be admitted that, in principle, no substantial difference can be taken between that case and the present, except this, that in Humble *v.* Langston, the plaintiff claimed to be indemnified by the defendant against all future calls, even though made after the defendant had himself transferred the shares to other persons; and the Court of Exchequer, at the end of the judgment, observes, that if there were any analogy in principle between the case of Burnett *v.* Lynch, and that before the court, the defendant's implied promise would only be to indemnify against such calls as should be made while he was beneficially interested, whereas the plaintiff Humble claimed an indemnity against calls made after the defendant had parted with his interest. This, no doubt, is a very important distinction; and though the Court of Exchequer expresses an opinion that there was no contract of indemnity at all, it adverts to the difference between a claim to indemnify during the time the defendant is beneficially interested, and a claim to be indemnified after he has ceased to be interested. The circumstances of the present case are, therefore, distinguishable from those in Humble *v.* Langston, and it consequently is not so direct an authority against the plaintiff's claim in the present case, as at first sight it might appear to be.

"It seems to us, therefore, that the circumstances of this case bring it directly within the principle upon which Burnett *v.* Lynch was decided. In the present case, the defendant entered into no express agreement to pay calls or indemnify, but he accepted the only transfer the plaintiff could give, and which invested him with full power to become the registered owner of the shares when

*6. It seems most unquestionable that a trustee may be made liable for assessments or calls upon the shares standing in his *name, beyond the amount of the trust property.[8] And the transferee of shares, having taken upon himself the position and attitude of owner, cannot be allowed to excuse himself from responsibility by pleading irregularity in transfers, and it makes no difference in this respect whether he hold as trustee or beneficially.

7. Thus where reserved shares were offered to the shareholders and the executors of such as are deceased, in proportion to the original shares, it was held that executors who accept shares must

he pleased. That transfer expressed that the transferee took them subject to the same rules as those under which the plaintiff held them, one of which was, that the registered owner should pay the calls. It could hardly have been the intention of the parties, that if the defendant, for his own benefit, omitted to make a perfect transfer, by registration in the company's books, the plaintiff should still continue to pay the calls; and if that was not the intention, was it not understood between them that the defendant should save the plaintiff harmless from any calls made during the time when he was virtually owner of the shares?

"In Burnett *v.* Lynch, a lease had been granted to Burnett, in which he covenanted to pay the rent and repair the premises; his executors assigned the lease to Lynch, subject to the performance of the covenant, but without any express covenant or contract by him that he would pay the rent or perform the covenant. The executors were called upon by the landlord, and obliged to pay damages for not repairing, according to the covenant, during the time Lynch was assignee; the executors brought an action on the case against Lynch, founded on a breach of duty in not repairing. In giving judgment for the plaintiffs, *Abbott*, Ch. J., says, 'It is true, the defendant entered into no express covenant or contract that he would pay the rent or perform the covenants; but he accepted the assignment subject to the performance of the covenants; and we are to consider whether any action will lie against him. If we should hold that no action will lie against him, the consequence will follow, that a man having taken an estate from another, subject to the payment of rent and performance of covenants, and having thereby induced an undertaking in the other that he would pay the rent and perform the covenants, will be allowed to cast that burden upon the other person. Reason and common sense show that that never could be intended.' He then goes on to say, that though an action on the case would lie, there might also be an action of assumpsit.

"With the distinction of circumstances to which we have already adverted between this case and that of Humble *v.* Langston, we think that the principle upon which the case of Burnett *v.* Lynch was decided, is directly applicable to the present case, and that the plaintiff is entitled to make the rule absolute to set aside the nonsuit, and enter a verdict upon the first count of the declaration, and so much of the pleas as may be applicable to that count."

[8] Hoare *ex parte*, 2 Johns. & Hem. 229; s. c. 8 Jur. N. S. 713.

be placed upon the list of contributories in their own right, and not in their representative capacity.[9]

SECTION X.

Fraudulent Practices to raise the Price of Shares.

1. *Courts of equity will vacate sales so procured.*
2. *Necessary parties.*
3, 4. *Dividends declared when none are earned will vacate sales, and subject directors to indictment.*
5. *Equity will not interfere where vendor acted* bonâ fide, *unless the shares were valueless.*
6. *Managers of company liable in tort to party injured.*
7 *and* n. 10. *Purchasing shares in another company considered.*
8. Bonâ fide *purchaser of shares fraudulently issued acquires same rights as other shareholders.*

§ 41. 1. All fraudulent practices, either of the shareholders, or directors, resorted to for the purpose of raising the price of shares in the market, where sales have been induced in faith of the truth of such representations, will be relieved against in a court of equity.[1] As where the directors of a joint-stock company, in * order

[9] Fearnside & Deans Case, Law Rep., 1 Ch. 231.

[1] Stainbank *v.* Fernley, 9 Simons, 556. And in a very recent case, the plaintiff, a director in a bank, who had been such from its organization, who usually attended the meetings, and was actually present and took part in the proceedings of the board of directors when the last dividend was declared, having purchased from the cashier of the institution twenty shares of the capital stock, brought an action to have such contract rescinded, and to recover back the money paid, on the ground of false representations and concealments by the cashier as to the value of the stock and the condition of the bank at the time of the purchase: Held, that the plaintiff was not estopped from setting up his actual ignorance of the condition of the bank at the time of the sale.

That although the purchaser was a director of the bank, having the means of knowledge, he was not in the particular transaction chargeable with notice of the condition of the bank.

That if he was actually ignorant of its condition, the fraudulent vendor would be equally responsible to him for the deceit as to any stranger to the institution.

That it was not a case in which the plaintiff was legally bound to know the truth or falsity of the vendor's representations.

Held, also, that the evidence in such action plainly showing that at the time of the alleged sale and transfer of the stock, on the 29th August, 1857, the bank was, by the application of all the ordinary tests, sound, solvent, and prosperous,

to sell their shares to advantage, represented in their reports, and by their agents, that the affairs of the company were in a very prosperous state, and declared large dividends, at a time when the affairs of the company were greatly embarrassed.

2. A person who had been induced, by these means, to purchase shares of one of the directors, filed a bill against that director, praying to be paid his purchase-money and offering to retransfer the shares; a demurrer for want of equity, and because all the other partners in the transaction ought to have been made parties, was overruled. But where a bill was filed against the public officer of a joint-stock bank, charging a * similar fraud, through the fraudulent representations of the directors, in their reports, as to the prosperous state of the company's affairs, and that the plaintiff had thereby been induced to purchase five hundred shares in the bank, and praying that the sale might be declared void as between him and the company, and that they might be decreed to repay the purchase-money, it was held, that as the litigation was between one member of the partnership and the other members, the public

and the stock worth all that the defendant had represented it to be, the plaintiff could not be allowed to show the contrary by introducing in evidence what purported to be a certified copy of proceedings had in November, 1857, on the petition of certain stockholders for the re-establishment of the bank. Lefever *v.* Lefever, 30 N. Y. 27.

In the very recent case of Smith *v.* The Reese River Silver M. Co., Law Rep. 2 Eq. 264; s. c. 2 Jur. N. S. 616 (April, 1866), where a person was induced to take shares in a company on the faith of a statement in the prospectus, as to the nature of the property contracted to be purchased, which statement the promoters had no ground for believing to be true, and which turned out to be untrue, Sir *W. Page Wood*, V. C., held, he was entitled to an injunction restraining the company from enforcing calls against him, notwithstanding the articles of association to which the prospectus referred would have informed the purchaser that the statement in the prospectus was not justified. The learned judge said: "He is not bound to call at the office for the mere purpose of ascertaining whether the representations are false or not. He was entitled to rely upon the representations made to him as being true to the knowledge of the directors."

But the party who claims to be injured by such fraudulent practices of directors and other agents of corporations must bring his action for relief at the earliest practicable opportunity after having learned the probable fact of such fraudulent practices. Clarke *v.* Dickson, 1 El. Bl. & El. 148, s. c. 5 Jur. N. S. 1029; Hop & Malt Company *in re*, Law Rep. 1 Eq. 483. One who purchases upon the facts stated in a prospectus must be held to have notice of facts stated in other documents expressly referred to unless there is special grounds for presuming the contrary. Ib.

officer was improperly made a party, as representing the company, and a demurrer was allowed.[2]

But in a late case before the Court of Chancery Appeal, it was decided that the directors of a railway company are in the position of trustees, and if the purchaser has not by his own conduct affected his rights, the company cannot, as against him, retain money acquired from a fraudulent sale of their property to him, through the false representations of their directors. But the court held that the plaintiff was not entitled to a decree against the directors, but was entitled to a decree against the company for his money and interest.[3]

And it seems to be settled, by the decision of the House of Lords, that in England and in Scotland, for any fraudulent act done by the directors, without the range of the powers of the company, whereby third persons suffer damage, they are personally liable to an action: but for all such acts within the power of the body of the shareholders to sanction, although the directors might not have been justified in what they were doing, there could be no right of action.[4]

And a director cannot screen himself from responsibility for any imposition which is brought upon others by means of the * circulation of a prospectus through his instrumentality, upon the ground that the document is capable of a construction by which it may be regarded as true. It is for the jury to say whether that is the natural sense.[5] And it is not necessary that there should have been any direct communication between the plaintiff and defendant in order to subject the defendant to an action for false representation. If the defendant authorized the circulation of the prospectus before the public, containing false representations, by

[2] Seddon *v.* Connell, 10 Simons, 58. It was further held, in this case (10 Simons, 79) that it is not competent for the party in such case to file a bill against the company and some of the directors, praying, that if he is not entitled to relief against the company, he may have it against the directors, and that such a bill is demurrable, on the ground that the prayer for relief should be absolute, for relief against the directors, in order to maintain the bill against them. But it is not necessary to make all the parties to a fraud defendants in a bill for relief.

[3] Conybeare *v.* New Brunswick & Canada Railw. & Land Company, 1 De G. F. & J. 578; s. c. 6 Jur. N. S. 518.

[4] Davidson *v.* Tulloch, 3 McQu. Ho. Lds. 783; s. c. 6 Jur. N. S. 543.

[5] Clarke *v.* Dickson, 6 C. B. N. S. 453; s. c. 5 Jur. N. S. 1029. See also Nicol *ex parte, in re* Royal British Bank, 3 De G. F. & J. 387; s. c. 5 Jur. N. S. 205.

which the plaintiff was misled, it is the same as if the defendant had made such representations to him personally.[5] And the fact that other inducements were also held out to plaintiff by other parties by which he was partially influenced, will not excuse the defendant.[5]

But the representation of an officer of the company as to the effect of deeds, which it forms no part of his duty to expound, will not release the party executing the deed from his liability.[6]

3. The declaring of dividends by the directors, where none have been earned, if done by them for the purpose of fictitiously enhancing the price of shares, for their own benefit, is regarded as such a fraud as will relieve a party who has purchased shares in faith of such facts, at prices greatly beyond their value,[7] and the transfer of the shares will be set aside.

4. In this case,[7] Lords *Campbell* and *Brougham* concurred in saying: "Dividends are supposed to be paid out of profits only, and where directors order a dividend to be paid, when no such profits have been made, without expressly saying so, a gross fraud is practised, and the directors are not only civilly liable to those whom they have deceived and injured, but are guilty of conspiracy, for which they are liable to be prosecuted and punished."

5. Where both parties labored under the same delusion in regard to the value of stock, relief could not be granted, of course, on the ground of fraud in the sale, and a court of equity * will not ordinarily interfere to set aside a sale, on the ground of mutual misapprehension as to the state and condition of the subject-matter, unless in extreme cases, as where that is sold as valuable which is wholly valueless, or does not exist.[8] To constitute a fraud in such cases, it is requisite, ordinarily, that the parties should have been upon unequal footing in regard to their means of access to the knowledge of the true state of the company's funds and property, and that the party gaining the advantage in the bargain should, in some way, participate in giving currency to the false estimate of its condition, beyond the mere fact of repeat-

[6] Athenæum Life Ins. Co. *in re* Sheffield, 5 Jur. N. S. 216; s. c. Johnson, Eng. Ch. 451.

[7] Burnes *v.* Pennell, 2 House of Lords' Cases, 497.

[8] 1 Story's Eq. Jur. § 142; Hitchcock *v.* Giddings, 4 Price, 135, 141; 2 Kent, Comm. 469.

ing the report of the directors, where both parties have equal means of judging of its correctness.

6. It seems to be regarded as settled law, that in case of such false representations to raise the price of stocks, and damage thereby sustained, the suffering party may maintain an action of tort against the party making the false representation, although it were not made directly to such injured party, there being no necessity for any privity between the parties to support an action of tort, for a false representation. But, where the action is *ex contractu* or *quasi ex contractu*, some privity is indispensable to the maintenance of the action.[9]

7. It has recently been decided that a *bona fide* sale and transfer of property of one company to another, in consideration of shares in the one company being transferred to the other, is not such a return of capital as would be in contravention of the English statute, which is in confirmation of the general rule of law, prohibiting the conversion by corporations of capital into income, and thus virtually reducing the stock of the company below the requirements of the charter; and on the other hand giving * the shares of the company a false value in the market by reason of fictitious dividends.[10]

[9] Gerhard *v.* Bates, 2 El. & Bl. 476; s. c. 20 Eng. L. & Eq. 129. In this case the defendant was one of the promoters and managing directors of a joint-stock company, and, in offering the shares for sale, had guaranteed a certain semi-annual dividend to all who should purchase, but without any other communication with the plaintiff personally, but the plaintiff purchased upon the faith of such general guaranty or representation; and it was held that he could not maintain an action upon the guaranty, but that he might recover in tort, as for a fraudulent representation. *Post*, §§ 175, 187.

[10] Cardiff C. & C. Co. *in re* Norton, 11 W. Rep. 1007. See also McDougall *v.* Jersey Imp. H. Co., 2 H. & M. 528; s. c. 10 Jur. N. S. 1043. This point of one company taking shares in another company is discussed, to some extent, in the Court of Chancery Appeal in the recent case of Great Western Railw. Co. *v.* Metropolitan Co., 9 Jur. N. S. 562. There can be no doubt, as a general rule, this will not be allowed, unless by the express sanction of legislative permission. And it was here considered, that such an express sanction will not be construed to extend to additional shares, issued by the same company, and expressly required to be allotted to the existing shareholders. Vice-Chancellor *Wood*, when the case was before him, cited the case of Solomons *v.* Lang, 12 Beav. 377, as establishing the right of the defendant in the suit, to raise the question of the plaintiff's right to take these additional shares, beyond the amount which the special legislative permission authorized. The case of the Attorney-General *v.* The Great

8. But the *bona fide* purchaser of shares fraudulently issued acquires the same right as other shareholders, unless he buys after the company is in the process of liquidation; and even in that case he may come in for his equal proportion of the assets, by proving that he bought of one who was a *bona fide* holder before the company was subjected to the process of being wound up.[11] But a *bona fide* sale of shares in a company, entered into after the presentation of the petition, but before the first advertisement for winding up the company, both vendor and purchaser being ignorant that such a petition was pending, was held sufficient to have passed the title.[12]

SECTION XI.

Liability of Company for not registering Transfers.

1. *The company liable to action.*
2. *May be compelled to record transfers by mandamus.*
3. *But not compellable to record mortgages of shares.*
4. *Grounds of denying mandamus.*
5. *Bill in equity most appropriate remedy.*
6. *Rule of damages.*

§ 42. 1. It seems to be settled in England, that an action will * lie against a joint-stock company, who neglect or refuse, upon proper request, to register shares and deliver new certificates, after the deed of transfer has been sent to the secretary. Damages may be recovered, it seems, by reason of such refusal of the company, whereby the party is deprived of the right to attend and vote at the meetings of the company, and especially where calls are made upon the shares, and in consequence of non-payment the shares are declared forfeited and sold.[1]

Northern Railw. Co., 1 Drew. & Sm. 154; s. c. 6 Jur. N. S. 1006, is also cited by the learned judge as analogous to the case then before him.

[11] Barnard *v.* Bagshaw, 1 H. & M. 69.

[12] Emmerson's case, Law Rep. 2 Eq. 231; s. c. reversed on Appeal, Law Rep. 1 Ch. App. 433.

[1] Hodges on Railways, 123; Catchpole *v.* Ambergate Railw. Co., 1 Ellis & Black. 111; 16 Eng. L. & Eq. 163. See also Wilkinson *v.* Anglo California Gold Co., 18 Q. B. 728; s. c. 12 Eng L. & Eq. 444. In regard to the right to sustain a writ of mandamus in England, to compel such transfer, upon the books of the company, see Rex *v.* Worcester Canal Co., 1 M. & R. 529; Regina *v.* Liverpool, Manchester, & Newcastle-upon-Tyne Railw. Co., 11 Eng. L. & Eq. 408; Sargent *v.* Franklin Insurance Co., 8 Pick. 90. So also an action on the

2. There can be no question probably in this country, that where the company refuse on reasonable request, to make the proper entry upon their books of the transfer of shares, whereby the owner is liable to be deprived of any legal right, or pecuniary advantage, the company may be compelled to do their duty, in the premises, by writ of mandamus.

3. But it has been held, that the company are not bound to register trust-deeds or mortgages, and especially such as contain other property, or the stock of other companies. The mandamus was refused in such a case, in the Queen's Bench, so late as * May, 1856, and upon the ground as stated by Lord *Campbell*, Ch. J., that "if the company were bound to register this deed, they must become the custodians of it, and must incur great responsibility as to its safe custody, and that therefore convenience requires that they should only be bound to register mere transfers, passing the legal title, and showing who is the legal owner of the shares." [2]

4. But a mandamus to compel the registry of the transfer of shares in a railway company to an infant,[3] was denied. And the

case will lie for not transferring stock. The rule of damages, where the stock has been sold, as the property of the vendor, is the value of the shares at the time of the refusal, 8 Pick. 90, or it has sometimes been held, the highest value, between the time of refusal and the commencement of the action. Kartright *v.* Buffalo Commercial Bank, 20 Wend. 91; s. c. 22 Wend. 348. And some cases extend it even to the time of trial. But see *ante*, §§ 36, 38.

Where stock in a railway is purchased and registered in the name of a married woman, out of her earnings, she and her husband may sue jointly for dividends, and if she sue alone, it is only ground of abatement. Dalton *v.* Midland Railw. Co., 13 C. B. 474; s. c. 20 Eng. L. & Eq. 273.

Stock cannot be transferred so as to pass the title after the dissolution of the corporation, the shareholders being then only entitled to a share in the assets. James *v.* Woodruff, 2 Denio, 574.

Where a company have registered a transfer, which is alleged to be a forgery, and are threatened with a suit from both the transferror and transferee, the court will not grant an interpleader. Dalton *v.* Midland Railw. Co., 12 C. B. 458; s. c. 13 C. B. 474; 22 Eng. L. & Eq. 452.

[2] Regina *v.* General Cemetery Co., 6 El. & Bl. 415; s. c. 36 Eng. L. & Eq. 126.

[3] Reg. *v.* Mid. Counties & Sh. Junction Railw. Co., 15 Ir. Com. Law, 514, 525; s. c. 9 Law T. N. S. 151. But the practice of compelling the registry of transfers, by mandamus, seems well established, even where they are not of a character to induce the most favorable consideration, as where it was a transfer to a pauper to enable the transferror to get rid of liability, it being intended to be out and out, with no secret trust for the transferror. Ib. The transfer of shares for special purposes is so frequent, and the motives and occasions are so various, that it could not be expected to give an abstract of all the cases. As a general

court of equity declined to interfere to compel the registry of the transfer of shares when the company are denied the opportunity of inspecting the certificates by their directors.[4]

5. The more effectual, and at present the more usual, remedy against corporations for refusing to allow the transfer of stock upon their books into the name of the real owner is by bill in equity. And in one case, where the party whose stock had been allowed by the bank to be transferred into the names of those who had purchased it under forged powers of attorney sought redress by an action at law, the court said, "We cannot do justice to this plaintiff unless we hold that the stocks are still his," and therefore denied the action for the value of the stocks, but allowed a * recovery for the dividends which had been declared after the transfer.

6. And there is the same difficulty in compensating the purchaser of stocks, where a transfer on the books has been denied in an action at law. In some cases this has been attempted to be done by allowing the party to recover the highest market price of the stock between the refusal to transfer and the trial. But the only rule at all analogous to settled principles seems to be that the corporation shall pay the value of the stock at the date of their refusal to transfer it, as that is the time when the corporation became in default, and when by said default the stock, as between the parties became theirs.[5] The question of the effect of forged and fraudulent transfers is very ably discussed by the court of Chancery Appeal in Tayler *v.* Great Indian Peninsular Railway.[6]

rule, one who understandingly consents to have shares transferred into his name upon the public registry of shares, must be content to assume all the responsibility towards the public and the other shareholders not conusant of the special contract, which any other shareholder would incur. But as between the company and the purchaser there may be special grounds of relief. Coleman *ex parte*, 1 De G. J. & Sm. 495; Grady *ex parte*, id. 488; Barrett *ex parte*, 10 Jur. N. S. 711; Saunders *ex parte*, id. 246; s. c. 4 Giff. 179.

Any transaction of this kind will not be disturbed, after considerable lapse of time. Spackman *ex parte*, 1 De G. J. & Sm. 504; s. c. 10 Jur. N. S. 911; Lane *ex parte*, id. 25; Spackman *ex parte*, reversed, 11 Jur. N. S. 207.

[4] East Wh. M. M. Co. *in re*, 33 Beav. 119.

[5] Pinkerton *v.* M. & L. Railw., 1 Am. Law Reg. N. S. 96; s. c. 42 N. H. 424.

[6] 5 Jur. N. S. 1087; s. c. 4 De G. & J. 559. See *post*, § 193, pl. 12. And see Building Association *v.* Sendemeyer, 50 Penn. St. 67.

SECTION XII.

When Calls become Perfected.

1. *Calls are made when the sum is assessed, notice may be given afterwards.*
2, 3. *Directors the proper authority to make calls.*
4. *The manner of giving notice and of proof.*

§ 43. 1. The English statute of 1845, called the Companies Clauses Consolidation Act, requires all calls to be paid before any valid transfer can be made. Under this statute, and similar provisions in special charters, it has often been made a question, when a call may be said to be made. It seems to be considered that the word call in this connection, may refer to the resolution of the directors, by which a certain sum is required to be paid to the company, by the shareholders,[1] or secondly to the notice to * the shareholders of the assessment, and the time and place at which they will be required to make payment, and the amount to be paid. But it seems finally to be settled, that the company are not obliged to regard any transfer, made after the resolution of the directors, making the assessment, which need not specify the time of payment, but that may be determined, by a subsequent act of the board.[2]

[1] *Ex parte* Tooke, *In re* The Londonderry and Coleraine Railw. Co., 6 Railw. C. 1 (1849); North American Colonial Association of Ireland *v.* Bentley, 19 L. J. (Q. B.) 427; 15 Jur. 187.

A resolution of the board of directors requiring the stockholders to pay an instalment of ten per cent every thirty days, on all cash subscriptions, until the whole is paid, and that due notice thereof be given, is admissible evidence of calls for the whole subscription. It was here considered that the words "month," and "thirty days," used in different portions of the act, must be considered of the same import. Heaston *v.* Cincinnati & C. R. R., 16 Ind. 275; Sands *v.* Sanders, 26 N. Y. 239.

[2] Great North of England Railw. Co. *v.* Biddulph, 2 Railw. C. 401; s. c. 7 M. & W. 243; Newry and Enniskillen Railw. Co. *v.* Edmunds, 5 Railw. C. 275; s. c. 2 Exch. 118, 122. *Parke*, B., in The Ambergate, &c., and Eastern Junction Railw. Co. *v.* Mitchell, 6 Railw. C. 235; s. c. 4 Exch. 540; Regina *v.* Londonderry & Coleraine Railw. Co., 13 Q. B. 998.

Unless there is something in the subscription, or the charter and by-laws of the company requiring notice of calls, or making the subscription payable upon calls, it is said in Lake Ontario A. & N. Y. *v.* Mason, 16 N. Y. 451, that it is not indispensable that notice of calls should be given the sub-

2. It seems the directors, and not the company, are the proper parties to make calls, under the English statutes.

3. This seems to have been decided upon the general ground of the authority of the directors.[3]

*4. The question of what shall amount to a good call, and how the same may be shown in court, is considerably examined in Miles *v.* Bough.[4] It is here decided, that no person could be sued for non-payment of a call till he had received due notice thereof, although the statute did not require notice in express terms; that an order to pay the money at a given broker's was a good call; that in the declaration it was sufficient to allege that the calls were made and the defendant duly notified, without further specification of particulars; and that the jury may infer sufficient notice from the fact of an express promise to pay, notwithstanding it appeared that a defective notice had been sent, unless it appeared that was the only notice given, when the case must be decided upon the sufficiency of the notice in fact given.

scribers before suit. But this seems contrary to the general course of decision upon the point, and somewhat at variance with the idea of a call, or assessment upon subscriptions to stock. And such seems to be the general understanding of the rule in the American courts. But these questions will depend very much upon the special provisions of the statutes, in the different states, by which the matter is controlled, and somewhat upon the special terms of the contract of subscription. Heaston *v.* Cincinnati & C. R. R. 16 Ind. 275. Thus, in the present case it was held the general railway law of Indiana did require notice and a personal demand before proceeding to forfeit the stock, but not before suit to recover instalments; that as to calls the statute required the subscribers to take notice of the action of the directors. It is further said, that where the articles of association or the preliminary articles of subscription, or both combined, contain an undertaking to pay the amount subscribed on certain terms and conditions, an action will lie to enforce the stipulations upon proof of the subscription and the performance of the conditions.

[3] Ambergate, N. & B. & Eastern Junction Railw. Co. *v.* Mitchell, 4 Exch. 540. *Pollock*, Ch. B. "The next objection is, that the directors made these calls; but they were competent to do so, as they may do all things, except such as are to be done by the shareholders at a general meeting; and there is nothing in the act which makes it necessary that the company should make calls at a general meeting."

Parke, B. "The directors may exercise all the powers of the company except those which are to be exercised by the company at their general meeting, and the power of making calls is not such a power as is required to be so exercised."

[4] 3 Q. B. 845. Defective notice by publication is not aided by personal notice of a shorter time. Sands *v.* Sanders, 26 N. Y. 239.

SECTION XIII.

Transfer by Death, Insolvency, or Marriage.

1. *Mandamus lies to compel the registry of successor.*
3. *In case of death, personal representative liable to calls.*
4. *Notice requisite to perfect the title of mortgagee.*
5. *Stock in trust goes to new trustees.*
6. *Assignees of insolvents not liable for the debts of the company.*

§ 44. 1. The title to shares in a railway is liable to transfer by the death, bankruptcy, or insolvency of the proprietor, or by marriage of the female owner of such shares. In such case the English statute requires a declaration of the change of ownership, to be filed with the secretary of the company, and the name of the new owner is thereupon required to be entered upon the * register of shareholders. A mandamus will lie to compel the clerk to make the proper entry in such case.[1]

2. These incidents are so much controlled by local laws, in different jurisdictions, that it would scarcely comport with our object to state more than the general principles affecting them. In most of the United States all property, (especially personal estate as railway shares,) in the first instance, upon the decease of the proprietor, vests in his personal representative, in trust, first for the payment of debts, and afterwards for legatees, or in default of them, the heirs of such proprietor.

3. And so far as regards voting upon such shares, the title of the executor or administrator will ordinarily be sufficient. Before the name of the executor or administrator is entered upon the books of the company, as a shareholder, the estate only could be held liable for calls probably, and perhaps the same rule of liability would obtain after that.[2] But in general where shares in a joint-

[1] Rex *v.* Worcester Canal Company, 1 M. & R. 529.

[2] Fyler *v.* Fyler, 2 Railw. C. 873, s. c. 3 Beav. 550; Jacques *v.* Chambers, 2 Coll. C. C. 435; s. c. 4 Railw. C. 499. But the administrator or other personal representative of a deceased shareholder, may, under the recent English statute, the Common-law Procedure, maintain an action against the company for refusal to register his name, as successor, to the title to the shares, and after having recovered damages, he is entitled to a mandamus to compel the company to register his name. He is also entitled to the prerogative writ of mandamus in such cases at common law. Norris *v.* The Irish Land Co., 8 El. & Bl. 512; s. c. 30 Law Times, 132.

stock company are bequeathed specifically, the legatee takes them subject to all future calls.[3] But where the payment of future calls is indispensable to bring the shares into the state in which the testator regarded them in his will, such calls should be paid by the estate.[4]

4. In case of death or insolvency, the title of a mortgagee first notified to the company, will commonly have priority.[5] Notice to the company is necessary to perfect the title of a mortgagee, in case of bankruptcy or insolvency.[6]

* 5. As to the title of the bankrupt, all shares standing upon the register of the company in his name will be regarded as under his control, order, and disposition, and will, under the English statutes, go to the assignees.[7] But stock in any incorporated company standing in the name of the bankrupt as trustee, is to be transferred by the assignee to the name of new trustees, and a court of chancery will so order.[8]

6. The assignees of an insolvent estate, a portion of whose assets consists of shares in a manufacturing corporation, are not liable under special statutes, making shareholders liable for the debts of the corporation. That is a provision of positive law, and is to be construed strictly.[9]

SECTION XIV.

Legatees of Shares.

1. *Entitled to election, interest, and new shares.*
2. *Shares owned at date of will pass, although converted into consolidated stock.*
3. *Consolidated stock subsequently acquired will not pass.*

§ 45. 1. Legatees of railway shares have the election out of which class of shares their legacy shall be paid, when there is more

[3] Blount *v.* Hipkins, 7 Sim. 43, 51; Jacques *v.* Chambers, 2 Coll. 435; Clive *v.* Clive, Kay, 600; Wright *v.* Warren, 4 De G. & Sm. 367; Adams *v.* Ferick, 26 Beav. 384.

[4] Armstrong *v.* Burnet, 20 Beav. 384.

[5] Cumming *v.* Prescott, 2 Yo. & Coll. Eq. Exch. 488.

[6] But where all parties are partners, notice will sometimes be implied. *Ex parte* Waitman, 2 Mont. & Ayr. 364; Duncan *v.* Chamberlayne, 11 Simons, 123; Etty *v.* Bridges, 2 Yo. & Coll. 486.

[7] Shelford, 118–121.

[8] *Ex parte* Walker, 19 Law J. Bank. 3.

[9] Gray *v.* Coffin, 9 Cush. 192.

than one class of the same description found in the will. And they are entitled to the income of the shares, after the death of the testator, and to receive any advantage, by way of new shares resulting from the ownership of the shares.[1]

But a specific legatee of shares is not entitled to a bonus on such shares, declared after the decease of the testator, but arising out of moneys due the company from the testator, and which * claim was compromised by his executors, but such bonus belongs to the general fund of personal estate.[2] And such legatee must bear the calls which are made after the testator's death, unless there is something in the will to show a different intent.[3]

2. A bequest of the testator's railway shares, of which he should be possessed at his decease, was held to pass such railway shares specifically named in the will as the testator had at the date of his will, although subsequently converted into consolidated stock of the same company, by a resolution of the company.

3. But that other consolidated stock of the same company owned by testator at his decease, did not pass under the will, the same having been purchased after the execution of his will.[4]

SECTION XV.

Shares in Trust.

1, 2. *Company may safely deal with registered owner.*
3. *But equity will protect the rights of* cestuis que trust.
4, *and note* 2. *Discussion of the rights of* cestuis que trust *in stock certificates.*

§ 46. 1. By the English statute, railway companies are not bound to see to the execution of trusts in the disbursement of their dividends, but are at liberty to treat the person in whose

[1] Jacques *v.* Chambers, 2 Coll. C. C. 435; s. c. 4 Railw. C. 205; Tanner *v.* Tanner, 5 Railw. C. 184; s. c. 11 Beav. 69. And it is held in this last case, that upon a bequest of railway shares and all right, title, and interest therein, money paid beyond the calls will pass to the legatee.

[2] Maclaren *v.* Stainton, 27 Beav. 460; s. c. 6 Jur. N. S. 360; Loch *v.* Venables, 27 Beav. 598; s. c. 6 Jur. N. S. 238.

[3] Day *v.* Day, 1 Drew. & Sm. 261; s. c. 6 Jur. N. S. 365.

[4] Oakes *v.* Oakes, 9 Hare, 666.

name the shares are registered as the absolute owner. It would seem that in case of the bankruptcy of a shareholder in a joint-stock company, a court of equity will sometimes protect trust funds, although registered in the name of the bankrupt, both from the claim of the assignee and the company, who have made advances to the nominal owner, upon the faith of his being the true * owner, but without any pledge of the stock.[1]

2. In general, in this country, it is believed railway companies will be protected in dealing *bona fide* with the person in whose name shares are registered on the books of the company, as the absolute owner, notwithstanding any knowledge they may have of the equitable interest of third parties.

3. But there can be no question, a court of equity will always protect the interest of a *cestui que trust*, when it can be done without the violation of prior or superior equities, which have *bona fide* attached.

4. It was recently held after careful examination of the authorities,[2] that the holder of stock, as trustee, has *prima facie* no right to pledge it as security for his private debt, and one who accepts the pledge under such circumstances, acquires no rights against the *cestui que trust*. And the word "trustee" in the certificate, in connection with the name of the holder, is notice to all persons to whom the certificate may be delivered, sufficient to put the party on inquiry, as to the nature of the holder's title, and the character and extent of the trust.

[1] Pinkett *v.* Wright, 2 Hare, 120. This is a very elaborate opinion of the learned Vice-Chancellor *Wigram*, upon the subject of protecting the interest of *cestuis que trust* in the stock of a banking company, standing in the name of a trustee who had become bankrupt. The trustee was also the proprietor of shares in his own right, all standing in his name, without any thing on the books of the company to distinguish which were trust funds.

It was held that the trustee must be presumed to have pledged such stock as belonged to himself and not that of his *cestuis que trust*, and that shares which stood in the name of the trustee at the time of the bankruptcy, and thenceforward remained in his name, might fairly be presumed to be identical with those in which the trust funds were invested, the number of shares being the same.

Notice to the company is indispensable to create an equitable mortgage of railway shares. *Ex parte* Boulton *v.* Skelchley, 29 Law Times, 71; s. c. 1 De G. & J. 173.

[2] Shaw *v.* Spencer, 8 Law Reg. N. S. 299; s. c. 99 Mass., not yet reported. The decision here falls short, probably, of what the authorities will justify, if the case had required it. But the usages of the Stock Exchange, whereby trustees are enabled to defraud their *cestuis que trust*, for the benefit of speculators,

SECTION XVI.

The extent of Transfer requisite to exempt from claim of Creditors.

1. *How transfer of stock perfected as to creditors.*
2. *Reasonable time allowed to record transfer.*
3, 4. *In some of the states no record required.*
n. 3. *Question further considered.*

§ 46. *a.* 1. The question of what constitutes a valid transfer of shares in a joint-stock corporation, so as to exempt them from attachment and levy by creditors of the transferror, is considerably discussed in a recent case in New Hampshire by a judge of large experience, and the result reached, that upon a pledge of stock in a railway corporation in New Hampshire, there should be such delivery as the nature of the thing is capable of, and to be good against a subsequent attaching creditor the pledgee must be clothed with all the usual muniments and *indicia* of ownership; that by the laws of New Hampshire, a record of the ownership of * shares must be kept, by domestic corporations, within the state, and by officers resident there; and that on the transfer of stock the delivery will not be complete, as to creditors, until an entry is made upon such stock-record, or it be sent to the office for that purpose, and the omission thus to perfect the delivery will be *prima facie*, and if un-

receives a moderate but very just rebuke. 1. By declaring that certificates of stock in blank are not to be regarded as negotiable instruments, cutting off all equities of *bona fide* parties in interest. S. P. Sewall *v.* Boston Water Power, 4 Allen, 482. 2. By declaring that no usage or custom of brokers, or course of business, can avail to defeat, or qualify, the established rules of law, recognized in courts of equity. The following significant intimation of the court is worthy of repetition: "The circumstance that stock certificates, issued in the name of one as trustee, and by him transferred in blank, are constantly bought and sold in the market without inquiry, is likewise unavailing. *A usage to disregard one's legal duty, to be ignorant of a rule of law, and to act as if it did not exist, can have no standing in the courts.*" We should be rejoiced to persuade ourselves, that we had reached a point where the dishonest practices of trade could no longer receive countenance by the courts, either directly or indirectly. We regard this case as falling far short of the truth, but as it is all which the case required, it is gratifying to believe the courts are moving in the right direction, and may ultimately be able to convince men who shut their eyes to exclude the light, that they need not feel surprise, to find their blind booty turning to ashes in their grasp; and the interests of the widow and the fatherless finally regarded as of more value, in the public esteem, than the accumulation of gain, by indirection and evasion, intended to defraud them of their last penny.

explained conclusive evidence of a secret trust, and therefore, as matter of law, fraudulent and void as to creditors.[1]

2. But in the case last cited it is said that when[2] the transfer is made at a distance from the office and the old certificate surrendered and a new one given by a transfer agent residing in a neighboring state, proof that the proper evidence of such transfer was sent by the earliest mail to the keeper of the stock record to be duly entered, although not received until an attachment had intervened, would be a sufficient explanation of the want of delivery and the transfer would be good against the creditor. Any unreasonable delay in perfecting the record title to such shares leaves them liable to the claims of creditors.

3. But where the charter of the company or the general laws of the state contain any specific restriction or requirement in regard to the transfer of shares, it must be complied with or the title will not pass.[2]

4. In a recent case in New Jersey,[3] it seems to be considered that nothing more is required to make an effectual transfer of stock in a bank, even as against creditors, than an assignment of * the certificates and a delivery to the assignee, and that this will be regarded as effectual against an attaching creditor without notice, even where the charter of the company declares the stock personal estate, and provides that "it shall be transferable upon the books of the corporation," and also, "that books of transfer of stock shall be kept, and shall be evidence of the ownership of said stock in all elections and other matters submitted to the decision of the stockholders."

[1] Pinkerton *v.* Manchester & Lawrence Railw., 1 Am. Law Reg. N. S. 96; s. c. 42 N. H. 424.

[2] Fisher *v.* Essex Bank, 5 Gray, 373; Sabin *v.* Bank of Woodstock, 21 Vt. 362; Pittsburgh & Connellsville R. Co. *v.* Clarke, 29 Penn. St. 146.

[3] Broadway Bank *v.* McElrath, 2 Beasley, 24. We think it proper to say, that there is considerable difference in the decisions of the different states as to the point of time from which the transfer of equitable titles is to be reckoned, as between purchasers for value and creditors. It is generally considered that the transfer takes effect from the date of notice to the trustee, who holds the legal title, subject to all equities, and these do not attach ordinarily until after notice brought home to the trustee. Some of the states regard the equitable rights of the purchaser as dating from the period of the actual purchase, provided notice to the trustee be given within reasonable time after. We have discussed the question and the cases, to some extent, in Rice *v.* Courtis, 32 Vt. 460; 1 Story Eq. Ju. 400 *b*, Redf. Ed.

*CHAPTER IX.

ASSESSMENTS OR CALLS.

SECTION I.

Party liable for Calls.

1. *The party upon the register liable for calls.*
2. *Bankrupts remain liable for calls.*
3. Cestuis que trust *not liable for calls in law or equity.*
4. *Trustee compelled to pay for shares.*
5. *One on registry may show his name improperly placed there.*

§ 47. 1. It seems to be settled law that the registered owner of railway shares is liable for all calls thereon, so long as his name remains upon the register.[1] The effect of the transfer of railway scrip is only to convey an equitable interest in the shares, with the right to have the shares formally assigned to him, and his name entered upon the register as a shareholder.[1]

2. In case of bankruptcy, the bankrupt remains liable for all calls, unless the names of the assignees are registered on the books of the company, as this is not regarded as a debt * payable in future, and which may be proved under the commission.[2]

[1] Midland Great Western Railw. Co. *v.* Gordon, 5 Railw. C. 76; s. c. 16 M. & W. 804; Mangles *v.* Grand Collier Dock Co., 10 Sim. 519; s. c. 2 Railw. C. 359; Sayles *v.* Blane, 14 Q. B. 205; s. c. 6 Railw. C. 79; West Cornwall R. *v.* Mowatt, 15 Q. B. 521. In this case it was said, even if the transaction by which the title to the stock and the registry of defendant's name were made, were illegal, it could not avail him in an action for calls. See *post*, § 236.

Long Island R. Co., 19 Wend. 37; Mann *v.* Currie, 2 Barb. 294; Hartford & N. H. R. *v.* Boorman, 12 Conn. 530; Mann *v.* Cooke, 20 Conn. 178; Rosevelt *v.* Brown, 1 Kernan, 148. The registry-book of shareholders is *prima facie* evidence of the liability to calls, of those whose names appear upon it, although irregularly kept. Birmingham R. *v.* Locke, 1 Q. B. 256; London Grand J. R. *v.* Freeman, 2 M. & G. 606; Same *v.* Graham, 1 Q. B. 271; Aylesbury R. *v.* Thomson, 2 Railw. C. 668. This last case holds that the purchaser of shares is only liable for calls *made* after his name is upon the register. The company may, by its charter, and probably by a by-law, provide that the original subscriber shall be holden for all calls, or until a certain amount is paid in. Vicksburg, Shreveport, & Texas Railw. *v.* McKeen, 14 La. Ann. 724.

[2] South Staffordshire R. *v.* Burnside, 2 Eng. L. & Eq. 418; s. c. 5 Exch. 129; 6 Railw. C. 611.

3. The trustee of shares, whose name appears upon the books of the company, is alone liable for calls, and the company have no remedy in equity for calls against the *cestui que trust*.[3]

But if a shareholder when the company is *in extremis* makes a colorable transfer to an irresponsible person, it will not be held to relieve him from liability to contribute.[4] But in the absence of fraud or *mala fides*, the *cestui que trust* cannot be subjected to a call, although he may be compelled to indemnify his trustee.[5] But it seems finally to be settled in the English Court of Chancery, that a shareholder may transfer his shares in an abortive company, where such shares pass by delivery to an insolvent person, for the purpose of getting rid of liability to contribute to its responsibilities, provided the transaction be a real one, and not a false or hollow contrivance.[6] But where the transaction exhibits no motive except escape from the liability of the company, and especially where it transpires after the company is publicly declared insolvent, it will be regarded as merely colorable and not valid.[7] But where the holder of shares threatened to put the company into insolvency unless the directors would find some one to purchase his shares and give him an indemnity, which was done twelve months before the company became insolvent, it was held to be a valid transfer.[8] Trustees under a will are properly made contributories.[9]

* 4. The trustee, into whose name the *cestui que trust* had caused shares to be transferred by deed, reciting that the price of the same had been paid to the vendor, who executed the deed, may nevertheless be compelled to make good such price to the vendor, if it

[3] The Newry, W. & R. R. *v.* Moss, 4 Eng. L. & Eq. 34; s. c. 14 Beav. 64. But where, in winding up the affairs of a company, the name of one of the members, who had obtained his certificate since the expenses were incurred, was placed among the contributories, it was held he was not liable. Chapple's case, 17 Eng. L. & Eq. 516; s. c. 5 De Gex & S. 400.

[4] Lund *ex parte*, 27 Beav. 465; Hyam *ex parte*, 6 Jur. N. S. 181; s. c. 1 De G. F. & J. 75. See also De Pass's case, 4 De G. & J. 544; Chinnock *ex parte*, 1 Johns. Eng. Ch. 714. *Post*, § 242.

[5] Electric Tel. Co. *v.* Bunn, 6 Jur. N. S. 1223.

[6] Mexican & South Am. Co. *in re*, 2 De G. F. & J. 302; Slater *ex parte*, 12 Jur. N. S. 242.

[7] Electric Tel. Co. *in re*, 30 Beav. 143.

[8] Phœnix Life Assurance Co., 7 Law T. N. S. 267.

[9] Drummond *ex parte*, 2 Gif. 189; s. c. 6 Jur. N. S. 908.

were not in fact paid, although he accepted the transfer in the belief that it had been paid.[10]

5. Notwithstanding the defendant's name appear upon the register of shares, he will be permitted, in a suit for calls, to show that it was illegally placed there, and without his authority. But a purchaser of shares, or even an original subscriber, cannot be sued for calls, under the English statute, until his name is placed on the registry.[11] But one's name appearing upon the books of the company as a shareholder is *prima facie* evidence of the fact, in an action against such person to enforce against him the personal responsibility of a stockholder for the debts of the company.[12] And in such an action the judgment against the corporation is *prima facie* evidence of its indebtedness as against the stockholder.[12]

SECTION II.

Colorable Subscriptions.

1. *Colorable subscriptions valid.*
2. *Directors may be compelled to register them.*
3. *Oral evidence to vary the written subscription inadmissible.*
4. *Register evidence although not made in the time prescribed.*
5. *Confidential subscriptions void.*

§ 48. 1. Equity will not restrain a railway company from enforcing calls, by action at law, upon the ground that one of the conditions of the charter, requiring a certain amount of subscriptions of stock before the incorporation took effect, had not been complied with, but that a fraud upon the provision had been practised by means of colorable subscriptions. The Court of Chancery regards colorable subscriptions, made in the course of * getting a bill through the House of Lords, (to comply with one of the standing rules of that house, requiring three-fourths of the requisite outlay to be subscribed before the bill passes,) to be binding upon the directors and managers, who make the same, and that they are in fact valid and binding subscriptions, although such subscriptions were made with the purpose of being subsequently cancelled, and

[10] Wilson *v.* Keating, 27 Beav. 121.

[11] Hodges on Railways, 101, 4th ed. Newry & Inniskillen Railw. *v.* Edmunds, 2 Exch. 118.

[12] Hoagland *v.* Bell, 36 Barb. 57.

had never been registered upon the books of the company, or any calls made upon them.

2. It is within the proper range of the powers of a court of equity to compel the directors to register such shares and enforce the payment of calls upon them.[1]

In a recent case[2] where this subject came under discussion in * equity, it was held that where the provisional directors, in the process of carrying a bill through parliament, proposed to the contractor that he should have the contract for the company's works, provided he would accept payment partly in shares, the number to be settled by the company's engineer; but contracted for him to sign for a sufficient number of shares to make up the amount required by the standing orders of parliament, which was 630 of £10 each, which he accordingly subscribed and the bill passed;

[1] Preston *v.* Grand Collier Dock Co., 11 Sim. 327; s. c. 2 Railw. Co. 335; Mangles *v.* The Same, 10 Sim. 519. The principle of these cases is very distinctly recognized in the case of Blodgett *v.* Morrill, 20 Vt. 509, and it lies at the foundation of all fair dealing, that one is bound by his own representations, upon which he had purposely induced others to act, although at the time he did not intend to be himself bound by them, but expected, through favor, to be relieved from their performance. See also Henry *v.* Vermilion R. Co., 17 Ohio, 187. But if one obtain shares in a distribution by commissioners by fraud, he may be compelled, in equity, to surrender them to other subscribers, to whom they would have been awarded but for such fraud. Walker *v.* Devereaux, 4 Paige, 229.

A subscription to the stock of a railway made in the common form upon the books of the company, the subscriber at the time of subscription taking the following writing, signed by the clerk of the company, by order of the directors: —

"In consideration that Ebenezer E—— will subscribe for thirty shares in the White Mountains Railway, said company agree to release him from twenty-five of said shares, or such portion of said twenty-five shares, as he may within one year elect to withdraw from his subscription, and if he has been assessed, and has paid any thing on said shares, that he elects to be released from, that these payments shall be allowed him, on the shares that he retains, and that the treasurer shall regulate his stock accounts and assessments accordingly," is a valid subscription for the thirty shares, it having been understood, at the time of making the subscription, between the subscriber and the directors, that the same was to be held out to the public, as a *bona fide* subscription for the thirty shares, and no disclosure made of the writing given to the subscriber.

It was held that the agreement to release the subscriber was a fraud upon other subscribers, and void, and the subscription may be enforced. White Mountains Railw. *v.* Eastman, 34 N. H. 124; Downie *v.* White, 12 Wisc. 176.

See also Conn. & Pass. Rivers R. *v.* Bailey, 24 Vt. 465; Mann. *v.* Pentz, 2 Sand. Ch. 257; Penobscot & Kennebec R. *v.* Dunn, 39 Maine, 601.

[2] North Shields Quay Co. *v.* Davidson, 4 Kay & J. 688.

but when the contract was closed he was to take but 300 shares, the scheme being abandoned before the works were commenced, it was held that the arrangement made by the directors with the contractor was *ultra vires;* and if not a fraud upon the orders of parliament it was void as against such subscribers as were not privy to it; and that the circumstance of the contractor having subscribed the deed last but one, and the last subscriber being privy to the arrangement, did not alter the rights of those subscribers who were not privy to it; and that the contractor was liable, as a contributory, for the entire number of shares for which he signed the deed.

3. Oral evidence is inadmissible to vary the terms of a subscription to the stock of a railway unless it tend to show fraud or mistake.[3] But where the subscriber is really misled, and induced to subscribe for stock, upon the representation of a state of facts * in regard to the time of completing the road, or its location, made by those who take up the subscription, and in good faith, and upon proper inquiry, and the exercise of reasonable discretion, believed by the subscriber, and which constitutes the prevailing motive and consideration for the subscription, and which proves false, it would seem that the contract of subscription should be held void, both in law and equity.[4]

4. When the statute requires the registry of shares to be made

[3] Wight *v.* Shelby Railw., 16 B. Monroe, 5; Blodgett *v.* Morrill, 20 Vt. 509; Kennebec & Portland R. *v.* Waters, 34 Maine, 369. But mere mistake, or misapprehension of the facts, by the subscriber, is no ground of relief unless it amount to fraud and imposition, brought about by some agent of the company. Hence when one subscribed for shares in a railway, under the mistaken belief that he might forfeit his stock at will, and be no further liable, he was held liable, notwithstanding this belief was the result of assurances made by the person taking the subscription at the time of its being made, that such were the terms of subscription secured by the charter, such assurances being founded in mistake, and not wilfully false. Railroad Company *v.* Roderigues, 10 Rich. (S. C.) 278; N. C. Railw. *v.* Leach, 4 Jones Law, 340. It is here said, that one of the commissioners, in taking subscriptions to the stock of a railway company, has no right to give any *assurances* as to the line of location which will be adopted. And if the location is different from that provided in the charter of the company, the party may lose the right to object to paying his subscriptions on that ground, unless he resort to mandamus or injunction, at the earliest convenient time. Booker *ex parte*, 18 Ark. 338; Brownlee *v.* Ohio, Ind. & Ill. Railw., 18 Ind. 68.

[4] Henderson *v.* Railway Company, 17 Texas, 560.

within a limited time, such requirement is regarded as merely directory, and the registry, although not made within the prescribed time, will still be competent evidence, and to the same extent as if made within the time required.[5]

5. Where subscriptions are made under an agreement that they are not to be binding unless a specified sum is subscribed, it is essential that there should be no conditions as to the liability of any of the subscribers not applicable to all. Confidential subscriptions made for the purpose of making up the required sum are a fraud upon the other subscribers; and should not be treated as valid subscriptions. Where by deducting such confidential subscriptions the required sum is not subscribed, the contract of subscription does not become operative, so as to bind the subscribers. Parol evidence is admissible to show that certain of the subscriptions were confidential in character and therefore fraudulent.[6]

*SECTION III.

Mode of enforcing Payment.

1. *Subscription to indefinite stock, raises no implied promise to pay the amount assessed.*
2. *If shares are definite, subscription implies a promise to pay assessments. Right of forfeiture a cumulative remedy.*
3. *Whether issuing new stock will bar a suit against subscriber, quære.*
4. *It would seem not.*
5. *But the requirements of the charter and general laws of the state, must be strictly pursued in declaring forfeiture of stock.*
6. *Notice of sale must name place.*
7. *Validity of calls not affected by misconduct of directors in other matters.*
8. *Proceedings must be regular at date.*
9. *Acquiescence will estop the party, often.*
10. *Forfeiture of shares.*
11. *Irregular calls must be declared void, before others can be made to supply the place.*

§ 49. 1. The company may resort to all the modes of enforcing payment of calls which are given them by their charter, or the general laws of the state, unless these remedies are given in the alternative. But the principal conflict in the cases seems to arise upon the point of maintaining a distinct action at law for the amount assessed. Many of the early turnpike and manufacturing compa-

[5] Wolverhampton N. W. Co. *v.* Hawksford, 7 C. B. N. S. 795; 6 Jur. N. S. 632. Affirmed in Exch. Chamber, 10 W. Rep. 153, 11 C. B. N. S. 456, 8 Jur. N. S. 844.

[6] New York Exchange Co. *v.* De Wolf, 31 N. Y. 273.

nies, in this country, did not create any definite, or distinct capital stock, to consist of shares of a definite amount, in currency, but only constituted the subscribers a body corporate, leaving them to raise their capital stock, in any mode which their by-laws should prescribe. And in some such cases, the charter, or general laws of the state, gave the company power to assess the subscribers according to the number of shares held by each. But the amount of the shares was not limited. The assessments might be extended indefinitely, according to the necessities of the company. In such cases, where the only remedy given, by the deed of subscription, the charter and by-laws, or the general laws of the state, was a forfeiture of the shares, the courts generally held, that the subscriber was not liable to an action *in personam* for the amount of calls.[1] And this seems to us * altogether reasonable and just.

[1] Franklin Glass Co. *v.* White, 14 Mass. 286; Andover Turnpike Co. *v.* Gould, 6 Mass. 40; Same *v.* Hay, 7 id. 102; New Bedford Turnpike Co. *v.* Adams, 8 id. 138; Bangor House Proprietary *v.* Hinckley, 3 Fairfield, 385, 388; Franklin Glass Co. *v.* Alexander, 2 New Hamp. 380. But where there was an express promise to pay assessments, or facts from which such an undertaking was inferable, it was always held, even in this class of cases, that an action will lie. Taunton & South Boston Turnpike Co. *v.* Whiting, 10 Mass. 327; Bangor Bridge Co. *v.* McMahon, 1 Fairfield, 478. But a subscriber to the stock of a turnpike company, who promised to pay assessments, when afterwards the course of the road was altered by law, was held thereby exonerated. Middlesex Turnpike Co. *v.* Swan, 10 Mass. 384. The citation of cases to these points might be increased indefinitely, but it is deemed useless, as these propositions have never been questioned. Worcester Turnpike *v.* Willard, 5 Mass. 80.

The following cases will be found to confirm the cases cited above. Chester Glass Co. *v.* Dewey, 16 Mass. 94; Newburyport Bridge Co. *v.* Story, 6 Pick. 45; Salem Mill-Dam Co. *v.* Ropes, 6 Pick. 23; Ripley *v.* Sampson, 10 id. 371; Cutler *v.* Middlesex Factory Co., 14 id. 483. This general question of the responsibility, assumed by those who consent to become shareholders in a corporation, where the shares are not fully paid up, is considerably discussed, by *Allen*, J., in a recent case in the N. Y. Court of Appeals, where the facts being peculiar, it was held the shareholder incurred no obligation to pay the balance due upon the shares if he elected to abandon them. Seymour *v.* Sturgess, 26 N. Y. 134. But there is no implication of duty to pay the amount of a subscription to the stock of a railway company, especially where the terms of subscription declare payment to be made in such instalments as shall be required by the board of directors, unless the declaration and proof show that an instalment had been required by the directors. Gebhart *v.* Junction Railw. Co., 12 Ind. 484; McClasky *v.* Grand Rapids & Ind. Railw. Co., 16 Ind. 96. Where by the charter of an eleemosynary corporation subscriptions were allowed to be taken, and the subscriber, by securing the amount and paying the interest promptly, was entitled

For if a subscription to an indefinite stock created a personal obligation to pay all assessments made by the company upon such stock, it would be equivalent to a personal liability of the stockholders for the debts and liabilities of the company; as we shall see, hereafter, that the directors of a corporation may be compelled, by writ of mandamus, to make calls upon the stock, for the purpose of paying the debts of the company.[2]

2. But where the stock of the company is defined in its charter, and is divided into shares of a definite amount in money, a *subscription for shares is justly regarded as equivalent to a promise to pay calls, as they shall be legally made, to the amount of the shares. This may now be regarded as settled, both in this country and in England, and that the power given the company to forfeit and sell the shares, in cases where the shareholders fail to pay calls, is not an exclusive but a cumulative remedy, unless the charter, or general laws of the state, provide that no other remedy shall be resorted to by the company.[3]

to save the payment of the principal, it was held this was matter of indulgence to the subscriber, to which he could only entitle himself by proving his compliance with the conditions upon which the indulgence was granted. Denny *v.* North W. Christian University, 16 Ind. 220. The undertaking of subscribers to a joint-stock will be held several and not joint, without express words. Price *v.* Grand Rapids & I. R. Co., 18 Ind. 137. The law by which a corporation exists and acts forms part of the contract of subscription. Hoagland *v.* Cin. & F. W. R. Co., 18 Ind. 452.

[2] *Post*, § 50.

[3] Hartford & New Haven Railway Co. *v.* Kennedy, 12 Conn. 499. In this case it was held, that, from the relation of stockholder and company thus created, a promise was implied to pay instalments; that the clause authorizing a sale of the stock was merely cumulative; and that, whether the company resorted to it or not, the personal remedy against the stockholder remained the same. The same points are confirmed by the same court, in Mann *v.* Cooke, 20 Conn. 178. And in Danbury Railw. Co. *v.* Wilson, 22 Conn. 435, the defendant was held liable for calls upon a subscription to the stock of a company whose charter had expired, and been revived by the active agency of defendant. See also Dayton *v.* Borst, 31 N. Y. 435; Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491.

All the cases, with slight exceptions, hold, that where the subscription is of such a character as to give a personal remedy against the subscriber, in the absence of all other specific redress, the mere fact that the company have the power to forfeit the shares for non-payment of calls, will not defeat the right to enforce the payment of calls by action. Goshen Turnpike Co. *v.* Hurtin, 9 Johns. 217; Dutchess Cotton Manufacturing Co. *v.* Davis, 14 Johns. 238; Troy T. Co. *v.* McChesney, 21 Wend. 296; Northern R. *v.* Miller, 10 Barb. 260; Plank Road Co. *v.* Payne, 17 Barb. 567. In this last case it was held to be

* 3. The question in the English cases seems to be, whether, after the forfeiture of the shares, and a confirmation of the same

matter of intention and construction, whether the remedies were concurrent and cumulative, or in the alternative. And in Troy & Boston R. *v.* Tibbitts, 18 Barb. 297, it is said to be well settled, that the obligation of actual payment is created, by a subscription to a capital stock, unless plainly excluded by the terms of the subscription, and that the forfeiture is a cumulative remedy. Ogdensburg R. & C. Railway *v.* Frost, 21 Barb. 541. See also Herkimer M. & H. Co. *v.* Small, 21 Wend, 273; s. c. 2 Hill, 127; Sagory *v.* Dubois, 3 Sandf. Ch. 466; Mann *v.* Currie, 2 Barb. 294; Mann *v.* Pentz, 2 Sandf. Ch. 257; Ward *v.* Griswoldville Manuf. Co., 16 Conn. 593; Lexington & West Cambridge R. *v.* Chandler, 13 Met. 311; Klein *v.* Alton & Sangamon R. 13 Illinois, 514; Ryder *v.* Same, id. 516; Gayle *v.* Cahawba R. 8 Ala. 586; Beene *v.* Cahawba & M. R. 3 id. 660; Spear *v.* Crawford, 14 Wend. 20; Palmer *v.* Lawrence, 3 Sandf. Sup. Ct. 161, where *Duer*, J., says the law must now be considered as settled, "that the obligation of actual payment is created in all cases, by a subscription to a capital stock, unless the terms of subscription are such as plainly to exclude it." Elysville *v.* O'Kisco, 5 Miller, 152; Greenville & Columbia R. *v.* Smith, 6 Rich. 91; Charlotte & S. C. R. R. Co. *v.* Blakely, 3 Strob. 245; Banet *v.* Alton & Sangamon R., 13 Illinois, 504, 514; Hightower *v.* Thornton, 8 Georgia, 486; Freeman *v.* Winchester, 10 Sm. & M. 577; Tar River Nav. Co. *v.* Neal, 3 Hawks, 520; Gratz *v.* Redd, 4 B. Mon. 178; Selma R. *v.* Tipton, 5 Ala. 787; Troy & R. R. *v.* Kerr, 17 Barb. 581. Where the statute gives an election to the company either to forfeit the shares for non-payment of calls, or to sue and collect the amount of the shareholder, it was held that no notice of such election was necessary to be given before suit brought. New Albany & Salem R. *v.* Pickens, 5 Ind. 247. The terms of the charter must be pursued where they provide specifically for the redress for non-payment of calls. As if the shareholder is made liable only for deficiency after forfeiture and sale of the stock. Grays *v.* Turnpike Co., 4 Rand. 578; Essex Bridge Co. *v.* Tuttle, 2 Vt. 393. But some of the American cases seem to hold, that a corporation has no power to enforce the payment of calls, against a subscriber for stock, unless upon an express promise, or some express statutory power, and that a subscription for the stock is not equivalent to an express promise to pay calls thereon to the amount of the shares. Kennebec & Portland R. *v.* Kendall, 31 Maine, 470. But this class of cases is not numerous, and is, we think, unsound. See also Allen *v.* Montgomery R., 11 Ala. 437. It has been held, that after the forfeiture is declared, the company cannot longer hold the subscriber liable. Small *v.* Herkimer M. & H. Co. 2 Comst. 330. So if the company omit to exercise their power of forfeiture, as the successive defaults occur, until all the calls are made, it thereby loses its remedy by sale. Stokes *v.* The Lebanon & Sparta Turnpike Co., 6 Humph. 241. See also Harlaem Canal Co. *v.* Seixas, 2 Hall, 504; Delaware Canal Co. *v.* Sansom, 1 Binney, 70.

The fact that the commissioners have by the charter an option to reject subscriptions for stock, does not make them less binding, unless they are so rejected. Connecticut & Passumpsic R. R. *v.* Bailey, 24 Vt. 465. An agreement made at the time of subscription inconsistent with its terms, and resting in oral evidence

* by the company, and the issuing of new stock in lieu of the forfeited shares, the subscriber is still liable for any deficiency. The cases all regard him as liable, under the English statutes, to a personal action, until the confirmation of the forfeiture of his stock.[4]

4. But in a late case, in the House of Lords,[5] it seems to have

merely, cannot be received to defeat the subscription. Ib. In a late case in Kentucky this subject is very elaborately discussed by the counsel, and, as it seems to us, very wisely and very justly disposed of by the court. McMillan *v.* Maysville & Lexington Railway Co., 15 B. Monroe, 218. It was there held, that subscriptions to the stock of a railway company, like other contracts, should receive such construction as will carry into effect the probable intention of the parties. That the stock subscribed was to be the means by which the road should be constructed, and hence, that a subscription for stock, on condition that the road should be so "located and constructed as to make the town of Carlisle a point," imposed upon the subscribers the duty to pay, upon the location of the road in that place, and that the construction of the road was not a condition precedent to the right to recover for calls on the stock. See also New Hampshire Central R. *v.* Johnson, 10 Foster, 390; South Bay Meadow Dam Co. *v.* Gray, 30 Maine, 547; Greenville & Columbia R. *v.* Catheart, 4 Rich. 89; Danbury & Norwalk R. *v.* Wilson, 22 Conn. 435. An agreement to take and fill shares in a railway company, is an agreement to pay the assessments legally made. Bangor Bridge Co. *v.* McMahon, 10 Maine, 478; Buckfield Br. R. *v.* Irish, 39 id. 44; P. & K. R. *v.* Dunn, id. 587; Penobscot R. *v.* Dummer, 40 Maine, 172; White Mountains Railw. *v.* Eastman, 34 N. H. 124. So, too, an agreement to take shares before the act of incorporation is obtained, creates an implied duty to pay calls duly made thereon. Buffalo & N. Y. City Railw. *v.* Dudley, 4 Kernan, 336. The general subject is discussed somewhat at large in this case, and the results arrived at confirm the doctrines laid down in the text. Rensselaer & W. Pl. Rd. Co. *v.* Barton, 16 N. Y. 457.

The same rule is mentioned in Fry's Exrs. *v.* Lex. & Big. S. Railw., 2 Met. (Ky.) 314, where the question of the extent of implied obligation assumed by subscription to the capital stock of a corporation is very fully and fairly illustrated.

[4] Great Northern R. *v.* Kennedy, 4 Exch. 417. So the allottees of shares in a projected railway company are made liable for a proportionate share of the expense. Upfill's case, 1 Sim. N. S. 395; s. c. 1 Eng. L. & Eq. 13; The Direct Shrewsbury & Leicester Railway Co., *in re*, 1 Sim. N. S. 281; s. c. 7 id. 28; London & B. R. *v.* Fairclough, 2 M. & G. 674; Edinburgh L. & N. H. R. *v.* Hebblewhite, 6 M. & W. 709; s. c. 2 Railw. C. 237; Birmingham, Bristol & Th. J. R. *v.* Locke, 1 Q. B. 256; s. c. 2 Railw. C. 867; Railway Co. *v.* Graham, 1 Ad. & Ellis (N. S.), 271; Huddersfield Canal Co. *v.* Buckley, 7 T. R. 36. It has been held, that a shareholder cannot absolve himself from calls by paying the directors a sum of money for his discharge, even though the money be accepted, and the shares transferred. Bennett *ex parte*, 18 Beav. 339; s. c. 5 De G. M. & G. 284. See also § 4, *ante*.

[5] Inglis *v.* Great Northern R., 1 McQu. H. L. 1112; s. c. 16 Eng. L. & Eq. 55. See also Peoria & Oquawka R. *v.* Elting, 17 Ill. 429; Cross *v.* Mill Co., 17 Ill. 54.

been settled, upon great consideration, that where the charter or general statutes give the right to forfeit the shares, or to collect the amount of the shareholder, and the forfeiture, sale, and cancellation of the shares, do not produce the requisite amount, the company may issue new shares for the deficiency, and at the same time maintain an action for it, against the former owner.

* 5. It seems to be well settled, that to entitle the company to sue for calls, the provisions of their charter, and of the general laws of the state, must be strictly pursued. And if the shares have been forfeited and sold without pursuing all the requirements, in such case provided, no action will lie to recover the balance of the subscription.[6] And if the shares be sold for the non-payment of several assessments, one of which is illegal, the corporation cannot recover the remainder of the subscription.[7] But where the by-laws of the company prescribe a specific mode of notice to the delinquent, through the mail, of the time and place of sale, this is not to be regarded as exclusive, but other notice which reaches the party in time will be sufficient.[8]

But in a recent case [9] the law in regard to proceedings in forfeit-

But where the deed of settlement gave the right to forfeit the shares at once, or to enforce the payment, if they should think fit, it was held, that a judgment for the amount due is a bar to any subsequent forfeiture. Giles *v.* Hutt, 3 Exch. 18. And where the charter of the company provided, that the shares of a delinquent shareholder "shall be liable to forfeiture, and the company may declare the same forfeited and vested in the company," it was held the option, in declaring such forfeiture, was in the company, and not in the shareholders. Railway Company *v.* Rodrigues, 10 Rich. (S. C.) 278.

[6] Portland, Saco, & Portsmouth Railw. *v.* Graham, 11 Met. 1.

[7] Stoneham Branch R. Co. *v.* Gould, 2 Gray, 277.

[8] Lexington & West Cambridge Railw. *v.* Chandler, 13 Met. 311. And where the charter required notice of the instalment three weeks prior to the same becoming due, it was held *primâ facie* evidence of compliance by producing the publication, and oral evidence of its being repeated the requisite number of times, without producing all the papers. Unthank *v.* Henry County Turnp. Co., 6 Porter (Ind.), 125. And in a later case, Anderson *v.* The Ohio & Miss. Railw. Co. 14 Ind. 169, where the charter limited the amount of calls to ten per cent per annum upon subscriptions to stock, and ten per cent had been paid, a call was held sufficient without specifying the place of payment or the per cent to be paid, only five remaining within the power of the directors to call for, and the notice fixing the time and place of payment.

[9] Lewey's Island Railw. *v.* Bolton, 48 Me. 451. The rules of law as to what is requisite to constitute a valid subscription to a stock in a railway company and to justify calls, are much considered in the recent case of Maltby *v.* N. W. Va. Railw., 16 Md. 422.

ure of shares is held very strictly. It is here considered that notice must be given in the precise time and in the exact form required by statute, and that the sale must in all respects correspond precisely with the requirements of the provisions of the law. The rule is carried so far here that posting notice in a public place was held no sufficient compliance with the law requiring it to be in a "conspicuous" place; and it was here considered that subscriptions to preferred stock could not be reckoned to make up the requisite amount of capital to enable the corporation to go into operation.

6. But notice that shares in a railway corporation will be sold * for non-payment of assessments on a day fixed, and by an auctioneer named, who is and has long been an auctioneer in the place at which the notice bears date, is insufficient if it do not name the place of sale.[10]

7. The validity of calls cannot be called in question upon the ground that the directors making the same are acting in the interest and for the benefit of a rival company, and have in consequence unnecessarily retarded the construction of the company's works.[11] But the directors must be duly appointed.[12]

8. And the proceedings in making the calls must have been substantially in conformity with the charter and by-laws of the company and the general laws of the state at the time of making the same. Any subsequent ratification by the directors of an informal call will only give it effect from the date of the ratification.[13]

9. A subscriber who has executed the deed of settlement, purchased shares and received dividends upon the same, is not at liberty to object to their validity upon the ground that the company were by the deed of settlement authorized to issue shares for £100, and these were issued as half shares at £50; this acquiescence estops him from doing so.[14]

10. It seems that, unless the constitution of the corporation or the general laws of the state contain a provision justifying a for-

[10] Lexington & West Cambridge Railway *v.* Staples, 5 Gray, 520.

[11] Orr *v.* Gl. A. & M. J. Railw., 3 McQu. Ho. Lds. 799; s. c. 6 Jur. N. S. 877.

[12] H. B. Coal Co. *v.* Teague, 5 H. & N. 151; s. c. 6 Jur. N. S. 275.

[13] Cornwall G. C. M. Co. *v.* Bennett, 5 H. & N. 423; s. c. 6 Jur. N. S. 539; Anglo California G. M. Co. *v.* Lewis, 6 H. & N. 174; s. c. 6 Jur. N. S. 1376.

[14] Hull Flax & Cotton Co. *v.* Wellesley, 6 H. & N. 38.

feiture of shares, it is not competent for the majority of the shareholders by prospective resolution to establish a regulation whereby the shares shall be forfeited upon failure to comply with the requirements of such resolution.[15]

11. It is no valid reason for making more calls than are justified by the constitution and laws affecting the question, that some of the calls were not regularly made and were therefore void, and were not paid by the defendant. It should appear that * such irregular calls had been declared void, otherwise the directors may have secured most of the money demanded by them.[16]

SECTION IV.

Creditors may compel Payment of Subscriptions.

1. *Company compelled to collect of subscribers by mandamus.*
2–4. *Amount due from subscribers, a trust-fund for the benefit of creditors.*
5. *If a state own the stock it will be the same.*
6, 7. *A diversion of the funds from creditors is a violation of contract on the part of the company, and a state law authorizing it invalid.*
8, 9. *The general doctrine above stated found in many American cases.*
10. *Judgment creditors may bring bill in equity.*
11. *Promoters of railways liable as partners, for expenses of procuring charter.*
12. *Railway company may assign calls before due, in security for* bonâ fide *debt. No notice required to perfect assignment against attachments or judgment liens.*

§ 50. 1. By the present English statute, the creditors of a company may recover their judgment debts, against shareholders, who have not paid the full amount of their shares to the extent of the deficiency.[1] Before this statute, it was considered that a writ of mandamus would lie, to compel the company to make and enforce calls against delinquents.[2]

2. In this country this question has arisen, not unfrequently, in

[15] Barton's case, 4 De Gex & J. 46.

[16] Welland Railw. *v.* Berrie, 6 H. & N. 416.

[1] 8 & 9 Vict. c. 16, §§ 36, 37.

[2] Walford, 277; Hodges, 106, n. (*u*); Reg. *v.* Victoria Park Co., 1 Q. B. 288, where the opinion of the court very clearly intimates, that the writ of mandamus will lie, to compel the company to enforce the payment of calls, where it appears that judgments against the company remain unsatisfied for want of assets. But, under the circumstances of this case, it was not deemed requisite to issue the writ.

the case of insolvent companies, no such provision existing in most of the states as that of the English Statute just referred to.

3. This subject is very extensively examined, and considered by the national tribunal of last resort, in a case of much importance and delicacy,[3] and the following results arrived at: —

4. On the dissolution of a corporation, its effects are a trust-fund, for the payment of its creditors, who may follow them, * into the hands of any one, not a *bona fide* creditor, or purchaser without notice; and a state law, which deprives creditors of this right, and appropriates the property to other uses, impairs the obligation of their contracts, and is invalid.

5. The fact, that a state is the sole owner of the stock in a banking corporation, does not affect the rights of the creditors.

6. The capital stock of a company is a fund set apart by its charter for the payment of its debts, which amounts to a contract, with those who shall become its creditors, that the fund shall not be withdrawn and appropriated to the use of the owner, or owners, of the capital stock.

7. A law, which deprives creditors of a corporation of all legal remedy against its property, impairs the obligation of its contracts, and is invalid.

8. These propositions, with the exception of the constitutional question, in regard to the impairing of an assumed or implied contract with the creditors of the corporation, are all fully sustained by numerous decisions of the highest authority in this country.

9. Thus in a case before Mr. Justice *Story*, in the Circuit Court,[4] it was held, that the capital stock of a corporation is a trust-fund, for the payment of its debts, and being so, it may, upon general principles of equity law, be followed into other hands, so long as it can be traced, unless the holder show a paramount title.[5] And in cases where the capital stock or assets of a corporation have been distributed to the stockholders without providing for the payment of its debts, a court of equity will allow the creditors to sustain a bill against the shareholders, to compel contribution to the payment of the debts of the company, to the extent of funds obtained by them, whether directly from the company, or

[3] Curran *v.* State of Arkansas, 15 How. U. S. 304.

[4] Wood *v.* Dummer, 3 Mason, 308.

[5] Adair *v.* Shaw, 1 Sch. & L. 243, 261. See Dayton *v.* Borst, 31 N. Y. 435.

through some substitution of useless securities for those which were good.[6]

*10. Where a corporation have abandoned all proceedings under their charter, from insolvency, and still owe debts, the subscriptions to the capital stock not being all paid, a judgment creditor may proceed, in equity, against the delinquent shareowners, there being no longer any mode by which calls upon the stock may be enforced, under the provisions of the charter, or by action at law, in favor of the company.[7]

11. It is held under the English statutes, in regard to fully registered companies, which never go into full operation, but have to be closed under the winding-up acts, that a shareholder, who has paid up the full amount of his shares, is still liable to pay the necessary calls, to defray the expenses of winding up the company,

[6] Nathan *v.* Whitlock, 9 Paige, 152; s. c. 3 Edward's Ch. 215. But it has been held, that the distribution of the capital stock among the shareholders, before the debts of the company are paid, and leaving no funds for that purpose, will not render the shareholders liable to an action of tort, at the suit of the creditors of the company, there being no such privity as will lay the foundation of an action at law, even in states where no court of chancery existed. Vose *v.* Grant, 15 Mass. 505. In equity the suit may be in the name of the receiver, Nathan *v.* Whitlock, 9 Paige, 152, or in the name of a creditor, suing on behalf of himself and others, standing in the same relation. Mann *v.* Pentz, 3 Comst. 415, 422. And all the shareholders, who have not paid their subscriptions, should be made parties to the bill, and compelled to contribute proportionally. Ib.

The same principle is recognized in numerous other cases. Mumma *v.* The Potomac Co., 8 Pet. 281; Wright *v.* Petrie, 1 Sm. & M. Ch. 282, 319; Nevitt *v.* Bank of Port Gibson, 6 Sm. & M. 513; Hightower *v.* Thornton, 8 Georgia 486; Fort Edward, &c. Plank Road Co., *v.* Payne, 17 Barb. 567; Gillet *v.* Moody, 3 Comst. 479. This case is where the bank, of which the plaintiff was receiver, had transferred specie funds to defendant, in exchange for his own stock in the bank. The transaction was held illegal, and the defendant was compelled to refund, for the benefit of the creditors of the bank. And where the subscriber to a bank, which became insolvent, assigned all his interest in the bank, it was held not to exonerate him from liability to assessments upon his subscription, to pay debts due from the bank, although contracted subsequent to the assignment. Dayton *v.* Borst, 7 Bosw. 115.

See also Morgan *v.* New York & Albany R. 10 Paige, 290.

[7] Henry *v.* The Vermilion & Ashland Railw., 17 Ohio, 187. See also Miers *v.* Z. & M. T. Co., 11 Ohio, 273; s. c. 13 Ohio, 197. And where the company retains its organization and officers, it may be compelled, by writ of mandamus, to enforce calls against the shareholders, to the extent of their liability, as well as to perform other duties. Commonwealth *v.* Mayor of Lancaster, 5 Watts, 152.

the subscribers to such joint-stock companies, under the statute, being held liable to the same extent as partners.[8]

12. The company may assign, as security for a debt due from them, an existing unpaid call upon shares not yet due, and if the assignment contains a power of sale, that will not invalidate the assignment, since if held void, a court of equity will expunge it, or restrain its exercise, and it cannot have any effect to avoid the assignment until acted upon; and a shareholder from whom such call is due will be affected with notice of the assignment, if presiding at the meeting when it was made, although having no further knowledge in regard to it.[9] But it was doubted if any notice were required to perfect an assignment in security of a *bona fide* debt, against a subsequent judgment or attachment lien. And in a later case,[10] it was decided that no notice is required in such case, and that Watts *v.* Porter,[11] where the majority of Queen's Bench held such notice indispensable, was no longer law.

*SECTION V.

Conditions precedent to making Calls.

1. *Conditions precedent must be performed before calls.*
2. *But collateral, or subsequent conditions not.*
3. *Definite capital must all be subscribed before calls.*
4. *It is the same where defined by the company, as in the charter.*
5. *Conditional subscriptions not to be reckoned.*
6. *Legislature cannot repeal conditions precedent.*
7. *Limit of assessments cannot be exceeded for any purpose.*
8. *Where charter fails to limit stock, corporation may.*
9. *Alteration in charter reducing amount of stock.*

§ 51. 1. Conditions precedent must be complied with, before any binding calls can be made. Any thing, which, by the express provisions of the charter, or the general laws of the state, is made a condition to be performed on the part of the company, or its

[8] Matter of the Sea, Fire, and Life Assurance Society, 3 De G. M. & G. 459; s. c. 23 Eng. L. & Eq. 422. The form of proceeding and the extent of responsibility is extensively considered, as to delinquent subscribers to an insolvent corporation, in Adler *v.* Milw. Patent Brick Co., 13 Wisc. 57.

[9] Pickering *v.* Ilfracombe Railw. Law Rep., 3 C. P. 235.

[10] Robinson *v.* Nisbitt, id. 264.

[11] 3 El. & B. 743.

agents, before and as the foundation of the right to make calls, upon the subscriptions to the stock; or where the thing is required to be done, before calls shall be made, and is an important element in the consideration of the agreement to take stock in the company, it should ordinarily be regarded as a condition precedent.

2. But where the matter to be done is rather incidental to the main design, and only affects the enterprise collaterally, it will commonly be regarded as merely directory to the company, or at most as a concurrent or subsequent condition, to be enforced by independent proceedings, and in the performance of which time is not indispensable.[1]

[1] Carlisle *v.* Cahawba & Marion Railway Co., 4 Ala. 70; *Ante*, § 18; Banet *v.* Alton & Sangamon Railway Co., 13 Ill. 504; Utica & Schenectady Railway Co. *v.* Brinkerhoff, 21 Wend. 139. This last case is an action upon a special undertaking to pay land damages, on condition the company would locate their road so as to terminate at a particular place, which the company alleged they had done, and defendant was held not liable, for want of mutuality, the company not being bound by the contract. Cooke *v.* Oxley, 3 T. R. 653. But it admits of some question, we think, whether the case of 21 Wend. 139, comes fairly within the principle upon which it was decided. The case of Cooke *v.* Oxley, which has been sometimes questioned, is an obvious case of want of consideration on the part of defendant, it being a mere naked refusal of goods, for a fixed time, the plaintiff in the mean time having an election, to take them or not. This class of cases is numerous and sound, resting upon the mere want of consideration. Burnet *v.* M. Bisco, 4 Johns. 235. But where such an option is given upon consideration, or as a standing offer, and in the mean time the other party proceeds to perform the contract on his part, it is as binding in this form as in any other. And it was so held, in the case of the Cumberland Valley Railway Co. *v.* Baab, 9 Watts, 458. In this case the inhabitants of one portion of Harrisburg made a subscription to induce the company to cross the river at a particular point, and to build their depot upon a particular street, which being done, the subscribers were held liable to pay their subscriptions to the company, and, as we think, upon the most obvious and satisfactory grounds.

In Henderson & Nashville Railway Co. *v.* Leavell, 16 B. Monr. 358, it was held, that a subscription to the stock of a railway, conditioned that the road should pass through a certain town, and the money subscribed should be expended in a certain county, was a valid subscription. The Court, *Stimpson*, J., say: "The stock in this case is not conditional, although the defendant has, in the act of subscribing for it, brought the company under certain obligations to him, in relation to it, with which they are bound to comply. Such stipulations are not incompatible with sound policy, or with any of the provisions of the charter. They do not render the subscription void, but operate, as it was intended they should, for the benefit of the stockholder. But even if the subscription had been made, upon the express condition that the money should not

* And where the company voted to issue six hundred additional shares and to allow each stockholder to take one new share for

be paid until certain acts were done by the company, when these acts were done, the stock would then be unconditional, and the subscribers would then be compelled to pay it, as was held in McMillan *v.* Maysville & Lexington Railway Co., 15 B. Monr. 218." If a subscription for stock be conditioned, that the subscriber may withdraw his subscription, at his election, if the whole stock is not taken, at a given time, and the defendant pay part of his subscription after that date, he is liable for the balance, unless he show the failure of the condition, and his own election, in a reasonable time after, to withdraw. Wilmington & Raleigh Railway Co. *v.* Robeson, 5 Iredell, 391. On a subscription to stock in a railway upon condition the road should "pass" on a certain route through a certain county, it is not a condition precedent to the right to demand payment, that the road should be actually constructed upon that line; it is sufficient if the road be permanently located there. North Missouri R. Co. *v.* Winkler, 29 Mo. 318; A. & N. L. Railw. Co. *v.* Smith, 15 Ohio, N. S. 328. See also Vicksburg, Shreveport, and Texas Railw. *v.* McKean, 12 La. Ann. 638. There is a recent case in Vermont, Conn. & Pass. Railw. Co. *v.* Baxter, 32 Vt. 805, where the court seem to hold, that, where the subscription defined the route of the proposed railway, the representations of the agent who carried about the paper, that the written words really defined one particular route, and not another, the subscribers themselves being equally conusant of the facts with the agent, was binding upon the company, and would preclude them from recovering calls upon such subscription, provided the road were not in fact located upon the particular route indicated by the agent, although in fact so located as to comply with the conditions of the written subscription, and although the agent in expressing the opinion he did, acted in perfect good faith. The case is not one of sufficient importance to require much discussion, but it may be well to bear in mind, what seems to have escaped the apprehension of the court for the moment, that the point ruled as stated in the marginal note and in the opinion of the court, seems to be adopting the oral representations of the agent, made at the time of the subscription, as part of the written contract of subscription. The charge of the court below puts the case upon the ground, that the subscriber is bound by the *legal construction* of his written subscription, and that he cannot escape such responsibility by showing that those who acted on behalf of the company maintained a different opinion, unless that was done fraudulently, with a view to deceive the defendant. We understood that to be the law at the time, and we cannot fairly say that we understand it differently now.

In Chamberlain *v.* Painesville & Hudson R. Co., 15 Ohio N. S. 225, it was decided that where a subscription was made for a given number of shares of stock in a railway company, payable at such times, and in such instalments, as the directors may prescribe, provided the road is "permanently located" on a given route, and that a "freight house and depot be built" at a point named: — 1. That on the permanent location of the road in accordance with the terms proposed, the subscription became absolute. 2. That the provision in relation to the erection of the buildings must be regarded as a stipulation merely, and

* every two held by him, if he subscribed for the same, paid a certain sum and gave his note for the balance, before a day named;

its performance could not be reasonably considered a condition precedent to the right to collect the amount of the subscription. 3. The giving by a subscriber, of his note for the balance of his subscription, and taking, therefor, from the company, a receipt, stipulating, that when paid, the amount of the note should be applied on his stock, was *prima facie* a waiver of conditions precedent. But this is denied in a recent case, Parker *v.* Thomas, 19 Ind. 213.

And in McAllister *v.* The Ind. & Cin. Railw. Co., 15 Ind. 11, a question similar to the one stated in Conn. & Pass. Railw. Co. *v.* Baxter, *supra*, arose and received a far more just and reasonable determination. The plaintiff made an unconditional subscription to the stock of the plaintiff's company, and paid the amount and took and retained his certificate without offering to surrender the same. But at the time of the subscription the company promised that a branch of their line should come to Milford, the place of the plaintiff's residence, which had not been done. The suit was brought to recover the money paid. *Held*, that the parol promise to construct the branch to Milford, could not be proven as part of the written contract of subscription; and hence the money paid could not be recovered on the ground of a breach of contract. 2. A recovery could not be had on the ground of fraud: the parol promise and representation being, under the circumstances, no more than the expression of an existing intention to make the branch. 3. Under the circumstances the company was not liable to repay the money.

See also Andrews *v.* Ohio & Miss. Railw. Co., 14 Ind. 169; Eakright *v.* L. & N. Ind. Railw., 13 Ind. 404, where the question of controlling written subscriptions by oral declarations of those who solicit them, as to the probable route of the road, is further discussed and placed upon the true ground, that such representations can have no effect, unless upon the ground of fraud. See also Parker *v.* Thomas, 19 Ind. 213; Cunningham *v.* E. & K. Railw. Co., 2 Head, 23; Brownlee *v.* O., Ind. & Ill. Railw. 18 Ind. 68.

There are some cases which go the length of saying that as the directors of a railway company have no power to give any binding assurance as to the route which shall be finally adopted, it being their duty to place it where, in their ultimate judgment, the public good requires, it is the folly of any subscriber to rely upon any such representation, and that even where it could be shown that such representations were fraudulently made, to induce subscriptions, and had the purposed effect, the subscriptions could not be avoided on that ground. Ellison *v.* Mobile & Ohio Railw., 36 Miss. 572; Walker *v.* Same, 34 id. 245.

See also Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491. The verbal promise of the agent who takes up subscriptions for a railway, that the time of payment shall be delayed beyond the time named in the charter, and which induces the subscriptions, is not binding upon the company. Thigpen *v.* Miss. Central Railw., 32 Miss. 347.

One subscribed, in 1853, for twenty shares of the stock of the P. & C. R. R. Co., on the express condition that the company "should locate and construct their railway along the route contemplated by the Meyer's Mill Plank Road Co., for their road," paid one instalment, part of the second, but delayed the payment

* it was held there was no implied condition that the whole six hundred shares should be issued, and the failure to do so was * no

of the residue, as the calls were made, until the company, before the road was *constructed* along the route mentioned, suspended operations, after which payment was refused on the ground that, though the road had been *located* by the company, they had not *constructed* it, according to the condition in the subscription. In an action brought by the company, it was *Held*, 1. That the promise of subscription being precedent to that of construction, upon the part of the company, the defendant could not insist upon performance by the railroad company, while he refused performance on his part, and that the road having been located as stipulated, and completed so far as the means of the company would allow, it was a compliance with the condition, and the company were entitled to recover. 2. That the condition in the contract of subscription was not a condition precedent, and did not require the completion of the road before payment could be required, but only that when located and constructed it should occupy the route designated, the undertaking being on the part of the subscriber, to pay, as calls should be made by the directors, and on the part of the company to locate as stipulated, and construct as fast as their means would allow. 3. That the suspension of operations made by the directors long after the payments upon defendant's stock had been due, was not a defence in an action brought against him for the unpaid balance thereon. Miller *v.* Pittsburg & Connellsville Railw. 40 Penn. St. 237.

It was held in one case that where the charter required subscriptions by responsible persons of a certain proportion of the estimated cost of the work before entering upon the construction, it was not necessary for the company to show compliance with this requirement in order to enforce calls. Nor does the right to make calls depend upon the extent or nature of the indebtedness of the company; nor can a subscriber defend against calls by showing that a portion of the requisite amount of subscriptions to bind the defendant were made by persons of no actual or reputed pecuniary responsibility, unless he also show that they were not made or taken in good faith. Penobscot Railw. *v.* White, 41 Me. 512. And the bad faith cannot be shown by the declarations of the subscribers, made long after making such subscriptions. Ib. And where the charter of a corporation requires that one thousand shares shall be subscribed before the organization of the company, the decision of the majority of the subscribers that this condition has been complied with, and the actual organization of the company in pursuance of the decision, are binding upon the minority. Ib. This will not preclude the minority from defending on the ground that the proceedings of the majority were in bad faith. See also Taggart *v.* West Maryland Railw., 24 Md. 563. And where the subscriber gives the company his note for the sum required to be paid at the time of subscription, and subsequently pays the same, his subscription is binding, and makes him a member of the company, and he cannot escape the responsibility of his position on account of any previous irregularity. Ogdensburgh Railw. *v.* Wolley, 38 N. Y. 118. Subscribers cannot defend against calls, on the ground that subscriptions were taken for two sections of the road without distinguishing how much was to be applied on each; or on the ground that the construction of the road was begun before twenty per

ground for allowing an action to be maintained for the money paid, or any defence to the notes given for the balance.[2]

3. It is an essential condition to making calls, in those companies where the number of shares and the amount of capital is fixed, that the whole stock shall be subscribed before any calls can lawfully be made.[3] And if calls are made before the requisite stock is subscribed, although the subscription is completed * before action brought, no recovery can be had.[4] But it has been held, that the general provision in the charter of a railway act, that so soon as 1,500,000*l.* shall have been subscribed, it shall be lawful for the company to put in force all the powers of the act, authorizing the construction of the railway, and of the acts therein recited, being the general railway acts, did not require such subscription to be made before making calls, but only before exercising compulsory powers of taking land.[5]

centum of each subscription was paid, according to the requirements of the charter; or that by a subsequent statute the amount of capital stock required to build the road had been reduced below the requirements of the charter; or that interest had been paid on subscriptions according to the recommendation of the terms of subscription; or that the charter of the company had been amended by extending the time for completing the road. Agricultural Branch Railw. *v.* Winchester, 13 Allen, 29.

[2] Nutter *v.* Lexington & West Cambridge Railw., 6 Gray, 85.

[3] Stoneham Branch Railway Co. *v.* Gould, 2 Gray, 277; Salem Mill-Dam Co. *v.* Ropes, 6 Pick. 23; s. c. 9 Pick. 187; Cabot & West Springfield Bridge Co. *v.* Chapin, 6 Cush. 50; Worcester & Nashua Railway Co. *v.* Hinds, 8 Cush. 110: Lexington & West Cambridge Railway Co. *v.* Chandler, 13 Met. 311; N. Hampshire Central Railway Co. *v*, Johnson, 10 Foster, 390.

But a subscriber for shares in a railway company is liable for calls, although by a subsequent amendment of the charter of the company the capital stock is limited to four thousand shares, and that number has not been subscribed, there being no such condition, either in the charter of the company, or the terms of subscription, at the time of subscribing. York & Cumberland Railway *v.* Pratt, 40 Maine, 447. But the number of shares required by the charter must be subscribed, as stated in the text. Penobscot Railway *v.* Dummer, 40 Maine, 172. But the records of the company are evidence of such fact. Ib. Same *v.* White, 20 Law Rep. 689; s. c. 41 Maine, 512; Peake *v.* Wabash Railw., 18 Illinois, 88.

[4] Norwich & Lowestoft Navigation Co. *v.* Theobold, 1 Moody & M. 151; Stratford & M. Railway Co. *v.* Stratton, 2 B. & Ad. 518. And see Atlantic Cotton Mills *v.* Abbott, 9 Cush. 423, where a condition in a subscription for stock, that the capital stock of the company should not be less than $1,500,000, was held a condition precedent to making calls.

[5] Waterford, Wexford, & W. Railway Co. *v.* Dalbiac, 6 Railw. C. 753; s. c.

4. And where the charter provides that the members might divide the capital stock into as many shares as they might think proper, and by a written agreement the subscribers fixed the capital stock at $50,000, divided into 500 shares of $100 each, and only one hundred and thirty-eight shares had been subscribed, it was held no assessment for the general purposes of the corporation could be made.[6]

5. And where the charter of a railway company requires their stock to consist of not less than a given number of shares, assessments cannot be made before the required number is taken. And in such case conditional subscriptions are not to be reckoned, even where the condition is acceded to by the company, if the subscriber still repudiates the subscription, on the ground that the condition is not fully performed by the contract drawn up in form. And the plea of the general issue, is no such * admission of the existence of the company, as to preclude subscribers from contesting the amount of subscriptions, to enable the company to make calls.[7]

4 Eng. L. & Eq. 455. But the American cases will not justify such a construction. It would here be held a condition precedent to the right to make calls, or even to maintain a corporate existence, probably.

[6] Littleton Manufacturing Co. *v.* Parker, 14 N. Hamp. 543; Contoocook Valley Railway Co. *v.* Barker, 32 N. Hamp. 363.

Where the condition of a bond given for the amount of a railway subscription was, that the same should be paid when the road was "completed" to a certain village, it was held that the condition was performed when the road was made to the suburbs of the village, in such a manner, as to allow daily trains on it, carrying all the freight and passengers that offer, although some portion of the work was only temporary. O'Neal *v.* King, 3 Jones, 517; Chapman *v.* Mad River & Lake Erie Railway Co., 6 Ohio N. S. 119.

[7] Oldtown & Lincoln Railw. Co. *v.* Veazie, 39 Maine, 571. Any condition the subscriber sees fit to annex to his subscription must be complied with before the subscriber is liable to assessments. Penobscot & Kennebec Railw. Co. *v.* Dunn, 39 Maine, 587.

A condition, that not more than five dollars on a share shall be assessed at one time, is not violated by two or more assessments being made at one time, if only five dollars is required to be paid at one time. Ib. Penobscot Railw. *v.* Dummer, 40 Maine, 172. And the same principle already stated, that where the conditions of a subscription required seventy-five per cent of the estimated cost of any section of the road to be subscribed, by *responsible persons*, before its construction should be commenced, if the subscriptions were obtained in good faith, assessments will be valid, although some of the subscriptions to make up the amount, prove worthless, is here also maintained. Ib.

And where the charter of the company requires that the capital stock be not

6. And where the charter originally required 11,000 shares to be the minimum, and when less than 10,000 were subscribed, the company was organized, and the subscriptions accepted, and assessments made, and afterwards, by an act of the legislature, accepted by the corporation, the minimum was reduced to 8,000 shares, in an action to recover assessments, made on defendant's shares, before and after such alteration of the charter, it was held:

1. That the minimum was a condition precedent, to be fulfilled by the corporation, before the subscribers were liable to assessments.

2. That the alteration of the charter will not affect prior subscribers.

3. Nor will the defendant be estopped from relying upon this * condition, by having acted as a shareholder and officer in the corporation, and contributed towards the expenses of the company.

4. That corporators, by any acts or declarations, cannot relieve the corporation from its obligation, to possess the capital stock, required by its charter.[8]

7. Where the charter of a railway company provided for assessments by the directors of the company upon the shares of the stock, as they might deem expedient and necessary in the execution and progress of the work, provided "that no assessment shall be laid upon any share in said corporation of a greater amount than one hundred dollars in the whole, . . . and if a greater amount of money shall be necessary to complete said road it shall be raised by creating new shares," it was held that the charter limited the amount of all the assessments to one hundred dollars on a share, and that assessments beyond that sum, made for the purpose of paying the debts of the company, were illegal.[8]

less than five hundred, nor more than ten thousand shares, of $100 each, and authorizes the directors to assess upon five hundred shares, as soon as subscribed and from time to time to enlarge the capital to the maximum amount named in the charter, all the shares to be equally assessed, it is not necessary for the company to define their capital, within the prescribed limits, before making calls. White Mountains Railw. *v.* Eastman, 34 N. H. 124.

It is doubtful if the directors of a railway have power to release subscribers to stock, but at all events, where the release is optional with the subscriber, he must make his election to be released, and in a reasonable time. Penobscot & Ken. Railw. *v.* Dunn, 39 Maine, 587. See also Troy & Greenfield Railw. *v.* Newton, 8 Gray, 596.

[8] Great Falls & Conway R. Co. *v.* Copp, 38 N. H. 124.

8. Where the charter of a railway company fails to fix the number of shares of the capital stock, it must be presumed to have been the purpose of the legislature that the corporation should limit the number. And this must be done before any valid assessments can be made. In such case, if the number fixed exceed the number subscribed, the company may change the number; but the assessments must be made upon the whole number, and if an assessment be made before the number ultimately fixed is subscribed, it will be irregular and void. A subscriber who has paid one assessment is not thereby precluded from insisting upon this irregularity in defence to others.[9]

9. Where the charter of a railway company as originally granted limited the amount of stock at a point which the subscription never reached, but by a subsequent alteration of the charter the amount of the capital stock was reduced, and after the subscriptions reached that amount the company was duly organized, it was held that the alteration in the charter did not release prior subscribers.[10]

*SECTION VI.

Calls may be made payable by Instalments.

§ 52. It was at one time considered that calls made payable by instalments were invalid.[1] But it seems now to be settled that such mode of making calls, where the directors of the company have an unlimited discretion, as to the time and mode of requiring payments of the subscriptions, is unobjectionable.[2]

But where the subscription contains a provision, that payment shall be made, at such times and places as should thereafter be directed by the directors, and shall be applied to the construction of the road, it was held, that the subscription did not become payable, until the directors, at a regular meeting, had fixed the time

[9] Som. & Ken. R. Co. *v.* Cushing, 45 Me. 524.

[10] Bedford Railw. Co. *v.* Bowser, 48 Penn. St. 29.

[1] Ambergate, N. & Boston & E. J. R. *v.* Coulthard, 5 Exch. 459; Stratford & M. R. *v.* Stratton, 2 B. & Ad. 518.

[2] London & N. W. R. *v.* M'Michael, 6 Exch. 273; Ambergate R. *v.* Norcliffe, 6 Exch. 629; s. c. 4 Eng. L. & Eq. 461; Birkenhead, L. & Ch. R. *v.* Webster, 6 Exch. 277; s. c. 6 Railw. C. 498.

and place of payment.[3] But it is further held, in this case, that it is not necessary to give notice to the subscribers of the time and place of payment.[3] This point in the decision seems not altogether in accordance with the usual practice in such cases, or the general course of decision in regard to calls, which upon general principles must be notified to subscribers before an action can be maintained. But where the subscription is made payable in instalments of ten per cent every sixty days as the work progresses, it is not important that any formal call or demand be made.[4]

Where the charter gives the corporation power to collect subscriptions to the capital stock by such instalments as the president and directors shall deem proper, they may make contracts with subscribers for the payment of subscriptions in any reasonable instalments, as to time and place, and if such condition were *ultra vires*, it would render the whole contract void, and not the condition merely.[5]

*SECTION VII.

Party liable for Calls.

1. *Subscribers liable to calls.*
2, 6. *What constitutes subscription to a capital stock.*
3. *How a purchaser of stock becomes liable to the company.*
4. *One may so conduct as to estop him from denying his liability.*
5. *The register of the company evidence of membership.*
6. *Subscriptions must be made in conformity to charter.*
7. *Transferee liable for calls. Subscriber also in some cases.*
8. *Original books of subscription primary evidence.*
9. *If lost secondary evidence admissible.*
10. *What acts will constitute one a shareholder.*
11. *May take and negotiate or enforce notes for subscriptions.*
12. *But note fraudulently obtained not enforceable.*
13. *Subscriptions as executor distinct contracts from those in private capacity.*

§ 53. 1. All the original subscribers to the stock in a railway company are usually made liable to calls, by the charter of the company, or by general statute.

2. Some question has arisen in the English courts, as to what is necessary to constitute one a subscriber. In an early case[1]

[3] Ross *v.* Lafayette & Ind. Railw., 6 Porter (Ind.), 297.

[4] Breedlove *v.* M. & F. Railw., 12 Ind. 114; Smith *v.* Ind. & Ill. Railw., id. 61.

[5] Roberts *v.* Ohio & Mobile Railw., 32 Mississippi, 373.

[1] Thames Tunnel Company *v.* Sheldon, 6 B. & C. 341.

upon this subject, it was held, that the word "subscriber," in the act of parliament constituting the company, applied only to those who had stipulated that they would make payment, and not to all those who had advanced money; and that one, who was named in the recital of the act, as one of the original proprietors, and who had paid a deposit on eight shares, but who had not signed any contracts, was not a subscriber within the meaning of the act, and not liable to be sued by the directors for calls on the remainder of such shares.

3. This is the generally received opinion upon that subject, in this country. In one case,[2] a plea to an action to recover calls on stock subscribed, that another person had agreed to take the stock, and that the commissioners had counted this stock to such other person, is insufficient. The signature of the first subscriber should have been erased, and that of the other substituted, or something done to hold the latter liable. A subscriber for stock * cannot subrogate another person to his obligation, without a substitution of his name upon the books of the company, or some other equivalent act recognized by the charter and by-laws of the company.

4. But the principal difficulty, in regard to liability for calls, arises, where there have been transfers, and the name of the transferee not entered upon the books of the company. For whenever the name of the vendee of shares is transferred to the register of shareholders, the cases all agree that the vendor is exonerated, (unless there is some express provision of law, by which the liability of the original subscriber still continues,) and the vendee becomes liable for future calls.[3] And the vendee having made such representation to the company, as to induce them to enter his name upon the register of shares, is estopped to deny the validity of the transfer.[4] And even where the party has represented himself to the company as the owner of shares, and sent in scrip certificates, which had been purchased by him, claiming to be registered as a proprietor, in respect thereof, and had received from the company receipts therefor, with a notice that they would be exchanged

[2] Ryder *v.* Alton & Sangamon R., 13 Ill. 516.

[3] Sheffield & Ashton-under-Lyne & Man. R. *v.* Woodcock, 2 Railw. C. 522; s. c. 7 M. & W. 574; London & Grand J. R. *v.* Freeman, 2 Railw. C. 468; s. c. 2 M. & G. 606; *post*, § 54.

[4] Sheffield, Ash. & M. R. *v.* Woodcock, *supra;* London & Grand J. R. *v.* Freeman, *supra.*

for sealed certificates on demand, he was held estopped to deny his liability for calls, although his name had not been entered upon the register of shareholders, or any memorial of transfer entered, as required by the act.[5] And where one has paid calls on shares, or attended meetings of the company, as the proprietor of shares, he is estopped to deny such membership.[6]

5. The holders of scrip certificates are properly entered as proprietors of shares before the passing of the act, although they have neither signed the parliamentary contract, nor been original subscribers; and the register-book of shareholders, which is * required by the statute to be kept in a prescribed form by the company, though irregularly kept, is *prima facie* evidence who are proprietors.[7]

6. The subscription for stock to be valid, must be made in conformity with the act. So that where it was required to be made in such form as to bind the subscriber and his heirs, it was deemed requisite to be made under seal.[8] But such a provision is of no force in this country, simple contracts being of the same force as against heirs as specialties.

7. If by the act of incorporation the shares are made assignable without restriction, and no express provision exists in regard to the party liable for calls, it would seem to follow, upon the general principles of the law of contract, that the proprietor of the share, for the time being, is liable for calls. And where certain formalities are requisite in the transfer of shares, and these have been complied with on the part of the transferee, or waived by the company at his request, his liability to calls then attaches.[9] The liability of the original subscriber often continues, at the election of the

[5] Cheltenham & Great Western Union R. *v.* Daniel, 2 Q. B. 281, and Same *v.* Medina, 2 Railw. C. 728. And this being matter of estoppel *in pais*, may be used in evidence, in answer to the defence, without being pleaded.

[6] London & Grand J. R. *v.* Graham, 2 Railw. C. 870; s. c. 1 Q. B. 271.

[7] Birmingham, Boston & Th. J. R. *v.* Locke, 2 Railw. C. 867; s. c. 1 Q. B. 256.

[8] Cromford & High Peak R. *v.* Lacey, 3 Y. & Jer. 80. See *ante*, § 18, n. 2.

[9] Huddersfield Canal Co. *v.* Buckley, 7 T. R. 36; Aylesbury R. *v.* Mount, 5 Scott, New R. 127; West Philadelphia Canal Co. *v.* Innes, 3 Whart. 198; Mann *v.* Currie, 2 Barb. Sup. Ct. 294; Hall *v.* U. S. Insurance Co., 5 Gill, 484; Bend *v.* Susquehannah Bridge Co., 6 Har. & J. 128; Angell & Ames, ch. 15, § 534.

company, after that against the vendee attaches, but when the company consent to accept the name of the transferee, that of the subscriber, or former proprietor, ceases.[10]

8. It seems to be regarded as settled law, that the best evidence of an original subscription to the capital stock of a railway company is the production of the original subscription book, or the book of records of the company on which the subscriptions were made.[11]

* 9. But where the books are shown not to be in the proper place of deposit and custody, and no trace can be found of their present existence elsewhere, secondary evidence is admissible. And the court decide the question of loss, as a preliminary one to the admission of the secondary evidence.[11]

10. One who accepts a subscription made by another on his behalf, and pays the calls made thereon and receives a certificate of ownership, is responsible as a shareholder; and it makes no difference that his name does not appear upon the transfer books or the alphabetical list of stockholders as a transferee of stock. And one may become a shareholder without receiving a certificate of stock.[12]

11. It seems clear that railway companies may accept promissory notes in payment of subscriptions, and either negotiate or enforce them by suit.[13] The questions of pleading and evidence which may be raised in suits upon such notes are extensively discussed in the case last cited.

12. And where the subscription to railway stock is dependent upon the condition that no calls shall be made until work should be begun upon a particular section of the road, and the subscriber was induced to execute his note for the amount upon the representation of the agents of the company that work had been so commenced, when in fact it had not, the note cannot be enforced.[14]

[10] *Post*, § 54.

[11] Graff v. Pittsburgh & Steubenville Railw. Co., 31 Penn. St. 489. These subscriptions are, in fact, sometimes made upon different books, and then brought together upon one book, for the purpose of permanent preservation. But it would seem there should be evidence of the original subscription.

[12] Burr v. Wilcox, 6 Bosw. 198.

[13] Goodrich v. Reynolds, 31 Ill. 490. See also Straus v. Eagle Ins. Co., 5 Ohio St. 59.

[14] Taylor v. Fletcher, 15 Ind. 80.

13. Subscriptions in the capacity of executor are to be regarded as distinct contracts from those in the personal capacity of the subscriber, so that the pendency of a suit for one will not abate or render vexatious a subsequent suit for the other.[15]

SECTION VIII.

Release from liability for Calls.

1, 2. *Where the transfer of shares, without registry, will relieve the proprietor from calls.*
3. *Where shares are forfeited, by express condition, subscriber no longer liable for calls.*
4. *Dues cannot be enforced which accrue upon shares after they were agreed to be cancelled.*

§ 54. 1. One may relieve himself of his liability for calls, by * the transfer of his shares, and the substitution of the name of his assignee for his own upon the books of the company. But until this change upon the books of the company is made, they are at liberty to hold the original subscriber liable, if they so elect.[1] But where the act of incorporation of a joint-stock company declared the shares should be vested in subscribers, their executors and assigns, with power to the subscribers to assign their shares, and a committee, to be appointed under the act, were authorized to make calls upon the proprietors of shares, it was held, that an original subscriber, who had transferred his shares, was no longer liable to calls.[2]

2. But this case is determined upon the express provisions of the charter of the company. The general rule, in England, at present, under their consolidated acts, is undoubtedly as stated above. And we see no good reason why it should not equally apply in this country. It would seem to be the only mode of securing the ultimate payment of calls. But some of the cases seem to assume, that the mere transfer of the shares in the mar-

[15] New York City & Erie Railw. *v.* Patrick, 39 N. Y. 256.

[1] *Ante*, § 47, and cases there cited. In Everhart *v.* West Chester and Philadelphia Railw., 28 Penn. St. 339, it is said that a transfer of stock, made for the purpose of exonerating a subscriber, without the consent of the company, is not a valid defence to an action against him for the purchase-money of the shares subscribed. *Ante*, § 32.

[2] Huddersfield Canal Company *v.* Buckley, 7 T. R. 36, 42.

ket does exonerate the subscriber from the payment of future calls. But this depends chiefly upon the provisions of special charters, and the general laws of the state, applicable to the subject.[3]

3. Where shares are allotted to one upon the express condition to be forfeited if a certain deposit is not paid in a certain time, and nothing more is done by the allottee, he is not liable * for calls, although the company have entered his name upon the register of shares as a shareholder.[4]

4. Where the corporation resolve to release subscribers and to cancel their stock upon making certain payments, which are made and the stock cancelled, the company cannot enforce any dues on such shares which subsequently accrue,[5] since the former arrangement amounted to an accord and satisfaction of all claim on the part of the company. But if the company thereby materially lessened the remedy of creditors, they might possibly interfere.

[3] In West Philadelphia Canal Co. *v.* Innes, 3 Wharton, 198, it was held, that where the proprietor of shares of the plaintiff's stock transferred them upon the books of the company, after calls were made, but before they fell due, that the transferee was liable for such calls, although he had never received certificates, or given notice of the acceptance of the transfer. And it was held to make no difference, that the transfer was from an original subscriber, without consideration, and that the holder is nevertheless liable for unpaid calls. Mann *v.* Pentz, 2 Sandf. Ch. 258; Hartford & New H. R. *v.* Boorman, 12 Conn. 530; Aylesbury R. *v.* Mount, 5 Scott, New R. 127.

[4] Waterford, Wexford, Wicklow, & D. R. *v.* Pidcock, 18 Eng. L. & Eq. 517. s. c. 17 Jur. 26; s. c. 22 Law J. Rep. (N. S.) Exch. 146; s. c. 8 Exch. 279. Where the company accept a conveyance of shares to themselves, it will exonerate the owner from calls. But a sale to another company of all the effects of the company, will not release the shareholders from calls already made. Plate Glass Insurance Co. *v.* Sunley, 8 El. & Bl. 47.

[5] Miller *v.* Second Jefferson Building Association, 50 Penn. St. 32. And where the company accept another in the place of the original subscriber, the latter is wholly released. Haynes *v.* Palmer, 13 Louis. An. 240.

SECTION IX.

Defences to actions for Calls.

1. *Informality in organization of company insufficient.*
2. *Slight acquiescence estops the party in some cases.*
3, 4. *Default in first payment insufficient.*
5. *Company and subscriber may waive that condition.*
6. *Contract for stock, to be paid in other stock.*
7, 8. *Infancy. Statute of limitations and bankruptcy.*
9. *One commissioner can give no valid assurance as to the route.*
10. *What representations matters of opinion.*

§ 55. 1. It is certainly not competent for a subscriber, when sued for calls, to go, in his defence, into every minute deviation from the express requirements of the charter, in the organization and proceedings of the company. Any member of the association, who intends to hold the company to the observance of those matters which are merely formal, should be watchful, and interpose an effectual barrier to their further progress, at the earliest opportunity, by mandamus, or injunction out of chancery, or other appropriate mode.[1] In cases of this kind often, where vast * expense has been incurred, and important interests are at stake, courts will incline to conclude a member of the association, by the briefest acquiescence, in any such immaterial irregularity, and often, in regard to those, which, if urged in season, might have been regarded as of more serious moment. In one case,[1] *Tindal*, Ch. J., says, in regard to the offer of a plea, that the money sued for, being the amount of a call, was intended for other purposes than those warranted by the act, "It seems to me it was never intended, nor ought it to be allowed, that so general a question as that should be litigated, in the question, whether a call is due from an individual subscriber." And it was held no sufficient ground of enjoining the directors from making calls, that the proceedings had been such as to amount to an abandonment of the enterprise, as it was possible that there were still legal obliga-

[1] The London & Brighton Railw. Co. *v.* Wilson, 6 Bing. N. C. 135. This case decides, that a plea, that the company had made deviations in their line, and that the money sued for was needed only in regard to such deviations, could not be entertained or regarded as a proper inquiry in an action for calls upon shares; and so also of a plea, that fewer shares had been allotted than the act required. Walford, 279; Wight *v.* Shelby Railway, 16 B. Monr. 5.

tions to answer.[2] And where the directors were authorized to limit the number of shares, but could not proceed with the road until two hundred and fifty shares were subscribed, and after that number were taken they resolved to close the books, it was held that this vote was equivalent to a vote fixing the number of shares, and that the company might therefore proceed to make and enforce calls, under the statute, and to collect the deficiency remaining, after the sale of forfeited stock.[3]

2. But where the statute prescribes the terms on which shares may be sold, it must be strictly followed, or the sale will be void, as where the prescribed notice is not given.[4] And it would seem, that the courts are reluctant to admit defences to actions for calls, upon the ground of informality in the proceedings of the company, or even of alleged fraud, where there has been any considerable acquiescence on the part of the shareholder.[5]

* 3. It seems to have been held, in some cases, that a subscriber for stock may defend against an action for calls, upon the ground that he did not pay the amount required by the charter to be paid down at the time of subscription.[6]

4. But it is questionable how far one can be allowed to plead his own non-performance of a condition in discharge of his undertaking. And a different view seems to have obtained to some extent.[7] It has been held the stockholder cannot object, that he has not complied with the charter, after having voted at the election of officers, or otherwise acted as a shareholder.[8] And so also where

[2] Logan *v.* Courtown, 5 Eng. L. & Eq. 171.

[3] Lexington & West Cambridge R. *v.* Chandler, 13 Met. 311.

[4] Portland, Saco, & Portsmouth R. *v.* Graham, 11 Met. 1.

[5] Walford, 278, 279; Cromford & High P. R. *v.* Lacey, 3 Y. & Jer. 80; Mangles *v.* Grand Collier Dock Co., 10 Sim. 519; s. c. 2 Railw. C. 359; Thorpe *v.* Hughes, 3 Mylne & Cr. 742.

[6] Highland Turnp. Co. *v.* McKean, 11 Johns. 98; Jenkins *v.* Union Turnp. Co., 1 Caines's Cas. in Error, 86; Hibernia Turnpike Co. *v.* Henderson, 8 S. & R. 219; Charlotte & C. R. *v.* Blakely, 3 Strob. 245.

[7] Henry *v.* The Vermilion R. 17 Ohio, 187. A similar rule is recognized in Louisiana, in the case of Vicks. S. & Texas Railw. *v.* McKean, 12 La. Ann. 638.

[8] Clark *v.* Monongahela Nav. Co., 10 Watts, 364. Nor can a subscriber, after having transferred his stock to another, thus treating it as a valid security, object, in the trial of a suit against him on the original subscription, that the same was originally invalid, by reason of the non-payment of the sums requisite to give it validity, at the time of making the subscription. Everhart *v.* West Chester & Ph. Railw., 28 Penn. St. 339.

the subscription is made, while defendant held the books of the company and acted as commissioner.[9] And * payment before the books are closed, has been held sufficient to bind the subscriber.[10] So also if the sum have been collected by suit.[11] And a promissory note has been held good payment, where the charter required cash on the first instalment, at the time of subscription.[12] And, by parity of reason, if the subscription binds the subscriber to pay for the stock taken, in conformity to the requisitions of the charter, which is the more generally received notion upon the subject at present, we do not well comprehend why the subscription itself may not be regarded as effectual, to create the subscriber a stockholder, and as much a compliance with the condition to pay, as giving a promissory note. In either case, the company obtain but a right of action for the money, and if the party can be allowed to urge his own default in defence, it is perhaps no compliance with the charter. But upon the ground that, so far as the subscriber is concerned, the company may waive this condition, upon what is equivalent to payment, it ought also to be equally held, that when

And where commissioners were appointed, by an act of the legislature, and were authorized to receive subscriptions for the purpose of constructing a railway, no subscription to be valid unless five dollars was paid upon each share at the time of subscribing; the act providing that when a certain number of shares shall have been so subscribed, and the same certified under the oath of the commissioners to the governor, he should issue letters-patent, incorporating the subscribers, and such as should thereafter subscribe, and this was done, and the company duly organized, it was held:

That the act imposed no restriction upon the corporation after it was organized, in regard to the payment of the five dollars at the time of subscription. That the condition, that subscriptions should not be valid till a certain amount was subscribed, was one which the parties had a right to annex to the contract of subscription, and as such, was valid, and the subscriptions could not be enforced till the condition was performed. Philadelphia & West Chester Railw. *v.* Hickman, 28 Penn. St. 318. See also Black River & Utica Railw. Co. *v.* Clarke, 25 N. Y. 208; H. & P. Plank Road Co. *v.* Bryan, 6 Jones Law, 82; Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491.

[9] Highland Turnp. Co. *v.* McKean, 11 Johns. 98; Grayble *v.* The York & Gettysburg Turnp. Co., 10 Serg. & Rawle, 269. So also if one act as a stockholder in the organization of the company. Greenville & Columbia Railw. *v.* Woodsides, 5 Rich. 145.

[10] Klein *v.* Alton & Sangamon Railw., 13 Ill. 514.

[11] Hall *v.* Selma & Ten. Railw., 6 Alabama, 741.

[12] McRae *v.* Russell, 12 Ired. 224; Selma & Ten. Railw. *v.* Tipton, 5 Alabama, 787; Tracy *v.* Yates, 18 Barb. 152; Greenville & Columbia Railw. *v.* Woodsides, 5 Rich. 145; Mitchell *v.* Rome Railw., 17 Georgia, 574.

the subscriber has obtained such a waiver, for his own case, he shall be estopped to deny, that it was so far a compliance with the charter as to render the contract binding.

5. And upon the other hand, the company having consented to accept the subscriber's promise, instead of money, for the first instalment, cannot defeat his right to be regarded as a stockholder, on account of his not complying with a condition which they have expressly waived. It would seem, that under these circumstances, the immediate parties to the contract could not obtain any advantage over each other, by reason of the waiver, of strict performance of such condition, by mutual consent. But the objection must come properly from some other quarter, either the public, or the other shareholders. And possibly the cases decided upon this subject do not justify any such *relaxation, even between the parties to the immediate contract of subscription. Upon general principles, applicable to the subject, as educed from the law of contracts, we see no objection to the waiver of such a condition on behalf of the company. And if there be any objection upon other grounds, it is not for the benefit of the subscriber.[13]

[13] It has been held that the misstatement of the length of the road, in the articles of association, if there be no fraud; or the lease, or sale, of the franchises of the corporation to another company, which is void; or the neglect to make the whole road, even without legislative sanction, will not exonerate a subscriber from paying calls. Troy & Rutland Railw. *v.* Kerr, 17 Barb. 581. But where a preliminary subscription is required, it must be absolute and not dependent upon conditions. Troy & Boston Railw. *v.* Tibbits, 18 Barb. 297. But a condition that provides for interest, by way of dividends, to paying subscribers, until the full completion of the road, at the expense of subscribers who do not pay, or one that imposes a limitation upon the directors in calling in stock, is void as being against good policy. Ib.

In a case in Kentucky, Wight *v.* Selby Railw., 16 B. Monr. 5 it was held, that a subscription to stock, in a railway, is not rendered invalid by reason of the subscriber's failure to pay a small sum required by the charter to be paid upon each share when he subscribed. *Simpson*, J. "It was their duty to pay it, at the time the stock was subscribed, but they should not be allowed to take advantage of their own wrong, and release themselves from their whole obligation, by a failure to perform part of it." This seems to us a sound view of the subject, and the only one, which is consistent with the general principles of the law of contract, as applicable to the question.

In a more recent case, S. subscribed for $500 of stock in a railway company upon the understanding that the first ten per cent required by law to be paid in cash upon subscribing should be paid by his services in securing subscriptions and right of way. He subsequently presented an account against the com-

*6. An agreement to take stock and pay in the stock of a canal company, and an offer of the canal stock, will not make the party liable to pay money.[14]

pany for services, from which it appeared, that at the date of the subscription the company was indebted to him in an amount greater than the cash payment required, in which account he applied and credited $50 for ten per cent upon his subscription, and $50 for the first call made thereon. The account was allowed by the company, and the balance paid by S. Held, that this was a sufficient compliance with the statute in respect to the payment of the first ten per cent, and made the subscription obligatory upon S. Beach *v.* Smith, 30 N. Y. 116. See also Vicksburg, Sh. and Texas R. Co. *v.* McKean, 12 La. Ann. 638.

In this case it is further held, to be no valid defence to a subscription to the stock of a railway, that it was delivered as an escrow to one of the commissioners appointed to receive subscriptions. It should have been delivered to a third person, to become effectual as an escrow. Such subscribers are presumed to know the conditions of the charter under which the subscription is taken, and that if they desire to make their subscriptions conditional, it must be so expressed in the written terms of subscription, and that it is not competent to deliver a written contract, as an escrow, to the party himself. For, to admit oral evidence of such a condition, in the delivery of a written contract to the party benefited thereby, is a practical abandonment of the rule of evidence, that such testimony is incompetent to control a written contract.

It has been held, that it is not competent for the commissioners to accept the check of a subscriber in payment of the amount required by the charter to be paid at the time of subscription, but that specie, or its equivalent, must be demanded. Crocker *v.* Crane, 21 Wend. 211; s. c. 2 Am. Railw. C. 484. But this is at variance with the general course of decision, unless in regard to banks, where the charter expressly requires the payment to be in specie. King *v.* Elliott, 5 Sm. & M. 428.

And where the charter of a railway company was made to depend upon the condition of the company expending $50,000 in two years, and completing the road in four years from the date of the grant, and the company having failed in the first part of the condition, but having obtained subscriptions to their stock to a large amount, and the defendant being one of the subscribers, the company having organized, and chosen directors, the defendant being one of them, the legislature revived and renewed the charter, and extended the time for the performance of such condition; and subsequently to this, a meeting of the stockholders was called by the commissioners, in which the defendant took part, additional directors being appointed, and at a meeting of the directors, the defendant being present, a call was made upon the subscriptions, it was held that this amounted to an acceptance of the renewal of the charter, and was such a recognition of the former organization of the company, as to amount to a sufficient organization under the new charter, and the defendant was held to be estopped by his conduct from denying the regularity of these proceedings, and to be lia-

[14] Swatara Railw. *v.* Brune, 6 Gill, 41.

7. Infancy is a good defence, if the person be an infant at the * time of suit brought, or if he repudiate the subscription within a reasonable time after coming of full age.[15] By the general provisions of the English statute, all persons may become shareholders, there being no exception, in terms, in favor of infants; and if one be registered while an infant, and suffer his name to remain on the registry after he becomes of full age, he is liable for calls, whether made while he was an infant, or afterwards.[16] * It seems to be

ble to pay calls on his stock. Danbury & Norwalk Railw. *v.* Wilson, 22 Conn. 435.

Where the general railway law, under which a company is organized, requires a payment of ten per cent upon each subscription before the filing of the articles of association with the secretary of state, it is sufficient, if the cash payments, by whomsoever made, amount in the aggregate to ten per cent upon $1,000 for each mile of the road proposed to be constructed. Lake Ontario, A. & New York Railw. *v.* Mason, 16 N. Y. 451. And the subscription to stock before the incorporation of the company, is obligatory upon the company, although the subscriber make no cash payment whatever, the right of membership thereby acquired being a sufficient consideration for the subscription. Ib. *Ante*, § 51, n. 1.

[15] North W. Railw. *v.* McMichael, 5 Exch. 114; Birkenhead Railw. *v.* Pilcher, 5 Exch. 121; s. c. 6 Railw. C. 622. The party should also deny having derived any advantage from the shares, or offer to restore them. N. W. Railw. *v.* McMichael, 5 Exch. 114; Leeds & T. Railw. *v.* Fearnley, 4 Exch. 26; Dublin & W. Railw. *v.* Black, 16 Eng. L. & Eq. 556; s. c. 8 Exch. 181. See also Deposit & G. Life Assur. Co. *v.* Ayscough, 6 E. & B. 761.

[16] Cork & Bandon Railw. *v.* Cazenove, 10 Q. B. 935. But it would seem that infants are not comprehended, by the general terms of the English statute. Birkenhead, &c. Railw. *v.* Pilcher, *supra*.

It has been said that an infant shareholder, or subscriber, in a railway company, is in the same situation as in regard to real estate, or any other valuable property, which he may have purchased and received a conveyance of. If, upon coming of age, he disclaim the contract, and restore the thing, with all advantages arising from it, his liability is terminated, and he cannot be made liable for calls. *Parke*, B., in Birkenhead & C. Railw. *v.* Pilcher, 6 Railw. C. 625. The infant is not regarded as merely assuming an executory undertaking, which is void on the face of it, but in the nature of a purchaser of what is presumed to be valuable to him.

Where, therefore, there is nothing but the simple fact of infancy pleaded to an action for calls, it is insufficient. Ib. It would seem that the plea should contain averments, showing the disadvantageous nature of the contract to the infant, his repudiation of the contract, and restitution of all benefits derived under it, on coming of full age, or that he is still an infant, and is ready to do so, upon coming of full age. McMichael *v.* London & N. W. Railw., 5 Exch. 855; s. c. 6 Railw. C. 618; Birkenhead & C. Railw. *v.* Pilcher, 5 Exch. 121;

doubted by the English courts whether the statute of limitations as to simple contracts applies to an action for calls, that being a liability imposed by statute, and so to be regarded as a specialty.[17]

8. Bankruptcy is a good defence for calls made after the certificate of bankruptcy issues, but to meet liabilities incurred before.[18]

9. One of the commissioners appointed with five others at a given place to take subscriptions to a railway, has no right in doing so to give any assurance as to the line of location that would be adopted by the company.[19]

10. And where the subscription is made upon condition of the road going in a particular route, the plaintiff may show that the defendant owned land upon that route. And any representations of the agents taking the subscriptions, as to the ultimate value of the stock, will be regarded as matters of opinion merely upon which the subscriber had no right to rely.[20]

s. c. 6 Railw. C. 564, 662. The mere plea of infancy is an immaterial plea, and issue being joined thereon, and found for defendant, the plaintiff is still entitled to judgment *veredicto non obstante*. Ib.

The plea must show that the infant avoids the contract of subscription, on his coming of full age. Leeds and Thirsk Railw. *v.* Fearnley, 5 Railw. C. 644; s. c. 4 Exch. 26. And the appearance by attorney is not equivalent to an averment that the defendant is of full age. Ib.

But where the plea alleged, that the defendant became the holder of shares, by reason of his having contracted and subscribed for them, and not otherwise; and that at the time of his so contracting or subscribing, and also at the time of making the calls, he was an infant; and that while he was an infant he repudiated the contract and subscription, and gave notice to the plaintiffs that he held the shares at their disposal; it was held a good *prima facie* bar; and that if the defendant, after he came of full age, disaffirmed his repudiation, or if he become liable, by enjoyment of the profits, those facts should be replied. Newry & Enniskillen Railw. *v.* Coombe, 3 Exch. 565; s. c. 5 Railw. C. 633.

Where shares were sold to an infant, and were duly transferred to him, on the declaration of the vendor that he was of full age, and the father of such infant, by a deed, reciting that he had purchased on behalf of the son, and covenanting that he, on coming of age, would execute the deed, and pay all calls, and that the father would indemnify the company against all costs, by reason of the son being an infant, it was held that the father was a contributory. *Ex parte* Reaveley, 1 De G. & S. 550. See also Stikeman *v.* Dawson, 4 Railw. C. 585; s. c. 1 De G. & S. 90.

[17] Cork & B. Railw. *v.* Goode, 13 C. B. 618; s. c. 24 Eng. L. & Eq. 245.

[18] Chapple's case, 17 Eng. L. & Eq. 516; s. c. 5 De G. & Sm. 400.

[19] North Carolina Railw. *v.* Leach, 4 Jones Law, 340.

[20] Vawter *v.* Ohio & Miss. R. Co., 14 Ind. 174.

*SECTION X.

Fundamental alteration of Charter.

1. *Will release the subscribers to stock.*
2. *Railway company cannot purchase steamboats.*
3, 7. *Majority may bind company to alterations, not fundamental.*
4. *Directors cannot use the funds for purposes foreign to the organization.*
5, 9. *But where the legislature or the directors make legal alterations in the charter, or the location of the road, it will not release subscribers.*
6. *But if subscriptions are made upon condition of a particular location, it must be complied with.*
8, 9. *Consideration of subscription, being location of road, must be substantially performed.*
10. *Express conditions must be performed.*
11. *How far alterations may be made without releasing subscribers.*
12. *It may be done where such power is reserved in the charter.*
13. *Personal representative liable to same extent as subscriber.*
14. *Money subscriptions not released by subsequent ones in land.*
15. *Corporation cannot emigrate into another state even by legislative permission.*

§ 56. 1. There can be no doubt, that subscribers to the stock of a railway company are released from their obligation to pay calls by a fundamental alteration of the charter. This is so undeniable, and so familiar a principle, in the general law of partnership, as not to require confirmation here. We shall briefly advert to the points decided in some of the more prominent cases, in regard to incorporated companies. The general doctrine applicable to the subject is very perspicuously stated by *Woodbury*, J., in an early case in New Hampshire.[1] "Every owner of shares expects, and stipulates, with the other owners, as a corporate body, to pay them his proportion of the expenses, which a majority may please to incur, in the prosecution of the particular objects of the corporation. To make a valid change in this special contract, as in any other, the consent of both parties is indispensable."

2. In an important case[2] where it appeared that after calls fell

[1] Union Locks & Canal Co. *v.* Towne, 1 N. Hamp. 44. But where the original charter or preliminary contract provides for modifications, the subscribers are still bound by all such as come fairly within the power. Cork & Youghal Railway *v.* Patterson, 18 C. B. 414; s. c. 37 Eng. L. & Eq. 398; *post*, § 254, n. 6; Nixon *v.* Brownlow, 30 Law Times, 74; s. c. 3 H. & N. 686.

[2] Hartford & New Haven Railw. *v.* Croswell, 5 Hill, 383. In Winter *v.* Muscogee Railw., 11 Ga. 438, the charter was so altered as to allow the road to stop short of its original terminus and pass in a different route, and subscribers to the stock were held thereby released, unless they assented to the altera-

* due, but before suit brought, the company, being incorporated for the purpose of building a railway, procured an additional special act, by which they were authorized to purchase steamboats: it was held, that a subscriber, not having assented to the alteration, was absolved from his obligation to pay calls.

3. In a very elaborate opinion of *Bennett*, Chancellor,[3] upon this subject, the following propositions are established: —

tion. But where one gave his note for the first instalment, and his stock was forfeited, for non-payment of calls, he is not relieved from payment of his note by a material alteration of the charter. Mitchell *v.* Rome Railw., 17 Ga. 574. But any modification of the charter which affects merely the detail of proceedings in making and enforcing calls will not release subscribers to the stock, when such modification has been accepted by the corporation. Illinois River Railw. Co. *v.* Beers, 27 Illinois, 185.

[3] Stevens *v.* Rutland & Burlington Railw., 29 Vt. 545. The opinion at length is a valuable commentary upon this important subject. In this opinion the learned chancellor maintains, —

1. That by the implied contract, among the proprietors of all joint-stock undertakings, there is a tacit inhibition against applying the funds, for any purpose beside the general scope of the original enterprise, and that this applies to corporations, equally with commercial partnerships. Natusch *v.* Irving, Gow on Part. App. 567. And that courts of equity will restrain a corporation from thus misapplying its funds by injunction. Ware *v.* Grand Junction Water Co., 2 Russell & Mylne, 461. And that this will be done upon the application of those shareholders who dissent. And in some instances will restrain the company from applying to the legislature for an enlargement of their powers. Cunliff *v.* Manchester & Bolton Canal Co., 13 Eng. Cond. Ch. 131; s. c. 2 Russell & My. 470, 475; Livingston *v.* Lynch, 4 Johns. Ch. 573.

2. That if the proposed alteration is only *auxiliary* to the main design of the original organization, it will not be enjoined; but if it be *fundamental*, it will be. That a variation in the course of a turnpike-road has been regarded as a *fundamental* alteration in the charter, Middlesex Turnpike Co. *v.* Lock, 8 Mass. 268, and, as such, to exonerate subscribers to the stock of the original company. [But Irvine *v.* The Turnpike Co., 2 Penn. 466, holds it will not have that effect.] And that in such cases it will make no difference, that the subscriber was a director in the company, and joined in the petition to the legislature for the alteration. Same *v.* Swann, 10 Mass. 384; Same *v.* Walker, 10 Mass. 390.

The learned chancellor regarded the case of Revere *v.* The Boston Copper Co., which was cited, by the counsel for the defendants, as making rather against his purpose. 15 Pick. 351, 363. The case of Hartford & New Haven Railw. *v.* Croswell, 5 Hill, 383, 385, is relied upon, as having defined a fundamental alteration of the charter of a corporation, in the language of Ch. J. *Nelson*, to be one "by which a new and different business is superadded to that originally contemplated."

3. No one can be made a member of a joint-stock corporation without his con-

*1. That a majority of a joint-stock company cannot use the joint property except within the legitimate scope of their charter,

sent. Ellis v. Marshall, 2 Mass. 269; nor can he be compelled to remain a member of such company after its fundamental organization is altered by act of the legislature. But an act of the legislature allowing a navigation company to raise their dam above the point of the original charter limit, is in furtherance of the original grant, and will not exonerate the subscribers. Gray v. Monongahela Navigation Co., 2 Watts & Serg. 156. And an alteration in the number of votes, to be cast by stockholders, if it impair the obligation of the contract resulting from the grant, is void, and so cannot release the subscribers. Osborn v. Bank of United States, 9 Wheat. 738. But any statute which has the force to effect an alteration in the structure of the corporation, will release subscribers. Indiana & Ebensburg Turnp. Co. v. Phillips, 2 Penn. 184.

4. That statutes extending the term of a corporation, for closing up its business, on petition of the directors, have no proper bearing upon the question. Lincoln & K. Bank v. Richardson, 1 Greenl. 79; Foster v. The Essex Bank, 16 Mass. 245.

5. That it is no fatal objection to the application that it is made at the instigation of a rival enterprise. Coleman v. Eastern Counties Railw., 10 Beavan, 1. [But see *ante*, § 20.]

6. That an existing railway company will be restrained in equity from applying its present funds to extend their line, or improve the navigation of a river connected with their line, or for obtaining an act of the legislature, authorizing them to do so. Munt v. Shrewsbury & Chester Railw., 13 Beav. 1; s. c. 3 Eng. L. & Eq. 144; Coleman v. Eastern Co.'s Railw., 10 Beavan, 1.

7. That members of an existing company cannot be compelled to surrender their interest to the company, or to others, and retire, in order to enable them to change the character of the enterprise. Lord *Eldon*, Chancellor, in Natusch v. Irving, *supra*.

8. In favor of the importance and necessity of having this constant supervision exercised over joint-stock companies, in order to keep them within the range of their legitimate functions, the learned chancellor thus concludes: —

"Where it is clearly shown that a corporation is about to exceed its powers, and to apply their funds or credit to some object beyond their authority, it would, if the purpose of the corporation was carried out, constitute a breach of trust; a court of equity cannot refuse to give relief by injunction. Agar v. The Regent's Canal Co., Cooper's Eq. 77; The River Dun Navigation Co. v. North Midland Railw. Co., 1 Railw. C. 153, 154. The last case was before the Lord Chancellor, and he uses this language: 'If these companies go beyond the powers which the legislature has given them, and, in a mistaken exercise of those powers, interfere with the property of individuals, this court *is bound* to interfere; and that was Lord *Eldon's* ground in Agar v. The Regent's Canal Co.' The lord chancellor further adds: 'I am not at liberty (even if I were in the least disposed, which I am not) to withhold the jurisdiction of this court, as exercised in the case of Agar v. The Regent's Canal Co.' In that case Lord *Eldon* proceeded simply on the ground that it was necessary to exercise this jurisdiction of chancery, for the purpose of keeping these companies within the powers

* and if they attempt to do so equity will restrain them. 2. The shareholders are bound by such modifications of the charter as are not fundamental, but merely auxiliary to the main design. 3. If a majority of a railway company obtain an alteration of their charter, which is fundamental, as to enable them to build an extension of their road, any shareholder who has not assented * to the act, may restrain the company, by injunction, from applying the funds of the original organization to the extension.

4. In a late case before the Master of the Rolls,[4] it was held

which the acts give them. And it is added: 'And a most wholesome exercise of the jurisdiction it is; because, great as the powers necessarily are, to enable the companies to carry into effect works of this magnitude, it would be most prejudicial to the interests of all persons with whose property they interfere, if there was not a jurisdiction continually open, and ready to exercise its power to keep them within their legitimate limits.'

"The injunction must, therefore, be allowed; but only so far as to restrain the defendants, until the further order of the chancellor, from applying the present funds of the corporation, or their income from their present road, either directly or indirectly, to the purpose of building said extension in said road, or to pay land damages and other expenses which may be contingent upon the building of it: and also from using or pledging, directly or indirectly, the credit of the corporation in effecting the object of the extension; and at the same time, the company will be left at liberty to build the extension with any new funds which they may see fit to obtain for that specific object." See also Gifford *v.* New Jersey Railw., 2 Stockton's Ch. 171, where this subject is examined somewhat at length by the chancellor, and the conclusion arrived at, that it is competent for a court of equity to interfere in the management and application of the funds of a corporation, at the instance of a single stockholder; that the legislature may give additional power from time to time to corporations, and that such acts are binding, unless they conflict with vested rights, or impair the obligation of contracts. That a stockholder in an existing corporation has a vested right in any exclusive privilege of the corporation which tends to enhance the value of its stock, and that he would not be bound by any act of the legislature tending to produce such effect, without his consent; but that such consent will be inferred from long acquiescence, which is equivalent to express consent. In Scofield *v.* School District, 27 Conn. 499, it was held by a divided court, that one inhabitant of a school district might obtain an injunction against the corporation denying them the power to use their school-house for the purposes of religious meetings and Sunday schools, which is certainly carrying the doctrine to the very verge of absurdity. *Post*, § 174, n. 7.

[4] Colman *v.* Eastern Counties Railw., 10 Beav. 1; s. c. 4 Railw. C. 513. See also Munt *v.* Shrewsbury & Chester Railw., 13 Beav. 1; s. c. 3 Eng. L. & Eq. 144; East Anglian Railw. *v.* Eastern Counties Railw., 11 C. B. 775; s. c. 7 Eng. L. & Eq. 505; MacGregor *v.* Deal & Dover Railw., 18 Q. B. 618; s. c. 16 Eng. L. & Eq. 180; Danbury & Norwalk Railw. *v.* Wilson, 22 Conn. 435; Mill-Dam Co. *v.* Dane, 30 Maine, 347; *post*, § 235; Winter *v.* Mus-

that directors have no right to enter into or to pledge the funds of the company in support of any project not pointed out by their act, although such project may tend to increase the traffic upon the railway, and may be assented to by the majority of the shareholders, and the object of such project may not be against public policy. And that acquiescence by shareholders in a project for ever so long time, affords no presumption of its legality. And in a late case in this country it is held, that the subscriber having acted as director of the corporation, and as such having participated in the proceedings to effect the alteration, will not make him liable for calls, upon his original subscription.[5]

5. But it is no defence to an action for calls, that the directors have altered the location of the road, if by the charter they had the discretion to do so.[6] And if the charter contain a provision that the legislature may alter or amend the same, the exercise of this power will not absolve the shareholders from their liability to pay calls.[7] And all subscriptions to stocks, and all contracts * for the

cogee Railw., 11 Ga. 438; Hamilton Plank Road *v.* Rice, 7 Barb. 157; Commonwealth *v.* Cullen, 1 Harris, 133; 3 Woodbury & Minot, 105.

[5] Macedon Plank Road Co. *v.* Lapham, 18 Barb. 312. But see Greenville & Columbia Railw. *v.* Coleman, 5 Rich. 118.

[6] Colvin *v.* The Turnpike Co., 2 Carter, 511; id. 656.

Nor is it a defence to an action for calls, that the name of the company, or the length and termini of the road, have been materially altered. Del. & Atlantic Railw. *v.* Irick, 3 Zab. 321.

[7] Northern Railw. *v.* Miller, 10 Barb. 260; Pacific Railw. *v.* Renshaw, 18 Missouri, 210. And where a subscription is made to the capital stock of a railway, while an act of the legislature exists, allowing the consolidation of such company with another, the fact that such consolidation is subsequently made affords no ground for avoiding the subscription. Bish *v.* Johnson, 21 Ind. 299. And if, from the articles of association of the company, it is obvious that consolidation with another company was one of the leading purposes of the incorporation, the fact of such consolidation, after the date of a subscription, will be no defence against its enforcement, even when the statute authorizing the consolidation is subsequent to the date of the subscription. Hanna *v.* Cin. & F. W. Railw., 20 Ind. 30. The consolidation of two corporations does not effect the dissolution of either, so as to work the abatement of pending actions. Baltimore & Susq. Railw. *v.* Musselman, 2 Grant Cas. 348. But see McMahan *v.* Morrison, 16 Ind. 172, *contra*. For many purposes the liabilities of the original companies remain, as before the consolidation. Central Railw. Co. *v.* Bunn, 3 Stockt. Ch. 336. It is here decided, that where the original company and a new company formed by the mortgagees after sale of the road bear the same name and have the same president, a suit to enforce a claim contracted before the sale, served upon the president, cannot go to judgment against the new company, nor

purchase of stock, to be delivered at a future day, must be understood to be made subject to the exercise of all the legal powers of the directors and of the legislature, and an illegal exercise of power by either will, it has sometimes been said, bind no one, and should exonerate no one from his just obligations.[8]

6. But where subscriptions are made upon the express condition that the road shall go in a particular place, the performance of such condition is commonly regarded as indispensable to the liability of the subscribers, the same as in other contracts.[9] But an alteration in the line of the road, which does not affect the interest of the subscriber, will not absolve him from his subscription.[10]

And when the subscription was made upon condition that the road be located upon a given line, and providing that such * location should be sufficiently evinced by an order of the board of directors accepting such subscription upon the condition named, it was held sufficient to bind the subscriber, that the road had been in fact located and built upon the line designated, and that this was known to him, although there had been no formal action of the board accepting the subscription.[11]

7. And an alteration in the charter, which consists only of an increase of the corporate powers, or of a different organization of the corporate body, leaving it with lawful power to execute, what

will a court of equity allow a general judgment, at law, to be taken. The plaintiff must elect to take judgment, in terms, against the original company. This seems to be a very judicious course, but one for which courts of equity will afford no precedent. The order should have been made, most obviously, in the court of law.

[8] Irvin *v.* Turnpike Co., 2 Penn. 466; Conn. & Pas. Rivers Railw. *v* Bailey, 24 Vt. 479; Faulkner *v.* Hebard, 26 Vt. 452; Fry's Exr. *v.* Lex. & Big S. Railw., 2 Met. (Ky.) 314.

[9] See cases under notes 2 & 3, *supra*; and also Railsback *v.* Liberty & Abington Turnp. Co., 2 Carter (Ind.) 656. And in Kenosha, Rockford, and Rock Island R. Co. *v.* Marsh, 17 Wiscons. 13, it was held, that where the legislature had the general power to repeal or alter acts of incorporation, and accordingly allowed an existing company, chartered to carry a railway over a given line, and whose subscriptions had been taken with that view, to change their route very essentially, the subscribers were thereby released from their obligation to pay calls.

[10] Banet *v.* Alton & Sangamon Railw., 13 Ill. 504; Danbury & Norwalk Railw. *v.* Wilson, 22 Conn. 435.

[11] Moore *v.* New Albany & Salem Railw. Co., 15 Ind. 78.

may be regarded as substantially the original object of its creation, will not exonerate subscribers to the stock of the company.[12] So too where the general laws of the state provide that all acts of incorporation may be altered, amended, or repealed by the legislature, it is no defence to a subscription for stock, that subsequently the legislature increased the liability of the stockholders.[13]

8. And notwithstanding much apparent conflict in the cases upon this subject, it will be found to be the general result of the best considered cases, that the alteration, either in the charter of the company, or the line of the road, to exonerate the subscriber for stock, must be one which removes the prevailing motive for the subscription, or else materially and fundamentally alters the responsibilities and duties of the company, and in a manner not * provided for, or contemplated, either in the charter itself or the general laws of the state.[14]

[12] Pacific Railw. *v.* Hughs, 22 Missouri, 291; Peoria & Oquawka Railw. *v.* Elting, 17 Ill. 429. In Everhart *v.* West Chester and Philadelphia Railw., 28 Penn. St. 339, the subscribers for stock were held not released by such a change in the charter of the company as empowered them to issue preferred stock, to enable them to raise the means of making and equipping the road in the manner originally contemplated. It was considered that such an amendment of the charter was merely ancillary to the main design, and might be accepted by a majority of the stockholders and thus become binding upon all; that it is implied in every subscription for the stock in a railway company, that they may resort to the ordinary and legal means for accomplishing the object proposed by the charter.

It is here said, that an alteration of the charter, which superadds an entirely new enterprise, will release subscriptions to the stock. See also Fry's Exr. *v.* Lex. & Big. S. Railw., 2 Met. (Ky.) 314.

[13] South Bay Meadow Dam Co. *v.* Gray, 30 Maine, 547; Buffalo & New Y. City Railw. *v.* Dudley, 4 Kernan, 336.

[14] But in the Greenville & Columbia Railw. *v.* Coleman, 5 Rich. 118, where the charter gave the stockholders the right to designate the route they preferred, and if any stockholder was dissatisfied with the route selected, the right to withdraw his subscription, "provided, at the time of subscribing, he designated the route he desires to be selected," and one subscribed without designating the route he preferred, under an assurance from one, who was soliciting subscriptions, that he might pay $5 on $100, and be free from liability as to the residue, it was held, that he was liable, as a stockholder, without the right to withdraw. But some of the American cases do not seem to recognize any alteration in the route of the road, even one which renders it practically a different enterprise, as a defence to subscriptions for stock. Central Plank Road Co. *v.* Clemens, 16 Mo. 359. But in Champion *v.* Memphis & Charleston R. Co.,

9. Where a town or city stipulate with a railway company for adequate consideration to terminate their route, at a point beneficial to such town or city, this will not preclude the company from forming connections with other routes, by land or water, at the same point.[15]

10. And where the plaintiff made it a condition of his subscription to the capital stock of a railway, that it should pass through some portion of the counties of Monroe and Ontario, and the road was so located as not to touch either of those counties, it was held, that he was released from his subscription.[16]

35 Miss. 692, it was decided, that when the route on which a railroad is to be located is prescribed by its charter, a subsequent material deviation from the route therein prescribed will release the stockholders who had previously subscribed, and who did not consent to the deviation.

It is not every deviation in the location of a railroad from the route prescribed in the charter which will release non-assenting stockholders, and it is impracticable to lay down any general rule to serve as a guide in determining the question of the materiality of the deviation. Each case must be determined by its own particular circumstances; and hence, where a stockholder resists the collection of his subscription for stock, upon the ground of a deviation from the route prescribed by the charter, he ought to set out in his plea such deviation clearly and distinctly, so that its materiality can be determined.

A plea by a stockholder in a railway company, setting up a deviation from the route prescribed by the charter as a defence to a suit, to enforce his subscription for stock, which describes the deviation as follows: "That said road was not constructed in accordance with the requirements of the charter," is bad for uncertainty.

[15] Baltimore & Ohio Railw. *v.* Wheeling, 13 Grattan, 40.

[16] Buffalo, Corning, & N. Y. Railw. *v.* Pottle, 23 Barb. 21. And where a party, who was not a stockholder, executed a promissory note to a railway company, promising to pay them $200, in consideration that they would locate their depot in block 94, in Indianapolis, to be paid when the company should commence the construction of their depot, and the line of the company's road extended from Terre Haute, through Indianapolis, to Richmond, a distance of 150 miles, at the date of the note, but by subsequent act of the legislature, was divided, at Indianapolis, and the portion between Indianapolis and Richmond, being about one-half, was given to another company, which built their depot in another portion of Indianapolis, the former company only constructing a freight depot, on block 94, it was

Held, that by the alteration of the charter of the Terre Haute and Richmond Railway Company, and the acceptance thereof by the company, the company became substantially a different corporation, and were unable to perform the condition upon which the note was to become payable, and that the circumstance, that the depot located on block 94 was of some advantage to the plaintiff in error, was of no importance.

But an amalgamation of two railway companies, effected subsequent to the

*11. Where the articles of incorporation of a railway company restrict calls upon subscriptions to twenty per cent in one year, *and ten per cent at one time, and also provide that said articles may at any time be changed by the unanimous consent of the board of directors, it is competent for the board to so change the mode of making calls, as to require them to be made not exceeding five per cent a month, and such change in the articles as to the mode of making calls will be binding upon previous subscriptions.[17]

12. And in a somewhat recent case[18] it was held, where the legislature had reserved, in the charter of a corporation, the power to modify or repeal the same, that members of the corporation hold their shares subject to such liability as may attach in consequence

date of a subscription to the stock of one of them, but which had been authorized by an act of the legislature prior to that time, will not release the subscription. And it is of no importance, that the consolidation took place without the knowledge of the subscriber. Sparrow *v.* Evansville & Crawfordsville Railway, 7 Porter (Ind.), 369.

The subscription of stock to an amalgamated company is a sufficient consent to the amalgamation. And such consent by the stockholders seems to be regarded as requisite to the power of the legislature to amalgamate existing railway companies. Fisher *v.* Evansville & Crawfordsville Railway, 7 Porter (Ind.), 407. Where one of the stockholders of a railway company agreed with the company to subscribe and take a given number of shares in the capital stock, if the company would adopt a particular route, there being two under consideration, and the company in consequence adopted that route, it was held that the party was bound by his contract to take and pay for the number of shares he had thus agreed to subscribe. Spartanburgh & Union Railw. *v.* De Graffenreid, 12 Rich. 675. But where in such a case, by a subsequent amendment of the charter, the route in consideration of which the subscription was made was abandoned, and another adopted, the subscriptions were held to be thereby avoided. Hester *v.* Memphis & Charleston Railw., 32 Miss. 378. But one who makes an absolute subscription to a railway, cannot avoid it by proving a parol condition upon which it was made, not complied with, unless he show that fraud also existed in the contract. North Carolina Railw. *v.* Leach, 4 Jones Law, 340. One of the commissioners, there being five, has no power to give any binding assurance as to the location. Ib.

If the party have any remedy in such case by mandamus or injunction, where the directors locate the road differently from the requirements of the charter, and omit to resort to it at once, he is bound by such acquiescence. Ib.

[17] Burlington & Mo. River Railw. *v.* White, 5 Clarke, 409.

[18] Bailey *v.* Hollister, 26 N. Y. 112. But it is here suggested, that after the charter of a corporation has expired, there is no power to revive it, by any agency less than the consent of all the corporators.

of the extension or renewal of the charter, although obtained without their consent.

13. And it was also here considered, that the estate of an intestate shareholder succeeded to the personal responsibility of the deceased in the corporation, and this will render the administrator liable for the debts of the corporation contracted after the decease of the intestate, to the same extent the deceased would have been if still living; and that the stockholder or his personal representative can only relieve himself from responsibility by a *bona fide* and absolute sale of the stock.

14. A railway company do not release money-subscriptions by accepting large land-subscriptions at a subsequent date.[19]

15. And a railway corporation, chartered in one state to construct and operate a road within that state, cannot emigrate into another state, even where that state had given legislative permission to act therein. And after having transferred its business office into another state, where it performed all its corporate functions, it is not competent for it to make valid calls in such other state upon subscriptions taken in the place of its creation.[20]

* SECTION XI.

Subscriptions before date of Charter.

1. *Subscriptions before date of charter good.*
2. *Subscriptions upon condition not performed.*
n. 4. *Where the condition is performed.*
3. *Subscription by a stranger to induce company to build station.*
4. *Subscription on condition, an offer merely.*
5. *Conditional subscription takes effect upon performance of the condition.*
6. *How far commissioners may annex conditions to subscription.*
7. *Such conditions void, if fraudulent as to company.*

§ 57. 1. It has been held that one who subscribes before the act of incorporation is obtained, and, by parity of reason, before the organization of the company, although after the act of incorporation, is holden to the corporation, to pay the amount of his subscription. And a suit is sustainable, in their name, upon any securities given in the name of the association, or of the commissioners for organizing the company, and equally upon the sub-

[19] Hornaday *v.* Ind. & Ill. Central Railw., 9 Ind. 263.
[20] Aspinwall *v.* Ohio & Mississippi Railw. Co., 20 Ind. 492.

scription itself in the name of the corporation.[1] And it is not competent for one, who is a subscriber to such an enterprise, to withdraw his name while the act of incorporation is going through the legislature.[2]

2. But an informal subscription, which is never carried through the steps necessary to constitute the subscribers members of the company, has been held inoperative, as no * compliance with the act.[3] And a subscription, upon condition that the road is built through certain specified localities, the company at the time not assuming to build the road through those places, will not, it has been held, make the subscriber liable to an action for calls, even if the condition be ultimately performed by the company.[4] But

[1] Kidwelly Canal Co. *v.* Raby, 2 Price, Exch. 93; Selma & Tenn. Railw. Co. *v.* Tipton, 5 Alabama, 786; Vermont Central Railw. Co. *v.* Clayes, 21 Vt. 30; Delaware and Atlantic Railw. *v.* Irick, 3 Zab. 321.

In the last case, the very point ruled, is, whether the company were proper plaintiffs, in an action to enforce calls against one who signed the commissioners' paper for shares before the organization. Held, the commissioners were to be regarded as agents of the company. See also Troy & Boston Railw. *v.* Tibbets, 18 Barb. 297; Stanton *v.* Wilson, 2 Hill, 153; Troy & Boston Railw. *v.* Warren, 18 Barb. 310; Hamilton Plank Road Co. *v.* Rice, 7 Barb. 157; Stewart *v.* Hamilton College, 2 Denio, 417; Danbury & N. Railw. *v.* Wilson, 22 Conn. 435. So also a subscription to the capital stock of a railway, made on the solicitation of one who was not a commissioner, but who felt an interest in the road, and volunteered to take up subscriptions to its stock, was held valid in a very recent case. Railway Company *v.* Rodrigues, 10 Rich. (S. C.) 278.

[2] Kidwelly Canal Co. *v.* Raby, 2 Price, Exch. 93; Brownlee *v.* Ohio, Ind. & Ill. Railw. Co., 18 Ind. 68.

[3] Troy & Boston Railw. *v.* Tibbits, 18 Barb. 298.

[4] Macedon & Bristol Plank R. *v.* Lapham, 18 Barb. 313. In this case it seems to have been decided that such a subscription is not good, as a subscription for stock, not upon the ground mainly that it was conditional and so against public policy, or from want of mutuality, but upon the ground of an extension of the road and an increase of the capital stock. But see also Utica & Sch. Railw. *v.* Brinckerhoff, 21 Wend. 139, where such a decision is made. But the current of authority, both English and American, is almost exclusively in a counter direction. It is impossible, upon any fair ground of construction, to consider such a subscription, where the road is located in a given line, in faith, and in fulfilment of the condition, as a mere offer, unaccepted. It is a proffer, a proposal, accepted, and as much binding as any other possible consideration. But if it were to be regarded as a mere offer, standing open, upon every principle of reason and law, when accepted, according to its terms, it is binding as a contract and no longer revocable, and the only case, of much weight, which ever attempted to maintain the opposite view, that of Cooke *v.* Oxley, 3 T. R.

one might perhaps raise some question, * whether, upon general principles, such a subscription ought not to be binding, as a

653, has been regarded as overruled upon that point for many years. See L'Amoreux *v.* Gould, 3 Selden, 349; Conn. & Passumpsic Rivers Railw. *v.* Bailey, 24 Vt. 478.

In the case of Boston & Maine Railw. *v.* Bartlett, 3 Cush. 224, the subject is very justly illustrated by Mr. Justice *Fletcher:* "In the present case, though the writing signed by the defendants was but an offer, and an offer which might be revoked, yet, while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance; and, during the whole of that time, it was an offer every instant, but as soon as it was accepted it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendants is most surely in the right, in saying that the writing when made was without consideration, and did not, therefore, form a contract. It was then but an offer to contract; and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance.

"But when the offer was accepted, the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting in order to perfect a valid contract on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted, and the bargain completed at once.

"A different doctrine, however, prevails in France, and Scotland, and Holland. It is there held, that whenever an offer is made, granting to a party a certain time within which he is to be entitled to decide whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time. There are certainly very strong reasons in support of this doctrine. Highly respectable authors regard it as inconsistent with the plain principles of equity, that a person who has been induced to rely on such an engagement should have no remedy in case of disappointment. But, whether wisely and equitably or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached.

"The authorities, both English and American, in support of this view of the subject, are very numerous and decisive; but it is not deemed to be needful or expedient to refer particularly to them, as they are collected and commented on in several reports as well as in the text-books. The case of Cooke *v.* Oxley, 3 T. R. 653, in which a different doctrine was held, has occasioned considerable discussion, and, in one or two instances, has probably influenced the decision. That case has been supposed to be inaccurately reported, and that in fact there was in that case no acceptance. But, however that may be, if the case has not been directly overruled, it has certainly in later cases been entirely disregarded, and cannot now be considered as of any authority.

"As, therefore, in the present case, the bill sets out a proposal in writing, and an acceptance and an offer to perform, on the part of the plaintiffs, within

standing offer accepted and acted upon by the company, which is sufficient consideration for the promise.[5]

3. And even where a mere stranger subscribes to a railway company, with others, in order to induce the company to build a station house and improve the roads to it, and to aid the company in such work, and the company perform the condition on their part, the subscription is upon sufficient consideration, and may be enforced against the subscribers.[6]

4. And a subscription to the stock of a railway company, conditioned to be void unless the company would accept the conveyance of a specific tract of land at a given price, is a mere offer to invest the land in shares, and until accepted by the company is of no validity.[7]

* 5. A subscription upon the performance of a condition becomes absolute upon such performance. The subscription takes effect from that time; the first instalment required to be paid at the time of subscription then becomes due and payable, and the subscriber liable to assessment for the remainder.[8]

6. There is a recent case[9] wherein propositions are declared which seem at variance with the general rule, that subscriptions dependent upon conditions are not effectual until such conditions are complied with. It was here held, that commissioners appointed to receive subscriptions to the stock of a projected railway company are so far limited in their authority that they have no power to attach conditions to subscriptions received by them, and where they do so the act is not binding upon the company, and that after the organization of the corporation, the directors have no power to assume the subscriptions upon the conditions named, i. e. that the company assume the payment of the subscriptions and release the subscribers.

7. But we apprehend that if this decision is maintainable upon

the time limited, and while the offer was in full force, all which is admitted by the demurrer, so that a valid contract in writing is shown to exist, the demurrer must be overruled."

[5] See this subject more fully discussed in §§ 51, 55, *ante*. See, also, Johnson *v.* Wabash & M. V. Railw., 16 Ind. 389.

[6] Kennedy *v.* Colton, 28 Barb. 59.

[7] Junction Railway Company *v.* Reeve, 15 Ind. 236.

[8] Ashtabula & New L. Railw. *v.* Smith, 15 Ohio N. S. 328.

[9] Bedford Railw. Co. *v.* Bowser, 48 Penn. St. 29. See, also, Lowe *v.* E. & K. Railw., 1 Head, 659.

recognized rules of law, it must be because the whole scheme of such a subscription evidences a covert fraud upon the contemplated corporation, and that the act of the directors is but one step in fulfilment of the scheme, as the case shows the action of the first board of directors was immediately repealed upon the coming in of a new board, and the court held it competent to show what took place at the time of passing the first resolutions with a view to establish the fraudulent purpose.

* SECTION XII.

Subscription upon Special Terms.

1. *Subscriptions not payable in money.*
2. *Subscriptions at a discount, not binding.*
n. 2. *Contracts to release subscriptions not binding.*
3. *Subscriptions after organization.*
4. *President may accept conditional subscriptions.*
5. *Recent case in Alabama.*
6. *True rule to be deduced from all the cases.*
7. *Important case on par values.*
8. *Difficulty of maintaining them.*
9. *Sad effects of opposite course on commercial fair dealing.*
10. *Can a corporation stipulate to pay interest on stocks?*
11. *Such a certificate of stock is not thereby rendered inoperative for legitimate purposes.*

§ 58. 1. It is well settled, that a railway, or other joint-stock company, cannot receive subscriptions to their stock, payable at less sums, or in other commodities, than that which is demanded of other subscribers. Hence subscriptions, payable in store-pay, or otherwise than in money, will be held a fraud upon the other subscribers, and payment enforced in money.[1]

2. So too in a case where subscriptions to stock of such a com-

[1] Henry *v.* Vermilion & Ashland Railw. Co., 17 Ohio, 187. But in one case, Philadelphia & West Chester Railw. *v.* Hickman, 28 Penn. St. 318, it is said the company may compromise subscriptions for stock, which are doubtful, upon receiving part payment; or may receive payment in labor or materials, or in damages which the company is liable to pay, or in any other liability of the corporation. The certificates of stock in this case were issued to the contractors, in part payment of work done by them upon the road; to others, in part payment for a locomotive, for sleepers, for land-damages, and for cars. We do not understand how there can be any valid objection to receiving payment for subscriptions to the capital stock of a railway company in this mode, if the shares, so disposed of, are intended to be reckoned at their fair cash value, at the time of the contract being entered into. It is certain, contracts of this kind have been very generally recognized by the courts as valid, and no fraud upon the other subscribers.

pany are, by the agents of the company, agreed to be received at a discount, below the par value of the shares, it will be regarded as a fraud upon the other shareholders, and not binding upon the company.[2]

[2] Mann *v.* Cooke, 20 Conn. 178. In this case the defendant subscribed for forty shares in the capital stock of a railway company, upon condition that all future calls should be paid, as required, or the shares should become the property of the company. He thereupon received certificates of ownership of the forty shares, the special terms of his subscription not being known to the other subscribers.

Some time afterwards, the company being largely indebted, and insolvent, and the greater part of the instalments on its stock being unpaid, the president made an arrangement with defendant that he should immediately pay the instalments on twenty shares of his stock, in full, and he was thereupon to be discharged from all liability on the other twenty shares. Defendant complied with these terms, and the money paid went for the benefit of the company.

The plaintiff was appointed receiver of the effects of the company, and brought this bill in equity to obtain payment of the balance due upon the other twenty shares, and it was held: —

1. That the subscription for the stock was in legal effect the same as an ordinary subscription for stock, without condition.

2. That the arrangement made with the president of the company was void, as a fraud upon stockholders and creditors.

3. That the company, being created for public purposes, could not receive subscriptions under a private arrangement at less than the par value of the stock, as this would deprive the company of so much of its available means, and thus operate as a fraud upon all parties interested.

But where one paid for stock in a railway company, under a secret agreement with the commissioner of contracts that he might receive land of the company at a future day, and pay in the stock certificate, and the company declined to ratify the contract, it was held the subscriber was released from his portion of the contract, and might recover the money he paid for the stock of the company. Weeden *v.* Lake Erie & Mad River Railway, 14 Ohio, 563. But in the case of the Cincinnati, Indiana, & Chicago Railw. *v.* Clarkson, 7 Ind. 595, it seems to be considered, that the company are bound by a contract to compensate a solicitor of subscriptions to the capital stock, payable in land, but no question is made in regard to the validity of the subscriptions. The solicitors were ordered by the directors to accept such subscriptions, and were to have two per cent on all which were accepted by the company, and the contract was held binding upon the company. An agreement by a railway company, that a subscriber for stock may pay the full amount, or any part of his subscription, and receive "interest thereon until the road goes into operation," does not oblige the company *to pay* interest before the road goes into operation. Waterman *v.* Troy & Greenfield Railway, 8 Gray, 433. See, also, Buffalo & N. Y. City Railw. *v.* Dudley, 4 Kernan, 336. *Ante*, § 54, pl. 4.

An agreement to pay interest upon stock "as soon as paid," means fully paid. Miller *v.* Pittsburg & Connellsville Railw., 40 Penn. St. 237.

* 3. In a case in Pennsylvania,[3] it is said that subscriptions made to the capital stock of a corporation before its * organization, must always be payable in money only. But after the organization, the company may stipulate with the subscriber for payment in any other mode, and can only enforce the contract according to its terms; and the act of the president of the company in accepting conditional subscriptions is binding upon the company.

4. It is also held in the same case,[3] that the fact the subscriber makes part payment in money before call, will not estop him from setting up the special contract in defence of an after call.

5. But in a somewhat recent case in Alabama,[4] it was held that a subscription to the capital stock of a railway company, in express terms made payable in work, in grading the line, to be taken at the public or private letting and performed to the acceptance of the company's engineer, could not be enforced against the subscriber until he had had reasonable opportunity to perform the contract in the manner specified by its terms. But if, after that, the defendant failed on his part to perform it, he was liable to pay the amount in money. It is here said that the subscriber must take notice of the published lettings of the work.

6. The cases may seem conflicting upon this point; but the true principle seems to be, that the corporation can only enforce the contract of subscription according to its terms, and of this the subscriber cannot complain, or resist successfully the enforcement of his subscription in that mode. But so far as the creditors of the company are interested in the matter, they may hold the directors responsible for having received the amount of the capital stock in money. And as to the duty of the directors, they cannot, in strictness and fairness, receive subscriptions payable in any thing but money; nor can they launch the company until the whole capital stock is subscribed in money. And any fraud or evasion in this particular will render the directors responsible for the debts of the company, as in equity and fair dealing it should.

[3] Pittsburg & Connellsville Railw. *v.* Stewart, 41 Penn. St. 54. The question of the presumptive effect of the conduct of a subscriber after the organization of the company, in attending and taking part in the meetings of the company, upon the proper construction of any special contract with the company, is here considerably discussed.

[4] Eppes *v.* M. G. & T. Railw. 35 Alabama, 33; H. & P. Plank R. Co. *v.* Bryan, 6 Jones Law, 82.

* 7. There is a very sensible case[5] in North Carolina bearing upon this question. The legislature had authorized the town of Newbern to take stock in a company for improving the navigation of the river Neuse, by which the business of the town was expected to be advanced. The town was, by the act, authorized to pay for the stock subscribed by them with their bonds, to be issued and sold on certain terms, but the amount of bonds issued was restricted to the amount of the stock subscribed, and it was held, that as the corporation could not, except by legislative sanction, accept any thing but money in payment of stock, and could not issue stock at any rate below par, the bonds could not be sold below par; and that, to a mandamus to compel the town to pay for stock thus subscribed, it must be regarded as a sufficient return, that the authorities of the municipality had prepared and executed the bonds, and had offered the same for sale by public advertisement, and had diligently endeavored otherwise to effect a sale of the same on the terms prescribed by the statute, and had not been able to sell the same.

8. This case unquestionably puts these perplexing inquiries upon the true basis; that is, of *fair dealing*, or *no dealing at all*. But we apprehend that railway contractors and builders would regard it as placing the matter in a very impracticable light. And we are not prepared to say how far the courts will feel justified in departing from the strict letter of the law in these particulars, out of deference to the speculative tendencies of the age.

9. It is certain that corporate stocks, from the first, are now always more or less a matter of speculation in the market; and the same is true of all municipal bonds issued in aid of enterprises affecting the interests of such corporations. And, in fact, no one ever dreams of demanding strictly par values, in dealing either with the bonds or the stock, and we do not suppose it can now ever be brought back to the strictly par basis. There is, too, * another great embarrassment in the way of return to par values. We have, in fact, no par basis to which to return. Until a specie

[5] Neuse River Nav. Co. *v.* Commissioners of Newbern, 7 Jones Law, 275. But in Shoemaker *v.* Goshen Turnpike Co., 14 Ohio N. S. 569, from the mere permission in the statute to submit the question of subscription to the voters of a township, the court implied the power to issue bonds in payment of such subscription in the usual negotiable form, and to negotiate them to the company at par, in payment for the stock subscribed.

basis is reached, every thing is at the mercy of speculators and monopolists. This is, no doubt, a very melancholy state of affairs to have a great commercial country in. But, so long as commercial men endure it, and the government submits to it, we do not see how the courts can remedy it. But it is certainly refreshing to see courts struggling to resist in every way in their power such a fearful tide of evil. In our humble judgment, unless some mode of escape is found, speculation and monopoly will eat out all honesty and fair dealing in all commercial transactions, and the country will in its commerce become a band of legalized plunderers upon each other. The monopoly in flour and grain and some of the other staples of the country is scarcely less than that, at the present time.

10. There seems to be some question whether a corporation can stipulate to pay interest upon its stock certificates from the first, without regard to the earnings of the company. It is certain such a stipulation is at variance with the ordinary duties of corporations, and will not therefore come within the range of the implied authority of the directors of the company. But in one case,[6] it seems to have been considered, that the stockholders might so ratify such a stipulation as to render it binding upon the company. But we should very seriously question if any such authority is implied from the general grant of corporate power for ordinary business purposes, like that of railways. It would seem to require a special delegation of authority by the legislature, and in that form it is nothing else but a device for borrowing money, in advance of launching the corporation upon its legitimate functions.

11. The case last cited[6] decided that such a stipulation, superadded to a certificate of stock, will not defeat its original effect of making the holder a member of the corporation; and that if certificates of stock be so issued by the directors, it will be regarded as a sufficient ratification of them by the corporation that * at a stockholders' meeting a majority voted to pay such interest in the bonds of the company; but the holders are not thereby compellable to accept payment in that mode, unless they assented to the vote.

[6] McLaughlin *v.* Detroit & Milw. Railw., 8 Mich. 100. It seems scarcely allowable to treat the vote of the majority as a ratification of an act of the directors beneficial to the minority, and at the same time not binding upon the minority except by their own consent.

SECTION XIII.

Equitable Relief from Subscriptions obtained by Fraud.

1. *Substantial misrepresentations in obtaining subscriptions will avoid them.*
2. *But for circumstantial misconduct of the directors, in the matter, they alone are liable.*
3. *Party purchasing must make reasonable examination of papers referred to on all doubtful points. But no relief will be granted, where there is no fraud, or intentional misrepresentation.*
4. *Directors cannot make profit for themselves.*

§ 59. 1. The directors of a railway company, who make representations on behalf of the company to induce persons to subscribe for the stock, so far represent the company in the transaction, that if they induce such subscription by a substantial fraud, the contract will be set aside in a court of equity.[1] The proper inquiry in such case is, "Whether the prospectus, so issued, contains such representations, or such suppression of existing facts, as, if the real truth had been stated, it is reasonable to believe the plaintiff would not have entered into the contract; that is, that he would not have taken the shares allotted to him, and those which he purchased."[2]

[1] Sir *John Romilly*, M. R., in Pulsford *v.* Richards, 17 Beav. 87; s. c. 19 Eng. L. & Eq. 387, 392. The prospectus issued in such cases is to be regarded as a representation. And where one is induced to take shares in a joint-stock company, through the false and fraudulent representations of the directors, he is not liable to calls for the purpose of paying the expenses of the company. The Royal British Bank, Brockwall's case, 29 Law Times, 375; s. c. 4 Drew. 205.

And where one of the directors of a company put the name of an extensive stockholder in the company, who resided in a foreign country, to a new subscription for forty additional shares, without consultation with such person, upon the belief that he would ratify the act, and upon being informed of such act, he made no objection for the period of nearly seven years, during which time the company had applied the dividends upon his stock in payment of such subscription, having no intimation of any dissent upon his part, it was held the subscription thereby became binding, and that the party could not recover such dividends of the company. Philadelphia, Wilmington, & Baltimore Railw. *v.* Cowell, 28 Penn. St. 329.

[2] Pulsford *v.* Richards, 17 Beav. 87; s. c. 19 Eng. L. & Eq. 392; Jennings *v.* Broughton, 17 Beav. 234; s. c. 19 Eng. L. & Eq. 420. One, to entitle himself to be relieved from his subscription, must show that he acted upon the false representations of the directors in a matter of fact material to the value of the enterprise, and not upon the mere speculation of the directors, or upon his own

* 2. But the omission to state in a prospectus the number of shares taken by the directors, or other persons, in their interest, is no such fraud as will enable a subscriber to avoid his subscription.[2] The fact that the directors of the company had entered into a contract with one, as general superintendent of construction, for four per centum upon the expenditure; and that this was an exorbitant compensation, and was, in fact, intended to compensate such person for his services, in obtaining the charter, and that this is not stated in the prospectus, is no such suppression as will exonerate subscribers for stock. "There was not the suppression of a fact, that affected the intrinsic value of the undertaking. That value depended upon the line of the projected railway, the population, the commercial wealth, the traffic of the places through which it passed, the difficulties of the construction, and the cost of the land required. Extravagance in the formation of a line of railway is a question of liability of the individual directors to the shareholders, but not a ground for annulling the contract between them."[2]

3. There can be no question one will be affected with notice of all facts discoverable by examination of papers referred to in a prospectus for the sale of shares, provided such papers are accessible to him, unless the facts stated in the prospectus are so specific as to divert interest from all further inquiry. It was accordingly held that where the contract of subscription bound the subscriber to the terms of the articles of association, an examination of which would have disclosed the facts upon which the party claimed to be relieved from his subscription, but that trusting to the statements contained in the prospectus, he did not look further, it was held that this neglect or omission, was no answer to his claim for relief.[3] But the party is not entitled to relief by reason of the representation of any fact, made in good faith, and upon reasonable grounds of probability, but which proves unfounded upon grounds equally unknown to both parties.[4]

4. But the learned judge here[2] suggests, with great propriety, that if the directors have made contracts, in the course of the performance of their duties, from which advantage is expected to

exaggerated expectations of the prospective success and value of the undertaking. See, also, upon this general subject, the remarks of the Master of the Rolls, p. 427.

[3] Central Railw. *v.* Kisch, Law Rep., 2 H. L. 99.

[4] Kennedy *v.* Panama Mail Co., Law Rep., 2 Q. B. 580.

arise to themselves, or to others, for their benefit, mediately or immediately, they may, in a court of equity, be made to stand in the place of trustees to the shareholders.[5]

*SECTION XIV.

Forfeiture of Shares. — Relief in Equity.

1. *Requirements of charter and statutes must be strictly pursued.*
2. *If not, equity will set aside the forfeiture.*
3. *Must credit the stock at full market value.*
4. *Provisions of English statutes.*
5. *Evidence must be express, that all requisite steps were pursued.*

§ 60. 1. The company, in enforcing the payment of calls by forfeiture of the stock, must strictly pursue the mode pointed out in their charter and the general laws of the state. This is a rule of universal application to the subject of forfeitures, and one which the courts will rigidly enforce, and more especially where the forfeiture is one of the prescribed remedies, given to the party, and against which equity does not relieve, when fairly exercised.[1]

2. But as the company, in such case, ordinarily stand in both relations of vendor and vendee, their conduct, in regard to fairness, will be rigidly scrutinized, and the forfeiture set aside in courts of equity, upon evidence of slight departure from perfect fairness.

3. Hence where the company declared the stock cancelled, and credited the value at a less sum than the actual market price at the time, but more than it would probably have sold for if that number of shares had been thrown at once into the market, the court set aside the forfeiture, on the ground that the company were bound to allow the highest market price which could be

[5] *Post*, § 179.

[1] Sparks *v.* Liverpool Water-Works, 13 Vesey, 428; Prendergast *v.* Turton, 1 Younge & Coll. N. R. 98, 110–112. This case is put mainly upon the ground of delay and acquiescence, but there is little doubt it would have been maintained, upon the general ground stated in the text. See Edinburgh, Leith, & N. H. Railw. *v.* Hibblewhite, 6 M. & W. 707; s. c. 2 Railw. C. 237.

But where the deed of settlement of a joint-stock company provides for a forfeiture of the shares without notice to the subscriber, the forfeiture determines the title without notice. Stewart *v.* Anglo-California Gold Mining Co., 18 Q. B. 736; s. c. 14 Eng. L. & Eq. 51.

obtained, without speculating on what might be the effect of throwing a large number of shares into the market.[2]

*4. By the English statute the company are not allowed to forfeit a larger number of shares than will produce the deficiency required.[3] And upon payment to the company of the amount of arrears of calls, interest, and expenses, before such forfeited shares are sold by them, the shares revert to the former owner.[3]

5. The evidence of the company having pursued the requirements of their act, in declaring the forfeiture, must be express and not conjectural.[4]

SECTION XV.

Right of Corporators and Others to inspect Books of Company.

1. *May inspect and take minutes from books.*
2. *Discussion of the extent to which such books are evidence.*
3. *For what purposes such books are important as evidence.*
4. *This will not embrace the books of proceedings of directors.*
5. *Party claiming to be shareholder may inspect register.*
6. *Allowed when suit or proceedings pending.*
7. *Party may have aid in the inspection.*

§ 60. *a.* 1. It seems to be conceded as a well-settled rule of law, that the shareholders or corporators in a joint-stock corporation are entitled, as matter of right, to inspect and take minutes from the books of the company at all reasonable times,[1] as they are the best evidence of the facts there registered, and equally the property of all the proprietors.[2] And the board of directors of the company have no power to exclude any member from the exercise of this right, even upon the ground that he is unfriendly to the interests of the company.[3]

2. But it seems to be now settled that strangers cannot obtain the inspection of such books, even by application to the court, their contents being regarded as private memoranda, in no sense possessing any public character,[4] notwithstanding a * contrary

[2] Stubbs *v.* Lister, 1 Y. & Coll. N. C. 81.
[3] 8 & 9 Vict. ch. 16, §§ 34, 35.
[4] Cockerell *v.* Van Dieman's Land Co., 18 C. B. 454; s. c. 36 Eng. L. & Eq. 405.
[1] Angell & Ames on Corp., § 681.
[2] Owings *v.* Speed, 5 Wheaton, 420, 424.
[3] People *v.* Throop, 12 Wend. 183; Cotheal *v.* Brouer, 1 Seld. 562.
[4] Mayor of Southampton *v.* Graves, 8 T. R. 590.

practice obtained[5] for a time. It may sometimes have been assumed, that the books of private corporations possessed a higher quality of evidence than is the fact. We do not apprehend that they are in any sense indispensable primary evidence of the facts there recorded. As a general thing, as to the organization of the company and the choice of officers, all that is requisite will be to prove, *de facto*, the organization of the company and the exercise of such offices by the persons named. Where it is requisite that an authority be given by the majority vote of the company, it may most conveniently be shown by the record, and perhaps in such a case the records of the corporation may fairly be considered the best proof of the facts, if in the power of the party, as if the corporation itself were called to prove such vote. But any party not entitled to the custody of the papers can only prove their contents, unless the corporation is the opposing party, in which case he may give notice to produce the books, and, in default, may prove the contents by secondary evidence. It has been decided that the clerk of the company cannot be compelled to produce the books on a *subpœna duces tecum*.[6]

3. It has been held that a bank depositor has the right, under proper circumstances and in a reasonable manner, to inspect the books of the bank.[7] In practice it is not one time in ten where the record books of a corporation are ever referred to in court, unless to fix a date or the precise form of a vote upon which a power is made to depend. But the registry of shareholders may be properly regarded as the primary evidence of membership, but by no means indispensable or conclusive.[8]

4. Where the deed of settlement under which a corporation is registered contained a provision "that the books wherein the proceedings of the company are recorded shall be kept at the principal office of the company, and shall be open to the inspection of the shareholders," it was held that the clause gave * shareholders power only to inspect the books of minutes of proceedings of the general meetings, and not of the minutes of the proceedings of the directors.[9]

[5] Mayor of Lynn *v.* Denton, 1 T. R. 689, and cases cited.

[6] Utica Bank *v.* Hillard, 5 Cow. 419; Narragansett Bank *v.* Atlantic Silk Co., 3 Met. 282.

[7] Union Bank *v.* Knapp, 3 Pick. 96.

[8] We refer to what we have before said upon the subject. *Ante*, § 18, pl. 10–13; § 23, n. 7.

[9] Reg. *v.* Mariquita Mining Co., 1 El. & El. 289.

5. In a somewhat recent English case[10] it was held, that a party whose claim to be a shareholder is disputed by the company may, in an action brought against the company, inspect any entries in the register which relate to the matter in dispute.

6. And in a still more recent case, where one of the members of the corporation was in controversy with the company in regard to his right to act as one of the governing body, which right depended upon an inspection of the records of the company in order to determine its usages, the court granted permission to inspect the books.[11] But it is here said this will not be done unless there is a suit or some proceedings pending.

7. And in the inspection of all documents, by order of the Court of Chancery, the party in whose favor the order is made has the right to have such aid in the inspection, either by counsel, interpreters, or experts, as will make the inspection available to him.[12]

[10] Foster *v.* The Bank of England, 8 Q. B. 689.

[11] Reg. *v.* Saddlers' Co., 10 W. R. 87. At Chambers, *Crompton*, J.

[12] Swansea Vale Railw. Co. *v.* Budd, Law Rep. 2 Eq. 274; s. c. 12 Jur. N. S. 561. As to the effect of the certificate of the clerk of a corporation under its seal, see New Orleans & O. R. Co. *v.* Lea, 12 Louis. Ann. 388.

*CHAPTER X.

RIGHT OF WAY BY GRANT.

SECTION I.

Obtaining Lands by express Consent.

1. *Leave granted by English statute.*
2. *Persons under disability.*
3. n. 2. *Money to take the place of the land.*
4. *Consent to pass railway.*
5. *Duty of railway in all cases.*
6. *License to build railway. Extent of duration.*
7. *Company bound by conditions in deed.*
8. *Parol license good till revoked.*
9. *Sale of road no abandonment.*
10. *Deed conveys incident; not explainable.*
11. *One cannot derogate from compulsory grant.*
12. *But this does not apply to accidental incidents.*
13. *Case in New York Court of Appeals somewhat at variance with the preceding cases.*
14. *A municipal corporation may be bound by implied contract in the grant of land so as not to be at liberty to recede from it.*
15. *A mere agreement to sell, although in writing, will not justify the company in entering upon the land, or defeat proceedings under the statute to recover damages for taking the land.*

§ 61. 1. The English statute[1] enables railway companies to purchase, by contract with the owners, "all estates or interests (in any lands) of what kind soever," if the same, or the right of way over them, be requisite for their purposes.

2. And by another section of the same statute such companies are empowered to purchase such lands of persons legally incapacitated to convey the title, under other circumstances, as guardians of infants, committees of lunatics, trustees of charitable or other uses, tenants in tail, or for life, married women, seized in their own right, or entitled to dower, executors or administrators, and all parties, entitled, for the time being, to the receipt of the rents and profits.[2]

[1] 8 & 9 Vict. ch. 18, § 6.

[2] Hutton *v.* The London & South W. Railw., 7 Hare, 264. Some suggestions are here made by Vice-Chancellor *Wigram* in regard to the time within which it is requisite to make compensation in the several modes of taking lands. The principal question decided is, that in regard to lands, injuriously affected by railway works upon other lands, it is not requisite to make compensation in ad-

*3. The valuation in this latter class of cases is to be made by disinterested persons, and the price paid into the bank for the benefit of the parties interested.

4. And where a railway act provided, in terms, that nothing therein should authorize the company to do any damage or prejudice to the lands, estate, or property of any corporation or person whatsoever, without the consent in writing of the owner and occupier, it was held they could not pass the line of another railway without their consent, although the withholding of such consent should frustrate the purpose of the grant.[3]

5. In this country most of the railway charters contain a power to the company to acquire lands, by agreement with the owner. In such case it has been held the rights of the company are the same as where they take their land under their compulsory powers.[4] And they are bound to the same care in constructing their road.[4]

6. And where the railway have the power to take five rods, through the whole course of their line, and a land-owner deeds them the full right to locate, construct, and repair, and for ever maintain and use their road over his land, if, in laying the drains or ditches through the land, it becomes necessary to go beyond the limits of the five rods, in order to guard against the effect of a stream to be passed, the company may lawfully do so under the grant.[5]

vance. But where lands are purchased from persons under disability, the course of devolution of the property is not thereby changed, but the money paid in compensation is to take the place of the land, and to be treated as real estate. Midland Counties Railw. *v.* Oswin, 1 Coll. C. C. 74; s. c. 3 Railw. C. 497; *Ex parte* Flamank, 1 Simons (N. S.) 260; *In re* Horner's Estate, 5 De G. & S. 483; s. c. 13 Eng. L. & Eq. 531; *In re* Stewart's Estate, 1 Sm. & G. 32; s. c. 13 Eng. L. & Eq. 533.

[3] Clarence Railw. *v.* Great North of England Railw., 4 Queen's Bench, 45; Gray *v.* The Liverpool & Bury Railw., 9 Beav. 391; s. c. 4 Railw. C. 235.

[4] Whitcomb *v.* Vermont Central Railw., 25 Vt. 49, 69. This right to acquire lands, by contract with the owners, is, by implication, if not expressly, limited to the necessities of the company, we presume, the same as taking lands *in invitum*, and cannot be extended to any private use. But if the owner of the land consent to the use, the constitutional objection is removed, and the right to hold the land is a question between the company and the public, probably. Dunn *v.* City of Charleston, Harper, 189; Harding *v.* Goodlet, 3 Yerg. 41; 11 Wend. 149; Embury *v.* Conner, 3 Comstock, 516.

[5] Babcock *v.* The Western Railw., 9 Met. 553. But a contract with the owner of land, for leave to build the road through his land, and staking out the track through the land, is no such occupation as will be notice of the right of

*7. In case of a deed to a railway company of land, on which to construct their road, the assent of the company will be presumed, and they are bound by the conditions of the grant, as that the road shall be so constructed as not to interfere with buildings on the land.[6]

8. An oral permission to take and use land for a railway is a bar to the recovery of damages for such use, until the permission is revoked.[7] In a very late case before the House of Lords,[8] a very important, and as it seems to us reasonable and just qualification is annexed to the familiar doctrine of implied assent to the appropriation of land to a permanent use by the owner standing by and not objecting. It is here ruled, "If a stranger builds upon the land of A., supposing it to be his own, and A. remains wilfully passive, equity will not allow him to profit by the mistake; but if the stranger knows that the land upon which *he is building belongs to A., then A. may assert his legal rights and take the

the company against a subsequent mortgagee. Merritt *v.* Northern Railw., 12 Barb. 605. But the payment by the company of the price of the land, and changing their route in faith of the title, might give them an equity superior to that of a subsequent mortgagee. Ib. The deed of one tenant in common is a good release of his claim for damages, although it convey no right as against his co-tenant. Draper *v.* Williams, 2 Mich. 536. But an agreement to sell land to a railway company, and a tender of the price by the company, creates no title in them. Whitman *v.* Boston & Maine Railw., 3 Allen, 133.

[6] Rathbone *v.* Tioga Navigation Co., 2 Watts & Serg. 74. And the rights and duties of the company, in such case, are precisely the same as if the land had been condemned, by proceedings *in invitum*, under the statute. Norris *v.* Vt. Central Railw., 28 Vt. 99. Such grant carries the incidents necessary to its enjoyment. And if it becomes necessary, in constructing the road, to make a deep cut, that may be done, and the company are not bound to protect the banks of the excavation by a wall. Hortsman *v.* Lexington & Cov. Railw., 18 B. Mon. 218. See also Louisville & Nash. R. *v.* Thompson, 18 B. Mon. 735.

[7] Miller *v.* Auburn & Syracuse Railway, 6 Hill, 61. And such license, when executed, by the construction of the work, is not allowed to be revoked. The only relief the party is entitled to is compensation for his land. Water Power *v.* Chambers, 1 Stock. Ch. 471. And it was held in a somewhat recent English case, Corby *v.* Hill, 4 C. B. N. S. 556; s. c. 31 Law Times, 181, that where the owner of land had given oral permission to one for a private way, he could not obstruct, or give permission to others to obstruct, such way; and that where a third person, by permission of the land-owner, placed building materials in the way, whereby an injury accrued to the person having the way, he might sue for such injury.

[8] Ramsden *v.* Dyson, Law Rep., 1 Ho. Lds. 123; s. c. 12 Jur. N. S. 506.

benefit of the expenditure. And a tenant building upon his landlord's land, in the absence of such special circumstances, acquires no right against him at the expiration of the tenancy. But a mere license to build works connected with a railway, the damages to be settled with a person named, or "on equitable terms hereafter," does not amount to any definite agreement.[9]

9. Where land is conveyed, for the use of a railway, upon condition that it shall revert to the owner upon the abandonment of the road, and the road was sold, under a mortgage, to the state, and by the state and by new companies chartered for that purpose completed, it was held, that the grantor was not entitled to hold the land.[10]

10. Where land was conveyed to a railway company, for the purpose of constructing their road, on which was a tenement, and to this water was conveyed by an aqueduct from another portion of the land of the defendant, and the price of the land was fixed by the commissioners, the defendant at the time claiming the right to withdraw the water, and this not being objected to by the president and engineer of the company, who were present at the

[9] Fitchburg Railw. *v.* Boston & Maine Railw., 3 Cush. 58. But a writing whereby the owner of land along the line of a contemplated gravel road gave the road company the right to enter upon his land anywhere within a mile of the contemplated road and dig and remove gravel, as much as they might require, was held not a mere license, but a grant irrecoverable. Bracken *v.* Rushville Gravel Road Co., 27 Ind. 346.

[10] Harrison *v.* Lexington & Ohio Railw., 9 B. Mon. 470. So, too, if land is conveyed on condition that an embankment (water-tight) over a brook crossing the land shall be erected by the grantors, and that the embankment, or dam, with the floodgates or sluices therein, might be used for hydraulic purposes by the grantors, their heirs, and assigns, the grantees not to be liable to the grantors for any damage they might sustain by a break in such dam, unless the same should happen through the gross neglect or wilful misfeasance of the grantees, but that the grantees should repair the dam forthwith, it was held to be a condition subsequent, the failure to perform which would give the grantors, or their heirs, a right of re-entry at their election. But it was further said, that the conveyance of the estate by the grantees defeated the condition, and that the assignee had no remedy upon it. Underhill *v.* Saratoga & Wash. Railw., 20 Barb. 455. And such conditions may be waived by the party in whose favor they are made, as in a grant of land for a railway track, the road to be completed by a day named, or the deed to be void, which was not done; but the grantor continued to treat the company as having the right to use the land for the purposes of the grant, and it was held a waiver of the condition. Ludlow *v.* New York & Harlem Railw., 12 Barb. 440.

time, it was held, that the deed containing * no exception in regard to the water, the company acquired the right to its use, in the manner it had been before used, and the defendant was liable to an action for diverting it,[11] and the intention of the parties could not be determined by extraneous evidence.

11. So, also, the principle that a grantor, knowing the purpose for which his deed is accepted, cannot derogate from his own grant, applies to the case of a compulsory conveyance, under legislative authority, and the act is sufficient notice to the grantor of the purposes of the conveyance. But this rule will not apply to any accidental state of facts, existing at the time of the grant, as the support resulting from an excavation being filled with water at the time, so as to entitle the grantee to insist upon its continuance.

12. And accordingly, where a railway took the land above a mine for the support of the abutments of a bridge, the mine having been abandoned for forty years and full of water, it was held they could not insist upon having the water remain in the pit, as a support to the earth, but that they were entitled to be protected from damage likely to result from working the mine.[12]

13. If a railway have power to take land by consent of the owner, an oral consent is sufficient.[13] And if the company take land and put it to their use without the consent of the owner, or any other proceeding under their powers, it is a trespass, but can only be sued by the person then owning the land, and not by his grantee.[13] But this case was reversed upon error, and it was decided, somewhat at variance with the present English rule, that such a license, coupled with an interest, was still revocable at the option of the licensor. But the final conclusion of the court of error, that "consent," in such an act, meant the effectual consent of the law expressed with due formality, seems altogether the more reasonable ground upon which to place the case.

14. The New York Court of Appeals[14] held that municipal * corporations, as to their rights and powers over lands owned by the corporation, were to be viewed the same as any other owner

[11] Vermont Central Railw. *v.* Hills, 23 Vt. 681.

[12] North Eastern Railw. Co. *v.* Elliott, 1 Johns. & H. 145; s. c. 6 Jur. N. S. 817.

[13] Central Railw. Co. *v.* Hitfield, 5 Dutcher, 206; s. c. in error, id. 571.

[14] Mayor, &c., of the City of New York *v.* The Second Avenue Railw., 32 N. Y. 261; s. c. 34 Barb. 41, where the case was similarly ruled.

of land, and that their acts and resolutions in regard to the use of such land by others were not to be regarded as either of a legislalative or governmental character; and that although such corporations have no power as a party to make contracts which shall control or embarrass their legislative powers and duties, yet, as these legislative duties, or powers, only extend to regulations of police and internal government, and not to the mere imposition of a sum of money for revenue purposes, consequently an ordinance imposing a license duty upon city cars, for revenue purposes only, is not an ordinance for police and internal government, and the imposition of an annual tax upon a city passenger railway, in derogation of its rights, as defined by a specific agreement between the city and the railway company, for purpose of revenue merely, is unlawful and void.[15]

15. Proof of a written agreement to sell land to a railway company, at a given price, within a limited time, and for tender of the same within the time, and a refusal to accept the same, will not justify the company in locating their road upon the land, or defeat proceedings under the statute to recover damages for such location.[16]

[15] The terms of this contract appear more fully where the case is reported in Barbour. It prescribed the regulations to which the company should be liable, requiring no further license, and reserving no power to require one thereafter. This was held to preclude the city authority from making the imposition demanded. It would seem, the case might have been decided, in conformity with the dissenting opinion of Mr. Justice *Ingraham*, in the court below, without any great violence to principle. See also Branson *v.* Philadelphia, 47 Penn. St. 329; Veazie *v.* Mayo, 45 Me. 560; People *v.* New York & Harlem R. Co., 45 Barb. 73; Vilas *v.* Mil. & Miss. R. Co., 15 Wisc. 233. A grant of land to the use of a highway seems to be regarded as giving the municipal authorities the same rights in regard to its use as where the land is condemned for that purpose. Murphy *v.* The City of Chicago, 29 Ill. 279.

The grant to a railway company of a right to build a tunnel will not preclude the owner of the land from digging minerals under the tunnel, in conformity with the general railway acts, London & N. W. Railw. Co. *v.* Ackroyd, 8 Jur. N. S. 911.

[16] Whitman *v.* Boston & Maine Railw., 3 Allen, 133. This written contract might be evidence of the value of the land, or an admission by the owner, and as such might probably be used in the proceedings under the statute for estimating damages.

*SECTION VII.

Specific Performance in Equity.

1. *Contracts before and after date of charter.*
2. *Contracts where all the terms not defined.*
3. *Contracts for land umpire to fix price.*
4. *Where mandamus also lies.*
5. *Contracts not signed by company.*
6. *Where terms are uncertain.*
7. *Contracts giving the company an option.*
8. *Contracts not understood by both parties.*
9. *Order in regard to construction of highways may be enforced at the suit of the municipality.*
10. *The courts sometimes decline to decree specific performance on the ground of public convenience.*
11. *No decree of specific performance when contract vague and uncertain, and for other reasons.*
12. *Courts of equity will not in the final decree make the price a charge on the land, unless so declared at first.*

§ 62. 1. There can be no doubt courts of equity will decree specific performance of contracts for land, made by consent of the owners, as well after the act of parliament as before.[1]

2. If the agreement contains provisions for farm-crossings, fences, and cattle-guards, either express or implied, the master will be directed to make the proper inquiry, and any decree for specific performance should provide minutely for all such incidents.[2] But, upon general principles, if the agreement provide that the price of land is to be fixed by an arbitrator or umpire, it has generally been held that a suit for specific performance is not maintainable.[3]

3. But if the arbitrator have acted and fixed the price,[4] and by parity of reason, if the umpire is named, and ready to act, there being no power of revocation, a court of equity may decree specific performance. Hence in the case above,[1] the Vice-Chancellor held, that, as the contract was to take the land on the terms prescribed in the act of parliament, the court had the means of

[1] *Ante*, § 13, *et seq.*; Walker *v.* The Eastern Counties Railw. Co., 5 Railw. C. 469; s. c. 6 Hare, 594.

[2] Sanderson *v.* Cockermouth & Washington Railw. Co., 19 Law Jour. Ch. 503; 11 Beavan, 497.

[3] Milnes *v.* Gerry, 14 Vesey, 400. But in this case the umpire was not agreed upon, and the court held they could not appoint one. But the Master of the Rolls held that an agreement to sell, at a fair valuation, may be executed. See Tillet *v.* Charing Cross Company, 26 Beav. 419; s. c. 5 Jur. N. S. 994.

[4] Brown *v.* Bellows, 4 Pick. 179.

applying those terms, so as to get at the price, and might there-
* fore require the party to put them in motion, and then, in its discretion, decree specific performance.

4. And the consideration, that possibly the party might proceed by mandamus, will not deprive him of this remedy in equity, unless the act specially provides the remedy by mandamus.[5]

5. But if the company take a bond of a land-owner, to convey so much land as they shall require, and subsequently appropriate the land, but decline accepting a deed and paying the price, equity will not decree specific performance of the contract, the bond not being signed by the company.[6] But in such a case specific performance will be decreed against the party signing the bond upon refusal.[7]

6. A contract to sell a railway company "the land they take" from a specified lot of land, at twenty cents a foot, "for each and every foot so taken by said company," imports a taking by the company, under their compulsory powers, and will not be specifically enforced until so taken by the company. And if the terms of a contract are doubtful, a court of equity will not decree specific performance.[8]

7. Where one contracts with a railway company, under seal, to permit them to construct their road over his land, in either one of two routes, and to convey the land after the road shall be definitively located, with a condition that the deed shall be void, when the road shall cease, or be discontinued, if the company take the land and build their road upon it, specific performance will be decreed, although the company did not expressly bind themselves to take the land, or pay for it. And where the company had been in the use of the land for their road three or * four years, it was held no such unreasonable delay as to bar the relief

[5] Hodges on Railways, 189.

[6] Jacobs *v.* Peterborough & Shirley Railw., 8 Cush. 223.

[7] Parker *v.* Perkins, 8 Cush. 318.

[8] Boston & Maine Railw. *v.* Babcock, 3 Cush. 228; s. c. 1 Am. Railw. C. 561. But under a contract with a railway company, giving them all the land they desired, not exceeding four poles in width, upon which to construct their road, "provided said road shall not run farther north of my southwest corner than ten feet, and not farther south of my northeast corner than 140 feet," it was held the company had a right to 66 feet through the whole land, and were only restricted in relation to the distance the road went from the corners named. Lexington & Ohio Railw. *v.* Ormsby, 7 Dana, 276.

sought. The party cannot excuse himself by showing, that, from his own notions, or the representations of the company, or of third persons, he was induced to believe that a different route would have been adopted by the company, or that there was an inadequacy in the price stipulated, unless it be so gross as to amount to presumptive evidence of fraud or mistake.[9]

8. But it is a good defence, in such case, that the party was led into a mistake, without any gross laches on his part, by an uncertainty or obscurity in the descriptive part of the agreement, so that it applied to a different subject-matter from that which he understood at the time, or that the bargain was hard, unequal, or oppressive, and would operate in a manner different from that which was in the contemplation of the parties when it was executed. But in such case the burden of proof is upon the defendant, to show mistake or misrepresentation.[9]

In a recent English case[10] before the Court of Chancery Appeal, after elaborate argument, the Lord Justice *Knight Bruce*, an equity judge of the most extended learning and experience, thus states the rule upon this point. This court will not enforce specific performance of a contract, where the defendant proves that he understood it in a sense different from the plaintiff, even although the plaintiff's construction may be the plain meaning of the contract.

9. Where the county commissioners made order in regard to the mode of construction of a railway, in crossing a highway, it was held, that the mayor and aldermen of a city, or the selectmen of a town, are the only proper parties to a bill for specific performance, and that the land-owners, over which the railway * passes, are not to be joined in the bill.[11] But where the

[9] Western Railw. *v.* Babcock, 6 Met. 346; s. c. 1 Am. Railw. C. 365. The delivery of a deed to the agent of a corporation, in such case, is sufficient. And where the party, in disregard of his contract, had obtained an assessment of damages for the land, under the statute, his liability upon the contract is, to the difference between the apprisal and the stipulated price in the contract.

Unreasonable delay is ordinarily a bar to specific performance in a court of equity. Guest *v.* Homfray, 5 Vesey, 818; Hertford *v.* Boore, Aston *v.* Same, 5 Vesey, 719; Watson *v.* Reid, 1 Russ. & My. 236; 2 Story's Eq. Jur. §§ 771, 777, and cases cited.

[10] Wycombe Railw. Co. *v.* Donnington Hospital, Law Rep. 1 Ch. 268; s. c. 12 Jur. N. S. 347.

[11] Brainard *v.* Conn. River Railw., 7 Cush. 506. In Roxbury *v.* Boston &

order required the highway to be so raised as to pass over the railway, at a place named, but without defining the height to which * it should be raised, the grade, the nature of the structure, or the time within which it should be made, it was held too indefinite to justify a decree for specific performance.[12]

Prov. Railw., 6 Cush. 424, it was also held the commissioners must make such order specific, and not in the alternative, and that laches, in regard to such order, will not defeat the claim for a decree for specific performance, where public security is essentially concerned.

And courts of equity have held a parol license to erect public works, and the works erected in faith of it, irrevocable, and the company entitled to hold the land upon making compensation, and have virtually decreed specific performance. Water Power Co. *v.* Chamber, 1 Stockton, Ch. 471. See also Hall *v.* Chaffee, 13 Vt. 150; Boston & Maine Railw. *v.* Bartlett, 3 Cush. 224. But it was held that an action for the price of land will not lie upon a parol contract of sale, where there had been no conveyance of the land, although the company had taken possession and paid part of the price. Reynolds *v.* Dunkirk & State Line Railw., 17 Barb. 612. This is undoubtedly according to the generally recognized rule upon the subject, in those states where the Statute of Frauds is in force.

In the recent case of Laird *v.* Birkenhead Railw., 6 Jur. N. S. 140; s. c. 1 Johns. Eng. Ch. 500, the question of an estoppel in fact becoming so fixed upon a railway company by acquiescence as to be enforced by a court of equity, is largely discussed by Vice Chancellor *Wood*, and placed upon higher and sounder grounds, as it seems to us, than in most of the earlier cases. The leading facts were, that the plaintiff, by agreement with the company, without writing, had built a tunnel through their land, in order to facilitate access to his own business, and had laid rails upon the work, and had been in the use of the same for two years, paying tolls as agreed between the parties. The company now claimed that the plaintiff was merely a tenant at will, and subject to their absolute dictation as to the right to use and the terms upon which he could use the works, and gave notice in writing of the immediate and absolute termination of the contract, and in pursuance of such notice removed the rails and permanently erected a board across the passage.

The learned judge overruled the demurrer, and said "it must be inferred, from the nature of the transaction, and after all this expense, that it was not to be determined by three months' notice. . . . The necessary inference is, that it is to be the right of user, as long as the plaintiff is the owner of the yard, and it would be a most unreasonable proposition to say that the company should have the power of determining it at three months' notice. . . . I consider that a contract had been made out upon the face of the bill," and it was further considered, that, aside from the actual use, a court of equity would have decreed specific performance upon reasonable terms; but after the use for a considerable term on the basis of an unsigned memorandum, the court will regard that as evidence of the ultimate agreement of the parties. S. P. Mold *v.* Wheatcroft, 27 Beav. 510.

[12] City of Roxbury *v.* Boston & Providence Railw., 2 Gray, 460.

10. The Master of the Rolls, Lord *Romilly*, in Raphael *v.* The Thames Valley Railway,[13] held, that in deciding whether specific performance should be enforced against a railway company, the court must have regard to the interests of the public, and therefore, where a bridge had not been constructed in conformity with an agreement with a land-owner, but the injury to the land-owner was small, and the railway had since been opened for traffic, and the relief, if granted, would have necessitated an interference with the traffic, the court refused to compel specific performance.

11. And it has been very recently declared by the English courts of equity, that where a contract is vague and so uncertain that no compensation could be awarded, a decree for specific performance could not be made.[14] So also the court will not interfere after considerable lapse of time and when the company are not possessed of funds for completing the purchase.[15] So refusal to decree specific performance may be based upon the public safety and convenience.[16]

12. And a Court of Equity will not make the amount to be paid for land a charge upon the land, under leave to apply for further directions, where it was not made so by the original decree.[17]

[13] Law Rep. 2 Eq. 37; s. c. 12 Jur. N. S. 656.
[14] Tillett *v.* Charing Cross Co., 26 Beav. 419; s. c. 5 Jur. N. S. 994.
[15] Pryse *v.* Combrian Railw., Law Rep. 2 Eq. 444.
[16] Raphael *v.* Thames Valley Railw., id. 37.
[17] Attorney-General *v.* S. & S. Railw., Law Rep. 1 Eq. 636.

*CHAPTER XI.

EMINENT DOMAIN.

SECTION I.

General Principles.

1. *Definition of the right.*
2. *Intercommunication.*
3. *Necessary attribute of sovereignty.*
4. *Antiquity of its recognition.*
5. *Limitations upon its exercise.*
6. *Resides principally in the states.*
7. *Duty of making compensation.*
8. *Navigable waters.*
9, 10, 11. *Its exercise in rivers, above tide-water.*

§ 63. 1. This title is very little found in the English books, and scarcely in the English dictionaries. But with us, it has been adopted from the writers on national and civil law, upon the continent of Europe,[1] and is perhaps better understood than almost any other form of expression, for the same idea. It is defined to be that *dominium eminens*, or superior right, which of necessity resides in the sovereign power, in all governments, to apply private property to public use, in those great public emergencies which can reasonably be met in no other way.

2. It is a distinct right from that of public domain, which is the[1] land belonging to the sovereign. This is a superior right which the sovereign possesses in all property of the citizen or subject, whether real or personal, and whether the title were originally derived from the sovereign or not. One of the chief occasions for the exercise of this right is, in creating the necessary facilities for intercommunication, which in this country is now very generally known by the name of Internal Improvement. This extends to the construction of highways (of which turnpikes and railways are, in some respects, but different modes of construction and maintenance), canals, ferries, wharves, basins, and some others.[2]

[1] Vattel, B. 1, ch. 20, § 244; Code Napoleon, B. 2, tit. 2, 545; 1 Black. Comm. 139; Gardner *v.* Newburgh, 2 Johns. Ch. 162; 2 Dallas, 310.

[2] 3 Kent, Comm. 339 *et seq.* and notes; Beekman *v.* Saratoga & Sch. Railw., 3 Paige, 45, 73; 12 Pick. 467; 23 id. 327; 3 Selden, 314. This right, as some

*3. This is a right in the sovereignty, which seems indispensable to the maintenance of civil government, and which seems to

of the above cases show, extends to numerous matters not named in the text. It would be out of place here to enter into the discussion of the general subject. The indispensable prerequisites to the exercise of the right will appear, as far as they apply to the subject of this work, in the following sections.

That railways are but improved highways, and are of such public use as to justify the exercise of the right of eminent domain, by the sovereign, in their construction, is now almost universally conceded. Williams *v.* N. Y. Central Railw., 18 Barb. 222, 246; State *v.* Rives, 5 Ired. 297; Northern Railw. *v.* Concord & Claremont Railw., 7 Foster, 183; Bloodgood *v.* M. & H. Railw., 18 Wend. 9; s. c. 14 Wendell, 51; 1 Bald. C. C. Reports, 205. See also 3 Paige, 73; 3 Seld. 314. A freight company has been regarded as not of such public interest as to justify taking land by the right of eminent domain. This was for loading and unloading freight. Memphis Freight Co. *v.* Memphis, 4 Cold. 419. But this case is perhaps questionable. A railway for the purpose of transporting freight is as much a public use as if it embraced passenger transportation. And a freight company of more limited extent might be said to be in aid of the company carrying greater distances. The marginal railways in cities for the purpose of connecting the different lines of traffic, are as much public companies and entitled to exercise the sovereign right of eminent domain, as any other railway. But no railway company can take land for other than public uses, as for the deposit of dirt, &c., not connected with the efficient use of their right of way. Lance's Appeal, 55 Penn. St. 16.

It seems to be well settled, that the legislature have no power to take the property of the citizens for any but a public use; but that a railway is such use. Bradley *v.* N. Y. & N. H. Railw., 21 Conn. 294; Symonds *v.* The City of Cincinnati, 14 Ohio, 147; Embury *v.* Conner, 3 Comst. 511.

But this is a power essentially different from that of taxation, in regard to which there is no constitutional restriction, and no guaranty for its just exercise, except in the discretion of the legislature. The People *v.* Mayor of Brooklyn, 4 Comst. 419; Cincinnati, W. & Z. Railw. *v.* Clinton Co. Comm. 1 Ohio, N. S. 77.

The legislature must decide, in the first instance, when the right of eminent domain may be exercised, but this is subject to the revision of the courts, so far as the uses to which the property is applied, are concerned. 2 Kent, Comm. 340.

But as to the particular instance, the decision of the legislature, and of the commissioners appointed to exercise the power, is ordinarily final and not revisable in the courts of law. Varrick *v.* Smith, 5 Paige, 137; Armington *v.* Barnet, 15 Vt. 745.

And the legislature may restrain the owners of property, in its use, when in their opinion the public good requires it, without compensation, as this is not the exercise of the right of eminent domain. Commonwealth *v.* Tewksbury, 11 Met. 55; Coates *v.* Mayor of New York, 7 Cowen, 585. But see Clark *v.* Mayor of Syracuse, 13 Barb. 32.

The following case recognizes the general right stated in the text. Donnaher *v.* The State, 8 Sm. & M. 649.

be rather a necessary attribute of the sovereign power in a state, than any reserved right in the grant of property to the subject or citizen.

4. It seems to have been accurately defined, and distinctly recognized, in the Roman empire, in the days of Augustus, and his immediate successors, although from considerations of policy *and personal influence and esteem, they did not always choose to exercise the right, to demolish the dwellings of the inhabitants, either in the construction of public roads or aqueducts, or ornamental columns, but to purchase the right of way.

5. But in the states of Europe and in the written constitution of the United States, and in those of most of the American states, an express limitation of the exercise of the right makes it dependent upon compensation to the owner.[3] But this provision in the United States constitution is intended only as a limitation upon the exercise of that power, by the government of the United States.[3]

6. And it would seem, that notwithstanding this right of sovereignty may reside in the United States, as the paramount sovereign, so far as the territories are concerned, in reference to internal communication, by highways and railways, and notwithstanding the ownership of the soil of a portion of the lands, by the United States, in many of the states, as well as territories, still, when any of the territories are admitted into the Union, as independent states, the general rights of eminent domain are vested exclusively in the state sovereignty.[4]

7. The duty to make compensation for property, taken for public use, is regarded, by the most enlightened jurists, as founded in the fundamental principles of natural right and justice, and as

[3] Barron *v.* Baltimore, 7 Peters, 243; Fox *v.* The State of Ohio, 5 How. 410, 434, 435.

[4] Pollard *v.* Hagan, 3 How. (U. S.) 212; Goodtitle *v.* Kibbe, 9 How. 471; Doe *v.* Beebe, 13 How. 25; United States *v.* Railw. Bridge Co., 6 McLean, 517. In the Court of Claims recently, in the case of The Illinois Central Railw. *v.* United States, 20 Law Rep. 630, it was held, that the abandonment of a military reserve, which had become useless for military purposes, causes it to fall back into the general mass of public lands, and that a state, by virtue of its right of eminent domain, may authorize the construction of railways through land owned but not occupied by the United States. And the United States being in possession of land owned by the plaintiffs, and which was necessary to carry out the objects of their charter, it was held, that a payment made by the plaintiffs, to obtain possession thereof, was made under duress, and might be recovered back.

lying at the basis of all wise and just government, independent of all written constitutions or positive law.[5]

*8. But the public have a right, by the legislature, through the proper functionaries, to regulate the use of navigable waters, and the erection of a bridge, with or without a draw, by the authority of the legislature, is the regulation of a public right, and not the deprivation of a private right, which can be made the ground of an action, even where private loss is thereby produced, nor is it the taking of private property for public use which will entitle the owner to compensation.[6]

9. And where a ford-way was destroyed, by the erection of a dam across a river, in the construction of a canal, or other public work, under legislative grant, the river being a public highway, although not strictly navigable, in the common-law sense, (which only included such rivers, as were affected by tide-water,) it was held the owner of the ford-way could recover no compensation from the state, or their grantees, the act being but a reasonable exercise of the right to improve the navigation of the stream, as a public highway.[7]

10. Neither can the owner of a fishery, which sustains damage or destruction by the building of a dam to improve the navigation of a river above tide-water, under grant from the state, sustain an action against the grantees.[8] So also in regard to the loss of the use of a spring, by deepening the channel of such a stream, by legislative grant.[9]

11. Nor is the owner of a dam, erected by legislative grant upon a navigable river, and which was afterwards cut off by a canal, granted by the same authority, entitled to recover damages.[10]

[5] *Spencer*, Ch. J., in Bradshaw *v.* Rogers, 20 Johns. 103; 2 Kent, Comm. 339, and note and cases cited, from the leading continental jurists.

[6] Davidson *v.* Boston & Maine Railw., 3 Cush. 91; Gould *v.* Hudson River Railw., 12 Barb. 616; s. c. 2 Selden, 522. Nor have the state any such right in flats, where the tide ebbs and flows, as to require a railway company to pay them damages for the right of passage. Walker *v.* Boston & Maine Railw. 3 Cush. 1; s. c. 1 Am. Railw. C. 462.

[7] Zimmerman *v.* Union Canal Co., 1 Watts & S. 346.

[8] Shrunk *v.* Schuylkill Navigation Co., 14 Serg. & Rawle, 71.

[9] Commonwealth *v.* Ritcher, 1 Penn. 467.

[10] Susquehannah Canal Co. *v.* Wright, 9 Watts & Serg. 9; Monongahela Navigation Co. *v.* Coons, 6 id. 101.

*SECTION II.

Taking Lands in invitum.

1. *Legislative grant requisite.*
2. *Compensation must be made.*
3. *Consequential damages.*
4. *Extent of such liability.*
5. *These grants strictly construed.*
6. *Limitation of the power to take lands.*
7. *Interference of courts of equity.*
8. *Rule of construction in American courts.*
9. *Strict, but reasonable construction.*
10. *Rights acquired by company.*
11. *Limited by the grant.*
12. *Late decision of the House of Lords.*

§ 64. 1. In England railways can take lands by compulsion, only in conformity to the terms of their charters, and the general laws defining their powers.[1] And in this country a railway company or other corporation must show, not only the express warrant of the legislature[2] (which it must for all its acts) for taking the land of others for their own uses, but also that the legislature, in giving such warrant, conformed to the constitutions of the states, in most of which it is expressly required that compensation should be made for all lands taken. And upon this subject, the circumspection of the English courts, in requiring damage and loss to the land-owners to be fairly met, is shown very fully by the language of Lord *Denman*, Ch. J., in The Queen *v.* The Eastern Counties Railway.[3]

[1] Taylor *v.* Clemson, 2 Q. B. 978; s. c. 3 Railw. C. 65. *Tindal*, Ch. J., here said, "This authority to take land, if exercised adversely, and not by consent, is undoubtedly an authority to be carried into effect, by means unknown to the common law." And in Barnard *v.* Wallis, 2 Railw. C. 177, the Master of the Rolls declares, that aside from the provisions of the act of parliament, the owner of one rod of land may insist upon his own terms, to the utter overthrow of the most important public work. "The price of his consent must be determined by himself." All kinds of property and estate are subject to this right of eminent domain, and a dwelling-house, so long regarded as the inviolable sanctuary of the owner or occupant, forms no exception. Wells *v.* Som. & Ken. Railw. Co., 47 Me. 345.

[2] Hickok *v.* Plattsburgh, 15 Barb. 435; 4 Barb. 127; Halstead *v.* Mayor, &c. of New York, 3 Comst. 430; Hart *v.* Mayor of Albany, 9 Wend. 571, 588; 2 Denio, 110; Dunham *v.* Trustees of Rochester, 5 Cowen, 462.

[3] 2 Q. B. 347; s. c. 2 Railw. C. 736, 752. It has been repeatedly decided that the corporate authorities of a city have no power to confer upon any person, natural or corporate, the franchise of operating a railway. Such a grant for an indefinite period is void as a perpetuity. Such powers are held by the city for the public benefit, and cannot be abrogated or delegated. And such a grant is not an

* 2. "We think it not unfit to premise, that when such large powers are intrusted to a company to carry their works into execution, without the consent of the owners and occupiers of the land, it is reasonable and just that any injury to property which can be shown to arise from the prosecution of those works should be fairly compensated for to the party sustaining it."

3. In the English statute, too, railway companies are made liable to pay damage to the owner of all lands "injuriously affected" by any of their works. Such a provision does not exist in many of the American states, and consequently no liability is imposed for merely consequential damages to lands, no part of which is taken.[4]

4. Under the English statute, giving damage where lands are "injuriously affected," railways have been held liable for all acts, which, if done without legislative grant, would constitute a nuisance, and by which a particular party incurs special damage.[5]

5. These grants, being in derogation of common right, are to receive a reasonably strict and guarded construction.[6] The * Mas-

act of municipal legislation merely, but a contract which, if valid, it could not revoke or limit, and which is consequently void as a perpetuity. Milhau *v.* Sharp, 27 N. Y. 611; *post*, § 76, p. 547.

[4] Hatch *v.* Vermont Central Railw., 25 Vt. 49; Philadelphia & Trenton Railw., 6 Whart. 25; Monongahela Nav. Co. *v.* Coon, 6 Watts & Serg. 101. See also Protzman *v.* Ind. & Cin. Railw., 9 Ind. 467; Evansville & Crawfordsville Railw. *v.* Dick, id. 433.

[5] Queen *v.* Eastern Co.'s Railw., 2 Q. B. 347; Glover *v.* North Staffordshire Railw., 16 Q. B. 912; s. c. 5 Eng. L. & Eq. 335.

[6] Gray *v.* Liverpool & Bury Railw., 9 Beav. 391; s. c. 4 Railw. C. 235–240. Hence under a general grant of power to take land for the track of a railway, with sidings and branches to the towns along the line, the company have no power to take land for a temporary track during the period of constructing the main line. Currier *v.* Marietta & Cin. Railw. Co., 11 Ohio N. S. 228. Nor can a railway company, under their general powers, take lands at a distance from their line not intended to be used in its construction. Waldo *v.* Chicago, St. Paul & Fond du Lac Railw. Co., 14 Wis. 575. Nor can a railway company take land compulsorily for the purpose of erecting a manufactory of railway cars, or dwellings to be rented to the employés of the company. But they may take land for the purpose of storing wood and lumber used on the road, or brought there for transportation upon it. And when land is taken for a legitimate purpose, the decision of the locating officers of the company is conclusive as to the extent required for that purpose, unless the quantity so taken is clearly beyond any just necessity. Vt. & Canada R. *v.* Vt. Cent. R., 34 Vt. 2.

ter of the Rolls, in this last case, says, "In these cases it is always to be borne in mind, that the acts of parliament are acts of sovereign and imperial power, operating in the most harsh shape in which that power can be applied in civil matters, — solicited as they are, by individuals, for the purpose of private speculation and individual benefit." And in another case[7] the rule of construction is thus laid down: —

6. "These powers extend no further than expressly stated in the act, except where they are necessarily and properly acquired for the purposes which the act has sanctioned." This last category, as here observed, is often a most perplexing one, in regard to its true extent and just limits. And doubtful grants are to be construed most favorably towards those who seek to defend their property from invasion.[8] And a railway, having an option between different routes, can only take lands on that route which they ultimately adopt; and if they contract for land upon the other routes, cannot be compelled to take it.[9] The time for exercise of these compulsory powers, by the English statutes, is limited to three years,[10] except for improvements * necessary for the public safety, in conformity with the certificate of the Board of Trade.

It was decided by the House of Lords, reversing the judgment of the Lords Justices, but affirming that of the Vice-Chancellor, that where the legislature authorizes a railway company to take, for their purposes, any lands described in their act, it constitutes

[7] Colman *v.* The Eastern Counties Railw., 10 Beav. 1; s. c. 4 Railw. C. 513, 524; State *v.* B. & O. Railw., 6 Gill, 363; Simpson *v.* So. Staff. Waterworks Co., 11 Jur. N. S. 453. And in a recent case in Kentucky, the rule is thus stated: The rules of construction which apply to charters delegating sovereign power to corporations do not depend upon the question whether the corporation is a private or a public one, but on the character of the powers conferred, and the purposes of the organization. The power of a railway, or other private corporation, to take private property for its use, being a delegation of sovereign power, must be construed as it would be if delegated to a municipal corporation. And the powers of private and public corporations, with respect to their property, are governed by the same principles, and, in the absence of express provisions of law, depend upon the purposes for which the corporation was formed. Bardstown & Lou. R. R. Co. *v.* Metcalfe, 4 Met. (Ky.) 199.

[8] Sparrow *v.* Oxford, W. and W. Railw., 9 Hare, 436; s. c. 12 Eng. L. & Eq. 249; Shelford on Railways, 233.

[9] Tomlinson *v.* Man. & Birm. Railw., 2 Railw. C. 104; Webb *v.* Man. & Leeds Railw., 1 Railw. C. 576.

[10] Such a limitation is held obligatory wherever it exists. Peavey *v.* Calais Railw., 30 Maine, 498; s. c. 1 Am. Railw. C. 147.

them the sole judges as to whether they will or will not take those lands, provided that they take them *bona fide* with the purpose of using them for the purposes authorized by the legislature, and not for any sinister or collateral purpose.[11] And that a court of equity cannot interfere, even upon the decision of an engineer, to curtail the power of the company, in regard to the quantity of land sought to be obtained by it, so long as it acts in good faith. But in a later case[12] it was said that the House of Lords, in the case of Stockton & Co. *v.* Brown, did not decide that the company, by its engineer, had an unlimited discretion to take any land which the engineer would make affidavit the company required for use in the construction of their works, without stating what works; but that it must appear to what use they proposed to put the lands, and if that came fairly within the range of their powers, the company could not be controlled in the *bona fide* exercise of its discretion as to the mode of constructing their works, within the powers confided to them by the legislature. The company will not be restrained from taking land for the purpose of depositing waste upon, although not confident of requiring it for any other purpose connected with the construction.[13]

7. As a general rule in the English courts of equity, if the construction of a railway charter be doubtful, they will remit the party to a court of law to settle the right, in the mean time so exercising the power of granting temporary injunctions as will best conduce to the preservation of the ultimate interests of all parties.[14]

* 8. Similar rules of construction have prevailed in the courts of this country. The language of Ch. J. *Taney*, in the leading case upon this subject, in the national tribunal of last resort, is very explicit. "It would present a singular spectacle, if, while the courts of England are restraining within the strictest limits the spirit of monopoly and exclusive privilege in nature of monopoly, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarg-

[11] Stockton & Darlington Railw. Co. *v.* Brown, 6 Jur. N. S. 1168; s. c. 9 Ho. L. C. 246; North Missouri Railw. *v.* Lackland, 25 Mo. 515; Same *v.* Gott, id. 540.

[12] Flower *v.* London Br. & S. Coast Railw. Co., 2 Drew. & Sm. 330; s. c. 11 Jur. N. S. 406.

[13] Lund *v.* Midland Railw. Co., 34 L. J. Ch. 276.

[14] Clarence Railw. *v.* Great North of England, C. & H. J. Railw., 2 Railw. C. 763. But the practice of courts of equity in this respect, is by no means uniform. See *post*, chap. xxviii.

ing these privileges by implication."[15] And in commenting upon the former decisions of that court, upon this subject, the same learned judge here says, "the principle is recognized, that in grants by the public nothing passes by implication."[16] And other cases are here referred to in the same court, in support of the same view.[17]

9. But it is not to be inferred that the courts in this country, or in England, intend to disregard the general scope and purpose of the grant, or reasonable implications, resulting from attending circumstances. But if doubts still remain, they are to be solved against the powers claimed.[18]

*10. But where the right of the company to appropriate the land is perfected under the statute, they may enter upon it without any process for that purpose, and the resistance of the owner is unlawful, and he may be restrained by injunction, but that is unnecessary. The statute is a warrant to the company.[19]

11. But a grant to a railway to carry passengers and merchandise from A. to M., does not authorize them to transport merchandise from their depot in the city of M. about the city, or to other points, for the accommodation of customers.[20]

12. There has been considerable discussion in the English

[15] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420.

[16] U. S. *v.* Arredondo, 6 Pet. 691, 738.

[17] Jackson *v.* Lamphire, 3 Pet. 280; Beaty *v.* Knowler, 4 Pet. 152, 168; Providence Bank *v.* Billings & Pittman, 4 Pet. 514. And that court not only adheres to the same view still, but may have carried it, in some instances, to the extreme of excluding all implied powers. See also upon this subject, Commonwealth *v.* Erie & Northeast Railw., 27 Penn. St. 339; and Bradley *v.* New York & New Haven Railw., 21 Conn. 294.

[18] Perrine *v.* Ches. & Del. Canal Co., 9 How. 172; Enfield Toll Bridge *v.* Hartford & N. H. Railw., 17 Conn. 454; Springfield *v.* Conn. River Railw., 4 Cush. 63; 30 Maine, 498; 9 Met. 553; 1 Zab. 442; 3 Zab. 510; 21 Penn. St. 9; 15 Ill. 20.

The following cases will be found to confirm the general views of the text: Tuckahoe Canal Co. *v.* Tuckahoe Railw., 11 Leigh, 42; Greenleaf's Cruise, Vol. 2, 67, 68; Thompson *v.* N. Y. & H. Railw., 3 Sandf. Ch. 625; Oswego Falls Bridge Co. *v.* Fish, 1 Barb. Ch. 547; Moorhead *v.* Little Miami Railw., 17 Ohio, 340; Stormfeltz *v.* Manor Turnpike Co., 13 Penn. St. 555; Toledo Bank *v.* Bond, 1 Ohio N. S. 636; Cincinnati Coll. *v.* State, 17 Ohio, 110; Cam. & Amboy R. *v.* Briggs, 2 Zab. 623; Carr *v.* Georgia Railw. & Banking Co., 1 Kelly, 524; 7 Ga. 221; New London *v.* Brainard, 22 Conn. 552; Bradley *v.* N. Y. & N. H. Railw., 21 Conn. 294; 9 Ga. 475; Barrett *v.* Stockton & D. Railw., 2 M. & G. 134.

[19] Niagara Falls & Lake Ontario Railw. *v.* Hotchkiss, 16 Barb. 270.

[20] Macon *v.* Macon & Western Railw., 7 Ga. 221.

courts, within the last few years, in regard to many recent statutes there, for the improvement of markets and streets in the metropolis or districts adjoining, through the agency of the municipal corporations. And while the courts there, and especially the House of Lords, in a very recent case,[21] adhere strenuously to the former rule, in regard to private corporations, that they can only take lands compulsorily, for the needful purposes of the works which they are authorized by the legislature to construct; on the other hand, they hold that it is competent and proper under parliamentary powers granted for that purpose, to allow municipal corporations to reimburse the expense of any improvements which they are authorized to carry forward, in their streets and squares or markets, by taking the lands adjoining such improvements, at the price of their value before such improvements, and selling them at the advanced prices caused by such improvements. And it was held that the municipality having, before the act passed, contracted for the sale of such of the lands so to be taken as they should not require for the purpose of the public improvement, did not disqualify them from exercising the discretion reposed in them by the act, as to how much land they would take. This rule of law in regard to the proper mode of reimbursing the expense of great public improvements is not very different from that which has been extensively in use in America under the name of betterment acts, whereby the expense is assessed upon the adjoining * property-owners, upon some scheme of equalization, presumptively apportioning the loss and benefit equitably.[22]

SECTION III.

Conditions Precedent.

1. *Conditions precedent must be complied with.*
2. *That must be alleged in petition.*
3. *When title vests in company.*
4. *Filing the location in the land office is notice to subsequent purchasers.*
5. *After damages are assessed and confirmed by the court the owner is entitled to execution.*
6. *If the company use the land.*
7. *Subscriptions payable in land without compensation, a court of equity will enforce payment.*

§ 65. 1. It has been held that a railway company must comply with all the conditions in its charter, or the general laws of the

[21] Galloway v. The Mayor & Commonalty of London and the Metropolitan Railw. Co., *et vice versa*, 12 Jur. N. S. 747. (1866.) s. c. Law Rep. 1 H. L. 34.

[22] *Post*, § 229, and cases cited in n. 22, 23.

state, requisite to enable it to go forward in its construction, before it acquires any right to take land by compulsion. In England one of these conditions in the general law is, that stock, to the amount of the estimated cost of the entire work, shall be subscribed. And where the charter or the general laws of the state gave the right to take land for the road-way only upon the legislature having approved of the route and termini of the line, it was held the company could not proceed to condemn lands for that purpose until this approval was made.[1]

2. And where the act of the legislature, under which a railway was empowered to take lands, required the company to apply to the owner, and endeavor to agree with him as to the compensation, unless the owner be absent or legally incapacitated, they have no right to petition for viewers until that is done.[2] The petition should allege the fact that they cannot agree with the owner.[2]

* The right of such companies to take land is held in some states to depend upon the legal sufficiency and validity of the certificate and public record of organization; and it was held the company must show these prerequisites to be strictly in conformity with the requirements of the law.[3]

3. Where the charter of a railway company provides that the title of land condemned for the use of the company shall vest in the company, upon the payment of the amount of the valuation, no title vests until such payment.[4] In a late case,[5] the law upon

[1] Gillinwater *v.* The Mississippi & A. Railw. Co., 13 Ill. 1.

[2] Reitenbaugh *v.* Chester Valley Railw., 21 Penn. St. 100. But where the company have the right to lay their road, not exceeding six rods in width, and have fixed the centre line of the same, they may apply for the appointment of appraisers, and determine the width of the road, any time before the appraisal. Williams *v.* Hartford & New Haven Railw., 13 Conn. 110. But slight, if indeed any evidence of this failure to agree with the land-owner is required, where the claimant appears and makes no objection on that ground. Doughty *v.* Somerville & Eastern Railw., 1 Zab. 442. And the petition may be amended where this averment is omitted. Pennsylvania Railw. *v.* Porter, 29 Penn. St. 165.

[3] Atlantic, &c. Railw. *v.* Sullivant, 5 Ohio N. S. 276.

[4] Baltimore & Susquehanna Railw. *v.* Nesbit, 10 How. (U. S.) 395. See also Compton *v.* Susquehanna Railw., 3 Bland, 386, 391; Van Wickle *v.* Railw., 2 Green, 162; Stacy *v.* Vermont Central Railw., 27 Vt. 39; Levering *v.* Railw. Co., 8 Watts & Serg. 459. And upon payment of the compensation assessed by commissioners, and taking possession afterward, the title of the company is perfected, as against the party to the proceedings. Bath River Navigation Co. *v.* Willis, 2 Railw. C. 7.

[5] Stacy *v.* Vermont Central Railw., 27 Vt. 39.

this subject is thus summed up: Where the charter of the company provides, that after the appraisal of land, for their use, "*upon the payment of the same*," or deposit, (as the case may be,) the company shall be deemed to be seized and possessed of all such lands, "they must pay or deposit the money before any such right accrues." — "The payment or deposit of the money awarded is a condition precedent to the right of the company to enter upon the land for the purposes of construction, and without compliance with it they may be enjoined by a court of equity, or prosecuted in trespass at law, for so doing. The right of the land-owner to the damages awarded is a correlative right to that of the company to the land. If the company has no vested right to the land, the land-owner has none to the price to be paid."

4. And where the charter contained the usual power to take land, it was held, that after laying out their road and filing the location in the land office, the company had acquired a right of entry, which subsequent purchasers were bound to respect.[6]

5. And where the road has been laid and the damages * assessed, and confirmed by the court, the owner of the land is entitled to execution, although the company have not taken possession of the land, and may desire to change the route.[7]

6. But where the railway enter into the possession of the land, and construct their road without having paid the whole of the damages assessed therefor, a court of equity will enforce the payment by an order for such payment within a time named, and in default will restrain the company by injunction from using the land until the price is paid.[8] In one case it was held, that where the railway is surveyed and located and the land-owner consents to the company entering and building their road before the damages are ascertained, under an agreement that this shall be done thereafter, and the road is thereupon constructed, the title to the land passes, and the owner retains no lien thereon for his damages, but must look for payment to the party contracting.[9] But in a recent English case,[10] it was held that the owner of lands

[6] Davis v. E. T. & Ga. Railw., 1 Sneed, 94.

[7] Neal v. Pittsburgh & Connelsville Railw., 31 Penn. St. 19.

[8] Cozens v. Bognor Railw., Law Rep. 1 Ch. 594; s. c. 12 Jur. N. S. 738.

[9] Knapp v. McAuley, 39 Vt. 275. But in this state the vendor's lien upon real estate for the price is expressly repealed by act of the legislature.

[10] Walker v. Ware, &c. Railw. Law Rep. 1 Eq. 195.

taken possession of by a railway company, either under statutory power or by agreement, has a lien thereon for the purchase-money and also for the damages to the adjoining land, if not the subject of a special agreement, inconsistent with the continuance of such lien. Of this lien he is not deprived by a deposit and bond under the statute, or by accepting a deposit, less than the whole amount due him, and a court of equity will enforce this lien, although the railway has been opened for public use.

7. And where a subscription of land is made to a railway company, upon some condition precedent to be performed by the company, such condition is waived by conveying the land and certificates of stock. But if such conveyance is induced by false representations, the company may be compelled to perform it, or by tendering a return of the certificates the entire conveyance may be set aside, even after the company have conveyed the land to others conversant of the facts at the time of such conveyance.[8]

SECTION IV.

Preliminary Surveys.

1. *May be made without compensation.*
2. *Company not trespasser.*
3. *For what purposes company may enter upon lands.*
4. *Company liable for materials.*
5. *Right to take materials.*
6, 7. *Location of survey.*

§ 66. 1. It is settled that the legislature may authorize railway companies to enter upon lands for the purpose of preliminary surveys, without making compensation therefor, doing as little damage as possible, and selecting such season of the year as will do least damage to the growing crops. The proper rule to be observed, in this respect, being such as a prudent owner of the land would be likely to adopt, in making such surveys for his own advantage.[1]

* 2. In the English statutes, and in many of the special charters and general railway acts in the American states, the company are bound to make compensation for such temporary use of the land,

[1] Cushman *v.* Smith, 34 Maine, 247; Polly *v.* S. & W. Railw. Co., 9 Barb. 449; Bloodgood *v.* Mohawk & H. Railw. Co., 14 Wend. 51; s. c. 18 Wend. 9; Mercer *v.* McWilliams, Wright (Ohio), 132. But in some states the party is made liable by statute for damages for temporary occupation.

where they do not ultimately take the land. But in such case, where the statute authorizes the entry upon the land, the company are not to be treated as trespassers, and even where the statute provides for no compensation, it is not regarded as taking private property for public use, within the provisions of the American state and United States constitutions.

3. Under the English statute the notice to use lands for temporary purposes should specify the particular purpose for which the lands are required.[2] By the English statute,[3] the company may make a temporary entry upon land for the following purposes: —

1st. For the purpose of taking earth, or soil, by side cuttings.

2d. For the purpose of depositing spoil.

3d. For the purpose of obtaining materials for the construction or repair of the railway.

4th. For the purpose of forming roads to, from, or by the side of the railway.[4]

5th. By section 42, if the owner of such lands, as the company give notice of temporary occupation, elect to sell to the company and give them notice accordingly, they are compellable to buy, and in all other cases to make compensation for all injury to the same.

4. It has been held, in regard to the right of railway companies to take materials from lands adjoining their survey to build * their road,[5] that the damages need not be appraised till after the materials were taken: that the commissioners had authority to assess damages for every act which the company might lawfully do under their charter: that the company had the right to take such materials, *in invitum*, and to use other land, without their survey, for

[2] Poynder *v.* The Great N. Railw. Co., 16 Sim. 3; s. c. 5 Railw. C. 196.

[3] 8 & 9 Vict. ch. 20, § 32.

[4] In Webb *v.* The Manchester & Leeds Railw. Co., 4 Myl. & Cr. 116; s. c. 1 Railw. C. 576, 599, Lord *Cottenham*, Ch., is reported to have said: "The powers given to these companies are so large, and frequently so injurious to the interests of individuals, that I think it is the duty of every court to keep them most strictly within those powers, and if there is any reasonable doubt as to the extent of their powers, they must go elsewhere and get enlarged powers, but they will get none from me, by way of construction of the act."

[5] Vermont Central Railw. *v.* Baxter, 22 Vt. 365. See also Bliss *v.* Hosmer, 15 Ohio, 44; Lyon *v.* Jerome, 15 Wendell, 569; Wheelock *v.* Young & Pratt, 4 Wendell, 647. Also Lesher *v.* The Wabash Nav. Co., 14 Illinois, 85. See *post*, § 68.

preparing stone for their use: that the same right equally resided in the contractors to build the road: and that the corporation is liable to the land-owner for materials so taken by the contractors, notwithstanding any stipulations in the contract of letting exempting them from such liability, as between themselves and the contractors.

5. It has sometimes been made a question, in this country, how far the legislature could confer upon railway companies the power to take materials, without the limits of their survey, *in invitum*.[5] And in a somewhat recent case,[6] where the charter of the company authorized them to take land, so much as might be necessary for their use, and also to take for certain purposes earth, gravel, stone, timber, or other materials, on or from the land *so taken*, it was held the company were not thereby empowered to take materials from land not taken.

6. But a railway company, who enter upon land to construct their road before the time for filing the location of their line, are liable as trespassers, if the location when filed does not cover the land so entered upon.[7]

7. And the *onus* is upon the company to justify by showing that the land is covered by the authorized location.[7] The location filed by the company is conclusive evidence of the land * taken, and cannot be controlled by extrinsic evidence, though a plan or map, made a part of the description of the location, and filed with the written location, may be referred to for explanation, but not to modify or control the written location.[7]

[6] Parsons *v.* Howe, 41 Me. 218. And under the English statute it has been held that the company are not justified in taking land compulsorily, which is required, not for the purpose of constructing any portion of the works upon it, but to supply earth or other material to be used upon other land. Bentinck *v.* Norfolk Estuary Co., 8 De G. M. & G. 714.

[7] Hazen *v.* The Boston & Maine Railw., 2 Gray, 574; Stone *v.* Cambridge, 6 Cush. 270; Hayes *v.* Shackford, 3 N. H. 10; Lewiston *v.* County Commissioners, 30 Maine, 19; Little *v.* Newport, A. & H. Railw., 12 C. B. 752; s. c. 14 Eng. L. &. Eq. 309; Springfield *v.* Conn. River Railw., 4 Cush. 63, 69, 70.

SECTION V.

Power to take temporary Possession of Public and Private Ways.

1. *The railway company may take possession of public or private ways, in building their works. Responsibility.*
2. *Remedy under the statutes, unless special damage.*
3. *Party excavating highway in building sewer and having restored it, no further responsible.*

§ 67. 1. Under the English statute,[1] the company have the power, upon notice, to take temporary possession of private roads; and by other sections, they may take possession of, cut through, and interrupt public roads. But in all such cases the damage is to be compensated, and the road restored, when practicable, and if not, a substituted one made.

2. If a private way be obstructed, the remedy is to sue for penalty under the statute, or to bring an action under the statute for special damage. But it is said an action upon the case for the obstruction cannot be maintained, except in the case of special damage, which is expressly saved by the statute.[2]

3. A party who excavates a public highway for the purpose of constructing a sewer, by contract with the public authorities, and who properly restores the same at the termination of his work, is not further responsible. But the parish must look after the subsequent repairs, whether rendered necessary by the natural subsidence of the earth, by reason of the former excavation, or by ordinary wear and tear.[3]

[1] 8 and 9 Vict. c. 20, § 30.

[2] Watkins *v.* Great Northern Railw. Co., 16 Q. B. 961; s. c. 6 Eng. L. & Eq. 179. But in Rangeley *v.* Midland Railw. Law Rep., 3 Ch. Ap. 306, it is said the company have no power under the statute to divert a public foot-path, so as to place it upon land of which it had not acquired the title.

[3] Hyams *v.* Webster, Law Rep., 2 Q. B. 264.

SECTION VI.

Land for Ordinary and Extraordinary Uses.

1. *By English statute may take land for all necessary uses.*
2. *Companies have the same power here.*
3. *So also of companies connecting at state lines.*

§ 68. 1. By the English statutes, railway companies may not only purchase land for the purpose of the track, but also for all such extraordinary uses as will conduce to the successful prosecution of their business.[1] This includes the site of stations, * yards, wharves, places for the accommodation of passengers, and the deposit of freight, both live and dead, and for the erection of weighing machines, toll-houses, offices, warehouses, and other buildings and conveniences; land for ways to the railway while in the course of construction, and to stations always. But a railway company in England cannot acquire the fee of land for the mere purpose of excavating soil in order to construct an embankment.[2] And it has been decided that a railway company cannot take land for any subsidiary purpose, even where the direct act of the company comes within the powers granted them.[3] As where they proposed

[1] 8 & 9 Vict. ch. 20, § 45. This section is only operative to enable the company to take lands for extraordinary purposes, beyond the line of deviation, by consent of the owners. But it is held that the justices have no jurisdiction, under the Railway Clauses Consolidation Act, to determine when accommodation works are necessary, but only what works are necessary, assuming that some such works are to be made. Reg. *v.* Waterford & L. Railw., 2 Irish Law (N. S.) 580. See *post*, § 99.

In the case of Chicago, Burlington, & Quincy Railw. *v.* Wilson, 17 Ill. 123, it was held, that a grant to a railway company to construct a road, with such appendages as may be deemed necessary for the convenient use of the same, will authorize them to take land, compulsorily, for workshops. And this power is not exhausted by the apparent completion of the road; but if an increase of business shall require other appendages, or more room for tracks, it may in like manner be taken, *toties quoties*. But the land-owner may traverse the right of the company to take the land, and have it determined by the proper tribunal. S. Carolina Railw. *v.* Blake, 9 Rich. 228. So also the company may take land for erecting a paint-shop and lumber and timber sheds for the use of the company. Low *v.* Galena & Chicago Union Railw., 18 Ill. 324.

[2] Eversfield *v.* Midsussex Railw., 1 Gif. 151; s. c. affirmed, 3 De G. & J. 286.

[3] Dodd *v.* Salisbury & Y. Railw., 1 Gif. 158; s. c. on appeal, 5 Jur. N. S. 782.

to alter the course of the road, in such a manner as to accommodate an adjoining land-owner, in consideration of which he proposed to pay a portion of the expense of the alteration, the company were enjoined from making the alteration, although coming clearly within their powers, if done solely for their own accommodation. The ground of the injunction was, that the alteration required the removal of the house of A., and the change was made partly for the accommodation of B., a purpose not within the powers granted the railway company. But it is incident to the grant of a railway, that it may lay down as many sidings and other collateral tracks as are fairly requisite * to accommodate its business.[4] But this will not allow the company to build a branch road on a different route from that embraced in its charter.[4]

2. The same may undoubtedly be done, in this country, whether any express provision to that effect is contained in the charter of the company, or the general statutes of the state, or not; such power being necessarily implied, as indispensable to the accomplishment of the general purposes of the corporation, and the design of the legislative grant.

3. And the same implied power is to be extended to a railway corporation, in a neighboring state, with which, by express statute, railways of the state where the lands lie have the right to unite at the line of the state,[5] or to extend their road into this * state.[6]

[4] B. O. & M. Railw. Co. *v.* Smith, 47 Me. 35. A grant to cross a highway will not justify running parallel to and upon it. Ib.

[5] State *v.* Boston, Concord, & Montreal Railw. Co., 25 Vt. 433. In this case a railway company in New Hampshire had constructed their road to the line of Vermont (where, by statute of the legislature of Vermont, two other roads were chartered, with permission to unite with any New Hampshire road), and had there purchased some fifteen acres of land, adjoining the terminus of their road, which is of course the "westernmost" bank of Connecticut River, their bridge being all in New Hampshire except the western abutment, which of necessity must rest upon Vermont soil. The company had no express grant from the legislature of Vermont. A controversy arising between this New Hampshire road and the Vermont roads at this point, in regard to the terms of junction, a *quo warranto* was prosecuted on behalf of the state, to determine the right of the New Hampshire railway to purchase and hold lands in the state of Vermont.

It was attempted to maintain, on the part of the prosecution, that there existed a right in any state to confiscate or escheat lands held by a foreign corporation. But the court repudiated the proposition, and held that the New

[6] New York & Erie Railw. *v.* Young, 33 Penn. St. 175.

And for the purpose of exercising the rights conferred by their act upon the company, the contractor for the execution of railway works must be deemed an agent of the company.[7]

SECTION VII.

Title acquired by Company.

1. *Company have only right of way.*
2. *Can take nothing from soil except for construction.*
3. *Deed in fee-simple to company.*
4. *For what uses may take land.*
5. *Right to cross railway, extent of.*
6. *Conflicting rights in different companies.*
7, 8. *Rule in the American states.*
9. *Right to use streets of a city.*
10. *Law not the same in all the states.*
11. *Rule in Massachusetts.*
12, 13. *Land reverts to the owner.*
14. *True rule stated.*
15. *Conditions must be performed.*
16. *Further assurance of title.*
17. *Condemnation cannot be impeached.*
18. *Where public acquire fee, it will never revert to grantor.*

§ 69. 1. Questions have sometimes arisen, in regard to the precise title acquired by a railway company in lands purchased by them, where the conveyance is a fee-simple. It is certain, in this country, upon principle, that a railway company, by virtue of their

Hampshire road, by the grant from the Vermont legislature of the right of the Vermont roads to form a junction with this road, at the line of the state, had acquired the implied permission to purchase and hold so much land as was necessary for the accommodation of their present and prospective business at that point, whether any junction had yet been arranged at the point or not; and that fifteen acres was not an unreasonable extent of land for such purposes, there being no question but the New Hampshire railway had, by its charter, the right to hold real estate, for the necessary purposes of its incorporation, to an amount beyond what it had yet purchased.

The court in this case did not hold that the New Hampshire road had any right to take land by compulsory proceedings in Vermont, or that their purchase of the land would deter the Vermont roads, at this point, from taking by statutory compulsion from them such portions of the same land as they might require for their own purposes. See also Nashville Railw. *v.* Cowardin, 11 Humph. 348. In the Supreme Court of New Hampshire, 20 Law Rep. 646, Crosby *v.* Hanover, it was held that the franchise of a toll-bridge across Connecticut River might be taken for a free highway, upon compensation being made to the proprietors; and that it made no difference, that one of the abutments of the bridge was within the limits of the State of Vermont, and consequently could not be taken by any proceedings in New Hampshire. s. c. 36 N. H. 404.

[7] Semple *v.* The London & Birmingham Railw., 9 Sim. 209; s. c. 1 Railw. C. 480; Vt. Central Railw. *v.* Baxter, 22 Vt. 365; *ante*, § 66; Lesher *v.* Wabash Nav. Co., 14 Ill. 85.

compulsory powers, in taking lands, could acquire no absolute fee-simple, but only the right to use the land for their purposes. And it is very questionable whether a railway, in such case, is entitled to the herbage growing upon the land, or to cultivate the same, or to dig for stone, or minerals, in the land, beyond what is necessary for their purposes in construction.

2. In England, the statutes[1] give all such minerals to the * former owner of the land, except such as are necessary in construction, unless the same shall have been expressly purchased. And in this country, no doubt, the same construction would be adopted, in regard to all lands taken by compulsory proceeding.[2]

[1] 8 and 9 Vict. c. 20, § 17. In Conn. & Pass. Railw. Co. *v.* Holton, 32 Vt. 43, it was decided, that the land-owner, after his land was legally appropriated for the track of a railway, has no right to enter upon or use such land for any purpose which in the least degree endangers or embarrasses its use for any purpose for which the railway has appropriated it. And consequently the owner could not enter upon the land with teams to remove turf therefrom, the effect of such entry being to enhance the danger of cattle getting upon the track, and to increase the dust by the passage of the cars after the sward is removed from the sides of the track. And the land-owner has no right to cross the track of the company at any other point than that established by the taking of the land; nor can he build a farm-crossing, unless established by law. And a railway company may maintain trespass for all unlawful entries and acts upon the land appropriated to their use when such acts interfere with their exclusive possession. s. p. in N. Penn. R. *v.* Rehman, 5 Am. Law Reg. N. S. 49.

[2] Baker *v.* Johnson, 2 Hill (N. Y.), 342. It was held here, that a contractor to build a canal, who stipulated with the commissioners to find all the materials necessary to the performance of the work, with stipulations in the contract that he might use all the earth obtained by excavation, might also use the stone obtained by excavating the bed of the canal across plaintiff's land, and that trover will not lie for such use. Timber standing on land taken for a railway belongs to the owner of the land, except so far as necessary for the construction and repair of the road. Preston *v.* Dub. & Pacific Railw. Co., 11 Iowa, 15. Earth and minerals above the grade of the road may be used by the company, but those below belong to the owner of the land. Evans *v.* Haefner, 29 Mo. 141.

The condemnation of land for the construction of a railway justifies the entry and necessary excavation of the soil by the company and its servants. Green *v.* Boody, 21 Ind. 10. But stone excavated in the construction, and which is not used upon any portion of the line, belongs to the owner of the land. Chapin *v.* Sullivan Railw. Co., 39 N. H. 564. But it seems from this, and from the general practice in the construction of railways, that earth or any other material which is excavated upon one portion of the line may be used upon any other portion, if required.

3. But it admits of some question, we think, what is the precise effect of a deed, in fee-simple, to a railway company. It would seem, upon general principles, that the grantor should be estopped from claiming any interest in the land, after the execution of his deed. But it seems to be agreed, in all the books, that, to the efficacy of a deed of land, it is requisite that the grantee be capable of taking the estate. And if the grantee be * an alien, or a corporation incapable of holding such estate, the deed is inoperative. Hence, in some of the cases, it seems to be a just inference from the reasoning of the court, that a railway, by a deed in fee-simple, acquires only a right of way,[3] that being all which such corporation is capable of taking.

4. It has been held in some of the states, that the lands of a railway company are subject to sale upon execution against them, or may be assigned by them.[4] So, too, they may purchase * and

[3] Dean *v.* Sullivan Railw., 2 Foster, 316; United States *v.* Harris, 1 Sumner, 21. It is held in some cases, that a grant to a railway, before its incorporation, is valid, not being the conveyance of a fee, and, to its operation and effect, not requiring the existence of a grantee, at the time of the conveyance. Rathbone *v.* Tioga Navigation Co., 2 Watts & Serg. 47. But it seems now to be considered that railway companies may acquire the absolute fee in land by purchase and deed in fee-simple, and the title will remain in the company after it has changed the location of its road, and ceased to use it for corporate purposes. Page *v.* Heineberg, 40 Vt. 81.

[4] Arthur *v.* Commercial & Railroad Bank, 9 Smedes & Marshall, 394. But this right to levy upon the lands of a railway company only extends to such lands, however acquired, as are not required to the full exercise and enjoyment of the corporate franchise. Plymouth Railw. Co. *v.* Colwell, 39 Penn St. 337. And a canal basin is not such a legitimate incident of a railway franchise as to be protected from levy, where there is no authorized canal connection. Ib. And town lots held by a railway company are not to be regarded as an incident of the franchise, so as to pass by a mortgage of the road "with its corporate privileges and appurtenances," unless directly appurtenant to the road and indispensably necessary to the exercise of its franchises. Shamokin Valley Railw. *v.* Livermore, 47 Penn. St. 465.

It has been held, that railway bonds were liable to levy on execution, but that seems questionable. Hetherington *et al. v.* Hayden, 11 Iowa, 335.

In a recent case in Vermont, Hill *v.* Western Vermont Railw. Co., 32 Vt. 68, the company, before the road was laid out or surveyed, procured a bond from B. to sell them such lands owned by him as should be required for their road. Their charter provided that the directors might cause such surveys of the road to be made as they deemed necessary, and fix the line of the same, and that the company might enter upon and take possession of such lands as were necessary for the construction of their road and requisite accommodations. The survey of

hold land for the procurement of materials, or for the economical construction of the road.[5] In a late English case,[6] it was held that the railway could not use land, thus conveyed, for any other purpose than that expressed in the acts of parliament, by virtue of which the company exercised their functions.

5. It has been held that, where one railway has power in their act to cross another railway, there being no express permission in the act for one company to take land, or for the other company to sell, that the first company could not be compelled, by mandamus, to purchase any of the land upon which the other road was constructed, their only claim being one for damages.[7] So, also, the right to make a junction with a pre-existing railway, does not imply the power to take the title to any of the lands of such railway, unless that is indispensable to effect the junction, but only to enter upon such lands, by way of easement, for the purpose of effecting the junction.[8]

6. But where the legislature confer the power upon two railway

the road, made by order of the directors, designated certain land belonging to B. as depot grounds; and the company paid him for and took the same, but never received any conveyance thereof from him. The plaintiff, having recovered a judgment against the company, levied his execution upon a portion of this land, and brought ejectment against the company to recover possession thereof. The referee, to whom the case was referred, found that a part of the land embraced in the levy was never necessary to the company for railway purposes, and would not become so prospectively. *Held*, that by B.'s contract with the company he was not bound to convey to them any greater quantity of, or estate in, his land than they required for depot accommodations; that under their charter the company could not acquire any more land, or any greater estate therein, for the purposes of a road-bed or stations, than was really requisite for such uses; that the estate so requisite was not one in fee-simple, but merely an easement, and was, therefore, not subject to be levied upon by the creditors of the company; that when taken for such purposes, the rule was the same, whether the land was taken compulsorily by condemnation and the award of commissioners, as to its extent and price, or under the agreement of the parties as to one or both of these particulars; that under their charter the directors had power to lay out their road and stations as they saw fit; and that, so long as they acted in good faith and not recklessly, their decision as to the quantity of land required for depot accommodations would be regarded as conclusive.

[5] Overmyer *v.* Williams, 15 Ohio, 26.

[6] Bostock *v.* The North Staffordshire Railw. 3 Sm. & Gif. 283.

[7] Reg. *v.* South Wales Railw., 13 Q. B. 988; s. c. 6 Railw. C. 489.

[8] Oxford, Worcester, & Wolverhampton Railw. *v.* South Staffordshire Railw., 1 Drew, 255; s. c. 19 Eng. L. & Eq. 131.

companies to purchase compulsorily the same piece of land, and one company has taken the land and constructed their road upon it, equity will enjoin the other company from proceeding to take it compulsorily for their use, until the conflicting rights of the companies are determined by a trial at law.[9]

7. The general course of decisions in this country coincides * with the English common-law rule, in regard to the title acquired by the public, by the exercise of the right of eminent domain, that is, that no more of the title is divested from the former owner than what is necessary for the public use.[10] The owner may still maintain trespass, for any injury to the freehold by a stranger.[10]

8. And in regard to railways, in particular, it has been repeatedly decided in the different states, that they take only an easement in land condemned for their use.[11] In an important case[12] in the Supreme Court of the United States, involving questions of title in regard to the streets in the city of Pittsburgh, Mr. Justice *McLean* thus sums up the general doctrine: —

"By the common law, the fee in the soil remains in the original owner where a public road is established over it; but the use of the road is in the public. The owner parts with this use only; for

[9] Manchester, S. & L. Railw. *v.* The Great N. Railw., 9 Hare, 284; s. c. 12 Eng. L. & Eq. 216.

[10] Dovaston *v.* Payne, 2 H. Bl. 527; Rust *v.* Low, 6 Mass. 90; Jackson *v.* Rutland & Burlington Railw., 25 Vt. 151; 2 Rolle's Ab. 566, p. 1.

[11] Railroad *v.* Davis, 2 Dev. & Bat. 457; Dean *v.* Sullivan Railw., 2 Foster, 316; Plank Road *v.* Buff. & P. Railw., 20 Barb. 644; Weston *v.* Foster, 7 Met. 297. In a late case in Ohio, where the subject seems to have been examined with care and study, it is laid down, as the result of the law upon the subject, that only such interest as will answer the public wants can be taken; and it can be held only so long as it is used by the public, and cannot be diverted to any other purpose. Giesy *v.* Cincinnati, Wil. & Zanesv. Railw., 4 Ohio N. S. 308. See also Hooker *v.* Utica & Minden Turnp. Co., 12 Wend. 371; People *v.* White, 11 Barb. 26; Blake *v.* Rich, 34 N. H. 282. The title of the land-owner is thus defined in this last case. The exclusive right of property in the land, in the trees and herbage upon its surface, and in the minerals below it, remains unchanged, subject always to the right of the company to construct and operate their road, in any legally authorized mode.

[12] Barclay *v.* Howell's Lessee, 6 Pet. 498. Cases to establish the general principle here announced might be multiplied to any extent. They will be found extensively collected in 3 Kent, Comm. 432, and notes. By the civil law, it is said, the soil of public highways is in the public, and the law of Louisiana is the same. Renthorp *v.* Bang, 4 Martin, 97.

if the road shall be vacated by the public he resumes the exclusive possession of the ground; and while it is used as a highway he is entitled to the timber and grass which may grow upon the surface, and to all minerals which may be found below it. He may bring an action of trespass against any one who obstructs the road."

* 9. But a query is expressed here, as in many other cases, whether this rule applies to the streets and thoroughfares of cities. In a late case in one of the British provinces on this continent, Nova Scotia, it is said to have been held, by a divided court, after long debate and deliberation, that the title to land, covered by a highway or street, vested absolutely in the crown, and that the owner had no reversionary interest.[13]

10. Some of the American cases seem to intimate a different rule from that which generally prevails in reference to highways, in regard to the title acquired by railway companies.[14] But in a late case[15] it was held, that the municipal authority of a city have no power to grant permission to a railway company to take or injure the property of a citizen; but the companies have an implied authority to make such sidetracks and continuations at the termini of their road as may be reasonable and necessary for the transaction of their business and the accommodation of the public, and may take private property for these purposes. The right to

[13] Koch *v.* Dauphin, James, 159.

[14] Wheeler *v.* Rochester & Syra. Railw., 12 Barb. 227; Munger *v.* Tonawanda Railw., 4 Comst. 349; Coster *v.* New Jersey Railw., 3 Zab. 227. The New York Court of Appeals, quite recently, upon elaborate examination, came to the conclusion, that a deed to a railway company, granting land to it and its successors, conveys an estate in fee. Nicoll *v.* New York & Erie Railw., 2 Kernan, 121. But see Henry *v.* Dubuque & Pacific Railw., 2 Clarke (Iowa), 288. In De Varaigne *v.* Fox, 2 Blatchf. C. C. 95, it was held, that where the statute conferred the right to take the fee of land, and it was taken upon compensation accordingly, the court will not construe the grant as a conditional fee or usufruct, leaving a possible reverter to the original proprietor, but will regard the entire property as vested in the grantee for ever, and that if any right accrues to the former owner in consequence of the change of the destination of the property, after the continuance of the use for twenty-six years, it is an equitable and not a legal right.

[15] Protzman *v.* Ind. & Cin. Railw., 9 Ind. 467. What shall be a reasonable extension of the track of a railway in a city beyond the depot is here discussed. It seems to be more a question of fact than of law. Evansville, &c. Railw. *v.* Dick, id. 433.

use and enjoy the street is an appurtenance to the adjoining land, and an injury to the appurtenance is an injury to the whole property; and as for such an injury the statute prescribes no remedy, the land-owner must resort to his common-law remedy.

* 11. But in a late case in Massachusetts,[16] the title seems to us to be explicitly and fully stated, and the only ground of distinction between railways and common highways, as to the title of the land taken, very intelligibly pointed out. The court here say, "the right acquired by the corporation, although technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically exclusive."

12. Hence, it seems to be admitted that, even in cases where the statute provides for the taking of the fee, upon the discontinuance of the public use, the land reverts to the former owner.[17] But where a special act authorizes a municipal corporation to hold the fee of the soil for the site of an almshouse, it was held that the original owner and his representatives could claim no exclusive interest therein, or any reversionary title thereto, after the removal of the almshouse to another site.[18]

[16] Hazen *v.* B. & M. Railw., 2 Gray, 574. But the company have no right to do any act upon the land except what is conducive to the use of the land for the purposes of their grant, of which they are the judge. Brainerd *v.* Clapp, 10 Cush. 6. In this case, *Shaw*, Ch. J., thus defines the title of the railway, in lands taken for their use: "The railroad company are authorized to do all acts, within the five rods, which by law constitute their limits, in taking away or leaving gravel, trees, stones, and other objects, which in their judgment may be necessary and proper to the grading and levelling of the road, in adjusting and adapting it to other roads, bridges, buildings, and the like, so as to render it most conducive to the public uses which the railway is intended to accomplish. Whatever acts therefore are requisite to the safety of passengers on the railway, to the agents, servants, and persons employed by the company, and to the safe passage of travellers, on and across highways and roads connected with it, and which can be done within the limits of the five rods, the company have a right under their act of incorporation to do. This is embraced in the idea of taking land for public use." See Chicago & Miss. Railw. *v.* Patchin, 16 Ill. 198.

[17] People *v.* White, 11 Barb. 26; United States *v.* Harris, 1 Sumner, 21. And by the repeal of a charter the lands do not revert to the former owner, but the franchises of the corporation are resumed by the state, and the railway remains public property, subject to the management and control of the state. Erie & Northeast Railw. *v.* Casey, 26 Penn. St. 287. But see Rexford *v.* Knight, *infra*.

[18] Hayward *v.* Mayor of New York, 3 Seld. 314. So also in regard to lands appropriated to the use of the state canals. Rexford *v.* Knight, 1 Kernan, 308.

13. In some of the cases in this country, it has been held, that it is only the residuum of title remaining in the corporation, at the time a railway is discontinued, that reverts to the former *owner of the land, and that, in the mean time, the company may wholly defeat the reversion, by a conveyance in fee-simple; and this remarkable proposition is distinctly announced in one case,[19] —"Corporations have a fee-simple for purposes of alienation, but they have only a determinable fee for purposes of enjoyment."

14. If it were said that corporations, created for special purposes of intercommunication, like railways and canals, and invested with the sovereign prerogative of eminent domain for these purposes only, had no interest, or estate, in lands whatever, except for the mere purpose of carrying on the functions with which they were invested by the state, and could neither use nor convey the lands, to be used for any other purpose whatever, it would seem far more in accordance with established principles and generally received notions upon the subject. In the same case it is said, a grant to a corporation, created only for a term of years, purporting to convey a fee, will not be construed to convey only a term for years.

15. In all these cases where the title of the company depends upon conditions, they must be strictly performed and strictly construed.[20]

16. But where, by the law of the state, railways, upon discovery that the title they are acquiring may prove defective, have the right to take new proceedings, it was held, that the discovery of a mortgage upon lands will justify the abandonment of pending process, and instituting procedure under the section which allows them to extinguish incumbrances, on that portion required for their road.[21] And the appraisal of land subject to an easement in the grantor, is irregular, and no title passes.[22]

17. After land is condemned for the use of a railway, the adju-

[19] Nicol *v.* New York & Erie Railw., 12 Barbour, 460. See State *v.* Rives, 5 Ired. 297.

[20] Bangor & Piscataqua Railw. *v.* Harris, 8 Shepley, 533; Lovering *v.* Railw., 8 Watts & Serg. 459; Munger *v.* Tonawanda Railw., 4 Comst. 349; Carr *v.* Georgia Railw. & Banking Co., 1 Kelly, 524.

[21] New York Central Railw. *in re*, 20 Barbour, 419.

[22] Hill *v.* Mohawk & H. Railw., 3 Seld. 152.

dication can no more be impeached by any collateral * proceeding, or by evidence, than the judgment of any other court of exclusive jurisdiction.[23]

And it was held, under the Pennsylvania statute,[24] that after the award of land damages, and payment of the money, the company become the owners of the land, notwithstanding the pendency of a *certiorari* to remove the case into the Supreme Court.[25]

18. Where the Commonwealth of Pennsylvania, in the construction of her public works, acquired the fee-simple of land taken therefor, either by purchase or the right of eminent domain, and the land was devoted to the use of a highway, a cessation of that use does not revest the title in the former owner.[26]

[23] Hamilton *v.* Annapolis & Elk Ridge Railw., 1 Md. Ch. 107.

[24] Stat. of 1829, § 15.

[25] Schuler *v.* Northern L. Railw., 3 Whar. 555; *ante*, § 65; *post*, § 73.

[26] Haldeman *v.* Penn. R. Co., 50 Penn. St. 425. See also as to proceedings under Lateral Railroad Acts of Pennsylvania, Brown *v.* Peterson, 40 Penn. St. 373; Boyd *v.* Negley, id. 377; Mayor, &c. of Pittsburgh *v.* Penn. R. Co., 48 id. 355. It seems scarcely necessary to state that the final judgment of condemnation and the payment of the award vests in the company the absolute right to use the land embraced in the judgment for all their legitimate purposes. Dodge *v.* Burns, 6 Wisc. 514; Burns *v.* Milw. & Miss. Railw. Co., 9 Wisc. 450. And the acceptance of the value of the land by the land-owner, however the amount may have been ascertained, is an acquiescence in the taking, as much as if he had conveyed the land by deed. Ib. The party cannot accept the amount of an award of damages, and also appeal therefrom. Miss. & Mo. Railw. Co. *v.* Byington, 14 Iowa, 572. But where by mutual submission the land-owner and railway company referred the amount of damages to be paid by the company to arbitrators, who awarded the amount to be paid for the title conveyed simultaneously, which the company offered to do on their part, but the land-owner declined to perform on his part, or to give any encouragement of ever doing, but many years after brought an action against the company for not performing the award, it was held he could not recover. Smith *v.* Boston & Maine Railw., 6 Allen, 262.

*SECTION VIII.

Corporate Franchises condemned.

1. *Road franchise may be taken.*
2. *Compensation must be made.*
3. *Railway franchise may be taken.*
4. *Rule defined.*
5. *Constitutional restrictions.*
6. *Not well defined.*
7. *Must be exclusive, in terms.*
8. *Legislative discretion.*
9. *Highways and railways compared.*
10. *Extent of eminent domain.*
11. *Exclusiveness of the grant, a subordinate franchise.*
12. *Legislature cannot create a franchise, above the reach of eminent domain.*
13. *Legislature may apply streets in city to any public use.*

§ 70. 1. The franchise of a turnpike, or bridge, or other similar *corporation may be taken for a free road, or for a railway, which, as we have said, is an improved highway.[1] And it will make no difference that the franchise is situate partly within the limits of different states, as in the case of a bridge across a river which forms the divisional line between different states. But the proceedings in one state can only take what lies within its limits.[2]

2. But compensation, either for the entire franchise, which is the more common course, and ordinarily the only just mode of procedure, or for the special injury, must be made.[3] But it is no objection to the validity of an act of the legislature, allowing a railway to carry its track across the land of a mill-dam company, incorporated by the legislature, that it contains no express provision for compensation to such mill-dam company. This is implied, as in other cases, where land is taken.[4] And the same implication has been held to extend to the case of a subsequent grant of a railway, which materially depreciated the use and value of a prior grant of a bridge.[5] But it is the more commonly received opinion, that a subsequent grant, which only incidentally

[1] Armington *v.* Barnet, 15 Vt. 745; West River Bridge *v.* Dix, 6 How. U. S. 507; s. c. 16 Vt. 446; White River Turnpike Co. *v.* Vermont Central Railw., 21 Vt. 594; Boston Water Power Co. *v.* Boston & Worcester Railw., 23 Pick. 360; Central Bridge Corporation *v.* City of Lowell, 4 Gray, 474.

[2] Crosby *v.* Hanover, 36 N. H. 404.

[3] West River Bridge *v.* Dix, *supra;* Boston Water Power Co. *v.* Boston & Worcester Railw., *supra.* But see 11 Leigh, 42.

[4] Boston Water Power Co. *v.* Boston & Worcester Railw., *supra.*

[5] Enfield Toll Bridge Co. *v.* The Hartford & New H. Railw., 17 Conn. 454; s. c. 17 Conn. 40.

operates injuriously to an earlier one, does not require compensation to be made for such injury, unless expressly so provided.[6]

3. So also may the franchise of one railway be taken for the construction of another railway.[7]

4. In a late case the law upon this subject is thus stated, by *Shaw*, Ch. J.: "The court are of opinion; that it is competent * for the legislature, under the right of eminent domain, to grant authority to a railway corporation, to take a highway longitudinally in the construction of their road. The power of eminent domain is a high prerogative of sovereignty, founded upon public exigency, according to the maxim, *Salus reipublicæ lex suprema est*, to which all minor considerations must yield, and which can only be limited by such exigency. The grant of land for one public use must yield to that of another more urgent."[8]

5. The great question of the inviolability of corporate franchises, which we shall have occasion to discuss more at large hereafter,[9] is, no doubt, to a certain extent, involved here. For, upon general principles of legislative authority, there could be no question that a corporation, which is the mere creature of the legislature, might be, at once and unconditionally, extinguished, by repeal of the charter. This is confessedly within the power of the legislative authority of the British parliament; and the legislative authority of the parliament of Great Britain is no more extensive than that of the legislatures of the American states, aside from restrictions contained in the constitutions of the United States, and of the several states.[10]

6. The only limitation upon this power over private corporations, in most of the states, perhaps in all, is found in that provision of the United States constitution which prohibits the legislatures of the several states from passing any law impairing the

[6] White River Turnpike Co. *v.* Vermont Central Railw., 21 Vt. 594.

[7] *Grier*, J., in Richmond Railw. *v.* Louisa Railw., 13 How. 81, 82; Newcastle & R. Railw. *v.* P. & Ind. Railw., 3 Ind. 464.

[8] Springfield *v.* Conn. River Railw., 4 Cush. 63. See also upon the general subject, Chesapeake & Ohio Canal Co. *v* Baltimore and Ohio Railw., 4 Gill & Johns. 1; Forward *v.* Hampshire & Hampden Canal Co., 22 Pick. 462, where the prior company is held bound by acquiescence in the transfer of its franchises to another company. Irvin *v.* Turnpike Co., 2 Penn. 466; Rogers *v.* Bradshaw, 20 Johns. 735; Backus *v.* Lebanon, 11 N. H. 19.

[9] *Post*, § 231.

[10] Dartmouth College *v.* Woodward, 4 Wheat. 518.

obligation of contracts. And the proper limits of this restriction, in regard to corporations, is not altogether well defined, in the different opinions of the several judges of the supreme national tribunal upon this subject; nor is there any thing approaching unanimity among them.

7. But it may perhaps be regarded as settled, for the time at least, that where exclusive privileges are conferred upon private * corporations, by express words, or necessary implication, the grant is irrevocable and inviolable. But that the grant of any privilege or franchise carries no implied exclusion, of similar privileges and franchises being conferred upon other persons, natural or corporate.[11]

8. The legislature may in all instances determine, when and where the public necessities require additional facilities, of a similar or analogous character, where the former grant is not exclusive.[11]

9. And in some cases of exclusive and perpetual grants, for common highways or bridges, it has been held, that this did not preclude the legislature from granting railways and railway bridges within the limits of the former grant.[12] In the last case referred to, the court held, that a perpetual grant of a toll-bridge across the Cape Fear River, which in terms subjected all persons to a penalty for transporting persons or property across that river in any other manner, within six miles of the plaintiff's bridge, would not subject the defendant's company to the penalty for carrying persons and property across the river, upon their road, by means of a bridge erected within the six miles; that the grant was intended to be exclusive only, as to all modes of travel and transportation then known, but not to exclude all improvements thereon, in all future time.[13]

10. But the exclusive character of a corporate grant will not preclude the power to take the franchise, upon making compen-

[11] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; Thorpe *v.* Rut. & Bur. Railw., 27 Vt. 140; Boston & Lowell Railw. *v.* Salem & Lowell Railw., 2 Gray, 1; Mohawk Bridge Co. *v.* Utica & Sch. Railw., 6 Paige, 554; Hudson & Delaware Canal Co. *v.* New York & Erie Railw., 9 Paige, 323.

[12] McRee *v.* Wilmington & Raleigh Railw., 2 Jones Law, 186. But see Enfield Bridge Co. *v.* Hartford & New H. Railw., 17 Conn. 40, 454.

[13] But this distinction is certainly not attempted to be maintained, in the majority of the cases upon this subject, either in England or in this country. *Post*, § 231 *et seq.*

sation, under the right of eminent domain, the stipulation in the charter, that the grant shall be exclusive of all others, being subject to the same law as other property, whether in possession or action; all which is confessedly subject to the exercise of the right of eminent domain, by the sovereign.[14]

* 11. It has sometimes been characterized, as a refinement or an invasion, to identify the covenant, in the charter of a private corporation, that the grant shall be exclusive of all others, with the charter itself, and thus subject it to the law of eminent domain. But it seems to us entirely a sound view, in all cases where the whole franchise of the corporation is proposed to be taken, and that the charge of refinement is rather to be laid at the door of such as attempt to raise a distinction between the exclusiveness of the grant and the grant itself, in order to preserve the inviolability of the former, which is the lesser and subordinate franchise, when the latter, and paramount, and vital franchise of a corporation is confessedly subject to the law of eminent domain.[15]

12. It is intimated in West River Bridge Company *v.* Dix, by *Woodbury*, J., that if the charter of the corporation contained an express stipulation against the exercise of the right of eminent domain upon the corporation, this might secure the franchise. But this is certainly not the prevailing opinion.[16]

[14] Enfield Toll Bridge Co. *v.* Hartford & New Haven Railw., 17 Conn. 40 and 454. This doctrine has been so repeatedly asserted in all the courts of the country, that it seems scarcely requisite to multiply references. And the right to take the franchise of another corporation, by parity of reason, carries the right to impair another franchise to any extent, upon making indemnity. Matter of Kerr. 42 Barb. 119.

[15] West River Bridge Co. *v.* Dix, 16 Vt. 446; s. c. 6 Howard (U. S.), 507, 539, Opinion of *Woodbury*, J.: who argues that it is difficult to comprehend why the *exclusiveness* of the grant to a private corporation should, upon principle, be any more inviolable by legislative authority than any other part of the corporate franchise. It is only as property that it is valuable, or that it is protected at all. And all property is, in cases of proper necessity, subject to the law of eminent domain. It is very questionable whether this law should be held to extend to those portions of public works which may always be obtained in the market, and where, by consequence, there is no practical necessity.

[16] In regard to the right of eminent domain, it seems now to be conceded, that no legislature, upon any consideration or pretence whatever, can deprive a future legislature of its exercise, in the absolute annihilation of corporate franchises, upon just and adequate compensation. In Backus *v.* Lebanon, 11 N. Hamp. 19, *Parker*, Ch. J., says: "Had the charter contained an express stipulation,

*13. The fee of the streets of a city, where it has been acquired by the municipality under the right of eminent domain, * becomes

that the property of the corporation should never be taken, in the exercise of the power of eminent domain, the question would at once have arisen, whether it was competent for any legislature to make a contract of that character; whether any legislature has authority, by contract, to lay restrictions upon this power." And reference is here made to Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. Hamp. 35, 69, as containing the views of the court upon the subject. See also Brewster *v.* Hough, 10 N. Hamp. 138; Northern Railw. *v.* Concord & Claremont Railw., 7 Foster, 183, 195.

The remarks of the late Professor Greenleaf, in his edition of Cruise, vol. 2, tit. 27, § 29, in note, p. 67, 68, upon this important subject, seem altogether worthy of commendation, and their insertion here will require no apology. "But in regard to the position, that the grant of the franchise of a ferry, bridge, turnpike, or railroad, is in its nature exclusive, so that the state cannot interfere with it by the creation of another similar franchise, tending materially to impair its value, it is with great deference submitted, that an important distinction should be observed between those powers of government which are essential attributes of sovereignty, indispensable to be always preserved in full vigor, such as the power to create revenues for public purposes, to provide for the common defence, to provide safe and convenient ways for the public necessity and convenience, and to take private property for public uses, and the like, and those powers which are not thus essential, such as the power to alienate the lands and other property of the state, and to make contracts of service, or of purchase and sale, or the like. Powers of the former class are essential to the constitution of society, as without them no political community can well exist; and necessity requires that they should continue unimpaired. They are intrusted to the legislature to be exercised, not to be bartered away; and it is indispensable that each legislature should assemble with the same measure of sovereign power which was held by its predecessors. Any act of the legislature, disabling itself from the future exercise of powers intrusted to it for the public good, must be void, being in effect a covenant to desert its paramount duty to the whole people. It is therefore deemed not competent for a legislature to covenant, that it will not under any circumstances open another avenue for the public travel within certain limits, or a certain term of time; such covenant being an alienation of sovereign powers and a violation of public duty.

"But if, in order to provide suitable public ways, the state has availed itself of private capital, and secured its reimbursement by the grant of a charter of incorporation, with the right to take tolls for a limited period; and the public necessity should afterwards require the creation of another way, the opening of which would diminish the profits of the first, and so prevent the corporators from receiving the compensation intended to be secured to them; the state, thus sacrificing the private property of the corporation for public uses, would unquestionably be bound, as a sacred moral duty, to make full indemnity therefor in some other mode.

"All those grants of franchises, therefore, which are in derogation of the essential attributes of sovereignty above mentioned, are to be construed strictly;

* 260, 261

a public trust for general public purposes, and is under the unqualified control of the legislature, and any legislative appropriation of it to public use is not to be regarded as the appropriation of private property, so as to require compensation to the city or municipality to render it constitutional.[17] The mere possibility

and nothing is to be taken by implication. It was on this ground that the case of the Warren Bridge was decided. The legislature had granted a charter for the building of the Charles River Bridge, with the right of receiving tolls, and upwards of forty years afterwards, the public exigency requiring another and free avenue between the same places, an act was passed authorizing the erection of the Warren Bridge, a few rods from the former, the opening of which, as a natural consequence, reduced the tolls of the former to a very small amount. And this act was held to be not unconstitutional. Charles River Bridge *v.* Warren Bridge, 11 Peters, 420, cited, and its reasoning affirmed, in Butler *v.* Pennsylvania, 10 How. (U. S.) 402; Woodfolk *v.* Nashville, &c. Railw. Co., 1 Am. L. Reg. 520. [See also Matter of Hamilton Avenue, 14 Barb. Sup. Ct. 405; Illinois and Michigan Canal *v.* Chicago and R. I. Railw. Co., 14 Ill. 314; Rundle *v.* The Delaware and R. Canal Co., 14 How. (U. S.) 80; 13 ib. 71; 10 ib. 511, 541; Shorter *v.* Smith, 9 Ga. 517.]

"The learned chancellor *Kent*, in a note appended to the case of 11 Pet. 420, deeply regrets that decision, concurring in the opinion of Mr. Justice *Story*, who dissented from it. But against the weight of the opinion of this great judge may be placed that of the late Chief Justice *Marshall*, the writer having been informed, as a fact within the personal knowledge of the informant, that the chief justice held the charter of Warren Bridge constitutional, upon the first argument of the cause; and that it was on account of this division of the bench that a second argument was ordered, which he did not live to hear. And it is worthy of notice, in this connection, that Mr. Justice *Story*, in delivering his dissenting opinion in the same term, in the case of Briscoe *v.* The Bank of the Commonwealth of Kentucky, 11 Pet. 328, supports it by referring to a similar opinion held by the late chief justice, upon the former argument of that cause; while in the case of Warren Bridge no such support is invoked; doubtless for the reason that it could not be had.

"The state being bound in good faith, as already stated, to make full and complete indemnity to individuals, whose private rights, in the exercise of its eminent domain, it has been obliged to sacrifice for the general good, the question is reduced to the mode of compensation; whether actual payment of the damages must precede or accompany the act of the state; or whether the individual ought to have at least a compulsory remedy at law; or whether the pledge of public faith is a sufficient security. On this subject various opinions are held. See 2 Kent, Comm. 338–440, and note (e) on p. 339, 5th ed.; 11 Pet. 471, 472, 642, 643; The People *v.* White, 4 Law Rep. (N. S.) 177." See also, to the same effect, the opinion of Mr. Justice *Grier*, of the United States Circuit Court, in Milnor *v.* The New J. Railw., 6 Law Reg. 6, 7; and Crosby *v.* Hanover, 20 Law Rep. 646; s. c. 36 N. H. 404.

[17] People *v.* Kerr, 27 N. Y. 188. See also Philadelphia & Reading Railw. *v.* City of Philadelphia, 47 Penn. St. 325.

of reverter to the original owner, or his heirs or * grantees, is not regarded in such cases as any appreciable interest requiring to be compensated.[17]

SECTION IX.

Compensation. — Mode of Estimating.

1. *General inquiry simple.*
2. *Remote damage and benefits not to be considered.*
3. *General rule of estimating compensation.*
4. *Prospective damages assessed.*
5. *In some states value "in money" is required.*
6, 7. *Damage and benefits cannot be considered in such cases.*
8. *Rule of the English statute.*
9. *Farm accommodations.*
10. *Benefits and damage, if required, must be stated.*
11. *Course of the trial in estimating land damages.*
12. *Items of damages not indispensable to be stated.*
13. *In contracts for land statutory privileges must be stated to be secured.*
14. *Questions of doubt referred to experts.*
15. *Special provisions as to crossing streets only permissive.*
16. *In an award of farm accommodations, time of the essence of the award.*

§ 71. 1. The inquiry in regard to what compensation shall be made, for land taken for public works, would, on the face of it, seem to be a very simple one. One would naturally suppose the value of the land taken or the damage sustained, to be the fair measure of compensation, and that there could be no serious difficulty in ascertaining the amount.

2. But in consequence of numerous ingenious speculations in regard to possible advantages and disadvantages arising from the public works, for which lands are taken, the whole subject has become, in this country especially, involved in more or less uncertainty. All the cases seem to concur in excluding mere general and public benefit, in which the owner of land shares in common with the rest of the inhabitants of the vicinity, from being taken into consideration in estimating compensation.

3. It has been said, the appraisers are not to go into conjectural and speculative estimations of consequential damages,[1] but * con-

[1] Meacham *v.* Fitchburg Railw., 4 Cush. 291; Upton *v.* South Reading Branch Railw. Co., 8 Cush. 600; Albany N. Railw. Co. *v.* Lansing, 16 Barb. 68; Canandaigua & N. Railw. *v.* Payne, 16 Barb. 273; Greenville & C. Railw. Co. *v.* Partlow, 5 Rich. 428; White *v.* Charlotte & S. C. Railw. Co., 6 Rich. 47; A. & S. Railw Co. *v.* Carpenter, 14 Illinois, 190; Symonds *v.* The City of Cincinnati, 14 Ohio, 147; Brown *v.* Cincinnati, id. 541; McIntire *v.* State, 5

fine themselves to estimating the value of the land taken to the owner. This is most readily and fairly ascertained, by determining the value of the whole land, without the railway, and of the portion remaining after the railway is built. The difference is the true compensation to which the party is entitled.[2]

4. But the appraisers are to assess all the damages, present and prospective, to which the party will ever be entitled, by the prudent construction and operation of the road.[3]

Blackford, 384; State *v.* Digby, 5 Blackf. 543; James River & Kanawha Co. *v.* Turner, 9 Leigh, 313; Schuylkill Co. *v.* Thoburn, 7 Serg. & R. 411. A jury may take into the account, in estimating the damages, the effect the construction of the railway will have in diminishing deposits of sediment, which had been made by a river, in high water flowing upon the land and greatly enriching it. Concord Railw. *v.* Greeley, 3 Foster, 237. And the deterioration of the adjacent parts of the same land, (but which are not taken,) either for agriculture, or sale for building lots; by risk from fire, care of family and stock, inconvenience caused by embankments, excavations, and obstructions to the free use of buildings, is to be taken into the account, in estimating damages. Somerville & E. Railw. *v.* Doughty, 2 Zab. 495. The increase or decrease in the price of the remaining land, and the expense of fencing, are to be taken into the account, in assessing compensation. Greenville & Columbia Railw. *v.* Partlow, 5 Rich. 428. The value of the land taken, considering its relation to the land from which it is severed, is to be given, and such further sum as the incidental injury to the land not taken, from the construction of the road, exceeds the incidental benefits. Nashville Railw. *v.* Dickerson, 17 B. Mon. 173, 180. Louisville & Nash. Railw. *v.* Thompson, 18 id. 735.

[2] Troy & Boston Railw. *v.* Lee, 13 Barb. 169, 171; Matter of F. Street, 17 Wend. 649; Canal Co. *v.* Archer, 9 Gill & J. 480; Parks *v.* City of Boston, 15 Pick. 198; Somerville Railw. *v.* Doughty, 2 Zab. 495. But no account is to be taken, in estimating land damages, of the benefit the railway may have been to other property of the plaintiff, disconnected with that taken. Railw. *v.* Gilson, 8 Watts, 243; but see Columbus, P. & I. Railw. *v.* Simpson, 4 Law Reg. 696; s. c. 5 Ohio N. S. 251; Rochester & Sy. Railw. *v.* Budlong, 6 How. Pr. 467; Sater *v.* B. & Mt. Pl. Railw., 1 Clarke, 386. The value of the land, at the time of trial, or at any time subsequent to the construction of the work, cannot be referred to in determining the benefits conferred upon that portion of the land not taken. Ind. Central R. *v.* Hunter, 8 Ind. 74.

[3] Dearborn *v.* Boston, Concord, & Montreal Railw. Co., 4 Foster, 179. Clark *v.* Vt. & Canada Railw., 28 Vt. 103. The expense of fencing is to be included in the estimate of land damages. Winona & St. Peter Railw. Co. *v.* Denman, 10 Minn. 267. The matter of estimating land damages to the owner of a farm, a portion of which is taken for the construction of a railway, is discussed very much in detail and with a very considerate regard to the equitable interests of all parties in the case of Robbins *v.* Milw. & Hor. Railw. Co., 6 Wis. 636. Damages done to mill property in lessening the advantages of the water-power,

* 5. Some of the state constitutions in terms provide, that compensation for private property, taken for public use, shall be made "in money," and many eminent jurists have strenuously maintained that compensation, to the extent of the value of the land taken, must always be made in money, and that no deduction can be made, on account of any advantage which is likely to accrue to other property of the owner, by reason of the public work, for which the property is taken.[4] Such accidental advantages to the portion of land not taken as drainage by means of cuts in the soil from grading the railway cannot be taken into account.[5]

6. In a late case in Vermont the court held, that taking land for a public highway is not appropriating it to public use, within the meaning of the constitution of that state, which requires compensation in such cases to be made "in money," but that this provision only applies, where the fee of the land is taken; and that where an easement only is taken for the purpose of a highway, and the remaining land is worth more than the whole * was before the laying out of the road, the party is entitled to no compensation.[6]

present and prospective, should be taken into the account in estimating land damages. Dorlan *v.* E. Br. & Waynesburg Railw. Co. 46 Penn. St. 520.

[4] 2 Kent, Comm. 7th ed. 394 and note; Jacob *v.* The City of Louisville, 9 Dana, 114; The People *v.* The Mayor of Brooklyn, 6 Barb. (S. C.) 209. But this last case was subsequently reversed in the Court of Appeals. 4 Comst. 419; Rice *v.* Turnpike Co., 7 Dana, 81; Woodfolk *v.* N. & C. Railw., 2 Swan, 422. In this case, it was said, benefits to the remaining land may be set off against injury, but the party cannot be compelled to apply such benefits towards the price of his land. Railway *v.* Lagarde, 10 Louis. Ann. 150. Under such a provision in the constitution of Ohio, it was held, that in assessing damages, the jury had no right to take into consideration the fact, that the value of the land had been increased by the proposal, or construction of the work. Giesy *v.* Cin. Wil. & Zanesv. Railw., 4 Ohio N. S. 308. General benefits resulting from the erection of a railway, to all who own property in the vicinity, are not to be taken into the account, in estimating land damages; and it was doubted if special benefits, accruing to the remainder of the land, could be so taken into account. Little Miami Railw. *v.* Collett, 6 Ohio N. S. 182. Pacific Railw. *v.* Chrystal, 25 Mo. 544.

[5] Evansville & C. Railw. *v.* Fitzpatrick, 10 Ind. 120; Same *v.* Cochran, id. 560.

[6] Livermore *v.* Jamaica, 23 Vt. 361. This case has been questioned. 1 Bennett's Shelford on Railways, 441. See also Reitenbaugh *v.* Chester Valley Railw., 21 Penn. St. 100. *Contra*, McMahon *v.* Cincinnati Railw., 5 Ind. 413; 3 id. 543. Benefits arising to the owner of the land "by the construction of the road" held not to have reference to the whole work, but to that particular

7. This is certainly not in conformity with the general course of decision upon this subject. It is the only case, probably, where an attempt is made to escape from such a constitutional provision, in this manner. Some will doubtless regard it as too refined to be sound. And if it is true, as is sometimes claimed, that the legislature had no right to resume the fee of land for highways and railways, such a constitutional provision, with such a construction, would have little application to the taking of land for such uses.[7]

portion which runs through the party's land. Milwaukee & Mis. R. *v.* Eble, 4 Chand. 72. An act which provides for setting off the advantages to other land against the value of the land taken, is not, on that account, unconstitutional. McMasters *v.* Commonwealth, 3 Watts, 292. But it has very often been held, that such accidental advantages, especially where they are not peculiar to the particular land-owner, cannot be set off against the specific value of the land taken. State *v.* Miller, 3 Zab. 383; Woodfolk *v.* Nash. & Ch. Railw., 2 Swan, 422; Hill *v.* M. & H. Railw., 5 Denio, 206; Keasy *v.* Louisville, 4 Dana, 154; Sutton *v.* Louisville, 5 Dana, 28; People *v.* Mayor of B., 6 Barb. 209. But many cases hold the contrary. People *v.* Mayor of Brooklyn, 4 Comst. 419, where s. c. 6 Barb. 209, is reversed; Rexford *v.* Knight, 15 Barb. 627. But where profits are to be taken into the account, the title to have them considered obtains, at the time the servitude is located. Palmer Co. *v.* Ferrill, 17 Pick. 58. Benefits by increase of business and population, markets, schools, stores, and other like improvements, cannot be considered, in estimating damages, for flowing land, by a mill-dam. Ib.

In a recent case in New Hampshire, petition of the Mount Washington Road Company, 35 N. H. 134, it was decided, that in assessing damages for land taken for a turnpike, or free highway, compensation is to be given for the actual value of the land taken, without regard to any speculative advantages or disadvantages to the owner from the making of the highway. See Cushman *v.* Smith, 34 Maine, 247. But in Indiana Central Railw. *v.* Hunter, 8 Ind. 74, the same rule is adopted, as in the case first cited in this note. And in Whitman *v.* Boston & Maine Railw., 7 Allen, 313, it was decided, that in estimating the damages to land by reason of the location of a railway across it, and the filling up of a canal in which the owner of the lot had a privilege, if the value of the lot is so enhanced, that what remained was worth more than the whole lot was before, the owner has no claim for damages. S. P. in the s. c., 3 Allen, 133. But the benefits to be deducted from the value of land taken must accrue to the remaining land, and not to all land in the same vicinity. Winona & St. Peter Railw. *v.* Waldron, 11 Minn. 515.

[7] Hatch *v.* Vermont Central Railw. Co., 25 Vt. 49; Reitenbaugh *v.* Chester Valley Railw., 21 Penn. St. 100. *Contra*, Little Miami Railw. *v.* Naylor, 2 Ohio N. S. 235. And in a case in Mississippi, Brown *v.* Beatty, 34 Miss. 227, where the constitution required "compensation first to be made" for land taken, it was held the provision secured to the owner the right to receive the cash value in money, and, in addition, full indemnity for all damages by means of severance,

* 8. The English statute provides, that, in estimating compensation for land damages "regard shall be had not only to the land taken, but also to damage, by reason of severance from other lands, or otherwise injuriously affecting such lands." There are, too, in the English statute, provisions for compensation to sundry subordinate interests in lands, as to lessees for years, and to tenants from year to year. And also in regard to mines. The company are not entitled to mines or minerals under lands, except such parts as shall be necessary to use in the construction of the road, unless expressly purchased. It has been held that stone got from quarries are minerals,[8] and that mines are quarries, or places where any thing is dug.[9] By the English statute, * the company may remove or displace gas or water pipes, making compensation to all parties injured.

9. And where commissioners appraise the damages upon the basis of the railway making and maintaining certain works for the accommodation of the land-owner, as a culvert and waste-way, etc., it was held this portion of the award was not void, but if acquiesced in by the company, and the land taken, and compensation made

and that no enhanced value of the portion of land not taken could be taken into the account. See also Branson *v.* Philadelphia, 47 Penn. St. 329.

Henry *v.* Dubuque & Pacific Railw. Co., 10 Iowa, 540. It is said in one case, what is very nearly a truism, that corporate existence and the right of eminent domain can only be derived from legislative grant, and that both must be shown to justify taking lands compulsorily, and also compliance with all conditions of the grant. Atkinson *v.* Marietta & Cin. Railw. Co., 15 Ohio N. S. 21. *Post*, § 76.

The dedication of land to the use of a street will not authorize the legislature to appropriate it to the use of a railway track without compensation to the owner, and, if this is attempted, it may be restrained by injunction. Schurmeier *v.* St. Paul & P. Railw., 10 Minn. 82.

[8] Micklethwait *v.* Winter, 6 Exch. 644; s. c. 5 Eng. L. & Eq. 526.

[9] Hodges on Railways, 238, note (*y*). The more common mode of estimating land damages unquestionably is, to give the company the specific benefit caused to land, a portion of which is taken, in the enhancing the value of the same, and only to allow the land-owner such a sum as will leave him as well off in regard to the particular land as if the works had not been built, or his land taken. This is done by giving the land-owner a sum equal to the difference between what the whole land would have sold for before the road was built, and what the remainder will sell for after the construction. Harvey *v.* Lack. & Bloomsburg Railw., 47 Penn. St. 428. But this rule will, in many cases, prove entirely inadequate and unsatisfactory, and where it has been adopted it may be regarded as only extending to other cases of a very similar character. Win. & St. Peters' Railw., *v.* Denman, 10 Minn. 267.

upon that basis, they thereby become bound by its provisions.[10] But where it was referred to arbitration to estimate the damages caused to the plaintiff, and the company by the express terms of its charter was bound to make suitable crossings for the accommodation of land-owners through whose land the right of way was taken, and the land-owner told the agents of the company, at the hearing before the arbitrators, that he should require a crossing to be provided for his convenience; and the agents claimed that the arbitrators had nothing to do with this matter, and that claim was acquiesced in by the arbitrators and the parties, and the award only embraced the damage to the land, and subsequently the land-owner was induced to convey to the company the right of way, without annexing a condition binding the company to maintain a crossing for his accommodation; upon the assurance of the counsel of the company that such deed would not affect his right to claim a crossing, it was held, upon a bill to reform the deed and to establish his right to the crossing, that he was entitled to the relief sought, and an injunction was granted accordingly.[11]

But where a private way crossed the line of railway obliquely, and the award of land damages only indicated the point at which the company were to supply a crossing, it was held a sufficient compliance with the obligation of the company to give a crossing at right angles, although this did not connect with the termini of the road or afford any access to it.[12]

10. In some of the states in this country, the advantages and disadvantages of taking land for a railway are required to be stated in the report of appraisal, and the omission to make such * specific statement was held a fatal omission.[13] So, too, where

[10] Morse, Petitioner, 18 Pick. 443.

[11] Green *v.* Morris & Essex Railw. Co., 1 Beasley, 165.

[12] Mann *v.* Great S. & W. Railw. Co., 9 Ir. Com. L. Rep. 105.

[13] Ohio & Pennsylvania Railw. *v.* Wallace, 14 Penn. St. 245; Reitenbaugh *v.* Chester Valley Railw., 21 Penn. St. 100; R. R. Co. *v.* Gilson, 8 Watts, 243; Zack *v.* Penn. Railw. Co., 25 Penn. St. 394. But it has been held, in some cases, where the advantages resulting to the land-owner were to be taken into the account, that the value of the land need not be stated separately from the damage, in an award of arbitrators, but only the amount of the whole injury. At all events, such amendments will be allowed, as to cure such defects. Greenville & Columbia Railw. *v.* Nunnamaker, 4 Rich. 107.

Questions have sometimes been made, in regard to which party, in proceedings of this character, is entitled to go forward, in the proofs and argument. Upon principle, and in analogy to similar proceedings upon other subjects, we

additional expense of fencing is allowed in improved land, the report must specify that fact.[14]

* 11. But in general there is no discrimination made in the report estimating damages for taking land for public works, between the value of the land appropriated and the incidental injury from severance and otherwise; and unless specially required by the charter of the company or some other legislative act, such discrimination does not seem indispensable to the validity of the report, but would unquestionably, in the majority of cases, tend to render the report more satisfactory.[15]

think there can be little doubt this right is with the land-owner, in the proceedings before the jury and the commissioners or arbitrators, where he is to all intents actor. But after having obtained an award, it has been more usual, in practice, to allow the excepting party to go forward. 1 Greenleaf's Ev. §§ 76, 77; Connecticut River Railw. *v.* Clapp, 1 Cush. 559; s. c. 1 Am. Railw. C. 450; Mercer *v.* Whall, 5 Q. B. 447.

But see Albany N. Railw. Co. *v.* Lansing, 16 Barb. 68, where the court say, "The commissioners have the right and power to exercise their own discretion in reference to the order that they take in appraising the land. They may view the land first and hear the proofs and allegations afterwards, or *vice versa*. So whether one party or the other should first be heard, is for them to determine. Having decided that the railway corporation might open and close the hearing, the defendant was concluded by their decision, as also would their decision have been conclusive on the company had the same privilege been awarded to the owner of the land." But where the error in the exercise of this discretion does manifest wrong, at *nisi prius*, the verdict will be set aside for this reason alone in the full bench. 1 Greenleaf's Ev. 104 and note, § 76.

But awards of land damages have been set aside for excessive damages. Somerville & Easton Railw. *v.* Doughty, 2 Zab. 495. But this subject was somewhat considered in Troy & Boston Railw. *v.* Lee, 13 Barb. 169; Same *v.* Northern Turnpike Co., 16 Barb. 100; and it was held that such award should not be set aside, unless it appeared that the commissioners erred in the principles by which their judgment should be guided, or were clearly mistaken in the application of correct principles. This is putting them much upon the same ground as awards in other cases. And in Walker *v.* Boston & Maine Railw., 3 Cush. 1, it was held, that the common pleas, to whom the verdict of a sheriff's jury is to be returned, and who may set the same aside, for any good cause, were justified in doing so, for irregularity in impanelling the jury; or in the conduct of the jury; or in the instructions given the jury by the sheriff; or for facts affecting the purity, honesty, or impartiality of the verdict; such as tampering with the jury or other misconduct of the party; or any irregularity or misconduct of the jurors. But in a court of error the verdict can only be set aside for error appearing of record. But see § 72, *post*; Nicholson *v.* New York & New Haven Railw., 22 Conn. 74.

[14] New Jersey Railw. *v.* Suydam, 2 Harrison, 25.

[15] Trenton Water Power Co. *v.* Chambers, 2 Beasley, 199.

12. In contracts between railway companies and land-owners, in regard to farm accommodations, if the company desire to retain any special distinction conferred by statute, they must incorporate the statute, either in terms or by reference, into the contract. Otherwise the company will be held strictly to the terms of the contract as applied to the subject-matter.[16]

13. Where there is any controversy in regard to the mode of crossing highways and turnpikes by railway companies, the court will refer the matter to men of experience and skill in such questions.[17]

14. A permission in a railway charter to cross a street or highway by a level crossing, by making a bridge over the street for the accommodation of foot passengers, is not peremptory upon the company. They may still be permitted to cross the street otherwise than on a level on their undertaking to abide by any order the court might make as to damages.[18]

15. Where land is sold to a railway company upon condition of furnishing such farm accommodations as the land-owner should notify to the company within one month, time is regarded as of the essence of the condition, and if notice is not given within the time limited the court will neither order the company to make such accommodations as are demanded, or even such as are proper.[19]

[16] Clarke *v.* M. Sh. & L. Railw. Co., 1 Johns. & H. 631.

[17] Atty.-Genl. *v.* Dorset Railw. Co., 3 Law T. N. S. 608.

[18] Dover Harbor *v.* L. C. & Dover Railw. Co., 7 Jur. N. S. 453.

[19] Darnley *v.* London, Chatham, & Dover Railw. Co., 3 De G., J. & S. 24; s. c. 11 Jur. N. S. 520; s. c. 9 id. 148, where the Vice-Chancellor decided otherwise.

*SECTION X.

Mode of Procedure.

1. *Legislature may prescribe.*
2. *Must be upon proper notice.*
3. *Formal exceptions waived, by appearance.*
4. *Unless exception is upon record.*
5. *Proper parties, those in interest.*
6. *Title may be examined.*
7. *Plaintiffs must show joint interest.*
8. *Jury may find facts and refer title to the court.*
9. *Land must be described in verdict.*
10. *Distinct finding on each claim.*
11. *Different interests.*
12. *What evidence competent.*
13. *Proof of value of land.*
14. *Opinion of witnesses.*
15. *Testimony of experts.*
16. *Matters incapable of description.*
17. *Costs.*
18. *Expenses.*
19. *Commissioners' fees.*
20. *Appellant failing must pay costs.*
21. *Competency of jurors.*
22. *Power of court to revise proceedings.*
23. *Debt will not lie on conditional report.*
24. *Excessive damages ground of setting aside verdict.*
Note. Other matters of practice.
25. *No effort to agree required in order to give jurisdiction.*

§ 72. 1. It seems to be universally admitted, that where the organic law of the state does not prescribe the mode of procedure, in estimating land damages, for the use of a railway company, or other public work, it is competent for the legislature to prescribe the mode, and that the mode, so prescribed, must be strictly followed.[1]

2. Thus, it has been held, that notice in writing to the owner of the land to be taken, its situation and quantity, must be given.[2] But the form of the notice, or whether signed by the company, or by the commissioners, is not important.[3] And it is requisite, not only that proper notice should be given, but that it should appear upon the face of the proceedings that the particular notice required, by the statute, was given.[4] But in general, we apprehend, if it appears upon the proceedings that * notice was given to the land-owner, it might, upon general principles, be presumed it was the notice required.

[1] Bonaparte *v.* C. & A. Railw., Bald. C. C. R. 205; Bloodgood *v.* M. & H. Railw., 14 Wend. 51; s. c. 18 id. 9; s. c. 2 Am. Railw. C. 415.

[2] Vail *v.* Morris & Essex Railw., 1 Zab. 189. But the notice to appoint commissioners need not describe the land, it is held in other cases. Doughty *v.* Somerville & Easton Railw., id. 442.

[3] Ross *v.* Elizabethtown & Somerville Railw., Spencer, 230.

[4] Van Wickle *v.* Railw. Co., 2 Green, 162. See also Bennet *v.* Railw., id. 145.

3. But merely formal exceptions to the mode of procedure, and the competency of the triers, in such cases, must be taken at the earliest opportunity, where there is an appearance, or they will be regarded as waived.[5]

4. And after appeal, it should appear by the record that merely formal exceptions were made in the proceedings below, and overruled, or they cannot be revised.[5] So, too, where the party, excepting to proceedings before commissioners, applies for a jury to revise the assessment of damages, it will be regarded as a waiver of the exceptions.[5] He should have applied for a *certiorari*, if he intended to revise the case upon his exceptions.[5]

5. In regard to the proper parties to such proceedings, almost infinite variety of questions will arise. The only general rule which can be laid down, perhaps, is, that those having an interest in the question, may become parties plaintiff, or be made parties defendant, according to the character and quality of the interest.[6]

6. In the English courts, it has been held, that these summary tribunals for estimating land damages are not to inquire into the title of the claimants.[7] But in some cases, in this country, it has been held, that the claimant's title to the land is a * proper subject of inquiry, before the jury, in estimating damages.[8] And where the commissioners refuse to allow the petitioner damages, on

[5] Fitchburg Railw. *v.* Boston & Maine Railw., 3 Cush. 58; s. c. 1 Am. Railw. C. 508; Walker *v.* Boston & Maine Railw., 3 Cush. 1; Pittsfield & North Adams Railw. *v.* Foster, 1 Cush. 480; Field *v.* Vermont & Massachusetts Railw., 4 Cush. 150; Taylor *v.* County Commissioners, 13 Met. 449; Porter *v.* County Commissioners, id., 479; Meacham *v.* Fitchburg Railw., 4 Cush. 291; Davis *v.* Charles River Branch Railw., 11 Cush. 506.

[6] Fitchburg Railw. *v.* Boston & Maine Railw., 3 Cush. 58; Ashby *v.* Eastern Railw., 5 Met. 368; Greenwood *v.* Wilton Railw., 3 Foster, 261; Parker *v.* Boston & Maine Railw., 3 Cush. 107; Mason *v.* Railw., 31 Me. 215; A. & St. L. Railw. Co. *v.* Cumberland Co. Comm., 51 Me. 36. And it seems to be regarded as indispensable that parties under disability should be properly represented in the proceedings the same as in other suits. Hotchkiss *v.* Auburn & Rochester Railw., 36 Barb. 600. But where a demand and tender of the value of land required, together with other legal damages, are required before instituting compulsory proceedings, the requirement cannot apply to the case of an infant, whose rights will be sacred till of full age. Indiana Central Railw. Co. *v.* Oakes, 20 Ind. 9.

[7] *Post*, § 98.

[8] Directors, &c. *v.* Railw., 7 Watts & Serg. 236. Allyn *v.* Prov. W. & B. Railw., 4 Rhode Is. 457.

account of his not being the owner of the land, this is such a final decision as may be revised by a jury, and the Supreme Court will allow a mandamus, if that is denied.[9]

7. Parties who join must show a joint interest in the land, but this need not always be shown by deed. Oral evidence is sometimes admissible, where one owns the fee, and others have a joint interest, in consequence of erections, and the jury may properly pass upon the title, as matter of fact.[10]

8. But the jury are not bound to decide upon conflicting titles, but may report the facts, without determining the owner.[11] And it has been held that the jury are not bound to find a special verdict, in regard to the title of the claimant, or where there are conflicting claims, but may do so with propriety.[12]

9. The jury should describe the land with intelligible boundaries.[13]

[9] Carpenter *v.* County Commissioners of Bristol, 21 Pick. 258. The trustee, and not the *cestui que trust*, is the proper party to such proceeding. Davis *v.* Charles River Branch Railw., 11 Cush. 506. The title of the petitioner may be inquired into, either on the return of the petition or of the report. Church *v.* Northern Central Railw. Co., 45 Penn. St. 339. The mode of proceeding on *certiorari*, and in other writs, is here discussed.

[10] Ashby *v.* Eastern Railw., 5 Met. 368. So also where the land belonged to a partnership, and was not needed for the payment of partnership debts, one of the partners having deceased, it was held the title remained in the partners as tenants in common, and that proceedings to recover damages by reason of laying a railway upon it, were properly taken in their joint names. Whitman *v.* Boston & Maine Railw., 3 Allen, 133.

[11] Matter of Anthony Street, 19 Wend. 678. So, too, where one owns the fee, and another has a bond for a deed, the condition of which is not yet performed, they may join. Proprietors of Locks and Canals *v.* Nashua & Lowell Railw., 10 Cush. 385.

[12] Davidson *v.* Boston & Maine Railw., 3 Cush. 91; 1 Am. Railw., C. 534. The sheriff is bound to give the jury definite instructions, in regard to the effect of a conveyance. Ib.

[13] Vail *v.* Morris & Essex Railw., 1 Zab. 189. But see Philadelphia Railroad *v.* Trimble, 4 Whart. 47. The jury are not to include in their estimate the expense of farm accommodations, which it is the duty of the railway to furnish. Ib. But if this be done, and the party have judgment on the verdict, he is bound to make the erections. Curtis *v.* Vermont Central Railw., 23 Vt. 613. One tenant in common cannot proceed in his own name to have the damages done, by a railway, to the common land, assessed, even where he has authority from his co-tenant to do so. Railw. *v.* Bucher, 7 Watts, 33.

But if the petition be signed by the lessee and the agent of the owner of mines, this is a sufficient representation of the interest. Harvey *v.* Lloyd, 3

*10. Where the claim for damages consists of several items, it is more conducive to a final disposition of the case to state the finding upon each item. In such case any objectionable item may be remitted or deducted without the necessity of a rehearing.[14]

11. But where the petition alleges several distinct causes of damage, and a general verdict is rendered, if one or more of the causes is insufficient, it will not be presumed the jury gave any damages, on such insufficient claims, in the absence of any instructions by the sheriff in relation to them.[15] But it is not necessary to apportion the damages to several joint-owners, and a tenant for life may take proceedings to obtain damages done to his estate by the construction of a railway, without joining the remainderman.[16]

12. The character of the proof admitted to enable the triers to learn the value of land is so various, that it is not easy to fix any undeviating rule upon the subject. It seems to have been the intention of the courts to allow only strictly legal evidence to be received, such as would be admissible in the trial of similar questions before a jury in ordinary cases.[17]

13. It has been allowed to show what price the company had paid by voluntary purchase for land adjoining, but in the same case it was held not competent to inquire of adjoining land-owners, who were farmers, and had occasionally bought and sold *land, what was the value of their own land adjoining.[18] Nor is

Penn. St. 331. See also Shoenberger *v.* Mulhollan, 8 Penn. St. 134. See also Cleveland & Toledo Railw. *v.* Prentice, 13 Ohio N. S. 373; Strang *v.* Beloit & M. Railw. Co., 16 Wis. 635. It is here said that the description, by way of an approximating diagram, may be sufficient without an actual survey.

[14] Fitchburg Railw. *v.* Boston & Maine Railw., 3 Cush. 58; s. c. 1 Am. Railw. C. 508.

[15] Parker *v.* Boston & Maine Railw., 3 Cush. 107.

[16] Railroad *v.* Boyer, 13 Penn. St. 497; Directors of Poor *v.* Railw., 7 Watts & Serg. 236; Pittsburgh & Steuben Railw. *v.* Hall, 25 Penn. St. 336. In one case it was said to be the duty of the commissioners to assess damages to joint owners jointly. Ross *v.* Elizabethtown & Somerville Railw., Spencer, 230. See also Colcough *v.* Nashville & N. W. Railw. Co., 2 Head. 171.

[17] Troy & Boston Railw. *v.* Northern Turnpike Co., 16 Barb. 100; *Johnson*, J., in Rochester & Syracuse Railw. *v.* Budlong, 6 How. Pr. 467; Lincoln *v.* Saratoga & Schenectady Railw., 23 Wend. 425, 432.

[18] Wyman *v.* Lexington & West Cambridge Railw., 13 Met. 316. But in Roberts *v.* Knapp, 35 N. Y. 91, it was held, that farmers and residents of the

it competent to show for what price one had contracted to buy land adjoining.[19] Nor can the claimant prove, what the company have offered him for the land;[20] nor what the company have been compelled to pay for land adjoining, which was taken compulsorily.[21]

immediate neighborhood are competent to fix the price of land in their vicinity; one who had been a farmer, but had changed his occupation to that of a mechanic, was nevertheless held a competent witness to testify to the value of land in the neighborhood. And in Shattuck *v.* Stoneham Branch Railw., 6 Allen, 115, it was held, that in such proceedings the land-owner, being a competent witness, may testify to his opinion of the amount of damage which he has sustained, and may prove recent sales of other lands in the vicinity, similarly situated, and about the same time; but he cannot give evidence of the opinions of others, as to the value of other lands in the vicinity. But it is rather matter of discretion with the court, whether sales of other lands were sufficiently recent, or the land sufficiently like that in question, to afford aid to the jury. And on such hearing the company may prove that they have located a passenger station, since the hearing began, near the petitioner's land over which the railway passed.

[19] Chapin *v.* Boston & Providence Railw., 6 Cush. 422.

[20] Upton *v.* South Reading Railw., 8 Cush. 600.

[21] White *v.* Fitchburg Railw., 4 Cush. 440. Only such damages as are peculiar to the owner of the land taken, and not those which are common to all land in the vicinity, can be considered. Freedle *v.* North Carolina Railw., 4 Jones Law, 89. It has been held that the benefits resulting to the land-owner from the construction of the road are to be deducted, in estimating damages for land taken for a railway; and that consequently a statute providing for such deduction is not thereby rendered unconstitutional. C. P. & Ind. Railw. *v.* Simpson, 5 Ohio N. S. 251. But as the constitution of this state expressly required that compensation to the land-owner should be made in all cases when land is taken for public use *in money*, it seems scarcely consistent to say that the benefits to the land-owner can in all cases be deducted, since in some cases the benefits to the particular piece of land, a portion of which is taken, might more than compensate for that which is taken, thus leaving nothing to be compensated "in money."

The force of this embarrassment was felt by the court in a highway case in Vermont, where the constitution requires, that "whenever private property is taken for public use, the owner ought to receive an equivalent in money." The court escaped from the embarrassment here by a device, which some might possibly regard as more ingenious than ingenuous, by saying, that as the constitution only applied to property "taken for public use," this could not reach cases where only an easement in property was taken. The court might, with almost equal propriety, have said, that the provision of the constitution "ought to receive," being in the optative mood, did not imply an imperative duty, as few persons expect to *obtain* by process of law all which they "ought to receive." Livermore *v.* Jamaica, 23 Vt. 361, *Redfield*, J. dissenting, *sub silentio*. *Ante*,

14. And it has been held that witnesses cannot be allowed to give their opinion of the value of the land or materials taken.[22] *This inquiry leads to the discussion of the general question, of what matters may be proved, by the opinion of witnesses who are not possessed of any peculiar knowledge, skill, or experience upon the subject.

15. And it must be admitted the cases are not altogether reconcilable upon the subject. Experts are admitted to express their opinions, not only upon their own observation, but upon testimony given in court, by other witnesses, and where the testimony is conflicting, upon a hypothetical state of facts.[23] The testimony of such witnesses is intended to serve a double purpose, that of instruction to the jury upon the general question involved, and elucidation of the particular question to be considered by them.[23] The resort to the assistance and instruction of persons skilled in particular departments of art or science is constantly adverted to, as of great advantage in enabling the triers to properly comprehend those subjects out of the range of their general knowledge,

§ 71, pl. 6. See also C. & P. Railw. *v.* Ball, 5 Ohio N. S. 568; Kramer *v.* Clev. & Pittsb. Railw., id. 140.

[22] Montgomery & West Point Railw. *v.* Varner, 19 Ala. 185; Concord Railw. *v.* Greely, 3 Foster, 237; Buffum *v.* New York & Boston Railw., 4 Rh. I. 221; Cleve. & Pittsb. Railw. *v.* Ball, 5 Ohio N. S. 568. But the witness may give an opinion as to the value of the whole land, both before and after the location of the road. Ib. And so also in Illinois & Wisconsin Railw. *v.* Van Horn, 18 Ill. 257. See also Dorlan *v.* E. Br. & Way. Railw. Co., 46 Penn. St. 520. In a case in Pennsylvania (East Penn. Railw. Co. *v.* Hiester, 40 Penn. St. 53), it is said that the only proper test of the value of land so taken is the opinion of witnesses as to the value of the land taken, in view of its location and productiveness, its market value, or the general selling price of land in the neighborhood. And this seems to us exceedingly sensible and free from refinement or conceit. See also Same *v.* Hottenstine, 47 Penn. St. 28.

[23] 1 Greenleaf Ev. § 440. Thus the testimony of persons employed in making insurance of buildings against fire, may, in actions against railways for consequential damages to buildings, by the near approach of the track, express their opinion of the effect thereby produced upon the rent, or the rate of insurance of such buildings. Webber *v.* Eastern Railw., 2 Met. 147. See also Henry *v.* Dubuque & Pacific Railw., 2 Clarke, 288. And in the case of Brown *v.* Providence, Warren, & Bristol Railw., 5 Gray, 35, it was held, that the company could not show that liquors were sold, or to be sold, upon land, as a part of the inducement to pay so high a rent, or that it was "*contemplated*" having a station near the point; such testimony being too indefinite and remote.

or the particular studies of judges, or jurors, in some of the best-considered English cases, within the last few years.[24] But the testimony of scientific witnesses will not establish facts in conflict with the axiomatic principles of science and philosophy, or those which contradict the evidence of the senses, or of consciousness.[24]

* 16. But there is certainly a very considerable number of subjects, in regard to which the jury are supposed to be well instructed, and altogether capable of forming correct opinions, and in regard to which the testimony of experts is not competent, or not requisite, but which it is more or less difficult for the witnesses to describe accurately, so as to place them fully before the minds of the jury, as they exist in the minds of the witnesses. Among these are inquiries in regard to the extent of one's property, solvency, health, affection, or antipathy, character, sanity, and some others. In such cases the witnesses' knowledge is chiefly matter of opinion, and it is impossible to enumerate each particular fact. Of this character seem to us to be questions in regard to the quality and value of property. One may enumerate some of the leading facts upon which such an opinion is based; but after all, the testimony, as to facts, is excessively meagre, without the opinion of the witness, either upon the very subject of inquiry, or some one as near it as can be supposed. Hence in those courts where the opinion of witnesses, in regard to the value of property, real or personal, is not admitted, it leads to sundry shifts and evasions, in the course of the examination of witnesses upon that subject, which, while it is not a little embarrassing in itself, at the same time illustrates the inconsistency, not to say absurdity, of the rule.[25]

[24] Broadbent *v.* Imperial Gas Co., 7 De G. M. & G. 436, 466, opinion of Lord Chancellor *Cranworth*.

[25] Opinion of the court in Concord Railw. *v.* Greely, 3 Fost. 237. "A witness may state what was the cost of property of a particular description at a given place, in order to ascertain the value of property of a similar description. Whipple *v.* Walpole, 10 N. H. 130. But evidence of the price for which the corporation offered to sell a tract adjoining Greely's, and how much they refused to take for it, is certainly of doubtful competency. We have held at this term, in the case of Hersey *v.* The Merrimack County Mutual Fire Insurance Company, in Merrimack county, that what the owner of a piece of real estate said he would sell the same for, was competent evidence against him, as tending to show its value. But that was a statement in regard to the value of the land itself, while the evidence admitted here was going one step further; it was a

*17. In regard to costs, in such proceedings, the more general rule is not to allow them, unless specifically given by statute.[26]

statement in regard to other lands; and it is quite questionable whether it could have any legitimate tendency to prove the value of Greely's land.

"On questions of science, skill, or trade, or others of a like kind, experts may not only testify to facts, but are permitted to state their opinions. 1 Greenl. Ev. § 440. But upon subjects of general knowledge, which are understood by men in general, and which a jury are presumed to be familiar with, witnesses must testify as to facts alone, and the jury must form their opinions. In such cases, the testimony of witnesses, as experts merely, is not admissible."

If an inquiry arose in regard to the value of a cargo of flour, it would certainly sound strange to hear witnesses testify what precisely similar flour is worth, and at the same time be gravely told, that they were studiously to avoid expressing any opinion of the value of this very flour, which they had seen and examined, and in regard to which the whole testimony was received. Yet such is, from necessity, the course resorted to, under the rule. The more general course is, we think, to receive the opinion of witnesses, acquainted with the property and the state of the market, as to the value of the particular property in question. White *v.* Concord Railw., 10 Foster, 188. But in New Hampshire, in a late case, it is held that the opinion of witnesses, in regard to apparent health, is competent to be given; and this seems to be yielding the main point of exclusion before insisted upon. Spear *v.* Richardson, 34 N. H. 428. In this same case the opinion of witnesses, whether a horse was sound, or had a particular disease, the heaves, was excluded because the witness was not shown to be an expert. We are not surprised that the judge regarded the distinction as "somewhat nice." And in Currier *v.* Boston & M. Railw., 34 N. H. 498, it was held that a witness could give an opinion in regard to the occurrence of hardpan in an excavation; and in Hackett *v.* Boston, Con. & Mont. R., 35 N. H. 390, it was held that a witness might express an opinion in regard to distances, dimensions, and qualities. See also Roch. & Sy. Railw. *v.* Budlong, 6 How. Pr. 467.

And in Illinois & Wisconsin Railw. *v.* Van Horn, 18 Illinois, 257, it is held that it is proper to have the opinion of witnesses in regard to the value of city lots, "as they have no stated value." *Skinner*, J. said: "To describe to a jury a piece of ground, however minutely, with its supposed adaptations to use, advantages and disadvantages, and demand of them, upon this information alone, a verdict as to its value, would be merely farcical; and this, indeed, is all that can be done to enable them to arrive at a conclusion as to the value, unless the witnesses are allowed to state their judgment or opinion, together with the facts upon which such opinion is founded. Butler *v.* Mehrling, 15 Ill. 488; Kellogg *v.* Krauser, 14 Serg. & Rawle, 137." In Cleve. & Pittsb. Railw. *v.* Ball, 5 Ohio N. S. 568, it is said, witnesses may be allowed to express an opinion as to the value of the land taken, but not as to the extent of damages which the landowner will sustain by the appropriation of the land to public use, that being the very question to be settled by the triers. This seems to us placing the matter

[26] Herbein *v.* The Railroad, 9 Watts, 272.

* But where the statute provides for an assessment of land damages, by a jury, at the suit of the party aggrieved, the costs to be paid by the company, this was held not to include the fees of witnesses examined by the jury, on the part of the claimant.[27]

18. But the terms "costs and expenses incurred," were held to include the costs of witnesses, and of summoning the viewers.[28]

19. If the act makes no provision for compensation to the commissioners, they have no power to order the company to pay the cost of their expenses and services.[29]

20. But where the party whose costs are rightfully denied in the Court of Common Pleas, appeals upon that question, and the judgment is affirmed, he must pay costs to the other party, consequent upon the appeal.[30]

21. It is no objection to the competency of a juror, in this class of cases, that he had been an appraiser of damages upon another railway, in the same county, or that he is a stockholder in another railway which had long before acquired the lands necessary for its use.[31]

upon its proper basis. One must have had experience in regard to the particular point, as laying a railway over a wharf, in order to give an opinion of the extent of the injury caused thereby, and it is not sufficient that he may have had experience and skill in other matters pertaining to the building and operation of railways. Boston & Worcester Railw. *v.* Old Colony & F. R. Railw., 3 Allen, 142. The court in this case declined to set aside the verdict for land damages, because testimony of the sale of upland at a considerable distance from the wharf, and of the price paid four months before the time of making the location, was received, and also of the number of trains passing over the land taken, and of the number of vessels and amount of lumber, wood, and coal, &c., coming to the wharf.

[27] Railroad *v.* Johnson, 2 Wharton, 275.

[28] Penn. Railroad *v.* Keiffer, 22 Penn. St. 356; Chicago & Mont. Railw. *v.* Bull, 20 Illinois, 218.

[29] At. & St. L. Railroad *v.* The Commissioners, 28 Maine, 112.

[30] Harvard Branch Railw. *v.* Rand, 8 Cush. 218; Commonwealth *v.* Boston & Maine Railw., 3 Cush. 56. But see § 71, note 10, *ante*, in regard to the course of proceeding, in estimating land damages. Where the statute gives an appeal, in estimating land damages, to a court of common-law jurisdiction, and does not prescribe the mode of trying the appeal, it will be tried by commissioners, that being the usual course of trying cases of that class, in common-law courts. And a statute requiring parties to be allowed a trial by jury, in all cases proper for a jury, will not alter the mode of trying such appeals. Gold *v.* Vt. Central Railw., 19 Vt. 478.

[31] People *v.* First Judge of Columbia, 2 Hill (N. Y.), 398. The tribunal for assessing land damages should be free from interest or bias in order to meet

* 22. Courts do not generally possess the power to revise the assessment of land damages, by a jury or other tribunal appointed by them for that purpose, upon its merits, and set it aside, upon the mere ground of inadequacy, or excess of damages.[32]

23. Where commissioners assessed land damages at a sum named, and stated further, that the plaintiff was to receive an additional sum in a certain contingency, and the report became matter of record, it was held that debt would not lie, for the additional sum, upon averring the happening of the contingency.[33]

24. Where the statute gave the court a discretion, to accept and confirm the inquest of land damages, or order a new inquest, "if justice shall seem to require it," it was held they might set aside the report for mere excess of damages, and that the Supreme Court might do the same, when the proceedings are brought up by *certiorari*.[34]

the constitutional requirement for just compensation. Powers *v.* Bears, 12 Wis. 213. But see Strang *v.* Beloit & M. Railw. Co., 16 Wis. 635.

[32] Willing *v.* Baltimore Railw., 5 Whart. 460. As to what is good cause for setting aside the report of commissioners, see Bennet *v.* Railw., 2 Green, 145; Van Wickle *v.* Same, id. 162; R. & S. Railw. *v.* Budlong, 6 How. Pr. 467.

In Missouri, when the report of commissioners is set aside, the court must appoint a new board. Hannibal & St. Joseph Railw. Co. *v.* Rowland, 29 Mo. 337. But this rule will not apply where the report is recommitted to the same board, with instructions to pursue a different rule in estimating damages. Ib.

[33] W. & P. Railroad Co. *v.* Washington, 1 Robinson (Va.), 67. See also Dimick *v.* Brooks, 21 Vt. 569.

[34] Pennsylvania Railw. *v.* Heister, 8 Penn. St., 445; Same *v.* McClure, ib.; Same *v.* Riley, ib.; Same cases, 2 Am. Railw. C. 337.

OTHER MATTERS OF PRACTICE, IN REGARD TO ASSESSING LAND DAMAGES.

All the commissioners must be present and act, in all matters of a judicial character. Crocker *v.* Crane, 21 Wend. 211. In regard to the mode of selecting and impanelling juries, for assessing land damages against railways, the following cases may be referred to: Penn. Railw. *v.* Heister, 8 Penn. St. 445, which decides, that where the statute requires the sheriff to summon the jury, it is irregular for him to select them from a list prepared by his deputy. And Vail *v.* Morris & Essex Railw., 1 Zab. 189, where it is held, that commissioners appointed to value the land of E. V. upon one route, adopted by the company, cannot appraise the land of the same person, when the company adopt a different route, across the land.

In regard to the right of appeal, which is given in terms to the party aggrieved,

*25. It does not seem important, where the statute in terms allows either party to take compulsory proceeding to assess land damages upon the parties failing to agree, that there should have been any previous attempt to agree, in order to give jurisdiction to the courts to assess the amount of such compensation.[35]

it has been held to extend to the railway company, as well as the land-owner. Kimball *v.* Kennebec & Portland Railw., 35 Maine, 255.

No appeal lies from the order of the Supreme Court, confirming the report of commissioners on the appraisal of land damages for land taken under the general railway act. The act provides for no such appeal to the Court of Appeals, and the remedy, in the act, is intended to be exclusive. And besides, the Supreme Court exercise a discretion, to some extent, in confirming such reports, and appeals will not, upon general principles, lie to revise such adjudications. New York Central Railw. *v.* Marvin, 1 Kernan, 276; Troy & Boston Railw. *v.* Northern Turnpike Co., 16 Barb. 100.

Where the special act of a railway company required them to give the land-owner ten days' notice of the time when a jury would be drawn to assess damages, it was held that a strict compliance with this requirement was indispensable to give jurisdiction, and that the objection was not waived by appearance before the officer at the time the jury were drawn, and objecting to the regularity of the proceedings, without stating the grounds, or by appearing before the jury, when they met to appraise the damages, and objecting to one of them, who was set aside. Cruger *v.* The Hudson River Railw., 2 Kernan, 190.

Mere informalities in the summons, which do not mislead the company, will not avoid the proceeding. Eastham *v.* Blackburn Railw., 9 Exch. 758; s. c. 25 Eng. L. & Eq. 498.

It is not important that the award should specify the finding upon the separate items of claim. *In re* Bradshaw, 12 Q. B. 562.

Where the special act of a railway company prescribes a different mode of procedure, in condemning land, from that required by a general law of the state, subsequently passed, the company may pursue the course prescribed by their special act. Clarkson *v.* Hudson River Railw., 2 Kernan, 304. But it seems to be here considered, that the company may adopt the course prescribed by the general act, if they so elect. And upon general principles it would seem that they should do so, unless there is something in the general act by which the existing railways are at liberty to proceed under their charters. This is the ground of the decision in the last case. North Mo. Railw. *v.* Gott, 25 Mo. 540.

Where the company's special act vests specific and special powers in them, for the benefit of the public (as to build stations of given dimensions larger than the general act provides), it is not controlled by subsequent general acts. London & Blackwall Railw. *v.* Board of Works, 3 Kay & J. 123; s. c. 28 Law Times, 140.

In regard to the mode of proceeding in such cases, see Coster *v.* N. J. Railw. & Tr. Co., 4 Zab. 730; Green *v.* Morris & Essex Railw., id. 486; Pittsfield & North Adams Railw. *v.* Foster, 1 Cush. 480.

[35] Bigelow *v.* Miss. Central & Tenn. Railw. Co., 2 Head, 624.

*SECTION XI.

The Time Compensation to be made.

1. *Opinions conflicting.*
2. *Chancellor Kent's definition.*
3. *That of the Code Napoleon.*
4. *Most state constitutions require it to be concurrent with the taking.*
5. *English cases do not require this.*
6. *Adequate legal remedy sufficient.*
7. *Where required, payment is requisite to vest the title.*
8. *Some states hold that no compensation is requisite.*

§ 73. 1. In general, railway acts require compensation to be made, before the company take permanent possession of the land.[1] And it has even been made a question, in this country, whether the legislature could give a railway company authority to take permanent possession of lands, required for their use, previous to making or tendering or depositing, in conformity with their charter or the general law, compensation for the same.[2]

2. The profound and sensible author of the Commentaries on American Law[3] thus states the rule upon this subject: "The settled and fundamental doctrine is, that government has no right to take private property, for public purposes, without giving just compensation; and it seems to be necessarily implied, that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception, concurrently, in point of time, with the actual exercise of the right of eminent domain."

3. The language of the Code Napoleon[4] is specific upon this point: "No one can be compelled to give up his property * except

[1] Lands Clauses Consolidation Act, 8 Vict. c. 18, § 84, *et seq.*; Ramsden *v.* Manchester & S. J. & A. Railw., 1 Exch. 723; s. c. 5 Railw. C. 552. In such cases courts of equity will enjoin the company from taking possession until compensation is made, unless the owner consent. Ross *v.* E. T. & S. Railw., 1 Green's Ch. 422.

[2] Thompson *v.* Grand Gulf Railw. Co., 3 Howard, Miss. 240. The constitution of this state, however, requires a previous compensation to be made. See also Cushman *v* Smith, 34 Maine, 247.

[3] 2 Kent, Comm. 340 (7th ed.), 393, and note. The Milwaukee & M Railw. Co. *v.* Eble, 4 Chandler, 72; Cushman *v.* Smith, 34 Maine, 247.

[4] Code Napoleon, Book II. Title II. 545.

for the public good, and for a just and previous indemnity." A similar provision existed in the Roman civil law.

4. It is embodied, in different forms of language, into the written constitutions of most of the American states, but not generally, in terms requiring the indemnity concurrently with the appropriation. But practically that view has generally prevailed in the courts.[5]

[5] Lyon *v.* Jerome, 26 Wend. 485, 497; Opinion of *Sutherland*, J., Case *v.* Thompson, 6 Wend. 634. In this case it was held, that it was not indispensable to the opening of a road over the land of an individual, that the price should be paid, or assessed even, before the opening of the road. And in Bonaparte *v.* C. & A. Railw. Co., 1 Bald. C. C. 205, 216, it was held, that a law taking private property without providing for compensation was not void, for it was said, that may be done by a subsequent law. But the appropriation was enjoined, in that case, till compensation should be made. See also Gardner *v.* The Village of Newburgh, 2 Johns. Ch. 162; Henderson *v.* The Mayor, &c. of New Orleans, 5 Miller's Louis. 416; Rogers *v.* Bradshaw, 20 Johns. 735; *Duncan*, J., in Eakin *v.* Raub, 12 Serg. & R. 330, 366, 372; O'Hara *v.* Lexington Railw., 1 Dana, 232; Hamilton *v.* Annapolis & Elkridge Railw. C. 1 Md. Ch. 107; Martin, *ex parte*, 8 Eng. (Ark.) 198. In Bloodgood *v.* The Mohawk & Hudson Railw. Co., 14 Wend. 51, it is held that this constitutional requirement merely contemplates a legal provision for compensation, and not that such property shall be actually paid for before taken. In Boynton *v.* The Peterboro' and Shirley Railw. Co., 4 Cush. 467; 1 Am. Railw. C. 595, *Shaw*, Ch. J. says, "The right to damages for land taken for public use accrues and takes effect at the time of taking, though it may be ascertained and declared afterwards. That time in the case of railroads, *prima facie*, and in the absence of other proof, is the time of the filing of the location." Charlestown Branch Railw. *v.* Middlesex, 7 Metcalf, 78; s. c. 1 Am. Railw. C. 383; Davidson *v.* Boston & Maine Railw., 3 Cush. 91.

In Massachusetts the remedy is limited to three years by statute, and the time begins from the filing of the location. Charlestown Branch Railw. *v.* County Commissioners of Middlesex, 7 Met. 78; s. c. 1 Am. Railw. C. 383. So where a corporation, after locating a railway over a wharf more than sixty feet, and filing the location with the county commissioners, agreed with the owners of the wharf to extend the road sixty feet on and over the same before a certain day, and the owners, in consideration, agreed to demand no damages for the extension, and the road was constructed according to the location filed before the agreement. Held, that this was not an agreement not to extend the road more than sixty feet, and that the owners of the wharf were not thereby entitled to apply, after three years from the filing of the location, for an estimate of the damages caused by an extension of the road more than sixty feet over the wharf. Ib. By the New York statute of 1851, railway companies have no right to enter upon, occupy, or cross a turnpike or plank road without consent of the owners, except on condition of first making compensation for damages to such turnpike or plank road company. Plank Road Co. *v.* Buffalo, &c. Railw. Co., 20 Barb. 644.

*5. It was held in one case,[6] where the act of parliament gave the right to take lands for the purpose of building a turnpike-

Shaw, Ch. J., in Boston & Providence Railw. Corporation *v.* Midland Railw. Co., 1 Gray, 340, 360, says: "The effect of the location is to bind the land described to that servitude, and to conclude the land-owner and all parties having derivative interests in it from denying the title of the company to their easement in it. We think, therefore, that the filing of the location is the taking of the land. It is upon that the owner is forthwith entitled to compensation, it is that act which gives the easement to the corporation and the right to have damages to the owner of the land." See, also, Drake *v.* Hudson River Railw., 7 Barb. 508, 552.

In those states, where the constitutions contain express provisions requiring a previous compensation to the right to appropriate the land, as in Pennsylvania, Wisconsin, Kentucky, and Mississippi, the decisions upon this point would not be much guide, in regard to the general rule, in the absence of any express provision of the kind. But see Harrisburg *v.* Crangle, 3 Watts & Serg. 460.

And in some of the states, even where a concurrent right to compensation, with the appropriation of the land, is recognized, it seems to be considered by some that a statute, authorizing the appropriation of land for public uses, and which makes no provision for compensation, is not on that account unconstitutional. Opinion of the Chancellor in Rogers *v.* Bradshaw, 20 Johns. 735.

But the prevailing opinion, even in New York, seems to be, that the statute should provide some available remedy for adequate compensation, and that unless that is done, the act, if not positively unconstitutional, is so defective, that no proceedings should be suffered under it, until compensation is secured, and that a court of equity should interfere. Gardner *v.* Newburgh, 2 Johns. Ch. 162; Rexford *v.* Knight, 1 Kernan, 308; Willyard *v.* Hamilton, 7 Ham. 449; Rubottom *v.* McClure, 4 Blackf. 505; McCormick *v.* Lafayette, Smith (Indiana), 83; Mercer *v.* McWilliams, Wright, 132.

Some cases have made a distinction (in regard to the necessity of a previously ascertained compensation being made and so situated as to be capable of being made available to the owner of land, concurrently with its appropriation to public use) between ordinary cases and that class of cases where the property is put to the use of the state directly, and that in such cases it is not indispensable. Young *v.* Harrison, 6 Geo. 130.

And the grant of the right to bridge a navigable river, or arm of the sea, or to obstruct the flow and reflow of the tide upon the flats of private persons, although it may abridge their beneficial use, is not such an invasion of private property as to entitle the party to compensation. It is but the regulation of public rights, and if private persons thereby suffer damage, it is *damnum absque injuria*. Davidson *v.* Boston & Maine Railw., 3 Cush. 91. See, also, upon the

[6] Lister *v.* Lobley, 7 Ad. & Ellis, 124, Lord *Denman* says: "The amount of compensation cannot generally be ascertained till the work is done. The effect of the words in question is that they shall not do it without being liable to make compensation." It seems to have been supposed here, that if the company did not make compensation they might be compelled to do so by mandamus.

* road, making, or tendering satisfaction, that this need not be done before, or at the time of entering upon or taking the lands.

6. But this subject was largely discussed, in an early case in New York,[7] and finally determined by the court of errors * reversing

subject generally, Zimmerman *v.* Union Canal Co., 1 Watts & S. 346; Philadelphia & Reading Railw. *v.* Yeiser, 8 Penn. St. 366; 2 Am. Railw. C. 325; Commonwealth *v.* Fisher, 1 Penn. 462, and *ante*, § 63.

But it is very generally held, that in the absence of all express provision by statute in regard to the time when compensation shall be made, the party is at all events entitled to have it ascertained and ready for his acceptance, concurrently with the actual appropriation of the estate to public use, and that he is not obliged to wait till the work is completed. People *v.* Hayden, 6 Hill (N. Y.), 359; Baker *v.* Johnson, 2 Hill, 342.

But no right to compensation vests in the land-owner till the acceptance and confirmation of the appraisal by the proper tribunal, under any statutory provisions, in most of the American states, and until that, the company may change the location of their road, and abandon proceedings pending against land-owners, on the first surveyed route, by paying costs already assessed. Hudson River Railw. *v.* Outwater, 3 Sandf. Sup. Ct. 689.

And where the statute of the state provides that no valuation of property taken for railway and canal purposes need be made before taking possession of the same, in those cases where the property is not obscured, so that its value cannot be judged of, it was held there should be no unreasonable delay in having the valuation made. Compton *v.* Susquehannah Railw., 3 Bland. Ch. 386.

[7] Bloodgood *v.* M. & H. Railw. Co., 14 Wend. 51; s. c. 18 id. 9, 59. See, also, upon this subject, Fletcher *v.* Auburn & Syracuse Railw., 25 Wend. 462; Smith *v.* Helmer, 7 Barb. 416; Pittsburgh *v.* Scott, 1 Penn. St. 309; People *v.* Michigan Southern Railw., 3 Gibbs, 496. In this case it is said the party who makes no application for compensation for many years should be regarded as having waived all claim. Id. p. 506. See, also, Smith *v.* McAdam, 3 Gibbs, 506. And where the statute provided for depositing the value of the land taken before entry upon it, it was held this was a provision for the security of the land-owner, and might be waived by him; and if so, and entry was made by the company without making the deposit, he might recover the assessment in an action of debt. Smart *v.* Railway, 20 N. H. 233. But in one case it was held indispensable to the validity of the power, that the party, whose land was taken should have something more than a right of action for the value of his land. Shepardson *v.* M. & B. Railw., 6 Wisconsin, 605. See Powers *v.* Bears, 12 id. 213; Ford *v.* Ch. & N. W. Railw. Co., 14 id. 609.

And by the construction of the statute of Maine, a railway corporation, as soon as their track is located, may take immediate possession, and the land-owner, failing to agree with the company, as to the amount of damages may apply to the courts to have the same assessed, and thereupon the company are required to pay or give security for the same, and their right of possession is suspended until the requirement is complied with; but no action of trespass lies in such

the judgment of the court below, that if provision was made for compensation in the act, giving power to take the lands, it was not indispensable that the amount should be actually ascertained and paid before the appropriation of the property.

7. In Mississippi it is required, by the constitution of the state, that the compensation be paid before the right to use the land is vested.[8] So also in Georgia the title does not vest in the * company until the ascertained compensation is paid or tendered.[9] A similar decision was made by the Supreme Court of the United States,[10] where the charter of the company provided that the payment, or tender, of the valuation, should vest the estate in the company, as

cases. Davis *v.* Russell, 47 Me. 443. Where by statute a bond is required to be filed by the company to secure damages to the land-owner, upon failure of the parties to agree upon the amount, such bond extends to all the lawful damage caused to the owner by the construction of the company's works; and the fact of its being approved and ordered to be filed is presumptive proof that the parties had failed to agree. Wadhams *v.* Lackawanna & Blooms. Railw. Co., 42 Penn. St. 303.

But in most of the states the assessment of the damages due to the land-owner, and the payment, tender, or deposit of the same, is held a condition precedent to the right of entry upon the land, and the company entering before this will, *prima facie*, be regarded as trespassers. Memphis & Charleston Railw. Co. *v.* Payne, 37 Miss. 700; Henry *v.* Dubuque & Pacific Railw., 10 Iowa, 540; Evans *v.* Haefner, 29 Mo. 141; Burns *v.* Dodge, 9 Wis. 458.

In McAulay *v.* Western Vermont Railw. Co., 33 Vt. 311, it was decided that the payment of land damages was a condition precedent to the acquiring of title by a railroad company of lands taken for their road. But that where the land-owner acquiesces in the occupation of his land for the construction of a railway without prepayment of land damages, upon a contract or understanding for future payment by the company, and the road is constructed and put in operation, he cannot afterwards, on failure to obtain payment, maintain trespass or ejectment for the land. And whether, under such circumstances, he would still retain an equitable lien on the land, seems doubtful. The mere prosecution of a controversy by the land-owner with the company, before commissioners or on appeal, as to the amount of the damages, is not such a prohibition of the taking of the land by the company without prepayment of land damages as is necessary to enable the land-owner to maintain trespass or ejectment for the land after the road is put in operation. Nor will notice to the laborers on the railway employed by the contractor be considered as sufficient to entitle the land-owner to maintain trespass or ejectment against the company, the company not being affected by such notice.

[8] Stewart *v.* Raymond Railw. Co., 7 Smedes & M. 568. See also Thompson *v.* Grand Gulf Railw., 3 Howard (Miss.), 240.

[9] Doe *v.* The Georgia Railw. Banking Co., 1 Kelly, 524.

[10] Baltimore & Susquehanna Railw. Co. *v.* Nesbit, 10 How. 395.

fully as if it had been conveyed. And a similar decision was also made by the Supreme Court of Vermont.[11]

8. In one case in North Carolina,[12] it was held that compensation need not be made prior to appropriating land for public use. The constitution of the state is said to contain no prohibition against taking private property for public use, without compensation. And the same is true of the constitution of South Carolina. And the latter state held[13] that private property might be taken without compensation. But this decision is certainly at variance with the generally received notions upon that subject, since the period of the Roman Empire.

[11] Stacey v. Vermont Central Railw. Co. 27 Vt. 39. The opinion of *Isham*, J., in this case, will show the correlative rights of the company and land-owner, and by what act the right of each becomes perfected. Where the statute requires the company to contract in writing, it is not competent to show title in any other mode, unless by formal conveyance. Harborough *v.* Shardlow, 2 Railw. C. 253; 7 M. & W. 87. In Graff *v.* The City of Baltimore, 10 Md. 544, it was held, under a statute for enabling the city to supply pure water, and to take land upon valuation by a jury, and compensation to the owners, and that where "such valuation is paid, or tendered, to the owner or owners" of the property, it "shall entitle the city to the use, estate, and interest in the same, thus valued, as fully as if it had been conveyed by the owners;" that the city is not bound by the mere inquisition and judgment thereon, but could rightfully abandon the location; and that payment, or tender, under the statute, was indispensable to the vesting of the title. But it was held, that the city may be made liable, in another form of proceeding, to the land-owner, for any loss or damage he may have sustained, by reason of the conduct of the municipal authority in the premises.

[12] R. & G. Railw. Co. *v.* Davis, 2 Dev. & Bat. 451. But in New Jersey it was held that the supervisors, in laying out roads, are bound to award damages to land-owners, with their return, or the whole proceeding is illegal and void. State *v.* Garretson, 3 Zab. 388.

[13] State *v.* Dawson, 3 Hill, (S. C.), 100. In this case Mr. Justice *Richardson* dissents from the decision of the court, and it is generally allowed that his opinion contains the better law. His argument, in the language of the author of the Commentaries, vol. 2, *ubi supra*, "was very elaborate and powerful." See Louisville Railw. Co. *v.* Chappell, 1 Rice, 383; Lindsay *v.* The Commissioners, 2 Bay, 38.

*SECTION XII.

Appraisal includes Consequential Damages.

1. *Consequential damage barred.*
2. *Such as damage, by blasting rock.*
3. *But not where other land is used unnecessarily.*
4. *But loss by fires, obstruction of access, and cutting off springs, is barred.*
5. *Loss by flowing land not barred.*
6. *Damages, from not building upon the plan contemplated, are barred.*
7. *Special statutory remedies reach such damages.*
8. *Exposure of land to fires.*
9. *No action lies for damage sustained by the use of a railway.*

§ 74. 1. It is requisite that the tribunal appraising land damages, for lands condemned for railways, should take into consideration all such incidental loss, inconvenience, and damage, as may reasonably be expected to result from the construction and use of the road, in a legal and proper manner. And as all tribunals, having jurisdiction of any particular subject-matter, are presumed to take into consideration all the elements legally constituting their judgments, such incidental loss and damage will be barred, by the appraisal, whether in fact included in the estimate or not.

2. Hence damage done by the contractors to the remaining land, by blasting rocks, in the course of construction, has been held to be barred, as included in the estimated compensation for the land taken.[1]

[1] Dodge *v.* The County Commissioners, 3 Met. 380; Sabin *v.* Vermont Central Railw., 25 Vt. 363; Dearborn *v.* Boston, Concord, & Montreal Railw., 4 Foster, 179, 187; Whitehouse *v.* Androscoggin Railw., 52 Me. 208. But in Hay *v.* Cohoes Company, 2 Comst. 159, the defendants, a corporation, dug a canal upon their own land, for the purposes authorized by their own charter. In so doing, it was necessary to blast rocks, and the fragments were thrown against and injured the plaintiff's dwelling, upon land adjoining, and it was held the defendants were liable to a special action for the injury, although no negligence or want of skill was alleged or proved: and in Tremain *v.* Cohoes Company, 2 Comst. 163, a precisely similar action, it was held that evidence to show the work done in the most careful manner was inadmissible, there being no claim for exemplary damages.

But there is probably an essential difference between the case of a railway, in the construction of which blasting rocks is almost indispensable, and that of a manufacturing company, or other proprietor, who may find it convenient to blast rocks upon his premises, to increase their utility or beauty. But for doing what the act does not authorize, or doing what it does authorize, improperly, a rail-

*3. But it was held that this did not preclude the land-owner from recovering damages for using land adjoining the land taken

way company is liable to an action. Turner *v.* Sheffield & R. Railw., 10 M. & W. 425.

In Carman *v.* Steubenville & Ind. Railw., 4 Ohio N. S. 399, it seems to be taken for granted, that throwing fragments of rock, by blasting, upon the land of adjoining proprietors, is an actionable injury, and as in this case it was done by the contractor in the performance of his contract, in the manner stipulated, the company were held liable.

The result of the cases would seem to be, that where the damage done, by blasting rocks, or in any similar mode, in the course of the construction of a railway, is done to land, a portion of which is taken by the company under compulsory powers, this damage will not lay the foundation of an action, in any form, as it should be taken into account in estimating the compensation to the land-owner for the portion of land taken. Brown *v.* Prov., Warren, & Bristol Railw., 5 Gray, 35. And if not included in the appraisal, it is nevertheless barred. Dodge *v.* County Commissioners, *supra*.

But if the damage is done to land, no part of which is taken, and where no land of the same owner is taken, it may be recovered, under the statute, if provision is made for giving compensation for consequential damage, or where lands are "injuriously affected." But if the statute contain no such provision, the only remedy will be by a general action. And in this view many of the cases cited above seem to assume, that blasting rocks, by an ordinary proprietor of land, is a nuisance to adjoining proprietors if so conducted as to do them serious damage. And this is the ground upon which the case of Carman *v.* Stubenville & Ind. Railw. is decided, without much examination of this point, indeed, and by a divided court. But if a railway is not liable for necessary consequential damage, unless the statute gives a remedy (*post*, § 75), it may perhaps be questioned how far a recovery could be maintained, in a general action for damage done by blasting rocks, as that is confessedly within the range of their powers. See opinion of *Shaw*, Ch. J., in Dodge *v.* County Commissioners, 3 Met. 380: "An authority to construct any public work carries with it an authority to use the appropriate means. An authority to make a railway is an authority to reduce the line of the road to a level, and for that purpose to make cuts, as well through ledges of rock as through banks of earth. In a remote and detached place, where due precaution can be taken to prevent danger to persons, blasting by gunpowder is a reasonable and appropriate mode of executing such a work; and, if due precautions are taken to prevent unnecessary damage, is a justifiable mode. It follows that the necessary damage occasioned thereby to a dwelling-house or other building, which cannot be removed out of the way of such danger, is one of the natural and unavoidable consequences of executing the work, and within the provisions of the statute.

"Of course, this reasoning will not apply to damages occasioned by carelessness or negligence in executing such a work. Such careless or negligent act would be a tort, for which an action at law would lie against him who commits, or him who commands it. But where all due precautions are taken, and damage is still necessarily done to fixed property, it is alike within the letter and the

* for a cart-way, where six rods were allowed to be taken by the company throughout the line of the road, which would give ample space for cart-ways upon the land taken.[2] But it was held, in another case, that the company were not liable for entering upon the adjoining lands, and occupying the same with temporary dwellings, stables, and blacksmith shops, provided no more was taken than was necessary for that purpose.[3]

4. So it is settled that the appraisal of land damages is a bar to claims for injuries by fire, from the engines obstructing access to buildings, exposing persons or cattle to injury, and many such risks.[4] And it will make no difference, that the damages were not known to the appraisers, or capable of anticipation at the time of assessing land damages;[5] as where a spring of water is cut off * by an excavation for the bed of a railway fifteen feet * below the surface, from which the plaintiff's buildings had been supplied with water.

equity of the statute, and the county commissioners have authority to assess the damages. This court are therefore of opinion, that an alternative writ of mandamus be awarded to the county commissioners, to assess the petitioners' damages, or return their reasons for not doing so." See also Pottstown Gas Co. *v.* Murphy, 39 Penn. St. 257; Whitehouse *v.* Androscoggin Railw., *supra*. In the latter case it was held that the damage resulting to the land-owner, for not removing the stone thrown upon land adjoining that taken, could not be taken into account in estimating damages, since it was presumable the company would remove them in proper time, according to their duty; and, if they did not, the remedy would be by special action.

[2] Sabin *v.* Vermont Central Railw., 25 Vt. 363.

[3] Lauderbrun *v.* Duffy, 2 Penn. St. 398. But it seems questionable whether this case can be maintained as a general rule.

But if a party is entitled to compensation for injuries of this kind, as where his lands adjoining the railway, and no part of which is taken, are injuriously affected, as by blasting rocks, his only remedy is under the statute. Dodge *v.* County Commissioners, 3 Met. 380.

[4] Phila. & Reading Railw. *v.* Yeiser, 8 Penn. St. 366; s. c. 2 Am. Railw. C. 325; Aldrich *v.* Cheshire Railw., 1 Foster, 359; s. c. 1 Am. Railw. C. 206; Mason *v.* Kennebec & Port. Railw., 31 Maine, 215. See also Furniss *v.* Hudson River Railw., 5 Sand. 551; Huyett *v.* Phil. &. Read. Railw., 23 Penn. St. 373; *ante*, §§ 71, 72. See also Lafayette Plank Road Co. *v.* New Albany, &c. Railw. Co., 13 Ind. 90.

[5] Aldrich *v.* Cheshire Railw., *supra*. But see Lawrence *v.* Great Northern Railw., 16 Q. B. 643; s. c. 4 Eng. L. & Eq. 265.

So, also, where the company's works cut off a spring of water, below high-water mark, on a navigable river, it was held the riparian owner was entitled to claim damages of them on that account, in a proceeding under the statute. Lehigh Valley Railw. *v.* Trone, 28 Penn. St. 206.

5. But it was held, that where, in the construction of a canal, with waste weirs, erected by direction, and under the inspection of the commissioners appointed to designate the route of the canal, with all the works connected therewith, and to appraise damages, the waste water, after flowing over the land of adjoining proprietors, flowed upon the land of the plaintiff, and thereby greatly injured it, that he was entitled to recover damages.[6] But the occasional flow of land by water caused by public works is to be estimated as part of the damages under the English statute.[7]

6. And where the appraisal of land damages is reduced below * what it otherwise would have been, by the representations of the agents of the company that the road would be constructed in a particular manner, made at the time of the appraisal to the com-

[6] Hooker *v.* New Haven & Northampton Co., 14 Conn. 146; s. c. 15 Conn. 312.

But in such case, the owner of property overflowed by water, through the defective construction of a railway, is bound to use reasonable care, skill, and diligence, adapted to the occasion, to arrest the injury, and if he do not, notwithstanding the first fault was on the part of the company, he must be regarded as himself the cause of all damage, which he might have prevented by the use of such care, diligence, and skill. Chase *v.* The N. Y. Central Railw., 24 Barb. 273.

The same rule was adopted by a special referee, in Lemmex *v.* Vermont Central Railw., in regard to damage to wool, by being exposed to rain at one of the company's stations, through the fault of the agents of the company, where the owner did not remove it, as soon after he obtained knowledge of its condition, or take as effective measures to arrest the injury, as he reasonably should have done. It was held the company were only liable for such damage as necessarily resulted from their own fault, and beyond that the plaintiff must be regarded as the cause of his own loss. See also *post*, § 180.

The assessment of compensation for land taken for a railway covers all damages, whether foreseen or not, and whether actually estimated or not, which result from the proper construction of the road. But the company are liable to an action for damages resulting to any one from the defective construction of their road. In the present case the plaintiff's meadows were injured, in consequence of the insufficient culverts in the defendant's road, there being no impediment to the construction of proper ones. Suitable bridges and culverts to convey the water across the railway, at or near the places where it naturally flows, are necessary to the proper construction of the road, except where they cannot be made, or where the expense of making them is greatly disproportionate to the interests to be preserved by them. Johnson *v.* At. & St. Law. Railw., 35 N. H. 569.

[7] Ware *v.* Regent's Canal Co., 3 De G. & J. 212.

missioners, and which representations are not fulfilled in the actual construction of the road, whereby the plaintiff sustained serious loss and injury, it was held, that the adjudication of the commissioners was a merger of all previous negotiations upon the subject, and that no action could be maintained for constructing the railway contrary to such representations, provided it was done in a prudent and proper manner.[8]

7. But where no part of the plaintiff's land is taken, and the statute gives all parties suffering damage by the construction of railways the right to recover, as in England, and some of the American states, and the water is drawn off from plaintiff's well upon lands adjoining the railway, he may recover.[9] So, too, may the proprietor of a mill-pond recover damages, sustained by the construction of a railway across the same, although the dam was authorized by the legislature, upon a navigable river; and in constructing it, the conditions of the act were not complied with.[10]

8. But it has been held that the appraisers are not to estimate increased damages to a land-owner in consequence of the exposure of the remaining land to fires by the company's engines.[11]

[8] Butman *v.* Vt. C. Railw. Co., 27 Vt. 500. See also Railw. Co. *v.* Washington, 1 Rob. 67; B. & S. Railroad Co. *v.* Compton, 2 Gill, 20, 28; *ante*, § 71; Kyle *v.* Auburn & Roch. Railw., 2 Barb. Ch. 489. But see Wheeler *v.* Roch. & Sy. Railw., 12 Barb. 227, where it is held that a railway company will be enjoined from building a road-crossing at a different place from that named at the time damages were assessed. But it has been held, that it was competent for the company to show, by experts, the *necessity* of putting a culvert through an embankment, at a particular point, in order to preserve the work, as an answer to a claim for damages on account of the prospective obstruction of the water, and setting it back upon the land at that point, by the embankment. But it should be shown that such culvert is absolutely indispensable, before any deduction can be made on that account, unless the company are in some legal way bound to make it. The company are not estopped from proving this necessity because the plat of the location of the road does not indicate a culvert at that point. Nason *v.* Woonsocket Union Railw., 4 Rhode Island, 377. *Post*, § 93.

[9] Parker *v.* Boston & Maine Railw., 3 Cush. 107.

[10] White *v.* South Shore Railw., 6 Cush. 412.

[11] Sunbury & Erie Railw. *v.* Hummel, 27 Penn. St. 99, *Lewis*, Ch. J., and *Black*, J., dissenting. The general current of authority seems to us with the minority of the court. And in Lehigh Valley Railw. *v.* Lazarus, 28 Penn. St. 203, the case of Yeizer, 8 Penn. St. 366, *ante*, n. 4, is regarded, by the reporter of that state, as overruled. But in an action of trespass against a railway com-

* Nor can any common-law action be sustained for such damage unless where actual loss intervenes through the negligence of the company."

pany for constructing their road through plaintiff's land, and thereby preventing his cattle thriving, this latter injury is not so remote a consequence of the act charged that it may not be made a ground of claiming damage, when specially alleged in the declaration. Baltimore & Ohio R. *v.* Thomson, 10 Md. 76. If we understand the ground assumed by the court in Pennsylvania, at the present time, it is, that an injury to buildings, standing near the line of a railway, by fire from the companies' engines, when properly constructed and prudently managed, is too remote and uncertain to form an element in estimating damages to the land-owner, either when part of the land is taken, or the statute provides for damages to all persons "injuriously affected" by the company's works. We are entirely conscious of the embarrassment attending all attempts to define the class of injuries, which do, or which do not, come within the rule of legal consequential injuries, by the construction or operation of railways. But it seems important to distinguish between a railway, as one of the legitimate uses to which the proprietor of land might put it, for the purpose of private transportation, and upon which he might no doubt use locomotive steam engines, and the use of such engines upon a public railway.

In the former case the land-owner would not be liable to an adjoining proprietor except for want of care, skill, or prudence in the construction or use of his engines. The same would probably be true of a public company, if the legislature did not subject them to any consequential damage resulting from the nature of their business. But where they are, as in England, and many of the American states, made liable, either as part of the price of land taken, or as a distinct ground of claim, to all consequential damage caused to the land-owner, both by the construction and operation of their road, or either of them, in a prudent and proper manner, it seems difficult to escape the conclusion, that the exposure of property along the line of a railway to loss by fires communicated by the company's engines, is one of the most direct sources of consequential injury which can be imagined. It is more direct and substantial than that from noise, dirt, dust, smoke, and vibration of the soil, all which, under circumstances, have been held proper elements of damage to be considered. Perhaps none of them are absolutely grounds of giving damage in all cases. That depends very much upon the nearness of the track to the land. And other circumstances may perhaps deserve consideration, in many cases. But where the track passes directly through lands, near where buildings are already erected, it is difficult to conjecture upon what ground it could be claimed, that the increased exposure to fire was not a serious detriment to the owner. It is certain it must very seriously enhance the rate of insurance, and proportionally diminish the value of the rent, and of the buildings.

As was said by *Shaw*, C. J., Proprietors of Locks & Canals *v.* Nashua & Lowell Railw., 10 Cush. 385, it is incumbent upon one who claims damage on this ground, to show that the company's track ran so near his buildings "as to cause *imminent* and *appreciable* danger by fire." When it is undertaken to be decided, as a question of law, that in no case is danger from fire, by the

* 9. In a recent English case [12] it was held, after extended argument and careful consideration, that the owner of a house situated close to a railway, and which suffers depreciation in value from vibration and smoke, not caused by any negligent user of the railway, but being the inevitable result of the ordinary user, has no right to compensation under the English statute, or by distinct action at law. The case is put upon the ground that the legislature having legalized the use of locomotive steam engines by railway companies, adjoining proprietors must submit to the inevitable consequences of a lawful business, however inconvenient it may become; and can sustain no action for damages any more than for the exercise of any other legal business which might depreciate the value of property in the neighborhood. The English statutes are construed to give compensation only for injuries sustained by construction and not by the use of a railway.

proper use of the company's engines, to be considered in estimating land damages, it is certainly contrary to the general course of decisions upon the subject, if not to the very principle upon which such companies have been subjected to such damages as they cause to land-owners, beyond what accrues from the ordinary use of lands for building and agricultural purposes. These decisions in Pennsylvania are still maintained there, and the rule has been applied to the case of buildings where the owner is compelled to pay a higher rate of insurance in consequence of the proximity of the railway. Patten *v.* Northern Central Railw., 33 Penn. St. 426. It is here maintained that any claim for damages in consequence of the mere intrusion of noise and bustle upon one's seclusion is essentially anti-social, and at war with the fundamental laws of society, which we should not be inclined to question. And as to all mere conjectural or contingent advantages and disadvantages, it may well be said they are too remote to form an element in estimating land damages. Searle *v.* Lackawanna Railw., 33 Penn. St. 57. But we cannot admit that either of these rules has any just application to exposure to fire from the company's engines, where the danger is certain and inevitable. *Post*, § 82.

[12] Brand *v.* Hammersmith & City Railw. Co., Law Rep., 2 Q. B. 223; 12 Jur. N. S. 336. See also Lafayette Plank-Road Co. *v.* New Albany Railw. Co., 13 Ind. 90.

*SECTION XIII.

Action for Consequential Damages.

1. *Statute remedy for lands "injuriously affected."*
2. *Without statute not liable to action.*
3. *Are liable for negligence in construction, or use.*
4. *Statute remedy exclusive.*
5. *Minerals reserved.*
6. *Damages for taking land of railway for highway.*
7. *Compensation for minerals, when recoverable.*

§ 75. 1. The liability of railways for consequential damage to the adjoining land-owners must depend upon the provisions in their charters, and the general laws of the state. In England railway companies are, by express statute,[1] made liable to the owners of all lands "injuriously affected" by their railways. And under this statute it has been determined, that if the company do any act, which would be an actionable injury, without the protection of the special act of the legislature, they are liable under the statute.[2] So that there, any act of a railway company amounting to a nuisance in a private person, and causing special damage to any particular land-owner, is good ground of claiming damages under this section of the statute.[3]

2. But in the absence of all statutory provision upon the subject, railways are not liable for necessary consequential damages to land-owners, no portion of whose land is taken, where they construct and operate their roads in a skilful and prudent manner.[4]

[1] 8 and 9 Vict. c. 8, § 68.

[2] Glover *v.* The North Staffordshire Railw. Co., 16 Q. B. 912; s. c. 5 Eng. L. & Eq. 335; *post*, § 82.

[3] Hatch *v.* Vt. Central Railw. Co., 25 Vt. 49. See § 82, *post*.

[4] Monongahela Nav. Co. *v.* Coons, 6 Watts & S. 101; Radcliff *v.* The Mayor of Brooklyn, 4 Comstock, 195; Phil. & Trenton Railw. Co., 6 Wharton, 25; Seneca Road Co. *v.* Aub. & Roch. Railw. Co., 5 Hill (N. Y.), 170; Hatch *v.* Vt. Central Railw., 25 Vt. 49; Richardson *v.* Vt. Central Railw. Co., 25 Vt. 465.

There are many other cases confirming the same general view stated in the text. Henry *v.* Pittsburgh & Allegheny Bridge Co., 8 Watts & Serg. 85; Canandaigua & Niagara Railw. *v.* Payne, 16 Barb. 273, where it is held, that injury to a mill upon another lot of the same land-owner, in consequence of the construction and operation of the railway, is a matter with which the commissioners have nothing to do in estimating damages for land. So in Troy &

*3. But if the railways are guilty of imprudence, or want of skill, either in the construction or use of their road, they are * liable

Boston Railw *v.* Northern Turnpike, 16 Barb. 100, it was held that the consideration that the business of a turnpike, which claimed damage, would be diminished by the construction of the railway along the same line of travel, should be disregarded in estimating damage to such turnpike. "Every public improvement," say the court, "must affect some property favorably, and some unfavorably, from the necessity of the case. When this effect is merely consequential the injury is *damnum absque injuria*. Though their property has undoubtedly depreciated by the construction of the railway, yet the turnpike company enjoy all the rights and privileges secured to them by their charter, and no vested rights have been violated."

Nor is one entitled to damage, in consequence of a highway being laid upon his line, thus compelling him to maintain the whole fence. Kennett's Petition, 4 Foster, 139. In Albany Northern Railw. *v.* Lansing, 16 Barb. 68, it is said, "The commissioners, in estimating the damages, should not allow consequential and prospective damages."

In Plant *v.* Long Island Railw., 10 Barb. 26, it is held not to be an illegal use of a street to allow a railway track to be laid upon it, and that the temporary inconvenience to which the adjoining proprietors are subject while the work of excavation and tunnelling is going on is *damnum absque injuria*. So also in regard to the grade of a street having been altered, by a railway, by consent of the common council of the city of Albany, who by statute were required to assess damages to any freeholder injured thereby, and who had done so in this case, it was held that no action could be maintained against the railway. Chapman *v.* Albany & Sch. Railw., 10 Barb. 360; Adams *v.* Saratoga & Wash. Railw., 11 Barb. 414.

And in a case in Kentucky, Wolfe *v.* Covington & Lexington Railw., 15 B. Monr. 404, it was held, the municipal authority of a city might lawfully alter the grade of a street, for any public purpose, without incurring any responsibility to the adjacent landholders, and might authorize the passage of a railway through the city, along the streets, and give them the power to so alter the grade of the streets, as should be requisite for that purpose, this being done at the expense of the company, and by paying damages to such adjacent proprietors as should be entitled to them. But one, who urged the laying of the road in that place, on the ground that it would benefit him, and who was thereby benefited, cannnot recover damages of the company, upon the maxim, "*volenti non fit injuria*." A railway, when so authorized, "is not a *purpresture*, or encroachment upon the public property or rights."

And where a railway company erect a fence upon land which they own in fee, for the purpose of keeping the snow off their road, they are not liable for damages sustained by the owner of land upon the opposite side of the fence, by the accumulation of snow, occasioned by the fence. Carson *v.* Western Railw., Mass. Sup. Court, 20 Law Rep. 350; s. c. 8 Gray, 423. See also Morris & Essex Railw. *v.* Newark, 2 Stock. Ch. 352.

And where the act complained of is the construction of an embankment, by a railway company, at the mouth of a navigable creek, in which the plaintiff

to any one suffering special damage thereby,[5] as in needlessly diverting watercourses and streams, and not properly restoring them,[5] whereby lands are overflowed or injured.[5]

4. And the remedy given by statute for taking or injuriously affecting lands is exclusive of all remedies, at common law, by action, or bill in equity, unless provided otherwise in the statute.[6]

* 5. But in a late English case,[7] the House of Lords held, that

has a prescriptive right of storing, landing, and rafting lumber, for the use of his saw-mill, whereby the free flow of the water is obstructed, and the plaintiff thereby deprived of the full enjoyment of his privilege, the injury is regarded as the direct and immediate consequence of the act of the company, and they are liable for the damages thereby sustained. Tinsman *v.* The Belvidere Delaware Railw. Co., 2 Dutcher, 148.

See also Rogers *v.* Kennebec & Portland Railw., 35 Me. 319; Burton *v.* Philadelphia W. & B. Railw., 4 Harr. 252; Hollister *v.* Union Co., 9 Conn. 436; Whittier *v.* Portland & Kennebec Railw., 38 Maine, 26.

[5] Whitcomb *v.* Vt. Central Railw. Co., 25 Vt., 69; Hooker *v.* N. H. & N. Y. Railw. Co., 14 Conn. 146; *post*, § 79. And there is the same liability although the lands are not situate upon the stream. Brown *v.* Cayuga & Susquehannah Railw., 2 Kernan, 486.

A party is liable to an action for diverting the water from a spring, which ran in a well-defined channel into a stream supplying a mill, at the suit of the mill-owner, notwithstanding he had permission from the owner of the land where the spring arose. *Aliter* if the spring spread out upon the land, having no channel. As the land-owner might drain his land, so he may give permission to others to do so. Dudden *v.* The Union, 1 Hurlstone & Norman, 627. See also Brown *v.* Illius, 27 Conn. 84; Robinson *v.* New York & Erie Railw., 27 Barb. 512; Waterman *v.* Conn. & Pass. Riv. Railw., 30 Vt. 610; Henry *v.* Vermont Central Railw., id. 638. But in this last case it was decided that the effect of erecting a bridge in a stream upon the course of the current below was so far incapable of being known or guarded against, that there was no duty imposed upon railway companies to guard against an injury to land-owners below by a change of the current. See, also, New Albany & C. Railw. Co. *v.* Higman, 18 Ind. 77; Same *v.* Huff, 19 id. 315; Colcough *v.* Nashville & N. W. Railw. Co., 2 Head, 171.

[6] Regina *v.* Eastern Counties Railw., 2 Q. B. 347, 569; s. c. 3 Railw. C. 466. But in this case the act expressly provided, that the verdict and judgment should be conclusive and binding, which most railway acts do not; but it seems questionable if this will make any difference. E. & W. I. Docks, &c. *v.* Gattke, 3 Mac. & Gor. 155; s. c. 3 Eng. L. & Eq. 59; *post*, § 81.

[7] Caledonia Railw. *v.* Sprot, 2 McQu. Ho. Lds. 499; s. c. 39 Eng. L. & Eq. 16. But in Bradley *v.* New York & New H. Railw., 21 Conn. 294, where the defendants' charter gave them power to take land, and made them liable for all damages to any person or persons, and they excavated an adjoining lot to plaintiff's, so as to weaken the foundations of his house, and erected an embankment in the highway opposite his house, so as to obscure the light, and render it other-

a railway company which had been condemned to pay for land, the owner reserving the minerals, were not liable to the land-owner, by reason of his inability to work a mine which he had discovered under the railway. The Lord Chancellor said, "The conveyance of the surface of land gives to the grantor an implied right of support, sufficient for the object contemplated, from the soil of the grantor, adjacent as well as subjacent."

6. And it has been held, that in estimating damages to a railway in consequence of laying a highway across land occupied by them, it is not proper to take into account the probable increase of business to the company in consequence.[8]

7. And where the company take land, but decline to purchase the minerals after notice from the owner of his intention to work them, pursuant to the English statute, the company is not entitled to the subjacent or adjacent support of the minerals. And where the company gave notice, under the statute, that the working of the mines was likely to injure the railway, the owner was held entitled to recover compensation which had been assessed under the statute.[9]

wise unfit for use, it was held, that this did not constitute a taking of plaintiff's land, but that defendants were liable to consequential damage under their charter.

But in the early case of the Wyrley Nav. *v.* Bradley, 7 East, 368, it is considered that, where the act of parliament reserved the right to dig coal to the proprietor of mines, unless the company, on notice, elected to purchase and make compensation, where the canal was damaged by the near approach of the mine, after such notice, and no compensation made, the coal-owner was not liable, although it is there said to be otherwise in case of a house, undermined by digging on the soil of the grantor. But this case seems to turn upon the reservation in the grant.

[8] Boston & Maine Railw. *v.* County of Middlesex, 1 Allen, 324. The reservation in a deed of land to a railway company of the right to make a crossing over the land, creates an easement in the land, but does not extend such easement across the other lands of the company. Ib.

[9] Fletcher *v.* Great Western Railw., 4 H. & N. 242. And in North Eastern Railw. Co. *v.* Elliott, J. & H. 145; s. c. 6 Jur. N. S. 817, it was held that the general principle, that a vendor of land sold for a particular use cannot derogate from his own grant by doing any thing to prevent the land sold from being put to that use, applies to sales to railways under compulsory powers. But it was here said that this principle will not compel the vendor of land to perpetuate any thing upon the portion of the land retained by him, which is merely accidental, though existing and of long standing at the date of the sale. Hence, where a railway company took land for a bridge in a mining district, where a shaft had been sunk many years before, but the working of the mines abandoned and the shaft filled with water for a long time before the taking of the land, it was held that the land-

*SECTION XIV.

Right to occupy Highway.

1. *Decisions conflicting.*
2. *First held that owners of the fee were entitled to additional damages.*
3. *Principle seems to require this.*
4. *Many cases take a different view.*
5. *Legislatures may and should require such additional compensation.*
6. *Courts of equity will not enjoin railways from occupying streets of a city.*
7. *Some of the states require such compensation.*

n. 11. *All do not. But the English courts, principle, and many of the state courts, do require it, as matter of right.*

8. *Recent decisions upon the right to occupy the highway.*
   1. *The decisions in the state of New York require compensation to the owner of the fee.*
   2. *Distinction between streets of cities and highways in the country.*
   3. *Legislature may control existing railways.*
   4. *In Ohio the owner of the fee may claim indemnity against additional injury.*
   5. *True distinction, whether the use is the same.*
   6. *The present inclination seems to be to require additional compensation for laying street railway in highway.*
   7. *Cases in the opposite direction. Judge Ellsworth's opinion.*
   8. *Explanation of the apparent confusion.*
   9. *Where permanent erections made in street, compensation must be made.*
   10. *Rights of land-owners as to obstructing railway.*

11–23. *Recent cases in New York.*

§ 76. 1. The decisions are contradictory, in regard to the right of a railway company to lay its track along a common highway, without making additional compensation to land-owners adjoining such highway, and who, in the country, commonly own to the middle of the highway.

* 2. In some of the early cases, upon this subject, it seems to have been considered, that, under such circumstances, the land-owners were entitled to additional compensation, when the land was converted from a common carriage-way to a railway.[1]

owner was not precluded from draining the water and working the mine, although the effect must be to lessen the support of the bridge to some extent, by withdrawing the hydrostatic pressure upon the roof of the mine, and the consequent support of the superincumbent strata of earth.

[1] Trustees of the Presbyterian Society in Waterloo *v.* The Auburn & Rochester Railw. Co., 3 Hill (N. Y.), 567. The case of Fletcher *v.* Auburn & Syracuse Railw. Co., 25 Wend. 462, might have been put upon the same ground, but is not. The ground assumed is, that the land-owners are entitled to consequential damage, in consequence of the new use to which the land is put, which amounts to nearly the same thing. Philadelphia & Trenton Railw., 6 Wharton, 25; Miller *v.* The Auburn & Syracuse Railw. Co., 6 Hill (N. Y.), 61; Mahon *v.* Utica & Schenectady Railw., Lalor's Supp. to Hill & Denio, 156. And in Ramsden *v.* The Manchester South Junction & Alt. Railw., 1 Exch. 723, the

*3. There is certainly great reason in this view, inasmuch as the land-owner's entire damage is to be assessed, at once, and it

Court of Exchequer expressly decide, that a railway company has no right even to tunnel under a highway, without making previous compensation to the land-owner. Seneca Road *v.* Auburn Railw., 5 Hill, 170; Troy *v.* Cheshire Railw. Co. 3 Foster, 83. But a distinction is taken between the property of adjoining land-owners in the highway or street in cities, and in the country. In the former it has been held that the fee of the streets is under the sole control of the municipal authorities, and that it is no perversion of the legitimate use of the streets to allow a railway company to lay their track upon them. Plant *v.* Long Island Railw. 10 Barb. 26; Adams *v.* Saratoga & Washington Railw., 11 Barb. 414; Chapman *v.* Albany & Schenectady Railw., 10 Barb. 360; Drake *v.* Hudson River Railw., 7 Barb. 508; Applegate *v.* Lexington & Ohio Railw., 8 Dana, 289; Wolfe *v.* Covington & Lexington Railw., 15 B. Monr. 404.

In Williams *v.* New York Central Railw., 18 Barb. 222, 246, the court say: "A railroad is only an improved highway, and the use of a street, by a railway, is one of the modes of enjoying a public easement." But see this case reversed, *post*. A general power to pass highways in the construction of a canal, or railway, has been held to include turnpikes also. Rogers *v.* Bradshaw, 20 Johns. 735; White River Turnpike Co. *v.* Vermont Central Railw., 21 Vt. 590. But the grant of a railway from one terminus to another, without prescribing its precise course and direction, does not, *prima facie*, confer power to lay out the railway upon and along an existing highway. But it is competent for the legislature to grant such authority, either by express words, or necessary implication; and such implication may result, either from the language of the act, or from its being shown, from an application of the act to the subject-matter, that the railway cannot, by reasonable intendment, be laid in any other line. Springfield *v.* Connecticut River Railw., 4 Cush. 63; s. c. 1 Am. Railw. C. 572. But in general, the adjoining owner of land to a highway is entitled to additional compensation, where it is put to a different and more dangerous use. And towns have an interest in highways and bridges, which will enable them to maintain an action upon the case for their obstruction or destruction, and the conversion of the materials. Troy *v.* Cheshire Railw., 3 Foster, 83. But the town is not liable to pay damages assessed, by the selectmen, in laying out a highway, at the request of a railway company, made necessary to supply the place of one taken by the company for their track. Ellis *v.* Swanzey, 6 Foster, 266.

In general, it may be stated as the settled doctrine of most of the states, that the owner of land, bounded upon a highway, owns to the centre of the way. Buck *v.* Squiers, 22 Vt. 484, 495. The general rule as to monuments, referred to in deeds of land, undoubtedly is, that the centre of such monuments is intended, whether it be stake, stone, tree, rock, or a highway, or stream. It is undoubtedly more a rule of policy than of intention, and as such, to answer its end, should be applied in every case, unless a clearly defined intention to the contrary be made to appear. 3 Kent, Comm. 433; Chatham *v.* Brainerd, 11 Conn. 60; Champlin *v.* Pendleton, 13 Conn. 23; Livingston *v.* Mayor of New York, 8 Wend. 85, 106; Starr *v.* Child, 20 Wend. 149; s. c. 4 Hill, 369; Canal Comm. *v.* People, 5 Wend. 423; s. c. 13 Wend. 355; Johnson *v.* Ander-

* could never be done understandingly, unless the use to which it were to be put were known to the assessors. And it is obvious,

son, 18 Me. 76; Bucknam *v.* Bucknam, 3 Fairfield, 463; Leavitt *v.* Towle, 8 N. Hamp. 96; Dovaston *v.* Payne, 2 Smith's Leading Cases, 90, and notes by Wallace & Hare; Nicholson *v.* New York & New Haven Railw., 22 Conn. 74.

But the owner of the fee of land, over which a highway passes, cannot maintain a bill in equity, to enforce an order of commissioners, as to the manner of constructing a railway, where it crosses the highway, but the same should be brought by the principal executive officers of the town or city. Brainard *v.* Conn. River Railw., 7 Cush. 506. The court say: "It is only where the owner suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him, and certainly no rule of law rests on a wiser or more sound policy. Were it otherwise, suits might be multiplied to an indefinite extent, so as to create a public evil, in many cases, much greater than that which was sought to be redressed." Stetson *v.* Faxon, 19 Pick. 147; Proprietors of Quincy Canal *v.* Newcomb, 7 Met. 276; Smith *v.* Boston, 7 Cush. 254; Hughes *v.* Providence & Worcester Railw. Co., 2 Rhode Island, 493.

In Williams *v.* Natural Bridge Plank Road Co., 21 Missouri, 580, it is held, that the grant of the right of locating a plank-road upon a county road, does not exclude the idea that the owner of the soil over which the road passes should have compensation for any injury he may sustain by converting a county road into a plank-road. This case is put, by the court, upon the ground, that the plank-road is an additional burden upon the soil, and that for this the land-owner is as much entitled to compensation as if his land had originally been taken for the purpose of the plank-road, and that to deny all redress in such case is a virtual violation of that article of the constitution giving compensation to the owner of property taken for public use.

This is undoubtedly the rule of the English law, and of reason and justice, and we should rejoice to see it prevail more extensively in this country. The American courts seem to have been sometimes led astray upon this subject by the fallacy, that a railway is merely an improved highway, which for many purposes it is, but not for all, any more than a canal. See also Railroad, *ex parte*, 2 Rich. 434.

And the New York statute, giving railways the right to pass upon, or over turnpikes, plank-roads, rivers, &c., by restoring such ways, rivers, &c., so as not unnecessarily to have impaired their usefulness, was construed not to preclude a plank-road from recovering of the railway all damages sustained by them in a common action for damages, under the code, the company having entered upon the plank-road without causing damages to be assessed under the statute. Ellicottville Plank-road *v.* Buffalo, &c. Railw., 20 Barb. 644. As the New York Court of Appeals have changed the rule upon this subject, in that state, since the body of this work was through the press, in the former edition, and only a note of the case was inserted at the close of that edition, we deem it proper here to present the opinion at length. Williams *v.* New York Central Railw., 16 N. Y., 97. The point decided is, that the dedication of land to the use of the public as a highway does not authorize it being taken by a railway company

* that it would ordinarily be attended with far more damage to the remaining land to have a railway than a common highway laid across it.

for their track, without compensation to the owner of the fee, although done by the consent of the legislature, and of the municipal authorities.

Selden, J. — "This is a suit in equity, the object of which is to obtain a perpetual injunction, restraining the defendants from continuing to use and occupy with their railway a portion of a certain highway or street in the village of Syracuse, known as Washington Street, and to recover damages for past occupation.

"Washington Street was gratuitously dedicated to the use of the public by the plaintiff and others, through whose land it was laid, and the Utica and Syracuse Railway Company, to the rights and liabilities of which the defendants have succeeded, constructed their railway upon it without making any compensation to the plaintiff, and without his consent. At the time the track was laid, the plaintiff was the owner of a large number of lots fronting upon the street, a portion of which he has since sold, with a reservation of his claim against the railway company for damages, and a portion of which he still owns. The damages which have accrued both upon the sold and unsold portions of the premises are claimed in this suit.

"The defendants, in justification of their occupation of the street, show that the charter of the Utica and Syracuse Railway, Session Laws of 1836, p. 819, § 11, declares that their road might 'intersect' and be built upon any highway, and that this right is confirmed by the general railway act of 1850.

"They also show the express consent of the municipal authority of the city of Syracuse to such occupation. The principal question, therefore, and the only one which I deem it necessary to consider, is, whether the state and municipal authorities combined could confer upon the railway company the right to construct their road upon this street without obtaining the consent of, or making compensation to, the plaintiff.

"If the railway encroaches in any degree upon the plaintiff's proprietary rights, then it is clear that the constitutional inhibition, which forbids the taking of private property for public use "without just compensation," applies to the case.

"It is conceded that, by the dedication, the public acquired no more than the ordinary easement, or a right to use the premises as a highway, and that the plaintiff continues the owner in fee in respect to the unsold lots to the centre of the street, subject only to this easement. But it is contended that the taking and use of the street by the railway company does not encroach upon the reserved rights of the plaintiff, because the use of a street for the purposes of a railway is only "one of the modes of enjoying the public easement." . . .

[After examining various cases, which, the learned judge said, "may be considered as settling that a railway in a populous town is not a nuisance *per se*, and that when the railway company has acquired the title to the land upon which its road is located, such company being in the exercise of a lawful right,

*4. If the rule of estimating damages, according to the money value of the land taken, were adopted, there would be more

is not liable, unless guilty of some misconduct or negligence, for any consequential injuries which may result to others from the operation and use of its road; but they decide nothing whatever in regard to the question to be considered in this case," — he proceeded:] "There is also another class of cases in which, although the injury complained of is to the corporeal rights of the plaintiff, yet being merely consequential, and no direct trespass or unauthorized intrusion upon the plaintiff's property being alleged, the question under consideration here could not arise. Such are the cases of Fletcher *v.* The Auburn and Syracuse Railway Co., 25 Wend. 464, and Chapman *v.* Albany and Schenectady Railway Co., 10 Barb. 360." In these and the like cases, the title of the company to the ground on which its road is built, is not disputed. It is unnecessary, therefore, to notice them further here.

"We come, then, to the consideration of the cases which do bear, with more or less weight, upon the question to be decided, and upon which, so far as authority is concerned, its decision must mainly depend. The first among these cases, in the order of time as well as of importance, is that of The Presbyterian Society of Waterloo *v.* The Auburn and Rochester Railway Co., 3 Hill, 567. The declaration was in trespass for entering upon the plaintiffs' premises, digging up the soil, and constructing their railway track upon it. The defence was, that the *locus in quo* was a public highway, and that the charter of the company expressly authorized it to construct its road upon and across any highway. The point, therefore, was presented in the most direct manner possible, and the defence most emphatically overruled. The language of Chief Justice *Nelson* is most pertinent and forcible. He says: 'But the plaintiffs were not divested of the fee of the land by the laying out of a highway; nor did the public thus acquire any greater interest therein than a right of way, with the powers and privileges incident to that right, such as digging the soil and using the timber and other materials found within the limits of the road in a reasonable manner, for the purpose of making and repairing the same, subject to this easement, and this only. The rights and interests of the owners of the fee remained unimpaired.

"'It is quite clear, therefore, even if the true construction of the eleventh section accords with the view taken by the counsel for the defendants, that the legislature had no power to authorize the company to enter upon and appropriate the land in question for purposes other than those to which it had been originally dedicated in pursuance of the highway act, without first providing a just compensation therefor.'

"It was argued in that case, as in this, that using the road for a railway was only a different mode of exercising the right which had been acquired by the people; that the use was virtually the same, that of accommodating the travelling public. But the argument met with no favor from the court. Judge *Nelson* says: 'It was said on the argument, that the highway is only used by the defendant for the purposes originally designed, — the accommodation of the public, and for this compensation has already been made. This argument might have been used with about the same force in the case of Sir John Lade *v.* Shepherd, 2 Strange, 1004.'

*reason in saying the public would thereby acquire the right to use it for any purposes of a road, which any future improvement

"He adds, on this subject: 'The claim set up (by the defendant) is an easement, not a right of passage to the public, but to the company, who have the exclusive privilege of using the track of the road in their own peculiar manner. The public may travel with them over the track, if they choose to ride in their cars.'

"This case, which was decided by our late Supreme Court, upon full consideration, and in so emphatic a manner, ought to be conclusive, unless it appears upon principle to be erroneous. . . .

"It will not be seriously and cannot be successfully contended, either that the dedication of land for a highway gives to the public an unlimited use, or that the legislature have the power to encroach upon the reserved rights of the owners, by materially enlarging or changing the nature of the public easement.

"The only plausible ground which can be taken is that which was assumed in the case of The Presbyterian Society in Waterloo *v.* The Auburn and Rochester Railroad Co., *supra*, and which has also been assumed here, namely, that to convert a highway into a railway track is no material change in or enlargement of that to which it was originally dedicated; that the construction of a railway along a highway is simply one of the modes of accomplishing the object of the original dedication, viz., that of creating a thoroughfare and passage-way for the public; in short, that the railway is a species of highway, and that the two uses are substantially identical.

"But is this assumption just? Are the two uses the same? If the only difference consisted in the introduction of a new motive power, it would not be material. But is there no distinction between the common rights of every man to use upon the road a conveyance of his own at will, and the right of a corporation to use its conveyances to the exclusion of all others, — between the right of a man to travel in his own carriage without pay, and the right to travel in the car of a railway company on paying their price?

"It may be said that the use of the road as a common highway is not subverted; that a man may still drive his own carriage upon it. Without pausing to notice the fallacy of this argument, and the impracticability of the enjoyment of such a right when railway trains are passing and repassing every half hour, let us look at the subject in another point of view. The right of the public in a highway is an easement, and one that is vested in the whole public. Is not the right of a railway company, if it has a right to construct its track upon the road, also an easement? This cannot be denied; nor that the latter easement is enjoyed, not by the public at large, but by a corporation; because it will not be pretended that every man would have a right to go and lay down his timbers and his iron rails, and make a railway upon a highway. These, then, are two easements; one vested in the public, the other in the railway company. These easements are property, and that of the railway company is valuable. How was it acquired? It has cost the company nothing.

"The theory must be that it is carved out and is a part of the public easement, and is, therefore, the gift of the public. This would do if it was given solely at

* might suggest. And this is the view which seems very extensively to prevail in this country. It was long since settled that

the expense of the public. But it is manifest that it is at the joint expense of the public and the owner of the fee. Ought not the latter, then, to have been consulted?

"But it is unnecessary to refine upon this case. Any one can see, that to convert a common highway, running over a man's land, into a railway, is to impose an additional burden upon the land, and greatly to impair its value. As no compensation has, in this case, been made to the owner, his consent must in some way be shown.

"The argument is, that as he has consented to the laying out of a highway upon his land, *ergo*, he has consented to the building of a railway upon it, although one of these benefits his land, renders access to it easy, and enhances its price, while the other makes access to it both difficult and dangerous, and renders it comparatively valueless. Were the transaction between two individuals, every one would see at once the injustice of the conclusion attempted to be drawn. It is the public interest, supposed to be involved, which begets the difficulty; and it is just for this reason that the constitution interferes for the protection of individual rights, and provides that private property shall not be taken for public use without compensation; a provision no less necessary than just, and one which it is the duty of courts to see honestly and fairly enforced.

"The case stated by the learned judge who delivered a dissenting opinion in the Supreme Court, is a striking illustration of the injustice that would frequently be done under the rule contended for by the defendants.

"A street was laid out through a man's land, and he was assessed several hundred dollars for benefits, in addition to the land taken, and before the street was opened it was taken by a railway company, and converted into the track of their road. The owner lost his land, had to pay several hundred dollars, and had the annoyance of the railway besides, while the railway company got the road for nothing.

"The case of Inhabitants of Springfield *v.* Connecticut River Railroad Co., 4 Cush. 63, shows what the Supreme Court of Massachusetts thought of the argument that the uses are the same. It was insisted there, on the part of the defendants, that the power conferred upon them by the legislature to build their road between certain *termini*, gave them, by necessary implication, the right to build their track upon any intervening highway. But Chief Justice *Shaw*, in his reply to this argument, says: 'The two uses are almost, if not wholly, inconsistent with each other, so that taking the highway for a railway will nearly supersede the former one to which it had been legally appropriated. The whole course of legislation on the subject of railways is opposed to such a construction.'

"I concur with the learned chief justice, and have no hesitation in coming to the conclusion, that the dedication of land to the use of the public as a highway is not a dedication of it to the use of a railway company; that the two uses are essentially different, and that, consequently, a railway cannot be built upon a highway without compensation to the owners of the fee. The legislative pro-

* the land-owner was not entitled to any additional damage, by reason of any alteration in the construction of the highway.[2] Or in applying it to the use of a turnpike road where toll was paid, this being but a different mode of supporting the highway, of which the land-owner had no just cause of complaint, since it did not materially alter the use of the land.[3] And the same rule has now been pretty extensively extended to improvements in erecting railways along the streets and highways.[4] These questions depend much upon the terms of the charter of the railway company.

visions on the subject were probably intended, as was intimated in The Presbyterian Society of Waterloo *v.* The Auburn and Rochester Railroad Co., *supra*, to confer the right so far only as the public easement is concerned, leaving the companies to deal with the private rights of individuals in the ordinary mode. If, however, more was intended, the provisions are clearly in conflict with the constitution, and cannot be sustained.

"It follows that the defendants, in constructing their road upon Washington Street, without the consent of the plaintiff, and without any appraisal of his damages, or compensation to him in any form, were guilty of an unwarrantable intrusion and trespass upon his property, and that he is entitled to relief.

"Although he had a remedy at law for the trespass, yet as the trespass was of a continuous nature, he had a right to come into a court of equity, and to invoke its restraining power to prevent a multiplicity of suits, and can, of course, recover his damages as incidental to this equitable relief. There may be doubt as to his right to recover in this suit the damages upon the lots which have been sold, because, as to those lots, there was no occasion to ask any equitable relief, and to permit the damages to be assessed in this suit in effect deprives the defendants of the right to have them assessed by a jury. But as this question has not been raised, it is unnecessary to consider it."

It has been held that the laying out and operating a horse railway in the streets of a city is not an additional servitude upon the soil, for which the owner is entitled to compensation. Brooklyn Central & Ja. Railw. *v.* Brooklyn City Railw., 33 Barb. 420. And if one company lay their track across the track of another, they are entitled to no compensation. Ib.

[2] Zimmerman *v.* The Union Canal Co., 1 Watts & Serg. 346; Mayor *v.* Randolph, 4 Watts & Serg. 514; Gov. & Co. of Plate Manufacturers *v.* Meredith, 4 T. R. 790; Sutton *v.* Clark, 6 Taunton, 29; Boulton *v.* Crowther, 2 B. & C. 703; The King *v.* Pagham, 8 B. & C. 355; Henry *v.* The Alleghany & Pittsburg Bridge Co., 8 Watts & Serg. 86; Shrunk *v.* Schuylkill Nav. Co., 14 S. & R. 71; Commonwealth *v.* Fisher, 1 Penn. 467; Hatch *v.* Vermont Central Railw., 25 Vt. 49; Taylor *v.* City of St. Louis, 14 Misso. 20; Richardson *v.* Vermont Central Railw., 25 Vt. 465; Callender *v.* Marsh, 1 Pick. 418; Rounds *v.* Mumford, 2 Rhode Island, 154; O'Connor *v.* Pittsburgh, 18 Penn. St. 187; Plum *v.* Morris Canal & Bank Co. and the City of Newark, 2 Stockton's Ch. 256.

[3] Wright *v.* Coster, 3 Dutcher, 76.

[4] Plant *v.* Long Island Railw. Co., 10 Barb. 26. But see Mifflin *v.* Harris-

5. And as it is confessedly competent for the legislature to require railways, in laying their track along the highways, to make compensation to the adjoining land-owners, for any increased detriment, or to be liable for all consequential damage,[5] and as it is assuredly just and equitable to do so, it seems desirable it should be done. And in those states and countries * where such enterprises have become so far matured as to have assumed the form of a settled system, it more commonly is done. And where it is not, it may be regarded as the result of oversight in the legislature. It was held that a railway is liable to pay damages for crossing a turnpike company's road, notwithstanding the legislature gave the right.[6]

6. Injunctions in equity have been denied, when applied for, to restrain railways from occupying the streets of cities and towns with their track,[7] by consent of the municipal authority.

burg, Portsmouth, M. & L. Railw. Co., 4 Harris (Penn.), 182. In this case the act required payment of damage to all who were injured by converting a turnpike into a railway, and it was held a receipt in full to the turnpike company did not bar the claim of an adjoining land-owner for additional damages. But the levelling of a street, preparatory to laying the structure of a railway, is not an obstruction. McLaughlin *v.* Charlotte and S. C. Railw., 5 Rich. 583; Benedict *v.* Coit, 3 Barb. 459.

[5] Bradley *v.* N. Y. & N. H. Railw. Co., 21 Conn. 294.

[6] Seneca Railw. Co. *v.* Aub. & Roch. Railw. Co., 5 Hill, 170. And the amount of damage is immaterial. The maxim, *de minimis*, does not apply to cases of plain violation of right. Id. *Cowen*, J.

[7] Hamilton *v.* New York & Harlem Railw., 9 Paige, 171; Hentz *v.* Long Is. Railw., 13 Barb. 646; Chapman *v.* Albany & Sch. Railw., 10 Barb. 360; Lexington & Ohio Railw. *v.* Applegate, 8 Dana, 289; Drake *v.* Hudson River Railw., 7 Barb. 508; Wetmore *v.* Story, 22 Barb. 414; Milhau *v.* Sharp, 15 Barb. 193. But where the railway is constructed without the legal permission of the municipal authorities or the legislature, along the streets of a populous city, it becomes a nuisance, and courts of equity will prohibit its continuance, at the suit of individuals who are tax-payers and property owners on the streets, through which the rails are laid. In a late case in New Jersey, Morris & Essex Railw. *v.* City of Newark, 2 Stockton's Ch. 352, the right of a railway company to occupy the streets of a city seems to have been examined with considerable care by the chancellor, but the cases upon the subject are not examined very extensively, and reliance is there placed upon the case of Williams *v.* The New York Central Railw., which has since been reversed in the Court of Appeals, *ante*, n. 1.

There is one distinction here adverted to that is not named in other cases, so far as we have noticed, that so long as the highway or street continues to be used as such, the concurrent use of it by a railway company for their track, by con-

* 7. But in a recent and well-considered case,[8] it was held, that where a railway company, in carrying their road through the streets of the city of New Haven, found it necessary to carry one of the streets over the railway, upon a high bridge, with large embankments at each end, the plaintiff owning the land upon both sides of the street, and no compensation being assessed to him, he

sent of the legislature and the municipal authorities, does not entitle the owner of the fee to additional compensation. But if it is appropriated exclusively to the use of the railway, the owner is then, by constitutional provision, entitled to compensation, the discontinuance of the highway causing a reverter of the fee to the owner. This qualification takes away the most offensive feature of what is claimed, in some of the cases, the right, in the legislature and the municipal authorities, to transmute a common highway or street into a public railway, as one of those improvements in the mode of intercommunication which the progress of events had brought about, and which must be regarded as fairly within the contemplation of the parties at the time of the original taking.

But, in the present case, there being no necessity for the use of the street in question by the railway, but merely a convenience, and no express consent of the municipal authorities for such use, it was held that no right to such use could be implied, from the grant of their charter, between certain *termini*, which might be obtained by a route less injurious to the public, and that the consent of the municipal authorities was not to be inferred from their not interfering until the track had been laid and used for several years and large sums of money thus invested, and important interests accrued, and the injunction restraining the authorities from removing the track was dissolved. The extent to which a railway company must obstruct the highway, at an intersection of the two, to create an actionable impediment to the public travel, is extensively considered in the case of Great Western Railw. Co. *v.* Decatur, 33 Ill. 381. It was here decided, that twelve feet of the highway remaining unobstructed, so that a steady team might have passed in safety, is not enough to exonerate the railway company from a charge of obstructing the passage of the highway.

[8] Nicholson *v.* New York & New Haven Railw., 22 Conn. 74. If there is any departure from general principles, in this case, it is in holding the railway company justified in making alterations in highways, which cause no appreciable injury to the land-holders, and this certainly commends itself to our sense of reason and justice. It may be somewhat questionable, perhaps, whether the charge of the judge, who tried the case at the circuit, was not based upon the technical rules applicable to the case, namely, that the company were, at all events, liable for nominal damages, and for all actual damages in addition. But where a railway company, by consent of the mayor and aldermen of a city, under the Revised Statutes, raise a street to enable them to carry their road under it, they become primarily liable to the adjoining land-owners for any damage to their estates thereby. And it will not affect the liability of the company, that the city took of them a bond of indemnity, and appointed a superintendent to take care of the public interests in the execution of the work. Gardiner *v.* Boston & Worcester Railw., 9 Cush. 1.

might recover of the company in an action of trespass, for any appreciable incidental damages, occasioned by thus constructing their road, and the consequent alteration of the highway or street. And as the company, in thus constructing their road, acted under the authority of the legislature, they were, *prima facie*, not to be regarded as trespassers, but that, where they caused any appreciable damage to the land-owners along the line of the road, they were liable in this form of action. The court in this case, *Hinman*, J., assumed the distinct * ground, that the railway, by laying their track upon the plaintiff's land, which was before subject to the servitude of the highway, or street, would become liable "for such entry" upon the land. "In such case," says the learned judge, "the subjecting the plaintiff's property to an additional servitude, is an infringement of his right to it, and is, therefore, an injury and damage to him. It would be a taking of the property of the plaintiff, without first making compensation." And the same court, in a later case,[9] held that the location of a railway upon a public highway is the imposition of a new servitude upon the land, and the owner of the fee is entitled to compensation for the damage caused thereby. And this includes all incidental damage to land adjoining, and which belongs to the same proprietor.

In a case in Pennsylvania,[10] it is held that the legislature may authorize the construction of a railway on a street, or public highway, and the inconvenience thereby incurred by the citizens must be borne for the sake of the public good. But where this is claimed by construction and inference, all doubts are to be solved against the company.

And where, by the act of incorporation of a municipality, it was provided that the "streets, lanes, and alleys thereof" should for ever be and remain public highways, it was held that the municipal authorities could not authorize the construction of a railway thereon.[10]

But where the state conveys to a city the title of a common, reserved in the grant of the township for a "common pasture," subject to the easement of the lot holders, of common of pasturage,

[9] Imlay *v.* The Union Branch Railw. Co., 26 Conn. 249.

[10] Commonwealth *v.* Erie & Northeast Railw., 27 Penn. St. 339. See also Alleghany *v.* Ohio & Pennsylvania Railw., 26 Penn. St. 355.

it was held that the city might lawfully grant a portion of the same to a railway company, for the purpose of constructing their road.[11]

[11] Alleghany *v.* Ohio & Pennsylvania Railw., 26 Penn. St. 355. But the grant of fifty feet, through such a common, in a densely populated city, will only convey the right to the railway to erect their road thereon, and to receive and discharge passengers and freight, and will not give the right to erect depots, car-houses, or other structures, for the convenience or business of the road; or to permit their cars and locomotives to remain on their track longer than is necessary to receive and discharge freight and passengers. Ib.

And it might have been regarded as the settled doctrine of the New York courts, until the case of Williamson *v.* N. Y. Central R., *ante*, n. 1, that the owner of the fee of land dedicated to the use of a highway or street, and which the legislature devote to the use of a railway, had no claim upon the company for compensation, by reason of the additional servitude thereby imposed upon the land. Corey *v.* Buffalo, Corning, & New York Railw., 23 Barb. 482; Radcliff *v.* Mayor of Brooklyn, 4 Comst. 195; Gould *v.* Hudson River Railw., 2 Seld. 522. But this is now otherwise in New York.

And so late as January, 1857, the subject is elaborately examined by Vice-Chancellor *Kindersley*, in Thompson *v.* West Somerset Railw., 29 Law Times, 7, in relation to the *cestuis que trust* of a pier, over which the act of parliament, in express terms, authorized the company to construct their road, but which they had done without proceeding under the statutes, to appraise compensation, and the court held them trespassers, and an injunction was granted until the company made compensation.

And in a case in Indiana, the subject is considered, and although the authorities are not much reviewed, the conclusions of the court conform so closely to the broadest views of reason and justice, that we shall insert an extended note of the points decided.

A city ordinance authorized the construction of a railway, on either of two streets, through the corporate limits, under suitable restrictions as to grade. It was considered that the ordinance did not authorize the company to substantially alter the grade of the street. It was further:

Held, that besides the right of way, which the public have in a street, there is a private right, which passes to a purchaser of a lot upon the street, as appurtenant to it, which he holds by an implied covenant, that the street in front of his lot shall for ever be kept open, for his enjoyment, and for any obstruction thereof, to the owner's injury, he may maintain an action.

The right which the owner of a lot has to the enjoyment of an adjoining street is part of his property, and can only be taken for public use, on just compensation being made, pursuant to the constitution. Tate *v.* Ohio & Miss. Railw., 7 Porter (Ind.), 479.

And in Haynes *v.* Thomas, id. 38, where the cases are more fully examined, the same general propositions are maintained. It is there said, the right of the owner of a town lot, abutting upon a street, to use the street, is as much property as the lot itself, and the legislature has as little power to take away one as the other.

These general propositions are repeated, and somewhat varied, in the notes

* 8. Since the second edition of this work, the decisions have been considerably numerous in regard to the right of railways * to occupy the streets and highways, without making additional compensation to the owners of the fee of the lands across which the same are laid. The principles involved are much the same as have been already stated; but it will be important to the profession to know them in detail.

1. In a somewhat recent case[12] it was decided, that the occupation of the highway by the track of a railway company, is the imposition of an additional servitude, and is the taking of the property of the owner of the fee in the lands over which the same is laid, within those constitutional prohibitions requiring compensation where private property is taken for public use; and that consequently the company can acquire no right to such use, under legislative and municipal license, without compensation, and that there is no difference in this respect between railways operated by steam and by other motive power. But in another case it was held, that any legislative act empowering a railway company to occupy certain streets and avenues in the city of New York, should not be construed as not intended to give such permission without compensation.[13] In the main, this case assumes the opposite ground from that declared by Craig *v.* Rochester City and Br. Railway Co.[12] The question came up for revision in the Court of Appeals, in the case of the People *v.* Kerr,[14] * where the court maintained

of this case. And although we think, upon principle, the right as against a railway company should be placed upon the basis of its being an additional and more oppressive burden and servitude upon the land, which entitles the land-owner to additional compensation, there can be, in our judgment, no manner of question of the general soundness of the above decisions. And the latter case, being that of the voluntary dedication of property, by the owner, for the purposes of a street and highway, is very well calculated to illustrate the hardship and injustice of wresting such use to the purposes of a railway, so much more burdensome and injurious. So that the general current of the American law upon this subject may now be regarded as the same with the English rule already stated.

Protzman *v.* Ind. & Cin. Railway., 9 Ind. 467; Evansville & C. Railw. *v.* Duke, 9 Ind. 433. See also Marquis of Salisbury *v.* Great Northern Railw., 5 C. B. (N. S.) 174, s. c. 5 Jur. N. S. 70.

[12] Craig *v.* Rochester City & Br. Railw. Co., 39 Barb. 494.

[13] People *v.* Kerr, 37 Barb. 357.

[14] 27 N. Y. 188. This case must be regarded as settling the law in this state, notwithstanding some conflict in the decisions of their different supreme courts. The rule is thus laid down by *Emott*, J., in the case last cited. "It must be regarded as settled, in the jurisprudence of this state, that the appro-

the proposition that the construction of a city railway upon the surface of the streets, and without change of grade, is an appropriation of the land to some extent to public use, but the court held that the original owner of the fee of the streets in the city of New York had no such remaining interest as to justify any demand for compensation on his part for reasons before stated.[15]

2. The same distinction, as to the right of the owner of the fee to demand compensation, between the use of the streets of towns and cities for the track of railways, and of highways in the country, is observed in many of the other states. Thus in two cases in Iowa this distinction is maintained.[16]

3. The question of the locations of railway across or along the streets and highways of cities and towns, as well as in the rural districts, is extensively discussed in a late case in Maine, which came more than once before the courts.[17] But most of the propositions here maintained are more or less affected by statutory provisions. It is here declared (which indeed is found in many other cases, and is sufficiently obvious in itself) that statutes regulating the operation of railways are to be considered as affecting only the general police of the state, and as applying equally to existing and future railways; but even matters of police affecting the construction of railways cannot reasonably be construed as having a retroactive operation, so as to require a railway company to undo and do over again the work of construction.

4. The cases[18] decided in Ohio, in regard to the use of highways

priation of property to the construction or use of a railway for the transportation of property, is an application of such property to the use of the public. The doctrine applies to all railways, whether traversing the state or the streets of a city, and of course the motive power used does not affect the question. So, also, the uniform course of decisions and legal proceedings since Bloodgood *v.* Mohawk & Hudson Railw. (18 Wend. 1), and founded upon the principles there asserted, is conclusive that it does not affect the question of public use in such cases, that the property applied to it is to be appropriated by a corporation or by individuals, and not directly by the state or the people, or that the road is not of a character to be actually used by any and every citizen with his own vehicle.

[15] *Ante*, § 70, pl. 13.

[16] Milburn *v.* City of Cedar Rapids, &c., 12 Iowa, 246; Haight *v.* The City of Keokuk, &c., 4 id. 199.

[17] Veazie *v.* Mayo, 45 Me. 560; s. c. 49, id. 156.

[18] Crawford *v.* Delawne, 7 Ohio N. S. 459; Cincinnati & Spring Grove Avenue Railw. Co. *v.* Cumminsville, 14 Ohio N. S. 523.

and streets for the purpose of street railways, do not appear to be altogether decisive of the principle involved. It seems to be there regarded, that so far as a street or highway can be appropriated for such use, without appreciable damage to the * owner of the land adjoining, that he is not entitled to any additional compensation, but that if, from change of grade or any other cause, there is any essential damage inflicted upon the abutters, by obstructing access to lands or buildings, or in any other respect, more than would have resulted from the use in the ordinary mode for a highway, the owner of the fee will be entitled to demand additional compensation.

5. But it is obvious that the difficulty, in point of principle, lies somewhat deeper. For although the rule there laid down, in point of equity, may be entirely just and reasonable, it must always prove embarrassing in practice, and compel an appraisement in each particular case, in order to insure security. The true principle undoubtedly is, that if the use is substantially the same as that of an ordinary highway, no additional compensation can be required; but if the use is new and distinct from that of an ordinary highway, the owner of the fee is entitled to additional compensation in every case, without reference to special damages; so that the question turns upon the point whether the use of a street or highway for the support of a railway track is using it for a highway only. As such use of the street for street railways is of necessity solely under municipal control, and is a use to which the municipal authorities might themselves devote the street by constructing the tracks at their own expense, allowing all travellers to use them with every species of carriage, it seemed natural to conclude that it could not be regarded as an additional servitude; but the current of authority seems to be setting in the opposite direction.

6. The present inclination seems to be to make no distinction between the use of streets by steam and street railways, and to require compensation in both cases alike.[19]

7. There are some few cases in different states which still ad-

[19] Ford v. Chicago and North Western Railw. Co., 14 Wisc. 609; City of Janesville v. Milw. & Miss. Railw. Co., 7 id. 484; Pomeroy v. Chi. & Milw. Railw. Co., 16 id. 640; Warren v. State, 5 Dutcher, 393; Veazie v. Penobscot Railw., 49 Me. 119. The same principle is maintained in Brown v. Duplessis, 14 Louis. Ann. 842. But by statute in this state the cities may sell the use of the streets for city passenger railway purposes.

here to the doctrine that the laying of a railway track for the passage of street railways, at the ordinary grade of the highway, * is not an appropriation of any estate in the land to public use beyond that already appropriated by devoting the land to the use of a highway or street.[20] And there is an elaborate opinion of Mr. Justice *Ellsworth*, of the Connecticut Superior Court,[21] where the same views are maintained, and, as it seems to us, with more plausibility than any case we have found in the opposite direction.

8. The explanation of the singular vacillation of the courts upon the subject of railways being located on the highways, and whether the owner of the fee was thereby entitled to additional compensation, seems to arise in the following manner. At the first it was so common to designate steam railways as only an improved highway, that the courts, almost universally in this country, held the owner of the fee entitled to no additional compensation by reason of such railways being laid upon the highway, either across or along their route. But this view, upon more careful consideration, being found untenable, the retrocession of the courts from their former false assumption naturally gave them an unnatural impulse in the opposite direction, by which the conclusion was arrived at, that all railways must equally be an additional burden upon the fee. Whether the proper distinction between street railways and those occupying a distinct route and transacting mainly a distinct business will ever be clearly defined is perhaps questionable.

9. It seems very certain that the grant to a railway company of the right to pass along the streets of a city or town can confer no right to erect stations and other permanent structures in the streets, and thereby render them unfit for use as streets.[22] In such cases the adjoining land-owners will be entitled to redress by way of damages, whether they own to the middle line of the street or only to the margin.[22]

10. But the owner of an unimproved building lot upon a street cannot be regarded as suffering any such injury from the location of a railway along the public street adjoining as will entitle him to an injunction.[23] And the fact that the defendant * owned the

[20] New Albany Railw. Co. *v.* O'Daily, 12 Ind. 551.

[21] Elliott *v.* Fairhaven & Westville Railw. Co., 32 Conn. 579.

[22] Lackland *v.* North Missouri Railw. Co., 31 Mo. 180.

[23] Zabriskie *v.* Jersey City & Bergen Railw. Co., 2 Beasley, 314.

* 314, 315

land across which a railway track is laid, and had never released the right of way to the railway, is no ground of defence for placing obstructions upon the track.[24] Nor will the breach of contract by which the company secured the right of way give any color of justification to the land-owner for placing any such obstructions on the track.[24]

11. Some recent cases affecting the location of street railways in the city of New York may be of interest to the profession, and we have therefore inserted in the note below [25] the leading points decided.

[24] State *v.* Hessenkamp, 17 Iowa, 25.

[25] Sixth Av. Railw. Co. *v.* Kerr. 45 Barb. 138, where the following points are ruled: —

Where a railroad is laid in a public street, under a permissive grant to the company to use a portion of the street for that purpose, the company does not acquire the same unqualified title and right of disposition to the land occupied which individuals have in their lands.

The only exclusive power conferred by such grants is that of using railway carriages in the same manner as the grant of a stage line confers, for the time being, the grant of a monopoly of using such stages for the transportation of passengers for hire on that route. Ib.

After a railway company has obtained permission from the common council of New York to lay a railway through certain streets of the city, and such grant is subsequently confirmed by an act of the legislature, the legislature has the power to grant similar privileges to another company, and to authorize the latter to run upon, intersect, or use any portion of the tracks already laid, on condition of making compensation or payment to the first grantees, if the parties do not agree. Ib.

Such a grant is not a violation of any right of property. The grantees must be considered as holding the grants for the public use, in the public street, which is open to all the public.

The right to grant a crossing of the road necessarily involves a right to pass over a larger portion of such road, when the legislature so directs. Ib.

A railway corporation, by acquiring the right to construct its road across a highway, and obtaining title to the land for its road-bed, does not destroy or impair the public easement. The perfect and unqualified right of every citizen to pass over the road at that point remains the same as before. Ib.

The common council of the city of New York has no power to authorize an extension of a city railway, unless possibly where such extension is really necessary to the enjoyment of a previous valid grant. People *v.* Third Av. Railw., 45 Barbour, 63.

If it be claimed that such extension is a necessary incident to the principal subject of the grant, that is a question of fact, and the burden of proving it rests on the railroad company. Ib.

* By the act incorporating the New York & Harlem Railw., passed April

25, 1832, the company was empowered to construct a single or double railway from any point on the north bounds of 23d Street, in the city of New York, to any point on the Harlem River between the east bounds of the Third Avenue and the west bounds of the Eighth Avenue, with a branch to the Hudson River, between 124th Street and the north bounds of 129th Street. *Held*, 1. That the practical location of the railway within the prescribed limits would exhaust the powers conferred, and prevent a subsequent change of location, except by consent of the legislature. 2. That the location of the tracks (if there were two) would have to be substantially upon the same route. That the permission to build a double track should be construed to mean two tracks essentially upon the same location, for the purpose of enabling cars to run in opposite directions, and not two essentially different routes through different streets and avenues, such as would be occupied by parallel railways; especially as the right of granting to other persons or corporations authority to construct parallel railways on streets or avenues not occupied by the New York and Harlem Railw., was expressly reserved to the legislature by the sixteenth section of the same act. People *v.* N. Y. & Harlem Railw., 45 Barbour, 73.

By an amendatory act of the 6th of April, 1832, the company was "authorized and empowered, with the permission of the mayor, &c., of New York, to extend their railway along the Fourth Avenue to 14th Street, and through such other streets as the mayor, &c., might from time to time permit, subject to such prudential rules" as were prescribed by the act, and as the said mayor, &c., in common council convened, might prescribe. *Held*, that the precise route of the extension was not intended to be defined by the act, but this was designedly left to the sound discretion of the common council; and the road was to be extended through such other streets as the mayor, &c., might from time to time permit. Ib.

That this was a continuous power, left to be exercised from time to time as the wants of the community should require. It was not, therefore, a power which was spent by a single grant or permission, but might be repeatedly exercised, according to the exigency of the case. Ib.

Held, also, that the extension authorized by the act of April 6, 1832, was a longitudinal and not a lateral one; and it was not meant that it should pursue the same precise direction with that portion of the road to which it was attached, and not in any degree diverging from such a course, but that it should have the same general direction as a southern, southeastern or southwestern direction, and not a direction to opposite or widely divergent points of the compass. Ib.

Held, further, that a reasonable interpretation of the act required that the extension should be made from the termination of the road already constructed, so as to be a legitimate continuation and prolongation thereof. That it was to go further, not to return back. It was to be continued, not to branch off. It was to be a single route, not several routes. It was to be an extension, and not a branch. Ib.

Accordingly, the common council of New York having professedly, in pursuance of the authority given by the act of April, 1832, passed an ordinance on the * 21st of April, 1863, granting permission to the New York & Harlem Railw. to extend its railway, and construct a double track from their present Fourth

Avenue track, between 17th and 18th Streets, through Broadway to the foot of Whitehall Street, with an additional track around Bowling-Green and State Street, and another additional single track around Union Square; with further permission to construct an additional single track to the Fulton Ferry, through John Street, &c., returning through Fulton Street; and to extend its railway and construct a double track in Fourth Avenue, through 23d Street to Madison Avenue, and thence through Madison Avenue as far as it is or hereafter may be opened; with further permission to connect therewith by a single or double track from Fourth Avenue to Madison Avenue, through 24th Street. *Held*, that the permission attempted to be granted by the ordinance was not warranted by the terms, intent, or fair interpretation of the act of 6th April, 1832. Ib.

Held, also, that the permission granted by the common council to the railway company was not maintainable as a lawful exercise of power granted to the common council under the ancient Dongan and Montgomery charters, independent of any statutory grant or authority. Ib.

And in a recent case in Pennsylvania Commonwealth v. Central Passenger Railw., 55 Penn. St. 506, where a proviso in the defendants' act of incorporation prohibited the company from using any railway, turnpike, or artificial road, without first obtaining the consent of the owners, it was held it could not use the paved streets of the city of Philadelphia without first obtaining the consent of the municipal authority.

NATURE AND EXTENT OF STREET RAILWAY FRANCHISES.

We have thought it proper to here insert the substance of our views on some of the questions just discussed, as contained in a report to the legislature of Massachusetts, upon the rights, duties, and interests of street railways in the Commonwealth, in January, 1865.

THE PROPERTY RIGHTS OF THE COMPANY CONSIDERED.

1. *The interest demands reasonable protection.*
2. *The legislature have power to impose a permanent burden upon streets.*
3. *But this is not to be assumed as matter of construction.*
4. *Decisions not uniform. Generally held that street railway franchise exists in the easement for the highway. Analogy of steam roads.*
5. *Street railways do not increase the servitude of the highway.*
6. *Must always be regarded, and treated, as a portion of the highway.*
7. *The estate or franchise of street railways, exclusive, as to passenger traffic.*
8, 9. *This point further illustrated.*
10. *How far the legislature may affect the exclusiveness of this franchise.*
11. *Where compensation is required, no abridgment of right implied.*
12. *The franchise and property must remain subject to legislative and municipal control.*
13. *Some states allow additional land-damages for change of grade of the street.*
14. *This not demandable, unless the change is required for something in addition to highway, or unless given by special statute.*
15–19. *Summary of the argument under this head.*

1. We shall now state, as briefly as practicable, and make it intelligible, the true nature of the property of the companies in their locations, as we understand it, and what further legislation, if any, is demanded on their behalf. During the hearing it was a good deal pressed upon our consideration, that some further provision of law was demanded, in order to render so large an amount of capital,

as that already invested in street railways, as secure as possible, its present insecurity tending very unjustly and unnecessarily to depreciate its value in the market. There is great reason and justice in this claim, provided it can be done without too great infringement of other interests, or too great departure from the established policy of the law, in regard to such other interests.

2. We make no question of the right of the supreme legislative power of the * Commonwealth to impose a permanent burden upon the streets and highways, throughout its limits, in favor of street railway companies.

3. But such a step is so much at variance with the general policy of states in this country, and everywhere, so far as we know, that it cannot be assumed, as matter of construction, upon any general and doubtful provisions of legislation. And we have felt it to be our duty to examine carefully into the legislation and decisions of the different states, in order to determine, if we could, the nature and extent of the franchise, or estate, of the street railway companies, consequent upon the grant of their charters and the location of their tracks.

4. In looking into these decisions, we find no uniformity, and no such view of the principles involved, as will be likely to result in the attainment of uniformity of decision, at least for many years to come. In a large number of the cases which have come before the courts, in the different states, it seems to have been assumed, as matter of course, that street railways, laid in the public streets and highways, become a part of the public easement in such streets and highways, and that the owners of the fee of the land covered by such railways, or the adjoining proprietors, have no claim for additional damages. And the same rule has been extended to steam railways, laid in the public streets and highways, in a majority of the states where the question has been decided. This we cannot regard as a sound principle, as to steam railways. For although they may be regarded, in a certain sense, as a public highway, for the passing and repassing of all persons who choose to avail themselves of the privilege, in that particular mode of travel, it is very obvious that they are, in no sense, a common highway for public travel, in the ordinary sense, or the ordinary mode. They do not admit of such communication along their line. They are confined to a single mode of communication, which is exclusively under the control of a private company, and they impose a servitude upon the land, for the exclusive benefit of this private company, as distinct, and as clearly an additional burden, from the easement for the ordinary highway, as a canal, or any other public work which it is possible to conceive. Hence, in the state of New York the Court of Appeals have reversed their former decisions, and now follow the English courts, and hold the owner of the fee, covered by a highway, entitled to additional compensation, where a steam railway is laid either across or along its course. Some other states have of late taken the same view, and we feel confident that so reasonable a doctrine must ultimately prevail throughout the country. It may be proper here to state, what will occur to any one, that while the track of the street railway is not, or should not be, an impediment to the use of the highway for ordinary vehicles, the rail of the steam road is required to be so constructed as to prove a very serious impediment to ordinary travel; and there are other important grounds of distinction between the steam railways, as at present operated, and the street railways.

5. In regard to street railways, therefore, the question is very different, as to creating an additional servitude upon the land. They are confined to the public highways; as a general thing, no alteration in grade is required. They are not allowed to use such motive power as will seriously annoy other travellers, or the adjoining proprietors. The statutes, whether general or special, under * which these companies have gone into operation, have been studiously drawn, with a special view to make this new mode of transportation inherent merely in the public easement of the highway. This has been done, probably, with the double purpose of escaping the payment of additional land damages, and at the same time to quiet the public mind as to any apprehension that the companies might ultimately set up a claim for vested rights, which should prove to be beyond the control of the municipal authorities, or even of the legislature.

6. From the form of these grants, the manner of the construction and operation of the roads, and the early current of decisions upon the subject, no doubt was entertained that they would always be regarded and treated as a portion of, and inhering only in, the highway, and as creating no estate in the soil beyond that of the public easement for the highway.

7. This being assumed, the inquiry becomes nice, and somewhat difficult, as to what precise estate or interest is vested in the corporations. It is certain, we think, that the grant of an act of incorporation to a company for the purpose of constructing and operating a railway for the transportation of passengers, although located in and along the highway, is a franchise, and one of an exclusive character, to some extent. The extent of the exclusiveness of a grant of this character, where no exclusive words are contained in the grant, must depend upon the reasonable and fair implications, to be gathered from the nature of the business, and other surrounding circumstances. And in a case of this kind, where the incorporation is exclusively for the purpose of transporting passengers and taking tolls, we think it must be regarded as a fair implication, from the very nature of the grant, the investment requisite to carry it into operation, and the necessity of avoiding competition in order to produce any adequate return, that the franchise must be considered as being exclusive of all similar transportation upon the same route, by mere private enterprise. It would be little short of absurdity to suppose that it could have entered into the contemplation of the legislature, or of the companies, that after obtaining their location, and after having erected and equipped their roads, at large expense, it was still competent for any person, natural or corporate, at his own mere option, to construct cars and divide the business, by running upon the same track laid by such company.

8. This will be more obvious by considering the nature of the business. It is not like ordinary mechanical or manufacturing business, which any one may institute at pleasure. A grant of incorporation, for such or any similar business, implies nothing exclusive in the conduct of the business. The franchise, in such a corporation, does not extend beyond the mere fact of acting in a corporate capacity, or being a corporation. That only is exclusive in the grant which is of a prerogative character, and requires the consent of the sovereign for its creation. If it were competent for any one to lay a passenger railway in the streets, at his own option, or if any one could obtain such a right from the mu-

nicipal authority, or from any source except the legislature, then the grant of an incorporation for carrying on the business would not naturally be construed to exclude others from carrying on the same business, at the same place. And this was the view at first attempted to be maintained, as to street railways, *i. e.*, * that the cities and towns might create them, by special grants, to individuals or companies.

9. But this view has long since been abandoned, and it is now entirely well settled that such a franchise in the highways can only be created by legislative grant. It is a franchise to carry passengers, and to demand tolls. This is one of the prerogatives of sovereignty, and only derivable through the action of the legislature. It must, therefore, in its very nature, be exclusive of all interference from any quarter subordinate to the authority from which it was derived. There can then, we think, be no question whatever, that the franchise of these street railway companies is exclusive of all competition, or interference in their business, except under the paramount authority of the legislature.

10. It was indeed made a question before us, how far it was competent for the legislature even, after granting an exclusive franchise of this character to one company, to virtually repeal it, by permitting other companies to come upon the same track and do a competing business. This is one of those things, where the legislative power of a state may sometimes do that indirectly, provided they act in good faith (which is always to be presumed), which they could not do directly. For instance, it could not be claimed that the legislature, after creating such a franchise, could, by a direct act of legislation, either repeal the charter, or take away the right of compensation by way of tolls or fare. But they may, nevertheless, allow other persons, either natural or corporate, to do a similar business in the same streets; or to do it, upon the tracks of an existing company, by making compensation to the other company, whenever in their judgment the public good requires it. In the one case, the grant being wholly independent, is understood to be made because the amount of travel is supposed to require two such modes of conveyance; and, in the other, the compensation is regarded as an equivalent for the use.

11. But where the legislature do not create a distinct company to do similar business along the same routes, it is fair to conclude that there is no purpose of abridging, or in any manner qualifying, the rights before conceded to the first company. And the mere permission of a branch road to come upon the track of an existing trunk route, where the object, whether for the transportation of its own passengers, or to take up and set down other passengers along the line of the trunk route, is not specifically defined, is not, ordinarily, to be so construed, as to effect an essential abridgment of the rights and interests of the trunk line. All reasonable implications should be made in the opposite direction, both upon the ground that the legislature must be presumed to intend to act with entire justice towards the company first chartered, and first investing capital upon the route, and also, upon the ground that the provision for compensation clearly shows that there was no purpose of abridging the rights of the first company, by allowing the second company to run its cars over the track of the former.

12. It is upon this ground that we have come to the conclusion already stated

in regard to compensation for the use of a trunk line by a branch company, when it diverts a portion of the traffic. But we cannot regard this rule of compensation, or the presumptions of law upon which it is based, as imposing any * restrictions upon the power of the legislature, or that the general law of the Commonwealth or the Constitution of the United States restrains the legislature, in regard to permitting subsequently chartered companies to come upon the track of other and older companies. From the very fact that the franchise of street railways is made to exist only in the public easement of the highway, there arises a clear presumption, that the use of such tracks was intended to remain for ever subject to the control of the legislature, and that they could either control such use, by legislation, or make it subject to the absolute control of the municipalities. It does not seem to us possible for the companies to escape this state of uncertainty, so long as their franchise is vested only in the public easement of the highway, unless they can induce the legislature to give them exclusive and independent rights in the highway, by express grant; and it is doubtful whether even this would bind future legislatures.

13. A claim, for additional compensation to the abutters, has been maintained against such companies, in some states, wherever it becomes necessary to alter the grade of the streets in laying the rails, in such a manner as to cause special damage to such adjoining proprietors. But this, we think, unless allowed by special statute, is a virtual concession, that the laying a street railway may, in certain contingencies, prove an additional servitude upon the soil, requiring compensation beyond that of the easement for the highway; and if this proposition be conceded, it will be impossible to escape the conclusion that the street railway is something distinct from the public easement of the highway. And if it be not a part of the same thing, and identical with it, then the owner of the fee of the land in which such easement exists, may always claim damages for the location of a street railway. But this is not the view of the rights of such companies which has generally been taken, or which we think sound.

14. On the other hand, if the street railway is only a part of the highway, inherent in the public easement, then no additional compensation to the land-owner is due, in consequence of any alteration in the grade of the street or highway, unless granted by special statute. That will be only one of those legitimate contingencies which were fairly within the range of the purposes for which the easement of the highway was originally taken, and which should have been taken into account, and is therefore presumed to have been taken into account, in estimating compensation to the land-owner in the first instance. For, in assessing damages for a highway, there must be taken into the judgment, not only the present injury, from building the highway in the first instance, but from all future and allowable alterations of the same. And this will embrace, not only the accommodation of the way to the present modes of ordinary travel and transportation, but to all such modes of travel and transportation as may hereafter arise in the ordinary course of improvement, without extending it beyond the contemplated use of an ordinary highway. And if the street railway comes within this range, the fact that it is new, or that in some instances it may require to be accommodated with a different grade, to some extent, will be no ground for claiming additional compensation to the owner of the fee. This is

often true in laying a plank road over an ordinary highway, * but we are not aware that any additional compensation is ever required, on that account, in the case of laying a plank road upon an existing highway. So, too, in altering the grade of the highway, without introducing any change in the mode of construction, great injury may occur to the abutters, and one not contemplated, precisely in that form, at the time the land was taken; and still no additional compensation can be claimed, or allowed, unless by statute, since it comes within the range of the purpose for which the land was originally taken. Each party assumes the risk of any change in the use, or its entire abandonment as a highway. In the one case no additional compensation can be claimed, and, in the other, there is no duty of refunding what has been already paid by way of damages.

15. We must, therefore, to sum up the results of the argument upon this point, conclude, that the street railway companies in the Commonwealth, by the grant of their charters, acquired a franchise of a prerogative character, not liable to be intruded upon, after the location and construction of their roads, except by authority derived from the legislature, or by virtue of some condition annexed either to the grant or the location.

16. But we think, so long as the grant is not exclusive in terms, it must be regarded as a fair implication, from the fact of the franchise residing only in the public easement of the highway, that the legislative authority of the commonwealth has entire control of the use of such erections as are made by virtue of the first grant; and that it may, at any time, define such use by the public generally; and by natural or corporate persons, for transporting passengers for hire, by making compensation. And from the same view it must equally result, that the legislature may delegate the control of this use to the municipal authorities.

17. And consequently we have not been able to devise any legal mode in which the property rights of these companies can, with propriety, so long as they exist only in the public franchise of the highway, be made more secure. The franchise is exclusive of all interference except by authority derived from the legislature, but it exists where its continuance is only at the will of others who have the legitimate control of the highways.

18. If it is taken or interfered with, by the authority of the legislature, for merely public uses, such as the greater accommodation of public travel, then no compensation is demandable, since that is one of the conditions or contingencies upon which the grant was accepted. But so far as this franchise is taken, or interfered with, for the advancement of private ends and enterprises, the first grantee is entitled to full compensation, as much as for any other property.

19. This, then, although an exclusive franchise, so far as the carrying of passengers and taking tolls is concerned, is a mere estate at will, so far as the legislative power is concerned, or the general demands of the public interest may require, through the action of the municipal authorities.

*SECTION XV.

Conflicting Rights in different Companies.

1. *Railway company subservient to another, can only take of the other land enough for its track.*
2. *Where no apparent conflict in route, first located acquires superior right.*

§ 77. 1. Where the defendants' statutory powers were subject to those conferred upon the plaintiffs, whose charter was first granted, providing that the plaintiffs' powers shall not be so exercised as to prevent the defendants from compulsorily taking and using land sufficient to construct their branch lines, not exceeding twenty-two feet in width, at the level of the rails, the plaintiffs having first purchased, with the consent of the owner, lands which the defendants proposed to take, beyond the twenty-two feet, for purposes of building stations, &c., it was held, that the plaintiffs having occupied the ground first, were entitled to hold so much as was not actually necessary for the formation of defendants' railway.[1]

2. Where two railway companies were incorporated to complete independent lines across the state, only the termini of either being prescribed, there being no apparent or necessary conflict of the routes, it was held, that the company which first surveyed and adopted a route, and filed the survey in the proper office, were entitled to hold it, without reference to the date of the charters, both being granted at the same session of the legislature.[2]

[1] Lancaster & Carlisle Railw. *v.* The Maryport & Carlisle Railw., 4 Railw. C. 504; *post*, § 105.

[2] Morris & Essex Railw. *v.* Blair, 1 Stockton, Ch. 635.

A similar decision, in principle, is made in Gawthern *v.* Stockport, Disley & W. Railw., 29 Law Times, 308, Rolls Court, March, 1857. In this case the railway first chartered was laid out and partly built, but had been lying by some time, and the Master of the Rolls held, a subsequent railway was not precluded from interfering with the contemplated route of the first railway. One railway may be laid across the line of another company, but the latter will be entitled to damages, although the former is laid upon piles over tide water. Grand J. & Depot Co. *v.* County Commissioners, 14 Gray, 553. And it is here said, where two railway companies file a joint location, they are jointly liable for damages to land-owners; and a location may refer to a plan so as to make that part of the location.

*SECTION XVI.

Right to Build over Navigable Waters.

1. *Legislature may grant the right.*
2. *Riparian proprietor owns only to the water.*
3. *His rights in the water subservient to public use.*
4. *Legislative grant paramount, except the national rights.*
5. *State interest in flats where tide ebbs and flows.*
6. *Rights of adjoining owners in Massachusetts.*
7. *Railway grant to place of shipping.*
8. *Principal grant carries its incidents.*
9. *Grant of a harbor includes necessary erections.*
10, 11. *Large rivers held navigable in this country.*
12. *Land being cut off from wharves is "injuriously affected."*
13. *Paramount rights of Congress infringed creates a nuisance. Party specially injured may have action.*
14. *Case in New Hampshire.*
15. *Obstruction, if illegal,* per se *a nuisance.*

§ 78. 1. In regard to navigable streams, it seems to be a conceded point, that the owner of land adjoining the stream has no property in the bed of the stream, and hence that the legislature in England may give permission to a railway company to so construct their road, as to interfere with and alter the bed of such a stream, to the damage of any owner of adjoining land, in regard to flowage, or otherwise, even to the hinderance of accustomed navigation, without compensation; and that the railway company, in constructing their road within the provisions of the act, do not become liable to an action for damages, to any such proprietor of adjoining land.[1]

[1] Abraham *v.* Great Northern Railw., 16 Q. B. 586; s. c. 5 Eng. L. & Eq. 258. "The legislature might authorize defendants to construct a causeway or bridge across navigable or tide-waters, although the navigation might be thereby impaired." And in a very recent case in the Queen's Bench, (Jan. 1858), Regina *v.* Musson, 8 El. & Bl. 900; s. c. 30 Law Times, 272, it is held that a pier, built into the sea, is not liable to the parish rates, except so far as it is above high-water mark. Lord *Campbell*, Ch. J. said, "As to the part between high and low water mark, it is quite clear that the soil between high and low water mark is in the Crown, and *prima facie* extra parochial. If so, the onus lies on the parish of showing it is within the limits of the parish. That may be done by evidence of perambulating it, in the parish bounds, or of reputation." See Parker *v.* Cutler Milldam Co., 20 Maine, 353; opinion of court in Brown *v.* Chadbourne, 31 Maine, 9; *Shepley*, Ch. J., Rogers *v.* The Kennebec & Portland Railw., 35 Maine, 319. So, too, to construct their road across the basins of a water company, to their injury, upon making compensation. Boston Water Power Co. *v.* Boston & Worcester Railw., 23 Pick. 360; s. c. 1 Am. Railw.

*2. The same point has been often decided in this country.[2] Whether waters are navigable or not, is determined by the ebb and flow of the tide. And although streams, above that point, are navigable often, for steamboats and lesser water craft, and are public highways for such purposes, and often become highways by prescription, for purposes of inferior navigation, as floating timber, and wood, and possibly they may be regarded as such even independent of such prescription; yet the ownership of the riparian proprietor to the middle of the stream, *ad medium filum aquæ*, is not excluded, except in tide-waters,[3] and such large rivers, in this country, as by authority of Congress or common consent have acquired or assumed the character of navigable waters, although not coming strictly within the common-law definition.[4]

3. But in tide-waters, and navigable lakes, the rights of the owner of land adjoining such waters, in the stream are subservient to the public rights, and are consequently subject to legislative control, and any loss the owner of such land may thereby sustain is *damnum absque injuria*.[4]

*4. It seems to be considered, that the state legislatures have unlimited power to erect bridges and railways, and make any other public works across navigable waters, subject only to the paramount authority of the national government.[5]

C. 298. The grant of power to construct a railway between two points, carries authority to cross navigable waters, if that is reasonably necessary, in the construction of the works. Fall River Iron Works *v.* Old Colony & Fall River Railw., 5 Allen, 221.

[2] Gould *v.* Hudson River Railw., 2 Selden, 522; *post*, § 206.

[3] 1 Hargrave's Law Tracts, by Lord Hale, 12, 13, 85; Angell on Tide-Waters, c. VI. pp. 171, 172, 173, 174.

[4] Champlain & St. Lawrence Railw. *v.* Valentine, 19 Barb. 484. But in Bell *v.* Gough, 3 Zab. 624, it is held, that if the riparian owner have made improvements on the land below high water, so as to have reclaimed it, the part so reclaimed belongs to him, and cannot be granted by the state. And three of the judges, in the trial of this case, in the Court of Appeals, which consisted of nine judges, held that riparian owners have a vested right in the benefits and advantages arising from their adjoining the water, of which they cannot be deprived without compensation. But this case, although exhibiting great research and ability and considerable learning, is not altogether in accordance with the general current of the decisions upon the subject, and is probably based upon the custom or usage which has prevailed to a great extent in some sections of this country from its first settlement, originally founded upon Colonial statutes probably, and in others, perhaps, growing up by common consent, as a kind of local law.

[5] The People *v.* Rensselaer & Saratoga Railw., 15 Wend. 113; Bailey *v.* Phil.

*5. The commonwealth of Massachusetts has no interest in flats where the tide ebbs and flows, which it is necessary to have

& Wil. Railw., 4 Harring. 389; People *v.* City of St. Louis, 5 Gilman, 351; Spooner *v.* McConnell, 1 McLean, C. C. 337; State of Pennsylvania *v.* Wheeling Bridge Company, 13 How. 518; Wilson *v.* The Blackbird Creek Marsh Co., 2 Pet. (U. S.) 245; Hogg *v.* The Zanesville Canal Co., 5 Ham. 410; United States *v.* The N. Bedford Bridge Co., 1 W. & M. 401; Atty.-Gen. *v.* Hudson River Railw., 1 Stockton, Ch. 526; Getty *v.* Same, 21 Barb. 617.

In the late case of Smith *v.* Maryland, 18 How. (U. S.) 71, it is held that the soil, in the shores of Chesapeake Bay, in the state of Maryland, below low-water mark, belongs to the state, subject to any prior lawful grants by the state, or the sovereign power, before the Declaration of Independence. But that this right of soil in the state is a trust, for the enjoyment by the citizens of certain public rights, among which is the common right of fishery; that the state may lawfully regulate the exercise of this right, and declare vessels forfeit, for violations of regulations so established; and that the exercise of such powers by the state is no infringement of the paramount authority of Congress, or of the exclusive admiralty and maritime jurisdiction of the United States courts.

In the case of Milnor *v.* The Railway Companies, and Others *v.* The Plank-Road Companies, in New Jersey, before the Circuit Court of the United States, where it was sought to restrain the companies from bridging the Passaic River, below Newark, which had been erected into a port of entry by Congress, and had some foreign commerce, and some internal navigation, the following points were ruled by Mr. Justice *Grier*, 6 Law Reg. 6: "A court of the United States has no jurisdiction to restrain, by injunction, the erection of a bridge over a navigable river lying wholly within the limits of a particular state, where such erection is authorized by the legislature of the state, though a port of entry has been created by Congress above the bridge. *Dicta*, in Devoe *v.* Penrose Ferry Bridge Co., 3 Am. L. Reg. 83, overruled; and, in Pennsylvania *v.* Wheeling Bridge Co., 13 How. 579, explained.

The point overruled by the learned judge is thus stated by him: "That although the courts of the United States cannot punish, by indictment, the erection of a nuisance on our public rivers, erected by authority of a state, yet that as courts of chancery they may interfere at the instance of an individual or corporation who are likely to suffer some special injury, and prohibit, by injunction, the erection of nuisances to the navigation of the great navigable rivers leading to the ports of entry within a state." 3 Amer. Law Reg. p. 83.

The following extract from the opinion gives the point of the decision: "The Passaic River, though navigable for a few miles within the state of New Jersey, and therefore a public river, belongs wholly to that state; it is no highway to other states, no commerce passes thereon from states below the bridge to states above. Being the property of the state, and no other state having any title to interfere with her absolute dominion, she alone can regulate the harbors, wharves, ferries, or bridges, in or over it. Congress has the exclusive power to regulate commerce, but that has never been construed to include the means by which commerce is carried on within a state. Canals, turnpikes, bridges, and railways are as necessary to the commerce between and through the several states, as

* apprised, under the statute, when such land is taken, as appurtenant to the upland, for the purpose of building a * railway.[6] And as

rivers. Yet Congress has never pretended to regulate them. When a city is made a port of entry, Congress does not thereby assume to regulate its harbor, or detract from the sovereign rights before exercised by each state over her own public rivers. Congress may establish post-offices and post-roads; but this does not affect or control the absolute power of the state over its highways and bridges. If a state does not desire the accommodation of mails at certain places, and will not make roads and bridges on which to transport them, Congress cannot compel it to do so, or require it to receive favors by compulsion. Constituting a town or city a port of entry, is an act for the convenience and benefit of such place, and its commerce; but for the sake of this benefit the constitution does not require the state to surrender her control over the harbor, or the highways leading to it, either by land or water, provided all citizens of the United States enjoy the same privileges which are enjoyed by her own.

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[6] Walker v. Boston & M. Railw., 3 Cush. 1; s. c. 1 Am. Railw. C. 462. Under a colonial ordinance of 1647, of Massachusetts, the flats on creeks, coves, and arms of the sea, where the tide ebbs and flows, to the extent of one hundred rods, are appurtenant to the upland, and the owners of the adjoining land have an estate in fee therein, subject to the right of the Commonwealth, for making public erections, which is paramount, and subject also to such restraints and limitations of the proprietors' use of them, as the legislature may see fit to impose for the preservation and protection of public and private rights. Commonwealth v. Alger, 7 Cush. 53. And a similar custom or usage prevailed to some extent in some of the other American colonies, traces of which will be found in some of the more recent decisions in those states, which have succeeded them.

The question of the right of riparian owners along the margin of the sea, where the tide ebbs and flows upon sea flats, in the state of Massachusetts, is more extensively and more learnedly discussed in Commonwealth v. Roxbury, 9 Gray, 451, and the reporter's note, by the present Mr. Justice *Gray* of the Supreme Judicial Court, than in any other place within our knowledge. The leading propositions decided by the case, are:

1. The Commonwealth is the owner in fee of all channels, lands, and flats below low-water mark, and more than one hundred rods below high-water mark.

2. The charter of the colony of Massachusetts conveyed to the grantees all public and private rights in the sea-shore between high and low water mark, without express words.

3. An order of the General Court, that all the ground lying between two towns shall belong to one of them, conveys no right, more than one hundred rods below high-water mark.

4. An act granting permission to a mill corporation to exclude the tide waters from a portion of the flats, and use it as a basin for the purposes of a mill power, does not release the title of the Commonwealth to such flats.

5. An act defining the boundary between two towns, and recognizing some deviations from the original or natural boundary, and some exchanges of territory, will not imply any relinquishment of title on the part of the Commonwealth.

* 328, 329

the owner has the right to raise such flats, by filling up, if he is compelled to do more filling up to secure free access to other

"Whether a bridge over the Passaic will injuriously affect the harbor of Newark, is a question which the people of New Jersey can best determine, and have a right to determine for themselves. If the bridges be an inconvenience to sloops and schooners navigating their port, it is no more so to others than to them. I see no reason why the state of New Jersey, in the exercise of her absolute sovereignty over the river, may not stop it up altogether, and establish the harbor and wharves of Newark at the mouth of the river. It would affect the rights of no other state. It would still be a port of entry, if Congress chose to continue it so. Such action would not be in conflict with any power vested in Congress. A state may, in the exercise of its reserved powers, incidentally affect subjects intrusted to Congress without any necessary collision. All railways, canals, harbors, or bridges, necessarily affect the commerce not only within a state but between the states. Congress, by conferring the privilege of a port of entry upon a town or city, does not come in conflict with the police power of a state exercised in bridging her own rivers below such port. If the power to make a town a port of entry includes the right to regulate the means by which its commerce is carried on, why does it not extend to its turnpikes, railways, and canals, to land as well as water? Assuming the right (which I neither affirm nor deny) of Congress to regulate bridges over navigable rivers below ports of entry, yet, not having done so, the courts cannot assume to themselves such a power. There is no act of Congress or rule of law which courts could apply to such a case. It is possible that courts might exercise this discretionary power as judiciously as a legislative body, yet the praise of being 'a good judge' could hardly be given to one who would endeavor to 'enlarge his jurisdiction' by the assumption, or rather usurpation, of such an undefined and discretionary power.

"The police power to make bridges over the public rivers is as absolutely and exclusively vested in a state as the commercial power is in Congress: and no question can arise as to which is bound to give way, when exercised over the same subject-matter, till a case of actual collision occurs. This is all that was decided in the case of Wilson *v.* The Blackbird Creek, &c., 2 Peters, 245. That case has been the subject of much comment, and some misconstruction. It was never intended as a retraction or modification of any thing decided in Gibbons *v.* Ogden, or to deny the exclusive power of Congress to regulate commerce. Nor does the Wheeling Bridge case at all conflict with either. The case of Wilson *v.* The Blackbird Creek, &c., governs this, while it has nothing in common with that of the Wheeling Bridge."

And where the legislature of the colony of New Jersey, at an early day (1760), passed an act to enable the owners of meadows along a small creek emptying into the Delaware River, and into which the tide ordinarily flowed for about two miles, to support and maintain a dam, to shut out the tide from the creek, for the purpose of draining such meadows; and enacted that said bank, dam, and all other waterworks already erected, or which should thereafter be found necessary to be erected, for the more effectual preventing the tide from overflowing the meadows lying on the said creek, should be erected, supported, and main-

lands, by reason of the construction of a railway, *it is proper to be considered by the jury in estimating land damages to such owners.[7] But the owner of a tide-mill has no right to have such riparian flats, as he owns, kept open and unobstructed for the free flow of tide-water to his mill.

6. The adjoining owners of such flats in Massachusetts have the right to build solid structures to a certain extent, and thus obstruct the ebb and flow of the tide, if in so doing they do not wholly obstruct the access of other proprietors to their houses and lands; and if the mill-owner and other proprietors suffer damage therefrom, it is *damnum absque injuria*.[8] "Therefore," say the

tained at the equal expense of all the owners and possessors of the meadows, defining the limits up the creek; and provided the manner in which the natural watercourse of the creek should be kept clear, and for the election yearly, by all the land-owners, of two managers, empowered to assess the owners or occupiers of such meadows, as they should deem necessary for repairing and maintaining the dam; and the act had been accepted by the owners of the meadow, managers elected, and the dam repaired, under the provisions of the act, and a large amount expended, from time to time, after the passage of the act; and where the legislature in the year 1854 passed an act, declaring this creek to be a public highway in all respects, as fully as it was before the erection of such dam, and empowering the municipal authorities to remove the dam, and open the navigation:

It was held, upon a bill filed in equity to restrain the committee of the township from performing this duty, so imposed upon them;

That the legislature had the right to make the grant, there being nothing to show that the public interest demanded the navigation of the creek;

That it does not follow, that every creek or rivulet, into which the tide ebbs and flows, is to be regarded as navigable water, in such sense as to be beyond the control of the legislature, except as a public highway; and the legislature is the sole judge, to determine when such streams shall be considered navigable rivers, and be maintained and protected as such; that the act of 1760 did not only authorize the owners of the meadows to continue the dam, but it gave the authority of the state to compel its continuance; that the act of 1854 was in violation of the United States Constitution, inhibiting the several states from passing laws impairing the obligation of contracts. It was a virtual repeal of the former act, under which rights had become vested, and valuable property acquired;

That the act of 1854 was also repugnant to the constitution of the state, as a taking of private property for public use, without just compensation; a partial destruction or diminution of the value of property, being to that extent, a taking. Glover *v.* Powell, 2 Stockton's Ch. 211.

[7] Commonwealth *v.* Boston & Maine Railw., 3 Cush. 25; s. c. 1 Am. Railw. C. 482; Fitchburg Railw. *v.* Boston & Maine Railw. 3 Cush. 58; s. c. 1 Am. Railw. C. 508.

[8] Davidson *v.* Boston & M. Railw., 3 Cush. 91; s. c. 1 Am. Railw. C. 534.

court, "so far as the railroad erected by the legislature affected the right of the claimants to pass and repass to and from their lands and wharves with vessels, it was a mere regulation of a public right, and not a taking of private property for a public use, and gave no claim for damages."

7. The grant of a railway "to the place of shipping lumber" on a tide-water river, justifies an extension across flats and over tide-water to a point at which lumber can be conveniently shipped.[9]

8. In a recent case in the House of Lords,[10] it was held, that where a statute authorizes a company to construct certain works, as a harbor, it is to be presumed they have power to execute all works incidental to their main purpose, and which they deem necessary, provided they act *bona fide*.

9. Accordingly, when public trustees for improving the navigation of the Clyde were authorized by statute to acquire lands adjoining the river, and to construct a quay, or harbor, and having acquired part of A.'s land, proposed to erect a large goods-shed fronting the river, and between the rest of A.'s land and * the river, it was held, that although the statute gave no express power to erect sheds, it must be presumed that a harbor, equipped with all the most approved appliances for trade, was intended by the legislature, and that therefore a power to erect sheds was implied.[10]

10. An interesting case[11] has recently been determined by the

[9] Peavy *v.* The Calais Railw., 30 Maine, 498; s. c. 1 Am. Railw. C. 147. See also Babcock *v.* Western Railw., 9 Met. 553; s. c. 1 Am. Railw. C. 399. So the grant of a railway between certain termini, which line passes over navigable rivers, authorizes the company to bridge such rivers. Attorney-Gen. *v.* Stevens, Saxton, Ch. 369.

[10] Wright *v.* Scott, 34 Eng. L. & Eq. 1; *ante*, § 63.

[11] McManus *v.* Carmichael, 5 Am. Law Reg. 593. It is maintained in this case, with great labor and research, that a large number of the states have adopted similar views in regard to their large rivers. See also Bowman *v.* Wathen, 2 McLean's C. C. 376, where the learned judge of that circuit thus lays down the law, in regard to the shores of the Ohio river: "On navigable streams the riparian right we suppose cannot extend generally beyond high-water mark. For certain purposes, such as the erection of wharves and other structures for the convenience of commerce, and which do not obstruct the navigation of the river, it may be exercised beyond this limit. But in the present case this inquiry is not important. It is enough to know that the riparian right on the Ohio River extends to the water, and that no supervening right over any part of this space can be exercised or maintained without the consent of the proprietor. He has the right of fishery, of ferry, and every other right which is properly appurte-

Supreme Court of Iowa, in regard to the important question, to what extent the large rivers in this country, as the Mississippi, are to be regarded as navigable waters, above where the tide ebbs and flows.

11. It is there held, that all waters are to be regarded as navigable, above where the tide ebbs and flows, which are of common use to all the citizens of the republic for purposes of navigation, or that navigability, in fact, is to be regarded as the decisive test, rather than the ebb and flow of the tide. And it is here maintained, that the acts and declarations of the United States constitute the Mississippi a public highway, and that consequently the riparian proprietors have no interest in the lands below high-water mark.

12. And where one, upon the shore of a navigable stream or arm of the sea, is cut off by a railway or other public work from * all communication with the navigation, to the injury of wharves or other erections which the party made upon his land, it has been held that such person is entitled to damages under the statutes allowing parties compensation where their estate is "injuriously affected." [12]

13. And it seems to be regarded as settled, that where the grant of any authority, by the state legislature, in regard to navigable waters, in its exercise works an interference with the exclusive power of Congress to regulate commerce, whether foreign or internal, such interference being unlawful is a nuisance, and any private person suffering special damage thereby is entitled to an action at law, or to maintain a bill in equity for a perpetual injunction.[13]

nant to the soil. And he holds every one of these rights by as sacred a tenure as he holds the land from which they emanate. The state cannot, either directly or indirectly, divest him of any one of these rights, except by a constitutional exercise of the power to appropriate private property for public purposes. And any act of the state, short of such an appropriation, which attempts to transfer any of these rights to another, without the consent of the proprietor, is inoperative." See also Lehigh Valley Railw. v. Trone, 28 Penn. St. 206.

[12] Bell v. Hull & Selby Railw., 6 M. & W. 699.

[13] State of Pennsylvania v. Wheeling Bridge Co., 13 How. 518; s. c. 18 id. 421. The same principle is recognized in other cases. Works v. Junction Railw., 5 McLean, 425; United States v. Railroad Bridge Co., 6 id. 517.

When the case of Pennsylvania v. Wheeling Bridge Co. was last before the court, it was held, that the paramount authority of Congress, in the regulation of commerce, included the power to determine what was an obstruction to nav-

14. The questions are very numerous which have arisen in regard to the conflicting rights of different grantees affecting franchises and easements of different kinds. In a case in New Hampshire,[14] some questions affecting the construction of grants, and reservations of this kind, are very extensively discussed.

*15. It seems to be well settled, both in England and in this country, that if there is no legal authority for the erection of a pier in a navigable river, such erection will become a nuisance *per se*, and that no evidence can be received to show that although illegal it will do no harm, that question being wholly immaterial.[15]

SECTION XVII.

Obstruction of Streams by Company's Works.

1. *Cannot divert stream, without compensation.*
2. *Company liable for defective construction.*
3. *So also if they use defective works, built by others.*
4. *Company liable to action, where mandamus will not lie.*
5. *Company liable for defective works, done according to their plans.*
6. *When a railway "cuts off" wharves from the navigation.*
7. *Stream must be restored and maintained.*
8. *Company cannot cast surface water on adjoining land except from strict necessity.*

§ 79. 1. In regard to the obstruction of streams, by building railways, the better opinion seems to be, that the company are bound to do as little damage to riparian proprietors as is reason-

igation. And Congress having legalized the bridge of defendants, after the judgment of the court to abate it, but before it was carried into effect, it was held, that the occasion for executing the judgment was thereby removed. Mr. Justice *Nelson*, p. 432, thus lays down the law, as to streams under state control: —

"The purely internal streams of a state, which are navigable, belong to the riparian owners to the thread of the stream," and they have a right to use them, "subject to the public right of navigation." — "They may construct wharves or dams or canals, for the purpose of subjecting the stream to the various uses to which it may be applied, subject to this public easement. But if these structures materially interfere with the public right, the obstruction may be removed or abated as a public nuisance." — "These purely internal streams of a state, as to the public right of navigation, are exclusively under the control of the state legislature." And although erections authorized by grant from the state legislature cause "real impediment to the navigation," they are nevertheless lawful, and the riparian owner has no redress. See also Morgan *v.* King, 18 Barb. 277.

[14] Goodrich *v.* Eastern Railw. Co., 37 N. H. 149.

[15] The People *v.* Vanderbilt, 38 Barb. 282.

ably consistent with the enjoyment of their grant.[1] The state cannot grant the power to divert a stream of water without compensation.[2]

2. Thus if by making needless obstructions in streams, in the erection of bridges, or by imperfect or insufficient sluices or ducts for the passage of streams, intersected by a railway, the land or adjoining property is injured, the company are liable.[3]

3. So, too, the company are liable to pay damages for an injury caused to the plaintiff, by flowing his land in a great freshet, in consequence of their bridges damming up the water, although the bridges were erected by another company, before the defendants' company was chartered,[4] and there had been no request to the defendants to remove the obstruction.[5]

* 4. And where the waters on certain lowlands were flowed back upon the plaintiff's land, by reason of insufficient openings in a railway constructed across such lowlands, it was held that the company were liable to make good the damages sustained by plaintiff, although no statute required them to make the openings, and they could not be compelled to do so by writ of mandamus.[6] So, too, in regard to other public works, if damage accrue to others in consequence of their imperfect construction, the proprietors are

[1] Boughton *v.* Carter, 18 Johns. 405; Hooker *v.* N. H. & Northampton Co., 14 Conn. 146.

[2] Gardner *v.* Newburgh, 2 Johns. Ch. 162.

[3] Hatch *v.* Vermont Central Railw., 25 Vt. 49 *et seq.*; Mellen *v.* Western Railw., 4 Gray, 301; March *v.* C. & P. Railw., 19 N. H. 372.

[4] Brown *v.* Cayuga & Susquehannah Railw., 2 Kern. 386.

[5] Per *Denio*, J., 2 Kern. 486. But the question in regard to the liability of the company for continuing the obstruction, without notice to remove it, was not decided by the court. This subject, in regard to the necessity of a special request, is somewhat discussed in Norton *v.* Valentine, 14 Vt. 239, 244. In Hubbard *v.* Russell, 24 Barb. 404, it is held, that in order to recover damages of the "continuator of a private nuisance, originally erected by another," there must be proof of a request to remove the same. But where a railway company bought up a navigation company, and suffered the works of that company to fall to decay, so that damage was suffered by a municipal corporation, in regard to their harbor, it was held the company were liable; although only a nonfeasance in form, it operated substantially as a misfeasance, they having maintained and used the locks of the navigation company in such a state as to cause the injury. Preston *v.* Eastern Counties Railw., 30 Law Times, 288; s. c. *nom.* Preston *v.* Norfolk Railw., 2 H. & N. 735.

[6] Lawrence *v.* Great Northern Railw., 4 Eng. L. & Eq. 265; s. c. 16 Q. B. 643, and 6 Railw. C. 656.

liable, as a municipal corporation, for insufficient sewers, whereby plaintiff's factory was overflowed in a freshet, and the property therein seriously injured.[7]

5. In a case, where the plaintiff's garden was overflowed, by the manner in which an excavation was made, in the course of construction of a railway across a road, or highway, by carelessly cutting into a drain, or culvert, and letting out the water,[8] it seems to have been admitted, on all hands, that the company would have been liable for the injury if it had been done by persons under their control, or in accordance with the directions of their surveyor or engineers.[8]

6. And where the plaintiff owns a dock on the east side of Hudson River, on the margin of a bay, under a charter from the * state, in 1849, and the Hudson River Railway, in pursuance of its charter, granted in 1846, constructed their road across the bay, on piles, about nineteen hundred feet west of the dock, with a drawbridge sufficient to allow a passage to such vessels as had before navigated the bay, the charter of the railway containing a provision, that if any dock shall be "cut off" by the railway, the company shall extend the same to their road, it was held that this dock was not "cut off," within the meaning of the provision.[9]

7. And under the New York statute, and the same rule would probably apply in other states, a railway company which is compelled to divert a stream of water in the construction of its road is bound not only to restore it, as nearly as practicable, to its former state, but also to maintain it there, since the mere restoration of the stream may not leave it as secure as before.[10]

8. But surface water produced by the excavation in building the railway is not to be regarded in the same light as water confined to a natural channel, and in such case the company will be

[7] Rochester White Lead Co. *v.* The City of Rochester, 3 Comst. 463. See also Radcliff *v.* Brooklyn, 4 Comst. 195; Mayor of New York *v.* Furze, 3 Hill, 612; Bailey *v.* Mayor of New York, 3 Hill, 531.

[8] Steel *v.* Southeastern Railw., 16 C. B. 550; s. c. 32 Eng. L. & Eq. 366. See § 129, *post*, for a full statement of this case. But there is no liability incurred towards a mill-owner below, by cutting off springs, in sinking wells upon one's own land. Chasemore *v.* Richards, 2 H. & N. 168; s. c. 29 Law Times, 230.

[9] Tillotson *v.* Hudson River Railw., 15 Barb. 406.

[10] Colt *v.* Lewiston Railw., 36 N. Y. 214.

liable to an action for turning it upon the land of an adjoining proprietor, unless that becomes indispensable in order to maintain the railway, and is done in a manner to do the least injury to the land-owner.[11]

SECTION XVIII.

Obstruction of Private Ways.

1. *Obstruction of private way matter of fact; need not be illegal.*
2. *Farm road on one's own land, and private-way.*
3. *But railway may lawfully pass along public street.*

§ 80. 1. Where the statute gives a right of action against the company, when in the construction or management of their road they shall obstruct the safe and convenient use of a private way, it was held not necessary to the maintenance of the action that the railway should be constructed or managed in an illegal and improper manner.[1] But if the railway be shown to have been constructed and managed in a proper manner, and a passage over the railway provided for the private way, the court cannot decide, as matter of law, whether the safe and convenient use of the way is obstructed or not. That is a question of fact to be settled by the jury.[2]

2. But a farm road, which the owner of the land has constructed for the convenient use of his farm, is not to be regarded as a private way, within the meaning of a railway act.[3] A private way, within the construction of the railway acts, is a way, or right of way, which one man has in the land of another.[4]

*The owner of a private way, for the purpose of recovering penalties for its obstruction, is the person who, for the time being, owns such road in possession.[5]

3. But it has been held,[6] that, where the plaintiff's right of way

[11] Curtis *v.* Eastern Railw., 14 Allen, 55.

[1] Concord Railw. *v.* Greely, 3 Foster, 237.

[2] Greenwood *v.* Wilton Railw., 3 Foster, 261.

[3] Clark *v.* The Boston, Concord, & Montreal Railw., 4 Foster, 114.

[4] Bliss *v.* Passumpsic River Railw., Vermont Sup. Court, not reported.

[5] Mann *v.* Great Southern & Western Railw., 9 Ir. Com. Law Rep. 105.

[6] McLaughlan *v.* Charlotte & S. C. Railw., 5 Rich. 583. But this decision seems to rest upon the peculiar views of this state upon that subject, that it is lawful to take private property for public use without compensation, their state

in another's land was obstructed by the passage of a railway through the streets of a town, in accordance with their charter, no action for damages could be maintained, and that the party could have no redress, unless his case came within the provisions of the statute allowing compensation.

SECTION XIX.

Statute remedy Exclusive.

1. *Remedy for land taken, exclusively under the statute.*
2. *But if company do not pursue statute are liable as trespassers. Liable for negligence also.*
3. *Courts of equity often interfere by injunction.*
4. *Important case in the House of Lords.*
5. *Right at law must be first established.*
6. *Where statute remedy fails, common-law remedy exists.*
7. *The general rule adhered to in America.*
8. *Company adopting works responsible for amount awarded for land damages.*

§ 81. 1. It seems to be well settled, notwithstanding some exceptional cases, that the remedy given by statute to land-owners for injuries sustained by taking land for railways, is exclusive of all other remedies, and not merely cumulative.[1]

constitution containing no provision upon the subject. But the reported cases in this state, from the first, Dun *v.* City Council of Charleston, 1 Harper, 189 (1824), manifest a scrupulous regard to the rights of property owners, when attempted to be interfered with for other than strictly public purposes. And we are not aware that practically, and as a general thing, the legislature of this state have exercised the theoretical right which it possesses, of taking private property for public use without compensation. We believe that is not the fact.

[1] East and West India Dock & Birmingham Junction Railw. Co. *v.* Gattke, 3 Mac. & Gor. 155; s. c. 3 Eng. L. & Eq. 59; Watkins *v.* Great Northern Railw. Co., 16 Q. B. 961; s. c. 6 id. 179; Kimble *v.* White Water Valley Canal, 1 Carter, 285; Knorr *v.* Germantown Railw. Co., 1 Wharton, 256; Mason *v.* Kennebec & P. Railw. Co., 31 Maine, 215; s. c. 1 Am. Railw. C. 62; McCormack *v.* Terre Haute & Richmond Railw., 9 Ind. 283. But in Carr *v.* The Georgia Railw. & Banking Co., 1 Kelly, 524, it was held, the statute remedy was not exclusive, but merely cumulative. This case professes to go upon the authority of Crittenden *v.* Wilson, 5 Cowen, 165, where it was held, that the party whose lands had been overflowed, by means of a dam erected by the authority of the legislature, which contained a provision for estimating damages to land-owners injured thereby, — might maintain an action as at common law. These decisions go upon the principle, found in some of the elementary books, that a statutory remedy for what was actionable at common law is *prima facie* to be regarded as cumulative merely. It seems now to be the generally received opinion upon this subject, that the statutory remedy, being more ample and

*2. But if the railway company have assumed to appropriate the land, in violation of the provisions of the statute to be * complied with on their part, their acts are ordinarily to be regarded as trespasses; and where they have acquired the right to the use of the land, but have omitted some duty imposed by the statute, or where they have been guilty of negligence, or want of skill, in the exercise of their legal rights, they make themselves liable to an action upon the case at common law.[2]

more specific, is ordinarily to be regarded as exclusive. But the settled difference of opinion, among the judges of the Queen's Bench upon the subject, in Kennett Nav. Co. v. Withington, 18 Q. B. 531; s. c. 11 Eng. L. & Eq. 472, shows that the matter is not quite settled in that country.

The learned editors of the American Railway Cases have an able and very satisfactory note upon this subject in which most of the authorities bearing upon the point are thoroughly revised. 1 Am. Railw. C. 166, 167, 168, 169, 170, 171.

In Aldrich v. The Cheshire Railw., 1 Foster, 359; s. c. 1 Am. Railw. C. 206, it is held, that the statute remedy is exclusive of all others. So also in Troy v. The Cheshire Railw., 3 Foster, 83, it is held, that the statute remedy must be followed, as far as it extends, but if it only extend to part of the injury occasioned, the party may have his action at common law for the residue.

But where a railway company are ordered to make and maintain a private way, for the benefit of a party, and fail to comply, the appropriate remedy is the one pointed out in the statute. White v. Boston & Prov. Railw., 6 Cush. 420. And where the statute provides no specific remedy in such a case, an action on the case will lie probably upon general principles.

But in an English case, Ambergate, Nott. & Boston & E. J. Railw. v. Midland Railw., 2 El. & Bl. 823; s. c. 22 Eng. L. & Eq. 289, where the statute gives a penalty for one company running its engines upon the track of another company, without first having obtained the requisite certificate of approval of the engines by the second company, it was held, that this did not take away the common-law right of seizing the engines, while upon their track, damage feasant. And having made the distress upon the engine, while so unlawfully on their track, and the first company having demanded its surrender, after it had been removed off the defendant's line, with the declared purpose of using it again in the same way; that such demand was illegal, and the defendants justified in not acceding to it. See also, in confirmation of the general proposition of the text, New Albany & Salem Railw. v. Connelly, 7 Porter (Ind.), 32; Leviston v. Junction Railw., id. 597; Lebanon v. Alcott, 1 N. H. 339; Victory v. Fitzpatrick, 8 Ind. 281. See, also, Colcough v. The Nashville & N. W Railw. Co., 2 Head, 171; Brown v. Beatty, 34 Miss. 227; Indiana Central Railw. Co. v. Oakes, 20 Ind. 9.

[2] Watkins v. Great Northern Railw. Co., 12 Q. B. 961; s. c. 6 Eng. L. & Eq. 179; Dean v. Sullivan Railw. Co., 2 Foster, 316; s. c. 1 Am. Railw. C. 214; Mayor of Lichfield v. Simpson, 8 Ad. & Ellis (N. S.), 65; Furniss v. Hudson River Railw. Co., 5 Sandf. S. C. 551; Turner v. Shef. & Rotherham Railw., 10 M. & W. 425. In this last case, the injury complained of was, the

3. And the courts of equity will in many cases interfere by injunction, where railway companies are proceeding to take land contrary to the provisions of the act of parliament.[3]

4. In the House of Lords, in a recent case,[4] this principle is * very extensively discussed, although not arising in the case of a railway, or where the land itself was proposed to be taken. But here the injury complained of was, that the company's works, in the manner in which they had been carried on, rendered the respondent's land useless. This was done by means of the gas escaping from the company's works deadening the life of vegetation, the respondent being a market gardener. The respondent had brought an action against the company for the nuisance, which, by agreement, upon the suggestion of the court, had been referred to an arbitrator, who had reported damages, as having accrued in the mode complained of, to a considerable extent.

obstruction of ancient lights by the erection of the company's station-house, done under the act; and the dust, &c., drifted from the station-house and embankment into the plaintiff's house. The plaintiff's house not being upon the schedule attached to the bill, the company had no right under the act to take it, or injuriously to affect it. So that the parties stood as at common law. See also Shand *v.* Henderson, 2 Dowl. P. C. 519; Davis *v.* London & Blackwall Railw., 2 Scott, N. R., 74; s. c. 2 Railw. C. 308.

[3] Stone *v.* Commercial Railw., 9 Sim. 621; s. c. 1 Railw. C. 375; Lord Chancellor in Manser *v.* N. & E. Railw. Co., 2 Railw. C. 380, 391; Priestly *v.* Manchester & L. Railw. Co., 4 Yo. & Col. Ex. 63; s. c. 2 Railw. C. 134; London & Birmingham Railw. Co. *v.* Grand Junction Canal Co., 1 Railw. C. 224. In this case, as well as the next preceding, it is said the company is to be the judge of the most feasible mode of carrying forward its own operations, and is not liable to be called to account for the exercise of his discretion, so long as they act *bona fide*, and with common prudence.

But it affords no just ground of equitable interference, that the special tribunal, provided by statute to have exclusive jurisdiction of certain claims, is altogether incompetent to decide such questions as naturally arise. If any such defect exists, the legislature alone can afford redress. Barnsley Canal Co. *v.* Twibill, 7 Beav. 19; s. c. 3 Railw. C. 471.

Nor is the land-owner entitled to maintain a common-law action, because he refused to join in the proceedings under the statute, the company having proceeded *ex parte*, and caused an appraisal, and deposited the sum awarded for compensation. Hueston *v.* Eaton & H. Railw., 4 Ohio N. S. 685. See also The Western Maryland Railw. Co. *v.* Owings, 15 Md. 199; Sturtevant *v.* Milw. Wat. & B. Railw. Co., 11 Wisc. 61; Powers *v.* Bears, 12 Wisc. 213; Davis *v.* La Crosse & Milw. Railw. Co., id. 16; Burns *v.* Milw. & Miss. Railw. Co., Wisc. 450.

[4] Imperial Gas Light & Coke Co. *v.* Broadbent, 7 Ho. Lds. 606; s. c. 5 Jur. N. S. 1319.

The company were now proceeding to make a very extensive addition to their works, when the respondent obtained an injunction against them, which, upon final hearing before the chancellor, assisted by the common-law judges, had been made perpetual,[5] and the question was then appealed by the company into the House of Lords.

5. It was here held, affirming the decision below, that in such case the plaintiff in equity cannot claim a perpetual injunction, until his right is first established at law. But this was sufficiently done in the present case, by the award of the arbitrator. But after the right is once established at law, it is the province of the equity judge to determine how far the cause of complaint may have been removed by any subsequent alteration of the works; and this question will not be referred to a trial at law.

6. It was also held here that the respondent had no remedy under the statute, and consequently, although such statutory remedy to its extent was necessarily exclusive of all others, yet where the wrong done is not authorized by these powers, the common-law right of action still remained.[6]

7. The general principle that the statute remedy, as far as it extends, is exclusive, seems to be universally adhered to in the American courts, with slight modifications, some of which are, * and some are not, perhaps, entirely consistent with the maintenance of the general rule.[7]

8. It was held in one case, where the land damages had been assessed under the statute, and judgment rendered for the amount against the company, that a subsequent company, formed by the mortgagees of the first company, were responsible for the amount of such judgment, if they continued to operate the road and use the right of way for which the judgment was rendered.[8] But this seems a considerable stretch of construction, although eminently just and reasonable.

[5] s. c. before V. C. Wood, 2 Jur. N. S. 1132; before the Chancellor, 3 id. 221.

[6] See the following cases cited in argument: Hole *v.* Barlow, 4 C. B. (N. S.), 334; Attorney-General *v.* The Sheffield Gas Consumers' Co., 3 De G. M. & G. 304; Same *v.* Nichol, 16 Vesey, 338; Wynstanley *v.* Lee, 2 Swanst. 333; Haines *v.* Taylor, 10 Beavan, 75.

[7] Pettibone *v.* La Crosse & Milw. Railw. Co., 14 Wis. 443; Vilas *v.* Milw. & Miss. Railw. Co., 15 id. 233.

[8] Pfeifer *v.* Sheboygan & Fond du Lac Railw. Co., 18 Wis. 155.

SECTION XX.

Lands injuriously affected.

1. *Obstruction of way, loss of custom.*
2. *Equity will not enjoin legal right.*
3. *Liable for building railway, so as to cut off wharf.*
4. *Not liable for crossing highway on level.*
5. *English statute only includes damages, by construction.*
6. *Equity will not enjoin a doubtful claim.*
7. *Damages unforeseen, at the time of the appraisal, may be recovered, in England.*
8. *Injuries to ferry, and towing path, compensated.*
9, 10. *Remote injuries not within the statute.*
11. *Damages compensated, under statute of Massachusetts.*
12. *Damages not compensated, as being too remote.*
13. *For negligence in construction, remedy at common law.*
14. *Or neglect to repair.*
15. *Recovery under the statute, &c.*
16. *Possession by railway, notice of extent of title.*
17. *Railways have right to exclusive possession of roadway.*

§ 82. 1. The right of a party to claim consequential damages, where his land was not taken, but only injuriously affected, was very thoroughly discussed by Lord *Truro*, Chancellor, in a late case,[1] where the defendant, a furrier, claimed damage, in consequence of the dust and dirt, occasioned by the company, having injured his goods, and that his customers had been compelled, by the obstruction caused by the company's works, to quit the * side of the road upon which the defendant's shop was situated, before they arrived at that point, and cross the street to get along, by reason whereof he had lost custom. The defendant also claimed that the company had obstructed a passage to his buildings, by which he had an entrance to the back part of his premises.

The Lord Chancellor considered that if the party had any claim for compensation it was to be procured under the statute and estimated by the sheriff's jury, and dissolved the injunction. It seems now to be settled by the decision of the House of Lords (Rickett *v.* Metropolitan Railway), that unless the injury is of such a nature as to be actionable aside from the statute, it will not entitle the party to compensation under the statute, and that interruption of business therefore, by making access more inconvenient, will not entitle the party to such compensation.[2] But where the

[1] East & W. I. Docks & Birmingham Junction Railw. Co. *v.* Gattke, 3 Mac. & Gor. 155; s. c. 3 Eng. L. & Eq. 59.

[2] Law Rep. 2 H. L. 175.

works of a railway diminish the light of premises, although the pecuniary value of plaintiff's interest is not diminished, property in the neighborhood generally having advanced in price, the owner is entitled to compensation.[3] Where the value of a house is lessened by railway works producing noise, smoke, and vibration, the party is entitled to compensation under the statute.[4]

But where the railway company lowered a highway several feet, thereby greatly obstructing access to plaintiff's dwelling, and obliging him to make use of a ladder for that purpose, it was held that no claim could be maintained under that clause in the statute for injuriously affecting land, the injury complained of being one of a permanent nature, and therefore the subject of compensation under the general provision for land damages.[5] But where the works of a railway intercepted water which would have percolated through the strata of the earth into plaintiff's well, and also drained off water which had reached the well by such percolation :[6] It was held the land-owner had no remedy either under the statute or at common law.

2. This case was an application, by the company, for an injunction to restrain the party from proceeding under the statute, and the court held, that as the party had a clear legal right, under the act of parliament, they could not be deprived of pursuing it in the

[3] Eagle *v.* Charing Cross Railw., Law Rep. 2 C. P. 638. A. owned a house on a highway; a railway company, under powers given them by statute, made an embankment on the highway opposite the house, thereby narrowing the road from fifty to thirty-three feet, thus materially diminishing the value of the house for sale or letting, and obstructing the access of light and air. *Held*, 1. That A. had sustained particular damage from the works; 2. That the damage would have been actionable if not authorized by statute; 3. That the injury done was an injury to A.'s estate, and not a mere injury to A. personally or to his trade; and that, these three things concurring, A. was entitled to compensation under stat. 8 Vict. cc. 18, 20. Beckett *v.* Midland Railw., Law Rep. 3 C. P. 82.

[4] Brand *v.* Hammersmith & City Railw., L. R., 2 Q. B. 223.

[5] Moore *v.* Great Southern & Western Railw. Co., 10 Ir. Com. Law Rep. 46, in Exch. Chamber S. P. Tuohey *v.* Same, id. 98. But the English courts seem to consider that compensation in such a case may be given under the provision for damages where land is injuriously affected. Chamberlain *v.* West End of London & C. Railw., 2 B. & S. 617; s. c. 3 B. & S. 768; 8 Jur. N. S. 935.

[6] New River Co. *v.* Johnson, 2 Ellis & Ellis, 435; s. c. 6 Jur. N. S. 374, Q. B. This question is a good deal discussed in a later case, Reg. *v.* Met. Board of Works, 3 B. & S. 710, where it was held that the railway company were not responsible for underground currents of water intercepted by their works, either at common law or under the statute.

mode pointed out, and fully affirmed the views of Lord *Denman*, Ch. J., in Regina *v.* Eastern Counties Railway Company,[7] where the damage claimed was by lowering a road * upon which the land abutted, so as to impede the entrance to the land, and compel the owner to build new fences.

3. The construction of a railway across flats, in front of plaintiff's wharf, gives him a right to damage under the statute of Massachusetts, although the wharf itself remained uninjured.[8] But the charter of a railway company having authorized them to make certain specified erections between the channels of two rivers, and such erections having so changed the currents of the rivers as to render more sea-wall necessary to secure certain wharves and flats in the vicinity, it was held that the damage thereby occasioned was *damnum absque injuria*.[9]

4. One cannot claim damage of a railway company, by reason of their track crossing a public highway, near his dwelling, upon a level, the highway being the principal approach to his grounds.[10]

5. In a recent English case,[11] it is held that the English statute, giving compensation, where lands are injuriously affected, was intended to include only such damages as were caused by the erection of the company's works, and not such as might in future be caused by the use of the works, this being the case of Gas Works, and the 68th section of the Lands Clauses Acts

[7] 2 Ad. & Ellis (N. S.), 347. See *post*, § 99. In this case the court held that the injuries complained of clearly came within the act, and Lord *Denman*, in closing his opinion, makes a very significant reply to a class of arguments, not uncommon upon all subjects. "Before we conclude, we shall briefly advert to an argument much pressed upon us; that if we make this rule absolute, *any* injury to land, at any distance from the line of railway, may become the subject of compensation. If extreme cases should arise, we shall know how to deal with them; but in the present instance, the alleged injury is to land adjoining a road, which has been 'lowered' under the provisions of the act, and which is therefore land *injuriously affected*, by an act expressly within the powers conferred by the company."

[8] Ashby *v.* The Eastern Railw. Co., 5 Met. 368; s. c. 1 Am. Railw. C. 356. And in Bell *v.* The Hull & Selby Railw., 2 Railw. C. 279, a similar decision is made under the English statute.

[9] Fitchburg Railw. *v.* Boston & Maine Railw. 3 Cush. 58; s. c. 1 Am. Railw. C. 508; *Ante*, § 75.

[10] Caledonian Railw. *v.* Ogilvy, 2 McQu. Ho. Lds. 229; s. c. 29 Eng. L. & Eq. 22.

[11] Law Times, February, 1857, p. 329, not yet reported in this country.

being made a part of the company's special act. But this certainly could not extend to the ordinary use of a railway, which is the only or the principal mode of injuriously affecting lands not taken, and which could be as strictly estimated, at the time of the company's works being erected, as from time to time thereafter.

6. In one case,[12] where the lessee of an inn and premises, * situated near a tunnel on the company's road, claimed damages, because the vibration caused by the trains prevented his keeping his beer in the cellar in a fit state for his customers, and the value of the house was thereby lessened, being rendered unfit for a public-house; and the plaintiffs moved for an injunction to restrain the defendant from proceeding to assess damages under the statute; the Lord Chancellor denied the motion, upon the ground that the remedy at law was altogether adequate. But his lordship intimated a very decided opinion, that no such damages could be recovered. He says, "Whether an action will lie on behalf of a man who sustains a private injury, by the exercise of parliamentary powers, done judiciously and cautiously, is not an easy question, or rather it is not easy to come to the conclusion that an action will lie. I entertain a decided opinion, (probably however erroneous,) that no such action will lie."[13]

7. And where the plaintiff's damages for land taken by the company, and by severance and otherwise, were determined by an arbitrator,[14] but from the road being built across certain flats, with insufficient openings, the waters became dammed up and injured the plaintiff's remaining lands, it was held, he was entitled to recover "*as for an unforeseen injury, arising from the manner in which the railway was constructed.*" But it is here said, "The

[12] The London & N. W. Railw. Co. *v.* Bradley, 3 Mac. & Gor. 366; s. c. 6 Railw. C. 551.

[13] Hatch *v.* Vermont Central Railw. Co., 25 Vt. 49; s. c. 28 id. 142.

[14] Lawrence *v.* Great N. Railw. Co., 16 Q. B. 643; s. c. 6 Railw. C. 656; s. c. 4 Eng. L. & Eq. 265; *ante*, § 79, n. 6; § 74, n. 7; L. & Y. Railw. *v.* Evans, 15 Beav. 322; s. c. 19 Eng. L. & Eq. 295. Under most of the American statutes, the damages, as well prospective as present, must be assessed at once, and no recovery can be had for unforeseen injury, more than in any case of a recovery of damages for a tort. But in the case of Lancashire & Y. Railw. *v.* Evans, it is obvious, from the elaborate review of the case by the Master of the Rolls, that the English courts now regard the land-owner as entitled to make new claims, from time to time, as they occur, for any injurious consequence of the construction of the works. For any unlawful act, in the construction or use of the works, an action at common law is the proper remedy.

company might, by erecting their works with proper caution, have avoided the injury." It seems this is the only ground of an action.

8. In a doubtful case the court issued an alternative mandamus and required a return of the facts.[15] So, too, a party whose * ferry has been materially lessened in value, by obstructing access to it, may recover damages of the company under the statute.[16] So, too, if a towing-path be obstructed, or the navigation diverted from it, the owner under a similar statute may have compensation.[17] So, too, an occasional flooding of lands, caused by a proper execution of parliamentary powers, is within the remedy given by statute.[18]

9. Some questions under this head have arisen, in regard to mines and minerals, not of sufficient importance to be stated in detail.[19] Where the damage resulted from the company turning a brook, the court ordered a mandamus.[20] But brewers, accustomed to take water from a public river, are not entitled to receive compensation when the waters were deteriorated by the works of a dock company.[21]

10. It was held that a tithe-owner is not entitled to compensa-

[15] Queen *v.* The North Union Railw. Co., 1 Railw. C. 729.

[16] *In re* Cooling, 19 Law J. Q. B. 25; s. c. *nom.* Cooling *v.* Great Northern Railw., 15 Q. B. 486; Hodges on Railways, 277. It is said here that a ferry is different from a public-house, whose custom is said to be injured by obstructing the travel and access to the house, by cutting through thoroughfares leading to it, which, it has been held, is no ground of claiming damage under a similar statute. The King *v.* The London Dock Co., 5 Ad. & El. 163. But this case is considered as overruled by Reg. *v.* The Eastern Counties Railw. Co., 2 Q. B. 347; Chamberlain *v.* East End of London & Crys. Pal. Railw. Co., 2 B. & S. 617; s. c. 3 B. & S. 768; 8 Jur. N. S. 935.

[17] The King *v.* Commis. of Thames & Isis, 5 Ad. & Ell. 804.

[18] Ware *v.* Regent's Canal Co., 3 De G. & Jones, 212.

[19] Fenton *v.* Trent & Mercy Nav. Co., 9 M. & W. 203; Cromford Canal Co. *v.* Cutts, 5 Railw. C. 442; The King *v.* Leeds & Selby Railw. Co., 3 Ad. & Ell. 683.

[20] Reg. *v.* North Midland Railw. Co., 11 Ad. & El. 955; s. c. 2 Railw. C. 1.

[21] The King *v.* Bristol Dock Co., 12 East, 429. But where mines below the company's works are injured in consequence of the negligent or imperfect mode of constructing or maintaining the company's structures and cuttings, the person so injured may maintain a common-law action against the company. Bagnall *v.* London & N. W. Railw., 7 H. & N. 423. Affirmed in Exchequer Chamber, 31 Law J. 480. See also Reg. *v.* Fisher, 3 B & S. 191; s. c. 9 Jur. N. S. 571; Elliot *v.* Northeastern Railw. Co., 9 Jur. N. S. 555; s. c. 10 Ho. Lords Cas. 333.

tion unless the act contain an indemnity in his favor.[22] The interest of a tithe-owner is too remote and incidental to be the subject of general indemnity. It often forms the basis of special statutory provisions for indemnity.

*11. In a well-considered case, the rule in regard to what damage is to be included under the terms "lands injuriously affected," or equivalent terms, is thus laid down: "All direct damage to real estate by passing over it, or part of it, or which affects the estate directly, although it does not pass over it, as by a deep cut or high embankment, so near lands or buildings as to prevent or diminish the use of them, by endangering the fall of buildings, the caving of earth, the draining of wells, the diversion of water-courses," by the proper erection and maintenance of the company's works. "Also, as being of like character, blasting a ledge of rocks so near houses or buildings as to cause damage; running a track so near as to cause imminent and appreciable danger by fire; obliterating or obstructing private ways leading to houses or buildings,"—all these and some others, doubtless, are included.

12. "But that no damage can be assessed for losses arising directly or indirectly from the diversion of travel, the loss of custom to turnpikes, canals, bridges, taverns, coach companies, and the like; nor for the inconveniences which the community may suffer in common, from a somewhat less convenient and beneficial use of public and private ways, from the rapid and dangerous crossings of the public highways, arising from the usual and ordinary action of railroads, and railroad trains, and their natural incidents."[23]

[22] Rex r. The Commissioners of Nene Outfall, 9 B. & C. 875; London & Blackwall Railw. Co. r. Letts, 3 H. L. Cases, 470; s. c. 8 Eng. L. & Eq. 1; Hodges on Railways, 289, n. (*m*).

[23] Proprietors of Locks & Canals r. Nashua & Lowell Railw., 10 Cush. 385. *Shaw*, Ch. J. (391, 392). Nor is the party, whose lands lie near a railway line, entitled to compensation, for being injuriously affected, by persons in the trains overlooking the grounds, thus rendering them less comfortable and secluded, for the walks of the family and visitors. Nor can the party claim compensation for vibration of the ground caused by the use of the road, the statute only extending to damages caused by the *construction* of the works. Reg. *v.* Southeastern Railw., *in re* Penny, 7 Ellis & Black. 660, *ante*, pl. 5. But actual injury during the construction of a railway, by vibration caused by the ballast trains, is to be compensated; but by *Campbell*, Ch. J., it is said such vibration caused by

13. It is held also in this case, that no damages can be assessed under the statute, for cutting through a watercourse in making an embankment without making a culvert, whereby the water is made to flow back and injure the plaintiff's land, at a distance * from the railway, no part of which is taken, the remedy being by action at common law.[23]

14. And where the company, by consent of the land-owner, enters upon the land and makes the requisite erections, which are subsequently conveyed to it with the land by the land-owners, it was held such grantor is not estopped from claiming damages resulting from want of proper care and skill in constructing the works, or from neglect to keep them in repair.[24]

15. The rule of the English courts that damages can only be recovered for injuriously affecting land, where but for the statute the act complained of would be just ground of action at common law, does not apply where part of the land is taken and damages are sought, not only for the part taken, but for the rest of the land being injuriously affected, either by severance or otherwise.[25] And it was here held that the owner of a mill was entitled to have damages assessed to him for the increased exposure of the same to fire by the passage of the company's trains. But loss of trade caused by the operations of the company during the construction of their works is not damages for which the party is entitled to compensation.[26] But a person may claim damages on the ground of being injuriously affected on account of the obstruction or diversion of a public way by the construction of the works of a railway.[27]

16. The owners of land adjoining a railway track are affected with presumptive notice of the rights of the company from long

running trains after the road is completed will merit a different consideration. Ib. See also Croft v. London & N. W. Railw. Co., 3 B. & S. 436.

[24] Morris Canal & Banking Company v. Ryerson, 3 Dutcher, 457; Waterman v. Conn. & Pass. Riv. Railw., 30 Vt. 610; Lafayette Plank Road Co. v. New Albany, &c. Railw., 13 Ind. 90.

[25] S. T. & A. Railw. Co., *in re*, 10 Jur. N. S. 614.

[26] Senior v. Met. Railw. Co. 2 H. & C. 258, Cameron v. Charing-Cross Railw. Co., 16 C. B. N. S. 430; overruled in Exch. Chamber, Ricket v. Metropolitan Railw. Co., 5 B. & S. 149; s. c. 13 W. R. 455, where the proposition of the text is established.

[27] Wood v. Stourbridge Railw. Co., 16 C. B. N. S. 222. See also Boothby v. Androscoggin & K. Railw. Co., 51 Me. 318.

use, the same as in regard to other owners in possession.[28] And equity will enjoin an adjoining owner to a railway track against making erections which will interfere with the company repairing its track.[29]

*17. It seems scarcely needful to repeat what has been so often declared by the courts, that railways have the exclusive right to possession of their roadway, and to exclude all intrusions thereon, whether from persons or structures.[30]

SECTION XXI.

Different Estates Protected.

1. *Tenant's good-will and chance of renewal protected.*
2. *Tenants entitled to compensation for change of location.*
3. *Church property in England, how estimated.*
4. *Tenant not entitled to sue, as owner of private way.*
5. *Heir should sue for compensation.*
6. *Lessor and lessee both entitled to compensation.*
7. *Right of way, from necessity, protected.*
8. *Mill-owner entitled to action for obstructing water.*
9. *Occupier of land entitled to compensation.*
10. *Tenant, without power of alienation, forfeits his estate, by license to company.*
11. *Damages not transferable by deed of land, after they accrue.*

§ 83. 1. The English statute provides for the protection of the interests of lessees in certain cases.[1] And lessees from year to year have recovered, for the good-will of the premises, which would have been valuable as between the tenant and a purchaser, although it was not a legal interest as against the landlord.[2] But not when the tenancy was from year to year, determinable at three months' notice, with a stipulation against underletting without leave.[2] So, too, an under-tenant is entitled to compensation for good-will.[3] But in a lease for fourteen years, with covenant to yield up the premises at the end of the term, with all fixtures and improvements, where the company suffered the lease to expire and

[28] Macon & Western Railw. Co. *v.* McConnell, 27 Ga. 481.

[29] Cunningham *v.* Rome Railw. Co., 27 Ga. 499.

[30] Railw. Co. *v.* Hummell, 44 Penn. St. 375; Harvey *v.* Lackawanna & B. Railw. Co., 47 id. 428.

[1] 8 & 9 Vict. c. 18, §§ 119 to 122, and 8 & 9 Vict. c. 20, § 43.

[2] *Ex parte* Farlow, 2 B. & Ad. 341; The Matter of Palmer *v.* Hungerford Market, 9 Ad. & Ellis, 463.

[3] Rex *v.* The Hungerford Market, 4 B. & Ad. 592.

then turned out the tenant, held that he was entitled to compensation for good-will and the chance of * beneficial renewal, but not for improvements, but nevertheless these might be considered by the jury in estimating the chance of beneficial renewal.[4]

2. The loss which a brewer sustained by having to give up his business till he could procure other premises, suitable for carrying it on, was held a proper subject of compensation under a similar statute.[5] Where the act required tenants from year to year to give up premises to the company, upon six months' notice to quit, without reference to the time when their term began, but allowed them compensation, if required to leave before their term expired, it was held, that when the six months' notice required the tenant to leave at the end of his term, he was not entitled to compensation.[6] But where a tenant gives up premises under a six months' notice from a railway company, when he is entitled to compensation, without demanding it of the company, he is still bound to pay full rent to his landlord.[7]

3. Church property in England is estimated with reference to the cost of a new site and similar erections, to be fixed by agreement between the company and the diocesan and archbishop of the province. But after this appropriation of the site of a church to secular purposes, the rector is entitled to have his interest in the premises connected therewith estimated at its value for secular uses.[8]

4. Where the charter of a company imposed a penalty upon them for any obstruction or interruption of a road, and in the case of a private road gave the right to recover the penalty to the owner of the road, it was held, that the tenant of the farm over which the road passed could not sue for the penalty.[9]

[4] Rex *v.* The Hungerford Market, 4 B. & Ad. 592. But the case of Rex *v.* Liv. & Manchester Railw., 4 Ad. & Ellis, 650, seems to treat a similar estate as absolutely gone, at the end of the term, and the company bound to make no compensation. But where the company stipulated with a tenant, having a doubtful right of renewal, to compensate him for the same on his establishing the right, and subsequently became themselves the owner of the reversion, it was held the tenant might maintain a bill in equity for the declaration of his rights as to renewal and compensation therefor. Bogg *v.* Midland Railw., L. R. 4 Eq. 310.

[5] Jubb *v.* Hull Dock Co., 9 Ad. & Ellis (N. S.), Q. B. 443.

[6] The Queen *v.* London & Southampton Railw. Co., 10 Ad. & El. 3; S. C. 1 Railw. C. 717.

[7] Wainwright *v.* Ramsdem, 5 M. & W. 602; S. C. 1 Railw. C. 714.

[8] Hilcoat *v.* The Archbishops of Canterbury & York, 10 C. B. 327.

[9] Collinson *v.* Newcastle & Darlington Railw., 1 Car. & Kir. 546.

5. Where land of a deceased person is taken for a railway, * the heir and not the administrator is entitled to the damages for such taking, and to prosecute for the recovery thereof, although the administrator had previously represented the estate insolvent, and afterwards obtained a license to sell the real estate for the payment of debts.[10]

6. And a tenant, whose lease began before, and who was in possession at the time an injury was done, is entitled to recover damages for an injury sustained by him, in building a turnpike road.[11] But the lessor and lessee are each entitled to recover compensation for the damage sustained by them respectively.[12]

7. And where the plaintiff had no access to his land except over the land of his grantor, it was held, that he had a way, by necessity, across such land, and that he was entitled to maintain an action against a railway company for obstructing it.[13]

8. So also where the free flow of water from a saw-mill is obstructed by the erection of a railway bridge below the mill, the company are liable to the owner of the mill in an action of tort.[14] But they are not liable for any increased expense thereby occasioned to the mill-owner, in getting logs up the stream to his mill, whether the stream be navigable for boats and rafts, or not.[14]

9. Where the statute gives remedy against all persons interested, the occupant of land is liable to be affected by the proceedings, and a similar construction will prevail where the remedy is given to all interested.[15]

It seems indispensable to the asserting of any valid claim for land damages that the claimant prove the character and extent * of his title.[16] And it is here said that possession alone will not be

[10] Boynton *v.* Peterboro & Shirley Railw., 4 Cush. 467.

[11] Turnpike Road *v.* Brosi, 22 Penn. St. 29.

[12] Parks *v.* City of Boston, 15 Pick. 198. See also Burbridge *v.* New Albany & S. Railw., 9 Ind. 546.

[13] Kimball *v.* The Cocheco Railw., 7 Fost. 448.

[14] Blood *v.* Nashua & Lowell Railw., 2 Gray, 137.

[15] Gilbert *v.* Havermeyer, 2 Sandf. 506. The term "owner" in a statute requiring compensation by railway companies for land taken by them includes every person having any title to or interest in the land, capable of being injured by the construction of the road, and extends to the interest of a lessee or termor. Balt. & Ohio Railw. *v.* Thompson, 10 Md. 76; Lewis *v.* Railw., 11 Rich. 91; Sacramento Railw. *v.* Moffatt, 7 Cal. 577.

[16] Robbins *v.* Milw. & Horricon Railw. Co., 6 Wisc. 636.

regarded as ground of presumption of title in fee. And where the entire fee in the land is condemned to the use of the railway, and the money paid into court, it must be apportioned to the several owners of different interests in the land, as nearly as possible, as if it were the land itself. And the same result will follow where a permanent right of way is given in any form to a perpetual corporation.[17]

10. And where a tenant, who held the land for a term of years, with a strict clause against alienation or subletting, assigned a small portion to a railway, for a temporary purpose, the company not dealing with the landlord, or giving him any compensation for the use of the land, it was held, that he was entitled to maintain ejectment against the company, and his tenant, for the forfeiture incurred by this subletting.[18]

11. And the damages assessed are payable to the owner of the land at the date of the adjudication, and do not pass by deed to a subsequent purchaser.[19] And where the company gave notice to treat for land to a tenant at will, and were allowed to take possession and complete their line, a person who had subsequently purchased an undivided portion of the land was not allowed to maintain a bill to restrain the company from the use of the land.[20]

[17] Ross *v.* Adams, 4 Dutcher, 160. In such case the party having an unexpired lease will only be entitled to so much of the interest of the fund in court as will indemnify him for his loss of rent, and the rest of the income must accumulate till the expiration of the lease. Wootton's Estate, Law Rep. 1 Eq. 589. And all costs of parties summoned by the railway in order to receive a perfect title, must be paid by the company. Haynes *v.* Barton, L. R. 1 Eq. 422. And the costs of paying money out of court for the benefit of a charity must also be borne by the company. Lathropp's Charity, L. R. 1 Eq. 467. A party not summoned, although having knowledge of proceedings to condemn land, is not bound thereby; but may have an action to protect his interest. Martin *v.* L. Ch. & Dover Railw., L. R. 1 Eq. 145; s. c. id. 1 Ch. Ap. 501. See also London, Br. & S. C. Railw. *in re*, as to costs of parties summoned. Law R. 1 Ch. Ap. 599.

[18] Legg *v.* Belfast & Bellamy Railw., 1 Irish Law (N. S.), 124, n.

[19] Lewis *v.* Wilm. & Manchester Railw., 11 Rich. Law, 91. But where a third person agreed to pay the land-owner interest on the agreed compensation for his land damages "if said railway shall be kept in operation," his object being to secure the beneficial operation of the railway by running passenger and freight trains, it was held he was not bound to perform on his part, merely because the railway occasionally ran a freight train. Jepherson *v.* Hunt, 2 Allen, 417.

[20] Carnochan *v.* Norwich & Spalding Railw., 26 Beav. 169.

SECTION XXII.

Arbitration.

1. *Attorney, without express power, may refer disputed claim.*
2. *Award binding, unless objected to in court.*

§ 84. 1. It was held that an attorney, who had no authority under seal, either to defend or refer suits, might nevertheless make a valid reference of a disputed claim against the company, under a judge's order.[1]

*2. And if the company object that the arbitrator awarded upon matters not submitted, they should have applied to the court to revoke the submission, or set aside the award, upon its return into court; but not having done so, the claim being set up and entertained by the arbitrator, the award is binding.[1] The same principles would probably obtain in the American courts.

SECTION XXIII.

Statute of Limitations.

1. *General limitation of actions applies to land claim.*
2. *Filing petition will not save bar.*
3. *Acquiescence of forty years by land-owner, effect of.*
4. *The estoppel will take effect if the use is clearly adverse.*

§ 85. 1. Where neither the general statutes nor the special act contain any specific limitation, in regard to claims upon railway companies for land damages, it has been held that the general statute of limitation of actions, for claims of a similar character, will apply. And where the claim was for an injury to an island, caused by the erection of a railway bridge, and to the award of the

[1] Faviell *v.* The Eastern Counties Railw., 2 Exch. 344. It is held generally, in the English courts, that an attorney should be appointed under seal to prosecute and defend suits, on the part of corporations. Thames Haven Dock & Railw. Co. *v.* Hall, 5 Man. & G. 274; Arnold *v.* The Mayor of Poole, 4 id. 860.

But when, by the incorporation of a railway company, the directors were empowered to appoint and displace any of the officers of the company, the appointment of an attorney, by the company, need not be under seal. See *post*, § 141.

viewers, and the company plead *actio non infra sex annos*, the plea was held good.[1]

2. And where the statute provides, that no process to recover compensation for land or property taken by a railway shall "be sustained, unless made within three years from the time of taking the same," a mere filing of an application with the clerk of the county commissioners, without bringing it to the notice of the commissioners, or any action of theirs thereon until the three years have elapsed, will not save the bar of the statute.[2]

* The land-owner may also traverse the right of the company to take the land, either originally, for the location and construction of their road, on the ground that it does not come within their line, or the line of deviation from the prescribed route, or that they have not taken the proper preliminary steps, or for any other cause; or, when the company propose to change their route, or to enlarge their accommodation works, on the ground of having made their exclusive election in one case, or the want of necessity in the other.[3]

3. Where the land-owner had allowed the company, upon an appraisal in the alternative stating both the value of the land and of the annual use, to occupy the same for the purposes of a canal, for more than forty years, paying an annual sum about the same which had been awarded, the award being defective in law, in that no person had been made a party to the proceeding who was authorized to represent the land-owner, who was an infant, it was held that this was no ground of presuming a contract on the part of the land-owner to convey the land in fee in consideration of a rent charge.[4] But it was held that an ejectment on the part of the land-owner, and the erection of a bridge by him, ought to be restrained by injunction, on the ground of acquiescence, the company undertaking to put in force their parliamentary powers which had not expired, and thus obtain the land.

4. But in another case, where the party had, by contract with the original land-owner, used the land of others for more than fifty years, first for a tram-way and subsequently for a railway in a

[1] Forster *v.* The Cumberland Valley Railw., 23 Penn. St. 371.

[2] Charles River Railw. *v.* County Commissioners of Norfolk, 7 Gray, 389.

[3] South Carolina Railw. *v.* Blake, 9 Rich. 228; *ante*, § 72; *post*, § 105, n. 14.

[4] Somerset Canal Co. *v.* Harcourt, 2 De G. & J. 596.

different place across the same land, it was held that the present land-owner was concluded by the agreement, and that the change of one place for another would not defeat the estoppel.[5] All the party can claim is, to have damages under the statute.[5]

[5] Mold *v.* Wheatcroft, 29 Law J. Ch. ch. 11; s. c. 27 Beav. 510.

*CHAPTER XII.

REMEDIES BY LAND-OWNERS UNDER THE ENGLISH STATUTE.

SECTION I.

Company bound to purchase the whole of a House, etc.

1. *The company to take the accessories with the house.*
2. *But the owner has an election in regard to that.*
3. *A deposit of the appraised value means the value of all the company are bound to take.*
4. *Company bound to take all of which they take part, and pay special damage besides.*
5. *Where company desire part, not compellable to take whole unless they persist in taking part.*
6. *Land separated from house by highway not part of premises.*

§ 86. 1. By the English statute,[1] railway companies are bound to purchase the whole of a house and lands adjoining, if required, when they give notice to take part; and also if the house or the principal portion of it be within fifty feet of the railway, and deteriorated by it. The act includes house, garden, yard, warehouse, building, or manufactory; but it was considered that this did not extend to a lumber-yard.[2] Under a similar provision, in a special charter, it was held, that the company were not bound to take the entire premises, where the principal dwelling-house only was within the prescribed limit.[3]

2. It has been considered that this statute gave an option to the land-owner, whether the company should take the whole or part of the house, so situated.[4] And in this last case it was * held,

[1] 8 & 9 Vict. ch. 18, § 92.

[2] Stone *v.* Commercial Railw., 9 Simons, 621; s. c. 1 Railw. C. 375; Reg. *v.* Sheriff of Middlesex, 3 Railw. C. 396. But it will include an open space in front of a public house used by guests for the purpose of access to the house with vehicles, the land having passed with the lease of the house for many years. Mason *v.* London, Chatham, & Dover Railw., L. R. 6 Eq. 101.

[3] Reg. *v.* L. & Greenw. Railw. Co., 3 Q. B. 166; s. c. 3 Railw. C. 138.

[4] Sparrow *v.* The Oxford, Worcester, & Wolverhampton Railw. 32 De G. M. & G. 94; s. c. 13 Eng. L. & Eq. 33. By Lord *Cranworth* and Sir *Knight Bruce*, L. J. See also Barker *v.* N. Staffordshire Railw., 2 De G. & S. 55; s. c.

that a narrow strip of land adjoining an iron and tin-plate factory, which had been used as a place of deposit for rubbish, and over which, a person had a right of way, was such a part of the manufactory, that the company were bound to take the whole.[4]

3. And the statute requiring a deposit of the appraised value of the land taken by a railway company, before entering upon the same, imports the value of the whole premises, in all cases where the company give notice of requiring part and the owner elects, according to the terms of the statute, that they shall take the whole.[5]

4. Where three adjoining houses had gardens laid out from the

5 Railw. C. 401, 419, where Lord *Cottenham*, Chancellor, intimates an opinion, that certain parcels of land (and a brine-pit and steam-engine upon one of them) adjoining salt-works, are not a part of the manufactory. But his lordship gives a very satisfactory reason for denying the aid of the court, viz., "That a party having known his rights, and having had his claim, in respect of them, disposed of [upon the original bill, and by leave of court then filing a supplemental bill], if he then raises a new ground of equity, does not present his case in a form to entitle him to ask for the extraordinary interposition of this court."

In Sparrow *v.* The Oxford, &c. Railw. Co., 2 De G., M. & G. 94; s. c. 13 Eng. L. & Eq. 33, Lord *Cranworth*, L. J., made some very significant suggestions in regard to the rights of land-owners to compensation. "The only remaining question," said his lordship, "is one which has been raised now for the first time, namely, that if they cannot take the land, they are now entitled to burrow under it, as it were to make a tunnel, which they say they are able and willing to do, without taking or touching any part of the surface. It was argued in this way, 'Suppose the manufactory were at the top of a hill, and you were burrowing under it, at the distance of a thousand feet, are they then taking part of the manufactory?' I do not feel myself called upon to answer that question, but if I were, I rather believe you are, on the principle of the maxim, *Cujus est solum, ejus est usque ad inferos*. Do you mean to say, that if you are an inch below the surface, you would not be taking any part of the manufactory? I am inclined to think that however deep below [the tunnel was made,] it would be within the enactment. If that has been a *casus omissus*, I think it ought to be construed in a way most favorable to those who are seeking to defend their property from invasion." In the case of Ramsden *v.* The Manchester S. Junction Railw., 1 Exch. 723, it was determined, that a railway company could not tunnel, even a highway, without first making compensation to the owner of the freehold, under the Land Clauses Act. The company are not bound to take property more than fifty feet from the centre line of the road, unless it is incapable of separation. Queen *v.* London & G. Railw., 3 Ad. & Ell. (N. S.) 166.

[5] Underwood *v.* The Bedford & Cambridge Railw., 11 C. B. N. S. 442; s. c. 7 Jur. N. S. 941; Dadson *v.* East Kent Railw. Ib. So an offer of compensation to the party must be distinct from costs. Balls *v.* Metropolitan Board of Works, L. R., 1 Q. B. 337.

plat of land upon which they were built for the accommodation * of each, and a railway company propose to take a strip of land from the gardens attached to two of the houses upon the side most remote from the houses, and the owner elected to have the company take the houses, which they declined to do, but took the land; the company were held liable to purchase the whole of the two houses, the gardens being part of the houses to which they were attached, and that they were also liable to make compensation for any injury sustained in respect of the other house.[6]

5. It has also been determined, that the railway, after giving notice to purchase part of a house, &c., and being required by the owner to take the whole, cannot be compelled by mandamus to take the whole, as the act of parliament imposes no such obligation. The statute is intended to protect the owner from being compelled to sell a part, but does not compel a company, wanting a part only, to take the whole, if they chose to waive their claim altogether, and the mandamus having claimed the whole, could not go for a part only.[7]

6. The plaintiff was an owner in fee of a house on one side of

[6] Cole *v.* Crystal Palace Railw., 5 Jur. N. S. 1114; s. c. 27 Beav. 242. The term "house" in the statute includes all that would pass by the same word in an ordinary conveyance. Hewson *v.* London & South Western Railw. Co., 8 W. R. 467; Ferguson *v.* Brighton & South Coast Railw., 9 L. T. N. S. 134; s. c. 30 Beav. 100. It will therefore embrace all of a series of gardens connected by a gravel walk passing through the walls of the different gardens. Ib. See King *v.* Wycombe Railw., 6 Jur. N. S. 239; s. c. 28 Beav. 104. A hospital may compel a railway company to take the whole of the hospital if they insist upon taking one wing used for the same purposes as the rest of the building, although connected only by a wall. St. Thomas Hospital *v.* Charing-Cross Railw. Co., 1 Johns. & H. 400; s. c. 7 Jur. N. S. 256. Houses in the course of construction come within the statute. Alexander *v.* Crystal Palace Railw., 8 Jur. N. S. 833; s. c. 30 Beav. 556. See also Chambers *v.* London, Chatham, & Dover Railw., 8 L. Times, N. S. 235. Land used for purposes of pastime, as archery and dancing, but chiefly as a pasture for cows, although important to the enjoyment of the house, is not so a part of the same premises as to require the company to take it with the house or the house with that. Pulling *v.* London, Chatham, & Dover Railw. Co., 10 Jur. N. S. 665; s. c. 33 Beav. 644.

[7] Queen *v.* The London & South Western Railw. Co., 12 Q. B. 775; s. c. 5 Railw. C. 669. The remark of Lord *Denman*, in closing his opinion in this case, is applicable to similar cases everywhere. "We have to lament the waste of time that has occurred, from the obscurity thrown about the case by the superfluous matter foisted into the record."

* a high road, where he had resided for a great number of years. Some years ago he purchased six acres of land on the other side of the road, upon part of which there were built three houses. Two of the houses were let to tenants, the third house was occupied by the plaintiff's groom, and other servants; the rest of the land which lay beyond the houses was used by the plaintiff for pasturing his cows, horses, &c. The plaintiff alleged that the six acres were indispensable to the enjoyment of the houses by him. A railway wanting part of the six acres which lay about 250 yards from the plaintiff's house, the plaintiff sought to compel the company to take the house also, on the ground that the land formed part of his house, within the 92d section of the Act. But the motion for injunction having been denied by the Vice-Chancellor, *Wood*, his judgment was affirmed in the Court of Chancery Appeal, Lord Justice Knight Bruce *dubitante*.[8]

SECTION II.

The Company compellable to take intersected Lands, and the Owner to sell.

1. *When less than half an acre remains on either side, company must buy.*
2. *Owner must sell where land of less value than railroad crossing.*
3, 4. *Word "town" how construed.*

§ 87. 1. By the 93d section of the English statute the company is compellable to take lands, not in a town, or built upon, which are so intersected by the works as to leave either on one or both sides a less quantity of land than half a statute acre.

2. And by section 94, if the quantity of land left on either side of the works[1] is of less value than a railway crossing, and the

[8] Steele *v.* Midland Railw., Law Rep. 1 Ch. 275; s. c. 12 Jur. N. S. 218.

[1] 8 and 9 Vict. ch. 18, §§ 93 and 94; Falls *v.* Belfast & B. Railw., 11 Irish L. R. 184. This statute does not apply to lands in a town or built upon. Marriage *v.* The Eastern Co.'s R. and the London and B. Railw., 30 Law Times, 264; s. c. 9 Ho. Lds. 32, where the judgment of the Exchcq. Chamber 2 H. & N. 649, is reversed, and the statute held to apply to all intersected lands, whether in a town or not. A land-owner is not entitled to the costs of an inquiry whether the land is of less value than the cost of crossing. Cobb. *v.* Mid Wales Railw., Law Rep. 1 Q. B. 342.

owner have not other lands adjoining, and require the promoters * to make the crossing, the owner may be compelled to sell the land.

3. It was held, that the term "town," in a turnpike act, imported a "collection of houses," and that the extent of the town was to be determined by the popular sense of the term, and to include all that might fairly be said to dwell together.[2]

4. And in another case, it is said, that the term includes all the houses, which are continuous, and that this includes all open spaces occupied, as mere accessories to such houses.[3]

SECTION III.

Effect of Notice to Treat for the purchase of Land.

1. *Important question under statute of limitations.*
2. *Company compelled to summon jury.*
3. *Ejectment not maintainable against company.*
4. *Powers to purchase or enter, how saved.*
5. *Subsequent purchasers affected by notice to treat as the inception of title.*
6. *But the notice may be withdrawn before any thing is done under it.*
7. *Not indispensable to declare the use, or that it is for station, and another company to participate in use.*

§ 88. 1. Inasmuch as the time for taking land, by the English statute, is limited to three years, an important question has arisen there, in regard to the effect of instituting proceedings, by giving notice to treat, within the time limited, although not in season to have the matter brought to a close before its expiration.

2. This having been done, and the land-owner having intimated his desire that a jury should be summoned, but the company taking no further steps, the question was whether a writ of mandamus would lie, after the prescribed period had elapsed, to compel the company to proceed to summon a jury. It was determined in the affirmative.[1]

[2] Reg. *v.* Cottle, 3 Eng. L. & Eq. 474; s. c. 16 Q. B. 412.

[3] Elliott *v.* South Devon Railw., 2 Exch. 725. See also Carington *v.* Wycomb Railw., Law Rep. 2 Eq. 825.

[1] The Queen *v.* Birmingham & Oxford Junction Railw., 15 Q. B. 634; s. c. 6 Railw. C. 628; Birmingham & Oxford Junc. Railw. Co. *v.* Regina, 1 El. & Bl. 293; s. c. 4 Eng. L. & Eq. 276, where the judgment of the Q. B. was fully affirmed in the Exchequer Chamber. The court say, "The notice to treat is an

* 3. So, too, where the company have taken possession of land, by depositing the value of the land in the Bank of England, and executing a bond to the party to secure payment, subject to future proceedings, as they may do, and where the company took no further steps to ascertain the sum to be paid by them, as compensation, until the time limited for exercising their compulsory powers had expired, it was held, that having rightfully entered upon the land before the expiration of the prescribed period, an ejectment could not be maintained against them after that period. The proper remedy for the land-owner is by writ of mandamus.[2]

4. So, too, if they have made the deposit, and given a bond for the payment of the price, under this same section,[3] a day * before the efflux of the time limited, although they had not entered upon

inchoate purchase, and after that has been given, in due time, it is competent for the land-owner to compel the completion of the purchase." But where an annuitant, having power to enter upon land and distrain for his security, was served with notice by a railway company of their intention to purchase, and the company subsequently purchased the property of a prior mortgagee, who had a power of sale, it was held the annuitant could not, in equity, compel the company to pay the owners of the annuity, he alleging no fraud or other improper conduct on the part of the company. Hill *v.* Great Northern Railw., 5 De G. M. & G. 66; s. c. 27 Eng. L. & Eq. 198, reversing the decision of one of the vice-chancellors in s. c. 23 Eng. L. & Eq. 565. See also Met. Railw. Co. *v.* Woodhouse, 11 Jur. N. S. 296. If the land-owner lie by an unreasonable time, he cannot maintain mandamus, or where the company abandon their notice to take part of land upon the owner serving notice to take the whole. Quicke *ex parte*, 13 W. R. 924.

[2] Doe *d.* Armistead *v.* The N. Staffordshire Railw., 16 Q. B. 526; s. c. 4 Eng. L. & Eq. 216. The expression "deviation," which appears in the acts of parliament and in the English cases, is here determined to import the distance from the line of railway upon the parliamentary plans which are the basis of the charter, and one hundred yards "deviation" is commonly allowed, in the acts. Worsley *v.* The South Devon Railw. Co., 16 Q. B. 539; s. c. id. 223. See also Lind *v.* Isle of Wight Ferry Co., 7 L. T. N. S. 416. The courts will restrain the company within the limits of deviation allowed by the act, even where the plans deposited contain no limitation. Higley *v.* Lan. & Y. Railw. Co., 4 De G. M. & Gr. 352. The line of deviation controls the right rather than the delineations on the plan. Weld *v.* So. Western Railw. Co., 32 Beav. 340; Knapp *v.* London Chatham & Dover Railw., 2 H. & C. 212.

[3] The Marquis of Salisbury *v.* The Great Northern Railw. Co., 17 Q. B. 840; s. c. 10 Eng. L. & Eq. 344. The position is here distinctly assumed, that after the notice to treat the parties stand in the relation of vendor and purchaser, and the company are not at liberty to recede. All the after proceedings are

the land, their powers to purchase or enter upon the lands are saved.[3]

5. And where a railway company gave notice to a tenant at will to take part of the lands, and the company was allowed to take possession and complete their line, and afterwards a person, who had, subsequently to the notice, purchased one-ninth of the land, filed a bill merely praying an injunction to restrain the railway company from entering upon, continuing in possession of, or otherwise interfering with the land, the bill was dismissed with costs.[4]

6. But it seems to be considered that mere notice by a railway company of an intention to take land, may be withdrawn if done before the company have taken possession of the land, or done any thing in pursuance of the notice.[5] And this is especially true where the land consists of a house and appurtenances, and the notice only extends to taking a part of the land, and the owner requires the company to take the whole land with all the buildings.

7. It is no objection to a notice to take land for the use of a railway company that it does not declare the use for which it is proposed to be taken; nor will it affect the title of the company that it is taken for a station for the joint use of that and another company, which latter company could not have taken the land for their own use alone.[6]

merely for the purpose of ascertaining the price of the land. Sparrow *v.* Oxford & Worcester Railw. Co., 9 Hare, 436; 12 Eng. L. & Eq. 249.

[4] Carnochan *v.* Norwich & Spalding Railw., 26 Beav. 169. But a notice to treat, in order to become the inception of title, must be followed up within a reasonable time, or it will be regarded as abandoned. Hedges *v.* The Metropolitan Railw. Co., 28 Beav. 109; s. c. 6 Jur. N. S. 1275.

[5] King *v.* The Wycombe Railw. Co., 6 Jur. N. S. 239; s. c. 28 Beav. 104; Gardner *v.* Charing-Cross Railw. Co., 2 J. & H. 248; s. c. 8 Jur. N. S. 151. Where the company agree verbally to take the whole of a house and land, that is a valid waiver of notice under the statute, and will be enforced in equity. Binney *v.* Hammersmith & City Railw. Co., 9 Jur. N. S. 773. Tenant coming into possession of land after notice to treat, and before proceedings taken, is entitled to renewal of notice, so as to make him party. Carter *v.* Great Eastern R. Co., 9 Jur. N. S. 618. And a notice to take land will not enable the company to proceed and complete title after their powers for compulsory purchase have ceased. Richmond *v.* North London Railw., Law Rep. 5 Eq. 352.

[6] Wood *v.* Epsom & L. Railw. Co., 8 C. B. N. S. 731.

*SECTION IV.

Requisites of the Notice to Treat.

1. *Notice to treat must, in terms or by reference, accurately describe land.*
2. *After notice to treat company compellable to purchase. Company cannot retract after giving notice to treat.*
3. *New notices given for additional lands.*
4. *Power to take land not lost by former unwarranted attempt.*
5. *Lands may be taken for branch railway.*
6. *Effect of notice in case of a public park.*

§ 89. 1. As by the English statute the notice to treat is made the act of purchase, it is of the first importance that it should describe the lands accurately. But even where the notice was indefinite, if it be accompanied with a plan which shows the very land proposed to be taken, it will be sufficient;[1] or reference may be made to the parliamentary plan.[1] The company can only claim to use what their notice and the annexed plan show clearly was submitted to the appraisers to value.[2]

2. It was held long ago in the English courts, under similar statutes for taking land by compulsion, that the notice to treat constituted the act of purchase, and that after giving it there remained no longer to the company any power to retract, and they will be compelled by mandamus to complete the purchase.[3] Nor can the company after requiring the tenant to give up to them the possession of his land before the expiration of his term, afterwards surrender the same, especially where damage has accrued to the premises in consequence of the company taking possession. They must pay money into court.[4]

[1] Sims *v.* The Commercial Railw., 1 Railw. C. 431; Hodges on Railways, 197.

[2] Kemp *v.* The London & Br. Railw. Co., 1 Railw. C. 495.

[3] The King *v.* Hungerford Market Co., 4 B. & Ad. 327; Same *v.* Commissioners of Manchester, id. 332, n.; Doo *v.* The London & Cr. Railw., 1 Railw. C. 257; Burkinshaw *v.* Birm. & Ox. Junc. Railw. Co., 5 Exch. 475; s. c. 4 Eng. L. & Eq. 489; Ed. & Dundee Railw. Co. *v.* Leven, 1 Macq. House of Lords Cases, 284; Stone *v.* The Commercial Railw. Co., 9 Sim. 621; s. c. 1 Railw. C. 375. When variance from notice will not vitiate precept, see Walker *v.* The London & Bl. Railw. Co., 3 Ad. & Ellis (N. S.), Q. B. 744; Reg. *v.* York & North Midland R. Co., 1 El. & Bl. 178–858; Reg. *v.* Ambergate & C. R. Co., id. 372. See *ante*, § 88, and notes.

[4] Pope *v.* Great Eastern Railw., Law Rep. 3 Eq. 171. Notice to treat is not equivalent to requiring the tenant to surrender the possession. Queen *v.* Stone, Law Rep. 1 Q. B. 529.

3. And where the company had given notice to take twenty perches of land, they cannot subsequently give notice to restrict the land to one perch.[5] But the company, having issued one notice, may issue a second, requiring additional lands.[6] They * are at liberty, by new notices from time to time, to take such additional lands as the progress of the work shows will be requisite.

4. Nor will the company be deprived of the power to take land for the necessary use of the works, when the emergency arises, by having previously attempted to take it for other purposes not warranted by their act.[7]

5. And the company, having opened their main line for travel, but not completed the stations and works, are at liberty to take any lands within the limits of deviation for a branch railway.[8]

6. But it was held, that where the Commissioners of Woods and Forests gave notice of taking lands for a public park, as they were acting in a public capacity, the notice given by them did not constitute a quasi contract, enforcible by mandamus.[9]

SECTION V.

The Notice may be Waived, by the Party entering into Negotiation.

1. *Notice must be set forth in proceedings.*
2. *Agreement to waive operates as estoppel.*
3. Certiorari *denied where party has suffered no injury.*

§ 90. 1. It is a general rule, in regard to all summary and inferior jurisdictions, that the basis of their jurisdiction must appear upon the face of the proceedings.[1] Hence in proceedings to take land *in invitum*, under a notice to treat, the notice being regarded

[5] Tawney *v.* Lynn & Ely Railw. Co., 4 Railw. C. 615.

[6] Stamps *v.* Bir. Wolv. & Stour Valley Railw., 6 Railw. C. 123; s. c. 7 Hare, 251.

[7] Webb *v.* Manchester & Leeds Railw., 1 Railw. C. 576; Simpson *v.* Lancaster & Carlisle Railw., 15 Sim. 580; s. c. 4 Railw. C. 625; Williams *v.* South Wales Railw. Co., 13 Jur. 443; s. c. 3 De G. & S. 354.

[8] Sadd *v.* The Maldon, W. & Braintree Railw. Co., 6 Exch. 143; s. c. 2 Eng. L. & Eq. 410.

[9] Queen *v.* The Comm. of Woods & Forests (*Ex parte* Budge), 15 Ad. & Ellis (N. S.), 761.

[1] Rex *v.* Bagshaw, 7 T. R. 363; Rex *v.* Mayor of Liverpool, 4 Burrow, 2244; Rex *v.* Trustees of the Norwich Roads, 5 Ad. & Ellis, 563.

as essential to the jurisdiction, it has more generally been held indispensable to the jurisdiction that it should be set forth upon the proceedings.[1]

2. But where the land-owner enters into negotiation with the * company, and agrees to waive the notice, he is afterwards estopped from taking the objection, that he never received notice.[2] And it was held, that the party whose duty it was to give the notice, and who was shown by the returns to have appeared before the jury, cannot object to the inquisition upon the ground that it did not disclose a proper notice to treat.[3]

3. In another case, where application was made to the King's Bench to issue a *certiorari*, to bring up and quash an inquisition for land damages in a railway case, on the ground of some alleged defect, the court say, the granting the writ is matter of discretion, though there are fatal defects on the face of the proceedings which it is sought to bring up; and that it is almost an invariable rule to deny the writ, where it appears the party has suffered no injury or has assented to the proceedings below.[4]

SECTION VI.

Title of the Claimant must be distinctly stated.

1. *Claimant's reply to notice should be clear and accurate.*
2. *Award bad, which does not state claimant's interest.*
3. *Where lands are held by receiver or commission for a lunatic. Expression "fee-simple in possession."*

n. 3. *Analogous American cases.*

§ 91. 1. In reply to a notice to treat, the claimant may state the particulars of his claim and proceed to treat. In this case the statement should give a clear description of the claimant's interest in the land, as a defect here is liable to affect the validity of the after proceedings.

2. In one case where the claimant's answer to the notice to treat stated that, as trustees under a will, they claimed an estate in copyhold, and a certain sum as compensation for their interest in the lands, and appointed an arbitrator, and the other party

[2] Reg. *v.* The Committee for the South Holland Drainage, 8 Ad. & Ellis, 429.
[3] Reg. *v.* The Trustees of Swansea Harbor, 8 Ad. & Ellis, 439.
[4] Reg. *v.* The Manchester & Leeds Railw. Co., 8 Ad. & Ellis, 413.

appointing one, and an umpire being agreed upon, he awarded a certain sum as the value to be paid to the trustees, "for the purchase of the fee-simple, in possession, free from all *incumbrances;" the company applying to set aside the award, upon the ground that other persons claimed an interest in the lands, the court held the award bad, for not finding the interest of the claimants in the land, or that they had a fee-simple which it appraised. But the court did not set the award aside, but left the company to dispute it, when it should be attempted to be enforced.[1]

3. If the lands are in possession of a receiver, or the committee of a lunatic, a special application should be made to the Court of Chancery.[2] The claimant cannot object that the award describes the land as a fee-simple in possession, whereas, the land is in possession of a tenant. Lord *Denman*, Ch. J., in giving judgment says, "The answer is that such assumption, if really made, is in favor of the claimant, and therefore no matter of complaint for him. But it does not appear clearly that any such assumption was made. The expression 'fee-simple in possession,' in the claim, is used in contradistinction to fee-simple in reversion or remainder."[3]

[1] The North Staffordshire Railw. Co. *v.* Landor, 2 Exch. 235.

[2] *In re* Taylor and York N. Midland Railw., 1 Hall & Twells, 432; s. c. 6 Railw. Cas. 741. In this case the Lord Chancellor said, "All the world ought to be aware, that the sanction of the Lord Chancellor is necessary to be obtained in the first instance, in cases like the present."

[3] Bradshaw and the East & W. I. Docks and Birmingham J. Railw. Co., 12 Ad. & Ellis (N. S.), 562. The vendor of land to a railway company does not waive his lien for damages by accepting a certificate of deposit made by the cashier of the company for the purchase-money, the money not being paid when called for. Mims *v.* Macon & W. Railw. Co., 3 Kelley, 333. Where a company received a grant of certain salt mines, subject to a condition which they did not comply with, but retained the lands for a different purpose, and afterwards, when the period for performing the condition had expired, a general grant of all unoccupied salt lands in the state, necessary to use, for constructing a railway, was made to a railway company, who proceeded and occupied the lands above-named, it was held that the first grantors had no interest or title enabling them to maintain an action for damages. "They had the lands set apart to their use, for making salt, and had no right to enter upon and occupy them for any other purpose," are the words of the court. Parmelee *v.* Oswego & Syracuse Railw., 7 Barb. 599.

The statute of Pennsylvania gives the right to construct lateral railways over intervening lands, to the owner of lands, mills, quarries, coal, or other mines,

*SECTION VII.

The Claim of the Land-owner must correspond with the Notice.

§ 92. In one case the claim of the land-owner described more land than the notice to treat, being intersected land, less than one-half acre, which the company are bound to take if so required. But the claim did not properly designate the portion which, it was claimed, the company should take under their notice, and that which they were required to take, as intersected land. The umpire received evidence as to the value of the intersected land, and awarded one entire sum as compensation for the whole. Held that the award was bad, there being no valid submission as to intersected lands.[1]

lime-kilns, or other real estate, in the vicinity of any railway, canal, or slack-water navigation. It was held, that one who was in possession of the land, on which a coal-mine was, at the commencement of the proceeding to recover land damages, and who had erected a two-story dwelling-house upon the land, was an owner of the coal-mine, within the act. Shoenberger *v.* Mulhollan, 8 Penn. St. 134. It is sufficient in such case that the petition be signed by the lessee and agent of the owner. Harvey *v.* Lloyd, 3 Penn. St. 331.

It is considered necessary that the mortgagee of land should become a party to the proceedings for condemning or granting land to a railway, in order to give good title to the company. Stewart *v.* Raymond Railw., 7 S. & M. 568. Or that he should give his consent, in writing, in the case, to the proceeding taken by the mortgagor. Meacham *v.* Fitchburg Railw., 4 Cush. 291; s. c. 1 Am. Railw. Cas. 584. But the mortgagor may recover the full amount of damage, without regard to mortgages. Breed *v.* Eastern Railw., 5 Gray, 470.

Where the state held land for a state prison, and granted the charter of a railway, in the usual form, authorizing the company to locate their road, so that it might pass over the land of the state, so held, but without any expression in the act of a design to aid the company in their undertaking, it was held the state might recover damages for the land taken. The court say, "The inquiry relates solely to the property of the Commonwealth, which it holds in fee in its capacity as a body politic. It appears to us the question is purely one of intention."—"We think if the legislature had intended to aid the enterprise by an appropriation of money, land, or other means, — such aid being unusual, — the purpose to do so would have been in some way expressed." Commonwealth *v.* Boston & Maine Railw., 3 Cush. 25; s. c. 1 Am. Railw. Cas. 482, 496, 497.

[1] The N. Staffordshire Railw. *v.* Wood, 2 Exchcq. 244.

*CHAPTER XIII.

ENTRY UPON LANDS BEFORE COMPENSATION IS ASSESSED.

SECTION I.

Lands taken or Injuriously Affected, without having previously made Compensation to the Parties.

1. *No entry under English statutes without previous compensation, except for preliminary survey.*
2. *Legal remedies against company offending.*
3. *What acts constitute taking possession under statute.*
4. *Company may enter with land-owner's consent after agreement for arbitration.*
5. *Bond may be given in certain cases.*
6. *Company restrained from using land, until price paid even after line in operation. But this rule dissented from.*

§ 93. 1. The eighty-fourth section of the English statute, The Lands Clauses, &c., provides, that no entry shall be made upon any lands by the company until compensation shall have been made under the act, or deposited in the Bank of England, except for the purpose of preliminary surveys, and probing or boring to ascertain the nature of the soil, which may be done by giving notice, not more than fourteen days or less than three days, and making compensation for any damage thereby occasioned to the owners or occupiers of such lands.

2. It has been considered that if the company enter upon lands without complying with the requisitions of the statute, they are liable in trespass or ejectment.[1] And in some cases an injunction will be granted. But where the company entered to make preliminary surveys, without giving the requisite notice, the court refused to order the injunction, but reserved the question of costs.[2]

[1] Doe *d.* Hutchinson *v.* The Manchester, Bury, and Rosendale Railw., 14 M. & W. 687.

[2] Fooks *v.* The Wilts, Somerset, and Weymouth Railw., 5 Hare, 199; s. c. 4 Railw. C. 210. In this case the injunction was denied, chiefly upon the ground that the alleged trespass was complete before the application. The court intimate that if the company should attempt to proceed further it might be proper to restrain them by injunction. The point of the company being in the wrong, is distinctly recognized by the court.

* 3. And where the entry was regularly made upon the land, for preliminary surveys, and afterwards the contractors, without the knowledge of the corporation, but with the consent of the occupying tenants, brought some of their wagons and rails and other implements upon the land, but did not commence the works or do any damage, and this was without the assent of the owner, and his agent thereupon filed a bill to obtain an injunction against taking possession of the lands until they had complied with the statute, the Vice-Chancellor said, that although the company were bound by the acts of their contractors, the acts done were not a taking possession within the meaning of the statute, and that the bill was improperly filed.[3]

4. But where the company agreed with the land-owner that the question of compensation should be settled by arbitration, and thereupon entered upon the land, by consent of the owner, and the arbitrator made an award, which became the subject of dispute, and the owner thereupon gave the company notice to quit, and brought ejectment, it was held he could not recover, although the company had not tendered the money awarded, or a conveyance, but that the owner's remedy was to proceed upon the award.[4] The notice to quit under the circumstances did not make the company trespassers.

5. By the eighty-fifth section, if the company find it necessary to enter upon land, for the purpose of carrying forward their works, before the amount of compensation can be settled, they may deposit in the bank the amount claimed, or in other cases the appraisal, and also give the party a bond with surety, to be approved by two justices in a penal sum equal to the amount so deposited, conditioned for the payment or deposit of the amount finally fixed as the ultimate value and interest thereon, and then take possession of the land and proceed with their works. The company can obtain their money so soon as the condition of the bond has been complied with. But the vendor must join in the petition for the money to be paid the company, or else it must

[3] Standish *v.* Mayor of Liverpool, 1 Drewry, 1; s. c. 15 Eng. L. & Eq. 255.

[4] Doe *d.* Hudson *v.* The Leeds and Bradford Railw. 16 Q. B. 796; s. c. 6 Eng. L. & Eq. 283. The decision here goes chiefly upon the ground of the consent of the land-owner to the entry of the company, and to refer the compensation to an arbitrator.

* be shown that he has been served with a copy of the petition.[5] It does not invalidate the bond, if it bear date before the date of the valuation.[6]

6. Where a railway company took land for the construction of their road, without paying the price, and after completing their works leased the line to another company, it was held, upon a bill against both companies, to compel the payment of the land damages, that a decree must pass for the plaintiff for payment by the first company, and in default that both companies be restrained from using the land.[7] But where the price of lands so taken had been secured by bond, which had not been paid, it was held the company, after having constructed their road, could not be re-

[5] *Ex parte* South Wales Railw. Co., 6 Railw. C. 151. But in *ex parte* The Eastern Counties Railw. Co., 5 Railw. C. 210, the money was ordered to be paid to the company upon affidavits showing the claim settled. The land-owner has no lien upon the money deposited for costs, but the company are entitled to the money upon payment of the sum finally settled for the value of the land. The Great Northern Railw. Co. *ex parte*, 5 Railw. Cases, 269; London & South W. R. *ex parte* Stevens, 5 Railw. C. 437.

The bond must be given in the very terms of the statute. Hosking *v.* Phillips, 3 Exch. 168, opinion of *Parke*, B. And it will make no difference that the obligee is a gainer by the deviation from the statute. Poynder *v.* Great Northern Railw. Co., 16 Sim. 3; s. c. 5 Railw. C. 196.

But where the company choose to treat for the claimant's title only, it is sufficient if the bond follow the statute, so far as it applies to that particular case. Willey *v.* Southeastern Railw. Co., 1 Hall & Twells, 56; s. c. 6 Railw. Cas. 100. Opinion of Lord Chancellor, 107, 108. If the company enter by consent of the tenant, and do permanent damage to the land, the *owner* may nevertheless obtain an injunction and compel them to make a deposit and give a bond as required by the statute. Armstrong *v.* Waterford & Limerick Railw. Co., 10 Irish Eq. 60. If there is a mortgage upon land, the company must treat with the mortgagee, or provide for the expense of reinvestment for his benefit, or their entry will be regarded as unlawful. Ranken *v.* East and West India Docks & Bir. J. Railw., 12 Beavan, 298; 19 L. J. Ch. 153.

Under the general statutes, in many of the American states, where there are conflicting claims to the land required by a railway company, the company are required to make application to the Court of Chancery, and deposit the money, in bank, subject to the final order of that court. In such case it has been considered that the company had no interest in the controversy, after depositing the money for the price of the land. Haswell *v.* Vermont Central Railw., 23 Vt. 228.

[6] Stamps *v.* Birmingham, Wolverhampton, & Stour Valley Railw., 6 Railw. C. 123.

[7] Cosens *v.* Bognor Railw. Law Rep., 1 Ch. App. 594, *Turner*, L. J., dissenting. But see *ante*, § 73, n. 7.

strained by injunction from continuing to occupy the land until they paid the purchase-money.[8] And this, it seems to us, is the correct view of the matter, that the land-owner by accepting security, or even the promise of the company, for land damages, and pressing them to apply the land to the purposes of constructing their works, so essentially converted its nature, as to lose all lien upon it for the price.[9]

*SECTION II.

The proceedings requisite to enable the Company to enter upon Land.

1. *Provisional valuation under English statutes.*
2. *Irregularities in proceedings.*
3. *Penalty for irregular entry upon lands.*
4. *Entry after verdict estimating damages, but before judgment.*
5. *Mode of assessing damages provided in charter not superseded by subsequent general railway act.*

§ 94. 1. In some cases specified in the English statute, it is necessary to have a provisional valuation of land, by a surveyor appointed by two justices, to determine the amount of the security to be given before the entry of the company upon the land. Where in such cases the justices appointed a surveyor, who had all along acted for the company, to appraise the value, it was held no sufficient reason to interfere, by injunction, but the court reprobated such a practice. The court also declined to interfere, by injunction, on the ground that the sureties on the bond were the company's solicitors, and were upon similar bonds to a large amount.[1]

2. In the same case it was considered that depositing money and executing a bond to tenants in common, in their joint names, was irregular.[1] It was held that the proceedings under the 85th section of the English act, to obtain possession of the land before

[8] Pell *v.* Northampton & Banbury Railw. Law Rep. 2 Ch. App. 100. The lessee is a proper party in such case. Bishop of Winchester *v.* Midhants Railw. Law Rep. 5 Eq. 19.

[9] *Ante*, § 73, and notes.

[1] Langham *v.* Great Northern Railw., 1 De Gex & Smale, 486; s. c. 5 Railw. C. 265, 266. This case was in favor of five plaintiffs, three tenants in common, and two devisees in trust for the sale of the lands, and it was queried, whether there was not a misjoinder.

amount of compensation is settled, may be *ex parte*, and altogether without notice.[2]

3. The English statute subjects the company to a penalty for entering upon lands before taking the steps required by the * statute, but provides, that the penalty shall not attach to any company, who have *bona fide* done what they deemed to be a compliance with the statute.[3]

4. If one enter upon lands after verdict estimating damages, but before judgment on the verdict, he is liable in trespass, but only for the actual injury, and not for vindictive or exemplary damages.[4]

5. It has often been made a question in this country, where the charter of a railway provides one mode of assessing land damages, and a subsequent general railway act provides a different mode, which the company are bound to pursue. It has been held the company might still pursue the course pointed out in their charter.[5]

SECTION III.

Mode of obtaining Compensation under the Statute, for Lands taken, or injuriously affected, where no Compensation is offered.

1. *Claimant may elect arbitration or jury trial.*
2. *Method of procedure.*

§ 95. 1. Where land is taken by the company, or injuriously affected by their works, and no compensation has been offered by the company, the claimant may, where the amount exceeds

[2] Bridges *v.* The Wilts, Somerset, and Weymouth Railw., 4 Railw. C. 622. This is a decision of the Lord Chancellor affirming that of the Vice-Chancellor of England. Poynder *v.* The Great N. Railw. Co., 16 Sim. 3; s. c. 5 Railw. C. 196. In this case the bond was held to be informal, for being made to be performed "on demand," the Lord Chancellor refused a perpetual injunction, but allowed it till the bond was corrected.

[3] Hutchinson *v.* The Manchester, Bury, and Rossendale Railw. Co., 15 M. & W. 314. *Pollock*, Ch. B., thus lays down the rule of construction of this statute: "A penal enactment ought to be strictly construed, but a proviso, which has the effect of saving parties from the consequences of a penal enactment, should be liberally construed."

[4] Harvey *v.* Thomas, 10 Watts, 63.

[5] Visscher *v.* Hudson River Railw., 15 Barbour, 37; Hudson River Railw. *v.* Outwater, 3 Sandf. Sup. Ct. 689; *ante*, § 72, n. at the end.

fifty pounds, have the same assessed, either by arbitrators or a jury, at his election.

2. If he desire to have the same settled by arbitration, he shall give notice to the company of his claim, stating his interest in the land and the amount he demands, and unless the company within twenty-one days enter into a written agreement to * pay the amount claimed, the same shall be settled by arbitration, in the manner pointed out in the statute; or, if the party desire to have the same settled by a jury, he shall so state in his notice of claim, and unless the company agree to pay the sum claimed, in the manner stated above, they shall within twenty-one days issue their warrant to the sheriff to summon a jury to settle the same, in the manner pointed out in the act, and in default thereof they shall be liable to pay the amount claimed, to be recovered in the superior courts.[1]

SECTION IV.

The Onus of carrying forward Proceedings.

1. *Rests upon claimant after company have taken possession.*
2. *Miscellaneous provisions.*
3. *Proceedings cannot be had unless actual possession is taken or injury done.*

§ 96. 1. It has been held, under the English statutes, that after the company have taken possession of land, either by right or by wrong, the *onus* of taking the initiative steps to have the purchase-money or compensation assessed, lies upon the claimant.[1] It was considered in this case, that the remedy under the 68th section[2] applied to all cases where the company took possession of the land under the 85th section.[3]

2. But if questions in equity are pending, they must be dis-

[1] 8 & 9 Vict. ch. 18, § 68.

[1] Adams *v.* The London & Blackwall Railw. Co., 2 Hall & Twells, 285; s. c. 6 Railw. C. 271, 282. The opinion of the Lord Chancellor on appeal. It was also considered, in this case, that if the company failed to perform their duties in the proceedings, the more appropriate remedy was by mandamus, and not by application to the courts of equity for decree of specific performance.

[2] See *ante*, § 95.

[3] See *ante*, §§ 93, 94. Doe *d.* Armistead *v.* North Staffordshire Railw. Co., 16 Q. B. 526; s. c. 4 Eng. L. & Eq. 216.

posed of before the common-law remedy can be pursued.[4] This was a case where the determination of the matters pending in equity was necessary to enable the parties to know what was to be submitted to the assessors.[4] In proceedings under the 68th * section, it is not necessary for the company to give the claimant notice of their issuing a warrant to the sheriff to summon a jury, ten days before they issue it, as is required in proceedings under the other sections.[5] It was held, that if the claimant recover a larger sum than was offered by the company, he is entitled to recover costs under section 68, as well as under other sections.[5]

3. It is considered that the land must be actually taken, or actually injuriously affected by the company, before the claimant can take proceedings under section 68. Hence if the company give notice of their intention to take lands, but do not afterwards actually take possession or injuriously affect them, the claimant can only proceed by mandamus. It has been decided that the claimant in such case cannot make a demand of a certain sum, and then recover it, if the company do not issue their warrant to the sheriff.[6]

SECTION V.

Equity will not interfere, by Injunction, because Lands are being Injuriously Affected, without notice to treat, or previous compensation.

1. *Claimant must wait until works are completed.*
2. *Even if appearance of land will be greatly altered.*
3. *How far equity interferes where legal claim of party is denied.*
4. *Where a special mode of compensation has been agreed upon.*

§ 97. 1. It is said courts of equity will not interfere by injunction, because lands are being injuriously affected by the

[4] Southwestern Railw. Co. *v.* Coward, 5 Railw. C. 703; s. c. 1 Hall & Twells, 377, *note.*

[5] Railstone *v.* The York, Newcastle, & B. Railw. Co., 15 Ad. & Ellis (N. S.), 404. This case is somewhat questioned in Richardson *v.* Southeastern Railw., 11 C. B. 154; s. c. 6 Eng. L. & Eq. 426. But in this same case, in error, in the Exchequer Chamber, 9 Eng. L. & Eq. 464, the question as to costs is affirmed, and the court say, it is not necessary to say whether they consider the case of Railstone *v.* The York, N. & B. Railw. Co. sound or not, as it does not necessarily affect the question before the court.

[6] Burkinshaw *v.* Birmingham & Oxford Junction Railw. Co., 5 Excheq. 475.

company's works, and no notice to treat or previous compensation has been made, if it appears the company are only exercising their statutory powers. The claimant should allow the * works to be completed, and then take his remedy under the statute.[1]

2. It was objected, in one case, that the company would be likely to greatly alter the appearance of the land which they had entered upon, and that a jury could not understandingly assess the value after the damages were sustained, but the court said it was no ground for the interference of a court of equity.[2]

3. The courts in England hold, that in this class of claims it is proper to wait till the full extent of the injury is known.[3] And equity will not enjoin the party from proceeding under the statute, in a case where it is alleged that he has no legal claim under the statute,[4] as in such case the company may defend against the award, and this seems to be the course finally determined upon. But some actions at law have been brought and sustained to try the right, by order of the courts of equity.[5]

4. So, too, where the bill alleges that the party has upon consideration agreed to receive compensation in a particular mode, equity will enjoin him from taking proceedings under the statute.[6]

[1] 8 & 9 Vict. ch. 18, § 68.

[2] Langham *v.* Great Northern Railw., 1 De G. & Sm. 486; s. c. 5 Railw. C. 263. The counsel for defendant not called to answer this portion of plaintiff's argument.

[3] Hutton *v.* The London & Southw. Railw. Co., 7 Hare, 259.

[4] East & West India Docks & Bir. J. Railw. Co. *v.* Gattke, 3 Mac. & Gor. 155; s. c. 3 Eng. L. & Eq. 59; South Staffordshire Railw. Co. *v.* Hall, 1 Sim. N. S. 373; s. c. id. 105. In this last case, the opinion of Lord *Cranworth* seems to overrule that of Lord *Cottenham* in The London & N. W. Railw. Co. *v.* Smith, 1 Hall & Twells, 364; s. c. 5 Railw. C. 716. The Sutton Harbor Improvement Co. *v.* Hitchins, 15 Beav. 161; s. c. 9 Eng. L. & Eq. 41; The London & N. W. Railw. Co. *v.* Bradley, 3 Mac. & Gor. 366; s. c. 6 Railw. C. 551. See also Monchet *v.* G. W. Railw. Co., 1 Railw. C. 567. But see the case of L. & Y. Railw. *v.* Evans, 14 Beav. 529; s. c. 19 Eng. L. & Eq. 295, where the case of L. & N. W. Railw. *v.* Smith is still further questioned.

[5] Glover *v.* The North Staffordshire Railw. Co., 16 Q. B. 912; s. c. 5 Eng. L. & Eq. 335.

[6] Duke of Norfolk *v.* Tennant, 9 Hare, 745; s. c. 10 Eng. L. & Eq. 237.

*SECTION VI.

Sheriff's Jury, or Arbitrator, cannot determine the Question of Right in the Claimant, but only the amount of Damages.

1. *Later English decisions sustain this view.*
2, 3. *Statement of recent case.*
4. *In most American states assessment is final.*
5. *Plaintiff will recover damages assessed if he suffered any legal injury.*

§ 98. 1. There has been some contrariety of opinion among the English judges in regard to the right of the company, before the sheriff's jury, to raise the question of the claimant's right to recover any compensation, under the sixty-eighth section, where lands are taken or alleged to be injuriously affected by the works of the company; and whether the jury can go into any inquiry beyond that of the value of the claimant's interest in the land. The latest decisions upon this point hold, that the jury is confined to the question of the amount of compensation.[1]

2. In the very latest English case upon this subject,[2] the judges of the Court of Queen's Bench differed in opinion, and delivered opinions *seriatim*. *Coleridge*, J., and Lord *Campbell*, Ch. J., and *Wightman*, J., holding, that the jury had nothing before them but the *quantum* of damages, and that whether the company declined to issue their warrant to the sheriff, or did issue it in both cases, the right to recover any damage on account of a claim for the injuriously affecting of land, was to be tried upon the action, to recover the amount assessed, in the courts. The proceedings under the statute were held, by the majority of the court, to be merely for the purpose of fixing the amount of the claim. If, indeed, the company stood still upon the question of right, they were liable, in the event of the claimant's recovery, for the full amount of the claim made; but if they proceeded to a hearing before the arbitrator or a jury,

[1] Regina v. Metropolitan Comm. of Sewers, 1 El. & Bl. 694; s. c. 18 Eng. L. & Eq. 213.

[2] Regina v. The London & Northwestern Railw. Co., 3 El. & Bl. 443; s. c. 25 Eng. L. & Eq. 37. And the same rule is extended to the finding of arbitrators that premises were injuriously affected by the narrowing of a way of approach, by means of the company's embankment; the award is not conclusive upon the point of the injurious effect. Beckett v. Midland Railw. L. R. 1 C. P. 241.

whichever course the claimant should elect, they might not only contest the amount there, but the right of any recovery in the action which the claimant was compelled to bring, to obtain * execution against the company, but that it was improper to go into any inquiry before the arbitrator or the jury, in regard to the right to recover any thing, inasmuch as this tended improperly to embarrass the mind of the triers in regard to the damages. And in this case, where the jury went into the question of right, and determined the claimant had no right, but added, if he had such right his claim should be valued at £150, the majority of the court determined that the former part of the verdict could not be rejected, and let the verdict stand as a good finding of the sum named, which last point seems rather too refined for common apprehension, even after reading attentively the elaborate opinion of the majority of the court by *Coleridge*, J.

3. Mr. Justice *Erle* dissented from the principal decision of the court, and held the verdict good in all respects. But this case must be regarded as settling the question of the right of the jury to pass upon the claim beyond its mere amount, at least under the English statutes.

4. In most of the American states the assessment of land damages, by whatever tribunal, becomes final, unless appealed from, and execution issues without resort to a future action, or, if an action is necessary upon awards of arbitrators, this will not justify a re-examination of the case, either upon the question of title or amount of damages. But in some of the states, the proceedings are similar to those above named in the English courts.[3]

5. And under the English statutes, where the claim is for injuriously affecting land, the plaintiff must recover the entire amount of damages assessed to him for land taken by a railway, unless the defendant's pleas show that he had no right to recover[4] to any extent.

[3] *Ante*, § 72.

[4] Mortimer *v.* South Wales Railw. Co., 5 Jur. N. S. 784; s. c. 1 Ellis & Ellis, 375.

*SECTION VII.

The extent of Compensation to Land-owners, and other Incidents by the English Statutes.

1. *Liberal compensation allowed.*
2. *Decisions under English statutes.*
3. *Limit of period for estimating damages.*
4. *Whether claim for damages passes to the devisee or executor.*
5. *Vendor generally entitled to damages accruing during his time.*

§ 99. 1. In one of the early cases[1] upon this subject, Lord *Denman*, Ch. J. said, we think it not unfit to premise, "that where such large powers are intrusted to a company to carry their works through so great an extent of country, without the consent of the owners and occupiers of land through which they are to pass, it is reasonable and just that any injury to property, which can be shown to arise from the prosecution of those works, should be fairly compensated to the party sustaining it." But this must be received under some limitations. For it is supposable, that possible remote injuries may accrue to property, of a general and public character, which it was never intended to compensate.

2. Some points arising under the English statute may be here referred to. It was held, that where the powers conferred upon a canal company were unlimited as to time, no limitation as to their exercise could be assigned, so as to require their exercise within a reasonable time,[2] and, consequently that the works might be resumed at any period.[2] Future damages to accrue to land-owners cannot be estimated properly[3] until after the completion of the works.[3] The compensation when given, fixes *the rights of the parties, upon the basis of its estimation, as, if the estimation is had upon the footing of an entire severance of the land, the land-owner has no right to cross the track.[4] And where this did not

[1] Reg. *v.* Eastern Counties Railw., 2 Ad. & Ellis (Q. B), 347.

[2] Thicknesse *v.* The Lancaster Canal Co., 4 M. & W. 472. Lord *Abinger*, Ch. B. intimates an opinion here, that possibly, after a long delay of the company to proceed with their works, and the erection of fences and buildings, by the land-owners, in faith of the abandonment of the works by the company, a court of equity might restrain the company from completing their enterprise, notwithstanding the grant of power to do so, by parliament; but a court of law could do no such thing. pp. 490, 491.

[3] Lee *v.* Milner, 2 M. & W. 824.

[4] Manning *v.* The Eastern Counties Railw., 12 M. & W. 237. But unless it

sufficiently appear, by the record of the verdict, that not having been made, held that parol evidence might be given of the finding, and of the grounds upon which it proceeded.[4]

3. Where consequential damages to existing works, by the erection of new ones, are required to be compensated, the period for estimation is limited to the yearly value of the works, antecedent to the passing of the act.[5]

4. The devisee is entitled to claim consequential damages and not the executor.[6] But where one contracted to sell freehold estates and died before the money was paid; under the London Bridge Improvement Act, it was held the money should go to the executor.[7] But the cases are not uniform upon this subject, and the usual course seems to be, that the money for consequential damage goes to the party interested in the inheritance, or else is divided according to the interest of the several estates.[8] In one case it was held, that the vendee was entitled to compensation, which accrued during the time of the vendor's title, but not liquidated till after the conveyance.[9]

5. But in general the vendor is entitled to land damages accruing during his time, although not collected, and often where the works are not completed till after the conveyance.[10] The presumption is, if the jury assess compensation to one person, that it is only for his interest in the premises.[11]

appeared by the record upon what basis the assessment was made, it seems questionable, whether, upon general principles, oral evidence is admissible to show that basis. *Ante*, § 74, n. 7.

[5] Manning *v.* The Commissioner under the W. I. Dock Act, 9 East, 165.

[6] The King *v.* The Comm. under London Dock Acts, 12 East, 477.

[7] *Ex parte* Hawkins, 3 Railw. C. 505, and note. No other party seems to have had a counter interest in this case.

[8] The Midland Counties Railw. Co. *v.* Oswin, 1 Coll. C. C. 74, 80; s. c. 3 Railw. C. 497; Danforth *v.* Smith, 23 Vt. 247.

[9] King *v.* Witham Nav. Co., 3 B. & Ald. 454.

[10] Rand *v.* Townshend, 26 Vt. 670.

[11] Rex *v.* Nottingham Old Waterworks, 6 Ad. & Ellis. 355.

*SECTION VIII.

Right to temporary use of Land to enable the Company to make Erections upon other Lands.

1. *Right to pass another railway by a bridge gives temporary use of their land, but no right to build abutments upon it.*
2. *Right to construct a bridge across a canal gives right of building a temporary bridge.*
3. *And if thus erected* bonâ fide *may be used for other purposes.*

§ 100. 1. Where one railway act gives the company power to pass another railway, by means of a bridge, provided the width between the abutments of the bridge is not less than twenty-six feet, and at the points where the bridge is to be built, the land of the second company is forty-seven feet wide, the first company have no right to build the abutments of their bridge upon the land of the second company, but having purchased adjoining land for that purpose, they have a right at law to the temporary use of the land of the second company, for the purpose of building, and this right was in effect secured to the first company by an injunction out of chancery.[1]

2. So, too, where a railway company had permission to carry their road over a canal, by means of a bridge of a given description, it was held that they might, as incident to the right of erecting the bridge, make a temporary bridge over the canal, supported partly on piles driven into the bed of the canal, to enable them to transport earth across the canal to build the necessary embankment, in the construction of the permanent bridge.[2]

3. And such a temporary bridge having been erected for the *bona fide* purpose of building the permanent bridge, might also be used for other purposes, for which alone it could not have been erected.[3]

[1] Great North of England, Clarence & Hartlepool Junction Railw. *v.* The Clarence Railw., 1 Collyer, 507.

[2] London & Birmingham Railw. *v.* Grand Junction Canal Co., 1 Railw. Cas. 224.

[3] Priestley *v.* The Manchester & Leeds Railw., 4 Yo. & Col., Ex., 63; s. c. 2 Railw. C. 134.

*SECTION IX.

Reservations to Land-owners to build private Railway across public Railway.

§ 101. Where the special act of a railway company provided, that nothing in the act contained shall prevent any owner or occupier of any ground through which the railway may pass from carrying, at his or their own expense, any railway, or other road, any cut, or canal which he or they may lawfully make in their own land, across the said main railway, within the lands of such owner or occupier, it was held, that this provision was not confined to the owners or occupiers of such land, at the time, but was intended to apply to all future time, so long as such principal railway shall continue, and extended to all persons owning or occupying lands adjoining the railway, upon opposite sides, whenever the title was acquired, even where they purchased the land upon opposite sides at different times.[1]

SECTION X.

Disposition of Superfluous Lands.

1. *Vest in adjoining owner unless disposed of in ten years.*
2. *Former owner not excluded; effect of cottage in field.*

§ 101 *a*. 1. By the English statute railways are required, where they have acquired more lands under their powers than are required for their purposes, to sell the same within ten years from the passing of the act, and that superfluous lands, then remaining unsold, should vest in the owners of adjoining lands, in proportion to the amount of their lands respectively adjoining the same. That time was by a subsequent act extended five years more. It has been held that the act embraced lands, the reversion of which had been bought by the company; and also that the superfluous land was to be divided among the owners of the adjoining property,

[1] Monkland & Kir. Railw. *v.* Dixon, 1 Bell Ap. Cas. 347; s. c. 3 Railw. C. 273. The Court here (H. of L.) denied an interdict against such owner or occupier prolonging his railway for the benefit of any persons with whom he might make an agreement for that purpose.

in proportion to the frontage of each, meaning by that the length of the line of contact, without reference to the extent of the land in other directions, and that the later act did not defeat titles already vested under the former act.[1]

2. It has also been held that the former owner of the lands, from which they were severed, is entitled to share in the same under the statute, and that the fact that a cottage stands in the field, part of such superfluous lands, will not bring them within the exception of lands built on or used for building purposes.[2]

[1] Moody *v.* Corbett, Law Rep. 1 Q. B. 510.

[2] Carington *v.* Wycomb Railw. Law Rep. 2 Eq. 825.

*CHAPTER XIV.

THE MODE OF ASSESSING COMPENSATION UNDER THE ENGLISH STATUTES.

SECTION I.

By Justices of the Peace.

1. *Where compensation claimed does not exceed £50.*
2. *Mode of enforcing award.*
3. *Value of land and injury accruing from severance to be considered.*

§ 102. 1. By the English statute, where the compensation claimed shall not exceed £50, the same is to be settled by two justices. So, also, as to damages claimed for lands injuriously affected. So, too, if the company enter upon any private road or way. And justices may fix the compensation, in certain cases, for the temporary use of land; and the compensation to tenants for a year, or from year to year. They may apportion the rent, too, where the whole land is not taken. In some of these cases their jurisdiction extends beyond £50.

2. The mode of enforcing payment of money awarded by such justices, is to obtain an order, which may be enforced by distress, upon the goods and chattels of the party liable. The *certiorari* is taken away in such cases, but an order of such justices may still be brought up, to be quashed, for want of jurisdiction.[1]

3. The justices are to take into consideration the value of the land, and any injury which may accrue from severance.

*SECTION II.

By Surveyors.

§ 103. The assessment of compensation by surveyors, under the English statutes, is merely provisional in most cases, as where the party is out of the kingdom, or cannot be found, two justices

[1] See the subject discussed *post*, §§ 202, 203.

are required to nominate an able practical surveyor, who is, under certain solemnities, required to make a valuation of the land taken or injuriously affected, the amount of which the company are required to deposit in the bank, before proceeding with the works. And if such party be dissatisfied with the sum thus deposited, he may, before applying to Chancery for the money, require the question to be submitted to arbitration, as in other cases of disputed compensation. Surveyors are required to assess damages for severance of land, the same as justices of the peace.[1]

SECTION III.

By Arbitration.

1. *May be claimed in cases exceeding jurisdiction of justices of the peace.*
2. *How made compulsory.*
3. *What form of notice is sufficient.*

n. 5. *Analogous American cases.*

4. *Arbitrator's power limited to award of pecuniary compensation.*
5. *Where land-owner gives no notice, company may treat it as case of disputed compensation.*
6. *Similar rule under Massachusetts statute regarding alteration of highways.*
7. *And land-owners may recover without waiting for selectmen to act.*
8. *Company estopped in such case from denying that road was constructed by their servants. Embankments part of the railway.*
9. *Finality of award.*
10. *May employ experts. Damages embraced.*
11. *Construction of general award.*

§ 104. 1. By the English statutes, if the amount of compensation claimed exceed the jurisdiction of two justices, any party claiming compensation may compel an arbitration, by taking * the requisite steps in due time. Unless both parties concur in the same arbitrator, each party, upon the request of the other, is required to name one. The appointment of the arbitrator is to be under the hand of the party, and delivered to the arbitrator, and is to be deemed a submission by such party. Such submission is irrevocable, even by the death of the party.

2. If either party neglect, for fourteen days, after request by the other party to name an arbitrator, one may be named by the other party, who shall decide the controversy. If either party name an arbitrator who is incompetent, the other party must retire from the arbitration, or he will be bound by his ac-

[1] Hodges on Railways, 250, 251, 252.

quiescence.[1] The secretary of a railway company, by the English statutes, would seem to have power to bind the company, by signing the submission, whether the arbitration is compulsory or not.[2]

3. It was held that the appointment of an arbitrator or referee implied the notification of such appointment to the other party within the time limited in the submission, or the doings of such referee were void.[3] And not only so, but the notice must be explicit. It is not sufficient to say, "Take notice, that it is *my intention* to nominate S. M.," notwithstanding it was added, "if the company fail to appoint, I the said T. B. will appoint S. M. to act on behalf of both parties."[4] And in this case it is said, it would seem that the appointment by the claimant of an arbitrator to act for both parties, is not valid, unless he has previously appointed an arbitrator, on his part, and notified such appointment to the company. There should be two separate appointments, although it may be of the same person, it is here suggested.[5]

*4. The arbitrator has no power beyond the awarding of a pecuniary compensation for the land taken by the company, and cannot direct what right of way shall remain in the tenant to the portion of land not taken.[6] Nor can he apportion the rent to the tenant.[6]

5. If the land-owner gives no notice of claim, in reply to the notice to treat, the company may treat it as a case of disputed compensation.[7] If the compensation claimed be less than 50*l.*, it may be settled by two justices. But if more than 50*l.* be claimed, or offered, and the claimant desire to have it settled by arbitra-

[1] *In re* Eliott, 2 De G. & Sm. 17.

[2] Collins *v.* South Staffordshire Railw. Co., 7 Exch. 5; s. c. 21 Law J. (Ex.), 247; s. c. 12 Eng. L. & Eq. 565.

[3] Tew *v.* Harris, 11 Q. B. 7.

[4] Bradley *v.* London & N. W. Railw. Co., 5 Exch. 769.

[5] But where both parties petition for a jury to revise the damages, one warrant is sufficient. Davidson *v.* Boston & Maine Railw., 3 Cush. 91. And if two warrants are issued, the sheriff should execute, and return them as one. Ib. And where there are several applications, which by statute are to be determined by one jury, the proper mode is to issue but one warrant to the sheriff, but if several warrants issue irregularly, yet if the officer summon a single jury, who hear and determine each case, their verdicts will not be set aside for such irregularity. Wyman *v.* Lexington & West Cambridge Railw., 13 Met. 316.

[6] Ware *v.* Regent's Canal Co., 9 Exch. 395; s. c. 25 Eng. L. & Eq. 444.

[7] 8 & 9 Vict. ch. 18, §§ 21, 22, 23, 38.

tion, it is at his option, and he must give notice of such desire before the company issue their warrant to the sheriff to summon a jury to assess the compensation, which they may do in ten days after giving the claimant notice that they shall do so, unless in the mean time he elect to have the matter settled by arbitration.[7]

6. And under the Massachusetts statute, giving railways the right to alter highways, upon giving notice to the selectmen of the towns where such highways are situated, and conforming to their requirements, or the decision of the county commissioners, in regard to the alteration of the highway, it was held, that if the selectmen give no notice to the company, as to what alterations they require, the presumption is, that they require none, but leave the whole matter to the company.

7. And to entitle adjoining land-owners to recover damages of the railway under the statute of Massachusetts, it is not necessary that the selectmen should have acted in the premises. The remedy in such case is not by an action against the town, but by proceedings under the statute against the company.[8]

8. In such case the company are estopped to deny, that the construction of their road, as in fact made, was done by their servants in compliance with the requirement of the charter.[8] And embankments made by them for the purpose of carrying * a highway over the railway, are to be regarded as a part of the railway.[8]

9. By a submission to arbitration it was provided that the arbitrator should determine what sum should be paid for the purchase of land, and what "other, if any, sum for severance damage, and the arbitrator after reciting" the submission, and that he had considered the matters so referred to him, awarded a certain sum to be paid for the purchase of the land, without saying any thing about severance-damage: it was held that the award was final and good, that the arbitrator by his silence negatived any right to compensation on account of severance-damage.[9]

10. A submission to arbitration under the English statute for assessing land damages is not revoked by the death of the land-owner.[10] It was here considered that the award was valid although

[8] Parker *v.* Boston & Maine Railw., 3 Cush. 107.

[9] *In re* Swansea Harbor Trustees, 6 Jur. N. S. 979; s. c. *nom.* Beaufort *v.* Swansea Harbor Trustees, 8 C. B. N. S. 146.

[10] Caledonia Railw. Co. *v.* Lockhart, 3 McQu. Ho. Lds. 808; s. c. 6 Jur. N. S. 1311, in the House of Lords.

not made within the statute period of three months; that the arbitrator may employ an expert and consult men of science, if necessary; that the right to compensation extends to any land injured by the severance of that which was taken, or by the works which the company is authorized to construct, and may include damages likely to be caused to the tenants of the land-owner. The right to compensation depends on cause and effect, and not on "proximity or distance."

11. The award of a gross sum for damages for drainage which lessened a waterpower upon which a mill had been erected, was held presumptively to apply to the damage to the mill, and not to the unemployed waterpower, which might be available for the proprietor of the other side of the river.[11]

[11] St. George *v.* Reddington, 10 Ir. Ch. 176.

*CHAPTER XV.

CONSTRUCTION OF RAILWAYS.

SECTION I.

Line of Railway. — Right of Deviation.

1. *Manner of defining the route in English charters.*
2. *Question involved stated.*
3. *Plans only binding, when and for the purpose referred to in the act.*
4. *Contractor bound by deviation, unless he object.*
5. *Courts of equity will not enforce contract against public security.*
6. *Right to construct accessory works.*
7, 8. *Company may take lands designated, in their discretion.*
9. *Equity cannot enforce contract not incorporated into the act.*
10. *Right of deviation lost by election.*
11. *Railway between two towns, extent of grant.*
12. *Grant of land for railway includes accessories.*
13. *Route designated need not be followed literally.*
14. *Terminus being a town, is not extended, as the town extends.*
15. *Party accepting compensation waives informality.*
16. *Powers limited in time expire with limitation.*
17. *Construction of charter as to extent of route.*
18. *Map may be made to yield to other grounds of construction.*
19. *Power to change location must be exercised before construction.*
20. *Binding force of plans made part of charter.*
21. *Grant terminating at town liberally construed.*

§ 105. 1. The English railway acts are granted altogether, after full surveys of the route and with reference to definite plans of the engineers, which, when referred to generally in the act, thus become so far a part of it as to be binding upon the company to the extent of determining the datum line, and the line of railway measured with reference to that datum line; and the level of the railway, with reference to the datum line; but not the surface levels, unless expressly so provided in the act.[1]

[1] North British Railw. *v.* Tod, 5 Bell Ap. Cas. 184; s. c. 4 Railw. C. 449. This was an appeal from the judgment of the Court of Sessions in Scotland. The opinions of Lord *Lyndhurst*, Chancellor, and of Lord *Campbell*, Ch. J., certainly exhibit the rule of the English law upon this subject very fully and very ably. Lord *Lyndhurst* says: "Now as to the effect of plans exhibited previous to the contract being made, or previous to the act of parliament being obtained,

*2. The question in this last case [1] was in regard to the right to intersect an approach, leading to a mansion-house, at a *dif-

it does seem, from cases which have occurred, both in Scotland and this country, that the rule of the courts in this country, and in the other, is no longer a matter of any doubt or dispute. If a contract or an act of parliament refer to a plan, to the extent that the act refers to the plan, and for the purpose for which the act or contract refers to the plan, undoubtedly it is part of the contract or part of the act. As to that there is no dispute. A contract, or an act of parliament, either does not refer to a plan at all, or it refers to it for particular purposes. It has been contended, both in Scotland and in England, that the defendant in the suit, or those who claim the benefit of the provisions of an act of parliament, previous to this enactment being made, or the contract being concluded, have represented that the works are to be carried on in a particular mode, upon a plan shown previous to the powers being obtained under the act, or the contract being concluded, and that the party obtaining the act, or obtaining the contract, is bound by such representation. There was a case very much considered in Scotland, the case of The Feoffees of Heriot's Hospital *v.* Gibson, 2 Dowl. 301; and several cases have occurred in the courts of equity in this country. It was my fortune to have to consider the matter very minutely in the case of Squire *v.* Campbell, 1 My. & Cr. 459, in which I thought it my duty to review all the cases that had occurred in the one country and in the other, for the purpose, if possible, of establishing a rule which might be a guide on future occasions when similar cases should occur; and I found that, certainly, what had been very much the opinion of the profession in this country, namely, that the parties were bound by the exhibition of such plans, had met with a very wholesome correction by the doctrine laid down by Lord *Eldon*, and Lord *Redesdale*, in the case of Heriot's Hospital, decided by this House. Under the authority of that case, in which the point was very distinctly raised, and deliberately decided upon, I came to the conclusion that there was no ground for equitable interposition. Now, my Lords, not relying upon the authority of Squire *v.* Campbell, but relying, as we are bound to do, upon the case of The Feoffees of Heriot's Hospital, I consider that to be the rule to which the courts of this country, and the Court of Sessions in Scotland, and this House, must hereafter adhere. Taking that, then, to be the rule in examining the facts of this case, and the act of parliament upon which the question turns, we are not to look at what was represented upon the plan, except so far as its representation is incorporated in, and made part of, the act of parliament; and the real question, therefore, turns upon this, whether the acts of parliament do or do not make the datum line, and line of railway with reference to that datum line, the subject-matter of these enactments, and the rule by which the rights of the parties are to be regulated, or whether it also includes the surfaces which, in this instance, accidentally, no doubt, had been very much misrepresented upon the plan.

"I say, then, that a case does arise upon these provisions of the act, in which the plan indeed is referred to, but is, in the terms of the act of parliament, referred to only for the purpose of ascertaining the line of the railway, with reference to the datum line. It is not referred to with reference to any surface level. The plan, therefore, is entirely out of the enactment, and is not to be looked at

ferent level from that laid down in the parliamentary plans, in which it appeared as a cutting of fifteen feet, and the way raised

for the purpose of construing the enactment as to any part of it, except so far as it is referred to and incorporated in the act. Arriving at that construction of the rule upon the provisions of the two acts to which I have referred, and applying it to the principle which has been established in the cases I have mentioned, we have no difficulty in coming to the conclusion, that the application of that principle will necessarily lead to the construction of the clauses to which I have referred. The plan is binding, to the extent of determining the datum line, and the line of railway measured with reference to that datum line, but not with reference to the surface levels of the land, because the act does not apply it for that purpose, but cautiously confines the enactment to the other plans to which I have referred.

"Acting, therefore, upon the principle so established, and with reference to the construction, or what I conceive to be the construction, to be put upon these sections, although we cannot but greatly lament the hardships which, in all probability, these circumstances have imposed upon the respondent, in having his land interfered with in a manner which he did not at all anticipate; yet, when we are called upon to consider whether the Court of Sessions is correct or not, we are bound to look to see what are the powers which these acts vest in the company; and for the reason I have explained, I come to the conclusion that the company have not exceeded those powers, and do not propose to exceed those powers, in the plans that they have formed, and that the Court of Sessions has been in error in granting the interdict."

Lord *Campbell*. — "I acknowledge that I come to the conclusion at which I have arrived with very great reluctance. It seems to me to be a case of very great hardship upon the respondent. But when we come to consider what the law upon the subject is, I feel bound to concur in the opinion which has been expressed. What is the legal construction of the act of parliament? Does the company, or does it not, propose to exceed the powers which the acts of parliament confer upon it? Now it is admitted, that if the deviation is to be calculated from the datum line alone, they (the company) do not propose, either vertically or laterally, to exceed the powers of deviation which are conferred upon them. Well, then, that raises the question whether those powers of deviation are to be calculated from the datum line alone, or whether the surface-level is to be taken into consideration, and my opinion is, that the act does refer every thing to the datum line. I think it is evident that the 11th section clearly makes the datum line alone that which is to be regarded. The word 'levels,' in the plural number, really does not at all include the surface-levels. It means merely the levels of the datum line, which point out the course the railway is to go. If that be so, the company do not propose to do any thing that they are not authorized to do, according to the letter of the act of parliament.

"There certainly was a representation made here on the part of the company, when they proposed to bring in the act, by which they intimated that, at that time, the intention was that the railway should be fifteen feet four inches below the surface of the respondent's property at the point of intersection; and that the bridge by which his approach should pass over the railway, would not be

* upon a bridge two feet. The owner of the house, it seems, had opposed the railway being carried through his avenue, but, relying upon the representations contained in the plan and sections, was induced to abstain from opposing the bill. The line of deviation is marked upon the plan, and is by the act limited to ten yards in passing through villages, and one hundred yards in the open country.

3. In this case it was decided, that the plans were only binding upon the company to the extent to which they were referred to in the act, and that it made no difference that the deposited plans were so incorrect as altogether to mislead the owner of the * lands, in reference to the manner in which his property would be affected by the railway works. The plans not being referred to in the act, or only referred to, as in the present case, to determine

more than three feet. But this was entirely an intimation, on the part of the company, that such was their intention. An act of parliament of this sort has, by Lord *Eldon* and all other judges who have considered the subject, been considered as a contract. Well, then, what took place was a negotiation; it was not a contract. We must disregard it, and we must look to see what the contract was. The contract is to be gathered from the words of the act of parliament; and that brings us to the question that I first considered, what is the construction of the act of parliament? That act of parliament must be considered as overruling and doing away with every thing that had taken place prior to the time when the act passed, and renders the representation or proposal of the company, pending the act, of no avail. Many cases have occurred in the courts of common law in which it has been held, that every thing that takes place before a written contract is signed is entirely to be disregarded in construing the contract. Now, if the respondent had been cautious, he would have done what I would strongly recommend to all gentlemen hereafter to do, under similar circumstances, which is, to have a special clause introduced into the act of parliament to protect their rights."

See also Beardmer *v.* The London & N. Western Railw., 1 Hall & Twells, 161; s. c. 5 Railw. C. 728. The same rule obtains in this country. Boston & Prov. Railw. *v.* Midland Railw., 1 Gray, 340; Commonwealth *v.* Fitchburg Railw. 8 Cush. 240. It seems that the deviation of five feet, which, by the 11th section of the Railway Clauses Act of 1845, is allowed in regard to levels, is to be reckoned with reference to the level of the datum line, and not with reference to the surface-levels delineated on the plans. And any greater deviation in regard to levels, which may be obtained, under certain conditions, in certain emergencies, is subject to the discretion of the Railway Commissioners; and at the suit of land-owners, affected by such deviation, beyond the limits allowed by the act, the Court of Chancery will restrain the company from proceeding until they obtain the judgment of such commissioners. Pearce *v.* Wycombe Railw., 1 Drew. 244; s. c. 19 Eng. L. & Eq. 122.

the datum line with reference to lateral deviation, could not control beyond the matter of lateral deviation.

4. This subject is incidentally connected with the performance of construction contracts. But it has been held, where the company deviate from the intended line of the road, even beyond what was permitted by their act, with the consent of the land-owner, and the contractor never objected to the deviation, but continued to receive certificates of estimates, and payments, in precisely the same mode in which he would have received them had the deviation not taken place, that it did not affect his liability upon the contract.[2]

5. A reference, in the special act, to the deposited plans, for one purpose, does not make them binding for all purposes.[3] So too, where, by the general acts, a railway company has power to pass highways and other roads, by bridges, or excavation, in their discretion, but their special act gives them power to pass them on a level, this will not compel them to do so; they may still exercise the power conferred by the general acts. And a special agreement with land-owners, that they will pass such roads on a level, being a contract in derogation of public right, inasmuch as the public security is greatly jeoparded thereby, will not be specifically enforced in a court of equity.[4]

6. The extent of deviation is to be measured from the line delineated upon the plans to the actual medium filum of the railway as constructed, and the fact of the embankments extending beyond that distance is no violation of the right of deviation *allowed in the act.[5] Where a tunnel is marked upon the plans referred to in the act, it must be made in the exact position in-

[2] Ranger *v.* The Great Western Railw., 5 Ho. Lds. 72; s. c. 27 Eng. L. & Eq. 35.

[3] Reg. *v.* Caledonia Railw., 16 Q. B. 19; s. c. 3 Eng. L. & Eq. 285. Where there is a power given for deviation in the construction, which would render some portion of the delineated surveys impracticable, it must be taken, as of necessity, that the legislature intended the omission of such particulars as became impracticable in a given contingency allowed by the act.

[4] Braynton *v.* The London & North W. Railw., 4 Railw. C. 553. But the Lord Chancellor, upon appeal, considered that the agreement only extended to the land to be purchased, and that it contained nothing intended to limit the powers given to the company by the general acts.

[5] Doe *d.* Payne *v.* The Bristol & Exeter Railw., 2 Railw. C. 75; s. c. 6 M. & W. 320; Doe *d.* Armistead *v.* The North Staffordshire Railw., 16 Q. B. 526; s. c. 4 Eng. L. & Eq. 216.

dicated, and the general right of deviation does not apply.[6] But the company may take lands within the line of deviation for a branch railway.[7] Under an act allowing land to be "taken when necessary for making and maintaining the said railway and works," it was held that the company might take lands for forming or enlarging stations, or places for carriages to collect and wait till trains are ready to start; and the Lord Chancellor said, in one case,[8] "The term railway, by itself, includes all works authorized to be constructed; and for the purpose of constructing the railway, the company are authorized to construct such stations and other works as they may think proper."

7. And it would seem that, where lands are designated by numbers on the plans, although not altogether within the line of deviation, they may be taken by the company when necessary for stations.[9]

And it has recently been decided in the House of Lords, that where the legislature authorized a railway company to take, for the purpose of their undertaking, any lands specially described in the act, it constitutes them the judges as to whether they will or will not take those lands, provided they take them *bona fide*, with the object of using them for the purposes authorized by the legislature, and not for any sinister or collateral purpose.[10] And * after referring the question, as to the propriety or right to take the land, to an engineer, who decided against the company and in favor of the land-owner, the court ultimately held that neither the opinion of the engineer nor of the court could curtail the power of the company in respect to the quantity of land which

[6] Little *v.* The Newport, Ab. & Hereford Railw., 12 C. B. 752; s. c. 14 Eng. L. & Eq. 309.

[7] Sadd *v.* The Maldon, Witham & B. Railw., 6 Exch. 143.

[8] Cother *v.* Midland Railw., 2 Phillips, 469.

[9] Crawford *v.* Chester & Holyhead Railw., 11 Jur. 917; 1 Shelford, Bennet's ed. 617. But the deviation is not authorized for the purpose of taking materials alone. Bentinck *v.* Norfolk Estuary, 32 Law Times, 29.

[10] Stockton & Darlington Railw. Co. *v.* Brown, 9 Ho. Lds. 246; s. c. 6 Jur. N. S. 1168. But a railway cannot take the fee of land for the purpose of supplying soil to build an embankment. Eversfield *v.* Midsussex Railw., 1 Gif. 153; s. c. affirmed, 5 Jur. N. S. 776; s. c. 3 De G. & J. 286. Nor can land be taken within the range of the powers conceded by the act, except for the exclusive purpose of the works named in the act, and if any subsidiary object is embraced in the purpose of taking, as to give a more convenient road for an ordinary land-owner, who was to pay part of the expense, the company will be restrained by injunction. Dodd *v.* Salisbury & Yeoville Railw. Co., 1 Giff. 158; 5 Jur. N. S. 782.

the company, *bona fide* acting under its statutory powers, sought to obtain.

8. And where, by a special act, a company were empowered to erect a market house on land described in the deposited plans, it was held, that as the land of the plaintiff was described in the plans, and as therefore it might be wanted, the company were authorized to take it, and that the company were to be regarded as the proper judges of what lands were necessary for the works.[11]

9. The trustees of a turnpike-road agreed to assent to a bill in parliament for the formation of a railway, on the condition that the railway should pass over the road at a sufficient elevation, and the road be not lowered, or otherwise prejudiced. It was held that this modified assent, not being embodied into any agreement between the trustees and company, or incorporated into the act, afforded no equitable ground for restraining the company from the exercise of all their powers under their act; that the company were authorized to sink the original surface of a turnpike-road to gain the requisite elevation for the arch of a bridge to carry the railway over the road, notwithstanding the effect might be to render the road liable to be occasionally flooded.[12] Any omission, misstatement, or erroneous description in the parliamentary plans referred to in the act, may be corrected on application to two justices, in the mode prescribed in the act.[13]

10. By statute, in some of the states, a railway company who file the location of their road in the requisite office, are allowed to deviate, to any extent consistent with their charter, in the course of construction.[14] But it has been held, that after once

[11] Richards *v.* The Scarborough Public Market Co., 23 Eng. L. & Eq. 343.

[12] Aldred *v.* The North Midland Railw., 1 Railw. C. 404.

[13] Taylor *v.* Clemson, 2 Q. B. 978; s. c. 3 Railw. C. 65, shows the mode of procedure in such cases.

[14] The Boston & Providence Railw. *v.* The Midland Railw., 1 Gray, 340. The charter gave the company power to construct their road in five-miles sections, but not to begin the work within a prescribed distance of one terminus, or until all of its stock was taken by responsible persons, and one hundred and forty thousand dollars paid into the treasury; it was held, that this restriction, in regard to the subscription and payment of stock, did not fix a limitation upon the company in regard to building their whole road not in sections.

The courts, in interpreting an act of incorporation, will not examine what took place while it was passing through the legislature. Bank of Pennsylvania *v.* The Commonwealth, 19 Penn. St. 144. And in Commonwealth *v.* Fitchburg

* locating their road, their power to re-locate, and for that purpose to occupy the land of another or the public street, ceases.[15]

11. It has been held, that a grant to a railway company to construct their road between two towns, gave them implied authority to construct a branch to communicate with a depot and turn-table, on a street in one of the towns (New Orleans) off the direct line.[16]

12. The grant to take land implies power to take buildings.[17] And a grant to take land for the company's road implies the right to take land for all the necessary works of the company, * such as depots, car and engine houses, tanks, repairing shops, houses for switch and bridge tenders, and coal and wood yards, but not for the erection of houses for servants, car and engine factories, coal-mines, &c.[18]

13. And a charter allowing the company to extend their line to

Railw. 8 Cush. 240, it was held, that the petitions to the legislature upon which the act was granted were inadmissible upon the question of the construction of the act, in regard to the course and direction of the line of the road.

[15] Little Miami Railw. *v.* Naylor, 2 Ohio N. S. 235. And an authority to change the location of the line, during the work, does not imply power to change it after the road is complete. Moorhead *v.* Little Miami Railw., 17 Ohio, 340. The same view is maintained by Lord *Eldon*, Chancellor, in Blakemore *v.* Glamorganshire Canal Co., 1 My. & K. 154. But a different rule seems to be intimated in South Carolina Railw. *ex parte*, 2 Rich. 434. But see Canal Co. *v.* Blakemore, 1 Cl. & Fin. 262; State *v.* Norwalk & Danbury Turnpike Co., 10 Conn. 157; Turnpike Co. *v.* Hosmer, 12 Conn. 364; Louisville & Nashville Branch Turnpike Co. *v.* Nashville & Kentucky Turnpike Co., 2 Swan, 282, where the proposition of the text is maintained. But in South Carolina Railw. *v.* Blake, 9 Rich. 229, it is held, that a railway company have the same power to acquire land, either by grant or by compulsory proceedings, for the purpose of varying, altering, and repairing their road, as for the original purpose of locating and constructing it. But that the company are not the final arbiters in determining the exigency for taking the land. The petition of the company for taking the land should allege in detail the necessity for taking it, and the land-owner may traverse these allegations, and in that case this is tried as a preliminary question.

[16] Knight *v.* Carrolton Railw., 9 Louis. Ann. 284; New Orleans & Carrolton Railw. *v.* Second Municipality of New Orleans, 1 id. 128. But where by the charter of a railway they were authorized to construct their road "from Charleston" to certain other points, it was held that this gave them no authority to enter the city, but that the boundary of the city was the terminus *a quo*. Northeast Railw. *v.* Payne, 8 Rich. 177.

[17] Brocket *v.* Railway, 14 Penn. St. 241.

[18] State *v.* Comm. of Mansfield, 3 Zab. 510; Vt. Cent. Railw. *v.* Burlington 28 Vt. 193; Nashville & C. Railw. *v.* Cowardin, 11 Humph. 348.

a certain point, "thence running through Acton, Sudbury, Stow, Marlborough," &c., does not oblige the company to locate their road through these towns, in the order named in the charter. And a location of the road from Acton through Stow to Sudbury, and thence through Stow again to Marlborough, was held to be a sufficient compliance with the grant.[19]

14. If the charter of a railway limit the line of construction, by the boundaries of a borough, and the boundaries of such borough are subsequently extended, that will not alter the right of the company in regard to the location of their road.[20] And an exclusive grant for a railway within certain limits, defined at one terminus by a city, is to be restrained to the limits of the city at the date of the grant.[21]

15. A party whose land was taken by a railway company for the purposes of their road, and the damages assessed and * deposited for, and accepted by him, with full knowledge of all the proceedings and of any defect therein, and who allowed the company to occupy the land and make improvements thereon, without remonstrance, for two years, and who then brought an action of trespass against the company, on the ground that their proceedings were irregular and void, was held to have waived all right to object to them on that ground.[22]

16. And where the company by charter had power to take land

[19] Commonwealth *v.* The Fitchburg Railw., 8 Cush. 240. See also Brigham *v.* Agricultural Branch Railw , 1 Allen, 366. It seems agreed that slight deviations from the route prescribed in the charter will not release the stockholders from the obligation of their subscriptions; but that any substantial deviation will have that effect. The precise line of distinction between the two classes of cases must be left to the construction of the courts in each particular case. The stockholders may enjoin the company in the course of construction from making an essential deviation, and after the road is completed, the company may, by *scire facias*, be called to account for not building upon the route indicated in their charter. But where all interested acquiesce in the route adopted, until their road is completed, it will require a very clear case to induce the courts to interfere. The following cases bear upon the general question: Ashtabula & N. L. Railw. *v.* Smith, 15 Ohio N. S. 328; Champion *v.* Memphis & C. Railw. Co., 35 Miss. 692; Fry *v.* Lex. & Big S. Railw. Co., 2 Met. (Ky.) 314; Aurora *v.* West, 22 Ind. 88; Smith *v.* Allison, 23 id. 366; Miss. O. & R. Railw. *v.* Cross, 20 Ark. 443; Witter *v.* same Co., id. 463; Illinois Grand T. Railw. *v.* Cook, 29 Ill. 237. See also K. R. & R. Railw. *v.* Marsh, 17 Wisc. 13.

[20] Commonwealth *v.* Erie & North East Railw., 27 Penn. St. 339.

[21] Pontchartrain Railw. *v.* Lafayette & Pont. Railw., 10 Louis. Ann. 741.

[22] Hitchcock *v.* Danbury & Norwalk Railw., 25 Conn. 516.

for engine and water stations, within five years from the date of their grant, it was held they could not exercise such powers after the expiration of the time limited, although operating their line by horse power during that time they had not required the exercise of such powers on that account.[23]

17. A charter to construct a railway, "to commence at some convenient point in the city of Brooklyn, and to terminate at Newtown, Queen's county, — to be located in King's and Queen's counties, and its length to be about twenty-five miles;" there being both a town and village of the name of Newtown, and the boundary of the town being also the boundary of the city of Brooklyn, it was held, that the natural and only consistent construction was, to regard Newtown as the village of that name, and thus extend the railway through a portion of both counties named, and not restrict it to the limits of the city of Brooklyn.[24]

18. It is here declared, that where the charter, as applied to the route indicated, defines a precise line, that line becomes as binding upon the company as if it formed a portion of the charter itself; and that where a map is filed in conformity with the charter, which does not embrace the entire route indicated by the charter as applied to the subject-matter, in order to reconcile the apparent conflict, the map may be regarded as intended to give only a portion of the route; or in case of irreconcilable conflict, the map must yield to the express provisions of the charter.[24] The distinction between the application of terms to indicate the route of a railway and to define its termini, is considerably discussed in a case in New Jersey.[25]

*19. A power to change the location of a railway, on account of the difficulty of construction and other causes, may be exercised at any time before the construction is finished at the particular point.[26]

20. The lines and works of a railway are sufficiently indicated by black lines upon the plan, and dotted lines around them to mark the limits of deviation.[27] And where the deposited plans and sections specify the span and height of a bridge by which the railway is to be carried over a turnpike-road, the company will

[23] Plymouth Railw. Co. v. Colwell, 39 Penn. St. 337.
[24] Mason v. Brooklyn & Newtown Railw. Co., 35 Barb. 373.
[25] McFarland v. Orange & Newark Horse-Car Railw. Co., 2 Beasley, 17.
[26] Atkinson v. Mar. & Cin. Railw. Co., 15 Ohio N. S. 21.
[27] Weld v. London & S. W. Railw., 32 Beav. 340; s. c. 9 Jur. N. S. 510.

not, in the construction of the bridge, be allowed to deviate from the plans and sections.[28]

21. Under a charter which fixes the terminus of a railway at or near a certain point, a large discretion is conferred upon the company in locating their road, which will not be controlled by the courts, unless for very clear excess, or where bad faith is shown. And where a company is empowered to extend their line from a point at or near its present terminus, "in Fall River, in a southerly direction to the line of Rhode Island," a location starting from a point on the line 2,475 feet from the terminus was held authorized.[29]

SECTION II.

Distance, how measured.

1. *This is affected by subject-matter.*
2. *Contracts to build railway, by rate per mile.*
3. *General rule to measure by straight line.*
4. *Same rule in regard to turnpike-roads.*
5. *Rate fixed by mile means full mile; no charge for fractions.*

§ 106. 1. Questions of some perplexity sometimes arise in regard to the mode of measuring distance, in a statute or contract. The import of terms defining distance will be sometimes controlled by the context, or the subject-matter. In one case,[1] where the assignor of the lease of a public-house in London covenanted that he would not keep a public-house within half a mile from the premises assigned, it was held that the distance should be computed by the nearest way of access.

2. And contracts to be paid for constructing a turnpike, or railway, a given price by the mile, would, ordinarily, no doubt, require an admeasurement upon the line of the road. It was held, in a late case in Vermont, that in such cases the contractor is not entitled to compute the length of track, and thus * include turnouts and side-tracks.[2] But this might not exclude branch lines extending any considerable distance from the main track.

[28] Atty.-General *v.* Tewksbury & Great Malvern Railw. Co., 1 De G., J. & Sm. 423; s. c. 9 Jur. N. S. 951.

[29] Fall River Iron Works *v.* Old Colony & Fall River Railw., 5 Allen, 221.

[1] Leigh *v.* Hind, 9 B. & C. 774; s. c. 17 Eng. Comm. L. R. 495. But *Parke*, J., was of a different opinion, and said: "I should have thought that the proper mode of measuring the distance would be to take a straight line from house to house, in common parlance, as the crow flies."

[2] Barker *v.* Troy & Rutland Railw., 27 Vt. 766.

3. But, in general, the English courts have chosen to adhere to the rule laid down by *Parke*, J., in Leigh *v.* Hind, that distance is to be measured in a direct line, through a horizontal plane. Thus, in settlement cases, where the pauper laws provide that no person shall retain a settlement gained by possessing an estate or interest in a parish for a longer time than he shall inhabit "within ten miles thereof," it was held, that the distance was to be measured in a direct line from the residence to the nearest point of the parish.[3] And the twenty miles within which the parties are required to reside, in certain cases affecting the jurisdiction of the county courts, by the recent statute, 9 & 10 Vict. c. 95, § 128, is to be computed in a direct line, without reference to the course of travel.[4]

4. And where a turnpike act provided, that no toll-gate should be erected nor any toll taken, within three miles of B., and the road did not extend to B., but connected with another turnpike which did, and also a public road, made since the act was passed, it was held, that the three miles should be measured "in a straight line on a horizontal plane, and not along any of the roads."[5]

5. And where the rate of fare is fixed by the mile, and no provision made for fractions of a mile, the company can only * charge the prescribed tariff for the full mile traversed.[6] But the English statute[7] provides specially for fractions of a mile.

[3] Regina *v.* Saffron-Walden Railw., 9 Q. B. 76.

[4] Stokes *v.* Grissell, 14 C. B. 678; s. c. 25 Eng. L. & Eq. 336; Lake *v.* Butler, 5 El. & Bl. 92; s. c. 30 Eng. L. & Eq. 264.

[5] Jewell *v.* Stead, 6 El. & Bl. 350; s. c. 36 Eng. L. & Eq. 114. Lord *Campbell*, Ch. J., said: "I am of opinion that the distance is to be measured by a straight line upon a horizontal plane." Lake *v.* Butler, *supra*, lays this down as a general rule. Lord *Campbell*, Ch. J.: "I think we ought to adopt that mode which is most convenient and most certain. If the distance is to be measured by the nearest mode of communication, uncertainty will be introduced, whether it may be by foot way, or bridle way, or carriage way; and in some cases the distance must be travelled by all the three modes; and in others by a tidal river, in which case the distance would vary, at different times of the day; also the distance by carriage road might be shortened, or lengthened, by a new road being made. But if the other mode of calculation is adopted, no uncertainty will arise."

[6] Rice *v.* Dublin & Wicklow Railw., 8 Ir. Com. Law, 160.

[7] 21 & 22 Vic. c. 75 s. 1.

SECTION III.

Mode of Construction, to be done with least Damage.

1. *Does not extend to form of the road, but the mode of construction.*
2. *Special provisions of act not controlled by this general one.*
3. *Works interfered with, to be restored, for all uses.*

§ 107. 1. It has been held, that the general provisions of the Railway Clauses Consolidation Act, that in the exercise of their powers, the company shall do as little damage as possible, and shall make satisfaction, to all parties interested, for all damages sustained by them, does not extend to the form of constructing the railway. It does not apply to what is done, but to the manner of doing.

2. Hence, if by other sections of the statute or special act the company are required to build bridges in a particular form, they may still do so, notwithstanding it may cause more damage to the owners of land than to build them in some other form.[1]

3. And where, in a parliamentary contract between the promoters of a railway and the proprietors of a ropery, it was stipulated that the railway should be so constructed, that when finished the level of the ropery should not be altered, nor the surface of the ropery in the least diminished, it was held the company were bound to restore the surface, so as to be available for all purposes to which it might have been applied before the construction of the railway, and not for the purposes of the ropery only.[2]

[1] Regina *v.* The East & W. I. Docks and B. J. R., 2 El. & Bl. 466.
[2] Harby *v.* The East & W. I. Docks and B. J. R., 1 De G. M. & G. 290.

*SECTION IV.

Mode of crossing Highways.

1. *English statutes require it should not be at grade.*
2. *Or if so, that gates should be erected and tended.*
3. *And if near a station, railway train not to exceed four miles an hour.*
4. *Cannot alter course of highway.*
6. *Mandamus does not lie where company have an election.*
7. *Railway cannot alter highway to avoid building bridge.*
8. *Extent of repair of bridge over railway.*
9. *Permission to connect branches with main line not revocable.*
10. *Grant to build railways across main line implies right to use them as common carriers.*
11. *Railway responsible for injury by falling into culvert when covered by snow.*
12. *The right to lay line across railway carries right to lay as many tracks as are convenient for the business.*
13. *Damages for laying highway across railway.*
14. *Laying highway across railway at grade. Company not estopped by contract with former owner of land.*

§ 108. 1. By the general English statutes upon the subject of railways, it is provided, "that if the line of the railway pass any turnpike-road, or public highway, then, (except when otherwise provided by the special act,) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge."[1]

2. And by § 47 it is provided, that whenever the railway does pass any such road, upon a level, the company shall maintain gates, at every such crossing, either across the highway, or the railway, in the discretion of the railway commissioners, and employ suitable persons to tend the same, who are required to keep them constantly shut, except when some one is actually passing the highway, or railway, as the case may be.[2]

3. And where a railway passes a highway near a station, on

[1] Railway Clauses Consolidation Act, § 46. Mandamus requiring the company to carry their road over a highway, by means of a bridge, when that was the only mode in which it could be done, according to the level of the line of the railway at the time, was held bad. Southeastern Railw. *v.* The Queen, 17 Q. B. 485.

[2] A road on which toll-gates are erected and tolls taken is a turnpike road. The Northam, B. & Roads Co. *v.* London & Southhampton Railw., 6 M. & W. 428; 1 Railw. C. 653; Regina *v.* E. & W. I. Docks Railw. Co., 2 El. & Bl. 466.

* a level, the trains are required to slacken their speed, so as not to pass the same at any greater speed than four miles an hour.[3]

4. The right to raise or lower highways, in the construction of a railway, does not authorize the company to change the course of the highway, even with the consent of the town council, and for so doing the company were held liable to persons who had sustained special damage thereby.[4]

5. The right to use "highways" in the construction of plank roads, contained in a general law, does not extend to military roads constructed by the United States, while the state was a territory,[5] but the legistature may grant such right, by the charter of the company.

6. And where a mandamus[6] recited that the railway, which defendants were empowered to make, crossed a certain public highway, not on a level, by means of a trench, twenty feet deep, and sixty-five feet wide, through and along which the railway had been carried, and the highway thereby cut through and rendered wholly impassable for passengers and carriages; and that a reasonable time had elapsed for defendants to cause the highway to be carried over the railway, by means of a bridge, in the manner pointed out in the statute,[7] and commanded defendants to carry the highway over the railway, by means of a bridge, in conformity with the statute, particularly specifying the mode, it was held, that it not being otherwise specially provided in the company's charter, they had, by the general act, an option to carry the highway over the railway, or the railway over the highway, by a bridge; and that the option was not determined by the facts alleged in the writ, and the judgment of the * Ex-

[3] § 48. Some similar provisions, in regard to the construction of railways in this country, seem almost indispensable to the public security. But the rage for cheap railways is so great, that nothing of the kind could be effected, we fear, at present.

[4] Hughes *v.* Providence & Wor. Railw., 2 R. I. 493. It is the duty of a railway company not to obstruct public roads, where they intersect the railway-track, either by stopping a train or otherwise; and the company must take the consequences of all such obstructions. Murray *v.* Railw. Company, 10 Rich. 227.

[5] Attorney-General *v.* Detroit & Erie Plank-Road Co., 2 Mich. 138.

[6] Regina *v.* The Southeastern Railw., 15 Q. B. 313; s. c. 6 Eng. L. & Eq. 214.

[7] 8 and 9 Vict. c. 20.

chequer, awarding the writ, was accordingly reversed in the Queen's Bench.

7. Where the charter of a railway authorized them, by consent of the commissioners, to alter a highway whenever it became necessary in order to build the railway in the best place, and required the company to maintain all bridges made necessary to carry the highway over the railway: It was held that the company had no power to alter the course of the highway in order to avoid the expense of building a bridge; and that the old highway was still subsisting, notwithstanding the attempt thus to lay out a substitute.[8]

8. And where a railway company, under their statutory powers, in England, carry a highway over their road by means of a bridge, the company is bound to keep both the bridge and the road and all the approaches thereto in repair, and such repair includes not only the structure of the bridge, but the superstructure, and every thing requisite to put the highway in fit condition for safe use.[9]

9. Where the proprietors of land, through which a railway company were empowered to take the right of way, had the right to lay branch railways upon the lands adjoining, and to connect them at proper points with the main line, so as not to endanger the safety of persons travelling as passengers upon the railway, and in case of difference in regard to any of these points, the same to be determined by two justices of the peace; but the company were not required to admit any such branch to connect

[8] Norwich & Worcester Railw. *v.* Killingly, 25 Conn. 402. Nor have the company any right under such a power to materially and essentially change the route of a highway, that being a power resting solely in the discretion of the municipal authorities. Warren Railw. Co. *v.* State, 5 Dutcher, 393. See also Veasie *v.* Penobscot Railw. Co., 49 Me. 119.

[9] North Staffordshire Railw. Co. *v.* Dale, 8 Ellis & Bl. 835. But where the expense of keeping a bridge in repair was imposed by statute upon several towns, and a railway company, jointly, with a provision that the municipal authorities of one of the towns shall have the care and superintendence of the same, "and shall employ all services necessary in the care thereof," it was held this did not impose any special obligation upon that particular town, in regard to the repairs, but that all the parties still remained jointly responsible for the performance of that duty, and that the municipal authorities of this town were thereby made the agents of all the parties thus responsible; and that therefore one of the parties could not maintain an action against the town for an injury through the joint neglect of all the parties. Malden & Melrose Railw. *v.* Charlestown, 8 Allen, 245.

with their line, at any place where they should have erected any station or other building; it was held that the consent of the company to unite with the line at a station was not in the nature of a license and could not be revoked.[10]

10. And where the owners or occupiers of adjoining land had the right to build railways, and to cross the line of the principal railway, without being liable to toll or tonnage, it was held the * owners of such railways might use them as common carriers of freight and passengers.[11]

11. It has been held that railway companies are responsible for injuries, resulting from the dangerous state of highways, caused by their own works, as where one fell into a culvert, made by the company at a highway crossing, to prevent the accumulation of the water, it being invisible at the time by reason of snow.[12] So also in all cases where the defect in the highway is caused by the works of the railway company the latter will be responsible for all injuries in consequence, although the party might also obtain redress of the town bound to maintain the highway.[13]

12. A railway corporation having acquired the right to lay its line across a highway, may lay and maintain as many tracks as are essential to the convenient transaction of its business.[14]

13. A railway corporation is entitled to damages for land taken by laying a public highway across its line, and for the expense of maintaining signs and cattle guards at the crossing, and of flooring the same and keeping it in repair ; but not for any increased liability to accidents, for increased expense of ringing the bell, or for its liability to be ordered by the county commissioners to build a bridge for the highway over the track. And in assessing damages, in such a case, no supposed benefits from an increase of travel on the railway can be set off against the company.[15]

14. Under the revised statutes of Massachusetts, town or city authorities have no power to lay a highway across a railway, at grade, and the company is not estopped from objecting thereto by any agreement with the former owners of the land in regard to

[10] Bell *v.* Midland Railw. Co., 3 De G. & Jones, 673.

[11] Hughes *v.* Chester & Holyhead Railw. Co., 8 Jur. N. S. 221.

[12] Judson *v.* N. Y. & N. Haven Railw. Co., 29 Conn. 434.

[13] Gillett *v.* Western Railw., 8 Allen, 560.

[14] Commonwealth *v.* Hartford & New Haven Railw., 14 Gray, 379.

[15] Old Colony & Fall River Railw. *v.* County of Plymouth, 14 Gray, 155.

the right of way to be used by them at the point where the highway is laid.[16] Nor can such authorities, under the general statutes of that state, lay out a way across any portion of the land, not exceeding five rods in width, which has been taken by a railway company for their line, unless permission has been granted by the county commissioners.[17]

*SECTION V.

Rights of Telegraph Companies.

1. *Right to "pass directly across a railway," does not justify boring under it.*
2. *Exposition of the terms "under" and "across."*
3. *Erecting posts in highway a nuisance, even if sufficient space remain.*
n. 4. *Opinion of Crompton, J.*

§ 109. 1. Where a telegraph company had by their act the power to pass under highways, but to pass "directly but not otherwise across any railway or canal," and a railway was laid upon the level of a highway, in accordance with their special act, it was held that the telegraph company could carry their works under the highway at the point where it was intersected by the railway.[1] But the telegraph company, attempting to pass under the railway in such a manner as to disturb their works, was held liable in trespass.[2]

2. *Parke*, B., in giving judgment, said: "Across seems therefore different from under, and the power to carry 'across' does not enable them to go under. It may be that this prohibition would not apply, if the railway were carried over a highway, at a great height, for then the highway and railway might be considered independent of each other."

3. In a recent English case[3] it was decided, that a telegraph company, which erected posts in any portion of the highway, although not in the travelled portion of it, whereby the way is rendered in any respect less commodious to the public than before, is

[16] Boston & Maine Railw. *v.* City of Lawrence, 2 Allen, 107.

[17] Commonwealth *v.* Haverhill, 7 Allen, 523.

[1] Southeastern Railw. *v.* European & Am. Tel. Co., 9 Exch. 363; *s. c.* 24 Eng. L. & Eq. 513.

[2] *Post*, §§ 130, 143, 164.

[3] Reg. *v.* United Kingdom Electric Telegraph Company, 9 Cox. C. C. 174; 3 F. & F. 73, 8 Jur. N. S. 1153.

guilty of committing a nuisance at common law; and the fact that the jury find that a sufficient space for the public use remained unobstructed, will not afford any justification, unless the act is done by legislative permission.[4]

[4] The case is of so much importance that we have ventured to insert the leading opinion on the final hearing in full bench.

Crompton, J. "The defendants were indicted for erecting their posts on a high * road, so as to obstruct the public in the use thereof, and we determined before giving judgment to hear the case of Regina *v.* Train, thinking it possible that the same question might there arise, or that something, at all events, throwing light upon it might be elicited during its progress. Having heard that case, there is nothing to prevent our giving judgment without further delay. My brother *Martin* laid down two propositions, and the question is, whether either of them constitutes a misdirection. The first of these propositions was as follows: 'In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences, one on each side, the right of passage or way *prima facie*, and, unless there be evidence to the contrary, extends to the whole space between the fences; and the public are entitled to the use of the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers.' Now, this seems to us a very proper direction. It is urged by Mr. O'Malley that this ruling is not applicable to a place where there is a considerable portion of greensward on either side of the metalled road, which either the owner of the adjoining freehold or the lord of the manor would be entitled, if he thought proper, to enclose. This is the first of two objections taken on behalf of the defendants. But it seems to me that my brother *Martin* carefully guards against that. He says, that *prima facie* the space between the fences is to be taken as the highway; and this seems to be in accordance with the judgment of Lord *Tenterden*, C. J., in Rex *v.* Wright, 3 B. & Ad. 681, where he says: 'I am strongly of opinion, when I see a space of fifty or sixty feet through which a road passes, between enclosures set out under an act of Parliament, that, unless the contrary be shown, the public are entitled to the whole of that space, though, perhaps, from economy, the whole may never have been kept in repair.' The same principle is involved in the decision in Williams *v.* Wilcox, and my brother *Martin* seems to have laid down the law in unison with these cases. He says, 'that *prima facie*, and in absence of evidence to the contrary, the public are entitled to the right of passage over the whole, and are not confined to that part which is metalled for the better convenience of travellers and traffic.' Mr. O'Malley was unable, when invited, to say to what definite portion of the road, metalled or otherwise, he held the public to be entitled. He, however, contended that the posts might have been erected on what was in fact no part of the highway, such as a rock, or something of that kind, which might occupy part of the space between the fences, but over or across which no road could possibly exist. But this would not be a part of the highway any more than a house similarly placed, built before the dedication of the road. We think, therefore, on the first point, the direction of the learned judge was correct, and that the right of the public extends over the entire highway.

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*SECTION VI.

Duty in regard to substituted Works.

1. *Bound to repair bridge substituted for ford, or to carry highway over railway.*
2. *The same rule has been applied to drains, substituted for others.*
3. *The extent of this duty as applied to bridge and approaches.*

§ 110. 1. Where a public company, as a navigation company, under the powers conferred by the legislature, destroyed a ford

"The second proposition laid down by the learned judge is a wider one, and it remains to be seen whether it amounts to a misdirection. It is, 'that a permanent obstruction erected on a highway, placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act, and a public nuisance at common law; and that if the jury believed that the defendants placed, for the purposes of profit to themselves, posts, with the * object and intention of keeping them permanently there, in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such size and dimensions and solidity as to obstruct and prevent the passage of carriages, and horses, or foot passengers upon the parts of the highway where they stood, the jury ought to find the defendants guilty upon this indictment; and that the circumstance that the posts were not placed upon the hard or metalled part of the highway, or upon a foot-path artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right, and do not affect the right of the crown to the verdict.' This appears to us also to be substantially a proper direction, inasmuch as the real question is, whether there was a practical, as distinguished by myself in Regina *v.* Russell, from a mathematical nuisance. My brother *Martin* appears distinctly to have raised that point, by saying that the posts must not be of such size, dimensions, and solidity as to obstruct and prevent the passage of carriages, and horses, and foot passengers at all. In Regina *v.* Russell, the jury found there was no practical obstruction; but where there is a practical obstruction on a highway, by which the public are prevented from using it, that is a nuisance according to all definitions of the word, and it makes no difference whether or not enough be still left unobstructed for the use of the public; or whether the obstruction is placed on that part of the road which is neither metalled nor repaired for the purpose of traffic. In Rex *v.* Wright, Lord *Tenterden* laid it down that the public are entitled to the entire space on either side of the highway, as he says, for the benefit of air and sun. We must take it now that the jury found the defendants guilty upon these facts, and that the posts were of such size and solidity as to create an obstruction, and amount to a nuisance. It was further objected by Mr. O'Malley that certain of the posts appeared actually to have stood upon parts of the road which were inaccessible to travellers; but supposing this to be

and substituted a bridge, it was held, that they were liable to keep the bridge in repair.[1] So, too, where such company cut through a highway, rendering a bridge necessary to carry the highway over the cut, the company are bound to keep such bridge in repair.[2]

2. So, where a navigation company had power to use a public drain, by substituting another, or others, it was held that the company were bound to keep in repair the substituted drains, as well as to make them.[3]

3. Under the English statute,[4] where the company carried the highway, by means of a bridge, over the railway, it is bound to maintain the bridge; and all the approaches thereto in repair, and such repair includes not only the structure of the bridge, and the approaches, but the metalling of the road on both.[5] But this will not include the road beyond where it may properly be regarded as forming an approach to the bridge.[6] And the same rule obtains here. In White *v.* Quincy,[7] it was held the duty of the company as to repair extended to the whole structure, which they had found it necessary to build to effect their purpose; even where it extended beyond the boundaries of the location of their line.

the case, it would be no use to the company to have these few isolated posts left standing at different spots along the line of road; and if they wished to keep them, they should have contended at the trial that some of these posts did not come within the rule laid down by the learned judge. We think, therefore, that with respect to these few posts, which may possibly have excepted from the rule, it would be useless to grant a rule."

[1] Rex *v.* Inhabitants of Kent, 13 East, 220; Rex *v.* Inhabitants of Lindsey, 14 East, 317.

[2] Rex *v.* Kerrison, 3 M. & Sel. 526. This duty may be enforced by indictment. Regina *v.* Ely, 19 L. J. (M. C.) 223. And the same obligation rests upon the assignees of the company. Penn. Railw. Co. *v.* Duquesne Borough, 46 Penn. St. 223.

[3] Priestly *v.* Foulds, 2 Railw. C. 422; 2 Man. & Gr. 175.

[4] 8 and 9 Viet. c. 20.

[5] Newcastle, &c. Turnpike Co. *v.* North Staf. Railw. 5 H. &. N. 160.

[6] W. & L. Railw. *v.* Kearney, 12 Ir. Com. L. 224; Fosberry *v.* Waterford & Limerick Railw., 13 Ir. Com. Law, 494; London & North Western Railw. Co. *v.* Skerton, 5 B. & S. 559.

[7] 97 Mass. 430. See also Titcomb *v.* Fitchburg Railw., 12 Allen, 254.

*SECTION VII.

Construction of Charter in regard to Nature of Works, and Mode of Construction.

§ 111. There are some cases in regard to the construction of railway works, and their requisite dimensions, which have come under the consideration of the courts, and where the decisions are of little precedent, for other cases, not altogether analogous, and on that account not deserving an extended analysis, but which nevertheless we scarcely feel justified in wholly omitting here.[1]

[1] Attorney-General *v.* London & Southampton Railw., 9 Sim. 78; s. c. 1 Railw. C. 302. This case is in regard to the width of a road under a railway bridge. Manchester & Leeds Railw. *v.* Reg. (in error), 3 Q. B. 528; s. c. 3 Railw. C. 633. The footpaths are not to be regarded as any part of the requisite width of the bridge. Reg. *v.* Rigby, 14 Q. B. 687; s. c. 6 Railw. C. 479; Reg. *v.* London & Birmingham Railw., 1 Railw. C. 317. This is a case in regard to the width of a bridge over a highway. Reg. *v.* Birmingham & Gloucester Railw., 2 Q. B. 47; 2 Railw. C. 694, which is a case in regard to the width of the approaches to a bridge across a railway. Reg. *v.* Eastern Counties Railw., 2 Q. B. 347, 569; s. c. 3 Railw. C. 22, as to the right to lower a street, in order to obtain the requisite height under a bridge, notwithstanding the provisions of the local paving act. Reg. *v.* Sharpe, 3 Railw. C. 33, as to the right to erect a bridge at a different angle from the former road. Where a special act required a company to strengthen a bridge described in the act, held that they might, nevertheless, pull down the old bridge and build a new one. Wood *v.* North Staffordshire Railw., 1 McNagh. & G. 278; Rex *v.* Morris, 1 B. & Ad. 441, as to making a railway on a turnpike road. A turnpike road, having power to take tolls upon any way leading out of their road, may demand tolls of passengers crossing their road upon a railway granted subsequently. Rowe *v.* Shilson, 4 B. & Ad. 726.

Where a railway company, in the course of construction, turned a stream of water, which by their charter they might do, restoring it to its former state, as near as practicable, and the new channel was properly guarded, as far as could be perceived, at the time of turning it, it was held, that the company were not obliged thereafter to watch the operation of the water and take precautions to prevent its encroaching upon the adjoining lands. Norris *v.* Vt. C. Railw., 28 Vt. 99. See also Fitchburg Railw. *v.* Grand Junction Railw. & Depot Co., 4 Allen, 198, where a question in regard to apportioning the expense of a work done by the plaintiff, for the mutual benefit of the parties, in conformity with statutory provisions, is considered, and numerous exceptions on the part of the defendant are overruled by the court. The most important of these exceptions, and which the court regarded as no sufficient ground of defence, are: that the

*SECTION VIII.

Terms of Contract. — Money Penalties. — Excuse for Non-Performance.

1. *Contracts for construction assume unusual forms.*
2. *Estimates made by engineer.*
3. *Money penalties, liquidated damages. Full performance.*
4. *Excuses for non-performance.*
5. *Penalty not incurred, unless upon strictest construction.*
6, 7. *Contractor not entitled to any thing for part-performance.*

n. 2. *Proper construction of the terms used in these contracts.*

8. *Contract for additional compensation must be strictly performed.*

§ 112. 1. As the time within which such works are to be accomplished is often limited in the act, and as the manner in which the work is done, is of the greatest possible importance to the public safety, the law sanctions contracts for such undertakings, in forms not only unusual, but which might not be strictly binding perhaps in the case of ordinary contracts. For instance, it is not uncommon for the contract to impose penalties upon the contractor for slight deviations from the terms of agreement, and to secure to the company the absolute right to put an end to the contract, whenever they or their engineer are dissatisfied with the mode in which the work is done, or the progress made in it.

2. And it is almost universal, in these contracts in this country, to refer the quality and quantity of the work done, and the consequent amount of payments, to be made from time to time, to the absolute determination of an engineer employed by the company.[1]

3. The penalties which these contracts provide, either absolutely,

commissioner appointed under the statute, in supervising the work and apportioning the cost, conducted with partiality towards the plaintiff, and under their undue influence; and that the value of the defendant's property and franchise was diminished by the work, and those of the plaintiff increased thereby.

[1] Ranger *v.* Great Western Railw., 13 Sim. 368; 1 Railw. C. 1; s. c., 5 Ho. Lds. 72; 3 id. 298; *ante*, § 105. And where the contract refers the umpirage to the company's engineer, by name, "if and so long as he shall continue the company's principal engineer," it was held that the reference was not terminated by the amalgamation of this company with another, the same engineer being continued on the old line, but not as the principal engineer of the amalgamated company. Wansbeck Railw. *in re*. Law Rep. 1 C. P. 269.

or in the discretion of the company's engineer, for delay * in the work, are to be regarded, commonly, in the nature of liquidated damages.[2] To entitle the party to recover for work * done upon

[2] Ranger v. Great Western Railw., 5 Ho. Lds. 72; s. c. 27 Eng. L. & Eq. 61. In regard to the penalties given by the contract, it is said here by the Lord Chancellor: "All the circumstances which have been relied on in the different reported cases, as distinguishing liquidated damages from penalty, are to be found here. The injury to be guarded against was one incapable of exact calculation. The sum to be paid is not the same for every default, for that which should occasion small as for that which should cause great inconvenience, but one increasing as the inconvenience would become more and more pressing; and, finally, the payments are themselves secured by the penalty of a bond; and this is hardly consistent with the notion that the payments secured were themselves only penal sums to secure something else. For these reasons, I think it clear that these payments, though called penalties, are in truth liquidated damages, agreed on by the parties, and which the company might set off against the demand of the appellant upon them under the contract. But then the appellant contends that the company never had a title to recover these penalties, because the delays in respect of which they claimed were produced by the harassing and vexatious conduct of the respondents themselves, or their agents. It is sufficient on this head to say, that the appellant, in my judgment, wholly fails to make out, in point of fact, the proposition for which he contends. The only penalties actually deducted are 200*l.* for five weeks' delay in completing the headings of tunnels 1 and 3 in contract 1 B, and 20*l.* for delay in the works of the Avon bridge. There is no doubt but that these sums were due, unless the appellant could relieve himself by showing that the delay had been forced on him by the company itself. The evidence altogether fails to satisfy me of this."

Where, in a contract between the original contractors for building a railway and the sub-contractors, it was provided, that the work should be subject to the supervision and control of the engineer of the company, and that he should make monthly estimates, four-fifths of which "value" should be paid to the sub-contractors; and when the work was completed, a final estimate; the monthly and final estimates as to the quantity, character, and value of the work done, should be conclusive between the parties; and that if the contractor should not truly comply with his part of the agreement, or in case it should appear to the engineer that the work did not progress with sufficient speed, the other party was to have power to annul the contract; and the unpaid portion of the work was to be forfeited by the sub-contractor and become the property of the other party;

Held, that the award of the engineer declaring the work forfeited, was conclusive, and binding on the sub-contractor; that the action of the sub-contractor upon the contract was in affirmance of the contract, and that he could not therefore impeach its stipulations.

That the term "value," as used in the contract, was to be distinguished from the term "price," fixed for the different classes of work, and that the engineer, in making monthly estimates, had a right to deduct from the amount of work done sufficient to bring it to the average of all the work to be done, and is not

construction contracts, he must show, either that he has performed the labor according to the contract, or that the other party has waived strict performance, or hindered it.[3]

4. But the party may excuse full performance by showing that he was prevented by an injunction out of Chancery at the suit of a third party.[4] Or, that the parties had entered into a new contract for the same work, upon different terms.[5]

5. Where the work was suspended at the request of the company, with the view to a new location, the company agreeing to pay the plaintiff $750 by way of damages, if the work should not be resumed within two years, and, if it was, the plaintiff to proceed with the work at the prices stipulated, upon those sections not altered; the route being altered as to some of the sections, upon which the defendants resumed within the two years, employing others to do the work, without giving notice to plaintiff; held that the plaintiff could not recover the damages agreed, as the work was resumed within the two years, but that the plaintiff was entitled to damages for not being employed to do the work.[6]

6. Where, by the terms of the contract, a proportion of the sum

bound to allow the sub-contractor the price stipulated in the contract, for work of this description.

If the company withheld unjustly funds due the sub-contractor, they could not fairly take advantage of the forfeiture declared for want of prosecution of the work. But the retention of the 20 per cent in case of forfeiture, is intended as the measure of reparation for the failure to perform the work according to the contract, and not as a mere penalty.

The payment after the forfeiture, by one of the original contractors, of the hands who had been employed on the works by the sub-contractor, and furnishing money to carry on the work, is not a waiver of the forfeiture, especially if he was then ignorant that the work had been forfeited. Faunce *v.* Burke, 16 Penn. St. 469. In English contracts for constructing railways, it is common to provide for the use of the contractor's plant, in case of the company putting an end to the contract, and for the sale of the same, and crediting the money to the contractor. But this construction will not be adopted unless loss or expenses have been occasioned, for which the contractor is responsible. Garrett *v.* Salisbury & Dorset J. Railw., Law Rep. 2 Eq. 358.

[3] Andrews *v.* The City of Portland, 35 Me. 475. And it was held here, that part payment, under the contract, after the contractor had failed in strict performance, was no waiver, unless the failure was known to the employer at the time of payment.

[4] Whitfield *v.* Zellnor, 24 Miss. 663.

[5] Howard *v.* The Wilmington & Susquehannah Railw., 1 Gill, 311.

[6] Fowler *v.* Kennebec & Portland Railw., 31 Me. 197.

earned is to be paid monthly, and the remainder reserved, * as security for the fulfilment of the contract, it was held, that nothing was due till the day of payment, which could be attached by trustee process.[7]

7. And where, in such case, the company have the power to determine the contract, and the reserved fund is thereby to be forfeited, and the company do so, after the contractor has worked one month and part of another, and has received the proportion of payment for the first month, it was held nothing was due to the contractor.[8]

8. Where a railway company, after making a contract for the construction of its road, became embarrassed and was unable to make payments to the contractor, and the president, who was a stockholder, and extensively interested in the success of the enterprise, made an additional agreement with the contractor that he would give him his notes to the amount of $10,000, if the work were completed by a day named, it was held, that he was not liable upon the agreement unless the contractor performed his part of the agreement by the day named. The notes were, by the terms of the agreement, to go in part payment of what was due from the company, and the new agreement was not to affect the subsisting contract with the company.[9]

SECTION IX.

Form of Execution. — Extra Work. — Deviations.

1. *No particular form of contract requisite generally.*
2. *But the express requirements of the charter must be complied with.*
3. *Extra work cannot be recovered of the company, unless done upon the terms specified in contract.*
4. *If the company have the benefit of work are liable.*

§ 113. 1. No particular form of contract is requisite to bind the company, unless where the charter expressly requires it.[1] * And although there seems still to be a failing effort in the English

[7] Williams *v.* Androscoggin & Kennebec Railw., 36 Me. 201.

[8] Hennessey *v.* Farrell, 4 Cush. 267.

[9] Slater *v.* Emerson, 19 How. (U. S.) 224.

[1] *Post*, §§ 130, 143, 164. Corporations cannot enter into partnerships, but two or more corporations may become jointly bound by the same contract. Marine Bank of Chicago *v.* Ogden, 29 Ill. 248.

courts to maintain the necessity of the contracts of corporations being under seal,[2] it is certain that the important business transactions of daily occurrence, in both that country and here, where no such formality is resorted to by business corporations, in matters of contract, and where to look for any such solemnity would be little less than absurd, almost of necessity drive the courts of England to disregard the old rule of requiring the contracts of corporations to be made under the corporate seal.[3]

2. But when the charter of the corporation requires any particular form of authenticating their contracts, it cannot be dispensed with. And where, by the charter of a railway company, the directors were authorized to use the common seal, and all contracts in writing, relating to the affairs of the company, and signed by any three of the directors, were to be binding on the company; and the company entered into a contract, not under seal, by their secretary, to complete certain works, and, after part performance, the contractor was dismissed by the company, it was held he could not recover the value of the work done.[3]

[2] Mayor of Ludlow *v.* Charlton, 6 M. & W. 815. But see Beverly *v.* Lincoln Gas Light & Coke Co., 6 Adol. & Ellis, 829; Dunston *v.* The Imperial Gas Co., 3 B. & Ad. 125. *Tindal*, Ch. J., in Gibson *v.* East India Co., 5 Bing. (N. C.) 262, by which it seems that the English courts except from the operation of the rule only such transactions of business corporations as could not reasonably be expected to be done under seal. But see Bank of Columbia *v.* Patterson, 7 Cranch, 299, and 2 Kent, Comm. 289, 291, and notes, where it is said the old rule is condemned, and English and American cases cited and commented upon. *Post*, § 143; United States Bank *v.* Dandridge, 12 Wheat. 64; Bank of the Metropolis *v.* Guttschlick, 14 Pet. 19; Norwich & Worcester Railw. *v.* Cahill, 18 Conn. 484; San Antonio *v.* Lewis, 9 Texas, 69. See, also, Weston *v.* Bennett, 12 Barbour, 196; Rathbone *v.* Tioga Navigation Co., 2 Watts & Serg. 74.

[3] Diggle *v.* The London & Blackwall Railw., 5 Exch. 442; s. c. 6 Railw. C. 590. It is said here that a contract, to be binding on a corporation when not under seal, must be one of necessity, or of too frequent occurrence, or too trivial, to be made under seal. In a recent case in the Court of Exchequer, Williams *v.* Chester & Holyhead Railw., 15 Jur. 828; s. c. 5 Eng. L. & Eq. 497, *Martin*, B., thus comments upon the rule of evidence in regard to implied contracts of corporations. "Persons dealing with these companies should always bear in mind, that such companies are a corporation, a body essentially different from an ordinary partnership or firm, for all purposes of contracts, and especially in respect of evidence against them on legal trials; and should insist upon these contracts being by deed under the seal of the company, or signed by directors in the manner prescribed by the act of parliament. There is no safety or security for any one dealing with such a body, on any other footing. The same observation also applies in respect of any variation or alteration in a contract which has been made."

* 3. But where the contract contains express provisions that no allowance shall be made against the company for extra work, unless directed in writing under the hand of the engineer or some other person designated, or unless some other requisite formality be complied with, the party who performs extra work, upon the assurance of any agent of the company that it will be allowed by the company, without the requisite formality, must look to the agent for compensation, and cannot recover of the company, either at law or in equity.[4] So, under the English General Company Acts, where the directors are authorized to contract on the part of the company, although not in writing, when such contracts would, if entered into by private persons, be binding in that form, three directors being a quorum for that purpose, it was held, that the mere fact that extra work was done with the approbation of the company's engineer, the special * contract requiring written directions for all the work, had no tendency to prove a contract binding the company.[5]

But see *post*, § 143, and cases cited. And where the assistant engineer upon a railway, having charge of the construction of a section of the road, becoming dissatisfied with the contractor, dismissed him, and assumed the work himself, agreeing with the workmen to see them paid, it was held his subsequent declarations could not be admitted, to charge the company for supplies furnished the contractors, on the ground that they were not made in the course of the performance of his duty as agent of the company. Stiles *v.* The Western Railw., 8 Met. 44; s. c. 1 Am. Railw. C. 397. See also Underwood *v.* Hart, 23 Vt. 120, where the subject of the admissions of agents is discussed, and the cases revised.

If a contract under seal be enlarged by parol and subsequently performed, or if the terms of the contract under seal be varied by parol, the proper remedy is by an action of assumpsit. Sherman *v.* Vermont Central Railw., 24 Vt. 347; Barker *v.* Troy & Rutland Railw., 27 Vt. 774. In Childs *v.* The Somerset and Kennebec Railw. in the Circuit Court of the United States, before Mr. Justice *Curtis*, 20 Law Rep. 561, it was held, where the plaintiff, by special contract, agreed to build certain bridges and depots for the defendant corporation, for which he was to be paid partly in cash and partly in shares of their capital stock, and in the progress of the enterprise it became necessary to do much extra work, and furnish materials not provided for in the special contract; that the plaintiff was entitled to recover the whole value of the extra work and materials thus furnished in money, upon an implied assumpsit, and that the agreement to take pay in shares did not extend to this part of the work.

[4] Kirk *v.* The Guardians of the Bromley Union, 2 Phil. 640; Thayer *v.* The Vermont Central Railw., 24 Vt. 440; Herrick *v.* Same, 27 Vt. 673; Vanderwerker *v.* Same, 27 Vt. 125, 130.

[5] Homersham *v.* Wolverhampton Waterworks Co., 6 Exch. 137; s. c. 6 Railw.

4. In one very well-considered case[6] upon the subject of extra work, not authorized in the manner specified in the contract, it is said by the Vice-Chancellor: "From what I have been informed of the course taken at law in these cases, it is this: If, in an action by a contractor, it appears that the company have the benefit of the work, done with their knowledge, the court of law does not allow the company to take the benefit of that work without paying for it, although in covenant (or any action upon the contract) the contractor cannot recover." This may be in accordance with the general rules of law applicable to the subject.[7]

SECTION X.

If one Party repudiate the Contract, the other may sue presently. — Inevitable Accident.

1. *Party repudiating excuses the other.*
2. *New contract valid.*
3. *President cannot bind the company.*
4. *Effect of inevitable accident.*

§ 114. 1. Questions often arise in regard to the right of a party to sue for damages before the time for payment arrives, and before he has fully performed on his part. But it seems now to be well settled, that where one party absolutely repudiates the contract on his part, he thereby exonerates the other from further performance, and exposes himself presently to an action for damages.[1]

C. 790. *Pollock*, Ch. B., said: "The company is not bound by the mere order of the engineer, or by the contract with one director."

[6] Nixon *v.* Taff Vale Railw., 7 Hare, 136. But see *post*, §§ 130, 143.

[7] Dyer *v.* Jones, 8 Vt. 205; Gilman *v.* Hall, 11 id. 511. But, in many cases, the work is done by a sub-contractor, and enures to the benefit of the original contractor, as in Thayer *v.* Vermont Central Railw., 24 Vt. 440, and would not therefore give any right of action against the company, although in one sense they may put the work to their own use, and so may be said to have the benefit of it, to some extent.

[1] Cort *v.* The Ambergate, Not. B. & E. J. Railw., 17 Q. B. 127; s. c. 6 Eng. L. & Eq. 230; Planche *v.* Colburn, 8 Bing. 14; Hochster *v.* De Latour, 2 El. & Bl. 678; s. c. 20 Eng. L. & Eq. 157. But in an action to recover damages on such contract, the jury are not to go into conjectured profits resulting from a sub-contract very much below what the plaintiff was to be paid, but only the difference between the contract price and the value of doing the work at the time of the breach, can be given. Masterton *v.* Mayor of Brooklyn, 7 Hill, 61. The repudiation of a contract by the company, followed by seizure of the works, under

* 2. Where the contract is unconditionally repudiated by one party, before it is fully performed, it is competent for the other to stipulate for its performance, upon different terms, no doubt. And such stipulation, although not under seal, would probably be regarded as made upon a valid and sufficient consideration; and if made by an agent of the former party to the contract, but who had not authority to bind his principal to such contract, it would nevertheless be binding upon the agent and other party contracting, and would not be required to be in writing, as it would be an original and not a collateral undertaking.

3. But it has been held, that after a railway company has entered into a written contract, for the performance of certain work, the promise of its president to allow additional compensation to the contractors, for the same work, is without consideration and not binding upon the company.[2]

4. A very singular question arose in a late English case.[3] The plaintiff agreed to make and erect on premises, under the control of the defendants, certain machinery, and the latter were to provide all necessary brick work, &c. Before the works were completed the buildings in which the work was to be done were destroyed by fire. It was held the plaintiffs were entitled to recover for the work already done by them before the fire, and that it was an implied term of the contract that the defendant should provide the buildings in which the work was to be done, and enable the plaintiffs to do their part of the work and therefore that the defendant was not relieved by the occurrence of the fire; as a party who contracts to do a thing is bound to carry out his engagement, or to make compensation, notwithstanding he is prevented by inevitable accident.

order of a court, will be held a waiver of their right to proceed by arbitration under the same contract on all matters involved in the question of the legality of the seizure. Putney *v.* Cape Town Railw., Law Rep. 1 Eq. 84.

[2] Colcock *v.* Louisville Railw., 1 Strobhart, 329; Nesbitt *v.* L. C. & C. Railw., 2 Speers, 697. The controversy here is in regard to *hard pan* excavation. And as the plaintiff contracted to do all the work on the road, and to construct the road-bed, and his contract only provided for earth and rock excavation, he is bound to accept his estimates under the contract, and especially, after having done so, he cannot claim extra compensation for excavating *hard pan*, even if he show that, by usage, "earth" has a technical meaning, and does not include *hard pan*.

[3] Appleby *v.* Meyers, Law Rep., 1 C. P. 615; s. c. 12 Jur. N. S. 500.

*SECTION XI.

Decisions of Referees and Arbitrators in regard to construction Contracts.

1. *Award valid if substantially correct.*
2. *Court will not set aside award, where it does substantial justice.*

§ 115. 1. The general rule of law, in regard to the decisions of arbitrators and referees, by which they have been held binding upon the parties, although not made strictly according to the technical rules of law, if understandingly made, and exempt from fraud or partiality, has been sometimes applied to contracts for construction of railway works, the settlement of which has been determined by an umpire. As where the contract reserved the right to the company to alter the gradients of the road, and to substitute piling for embankment without extra allowance. These alterations were made, and thus increased the expense to the contractors. The final settlement being made by referees, to whom "all matters in dispute, with the contract as a basis of settlement," were referred, and they having allowed the contractor compensation for this increased expense, it was held to be within the power conferred upon the referees.[1]

2. So, too, where the contract specified a price for earth excavation, and another for rock excavation, but nothing was said of "hard pan," a good deal of which occurred in the course of the work, which was admitted to be more expensive than the ordinary earth excavation; the whole subject was referred, and the plaintiff claimed in his specification thirty cents per yard for excavating hard pan, and the referees allowed him fifty cents on trial. The defendants objected to the allowance, being more than the claim. But the court said, where the testimony was received without objection, and showed the party entitled to *recover, beyond his specification, the court will not set aside the report, or grant a

[1] Porter *v.* Buckfield Branch Railw., 32 Maine, 539. In this case the contract provided for payment of a portion of the price of the work in the stock of the company, and the arbitrators directed, that the same proportion of their award should be paid by issuing certificates of stock, and the award was held valid in this particular also.

new trial, where it is apparent the party has not recovered more than what he is fairly entitled to.[2]

SECTION XII.

Decisions of Company's Engineers.

1. *Estimates for advances, mere approximations, under English practice.*
2. *But where the engineer's estimates are final, can only be set aside for partiality or mistake.*
3. *Contractor bound by practical construction of the contract.*
4. *Estimates do not conclude matters, not referred.*
5. *If contractor consent to accept pay in depreciated orders, he is bound by it.*
6. *Right of appeal lost by acquiescence.*
7. *Engineer cannot delegate his authority.*
8. *Arbitrator must notify parties, and act* bonâ fide.

§ 116. 1. The English contracts for railway construction generally contain a provision for referring the final settlement with the contractor to an indifferent board of arbitrators, or one selected by the parties respectively, with the umpirage of a third party in case of disagreement.[1] Under such contracts the provision in regard to monthly or semi-monthly estimates is such, that they are understood to be mere approximations, and it is only equivalent to a provision, that the company shall advance, from time to time as the work progresses, a stipulated proportion of the work, which they shall, by their engineer, adjudge to be done. All that is requisite to the validity of such estimates is, that they were made *bona fide*, and with the intention of acting according to the exigency of the contract.[1]

[2] Du Bois *v.* Delaware & Hudson Canal Co., 12 Wend. 334.

[1] Ranger *v.* Great Western Railw., 5 Ho. Lds. 72; s. c. 27 Eng. L. & Eq. 35, 46. So where in a canal contract it is provided, that the engineer "shall in all cases determine the amount or quality of the several kinds of work" to be done, and the compensation therefor, and either party had the right to compel an indifferent reference, where he felt aggrieved by the decision of the engineer, "to investigate and determine all questions that may arise relating to compensation for work done under this contract;" it was held, this umpirage only extended to the final account of the engineer. People *v.* Benton, 7 Barb. 209.

Under a contract where the company stipulated to pay the contractor ninety per cent of work done, according to the engineer's estimate; and the engineer had the right to declare the contract abandoned, and in that event the ten per cent became forfeited, and the engineer did so declare; it was held that this did

* 2. But where the contract contains provisions referring the estimate of the quantity and quality of the work absolutely to the determination of the company's engineer, or any particular party, and provides, as is not uncommon in this country, that his decision shall be final, no relief from his determination can ordinarily be obtained, even in a court of equity, unless upon the ground of partiality, or obvious mistake, which latter is held to apply rather to the quantity, than the quality of the work, this being purely matter of judgment and discretion, and which was intended to be concluded by the opinion of the arbitrator.[2] But in an English case[3] before Vice-Chancellor *Stuart*, where in a building contract the corporation reserved the power to determine the contract, which they afterwards exercised, and it was stipulated that any dispute or difference which might arise between the contracting parties should be referred to and settled by the engineer, that it should not be competent for either party to except at law or equity to his determination, and that without the certificate of the engineer no money should be paid to the plaintiffs;" it appearing that the engineer had never refused to discharge his duty according to the contract, and had nothing to disqualify him to act, and was ready and willing to proceed and determine all * matters at issue between the parties, it was held that there was no ground for the equitable interference of the court.

3. If the contractor acquiesce in a particular construction of his

not absolve the company from the payment of the ninety per cent upon the work done by the contractor, before the contract was declared abandoned. Ricker *v.* Fairbanks, 40 Maine, 43.

[2] Herrick *v.* The Vermont Central Railw., 27 Vt. 673; Kidwell *v.* Balt. & Ohio Railw., *infra;* Alton Railw. *v.* Northcott, 15 Ill. 49. In this case it was held that the estimate of the umpire will not bind the parties, if based on an erroneous view of the contract.

So a court of equity may correct the mistakes of the engineer, although the contract stipulates that his decision shall be final. Mansfield & Sandusky Railw. *v.* Veeder, 17 Ohio, 385. So, too, where the engineer proved to be a stockholder in the company. Milnor *v.* The Georgia Railway & Banking Co., 4 Ga. 385. And in Kems *v.* O'Reilley, Leg. Int. Aug. 31, 1866, it was decided that the award of an engineer between contractor and sub-contractor is final. And in Leech *v.* Caldwell, id. Nov. 16, 1866, it was held, that where the sub-contractor covenanted to abide the decision of the engineer of the work in any dispute arising on the contract, the alleged fraud of the engineer did not affect the covenant.

[3] Scott *v.* Corporation of Liverpool, 31 Law Times, 147, 1858.

contract, and allow his estimates, from time to time, to be made upon such basis, he will be bound by it thereafter.[4]

4. Where the contract specifies a price for rock excavation, and another for ordinary earth excavation, and in the course of the work a large quantity of *hard pan* was excavated, for which no provision was made in the contract, and the other party conceded that compensation was due, beyond the price fixed in the contract for ordinary earth excavation, it was decided that the contractor might recover upon a *quantum meruit* count. And where the contract also provided that the engineer should finally determine all questions necessary to the final adjustment of the *contract*, this did not render the engineer's estimate conclusive, as to the sum to be paid for excavating hard pan.[5] These points are both decided, mainly, it is presumed, upon the concession of the defendant, that the hard pan excavation was a matter altogether outside of the contract. Otherwise it might seem difficult to maintain their entire consistency with other decided cases.[6]

5. Where the contract gives the engineer power to stop the work, when the means of carrying it forward fail, and he informed the contractor it could not proceed unless he would receive his monthly pay in orders, which were at a discount, and the contractor consented to receive them, he is not entitled to recover of the company the amount of such depreciation.[7]

6. And although the contractor, by the contract, had the power to refuse to abide by the final estimates of the engineer, * yet if he submitted to him his charges for the work done, and made no objection to his making up the final estimate, he is bound thereby.[7]

7. Where in a contract for work upon a railway it was stipulated that the work should be measured by defendant's engineer

[4] Kidwell *v.* The Baltimore & Ohio Railw., 11 Grattan, 676. See also Commonwealth *v.* Clarkson, 3 Penn. St. 277.

[5] Dubois *v.* Delaware & Hudson Canal Co., 12 Wend. 334; s. c. 15 id. 87. See s. c. 4 Wend. 285. But see *ante*, § 114; Nesbitt *v.* L. C. &c. Railw., 2 Speers, 697, where *hard pan* seems to be regarded as earth excavation, unless there is some special provision in the contract *for estimating it otherwise.*

[6] Morgan *v.* Birnie, 9 Bing. 672. See also Sherman *v.* The Mayor of New York, 1 Comst. 316, 320.

[7] Kidwell *v.* The Baltimore & Ohio Railw., 11 Grattan, 676. See also Commonwealth *v.* Clarkson, 3 Penn. St. 277, upon the general subject of the conclusiveness of the engineer's estimate.

or agent, which should be final and conclusive, it was held that such person could not delegate his authority, but that it was indispensable that he should himself make the admeasurement. But in making it, it is not necessary that he should give previous notice to the parties to enable them to be present.[8]

8. But if such agent is to make an estimate of certain expenses to be allowed the plaintiff, and he proceeds to do so, in the absence of plaintiff and without notice to him, he will not be bound by the estimate. But such estimate will not be affected by the inadequacy of the amount, or that the usual means were not resorted to for ascertaining facts, if the umpire act *bona fide*, which is a fact to be determined by the jury.[8]

SECTION XIII.

Relief in Equity from Decisions of Company's Engineers.

1. *Facts of an important case stated.*
2. *Claim of contractor in the bill.*
3. *Bill sustained. Amendment alleging mistake in estimates.*
4. *Relief only to be had in equity.*
5. *Proof of fraud must be very clear.*
6. *Engineer being shareholder, not valid objection.*
7. *Decision of engineer conclusive as to quality of work, but not as to quantity.*
8. *New contract condonation of old claims.*
9. *Account ordered after company had completed work.*
10. *Money penalties cannot be relieved against unless for fraud.*

n. 1. *Review of the cases upon this subject.*

11. *Engineer's estimates not conclusive unless so agreed.*
12. *Contractor, whose work surrendered by supplemental contract, entitled to full compensation.*
13. *Direction of umpire binding on contracting parties, and dispenses with certificate of full performance.*

§ 117. 1. In consequence of the peculiar stringency of the terms of contracts for railway construction, applications for * relief in equity have not been unfrequent. In one case[1] it was agreed by

[8] Wilson *v.* York & Md. Railw. Co., 11 Gill & Johns. 58. Gross negligence is not fraud, but is evidence to be considered by the jury. Id.

[1] Ranger *v.* Great Western Railw., 1 Railw. C. 1; s. c. 13 Sim. 368.

And where by the contract the work was to be done to the satisfaction of the engineer of the defendants, and suit was brought without obtaining the judgment of the engineer, held, that it could not be maintained. Parkes *v.* The Great Western Railw., 3 Railw. C. 17.

This case is also found in 3 Railw. C. 298, and in 5 Ho. Lds. 72, and in 27 Eng. Law. & Eq. 35.

This case came before the House of Lords, on appeal for final determination,

the contract that every fortnight the engineer of the * company should ascertain the value of the work done, according to its

May 26, 1854, just ten years after the decision in the Vice-Chancellor's court. The judgment was in the main affirmed, but in form was reversed, and sent back to the Court of Chancery, for an account to be taken between the parties, according to their respective rights, as established by the final decision.

The case, as it appeared on the final hearing, is deserving of a more extended notice. The following is the statement of the case, and the points ruled in the House of Lords.

In a contract between R. and a railway company for the performance by R. of a portion of the line of railway, after reciting that R. agreed to secure the due performance of his contract, by his bond in the penal sum of £4,000 conditioned for the payment to the company of certain fixed sums for every week in which the work should not be completed according to the contract, the penalty in each successive week to increase in a fixed proportion, it was witnessed, amongst other things, that in case R. should become insolvent, &c., or should, from any cause whatsoever (not the act of the company), not proceed in the works to the satisfaction of the company, the company might give to R. a notice in writing requiring him to proceed with the said works, and in case R. should for seven days after such notice make default in commencing or regularly proceeding with the said works, it should be lawful for the company to employ other persons to complete the works, and pay them out of the money which should be then remaining due to R. on account of his contract; and that the moneys previously paid to R. on account of any works should be considered as the full value, and be taken by him as in full payment and satisfaction for all works done by him; and that all moneys which either then or thereafter would have been payable to R., together with all the tools and materials then being upon the works, should, upon such default as aforesaid, become and be in all respects considered as the absolute property of the company; and that if such moneys, tools, and materials should not be sufficient to pay for the completion of the works, then R. should make good such deficiency on demand. It was then further witnessed, and the company covenanted to pay to R. for the completion of the works the sum of £63,028 16*s.*, in the following manner, namely, every fourteen days four-fifth parts of the whole value of the said works which shall have been actually performed during the preceding fourteen days, until there should be a reserved fund of £4,000, and then every fourteen days to pay the full value of such works, such value to be estimated by the principal engineer or his assistant, having reference as well to the prices in the schedule (as to extra work) as to the entire cost of the whole works; and at the expiration of one calendar month after the completion of the entire works, to pay one moiety of the £4,000 so retained in the hands of the company, and at the expiration of one year and a month, the remaining moiety of the £4,000. And it was lastly agreed, that during the progress of the works, the decision of the principal engineer for the time being of the company, with respect to the amount, state, condition, &c., or any other matter or thing whatsoever relating to the same, shall be final, and without appeal; but in case of dispute, after the completion of the contract, as to any matter of charge or account between the company and R., such dispute shall be finally

quality and relative proportion to the whole work; the * contractor to receive eighty per centum, the remainder being reserved to

settled by the arbitration of the said engineer on the part of the company, and an engineer appointed by R. on his part, or if they disagree, by an arbitrator to be named by them. After R. had proceeded to a very considerable extent towards the completion of his contract, the company, being dissatisfied with the progress of the works, gave the notice to R. mentioned in the contract, and after seven days they took possession of the works, and of all the tools and materials thereon, and completed the works by other parties. R. filed his bill, setting up a case of fraud against the company in concealing the nature of the strata through which cuttings and tunnels were to be made, and insisting that he was entitled to be paid for those works at fair prices, regardless of the contract; that the fortnightly certificates of the value of the works given by B., the engineer of the company, were void, and not binding upon him, in consequence of B. being a shareholder in the company; that he was entitled to be relieved against certain money penalties which had been charged against him in the engineer's certificates; that the company were not justified in taking possession of the works, tools, and materials; and that he was entitled to have an account taken of the value of the works done, on the footing that there were no contracts, or that they were abandoned; and that the company might be debited with the value of the engines, tools, materials, articles, and things of which the company took possession.

Held, first, that no case of fraud had been made out. But, *semble*, that although a corporation cannot be guilty of fraud, yet if their agents employed in carrying out a trading speculation be guilty of fraud, the corporation will be liable. Per the Lord Chancellor.

Secondly, that the principle which prevents a person being a judge in his own cause (Dimes *v.* The Grand Junction Canal Co., 3 Ho. Lds. 759; 17 Jur. 73; s. c. 16 Eng. L. & Eq. 63), does not apply to the case of the engineer of a railway company holding shares in that company, who, according to the terms of a contract between the company and a contractor, was, during the progress of the works, to give periodical certificates of the value of the work done, but which, on the completion of the contract, were not final.

Thirdly, that the money penalties had been properly charged against R., they being, upon the proper construction of the contract, not penalties, but liquidated damages.

Fourthly, that even assuming that the company were not justified in taking possession of the works, tools, and materials, after the notice given R. was not entitled to treat the contract as not existing, or as abandoned. R.'s right would have been by action for damages, and the seizure by the company formed no ground for such equitable relief as was asked.

Fifthly, that upon the true construction of the contract, the company did not according to their contention, upon taking possession of the works and plant after notice, become absolute owners of the tools and materials, &c.; this whole provision is to be regarded, not in the nature of a penalty, but as mere machinery for enabling the company to complete the works at the cost of R., and the company are bound to account for the value of the tools and materials, in settling

enforce the completion of the works. That if the * engineer should not be satisfied with the works, after notice given to the contractor,

their accounts with him, which accounts were decreed to be taken on the footing of the contract. In regard to the competency of the engineer, the learned chancellor said: "When it is stipulated that certain questions shall be decided by the engineer appointed by the company, that is, in fact, a stipulation that they shall be decided by the company. It is obvious that there never was any intention of leaving to third persons the decision of questions arising during the progress of the works. The company reserved the decision for itself, acting, however, as from the nature of things it must act, by an agent, and that agent was, for this purpose, the engineer. His decisions were, in fact, their decisions. The contract did not hold out, or pretend to hold out, to the appellant, that he was to look to the engineer in any other character than as the impersonation of the company. In fact, the contract treats his acts and their acts, for many purposes, as equivalent, or rather identical. I am, therefore, of opinion, that the principle on which the doctrines as to a judge rest, wholly fails as to its application to this case. The company's engineer was not intended to be an impartial judge, but the organ of one of the contracting parties. The company stipulated that their engineer for the time being, whosoever he might be, should be the person to decide disputes pending the progress of the works, and the appellant, by assenting to that stipulation, put it out of his power to object, on the ground of what has been called the "unindifferency" of the person by whose decision he agreed to be bound. It is to be observed, that the person to decide was not a particular individual, in whom notwithstanding his relation to the company, the contractor might have so much confidence as to agree to be bound by his awards, but any one from time to time the company might choose to select as their engineer. The appellant alleges that he did not know the fact that Mr. Brunel was a shareholder until more than two years after the works had been begun.

"But he must have known that the company had it in their power to appoint another engineer in Mr. Brunel's place, who might hold shares, or that Mr. Brunel himself might purchase shares. Without the intervention of the engineer, the contract was, as it were, paralyzed; nothing could be done under it; and it surely can hardly be argued that a person appointed engineer could, by purchasing shares, render the contract practically inoperative."

It is regarded as questionable, how far a contract, vesting the property of the contractor in the company, in the event of his insolvency merely, could be maintained, as consistent with the English bankrupt and insolvent laws. Roach *v.* The Great W. Railw., 1 Q. B. 51; s. c. 2 Railw. C. 505. But this objection may be obviated by the company stipulating for a lien merely; a right to use the tools and materials of the contractor in the completion of the work, according to and in fulfilment of his contract. Hawthorn *v.* Newcastle-upon-Tyne & N. Shield Railw., 3 Q. B. 734, note *a*; s. c. 2 Railw. C. 299. It is said in one case, by a very learned equity judge, Lord *Redesdale* (O'Connor *v.* Spaight, 1 Sch. & Lef. 309), that where an account has become so complicated that a court of law would be incompetent to examine it, upon a trial at Nisi Prius, with all necessary accuracy, a court of equity will, upon that ground alone, take cognizance

and his * default in complying for seven days to take possession of the works, thereupon the plant and materials of the contractor,

of the case. But a court of equity will not ordinarily interfere in any such case, and especially when the party applying has been guilty of laches. Northwestern Railw. *v.* Martin, 2 Phil. 758. See also Taff-Vale Railw. *v.* Nixon, 1 H. L. Cas. 111; Faley *v.* Hill, 2 id. 45, 46. See also Nixon *v.* Taff-Vale Railw., 7 Hare, 136. It is questionable, we think, whether any such distinct ground of exclusive equity jurisdiction, in matters of account, as the complicated nature of the transactions, can be maintained, but there is little doubt this would be regarded as an important consideration in guiding the discretion of that court, in assuming such jurisdiction, in any particular case pending in a court of law. But sometimes where the contractor claims the right to appropriate payments, made generally, to a different contract from that upon which the company desire it to apply, it becomes necessary to draw the whole into a court of equity. Southeastern Railw. *v.* Brogden, 14 Jur. 795; s. c. 3 McN. &. G. 8. See upon the general subject, Waring *v.* The Manch. & Sheffield & L. Railw., 7 Hare, 482. An important case, upon a contract for railway construction, finally determined in the national tribunal of last resort, upon elaborate argument and great consideration, and which involved most of the subjects involved in the case of Ranger *v.* the Great Western Railw., may be regarded, perhaps, as bearing something of the same relation to cases in this country upon that subject which the English case does to cases of that kind in the English courts.

This is the case of Philadelphia, Wilmington, & Baltimore Railw. *v.* Howard, 13 How. 307; s. c. 1 Am. Railw. C. 70. It came into the United States Supreme Court by writ of error to the Circuit Court of the United States for the District of Maryland. The facts in the case are complicated, and the points involved numerous. It will only be necessary to state the facts, in connection with the several points decided. The points bearing upon this subject are: —

In such contract the covenant to finish the work by a time named on the one part, and to pay monthly on the other part, are distinct and independent covenants. And a right to annul the contract, on the part of the company, at any time, did not include a right to forfeit the earnings of the other party for work done prior to the time when the contract was annulled.

A covenant to execute the work, according to a certain schedule, which mentioned that it was to be done according to the directions of the engineer, bound the company to pay for work done according to his directions, although not strictly in conformity with a profile showing the original proximate estimates.

And when the contract was to place the waste earth where ordered by the engineer, it was the duty of the engineer to provide a convenient place, and if he failed to do so the other party is entitled to damages.

Where the contract authorized the company to retain, until the completion of the contract, fifteen per cent of the earnings of the contractor, by way of indemnity from loss, by any failure to perform the contract by the contractor, it was held this was not to be regarded as a forfeiture, and that the company, if they terminated the contract, were bound to pay the contractor any amount

and *all the work done and not paid for, and the reserved fund to be forfeited to the company.

which they had so retained, unless the jury were satisfied the company had sustained loss by the default, negligence, or misconduct of the contractor, which should be deducted.

Where the contractor was delayed in the progress of the work, by an injunction out of Chancery, he is entitled to no damages, unless the jury find that the company did not use reasonable diligence in obtaining a dissolution of the injunction.

If a railway company, having the power reserved to them of annulling a contract for construction, "when, in their opinion, it is not in due progress of execution," or the contractor is "irregular or negligent," it was held, that if they exercised this power for the purpose of having the work done cheaper, or of oppressing and injuring the contractor, he was entitled to recover damages for any loss of profit he might have sustained, and of the reasons which influenced the company, the jury were to be judges.

And in Herrick *v.* Vermont Central Railw., 27 Vt. 673, the following points were decided upon this subject: —

A stipulation in a contract for the construction, in part, of a railway, that "the engineer shall be the sole judge of the quality and quantity of the work, and from his decision there shall be no appeal," is binding upon the parties, and constitutes the engineer an arbitrator or umpire between them.

Such a stipulation imposes upon the party by whom the engineers are to be employed, the duty of employing for such engineers competent, upright, and trustworthy persons, and to see to it that they perform the service expected of them at a proper time and in a proper manner.

Such a stipulation, when construed with reference to its subject-matter, and the ordinary course of business, does not require the estimates to be made or verified by the chief engineer, but has reference as well to the assistant, or resident engineer, by whom such estimates are usually made.

If payment for the work performed is dependent upon and to be made according to the engineer's estimates, as to its amount, and the employing party performs its duty in reference to the employment of suitable engineers, &c., the obligation to pay will not arise until such estimates are made.

But if no estimates are made, through the neglect or fault of the engineer, or of the party who employs him, the other party could probably recover at law, for the work performed by him, without any engineer's estimate of it.

A contract providing for monthly estimates of the contractor's work, according to which he is to be paid, imports an accurate measurement and final estimate for each month, and not such a one as is merely approximate or conjectural.

A court of equity has jurisdiction of a claim to be paid for a larger amount of work done under such a contract than was estimated by the engineer, where the under-estimate was occasioned either by mistake or fraud.

The Vermont Central Railw. Co. contracted with B. for the construction of their railway, and B. contracted with the plaintiff for the construction of a part of it. In both contracts there was such a provision in reference to the conclu-

* 2. The company having taken the forfeiture under the contract, the plaintiff filed his bill, insisting that the engineer had under-estimated the work £30,000, and that no forfeiture had been incurred by him, and praying that the company might elect to permit the plaintiff to complete the works, or that the contract might be considered at an end, and in either case an account between the parties might be taken.

siveness of the engineer's estimates. *Held*, that there was no privity of contract between the plaintiff and the Vermont Central Railway Co., and that he could not recover of them for work not estimated by the engineer, by reason only of a mistake, which they had not, either directly or indirectly, caused or connived at; and that their indebtedness to B. for the same work for which he was indebted to the plaintiff, did not constitute a fund against which the plaintiff had a claim.

But if there was any connivance on the part of the Vermont Central Railway Co., or their agents, in bringing about the under-estimates complained of, even if it was without the design ultimately to defraud, but only as a temporary expedient for present relief, the plaintiff would be entitled to recover of them the loss which he sustained by reason thereof.

The plaintiff claimed in his bill, that he had been under-estimated a given amount, for the payment of which he instituted the present suit; by the report of the Master, the amount not estimated was found to be more than twice that amount. *Held*, that the plaintiff should be limited to the amount claimed in his bill.

The report of a Master in Chancery upon the taking of an account, should contain a succinct statement of all the points made by counsel, and the facts found by him upon each point.

The testimony given *viva voce* before a Master in Chancery, in taking an account, or a copy of it, should be returned to the court, with his report.

The Master should also state the account, at length, and all the facts found by him, so that they will be intelligible, without reference to the testimony.

In a contract for railway construction, where the parties by a subsequent contract stipulated for the completing of the work by a day named, for the additional price of £15,000, and a further stipulation that the contractor should pay the company £300 for each day's delay beyond the time specified, the company to furnish the rails and chairs, blocks, &c., to complete the same, by the day specified. The work was not finished for twenty-four days after the time specified, and the rails, chairs, blocks, &c., were not furnished to complete it sooner. The court held the covenants independent of each other, and the contractor bound to deduct the stipulated forfeiture, notwithstanding the default of the company. McIntosh v. Midland Counties Railw., 14 M. & W. 548; s. c. 3 Railw. C. 780. The rule of law that covenants, which are not the entire consideration for each other, will ordinarily be construed as independent, unless there is something in the transaction which shows the parties regarded them as dependent, is certainly carried further in this case than reason and justice would seem to justify. We think this case would not be followed in this country.

3. The Lord Chancellor held, that the facts alleged do entitle the plaintiff to relief in equity. The plaintiff amended his bill, and alleged that the most expensive masonry had been paid for only at the price of inferior work, and claimed large sums in that respect, and also alleged fraud against the company, in the contracts and in the certificates.

4. It was held, that the investigations as to the sufficiency of the payments made could only be made in a court of equity.

5. That the evidence in support of an allegation of fraud must be very clear, and that it is not enough to show that the statements of the company as to the nature of the work, gave imperfect information, but it must also be shown that the contractor could not with reasonable diligence have acquired all necessary information.

6. The fact of the engineer being a shareholder in the company is not enough to avoid his decision, as the contractor might have ascertained this fact. The character of an engineer is of more value to him than his interest as a shareholder.

7. That the decision of the engineer as to the quality of the work is conclusive, but not as to the quantity. The question of measurement and calculation will be entertained and decided by a court of equity.

* 8. That where the parties have entered into new contracts, it will be considered a condonation of old injuries, unless, at the time of making the new contract, the plaintiff insisted upon his adverse claims, the parties being at liberty to proceed at law.

9. After the works were completed by the company the court ordered an account taken, directing special inquiries as to the amount and kind of work done.

10. It was held that stipulations in regard to penalties in these contracts are binding upon the parties, and no relief against them will be afforded in equity unless fraud be shown. And that, where it had been agreed that a written contract should form part of an unwritten one, this will include stipulations as to forfeiture.[1]

11. In one case in Pennsylvania[2] it was decided that the estimates and decisions of the engineer of a railway company are conclusive, in disputes with contractors, only where such is the positive stipulation of the contract; that in every other case the

[2] Memphis Railw. Co. *v.* Wilcox, 48 Penn. St. 161.

correctness of such estimates are to be tested by evidence, and in an action against the company by a contractor to recover a balance claimed to be due for work, it is correct to instruct the jury to rely on the engineer's final estimates unless shown to be erroneous.

12. In such a contract, where a supplemental contract was made by the company, assuming the work, and agreeing to pay the contractor for what work he had done, and reserving no claim for damages, either on account of the suspension of the work or its not being completed, it was held that the contractor was entitled to compensation according to the stipulations of the supplemental contract, without any deductions on account of suspension of or not completing the work, and that the work done and agreed to be compensated must be estimated at what it was worth, and the contractor's claim could not be restricted to what would be coming to him under the final estimates of the engineer; nor could the company claim any deductions on account of loss incurred in completing the work.[2]

13. And where the plaintiff stipulated to perform the work of shifting the track of a railway, under the direction and to the * satisfaction of the city surveyor, whose certificate that the work had been so performed was to entitle him to payment, it was held, that where the surveyor directed that the work should not be done beyond a certain point, that was a valid excuse for not obtaining his certificate of performance beyond that point.[3]

*SECTION XIV.

Frauds in Contracts for Construction.

1. *Relievable in equity upon general principles.*
2. *Statement of leading cases upon this subject.*
3. *Where no definite contract closed, no relief can be granted.*

§ 118. 1. It is well known that courts of equity will relieve against fraud practised by the agents of railways, in building-contracts, the same as in other cases of fraud. But the importance and peculiar nature of these contracts will justify a brief note of the cases decided upon the subject.

[3] Devlin *v.* Second Avenue Railw. Co., 44 Barb. 81.

2. The most important case in the English books upon this subject, is that of Ranger *v.* The Great Western Railway, which we have just referred to upon another point.[1] And the state-

[1] 1 Railw. C. 1; s. c. 3 Railw. C. 298. On appeal in the House of Lords, 27 Eng. L. &. Eq. 35, 41; s. c. 13 Sim. 368; 5 Ho. Lds. 72. In regard to fraud, on the part of railway companies, in building-contracts, the Lord Chancellor said: "The first ground on which the appellant rests his title to relief is, that he was induced to enter into the contract by the fraud of the company; that the sum at which he agreed to do the works was far below what he would have required had he known the real nature of the soil through which the tunnels were to be made; but on this point he had been misled by the fraudulent contrivance of the respondents. The case made by the bill on this head is, that there being on the line of the road to be made for the railway in the neighborhood of Bristol three kinds of stone, sandstone, Dunns or Dunn stone, and Pennant or Hanham stone, of which the first (that is, sandstone) is comparatively soft and easy to work, whereas the other two kinds (particularly the latter) are hard and difficult to work, the company acting through Mr. Brunel, their engineer, fraudulently contrived to make the appellant believe that the cuttings would be through the softer material (sandstone), and not through Dunns or Pennant stone, whereas the fact was, as they well knew, that the line was chiefly through the harder sorts of stone. The bill represents, that, for the purpose of enabling persons desirous of contracting to make the road along the line included in the contract described as 1 B, to tender for the same, it was necessary that in different parts of that portion of the intended line pits should be sunk, called 'trial pits,' in order that the nature of the strata might be previously known; and accordingly that the respondents did sink ten such pits, but that eight of them were only sunk to the depth of a few feet, and were, therefore, of little or no use in showing what would be the nature of the soil at the level of the line of the railway, which was at a very considerable depth below the surface; and the other two were sunk respectively to depths of 78 and 55 feet only, at points where the intended line of road was in one case 112 feet and in the other 97 feet below the surface, so that these two pits did not reach the level of the railway, in one case by 34 feet, and in the other by 42 feet. The bill further alleges that the soil dug out of all of the said pits was laid on the surface near the mouth, and showed apparently a substratum of sandstone, the workmen employed to sink the pits having by directions from the company ceased to dig when they reached the hard stone, except that out of the bottom of one of the deep pits some Dunn stone was taken, but which had crumbled away when exposed to the air.

"The bill then goes on to charge, in substance, that the company, with knowledge that the cuttings would have to be made through the harder sorts of stone, caused notice to be given by advertisement, that they were ready to receive tenders according to certain printed forms circulated for the purpose, and the nature of the works to be done was to be ascertained from a specification deposited in their office at Bristol. The specification described the works for which the tender was to be made. The printed form of tender contained an undertaking by the party tendering, not only that he would do the contract works at a specified sum, but also that he would do any extra works, and make any

*ment of that case, in the House of Lords, by the Lord Chancellor *Cranworth*, is a better commentary than elsewhere exists,

alterations in or additions to the original works which might be deemed expedient in the course of their progress, on being paid for the same according to certain rates set out in a schedule of prices annexed to the tender. The different heads under which charges were to be made by the contractor, in respect of such extra or altered works were all printed as part of the form of tender, and the party tendering was to write against each such head the price at which he would agree to be bound to do the same works of the nature there referred to. Amongst the works so to be done was the excavating clay, shell, and sandstone, but there was no mention in the schedule of any other stone. Neither Dunn stone nor Pennant are referred to by name; and the suggestion of the bill is, that the omission of any mention of Dunn or Pennant stone was a contrivance, or part of a contrivance, for the purpose of leading the persons tendering, to suppose that they might make their calculations on the footing of there being no hard stone to be cut through, — a supposition which would be confirmed by the trial pits, out of which no hard stone had been dug, except the small portion of Dunn stone from one of the pits, which, as I have already stated, crumbled away when exposed to the air.

"The appellant was resident in London, and in order to enable him to make his tender, he sent down to Bristol an agent, Thomas Lloyd, whom he represents as a competent judge in such matters, to examine the line of the proposed works, so as to enable him to form a correct judgment as to what would be a fair amount to be tendered. The bill states that Lloyd accordingly proceeded to Bristol in the month of March, 1836, surveyed the line and inspected the trial pits, and that, reasonably supposing the two principal pits to have been sunk to the level, and not finding amongst the excavated material accumulated on the surface any thing but soft or loose stone, — no Pennant or Hanham stone, — he concluded that there would be no cutting through hard stone; and the sum tendered was calculated on that basis. It was, according to the bill, impossible for Lloyd to get down to or near the bottom of the two principal trial pits, in consequence of their being nearly filled up with rubbish and water before he examined them. The appellant, therefore, contends that he was imposed upon as to the nature of the work he had to perform, and so agreed to do it on terms to which, but for the deception practised upon him, he would not have consented. The question on this part of the case is one of fact. Is it established that any imposition was practised on the appellant to induce him to enter into the contract? For if there was, he was clearly entitled to relief, — whether precisely that which he asks for is another question. Strictly speaking, a corporation cannot of itself be guilty of fraud; but where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that, if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation. The question, therefore, on this part of the case is whether the directors, or the engineers,

* upon this subject. The general subject of fraud in railway companies, in regard to building contracts, is somewhat considered in a late case in the Supreme Court of Vermont.[2]

or agents, whom they employed, were guilty of the fraudulent misrepresentations alleged by the bill. I am clearly of opinion that no such case is made out. [His lordship here stated the nature of the evidence on this point, and continued]: —

"Two engineers, Mr. Frere and Mr. Babbage, both say that the appellant had ample opportunity, by means of the trial pits and cuttings, of ascertaining the nature of the soil and strata; and the circumstances of the case satisfy me that this must be true. The work to be done was of a laborious, difficult, and expensive character. The notices calling for tenders had been circulated for many weeks, and even months, and would naturally excite the attention of contractors of eminence, who would be drawn to the spot. I cannot attribute to the company the fraudulent intention imputed to them — an intention as absurd as it would have been fraudulent — of meaning to mislead those who should apply to make tenders for the work, when they must have felt that the success of such a fraud must entirely depend on the very improbable chance, that those who should be attracted by the notices would omit to make inquiry into the nature of the soil they would have to excavate. The work was not one of a trifling nature; one of the persons who made a tender demanded above £100,000. The tenders were, in the first instance, to be made before the 1st March, 1836; and until nearly a fortnight after that date the two principal trial pits had been open, and free from water, so that there was nothing to prevent any contractor from himself ascertaining to what depth it had been cut, and what was the soil at the bottom; and though by the 12th March a great deal of water had entered, and so partially choked the two principal pits, yet Mr. Frere says the company and their engineers were always ready to facilitate the appellant's investigation as to the nature of the soil and strata.

"The appellant, in his bill, assumes that sandstone and Pennant stone are two different kinds of stone, but this is not the conclusion at which, on the evidence, I arrive. 'Pennant stone,' says Mr. Brunel, 'is a species of sandstone, and the only species in the neighborhood of Bristol of sufficient hardness to be used for bridges, or other strong masonry.' And Mr. Frere says that it is extensively used in Bristol, and is the hardest sort of sandstone found in that neighborhood, except the Brandon Hill stone. Dunn stone, according to the same witness, is merely a local term for a particular variety of shale, and is frequently found in cuttings along with sandstone. This explanation fully justifies the language of the tenders, without supposing that the materials to be excavated and removed were there mentioned by the company for any purpose of deception. The soil to be removed was sufficiently designated as consisting of clay, shale, and sandstone, the latter term comprehending all sandstone, hard as well as soft; that is Pennant or Hanham stone (which is in truth only Pennant stone found at Hanham), as well as ordinary sandstone. In the contract 2 B, the expression occurs,

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[2] Herrick *v.* The Vermont Central Railw., 27 Vt. 673.

*3. But it is clear that where no binding and complete contract has been entered into by the company, although the *tenders made by a contractor have been accepted by their engineer, authorized to act on their behalf, and the contractor has incurred

'compact gray sandstone, commonly called Hanham stone.' It was for the appellant, before he made a tender, to satisfy himself as to the probable hardness of the sandstone to be removed, which, after all, could never be ascertained beforehand with perfect certainty. By examining the trial pits and cuttings, and making inquiries of the engineers, he might have ascertained the depth to which the pits had been sunk, and the nature of the soil through which they had penetrated, and at which they had arrived. The cuttings, according to the evidence of Mr. Frere, exhibited sandstone, Pennant, and Dunn stone; and the old quarry in Fox's Wood showed Pennant.

"In these circumstances, I think it is impossible to believe that there was any thing like contrivance to mislead the appellant or any other contractor; and it is clear that the appellant, if there was no fraud, was bound to satisfy himself on the subject; for the specification of the proposed works, submitted to him before the tender was made, expressly stipulates that the contractor must satisfy himself of the nature of the soil, and of all matters which can in any way influence his contract. This, though of course it would not absolve the company from the consequences of any fraudulent contrivances to mislead, yet certainly, in the absence of fraud, threw on the appellant the obligation of judging for himself. I must further add, that I cannot believe the appellant to have been really mistaken as to the nature of the soil, except, possibly, that the proportion of hard stone was greater than he had imagined he should find. I come to this conclusion from the fact, that the specification, which was submitted to him before he made the tender, provides for the construction of the Avon bridge, and other masonry, by means of the stone to be obtained from the cuttings. Now, Mr. Brunel says that Pennant is the only sandstone in the neighborhood of Bristol of sufficient hardness to be used for masonry. The appellant either did know or might have known this when he made his tender, and it is surely impossible for him, in the face of such a clause in the specification, to say that he did not know there would be any beds of Pennant stone — that is, of stone capable of being used for masonry — to be excavated or removed. It is not unworthy of observation, that Mr. Stanton, one of the persons who made a tender, in his schedule of prices as to the sum which he would require for working sandstone, obviously points to the difference which might exist in the expense of removing sandstone of different qualities; and he did not, like the appellant and the other persons who made tenders, offer one fixed uniform sum for sandstone of every quality, but he required for moving, &c., sandstone from open cuttings, 1*s.* 4*d.* to 2*s.* 2*d.*, and from tunnels, 2*s.* 9*d.* to 4*s.* 6*d.*; from which, I think, it may be fairly inferred that he understood the words 'sandstone' used in the schedule to include stone of different degrees of hardness; some more expensive to work, some less so. To all these considerations must be added, that the appellant did not, so far as there is any evidence on the subject, make any remonstrance as to the supposed deception or mistake during the progress of the works, nor until after the relation between the parties had been entirely determined."

* 430, 431

expense upon the faith of having the contract, in preparation to fulfil it, there being certain alternatives in the tender, which had not been decided upon, and the whole thing being given up and no specific contract made under the seal of the company, equity can grant no relief.[3] For if there was no contract equity could not create one, and if there was a valid contract the remedy at law is adequate.

*SECTION XV.

Engineer's Estimate wanting through Fault of Company.

1. *In such case contractor may maintain bill in equity.*
2. *Grounds of equitable interference.*
3. *After company terminate contract, contractor will be enjoined from interference. And same rule sometimes extends to company.*
4. *Stipulation requiring engineer's estimate, not void.*
5. *Not the same as an agreement, that all disputes shall be decided by arbitration.*
6. *Engineer's estimate proper condition precedent.*
7. *Same as sale of goods, at the valuation of third party.*
8. *The result of all the English cases seems to be, that only the question of damages properly referable to the engineer.*
9. *The rule in this respect different, in this country.*

§ 119. 1. Where, by the terms of a railway construction contract, executed under the seals of the parties, the work is to be paid for, from time to time, upon the estimate and approval of the company's principal engineer, and the amount and quality of the work finally to be determined, in the same mode, no action, either at law or in equity, can be maintained until such estimate and approval is obtained, unless it is prevented by the fault of the company. But where no such engineer is furnished by the company, or where through their connivance he neglects to act, the contractor is not without remedy, in equity.[1] Lord Chancellor *Cottenham*, in affirming this decision,[2] says: —

2. "It is true that the specification and contract constitute a relationship between the plaintiffs and the defendants, which, if correctly acted upon, would have given to the plaintiffs a legal

[3] Jackson *v.* The North Wales Railw., 1 Hall & T. 75, s. c. 6 Railw. C. 112.

[1] McIntosh *v.* The Great Western Railw., 2 De G. & S. 758. This is the decision of the Vice-Chancellor, which came before the Lord Chancellor, as mentioned in note 2.

[2] McIntosh *v.* The Great Western Railw., 2 Hall & T. 250; s. c. 2 Mac. & G. 74.

right, and a legal right only, to the benefits they claimed by this bill. But if the facts stated in the bill are such as, if true, deprive the plaintiffs of the means of enforcing such legal rights, and if those facts have arisen from the conduct of the defendants, or of their agent so recognized by the specification and contract, and now used for the fraudulent purpose of defeating * the plaintiffs' claim altogether, the defendants cannot resist the plaintiffs' claim in equity upon the ground that their remedy is only at law; nor is it any answer to show that, if the plaintiffs cannot get at law what they contracted for, they may obtain compensation in damages. It is no answer to a bill for specific performance that the plaintiffs may bring an action for damages for a breach of the contract, or in a proper case of a bill for discovery of some specific chattels that damages may be recovered in trover,— the language of pleading is not that the plaintiff have no remedy, but no adequate remedy save in a court of equity. It is therefore no answer in the present case for the defendants to urge, that if they or their agent have been neglectful of what they undertook to do, by which the plaintiffs have suffered, they may be liable in damage to the plaintiffs. They contracted for a specific thing, and are not bound to take that, or something in lieu of it, if such other thing be not what this court considers as a fair equivalent. I do not therefore consider that any answer is given to the plaintiffs' right to file a bill in this court by showing that the ground upon which they seek their right so to do, namely, the being barred of their legal remedy by the conduct of the defendants, may subject them to damages at law."

3. And where disputes arose between the contractor and the company, each charging default upon the other's part, and claiming the right to occupy the works, and the workmen of both coming in collision, upon the line of the road, and the completion and opening of the road being delayed in consequence, the court, on the application of the company, restrained the contractor from continuing on the line or interfering with the operations of the company, but directed an account of what was due the contractor, without regard to the former certificates of the company's engineer, and an issue to try whether the company were justified in removing the contractor, reserving all claims for loss and compensation till the final hearing.[3]

[3] East Lancashire Railw. *v.* Hattersley, 8 Hare, 72.

And in a very recent case,[4] by the terms of the contract it was provided, that if the contractor made default the company might themselves complete the line, and that the plant, &c., upon the * line belonging to the contractor should become the property of the company, and be set off against the debts, if any, due from him to the company, and that the contractor should not hinder the company from using the same. Default having been made by the contractor, the company completed the line and were proceeding to remove the plant, &c. An arbitration was pending to decide the question of amount between the contractor and the company. It was held that the company must be enjoined from removing the plant before award given.

Lord *Romilly*, M. R., here suggests that the company have no right to take the plant until it appears that the contractor is indebted to them; but we should have said that under such a contract the fair construction is that the company may take and use the plant in completing the line, making themselves debtor to the contractor for the same. The purpose of such a stipulation presumptively is, that the work may not be interrupted by the change of hands from the contractor to the company. But after the road is completed, so far as the contract extended, and the company had made no use of the plant, the view suggested by his lordship seems entirely just and reasonable.

4. The question of the right to recover at all at law, without procuring the engineer's estimate, where that is made a condition precedent in the contract, has been of late considerably discussed in the English courts, and especially in the important case before the House of Lords, in July, 1856;[5] and the result arrived at seems to be, that such a clause in a contract, in regard to the basis of recovery, is not equivalent to a stipulation that no action shall be brought, or that the case shall not come before the courts of law or equity, which has long since been determined to be repugnant and void.[6]

5. The distinction is somewhat refined, and difficult of exact definition, but it seems to us not altogether without foundation. A stipulation, that no action shall ever be brought upon a con-

[4] Garrett *v.* Salisbury & Dorset Junction Railw., Law Rep. 2 Eq. 358; s. c. 12 Jur., N. S. 495.

[5] Scott *v.* Avery, 5 Ho. Lds. 811; s. c. 36 Eng. L. & Eq. 1.

[6] Thompson *v.* Charnock, 8 T. R. 139. See also Tattersall *v.* Groote, 2 B. & P. 131.

tract, or, what is equivalent, that all disputes under it shall be referred to arbitration, is a repugnancy, which if carried out literally must render the contract itself, as a mode of legal redress, * wholly idle. And it is only in this view that contracts are to be considered by the courts.

6. But a stipulation that the liability under a contract or covenant shall not accrue, except upon the basis of certain previously ascertained facts, where the contract contains provisions for ascertaining them, by the action of either party, without the concurrence of the other, is no more than a limitation upon the right of action, as that no action shall be brought until after one year, or unless commenced within six months,[7] which have been held valid. And even where the concurrence of both parties is requisite and the performance of the condition fails through the refusal of one, it probably is the same as to the other as if performed.

7. Hence a contract to purchase goods at the valuation of N. and M., cannot be made the foundation of an action, without obtaining the valuation stipulated, or showing that the other party hindered it.[8] And in some cases it has been held, that if the obtaining of the estimate is withheld or defeated by the fraud of the other party, that no action at law will lie, the only remedy being by a special action for the fraud, or in equity, perhaps.[9]

8. This subject is very elaborately discussed by the judges before the House of Lords, in the case of Scott *v.* Avery,[5] and it is remarkable how wide a difference of opinion was found to exist, upon a question which might seem at first blush so simple. Of the nine judges who gave formal opinions, three were * opposed to allowing any force whatever to such a stipulation. And of the

[7] Wilson *v.* Ætna Ins. Co., 27 Vt. 99, and cases there cited.

[8] Thurnell *v.* Balbirnie, 2 M. & W. 786; Milnes *v.* Gery, 14 Vesey, 400.

[9] Milner *v.* Field, 5 Exch. 829. But in a later case in the same court it is said that the award must be obtained, or it must be shown that it is no longer practicable to obtain it. Brown *v.* Overbury, 11 Exch. 715; s. c. 34 Eng. L. & Eq. 610. This rule, with the qualification that the defendant by his own act or refusal had rendered the performance of the condition impracticable, is now, in this country certainly, held such an excuse as will enable the party to sue in a court of law. United States *v.* Robeson, 9 Peters, (U. S.) 319, 326. And in a very late case in Pennsylvania, Snodgrass *v.* Gavit, 28 Penn. St. 221, Mr. Justice *Woodward* assumes it as the unquestionable rule, in that state, that "where parties stipulate that disputes, whether actual or prospective, shall be submitted to the arbitrament of a particular individual, or tribunal, they are bound by their contract, and cannot seek redress elsewhere."

other six, four held that only the question of damages can properly be made to depend, as a condition precedent, upon the award of an arbitrator, while two held that the award may be made to include all matters of dispute growing out of the contract, which it seems to us must be regarded as equivalent to saying that no action at law or in equity shall be brought to determine any controversy growing out of the contract, which all the judges agree is a void stipulation. We therefore feel compelled to adopt the view that upon principle, and the fair balance of authority, such a stipulation, in regard to estimating labor or damages, under a contract for construction, is valid, and may be treated as a condition precedent, but that beyond that, the present inclination of the English courts is to hold that it is repugnant to sound policy, and subversive of the legal obligation of the contract, as being equivalent to a stipulation that no action at law shall be brought upon the contract, but only upon the award, if not paid.

9. But the balance of authority in this country seems to be in favor of allowing such a condition precedent, in this class of contracts, to extend to the quality of the work, as well as the quantity, and to the question, whether the work is progressing with sufficient rapidity, and whether the company on that account are justified in putting an end to the contract.[9] It seems reasonable to us, on many grounds, that contracts of this magnitude and character should receive a somewhat different interpretation in this respect from that which is applied to the ordinary commercial transactions of the country, as has been held in regard to pecuniary penalties.[10] We should not therefore feel justified in intimating any desire to see the American cases on this subject qualified.

*SECTION XVI.

Contracts for Materials and Machinery.

1. *Manufacturer not liable for latent defect in materials.*
2. *Contract for railway sleepers, terms stated.*
3. *Construction of such contract.*
4. *Party may waive stipulation in contract, by acquiescence.*
5. *Company liable for materials, accepted and used.*

§ 120. 1. In a contract for fire engines, it was stipulated that the engines and tender should be subject to the performance of

[10] *Ante*, §§ 116, 117.

one thousand miles, with proper loads, the manufacturers to be liable for any breakage which may occur through defect of materials or workmanship, but not where it occurs from collision, neglect, or mismanagement of the company's servants, or any other cause, except the two first named. The trial to take place within one month from the day on which any engine is reported ready to start, in default of which the manufacturers to be released from all responsibility. It was specially agreed the fire-boxes should be of copper, 7-10ths of an inch thick. One of the engines, so supplied, performed the thousand miles according to the contract, but some months after the fire-box burst, when it was discovered that the copper was reduced to 3-16ths of an inch in thickness, it being conceded it was originally of the thickness required by the contract. In an action for the price of the engine, which by the contract was to be paid upon the satisfactory completion of the trial, it was held the defendants could not give evidence of such defect in the copper, no fraud being alleged, and that, by the terms of the contract, the three months' trial having been satisfactory, released the manufacturers from all responsibility in respect of bad materials and workmanship.[1]

2. In a contract for railway sleepers,[2] it was stipulated that the plaintiff below should supply the defendant below with 350,000 sleepers, the contract before having recited that the *defendants were desirous of being supplied with that number of railway sleepers. The contract specified that the plaintiffs were willing to supply them according to a specification and tender, which stated that the number of sleepers required was 350,000, that one-half would have to be delivered in 1847, and the remainder by midsummer, 1848; and the contract also contained a covenant to supply the sleepers within the time specified, "as, and when, and in such quantities, and in such manner," as the engineer of the company by orders in writing, "from time to time or at any time, within the time limited by the specification, should require." The deed also contained a provision, that the engineer might vary the time of delivery, that the company should retain in their hands £2,000 as security for the performance of the contract, and should pay it over within two months after the sleepers had been delivered, and

[1] Sharp *v.* The Great Western Railw., 2 Railw. C. 722; s. c. 9 M. & W. 7.

[2] The Great Northern Railw. *v.* Harrison, 14 Eng. L. & Eq. 189, 12 C. B. 576, in the Exchequer Chamber, from the C. P.; s. c. 8 Eng. L. & Eq. 469, 11 C. B. 815.

that the contract might be determined upon the default or bankruptcy of the plaintiffs.

3. It was held that there was an implied covenant on the part of the company to take the whole number of 350,000 sleepers. That an order by the engineer was a condition precedent to any delivery of the sleepers by the plaintiffs; That the company were bound to cause such order to be given within the time limited by the specification; That although the engineer had power to alter the time for the delivery of the sleepers, such power was to be exercised within the period limited by the specification; That the engineer, as to matters in which he had a discretion, *e. g.* as to varying the time of delivery of the sleepers, stood in the position of arbitrator between the parties, but as to giving the order for the delivery he was a mere agent of the company; The only legitimate rule of construction is to ascertain the meaning from the language used in the instrument, coupled with such facts as are admissible in evidence, to aid its explanation. — Per *Parke*, B.

4. It has been held, also, in a contract with a railway company to deliver iron, "near the months of July and August," and the delivery continuing till the 25th of October, and the company not objecting to receive it, that they were bound by the * terms of the contract, one of which was that they were to give their notes for each parcel of iron as it was shipped.[3]

5. So, too, under the English statute,[4] which provides that the directors of a railway company may contract by parol, on behalf of the company, where private persons may make a valid parol contract, it was held, where the agent of the company agreed by parol with the plaintiff to purchase of him a quantity of railway sleepers upon certain terms, the sleepers being delivered and used by the company, that they were liable.[5]

[3] Bailey *v.* The Western Vermont Railw., 18 Barb. 112. It was also held, here, that the refusal of the company to give their notes, as stipulated, excused the plaintiff from delivering or tendering the remainder of the iron, until the company should tender their notes, and entitled plaintiff to sue presently.

[4] 8 and 9 Vict. c. 16.

[5] Paulding *v.* London & North W. Railw., 8 Exch. 867; s. c. 22 Eng. L. & Eq. 560. The contract was made by the engineer's clerk, who was also clerk of the company, but there was evidence of the assent of the committee. Lowe *v.* London & North W. Railw., 18 Q. B. 632; s. c. 14 Eng. L. & Eq. 18.

SECTION XVII.

Contract to Pay in the Stock of the Company.

1. *Breach of such contract generally entitles the party to recover the nominal value of stock.*
2. *But if the party have not strictly performed on his part, can only recover market value.*
3. *Cash portion overpaid, will only reduce stock portion dollar for dollar.*

n. 2. *Lawful incumbrance on company's property, will not excuse contractor from accepting stock.*

§ 121. 1. In many contracts for construction, the whole or a portion of the price is stipulated to be paid in the stock of the company, as the work progresses, at certain stages, or when it is completed. The time, place, and mode of payment in such cases, will be the same ordinarily as in other contracts for payment of stock. If the company refuse or neglect to deliver the stock or the proper certificates when it becomes due, upon proper request or opportunity, they are generally liable, it is considered, as in other cases of failure to perform contracts, for a certain amount or value, in collateral articles expressed in currency.[1]

* 2. But it was held, that where the plaintiff recovered a balance due on equitable grounds, and not on the ground of strict and full performance of the contract, he was precluded on like equitable grounds from recovering more for the stock portion of the contract than its market value at the commencement of the action.[2]

[1] Moore *v.* Hudson River Railw., 12 Barb. 156. It was held, in this case, that where a portion of the price of construction was payable in stock, at par, within thirty days after the completion of the contract, the company were not bound to make any tender of the stock, as in case of contracts for specific articles. But that it was a payment in depreciated currency, and no tender necessary. In a recent English case, Re Alexandra Park Co., 12 Jur. N. S. 482, where the contractor stipulated to accept a portion of his pay in stock, at the election of the company, it was held he was not bound by such an election after the company was ordered to be wound up as insolvent, as the shares thereby become extinguished.

[2] Barker *v.* T. & R. Railw., 27 Vt. 766. In this case the court say: "If the defendants have, upon reasonable request, declined paying the amount due, in their stock, as stipulated, it would seem but reasonable they should pay the amount in money.

"1. This is the general rule in regard to contracts payable in collateral articles, estimated in currency, and not delivered.

"2. The stock of a corporation is but a certificate of such a sum being due

* 3. So, too, where the work is to be paid partly in stock and partly in money, if the money part be overpaid, even by doing a

the bearer. And when the party stipulated to pay in his own paper, if he refuse, suit may be brought immediately, although the paper was to have been on time, if given. But it was never supposed the party could reduce the recovery, by showing his paper depreciated in the market. This would be virtually giving the difference to the other stockholders. This would be the rule which should be applied if defendants are wilfully in fault. If it were the stock of another company, no doubt, all which could be recovered is the value of the stock in the market. Certainly, this is the general rule in regard to stock. And, perhaps, that rule should be applied to the stock of the defendants, if it appears they have not wilfully and unreasonably refused to deliver the stock. *Ante*, § 38.

"But the recovery here is not allowed upon strictly legal grounds, upon the strict and literal performance of the contract on the part of the plaintiffs. It is rather upon equitable grounds that any recovery and apportionment of the contract is allowed for any thing less than full performance. By the terms of the contract the defendants had a right to retain the tenth part reserved until full performance. And, although it has not been regarded as a strict condition precedent in some of the cases (Danville Bridge Co. *v.* Pomeroy, 15 Penn. St. 151), still it is a stipulation in the contract, for the full performance of which the defendants had the right to insist, and for doing which they are not to be themselves regarded as in fault. The defendants, too, were justified in refusing to pay any deficiency in the work at the time of the demand; so that while we excuse the plaintiffs from full performance of their contract, as a strict condition precedent, and allow them to recover to the extent of what they had done, on the equitable ground that they had in good faith attempted to fulfil their undertaking, and supposed they had done so, and only failed by mistake and misapprehension, which should not, under the contract, defeat the recovery *in toto*, but only subject it to an equitable deduction for all damage sustained by defendants, it seems to us that it should form a part of this equity to the defendants, not to be required to pay more for this stock, even if it were their own, than it was in fact worth, or could have been made to benefit the plaintiffs.

"As we now hold, the plaintiffs were, at the time of the demand, entitled to recover, upon equitable grounds, a sum less than the whole price. But they demanded the whole price, and the defendants refused. The demand itself was unreasonable. Is it certain a reasonable one would have met a similar fate? It has been held the demand must be reasonable, to render the refusal unreasonable. Jameson *v.* Ware, 6 Vt. 610. As, therefore, the refusal of defendants seems to have been not altogether without good excuse, and in allowing an equitable recovery, in a case like the present, one of the first requirements seems to be, that no injustice shall be thereby visited upon defendants, it would almost necessarily follow that we should not suffer the plaintiffs to recover more for the work really done by them than they could possibly have realized if they had been paid at the time, according to the contract. And, as we set up a basis of recovery upon equitable grounds, and one not contemplated in the contract, we should not visit the defendants with a judgment which will make them worse off than if they had been allowed to pay the sum found to be

* portion of the work, which the party reserved the right to do in order to hasten the work, it will only reduce the stock payment due upon this equitable basis, after it is declared, according to the stipulations of the original contract. If this view is sound and equitable, and we see no reason to doubt it, the plaintiffs, as to the stock portion of their judgment, are entitled to the highest price the stock bore after the suit was commenced, and before the final judgment, or, if they choose, the court will strike out that portion of the amount reported, and require the certificates of stock still to be delivered; and if defendants refuse, on reasonable request, enter up judgment for the full amount." But if the contractor perform extra work he is entitled to recover for that, in money, upon an implied promise, notwithstanding by his contract he was to accept part of his pay in stock for all work done under the contract. Childs *v.* Som. & Ken. Railw., Cir. Ct. U. S. Maine District, May 1, 1857. 20 Law Rep. 561. In the case of Cleveland & Pittsburgh Railw. *v.* Kelley, 5 Ohio, N. S. 180, it is held, that where one-fourth of the amount due the contractors is to be taken in the stock of the company, and the company refuse to deliver the stock on request, they are only liable for the market value of the stock at the time it should have been delivered. The court profess to base their opinion upon the ground that in contracts of this character there is not understood to be any election reserved by the company to pay either in their stock, or in money, but that it is an absolute undertaking to deliver so much stock as shall, at its par value, be equal to one-fourth the amount due the contractor. It does not readily occur to us how this relieves the question from the apparent violation of principle, in allowing the company to refuse to give certificates of their own stock which they have contracted to do, and at the same time pay less than its par value. It is, in ordinary cases, equitable, no doubt, and always where the refusal is upon the ground that nothing is due the contractor. *Ante*, § 121, n. 2.

The point of the decision is thus summed up by Mr. Justice *Swan*. "For these reasons we are of the opinion that no such election was contemplated by either of the parties when the contract was entered into; that the law relating to trade notes and contracts of a like kind, has no application to the agreement between these parties; that it was an exchange of work for stock, in which monetary terms were necessarily used, not for the purpose of expressing real values, but as the only mode of expressing quantities and proportions; that the fourth to be taken in stock was not a money indebtedness, but a stock indebtedness; and, consequently, that the company could derive no benefit from the increased value of the stock, and could suffer no loss by its depreciation; the damages which the contractors suffered from the non-delivery of the stock being its market value."

See also Boody *v.* Rut. & Bur. Railw. (Cir. Ct. U. S.), 24 Vt. 660. In this case it was held, that the defendants having given their creditors a mortgage upon their road, after the contract with the plaintiff, did not excuse him from accepting the stipulated proportion of the payments in stock.

Nor can the contractors, in such case, refuse to receive the stock, because the legislature, in the mean time, altered the charter of the company, by which the capital stock and debt of the company were increased; nor because the com-

* dollar for dollar, and not according to the market value of the stock at the time.[3]

SECTION XVIII.

Time and Mode of Payment.

1. *No time specified, payment due only when work completed.*
2. *Stock payments must ordinarily be demanded.*
3. *But if company pay monthly, such usage qualifies contract.*
4. *Contract to build wall by cubic yard, implies measurement in the wall.*

§ 122. 1. Where no time of payment is specified in terms in the written contract between the parties for the construction of a portion of a railway, it was held, that looking to the contract alone the contractor could not call for payment either of the cash or stock portion of the contract, until a complete performance of the contract on his part.[1] Or, upon the most favorable construction, until some distinct portion of the work, for which the contract fixed a specific price, was accomplished.[1]

2. In regard to the stock portion of the payments, a special demand was necessary before the contractor could maintain an action for it.[1]

pany voted not to pay interest on the stock, in money, as they had before done, it not appearing that the value of the stock had been affected by either. Moore *v.* Hudson River Railw., 12 Barb. 156.

And where a company, in settlement with a contractor, agreed to pay him a certain amount, in stock, or the bonds of the company, at his election, the company retaining the same as security for certain liabilities on account of the contractor, and gave the contractor a certificate of such stock, with an agreement indorsed, to exchange it for bonds, at his election, and the certificates were then returned to them, as their indemnity; it was held, that the company were bound to deliver the bonds, notwithstanding the treasurer had entered the shares in the books of the company as the property of the contractor, and they had in consequence been sold upon execution against him. Jones *v.* Portsmouth & Concord Railw., 32 N. H. 544.

A contractor who agrees to take a portion of his pay in the bonds of the company, has no such interest in any question, in regard to their validity, as will prevent a court of equity from enjoining those of a county, which had been delivered to the company without a proper compliance with the conditions of the statute, under which the subscription was made, the contractor having had knowledge of the facts from the first. Mercer County *v.* Pittsburgh & Erie Railw., 27 Penn. St. 389.

[3] Jones & Dow *v.* Chamberlain, 30 Vt. 196.

[1] Boody *v.* Rut. & Bur. Railw., 24 Vt, 660 (U. S. Cir. Ct.).

3. But where it appeared that the company were accustomed to make monthly payments to their contractors, upon the estimates of the engineer, at the end of each month, and that they had so dealt with the plaintiff, it was held that this must be considered the rule of payment under the contract, established by mutual consent and binding upon the parties.[1]

4. A contract to build "riprap" wall for fifty cents a cubic yard, in the absence of proof of any general usage or uniform custom which could control the mode of measurement, was held to imply payment by the cubic yard after the wall was constructed.[2]

*SECTION XIX.

Remedy on Contracts for Railway Construction.

1. *Recovery on general counts.* | 2. *Amount and proof governed by contract.*

§ 123. 1. It is a familiar principle of law applicable to contracts for the performance of work and labor, that if the work is done so that nothing more remains but payment, there is no necessity of declaring specially upon the contract, but the recovery may be had under the general counts; and it will make no difference in this respect that it was not done within the time prescribed by the contract, if the work has been accepted by the other party, or the time for performance extended by such party, or the work has been done upon some permanent property of the other party, as in the case of building a railway.[1]

2. But ordinarily the contract will govern as to price and other incidents, so far as it can be traced. But where the party for whom the labor is performed wilfully hinders and obstructs the progress of the work, it has been held he was liable, as upon a *quantum meruit*.[1] But in such case the party must prove the performance of the labor, by such proof as would be competent in an action on the special contract, and cannot treat the dealing as if it had been matter of account from the first.[1]

[2] Wood *v.* Vermont Central Railw., 24 Vt. 608.

[1] Merrill *v.* Ithaca & Owego Railw., 16 Wendell, 586; s. c. 2 Am. Railw. C. 421.

SECTION XX.

Mechanic's Lien.

1. *Such lien cannot exist in regard to a railway.*
2. *Opinion of Scott, J.*

§ 123 *a*. 1. It has been considered that although a public railway may come within the literal import of the terms used in a statute, to secure material-men and laborers, by what is denominated a mechanic's lien upon "buildings or other * improvements," yet that the public have such an interest in public works of this character, that it cannot reasonably be presumed that such terms were intended to include the bridges and culverts upon the line of a public railway.[1]

2. The language of *Scott*, J., shows the ground of the decision. "Although railway companies in some respects resemble private corporations, yet, as they are organized for the public benefit, the state takes a deep interest in them, and regards them as matters of public concern. The establishment of this railway is regarded as a public work established by public authority, intended for the public use and benefit." The learned judge argues, that such a lien to be effectual must be liable to defeat the object of the work, and therefore, and as the legislature have provided a specific remedy for laborers, it is not to be supposed that a mechanic's lien also exists in regard to the structures on the works.

SECTION XXI.

Remedies on behalf of Laborers and Sub-contractors.

1. *Sub-contractors not bound by stipulations of contractor.*
2. *Laborers on public works have a claim against the company.*
3. *But a sub-contractor cannot go against the proprietor of the works, although laborer employed by him may.*

§ 123 *b*. 1. A sub-contractor who has completed his work to the acceptance of the engineers appointed to pass upon its sufficiency, is entitled to recover of the contractor the sum retained upon his

[1] Dunn *v*. North Missouri Railw., 24 Mo. 493.

estimates, as security for the completion of the work, notwithstanding any deficiency in the performance of the contractor, whereby he is himself unable to recover such deficiency of the company.[1]

2. By statute in many of the states, the workmen upon a railway, although in the employment of the contractor, have a claim for any arrears of wages, not exceeding a certain period, upon the company, and this provision has been held to extend equally * to workmen employed by sub-contractors.[2] And the provisions of this statute being only a matter of general police, will be equally binding upon all railway companies, whether chartered before or after the passing of the statute.[2]

3. But the sub-contractor himself cannot pass by his immediate employers and maintain an action against the principal proprietor of the work.[3]

[1] Blair *v.* Corby, 29 Mo. 480, 486.

[2] Grannahan *v.* Hannibal & St. Joseph Railw. Co., 30 Mo. 546. See also McClusky *v.* Cromwell, 1 Kern. 593; Kent *v.* N. Y. Cent. Railw., 2 id. 628; Peters *v.* St. Louis & Iron M. Railw. Co., 23 Mo. 107.

[3] Branin *v.* Conn. & Pass. Railw. Co., 31 Vermont, 214; Lake Erie, &c. Railw. Co. *v.* Eckler, 13 Ind. 67. See Boswell *v.* Townsend, 37 Barb. 205.

*CHAPTER XVI.

EXCESSIVE TOLLS, FARE, AND FREIGHT.

1. *English companies created sometimes, for maintaining road only.*
2. *Where excessive tolls taken may be recovered back.*
3. *So also may excessive fare and freight.*
4. *By English statute, packed parcels must be rated in mass.*
5. *Nature of railway traffic requires unity of management and control.*
6. *Tolls upon railways almost unknown here. Fare and freight often limited.*
7. *Guaranty of certain profit on investment lawful.*
8. *Restriction of freight to certain rate per ton, extends to whole line.*
9. *Need not declare for tolls.*
10. *Mode of establishing and requisite proof.*
11. *A provision in a railway charter for the payment of a certain tonnage to the state is only a mode of taxation.*
12. *Where a company is allowed to take tolls on sections of their road this makes each section a distinct work.*
13, 14. *Discussion of cases in New York in regard to the difference between fares taken in the cars and at the stations.*
15. *Fares fixed by statute are payable in legal tender notes.*

§ 124. 1. By the English statutes, companies are created who own the railway stations, &c., merely, and who are empowered to demand certain tolls of other persons, or companies, for the use of such road.

2. In such cases, if illegal tolls are demanded and paid, the excess may be recovered back, as money had and received, to the use of the person paying it, upon the general principles of law applicable to the subject of tolls, and the demand and receipt of excessive tolls.[1]

Where the English statute[2] gave the company the right, where any person should fail to pay the toll due upon any carriage, to detain and sell the same, it was held incumbent upon the company first to demand the sum due for toll, and that this was a condition precedent to the right to sell under the statute.[3] It was also considered here that a charge for transporting carriages back is not a toll, but something which may be compensated by special agreement between the parties; and if it be demanded as * part of the

[1] Fearnley *v.* Morley, 5 B. & C. 25. See also this subject very extensively examined in Centre Turnpike Co. *v.* Smith, 12 Vt. 212; *post*, § 143. Tolls are a payment for passing along the line of the railway, and should be received with reference to the number of carriages passing. Simpson *v.* Denison, 10 Hare, 51; s. c. 13 Eng. L. & Eq. 359.

[2] 8 and 9 Vict. c. 20, § 97.

[3] Field *v.* Newport, Ab. & Hereford Railw., 3 H. & N. 409.

toll, being an illegal claim, as such, it vitiates the entire demand and renders it illegal.

3. And the same rule has been extended to the recovery of money overpaid upon an exorbitant and illegal demand of freight or fare by railways. And the recovery may be had, although the person paying it did not tender any specific sum, as due, and although a portion of the overcharge was on account of what was claimed to be due another company.[4]

4. And under the English statutes, packed parcels of the same class are required to be rated in mass.[5]

5. Most of the business upon public railways, in this country, and in England, at the present time, is almost of necessity transacted by the companies themselves. The very nature of the business seems to require absolute unity in the management and control of the traffic, and especially in this country, where a large proportion of the roads are operated upon a single track, requiring the utmost watchfulness and circumspection to avoid collisions. We suppose the idea of operating a railway, with large traffic, in England, upon a single track, would be regarded as too glaring an absurdity to be seriously entertained, although they have some unimportant single track railways. But in this country it is rather the rule than the exception, and many of the continental railways in Europe have only a single track.

6. The matter of tolls upon railways is a thing almost unknown in this country, and very little practised anywhere at present. But the English special acts, and the American railway charters, very often fix the maximum of freight and fare which it shall be lawful for the company to receive, and if tolls are allowed to be taken of other companies or persons, these also are limited.

[4] Parker *v.* The Bristol & Exeter Railw. Co., 6 Exch. 702; s. c. 6 Railw. C. 776. See also Snowden *v.* Davis, 1 Taunt. 359; Atlee *v.* Backhouse, 3 M. & W. 633; and Spry *v.* Emperor, 6 M. & W. 639, where the general subject is discussed. In Parker *v.* The Great Western Railw. Co., 3 Railw. C. 563, the very point is decided. Crouch *v.* London & N. W. Railw. Co., 2 Car. & K. 789; Crouch *v.* Great Northern Railw., 25 Eng. L. & Eq. 449.

[5] Parker *v.* The Great Western Railw. Co., 11 C. B. 545; s. c. 8 Eng. L. & Eq. 426. This subject of overcharge and the right to recover back the excess, is extensively discussed in this case, and in the case of Edwards, Assignee of Edwards, *v.* The Great Western Railw. Co., 11 C. B. 588; s. c. 8 Eng. L. & Eq. 447; Crouch *v.* Great Northern Railw. Co., 9 Exch. 556; s. c. 25 Eng. L. & Eq. 449.

* 7. A guaranty of a certain amount of profit to a company, by other companies, in consideration of the right to use the track of such company, is lawful.[6]

8. The restriction in the charter of the Camden & Amboy Railway of freight to eight cents per ton per mile, extends to the whole distance of the line of said company, although some of it is by water, and includes the auxiliary roads through New Brunswick and Trenton.[7]

9. In an action to recover tolls due to a railway it is not necessary to describe the dues as tolls. Any description which sufficiently identifies the nature of the service for which compensation is demanded, is all that is required.[8]

10. Freights upon a railway may be established by the directors, or by their agents; and their assent will be presumed, if nothing appear to the contrary.[8] And where the directors are required to establish freights, and they do establish a printed tariff, that is to be regarded as the original; and where copies of such tariff are required to be posted at the depots or stations of the company, that affords sufficient excuse for the absence of such copies to justify the admission of secondary evidence.[8]

11. A provision in the charter of a railway company that it shall pay a certain tonnage to the state upon all freight transported by it, is only a mode of taxation, and is not in conflict with any provision of the United States constitution securing to Congress the exclusive power of regulating commerce with foreign nations and among the states, and prohibiting the states, without the consent of Congress, from levying duties on imports and exports. The company by accepting the charter containing such a provision, virtually made an express contract to perform * it, and have no just cause of complaint, treating the provision either as a law or a contract.[9]

[6] Great N. Railw. *v.* S. Yorkshire Railw., 9 Exch. 642.

[7] Camden & Amboy Railw. *v.* Briggs, 1 N. J. (Zab.) 406.

Where one company leased its line to another, at a certain rate, for all minerals transported, among other commodities, it was held, that the owners of minerals transported upon such line, could not, by injunction, compel the lessees to transport minerals upon the same terms on which they agreed with the other company, by way of compensation to them, the latter being a rent merely, and not a rate of toll or freight. Finnie *v.* Glasgow & Southwestern Railw. Co., 2 McQu. Ho. Lds. 177.

[8] Manchester & Lawrence Railw. *v.* Fisk, 33 N. H. 297.

Pennsylvania Railw. *v.* The Commonwealth, 3 Grant's Cas. 128. As to the

* 449, 450

12. And a provision in the charter of a railway company or other road company, that it may demand tolls upon any particular portion of its road as soon as completed and in operation, has been construed to create such portion a distinct public work, not liable to be affected by failure to complete the remainder of the work embraced in the same charter. But if the work is not done in a proper manner, that will be a cause of forfeiture not cured by the provision allowing tolls to be levied upon distinct portions of the entire line.[10] But it is here left in doubt whether such defect in construction will operate to forfeit the entire road or only those sections where such defects occur.

13. We have discussed the question of railway companies making a discrimination between fares paid in the cars and at their stations.[11] Under the New York statute, which allows of this discrimination only where the company keep their ticket office open, it was held the company could only make that discrimination in the cases specified in the statute, and not in other cases, even if the passenger took the cars after midnight, the company being required to keep the ticket office open only until 9 o'clock, P. M.[12]

14. This question is still further discussed in a later case ;[13] but the questions turned chiefly upon the construction of the statute in force there, requiring the company to keep all their ticket offices open one hour before the trains start, except between 9 P. M., and 5 A. M., when they are only required to do so at Utica and other principal offices, and which also enacts, that if any person shall, at any station where a ticket office is kept open, enter the cars as a passenger, without having first purchased a ticket, it shall be lawful for the company to require five cents extra fare of such person ; and it was decided that the extra fare * could only be demanded where the company kept a ticket office open. And it will make no difference that the passenger entered the cars at an hour when the ticket offices were required to be kept open, if such was not the fact. It was also held, that the company, by so demanding

right to tax shares in a corporation for county purposes, see Lycoming County *v.* Gamble, 47 Penn. St. 106.

[10] The People *v.* J. & M. Plank-Road Co., 9 Mich. 285.

[11] *Ante*, § 28.

[12] Chase *v.* N. Y. Central Railw., 26 N. Y. 523.

[13] Nellis *v.* N. Y. Central Railw., 30 N. Y. 505.

and receiving the five cents extra fare when not entitled to receive it, became liable to the penalty of $50, under the statute, for taking more fare than allowed by law.

15. Where the company is restricted by statute to the charge of two cents fare per mile, that will not justify their demanding fares in gold, or its equivalent in currency. A fare is a debt, within the terms of the act of Congress creating the legal tender notes, and is payable in that currency, as much as any other debt.[14]

[14] Lewis v. N. Y. Central Railw., 49 Barb. 330.

*CHAPTER XVII.

LIABILITY FOR FIRES, COMMUNICATED BY COMPANY'S ENGINES.

1. *Fact of fires being communicated evidence of negligence.*
2. *This was at one time questioned in England.*
3. *Opinion of* Tindal, *Ch. J., upon this point.*
4. *English companies feel bound to use precautions against fire.*
5. *Rule of evidence, in this country, more favorable to companies.*
6. *But the company are liable for damage by fire through want of care on their part.*
7. *One is not precluded from recovery, by placing buildings in an exposed situation.*
8. *Where insurers pay damages on insured property, may have action against company.*
9. *Where company made liable for injury to all property, are allowed to insure.*
10. *Construction of statutes making companies liable for loss by fires.*
11. *Extent of responsibility of insurer of goods, to company.*
12. *Construction of statute as to engines which do not consume smoke.*
13. *Construction of Massachusetts statute and mode of trial.*
14, 15. *For what acts railway companies may become responsible without any actual negligence.*
16. *Company not responsible for fires resulting from other fires caused by them.*

§ 125. 1. In the English courts it seems to have been settled, as early as the year 1846,[1] upon great consideration, that the fact of premises being fired by sparks emitted from a passing engine, is *prima facie* evidence of negligence on the part of the company, rendering it incumbent upon them to show that some precautions had been adopted by them reasonably calculated to prevent such accidents.

2. In an earlier case, where the facts were reported, by the judge, at *Nisi Prius*, for the opinion of the full court, that a stack of beans near the track of the railway was fired and consumed by sparks from the company's engine, of the ordinary construction, and used in the ordinary mode, the court said the facts reported did not show, necessarily, either negligence or no negligence. That was a question for the jury.[2]

3. But the court in the case of Piggott *v.* Eastern Co.'s Railway, went much further. *Tindal*, Ch. J., said: "The defendants

[1] Piggott *v.* Eastern Counties Railw. Co., 3 C. B. 229.
[2] Aldridge *v.* Great Western Railw., 3 M. & G. 515; 2 Railw. C. 852.

are a company intrusted by the legislature with an agent of an extremely dangerous and unruly character, for their own private * and particular advantage ; and the law requires of them, that they shall in the exercise of the rights and powers so conferred upon them, adopt such precautions as may reasonably prevent damage to the property of third persons, through or near which their railway passes. The evidence in this case was abundantly sufficient to show that the injury of which the plaintiff complains was caused by the emission of sparks or particles of ignited coke, coming from one of the defendants' engines ; and there was no proof of any precaution adopted by the company to avoid such a mischance. I therefore think the jury came to a right conclusion, in finding that the company were guilty of negligence, and that the injury complained of was the result of such negligence. There are many old authorities to sustain this view ; for instance, the case of Mitchil *v.* Alestree, 1 Vent. 295, for an injury resulting to the plaintiff from the defendant's riding an unruly horse in Lincoln's Inn Fields ; that of Bayntine *v.* Sharp, 1 Lutw. 90, for permitting a mad bull to be at large ; and that of Smith *v.* Pelah, 2 Stra. 1264, for allowing a dog, known to be accustomed to bite, to go about unmuzzled. The precautions suggested by the witnesses called for the plaintiff in this case, may be compared to the muzzle in the case last referred to. The case of Beaulieu *v.* Finglam, in the Year-Books, P. 2, H. 4, fol. 18, pl. 5, comes near to this. There, the defendant was charged, in case, for so negligently keeping his fire as to occasion the destruction of the plaintiff's property adjoining. The duty there alleged was, — '*quare cum secundum legem et consuetudinem regni nostri Angliæ hactenus obtentam, quod quilibet de eodem regno ignem suum salvò et securè custodiat, et custodire teneatur, ne per ignem suum damnum aliquod vicinis suis eveniat.*' "

4. The principle of this case seems to have been acquiesced in by the railways in England,[3] and such precautions used, as

[3] Hammon *v.* Southeastern Railw. Co., Maidstone Spring Assizes, 1845, before Lord *Denman*, Ch. J., for the destruction of farm buildings, including a thatched barn, by sparks emitted from the defendants' engines in passing along the line of their railway. There was evidence of the fire being so caused, and that defendants' engines had no wire guard, or perforated plate, to prevent the escape of the sparks, although both were in use before that time. There was evidence in this case that it was principally where the engines were overtasked that they were liable to emit sparks. His Lordship directed the jury that it lay upon the plain-

* to secure the engines against emitting sparks. In this last case it was held proper evidence to go to the jury that the company's engines had before, in passing along the line, emitted sparks, a sufficient distance to have done the injury in the present case, as a means of ascertaining the possibility of the building being fired in the manner alleged. The testimony in this case showed, that the danger of emitting sparks is very much increased by overtasking the engine, and that it may be altogether avoided by shutting off the steam in passing a place where there is danger from sparks, or that the danger may be guarded against by mechanical precautions.

The subject has been a great deal discussed in more recent English cases.[4] In this case it was held by *Bramwell* B., at the jury trial, and his views seem to have been sustained by the court of exchequer, that the mere fact of the company using fire as a means of locomotion, from which occasional fires will be communicated, even with the utmost care to prevent it, made them responsible for damage caused thereby. But in the exchequer chamber the judges seem to have been agreed, that the legislature having legalized this mode of locomotion, it could not subject the company, while pursuing a legal business, in a legal mode, to damage thereby caused to others, unless through some degree of neglect. If the company resort to all known precautions against fire they are not liable.

5. But in this country it must be confessed the rule of the liability of railways for damage done by fire communicated by their engines, is more favorable to the companies than in England. It seems to have been assumed, in this country, that the * business of railways being lawful, no presumption of negligence arises from the fact of fire being communicated by their engines.[5]

tiff to establish negligence; they were to consider that the plaintiff might have saved all hazard by tiling his barn, and also whether the train was driven too fast. The plaintiff had a verdict, and the court subsequently refused a new trial. Taylor *v.* Same Co. was tried at same term, with similar proof and the same result. Walford on Railways, 183, 184, and notes.

[4] Vaughn *v.* Taff-Vale Railw., 3 H. & N. 743; s. c. in Exchequer Chamber, 5 H. & N. 679; s. c. 6 Jur. N. S. 899. See also The King *v.* Pease, 4 B. & Ad. 30, upon which the last case is decided in Exchequer Chamber. In reference to the decision in the Court of Exchequer, we said in our last edition it was going further than any just principle would allow, unless the defendant's business is regarded as unlawful. *Post*, pl. 14, 15, and note.

[5] Rood *v.* N. Y. & Erie Railw., 18 Barb. 80; Lyman *v.* Boston & W. Railw., * 454, 455

But after other probable modes of accounting for the fire have been disproved, the onus is on the company to prove that the fire was not communicated by their engines of the train passing at the time.[6]

6. In this country it has been held, that proof that sparks have upon other occasions been emitted and caused fires along the line of the road, is not admissible, either to show that defendants' engine caused the damage, or to rebut defendants' proof of care and diligence in using their engines.[7] But the testimony seems to have been received in other cases.[8] All the cases upon this subject hold railways bound to the exercise of care, skill, and diligence, to prevent fires being communicated in this mode, and make them liable in case of damage through their negligence.[9]

7. And one is not precluded from recovery in such cases, by having placed his buildings or other property in an exposed position.[10] We cannot forbear to add that the interference of the legislatures upon this subject, in many of the American states, seems to us an indication of the public sense, in favor of placing the risk in such cases upon the party in whose power it lies most to prevent such injuries occurring. There seems to us both justice and policy in the English rule upon the subject. And in a recent case,[11] it was held, in actions against railway companies for damages caused by fires communicated by coals upon the track, just after the passing of a train, that it was com-

4 Cush. 288; Burroughs *v.* The Housatonic Railw., 15 Conn. 124. In this case the court compare the injury to that of fire communicated by sparks from the chimney of a dwelling-house. Where the statute requires the company to show that the fire occurred "without any negligence on their part," it was held sufficient to show that their engines were properly constructed, in good order, and had the usual apparatus for preventing the escape of sparks, and were managed by discreet persons. B. & S. R. *v.* Woodruff, 4 Maryland, 242.

[6] Sheldon *v.* Hudson River R., 4 Kernan, 218.

[7] Baltimore & Susquehannah Railw. *v.* Woodruff, 4 Maryland, 242.

[8] McCready *v.* The Railw. Co., 2 Strob. 358. Sheldon *v.* Hudson River Railw., 4 Kernan, 218; s. c. 29 Barb. 226.

[9] 15 Conn. 124; Huyett *v.* Phil. & R. Railw., 23 Penn. St. 373. The jury are to determine the question of negligence. Id. The company are bound to use more care in regard to fires in a very dry time, or where property is very much exposed. Id.

[10] Coop *v.* Champ. Trans. Co., 1 Denio, 91, 99, 101.

[11] Field *v.* New York Central Railw., 32 N. Y. 339.

petent to show that the company's locomotives, in passing over the road on former occasions, dropped coals upon the track at or near the same place; and also, where it was in evidence that engines properly constructed and in good order will not drop coals upon the track, that the fact of defendants' engines doing so, is, in itself, evidence of negligence, sufficient to charge the defendants, thus imposing upon them the burden of showing that they were not culpable.

8. And where the railway companies are made liable for all damage in this way, as they are in Massachusetts, and some of the other states, by statute, if one whose property is insured suffer loss in this way, and the insurers pay him his entire loss, * they may recover in his name against the company.[12] And it was decided in one case that the insurer might recover of the carriers in the name of the consignor, on whose behalf the policy was effected, after having paid the amount of the loss to the consignor.[13]

9. By statute in some of the states, as we have seen, railways are made liable for any injury to "buildings or other property of any person — by fire communicated," by their locomotive engines, and it is sometimes specially provided that railways shall have an insurable interest in such property. But it has been held that such statutory liability only extends to property of a permanent nature, and upon which an insurance may be effected; and that for injuries of this kind to other property the

[12] Hart *v.* The Western Railw., 13 Met. 99. And under such a statute, where the sparks from the engine communicated fire to a shop, and the wind drove the sparks from the shop sixty feet across the street, and set fire to a house, it was held that this second fire must be regarded as "communicated" by the company's engine, within the statute. Id. But see *post*, pl. 16.

In a contract of insurance in favor of a railway company, upon "cars of all descriptions" — "on the line of their road and in actual use," where, in answer to the inquiry "where the property was situated," the company reply, "from Boston to Fitchburg and branches this side of Fitchburg;" and the cars of the plaintiff's company loaded with ice, standing upon a track belonging to the proprietors of a wharf where the ice was unloaded, but communicating with the track of the Fitchburg road, were burned by a fire communicated from the wharf, it was held to come within the contract, and the insurance company were held liable. Fitchburg Railw. *v.* Charlestown Mutual Ins. Co., 7 Gray, 64.

[13] Burnside *v.* Steamboat Company, 10, Rich. (S. C.) 113; Garrison *v.* Memphis Ins. Co., 19 How. (U. S.) 312.

company will only be responsible for negligence, unskilfulness, or imprudence in running and conducting their engines.[14]

* 10. And where by statute railway companies are made liable for all damages caused to property so near the road as to be exposed by fire from their engines, it was held to extend to all property subject to insurance, and to include growing trees.[15]

11. Many of the English railway companies make it a condition that certain goods shall be insured and declared, or else they will not be responsible for any loss which may occur in regard to them. Such a condition seems reasonable, and it is so treated by the English courts. But to be any protection to the companies it must assume that the insurers are bound to make good any loss, as well for the benefit of the assured as for that of the company, and that the company are not responsible to the insurer unless perhaps for neglect of duty as a faithful bailee.[16] But to produce this result, the policy should specify that the insurance is for the benefit of the company as well as the owners. Strictly speaking there is no privity, in case of insurance against fire, except as to the immediate parties to the risk, and to give any other party not named in the policy the benefit of the insurance is an equitable extension, and one which the courts have declined to make sometimes, as between mortgagor and mortgagee.[17] But where the insurer pays the insurance, on the destruction of the property, it has been held that he will be subrogated to any claim the party insured might have against other parties,[18] unless that is excluded by the terms of the policy.

12. The English statute[19] subjects railway companies to a penalty for each day they use an engine upon their roads so constructed as not to consume its own smoke. But it has been held that this only refers to the construction of the engine when under proper management, and that the penalty is not in-

[14] Chapman *v.* Atlantic & St. Lawrence Railw., 37 Maine, 92. This is an action for the loss of cedar posts, piled upon land adjoining the railway, by the consent of the owner of the land, and set on fire by a spark from the defendants' engine, and they were held not liable under the statute.

[15] Pratt *v.* Atlantic & St. Lawrence Railw., 42 Maine, 579.

[16] Peck *v.* North Staffordshire Railw., Ellis B. & Ellis, 956.

[17] Columbia Insurance Co. *v.* Lawrence, 10 Pet. 507, 512, per Story, J.; White *v.* Brown, 2 Cush. 412.

[18] Insurance Co. *v.* Woodruff, 2 Dutcher, 541; ante pl. 8. n. 11, 12.

[19] 8 & 9 Vic. ch. 20, § 114.

curred by an engine emitting smoke instead of consuming it in consequence of bad management and not of defective construction.[20]

13. The Massachusetts statute, making railway companies responsible for loss by fire communicated by their engines, and giving them an insurable interest in the property exposed to fire in that mode, was held to embrace personal property, although the company had no knowledge or reasonable cause to believe that such property was situated where it might be so injured.[21] And in the trial of an action for such injury, where it was claimed that no burning sparks could reach far enough to communicate the fire, it is competent to show that the same engine, * using similar fuel, emitted sparks reaching a greater distance.[21] And where it was attempted to show that similar engines did not on other roads emit sparks reaching that distance, it is competent to prove that such engines on other roads have emitted sparks which did communicate fire at that distance.[21] In such an action, where the question of plaintiff's want of due care depended upon the consideration of the dryness of the season, the strength and direction of the wind, and the condition of the plaintiff's buildings, it is proper to submit to the jury, under general instructions, whether the plaintiff exercised due care or not, and if this is done no exception lies to a refusal to instruct the jury that "if the season was dry, and the wind was from the railway and strong, and the plaintiff knew those facts and left a door of a shed open towards the railway, and combustible materials within the shed, and that contributed to the fire, it is evidence of negligence on his part, which should preclude his recovery."[21]

14. A question of considerable practical importance has recently been determined by the Court of Exchequer Chamber in England, which may be thought sometimes to have a bearing upon the conduct of railways. The proposition there maintained is, that if a person bring on his own land any thing, which, if it escape, may prove injurious to his neighbor's property, such as a large body of water, he is liable to make compensation for any injury that may

[20] Manchester, Sheffield, & Lincolnshire Railw. *v.* Wood, 29 Law J. 29; s. c. 1 L. T. N. S. 31; s. c. 2 Bl. & El. 344.

[21] Ross *v.* Boston & Worcester Railw., 6 Allen, 87. The company should use precautions to prevent fire escaping from their engines or they will be responsible for consequences. Bass *v.* Chicago, Bur. & Quincy Railw. Co. 28 Ill. 9.

accrue from its escape out of his land; and it is no excuse, if it do escape and cause damage to his neighbor, that the injury was caused without any default or negligence on his part.[22]

[22] Fletcher *v.* Rylands, Law Rep. 1 Exch. 265; 12 Jur. N. S. 603; s. c. 11 id. 714. The learned judge, in giving the opinion, said: "It appears from the statement in the case that the plaintiff was damaged by his property being flooded by water, which, without any fault on his part, broke out of a reservoir constructed on the defendants' land by the defendants' orders, and maintained by the defendants.

"It appears from the statement in the twelfth paragraph of the case, that the coal under the defendants' land had, at some remote period, been worked out, but that this was unknown at the time when the defendants gave directions to erect the reservoir; the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff but for this latent defect in the defendants' subsoil; and it further appears, from the seventeenth and eighteenth paragraphs, that the defendants selected competent engineers and contractors to make their reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil, but that those persons employed by them, in the course of the work, became aware of the existence of ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings. It is found that the defendants personally were free from all blame, but that, in fact, proper care and skill was not used by the persons employed by them to provide for the sufficiency of the reservoir in reference to these shafts. The consequence was, that when the reservoir was filled, the water burst into the shafts and flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief.

"The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law, therefore, arises, what is the obligation which the law casts upon a person who, like the defendants, lawfully brings on his own land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land? It is agreed on all hands, that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors; but the question arises, whether the duty which the law casts upon him under such circumstances is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, and no more. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect.

"Supposing the second to be the correct view of the law, a further question arises subsidiary to the first, namely, whether the defendants are not so far identified with the contractors, whom they employed, as to be responsible for the

* 15. The carefully considered judgment of the full court of Exchequer Chamber by *Blackburn*, J., contains so many points

consequences of their want of care and skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts led to.

"We think that the rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there any thing likely to do mischief if it escapes, must keep it at his peril, and that if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was the consequence of *vis major*, or the act of God; but, as nothing of the sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person, whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And, upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches.

"The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times. The owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is, with regard to tame beasts, in the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled, that it is not the general nature of horses to kick or bulls to gore; but, if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too.

"As early as the Year Book, 20 Edw. 4, 11, pl. 10, *Brian*, C. J., lays down the doctrine in terms very much resembling those used by Lord *Holt*, in Tenant *v.* Goldwin, which will be referred to afterwards. It was trespass with cattle. Plea, that the defendant's land adjoined a place where the defendant had common; that the cattle strayed from the common, and the defendant drove them back as soon as he could. It was held a bad plea. *Brian*, C. J., says: 'It behoves him to use his common so that he shall do no hurt to another man; and if the land on which he has common be not inclosed, it behoves him to keep the beast in the common, and out of the land of any other.' He adds, when it was proposed to amend, by pleading that they were driven out of the com-

* bearing upon questions which are liable to arise in the course of the construction and operation of railways, that we have deemed

mon by dogs, that although that might give a right of action against the master of the dogs, it was no defence to the action of trespass by the person on whose land the cattle went. In the recent case of Cox *v.* Burbridge, *Williams*, J., says: 'I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal, in which, by law, the right of property can exist, I am bound to take care that it does not stray into the land of my neighbor; and I am liable for any trespass it may commit, and for the ordinary consequences of the trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial.' So in the case of May *v.* Burdett (9 Q. B. 101; 10 Jur. 692), the court, after an elaborate examination of the old precedents and authorities, came to the conclusion, that "a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril." And Lord *Hale* (1 Hale's P. C. 430) states, that where one keeps a beast, knowing its nature is such that the natural consequence of its being loose is, that it will harm men, the owner must at his peril keep him up safe from doing hurt; for though he use his diligence to keep it up, if it escape and do harm, the owner is liable to answer damages; though, as he proceeds to show, he will not be liable criminally, without proof of want of care. In these latter authorities, the point under consideration was damage to the person, and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt; though where it was not known to be so the owner was not responsible for such damages; but where the damage is, like eating grass, or other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same. In Com. Dig. 'Droit,' M. 2, it is said: 'That if the owner of 200 acres, in a common moor, enfeoffs B. of 50 acres, B. ought to inclose, at his peril, to prevent damage by his cattle to the other 150 acres. For if his cattle escape thither, they may be distrained damage feasant. So, the owner of the 150 acres ought to prevent his cattle from doing damage to the 50 acres at his peril.' The authority cited is Dy. 372 *b.*, where the decision was, that the cattle might be distrained; the inference from that decision, that the owner was bound to keep in his cattle at his peril, is, we think, legitimate; and we have the high authority of Comyns for saying that such is the law. In the note to F. N. B. 128, which is attributed to Lord *Hale*, it is said: 'If A. & B. have lands adjoining, where there is no inclosure, the one shall have trespass against the other on an escape of their beasts respectively (Dy. 372, Rastal Ent. 621, 20 Edw. 4, 10), although wild dogs, &c. drive the cattle of the one into the lands of the other.' No case is known to us on which, in replevin, it has ever been attempted to plead in bar to an avowry for distress damage feasant, that the cattle had escaped without any negligence on the part of the plaintiff; and surely, if that would have been a good plea in bar, the facts must often have been such as would have supported it. The authorities, and the absence of any authority to the contrary, justify *Williams*, J., in saying, as he does, in Cox *v.* Burbidge, that the law is clear, that in actions for damage occasioned by animals that have not been kept in

* it might afford valuable matter for the profession.[22] The opinion will also point out very clearly for what matters railway * companies

by their owners, it is quite immaterial whether the escape is by negligence or not.

"As has been already said, there does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stenches, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor; and the case of Tenant *v.* Goldwin is an express authority that the duty is the same, and is to keep them in at his peril.

"As *Martin*, B., in his judgment below, appears not to have understood the case in the same manner as we do, it is proper to examine it in some detail. It was a motion in arrest of judgment after judgment by default, and therefore all that was well pleaded in the declaration was admitted to be true. The declaration is set out at full length in the report in 6 Mod. 311. It alleged that the plaintiff had a cellar which lay contiguous to a messuage of the defendant, 'and used (*solebat*) to be separated, and fenced from a privy house of office, parcel of the said messuage of the defendant, by a thick and close wall, which belongs to the said messuage of the defendant, and by the defendant, of right, ought to have been repaired (*jure debuit reparari*),' yet he did not repair it, and, for want of repair, filth flowed into the plaintiff's cellar.

"The case is reported by *Salkeld*, who argued it, in 6 Mod., and by Lord *Raymond*, whose report is the fullest. The objection taken was, that there was nothing to show that the defendant was under any obligation to repair the wall, — that, it was said, not being a charge of common right, and the allegation, that the wall *de jure debuit reparari* by the defendant, being an inference of law which did not arise from the facts alleged. *Salkeld* argued, that this general mode of stating the right was sufficient in a declaration, and also that the duty alleged did of common right result from the facts stated. It is not now material to inquire whether he was or was not right on the pleading point. All three reports concur in saying that Lord *Holt*, during the argument, intimated an opinion against him on that, but that after consideration the court gave judgment for him on the second ground.

"In the report 6 Mod., it was stated, 'And at another day, *per totam curiam*, the declaration is good; for there is a sufficient cause of action appearing on it, but not upon the word "*solebat*." If the defendant has a house of office inclosed with a wall which is his, he is of common right bound to use it so as not to annoy another. . . . The reason here is, that one must use his own, so as thereby not to hurt another; and, as of common right one is bound to keep his cattle from trespassing on his neighbor, so he is bound to use any thing, that is his, so as not to hurt another by such user. . . . Suppose one sells a piece of pasture lying open to another piece of pasture which the vendor has, the vendee is bound to keep his cattle from running into the vendor's piece; so of dung or any thing else.' There is an evident allusion to the same case in Dyer, as is referred to in Com. Dig., 'Droit' (M. 2). Lord *Raymond*, in his report (2 Ld. Raym. 1089), says, 'The last day of term, *Holt*, C. J., delivered

* 461, 462

and others are or are not to be held responsible, if there is no actual negligence on their part.

the opinion of the court that the declaration was sufficient. He said that upon the face of the declaration there appeared a sufficient cause of action to entitle the plaintiff to have his judgment; that they did not go upon the *solebat* or the *jure debuit reparari*, as if it were enough to say that the plaintiff had a house and the defendant had a wall, and he ought to repair the wall; but if the defendant has a house of office, and the wall which separates the house of office from the plaintiff's house is all the defendant's, he is of common right bound to repair it. . . . The reason of this case is upon this account, that every one must so use* his own as not to do damage to another; and as every man is bound so to look to his cattle as to keep them out of his neighbor's ground, so that he may receive no damage; so he must keep in the filth of his house of office, so that it may not flow in upon and damnify his neighbor. . . . So if a man has two pieces of pasture which lie open to one another, and sells one piece, the vendee must keep in his cattle, so as they shall not trespass upon the vendor. So a man shall not lay his dung so high as to damage his neighbor; and the reason of these cases is, because every man must so use his own as not to damnify another.' *Salkeld*, who had been counsel in the case, reports the judgment much more concisely, but to the same effect. He says, 'The reason he gave for his judgment was because it was the defendant's wall and the defendant's filth; and he was bound of common right to keep his wall so as his filth might not damnify his neighbor; and that it was a trespass on his neighbor, as if his beast should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbor's, . . . he must repair the wall of his house of office; for he whose dirt it is must keep it that it may not trespass.' It is worth noticing how completely the reason of Lord *Holt* corresponds with that of *Brian*, C. J., in the cases already cited in 20 Edw. 4. *Martin*, B., in the court below, says, that he thinks this was a case without difficulty, because the defendant had, by letting judgment go by default, admitted his liability to repair the wall, and that he cannot see how it is an authority for any case in which no such liability is admitted. But a perusal of the report will show that it was because Lord *Holt* and his colleagues thought (no matter for this purpose whether rightly or wrongly) that the liability was not admitted that they took so much trouble to consider what liability the law would raise from the admitted facts; and it does, therefore, seem to us to be a very weighty authority in support of the position, that he who brings and keeps any thing, no matter whether beasts, or filth, or clean water, or a heap of earth, or dung, on his premises, must at his peril prevent it from getting on his neighbor's, or make good all the damage which is the natural consequence of its doing so. No case has been found in which the question as to the liability for noxious vapors escaping from a man's work by inevitable accident has been discussed, but the following case will illustrate it. Some years ago several actions were brought against the occupiers of some alkali works at Liverpool, for the damage alleged to be caused by the chlorine fumes of their works. The defendants proved that they, at great expense, erected contrivances by which the fumes of chlorine were condensed, and sold as muriatic acid; and they called a great body of scientific evidence to

16. A question of considerable practical importance has been somewhat discussed, in regard to the extent of the responsibility

prove that this apparatus was so perfect that no fumes possibly could escape from the defendant's chimneys. On this evidence, it was pressed upon the jury that the plaintiff's damage must have been due to some of the numerous other chimneys in the neighborhood; the jury, however, being satisfied that the mischief was occasioned by chlorine, drew the conclusion that it had escaped from the defendants' works somehow, and in each case found for the plaintiff. No attempt was made to disturb these verdicts, on the ground that the defendants had taken every precaution which prudence or skill could suggest to keep those fumes in, and that they could not be responsible unless negligence were shown; yet if the * law be as laid down by the majority of the Court of Exchequer, it would have been a very obvious defence. If it had been raised, the answer would probably have been that the uniform course of pleading in actions on such nuisances is to say that the defendant caused the noisome vapors to arise on his premises, and suffered them to come on the plaintiff's, without stating there was any want of care or skill in the defendant; and that the case of Tenant *v.* Goldwin showed that this was founded on the general rule of law, that he whose stuff it is must keep it that it may not trespass. There is no difference in this respect between chlorine and water; both will, if they escape, do damage,—the one by scorching and the other by drowning; and he who brings them there, must at his peril see that they do not escape and do that mischief. What is said by *Gibbs*, C. J., in Sutton *v.* Clarke, though not necessary for the decision of the case, shows that that very learned judge took the same view of the law that was taken by Lord *Holt*. But it was further said by *Martin*, B., that when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage, to render him legally responsible, and this is no doubt true; and, as was pointed out by Mr. *Mellish* during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential; as, for instance, where an unruly horse gets on the footpath of a public street, and kicks a passenger (Hammack *v.* White); or where a person in a dock is struck by the falling of a bale of cotton which the defendants' servants are lowering (Scott *v.* The London Dock Company), and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may be held to do so subject to their taking upon themselves the risk of suffering from that inevitable danger; and persons who, by the license of the owner, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed, that all the cases in which inevitable accident has been held an excuse for what *primâ facie* was a trespass, can be explained on the same principle; viz., that the circumstances were such as to show that the plaintiff had taken the risk upon himself. But there is no ground for saying that the plaintiff here took upon him-

of railway companies, or others, for fires communicated by the accidental extension of other fires, for which the party, through negligence or otherwise, is confessedly responsible. Upon principle, it would seem, that one who is the unintentional, but careless, cause of setting a fire, should not be held responsible for damage beyond the immediate, direct, and natural consequences of the original fire. There are numerous disastrous consequences resulting sometimes from setting fires, but which are so rare as not to be fairly reckoned in the category of natural or ordinary results, by way of cause and effect. A fireman may be fatally injured and a family beggared, or a horse may be frightened, and the fathers of more than one dependent family killed, or crippled for life, in consequence. But no actions have ever been instituted for any such remote damages. And although some of the cases bear a considerably close analogy to these in principle, it must, we think, be treated as the prevailing rule of law that such remote and consequential damages will not form the ground of an action in the courts. Thus in Ryan *v.* New York Central Railway,[23] it was held the defendants were not responsible for the destruction of the plaintiff's house, distant one hundred and thirty feet from their shed, which had been set on fire through their own negligent conduct in regard to one of their engines, or by reason of some defect in the engine, from which the fire had communicated to the plaintiff's house.

self any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what there might be, nor could he in any way control the defendants or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property.

"The view which we take of the first point renders it unnecessary to consider whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them, under the circumstances stated in this case.

"We are of opinion that the plaintiff is entitled to recover; but as we have not heard any argument as to the amount, we are not able to give judgment for what damages. The parties, probably, will empower their counsel to agree on the amount of damages; should they differ on the principle, the case may be mentioned again. Judgment for the plaintiff."

[23] 35 N. Y. 210. But see Trask *v.* Hartford & New H. Railw., 2 Allen, 331.

*CHAPTER XVIII.

INJURIES TO DOMESTIC ANIMALS.

1. *Company not liable unless bound to keep the animals off the track.*
2. *Some cases go even further, in favor of the company.*
3. *Not liable where the animals were wrongfully abroad.*
4. *Not liable for injury to animals, on land where company not bound to fence.*
5. *Where company bound to fence are* primâ facie *liable for injury to cattle.*
6. *But if owner is in fault, company not liable.*
7. *In such case company only liable for gross neglect or wilful injury.*
8. *Owner cannot recover, if he suffer his cattle to go at large near a railway.*
9. *Company not liable in such case, unless they might have avoided the injury.*
10. *Where company are required to keep gates closed, are liable to any party injured by omission.*
11. *Opinion of* Gibson, *Justice, on this subject.*
12, 17. *Not liable for consequences of the proper use of their engines.*
13. *Questions of negligence ordinarily to be determined by jury.*
14. *But this is true only where the testimony leaves the question doubtful.*
15. *Actions may be maintained sometimes, for remote consequences of negligence.*
16–18. *Especially where a statutory duty is neglected by company.*
19. *The question of negligence is one for the jury.*
20. *One who suffers an animal to go at large can only recover for gross neglect.*
21. *Testimony of experts receivable as to management of engines.*
22. *One who suffers cattle to go at large must take the risk.*
23. *The company owe a primary duty to passengers, &c.*
24. *In Maryland company liable unless for unavoidable accident.*
25. *In Indiana common-law rule prevails.*
26. *In Missouri, modified by statute.*
27. *In California cattle may lawfully be suffered to go at large.*
28, 29. *Abstract of late cases in Illinois.*
30. *The weight of evidence and of presumption.*
31. *Company not liable except for negligence.*
32. *Company must use all statutory and other precautions.*
33. *Not competent to prove negligence of the same kind on other occasions.*

§ 126. 1. The decisions upon the subject of injuries to domestic animals by railways are very numerous, but may be reduced to a comparatively few principles. Where the owner of the animals is unable to show that as against the railway they were properly upon the track, or, in other words, that it was through the fault of the company that they were enabled to come upon * the road, the company are not in general liable, unless, after they discovered the animals, they might, by the exercise of proper care and prudence have prevented the injury.

* 465, 466

The fact of killing an animal of value by the company's engines, is not *prima facie* evidence of negligence on their part.[1] A distinction is here taken by the court between injuries to permanent property situated along the line of the railway, as injury to buildings by fires communicated by the company's engines, and damage to cattle which are constantly changing place, there being more evidence of fault on the part of the company from the mere occurrence of the injury in the former than in the latter case.[2]

2. Most of the better considered cases certainly adopt this view of the subject, and some perhaps go even further in favor of exempting the company from liability, where they were not originally in fault, and the animals were exposed to the injury through the fault of the owner, mediately or immediately.

3. For instance, if the animal escape into the highway, and thus get upon the track of the railway where it intersects with the highway, and is killed, the company are not liable.[3] And if the animals are trespassing upon a field, and stray from the field, upon the track of the railway, through defect of fences, which the company are bound to maintain, as against the owner of the field, and are killed, the company are not liable, either at common law or under the English statute,[4] or upon the ground that the defendant exercised a dangerous trade. The obligation to make and maintain fences, both at common law and under the statute, applies only as against the owners or occupiers of the adjoining close.[5]

[1] Scott *v.* W. & R. Railw., 4 Jones Law, 432.

[2] See note 1, and also Ind. & Cincin. Railw. *v.* Caldwell, 9 Ind. 397.

[3] Towns *v.* Cheshire Railw., 1 Foster, 363; Sharrod *v.* London & N. W. Railw., 4 Exch. 580. Halloran *v.* New Y. & Harlem Railw., 2 E. D. Smith, 257. In Maryland it was held that a statute for the protection of animals and stock did not include negro slaves. Scaggs *v.* Balt. & Wash. Railw., 10 Md. 268.

[4] 8 & 9 Vict. ch. 20, § 68.

[5] Ricketts *v.* The East and West India Docks and Birm. J. Railw., 12 C. B. 160; s. c. 12 Eng. L. & Eq. 520. The same point is ruled in the following cases. Jackson *v.* Rut. & Bur. Railw., 25 Vt. 150. See also cases referred to in §§ 166, 167. And it was held, Man. Sh. & Lincolnshire Railw. *v.* Wallis, 14 C. B. 243; s. c. 25 Eng. L. & Eq. 373, that a railway are not bound to fence against cattle straying upon a highway running along the railway, and that they are not liable for an injury sustained by cattle in getting from such highway upon the railway, through a defect of the fences maintained by the company; although the cattle strayed upon the highway without any fault of the owner. Brooks *v.* N. Y. & Erie Railw., 13 Barb. 594. But in the Midland Railw. *v.* Daykin,

* 4. So where the statute requires railways to fence their road, where the same passes through "enclosed or improved lands," if injury happen to another's cattle through want of fences, upon common or unenclosed land, it is not legally imputable to the negligence of the company.[6]

5. But if the railway are bound to maintain fences, as against the owner of the cattle, and they come upon the road through defect of such fences, and are injured, the company are, in general, liable without further proof of negligence.[7]

* 6. But where the statute imposes the duty of building fence upon the railway, they may lawfully stipulate with the land-owners to maintain it, and if such land-owner suffer his cattle to be where they may come upon the railway without building the fence, he

17 C. B. 126; s. c. 33 Eng. L. & Eq. 193, it was held, that where a colt strayed from a field, upon a public road, abutting upon which was a yard not fenced from a railway, the gate of which was, through the neglect of the company's servants, left open, and, while the colt was being driven back to the field by the servants of the owner, it escaped into the yard, and thence upon the railway, where it was killed by a passing train, the company were liable. *Jervis*, Ch. J., says: "I can see no room to doubt that that was a lawful use of the highway." But in Ellis *v.* London & Southwestern Railw., 2 H. & N. 424, where a railway company constructed their road across a public footway, in such a manner that no security against injury to passers on the way was afforded within the provisions of the English statute, 8 & 9 Vict. ch. 20, §§ 46, 61, 68, by means of a bridge or stile, but the company erected high gates which obstructed the footway and gave the key to plaintiff's servant, which had been lost and the gates left open, without notice to the railway company, whereby the plaintiff's colts escaped from his lands adjoining, and came upon the railway and were killed by a passing train, the jury having found that the plaintiff, by his own negligence and that of his servants had contributed to the accident, it was held he could not recover, notwithstanding the omission of duty by the company.

[6] Perkins *v.* Eastern Railw. and the Boston & M. Railw., 29 Maine, 307. And if by the common usage cattle have the right to run upon unenclosed land, the owner incurs the risk of all accidents. Knight *v.* Abert, 6 Penn. St. 472; Phil. & Germ. Railw. *v.* Wilt, 4 Whart. 143.

[7] Suydam *v.* Moore, 8 Barb. 358; Waldron *v.* Rensselaer & Sar. Railw., 8 Barb. 390; Horn *v.* Atlantic & St. Lawrence Railw., 35 N. H. 169; s. c. 36 id. 440; Smith *v.* Eastern Railw., 35 N. H. 356. But where the cattle come upon the railway, at a point not proper to be fenced, as at the intersection of a highway, or at a mill yard, the company are not liable for injury to them, unless the plaintiff prove some fault on the part of the company's servants, besides the want of fences. Indianapolis & C. R. *v.* Kinney, 8 Ind. 402; Lafayette & Ind. Railw. *v.* Shriner, 6 Ind. 141.

cannot recover of the company.[8] So, too, if the plaintiff leave down the bars at a cattle crossing, whereby his cattle go upon the railway and are killed, he cannot recover.[9]

7. And where the cattle go upon a railway through defect of fences, which the owner is bound to maintain, and suffer damage, the owner has no claim upon the company, unless, perhaps, for what has sometimes been denominated gross negligence, or wilful injury,[10] for in such cases the cattle are regarded as trespassers,[10] and the owner the cause of the injury sustained, unless the railway might have prevented it. But where there was no reasonable ground to suppose that the portion of fence which it was the duty of the company to build would have protected the animals, and the owner was shown to have been guilty of negligence in not taking care of them, it was * held there could be no recovery, since his negligence was the direct and proximate cause of the injury.[11]

8. And it was held to be gross negligence for the owner of cattle to suffer them to go at large, in the vicinity of a railway, whether the same was fenced or not.[12] And it will impose no additional

[8] Tower *v.* Prov. & Wor. Railw., 2 Rhode Island, 404, 411; Clark *v.* Sy. & Utica Railw., 11 Barb. 112; C. H. & D. Railw. *v.* Waterson, 4 Ohio N. S. 424. So, also, where the duty of maintaining the fences along the railway is upon the land-owner, and it is burned down by fire, communicated by the company's engines, and he suffers his fields to remain unfenced, whereby his cattle go upon the track, and are killed, he cannot recover. If the company are in fault, and liable to damages in regard to the fire, this does not oblige them to rebuild the fence, nor will it justify the plaintiff in suffering his fields to remain unfenced except at his own peril. Terry *v.* New York Central Railw., 22 Barb. 574.

[9] Waldron *v.* Portland, S. & P. Railw., 35 Maine, 422.

[10] Tonawanda Railw. *v.* Munger, 5 Denio, 255; s. c. 4 Comst. 349; Clark *v.* Syracuse & Utica Railw., 11 Barb. 112; Williams *v.* Mich. Central Railw., 2 Mich. 259. In this case the horses were wrongfully upon the railway, and the court say "they (the company) cannot be held liable for any accidental injury which may have occurred, unless the lawful right of running the train was exercised without a proper degree of care and precaution, or in an unreasonable or unlawful manner." See also Garris *v.* Portsmouth & Roanoke Railw., 2 Ired. 324; C. H. & D. Railw. *v.* Waterson, 4 Ohio N.S. 424; C. C. & C. Railw. *v.* Elliott, 4 Ohio N. S. 474; New Albany, &c. Railw. *v.* McNamara, 11 Ind. 543.

[11] Joliet & Northern Ind. Railw. *v.* Jones, 20 Illinois, 221.

[12] Marsh *v.* N. Y. & Erie Railw., 14 Barb. 364; Talmadge *v.* Rensselaer & Saratoga Railw., 13 Barb. 493; Louisville & Frankfort Railw. *v.* Milton, 14 B. Monroe, 75. This is where the plaintiff below suffered the company to build a railway through his field without stipulating that they should fence the track, and his cattle running upon the track while depasturing in the field were killed,

obligation upon a railway company, in regard to cattle suffered to go at large in the public highways, by order of the county commissioners having charge of the same, if the company are guilty of no negligence; in such cases, the owners of cattle killed at the road-crossings, by trains of the company, cannot recover of them.[13]

9. It has been held not to be sufficient in such cases to charge the company, to show that they were running at an unreasonable rate of speed, or without proper care in other respects.[14] The only question in such case is, we apprehend, whether the company, after discovering the peril of the animals, might have so conducted as to have prevented the injury.[14] The same rule obtains, which does in actions for personal injuries, where there is fault in both parties.

This subject is extensively discussed in Vicksburg and Jackson Railway *v.* Patton,[15] and the doctrine enunciated, that the owner of domestic animals not of a dangerous character, may lawfully suffer them to depasture upon the unenclosed commons, and if they wander upon the premises of others not enclosed, the owner of the animals is not liable for any damage in consequence. But a railway, crossing such common, has the same right to its unobstructed use as the owner of cattle, and they may *lawfully run their cars at all times, and at all lawful rates of speed; but if their own track be unenclosed and cattle liable to wander upon it, the company should have proper regard to so running their trains as not to injure them. And if cattle are injured through any default of the company, it is liable. It is the duty of the com-

and the court held the company are not liable, "unless the injury could have been avoided with reasonable care." But in Housatonic Railw. *v.* Waterbury, 23 Conn. 101, it was held that in such case the company hold their easement subject to the land-owner's right to cross and recross, to and from the different sections of his farm, provided the right is reasonably exercised, and that the land-owner is not chargeable with negligence in letting his cattle run on his land unfenced, unless he knew they were accustomed to keep near the track, thus imposing a duty of watchfulness on both parties.

[13] Mich. & Southern & Northern Ind. Railw. *v.* Fisher, 27 Ind. 96.

[14] Vandergrift *v.* Rediker, 2 N. J. (Zab.) 185; Clark *v.* Sy. & Utica Railw., 11 Barb. 112; Williams *v.* Mich. Central Railw., 2 Mich. 259; Lafayette & Ind. Railw. *v.* Shriner, 6 Porter (Ind.), 141. Here it is held the company are liable for gross negligence, even where the cattle are wrongfully upon the road.

[15] 31 Miss. 156; Gorman *v.* Pacific Railw., 26 Mo. 441.

pany to keep their engines in good repair, and to have a sufficient number of servants to manage their trains with safety; and if through any default in any of these duties the cattle of another are injured, it will be liable. It was held in this case, contrary to the general course of practice, that it may be proved that the general character of the engineer in charge of the train was that of a reckless and untrustworthy agent. And it is here said that the company are liable to exemplary damages for such an injury occurring through the gross negligence or wanton misconduct of its agents; both of which propositions seem not entirely reconcilable with the general course of decision.

10. And it has been held that where the statute, in general terms, requires railways to keep gates at road-crossings constantly closed, that one whose horses leaped from his field into the highway, and then strayed upon the railway, by reason of the gates not being kept constantly closed, and were killed, might recover of the company.[16] In such case it was held, that as to the company the horses were lawfully on the highway, as the provision in the statute in regard to keeping the gates shut was intended for the protection of all cattle, horses, &c., passing along the highway, whether strayed there or not, unless perhaps when voluntarily suffered to run at large in the highway. And the duty of keeping cattle-guards at road-crossings has been considered to extend to the protection of all animals in the street, and to be a duty which the railway owe the public generally, and not merely the owners of cattle driven along the highway, which, in strictness, is the only condition in which cattle are rightfully in the highway, at common law.[17]

[16] Fawcett *v.* York & North M. Railw., 16 Q. B. 610; s. c. 2 Eng. L. & Eq. 289. But it is a question for the jury, under the circumstances, whether they believe the gates were left open by the fault of the company's servants or the tort of a stranger. Walford, 179, citing two *Nisi Prius* cases (1842), (1845).

[17] Trow *v.* The Vermont Central Railw., 24 Vt. 487. And in Railroad *v.* Skinner, 19 Penn. St. 298, it is said, that if cattle are suffered to go at large, and are killed or injured on a railway, the owner has no remedy against the company, and may himself be made liable for damage done by them to the company; and it is unimportant whether the owner knew of the jeopardy of the cattle; and that is error to submit the question of negligence to the jury, unless there is some evidence of such fact.

In a late case in the Circuit Court of Virginia, in error from the County Court,

*11. In the New York and Erie Railway *v.* Skinner,[18] *Gibson*, J., lays down the rule in the broadest terms, that railways, * indepen-

The Richmond & Petersburgh Railw. *v.* Mrs. Jones, this subject is discussed at length, 6 Am. Law Reg. 346. It appeared, upon the trial of the case before the jury, that the company had been assessed in damages to the land-owners along the line of their road, in consequence of additional fence being required, by reason of the construction of the railway. The animal, for killing which the suit was brought, was found dead near the crossing of the highway and railway in such a state as to show that it had been killed by collision with the company's engines very near the crossing. The plaintiff below suffered the beast to run at large and graze upon the unenclosed lands in the neighborhood of the railway, her own land not lying in immediate contact with the line of the railway. The case, not being of sufficient amount to authorize its being carried to the Court of Appeals, the decision was final, and the case is discussed at length upon the principles involved, and the following points ruled: —

Prima facie the company are not liable, even when cattle are killed at a road-crossing. Both the owner of the cattle and the company, in such case, being apparently in the exercise of their legal rights, the law presumes no breach of duty, and thus imposes upon the party who alleges such breach the burden of proof. To entitle the owner in such case to recover of the company, he must prove want of care or skill on the part of the company.

But where cattle are killed along the line of the road, and not at a road-crossing, the case is much less favorable to the owner, inasmuch as the company, having paid the expense of fencing to the land-owners adjoining, are entitled to have cattle excluded from their track. And the statute depriving the company of an action against the owner of cattle for damages, caused by their straying upon the road, does not render it lawful for cattle to be allowed to go there unrestrained by fences.

[18] 19 Penn. St. 298; s. c. 1 Am. Law Reg. 97. But in Danner *v.* South Carolina Railw., 4 Rich. 329, it was held, that the fact that cattle pasturing on one's own land are injured by a railway company's trains, is *prima facie* evidence of the liability of the company, and that the company could only excuse themselves, by showing, from the manner the injury occurred, that they were not guilty of negligence. And that for this purpose the company must show, not only that the injury was not intentional, but that it was unavoidable, and occurred without the least fault on the part of the engineer. But to the maintenance of an action on the case for such injury, it is requisite to show, that it arose from the negligence of the company, and if it appear to have been wilful, or accidental, this action will not lie. This seems to be assuming the extreme opposite of the case last cited. The truth will be found to lie between them, doubtless. But the rule in Danner's case does not apply where the animal killed is a dog. Wilson *v.* Railw. Company, 10 Rich. (S. C.) 52. But it does apply to the killing of a horse at night. Murray *v.* Same, id. 227.

By the law of South Carolina, cattle must be fenced out, not fenced in. The entry, therefore, of cattle, as a horse, upon an unenclosed railway track, is no trespass. Murray *v.* Railroad Company, 10. Rich. 227. And it was held, that the

dent of statutory requisitions, and as against the adjoining land-owners, are under no duty whatever to fence their road, nor are they bound to run with any reference whatever to the possibility of cattle getting upon the track. Every man is bound, at his peril, to keep his cattle off the track, and if he do not, and they suffer damage, he has no claim upon the company, or their servants, and is liable for damages done by them to the company or its passengers. The opinion contains many sensible suggestions, and is curious for the enthusiasm and zeal manifested by one already beyond the ordinary limit of human life. These views have sometimes been adopted in the jury trials in other states, and as reported in the newspapers, in a recent case in Wisconsin, Prichard *v.* The La Crosse and Milwaukee Railway. But they are certainly not maintained to the full extent, in any country where the maxim *sic utere tuo ut alienum non laedas* * prevails, even to the limited extent recognized in the common law in England.

owner of a horse, permitted to roam at large over unenclosed land, is not guilty of such negligence as will embarrass his recovery, should the horse be killed by the negligence of another. Ib.

The statute in Georgia, 1847, makes railway companies liable for all damages done to live-stock or other property. But it was held they were not liable when the damage was caused by the design or negligence of the owner. Macon & W. Railw. *v.* Davis, 13 Ga. 68. And in New York it is held, that their general statute, making railway companies liable for all damage done to cattle, horses, and other animals, until they shall fence their roads, renders them liable to the owner of cattle, which strayed into an adjoining close, where they were trespassers, and thence upon the railway, or from the highway upon the railway. And that it makes no difference how the cattle came upon the railway, unless it is by the direct act or neglect of the owner, so long as the company do not fence their road according to the requirements of the statute. Corwin *v.* N. Y. & Erie Railw., 3 Kernan, 42. In this case the company had contracted with the land-owner to build the fence, which he had not done, and it was admitted, that if he had owned the cattle he could not recover. It is somewhat remarkable, that the rights of the owner of cattle trespassing should be superior to those of the owner of the land. But in Shepard *v.* Buffalo, N. Y. & Erie Railw., 35 N. Y. 641, the court advance a step further in the same direction, and declare, it is no defence that the party whose cattle are killed was legally bound to build the fence himself, under a contract between his assignor and the company. And it seems to be the disposition of the court to give the statute such an extensive operation that the company shall be absolutely responsible for all cattle injured, until it causes the erection of proper fences, according to the requirements of the statute. This savors rather too clearly of virtuous enthusiasm in the cause of the public good, to be very generally followed by others, or to be very enduring in the place where it originates.

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It was held in Gorman *v.* Pacific Railway, that the company were not bound to fence their road; but it was also held that the jury should consider the fact that the road was not fenced, in determining whether the company exercised proper care under the existing circumstances; and it was said that such companies should exercise the utmost care and diligence in the enjoyment of their own privileges to avoid doing injury to others.[19]

12. It has been considered that a railway is not responsible for injuries to horses, in consequence of their being frightened on the road by the noise of the engine and cars, in the prudent and ordinary course of their operations.[20]

13. The subject of negligence in the plaintiff, which will prevent his recovery, is discussed much at length in Beers *v.* The Housatonic Railway,[21] and in the main the same views are adopted in regard to injuries to cattle, which we have stated in regard to injuries to persons.[22] It is there laid down, by the court, that where there was negligence or want of care in whatever degree, by either party, is a question of fact to be determined by the jury, and that even where the circumstances are all admitted, it will not be determined as a question of law, but the inference of negligence, or no negligence, is one of fact for the jury.

14. But this, we apprehend, is true only where the circumstances leave the inference doubtful. If the proof is all one way, either in favor of or against negligence having intervened, the inference is always one of law for the court.[23]

* 15. There are some few cases where actions have been brought for injuries to cattle or horses, in consequence of some alleged remote negligence in the company. In one case,[24] the action was for the loss of a horse, by falling into a large well upon the com-

[19] 26 Mo. 441.

[20] Burton *v.* The Phil. Wil. & Balt. Railw., 4 Harr. 252.

[21] 19 Conn. 566. And in Poler *v.* New York Central Railw., 16 N. Y. 476, where a gate adjoining plaintiff's land upon defendant's land got out of repair and liable to be blown open, and the plaintiff, without giving notice to defendant, took measures to secure the gate, which proved ineffectual, and his cattle escaped through the fence and were killed on the track of defendant's road, it was a question of fact whether the plaintiff was guilty of culpable negligence.

[22] *Post*, § 177, and cases cited; Chicago & Mis. Railw. *v.* Patchin, 16 Ill. 198.

[23] Underhill *v.* N. Y. & Harlem Railw., 21 Barb. 489; Lyndsay *v.* Conn. & Pas. Rivers Railw., 27 Vt. 643; Scott *v.* W. & R. Railw., 4 Jones Law, 432.

[24] Aurora Branch Railw. *v.* Grimes, 13 Ill. 585.

pany's grounds. The plaintiff had frequent car-loads of lumber coming to the company's station, and he requested them to remove it to a position on their track where it could be discharged into his own lumber-yard, which they declining to do, he drew it with this horse to the proper point, and unloaded it. Upon another car arriving he attempted to do the same, without consulting the company, but his horse proved restive and backed off the track, and in his struggle fell into the well. The plaintiff had a verdict below, and a new trial was awarded, upon the ground that the duty of the company to exercise care and prudence depends upon the question whether the plaintiff is in the exercise of a legal right. For if not, he must show that he exercised extraordinary care before he can be permitted to complain of the negligence of another.

16. And in another case,[25] the plaintiff's horse was killed by breaking a blood-vessel in struggling from fright at the defendants' train of cars in its near approach to the turnpike road, which by their charter they were required to purchase, and in crossing all roads to restore them to their former state of usefulness. At the place of the injury the defendants excavated their road-bed upon the turnpike, some five feet below the surface, leaving a steep descent upon the railway, and no fence between the track of the turnpike and railway. The plaintiff was passing along the turnpike, leading his horse at the time. It was held, that under their charter the company were liable, if the excavation impaired the safety of the turnpike for public travel, and that such "encroachments of defendants upon a turnpike is a public nuisance, for which any person sustaining a particular injury may maintain an action."

17. And it has been laid down, in general terms, that a * railway company, authorized to use steam locomotive engines upon their road, is not liable for the damage or disturbance caused by such use, near a turnpike road existing before the railway company, unless such engines are used in an extraordinary and unreasonable manner.[26]

18. And where the legislature imposed a penalty upon railways, of $100 for every month's delay, in performing the duty of keep-

[25] Moshier *v.* Utica & Sch. Railw., 8 Barb. 427. But see Coy *v.* Utica & Sch. Railw., 23 Barb. 643.

[26] Bordentown & South A. Turnpike *v.* Camden & Amboy Railw., 2 Harrison, 314; Coy *v.* Utica & Sch. Railw., 23 Barb. 643.

ing and maintaining legal and sufficient fences on the exterior lines of their road, as required by their charters, it was held that the neglect of the corporation to perform this duty, rendered them liable to reimburse any person suffering injury thereby, in his property, in an action at common law. And if the defect in the fences by which the injury occurs were known to the company, they are liable for the damage suffered, notwithstanding their engineer was at the time in the exercise of due care, and notwithstanding the fence was originally imperfectly built by the plaintiff for the company.[27]

19. In an action for injury to domestic animals by the passing engines of a railway company, it is not conclusive of the liability of the company that the damage occurred in consequence of the passing of their engine, and that the engineer omitted the statutory requirements of blowing the whistle, ringing the bell, reversing the engine, &c. It should still be submitted to the determination of the jury whether the damage was caused by the engineer's neglect of duty, as that is a question lying exclusively within their province.[28]

20. One who voluntarily suffers his cow to go at large in the public streets of a city, with no one to take charge of her, and thus to stray upon a railrway track, at a time when cars are passing, is guilty of such carelessness that he cannot recover for any * injury to the animal through any degree of negligence short of that which is gross.[29]

21. The competency of the evidence of experts in regard to the management of locomotives so as to avoid the possibility of doing damage to animals upon the track, is discussed in a late case in Ohio.[30] It is not easy to define any very exact rule in regard to the extent of the testimony of experts as to the practicability of avoiding doing damage, under a given state of ex-

[27] Norris v. Androscoggin Railw., 39 Maine, 273. In this case the fence was stone-wall, built by plaintiff, by contract with the company some two years before, and accepted by them. The gap in the wall whereby the animal escaped upon the track of the railway, occurred several days before, and was known to the defendants. There was no other evidence of the manner of constructing the wall. The court held the plaintiff stood in the same position, as to his claim, as if any other one had built the wall.

[28] Memphis & Charlotte Railw. v. Bibb, 37 Ala. 699.

[29] Bowman v. Troy & Boston R. Co., 37 Barb. 516.

[30] Bellfontaine & Iowa R. Co. v. Bailey, 11 Ohio N. S. 333.

posure of persons or animals. The subject is a broad one, and to its full discussion would require a volume, instead of a single paragraph. But we make no question, the management of a locomotive steam engine, under any and all conditions and circumstances, is a matter of science and skill, as to which courts and juries are not ordinarily competent to form a reliable and satisfactory judgment, and that they do therefore stand in need of aid and instruction in regard to the matter, whenever it comes before them for determination, and that consequently the testimony of experts may always be received under the ordinary limitations and restrictions.

22. The subject of the responsibility of railways for injury to cattle running at large and coming upon their track is very carefully considered in a later case in Ohio.[31] It is here declared that the owner of cattle who does not keep them within his own enclosure, when he might do so by proper care, cannot require of a railway company to regulate the management and speed of their trains with reference to cattle coming upon their track. Such companies, like all others, have a right to regulate the management and conduct of their business solely with reference to the security of persons and property in their charge, and the meeting of their reasonable appointments in regard to them, and may make their plans upon the reasonable and legal presumption that other persons will perform all their legal obligations towards them, and consequently that the owners of domestic animals will keep them at home, where alone they belong, and not suffer them to stray upon the track of a railway company, unless they * are prepared to incur the legitimate hazards of such an exposure. But when a railway company finds cattle upon its track, it is bound to avoid damage to them, if practicable, by the same degree of effort that a prudent owner of the cattle would be expected to do, properly considering the hazard both to the train and the cattle. And the proper inquiry in such a case is, whether the agents of the company exercised reasonable and proper care, in running their engine, to avoid injury to the cattle of the plaintiff; and the facts and circumstances bearing upon this question are for the exclusive consideration of the jury.

23. And much the same view is taken in a recent case in Kentucky,[32] where it is said that the paramount duty of a railway

[31] Central Ohio R. Co. *v.* Lawrence, 13 Ohio N. S. 66.

[32] Lou. & Frankfort R. Co. *v.* Ballard, 2 Met. (Ky.) 177. But railway com-

company, in the conduct of a train, is to look to the safety of persons and property therein, and subordinate to this is the duty to avoid unnecessary damage to animals straying upon the road. And while a railway company is not justified in any conduct of its agents, in regard to cattle upon its track, which is needless, wanton, or wilful, it cannot be responsible for any thing short of this, since the owners of cattle are specially bound to keep them off the tracks of railways.

24. And in a late case in Maryland,[33] it was held that the well-settled principle of the common law, that a plaintiff is not entitled to recover for injuries to which his own fault or negligence has directly contributed, is not abrogated by the several acts of assembly, regulating the liabilities of railways in this state for stock killed or injured by their trains. These acts leave the question of the effect of the plaintiff's conduct upon his right to recover for the acts of others where it was at the common law. But the onus of proof is changed by the statute, and where stock is killed the law now imputes negligence to the company, unless it can show that the damage results from unavoidable accident.[33] It was not intended hereby to interfere with the time-table or the rate of speed on railways. The act leaves all this to the discretion of the companies, but imposes upon them the highest degree of care and caution; and in the absence of fault on the part of the plaintiff it must appear that the collision took place without any * fault or negligence on the part of the company or its agents, in order to exonerate them. In other words, if the plaintiff is not in fault the company will be responsible, unless the damage is the result of unavoidable accident.

25. In Indiana it is held, that in an action against the company for killing stock it must appear, both in the complaint and proof, that the damage resulted from the carelessness of the company or the omission to fence their road.[34]

26. In Missouri[35] it is determined by statute and the construc-

panies are not bound to maintain fences, sufficient to exclude the possibility of cattle coming upon their line, even under the extreme duty and obligation which they owe toward the protection of their passengers. Buxton *v.* N. E. Railw. Law Rep. 3 Q. B. 549.

[33] Keech *v.* Baltimore & Wash. R. Co., 17 Md. 32.

[34] Indianapolis, &c., R. Co. *v.* Sparr, 15 Ind. 440; Same *v.* Williams, id. 486.

[35] Meyer *v.* North Mo. R. Co., 35 Mo. 352; Powell *v.* Han. & St. Jos. R. Co., id. 457; Burton *v.* North Mo. R. Co., 30 id. 372.

tion of the courts, that if the accident occur upon a portion of the line not enclosed by a lawful fence, and not at a road or street crossing, whereby domestic animals are killed or injured, the company are responsible, at all events, and without reference to any question of negligence, either on their part or that of the owner of the animals. But at highway or street crossings the company are not responsible for any damage to such animals, unless it occur through some neglect or fault on their part.

27. In California[36] it seems to be considered that the custom of the country to suffer domestic animals to go at large on the commons will override the rule of the common law, obliging the owner to restrain his cattle within his enclosures, and that consequently no negligence is imputable to the owner on account of so suffering his animals to go at large. But railway companies are not held responsible for damage inflicted upon such animals so running at large unless it might * have been avoided by ordinary care and prudence on the part of the company at the time.[37]

28. There seems to have been some very nice questions raised in the courts of Illinois, for if it were not so some of the decisions would seem to partake largely of the character of incomprehensibility. For we find it gravely declared, in one case,[38] that the law does not require any different words to be used in proving a case against a railway from those used in other cases. It is only necessary the mind should be convinced of the existence of the neces-

[36] Waters *v.* Moss, 12 Cal. 535. And in Alger *v.* Miss. & Mo. Railw. Co., 10 Iowa, 268, it was held that permitting cattle to run at large does not impute negligence to the owner, nor is he liable as a trespasser if they are found upon an unfenced railway. A railway company is bound to exercise ordinary care not to injure animals coming upon their track through defect of fence. After the road is fenced the company is only liable in such cases for gross neglect. And in McCall *v.* Chamberlain, 13 Wisc. 637, it is held that the duty upon railway companies to fence their roads is intended for the protection of the public generally. And until such fences are built the company is liable for all injuries to animals upon their track, without reference to any question of being rightfully in the adjoining land from whence they escaped upon the track. And the lessee of the company assumes all their responsibility.

[37] Richmond *v.* Sacramento Valley R. Co., 18 Cal. 351. There is no statute here requiring railways to be fenced by the companies. But when that is required, and the plaintiff alleges the duty was not performed, he must prove it as part of his case. Indianapolis, &c., R. Co. *v.* Wharton, 13 Ind. 509.

[38] Ohio & Miss. R. Co. *v.* Irvin, 27 Ill. 178.

sary facts. And in the same case: The presumption is that the houses compose a village, and if an animal is killed beyond the houses the presumption is that it is killed beyond the village, and if the town extends beyond the houses the defendant should know the fact; and also: Every one is supposed to have some idea of the value of such property as is in general use, and it is not necessary to have a drover or butcher to prove the value of a cow. And in another case in this state it seems to have been claimed that the declaration against a railway for injuries to domestic animals must negative the possibility of any excuse on the part of the company. But the court hold that matters of excuse on the part of the company, as that the animals were killed at a farm crossing and that the road was properly fenced by them, must be shown by way of defence.[39] But it was held in another case in that state, that the plaintiff, in making out his own cause of action, must negative by proof the existence of a public crossing where the killing occurred, and should show that the defendants were bound to fence at that point.[40] And it was held in a later case, that it was negligence in a railway company to allow vegetation to grow upon its right of way, so that cattle may be concealed from view.[41]

29. If one allows stock to run in the highway near a railway * crossing it is such negligence that he cannot recover for any injury[42] thereto. And if one allows his cattle so to run in the highway and thus come upon the track of the railway, and the company use all statutory and other reasonable precautions to avoid damage to them, the owner cannot recover for any such damage which is thus caused either wholly or in part by his own neglect, and he would also be liable for all injury to the company or to persons or property in their charge.[42] And the omission of the company to sound the whistle or to ring the bell, in such cases, will not render them responsible for damage to cattle, unless it appear that such precautions would have prevented the injury.[43]

30. In actions for injury to cattle, if negligence is clearly proved on the part of the plaintiff, the company are not responsible unless

[39] Great Western Railw. *v.* Helm, 27 Ill. 198.
[40] Ohio & Miss. R. Co. *v.* Taylor, 27 Ill. 207.
[41] Bass *v.* Chicago, B. & Quincy R., 28 Ill. 9.
[42] Ch. Bur. & Quincy R. Co. *v.* Cauffman, 28 Ill. 513.
[43] Illinois Central Railw. *v.* Phelps, 29 Ill. 447.

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guilty of gross negligence, which implies wilful injury.[44] In such actions, founded upon the statute, the declaration should negative all the exceptions in the statute;[45] but the plaintiff is not called upon to negative in proof the existence of any contract between himself and the company to maintain the fences along the line of the road against his land.[45]

31. As the statute does not require railway companies to fence their road within the limits of cities and villages, they are not responsible for damage to domestic animals caused by their trains within such corporate limits; and if the animal come upon their track within these limits, and is driven by the train beyond these limits and there killed, without any fault on the part of the company, it is immaterial whether the road was properly fenced at the point where the animal was killed, as it came upon the track at a point where the company were not obliged to fence.[46] The mere killing of an animal by a railway company does not render them liable unless they have been guilty of negligence or the case comes within the statute.[46]

32. In cases where the company are required by statute to * ring the bell or sound the whistle, and that is omitted, if injury occur in consequence, they will be responsible, unless the party injured was himself guilty of negligence contributing to such result.[47] It is here said that railway companies are responsible for injuries to persons or property, when wilfully done, or resulting from gross neglect of duty. The company to exonerate themselves must use all reasonable or statutory precautions to prevent the injury, and an omission to do so will render them responsible, if the omission produce or contribute to the injury, and the plaintiff was not himself in fault in any particular also contributing to the injury.[47]

33. But in actions of tort against railway companies to recover damages for killing cattle upon their track, it is not competent to prove the company guilty of negligence in running their other trains, beside the one by which the cattle were killed.[48]

[44] Illinois Central Railw. *v.* Goodwin, 30 Ill. 117.

[45] Great Western Railw. *v.* Bacon, 30 Ill. 347.

[46] Same *v.* Morthland, 30 Ill. 451; Galena & Chicago R. Co. *v.* Griffin, 31 Ill. 303. As to cases under positive statute, see Illinois Central Railw. Co. *v.* Swearingen, 33 Ill. 289.

[47] Great Western R. Co. *v.* Geddis, 33 Ill. 304.

[48] Mississippi Central Railw. *v.* Miller, 40 Miss. 45.

*CHAPTER XIX.

FENCES.

SECTION I.

Upon whom rests the obligation to maintain fences.

1. *By the English statute there is a separate provision made for fencing.*
2. *This provision is there enforced against the companies by mandamus.*
3. *But where no such provision exists, the expense of fencing is part of the land damages.*
4. *And where that is assessed, and payment resisted by the company, the land-owner is not obliged to fence.*
5. *In some cases it has been held the fencing is to be done equally, by the company and the land-owner.*
6. *Assessment of land-damages, on condition company build fences, raises an implied duty on their part.*
7. *In some states, owners of cattle not required to confine them upon their own land.*
8. *Lessee of railway bound to keep up fences and farm accommodations.*
9. *Company bound to fence land acquired by grant.*
10. *Farm-crossings required wherever necessary.*
11. *Where land-owner declines farm accommodations, has no redress; courts of equity will not decree specific performance.*
12. *Fences and farm accommodations not required for safety of servants and employees.*
13. *Requisite proof where company liable for all cattle killed.*
14. *Party bound to fence assumes primary responsibility.*
15. *Company not responsible for injury at road-crossings.*
16. *Railway companies not responsible for injury to cattle by defect of fence about yard.*
17. *Case of horse escaping through defect of fence.*
18. *It must appear the injury occurred by default of company.*
19. *Cattle-guards required in villages but not so as to render streets unsafe.*
20. *Company responsible for injuries through defect of fences and cattle-guards.*
21. *Courts of New Hampshire maintain common-law responsibility.*
22. *Company responsible as long as they control road.*
23. *Maintaining fences along the line of railway, matter of police.*
24. *Rule as to land-owner agreeing to maintain fence, &c.*
25. *Company not responsible for defect of fence unless in fault.*
26. *Railway not responsible in Indiana unless in fault.*
27. *Company not liable where fence thrown down by others.*
28. *Where owner in fault he cannot recover unless, &c.*
29. *Rule of damages for not building fence, &c.*
30. *Land-owner must keep up bars.*
31. *Illustrations of the general rule.*
32. *In actions under statute case must be brought within it.*
33. *In Pennsylvania one required to keep his cattle at home.*

*§ 127. 1. By the Railway Clauses Consolidation Act[1] it is made the duty of the railways in England, before they use land for any of their purposes, to fence it, and make convenient passes for the owner, which, if the parties do not agree, are to be determined by two magistrates. Under this statute it has been held, that the railway is not excused from making the necessary accommodations to keep up communication, to the owner, between different parts of lands, intersected by the line of a railway, because these are not defined in the arbitrators' award of land damages. They are totally distinct things from the land damages.[2] And where the jury, assessing land damages, also made a separate verdict for the expense of crossing the railway by a private way, it was considered that they exceeded their jurisdiction, and their proceedings were quashed.[3]

2. It is considered, in the English courts, that the expense of fences and crossings being imposed upon the railways by statute, perpetually, and the mode of enforcing its performance pointed out in the statute, it has no connection with the land damages, but is to be enforced under the statute, and land damages are to be appraised, upon the basis of that duty resting upon the railway.

3. But where the statute makes no such provision, the expense of fencing and making crossings are important considerations * in estimating damages for the land taken, and this expense should

[1] 8 and 9 Vict. ch. 20, § 40. But in Kyle *v.* Auburn & Rochester Railw., 2 Barbour's Ch. 489, the court declined to interfere by injunction, to compel the building of a farm-crossing, although the company assumed before the jury for assessing land damages, that such a crossing should be built by them, the plans showing no such crossing. It is said, under such circumstances, to be the duty of the land-owner to make necessary crossings, and that he is a trespasser for crossing the railway without them; and this should be so considered, in assessing damages for taking the land, and compensation made for such expense.

[2] Skerratt *v.* The North Staffordshire Railw., 5 Railw. C. 166, per Lord *Cottenham*, Chancellor. See *post*, § 193, n. 3.

[3] *In re* South Wales Railw. Co. *v.* Richards, 6 Railw. C. 197. So too where the land-owner stipulated with the promoters for certain watering-places and other conveniences, and to accept £5,000 for especial damage, and to withdraw thereupon opposition to the bill, it was held the duty to make suitable watering-places might be enforced by mandamus. Reg. *v.* York & N. Midland Railw., 3 Railw. C. 764; *infra*, §§ 128, 190, 191. The provision for fences, in the English statute, being a separate, independent, general provision, is enforced, altogether aside of the proceedings to assess land damages.

undoubtedly be borne by the company, in addition to paying the value of the land, for otherwise the land is taken without an equivalent. But the courts in most of the American States have resisted this view wherever it was practicable, more commonly upon some technical ground of presumption or inference, when, in fact, the omission of such an express provision in the charter or the general laws of the states was wholly the result of oversight in the legislatures. But it is refreshing to find some courts so far relieved from the trammels of mere technicality as not to feel compelled to sacrifice an obvious principle of justice to the shadow of a mere form. In a recent case in California we find an announcement upon this question which evidently comes from the right quarter, a sense of simple justice. It declares, if fences are rendered necessary for the protection of the crops of the land-owner by means of the construction of the railway through the land, the cost of such fences must be included in the compensation to be paid by the company,[4] and this by necessary consequence must include a sum sufficient to indemnify the owner against the constantly accruing expenses of maintaining such fences. And the tendency of the more recent decisions is sensibly in this direction; and we might add, without offence, that in our judgment it is the only sensible direction the decisions could take, and we have always expected them to take such a direction in the end, however late it may come.[5]

4. And where in such circumstances the commissioners assessed the land damages, and a separate sum for building fences, and judgment was rendered in favor of the land-owner, for both sums, but the payment resisted by a proceeding in Chancery, on the part of the railway, and while this was still undecided, the company commenced running their engines, and the cattle of the occupier of the land strayed upon the track and were killed by the engines of the company, it was held,[6] that the obligation * to maintain the

[4] Sacramento Valley Railw. *v.* Moffatt, 6 Cal. 74.

[5] Evansville Railw. *v.* Fitzpatrick, 10 Ind. 120; Same *v.* Cockran, id. 560; Same *v.* Stringer, 551.

[6] Quimby *v.* Vermont Central Railw. Co., 23 Vt. 387; See also Vanderkar *v.* Rensselaer & Sara. Railw., 13 Barb. 390. But in the English Railway Acts, where the company is required to make crossings, where land is divided, and the mode of determining the nature of the crossings is to be referred to two justices, upon the application of the land-owner ("in case of any dispute") it was held, that until the company have made a communication, a party whose

fence rests primarily upon the company, and until they have either built the fences, or paid the land-owner for * doing it, a sufficient time before to enable him to do it, the mere fact that cattle get upon the

land had been severed by the railway has a right to pass from one portion of his property to the other across the railway, at any point, and that the section requiring the owner to pass at such a place as shall "be appointed" for crossing, means, "when such places shall have been appointed." Grand Junction Railw. v. White, 8 M. & W. 214; s. c. 2 Railw. C. 559. And where, at the time of appraising land damages, the land-owner, in the presence of the agents of the company, pointed out to the commissioner the place where he would have a farm-crossing, and no objection was made by the company, and the sum awarded was paid, but the company, in constructing their road, were throwing up an embankment at that point, and locating the crossing at a different place, where it would be inconvenient for the land-owner, an injunction was granted, until the company should either make a suitable crossing or compensate the land-owner. Wheeler v. Rochester & Sy. Railw., 12 Barb. 227; Milwaukee & Mis. Railw. v. Eble, 4 Chand. 72. It is here held, that the land-owner is entitled to include, in his damages, the expense of fencing, as incidental to the taking of the land. But the contrary is held in a very elaborate case in Iowa, Henry v. Dubuque & Pacific Railw., 2 Clarke, 288. But the argument of the court seems to us unsatisfactory and suicidal.

And where the railway at first contracted with the land-owner to build the fence for them at a specified price, but a controversy arising in regard to land damages, the commissioners reported a sum which was finally confirmed by the court, and an additional sum for the expense of building the fence, and the plaintiff took judgment and execution for this also, and subsequently built the fence, according to his contract with the company, and sued the company for the price, it was held that he could not recover, the former judgment having merged the contract, and imposed upon him the duty to build the fence, under the award and judgment. It was also held that the land-owner could not claim to recover any thing beyond the award for having built the fence, according to the original contract, which rendered it more expensive to him than it would otherwise have been. Curtis v. Vermont Central Railw., 23 Vt. 613; s. c. 1 Am. Railw. C. 258; see Lawton v. Fitchburg Railw., 8 Cush. 230.

And where the statute requires the company to make farm-crossings where they divide land, it is not proper for the jury, in assessing compensation to the land-owner, to include the expense of a bridge for the purpose of a farm-crossing. Philadelphia, Wilmington, and Baltimore Railw. v. Trimble, 4 Wharton, 47; s. c. 2 Am. Railw. C. 245.

In the case of Chicago & Rock Island Railw. v. Ward, 16 Illinois, 522, where the company covenanted to maintain fences upon land intersected by their road, and failed to perform the covenant, and crops were destroyed, it was held the company were liable for the value of the crops growing upon the land and destroyed, as of the time when fit for harvesting. This does not seem entirely in accordance with general principles upon this question. The case professes to go upon the authority of De Wint v. Wiltse, 9 Wend. 325. But see §§ 148, 156.

road from the land adjoining is no ground for imputing negligence to the owner of the cattle.[6]

5. In some cases in this country it has been held that the railway and the adjoining land-owner are to defray equal proportions of the expense of maintaining fences, upon the principle of being adjoining proprietors, and being equally interested in having the fence maintained, unless the land-owner chooses to let his land lie in common, and in that case the company must be at the whole expense of fencing, as a necessary protection and security to their business.[7]

[7] In the matter of the Rensselaer & Sar. Railw., 4 Paige, 553. In Northeastern Railw. *v.* Sineath, 8 Rich. 185, it is held that damages are not to be assessed for fencing through unenclosed land used for grazing. In a recent case in Kentucky, Louisville & Frankfort Railw. *v.* Milton, 14 B. Monr. 75, it is held, that where one grants the right of building a railway across his land, neither the land-owner nor the company are bound to fence adjoining the railway. If the land-owner suffer his cattle to run at large, as he may, if he choose to incur the risk, he cannot recover damages of the company for any injury sustained by them, unless it might have been avoided by the agents of the company, with due regard to the safety of the train and its contents. If such cattle, permitted to run at large upon the railway track, are killed accidentally by the train, when running at its customary speed, the owner cannot recover of the company.

The court here discountenance the notion that seems sometimes to have prevailed, that if the railway are in the right in running their train, and especially where cattle are trespassing upon the track, they may destroy them at will, without incurring any responsibility. And in regard to the case of New York & Erie Railw. *v.* Skinner, 19 Penn. State, 298, the court say: "This court is not disposed to sanction all the legal doctrines avowed in that opinion."

Railways are only bound to the use of such diligence, prudence, and skill, to avoid injury to cattle rightfully in the highway at a road-crossing, as prudent men exercise in the conduct of their own business. And as to cattle wrongfully upon the railway, unless the injury is caused wilfully, or through gross negligence, the company are not liable. Chicago & Mississippi Railw. *v.* Patchin, 16 Ill. 198; Great Western Railw. *v.* Thompson, 17 Ill. 131; Quimby *v.* Vt. Central Railw., 23 Vt. 387; Central Mil. Tr. Railw. *v.* Rockafellow, 17 Ill. 541; Railroad Co. *v.* Skinner, 19 Penn. St. 298.

In a late case in New Hampshire, White *v.* Concord Railway, 10 Foster, 188, it was held, that where the statute required railways to fence and maintain proper cattle-guards, cattle-passes, and farm-crossings, for the convenience and safety of the land-owners along the side of the road, provided they might instead settle with the land-owners therefor, and a railway divides a pasture, and a crossing is made, under the statute, the land-owner may let his cattle run in the pasture "without a herdsman," and that the company will be liable for their destruction while crossing the track from one pasture to the other, unless the

*6. But many of the American cases assume the ground that where there is no statute imposing the duty of fencing upon the

injury was caused by accident, or by the fault of the owner, or unless it appear that the company have settled with the owner in relation to such guards, passes, and farm-crossings.

And it was held also, in the same case, that where the plaintiff deeded the land to the company upon condition, "said corporation to fence the land and prepare a crossing, with cattle-guards, at the present travelled path, on a level with the track," this was not such settlement, and did not alter the legal relations of the parties.

In this case, both parties being in the right, were bound to the degree of prudence which is to be expected of prudent men. The railway, knowing of the crossing, and of the liability of cattle to be upon it, were bound to keep a look-out, rather than the land-owner to keep some one constantly upon the "look-out."

In the case of Long Island Railw., 3 Edw. Ch. 487, the Vice-Chancellor seems to consider that a railway company have no interest in having their road fenced, and are not therefore bound to contribute to the expense of fencing, which is at variance with the opinion of the Chancellor (4 Paige, 553), and equally, as it seems to us, with reason and justice. See Campbell *v.* Mesier, 4 Johns. Ch. 334.

In a case, in the Supreme Court of Pennsylvania, Sullivan *v.* Phila. & R. Railw., 6 Am. Law Reg. 342, s. c. 30 Penn. St. 234, the subject of the duty of railway companies to fence their roads for the security of passengers is discussed, and, as it seems to us, many sensible and practical suggestions made. The general and correlative duties of passenger carriers and their passengers are thus stated: —

"The carrier's contract with his passenger implies: first, that the latter shall obey the former's reasonable regulations; second, that the carrier shall have his means of transportation complete and in order, and his servants competent.

"If a passenger be hurt without his own fault, this fact raises a presumption of negligence, and casts the *onus* on the carrier.

"This being a presumption of fact, it is for the jury to determine.

"It is no answer to an action by a passenger against a carrier, that the injury was caused by the negligence or even trespass of a third person. The parties are bound by their contract."

Post, § 176, n. 6; § 189.

Woodward, J.: "Whether that spot in the road was not so commonly infested with cows as to require a fence or cattle-guard of some sort; whether the speed of the cars was not too great for a curve, exposed at all times to the incursions of cattle; whether the engineer discovered the cow as soon as he might, and used his best endeavors to avert the collision; in a word, whether the accident was such as no foresight on the part of the company or its servants could have prevented; these were questions, and grave ones, too, that ought to have been submitted to the jury.

"The learned judge, after stating correctly the extreme care and vigilance which the law exacts of railroad companies, asks if they are required to provide suitable fences and guards to keep cattle off the road. In answering his ques-

* company, and no stipulation, express or implied, between the company and the land-owners that they shall maintain fences,

tion in the negative, the judge seems to have misapplied the reasoning of Judge *Gibson* in Skinner's case, 7 Harris, 298; 1 Amer. Law Reg. 97. That was an action, by the owner of a cow killed on a railroad, to recover her value from the company; and the doctrine laid down was that the owner was a wrong-doer in suffering his cow to wander on a road engaged in transporting passengers, and was rather liable for damages than entitled to recover them. The owner of the cow could not insist that the company should fence their road for the protection of his stock. It was his business to keep his cattle within his own bounds. Now, such reasoning between a railway company and a trespasser commends itself to every man's understanding, because it tends to the security of the passenger. If farmers cannot make companies pay for injuring cattle, but they involve themselves in liability for suffering their cattle to run at large, passengers are all the more secure from this kind of obstruction.

"But when, notwithstanding this strong motive for keeping cattle off the road, a cow is found there, and causes an injury to a passenger whom the company have undertaken to carry safely, is it an answer to the passenger suing for damages that the owner of the cow had no right to let her run at large? Grant that she was unlawfully at large, and grant the owner is bound to indemnify the company for the mischief she caused, yet as between the company and its passenger, liability is to be measured by the terms of their contract.

"Having undertaken to carry safely, and holding themselves out to the world as able to do so, they are not to suffer cows to endanger the life of the passenger any more than a defective rail or axle. Whether they maintain an armed police at cross-roads, as is done by similar companies in Europe; or fence, or place cattle-guards within the bed of their road, or by other contrivance exclude this risk, is for themselves to consider and determine. We do not say they are bound to do the one or the other, but if, by some means, they do not exclude the risk, they are bound to respond in damages when injury accrues.

"Perhaps the passenger would have his remedy against the owner of the cow; it is clear, from Skinner's case, that the company would, but the passenger has unquestionably a remedy against the company. If he be injured by reason of defective machinery, nobody would think of setting up the liability of the mechanic who furnished the bad work, as a defence for the company against the claim of the passenger. Yet it would be a defence exactly analogous to that which satisfied the court in this case. We do not wish to be understood as laying down a general rule, that all railroad companies are bound, independently of legislative enactment, to fence their roads from end to end, but we do insist that they are bound to carry passengers safely, or to compensate them in damages. If a road runs through a farmer's pasture grounds, where his cattle are wont to be, possibly as between the company and the farmer the latter may be bound to fence, but as between the company and the passenger the company are bound to see that the cattle are fenced out. If cattle are accustomed to wander on unenclosed grounds, through which the road runs, the company are bound to take notice of this fact, and either by fencing in their track, or by enforcing the owner's obligation to keep his cattle at home, or by moderating the speed of the

* they are not bound to do so, but the common-law duty of keeping one's cattle at home rests upon the land-owner.[8] And this view is probably consistent, in principle, with the cases where such a duty is held to result from the appraisal of land-damages, subject to the expense of building fences being borne by the company, or where the assessment specifically includes the expense of fencing, and that has not been paid.

And in the Irish courts the company is only bound to erect such accommodation works for the benefit of the land-owners as are a compliance with the specifications in the award. This is true even where the railway crosses a private road over a farm in the right of some third party as lessee of the farm obliquely, * and the award adjudicating the claim of such lessee specified only a crossing over the railway as a "level crossing" at a given point, and the company gave a crossing at right angles with the road, which did not connect the termini of the road, and gave no access to it; it was nevertheless held that this was a compliance with the award.[9] This is certainly not a fair construction of the award, as applicable to the subject-matter; and it does not require any gift of prophecy to foretell that the doctrine of

train, or in some other manner, to secure the safety of the passenger. That is their paramount duty. To enable them to perform it the law entitles them to a clear track. 7 Harris, 298; 12 id. 496."

[8] Hurd *v.* Rut. & Bur. Railw., 25 Vt. 116, 123; New York & Erie Railw. *v.* Skinner, 19 Penn. St. 298; Clark *v.* Syra. & Utica Railw., 11 Barb. 112; Dean *v.* The Sullivan Railw., 2 Foster, 316; A. & S. Railw. *v.* Baugh, 14 Ill. 211. Where, upon appeal from the first appraisal of land damages, where the erection of fences had been specified, that was vacated, and the new appraisal made no such requirement of the company, it was held that the presumption was, that the whole damages were appraised in money, and the company were not bound to build fences. Morss *v.* Boston & Maine Railw., 2 Cush. 533; Williams *v.* New York Central Railw., 18 Barb. 222. It seems impossible to estimate damages for taking land for the use of a railway, without taking into the account the expense of fencing. Henry *v.* Pacific Railw., 2 Clarke, 228; Mil. & Mis. Railw. *v.* Eble, 4 Chandler (Wis.), 72; Northeastern Railw. *v.* Sneath, 8 Rich. 185; Matter of Rense. & Sar. Railw., 4 Paige, 533. And those cases which hold the company not bound to fence, unless required to do so by statute or contract, go upon the presumption that they have already paid the expense of fencing in the land damages. See Baltimore & Ohio Railw. *v.* Lamborn, 12 Md. 257; Mad. & Ind. Railw. *v.* Kane, 11 Ind. 375; Stucke *v.* Milw. & Miss. R. Co., 9 Wisc. 202; Richards *v.* Sacramento Valley R. Co., 18 Cal. 351.

[9] Mann *v.* Great Southern & Western R., 9 Irish Com. Law R. 105.

the case will not be followed in this country, and, with deference be it said, it ought not to be followed anywhere.

7. And in some of the states the rule of the common law, in regard to the duty resting upon the owner of domestic animals to restrain them, has not been adopted so as to charge the owner with negligence for suffering them to go at large.[10]

8. But it is held, that where the statute imposes upon the company the duty of maintaining fences and cattle-guards at farm-crossings, and provides that until such fences and cattle-guards shall be duly made the corporation and its agents shall be liable for all damages from such defect, this renders a lessee of the road liable for injury to cattle caused by his operating it without proper cattle-guards at farm-crossings.[11]

* 9. A general statute, requiring fences to be maintained by railways upon the sides of their road, applies to land acquired by purchase as well as to that taken *in invitum*.[12]

[10] Kerwhacker *v.* C. C. & Cincinnati Railw., 3 Ohio N. S. 172. In such cases the company are bound to use reasonable care not to injure animals thus rightfully at large. Ib.; C. C. & Cincinnati Railw. *v.* Elliott, 4 Ohio N. S. 474. If the owner is to be charged with *remote* negligence in suffering his cattle to go at large, under such circumstances, and the servants of the company are guilty of want of care at the time of the injury, which is the *proximate* cause of it, the company are still liable. Ib.; Chicago & Miss. Railw. *v.* Patchin, 16 Ill. 198; Ind., &c. Railw. *v.* Caldwell, 9 Ind. 397.

[11] Clement *v.* Canfield, 28 Vt. 302. And the same rule applies to a company running its cars over another company's line by arrangement between the companies. If the road is not properly fenced, the company running the trains by which the damage is caused will be responsible, although it be the default of the other company, for which that is also responsible to the party injured. Illinois Central Railw. *v.* Kanouse, 39 Ill. 272. An order upon a railway for making farm accommodations must specify the time within which they shall be made. Keith *v.* The Cheshire Railw., 1 Gray, 614. And where the act allowing a railway company to lease its road is upon the express condition that it be not thereby exonerated from any of its duties or liabilities, this must include the maintaining of fences. Whitney *v.* Atl. & St. Law. Railw., 44 Maine, 362. Where a railway company permits its cattle-guards to remain filled with snow, so that cattle which have strayed upon the highway without any negligence on the part of the owner pass over such guards, and in consequence are injured by a passing train, the company are liable for the damages. Donnigon *v.* Ch. & N. W. Railw. Co., 18 Wisc. 28.

[12] Clarke *v.* The Rochester, L. & N. F. Railw., 18 Barb. 350. A fence built in zigzag form of rails, half the length upon the land taken for the railway, and half upon the land of the adjoining proprietor, is a compliance with the statute

10. And the statute, requiring farm-crossings "for the use of proprietors of land adjoining," has no reference to the quantity of land to be accommodated, but only that the crossing must be useful.[12]

11. Where the statute requires the company to erect, at farm-crossings, bars or gates, to prevent cattle, &c., from getting upon the railway, and the land-owner who is entitled to such protection refuses to have such bars or gates erected, or requests the company not to erect them, or undertakes to erect them himself, he cannot maintain an action against the company for not complying with the statute.[13] A court of equity will not decree

requiring the fence to be built upon the side of the road. Ferris *v.* Van Buskirk, 18 Barb. 397. And where the statute provides that, upon certain proceedings, railway companies may be compelled to provide farm-crossings and cattle-passes for the owners of land intersected by the company's road, and no such proceedings have been taken, the company are not liable to an action for damages resulting from the want of necessary farm-crossings and cattle-passes, unless it appears that the company had contracted to build them. Horn *v.* Atlantic & St. Lawrence Railw., 35 N. H. 169: s. c. 36 id. 440. Where the railway company contract to build fences and farm-crossings, this obliges them to erect bars or gates at such crossings, as required by statute. Poler *v.* N. Y. Central Railw., 16 N. Y. Court of Appeal, 476.

[13] Tombs *v.* Rochester & Syracuse Railw., 18 Barb. 583. But where the statute requires the commissioners to prescribe the "time when such works are to be made," and the owner has the right, by statute, to recover double damages, "by reason of failure to erect the works," and the commissioners failed to *prescribe the time*, no action will lie. Keith *v.* Cheshire Railw., 1 Gray, 614. When the statute requires fences to be maintained by railway companies, it must be done before they begin running trains. Clark *v.* Vermont & Canada Railw., 28 Vt. 103. And in Gardiner *v.* Smith, 7 Mich. 410, it was held to attach as soon as the company have possession of the land for construction. Since the decision of the case of Clark *v.* Vt. & Canada R., *supra*, the same court held, that during the construction of a railway the company, in such case, were bound, either by fences or other sufficient means, to protect the fields of land-owners adjoining the railway. And whether the company have used the proper precautions to prevent the escape of the land-owner's cattle or the intrusion of other cattle, during such construction, is a question of fact, in each particular case to be determined by the jury. Where the contractor for building a railway took away the fences in course of construction, and the sheep of the land-owner escaped thereby and were lost, he was held responsible for the loss. Gardiner *v.* Smith, 7 Mich. 410. And it will make no difference that the land-owner turned the sheep into the lot after the land was taken possession of by the contractor, and he was constantly throwing down the fences to carry forward the work. Ib. Holden *v.* Rut. & Bur. Railw., 30 Vt. 297. But a railway company cannot fence their road by means of willows set upon the line of the land

specific performance of a covenant by a railway company to maintain and keep in repair the cattle-guards on the line of plaintiff's land.[14] Nor will the court of chancery, upon any general right, direct that farm-crossings, agreed to be built by a railway company, shall be made under its direction, or at its discretion.[15]

*12. Railways are not bound to maintain fences upon their roads so as to make them liable to their own servants for injuries happening in consequence of the want of such fences. And where the statute makes them liable for all injuries done to cattle, &c., by their agents or instruments until they fence their road, the liability extends only to the owners of such cattle or other animals, and this liability is the only one incurred.[16]

13. Where the statute makes railways liable for cattle killed by them without reference to their negligence, all that is necessary to entitle the party to recover is to show the fact that the cattle were killed by the company and that he was the owner.[17]

14. And where it is the duty of the company to fence the land adjoining their road, and they omit to do so, whereby cattle escape upon the track and are killed, they are liable in damages without any proof of care on the part of the owner to restrain them.[18] And evidence of notice to the owner that the animal had escaped two or three times before and had been upon the track, is inmaterial.[18] But where the duty of maintaining fences is upon the land-owner, and cattle escape and are killed *upon

taken, and which in growing will injure the adjoining land by the extension of their roots, there being no controlling necessity of fencing in that mode. The company were accordingly enjoined. Brock *v.* Conn. & Pass. R., 35 Vt. 373.

[14] Columbus & Shelby Railw. *v.* Watson, 26 Ind. 50.

[15] Darnley *v.* London, Chatham & Dover Railw., Law. Rep. 2 H. Lds. 43.

[16] Langlois *v.* Buffalo & Rochester Railw., 19 Barb. 364. But in McMillan *v.* Saratoga & Wash., 20 Barb. 449, it is conceded the company would have been liable to the representative of their engineer, who was killed by the train running upon cattle which came upon the track through defect of fences, which it was the duty of the company to maintain, if they had been shown to have had actual knowledge of such defect before the injury. See *post*, § 131.

[17] Nashville & Ch. Railw. *v.* Peacock, 25 Alabama, 229. See also Williams *v.* New Albany & Salem Railw., 5 Ind. 111; Lafayette & Ind. Railw. *v.* Shriner, 6 Ind. 141. In this case it was held, that such a statute had no reference to the case of cattle killed at a road-crossing, as that was a place which could not be protected either by fences or cattle-guards.

[18] Rogers *v.* Newburyport Railw., 1 Allen, 16.

the track, the company are not liable without proof of due care on the part of the owner to restrain them.[19] The statute, requiring railways thereafter constructed to fence their roads on both sides, does not apply to a road in the process of construction at the date of the act.[19]

The statute, requiring railways to fence their roads, and making them liable for injury to cattle without regard to the negligence of the owner, or his being an owner of adjoining land, is a police regulation.[20] But this liability does not extend to animals injured by fright.[21]

15. Railway companies are not liable for injuries to animals at highway crossings, although the crossing had been abandoned by the public for two years and the highway changed, it not appearing to have been vacated in the mode prescribed by statute, so as to justify the company in fencing their track across it.[22]

16. Railway companies in England are not held responsible for injuries to cattle transported to their stations, in consequence of injury by escaping upon the track through defects of the fence about the cattle-yard; nor for the cattle being frightened by one of the porters of the company coming out of the station into the cattle-yard, having a lantern, such as was ordinarily used, in his hand; it being no evidence of negligence on the part of the company's servants.[23] It was considered here that the cattle had been delivered to the plaintiff, and it was his fault, since he knew the yard was not fenced, and had himself pronounced it an unsafe place, not to guard against their escape.

17. It appeared in one case[24] that the plaintiff's horse had es-

[19] Stearns *v.* Old Colony & Fall River Railw., 1 Allen, 493.

[20] Indianapolis & C. Railw. *v.* Townsend, 10 Ind. 38; Jefferson Railw. *v.* Applegate, id. 49; Ind. & C. R. *v.* Meek, id. 502; Jeff. Railw. *v.* Dougherty, id. 549.

[21] Peru Railw. *v.* Haskett, 10 Ind. 409. And the company are not liable for cattle killed in the highway without their fault, where the track of the road was fully fenced. Northern Ind. R. *v.* Martin, 10 Ind. 460.

[22] Indian. Railw. *v.* Gapen, 10 Ind. 292.

[23] Roberts *v.* Great Western Railw., 4 C. B. (N. S.) 506.

[24] Holden *v.* Rutland & Burlington Railw., 30 Vt. 297. Where the plaintiff had knowledge at evening that his fence was in danger of being carried off by a flood, and knew his cattle would in consequence be liable to come upon the railway track, and refused to remove them from the pasture, and before morning the fence was removed, and the cattle came upon the track and were killed by a

caped * in the night-time from his pasture upon the railway track on account of the want of proper fence along the line of the road, and was found in the morning a mile from the plaintiff's land in a rocky pasture seriously injured in the leg; and there was some evidence tending to show that the injury was received in the pasture where he was found. The court charged the jury that if they were satisfied there was a clear connection between the escape of the horse and the injury received, the plaintiff was entitled to recover. This was held erroneous in not requiring the jury to discriminate between a *direct* and a *remote* connection between the neglect of the company and the damage to the plaintiff's horse, as he could only recover upon the former ground.

18. In this case[24] the plaintiff's cows were killed by escaping from the plaintiff's pasture, and going into a piece of land leased by the plaintiff to the defendants, to be used by them as a wood-yard, and from that upon the defendants' track, for want of fence about the wood-yard. The evidence left it doubtful whether the defendants were to have the exclusive occupancy of the wood-yard, or were to fence the same, as between them and the plaintiff: It was held that, in order to recover of the defendants for killing the cows, it should be found by the jury that it was the duty of the defendants to maintain the fence for defect of which they escaped upon the defendants' track.

19. The statute of New York, requiring railways to maintain cattle-guards at road-crossings, applies to streets in a village, but not so as to impede the passage along the streets, or render them unsafe for persons passing.[25]

* 20. It has often been declared that railway companies, to relieve themselves from responsibility for damage caused by their trains to domestic animals, must not only build but maintain in good

passing train, it was held the plaintiff could not recover. Michigan, &c., R. Co. *v.* Shannon, 13 Ind. 171. There are numerous cases in this state where matters of practice under the statute of that state are discussed. Wright *v.* Gossett, 15 Ind. 119; Ind., &c. Railw. *v.* Fisher, id. 203; Same *v.* Kercheval, 16 id. 84; Ohio & Miss. Railw. Co. *v.* Quier, id. 440. See also 19 id. 42; 20 id. 229; 23 id. 438; 24 id. 139. And it has been held that all animals killed at one time constitute a separate and indivisible cause of action, and two of these cannot be united to give jurisdiction to the Circuit Court. Ind. & Cin. R. Co. *v.* Kercheval, 24 Ind. 139.

[25] Brace *v.* N. Y. Central Railw. Co., 27 N. Y. 269.

repair all fences and cattle-guards required of them by law.[26] If such structures are allowed to fall into decay, or are accidentally thrown open or thrown down, and not closed and restored within a reasonable time, the company are responsible to the owner of cattle injured by such neglect, provided he is not in fault himself.[26] But even where such fences and cattle-guards are properly maintained, the railway companies will be held responsible for all damage to animals caused by the wilful or negligent conduct of their agents and employees.

21. In New Hampshire the common-law rule of responsibility for damage only as to cattle rightfully in the adjoining fields is maintained in regard to the duty of railway companies to fence their track, and an omission of this duty will not render them responsible for an injury happening to cattle trespassing upon the track or upon the lands adjoining.[27] It is here held that railway companies are not responsible to the owner of lands adjoining their track for damage done upon such lands by cattle suffered by their owners to run at large in the highway, and thence escaping upon the railway track, and thus coming upon such adjoining lands, through defect of fences, which it is the duty of the company to maintain. But this seems questionable. We should have said, without much examination or reflection, that although the owners of the cattle are clearly responsible for all such damage, it is not quite certain the company may not also be held responsible for the same damage to the land-owner, inasmuch as the law casts upon them the duty of maintaining the fences against the land, and the damage occurred in consequence of the omission. But the court unquestionably took the surest course to visit the responsibility, in the first instance, where it ultimately belongs. It is here further said that railways are bound to maintain proper cattle-guards at farm-crossings, and are responsible for all damages to cattle rightfully there by such omission, but are not responsible for any injury to cattle suffered * to go at large in the highway, or wrongfully there for any cause, although such injury may occur by reason of the omission to build and maintain such cattle-guards.[28]

22. A railway company are responsible for all damage done to cattle rightfully in lands adjoining the railway track through de-

[26] McDowell *v.* N. Y. Central Railw., 37 Barb. 195.
[27] Chapin *v.* Sullivan Railw. Co., 39 N. H. 53.
[28] *Post*, § 128, pl. 7.

fect of fences which the company are bound to maintain ; and they cannot excuse themselves from responsibility by showing that the road is operated for the benefit of other parties, and especially so long as it is done under the direction and control of the company.[29]

23. The building of fences along the line of a railway track is, no doubt, in regard to the security of travel thereon, to be regarded as a matter of police, and a duty which the companies cannot shift upon others by contracts to maintain such fences.[30] And it makes no difference by whom such fences were built, — the company is bound to maintain them in good condition at all times.[31]

24. A land-owner, who by contract with the company is bound to maintain the fences through his land, cannot recover of the company for damage to cattle by reason of defect of fences, unless he show negligence on the part of the company.[32] But a railway company is responsible for cattle killed by their trains at a mere private road-crossing, which was not, but might have been, easily fenced by them.[33] This case was controlled by the statute. A sufficient fence in Indiana is held to be such an one as good husbandmen usually keep.[34] But in many of the states what shall constitute legal fences is defined by statute.

25. Railway companies are not responsible for damage accruing to domestic animals from want of fences, at points which do not properly admit of being fenced, as in the immediate vicinity * of engine-houses, machine-shops, car-houses and wood-yards.[35] And where the fence along a railway line is destroyed by unavoidable accident, as by fire, and is repaired in a reasonable time, but in the mean time cattle get at large by reason of the want of fence, and are injured, the company will not be held responsible.[36]

26. By statute in this state railway companies are made respon-

[29] Wyman *v.* Pen. & Ken. R. Co., 46 Me. 162.

[30] New Albany & Salem R. Co. *v.* Tilton, 12 Ind. 3; Same *v.* Maiden, id. 10. See also Illinois Central R. Co. *v.* Swearingen, 33 Ill. 389.

[31] New Albany, &c. Railw. Co. *v.* Pace, 13 Ind. 411.

[32] Terre Haute, &c. R. Co. *v.* Smith, 16 Ind. 102.

[33] Ind. Central Railw. *v.* Leamon, 18 Ind. 173.

[34] Toledo & Wabash Railw. Co. *v.* Thomas, 18 Ind. 215. If such a fence is maintained, the company is only liable as at common law for negligence.

[35] Ind. & Cin. Railw. Co. *v.* Oestel, 20 Ind. 231; Galena & Chicago Union R. Co. *v.* Griffin, 31 Ill. 303.

[36] Toledo & Wabash R. Co. *v.* Daniels, 21 Ind. 256; Ind., Pitts. & Clev. R. Co. *v.* Truitt, 24 id. 162.

sible for animals, but not for persons, injured upon their roads, when they might be, but are not fenced, irrespective of the question of negligence. But when a proper fence is maintained in all places where it is required to be, the company are not responsible for animals injured except, as at common law, where there is negligence on their part conducing to the result, and none on the part of the owner of that character.[37]

27. The requirements of railway companies as to fencing their road are not intended chiefly for the protection of domestic animals, but for the security of travel and transportation, and where the fence is thrown down by third persons without the knowledge of the company that it is down, and cattle stray upon the track and receive injury, the company is not responsible for the damage.[38]

28. Where the plaintiff is guilty of negligence which immediately and directly contributes to the injury of cattle, he cannot recover of a railway company unless by the exercise of ordinary care and prudence at the time the company might have avoided inflicting the injury.[39]

29. Where the railway company stipulated with an adjoining land-owner to construct five "cowpits" or cattle-guards upon his land, but did it in so imperfect a manner as to be of no value, and the land-owner brought suit for the breach of contract, it was held he could only recover such damage as he had *sustained up to the time of bringing the action, unless where he had himself constructed the cattle-guards in a proper manner, when he might also recover the expense of such construction.[40]

30. Where bars are erected at a farm-crossing at the request of the land-owner, it is his duty to keep them up; and if he fails to do so, whereby his own cattle or those of third persons straying into his field get upon the track and are injured, the owners of such cattle cannot recover of the company if guilty of no default at the time of the injury.[41]

[37] Thayer *v.* St. Louis, Alton, &c. Railw. Co., 22 Ind. 26; McKinley *v.* Ohio, &c. Railw. Co., id. 99, where it is held it will make no difference as to the responsibility of the company that the road is operated by a receiver.

[38] Toledo, &c. Railw. *v.* Fowler, 22 Ind. 316.

[39] Ind. &c. Railw. *v.* Wright, 22 Ind. 376.

[40] Indiana Central Railw. *v.* Moore, 23 Ind. 14.

[41] Indianapolis R. Co. *v.* Adkins, 23 Ind. 340. See also Eames *v.* Boston & Worcester Railw., 14 Allen. 151. In this case the company erected bars for the accommodation of the land-owner, and the animal killed escaped upon the track,

31. A railway running along the line of a highway is required to be fenced with especial care and watchfulness.[42] But where an animal passes upon the track of a railway at the crossing of a highway, where it would not be proper nor practicable to make any effectual fence or cattle-guards, and is injured, the company is not responsible unless in fault in the management of the train at the time.[43] And it was here considered that notwithstanding the facts that the plaintiff was guilty of negligence in permitting the animal to stray upon the track, and was not an adjoining proprietor, he might recover for an injury thereto by the cars of a railway company if their track was not fenced. But where the owner of a blind horse turned him out upon the common of a town, through which a railway ran, where he was killed by a passing train, and the track was not fenced, it was held he could not recover, on account of his own gross negligence.[44]

32. In actions against railway companies, under the statute, for injury to domestic animals, it should appear affirmatively that the case comes within the provisions of the statute. Thus where railways are required to fence their roads within six months after opening them for use, on penalty of being responsible for all cattle injured, it should appear, in an action for * injury by reason of such omission, that the six months had expired.[45] So if it claimed that the injury occurred by reason of the omission to fence, it should appear that it occurred at a point in the road where the company were not excused from fencing.[46] To constitute a town or village within the statute it is not requisite there should be any plot of the same dedicating streets, &c., in the manner provided by statute.[46]

by the bars being left down, and afterwards passed upon the adjoining lot, and then upon the railway again, it not appearing precisely how. The court held, the owner could not recover without showing the bars were down without his fault, or else that the animal, after leaving the track, came upon it again through the fault of the company.

[42] Ind. & Cin. R. Co. *v.* Guard, 24 Ind. 222; Same *v.* McKinney, id. 283.

[43] Ind. & Cin. R. Co. *v.* McKinney, 24 Ind. 283.

[44] Knight *v.* Toledo & Wabash R. Co., 24 Ind. 402. A railway company is not bound to resort to any extraordinary means to insure the fence being kept up along its line night and day; reasonable diligence is all that is required. Illinois Central Railw. *v.* Dickerson, 27 Ill. 55; Same *v.* Phelps, 29 id. 447; Same *v.* Swearingen, 33 id. 289.

[45] Ohio & Miss. R. Co. *v.* Meisenhiemer, 27 Ill. 30; Same *v.* Jones, id. 41.

[46] Illinois Central Railw. Co. *v.* Williams, 27 Ill. 48.

33. An owner of mules killed upon the track of a railway by an engine and cars, cannot recover therefor, even where they escaped from a properly fenced enclosure without his knowledge, and were on the highway at its intersection with the railway.[47]

SECTION II.

Against what Cattle the Company is bound to fence.

1. *At common law every owner bound to restrain his own cattle.*
2. *And if bound to fence against others' land, it extends only to those cattle rightfully upon such land.*
3. *Company may agree with land-owner to fence, and this will excuse damage to cattle.*

n. 5. *Review of cases upon this subject.*

4. *Owner may recover unless guilty of express neglect.*
5. *Comment upon the last case.*
6. *Statement of case in Massachusetts.*
7. *Further comment on the last case.*
8. *Rule of responsibility as held in Kentucky.*
9. *Rule laid down in Ohio.*
10. *Rule in Indiana.*
11. *Distinction between suffering cattle to go at large and accidental escape.*

§ 128. 1. At common law the proprietor of land was not obliged to fence it. Every man was bound to keep his cattle upon his own premises, and he might do this in any manner he chose.[1]

2. And where, by prescription or contract, or by statute, a * land proprietor is bound to fence his land from that of the adjoining proprietor, it is only as to cattle rightfully in such adjoining land.[2] The same rule has been extended to railways.[3]

And it has been considered in some cases that where no statute, in terms, imposes upon railways the duty of fencing their roads, that they are not bound to fence, and that the owner of cattle is

[47] North Penn. Railw. Co. *v.* Rehmon, 49 Penn. St. 101.

[1] Dovaston *v.* Payne, 2 H. Bl. 527; Rust *v.* Low, 6 Mass. 90, 99; Jackson *v.* Rut. & Bur. Railw., 25 Vt. 157, 158; Wells *v.* Howell, 19 Johns. 385; Manchester, Sh. & Lincolnsh. Railw. *v.* Wallis, 14 C. B. 243; s. c. 25 Eng. L. & Eq. 373; Morse *v.* Rut. & Bur. Railw., 27 Vt. 49; Lafayette & Ind. Railw. *v.* Shriner, 6 Porter (Ind.), 141; Woolson *v.* Northern Railw., 19 N. H. 267; Indianapolis & Cin. Railw. *v.* Kinney, 8 Ind. 402. But in Pennsylvania the common-law rule in regard to keeping one's cattle at home is reversed by statute, and improved lands must be fenced in order that the owner may recover for damages done by stray cattle. Gregg *v.* Gregg, 25 Legal Intel. 372, Nov. '68.

[2] Same cases above; Lord *v.* Wormwood, 29 Maine, 282.

[3] Ricketts *v.* East & West India Docks & Birmingham J. Railw., 12 C. B. 161; s. c. 12 Eng. L. & Eq. 520; Perkins *v.* Eastern Railw. Co., 29 Maine, 307; Towns *v.* Cheshire Railw., 1 Foster, 363; Cornwall *v.* Sullivan Railw. 8 Foster, 161.

bound to keep them off the road, or liable to respond in damages for any injury which may be caused by their straying upon the railway,[4] and as a necessary consequence cannot recover for any damage which may befall them.[5]

* 3. But where a railway is not obliged to fence unless requested

[4] Vandegrift *v.* Rediker, 2 Zab. 185; Tonawanda Railw. *v.* Munger, 5 Denio, 255; s. c. affirmed in error, 4 Comst. 349; Clark *v.* Syracuse & Utica Railw., 11 Barb. 112; Williams *v.* Mich. Central Railw., 2 Mich. 259; New York & Erie Railw. *v.* Skinner, 19 Penn. St. 298.

[5] Brooks *v.* New York & Erie Railw., 13 Barb. 594. In this case it was held that the statute requiring railways to maintain cattle-guards at road-crossings did not extend to farm-crossings. So too it has been held that the statute requiring gates or cattle-guards at road-crossings does not extend to street-crossings. Vanderkar *v.* Rensselaer & Sara. Railw., 13 Barb. 390. In Central Military Track Railw. *v.* Rockafellow, 17 Illinois, 541, the rule is laid down in regard to cattle straying upon a railway, that they are to be regarded as wrongfully upon the road, and the owner cannot recover for an injury, unless caused by wilful misconduct or gross negligence. The court say, "A railroad company has a right to run its cars upon its track without obstruction, and an animal has no right upon the track without consent of the company, and if suffered to stray there, it is at the risk of the owner of the animal."

And in Illinois Central Railw. *v.* Reedy, 17 Illinois, 580, the same court say, "Animals wandering upon the track of an unenclosed railroad, are strictly trespassers, and the company is not liable for their destruction, unless its servants are guilty of wilful negligence, evincing reckless misconduct."—"The burden of proof is on the plaintiff to show negligence; the mere fact that the animal was killed" is not enough.

In Munger *v.* Tonawanda Railw., 4 Comst. 349, it is held, that cattle escaping from the enclosure of the owner and straying upon the track of a railway, are to be regarded as trespassers, and no action can be maintained against the company if the negligence of the plaintiff concurred with that of the company in producing an injury to the cattle while in that situation; and that the law charges the owner of cattle, in such case, with negligence, although his enclosures are kept well fenced, and he is guilty of no actual negligence, in suffering the cattle to escape. And it was accordingly held, that the company was not liable, under such circumstances, for negligently running an engine upon and killing the plaintiff's cattle.

The same principles substantially are maintained in the same case, 5 Denio, 255. And it is further held here, that where the general statutes of the state allow towns to prescribe what shall be a legal fence, and when cattle may run at large in the highway, and which forbid a recovery for a trespass by cattle lawfully in the highway, by one whose fences do not conform to the town ordinance upon the subject, this will have no application to railways, and that cattle allowed to run in the highway by such ordinance, and which, while so running in the highway, enter upon the lands of a railway at a road-crossing, where there is no obstruction against the intrusion of cattle, are to be regarded as trespassers.

by the land-owner, and had agreed with such owner that they should not fence against his land, and a cow placed in such lands strayed upon the track of the road, and was killed by a train, it was held the owner of the cow, having by his own fault contributed to the loss, could not recover of the company.[6]

4. In a late case in Connecticut,[7] it was decided that where cattle are at large without the fault of the owner, and go upon the track of a railway, and are injured through the negligence of the company in the management of their train, the owner is not precluded from recovering damages, because the cattle were trespassers upon the railway. In order to preclude the plaintiff from recovery in such case, he must have been guilty of express, and not merely of constructive, wrong in suffering the cattle to go at large.

* 5. We could not dissent from the propositions maintained in the preceding case, notwithstanding some hesitation in regard to the proper construction placed by the court upon the facts found in the case. The law of every case must be judged of by the facts which the court assume to be established in deciding it. It would be as unfair to criticise the decision of a court, upon a new construction of the facts, as it would upon a different state of the testimony at a different trial. The decision of a court is good or bad upon the facts assumed by the judge, and no fair-minded man will attempt to escape from the weight of an authority by assuming or

[6] Tower *v.* Providence and Worcester Railw., 2 Rhode Island, 404.

[7] Isbell *v.* New York & New H. Railw. Co., 27 Conn. 393. The courts in Indiana, in hearing cases in error, feel bound to presume that the court below applied the testimony correctly in determining localities and geographical boundaries, and especially in matters affecting jurisdiction, as the local courts would more naturally understand these questions than another less familiar with the facts. Ind., &c. Railw. Co. *v.* Moore, 16 Ind. 43; Same *v.* Snelling, id. 435.

By the law of Indiana, before the statute of 1859, it must appear, in order to recover damages for animals killed or injured by a railway company, that it occurred through the negligence of the company, and without the immediate fault of the owner. Wright *v.* Ind., &c. Railw. Co., 18 Ind. 168; Toledo & Wabash Railw. Co. *v.* Thomas, id. 215. The act of 1859 is prospective only. Ind., &c. Railw. Co. *v.* Elliott, 20 id. 430. It was here made a question whether a statute awarding damages to the owners of animals killed or injured by the rolling stock of any railway, applied equally to freight as to passenger trains, and it was held that it did. The wonder is that any such question should ever be made. We never before supposed there could be any doubt in regard to it.

even proving, that the judge took a mistaken view of the facts. It is merely an attempt to balance one assumed blunder of the court, by showing that they fell into another in an opposite direction. A decision is good upon the ground upon which it is placed, or it is wrong upon every ground.

6. We have said thus much in order to state that the case of Browne *v.* Providence, Hartford, and Fishkill Railway Company,[8] which decides that a railway corporation, which is obliged by law to make all needful fences and cattle-guards upon the sides of its track, is liable for injuries by its engines to cattle straying at large through the land of a stranger upon its road, by reason of its negligence in not erecting fences and cattle-guards as required by statute, seems clearly to have assumed a different rule of responsibility, as against railway companies, from that which has ordinarily been before applied to all lawful business, as between adjoining proprietors. Indeed, the court distinctly assume the position, that the common-law responsibility imposed upon adjoining land-owners is not sufficient, and that railway companies must be held to a higher degree of responsibility, "on account of the new circumstances and condition of things arising out of the general introduction and use of railways in the country," and that the requirements of the railway companies in regard to fencing and cattle-guards "were designed for the safety of the * public, and for the protection of all domestic animals, whether rightfully or wrongfully out of their owners' enclosure."

7. This decision certainly has the credit of meeting the question involved fairly, and of wrestling manfully with its difficulties, and of placing it upon the only plausible ground, that the business was so dangerous to the public that it merited a more extended construction, where railways are required to fence their roads, than where other land-owners were required to do the same thing. We had always supposed that railways were required to fence their roads for the protection of their passengers, and of persons and animals rightfully in the highway or the adjoining lands. And we have yet to learn any sound principle upon which they can fairly be required to guard against injuries to persons or animals wrongfully upon their track, by making permanent erections to preclude such persons or animals from coming there. It is true, unquestionably, that railway companies, in common with all others, are

[8] 12 Gray, 55. *Ante*, § 127, pl. 21, and notes.

bound to avoid doing an injury to any one, if it can be avoided at the time, whether such person or his property be rightfully or wrongfully in their way ; but that this duty extends to previous precautions against doing injuries to persons wrongfully upon their track, either personally or by their property, is more than can fairly be maintained, as it seems to us, unless railways are to be outlawed in this respect. Every one in the exercise of a lawful business has the right to expect, and to conduct his business upon the expectation that others will also perform their duty, and if they do not, that they will be required by the administrators of the law to take the natural consequences of such neglect, provided that even when in fault, in exposing themselves or their property to damage and loss, from the lawful pursuit of lawful business by others, they be not wantonly damaged by such others, but only from necessity. And this is all which we understand to have been decided by the case of Isbell *v.* New York and New Haven Railway Company.[7] And in the later case in Massachusetts,[9] *Chapman*, J., seems to assume the same ground, and it is the only one in our judgment fairly maintainable.

8. A railway company which is not bound to fence its track * is not liable for injuries inflicted by its engines and trains upon cattle straying upon the track of the road, unless such injury was caused by the wanton and reckless negligence of the company through its agents and servants.[10]

9. It was held in Ohio,[11] that where a land-owner granted to the company the right of way of a given width, and covenanted to maintain the fences on both sides, and subsequently conveyed the land, it was held that the grantee of the land was so far affected by his grantor's covenant to maintain the fences on the line of the railway that he could not visit any consequences upon the company resulting from its not being performed, but must bear them himself.

10. Where the owner of cattle was not in the habit of suffering his cattle to go at large on the railway track, and was not in a position to take any steps to avert the danger they might be in from the passing trains of the company, the presence of the cat-

[9] Rogers *v.* Newburyport Railw. Company, 1 Allen, 16.

[10] Lou. & Frankfort R. Co. *v.* Ballard, 2 Met. (Ky.) 177.

[11] Easter *v.* Little Miami R. Co., 14 Ohio N. S. 48. See also McCool *v.* Galena & Chicago Union R. Co., 17 Iowa, 461.

tle upon the track will be regarded as accidental, and at most they will be deemed but as trespassers, and be presumed to have escaped through the insufficiency of fences, and liable for any damage they might cause. But if the servants of the company used no means to avoid killing the cattle, and manifested such indifference to consequences, such a degree of rashness and wantonness as evinced a total disregard for the safety of the cattle, and a willingness to destroy them, although the destruction may not have been intentional, in justice and upon principle the company should be held responsible for the damages, unless it appear that the owner was equally in fault.[12] The simple killing of an animal by a railway company's train is *prima facie* evidence of negligence on the part of their engineer.[12]

11. In one case [13] it was held that the negligence on the part of * the owner of cattle, which shall preclude his recovery for an injury to them by a railway train, must depend more upon its degree than upon the time when it occurs; and a distinction in this respect should be made, between one who suffers his cattle knowingly to go at large where they will naturally be exposed to passing trains upon a railway, and cases where the cattle get at large without the owner's knowledge, through defect of fences or their being temporarily thrown down.

[12] Indianapolis, &c. R. Co., *v.* Meek, 10 Ind. 502.

[13] C. H. & N. W. R. Co. *v.* Goss, 17 Wisc. 428. All questions of negligence, where there is any uncertainty in the facts, must be submitted to the jury under proper instructions. Congor *v.* Galena, &c. U. R. Co., id. 477. We have discussed this question in Briggs *v.* Taylor, 28 Vt. 180, 184. *Post*, § 176, pl. 2.

*CHAPTER XX.

LIABILITIES IN REGARD TO CONTRACTORS, AGENTS, AND SUB-AGENTS.

SECTION I.

Liability for Acts and Omissions of Contractors and their Agents.

1. *Company not ordinarily liable for the act of the contractor or his servant.*
2. *But if the contractor is employed to do the very act, company is liable.*
3. *American courts seem disposed to adopt the same rule.*
4. *Distinction attempted between liability for acts done upon movable and immovable property not maintainable.*
5. *Cases referred to where true grounds of distinction are stated*
6. *No proper ground of distinction in regard to mode of employment.*
7. *Proper basis of company's liability explained.*
8. *So long as one retains control of work he is responsible for the conduct of it.*
9. *A master workman is only responsible for the faithfulness and care of his workmen, in the business of their employment.*
10. *Railway company responsible for injuries consequent upon defects of construction, in the course of the work by a contractor.*
11. *But ordinarily the employer is not responsible for the negligent mode in which work is done, the contractor being only employed to do it in a lawful and reasonable manner.*

§ 129. 1. The general doctrine seems now firmly established, that the company is not liable for the act of the contractor's servant, where the contractor has an independent control, although subordinate, in some sense to the general design of the work. The distinction, although but imperfectly defined for a long time, has finally assumed definite form, that one is liable for the act of his servant, but not for that of a contractor, or of the servant of a contractor.[1]

[1] Laugher *v.* Pointer, 5 B. & C. 547, where the subject is ably discussed, but not decided, the court being equally divided. Quarman *v.* Burnett, 6 M. & W. 499; Milligan *v.* Wedge, 12 Ad. & Ellis, 737; Knight *v.* Fox, 5 Exch. 721; Burgess *v.* Gray, 1 C. B. 578; Overton *v.* Freeman, 11 C. B. 867; s. c. 8 Eng. L. & Eq. 479; Peachey *v.* Rowland, 13 C. B. 182; s. c. 16 Eng. L. & Eq. 442; Rapson *v.* Cubitt, 9 M. & W. 710; Reedie *v.* London & N. W. Railw., 6 Railw. C. 184; Hobbitt *v.* Same, 6 Railw. C. 188; s. c. 4 Exch. 244; Steel *v.* Southeastern Railw., 16 C. B. 550; s. c. 32 Eng. L. & Eq. 366. In this last case, the action against the company was for flowing plaintiff's land, by the defective manner in which certain mason work was done, by the workmen of one Furness, who did the work as a contractor under the company, but under the superintendence of one Phillips, the surveyor of the company, who furnished

* 2. But if the contractor or his servants do an act which turns out to be illegal, or a violation of the rights of others, and it be the very act which he was employed to do, the employer is liable to an action.[2] Lord *Campbell*, Ch. J., here said, "The position in effect contended for by defendants' counsel, I think wholly untenable, namely, that where there is a contractor, the employer can in no case be made liable. It seems to me, that if the contractor do that which he is ordered to do, it is the act of the employer, and this appears to have been so considered in the cases" [upon the subject]. "In these cases nothing was ordered, except that which the party giving the order had a right to order, and the contract was to do that which was legal, and the employer was held properly not liable for what the contractor did negligently, the relation of master and servant not existing. But here the defendants employ a contractor to do that which was unlawful. Upon the principle contended for, a man might protect himself in the case of a menial servant, by entering into a contract."

3. The American cases have not as yet, perhaps, assumed that definite and uniform line of decision which seems to obtain in the English courts upon the subject. But there is a marked disposition, manifested of late, to adopt substantially the same view.[3] But some of the earlier cases in this country and in England, hold the employer responsible for all the acts and omissions of a contractor, the same as for those of a servant.[4]

the plans. It appeared that the injury resulted from the workmen not following the directions of Phillips. The court held the action could not be maintained. *Cresswell*, J., said: "If it could have been shown that the plaintiff's land was flooded in consequence of something done by the orders of Phillips, the company's surveyor, it might have been said that was the same as if Phillips had done it with his own hands, and then the company would have been responsible. This work was done under a contract, and there is nothing to show negligence in any one for whose acts the company are responsible." This seems to be placing the matter upon its true basis. See also Young *v.* New York Central Railw., 30 Barb. 229. But if a servant of the contractor, while employed on the work, receive an injury from a passing train of the company through the fault of their servants, and without his own fault, he may maintain an action against the company. Ib. See also City of Cincinnati *v.* Stone, 5 Ohio N. S. 38.

[2] Ellis *v.* The Sheffield Gas Consumers' Co., 2 El. & Bl. 767; s. c. 22 Eng. Law & Eq. 198.

[3] Kelly *v.* Mayor of New York, 1 Kernan, 432; Blake *v.* Ferris, 1 Selden, 48; Pack *v.* The Mayor of New York, 4 Selden, 222; Hutchinson *v.* York and Newcastle Railw., 5 Exch. 343; s. c. 6 Railw. C. 580, 589.

[4] Bush *v.* Steinman, 1 B. & P. 404; Lowell *v.* Boston and Lowell Railw. 23

* 4. At one time a distinction was attempted to be maintained, between the liability of the owner of fixed and permanent property and the owner of movable chattels, for work done in regard to them, or with them, making the employer liable in the former and not in the latter case.[5] But the distinction was found to rest upon no satisfactory basis, and was subsequently abandoned.[6]

5. The grounds of all the decisions upon this subject are fully and satisfactorily explained, in the late cases of Ellis *v.* Gas Consumers' Company,[2] and Steel *v.* Southeastern Railway.[1]

6. Sometimes a distinction has been attempted to be drawn, in regard to the employer, whether the employment were by the job or by the day, making him liable for the acts of the operatives in the latter and not in the former case. But this is obviously no satisfactory ground upon which to determine the question, although it might, in point of fact, come very nearly to * effecting the same, or a similar separation of the instances in which the employer is or is not liable.

7. The true ground of the distinction being, after all, not the

Pick. 24. See also, upon this point, Mayor of New York *v.* Bailey, 2 Denio, 433; Elder *v.* Bemis, 2 Met. 599; Earle *v.* Hall, id. 353. In the latter case the subject is very ably discussed, and the early cases somewhat qualified. And in the case of Hilliard *v.* Richardson, 3 Gray, 349, there is a very elaborate and satisfactory opinion, by Mr. Justice *Thomas*, in which the cases are very extensively reviewed, and the old rule of Bush *v.* Steinman distinctly repudiated.

[5] Rich *v.* Basterfield, 4 C. B. 783; The King *v.* Pedley, 1 Ad. & Ellis, 822. And see Fish *v.* Dodge, 4 Denio, 311. *Littledale*, J., in Laugher *v.* Pointer, 5 B. & C. 547. *Parke*, B., in Quarman *v.* Burnett, 6 M. & W. 510; Randleson *v.* Murray, 8 Ad. & Ellis, 109.

[6] Allen *v.* Hayward, 7 Q. B. 960; Reedie *v.* London and N. W. Railw., 4 Exch. 244. But it is still maintained, by some, that if the owner or occupier of real estate employ workmen under a contract which presupposes the underletting of the work, or the employment of subordinates, and in the course of the accomplishment of the work any thing is done, by digging or suffering rubbish to accumulate, which amounts to a public nuisance, whereby any person suffers special damage, the owner or occupier of the premises is liable. Bush *v.* Steinman, 1 B. & P. 404; Randleson *v.* Murray, 8 Ad. & Ellis, 109. But this rule is questioned. Fish *v.* Dodge, 4 Denio, 311. And after all it seems, like the other phases of the same question, to resolve itself into an inquiry, how far the first employer may fairly be said to have done, or caused to be done, the wrongful act. Burgess *v.* Gray, 1 C. B. 578. If the nuisance occurred naturally, in the ordinary course of doing the work, the occupier is liable; but if it is some irregularity of the contractor, or his servants, he alone is responsible. See Carman *v.* Stubenville and Ind. Railw., 4 Ohio N. S. 399; Thompson *v.* New Orleans & Carrollton Railw., 1 Louis. Ann. 178; s. c. 4 id. 262; s. c. 10 id. 403.

form of the employment, or the rule of compensation, but whether the work was done under the immediate control and direction of the employer, so that the operatives were his servants, and not the servants of another, who was himself the undertaker for accomplishing the work, and having a separate, and independent, and irresponsible control of the operatives, bringing the question again to the same point, the difference between a contractor and a servant.[7]

8. In a recent case before the Privy Council, where the owner of land employed Indian laborers in the Mauritius, at so much per acre, to clear it, which they did, partly by lighting a fire so negligently that sparks were carried by the wind upon the land of another, and there burned down his house, it was held, upon the ground that the owner of the land retained control of the work, and made constant interference in the conduct of it, that he was responsible for the negligence of the workmen, as the relation of master and servant, or superior and subordinate, continued.[8]

9. Where one gratuitously permits a carpenter to do a piece of work in a shed belonging to the former, and one of the workmen of the carpenter, in the course of the work, dropped a match with which he had lighted his pipe, and thereby set fire to the shed, it was held the master was not responsible for the damage; notwithstanding the jury found it occurred from the negligent act of the defendant's workman.[9] But it would have been otherwise if the negligence had occurred in the course of the employment.

[7] In the case of Blackwell *v.* Wiswall, 24 Barb. 355, is an elaborate opinion by *Harris*, J., which was affirmed by the full court, which holds that the only ground upon which one man can be made responsible for the wrongful acts of another is, that he should have controlled the conduct of such person. And that the person who is made liable for the acts of another must stand in the relation of superior.

Hence one who had obtained the exclusive right of a ferry, and who suffered another to operate it for his own benefit, as lessee, is not responsible for any injury inflicted upon passengers, through the negligence or unskilfulness of the servants of the lessee, who conduct the ferry, and it would make no difference if the lessee had been himself conducting the ferry, at the time the injury accrued.

And if it were true that the grantee of the ferry was guilty of a breach of duty, in making the lease, it will not entitle any one to sue on that account, unless he has sustained injury resulting from the act of leasing directly, and not incidentally merely.

[8] Serendat *v.* Saisse, Law Rep. 1 P. C. 152; s. c. 12 Jur. N. S. 301. The case was governed by the rule laid down in the Code Napoleon, but that is not essentially different from the rule of the English law upon the subject.

[9] Williams *v.* Jones, 3 H. & C. 602; s. c. 11 Jur. N. S. 843; Woodman *v.*

10. And when a railway company was empowered by act of parliament to build a bridge across a navigable river, but were to do it so as not to detain vessels longer than while persons and teams ready to cross the bridge were passing over; and during the construction of the work by a contractor, by some defect of construction the bridge could not be raised, and the plaintiff's vessel was detained, it was held the company were responsible.[10]

11. A person employing another to do a lawful act is presumed, in the absence of evidence to the contrary, to employ him to do it in a lawful and reasonable manner; and, therefore, unless the parties stand in the relation of master and servant, the employer is not responsible for damages occasioned by the negligent mode in which the work is done.[11]

*SECTION II.

Liability of the Company for the Acts of their Agents and Servants.

1. *Courts manifest disposition to give such agents a liberal discretion.*
2. *Company liable for torts committed by agents in discharge of their duties.*
3. *May be liable for wilful act of servant in the range of his employment.*
4. *Some of the cases hold it necessary to show the assent of the company.*

n. 6. *Cases upon this subject reviewed.*

5. *Most of the cases adhere to the principle of* respondeat superior.
6. *But it seems not to have been considered that the company is present.*
7. *The cases seem to regard the company as always absent.*
8. *In cases where the company owe a special duty, the act of the servant is always that of the company.*
9. *It seems more just and reasonable to regard the company as always present in the person of their agent.*
10. *What shall amount to ratification of the act of an agent by a corporation difficult to define.*
11. *How corporations may be held responsible for the publication of a libel.*
12. *The powers of a corporation are such only as are conferred by charter.*
13. *False certificate of capital being paid in money.*
14. *Gas company not bound to supply gas to all who require it.*
15. *Company may become responsible for false imprisonment.*
16. *Company responsible for injury done by various animals kept by them or suffered to remain about their stations.*
17. *The general manager of a railway company may bind them for medical aid for servant injured in their employment.*

§ 130. 1. The extent of the liability of railways for the acts of their servants and agents, both negative and positive, seems not very fully settled in many of its incidents. But the disposition of

Joiner, 10 id. 852; Bartlett *v.* Baker, 3 H. & C. 153; Blake *v.* Thirst, 2 id. 20.

[10] Hole *v.* Sittingbonne & Sheerness Railw., 6 H. & N. 488.

[11] Butler *v.* Hunter, 7 H. & N. 826.

the courts has been to give such agents and servants a large and liberal discretion, and hold the companies liable for all their acts, within the most extensive range of their charter powers.[1]

* 2. This seems the only construction which will be safe or just, or indeed practicable. It has long been settled, that corporations are liable for torts committed by their agents, in the discharge of the business of their employment, and within the proper range of such employment.[2]

3. But it has been claimed sometimes, that a corporation is not liable for the wilful wrong of its agents or servants.[3] This opinion seems to rest upon those cases which have maintained that the master, whether a natural person or a corporation, is never liable for the wilful act of his servant.[4] Without stopping here to discuss the soundness of the general principle, as applicable to the relation of master and servant, it must be conceded, we think, that it is not applicable to the case of corporations, and especially such as railways. In regard to such corporations, it seems to us altogether an inadmissible proposition, to excuse them for every act of their servants and agents which is done, or claimed to have been done, positively and wilfully, and which results in an injury to some

[1] Derby *v.* Phil. & Read. Railw., 14 Howard, 468, 483: Noyes *v.* Rutland & Burlington Railw., 27 Vt. 110. We may suppose the officers and servants of railways to take exorbitant fare and freight, to refuse to permit passengers to have tickets at the fixed rate, or to destroy the life of animals, or of persons, by recklessness, or wantonness, in the discharge of their appropriate duties, and it would be strange if the company were liable in the former case, on account of their special duty as common carriers, and not in the latter, because they owed no duty to the public in that respect. Alabama & Tenn. Rivers Railw. *v.* Kidd, 29 Alabama, 221. But it has been held to make no difference, in regard to the liability of the company for the act of their servant, while acting in the due course of his employment, that he did not follow their instructions, either general or special. Derby *v.* Phil. & Read. Railw., 14 How. (U. S.) 468, 483. See also Southwick *v.* Estes, 7 Cush. 385.

[2] Yarborough *v.* The Bank of England, 16 East, 6; Queen *v.* Birmingham, & Gloucester Railw., 3 Ad. & Ell. (N. S.) 223; Hay *v.* Cohoes Co., 3 Barb. 42; 2 Aiken's Vt. 255, 429; Bloodgood *v.* M. & H. Railw. 18 Wend. 9; Dater *v.* Troy T. & Railw., 2 Hill, 629; Chestnut Hill Turnpike Co. *v.* Rutter, 4 S. & R. 16. They are bound by estoppels *in pais*. Hale *v.* Union Mutual Fire Ins. Co., 32 N. H. 295.

[3] Foster *v.* The Essex Bank, 17 Mass. 479, 510; State *v.* Morris & Essex Railw., 3 Zab. 360, 367.

[4] M'Manus *v.* Crickett, 1 East, 106; Croft *v.* Allison, 4 B. & Ald. 590; Wright *v.* Wilcox, 19 Wend. 343.

other party, or proves to be illegal, unless directed or ratified by the corporation. Some of the cases seem to disregard any such ground of exemption for the corporation.[5]

4. But in some cases it has been held, that the corporation is not liable for the wilful act of its agents, unless done with the assent of the corporation, seeming to imply that if the servant pursue his own whim or caprice, and act upon his own impulses, the act is his, and not that of the corporation.[6]

[5] Edwards *v.* The Union Bank of Florida, 1 Florida, 136; Whiteman *v.* Wilmington & Sus. Railw., 2 Harr. 514.

[6] Phil., Germantown & N. Railway *v.* Wilt, 4 Whart. 143; Fox *v.* The Northern Liberties, 3 W. & S. 103. It has always seemed to us, that the whole class of cases, which hold that the master is not liable for the wilful acts of his servant, has grown up under a misconception of the case of M'Manus *v.* Crickett, 1 East, 106, for they all profess to base themselves upon that case.

That case we apprehend was never intended to decide more than that the master is not liable, in trespass, for the wilful act of the servant. Lord *Kenyon*, Ch. J., in delivering his opinion in that case, with which the court concur, expressly says, speaking of actions on the case, brought against the master, where the servant negligently did a wrong, in the course of his employment for the master:—

"The form of these actions shows, that where the servant is, in point of law, a trespasser, the master is not liable, as such, though liable to make compensation for the damage consequential from his employing of an unskilful or negligent servant." "The act of the master is the employment of the servant."

This reasoning certainly applies with the same force to that class of cases where the act of the servant is both direct and wilful, as where it is only negligent. The master is not liable in either case, perhaps, so much for having impliedly authorized the act, as for having employed an unfaithful servant, who did the injury, in the course of his employment. And whether done negligently or wilfully, seems to be of no possible moment, as to the liability of the master, the only inquiry being whether it was done in the course of the servant's employment. And the argument, that when the servant acts wilfully, he *ipso facto* leaves the employment of the master, and if he is driving a coach-and-six, or a locomotive and train of cars, thereby acquires a special property in the things, and is, *pro hac vice*, the owner, and doing his own business, may sound plausible enough, perhaps, but we confess it seems to us unsound, although quoted from so ancient a date as Rolle's Abridgment, and adopted by so distinguished a judge as Lord *Kenyon*.

The truth is the whole argument is only a specious fallacy; and whether Lord *Kenyon* intended really to say, that no action will lie against the master in such case, or only to say, what the case required, that the master is not liable in trespass, it is very obvious the proper distinction, in regard to the master's liability, cannot be made to depend upon the question of the *intention* of the servant. The master has nothing to do, either way, with the purpose and intention of his servants. It is with their acts that he is to be affected, and if these come

* 5. Most of the cases, upon the subject of the liability of railways, for the acts of their officers, agents and servants, have * attempted

within the range of their employment, the master is liable, whether the act be a misfeasance, or a nonfeasance, an omission or commission, carelessly or purposely done.

It will happen, doubtless, that when the master is under a positive duty to keep or carry things safely, as a bailee, or to carry persons safely, that while he will be liable for the mere nonfeasance of the servant, the servant will not be liable to the same party for such nonfeasance, there being no privity between the servant and such party, no duty owing to such person from the servant. But in such case the servant will be liable for his positive wrongs, and wilful acts of injury, and the master is also liable for these latter acts, but not in trespass, as the servant is ordinarily, but in case.

And so, where the servant goes out of his employment, and does a wrong, as committing an assault by his own hands upon a stranger, or stealing goods, or any other act wholly disconnected with his employment, the master is not liable. This is the view taken of this subject by Judge *Reeve*. Dom. Rel. 358, 359, 360, and it is, we think, the only consistent and rational one, and the one which must ultimately prevail.

It is virtually adopted, in regard to corporations, in England. Queen *v.* Great North of England Railway, 9 Q. B. 315 (1846). Lord *Denman*, Ch. J., said: "It is as easy to charge one person, or a body corporate, with erecting a bar across a public road, as with the non-repair of it, and they may as well be compelled to pay a fine for the act as the omission. State *v.* Vermont Central Railw., 27 Vt. 103; Maund *v.* The Monmouthshire Canal Co., 4 M. & G. 452, where it is held, that trespass will lie against a corporation for the act of its servant.

This is familiar law in the American courts. And it is not deemed of any importance that the agent should act by any particular form of appointment; and it would be strange if the liability of the corporation could be made to depend upon the *intention* of the agent.

This distinction is not claimed to be of any importance where the company owe a duty, as carriers of freight or passengers, for there the corporation are liable for all the acts of their servants; but for the acts of their servants in regard to strangers, it has been claimed there is no liability where the servant acts wilfully, unless the corporation direct or affirm the act of the servant.

And to this we may assent, in a qualified sense. The corporation does virtually assent to all the acts of its agents and servants, done in the regular course of their employment. A railway or any business corporation exists and acts only by its agents and servants, and by putting them into their places, or suffering them to occupy them, the company consent to be bound by their acts. Thus, a conductor or engineer of a railway, while he acts with the instruments which the company put into his hands to be used on their behalf, upon the line of their road, is acting instead of the corporation, and his acts will bind the corporation, whether done negligently or cautiously, heedlessly or purposely.

It would present a remarkable anomaly upon this subject, to hold the company liable for cattle killed carelessly upon their track, but not liable when it was

to carry out the analogy of principal and agent, or * master and servant, as between natural persons, and to apply strictly the principle of *respondeat superior*.[7]

done purposely by the engineer, of other servants or the company. It is probably true, that if the engineer should kill cattle, in any way wholly disconnected with his employment, either upon the land of the company, or of others, the company could not be made liable; but if the engineer should destroy them wilfully, by rushing the engine upon them, the company would be liable undoubtedly, if any one were, of which there can be little question. So the company might not be liable if the engineer should drive the engine upon another road and there do damage, when his employment extended to no such transaction.

The case of The Southeastern Railw. *v.* The European & Am. Telegraph Co., 9 Exch. 363, seems to have adopted, in principle, the view for which we contend. The act here complained of was, boring under the railway, and it was held the company had no right to do so, and that they were liable, *in trespass*, for this unauthorized act of their servants. See also Sinclair *v.* Pearson, 7 N. H. 219, 227, opinion of *Parker*, Ch. J.; Phil. & Reading Railw. *v.* Derby, 14 How. 468, 483, *Grier*, J.: Case of the Druid, 1 Wm. Rob. 391, opinion of Dr. *Lushington*, reviewing the cases.

And we do not very well see why the railway is not liable to the very same action which the servant would be, because his act is the act of the corporation, within the range of his employment, as running over sheep upon the track, in Sharrod *v.* London & N. W. Railw., 4 Exch. 580, where it is held the action must be case. The distinction between this case and that of The Southeastern Railw. *v.* The European & Am. Telegraph Co. is not very obvious, unless we suppose in the latter case a vote of the corporation, which is highly improbable. See Phil. Railw. Co. *v.* Wilt, 4 Whart. 143, where it is said the action should be case, and that trespass will not lie unless the act is done by the command or with the assent of the corporation, which never occurs. Corporations do not vote such acts. A vote of a corporation that their engineers should run their engines over cattle would be an anomaly.

In Sleath *v.* Wilson, 9 C. & P. 607, where a servant had been driving his master's carriage, and being directed to return to the stable, or while that was his duty, in the ordinary course of his employment, he went out of his way with the carriage, to do some errand of his own, and drove against a person negligently; it was held that the master was liable, this being the act of the servant, in the course of his employment, because the injury was done with the master's horses and carriage, which he put into the servant's hands.

But here the servant was far more obviously going aside of his employment,

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[7] Sherman *v.* Rochester, &c. Railw., 15 Barbour, 574, 577; Vanderbilt *v.* Richmond T. C., 2 Comst. 479. In this last case, it was held the company were not liable for the trespass committed by its servants, although directed so to do by the president and general agent of the company, he having no authority to command an unlawful act. The same rule is laid down in Lloyd *v.* Mayor of New York, 1 Selden, 369; Ross *v.* Madison, 1 Carter (Ind.), 281.

* 6. But they seem to have lost sight of, or not sufficiently to have considered, one peculiarity of this mode of transportation of freight and passengers, that the superior is virtually always present, in the person of any of the employees, within the range of the employment, as much so as is practicable in such cases. And this

than in the supposed cases of his assuming to do a wilful wrong in the direct course of his ordinary employment.

This case certainly cannot stand with the argument of the court, 1 East, 106. And yet it is confirmed by other cases. Joel *v.* Morrison, 6 C. & P. 501. Any different view of this subject will, it seems to us, in principle, bring us back to the earlier theory of the relation of corporations to their servants; that corporations are not liable for torts, committed by their servants, they having no authority to bind the corporation by unlawful acts.

There is an elaborate case in 20 Maine, 41, State *v.* Great Works Mill & Manu. Co., taking precisely the old view of the liability of corporations for the acts of their servants, where the act proves unlawful. But most of the later cases hold the company liable for the torts of their agents, done in the course of the agency.

But the company are not liable for injuries to persons or property through the recklessness and want of common care and prudence of such persons, or property, as where a slave lay down to sleep upon the track of a railway, and was run over by a train of cars, it not being possible to discover such slave above twenty feet, on account of the grass upon the track. Felder *v.* Railw. Co., 2 McMullan, 403.

See also Mitchell *v.* Crassweller, 13 C. B. 237; s. c. 16 Eng. L. & Eq. 448; Leame *v.* Bray, 3 East, 593; Claflin *v.* Wilcox, 18 Vt. 605, where the principles involved in this inquiry are examined. Smith *v.* Birmingham Gas Co., 1 Ad. & Ell. 526.

In two cases in Vol. 24 Conn., Crocker *v.* New London, W. & P. Railw., 249, and Thames Steamboat Co. *v.* Housatonic Railw., 40, the general proposition is maintained, that railway companies are not liable for acts done without the command of the agent, having the superior control in that department of the company's business, at the time, and out of the range of the particular employment of the servant doing the act. This seems to us a sound and just proposition. See also Giles *v.* Taff Vale Railw., 2 Ell. & Bl. 822; Glover *v.* London & North W. Railw., 5 Exch. 66.

It is said, in Illinois Central Railw. *v.* Downey, 18 Ill. 259, that case cannot be maintained against a corporation for injuries wilfully and intentionally committed by its servants, and not occasioned in the course of their employment in the pursuit of their regular business. The judge, in laying down the proposition, seems to found himself upon the form of the action. But if any action will lie against a corporation for the wilful misconduct of its agents, we do not see why it may not be the same ordinarily brought against natural persons for similar injuries. But the proposition laid down in the case is not entirely clear or perspicuous. The act of a servant may be in the direct course of his employment and business, and still be wilful, and that was the very case before the court, if the act was done wilfully.

consideration, in regard to natural persons, is held sufficient, to make the superior always liable for the act of the subordinate, whether done negligently or wilfully.[8]

* 7. And although the cases seem to treat the superior as always absent, in the case of injuries done by railways, it is submitted, that the more just and reasonable rule is, to regard the principal as always present, when the servant acts within the range of his employment.[9]

8. This distinction is of no importance in regard to the liability of railways, as carriers of freight and passengers, for then the law makes the company liable absolutely in one case and in the other, as far as care and diligence can effect security. Those cases, therefore, which have excused corporations as bailees of goods for hire, when they were purloined by their servants, it would seem are necessarily wrong.[10]

9. But, as railways are, like other corporations, mere entities of the law, inappreciable to sense, we do not see why this abstraction should not be regarded as always existing and present in the discharge of its functions. It is indeed a mere fiction, whether we regard the company as present or absent. And it seems more just and reasonable, that the fiction should not be resorted to, to excuse just responsibility. It is certain we never require proof of any organic action of the corporation, to constitute railways carriers of freight and passengers. All that is required, to create the liability, is the fact of their assuming such offices. So, too, for the most part, in regard to injuries to strangers and mere torts, it is not expected that proof will be given of any express authority to the servant or employee to do the particular act.[11]

[8] Morse *v.* The Auburn & Syr. Railw. Co., 10 Barb. 621; Vanegrift *v.* Railw., 2 N. J. 185, 188. See also Burton *v.* Philadelphia, &c. Railw., 4 Harring. (Del.) 252.

[9] Chandler *v.* Broughton, 1 Crompton & M. 29. In this case it is held, that if the master is present, although passive, he is liable for the wilful act of his servant. M'Laughlin *v.* Pryor, 1 Car. & M. 354.

[10] Foster *v.* The Essex Bank, 17 Mass. 479, 510. Trespass will lie against a railway company. Crawfordsville Railw. *v.* Wright, 5 Ind. 252.

[11] Lowell *v.* Boston & Lowell Railw., 23 Pick. 24. Numerous cases upon the subject of the liability of railways show this practically. Where the company begins to run trains before condemning the land to their use, it is seldom that the act of running them is traceable directly to the corporation, except as the act of the employees. This is always done by design, and never any doubt was entertained that the company are liable, and in trespass, to the land-owner,

* 10. What shall amount to a ratification of the acts of its agent by the stockholders of the corporation, so as to give an authority not expressly conferred, or one not intended to have been conferred, or even where the formal act of the corporation was a denial of the authority, has been a good deal discussed, and is not, perhaps, susceptible of a specific definition. The question is discussed and the authorities examined in Cumberland Coal Company *v.* Sherman.[12]

11. And it seems to be settled, both in this country and in England, that a corporation may become responsible for the publication of a libel. In the English case,[13] a railway company were held responsible for telegraphing along their line, that the plaintiffs, who were bankers, had stopped payment. Lord *Campbell* said: The allegation of malice "may be proved by showing that the publication of a libel took place by order of the defendants, and was therefore wrongful, although the defendants held no ill will to the plaintiffs, and did not mean to injure them." And the leading American case[14] decides that a railway may be liable for a libel

which could not be the case upon the strict analogies referred to in note (6), unless the corporation were regarded as present, and assenting to the act. Hazen *v.* Boston & Maine Railw., 2 Gray, 574; Eward *v.* Lawrenceburg & Upper Mis. Railw., 7 Porter (Ind.), 711; Hall *v.* Pickering, 40 Maine, 548.

The rule laid down upon this subject by Lord *Denman*, Ch. J., in a case which, although a trial at *Nisi Prius*, seems to have been examined and acquiesced in by all the judges of K. B., Rex *v.* Medley, 6 C. & P. 292, certainly exhibits the sagacity and wisdom of its author.

That is the case of an indictment against the directors of a gas company for the act of the company's superintendent and engineer, in conveying the refuse gas into a great public river, whereby the fish are destroyed, and the water rendered unfit for use, &c., thereby creating a public nuisance. No distinction is attempted, or could fairly be made here between the liability of the company and that of the directors.

The court held the directors liable for an act done by their superintendent and engineer, under a general authority to manage the works, though they were personally ignorant of the particular plan adopted, and though such plan was a departure from the original and understood method, which the directors had no reason to suppose was discontinued.

The learned judge uses this significant language, which fully justifies all we contend for: "It seems to me both common sense and law, that if persons, for their own advantage, employ servants to conduct works, they must be answerable for what is done by those servants."

[12] 30 Barb. 553.

[13] Whitefield *v.* Southeast. Railw. Co., Ellis, Blackb. and Ellis, 115.

[14] Philadelphia, Wil. & Balt. Railw. *v.* Quigley, 21 How. (U. S.) 202.

published and circulated in their reports, wherein they represented the plaintiff as an incompetent * mechanic and builder of bridges, station-houses, and other structures, and wanting in all requisite capacity and skill for such employment. The court held that, in the absence of express malice or bad faith, the report to the stockholders is a privileged communication, but the privilege does not extend to the publication of the report and evidence in a book for distribution among the persons belonging to the corporation and others, and so far as the corporation authorized the publication in the form employed they are responsible in damages.

12. It is well settled, that corporations have no powers except such as are conferred by their charters, or incidentally requisite to carry into effect the purposes of their charters. Hence it was held, that a charter to build a road to the top of a mountain and take tolls thereon, does not warrant the company in purchasing horses and carriages and establishing a stage route. Nor does an additional act for erecting and leasing buildings for the accommodation of the business of the company or others on the road have that effect. And an agent can do no act not within the corporate powers, nor can the corporation ratify any such act.[15]

13. Where the statute requires the directors of a corporation to certify the fact of the capital stock being paid into the treasury in cash, and this is done, when in fact the payment was made in property of uncertain value, such certificate is false, and the directors responsible for the debts of the company under the statute, imposing that penalty for making a false certificate in that respect.[16]

14. A gas company, chartered for the purpose of lighting the streets and buildings of a town, is not obliged to supply gas to all persons having buildings on the line of their pipes, upon being tendered reasonable compensation.[17]

15. In one case[18] it is said the company are responsible for a

[15] Downing *v.* Mount Washington Road Co., 40 N. H. 230.

[16] Waters *v.* Quimby, 3 Dutcher, 198.

[17] Paterson Gas Light Co. *v.* Brady, 3 Dutcher, 245.

[18] Goff *v.* Great Northern Railw. Co., 3 El. & El., 672; s. c. 7 Jur. N. S. 286. But where the station master ordered the owner of a horse into custody till it could be ascertained if his claim that the horse was to be carried free of charge were well founded, it was held that, as there could be no pretence of the company having any claim to make any such arrest, they could not be held liable for what was so manifest-

false imprisonment committed by its agents, and no authority under seal is requisite; but there must be evidence justifying the jury in finding that the company's servants who did the act * had authority from the company to do so. In this case the plaintiff had been taken into custody by the servants of the company, and by direction of the superintendent of the line, carried before a magistrate, and charged with an attempt to travel in one of the company's carriages without having first paid his fare and procured a ticket. The fact was, he had paid his fare and procured a ticket and mislaid it at home, and, by mistake, taken another ticket accidentally laid in the same place. He explained the transaction to the company's servants, and declined to pay fare again, because he had not the means, but offered to pawn some of the tools of his trade which he had with him. The court held, that, as some one must have authority to act for the company in such emergencies, the superintendent of the line must be regarded as having that authority. The jury gave a verdict for the plaintiff for £50 damages, and the court declined to interfere on the ground that they were excessive. The wonder is that any one should have had any hesitation in regard to the acts of the agents who thus acted in matters representing the company. It should be considered in all cases, that where a servant of any corporation does any act coming fairly within the scope of the business intrusted to him, it must be held binding upon the company.

16. It seems to be considered that railway companies may be responsible where injury to passengers, or others rightfully there, occurs in consequence, for allowing a dangerous animal to remain about their stations after they have sufficient knowledge of its

ly a mere tort of the servant. Poulton *v.* London & S. W. Railw., Law Rep. 2 Q. B. 534. But where the servant of a railway company does an act of force towards another, in the due course of his employment, or under discretionary authority from the company, as in expelling a passenger from their cars for not paying fare, under a mistake of the fact, or with needless violence, the company is responsible, and the action may be against the servant and corporation jointly. Moore *v.* Fitchburg Railw., 4 Gray, 465. But the president of the company is not liable in such case for merely transmitting the general authority of the corporation to the servant, but would be if he originated the particular order. Hewett *v.* Swift, *et als.*, 3 Allen, 420. See St. John *v.* Eastern Railw., 1 Allen, 544. So, too, the company is responsible for any negligence or misconduct of its servants, in the course of their employment, in assisting passengers to alight from the cars. Drew *v.* Sixth Avenue Railw., 40 N. Y. (3 Keyes) 429.

vicious propensities. But the fact that a stray dog had torn the dress of one passenger a few hours before, and attacked a cat soon after, and been driven from the station by the servants of the company, and soon after returned and bit the plaintiff, will not be sufficient to render the company responsible.[19] But where injury occurred from the bite of a dog kept about the stables of a horse railway company, by a person employed by them and having charge of their stables, and with the knowledge and implied assent of their superintendent, it was held that the company might properly be regarded as the keeper of the dog, and responsible under the statute for double the damages sustained by the bite.[20]

17. The general manager of a railway has authority to bind the company to pay for medical attendance on a servant of the company, injured by an accident, in their employment.[21]

*SECTION III.

Injuries to Servants, by neglect of Fellow-Servants, and use of Machinery.

1. *In general no such cause of action exists against company.*
2. *But if there is any fault in employing unsuitable servants, or machinery, they are liable.*
3. *But not liable for deficiency of help or for not fencing road.*
4. *Has been questioned whether rule applies to servants of different grades.*
5. *Rule not adopted in some states. Case of Slaves. Scotland.*
6. *No implied contract, by ship-owners, that ship is seaworthy.*
7. *But rule does not apply where servant has no connection with the particular work.*
n. 9. *Cases reviewed in England, Scotland, and America.*
8. *Recent English case illustrating the English doctrine.*
9. *Statement of the law in Kentucky and review of the subject.*
10. *Subject reviewed by Chief Justice* Shaw.
11. *Company may show in excuse, that the damage accrued from the servant disregarding his instructions.*
12. *The servants of one company, not fellow-servants with those of another company, using the same station, where the injury occurred.*
13. *The fact that the injury occurred by reason of the intoxication of a fellow-servant, and that his being an habitual drunkard was known, or ought to have been, by the company, tends to show culpable neglect on their part.*

§ 131. 1. It seems to be now perfectly well settled in England, and mostly in this country, that a servant, who is injured by the

[19] Smith *v.* Great Eastern Railw., Law Rep. 2 C. P. 4.
[20] Barrett *v.* Malden & Melrose Railw., 3 Allen, 101.
[21] Walker *v.* Great Western Railw., Law Rep. 2 Exchequer, 228.

negligence or misconduct of his fellow-servant, can maintain no action against the master for such injury.[1]

2. But it seems to be conceded, that if there be any fault in the selection of the other servants, or in continuing them in their places, after they have proved incompetent, perhaps, or in the employing unsafe machinery, the master will be answerable for all injury to his servants, in consequence.[2]

[1] Priestly *v.* Fowler, 3 M. & W. 1; Hutchinson *v.* York, Newcastle & Berwick Railw., 5 Exch. 343; Wigmore *v.* Jay, 5 Exch. 354; Skip *v.* Eastern Counties Railw., 24 Eng. L. & Eq. 396 (1853); Farwell *v.* Bos. & W. Railw., 4 Met. 49; Murray *v.* South C. Railw., 1 McMullan, 385; Brown *v.* Maxwell, 6 Hill (N. Y.), 592; Coon *v.* Sy. & Utica Railw., 6 Barb. 231; s. c. 1 Selden, 492; Hayes *v.* Western Railw., 3 Cush. 270; Sherman *v.* Roch. & Sy. Railw., 15 Barb. 574; McMillan *v.* Railroad Co., 20 Barb. 449; Honner *v.* The Illinois Central Railw., 15 Ill. 550; Ryan *v.* Cumberland Valley Railw., 23 Penn. St. 384; King *v.* Boston & Worcester Railw., 9 Cush. 112; Madison & I. Railw. *v.* Bacon, 6 Porter (Ind.), 205. The same rule prevails in Virginia. Hawley *v.* Baltimore & Ohio Railw., 6 Am. Law Reg. 352.

[2] *Shaw*, Ch. J., 4 Met. 49, 57; Keegan *v.* Western Railw., 4 Selden, 175. But it makes no difference in regard to the liability of the company that the person came into the service voluntarily, to assist the servants of the company in a particular emergency, and was killed by the negligence of some of the servants. Degg *v.* Mid. Railw. Co., 1 H. & N. 773. It is said, McMillan *v.* Saratoga & Wash. R., 20 Barb. 449, that the servant, in order to entitle himself to recover for injuries from defective machinery, must prove actual notice of such defects in the master. But culpable negligence is sufficient, undoubtedly, and that is such as, under the circumstances, a prudent man would not be guilty of. *Post*, note 10, § 170. But if the servant knew of the defects, and did not inform the master, or if the defects were known to both master and servant, and the servant makes no objection to continue the service, he probably could not recover of the master for any damage in consequence. But if the master know of the defect, and direct the servant to continue the service, in a prescribed manner, he is responsible for the consequences. Mellors *v.* Shaw, 7 Jur. N. S. 845. Where the defendants were joint owners and workers of a coal-mine, and one of their employees was injured by a defect in the machinery, and it appeared that one of the defendants personally interfered in the management of the colliery, and the jury found that defendant guilty of personal negligence, it was held sufficient to implicate both defendants, as they must be presumed to have known that improper machinery was being employed. Ashworth *v.* Stanwix, 30 L. J. Q. B. 183. But see Wright *v.* N. Y. Central Railw., 28 Barb. 80. *Post*, n. 3, 20. Morgan *v.* Vale of Neath Railw., L. R. 1 Q. B. 149. The company was held responsible for an injury to one of its servants caused by want of repair in the road-bed. Snow *v.* Housatonic Railw., 8 Allen, 441. But the company cannot be held as guarantors to its servants that the structures continue in proper condition. If originally properly built and properly inspected, from time to time, it is all that can be required. As, for instance, if a servant

* In Frazier *v.* The Pennsylvania Railway Company,[3] it was held, that if the company knowingly or carelessly employ a rash or incompetent conductor, whereby the brakeman on the train is injured, the company are responsible for the injury; that the act of the agent of the company having charge of employing such agents or servants, and of dismissing them for incompetency, is * the act of the company; but the company are not responsible for such injury, unless they were in fault in employing or continuing the conductor in their service; that the character of such conductor for skill and faithfulness may be shown by general reputation. The master is not in general bound to use any special precautions to secure the servant from injury in regard to matters equally within the knowledge of both.[4] But the master is liable for all injuries accruing to his servants from his own personal negligence; and this may consist in personal interference in the particular matter causing the injury, or by negligently retaining incompetent servants, producing the injury.[5] But a railway company is liable in damages for an injury resulting to any person lawfully using its road, from its neglect to introduce any improvement in its machinery or apparatus, which is known

is killed by the falling of a bridge, properly constructed, and carefully inspected the day before, the company is not responsible. Faulkner *v.* Erie Railw., 49 Barb. 324; Warner *v.* Same, 8 Am. Law Reg. N. S. 209.

And if the master use reasonable precautions and efforts to procure safe and skilful servants, but, without fault, happen to have one in his employ through whose incompetency damage occurs to a fellow-servant, the master is not liable. Tarrant *v.* Webb, 18 C. B. 797. In Dynen *v.* Leach, 26 Law J. N. S., Exch. 221. it was decided, that where an injury happens to a servant in the use of machinery, in the course of his employment, of the nature of which he is as much aware as his master, and the use of which is the proximate cause of the injury, the servant cannot recover, nor, if death ensues, can his personal representative recover of the master, there being no evidence of any personal negligence on his part, conducing to the injury. Nor does it vary the case that the master has in use in his works an engine, or machine, less safe than some other which is in general use, or that there was another and safer mode of doing the business, which had been discarded by his orders.

And in Assop *v.* Yates, 2 H. & N. 768, it was held, that if the servant knew of the exposure, and consented to continue the service, and suffered damage, he could not recover of the master for any negligence which might have contributed to the result.

[3] 38 Penn. St. 104; Wright *v.* N. Y. Central Railw. Co., 28 Barb. 80; Carle *v.* B. & P. Canal and R. R. Co., 43 Me. 269.

[4] Seymour *v.* Maddox, 16 Q. B. 326.

[5] Ormond *v.* Holland, 1 El. Bl. & El. 102.

to have been tested, and found materially to contribute to safety, and the adoption of which is within its power so as to be reasonably practicable.[6] But in another case,[7] in an action by a servant against his master for injuries sustained by the explosion of a steam-boiler used in his business, the plaintiff introduced evidence without objection, that there was no such fusible safety-plug on the boiler as was required by statute; and the presiding judge excluded evidence of a custom among engineers not to use such a plug, and instructed the jury that if the defendant knowingly used the boiler without the plug, and the want of it caused the accident, the plaintiff was entitled to recover, and refused to instruct them that if the defendant used all the appliances for safety that were ordinarily used in such establishments, he was not liable, although he did not use the fusible plug required by statute, and it was held the defendant had no ground of exception. It is here declared by the court that ordinary care must be measured by the character and risks and exposures of the business, and the degree of care required is higher when life or limb is endangered, or a large amount of property is involved, than in other cases.[8]

* 3. But the company are not liable because there was a deficiency of help at that point.[9] And a neglect in the company to fence their road, whereby the engine was thrown from the track, by coming in contact with cattle thus enabled to come upon the road, and a servant of the company so injured that he died, will not render them liable.[10]

4. But it has been questioned whether the rule has any just application to servants in different grades, who are subordinated the one to the other.[11] But as the ground upon which the rule

[6] Smith *v.* N. Y. & Harlem Railw. Co., 19 N. Y. 127.

[7] Cayzer *v.* Taylor, 10 Gray, 274.

[8] *Post*, Common Carriers of Passengers. See also Briggs *v.* Taylor, 28 Vt. 180, 184.

[9] Skip *v.* Eastern Counties Railw., 9 Exch. 223; Hayes *v.* Western Railw., 3 Cush. 270.

[10] Langlois *v.* Buf. & Roch. R. 19 Barb. 364.

[11] *Gardiner*, J., in Coon *v.* Sy. & Utica Railroad Co., 1 Seld. 492: s. c. 6 Barb. 231. But in Gillshannon *v.* Stony Brook Railw., 10 Cush. 228, it was held to make no difference that the servants were not in a common employment. This was the case of a laborer riding upon a gravel train to the place of his employment, and injured by the negligence of those in charge of the train. In Wilson *v.* Merry, Law. Rep. 1 H. Lds. 326, it was decided, that a master is not re-

is attempted to be maintained is one of policy chiefly, that it is better to throw the hazard upon those in whose power it is to guard against it, it seems very questionable how far any such distinction is maintainable. It has been attempted in a good many cases, but does not seem to have met with favor.

5. And the rule itself has been denied in some cases, in this country, after very elaborate consideration.[12] And it has been * held not to apply to the case of slaves,[13] especially where the employer stipulated not to employ them about the engines and cars, unless for necessary purposes of carrying to places where their services were needed, and they were carried beyond that point, and killed in jumping from the cars.[14] The Court of Sessions in

ponsible for injury to a servant caused by the negligence of a fellow-servant, by the mere fact that the latter is of a higher grade, as a superintendent, s. p., Feltham *v.* England, L. R. 2 Q. B. 33. But in Haynes *v.* East Tenn. & Ga. Railw., 3 Coldwell, 222, a somewhat different view was taken, the company being held responsible for an injury to one of the subordinate servants of the company by the carelessness of the superintendent in starting a train at an unusual hour.

[12] Little Miami Railw. *v.* Stevens, 20 Ohio, 415; C. C. & C. Railroad Co. *v.* Keary, 3 Ohio N. S. 202. These cases are placed mainly upon the ground of the person injured being in a subordinate position. It was held the rule did not apply to day laborers upon a railway, who were not under any obligation to renew their work from day to day, where one, after completing his day's work, was injured through the negligence of the conductor of one of the company's trains, upon which he was returning home, free of charge, but as part of the contract upon which he worked. Russell *v.* Hudson River R., 5 Duer, 39. And in Whaalan *v.* M. R. & Lake Erie Railw., 8 Ohio N. S. 249, it was held that where one of the employees of a railway, engaged in making repairs upon its track, was injured by the neglect of a fireman upon one of the trains, there was no such subordination in regard to their duty as to justify any departure from the general rule of excusing the master. See also Indianapolis Railw. *v.* Love, 10 Ind. 554; Same *v.* Klein, 11 Ind. 38. In Hard, Adm'r *v.* Vt. & Canada Railw., 32 Vt. 473, the plaintiff's intestate, who was an engineer on the defendant's road, was killed by the explosion of a locomotive engine which he was running, which occurred by the neglect of the company's master-mechanic in not keeping the machine in repair. It was his duty to superintend and direct the repairs upon the engines. The directors of the company were not guilty of any neglect in furnishing the road, in the first instance, with suitable machinery and competent employees, and they were ignorant of any defect in this engine. The company were held not responsible for the death of plaintiff's intestate, on the ground that under the circumstances the injury must be considered as occurring from the neglect of a fellow-servant, employed in the same common business.

[13] Scudder *v.* Woodbridge, 1 Kelly, 195.

[14] Duncan *v.* Railroad Co., 2 Richardson, 613.

Scotland, too, seems to have dissented from the English rule upon this subject.[15]

[15] Dixon *v.* Ranken, 1 Am. Railw. C. 569. The remarks of Lord *Cockburn* are pointed and pertinent. "The English decisions certainly seem to determine that in England, where a person is injured by the culpable negligence of a servant, that servant's master is liable in reparation, provided the injured person was one of the public, but that he is not responsible if the person so injured happened to be a fellow-workman of the delinquent servant. It is said, as an illustration of this, that if a coachman kills a stranger by improper driving, the employer of the coachman is liable, but that he is not liable if the coachman only kills the footman. If this be the law of England, I speak of it with all due respect, it most certainly is not the law of Scotland. I defy any industry to produce a single decision or dictum, or institutional indication, or any trace of any authority to this effect, or of this tendency, from the whole range of our law. If any such idea exists in our system, it has, as yet, lurked undetected. It has never been directly condemned, because it has never been stated."

After citing numerous cases in their Reports, where the question was involved but not raised, his lordship continues: "The new rule seemed to be recommended to us, not only on account of the respect due to the foreign tribunal, — the weight of which we all acknowledge, — but also on account of its own inherent justice. This last recommendation fails with me, because I think that the justice of the thing is exactly in the opposite direction. I have rarely come upon any principle that seems less reconcilable with legal reason. I can conceive some reasoning for exempting the employer from liability altogether, but not one for exempting him only when those who act for him injure one of themselves. It rather seems to me that these are the very persons who have the strongest claim upon him for reparation, because they incur danger on his account, and certainly are not understood by our law to come under any engagement to take these risks on themselves."

But the English cases certainly do regard the servant as impliedly stipulating to run these risks when he enters into the service. The remarks of the learned judge above ought not perhaps to be regarded as of any inherent weight here, beyond the mere force of the argument, and it is always to be regretted that any difference of decision should exist among the tribunals of the different states upon a subject of so much practical moment. The great preponderance of authority in this country is undoubtedly in favor of the English rule: but we could not forbear to state, that we have always had similar difficulties to those stated by his lordship, in regard to the justice or policy of the rule. When these cases go by appeal to the House of Lords, they are determined according to the rule of the Scottish law. Marshall *v.* Stewart, 33 Eng. L. & Eq. 1. Opinion of *Cranworth*, Chancellor.

But see the very lucid and convincing argument of *Shaw*, Ch. J., in Farwell *v.* Boston & Wor. Railw., 4 Met. 49, 56; s. c. 1 Am. R. C. 339; and the most ingenious attempt at *reductio ad absurdum* upon the subject by Lord *Abinger*, Ch. B., in Priestly *v.* Fowler, 3 M. & W. 1, 6, 7, where the learned Ch. B., among other ingenious speculations, supposes some fearful consequences might follow if the master were to be held liable for the negligence of the chambermaid in putting the servant into wet sheets!

* 6. But it has been held, that there is no implied obligation on the part of a ship-owner towards a seaman, who agrees to * serve

If a man should receive damage in any way by his own foolhardiness, even where a fellow-servant was concerned in producing the result, he could not recover of any one upon the most obvious grounds. Some discretion and reserve are no doubt requisite in the application of the rule of the servant's right to recover for the default of his fellow-servant, but whether the difficulty of its application will fairly justify its abandonment, would seem somewhat questionable, if the thing were *res integra*, which it certainly is not, either in the English or American law.

In an English case, in the Court of Exchequer, 11 Exch. 832; s. c. 36 Eng. L. & Eq. 486, Wiggett *v.* Fox *et al.*, the court adhere to the rule laid down in former English cases upon this subject, reiterating the same reasons, with the qualification, that if there were any reason for holding that the persons whose act caused the injury were not persons of ordinary skill and care, the case would be different, there being an implied obligation upon the master not to employ such persons.

With this qualification there seems to be no serious objection to the English rule of law upon this subject. Bassett *v.* Norwich & Nashua Railw., Superior Court of Conn. 19 Law Rep. 551.

In a case in the Court of Sessions in Scotland, so late as January, 1857, the court repelled a plea, founded on the claim that the master is not liable to a servant for the negligence of a fellow-servant. The Lord Justice *Clerk* took occasion to remark, that the master's liability rested upon the broad principle, that an employer being liable to third parties for injuries caused by his servants, *à fortiori* he is liable to the servant for injury caused by another servant.

But for injury to servants through obvious or known defects of machinery in the use of the master, unknown to the servant, but which the employer by the use of ordinary care could have cured, the cases all agree that he is liable. McGatrick *v.* Wason, 4 Ohio N. S. 566.

In the Exchequer Chamber, so late as May, 1857, in Roberts *v.* Smith, 29 Law Times, 169, it was held, that where the master directs the conduct of the servant, he is liable for any injury resulting therefrom to the other servants. See also Weyant *v.* N. Y. & Harlem R. 3 Duer, 360.

It has been held in some cases, Scudder *v.* Woodbridge, 1 Ga. 195, that the rule that the master is not liable for an injury to one servant inflicted by the want of care or skill in a fellow-servant, does not apply to the case of slaves, on account of their want of freedom in action and choice in continuing the service when it becomes perilous. But if an exception could be founded upon any such basis, it would extend to all the subordinate relations of service, as has sometimes been attempted. But where the injury resulted from the habitual negligence of the engineer of a boat, whereby the slaves perished, by the bursting of a boiler, the master of the boat is liable, and the same rule applies to the case of freemen. Walker *v.* Bolling, 22 Alab. 294; Cook *v.* Parham, 24 Alab. 21. The court here were equally divided upon the question, whether the general rule upon this subject applied to the case of a slave hired on a steamboat.

But this court subsequently held, on general principles, that where one em-

* 525, 526

on board, that the ship is seaworthy, and in the absence of any express warranty to that effect, or of any knowledge of the defect, or any personal blame on the part of the ship-owner, the seaman cannot maintain an action, by reason of the ship becoming leaky, and his being obliged to undergo extra labor.[16]

7. But a carpenter employed by a railway company to build one of their bridges, and who took passage in their cars, by their directions, to go to a certain point for the purpose of loading timber to be used in building the bridge, and who was injured * in the course of the passage by the negligent conduct of the train, is entitled to recover of the company, the plaintiff having no particular connection with the conduct of the business in which he was injured.[17]

8. The English courts still maintain their former stand, that all the servants of the same company engaged in carrying forward the common enterprise, although in different departments, widely separated, or strictly subordinated to others, are to be regarded as fellow-servants, bound by the terms of their employment to run the hazard of any negligence or wrong-doing which may be committed by any of the number, so far as it operates to their detriment. This is strikingly illustrated in a recent case in the Common

ploys a mechanic to repair a building which is in a ruinous state, but this is not known to the workmen and not disclosed to the contractor, the employer is liable for all injury sustained by the contractor or his subordinates, being slaves in this case, by reason of the peril to which they are thus fraudulently exposed, but that he will not be held so liable if he inform the contractor of the peril to which he is exposed. Perry *v.* Marsh, 25 Alab. 659.

[16] Couch *v.* Steel, 3 El. & Bl. 402; s. c. 24 Eng. L. & Eq. 77. But if the master might have known the exposure of the servant, but for his own want of ordinary care, as in the use of a defective locomotive engine, which exploded and injured the servant, through defective construction, the master is liable for the injury. Noyes *v.* Smith, 28 Vt. 59. But where the danger is known to the servant and not communicated to the superior, or master, he cannot recover for any injury he may sustain in consequence. McMillan *v.* Saratoga & Wash. R. 20 Barb. 449; Hubgh *v.* N. O. & C. Railw., 6 Louis. An. 495.

[17] Gillenwater *v.* Mad. & Ind. Railw. 5 Ind. 340. And where laborers upon a railway were transported to and from their labor and meals upon the gravel trains of the company, which they were employed in loading and unloading, but had no agency in managing, and in such transportation, by the gross negligence and unskilfulness of the engineer were injured, it was held the company were liable. Fitzpatrick *v.* New Albany and Salem Railw., 7 Porter (Ind.), 436. But not where the servant is in fault in attempting to get upon the train when in motion. Timmons *v.* The Central Ohio Railw., 6 Ohio N. S. 105.

Pleas,[18] where it was held that one employed to pick up stones from off the defendant's line, and who, while returning in the evening after his work was over in a train driven by the defendant's servants, was injured by a collision caused by the negligence of those who had charge of the train, it being one of the terms of the contract of hiring that he should return in the defendant's train, could not recover damages of the company, as he and the person guilty of the negligence resulting in the injury were fellow-servants, engaged in a common employment, within the meaning of the rule of law applicable to the case.

9. This whole question is very elaborately reviewed in a recent case in Kentucky,[19] which we shall here repeat, together with our own comments at the time upon the several propositions embraced in the opinion, at the risk of some repetition, perhaps.

Where an employee upon a railway is injured by the negligence of the engineer of the company, and is himself guilty only of such neglect and want of care as would not have exposed him * to the injury but for the gross neglect of the engineer, and when the engineer might with ordinary care have avoided the injury, he is not precluded from maintaining his action.

What is gross neglect in the engineer may be determined by the court, as a question of law, where there is no controversy in regard to the facts.

In regard to those acts of a corporation which require care, diligence and judgment, and which it performs through the instrumentality of general superintending agents, the corporation itself is to be regarded as always present supervising the action of its agents.

The rule of law, that the master is not responsible to one of his servants for an injury inflicted through the neglect of a fellow-servant, is not adopted, to the full extent of the English decisions, in the state of Kentucky. The rule is there regarded as anomalous, inconsistent with principle, analogy, and public policy, and unsupported by any good or consistent reason.

In regard to all servants of the company acting in a subordinate sphere, the one class to another, and receiving injuries while in the performance of duties, under the command of a superior, whose authority they have no right to disobey or disregard, it is the same

[18] Tunney *v.* Midland Railw. Co., Law Rep. 1 C. P. 291; s. c. 12 Jur. N. S. 691.

[19] Louisville & Nashville Railw. *v.* Collins, 5 Am. Law. Reg. N. S. 265; s. c. 2 Duvall, 114.

precisely as if the injury were inflicted by the act of the company; and if there is any want of care and skill in the superior such as his position and duty reasonably demand, the company are responsible.

In such cases there is no implied undertaking on the part of the servant to risk the consequences of the misconduct of the agent of the company under whose authority he acted, and through whose negligence he received the injury.

Servants so situated, in distinct grades of superiority and subordination, are not to be considered as "fellow-servants," or "in the same service;" but rather in the light of strangers to each other's duties and responsibilities; and the subordinate may recover of the company for any injury sustained by reason of the ordinary neglect of the superior.

But if the subordinate is himself guilty of any want of ordinary care, whereby he is more exposed to the injury, he cannot recover, unless the superior was guilty of wilful misconduct or * gross neglect, but for which he might have avoided inflicting the injury, notwithstanding the negligence of the other party.

Where, therefore, an engineer, while upon his engine, ordered a common laborer to do some needed work under the engine, in fastening bolts or screws belonging to it; and such workman, while lying upon his back in the performance of the service, had both his legs cut off by the movement of the engine forward and backward, through the gross neglect or wilful misconduct of such engineer, the company are responsible for the injury, notwithstanding there might have been some want of ordinary care on the part of the subordinate, contributing to some extent to the injury, but not necessitating it, except through the gross misconduct of the superior.

Per *Robertson*, C. J. — We do not consider that the rule exempting the company from responsibility for injuries inflicted upon their servants through the want of ordinary care in other servants of the company, extends beyond those who are strictly "fellow-servants" in the same grade of employment, and where one is not subject to the order or control of the others.

Beyond this the company is responsible for the consequences of the misconduct of superiors towards inferiors in its service, the same as towards strangers.[20]

[20] We have presented a very extended syllabus of the foregoing case, embracing all the points upon which the opinion of the court is given, without

* 10. The question is again reviewed by the same learned judge who gave the widely-admired opinion in Farwell *v.* Boston and

regard to their being directly and necessarily involved in the decision of the cause.

And notwithstanding the avowed willingness of the learned judge to disregard the general current of authority upon the point, and the apparent spirit of freedom with which he deals with the decisions in other states and countries, — notwithstanding all this, and more that might be fairly said as to the fearlessness and disregard of self with which the opinion abounds, which is not altogether common in dealing with the opinions of such men as Lord *Abinger* and Chief Justice *Shaw*, and a host of others scarcely less eminent in their field of service; notwithstanding all this, which has rather surprised us, we must confess, at the same time that we could not but regard it as a refreshing exception to the proverbial subserviency of opinion to precedent and analogy, we have nevertheless felt compelled to the conclusion that the opinion is altogether and entirely sound in its principles, and maintained with very uncommon ability in its logic as well as its illustrations, both of which seem altogether unexceptionable.

But we must warn those members of the profession who are not altogether aware of the extent of the decisions in the opposite direction, that they embrace a very large number of the best-considered English cases, and an equal number, almost, in the American states, including all, as far as we know, with the exception of Ohio, and Georgia, and now Kentucky. And the decisions in these latter states are all attempted to be placed upon peculiar grounds, thereby virtually confessing the soundness of the general rule, that one cannot recover of his employer for an injury inflicted through the want of care in a fellow-servant, employed in the same department of the master's business, and under the same general control. This is declared by the learned judge in the case last cited.

The opinion in the case would have been far more satisfactory if the learned judge could have devoted more time and labor to the matter. If a careful review of the preceding cases, with the reasoning of the judges, could have been presented in the very carefully prepared opinion, it could not have failed to be more valuable. Discussion of a broad principle is much less expensive to the author, and far less satisfactory, as a general thing, to the profession, than a careful review of the cases.

We should not expect our readers would here listen to such an attempt on our part, since it must occupy considerable space, and would be merely professional, instead of being clothed with the weight of judicial authority.

But we have noticed with gratification, more for the justice of the view than because we had before contended for the same, that the learned judge declares most unequivocally, in the principal case, that the corporation is to be regarded as constructively present in all acts performed by its general agents within the scope of their authority, *i. e.* within the range of their ordinary employment. The consequences of mistake or misapprehension, upon this point, have led many courts into conclusions greatly at variance with the common instincts of reason and humanity, and have tended to interpose an unwarrantable shield between the conduct of railway employees and the just responsibility of the company.

* Maine Railway, in a later case,[21] and the following propositions maintained. A carpenter employed by the day by a railway * cor-

We trust that the reasonableness and justice of this construction will at no distant day induce its universal adoption. See ante, § 130, pl. 6, 7, 8, 9, and notes, and cases cited.

In regard to the leading point involved in the principal case, how far a servant is entitled to recover of the master for an injury inflicted by the negligence or want of skill of a fellow-servant, the doctrine of exemption was first established in the Court of Exchequer, in Priestly *v.* Fowler, 3 M. & W. 1, which was decided at Michaelmas Term, 1837. The same rule was adopted in this country by the Supreme Judicial Court of Massachusetts, in Farwell *v.* The Boston & Worcester Railroad Corporation, 4 Met. 49, at the March Term, 1842, supported by one of the ablest and most unexceptionable opinions ever delivered from the American Bench, — an opinion which has commanded the admiration of the entire profession, both Bench and Bar, in England as well as in America; and which has been more extensively adopted and formally incorporated into the opinions of the English courts than perhaps any other opinion of an American judge. This opinion was in fact preceded by that of Murray *v.* The South Carolina Railw. Co., 1 McMullan, 385, in the same direction; but the former has been regarded as the leading American case.

These leading opinions, in the different countries, have been followed by a multitude of cases reaching down to the present time, most of them occupied in the discussion of what were claimed to be exceptional cases. In England, we may, among a multitude of others, refer to Hutchinson *v.* York, Newcastle & Berwick Railw., 5 Exch. 343; Wigmore *v.* Jay, id. 354; Skip *v.* Eastern Counties Railw., 9 Exch. 223; s. c. 24 Eng. L. & Eq. 396; Degg *v.* Midland Railw., 1 Hurlst. & N. 773; Tarrant *v.* Webb, 18 C. B. 797; s. c. 37 Eng. L. & Eq. 281; Mellors *v.* Shaw, 1 B. & S. 437; s. c. 7 Jur. N. S. 845; Seymour *v.* Maddox, 16 Q. B. 326; Ormond *v.* Holland, 1 El. Bl. & Ellis, 102.

In the American states the decisions are considerably numerous where the general principle of the foregoing decisions has been acted upon, or recognized, but we shall not refer to more than will be requisite to show how far the rule prevails in different states.

It is adopted in Brown *v.* Maxwell, 6 Hill (N. Y.), 592; Coon *v.* Syracuse & Utica Railw., 6 Barb. 231; s. c. 1 Selden, 492, and numerous other New York cases cited, *ante*, § 131. See also Honner *v.* Ill. Central Railw., 15 Ill. 550; Ryan *v.* Cumberland Valley Railw., 23 Penn. St. 384; Madison & Indianapolis Railw. *v.* Bacon, 6 Porter (Ind.), 205; Hawley *v.* Baltimore & Ohio Railw., 6 Am. Law. Reg. 352; Frazier *v.* Pennsylvania Railw. Co., 38 Penn. St. 104; Wright *v.* New York Central Railw., 28 Barb. 80; Carle *v.* B. & P. Canal & Railw. Co., 43 Maine, 269; Noyes *v.* Smith, 28 Vt. 59; Indianapolis Railw. *v.* Love, 10 Indiana, 554; Same *v.* Klein, 11 id. 38. The general principle is adopted in all the other states where the question has arisen; for although in Ohio, in the cases of Little Miami Railw. Co. *v.* Stevens, 20 Ohio,

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[21] Seaver *v.* Boston & M. Railw. Co., 14 Gray, 466.

* 531, 532

poration to work on the line of their road, and carried on the cars to the place of such work without paying fare, cannot maintain an

415, and C. C. & C. Railw. Co. *v.* Keary, 3 Ohio N. S. 201, the companies are held responsible for the injury, the decisions are placed upon the ground, that the persons injured were in subordinate positions. And in Scudder *v.* Woodbridge, 1 Kelly, 195, it was held the rule did not excuse the master for injury thus caused to slaves, mainly upon the same ground of their dependent and subordinate positions. And the principal case is placed upon the same ground. And in the more recent case of Whaalan *v.* Mad. R. & Lake Erie Railw. Co., 8 Ohio, N. S. 249, it was held, that where one of the trackmen was injured by neglect of the fireman upon one of the trains, there was no such subordination of position as to take the case out of the general rule, and the case was decided in favor of the company; thus maintaining the soundness of the general rule in that state by its latest decision.

It is safe, therefore, to state, that all the cases, both English and American, maintain the general rule to the extent of those who are strictly "fellow-servants" in the same department of service. And where this is not the fact, but the employees are so far removed from each other that the one is bound to obey the directions of the other, so that the superior may be fairly regarded as representing the master, we think it more consonant with reason and justice to treat the matter as not coming within the principle of the rule. This is so declared by *Gardiner*, J., in Coon *v.* Syracuse & Utica Railroad Co., 1 Selden, 492. But this qualification is denied by *Shaw*, C. J., in Farwell *v.* Boston & Worcester Railw., 4 Met. 49, 60, 61, unless the departments of service are so far independent as to have no privity with each other, not being under the control of a common master. And it was so decided in Gilshannon *v.* Stony Brook Railw. Co., 10 Cush. 228. And it seems finally to be settled upon authority, that it is sufficient to bring the case within the rule, that the servants are employed in the same common service, as in running a railway, or working a mine. Wright *v.* New York Central Railw., 25 N. Y. 562, 564, by *Allen*, J. The question is whether they are under the same general control. Abraham *v.* Reynolds, 5 H. & N. 142; Hard, Adm'r *v.* Vermont & Canada Railroad, 32 Vt. 473. And there is no question that the master is responsible for any want of skill or care in employing competent and trustworthy servants, and in sufficient numbers; and in furnishing safe and suitable machinery for the work in hand, unless the servants, knowing, or having the means of knowing, of the deficiency in furnishing proper help or machinery, consent to continue in the employment. And the neglect or want of skill of the master's general agent employed in procuring help and machinery, is the act of the master; Hard *v.* Vermont & Canada Railw. Co., *supra;* Wiggett *v.* Fox, 36 Eng. L. & Eq. 486; 11 Exch. 832; Noyes *v.* Smith, 28 Vt. 59. Indeed this exception is recognized in most of the preceding cases. Many of the late cases upon the question have turned upon this point, the general rule having been regarded as settled beyond question for many years. We are not disposed to question the extent of the exceptions to the general rule; and possibly any greater extension in that direction might essentially impair the general benefit to be derived from it. But we would be content to treat all the subordinates who were under the control of a

action against the corporation for injuries received while being so carried, by the negligence of the engineer employed by them for that service, or by a hidden defect in the axle, the failure to discover which, if discoverable, was occasioned by the negligence of servants of the corporation, whose duty it was to examine and keep in repair the cars, engines, and axles. In such a case, if the company exercised reasonable care in providing and using the machinery, in the use of which the plaintiff was so injured, they are not responsible for the injury.

11. And in a late case[22] before the same court, where a servant was accidentally hurt by an engine running upon him from the turn-table, through some defect in the brake, it was held competent for the company to show in defence that the person having charge of all the engines upon the road had given instructions to the engineers to have the wheels of their engines blocked while turning upon the turn-table, and that the accident occurred in consequence of some servant neglecting such instructions, although the instructions had not been communicated to the plaintiff.

12. But the servants of one railway company are not fellow-servants with the servants of another company who use the same station with the first company, and while those are subject to the direction of the station-master of that company, and the second company is responsible for an injury to one of the servants of the first company, by the negligence of their engine driver.[23]

13. Although a railway company is not responsible to one whom they employ to repair their cars, for any hurt he may receive in passing upon the company's cars to and from his work, free of charge, through the misconduct of a switchman, provided the company were not in fault in his selection or retainer; but, if he were an habitual drunkard and that known to the company, or might have been known but for their own neglect to make proper inspection of their business, and the injury resulted from this intoxication, the testimony is proper to be submitted to the jury, as tending to show culpable neglect on the part of the company.[24] And when

superior as entitled to hold such superior as representing the master, and the master as responsible for his incompetency or misconduct. We should regard this as a more salutary rule, upon the whole, than the present one, but the general current of authority seems greatly in the opposite direction.

[22] Durgin *v.* Munson, 9 Allen, 396.

[23] Warburton *v.* Great Western Railw., L. R. 2 Exch. 30.

[24] Gilman *v.* Eastern Railw., 10 Allen, 233.

this case was before the court, at another time,[25] it was held that a verdict for the plaintiff will not be disturbed in such a case, because it was, by the order of the company, the regular business of another servant of the company to manage the switch, and on this occasion it was wrongly adjusted by the flagman, who was an habitual drunkard, and had usually been intrusted with the management of the switch, and that his habits were known, or by the exercise of proper care would have been known, to the corporation. Nor will it excuse the company that due care was exercised in the original selection of such flagman, and that a proper local agent had been employed by the company with authority to hire and superintend such servants of the company as may be necessary. It was also held here that evidence that the flagman was commonly reputed to be an habitual drunkard, in the place where he lived, was competent evidence for the jury as tending to show that his intemperate habits should have been known to the officers of the company.

* § 131 *a*. The following points, decided by a court of ability, and the opinion in which the several propositions were very carefully illustrated, with our own comments upon them, as published in the American Law Register,[1] appear to us proper to be repeated here, as the clearest exposition of our own views upon the questions involved which we could give.

1. *Where a passenger is injured on a railway the* primâ facie *presumption is, that it resulted from the want of due care on the part of the company.*
2. *But, nevertheless, it is competent to prove the damage occurred without their fault.*
3. *One who rides upon a free pass, or in the baggage-car, is not thereby deprived of his remedy against the company for injuries received through their want of due care, provided he was at the time a passenger and without fault on his own part.*

The following propositions were declared by the Supreme Court of Missouri, in the case of Hannibal and St. Joseph Railroad Company *v.* Hattie Higgins, by Eliza Higgins, her guardian:[1] —

1. The statute of Missouri giving a remedy to the representatives of a passenger killed upon a railway train, goes upon the same principle which before obtained in regard to injuries to passengers, that such injury or death *prima facie* results from want of due care in the company.

2. The presumption is not conclusive under the statute, but

[25] 13 Allen. 433.

[1] 5 Am. Law Reg. N. S., 715-721; s. c. 36 Mo. 418.

may be rebutted by evidence of the cause of the injury. One who had been in the employment of the company as an engineer and brakeman, until his train was discontinued a few days previous, and who had not been settled with or discharged, although not actually under pay at the time, and who signalled the train to take him up, and who took his seat in the baggage-car with the other employees of the company, and paid no fare and was not expected to, although at the time in pursuit of other employment, cannot be considered a passenger. If he would secure the immunities and rights of a passenger, he should have paid his fare and taken a seat in the passenger-car.

3. It will not deprive of his remedy a passenger who comes upon the train in that character, and is so received, that he is allowed as matter of courtesy to pass free, or to ride with the employees of the road in the baggage-car. But a passenger who *leaves the passenger carriages to go upon the platforms or into the baggage-car, unless compelled to do so for want of proper accommodations in the passenger carriages, or else by permission of the conductor of the train, must be regarded as depriving himself of the ordinary remedies against the company for injuries received, unless upon proof that his change of position did not conduce to the injury.[2]

[2] *Holmes*, J. — "The plaintiff below, an infant and only child of Thomas G. Higgins, who was killed while riding in a baggage-car on the Hannibal and St. Joseph Railroad, on the 16th day of September, 1861, brings this suit; the widow having failed to sue within six months to recover the $5,000, which are given by the second section of the act concerning damages (Rev. Stat. 1855, p. 647), where any passenger shall die from an injury resulting from or occasioned by any defect or insufficiency in any railroad.

"The petition is evidently framed upon that act, though the statute is not named or referred to by any express words. It contained two counts; one founded upon the second section, and the other upon the third section of the act.

"The verdict was for the plaintiff upon the first count, and for the defendant upon the second count; and the damages were assessed at $5,000. The defendant's motion for a new trial was overruled. The case came up by appeal, and stands here upon the first count only.

"The clause of the act on which this first count is founded relates exclusively to passengers, and to the cases of injury and death occasioned by some defect or insufficiency in the railroad. This statute makes the mere fact of an injury and death resulting from a cause of this nature, a *prima facie* case of negligence and liability on the part of the defendant, as a presumption of law. It is not a conclusive presumption, but disputable by proof that such defect or insufficiency

*SECTION IV.

Injuries by defects in Highways caused by Company's Works.

1. *Liable for injuries caused by leaving streets in insecure condition.*
2. *Municipalities liable primarily to travellers suffering injury.*
3. *They may recover indemnity of the company.*
4. *Towns liable to indictment. Company liable to mandamus or action.*
5. *Construction of a grant to use streets of a city.*
6. *Such grant does not give the public any right to use the tracks.*
7. *Bound to keep highways in repair.*
8. *Municipalities not responsible for injuries by such grant.*
9. *Canal company not excused from maintaining farm accommodations by railway interference.*
10. *Railway track crossing private way.*
11. *One being wrong-doer in opening company's gates cannot recover.*

§ 132. 1. Where a public company has the right, by law, of taking up the pavement of the street, the workmen they employ

was not the result of negligence, nor does it preclude any other defence of a different nature. The act is to be interpreted and construed with reference to the state of the law as it stood before its passage. By the general principles of law, which were applicable to common carriers of passengers and to persons standing in that relation, the fact of an injury to a passenger, occasioned by a defective railroad car or coach, or by a defect in any part of the machinery, makes a *prima facie* case of negligence against the defendant sufficient to shift the burden of proof: and by that law carriers of passengers were held responsible for the utmost degree of care and diligence, and were liable for the slightest neglect. This act is evidently based upon the same principles: it is confined by its terms strictly to passengers and to injuries arising from cases of that peculiar nature only; and it must receive a construction in accordance with these principles. Viewed in this light, it is clear that the intent of this clause of the act was to provide greater security for the lives and safety of the passengers as such, and to enable the representatives of a deceased passenger to pursue the * remedy given by the act; and no other class of persons is intended within its purview.

"The first question here presented is, whether the deceased person was a passenger within the meaning of the act. The evidence shows he had been in the employ of the company as an engineer and brakeman for several years, with some intermission: that for several months previous to the accident, and down to the 4th day of September, 1861, when his train was stopped by guerillas, he had been continually on duty as a brakeman; and that, about that time, the interruptions occasioned by actual hostilities in that neighborhood had caused the train on which he was employed to cease running for a time; and that for several days before the day of his death he had not been in actual service upon any train, but his name still remained on the roll of the company's employees as before. He had never been paid off and discharged; his account was unsettled; there were arrears still due him at the time of his decease. It appears

are bound to use such care and caution in doing the work as will protect the king's subjects, themselves using reasonable care,

brakemen were paid monthly, but at the rate of so much per day for as many days as they actually worked during the month.

"These facts would all go to show that his employment still continued, and that his relations to the company was still that of an employee. On the morning of the accident he signalled the train to stop, and take him up where he was; he took his place on the baggage-car among other employees; he appears to have treated himself as an employee, and was treated by the conductor as an employee who was passing from one point to another on the road in the usual manner. He engaged no passage, took no seat in any passenger-car, paid no fare, and evidently did not expect to pay any; and none was exacted from him. He did not claim to be a passenger, nor was he treated otherwise than as an employee by the conductor. Upon a careful examination of the evidence on this point, we think it tended to prove that he was an employee, and not a passenger within the purview of this act, and that under all the circumstances the conductor had a right to presume he was travelling as an employee of the company merely.

"Such being the relation of the parties, the mere circumstances that he had been off duty as a brakeman for some days, or that he was then passing on his own private errand, and not immediately engaged on the business of the company or in running that very train, cannot be allowed to make any difference: Gilshannon *v.* Stony Brook Railw. Co., 10 Cush. 228. The conductor, knowing him only as an employee, was not bound to inquire into his particular errand; and though informed, by a casual conversation with him in the baggage-car, that he was looking for some temporary employment so as not to lose time, he still might be justified as treating him as an employee who had the privilege of free passage on the train as such. Under such circumstances it was his business, if he claimed to be a passenger, to engage or take a seat in the passenger-coach, or at least in some way to make it known to the conductor that he claimed to be travelling in the character of a passenger.

"Where a director was invited by the president to pass over the road as a passenger, without paying fare; Philadelphia and Reading Railroad Co. *v.* Derby, 14 How. (U. S.) 468; where a man was taken up by the engineer of a gravel-* train, to be carried as a passenger, paying fare as the practice had been, and was allowed to go from the tender to the gravel-car: Lawrenceburg & Upper Mississippi Railroad Co. *v.* Montgomery, 7 Ind. 474; and where a man who had been a work-hand on the road, but had left the service of the company two weeks before the accident, because they did not pay him, got upon the train to be carried as a passenger: Ohio and Mississippi Railroad Co. *v.* Muhlins, 30 Ill. 9; and where a house-carpenter was employed to build a bridge, and was sent by the company on their cars to another place to assist in loading timber for the bridge: Gillenwater *v.* Madison and Indiana Railroad Co., 5 Ind. 340; the injured person was held to be clothed with all the right and character of a passenger and a stranger; and that he was not to be considered as standing on the same footing as ordinary employees and fellow-servants of the company.

"If this party had been invited to go in the train as passenger, or had taken a

from injury. And if they so lay the stones as to give such an appearance of security as would induce a careful person, using

seat in the passenger-car, or had been taken on board the train in the character of a passenger, and the conductor had merely waived his right to demand fare as an act of liberality or courtesy, and had then allowed him to pass into the baggage-car to ride there, the case would have been quite different, and might have fallen within the reasoning and the principles of these adjudicated cases. The benefit of this act was plainly intended for those only who stand, strictly speaking, in the relation of passengers, and between whom and the carrier there exists the privity of contract, with or without fare actually paid, and the peculiar responsibilities which are implied in that relation and depend wholly upon it. Where the relation is properly that of master and servant only, this particular clause of the act has no application. We think this matter was not fairly nor correctly laid before the jury by the instructions of the court below.

"Again, even if the deceased party would be considered as having been in any proper sense a passenger, there would not be the least doubt that he himself neglected all precautions and voluntarily placed himself in a position which he knew to be the most dangerous on the train for passengers. A baggage-car is certainly no place for a passenger, and as such the proof shows he had no business to be there at all. We are aware that it had been held in some cases, that if a passenger, who is travelling as such, is allowed to go into the baggage-car or into a part of the baggage-car which is used as a post-office, where passengers are sometimes permitted to be, as in Carrol *v.* New York and New Haven Railroad Co., 1 Duer, 571, and while there an accident and injury occur, by reason of negligence on the part of the company, and under such circumstances that his being in that place cannot be said to have materially contributed to produce the accident or injury, the defendant would still be held liable. In many cases of this kind, it might be difficult to determine whose negligence had been the real cause of the injury.

"But any question of this nature is removed from our consideration in this case by force of another statute which finds an apt and just application here.

"By the 64th section of the Act concerning Railroad Associations, Rev. Stat. 1855, p. 430, approved one day only after the act in question, it is expressly provided as follows:—

"'In case any passenger on any railroad shall be injured while on the platform * of a car, or in any baggage, wood, or freight-car, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger-cars, then in the train, such company shall not be liable for the injury. Provided, said company at the time furnish room inside its passenger-cars sufficient for the proper accommodation of its passengers.'

"This provision is by the 57th section of the same act made applicable to all existing railroads in this State: Ibid., p. 438. Under this section the exemption of the company is made to depend upon a violation by the passenger of the printed regulation hung up in the passenger-cars only. They are not required to be posted up in a baggage-car: it is presumed that no passenger will ever be found there. There was evidence in the case tending to prove that the pro-

reasonable caution, to tread upon them, as safe, when in fact they are not so, the company will be answerable in damages for any injury such person may sustain in consequence.[1]

vision of the statute had been complied with on the part of the defendant; but the printed forms used had been changed since that time, and no copy of the former cards had been found, and on proof made of the loss of them secondary evidence was offered to prove their contents. This evidence was excluded as irrelevant, and having no bearing upon the case. In the view we have taken of this statute the evidence was certainly very material and should have been admitted. It is true such notice would have given this party no information, for the reason he did not go in the passenger-car; the evidence tended to show that he was in fact well acquainted with these regulations; and this consideration, so far from weighing any thing in his favor, would rather tend to strengthen the inference that he was not a passenger at all. This statute proceeds again upon the general principles of law in relation to contributory negligence, and it supposes that a passenger who has had the warning of this notice, and yet has placed himself in a situation so dangerous as a baggage-car, is to be considered as contributing by his own negligence to produce the injury, and therefore that the company is not to be held liable in such cases.

"We think that the first and second instructions asked for by defendant should have been given, and that the fifth, sixth, and seventh instructions asked for by plaintiff should have been refused. It is not deemed necessary more particularly to notice the other instructions."

The foregoing opinion seems to us to present several interesting practical points, in a very judicious and sensible light. It is sometimes difficult to determine, with exact precision, when a person ceases to be an employee of the road and becomes a passenger. There is perhaps no fairer test than the one presented in this case, to allow his own claim and conduct at the time, and the acquiescence of the company, to determine that question. At the time, one who has recently been in the employment of the company has a motive to claim the privileges of the employment, by passing without the payment of fare. And if he claims the privilege, and it is acceded to by the officers of the company, there is great injustice in allowing the person at the same time to hold the company to the higher responsibility which it owes to passengers, from whom it derives revenue. It should therefore be made to appear, that one who passes in the character of an employee of the road was really a passenger, before he can fairly be allowed to demand the indemnity which passengers may by law require. If the person assumes one character for his advantage, and the company accede to the claim, he ought not to be allowed the benefits of any other character, unless it is very clear such was his real position, and that this was understood by the company.

The effect of free passes, and of the passenger being out of his place in the carriages, is very fairly presented, as it seems to us, in the foregoing opinion, and the principal cases are referred to upon all the points.

[1] Drew *v.* The New River Co., 6 Carr. & P. 754.

And in a more recent case,[2] a canal and railway company, as early as the 28 Geo. 2, had acquired the right, by act of parliament, to construct a canal and take tolls thereon, and had built the same across an ancient highway near St. Helens, a small village, and had made a swivel bridge across the canal for the passage of the highway; and by subsequent acts, reciting the *existence of such works, all persons were to have free liberty with boats to navigate the canal for the transportation of goods, and penalties were imposed upon such persons as should leave open the drawbridges. The company maintained the works and received a toll from all others using them. A boatman having opened the swivel bridge, to allow his boat to pass through, in the night-time, a person walking along the road fell into the canal and was drowned, just as the boat was coming up. When the bridge was open the highway was wholly unfenced. Two lamps had formerly been kept burning, of which one had been removed and the other was out of repair at the time. The jury found that the deceased was drowned by reason of the neglect of reasonable precautions on the part of the canal company, without any fault on his own part.

Held that the defendants, having a beneficial interest in the tolls, were liable to an action, the same as any owner of private property would be for a nuisance arising therefrom. That the bridge being in the possession of defendants, the action was properly brought against them and not against the boatman. That the passing the subsequent acts, recognizing the existence of the bridge, was not a legislative declaration of its sufficiency.

It was further held, that even if the bridge had been sufficient at the time of its erection, it was the duty of the company so to alter and improve its structure, from time to time, as at all times to maintain a bridge sufficient, with reference to the existing state of circumstances, and that the jury were warranted in considering the bridge, in the state in which it was, insufficient.

2. But it has been held, that where such companies, having the power, by law, to cut through and alter highways, either temporarily or permanently, do it in such a manner as to leave them unsafe for travellers, who in consequence sustain injury without fault on their part, that the towns or cities in which

[2] Manley *v.* The St. Helens Canal & Railw. Co., 2 H. & N. 840.

such highways or public streets are situated are primarily liable [3] for all such injuries.

* 3. And it is also true that such towns or cities may claim an indemnity against the railway companies who are first in fault, and in such action recover not only the damages but the costs paid by them, and which were incurred in the reasonable and necessary defence of actions brought against them on account of the defects in such company's works.[4]

[3] Willard *v.* Newbury, 22 Vt. 458; Batty *v.* Duxbury, 24 Vt. 155; Currier *v.* Lowell, 16 Pick. 170; Buffalo *v.* Holloway, 14 Barb. 101. In this last case an opinion is intimated, that a contractor for such works is not liable to make such precautionary erections as may be requisite to guard the public against injury, no such provision being found in his contract. But is not that a duty which every one owes the public in all works which he undertakes? In Barber *v.* Essex, 27 Vt. 62, the following points are decided: An old highway, which a railway proposes to use for its track, is not considered as discontinued till the company have provided a substitute, or unless effected by some other definite legal act, or by an abandonment by legal authority, or nonuser. Towns are responsible to the public for the safe condition of their highways, and cannot excuse themselves from the performance of the duty by showing that a railway company, proceeding under their charter, had caused the defects complained of. The towns are bound to watchfulness upon this subject, and theirs being a primary responsibility, they cannot shift it upon the railway, whose responsibility is secondary in regard to travellers and the public generally. The towns have their remedy over against the company. See, also, to same effect, Phillips *v.* Veazie, 40 Maine, 96. The obligation upon the towns to make highways safe and convenient for travellers continues when they are crossed by railways at grade, except so far as the necessary use of the crossing by the railway may prevent it, and subject to such specific directions as may be given by the county commissioners. Davis *v.* Leominster, 1 Allen, 182. But towns are not liable for obstructions caused by telegraph poles which they have no right to remove. Young *v.* Yarmouth, 9 Gray, 386. The railway is also responsible for all unlawful obstructions of the highway. Parker *v.* Boston & Maine Railw. Co., 3 Cush. 107. But where the duty of maintaining a bridge is imposed exclusively upon the railway, the town is not responsible for any defects in the same. Sawyer *v.* Northfield, 7 Cush. 490. See, also, Jones *v.* Waltham, 4 Cush. 299; Vinal *v.* Dorchester, 7 Gray, 421.

[4] Lowell *v.* Boston & Lowell Railw., 23 Pick. 24; Newbury *v.* Conn. & Pas. Rivers Railw., 25 Vt. 377. The recovery in these cases is allowed upon the ground, that the wrong is altogether upon the part of the company, and the town, standing primarily liable to the public for the sufficiency of the highways, and being virtual guarantors against the negligence of the railway company, may therefore recover of them an indemnity, not only for the damages they are compelled to pay, but also the costs and expenses incurred by them in defending *bona fide* against suits brought against them for the default of the company.

And where the injury did not accrue for more than six years, it was held that the railway was still liable to indemnify the town, notwithstanding the bar of the statute of limitations, * reckoning the cause of action as accruing at the date of the neglect; and that it did not exonerate the company guilty of the neglect, that they had leased their road to another company who were operating it at the time the injury occurred.[5]

4. And where the statute provides that railways "shall maintain and keep in repair all bridges, with their abutments, which they shall construct for the purpose of enabling their road to pass over or under any road, canal, highway, or other way," and the company omitted to perform the duty in the manner required for the public safety, it was held that the town, within which the road lay, were liable to indictment for not keeping it in safe repair, and that they may compel the railway company to make all such repairs as may be necessary, by writ of mandamus; or if they have been obliged to make expenditures therein, may reimburse themselves by an action on the case against the company.[6]

5. And where a railway company were authorized by the legislature to construct and operate their road through the streets of a city, and the city government have assented to the location and construction upon a designated route, on certain conditions, it was held that the municipal authority had no power by resolution to annul or impair the grant to the company on account of its failure to complete the road within the time limited in the conditions annexed to their assent.[7] And that such condition was not to be regarded as precedent to the vesting of the estate or franchise, but only a condition subsequent upon the non-performance of which the grantor might elect to defeat it, but that nothing short of a judicial determination would operate to divest the interest of the company.[7]

Duxbury *v.* Vt. C. Railw., 26 Vt. 751, 752, 753; Hayden *v.* Cabot, 17 Mass. 168; Hamden *v.* New Hav. & Northamp. Co., 27 Conn. 158.

[5] Hamden *v.* New H. & North. Co. & N. Y. & N. H. Railw., 27 Conn. 158. But where the company have the right to lay their rails in the street, they are not responsible for any injury resulting therefrom to others, unless they have been in fault either in laying them down or in keeping them safe. Mazetti *v.* New York & Harlem Railw., 3 E. D. Smith, 98; *post*, § 225, pl. 7.

[6] State *v.* Gorham, 37 Maine, 451.

[7] Brooklyn Central Railw. *v.* Brooklyn City Railw., 32 Barb. 358.

6. Where a railway has been laid upon a public street, it does not thereby become public property, in such a sense as to entitle the public at large or other railway companies to use the *track for the passage of carriages constructed for such use.[7] Nor will the permission of the municipal authorities for that purpose give any such right.[7]

7. Where a railway company is required to construct its road so as not to obstruct the safe and convenient use of the highway, this is a continuing obligation requiring the company to so maintain their road as to leave the highway safe and convenient for public use; but this will not exonerate the towns from their primary responsibility.[8]

8. Cities or towns are not liable for damages resulting from the proper exercise of authority in permitting railway tracks to be laid in the streets, or in raising the grade of streets, unless they exceed their lawful authority in this respect.[9] And it is here said to be a legitimate use of a street to allow a railway track to be laid in it.

9. Where a canal company had constructed a bridge as part of the farm accommodations of an adjoining land-owner which the company were bound to maintain, and a railway company by subsequent legislative grant had laid its track along the line of the canal, and in consequence had been compelled to alter the construction of the bridge so as to render it more expensive to maintain the same, it was held the canal company were not thereby exonerated from maintaining the bridge, but were liable to the land-owner the same as before the alteration by the railway company, notwithstanding any liability which might rest upon the railway company.[10]

10. Where a railway crossed on a level a considerably frequented footpath, and there was no servant of the company at the crossing to warn persons of the approach of the trains, the view being somewhat obstructed by the pier of the bridge, but a person before reaching the track could see nearly three hundred yards either way along the line, and the plaintiff's wife, while crossing the line at the spot was run over and killed, it was held that the fact of the company not keeping a servant at the crossing to warn

[8] Wellcome *v.* Leeds, 51 Me. 313.

[9] Murphy *v.* City of Chicago, 29 Ill. 279.

[10] Ammermon *v.* Wyoming Land Co., 40 Penn St. 256.

persons of the approach of trains, was not evidence of negligence to go to the jury.[11]

*11. And where it was made, by statute, the duty of a railway company to maintain gates at all level crossings of highways, and to have persons to open and shut them when any one wished to pass, but at all other times they were to be kept shut, and a person coming along the highway when no servant of the company was present, as he should have been, to open and shut the gates, the plaintiff having waited a reasonable time opened the gates himself in order that he might be able to proceed on his journey, and in doing so was injured by the closing of the gates, which were so constructed as to fall back into their places with their own weight, it was held the action would not lie, one judge dissenting.[12] This case was decided mainly upon the ground that by the act of parliament requiring the gates to be kept closed, except when opened by the servants of the company, it amounted to a virtual prohibition of any one crossing the railway at any other time, and if the plaintiff found no servant of the company to open the gate, it was his duty to wait until he could find one, and seek his remedy for the delay against the company; and being a wrong-doer in opening the gate, he could not recover of the company for any injury he thereby sustained.

*SECTION V.

Liability for Injury in the Nature of Torts.

1. *Railway crossings upon a level always dangerous.*
2. *Company not excused by use of the signals required by statute.*
3. *Party cannot recover if his own act contributed to injury.*
4. *But company liable still if they might have avoided the injury.*
5. *If company omit proper signals, not liable, unless that produce the injury.*
6. *Not liable for injury to cattle trespassing, unless guilty of wilful wrong.*
7. *General definitions of company's duty.*
8. *Action accrues from the accruing of the injury.*
9. *Where injury is wanton, jury may give exemplary damages.*
10. *One who follows direction of gate-keeper excused.*
11. *Company responsible for injury at a crossing opened by themselves for public use.*
12. *The responsibility of railway companies for damages to persons crossing, mainly matter of fact, and each case depends on its peculiar circumstances.*

§ 133. 1. We have discussed the subject of this chapter, in

[11] Stapley v. London, Brighton, &c., Railw. Co., Law Rep. 1 Exch. 21; s. c. 11 Jur. N. S. 954.

[12] Wyatt v. Great Western Railw. Co., 6 B. & S. 709; s. c. 11 Jur. N. S. 825.

general, in former sections.[1] We shall here refer to some cases, where railway companies have been held liable for injuries to persons, in no way connected with them by contract or duty. The subject of railway crossings,[2] on a level with the highway, has been before alluded to, as one demanding the grave consideration of the legislatures of the several states. It causes always a most painful sense of peril, especially where there is any considerable travel upon the highway, and is followed by many painful scenes of mutilation and death, under circumstances more distressing, if possible, than even the accidents, so destructive sometimes to railway passengers.

2. In a case[3] where the plaintiff was injured at a railway crossing, by collision with an engine, it was held that where the statute required, at such points, certain specified signals, the compliance with the requirements of the statute will not excuse * the company from the use of care and prudence in other respects. That it is not necessarily enough to excuse the company, that they pursued the usual course adopted by engineers in such cases. The question of negligence is one of fact, in such cases, to be submitted to the jury, under all the circumstances of the case, and to be determined by them, upon their view of what prudence and skill required.

3. But when the statute requires certain precautions against accidents, and its requirements are disregarded, the party suffering damage is not entitled to recover, if he was himself guilty of negligence which contributed to the damage.[4] And where the

[1] *Ante*, § 130, *post*, 177.

[2] *Ante*, § 108.

[3] Bradley *v.* Boston & Maine Railw., 2 Cush. 539. Some distinction is made by the judge, in trying this case, between those cases of negligence which occur in long-established modes of business, and the case of the management of railway trains; that in the former case usage, if uniform and acquiesced in by the public, may amount to a rule of law; but not in a business so recent as the management of railway trains. This view seems to be sanctioned by the Supreme Court in revising the case. See, also, Gleason *v.* Briggs, 28 Vt. 185; Linfield *v.* Old Colony Railway, 10 Cush. 562.

[4] Parker *v.* Adams, 12 Met. 415; *post*, § 177; Macon & W. Railw. *v.* Davis, 18 Georgia, 679, where the question of negligence in the conductors of a railway train in passing a road-crossing, is held to be one of fact depending upon the circumstances of each particular case. Dascomb *v.* Buffalo & State Line Railw., 27 Barb. 221. But the omission of any statute duty by railway companies at the time and place where an accident occurs is *prima facie* evidence

* plaintiff's farm was intersected by the line of a railway, and he, with a wagon and one horse, having his son and a servant with

of liability. Aug. & Sav. Railw. *v.* McElmurry, 24 Ga. 75. In Johnson *v.* Hudson River Railw., 6 Duer, 633, where the plaintiff's husband was killed in the streets of the city of New York by one of defendants' freight cars in the night-time, it being very dark, and the company using neither lights nor bells to guard against accident; it was held, that although the law required of defendants only ordinary care towards the deceased, it must be measured by the degree of peril against which such care is to be exercised, which, under the circumstances, was so extreme as to justify the court in telling the jury that defendants were required to use every precaution in their power to insure the safety of persons passing; and that if lights or bells would have contributed to that end, they were culpable for not using them; and that in this form the question of negligence was properly submitted to the jury as one of fact.

It was also held that the deceased was only bound to the exercise of ordinary care, and that his being found upon the track was not sufficient ground to preclude the recovery. In the case of Wakefield *v.* Conn. & Pass. Rivers Railw., 37 Vt. 330, it was held, that the requirements of the statute in regard to blowing the whistle and ringing the bell, a prescribed distance before crossing the highway, was a duty of the company not only in reference to travellers about crossing the track of the railway, but with reference to all persons, who being lawfully at or in the vicinity of the crossing, are exposed to accident or injury by reason of the passing train, short of actual contact with it. And it is further said here, that although there might be cases in which the company would be excused from a strict compliance with the statute, and might be justified in omitting the signals, in all cases of such omission, where damage ensued in consequence, the company must show that they were justified in the omission. This seems rather a loose view to be taken of a peremptory statutory requirement, that the party is to exercise a discretion when to comply. As a general rule, the party must omit any such requirement at the peril of all legal consequences. But the court seem to suppose that the statute in imposing a penalty for the "unreasonable" omission of such signals must have contemplated cases of *reasonable* omission. That may be so; but it would be more satisfactory to the common mind to find such an important qualification of the leading provision of the statute, more explicitly declared, than by so indirect an inference. We do not suppose any such construction could safely be applied to these statutes generally. It would be sure to result in a virtual repeal or disregard of the statute. It would be far more salutary to have the engineer understand that he had no discretion in the matter, that he must give the signals regardless of consequences.

In an important case, Shaw *v.* Boston & Worcester Railw., 8 Gray, 45, the subject of injuries at railway and highway intersections is a good deal discussed. *Post*, § 179, pl. 9 & n. It is here decided that the record of the county commissioners stating that in their opinion no flagman at the crossing was necessary, is not competent to show due care on the part of the company in omitting that precaution. The court said it was the duty of the judge in charging the jury in regard to the precautions required to be taken by a railway company at a highway crossing, to distinguish between such circumstances as could have been

him, drove upon a trot directly over the track at a public crossing, without taking the slightest precaution to ascertain whether a locomotive was coming, it was held that he was guilty of great carelessness, and that he could not recover for any damage thereby sustained, and that it was immaterial whether the train was on time or not. It was also held, that the question of negligence, in a case of this character where the testimony was all one way, was one of law to be decided by the court and could not be left to the jury.[5] The company are bound to maintain a sign-board and other precautions, required by statute at railway crossings, at the place where an opened travelled street in a city intersects the railway, although the street has not been so laid out and established by the municipal authorities as to make the city responsible for damages occasioned by defects therein, such passage being a "travelled route" within the meaning of the statute.[6] But it has been held, that the company is not liable for not constructing an under pass for the accommodation of the public travel, on a way which was not laid out agreeably to the statute, and had not been in use by the public twenty years.[7] It is such negligence for a deaf man to drive an unmanageable horse across a railway track when a train is approaching, that he cannot recover for any damage sustained. He should wait and avoid exposure.[8]

reasonably anticipated, and such as would have required extraordinary precautions, but were of so extraordinary a character as not to have been anticipated. It was also held a fatal variance that the proof showed the injury to have occurred some rods out of the highway where the plaintiff's horse drew the carriage by reason of being frightened by defendants' locomotive engine, the declaration charging it to have occurred while travelling in the highway, and the declaration cannot be amended after verdict so as to cure the variance. Also that the degree of care required of the company and travellers, at a railway and highway crossing, is the same, being that which men of ordinary capacity would exercise under like circumstances. The fact that a collision occurred at a railway crossing, and that the plaintiff was in no fault, is not proof that the defendant was in fault.

[5] Dascomb *v.* Buffalo & State Line Railw., 27 Barb. 221; Mackey *v.* New York Central Railw., 27 Barb. 528. It would seem to be the duty of one about to pass a railway to exercise watchfulness to know that a train is not approaching. Ib.

[6] Whitaker *v.* Boston & Maine Railw., 7 Gray, 98. But later statutes adopt a different phraseology.

[7] Northumberland *v.* At. & St. Law. R. Co., 35 N. H. 574.

[8] Ill. Cent. R. Co. *v.* Buckner, 28 Ill. 299. This question, both as to the

* 4. If the plaintiff's negligence did not contribute to his injury, it will not preclude his recovering for the consequences of defend-

case required of the company and the person crossing a railway, is considered and discussed, in Ernst *v.* Hudson River Railw., 35 N. Y. 9, and the following proposition maintained. The omission of a railway company to give the signals required by the statute on the approach of a locomotive within eighty rods of a highway crossing, is a breach of duty to the passengers, whose safety it imperils, and to the wayfarer, whom it exposes to mutilation and death.

Such a crossing is dangerous, only when the company makes it so by propelling its engines across it; and the statute, therefore, for the protection of human life, exacts public warning of the approach of such danger. The injunction is plain and absolute, and the company who violates it does so at its peril.

The omission of the customary signals is an assurance by the company to the traveller, that no engine is approaching from either side within eighty rods of the crossing; and he may rely on such assurance, without incurring the imputation of breach of duty to a wrong-doer.

When the passer-by knows of the immediate proximity of an advancing train, whether the warning be by signals or otherwise, and, having a safe and seasonable opportunity to stop, he voluntarily takes the risk of crossing in front of it, he is guilty of culpable negligence, and forfeits all claims to redress.

But when the usual warning is withheld, the wayfarer has a right to assume that the crossing is safe, and that the company is not violating the law, and endangering human life, by running an engine without signals.

The citizen, on the public highway, is bound only to the exercise of ordinary care; and when he is injured by the negligence of a railroad company, it is no answer to his claim for redress, that, notwithstanding the omission of the signals, he might, by greater vigilance, have discovered the approach of the train, if he had foreseen a violation of the statute, instead of relying upon its observance.

The traveller is not bound to stop on the highway, or to look up and down an intersecting railway track before crossing, when there are no signals of an approaching engine.

Ordinarily, in cases of this description, the question whether the party injured was free from culpable negligence, is one of fact to be determined by the jury, under appropriate instructions, and subject to the revisory power of the courts.

Where the proof is undisputed and decisive, that the plaintiff was guilty of misconduct, and that this contributed to the injury, a nonsuit is matter of right; but it is equally matter of right to have the issue of negligence submitted to the jury, when it depends on conflicting evidence, or on inferences to be deduced from a variety of circumstances, in regard to which there is room for fair difference of opinion between intelligent and upright men.

The same view is maintained and further illustrated in the subsequent case of Renwick *v.* New York Central Railw., 36 N. Y. 132. It seems to us these cases develop a very important and most unquestionable rule of responsibility on the part of railway companies, in regard to injuries to persons at highway crossings; *i.e.*, that the companies, when omitting the customary and required

ant's wrong.[9] If the wrong on the part of the defendant is so * wanton and gross as to imply a willingness to inflict the injury,

signals before arriving at such crossings, should expect a proportionally less degree of watchfulness on the part of travellers. That is certainly natural, almost inevitable. In such a case the company ought not to complain, if held responsible for all consequences not the result of absolute foolhardiness. In State of Maryland *v.* Baltimore & Ohio Railw., 5 Am. Law Reg. N. S. 397, s.c. 24 Md. 84, it was held, that the plaintiff cannot recover for an injury resulting from the negligence of the defendant, provided he might, himself, by the exercise of proper prudence, care, and skill, have escaped from its consequences, or where his own want of such prudence, care, and skill directly contributed to produce the damage complained of. Railways owe a higher degree of watchfulness to their passengers than to mere strangers. In the former case the utmost care and skill is required, in order to avoid injuries; but in the latter case, only such as skilful, prudent, and discreet persons, having the management of such business in such a neighborhood, would naturally be expected to put forth.

[9] Kennard *v.* Burton, 25 Maine, 39. In the newspaper report of a recent trial in the Supreme Court of Pennsylvania, the court are reported to have charged the jury, as matter of law, that "a person about to cross a railway track [with a team] is in duty bound to stop and look in both directions, and listen before crossing." It has recently been decided by the full bench Supreme Court in Massachusetts, *ante*, n. 4, that it is not competent for the judge to lay down any definite rule, as to the duty of the company, in regard to proper precautions in crossing highways; that the circumstances attending such crossings are so infinitely diversified that it must be left to the jury to determine what is proper care and diligence in each particular case. This we apprehend is the true rule upon that subject, both as to the company and travellers upon the highway, and that it will finally prevail, notwithstanding occasional attempts to simplify the matter by definitions. The Pennsylvania case referred to is that of O'Brien *v.* Philadelphia, Wilmington, & Baltimore Railw., 10 Am. Railw. T. No. 10, 13. The following extracts from the charge to the jury may serve to explain the views of the court.

But if the jury find that the company were not faultless, that they did or omitted any thing that would constitute negligence as I have defined it, the next inquiry will relate to the conduct of the plaintiff.

He was a carter, and the same general principles apply to him as to the defendants. He was bound to pursue his business with all that regard to the safety of himself and others which prudent men commonly employ in like occupations. Did he demean himself in that manner? In answer to the 6th and 7th points on the part of the defendants, I instruct the jury that a carter, or any man having charge of a team, but who is about to cross a railroad at grade on which locomotives run, is bound to stop and listen, and look in both directions, before he permits his team to set foot within the rails, and omission to do so is negligence on his part. This rule of law is demanded by a due regard to the safety of life and property, both his own and that which is passing on the railroad. From the diagram in evidence it is perfectly apparent that the plaintiff could have seen the approaching train if he had looked. If he saw it, it was extreme rash-

plaintiff may recover, notwithstanding his own ordinary neglect.[10] And this is always to be attributed to defendant, if he might have avoided injuring plaintiff, notwithstanding his own negligence. So, too, if the neglect on the part of the plaintiff is not the proximate cause of the injury, it will not preclude a recovery.[11]

5. If a railway wholly omit to give the proper signal at a road-crossing, they are not necessarily liable for injury to one crossing at that moment, whose team took fright and injury ensued. It should be shown that the omission had some tendency to produce the loss.[12] The statute requiring railway companies to make signals in all cases of crossing highways, applies to crossings above or below the grade of the highway, as well as to those at grade.[13]

6. A conductor was held not liable for running the engine over an animal trespassing upon the track, unless he acted wilfully.[14]

ness in him to allow his lead horse to advance so far, and if he did not see it, it must have been because he did not look.

I state the general rule, but whether it is applicable to the plaintiff in the circumstances which surrounded him is for the jury. A few yards on his right, some witnesses think seventy, there was a gravel train, with a locomotive attached, standing on one of the tracks, and liable to start any moment, and on his left, according to his witnesses, was the omnibus in close proximity to the crossing.

Now, for these circumstances the plaintiff was in no wise responsible, and the question is, whether they constituted any excuse for his not looking up the road.

In Brooks *v.* Buffalo & Niagara Falls Railw., 25 Barb. 600, it is said if one cross a railway at grade with a team, where the danger may easily be seen by looking for it, and especially where he drives upon the railway track and there stops, looking in an opposite direction from an approaching train till it strikes him, he is guilty of such negligence as will preclude a recovery.

[10] Wynn *v.* Allard, 5 Watts & Serg. 524; Kerwhaker *v.* C. C. & Cincinnati Railw., 3 Ohio, N.S., 172, 188.

[11] Trow *v.* Vermont Central Railw., 24 Vt. 487; Isbell *v.* N. Y. & N. H. Railw. Co., 27 Conn. 393; Chicago & R. I. Railw. *v.* Still, 19 Illinois, 499.

[12] Galena & Ch. Railw. *v.* Loomis, 13 Illinois, 548. A railway is not liable for an injury which happens in crossing a railway, in consequence of the stationary cars of the company, upon their track, obstructing the view of the plaintiff in his approach to the road. Burton *v.* The Railw. Co., 4 Harr. 252. See also Morrison *v.* Steam Nav. Co., 20 Eng. L. & Eq. 267, 455; 8 Exch. 733.

[13] People *v.* New York Central Railw., 25 Barb. 199.

[14] Vandegrift *v.* Rediker, 2 Zab. 185. But where the act is wrongful, the action may be against both the engineer and fireman. Suydam *v.* Moore, 8 Barb. 358.

So, too, where the train passed over slaves asleep upon the track, the company were held not liable.[15]

[15] Herring *v.* Wil. & R. Railw., 10 Iredell, 402. In this case, it is held that the engineer might not be chargeable with the same degree of culpability in driving his train over a rational creature, or one who seemed to be such, and in the exercise of his faculties, as in doing the same when the obstruction was a brute animal. And in the case of running over a person asleep, or a deaf-mute, or an insane person, some indulgence is, doubtless, to be extended, inasmuch as the peculiar state of the person might not be readily discoverable by those in charge of the train, if not they would have a right to calculate that they would conduct like other rational beings, and step off the track as the engine approaches. But in East Tennessee & Ga. Railw. *v.* St. John, 5 Sneed, 524, it was held that the company were responsible for killing a slave asleep on the track, who might have been seen by the conductor a quarter of a mile, but who was mistaken for the garments of the laborers, and no signal given in consequence.

The practice of allowing persons to walk upon a railway track is a vicious one, and one which would not be tolerated in any state or country where the railways are under proper surveillance and police. But as it now is in many parts of this country, an engineer will find some person upon his track every mile, and, in some places, every few rods. If he were required to check the train at every such occurrence, it would become an intolerable grievance. If men will insist upon any thing so absurd as to be permitted to walk upon a railway track at will, they must expect that those who are bereft of sense, but preserve the form of humanity, when they chance to come into the same peril, will perish; not so much from their own infirmities, as from the absurd practices of those who have no such infirmities. And their destruction is not so much attributable, perhaps, to the fault of the railways, as to the bad taste, and lawlessness of public opinion, in making such absurd demands upon the indulgence of railways. And, if it be urged that the companies might enforce their rights, and keep people off their tracks, it would be found, we fear, upon trial, that such arguments are unsound. The companies, probably, could not enforce such a regulation, in many parts of the country, without exciting a perplexing and painful prejudice, to such an extent as to endanger the safety of their business. The only effectual remedy will be found in making the act punishable by fine and imprisonment, as is done in England and some of the American states, and in a strict enforcement of the law upon all offenders. Every one can see that, if sane persons were excluded from the railway, the sight of a person upon the track would at once arrest the attention of conductors of trains, and there would be little danger comparatively of their destruction, whereas now, persons bereft of sense are almost sure to be run over.

Persons are so frequently upon the track that the conductors have no alternative but to push their trains upon them. For such persons are, not unfrequently, so reckless, that, if they could alarm engineers, they would be found trying such experiments every hour.

One who was engaged in sawing wood upon the track of a railway by direction of the superintendent of the company, and is injured by the engine of

* 7. The duty required of railways towards those who are, at the time, in the exercise of their legal rights, is the possession of * the most approved machinery, and such care, diligence, and skill in using it as skilful, prudent, and discreet persons would be expected to put forth, having a proper regard to the interests of the company, the demands of the public, and the interests of those having property along the road, exposed to fire, and to injury in other modes.[16] They are, at least, bound to exercise as much care as if they owned the property along the line, i.e., what would be regarded as the duty of a prudent owner under all the circumstances.[17] It has been held that the company, when their

another company, lawfully upon the track, cannot recover of the latter company, although their engineer was guilty of carelessness, being himself also in fault. Railroad *v.* Norton, 24 Penn. St. 465. In Ranch *v.* Lloyd & Hill, 31 Penn. St. 358, it was decided, that where the state owned the railway, and its regulations were prescribed by the canal commissioners, and the state supplied the motive power, and allowed persons to use their cars, furnishing a conductor, that such conductor is the responsible person in charge of the train throughout its entire route. That the agencies provided for him, whether of steam, or horse power, become his agencies, and the ultimate responsibility in regard to their proper conduct, so far as strangers are concerned, rests upon him and upon the owners of the train, whose servant he is. And that where it was the practice to have cars pass over a portion of the road by the force of gravity, and after arriving at a given point, to be drawn by horse power to the storehouses, and the conductor left them standing across the usual crossing of the highway and went to his breakfast, and during his absence a lad, seven years old, attempted to crawl under the cars, in returning from an errand on which he had been sent, and by means of the starting of the train by the horse power, furnished by a stable-keeper, by contract with the state, and driven by the proprietors' drivers, was seriously injured, it was considered that the conductor and his employers were responsible for the injury.

It was also decided that where cars were so left standing in the highway unnecessarily, it is not a question to be submitted to the jury, whether they constitute an unlawful obstruction. As matter of law, such obstruction, if it could be avoided, is unlawful.

In such a case, no greater care and prudence is required to be exercised by such child than it is reasonable to expect of one of such tender years. See Galena & Ch. Railw. *v.* Jacobs, 20 Ill. 478.

[16] Baltimore & Susq. Railw. *v.* Woodruff, 4 Maryland, 242, 257. And it is said in Mersey Docks *v.* Gibbs, Law Rep. 1 H. Lds. 93, that if one would be responsible for injury resulting from a cause of mischief, of whose existence he has knowledge, he will be equally so if he is negligently ignorant of its existence.

[17] Quimby *v.* Vermont Central Railw., 23 Vt. 387. And where one was injured by the company's train, at a road-crossing, by collision between the com-

* road passes the thoroughfares of a city, are bound to use extraordinary care not to injure persons in the streets.[18]

8. The general rule, in regard to the time of the accruing of the action is, that when the act or omission causes direct and immediate injury, the action accrues from the time of doing the act, but where the act is injurious only from its consequences, as by undermining a house or wall, or causing water to flow back at certain seasons of high tide or high water, the cause of action accrues only from the consequential injury.[19] In the case of Backhouse *v.* Bonomi,[20] it was held that no cause of action accrued from defendant's excavation in his own land, until it caused damage to the plaintiff's; and the case of Nicklin *v.* Williams,[21] as far as it conflicts with this, was held not maintainable. The cases were examined very thoroughly in the course of the discussion of this case before the Queen's Bench, which held that the cause of action accrued from the act of defendant, and in the Exchequer Chamber, where that judgment was reversed, and finally in the House of Lords, where the judgment of the Exchequer Chamber was affirmed. The law on this point may now be considered settled in the English courts. Where the issue is in regard to the prudent use of a highway by the company, it is

pany's locomotive and the carriage in which the plaintiff was riding, it was held, that the carelessness of the driver of the carriage cannot be shown by common reputation. Nor can the occupation of the plaintiff, and his means of earning support, be shown, with a view to enhance the damages for such an injury, unless specially averred in the declaration. Baldwin *v.* Western Railw., 4 Gray, 333. In O'Brien *v.* Philadelphia, Wilmington & Baltimore Railw., 10 Am. Railw. Times, No. 13, where plaintiff was injured at a railway crossing a highway, by collision with his team, Mr. Justice *Woodward*, of the Pennsylvania Supreme Court, charged the jury, that the plaintiff was only entitled to compensatory damages, there being no pretence of any intentional wrong, or flagrant rashness, on the part of the agents of the company.

[18] Wilson *v.* Cunningham, 3 Cal. 241.

[19] Roberts *v.* Read, 16 East, 215. Where the act complained of was maliciously opposing plaintiff's discharge as an insolvent, and the act was more than six years before action brought, but the consequent imprisonment continued within the six years, it was held the cause of action was barred. Violet *v.* Simpson, 30 Law Times, 114; s. c. 8 El. & Bl. 344.

The admissions of the corporators, or of the president, are not sufficient to remove the bar of the statute of limitations, in favor of a private corporation. Lyman *v.* Norwich University, 28 Vt. 560.

[20] 9 Ho. Lds. 503; s. c. El. Bl. & El. 646; Id. 622; 7 Jur. N. S. 809; s. c. 5 Jur. N. S. 1345; 4 id. 1182.

[21] 10 Exch. 259.

not competent to give evidence of the mode of using the same by the company at other times.[22]

9. As a general rule, in the English practice, and in most of the states of the Union, in actions for torts, where the defendant's conduct has been wanton, or the result of malice, the jury * are allowed to give damages of an exemplary character, and the term vindictive even is sometimes used.[23] But this is questioned by some writers, and in many cases.[24]

10. Where a level crossing over a railway is protected by a gate, established by the company and tended by one of its servants, in conformity with the law, those having occasion to cross the track, and who are injured by an attempt to cross when the gate-keeper assures them the line is clear, may recover damages of the company. It is the implied duty of the gate-keeper to know when trains are due, and to give correct information in that respect, and not open a gate for passage across the track unless he knows no duly advertised train is due. And if a train not advertised to the gate-keeper, or at a time not advertised to him, is allowed to pass, whereby injury accrues to those having just occasion to pass the track, it is the fault of the company.[25]

11. And where a railway company make a private crossing over their track, at grade, in a city, and allow the public to use it as a highway, and station a flagman there to warn persons of the approach of trains, they will be held responsible in damages to any one, who in the exercise of proper care, is induced to cross by signal from the company's flagman that it is safe, he being damaged by collision with approaching trains, through this negligence of the flagman.[26]

12. In the English courts, the cases in regard to responsibility on the part of the companies for injuries at the crossings of high-

[22] Gahagan *v.* Boston & Lowell Railw., 1 Allen, 187.

[23] Sedgwick on Dam. 38, 98, 454; *ante*, §§ 131, 154. In the case of Shaw *v.* Boston & Worcester Railw., *ante*, n. 4, where the plaintiff's husband was killed, by the same collision, and she was shown to have had a family of young children, and to be without sufficient property for their support, it was held to be error in the court not to charge the jury, when specially requested so to do, that these facts could not be considered by them in estimating damages.

[24] Appendix to Sedgwick on Dam. 609; Varillat *v.* N. Orleans & Car. Railw., 10 Louisiana Ann. 88.

[25] Lunt *v.* London & N. W. R. Co., Law Rep. 1 Q. B. 277; s. c. 12 Jur. N. S. 409.

[26] Sweeney *v.* Old Colony & Newport Railw., 10 Allen, 368.

ways and private ways, do not seem always entirely consistent with each other, the rule being never to disturb a verdict where the damages are at all reasonable, provided there was any proof, although the slightest, of the omission of duty on the part of the company's servants, and provided also that the plaintiff was not himself in fault. In two recent cases, there were no watchmen or gate-tenders present, at crossings of public ways; and in both instances foot-passengers were run down by passing trains in crossing. In one case,[27] there seemed no specific omission by the company, and the court held them not liable; in the other case,[28] the gates were partly open, contrary to the statutes, and the court refused to set aside a verdict against the company.

SECTION VI.

Misconduct of Railway Operatives shown by Experts.

1. *The management of a train of cars is so far matter of science and art, that it is proper to receive the testimony of experts.*
2. *In cases of alleged torts company not bound to exculpate.*
3. *So, too, the plaintiff is not bound to produce testimony from experts.*
4. *The jury are the final judges in such cases. But omission to produce testimony of experts will often require explanation.*

n. 6. *General rules of law in regard to the testimony of experts.*

§ 134. 1. The conduct of a railway train is not strictly matter of science perhaps. Its laws are not so far defined, and so exempt from variation, as to be capable of perfect knowledge, like * those of botany and geology, and other similar sciences, or even those of medicine and surgery perhaps, whose laws are subject to more variation.[1] But they are nevertheless so far matters of skill and experience, and are so little understood by the community generally, that the testimony of inexperienced persons in regard to the conduct of a train, on a particular occasion, or under particular circumstances, would be worthy of very little reliance. They might doubtless testify in regard to what they saw, and what appeared to be the conduct of the operatives, but those skilled in such matters might, as experts in other cases are

[27] Stubley *v.* London & N. W. Railw., Law Rep. 1 Exch. 13.

[28] Stapley *v.* London B. & So. Coast Railw., L. R. 1 Exch. 21.

[1] Quimby *v.* Vermont Central Railw., 23 Vt. 394, 395.

allowed to do, express an opinion in regard to the conduct of the train, as shown by the other witnesses, and how far it was according to the rules of careful and prudent management, and what more might, or should have been done, consistently with the safety of the train, in the particular emergency.[2] But where the plaintiff, who claimed damages on account of the misconduct of a flagman at a railway crossing, had attempted to prove that he was a careless and intemperate person, it was held that the company might show that he was careful, attentive, and temperate, and that these facts might be proved by those who had seen his conduct, and need not be shown by experts.[3]

2. But a railway company, when sued for misconduct, are not bound, in the first instance, ordinarily, to show, by the testimony of experts, that they were guilty of no mismanagement. But in the case of an injury to passengers, the rule is otherwise.[4]

3. And it has been said, that one who brings an action against a railway, founded upon negligence and misconduct, is not bound, in opening his case, to show, that by the laws and practice of railway companies there was mismanagement in the particular * case. If he sees fit to trust that question to the good sense of the jury, he may.[5]

5. But it is obvious, that in cases of this kind, although the jury are ultimately to determine, upon such light as they can obtain, and will be governed a good deal by general principles of reason, based upon experience, and that the testimony of witnesses, unskilled in the particular craft, will doubtless have a considerable influence in establishing certain remote principles, by which all men must be governed, in extreme cases, nevertheless, in that numerous class of cases, in courts of justice, which have to be determined upon a nice estimate and balance of conflicting testimony, the opinion of experienced men, in the par-

[2] Illinois Central Railw. *v.* Reedy, 17 Illinois, 580, 583. *Caton*, J.: "The burden of proof is on the plaintiff, and it is for him to show, by facts and circumstances, and by those acquainted with the management of trains, who could speak understandingly on the subject, that it was practicable and easy to have avoided the collision, and that, in not doing so, those in charge of the train were guilty of that measure of carelessness, or wilful misconduct, which the law requires to establish the liability."

[3] Gahagan *v.* Boston & Lowell Railw., 1 Allen, 187.

[4] *Post*, § 176; Galena & Chicago Railw. *v.* Yarwood, 17 Illinois, 509.

[5] Quimby *v.* Vermont Central Railw., 23 Vt. 394, 395.

ticular business, must be of very controlling influence. And it is very well understood, that generally, the fact that such evidence is not produced, unless the omission is explained, will tend to raise a presumption against the party.[6]

[6] Murray *v.* Railroad Company, 10 Rich. (S. C.) 227. As we find few cases in the books bearing upon this general question, in regard to railways, we may refer to analogous subjects where the question has arisen. Nautical men may testify their opinion, whether, upon the facts proved by the plaintiff, the collision of two ships could have been avoided, by proper care on the part of defendants' servants. Fenwick *v.* Bell, 1 C. & K. 312. So, too, in regard to the proper stowage of a cargo. Price *v.* Powell, 3 Comst. 322. So a master, engineer, and builder of steamboats, may testify his opinion, upon the facts proved, as to the manner of a collision. The Clipper *v.* Logan, 18 Ohio, 375; Sills *v.* Brown, 9 C. & P. 601.

It has been held, that even experts may not be called to express an opinion, whether there was misconduct in the particular case on trial, as that is the province of the jury, but that they may express their opinion upon a precisely similar case, hypothetically stated, which seems to be a very nice distinction, and which is combated in a very sensible note to Fenwick *v.* Bell, 47 Eng. Com. Law R. 312. The opinion of Lord *Ellenborough*, in Beckwith *v.* Sydebotham, 1 Camp. 116, 117, that where there is a matter of skill or science to be decided, the jury may be assisted by the opinion of those peculiarly acquainted with it, from their professions and pursuits, seems to us more just and wise.

We have always regarded the testimony of experts, as a sort of education of the jury upon subjects in regard to which they are not presumed to be properly instructed. The distinction we make upon the subjects, where we allow the testimony of experts, and where we do not, shows this. The nearer the testimony comes to the very case in hand, the more pertinent and useful. And the finesse of keeping the very case out of sight by name, but describing it by * allegory, in asking the opinion of the experts, is scarcely equalled by the device of certain species of birds, who imagine themselves invisible to others because they are so to themselves. It is not unlike asking a witness in regard to the genuineness of handwriting, in dispute before a jury, and which is to be determined by them, and this is always allowed without question. And in all such questions, there is likely to be so much disagreement among the experts, as to leave the jury a sufficient duty to perform. But the more common practice is according to the rule in Sills *v.* Brown.

In an action against a railway company for carrying their road through plaintiff's pasture, throwing down his fences, and scattering, frightening, and injuring his cattle, it was held that an experienced grazier is competent to testify as an expert in regard to the state of cattle and to causes affecting their weight and health on a supposed state of facts. But that such person could not express an opinion upon the facts proved in the particular case, on the point to be determined by the jury. Baltimore & Ohio Railw. *v.* Thompson, 10 Md. 76.

In Webb *v.* Manchester & Leeds Railw., 4 Myl. & Cr. 116; s. c. 1 Railw. C. 576, a point involving questions of practical science being in dispute, and the testimony conflicting, it was referred to an engineer for his opinion, and his conclusion,

in regard to the facts, adopted and made the basis of the order of court. In the case of Seaver v. Boston & Maine Railw. Co., 14 Gray, 466, after several experts called by the plaintiff had testified, upon a statement of facts and circumstances of the accident, what in their opinion threw the cars from the tracks, the defendants were permitted to ask a machinist who had been connected for many years with railways, and with the running of cars and engines upon them, and who was in the cars at the time of the accident, and saw the occurrence and all the attending circumstances, what in his opinion threw the cars from the track, and it was held no ground of exception.

We had occasion, in our book on Wills, pt. 1, § 15, pp. 135–159, to examine the subject of the testimony of experts upon the question of mental soundness in all its bearings. Many of the principles there laid down, and especially the course of practice, will apply to the general bearing of this class of testimony in other cases.

* CHAPTER XXI.

RAILWAY DIRECTORS.

SECTION I.

Extent of the Authority of Railway Directors.

1. *Notice to one director, if express, sufficient.*
2. *Applications to the legislature for enlarged powers, and sale of company's works, require consent of shareholders.*
3. *Constitutional requisites must be strictly followed.*
4. *Directors, or shareholders, cannot alter the fundamental business of the company.*
5. *Inherent difficulty of defining the proper limits of railway enterprise.*
n. 9. *Opinion of Lord* Langdale, *and review of cases on this subject.*
6. *An act* ultra vires *can only be confirmed by actual and not by constructive assent.*
7. *The directors of a trading company may give bills of sale in security for debts contracted by them.*
8. *Directors cannot bind company except in conformity with charter.*
9. *Company cannot retain money obtained by fraud of directors.*
10. *But it must appear the plaintiff was misled without his own fault.*
11. *Company, by adopting act of directors, are liable to make recompense.*
12. *A prospectus and report should contain the whole truth.*
13. *Directors cannot issue shares to procure votes and control corporation.*
14. *What will amount to fraud in the reports of the company.*
15. *Directors responsible for fraudulent acts and representations.*
16. *Extent of power of directors.*

§ 135. 1. We have before stated, in general terms, the power of the directors of the company to bind them.[1] The board of directors ordinarily may do any act, in the general range of its business, which the company can do, unless restrained by the charter and by-laws.[2] Notice to one of a board of directors, in

[1] *Ante*, § 113; *Post*, § 164.

[2] Whitwell, Bond & Co. *v.* Warner, 20 Vt. 425. But the general agent of such a company, who performs the daily routine of the business of the company, cannot bind them beyond the scope of his ordinary duties. Hence the law agent of a joint-stock insurance company cannot bind the company by his false representations as to the state of its finances. Burnes *v.* Pennell, 2 H. L. Cas., Clark & F. (N. S.) 497. But where the directors of the company make such false representations as to the state of the finances of the company to enhance the price of stocks, they are liable to an action at the suit of the person deceived, or to criminal prosecution; and transfers of stock, made upon the faith of such representations, will be set aside in equity. Ib. Lord *Campbell* said, it

* the same transaction, or express notice, is, in general, notice to the company. But the fact that one of a firm is a director in a banking company, but takes no active part in the business of the bank, is no notice to such bank of the dissolution of such partnership, or the retiring of one of its partners.[3]

2. But it is said the directors of a corporation have no authority, without a vote of the shareholders, to apply to the legislature for an enlargement of the corporate powers.[4] And it was held, that the managing directors of a joint-stock company, who had power to lease the works of a company, could not, in the lease, give an option to the lessee, to purchase, or not, at a price fixed, the entire works of the company, at any time within twenty years, and that such a contract must be ratified by every member of the company to become binding upon them.[5]

3. And where the deed of a joint-stock company enables the majority to bind the company, by a resolution passed in a certain manner, these formalities must be strictly complied with, or the minority will not be bound by the act.[6]

was not necessary the representation should have been made personally to the plaintiff. See, also, Soper *v.* Buffalo & Roch. Railw., 19 Barb. 310.

But where the charter of a railway company, or the general laws of the state, require the ratification of a particular contract, by a meeting of the shareholders, held in a prescribed manner, such contract, assumed by the directors only, does not bind the company, and a court of equity will not hesitate to enjoin its performance by the company at the suit of any dissenting shareholder. Zabriskie *v.* C. C. & C. Railw., 10 Am. Railw. Times, No. 15; s. c. 23 How. (U. S.) 381.

Where a tariff of fares of freight and passengers upon a railway are established and posted up by the president of the company, and are acted upon in transacting the business of the company without objection, the consent of the corporation will be presumed. Hilliard *v.* Goold, 34 N. H. 230.

[3] Powles *v.* Page, 3 C. B. 16. Dunham *v.* Troy Union Railw., 40 N. Y. (3 Keyes) 543. But the secretary of a railway company cannot bind the company by admissions. Bell *v.* London & N. W. Railw., 15 Beav. 548. Nor can the directors bind the company by their declarations, unless connected with their acts, as part of the *res gestæ*. Soper *v.* Buffalo & Roch. Railw., 19 Barb. 310. Notice of process to two directors of a canal company is good notice to the company, and will bind it, although never communicated to the board. Boyd *v.* Chesapeake & Ohio Canal Co., 17 Md. 195.

[4] Marlborough Manufacturing Co. *v.* Smith, 2 Conn. 579.

[5] Clay *v.* Rufford, 5 De G. & S. 768; s. c. 19 Eng. L. & Eq. 350.

[6] *Ex parte* Johnson, 31 Eng. L. & Eq. 430. One railway company cannot, without the permission of parliament, purchase stock in other railway companies. Salomons *v.* Laing, 12 Beav. 339, 377; s. c. 6 Railw. C. 289.

In the case of Ernest *v.* Nichols, 6 Ho. Lds. 401; s. c. 30 Law Times, 45,

* 4. So, too, where the directors, or even a majority of the shareholders, assume to enter into a contract, beyond the legitimate scope of the objects and purpose of the incorporation, the contract is not binding upon the company, and any shareholder may restrain such parties, by injunction out of Chancery, from applying the funds of the company to such purpose, however beneficial it may promise to become to the interests of the company. This is a subject of vast concern to the public, considering the large amount of capital invested in railways, and the uncontrollable disposition which seems almost everywhere to exist, in the utmost good faith, no doubt, to improve the business of such companies, by extending the lines of communication, and even by the virtual purchase of other extensive works, more or less nearly connected, either in fact, or in apprehension, with the proper business of the company. In a late English case (1861), before the Master of the Rolls, it was held, that where a railway company were required by their charter to keep up a ferry accommodation between certain points, and for that purpose were obliged to have a much larger number of steamboats on certain days, than upon ordinary occasions, they were not acting *ultra vires* in employing the steamboats for excursions to a point beyond the ferry and back, when not required for the purposes of the ferry.[7] The learned judge thus defined the powers of railway companies. After saying that if every shareholder but one assented, the company could not carry on a trade perfectly distinct from that for * which they were constituted; "it is impossible," said the Master of the Rolls, "for them to set up a brewery, — they cannot carry on a trade such as managing a packet company." — "And if this were the case of a railway company embarking in the formation of a packet company, for the

decided in the House of Lords, in August, 1857, the subject of the power of the directors of a joint-stock company to bind the company, is discussed very much at length, and the conclusion reached, as in some former cases (Ridley *v.* Plymouth, &c. Co., 2 Exch. 711, and some others), that the directors could execute no binding contract on behalf of the company, except in strict conformity to the deed of settlement by which the company was constituted; and that it was no excuse for the other contracting party to say he was ignorant of the provisions of that deed. It was his folly to contract with a director or directors, under such ignorance, and he must be content to look to those with whom he contracted.

[7] Forrest *v.* Manchester S. & L. Railw., 30 Beav. 40; 7 Jur. N. S. 749; s. c. affirmed in Court of Chancery Appeal, id. 887, but upon the ground that the suit was illusory, and not in fact the suit of the plaintiff, but of a rival company.

purpose of carrying passengers between two places, or even for the mere purpose of making excursions, I should be of opinion it was not justified. But I am of opinion, that no capital of the company is embarked expressly and solely for the purpose of making excursion trips."

And in the Supreme Court of the United States[8] it has been decided, that the separate railway corporations had no right to consolidate their roads into one, and put them under one management, which seems to us a very questionable proposition, to say the least, since such a combination of management is obviously the only thing which will be adequate to produce the kind and degree of concentration of effort and management in the carrying forward of railway enterprises in this country, which will make them either remunerative or useful to the public. And as there is no national supervision of these vast interests, we must find it either in the discretion of railway directors and managers, or in some new constitutional provisions in the national government, adequate to the exigency. But the proposition that such companies cannot establish a steamboat line in connection with their business, and that their joint notes given for the purchase of boats cannot be enforced, is unquestionable.[8]

5. There can be no doubt the courts of equity hold some rightful control over these speculative schemes and enterprises. But they lie so deeply entrenched, in the general spirit of the age, and receive so much countenance and sympathy from kindred enterprises, in almost all the departments of business, that it often becomes extremely difficult, if not impossible, to fix any well-defined and practicable limits to the operations of railway companies, that shall not allow them, on the one hand, the power of indefinite extension, and overwhelming absorption of kindred enterprises, or which will not be regarded, on the other, as a denial of fair liberty and free scope to carry out the just objects of * their creation. We have thought that we could not afford a more just and unexceptionable commentary upon this difficult and important subject, than in the language of one of the most sober, discreet, and learned of the English equity judges, Lord *Langdale*, M. R.[9]

[8] Pearce *v.* M. & I. & P. & I. Railw., 21 How. 441. But see Rut. & Bur. Railw. *v.* Proctor, 29 Vt. 93, 95.

[9] Colman *v.* The Eastern Counties Railw. Co., 10 Beav. 1; s. c. 4 Railw. C. 513. The managing directors of a railway company, with the view of increasing the

*6. In a recent English case,[10] it was declared by the Court of Chancery that the directors of the company were restricted, as to traffic on their line, entered into a contract with a steam-packet company, that they would guarantee the proprietors of the steam-packet company a minimum dividend of £5 per cent on their paid-up capital until the company should be dissolved, and that, upon a dissolution, the whole paid-up capital should be returned to the shareholders in exchange for a transfer of the assets and properties of the steam-packet company.

One of the shareholders filed a bill on behalf of himself and all other shareholders who should contribute, except the directors, against the company and the directors, and obtained an injunction, *ex parte*, to restrain the completion of the contract: —

Held, on motion to dissolve the injunction, that an objection for want of parties to a suit so framed was not sustainable. That directors have no right to enter into or to pledge the funds of the company in support of any project not pointed out by their act, although such project may tend to increase the traffic upon the railway, and may be assented to by the majority of the shareholders, and the object of such project may not be against public policy. That acquiescence by shareholders in a project for however long a period, affords no presumption that such project is legal.

That an objection stated by affidavit and remaining unanswered, that the plaintiff was proceeding at the instigation and request of a rival company, did not deprive him of his right to an injunction, and the motion to dissolve the injunction was refused, with costs.

The learned judge said: "To look upon a railway company in the light of a common partnership, and as subject to no greater vigilance than common partnerships may be, would, I think, be greatly to mistake the functions which they perform, and the powers of interference which they exercise with the public and private rights of all individuals in this realm. We are to look upon those powers as given to them in consideration of a benefit, which, notwithstanding all other sacrifices, is on the whole hoped to be obtained by the public; but the public interest being to protect the private rights of all individuals, and to save them from liabilities beyond those which the powers given by the several acts necessarily occasion, those private rights must always be carefully looked to.

"I am clearly of opinion, that the powers given by an act of parliament like that which is now in question, extend no further than expressly stated in the act, except where they are necessarily and properly acquired for the purposes which the act has sanctioned. How far those powers may extend which are necessarily or conveniently to be exercised for the purposes intended by the act, will very often be a subject of great difficulty. We cannot always ascertain what they are; ample powers are given for the purpose of constructing the railway; ample powers are given for the purpose of maintaining the railway; ample powers are

[10] Stanhope's case, Law Rep. 1 Ch. App. 161; s. c. 12 Jur. N. S. 79, reversing the decision of the Master of the Rolls in s. c. 11 Jur. N. S. 872; Lord Belhaven's case, 3 De G., J. & S. 41; s. c. 11 Jur. N. S. 572, is here denied, and Spackman's case, id. 207, approved.

* the extent of their authority to bind the members, by the terms of the deed of settlement or charter, or fundamental constitution

also given for the purpose of doing all those things which are required for the proper use of the railway; but I apprehend that it has nowhere been stated that railway companies have power to enter into transactions of all sorts and to any extent. Indeed it is admitted, and very properly admitted, that they have not a right to enter into new trades and new businesses not pointed out by the act; but it is contended that they have a right to pledge the funds of the company, without any limit, for the encouragement of other transactions, however various and extensive, provided only they profess that the object of the liability occasioned to their own shareholders by such encouragement is to increase the traffic upon the railway, and thereby the profit to the shareholders. Surely that has nowhere been stated; there is no authority for any thing of that kind. What has been stated is, that these things to a small extent have frequently been done since the establishment of railways. Be it so; but unless what has been done can be proved to be in conformity with the powers given by the special acts of parliament, they do not, in my opinion, furnish any authority whatever. To suppose that the acquiescence of railway shareholders, for the last fifteen years, in any transaction conducted by a railway company, is any evidence whatever of their having a lawful right to enter into it, is, I think, wholly to forget the frenzy in which the country has been for the last fifteen or sixteen years, or thereabout. There is no project, however wild, which has not been encouraged by some one or more of these companies. There is no project, however wild, which the shareholders, or the persons liable in respect of those companies, have not acquiesced in, from one cause or another, either from cupidity and the hope of gaining extraordinary profits beyond their first anticipations, or from terror of entering into a contest with persons so powerful. In the absence of legal decisions, I look upon the acquiescence of shareholders in these transactions as affording no ground whatever for the presumption that they may be in themselves legal."

The case was afterwards mentioned to the court, on behalf of the defendants, when his lordship stated, that the injunction was only meant to refer to the guaranty proposed to be given, and the case made by the bill; but was not intended to affect any arrangement which the directors might enter into with any steam-packet company respecting the rates and tolls to be charged on the railway.

In Salomons *v.* Laing, the same learned judge said (12 Beav. 339, 377; s. c. 6 Railw. C. 301): "A railway company, incorporated by act of parliament, is bound to apply all the moneys and property of the company for the purposes directed and provided for by the act of parliament, and not for any other purpose whatever. When the expenses are paid, and the public purposes directed and provided for by the act of parliament, — which, in truth, was the motive and inducement for granting the extraordinary powers given by all these acts of parliament, — when these purposes are fully performed, any surplus which may remain after setting apart the sum to answer contingencies, may, if not applied in enlarging, improving, or repairing the works, be divided among the shareholders. The dividends, which belong to the shareholders, and are divisible among them, may be

* of the company; and that any arrangement *ultra vires* of the directors, by which, in consideration of a money payment by a

applied by them severally as their own property, but the company itself, or the directors, or any number of the shareholders assembled at a meeting or otherwise, have no right to dispose of the shares of the general dividend, which belong to the particular shareholder, in any manner contrary to the will, or without the consent or authority of that particular shareholder. Any application of or dealing with the capital, or any part of the capital, or any funds or money of the company, which may come under the control or management of the directors or governing body of the company, in any manner not distinctly authorized by the act of parliament, is in my opinion an illegal application or dealing; and without meaning to say that it is or could be practicable for individual shareholders to interfere on every occasion, however small, of alleged misapplication of particular sums, I am of opinion that if, as in this case, the directors are proceeding upon an illegal principle, and for purposes not authorized by the act of parliament, to involve the company, or the shareholders of the company, or any of them, in liabilities to which the shareholders, or any of the shareholders, never consented, relief may and ought to be given in this court; and that the mere circumstance of the Brighton company having obtained, as it is not disputed they did lawfully obtain, a certain number of shares in the Portsmouth company, is not a reason why the company should be enabled or permitted to purchase more shares, and thereby increase the risks to which parliament permitted the shareholders to be exposed by the shares which may have become vested in them by the Amalgamation Act, or any reason why the directors should be permitted to divert so much of the funds of the company as they think proper, or indeed any portion of those funds, for the support of another company having distinct objects, and meant to be applied to purposes different from those in consideration of which alone those powers were granted to them." *Ante*, § 56. Where the statute prohibits the directors of a company from being concerned, directly or indirectly, in building its road, a contract between the company and two of its directors, for that purpose, is absolutely void. Barton *v.* Port Jackson, &c., Plank Road Co., 17 Barb. 397.

The deed of a joint-stock banking company contained provisions, that the directors should be not fewer than five or more than seven; that three, or more, should constitute a board, and be competent to transact all ordinary business, and that the directors should have power to compromise debts. Agents might be appointed by the directors to accept or draw bills, without reference to the directors. The number of directors became reduced to four, and three executed a deed, compromising a large debt due the company, taking from the debt or a mining concern, and covenanting to indemnify him against certain bills of exchange.

In an action on this covenant, held that it did not bind the company, not being ordinary business, and no number of directors less than five being competent to transact it. And query, whether a board of three directors could transact even ordinary business, unless when the board consisted of five only. Kirk *v.* Bell, 16 Q. B. 290; s. c. 12 Eng. L. & Eq. 385.

But where a series of contracts have been openly made by the officers of a corporation, within the knowledge of the corporators, who have acquiesced in

shareholder desiring to retire, they declared his shares forfeited, is not, nor can any lapse of time render it, binding on the general body of the shareholders, unless it is shown, not only that the latter might have been, but also that they actually were, fully aware of the transaction. This seems to us to be placing the question of ratification of an act *ultra vires* upon its only safe and salutary basis. There should always be either express or * presumptive evidence of actual and unconstrained acquiescence entirely satisfactory to the court, in order to bind a principal by any act of his agent, beyond the proper limits of the authority delegated to him. This is a principle of universal acceptance and application in the law of agency.

7. One of the latest English cases[11] declares, that the power of the directors to give a bill of sale, as security for debts, is incident to all trading corporations, although it be not expressly conferred by the articles of association, or the constitution of the company. Mr. Ch. Justice *Erle* said, "The fact that the company carries on a trade is a sufficient answer to the first objection. Every trading company must have the power of giving security for the debts which it contracts."

and derived benefit from them, the contracts are binding upon the corporation, although not expressly authorized in its charter. And if it be a municipal corporation it is bound to pay whatever is due, by taxes, if it has no other means. Alleghany City *v.* McClurkan, 14 Penn. St. 81.

So also where, by consent of the board of directors, a general agent was employed in making contracts for the purchase of the right of way, and were in the habit of agreeing upon the price, by submission to arbitrators, and the awards had been paid in such cases by the company's financial officers, under a general resolution to pay the amount these agents directed, it was held that such agent, and another agent employed to assist in the same service, had power to submit the question of price, in such cases, to arbitrators, and their award was binding upon the company. And it is not requisite that the contract of submission should be under the seal of the company in such case, nor will it be avoided by the agent attaching a seal to its execution, by himself. Wood *v.* The Auburn & Roch. Railw., 4 Seld. 160. But the facts that the directors have executed some ten or twelve similar contracts, and that such contracts had been published in the annual reports, and distributed to the stockholders without objection, although evidence of acquiescence on their part is not evidence of the enlargement of the charter powers of the company, so as to bind the company, as between them and the primary parties entering into the contract with them. *McLean*, J., in Zabriskie *v.* C. C & C. Railw., 10 Am. Railway Times, No. 15. *Ante*, § 56.

[11] Shears *v.* Jacobs, Law Rep. 1 C. P. 513; s. c. 12 Jur. N. S. 785.

8. Where power is given in the charter of a corporation or in the deed of settlement, for the directors to confirm any contract made by provisional directors, or any persons acting as directors of the company in its formation, the directors alone have power to confirm such contracts by deed.[12] But the directors have no power to make any contract under seal binding upon the corporation, if the formalities prescribed by its constitution have not been complied with.[13]

9. The directors being but the servants or trustees of the company, it cannot, as before stated, retain money obtained from one by the fraudulent sale by the directors of the company property, unless the purchaser has by his own misconduct precluded himself from redress.[14] It was here held, that directors are not justified in using reports to induce a sale of property, which were true at the time they were made, if not true at the time they are so used.

10. But the last case was reversed in the House of Lords, and the decree of Vice-Chancellor *Stuart*[15] affirmed with costs, — his * honor not having awarded costs, — on the same grounds mainly which the Vice-Chancellor had assumed: that as no specific representations had been made by the company, and no specific inquiry by the plaintiff, his case failed on that point; and inasmuch as he completed the purchase after being informed of the facts as to defect of title, he could not complain of any previous misrepresentation.[16]

11. But it was declared in the House of Lords,[16] that if reports are made to the stockholders of a company by their directors, and adopted by them at one of their appointed meetings, and afterwards circulated in their published reports, they are binding upon the company. And if erroneous statements in such reports can be clearly shown to have been the proximate and immediate cause

[12] Wilkins *v.* Roebuck, 4 Drew. 281.

[13] Hambro *v.* Hull & London Fire Ins. Co., 3 H. & N. 789. See, also, Eastwood *v.* Bain, id. 738; Bryon *v.* Met. Saloon Omnibus Co., 3 De G. & J. 123; Baker *ex parte*, 4 Drew. & Sm. 55; s. c. 6 Jur. N. S. 240.

[14] Conybeare *v.* New B. & Canada Railw. Co., 1 De G. F. & J. 578; s. c. 6 Jur. N. S. 518; *ante*, § 41, pl. 2.

[15] 6 Jur. N. S. 164.

[16] 9 Ho. Lds. 711; s. c. 8 Jur. N. S. 575. See here Lord *Chelmsford's* strictures upon the loose mode of stating fraud. See Royal British Bank *in re* Mixer's case, 4 De G. & J. 575. See, also, Cullen *v.* Thompson, 4 McQu. 424, in the House of Lords, where all the officers of a company participating in a fraudulent representation are held liable, although but part signed the report. 9 Jur. N. S. 85.

of shares having been bought from the company by any individuals, a court of equity will not permit the company to retain the benefit of the contract.

12. But when a company issues a prospectus, a person contracting to take shares on the faith of it, has the right to claim, not only that he shall not be misled by any statements actually false, but that he shall be correctly informed by it of all the facts, the knowledge of which might reasonably have deterred him from entering into the contract.[17] But the false representation of an officer is not that of the company, even if made at the office.[18] But to become the act of the company it must be contained in a report of the company adopted at a regular meeting.[18]

13. The directors of a railway company are not justified in acting on an old resolution authorizing the issue of shares, after the purpose for which the issue was authorized has ceased to be available;[19] nor in issuing shares, supposing them to possess the power, for the express purpose of procuring votes to influence a * coming general meeting.[19] An injunction will be issued to restrain such action of the directors, it not being a question of the internal management of the company, but an attempt to prevent such management being legitimately carried on.

14. In a trial[20] before *Martin*, B., where it appeared that the profits of the company had been studiously misrepresented by the manner of keeping the books, and a large apparent profit on the year preceding the report presented, by not bringing all the cost of material forward into the account of the year in which it was consumed, it was held that any error in the mere mode of keeping the accounts would not be evidence of fraudulent representation, but the falsification of facts and figures was so, as against any of the officers of the company who were aware of the issue of the prospectus, and had aided or connived at the mode in which it was made up.

[17] N. B. & C. Railw. & Land Co. *v.* Muggeridge, 1 Drew. & Sm. 363; s. c. 7 Jur. N. S. 132. [18] Royal British Bank *in re*, 3 L. T. N. S. 843.

[19] Fraser *v.* Whalley, 2 H. & M. 10.

[20] Bale *v.* Clelland, 4 F. & F. 117; Kisch *v.* Venezuela Railw. Co., 3 De G. J. & S. 122; s. c. 11 Jur. N. S. 646. The question of fraud by means of inducing a shareholder to buy his shares upon a misapprehension of the true condition of the company, is one of fact, to be judged of by the jury upon a consideration of all the facts, and is mainly one of intent. Cleveland Iron Co. *v.* Stephenson, 2 F. & F. 428.

15. It was also held in the last case, that as the statute required the dividend to be declared by the directors, though with the sanction of the shareholders, if to the knowledge of the directors and officers of the company such dividend so declared by the directors was paid otherwise than out of profits, they are responsible for it, and for the circulation of any declaration of it, acted upon by innocent shareholders.

16. Directors may ratify any contract made on their behalf which they have power to make themselves.[21] And where the constitution of the corporation gives to the directors, with the sanction of an extraordinary meeting of the shareholders, by a majority of two-thirds, power to do any act which might be done with the consent of all the shareholders, the directors may lease the entire business of the company in that mode.[22]

*SECTION II.

When Directors become Personally Liable.

1. *Not liable personally, for any lawful act done as directors.*
2. *But are liable upon express undertaking to be personally holden.*
3. *Are liable personally, if they assume to go beyond their powers.*
4. *Extent of powers affected often by usage and course of business.*
5. *But if contract is beyond the power of company, or not in usual form, directors personally liable.*
6. *Statement of case illustrating last point.*

§ 136. 1. The English statute enacts, what was the common law indeed, that no director should become personally liable by reason of any contract made, or any act done, on behalf of the company, within the scope of the authority conferred by the statutes of the legislature and the company, or, as it is expressed, "by reason of any lawful act done by them." Corporations are not, in general, responsible for the unlawful or unauthorized acts of their officers.[1] But the corporation may be held responsible

[21] Wilson *v.* West Hartlepool Harbor & Railway Co., 34 Beav. 187; s. c. 2 De G., J. & S. 475; 11 Jur. N. S. 124.

[22] Featherstonhaugh *v.* Porcelain Co., Law Rep. 1 Eq. 318; s. c. 11 Jur. N. S. 994.

[1] Mitchell *v.* Rockland, 41 Me. 363. Commissioners to accept subscriptions for a corporation, who are by the charter required to give notice of the time and place of opening the books, may give such notice by a majority of their number. Penobscot Railw. *v.* White, 41 Me. 512.

for the publication of a libel, by its agents and servants in the due course of the business of the company, as where the company were the owners, and by their agents managed the electric telegraph along their line, and sent a despatch to the effect that the plaintiff's bank "had stopped payment," which proved not to be the fact. This despatch was sent for their own protection, in order to insure their agents against taking bills on such bank. But the message went beyond what was necessary for that purpose, and thus made the company responsible as for a voluntary publication. It would have answered all purposes to have directed their agents not to take the bills without assigning any reason.[2] So, too, in Philadelphia, Wilmington, and Baltimore Railway *v.* Quigley,[3] it was decided, *that a railway may become liable for publishing and circulating among its members a statement of the report of the directors, and the evidence on which it is based, although the report itself, when made to the stockholders in good faith, and for their information upon matters affecting their interest, would be regarded as a privileged communication.

2. But directors have been held liable, in many cases, personally, where the debt was that of the company, and where it so appeared upon the face of the contract. As upon a promissory note, which was expressed, "jointly and severally we promise to pay," "value received for and on behalf of the Wesleyan Newspaper Association. S. & W., Directors."[4] But it is ordinarily a question of intention, whether the directors are personally liable if they act within the powers conferred by the company.[5]

[2] Whitfield *v.* South Eastern Railw., 1 Ellis, B. & Ellis, 115; s. c. 4 Jur. N. S. 688.

[3] 21 How. (U. S.) 202.

[4] Healey *v.* Story, 3 Exch. 3. *Alderson*, B., said the terms, jointly and severally, imported a personal undertaking, inasmuch as they could properly have no application to the company. But see Roberts *v.* Button, 14 Vt. 195, and the cases cited, where the subject is examined more at length than space will here allow. Dewers *v.* Pike, Murphy & Hurl. 131. But in the case of Lindus *v.* Melrose, 3 H. & N. 177, before the Court of Exchequer Chamber (February, 1858), it was held that a promissory note expressed, "For value received we jointly promise to pay," and signed by three of the directors of a joint-stock company, and countersigned by the secretary, and expressed to have been on account of stock of the company, did not bind the signers personally, but imported, on its face, a contract on behalf of the company.

[5] Tyrrell *v.* Woolley, 1 Man. & Gr. 809; Burrell *v.* Jones, 3 B. & Ald. 47. In a somewhat recent case, Davidson *v.* Tulloch, 3 McQu. 783; s. c. 6 Jur. N. S. 543,

3. But where the directors of a railway assume to do an act exceeding their power, as accepting bills of exchange, which * does not come within the ordinary business of railways, they will be personally liable.[6]

4. But the business of railways is so much extended in this country, as borrowers of money, carriers, and contractors, in various ways, that it is not easy to determine, except from each particular case, how far the directors may draw or indorse bills, or, indeed, what particular acts they may or may not do.

In a recent case the question of the extent of corporate powers is considerably discussed,[7] and it was held that the exercise of such powers must be conferred by their charters, but that it is the duty of courts to give the charters such a construction as to effect the leading purposes of the grant where that can be done consistently with the grant; and that business corporations have the power to make such contracts and in such forms as are requisite to accomplish the purposes of the grant, having regard to any special limitations contained in such grants, and that promissory notes or bills made or received by such corporations are *prima facie* valid, but that it is competent to show that the transactions out of which they arise are not within the powers of the corporation and thus defeat their operation. In another case[8] it

before the House of Lords, it was determined, that an action may be maintained against the directors of a company in respect of any transactions which the body of the shareholders could not sanction, but in respect of any transactions which they might sanction, although the directors might not have been justified in what they were doing, there can be no right of action. And directors are not liable for defect of authority to make a conveyance of property, the sale of which they had negotiated, but the actual sale being broken off by an objection of the vendee's solicitor, that the directors had not the requisite authority. Wilson *v.* Miers, 10 C. B. N. S. 348. See also Nowell *v.* Andover & R. Railw. Co., 3 Gif. 112; s. c. 7 Jur. N. S. 839. The company are not liable to make good any loss sustained through the false representations of their officers, although incidentally benefited thereby, unless they entered into the scheme for the purpose of such gain. Barry *v.* Croskey, 2 Johns. & H. 1.

[6] Owen & Van Uster, 10 C. B. 318; Roberts *v.* Button, 14 Vt. 195. They are in all cases responsible for the consequences of omission of duty, to the same extent as other trustees. Vanguard *v.* Marshall, Law Rep. 6 Eq. 112.

[7] Straus *v.* Eagle Insurance Co., 5 Ohio, N. S. 59.

[8] Hamilton *v.* Newcastle & Danville Railw., 9 Ind. 359; M. & M. Railw. *v.* Hodge, id. 163. In Massachusetts it was held that the only remedy under the late statute for a corporate debt, against an officer of the corporation, was in equity. Bond *v.* Morse, 9 Allen, 471.

was held, that *prima facie* a railway company had power to execute promissory notes for its legal indebtedness, and that it could do this only by its agents; that no written or sealed authority to the agent was requisite; nor that the contract should be under seal unless specially so required by the charter; that it was not important to prove the consideration, as the law will make the same implications in favor of the note of a corporation as in other cases.

5. By the construction of the English statutes, if a trustee or director of any public work made a contract for any matter not provided for in the special acts of the company or by the general statutes, applicable to the subject, or in a different form from * that so provided, he is taken to have intended to become personally responsible.[9]

6. Thus where a check on the company's bankers, for payment to a third party of the company's money, was drawn by three directors in the name of the company, but the document was signed by them in their own names, and countersigned by the secretary of the company, adding to his name "Secretary," and a stamp bearing the name of the company was affixed, but the three directors did not appear, on the face of the check, to be directors or to sign as such, it was held that it did not purport to be the check of the company, and was not binding on them.[10]

*SECTION III.

Compensation for Service of Directors.

1. *In England, directors of railways are entitled to compensation for services.*
2. *But the company may grant an annuity to a disabled officer.*
3. *In this country are entitled to compensation, in conformity to the order of the board.*
4. *Some American cases follow the English rule.*
5. *Official bonds strictly limited to term for which executed.*

§ 137. 1. In England, in the absence of contract or usage, from which one might be inferred, directors of railways and other corpo-

[9] Parrott *v.* Eyre, 10 Bing. 283; Wilson *v.* Goodman, 4 Hare, 54, 62; Higgins *v.* Livingstone, 4 Dow, P. C. 341.

[10] Serrell *v.* Derbyshire, Staffordshire & Wor. J. Railw., 19 Law J. 371; s. c. 9 C. B. 811. It would seem, that without much latitude of construction this case might have been otherwise ruled, and been more satisfactory.

rations are not entitled to compensation for services as directors. This is regarded as an office, and so an honorary service. And a resolution of the board of directors that compensation should be allowed for certain specified services, not being under seal, so as to amount to a by-law, will not entitle such director to sue the company for compensation for such service.[1]

*2. But it would seem, that where the company voted an annuity to a disabled officer, in the nature of a retiring pension, and the directors, by deed, in the name of the company, made a formal grant in conformity with the vote, that the contract is binding upon the company, although no power is expressly given by their charter to grant annuities.[2]

3. Railway directors in this country are generally allowed compensation, but cannot recover it beyond the rate fixed by the general resolutions of the board.[3] And where a director acts as a member of the executive committee of the board, or in selling the bonds of the company, his service is to be regarded as in his capacity of director, and the amount of compensation is limited to that allowed directors.[3]

[1] Dunston *v.* The Imp. Gas L. Co., 3 B. & Ad. 125. But see Hall *v.* The Vt. & Mass. R., 28 Vt. 401. The rule of law in that respect is different in this country, a resolution of the board of directors having the same force, whether under seal or not. *Post*, § 164, *ante*, § 130. See also Gaskell *v.* Chambers, 5 Jur. N. S. 52; s. c. 26 Beav. 360. In this case the directors transferred the business of the company to another company, and received from the latter a large sum for compensation, and withheld the particulars from their members. It was held they were trustees of the money for the members, and the directors were ordered to pay it into court. But the directors are not the servants of the individual shareholders, and therefore such an one who feels aggrieved must seek redress through the company for any misconduct of the directors. Orr *v.* Glasgow, A. & M. J. R. Co., 3 McQu. Ho. Lds. 799; s. c. 6 Jur. N. S. 877.

[2] Clarke *v.* Imp. G. L. Co., 4 B. & Ad. 315.

[3] Hodges *v.* Rut. & Burlington Railw., 29 Vt. 220. But where a director performs services for the company, disconnected with his office, he is not restricted, in regard to compensation by any resolution of the board in regard to the compensation to be made the directors. Henry *v.* Rut. & Bur. Railw., 27 Vt. 485. In another case it was held, that railway directors, as a general rule, are not entitled to compensation for their personal services, unless rendered under some express contract. Hall *v.* Vermont & Mass. Railw., 28 Vt. 401. But an allowance to a director for extra services made by a board of which the claimant was one, and his presence indispensable to constitute a quorum, is void, and any stockholder may on behalf of himself and others, enjoin the treasurer from payment. Butts *v.* Wood, 37 N. Y. 317.

4. Some of the American states adopt the English rule that railway directors cannot recover compensation for services rendered in obtaining subscriptions to the capital stock of the company, before its organization; or for any other services, unless they are most unquestionably beyond the range of their official duties.[4] And it is here determined that it would make no difference that the services were rendered under an expectation and an understanding among those engaged in the enterprise that the services should be compensated by the company after its organization. And from the technical embarrassment of * holding the company bound by any such arrangements before its existence, the policy of the law is wholly opposed to them.[4] We think this by far the most salutary rule upon the subject.

5. It is scarcely necessary to state that official bonds for faithful administration by officers of corporations are to be limited strictly to the term for which such officer is elected. And if the office is annual, and the officer continued from year to year, without the renewal of the bond, and the officer's annual account is passed from year to year, until finally a defect occur at a remote period from that covered by the bond, there is no indemnity to be obtained under the bond.[5]

SECTION IV.

Records of the Proceedings of Directors.

1. *English statutes require minutes of proceedings of directors and make it evidence.*
2. *Presumptions in favor of their containing all that passed.*
3. *Company will ratify unauthorized act of directors by acquiescence.*

§ 138. 1. The English general statutes require the directors to keep minutes of all appointments, contracts, orders, and proceedings of the directors and committees, in books kept for that purpose, and these, duly made, are receivable as evidence, without further authentication. But this is held not to exclude other evidence of such transactions.[1]

[4] N. Y. & N. H. Railw. Co. *v.* Ketchum, 27 Conn. 170; *post*, § 140.

[5] M. & M. Savings Co. *v.* O. F. Hall Ass., 48 Penn. St. 446.

[1] Inglis *v.* The Great Northern Railw., 1 McQu. Ho. Lds. 112; s. c. 16 Eng. L. & Eq. 55. Lord *St. Leonards* said, in the House of Lords: "But independently of the evidence furnished by the books, the due appointment was proved by a

2. As against the company and the members present at a particular meeting, the minutes of the directors will be held *prima facie* correct.[2] And where the proceedings of the minutes of the meeting are imperfect, it will be presumed that every thing was brought before the meeting which it was *requisite to bring before them to have the action of the company valid.[3]

3. The legality of the proceedings of directors in purchasing shares of the company for the company, which required the sanction of a general meeting, will be presumed either from lapse of time and no dissent on the part of the shareholders, or from the proceedings of the general meeting at which the matter would naturally have been acted upon not being forthcoming, as it was the duty of the company to keep regular minutes of such meeting.[3] And it was also here held that the company, by transferring such shares, thereby confirmed the validity of the transfer to them.[3] So also by paying an annuity, the price of such shares.[3]

SECTION V.

Authority of Directors to borrow Money, and buy Goods.

1. *Authority of directors to bind company, express or implied.*
2. *General agent will bind company within scope of his duties. Directors presumed to assent to his contracts.*
3. *Contracts under seal of company* primâ facie *bind them.*
4. *Strangers must take notice of general want of authority in directors, but not of mere informalities.*
5. *Cannot subscribe for stock of other companies.*
6. *May borrow money if requisite.*
7. *How far directors may bind company by accepting land in payment of subscription.*

§ 139. 1. Joint-stock companies, under many of the English statutes,[1] are held bound by contracts made by a competent board of directors, though not under seal, and not made in strict compliance with the acts.[2] But those who seek to bind

witness, and his evidence was admissible evidence, for the act confers a privilege, but does not exclude other evidence of the fact. Miles *v.* Bough, 3 Q. B. 845.

[2] *Ex parte* Stark, 10 Jur. N. S. 790.

[3] *Ex parte* Lane, 1 De G. J. & Sm. 504, s. c. 10 Jur. N. S. 25.

[1] 7 & 8 Vict. ch. 110.

[2] Ridley *v.* Plymouth Banking Co., 2 Exch. 711. Where one has the actual charge and management of the business of a corporation, with the knowledge of the directors, the company will be bound by his contracts, made on their behalf, within the apparent scope of the business thus intrusted to him. Goodwin *v.*

*such companies, on contracts made with the directors, must show their authority to bind the company, either by the terms of the deed of settlement, or that the body of the shareholders authorized these persons to act on their behalf. A ratification by a competent board of directors will bind the company.[2]

2. The general rule upon this subject, in regard to goods and money which is obtained by agents, ostensibly clothed with competent authority, and which actually goes to the use of the company, seems to be that the company is holden. Thus where a joint-stock manufacturing company, having a board of directors, with authority to appoint officers and delegate their authority, purchased goods through the general manager of the company, or his deputy, or the secretary, all of whom were duly appointed, and when the goods were delivered on the company's premises, and used for their purposes, they were held liable, on the ground that the manager had authority to give such orders, in the absence of any express provision to the contrary. And it was held that, as to the other, the directors must be taken to have known that the goods had been furnished and used, and that, therefore, the company was liable to pay for them.[3]

3. A contract under the seal of the company is *prima facie* binding upon them. In such case it is not enough, in order to defeat a recovery upon the contract, to show an excess of authority on the part of the directors, who made the contract.[4] The

Union Screw Co., 34 N. H. 378; Chicago, Burlington, & Quincy Railw. *v.* Coleman, 18, Illinois 297. In this case it is held, the admission of the president of the company in regard to the authority and acts of a sub-agent will bind the company.

[3] Smith *v.* Hull Glass Co., 11 C. B. 897. And where the general agent of a manufacturing company directed the clerk to issue a promissory note in the name of the company, and it was shown that the note was in the form customarily used by the company, in other similar cases, and which they had always recognized, it was held to be sufficient proof of the execution of the note by the company to go to the jury, and to warrant them in finding that the company had adopted, by usage, the signature of their agent as their own, and intended to be bound by it. Mead *v.* Keeler, 24 Barb. 20. Such company may borrow money for its legitimate business, and bind itself by a written obligation for its repayment. Ib. See also Curtis *v.* Leavitt, 15 New York, 9, where this subject is discussed.

[4] Royal British Bank *v.* Turquand, 5 El. & Bl. 248; s. c. 32 Eng. L. & Eq. 273. Lord Ch. J. *Campbell* said, in giving judgment: "A good plea must allege facts to establish illegality, as was done in Collins *v.* Blantern, 2 Willes, 347, and Paxton *v.* Popham, 9 East, 408. A mere excess of authority by the directors, we think of

* defence must establish such an excess of authority as was known to the other party, or such as may be presumed to have been so known, and thus virtually establish *mala fides*, both on the part of the directors and the other contracting party.[4]

4. The case of Royal British Bank *v.* Turquand, just referred to, was affirmed in the Exchequer Chamber,[5] in which a somewhat important distinction seems to be made between a general want of authority in the directors to do the act in question in any case, and a mere want of authority in the particular instance, for want of the requisite formalities on the part of the company, they being bound in the latter and not in the former case. *Jervis*, Ch. J., in giving judgment said, "Parties dealing with these joint-stock companies, through the directors, are bound to read the deed or statute limiting the directors' authority, but they are not bound to do more. The plaintiffs, therefore, assuming them to have read this deed, would have found,

itself would not amount to a defence. The bond being under the seal of the company, the gist of the defence must be illegality. If the directors had exceeded their authority, to the prejudice of the shareholders, by executing the bond, and this had been known to the obligees, illegality, we think, would have been shown. The obligors in executing, and the obligees in accepting the bond, might be considered as combining together to injure the shareholders. The two parties would have been in *pari delicto*, and the action could not have been maintained. In such circumstances *potior est conditio defendentis*. But without the *scienter* and without prejudice to the shareholders, or any others whatsoever, illegality is not established against the obligees. If no illegality is shown as against the party with whom the company contract under the seal of the company, excess of authority is a matter only between the directors and the shareholders." And again, "The plaintiffs have *bona fide* advanced their money for the use of the company, giving credit to the representations of the directors that they had authority to execute the bond, and the money which they advanced, and which they now seek to recover, must be taken to have been applied in the business of the company, and for the benefit of the shareholders." "The case of Hill *v.* Manchester Waterworks Co., 2 B. & Ad. 544, is an instance of such a bond being upheld, the pleas not disclosing any fraud or injury done to the shareholders of the company, and the case of Horton *v.* Westminster Improvement Commiss., 7 Exch. 911; s. c. 14 Eng. L. & Eq. 378, was decided on the same principle." Agar *v.* Athenæum Life Assurance Co., 3 C. B. N. S. 725; s. c. 30 Law Times, 302, is decided on the authority of R. British Bank *v.* Turquand, *infra*, n. 5. A release purporting to be under the corporate seal, and signed by the president of the company, and exhibited by them in court, as their act, would operate as an estoppel upon the company, in any suit between the party as to whom the release was given and the company. Scaggs *v.* Baltimore & Wash. Railw., 10 Md. 268.

[5] 6 El. & Bl. 327; s. c. 36 Eng. L. & Eq. 142.

* not a prohibition to borrow, but a permission to borrow, on certain things being done. They have, in my opinion, a right to infer, that the company which put forward their directors to issue a bond of this sort, have had such a meeting, and such a resolution passed, as are requisite to authorize the directors in so doing." This rule has been extended to negotiable paper drawn in the name of the company by the directors, beyond the scope of their powers to bind the company,[6] even while in the hands of a *bona fide* holder.

5. It was held that a joint-stock business company had no power to take stock in a savings bank, and that a loan effected by that means could only be enforced to the extent of the money actually received by the company over and above the amount retained upon the subscription.[7]

6. There seems to be no question made of the general right of corporations, both public and private, to borrow money, so far as their legal functions may require it. The rule has recently been extended to insurance companies.[8] But it was once doubted whether this could be done except under the corporate seal.[9] But the cases now show that no such thing is requisite.[10]

7. It is made a question in a recent case[11] how far the proposition by one to subscribe to the stock of the company, payable in certain specified lands at a given price, may be lawfully accepted by the directors of the company, and whether the same should not be made by a special agent appointed for that pur-

[6] *Post*, § 239, pl. 5.

[7] Mutual Savings Bank *v.* Meriden Agency Co., 24 Conn. 159. See also *post*, § 211, note 3.

[8] Nelson *v.* Eaton, 26 N. Y. 410.

[9] Wilmot *v.* Corporation of Coventry, 1 Younge & Coll. Exchequer, 518.

[10] Marshall *v.* Queenborough, 1 Simons & Stu. 520. See cases before referred to in this section. And it was held that the directors of a company incorporated for making a cemetery could not raise money, by indorsing and accepting bills, for the purposes of the undertaking. Steele *v.* Harmer, 14 M. & W. 831. The same principle is recognized in the earlier cases. Broughton *v.* Manchester Waterworks, 3 B. & Ald. 1.; Clarke *v.* Imperial Gas-Light Co., 4 B. & Ad. 315. And where the by-laws of the corporation provide that in the management of its affairs the directors shall have all the powers of the corporation not inconsistent with the by-laws or the laws of the commonwealth, and there is no prohibition, in the by-laws, of the directors borrowing money, issuing bonds, or conveying the lands of the company, the directors may exercise such powers. Hendee *v.* Pinkerton, 14 Allen, 381.

[11] Junction R. Co. *v.* Reeve, 15 Ind. 236.

pose. But it was held clearly that the separate consent of several members of the board, not shown to constitute a quorum, did not create an acceptance binding upon the company.

*SECTION VI.

Duty of Railway Directors to serve the Interests of Company.

1. *General duty of such office defined.*
2. *Claim for secret service and influence with directors.*
3. *Opinion of Justice* Hoffman *upon the legality of such contracts.*
n. 3. *Cases reviewed upon the subject of secret services.*
4. *Directors cannot buy of themselves for the company. What amounts to ratification.*
5. *The point further illustrated. Authority of directors.*
6. *Purchase of shares to buy peace.*
7. *Director may loan money to company.*
8. *Director* de facto *sufficient.*
9. *Hotel company may lease premises to others.*
10. *Director cannot recover for work done for company.*
11. *Contract of projector not binding on company.*
12. *Director cannot act where interested.*
13. *Court will not act on petition of member who is a mere puppet for others.*

§ 140. 1. The general duty of railway directors is stated, somewhat in detail, in another part of this work.[1] It is an important and public trust, and whether undertaken for compensation or gratuitously, imposes a duty of faithfulness, diligence, and truthfulness in the discharge of its functions, in proportion to its difficulty and responsibility.

2. An important case, involving incidentally the duty of railway directors, arose recently, in the Superior Court of the city of New York.[2] The plaintiff claimed pay for labor and services, in procuring for the defendants the contract for the construction and equipment of the Ohio and Mississippi Railway, from Cincinnati to St. Louis. The mode of his performing this service seems to have been through one Clement, who knew nothing of defendants, but who acted upon the plaintiff's recommendation of them, and, for the agreed compensation of $ 10,000, secretly influenced the directors of the railway, by personal solicitation, to give the contract to the defendants.

3. Mr. Justice *Hoffman*, in giving judgment, makes some suggestions, upon the general subject, well worthy of our notice.

[1] § 211, n. 6, *post.*

[2] Davison *v.* Seymour *et al.*, 1 Bosworth, 88; Redmond *v.* Dickerson, 1 Stockton, Ch. 507.

"Undoubtedly this was the employment of Clement, for a bribe, * to use personal influence with the directors, to secure a lucrative contract for one, of whose capacity and responsibility he was entirely ignorant. He was to use this secretly, and with individuals.

"The directors of this great railroad scheme, if they stood not in the capacity of public officers, owing a duty to the state, yet were trustees of the stockholders of the road, and owed the best efforts of industry, integrity, and economy to them.

"No one can deny, that a stipulation for any personal advantage or profit, which might attend and influence the discharge of their trust to the stockholders, would be a violation of duty; and no engagement given to them, or contracts made with them, for that object, could bear the scrutiny of the law.

"If, again, one of their officers, if Mitchell, for example, empowered to negotiate and finally to settle the contract with Seymour, had received an obligation for the payment of a sum of money for his services, it could never have been enforced." The learned justice cited and commented upon the following cases in support of the principle which would avoid such agreements;[3]

[3] Gray v. Hook, 4 Comst. 449; Waldo *v.* Martin, 4 Barn. & Cress. 319; s. c. 2 Carr. & Payne, 1; Harrington *v.* du Chastel, 2 Swanston, 167; Hopkins *v.* Prescott, 4 Com. Ben. 578; Money *v.* Macleod, 2 Simons & Stuart, 301; Marshall *v.* Baltimore and Ohio Railroad Co., 16 Howard (U. S.), 314, 325; Fuller *v.* Dame, 18 Pick. 472.

Lord Chancellor *Eldon* says, in regard to one acting as the agent of others, and who secured a large sum to himself, without the knowledge of those on whose behalf he acted, "It is impossible for this court to sanction such a proceeding." Fawcett *v.* Whitehouse, 1 Russ. & M. 132.

Mr. Shelford, the learned author of the Treatise on Railways, thus lays down the rule, in regard to the duty of the directors of a railway company, pp. 193, 194. "The employment of a director is of a mixed nature, partaking of the nature of a public office. . . . If some directors are guilty of a gross non-attendance, and leave the management entirely to others, they may be guilty, by these means, of the breaches of trust which are committed by others. By accepting a trust of this sort, persons are obliged to execute it with fidelity and reasonable diligence, and it is no excuse that they had no benefit from it, and that it was merely honorary. . . . Supine and gross negligences of duty will amount to a breach of trust." Charitable Corporation *v.* Sutton, 2 Atk. 400. The same principle, in regard to the effect of the service being gratuitous, is found in the celebrated case of Coggs *v.* Bernard, 1 Salk 26. In Marshall *v.* Baltimore and Ohio Railw., *supra*, Mr. Justice *Grier* made some very pertinent remarks, in regard to the duty of courts of justice, in enforcing against railway companies

* and continued: "I am led to the conclusion, that it would be imposible to allow Clement to sustain an action upon the * agree-

contracts for obtaining legislative grants, by extraordinary efforts and influences, secretly exercised. This was an action to recover $50,000 for secret service, in getting a bill through the legislature of Virginia, giving the company the right to carry their road through the state. The learned judge said: "All persons whose interests may in any way be affected by any public or private act of the legislature, have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true characters so that their arguments and representations, openly and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character is practising deceit on the legislature. Advice or information flowing from the unbiased judgment of disinterested persons, will naturally be received with more confidence and be less scrupulously examined than where the recommendations are known to be the result of pecuniary interest, or the arguments prompted and pressed by hope of a large contingent reward, and the agent 'stimulated to active partisanship by the strong lure of high profit.' Any attempts to deceive persons intrusted with the high functions of legislation, by secret combinations, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public.

"Legislators should act with a single eye to the true interest of the whole people, and courts of justice can give no countenance to the use of means, which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors.

"Influences secretly urged under false and covert pretences must necessarily operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts. Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are 'proper means,' and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or 'careless' members in favor of his bill. The use of such means and such agents will have the effect to subject the state governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector. Speculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capital of the Union, and of every state, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome, — '*omne Romæ venale.*'"

The following cases take a similar view. Wood *v.* McCann, 6 Dana, 366; Hunt *v.* Test, 8 Alab. 713; Harris *v.* Roof, 10 Barb. 489; Rose *v.* Truax, 21 Barb. 361. The enormity of such transactions, in some quarters, if universal and concurrent general opinion may be regarded as authentic, is truly appalling

* 579, 580

ment with him. There was in it most of the elements of a vicious contract, which have avoided similar obligations in the

to any just sentiment of confidence in official fairness, and responsible relation to public trusts. It is probable that the virus of the disease lies deeper in the fountains of the common moral sentiment than we have generally supposed. We feel no disposition to join in a general outcry upon the subject. For we do not believe, as a general thing, that such evils are likely to be cured by any formal criticisms, either in the abstract or in particular cases, whether it come from the bench or the press. The difficulty is one which, for its cure, demands sterner remedies. The perpetrators of such enormities are quite too apt to consider, that because they have been made the victims of some severe strictures, in high places perhaps, they have expiated their guilt, and perhaps earned an indulgence for the future; and so rush at once into a deeper chasm of iniquity, just as soon as another tempting occasion presents. And it is not uncommon, that the administrators of the law, even in such cases, after having administered a somewhat seathing rebuke to the perpetrators of such crimes, begin to feel compunctious visitings, and terminate the drama, which was introduced with such a high-sounding announcement, by the infliction of a most insignificant penalty, which renders both the law and its ministers more or less objects of contempt.

The true method undoubtedly, in such cases, if we desire to make the law, as it should be, a just and unaffected terror to evil-doers, is to say little, but do justice. Let the judgments of the courts, rather than the comments of the judges, testify to the sense of abhorrence of such crimes. These philippics from the bench generally are very justly regarded, not only by the people at large, but by the culprits themselves, as a kind of apology for the sentence, and thus destroy half its good effect. And if the other half is deducted by the judge, on account of the plainness and the honesty of the rebuke which he has already administered to the offender, very little remains.

But the exposition of the subject, in an important case in the city of New York, is so instructive, that we venture to repeat it here. *In re* Robert W. Lowber *v.* The Mayor, Aldermen, and Commonalty of the city of New York; and *In re* A. C. Flagg, Comptroller, and others, tax-payers *v.* Lowber. The gist of these cross-actions is, that by collusion with certain of the city authorities, Lowber was to receive $200,000 for a piece of land for a market on the East River. The arrangement was made by consenting to a judgment of court on the report of a referee. Comptroller Flagg, upon hearing of this judgment, took measures for obtaining a stay of proceedings. In giving judgment on this motion, *Roosevelt*, J., said: —

"The decision of the general term of the superior court, it may be said, was not pronounced, and of course was not known till some months after the title in this case was passed, and even some weeks after the judgment in the present action was entered. But the fact, while it affords matter of vindication to the corporation counsel, is at the same time, of itself, a sufficient reason, under the circumstances, for opening the judgment, — a reason, as it seems to me, not only sufficient, but controlling, leaving in any just view of the subject no alternative. To say that the citizens, in such a case, are to hazard more than a half

* leading cases cited. There was secrecy, individual application, a concealed promise of compensation, and utter ignorance and

million of dollars, the probable cost of land and market, and that there is no relief, would be monstrous. The proposition shocks all our notions of law and judicial proceedings, and especially when broached in a court having, by the constitution, general jurisdiction in law and equity."

"'As matter of law' (says the counsel of the city in his second point), 'I deny that the corporation can be ordered by this, or any court, to defend a suit.' The counsel seems to forget that if the corporation (by which he means the aldermen and other officers of the corporation) cannot be ordered to defend a suit, the corporators may be permitted to do it for them; and that if the court cannot compel the corporation to resist an unjust claim, it can refuse to permit its records to be used as the machinery for enforcing it.

"If this were not so, of what avail would be the legislative restrictions on the power of contracting debts and on the power of exercising extensive functions? All the property of the city, and all its revenues, past, present, and prospective, from taxation or otherwise, might be disposed of without appeal, by a single act of mortgage or conveyance, clothed in the form of a concerted judgment — a judgment, at the most, nominally defended, but really confessed — and of which, as in this case, the court itself, without its knowledge, might be made to figure as the innocent author.

"As matter of law, I deny that the court can be made, and thus in effect 'ordered,' by the boards of direction, by whatever name called, of this or any corporation, thus to lend its aid to violate the law and ruin the corporators. Nor it is true either, that the corporation counsel, in the defence of suits in this court, brought against the city, is subject to the absolute orders of the two boards, and 'only responsible' to them. Although, in the loose language of ordinary discourse, the aldermen and assistant aldermen are commonly called 'the corporation,' they are in fact only its legislative, as distinguished from its executive, organs. The corporation of the city, as we have seen, consists of the whole body of the citizens. The citizens are the *quasi* stockholders. The 'charter officers,' whether legislative or executive, including the 'head of the law department,' are merely the agents and trustees of the citizens, and all ultimately responsible to them. It is an error on the part of the corporation counsel to assume, as he does in his third point, that he is 'responsible only to his client,' and that the client is the common council, as distinguished from the 'commonalty.' His office is the direct gift of the people, made elective for the express purpose of putting an end to the subserviency previously supposed to exist, and of creating a check or counterpoise in its stead. Nor is this all; the corporation counsel, when conducting the prosecution or defence of a suit in court, is an officer of the court, and as such, and like any other attorney in like case, responsible to the court. Although subject, within certain limits, to the legally authorized resolutions of the common council, when acting in his general character of 'counsel to the corporation,' when acting as an attorney of the court he is subject to the rules and regulations of the court, and with this intimation will, I have no doubt, be 'perfectly prepared [see his communication]

* recklessness as to the competency of the party whose cause he was promoting, and whose reward he was to receive. There is the difference, that these directors were servants of an organization inferior to that of a state, yet acting in a very spacious sphere, and representing an extensive body of constituents. The difference between their position and that of legislators, upon a question like this, appears to me but shadowy.

"If, then, the claim of Clement would be promptly rejected, does the present plaintiff stand in a better position? His original employment might have been consistent with an open, avowed agency, an intent or instructions to make it known, and thus be free from all objections. But we are left in ignorance of what the terms of such original agreement were, — how far they extended. All is indefinite, except merely an employment. He engages Clement, and here again, that employment may have been perfectly free from censure on the plaintiff's part. But upon the best consideration we can give, we cannot separate the act of Clement from the acts of the plaintiff. There is a legal identity for the purposes of this action. The plaintiff must be held to have employed Clement to do what he did do, or to have been bound to superintend his proceedings, and free them from what was illegal. It is impossible to permit him to profit by the misdeeds of his own agents, however ignorant and exempt from * them himself. His ignorance, when knowledge was a duty, becomes equivalent to a fault."

4. The directors of a corporation, created for business purposes and profit, are trustees for the shareholders, and owe them all the duties and responsibilities which attach to other trustees and agents. If, therefore, a director enter into a contract for the company, he can derive no personal benefit from it.[4] Accordingly,

to perform any duty which such a result, or the office he holds, may devolve upon him.'

"An order will, therefore, be entered (first submitting a draft to the court for settlement), directing that the judgment and execution be set aside, as also the answer, reference, and report; and that a new answer, to be prepared by the counsel to the corporation, and approved by the comptroller, be filed and served in twenty days from the date of this order, unless the comptroller, within the said twenty days, should elect, as he may, officially, and as a tax-payer and corporator, on behalf of himself and others, to file an original bill of complaint, setting forth such matters and making such parties, and praying such relief in the premises, as he may be advised."

See also Semmes *v.* Mayor, &c. of Columbus, 19 Ga. 471. *Ante*, § 176.

[4] Great Luxembourg Railw. *v.* Magnay, 25 Beavan, 586; s. c. 4 Jur. N. S. 839.

where the company had furnished the director with a large sum of money, to enable him to purchase the concession of another company in regard to their line, and he purchased it, as it turned out, of himself, being the concealed owner of it, it was held that the transaction could not stand, but the company must adopt or repudiate it altogether. But the company having sold the concession during the pendency of a suit impeaching the transaction, it was held they could have no relief, either as to the application of the money or otherwise.[5]

5. And where the directors of an insurance company had purchased the stock of one of the board, and allowed him to retire from his position both as director and shareholder, and had used the funds of the company to compensate him for his shares, it was held that this was such an irregularity as could not be confirmed and legalized by a meeting of the shareholders even, unless the deed of settlement under which the company was formed provided for its being so ratified, or for its transaction by the directors.[6] And it was held, that in such case a bill in equity, filed by certain shareholders on behalf of themselves and the others against the company and the directors, praying that the directors might be decreed to restore to the company the funds so diverted by them, was maintainable.[6]

6. It seems to be regarded as a valid contract between the different directors of a corporation, by which one portion purchase the interest of another portion, to enable them to retire with a view to heal dissensions in the board; and the fact that the money is paid by the company's bankers and refunded by a * resale of the shares thus purchased, will not render the contract invalid.[7]

7. But where by a constitutional provision of a corporation the director's office was vacated, if he participated in the profits of any contract with the company, but the company were empowered to borrow money on the director's own individual responsibility, or on other securities, it was held that a director, lending his own money to the company at a large interest, was not thereby disqualified from being a director.[8]

[5] See also Sturges *v.* Knapp, 31 Vt. 1.

[6] Hodgkinson *v.* National Live Stock Ins. Co., 5 Jur. N. S. 478, 969; s. c. 26 Beav. 473.

[7] Haddon *v.* Ayers, 1 Ellis & Ellis, 118,; s. c. 5 Jur. N. S. 408.

[8] Bluck *v.* Mullalue, 5 Jur. N. S. 1018; s. c. 27 Beav. 398.

8. A director who acts as such by sitting at the board and executing works for the company, will be treated as such so far as his claim against the company is concerned, although he was not properly appointed.[9]

9. It is not *ultra vires* for a hotel company to lease part of their premises to a business company, with the condition that the first company shall have the exclusive privilege of supplying the portion so leased with all provisions, wines, and liquors.[10]

10. Under the English statute[11] it is an answer to a claim for compensation for works of the company executed by the plaintiff, that he was at the time of entering into the contract interested therein, and it makes no difference that the consideration was executed, and the company had had the benefit of the contract.[12]

11. A contract made between the projector of a corporation and the directors of the company thereafter created, which is not in terms made conditional on the completion of the company, is not under the English statute binding upon the company when fully established.[13]

12. A rule of the constitution of the company, whereby a director is prohibited from voting upon any matter in which he is interested, will not preclude him from voting as a shareholder at * a general meeting.[14] But the resolution of a board of directors, of which the creditor is a member, acknowledging the existence of a debt barred by the statute of limitations, will not operate to remove

[9] South Essex Gas Light & Coke Co., *in re*, 20 L. J. Ch. 43.

[10] Simpson *v.* Westminster Palace Hotel Co., 6 Jur. N. S. 985; s. c. 2 De G. F. & J. 141; s. c. 8 Ho. Lds. Cas. 712. But where the promoters of a railway contracted with a land-owner, a peer in parliament, to pay him £20,000, for his countenance and support in obtaining their act, independent of and above all ordinary compensation for land and other damages, another separate contract defining the land to be taken and the amount to be paid therefor, the directors of the company after its organization having ratified the first contract, it was held that the original agreement and the ratification by the directors were *ultra vires* of the company, and could not be enforced against it. Earl of Shrewsbury *v.* North Staffordshire Railw. Law. Rep., 1 Eq. 593.

[11] 7 & 8 Vic. c. 110, § 29.

[12] Stears *v.* South Essex Gas Light & Coke Co., 9 C. B. N. S. 180; s. c. 7 Jur. N. S. 447. See also Walker *ex parte*, 8 De G. M. & G. 607.

[13] Gunn *v.* London & Lancashire Ass. Co., 12 C. B. N. S. 694.

[14] Lead Mining Co. *v.* Merryweather, 10 Jur. N. S. 1231; s. c. 2 H. & M. 254.

such bar, if indeed any resolution of the board will bind the company to that extent.[15]

13. Although it is the unquestionable right of every member of the company to restrain the unlawful acts of the directors, still when it appears that the plaintiff is a mere puppet in the hands of others not members of the company, who indemnify him against the costs of the suit, the court will not interfere by interlocutory injunction.[16]

SECTION VII.

Right to dismiss Employees. — Rule of Damages, when done wrongfully.

1. *Some cases hold, that if wrongfully dismissed may recover salary.*
2. *English courts do not favor this view. Case stated by English judges.*
3. *The American cases have sometimes taken the same view.*
4. *Where the contract provides for a term of wages, after dismissal, it is to be regarded as liquidated damages.*
5. *Statute remedy, in favor of laborers of contractors, extends to laborers of subcontractors.*

§ 141. 1. Where a railway company dismiss a servant, superintendent, or other employee, without just cause, it seems to be considered, in some cases, that they are *prima facie* liable for the salary, for the full term of the employment.[1] This proposition has been often made by judges, and seems to have been acquiesced in, by the profession, to a very great extent, but in a late English case,[2] where the subject is examined with great * thoroughness, the opinion of the judges certainly seems to incline to a different result. *Patteson*, J., said: —

2. "I am not aware that this precise point has been raised in

[15] Gold Mining Co., *ex parte*, 10 L. T. N. S. 229.

[16] Filder *v.* L. Brighton & South Coast Railw. Co., 1 H. & M. 489.

[1] Costigan *v.* The Mohawk & Hudson Railw., 2 Denio, 609.

[2] Goodman *v.* Pocock, 15 Q. B. 576. This is the case where a clerk, dismissed in the middle of the quarter, brought an action for the wrongful dismissal, on the special contract, and, in the trial of the action, the jury were instructed that they should not, in assessing damages, take into account the services rendered by plaintiff in the broken quarter, for which he had received no pay. The plaintiff then brought this action for those services, and here the court held, that those services should have been taken into account in assessing damages in the former action, and that no recovery could be had in this action, on account of the former recovery.

any case." . . . "Mr. Smith, 2 L. Cases, 20 says, 'that a clerk, servant, or agent, wrongfully dismissed, has his election of three remedies. 1. He may bring a special action for his master's breach of contract, in dismissing him. 2. He may wait till the termination of the period for which he was hired, and may then *perhaps* sue for his whole wages, in *indebitatus assumpsit*, relying on the doctrine of constructive service. Gandell *v.* Pontigny, 4 Camp. 375. 3. He may treat the contract as rescinded, and may immediately sue upon a *quantum meruit*, for the work he actually performed. Planché *v.* Colburn, 8 Bing. 14.' I think Mr. Smith has very properly expressed himself with hesitation, as to the second of the above propositions; it seems to me a doubtful point."

Lord *Campbell*, Ch. J., and *Coleridge*, J., both agree that the party, dismissed without cause, may bring *indebitatus assumpsit*, for the service actually performed, or may sue for the breach of the contract in dismissing plaintiff, but cannot do both.

And *Erle*., J., lays down the rule very distinctly, and, as it seems to us, upon the only sound and sensible basis. "The plaintiff had the option, either to treat the contract as rescinded, and to sue for his actual service, or to sue on the contract for the wrongful dismissal. . . . As to the other option, referred to by Mr. Smith, I think that the servant cannot wait till the expiration of the period for which he was hired, and then sue for his whole wages, on the ground of a constructive service, after dismissal. I think the true measure of damages is the loss sustained at the time of dismissal. The servant after dismissal may and ought to make the best of his time, and he may have an opportunity of turning it to advantage. I should not say any thing that might seem to doubt Mr. Smith's very learned note, if my opinion on this point were not fortified by the authority of the Court of Exchequer Chamber, in Elderton *v.* Emmens, 6 Com. B. 160."

* 3. The cases[3] in this country have sometimes taken a similar view of the rule of damages, in such cases, and the rule must, we think, ultimately prevail everywhere.[4]

[3] Algeo *v.* Algeo, 10 Serg. & Rawle, 235; Donaldson *v.* Fuller, 3 id. 505; Perkins *v.* Hart, 11 Wheaton, 237.

[4] Spear & Carlton *v.* Newell, Sup. Ct. Vt., not reported. In this case the plaintiff sued for the price of rags and other materials furnished, to supply a

4. Where the contract specifies the time for which the party employed shall be entitled to wages after notice of dismissal, that is to be regarded as stipulated damages for the breach of the contract.[5] But even this cannot be recovered under the *indebitatus* count, for work and labor.[6]

5. Where the statute provides, that the laborers of contractors upon a railway may give notice to the company of their wages remaining unpaid, in certain contingencies, and thus charge the company, the provision was held to extend to laborers and workmen of sub-contractors.[7]

paper-mill of defendant, under special contract. The materials were, at one time, unfit for use, on account of latent defects, for which by the contract the plaintiffs were liable. The defendant claimed the rule of damages should be the rent of the mill and the expense of supplying workmen until good materials were furnished. But the court held, that it was the duty of the defendant to make the best of the case, on his part, and that he could only recover such damages as intervened, before he had opportunity to supply himself with proper materials for use.

[5] Hartley *v.* Harman, 11 Ad. & Ellis, 798.

[6] Fewings *v.* Tisdal, 1 Exch. 295.

[7] Kent *v.* New York Central Railw., 2 Kernan, 628. Peters *v.* St. Louis & Iron Mountain Railw., 24 Mo. 586. Where the statute in such case makes the company liable for thirty days' labor of the workmen, it is not indispensable that the labor should have been performed in thirty consecutive days, to entitle them to compensation against the company. Such claims may be sued in the name of an assignee, under the new code of Missouri. Ib. *Post*, § 232, n. 5.

*CHAPTER XXII.

ARRANGEMENTS BETWEEN DIFFERENT COMPANIES.

SECTION I.

Leases, and similar Contracts, require the Assent of Legislature.

1. *By English statutes one company may pass over road of another, but contract binding.*
2. *But cannot transfer duty of one company to another, without legislative grant.*
3. *Original company liable to public, after such lease. But lessee not excused.*
4. *Courts of equity enjoin companies from leasing, without legislative consent.*
5. *But such contracts, made by legislative grants, are to be carried into effect.*
6. *Majority of company may obtain enlarged powers, with new funds.*
7. *So the majority may defend against proceedings in legislature.*
8. *Legislative sanction will not render valid contracts* ultra vires.
9. *Railway company cannot assume duties of ferry, without legislative grant.*
10. *The grant to a railway of the implied right to establish a ferry over a public river directly beyond the terminus of its road, does not extend the responsibility of the company to the ferry.*
11. *Such a ferry may become an encroachment upon another by carrying passengers gratuitously.*
12. *The grant to a railway of a ferry in express terms will not authorize them to carry any thing except passengers and freight passing over their line.*

§ 142. 1. The English statute[1] gives special permission to one company to contract with other companies for the right of passage over their track. And this has been construed, to give the right to contract for the privileges ordinarily attaching to such passage, of stopping at the stations, and taking up and putting down passengers and freight.[2] The parties will be bound by the terms of the contract, notwithstanding the ninety-second section of the act, which gives all companies and persons the right to use railways upon the payment of the tolls demandable.[3]

*2. But an agreement between railway companies, without the authority of the legislature, transferring the powers of one company to the other, is against good policy, and a court of equity

[1] 8 and 9 Vict. ch. 20, § 87.

[2] Simpson v. Denison, 10 Hare 51; s. c. 16 Jurist, 828; 2 Shelf., Ben. ed. 694; 13 Eng. L. & Eq. 359.

[3] Great Northern Railw. v. Eastern Co. Railw., 9 Hare, 306; 2 Shelf., Ben. ed. 696; 12 Eng. L. & Eq. 224.

will not lend its aid to carry such contract into effect.[4] But it has been held, that a contract, by which one railway gives another the right of passage, upon the guaranty of a certain per cent profit upon their stock and all other investments, is a payment of tolls within the statute.[5] It seems to be considered, by the English courts, that one railway leasing its entire use to another company does not come within this section of the general statute, and as the public thereby lose the security of the first company, for care and diligence, in the discharge of its public duties, the contract, unless made in pursuance of an act of the legislature, or ratified by such act, is illegal, as against public policy.[6] At all events, a court of equity may properly decline to lend its aid in enforcing a specific performance of such contract.[7]

* 3. But even where such contracts have been made, by permission of the legislature, it has been held, in this country, that the company leasing itself does not thereby escape all responsibility

[4] Same case, 9 Hare, 306; 12 Eng. L. & Eq. 244; South Yorkshire Railw. *v.* Great N. Railw., 19 Eng. L. & Eq. 513; Johnson *v.* Shrewsbury & B. Railw., 3 De G. M. & G. 914; s. c. id. 584; Lond. B. & South Coast R. *v.* L. & S. W. R. & Portsm. R., 4 De G. & J. 362; s. c. 5 Jur. N. S. 801, where the subject is extensively examined by the Lord Chancellor, and the cases commented upon.

In a recent case before the Superior Court of Cincinnati, Ohio & Miss. Railw. *v.* Ind. & Cin. Railw., the question of the right of a railway, chartered by one state to contract with the railways of other states for permanent privileges in running cars upon such railways, is extensively considered and denied by *Storer*, J. The case illustrates very forcibly the demand which obviously exists for making all lines of railway extending into different states national agencies rather than mere state institutions. For military and postal purposes railways are far more national than banks, and as means of intercommunication equally so.

[5] The South Yorkshire R. & R. D. *v.* Great Northern Railw., 9 Exch. 55; 22 Eng. L. & Eq. 531; s. c. in Exchequer Ch. 9 Exch. 642; s. c. 25 Eng. L. & Eq. 482. One company having made a beneficial contract with another company in regard to traffic, may, with a lease of itself, transfer the benefit of this contract. London & S. W. Railw. *v.* South E. Railw., 8 Exch. 584; s. c. 20 Eng. L. & Eq. 417.

[6] Johnson *v.* The Shrewsbury & Birmingham Railw., 3 De G. M. & G. 914; s. c. 19 Eng. L. & Eq. 584; Troy & Rut. Railw. *v.* Kerr, 17 Barb. 581. This doctrine is reaffirmed in the House of Lords in Shrewsbury & B. Railw. *v.* L. & N. W. R., in May, 1857, 6 Ho. of Lds. 113.

[7] South Yorkshire & River Dun Co. *v.* Great N. Railw., 19 Eng. L. & Eq. 513; Johnson *v.* Shrewsbury & Birmingham R., 3 De G. M. & G. 914; s. c. Shrewsbury & Birm. Railw. *v.* London & N. W. & Shropshire Union Railw., 21 Eng. L. & Eq. 319; s. c. 1 Eng. L. & Eq. 122; 3 De G. M. & G. 115. But see cases *ante*, n. 5; *post*, § 185.

to the public. But that the public generally may still look to the original company, as to all its obligations and duties, which grow out of its relations to the public, and are created by charter and the general laws of the state, and are independent of contract or privity between the party injured and the railway.[8]

But there seems no good reason to excuse the company, assuming to act as common carriers, by virtue of the lease of another company's road, from the ordinary responsibility of common * carriers for the transportation across the portion of the route held by lease, on the ground of the responsibility of the company owning and leasing the road, even when the loss occurred from the default

[8] Nelson v. The Vermont & Canada Railw., 26 Vt. 717. But it is, perhaps, worthy of consideration, in regard to this case, that the effect of legislative consent to the lease is not made a point or decided in this case. Sawyer v. The Rut. & Burl. Railw., 27 Vt. 370. And in Parker v. Rensselaer & Saratoga Railw., 16 Barb. 315, where the defendants were running upon the Saratoga & Sche. Railw. by virtue of a contract, and the plaintiff's cow was killed through defect of cattle-guards, which it was the duty of the Saratoga & Sche. Railw. to maintain, it was held the defendants were not liable, the neglect being attributable to the Saratoga & Sche. company. Perhaps the only question in regard to the soundness of this decision is, whether both companies are not chargeable with negligence, the one for suffering the road to be used, and the other for using it in that condition. This is the view taken of the law in Clement v. Canfield, 28 Vt. 302; *ante*, § 169. Ohio & Miss. Rail. v. Dunbar, 20 Ill. 623.

But in the York & Maryland Line Railw. v. Winans, 17 How. 30, it is decided, that where a railway is chartered by one state, and all its stock owned and the road operated by a corporation erected and existing in another state, the first corporation is nevertheless liable to the patentee of an improvement in railway cars for the use of his patent, cars of that construction having been procured and used upon the road by the corporation owning the stock of such company. *Campbell*, J., said, "The corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature."

But one company giving permission to another to use a part of their track, do not thereby become bound to keep the track in such repair as to be safe for use. Nor do such company thereby assume any obligation towards the passengers carried thereon by such other company. Murch v. Concord Railw., 9 Foster, 9; *post*, § 183. See also Briggs v. Ferrell, 12 Ired. 1. And in Vermont Central Railw. v. Baxter, 22 Vt. 365, the company are held liable for the acts of the contractor in the exercise of the right of eminent domain, in obtaining materials for constructing the road.

And a railway company leasing the entire use of its road to another company, is still responsible for damages caused by fires communicated by the engines of the lessees while operating the road. And it will make no difference that one of the buildings destroyed by the fire caught from another building to which the fire first communicated. Ingersoll v. Stockbridge & Pittsfield Railw., 8 Allen, 438.

of the latter company in not performing the stipulations in their lease.[9] Nor can the lessees of a railway excuse themselves from responsibility in such cases on the ground that their lease is void, being taken without the sanction of the legislature.[9]

And a railway company is always responsible for an injury occasioned by want of proper care and prudence on the part of its servants, in the management of a train which is under their exclusive care, management, and control, although belonging to another company.[10] But if such injury is occasioned by the negligence of another company, whose car, for the purpose of being loaded by the plaintiff, has been placed upon a side track of defendants' which is in constant use by other roads, that other company is bound to use reasonable care to prevent a collision, and if it fails to do so, whereby the plaintiff receives an injury, he cannot recover of the company whose cars caused the collision.[10] And if such injury results from the negligence of another company, which has a joint right with the defendants to use defendants' track under a lease, and which is running trains over defendants' road on its own account, the defendants are not responsible.[10]

There can be no question of the liability of the company leasing another line of railway, whether within or beyond the limits of the state where the first company exists, for all acts and omissions whereby injury accrues to other parties, while so operating such other line, as lessees, to the same extent and in the same manner precisely as if such injury had occurred upon the line of the first company. And it seems to be the inclination of the American courts to hold this in regard even to those companies who have assumed to operate the roads of other companies, whether temporarily or permanently, and whether by express legislative sanction or not.[11] This subject is very extensively discussed in the case last referred to, and the views presented, * although differing somewhat from those hitherto adopted by the English courts, certainly have very much to commend them to favorable consideration. But the original company will be responsible even for the safe delivery of goods carried over the line, where it is leased to a corporation out of the state.[12]

[9] McCluer *v.* Manchester & Lawrence Railw., 13 Gray, 124.
[10] Fletcher *v.* Boston & Maine Railw., 1 Allen, 9.
[11] Bissell *v.* Mich. So. & N. Ind. Railw., 22 N. Y. 258.
[12] Langley *v.* Boston & Maine Railw., 10 Gray, 103.

4. The English courts have in some instances even restrained railway companies from carrying contracts of leasing into effect, without the authority of the legislature.[13]

5. But such contracts being legal, and not inconsistent with the policy of the acts of parliament, are to have a reasonable construction; and where, by the creation of new companies and other facilities, the business is very largely increased, the parties are still to abide by the fair construction of the original contract, as applicable to the altered circumstances.[14]

6. There is no doubt of the right of a railway company in England to apply to the legislature for enlarged powers, even for the power to become amalgamated with other companies, so as to make one consolidated company. And contracts between the different companies, for this purpose, have been there recognized, and enforced, in courts of equity.[15] And while the courts of equity will enjoin the companies from applying their funds to pay the expenses of such parliamentary proceedings, they will not enjoin them from obtaining additional powers, by legislative acts, when other parties volunteer to furnish the requisite funds.[16] And there seems to be no question made, in the English courts, of the power of parliament to extend the line of a railway, or to consolidate existing companies, and that the shareholders are bound, by the acceptance of such legislative provisions, by a majority of the company, or by contracts to procure such powers by act of parliament.[17]

[13] Winch *v.* Birkenhead, L. & C. Railw., 5 De G. & S. 562; s. c. 13 Eng. L. & Eq. 506; Beman *v.* Rufford, 1 Simons (N. S.) 550; s. c. 6 Eng. L. & Eq. 106.

[14] East Lancashire Railw. *v.* The L. & Yorkshire Railw., 9 Exch. 591; s. c. 25 Eng. L. & Eq. 465.

[15] Mozley *v.* Alston, 1 Phillips, 790, where Lord *Cottenham* said: "There is scarce a railway in the kingdom that does not come to parliament for extension of powers."

[16] Stevens *v.* South Devon Railw., 9 Hare, 313; Great Western Railw. *v.* Rushout, 5 De G & S. 290; s. c. 10 Eng. L. & Eq. 72; *post*, § 252.

[17] Great Western Railw. *v.* Birm. & Oxford Junction Railw., 5 Railw. C. 241. The Lord Chancellor says, that to nullify, in a court of equity, all contracts made upon the faith of obtaining the consent of the legislature to carry them into effect, would be "to nullify many family agreements, and all contracts by persons projecting new companies." Shrewsbury & Birm. Railw. *v.* London & N.W. Railw., 4 De G. M. & G. 115; s. c. 9 Eng. L. & Eq. 394.

And it has been held, in an important case in the Circuit Court of the United States, Columbus, Piqua. & Ind. Railw. *v.* Indianapolis & Bellefontaine Railw., 5 McLean, 450, that an agreement between two railway companies to build their

* 7. And it has accordingly been held, that a public company, as the commissioners of sewers for a county, might impose a rate to defray the expense of opposing a bill, in parliament, which threatened to affect the interests of the company unfavorably, the same as they might to defray the expense of litigation in court.[18] Lord *Campbell* said: "Our determination rests upon the ground that this opposition was clearly *bona fide*, and clearly prudent."

8. In a very recent case, in Vice-Chancellor *Wood's* court,[19] * the defendants entered into an agreement to purchase plaintiffs' property, there being at the time no legislative permission either to buy or sell such property. Subsequently such

roads from certain cities, to meet at a given place, and that the charges for transportation shall be regulated by both companies, and also the meeting of the cars, and the through freight cars, is a valid contract, and will be enforced by injunction in equity. That to fix the charge for the transportation of passengers and freight, is the exercise of the corporate franchise of each company, and an agreement that both companies shall regulate this is no abandonment or transfer of the franchise of either.

[18] Reg. *v.* Commissioners of Norfolk, 15 Q. B. 549. The ground upon which the decisions in England and America, which hold the franchises of corporations not to be assignable except by consent of the legislature, rest, is mainly the same as that upon which it has been held in this country, that such franchises are beyond legislative control, namely, that the charter constitutes a contract between the sovereignty and the corporation, on the one part, for the grant of certain privileges and immunities, and upon the other for the performance of certain duties and functions, which are deemed an equivalent or consideration. And this feature is of peculiar force in the case of that class of corporations upon which the legislature have conferred important public duties and functions, as railways and banks, and some others. The state confers upon a railway some of its most essential powers of sovereignty, that of eminent domain, and of a virtual monopoly in transportation of freight and passengers, and in return therefor stipulates for the faithful performance of these duties by the corporation. The corporation have no more right, in equity and justice, to transfer their obligations to other companies, or to natural persons, than the state have to withdraw them altogether. Either would be regarded as an abuse of the powers conferred, or an impairing of the just obligation of the contract resulting from the grant, and its acceptance.

[19] Leominster Canal Co. *v.* Shrewsbury & Hereford Railw., 3 Kay & J. 654; s. c. 29 Law Times, 342, August, 1857. The learned judge concludes his opinion in this case in a manner very creditable to his sense of fair dealing and good faith in the conduct of railway directors: "I cannot, however, but feel that solicitors acting for railway companies, like that of the defendants, must be in a most painful position when they are unable to rely (as here they cannot) upon the good faith or even the common honesty of directors."

permission was obtained, and steps taken by the defendants, under the act, to carry the contract into effect, but they ultimately refused to complete their purchase, on the ground that the original agreement was not under the seal of the corporation, nor signed by two of their directors. The plaintiffs then filed a bill for specific performance, and it was held, that the bill must be dismissed, on the ground that the contract was originally *ultra vires*, not being made dependent upon obtaining the consent of the legislature. It is also said, that the contract would not be binding upon the company, unless made under their common seal, that being required in the defendants' special act, and if it were binding, that mandamus is the more appropriate remedy.

9. A railway company cannot acquire the franchise, so as to be bound to perform the duty of an existing ferry, without the authority of the legislature, given either expressly, or by necessary implication.[20]

10. And the grant to a railway company, having its terminus at the bank of the river Hudson, opposite the city of Albany, of power to connect its terminus upon one side of the river with a depot upon the opposite bank; though it does, by implication, give the right to establish a ferry, does not make it a part of the railway, so that passengers crossing the river may be regarded as carried under the general railway franchise.

11. And where the grant of such a ferry was restricted, by express condition, to the transportation of freight and persons carried by the railway, and their servants and employees, it was held that the company, by constantly carrying other persons gratuitously across their ferry, were guilty of an infringement of the * franchise of a pre-existing ferry, the same as if such persons were carried for toll.[21]

12. And the grant in express terms of a ferry as a portion of the line of a railway, will not empower the railway company to use the ferry for any other purpose than the transportation of the freight and passengers of the company.[22]

[20] *Battle*, J., in State *v.* Wilmington & Manch. Railw., Busbee, 234.
[21] Aikin *v.* The Western Railw., 20 New York, 370.
[22] Fitch *v.* N. H. N. L. & Stonington Railw. Co., 30 Conn. 38.

SECTION II.

Necessity of Contracts of Corporations being under seal.

1. *The English courts manifest great reluctance to abandon the former rule of law on this subject.*
n. 2. *Extended review of the English and some of the American cases.*
2. *Reference to later decisions.*
3. *What amounts to a seal, according to modern use.*

§ 143. 1. The apparent hesitation among the English courts and text-writers[1] to accept the acknowledged rule of the American courts, that a corporation may as well contract, by mere words, without writing, or by implication of law, or by vote, or by writing, without seal, as a natural person; in short, that in the case of a contract, by a corporation, a seal is of no more necessity or significance than in the case of a contract by a natural person, would seem to justify some reference here to the present state of the English law upon the subject.[2]

[1] Hodges on Railways, 59, 60, 61, and notes.

[2] It would seem a very obvious view of the question, that if a seal is not, as was at one time claimed, indispensable to the authentication of a corporate contract, if, in short, it can be dispensed with in any case, it becomes merely a matter of reason and discretion, or more properly, perhaps, of intention and convenience, in order to show the definite act of the company, and when it shall be required, or when a contract shall be said to be complete without it, is rather a question of usage than an unbending rule of law. Beverley *v.* Lincoln Gas Light & Coke Co., 6 Ad. & Ell. 829, is the case of gas-meters ordered for the use of the company by one of the committee, taken on trial, and not returned in a reasonable time, and the company held liable. This is the earliest case in the English books where the courts in that country made any formal departure from the old rule, and it was here held, that a corporation aggregate is liable in assumpsit for goods sold and delivered. *Patteson*, J., refers to the American authorities upon the subject, and says: "It is well known that the ancient rule of the common law, that a corporation aggregate could speak and act only by its common seal, has been almost entirely superseded, in practice, by the courts of the United States." And after stating the greater facilities here for advancement in jurisprudence, the learned judge enters a formal disclaimer against "the right or the wish to innovate on the law upon any ground of inconvenience, however strongly made out;" "but when we have," says the learned judge, "to deal with a rule established in a very different state of society, at a time when corporations were comparatively few in number, and upon which it was very early found necessary to ingraft many exceptions, we think we are justified in treating it with some degree of strictness, and are called upon not to recede from the principle of any relaxation in it, which we find to have been

* 2. The English courts in many recent cases seem to have applied the general rule of presumption, by which the conduct of

established by previous decisions." And this seems to form the basis of the subsequent decisions of the English courts upon the subject. The decisions have evinced an effort to preserve the rule, and at the same time to invent and ingraft such a number of exceptions upon it as really to meet all the inconvenience or absurdity which could fairly be objected against the old rule. But in settling the exceptions, the decisions have not always commended themselves as consistent either with reason or with each other. Thus affording another striking illustration of the folly of attempting to maintain an absurd rule, by multiplying exceptions, every one of which was based upon a principle of reason, which, if carried to its legitimate results, would subvert the rule itself. This was in 1837, in the K. B., and established the exception to the old rule of executed contracts for goods sold and used by the company in the business for which it was created. The next year the same court held, that a corporation might also maintain an action upon an executory contract not under seal. Church *v.* The Imperial Gas-Light & Coke Co., 6 Ad. & Ell. 846. This was upon a contract to take gas of the company, which the defendant below declined to receive. In 1843 a case arose in the Common Pleas, Fishmonger's Co. *v.* Robertson, 5 M. & G. 131. This was an action upon a contract to pay the plaintiffs 1,000*l.* to withdraw their opposition to a bill in parliament, and to promote its passage into a law, the parties being mutually interested in the same, and alleging performance of the contract on the part of the plaintiffs. The subject was very much considered, and an elaborate opinion delivered by *Tindal*, Ch. J., and it was decided, that the contract having been executed on the part of the corporation, and the defendants having received the full consideration, were bound by the contract, and that the contract was not void as against public policy. See also Arnold *v.* The Mayor of Poole, 4 Man. & Gr. 860 (1842), to the same effect, where it is held, that no municipal corporation but that of London can appoint an attorney except under the corporate seal. Mayor of Ludlow *v.* Charlton, 6 M. & W. 815 (1840). But the Court of Q. B., in 1846 (Sanders *v.* St. Neot's Union, 8 Q. B. 810), held, that if work be done for a corporation, and adopted by them for purposes connected with the incorporation, although not under seal, they are liable for it. The case of the Governor & Company of Copper Miners *v.* Fox, 16 Q. B. 229 (1851), holds that the plaintiffs could not sue upon a mutual contract, because the plaintiffs' portion of it, not being under seal, and being for the delivery of iron rails, and the plaintiffs being incorporated for dealing in copper, not coming within the proper business of the company, as a trading company, they were not bound by it, and by consequence the defendants were not. This case admits the exception from the old rule of all contracts pertaining to the proper business of the incorporation, and then attempts a distinction between dealing in iron and copper! — a distinction which, if it be of any force, would show that the contract, being *ultra vires*, would not bind the company in any form. The next case (Homersham *v.* Wolverhampton Waterworks, 6 Exch. 193; s. c. 6 Railw. C., 790, *ante*, § 113), in the order of time, is for extra work, under a contract, which was done in express violation of the provisions of the general contract, in regard to extra work, and was not authorized, in the manner required in rela-

* natural persons is to be judged of, to corporations. Thus[3] it was held, that where a company has stood by and seen works * per-

tion to contracts, by the company's charter. It seems to have been correctly enough decided, upon either ground, that no recovery could be had. *Ante*, § 113, and cases cited. Lamprell *v.* Billericay Union, 3 Exch. 283 (1849). But Cope *v.* Thames Haven Dock & Railw. Co., 3 Exch. 841, seems to be an express decision affirming the general necessity of the corporate seal to bind the company (1849). So also Diggle *v.* The London & Blackwall Railw., 5 Exch. 442, is of the same character, being for extra work performed in express violation of the general contract; and there are some other cases of this kind in the English Reports.

But the next case in the order of time, involving the general question, is Finlay *v.* Bristol & Exeter Railw., 7 Exch. 409; s. c. 9 Eng. L. & Eq. 483, and here it was held, that although a corporation was liable for use and occupation, on a parole demise, it is only liable for the actual occupation, and a continuous occupation, for several years, will not render the corporation tenants from year to year. In Clark *v.* The Guardians of the Cuckfield Union, 1 B. C. C. 81; s. c. 11 Eng. L. & Eq. 442, the cases are all elaborately reviewed by *Wightman*, J., and the conclusion arrived at, that whenever the purposes for which a corporation is created render it necessary that work should be done, or goods supplied, to carry such purposes into effect, and such work is done, or such goods supplied, and accepted by the corporation, and the whole consideration for payment is executed, the corporation cannot refuse to pay, upon the ground that the contract was not under seal; and the case of Lamprell *v.* Billericay Union, 3 Exch. 283, is seriously questioned. In Lowe *v.* The London & N. W. Railw, 17 Jur. 375; s. c. 14 Eng. L. & Eq. 18, it is held, where a railway have taken possession of land, and occupied it, by the permission of the owner, for the purposes of their incorporation, that they are liable to be sued in assumpsit, for use and occupation, notwithstanding they have not entered into a contract under their common seal. But in the case of Smart *v.* The Guardians of the Poor of West Ham Union, 10 Exch. 867; s. c. 30 Eng. L. & Eq. 560 (1855), the question came before the Court of Exchequer, and the judges manifested a firm determination to adhere strictly to the old rule. *Parke*, B., says: "With respect to the case of Clark *v.* The Guardians of the Cuckfield Union, I must say that I am not satisfied with the observations of my brother *Wightman*, for if that case be correctly decided, the effect would be to overrule several previous decisions of this court." And *Alderson*, B., says: "We must adhere to former decisions, till overruled by a court of error."

But in the case of the Australian Royal Mail Co. *v.* Marzetti, in June, 1855, in the Court of Exchequer, 11 Exch. 228; *Pollock*, Ch. B., says, in regard to a contract not under seal: "The principle applicable to corporations is, that in respect of small matters, where it would be absurd and inconvenient to require them to put their seals to contracts, in those cases they may contract without seal," also "*in respect of matters for which it was created.*" — "These principles," adds the learned chief baron, "are founded on justice, public con-

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[3] Hill *v.* South Staffordshire Railw. Co., 2 De G. J. & S. 230; 11 Jur. N. S. 192.

* 597, 598

formed, it will be held to have assented to them, as much as if it had been a natural person. But the principle that a company

venience, and sound sense," and he might have said, perhaps, with equal propriety, will finally be found virtually to include all the legitimate business of corporations. For it is impossible to make any sensible distinction, between the proper business of a corporation, as appears upon the face of their charter, and that which is purely incidental or ancillary to the proper business of the corporation. And this is conceded by Lord *Campbell*, in the Governor & Company of Copper Miners v. Fox, *supra*, when refining upon the very elemental distinction between a trade in iron and copper.

And if we allow corporations to bind themselves, without seal, in all the business created by their charter, and in all that is incidental thereto, we shall have few cases remaining.

The only remaining case, directly upon the subject, which has yet reached us, is that of Henderson *v.* The Australian Royal Mail Steam Nav. Co., 5 El. & Bl. 409; s. c. 32 Eng. L. & Eq. 167 (June, 1855), where the defendants, a company incorporated for the purpose of carrying the mails, passengers, and cargo, between Great Britain and the Cape of Good Hope and Australia, and for that purpose to construct and maintain steam and other vessels, and to do all such matters as might be incidental to such undertaking, entered into a contract with the plaintiff to go out to Sydney and bring home a sloop belonging to the company which was unseaworthy, and it was held, that the action might be maintained, for the service performed under the contract, although the contract was not under seal.

The opinion of the judges at length will afford the safest commentary upon the present state of the English law upon the subject, and will present a very instructive contrast with the quiet, and perfectly settled, and satisfactory state of the law here upon the same subject, from having, as we believe, more wisely, abandoned a rule which grew out of an uncultivated state of society, and which had a very limited application, when adopted, and which is found, in practice, utterly inconsistent with the views of business men, in all commercial countries, at the present day.

Wightman, J.: "I am of opinion that our judgment should be for the plaintiff. This is an action against the Australian Royal Mail Steam Navigation Company, which is a company constituted expressly for the purpose of carrying on a trade by vessels; it is incorporated 'for the purpose of undertaking the establishment and maintenance of a communication, by means of steam navigation, or otherwise, and the carrying of the royal mails, passengers, and cargo, between Great Britain and Ireland, and the Cape of Good Hope and Australasia,' and for that purpose it must maintain and employ many vessels. Can it be doubted that amongst the ordinary operations of the company there would arise a necessity for employing persons to navigate or bring home vessels which met with accidents abroad? The words of the contract, as set out in the declaration, show an employment directly within the scope of the objects for which the company was incorporated.

"It is true there is a conflict of authorities which it is difficult to reconcile. Two or three cases in the Court of Exchequer, Lamprell *v.* The Billericay Union, 3 Exch. 283, and the Mayor of Ludlow *v.* Charlton, 6 M. & W. 815, and

* is not bound by a deed of agreement entered into by its directors or trustees for and on behalf of the company, which is not

Arnold *v.* The Mayor of Poole, 4 Man. & Gr. 860, in the Court of Common Pleas, appear to militate against the view taken by this court. But those decisions proceeded upon a principle adapted to municipal corporations, which are created for other objects than trade; and the Court of Exchequer applied that principle to modern trading companies, which are of an entirely different character.

"In early times there was a great relaxation of the rule which required that the contracts of corporations should be under seal, and that relaxation has been gradually extended. At first the relaxation was made only in those cases mentioned by Mr. Lush, when the subject-matter of the contract was of small moment and frequent occurrence, which in the case of municipal corporations might be the only exceptions necessary. But in the later cases there was a further relaxation, especially in the case of corporations created by charter for trading purposes, and other like corporations. The general result of the cases mentioned in Clark *v.* The Guardians of the Cuckfield Union, 16 Jur. 686; s. c. 11 Eng. L. & Eq. 442, is, that in the case of trading corporations, wherever the contract relates and is essential to the purpose for which the company was incorporated, it may be enforced, though not under seal. In deciding that case, I reviewed all the cases, and adhere to the opinion which I then expressed, that in such a case as the present, where the contract is essentially necessary to the objects of the company, and directly within the scope of their charter, it may be enforced, though made by parol."

Erle, J.: "I am of opinion that the contract is binding on the corporation, though not under seal, on the ground that it is directly within the scope of the company's charter.

"The authorities are apparently conflicting, but none conflict with the principle laid down by my brother *Wightman*, in which I concur. In Beverley *v.* The Lincoln Gas Light and Coke Company, 6 Ad. & Ell. 829, the supply of gas was directly incident to the purpose for which the company was incorporated. So also in Church *v.* The Imperial Gas Light & Coke Company, 6 Ad. & Ell. 846; and in Sanders *v.* The Guardians of the St. Neot's Union, 8 Q. B. 810; and in the elaborate judgment of *Wightman*, J., in Clark *v.* The Guardians of the Cuckfield Union, 16 Jur. 686; s. c. 11 Eng. L. & Eq. 442, it was assumed that the matter was within the scope of the company's charter.

"The judgment delivered by Lord *Campbell*, Ch. J., for this court, in the Copper Miners' Company *v.* Fox, 16 Q. B. 229; s. c. 3 Eng. L. & Eq. 420, enunciated the principle. The principle affirmed by this series of cases does not conflict with the two leading cases in the Court of Exchequer, which were cases of municipal corporations. Neither building, which was the matter in the Mayor of Ludlow *v.* Charlton, 6 M. & W. 815, nor litigation, which was the matter in Arnold *v.* The Mayor of Poole, 4 Man. & Gr. 860, was incidental directly to the purposes for which the corporations of those towns were constituted.

"The other cases to which I adverted were corporations for trading purposes and it is difficult to reconcile them. In Lamprell *v.* The Guardians of the Billericay Union, 3 Exch. 283, the action related to the building a workhouse, with

* under the seal of the company,[4] is still adhered to by the English and Irish courts. And to this extent the rule may not be

which the defendants were, as a corporation, connected. Diggle *v.* The London & Blackwall Railw., 5 Exch. 442, is that which to the greatest degree conflicts, unless it can be distinguished or explained on the ground that it was a unique contract; if it cannot, I do not agree to it; and in this conflict of authorities I adhere to those who oppose it.

"The notion that a set of contracts shall have their validity depending on the frequency and insignificancy of the subject-matter is of such extreme perniciousness, that I do not think that it can be adhered to, and must be considered as applicable only to municipal corporations. It has been so held as to contracts for servants, but I do not think that it was meant to be said that the contract was valid if the matter was of small importance, and invalid if the matter was of great importance; and indeed, in the case of trading companies, which it is allowed may draw and accept bills of exchange not under seal, it is obvious that insignificancy is no element; neither is the frequency or rarity of the contract an element. The nature of the contract and the subject-matter of it must be the principle which governs the question whether it is valid, though not under seal. It would be pernicious to the law of the country, that under the semblance of a contract parties should obtain goods or services, and not be compellable to pay for them. The Court of Exchequer had an opinion that it would be important that the rule should be certain; but their resort to the rule, that the contract in all cases, with the above-mentioned exceptions, should be under seal, cannot be acted upon."

Crompton, J. "I concur in the principle now adopted by my brothers *Wightman* and *Erle*. It is desirable that in the case of trading corporations there should be a relaxation of the rule, that the contract of corporations should be under seal, where the contract is for the purpose of carrying on their trade. That principle was supported in The Copper Miners Company *v.* Fox, 16 Q. B. 229; s. c. 3 Eng. L. & Eq. 420, and Clark *v.* The Guardians of the Cuckfield Union, 16 Jur. 686; s. c. 11 Eng. L. & Eq. 442; and it is an important principle, and may be the governing principle in these cases; and but for the two cases in the Court of Exchequer, I should think that the appointment of the plaintiff in this case did not require a seal. I cannot, however, distinguish this from Lamprell *v.* The Guardians of the Billericay Union, 3 Exch. 283, and Diggle *v.* The London & Blackwall Railw. Company, 5 Exch. 442; and if the judgment of the court depended upon me, I might defer to them, at the same time wishing the other principle to prevail. I cannot disguise from myself that we are deciding against the cases in the Court of Exchequer, and the rule which that court adopted. But I agree with what my brothers have said; and I will add, that those cases created considerable surprise at the time."

And in a still more recent case, Reuter *v.* The Electric Telegraph Co. 6 El. & Bl. 346 (May, 1856), in the Court of Queen's Bench, the defendants had made a contract, under their corporate seal, with the plaintiff, to transmit all his

[4] McArdle *v.* Irish Iodine Co., 15 Ir. Com. Law, 146.

* objectionable. But there are many American cases, where the construction in favor of the responsibility of the company for the

messages, and all he could collect, for a commission not exceeding £500, or less than £300 per annum, and while this contract was in existence, the chairman of the company entered into a parol agreement with the plaintiff, to pay him at the increased rate of £50 per cent, in consideration of the plaintiff's further services in collecting public intelligence and sending it by the company's telegraph. These additional services were found to be beneficial to the company, and this agreement was entered upon the minutes of the company, and the plaintiff had received £300 for services in pursuance of it.

The deed of settlement provided, that all contracts, where the consideration exceeds £50, should be signed by three directors. It was held, that the parol contract having been acted upon, and ratified by the company, was binding upon them. De Grave *v.* The Mayor of Monmouth, is a case of ratification, 4 C. & P. 111.

And in Bill *v.* The Darenth Valley Railw., 1 H. & N. 305; s. c., 37 Eng. L. & Eq. 539, the Court of Exchequer held, that one who had served the company, as secretary, might recover compensation for his services, although the remuneration to be paid him had not been fixed, at a general meeting of the company, as required by the English statute. That was held to determine the duty of the directors towards the company, and not to limit the liability of the company to third parties, which is the view taken of the subject here. Noyes *v.* Rut. & Burling. Railw., 27 Vt. 110–113; *ante*, § 136, n. 5.

But it has been held, that if a corporation contract through an agent, who attaches a seal to his execution of the contract on their behalf, it thereby becomes the deed of the company, although the seal was not their common seal, and an action of assumpsit cannot be maintained upon it. Porter *v.* Androscoggin & Kennebec Railw., 37 Maine, 349. But it must be executed in the name of the company. Sherman *v.* New York Central Railw., 22 Barb. 239.

If, in an action of assumpsit, upon a contract, purporting to be executed by a railway company, the company claim that it was executed under their seal, and that therefore an action of assumpsit will not lie upon it, and prevail, upon this ground, they are estopped to deny, in a subsequent action of covenant, upon the same contract, that the seal attached to the contract is the seal of the company. Philadelphia, Wilmington & Baltimore Railw. *v.* Howard, 13 Howard, 307.

But the English courts do not hold the corporation absolutely bound by contracts under their common seal, thus reducing the question to one of authority, in fact, to enter into the contract. Shrewsbury & Birmingham Railw. *v.* London & N. W. Railw., 6 Ho. Lds. 113.

In The London Docks Co. *v.* Sinnott, 8 El. & Bl. 347 (Nov. 1857), the Court of King's Bench maintain the general rule that "corporations aggregate can only be bound by contracts under the seal of the corporation." Lord *Campbell*, Ch. J., in giving judgment, enumerates the following exceptions to the general rule, mercantile contracts, contracts with customers, and such as do not admit of being executed under seal, as bills of exchange. But in some English cases, decided since the publication of the second edition of this work, it seems

*act of the directors, even in executing a contract under seal, without using the specific seal of the corporation, is more forcible, the directors for the time being held to have adopted the seal used as the corporate seal, the same as any number of natural persons may adopt the same seal. But this latitude of construction in regard to the seal of a corporation is common in this *country, it being generally held indispensable to bind the company by deed that their corporate seal should be used.

3. There has been considerable controversy, first and last, as to what, precisely, amounted to a seal. The generally received opinion upon the subject seems now to be, that a mere scroll or engraved likeness of the device of a seal will not answer the demands of the law.[5] It must be the result of the use of some adhesive or impressible material. It was at one time restricted to the use of wax, or some similar material. But it seems now to be regarded as sufficient, in the case of a corporation, if the impression is stamped into the substance of the paper on which the seal is used.[6] There is a great deal of curious learning on the subject, much of which will be found in a carefully prepared article upon the subject, lately published.[7]

to be conceded that corporations may be as much bound by the contracts of their agents as natural persons. Thus in Wilson *v.* The West Hartlepool Railw. Co., 34 Beav. 187; s. c., 10 Jur. N. S. 1064, it was held that when a company, through their directors, hold out to the world that a person is their agent for a particular purpose, they cannot afterwards dispute acts done by him, within the scope of such countenanced agency. And accordingly where the general manager of a railway company had in several instances entered into contracts for the sale of the company's lands, which contracts had been adopted by the company, and he entered into a contract with the plaintiff for the sale to him of a portion of their land, and in pursuance of the terms of the contract the company's servants laid down a branch line of railway, and the plaintiff removed machinery and other effects to the land, and no act was done by the company to lead the plaintiff to believe that the contract had been entered into without authority; but they subsequently repudiated the authority of the manager and refused to convey the land to the plaintiff, upon bill for specific performance; it was held that the case fell within the principle of the London & Birmingham Railw. Co. *v.* Winter, Cr. & Ph. 57, and specific performance was decreed.

[5] Bates *v.* Boston & N. Y. Central Railw., 10 Allen, 251.

[6] Hendee *v.* Pinkerton, 14 Allen, 381.

[7] 1 Am. Law Review, 649.

SECTION III.

Duty of the respective Companies to Passengers and Others.

1. *Company bound to keep road safe. Act of other companies no excuse.*
2. *Some cases hold that passengers can only sue the company carrying them.*
3. *Passenger carriers bound to make landing-places safe.*
4. *But those who ride upon freight trains, by favor, can only require such security as is usual upon such trains.*
5. *Owners of all property bound to keep it in state, not to expose others to injury.*
6. *This rule extends to railways, where persons are rightfully upon them.*

n. 3. *Cases, as to the necessity of privity of contract existing, reviewed.*

7. *One who keeps open public works is bound to keep them safe for use.*
8. *Corporations presumptively responsible to the same extent as natural persons in the same situation.*
9. *A railway company drawing the cars of a connecting road over its own line is responsible as a common carrier.*

§ 144. 1. A public company, like a canal or railway, who are allowed to take tolls, owe a duty to the public to remove all obstructions in the canal or upon the railway, although not caused by themselves or their servants, but by those who are lawfully in the use of the canal or railway, or by mere strangers.[1] Nor can a railway company excuse themselves from liability for injury to passengers carried over any part of their road, by showing that the particular neglect was that of a servant employed and paid by a connecting road as a switchman at the junction of two railways.[2]

[1] Parnaby *v.* Lancaster Canal Co., 11 Ad. & Ell. 223; and Lancaster Canal Co. *v.* Parnaby, id. 230. See *post*, § 145, pl. 7, 8, and note.

[2] McElroy *v.* Nashua & Lowell Railw., 4 Cush. 400. *Shaw*, Ch. J., here says: "The switch in question, in the careless and negligent management of which the damage occurred, was a part of defendants' road, over which they must necessarily carry all their passengers, and although provided for, and attended by a servant of the Concord company, at their expense, yet it was still a part of the Nashua & Lowell Railroad, and it was within the scope of their duty to see that the switch was rightly constructed, and attended, and managed, before they were justified in carrying passengers over it." So also where a train of another company and through its own fault, ran into a train standing upon its own track, but over which the other company had running power, it was held the company owning the track was *prima facie* responsible to its own passengers thus injured. Ayles *v.* S. E. Railw., L. R. 3 Exch. 146. So also where a company grants the use of its track to another company whereby through the fault of the latter company its own passengers are injured, the first company is responsible. Railway Co. *v.* Barron, 5 Wallace, 90. And a railway passenger carrier is responsible for the sufficiency of a carriage which it borrows and uses,

2. But it was held that a passenger, who suffered an injury in attempting to get upon the cars of one company while using * the road of another company, by contract with such company, through a defect in the construction of the road of the latter company, could not maintain an action against them, there being no privity of contract between the plaintiff and such company; the remedy being in such case against the company who were carrying the plaintiff as a passenger.[3]

to the same extent as for its own. Jetter *v.* N. Y. & H. Railw., 39 N. Y. (2 Keyes) 154.

[3] Murch *v.* The Concord Railw., 9 Foster, 9; Winterbottom *v.* Wright, 10 M. & W. 109. But a railway company owe a public duty, independent of all privity of contract, to keep their public works in such a state of repair, and so watched and tended as to insure the safety of all who are lawfully upon them, either by their direct permission or mediately through contract with other parties. Sawyer *v.* Rutland & Bur. Railw., 27 Vt. 377. This is here thus stated by *Isham*, J.: "That duty is imposed upon the defendants at common law, and it arises not from any contract of the parties, but from the acceptance of their charter, and from the character of the services they have assumed to perform. The obligation to perform that duty is coextensive with the lawful use of the road, and is required as a matter of public security and safety." The same principle is maintained in Smith *v.* New York & Harlem Railw. Co., 19 N. Y. 127, where it was decided that a switch-tender, employed by a railway company on a portion of its road upon which it permits another company to run trains, is not a servant of the latter; and an engineer of the latter, injured by the negligence of such switch-tender, may maintain an action against the company employing him. But where animals were killed by the train of one company, while rightfully upon the track of another company, it was held that the company owning the road was responsible for the damage. Ind. & Madison Railw. *v.* Solomon, 23 Ind. 534. So an apothecary, who sold a deadly poison labelled as a harmless medicine, was held directly liable to all persons injured thereby, in consequence of the false label, without fault on their part. The liability of the apothecary arises, not out of any contract or privity between him and the person injured, but out of the duty which the law imposes upon all, to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug, with such label, may have passed through many intermediate sales before it reaches the hands of the person injured, upon the same principle that one who suffers a dangerous animal to go at large, is responsible for the consequences. Thomas *v.* Winchester, 2 Seld. 397.

In Toomey *v.* London Br. & South C. Railw., 3 C. B. (N. S.) 146, the plaintiff mistook a door at a railway station, and passing through it, instead of another, fell down a flight of steps and was hurt. There was a light over the door which he intended to pass through, and a printed notice showing the purpose of it. There was also an inscription over the other, but no light. The defendant could not read. There was no evidence that the steps were more than ordinarily dangerous. Held that the company were not liable. But a railway

* 3. And while the cases recognize the duty in such companies as carry passengers, either upon their own road or that of other companies, by permission or lease, to make the approaches to such road safe, at all points where freight or passengers are usually received, this duty does not exist in regard to a passenger who, out of special favor, is allowed to get upon the train at an unusual place for receiving passengers.[3] And the same rule has been extended to the owners of docks, who keep up the gangways to ships while remaining at their docks; and where they were left unsafe by the negligence of the servants having charge of the same, and one who visited a ship in the dock on business, by invitation of the officer, and was injured by the defect in the gangway without his own fault, it was held the dock owners were responsible.[4]

4. And one who, by favor, is allowed to travel upon a freight-car, contrary to the usual custom of the company, is bound to be satisfied with such facilities and accommodations as usually exist upon freight trains, as railway companies are not to be regarded as common carriers of passengers upon their freight trains, unless they make it an habitual business.[3]

5. It has been held that natural persons, who assume no pub-

company is bound to fence a station so that the public may not be misled, by seeing a place unfenced, into injuring themselves by passing that way, being the shortest to the station. Where a passenger, in waiting for a train, had gone to a public house for refreshments, the porter showing him the way with his lantern, and hearing the bell ring started out for the station, and mistaking the light of the engine for that of the station crossed an open space direct, and was injured by falling into a hole three feet deep, it was held the company were liable. Burgess *v.* Great Western Railw., 6 C. B. N. S. 923.

Nor is a railway company liable for an injury through the defect of a crane which they had furnished to enable the consignee of heavy goods to unlade them from the cars, although such crane was known to them to be inadequate for the use for which it was furnished, the party injured having been employed to assist the consignee, and thereby lost his life. The case is put upon the ground of want of privity, it being admitted that the company would, in such case, have been liable to the party to whom they furnished the crane, if he or his ordinary servants had sustained injury in its prudent and lawful use. But the party here was called in for the occasion. Blakemore *v.* The Bristol & Exeter Railw., 8 El. & Bl. 1035. It seems to us the principle of want of privity is here misapplied. This is a clear case of tort and not of contract, and the party injured, although called in for the occasion, was *pro hac vice* a servant of the borrower, and it was the same as if the borrower himself had been injured. The furnishing the instrument had express and direct reference to its use by the consignee and his servants, extraordinary as well as ordinary.

[4] Smith *v.* London & St. Katherine's Dock Co., Law Rep. 3 C. P. 326.

lic duties, are liable, if they suffer their property to remain in a dangerous condition; as that the occupier of land is bound to fence off a hole or area upon it which adjoins or is so close to a highway that it may be dangerous to passers-by if left unguarded.[5]

*6. The same rule has often been extended to turnpike roads[6] and to plank roads, where the statute made no provision for the liability of the company.[7] And the same rule has been extended generally to railway companies in this country, without question, so far as persons are rightfully in the use of the same.[8] It was held that the owner of a car which was in the use of another party, upon a railway, by contract between him and the company, and suffered an injury by reason of the bad state of the railway, might maintain an action against the company.[8]

7. This principle, or an extension of it, has been a good deal discussed in a case in the House of Lords.[9] The *plaintiffs,

[5] Barnes *v.* Ward, 2 Carr. & K. 661.

[6] Randall *v.* Cheshire Turnpike Co., 6 N. H. 147; Townshend *v.* Susquehannah T. Co., 6 Johns. 90.

[7] Davis *v.* Lamoille County Plank Road, 27 Vt. 602.

In the case of Gibbs *v.* Trustees of the Liverpool Docks, 3 H. & N. 164; s. c. 31 Law Times, 22, it was held, in the Exchequer Chamber, reversing the judgment of the Court of Exchequer, that it is the duty of those receiving tolls, whether as trustees or otherwise, not to allow a dock to remain open for public use, when they know that it is in such a state that it cannot be used without danger, citing Parnaby *v.* Lancaster Canal Co., 11 Ad. & Ell. 223, and distinguishing the case from Metcalfe *v.* Hetherington, 11 Exch. 257. But it seems the party is never liable in such case, unless he knew or might have known of the defect but for his own neglect of duty. McGinity *v.* Mayor of New York, 5 Duer, 674. See *post*, n. 9.

[8] Cumberland Valley Railw. *v.* Hughs, 11 Penn. St. 141.

[9] The Mersey Docks & Harbor Board *v.* Penhallow, Law Rep. 1 Ho. Lds. 93; s. c. 12 Jur. N. S. 571. The recent cases bearing upon the general question of the responsibility of one party for negligence in his own business, which incidentally operates to produce injury to another, and which are here discussed by court or counsel, are the following: Metcalfe *v.* Hetherington, 5 H. & N. 719; Coe *v.* Wise, 10 Jur. N. S. 1019; Holliday *v.* St Leonard's, Shoreditch, 8 Jur. N. S. 79; s. c. 11 C. B. N. S. 192; Pickard *v.* Smith, 10 C. B. N. S. 470; Southampton & I. Bridge Co. *v.* The Local Board of Health, 8 Ellis & Bl. 801; Ruck *v.* Williams, 3 H. & N. 308; Whitehouse *v.* Fellowes, 10 C. B. N. S. 765; Brownlow *v.* The Metropolitan Board, 8 Jur. N. S. 891; s. c. 13 C. B. N. S. 768; Jones *v.* The Mersey Board, 11 Jur. N. S. 746.

There is obviously considerable conflict in the decisions bearing upon the general question involved. The result of the discussion in the latest case before the court of last resort in England, *supra*, seems to be, that the statute is the only

a corporation, were empowered by act of parliament to make and maintain docks for the use of the public, and to take tolls from persons using them. The corporation did not, nor did its individual members, derive any emolument from the tolls, but was bound to apply them in maintaining the docks, and in paying a debt contracted in making them. The corporation had the usual powers of appointing water-bailiffs, harbor-masters, and servants, by whose hands the duties of superintendence were carried out. A ship, in entering one of the docks, struck against a bank of mud left at its entrance, of the existence of which the corporation was either aware, or negligently ignorant. The ship and cargo being both injured, separate actions were brought by the respective owners. It was held, affirming the judgment of the Exchequer Chamber,[10] that as long as the docks were open for the use of the public, the corporation were bound, whether they received the tolls for private or fiduciary purposes, to take care that the docks were navigable without danger, and consequently that they were liable in damages.

8. It was here held, that in construing statutes creating bodies corporate, such as the plaintiffs, the legislature must be considered, unless the contrary appears, to intend that the corporate body shall have the same liabilities and duties as are imposed by the general law upon private persons doing the same things.

9. A railway company which for an agreed compensation receives and draws over its own line the cars of a connecting road

and sufficient warrant for creating any such public work as a railway, harbor, or canal. But the responsibility of those to whom the power is given, depends upon the provisions and construction of the statute; that it is unimportant whether the grantee of the power be a natural or corporate person, the responsibility in either case will be the same; that in the absence of all special statutory provision to the contrary, the builders of such works, and those who operate the same for their own benefit, or that of others, are bound to see that they are constructed with reasonable care and skill, and maintained in the same manner. It was at one time supposed the grantee of such a power might excuse himself from all responsibility by showing good faith and diligence in the discharge of the public duty imposed by the grant of the power. Sutton v. Clarke, 6 Taunt. 29, where Chief Justice *Gibbs* said: "He has done all that was incumbent on him, having used his best skill and diligence." But it has since been held that this is not enough, and that the grantees of such a power are bound to conduct themselves in a skilful manner, and to do all that any skilful person could reasonably be required to do in such a case. Jones v. Bird, 5 B. & A. 837.

[10] 3 H. & Norm. 164, 4 Jur. N. S. 636.

is responsible, as a common carrier, for the safe delivery of the passengers and freight, the same as in other cases. And where by an agreement between the two companies, the latter is to indemnify the former from all claims for damages in consequence of the transportation, unless caused by the default of the transporting company, or from some defect in its road, this will leave the transporting company responsible, both under the contract, and independently of it, upon general principles, for an injury caused by a defect in its track, although without its fault.[11]

*SECTION IV.

Extent of the Powers and Duties of Lessees of Railways.

1. *Statement of the points in an important English case.*
2. *Lessees of railways liable for their own acts, and for many acts of lessors.*

§ 145. 1. A very elaborate and important case upon the relative rights and duties of the lessors and lessees of railways came before the court of C. B. in June, 1851, and the Exchequer Chamber in January, 1853. The importance and difficulty of the subject, and the few cases upon it which have yet arisen, will justify an extended notice of the points decided in the court of last resort.[1] In 1836 a company (afterwards called the West London Railway Company) was incorporated by act of Parliament for the making of a railway from the Kensington Canal to join the London and Birmingham (afterwards called the London and Northwestern) and the Great Western Railways at a place called Holsden Green, and certain duties were by the act cast upon the company; and, amongst other things, it was provided that, if the railway should be abandoned, or should, after its completion, cease for the space of three years to be used as a railway, the land taken by the company for the purposes of the act should revert to the owners of the adjoining land.

In February, 1837, the West London Railway Company entered into an agreement with the Great Western Railway Company, under which the last-mentioned company bound themselves to stop certain of their trains at a point where their railway inter-

[11] Vermont & Mass. Railw. *v.* Fitchburgh Railw., 14 Allen 462.

[1] The West London Railw. *v.* The London & N. W. Railw., 11 C. B. 327; s. c., 18 Eng. L. & Eq. 481.

sected the West London Railway, for the purpose of transferring passengers and goods from one railway to the other, and to stop their trains for the purpose of meeting corresponding trains of that company, in the manner particularly detailed in the deed.

In 1840, another act, 3 & 4 Vict. c. 105, passed, giving further powers to the West London Railway Company; the thirty-fourth section, reciting the agreement of February, 1837, regulated the *mode of crossing, until the plaintiffs' railway should be completed; the thirty-sixth section saved the plaintiffs' right under that agreement; and the thirty-seventh section provided, that if the plaintiffs' line was abandoned, or ceased to be used as a railway for three years after its completion, then, on payment or tender to them by the Great Western Railway Company of the purchase-money of the piece of land where the railways crossed, the said land should vest in the Great Western Railway Company.

By a subsequent act (8 & 9 Vict. c. 156), reciting that "it had been found that the said West London Railway [which it appeared in evidence had been worked with passenger trains as well as with goods trains] could not be worked, as a separate and independent undertaking, with advantage to the proprietors thereof, but that the same might be advantageously worked and used in connection with the said London and Birmingham Railway and the said Great Western Railway, or either of them, by both or either of the companies to whom the said last-mentioned railways belonged; that the West London Railway Company were therefore desirous of letting the said railway on lease to the London and Birmingham Railway Company; and that the last-mentioned company were willing to accept such lease, subject to certain terms and conditions which had been mutually agreed on between the said two companies," — the West London Railway Company was authorized to lease to the London and Northwestern Railway Company their railway, and all their rights, powers, and privileges in relation thereto, — subject to the provisions of the act, and to the performance of the conditions to be mentioned in such lease.

By the lease, which was afterwards executed in pursuance of this act, the London and Northwestern Railway Company covenanted, amongst other things, that they would "at their own expense, during the continuance of the lease, efficiently work and repair the railway and works thereby demised, and indemnify the West London Railway Company against all liabilities, loss, charges,

and expenses, claims and demands, whether incurred or sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with * the working of the same railway or works; but the West London Railway Company shall have no control whatever over the working or management by the London and Birmingham (Northwestern) Railway Company of the West London Railway or works. It was held: —

That in order to perform their covenant to work efficiently, the defendants were not bound under all circumstances to work the line for passenger traffic; but that, if as much gross proceeds could be obtained by efficiently working the railway for goods only, as for passengers only, or for both passengers and goods, the covenant was well performed, — *Platt*, B., *Martin*, B., not concurring.

That the agreement of February, 1837, with the Great Western Railway Company, was, by virtue of the provisions in the leasing act, and the lease itself, transferred to the defendants, the lessees; and, consequently, that they had power to compel the Great Western Railway Company to stop trains on their line, pursuant to the provisions of that agreement. That, although the defendants had power to stop the Great Western trains, they were not bound to exercise it, necessarily, as a part of the efficient working of the line demised; and that they were not bound necessarily to work the demised line in connection with the trains on the Great Western Railway.

That there was no covenant in the lease to bind the defendants to work the demised line in connection with either or both their own or the Great Western Railway; but that it would be for the jury to say whether or not they could practically work the line efficiently, without some connection with one or other of those railways.

That, for the purpose of considering the liability of the defendants, they were not to be treated by the jury as if they were lessees of a separate and independent line, having no control over the other two railways; but that the covenant to work the demised line efficiently, must be construed with a reference to the subject-matter, and the character of the defendants.

That the obligation of the defendants under their covenant, was not limited, as decided by the court below, to the indemnification of the plaintiffs from the obligations cast upon them by their acts of incorporation. The court say, in substance: —

* If this railway had been leased to a simple individual, or company, without any connection with any other railway, and leased alone, the measure of efficient working, we cannot help thinking, would be very different from what would be required from a company whose line was connected with it, who had the entire control over their own line, and were armed with a power of adding to the traffic of the railway, by the control possessed over another line, and whose capabilities and powers in this respect were reasons which disposed parliament to permit the lease to be made to them.

It is difficult, indeed almost impossible, to define the precise nature and degree of efficient working which such a company ought to apply, under this covenant; not so difficult to say that it ought to be different and greater than would be required from a company or an individual who had nothing but the railway leased. They could only be required to supply convenient accommodation and attendance for the receipt, and sufficient means of carriage, of such goods and passengers as might be offered at one terminus, or any intermediate station, to be carried to the other terminus, or some other intermediate station; and this, however small the gross receipt might be.

But that would be too small a measure of efficient working, in the case of these defendants, who have the power of supplying more goods and passengers themselves by facilitating the transit of both from Holsden to the Kensington Terminus, or Great Western Station, or by increased facilities for receiving them at the Kensington Terminus, by arrangements within their power, without any serious injury to their own concern.

They are certainly not bound to make a sacrifice of their own concerns for the purpose of efficiently working this line so as to produce the greatest profit to the plaintiffs and themselves.

The covenant must have a reasonable construction in this respect. But they are, we think, bound to do more than a lessee of merely the railway in question would do, unconnected with any other.

2. It seems to be regarded as settled that the persons or corporation who come into the use of a railway company's powers and privileges, are liable for their own acts while continuing * such use, and also for the continuance permissively of any wrong which had been perpetrated by such company upon land-owners

* 611, 612

or others, by means of permanent erections, which still remain in the use of their successors.[2] Thus it has been held that the lessees of a railway are liable to a penalty, under the statute, for not having a bell upon their engines, and not ringing it, as required by the statute.[3] But the lessees of a railway are not liable for the acts of the servants of the lessors.[4]

SECTION V.

Contracts between different Companies regulating the Traffic.

1. *Such contracts generally held valid and binding.*
2. *Arrangements to avoid competition valid.*

§ 146. 1. It seems in general to have been considered, that contracts between different connecting companies, with a *bona fide* view to regulate traffic, in a reasonable and just manner, were legal and binding.[1] But when it is considered that these * companies have to a very great extent a monopoly of the traffic and travel of the country, the power to regulate fares and freight by arrangement between the different companies is certainly one very susceptible of abuse. But there is ordinarily very little

[2] In regard to the construction of contracts between different companies for the mutual use of each other's line, or the line of one road by the other, tolls, &c., see the Lancashire & Yorkshire Railw. *v.* The East L. Railw., 7 Exch. 126; 8 Eng. L. & Eq. 564; s. c. reversed in Exchequer Ch., 9 Exch. 591; 25 Eng. L. & Eq. 465; and affirmed H. Lords, 5 Ho. Lds. 792; 36 Eng. L. & Eq. 34. It was held in a late Scotch case, on appeal in the House of Lords, that under an act of parliament requiring one company to accept a lease of and operate the other's road, so soon as it was in readiness, the lessees were bound to accept any reasonable portion of the road, so soon as completed, it being such a portion as might be worked with advantage. Edinburgh & G. Railw. *v.* Stirling & D. Railw., 1 McQu. Ho. Lds. 790; Brown *v.* The Cayuga & Susquehanna Railw., 2 Kernan, 486. [3] Linfield *v.* Old Colony Railw., 10 Cush. 562.

[4] Walford on Railways, 184, citing two cases not reported.

[1] Shrewsbury & Birm. Railw. *v.* London & N. W. Railw., 17 Q. B. 652; s. c. 9 Eng. L. & Eq. 394. Lord *Campbell* says here, That if the object of the contract were to create a monopoly, and to deprive the public of all benefit of competition, it might be illegal, but an agreement that one company shall not interfere or compete with the other, is no more illegal than a contract by which one tradesman or mechanic agrees not to continue his business in a particular place. Same case in Chancery, before Lord *Cottenham*, 2 Mac. & Gordon, 324, where a similar view is taken of the legality of the contract. Lord *Langdale*, M. R., in Colman *v.* The Eastern Counties Railw., 10 Beav. 1; s. c. 4 Railw. C. 513.

danger that they will willingly incur the serious reprobation of public opinion. And it has sometimes been doubted whether contracts, whereby one railway company seeks to assume the entire business of other companies, affording them a guaranty in regard to stock and profits, or either, could be regarded as coming within the fair interpretation of the English general statutes, allowing one company to contract for running upon the track of other companies, for tolls, and so could be held valid by the courts of that country, either in law or equity.[2] But some of the later cases seem to sustain such contracts.[3]

2. There is no principle of public policy which renders void a traffic arrangement between two lines of railway for the purpose of avoiding competition. And if the arrangement embrace the division of the net earnings of both companies in certain definite proportions, the court will not interfere upon the ground that one company may not adventure its profits upon the chances of the earnings of another company.[4] And it is no valid objection that such division is based upon the experience of the result of past traffic.[4]

SECTION VI.

What is requisite to constitute a perpetual Contract between different Railway Companies.

1. *Railway connections commonly temporary.*
2. *The matter is one mainly of public convenience and so subject to legislative control.*

§ 147. 1. Where in the charter of a railway company a right is reserved to the legislature to allow other railways to connect with the former, upon such terms as shall be reasonable, complying with the established regulations of such company upon the subject, and in pursuance of such reservation a junction is made by a second railway company with the first, which, in faith * of such connection, proceeds to make expensive and permanent arrangements for the accommodation of the enlarged business thus brought upon its track, it was held, that this imposed no

[2] Simpson *v.* Denison, 10 Hare, 51; s. c. 13 Eng. L. & Eq. 359.

[3] *Ante*, § 142.

[4] Hare *v.* London & N. W. Railw., 2 Johns. & H. 80; s. c. 7 Jur. N. S. 1145; *post*, § 148.

obligation upon the second company to continue this connection permanently. And also that the second company might lawfully obtain an extension of their own road, so as to do their own business, without continuing the connection.[1]

2. It seems that ordinarily a mere legislative permission to railway companies to connect their lines imposes no obligation upon either company to do so. And if that were to be so regarded, it is certain that no absolute vested right to insist upon the permanency of such connection could exist in either company, which it would not be competent for the legislature to dissolve. After the connection is made, it is optional with either party to discontinue it, and clearly so by legislative permission. Even after such connection is made, it is not incumbent upon either company to continue the same gauge, or if so, such right cannot by possibility exist until the connection is made, and if, before that, either company, by legislative act, is relieved from all obligation to connect, this will terminate all possible claim on the part of the other.[2]

SECTION VII.

Contracts by Railways ultra vires, and Illegal.

1. *Contracts to make erections not authorized by their charter.*
2. *Contracts to indemnify other companies against expense.*
3. *Contracts to divide profits.*
4. *Illustration of the doctrine* ultra vires.
5. *How far railways may accept bills of exchange. Railway companies not empowered to make bills and notes except from necessity.*
6. *Contracts* ultra vires *cannot be specifically enforced against the directors.*
7. *Money unlawfully borrowed company must refund.*
8. *How far acts* ultra vires *confirmed by acquiescence.*
9. *Company not restrained from making unlawful payments on the ground of policy.*
10. *Decision rests on no safe grounds.*
11. *It seems too much like paying black mail to buy peace.*

§ 148. 1. It has been considered, that a contract by a railway company with the corporation of a city, by which the company bind themselves to erect a bridge and other accessory works across a river, at a point where, by their charter, they are not authorized to pass, and to do this by a definite time, and in default to pay one thousand pounds, as liquidated damages,

[1] Boston & Lowell Railw. *v.* The Boston & Maine Railw., 5 Cush. 375.

[2] Androscoggin & Kennebec Railw. *v.* Androscoggin Railw., 52 Me. 417.

such works being, without an act of parliament, a nuisance, is an illegal contract, and equally so notwithstanding a stipulation that the company shall in the mean time exert themselves to obtain an act authorizing the erections.[1]

2. And where the chairman of the Southeastern Railway Company promised the managing committee of a proposed railway company, that in consideration of their not abandoning their project, but pursuing it in parliament, the Southeastern *Railway Company would, in case of their bill being rejected, insure the company, of which they were the managing committee, against all loss, and would pay all expenses incurred by them in endeavoring to obtain the act; and the Southeastern Railway Company were authorized, by their acts, to apply their funds in certain ways, not including this: it was held[2] that the agreement was void, as it was an agreement made by contracting parties (who must be presumed to know the powers of the defendants' company, by their acts of parliament, which are public acts) that the company should do an act which was illegal, contrary to public policy and the provisions of the statutes.[3]

3. And a contract by which one railway agrees to give up to another railway a part of its profits, in consideration of securing a portion of the profits of the other company, is illegal, and *ultra vires*.[4]

[1] The Mayor of Norwich *v.* The Norfolk Railw., 4 El. & Bl. 397; s. c. 30 Eng. L. & Eq. 120.

[2] McGregor *v.* The Official Manager of the Deal & Dover Railw., 16 Eng. L. & Eq. 180, in Exchequer Chamber; s. c. 18 Q. B. 618. See also East Anglian Railways Co. *v.* Eastern Counties Railw., 11 C. B. 775; s. c. 7 Eng. L. & Eq. 505, where the same question, in effect, is determined. *Ante*, § 16.

[3] *Ante*, § 56, n. 3.

[4] Shrewsbury & Birmingham Railw. *v.* London & Northwestern Railw., 6 House of Lords, 113; s. c. 29 Law Times, 186. But one company may lawfully accept the lease of an unfinished railway under a specified rent yearly after the same is finished, and may stipulate for the payment in advance of the rent for the whole term for the purpose of constructing the road; and this will be no infringement of the statute allowing the connection of the two roads, upon condition the first company shall not expend any portion of its reserved funds for the construction of the other road. This looks very much like one company building the road of the other out of its own funds, surplus or borrowed, for the use of such road a certain number of years. If so, it is converting surplus into capital without legal warrant. The case is so near the dividing line between what is and what is not justifiable as not to be of much authority, for general adoption, by those who desire to protect an existing company against expending its funds in extending its line. It is one of those cases which reluctantly, at declar-

4. The rule laid down upon this subject by a distinguished English judge, on a recent occasion in the House of Lords,[5] is perhaps as fair and full a definition of the doctrine as can be made. "There can be no doubt that a corporation is fully capable of binding itself by any contract under its common seal in England, and without it in Scotland, except where the statutes by which it is located or regulated expressly or by necessary implication prohibits such contracts between the parties. *Prima facie* all its contracts are valid, it lies on those who impeach any contract to make out that it is avoided. This is the doctrine of *ultra vires*, and it is no doubt sound law, though the application of it to the facts of each particular case has not always been satisfactory to my mind." His lordship here declares that it would not be *ultra vires* for a company wishing to alter one of its branches, and about to apply to parliament for authority to do so, to enter * into a contract for land which would be necessary for the purpose if they should obtain the act.

5. The question how far a railway company, without special grant of power for that purpose, may accept bills of exchange, is very carefully examined and thoroughly discussed, both by court and counsel, in a recent English case.[6] It seems to be there * con-

ing the *bona fide* acts of corporations *ultra vires*, where no great harm to any one is expected to ensue, and the public interest has been materially subserved. Durfee *v.* Old Colony & Fall River Railw. 5 Allen, 230.

[5] Lord *Wensleydale*, in the Scottish Northeastern Railw. Company *v.* Stewart, 3 McQu. Ho. Lds. 382; s. c. 5 Jur. N. S. 607.

[6] Bateman *v.* Mid-Wales Railw. Company, Law Rep. 1 C. P. 499; s. c. 12 Jur. N. S. 453. The language of *Crompton*, J., in Chambers *v.* Manchester & Milford Railw. Co., 5 B. & S. 588; s. c. 10 Jur. N. S. 700, seems to place the question upon its true basis.

"The law as laid down by *Parke*, B., in the South Yorkshire Railw. & River Dun Company *v.* The Great Northern Railw. Company, does not appear to be questioned, and seems to be applicable to the present case. 'Corporations, which are creations of the law, are, when the seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by contract in which all concurred.' This is undoubtedly true of corporations generally; but as Mr. Lush has observed, railway corporations are the creatures of an act of parliament; and the question is, how far provision has been made for conferring upon them borrowing powers, which are said to have been exercised in the present case. 'But,' proceeds *Parke*, B., 'where a corporation is created by act of parliament for particular purposes, with special powers, then indeed another question arises; their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear

sidered, that unless the corporation is a trading company, as the Bank of England or the East India Company, there is no presumptive power to accept bills of exchange. In the case of railway corporations, created for a special purpose, there is no presumptive power either to borrow money, or to issue or accept bills of exchange for the purpose of negotiation in the market. The rule is thus stated by one of the judges in the case last cited, speaking of trading corporations. "Such a corporation may, in some cases, bind itself by promissory notes and bills of exchange. . . . But a corporation will not have these extraordinary powers, unless the nature of the business in which it is engaged raises a necessary implication of their existence."

6. Contracts *ultra vires*, entered into by the directors, and which are not binding upon the company, cannot be specifically enforced against the directors, nor can the directors be decreed by the court to make good their representations.[7]

7. A corporation having no power to lend, made a loan to a company having no power to borrow. The borrowers were aware of those facts. They bought a canal with the money; but that

by the express provisions of the statute creating the corporation, or by necessary and reasonable inference from its enactments, that the deed was *ultra vires*, — that is, that the legislature meant that such a deed should not be made.' This, as it appears to me, touches the very question before us, and, moreover, seems to convey the notion that directors of a railway company are of the nature of special rather than general agents of the company they represent. They have the custody of the seal of the company, but they have not the power to affix it to instruments which the legislature has declared to be *ultra vires;* and should this be done, the company are not bound." . . .

"These bonds, therefore, seem in effect to amount to an account stated, and a promise to pay, under seal; and, so long as they are used for the purpose for which they were originally intended, it may be that there is nothing objectionable in them. But here the bonds are issued by the directors for the purpose of raising money to discharge liabilities into which the plaintiff has entered on behalf of the company, of which he was chairman; and this is, to say the least of it, an indirect mode of borrowing, and beyond the powers conferred upon the company under their act. The point was also put to us upon the argument whether the prohibition to borrow was to be held to extend to the raising of small sums for the immediate necessities of a newly started company; and to this, we think, it was well answered, that if once a company be permitted to overdraw one hundred pounds, there would be no impediment to their doing so to any extent to which their credit would reach. I am therefore of opinion that these bonds are void, and that the plaintiff is not entitled to recover upon them."

[7] Ellis *v.* Coleman, 25 Barb. 662.

was set aside, and the purchase-money ordered to be refunded. The loaning company sought a refunding of the money loaned by them, with the interest, out of the refunded purchase-money. It was held they were entitled to a decree accordingly.[8] But the lender of money to a company having no power to borrow, cannot compel the company to refund the money, unless it has been *bona fide* applied to the purposes of the company.[9]

8. Where part of a contract only is *ultra vires* of the company, a court of equity will restrain that portion only.[10] Where there * is a defect of capacity in the company to do the act, the power cannot be created by the express agreement of the shareholders; nor can it be presumed from any extent of acquiescence. But where only certain formalities are required to the valid execution of the act, as the consent of a general meeting, that will be presumed from acquiescence.[11] But where dissentient members[12] were allowed to retire by the resolution of a general meeting, it was held the other members could not be allowed to question its regularity and validity, after an acquiescence of twenty years, although *ultra vires*.

9. Directors of an insurance company offered to pay losses caused by the explosion of gunpowder, although expressly excepted from the risks assumed by the policy, at the same time not admitting any legal liability to do so. On a bill by a shareholder to restrain the directors from doing so, it appearing that it was usual and advantageous for companies to do so, although not strictly

[8] Ernest *v.* Croysdell, 2 De G. F. & J. 175; s. c. 6 Jur. N. S. 740.

[9] Troup *in re*, 29 Beav. 353; Hoare *ex parte*, 30 id. 225.

[10] Mansell *v.* Midland Great Western (Ireland) Railw. Co., 1 H. & M. 130; s. c. 9 Jur. N. S. 660. It was here held, that an agreement to contribute to the parliamentary deposit required on bills promoted by another company is *ultra vires*. So is an agreement to take shares in the future extension of another company. So also is an agreement to make traffic regulations applicable to future extensions. But no such agreement is *ultra vires* if its validity is expressly made dependent upon the sanction of parliament. But where part of an entire arrangement between two companies, the parts of which are dependent upon each other, is illegal, or *ultra vires*, a court of equity will restrain the execution of every portion of the arrangement. Hattersley *v.* Shelburne, 7 Law T. N. S. 650.

[11] British Provident Life Ins. Co., *ex parte* Grady, 9 Jur. N. S. 631.

[12] Brotherhood *in re*, 31 Beav. 365. A restriction upon the liability of the shareholders for bills drawn by the company will not affect the responsibility of the company. State Fire Ins. Co., 8 L. T. N. S. 146.

responsible for the loss: held, that this was a mode of carrying on the business with which the court could not interfere.[13]

10. This is a most remarkable decision, but more remarkable for the reasons and grounds upon which it is placed. The fact that the unlawful payments proposed to be made were prudent and politic, is nothing more than may be urged in favor of all proposed illegal diversion of the funds of a company. It is always proposed thereby to advance the interests of the company, and consequently the dividends to the shareholders. It is impossible to suppose that any such principle can ultimately maintain its ground in the English courts of equity.

11. The subsequent cases seem to manifest the feeling that all secure ground to rest upon is taken from under them. It is said in one case [14] * that in matters strictly relating to the internal management of the company, even though not strictly within the terms of the constitution of the company, the court will not interfere. But it is here added, if the matters complained of are plainly beyond the powers of the company, and are inconsistent with the objects for which the company was constituted, the court will interfere, at the instance of the minority, to prevent the act complained of from being carried out. If this is intelligible to others, or reconcilable with good sense and good law, it certainly passes our comprehension, and we can only say that we should not expect it to be long maintained anywhere. It is nothing more or less than paying black mail to buy peace, and if public companies can do that with funds they hold in trust, it may be as well for courts of equity not to attempt to define what they may or may not do.

§ 148 *a*. The following points, decided by a court of learning and experience, in regard to the rights of railway corporations in one state to enter into permanent arrangements with similar corporations in other states, with our own comments upon it, as published in the American Law Register,[1] we deem of sufficient importance as illustrating some of the doctrines discussed in the preceding section, to be here repeated. The opinion of Judge *Storer*, at length, will be found in the American Law Register,[2] and will repay careful reading.

[13] Taunton *v.* Royal Ins. Co., 2 H. & M. 135; s. c. 10 Jur. N. S. 291.
[14] Gregory *v.* Patchett, 33 Beav. 595; s. c. 10 Jur. N. S. 1118.
[1] Vol. 5, N. S., 733. [2] Vol. 5, N. S., 733–744.

1. *The power of a receiver to sue in the name of the corporation.*
2. *Foreign railway corporation acquired no prerogative rights by leasing a portion of the track of a domestic railway.*
3. *Statement of the contract and ground of holding it void, as being* ultra vires.
4. *Further reasons why such contract cannot be specifically performed here.*

n. 3. *Comments upon the preceding propositions.*

Superior Court of Cincinnati. Ohio and Mississippi Railroad Company *v.* Indianapolis and Cincinnati Railroad Company.

1. A receiver appointed by the Circuit Court of the United States for the Southern District of Ohio, to take possession of a railway and its effects, may sue in this court, upon a contract made by that corporation in the corporate name of the railway, without disclosing in the petition his own name as receiver.

* 2. A foreign corporation having no charter from the state of Ohio, authorizing it to construct and operate a railway in this state, cannot, by a transfer of a portion of a railway already constructed in the state by legal authority, acquire a right to use and operate such railway within this state.

3. The plaintiffs, being authorized to construct and operate a railway from Cincinnati to Vincennes, and the defendants, being authorized to construct and operate a railway from Indianapolis to Lawrenceburg, of a different gauge, entered into a contract whereby the defendants, in consideration of being allowed to lay a third rail on the road of the plaintiffs, to furnish motive power for hauling the cars of the defendants on that part of the road, agreed, among other things, to lend to the plaintiffs $30,000, for the purpose of erecting a depot for the plaintiffs in Cincinnati, to become the property of the plaintiffs at the expiration of the contract; to form no connections at or beyond Lawrenceburg prejudicial to the plaintiffs; and to give the plaintiffs exclusive control of the employees of the defendants while on the road of the plaintiffs. Held, on the construction of the charters of the plaintiffs and defendants, that such contract was beyond the competency of the contracting parties, and was void.

4. The contract also provided, that the defendants should have the use of a depot and certain grounds in Cincinnati for unloading goods and lumber, for thirty years. Held, that this created an easement in the land, and was, in connection with the laying and keeping up the third rail, in substance a lease, which the plaintiffs had no authority to make, and that it being for more than three years, was also invalid under the statute of frauds, for the

want of legal acknowledgment. Held, also, that the defendants having as a foreign corporation no right to accept a lease of a railway in Ohio, the plaintiffs could not have had a specific performance of the agreement, the remedies of the parties not being mutual.[3]

*SECTION VIII.

Companies exonerated from Contracts, by Act of the Legislature.

§ 149. It seems to be conceded that a railway company may plead a subsequent act of the legislature, in bar of the performance of their covenant or contract. But it will afford no bar,

[3] We can see no good ground to question the soundness of the foregoing opinion; but it seems to us that the case exhibits in a strong light the embarrassments constantly resulting from having railway corporations restricted in their corporate functions to the limits of state lines. It would certainly seem that there is far more necessity and propriety in having all the railway corporations in the country possess a national character, than there is in giving the same character to all the banks of the country, which has been already practically effected by means of discriminating taxation. There is every reason to regard railways as national institutions, in almost every sense in which they possess a public character, or perform public service, with the single exception of intercommunication, which is mainly of local and state concern.

1. As one of the wonderful advancements of military operations in modern times, by which railways have wrought a complete change in the conduct of war, and have become an indispensable necessity, they are entirely of a national character, so much so as to exclude all state control in times of war or civil commotion.

2. In regard to postal communication, which has been regarded as exclusively of a national character, since the early and palmy days of the Persian monarchy, where public posts are said to have originated, railways must also be regarded as an indispensable necessity. For if we admit the right of state control over all or any considerable portion of the railways in the country, it will place all postal communication at the mercy and good will of state authority, which any one must see is wholly inadmissible.

We discussed the rights of railway corporations in regard to acquiring land and other prerogative rights in adjoining states, without the action of the legislature, in a case in Vermont, many years since, when we came to the conclusion that no such prerogative rights could be acquired out of the state of the charter, except by legislative act. State *v.* B. C. & M. Railw., 25 Vt. 433. This will not preclude such corporations from acquiring the title of land out of the state, by voluntary contract, or entering into any other contract, of the ordinary character of contracts between natural persons, but it will not justify taking land compulsorily, or operating a railway and taking tolls, &c.

unless the act either expressly, or by clear implication, renders the duty of the contract unlawful or comes in conflict with it.[1]

*SECTION IX.

Width of Gauge. — Junction with other Roads.

1. *Where the act requires broad gauge, does not prohibit mixed gauge.*
2. *Permission to unite with other road, signifies a road* de facto.
3. *Equity will sometimes enjoin company against changing gauge.*
4. *Contract to make gauge of the companies the same, although contrary to law of state, at its date, may be legalized by statute.*

§ 150. 1. Where the company's special act required them to lay down a railway of such gauge and construction as to be worked in connection with another company named (the broad gauge), a court of equity declined to interfere, by injunction, when the company were laying down part of the line with double tracks of the mixed gauge, there being no prohibition in the act against such a construction, the broad gauge being all which was required by the act.[1]

2. Where the act of incorporation gave the company the right to construct a road in a particular line, and also required them to purchase a former railway along the same route, and gave them the right to connect "their road with any road legally authorized to come within the limits of the city of Erie," it was held that this right extended equally to the road purchased or built by them, and that they had the right to connect with any other railway in the actual use of another company in Erie, without inquiry whether such company were in the legal use of their franchises at the time or not. That is a question which cannot be inquired into in this collateral manner.[2]

[1] Wynn *v.* The Shropshire Union Railw. & Canal, 5 Exch. 420; Stevens *v.* South Devon Railw., 13 Beav. 48; s. c. 12 Eng. L. & Eq. 229. But where one was induced to give lands to a railway company, or subscribe for stock, and the essential inducement to make the contract was that the company should construct their road within some definite time, the extension of time for the construction of the road, by act of the legislature, will not exonerate the company from their obligation to such person. Henderson *v.* Railw. Company, 17 Texas, 560.

[1] Great Western Railw. *v.* Oxford, Worcester, & Wolverhampton Railw., 5 De G. & S. 437; s. c. 10 Eng. L. & Eq. 297.

[2] Cleveland, Painsville, & Ashtabula Railw. *v.* The City of Erie, 27 Penn. St. 380.

3. Where two railway companies agree to operate their roads in connection, between certain points, if one of the companies changes its gauge, so as to break up the connection contemplated, an injunction will be granted to enforce the contract.[3]

*4. A contract entered into by railway companies to make the gauge of both the companies the same, is not illegal, although this be contrary to the law of one of the states, if the contract appear to have been made with reference to an alteration of the powers of the company, in that respect, and that such alteration was procured before any part of the track was laid.[3]

[3] Columbus, Piqua, & Ind. Railw. *v.* Ind. & Bellef. Railw., 5 McLean's C. C. R. 450.

*CHAPTER XXIII.

MANDAMUS.

SECTION I.

General Rules of Law governing this Remedy.

1. *Regarded as a supplementary remedy.*
2. *Mode of procedure.*
   (1.) *Matter of discretion.*
   (2.) *Alternative writ.*
3. *Proceedings in most of the American courts.*
4. *English courts do not allow application to be amended.*
5. *Recent English statute has essentially simplified proceedings.*
6. *Mode of trying the truth of the return.*
7. *Costs rest in the discretion of court.*
8. *Mode of service.*
9. *By late English statutes, mandamus effects specific performance.*

§ 151. 1. THE office of the writ of mandamus is very extensive. It is the supplementary remedy where all others fail. Lord *Mansfield* says,[1] "It was introduced to prevent disorder, from a failure of justice and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one." "If there be a *right* and no other specific *remedy* this should not be denied."[2] The general rules applicable to the use, and the mode of obtaining this writ, are sufficiently discussed in the digests, abridgments, and elementary works, under this title.[3]

[1] Rex *v.* Barker, 3 Burr. 1265. See Woodstock *v.* Gallup, 28 Vt. 587. People *v.* Head, 25 Ill. 325. Draper *v.* Noteware, 7 Cal. 276. The same principles are declared by Lord *Ellenborough*, in Rex *v.* Archbishop of C., 8 East, 213, 219; 6 Ad. & Ellis, 321. And where there is any other equally efficacious remedy this writ will not lie. Bush *v.* Beavan, 1 H. & C. 500; 32 L. J. Exch. 54. *Post*, § 160, pl. 3.

[2] Commonwealth *v.* Pittsburgh, 34 Penn. St. 496; Fremont *v.* Crippen, 10 Cal. 211. In this last case it was held mandamus would lie to compel the sheriff to execute a writ of possession, although there might be either a civil action or a criminal prosecution against him for the refusal, since neither of these remedies would do full justice to the complainant.

[3] 12 Petersdorff, Ab. 438; 6 Bac. Ab. 309, 418, tit. Mandamus; 3 Black. Comm. 110, 264; 1 Kent, Comm. 322; Curtis's Digest, 333. And that the party may have some remedy in equity will not preclude this remedy. But see

* 2. The mode of proceeding in obtaining the writ is controlled very much by statute in England at the present time, and in most of the American states. There are some few points which are of general application.

(1.) The power of granting the original prerogative writ of mandamus in England was confined to the Court of King's Bench,[3] and in most of the American states it is given, by statute, to the highest court of law of general jurisdiction.[3] This prerogative writ seems anciently to have been issued to inferior jurisdictions by the Court of Chancery in England, but not to the King's Bench.[4] This writ is not demandable as of right, but is awarded in the discretion of the court.[5]

(2.) The form of application is either by motion in court, and * the production of affidavits in support of the ground of the motion, in which case, if the motion prevails, a rule to show cause why the writ should not issue, or an alternative mandamus issues

infra. Nor that an indictment will lie. *Post*, § 160. And it is no bar to this remedy that the party might by statute build the work, at the expense of the other party, by order of a justice. Reg. *v.* The Norwich & B. Railw., 4 Railw. C. 112. The legislature empowered the board of supervisors of the county of New York to cause to be raised and collected a sum not exceeding $80,000 to meet and pay whatever sum up to that amount might be found due to the contractors with the commissioners of records, and authorized the comptroller to pay "said amount when it should be judicially determined." The contractor not having the power to bring action and obtain judgment against the supervisors in the regular manner, it was held that this was not the intention of the legislature, and that, in the absence of any specific directions in the act as to how this judicial determination should be obtained, it would be unreasonable to infer that any other remedy was intended than that attainable by mandamus; and that application for mandamus was the proper remedy for the contractors, upon the refusal of the comptroller to pay them the amount certified by the commissioners to be due them. People *v.* Haws, 34 Barb. 69. And see, to the same point, Regina *v.* Port of Southampton, 1 E. B. & S. 5; s. c. 7 Jur. N. S. 990; 30 L. J. Q. B. 244. And where a new right has been created by act of Parliament, the proper mode of enforcing it is by mandamus at common law. Simpson *v.* Scottish Union Fire & Life Ins. Co., 9 Jur. N. S. 711; s. c. 32 L. J. Ch. 329; s. c. 1 H. & M. 681. Commonwealth *v.* Pittsburg, 34 Penn. St. 496.

[4] The Rioters' Case, 1 Vernon, 175; Ang. & Ames on Corporations, § 697. But see R. *v.* Severn & Wye Railw., 2 B. & Ald. 646; R. *v.* Commissioners of Dean Inclosure, 2 M. & S. 80; R. *v.* Jeyes, 3 Ad. & El. 416.

[5] Rex *v.* Bishop of London, 1 T. R. 331, 334; Rex *v.* Bishop of Chester, id. 396, 404; id. 425; 2 T. R. 336. People *v.* Auditor of Public Accounts, 33 Ill. 9; s. c. 3 Am. Law Reg. N. S. 332. And the court will not entertain jurisdiction unless substantial interests are involved. Id.

upon the *ex parte* hearing, and the definitive hearing is had upon the return of the rule, or the return to the alternative writ.

3. The more common practice in the American courts (which often hold but one or two short sessions annually in a county, and where, by consequence, such formal proceedings would be attended with embarrassing delays) is, by formal petition, alleging in detail the grounds of the application, which is served upon the opposite party, and all parties supposed to have an interest in the questions involved, a sufficient time before the term to give an opportunity for taking the testimony upon notice; and, upon the return of the petition, the case is heard upon its general merits; and in either form, if the application prevails, a peremptory mandamus issues, the only proper return to which is a certificate of compliance with its requisitions, without further excuse or delay.[6]

[6] Hodges on Railways, 640, 641, 642, 643, 644. It is first indispensable to demand of the party, against whom the application is to be made, to perform the duty, and the party must, it would seem, be made aware of the purpose of the demand. The King *v.* Wilts & Berks Canal Navigation, 3 Ad. & Ellis, 477; The King *v.* Brecknock & Abergavenny Canal Navigation, 3 Ad. & Ellis, 217. People *v.* Romert, 18 Cal. 89. The refusal must be of the thing demanded, and not of the right merely. The King *v.* Northleach & Witney Roads, 5 Barn. & Ad. 978. The refusal must be direct and unqualified, but may be made as effectual, by silence as by words or acts, but the party should understand that he is expected to perform the required duty, upon pain of the legal redress being resorted to, without further delay. The Queen *v.* Norwich & Brandon Railw., 4 Railw. C. 112; The Queen *v.* Bristol & Exeter Railw., 4 Q. B. 162. But this should be taken, as a preliminary question, according to the English practice. Queen *v.* Eastern Counties Railw., 10 Ad. & Ellis, 531. But in Commonwealth *v.* Commissioners, 37 Penn. St. 237, a demand was held unnecessary in the case of public officers neglecting to do their duty.

Conditions precedent must be shown to have been performed.

But the mere requisition of an act of Parliament that parties claiming damages, by reason of a railway company's works, shall enter into a bond to prosecute their complaint and pay their proportion of the costs, before the company should be obliged to issue their warrant to summon a jury, and if not so done, the company might give notice, requiring the same to be done before commencing the inquiry, was held not to be a condition precedent, unless required by the company. The Queen *v.* The North Union Railw., 1 Railw. C. 729.

And where an umpire failed to make an award, it was held the company might be compelled, by mandamus, to issue a warrant for the sheriff to assess the compensation, and no formal demand was necessary. Hodges on Railways, 642, and note; South Yorkshire & Goole Railw., *in re* 18 Law Jour. (Q. B.) 53. A return stating an excuse for non-compliance with a peremptory writ of mandamus, is not admissible. Regina *v.* Ledgard *et als.* Mayor, &c. of Poole, 1

* 4. The general rule of the English courts seems to be, that if the first application is denied on account of defects in the affidavits, not to permit a second application to be made; and the rule extends to other writs, resting in the discretion of the court.[7]

* 5. But the late Common-law Procedure Acts in England, 1852, 1854, apply to this class of writs, and have essentially simplified the proceedings, and rendered them more conformable to reason and justice than in some of the American courts even,[8] the rule for

Q. B. 616. Application by the prosecutor for leave to withdraw his plea and argue the case on the return refused. R. *v.* Mayor of York, 3 Q. B. 550; Strong, Petitioner, &c., 20 Pick. 484.

It is the practice for different persons, in the same or similar situation, to unite in the same application for a mandamus, and it is said but one writ can issue in such a case. Rex *v.* Montacute, 1 Wm. Black. 60; Rex *v.* Kingston, 1 Strange, 578 (note 1); Scott *v.* Morgan, 8 Dowl. P. C. 328. But it seems to be considered that where the rights are distinct and wholly independent, one writ will not be awarded, but several, and therefore the application should be several. Reg. *v.* Chester, 5 Mod. 11; The case of Andover, 2 Salk. 433; Smith *v.* Erb, 4 Gill (Md.), 437; State *v.* Chester & Evesham, 5 Halst. 292. And the petitioner for a mandamus must set forth clearly his interest in the matter which he presents as the ground of his application. Fleming, *ex parte*, 2 Wallace (U. S.), 759.

But several connected matters, which are not repugnant, may be included, by way of defence, in the return. Reg. *v.* Norwich, 2 Salk. 436; Wright *v.* Fawcett, 4 Burrow, 2041; Rex *v.* Churchwardens of Taunton, 1 Cowp. 413.

Upon a mandamus to restore a corporate officer to his functions, the return should specify the grounds of the amotion. Commonwealth *v.* The Guardians of the Poor of Philadelphia, 6 Serg. & Rawle, 469, unless the officer were removable upon the mere motion of the corporation. Rex *v.* Guardians of Thame, 1 Strange, 115. It is not a sufficient reason for setting aside a peremptory mandamus that a previous alternative writ had not issued. Knox County *v.* Aspinwall, 24 How. (U. S.) 376.

[7] Queen *v.* Manchester & Leeds Railw., 8 Ad. & Ell. 413. And the same rule obtains where the first writ is denied because no sufficient demand had been made, and a subsequent demand is made. *Ex parte* Thompson, 6 Q. B. 721. But it is apprehended no such rule of practice could be enforced in this country, and very few, we think, would regard it as desirable. It seems to be relaxing in England, where the alteration of the affidavits is mere form. Regina *v.* The G., W. Railw., 5 Q. B. 597, 601; Regina *v.* The East Lancashire Railw., 9 Q. B. 980. And in Reg. *v.* Derbyshire, S. & W. Railw., 18 Jur. 1054; s. c. 26 Eng. L. & Eq. 101, the writ was amended, as to the name of the company. Reg. *v.* Eastern Counties Railw., 2 Railw. C. 836, amendment allowed. Regina *v.* Justices of Warwickshire, 5 Dowl. 382; Reg. *v.* Jones, 8 Dowl. 307; Shaw *v.* Perkins, 1 Dowl. (N. S.) 306; Reg. *v.* Pickles, 3 Q. B. 599, n.; State *v.* Hastings, 10 Wisc. 518, 525.

[8] And by 23 and 24 Victoria, Ch. 126, § 32, costs are to be allowed against

the issuing of the alternative writ being now, in all cases, made absolute in the first instance, and the whole hearing had, upon the return, which in our practice is still further simplified, by admitting the party to make answer to the petition, alleging the grounds of his refusal, which are tried at once.[9]

* 6. If falsehood is alleged in the return to the alternative mandamus, it was the practice at common law to drive the party to his action for a false return. But by statute in England, and generally by practice in this country, the question is tried in the

the defendant where an absolute writ is granted, unless otherwise specially directed by the courts.

[9] Walter *v.* Belding, 24 Vt. 658; Rogers, *ex parte*, 7 Cowen, 526. In the American states the statute of 9 Anne, allowing the prosecutor to traverse the return to the writ or the answer to the petition, and for the court to determine the truth, either upon affidavit or by the verdict of a jury in their discretion, has been pretty extensively adopted, either in practice or by statute. The People *v.* Beebe, 1 Barb. Sup. Ct. 379; The People *v.* The Commissioners of Hudson, 6 Wend. 559; Smith *v.* Commonwealth, 41 Penn. St. 335.

Where the case is fully heard upon the petition or rule to show cause, and there is no dispute in regard to the facts, the court will not delay, for the issuing of the alternative writ and the return thereto, but will in the first instance issue the peremptory mandamus. *Ex parte* Jennings, 6 Cow. 518; The People *v.* Throop, 12 Wend. 183. The rule for the peremptory mandamus is sometimes, in the first instance, made *nisi*, to allow the respondents to consult, if they will comply with the requirements of the judgment. Walter *v.* Belding, 24 Vt. 658. Or sometimes this is done to allow the parties to arrange the matter, or the court to consider the case. Rex *v.* Tappenden, 3 East, 186.

The court have such control over their own judgments, that, if a peremptory writ of mandamus be unfairly obtained, it will be set aside upon motion. The People *v.* Everett, 1 Caines, 8.

Courts enforce compliance with the peremptory writ by attachment, as also a return to the alternative writ, without requiring the issue of an *alias* and *pluries*, as in the early English practice. The cases are not altogether agreed, whether defects in the writ are cured by admissions in the return, but upon general principles of pleading it would seem they are. The King *v.* Coopers of Newcastle-upon-Tyne, 7 T. R. 548. But see Reg. *v.* Hopkins, 1 Q. B. 161. But where an alternative mandamus is issued, and the defendants make their return, and the relators, instead of demurring, take issue upon the material allegations in the return, they thereby admit that, upon its face, the return is a sufficient answer to the case made, by the alternative writ. And if no material fact is disproved upon the trial, the defendants will be entitled to a verdict in their favor. The People *ex rel.* Kipp *v.* Finger, 24 Barb. 341. The return should set forth an available justification for defendant's refusal to do the act sought to be enforced, and it may allege different independent facts as furnishing such justification.

court issuing the writ, and the remedy there applied, damages and costs being given in the discretion of the court, and execution enforced.

7. Costs in all the proceedings for mandamus rest in the discretion of the court, unless controlled by statute. By the English practice it is common to award costs where the application is denied, but not always where it prevails.[10] The more general and the more equitable rule in regard to costs, in proceedings where the court have a discretion, in that respect, is to allow costs to the prevailing party, unless there is some special reason for denying them.[11]

* 8. Service of such process, and indeed of all process, by summons, in England, is by delivering the original where there is but

[10] Reg. *v.* Mayor of Bridgenorth, 10 Ad. & El. 66; Reg. *v.* The Eastern Counties Railw., 2 Q. B. 578, 579, and cases cited by counsel. Reg. *v.* East Anglian Railw., 2 El. & Bl. 475; s. c. 22 Eng. L. & Eq. 274. 1 Wm. 4, c. 21, § 6, makes costs discretionary with the courts, in England. 23 and 24 Victoria, c. 126, § 132. Regina *v.* St. Saviour, 7 Ad. & Ell. 925. See Regina *v.* Brighton & South Coast Railw., 10 Law T. N. S. 496.

[11] Reg. *v.* Thames & Isis Commissioners, 8 Ad. & Ell. 901, 905; 5 Ad. & Ell. 804; Reg. *v.* Fall, 1 Q. B. 636; Reg. *v.* Justices of Middlesex, 6 Eng. L. & Eq. 267, unless strong reasons for denying costs exist; 1 Q. B. 751.

Where the prosecutor omitted to proceed with a mandamus after a return had been made, the Court of Queen's Bench compelled him to elect either to proceed or pay the costs. Reg. *v.* Mayor of Dartmouth, 2 Dowl. (N. S.) 980. If the *quo warranto*, mandamus, or other like writ, is procured by the real party in interest, who is able to pay costs, to be prosecuted by some one, not able to pay costs, the Court of Queen's Bench will grant a rule, requiring the real party to pay costs. Reg. *v.* Greene, 4 Q. B. 646. See also a general rule, adopted immediately after the decision of the last case, Easter Term, 1843, requiring a formal rule, for payment of costs in mandamus, to be drawn up immediately on reading all the affidavits on both sides, 4 Q. B. 653. The rule for costs is decided upon the reading only of the affidavits, with reference to which the rule is drawn up. Reg. *v.* St. Peter's College, 1 Q. B. 314, overruling Rex *v.* Kirke, 5 B. & Ad. 1089.

The parties are, in the English cases, required to pay costs occasioned by their delay. Reg. *v.* Mayor of Cambridge, 4 Q. B. 801. But where the judge makes a mistake, the parties who come to defend his ruling, which they are bound to suppose correct, do not pay costs. Reg. *v.* London & Blackwall Railw., 3 Railw. C. 409, and note.

The party who institutes proceedings for mandamus, which he is compelled to abandon, by personal misfortune, as being pauperized by the loss of his trade, must still pay costs, as the court could only conclude he had no grounds to support his petition. Reg. *v.* London & Blackwall Railw., 4 Jurist, 859. See also Morse, Petitioner, 18 Pick. 443.

one person summoned, and where there are more than one, by showing the original, and delivering a copy to each defendant but one, and the original left with such one. But service by copy of a writ of mandamus was held sufficient.[12]

9. By the latest English statutes upon the subject of mandamus,[13] any party requiring any order, in the nature of specific performance, may commence his action in any of the superior courts of common law in Westminster Hall, except in replevin and ejectment, and may indorse upon the writ and copy to be served, that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration, either together with any other demand which may now be enforced in such action, or separately, a writ of mandamus, commanding the defendant to fulfil any duty, in the fulfilment of which the plaintiff is personally interested. And if a mandamus is awarded, it may issue peremptorily in the first instance, in aid of the execution, for damages and costs. The form of the writ is very brief, and compliance with its requisition is to be enforced by attachment. The prerogative writ is still retained, but its use, and also that of decrees for specific performance in equity, seem to be pretty effectually superseded by these provisions.[14]

[12] Reg. *v.* Birmingham & Oxford Railw. Co., 1 El. & Bl. 293; s. c. 16 Eng. L. & Eq. 94. The conductor of a railway train in some of the states is regarded as a "hired agent" of the company, within the meaning of the statute allowing the service of process upon such agent. New Albany & Salem Railw. *v.* Grooms, 9 Ind. 243.

[13] 17 & 18 Vict. ch. 125.

[14] A mandamus to a local board of health, constituted under 11 & 12 Victoria, ch. 63, recited that the prosecutor had been injured by the board in the prosecution of its powers under the act; that he had demanded compensation from the board, and that they had denied all liability, and commanded the board that compensation be made to him out of the general or special rate to be levied under the act. The return stated that the board had not denied all liability, and that it was always ready to make compensation, as soon as it had been duly ascertained under the act; that it had not as yet been so ascertained; nor had the prosecutor as yet taken any steps to ascertain the amount, nor notified the board of the amount of his claim, nor appointed nor given notice to appoint an arbitrator. This return was traversed, generally; and on the trial it was found that the board had denied all liability, and a verdict was entered for prosecutor. On a motion to enter the verdict on the rest of the return for the board, and to enter judgment for the board, Held, that the mandamus was good, and that the prosecutor was entitled to a verdict on the whole of the return, and to a peremptory mandamus, on the ground that, as there did not appear by the return

*SECTION II.

Particular cases where Mandamus lies to enforce Duty of Corporations.

§ 152. The opinion of *Jervis*, Ch. J., in the case of York & North Midland Railway *v.* Reg.,[1] is perhaps the best commentary

to be any dispute as to the amount, the rest of the allegations in the return, apart from the traverse of denial of liability, were immaterial. Regina *v.* Burslem Board of Health, 5 Jur. N. S. 1394; s. c. 1 Ellis & Ellis, 1077, 1088. And generally, where a debt is of such a nature that mandamus will be granted to enforce its payment, it is not necessary that the amount of the debt should be previously ascertained, but such amount may be ascertained in the verdict of the jury in the action in which mandamus is claimed. Ward *v.* Lowndes, 5 Jur. N. S. 1124; s. c. in Exch. Cham. 1 L. T. N. S. 268; 1 Ellis & Ellis, 940. But see McCoy *v.* Harnett County, 5 Jones Law, 265.

[1] 1 El. & Bl. 858; s. c. 18 Eng. L. & Eq. 199. "Upon these facts several points arise: First, does the statute of 1849 cast on the plaintiffs in error a duty to make this railway? Secondly, if it does not, is there under the circumstances a contract between the plaintiffs in error and the land-owners, which can be enforced by mandamus? Thirdly, and failing these propositions, does a work, which in its inception was permissive only, become obligatory by part performance? These questions will be found upon examination to exhaust the subject, and to comprehend every view in which the mandamus can be supported. In substance, do these acts of parliament render the company, if they do not make this railway, liable to an indictment for a misdemeanor, and to actions by the party aggrieved? For if they do not, a mandamus will not lie, and thus the question depends entirely upon the construction of the special act, and the statutes incorporated therewith. The act of 1849 may cast the duty upon the plaintiffs in error, in one of two ways; it may do so by express words of obligation, or it may do so by words of permission only, if the duty can be clearly collected from the general purview of the whole statute. The words of the 3d section of the act of 1849, 'it shall be lawful for the said company to make the said railway,' are permissive only, and not imperative, and it is a safe rule of construction to give to the words used by the legislature their natural meaning, when absurdity or injustice does not follow from such a construction. Indeed, if there were any doubt upon this subject, other parts of the statute referred to in the argument clearly show that these words were intended to be permissive only. The distinction is well put by my brother *Erle:* 'The company are permitted at their option to take lands, turn roads, alter streams, and exercise other powers, and these matters are made lawful for them; but they are commanded to make compensation for lands taken, to substitute roads for those they turn, and to perform other conditions relating to the exercise of their powers, and these matters are required of them.' It seems clear, therefore, that the duty is not cast upon the plaintiffs in error by the express words of the statute of 1849; and, indeed, it was not so urged in the

* we could give upon the present state of the English law upon this subject.

argument; nor was it so put by Lord *Campbell* in his judgment in the court below. But it does not follow, merely because the words of the 3d section are permissive only, that there is no duty cast upon the plaintiffs in error, by the statute taken altogether, to make this railway. This point was not relied upon in this case in the court below, but it was made the distinct ground of a decision in another case in that court (The Queen *v.* The Lancashire & Yorkshire Railw. Co.), and was much pressed in the argument before us in support of this judgment.

"It becomes necessary, therefore, to examine the statute in its general provisions, and to consider the grounds on which the Court of Queen's Bench proceeds in the case of the Queen *v.* The Lancashire & Yorkshire Railw. Co., 1 E. & B. 228; 16 Eng. L. & Eq. 328. We agree with Lord *Campbell*, that the portion of the line between Market Weighton and Cherry Burton, to which the mandamus applies, is not to be considered as a separate railway, or even as a separate branch of a railway, but it is to be treated as if in its present direction it had been included in the act of 1846. The acts, then, taken together, in substance, recite that it will be an advantage to the public if a railway is made from York to Beverley, through Market Weighton and Cherry Burton, according to certain plans and sections deposited, as required by the practice of parliament, and referred to in the statute, and that the plaintiffs in error are willing to make that railway. On this basis the whole provisions are founded. It has been proved that the work will be advantageous to the public; it is assumed it will be profitable to the company, and that, therefore, they will willingly undertake it. Accordingly, the company are empowered to make this line. If they do make it they may take land; but if they do take land they must make compensation. If necessary, they may turn roads, or divert streams; but if they do, they must make new roads and new channels for the streams they alter. Similar provisions pervade the whole statute, and throughout the command waits upon the authority, and the distinction between 'may' and 'must' is clearly defined. But as it is manifest that such general powers must stop competition, and may, to a certain extent, be injurious to land-owners on the line, the compulsory power to take land is limited to three years, and the time for making the railway to five, after which the powers granted to the company cease, except as to so much of the line as shall have been completed, and the land, if taken by the company, reverts, on certain terms, to the original proprietors. An argument might have been founded on the terms in which the latter provision is contained. By the 10th section of the act of 1849, it is enacted that the railway shall be completed within five years from the passing of this act. That section was not referred to in the argument for this purpose, but it might be said that these words were compulsory, and imposed a duty upon the company to make the line. The context of the section, however, when examined, shows that such is not the meaning of it. If not completed within five years, the powers of the act are to expire, except as to so much of such railway as shall have been completed. If the section were intended to be obligatory, it would not contain that exception which contemplates that the line may be made in part. It is inconsistent to suppose that the legislature would say to the company in the same section, you may

*SECTION III.

Mandamus the appropriate Remedy to restore Officers and Members of Corporations to the Discharge of their proper Functions, where they have been deprived of the same through the agency of the Corporation.

1. *The writ formerly granted only to restore to public office.*
2. *Now granted in all cases where of value and sufficiently permanent.*
3. *Not available, where election annual and facts traversed.*
4. *Claimant must have permanent and vested interest.*

§ 153. 1. It does not come within the scope of this work to examine with minuteness all questions arising upon the law of * cor-

complete a part only, if you can, in five years, and then as to that part the powers of the act shall continue, but you must complete the entire line in that time. Upon the whole, therefore, we find no duty cast upon the company to make this railway in any part of this act of parliament. On the contrary, the legislature seems to contemplate the possibility of the railway being made in part, or being totally abandoned. In the latter case the powers expire in three or five years; in the former, the statute remains in force as to so much of the railway as shall have been completed within that time, and expires as to the residue. This provision is inconsistent with the intention to compel the company to make the entire line, as the consideration for the powers granted by the act.

But it is said that a railway act is a contract on the part of the company to make the line, and that the public is a party to that contract, and will be aggrieved if the contract may be repudiated by the company at any time before it is acted upon. Though commonly so spoken of, railway acts, in our opinion, are not contracts, and cannot be construed as such. They are what they purport to be, and no more. They give conditional powers, which, if acted upon, carry with them duties, but which, if not acted upon, are not, either in their nature or by express words, imperative on the companies to which they are granted. Courts of justice ought not to depart from the plain meaning of the words used in acts of parliament. When they do, they make but do not construe the laws. If it had been so intended, the statute should have required the companies to make the line in express terms; indeed, some railway acts are framed upon this principle; and to say that there is no difference between words of requirement and words of authority when found in such acts, is simply to affirm that the legislature does not know the meaning of the commonest expressions. But if we were at liberty to speculate upon the intentions of the legislature when the words are clear, and to construe an act of parliament by our own notions of what ought to have been enacted upon the subject, — if, sitting in a court of justice, we could make laws, much might be said in favor of the course which, in our opinion, is taken by the legislature on such subjects. Assuming that the

* 266, 267

porations, as affected by the writ of mandamus. But it may be useful to state that this is the appropriate remedy, where any

line, if made, would be profitable to the public, that benefit may be delayed for five years, during which time competition is suspended. On the other hand, if the line would pay, it probably will be proceeded with, unless the company having the power is incompetent to the task. Individual land-owners may be benefited by the expenditure of capital in their neighborhood, without looking to the ultimate result; but it is not for the public interest that the work should be undertaken by an incompetent company, nor that it should be begun, if, when made, it would not be remunerative. By leaving the exercise of the powers to the option of the company, the legislature adopts the safest check on abuse in either of those respects, namely, self-interest. It seems to us, therefore, that these statutes do not cast upon the plaintiffs in error the duty, either by express words or by implication; that we ought to adhere to the plain meaning of the words used by the legislature, which are permissive only, and there is no reason, in policy or otherwise, why we should endeavor to pervert them from their natural meaning.

"But it is said that the land-owners are in a better situation than the public at large, and that the privilege to take their own lands is the consideration which binds the company to complete the railway. That during the currency of the three years they are deprived of their full rights of ownership, and, if not to be compensated by the construction of the railway, they would in many cases suffer a loss, because, whilst the compulsory power of purchase subsists, they are prevented from alienating their lands or houses described in the books of reference, and from applying them to any purposes inconsistent with the claim that may be made to them by the railway company. In truth, they are not prevented from so doing at any time before the notice to take their land is given, if they act *bona fide* in the mean time; the notice to take their lands being the inception of the contract between the land-owners and the company. But if this complaint was better founded, it does not follow, because certain land-owners are subjected to temporary inconvenience for the performance of a public good, that therefore the company are bound to make the whole railway. If it were a contract between the land-owners and the company, it would not be just, the one should be bound and the other free. But to assert that there is a contract between the land-owners and the company, is to beg the whole question; for on this part of the case the question is, whether there is such a contract? As a matter of fact, we know that in many cases no such actual contract exists. Some few proprietors may desire and promote the railway, but many others oppose it, either from disinclination to the project or with a view to make better terms. With the dissentients there is no contract, unless it be found in the statute, and to the statute therefore we must look to see what is the obligation that is cast upon the company in respect of the land-owners upon the line. As in the former case, the words upon this subject are permissive only. The company may take land; if they do they must make full compensation. And in that state of things, if there be a bargain between the parties, what is the bargain? The company say, in the language of the statute, that the bargain is that they shall make full compensation for the land taken, and no more; the prosecutors say, that the consideration to

* member or officer of a corporation is unlawfully deprived of his proper agency or function in the affairs of the company through

be paid for the land is the full compensation mentioned in the act, and also the further consideration of the construction of the entire line of railway from York to Beverley. But if this is the price which the prosecutors are to have, each land-owner is entitled to the same value, and yet by this mandamus the other proprietors on the line from Market Weighton to Cherry Burton, who perhaps are hostile to the application, are constrained to sell their lands for an inadequate consideration, namely, the full compensation and a part only of the line of railway, to which, by the hypothesis, they were entitled by the original bargain. If this were the true meaning of the statute, it would indeed be unjust, more so than the imposition of the temporary inconvenience to which it is said the land-owners may be subject, and to which we have already referred. But that that is not the true meaning, is clear from the words of the statute, which are permissive, and only impose the duty of making full compensation to each land-owner, as the option of taking the land of each is exercised; and further, from the section to which we have already referred, which contemplates the total abandonment of the line, or a part performance of it, and makes provision for the return of the land to the original proprietors in certain cases. Upon this part of the case the authority of Lord *Eldon*, in Blakemore *v.* The Glamorganshire Canal Company, 1 Myl. & K. 154, was much pressed upon the court. Speaking of contracts for private undertakings he says: 'When I look upon these acts of Parliament I regard them all in the light of contracts made by the legislature on behalf of every person interested in any thing to be done under them, and I have no hesitation in asserting that, unless that principle be applied in construing statutes of this description, they become instruments of greater oppression than any thing in the whole system of administration under our constitution. Such acts of Parliament have now become extremely numerous, and from their number and operation they so much affect individuals, that I apprehend those who come for them to Parliament do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else; that they shall do and forbear all that they are hereby required to do and forbear, as well with reference to the interest of the public as with regard to the interest of individuals.' There is nothing in that language to which it is necessary to make the least exception; indeed it is nothing more than an illustration of the obligatory nature of the duty imposed by acts of Parliament, which do impose a duty with reference to other persons. In that case the statute had secured to Mr. Blakemore the surplus water, and had commanded the company to do certain things that he might enjoy it. In discussing whether Mr. Blakemore's right under the statute was affected by his right before the statute, his lordship might well say he considered the statute the origin of Mr. Blakemore's right in the light of a contract, and the statute then under discussion containing express words of command, he might well add, that those who come for such acts of Parliament do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do. As we understand them, the words used by Lord *Eldon* in no respect conflict with the view we take of this case; but if they mean that words of permission only, when used in the class of

* its agency. This is somewhat questioned by some of the earlier English cases.[1]

cases under consideration, should receive a construction different from their ordinary meaning, because, if construed otherwise, they might work injustice, with great respect for his high authority, we dissent from that proposition. We agree with my brother *Alderson*, who, in Lee *v.* Milner, 2 Y. & Coll, 611, said: 'These acts of Parliament have been called parliamentary bargains, made with each of the land-owners. Perhaps more correctly they ought to be treated as conditional powers given by Parliament to take the lands of the different proprietors through whose estates the works are to proceed. Each land-owner, therefore, has the right to have the power strictly and literally carried into effect as regards his own land, and has the right also to require that no variations shall be made to his prejudice in the carrying into effect a bargain between the undertakers and any one else.' — 'This,' he adds, 'I conceive to be the real view taken of the law by Lord *Eldon*, in the case of Blakemore *v.* The Glamorganshire Canal Company.' There remains but one further view of the case to be considered, and that we have partly disposed of in the observations we have already made; but inasmuch as Lord *Campbell* proceeded on this ground only in the court below, although it was not much relied upon before us in the argument, we have, out of respect for his high authority, most carefully examined it, and are of opinion that the mandamus cannot be supported, on the ground that the railway company, having exercised some of their powers and made a part of their line, are bound to make the whole railway authorized by their statutes.

"It is unnecessary here to determine the abstract proposition, that a work which, before it is begun, is permissive, is, after it is begun, obligatory. We desire not to be understood as assenting to the proposition of my brother *Erle*, that many cases may occur where the exercise of some compulsory powers may create a duty to be enforced by mandamus; and, on the other hand, we do not say that such may not be the law. If a company, empowered by act of parliament to build a bridge over the Thames, were to build one arch only, it would be well deserving consideration whether they could not be indicted for a nuisance in obstructing the river, or for the non-performance of duty in not completing the bridge. It is sufficient to say that in this case there are no circumstances to raise such a duty, if such a duty can be created by the acts of plaintiff himself. The plaintiffs in error have made the principal portion of their line, and they have abandoned the residue for no corrupt motive, but because Beverley has already sufficient railway communication, and because the residue of the line passes through a country thinly populated, and if made would not be remunerative. But it is said that the railway company are not in the situation of purchasers of land, with liberty to convert it to any purpose, or to allow it to be waste: that they are allowed to purchase it only for a railway, and having acquired it under the compulsory power of the act, there must be an obligation upon the company to apply the land to that, and to no other purpose. Subject to the qualification in the act, this is undoubtedly true. Having acquired the

[1] Vaughn *v.* Company of Gunmakers, 6 Mod. 82; S. P. Comb. 45; White's case, 6 Mod. 18.

* 2. But a different rule, as to requiring the office to be of a public nature to justify the writ of mandamus to restore the * party to

lands of particular land-owners, the company could not retain them by merely laying rails on the lands so taken, and we agree it never was intended that the land-owners should be left with a high mound or a deep cutting running through their estate, and leading neither to nor from any available terminus. The precaution against such a wasteful expenditure of capital may, perhaps, safely be left to the self-interest of the company, but if such work were be done, it would not be a practicable railway, and after five years the powers of the act would expire, and the land revest in the original proprietor. It is true that he would sustain some inconvenience without the corresponding advantage of railway communication, but in the mean time he would have received full compensation in the market value of the land, and for all damage by severance or otherwise, and would receive back the land on more reasonable terms. To be a railway it must have available *termini*. When the statutes passed, all persons supposed the *termini* would be York and Beverley; and if the arguments be well founded, and the company are bound, if they take the land upon any portion of the railway, to complete the whole line, it would seem to follow that one of the proprietary, by compelling the company to take his land on the line from Market Weighton to Cherry Burton, would thus entitle himself to a mandamus to compel them to make the line from Cherry Burton to Beverley, and the acts having expired, to apply to Parliament for a renewal of their powers for that purpose. But although the *termini* were originally intended to be York and Beverley, it is plain that the legislature contemplated the possibility of the line being abandoned or being only partially made, because in the one case the powers of the act were to cease, and in the other they were partially continued. An option, therefore, is given to some one. By the course taken the Court of Queen's Bench has exercised that option, and said the line is to be made, not to Beverley, but to Cherry Burton. In our opinion that option is left to the company, and the company having *bona fide* made an available railway over the land taken, the obligation to the land-owner has, in that respect, been fulfilled. The cases upon this subject are very few, and the absence of authority is very striking, when we remember how many acts have passed *in pari materia*, not only for railways, but also for bridges and turnpike roads. Notwithstanding the numerous occasions on which such proceedings might have been taken, and the manifest interest of land-owners to enforce their rights, no instance can be found of an indictment for disobeying such a statute, or of a mandamus for the purpose of enforcing it. If correctly reported, Lord *Mansfield* determined this point in The King *v.* The Proprietors of the Birmingham Canal, 2 Wm. B. 708, for he says the act imports only an authority to the proprietors, not a command. They may desert or suspend the whole work, and, *à fortiori*, any part of it. On the other side, the language of Lord *Eldon*, in Blakemore *v.* The Glamorganshire Canal Company, is referred to as an authority for this mandamus. In our opinion it does not bear that construction, although it appears that the Court of Queen's Bench took a different view of that authority in the case of The Queen *v.* The Eastern Counties Railw. Company, 10 Ad. & Ell. 531, and was inclined to act upon it, and award a mandamus. The writ was subsequently withheld in

* 270, 271

it. seems to have obtained since the case of Rex *v.* Baker,[2] and the only proper inquiry now is whether the plaintiff has any such valuable and permanent interest in the office or place as to justify the granting of the writ.[3]

*3. It was held, in an early case[4] in Massachusetts, that this remedy could not be rendered available in cases where the office only extended to one year, and the question arising upon the return of the writ was one of fact, the traverse to which could not, according to the course of practice in that court, be determined before the term of the office would expire. "The cases, therefore," say the court, "in which the writ of mandamus may be an adequate remedy, in admitting or restoring to office, seem to be where the office is holden for a longer term than a year, or where the return to the writ will involve merely a question of law, so that, admitting the facts to be true, a peremptory mandamus ought to go."

4. It was accordingly held, in a very late English case,[5] that, as mandamus to reinstate a person in office only lies where the office and its tenure are of a permanent nature, it is not an available remedy for the secretary of a benefit society, who had been dismissed by a resolution of a meeting of the society. The court here seem to consider that the office must be of such a character that the incumbent has such a vested and permanent interest in the same as that the court could render the operation of the writ of mandamus effective towards restitution, and where its operation is not liable to be countervailed by any counter agency.

that case on another ground, but Lord *Denman* seems to have been of opinion that on a fit occasion a mandamus ought to go. That, and the recent cases in the Queen's Bench, now under discussion, are the only cases which bear upon the subject. We feel that Lord *Denman* and Lord *Campbell* are high authorities upon this or any other matter, and are both equally entitled to the respect of this court; but we are bound to pronounce our own judgment, and, after the most careful consideration, are of opinion that the judgment ought to be for the plaintiffs in error. The result is, that the judgement of the Court below must be reversed."

[2] 3 Burrows, 1267.

[3] Angell & Ames, §§ 704, 705.

[4] Howard *v.* Gage, 6 Mass. 462, 464.

[5] Evans *v.* The Heart of Oak Benefit Society, 12 Jur. N. S. 163.

SECTION IV.

Mandamus to compel Company to complete their Road.

1. *English courts have required this upon a general grant.*
2. *But these cases overruled. Not required now, unless under peculiar circumstances.*
3. *Recent case in New York court of appeals.*

§ 154. 1. The English courts at one time, it would seem, regarded a parliamentary grant to a railway company as equivalent to an agreement on their part to build the road. To make this intelligible to the American reader it is necessary to keep in mind the English parliamentary rules, in regard to passing acts * of incorporation of such companies. The promoters are required to prepare plans and sections, and maps of their roads, with the line delineated thereon, so as to show its general course and direction, and to deposit copies of the same with the clerks of the peace, in the office of the Board of Trade, the Private Bill Office, in certain cases at the Board of Admiralty, and with the parish clerk of each parish through which the proposed line passes, before parliament assembles, and the plans are usually referred to in the charter as defining the course of such railway, and thus become binding upon the company, although not so regarded unless so referred to.[1] Specific notice too is to be served upon each land proprietor whose land is to be taken.[1] There is therefore some plausibility in regarding the obtaining of a charter under these circumstances as a binding obligation on the part of the company that they will build the road. No act of incorporation of a railway is passed in the British parliament until three-fourths of the estimated outlay is subscribed. Accordingly, in some of the earlier cases upon this subject, after considerable discussion and examination, it is laid down,[2] that when a railway company have obtained an act of par-

[1] Hodges on Railways, 18, and notes; North British Railw. Company *v.* Tod, 5 Bell Ap. Cas. 184; s. c. 4 Railw. Cas. 449; Reg. *v.* The Caledonian Railw. Co., 3 Eng. L. & Eq. 285.

[2] The Queen *v.* The York & North Midland Railw. Co., 16 Q. B. 19; s. c. 16 Eng. L. & Eq. 299. This case was decided by a divided court, *Erle*, J., dissenting, whose opinion ultimately prevailed in the Exchequer Chamber. Lord *Campbell*, Ch. J., and the majority of the court, founded their opinion chiefly upon the celebrated judgment of Lord *Eldon*, in Blakemore *v.* The Glamorganshire Canal Navigation, 1 Mylne & Keen, 154. See also Reg. *v.* Ambergate, &c. Railw. Co., 23 Law Times, 246; s. c. 17 Q. B. 362, 957; Reg. *v.* Eastern Counties

liament, reciting that the proposed railway will be beneficial to the public, and that the company are willing to execute it, and giving them compulsory powers upon landholders for that purpose, and in pursuance of such powers the company have taken land, and made part of their line, they are bound by law to complete such line, not only to the extent which they have taken lands, but to the furthest point. And this is so held in some cases, although the statute enacts only that it shall be lawful for them to make the railway.

* 2. So also in another case,[3] where the undertaking was not yet entered upon, it was held that the company under such circumstances were bound to execute the work, from the time when such act receives the royal assent. And in another case,[4] where by the return to the writ it appeared that the company had no sufficient funds to build the road, and that the period for exercising their compulsory powers in obtaining lands had expired, and that the building of the road had thus become impossible, it was held that a mandamus must nevertheless be awarded. Writs of peremptory mandamus issued in each of the foregoing cases. But the first and last of these three cases came before the Exchequer Chamber, and were heard at great length before all the judges, and an elaborate opinion delivered by *Jervis*, Ch. J., of the Common Bench, reversing the judgment of the Queen's Bench, chiefly on the ground that there was no implied obligation upon the company, either before or after entering upon the work, to complete it.[5]

Railw., 1 Railw. C. 509. But the writ was held defective in this case, in not alleging that the company had abandoned or unreasonably delayed the work. Reg. *v.* Same, 2 Railw. C. 260; s. c. 10 Ad. & El. 531; 2 Q. B. 347, 569.

[3] Reg. *v.* The Lancashire and Yorkshire Railw. Co., 7 Railw. Cas. 266; s. c. 16 Eng. L. & Eq. 327.

[4] Reg. *v.* Great Western Railw. Co., 16 Eng. Law & Eq. 341. The extreme to which this very questionable doctrine was pushed in this case, seems to have proved, as is not uncommon in such cases, the point of departure, for its entire overthrow and abandonment.

[5] York & North Midland Railw. Co. *v.* Reg., 1 El. & Bl. 858; s. c. 18 Eng. L. & Eq. 199; Great Western Railw. Co. *v.* Same, 1 El. & Bl. 874. These decisions, rendered (in April, 1853), one of which is given at length in the last section, seem to have been acquiesced in, and they certainly conform to what has ever been regarded as the law upon that subject in this country. And the same principle was maintained in Scottish Northeastern Railw. *v.* Stewart, 3 McQueen's H. L. Cases, 382; s. c. 5 Jur. N. S. 607. But see Lind *v.* Isle of Wight Ferry Co., 7 Law Times, N. S. 416; Mason *v.* Stokes Bay Pier & Railw. Co., 11 W.

3. This question arose and was examined in the courts of New York, somewhat, in a late case,[6] where it was held that a railway corporation, which has completed its road between the termini named in the charter, forfeits its franchise by *abandoning or ceasing to operate a part of the route. The remedy, however, in such cases, is not by injunction at the suit of the public, but by mandamus or indictment at the election of the state, or by proceeding to annul the charter of the corporation.

It is here said, that it seems that the corporation owes a duty to the public to exercise the franchise granted to it, and that it cannot abandon a portion of its road and incur a forfeiture at its mere pleasure.

SECTION V.

In what Cases this is the proper Remedy.

1. *Where the act is imperative upon the company to build road.*
2. *Mandamus more proper remedy than injunction.*
3. *Commissioners of public works not liable to this writ.*
4. *Public duties of corporations may be so enforced.*
5. *Facts tried by jury. Instances of this remedy.*
6. *Cannot be substituted for* certiorari, *when that is taken away.*
7. *Requiring costs to be allowed.*
8. *Other instances of its application.*
9. *Lies where the duty is clear, and no other remedy.*
10. *Not awarded to control legal discretion.*
11. *Does not lie to try the legality of an election.*
12. *Lies to compel transfer of stock.*

§ 155. 1. But although it must be regarded as now definitively settled that the writ will not lie, in any case, coming within the categories laid down in the foregoing opinion of *Jervis*, Ch. J., yet where the act of the legislature is imperative upon the company to build their road, this duty will still be enforced by mandamus.[1]

R. 80. It is here held, that where a notice from a railway company to take lands for the purposes of their undertaking has been followed by an award fixing the amount of purchase and compensation-money, the court has jurisdiction to compel the company to complete the purchase. S. P. Metropolitan Railw. *v.* Woodhouse, 11 Jur. N. S. 296; s. c. 34 L. J., Ch. 297. But see Quicke *ex parte*, 13 W. R. 924; s. c. 12 L. T. N. S. 113.

[6] The People *v.* The Albany & Vermont Railw., 24 N. Y. 261; s. c. 37 Barb. 216.

[1] Hodges on Railways, 665, in note; Great Western Railw. Company *v.* Reg. Exchcq. Ch. 1853. 1 El. & Bl. 874; s. c. 18 English Law & Eq. 211. The land-owners are so far interested in the building of a railway as to be entitled

* 2. But it has been held that such public duty cannot be enforced by injunction, at the suit of the attorney-general.[2] Corporations have for a very long time been compelled, by writ of mandamus, to perform duties imposed by statute.[3] A turnpike company was compelled to fence its road where it passed through the land of private persons, and it was held no excuse that the company had made satisfaction for the damages awarded to the land-owner, or that, having completed their road, they had no funds with which to build the fences.[4]

3. But it has been held, that Commissioners of Woods and For-

to bring the petition, and different owners of land may join. Reg. *v.* York and North Midland Railw. 16 Eng. L. & Eq. 299. But it has been held, that a land-owner could not apply for an injunction to restrain a railway company from applying for an act of the legislature repealing a former act, and to restrain them from paying back deposits. Hodges on Railways, 657, note; Anstruther *v.* East Fife Railw., 1 McQueen, Ho. Lds. 98. Nor can a land-owner maintain a suit in equity against a company for not completing their line, in pursuance of their act of incorporation. Heathcote *v.* North Staffordshire Railw. Company, 6 Railw. C. 358. The Lord Chancellor here held, reversing the opinion of the Vice-Chancellor, that in such case, a court of equity will leave the party to his legal rights. Reg. *v.* Dundalk & Enniskillen Railw., 5 L. T. N. S. 25; Lind *v.* Isle of Wight Ferry Co., 7 L. T. N. S. 416; State *v.* Hartford and New Haven Railw., 29 Conn. 538. And mandamus is the proper remedy by which to compel a canal company to bridge over a private way which it intersects. Habersham *v.* Savannah, &c. Canal Co., 26 Georgia, 665.

[2] Attorney-General *v.* Birmingham & Oxford Junction Railw., and two other Companies, 3 Mac. & G. 453; s. c. 7 Eng. L. & Eq. 283.

[3] The Hartford & New Haven Railway Company was chartered to construct and operate a railroad from Hartford to the navigable waters of the harbor of New Haven. A steamboat company was afterwards chartered to run in connection with it to New York; and the railway and steamboat line constituted a route that was of great convenience to the public. After the construction of the road and the use of it in connection with the steamboat line for several years, the railroad company constructed a track diverging from its original track at a point a mile and a half from tide-water and running to the station of the New York & New Haven railway company, in the city of New Haven, and discontinued the running of its passenger trains to its original terminus at tide-water. This change incommoded travellers who wished to pass by the steamboat route, of whom there were many. Held, that a mandamus ought to be issued to compel the company to run passenger trains to its original terminus, and that the mandamus was properly applied for by the attorney for the state. State *v.* Hartford & New Haven Railw., 29 Conn. 538.

[4] Reg. *v.* Trustees Luton Roads, 1 Q. B. 860. Lord *Denman*, Ch. J., said, "The law orders these parties to perform the duty if they build the road." *Patteson*, J., said, "If they had not adequate funds they ought not to have made the road."

ests, who gave notice that they intended to take certain lands, in order to ascertain if they could be obtained at a certain price, and finding, by the claim of the land-owners, that the land could not be obtained, so as to bring the amount to be expended within the legislative limit, and the funds at the disposal of the *commissioners, abandoned their notice, could not be compelled by mandamus to take the land, such commissioners acting in a public capacity, although the rule is otherwise as to private railway companies.[5]

4. Public duties of corporations have been enforced by mandamus, as repairing the channel and banks of a river, which, by their charter, they had been permitted to alter.[6] Also to make alterations in the sewers of a city; and where, in the act of parliament, this duty is defined, "to make such alterations and amendments in the sewers as may be necessary in consequence of the floating of the harbor," it was held this was a proper form for the command of the writ.[7] Also to restore a highway, intersected by a railway, to its former width.[8]

[5] Reg. *v.* Commissioners of Woods and Forests, 15 Q. B. 761; *Ante*, § 88.

[6] Reg. *v.* Bristol Dock Company, 1 Railw. C. 548, 2 Q. B. 64, 2 Railw. C. 599. A return that the law imposed no such duty, but that they had performed it, "as near as circumstances permitted," is insufficient, as being a traverse of the law, or an evasion of the writ. Reg. *v.* Caledonian Railw., 16 Q. B. 19; s. c. 3 Eng. L. & Eq. 285.

[7] The King *v.* The Bristol Dock Company, 6 Barn. & Cress. 181. Mandamus is the appropriate remedy to compel a delinquent municipal corporation to discharge its liabilities under a subscription to stock of, or a loan of its credit to, a railroad company. Commonwealth *v.* Perkins, 43 Penn. St. 400. A declaration for a mandamus to levy a rate to pay a debt is good, though it does not state the amount of the debt. Ward *v.* Lowndes, 6 Jur. N. S. 247; s. c. 29 L. J., Q. B. 40; Ellis & Ellis, 940. But see McCoy *v.* Harnett County, 5 Jones Law, 265. But in Austin, *ex parte*, 13 Law Times, N. S. 443, it was held that the court will not in the first instance grant a rule for a mandamus calling on a public order to make a rate for the payment of costs due to a successful appeal against a rate which had been quashed at quarter sessions. After the order for payment of costs is found good, if it is still disobeyed, a mandamus may be called for. Austin, *ex parte*, *supra*. See People *v.* Mead, 24 N. Y. 114.

Mandamus will lie to compel a town committee to pay their damages to land-owners for lands taken for a highway. Minhinnah *v.* Haines, 5 Dutch, 388; State *v.* Keokuk, 9 Iowa, 438. And see State *v.* County Judge, 12 Iowa, 237; State *v.* Davenport, id. 335; Knox County *v.* Aspinwall, 24 How. (U. S.) 376; Uniontown *v.* Commonwealth, 34 Penn. St. 293; Commonwealth *v.* Pittsburg, id. 496.

[8] Reg. *v.* Birmingham & Gloucester Railw., 2 Railw. C. 694; 2 Q. B. 47; Reg.

5. In the English practice, questions of fact, arising on a * mandamus, are tried by a jury.[9] So a railway company may, by mandamus, be required to establish an uniform rate of tolls.[10] And also to proceed in the appraisal of land damages, after giving notice to treat.[11] So the sheriff or officer who holds the inquisition, may be compelled to proceed where he has no legal excuse, as where such officer assumed to direct a verdict against the claim, on the ground the applicant could not recover.[12]

6. But where the statute in terms takes away the remedy by *certiorari*, the court will not indirectly accomplish the same thing by mandamus.[13]

7. A mandamus was awarded requiring the presiding officer to allow costs in a case before him,[14] for assessing land damages, including witnesses, attendance by attorney at the inquest,

v. Manchester & L. Railw., 1 Railw. C. 523; 3 Q. B. 528; 2 Railw. C. 711. But in some cases it is requisite the duty should be strictly defined. Reg. *v.* The Eastern Counties Railw., 3 Railw. C. 22; 2 Q. B. 569.

[9] Reg. *v.* London & Birmingham Railw., 1 Railw. C. 317; Reg. *v.* Manch. & Leeds Railw., 3 Q. B. 528; s. c. 2 Railw. C. 711; Reg. *v.* Newcastle-upon-Tyne, 1 East, 114.

[10] Clarke *v.* L. & N. Union Canal, 6 Q. B. 898. But in this case judgment was given for defendant, by reason of the "insufficiency of the writ."

[11] *Ante*, §§ 88, 99, *et seq.* and cases there cited.

[12] Walker *v.* The London & Blackwall Railw., 3 Q. B. 744. In Carpenter *v.* Bristol, 21 Pick. 258, which was where county commissioners refused to assess damages sustained in consequence of constructing a railway, on the ground that the party applying did not own the land, and also refused to grant a warrant for a jury to revise their judgment, as required by R. S. ch. 39, § 56: Held, that the party was entitled to a jury to revise, and that a mandamus would lie to compel the commissioners to grant a warrant.

The court say, "Where application was made to county commissioners to estimate damages caused by the laying out of a railway, turnpike, or highway, the duty required of them would be a judicial duty. If they refused or neglected to perform it, this court would issue a mandamus commanding them to do it; that is, to exercise their judgment on the matter. But when they had performed this duty, it being within their discretion, no other tribunal would have a right to interfere with or complain of the manner in which they had performed it." So also in Chicago, Burlington, & Quincy Railw. *v.* Wilson, 17 Ill. 123, it was held, that upon application to a judge, to appoint commissioners to condemn land for the use of a railway, he is compellable to act, if a case is made under the statute. His duty is ministerial, and not judicial, and a mandamus was accordingly awarded.

[13] The King *v.* The Justices of West Riding of Yorkshire, 1 Ad. & Ell. 563.

[14] The King *v.* The Justices of the City of York, 1 Ad. & Ell. 828; Reg. *v.* Sheriff of Warwickshire, 2 Railw. C. 661.

conferences and briefs, but not the expenses of surveyors, as such.

* 8. And where the commissioners refused to assess the value of land taken for a railway, on the ground that the prosecutor had no title to the same, it was held that he is entitled to have their judgment revised by a jury, and a mandamus will lie, on his behalf, to compel the commissioners to grant a warrant for a jury.[15] And a mandamus will issue, at the suit of supervisors of a town, to compel a railway to build a highway,[16] or bridge,[17] for public use.

9. No better general rule can be laid down upon this subject, than that where the charter of a corporation, or the general statute in force, and applicable to the subject, imposes a specific duty, either in terms or by fair and reasonable construction and implication, and there is no other specific or adequate remedy, the writ of mandamus will be awarded. But if the charter, or the general law of the state, affords any other specific and adequate remedy, it must be pursued.[18]

10. So, too, it must be a complete and perfect legal right, or the court will not award the writ.[19] And the writ of mandamus is

[15] Carpenter *v.* Bristol, 21 Pick. 258. See Smith *v.* Boston, 1 Gray, 72; s. p. Fotherby *v.* Met. Railw., Law Rep. 2 C. P. 188.

[16] Whitmarsh Township *v.* Phil., Ger., & N. Railw. Co., 8 Watts & Serg. 365.

[17] Cambridge & Somerville *v.* Charlestown Branch Railw., 7 Met. 70.

[18] Rex *v.* Nottingham Old Waterworks, 6 Ad. & El. 355; Dundalk Western Railw. *v.* Tapster, 1 Q. B. 667; Corregal *v.* London & Blackwall Railw., 3 Railw. C. 411; The People *v.* The Corporation of New York, 3 Johns. Cas. 79. It seems to be considered, that *quo warranto* will not lie to an eleemosynary corporation, and therefore mandamus is the necessary remedy to correct abuses. 2 Kyd on Corporations, 337, n. a. In King *v.* Dr. Gower, 3 Salk. 230, it was held mandamus was not the proper remedy to try the right. Rex *v.* Bank of England, Douglas, 524; Shipley *v.* Mechanics' Bank, 10 Johns. 484; The State *v.* Holiday, 3 Halst. 205: Asylum *v.* Phenix Bank, 4 Conn. 172. Unless the rights of the stockholders in this respect are restricted by the charter of the corporation, or by its rules and by-laws passed in conformity thereto, stockholders have a right of access at reasonable hours to the proper sources of information, to know how the affairs of the corporation are conducted; and if such access is refused to them, mandamus is the appropriate remedy to enforce this right. Cockburn *v.* Union Bank, 13 La. Ann. 289. See also People *v.* Haws, 34 Barb. 69; Lamb *v.* Lynd, 44 Penn. St. 336. But see Briggs, *ex parte*, 1 Ellis & Ellis, 881; s. c. 28 L. J., Q. B. 272, where the assertion of the right to inspect accounts is somewhat modified.

[19] Rex *v.* Archbishop of Canterbury, 8 East, 213; People *v.* Collins, 19 Wend. 56; 1 Wend. 318; Napier, *ex parte*, 18 Q. B. 692; s. c. 12 Eng. L. & Eq. 451.

never awarded to compel the officers, or visitors of a corporation, * who have discretionary powers, to exercise such powers according to the requisitions of the writ, but to compel them to proceed and exercise them according to their own judgment, in cases where they refuse to do so.[20] And it may be laid down as a general rule, that where any officers, or boards, have a legitimate discretion, and are acting within their appropriate jurisdiction, they cannot be controlled in their action by mandamus, issuing from a superior court.[21] If the visitor or trustee be himself the party interested in the exercise of the function, it is said to form an exception.[22]

[20] Rex *v.* Bishop of Ely, 1 Wm. Black. 81; Reg. *v.* Dean and Chapter of Chester, 15 Q. B. 513; Appleford's case, 1 Mod. 82. Lord *Hale's* opinion cited with approbation by Lord *Campbell*, Ch. J., 15 Q. B. 520; Rex *v.* Bishop of Ely, 2 T. R. 290; Murdock's Appeal, 7 Pick. 322; *Parker*, Ch. J., Attala County *v.* Grant, 9 Sm. & Mar. 77; Towle *v.* The State, 3 Florida, 202; 2 Q. B. 433; *Ex parte* Benson, 7 Cow. 363, and cases cited, 3 Binney, 273; 5 id. 87; 6 id. 456; 5 id. 536; 2 Penn. 517; 5 Wend. 114; 10 Pick. 244; 13 Pick. 225; 24 id. 343; People *v.* Columbia C. P., 1 Wend. 297.

But the officers of a municipal corporation will be compelled to hold a court for the revision of the list of burgesses, notwithstanding the time for holding the same, in compliance with the terms of the statute, had elapsed, and notwithstanding the mayor, at the time of granting the mandamus, was not the same person who acted at the court. Regina *v.* Mayor and Assessors of Rochester, 7 El. & Bl. 910; s. c. 30 Law Times, 73.

But it was held, in Heffner *v.* Commonwealth, 28 Penn. St. 108, that the plaintiff in the proceeding must show a specific legal right, which had been infringed; and that the damage, which the petitioner suffered, in common with other citizens, by the neglect of a municipal corporation to lay out an alley, although, by reason of his land lying adjacent, he was specially exposed to suffer loss by the neglect, would not entitle him to demand the writ: that the injury sustained by the petitioner must not only be different in amount or degree, but must be different in kind from that which falls upon the public in general, by the grievance complained of, to entitle him to the writ. The suit should be prosecuted by some public officer, for the redress of an omission of duty affecting only the public interest and that of individuals incidentally.

So, also, where the party is entitled to costs in a proceeding before commissioners to estimate land damages against a railway, unless the duty to award such costs is one which is plain and obvious, it will not be enforced by writ of mandamus. Morse, Petitioner, 18 Pick. 448. And the court will not grant a mandamus requiring parish officers to receive a pauper in obedience to an order of removal, the proper course being by indictment. Downton, *ex parte*, 2 El. & Bl. 856.

[21] Waterbury *v.* Hart., Prov., & F. Railw. Co., 27 Conn. 146.

[22] Reg. *v.* Dean and Chapter of Rochester, 17 Q. B. 1; s. c. 6 Eng. L. & Eq. 269.

* 11. But in a recent case,[23] it is said to be an inflexible rule of law, that where a person has been *de facto* elected to a corporate office, and has accepted and acted in the office, the validity of the election and the title to the office can only be tried by proceeding on a *quo warranto* information. A mandamus will not lie, unless the election can be shown to be merely colorable.

But where the right is clear, or where the old board refuse to surrender to the newly elected one, without any color of excuse, the new board may be put in possession of the insignia or functions of office by writ of mandamus, or, as held in some of the states, by bill in equity.[24]

12. And this is the proper remedy to compel a corporation to allow the transfer of stock upon their books,[25] or the company may be compelled to pay damages for such refusal by an action at law.[25]

SECTION VI.

Proper Excuses, or Returns to the Writ.

1. *Company may return that powers had expired at date of writ.*
2. *May show want of funds to perform duty.*
3. *But cannot show that road is not necessary, or would not be remunerative.*
4. *May quash part of return, and require answer to remainder.*
5. *Counsel for writ entitled to begin and close.*
6. *Cannot impeach the statute in reply to the writ.*
7. *Peremptory writ cannot issue till whole case tried.*
8. *Will not quash return summarily.*
9. *No excuse allowed for not complying with peremptory writ.*

§ 156. 1. It seems to be an unquestionable answer to the writ of mandamus to compel the company to complete their road, that the time for taking lands under the act had expired at the time of issuing the alternative writ, so that it had become * impossible to build the road, as required in the writ.[1] But where, at the

[23] Reg. *v.* Mayor, &c. of Chester, 5 El. & Bl. 531; s. c. 34 Eng. L. & Eq. 59.

[24] Dart *v.* Houston, 22 Ga. 506.

[25] Helm *v.* Swiggett, 12 Ind. 194. But where a shareholder executed a transfer of his shares, which he took together with the certificate of his shares to the company's office for registration, and left the transfer, but refused to leave the certificate for the inspection of the directors, it was held that the court would not compel the company to register the transfer. East Wheal Martha Mining Company *in re*, 33 Beav. 119.

[1] Reg. *v.* London & N. W. Railw., 16 Q. B. 864; s. c. 6 Eng. L. & Eq. 220, * 281, 282

time of the service of the alternative mandamus, the company had time to institute compulsory proceedings for taking lands, it was held, that if, instead of doing so, they attempted to defend the writ, and failed, it was at their peril, and the court would not excuse them, upon the ground that in the mean time their compulsory powers had expired.[2]

2. And where it was attempted to defend against the writ, on the ground that it was not shown that the company had funds, the court said, in the last case referred to: "We shall presume that the company have funds." But it would seem that the want of funds, and of the ability to obtain them, if shown on the return to the alternative mandamus, might be an excuse.[3] * And the com-

denying the authority of Reg. *v.* Birmingham & Gloucester Railw., 2 Q. B. 47, upon this point, as justifying the writ. And in the former case it was held, the prosecutors were guilty of laches in not sooner applying for the writ. But a plea that the cause of action did not accrue within six years, is a bad plea to a declaration for a mandamus, as the statute of limitations does not bar an action for such a writ. Ward *v.* Lowndes, 6 Jur. N. S. 247; s. c. 1 Ellis & Ellis, 940, 956; 2 id. 419; 29 L. J. Q. B. 40.

[2] Reg. *v.* York, Newcastle, & Berwick Railw., 16 Q. B. 886; s. c. 6 Eng. L. & Eq. 259; Reg. *v.* Lancashire & Yorkshire Railw., 16 Q. B. 906; s. c. 6 Eng Law & Eq. 265; Reg. *v.* G. W. Railw., 1 El. & Bl. 263, 744; s. c. 18 Eng. L. & Eq. 364. In this case it was held, that the return must show that the company's compulsory powers for taking land had expired, and that they could not obtain the necessary land without exercising those powers. Where, on motion for mandamus to compel the company to build a bridge, it was stated on behalf of the company that they could not build it without purchasing additional land, and that their powers for that purpose had expired, and the prosecutor stated that they could build it without taking additional land, it was held that a writ of mandamus should issue to the company, and that they might return their inability from want of power to purchase land. Regina *v.* Dundalk & Enniskillen Railw., 5 L. T. N. S. 25. Where mandamus was issued to a railway, reciting that premises in the occupation of B. had been injuriously affected by the works of the company, and that the company having declined to join in the appointment of an arbitrator to estimate the damage to B., he had appointed an arbitrator, who had duly made his award, and commanding the company to take up his award, and the company returned that B. also occupied other lands that were taken by the company, and that, before the execution of their works, it was agreed between him and the company that the company should pay to him a certain sum in satisfaction of the lands so taken, and the premises so injuriously affected, this was held a good return. Regina *v.* West Midland Railw., 11 W. R. 857, in the Queen's Bench.

[3] Lord *Campbell*, Ch. J., in Reg. *v.* London & N. W. Railw., 16 Q. B. 864; s. c. 6 Eng. L. & Eq. 220; Reg. *v.* Ambergate, &c. Railw., 1 El. & Bl. 372; s. c. 18 Eng. L. & Eq. 222. In Reg. *v.* Eastern Counties Railw., 10 Ad. &

pany are not estopped from making this plea by reason of having, in some instances, exercised their compulsory powers of taking land.[4]

3. But it is no sufficient excuse that the road has become unnecessary, or that it would not prove remunerative, or that, in all reasonable probability, the funds which will come to the hands of the company will prove inadequate to the completion of the work.[5]

4. By the English statute the court may quash part of a return to the writ which is bad in law, and put the prosecutor to plead to or traverse the remainder. But if the grounds of defence to the writ be repugnant, the court may, upon that ground, quash the whole.[6]

5. The counsel for the crown are allowed to begin, although the return may be in the nature of a demurrer to the writ.[7] The validity of the writ may be impeached on the return.[8]

6. In a case where the approaches to a bridge across a railway were not of the width required by the special act, a return to the writ of mandamus, that they were as convenient to the public as the original road, or as they could be made, in execution of the powers of the act, and that to widen them to the dimensions defined in the act would require more land, and that their powers for taking land compulsorily had expired before they were called upon to widen these approaches, is bad.[9]

7. The peremptory writ will not be issued until all the * matters contained in the alternative writ are finally determined in favor of the application.[10]

Ellis, 531, it was considered no objection to granting the writ that the company had not the requisite funds, and could not raise them, without a new act.

[4] Reg. *v.* Ambergate, &c. Railw., 1 El. & Bl. 372; s. c. 18 Eng. L. & Eq. 222.

[5] Reg. *v.* York & N. M. Railw., 16 Eng. Law & Eq. 299, not reversed upon these points. Reg. *v.* L. & Y. Railw., 7 Railw. Cas. 266; s. c., 16 Eng. L. & Eq. 327.

[6] 9 Anne, c. 20; Reg. *v.* Mayor of Cambridge, 2 T. R. 456; 4 Burrow, 2008; Rex *v.* Mayor of York, 5 T. R. 66.

[7] Reg. *v.* St. Pancras, 6 Ad. & Ellis, 314; State *v.* Directors of Bank, 28 Vt. 594.

[8] Clarke *v.* Leicestershire & Northamptonshire Canal Co., 6 Q. B. 898; s. c. 3 Railw. C. 730.

[9] Reg. *v.* Birmingham & Gloucester Railw., 2 Q. B. 47; 3 id. 223; 2 Railw. C. 694; Rex *v.* Ouse Bank Commissioners, 3 Ad. & Ellis, 544.

[10] Reg. *v.* Baldwin, 8 Ad. & Ellis, 947. This was where the alternative writ required two sums of money to be paid, and it had been found that one of the sums was due, and the inquiry was not finished in regard to the other. The

8. The court will not quash a return summarily, or order it taken off the file, unless it is frivolous, so as to be an obvious insult, and contempt of court.[11]

9. No excuse for non-compliance with a peremptory writ of mandamus is admissible.[12] It is no ground of objection to a mandamus, that a requisition is made on parties in the alternative, to do one of three things, if the duty enjoined by the act of parliament forms one of them, and there has been a general refusal to comply with the requisition.[13] And the demand for the rate in this case was held sufficient, notwithstanding the church-wardens required the vestry to lay the rate, or do another act, which last was illegal.[13]

SECTION VII.

Where the alternative Writ requires too much, it is bad; for that which it might have maintained.

§ 157. It seems to be well settled in the English practice, that if the writ issue, in the first instance, for some things which defendant is not bound to do, it cannot be supported, even as to those things which he is compellable to perform.[1] But the writ * may be awarded to complete such portions of their road as the company are still compellable to build, although from lapse of time it has become impossible to build the entire road.[2]

But if the alternative writ commands more than is necessary to

court refused to grant a peremptory writ for the payment of the sum, about which the controversy was ended.

[11] Reg. *v.* Payn, 3 Nev. & P. 165; The King *v.* Round, 5 Nev. & M. 427. But the return to a writ of mandamus must be very minute in showing why the party did not do what he was commanded to do. Reg. *v.* Port of Southampton, 1 El. B. & S. 5; s. c. 7 Jur. N. S. 990; 30 L. J. Q. B. 244.

[12] Reg. *v.* Mayor of Poole, 1 Q. B. 616. But after judgment for the crown, on a return to a writ of mandamus, the defendants having voluntarily, and with the prosecutor's assent, done the act commanded, the court will quash a peremptory writ of mandamus as unnecessary, and an abuse of the process of the court. Reg. *v.* Saddlers' Company, 3 El. & El. 42; s. c. 10 Ho. Lds. Cas. 404; 33 L. J. Q. B. 68. [13] Reg *v.* St. Margarets, Leicester, 8 Ad. & Ellis, 889.

[1] Reg. *v.* Caledonian Railw., 16 Q. B. 19; s. c., 3 Eng. L. & Eq. 285; Reg. *v.* East & West India Docks & Birm. Junc. Railw., 2 El. & Bl. 466; s. c. 22 Eng. L. & Eq. 113.

[2] Reg. *v.* York & North M. Railw., 16 Eng. L. & Eq. 299. This case was reversed in Exchequer Chamber upon other grounds.

be done to comply with the statute, it will be quashed, notwithstanding the party might have been entitled to this remedy to a certain extent.[3]

SECTION VIII.

Enforcing Payment of Money awarded against Railways.

1. *The enforcement of payment of money against corporations by mandamus.*
2. *Where debt will lie, the party not entitled to mandamus.*
3. *Mandamus proper to compel payment of compensation under statute.*
4. *Mandamus not allowed in matters of equity jurisdiction.*
5. *Contracts of company not under seal enforced by mandamus.*
6. *Where a statute imposes a specific duty, an action will lie.*

§ 158. 1. It seems to have been the more general practice to enforce the payment of money awarded against a corporation, in pursuance of a statute duty, by mandamus, where no other specific remedy is provided.[1]

[3] York & North Midland Railw. *v.* Milner, 3 Railw. C. 774, reversing, in the Exchequer Chamber, The Queen *v.* York & N. M. Railw., 3 Railw. C. 764.

[1] The King *v.* Nottingham Old Waterworks, 6 Ad. & Ellis, 355; Rex *v.* Trustees of Swansea Harbor, 8 Ad. & Ellis, 439. In this case one party moved for a *certiorari* with a view to quash the proceedings, and the other for a mandamus to carry them into effect. The rule for the former was discharged, and for the latter made absolute. Reg. *v.* Deptford Improvement Co., 8 Ad. & Ellis, 910. Where a city council is authorized and required by law to levy and collect a tax upon the real and personal property of the city, sufficient to pay the interest upon bonds issued by the city in payment of a subscription to the stock of a railway company, and the council refuses to do so, and there is no specific legal remedy provided for such refusal, mandamus may be issued to compel them to perform that duty, at the instance of holders to whom the bonds have passed from the company. An express or explicit refusal in terms is not necessary to put the respondents in fault; it will be sufficient that their conduct makes it clear that they do not intend to do the act required. The writ, in such case, may be applied for by any of the bondholders; and it is not necessary that all the bondholders should be parties to it. Nor is it necessary to make the railway corporation, to which the bonds were originally executed, or the tax-payers of the city, or the commonwealth, parties to the bills, in Kentucky. And it is no objection to the issuing of the writ that an action has been brought against the city, upon some of the coupons, such action having been dismissed before judgment, on the petition for mandamus. Maddox *v.* Graham, 2 Met. (Ky.) 56.

It is laid down in the above case, that a proceeding for a mandamus against the city council is virtually a proceeding against the corporation, and the judgment is obligatory upon the members of the common council who may be in office at the time of its rendition. And a change in the membership of this council does not so change the parties as to abate the proceeding. Ib.

* 2. But it has been held that an action of debt will lie upon the inquest and assessment of compensation for land.[2] And where, in granting to a railway the right to erect a bridge across the river Ouse, it was provided in the act of parliament, that, if the erection of such bridge should lessen the tolls of another bridge company upon the same river, after a trial of three years, as compared with the three years next preceding the erection of the railway bridge, the railway company should pay to the bridge company a sum equal to ten years' purchase of such annual decrease of tolls; it was held that debt will lie for such purchase, and that mandamus is no more effectual remedy and ought not to be granted.[3] If the party have no right to execution, upon an award, mandamus will be awarded, otherwise not.[4]

3. So the court will not enforce an ordinary matter of contract or right, upon which action lies in the common-law courts, as to compel common carriers to perform their public duties, or special contracts,[5] the statute not requiring them to carry all goods offered. But where compensation is claimed for damages done under a statute, the proper remedy is by mandamus, * although the party may claim that the company went beyond their powers, and thus committed a wrong for which the proper remedy is an action.[6]

4. Nor will mandamus lie where the proper remedy is in equity,[7]

[2] Corrigal *v.* The London & Blackwall Railw., 5 Man. & Gr. 219.

[3] Reg. *v.* The Hull & Selby Railw., 6 Q. B. 70; Williams *v.* Jones, 13 M. & W. 628. Courts of equity will not interfere where there is a remedy before sheriffs' jury. East and West India D. & B. Railw. *v.* Gattke, 3 Mac. & G. 155; s. c. 3 Eng. L. & Eq. 59.

[4] Rex *v.* St. Catherine's Dock Co., 4 Barn. & Ad. 360; Corpe *v.* Glyn, 3 B. & Ad. 801; Reg. *v.* The Victoria Park Co., 1 Q. B. 288. And in this case *Denman*, Ch. J., says, the court should not go beyond our extraordinary interposition by mandamus, to require a corporation to make a call upon the shareholders, to pay debts, where the legislature had intrusted them with that power, and they had no standing capital.

[5] *Ex parte* Robbins, 7 Dowl. P. Cases, 566.

[6] Reg. *v.* North Mid. Railw., 2 Railw. C. 1; 11 Ad. & Ellis, 955; Thicknesse *v.* Lancaster Canal Co., 4 M. & W. 472; Fenton *v.* Trent & Mersey Nav. Co., 9 M. & W. 203; Rex *v.* Hungerford Market Co., 3 Nev. & M. 622.

[7] Rex *v.* The Marquis of Stafford, 3 T. R. 646. See Edwards *v.* Lowndes, 1 Ellis & B. 92; 20 L. J. Q. B. 404; 16 Eng. L. & Eq. 204. The relation of trustee and *cestui que trust* gives no right of action at law for money due. Pardoe *v.* Price, 16 M. & W. 451. The proper remedy is in equity, and mandamus will not lie. Reg. *v.* Trustees of Balby & Worksop Turnpike, 1 B. B. C. 134; s. c. 16 Eng. L. & Eq. 276.

and the right is one not enforceable at law, but only in equity, as in matters of trust and confidence. But in a case where the act of incorporation allowed the company to sue and to be sued in the name of their clerk, it was held that execution could not issue against the clerk personally, and in giving judgment, *Tindal*, Ch. J., said: "There can be no doubt but that the funds of the trustees may be made answerable for the amount ascertained in the action, in case of a refusal to apply them, either by a mandamus or a bill in equity." [8]

5. And where, after a rule *nisi*, for a mandamus to compel the company to summon a jury to assess compensation to land-owners, a contract was entered into between the land-owners and the agent of the company, wherein they agreed upon the payment of a stated sum, and also a weekly compensation; upon the payment of the stated sum, and the execution of the contract, the proceedings were discontinued. The company paid the weekly sum for a time, and then discontinued the payment. The application for mandamus being renewed, the court held, that, as the contract was not under their seal, no action will lie upon it, against the company,[9] and it should therefore be enforced by mandamus.[10]

* 6. It seems to be the general rule of the English law, that where a statute imposes a specific obligation or duty upon a corporation, an action will lie to enforce it, founded upon the statute, either debt or case, according to the nature of the claim.[11]

[8] Wormwell *v.* Hailstone, 6 Bing. 668.

[9] Reg. *v.* Mayor of Stamford, 6 Q. B. 433.

[10] Reg. *v.* Bristol & Exeter Railw., 4 Q. B. 162; s. c. 3 Railw. C. 777. This seems to us rather a refinement. If the contract was really obligatory upon the company, it might as well be the foundation of an action, as to be enforced by mandamus. In Tenney *v.* East Warren Lumber Company, 43 N. H. 343, it was held, that evidence that a deed purporting to be the deed of a corporation was executed by agents duly authorized by it, is *prima facie* evidence that any seal affixed to it has been adopted by the corporation for that occasion. And the same point is maintained in Ransom *v.* Stonington Savings Bank, 2 Beasley, 212.

[11] Tilson *v.* Warwick Gas-Light Co., 4 B. & Cres. 962; Carden *v.* General Cemetery Co., 5 Bing. (N. C.) 253.

SECTION IX.

The Writ sometimes denied in Matters of Private Concern.

1. *Mandamus denied to compel company to divide profits.*
2. *Allowed to compel production and inspection of corporation books.*
3. *Will compel the performance of statute duty, but not to undo what is done.*
4. *Allowed to compel the production of the register of shares, or the registry of the name of the owner of shares, and in other cases.*
5. *It is the common remedy for restoring persons to corporate offices of which they are unjustly deprived.*

§ 159. 1. Where the charter and subsequent acts relating to the Bank of England required the corporation to divide their profits semi-annually, a mandamus to compel the production of the books of the company, so as to show an account of their net income and profits, since the last dividend was declared, more than six months having elapsed, was denied.[1] *Abbott*, Ch. J., said it was in effect "an application, on behalf of one of several partners, to compel his copartners to produce their accounts of profit and loss, and to divide their profits, if any there be." It was also said, that this might very properly be done in a Court of Chancery, but a court of law is a very unfit tribunal for such a subject. "A mere trading corporation differs materially from those which are intrusted with the government of cities and towns, and therefore have important public duties to perform." *Bayley*, J., said: "The court never grant this writ, except for public purposes, and to compel the performance of * public duties." *Best*, J., said: "If we were to grant this rule we should make ourselves auditors to all the trading corporations in England."

2. But in a later case[2] it was held, that mandamus may be granted to compel the production and inspection of corporation books and records at the suit of a corporator, where a distinct controversy has already arisen, and the relator is interested in the question, and the former cases upon the subject are elaborately reviewed, and held to confirm this view.[3]

[1] Rex v. The Bank of England, 2 B. & Ald. 620.

[2] Rex v. Merchant Tailors' Company, 2 B. & Ad. 115.

[3] Rex v. Hostmen of Newcastle-upon-Tyne, 2 Strange, 1223. So to inspect the court roll of a manor, at the instance of a tenant who has an interest in a pending question, and has been refused permission to inspect the court rolls by

3. The court has refused to grant a mandamus to a private trading corporation, to permit a transfer of stock to be made in their books.[4] In one case the writ was applied for, to compel a railway company to take the company seal off the register of shareholders.[5] Lord *Campbell*, Ch. J. said: "If I had the smallest doubt, I would follow the example of the high tribunal (Q. B. in Ireland), which is said to have complied with a similar application. But having no doubt, I am bound to act on my own view. The writ of mandamus is most beneficial, but we must keep its operation within legal bounds, and not grant it at the fancy of all mankind. We grant it when that has not been done which a statute orders to be done, but not for the purpose of undoing what has been done."[6] "It is said the court will compel the corporation to affix its seal, when it refuses to do * so, without legal excuse, but will not try the legality of an act, professedly done in pursuance of a statute." The difference seems to be one of form rather than substance, and to rest mainly upon the consideration, that after the act is done, its legality had better be tested in the ordinary mode, by an action at law or in equity.

4. But the writ has been granted to compel the production of a register of shareholders, to enable a creditor to proceed against them.[7] So, too, to compel the registry of the name of the owner of shares, properly transferred, or of the name of the personal

the lord of the manor. Rex *v.* Shelley, 3 T. R. 141. But not otherwise. Rex *v.* Allgood, 7 T. R. 746. But it is not necessary a suit shall be pending, if a distinct question have arisen. R. *v.* Tower, 4 M. & S. 162. And in an action against an incorporated company, which had ceased to carry on business, a director of the company may be ordered by the court or a judge to give the plaintiff inspection of documents not denied to be in his possession, or under his control. Lacharme *v.* Quartz Rock Mariposa Gold Mining Company, 31 L. J. Exch. 335; s. c. 1 H. & C. 134. And the corporators may compel the inspection of the stock ledger, if that contain important evidence, although the corporation do not keep the books required by law. People *v.* Pacific Mail Steamship Co., 50 Barb. 280.

[4] Rex *v.* The London Assurance Company, 5 B. & Ald. 899.

[5] Nash, *ex parte*, 15 Q. B. 92.

[6] The office of the writ of mandamus is to stimulate and not to restrain the exercise of official functions; and after the officers have performed the duties imposed upon them, they are no longer subject to it. School Directors of Bedford Borough *v.* Anderson, 45 Penn. St. 388.

[7] Reg. *v.* Worcestershire & Stafford Railw., Q. B. Weekly R. 1853–54, 482.

representative, in case of the decease of the owner.[8] But in some cases of peculiar necessity for specific aid by way of mandamus, as the delivery of a key to the party entitled to hold it, by the foundation of a private charity,[9] the writ has been awarded.

5. And there can be no doubt the Court of Queen's Bench has almost immemorially been accustomed to try the validity of municipal and other public corporate elections by *quo warranto*, which, in case of illegality found, will displace the incumbents, but not establish those rightfully entitled to the function,[10] * mandamus being requisite for that purpose. But whatever may be the English rule in regard to merely private corporations, it is certainly settled in this country that the courts will try the validity of an election and the question of usurpations, and the legality of amotions in private corporations[11] in this mode. But there is one

[8] *Ante*. § 42 and § 44; Reg. *v.* L. & C. Railw., 13 Q. B. 998. No question is made here but the court will compel the company, by mandamus, to enter a transfer upon their books in a proper case, but the application was denied on other grounds. See Reg. *v.* Midland Counties & Sh. J. Railw., 9 L. T. N. S. 15 Ir. Com. Law, 514, 525; s. c. 151, 155. And see Helm *v.* Swiggett, 12 Ind. 194. But not where inspection of the certificate of shares was refused to the directors. East Wheal Martha Mining Co., *in re*, 33 Beav. 119.

[9] Reg. *v.* Abrahams, 4 Q. B. 157.

[10] Rex *v.* Williams, 1 Bur. 402; Rex *v.* Hertford, 1 Ld. Ray. 426; 1 Sal. 374: Rex *v.* Breton, 4 Burrow, 2260; Rex *v.* Cambridge, 4 Bur. 2008; Rex *v.* Tregony, 8 Mod. 111, 127; Rex *v.* Turkey Co., 2 Burrow, 999; Anonymous, 2 Strange, 696.

In some English cases the King's Bench seems to have altogether disregarded the distinction between public and private corporations, in exercising control over their functionaries. Rex *v.* Bishop of Ely, 2 T. R. 290. And in Rex *v.* St. Catherine's Hall, 4 T. R. 233, the refusal to grant the writ seems to be placed altogether upon other grounds. But it seems a mandamus will not be awarded to compel a voluntary society to recognize the rights of the minority. The King *v.* Gray's Inn, Douglass, 353; Rex *v.* Lincoln's Inn, 4 B. & C. 855. Where there is already one in the office *de facto*, mandamus will not be awarded, *quo warranto* being the proper remedy to try the title of the officer in possession. Rex *v.* Mayor of Colchester, 2 T. R. 259, 260. But in Rex *v.* Thatcher, it was awarded to the commissioners of land-tax to admit the person clerk having the majority of legal votes. 1 Dow. & R. 426; The People *v.* The Corporation of New York, 3 Johns. Cases, 79. The St. Louis County Ct. *v.* Sparks, 10 Missouri, 117; Bonner *v.* State, 7 Georgia, 473; Clayton *v.* Carey, 4 Maryland, 26.

[11] Commonwealth *v.* Arrison, 15 S. & R. 131; People *v.* Thompson, 21 Wendell, 235; s. c. 23 Wendell, 537; People *v.* Head, 25 Ill. 325; State

case where the court refused to try the title to an annual office by writ of mandamus, for the reason that it would prove unavailing.[12] But it has been awarded in England to restore a clerk to a butchers' company, a clerk to a company of masons, and sundry similar officers,[13] and in this country, to restore the * trustee of a private academic corporation,[14] a member of a religious corporation, and many similar officers.[15]

v. Common Council, 9 Wisc. 254; State *v.* Boston, Concord, & M. R., 25 Vt. 433; In the matter of the White River Bank, 23 Vt. 478; Commonwealth *v.* The Union Fire and Marine Insurance Co., 5 Mass. 231; State *v.* Ashley, 1 Pike, 570; St. Luke's Church *v.* Slack, 7 Cush. 226. But in Gorman *v.* Board of Police, 35 Barb. 527, it is intimated that mandamus will not issue to restore an officer removed in an illegal manner, but for a sufficient cause. Martin *v.* Board of Police, id. 550. See to the same point Barrows *v.* Mass. Medical Society, 12 Cush. 402. And *a fortiori* mandamus lies where the office concerns the public or the administration of justice. Lindsey *v.* Luckett, 20 Texas, 516; Felts *v.* Memphis, 2 Head, 650.

[12] Howard *v.* Gage, 6 Mass. 462. But this case was decided upon the ground that the statute of Anne not being in force in that state, the truth of the return to the alternative writ could not be tried till the term would expire. But the decision is scarcely maintainable even upon that ground. But it was held a good defence to a writ of mandamus to compel a township treasurer to pay an order for a teacher's salary, that his term of office had expired, and all the funds in his hands had in good faith been paid over to his successor. State *v.* Lynch, 8 Ohio, N. S. 347.

[13] Angell & Ames on Corporations, § 704. And where, by the custom of a parish, one churchwarden was appointed annually by the parishioners, and one annually by the rector, and the latter appointed a person who was not an inhabitant of or an occupier of property in the parish, it was held that a mandamus to the rector to appoint a churchwarden was the proper process by which to question the validity of the appointment. Barlow *in re*, 30 L. J. Q. B. 271; s. c. 5 L. T. N. S. 289. And see Reg. *v.* Hearts of Oak Benefit Society, 13 W. R. 724.

[14] Fuller *v.* The Trustees of the Academic School in Plainfield, 6 Conn. 532. The opinion of *Daggett*, J., here discusses the power of amotion of trustees and officers by eleemosynary corporations somewhat at length, and comments very judiciously upon the cases upon the subject.

[15] Green *v.* The African Methodist Ep. Society, 1 Serg. & R. 254; Commonwealth *v.* St. Patrick Benevolent Society, 2 Binney, 441, 448; Commonwealth *v.* The Philanthropic Society, 5 Binney, 486; Commonwealth *v.* Penn. Ben. Institution, 2 Serg. & R. 141; Franklin Ben. Association *v.* Commonwealth, 10 Penn. St. 357; Commonwealth *v.* The German Society, 15 Penn. St. 251. But if the society have the absolute power of expulsion, it would seem their judgment in the matter is not revisable. Ib.

But it was said, a private person who makes a highway upon his own land, and dedicates it to public use, had no such interest in the highway as to enable

SECTION X.

This Remedy lost by Acquiescence. — Proceeding must be Bona Fide.

1. *Remedy must be sought at earliest convenient time.*
2. *Courts will not hear such case, merely to settle the question.*
3. *In New York may be brought any time within statute of limitations.*

§ 160. 1. The right to interfere in the proceedings of a corporation by mandamus, is one of so summary a character, that it should be asserted at the earliest convenient time, or it will not be sustained.[1] And especially where, in the mean time, the * facilities for accomplishing a public work, or the public demand for it, have materially changed, the writ will not be awarded.[2] But it is often proper and necessary to wait till public works are completed, before moving for the writ.[3]

2. The English courts decline to hear applications for manda-

him to sue for penalties given against a railway which had cut through the highway and not restored it, and a mandamus to enforce the recovery of such penalty was denied on the ground that the prosecutor had no public duty in regard to the highway. Reg. *v.* Wilson, 11 Eng. L. & Eq. 403; s. c. 1 El. & Bl. 597.

[1] Rex *v.* Stainforth & Keadby Canal Co., 1 M. & S. 32; Rex *v.* The Commissioners of C. Inclosure, 1 B. & Ad. 378; Reg. *v.* Leeds and Liverpool Canal Co., 11 Ad. & Ell. 316; Lee *v.* Milner, 1 Railw. C. 634, Appendix; Reg. *v.* London & N. W. Railw., 16 Q. B. 864; s. c. 6 Railw. C. 634, and Reg. *v.* Lancashire & Yorkshire Railw., 16 Q. B. 906; s. c. id. 654. So, in Connecticut, where by statute a school district can change its school-house only by a two-thirds vote, and a district which had an established school-house voted by a less majority to have the school kept for the season in a room furnished for the purpose within half a mile from the school-house, more convenient for the children generally, and the district committee kept the school there, a mandamus, being applied for by some members of the district, tax-payers therein, and some of whom had children whom they wished to send to the school, to compel the district committee to have the school kept in the school-house, it appearing that at the time of the application the term of the school had half expired, and had nearly expired at the time of the hearing, this was held not to be such a case as called imperatively for the interposition of the court by mandamus, it not appearing to be a permanent attempt to change the place of the school. Colt *v.* Roberts, 28 Conn. 330. See State *v.* Lynch, 8 Ohio N. S. 347.

[2] Reg. *v.* Rochdale & Halifax T. Railw., 12 Q. B. 448.

[3] Parkes *ex parte*, 9 Dowl. P. C. 614; *Ante*, § 88. Reg. *v.* Bingham, 4 Q. B. 877; 3 Railw. C. 390.

mus, which are not *bona fide*, but merely to obtain the opinion of the court,[4] even where the prosecutor may have *bona fide* purchased shares in the corporation, but for the mere purpose of trying a question in which the public have an interest.[4]

3. In New York it was held, that as there was no special limitation upon this remedy, it might be brought within the time fixed for the limitation of other similar or analogous remedies.[5] But this rule seems liable to objection in many cases. The English rule, that the party should suffer no unreasonable delay, in the opinion and discretion of the court, seems more just and equitable, and is countenanced by other American cases.[6] The late decisions of the English courts are very strict upon this point.[7]

*SECTION XI.

Mandamus allowed where Indictment lies.

1. *Party may have mandamus sometimes where act is indictable.*
2. *Allowed to compel company not to take up their rails.*
3. *Will not lie where there is other adequate remedy.*

§ 161. 1. It seems to have been considered that the fact that a railway or other corporation had exposed themselves to indictment by the very act or omission proposed to be remedied by mandamus, was no sufficient answer to the application.[1] But we are not to understand by this that the two remedies are regarded as in any just sense concurrent, and at the election of the party injured. An indictment is ordinarily no adequate redress for private wrong. The case of a nuisance, put by Lord *Denman*, in the last case, illustrates the subject fairly. The indictment only redresses the public wrong inflicted by a nuisance. One who suffers special damage is entitled to a private action, and sometimes to specific redress, in equity or by mandamus.

[4] Reg. *v.* Liverpool, M. & N. Railw., 21 L. J. Q. B. 284; 16 Jur. 149; 11 Eng. L. & Eq. 408; Reg. *v.* Blackwall Railw., 9 Dowl. P. Cas. 558.

[5] The People *v.* The Supervisors of West Chester, 12 Barb. 446.

[6] Mayor, &c. of Savannah *v.* State, 4 Ga. 26.

[7] Reg. *v.* Townsend, 28 Law Times, 100.

[1] Reg. *v.* Bristol Dock Co., 2 Q. B. 64: s. c. 2 Railw. C. 599; Reg. *v.* Manchester & Leeds Railw., 3 Q. B. 528.

2. Hence, where a railway company, after having completed their road, under an act of parliament, by which it was provided the public should have the beneficial enjoyment of the same, proceeded to take up the railway, a mandamus was awarded to compel them to reinstate it.[2]

* 3. And it may safely be affirmed that the mandamus will be denied where there is other adequate remedy.[3]

SECTION XII.

Judgment upon Petition for Mandamus revisable in Error.

§ 162. In those states where the court having jurisdiction to award the writ of mandamus is not the court of last resort, the judgment upon applications for such writs is revisable upon writ

[1] Rex. v. The Severn & Wye Railw., 2 B. & Ald. 646. *Abbott*, Ch. J., said, in giving judgment : "If an indictment had been a remedy equally convenient, beneficial, and effectual as a mandamus, I should have been of opinion that we ought not to grant the mandamus"; but it is not, "for a corporation cannot be compelled, by indictment, to reinstate the road."

"The court may, indeed, in case of conviction, impose a fine, and that fine may be levied by distress; but the corporation may submit to the payment of the fine and refuse to reinstate the road." Grant on Corp. 270. And in State v. Hartford & New H. Railw. Co., 29 Conn. 538, this writ was awarded to compel the defendants to continue to run trains to connect with the steamboats on the Sound, after the company had formed a connection with the New Haven & New York Railw., and had discontinued running trains across that portion of their road which connected with the steamboats. And it was here considered that a contract with the connecting railway to discontinue connection with the steamboats for some equivalent benefit to both companies was void, as against good policy, and that it was a proper case for the public attorney to interfere by way of petition for mandamus.

[2] Reg. v. Gamble & Bird, 11 Ad. & Ell. 69; Reg. v. Victoria Park Co., 1 Q. B. 288; Draper v. Noteware, 7 Cal. 276; Williams v. Judge of County Court, 27 Miss. 225; Trustees v. State, 11 Ind. 205; Bush v. Beaven, 1 H. & C. 500; s. c. 32 L. J. Exch. 54. But in People v. Hilliard, 29 Ill. 413, the court hold, that it is not indispensable that the petition should state that the relator is without any other sufficient remedy. If such appear to the court to be the fact, the alternative writ will not be quashed. Id. But see School Board v. People, 20 Ill. 525, *contra*. People v. Wood, 35 Barb. 653; Goodwin v. Glazer, 10 Cal. 333. But the existence of an equitable remedy is no ground for refusing mandamus. Commonwealth v. Commissioners of Alleghany, 32 Penn. St. 218.

of error.[1] But it is said not to be the province of a court of error to issue the writ of mandamus, unless the power is conferred by statute.[2]

[1] Reg. *v.* The Manchester & Leeds Railw., 9 Q. B. 528, reversing the judgment of K. B. in s. c. 1 Railw. C. 523, this last hearing being in the Exchequer Chamber. 6 & 7 Vict. ch. 67, § 2, gives the right to a writ of error. But upon general principles, it is as much revisable as judgment upon *habeas corpus*. Holmes *ex parte*, 14 Pet. U. S. 540. Cowell *v.* Buckelew, 14 Cal. 640. See also Columbia Ins. Co. *v.* Wheelright, 7 Wheat. 534. The matter of granting the writ of mandamus, being discretionary in the court, should not preclude a revision of the questions decided by the court below as matter of law. When the writ is denied as matter of discretion, that judgment is of course not revisable in a court of error.

[2] Angell & Ames on Corp, § 697.

*CHAPTER XXIV.

WRIT OF CERTIORARI.

SECTION I.

To remove Proceedings against Railways.

1. *Lies to bring up unfinished proceedings, or those not according to the common law.*
2. *This writ is one of very extensive application, unless controlled by statute.*
3. *Where the case is fully heard on the application, judgment may be entered.*

§ 163. 1. WHERE the proceedings against a railway are in a court of record, and according to the course of the common law, after final judgment the writ of error is the appropriate process for their revision in a superior court, and the writ of *certiorari* will not lie.[1] But the *certiorari* is the proper process to bring up an unfinished proceeding,[2] in an inferior court of record, or a * summary

[1] The King *v.* Inhabitants of Pennegoes, 1 B. & C., 142; s. c. 2 Dow & R. 209; Queen *v.* Dixon, 3 Salk. 78.

Certiorari is the appropriate remedy to revise erroneous rulings of county commissioners, when there is no mode of revision appointed by law. Mendon *v.* County Commissioners, 2 Allen, 463. The same principle is maintained in People *v.* Board of Delegates, 14 Cal. 479. It does not lie to review acts simply ministerial, but all acts of a judicial nature, whether of a court or a municipal board. Robinson *v.* Supervisors, 16 Cal. 208. And see, to the same point, People *v.* Board of Health, 33 Barb. 344; People *v.* Hester, 6 Cal. 679; Borough of Sewickley, 2 Grant's Cases, 135; Justice, &c. *v.* Hunt, 29 Ga. 155. But see Camden *v.* Mulford, 2 Dutch. 49; State *v.* Jersey City, id. 444. The power of review on a common-law *certiorari* extends not only to questions affecting the jurisdiction of the magistrate and the regularity of the proceedings before him, but to all other legal questions. Mullins *v.* People, 24 N. Y. 399; Jackson *v.* People, 9 Mich. 111. But see People *v.* Van Alstyne, 32 Barb. 131; People *v.* Board of Delegates, 14 Cal. 179. Only questions raised by the record can be considered. People *v.* Wheeler, 21 N. Y. 82. And see Frederick *v.* Clarke, 5 Wisc. 191; Greenway *v.* Mead, 2 Dutch. 303; Low *v.* Galena & Chicago Railw., 18 Ill. 324; Mayo County, *in re*, 14 Ir. Com. Law, 392.

[2] The writ of *certiorari* before judgment corresponds to the writ of *error* after it. Commonwealth *v.* Simpson, 2 Grant's Cases, 438. And a proceeding by *certiorari* is like an appeal, and is governed by the same rules, so that the plain-

proceeding in such court, not according to the course of the common law, after judgment thereon, and where there is alleged error in the proceedings.[1]

2. This writ is of universal application, unless taken away by the express words of the statute, or where the superior court is not the proper tribunal to proceed with the cause.[3] And in such case the cause may be brought up, and any error corrected, and then remanded to the inferior court, with a writ of mandamus, in the nature of a *procedendo;* or the mandamus may be awarded, in the first instance, directing the inferior court to proceed and finish the case upon its merits.[4]

tiff can dismiss the case in the appellate court, and leave the whole matter as if no steps had been taken therein. Joliet, &c. Railw. *v.* Barrows, 24 Ill. 562.

[3] Where a party has had no notice of an assessment of damages for land taken, until after the time limited for the appeal has expired, he may have the decision reviewed by *certiorari.* Joliet, &c. Railw. *v.* Barrows, 24 Ill. 562. And see McConnell *v.* Caldwell, 6 Jones Law, 469; Aycock *v.* Williams, 18 Texas, 392. In the last case it was held, that, if a justice of the peace grant a new trial without notice to the adverse party, who does not appear at the second trial, the latter may either enjoin the collection of the judgment thus rendered, or remove the cause to the District Court by *certiorari.* And *certiorari* will be granted to bring up an order of Quarter Sessions which was void on the ground of interest in the justices. See McHeran *v.* Melvin, 3 Jones Equity, 195; Darling *v.* Neill, 15 Texas, 104; Robson *in re*, 6 Mich. 137; Clary *v.* Hoagland, 5 Cal. 476. And one against whom a judgment is sought to be enforced, though not a party to the proceedings, may apply for a *certiorari.* Clary *v.* Hoagland, *supra.* And see Reg. *v.* Bell, 8 Cox, C. C. 28; Reg. *v.* Hammond, 12 W. R. 208; Reg. *v.* London & Northwestern Railw., 12 W. R. 208.

[4] Woodstock *v.* Gallup, 28 Vt. 587; Ottawa *v.* Chicago, &c. Railw., 25 Ill. 43. And in New York the only way of reviewing a decision of a justice of the peace in summary proceedings is by a *certiorari.* Romaine *v.* Kinshimer, 2 Hilton, 519; Reg. *v.* Bristol & Exeter Railw., 11 Ad. & Ellis, 202; Crosse *v.* Smith, 3 Salk. 79. It is here said: "There is no jurisdiction which can withstand a *certiorari.* But if the *certiorari* be taken away, by the express words of the statute, the court will not indirectly accomplish the same thing by mandamus. Rex *v.* Justices of W. R. of York, in the Matter of Railway, 1 Ad. & El. 563; Rex *v.* Fell, 1 B. & A. 380; Rex *v.* Saunders, 5 Dow. & R. 611. Where the *certiorari* upon a given subject is taken away by act of parliament, it must be understood as extending only to the terms of the act, and for something done in pursuance of it. *Denman*, Ch. J., Reg. *v.* Sheffield, A. & M. Railw., 11 Ad. & El. 194; s. c. 1 Railw. C. 537, 545. *Patteson*, J., "Where there is a total want of jurisdiction and parties have proceeded in defiance of *certiorari*, it is not taken away." South Wales Railw. Co. *v.* Richards, 6 Railw. C. 197.

See Jubb *v.* Hull Dock Co., 9 Q. B. 443. *Denman*, Ch. J., intimates, that

* 3. Where the case is fully heard in regard to its merits, upon the rule to show cause, and there is no dispute about the facts, it is common for the Court of King's Bench to give judgment, without waiting for the record to be brought up on *certiorari*,[5] similar to the course we have intimated in regard to applications for mandamus.[6]

SECTION II.

Where there is an Excess of Jurisdiction.

§ 164. Where there is an excess of jurisdiction, the appropriate remedy ordinarily is by action of trespass. And in such cases the court have more commonly refused to give redress, either by *certiorari* or mandamus.[1] But it is not considered that a statutory provision, taking away the writ of *certiorari*, for any thing * done under the act of incorporation, or the general statutes as to railways, applies to things done wholly without the jurisdiction conferred.[2]

where the *certiorari* is taken away, in regard to proceedings under an act of parliament, that will not deprive the party of that remedy, when the proceeding is complained of, as not coming within the act, although some part of the proceedings is confessedly within the act, citing Rex *v.* The Justices of Kent, 10 B. & C. 477. See Reg. *v.* St. Olaves, 8 Ellis & Bl. 529. The right to have proceedings reversed in the Supreme Court does not deprive the party of the right to bring *certiorari*. Vanwickle *v.* C. & A. Railw.; Bennett *v.* Same, 2 Green, 145, 162. A *certiorari* suspends all proceedings in a case till it is decided. Taylor *v.* Gay, 20 Ga. 77.

[5] *In Re* Edmunson, 17 Q. B. 67; s. c. 24 Eng. L. & E. 169. This was a case where the statute required the complaint to be made within six months after the cause of action arose, and for non-compliance with this requirement the court held the proceedings liable to be quashed, and granted the *certiorari*.

[6] *Ante*, § 152. On *certiorari* the court will not reverse a judgment for error in taxing costs, but will correct the error in this respect. Marshall *v.* Burton, 5 Harring. (Del.) 295.

[1] Reg. *v.* Bristol & Exeter Railw., 2 Railw. C. 99; 11 Ad. & Ellis, 202; Reg. *v.* Sheffield & Ashton-under-Lyne & Manchester Railw., 11 Ad. & El. 194; s. c. 1 Railw. C. 537, 545. The court will rarely grant this writ where the party has an opportunity to litigate the question in action at law. People *v.* Board of Health, 33 Barb. 344. And see Baltimore, &c. Co. *v.* Northern, &c. Railw., 15 Md. 193; Peabody *v.* Buentillo, 18 Texas, 313; Clary *v.* Hoagland, 13 Cal. 173.

[2] *Ante*, § 162; Reg. *v.* Sheffield, A. & M. Railw., 11 Ad. & El. 194; s. c. 1 Railw. C. 545; South Wales Railw. *v.* Richards, 6 Railw. C. 197; Reg. *v.*

* 298, 299.

SECTION III.[1]

Jurisdiction and Mode of Procedure.

1. *Lies in cases of irregularity, unless taken away by statute.*
2. *Inquisitions before officers, not known in the law.*
3. *Granting the writ is matter of discretion. Defects not amendable.*
4. *Not allowed for irregularity in proceedings, or evidence, or form of judgment.*

§ 165. 1. Although it is held that a statutory provision, denying the *certiorari*, is to be limited to matters within the jurisdiction conferred, and will not restrict the power of the court in regard to matters wholly beyond the jurisdiction, the same rule cannot be extended to mere irregularity in the exercise of the jurisdiction. For unless the prohibition of the writ could apply to such cases, it could have no application, and it is incumbent upon the court to give it a reasonable operation and construction.[1]

2. An inquisition taken before two under-sheriffs extraordinary, will be set aside on that ground.[2] But an inquisition taken before a clerk of the under-sheriff, and an assessor appointed *pro hac vice* by the sheriff, although none of the persons named in the act, for such an office, will not be quashed on *certiorari*.[3]

* 3. The granting of the *certiorari* is matter of discretion,[4] although there are fatal defects on the face of the proceedings, which it is sought to bring up.[5] The affidavits should swear positively

Lancashire & Preston Railw., 6 Q. B. 759; 3 Railw. C. 725. Where a jury, summoned under 8 & 9 Victoria, ch. 18, § 68, have taken into consideration, in awarding compensation, one claim, among others, as to which they had no jurisdiction, a *certiorari* lies, although such excess of jurisdiction does not appear upon the face of the proceedings, but it may be shown by affidavit. Penny *in re*, 7 Ellis & Bl. 660.

[1] Reg. v. Sheffield, A. & M. Railw., 1 Railw. C. 537; 11 Ad. & El. 194.

[2] Denny v. Trapnell, 2 Wilson, 379. This decision is upon the ground that the sheriff can only appoint one under-sheriff extraordinary.

[3] Reg. v. Sheffield, A. & M. Railw., 11 Ad. & Ellis, 194. Thus showing the disposition of the court to sustain the proceedings when not in contravention of the express terms of the statute.

[4] State v. Hudson, 5 Dutch. 115; Lantis *in re*, 9 Mich. 324; People v. Board of Health, 33 Barb. 344; Johnson v. McKissack, 20 Texas, 160; People v. Peabody, 26 Barb. 437; Randle v. Williams, 18 Arkansas, 380; Mayo County *in re*, 14 Ir. Com. Law Rep. 392; Reg. v. Reynolds, 13 W. R. 925; s. c. 12 L. T. N. S. 580.

[5] Reg. v. Manchester & Leeds Railw., 8 Ad. & Ellis, 413. Lord *Denman* says, "I disclaim the principle, that we are to issue a *certiorari* to bring up the inqui-

and specifically to the existence of the defects relied upon.[5] And where the party applying for the writ fails, from incompleteness in the affidavits, he will not have a *certiorari* granted him, upon fresh affidavits supplying the defects.[5] The conduct of the prosecutor, especially if it had a tendency to induce the defects complained of, is important to be considered in determining the question of discretion, in regard to issuing the writ.[6]

4. The court will not ordinarily quash proceedings in inferior tribunals for mere formal irregularity in the proceedings or the testimony received, especially when there was no objection made at the time; nor will the form of the judgment or decree be considered any sufficient ground for allowing the writ, provided substantial justice has been done.[7]

sition, on the ground that there may probably be defects; we must clearly see that facts do exist which will bring the defects before us." And an individual member of a corporation cannot carry on suit by bringing *certiorari* in the name of the corporation without the consent of a legal majority of the members thereof. Silk Manufacturing Co. *v.* Campbell, 3 Dutcher, 539.

[6] Reg. *v.* South Holland Drainage, 8 Ad. & El. 429.

[7] Salem & South Danvers Railw. *v.* County Commissioners, 9 Allen, 563.

*CHAPTER XXV.

INFORMATIONS IN THE NATURE OF QUO WARRANTO.

1. *General nature of the remedy.*
2. *Its exercise confined to the highest court of ordinary civil jurisdiction.*
3. *In the English practice, this remedy not extended to private corporations.*
4. *In this country it has been extended to such corporations.*
5. *This remedy will only remove an usurper, but not restore the one rightfully entitled.*
6. *Will not lie where railway company open part of their road.*
7. *Nor where company issue stock below par, or begin to build road before subscription full.*
8. *Form of the judgment.*
9. *Rules in regard to taxing costs.*
10. *Used to test corporate existence and power.*
11. *Penalties provided by charter cannot subsequently be increased to a forfeiture.*
12. *But a grant of corporate franchises may be annulled when its purposes have failed.*
13. Scire facias *the proper remedy to determine forfeiture.*
14. *Insufficient excuses for failure to repair a turnpike road.*
15. *This remedy does not supersede any equitable redress.*

§ 166. 1. THIS is a subject of very extensive application to corporations, for the purpose of determining when they have forfeited their corporate franchises, or usurped those not rightfully belonging to them, and for numerous other purposes.[1] It will be found treated very much at length in treatises upon corporations.[2] We should scarcely feel justified in going into the subject further here than it has a special application to railways. The form of the proceedings in modern times is by information of the attorney-general, or other public prosecuting officer, on behalf of

[1] See Palmer *v.* Woodbury, 14 Cal. 43; Gano *v.* State, 10 Ohio N. S. 237; Parker *v.* Smith, 3 Minn. 240; Cleaver *v.* Commonwealth, 34 Penn. St. 283; People *v.* Ridgely, 21 Ill. 65; Scott *v.* Clark, 1 Clarke, 70; Mississippi, &c. Railw. *v.* Cross, 20 Ark. 443, 495.

[2] Angell & Ames on Corporations, §§ 731–765. See State *v.* Mississippi, &c. Railw., 20 Ark. 443, 495; State *v.* Brown, 5 Rhode Island, 1; Lindsey *v.* Attorney-General, 33 Miss. 508. The information may set forth specifically the ground of forfeiture relied upon, or may call upon the corporation to show by what warrant they still claim to exercise their corporate franchises; and the information, like any other criminal information, is regarded as amendable. Commonwealth *v.* Commercial Bank, 28 Penn. St. 383. And the information must acquaint the court with the charter of the company, so as to show its powers and duties. Danville, &c. Co. *v.* State, 16 Ind. 456.

* the state, or sovereignty, in the nature of a *quo warranto*, upon which a rule issues to the defendant to show by what warrant he exercises the function or franchise called in question.[3] These proceedings are now very much controlled in England and in the American states by statute defining the form of process and the jurisdiction of the courts in regard to them.

2. In the absence of special provisions, the highest courts of ordinary civil jurisdiction are accustomed to exercise the prerogative right of sovereignty, to issue this process, as well as other prerogative writs, such as a mandamus, certiorari, procedendo, prohibition, &c. In some of the states the courts refuse to exercise any such prerogative rights.[4] And in others this power is, by statute, conferred upon the Court of Chancery, but in other forms.[5]

3. The English courts do not seem to have allowed the exercise of this proceeding in the case of mere private corporations, although there are numerous cases in the English books of its exercise in regard to municipal corporations,[6] and others of an important public character.

[3] State *v.* Brown, 33 Miss. 500.

[4] State *v.* Ashley, 1 Pike (Ark.), 279; State *v.* Turk, Mart. & Yerg. 287; Attorney-General *v.* Leaf, 9 Humph. 753. See also State *v.* Merry, 3 Missouri, 278; State *v.* McBride, 4 id. 303; State *v.* St. Louis P. M. & Life Ins. Co., 8 id. 330, where in the latter state it was held the writ should issue.

In Pennsylvania the Supreme Court has authority to try by *mandamus* or *quo warranto* whether or not a contract entered into between two different corporations is in excess of the lawful powers of either, and if either corporation is exercising rights or franchises to which it is not entitled, then to oust it therefrom; and the proceeding may be either at common law or in equity, provided the right of trial by jury is not interfered with. Commonwealth *v.* Delaware & Hudson Canal Co., 43 Penn. St. 295.

[5] State *v.* Turk, Mart. & Yerg. 287; State *v.* Merchants' Ins. Co., 8 Humph. 253; Attorney-General *v.* Leaf, 9 id. 753.

[6] Rex *v.* Williams, 1 Bur. 402; Rex *v.* Breton, 4 Burrow, 2260; Rex *v.* Highmore, 5 Barn. & Ald. 771; Rex *v.* M'Kay, 4 B. & C. 351; Smyth *ex parte*, 11 W. R. 754; s. c. 8 L. T. N. S. 458; Reg. *v.* Hampton, 13 L. T. N. S. 431. The same rule obtains in regard to this proceeding in this respect in England as in regard to mandamus.

Ante, § 155; Rex *v.* Sir Wm. Lowther, 1 Strange, 637; Rex *v.* Mousley, 8 Ad. & Ellis, N. S. 957, decided in 1846, where it is held that the mastership of a hospital or a grammar school was not of so public a character as to justify the exercise of this remedy; nor the office of a churchwarden, Barlow *in re*, 30 L. J. Q. B. 271; s. c. 5 L. T. N. S. 289.

*4. But there is no question that in the American states this form of proceeding is extended to aggregate corporations in general, and more especially to the case of banks and railways, which partake in some sense of a public character.[7] The general principles which we have found applicable to the subject of mandamus, will, for the most part, apply to this proceeding.[8]

5. The court cannot establish corporate officers, who would have been elected had all the legal votes offered been received by the inspectors.[9] The only remedy is to set aside the election. And the court will not proceed by mandamus to fill an office until the title is first tried.[10]

[7] Commonwealth *v.* Arrison, 15 Serg. & Rawle, 128; The People *v.* Thompson, 21 Wend. 235; s. c. 23 id. 537; Commonwealth *v.* Union Ins. Co., 5 Mass. 231; People *v.* River Raisin & Lake Erie Railw., 12 Mich. 381. See *ante*, § 153; State *v.* B. Concord & M. Railw., 25 Vt. 433; Grand Gulf Railw. and Bank *v.* State, 10 Sm. & M. 427; State *v.* A. P. Hunton and others, 28 Vt. 594. But if an election of managers of a corporation be not disputed during their term of office by *quo warranto*, and they are permitted to act throughout their term as managers *de facto*, the legality of the next election cannot be questioned for any vice or irregularity in the first. A writ of *quo warranto* brought during the term of an office may be tried after the term has expired, but title to a term of office already expired, at the issue of the writ, cannot be determined in this manner by proceedings instituted against those afterwards succeeding to the office. Commonwealth *v.* Smith, 45 Penn. St. 59. This writ will be granted, although the defendant has resigned the office, if the object of the relator is not only to cause the defendant to vacate the office, but to establish another candidate in the office, as the relator is entitled in such case to have judgment of ouster, or a disclaimer upon the record. Queen *v.* Bloyzard, Law Rep. 2 Q. B. 55. In Neall *v.* Hill, 16 Cal. 145, it is said that the removal of a mere private or ministerial officer of a corporation is a right that belongs to the corporation alone, and the courts have no jurisdiction to remove such officer, or, it seems, even to enjoin him from acting.

[8] *Ante*, chap. XXIII. And see State *v.* Commercial Bank of Manchester, 33 Miss. 474, where the acts and omissions that will allow a forfeiture of the charter by *quo warranto*, are discussed.

[9] In the matter of the Long Island Railw., 19 Wendell, 37; 2 Am. Railw. C. 453. In *quo warranto* against a usurper by a claimant, it is competent for the court to oust the usurper without determining the right of the claimant. Gano *v.* State, 10 Ohio N. S. 237. See Doane *v.* Scannell, 7 Cal. 393; People *v.* Same, id. 432. One who is relator in a *quo warranto*, on the ground of the use of blank voting papers, but who has previously used blank voting papers on the same and former elections, and has been formerly elected in that mode, is precluded from maintaining the writ upon that ground. *Sed quære.* Queen *v.* Lofthome, L. R. 1 Q. B. 433.

[10] Rex *v.* Truro, 3 B. & Ald. 590.

6. And where a railway company were authorized to make a line, with branches, and they completed a portion of it, but abandoned other parts of it, this is not a public mischief, which will entitle the attorney-general to file an information, in the nature * of a *quo warranto* against the company, to prevent them from opening the part completed, until the whole is perfect.[11]

7. And an information in the nature of a *quo warranto*, under the Massachusetts statute, will not lie against a railway company, in behalf of a stockholder, merely because they issued stock below the par value,[12] and began to construct their road, before the requisite amount of stock was subscribed, it not appearing that the petitioner's private right was thereby put at hazard.[13]

8. The form of the judgment in proceedings of this character will depend upon the facts proved, and the object to be attained. Where the defect in defendant's right is merely formal, like the omission to take the requisite oath, the judgment is for a suspen-

[11] Attorney-General *v.* Birmingham Junction Railw., 3 Mac. & Gor. 453; s. c. 8 Eng. L. & Eq. 243.

[12] See Howe *v.* Derrel, 43 Barb. 504; Commonwealth *v.* Farmers' Bank, 2 Grant's Cas. 392.

[13] Hastings *v.* Amherst & Belchertown Railw., 9 Cush. 596. In this case the charter provided that the road extend "through Amherst." Another section of the charter provided that the road might be divided into two sections, one extending "to the village of Amherst," and the other from "Amherst to Montague." It was held, that taking land for the road, upon a route not terminating "in either village of Amherst," was not the exercise of a franchise, not granted by the charter.

Any material departure from the points designated in the charter for the location of a railway, is a violation of the charter, for which the franchise may be seized upon *quo warranto*, unless the legislature has waived this right of the state by acts recognizing the legality of such violation of the charter. Mississippi, &c. Railw. *v.* Cross, 20 Ark. 443.

Where an act incorporating a railway provided that no subscription should be received and allowed, unless there should be paid to the commissioners at the time of subscribing five dollars per share, and this provision was not complied with, but the corporation organized itself, elected directors, &c., and began the construction of its road, by making contracts to grade it, some of the contractors not being aware of this failure to make the stipulated payment on the shares at subscription, and one of the stockholders, who was aware of that failure when he became a stockholder, and who had voted at the election of directors, and otherwise aided in setting up the corporation, applied to the court for leave to file an information in the nature of a *quo warranto* against the directors, to compel them to show by what authority they exercised their powers: it was held that this application should be rejected. Cole *v.* Dyer, 29 Georgia, 434.

sion of the exercise of the function until qualified by compliance with the requisite formality.[14] But if there be shown, or *confessed, a total defect of title in defendant, there is a judgment of ouster or forfeiture.[15] And where it is intended to dissolve the corporation, judgment to that effect should be given in form.[15]

9. The relator is liable to costs if he fail, and is entitled to recover costs if he prevail ordinarily. But where the office is one where the party is compellable to serve, and is accepted and held in good faith, it is not common to allow costs against the incumbent upon judgment of ouster.[16]

10. In some of the states a process or proceeding under the name of "Quo Warranto" has been applied to test the question of corporate existence and power, on the ground of forfeiture of corporate rights by means of the omission to perform acts required by the charter, or of an excess of power having been resorted to, in either case in violation of granted powers and duties.[17]

11. And where the charter of a plank road company provides for the security of travel and for the enforcement of the duty of the company by suitable penalties, and the legislature, after the road was built and in use, imposed an entire forfeiture of the whole franchise of the corporation for failure to keep any portion of the road in repair, it was held to be such a modification of the charter as did not come within the proper exercise of the police power of the state, and therefore void as a violation of the contract in the grant of the charter.[18]

12. But where a turnpike charter provides penalties upon the company and its agents for neglecting to keep the road in good and perfect repair, such provision cannot be held to deprive the state of its sovereign power to annul a grant when its purposes have failed, through either the positive acts or neglect of the grantees; and when the fact of such act or neglect is duly established, the special remedy provided by the charter will be regarded as merely cumulative. It is of the very essence of a *corporation,

[14] Rex *v.* Clarke, 2 East, 75. But a judgment of ouster will conclude the party in any subsequent proceeding. Ib.

[15] State *v.* Bradford Village, 32 Vt. 50; Rex *v.* Tyrrell, 11 Mod. 335.

[16] Rex *v.* Wallis, 5 T. R. 375; State *v.* Bradford Village, *supra*.

[17] Danville & W. L. Plank Road Co. *v.* The State, 16 Ind. 456. See also The People *v.* J. & M. Plank Road Co., 9 Mich. 285, where the extent of the remedy and the form of procedure is extensively discussed, but by a divided court.

[18] The People *v.* J. & M. Plank Road Co., 9 Mich. 285.

* 305, 306.

as a political existence or abstraction, that it should always be liable to dissolution by a surrender of its corporate franchises, and by a forfeiture of them, either by non-user or misuser.[19]

13. In a case where the statute directed the public prosecuting officers to take proceedings to determine whether the charter and franchises of a turnpike company had become forfeited by non-user or abuser, where no form of remedy is prescribed, it was held that *scire facias* was the proper one to be adopted, and all that is required to be set forth in the writ is enough to inform the company of the causes of complaint and the extent of redress sought.[19] This procedure is very much the same, in effect, as that by *quo warranto*, already discussed, except that it is in the form of a civil action.[19]

14. It is no excuse for a turnpike company not keeping its road in repair, that the state have chartered a railway along the same route, and thereby disabled the company from maintaining its road in the state of repair required by the charter.[19] Nor is it a bar to the proceedings that the company have applied all their tolls to the repair of the road.[19]

15. This remedy under the Massachusetts General Statutes,[20] in order to redress an injury to private rights or interests from the exercise by a private corporation of a franchise or privilege not conferred by law, does not supersede the jurisdiction in equity in cases of private nuisance.[21]

[19] Wash. & Balt. T. Road Co. *v.* The State, 19 Md. 239. The particular forms of the pleading, both on the part of the plaintiff and defendant, are here extensively discussed, as well as many questions in regard to the admissibility of evidence.

[20] C. 145, § 16.

[21] Fall River Iron Works *v.* Old Colony & Fall River Railw., 5 Allen, 221.

END OF VOL. I.

APPENDIX OF LATER CASES.

APPENDIX OF CASES

REPORTED SINCE THE EDITION WENT TO PRESS.

CORPORATIONS.

Receivers appointed to close up when same are insolvent.

If two receivers are appointed to close up the concerns of a corporation, and one of them misapplies the funds by putting them to his own private use, and the other is guilty of gross neglect of duty in giving no attention to the matters thus intrusted to his care and supervision, they will be jointly liable for the amount found due in stating their account, and will be charged with interest thereon, from the time the money was thus received and misapplied. Commonwealth *v.* Eagle Ins. Co., 14 Allen, 344.

Commissioners appointed by special act of the legislature to arrange connections between different companies.

In such cases, the court will give the award of the commissioners such construction as to secure to the commissioners scope for the fair and full exercise of the legal duties enjoined upon them, and no more.

Their award is not held, in this state, final and conclusive upon the rights of the parties; but is open to future examination and revision. Eastern Railw. *v.* The Concord & Portsmouth Railw., 47 N. H. 108. This latter view, as to the proper effect of the award of such a board is unquestionably the true view; but the precise extent to which the award is re-examinable is somewhat difficult to define. It should, commonly, only be subject to impeachment for some error or irregularity in the proceedings before the board, or else for favor, partiality, or mistake. But some courts go much further, and some refuse to hear any allegations or proof against the award.

Right of owner of shares to demand registry of transfer.

In the absence of any provision in the organic law of the corporation, the directors have no power to refuse to register the transfer of shares. *Re* Smith & Co.; Weston's case, 17 W. R. 62. In the absence of any counter-provision in the organic law of a corporation, the shareholders have

a right at any time to get rid of their shares by an out and out transfer to any one. Ib. Transfer to an infant is not void, but voidable, at his election upon coming of age, and not having done it in five months after coming of age he was held bound thereby. *Ex parte* Rayner; *Re* Waud, id. 64.

Costs of litigation when properly chargeable to company.

If the litigation is undertaken *mala fide*, and from improper motives and in respect of a matter in which the corporation is only collaterally interested, the costs cannot be charged upon the funds of a municipal corporation. But if undertaken in the *bona fide* assertion of the rights of the corporation, the expenses are properly chargeable to the company, although the litigation may not have resulted favorably to its interests. Reg. *v.* Tamworth, 17 W. R. 231. The usages of the stock exchange as to transfer of shares binding on parties. Maxted *v.* Paine, id. 886.

Transfer of shares as collateral security.

In such case, the transferee is bound to return the identical shares pledged. And if he sell them, and buy others of the same description for less price, the debtor is entitled to receive the difference. But if the debt being paid and the shares retransferred before he learns that he has not received back the identical shares, he parts with them, so that it is no longer in his power to restore them, he is not in condition to sustain his bill, founded upon an offer to restore the shares received by him. Langton *v.* Waite, 17 W. R. 475.

Specific contract for sale of shares.

Such contract will be enforced, notwithstanding the depreciation of the value of the shares in the market by an unexpected call made. Hawkins *v.* Maltby, 17 W. R. 557; approving case between same parties, 16 id. 209; overruling s. c. 15 id. 1075; Price *v.* Denb. R. & C. Railw. 17 id. 572.

Right to inspect entries in books of company.

The court will allow a passenger who sues a railway for injuries on their trains, to inspect the company's entry of accidents on report of the guard, engineer, &c., kept in obedience to the statute. Woolley *v.* North London Railw. id. 650; s. c. id. 797.

EMINENT DOMAIN.

Location of railway confirmed by statute.

A statute which "ratifies and confirms" the location of a railway, and "the railroad" "as actually laid out and constructed" does not exempt the

company from liability for injuries caused to public or private rights, by the manner in which they have constructed, or are maintaining, part of the road at the time of the enactment. Salem *v.* Eastern Railw., 98 Mass. 431.

Difficulty of access.

The difficulty of access to a mill, and consequent loss of custom to the same by reason of the frequent passing of trains rendering it unsafe, is proper to be considered in estimating land damages. Western Penn. Railw. *v.* Hill, 56 Penn. St. 460.

Company when liable in ejectment.

Where a railway company takes possession of the land of another, without his consent and without taking proceedings to have the land condemned under their statutory powers, the owner may maintain an action to recover possession of the same. Graham *v.* Columbus & Ind. C. Railw. 27 Ind. 260.

Relief by injunction for nuisance in navigable highway.

The principle is the same in such cases, whether the nuisance is created in a tidal or non-tidal river. Attorney General *v.* Earl of Lonsdale, 17 W. R. 219.

Notice to take land.

The English courts regard this as a purchase at the election of the land-owner, and will carry it into effect by mandamus, and give substantial damages, in case of restoring the party to his rights as owner of the land. Morgan *v.* Met. Railw., 17 W. R. 261.

Covenants against building upon adjoining lands.

It is no breach of such covenant on the part of the vendor, extending to the act of his assigns as well as his own, that the land has been taken by a railway company, since such covenant will not extend to the act of a compulsory assignee, like a railway company, acting under their compulsory parliamentary powers. Bailey *v.* De Crespigny, 17 W. R. 494.

Extent of lien for price of land taken by railway company.

In the case of Pell *v.* Northampton & B. Railw. M. R. 16 W. R. 1077, affirmed by L. C., 17 id. 308, it is held that the owner retains his lien for the price of the land taken by a railway company, and upon which by the vendor's consent the company have constructed and opened their road, and given security for the price, upon which part of it had been recovered by suit.

The holder of a rent charge in security for the price of land taken by a

railway company, has a lien superior to the debenture holders of the company. Eyton *v.* Denb. R. & C. Railw., 17 W. R. 546.

May take land for substituted road, even when not strictly indispensable.

It will not deprive a railway company of the power to take land for the purpose of constructing a new way in place of one used by them, that they already have land upon which they might build this way, but for their purpose of using such land for the site of a public house. Lamb *v.* The North London Railw., 17 W. R. 746.

Extent of powers of company in building branches and new lines.

In Morris & Essex R. R. *v.* Central Railw., 2 Vroom, 205, it was decided:

1. The Central Railroad Co., was chartered Feb. 20, 1847, and has for many years owned and used a road between Elizabethport and Phillipsburgh. Their charter authorized them to construct a "railroad or lateral roads," with a branch road between certain termini, and gave power to build and maintain at the Delaware River, or within thirteen miles of the borough of Easton, such wharves, piers, bridges, and other facilities as they might think expedient and necessary for the full enjoyment of all the benefits conferred by the charter.

2. In May, 1860, the Morris & Essex Railway, the plaintiff, filed the survey of a route, for the extension of their road from Hackettstown to the Delaware, at Phillipsburgh, and, in 1863, purchased lands in Phillipsburgh, on the line of said route, upon which, they constructed the road-bed as early as April 1, 1864.

3. On March 24, 1864, the defendants filed a survey or location of a part of their road, in the village of Phillipsburg, the route of which survey crossed the location of the extension above mentioned, thus giving to the defendants a new access to the Delaware River. They afterwards applied to have damages appraised for the lands so to be taken. An award having been made, the proceedings were removed to this court by *certiorari*. *Held*, by the court:—

1. That the defendants' road having been completed and in use, and the branch now proposed to be made, having formed no part of the original plan in making the road, they had no right to add such branch under any provision of the charter.

2. That the charter gave to the defendants no authority to add a branch or spur to their road. Having laid out the road according to the charter as they understood it, their powers were exhausted.

3. That the term limited for taking land under the charter had expired, and the right of eminent domain conferred, no longer existed.

4. By the 7th section of the defendants' charter, it is provided that it shall

be lawful for the company to change or alter the location of said road, or to locate new lines when additional lines shall be required at any point or points between Phillipsburgh and Elizabethport, not varying in any case over one mile from the line located and filed. The court *held*, —

1. That as the company had not since the passage of the act established any new lines, its power in that respect was not exhausted.

2. That by the terms "between Phillipsburgh and Easton," as used in the charter, these two places being the termini of the road, are not excluded.

3. To authorize the Central Railway to cross the track of the Morris and Essex road, it is not necessary that any express power should be given in the charter.

When assessment of land damages to be set aside.

When in the assessment of damages for lands taken for the purpose of a railway, it appears to the court that injustice has been done through some mistake or misapprehension of the jury, the verdict should be set aside. Cadmus *v.* Central R. R. Co., 2 Vroom, 179.

The interest of a railway company, laid in the streets of a city, in such streets.

A railway corporation, whose track is laid in the streets of a city, has no such interest in the street as will entitle them to move for an injunction against another company for laying another track in the same street, so remote from the track of the first company, as not in any manner to interfere with the use of same. N. Y. & H. Railw. *v.* Forty-Second Street & G. S. F. Railw., 50 Barb. 285; s. c. id. 309.

Injuries to land affecting easements therein, not taking of land.

A. being an owner of a nail factory, together with the easement or right to carry the waters of a creek across a certain parcel of land thereto, the defendant, for the purpose of constructing its railway, acquired by purchase a portion of the land subject to such easement. The road being constructed in such manner and upon such a grade that the water could no longer be conveyed to the factory across the land in a straight trunk, the defendant took down the original raceway, and carried the water under the railway track in a new trunk built for that purpose. A. accepted the new structure without objection, and used the water flowing through it during his life: *Held*, that such acceptance of the substituted structure was, in judgment of law, a compensation for all damages sustained by A. in consequence of the removal of the original raceway. Arnold *v.* The Hudson River Railw. Co., 49 Barb. 108.

The legislature may rightfully authorize the construction of railways, or other works of public nature, without requiring compensation to be made to persons whose property has not been actually taken or appro-

priated for the use thereof, but who may, nevertheless, suffer indirect or consequential damages by the construction of such works. Ib.

The case of a railway company acquiring its roadway, subject to an easement or servitude appurtenant to mill property, consisting of the right to carry water across the land of another to the mill, is within the above principle. Ib.

If the owners suffer an injury, by having an easement impaired, this is an injury which the property suffers in consequence of the construction of a public work under legal authority, and not the taking of the property. Ib.

Such a loss is to be regarded as *damnum absque injuria*, except in cases where, by statute, compensation is required to be made. Ib.

The principle of the last case is also maintained in Cleveland & Pittsburgh Railw. *v.* Speer, 56 Penn. St. 325.

It was further held in this case, that where the grant for a railway is defined by the extreme termini, and the company have once definitely located the same, they have no further right to change the route. In the first instance, they had an unlimited discretion where to locate the same, and for that purpose might use streets or highways. And if the act of location were voidable, none but the commonwealth could interfere. But railways are not precluded from changing the point of a switch and other arrangements in regard to their track, within the limits of the land appropriated to their road. Ib.

Responsibility of company for legal use of franchise.

A citizen cannot maintain an action against a railway company for injury to his property by reason of noise, smoke, and offensive odors, caused by the side tracks and the locomotives being placed near his dwelling. Ib.

In estimating land damages for the construction of a railway, all such natural and probable consequences of the works as would occur to the mind of an intelligent viewer must be allowed; but not such as might result from improper construction, which the company have no right to do, and are responsible in damages for doing. But the company are not responsible for not building a culvert, so as to carry off the water of an extraordinary flood. Pittsburgh, Ft. Wayne, &c. Railw. *v.* Gilleland, id. 445.

Company cannot assign powers.

The company, being unable to raise money to build their road, cannot delegate their powers to a natural person; and if that is attempted, and the road so constructed, a bill in equity will lie against such person to restrain him from creating a nuisance to the adjoining property. Stewart & Foltz's Appeal, id. 413.

Effect of acquiescence on the part of railway company.

The mere existence and use, for seventeen years, of a turnout from the main track of a railway company, chartered for general purposes, and the receipts by the company from the owner of the turnout for mending the turnout, &c., do not give him an irrevocable right to maintain a frog and switch on such railway. Heyl *v.* Phil., W. & B. Railw. Co., 51 Penn. 469.

An incorporated railway company is a trustee of the right of way for the commonwealth for the use of her citizens; and a permissive privilege from such company differs entirely from a privilege on private property by individuals, where the expenditure of money is to be attributed to a mutual understanding that the privilege should remain unaltered. Ib.

Time and mode of exercising compulsory powers against land-owners.

The charter of the Philadelphia, Wilmington, and Baltimore Railway authorizes them, "as soon as they conveniently can," to construct a road with one or more tracks and to make and erect "such warehouses," and all the works and appendages for the convenience of the said company for the use of said railroad." This gives the right to construct sidings, turnouts, stations, engine-houses, and all works and appendages usual in the convenient operation of a railway. Phil., Wil., & Bal. Railw. *v.* Williams, 54 Penn. 103.

The expression, "as soon as they conveniently can locate and construct," is not a limitation upon the power to compel the company to exercise its whole authority in the very beginning. Ib.

It is not the special use made of the property taken which characterizes, but its convenient necessity for public use. Ib.

The charter giving power to take land, gives power to take a right of way over it, under the maxim, *omne majus continet in se minus*. Ib.

The charter of the company provides for compensation for taking the right of way, and its owner may have a view to assess the damages whenever his right is directly injured by entry upon the land. Ib.

"Owners of such acquired land" includes all owners of titles in or growing out of the land, whose rights are capable of actual privation by taking. Ib.

The remedy for obstructing a right of way by a railway track under this charter, is not by action denying the right of entry to take the land, but by application for the assessment of damage. Ib.

A land-owner said to the president of a railway company, when endeavoring to settle for damages, that if they would run the road "further over" from his house and spring, he would give the land occupied for nothing; and the president said he would try to accommodate. *Held*, that

this was too slight to prove the grant of a right of way or release of damages; for there was no designation of the land released. East Penn. Railw. *v.* Schollenberger, 54 Penn. 144.

The promise to try to accommodate was not an acceptance of the offer. Ib.

The right of passage which a railway corporation acquires across land is an interest in the land, and must come by private purchase or under the eminent domain which the state has vested in them. Ib.

If the company had the right to deposit stone and earth on land outside the sixty feet appropriated to the road, it was in some sense taking the land, and was a proper subject for compensation. Ib.

Concessions by natural persons to public company construed strictly.

Where a railway company claim to lay their track upon the land of another, without compensation, and in violation of the constitutional rights of the land-owner, upon the assertion of his contract or assent, it is incumbent upon them to show by written contract, or very satisfactory proof, that they are acting in conformity to the terms of the concession. Unangst's Appeal, 55 Penn. St. 128.

Right to enter upon lands for preliminary surveys.

The legislature may grant the right to enter upon land for the purpose of preliminary surveys, without compensation. Fox *v.* Western Pacific Railw., 31 Cal. 538.

Rule of estimating land-damages.

The measure of damages for building a railway through a man's land, is the difference between the value of the property before and after building the road. Hornstein *v.* Atlantic & Gt. West. Railw., 51 Penn. St. 87; s. p. in S., F., A. & S. Railw. *v.* Caldwell, 31 Cal. 367.

Such advantages only as are special and peculiar to the property in question, not common to the public, are to be considered. Ib.

The viewers and the jury in court are to balance the advantages that are special against the disadvantages that are actual, and decide how much less the land would bring in the market by reason of the road. Ib.

The owner of land adjoining a public street in a town or village, after a public railway is legally laid and established upon the street, has no claim for additional land damages because the company remove the track nearer to his land than it was first laid. That is a privilege inherent in the public authority, and which the company may exercise by delegation. Snyder *v.* Penn. Railw., 55 Penn. St. 340. This case seems to assume the ground, that the land-owner whose land is once appropriated for a highway has no

additional claim for damages by reason of it being thereafter appropriated, also to the additional servitude of the railway track, which claim has been abandoned in most of the other states as no longer tenable.

CONTRACTS.

Such errors as are apparent, being errors of computation, may be set right by a court of equity. Neill *v.* The Midland Railw., 17 W. R. 871.

RESTRICTIONS IN REGARD TO TOLLS.

By the charter of the Philadelphia & Reading Railway, it was provided that the "toll on any property transported should not exceed four cents per ton per mile, and on each passenger two cents." *Held*, that they might charge for transportation in addition to the toll. Boyle *v.* Phil. & Reading Railw., 54 Penn. St. 310.

The company was incorporated as a railroad and transportation company. Ib.

The legislature is presumed to have used words in their ordinary signification. Ib.

"Toll" is a tribute or custom paid for *passage*, not for *carriage;* something taken for a liberty or privilege, not for a service. Ib.

A corporation authorized to engage in a business, as a necessary incident to their authority has the right ordinarily belonging to such business, and compensation for services is inseparable from the right. Ib.

When several distinct powers are given by one statute, the restriction imposed on one are not restrictions on the others. Ib.

FIRES CAUSED BY SPARKS FROM COMPANIES' ENGINES.

In such cases the company is responsible, where the fire first communicated spreads in a direct line, without any break, across the lands of several different proprietors, and a highway, to woodlands half a mile distant from the railway. Perley *v.* Eastern Railw., 98 Mass. 414. And it is competent for the jury to find, in such case, that the back fires kindled in a vain effort to stop the progress of the flames, which were swallowed up as it advanced, did not contribute to the plaintiff's loss. Ib.

The use of any ordinary fuel to make steam in engines on a railway is

legal. The limit on its use is, that the latest improvements in its management in practical use should be applied to it. Lackawanna & Blooms. Railw. *v.* Doak, 52 Penn. St. 379.

A building near a railway was found to be on fire, whilst a train drawn by an engine without a "spark-catcher" was passing; there was no direct evidence that the fire had been communicated from the engine. *Held*, that it was proper for the court to submit the question of negligence to the jury. Ib.

It is the duty of a railway company, in the use of an engine, to use such precaution as might reasonably prevent damage to others; and failure to do so is negligence. Ib.

There being in the charter of a railway company no prescribed limit of approach towards buildings and bridges, the company may locate their roads and stations on such route and at such points as in their judgment will be beneficial to their own and the public interest. Frankford & Bristol Turnpike *v.* Philadelphia & Trenton Railw., 54 Penn. St. 345.

The emission of sparks from the stack of a locomotive is not in itself illegal; and the loss of property adjacent to a railway from the sparks, apart from the nuisance, is *damnum absque injuria*. Ib.

The law in conferring the right to use an element of danger, protects the person using it, except for the abuse of his privilege; but in proportion to its danger will arise the degree of caution and care he must use. Ib.

Great danger demands higher vigilance and more efficient means to secure safety. Ib.

It is the duty of railway companies running their engines close to buildings, to use the utmost vigilance and foresight to avoid injury. Ib.

It is the duty of companies to control their engines carefully, to adopt every known safeguard, and to avail themselves from time to time of every approved invention to lessen their danger. Ib.

Questions of skill, vigilance, care, and proper management in any business, are questions of fact to be referred to the jury. Ib.

The degree of care having no legal standard, such care must be required as is ordinarily sufficient, under similar circumstances, to avoid the danger, and secure the safety needed. Ib.

It is the duty of railway companies to adopt the best precautions against danger in use; and it is not sufficient for them to exercise what, under circumstances of less risk, would be ordinary care. Ib.

The court below charged, "if the defendants used ordinary skill in procuring a good and safe spark-catcher, such as are most in use in the country, and approved by experienced railway operators and mechanics, they would not be required to use any other or greater care or skill in respect to the spark-catcher used by them." *Held*, not to be error. Ib.

Evidence of the practice and common use of the stack by many others

in the same business is admissible on the question of the safety of the stack. Ib.

If the construction of the stack was that which was best adapted for the purpose in known practical use, the duty of the company was performed. Ib.

Negligence is the absence of care according to the circumstances. Ib.

INJURIES TO DOMESTIC ANIMALS.

A party whose cattle, without fault on his part, escape from his enclosure, and wander upon a railway track, and are there killed by alleged carelessness in not slackening the speed of the locomotive, cannot recover for their loss from the railway company. Price *v.* New Jersey Railroad & Transp. Co., 2 Vroom, 229.

There are some very sensible suggestions in Card *v.* New York & Harlem Railw., 50 Barb. 39, in regard to the duty of an engineer, when he perceives that his track is obstructed by cattle. He is not to assume that travellers upon the highway, either when driving cattle or not, will always conduct with entire prudence and discretion; but he is bound to know and to remember that this is not always the case, and to exercise the more watchfulness to avoid collisions, and especially where he already sees evidence of exposure, either carelessly or not. And the fact that the driver of the animals was not without fault will not excuse the company, if they were reckless or careless, and but for that the injury would not have occurred.

Cattle suffered to go at large by law.

Where, by the laws of the state, the owner of animals is not bound to confine his stock within his own enclosures, or where such a rule is established by the towns or cities, the owner is not guilty of negligence in not confining them; but he may be guilty of such wilful misconduct in regard to his animals as to render himself liable to a railway company for damages caused by their being upon the track. Hannibal & St. Jo. Railw. *v.* Kenney, 41 Mo. 271.

But in such case the company are not bound to exercise any special watchfulness in regard to cattle; but must conduct their business with reference to their being allowed to run at large, and not injure them, if it can be reasonably avoided. Mich. So. & No. Ind. *v.* Fisher, 27 Ind. 96.

Cattle, estrays, &c.

One who negligently suffers his sheep to stray upon a railway, where they are killed by a passing train, has no cause of action against the com-

pany. Eames *v.* Salem & Lowell Railw., 98 Mass. 560; Chicago & Alton Railw. *v.* Utley, 38 Ill. 410.

The statute making railways responsible for all damages done to cattle, without reference to any other consideration except the mere fact of having done the damage, is a police regulation for the security of passengers, and applies to companies organized under special charters, as well as under the general law, and has reference to all animals which may be controlled by fences. Indianapolis P. & C. Railw. *v.* Marshall, 27 Ind. 300.

In regard to sufficiency of the averments against a railway company for killing stock, see Great Western Railway *v.* Hanks., 36 Ill. 281.

No more than the value of animals killed can be recovered, unless there is proof of wantonness or wilful injury. Toledo, P. & W. Railw. *v.* Arnold, 43 Ill. 418.

FENCES.

The doctrine of the case of Shepherd *v.* Buffalo, &c., Railw., 35 N. Y. 641, *ante*, vol. 1, p. 471, affirmed. Tracy *v.* Troy & Boston Railw., 38 N. Y. 433.

The fact that a railway crossing is near a station, where it would be inconvenient to construct a cattle guard, will not excuse the company from compliance with the positive requirements of the statute to that effect. Ib.

One company running its engines over the track of another company, by special license or permanent contract, or as lessee or joint-owner, is equally responsible for damages done to cattle, through defect of fences, as would be the company owning the track, for committing a similar injury in the same mode. Ib. s. p. Toledo & P. & W. Railw. *v.* Rumbold, 40 Ill. 143.

A statute, induced by public consideration, in order to protect passengers and the owners of domestic animals, along the line of the road, should receive a liberal construction to effect the benign purpose of its framers; and every statute should be expounded, not according to the letter, but according to the meaning. Ib.

5. The "suitable" fences required by statute, to be maintained by railways, need not necessarily be such as are required to be maintained between adjoining proprietors of lands, and which by statute are called legal and sufficient. Eames *v.* Salem & Lowell Railw., 98 Mass. 560. But in Enright *v.* San F. & San J. Railw., 33 Cal. 230, it is held that "sufficient fences" in such a statute must be considered as "referring to and adopting the general law fixing the standard of lawful fence," and with great rea-

son as it seems to us. But see Chicago & Alton Railw. *v.* Utley, 38 Ill. 410.

Railways are required to build fences along the line of their roads, for the protection of adjoining proprietors, and if waived by the latter the company are not responsible for injury to cattle in consequence of the fence not being built. Enright *v.* San F. & San J. Railw., 33 Cal. 230.

Where the owner of land adjoining a railway, for whose benefit and at whose request the company construct an insufficient bar-way, acquiesces in the use of the same without objection, he cannot afterwards recover of the company for any loss in consequence of such deficiencies. Ib.

The question of the obligation of the company to build fence at a particular place, is one of law, and should not be submitted to the jury. Illinois Central Railw. *v.* Whalen, 42 Ill. 396.

A railway company, in purchasing the right of way, bound itself by contract with the owner of land through which the road passed, to fence the road through his land. The company neglected to fence, and the owner's cattle being on his land, went upon the road, and were killed by the engines. *Held*, that he could not recover damages for the injury in an action of tort. Drake *v.* Phil. & Erie Railw., 51 Penn. St. 240.

He should have built the fences himself, before turning his cattle upon the land and was guilty of inexcusable negligence in thus exposing them to almost certain injury. The company having purchased the right of way for a fixed sum of money, and an agreement to fence, the owner had no right to obstruct the road by allowing the cattle to roam upon it.

But in Fernow *v.* Dubuque & So. Western Railw., 22 Iowa, 528, it was held the company were responsible in such case; and that seems to be the general opinion. To render the defendants liable, it must appear that the disaster was *exclusively* the result of their neglect; the plaintiff's cattle being on the road, when they ought not to be, he could not recover. Ib.

Whether the plaintiff could recover for the loss of his cattle by an action on the contract, *not decided*. Ib.

Company not bound to fence against cattle trespassing.

A railway is not bound to maintain a fence on the line of its road against cattle unlawfully in a pasture adjoining. Mayberry *v.* Concord Railw., 47 N. H. 391.

Whether it would be otherwise if the owner of the cattle was in possession of the pasture by disseisin, *quære*. Ib.

INJURY BY FELLOW-SERVANTS OR MACHINERY.

A master who has used due diligence in the selection and employment of his servants, is not responsible for an injury done to one of them by the

carelessness of another, in the course of their common employment. Harrison Adm'x. *v.* Central Railw., 2 Vroom, 293.

A railway company are responsible to an employee for all damages resulting from their own misconduct; but to warrant a recovery, the fault or misconduct must be that of the company themselves, and not simply the negligence of a fellow-servant. Ib.

An employer contracts with his employee to use reasonable diligence to protect him from unnecessary risks; and for the omission of such diligence, which is equivalent to negligence or want of care, he will be answerable to the action of such employee for all damages that may ensue. Ib.

The company are not responsible for the negligence of a servant, by which damage accrues to a fellow-servant, unless wanting in proper care in the selection of such servant, or of improperly continuing him in their service, or for injury to servant from machinery, unless it was unsuitable for use. Weger *v.* Penn. Railw., 55 Penn. St. 460.

The servant is by no means entitled to the same redress for injuries as a passenger. The presumption from injury in the case of the latter is against the company; but in the case of the servant, the presumption is against the servant. Ib. Where the injury happened by reason of the foreman's watch being behind time, and his directing the hands to go upon the track when a train was due, the company were held not responsible. Ib.

See also to same effect, Shauck *v.* Northern Central Railw., 25 Md. 462; s. p. Pittsburgh, Ft. Wayne & Chicago Railw. *v.* Devinney, 17 Ohio, N. S. 197; Warner *v.* Erie Railw. Co., 39 N. Y. 468.

Responsibility of master for tortious acts of servant.

The master was not held reponsible for his servant driving the master's cart against another in the street, when the servant left the line of the master's business and went some distance out upon his own business, during which deviation the injury occurred. Storey *v.* Ashton, 17 W. R. 727.

INJURIES IN THE NATURE OF TORTS.

The maxim — "So use your own property as not to injure the rights of another" — is applicable alike to corporations and individuals. Hill *v.* Portland & Rochester Railw., 55 Me. 438.

A railway corporation has the right to establish reasonable signals, to be given for the starting of trains from its station. Ib.

Whether or not the loud and sudden sounding of a steam-whistle is a reasonable signal for such purpose, and within the rule of ordinary care, depends upon all the circumstances of each particular case; and it is a question for the jury. Ib.

In the trial of an action for personal injury to the plaintiff, caused by being thrown from his carriage in consequence of his horse becoming frightened at the sound of a locomotive whistle, at a railway crossing near a station, it is competent for the plaintiff to show that the sound of the whistle produced a similar effect upon other horses, at the same time and place. Ib.

Also to show the usual effect of that whistle, at the same place, on ordinary horses. Ib.

It is not competent for the corporation to ask a witness acquainted with the practice of railways generally, and who had the charge of another railway for sixteen years, whether or not, in his opinion, the signals in question were "reasonable or unreasonable," "prudent or extraordinary," or whether or not similar signals were given by other railway corporations. Ib.

One who approached a railway at a point in a town where he had often crossed, muffled in his coat within the covered top of his wagon, taking no notice of the railway, and drove slowly upon the track without stopping or looking out, was guilty of negligence. Hanover R. Co. *v.* Coyle, 55 Penn. St. 396.

In an action against a railway for injuring the plaintiff by negligence, the court below admitted declarations of the engineer, by whose negligence the plaintiff was injured, made at the time of the injury, as part of the *res gestæ*, and it was held not to be error. Ib.

The plaintiff was a pedler; evidence of the annual amount of his sales, the profit he made, tended to show the amount he might have earned if he had been able to attend to his business, and was admissible. Ib.

In the case of Wilcox *v.* Rome & Watertown Railw., 39 N. Y. 358, the general question of the duty of travellers and railway companies at road crossings is considerably discussed, and it is said that it is the duty of the traveller before crossing a railway track to look out, and also to listen, for an approaching train, and if it appears that he might have seen it if he had looked, and he was killed in crossing, it will be presumed he did not look, and so was guilty of culpable neglect, which will preclude any recovery, on account of the death. And the fact that the company omit the statute duty required of them, in not ringing the bell and sounding the whistle, will not excuse the traveller in omitting any precaution to insure his safety. Ib.

Where a passenger carrier by steamboat was sued for injury to another boat through want of due care, it was held that, notwithstanding the fact that the passenger carrier owed the highest possible degree of care to his passengers to avoid the collision, so as not to expose them to injury, he was only bound to exercise the care of a prudent owner towards the owner of the other boat, and could only be held responsible for want of that degree of care. Ph., W. & Baltimore Railw. *v.* Kerr, 25 Md. 521.

The burden of proof in this class of cases is upon the plaintiff to show that his injury resulted from the want of ordinary care upon the part of the company. Baltimore & Ohio Railw. *v.* Bahrs, 28 Md. 647. The company is bound to exercise such care in moving trains about the city of Baltimore as a prudent person would, having equal reference to the despatch of the business of the company and the safety of others. Bannon *v.* Baltimore & Ohio Railw., 24 id. 108. The infancy of the person injured will not affect the duty of the company. Ib.

A railway company is not bound to keep a flagman at a road crossing to give travellers notice of the approaching train. It is only bound to run its trains in a careful and prudent manner, so as not needlessly to inflict damage upon others. But it may, by having kept a flagman at a road or street crossing, have so far excited the public expectation of being warned of danger in that mode, as to make it an act of negligence on the part of the company to withdraw the flagman, for which the company would be held responsible where injury occurred in consequence. Ernst *v.* Hudson River Railw., 39 N. Y. 61.

Case illustrating the proper degree of care to be exercised by the driver of street cars, as well as by the owners of other carriages. Cook *v.* Met. Railw. 98 Mass. 361.

The effect of certain kinds of contributory negligence, as being in a car-house, without the knowledge of the railway employees; or attempting to cross a railway track where a train is within forty feet, is considered in Lehey *v.* Hudson River Railw., 4 Rob. (N. Y.) 204; Schwartz *v.* The same, id. 347. The plaintiff was held in both these cases not entitled to recover, by reason of such negligence on his part. See also Ernst *v.* Hudson River Railw., 39 N. Y. 61; Edgerton *v.* N. Y. & H. Railw., id. 227.

If a railway construct an open crossing at the intersection of a way laid open by dedication, so as to become public, they are bound to maintain it in a safe condition for passing. At road crossings, both the railway company and travellers are bound to exercise care to prevent collisions. The traveller, in approaching, is bound "to stop, look out, and listen," and if he fails to do so he cannot recover for any damage he sustains by any collision with the company's trains. So, too, if the traveller by defect in the crossing is stopped upon it, he must do all in his power to notify any trains which may approach, and to extricate himself as soon as possible, and if he fails in either particular, and that contributes to his damage, he cannot recover. And it is the duty of the company on approaching a crossing to give all notice of their approach by the usual signals, and to look out for objects at the crossing, and if any thing is seen to stop the train, as speedily as possible. Pittsburgh, Ft. Wayne, & Chicago Railw. *v.* Dunn, 56 Penn St. 280. See also Baltimore & Ohio Railw. *v.* Breinig, 25 Md. 378.

DIRECTORS.

Directors responsible for the authority they assume.

The duty of the directors of joint-stock companies to serve the interests of the company, and their responsibility in making contracts on behalf of the company, has been considerably discussed in the English courts of late. In Colonial Bank of Australasia *v.* Cherry & McDougall, 17 W. R. 1031, the Judicial Committee of the Privy Council held, mainly upon principle and the authority of Mr. Justice Story's Agency, that when the directors assume to act on behalf of the company they *impliedly* warrant their authority to bind the company. And where directors stated, without intention to deceive, that they had appointed an agent with certain powers, and they had not in fact authority to give any such powers, it was held they were responsible, without proof of any actual warranty, that being implied from the appointment of the agent to do the act. Ib.

Directors when responsible for the act of co-directors.

A director of a company who knows that his co-directors are misappropriating the moneys of the company, or are otherwise guilty of a breach of trust, is bound to take active and immediate steps to prevent the same, by notification to the shareholders or otherwise; or if he cannot prevent the same without filing a bill in chancery, to do that, and if he fails to do this he will be held to have concurred in the breach of trust, and will be held responsible accordingly, notwithstanding any amount of mere protest against the proceeding. And a director who signs checks to the prejudice of the company cannot be excused on the ground that it was done as "a matter of routine" or as "a ministerial act." Joint Stock Discount Co. *v.* Brown, 17 W. R. 1037.

Power of directors and duty of courts in controlling their action.

The directors of a railway corporation, acting in good faith, have power to issue convertible bonds in the name of the corporation, for the amount they may borrow to complete and finish, or to operate the road, with the right to authorize their conversion into stock, although it increases the amount of capital stock beyond that fixed by the charter. And that being so, the right of the directors to issue stock in conversion of such bonds is clear. Belmont *v.* Erie R. R. Co., 52, Barb. 637.

If the court were satisfied, however, that bonds were about to be issued by the directors of a corporation, not for the payment of money actually borrowed for the purposes authorized by the charter, but as part of a fraudulent device to increase the stock, the issuing of them might be restrained by injunction. Ib.

So while the bonds remain in the hands of any persons affected with notice that they do not represent a *bona fide* indebtedness, but were issued with such fraudulent design, the issuing of stock in conversion of them may also be enjoined. Ib.

To enable a stockholder in a corporation to maintain an action to restrain the directors from the exercise of their corporate powers and for the appointment of a receiver, the risk and responsibility must be upon him — so as to afford a guarantee that he is acting for the benefit of the company. If it appears that other persons whose interests are hostile to those of the company have agreed with the plaintiff to bear and pay the expenses of the litigation, any relief, especially upon an interlocutory motion, will be refused. Ib.

Although a stockholder of an incorporated company may have an injunction to restrain illegal acts of the directors, and in certain cases he may have a receiver appointed of a particular fund the proceeds of an unlawful act, yet where the complaint makes no case for any partial receivership, but while neither charging insolvency, nor asking to dissolve and wind up the company, prays "that a receiver may be appointed of all and singular the funds and books and papers and rights of action of such company," the court is not authorized to appoint a receiver, the effect of which would be to remove all the directors. Ib.

A court of equity has no visitorial power over corporations, except such as may be expressly conferred on it by statute. Ib.

An action will not lie in behalf of a stockholder in a corporation and its directors to remove the directors and appoint a receiver of all the property, rights of action, and records of the company, and for an injunction, upon allegations of misconduct in a part of the directors only, in which the others are not charged with participating — except that they are under the influence of the former. Ib.

The misconduct of some, or even all, of the directors, affords no ground for taking away the right of the stockholders, who constitute the company, either by dissolving the corporation, or taking away its management and placing it in the hands of an officer of the court. Ib.

The duty of the directors to serve the interests of the company.

This duty is so imperious and unyielding, that no contract made by one of the directors of the company to accept the assignment of a portion of the contract for construction without the knowledge of the company can be upheld. And the fact that no injury accrues to the company in consequence will make no difference. Flint & Pere M. Railw. *v.* Dewey, 14 Mich. 477.

Directors personally responsible to refund money expended by them in "rigging the market."

By this is understood purchasing shares above par for the purpose of raising the credit of the shares. Land Credit Co. of Ireland *v.* Lord Fermoy, 17 W. R. 562.

So, too, all the members of a committee of directors are responsible for the loss of money which one of their number has misapplied, if the money went into his hands with the consent of the others. Ottoman Co. *v.* Farley, id. 761.

MANDAMUS.

It will not lie when the statute has provided another adequate remedy. Louisville, &c. Railw. *v.* State, 25 Ind. 177.

The remedy is discretionary, and will never be awarded where there is another sufficient remedy. People *v.* Hatch, 33 Ill. 9. The applicant must show a clear legal right to the redress sought. Ib.